

Building the Airplane While in Flight¹: International and Military Law Challenges in Operation Unified Response

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We are just now beginning to learn the extent of the devastation, but the reports and images that we've seen of collapsed hospitals, crumbled homes, and men and women carrying their injured neighbors through the streets are truly heart-wrenching . . . I have directed my administration to respond with a swift, coordinated, and aggressive effort to save lives. The people of Haiti will have the full support of the United States in the urgent effort to rescue those trapped beneath the rubble, and to deliver the humanitarian relief—the food, water, and medicine—that Haitians will need in the coming days. In that effort, our government, especially USAID and the Departments of State and Defense are working closely together and with our partners in Haiti, the region, and around the world.”²

At 4:53 PM on 12 January 2010, a 7.0 magnitude earthquake struck Port au Prince, Haiti, centered fifteen miles west-southwest of the city, at a depth of approximately 8.1 miles.³ Approximately three million people were directly affected by the earthquake—one-third of Haiti's population.⁴ The devastation and destruction were “unimaginable.”⁵ In the early days of the disaster, it was estimated that 150,000 people might have died.⁶ Within a month, President Rene

Préval estimated the death toll would rise to 300,000 as a direct result of the earthquake.⁷

The day after the earthquake, U.S. Ambassador to Haiti Kenneth H. Merten issued a disaster declaration,⁸ a crucial first step for the United States to provide humanitarian assistance and disaster relief to the people of Haiti.⁹ Subsequently, on 17 January 2010, Secretary of State Hillary Clinton and President Préval issued a Joint Communiqué which recognized the “long history of friendship between the people of Haiti and the people of the United States,” as well as the “urgent need for . . . safe, swift and effective implementation of rescue, relief, recovery, and reconstruction efforts,” and agreed that “efforts in Haiti by the Government and people of the United States [were

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¹ “Building the Airplane While in Flight” was a phrase used by the Joint Task Force senior staff to describe the difficulty of the JTF-H mission during its first few weeks. The phrase meant that the JTF was trying to establish its functions and processes as a JTF headquarters while simultaneously providing the humanitarian assistance and disaster relief it was being established to provide.

² Press Release, The White House, Office of the Press Sec'y, Remarks by the President on Rescue Efforts in Haiti (Jan. 13, 2010), available at <http://www.whitehouse.gov/the-press-office/remarks-president-rescue-efforts-haiti>.

³ *Magnitude 7.0—Haiti Region*, U.S. GEOLOGICAL SURV. (Jan. 12, 2010), <http://earthquake.usgs.gov/earthquakes/recenteqsww/Quakes/us2010rja6.php> (last visited Nov. 17, 2010). This earthquake was followed quickly by two strong aftershocks of 5.9 and 5.5 magnitude.

⁴ *Haiti Earthquake Flash Appeal 2010: Executive Summary*, CONSOLIDATED APPEALS PROCESS (15 Jan. 2010), <http://ochaonline.un.org/humanitarianappeal/webpage.asp?Page=1841>. The summary states,

[P]lotting the earthquake's zones of intensity against population densities in this part of Haiti shows that 3 million people were in areas of “very strong” to “extreme” shaking, where structures would have suffered moderate to very heavy damage. . . . This response plan and appeal therefore are based on an initial estimate of 3 million people severely affected, in the sense of injury and/or loss of access to essentials such as food, water, health care, shelter, plus livelihoods, education and other basic needs, and on restoring and strengthening state capacities.

⁵ *Haiti President Thankful for Incoming Aid*, MIAMI HERALD, Jan. 14, 2010, available at <http://www.miamiherald.com/2010/01/13/1422279/haitis-president-thankful-for.html>.

⁶ *Haiti Earthquake of 2010*, N.Y. TIMES, <http://www.nytimes.com/info/haiti-earthquake-2010/> (last visited Nov. 17, 2010).

⁷ Mica Rosenberg, *Haiti Death Toll Could Reach 300,000*, REUTERS (Feb. 22, 2010, 10:21 AM), <http://www.reuters.com/article/idUSTRE61L01P20100222>; see also *Haiti Death Toll Up to 230,000*, USA TODAY (Feb. 9, 2010, 6:36 PM), http://www.usatoday.com/news/world/2010-02-09-haiti-death-toll_N.htm. According to the U.N. Office for the Coordination of Humanitarian Affairs, the final statistics from the earthquake were 222,570 dead; 300,572 injured; 188,383 houses collapsed or damaged, of which 105,000 were completely destroyed; sixty percent of government, administrative, and economic infrastructure destroyed including the Presidential Palace, Parliament, and the cathedral; twenty-five percent of remaining houses in Port-au-Prince are so damaged they require demolition; twenty-three percent of all Haitian schools damaged; fifty percent of hospitals in the affected area destroyed or damaged, and twenty million cubic yards of rubble that must be removed. See *Haiti*, U.N. OFF. FOR COORDINATION OF HUMANITARIAN AFF., <http://ochaonline.un.org/tabid/6412/language/en-US/Default.aspx> (last visited Nov. 22, 2010).

⁸ RHODA MARGESSON & MAUREEN TAFT-MORALES, CONG. RESEARCH SERV., R41023, HAITI EARTHQUAKE: CRISIS AND RESPONSE 11 (2010), available at <http://www.fas.org/sgp/crs/row/R41023.pdf>.

⁹ A disaster declaration can be made by the Ambassador or Chief of Mission if: (1) the disaster exceeds the host nation's ability to respond, (2) the effected country's government either requests or is willing to receive U.S. assistance, and (3) a response to the disaster is in the U.S. national interest. The disaster declaration is transmitted to the Office of U.S. Foreign Disaster Assistance (OFDA) and the Department of State to begin possible U.S. assistance. JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE, at xiii (17 Mar. 2009) [hereinafter JOINT PUB. 3-29]. See also HEADQUARTERS, U.S. ARMY SOUTHERN COMMAND, ANNEX V TO CDR USSOUTHCOM/INTERAGENCY COORDINATION TO UNIFIED RESPONSE OPORD 04-10 (18 Jan. 2010). “The UN generally conducts Foreign Humanitarian Assistance under the provisions of a resolution or mandate from the Security Council or the General Assembly.” JOINT PUB. 3-29, *supra*, at III-9.

essential] to support the immediate recovery, stability and long-term rebuilding of Haiti.”¹⁰ This agreement formed the basis for Operation Unified Response (OUR).

The Department of Defense (DoD) relief effort was assigned to Southern Command (SOUTHCOM) which designated Lieutenant General P.K. Keen, the deputy commander of SOUTHCOM, as the Commander of Joint Task Force–Haiti (JTF-H).¹¹ The JTF mission was to “conduct[] Foreign Disaster Relief in support of the U.S. Agency for International Development [USAID] to support the GoH [Government of Haiti] and MINUSTAH [United Nations Stabilization Mission in Haiti] by providing localized security, facilitating the distribution and restoration of basic human services, providing medical support, and conducting critical engineering operations in order to alleviate human suffering and provide the foundation for the long term recovery of Haiti.”¹² Operation Unified Response was conceived as a five-phase operation: (1) Initial Response/ Emergency Response; (2) Relief; (3) Restoration and DoD Transition; (4) Stabilization; and (5) Recovery.¹³

This article will explore the two main legal issues associated with Phase I and Phase II of OUR¹⁴: (1)

¹⁰ Joint Communiqué of the Governments of the United States and Haiti, U.S.–Haiti, Jan. 17, 2010, available at <http://www.state.gov/r/pa/prs/ps/2010/01/135288.htm>. Five days later, the U.N. General Assembly issued a resolution calling on Member States to assist or contribute to Humanitarian Assistance and Disaster Relief Operations in Haiti. G.A. Res. 64-250, agenda item 70(a), U.N. Doc. A/RES/64/250 (Jan. 22, 2010).

¹¹ CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], HAITI EARTHQUAKE HUMANITARIAN RELIEF, MODIFICATION 4 (29 Jan. 2009) [hereinafter CJCS EXORD MOD 4]. Lieutenant General (LTG) P.K. Keen was in Haiti on his way to the Hotel Montana when the earthquake occurred. Hotel Montana was a five-star hotel and was one of the largest expatriate meeting places in Haiti. As a result of the earthquake, the Hotel Montana was completely destroyed. Several U.S. citizens are believed to have died there during the earthquake, as well as numerous U.N. employees and officials. Major Ken Bourland, a member of LTG Keen’s staff, was at the Hotel Montana when it collapsed. His was the only military death associated with the earthquake. Jay Newton-Small, *Can America’s Top Gun in Haiti Keep the Relief Effort in Order?*, TIME MAG., Jan. 25, 2010, available at http://www.time.com/time/specials/packages/article/0,28804,1953379_1953494_1956342,00.html.

¹² HEADQUARTERS, U.S. SOUTHERN COMMAND, OPOD 01-10, CDRUSSOUTHCOM SUPPORT TO HAITI EARTHQUAKE RELIEF EFFORTS para. 2 (22 Jan. 2010) (UNCLAS/FOUO) [hereinafter SOUTHCOM OPOD 01-10]. The U.S. Agency for International Development was the lead federal agency for Haiti humanitarian relief and was responsible for coordination of humanitarian assistance and disaster relief. *Id.* para 1.e.(2)(c)2; see also Exec. Order No. 12966, 60 Fed. Reg. 36949 (July 18, 1995) (Foreign Disaster Assistance) (July 14, 1995); NAT’L SEC. PRESIDENTIAL DIR. 44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTION AND STABILIZATION (Dec. 7, 2005); U.S. DEP’T OF DEF., DIR. 5100.46, FOREIGN DISASTER RELIEF (4 Dec. 1975) [hereinafter DODD 5100.46].

¹³ SOUTHCOM OPOD 01-10, *supra* note 12, para. 3.

¹⁴ Phase I ran from 12 January 2010 through 5 February 2010. HEADQUARTERS, U.S. SOUTHERN COMMAND, FRAGMENTARY ORDER 025, TRANSITION TO PHASE 2, TO SOUTHCOM OPOD 01-10 (5 Feb. 2010) (UNCLAS/FOUO) [hereinafter SOUTHCOM FRAGO 025]. Phase II ran from 5 February 2010 through 1 June 2010. HEADQUARTERS, U.S.

development of rules of engagement, and (2) use of Overseas, Humanitarian, Disaster, and Civic Aid (OHDACA) appropriations for humanitarian assistance and disaster relief.¹⁵ The focus of Phase I was providing “immediate lifesaving actions, situational assessment and crisis action planning . . . [with] priority [being] Search and Rescue, establish[ing] C2 [command and control], FP [Force Protection], humanitarian assistance coordination center (HACC), log hub [logistics hub], water, food, med [medical], shelter, [and] eng (open LOCs) [engineering (open lines of communication)].”¹⁶ In Phase II, the focus of operations shifted to “mitigate near-term human suffering . . . provide immediate disaster relief . . . and provide water, food, medical, shelter, engineering support.”¹⁷ In both phases, the success of the humanitarian assistance mission was directly connected to the JTF’s ability to appropriately manage the security situation and its ability to develop a legal, supportable mechanism for using OHDACA funds in ways not previously envisioned by the statute, but certainly demanded by the unique nature of the Haiti earthquake.

Relevant Brief History of Haiti

Haiti has long been the poorest country in the western hemisphere. Even before the earthquake, the World Food Programme spent \$65 million in 2009 and \$50 million in 2008 delivering food and relief supplies throughout Haiti.¹⁸ The persistent poverty, socio-economic issues, and political upheaval of the recent past exacerbated the effects of the disaster and affected how and where JTF-H provided humanitarian assistance and disaster relief. Accordingly, it is important to have at least a passing familiarity with the history of Haiti in order to understand the social context in which the legal issues covered by this article arose.¹⁹

SOUTHERN COMMAND, FRAGMENTARY ORDER 102, COMPLETION OF OPERATION UNIFIED RESPONSE, TO SOUTHCOM OPOD 01-10 (22 May 2010) [hereinafter FRAGO 102]. According to joint doctrine, a phase can be characterized by the “focus that is placed on it. Phases are distinct in time, space, or purpose from one another, but they must be planned in support of each other and should represent a natural progression and subdivision of the campaign or operation. Transition between operational phases are designed to be distinct shifts in focus by the joint force, often accompanied by changes in command relationships.” JOINT PUB. 3-29, *supra* note 9, at I-12.

¹⁵ See *infra* notes 137–231 and accompanying text.

¹⁶ HEADQUARTERS, U.S. SOUTHERN COMMAND, EXECUTE ORDER, HAITI, EARTHQUAKE FOREIGN DISASTER RELIEF para. 3.B.1 (16 Jan. 2010) [hereinafter SOUTHCOM EXORD]; see also SOUTHCOM FRAGO 025, *supra* note 14, para. 3.a(2)(a).

¹⁷ SOUTHCOM OPOD 01-10, *supra* note 12, para. 3.a.(2)1.b.

¹⁸ WORLD FOOD PROGRAMME, ANNUAL REPORT 2010, at 44 (2010).

¹⁹ The Command Historian for SOUTHCOM, Dr. Bradley Coleman, produced a six-page information memorandum on the U.S. Military Experience in Haiti that was required reading for members of the JTF-H staff. The memorandum offered relevant historical lessons and perspectives intended to inform the Command decision-making process. See also CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN HAITI, 1994–1995:

Haiti occupies the western one-third of the island of Hispaniola; the Dominican Republic occupies the eastern two-thirds. Although the Taino Indians had been living and thriving on the island of Hispaniola for hundreds of years, the modern, Western history of the island began with its discovery by Christopher Columbus in 1492.²⁰ After two hundred years of control and colonization by the Spanish, the western third of the island was ceded to France as part of the Treaty of Ryswick.²¹ Under the French, Haiti became one of the richest colonies in the western hemisphere due to sugar, coffee, indigo, and cotton production, but also due to an extremely brutal system of slavery enforced by French Law.²²

In 1791, following the French Revolution, slaves and runaway slaves, led by Toussaint l'Ouverture, began what became known as the Haitian Revolution. Over the course of the next thirteen years, the "Haitians" would fight the French, the British, and the French again before achieving recognized independence in 1804.²³ Unfortunately, all those years of fighting reduced the Haitian population by one-half and thoroughly destroyed the local economy.²⁴ Moreover, a long succession of authoritarian dictatorships, plagued by violence, coups and exploitation, essentially doomed the new nation to perpetual poverty.²⁵

LESSONS LEARNED FOR JUDGE ADVOCATES 7 (11 Dec. 1995) [hereinafter OPERATIONS IN HAITI, 1994–1995] (noting "full appreciation of any legal or practical issue requires some knowledge of the historical setting which gave rise to that issue").

²⁰ TERRY V. BUSS, HAITI IN THE BALANCE: WHY FOREIGN AID HAS FAILED AND WHAT WE CAN DO ABOUT IT 21 (2008).

²¹ The Treaty of Ryswick settled the Nine Years War in which France fought against the Grand Alliance of England, Spain, the Holy Roman Empire and the United Provinces. DEREK MCKAY & H.M. SCOTT, THE RISE OF THE GREAT POWERS 1648–1815, at 43–53 (1983).

²² The system of French slavery in Haiti was enacted under a system of laws known as Code Noir. Code Noir sanctioned the most brutal treatment of slaves, to include drowning in sacks, crucifixion on planks, buried alive, thrown into boiling cauldrons, or consigned to man-eating dogs. Vincent Browne, *Haiti's Never-ending Tragedy Has American Roots*, SUNDAY BUS. POST ONLINE (Ireland) (17 Jan. 2010), <http://www.sbpost.ie/commentandanalysis/haitis-never-ending-tragedy-has-american-roots-46757.html>.

²³ Adam Hochschild, *Birth of a Nation: Has the Bloody 200-Year History of Haiti Doomed It to More Violence?*, SAN FRANCISCO CHRON., May 30, 2004, in ADAM HOCHSCHILD, BURY THE CHAINS (2005). Ironically, the only existing copy of the Haitian Declaration of Independence was discovered in the British National Archives in February 2010, shortly following the 12 January 2010 earthquake.

²⁴ The new country's economy was further suppressed when Haiti agreed to pay France for the loss of profits from confiscated slave plantations. Hochschild, *supra* note 23. HANS SCHMIDT, THE UNITED STATES OCCUPATION OF HAITI, 1915–1934, at 24 (1971) (explaining "the great wealth of Haiti was largely destroyed during the protracted war for independence. What remained gradually deteriorated through years of neglect under independent Haitian rule"). During his second term, President Aristide demanded France repay the reparations, valued at \$21 billion. See Lydia Polgreen, *200 Years After Napoleon, Haiti Finds Little to Celebrate*, N.Y. TIMES, Jan. 2, 2004.

²⁵ See generally SCHMIDT, *supra* note 24; see also MICHAEL DASH, HAITI AND THE UNITED STATES: NATIONAL STEREOTYPES AND THE LITERARY IMAGINATION (2d ed. 1997).

In 1915, Haiti's fifth president in two years was assassinated, which prompted President Wilson to send U.S. Marines to protect U.S. citizens, property and interests and to prevent the entry of German forces into the country.²⁶ Despite several periods of violent unrest, the nineteen-year U.S. occupation of Haiti yielded several positive improvements in the country, to include the construction of roads, bridges, schools, lighthouses, wharves, and hospitals, and the development of the country's communications infrastructure.²⁷ Unfortunately, the U.S. occupation did nothing to alleviate "the social forces that created [instability] . . . poverty, ignorance, and the lack of a tradition or desire for orderly free government."²⁸ In fact, some actions during the U.S. occupation exacerbated the negative tendencies of these social forces, including the declaration of martial law,²⁹ the installation of a figurehead President,³⁰ the dissolution of the legislature for almost twelve years,³¹ the imposition of "Jim Crow"-style laws on the residents, and the assumption of control of the police and all of Haiti's finances.³² These actions reinforced what

²⁶ SCHMIDT, *supra* note 24; see also Paul H. Douglas, *The American Occupation of Haiti I*, 42 POL. SCI. Q. 229–31 (1927); MICHEL-ROLPH TROUILLOT, HAITI: STATE AGAINST NATION 100 (1990); Raymond Leslie Buell, *The American Occupation of Haiti*, 5 FOREIGN POL'Y ASS'N INFO. SERV., No. 15, at 337–38 (1929). Obviously, there is a great deal of skepticism regarding the real reasons for the U.S. intervention in Haiti with most focusing on the U.S. interest in keeping the Caribbean, and access to the Panama Canal, free from foreign influence.

²⁷ Although the infrastructure work was greatly beneficial, it often came on the backs of forced labor, which served to increase the general resentment of the U.S. occupation. Stephen Solarz, *Foreword* to SCHMIDT, *supra* note 23, at xii.

²⁸ U.S. DEP'T OF STATE, REPORT OF THE PRESIDENT'S COMMISSION FOR THE STUDY AND REVIEW OF CONDITIONS IN THE REPUBLIC OF HAITI (1930) [hereinafter THE FORBES COMMISSION]. The Forbes Commission was the result of a joint congressional resolution of 6 February 1930, which authorized President Hoover to conduct an investigation of conditions in Haiti and the effect of U.S. policies during the occupation. The Commission was led by W. Cameron Forbes and examined the political aspects of American intervention, social and economic conditions, and the effectiveness of U.S. Administration of Haitian affairs. Ultimately the Commission found that it was a tragedy for the United States to remain in Haiti and a tragedy for the United States to leave, but that the best course of action was for the United States to withdraw. See ROBERT MELVIN SPENCER, W. CAMERON FORBES AND THE HOOVER COMMISSIONS TO HAITI, at ix (1985).

²⁹ ROBERT DEBS HEINL JR. & NANCY GORDON HEINL, WRITTEN IN BLOOD: THE STORY OF THE HAITIAN PEOPLE, 1492–1971, at 178 (1978). Martial law would continue in Haiti until 1929.

³⁰ See LOWELL THOMAS, OLD GIMLET EYE: THE ADVENTURES OF SMEDLEY D. BUTLER AS TOLD TO LOWELL THOMAS 182 (1933) (providing an excellent description of the circumstances that lead to the selection of Phillipe Sudré Dartiguenave as the President of Haiti).

³¹ BUSS, *supra* note 20, at 24.

³² See generally SCHMIDT, *supra* note 24. These last two actions were accomplished by forcing the Haitian legislature to ratify the Treaty Between the United States and Haiti. Treaty Between the United States and Haiti Regarding the Finances, Economic Development and Tranquility in Haiti, U.S.–Haiti, Sept. 16, 1915, 39 Stat. 1654. In a message of 8 September 1915, Rear Admiral William B. Caperton, Commander of U.S. troops in Haiti, wrote, "Successful negotiation of treaty is prominent part of present mission. After encountering many difficulties treaty situation at present

Haitians had experienced during their hundred years of independence—the right of the powerful to set the rules to their own advantage.³³ When the United States finally left Haiti in 1934, the leadership in Haiti quickly reverted to a dictatorial-style government.³⁴

After twenty years of various authoritarian rulers, Dr. Francois “Papa Doc” Duvalier came to power in 1957 and began the most repressive and corrupt government in Haiti’s history, characterized by massive institutional graft, political murders, beatings, and widespread cultural intimidation.³⁵ When his son, Jean-Claude “Baby Doc” Duvalier, took over in 1971, the violence decreased slightly, but the kleptocracy expanded. By the time “Baby Doc” was forced into exile by the military in 1986, it is estimated he stole between \$300 and \$800 million.³⁶

After four years of military rule, Jean-Bertrand Aristide, a Roman Catholic priest, was elected President of Haiti in 1990 on a quasi-socialistic platform that called for large-scale public works programs, agricultural reform, and an end to public corruption.³⁷ Elected with 66% of the vote,³⁸ President Aristide was wildly popular with the poor because of his embrace of liberation theology and its effect on his policies.³⁹ On 29 September 1991, while visiting the United

looks more favorable than usual. This has been effected by exercising military pressure at propitious moments in negotiations.” *The Rape of Haiti*, NATION, Nov. 9, 1921, at 346–52.

³³ SCHMIDT, *supra* note 24.

³⁴ BUSS, *supra* note 20, at 24–25.

³⁵ It is estimated that 50,000 people were the victims of political murder under the Duvalier regimes. See RANDALL ROBINSON, AN UNBROKEN AGONY: FROM REVOLUTION TO THE KIDNAPPING OF A PRESIDENT 143 (2007).

³⁶ Press Release, Transparency Int’l, Plundering Politicians and Bribing Multinationals Undermine Economic Development (Mar. 25, 2004). Bella Stumbo, *From Horror to Hope for the First Time in Decades, Haiti Has a Popularly Elected President. Can He Steer His Country Away from Its Bloody Past?*, LOS ANGELES TIMES, Apr. 21, 1991, at 8. For an outstanding insider history of the Duvalier legacy in Haiti, see ELIZABETH ABBOT, HAITI: THE DUVALIERS AND THEIR LEGACY (1991).

³⁷ *Haiti’s Last Chance*, J. OF COM., Dec 14, 1990, at 8A, 1990 WLNR 577389.

³⁸ Stumbo, *supra* note 36, at 8.

³⁹ Liberation theology has been described as “an interpretation of Christian faith through the poor’s suffering, their struggle and hope, and a critique of society and the Catholic faith and Christianity through the eyes of the poor.” PHILLIP BERRYMAN, LIBERATION THEOLOGY: ESSENTIAL FACTS ABOUT THE REVOLUTIONARY MOVEMENT IN LATIN AMERICA AND BEYOND (1987). Aristide was committed to liberation theology when he returned to Haiti in 1982, after years of study abroad for the priesthood. He regularly used his pulpit in a small church in La Saline to blend scripture with Marxist terminology in fiery sermons that preached social justice for the poor and condemnation for the country’s military and political elites (i.e., Duvalierists). As a political candidate, Aristide’s embrace of liberation theology and its centrality to his political agenda placed him in direct conflict with those same elites who had prospered during the dictatorships of the previous forty years. See generally ALEX DUPUY, THE PROPHET AND POWER: JEAN BERTRAND ARISTIDE, THE INTERNATIONAL COMMUNITY, AND HAITI 55–99 (2007).

Nations, President Aristide was overthrown in a military coup lead by Lieutenant General Raul Cedras.⁴⁰ Though the international community condemned the coup,⁴¹ it took three years of persistent negotiation, and the threat of a UN-sanctioned invasion,⁴² to convince the coup leadership to allow President Aristide to resume his office on 15 October 1994.⁴³ As part of Aristide’s return to power, U.S. forces arrived in Haiti on 19 September 1994 on a peace-keeping mission.⁴⁴ The dual purpose of the U.S. deployment was to create a secure and stable environment that would allow President Aristide to return, and that would create the conditions necessary for the UN Mission in Haiti (UNMIH) to begin the “professionalization of the Haitian armed forces and creation of a separate police force.”⁴⁵

⁴⁰ BUSS, *supra* note 20, at 30–31.

⁴¹ The U.N. General Assembly condemned the coup in a strongly worded resolution on 11 September 1991. G.A. Res. 46/7, U.N. Doc A/RES/46/7 (Oct. 11, 1991). During the course of the next three years, the U.N. imposed increasingly severe sanctions on Haiti as a result of the coup to include oil and arms embargos, travel restrictions, military and police supplies, and ultimately all commerce to and from Haiti except food, medicine, cooking oil, and journalistic supplies. S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993); S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 16, 1993); S.C. Res. 917, U.N. Doc. S/RES/ 917 (May 6, 1994).

⁴² U.N. Security Council Resolution 940 stated, “Acting under Chapter VII of the United Nations Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership.” S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

⁴³ Anthony Lewis, *Abroad at Home: Resolution Matters*, N.Y. TIMES, Sept. 19, 1994, at A17; Larry Rohter, *Showdown in Haiti: On Haiti’s Streets, an Eerie Silence*, N.Y. TIMES, Sept. 19, 1994, at A9. When President Aristide returned to power, one of the first things he did was disband that country’s armed forces.

⁴⁴ While U.S. forces were staging to invade Haiti for Operation Uphold Democracy, the coup leadership was finally convinced to step down and allow the return of President Aristide. In fact, members of the U.S. military were en route for a forcible entry into Haiti on 18 September 1994 when Lieutenant General Raul Cédras, military leader of the coup, agreed to return control of the government to President Aristide. OPERATIONS IN HAITI, 1994–1995, *supra* note 19, and accompanying text.

⁴⁵ A U.N. Mission in Haiti was first proposed on 31 August 1993. S.C. Res. 862, U.N. Doc. S/RES 862 (Aug. 31, 1993). Subsequent Security Council resolutions expanded and clarified the proposed mission until S.C. Res. 975, U.N. Doc. S/RES/875 (Jan. 30, 1995), which officially directed the UNMIH to assume responsibility from the U.S.-led Multinational Force that had restored President Aristide on 31 March 1995. See S.C. Res. 867, U.N. Doc S/RES/ 867 (Sept. 23, 1993); S.C. Res. 873, U.N. Doc. S/RES 873 (Oct. 13, 1993); S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 16, 1993); S.C. Res. 905, U.N. Doc. S/RES/905 (Mar. 23, 1994); S.C. Res. 917, U.N. Doc. S/RES/917 (May 6, 1994); S.C. Res. 933, U.N. Doc. S/RES/933 (June 30, 1994); S.C. Res. 948, U.N. Doc. S/RES/948 (Oct. 15, 1994); S.C. Res. 964, U.N. Doc. S/RES/964 (Nov. 29, 1994); S.C. Res. 975, U.N. Doc. S/RES/975 (Jan 30, 1995). Although President Aristide was ultimately restored to power due in no small part to the persistent efforts of the United States, in recent years President Aristide has claimed that the United States was involved through the Central Intelligence Agency (CIA) in financing and training the original coup plotters in 1991. A *New York Times* investigation into the matter found no evidence of CIA involvement in the 1991 coup. Howard W. French, *C.I.A. Formed Haitian Unit Later Tied to Narcotics Trade*, N.Y. TIMES, Nov. 14, 1993, available at <http://www.nytimes.com/1993/11/14/world/cia-formed-haitian-unit-later-tied-to-narcotics-trade.html?pagewanted=1>.

Because Haiti's Constitution prohibited consecutive presidential terms, President Aristide was succeeded in 1996 by Rene Prével, a close personal friend of Aristide who had served as Prime Minister during the seven months before the coup.⁴⁶ Within a year, Aristide formed a new political party,⁴⁷ and when the 1997 parliamentary elections failed to garner a working majority, President Prével began to govern by decree, which, in turn, led the opposition to refuse to participate in the government.⁴⁸ New parliamentary elections in May 2000 yielded huge Aristide victories that were denounced as fraudulent and improper by the United Nations, the Organization of American States, the European Union, the United States, Canada, Venezuela, Argentina, and Chile, resulting in the suspension of almost all foreign aid to Haiti.⁴⁹ In November 2000, in an election marred by violence and intimidation that was boycotted by virtually all opposition parties, Aristide was once again elected President of Haiti.⁵⁰ During the next three years, a coalition of Aristide's political opponents formed the Democratic Convergence, elements of which fomented violence.⁵¹ This, in turn, encouraged Aristide to allow his most radical followers to respond with violence—often armed by the National Police.⁵²

As the violence escalated, representatives from the international community proposed a power sharing agreement in February 2004, but the opposition rejected it.⁵³

⁴⁶ Larry Rohter, *President-to-Be Of Haiti Faces Tough Agenda*, N.Y. TIMES, Dec. 17, 1995. Many believed that Prével was merely keeping the presidential seat warm until Aristide could run for office again in 2000.

⁴⁷ Editorial, *Aristide Is Forming New Political Party in Haiti, Undermining Leader*, N.Y. TIMES, Jan. 10, 1997, at A11.

⁴⁸ BUSS, *supra* note 20, at 35–36.

⁴⁹ *Id.* at 36. Most observers agreed that Aristide's party would have won easily without the fraud.

⁵⁰ Polgreen, *supra* note 24. Because so many international observers believed President Aristide's reelection was the result of flaws and impropriety, they suspended over \$500 million in international aid—adding to the country's persistence economic woes. David Gonzales, *8 Years After Invasion, Haiti Squalor Worsens*, N.Y. TIMES, July 30, 2002, at A1.

⁵¹ BUSS, *supra* note 20, at 37–39. Other elements of the Democratic Coalition were in fact legitimate business interests and middle class neoliberals. The Coalition was united around their opposition to Aristide's increasing authoritarianism.

⁵² Walt Bogdanich & Jenny Nordberg, *Mixed U.S. Signals Helped Tilt Haiti Toward Chaos*, N.Y. TIMES, Jan. 29, 2006. At the same time, President Aristide's second term as President was, in fact, more corrupt as Aristide encouraged paramilitary groups loyal to him personally to intimidate opponents. Members of his inner circle, including the National Palace security chief, the director of the Haitian National Police, the head of an investigations unit of the National Police, and the President of the Haitian Senate, were also convicted in the United States for narcotics distribution and money-laundering. Ben Fountain, Op-Ed., *Addicted to Haiti*, N.Y. TIMES, Feb. 7, 2010, at 12.

⁵³ Christopher Marquis, *Powell, Too, Hints Haitian Should Leave*, N.Y. TIMES, Feb. 27, 2004, at A13. There is some evidence that the Bush Administration's tacit support to the opposition motivated them to reject a

On 29 February 2004, President Aristide resigned and fled the country under pressure from Washington and Paris.⁵⁴ That same day, the UN Security Council determined that the situation in Haiti constituted a threat to international peace and security and authorized a Multinational Interim Force (MIF) to contribute to security and stability in Haiti.⁵⁵ On 30 April, the Security Council established MINUSTAH, which took over from the MIF on 1 June 2004.⁵⁶ After two more years of violence during which a U.S.-backed interim administration attempted to lead the government, Rene Prével was once again elected President.⁵⁷ President Prével's second term was characterized by slow democratic and economic advances as the international community returned to support Haiti's reconstruction and recovery. Despite this continued slow progress toward a stabilized government, Haiti nevertheless continued to suffer from high crime rates, corruption, drug problems, food riots and chronic human rights problems, "including inhumane prison conditions, police violence, threats against human rights defenders, and impunity for past abuses."⁵⁸

compromise with Aristide based on the belief that Aristide's ouster was likely. See generally DUPUY, *supra* note 39, at 172–73.

⁵⁴ *Rene Preval Is Inaugurated as President in Uneasy Haiti*, N.Y. TIMES, May 15, 2006, at A6. President Aristide claimed he was specifically forced from power by the United States, whom he accused of conspiring to keep him from power since his election in 1990. For a detailed, inside perspective of this argument, see RANDALL ROBINSON, *AN UNBROKEN AGONY* (2007). There is no evidence to support this claim. BUSS, *supra* note 20, at 38.

⁵⁵ S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004). The MIF replaced UNMIH which had been in Haiti since Aristide was returned to the presidency in 1994. See *supra* note 41.

⁵⁶ S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004). The MINUSTAH was originally set up to support the transitional government in ensuring a secure and stable environment; to assist in monitoring, restructuring and reforming the Haitian National Police; to help with comprehensive and sustainable disarmament, demobilization and reintegration (DDR) programs; to assist with the restoration and maintenance of the rule of law, public safety and public order in Haiti; to protect U.N. personnel, facilities, installations and equipment and to protect civilians under imminent threat of physical violence; to support the constitutional and political processes; to assist in organizing, monitoring, and carrying out free and fair municipal, parliamentary and presidential elections; to support the transitional government as well as Haitian human rights institutions and groups in their efforts to promote and protect human rights; and to monitor and report on the human rights situation in the country. The mission was originally authorized to include up to 6700 military personnel and 1622 police. Over the course of the next five years and six additional Security Council resolutions, that number grew to 6940 military personnel and 2211 police officers. See S.C. Res. 1608, U.N. Doc. /S/RES/1608 (2005); S.C. Res. 1702 (2006), S.C. Res. 1743, U.N. Doc. /S/RES/1743 (2007); S.C. Res. 17808, U.N. Doc. /S/RES/1780 (2007); S.C. Res. 1840, U.N. Doc. /S/RES/1840 (2008); S.C. Res. 1892, U.N. Doc. /S/RES/1892 (2009); see also *United Nations Stabilization Mission in Haiti*, UNITED NATIONS, <http://www.un.org/en/peacekeeping/missions/minustah/index.shtml>.

⁵⁷ Ginger Thompson, *Haitians Dance for Joy as Preval Is Declared Winner*, N.Y. TIMES, Feb. 17, 2006, at A10.

⁵⁸ HUMAN RIGHTS WATCH, *WORLD REPORT 2010—HAITI* (2010), available at <http://www.unhcr.org/refworld/docid/4b586cf037.html>.

With a democratic government in power, and the MINUSTAH force in place ensuring stability and security, the World Food Programme began a systematic program to provide food and development projects in Haiti in 2005.⁵⁹ At that time, Haiti ranked 154 out of 177 countries on the United Nations Development Programme's Human Development index.⁶⁰ In almost every measurable way, Haiti was the poorest country in the western hemisphere: 76% of Haitians lived below the poverty line; 56% lived on less than \$1 per day;⁶¹ domestic food production covered only 41% of the national need;⁶² 97% of the country had been deforested;⁶³ half the population had no access to potable water; only 10% of the population had access to electrical service;⁶⁴ 70% of the government was funded by international donations;⁶⁵ and unemployment was between 50-70%.⁶⁶ Over the course of five years, the World Food Programme spent almost \$2 billion in relief supplies, development and special projects in Haiti.⁶⁷ During this same five-year period, Haiti was hit with numerous natural disasters that further hindered economic development and required additional international emergency aid: in 2004, Hurricane Jeanne killed over 3,000 people and destroyed over 200,000 homes;⁶⁸ in 2005, Hurricanes Dennis and Emily killed 56, destroyed almost 4,500 homes, and otherwise affected almost 15,000 people;⁶⁹ in 2007, Hurricane Noel caused widespread devastation through mudslides and flooding that killed almost 100, displaced

almost 8,000, and destroyed 400 homes;⁷⁰ and in 2008, four named storms hit Haiti resulting in 793 dead, 310 missing, 593 injured, 22,702 homes destroyed, 84,625 homes damaged, and 70% of Haiti's crops destroyed.⁷¹

When the earthquake hit in January 2010, Haiti was a country just beginning to develop a system of democratic institutions, as well as, the infrastructure and services necessary to be a modern economy. Unfortunately, it was still the poorest nation in the western hemisphere, was still heavily reliant on the international community for food aid and resources, and was wholly unprepared to respond to the devastation caused on 12 January 2010.

Legal Doctrine for the Use of Military Assets in Disaster Relief Operations

In January 1994, over 180 delegates from forty-five states, to include the United States, and twenty-five non-governmental organizations, met in Oslo, Norway, to finalize the basic framework for using foreign Military and Civil Defense Assets (MCDA) in international disaster relief operations.⁷² This framework became known as the *Oslo Guidelines*. Following the unprecedented deployment of military assets in response to natural disasters in 2005, the *Oslo Guidelines* were updated and revalidated in 2007.⁷³ While the *Oslo Guidelines* are not binding on the participating Member States, they were endorsed by all the parties as the most effective and efficient way to incorporate military assets into disaster relief operations. The U.S. military incorporated these Guidelines into military doctrine in Joint Publication 3-29, *Foreign Humanitarian Assistance*.⁷⁴

⁵⁹ WORLD FOOD PROGRAMME, PROTRACTED RELIEF AND RECOVERY OPERATION APPROVED BY THE EXECUTIVE DIRECTOR (1 JANUARY–30 JUNE 2005)—HAITI, 10382.0 (12 Sept. 2005), available at <http://one.wfp.org/eb/docs/2005/wfp076561~1.pdf>.

⁶⁰ WORLD FOOD PROGRAMME, PROJECTS FOR EXECUTIVE BOARD APPROVAL, AGENDA ITEM 9, PROTRACTED RELIEF AND RECOVERY OPERATIONS HAITI, 10674.0 (11 Oct 2007).

⁶¹ *Id.*

⁶² *Id.*

⁶³ This deforestation makes Haiti particularly susceptible to the devastating effects of hurricanes and tropical storms. See *infra* notes 68–71.

⁶⁴ BUSS, *supra* note 20, at 11.

⁶⁵ INT'L CRISIS GROUP, HAITI: STABILISATION AND RECONSTRUCTION AFTER THE QUAKE 2 (2010), available at <http://www.unhcr.org/refworld/docid/4bb44bf72.html>.

⁶⁶ *Id.*

⁶⁷ WORLD FOOD PROGRAMME, ANNUAL REPORT 2010, at 44 (2010); WORLD FOOD PROGRAMME, ANNUAL REPORT 2009, at 49 (2009).

⁶⁸ MILES B. LAWRENCE & HUGH D. COBB, TROPICAL CYCLONE REPORT FOR HURRICANE JEANNE (2005), available at http://www.nhc.noaa.gov/pdf/TCR-AL112004_Jeanne.pdf.

⁶⁹ U.S. Agency for Int'l Dev., *Latin American and the Caribbean—Hurricane Season 2005*, Fact Sheet No. 3, FY 2006, Nov. 23, 2005, available at <http://www.reliefweb.int/library/documents/2005/usaid-americas-23nov.pdf>; Int'l Fed'n Red Cross & Red Crescent Societies, *Caribbean: Hurricanes Dennis & Emily*, Operations Update No. 02, July 25, 2005, available at <http://www.reliefweb.int/library/documents/2005/IFRC/ifrc-carib-25jul.pdf>.

⁷⁰ DANIEL P. BROWN, TROPICAL CYCLONE REPORT, HURRICANE NOEL (2007), available at http://www.nhc.noaa.gov/pdf/TCR-AL162007_Noel.pdf; U.N. Children's Fund, *Floods Continue to Cause Havoc in Haiti*, RELIEFWEB (01 Nov. 2007), <http://www.reliefweb.int/rw/rwb.nsf/db900sid/SHES-78KQ9M?OpenDocument>.

⁷¹ The four storms were Fay, Gustav, Hanna and Ike. See Jeffrey Masters, *Hurricanes and Haiti: A Tragic History*, WEATHER UNDERGROUND, <http://www.wunderground.com/education/haiti.asp> (last visited Nov. 19, 2010). The USS *Kearsage* deployed to Haiti for nineteen days following these storms and delivered 3.3 million pounds of internationally-donated relief supplies to Haitians isolated by mudslides and flooding. Donna Miles, *Military Assesses Haiti Disaster, Readies for Response*, AM. FORCES PRESS SERV., Jan. 13, 2010, available at <http://www.defense.gov/news/newsarticle.aspx?id=57479>.

⁷² U.N. OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS (OCHA), GUIDELINES ON THE USE OF FOREIGN MILITARY AND CIVIL DEFENCE ASSETS IN DISASTER RELIEF—"OSLO GUIDELINES" (2007), available at <http://www.unhcr.org/refworld/docid/47da87822.html> [hereinafter OSLO GUIDELINES].

⁷³ *Id.* Operation Unified Assistance, in 2005, provided disaster assistance in Indonesia, Thailand, and Sri Lanka following the devastating tsunami of 2004. Operation Unified Assistance involved twenty naval vessels, eighty-five aircraft, and over 15,000 personnel. See *Operation Unified Assistance*, GlobalSecurity.org, <http://www.globalsecurity.org/military/ops/unified-assistance.htm> (last visited Nov. 19, 2010).

⁷⁴ JOINT PUB. 3-29, *supra* note 9; see also DoDD 5100.46, *supra* note 12.

The basic principle of the *Oslo Guidelines* and Joint Publication 3-29 is that disaster relief and humanitarian assistance operations are the primary responsibility of civilian agencies and that military assets should be used “only where there is no comparable civilian alternative and only when the use of military assets can meet a critical humanitarian need.”⁷⁵ Moreover, both the *Oslo Guidelines* and the Joint Publication specifically state that military assets should be used for disaster relief only when they are requested by the affected country and only if they are “unique in capability and availability.”⁷⁶ Furthermore, military forces “should be seen as a tool complementing existing relief mechanisms in order to provide specific support to specific requirements, in response to the acknowledged ‘humanitarian gap’ between the disaster needs that the relief community is being asked to satisfy and the resources available to meet them.”⁷⁷ Re-enforcing this universally accepted policy regarding the limited role of military assets in disaster relief operations, both the *Oslo Guidelines* and the Joint Publication further state that “any use of [military assets] should be, at the onset, clearly limited in time and scale and present an exit strategy element that defines clearly how the function it undertakes could, in the future, be undertaken by civilian personnel.”⁷⁸

When JTF–H forces began arriving in Haiti, it was clear what “unique capabilities” the U.S. military brought to the disaster: operational reach, security, logistics, command and control, communications, and mobility.⁷⁹ Of these unique capabilities, establishing security was the most obvious first priority for the JTF, because without a secure operational environment, relief supplies and aid could not reach the victims of the disaster.

Security—Rules of Engagement

When the JTF first arrived in Haiti, the social and political climate in Haiti was still permeated with violent outbreaks, both criminal and political.⁸⁰ Moreover, the JTF was acutely aware that during other, earlier disaster relief

⁷⁵ JOINT PUB. 3-29, *supra* note 9, at xx, III-10; *see also* OSLO GUIDELINES, *supra* note 72, para. 5 (using virtually verbatim language). The *Oslo Guidelines* go further and state that military assets should be used in disaster relief only “as a last resort, *i.e.*, only in the absence of any other available civilian alternative to support urgent humanitarian needs in the time required.” OSLO GUIDELINES, *supra*, para. 32.ii.

⁷⁶ OSLO GUIDELINES, *supra* note 72, para.5.

⁷⁷ *Id.* para. 24.

⁷⁸ *Id.* para. 32.v.

⁷⁹ These unique capabilities are specifically listed in Joint Pub. 3-29. JOINT PUB. 3-29, *supra* note 9, at ix, I-2.

⁸⁰ *See supra* note 58 and accompanying text. Exacerbating this problem was the fact that the main prison in Port-au-Prince was destroyed by the earthquake and more than 4,300 dangerous criminals and gang members had escaped. U.S. DEP’T OF STATE & U.S. AGENCY FOR INT’L DEV., FY 2010 HAITI SUPPLEMENTAL BUDGET JUSTIFICATION 4 (2010).

efforts in Haiti,⁸¹ in situations where the death and damage was much less than that of the 2010 earthquake, relief trucks and food storage points had been attacked by Haitians.⁸² Consequently, even Amnesty International was calling on the foreign military forces in Haiti to take steps to ensure security and stability in the face of increased lawlessness following the 2010 earthquake.⁸³

It was in this environment that the JTF began considering appropriate Rules of Engagement (ROE) for the servicemembers arriving in country. The U.S. Standing Rules of Engagement/Standing Rules for the Use of Force⁸⁴ were in effect.⁸⁵ Southern Command had provided Rules of Engagement in OPOD 01-10 dated 22 January 2010,⁸⁶ the basic premise of which was the inherent right to unit self-defense in response to hostile acts or demonstrated hostile intent.⁸⁷ However, it was the supplemental measures and admonitions from SOUTHCOM that provided unique challenges for JTF-H in drafting its own ROE; specifically, the development of escalation of force (EOF) procedures and the decision to authorize deadly force to protect certain property while adopting a posture intended to minimize the use of force.⁸⁸

⁸¹ *See infra* notes 66–69 and accompanying text.

⁸² Following flooding in 2004 that left over 1,000 Haitians dead, crowds attacked relief trucks and food storage points as MINUSTAH forces delivered over forty tons of aid. James McKinley Jr., *Floodwaters Recede from Haitian City, but Hunger Does Not*, N.Y. TIMES, Sept. 25, 2004, at A7. When Hurricane Jeanne left 1900 Haitians dead, rioting and violence also hindered the delivery of food and aid throughout Haiti. Deborah Sontag & Lydia Polgreen, *Storm-Battered Haiti’s Endless Crises Deepen*, N.Y. TIMES, Oct 16, 2004, at A1.

⁸³ Amnesty Int’l, *Protection of Human Rights Must Accompany Relief Efforts in Haiti*, Jan. 15, 2010, available at <http://www.unhcr.org/refworld/docid/4b55783e3e.html> (“The current situation of lawlessness in Haiti and the increased vulnerability of women and children creates the perfect environment for human rights abuses and crimes such as rape and sexual abuse to take place undetected and go unpunished.”).

⁸⁴ CHAIRMAN JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR US FORCES (13 June 2005) [hereinafter CJCSI 3121.01B].

⁸⁵ “Per SECDEF and CDRSOUTHCOM direction in reference p. and q., the standing rules of engagement (SROE) will apply to Title 10 forces in Haiti providing humanitarian assistance/disaster relief.” SOUTHCOM OPOD 01-10, *supra* note 12, para 1.f(1).

⁸⁶ *Id.*

⁸⁷ CJCSI 3121.01B, *supra* note 84; SOUTHCOM OPOD 01-10, *supra* note 12.

⁸⁸ SOUTHCOM OPOD 01-10, *supra* note 12. The SOUTHCOM OPOD specifically directed JTF-H to “develop and implement escalation of force procedures” to identify mission-essential property or foreign property that could be defended with deadly force, and, as an overarching principle to “minimize [the] use of force.”

After eight years of deployments in Iraq and Afghanistan, most of the Soldiers and Marines in JTF-H had experience implementing and applying ROE in the Global War on Terror. Those conflicts, however, were obviously different than the environment in Haiti, and the first priority of the JTF-H ROE Planning Cell⁸⁹ was to ensure the ROE appropriately refocused servicemembers on the humanitarian nature of the mission. While JTF-H was concerned with violence and acted under a specific mission to provide security,⁹⁰ the ROE Planning Cell assumed that specific, targeted violence against U.S. forces would be unlikely because the mission was purely humanitarian. Any violence would likely result from civic unrest, localized acts of desperation, or criminal elements taking advantage of the circumstances. Based on this assumption, the ROE Planning Cell focused the planning process first on the development of EOF procedures with a view toward minimizing the use of force as required by the SOUTHCOM OPORD.⁹¹

The Global War on Terror has had a profound effect on EOF. Prior to the Global War on Terror, EOF was primarily viewed as a series of steps that used incrementally increasing force to deter a threat. In 2005, however, Multi-National Corps–Iraq (MNC-I) drafted and implemented new EOF guidance to reduce civilian casualties and to better integrate ROE into the emerging counterinsurgency fight.⁹² At that moment, EOF became a threat identification tool, designed to identify whether a perceived threat evinced hostile intent, rather than as a procedure for using proportional force to deescalate or disperse an already identified threat.⁹³ This

⁸⁹ CJCSI 3121.01B, *supra* note 84. Appendix J discusses the ROE Planning Cell and specifically states that

the Director for Operations (J-3) and his staff are responsible for developing ROE during crisis action planning. Likewise, the Director for Strategic Plans and Policies (J-5) should play a large role in ROE development for deliberate planning. As an expert in the law of military operations and international law, the staff judge advocate (SJA) plays a significant role, with the J-3 and J-5, in developing and integrating ROE into operational planning.

As nine years of persistent conflict has taught every judge advocate, ROE belong to the commander, and it is the job of the judge advocate to advise and assist the commander in developing and integrating ROE into mission analysis. In practice, ROE is often developed in the Office of the Staff Judge Advocate (OSJA) and then distributed to other members of the staff for comment. In Haiti, this latter approach was followed. *See also* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, THE RULES OF ENGAGEMENT (ROE) HANDBOOK FOR JUDGE ADVOCATES 1-31 (2000) [hereinafter ROE HANDBOOK].

⁹⁰ SOUTHCOM OPORD 01-10, *supra* note 12, para. 2.

⁹¹ *See supra* note 88 and accompanying text.

⁹² *See* Lieutenant Colonel Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 7. This article offers an outstanding examination of the evolution of Escalation of Force from its “traditional purpose of applying proportional force to deescalate or disperse an already identified threat . . . [to] a method to assess potential threats.” *Id.* at 8.

⁹³ *Id.*

EOF evolution was crucial for the battlefields of Iraq and Afghanistan because both conflicts involved a known enemy who, while “disguised” as civilians, attempted to perpetrate violence against Americans. For U.S. forces, identifying whether a particular action—such as a car speeding toward a checkpoint—was orchestrated by someone with hostile intent, rather than by someone who was innocently careless, was crucial to protecting the force. The MNC–I determined to solve this problem by evolving EOF into a procedure for determining that intent, rather than using it as a procedure to deter that behavior.⁹⁴

For the last five years, the use of EOF to distinguish between enemy conduct and innocent civilian behavior has been so effective that every unit that has deployed to Iraq or Afghanistan has received rigorous training on it as a threat assessment tool.⁹⁵ In fact, in 2007, the Center for Army Lessons Learned (CALL) published an *Escalation of Force Handbook* that focused on the use of EOF to assess threats.⁹⁶ The essential point of this new EOF training was that EOF steps were not necessary if a hostile act was witnessed or hostile intent was known; in those situations, immediate, deadly force was authorized. In other words, the assumption that there is an enemy who must be assessed underlies the use of EOF as a threat assessment tool. In humanitarian missions like Haiti, however, that is not the case. Therefore, re-educating and refocusing the force about the traditional use of EOF became paramount during the JTF-H mission.

Before EOF evolved into a threat assessment tool and was used as a threat deterrent,⁹⁷ “traditional” EOF procedures could be distilled into “The 5 S’s”: Shout (verbal warnings); Show (your weapon); Shove (use non-lethal physical force); Shoot (warning shot); and Shoot (aimed fire).⁹⁸ Under this traditional theory, EOF was ideally suited for riot control and civic disturbance situations

⁹⁴ In Iraq and Afghanistan, Soldiers do not want to “deter” the behavior of the enemy when they are executing a hostile action; they want to defeat that action and defeat that enemy. Deterrence would allow the enemy actor to withdraw and execute violence against the force at a later date and time. In humanitarian actions, violent behavior is usually tied to a particular convergence of unique circumstances, and deterring violence in a particular situation usually means that it will not happen again.

⁹⁵ *See* Captain Russell E. Norman & Captain Ryan W. Leary, *Making a Molehill Out of a Mountain: The U.S. Army’s Counterinsurgency Doctrine Applied to Operational Law in Iraq*, ARMY LAW., May 2010, at 22. During predeployment training in 2007, XVIII Airborne Corps OSJA personnel “attempted to frame EOF as a threat assessment technique as opposed to a gradual and increasing approach to engagements. In other words, instead of looking at EOF as a series of steps a servicemember must go through before engaging the enemy, servicemembers should look at EOF as a tool they can use to clarify an ambiguous threat.” *Id.* at 29 n.72.

⁹⁶ CTR. FOR ARMY LESSONS LEARNED, PUB. 07-21, ESCALATION OF FORCE HANDBOOK (2007) [hereinafter EOF HANDBOOK]. It should be noted that the *EOF Handbook* does not necessarily represent approved U.S. Army policy or doctrine, but rather is a Center for Army Lessons Learned (CALL) product provided for informational purposes.

⁹⁷ Bagwell, *supra* note 92, at 5.

⁹⁸ ROE HANDBOOK, *supra* note 89, 2-6.

where the focus was on restraint when using force.⁹⁹ The exercise of restrained force was meant to deter violent behavior when violence was the result of hunger or desperation, rather than a specific intent to kill. Of course, even generalized violence could cause death or serious injury to civilians or members of the force in these circumstances. Thus, a specific EOF procedure was needed to “de-escalate”¹⁰⁰ and “discourage threatening behavior.”¹⁰¹ The JTF-H ROE acknowledged the right of servicemembers to defend themselves while simultaneously restricting the use of lethal force against Haitians whose primary intent was to obtain food.¹⁰²

The first two steps in the JTF-H “humanitarian” EOF were (1) an evaluation of the situation and (2) disengagement.¹⁰³ The first step was an obvious and important reminder of the need to maintain and reassess situational awareness, but it was particularly important in Haiti where members of the force had to constantly remind themselves that violence was likely the result of hunger and desperation rather than a specific intent to kill. The second step, however, was something slightly new. De-escalation, which has long been a part of the Standing Rules of Engagement, is focused on allowing a hostile force the opportunity to withdraw or cease hostilities.¹⁰⁴ In

⁹⁹ Joint Publication 3-0, *Joint Operations* states that the purpose of restraint is to limit collateral damage and prevent the unnecessary use of force. JOINT CHIEFS OF STAFF, JOINT PUB., 3-0, JOINT OPERATIONS (17 Mar. 2009) [hereinafter JOINT PUB. 3-0].

¹⁰⁰ Prior to the publication of the *EOF Handbook*, CALL, the Carr Center for Human Rights Policy at Harvard University, and the U.S. Army Peacekeeping and Stability Operations Institute held a conference to review the proposed draft. In the report that emerged from the conference, participants suggested that procedures be developed to address the de-escalation of force (DOF)—steps designed to reduce tensions and prevent the emergence of a potential threat. TYLER MOSELLE, CARR CENTER FOR HUMAN RIGHTS POLICY, LEARNING AND INTEGRATION: ESCALATION OF FORCE PROCEDURES AND TRAFFIC CONTROL POINT OPERATIONS 12 (2007) [hereinafter CALL EOF CONFERENCE REPORT] (on file with author).

¹⁰¹ HEADQUARTERS, JOINT TASK FORCE-HAITI, OPORD, ANNEX C (OPERATIONS), APPENDIX 8 (U.S. FORCES RULES OF ENGAGEMENT) para. 3.C.2 [hereinafter JTF-H ROE], in HEADQUARTERS, JOINT TASK FORCE-HAITI, FRAGMENTARY ORDER 80, ADDITION OF APPENDIX 8 (U.S. FORCES RULES OF ENGAGEMENT) TO ANNEX C (OPERATIONS), TO JTF-H OPORD (8 Feb. 2010). Following publication of the ROE, the JTF-H OSJA put together a standard training package for subordinate units to use when training ROE and EOF. The package consisted of fifty-eight slides presenting various factual scenarios that leaders could use for discussion in their units. See HEADQUARTERS, JOINT TASK FORCE-HAITI, FRAGMENTARY ORDER 111, Enclosure 1, to JTF-H OPORD (16 Feb. 2010) [hereinafter JTF-H ROE TRAINING SCENARIOS].

¹⁰² The big difference between these EOF procedures and those in Iraq and Afghanistan was the underlying assumption that the individuals or groups in Haiti did not intend to cause harm to members of JTF-H. Again, the focus of ROE in humanitarian assistance and disaster relief had to be on changing the mindset of Soldiers from one necessary to combat a cunning enemy in Iraq and Afghanistan to one that recognized that generalized violence did not necessarily mean an immediate threat to the force.

¹⁰³ JTF-H ROE, *supra* note 102, para. 3.C.2.B.1–2.

¹⁰⁴ See CJCSI 3121.01B, *supra* note 84, app. A, para. 4.a(1) (“De-escalate. When time and circumstances permit, he forces committing hostile acts or

comparison, disengagement focused on U.S. forces and their ability to withdraw or break contact.¹⁰⁵ Including disengagement as a discrete step in the EOF process was meant to reinforce several other principles in the ROE to include, most importantly, the requirement to minimize the use of force. In fact, JTF-H found that disengagement was often the best form of crowd control: What better way to encourage peaceful civility at a food distribution point than to depart, or threaten departure, with all the food and water until the crowd calmed down?¹⁰⁶

The third step in the JTF-H EOF process was the use of non-lethal measures, to include audible signals, visual signs, and physical manipulation.¹⁰⁷ Again, because the guiding principle of the humanitarian assistance and disaster relief (HA/DR) operation was the minimization of the use of force, the JTF-H ROE described non-lethal measures in great detail, particularly techniques that could be used to attract the attention of rowdy crowds, including the use of horns, sirens, bull horns, vehicle mounted PA systems, sound commanders, and flares.¹⁰⁸ Anything that might cause a mob to stop rioting, even for a moment, was viewed as a potentially effective way to shift focus from violence to orderly behavior. However, if these non-lethal EOF measures failed, U.S. forces were authorized to temporarily detain individuals who violated established perimeters or secured areas, like distribution points, or who otherwise

demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening action.”)

¹⁰⁵ See JTF-H ROE, *supra* note 102.

¹⁰⁶ This exact scenario was contained in the *JTF-H ROE Training Scenarios*. In fact, many of the scenario solutions began with the admonition to “disengage” if possible. JTF-H ROE TRAINING SCENARIOS, *supra* note 102.

¹⁰⁷ JTF-H ROE, *supra* note 102, para. 3.C.2.B.3. In the *ROE Handbook* mnemonic “the 5 S’s,” the JTF-H non-lethal measures would fall under the first three S’s: shout, show, and shove. The use, effectiveness, and importance of non-lethal measures in crowd control has its origin in the peacekeeping missions of the 1990s, particularly the incident at the city of Brcko, Bosnia, during Operation Joint Guard in the Balkans in August, 1997. During separate incidents at the Brcko Police Station and the Brcko Bridge, U.S. forces showed remarkable restraint dealing with mobs wielding clubs, railroad ties, stones, bricks, nail-studded boards, and Molotov cocktails. Despite several injuries to several Soldiers, some very serious, U.S. forces limited themselves to non-lethal measures and warning shots, thereby preventing riotous situations from devolving further or from becoming the type of international incidents that would undermine the peacekeeping effort. See generally ROBERT M. PERITO, WHERE IS THE LONE RANGER WHEN WE NEED HIM?: AMERICA’S SEARCH FOR A POSTCONFLICT STABILITY FORCE 9–32 (2004); Colonel James K. Greer, *The Urban Area During Stability Missions Case Study: Bosnia-Herzegovina, Part 2*, in CAPTIAL PRESERVATION: PREPARING FOR URBAN OPERATIONS IN THE TWENTY-FIRST CENTURY—PROCEEDINGS OF THE RAND ARROYO-TRADOC-MCWL-OSD URBAN OPERATIONS CONFERENCE, MARCH 22-23, 2000 (Russell W. Glenn ed., 2000); U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (14 June 2001) (revised 27 Feb. 2008).

¹⁰⁸ *Id.*

threatened DoD personnel or non-DoD personnel involved in food and water distribution.¹⁰⁹

Granting authority to detain was potentially controversial because JTF-H was not operating under a law enforcement mandate or mission.¹¹⁰ However, because temporary detention was viewed as an effective means of discouraging violent behavior without resorting to lethal measures, contemplating the authority to detain was essential. Ultimately, the JTF-H ROE cell determined that temporary detention was not a tool to assist the Government of Haiti or MINUSTAH with law enforcement, but rather, was a commander's tool derived from the Staff Standing Rules of Engagement inherent right to protect the force (i.e., collective self defense) and necessary in certain circumstances to prevent interference with the mission (e.g., distribution of food and water).¹¹¹

Authorizing temporary detention under a self-defense and mission completion mandate meant detention was limited to very specific situations. For example, temporary detention was not authorized to stop individuals engaged in looting because neither the mission nor DoD personnel would be threatened under these circumstances.¹¹² Alternatively, individuals agitating violence at a food distribution point could threaten the mission and DoD personnel and were, therefore, subject to temporary detention.¹¹³ However, in keeping with the theory of a limited detention authority, individuals detained by JTF-H

forces had to be released or turned over to appropriate law enforcement authorities within twenty-four hours.¹¹⁴

The final step in the JTF-H EOF procedures involved lethal measures.¹¹⁵ Because it was a humanitarian operation, it was particularly important that deadly force be used only as a last resort and in response to hostile acts or demonstrated hostile intent directed at U.S. forces or other persons or designated property specifically identified for defense with lethal force.¹¹⁶ Two aspects of the JTF-H EOF procedures regarding lethal measures merit explication: first, the decision to categorize warning shots as a lethal measure appropriate for use within certain specific constraints; and second, the decision to identify only very limited property for defense with lethal force.

As with EOF procedures generally, the JTF-H ROE cell had to reeducate the force on the appropriate use of warning shots in the humanitarian context after years of exposure to warning shots in the context of the Global War on Terror. Historically, warning shots were viewed as a form of non-lethal force.¹¹⁷ In the counterinsurgency fights in Afghanistan and Iraq, however, warning shots were generally authorized only when deadly force was authorized.¹¹⁸ As these counterinsurgency missions matured, and as EOF evolved into the threat assessment procedure discussed previously,¹¹⁹ warning shots became

¹⁰⁹ JTF-H, *supra* note 102, para. 3.F; *see also* SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.q.4.b.

¹¹⁰ At the time of the earthquake local Haitian police and MINUSTAH had a law enforcement mission in Haiti. *See supra* notes 52–53 and accompanying text.

¹¹¹ HEADQUARTERS, JOINT TASK FORCE–HAITI, FRAGMENTARY ORDER 098, JTF-HAITI GUIDANCE FOR TEMPORARY DETENTION (11 Feb. 2010) [hereinafter JTF-H TEMPORARY DETENTION FRAGO 098].

¹¹² JTF-H ROE TRAINING SCENARIOS, *supra* note 102; JTF-H TEMPORARY DETENTION FRAGO 098, *supra* note 111. The JTF-H ROE training scenarios included numerous examples where detention would not be authorized because there was no mission or force protection issue (e.g., witnessing looters). It should be noted, that temporary detention was also authorized where JTF-H forces witnessed criminal acts that were likely to cause death or grievance bodily harm to civilians. *See* JTF-H ROE, *supra* note 102, para. 3.C.3.A. Forces who observed criminal acts where detention was not authorized were directed to contact their area MINUSTAH force or local police. *Id.* The decision to authorize JTF-H forces to intervene where they witnessed criminal acts likely to cause death or grievous bodily harm was in part a result of incidents which occurred during Operation Uphold Democracy in 1994. During the early days of that operation, police and militia brutally beat demonstrating Aristide supporters, one of whom died, all in full view of U.S. forces who did not intervene because the ROE cards they were carrying included no authorization to act. While the decision to change the ROE to authorize U.S. forces to act in those situations had already been made, the new ROE cards had not been distributed. News reports subsequently, and erroneously, attributed the change in ROE to the incident itself. *See* OPERATIONS IN HAITI, 1994–1995, *supra* note 19, at 20-1, 37-9.

¹¹³ JTF-H ROE TRAINING SCENARIOS, *supra* note 102.

¹¹⁴ JTF-H TEMPORARY DETENTION FRAGO 098, *supra* note 111, para. 3.C.1.A.5 (“Any detainee remaining in US custody longer than twenty-four hours requires an additional report of the circumstances of detention forwarded through operational and judge advocate channels to Joint Task Force–Haiti. Should a detainee remain in the custody of a unit beyond forty-eight hours, an inquiry initiated at the O-6 Commander’s level or above is required.”).

¹¹⁵ JTF-H ROE, *supra* note 102, para. 3.C.2.B.4. Non-lethal weapons, to include riot control means (RCM) and riot control agents (RCA), were authorized where units were properly trained and as directed by an O-6 level commander. Neither RCM nor RCA were ever used in Haiti.

¹¹⁶ *Id.* paras. 3.A.3, 3.A.4, 3.C.2.B.4 (emphasis added).

¹¹⁷ During Operation Uphold Democracy in 1995, the ROE specifically categorized warning shots as non-lethal: “When practical and a situation warrants (i.e., controlling disturbances, dispersing crowds), fire warning shots into the air *before* using deadly force” (emphasis added). *See supra* note 41 and accompanying text. *See also* ROE from Operations Plan for Uphold Democracy, Appendix 8 (Rules of Engagement) to Annex C (Operations) to Combined JTF Haiti OPLAN 2380, *reprinted in* OPERATIONS IN HAITI, 1994–1995, *supra* note 19. As recently as 2001, then-Lieutenant Colonel Mark S. Martins wrote that “prohibiting warning shots under such circumstances would deny soldiers a useful, *nonlethal*, option to maintain control and accomplish the mission,” (emphasis added). Lieutenant Colonel Mark S. Martins, *Deadly Force Is Authorized, But Also Trained*, ARMY LAW., Sept./Oct., 2001, at 1–16. Most of the Exercise ROE cards printed in the *ROE Handbook* as well as the ROE Card for the Multinational Force Observer Mission (Sinai) include warning shots in the list of non-deadly force methods available to troops. ROE HANDBOOK, *supra* note 89, app. B.

¹¹⁸ Multinational Corps–Iraq, MNC-I ROE Card (27 Mar. 2005), *reprinted in* INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 102 (2010).

¹¹⁹ *See supra* notes 89–102 and accompanying text.

less favored because ricochets and other unintended effects resulted in frequent injuries to civilians.¹²⁰ Ultimately, the commands in each theater prohibited the use of warning shots.

The JTF-H ROE cell approached the use of warning shots through the prism of these counterinsurgency experiences but with a focus on the humanitarian assistance mission and the use of traditional EOF as a threat deterrent rather than as a threat identifier.¹²¹ Given these considerations, warning shots represented an important preparatory step in the use of directed lethal force against individuals engaging in hostile acts or demonstrating hostile intent, to include acts likely to result in death or grievous bodily harm to civilians.¹²² It is axiomatic that an action that might result in unintended injury to a civilian was better than an action directed at injuring a civilian. That said, however, because of the recognized potential for warning shots to result in unintended consequences,¹²³ as well as the direction to minimize the use of force in this humanitarian mission,¹²⁴ limiting warning shots to those situations where deadly force would otherwise be authorized was prudent because it further limited the circumstances in which a victim of the earthquake could be unintentionally injured.

¹²⁰ Thom Shanker, *US Changes Guidelines for Troops to Lessen Everyday Tensions With Iraqi Civilians*, N.Y. TIMES, May 2, 2006, at A10 (“[I]n an effort to avoid confrontations that escalate into use of force, soldiers are told to substitute hand signs or gentle warnings for firing of warning shots, and to use strobe lights to ensure that civilian drivers approaching checkpoints can see Americans clearly.”). For an exhaustive listing of EOF incidents that resulted in death or injury to Iraqi civilians in 2005–2006, see ACLU Documents received from the Department of the Army in response to ACLU Freedom of Information Act Request, at <http://www.aclu.org/natsec/foia/log.html> (last visited Nov. 22, 2010). These accidental deaths and injuries caused by EOF were one of the reasons that CALL and the CALL EOF Conference chose to categorize warning shots (in the EOF Handbook) as a type of deadly force when used in counterinsurgency operations. The EOF Handbook defines EOF as “sequential actions which begin with non-lethal force measures (visual signs that include flags, spotlights, lasers, and pyrotechnics) and graduate to lethal measures (direct action) to include warning, disabling, or deadly shots in order to defeat a threat and protect the force.” EOF HANDBOOK, *supra* note 96, at 1. See also CALL EOF CONFERENCE REPORT, *supra* note 101, at 5; Ctr. for Army Lessons Learned (CALL), Escalation of Force (EOF) Conference Packet 13 (26–27 Mar. 2007) (Carr Ctr. For Human Rights and PKSOI Workshop) (on file with author). “Warning shots should be used in situations where force, up to and including deadly (lethal) force, would be authorized in accordance with standing ROE/EOF.” *Id.* at 16. It should be reiterated here that the EOF Handbook does not necessarily represent approved U.S. Army policy or doctrine, but rather is a CALL product provided for informational, operational and institutional purposes that contribute to the overall success of United States and Allied efforts. See *supra* note 96 and accompanying text.

¹²¹ See *supra* notes 89–102 and accompanying text.

¹²² JTF-H ROE, *supra* note 102, para. 3.C.3.A.

¹²³ See *supra* note 120 and accompanying text.

¹²⁴ SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.q.1.

For example, pursuant to the JTF-H ROE limitation, warning shots would not be authorized in a situation where a crowd at a food distribution point was getting generally unruly, impatient or antagonistic—even if it appeared likely that the crowd would get out of control. If the crowd’s behavior escalated to the point that it directly threatened the force or threatened other civilians in the crowd with death or grievous bodily harm, warning shots would then be authorized because deadly force would then be authorized. While the use of warning shots earlier in that scenario might potentially have prevented matters from escalating in the first place, the possibility of injury from the rounds themselves or from the panic that might have ensued following several loud retorts from an M-4 or M-16, would have been an unnecessary risk in a humanitarian mission when conditions were not yet actually dangerous to anyone.¹²⁵

The final important consideration in the JTF-H ROE, as in every ROE, was the determination of when deadly force was actually authorized—a determination that can vary significantly depending on the mission. As a general matter, the inherent right to unit self defense is not controversial, regardless of the nature of the mission. Similarly, the protection of civilians (noncombatants) from actions likely to cause death or grievous bodily harm is also not particularly controversial, regardless of the mission.¹²⁶ However, the designation of specific property for protection with deadly force was more complicated because of the unique circumstances of the humanitarian mission. For JTF-H, choosing to use deadly force to protect mere property from the very people the force was there to help—people who were suffering in a desperate situation—had to be limited to those circumstances where the loss of the property would have repercussions sufficiently serious to justify potentially killing a starving earthquake victim. Property that easily fit into this category included: military weapons,¹²⁷ banks, power production and distribution

¹²⁵ JTF-H ROE TRAINING SCENARIOS, *supra* note 102.

¹²⁶ During Operation Uphold Democracy, the initial permissive entry-ROE card did not allow the U.S. military to use force to prevent Haitian on Haitian violence when they arrived in Haiti on 18 September 1994. By 21 September 1994, however, the Joint Chiefs of Staff had approved allowing U.S. forces to prevent Haitian on Haitian violence. See OPERATIONS IN HAITI, 1994–1995, *supra* note 19, at 37–39; see also *supra* note 112. The JTF-H ROE specifically noted that the use of force was **not** authorized where the threat to the civilian was purely financial or only mildly physical. In those instances, the JTF forces were directed to report the incident to the appropriate law enforcement authority. See JTF-H ROE, *supra* note 102, para. 3.C.3.A.

¹²⁷ JTF-H ROE, *supra* note 102, para. 3.C.4.A.1.A.2. The SOUTHCOM Commander had also designated aircraft for protection with up to deadly force, but within two days of the earthquake, the JTF had secured the only airport, and the practical reality was that aircraft were in no danger of being approached, much less threatened, in a way that would necessitate the use of force. See SOUTHCOM OPORD 01-10, *supra* note 12, para. 4.d(1)(a); JTF-H ROE, *supra* note 102, para. 3.C.4.A.1.A.1. Moreover, anyone who gained unauthorized access to the airport would have breached a U.S.-controlled perimeter and would have been subject to temporary detention. JTFH-ROE, *supra* note 102, para. 3.F.1.

facilities and equipment, dams, bridges, air and sea port facilities, government buildings, hospitals, and foreign embassies and consulates.¹²⁸ The loss of military weapons would have had obvious external consequences insofar as the sole purpose of a military weapon is to cause, or threaten to cause, death or grievous bodily harm. The loss of the other listed critical infrastructure, all of which were fixed point, identifiable structures for which local police were generally responsible and most of which were already seriously damaged or destroyed in the earthquake, would have significantly limited the ability of the Government of Haiti to provide even minimal services and support to the victims of the earthquake. Having identified the obvious types of property for which deadly force should be authorized, the JTF-H turned its attention to a consideration of that category of property that is of most immediate concern in any humanitarian mission: food, water, and medical supplies.

Given the extent of the devastation, as well as the fact that Haitians attacked relief supply storage and distribution points in previous, much smaller, natural disasters,¹²⁹ the JTF-H had to consider how it should react if mobs tried to take food, water or medical supplies. Obviously, if a rioting mob directly threatened the safety of Soldiers or other civilians, the use of deadly force would be authorized,¹³⁰ but a mob or group of civilians that was clearly just trying to take relief supplies in a manner not consistent with any distribution plan would present a different problem. Maintaining the integrity of the distribution plan every day at each of the sixteen distribution points was crucial because, in most cases, the approximately 1.5 million Haitians in need of direct assistance were visiting their assigned distribution point only once every two weeks to get their allocated supplies.¹³¹ Maintaining a minimum level of survivability

¹²⁸ This list of critical infrastructure was identified by the SOUTHCOM Commander as foreign property for which the use of deadly force was authorized included. SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.q.4.f(1)(a). While the SOUTHCOM Commander retained exclusive authority to designate foreign property for protection with deadly force, he specifically stated that the authorization to use deadly force to protect those critical infrastructure projects was not a requirement to protect them. In fact, the SOUTHCOM Commander specifically delegated to the JTF-H Commander the authority to limit the use of deadly force to protect such property. *Id.* para. 3.q.4.f; JTF-H ROE, *supra* note 102, para. 3.C.4.A.2.

¹²⁹ See *supra* notes 80–82 and accompanying text.

¹³⁰ See *supra* note 127 and accompanying text.

¹³¹ Posture Statement of General Douglas M. Fraser, U.S. Air Force, Commander, U.S. Southern Command, Before the 111th Congress, Senate Armed Services Committee (Mar. 11, 2010) (on file with author) (“Under the leadership of the Government of Haiti the World Food Program began a targeted and systematic food distribution effort using predetermined distribution locations. In consultation with the Government of Haiti and interested stakeholders, 16 different sites around the capital were identified to serve as fixed distribution points, instead of attempting to deliver to different settlements throughout the city. United States military forces from the 82d Airborne Division and the 22d MEUs (Marine Expeditionary Unit) worked closely with MINUSTAH forces and Haitian National Police personnel to ensure locations, routes and distribution of aid was calm, orderly, and without incident. In total, the program provided humanitarian

for over 1.5 million people required a regular distribution of supplies each day, every day. If distribution points were overrun or supplies were taken from delivery vehicles before they reached the distribution points, thousands of Haitians would very quickly find themselves in even greater dire circumstances. On the other hand, using deadly force to protect relief supplies meant shooting at some of the very people for whom the supplies were intended.

Ultimately, the JTF-H Commander decided that deadly force would not be authorized to defend food, water, medical or other relief supplies.¹³² This was purely a policy decision based on the potential negative effects, real and perceived, associated with defending food from the people for whom the food was intended. To mitigate the possibility that relief supplies would be looted from distribution points, the JTF-H instead developed distribution point Training, Tactics and Procedures (TTPs) that were disseminated to the force as part of the JTF-H ROE Training Scenarios.¹³³ These TTPs emphasized how non-lethal measures¹³⁴ would be appropriate to prevent the looting of relief supplies, to include the temporary detention of potential looters for interfering with the military mission of distribution.¹³⁵ They also emphasized how proper planning and an affirmative perception of organization and authority could significantly diminish the possibility of a riot directed at obtaining the relief supplies.¹³⁶ Ultimately, no instances relating to the defense of relief supplies arose at U.S.-controlled distribution points.

Having established ROE that would allow the force to provide appropriate security throughout the areas of devastation, the JTF-H turned its attention to the mechanism for funding the provision of critical humanitarian assistance in the form of food, water, medical, shelter, and engineering support.

assistance in quantities of fifteen-day rations to approximately 9000 families per site, per day. The initial operation was a large success in establishing a sustainable and predictable food distribution program that reached over 2.9 million Haitians, exceeding their original goal by almost 1 million people.”)

¹³² JTF-H ROE, *supra* note 102, para. 3.C.4.B.2.A.

¹³³ ROE TRAINING SCENARIOS, *supra* note 102.

¹³⁴ See *supra* note 105 and accompanying text (discussing non-lethal measures as including physical manipulation).

¹³⁵ JTF-H ROE, *supra* note 102, para. 3.F.1.

¹³⁶ JTF-H ROE TRAINING SCENARIOS, *supra* note 102. Proper planning included early notice about distribution procedures (to include notice that any acts of disorder will result in cancellation of the distribution), good use of the terrain and other structures to control the crowd, emplacement of security and a cordon line before the arrival of relief supplies, strong point control of entrance and exit to the distribution point, and a good means to communicate with the crowd at the distribution point.

Overseas Humanitarian, Disaster and Civic Aid (OHDACA)

The overall purpose of the U.S. Government effort in Haiti was to “provide fast, visible, and effective [humanitarian assistance] and [foreign disaster relief] operations.”¹³⁷ The JTF-H was supposed to support this effort by leveraging “unique DOD capabilities,”¹³⁸ by providing “air and surface transportation of DOD and non-DOD personnel and supplies,”¹³⁹ and by providing “food, water, clothing, medicine, beds and bedding, temporary shelter, and housing.”¹⁴⁰ In order to provide these types of direct humanitarian assistance and disaster relief, JTF-H had to have access to funds specifically appropriated and authorized for these purposes.¹⁴¹ Moreover, as the third- and fourth-order effects of the destruction became more apparent, the fiscal authorities that financed the JTF-H efforts had to be flexible enough to cover operations and activities not previously envisioned.¹⁴²

As noted previously, USAID was the lead federal agency for HA/DR operations in Haiti.¹⁴³ The U.S. Agency for International Development is an independent federal agency that receives overall foreign policy guidance from

¹³⁷ CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], HAITI EARTHQUAKE HUMANITARIAN RELIEF para. 3 (14 Jan. 2010) [hereinafter CJCS EXORD]. CJCS EXORD MOD 4, *supra* note 11, para. 3.A. See also SOUTHCOM EXORD, *supra* note 16, para. 3.A.1 (“provide FHA/DR to mitigate human suffering and accelerate long-term regional recovery”); and SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a.1 (“provide FHA/DR to mitigate human suffering and enable the long-term recovery of Haiti”).

¹³⁸ SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a.1(b)1. The primary unique DoD capabilities which were being accessed included (1) the exceptional operational reach of military forces that could significantly enhance the initial disaster response, and (2) the unmatched DoD capabilities in logistics, command and control, communications, and mobility. JOINT PUB. 3-29, *supra* note 9, at 1-2. See *supra* notes 70–77 and accompanying text for a discussion of how the unique capabilities of DoD are supposed to be integrated into disaster relief and humanitarian assistance operations.

¹³⁹ CJCS EXORD MOD 4, *supra* note 137, para. 3.B.1.B.

¹⁴⁰ *Id.* para. 3.B.1.C. While these types of humanitarian assistance were the focus of JTF-H’s mission, the JTF-H mission did expand to include the assisted departure of American citizens from Haiti and the recovery of American citizen remains, both of which are normally missions of the Department of State. See *infra* note 200 (discussing operations associated with the recovery of American citizen remains). The former occurred on a reimbursable basis while the latter was funded under the OHDACA appropriation.

¹⁴¹ See *infra* notes 151–67 and accompanying text. The most basic principle of fiscal law states that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.” 31 U.S.C. § 1301 (2006). In *United States v. MacCollom*, the Supreme Court affirmed the principle that public funds could not be expended without express congressional authorization. 426 U.S. 317 (1976).

¹⁴² See *infra* notes 183–214 and accompanying text

¹⁴³ See *supra* note 12 and accompanying text.

the Department of State (DoS) but which is primarily responsible for administering foreign aid.¹⁴⁴ Within USAID, the Office of U.S. Foreign Disaster Assistance (OFDA) is responsible for “providing and coordinating U.S. Government humanitarian assistance in response to [natural] disasters.”¹⁴⁵ The OFDA is staffed by approximately 250 employees and is specifically funded to provide humanitarian assistance and disaster relief abroad.¹⁴⁶ In 2009, OFDA’s total budget was \$1.09 billion which was spent in response to sixty-three disasters in forty-nine countries around the world.¹⁴⁷ While most OFDA funds go to various nongovernmental organizations, U.N. agencies, and other international relief organizations that are positioned to provide immediate, effective relief in disaster stricken areas, OFDA funds are also used to reimburse other agencies of the Federal Government for their expenditures in support of disaster relief efforts.¹⁴⁸

Following the earthquake in Haiti, however, the extent of the destruction far exceeded the ability of OFDA and other international organizations alone to provide timely assistance.¹⁴⁹ In order to provide immediate emergency response and relief to Haiti, OFDA needed thousands of personnel, hundreds of vehicles, ships, and planes, and an organizational structure to manage the flow of relief supplies into and throughout the devastated areas. Beyond providing security, the U.S. military’s unique ability to provide operational reach, command and control, communications, mobility, and logistics made it a crucial component in the

¹⁴⁴ See USAID, <http://www.usaid.gov> (last visited Apr. 4, 2010).

¹⁴⁵ USAID OFDA ANNUAL REPORT FOR FISCAL YEAR 2009, at 13 [hereinafter USAID OFDA 2009 ANNUAL REPORT], available at http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/fy2009/annual_report_2009.pdf. Other USAID offices, with which OFDA works closely, following large-scale disasters, include the Office of Food for Peace (FFP), the Office of Transition Initiatives (OTI) and the Office of Conflict Management and Mitigation (CMM).

¹⁴⁶ *Id.* at 16.

¹⁴⁷ USAID OFDA 2009 ANNUAL REPORT, *supra* note 145, at 9. In 2008, OFDA responded to eighty disasters in sixty-two countries with a total budget of \$739.5 million. USAID OFDA ANNUAL REPORT FOR FISCAL YEAR 2008, at 7, available at http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/publications/annual_reports/pdf/AR2008.pdf [hereinafter USAID OFDA 2008 ANNUAL REPORT].

¹⁴⁸ USAID OFDA 2009 ANNUAL REPORT, *supra* note 145, at 13–15. Reimbursement between federal agencies is usually accomplished under the authority of the Economy Act, 31 U.S.C. § 1535 (2006). During the first five days after the earthquake, OFDA and FFP provided \$58 million to the World Food Program, \$5 million to the World Health Organization, and \$22 million to the International Organization for Migration. Simultaneously, OFDA provided \$23.5 million to FEMA to fund the deployment of U.S. Urban Search and Rescue teams, and \$13 million to the U.S. Department of Health and Human Services to deploy Disaster Medical Assistance Teams to augment health care capacity in Haiti. USAID Fact Sheet No. 5, Fiscal Year 2010 (Jan. 17, 2010), available at <http://www.usaid.gov/helphaiti/documents/01.17.10-USAID-DCHAHaitiEarthquakeFactSheet5.pdf>.

¹⁴⁹ See *supra* note 7.

overall relief effort.¹⁵⁰ The order which directed SOUTHCOM to “provide fast, visible, and effective [humanitarian assistance] and [foreign disaster relief] operations” in Haiti also directed that “OHDACA funding [be used] in providing [humanitarian assistance].”¹⁵¹

Overseas Humanitarian, Disaster and Civic Aid (OHDACA) funding refers to that portion of Operation and Maintenance funding that is specifically budgeted for DoD to conduct worldwide humanitarian assistance, disaster relief, and demining.¹⁵² The OHDACA appropriation funds several statutorily authorized OHDACA Programs¹⁵³ including 10 U.S.C. § 401, Humanitarian and Civic Assistance; 10 U.S.C. § 402, Denton Transportation of Humanitarian Relief Supplies for NGOs; 10 U.S.C. § 404, Foreign Disaster Assistance; 10 U.S.C. § 407, Humanitarian Deming Assistance; 10 U.S.C. § 2557, Excess Nonlethal Supplies for Humanitarian Relief; and 10 U.S.C. § 2561, Humanitarian Assistance.¹⁵⁴ The OHDACA appropriation

¹⁵⁰ These unique capabilities are specifically listed in Joint Pub. 3-29 as the type that justify the use of military forces in foreign humanitarian assistance operations. JOINT PUB. 3-29, *supra* note 9, at ix & 1-2. See also *supra* notes 73–76 and accompanying text.

¹⁵¹ CJCS EXORD, *supra* note 137, para. 4.A. Subsequent CJCS EXORD modifications added changed the direction to “OHDACA funding [be used] in providing [humanitarian assistance] and [foreign disaster relief].” CHAIRMAN JOINT CHIEFS OF STAFF, EXORD [EXECUTE ORDER], HAITI EARTHQUAKE HUMANITARIAN RELIEF, MODIFICATION 3, para. 4.A (22 Jan. 2010) [hereinafter CJCS EXORD MOD 3]. This modification was the trigger for using 10 U.S.C. § 404 in addition to 10 U.S.C. § 2561 as an authority for conducting OHDACA funded relief efforts.

¹⁵² The National Defense Authorization Act of 1995 established a single funding account within the Operations and Maintenance funds for funding these OHDACA Programs. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, §§ 301 and 1411, 108 Stat. 2663 (1994); H.R. REP. NO. 103-701, 1994 WL 440344, *reprinted in* 1994 U.S.C.C.A.N. 2224 (the bill “contain[s] a provision (sec. 1023) that would establish a single funding account for overseas humanitarian, disaster, and civic aid (OHDACA) programs”). See also The National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 11311, 110 Stat. 186.

¹⁵³ The National Defense Authorization Act of 1995 designated Humanitarian Assistance Programs authorized by §§ 401, 402, 404, 2547 and 2551 of 10 U.S. Code as “OHDACA Programs.” National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, §§ 301 and 1411, 108 Stat. 2663 (1994); H.R. CONF. REP. 103-701, 1994 WL 440344, 1994 U.S.C.C.A.N. 2224. See also The National Defense Authorization Act of 1996, Pub. L. No. 104-106, § 11311, 110 Stat. 186. On 30 October 2000, § 2547 and 2551 were redesignated as § 2557 and 2561 respectively by the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 1033(b)(1), 114 Stat. 1654 (2000).

¹⁵⁴ The OHDACA Programs that were used to fund operations in JTF-H were 10 U.S.C. § 404 and 10 U.S.C. § 2561. See Department of Defense Budget Amendment to FY 2010 Supplemental Request Operation Unified Response, Justification Material (March 2010); Defense Security Cooperation Agency Budget Amendment to FY 2010 Supplemental Request, Operation Unified Response (March 2010). 10 U.S.C. § 404, Foreign Disaster Assistance, was first enacted in 1995 in the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994) in order to “provide a statutory basis for foreign disaster relief activities by authorizing the President to conduct such activities.” H.R. REP. NO. 103-701, *reprinted in* 1994 U.S.C.C.A.N. 2224 (1994). 10 U.S.C. § 2561, Humanitarian Assistance, was first enacted in 1993 (as 10

U.S.C. § 2551) in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

was first used in 1995 to provide a single source appropriation for funding the OHDACA Programs.¹⁵⁵ The first of these OHDACA Program statutes was enacted in 1986¹⁵⁶ in response to a Comptroller General opinion,¹⁵⁷ *The Honorable Bill Alexander*, which found that DoD could not use Operation and Maintenance funds to conduct humanitarian and civic assistance operations.¹⁵⁸

U.S.C. § 2551) in the National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, 106 Stat. 2315 (1992).

¹⁵⁵ Prior to 1995, each of the OHDACA Programs was funded through individual appropriations for each authorization. In 1996, when Congress continued using the budget account known as OHDACA, it specifically stated that “although DOD is uniquely capable of performing some humanitarian and disaster relief operations, these operations are fundamentally the responsibility of the Department of State and the Agency for International Development and, in general, are more appropriately funded through these agencies.” H.R. REP. NO. 104-450, *reprinted in* 1996 U.S.C.C.A.N. 238.

¹⁵⁶ 10 U.S.C. § 401. Humanitarian and Civic Assistance Provided in Conjunction with Military Operations, enacted as part of the National Defense Authorization Act of for Fiscal Year 1987, Pub. L. No. 99-661, § 333, 1986 Stat. 2638 (1986). Previously, the Stevens Amendment, which was part of the Department of Defense Appropriations Act of 1985, granted authority to use O&M appropriations for humanitarian and civic assistance operations incidental to authorized operations, the authority was limited to that year. Pub. L. No. 98-473, §§ 101(h), 8103, 98 Stat. 1837, 1942 (1984).

¹⁵⁷ “The General Accounting Office has recommended that this authority (to conduct humanitarian and civic relief operations) be legislatively clarified because of its concern that the scope of current Defense Department activities may exceed the authority that Congress intended to confer in Section 8072 The committee believes that the provision of humanitarian and civic assistance activities to the civilian populace of developing foreign countries potentially confronted with low intensity conflict should be explicitly recognized as a valid military mission.” S. REP. NO. 99-331 (July 8, 1986), *reprinted in* 1986 U.S.C.C.A.N. 6413, 1986 WL 31982 (Leg.Hist. for National Defense Authorization Act of Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3967).

¹⁵⁸ *The Honorable Bill Alexander*, 63 Comp. Gen. 422 (1984). This opinion was written in response to a 25 January 1984 request by Congressman Bill Alexander that the Government Accountability Office (GAO) investigate and provide a formal legal opinion regarding the propriety of using DoD O&M appropriations to fund various activities that took place during a military exercise in the Republic of Honduras—at least some of which were humanitarian and civic relief activities. The GAO concluded that the humanitarian and civic relief activities of DoD in Honduras fell “clearly within the scope of other appropriation categories and thus [could] not be funded with O&M funds. The types of civic and humanitarian assistance provided during the exercises are similar to those ordinarily carried out through health, education, and development programs under the Foreign Assistance Act of 1961, 22 U.S.C. § 2151—*et seq.* administered by the U.S. International Development Cooperation Agency (of which AID is a part).” *Id.* app. Based upon its decision, GAO recommended that DoD seek “specific funding authorization from Congress if it wishes to continue performing such a wide variety of activities.” *Id.*

When the earthquake occurred in Haiti, DoD had approximately \$109.9 million in OHDACA funds available for use through September 2011,¹⁵⁹ of which \$20 million was specifically appropriated for Foreign Disaster Relief.¹⁶⁰ The initial order to SOUTHCOM to provide disaster relief and humanitarian assistance in Haiti included authority to use the entire \$20 million for operations in Haiti.¹⁶¹ At the same time, OFDA transferred \$1.5 million to DoD as an Economy Act transfer to further fund immediate assistance, mostly in the form of logistics transportation and supplies.¹⁶² Within days, all available OHDACA funds, totaling an additional \$106 million, were released to SOUTHCOM for use in disaster relief and humanitarian operations in Haiti.¹⁶³ Given the extent of the devastation, however,¹⁶⁴ it was

¹⁵⁹ 2010 National Defense Authorization Act, Pub. L. No. 111-84, § 303(19), 123 Stat. 2246 (2009).

¹⁶⁰ See Office of the Secretary of Defense, Operation and Maintenance Overview, Fiscal Year 2010 Budget Estimates 62 (revised June 2009) (on file with author) (“[T]he \$20.0 million requested in FY 2010 is to continue the program first appropriated, as a three year appropriation, in FY 2008. Request that these funds be appropriated specifically for disasters . . . [h]owever, should a large scale disaster occur during this period, it is likely that additional funding could be required.”). See also Def. Sec. Cooperation Agency, Fiscal Year 2010 Budget Estimates, Overseas Humanitarian, Disaster Assistance, and Civic Aid (May 2009) (on file with author) (“The Department requests \$20.0 million in FY 2010 to continue the program that was initially appropriated in FY 2008 as a \$40.0 million, three year appropriation. Request that these funds be appropriated specifically for disasters). Of the remaining \$89 million, \$84.6 million was programmed to be spent on 703 Humanitarian Assistance Programs and activities and around the world, and \$5.2 million for Humanitarian Mine Action programs. *Id.*

¹⁶¹ CJCS EXORD, *supra* note 137, para 4.A.

¹⁶² USAID Fact Sheet No. 5, *supra* note 148 (“DOD has been supporting the humanitarian response through transportation of emergency relief personnel and commodities into Haiti.”). The OSD/USAID subsequently transferred another \$39 million to DoD just before 1 February 2010. USAID Fact Sheet No. 14, Fiscal year 2010 (Jan. 26, 2010), available at http://www.usaid.gov/ht/docs/eqdocs/ofda_fact_sheets/01.26.10_haiti_factsheet_14.pdf.

¹⁶³ CHAIRMAN JOINT CHIEFS OF STAFF, HAITI EARTHQUAKE HUMANITARIAN RELIEF EXORD (EXECUTE ORDER), MODIFICATION 2, para. 4.A (18 Jan. 2010) [hereinafter CJCS EXORD MOD 2] (adding \$14 million to the total OHDACA funds available for DoD relief operations in Haiti); CJCS EXORD MOD 3, *supra* note 151, para. 4.B (adding \$92 million to the total OHDACA funds available for DoD relief operations in Haiti) Title 10 U.S.C. § 404(d) allows “amounts appropriated to the Department of Defense for any fiscal year for OHDACA programs of the Department shall be available for organizing general policies and programs for disaster relief programs occurring outside the United States.” The first \$14 million was obtained by pulling back all unobligated FY 09 funds from other Humanitarian Assistance Programs and directing it into the relief effort. The remaining \$92 million was obtained by redirecting all FY 10 OHDACA money into the disaster relief fund. E-mail from SOUTHCOM SCJ7 Office (Jan. 7, 2010) (on file with author).

¹⁶⁴ See *supra* note 7. As points of comparison, following are total expenditures from other foreign disaster assistance operations: (1) Hurricane Mitch Relief Efforts: \$223 million. CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998–1999: LESSONS LEARNED FOR JUDGE ADVOCATES (15 Sept. 2000); (2) Indian Ocean Tsunami (2004–2005): \$175.8 million,

obvious that an even greater amount of funds was going to be needed. Accordingly, on 25 January 2010, the Undersecretary of Defense (Comptroller) executed a Reprogramming Action that transferred \$400 million from the military services’ general Operations and Maintenance (O&M) funds into the OHDACA account.¹⁶⁵ A second Reprogramming Action for \$255 million was subsequently executed on 15 March 2010.¹⁶⁶ Ultimately, almost \$455 million was spent on OHDACA related expenses for DoD operations in Haiti.¹⁶⁷

The use of OHDACA by JTF-H was specifically limited to the Emergency/Initial Response Phase (Phase One) and Relief Phase (Phase Two) of operations.¹⁶⁸ The rationale for limiting OHDACA funds to Phase One and Phase Two projects was grounded in the Oslo Guidelines and U.S. policy that military involvement in disaster relief should be a short-term, stop-gap measure until HA/DR efforts can be completely assumed by the Department of State and USAID

Defense Security Cooperation Agency, OHDACA Info Paper (n.d.) [hereinafter DSCA OHDACA Info Paper] (on file with author); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005); S. REP. NO. 109-52 (2005); (3) Pakistan Earthquake: \$60.8 million, DSCA OHDACA Info Paper (n.d.); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3419 (2006); (4) Georgia Complex Emergency: \$13.51 million. DEPARTMENT OF DEFENSE FISCAL YEAR 2008 REPORT ON HUMANITARIAN ASSISTANCE (required by 10 U.S.C. § 2561), available at <http://www.dsc.osd.mil/programs/HA/2009/FY08%20HA%20Report%2010%20U%20S%20C%202561.pdf>.

¹⁶⁵ U.S. Dep’t of Def., DD Form 1415-1, Reprogramming Action—Prior Approval (n.d.) (Haiti Earthquake Effort, DoD Ser. No., FY 10-07 PA (2010) [hereinafter DD Form 1415-1] (on file with author). The DoD Financial Management Regulation (DoD FMR) establishes a procedure by which DoD can reprogram appropriated funds in order to maintain the flexibility necessary for the timely execution of DoD programs. Because of the size of this reprogramming, approval was required by the Office of Management and Budget (OMB), the House Appropriations Committee, the House Armed Services Committee, the Senate Appropriations Committee, and the Senate Armed Services Committee. U.S. DEP’T OF DEF. REG. 7000.14R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 3, ch. 6 (Reprogramming of DOD Appropriated Funds). Specific amounts were taken out of each service’s O&M funds by this reprogramming action. The DD 1451-1 requires that these funds be restored to the O&M accounts at some point. Ultimately, all of money that was reprogrammed for OHDACA use in Haiti was restored to the DoD O&M accounts in a supplemental appropriation. See Supplemental Appropriation Act, 2010, Pub. L. No. 111-212, 124 Stat. 2302 (July 29, 2010).

¹⁶⁶ U.S. Dep’t of Def., DD Form 1415-1, Reprogramming Action—Prior Approval (n.d.) (Haiti Earthquake Effort, DOD Ser. No., FY 10-08 PA (2010) (on file with author).

¹⁶⁷ QUARTERLY REPORT FROM DFAS-IN, CONTINGENCY COST REPORT AND ANALYSIS TEAM, OPERATION UNIFIED RESPONSE (8 Oct 10) [hereinafter DFAS CONTINGENCY COST REPORT] (5 January 2011) (on file with author). In comparison, when Operation Unified Response ended in June 2010, USAID had spent approximately \$633 million. USAID Fact Sheet No. 57, Fiscal Year 2010 (June 4, 2010), available at http://www.usaid.gov/ht/docs/eqdocs/ofda_fact_sheets/haiti_eq_fs57_06-04-2010.pdf.

¹⁶⁸ CJCS EXORD, *supra* note 137, para. 4.A.

for long term relief and reconstruction efforts.¹⁶⁹ This limitation on the types of humanitarian projects JTF-H could undertake, however, was counterintuitive to the experience of those who had served overseas in the Global War on Terror where funding sources allowed them to conduct a broad array of humanitarian assistance-type projects within the counterinsurgency missions in Iraq and Afghanistan, to include projects that were clearly reconstruction or restoration.¹⁷⁰ One way the JTF-H Office of the Staff Judge Advocate (OSJA) ensured that HA/DR projects were appropriate for funding with OHDACA was a requirement that all contractual requirements in excess of the micro-purchase threshold be reviewed by the Joint Acquisition Review Board (JARB), which required an independent legal review, “to ensure the Command [was] making sound acquisition and financial decisions based upon existing law and policy.”¹⁷¹

Generally speaking, most OHDACA expenditures in Haiti were used for one of five categories of expenses: military and civilian personnel pay and subsistence (\$64

million);¹⁷² personnel support (\$40 million);¹⁷³ operational support (\$134 million);¹⁷⁴ transportation (\$147 million);¹⁷⁵ and humanitarian relief (\$68 million).¹⁷⁶ While the first three categories of expenses were indirect HA/DR because they represented the cost of sustaining the task force in Haiti, the latter two categories represented direct military HA/DR expenses intended to address “immediate humanitarian needs . . . (e.g. water, food, shelter, sanitation, medicine, etc).”¹⁷⁷ Most of the direct HA/DR expenses were straightforward and obvious parts of Relief Phase operations: airlift and sealift of relief supplies and relief supplies themselves, including water, medical supplies, and humanitarian daily rations.¹⁷⁸ Where humanitarian projects involved engineering assets, however, the danger of exceeding OHDACA authority by conducting reconstruction (Phase Three) required careful analysis by the JTF-H OSJA.¹⁷⁹ The importance of ensuring OHDACA did not fund reconstruction projects cannot be understated; use of OHDACA to fund Phase Three reconstruction projects would have violated the Anti-Deficiency Act and subjected responsible Command personnel to career-ending

¹⁶⁹ See *supra* notes 72–78 and accompanying text. See also *supra* notes 143–58 and accompanying text. This limitation on the use of OHDACA was based on the OHDACA Programs that were being funded, 10 U.S.C. § 404 (Foreign Disaster Assistance) and 10 U.S.C. § 2561 (Humanitarian Assistance). Other OHDACA programs, such as 10 U.S.C. § 401 (Humanitarian and Civic Assistance), allow expenditures in different circumstances, with different limitations.

¹⁷⁰ It was not uncommon for members of the JTF-H OSJA to hear other staff officers say: “But we did this type of project in Iraq/Afghanistan all the time!” Global War on Terror funding sources that allow commanders to engage in humanitarian and civic relief type projects include: Commander’s Emergency Response Program (CERP), Department of Defense Appropriations Act for Fiscal Year 2005, Pub. L. No. 108-287, § 9007, 118 Stat. 951 (2004) (The primary purpose of the CERP is to “enable[e] military commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi people, and to fund a similar program to assist the people of Afghanistan”); Iraqi-CERP (I-CERP). The I-CERP is an Iraqi funded CERP program that is based on a memorandum of understanding between the Iraq Supreme Reconstruction Council and Multi-National Force Iraq, dated 3 April 2008, that allowed MNF-I commanders to execute urgent reconstruction projects for the benefit of the Iraqi people. See MNF-I FRAGO 08-166 (17 Apr. 2008); MNC-I FRAGO (19 Apr. 2008); Iraq Security Force Fund (ISFF), Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act for 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). The purpose of ISFF was to establish funds that designated commanders in Iraq could use “to provide assistance, with the concurrence of the Secretary of State, to the security forces of [Iraq] including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction and funding.” See also Afghanistan Security Force Fund, Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act for 2005, Pub. L. No. 109-13, 119 Stat. 231 (2005). The purpose of the Afghanistan Security Force Fund (ASFF) was to establish funds that designated Commanders in Afghanistan could use “to provide assistance, with the concurrence of the Secretary of State, to the security forces of [Iraq] including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction and funding.” *Id.*

¹⁷¹ See FRAGMENTARY ORDER NO. 55 to JTF-H OPORD enclosure 1, para. 2 (31 Jan. 2010).

¹⁷² This includes incremental pay, allowances and subsistence for military and civilian personnel. Defense Finance and Accounting Service Contingency Cost Report; Defense Security Cooperation Agency Budget Amendment to FY 2010 Supplemental Request, Operation Unified Response (Mar. 2010), available at http://comptroller.defense.gov/defbud/get/fy2011/Budget_Amendment_to_FY2010_Supplemental_Request.pdf.

¹⁷³ *Id.* This includes material and services required to support military and civilian personnel engaged in contingency operations.

¹⁷⁴ *Id.* This covers the incremental cost to operate and support units deployed, to include air and ground OPTEMP, steaming days, maintenance support, fuel and communications.

¹⁷⁵ *Id.* This includes the cost of transporting units as well as humanitarian relief supplies and medical evacuations.

¹⁷⁶ *Id.* This includes all humanitarian relief and humanitarian assistance projects.

¹⁷⁷ SOUTHCOM EXORD, *supra* note 16, para. 3.B.2. See *supra* notes 12 and 13 and accompanying text. The SOUTHCOM OPORD 01-10 further clarified that the during the Relief phase of operations, military forces will “provide water, food, medical, shelter, engineering support (open LOCs [lines of communication]).” SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.b. Critical engineering during the Relief Phase included: “i. Help determine communications infrastructure requirements; ii. Conduct critical engineering assessments; iii. Establish Forward Operating Bases; iv. Conduct essential expeditionary lines of communication repairs; v. Identify [sic] commercial contractors for transition; vi. Reduce military engineer assets.” *Id.* para. 3.a(2)1.b(4)(a)(4).

¹⁷⁸ See *supra* notes 172–77 and accompanying text. The vast majority of actual relief supplies distributed in Haiti came from international and non-governmental relief organizations, although in the initial weeks of the operations, almost all of these supplies were transported by JTF-H assets and distributed at Distribution Points secured by JTF-H personnel.

¹⁷⁹ Phase Three focused on reconstruction of key infrastructure. SOUTHCOM EXORD, *supra* note 16, para. 3.B.3 (“facilitate key infrastructure reconstruction”); SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.c (“main effort shifts to reconstruction of key infrastructure (e.g., roads, power, communications, etc.)”).

administrative action, at best, and criminal prosecution—although highly unlikely—at worst.¹⁸⁰

Phase One and Phase Two engineering projects appropriate for OHDACA funding included conducting critical engineering assessments and repairing airports, seaports, and roads to facilitate the delivery of immediate humanitarian relief.¹⁸¹ Phase Three projects were those that went beyond facilitating immediate humanitarian relief or that focused on reconstruction or restoration of infrastructure that was not part of the delivery of immediate humanitarian relief.¹⁸² During the initial weeks of OUR, repairing airports, seaports, and roads, projects for which OHDACA was clearly appropriate, occupied almost all of the engineering assets in Haiti. Once basic repairs were substantially underway and the method for delivering food, water, and medical aid became systematized, JTF-H began considering other engineering projects that would mitigate the secondary effects of the earthquake.

Joint Task Force–Haiti determined that the most obvious looming catastrophic secondary effect of the earthquake was the twenty million cubic meters of debris, which resulted from damage to buildings and infrastructure, that clogged the roads, neighborhoods, and drainage canals.¹⁸³ This disaster-generated debris¹⁸⁴ limited where and how internally displaced person (IDP) camps were settled, managed, and supported; prevented the collection of tens of thousands of decomposing bodies still buried under

¹⁸⁰ The Anti-Deficiency Act (hereinafter ADA) prohibits making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available unless authorized by law, or obligating money for a purpose for which there is not an authorization. 31 U.S.C. § 1341 (2006). Officers who violate the ADA are subject to administrative and punitive action, to include fines up to \$5000 and imprisonment up to two years, per violation. The U.S. GAO reviews agency expenditures to ensure compliance with the Anti-Deficiency Act.

¹⁸¹ SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.a(4)(a)(4) and 3.a(2)1.b(4)(a)(4). Critical engineering during the Relief Phase included: “i. Help determine communications infrastructure requirements; ii. Conduct critical engineering assessments; iii. Establish Forward Operating Bases; iv. Conduct essential expeditionary lines of communication repairs; v. Identify [sic] commercial contractors for transition; vi. Reduce military engineer assets.” *Id.* para. 3.a(2)1.b(4)(a)(4).

¹⁸² *Id.*; see also FRAGMENTARY ORDER NO. 21 to JTF-H OPORD para. 3.A.1.A (24 Jan. 2010) (“As a general rule, OHDACA funds may be used for the following activities . . . 4. Modest construction projects . . . and repairs of facilities damaged by the earthquake and necessary to facilitate alleviation of the suffering of the victims of the disaster.”) and para. 3.A.1.B (“As a general rule, the following types of activities may not be funded with OHDACA funds . . . 5. Rebuilding or repairing government facilities or infrastructure in need of repair.”).

¹⁸³ United Nations Development Programme, Programme Outline—Debris Management, *Empowering Haiti to Build a Better Future*, Mar. 2010 available at http://www.undp.org/haiti/doc/CN_2_DebrisMgmt-E-s.pdf.

¹⁸⁴ The Debris Management Task Force used the phrase “disaster generated debris” to distinguish earthquake caused rubble from other garbage and waste. See *infra* note 189 and accompanying text.

the rubble; and caused garbage and human waste to accumulate in massive amounts everywhere.¹⁸⁵ The amassing of all of this debris and waste was an ominous and growing indicator of the potential for major outbreaks of disease, particularly when the April rainy season began.¹⁸⁶ The fact that approximately 1.2 million Haitians were packed into 460 overflowing IDP camps would exacerbate the effects of any such outbreaks.¹⁸⁷ While there were other plans underway to mitigate these potential health epidemics,¹⁸⁸ clearance of disaster-generated debris was

¹⁸⁵ Simon Romero, *Outbreaks Are Feared as Sanitation Troubles Worsen in Haiti*, N.Y. TIMES, Feb. 20, 2010, at A4 (“As hundreds of thousands of people displaced by last month’s earthquake put down stakes in the squalid tent camps of this wrecked city, the authorities are struggling to address the worsening problem of human waste. Public health officials warn that waste accumulation is creating conditions for major disease outbreaks including cholera, which could further stress the ravaged health system.”). *Id.*

¹⁸⁶ Haiti has two rainy seasons: April to June and August to October. Rain and hurricane caused flooding was common before the earthquake, but after the earthquake was almost a certainty given the volume of debris. ANALYSIS OF MULTIPLE NATURAL HAZARDS IN HAITI, REPORT PREPARED BY GOVERNMENT OF HAITI, WITH SUPPORT FROM THE WORLD BANK, THE INTER-AMERICAN DEVELOPMENT BANK, AND THE UNITED NATIONS SYSTEM (Mar. 26, 2010), available at http://www.iris.edu/hq/haiti_workshop/docs/Report-MULTIHAZARDS-HA-English-SergioMora-Final-Red.pdf. Flooding would disperse human waste throughout the cities and IDP camps. This would lead to diarrheal illnesses, such as cholera, typhoid, and shigellosis, and the massive proliferation of disease carrying mosquitoes who would spread malaria and dengue fever. Romero, *supra* note 185.

¹⁸⁷ U.N. Secretary-General, *United Nations Security Council Report of the Secretary General on the United Nations Stabilization Mission in Haiti*, S/2010/200 (22 Feb. 2010). A huge majority of these internally displaced persons (IDPs) camps were established spontaneously—often in areas that were not ideal for supporting thousands of IDPs. See also USAID OFFICE OF TRANSITION INITIATIVES—HAITI, QUARTERLY REPORT, JAN.–MAR. 2010 [hereinafter USAID OFFICE OF TRANSITION INITIATIVES—HAITI, QUARTERLY REPORT, JAN.–MAR. 2010], available at http://www.usaid.gov/our_work/cross-cutting_programs/transition_initiatives/country/haiti3/rpt0310.pdf. By April 2010, it was estimated that more than 2.1 million IDPs were living in more than 1300 spontaneous settlement camps throughout Haiti. USAID Fact Sheet, No. 50 (16 Apr. 2010), available at <http://www.insidengo.org/downloads/Haiti04.16.10USAIDDCHAEarthquakeFactSheet.pdf>.

¹⁸⁸ For example, USAID was trying to manage the human waste problem by building or buying 18,000 latrines to meet the sanitation needs of the affected Haitian population, including 9000 latrines in Port-au-Prince. However, because of overcrowding and debris in Port-au-Prince, approximately 4500 of the latrines would have to be portable latrines, rather than trench latrines, which would then require approximately forty-five desludging trucks to maintain. The USAID estimated it would take six weeks for the trucks and portable latrines to arrive in Haiti. USAID Fact Sheet No. 34 (Feb. 15, 2010), available at <http://www.usaid.gov/helphaiti/documents/02.15.10-USAID-DCHA Haiti Earthquake Fact Sheet 34.pdf>. However, since Port-au-Prince did not have a functioning sewage system before the earthquake, and since Haiti did not have any sewage treatment plants, even properly collected waste was simply deposited in open air trash dumps throughout the city. See Romero, *supra* note 185. As of 14 February 2010, it was estimated that only 5% of the required latrines were in place in Haiti. Daily SitRep—Component SitRep to Joint Task Force-Haiti (14 Feb. 2010) (HACC, JTF-H) (on file with author). Another plan involved the construction of new IDP camps outside the city and away from areas of flooding. The problems with this plan reflected OFDA’s general belief that relocating disaster victims to temporary shelters and IDP camps should be avoided if possible: construction of these camps took time; even newly constructed camps posed health and social risks; camps remove people from

viewed as the most urgent for two reasons: first, clearing drainage canals would minimize the likelihood of flooding throughout the city and IDP camps and, thereby, prevent a disastrous dispersal of waste and garbage; and second, clearing debris from neighborhoods would allow families to return to their communities and reduce congestion and overcrowding in the IDP camps. In an effort to coordinate a debris removal plan, JTF-H hosted the first of several meetings of the Debris Management Task Force (DMTF) on 14 February 2010.¹⁸⁹

Given the enormity of the debris removal task in Haiti,¹⁹⁰ the DMTF identified five near-term “quick win” projects that would have significant impacts for the Haitian population before the rainy season: (1) establishing debris staging areas in Port-au-Prince,¹⁹¹ (2) establishing debris staging areas in other regions; (3) clearing the main drainage canals in Port-au-Prince, starting with the Camp Solino area;¹⁹² (4) clearing the Turgeau neighborhood of debris;¹⁹³ and (5) conducting habitability assessments, starting with the Turgeau neighborhood.¹⁹⁴ Although JTF-H had engaged in

important social support structures; camps removed from normal population centers create a community completely dependent on international aid (in the case of the proposed new Haitian IDP camps, their location well outside of Port-au-Prince meant the inhabitants would be unable to work in the city). USAID OFDA 2009 ANNUAL REPORT, *supra* note 145, at 22.

¹⁸⁹ The Debris Management Task Force was comprised of representatives from the Government of Haiti, the United Nations, MINUSTAH, USAID, Canada, the European Union, and JTF-H. Debris Management Task Force, Notes for the Record (14 Feb. 2010) (on file with author). *See also* USAID Fact Sheet No. 34 (Feb. 15, 2010), available at <http://www.usaid.gov/help/haiti/documents/02.15.10-USAID-DCHA Haiti Earthquake Fact Sheet 34.pdf>.

¹⁹⁰ To compare, the seven New York City buildings destroyed as a result of the 9/11 Terror Attack resulted in less than 300,000 cubic meters of debris. United Nations Development Programme, Fact Sheet—Haiti Earthquake Debris Management (n.d.) (on file with author).

¹⁹¹ Having a place to bring, process and store the debris was a crucial prerequisite to any debris removal plan.

¹⁹² Camp Solino consisted of 1500 families of 7000–10,000 people on a small piece of land immediately adjacent to a drainage canal that was utterly clogged with disaster generated debris, garbage and waste. *Working with Displaced Communities in Port-au-Prince*, CHF-HAITI BLOG (Mar. 8, 2010) available at <http://www.chfinternational.org/node/3409>; Mark Schuller, *Haiti's Resurrection: Promoting Human Rights*, HUFFINGTON POST, Apr. 4, 2010, http://www.huffingtonpost.org/mark-schuller/haitis-resurrection-promo_b_525104.html.

¹⁹³ One of the most emblematic, overcrowded, and squalid IDP camps was in the Champ de Mars square, immediately alongside the ruined Haitian presidential palace. Approximately 80% of the 29,000 people living in this forty-two-acre camp came from the Turgeau neighborhood. Decongesting this area was the Government of Haiti's number one priority. Debris Management Task Force Planning Team Update (17 Feb. 2010) (draft) (on file with author); Debris Management Task Force Brief to CSC (2 Mar. 2010) (on file with author).

¹⁹⁴ Conducting these types of general all-purpose habitability assessments was well beyond the “critical engineering assessments” authorized in SOUTHCOM OPORD 01-10, *supra* note 12, para. 3.a(2)1.b(4)(a)(4)(ii). Tens of thousands of Haitians were living in IDP camps even though their houses or apartments were not destroyed in the earthquake because of fear that even minor aftershocks would cause these buildings to collapse.

limited debris removal operations previously, all of those operations involved clearing debris from roads to facilitate the delivery of aid or other legitimate uses of OHDACA funding.¹⁹⁵ All of the “quick win” projects, on the other hand, appeared to fit within the general view of debris removal as part of reconstruction and were, therefore, beyond the authority for the use of OHDACA. This view was confirmed on 19 February, 2010 when initial guidance from SOUTHCOM and the Office of the Secretary of Defense (OSD) identified these “quick win” projects as definitely beyond the scope and authority for OHDACA.¹⁹⁶ This brought planned JTF-H debris removal operations to a “dead stop.”¹⁹⁷ Unfortunately, neither USAID nor the Government of Haiti was in a position to mobilize assets or contract with sufficient alacrity to address these “quick win” projects in the compressed timeline demanded by the rainy season.¹⁹⁸

Despite the initial opinion from SOUTHCOM and OSD, the JTF-H Commander believed that completing these five projects was a crucial part of humanitarian relief and a necessary part of Phase Two operations.¹⁹⁹ In order to support the JTF-H Commander's intent,²⁰⁰ JTF-H OSJA

Conducting structural integrity and habitability assessments of these thousands of buildings would allow for immediate decompression in some camps as Haitians were encouraged to return to their still standing homes.

¹⁹⁵ Another example of a clearly legitimate use of OHDACA involved removing rubble or demolishing a building that was damaged and in danger of collapsing on a neighboring hospital. Completely separate from this type of debris removal, JTF-H was also involved in debris removal at the Hotel Montana pursuant to a direct mission to assist the Department of State in the recovery of U.S. citizen remains. *See* HEADQUARTERS, JOINT TASK FORCE-HAITI, FRAGMENTARY ORDER NO. 108, JTF-H SUPPORT TO AMCITZ RECOVERY AND REPATRIATION OPERATIONS (16 Feb. 2010) (citing Memorandum, White House, subject: Department of Defense Response to Conditions Resulting from the Haiti Earthquake, No. 00636 (28 Jan. 2010)).

¹⁹⁶ E-mail from USSOUTHCOM J8, to JTF-H Chief of Staff, subject: Funding v. Authority (Feb. 19, 2010, 1815 EST) (on file with author).

¹⁹⁷ The JTF-H Deputy Commanding General, Major General Daniel B. Allyn, characterized the message from SOUTHCOM as putting the JTF at a “dead stop wrt [with regard to] support to the current ‘quick wins’ for debris removal.” E-mail from JTF-H DCG, to Commanding General, JTF-H, subject: Funding v. Authority (Feb. 19, 2010, 1820 EST) (on file with author).

¹⁹⁸ *See generally* Memorandum for CDRUSSOUTHCOM, Attn: DCDR, subject: Request for Authorities and Funding Assistance (20 Feb. 2010) [hereinafter Request for Authorities and Funding Memorandum]. “According to Ambassador Luck (USAID Response Coordinator), there is not sufficient time to mobilize Haitian assets or contract sufficiently to fully address this humanitarian emergency.” *Id.* para. 3.c. That said, the USAID and GOH were integral partners in identifying the “quick win” projects and ultimately managing project implementation.

¹⁹⁹ E-mail from Commanding General, JTF-H, to SOUTHCOM, subject: Funding v. Authority (Feb. 19, 2010, 1832 EST) (on file with author).

²⁰⁰ As legal advisors to commanders, judge advocates (JA) must do more than simply advise whether a particular action is illegal or improper. A JA's primary mission as a commander's legal advisor is determining “whether there is a way to legally, morally, and ethically accomplish (the Commander's) goal or to get to ‘yes.’” Lieutenant Colonel Mike Ryan,

undertook a critical analysis of all authorities guiding the use of OHDACA, as well as all orders directing the HA/DR mission in Haiti generally, to craft an argument that would allow use of OHDACA for the “quick win” projects. Ultimately, this argument was reduced to a memorandum signed by the JTF-H Deputy Commander and submitted to SOUTHCOM, which in turn forwarded it to OSD for consideration and action.²⁰¹

Since U.S. policy generally limits OHDACA funds in foreign disaster operations to immediate humanitarian assistance and relief,²⁰² and since the CJCS Execute Order (EXORD) explicitly limited OHDACA to Phase One and Phase Two,²⁰³ the only way to use OHDACA for the “quick win” projects was for those projects to fit squarely within Phase Two. The JTF-H OSJA attempted to do this by acknowledging that general debris removal was clearly a part of reconstruction and, therefore, beyond the authority of Phase Two, but then distinguished “quick win” projects from general debris removal by connecting them to the HA/DR objectives and specified tasks of the Relief Phase.²⁰⁴

The CJCS EXORD directed that JTF-H provide, among other things “food, water, clothing, medicine, beds and bedding, *temporary shelter*, and *housing*.”²⁰⁵ The SOUTHCOM EXORD clarified these objectives and further defined “immediate humanitarian needs” as including “water, food, *shelter*, *sanitation*, medicine, etc.”²⁰⁶ It stood to reason that if shelter and sanitation were authorized objectives for OHDACA-funded Relief Phase operations, then creating the space and drainage necessary to provide them had to also be authorized.²⁰⁷ If JTF-H had been able to establish sufficient planned IDP camps before people began settling in flood zones or other overcrowded areas where proper sanitation could not be provided, OHDACA could clearly have funded tarps and building materials for shelter

Setting Conditions for Success: Seven Simple Rules for New Staff Officers, ARMY LAW., Oct. 2006, at 33, available at http://www.loc.gov/rft/rd/Military_Law/pdf/10-2006.pdf.

²⁰¹ Request for Authorities and Funding Memorandum, *supra* note 198.

²⁰² See *supra* note 169 and accompanying text.

²⁰³ See *supra* note 168 and accompanying text.

²⁰⁴ Request for Authorities and Funding Memorandum, *supra* note 198. As regards conducting habitability assessments, the Request for Authorities and Funding Memorandum argued that the “critical engineering assessments” required in Phase Two by SOUTHCOM OPOD 01-10, *supra* note 12, para. 3.a(2)1.b.ii included habitability assessments, particularly insofar as these assessments would “maximize the use of safe/habitable existing structures to support camp decongestion.” Request for Authorities and Funding Memorandum, *supra* note 198, para. 2.c.

²⁰⁵ CJCS EXORD, *supra* note 137, para. 3.B.1.C (emphasis added).

²⁰⁶ SOUTHCOM EXORD, *supra* note 16, para. 3.B.2 (emphasis added).

²⁰⁷ Request for Authorities and Funding Memorandum, *supra* note 198, para. 3.d.

and construction of drainage and latrines for adequate sanitation. Since the magnitude of the disaster far exceeded the ability of JTF-H to prospectively establish such camps, JTF-H had to address the shelter and sanitation issues given the actual camps that had developed.²⁰⁸

Moreover, the mission statement from SOUTHCOM specifically directed that JTF-H conduct “critical engineering operations in order to alleviate human suffering.”²⁰⁹ While the flooding had not yet occurred and disease had not yet struck the IDP camps, both were inevitable if conditions were not alleviated.²¹⁰ Conducting the engineering operations associated with the “quick win” projects was vital to avert the imminent human suffering that would result from the rain.

Finding ways to tie these individual projects directly to HA/DR activities, as distinct from the general debris removal necessary for reconstruction, was vital to convincing SOUTHCOM and OSD to change their initial guidance that suggested OHDACA was not appropriate for the “quick win” projects. Although every act of debris removal was certainly a precursor to reconstruction, the actual purpose of these specific projects was not reconstruction but rather was to provide shelter, sanitation, and the alleviation of imminent suffering. While there certainly was a slippery slope concern regarding debris removal, that concern was appropriately managed on a project-by-project basis, rather than by a blanket prohibition.²¹¹

After reviewing the Request for Authorities and Funding Memorandum, OSD reversed its initial opinion and determined that “SOUTHCOM has the existing authority to undertake debris removal operations under both humanitarian assistance and disaster assistance authorities, so long as the activities remain in support of general humanitarian assistance or disaster relief operations, and do

²⁰⁸ *Id.* All but a few of the approximately 460 IDP camps were established spontaneously by the earthquake victims themselves. The two camps directly affected by the “quick win” projects, Camp Solino and Champs de Mars, were spontaneously established following the earthquake. *Id.*

²⁰⁹ SOUTHCOM OPOD 01-10, *supra* note 12, para. 2.

²¹⁰ Haiti averages approximately eighteen inches of rainfall during the April–June rainy season, and another eighteen inches during the August–October hurricane season. ANALYSIS OF MULTIPLE NATURAL HAZARDS IN HAITI, REPORT PREPARED BY GOVERNMENT OF HAITI, WITH SUPPORT FROM THE WORLD BANK, THE INTER-AMERICAN DEVELOPMENT BANK, AND THE UNITED NATIONS SYSTEM (Mar. 26, 2010), available at http://www.iris.edu/hq/haiti_workshop/docs/Report-MULTIHAZARDS-HA-English-SergioMora-Final-Red.pdf.

²¹¹ See generally Request for Authorities and Funding Memorandum, *supra* note 198; see also E-mail from JTF-H SJA (Feb. 17, 2010, 07:50 EST) (Rubble/debris) (“[T]here is a fine line between clearing for drainage and clearing for reconstruction . . . [N]evertheless, I believe this risk can be managed and the JTF should go forward with this mission as part of our ph II HA mission.”).

not fall into the category of ‘reconstruction.’”²¹² The OSD established three criteria for analyzing these specific “quick win” engineering projects or future debris removal projects: (1) what is the ultimate intent of the project (truly HA/DR and not reconstruction); (2) what is the unique military capability that is needed to accomplish the project; and (3) would the HA/DR need addressed by the project go unfilled if military assets did not step forward.²¹³ While criteria (1) and (3) were directly addressed in JTF-H’s Request for Authorities and Funding Memorandum to SOUTHCOM, criterion (2) required additional explanation before debris removal work could begin.

The requirement that use of a unique military capability was required before engineering assets could be used for a particular project was derived from a U.S. policy directing that military assets could be used in foreign disaster relief only when “there is no comparable civilian alternative” and only when the military assets used were “unique in capability and availability.”²¹⁴ While using military engineering assets would have certainly satisfied these criteria, insufficient military engineering assets were available to perform the “scope and scale” of the “quick win” projects. The JTF-H intended to contract for the debris removal engineering assets through the Global Contingency Services Contract, which was already providing the majority of the engineering assets for the American Citizen recovery operation at the Hotel Montana.²¹⁵

As discussed previously, the obvious “unique capabilities” the military brought to the disaster included operational reach, security, logistics, command and control, communications and mobility.²¹⁶ The requirements of disaster relief in Haiti however highlighted a new unique capability that needed to be added to this list: contingency contracting.²¹⁷ Contingency contracting is “the process of obtaining goods, services and construction from commercial sources via contracting means in support of contingency

operations.”²¹⁸ Contingency contracting for JTF-H was provided by Expeditionary Contracting Command (ECC), which is a subordinate command of the Army Contracting Command, a part of Army Materiel Command.²¹⁹ The ECC was formed in 2008 to provide “skilled, trained, contracting personnel for the support of expeditionary forces.”²²⁰ Operation Unified Response represented the first deployment of ECC personnel in response to an actual contingency.²²¹

Integrated contract support has been a significant force multiplier for the armed forces in Iraq and Afghanistan. In 2007, over half of the personnel in both theaters were contract personnel.²²² Acquisition, support, administration, and management of these contractors is vitally important, and the ability to do all of these things expeditiously in a contingency environment like Haiti, is unique to the military.²²³ For example, in declared humanitarian operations, the simplified acquisition threshold for contracts awarded and performed outside the United States is increased to \$1 million for contingency contracting.²²⁴

²¹² E-mail from Principle Dir., Office of Partnership, Strategy and Stability Operations, Office of the Undersec’y of Def. for Pol’y (Feb. 22, 2010, 1937 EST) (on file with author). The one “quick win” project OSD singled out as probably not appropriate for OHDACA was establishing the debris staging sites. OSD appeared to summarily agree that JTF-H’s mandate to conduct “critical engineering operations” included conducting structural assessments of houses. Request for Authorities and Funding Memorandum, *supra* note 198, para. 2.c.

²¹³ *Id.*

²¹⁴ See JP 3-29, *supra* note 9, at III-10; see also *supra* notes 71–77 and accompanying text.

²¹⁵ *Id.* For a discussion of the American Citizen remains recovery operation at the Hotel Montana, see *supra* notes 11 and 196.

²¹⁶ See *supra* note 78 and accompanying text.

²¹⁷ Arguably contingency contracting is a component of both operational reach and logistics, but in either case, an explanation of how it is a unique capability was required.

²¹⁸ U.S. JOINT PUB. 4-10, OPERATIONAL CONTRACTING SUPPORT, at vi (17 Oct. 2008), available at http://www.dtic.mil/doctrine/new_pubs/jp4_10.pdf.

²¹⁹ U.S. Army Contracting Command Fact Sheet, available at <http://www.amc.army.mil/pa/Fact%20sheets/ACC.pdf> (last visited Apr. 5, 2011).

²²⁰ The ECC was formed as a result of the REPORT OF THE COMMISSION ON ARMY ACQUISITION AND PROGRAM MANAGEMENT IN EXPEDITIONARY OPERATIONS 52 [hereinafter GANSLER REPORT], available at http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf. The Gansler Report also made four other systemic recommendations: (1) Increase the stature, quantity, and career development of military and civilian contracting personnel (especially for expeditionary operations); (2) Restructure organization and restore responsibility to facilitate contracting and contract management in expeditionary and CONUS operations; (3) Provide training and tools for overall contracting activities in expeditionary operations; (4) Obtain legislative, regulatory, and policy assistance to enable contracting effectiveness in expeditionary operations. *Id.* at 5.

²²¹ Larry D. McCaskill, *ECC Wraps Up Humanitarian Mission in Haiti*, ACC TODAY, Summer 2010, at 15, available at http://www.usmilitarycontracting.com/uploads/ACC_TodayVol3-July10_1_1_.pdf. More than a dozen ECC Soldiers and civilians deployed to Haiti as part of the contingency contracting mission with the first contracting officer arriving within twenty-four hours after the earthquake. Lieutenant Colonel Americus Gill, *Unit’s First Operational Deployment is Haiti Mission*, ACC TODAY, Summer 2010, at 16. See also Larry D. McCaskill, *Expeditionary Contracting Command Continues Support to Haiti Mission*, MIL. NEWS, Mar. 8, 2010, available at <http://www.army.mil/-news/2010/03/08/35485-expeditionary-contracting-command-continues-support-to-haiti-mission/>.

²²² GANSLER REPORT, *supra* note 220, at 3.

²²³ It took USAID almost five weeks to sign a \$3.5 million contract with a South Florida firm to manage the debris processing site. USAID OFFICE OF TRANSITION INITIATIVES—HAITI, QUARTERLY REPORT, JAN–MAR 2010, *supra* note 187; see also Carrie Kahn, *Haiti Seeks a Home for an Endless Sea of Debris*, NPR REPORT, Mar. 25, 2010, available at <http://www.npr.org/templates/story/story.php?storyID=1251707744>.

²²⁴ GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. subpt. 2.101 (Jan. 2011) [hereinafter FAR]; see also The Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-37 § 822, 117 Stat. 832.

Similarly, the limit for the use of simplified acquisition procedures for the purchase of commercial supplies and services is increased to \$11 million for contingency contracting in declared humanitarian operations.²²⁵ Moreover, military contingency contracting officers can also access military external support contracts to expedite delivery of the support needed in a contingency operation, which enables almost immediate delivery of crucial equipment, supplies, and expertise.²²⁶ In the case of the actual engineering requirements within the “quick win” projects approved for OHDACA, only the JTF-H’s contingency contracting capability was able to acquire, support, administer, and manage the engineering assets required to immediately begin the work—an absolute necessity if the projects were to be completed before the rainy season.

Having satisfied the three criteria for conducting debris removal, JTF-H began work on four of the five “quick win” projects, as well as other weather mitigation projects, in conjunction with USAID.²²⁷ By early April, the Turgeau debris removal and habitability assessments were completed with over 15,125 cubic yards of debris removed and 22,824 buildings evaluated, of which 46% were deemed immediately habitable.²²⁸ In fact, the Turgeau project was so successful JTF-H began another targeted debris removal

project on 12 April 2010 in the Delmas neighborhood to relieve the congested conditions in Camp Pétionville. After removing 12,724 cubic yards of debris, this project was transitioned to the Government of Haiti on 25 April 2010²²⁹—exactly as was envisioned by the JTF-H Request for Authorities and Funding Memorandum.

All of these combined weather mitigation efforts, as well as a relatively minor spring rainy season, prevented the feared outbreaks of disease during the Spring rainy season. Unfortunately, the ongoing debris removal process was not aggressive enough to prevent flooding and the spread of cholera following the fall hurricane season.²³⁰ By January 2011, an estimated 3600 Haitians who survived the earthquake had died from cholera.²³¹

Conclusion

Phase Two of OUR ended on 1 June 2010, at which time JTF-H was disestablished and OUR was formally concluded.²³² At its peak, 22,000 U.S. military forces were in the area of operations conducting humanitarian assistance and disaster relief operations—7000 on land and the remainder operating aboard fifty-eight aircraft and fifteen nearby vessels.²³³ These military forces established and maintained security throughout the country for the duration of the operation; they delivered more than 2.6 million bottles of water, 2.2 million food rations, seventeen million pounds of bulk food, 149,000 pounds of medical supplies;²³⁴ medical personnel treated and evaluated thousands of Haitian patients, including more than 8600 on the Navy hospital ship USNS *Comfort*; and engineering assets restored and reopened Port-au-Prince airport; rebuilt Port-au-Prince harbor; rebuilt and restored roads critical to the throughput of humanitarian assistance, and “jump started” the debris removal efforts by removing eighty blocks of debris and conducting engineering assessments of over 40,000

²²⁵ *Id.* subpt. 13.5.

²²⁶ External support contracts are generally issued during peacetime for use to provide significant logistical support during contingencies. JOINT PUB. 4-10, *supra* note 218, at III-9-10. The proposed Debris Removal PR&C specifically proposed using the Naval Facilities Engineering Command’s Global Contingency Services Contract to accomplish the ‘quick win’ debris removal projects. Letter of Justification, Debris Removal PR&C, para. 6 (18 Feb. 2010) (on file with author). Contingency contractors also use theater support contracts with local vendors, executed under expedited contracting authority, to provide supplies, services, and construction from commercial sources available within the operational area. JOINT PUB. 4-10, *supra* note 218, at III-11.

²²⁷ See generally USAID Fact Sheet No. 6, FY 2010 (18 Mar. 2010), available at http://www.usaid.gov/ht/docs/eqdocs/ofda_fact_sheets/03.18.10_haiti_factsheet_46.pdf; CHF International, One Year Factsheet, January 2011, available at http://www.chfinternational.org/files/CHF%20Haiti%20One%20Year%20Factsheet%20Jan%202010_small_0.pdf; Tom Prive, *Haiti Camps Prepare for Rains*, CATHOLIC RELIEF SERVS., available at <http://crs.org/haiti/rainy-season-prep>; Sara Fajardo & Kim Pozniak, *Shoring Up Haiti’s Water Resources*, CATHOLIC RELIEF SERVS., available at <http://crs.org/haiti/water-q-a>; U.S. Response Coordinator for the Haiti Earthquake Visits CHF Project at Grand Canal in Solino, CHF INT’L, available at <http://www.chfinternational.org/node/34160>. There were numerous other issues associated with debris removal that fell well beyond the scope of JTF-H’s efforts to accomplish the “quick wins”: ownership of debris; compensation to owners of debris; processing of debris; reuse or recycling of some debris; and the permanent disposal of debris. Proposed Haiti-Earthquake 2010 Draft Debris Management Plan, U.S. Army Corps of Engineers Debris Planning Cell, JTF-H (14 Feb. 2010) (on file with author).

²²⁸ See J4/LOG/ENG Input Slide for JTF-H Mission Update Brief (14 Apr. 2010), available at [https://schqanon.southcom.mil/DIRANDLNOS/J3/J33/Watch/contingencies/haiti_hadr/MUB%20Library/Archived%20Inputs/14%20Apr%200800%2010%20DCO%20MUB%20Inputs/LOG%20\(DCO\)%20MUB%2014%20Apr%202010%20Inputs.ppt](https://schqanon.southcom.mil/DIRANDLNOS/J3/J33/Watch/contingencies/haiti_hadr/MUB%20Library/Archived%20Inputs/14%20Apr%200800%2010%20DCO%20MUB%20Inputs/LOG%20(DCO)%20MUB%2014%20Apr%202010%20Inputs.ppt).

²²⁹ See *id.*

²³⁰ “A mountain of debris has been removed from the city, but it represents only 5 percent of the rubble pile Engineers have made cursory inspections of 380,000 homes in Port-au-Prince. Half of the houses need to be repaired or demolished.” William Booth, *After Massive Aid, Haiti Feels Tuck in Poverty*, WASH. POST, Jan. 11, 2011, at A1. Matthew Bigg, *Tomas Soaks Haiti Quake Camps, Triggers Floods*, REUTERS, Nov. 5, 2010.

²³¹ *Id.*

²³² FRAGO 102, *supra* note 14. FRAGO 102 also amended SOUTHCOM OPORD 01-10 to be a two-phase operation. With the conclusion of Operation Unified Response, JTF-H was disestablished and USSOUTHCOM assumed direct responsibility to maintain HA/DR support to USAID for ongoing relief in Haiti. *Id.*

²³³ Lisa Daniel, *SOUTHCOM Completes Haiti Disaster Relief*, AM. FORCES PRESS SERV., June 1, 2010, <http://www.defense.gov/news/newsarticle.aspx?id=59423>.

²³⁴ *Id.*

buildings.²³⁵ Creative legal thinking regarding the development of ROE and the flexible use of OHDACA were the foundational prerequisites for all of these successes,²³⁶

and illustrate the vital role JAs play in supporting the commander.

²³⁵ *Narrative History of Operation Unified Response*, U.S. Southern Command (as of May 25, 2010), <http://www.southcom.mil/appssc/factFiles/Large.php?id=138>.

²³⁶ While this article focused on these two primary legal issues that supported humanitarian assistance and disaster relief in Haiti, there were numerous unique legal issues that also resulted in significant positive effects, but are beyond the scope of this article: (1) legal assistance to military members who had immediate family in Haiti and who were seeking immigration assistance in getting their families humanitarian paroles (JTF-H legal assistance attorneys obtained the only thirty humanitarian paroles issued in the first thirty days after the disaster.); (2) establishing a joint Foreign Claims Act program to investigate and adjudicate claims; (3) issues associated with the recovery of U.S. citizen remains; (4) General Order Number 1; (5) customs and duties on military supplies and relief supplies entering Haiti; and (6) potential constraints on recovery and relief operations in a UNESCO World Heritage Site.