

The Practice of Law at the Brigade Combat Team (BCT): Boneyards, Hitting for the Cycle, and All Aspects of a Full Spectrum Practice

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Introduction

The U.S. Army is on the cusp of its most significant reorganization since the early 1940s.¹ The Army Transformation Plan seeks to reorganize the Army into what is currently being called the Future Force and was previously referred to as the Objective Force.² The very structures upon which the Army is based—brigades and divisions—will be realigned, reorganized, and reconstituted into units quixotically (and temporarily) called Units of Action (UAs), Units of Maneuver, and Units of Employment.³ This massive reorganization effectively shifts the focus of the Army from divisions to brigade-plus sized maneuver elements in an effort to create a more “strategically responsive, precision maneuver force, dominant across the range of military operations.”⁴ Each of these UAs will be centered on the Future Combat System, an armored wheeled vehicle weighing between sixteen to eighteen tons.⁵ The first UA equipped with the Future Combat System is due to be fielded in 2012.⁶ The precursors to the Future Forces are the Stryker Brigades and the Brigade Combat Teams (BCTs) currently operating in Iraq.

The movement to the Future Forces has forced the Judge Advocate General’s Corps (JAGC) to adapt accordingly. As such, the JAGC has proposed moving to brigade-centric legal operations. Each brigade-sized element will include a judge advocate (JA) major and captain, and internal paralegal support. Anticipating these Army-wide developments, the 1st Cavalry Division (ICD) deployed to Iraq in five brigade-sized units or BCTs. Each BCT was essentially a maneuver brigade with organic indirect fires and logistical support.⁷ The division staff judge advocate (SJA) deployed two JAs in direct support of each BCT—a Brigade Operational Law Team (BOLT).

The practice of law in a deployed BCT is unique. The purpose of this article is to provide the Army JA community with a survey of the legal issues in the Iraq theater of operations. This article focuses on deployment-specific issues that BCT JAs frequently encountered and will likely encounter in the future. Particular emphasis is given to Operation Iraqi Freedom (OIF) fragmentary orders (FRAGOs),⁸ policy letters, and other official guidance.⁹

Operational Law

Operational law is one of the mainstays of the BCT practice. Operational law¹⁰ encompasses all legal issues related to the rules of engagement (ROE), mosque operations, and detention operations. As of 1 December 2004, the current ROE for OIF was V Corps 1003V Annex E to Operations Order Final Victory.¹¹ It is imperative that the BOLT become intimately

¹ HEADQUARTERS, UNITED STATES ARMY TRAINING AND DOCTRINE COMMAND, THE ARMY FUTURE FORCE: DECISIVE 21ST CENTURY LANDPOWER (2003) [hereinafter THE ARMY FUTURE FORCE].

² Peter A. Wilson et al., *An Alternative Future Force: Building a Better Army*, PARAMETERS, Winter 2003-2004, at 19.

³ *Id.* at 20.

⁴ THE ARMY FUTURE FORCE, *supra* note 1, at 2.

⁵ Wilson, *supra* note 2, at 19.

⁶ *Id.*

⁷ This comment is based on the author’s recent professional experiences while deployed to Iraq from 8 March 2004 through the date of this article, 1 December 2004 [hereinafter Professional Experiences].

⁸ A fragmentary order “provides timely changes of existing orders to subordinate and supporting commanders while providing notification to higher and adjacent commands.” U.S. DEP’T OF ARMY, FIELD MANUAL 101-5, 1-71 STAFF ORGANIZATION AND OPERATIONS (31 May 1997).

⁹ All cited FRAGOs are maintained on the U.S. Army Secure Internet Protocol Routing network (SIPR) at the 1st Cavalry Division, which requires a secret security clearance for access. Though the FRAGOs are maintained on a classified system, not all FRAGOs are classified. Portions of FRAGOs which have been quoted are unclassified. There is no classified material contained in this article.

¹⁰ U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES 60 (30 Sept. 1996) (defining operational law as “[t]he application of domestic, international, and foreign law to the planning for, training for, and deployment of US military forces in peacetime and wartime environments”).

¹¹ The current unclassified ROE card is as follows:

familiar with this document. These ROE have been in effect virtually unchanged since the outset of OIF.¹² Many FRAGOs have been released which clarify, but do not change the ROE. The clarifications concern mosques,¹³ protected property,¹⁴ curfews,¹⁵ traffic control points (TCP),¹⁶ indirect fires,¹⁷ convoy operations,¹⁸ riot control measures,¹⁹ and detention

NOTHING ON THIS CARD PREVENTS YOU FROM USING DEADLY FORCE TO DEFEND YOURSELF.

Enemy military and paramilitary forces may be attacked subject to the following instructions:

- **Positive Identification (PID) is required prior to engagement.** PID is “reasonable certainty” that your target is a legitimate military target. If no PID, contact your next higher commander for decision.
- Do not engage anyone who has surrendered or cannot fight due to sickness or wounds.
- Do not target or strike any of the following except in self-defense to protect yourself, your unit, friendly forces, and designated persons or property under your control. Civilians, hospitals, mosques, churches, shrines, schools, museums, national monuments, and any other historical and cultural sites.
- Do not fire into civilian populated areas or buildings unless the hostile force is using them for hostile purposes or if necessary for your self-defense.
- Minimize collateral damage.

You may use force, including deadly force, to defend yourself from persons who commit or are about to commit hostile acts against you. You may use the same level of force to protect the following:

- Your unit, and other friendly forces (including Iraqi police and security forces)
- Enemy prisoners of war and detainees
- Civilians from crimes that are likely to cause death or serious bodily harm, such as murder or rape
- Designated organizations and/or property, such as personnel of the Red Cross/ Red Crescent, UN, and US/Un supported organizations.

Warning before firing

You may, time permitting; give a warning in a loud clear voice:

KIFF- ARMICK (Stop or I’ll shoot)

ERMY SE-LA-HAK (Drop your weapon)

You may detain civilians if they interfere with mission accomplishment, possess important information, or if required for self-defense.

- Treat all persons and their property with respect and dignity.
- Iraqi security forces and police are authorized to carry weapons.

Necessary force, including deadly force, is authorized for the protection of some types of property including the following:

- Public utilities
- Hospitals and public health facilities
- Electric and Oil infrastructure
- Coalition and captured enemy weapons and ammunition
- Financial institutions
- Other mission essential property designated by your commander.

REMEMBER

- Attack only hostile forces and military targets.
- Avoid fratricide—be aware of nearby units and Iraqi police and security forces.
- Spare civilians and civilian property, if possible.
- Do not loot or steal.
- Conduct yourself with dignity and honor.
- Comply with the Law of War. If you see a violation, report it.

YOU ALWAYS HAVE THE RIGHT TO USE NECESSARY FORCE, INCLUDING DEADLY FORCE, TO PROTECT YOURSELF AND OTHERS.

These ROE will remain in effect until your commander orders you to transition to different ROE.

HEADQUARTERS, V CORPS, OPERATIONS ORDER FINAL VICTORY 1003V, ANNEX E, RULES OF ENGAGEMENT (19 Mar. 2003).

¹² The only change to 1003V is contained in both HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 581 TO OPOD 04-01 (6 Apr. 2003) and HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 586 TO OPOD 04-0136 (7 Apr. 2003).

¹³ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 308, REEMPHASIS OF CURRENT 1003V COMBAT ROE, PROTECTION OF CERTAIN DESIGNATED PROPERTY, AND MOSQUE OPERATIONS, TO OPOD 03-036 (6 July 2003) [hereinafter CJTF7 FRAGO 308]; HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 865, REEMPHASIS OF CURRENT 1003V COMBAT ROE, PROTECTION OF CERTAIN DESIGNATED PROPERTY, AND MOSQUE OPERATIONS, TO OPOD 03-036 (21 Sept. 2003) [hereinafter CJTF7 FRAGO 865].

¹⁴ CJTF7 FRAGO 308, *supra* note 13; CJTF7 FRAGO 865, *supra* note 13; HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 546 TO OPOD 04-01(31 Mar. 2004); HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 684 TO OPOD 04-01 (25 Apr. 2004) [hereinafter CJTF7 FRAGO 684].

¹⁵ HEADQUARTERS, 1ST ARMORED DIVISION, FRAGMENTARY ORDER 465A TO OPOD 03-215 (11 Aug. 2003).

¹⁶ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 507 MOD 1 TO FRAGMENTARY ORDER 200 (25 Mar. 2004) (providing ROE clarification for convoys and tactical control points) [hereinafter CJTF7 FRAGO 507 MOD 1].

¹⁷ CJTF7 FRAGO 684, *supra* note 14; HEADQUARTERS, 1ST ARMORED DIVISION, FRAGMENTARY ORDER 700A TO OPOD 03-215 (9 Oct. 2003) (providing ROE clarification for indirect fires); HEADQUARTERS, 1ST CAVALRY DIVISION FRAGMENTARY ORDER 97 TO OPOD 03-52 (14 Apr. 2004) (providing ROE clarification for indirect fires); *see also* UNITED STATES CENTRAL COMMAND, OPERATIONAL PLAN 1003V COLLATERAL DAMAGE

operations.²⁰ Clearly the dearth of FRAGOs complicates every operational law issue. The key, however, is to first understand which FRAGOs are applicable and to what extent each FRAGO applies. As new FRAGOs are issued, they will often either expressly or implicitly override or nullify provisions of previous FRAGOs.²¹

After understanding the applicable rules, it is critical to maintain competence with future FRAGOs. There are several methods to accomplish this. One method is to read the FRAGOs as they are issued. The BCT training and operations (S-3) section will issue FRAGOs on a daily basis, which will be sent out in a group e-mail or posted to a common network folder. A second method to track new FRAGOs is to develop a topically organized database of the FRAGOs as they are issued. The ICD Operations Law Team (DOLT) developed an excellent FRAGO database, which was periodically updated throughout the deployment. The database can be downloaded and searched using keywords. Furthermore, the database can be linked to the FRAGO, so that when a user finds an applicable FRAGO, he can click on the title to display the FRAGO. A final method of tracking FRAGOs is to read daily FRAGO summaries, which are often produced by division headquarters. The ICD DOLT e-mailed a summary of all FRAGOs and significant activities (SIGACTs) to all the division judge advocates.²²

Operational law questions arise in one of two ways: in conjunction with the planning process or as events or incidents arise during day-to-day operations. There is considerable SJA involvement in the planning process, which allows issues to be addressed as they arise.²³ Thus, JAs must not only understand the issues, but also to be able to recognize issues as they arise and work to achieve the commander's intent within legal boundaries. More often than not, however, operational law issues arise without warning.²⁴ In all cases, the key to operational law is the ability to understand the applicable rules and apply them in a manner consistent with the law and the commander's intent.

Administrative Law

Administrative law issues in a deployed environment are interesting and, often times, unusual and constitute of a huge portion of a deployed BCT's legal practice.

Investigations

Investigations are a constant presence in a deployed environment, from commander's inquires to formal *Army Regulation 15-6*.²⁵ Investigations are often required for typical administrative matters; for instance, line of duty

ESTIMATION POLICY AND METHODOLOGY (8 Mar. 2003) (stating its purpose, to "provide the commander with a process to estimate and mitigate unintended, unnecessary damage to non-combatant persons, property, or the environment in the conduct of combat operations").

¹⁸ CJTF7 FRAGO 507 MOD 1, *supra* note 16.

¹⁹ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 929 TO OPOD 03-036 (3 Oct. 2003) (providing ROE clarification on the use of riot control means); HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 1150 (outlining use of lethal and non-lethal force in coalition detention facilities) to OPOD 03-036 (28 Nov. 2003) [hereinafter CJTF7 FRAGO 1150].

²⁰ CJTF7 FRAGO 1150, *supra* note 19; HEADQUARTERS, 1ST CAVALRY DIVISION, APPREHENSION AND DETENTION OPERATIONS STANDARD OPERATING PROCEDURE, VERSION 8 (undated, last modified 9 Oct. 2004); HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 749 TO OPOD 03-036 (24 Aug. 2003); HEADQUARTERS, HEADQUARTERS, V CORPS, FRAGMENTARY ORDER 081M to OPOD 0303-343 (24 Mar. 2003).

²¹ Soon after the transfer of authority (TOA) from the 1st Armored Division to the 1st Cavalry Division, there was a discussion concerning how to alleviate the problem of thousands of FRAGOs from numerous organizations. A primary issue during this discussion was the applicability of the FRAGOs after the TOA. Professional Experiences, *supra* note 7. Unfortunately, this issue remains unresolved. One solution discussed within the ICD, holding tremendous promise, was the reissuing of all necessary FRAGOs into a single large FRAGO. This base document was to contain FRAGOs relating to every aspect of division operations in the area of operations (AO). Professional Experiences, *supra* note 7. This document was never drafted, but it would have simplified operational law issues since research could start with this document and move forward, alleviating the need to have a working understanding of the thousands of FRAGOs that exist when a unit assumes authority.

²² *Id.* at DOLT Section.

²³ For example, the BCT Commander wanted to get illicit weapons off the street. The planners decided that Commander's Emergency Response Program (CERP) funds would be used to conduct a weapons buy-back program, without regard for the fact that CERP funds are specifically prohibited to be used for weapons buy-back. HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 087 (29 June 2004). Planners identified the prohibition during the initial stage of the operation and, ultimately, an alternative course of action was taken that satisfied the commander's intent. Professional Experiences, *supra* note 7.

²⁴ For example, a BCT Battle Captain approaches a JA and asks: "Tower B just saw someone fire a mortar at the Camp, can we engage the guy?" In this example, the issue is easy to recognize; however, often the issue cannot be identified until after the event has occurred. For example, the Battle Captain, appearing a great deal more relaxed, asks: "We just had a truck full of militia fighters drive by Tower E. What should we have done?" Or, a unit returning from patrol reports that kids threw rocks at them, and they did not know how to respond. These events provide excellent opportunities for the legal office to inject itself into nightly battle update briefings (BUBs) providing ROE clarification.

²⁵ U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996).

investigations,²⁶ summary courts martial,²⁷ and reports of survey.²⁸ Investigations are also required for alleged law of war violations,²⁹ fratricide,³⁰ vehicle accidents,³¹ and various serious incidents—to include all negligent discharges³² and detainee death.³³

A JA's initial duty is to advise the command when to initiate an investigation and what type of investigation is appropriate. Next, the JA must brief the investigating officer (IO) on the nature of the IO's duties. These initial stages, seemingly unproblematic, can hide numerous legal issues. Chief among these issues are investigations following serious incidents and the command's definition of serious incident. In an effort to keep issues "in house," commanders are often very creative in their definition of a serious incident.³⁴ Further, there have been numerous incidents where units failed to initiate investigations into U.S.-caused traffic accidents resulting in a local national's death.³⁵

Most issues regarding investigations, however, involve shootings of civilians and normally arise after the investigation has been completed. Virtually all units will have incidents in which Soldiers mistakenly shoot a civilian. The frequency of these incidents is directly related to the size of the unit, the size of the area of operation (AO), the operational tempo, and training of the Soldiers. In the vast majority of these incidents, the Soldiers have acted entirely within the bounds of the ROE and applicable FRAGOs.³⁶

Often, however, investigations appear as if the command is attempting to conceal the incident.³⁷ Soldiers are concerned that their legitimate actions will be second guessed and that they will face disciplinary action.³⁸ To counter this perception, during briefings JAs should emphasize the inherently permissible nature of the ROE. During the first briefing, it is imperative for JAs to impart the importance of cooperating with the investigating officer and providing truthful responses.³⁹ Soldiers are often relieved to find that the JAs are not out to "get them."

Additionally, commands frequently initiate safety investigations,⁴⁰ mandated by Army safety regulations.⁴¹ While division and higher commands will generally permanently assign a full-time safety officer, each subordinate unit will assign a

²⁶ U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (15 Apr. 2004).

²⁷ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-21 (6 Sept. 2002) [hereinafter AR 27-10].

²⁸ U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 June 2002).

²⁹ HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 48 (reporting suspected law of war violations) (16 June 2004); HEADQUARTERS, 1ST CAVALRY DIVISION, FRAGMENTARY ORDER 326 TO OPORD 03-52 (29 June 2004).

³⁰ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 493 TO OPORD 04-01 (25 Mar. 2004) (covering reporting and investigation requirements for serious incidents) [hereinafter CJTF7 FRAGO 493].

³¹ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 394 TO OPORD 04-01 (7 Mar. 2004) (outlining accident reporting and investigation procedures).

³² HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 154 (pertaining to serious incident reporting procedures) (27 July 2004) [hereinafter MFI FRAGO 154]; HEADQUARTERS, MULTINATIONAL CORPS IRAQ, FRAGMENTARY ORDER 427 TO OPORD 04-01 (pertaining to serious incident reporting procedures) (31 July 2004) [hereinafter MFI FRAGO 427]; 1ST CAVALRY DIVISION, FRAGMENTARY ORDER 421 TO OPORD 03-52 (1 Aug. 2004) [hereinafter 1CD FRAGO 421].

³³ HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 57 (20 June 2004) (outlining investigating and reporting procedures for detainee deaths); MFI FRAGO 154, *supra* note 32; MFI FRAGO 427, *supra* note 32; 1CD FRAGO 421, *supra* note 32.

³⁴ For example, the division commanding general retained jurisdiction for officer misconduct in 1CD. A battalion commander, however, decided to handle an officer's negligent discharge of a .50 *inside* the camp through "green tab channels," or command channels. Professional Experiences, *supra* note 7.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* For example: every recount of the incident is exactly the same; tiny portions of different statements conflict with one another; or, a private suddenly becomes an expert in the ROE and is able to recite passages almost verbatim.

³⁸ *Id.*

³⁹ See generally AR 15-6, *supra* note 25.

⁴⁰ See CJTF7 FRAGO 493, *supra* note 30.

⁴¹ U.S. DEP'T OF DEFENSE, INSTR. 6055.7, ACCIDENT INVESTIGATION REPORTING AND RECORD KEEPING (3 Oct. 2000); U.S. DEP'T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS (1 Nov. 1994); HEADQUARTERS, CENTRAL COMMAND, REG. 385-1, SAFETY (11 Sept. 2000); UNITED STATES ARMY SAFETY PROGRAM, ACCIDENT INVESTIGATION AND REPORTING PROCEDURES HANDBOOK (undated); HEADQUARTERS, V CORPS, SAFETY STANDARD OPERATING PROCEDURE (1 Aug. 2001).

staff officer to fulfill the roll of a safety officer as an extra duty.⁴² Judge advocates should anticipate working closely with the safety officer, particularly after negligent discharges of weapons by service members.

Fiscal

The deployed BCT fosters a rich fiscal environment. From 3 April 2004 through 3 September 2004, the 5th BCT disbursed \$13.4 million and committed an additional \$6.4 million for 239 civil military operations (CMO) projects.⁴³ Additionally, ICD secured \$35 million for sewer projects and \$25 million for a landfill through their relationship with the Coalition Provisional Authority (CPA) and their Project Management Office.

Working with Sources Other Than the Commander's Emergency Response Program (CERP)

By way of example of a JAs involvement with fiscal issues and non-traditional JA roles, it is worthwhile to relate my personal experience with "the boneyard." The boneyard is a scrap yard located along the southern boundary of Baghdad, which contained approximately 600,000 square meters of metal scrap.⁴⁴ The boneyard consisted primarily of captured enemy tracked vehicles and bridging elements, ships, cars, and trucks that were consolidated by the U.S. government around November 2003.

Due to security concerns, the 5th BCT wanted to relocate the yard. The coalition camp in the area received numerous mortars from this area and believed that the yard was being used to mask the movement of insurgents and supplies. Further, it appeared that the boneyard, largely unguarded, was a rich source of improvised explosive device components. The 5th BCT tried on two occasions to move the boneyard. On both occasions, however, the Baghdad Mayoralty, the Amanant, stopped the movement of the yard.⁴⁵

Acting on behalf of a request from the Al Rashid District Council,⁴⁶ on 6 May 2004, the 5th BCT negotiated a deal to sell the boneyard for an estimated \$2.9 million.⁴⁷ Two days later, the CPA instructed the 5th BCT to stop the sale because the yard had been "given" to the city government of Baghdad, the Amanant. Thereafter, JAs began discussions with CPA attorneys regarding ownership of the scrap.⁴⁸ This attorneys never resolved the issue; rather, the CG intervened and reached a resolution with a senior CPA administrator.⁴⁹

On 25 May 2004 the Amanant attempted, and failed, to sell the yard. On 28 May 2004, the CPA requested that 5th BCT continue with the original sale (with the profits going to the Amanant rather than Al Rashid District Council). The JAs again drafted a contract of sale for the Mayor's signature. The Amanant balked, however, after learning the contractor would not pay a large cash payment upfront. As of 7 October 2004, the boneyard has not been relocated.

In addition to illustrating the complex and unusual nature of fiscal issues that frequently arise in a deployed environment, this example illustrates a few more important points. The first is JAs constant interaction with local nationals. The BOLT

⁴² Professional Experiences, *supra* note 7.

⁴³ 5th BCT Staff, Headquarters, 1st Cavalry Division, 3d Infantry Division, Pre Deployment Site Survey Briefing to the 3d Infantry Division Command Group (15 Sept. 2004).

⁴⁴ This equates to 40,000 to 90,000 tons of scrap, worth approximately \$10 to 12 million (roughly \$3 to 4 million after costs) based upon quality of scrap and scrap prices as of 1 May 2004.

⁴⁵ Professional Experiences, *supra* note 7.

⁴⁶ In Baghdad, a number of District and Neighborhood Councils were established by the CPA to better facilitate communication between coalition forces and the people of Baghdad. *See generally* Slide Presentation, Roles and Responsibilities for the NACs, DACs, and CAC (31 May 2004). The District Advisory Council (DAC) was established to provide advice to the district commander on district community projects and their priorities and to provide advice and prioritize issues for the district. The Neighborhood Councils (NCs) (formerly Neighborhood Advisory Councils) provide advice to the local commander on local community projects. Neighborhood councils identify community issues and forward them to the DAC. They are responsive to their neighborhood constituents and coordinate with non-governmental organizations (NGOs) for local projects.

⁴⁷ Professional Experiences, *supra* note 7.

⁴⁸ *Id.* This incident also raises issues concerning ownership of captured enemy property. United States ownership claims were based upon a combination of the following: Message, 181518Z Apr 03, Headquarters, United States Central Command, subject: Disposition of Captured Enemy Equipment (declaring all captured enemy property to be property of the United States); Hague Convention No. IV, Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land art. 23(g) (18 Oct. 1907); AR 27-10, *supra* note 27, paras. 396, 406; S.C. Res. 1511, U.N. SCOR, 58th Sess., 4844th mtg., U.N. Doc. S/RES/1511 (2003).

⁴⁹ Memorandum, Mr. Leslie A. Dean, Baghdad Central Regional Coordinator, CPA, to Mr. Hadi Faisal, Vice Mayor of Baghdad, subject: Permission to Sell Hulk Vehicles and Scrap (21 Apr. 2004) (on file with author).

will have nearly daily exposure to local nationals in one capacity or another.⁵⁰ The sale of the boneyard required negotiations with two different levels of government officials. Further, the sale involved working with numerous Iraqi contractors, security guards, and translators. Additionally, the sale involved approximately a dozen convoys outside coalition facilities to the boneyard, the CPA headquarters, and the Amanant.

Another important issue is the terse relationship between the BCT and the Amanant, and the BCT and the CPA. The general view of the CPA (and now of the State Department) is that the staffers are out of touch with what's going on in Baghdad.⁵¹ In an effort to lessen this tension, the ICD established the governance support team (GST), permanently located at the U.S. Embassy. The GST acts in two capacities. First, as a large (twenty to thirty person) liaison office between the line units and the State Department and their Iraqi counterparts. Second, as subject matter experts in government reconstruction projects. Each GST member is a subject matter expert in a particular field—solid waste, water, education, sewage, engineering, and governance. This is a valuable resource and serves an important role.

The tension in the relationship between the BCT and Amanant derives from a power struggle. The Amanant is a traditionally powerful organization. The mayor holds a ministerial level office. The Amanant's drive to consolidate power is motivated largely by the corruption that riddles the organization.⁵² For example, when the Amanant finally decided on the contractor for the boneyard, it was a company owned by a relative of the mayor's secretary.⁵³

CERP Money

Of the millions spent on CMO projects during OIF I, OIF II, and Operation Enduring Freedom, virtually every penny has come from CERP funds.⁵⁴ This program, initially designated the brigade commander's discretionary fund,⁵⁵ was designed to provide tactical commanders the flexibility to immediately influence reconstruction efforts in their AO.⁵⁶ This program was initially funded with millions of dollars the coalition forces seized from Baathist coffers.⁵⁷ As the 3d Infantry rolled through Baghdad, Soldiers found caches of U.S. dollars.⁵⁸ This money, combined with other ill-gotten gains, funded the initial reconstruction efforts in Iraq. As noted by the former Staff Judge Advocate of the First Armored Division, the handling of these funds was transparent and documented.⁵⁹ Under presidential direction, the Department of Defense (DOD) coordinated with the Office of Management and Budget and the Departments of State and Treasury to establish procedures to govern the

⁵⁰ Professional Experiences, *supra* note 7.

⁵¹ See generally William Langewiesche, *Welcome to the Green Zone*, ATLANTIC MONTHLY (Nov. 2004); Professional Experiences, *supra* note 7.

⁵² Professional Experiences, *supra* note 7. On 14 June 2004, the Vice Mayor of Baghdad, Mr. Hadi Faisal, was arrested for corruption based in large part on the investigative work done by a 5th BCT Civil Affairs officer.

⁵³ *Id.* The issue of corruption is ever present. Some argue that corruption is cultural and the United States should not try to impose "Western" values upon this common practice; others assert that corruption is not a cultural norm in Iraq. See generally Abduljabbar Mandeel, *Corruption in Iraq*, IRAQI PRESS, available at <http://www.iraqpress.org/english.asp?fname=ipenglish\00rdata\9911.htm> (last visited Nov. 3, 2004); Press Release, Coalition Provisional Authority, Commission on Public Integrity to Combat Government Corruption (Jan. 31, 2004), available at http://www.cpa-iraq.org/pressreleases/20040131_IGC_integrity_PR.html (last visited Dec. 13, 2004). Corruption in Iraq, as in most other societies, is virtually always conducted in secret. If corruption were a cultural norm, the practice would not be relegated to shadowy back rooms and mysterious envelopes of money. Iraqis are adamant about the need to eradicate corruption. Professional Experiences, *supra* note 7. Furthermore, Articles 47 and 55 of the Law of Administration for the State of Iraq for the Transitional Period prohibit corruption in regards to members of the Higher Judicial Council and Government Council respectively. LAW OF ADMINISTRATION FOR HIGHER JUDICIAL COUNCIL AND GOVERNMENT COUNCIL arts. 47 and 55 (8 Mar. 2004), available at <http://www.cpa-iraq.org/government/TAL.html> (last visited Dec. 13, 2004). Similarly, the Provisional Administrative Law for the City of Baghdad prohibits individuals from serving on the council who have been convicted of a crime of moral turpitude. PROVISIONAL ADMINISTRATIVE LAW FOR THE CITY OF BAGHDAD para. 2.06 (6 June 2004). Finally, the *1969 Iraqi Penal Code*, prohibits bribery of government officials. IRAQI PENAL CODE, para. 307 (July 19, 1969).

⁵⁴ Professional Experiences, *supra* note 7. At the end of the fiscal year, ICD secured a significant amount of Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA) funds. See generally Message, 222048Z Mar 03, Headquarters, Department of Defense, subject: Guidance for FY04 Overseas Humanitarian, Disaster, and Civic Assistance (OHDACA) Activities (classified). The OHDACA funds are used with much greater frequency in the Afghanistan theater of operations. Professional Experiences, *supra* note 7.

⁵⁵ HEADQUARTERS, V CORPS FRAGMENTARY ORDER 107M TO V CORPS OPERATIONS ORDER FINAL VICTORY (7 May 2003) (outlining the commander's discretionary recovery program).

⁵⁶ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 89 TO COMBINED JOINT TASK FORCE 7, OPERATIONS ORDER (OPORD) 03-036 (19 June 2003) (providing for the CERP, formerly the brigade commander's discretionary fund)).

⁵⁷ Lieutenant Colonel Mark Martins, *No Small Change of Soldiering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 3 (providing an excellent discussion of the background and current uses of the CERP).

⁵⁸ *Id.* (citing David Zucchini, Troops Find Baghdad Stash: \$650 Million—Little-noticed Cottages Hold Boxes of Cash, SAN FRANCISCO CHRON., Apr. 19, 2003, at A-10).

⁵⁹ *Id.*

handling and expenditure of these monies.⁶⁰ The procedures within the *Federal Acquisition Regulation* do not apply to the expenditure of CERP funds.⁶¹

This initial source of funds was later supplemented with nearly \$20 billion in monies contained in the Developmental Fund for Iraq (DFI).⁶² The DFI was established by the CPA as a repository for the vast majority of Iraq's oil revenue.⁶³ The CPA was given control over this fund with the mandate from the United Nations to use the fund for the "humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civil administration, and for other purposes benefiting the people of Iraq."⁶⁴ Transparency was demanded in regards to these funds as well.⁶⁵

The frequency of JA interaction cannot be overstated. Every request for CERP money will cross the desk of a BCT JA. Therefore, it is critical that JAs have an intimate understanding of the FRAGOs governing CERP.⁶⁶ Headquarters, Multinational Forces Iraq, Fragmentary Order 87, Commander's Emergency Response Program Guidance for Using Appropriated Funds, prohibits expending appropriated CERP in the following circumstances:

- payment of rewards;
- direct or indirect benefit of coalition forces;
- entertainment of the Iraqi people;
- weapon's buyback programs;
- the purchase of firearms or ammunition;
- the removal of captured enemy ammunition or unexploded ordnance;
- duplicating services available through the Iraqi municipal governments;
- to provide support to private businesses or individuals (except to repair damage caused by coalition forces and not compensable as a claim); and
- payment of salaries or pensions to the Iraqi civil work force if already paid directly by Iraqi ministries or local governments.⁶⁷

Aside from these limitations, the permissible uses of CERP funds are numerous and varied. Permissible uses include the following:

- water and sanitation infrastructure;
- food production and distribution;
- agriculture;
- electrical power generation and distribution;
- healthcare;
- education;
- telecommunications;
- economic, financial, management improvements;
- transportation;
- rule of law and governance;
- irrigation;
- civic clean-up activities;
- civic support vehicles;
- repair to civic or cultural facilities; and

⁶⁰ *Id.* (citing Memorandum, The President of the Secretary of Defense, subject: Certain State- or Regime-Owned Property in Iraq (30 Apr. 2003)).

⁶¹ See Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, § 1110, 117 Stat. 1209, 1215.

⁶² HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 1268, CERP PROGRAM UPDATE DFI, APPROPRIATED AND SEIZED, TO HEADQUARTERS, COMBINED JOINT TASK FORCE 7 OPERATIONS ORDER 03-036 (22 Dec. 2003).

⁶³ COALITION PROVISIONAL AUTHORITY, REG. NO. 2, DEVELOPMENT FUND FOR IRAQ (15 June 2003) [hereinafter DEVELOPMENT FUND FOR IRAQ].

⁶⁴ S.C. Res. 1483, U.N. SCOR, 57th Sess., 4761st mtg., para. 14, U.N. Doc. S/RES/1483 (2003). See also DEVELOPMENT FUND FOR IRAQ, *supra* note 63.

⁶⁵ *Id.* ("the Development Fund for Iraq shall be used in a transparent manner"). Some are currently questioning the true transparency in the expenditure of these funds. See, e.g., Christopher Cooper & Greg Jaffe, *Audit Splits U.S. and U.N.*, WALL ST. J., Sept. 17, 2004, at A4.

⁶⁶ See HEADQUARTERS, MULTINATIONAL FORCES IRAQ, FRAGMENTARY ORDER 87, COMMANDER'S EMERGENCY RESPONSE PROGRAM GUIDANCE FOR USING APPROPRIATED FUNDS, (29 June 2004) [hereinafter MFI FRAGO 87].

⁶⁷ *Id.*

- other humanitarian or reconstruction projects.⁶⁸

Clearly, the CERP provides wide latitude for commanders to act quickly to address a multitude of humanitarian and reconstruction issues. With a source of funding this easy to use and with so few restrictions, it is easy for commanders to be very aggressive in their interpretation of the CERP provisions. Such has consistently been the case with the rewards provisions of the CERP.

When the CERP was funded strictly with DFI and seized assets, the CERP funds could be used to pay for rewards for information or non-lethal assistance leading to the capture of designated targets and promoting a safe and secure environment.⁶⁹ This language was used to justify very liberal rewards programs at various BCTs that looked suspiciously like weapons buyback programs.⁷⁰ This issue is largely rendered moot by the unambiguous rules governing appropriated CERP.⁷¹

Rewards Programs

Currently there are two rewards programs in effect in the Iraqi theater of operations. Rewards for Justice is a rewards program administered by the Department of State and designed to pay large rewards for very high value targets—\$25 million for Saddam Hussein.⁷²

The OIF Rewards program is the more commonly used rewards program.⁷³ This program allows for the payment of rewards for information and assistance that benefits either an OCONUS operation or activity of the armed forces against terrorism or, force protection of the Armed Forces.⁷⁴ This program can provide rewards for the capture of individuals wanted by the coalition.⁷⁵ Within the ICD, the current approval authority for rewards is the division SJA.⁷⁶

Ethics

All ethics rules apply with equal force in a deployed environment.⁷⁷ It is sometimes difficult to impart this concept to clients operating in a “combat mode.” Ethics issues are few and far between, and they most often involve the prohibitions on gifts and rules on solicitations.

⁶⁸ *Id.*

⁶⁹ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 250, AMENDMENT TO THE COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) FORMERLY THE BRIGADE COMMANDER’S DISCRETIONARY FUND, TO OPERATIONS ORDER 03-036 (1 July 2003).

⁷⁰ The stated purpose of the rewards program was to authorize the use of rewards for information or other non-lethal assistance that leads to the capture of selected individuals, categories of weapons that appear on a list approved by USCENTCOM, and documents related to WMD and terrorism. HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 250, AMENDMENT TO THE COMMANDER’S EMERGENCY RESPONSE PROGRAM (CERP) FORMERLY THE BRIGADE COMMANDER’S DISCRETIONARY FUND, TO OPERATIONS ORDER 03-036 (1 July 2003). “Buyback” program is not easily defined. As executed in Haiti, Panama, and Somalia, a buyback program was evidenced by the following indices: (1) a strategic plan implemented on a nation-wide scale; (2) designed to remove explosives *and* firearms; (3) at, or near, market price. *See generally* CENTER FOR LAW AND MILITARY OPERATIONS, LESSONS LEARNED FOR JUDGE ADVOCATES: LAW AND MILITARY OPERATIONS IN HAITI: 1994-1995 74 (11 Dec. 1995); CENTER FOR LAW AND MILITARY OPERATIONS, citing Operation Uphold Democracy, Initial Impressions: Haiti D-20 to D+120, Volume II, at 49 (Apr. 1995). As noted in Haiti, the intention was simple: “getting firearms and explosives off the street and out of the countryside.” *See* CENTER FOR LAW AND MILITARY OPERATIONS, LESSONS LEARNED FOR JUDGE ADVOCATES: LAW AND MILITARY OPERATIONS IN HAITI: 1994-1995 72 (11 Dec. 1995).

⁷¹ MFI FRAGO 87, *supra* note 66.

⁷² *See* Rewards for Justice, *The Rewards Program*, at <http://www.rewardsforjustice.net> (last visited Dec. 13, 2004) (outlining the mission and history of the State Department rewards program); *see also* Message, 151330Z Mar 03, Headquarters, United States Central Command, subject: DOD Rewards Program in CENTCOM AOR.

⁷³ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 368, OIF REWARDS PROGRAM IMPLEMENTATION, TO OPORD 03-036 (10 July 2003) [hereinafter CJTF7 FRAGO 368]; Message, 030555Z Jul 03, Headquarters, United States Central Command, subject: CFC Rewards Program in USCENTCOM AOR (revised).

⁷⁴ CJTF7 FRAGO 368, *supra* note 73.

⁷⁵ *Id.*; *see also* Information Paper, Headquarters, Combined Joint Task Force 7, subject: CJTF-7 Rewards Program (6 July 2003).

⁷⁶ HEADQUARTERS, 1ST CAVALRY DIVISION, FRAGMENTARY ORDER 360 TO OPORD 03-52 (10 July 2003).

⁷⁷ *See generally* U.S. DEP’T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (30 Aug. 1993); Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635, § 2635.101 (1 Jan. 99) *as amended* by 64 Fed. Reg. 2421-2422 (14 Jan. 1999) and 64 Fed. Reg. 13063-13064 (17 Mar. 1999) (“The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.”).

Gifts given by prohibited sources and as a result of the recipient's official position are prohibited.⁷⁸ A prohibited source is defined as any person who is seeking an official action by the recipient's agency; does business or seeks to do business with the recipient's agency; conducts activities regulated by the recipient's agency; has interests which may be substantially affected by performance or nonperformance of the recipient's official duties; or is an organization whose majority is comprised of the above described individuals.⁷⁹ There are a number of exceptions,⁸⁰ though arguably only a few exceptions apply in a deployed environment.⁸¹ The most notable is the general exception for gifts with a market value of less than \$20.⁸² Deploying units may also encounter situations in which the Foreign Gifts and Decorations Act is applicable.⁸³ The act allows federal employees to accept gifts from foreign governments or multinational organizations when accepted in accordance with its provisions.⁸⁴

In a deployed environment, virtually every Soldier who deals with a local national on a regular or substantial basis is dealing with somebody who has an interest in doing business with the Army. If not a business interest, then surely they have interests that are directly affected by the performance of the Soldier's duties. Commanders, civil affairs, S-5s, and PSYOP are the individuals most likely to be recipients of gifts.⁸⁵ It is important to track gifts to ensure they are properly accepted or properly disposed of.⁸⁶

Gifts from foreign governments are treated differently than gifts from private individuals or organizations.⁸⁷ Furthermore, it is important to distinguish between gifts to individuals and gifts to the unit. If the gift is given to the unit, the gift may be accepted under the provisions of *AR 1-100*.⁸⁸ Note, however, the difference in treatment where the value of the gift exceeds a fair market value of \$1,000.⁸⁹ Gifts given to individuals may be accepted provided the value of the gift does not exceed \$285.⁹⁰

The local government a typical commander interacts with on a daily basis is the neighborhood councils (NC) and district councils (DC). These councils were established by the CPA as a means of enfranchising the people with local representative governments.⁹¹ These councils, however, have little or no experience working with governmental entities. They are simply advisory councils. They have no powers traditionally associated with a sovereign power—or a branch thereof. The Law of Administration for the State of Iraq for the Transitional Period (TAL) does not recognize the DCs and NCs.⁹² Thus, gifts from a DC or NC are treated as gifts from a source other than a foreign government.

⁷⁸ 5 C.F.R. § 2635.202.

⁷⁹ *Id.* § 2635.203.

⁸⁰ *Id.* § 2635.204.

⁸¹ For example, exceptions applying to discounts, awards/honorary degrees, political activities, and social events will rarely apply in a deployed environment.

⁸² *Id.*

⁸³ 5 U.S.C. § 7342 (2000).

⁸⁴ *Id.*; see also 5 C.F.R. § 2635.204.

⁸⁵ Professional Experiences, *supra* note 7.

⁸⁶ 5 C.F.R. § 2635.205.

⁸⁷ Compare 5 C.F.R. § 2635, with U.S. DEP'T OF ARMY, REG. 1-100, GIFTS AND DONATIONS (15 Nov. 1983) [hereinafter AR 1-100].

⁸⁸ AR 1-100, *supra* note 87, para. 6b.

⁸⁹ *Id.* para. 5(a)(2).

⁹⁰ 5 C.F.R. § 2635.

⁹¹ See generally OFFICE OF THE COALITION PROVISIONAL AUTHORITY & UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, THE BAGHDAD CITIZEN ADVISORY COUNCIL HANDBOOK (2d ed. 2003), available at http://www.omarmasry.net/Baghdad_city_council_main_english.htm (last visited Dec. 13, 2004).

⁹² THE LAW OF ADMINISTRATION FOR THE STATE OF IRAQ FOR THE TRANSITIONAL PERIOD (8 Mar. 2004). At Article 56, the TAL expressly recognizes traditional tribal councils—the *Qada'* and *Nahiya* councils. The TAL does not expressly recognize the TAL, however, it does anticipate the assistance of "other relevant councils." *Id.*

Legal Assistance

It should come as no surprise that legal assistance flourishes in a deployed environment.⁹³ The issues are varied both in their subject matter and the degree of urgency. Most issues are predictable. Questions concerning domestic relations,⁹⁴ *Army Regulation 608-99*,⁹⁵ creditor debtor agreements, and the Servicemember's Civil Relief Act⁹⁶ are the most common legal assistance issues. Judge advocates must also be prepared to field questions from both commanders and Soldiers concerning family care plans.⁹⁷

Military Justice

Generally

Military justice operates virtually the same in a deployed environment as it does in garrison. The only substantive differences are the difficulties encountered in organizing a trial—having to make travel and sleeping arrangements for witnesses from multiple camps, communicating with defense counsel over precarious communications networks, and other such issues. Initially during the deployment, 5th BCT thought the size of the caseload was inversely proportional to the operational tempo of the unit.⁹⁸ This assessment, however, was false. Crimes occur at all times during the deployment, including times of intense combat activity and during times of relative calm.

By way of example, during the first four months, Headquarters and Headquarters Company (HHC), 5th BCT, did not have a single military justice action. Over the next four months, however, the HHC commander presided over the following military justice actions: summarized Article 15s, company grade Article 15s, field grade Article 15s, summary courts-martial, three special courts-martial, and a general court-martial.⁹⁹

The most common criminal cases involve violations of General Order 1A (GO1A).¹⁰⁰ Alcohol and drugs are readily available though the mail, unscrupulous interpreters, and the International Zone.¹⁰¹ From the outset, it is imperative that the command establish a policy permitting the search of all persons, vehicles, and bags upon entry to the camp. This is an important practice to enforcing GO1A, but also in ensuring camp security.

In addition to minor disciplinary actions, commands will occasionally utilize the services of Criminal Investigation Command (CID). Currently, Camps Victory and Liberty are the only camps in Baghdad that have organic military police or CID units conducting garrison operations.¹⁰² Proper response in criminal investigations of major crimes is critical to the interests of military justice. On occasion CID would take twenty-four to forty-eight hours to respond to a call for investigation.¹⁰³ These delays can be attributed to the operational environment of a combat zone. Therefore, BCTs must be prepared to conduct basic investigatory tasks such as securing a crime scene, collecting evidence, logging evidence, taking photographs, and conducting witness interviews. The trial counsel should serve as the primary point of contact and the link between the BCT and CID. Trial counsels must be prepared to advise all commanders in executing these investigatory tasks while still remaining a disinterested party.

⁹³ For example, the only time the British Army Legal Service provides legal assistance is during a deployment. See United Kingdom Ministry of Defense Website, at www.army.mod.uk (last visited Dec. 5, 2004).

⁹⁴ The issue of proxy marriages comes up with some frequency. Professional Experiences, *supra* note 7. For more information on proxy marriages, see 52 AM. JUR. 2d Marriages § 15 (2004).

⁹⁵ U.S. DEP'T OF ARMY, REG. 608-99, FAMILY SUPPORT, CHILD CUSTODY, AND PATERNITY (29 Oct. 2003).

⁹⁶ Servicemember's Civil Relief Act of 1993, Pub. L. No. 108-189, 117 Stat. 2835 (codified as amended in scattered sections of 50 U.S.C. App.).

⁹⁷ See generally U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (13 May 2002).

⁹⁸ Professional Experiences, *supra* note 7.

⁹⁹ *Id.*

¹⁰⁰ Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000).

¹⁰¹ The International Zone, formerly known as the Green Zone, is an area about four square miles in central Baghdad near the large swooping bend of the Tigris River. Miles of walls, fences, razor wire, checkpoints and guard towers surround the entire area. Within the Green Zone there are actually a number of small fortified camps; the two largest being the 3rd BCT Forward Operating Base and the CPA Headquarters. The zone also houses the vast majority of the foreign contractors, security companies, and NGOs.

¹⁰² Professional Experiences, *supra* note 7.

¹⁰³ *Id.*

GOIA

General Order 1A is actually the original general order in combination with numerous amendments and partial waivers.¹⁰⁴ This order applies to the following:

All United States military personnel, and to civilians serving with, employed by, or accompanying the Armed Forces of the United States, while present in the USCENTCOM AOR *except for* personnel assigned to: Defense Attaché Offices; United States Marine Corps Security Detachments; sensitive intelligence and counterintelligence activities that are conducted under the direction and control of the Chief of Mission/Chief of Station; or other United States Government agencies and departments.¹⁰⁵

The order contains the following prohibitions and restrictions:

- PRIVATELY OWNED FIREARMS. Purchase, possession, use or sale of privately owned firearms, ammunition, explosives, or the introduction of these items into the USCENTCOM AOR.
- ENTRANCE INTO MOSQUE. Entrance into a Mosque or site of Islamic religious significance by non-Moslems unless directed to do so by military authorities, required by military necessity, or as part of an official tour conducted with the approval of military authorities and the host nation.
- ALCOHOL. Introduction, possession, sale, transfer, manufacture or consumption of any alcoholic beverage.
- DRUGS. Introduction, purchase, possession, use, sale, transfer, manufacture, or consumption of any controlled substances, or drug paraphernalia. The original prescription label of the prescribing medical facility or authority must accompany prescription drugs.
- PORNOGRAPHY. Introduction, possession, transfer, sale, creation or display of any pornographic or sexually explicit photographs, videotapes, movie, drawing, book, magazine, or similar representations. The prohibitions contained in this subparagraph shall not apply to AFRTS broadcasts and commercial videotapes distributed and/or displayed through AAFES or MWR outlets.
- GAMBLING. Gambling of any kind, including sports pools, lotteries and raffles, unless permitted by host-nation laws and applicable service or component regulations.
- ARCHEOLOGICAL ARTIFACTS. Removing, possessing, selling, defacing or destroying archeological artifacts or national treasures.
- UNOFFICIAL CURRENCY EXCHANGE. Selling, bartering or exchanging any currency other than at the official host-nation exchange rate.
- PETS. Adopting as pets or mascots, caring for, or feeding any type of domestic or wild animal.
- PROSELYTIZING. Proselytizing of any religion, faith or practice.
- WAR TROPHIES.¹⁰⁶

War trophies are a topic of constant interest for Soldiers and commanders. First, it is important to note the difference between personal war trophies and war trophies for units. Unit historical property is defined as “property which is part of a historical collection of artifacts displayed in a regimental day room, visitor’s center, hall of fame, exhibit area, or other type of display not recognized by a component museum service as a museum.”¹⁰⁷ In order to bring an item out of a country as a piece of unit historical property, the unit must submit a request through Multinational Forces Iraq (MNF-I), CENTCOM, and the Army Center of Military History.¹⁰⁸ Units are limited to one demilitarized weapon or weapons system.¹⁰⁹ Either the MNF-I historian or the SJA must coordinate for such requests.¹¹⁰

¹⁰⁴ Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A Waiver (Alcoholic Beverages by SAO personnel in Kuwait and KSA) (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A (BINGO by SAO in KSA) (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A Waiver (Firearms and Ammunition for SAO Personnel) (19 Dec. 2000); Headquarters, United States Central Command, General Order 1A Waiver (Alcoholic Beverages for Soldiers in a Non-operational Status) (11 Apr. 2001); Headquarters, United States Central Command, General Order 1A Amendment and Waiver (Alcoholic Beverages) (30 Nov. 2001); Headquarters, United States Central Command, General Order 1A Waiver and Amendment (1 Dec. 2001); Headquarters, United States Central Command, General Order 1A Waiver (Alcoholic Beverages and DIA Personnel) (21 Mar. 2002); Headquarters, United States Central Command, General Order 1A Waiver (Pets) (10 Sept. 2002); Headquarters, United States Central Command, General Order 1A Amendment (Alcoholic Beverages in Iraq) (9 Aug. 2003).

¹⁰⁵ Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000) (emphasis added).

¹⁰⁶ *Id.*

¹⁰⁷ HEADQUARTERS, MULTINATIONAL FORCE IRAQ, FRAGMENTARY ORDER 259, REMOVAL OF HISTORICAL PROPERTY FROM IRAQ, (31 Aug. 2004).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

War souvenirs for individual Soldiers are treated entirely differently.¹¹¹ If a Soldier wishes to retain a war souvenir, he or she must submit the request to a reviewing officer, who may be a company commander or individual in the rank of lieutenant colonel or above.¹¹² Permissible souvenirs include:

- helmets and head coverings;
- uniforms and uniform items such as insignia and patches;
- canteens, compasses, rucksacks, pouches, and load bearing equipment;
- flags (not otherwise prohibited by 10 USC 4714 and 7216);
- knives and bayonets other than those otherwise prohibited;
- military training manuals, books, and pamphlets;
- posters, placards, and photographs;
- currency of the former regime; or
- other items that clearly pose no safety or health risk, and are not otherwise prohibited by law or regulation.¹¹³

Prohibited items include:

- Weapons, including demilitarized and antique weapons;
- unexploded ordinance;
- switchblade knives;
- knives with an automatic blade opener;
- blades that are particularly equipped to be collapsed, telescoped or shortened; or stripped beyond the normal extent required for hunting or sporting; or concealed in other devices, such as walking sticks, umbrellas, or tubes;
- military equipment not designed to be issued to or carried by an individual, including but not limited to, motor vehicles, generators, trailers, aircraft, watercraft, machine tools, radars, and communication equipment;
- former Iraqi regime or Iraqi privately owned articles of a household nature, including but not limited to, silverware, goldware, chinaware, linens, furniture, rugs, fixtures, and electrical appliances;
- any objects of art, science, archeological, religious, national, or historical value. This prohibition does not include military posters, placards and photographs; military maps; or posters of Saddam Hussein;
- any object retained for a commercial or resale purpose;
- any sand, dirt, rocks, stones or gravel;
- any plant material, including but not limited to, live or dried plants, seeds, flowers, fruits, leaves or bulbs;
- any animals (mammals, fish, reptiles and birds), or parts thereof, or insects, or parts thereof, including animals or insects that are alive, dead, or preserved; and
- personal items belonging to military combatants (i.e., dog tags).¹¹⁴

This is a command function, but JAs have been tasked with providing legal advice on these procedures.

Claims

Claims comprise an enormous part of a deployed BCT JA's practice. Normally, one or more JAs will be appointed a member of the Foreign Claims Commission (FCC).¹¹⁵ This person adjudicates claims filed under the Foreign Claims Act (FCA).¹¹⁶ While there are numerous other claims authorities,¹¹⁷ their use is rare in a deployed environment.

¹¹¹ HEADQUARTERS, COMBINED JOINT TASK FORCE 7, FRAGMENTARY ORDER 674, WAR SOUVENIRS, TO OPOD 04-01 (Apr. 23, 2004) [hereinafter FRAGO 674]; Headquarters, United States Central Command, Gen. Orders No. 1A (19 Dec. 2000).

¹¹² FRAGO 674, *supra* note 111.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Foreign Claims Act, 10 U.S.C. § 2734 (2000); U.S. Dep't of Defense, Dir. 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990) (as amended); U.S. Dep't of Army, Reg. 27-20, Claims (1 July 2003) [hereinafter AR 27-20]; U.S. Dep't of Army, Pam. 27-162, Claims Procedures (8 Aug. 2003) [hereinafter DA Pam. 27-162].

¹¹⁶ 10 U.S.C. § 2734; AR 27-20, *supra* note 115, ch. 10.

¹¹⁷ *See, e.g.*, Military Claims Act, 10 U.S.C. § 2733, 2738; Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680; Non-Scope Claims Act, 10 U.S.C. § 2737; National Guard Claims Act, 32 U.S.C. § 715; Maritime Claims Settlement Act, 10 U.S.C. §§ 4801–4804, 4806; Federal Claims Collection Act, 31 U.S.C. § 3711; and the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651–2653.

*Personnel Claims Act*¹¹⁸

In addressing any claim, a claims JA should make two initial determinations. First, is the claimant a proper claimant? Second, is the claim proper? Under the PCA, a proper claimant is most commonly a member of the Active Army.¹¹⁹ The claimant, however, may also be a member of the U.S. Army Reserve (USAR) or the National Guard (NG) performing inactive-duty training or active service or a civilian employee of Department of the Army (DOA).¹²⁰ Some civilians qualify under the PCA, to include some civilian employees of Army, USAR or NG, spouses of Army Soldiers, and surviving family members of Army soldiers.¹²¹ Red Cross employees, foreign military personnel, United Services Organization personnel, and employees of government contractors, including technical representatives, are not proper claimants.¹²²

Claims are paid under the PCA where the loss was incurred incident to service.¹²³ Claims payable under the PCA include: contractor caused losses, damage to personal property, and damage to personal property caused by extraordinary events—fire, flood, hurricane, other unusual occurrences, or by theft or vandalism – whether located on or off a military installation.¹²⁴ In a deployed environment, these claims most often arise when property is lost in transit.¹²⁵ It is important that the claimant be able to document the lost goods though evidence or testimony.

Foreign Claims Act

“The Foreign Claims Act . . . was enacted on 2 January 1942, retroactive to 27 May 1941, the date on which President Roosevelt proclaimed that the threat of a German advance in Western Europe constituted a national emergency for the United States.”¹²⁶ The FCA was designed to facilitate good will and friendly relations between the U.S. Armed Forces and host countries.¹²⁷ The FCA is widely used in the Iraqi theater. A First Cavalry Division BCT typically averaged twenty to forty new claims per week throughout a one-year deployment.¹²⁸

The most common claimant under the FCA is a “local inhabitant” of the host country.¹²⁹ The term “inhabitant” conveys a meaning larger than citizen. It encompasses individuals who live in the country and have assumed a role in the economic and social fabric of the country.¹³⁰ Governments and corporations may also be proper claimants.¹³¹

Claims for “personal injury or death or for damage to or loss of real and personal property; or claims for damage to or loss of real property incident to its use and occupancy by the U.S. Armed Forces and for damage to or loss of personal property bailed to the United States are cognizable.”¹³² Such claims, however, *must* arise from the negligent behavior of a member of the armed forces or from a “non-combat activity.”¹³³ If a local national citizen employed by the U.S. Armed Forces, however, commits the act or omission, the FCA does not allow payment.¹³⁴

¹¹⁸ Personnel Claims Act, 31 U.S.C. § 3721; AR 27-20, *supra* note 115, ch. 11.

¹¹⁹ AR 27-20, *supra* note 115, para. 11-4.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* para. 11-5.

¹²⁴ *Id.*

¹²⁵ Professional Experiences, *supra* note 7.

¹²⁶ DA PAM. 27-162, *supra* note 115, para. 10-1; *see also* Foreign Claims Act, 10 U.S.C. § 2734.

¹²⁷ DA PAM. 27-162, *supra* note 115, para. 10-1.

¹²⁸ Professional Experiences, *supra* note 7.

¹²⁹ DA PAM. 27-162, *supra* note 115, para. 10-2.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* para. 10-3.

¹³⁴ *Id.*

Liability based upon the acts or omissions of U.S. Soldiers or civilian employees is compensable where the acts are considered negligent or wrongful.¹³⁵ The persons need not be acting within the scope of their employment.¹³⁶ In fact, the persons need not even be on duty at the time of the act or omission.¹³⁷

A claim arising from combat activities is not cognizable under the FCA.¹³⁸ This point is the greatest cause of consternation when adjudicating claims under the FCA. *Department of the Army Pamphlet 27-162* precludes payment under the FCA where “[d]amages caused by enemy action, or by the U.S. armed services resisting or attacking an enemy or preparing for immediate combat with an enemy . . .”¹³⁹ Payment for damages resulting from “[t]raining for combat and the operation of military facilities not directly involved in combat actions” are permitted¹⁴⁰ The combat activities exclusion applies even where war has not been declared.¹⁴¹

The combat activities exclusion is a difficult concept to convey to a foreign national and its application often results in inequitable outcomes. A frequent source of claims under the FCA is personal injury and property damage caused by bombings—cluster bombing in particular. These claims are not compensable due to the combat exclusion provision of the FCA.¹⁴² A traffic accident, however, between a foreign national and a U.S. Soldier operating a humvee is likely compensable. Non-compensable claims may be examined as a request for solatia-like payment under the CERP Program.¹⁴³

Real Estate Claims

Real estate claims encompass all claims for compensation for private property that was or is occupied by the United States. These claims are adjudicated by the U.S. Army Corps of Engineers Contingency Real Estate Support Team (CREST).¹⁴⁴ The CREST team is located in the International Zone and handles all real estate claims in the Baghdad AO.

Solatia

In certain countries, particularly in parts of Asia, the custom of solatia provides that an appropriate floral, fruit, or token money gift will be made to a victim or the victim’s family for injuries, death, or property damage.¹⁴⁵ Accordingly, when such customs exist, the U.S. military will provide solatia payments to foreign nationals as a result of incidents *involving* U. S. forces personnel or DOD civilian employees.¹⁴⁶ In Arab cultures, sensitivity to insults and slights (real or perceived) can go a long way to winning the acceptance of the local population or saving face. Until recently, the Air Force was the single service claims representative for CENTCOM. The Air Force refused to recognize Iraq as a country in which a tradition of solatia exists.¹⁴⁷ The Army has since assumed single service claims responsibility and, initially, followed the Air Force’s direction. On 26 November 2004, the Department of Defense Office of the General Counsel issued a letter of opinion finding

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ AR 27-20, *supra* note 115, para. 10-2; DA PAM. 27-162, *supra* note 115, para. 10-3.

¹³⁹ DA PAM. 27-162, *supra* note 115, para. 10-3.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *See id.*

¹⁴³ *See infra* notes 145-52 and accompanying text (outlining solatia-like payments).

¹⁴⁴ U.S. DEP’T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD 2-7 (15 Apr. 1999).

¹⁴⁵ DA PAM. 27-162, *supra* note 115, para. 10-10.

¹⁴⁶ *Id.*

¹⁴⁷ *See, e.g.,* Bryant K. Banes, Information Paper, Headquarters, Multinational Force Iraq, subject: Condolence Payments to Iraqi Civilians for Deaths, Injuries and Property Damage (11 June 2004) [hereinafter 11 June 2004 Memorandum]. There are, however, a number of Iraqi civil laws suggesting the propriety of solatia. IRAQ CIVIL LAW NO. 203 (1959) (providing that in the case of killing, death as result of personal harm or harmful acts, the compensation should be paid by the party causing harm to the representative of the victim); IRAQ CIVIL LAW NO. 202 (1959) (providing that any person who harms another, should pay the victim as compensation for damage incurred by the incident in question); IRAQ CIVIL LAW NO. 204 (1959) (outlining need for compensation by the responsible party for all types of assault with damages).

that a custom of “solatia payments [exist] in Afghanistan and Iraq.”¹⁴⁸ Prior to the issuance of this opinion letter, the U.S. military in Iraq was not making true solatia payments, but instead they were making what they termed “solatia-like” or “solatia-type” or “condolence” payments.¹⁴⁹ The guidance held that “[b]rigade-level commanders are authorized to use CERP funds to make solatia-like payments to compensate the families of local citizens killed or seriously injured by U.S. Soldiers.”¹⁵⁰ The 26 November 2004 clearly eliminates the need for such contorted fiscal guidance.

Previously, the use of appropriated funds for solatia-like payments was an issue of debate. On 11 June 2004, MNF-I released an information paper extending authorization to make solatia-like payments with appropriated funds.¹⁵¹ Further, the information paper stated that “[a]bsent express authorization from the Commander, MNC-I, these payments can be no more than \$2500 for a death, \$1000 for a serious injury, or \$500 for property damage.”¹⁵² It is unclear where these figures come from, or how this finding is justified. The applicable FRAGO states that the purpose of the CERP is to provide humanitarian relief and reconstruction assistance.¹⁵³ The FRAGO also notes that appropriated CERP funds may be used to pay for “collateral damage caused by combat operations that are not otherwise compensable because of combat exclusions.”¹⁵⁴ This section is commonly understood to encompass only damage to property not persons, which is supported by paragraph 3.C.8.L that notes that funds cannot provide “support to individuals or private businesses except for repairing damage caused by coalition forces”¹⁵⁵

Assuming CERP funds, however, can be used to pay for personal injuries, an issue remains as to whether or not CERP funds can be used to pay for injuries caused by someone other than coalition forces. One might interpret paragraph 3.C.8.L to apply only to damage caused by coalition forces. Further, paying for damages caused by Anti-Iraqi Forces (AIF) raises serious policy issues. This issue requires clarification. Multi-National Forces Iraq recently attempted to clarify this area of fiscal guidance. The new FRAGO reiterated guidance concerning solatia-like payments from FRAGO 87, but expressly excluded any reference to coalition involvement.¹⁵⁶

The 26 November 2004 memorandum expressly avoids this issue. The memorandum holds that solatia payments “may be made from local operation and maintenance funds.”¹⁵⁷ The memorandum further notes that “in determining whether to make a solatia payment, consideration should be given to . . . whether alternative authorities (e.g., Commanders’ Emergency Response Program) are available; and whether their use, in accordance with applicable law and regulations, might be more appropriate under the circumstances.”¹⁵⁸ Further guidance will undoubtedly be forthcoming, at present, however, the issue of using CERP to fund solatia remains open.

Miscellaneous Claims Notes

It is imperative that each BCT have at least one paralegal specialist dedicated to claims. The volume and complexity of claims issues cannot be parsed out between multiple persons. Equally important is hiring quality interpreters – preferably two interpreters.¹⁵⁹ While these translators need to be trusted, it is critical to maintain an objective evaluation of each interpreter.¹⁶⁰

¹⁴⁸ See On 26 November 2004, the Deputy General Counsel (International Affairs), Department of Defense, Office of the General Counsel, signed a memorandum authorizing the payment of solatia in Iraq and Afghanistan. Memorandum, Mr. Charles A. Allen, Deputy General Counsel (International Affairs), Department of Defense, Office of the General Counsel, to Staff Judge Advocate, U.S. Central Command, subject: Solatia (26 Nov. 2004) [hereinafter 26 November 2004 Memorandum].

¹⁴⁹ See, e.g., 11 June 2004 Memorandum, *supra* note 147.

¹⁵⁰ 1ST ARMORED DIVISION, FRAGMENTARY ORDER 542A TO OPOD 03-215 (Aug. 31, 2003) [hereinafter FRAGO 542A].

¹⁵¹ 11 June 2004 Memorandum, *supra* note 147.

¹⁵² *Id.*

¹⁵³ MFI FRAGO 87, *supra* note 66.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* para. 3.C.8.L.

¹⁵⁶ See FRAGO 542A, *supra* note 150.

¹⁵⁷ See 26 November 2004 Memorandum, *supra* note 148.

¹⁵⁸ *Id.*

¹⁵⁹ Professional Experiences, *supra* note 7.

The 5th BCT claims program is unique in that the BCT frequently interacted with a group of approximately twelve Iraqi attorneys. These attorneys assist clients, who are largely illiterate, by filling out paperwork, answering questions, and presenting evidence in exchange for a small fee—normally ten percent of the claim. The 5th BCT encouraged claimants to seek legal counsel. Their assistance inevitably sped up the application process. Further, when claimants do not have any means of communication, the attorney can help facilitate communication. The 5th BCT's relationships with local national attorneys also afforded leverage for assistance with CMO projects. Finally, the 5th BCT's relationships resulted in local national attorneys volunteering information on insurgent activities or bringing in persons who had such information.¹⁶¹

The division OSJA's role in the claims process is critical. The division acts as the higher claims authority; thus, when a claim is beyond the claim limit of a BCT FCC, the claim is forwarded along with a "seven paragraph" memorandum to the division.¹⁶² Furthermore, the division maintains a central database of claims to ensure the same claim is not paid at two different BCTs.

Other Issues

Intelligence Law

Intelligence law is a very small component of the BCT practice because in nearly all circumstances, the BCT intelligence staff section (S-2) does not run intelligence operations. Furthermore, most intelligence law only governs the collection of intelligence on U.S. persons.¹⁶³ Be prepared, however, to address intelligence law issues if, and when, local national workers are screened for operations security (OPSEC) reasons.¹⁶⁴

Intelligence law issues may arise in regards to *Army Regulation 381-12*.¹⁶⁵ All members of the Army, military and civilian, must be knowledgeable of their responsibilities under this regulation to report Subversion and Espionage Directed Against the United States (SAEDA) incidents.¹⁶⁶ Such events include attempts by unauthorized persons to obtain classified or unclassified information concerning U.S. Army facilities, activities, personnel, technology, or material through questioning, elicitation, trickery, bribery, threats, coercion, blackmail, photography, observation, collection of documents or material, correspondence, or computer hacking.¹⁶⁷ Also, active attempts to encourage military or civilian employees to violate laws, disobey lawful orders or regulations, or disrupt military activities constitute a SAEDA event that requires reporting. Finally, issues may arise concerning the Intelligence Contingency Fund—a funding source for intelligence operations detailed in *Army Regulation 381-141*.¹⁶⁸

Most people consider OPSEC an intelligence function; however, the proponent for OPSEC is the staff operations officer.¹⁶⁹ The OPSEC regulation, however, demands close coordination with security programs and intelligence staff.¹⁷⁰ Judge advocates should anticipate facilitating communication between the two staff sections and assisting in execution of an OPSEC plan.

¹⁶⁰ Units and individuals will go out of their way to protect and provide for their interpreter, even in the face of mountains of evidence of misconduct. On more than one occasion, a BCT fired or detained interpreters even as persons within their units protested loudly. In every instance, the fired or detained interpreter was indeed culpable. Professional Experiences, *supra* note 7.

¹⁶¹ *Id.*

¹⁶² See AR 27-20, *supra* note 115.

¹⁶³ See, e.g., Exec. Order No. 12,333, 46 Fed. Reg. 59941 (Dec. 8, 1981); U.S. DEP'T OF DEFENSE, DIR. 5240.1-R, PROCEDURES GOVERNING THE ACTIVITIES OF DOD INTELLIGENCE COMPONENTS THAT AFFECT UNITED STATES PERSONS (Dec. 1982) (implementing EO 12,333); U.S. DEP'T OF ARMY, REG. 381-10, UNITED STATES ARMY INTELLIGENCE ACTIVITIES (1 July 1984).

¹⁶⁴ Shortly after arriving in theater, the 5th BCT screened over 800 local national workers that worked directly for the BCT. After more than a year of service with the U.S. military, most local nationals had never even been given a preliminary screening. During such screenings, screeners may request to speak with an interpreter who is a U.S. citizen.

¹⁶⁵ U.S. DEP'T OF ARMY, REG. 381-12, SUBVERSION AND ESPIONAGE DIRECTED AGAINST THE UNITED STATES (15 Jan. 1993).

¹⁶⁶ *Id.* (citing NATIONAL SECURITY DECISION, DIR. 197, REPORTING HOSTILE CONTACTS AND SECURITY AWARENESS (1 Nov. 1985)).

¹⁶⁷ *Id.*

¹⁶⁸ U.S. DEP'T OF ARMY, REG. 381-141, INTELLIGENCE CONTINGENCY FUNDS (16 Jan. 2004).

¹⁶⁹ U.S. DEP'T OF ARMY, REG. 530-1, OPERATIONS SECURITY (3 Mar. 1995).

¹⁷⁰ *Id.*

Command Policy

Though not a traditional JA responsibility, writing policy letters and “Sends”¹⁷¹ messages became a common practice for JAs across the theater. Be prepared to draft policies on the following: cell phone use, internet use, pornography, sexual relations, negligent discharges, and fiscal responsibility.¹⁷²

Conclusion

In short, the BCT practice is diverse, interesting, dynamic, and fully engaging. The diversity of issues, many of which are non-traditional, cannot be overemphasized. More often than not, the JA will provide assistance on the basis of his analytical or writing skills rather than his ability to provide legal analysis. The complexity of issues is further compounded by the independence with which most BCTs operate. The BCT practice is unquestionably complex and challenging; however, it is equally rewarding.

¹⁷¹ A “Sends” message is akin to an informal policy letter, addressing both new policies and issues of concern.

¹⁷² It would be advisable to have a number of these policies in place before deployment.