

Notes from the Field

Mentoring Afghan National Army Judge Advocates: An Operational Law Mission in Afghanistan and Beyond¹

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On 4 July 2006 the 41st Brigade Combat Team (41st BCT), Oregon National Guard, assumed the mission of training the Afghan National Army as Task Force Phoenix V, from the 53rd Brigade, Florida National Guard, at Camp Phoenix, Kabul, Afghanistan.⁴

Introduction

Task force or brigade operational law team (BOLT) judge advocates (JAs) plan to conduct typical legal operations in the deployed environment. The 41st BCT BOLT arrived in Afghanistan ready for military justice, administrative law,⁵ legal assistance, and operational law including rules of engagement and the law of armed conflict. In Afghanistan,⁶ the mission of Task Force Phoenix V (Phoenix) was to mentor and train the Afghan National Army (ANA) and the Afghanistan National Police (ANP). Particular emphasis was placed on training the newly developed Afghanistan National Auxiliary Police (ANAP) who had significant requirements⁷ for JA legal support.

Morphing the Mission

Initially, the Phoenix BOLT was advised by the earlier JAs at Combined Security Transition Command – Afghanistan (CSTC-A) that mentoring the ANA JAs was not on the task list for Phoenix. Upon arrival, it became very apparent that the CSTC-A⁸ was understaffed with only two JAs.⁹ The JAs there were assigned to mentor the ANA JAs throughout five Corps,

¹ This article is intended to build on the good work and article of: Major Sean M. Watts & Captain Christopher E. Martin, *Nation Building in Afghanistan: Lessons Identified in Military Justice Reform*, ARMY LAW., May 2006, at 1.

² Brigade Judge Advocate, 41st BCT, Oregon Army National Guard, and Staff Judge Advocate (SJA), TF Phoenix V. Lieutenant Colonel (LTC) Hill has over nineteen years in service with more than three years on active duty, and the balance with the Oregon Army National Guard. Lieutenant Colonel Hill has been a judge advocate stationed at Fort Bliss for the U.S. Army Air Defense Artillery Center (USAADC) & Fort Bliss, deployed on REFORGER (Return of Forces to Germany) '88 with the 3d Armored Cavalry Regiment, and among other training exercises, has participated in annual training at the National Training Center with the 116th Cavalry (IDARNG). He has been deployed in support of Operation Southern Relief, Task Force Ponchartrain, New Orleans with the 41st BCT. Lieutenant Colonel Hill is an elected State Court Circuit Judge in Pendleton, Oregon for Umatilla and Morrow counties.

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⁴ To the best of known history, the original Phoenix mission was located at Bagram Air Field, under the 10th Mountain Division. The Special Forces established Camp Phoenix in the International Joint Stock Transportation & Forwarding Company (AFSOTR) trucking facility in Kabul, Afghanistan. Subsequently, Headquarters, Department of the Army (HQDA) approved and directed rotations to perform the PHOENIX mission, which officially started with the 4/31st Infantry, 2d Brigade, 10th Mountain Division and the 2/124th, 53d BCT (FL) from May - Nov. 2003. Subsequently, HQDA directed the Army National Guard Headquarters elements to act as the command and control element for the task force, including the 45th Brigade (OK) from Nov. - Sept. 2004, 76th Brigade (IN) from Sept. 2004 - July 2005, the 53d Brigade (FL), and now the 41st BCT (OR) from July 2006 - June 2007. Now in its fifth iteration, Phoenix is locally established operationally as a Combined Joint Task Force (CJTF) though current operational documents maintain Phoenix as a task force, with plans to seek CJTF designation pending.

⁵ Among other administrative matters, the Phoenix SJA worked extensively on joint operations issues within the U.S. forces assigned and attached to the CJTF Phoenix, and the nuances of command and control (C2).

⁶ The Islamic Republic of Afghanistan. CONST. OF AFGHANISTAN art. 1 (2004).

⁷ In the fall of 2006, attention turned to assisting the ANP, while still maintaining the ANA mentoring roll in conjunction with International Security Assistance Force (ISAF) Operational Mentoring and Liaison Teams (OMLTs) working under the Regional Corps Advisory Group (RCAGs), which may be under U.S. command (the Regional Corps Assistance Command – Provisional (RCAC)) or under command of a ISAF coalition partner.

⁸ Office of Security Cooperation – Afghanistan (OSC-A) was replaced by CSTC-A.

their brigades, the Kabul Military Training Center (KMTC), and the Ministry of Defense (MOD) JAs. These mentoring duties were in addition to their primary task of mentoring establishment of the military court system¹⁰ and mentoring the MOD and the Head of Legal, Department for the General Staff, ANA (Head of Legal).¹¹ The 41st BCT arrived with three JAs and two paralegal 27D's which were adequate to address Phoenix issues, but insufficient to engage in ANA mentoring, counseling, and training of ANA and ANP mentors and trainers.¹² The JAs at CSTC-A recognized a need for more legal staff to perform the broad range of mentoring duties. Prior to the 41st BCT's arrival, CSTC-A JAs established a mentoring program for the ANA Legal Corps by seeking to use Phoenix Regional Corps Advisory Group (RCAG) officers as legal liaison officers (LNO) for each Regional Corps Assistance Command (Provisional) (RCAC) (Prov.).¹³ Fortunately, Phoenix received an additional three JAs from the Utah National Guard.¹⁴ With the permission of the Phoenix Commander,¹⁵ the Phoenix Staff Judge Advocate (SJA) assigned these additional JAs as command judge advocates (CJAs) for three of the six provisional Afghan Corps commands. As CJAs, they advise and counsel the RCAC commander, assist the CSTC-A JAs with mentoring, and work alongside the RCAC commander and mentors on resolution of all legal issues arising within the Afghan Corps, ANA. The Training Assistance Group Command (TAGC or TAG) assigned the final JA to Phoenix although he was also assigned as the legal advisor for the 207th and 209th RCACs.¹⁶ At the earlier request of the Phoenix SJA, the RCAC commanders assigned Navy officers as legal LNO's to the 207th and the 209th RCACs. In the late fall, another surprise arrived in the form of a sergeant first class (SFC) 27D from another RFF who was assigned to the 209th RCAC.¹⁷

International Security Assistance Force's Role in the Combined Joint Operational Area (CJOA)

The International Security Assistance Force (ISAF) assumed "control" of the Afghanistan CJOA on 5 October 2006. The ISAF had not developed a plan to provide the ANA with ISAF JA mentors.¹⁸ The ISAF has assumed operational command of the RCAGs in the 207th and 209th Corps areas.¹⁹ There the Coalition Forces Operational Mentoring and Liaison Teams (OMLTs) have reduced the need for U.S. Embedded Training Teams (ETTs). However, with the U.S. priority

⁹ The CSTC-A has generally had only two JAs assigned to conduct mentoring. At this writing the JAs were Commander Adrian Rowe and Lieutenant Commander (LCDR) Scott Johnson.

¹⁰ The CSTC-A JA mentors successfully guided the MOD and assisted them in creating the ANA military courts in the five corps.

¹¹ Described in the Law of Military Courts, and is comparative to the U.S. Army, The Judge Advocate General (TJAG).

¹² The BCT Modified Tables of Organization and Equipment (MTOE) carries two JAs and one paralegal 27D. The "notional" joint manning document for Phoenix carried this same number. Phoenix is not a MTOE or a Table of Distribution and Allowances (TDA) organization as is commonly understood. Each iteration of Phoenix is manned by using a Joint Manning Document, which is similar in nature to both an MTOE and TDA organization, with specific positions to fill, yet allows "commanders choice" positions to be filled to manage the mission to the commanders intent. In the case of Phoenix, with the surprise addition of the Utah National Guard JA's, the Phoenix commander chose to assign them as JA as well as use commander's choice options to make a more robust judge advocate general (JAG) section for the anticipated mission. Due to the nature of Phoenix, flexibility is critical to meet the needs, and opportunity must be taken when available. Both The Office of the Judge Advocate General and Headquarters Department of the Army G3 were largely unaware of the nuances to Phoenix manning as a hybrid organization. Due to clear operational requirements of a BCT in this environment, a third JA was critical at Phoenix to perform legal assistance and claims services to leave the operational law/trial counsel free to perform those duties and the staff judge advocate free of conflicts. Moreover, the third JA was determined to be critical to provide independent legal advice to summary courts-martial officers.

¹³ The RCAGs continue to be the entity responsible for training and mentoring and may be commanded by a U.S. or International security Assistance Force (ISAF) commander. Where U.S. commanders command the RCAG, they are dual-hatted as the RCAC commander. The Phoenix SJA was tasked to prepare the requesting documents to create the six provisional commands in CJTF Phoenix V.

¹⁴ The Utah National Guard JAs arrived in response to a request for forces (RFF) augmentation to the notional joint manning document (JMD). The Phoenix JMD was created for each Phoenix mission and is a skeleton essentially setting minimums for manning and allowing the commander to add to functional areas by commander's choice options, and to be able to fill out future mission needs with RFFs and unit requests for forces (URFs).

¹⁵ Brigadier General Douglas A. Pritt, Commander, 41st BCT and CJTF Phoenix V.

¹⁶ First Lieutenant (1LT) Scott Delius, Georgia ARNG. Note that these RCACs were only the RCAC with the RCAG function now vested with the Operational Mentoring and Liaison Teams (OMLT).

¹⁷ Legal liaison officer's in Phoenix are LCDR Beltran and LCDR Edwards. The LNO's cannot give "legal advice" and are instead the eyes and ears for the legal mentors who provide guidance from afar. Sergeant First Class Tiona Harrison joined the 209th as their legal Non-Commissioned Officer (NCO) in November 2006.

¹⁸ The ISAF has three legal advisors at the ISAF headquarters and generally one legal advisor at each regional corps (RC) headquarters, mostly all on short tours. There has been some interest in developing legal support for the ANA JAs by ISAF, the Canadian Expeditionary Forces Command, Senior Legal Advisor.

¹⁹ The RCAG is the term used to describe the training and mentoring function of the Coalition command, whereas the RCAC, was created as provisional command U.S. units to provide for UCMJ authority in the RCACs. A U.S. commander, therefore, can be dual hatted as both the RCAC commander and the RCAG commander.

of reconstruction effort now being on the ANP, including development of the ANAP, the ETTs in the Corps areas were fully engaged in ANP reconstruction mission.²⁰

The ISAF RCAGs and ISAF OMLTs are located in U.S. camps under the training control (TRACON) of Phoenix. While the OMLTs are assuming mentoring missions, when they arrive the teams do not include a legal advisor or JA.²¹

Mentoring the ANA JA

The mission of mentoring ANA legal officers and counseling their U.S. mentors is a new task for JAs. Dealing with legal issues that arise with their ANA counterparts is not a task covered in the *2006 Operational Law Handbook*.²² The task of mentoring rather than teaching the ANA JA in the recently adopted military code, trial process,²³ and in the application and effective use of these processes, is difficult. Even the translation from Dari to English has proven to be a challenge due in part to translation errors and difficulties in interpretation of the Dari intent. Moreover, the role is to mentor, not truly teach, and certainly not to take actions for them, as they need to make decisions and act for themselves.

The Afghan Law of Military Courts

The ANA military code, the “Afghan National Army Law of Military Courts” or “Law of Military Courts” is commonly referred to as the AUCMJ.²⁴ The AUCMJ is less than a year old and consists of a mere eighty-five pages²⁵ whereas the United States Uniform Code of Military Justice (UCMJ) and *Manual for Courts-Martial* (MCM)²⁶ is over fifty years old and has over 900 pages. In part due to its recent adoption, and also due to significant challenges in communication within the organizational structure of the ANA, many ANA Soldiers and commanders did not understand the applicability of the AUCMJ. There is evidence that some commanders in the ANA are still applying the Soviet system of military justice which they understand.²⁷

The AUCMJ was drafted by CSTC-A JAs and was largely based on the UCMJ. The AUCMJ was approved by the Afghan President and Parliament after some changes by the Government of Afghanistan. The AUCMJ is clearly Afghan in application with punitive articles that address issues specific to Afghan culture and standards of conduct. The AUCMJ is not strictly based in Shari’a law as it pertains to military offenses; however, the AUCMJ provides the ability to incorporate other non-military offenses covered by other Afghan laws when the offense is not included in the AUCMJ.²⁸ This allows for the addition of elements of Shari’a law. Jurisdiction between civilian and military courts is concurrent. When the victim is a civilian and the offense is not specifically listed in the AUCMJ, one can expect jurisdiction of the Soldier to be assumed by the Afghan civilian authorities even though assimilation of civil penal law is available as well as prosecution for the offense within the military courts.²⁹ In those instances where assimilation might take place, the offense will have most likely taken place outside of the Soldier’s military duty with civilian victims. Assimilation generally involves the *Afghan Civil Penal*

²⁰ The 207th RCAG ISAF element and the 209th RCAG are now being staffed by the Italians and the Germans under the Training Control (TRACON) of Phoenix.

²¹ In particular the 207th Corps, Herat, Afghanistan and the 209th Corps, Mazar-e-Sharif (MeS), Afghanistan.

²² INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK (2006).

²³ Trials have not taken the course of a true adversarial system. See also ANA LAW ON MILITARY COURTS art. 12 (Sept. 25, 2005) [hereinafter ANA LAW ON MILITARY COURTS].

²⁴ The AUCMJ refers to the Afghan National Army Law of Military Courts (2005) (Law of Military Courts), consisting of the *Military Criminal Procedure Code*, the *Punitive Articles* and the *Nonjudicial Punishment Code* (for resolution of offenses without trial or nonjudicial punishment (NJP)).

²⁵ By presidential decree, the Military Courts Laws were effective 25 September 2005. Presidential Decree on the Approval of the Military Court Laws Decree No. 81 (25 Sept. 2005).

²⁶ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005).

²⁷ Report by Major Waldron, 205th RCAC CJA (19 Sept. 2006). This lingering acceptance may flow through to the highest levels of command.

²⁸ AUCMJ art. 47 (punitive articles).

²⁹ REPUBLIC OF AFGHANISTAN, PENAL CODE, AUCMJ art. 47 (7 Oct. 1976).

Code, which survived through several transitions of power and was resurrected after the fall of the Taliban.³⁰ The *Afghan Civil Penal Code* represents an amalgamation of Western, moderate Islam, and radical Marxist thought, and therefore creates some interesting twists in application of facts of any case to a given offender.³¹

Afghan law is generally based in the Islamic and Shari'a laws,³² and is consistent with the beliefs and provisions of Islam because of specific provisions in the Afghan Constitution.³³ The written Afghan law unofficially coexists with the traditional law of the Jurga or Shura, which has greatly assisted in maintaining local social stability.³⁴

The Afghan people's acceptance of other legal philosophies has made the development of the AUCMJ possible but does not displace Shari'a law which derived generally from the Quran, resulting in Quranic laws. The application of strict Shari'a legal concepts for punishment is counter productive to rehabilitation, which is required in a military justice system where the overall goal is to have Soldiers trained and ready to fight the nation's wars and defend it from all enemies.³⁵ The Taliban applied strict punishments to all, including flogging, amputation, and stoning.³⁶ However, the vast majority of Islamic nations currently no longer apply the traditional corporal punishments for violation of specific Quranic criminal laws.³⁷ Under the Afghan Constitution, and based on the application of Shari'a law, the punishment for offenses other than those established by written law is essentially prohibited.

Mentoring ANA JAs and counseling U.S. mentors (including U.S. ETTs,³⁸ U.S. Logistics Support Teams (LSTs),³⁹ and ISAF OMLTs) is exceptionally difficult given the complexity of the Afghan legal system and cultural contradictions within Afghan society.⁴⁰ Afghanistan's history of war as well as invasion and occupation has resulted over the centuries in the peoples' general acceptance of law of various foreign forces.⁴¹

³⁰ For a historical perspective, this law was created during the period of power by Mohammed Daoud who took control in 1973 and who was considered a Soviet lackey by the West. Insurgents killed Daoud on 27 April 1978 and power turned over to the communists, which proclaimed the country to be the "Democratic Republic of Afghanistan." Even with this sea of change, the 1976 criminal code stayed in place, with punishments from the extreme death by hanging, to confinement, fines, forfeitures, and loss of privileges. STEPHEN TANNER, *AFGHANISTAN, A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE FALL OF THE TALIBAN* 229 (2002).

³¹ AFGHANISTAN'S DOMESTIC LEGAL FRAMEWORK 444 (2005). The Senlis Council, Drug Policy Advisory Forum (David Spivack & Professor Ali Wardak), *Feasibility Study on Opium Licensing in Afghanistan for the Production of Morphine and Other Essential Medicines* (2005), available at http://www.senliscouncil.net/modules/publications/008_publication/domestic_law_exec_summ..

³² Shari'a law is based on offenses that are considered an affront to Allah and are mentioned in the Quran. SHARON OTTERMAN, *ISLAM GOVERNING UNDER SHARIA, SHARIA LAW BACKGROUND AND OVERVIEW FROM THE COUNCIL ON FOREIGN RELATIONS, A NONPARTISAN RESEARCH ORGANIZATION* (2005).

³³ See CONST. OF AFGHANISTAN art. 2 (2004).

³⁴ The Senlis Council, Drug Policy Advisory Forum (David Spivack & Professor Ali Wardak), *Feasibility Study on Opium Licensing in Afghanistan for the Production of Morphine and Other Essential Medicines* (2005).

³⁵ Some Quranic offenses punished under Shari'a law are counterproductive to military rehabilitation. Five such counter productive punishments are known as the Hadd offenses and include: wine-drinking and, by extension, alcohol-drinking, punishable by flogging; unlawful sexual intercourse, punishable by flogging for unmarried offenders and stoning to death for adulterers; false accusation of unlawful sexual intercourse, punishable by flogging; theft, punishable by the amputation of a hand; highway robbery, punishable by amputation of an appendage, typically a hand, or execution if the crime results in a homicide. OTTERMAN, *supra* note 32.

³⁶ *Id.*

³⁷ AFGHANISTAN CONST. art. 27.

³⁸ ETTs are U.S. service members. They train, coach, teach, and mentor the ANA.

³⁹ LSTs are U.S. service members. They work to sustain, assist and develop the ANA.

⁴⁰ For instance, alcohol and drugs, which are strictly prohibited by Afghan law (written and customary in Shari'a), are not only used in abundance but quietly tolerated, with Afghanistan currently producing the vast majority of the world's illicit opium supply.

⁴¹ Acceptance of the AUCMJ has a caveat. It has been noted by the author that in accepting the AUCMJ, the Afghans will tell you what they think you want to hear, not ordinarily out of any intent to deceive, but out of intent to please and avoid the humiliation of failure. Further mentoring is usually required to assure that action takes place.

Training the ANA and Mentoring the Trainers

There is a multifaceted approach to military justice within the Afghanistan CJOA. Phoenix military justice instruction begins at the KMTC where the Afghan JAs must instruct in both Dari and Pashtu. There is little reliance on written instruction due to low literacy rates. The KMTC provides training at the unit level regarding the use of the AUCMJ by the chain of command, compliance with the LOAC, and ANA JA training of ANA troops at their level. Initially, the Phoenix SJA assisted the CSTC-A legal mentors with schedules and the establishment of courses for ANA training at KMTC. This includes the distribution of the AUCMJ to the field for U.S. mentors. In pursuing the implementation of the training activity, it was noted that at times, the ANA JAs would request U.S. JAs conduct the training for ANA troops even though the ANA JAs had been fully trained to conduct this training themselves. Given the chance, the Afghan Soldier or officer will allow the U.S. mentor to complete tasks that they should be performing for themselves.

Acceptance of the AUCMJ by the ANA would be a tremendous step forward for the rule of law. One more step would be the ANA's acceptance of the President's authority over the ANA under the Afghan Constitution.⁴² Currently the ANA generally accepts the AUCMJ where the code is known. Reports from the field indicate that lower level ANA units doubt the existence of the AUCMJ and orders implementing it. These reports support the continuing need for a JA mentor for the ANA Corps SJA. There is also a continuing need for a U.S. mentor to mentor the corps commander, and where OMLTs are conducting the mentoring, coordination for JA support to mentor the ANA JA's. This effort will reinforce and facilitate the existence and use of the AUCMJ within the ANA.⁴³ Based on the influence of JA Mentors from CSTC and the RCACs,⁴⁴ the ANA has decreased the use of Taliban-type punishments and is beginning to use corrective training (liberally defined). There is evidence of limited use of the AUCMJ, including non-judicial punishment and courts-martial, to deal with ANA Soldier misconduct.

Military Courts in the Corps

Each of the five corps has a "basic" military court, which is presided over by three judges⁴⁵ (Qazi), and staffed by an SJA, a deputy SJA (DSJA), at least one prosecutor, and at least one defense counsel.⁴⁶ There is also an SJA and DSJA at the brigade level.⁴⁷ Interestingly, MOD has no separate court; therefore, issues within MOD would in theory be tried in the 201st Corps area, also referred to as the "central corps." Another jurisdictional problem has arisen with military organizations who are not part of the corps, yet are located in the corps area, but without the equivalent of a general courts-martial convening authority. Eventually, this problem may be reflected in MOD itself. Appeals from the basic military court are to the military court of appeals (MCA) by a panel of three judges.⁴⁸ Appeals can also be de novo depending on the type of case presented to the military court of appeals. Appeals from the MCA are to the civilian Supreme Court of Afghanistan (Stara Mahkama). The Supreme Court consists of the chief judge and nine senior judges. Records of trial on which to base appeals to either the MCA or the Supreme Court remain a significant problem due to poor recording methods at the lower court proceedings. For example, many trials use "recordings" recorded by a standard stereo cassette recorder and the record of trial is the government's file.⁴⁹

⁴² AFGHANISTAN CONST. art. 122.

⁴³ Verbal Report to Phoenix SJA by Major Paul Waldron, 205th RCAC CJA, in Khandahar, Afghanistan (Sept. 2006).

⁴⁴ An August 2006 example at KMTC was the "corrective" training of ANA soldiers who had been fighting by having them hold large bricks during a training seminar rather than imposing NJP. This is radically different from earlier disciplinary methods which probably would have comprised of beating the culprit with a large stick.

⁴⁵ Judges are appointed by the President of Afghanistan as a separate authority beyond being the Commander in Chief of the Military. See AFGHANISTAN CONST. art. 64 (2004).

⁴⁶ If any ANA JA is a trained lawyer, it probably is the defense attorney. The ANA JAs are tested and then certified by the Head of Legal, but they are not usually trained lawyers. The ANA maintains a strict ethnic quota, allowing only certain percentages of ethnic populations to be within the ANA to maintain the ethnic balance, and this balance exists as a selection criterion to maintain the national ethnic balance within the legal department.

⁴⁷ Brigades have an MTOE for two JAs and an NCO. These personnel are now being placed at the brigade structure.

⁴⁸ ANA LAW ON MILITARY COURTS, *supra* note 23, art. 12. The court is composed of five judges.

⁴⁹ Trials in the ANA are really conducted in a modified adversary system. The defense counsel has all rights to attend all investigatory and trial proceedings and has all rights to see the government file. That file may include defense documents such as witness statements for both government and defense. In the absence of witnesses, ANA judges are "free" to consider the evidence contained in the file, consider the weight of such evidence, and convict or acquit on such evidence. The implied presumption being that both the government and defense counsel have had equal opportunity to develop their case, obtain statements, counter statements and address the other sides evidence by submission of matters into the government file. Essentially this process is the "discovery" process, as well as a winnowing of the evidence to theoretically acceptable relevant evidence. Currently CSTC-A Strategic Reform Directorate (SRD) JAG is introducing the concept that maybe the government and the defense can have separate files too, but under the concepts of Afghan law as

The Role and Responsibility of the ANA Head of Legal

The ANA Head of Legal, our equivalent of the Judge Advocate General, is responsible for all legal operations including the military judges within the ANA.⁵⁰ The Head of Legal conducts testing for applicants to the ANA Legal Corps. This testing is the primary means to determine who is qualified as an ANA JA. Few applicants for ANA JA assignments are actually legally trained, hence the reliance on the testing. The MOD is the final approval authority regarding the organization, structure, and personnel staffing of the ANA legal department. The MOD's authority is subject to the constitution and the military courts law, which established the ANA military court system.⁵¹ The ANA military court system is separate and apart from the provincial court system (courts of appeal) which has jurisdiction of civilian cases.⁵²

CSTC-A's Mentoring Program for ANA Head of Legal

The CSTC-A established a mentoring program for the ANA Head of Legal.⁵³ The CSTC-A Legal Mentor's role is to provide "top down" mentoring primarily to the Head of Legal, ensure legal training at KMTC, and assist in establishing the ANA Corps JAs, military judges, and basic courts. Phoenix JAs on the other hand, work to provide ANA JAs and officers mentoring from the bottom up, assisting with resolution of legal issues up to the corps and MOD levels.

Mentoring the ANA Judge Advocate and Counseling the U.S. Mentor

In addition to the many roles of the RCAC CJA's, they also assist with the application of non-judicial punishment under the AUCMJ by the commanders at the corps and subordinate ANA units.

The Phoenix SJA also established a mentoring and counseling program for U.S. mentors to facilitate reports of ANA and ANP crime and corruption through the CJ3 (operations). The mentors provide a legal channel for review, advice, and coordination to the appropriate ANA Commander for action or investigation. The Phoenix SJA and RCAC CJAs essentially provide advice and counsel to the U.S. mentor regarding the application of the AUCMJ by the ANA Commander. This advice includes initiating preliminary investigations at the lowest responsible command level. When a commander refuses to investigate, the matter is addressed to the next level commander until a matter warranting investigation is properly investigated. While the U.S. mentor is teaching and coaching his ANA commander counterpart, the CJA is mentoring the ANA SJA on the same issue. In addition, the interplay with the CJA and the RCAC commander should reflect the relationship that the corps commander should have with his ANA SJA, so that the ANA Corps commander views the ANA SJA as an invaluable part of the command team.

The JAs assistance to the U.S. mentor is crucial because the U.S. mentor typically assists the ANA commander (or senior staff officer) in the areas of operations, training, and logistics as well as in the areas of command responsibility. The U.S. mentor has little time to learn how to apply the law to all areas of command responsibility. Moreover, one cannot expect the ANA Corps commander and other subordinate commanders to have thoroughly read the AUCMJ or to have had anyone explain its use in depth to them. In many instances, the ANA commander would prefer to have the issue handled by the U.S. mentor and, if allowed, will generally avoid applying themselves to resolution of the issue. Experience has shown that if an Afghan commander can get the United States or any coalition force nation to do it for them, or buy it for them, the Afghan commander will do so, and avoid doing it for themselves with their own resources.⁵⁴ There may even be an effort by the ANA commander to get the United States to investigate the allegation of corruption or criminal activity. The U.S. mentor must instead mentor the ANA commander and teach them to use their investigative authority under the AUCMJ and the

developed over time, this fact finding mission by government and defense counsels to seek the truth seems to have significant advantage in finding the truth, as opposed to endless discovery motions, objections and hearings, and trial by ambush. We American's tend to take shelter in the tactical shadows of technical legal process, whereas the Afghan JA seeks to cooperatively seek the truth with his counterpart. We should not force every nuance of the American legal system onto the Afghans as they will find their own way on the road to a functional military court system.

⁵⁰ At this writing Brigadier Shir is the ANA Head of Legal.

⁵¹ ANA LAW ON MILITARY COURTS, *supra* note 23, arts. 11 and 12.

⁵² See AFGHANISTAN'S DOMESTIC LEGAL FRAMEWORK 448 (2005).

⁵³ Commander Adrian Rowe (U.S. Navy), LCDR Scott Johnson (U.S. Navy), CSTC-A JAs.

⁵⁴ A common occurrence is a request from an ANA commander for more of anything, for instance, ammunition, saying they have none, when they have a full connex. This inclination to horde results at time with cross accusations between coalition partners of why one is not supporting the ANA when in fact they are more than fully supported and just want more.

punitive articles to address substantiated allegations. As part of the mentoring process, the U.S. mentor must follow up to ensure that something is actually done about the allegations. After a mentoring session on allegations, the ANA commander will often tell the U.S. mentor that they support the AUCMJ, that it is a great system, and that they will take action. However, just because the Afghan commander says they will do something does not mean that they will not find some reason to avoid taking any dispositive action.⁵⁵ For example, a corps commander referenced the end of Ramadan, (the Eid) as a reason to release a major military criminal from confinement. Fortunately, the CJA was able to mentor the ANA SJA, RCAC commander, and corps commander and dissuade them from releasing the prisoner.

The ANA SJAs and Corruption in the ANA and Government of Afghanistan

Serving as the SJA for an ANA corps or brigade is not only difficult, it is dangerous in Afghanistan. Senior ANA officers have been known to threaten SJAs and their families if the SJA advises or counsels others within the command to proceed with a corruption or criminal investigation. The investigative process is further hindered when the major suspects of corruption in the ANA are extended family or tribal members of individuals who are in power within the Government of Afghanistan. Even when corruption or criminal activity is addressed in the higher levels of the ANA or the Government of Afghanistan, the major suspects are often reassigned to another organization or ANA unit before evidence to support prosecution is obtained. Such reassignments occur even after an investigation is completed to avoid prosecution.

In Afghan culture, an individual's tribal or political position often trumps the results of an investigation (if one can even be initiated against the suspect) and prevents prosecution of the offender. Crimes that result in physical harm to victims are generally not tolerated in the Afghan culture, but economic "corruption," which takes resources out of the system,⁵⁶ or applies an extortion tax upon those providing or intended to receive the resources, is generally accepted as a way life in Afghanistan.⁵⁷ In short, reducing the amount of criminal activity is much easier than reducing economic corruption in the ANA and in Afghanistan in general. Economic corruption is accepted as a means of survival and many individuals have found success as a result of their corrupt actions.

Before one can mentor an ANA officer, and before the JA can advise and counsel the U.S. mentor, both the U.S. mentor and JA must discern if the ANA commander or officer can be trusted with information about allegations of corruption or criminal activity.⁵⁸ The ANA commander or officer may be related to the suspect or may be a member of the same tribe or village. Information regarding allegations shared with the suspect often leads to threats and other obstacles that interfere with the investigation. It is not uncommon for evidence to be destroyed or disappear when turned over to the ANA for investigation.

Humiliation is a significant issue in Afghan culture. So much so that several punitive Articles in the AUCMJ address humiliating acts.⁵⁹ Practically, throughout the mentoring process, JAs and U.S. mentors must look for ways to allow the commander or Soldier to save face and avoid humiliation when addressing crimes and corruption in the ANA. Afghans may refuse to provide evidence against a relative, or a person in a position of power, if the risk of humiliation is too great.

Where the ANA officer (or the family) is considered to be a risk, the U.S. mentor must report the allegations up the successive chain of command to address them at a higher level. Allegations must often be dealt with at the ANA Corps level because MOD has limited ability to conduct investigations. Unfortunately, some cases have established a clear need for a strong central investigative organization similar to the Army's Criminal Investigation Division Command (CID).⁶⁰ The use of ANA special prosecutors might also be useful to decrease or end personal threats against ANA SJAs, brigade JAs, and their prosecutors. The good news is that through U.S. JA mentoring, the ANA JA, and especially the ANA commanders, are seeking guidance, support, and direction from higher headquarters. Appropriate actions, that include some major

⁵⁵ Common stated causes for inaction include: lack of resources, computers (that they cannot operate anyway, but it's a status symbol to have), lack of time, and that they are overworked. None of these reasons have appeared to be real causes for inaction.

⁵⁶ In particular, U.S. resources that presumptively the United States will replace.

⁵⁷ For instance, the ANA pay officer that requires "tips" to pay the troops, or the "commander" that requires the local nation contractor to pay money to continue to operate in his area.

⁵⁸ The Phoenix SJA tracks reports from the field on crime and corruption and seeks to push those reports back to the mentors for further action or uses them as an update for incoming mentors. The Phoenix SJA also tracks the "reassignment" of ANA officers based on their misconduct and the reassignment given by their superiors as a result, to provide general situational awareness for the mentors, and to see if the action has any effect.

⁵⁹ AUCMJ LAW OF MILITARY COURTS arts. 22 and 23 (2005).

⁶⁰ At this time efforts are being made to form up, select, train and employ ANA CID agents, but the concept is still in its infancy.

prosecutions are taking place within the ANA Military Justice System, such as the general officer who was placed in pre-trial confinement and prosecuted for assaulting one of his Soldiers so badly that the Soldier was hospitalized.⁶¹ This trial of a general officer is a first in the history of the ANA and sends the strongest possible message to the ANA Soldiers regarding the use of the AUCMJ and the inception of the rule of law in Afghanistan.

Results of Investigations

Punishment of the accused does not always result even when there is a comprehensive investigation and prosecution resulting in a conviction. Afghan confinement facilities are limited to informal detention facilities on the ANA corps grounds, often with fencing on three sides and an open door without guards.⁶² Owing to an agreement with MOD legal, civilian confinement facilities are typically used for military prisoners. Civilian confinement facilities are not a good option because there is no military oversight of the military prisoners.

The AUCMJ is not yet widely used within the ANA and is only minimally effective in addressing the long-standing problem of crime and economic corruption in Afghan culture. Similar to the United States Old West after decades of war, and changes in national authority, the rule of law is slowly being introduced to the Afghanistan people. Minor offenders engage in economic corruption in part because they see major offenders getting away with the same thing. Offenders are relatively few, but crime and corruption appears pervasive based on reports of criminal activity and corruption and from media sources. Corruption and abuse of Soldiers by ANA officers and senior NCOs discourages service in the ANA and is a major hindrance to recruiting and Soldier retention.

Application of the AUCMJ and enforcement of its provisions is a critical tool in reducing crime and corruption in the ANA. This is a time consuming task, often requiring major cases that involve powerful or politically connected officers to go directly to the highest levels of MOD for investigation and resolution.

Conclusion: JAG at the Tip of the Spear

The United States has significant strategic reasons for helping the ANA, the ANP,⁶³ and other Afghan security forces, become operational and better skilled at providing security and law and order for the people of Afghanistan. Strategic goals for U.S. foreign policy in Afghanistan include assisting Afghanistan in becoming a self-sufficient stable democracy, denying safe harbor to terrorists, and improving the friendship with the United States in the Middle East. The United States' best course of action in the short term is to address victim-based crime and accept that economic corruption within the Afghan culture will not disappear overnight and methods must be sought to address this issue over the long term. Still, crime and corruption adversely affect ANA soldiers (and the ANP), and detracts from recruiting and personnel retention. The issue needs to be forcefully addressed by U.S. mentors with the highest levels of U.S. command in the Afghan CJOA.

All coalition forces, including the United States, agree that the rule of law is critical for the development of the ANA, the ANP, and Afghanistan as a country. United States JAs are major contributing factors in establishing the rule of law in the ANA (and soon the ANP) through mentoring of the ANA JAs, counseling and training U.S., ANA, and ANP mentors in Afghan law; and more importantly, by assisting in the resolution of crime and corruption cases in the ANA. More recently, the JAs have begun to assist the Government of Afghanistan with ANP corruption issues as CSTC-A and Phoenix change the priority of effort to the reconstruction of the ANP.

In the Afghanistan CJOA, The Judge Advocate General's Corps Regiment through CSTC-A and Phoenix JA play an important role in the U.S. achievement of its strategic goals in Afghanistan. The U.S. JAs are not only the tip of the spear, they sharpen the tip of the spear and help the rule of law stick to the fabric of Afghanistan's developing democracy.

⁶¹ The particular ANA general officer also was probably one of the many ANA Officers who frocked themselves to a higher rank without objection by their superiors.

⁶² At the 203rd Corps Detention B-Hut post trial confinees just walked away. Moreover, in September 2006, the 201st Corps ANA guards allowed a prisoner to escape.

⁶³ The 207th RCAC, Herat, played a key role in initiating the Phoenix mentoring for the ANP, with follow on missions now in the 209th (MeS) and 205th (Kandahar). Private contractors work the regional training facilities in conjunction with the Germans, but little is done with the police that are fielded for training and mentoring. In order to make the 62,000 (goal now 82,000) strong ANP an effective force, training, proper pay, and elimination of corruption is an essential task. At this time, the Phoenix SJA has assembled and developed legal materials to provide to the senior mentors for use in the field, as well as conducted initial legal training for ANP ETTs.