

Foreign Consequence Management: Humanitarian Assistance from a Bubble Suit

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I. Introduction

On 11 March 2011, at 2:46 p.m., a 9.0 magnitude earthquake struck off the northeast coast of Japan's Honshu Island.¹ This was one of the five largest earthquakes ever recorded.² The earthquake precipitated a 128-foot tsunami that ravaged up to six miles inland of Northern Japan, which left an estimated 4.4 million citizens without electricity and 1.4 million without water.³ It also caused the death of approximately 20,000 people.⁴ The earthquake damaged the Fukushima Daiichi nuclear power plant located on the east coast of Honshu Island.⁵ The tsunami crippled the power plant's primary and secondary electrical systems and severely damaged the plant's cooling capacity.⁶ This caused a release of radioactive material into the surrounding region.⁷ Immediately following the disaster, the Government of Japan formally requested assistance from the United Nations and the Government of the United States.⁸ This request triggered the U.S. Government's (USG's) first ever Foreign Consequence Management (FCM) mission.⁹

Foreign Consequence Management is the assistance provided by the USG to an impacted nation in order to mitigate the effects of a deliberate or inadvertent chemical, biological, radiological, or nuclear (CBRN) incident.¹⁰ The key elements of FCM consist of the USG's efforts to assist partner nations to respond to CBRN incidents and the interagency coordination of the USG's response.¹¹ Foreign Consequence Management specifically does not include: (1) acts of nature or man that do not involve CBRN materials, (2) domestic CBRN incidents, (3) CBRN incidents on U.S. facilities overseas where the United States maintains primary responsibility over the incident, and (4) CBRN incidents resulting from U.S. military operations in a foreign country where the Department of State (DoS) does not maintain an established presence.¹² The National Strategy to Combat Weapons of Mass Destruction (WMD) identifies FCM as an integral component of the three pillars to combat WMD.¹³ The USG must be prepared to respond to overseas incidents involving CBRN to protect U.S. citizens and its armed forces, as well as its friends and allies.¹⁴ As a consequence, the Department of Defense (DoD) must be fully prepared to support USG FCM operations.¹⁵

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¹ See Commander Jonathan G. Odom, *Doing Our Utmost to Help a Friend in Need*, JAG MAG., vol. 14, no. 2 (2011), http://www.jag.navy.mil/news/jag_mag/archive/2011_VOL2/2011%20JAGMAG_II_Doing%20our%20utmost%20to.pdf.

² *Id.*

³ See Captain Craig Goodman, Captain Carlene Wilson, Commander Jeffery Buss & Lieutenant Ryan Tashma, *Navy Information Professional Support Operation Tomodachi* (July 2011), <http://www.doncio.navy.mil/CHIPS/ArticleDetails.aspx?ID=2490>.

⁴ See THE AM. NUCLEAR SOC. SPECIAL COMMITTEE ON FUKUSHIMA, FUKUSHIMA DAIICHI: ANS COMMITTEE REPORT 1 (2012).

⁵ *Id.*

⁶ See Odom, *supra* note 1, at 6.

⁷ *Id.*

⁸ See Dana M. Herbert, James A. Prosser & Rachele A. Wharton, *A Cost Analysis of the Department of the Navy Humanitarian Assistance and Disaster Response to the 2011 Tohoku Earthquake and Tsunami* 8 (June 2012) (unpublished MPA Professional Report, Naval Postgraduate Sch.) (on file with Dudley Knox Library, Naval Postgraduate Sch.), available at http://calhoun.nps.edu/public/bitstream/handle/10945/7356/12Jun_Herbert_Prosser_Wharton_MBA.pdf?sequence=1.

⁹ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-41, CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR CONSEQUENCE MANAGEMENT, at III-5 (21 June 2012) [hereinafter JOINT PUB. 3-41].

Broadly speaking, the DoD's responsibilities for FCM events are to mitigate human casualties and to provide (and restore) associated essential services.¹⁶ This is typically accomplished by the provision of specialized personnel and equipment required by CBRN incidents.¹⁷ Military

¹⁰ *Id.* at III-1. *But see* U.S. DEP'T OF DEF, INSTR. 2000.21, FOREIGN CONSEQUENCE MANAGEMENT para. 1 (10 Mar. 2006) [hereinafter DoDI 2000.21] (including "high yield explosive incidents" as an additional category of incidents to which Foreign Consequence Management (FCM) applies).

¹¹ *Id.*

¹² See DoDI 2000.21, *supra* note 10, para. 2; JOINT PUB. 3-41, *supra* note 9, at III-3. The U.S. military will lead chemical, biological, radiological, or nuclear (CBRN) consequence management operations that are conducted concurrently with military operations in hostile environments where the Department of State (DoS) has no established presence. *See id.* at IV-1.

¹³ THE WHITE HOUSE, NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION (Dec. 2002), available at <http://www.fas.org/irp/offdocs/nspd/nspd-17.html> [hereinafter NATIONAL STRATEGY TO COMBAT WMD]. The three pillars of the National Strategy are to combat WMD, strengthened nonproliferation to combat WMD proliferation, and consequence management regarding the effects of a WMD incident. *Id.*

¹⁴ *See id.*; *see also* DoDI 2000.21, *supra* note 10, para. 4.

¹⁵ See DoDI 2000.21, *supra* note 10, para. 1.

¹⁶ See JOINT PUB. 3-41, *supra* note 9, at III-1; DoDI 2000.21, *supra* note 10, encl. 2.

¹⁷ See JOINT CHIEFS OF STAFF, INSTR. 3214.01D, DEFENSE SUPPORT FOR CHEMICAL, BIOLOGICAL, RADIOLOGICAL, AND NUCLEAR INCIDENTS ON FOREIGN TERRITORY para. A-2 (31 Dec. 2011) [hereinafter CJCSI

commanders may also be obliged to respond as necessary to save human lives when imminently serious conditions result from a foreign emergency or attack.¹⁸ By function, FCM operations and foreign disaster relief missions are closely related.¹⁹ Therefore, commanders must coordinate all FCM efforts with “other USG overseas response operations including but not limited to noncombatant evacuations, foreign disaster relief, [and] humanitarian assistance” operations.²⁰

Because the DoD has significant responsibilities regarding FCM events, judge advocates should be cognizant of this mission and its implications for future operations.²¹ In addition, the fast-moving, exigent nature of FCM missions necessitates that judge advocates contribute in every aspect of FCM planning and execution. Therefore, the purpose of this article is to present the gestalt of FCM operations and explain the DoD’s role therein. In doing so, it will first survey the legislative and executive authorities calling for DoD involvement in FCM operations. It will then review the process by which host nations request assistance from the USG and the phases of FCM operations. Finally, it will survey the basic funding mechanisms likely to be used in FCM operations. From a review of these issues, the judge advocate will quickly surmise the importance of the DoD’s FCM mission and the complex legal environment associated with its operations.

II. FCM Authorities

If a CBRN event occurs in a foreign country, there are a number of authorities that govern the USG’s response.²² The two major legislative authorizations, which sanction the DoD’s response to an FCM incident, are the International Disaster Assistance section of the Foreign Assistance Act (FAA) and the humanitarian assistance authorities found in

3214.01D]. See also JOINT PUB. 3-41, *supra* note 9, at III-9-11 (describing specialized units in the Department of Defense (DoD) available to respond to FCM incidents).

¹⁸ See DoDI 2000.21, *supra* note 10, at 3.

¹⁹ See CJCSI 3214.01D, *supra* note 18, at 3. See also JOINT CHIEFS OF STAFF, JOINT PUB. 3-29, FOREIGN HUMANITARIAN ASSISTANCE, at x (17 Mar. 2009) [hereinafter JOINT PUB. 3-29]. Relief missions include the prompt aid provided by the U.S. Government (USG) in response to natural disasters in order to alleviate the suffering of disaster victims. *Id.* Potential support provided by the DoD could include immediate response to prevent loss of life and destruction of property, construction of basic sanitation facilities and shelters, and provision of food and medical care. *Id.*

²⁰ CJCSI 3214.01D, *supra* note 17, at 3.

²¹ See *id.*

²² See 22 U.S.C. §§ 2151–2443 (2011); 10 U.S.C. §§ 401, 402, 404, 2547, and 2561 (2012).

Title 10 of U.S. Code.²³ In addition, there are several executive orders directing the Departments of State and Defense to take a lead role in FCM operations.²⁴ These legislative and executive authorities provide the basis by which the DoD conducts FCM operations.²⁵

A. Foreign Assistance Act

The Foreign Assistance Act of 1961 provides authorization for USG foreign aid programs.²⁶ Section 2292 of the FAA authorizes the President “to furnish assistance to any foreign country, international organization, or private voluntary organization, on such terms as he may determine, for international disaster relief and rehabilitation, including assistance relating to disaster preparedness, and to the prediction of, and contingency planning for, natural disasters abroad.”²⁷ Additionally, it states, “In carrying out the provisions of this section the President shall insure that the assistance provided by the United States shall, to the greatest extent possible, reach those most in need of relief and rehabilitation as a result of natural and man-made disasters.”²⁸ The types of assistance that may be provided under § 2292 are not enumerated; however, under § 2318, the President may drawdown equipment and services from any USG agency when such actions are in the best interests of the United States and support international disaster relief and rehabilitation efforts.²⁹ Further, in the event of an

²³ See 22 U.S.C. §§ 2151–2443; 10 U.S.C. §§ 401, 402, 404, 2547, and 2561. Section 401 programs are classified as humanitarian assistance (HA), but are funded via Combatant Commander operations and maintenance (O&M) funds due to the training benefit provided to U.S. military personnel. See INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 223 (2012) [hereinafter JA 422].

²⁴ See, e.g., PRESIDENTIAL DECISION DIRECTIVE (PDD)/NSC 39, U.S. POLICY ON COUNTER TERRORISM (21 June 1995) [hereinafter PPD/NSC 39].

²⁵ See DEF. THREAT REDUCTION AGENCY, FOREIGN CONSEQUENCE MANAGEMENT LEGAL DESKBOOK 1–2 (Jan. 2007) [hereinafter FCM LEGAL DESKBOOK].

²⁶ 22 U.S.C. §§ 2151–2443.

²⁷ *Id.* § 2292.

²⁸ *Id.* Treaty obligations may also affect the USG response to an FCM event. For example, the Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency creates an international framework for co-operation among State Parties and the International Atomic Energy Agency to facilitate prompt assistance and support in the event of a nuclear accident or radiological emergency. See Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency art. 1, Sept. 26, 1986, T.I.A.S. (entered into force Feb. 26, 1987, for the United States Oct. 20, 1988). See also Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Mar. 22, 1989, 28 I.L.M. 657. As its name suggests, this convention establishes a protocol regarding how nations proceed when the need to move hazardous waste across borders arises. *Id.*

²⁹ See 22 U.S.C. § 2318(a)(2). The aggregate value of drawdown articles and services cannot exceed \$200 million, of which not more than \$75

unforeseen emergency, the President may drawdown equipment and services from the DoD in particular in an amount not to exceed \$100 million.³⁰

From a legal perspective, a drawdown is the execution of statutory authority that permits the donation of U.S. property or services to the affected foreign country.³¹ However, there is normally no budget authority associated with drawdowns.³² Thus, the USG agency providing goods and services under a drawdown must absorb the fiscal impact associated with the drawdown within its budget.³³ When exercising the drawdown authority under 22 U.S.C. § 2318(1)(a), the President is limited to \$75 million from the inventory and resources of DoD per fiscal year (FY), plus \$75 million from other agencies/departments.³⁴ Because the drawdown authority is restricted to the use of existing articles, no new procurement is authorized and no new funds may be placed on existing contracts unless otherwise provided by law.³⁵

B. 10 U.S.C. Authorities

Pursuant to 10 U.S.C. § 402, which is popularly referred to as the “Denton Amendment,” the DoD may transport, free of charge, humanitarian supplies provided by non-governmental sources on a space available basis.³⁶ This means that the DoD is only authorized to move humanitarian cargo on flights that are already scheduled for military

million can be from the DoD. *Id.* Drawdowns allow the President to respond to unforeseen emergencies and other requirements without having to first seek additional legislative authority or budgetary appropriations. *See* DEF. SECURITY COOPERATION AGENCY, HANDBOOK FOR FOREIGN ASSISTANCE ACT DRAWDOWN OF DEFENSE ARTICLES AND SERVICES sec. C1.1 (June 2004) [hereinafter DRAWDOWN HANDBOOK].

³⁰ *See* 22 U.S.C. § 2318(a)(1). In order to invoke this “emergency drawdown authority,” the President must determine that the need cannot be met by either the Arms Export Act (22 U.S.C. §§ 2715–2733) or any other provision of law. *Id.*

³¹ *See* DRAWDOWN HANDBOOK, *supra* note 29, sec. C1.1.

³² *Id.* sec. C1.2.4.

³³ *Id.*

³⁴ *See* 22 U.S.C. § 2318(a)(1). Potential contributing agencies furnish valuation and availability (V&A) data to the DoS indicating the estimated value of the articles and services proposed for the drawdown. *See* JOINT PUB. 3-29, *supra* note 19, at B-4. The V&A data and the scope of support form the basis for the Presidential determination that authorizes a specific maximum dollar value authority for the drawdown. *Id.*

³⁵ *See* DRAWDOWN HANDBOOK, *supra* note 29, sec. C1.2.4.

³⁶ *See* 10 U.S.C. § 402 (2012). Under 10 U.S.C. § 401, the DoD may also carry out humanitarian and civic assistance (HCA) activities in host nations in conjunction with military operations. *See id.* § 401. These activities are designed to provide longer-term humanitarian assistance and are not normally useful in fast moving emergencies. *See* JA 422, *supra* note 23, at 224–25. *See also* Lieutenant Colonel John N. Ohlweiler, *Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response*, ARMY LAW., Jan. 2011, 9, at 22.

purposes.³⁷ In order to qualify for space available transportation, a shipment of supplies must be: (1) consistent with the foreign policy of the United States, (2) suitable for humanitarian purposes and are in stable condition, (3) legitimately needed by the people for whom they are intended, and (4) adequately arranged for distribution in the destination country.³⁸ Under the Denton Amendment, the DoD annually transports millions of pounds of privately donated humanitarian cargo on a space available basis.³⁹

Pursuant to 10 U.S.C. § 404, the President may direct the Secretary of Defense (SecDef) to provide international disaster assistance in response to manmade or natural disasters when necessary to prevent the loss of life or serious harm to the environment.⁴⁰ This provision calls on the President to notify Congress within forty-eight hours of commencing relief operations.⁴¹ The types of assistance provided under § 404 include transportation, supplies, services, and equipment.⁴²

The DoD Security Assistance Management Manual (SAMM) defines operations under § 404 as Foreign Disaster Relief (FDR).⁴³ These operations typically include unique DoD capabilities pertaining to logistics support, transportation, airfield management, communications, distribution of relief commodities, and/or security.⁴⁴ The SAMM places FCM under the rubric of FDR, acknowledging that “DoD activities following overseas disasters may include conducting FCM operations concurrently with FDR.”⁴⁵

³⁷ *See* 10 U.S.C. § 402. The Defense Security Cooperation Office (DSCA) approves movement of the cargo; Transportation Command schedules the movement. *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, LESSONS LEARNED FOR JUDGE ADVOCATES, LAW AND MILITARY OPERATIONS IN CENTRAL AMERICA: HURRICANE MITCH RELIEF EFFORTS, 1998–1999, at 79 (15 Sept. 2000) [hereinafter HURRICANE MITCH LESSONS LEARNED].

³⁸ *See* JOINT PUB. 3-29, *supra* note 19, at B-5.

³⁹ *Id.*

⁴⁰ *See* 10 U.S.C. § 404.

⁴¹ *Id.* The President has delegated to the SecDef the authority to provide disaster relief under 10 U.S.C. § 404 with the concurrency of the Secretary of State. *See* Exec. Order No. 12,966, 60 Fed. Reg. 36,949 sec. 2.14 (18 July 1995) [hereinafter EO 12,966].

⁴² *See* JA 422, *supra* note 23, at 224.

⁴³ *See* DEF. SEC. COOPERATION AGENCY, MANUAL 5105.38-M, SECURITY ASSISTANCE MANAGEMENT MANUAL sec. C12.9 (30 Apr. 2012) [hereinafter SAMM]. *See also* U.S. DEP’T OF DEF, DIR. 5100.46, FOREIGN DISASTER RELIEF 1 (June 2012) [hereinafter DoDD 5100.46] (citing 10 U.S.C. §§ 404, 2561 as authorities for the DoD Foreign Disaster Relief mission). *Id.* at 4.

⁴⁴ *See* SAMM, *supra* note 43, sec. C12.9.

⁴⁵ *Id.* sec. C12.9.4.4. *But see* DoDD 5100.46, *supra* note 43, at 1 (excluding FCM from the applicability of the instruction regarding foreign disaster relief).

Under 10 U.S.C. § 2557, the DoD makes excess nonlethal property (property that is not a weapon, ammunition, or other equipment or materiel designed to inflict serious bodily harm or death) available to foreign recipients for humanitarian relief.⁴⁶ The property must be transferred to the DoS, which is responsible for its distribution within the recipient country.⁴⁷ Items such as clothing, tents, medical equipment and supplies, heavy equipment, and vehicles are available through this program.⁴⁸

Finally, 10 U.S.C. § 2561 provides for the use of appropriated funds for: (1) the purpose of providing transportation of humanitarian relief, and (2) “other humanitarian purposes worldwide.”⁴⁹ Under the transportation prong of § 2561, the DoD may transport USG-donated humanitarian relief supplies on a fully funded basis.⁵⁰ The DoD may accomplish this through dedicated convoys/flights or contracted transportation.⁵¹ Thus, 10 U.S.C. § 2561 is a much broader authority than 10 U.S.C. § 402 because goods may be transported on a fully funded basis.⁵² However, 10 U.S.C. § 2561 only provides for the transportation of USG-donated goods, not privately donated humanitarian supplies.⁵³ This central distinction means that both §§ 402 and 2561 remain important authorities for use during DoD humanitarian operations.⁵⁴

Under the “other humanitarian purposes” prong of § 2561, the statute does not define the parameters of its

applicability.⁵⁵ However, the DoD generally limits its disaster relief and emergency response activities under this prong to those intended to stabilize emergency situations, such as the repair of roads or bridges, but not activities considered to be rebuilding.⁵⁶ As a consequence of the broad nature of the “other humanitarian assistance” language found of § 2561, the DoD heavily relies on this provision for the majority of its humanitarian activities.⁵⁷

C. Executive Orders

The genesis of USG policy regarding FCM relates to international terrorism.⁵⁸ Under the National Strategy to Combat Weapons of Mass Destruction, the President identified WMD in the possession of hostile states and terrorists as one of the greatest security challenges facing the United States.⁵⁹ In order to meet this challenge, the President designated the DoS and DoD as key players in mitigating the effects of terrorist events on foreign soil.⁶⁰ The President further directed planning be carried out in order to prepare for international disaster events to prevent unnecessary suffering and loss of life.⁶¹

Under Executive Order (EO) 12,656, the President tasked the DoD, in consultation with the DoS and Department of Energy, to “develop plans and capabilities for identifying, analyzing, mitigating, and responding to hazards related to nuclear weapons, materials, and devices”⁶² The DoD is called upon to support the DoS in its efforts to protect U.S. citizens and their property abroad.⁶³ The DoD is also directed to assist the State Department in its negotiations of contingency and post-emergency plans,

⁴⁶ See 10 U.S.C. § 2557 (2012).

⁴⁷ See JOINT PUB. 3-29, *supra* note 19, at B-3.

⁴⁸ *Id.* Title 10 U.S.C. § 2557 is less extensive than the drawdown authority under 22 U.S.C. § 2318. See HURRICANE MITCH LESSONS LEARNED, *supra* note 37, at 78. Section § 2557 requires that items be declared excess under applicable regulations. *Id.* While this authority can be used to transfer a variety of items, it requires coordination in advance with the Defense Reutilization and Management Office (DRMO) and higher headquarters. *Id.* The Defense Security Cooperation Agency administers DoD Humanitarian Assistance (HA) excess property warehouse operations. See SAMM, *supra* note 43, sec. C12.6.3.

⁴⁹ 10 U.S.C. § 2561. Humanitarian assistance activities include rudimentary construction and renovation of public facilities (such as schools, hospitals, clinics, and orphanages), digging or improving water wells and other sanitation and drinking water projects, and repairing/building rudimentary infrastructure such as roads and bridges. See DEF. SECURITY COOPERATION AGENCY, DEPARTMENT OF DEFENSE FISCAL YEAR 2011 REPORT ON HUMANITARIAN ASSISTANCE 3 (Jan. 2012) [hereinafter DSCA 2011 REP.], available at [http://www.dscamilitary.com/programs/HA/2011/Fiscal%20Year%202011%20Report%20on%20Humanitarian%20Assistance%20\(HA\).pdf](http://www.dscamilitary.com/programs/HA/2011/Fiscal%20Year%202011%20Report%20on%20Humanitarian%20Assistance%20(HA).pdf).

⁵⁰ See JA 422, *supra* note 23, at 224.

⁵¹ *Id.*

⁵² See *id.* See also 10 U.S.C. § 404.

⁵³ See JA 422, *supra* note 23, at 224.

⁵⁴ *Id.*

⁵⁵ See 10 U.S.C. § 2561. See also JA 422, *supra* note 23, at 224.

⁵⁶ See RHODA MARGESSON, CONG. RESEARCH SERV., RL 32714, INTERNATIONAL DISASTERS AND HUMANITARIAN ASSISTANCE: A U.S. GOVERNMENT RESPONSE 5–6 (2005). Under the SAMM, Title 10 U.S.C. § 2561 provides the authority for the DoD’s HA program. See SAMM, *supra* note 43, sec. C12. The HA program is intended to relieve or reduce the results of natural or manmade disasters or other endemic conditions such as human pain, disease, hunger, or privation that might present a serious threat to life or that can result in great damage to or loss of property. *Id.*

⁵⁷ See MARGESSON, *supra* note 56, at 5–6. Although not germane to FCM, the DoD also conducts humanitarian assistance operations in the form of humanitarian demining assistance. See 10 U.S.C. § 407 (2006).

⁵⁸ See Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (18 Nov. 1988) [hereinafter EO 12,656].

⁵⁹ See NATIONAL STRATEGY TO COMBAT WMD, *supra* note 13, at 1. WMD is defined as nuclear, biological, and chemical weapons. *Id.*

⁶⁰ See PRESIDENTIAL DECISION DIRECTIVE (PDD)/NSC 39, *supra* note 24.

⁶¹ See EO 12,966, *supra* note 41.

⁶² See EO 12,656, *supra* note 58, para. 501(7).

⁶³ *Id.* para. 1301.

intergovernmental agreements, and arrangements with allies and friendly nations that affect USG national security.⁶⁴

Pursuant to Presidential Decision Directive (National Security) 39, the DoS is designated the lead agency for international terrorist incidents that take place outside of U.S. territory.⁶⁵ Additionally, the DoS is directed to develop plans with the DoD to provide assistance to foreign populations affected by a terrorist-initiated FCM event.⁶⁶ To ensure the full range of necessary expertise and capabilities are available to on-scene coordinators, the directive calls for the development of a rapidly deployable interagency Foreign Emergency Support Team (FEST).⁶⁷ The State Department is responsible for leading the FEST as an initial response to an FCM incident.⁶⁸

Most importantly for FCM purposes, on 15 July 1995, President Clinton issued EO 12,966.⁶⁹ This order specifically authorizes the DoD to provide foreign disaster assistance under 10 U.S.C. § 404 in response to any manmade or natural disaster.⁷⁰ The SecDef may respond to a foreign disaster (which includes a CBRN incident) when: (1) directed by the President; (2) with the concurrence of the Secretary of State; or (3) on his/her own initiative to save human lives in emergency situations where there is insufficient time to consult with the Secretary of State.⁷¹ Executive Order 12,966 recognizes an immediate response authority for foreign emergencies, which is analogous to the military's immediate response authority to domestic disasters.⁷² Hence, when conditions resulting from any emergency or attack in a foreign country require immediate

action, local military commanders may take such actions as necessary to save lives.⁷³

With the exception of commanders exercising their immediate response authority, FCM operations begin with a request for assistance by the affected nation.⁷⁴ Once this request is received, the USG completes a series of steps to determine an appropriate response.⁷⁵ During this process, the DoD is an essential agency for planning and supporting the FCM mission.⁷⁶ The judge advocate's role in delineating the authorities under which the DoD is authorized to assist the host nation (HN) is paramount regarding the conduct of its FCM operations.

III. FCM Operations

Foreign Consequence Management operations are characterized by both the USG's efforts to assist partner nations and the interagency coordination of the USG's response.⁷⁷ The U.S. ambassador in the affected country is typically the first USG official contacted for assistance, and consequently, the U.S. embassy is in the best position to begin immediate planning and liaison operations.⁷⁸ Because of the DoD's unique capabilities, it will be called upon to assist the DoS in carrying out FCM operations.⁷⁹

A. Requests for Assistance

It is USG policy that the primary responsibility for responding to, managing, and mitigating the effects of a foreign CBRN incident resides with the HN.⁸⁰ When overwhelmed, the impacted nation is responsible for requesting foreign assistance.⁸¹ From a U.S. perspective, this is typically done when the HN submits a request for assistance to the U.S. embassy.⁸² The U.S. chief of mission

⁶⁴ *Id.* para. 502(6).

⁶⁵ See PPD/NSC 39, *supra* note 24, para. 3. The DoS is called upon to act through U.S. ambassadors as the on-scene coordinators for the USG. *Id.*

⁶⁶ *Id.* para. 3(h).

⁶⁷ *Id.* The Foreign Emergency Support Team (FEST) is a DoS-led interagency support team that can be deployed immediately in support of the U.S. embassy in response to actual or suspected terrorist incidents. See JOINT PUB. 3-41, *supra* note 9, at III-9. The Office of the Coordinator for Counterterrorism exercises responsibility for the management of the FEST. *Id.* The FEST is task-organized depending on the incident and may include DoD elements that provide support to the U.S. embassy, consulate, or mission for foreign emergency operations. *Id.* The appropriate combatant command provides liaison, and, as required, technical support to the FEST. *Id.*

⁶⁸ See PPD/NSC 39, *supra* note 23, para. 3(h).

⁶⁹ See EO 12,966, *supra* note 41. In providing assistance covered by this order, the Secretary of Defense is required to consult with the Administrator of the Agency for International Development as the President's Special Coordinator for International Disaster Assistance. *Id.* para. 3.

⁷⁰ *Id.* para. 1.

⁷¹ *Id.* para. 2.

⁷² See U.S. DEP'T OF DEF, DIR. 3025.18, DEFENSE SUPPORT OF CIVIL AUTHORITIES para. 4g (21 Sept. 2012).

⁷³ See DoDI 2000.21, *supra* note 10, para. 4.4. Following their immediate response, commanders must report up the chain of command to the combatant command (COCOM) that assistance has been provided by the most expeditious means available and seek approval or additional authorizations as needed. *Id.* para. 5.7.2. The COCOM will then notify higher headquarters of the assistance provided and the affected State Department Chief of Mission. *Id.*

⁷⁴ See JOINT PUB. 3-41, *supra* note 9, at III-1.

⁷⁵ *Id.* at III-3.

⁷⁶ See DoDI 2000.21, *supra* note 10, para. 4.

⁷⁷ See JOINT PUB. 3-41, *supra* note 9, at III-1.

⁷⁸ *Id.*

⁷⁹ See DoDI 2000.21, *supra* note 10, para. 4.

⁸⁰ *Id.*

⁸¹ See JOINT PUB. 3-41, *supra* note 9, at III-1.

⁸² *Id.* at III-3.

for the affected nation, frequently the ambassador, notifies the DoS of the request.⁸³ The DoS will then make internal DoS and National Security Council notifications and dispatch a FEST and/or a Consequence Management Support Team (CMST) to the U.S. embassy in the affected nation.⁸⁴ Additionally, DoS will begin logistics, transportation, and other support coordination with the country team in the impacted nation.⁸⁵

The U.S. embassy country team is expected to notify the relevant DoD Geographic Combatant Commander (GCC), who will dispatch a liaison element to work with the country team to assess the incident, identify potential support requirements, and begin the flow of information through the combatant command to the National Military Command Center (NMCC).⁸⁶ Specific requests for DoD support are submitted by the DoS to the Office of the Secretary of Defense Executive Secretary.⁸⁷ Upon receipt of a request, the SecDef assesses it against specific request criteria, issues appropriate orders, and coordinates for the movement of tasked resources.⁸⁸ The SecDef will also identify specific command relationships and task the relevant GCC to support the FCM operation.⁸⁹ This affected GCC will then develop a task force organization, issue C2 guidance, and coordinate resources for deployment with the country team as part of

⁸³ *Id.*

⁸⁴ *Id.* The Consequence Management Support Team (CMST) is a DoS-led interagency support team that provides CBRN consequence management advice, assistance, and support to a U.S. embassy, consulate, or mission in country. *Id.* at III-10. It can be deployed in lieu of or as a subordinate element to the FEST. *Id.* It is comprised of subject matter experts from DoS and other USG departments and agencies as required. *Id.* The CMST provides FCM situation assessments to the USG and affected nation and coordinates the USG response for DoS. *Id.*

⁸⁵ *Id.* Country teams in embassies are made up of key figures from the DoS and other agencies who work under the direction of the ambassador and meet regularly to share information and coordinate agency actions. U.S. Diplomacy, <http://www.usdiplomacy.org/state/abroad/countryteam.php> (last viewed 20 Oct. 2012 at 9:47 a.m.),

⁸⁶ JOINT PUB. 3-41, *supra* note 9, at 9. The National Security Council coordinates an interagency assessment of the request for assistance and determines whether the USG will fulfill the request. *Id.* The U.S. embassy in the affected nation will coordinate with the impacted nation regarding the specific support the USG will provide and finalize logistics, transportation, and legal negotiations. *Id.*

⁸⁷ *Id.* The Chairman of the Joint Chiefs of Staff (CJCS) serves as the principal military advisor to SecDef in preparing for and responding to an FCM incident. *Id.* The CJCS reviews all requests and provides recommendations for DoD support to USG FCM operations, and ensures military planning is accomplished to support DoS in preparing for and responding to a foreign CBRN incident. *Id.*

⁸⁸ *Id.* Of particular relevance to FCM operations is the support provided by the Defense Threat Reduction Agency (DTRA). *Id.* at III-10. The DTRA affords operational and technical advice and support to DoD components and other USG departments and agencies regarding FCM events. *Id.*

⁸⁹ *Id.*

the USG's overall response to the foreign CBRN incident.⁹⁰ In order to assist planners in understanding the operational environment and in developing an appropriate response, the DoD views FCM as a six-phase process.⁹¹ The judge advocate will be involved in all aspects of the planning process and be expected to identify legal issues associated with the FCM operation.

B. Phases of FCM

The initial phase of FCM is Phase 0, the shaping phase.⁹² This is an ongoing and continuous phase.⁹³ The intent of Phase 0 is to ensure the DoD has organized, trained, equipped, and prepared personnel to support USG efforts to minimize the effects of CBRN incidents on foreign soil.⁹⁴ Some of the key tasks of this phase include partner engagement, interagency coordination, plans development, training, exercise, and constant monitoring for a developing crisis.⁹⁵ Phase 0 will continue until notification of a foreign CBRN incident.⁹⁶

The next phase of FCM is Phase I, the deterrence phase (situation assessment and preparation).⁹⁷ The transition to Phase I occurs upon the receipt of information that an FCM incident has occurred.⁹⁸ Phase I focuses on those actions

⁹⁰ *Id.* Potential assets available for operation use during FCM operations include the U.S. Armed Forces Radiobiology Research Institute (AFRRI). *Id.* at III-9 to III-11. This agency can provide DoD technical support capability for nuclear and radiological incidents or accidents. *Id.* The U.S. Air Force Radiation Assessment Team (AFRAT) is a globally responsive, specialty asset team that provides health physics and radiological support in response to radiation incidents and accidents. *Id.* The U.S. Marine Corps Chemical-Biological Incident Response Force (CBIRF) is a unit that was created to deploy on short notice in response to CBRN incidents. *Id.* The U.S. Army 20th Support Command (CBRNE) is the operational headquarters for Army CBRN specialized units. *Id.* The Army Reserve's 7th Civil Service Support Command in Kaiserslautern, Germany provides European Command with FCM capabilities. 7th Civil Support Command, *available at* <http://www.usar.army.mil/ourstory/commands/7CSC/Pages/Overview.aspx> (last visited June 18, 2013).

⁹¹ See CJCSI 3214.01D, *supra* note 17, at A-5 to A-6.

⁹² *Id.* at A-5.

⁹³ See JOINT PUB 3-41, *supra* note 9, at III-18.

⁹⁴ *Id.*

⁹⁵ *Id.* The DoD will assist the DoS in shaping the environment through theater security cooperation, information operations, partner capacity-building and other engagement activities in an effort to prevent a CBRN incident and to enhance partner capabilities to manage the effects of an unpreventable CBRN incident. *Id.* Additionally, combatant commands are called upon to coordinate response, support, and situational awareness processes with U.S. embassies within their area of responsibility. *Id.*

⁹⁶ *Id.*

⁹⁷ See CJCSI 3214.01D, *supra* note 17, at A-5.

⁹⁸ See JOINT PUB 3-41, *supra* note 9, at III-18.

required to conduct situation assessment and preparation.⁹⁹ This includes the timely and accurate assessment of the CBRN situation, preparation for deployment, and deployment of selected advance elements.¹⁰⁰ Phase I ends when the nature and scope of the CBRN incident are defined and the initial response force requirements are ascertained.¹⁰¹ Once all assessments have been made and operational planning is complete, a formal execution order is developed for the deployment of forces.¹⁰²

Phase II of FCM occurs when U.S. forces are deployed to the incident site.¹⁰³ This phase begins with a SecDef-approved deployment and/or execution order.¹⁰⁴ This order designates the intermediate and/or forward staging bases and establishes command relationships.¹⁰⁵ Phase II is complete when sufficient forces are deployed to safely and effectively begin relief operations.¹⁰⁶ The next phase of FCM is Phase III, the dominance phase (assistance to affected nation authorities).¹⁰⁷ Phase III proceeds once operations by U.S. forces have begun at the incident site and supporting locations and ends with the determination that DoD support is no longer required.¹⁰⁸ Phase III contains both CBRN and humanitarian/disaster relief mitigation efforts.¹⁰⁹

United States forces move into to Phase IV of FCM with the implementation of a plan to transition all relief activities to the HN and non-governmental entities.¹¹⁰ Phase IV begins as soon as practicable following the initial response of U.S. Forces and is characterized by the stabilization of the situation.¹¹¹ The safe and expeditions exit of all DoD forces is one of the primary goals of FCM operations.¹¹² Phase IV is complete when a full transition of responsibilities has occurred.¹¹³ The final phase of FCM is Phase V, the

redeployment phase. This phase of operations begins with the redeployment of DoD forces involved in FCM operations or the formal transition of those forces to a purely humanitarian/disaster relief mission.¹¹⁴ Phase V is complete when all forces have completed transition to other missions.¹¹⁵

As one can readily conclude, the phases of FCM are important for planning and executing FCM missions.¹¹⁶ However, the conduct of FCM operations is also heavily influenced by the fiscal restraints inherent with humanitarian operations.¹¹⁷ These fiscal restraints reflect that humanitarian assistance is not a traditional DoD mission.¹¹⁸ Understandably, the funding of FCM missions is done through very specific fiscal authorities.¹¹⁹ The application of these authorities both direct and restrict DoD FCM efforts.¹²⁰ The judge advocate will be looked upon for guidance regarding the purpose and utilization of fiscal authorities and their impact on FCM operations.

IV. Funding of FCM

It is a basic tenet of fiscal law that all expenditures in an operation must be for an authorized purpose, made within applicable time periods, and authorized in appropriate amounts.¹²¹ As discussed above, there are both legislative and executive authorities for the DoD to conduct FCM operations.¹²² These authorities provide a valid purpose toward which USG funds may be expended by the DoD.¹²³ With respect to the available funding mechanisms for FCM missions, the DoD may use unit Operations and Maintenance (O&M) funds, Overseas Humanitarian Disaster and Civic Aid (OHDACA) funds, funds from other agencies (Economy Act transfers), Acquisition and Cross Servicing Agreements (ACSA), or a combination of these depending on the nature of the operation.¹²⁴ However, the majority of

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See CJCSI 3214.01D, *supra* note 17, at A-5.

¹⁰⁴ See JOINT PUB 3-41, *supra* note 9, at III-19.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* In many cases, the deployed forces may decide to move into phase III operations before all phase II objectives are complete and continue to work on phase II objectives while in phase III. *Id.*

¹⁰⁷ See CJCSI 3214.01D, *supra* note 17, at A-5.

¹⁰⁸ See JOINT PUB. 3-41, *supra* note 9, at III-19.

¹⁰⁹ *Id.*

¹¹⁰ See CJCSI 3214.01D, *supra* note 17, at A-6.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See JOINT PUB. 3-41, *supra* note 9, at III-19.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See *id.* at III-19.

¹¹⁷ See JA 422, *supra* note 23, at 223–25.

¹¹⁸ See, e.g., EO 12,966, *supra* note 41, para. 2.

¹¹⁹ See JA 422, *supra* note 23, at 223-25.

¹²⁰ See FCM LEGAL DESKBOOK, *supra* note 25, at 4-1.

¹²¹ See 10 U.S.C. §§ 1301, 1341, and 1502(a) (2012) (addressing purpose, amount and time, respectively).

¹²² See 22 U.S.C. §§ 2151–2443 (2011); 10 U.S.C. §§ 401, 402, 2547, and 2561; EO 12,966, *supra* note 41.

¹²³ See 10 U.S.C. § 1301.

¹²⁴ See JA 422, *supra* note 23, ch. 14.

costs for all DoD humanitarian assistance missions are funded through the OHDACA account in annual DoD appropriations.¹²⁵

A. Unit O&M Funds

A commander in the immediate vicinity of a foreign disaster may undertake immediate relief operations when time is of the essence to prevent human suffering and loss of life.¹²⁶ Funds expended under these circumstances will be from the responding unit's O&M funds.¹²⁷ Commanders are generally allotted up to seventy-two hours to expend O&M funds under their immediate response authority.¹²⁸ Once any actions are taken, the commander should promptly report the unit's activities up the chain of command and begin accounting for all incremental costs associated with the response.¹²⁹ However, the reimbursement of funds expended under these circumstances is not guaranteed.¹³⁰

B. OHDACA Funds

Overseas Humanitarian, Disaster and Civic Aid funds are the funds most likely to be used for FCM operations of any duration.¹³¹ The OHDACA appropriation has a two-year period of availability and is used to fund a number of DoD humanitarian activities, including the Humanitarian Assistance (HA) Program (10 U.S.C. § 2561), Excess

Property Program (10 U.S.C. § 2557), Humanitarian Mine Action (10 U.S.C. § 407), Denton Program (Space Available Transportation – 10 U.S.C. § 402), Funded Transportation Program (10 U.S.C. § 2561), and Foreign Disaster Relief (FDR—10 U.S.C. § 404), as directed by the SecDef.¹³²

The Defense Security Cooperation Agency (DSCA) provides program management and execution oversight of the OHDACA appropriation and its funded activities.¹³³ The DSCA works closely with combatant commands (COCOMs) and USG agencies to capture costs, facilitate reimbursement, and resource DoD personnel for their missions.¹³⁴ When faced with disaster relief missions, the DSCA assists COCOMs in identifying the incremental costs incurred as a direct result of supporting contingency operations in order to fund and/or reimburse such costs with OHDACA funds.¹³⁵ Therefore, any OHDACA funds transferred to a service's baseline appropriation may not be used to finance activities and programs that are not directly related to the incremental cost of the contingency.¹³⁶

Despite specific authority provided in 10 U.S.C. § 404, the primary authorization used to fund the DoD's disaster response activities is 10 U.S.C. § 2561.¹³⁷ According to the DSCA's FY 11 Report to Congress, "the DoD conducts

¹²⁵ See MARGESSON, *supra* note 56, at 9. The primary purpose of the Overseas Humanitarian Disaster and Civic Aid (OHDACA) appropriation is to fund the DoD humanitarian assistance, disaster relief, and demining under 10 U.S.C. §§ 401, 402, 404, 407, 2557, 2561. See JA 422, *supra* note 23, at 223. The availability for obligation regarding OHDACA funds is two years. See SAMM, *supra* note 43, sec. C12.3.1.

¹²⁶ See EO 12,966, *supra* note 41. Operations and maintenance funds are for expenses, not otherwise provided for, necessary for the operation and maintenance of the force and are available for obligation for one FY. See JA 422, *supra* note 23, at 206.

¹²⁷ See JOINT PUB. 3-29, *supra* note 19, at B-3. Operations and maintenance funds are also used to fund HCA activities. See JA 422, *supra* note 23, at 225. Pre-planned or budgeted HCA activities are funded via O&M funds at the COCOM level. *Id.* Each COCOM commander must ensure that Pre-planned HCA activities are approved by the DoS, do not duplicate other forms of U.S. economic assistance, and are not provided to any individual, group, or organization engaged in military or paramilitary activities. *Id.* In contrast, minimal cost HCA activities may be funded via the participating unit's O&M funds. *Id.*

¹²⁸ See JOINT PUB. 3-29, *supra* note 19, at B-3.

¹²⁹ *Id.*

¹³⁰ *Id.* This is the case because the commander has not coordinated with the DoS or DSCA prior to conducting the relief activities. See Herbert, Prosser & Wharton, *supra* note 8, at 37. Further, when an FCM mission is conducted at the request of another federal agency, typically the DoS, the reimbursement of funds will not likely be available if DoD forces act prior to receiving the request. *Id.*

¹³¹ See FCM LEGAL DESKBOOK, *supra* note 25, at 2-11.

¹³² See U.S. DEP'T OF DEF, SUPPORT TO FOREIGN DISASTER RELIEF: HANDBOOK FOR JTF COMMANDERS AND BELOW 10-10 to 10-11 (13 July 2011) [hereinafter JTF COMMANDER'S HANDBOOK].

¹³³ *Id.* The DSCA is part of the OSD Policy office. See Herbert, Prosser & Wharton, *supra* note 8, at 14. Within DSCA, the Programs Office of Humanitarian Assistance, Disaster Relief, and Mine Action manages the OHDACA account. *Id.* The DSCA's OHDACA funding is a multi-year appropriation, which is open for obligations for a period of two years. *Id.* Once the appropriation has expired, the appropriation remains open for an additional five years for the liquidation of any outstanding expenditure. *Id.*

¹³⁴ *Id.* at 10-11.

¹³⁵ See U.S. DEP'T OF DEF, REG. 7000.14-R, vol. 12, ch. 23, para. 230107 (Sept. 2007) [hereinafter DoDFMR].

¹³⁶ *Id.* Incremental costs are "additional costs to the DoD Component appropriations that would not have been incurred had the contingency operation not been supported." *Id.* para. 230107. The costs of investment items, construction costs, and costs incurred to fix existing shortcomings can be categorized as incremental expenses only if the expenditures were necessary to support a contingency operation and would not have been incurred in that FY in the absence of the contingency requirement. See *id.* Costs incurred beyond what was reasonably necessary to support a contingency operation cannot be deemed incremental expenses, since such costs are not directly attributable to support of the operation. *Id.* Examples of incremental costs include transportation costs of moving personnel, material, equipment, and supplies to the contingency or contingency staging area; cost of material, equipment, and supplies from regular stocks used in providing directed assistance; increases in military entitlements and allowances due to changes in geographic assignment area due to a contingency. *Id.*

¹³⁷ See RHODA MARGESSON, CONG. RESEARCH SERV., RL 33769, INTERNATIONAL CRISES AND DISASTERS: U.S. HUMANITARIAN ASSISTANCE, BUDGET TRENDS, AND ISSUES FOR CONGRESS 10 (2007); MARGESSON, *supra* note 56, at 5.

humanitarian assistance, disaster relief/emergency response, and funded transportation programs pursuant to Title 10 U.S. Code Sections 2557 and 2561 . . . disaster relief and emergency response includes . . . immediate assistance in the wake of natural and manmade disasters.”¹³⁸ However, most importantly, the SAMM defines the parameters under which FCM operations may be resourced with OHDACA funds as those activities falling within the definition of FDR, e.g., those involving prompt aid used to alleviate the suffering of foreign disaster victims.¹³⁹ The SAMM states, “OHDACA funds may be used only to the extent such use can be defined as foreign disaster relief. The support and reimbursement processes follow the same guidelines as other foreign disaster relief missions DoD supports.”¹⁴⁰ Therefore, the DSCA utilizes the regulatory framework associated with 10 U.S.C. § 404 to fund FCM operations with OHDACA funds even though the use of such funds are typically authorized under 10 U.S.C. § 2561.¹⁴¹

C. Economy Act Transfers

The Economy Act provides agencies the authority to furnish services to, or secure the services of, another agency for in-house performance or performance by contract of those activities the acquiring agency has the authority to perform.¹⁴² An agency of the USG may place an order with another agency for goods or services if: (1) the ordering agency has available funds, (2) the order is in the best interests of the USG, (3) the agency filling the order can provide, or acquire by contract, the ordered goods or services, and (4) the ordered goods or services cannot be provided by a separate contract as conveniently or cheaply.¹⁴³

¹³⁸ DSCA 2011 REP., *supra* note 49, at 3. Non-lethal excess property may include such items as medical, school, or office equipment and supplies, construction and disaster-related equipment/tools, and vehicles. *See id.*

¹³⁹ *See SAMM, supra* note 43, sec. C12.9.4.4.

¹⁴⁰ *Id.* sec. C12.9.4.4.

¹⁴¹ *See id.* Joint Publication 3-41 recognizes FCM missions as efforts to “mitigate human casualties and to provide (and restore) associated essential services.” JOINT PUB. 3-41, *supra* note 9, at xv. Viewed from this perspective, FCM contains all of the essential elements of a Foreign Disaster Relief operation. *See* JOINT PUB. 3-29, *supra* note 19, at B-3. *See also* FCM LEGAL DESKBOOK, *supra* note 25, at 4–6 (stating FCM operations under the authority of 10 U.S.C §§ 402, 404, and 2557 are supported by OHDACA funds made available under 10 U.S.C. § 2561).

¹⁴² *See* JOINT PUB. 3-29, *supra* note 19, at B-2.

¹⁴³ *See* 31 U.S.C. § 1535a (2011). The Federal Acquisition Regulation (FAR) subpart 17.5 and the Defense Federal Acquisition Regulation Supplement (DFARS) subpart 217.5 govern use of the Economy Act. *See* FEDERAL ACQUISITION REG. subpt. 17.5 (July 2009) [hereinafter FAR]; DEFENSE FEDERAL ACQUISITION REG. SUPP. subpt. 217.5 (15 Oct. 2009) [hereinafter DFARS].

Economy Act transactions are frequently used during disaster relief operations.¹⁴⁴ As the Comptroller General noted, the Economy Act allows the DoD to conduct humanitarian assistance activities on behalf of other agencies when it lacks the resources and/or separate authority to do the same.¹⁴⁵ During *Operation Unified Response* in 2010, Economy Act transfers were a very efficient means by which the DoS funded humanitarian transportation operations carried out by the DoD when there was limited availability of OHDACA funding.¹⁴⁶ The DoS was able to fund activities authorized under title 22 of U.S. Code through Economy Act transfers to the DoD.¹⁴⁷

D. ACSA Transactions

Acquisition and Cross Servicing Agreements are agreements between the DoD and defense departments of foreign nations for the reimbursable mutual exchange of logistical supplies, services, and support.¹⁴⁸ Transactions under ACSAs may be funded via (1) payment in kind, (2) replacement in kind, or (3) equal value exchanges.¹⁴⁹ Notably, ACSAs are regularly utilized by the DoD to provide goods and services to foreign military partners who may be unable to fund cash transactions.¹⁵⁰ Further, ACSAs allow the DoD to acquire logistical support without having to follow many of the acquisition procedures found in the Federal Acquisition Regulation (FAR).¹⁵¹

Under DoD Directive 2010.01, ACSA authority should be used during “contingency operations, humanitarian or foreign disaster relief operations . . . or for unforeseen or exigent circumstances.”¹⁵² During *Operation Tomodachi*, an

¹⁴⁴ *See* Ohlweiler, *supra* note 36, at 23.

¹⁴⁵ *See* The Honorable Bill Alexander, U.S. House of Representatives, 63 Comp. Gen. 422, at 2 (1984).

¹⁴⁶ *See* Ohlweiler, *supra* note 36, at 23.

¹⁴⁷ *Id.*

¹⁴⁸ *See* 10 U.S.C. §§ 2341–2350 (2012). Examples of logistics, supplies, services, and support include food, fuel, transportation, ammunition, equipment, and technical assistance. *See id.* § 2350.

¹⁴⁹ *See* U.S. DEP’T OF DEF, DIR. 2010.9, ACQUISITION AND CROSS SERVICING AGREEMENTS 5.5.5 (28 Apr. 2003) [hereinafter DoDD 2010.9]; JOINT CHIEFS OF STAFF, INSTR. 2120.01, ACQUISITION AND CROSS SERVICING AGREEMENTS para. 3e (20 Sept. 2010) [hereinafter CJCSI 2120.01].

¹⁵⁰ *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.’S SCH., U.S. ARMY, AFTER ACTION REPORT, *OPERATION TOMODACHI, U.S. ARMY JAPAN / I CORPS FWD/10TH AREA SUPPORT GROUP/JLTF-10, MAR. 2011 TO MAY 2011*, at 7 (24 May 2011) [hereinafter U.S. ARMY JAPAN AAR].

¹⁵¹ *See* DoDD 2010.9, *supra* note 149, para. 4; CJCSI 2120.01, *supra* note 149, encl. A.

¹⁵² DoDD 2010.9, *supra* note 150, para. 4.3.5. After consulting with the DoS, the DoD (i.e., COCOMs) may negotiate and enter into Acquisition

in-kind ACSA transaction was used to provide mobile shower units to the Tohoku Defense Bureau for use by displaced survivors of the 2011 earthquake, tsunami, and nuclear disaster.¹⁵³ Additionally, ACSAs were used to provide fuel and Meals Ready to Eat (MREs) to Japanese and New Zealand Soldiers assisting in the disaster response.¹⁵⁴

The funding mechanisms available to the DoD for foreign disaster relief operations restrict a commander's ability to provide adequate and timely relief.¹⁵⁵ However, commanders must learn how to operate under these limitations in order to accomplish their mission.¹⁵⁶ Judge advocates are uniquely situated to provide training and insight into these issues. The DoD views humanitarian assistance foremost as a tool for achieving U.S. security objectives.¹⁵⁷ Therefore, FCM operations are a very important means by which commanders can support this policy.¹⁵⁸

V. Conclusion

Foreign Consequence Management is the USG's response to a manmade or inadvertent CBRN incident on foreign soil.¹⁵⁹ Because FCM raises issues of sovereignty and diplomacy, the DoS is the lead federal agency for FCM incidents.¹⁶⁰ Due to its unique capabilities, the DoD is called upon to be ready to support the DoS when requested and at

and Cross Servicing Agreements (ACSAs). *See* JA 422, *supra* note 23, at 217. For transactions carried out under ACSAs, the approval authorities are the ACSA Warranted Officers within the COCOMs. *Id.*

¹⁵³ *See* U.S. ARMY JAPAN AAR, *supra* note 150, at 7. Additional funding sources may be available for FCM operations. For example, the Combatant Commander Initiative Fund (CCIF) supports unforeseen contingency requirements critical to COCOMs joint warfighting readiness and national security interests. *See id.* § 166a. Further, Emergency & Extraordinary Expenses (EEE) Funds allow the SecDef to fund any emergency or extraordinary expenses that cannot be anticipated or classified. *See id.* § 127.

¹⁵⁴ *See* E-mail from Major Mark E. Peterson, Legal Advisor, Joint Task Force Japan, to Colonel Tonya Hagmaier, J-4, Joint Task Force Japan (17 Mar. 2011, 0430 JST) (on file with author); e-mail from Mr. Edmund S. Bloom, Legal Advisor, U.S. Forces Japan, to Lieutenant Colonel Miki Huntington, J-4, U.S. Forces Japan (18 Mar. 2011, 1849 JST) (on file with author).

¹⁵⁵ *See* FCM LEGAL DESKBOOK, *supra* note 25, at 4-1.

¹⁵⁶ *Id.*

¹⁵⁷ *See* NINA M. SERAFINO ET AL., CONG. RESEARCH SERV., RL 34639, THE DEPARTMENT OF DEFENSE'S ROLE IN FOREIGN ASSISTANCE: BACKGROUND, MAJOR ISSUES AND OPTIONS FOR CONGRESS 10 (25 Aug. 2008).

¹⁵⁸ *See generally* JOINT PUB. 3-41, *supra* note 9.

¹⁵⁹ *See* DoDI 2000.21, *supra* note 10, para. 4.

¹⁶⁰ *Id.*

the direction of the SecDef.¹⁶¹ Therefore, the continued need for the DoD to provide specialized units and equipment in response to an FCM event will be a requirement for the foreseeable future, and, consequently, judge advocates must be aware of the attributes and capabilities associated with FCM as well as its funding mechanisms and restrictions.¹⁶²

The purpose of this article was to explain the DoD's role in FCM operations. In doing so, it surveyed the legislative and executive authorities calling for DoD involvement in FCM operations focusing primarily on the Foreign Assistance Act, 10 U.S.C. humanitarian assistance authorities, and key executive orders.¹⁶³ The article then presented the process of responding to host nation requests for assistance and the phases of FCM operations, which inform the judge advocate of the planning structure associated with FCM.¹⁶⁴ Finally, it surveyed the basic funding mechanisms likely to be used in FCM operations concentrating on unit O&M funds, OHDACA funds, Economy Act transfers, and ACSA transactions.¹⁶⁵ The DoD possesses the statutory and executive authorities to plan, support, fund, and execute FCM operations, and judge advocates well versed in these authorities would be assets to commands engaged in these missions.

Based upon these operational and funding authorities, FCM can best be viewed as a specialized subset of FDR.¹⁶⁶ In addition to the logistics-based operations that are indicative of FDR missions, FCM calls upon the DoD to provide specialized personnel and equipment to mitigate the effects of CBRN contaminates.¹⁶⁷ Consequently, FCM missions have the potential to include all of the elements of

¹⁶¹ *See* Ohlweiler, *supra* note 36, at 23.

¹⁶² *Id.*

¹⁶³ *See* 22 U.S.C. §§ 2151-2443 (2011); 10 U.S.C. §§ 401, 402, 404, 2547, and 2561 (2012); EO 12,966, *supra* note 41; PPD/NSC 39, *supra* note 24; EO 12,656, *supra* note 59.

¹⁶⁴ *See* JOINT PUB. 3-41, *supra* note 9; DoDI 2000.21, *supra* note 10; CJCSI 3214.01D, *supra* note 17.

¹⁶⁵ *See* JA 422, *supra* note 23, ch. 14.

¹⁶⁶ *See* DEF. SECURITY COOPERATION AGENCY, FISCAL YEAR 2013 BUDGET ESTIMATES OVERSEAS HUMANITARIAN DISASTER AND CIVIC AID 117 (Feb. 2012), *available at*: http://comptroller.defense.gov/defbudget/fy2013/budget_justification/pdfs/01_Operation_and_Maintenance/O_M_VOL_1_PAR_TSPARTS/O_M_VOL_1_BASE_PARTS/OHDACA_OP-5.pdf (stating "in times of natural and man-made disasters such as the Pacific Tsunami (2004), Pakistan Earthquake (2005), Georgia conflict (2008), Haiti Earthquake (2010), Pakistan Flooding (2010), and Japan Earthquake (2011) the U.S. military has and will continue to be called upon to provide aid and assistance because of our unique assets and capabilities"). *Id.*

¹⁶⁷ *See* CJCSI 3214.01D, *supra* note 17, at A-6.

FDR with the added complexity of operating in a CBRN environment.¹⁶⁸ Therefore, judge advocates must be aware of the nuances associated with FCM missions in order to

provide clear and concise legal advice to commanders operating in this complex environment.¹⁶⁹

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*