

## Note from the Field

### They Asked, But Can We Help? A Judge Advocate's Guide to Immediate Response Authority (IRA)

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#### Scenario

*During your morning drive to work, WXYZ reports a loud blast in your community; a bomb detonated at the local court house just ten miles away from your installation. As you arrive at work, your staff judge advocate (SJA) is hustling to the commander's office. You learn that dozens of casualties resulted from this explosion, that terrorism is suspected, and warnings of additional bombings linger. Your commander wants to help the local community and requires your immediate advice. As the operational law attorney, your SJA asks you to research the question, "Can your commander assist the local community?"*

#### Introduction

The answer is yes; your commander may help the local community, provided that he assists within the parameters of immediate response authority (IRA).<sup>1</sup> Military commanders and responsible officials of Department of Defense (DOD) components and agencies are authorized, when time does not permit prior approval from higher headquarters and subject to supplemental direction, to take immediate actions in response to requests from domestic civil authorities "to save lives, prevent human suffering, or mitigate great property damage."<sup>2</sup> Such "actions" are referred to as "immediate response."<sup>3</sup>

When an emergency occurs, state and local authorities may not have the equipment or capability immediately available to respond and assist their community. In some circumstances, the local military commander, who is ready and capable of rapid response, can immediately begin the relief effort while civilian authorities are marshalling the necessary relief assets. Sufficient local and state assets should arrive on scene and assume control within a short period of time. The IRA is *not* a blanket authority to provide unlimited military assistance. Specific requirements and criteria must be satisfied before providing such assistance, and it must end at the appropriate time.<sup>4</sup>

Immediate response may include DOD assistance to civil agencies in rescue, evacuation, emergency medical treatment, emergency restoration of essential public services, and emergency clearance of debris to permit rescue or movement of people from effected areas.<sup>5</sup> While the DOD directive provides a complete list of IRA activities, essentially any actions, not otherwise prohibited by law, may be conducted if they "save lives, prevent human suffering, or mitigate great property damage."<sup>6</sup>

An important distinction should also be made between other types of "immediate" response. Separate from IRA authority is an installation commander's Fire and Emergency Services Authority (F&ESA).<sup>7</sup> Under F&ESA, installation

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<sup>1</sup> U.S. DEP'T OF DEFENSE, DIR. 3025.1, MILITARY SUPPORT TO CIVIL AUTHORITIES (MSCA) para. 4.5. (15 Jan. 1993) [hereinafter DOD DIR. 3025.1].

<sup>2</sup> *Id.* para. 4.5.1.

<sup>3</sup> *Id.*

<sup>4</sup> *See generally id.* para. 4.5.

<sup>5</sup> *Id.* para. 4.5.4.

<sup>6</sup> *Id.* paras. 4.5.1, 4.5.4.

<sup>7</sup> U.S. DEP'T OF DEFENSE, INSTR. 6055.06, DOD FIRE AND EMERGENCY SERVICES (F&ES) PROGRAM (21 Dec. 2006).

commanders may enter into a reciprocal agreement with a local community for fire and emergency services. In the absence of such an agreement, “installation commanders are authorized to render emergency assistance to preserve life and property in the vicinity of a DOD installation, when . . . such assistance is in the best interest of the United States . . . .”<sup>8</sup> No request from civil authorities is necessary when an agreement is in place.<sup>9</sup>

Another type of “immediate” response that should not be confused with IRA is emergency response authority. Military forces may be used for law enforcement purposes when necessary to prevent the loss of life or wanton destruction of property or to restore governmental functioning and public order during sudden and unexpected civil disturbances beyond the control of local civilian authorities.<sup>10</sup> This authority should be exercised with extreme caution and prior approval is highly recommended. Emergency response authority is outside the scope of this note; the below criteria should not be used when analyzing the legality of an emergency response.

With this basic understanding of IRA, you can use the follow steps to analyze a particular request for assistance:

### Step by Step Analysis

#### **STEP 1. Has there been a request for assistance from civil authorities?**

The DOD cannot assist local authorities unless they have made a request. Essentially, the DOD shall not impose its resources or authority on a domestic civilian community. The DOD assists, if possible, *when asked* to do so by proper authority. Civil authorities *must* request assistance from a commander before any assistance is granted under IRA. A verbal request is sufficient, but it must be followed by a written request as soon as possible.<sup>11</sup>

#### **STEP 2. Is there time to seek approval from the chain of command, specifically the Secretary of Defense?**

The general rule is that defense support to civil authorities requires prior authorization from the chain of command; under the National Response Plan (NRP) these requests require approval from the Secretary of Defense.<sup>12</sup> The exception to this rule is the IRA doctrine, as provided in DOD directives, which allows military commanders and responsible officials of DOD activities, where time does not permit prior approval from higher headquarters, to take immediate action to “save lives, prevent human suffering, or mitigate great property damage.”<sup>13</sup> Requests for assistance under IRA are time-sensitive and should be received from local government officials at the time of the incident or within twenty-four hours of a damage assessment.<sup>14</sup> After the initial emergency period, the local and state authorities should follow the procedures laid out in the NRP if they require assistance from the federal government.<sup>15</sup>

#### **STEP 3. Have you and your commander evaluated the request for assistance under the criteria established in DOD Directive 3025.15?**

Under IRA, judge advocates (JAs) advise their commanders in analyzing requests for civil support. Requests from civil authorities for DOD assistance, whether under IRA or through the NRP, must be evaluated against specific criteria.<sup>16</sup> Under the NRP, attorneys in the office of the Chairman Joint Chiefs of Staff, Joint Director of Military Support (JDOM) analyze requests for civil support and advise the Secretary of Defense on approving defense support to civil authorities.<sup>17</sup> Under IRA, when a commander asks, “Can I do this?” the local JAs use the same criteria as the JDOM attorneys use to advise their

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<sup>8</sup> *Id.* para. E5.1.4.4.

<sup>9</sup> *Id.*

<sup>10</sup> U.S. DEP’T OF DEFENSE, DIR. 3025.12, MILITARY ASSISTANCE FOR CIVIL DISTURBANCES (MACDIS) para. 4.2.1.1 (4 Feb. 1994); U.S. DEP’T OF DEFENSE, DIR. 5525.5, DOD COOPERATION WITH CIVILIAN LAW ENFORCEMENT OFFICIALS para. E4.1.2.3.1 (15 Jan. 1986).

<sup>11</sup> U.S. DEP’T OF DEFENSE, DIR. 3025.15, MILITARY ASSISTANCE TO CIVIL AUTHORITIES para. 4.7.1 (18 Feb. 1997).

<sup>12</sup> U.S. DEP’T OF HOMELAND SECURITY, NATIONAL RESPONSE PLAN 42 (Dec. 2004) [hereinafter NATIONAL RESPONSE PLAN].

<sup>13</sup> DOD DIR. 3025.1, *supra* note 1, para. 4.5.1.

<sup>14</sup> U.S. DEP’T OF DEFENSE, MANUAL 3025.1-M, MANUAL FOR CIVIL EMERGENCIES para. C2.2.2 (June 1994).

<sup>15</sup> *See generally* Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121 - 5206 (as amended by Pub. L. No. 109-308 (2006)); *see also* DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES, VOL. 1, CH. 5 (18 July 2006) (providing an overview of the NRP, the Stafford Act, the role of the DOD and the principal federal agency).

<sup>16</sup> DOD DIR. 3025.15, *supra* note 11, para. 4.2.

<sup>17</sup> *Id.* para. 4.5; NATIONAL RESPONSE PLAN, *supra* note 12, at 10, 42, 104.

commanders and ensure they have considered each of the criteria when making decisions about whether to authorize immediate assistance. The evaluation criteria are as follows:

- Legality (compliance with laws)
- Lethality (potential use of lethal force by or against DOD forces)
- Risk (safety of DOD forces)
- Cost (who pays, impact on DOD budget)
- Appropriateness (whether the requested mission is in the interest of the Department to conduct)
- Readiness (impact on the [unit's] ability to perform its primary mission)<sup>18</sup>

### *Legality*

Judge advocates must ask questions and determine exactly what type of assistance the civil authorities are requesting. Not all types of assistance are lawful, no matter how much we want to help. The most significant legal impediment to assistance is the Posse Comitatus Act (PCA),<sup>19</sup> which prohibits military participation in direct civil law enforcement activities, such as apprehension, arrest, interrogation, search, seizure, stop and frisk, and surveillance.<sup>20</sup> While there are exceptions to the PCA, the exceptions are narrow and infrequent. A request from local authorities for assistance investigating and detaining suspected terrorists *cannot* be accommodated, as such assistance by military personnel would violate the PCA. Local police, the Federal Bureau of Investigation, and other designated federal law enforcement bodies would typically investigate and detain civilian suspects. Alternatively, if local authorities request the use of military working dogs in order to immediately identify additional bombs within local government structures and thereby save lives, such assistance can probably be provided, subject to additional analysis. If the request for assistance does not violate the PCA, then the JA should next review the DOD directives to determine whether the type of assistance falls within one of the enumerated types of assistance.<sup>21</sup>

### *Lethality*

Lethality refers to whether there is a potential for use of lethal force by or against DOD personnel. A commander must consider the environment where the assistance will be provided. The Rules for the Use of Force (RUF) in a domestic environment are more restrictive than the permissive rules applicable in a hostile foreign territory. The Secretary of Defense

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<sup>18</sup> DOD DIR. 3025.15, *supra* note 11, para. 4.2.

<sup>19</sup> 18 U.S.C. § 1385 (2000).

<sup>20</sup> DOD DIR. 5525.5, *supra* note 10, para. E.2.1.8. *See also* Hayes v. Hawes, 921 F.2d 100, 103 n.3 (7th Cir. 1990) (noting that 10 U.S.C. ch. 18 specifically incorporates 18 U.S.C. sec 1385 and provides the primary restrictions on military participation in civilian law enforcement activities); United States v. Red Feather, 392 F. Supp. 916, 922 (W.D.S.D. 1975).

<sup>21</sup> According to *DOD Directive 3025.1, para 4.5.4*:

Immediate Response may include DOD assistance to civil agencies in meeting the following types of need:

- Rescue, evacuation, and emergency medical treatment of casualties, maintenance or restoration or emergency medical capabilities, and safeguarding the public health.
- Emergency restoration of essential public services (including fire-fighting, water, communications, transportation, power, and fuel).
- Emergency clearance of debris, rubble, and explosive ordnance from public facilities and other areas to permit rescue or movement of people and restoration of essential services.
- Recovery, identification, registration, and disposal of the dead.
- Monitoring and decontaminating radiological, chemical, and biological effects; controlling contaminated areas; and reporting through national warning and hazard control systems.
- Roadway movement control and planning.
- Safeguarding, collecting, and distributing food, essential supplies, and materiel on the basis of critical priorities.
- Damage assessment.
- Interim emergency communications.
- Facilitating the reestablishment of civil government functions.

DOD DIR. 3025.1, *supra* note 1, para. 4.5.4.

has withheld the authority to arm any military troops operating in the homeland in a Defense Support to Civil Authority mission, so a local commander cannot arm personnel who are conducting an IRA mission.<sup>22</sup> If use of force by or against personnel is an issue then the commander should exercise caution, expedite notifications, or perhaps wait for DOD approval.

### *Risk*

Will DOD forces be safe in providing assistance? If there are risks, then do the civil authorities have a plan to manage the risk? Commanders should consider that risks to military personnel also mean risks to overall unit readiness.

### *Cost*

Assistance “should not be delayed or denied because of the inability or unwillingness of the requester to make a commitment to reimburse the Department of Defense.”<sup>23</sup> However, defense support to civil authorities should be on a reimbursable basis whenever possible. Costs should be tracked for reimbursement purposes; however, if no one reimburses the affected command, the costs of immediate response assistance are funded through operation and maintenance funds.<sup>24</sup>

### *Appropriateness*

The DOD cannot, for legal and fiscal reasons, become a first responder to all types of emergencies. Local and state authorities must first apply their own resources to the situation prior to making the request and have found that the situation was beyond their capabilities to affect the required response in quick order. It is important to recognize that local authorities may not even know what they need.

Another aspect of appropriateness, unique to IRA, is whether your unit is the appropriate DOD responder based on proximity and time. That is, are you the closest DOD unit that has the required capability? While a strict guideline for distance from an emergency to a DOD unit does not exist, a commander must consider this factor when determining whether to assist under his IRA. Further, is the type of assistance appropriate for IRA, or should the request be processed as a federal “request for assistance?” The guideline for the “time” determination has been whether this assistance be provided and completed within seventy-two hours.<sup>25</sup> A request for assistance that would take any longer to complete should be made through appropriate federal channels, rather than directly to a local commander under IRA.

An example of inappropriate immediate response based on time is a request to the local installation commander for medical personnel and supplies to care for casualties for the next month. This does not mean that the DOD cannot or would not provide this medical assistance under certain circumstances, but long term care is not immediate assistance. Medical care is not the unique purview of the DOD and would not typically be provided upon request by civil authorities unless all local resources were exhausted. A more appropriate immediate response request may be to provide ambulances staffed with military personnel to report to a mass casualty site and transport those casualties to local hospitals.

Debris removal may initially appear to be an inappropriate type of assistance for an IRA mission; however, it can be appropriate when the local authorities request debris removal to allow access to particular areas for search and rescue.<sup>26</sup> A commander may have equipment and personnel readily available to remove debris in a community where the same service is not otherwise available without inordinate delay. If all other factors are met, then debris removal would be appropriate immediate assistance.

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<sup>22</sup> Message, 281832Z Apr 06, PTC Washington, D.C., subject: Defense Support to Civil Authorities Standing (DSCA) EXORD para. 9.O.

<sup>23</sup> DOD DIR. 3025.1, *supra* note 1, para. 4.5.2.

<sup>24</sup> Department of Defense Appropriations Act, 2007, Pub. L. No. 109-289, tit. II, 120 Stat. 1257 (2006); DOD DIR. 3025.1, *supra* note 1, para. 4.5.2 (stating that immediate response should be provided to civil agencies on a cost-reimbursable basis if possible). Initial expenses are paid for through a unit’s operation and maintenance funds, as these are the only funds available for such purposes initially).

<sup>25</sup> The “72-hour” guideline for the time determination is not authoritative or documented in a directive, policy, or statute; however, it provides a method for determining whether the assistance is genuinely immediate response that cannot wait for formal requests to the Secretary of Defense. The types of immediate response allowed under *DOD Dir. 3025.1, para. 4.5.4*, are those that can be completed within seventy-two hours and generally focus on saving lives, preventing human suffer, or mitigating great property damage. DOD DIR. 3025.1, *supra* note 1, para. 4.5.4.

<sup>26</sup> *Id.* para. 4.5.4.3.

## Readiness

A unit must always stand ready to perform its primary mission to defend the United States. If assistance to civil authorities may impact readiness, a commander must carefully tailor the assistance provided to ensure readiness is maintained.

### **STEP 4. If you decide to respond under IRA, what do you need to do next?**

Commanders shall advise their chain of command of any assistance provided to civil authorities as quickly as possible and shall seek approval or additional authorizations as needed.<sup>27</sup> Notice should reach the National Military Command Center within a few hours of the decision to provide immediate response.<sup>28</sup> Forward the written request for assistance through command channels as soon as it becomes available.

### **STEP 5. How long can you help?**

Immediate response is not an indefinite response. As discussed above, a commander should respond to requests that can typically be completed within seventy-two hours. This is a guideline only, but it underlies the concept that IRA is narrow in scope and duration, and a formal request should be made for assistance that is required for a longer time and does not involve immediate live-saving activities. If, after an initial request is satisfied, a commander is still able to provide support to civil authorities, then follow-on requests and assistance should be made through the lead federal agency or principal federal agency based on the Stafford Act process and NRP.<sup>29</sup> A commander can notify their service force provider of their availability and capability to support a Defense Coordinating Officer (commonly known as DCO) on a longer-term basis or to become part of an established joint task force to respond to mission assignments.

## Conclusion

Just as every emergency is unique and cannot be fully anticipated, each request for civil support is unique. This article serves as a checklist for the consideration of immediate response, as well as an analytical tool to ensure that all parties maintain the legal boundaries of immediate response authority. Armed with this information, JAs of any experience level may respond readily and correctly to a commander's inquiry, "I want to help the local authorities, can I do this?"

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<sup>27</sup> *Id.* para. 4.5.3.

<sup>28</sup> Memorandum, Deputy Secretary of Defense, for Secretaries of the Military Departments, et al., subject: Reporting "Immediate Response" Requests from Civil Authorities (25 Apr. 2005).

<sup>29</sup> Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act), 42 U.S.C. §§ 5121 - 5206 (as amended by Pub. L. No. 109-308 (2006)); *see also* DOMESTIC OPERATIONAL LAW HANDBOOK FOR JUDGE ADVOCATES, VOL. 1, CH. 5 (18 July 2006) (providing an overview of the NRP, the Stafford Act, the role of the DOD and the principal federal agency).