

RECURRING SUBSTANTIVE LEGAL ISSUES

RECURRING SUBSTANTATIVE LEGAL ISSUES. Certain international and operational legal issues recur with some consistency while in a deployed or garrison environment. Fiscal law, captured enemy property, LOW application, interpreting international agreements, and weapons legal reviews are a few of the substantive matters confronted by operational law judge advocates. See the JAO web portal for more detailed explanation of these issues.

1. Fiscal Law. This area presents some of the most prevalent and complex issues in the operational environment. The ability to effectively utilize fiscal law can be a significant combat multiplier for a commander in certain operating environments. Judge advocates must be prepared to advise commanders on the constraints and restraints associated with the expenditure of funds during operations.

a. The primary constraint is that the expenditure of funds is proper only when authorized by Congress, not that funds may be expended unless prohibited by Congress. As such, each expenditure of funds must be specifically authorized by statute in terms of "time, purpose and amount." For instance, Procurement Marine Corps (PMC) funds are authorized to procure centrally managed items, such as most weapons and ammunition. Therefore, operations and maintenance (O&M) funds generally may not be used to procure ammunition. The most common fiscal law issues include: payments of U.S. funds to individual foreign nationals (e.g., foreign claims, solatia, condolence payments, etc.); contracting for host-nation goods and services; and expenditure of Title 10 funds for foreign military training and equipping, rudimentary construction, and humanitarian-civic assistance and disaster relief (HCA/DR).

b. Specific training in fiscal law, through attendance at fiscal law courses offered by TJAGLCS or the USAF JAG School, can help prepare judge advocates to analyze issues and provide advice in this area. Additionally, the Fiscal Law Course Deskbook, published by TJAGLCS and available online at JAO web portal, provides a comprehensive source of information on fiscal law issues. The Operational Law Handbook published by TJAGLCS also contains a chapter on basic fiscal law principles. Counsel for the Commandant (CL) also handles some fiscal law issues, especially in the areas of contracting and procurement.

2. Property Captured from the Enemy. The LOW authorizes the confiscation of enemy military property, therefore war trophies and souvenirs are authorized under the LOW. U.S. law and policy however declares all confiscated enemy property to be property of the U.S. government and strictly regulates the conditions under which individual Marines or units may retain such property.

a. Individual War Souvenirs. 10 USC § 2579 requires that all enemy material captured or found abandoned shall be turned in to "appropriate" personnel. The law authorizes the DoD to allow for individual Marines to request retention of war souvenirs if such property is "unserviceable," and there is a procedure for requesting, reviewing and approving each such request. The Marine service component command maintains implementing guidance for each AOR.

b. Unit War Trophies and Historically Significant Trophies.

Defense Transportation Regulations (DTR) 4500.9-R, allows theater commanders to approve the transport of historical artifacts from their respective AORs. Requests for approval should be submitted through the operational chain of command. Similar to individual war souvenirs, legal guidance for disposition of captured enemy equipment and historical artifacts are often AO and mission specific and should be researched before deployment.

3. Law of War (LOW). The LOW is that part of international law that regulates the conduct of armed hostilities. As a matter of DoD policy, U.S. Armed Forces are to comply with the LOW during all armed conflicts, however such conflicts are characterized, and in all other military operations. DoD, DON, the Joint Chiefs of Staff (JCS) and the Marine Corps have provided instructions, directives and orders addressing requirements for: 1) training, 2) command legal advisors, and 3) LOW violation reporting and investigation requirements. Within the Marine Corps, this implementing order is MCO 3300.4A, *Marine Corps Law of War Program*, of 9 January 2014. Marine judge advocates must fully understand and advise the commander, staff, and Marines on the requirements of this program. Further DoD implementation and policy with respect to the LOW can be found in:

- DA PAM 27-1, *Treaties Governing Land Warfare*, 1956
- FM 27-10, *The Law of Land Warfare*, 1956
- DoDD 2311.01E, *DoD Law of War Program*, 9 May 2006
- CJCSI 5810.01D, *Implementation of the DOD Law of War Program*, 30 Apr 10
- DODD 2310.01E, *The Department of Defense Detainee Program*, 5 Sep 06
- SECNAVINST 3300.1C, *Department of the Navy Law of War Program*, 28 May 2009
- AR 190-8/OPNAVINST3461.6/AFJI 31-304/MCO 3461.1, *Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees*, 1997
- MCRP 4-11.8B, *War Crimes*, 6 September 2005

4. International Agreements. Before deployment to a foreign country, commanders, their staff, and Marines must be aware of, and understand, the meaning and effect of any applicable international agreements, particularly with regards to diplomatic status and civil and criminal jurisdiction while in the host nation.

a. Common types of international agreements:

i. Defense Cooperation Agreements (DCA). DCAs establish mutually supporting security pledges between the United States and allied or friendly nations, and typically include provisions for territorial access, stationing, and provision of forces and material, and bi-lateral training and exercises.

ii. Status of Forces Agreement (SOFA). A SOFA defines the legal position of a visiting military force in a foreign country. A SOFA may be bilateral (between two nations) or multilateral (between many nations, such as the NATO SOFA). SOFAs set forth criminal and civil jurisdiction, claims, taxes, entry and exit, licenses, registration, customs, etc. Types of jurisdiction can vary - in many instances US forces can be subject to host nation criminal law and process - which is why a SOFA should be understood before deployment. In addition, several NATO countries have supplementary bilateral agreements with the United States, in addition to the NATO SOFA.

SOFAs and Foreign Criminal Jurisdiction are also discussed in paragraphs 1007 and 1008 of Chapter X of the JAGMAN.

iii. Article 98 Agreements. As of 26 March 2014, 122 countries are States Parties to the Rome Statute of the International Criminal Court. The United States is not a party. Most SOFAs do not afford any protection from ICC jurisdiction. The ICC purports to exercise jurisdiction over US persons who commit offenses covered by the Rome Statute, if those offenses are committed in the territory of an ICC Party or in the territory of a non-Party State, if that State consents to ICC jurisdiction. Moreover, such States are obligated to abide by an ICC request to surrender anyone suspected of an ICC crime. Thus, US service members alleged to have committed a covered crime and deployed to such a country, are at risk of surrender to the ICC. To help overcome this problem, the USG has negotiated agreements in accordance with Article 98 of the Rome Statute. Article 98 Agreements preclude a country from turning over a US citizen to the International Criminal Court (ICC) without USG consent. A by-country listing of Article 98 Agreement status is available and can be obtained by contacting JAO.

iv. Acquisition and Cross-Servicing Agreements (ACSA). 10 USC § 2342 provides authority for government-to-government ACSA for mutual logistics support between U.S. forces and eligible countries' forces. Eligible countries are NATO countries and SECDEF-designated non-NATO countries. Under an ACSA, support, supplies, and services between countries may be reimbursed in kind, by trade of equal value, or by cash. Additionally, ACSAs eliminate the requirement for certain contracting requirements that are otherwise required by the Federal Acquisition Regulations.

v. Visiting Forces Agreements (VFA).

b. Negotiation and Conclusion. Commanders, their staff, and their Marines are prohibited from negotiating or concluding an international agreement, without prior written approval by a DoD official who is assigned approval responsibility per DoD Directive 5530.3, *International Agreements*, of 11 Jun 87. This Directive delegates certain limited authority to SECNAV, CJCS, and combatant commanders to negotiate and conclude certain international agreements. SECNAVINST 5710.25B, *International Agreements*, of 23 Dec 2005, sets forth the authorities that may approve the negotiation and conclusion of international agreements within the DoN. SECNAV has delegated the authority to negotiate and conclude certain international agreements to CMC. CMC has delegated this authority to DC PP&O only for the International Affairs Program (IAP) (see MCO 1520.11F) and the Marine Corps Foreign and Marine Liaison Officer Program (see MCO 5710.7). CMC retains the authority for all other international agreements for which CMC has authority to negotiate and conclude.

5. Weapons Reviews. All weapons, weapon systems, and ammunition to be procured by the Marine Corps must undergo a legal review to ensure its procurement is consistent with domestic and international law, including the LOW. In addition, all weapons, weapon systems, and ammunition must undergo an arms control treaty review.

a. LOW Legal Review. DoD Directive 5000.01, *The Defense Acquisition System*, and SECNAVINST 5000.2E, *Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and*

Development System, require the Navy JAG (Code 10) to conduct legal reviews of all weapons, weapon systems, and ammunition before procurement by the DON, including the Marine Corps. For Marine Corps items, Marine Corps Systems Command forwards requests for legal reviews to the Navy JAG (Code 10) via JAO for review and endorsement.

b. Arms Control Treaty Review. DoD Directive 2060.1, *Implementation of, and Compliance with, Arms Control Agreements* and SECNAVINST 5710.23C, *Implementation of, and Compliance with, Arms Control Agreements*, require all DoD activities to undergo an arms control treaty review, separate and distinct from the LOW Legal Review. The Naval Treaty Implementation Program (NTIP) conducts this review for DON activities. If the particular weapon, weapon system, or ammunition, reasonably raises an arms control issue, the matter may need to be elevated to an OSD Compliance Review Group for approval.

c. Commercial Off-the-Shelf. There have been instances when units have sought to obtain weapons, weapons systems, or ammunition directly from commercial vendors. It is recommended that prior to any such procurement units coordinate with Marine Corps Systems Command (MCSC) and JAO to ensure such procurement does not violate any fiscal laws, and that a legal/arms control treaty review is obtained.