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Proceedings of the First Center for Law and Military Operations Symposium, 18-20 April 1990

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alimony, child support, or maintenance. Notwithstanding the Bankruptcy Code's broad definition of "debt,"[201] the Eighth Circuit, in an en banc decision, held that "not until the 15th of each month when a payment was due but unpaid did that portion of the debtor's obligation become a debt."[202] The court effectively concluded that one debt did not accrue, but, instead, a number of mini-debts accrued on the fifteenth of each month. The court apparently justified that conclusion by noting its "doubt that Congress ever intended that an ex-wife's judicially decreed sole and separate property interests in a pension payable to her former husband should be subservient to the Bankruptcy Code's goal of giving the debtor a fresh start."[203]

A retiree will not be able to use bankruptcy to avoid paying an ex-spouse part of his or her retired pay if the obligation owed is in the nature of alimony, child support, or maintenance. Notwithstanding the holding of *Bush*, bankruptcy may excuse a retiree from paying an ex-spouse a portion of his or her retired pay if the obligation arises from a property settlement. Attorneys should be wary of counseling clients to use bankruptcy as a means of defeating court-ordered divisions of retired pay as property.[204] Most importantly, clients who are contemplating divorce should understand the potential impact of the Bankruptcy Code on payments of military retired pay before deciding whether to seek, or agree to pay, retired pay as part of property division or as alimony, maintenance, or child support. CPT Connor.

Operational Law Note

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Opening and Welcoming Remarks

The Center for Law and Military Operations, The Judge Advocate General's School, United States Army, (TJAGSA) held the First Center for Law and Military Operations Symposium from 18 to 20 April 1990. Sixty participants, representing the Army, Navy, Marine Corps, Air Force, Coast Guard, Department of Defense (DOD), and Department of State attended the symposium. The following summary provides a brief introduction to the general topics covered during the symposium. Lieutenant Colonel H. Wayne Elliott is the current Director of the Center.

The then-Secretary of the Army, John O. Marsh, Jr., established the Center for Law and Military Operations in December of 1988. The goal of the Center is to examine both current and potential legal issues attendant to military operations through the use of symposia, the publication of professional papers, and the creation of a joint service operational law (OPLAW) library. The Center not only prepares attorneys to deal with operational legal issues as they exist, but also, as a concurrent function, attempts to anticipate future deployments in military operations. Accordingly, the Center seeks to identify, discuss, and implement legal doctrines essential to evolving missions in the field. In his directive to The Judge Advocate General of the Army, Secretary Marsh emphasized the invaluable contribution the Center could make to the development of close professional relationships between United States and allied attorneys in the OPLAW arena.

Colonel Thomas Strassburg, the Commandant of The Judge Advocate General's School, began the First Center for Law and Military Operations Symposium by welcoming the participants. Brigadier General John Fugh, The Assistant Judge Advocate General, delivered the opening remarks. General Fugh stressed the increasing importance of OPLAW and the role of the newly established Center in "the ongoing examination of legal issues associated with ... the conduct of military operations." General Fugh noted that this role is part of the Center's mission and that this first symposium embarked on the fulfillment of that mission from a joint service perspective.

Operational Law: Service Perspectives on Doctrine, Training, and Materials

The Army Perspective

The first director of the Center, Colonel David E. Graham, began the symposium with a presentation on the Army's perspective of OPLAW. Colonel Graham traced the genesis of OPLAW from the dual experiences of the British in the Falkland Islands War and the United States' Operation Urgent Fury in Grenada. These campaigns focused attention on the need to train legal advisors properly so that they can identify, and can provide timely advice on, the numerous legal issues associated with the deployment of United States forces—both in combat and in peacetime environments. Stressing that OPLAW does not portend an abandonment of traditional judge advo-

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[201] *See supra* note 188.

[202] *Bush*, 912 F.2d at 994.

[203] *See id.* at 995 n.18.

[204] Bankruptcy can make obtaining credit very difficult. Under the Fair Credit Reporting Act, credit reporting agencies can report bankruptcy adjudications on a consumer's credit report for up to ten years. *See* 15 U.S.C. § 1681 (1988).

cate Law of War responsibilities deriving from the Hague and Geneva Conventions, Colonel Graham briefly described the Army's efforts to incorporate the legal lessons learned from past operational deployments into an OPLAW discipline of study.

In the context of deployments, military leaders now commonly recognize that judge advocate responsibilities encompass areas such as claims, contracts, legal assistance, international agreements, diplomatic relations, and criminal law. Accordingly, the International Law Division at The Judge Advocate General's School has developed numerous OPLAW materials, to include the Operational Law Handbook, the OPLAN Review Checklist, and the Deployment Checklist. Additionally, the International Law Division provides OPLAW training and detailed instruction to the Graduate Class at TJAGSA. It also annually conducts two Judge Advocate and Military Operations short courses, three Law of War Workshops, and on-site instruction to reserve judge advocates.

Colonel Graham discussed the Army's working definition of OPLAW: "That body of law, both domestic and international, impacting specifically upon legal issues associated with the planning for and deployment of U.S. forces overseas in both peacetime and combat environments." He pointed out that the scope of the definition is currently under review so that the Army could consider some of the special concerns of the United States Army Forces Command (FORSCOM), such as the Department of Defense counternarcotics mission.

Colonel Graham next listed and discussed five types of overseas deployments: 1) deployment overseas under a peacetime stationing agreement; 2) deployment for conventional combat missions; 3) deployment for security assistance missions; 4) deployment for overseas exercises; and 5) deployment for unconventional missions. With respect to combat deployments, he noted that commanders increasingly are raising issues concerning applicable international and domestic law, such as the effects of the War Powers Resolution or the Arms Export Control Act. Increased mobility on the part of media representatives in the combat theater requires all commanders to have an understanding of the legal basis for their units' deployments, even though these issues more likely are the concerns of higher levels of command. He noted the importance of recordkeeping in the area of combat contracting and combat claims, particularly with respect to requisitions, appropriations, and seizures of property. Colonel Graham also elaborated on the problems encountered in a post-combat transition to conventional federal contracting rules and the problems arising out of statutorily-imposed limitations on the payment of combat-related claims.

OPLAW issues also arise concerning the criminal law for deploying personnel. For example, judge advocates must understand and be able to apply statutory definitions such as "time of war" and "before the enemy" that affect the application of certain criminal law provisions to an accused.

Colonel Graham then noted that the DOD counternarcotics mission and deployments for security assistance purposes are of increasing interest and require careful interpretation and application of pertinent congressional mandates and restrictions. He then addressed other OPLAW concerns in the context of low intensity conflict environments, pointing out that military exercises will continue to give rise to unique legal issues as long as exercise-related humanitarian assistance, construction, and training continue to supplant underfunded security assistance measures.

Colonel Graham concluded by noting the need for further work in the areas of intelligence law and the legal issues related to civil affairs.

The Navy Perspective

Professor R. J. (Jack) Grunawalt, Captain (Ret.), Director, Oceans Law and Policy Research Department, Center for Naval Warfare Studies, Naval War College, presented the Navy's OPLAW perspective. In his introduction, he stressed the importance of keeping OPLAW in its proper focus. Although OPLAW is not new, addressing OPLAW as a separate area of concern is. Accepting the "bureaucratic necessity" of defining OPLAW, he deemphasized any utility or necessity for arriving at a definition common to all services. From the Navy's perspective, OPLAW encompasses any body of law or policy that is integral to the execution of the operational commander's mission and includes public international law, the law of the sea, the law of space, rules of engagement (ROE), environmental law, and maritime law enforcement. The approach of the Navy is a task approach focused on particular issues, such as freedom of navigation and overflight, and specialized operations, such as counternarcotics missions.

Professor Grunawalt stressed that mission accomplishment is the baseline. The operational lawyer must know the mission from the commander's perspective and understand the nature of the threat the force is confronting. Therefore, viewing the commander as the boss—instead of as the client—is essential. Under this methodology, the lawyer assists in resolving operational problems and does not necessarily provide strictly *legal* advice. Any advice proffered must be timely and, in every possible case, it must precede the contemplated action to be effective. Likewise, counsel must be decisive; "no risk" opinions are of little value. Professor Grunawalt emphasized that, unlike the Army's focus on periodic deployments, the Navy operates in a constantly deployed environment.

With respect to educating and training Navy staff judge advocates (SJAs), Professor Grunawalt noted that

no naval counterpart to the Army's mid-career training of legal officers exists. While a Master of Laws (LL.M.) option in international law is available to some Navy judge advocates, the Navy relies principally on two-week courses at the Naval War College, with the goal of creating an appropriate orientation to OPLAW issues. Primarily, the Navy focuses on on-the-job training.

Training for Navy line officers takes a variety of forms. The Naval Academy, Naval Officer Candidate School, and Navy Reserve Officer Training Corps (NROTC) program provide some rudimentary instruction in international law. Command perspective training through military schools provides additional instruction. The Naval War College also provides some instruction in OPLAW areas and conducts various "courses of opportunity." For example, following the *USS Stark* incident, the Navy developed a three-day course on rules of engagement to enhance the preparedness of operational commanders in the execution of the rules of engagement. The Navy also has incorporated OPLAW issues in ROE exercises and wargaming.

The primary publication in the Navy OPLAW arena is *The Commander's Handbook on the Law of Naval Operations*. This publication is also available in an annotated form to support Navy and Marine Corps judge advocate requirements.

In conclusion, Professor Grunawalt concurred in Colonel Graham's assessment that intelligence law is an important area of concern for future work. Professor Grunawalt also strongly supports the efforts and goals of the Center for Law and Military Operations.

The Marine Corps Perspective

Lieutenant Colonel Terry Kane, Assistant Staff Judge Advocate for Operational Law, Headquarters, United States Marine Corps (USMC), addressed OPLAW from the Marine Corps perspective. Colonel Kane drew a distinction between practicing OPLAW and conducting a military operation. The Marine Corps is organized for combat as a Marine Air Ground Task Force (MAGTF) that, in turn, is organized into Marine Expeditionary Units (MEUs), Battalions (MEBs), and Forces (MEFs). Marines use the sea for basing and for avenues of approach as a bridge to land operations. Colonel Kane indicated that the Marine Corps has three MEFs that can operate from thirteen prepositioned ships with thirty-day sustainability. The MAGTF is subdivided functionally into four elements: 1) a command element; 2) a ground combat element (GCE); 3) an aviation combat element (ACE); and 4) a combat service support element (CSSE). Most Marine Corps lawyers function within a CSSE. An SJA draws upon the legal services support section for legal advice. The Operations Law Branch, Headquarters, Marine Corps, and attorneys at the unified commands deal with OPLAW issues arising outside the MAGTF.

Marine Corps lawyers who have received some training in the area of civil affairs attend to issues arising from civilian-military relations. The Marine Corps conducts formal training in civil affairs, to the extent possible, at Fort Bragg, North Carolina. The Marine Corps also provides OPLAW training through a variety of short courses, such as the USMC Law of War courses. The Marine Corps also avails itself of training available through other services, such as the Army's Law of War and Judge Advocate and Military Operations courses.

The Marine Corps relies upon doctrinal publications of the other services in the OPLAW area, such as *The Commander's Handbook on the Law of Naval Operations*, the Army's Field Manual 27-10, and the Air Force's Publication 110-31. The Marines base their delivery of legal services to deployed commands on Operational Handbook 4-10, Legal Services Support Annex.

The Air Force Perspective

Major Walter Phillips, Chief, International Operations Law, Air Force Judge Advocate General's School, delivered the OPLAW perspective for the Air Force. Major Phillips began his remarks by providing an expansive Air Force definition of OPLAW:

> Domestic and international legal issues associated with the planning and execution of peacetime and combat military operations. This body of law impacts directly upon the capability of the commander and his staff to accomplish the military mission. It includes, but is not limited to, legal issues relating to security assistance, training mobilization, pre-deployment preparation, deployment, overseas procurement, the conduct of military operations, and civil affairs operations in foreign countries.

After discussing this definition, Major Phillips described, in detail, the operational law instruction provided at the Air Force Judge Advocate General's School at Maxwell Air Force Base, Alabama.

The Air Force Judge Advocate Staff Officer Course offers four hours in international operations law. The courses include status of forces agreements, criminal law issues, claims, and operational planning factors. The course also provides two hours of the law of armed conflict. In addition, the school offers an annual one-week course in international operations law and teaches OPLAW topics during Air Force reserve and Air National Guard judge advocate courses. Faculty members also provide instruction on OPLAW to other Air Force schools, to include the Air Command and Staff College, the Air Force Senior NCO Academy, and the Air War College. Finally, the Air Force holds a Contingency Wartime Planning Course ten times each year.

In closing, Major Phillips pointed out the Air Force's concern over the drafting of effective rules of engagement applicable to air operations. He also acknowledged the need for the branches of the armed forces to think jointly in the OPLAW arena.

The Coast Guard Perspective

Commander Michael Perrone, Maritime International Law Division, United States Coast Guard, presented the Coast Guard perspective of OPLAW. Commander Perrone prefaced his comments with a historical commentary on the origin and current status of the Coast Guard. Essentially, the United States Coast Guard functions under the Department of Transportation. Upon declaration of war or presidential directive, however, it operates as an integral part of the Navy. An essential role of the Coast Guard—whether or not it acts as a service in the Navy—is to provide port security. Antiterrorism is a part of this Coast Guard mission. Commander Perrone discussed the various concerns regarding Coast Guard participation in the interdiction of drug traffickers and the need to train fully all Coast Guard personnel.

Other services provide training to Coast Guard personnel in OPLAW, primarily through the Navy's ROE and Operational Law Course. Because the Coast Guard offers no formal OPLAW training, Commander Perrone supported joint legal efforts to address OPLAW concerns.

Commander Perrone emphasized the difference between ROE and traditional use of force considerations, noting that a developing situation may require Coast Guard personnel to shift quickly from one concept to the other. Finally, Commander Perrone stressed the need to transmit OPLAW information to the smaller vessels used in Coast Guard security operations.

Psychological Operations: A Joint Perspective

Colonel Harold W. Youmans, Chief, Policy & Concepts Division, Headquarters, United States Special Operations Command (SOCOM), spoke on the legal considerations regarding psychological operations (PSYOP). After stipulating that PSYOP is a vital part of modern military and political power projections, Colonel Youmans reviewed the constitutional, statutory, treaty, directive, and regulatory authorities surrounding the application of PSYOP.

The President's authority to apply PSYOP derives from his constitutional authority as Commander in Chief and from his responsibility to faithfully execute the laws of the nation. Those laws include titles 10, 32, and 50 of the United States Code, which generally govern the practice of PSYOP. Additionally, statutory provisions controlling the United States Information Agency and the Central Intelligence Agency affect interagency aspects of PSYOP functions. Colonel Youmans further noted that treaties and other international agreements also control how the military applies PSYOP. For instance, the Annex to the Fourth Hague Convention is particularly determinative regarding "ruses of war." He then went on to discuss the effects that the United Nations Charter and the various bilateral and regional defense treaties have on PSYOP. To explain these effects, he offered a case study on how the United States applies PSYOP within the NATO context.

Colonel Youmans pointed out that presidential national security decision directives, executive orders, and interagency agreements also influence how the military employs PSYOP. For instance, within the Department of Defense, the Secretary of Defense fulfills his PSYOP responsibilities by promulgating various DOD directives and a DOD-wide master plan.

Operationally, the Office of the Joint Chiefs of Staff (JCS) has integrated PSYOP planning into the Joint Operations Planning System, the Unified Command Plan, the Joint Strategic Capabilities Plan, and other pertinent service and JCS memoranda. Joint PSYOP doctrine appears in Joint Publication 3-53. Colonel Youmans completed his remarks by briefly discussing the service doctrines and authorities.

To gain the full measure of benefit from the application of PSYOP, Colonel Youmans encouraged the attendees to increase their knowledge of PSYOP. He concluded by noting that a thorough knowledge of PSYOP concepts is crucial to a military attorney's ability to provide current, cogent legal advice to his or her commander.

Operation Just Cause

Lieutenant Colonel Glen Orgeron, USMC, Office of the Staff Judge Advocate, United States Southern Command (SOUTHCOM), provided a briefing on Operation Just Cause. In the context of the history of the Panama Canal, Colonel Orgeron examined the Panama Canal Treaty prohibition against interference in the internal affairs of Panama and provided a brief chronology of events leading up to the United States' combat deployment of December 1989.

Colonel Orgeron next addressed the actions that the United States took in the months preceding Operation Just Cause. These actions included a series of joint training exercises that asserted the United States' authority under the Panama Canal Treaty and the institution of more stringent security measures in the Canal area. A discussion of the Panamanian assault on an off-duty United States military officer and his wife, as well as the murder of First Lieutenant Robert Paz, followed.

The Joint Task Force for Just Cause included over 27,000 soldiers, sailors, airmen, and marines. The composition of the Peoples Defense Force (PDF) was primarily infantry elements that controlled many

Panamanian institutions. The battle plan included the objective of occupying the capital, Panama City. Just before H-hour, the constitutionally-elected Panamanian officials, Endara, Calderone, and Ford, received their oaths of office and assumed the leadership of Panama.

Colonel Orgeron stressed that the commander in chief (CINC) had directed the forces to make concerted efforts to minimize collateral damage. The forces secured all major objectives on D-Day, although sporadic resistance continued thereafter. United States forces considered Panama secured by the end of December 1989. Subsequently, Noriega surrendered on January 4, 1990, after seeking political asylum in the Papal Nunciature.

Colonel Orgeron explained that the stability operations that followed revealed that urgent needs for food, shelter, and medical supplies and assistance existed. To ameliorate the impact created by these needs, the United States dispatched Special Forces "A Teams" to work with the Panamanian populace in rural areas. Colonel Orgeron also noted that during the stability operations, American forces recovered large numbers of weapons from PDF arms caches. He concluded by praising the overall success of the campaign and the minimal damage inflicted on Panamanian property.

Colonel Bill Moorman, United States Air Force (USAF), Staff Judge Advocate, 12th Air Force/Southern Air Force (SOUTHAF), discussed the Air Force's contribution to Operation Just Cause. Colonel Moorman noted the two basic Air Force assumptions in planning for the operation: 1) American forces would use lethal force only as a last resort; and 2) the primary goals were the neutralization of the PDF, the capture of Noriega, the restoration of the legitimate government of Panama, and the protection of American lives.

The Air Force used over three hundred aircraft in the operation, which made it the most complex single air operation, with the longest flight distances, since World War II. The Air Force's objective was to have all forces over targets by 0100 hours local time on 20 December 1989. Colonel Moorman presented the various overflight considerations in the operation and discussed the use of the F-117 stealth fighters in Panama. He also pointed out the unique advantage of having Howard Air Force Base in-country. During the operation, the Air Force lost no aircraft and sustained no casualties.

Colonel Moorman then discussed the manner in which the Air Force developed and approved the ROE for the operation. He noted that SOUTHCOM wrote the basic ROE, SOUTHAF wrote the air ROE, and the JCS then reviewed the ROE. Colonel Moorman then addressed the Air Force's planning for the treatment and disposition of prisoners of war (POWs), refugees, and detainees. He pointed out that SOUTHAF command personnel thoroughly examined the capture and arrest authority of United States forces in the context of the Posse Comitatus Act and the authority of DOD to provide assistance to civil law enforcement authorities—particularly in conjunction with the arrest of narcotics traffickers.

Colonel Moorman also discussed the issues of war trophies, claims, and pillaging. He noted that the Air Force gave careful consideration to each of these issues, but that the magnitude of the problems the Air Force confronted in each of these areas was greater than anticipated. Colonel Moorman stressed the importance of ensuring that each airman had a clear understanding of the command's policy on war trophies, the need to avoid reckless acts that would lead to unnecessary claims, and the fundamental difference between illegal pillaging and the appropriate requisition of private property.

In closing, Colonel Moorman offered some observations concerning the role of the judge advocate as a part of the combat team. He noted that the military attorney must have an understanding of the operation and the planning process, be familiar with the peacetime ROEs, attend planning meetings, and demand full access to operational plans. Finally, the lawyer must be prepared to respond quickly to rapidly evolving events.

Colonel Michael Nye, USAF, Office of the Chairman, Joint Chiefs of Staff, discussed the role of the JCS in Operation Just Cause. Colonel Nye explained that the JCS primarily performed review and support functions while the Unified Command elements prepared and executed the plan. The JCS reviewed plans and ROEs in conjunction with the SOUTHCOM judge advocate. The Chairman of the JCS then briefed the Secretary of Defense (SECDEF), who, in turn, briefed the President.

For operations such as Just Cause, the Office of the JCS sets up a Current Situation Room to monitor developments, to transmit alert warnings, and to execute orders. The Chairman and SECDEF remained in the Current Situation Room to receive reports on the latest developments from the CINC. Throughout the operation, JCS lawyers worked with the State Department, the Justice Department, and the National Security Council. Colonel Nye pointed out that one of the major issues that these parties addressed concerned the question of what actions American forces could take to prevent Noriega's escape from the Papal Nunciature. The JCS finally relied upon the theory of a "public safety" exception to the Vienna Convention on Diplomatic Relations as the basis for searching diplomatic personnel leaving the Nunciature.

Colonel Nye noted that judge advocates staffed the Army Operations Center in the Pentagon twenty-four hours a day. The judge advocate on duty provided valuable assistance to the JCS by responding to the many legal questions that arose during the operation.

Major Gary Walsh, International Law Division, The Judge Advocate General's School, briefed the symposium participants on the After-Action Seminar conducted by the Center for Law and Military Operations following Operation Just Cause. He also discussed a number of the legal issues identified by the seminar participants.

The Center for Law and Military Operations conducted the After-Action Seminar at The Judge Advocate General's School from 26 to 27 February 1990. Most of the principal military and federal civilian attorneys involved in the planning or execution of Just Cause participated. The purpose of the seminar was to discuss the legal issues that arose during the operation with a view toward incorporating the experience gained into future operations planning. The participants addressed the issues in both a chronological and in a functional manner. Accordingly, the seminar categorized the issues as either predeployment or deployment matters and then further divided the issues into functional areas.

Major Walsh first addressed the predeployment issue of operations planning. The seminar participants concluded that the operation successfully integrated judge advocates at all levels into the planning process at an early stage. The role of the judge advocates in Just Cause extended well beyond simply reviewing operations plans. Military attorneys were involved intimately in the review and development of ROEs for Operation Just Cause. Major Walsh pointed out that providing senior officers instruction in operational law has produced dividends in the area of judge advocate involvement in operations planning.

The second predeployment issue discussed was legal assistance for deploying forces. As a result of the aggressive preventive law programs of the units involved, judge advocates needed to prepare relatively few legal documents for the deploying soldiers. Nevertheless, the lack of a quick and easy will-writer computer program hampered last-minute predeployment preparations. Major Walsh commented that The Office of the Judge Advocate General of the Army and The Judge Advocate General's School were working to develop a will format more appropriate for deployments.

Major Walsh then turned to deployment issues. The first deployment issue he addressed was the employment of civil affairs (CA) assets. He noted that CA assets continue to perform critical missions in the rebuilding process in Panama. The military could enhance the employment of these assets substantially if CA doctrine and planning specifically addressed the issue of effectively using CA assets in a post-deployment environment.

Major Walsh also noted that the seminar participants discussed the use of force issue extensively. Several participants stated that the manner in which the military employed force against military objectives and personnel throughout Operation Just Cause was as precise as one could reasonably hope for in a military operation. They attributed the minimal collateral casualties and incidental damage to the following factors: 1) the sophisticated understanding by commanders of legal issues associated with targeting; 2) the involvement of judge advocates in target selection; 3) the ability of commanders to view their objectives prior to the operation; and 4) the discipline, intelligence, and maturity of the soldiers involved in the operation.

Detainee collection and treatment also was a significant deployment issue. American forces extended the protections of the Geneva Convention on Prisoners of War (GPW) to all detainees. The process used to determine the status of these detainees met all the substantive requirements of article 5 of the GPW. Moreover, the United States forces, as early as D-Day, began providing a degree of care to detainees that met both the letter and spirit of the GPW.

Major Walsh noted that the claims system functioned smoothly in Panama primarily because the United States Army South Claims Office (USARSO) was already "on the ground" and had extensive experience in dealing with claims in Panama. The United States Army Claims Service provided valuable assistance to the USARSO Claims Office and to the claims officers in the combat units.

Major Walsh then addressed the issue of acquisition of property, which generated an extensive discussion among the after-action seminar participants. Many of the participants noted that the Department of Defense and the Department of the Army lack established policies that address the critical issue of payment for requisitioned property. These participants urged the military departments to acknowledge the need for legal authority, and to establish clear procedures, to compensate owners of property requisitioned for military purposes during military operations. Major Walsh confirmed that the Department of the Army recognizes the problem and is seeking to resolve it.

The issue of treatment of diplomatic personnel also arose during the deployment. Major Walsh emphasized that close coordination between the Department of State, the United States military, and the United States Embassy was imperative to the proper handling of diplomatic personnel and property. He noted that legal guidance to commanders in the area of diplomatic personnel and property—with respect to searches in particular—must be as specific as possible.

The final deployment issue that Major Walsh discussed concerned the disposition of captured property. Prompt dissemination of an unequivocal command policy on war trophies, coupled with an aggressive inspection

program, effectively precluded the problem of American soldiers taking prohibited items as war trophies.

Europe in Transition

Lieutenant Colonel Keith Sefton, USMC, Office of the Legal Advisor, European Command (EUCOM), began a discussion of the changes taking place in Europe by focusing on combined training exercises conducted in various European nations. Colonel Sefton pointed out that the military has reduced significantly the number and size of exercises taking place, particularly in Germany. He attributed this trend to the perceived reduction in the Soviet threat and the increased emphasis on environmental issues within the host nations. Because of these factors—especially the environmental factor—the United States is looking at alternative training sites. Colonel Sefton said that one alternative that the military is considering is to increase the use of African training sites, which are also within the EUCOM area of responsibility.

Colonel Sefton also discussed the concern of crisis action response with regard to the current political actions and turmoil occurring in Eastern Europe. EUCOM is studying this issue, because political unrest could have a significant impact on stability throughout Europe.

Finally, Colonel Sefton advised that EUCOM is becoming increasingly active in the counternarcotics area. He closed by stating that, because security assistance was on the upswing in Africa, attorneys must be prepared to address the attendant legal issues.

Mr. George Bahamonde, Special Assistant to the Judge Advocate, United States Army Europe (USAREUR), addressed the symposium on the issue of German unification. Mr. Bahamonde indicated that German unification, the apparent demise of communism, and reductions in the military forces of the North Atlantic Treaty Organization (NATO) and the Warsaw Pact were producing short-term instability throughout Europe.

Mr. Bahamonde then specifically addressed reunification by setting forth two basic approaches for the merger of East and West Germany. First, he posited the "takeover theory," noting that article 23 of Germany's Basic Law allows any part of what is now the German Democratic Republic (GDR) to apply for inclusion in the Federal Republic of Germany. Second, Mr. Bahamonde offered the "merger theory," pointing out that article 146 of the Basic Law, which provides for enacting a new constitution and electing a new legislature, essentially facilitates the creation of a new nation.

Because the merger theory would create complex issues—not the least of which would be problems of state succession to treaty obligations—Mr. Bahamonde felt that the takeover theory probably would prevail. Under the takeover theory, Chancellor Kohl would: 1) obtain an agreement with the GDR on economic and legal unification; 2) get approval for a unification plan in the "2+4" talks, which would include leaders from the two Germanies and from the four World War II occupying powers; and 3) get approval for unification from the thirty-five-nation Conference on Security and Cooperation in Europe.

Mr. Bahamonde indicated that American troop reductions coming with German unification may result in various costs to the United States, such as the cancellation or termination of support and service contracts, the discharge of local national employees, and the filing of environmental claims. Unification also would terminate the Allied Forces' occupation rights and would remove the basis for the United States' military presence under present agreements. Mr. Bahamonde asserted that numerous treaties would lapse if the nations involved viewed unification as the final World War II peace settlement.

Speaking on status of forces issues, Mr. Bahamonde noted that the Germans are calling for revisions to the German Supplementary Agreement—a document they always have regarded as allowing too many prerogatives to the Sending States. He predicted that changing the Supplementary Agreement would be a central issue in the context of unification.

In closing, Mr. Bahamonde discussed financial concerns from both the perspective of the Soviet Union and the United States. He stated that Congress desired a substantial peace dividend and expected the Germans to assume a larger share of the financial costs for any remaining American forces. From the Soviet view, Mr. Bahamonde indicated that, because the GDR has been paying virtually all of the costs for the Soviet troop presence in East Germany, the Soviets may pressure a united Germany to pay a large share of the costs associated with the maintenance of Soviet forces in the eastern portion of that country.

Colonel Philip Meek, USAF, Deputy Staff Judge Advocate, United States Forces, Europe, discussed the perspectives of various European nations on the presence of American forces. He focused his comments on the perceived reduction of the Soviet threat, and compared the United States' presence in Europe to its use of military forces stationed in non-European countries such as the Philippines and Panama. Colonel Meek asserted that the changes in Europe will cause the leaders of many nations to review the level of the American presence in their countries and to evaluate the scope of United States operational rights. He also examined the evolving situation in Germany and concluded that a conservative political sentiment seemed to be emerging. Colonel Meek also led a detailed discussion on the destabilizing nature of ethnic problems, as well as the rising nationalism, throughout the Soviet Union and Eastern Europe.

Colonel Meek concluded his remarks by examining the issue of base rights agreements in the context of a changing Europe. He noted that the United States-Spain Agreement on Defense Cooperation, which has some disadvantageous provisions from the American military perspective, may influence negotiations between the United States and other allies, such as Turkey and Greece.

The Department of Defense Counternarcotics Mission: Past, Present, and Future

Major Wallace Warriner, USMC, Deputy Legal and Legislative Counsel to the Chairman, Joint Chiefs of Staff, addressed the symposium on the DOD counternarcotics (CN) mission. He briefly described the political and legislative history of the growing role of DOD in countering drug trafficking. Major Warriner then outlined the current congressional mandate for DOD's involvement in CN operations. The Fiscal Year (FY) 1989 National Defense Authorization Act designated DOD as the lead agency for the detection and monitoring of aerial and maritime transit of illegal drugs. This act also directed the SECDEF to integrate the command, control, communication, and technical intelligence assets that the United States has dedicated to interdiction of illegal drugs and to provide support to law enforcement agencies in their CN missions. The FY 1990 DOD Authorization Act permits the SECDEF to accord a wide range of support to federal agencies.

Major Warriner then summarized the SECDEF's guidance for implementation of the assigned mission. He noted that the SECDEF has declared that DOD will attack the flow of illegal drugs at every phase: in the countries that are the sources of the drugs; in transit from the source countries to the United States; and at distribution points in the United States. He illustrated DOD's involvement in CN with examples of interdiction operations being conducted by the United States Atlantic Command (LANTCOM) off the Florida coast and by FORSCOM on the Southwest border.

Major Warriner next discussed the type of support that DOD may provide to United States law enforcement agencies and foreign governments. Examples of support to United States law enforcement agencies include the loaning and maintaining of communications and surveillance equipment, the training of personnel, the transportation of personnel to facilitate a CN operation, and the sharing of intelligence on narcotics traffickers. Support for foreign governments could be in the form of mobile training teams and other security assistance programs that may assist a foreign government in developing its own CN capability.

Finally, Major Warriner discussed the use of force instructions provided to military personnel who support law enforcement agencies. Federal statutes—particularly the Posse Comitatus Act—prohibit American military personnel from participating directly in searches, seizures, arrests, and other similar law enforcement activities. Military personnel may, however, use force in self-defense.

Major James A. McAtamney, International Affairs Division, Office of The Judge Advocate General of the Army, spoke on the fiscal law considerations of DOD CN operations. He indicated that support to law enforcement agencies is reimbursable to DOD under the Economy Act and other applicable laws unless the armed forces provide the support in the course of regular military operations or training, or unless the support results in a benefit to the participating military unit that is substantially equivalent to the benefit it would accrue from normal military operations or training. Major McAtamney also discussed some of the specific DOD missions funded by the FY 1990 DOD Appropriations Act. That act identified a broad range of support that DOD may provide on a nonreimbursable basis. The Foreign Assistance and Arms Export Control Acts, however, would govern DOD support to foreign governments. Major McAtamney pointed out that the International Narcotics Control Program, which is part of the Foreign Assistance Act, also authorized DOD to provide assistance in international CN activities.

Major McAtamney concluded by stating that the federal government must continue to give attention to the funding of DOD CN activities. Many statutory provisions—particularly in the security assistance programs—require reports to Congress, either before or after DOD renders assistance. Consequently, DOD also must pay special attention to proper accounting.

Lieutenant Colonel Thomas Bryant, Office of the Staff Judge Advocate, FORSCOM, elaborated on one of the issues facing the military forces that are providing assistance to law enforcement agents on the Southwest border. He pointed out that much of the property along the border is privately owned. Therefore, while the United States Customs and Border Patrol agents have statutory authority to enter private property to enforce immigration and other laws, military personnel who accompany these agents do not share this authority. Colonel Bryant discussed some of the possible solutions to this problem, such as cross-designation of military personnel as Border Patrol agents, and the FORSCOM proposal of having military personnel accompany Customs agents onto private lands.

The Negotiation and Conclusion of International Agreements

Mr. George Taft, Office of the Legal Advisor, Department of State, spoke on the subject of "Treaties and Other International Agreements: The View from the Fifth Floor of the State Department." Mr. Taft indicated that

State Department Circular 175 is the key document relevant to the authorization to negotiate and conclude international agreements and is applicable when the United States concludes a government-to-government agreement or an agency-to-agency agreement. The purpose of Circular 175 is to ensure that negotiating parties address the foreign policy implications of agreements and to facilitate a level of interagency cooperation that promotes a coordinated and coherent foreign policy. Mr. Taft noted, however, that many agencies fail to obtain the authority required by Circular 175 before commencing negotiations. He cited the United States Agreement on the Sparrow Missile as one such unfortunate example. For agency-to-agency agreements involving DOD, the State Department and DOD have a working arrangement in which the agencies follow DOD's negotiating procedures and in which the State Department reviews agreements prior to their closure.

Mr. Taft went on to assert that a key issue in negotiating agreements is the question of whether a binding agreement is actually necessary. Similarly, the question of whether the United States or an agency really is seeking to conclude a binding agreement often arises. Mr. Taft noted that while binding agreements help to ensure compliance by the parties, they are not always necessary and are frequently difficult to obtain. Nevertheless, if, for example, domestic legislation requires a binding obligation, the law will require the parties to complete an acceptable agreement. In addition, Mr. Taft pointed out that the type of agreement the parties use often will dictate whether or not it is binding. For instance, the United Kingdom, Canada, and Australia generally never consider a document entitled "memorandum of understanding" (MOU) to be binding, while in American practice the language contained in an MOU may, nevertheless, indicate that it actually constitutes a binding agreement. Mr. Taft also recommended that negotiating parties should ensure that all agreements make reference to related or superceded agreements.

Mr. Taft then admonished the attendees on several potential problem areas in negotiating agreements. First, he cautioned negotiators not to draft agency-to-agency agreements that purport to obligate the entire United States government. He also noted that final clauses in international agreements often create problems. Specifically, negotiators frequently position them—or actually hide them—throughout the agreement. Instead, negotiators should place provisions addressing entry into force, amendment procedures, dispute settlement, and termination at the end of an agreement. Mr. Taft went on to state that parties should review annexes and side letters to determine if they should be integral parts of the agreement. He indicated that these principles also apply to MOUs. Finally, Mr. Taft noted that every agreement should, if possible, clearly indicate whether annexes or side letters are binding.

Mr. Taft continued by explaining that agencies that negotiate binding agreements, and other agreements of interest to Congress, must report them to Congress under the Case-Zablocki Act within sixty days of their conclusion. He noted, however, that agencies are typically late in reporting about twenty percent of applicable agreements. Mr. Taft then posited the question, "How does an agency determine if an agreement is significant and if it must report the agreement to Congress?" He indicated that no real, express guidelines existed and that past practice and common sense are the best guides. Mr. Taft concluded by urging parties in doubt to seek appropriate authority from higher headquarters to negotiate and conclude international agreements, and then to report the agreements to the State Department after entry into force.

Mr. Paul van Son of the Office of the Secretary of Defense, Foreign Military Rights Affairs (FMRA) office, next addressed the subject of international agreements from a DOD perspective. Mr. van Son noted that his office presently employs three civilian attorneys and one military judge advocate. It serves as the principal point of contact with the State Department on international agreements relating to military facilities, access and operating rights, and status of forces matters. As appropriate, FMRA exercises a similar coordinating role regarding other international agreements affecting DOD.

Expressing the view that no substitute exists for knowing the law, Mr. van Son stressed that attorneys dealing with international agreements should understand thoroughly Department of Defense Directive 5530.3, which implements the Case-Zablocki Act. In addition to the Department of Defense Directive, each branch of service has promulgated implementing regulations. For instance, Army Regulation 550-51, which the Army currently is revising, implements the Army's policies respecting the Case-Zablocki Act. Mr. van Son then addressed four essential elements of Department of Defense Directive 5530.3:

1) Do not negotiate or conclude an international agreement, of which the Case-Zablocki Act requires reporting, without consulting with the Legal Advisor's office at the Department of State.

2) Do not negotiate or conclude any international agreement having *policy significance*, whether or not it is reportable under the Case-Zablocki Act, without first checking with Under Secretary of Defense (Policy) (USD(P)). The general responsibility for coordinating *policy significant* agreements in the Department of Defense vests with USD(P) and the coordination itself occurs at the Deputy Assistant Secretary level. From the perspective of USD(P), agreements with *policy significance* include agreements that directly and significantly would affect foreign defense relations, agreements that would create security commit-

ments, agreements that normally require approval at OSD or the diplomatic level, and agreements pertaining to technology sharing.

3) Do not negotiate or conclude agreements containing status of United States forces provisions, or access and base rights provisions, without coordinating with FMRA.

4) If a would-be negotiator has any doubt about the reporting requirements for a particular agreement, do not proceed with negotiations.

Mr. van Son went on to discuss status of forces agreements (SOFAs) and pointed out that they are politically significant because they involve government-to-government issues. Accordingly, he noted that the State Department concludes SOFAs at the diplomatic level. Mr. van Son commented that during military deployments, defining the status of DOD personnel frequently presents a problem because the State Department often cannot negotiate, conclude, and confer status for personnel who deploy for less than thirty days. Accordingly, individuals on immediate, short-term deployments usually are subject to host country jurisdiction. In addition, the nature of the "status" that a host country will confer to deploying military personnel often becomes a contentious point. Mr. van Son noted, in particular, that many foreign governments are reluctant to accord military personnel the same status as embassy administrative staff, technical staff, and DOD personnel. He also stated that although SOFA-type agreements, concluded on an agency-to-agency basis, may be helpful to deploying units, host nation courts may not uphold these agreements unless the governments involved concluded them at the diplomatic level. The problems that typify short-term deployments, therefore, emphasize the need to prepare for exercises and security assistance missions as early as possible. Units always should notify, and coordinate with, FMRA to resolve status issues as early as possible.

Mr. van Son acknowledged that, quite possibly, too many DOD agreements exist. Parties involved in negotiations should consider whether a binding agreement is really necessary. Often, understandings or statements of principles, understood not to be binding, may be sufficient. Mr. van Son suggested that if a party needs authority to enter a binding agreement, the party should seek to initiate the request for authority at the component command level, and to have the request forwarded, through the unified command, to USD(P). In conclusion, Mr. van Son indicated that agency negotiating parties should contact FMRA if they have any doubts about whether negotiating authority is necessary. He also emphasized that FMRA was a central repository for all SOFA and basing agreements.

Colonel Raymond Ruppert, Staff Judge Advocate, United States Central Command (USCENTCOM), briefed the symposium on USCENTCOM's perspective on the international agreement process. Colonel Ruppert prefaced his remarks with a detailed explanation of the USCENTCOM area of responsibility and pointed out that cultural and political conditions make the negotiation of binding international agreements difficult. The primary concerns of the command are security assistance (which international agreements do not affect), access rights for exercises, and prepositioning of material. As a unified command, coordination with JCS is crucial for the authority both to negotiate and to conclude international agreements.

Colonel Ruppert pointed out that in the USCENTCOM area, most agreements are politically significant; thus, the Secretary of Defense has not delegated the authority to negotiate and conclude those agreements to the USCENTCOM CINC. Under Department of Defense Directive 5530.3, the Secretary of Defense has delegated to the Chairman of the JCS the authority to negotiate and conclude international agreements except those involving predominantly uniservice matters, security assistance, the collection and exchange of military intelligence, cooperative research and development, mapping, communications security (COMSEC) technology and signals intelligence, and military and industrial security. In turn, the Chairman has redelegated to the individual CINCs the authority to negotiate and conclude international agreements concerning matters other than COMSEC, access to defense communications systems, JCS telecommunications and command communications equipment, and military satellite communications. Colonel Ruppert noted that a confusing area that still requires clarification is the definition of "predominantly uniservice matter."

Colonel Ruppert then discussed his perceptions of the procedure for requesting DOD authority to negotiate or conclude an international agreement. He noted that USCENTCOM directs requests to USD(P) and FMRA, or, if the negotiations do not involve matters of political significance, USCENTCOM will direct the request to the DOD component having the delegated authority to conclude the agreement. This request should include a draft text, a legal memo, a fiscal memo, and a technology risk assessment.

Finally, Colonel Ruppert noted that the State Department's reluctance to negotiate status rights for United States personnel deploying overseas for less than thirty days causes problems for USCENTCOM. For example, in 1989, the Ethiopian Government allowed American military forces to conduct an extensive search and rescue operation in Ethiopia for a missing United States aircraft that contained, among other passengers, a congressman. Although the American military presence involved a significant number of aircraft and United States military personnel, the countries did not negotiate and conclude any agreements. Thus, during the course of the ordered

deployment, the American military forces in Ethiopia were subject to the full civil and criminal jurisdiction of the host nation.

Captain Manuel Supervielle, Office of the Staff Judge Advocate, United States Western Command (WESTCOM), briefed the attendees on the negotiation of international agreements in the United States Pacific Command (USPACOM). Captain Supervielle noted that the primary mission of WESTCOM is to conduct training and to maintain access to countries in the region in support of the USPACOM peacetime strategy. He then discussed WESTCOM's Expanded Relations Program and stressed that low intensity conflict concerns remained high on the command's mission agenda.

Captain Supervielle addressed the types of activities requiring international agreements. He placed these activities into four categories. First, and most common, are combined training exercises in foreign countries. The JCS directs most combined training exercises and uses Operation and Maintenance (O&M) monies to fund them. Second, the various exchange programs, such as the Long Term Personnel Exchange Program (PEP), the Short Term Pacific Armies Look Exchange (PALEX), and small unit exchanges, may require various forms of international agreements. The final two categories Captain Supervielle mentioned were the Pacific Armies Management Seminar (PAMS) and the various Special Forces training exercises conducted in foreign countries. Captain Supervielle remarked that the military conducts most of its Special Forces operations without the benefit of negotiated agreements.

Captain Supervielle then illustrated how serious problems can arise when the military forces do not negotiate agreements by relating an incident that recently occurred in Thailand. In that incident, United States ships were unable to offload exercise supplies because of Thailand's insistence that the American forces must satisfy local customs requirements. On the opposite extreme, Captain Supervielle indicated that sometimes military parties will enter into agreements without having a real concern for their enforceability or binding effect. These parties often conclude agreements simply to expedite and simplify procedures for fulfilling a particular operational mission.

Captain Supervielle next discussed the specific authority of WESTCOM to negotiate agreements, the method of securing proper authority if an agreement does not exist, and the coordination process involved in the negotiating process. If WESTCOM cannot rely on pre-existing authority, it rarely seeks to negotiate an agreement. He then noted the role that the judge advocate must exercise in face-to-face negotiations by relating several instances in which he personally had negotiated and drafted various international agreements.

In conclusion, Captain Supervielle spoke to the full range of judge advocate responsibilities concerning international agreements. These responsibilities include reviewing draft agreements, writing agreements, negotiating through intermediaries, negotiating directly, reporting and safekeeping agreements, and providing advice on the entire exercise planning process. He particularly noted the importance of attending all planning conferences, even if the judge advocate is not involved directly in the negotiation of agreements.

Closing Remarks

Colonel David Graham closed the Symposium by noting that, though no joint definition of OPLAW currently exists, the Symposium had served as an excellent forum for extensively discussing the ways in which the various services deal with OPLAW matters. Stressing the importance of viewing OPLAW from a joint perspective, he thanked the attendees for their participation, acknowledged the receipt of various OPLAW materials provided to the CLAMO library, and requested that the attendees continue to assist in the development of the Center as a primary source of joint OPLAW materials. Major Jeffrey F. Addicott.

Claims Report

United States Army Claims Service

Claims Note

Streamlining Recovery Operations Between Claims and Contracting

USARCS Note: Any claims office that would like one of its claims attorneys appointed as an administrative contracting officer and can obtain approval from the local contracting authority should contact USARCS, ATTN: JACS-PC (Mr. Frezza) to effect coordination PRIOR to implementing the procedure described in this note.

In October 1987, the United States Army Contracting Command, Europe (USACCE) appointed an administrative contracting officer (ACO) to the United States Army Claims Service, Europe (USACSEUR). The purpose of the appointment was to render final decisions on contrac-