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### A Special Forces Human Rights Policy

Jeffrey F. Addicott

*St. Mary's University School of Law*, [jaddicott@stmarytx.edu](mailto:jaddicott@stmarytx.edu)

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In *Murphy*, the IRS took the position that since both of the parties had not rolled over the gain on the sale of their house the entire gain on the sale of the house was taxable.<sup>126</sup> The IRS has now reversed its position and agrees with the Tax Court that only one-half of the gain is taxable under these circumstances.<sup>127</sup>

<sup>126</sup> 103 T.C. 111, 113 (1994).

<sup>127</sup> AOD 1996-007 (July 15, 1996).

Thus, when a married couple sells their house, files a joint return, subsequently divorces, and only one of them purchases a replacement home, they are jointly and severally liable for one-half of the gain on the sale of their principal residence. Legal assistance attorneys should consider the impact on their clients when advising them whether to file a joint return if they are selling a home and seeking a divorce. Major Henderson.

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## Notes from the Field

### *A Special Forces Human Rights Policy*

#### *The Initiative*

The use of the United States military to promote human rights values in foreign militaries has taken on a much added significance in the post Cold War era. Emerging democracies often look to American soldiers to assist them in establishing a law-based military whose policies, rules, and practices are rooted in respect for human rights.<sup>1</sup>

Although the term "human rights" does not immediately bring to mind images of Special Forces soldiers in action, the decade of the '90s has witnessed the use of "Green Berets" in missions that reflect America's desire to inculcate human rights values in the militaries of our friends and allies. Special Forces soldiers have proved themselves as premier ambassadors in this regard. Indeed, promoting human rights in the militaries of the nascent democracies is clearly a priority mission for the Special Forces, an organization uniquely qualified for such a task.

Shortly after assuming command of the United States Army Special Forces Command (Airborne) (USASFC(A)) in May 1996,<sup>2</sup> Major General Kenneth Bowra took swift action to ensure that all Special Forces soldiers thoroughly understood their rights and responsibilities regarding human rights *vis a vis* the host nation military. A first ever Special Forces Human Rights Policy Memorandum<sup>3</sup> issued by General Bowra addressed four areas of concern.

First, all military personnel assigned to USASFC(A) or subordinate units deployed outside the continental United States, either in permanent or temporary status, will receive human rights awareness training. This training will be conducted by their respective legal advisors prior to deployment.

Second, deployed personnel will report all instances of suspected gross violations of internationally recognized human rights immediately through the chain of command. All such reports will be included in after action reports (AARs).

Third, so far as practicable, Special Forces commanders will plan for and include human rights training as part of all training provided to host nation military forces. Furthermore, command-

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<sup>1</sup> Specifically, a state violates international human rights law if, as a matter of state policy, it practices, encourages, or condones seven types of actions that have gained universal recognition as "gross violations" of internationally recognized human rights. Set out at *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 702, Customary International Law of Human Rights, those seven gross violations consist of: (1) genocide; (2) slavery or slave trade; (3) the murder or causing the disappearance of individuals; (4) torture or other cruel, inhuman, or degrading treatment or punishment; (5) prolonged arbitrary detention; (6) systematic racial discrimination; or (7) a consistent pattern of gross violations of internationally recognized human rights.

<sup>2</sup> Headquarters, United States Army Special Forces Command (Airborne), is located at Fort Bragg, North Carolina. The command consists of five active duty Special Forces groups and two reserve groups. The active duty groups are located as follows: 1st Group, Fort Lewis, Washington; 3d Group, Fort Bragg, North Carolina; 5th Group, Fort Campbell, Kentucky; 7th Group, Fort Bragg, North Carolina; and 10th Group, Fort Carson, Colorado.

<sup>3</sup> Memorandum, Commander, United States Army Special Forces Command (Airborne), to subordinate commands, subject: USASFC(A) Human Rights Policy (18 Aug. 96).

ers are required to review exercise and deployment AARs to evaluate the effect of human rights training initiatives on host nation military forces and then make recommendations to the USASFC(A) Commanding General for improvement.

Finally, the four page memorandum requires the USASFC(A) Staff Judge Advocate to:

(1) ensure that all Special Forces group judge advocates (GJA) undergo a human rights training program tailored to their area of responsibility (AOR), which is given to deployed soldiers;

(2) assist each Special Forces Group to develop appropriate human rights training programs that can be delivered to host nation military forces; and

(3) as opportunities arise, coordinate with host nation legal counterparts to assess host nation military human rights training programs and, as appropriate, recommend improvements to those programs.

Major General Bowra issued the human rights policy because he believes that an effective and efficient method of meeting the challenges of "regional crisis" and "threats to democracy" is to reduce the chance of such activities arising in the first place.<sup>4</sup> One way to achieve this is to install in the host nation militaries a healthy respect for human rights.

The sweeping requirements mandated by the USASFC(A) policy memorandum, particularly as they apply to training host nation forces, are not as difficult as they might first appear. In large part, the militaries of many emerging democracies already look to Army Special Forces as a model to assist them in defining how human rights concerns should properly function in their respective military establishments and how that military itself should fit into a more democratic form of government. Foreign militaries instinctively turn to the United States Army Special Forces for the following reasons.

First, the Special Forces are uniquely positioned to influence the attitudes and, in some cases, even the structure and function of the host nation military because they go where no other element of the United States military can. As noted by Lieutenant General (retired) William P. Yarborough, "Other than Special Forces, there is no element of the [United States] armed forces that is capable of performing across the entire spectrum of what is labeled, for want of a better term, *low intensity conflict*."<sup>5</sup>

Special Forces soldiers perform hundreds of missions each year in support of the warfighting commanders in chief and other government agencies. These operations span the entire spectrum of conflict, to include direct action, foreign internal defense, special reconnaissance, unconventional warfare, security assistance training, humanitarian assistance, counternarcotics, demining, and combating terrorism. Simply put, when it comes to operating with host nation forces, Green Berets are everywhere doing everything. The deployment figures tell the tale. In Fiscal Year 1995, for example, Special Forces soldiers deployed on 1593 missions to 184 countries around the world.

Second, because Special Forces soldiers are extensively trained in the language, culture, religion, and politics of the countries in which they operate, they are best able to foster genuine military-to-military relationships. This applies to individual host nations as well as to geographic regions. Thus, because of their ability to perceive cultural nuances, Special Forces can tailor each particular mission to make the maximum impression on their military counterparts regarding the importance of human rights concerns.

Third, more than any other arm of the United States military, Special Forces exemplify to foreign militaries the success story of a professional military force that can maintain a superb operational record while functioning in accord with human rights concerns. Almost without exception, foreign soldiers are deeply impressed with how human rights and military efficiency can go hand-in-hand. Foreign forces know that, to the Green Berets, concern for human rights has always been the *sine quo non* in United States military operations.

Indeed, the promotion of international human rights and democratic behavior have long been critical themes of the United States Army's Special Forces, regardless of the mission that they happen to be performing. President Kennedy routinely praised this unique quality, and no one who has followed the accomplishments of Special Forces soldiers in operations Provide Comfort (Iraq and Turkey), Restore Hope (Somalia), Just Cause (Panama), Desert Storm (Middle East), Uphold Democracy (Haiti), and the Implementation Force (Bosnia) can doubt their value in this regard.

In short, United States Army Special Forces soldiers are universally recognized and respected as efficient, professional, and humanitarian in their conduct. Lieutenant General (retired) James T. Scott, the former Commander of United States Army Special Operations Command, stressed this truism during a speech in the summer of 1996. He stated, "I can tell you that Special Forces

<sup>4</sup> The 1996 Defense Planning Guidance lists four primary challenges to United States security: (1) proliferation of nuclear weapons, (2) regional crisis, (3) threats to democracy, and (4) threats to economy.

<sup>5</sup> Lt. Gen. (ret.) William P. Yarborough, *Emerging SOF Rules and Missions: A Different Perspective*, Special Warfare, July 1995, at 10.

soldiers will . . . continue to serve as the *conscience and the example of lesser developed nations regarding human rights.*"<sup>6</sup>

Finally, the "*De Oppresso Liber*" motto of Special Forces reflects a profound concern for the inherent dignity of those who are denied international human rights. Crossing all cultural and social boundaries, this mentality makes Special Forces soldiers an ideal models as they train host nation forces and assist in alleviating many of the conditions that breed human rights abuses.

By word and deed, Special Forces promote the message that commitment to preserving human rights is the hallmark of a professional military serving the interests of a democratic nation. This message is not lost on the host nation. For example, in Haiti (which now officially has no standing military force), Special Forces worked closely with local citizens, political leaders, and foreign forces on a daily basis. Without question, the red thread that underlined every action taken in Haiti was the emphasis on respecting human rights. In the end, human rights concerns took root, in large part, because of the professionalism of United States Army Special Forces.

The most common opportunity for Special Forces to influence the human rights practices of the soldiers of fledgling democracies, however, occurs during joint and combined exercises for training. Green Berets often are quizzed by their counterparts concerning how one should respond to human rights abuses committed by service members. Realizing that it is better to draw on American history (to avoid unnecessary controversy), Special Forces soldiers invariably rely on various American illustrations, such as the lessons learned from My Lai,<sup>7</sup> to explain the practical necessity for abiding by the law of war and internationally recognized human rights law.

Invariably, the four basic points stressed to host nation soldiers are: (1) human rights abuses are never tolerated by a democratic populace (e.g., the American public); (2) such violations do not shorten the conflict, be it internal or external in nature, but usually have the opposite effect; (3) the soldiers guilty of human rights violations must be punished, or similar abuses will surely follow; and (4) to maintain discipline and *esprit de corps*, the chain of command must constantly train soldiers to respect internationally recognized human rights and the law of war.

#### *Group Judge Advocates*

The old adage that "you can't teach what you don't know" particularly applies to explaining and promoting human rights

concerns to host nation military personnel. In preparing for operational missions in developing democracies, Special Forces soldiers and their commanders must plan to specifically address this challenge. Even the team level predeployment briefings should anticipate human rights issues unique to the host nation.

Requiring a great deal of sensitivity, human rights training packages that are specifically tailored to the wants and desires of the host nation military should be available at planning conferences. Clearly, host nation forces are receptive to human rights discussions only when they are presented in a nonthreatening, nondemanding environment of instruction. In many cases, if the host nation is adverse to the idea of discussing human rights issues, a very informal approach will reap the greatest dividends. In other instances, host nation forces ask for more formal instruction about how the United States military approaches human rights issues.

To address the human rights concerns of individual nations, Special Forces soldiers and their commanders have many resources available to them. The most important resource, other than a soldier's solid moral compass, is the GJA assigned to each Special Forces Group (there are five active duty Group legal offices). Each GJA is thoroughly trained in human rights law and has compiled an extensive collection of information dealing with human rights issues related to the Group's AOR.<sup>8</sup> Apart from providing the mandatory predeployment legal briefings to all deploying soldiers, these specialized military attorneys stay abreast of current doctrine involving international agreements, changes in human rights doctrine, and political and social changes in the regions.

The USASFC(A) Staff Judge Advocate requires all GJAs to maintain close contact with their military legal counterparts in as many host nations as possible. Group judge advocates engage in human rights training initiatives targeted at institutionalizing human rights training in foreign militaries. This approach has been extremely successful. Support from GJAs has ranged from assisting the Thai military in establishing a human rights training program for their junior military attorneys at the Royal Thai Military Law School in Bangkok to developing human rights training handbooks for military coalition forces in Haiti.<sup>9</sup> Special Forces GJAs have also worked closely with United Nations personnel in Haiti and Bosnia.

#### *Conclusion*

The post Cold War world presents new challenges to United States Army Special Forces. A window of opportunity now ex-

<sup>6</sup> Lt. Gen. (ret.) James T. Scott, Address at USASFC(A) Change of Command Ceremony (May 21, 1996) (transcript on file with Office of the Staff Judge Advocate, USASFC(A)).

<sup>7</sup> See, e.g., Jeffrey F. Addicott & William A. Hudson, *25th Anniversary of My Lai: Time to Inculcate the Lessons*, 139 Mil. L. Rev. 153 (1993).

<sup>8</sup> See USASFC(A) Human Rights Handbook (on file with the Office of the Staff Judge Advocate, USASFC(A), Fort Bragg, North Carolina).

<sup>9</sup> Many of these initiatives have been conducted through the Center for Law and Military Operations located at The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

ists for Special Forces to make substantial contributions toward building and strengthening human rights concerns in the militaries of the emerging democracies.

Just ten years ago hundreds of countries functioned under some form of nondemocratic rule (in Latin America alone, over ninety percent were nondemocratic). Today, the vast majority of these nations operate under properly elected civilian governments, but great nations are neither created nor sustained by accident. United States assistance is often required to help solidify and, in many cases, to create a true commitment to promoting and preserving human rights.

Major General Bowra has made the promotion of human rights in the militaries of the emerging democracies a top priority for United States Army Special Forces. Recognizing that this new mission cannot be accomplished without the proactive support of his legal advisors, he has given judge advocates a critical role in the process of promoting human rights. We will not disappoint. Lieutenant Colonel Jeffrey F. Addicott, Staff Judge Advocate, United States Army Special Forces Command (Airborne), Fort Bragg, North Carolina.

### ***To Read or Not to Read . . . The Defense Counsel's Dilemma Provided by Article 31(b), UCMJ<sup>10</sup>***

#### *The Dilemma*

Military defense counsel seldom have the luxury of appointed investigators. They are generally left to their own skills in accomplishing both the pretrial investigation and preparation of the case for trial. Accordingly, their ability to obtain information is of paramount importance to the adequate representation of their clients. Their ability to obtain information, however,

may be clouded by concerns about the literal dictates of Article 31(b), Uniform Code of Military Justice (UCMJ).<sup>11</sup> Article 31(b) provides:

No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.<sup>12</sup>

Thus, military defense counsels ("person[s] subject to this chapter") face an unusual choice when interviewing a military witness that they suspect may have committed offenses. They must decide whether to advise the witness (suspect) of his Article 31(b) rights, and possibly lose the witness's testimony, or proceed by interviewing the witness without advising him and potentially violate Article 31(b). In the only decision on point, the United States Court of Military Appeals<sup>13</sup> (COMA) held that military defense counsel should read Article 31(b) rights when questioning suspects.<sup>14</sup>

The author believes that recent case law indicates that the United States Court of Appeals for the Armed Forces<sup>15</sup> (CAAF) has eliminated this requirement. According to this view of case law, the CAAF has established new guidelines for Article 31(b) rights warning requirements that do not require a literal interpretation of UCMJ Article 31(b) and do not require military defense counsel to read potential witnesses their rights when preparing to defend a case.<sup>16</sup>

<sup>10</sup> This note updates the article written by then Major John B. McDaniel entitled "Article 31(b) and the Defense Counsel Interview," which appeared in the May 1990 issue of *The Army Lawyer*. See John B. McDaniel, *Article 31(b) and the Defense Counsel Interview*, *ARMY LAW.*, May 1990, at 9. The opinions expressed in this note are the author's alone and do not necessarily reflect the policy of The Trial Defense Service, The Judge Advocate General, or the Army.

<sup>11</sup> 10 U.S.C. § 831(b) (1988) [hereinafter Article 31(b)].

<sup>12</sup> *Id.*

<sup>13</sup> On 5 November 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. The new names are the United States Courts of Criminal Appeals and the United States Court of Appeals for the Armed Forces, respectively. For the purposes of this note, the name of the court at the time that a particular case was decided is the name that will be used in referring to that decision. See *United States v. Sanders*, 41 M.J. 485, n.1 (1995).

<sup>14</sup> *United States v. Milburn*, 8 M.J. 110 (C.M.A. 1979).

<sup>15</sup> See *supra* note 13.

<sup>16</sup> For an excellent discussion of the historical background of this subject and case law prior to 1990, see John B. McDaniel, *Article 31(b) and the Defense Counsel Interview*, *ARMY LAW.*, May 1990, at 9.