

**....With Helmet and Flak Vest:
Practicing International Law in War Zones**

By

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It was quiet, almost deathly silent. Balad Air Base northwest of Baghdad was strangely still as I jogged around it shortly after dawn last summer. None of the normal morning commotion was coming from the rows of tents that house the troops. Weird. In Iraq, silence is not always a good thing.

Suddenly, the loudspeaker blared, “all clear, all clear,” and hundreds of troops poured from sand-bagged bunkers as they raced to get ready for another day in that troubled country. I was left, a little stunned, contemplating the fact that the racket from the overworked air conditioner in my quarters must have somehow allowed me to sleep through a mortar attack, get up and go jogging - in blissful ignorance - while others hunkered down. In Iraq, noise is not always a good thing.

Being a military attorney almost by definition makes you an international lawyer. International law pervades virtually every area of practice whether stationed in the U.S. or overseas. In the Air Force, military lawyers (called judge advocates or “JAGs”) have a quintessentially general practice, so we are obliged to frequently consider the international law dimension in a variety of situations. For example, it is not especially unusual for a JAG serving at a U.S. base to have a legal assistance case where the spouse is a foreign national, and this can present complications in resolving a family law issue.

Of particular interest are the international law responsibilities of JAGs deployed to the Middle East in support of combat operations in Iraq and Afghanistan. All of the services have military legal personnel in the area to support their units. For the Air Force, the number of deployed JAGs and paralegals ranges from 50 to 100, depending upon the tempo of operations and the number of Air Force personnel present in the region (currently around 14,000).

These deployed Air Force legal personnel serve in 16 locations (a further 241 Air Force JAGs are permanently stationed at 41 other locations in 19 foreign countries). Most of the deployed locations are in various Southwest and Central Asian countries from Iraq to Kyrgyzstan to as far as the island of Diego Garcia in the Indian Ocean. However, one well-known location is in the Western Hemisphere - Guantanamo, Cuba – to support a multi-service legal operation there.

In terms of the Middle East, the Army, with over 100,000 troops there, has the largest legal contingent with upwards of 300 people deployed. Sadly, the Army has also suffered the most casualties within the legal ranks with two killed in action and about a

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score wounded. To date, the Air Force has been fortunate to have suffered only one JAG wounded in action (and he's back on duty).

The security situation, particularly in Iraq and Afghanistan, has necessitated additional training for legal personnel beyond that which all Air Force personnel receive. This supplementary instruction, called "Contingency Skills Training," focuses on the use and maintenance of assault weapons and machine guns. In addition, it includes such things as small unit tactics, combat first aid, field communications, and explosive threat awareness. All of this extra training is designed to enable JAGs and paralegals to defend themselves in hostile environments, not to conduct offensive operations.

In terms of the practice of law in these forward locations, there are basically three types, expeditionary law, operations' law, and a joint/interagency practice that may include elements of both and more.² "Expeditionary law" is essentially the general practice of law in the often austere conditions of the field environment. JAGs are assigned to deployed Air Force "wings" (units composed of various kinds of aircraft and 2-3,000 people).

The ability to practice expeditionary law is a basic skill expected of everyone in the Air Force JAG Corps. The typical manning of a deployed wing legal office is only one JAG and one paralegal, so many young lawyers have the opportunity to test themselves as "sole" practitioners. Help is, of course, available. Despite dust, heat, and primitive surroundings, most locations have ready access to web-based legal research capabilities, and robust backup support is provided by headquarters legal offices located elsewhere in the theater and even back in the States.

Ordinarily, expeditionary law would include legal assistance (principally consumer and family law), criminal law (to include foreign criminal jurisdiction issues), claims (to include those made under the Foreign Claims Act³), and contract and fiscal law matters. The latter can be especially vexing because U.S. law is often very specific as to what can – and cannot – be purchased with various kinds of appropriations. It is often difficult to provide support to allies, absent an agreement – which itself may require reimbursement provisions. The intricacies of U.S. law are not always well understood or appreciated by coalition partners looking for assistance.

Moreover, the demands of U.S. contract law do not always easily comport to overseas business practices. Local commercial procedures that fully comply with foreign law may nevertheless be at odds with American statutes. Arms-length transactions, full and free competition, the absence of gratuities, are all concepts well understood in Western, capitalistic free markets, but may not be the way business is done in remote locations in the developing world. It is the JAG's responsibility to work through these issues to comply with the dictates of U.S. law, yet at the same time accomplish the task at hand. Innovation is a must.

² The author has previously discussed aspects of expeditionary and operational law. See Charles J. Dunlap, Jr., *The Revolution in Military Legal Affairs: Air Force Legal Professionals in 21st Century Conflicts*, 51 A.F. L. REV. 293 (2001) available at https://afsl10.jag.af.mil/dscgi/ds.py/Get/File-76386/7_Revolution_in_Military_Affairs.doc .

³ Foreign Claims Act, 10 U.S.C. § 3267 et seq. (2000).

Early in Operation Iraqi Freedom, an Air Force JAG was among the first American lawyers to deploy into Iraq. In an effort to purchase gravel needed to repair a damaged runway, the JAG discovered that the only local contractor with the ability to provide the stone refused to deal with the Americans. An unrepentant Ba'athist? No, simply a businessman unhappy with the loss of a bulldozer that was requisitioned by U.S. Army troops. And he wanted cash, no checks (given the chaos at that time, can you blame him?). And all of this would have to be negotiated over tea at the businessman's pace. The JAG tracked down the bulldozer, arranged for U.S. dollars, and drank some tea. All while bombs were still falling. Not your typical international business transaction, but one that worked.

A persisting complexity in many locations is the legal status of U.S. military personnel, civilian employees, and contractors. Interpreting status of forces agreements where they exist, or navigating local law where they do not, calls upon JAGs to be knowledgeable not just on international law, but the all-important local custom and practice. In some societies, Western concepts of the binding nature of an "agreement" or "diplomatic note" may not be fully internalized. Even where a bilateral agreement exists, it may not always be known or understood by the officials "on the scene." This is but one practical reason why JAGs scheduled for overseas deployment receive negotiations training in addition to comprehensive international law instruction.

JAGs provide basic law of armed conflict advice and brief aircrews on the rules of engagement when assigned to wings practicing expeditionary law, however, most "operations law" is practiced by JAGs serving in the air operations center or AOC. The AOC is the principle location where airstrikes are planned and controlled. JAGs are very active in the planning so that legal concerns can be vetted and resolved at the earliest possible point. In addition, JAGs are present around-the-clock on the operations' center floor to advise on targets of opportunity that may arise outside of the planning cycle. At the height of Operation Iraqi Freedom, sixteen JAGs and paralegals were assigned to the AOC, including four British and Australian JAGs.

The process of planning and executing air operations can be incredibly complex. Accordingly, all JAGs who work in the AOC now attend the "AOC Initial Qualification Course" at Hurlburt Field, Florida, prior to deploying. This is a six-week program required of all persons working in the AOC, regardless of functional specialty. It includes classes on all aspects of AOC operations, to include the specialized computer systems employed in the AOC. In addition to the course, JAGs participate in various exercises to get "hands-on" experience before finding themselves in an actual AOC where life or death decisions are regularly made.

Of course, JAGs attend a variety of international law courses aimed explicitly at law of armed conflict issues. In truth, learning the applicable law is relatively easy; it's learning how to apply the law in the operational setting that is so challenging. For example, a proper proportionality analysis requires a thorough understanding of weapons, aircraft, strategy, tactics, intelligence, and a myriad of other purely military matters. Another complicating matter that can impact the way air operations are conducted is the fact that the U.S. is not a party to several international agreements which nevertheless bind the air forces of coalition nations.⁴

⁴ See *e.g.*, Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, and

The third main category of international law practice in combat zones is a potpourri of hybrids. For example, some JAGs are assigned to or work directly with the U.S. embassy of the host country. Currently, there are JAGs working for the embassies in Iraq, Kuwait, Saudi Arabia, and Egypt. Additionally, U.S. Air Force JAGs in Iraq work with the Joint Services Law Enforcement Teams to build cases against Iraqis who commit crimes against coalition forces, with the Regime Crimes Liaison Office to build war crime cases against Saddam Hussein and other officials of his regime, and with the Multi-National Force Iraq.

One of the responsibilities of senior JAGs is to periodically conduct inspections in the field,⁵ and this is why I was briefly in Iraq and Afghanistan a few months ago. I can tell you that despite all the difficulties and dangers, the morale among the troops is amazingly high. One memorable experience occurred in Iraq during a ceremony where the caskets of two soldiers killed near Samara were being loaded onto a military plane for transport home to the United States.

Unlike many things in the military, no one was ordered to participate in this ceremony; it was just announced that it would be taking place, and people were permitted to leave their place of duty to attend. Over 60 people of all ranks volunteered to stand in brutal 118 degree heat (yes, "118") for 45 minutes for the privilege of rendering a final salute to fallen comrades.

An interesting note: the young officer-in-charge explained that if there was an alarm red (meaning the base was again under rocket/mortar attack) as we were assembling, everyone was to take cover in designated locations. However, once the ceremony began, no one was to move – no matter what happened – until the caskets were loaded and secured.

This is a good example of the kind of military esprit which is very real within the armed forces, but is also very hard to explain to others. But for these young airmen – and many are very young – the enemy was not going to disrupt honoring fallen comrades, no matter what the price. What great Americans! Honestly, it was an honor to stand among them for this eye-watering event.

Evidently, many young lawyers also want to stand with them. The Air Force JAG Corps receives about seven applications for every available JAG commission. Many if not most of those selected will find themselves practicing an exciting brand of international law not in a carefully tailored suit, but with a helmet and flak vest – and with a weapon close at hand.

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

⁵ See UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 806(a) (2004)