

## A Primer on Key International Law Issues for the Regionally Aligned Legal Advisor

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### I. Introduction

You are currently a Special Victim Prosecutor or the Senior Defense Counsel in one of the busiest jurisdictions in the Army—or maybe you are the Chief of Administrative Law at an Office of the Staff Judge Advocate with installation responsibility—or you are a Branch Chief at Litigation Division at Fort Belvoir. So what is next? You know you are up for reassignment and you cannot help but think that your next stop will be in a military justice position, or maybe a shot at being a Deputy Staff Judge Advocate. Your cell phone rings. It is the field grade assignments officer from the Judge Advocate General's Corps Personnel, Plans, and Training Office calling about your next assignment. She says, "Congratulations, you are going to be a brigade judge advocate for a Regionally Aligned Brigade." Or perhaps you are a Reserve or National Guard judge advocate who is mobilizing to support this brigade. "Do not worry," you are told, "you will be perfect for the job, and get there early; they are deploying to the Horn of Africa in two months."

Are you ready? What do you know about Regionally Aligned Forces (RAF)? How should you start preparing for your next assignment? First, relax; you *are* a perfect fit for the job. Much of the expertise you have already developed as a judge advocate will serve you well while working in a regionally aligned unit.

The RAF concept represents a transition in the Army's strategic vision for how it employs its operational and tactical forces, and the implementation of RAF will give rise to unique, region-specific legal issues. Many of these issues are unique to international and operational law. Judge advocates at all levels and in all types of assignments will need to be aware of the legal questions that the RAF focus presents. This article is a road map to assist you in preparing for those key international law issues that you will face as a judge advocate in a regionally aligned unit.

Certainly a judge advocate assigned to a RAF unit must be broadly skilled and competent within all JAG Corps core legal disciplines. However, this article focuses on the international legal issues that judge advocates involved in RAF missions will likely encounter. It begins with a brief introduction to RAF and the Army's strategic objectives for implementation of RAF. Second, this article discusses the various areas of practice commonly associated with international law but applied through the aperture of a RAF environment. This includes a discussion about command relationships, international agreements, human rights, rules of engagement (ROE), security cooperation, and information sharing. Third, this article discusses the references and resources that you should become acquainted with prior to arriving at your next assignment. In the end, you should have a better understanding of the international legal proficiency expected of you at the tactical and operational levels in a RAF unit, and how RAF fits into the strategic vision for the Army.

### II. The Background of RAF

*By aligning unit headquarters and rotational units to combatant commands, and tailoring our combatant training centers and exercises to plan for their greatest contingencies, units will gain invaluable expertise and cultural awareness, and be prepared to meet the regional requirements more rapidly and effectively than ever before.<sup>1</sup>*

#### A. The RAF Concept

Regionally Aligned Forces are Army units that are either assigned to combatant commands (CCMDs) or are service retained but aligned to a specific CCMD.<sup>2</sup> Regionally Aligned Forces incorporate Army Total Force capabilities, giving combatant commanders (CCDRs) "scalable, tailorable

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<sup>1</sup> C. Todd Lopez, Army News Serv., *Future Army Forces Must Be Regionally Aligned, Odierno Says*, U.S. DEP'T OF DEF (Oct. 24, 2012),

<http://www.defense.gov/News/NewsArticle.aspx?ID=118316> (quoting General Ray Odierno) [hereinafter Lopez].

<sup>2</sup> HEADQUARTERS, DEP'T OF ARMY, FRAGMENTARY ORDER 2 TO EXECUTION ORDER 052-13 IN SUPPORT OF REGIONALLY ALIGNED FORCES (RAF) para. 1.C.2.A (29 July 2015) [hereinafter FRAGO 2].

capabilities”<sup>3</sup> that are trained and developed to meet regional and global mission requirements. This is a fundamental change to how the Army has organized, trained, and equipped itself for the needs of the operational CCMDs. This fundamental change will require Soldiers to develop a comprehensive understanding of the cultures and parts of the world to which they are aligned.<sup>4</sup>

The RAF concept also represents “a critical first step in operationalizing ‘Strategic Landpower,’ which is the combination of land, human, and cyber activities that make decisive outcomes more likely and increases options for preventing and containing conflict.”<sup>5</sup> This strategic shift in how the Army conceptualizes the employment of ground forces in support of global events in the land, human, and cyber domains is consistent with current national security objectives and strategic guidance issued by the President and the Secretary of Defense.<sup>6</sup> For example, the RAF concept is ideally suited to *build global security*, one of three current defense strategic pillars, which is accomplished through forward or deployed forces that provide presence and conduct training, exercises, and other forms of military-to-military activities in support of U.S. national security interests.<sup>7</sup>

The successful implementation of the RAF concept achieves U.S. national security objectives by bolstering partner nation capacity, securing U.S. global access and power projection capability, fostering interagency integration, and ensuring our forces better understand the human domain where they operate.<sup>8</sup> In keeping with those objectives, RAF are both integral to the Army vision of being “Globally Responsive and Regionally Engaged,” and to the Army’s ability to “Prevent, Shape, and Win” our nations

wars.<sup>9</sup> How exactly will the RAF concept be implemented? The remainder of this section focuses on RAF implementation by taking a closer look at the RAF authorities, missions, and forces.

## B. RAF Authorities

To fully grasp the RAF concept, it is imperative that you take time to review the source documents ordering RAF into execution, specifically Headquarters, Department of the Army (HQDA), Execution Order (EXORD) 052-13 in support of (ISO) Regionally Aligned Forces (RAF) (RAF EXORD) and its attendant annexes, appendices, and Fragmentary Orders (FRAGOs).<sup>10</sup> In the RAF EXORD and all that flows from it, HQDA explains that “the RAF concept provides a way to resource CCMD requirements in a more flexible and agile way.”<sup>11</sup>

The EXORD, however, does not create or confer the authority to deploy or employ Army forces in support of combatant command missions or operations.<sup>12</sup> Instead, that authority must be found elsewhere. Annex AA to FRAGO 01 of the RAF EXORD is a good place to start.<sup>13</sup> The specific procedures of that annex will not be covered in detail here, but it is important to note at the outset that RAF and missions must be provided for under preexisting legal authorities and Department of Defense (DoD) directives.<sup>14</sup> To assist in comprehending those authorities and directives, the next two sections provide a brief overview of how forces are to be provided to CCMDs and what missions RAF are expected to support short of combat operations.

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

<sup>4</sup> Todd Lopez, Army News Serv., *Odierno: Those who doubt relevance of ground forces naïve*, U.S. ARMY (Oct. 23, 2013) [http://www.army.mil/article/113730/Odierno\\_\\_Those\\_who\\_doubt\\_relevance\\_of\\_ground\\_forces\\_na\\_ve/](http://www.army.mil/article/113730/Odierno__Those_who_doubt_relevance_of_ground_forces_na_ve/).

<sup>5</sup> Kimberly Field, James Learmont, and James Charland, *US Landpower in Regional Focus, Regionally Aligned Forces: Business Not as Usual*, U.S. ARMY WAR C. Q. PARAMETERS, 55 (Autumn 2013).

<sup>6</sup> *See id.*; *see also* Lopez, *supra* note 1 (“Also bolstering the Army’s expertise within the human dimension is the interaction that Soldiers have with allied militaries as part of the Army’s regionally aligned forces concept.”); Rosa Brooks, *Portrait of the Army as a Work in Progress*, FOREIGN POL. (May 8, 2014), <http://foreignpolicy.com/2014/05/08/portrait-of-the-army-as-a-work-in-progress/> (citing General Odierno’s interview and his explanation regarding the Army’s future and RAF); Colonel Kristian M. Marks, *Enabling Theater Security Cooperation Through Regionally Aligned Forces*, U.S. ARMY WAR C. STRATEGY RES. PROJECT (2013) (providing an in-depth explanation regarding the Army’s shift to the Regionally Aligned Force concept in order to meet future global requirements); BARACK OBAMA, NATIONAL SECURITY STRATEGY 7 (2015) (“Our military is postured globally to protect our citizens and interests, preserve regional stability, render humanitarian assistance and disaster relief, and build the capacity of our partners to join with us in meeting security challenges.”); U.S. DEP’T OF DEF., QUADRENNIAL DEF. REV. 12 (2014) (“Continuing a strong U.S. commitment to shaping world events is essential to deter and prevent conflict and to assure our allies and partners of our commitment to our shared security. This global engagement is fundamental to U.S. leadership and influence.”).

<sup>7</sup> DEP’T OF DEF., QUADRENNIAL DEFENSE REVIEW 16 (2014).

<sup>8</sup> Kimberly Field et al., *supra* note 5, at 56-57; *see also* Marks, *supra* note 6; *see also* Brooks, *supra* note 6 (referencing General Odierno’s comments at the 2013 annual meeting of the Association of the United States Army stressing the importance of understanding the human domain).

<sup>9</sup> Marks, *supra* note 6.

<sup>10</sup> *See* HEADQUARTERS, DEP’T OF ARMY, EXECUTION ORDER 052-13 IN SUPPORT OF REGIONALLY ALIGNED FORCES (27 Dec. 2012) [hereinafter RAF EXORD]; HEADQUARTERS, DEP’T OF ARMY FRAGMENTARY ORDER 1 TO EXECUTION ORDER 052-13 IN SUPPORT OF REGIONALLY ALIGNED FORCES annex AA (17 Oct. 2013) [hereinafter FRAGO 1]; FRAGO 2, *supra* note 2.

<sup>11</sup> RAF EXORD, *supra* note 10, at 1.B.2.A.

<sup>12</sup> *Id.* at 1.C.1.A.

<sup>13</sup> This annex and its appendices (there are two) specifically address the RAF authorities for *deployment* and *employment* of RAF and the specific “business rules” for providing forces to Combatant Commands (CCMDs) in order to accomplish RAF missions under existing law and directives. FRAGO 1, *supra* note 10, at Annex AA.

<sup>14</sup> For an overview of general U.S. *statutory* authorities that relate to implementing RAF, *see* Colonel Robert J. DeSousa & Colonel Scott J. Bertinetti, *RAF AND AUTHORITIES* (Carlisle Compendia 2015).

### C. RAF Units

The RAF concept provides CCDRs with “tailored, trained, responsive, and consistently available Army forces.”<sup>15</sup> Traditionally, those forces have been provided in one of two ways—they were either *assigned* or *allocated* to the CCMDs. Now, RAF units may be assigned, allocated, or *unassigned service retained CCMD aligned*.<sup>16</sup> The difference between a command relationship that is “assigned” versus “allocated” versus “service retained, combatant command aligned” is based on the administrative and operational structure of the armed forces created by the *Goldwater-Nichols Act* itself.<sup>17</sup>

Assigned forces are directly under combatant command authority by direction of the Secretary of Defense as provided in the “Forces for Unified Commands” memorandum and Section II of the Global Force Management Implementation Guidance (GFMIG). These forces are available while assigned for the range of military operations (ROMO) to include peacetime operations.<sup>18</sup> Allocated forces are provided to a CCMD for an assigned mission. Therefore, the CCDR is limited to employing allocated forces for purposes directed by the Secretary of Defense (SECDEF) or the President for that mission.<sup>19</sup> Service Retained, CCMD Aligned (SRCA) units are those forces unassigned to a CCMD, but aligned as directed by the Secretary of the Army (SECARMY) for purposes of planning and training with a CCMD.<sup>20</sup> This relationship is for a designated period of time as directed by the Army Force Provider’s alignment order and allows for direct liaison with the CCMD. The key distinction with this designation is that it does not bestow command authority upon the CCDR.<sup>21</sup>

Finally, the RAF concept emphasizes that successful implementation can be done only with the Army’s “Total Force,” meaning its active *and* reserve components.<sup>22</sup> This is key to the success of RAF as it is implemented simultaneously with troop end strength reductions.<sup>23</sup> Reserve component forces can work into the RAF concept in two ways: first, by augmenting and integrating with regionally aligned active

component forces; and second, by conducting their own regionally aligned training, exchanges, and operations, such as the National Guard State Partnership Program. Reserve component Soldiers, furthermore, often possess key advantages and specialties in areas of civilian expertise that can be important to RAF engagement.

In addition to total force integration, units must be committed to understanding the cultures, geography, languages, and militaries of the countries where they are most likely to be employed while maintaining readiness to respond globally.<sup>24</sup> Therefore, in order to meet mission requirements under RAF, Army forces will “conduct necessary [Language, Regional Expertise, and Culture (LREC)] training to meet combatant command requirements.”<sup>25</sup> In other words, units may need to engage in more robust training to develop awareness and knowledge of the region to which they may be aligned.

### D. RAF Missions

Notably, RAF units must be prepared to conduct a number of military operations, doctrinally referred to as a ROMO.<sup>26</sup> Conducted over the conflict continuum, the ROMO is categorized into three areas in which the United States utilizes the joint force as an instrument of national power. They are “Military Engagement, Security Cooperation, and Deterrence,” “Crisis Response and Limited Contingency Operations,” and “Major Operations and Campaigns.”<sup>27</sup>

Our Nation’s militaries conduct the ROMO through “unified action.” Unified action is the synchronized, coordinated, and, when appropriate, integrated U.S. military operations with intergovernmental agencies, multinational partners, and non-government organizations in order to establish unity of effort for achieving U.S. strategic goals. Unified Action is conducted in accordance with domestic and international law, governed by U.S. government policy, and shaped by national interests.<sup>28</sup>

<sup>15</sup> U.S. DEP’T OF ARMY, ASSESSMENT ON REGIONALLY ALIGNED FORCES, REPORT TO CONGRESS 2015, 2.

<sup>16</sup> FRAGO 2, *supra* note 2, at 1.C.2.A, 1.C.4.E.; *see also* FRAGO 1, *supra* note 10, at AA-3.

<sup>17</sup> 10 U.S.C. § 161 (1986).

<sup>18</sup> FRAGO 1, *supra* note 10, at AA-3.

<sup>19</sup> *Id.*

<sup>20</sup> FRAGO 2, *supra* note 2, at 1.C.2.E.2.

<sup>21</sup> FRAGO 1, *supra* note 10, at AA-3.

<sup>22</sup> FRAGO 1, *supra* note 10, at 0-6; *see also* Brooks, *supra* note 6 (referencing an interview with Colonel James Learmont, a British Army exchange officer assigned as lead to the Stability Support Division of the Strategy, Plans, and Policy Directorate of the Office of the Deputy CoS, G-3/5/7); *see also* FRAGO 2, *supra* note 2, at 3.A.1.B.

<sup>23</sup> Statement by The Honorable John M. McHugh, Secretary of the Army, and General Raymond T. Odierno, Chief of Staff United States Army, Before the Committee on Armed Services, U.S. Senate, Second Session, 113th Congress, On the Posture of the United States Army, April 3, 2014 (Record Version); *see also* David Vergun, *Regionally Aligned Forces Continue to Organize Despite Budget Uncertainties*, ARMY.MIL (Oct. 23, 2013), [http://www.army.mil/article/113660/Regionally\\_aligned\\_foces\\_continue\\_to\\_organize\\_despite\\_budget\\_uncertainties/](http://www.army.mil/article/113660/Regionally_aligned_foces_continue_to_organize_despite_budget_uncertainties/).

<sup>24</sup> RAF EXORD, *supra* note 10, at 5.

<sup>25</sup> FRAGO 1, *supra* note 10, at 0-7.

<sup>26</sup> FRAGO 2, *supra* note 2, at 1.B.3.A., 1.C.3.E; FRAGO 1, *supra* note 10, at 0-4; JOINT CHIEFS OF STAFF, JOINT PUBLICATION, 3-0, JOINT OPERATIONS, at 11 (August 2011).

<sup>27</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS x, I-5 (11 Aug. 2011) [hereinafter JOINT PUB. 3-0].

<sup>28</sup> *Id.* at x, I-8; *see also* FRAGO 2, *supra* note 2, at 3.C.1.

The RAF concept synchronizes the Army's efforts to conduct contingency operations along with the national defense strategic objective to build partner nation capacity through security cooperation.<sup>29</sup> Security cooperation encompasses all DoD activities conducted with foreign nations—particularly with defense establishments—with the purpose of promoting U.S. national security and partner nation military capacity, securing access for peacetime operations, and, if necessary, guaranteeing capabilities for projecting national power in contingency operations.<sup>30</sup> Security cooperation includes a wide range of activities such as military-to-military contacts, global “train and equip” priorities, combined exercises, international military education and training, humanitarian assistance, security assistance, and international armaments cooperation.<sup>31</sup> The Army has also issued recent strategic guidance emphasizing engagement with partner nation military forces, institutions, and populations, as central to the Army's security cooperation mission to “prevent, shape, and win.”<sup>32</sup> A regionally aligned judge advocate could be involved in security cooperation from a wide range of perspectives such as issues involving legal and fiscal authorities for military operations, questions involving all core competencies in a deployed environment, and direct participation through legal engagements.<sup>33</sup> As with all of the various missions described in this part, a judge advocate will need to be prepared for a widest possible array of legal activities and issues when working in a RAF environment.

### III. International Agreements and RAF

Regardless of the type of RAF mission, international agreements<sup>34</sup> (IAs) will likely govern critical deployment functions such as entry of forces, jurisdiction waivers, freedom of movement, customs, claims, and transfer of logistics. An agreement may also grant your brigade the

authority to carry weapons, use radio frequencies, drive on roads, or occupy facilities.

As a regionally aligned brigade judge advocate you must (1) understand the basic framework of international and domestic treaty law; (2) research and identify the existing agreements between the United States and each country in your area of responsibility; (3) understand common international agreement provisions to ensure compliance during the entire ROMO; (4) know who holds the authority to negotiate, conclude, amend, or terminate an agreement; and (5) be prepared to assist in drafting a request for authority to negotiate, conclude, amend, or terminate an agreement ISO the mission.

#### A. International and Domestic Treaty Law

Treaties are a main source of international law. Unlike customary international law, treaties only bind the parties to that agreement. Under domestic law, the United States divides international agreements into two general categories: “treaties,” and “international agreements other than treaties.” International agreements other than treaties may enter into force upon signature and do not require the advice and consent of the Senate.<sup>35</sup>

#### B. Researching International Agreements

Locating IAs for each country in the region is a challenge; however, the following unclassified sources will assist in populating your database.

Federal law requires the Department of State to publish annually a document entitled *Treaties in Force* (TIF).<sup>36</sup> Once you identify the agreement in TIF, use the *Treaties and Other International Agreements Series* (TIAS) to access the

<sup>29</sup> FRAGO 1, *supra* note 10, at Annex Y, Appendix 2; FRAGO 2, *supra* note 2, at 3.C.1.

<sup>30</sup> FRAGO 1, *supra* note 10, at AA-4; *see also* U.S. DEP'T OF DEF., DIR. 5132.03, DEPARTMENT OF DEFENSE POLICY AND RESPONSIBILITY RELATING TO SECURITY COOPERATION (24 Oct. 2008) [hereinafter DODD 5132.03]; U.S. DEP'T OF ARMY, REG. 11-31, ARMY SECURITY COOPERATION POLICY para. 1-1 (21 Mar. 2013) [hereinafter AR 11-31].

<sup>31</sup> FRAGO 1, *supra* note 10, at AA-4. One subset of security cooperation, security assistance, represents the programs through which the U.S. government provides military materiel, training, and other services to other countries in furtherance of U.S. national security goals.

<sup>32</sup> ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION: AN ENDURING MISSION FOR “PREVENT, SHAPE, WIN” (2014).

<sup>33</sup> *See infra* Part VI.

<sup>34</sup> International agreements may take the form of a memorandum of understanding or memorandum of agreement, an exchange of letters, an exchange of diplomatic notes (“Dip Notes”), a technical arrangement, a protocol, a *note verbale*, an *aide memoire*, etc. The title or form of the agreement is of little consequence. Forms that usually are not regarded as international agreements include contracts made under the Federal

Acquisition Regulation (FAR), credit arrangements, standardization agreements (STANAGs), leases, agreements solely to establish administrative procedures, and Foreign Military Sales (FMS) letters of offer and acceptance.

<sup>35</sup> U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL, vol. 11, ch. 720, (Sept. 25, 2006) [hereinafter FOREIGN AFFAIRS MANUAL]. The executive branch has the constitutional authority to enter into executive agreements because an existing treaty authorizes the agreement, legislation authorizes the agreement, or the agreement falls under the President's constitutional authority.

<sup>36</sup> *Treaties in Force*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/tif/index.htm> (last visited Apr. 16, 2015); 1 U.S.C. § 112a (2004). The *Treaties in Force* (TIF) lists agreements by country in alphabetical order. Usually the TIF will include citations to the United States *Treaties and Other International Agreements* (UST), the *Treaties and Other International Agreements* (TIAS) Series, or the United Nations *Treaty Series* (UNTS). A lack of a citation in the TIF indicates that the agreement is not yet published in one of the treaty series. An “NP” citation indicates that the Department of State made a decision to not publish that particular agreement.

agreement.<sup>37</sup> The TIF and TIAS are unclassified series. Consequently, while TIF and the TIAS are a good place to start, they often fail to offer a complete solution for your developing database.

The Army Judge Advocate General's International and Operational Law Division (IOLD) manages an online document library that contains many unclassified IAs.<sup>38</sup> You may also find multinational agreements elsewhere on the Internet, such as on the United Nations or North Atlantic Treaty Organization (NATO) websites. Judge advocates assigned in NATO positions are also a potential resource, as they can access NATO's legal research database (account required). Finally, you should round out your research by working through your technical chain of judge advocates. The service and CCMD Office of the Staff Judge Advocate maintain the most comprehensive database of agreements (typically on the secure Secret Internet Protocol Router Network (SIPRNet)) for countries within their areas of responsibility.

## C. Compliance with Existing International Agreements

### 1. Criminal Jurisdiction

Under international law, a State has jurisdiction over all persons found within its borders unless that State consents to a derogation of that sovereign right.<sup>39</sup> Beyond a complete waiver of jurisdiction, there are four common arrangements. First, receiving states may grant status protections equivalent to those afforded to the administrative and technical staff (A&T Status) of the U.S. Embassy.<sup>40</sup> Second, an agreement may create a shared jurisdiction arrangement.<sup>41</sup> Third, some nations extend status protections to visiting forces through domestic statutes commonly called Visiting Forces Acts.<sup>42</sup> Finally, if your unit is deploying to a country without status protections, they are completely subject to the host nation's jurisdiction. Your research should include country law studies to identify unique offenses in the receiving state's

<sup>37</sup> *Texts of International Agreements to which the US is a Party*, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/tias/index.htm> (last visited Apr. 16, 2015).

<sup>38</sup> *International & Operational Law Library*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/io.nsf/homeLibrary.xsp> (last visited Apr. 16, 2015).

<sup>39</sup> U.S. forces are generally subject to exclusive U.S. jurisdiction during a combat deployment. At the termination of combat activities, however, the primary right to exercise criminal jurisdiction will revert to the receiving state or fall under another jurisdictional structure pursuant to a negotiated agreement.

<sup>40</sup> Vienna Convention on Diplomatic Relations, art. 37, Apr. 18, 1961, 23 UST 3227, 500 U.N.T.S. 95. Under administrative and technical staff status, the United States exercises exclusive criminal and civil jurisdiction for acts committed within the scope of duty.

<sup>41</sup> Under a shared jurisdiction scheme, conduct that constitutes an offense under the law of the receiving state, but not the sending state, is exclusively within the jurisdiction of the receiving state. For example, dereliction of duty is an offense under the Uniform Code of Military Justice (UCMJ), but

domestic code. Remember, lack of status protection is a planning factor for your commander but not necessarily a legal objection.<sup>43</sup>

### 2. Claim Waivers

As with any deployment, you naturally anticipate that your unit will break or destroy items. Absent an agreement to the contrary (or a combat claims exclusion), the United States will usually pay for damages caused by its forces. Prior to deployments, judge advocates should check to see if the State waived the privilege to file a claim or agreed to pay third party claims for damage or loss caused by U.S. forces in the performance of official duties.

### 3. Force Protection

A sovereign is responsible for the security of persons within its territory. This does not, however, relieve the U.S. commander of his or her responsibility for the safety of the unit. As part of predeployment preparation, you should review the applicable rules of engagement and the international agreement for force protection terms.

### 4. Entry and Exit Waivers

States typically require foreigners to present passports and visas to enter into its territory. Processing passport and visa applications for your entire unit will have a significant impact on your commander's operational flexibility. As part of your initial research, you should identify whether the receiving state authorizes U.S. personnel to enter and exit its territory with military identification cards and orders (or other expedited procedures).

not under German law, so exclusive jurisdiction rests with the United States for that offense. For conduct that constitutes an offense under the laws of both the receiving and sending states, there is concurrent jurisdiction and primary jurisdiction is assigned to one party. The sending state usually has primary jurisdiction when the sending state or individual is the victim or the conduct is committed in the performance of official duty. For example, if a U.S. Soldier assaults another U.S. Soldier, it violates both U.S. and German law, but primary jurisdiction rests with the United States because the victim is from the sending state. In all other cases, primary jurisdiction rests with the receiving state unless waived. See NORTH ATLANTIC TREATY ORGANIZATION, Agreement between the Parties to the North Atlantic Treaty regarding the Status of their Forces, [http://www.nato.int/cps/en/nat/ohq/official\\_texts\\_17265.htm](http://www.nato.int/cps/en/nat/ohq/official_texts_17265.htm).

<sup>42</sup> Although not an international agreement, judge advocates should acquire a translated copy of the Visiting Forces Act to understand host nation law.

<sup>43</sup> Travel into a country without status protections may require combatant command (COCOM)-level approval. If U.S. military personnel are subjected to foreign criminal jurisdiction, the United States must take steps to ensure that the service member receives a fair trial. See U.S. DEP'T OF DEF., DIR. 5525.1, STATUS OF FORCES POLICY AND INFORMATION (21 Nov. 2003) and implementing service regulations.

## 5. Customs and Taxes

While U.S. forces must pay for goods and services requested and received, sovereigns generally do not tax other sovereigns. Receiving states normally exempt U.S. forces from paying customs, duties, and taxes on goods and services imported to or acquired in the territory of the receiving state for official use. A friction point occurs when the receiving State charges U.S. forces a “processing fee,” for example, instead of taxes or duties.

## 6. Contracting

States often consent through agreements for U.S. forces to locally contract for supplies and services that are not available from the host nation government. This provision does not alter or obviate other U.S. fiscal and contracting requirements.

## 7. Insurance, Vehicle Registration, and Drivers’ Licenses

Status of Forces Agreements (SOFAs) typically exempt the United States from acquiring third party liability insurance. The U.S. government is “self-insured”; the Federal Torts Claims Act provides specific authority to pay claims for damages.<sup>44</sup> Many countries also waive the requirement for the U.S. to register its vehicles. Finally, States may utilize agreements to authorize U.S. personnel to drive official U.S. vehicles with U.S. drivers’ licenses or to issue licenses based solely on the possession of a valid U.S. license.

## 8. Communications Support

Absent an agreement to the contrary, host-nation law will govern your commander’s use of frequencies within the

electromagnetic spectrum. This includes not only tactical communications but also commercial radio and television airwaves.

While deploying judge advocates will most frequently reference SOFAs, or other agreements establishing jurisdictional protections, you should also become familiar with agreements governing logistics support, pre-positioning equipment, acquisition and cross servicing,<sup>45</sup> personnel exchange programs, and defense assistance programs.

### D. Authority to Negotiate, Conclude, Amend, or Terminate an Agreement

The DoD’s authority to negotiate or conclude international agreements is delegated from the President’s executive power or provided by Congress through legislation.<sup>46</sup> The SECDEF delegated the authority to negotiate agreements that are predominately the concern of a single service to each service secretary and agreements concerning the operational command of joint forces to the Chairman, Joint Chiefs of Staff (CJCS).<sup>47</sup> The DoD strictly prohibits personnel from negotiating or concluding an IA without written approval. It is essential for judge advocates to know what constitutes the “negotiation” or “conclusion” of an IA to help commanders and staff avoid inadvertent action without first obtaining the proper authority.<sup>48</sup>

### E. Seeking Authority: The Circular 175 Procedure

There is a specific procedure for requesting authority to negotiate, amend, conclude, or terminate an IA. This is known as the “Circular 175” procedure.<sup>49</sup> The request, sent through the chain of command to the Undersecretary of Defense for Policy, must include a draft of the proposed

<sup>44</sup> 28 U.S.C. § 1346(b) (2013); 28 U.S.C. § 2671 (2000).

<sup>45</sup> 10 U.S.C. §§ 2341-2350 (2006). United States forces and those of an eligible country may provide logistics support, supplies, and services on a reciprocal basis. Such support, supplies, and services are reimbursed through: replacement in kind; trade of support, supplies, or services of equal value; or cash. Units cannot use Acquisition Cross-Service Agreement (ACSAs) as a substitute for normal sources of supply, or as a substitute for foreign military sales procedures. For additional guidance, see U.S. DEP’T OF DEF., DIR. 2010.9, ACQUISITION AND CROSS-SERVICING AGREEMENTS (24 Nov. 2003); INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK ch. 14 (2014) [hereinafter OPERATIONAL LAW HANDBOOK].

<sup>46</sup> For example, Exchange of Training and Related Support authorizes the President to “provide training and related support to military and civilian defense personnel of a friendly foreign country or an international organization” and goes on to require an international agreement to implement the support. In Executive Order 13637, the President delegated his agreement authority under 22 U.S.C. § 2770a (1985) to the Secretary of Defense (SECDEF). Exec. Order No. 13637, 78 Fed. Reg. 16, 127 (Mar. 8, 2013); 10 U.S.C. § 2342 (2006). Thus, SECDEF is authorized to enter into certain agreements with specified countries for logistics support, supplies, and services.

<sup>47</sup> U.S. DEP’T OF DEF., DIR. 5530.3, INTERNATIONAL AGREEMENTS para. 8.2, 8.4 (11 June 1987) [hereinafter DODD 5530.3]; CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 2300.01D, INTERNATIONAL AGREEMENTS (5 Oct. 2007). The Chairman of the Joint Chiefs of Staff (CJCS) delegated authority to the Combatant Commanders (CCDRs). Judge advocates should review combatant command (CCMD) and service regulations pertaining to international agreements.

<sup>48</sup> DODD 5530.3, *supra* note 47, at para. 8.2, 8.4. The term “negotiation” does not include preliminary or exploratory discussions or routine meetings where no draft documents are discussed so long as such discussions or meetings are conducted with the understanding that the views communicated do not and shall not bind or commit any side, legally or otherwise. *Id.*

<sup>49</sup> U.S. DEP’T OF STATE, CIRCULAR NO. 175 (13 Dec. 1955). This document governed the process for concluding international agreements that bind the United States. “Circular 175” or “C175” refers to the State Department’s procedures for prior coordination and approval of treaties and other international agreements. Although codified at 22 C.F.R. § 181.4 (2006) and directed in the Foreign Affairs Manual, Volume 11, Chapter 720, the “C175” reference remains as the descriptor for those procedures. See *Circular 175 Procedure*, U.S. DEP’T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70132.htm> (last visited Apr. 16, 2015).

agreement, a legal memorandum, and a fiscal memorandum.<sup>50</sup> The legal memorandum must trace the constitutional or statutory authority to execute each of the proposed obligations and address any other legal considerations.<sup>51</sup> It is highly unlikely that this authority will be granted at the brigade level. Regionally aligned brigade judge advocates are advised to raise any request for international agreements with the ASCC.

#### IV. Human Rights Law and RAF Operations

International human rights law (IHRL) plays an increasingly significant role in legal support to RAF operations. Therefore, RAF judge advocates can help maximize their value to the command by understanding several key IHRL-related issues. First, IHRL-related U.S. Leahy vetting legislation affects whether or not the DoD will fund RAF assistance to foreign forces. Second, many foreign forces are bound by multiple human rights treaties, and U.S. judge advocates are often required to teach these treaty obligations to partnered forces. Finally, human rights treaty obligations may restrict partnered forces' military operations. In sum, RAF judge advocates should understand those restrictions and their potential effects on U.S. interoperability missions.

##### A. Fiscal Impacts of IHRL ("Leahy Vetting")

Before a regionally aligned force may provide training, equipment, or assistance to foreign forces in their respective regions, federal law requires that the recipient forces be vetted in order to ensure they have not committed "gross violations of human rights."<sup>52</sup> This vetting requirement is commonly referred to as Leahy vetting. The DoD published implementing guidance for this statutory requirement in August 2014.<sup>53</sup> The Department of State—not the RAF—accomplishes the foreign force vetting. Normally, the Office of Security Cooperation (OSC) is responsible for training and working with the appropriate U.S. embassy for vetting. However, if your unit is initiating the training or support, plan on additional liaison work in order to ensure that any required

<sup>50</sup> When Under Secretary of Defense for Policy (USD(P)) does not have the blanket authority to negotiate and conclude an agreement, the Department of the Defense (DoD) will submit a Circular 175 packet to the Department of State, Treaties Affairs Office, in accordance with the procedures set forth in Volume 11, Foreign Affairs Manual, Chapter 720.

<sup>51</sup> DODD 5530.3, *supra* note 48, para. 9.3.

<sup>52</sup> See Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §1204, 128 Stat. 3292, 3530 (2014). Section 1206 of the same bill contains a limited authority to provide human rights training to foreign forces that would otherwise be prohibited from receiving U.S. training; 10 U.S.C. §2282 (2015). See also OPERATIONAL LAW HANDBOOK, *supra* note 45, at 55, 228.

<sup>53</sup> See Memorandum from The Secretary of Defense, subject: Implementation of Section 8057 DoD Appropriations Act, 2014, (18 Aug. 2014). This is a helpful document that addresses statutory definitions, exceptions, etc.

vetting is accomplished on time.<sup>54</sup> Although Leahy vetting issues are largely fiscal in nature, in practice, the operational law attorney—not the contract/fiscal attorney—often carries the majority of the associated workload.

##### B. Professor of RAF—Teaching International Human Rights Law

Foreign forces training with RAF are often signatories to regional human rights treaty obligations, some of which the United States has not signed or ratified.<sup>55</sup> Consequently, RAF judge advocates must not only be aware of these regional treaty obligations, but also be prepared to teach them to partnered forces. In addition to the specific provisions within these treaties, RAF judge advocates should also be prepared to teach the distinctions between IHRL and the law of armed conflict (LOAC) and how the two bodies of law interact with each other.<sup>56</sup>

When your unit is scheduled to conduct training in a designated region, confirm what legal training will be required of the RAF. Then reach out to the appropriate combatant command (CCMD) legal office through proper channels (e.g., for Africa-based unit training, contact the United States Africa Command (USAFRICOM) Legal Engagements section, via United States Army Africa, and the Defense Institute for International Legal Studies (DIILS)). Next, ask if those organizations have trained recently in that country and, if so, what they briefed. Finally, if possible, arrange a meeting with the local foreign forces legal advisor (if any) prior to the start of the training or operation in order to discuss IHRL-related trends and issues within the partner unit.

##### C. The Indirect Effects of Regional IHRL Obligations

Regional international human rights treaty provisions can restrict partner forces' military operations, which can in turn indirectly affect U.S. military operations—particularly during contingency operations. The RAF judge advocates who

<sup>54</sup> As a RAF comes up with ideas for operations in their region, "little t" training often turns out to be the most timely, and overall best, fiscal route to take. Scoping operational plans such that they fit within the confines of "safety, interoperability, and familiarization" that is low cost and does not significantly increase capacity of foreign forces helps qualify for "little t" status. The more complex "Big T" training may require months in order to secure funding. See OPERATIONAL LAW HANDBOOK, *supra* note 47, at 236.

<sup>55</sup> The three primary regional international human rights law (IHRL) treaties are: The European Convention on Human Rights ([http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)), the African Charter on Human and Peoples' Rights ([http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf)), and the Inter-American Charter on Human Rights ([https://www.oas.org/dil/access\\_to\\_information\\_American\\_Convention\\_on\\_Human\\_Rights.pdf](https://www.oas.org/dil/access_to_information_American_Convention_on_Human_Rights.pdf)).

<sup>56</sup> OPERATIONAL LAW HANDBOOK, *supra* note 45, at 52-54.

understand their partner nation's regional human rights obligations can help ensure that their own command understands how the partnered nation's IHRL obligations can indirectly affect U.S. operations and then plan accordingly. For example, if a partner force's regional IHRL treaty obligations prevent them from conducting detainee operations under the LOAC principles and policies under which U.S. forces operate, the RAF command needs to know that in order to properly plan interoperability missions. Finally, it is important that pre-deployment legal training include clear guidance on how members of the unit are required to report potential IHRL violations.

Without a doubt, IHRL impacts RAF operations. An awareness of the considerations and suggestions discussed above can help the RAF judge advocate provide solid legal support and contribute to the RAF being a "regionally engaged and globally responsive" force.<sup>57</sup>

## V. Rules of Engagement

If your RAF unit receives notice to conduct a security cooperation "shaping" mission, one area you may overlook is the ROE. Although not as complex as ROE for decisive action, you still need to consider both the use of force in self-defense while deployed OCONUS, and, depending on the mission, the ROE training and development you will conduct with partner nations. For example, what force are Soldiers authorized to use to defend weapon systems, vehicles and aircraft, or ammunition, whether static or in a convoy, in the host nation? Can your unit detain civilians in self-defense? How will your unit conduct training with a nation that cannot or will not participate in certain types of operations or use certain weapon systems? The purpose of this section is to

discuss ROE development, training, and implementation for RAF shaping missions.

### A. What ROE Apply to Your Mission?

The ROE facilitate planning and execution of operations by providing direction on circumstances and limitations under which the U.S. military uses force during operations.<sup>58</sup> In the RAF operating environment during shaping missions, it is especially critical that Soldiers understand when they are legally permitted to use force and their commander's intent for when they should use force in a given situation.<sup>59</sup> The first step is to determine which ROE apply to the assigned mission. At a minimum, the Standing ROE (SROE) apply outside of U.S. territory to all military operations and contingencies.<sup>60</sup> It is likely that the geographic CCMD with whom you are regionally aligned has established theater-specific ROE,<sup>61</sup> and it is possible that the SECDEF has authorized ROE for your mission through an Executive Order (EXORD).<sup>62</sup> At a minimum, your unit must address the concept and parameters for unit and individual self-defense in a shaping operational environment. Therefore, it is essential to any noncombat operation to evaluate how to implement, where appropriate, escalation of force (EOF) procedures in order to emphasize de-escalation of force during these operations.<sup>63</sup> Another area to investigate is agreements with the host nation. It is likely that such an agreement will control your unit's ability to carry and use weapons in performance of your unit's mission.<sup>64</sup> After determining the applicable ROE—even if that is only the SROE—you must next determine how the ROE will apply to your specific mission.

<sup>57</sup> RAF EXORD, *supra* note 10, at 2, 3, 9. See also Kimberly Field et al., *supra* note 5, at 56.

<sup>58</sup> JOINT CHIEFS OF STAFF, JOINT PUB.1-02, DEP'T OF DEF. DICTIONARY OF MILITARY & ASSOCIATED TERMS 213 (15 Mar. 15) (defining rules of engagement).

<sup>59</sup> Colonel Peter Newell & Major Joe Ratermann, *Rules of Engagement Training: Internalizing the Commander's Intent*, COMBAT TRAINING CTR. BULL. 11 (July, 22 2008), <https://call2.army.mil/toc.aspx?document=4170&tag=108> [hereinafter *ROE Training: Internalizing the Commander's Intent*]. This article provides a valuable overview of the importance of the integration of the commander's intent into Rules of Engagement (ROE) training.

<sup>60</sup> CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT (SROE)/STANDING RULES FOR THE USE OF FORCE (SRUF) FOR U.S. FORCES (13 June 2005) [hereinafter CJCSI 3121.01B]. CJCSI 3121.01B is classified SECRET, but many of the most important policy provisions and definitions are UNCLASSIFIED and are found in the OPERATIONAL LAW HANDBOOK at Chapter 5.

<sup>61</sup> *Id.* at 4; Operational Law Handbook, *supra* note 47, at 82. Most, if not all, of the geographic combatant commands maintain their own theater-specific ROE. Accessing this ROE will require access to a Secret Internet Protocol Router Network (SIPRNet).

<sup>62</sup> See CJCSI 3121.01B, *supra* note 60. Notably, Executive Orders are often classified SECRET as well.

<sup>63</sup> CJCSI 3121.01B, *supra* note 60 at 2, I-1 ("When time and circumstances permit, the forces committing hostile acts or demonstrating hostile intent should be warned and given the opportunity to withdraw or cease threatening actions."). While U.S. forces do not have to de-escalate the situation when force is used against them, RAF missions are conducted in peaceful, permissive environments where the nature of the threat likely dictates less aggressive responses in self-defense. Traditionally, Escalation of Force (EOF) procedures served to "help with the proportional application of force in self-defense situations. . . . The basic idea is simple—to increase the magnitude of force applied to an identified threat until the threat is deterred or, if necessary, eliminated. . . . [Escalation of Force] was envisioned to be used in times where there was no actual enemy." Lieutenant Colonel Randall Bagwell, *The Threat Assessment Process (TAP): The Evolution of Escalation of Force*, ARMY LAW., Apr. 2008, at 5. This article provides an excellent overview of how the traditional concept of using EOF procedures to de-escalate hostile situations has become confused with more recent procedures used in Iraq and Afghanistan to identify threats. In the RAF environment, where one anticipates "no actual enemy," EOF procedures are an important tool for Soldiers to understand when, how, and why to implement.

<sup>64</sup> See *supra* note 63 and accompanying text concerning International Agreements. A consideration for force protection measures is to rely on host nation security forces to provide primary defense for convoys and encampments.

## B. Conduct Mission Analysis

Once you know the ROE for your mission, the staff must conduct mission analysis in order to determine how to apply the ROE to the mission. While the particulars of the Military Decision Making Process (MDMP)<sup>65</sup> are beyond the scope of this article, judge advocates must analyze the mission in order to best advise the command on the application of the ROE. Perhaps the most important input into this step in terms of the ROE is the commander's intent and initial guidance from both your commander as well as higher headquarters.<sup>66</sup> The commander's intent and guidance gives the legal advisor along with the command staff a shared understanding of how the commander wants to apply the ROE.<sup>67</sup> As the staff understands the mission and the commander's intent, they should determine what supplemental measures, if any, the command should request or implement.<sup>68</sup> Finally, once mission analysis is complete, the judge advocate and the staff should begin to develop proposed ROE training during the MDMP steps of course of action development, analysis, comparison, and approval.<sup>69</sup>

<sup>65</sup> U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 5-0, THE OPERATIONS PROCESS para. 2-52 – 2-64 (17 May 2012) [hereinafter ADRP 5-0]; U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 9-1 (5 May 2014) (C1, 11 May 2015) [hereinafter FM 6-0]. See Major Michael J. O'Connor, *A Judge Advocate's Guide to Operational Planning*, ARMY LAW., Sept. 2014, at 5, 17. Major O'Connor's article is an excellent overview of Army planning processes for judge advocates.

<sup>66</sup> See FM 6-0, *supra* note 65, para. 9-73–9-79; U.S. DEP'T OF ARMY, DOCTRINE REF. PUB. 6-0, MISSION COMMAND para. 2-12 – 2-15 (17 May 2012) (C2, 28 Mar. 2014) [hereinafter ADRP 6-0]. The commander's intent "is a clear and concise expression of the purpose of the operation and the desired military end state that supports mission command, provides focus to the staff, and helps . . . achieve the commander's desired results without further orders . . ." FM 6-0, *supra* note 65, para. 9-73. The commander's intent "explains the broader purpose of the operation[,] . . . [allowing] subordinate commanders and Soldiers to gain insight into what is expected of them, what constraints apply, and most importantly, why the mission is being conducted." *Id.* para. 9-74.

<sup>67</sup> ADRP 6-0, *supra* note 66, para. 2-9–2-11 ("Effective commanders and staffs use collaboration and dialogue to create a shared understanding of the operational issues, concerns, and approaches to solving them. Commanders gain valuable insight while also sharing their own vision and commander's intent."). For example, while a mission-specific ROE may allow Soldiers to use deadly force in certain situations, a commander may emphasize that based on the political environment and anticipated nature of threats, the commander wants to emphasize de-escalation as a primary tool to counter uses of force against Soldiers.

<sup>68</sup> CJCSI 3121.01B, *supra* note 60, at 2, I-1. Supplemental measures "enable commanders to tailor ROE for specific missions," and consist of both permissive supplemental measures (those that require "prior approval of the SECDEF or combatant commander" for use of certain weapons/tactics) and restrictive measures ("used to place limits on the use of force for mission accomplishment"). *Id.* Examples to consider are restrictions on detention of civilians, warning shots, and various weapon systems.

## C. ROE Training

### 1. Training U.S. Forces to Defend Themselves in a RAF Environment

During mission analysis, commanders should make clear their intent for how they want to train the application of the ROE.<sup>70</sup> More than likely, the noncombat RAF shaping mission will be decentralized in nature.<sup>71</sup> Therefore, ROE training should focus on empowering small unit leaders (company commanders and senior noncommissioned officers) to serve as the primary trainers for their Soldiers and to situational training<sup>72</sup> applying the commander's intent to the anticipated threat (or lack thereof).<sup>73</sup>

One tool to consider is The Judge Advocate General's Legal Center and School's International and Operational Law Department's four-step training model for conducting a ROE training program: (1) formal classroom training led by unit judge advocates; (2) commander-led discussions with Soldiers that emphasize the commander's intent; (3) practical application of the ROE through situational training; and (4) emphasizing application of the ROE through the AAR process.<sup>74</sup> Using this model, judge advocates can efficiently assist commanders in delivering effective ROE training, both academic and practical, to Soldiers preparing to deploy to

<sup>69</sup> See generally ADRP 5-0, *supra* note 65, at Fig. 2-6; FM 6-0, *supra* note 65, para. 9-82–9-187; O'Connor, *supra* note 65, at 20.

<sup>70</sup> Newell, *supra* note 59, at 11, 13 ("Commanders are personally responsible for the actions of their subordinates. . . [and] must be able to communicate clearly to those in their command how their leaders expect them to act and react in tactical situations within permissible ROE and EOF parameters.").

<sup>71</sup> See CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, 2D BRIGADE, 1ST INFANTRY DIVISION, BRIGADE JUDGE ADVOCATE AFTER ACTION REVIEW, at 2 (June 2013 – June 2014) [hereinafter 2-1 ID RAF AAR] ("RAF missions were non-combat missions and did not implement ROE beyond the standing provisions on self-defense in the SROE. . . Soldiers needed to . . . [get] their mindset closer to their right to self-defense at home station than the use of force in combat environments in Iraq and Afghanistan."). This particular Brigade Judge Advocate also emphasized that "RAF missions can involve small groups of Soldiers operating with minimal supervision." *Id.* at 4.

<sup>72</sup> Major Winston S. Williams, *Training the Rules of Engagement for the Counterinsurgency Fight*, ARMY LAW., Jan. 2012, at 45–47. Major Williams' article provides great insight on proven methods for implementing ROE training in a large unit, emphasizing situational training (requiring Soldiers to practice tasks within a particular mission scenario until they perform the task to standard). *Id.* at 45–46. It also stresses the importance of empowering small unit leaders to conduct ROE training, both because of stretched legal resources and the inherent responsibility for training that rests with company commanders and noncommissioned officers. *Id.* See also Captain Howard H. Hoege, *ROE . . . also a Matter of Doctrine*, ARMY LAW., June 2002, at 1, 3 – 5. Because units will often deploy in small groups throughout a large area during a RAF mission, legal advisors should focus on executing decentralized training to an established standard.

<sup>73</sup> 2-1 ID RAF AAR, *supra* note 71, at 4.

<sup>74</sup> See Newell, *supra* note 59, at 12-16.

noncombat environments. Beyond ensuring Soldiers understand the commander's intent with regard to the use of force in self-defense, judge advocates must also be prepared to assist their units with conducting training with international partners under common ROE.

## 2. Training U.S. Forces to Operate with International Partners in the RAF Environment

As multinational operations become more frequent for the U.S. military, developing common ROE is a critical component for ensuring interoperability between forces.<sup>75</sup> While nations are willing to contribute to such international operations, their participation often hinges on each nation's caveats on operations.<sup>76</sup> These restrictions usually create friction for commanders, but judge advocates can ease conflicts by concentrating on three key areas:<sup>77</sup> (1) the "shifting nature of caveats, both declared and undeclared";<sup>78</sup> (2) varying national interpretations of self-defense policies;<sup>79</sup> and (3) ROE training that navigates national caveats and restrictions while emphasizing commonality.<sup>80</sup>

The NATO ROE<sup>81</sup> offers a resource for understanding and developing common ROE, but given that many RAF missions may fall outside of the NATO structure, the *Rules of Engagement Handbook (ROE Handbook)* is perhaps a better tool for developing common ROE training.<sup>82</sup> The *ROE Handbook* provides international partners with a framework

<sup>75</sup> Major Winston S. Williams, *Multinational Rules of Engagement: Caveats and Friction*, ARMY LAW, Jan. 2013, at 24.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 24-25 ("Declared caveats are established . . . by a national government and are known . . . early on . . ." Some examples of declared caveats include "geographical limitations and combat operation prohibitions . . ." Undeclared caveats "are those caveats that are not well documented in advance and often emerge during an operation . . . [and] may also result from differing interpretations of host nation policies and the international law of self-defense.").

<sup>79</sup> *Id.* at 25-26 ("All nations recognize the right of self-defense . . . [and] generally agree on a common definition of self-defense, which is 'the use of force to defend against attack or imminent attack,' [but] [w]ithin this common definition . . . are multiple interpretations of what the words mean.").

<sup>80</sup> *Id.* at 27-28 (The staff "should develop vignettes that are unique to staff operations, especially as these relate to self-defense/troops-in-contact situations," and should include "situations where caveats restrict a multinational partner to specific geographical areas and preclude offensive operations . . . [which] will help the staff develop battle drills and standard operating procedures (SOPs) for operations in theater." Unit legal advisors must coordinate with the ASCC when it comes to developing common ROE. The ASCC, through its interagency and international relationships, is best suited to advise and assist when it comes to multinational ROE.

<sup>81</sup> NORTH ATLANTIC TREATY ORG., MILITARY COMM., MC 362/1, NATO RULES OF ENGAGEMENT (2003), [https://clovis.hq.nato.int/RC/Basic%20documents/Forms/DanaInfo=clovis.hq.nato.int+All%20Policies.aspx?Paged=TRUE&p\\_SortBehavior=0&p\\_FileLeafRef=MC%5f0215%5f3](https://clovis.hq.nato.int/RC/Basic%20documents/Forms/DanaInfo=clovis.hq.nato.int+All%20Policies.aspx?Paged=TRUE&p_SortBehavior=0&p_FileLeafRef=MC%5f0215%5f3)

for addressing a wide variety of operational issues, from the use of force in self-defense, to detention,<sup>83</sup> to the use of various weapon systems. Through MDMP, the staff will understand potential operations, which should drive identification of the applicable ROE groups, series, and rules applicable to the operation or training exercise. Once the staff generates the specific ROE, legal and political advisors can work through each ROE rule to produce a ROE matrix that allows the staff to quickly identify areas of commonality and friction.<sup>84</sup> Finally, with the ROE matrix in hand, the staff can ascertain constraints on operations and work through various scenarios to create ROE training that forces units to train to operate under a common operating picture.

## VI. RAF and Security Cooperation

The RAF concept is a key factor in how the Army seeks to execute security cooperation—a key component to the Army's strategy of "Prevent, Shape, and Win."<sup>85</sup> Security cooperation comprises all activities undertaken by the DoD to encourage and enable international partners—including foreign defense establishments—to work with the United States to achieve strategic objectives.<sup>86</sup> A broad variety of activities are part of security cooperation, ranging from foreign arms sales regulated by Congress and the State Department, to multinational training exercises with partner militaries all the way down to smaller unit, group, or individual training opportunities or exchanges. As a

9%2epdf&p\_ID=1107&PageFirstRow=61&&CA3E-CBFA-44FF-8278-DAB9F59872FE [hereinafter NATO ROE] (login and password required).

<sup>82</sup> INT'L. INST. OF HUMANITARIAN LAW, Sanremo Handbook on Rules of Engagement (Nov. 2009) [hereinafter ROE Handbook], <http://www.iihl.org/sanremo-handbook-on-roe>. The ROE Handbook is a proven tool for nations to "identify and manage the respective legal and policy positions of nations participating in a multinational operational and promotes an understanding of national ROE policies." *Id.* at 1.

<sup>83</sup> Detention operations are beyond the scope of this article; however, like ROE, it is an area legal advisors should not ignore. In a shaping environment, detention will be severely restricted. Your unit might detain in self-defense, but international agreements might necessitate immediate transfer to host nation forces. Detention during military operations, especially in a non-international armed conflict, is a controversial topic for many nations; thus, as you plan for multinational ROE, you will find detention is one area where nations usually fail to agree.

<sup>84</sup> ROE Handbook, *supra* note 82, at annex B. Using the "compendium of ROE" found in annex B of the ROE Handbook as a guide, partner nations can develop a matrix that lists the ROE authorizations by Group/Series/Rule along with the participating nations and colors or codes to portray that nation's caveats with respect to a range of issues. See Appendix 3 for an example of a ROE matrix. The authors would like to thank Captain Tim Mathews, Operational Law Attorney, U.S. Army South, for providing an excellent example of a ROE matrix for a multinational training exercises, created using the ROE Handbook as a guide.

<sup>85</sup> ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION: AN ENDURING MISSION FOR "PREVENT, SHAPE, WIN" (2014).

<sup>86</sup> DODD 5132.03, *supra* note 32; AR 11-31, *supra* note 32, para. 1-1; JOINT CHIEFS OF STAFF, JOINT PUB. 3-22, FOREIGN INTERNAL DEFENSE (12 July 2010).

regionally aligned judge advocate, you could be engaged in security cooperation from a wide range of perspectives, and you should expect to perform the full range of your core functional competencies on any RAF security cooperation mission. You will likely even find yourself directly engaged in security cooperation through, for example, participating in LOAC training with partner nations. This part of the article aims to give you a general introduction to the range of security cooperation activities you might be involved in as a regionally aligned judge advocate.

One of the Army's top priorities for its role in the larger DoD security cooperation endeavor is to enhance support to the respective geographic combatant commands, and this is where the "regional" focus becomes key. Army service component commands develop theater and functional campaign support plans that identify the security cooperation capabilities required to achieve CCMD objectives.<sup>87</sup> The importance of engagement with foreign security forces is grounded in the Army's approach to prevent future wars by deterring threats; to shape future conflict by creating security conditions favorable to the United States and allied interests; and, when necessary, to win conflicts based in part upon access to, interoperability with, and knowledge of regional partners and allies—i.e., "prevent, shape, and win."<sup>88</sup> The RAF concept is one of the major components of the Army's approach to security cooperation.<sup>89</sup> In the vision of the Army, RAF supports security cooperation by building expertise, experience, and relationships within the aligned region. There are several specific areas within security cooperation where the regionally aligned judge advocate should be prepared to engage.

As a regionally aligned judge advocate, you will need an understanding of your unit's role in a security cooperation mission. Security cooperation, in addition to RAF, involves a plethora of initiatives including defense trade and arms transfers, humanitarian assistance and disaster relief, international military education and training, and defense institution building.<sup>90</sup> It is important that you understand the ASCC's campaign plan and the programs at play within your partnered region. As your unit's judge advocate you will be required to provide legal support across the full spectrum of military law core competencies, so an understanding of the security cooperation mission will be critical. Reach out to your technical chain of judge advocates as well as the interagency resources that can provide more information on

the legal challenges of any particular type of security cooperation mission.

In addition to the legal challenges facing a RAF unit in a deployed environment, RAF provides an additional opportunity for you to contribute directly as a judge advocate to the substantive goals of security cooperation. One of the key components of successful security cooperation is to work with partner militaries who maintain good order and discipline, respect the rule of law, and follow the LOAC. In other words, military law can be a big part of the RAF mission. As part of this focus, The U.S. Army Judge Advocate General (TJAG) recently issued guidance to the JAG Corps in a memorandum on Legal Engagements in Support of the Army Security Cooperation Strategy.<sup>91</sup> There are three lines of effort prescribed for the Army JAG Corps: (1) reinforcing the standards of the LOAC, (2) military-to-military engagements, and (3) building relationships and enhancing interoperability.<sup>92</sup> This guidance helps judge advocates think about ways to use both RAF and other concepts to support the mission of "prevent, shape, and win."

Judge advocates should be intimately involved with military-to-military engagements, particularly with foreign military attorneys. "Engagement with foreign security forces . . . is central to building security around the world by enabling the [CCMD] commanders to shape their theaters of operation."<sup>93</sup> By working with foreign military legal officers, judge advocates can help to build partner nations' ability to operate within the parameters of the LOAC and other applicable bodies of international law or customary international law that govern operations during peacetime and hostilities. Additionally, forming personal relationships with foreign partners can be vital when working through other issues that may arise in the future.

In addition to partnering with attorney counterparts, judge advocates can expect to have small groups within their unit, military training teams, sent more frequently to assist partner nations with a variety of skills training necessary to ensure stability and interoperability. These skills vary from small-unit tactics, such as gunnery, or utilizing military working dogs, to training on the LOAC and IHRL. Judge advocates should also be prepared to participate in large-scale exercises and training with partner units—both here in CONUS, as well as abroad in the host nation's country. In a regionally aligned unit, you may well be the primary lawyer

<sup>87</sup> *CALL Newsletter*, UNITED STATES ARMY COMBINED ARMS CENTER (July 2014), <http://usac.army.mil/organizations/mccoe/call>.

<sup>88</sup> ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION (2014).

<sup>89</sup> *Id.*

<sup>90</sup> See AR 11-31, ARMY SECURITY COOPERATION POLICY. The United States accomplishes these initiatives through a variety of activities such as the Foreign Military Sales program, the Afghan Security Forces Fund, DoD Regional Centers, Combating Terrorism Fellowship Program, and many others. See *Programs*, DEFENSE SECURITY COOPERATION AGENCY, <http://www.dsca.mil/programs> (last visited Oct. 1, 2015).

<sup>91</sup> Memorandum from LTG Flora D. Darpino, The Judge Advocate General, U.S. Army, to Judge Advocate Legal Services Personnel, subject: Legal Engagements in Support of the Army Security Cooperation Strategy (30 Apr. 2014), <https://www.milsuite.mil/book/docs/DOC-163027>.

<sup>92</sup> *Id.*

<sup>93</sup> ARMY STRATEGIC GUIDANCE FOR SECURITY COOPERATION (2014); see also Jay Morse, *Regionally-Aligned Forces: Less About what it is; More About what it can Be*, SMALL WARS JOURNAL (Jan. 2015) ("Human engagement is the crux of RAF.").

expected to interface with partner militaries in security cooperation.

The purpose of all of these operations is to accomplish several things: (1) build and develop our partners' capacity; (2) understand and solve interoperability issues with equipment, as well as differences in techniques, tactics, and procedures, and; (3) maintain our own unit readiness. By achieving these strategic goals, the hope is to shape the environments for potential future operations, shape our partners' abilities to ensure peace within their own regions, which will hopefully prevent the United States from having to deploy combat forces to these areas.

As a regionally aligned judge advocate, it is critical that you understand the country, region, and culture of the partner nations in your region. As the legal advisor, your commanders will look to you to provide answers to the wide variety of legal issues and questions that come with a security cooperation mission. Furthermore, you may be part of the main effort to help train partners on military law, LOAC, and other areas that build the legal capacity to help "prevent, shape, and win."

## VII. Foreign Disclosure of Classified Military Information

While conducting a RAF mission, you may be asked to share information with foreign partners. Disclosure of classified information is sometimes permissible; therefore, personnel should understand proper classification of information and disclosure limitations. This section introduces the policies and regulations that govern disclosure and release of this information. As discussed in other sections, early coordination with subject matter experts is paramount. Knowledge of disclosure procedures prior to the sharing of classified information will ensure mission

requirements are met while continuing to protect national security interests.

### A. Classified Military Information

Understanding the type of information available and who is authorized to obtain that information is paramount to protecting National Security and foreign relations.<sup>94</sup> There are three types of information normally handled by military units: classified military information (CMI), controlled unclassified information (CUI), and information within the public domain.<sup>95</sup> Importantly, CMI is information under the control of an agency within the DoD, which requires protection in the interest of national security.<sup>96</sup> This type of information falls within eight categories and should normally only be classified by an originator with authority over that category.<sup>97</sup> Therefore, care must be taken when sharing information with foreign nationals as units do not have authority to release information they did not originate.<sup>98</sup>

### B. Foreign Disclosure Officer

Disclosure decisions are not made by legal advisors; moreover, you should coordinate with the official appointed by your unit to ensure you avoid improper disclosures. Commanders of Army units shall appoint a Foreign Disclosure Officer (FDO) in writing and publish foreign disclosure procedures that include coordination and referral to the FDO, who shall ensure the following factors are considered.<sup>99</sup> First, FDOs may only disclose information originating from the command or organization in which they have delegated authority.<sup>100</sup> Second, the FDO shall not exceed the classification level authorized for disclosure of classified material (NDP-1). Finally, the FDO must ensure all five disclosure criteria listed in NDP-1 are met.<sup>101</sup> Because

<sup>94</sup> U.S. DEP'T OF DEF, INTERNATIONAL PROGRAMS SECURITY HANDBOOK, 3-11 (June 2009) [hereinafter IPS HANDBOOK]. Information that is obtained from another foreign government, from another agency, or is combined military information must be approved for release, in writing, by each interested party.

<sup>95</sup> U.S. DEP'T OF ARMY, REG. 380-10, FOREIGN DISCLOSURE AND CONTACTS WITH FOREIGN REPRESENTATIVES para. 2-3 (14 Jul. 2015) [hereinafter AR 380-10]. While this RAF section is primarily focused on the dissemination of classified military information (CMI), the regulation does discuss the dissemination of controlled unclassified information (CUI) to foreign nationals. You may handle CUI with no marking or distribution statements. It is incumbent upon all originators to review material prior to making a disclosure determination to determine whether the information is CUI or information within the public domain. Information may be disclosed regardless of the form, to include but not limited to classified documents or other written material, visual media, or through oral communication. *Id.*

<sup>96</sup> NATIONAL SECURITY DECISION MEMORANDUM 119, DISCLOSURE OF CLASSIFIED UNITED STATES MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS, 2 (20 Jul. 1971) [hereinafter NSDM 119]. The National Policy and Procedures for the Disclosure of Classified Material (NDP-1) is the SECDEF implementing policy, which will be on file with a foreign disclosure officer. NDP-1 and national policy prohibits giving the express or implied impression to foreign

governments that defense information, technology or equipment will be shared without first obtaining authorization.

<sup>97</sup> IPS HANDBOOK *supra* note 1, encl. 2. *See also* AR 380-10 *supra* note 2, para. 2-4; Executive Order No. 13526, Original Classification Authority, 2 FR 75 (5 Jan. 2010).

<sup>98</sup> IPS HANDBOOK, *supra* note 1, 3-2. *See also* AR 380-10 *supra* note 2, para. 1-5.

<sup>99</sup> AR 380-10, *supra* note 2, para. 1-18.

<sup>100</sup> U.S. DEP'T OF DEF., DIR. 5230.11, DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS para. 3 (16 June 1992).

<sup>101</sup> *Id.* These criteria require (1) the proposed disclosure to a foreign government must be consistent with U.S. foreign policy and national security objectives; (2) the disclosure will not compromise an unreasonable risk to the U.S. position in military security objectives; (3) the foreign recipient will afford the information substantially the same degree of security given to it by the United States; (4) disclosure will result in a benefit at least equivalent to the value of the information disclosed; and (5) disclosure is limited to information necessary to the purpose for which disclosure is made.

of the complexities of foreign disclosure policies, establishing a relationship with the FDO early to ensure consistent communication and coordination can avoid improper disclosure of information.

## VIII. Helpful RAF Resources

By now you realize that there is a lot to learn before you are a fully functioning, regionally aligned judge advocate. But, there are places you can go for assistance. Here are helpful resources that will become more robust as the RAF program develops.

### A. *Milsuite* Resources

The first place to look for RAF references is *Milsuite*.<sup>102</sup> There are resources including the RAF concept, guidance, and orders as well as best practices. In the future, *Milsuite* may have country-specific information as the RAF concept develops. *Milsuite* is also a good place to go to ask RAF-related questions and receive input from experts.

### B. National Guard State Partnership Program

For over twenty years the state National Guards have developed a RAF-like security cooperation partnership with seventy-four countries throughout the world.<sup>103</sup> It is worth your time to check to see if the nation you are aligned with already has a National Guard State Partner.<sup>104</sup> If it does, contact the judge advocates assigned to that state's joint forces headquarters and see what resources and contacts they have. The total force can work together to foster relationships with this nation.

### C. CLAMO and IOLD RAF Resources

#### 1. *RAF Repository*

The Center for Law and Military Operations (CLAMO) has combined its vast database with the International and Operation Law Division to develop a RAF-specific

webpage.<sup>105</sup> Furthermore, each of the Army Service Component Command OSJAs have populated this webpage with resources specific to their area of operation and region of the world. The page allows you to click on geographic combatant commands and then search by country.<sup>106</sup> Currently, searching this database will give you all of the CLAMO and the IOLD publicly-available information on your country. The Office of The Judge Advocate General's Information Technology Division is constructing a classified version of this website so that classified information may be posted as well

#### 2. *Other CLAMO Resources*

The Center for Law and Military Operations has generated several other resources that are helpful for any judge advocate operating overseas. First, CLAMO has a document that focuses on where to find country-specific legal resources outside of the DoD websites.<sup>107</sup> Second, CLAMO publishes annually a practitioner's handbook on conducting rule of law operations.<sup>108</sup> Finally, judge advocates should access CLAMO's IO Document Library for postings on JAGCNet of current international and operational resources, and after action reports on military operations and exercises.<sup>109</sup>

### D. Marine Corps Center For Lessons Learned

The U.S. Marine Corps' Center for Lessons Learned's website has a good search function to help locate any country-specific information they have gathered.<sup>110</sup> It is worth your time to go to their website and search for the country you are aligned with and see what information is available.

### E. Stay Tuned

All of the links above are works in progress and will be updated as the RAF program develops. Do not forget to review them periodically to see what new information has been posted.

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<sup>102</sup> *Regionally Aligned Forces*, MILBOOK, <https://www.milsuite.mil/book/groups/regionally-aligned-force-raf> (last visited Oct. 1, 2015).

<sup>103</sup> *State Partnership Program*, NATIONAL GUARD, <http://www.nationalguard.mil/Leadership/JointStaff/J5/InternationalAffairs/Division/StatePartnershipProgram.aspx> (last visited Oct. 1, 2015).

<sup>104</sup> *Id.* (click on the partnership map).

<sup>105</sup> *RAF Repository*, JAGCNET, <https://www.jagcnet2.army.mil/Sites/io.nsf/homeContent.xsp?documentId=5E93A3E490538BB985257E87005D718A#> (last visited Oct. 1, 2015).

<sup>106</sup> *Id.*

<sup>107</sup> *Center for Army Lessons Learned*, JAGCNET, <https://www.jagcnet2.army.mil/Sites%5C%5Cio.nsf/0/8D2D6BFBF650206085257DAC00699A54/%24File/CLAMO%20Guide-%20Legal%20Country%20Studies%20Resources.docx> (last visited Oct. 1, 2015).

<sup>108</sup> U.S. ARMY CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, *RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES* (2015).

<sup>109</sup> CLAMO's document library may be accessed through JAGCNet at <https://www.jagcnet.army.mil>. A common access card is required.

<sup>110</sup> MARINE CORPS CENTER FOR LESSONS LEARNED, <https://www.mccl.usmc.mil/index.cfm> (last visited Oct. 1, 2015).

## IX. Conclusion

Regionally Aligned Forces are a critical part of the DoD's concept of "Strategic Landpower." The RAF concept will bring new challenges for the judge advocates assigned to these developing units. While the lessons learned from traditional brigade judge advocates are essential to a successful assignment, the international law issues RAF judge advocates face will be new. This article provides a RAF judge advocate a useful background of the key international law issues arising during your assignment. Judge advocates can use these resources to develop country-specific international law expertise that will be essential to a successful tour with regionally aligned forces.