

XI

The Occupation of Iraq

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This article addresses legal issues arising during occupation, specifically during the author’s tenure as Staff Judge Advocate (SJA), III Corps and Multi-National Corps–Iraq (MNC-I). In doing so, personal thoughts will be recalled from days gone by on the legal issues which were dealt with at the operational—and at times tactical—level of war during the US occupation of Iraq, as well as during the key transitional period after occupation. It is hoped that these thoughts will inform future discussions by legal advisors facing similar challenges.

At the June 2009 conference from which this “Blue Book” derives, this presentation was billed as a retrospective. Such presentations can either be a travelogue with pictures of judge advocates (JAs) posed under the infamous Swords of Qadisiyah, or Hands of Victory, in Baghdad, or a series of “when I was in Iraq” vignettes. A retrospective is of most value to a legal practitioner, however, if it identifies key legal issues, shows how our institutions addressed those issues and explains what was learned from wrestling with them. Finally, this article tries to answer the most important question: how did lessons learned from our experiences at MNC-I during Operation Iraqi Freedom II (OIF II) aid commanders in accomplishing their mission? This author attempts to follow that path, then show how the work that was done led to significant changes that mitigated for future operations many of the issues confronted at MNC-I. The hope is that what is said

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will inform future discussions and encourage study, critical analysis and scholarly writings, all as enablers of change for the benefit of operational forces.

Putting the observations in context is important when you consider that the nature of the conflict and the issues confronted varied with each rotation of forces and, often, at different locales in theater during a single rotation. This author was the SJA for III Corps and MNC-I, and deployed to Iraq as part of OIF II, from May 2004 to February 2005. This author was preceded both in garrison and in theater by Army Colonel Karl Goetzke, who, despite very short notice, expertly trained, equipped and organized the III Corps Office of the Staff Judge Advocate (OSJA) while at Fort Hood and then deployed, serving as the SJA in theater from January 2004 to May 2004. Colonel Goetzke augmented both his garrison and theater team with mobilized US Army Reserve (USAR) judge advocates and paralegals; the mission could not have been accomplished without them. Remaining at Fort Hood, and serving as the Fort Hood installation SJA, was a mobilized USAR judge advocate.

The III Armored Corps is headquartered at Fort Hood, Texas, an expansive installation fondly referred to as “The Great Place.” III Corps was activated in 1918 and, like so many corps in our Army’s history, activated and deactivated many times over the years. As a corps, it last saw combat in 1945. It largely served as a training platform for armor units and was often in jest, but hardly to the liking of those serving near-entire careers at “The Great Place,” referred to as America’s most non-deployable corps.¹

All that changed in September 2003 when the corps was notified of its upcoming deployment to Iraq in January 2004—only four months away! Its mission was to assume the tactical fight so that Combined Joint Task Force 7 (CJTF-7) could focus its efforts on the strategic fight.²

The initial role of III Corps in Iraq was to replace its V Corps counterparts across the CJTF-7 staff in anticipation of the activation of Multi-National Force–Iraq (MNF-I). The III Corps commander saw his role as a resource provider. He operated with a decentralized style enabling subordinate commanders to fight their fights in their areas of operations.³ The corps had seven major subordinate commands, each with organic legal support:

- Multi-National Division (MND)–South (United Kingdom–led with one JA),
- MND–Central South (Polish-led with one coalition JA and one USAR JA),
- MND–Baghdad (led by the US Army’s 1st Cavalry Division with a fully staffed OSJA),

- MND–North Central (led by the US Army’s 1st Infantry Division with a fully staffed OSJA),
- I Marine Expeditionary Force (I MEF) in the west (with the I MEF OSJA team),
- MND–Northeast (Korean-led with a fully staffed legal section) and
- Multi-National Brigade–Northwest (led by a US Army Stryker brigade augmented to form Task Force Olympia with a thinly staffed but talented SJA section).

There were numerous geographically dispersed separate brigades in III Corps, each with its own judge advocate and paralegals. Members of the US Army Trial Defense Service, Region IX, also were present and fully engaged across the theater providing defense support. The III Corps OSJA deployed with thirty-five officers and fifteen enlisted soldiers, and formed the nucleus of the MNC-I OSJA. The office was complemented with one judge advocate from the Australian Defence Force, one judge advocate from the UK Directorate of Legal Services, one US Air Force judge advocate and one US Marine Corps judge advocate.

Within that broad context, several of the key events arising during OIF II will be highlighted. Each of these events adds to the context in which judge advocates provided legal support and presented unique issues that impacted our delivery of that support. Many of these key events overlapped major offensive operations, the latter of which are not the topic of this article but understandably presented separate legal issues. These include

- February 1, 2004: Transfer of authority from V Corps to III Corps.
- March 2004–May 2005: III Corps and MNC-I conducted the courts-martial related to the misconduct at Abu Ghraib, a topic discussed later.
- April 2004–June 2004: This period was described in *On Point II* as a time when the “caldron boils over.”⁴ Before this, there was relative calm after Saddam’s 2003 capture. Also during this time, there was a significant transition of the units that would ultimately comprise OIF II.
- May 15, 2004: The activation of MNC-I and MNF-I. The latter command had a strategic focus, providing much needed interface with the Iraqi government ministries, the interim Iraqi government, and the Iraqi Governing Council. MNF-I was separately staffed with an OSJA. Also standing up at about that time was the Multi-National Security Transition Command and Joint Task Force 134, both with their own legal teams.

- June 28, 2004: The interim Iraqi government was established and the Transitional Administrative Law (TAL)⁵ issued. A key task for the lawyers was to assess for the commanders how the TAL would impact ongoing combat operations.
- January 30, 2005: National elections held.
- February 10, 2005: Transfer of authority of MNC-I from III Corps to XVIIIth Airborne Corps.

The legal issues faced during this period are addressed by aligning those issues generally under the Army Judge Advocate General's Corps' core competencies.

Administrative and Civil Law

We quickly learned upon leaving garrison at Fort Hood that the deployment to Iraq did not mean administrative law issues were left behind. The most consuming of these tasks were investigations conducted under the provisions of Army Regulation 15-6⁶ (generally similar to the Navy's JAGMAN (Manual of the Judge Advocate General) investigations). The high number of these investigations was quite surprising, but anecdotally every rotation from Operation Iraqi Freedom I through present operations has had the same realization. The investigation of incidents, though resource intensive, proved valuable to commanders, brought closure to soldiers involved in incidents, enhanced the safety of non-combat operations and demonstrated coalition forces' commitment to the rule of law.

Also in this core competency, we dealt with issues of unit historical property, including whether captured weapons could be preserved as part of the unit's history; war souvenirs; logistical support to the Army Air Force Exchange Service; so-called "friendly fire" incidents; joint and coalition investigations; Freedom of Information Act requests; and what were then known as Reports of Survey for lost or damaged US military property.

Military Justice

As with every rotation before and after, several high-profile military justice matters arose. Most notably, the author served as the legal advisor to the convening authority for courts-martial related to Abu Ghraib. Those courts-martial taught numerous lessons. Fortunately, this article is not about those courts-martial; these comments are thus aimed at the macro-level lessons. The Abu Ghraib cases demonstrated that the military justice system is fully exportable from garrison to the theater of operations as Congress intended it to be, even for complex cases. To that end, military judges, counsel—including trial counsel, and military and civilian

defense counsel—and witnesses were brought into theater. This was a total JA-team support effort, beginning with the support we received from the OSJA, US Army Central in Kuwait. Other more fundamental adjustments were made to accommodate these trials, including equipping the renovated courtroom at Camp Victory on very short notice with the necessary technology to support expert witness and detainee depositions and testimonies, as well as cobbling together a consolidated team of trial personnel with the necessary workspace and support. Two cases were held at the Baghdad convention center, with its attendant security, transportation and logistics challenges. This was a massive logistical undertaking, but the convening authority allocated sufficient resources to ensure mission accomplishment.

Exportability is not without its limits, admittedly. Some of the cases were scheduled or likely scheduled to be tried at times when units were in major transition, or while key strategic events (such as upcoming January 2005 elections) were occurring. This meant that logistical support for the trials would have adversely impacted strategic operations or potential panel members were otherwise operationally engaged in those key events. Consequently, some cases were returned to the United States for trial and occurred both while the III Corps OSJA-Main was still deployed and after its return to Fort Hood. The consolidated trial team and the pending cases returned to Fort Hood to continue their work. The Abu Ghraib cases also taught the importance of dedicated trial resources for complex—and for Abu Ghraib, strategically significant—cases. It is naive to think that such litigation does not need to be viewed and resourced differently; far too much time was spent explaining in Army legal technical channels the need for additional personnel to support these trials.

The OSJA also dealt with, as has every rotation since, Washington's insatiable thirst for information on high-profile incidents. That desire for information will not diminish, so SJA offices have to consider how best to organize to satisfy that thirst without adversely impacting other, equally pressing matters.

Contract and Fiscal Law Issues

Contract and fiscal law was the subject area the OSJA was least equipped to address. There were simply insufficient numbers of experienced personnel to address the volume, magnitude and complexity of issues. This capability gap was not lost on those who followed on future rotations; they were much better trained and resourced to deal with the issues. One solution that has paid great dividends has been the Contract and Fiscal Law Reachback Group, nested within the Contract and Fiscal Law Division of the US Army Legal Services Agency and augmented, as an

additional duty, by uniformed and civilian subject matter experts. “Reachback” means the ability to reach back to Washington, DC and consult with experts on difficult contract and fiscal law issues. This has ensured that both timely and correct advice was received.

Providing advice on the uses of Commanders’ Emergency Response Program (CERP) funds proved challenging,⁷ especially at a time of transition from seized CERP (with fewer restrictions on its expenditure) to appropriated CERP and its authorized uses. This transition prompted many efforts to educate commanders on how to adapt to the new, though more restrictive, uses of CERP.

Numerous issues arose involving contractors, contracted security and personal security details (PSDs) on the battlefield. One issue with which commanders at all levels struggled mightily was accountability for those persons, including these important questions: Who were these contractors? For whom did they work? Who was training them on rules of engagement (ROE) and rules for the use of force? A related question was what legal authority the civilians in these PSDs had to possess weapons: who, if anyone, had authorized them to have and carry firearms? Despite procedures to require weapons permits, it was never easy to determine if those procedures were followed. The procedures were an issue for MNF-I and higher command levels, but contractors failing to follow procedures and training on the rules became a challenge for commanders.

An issue dealt with daily was the proper role and use of contractors. We drew a firm and consistent line on questions regarding the use of contractors to provide forward operating base security, ensuring that commanders and contracting officers were “sensitive to the international law issues surrounding hiring a contractor to perform certain missions during military operations.”⁸

A frequent challenge was the issue of weapons buyback and awards programs. There was a single awards program under the auspices of US Central Command (CENTCOM) but not every turned-in weapon qualified. This was sometimes a friction point with commanders who were unhappy when a particular weapon did not qualify for the CENTCOM awards program, since they perceived the effectiveness of such programs in pulling all weapons off the street. Without commenting here on the merit of weapons buyback programs, the OSJA legal opinion in these situations was consistent with the CENTCOM program.

Finally, any uncertainty about the authority to pay *solatia* payments was clarified in November 2004 when the Department of Defense’s Deputy General Counsel issued a “no-objection” opinion to work done by CJTF-7 lawyers that had concluded that *solatia* payments could be made.⁹ The authority to make such payments was widely welcomed by commanders who looked to offset injury and property damage caused to the local population.

Operational Law

Only a few of the many operational law issues confronted will be addressed. The ROE were virtually unchanged since the start of combat operations, yet there were numerous orders and messages related to the ROE that required even the most diligent of judge advocates and operators to look long and hard to ensure they had the latest guidance. The orders, numbering around thirty, addressed enemy tactics, techniques and procedures (also known as TTPs); indirect fires; troops in contact; and close air support. These orders were confusing, potentially contradictory when read in light of the ROE, and, in any event, simply not user friendly. Consequently, the 1st Cavalry Division OSJA led an effort to develop a consolidated ROE to ensure clarity, ease of use and relevance by bringing together key stakeholders to scrub the ROE and orders.

After June 28, 2004, the operational law team was fully engaged in drafting guidance for commanders to issue on how the TAL would impact ongoing operations. A balance was struck between conducting combat operations and demonstrating respect for the TAL, a balance which started to tip the scales in the direction of the situation as it currently exists under the US-Iraq security agreement.¹⁰

Key to training the ROE, and how the ROE applied to changing enemy TTPs, was the creation of ROE training vignettes. As TTPs changed, so did our vignettes, which were crafted to be immediately useful at the squad level, with or without the presence of a lawyer or paralegal to aid in the training.

Coalition ROE presented other challenges to the operational law team. Those issues and limitations were addressed primarily by understanding coalition partner ROE and respecting coalition ROE that could impact the roles in which those forces could be employed in operations.

At the conclusion of the occupation, coalition forces had to address how best to handle reports of abuse of detainees by Iraqi security forces (ISF). A “hands-off” approach was clearly unacceptable but the US role had to recognize the authority of the ISF in dealing with matters under their purview—and the larger issue of Iraqi sovereignty as a matter of international law. The command took a “stop-report-investigate” posture with regard to allegations of detainee abuse: stop the abuse, report it up the chain of command and investigate abuse allegations (if appropriate). That posture served commanders and soldiers well.

Operational law attorneys were engaged in these and all other issues across the full spectrum of legal support to operations, to include advice on interrogations, information operations, “friendly fire” incidents, foreign fighters, detainee operations, rule of law missions, application of the interim Iraqi government emergency measures to complement operations, synchronizing the legal assets of a

multinational coalition and ISF ROE, all topics worthy of their own conference and separate discussion.

Conclusion

As alluded to at the outset of this survey of issues, the real value comes in assessing what was learned and what was done, across all our institutions, in response. This author is proud of how our institutions, aided by academic debate held in conferences and ensuing scholarly publications, responded to the challenges faced.

Since OIF II, Congress broadened the application of the Military Extraterritorial Jurisdiction Act, and the Department of Defense (DoD) issued policy and procedures related to its implementation.¹¹ Congress also amended Article 2 of the Uniform Code of Military Justice, broadening jurisdiction over DoD contractors and DoD civilians accompanying the force.¹² Greater guidance was issued regarding the roles of contractors on the battlefield, support to contractors and the possession of weapons by contractors.¹³

New organizations were established to support commanders, including the Joint Contracting Command—Iraq and Afghanistan, which is fully staffed by contracting, fiscal law and acquisition experts.

As discussed earlier, *solatia* provisions were clarified.¹⁴

As a result, at least in part, of the Army's experiences at Abu Ghraib, the Army rewrote its Interrogation Field Manual, which is now the standard for DoD.¹⁵

Training also has improved to better equip legal professionals. The Army implemented the Pre-deployment Preparation Program; the Brigade Judge Advocate Mission Primer, a three-day course held at the Pentagon; the Contract and Fiscal Law Reachback Group, which has proved invaluable; and a much larger contracting personnel "bench" as a result of the Gansler Commission.¹⁶

These changes are the result of our institutions adapting to the evolving requirements of the force and have, it is hoped, equipped current and future deployers with additional tools to address the challenges that will come their way. These changes also illustrate the value of conferences like the Naval War College's June 2009 conference—with their ensuing debate and scholarly publications—in enabling substantial and meaningful change.

Notes

1. The use of this moniker reached its zenith during the first Gulf War (1990–91), when both V Corps and VII Corps deployed to Saudi Arabia from Germany and XVIII Airborne Corps deployed to Saudi Arabia from the United States, while III Corps remained in Texas.

2. DONALD P. WRIGHT & TIMOTHY R. REESE, ON POINT II: TRANSITION TO THE NEW CAMPAIGN, THE UNITED STATES ARMY IN OPERATION IRAQI FREEDOM MAY 2003–JANUARY 2005, at 173 (2008), *available at* <http://www.globalsecurity.org/military/library/report/2008/onpoint/index.html>.

3. *See id.* at 174.

4. *Id.* at 38.

5. Law of Administration for the State of Iraq for the Transitional Period (2004) (describing the nature of the interim government and timetable for elections), *available at* <http://www.cpa-iraq.org/government/TAL.html>.

6. Headquarters, Department of the Army, AR 15-6, Procedures for Investigating Officers and Boards of Officers (2006), *available at* http://www.army.mil/USAPA/epubs/pdf/r15_6.pdf.

7. For a discussion of CERP, see Mark S. Martins, *The Commander's Emergency Response Program*, JOINT FORCE QUARTERLY, Apr. 2005, at 46.

8. *See generally* 2 CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, FULL SPECTRUM OPERATIONS (1 MAY 2003–30 JUNE 2004) 106 (2005) [hereinafter LESSONS LEARNED].

9. *See* Memorandum from Charles A. Allen, Deputy General Counsel (International Affairs), Office of the General Counsel, Department of Defense, to the Staff Judge Advocate, US Central Command, Subject: Solatia (Nov. 26, 2004).

10. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008, *available at* http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

11. The Military Extraterritorial Jurisdiction Act (MEJA) is codified at 18 U.S.C. §§ 3261–67 (2005). MEJA was amended in 2004 “to include employees, contractors (and subcontractors at any tier) and contractor employees [outside the United States] of any Federal agency or provisional authority whose employment relates to supporting the DoD mission.” Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1088, 118 Stat. 1811 (2004). This change was implemented by Department of Defense, Instruction 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (2005), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/552511p.pdf>.

12. Article 2(a)(10), Uniform Code of Military Justice, was amended in 2006 to extend court-martial jurisdiction “[i]n time of declared war or a contingency operation, [to] persons serving with or accompanying an armed force in the field.” John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083, 2217 (2006). This change was implemented by Memorandum from Secretary of Defense to Secretaries of the Military Departments et al., Subject: UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War or Contingency Operations (Mar. 10, 2008), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/sec080310ucmj.pdf>.

13. LESSONS LEARNED, *supra* note 8, at 109. *See also* Department of Defense, Instruction 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces (2005), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf>; Memorandum from Deputy Secretary of Defense to Secretaries of the Military Departments et al., Subject: Management of DoD

Contractors and Contractor Personnel Accompanying U.S. Armed Forces in Contingency Operations Outside the United States (Sept. 25, 2007), *available at* [http://www.acq.osd.mil/dpap/pacc/cc/docs/DepSecDef%20Memo%20Mgt%20of%20Contractors %2025Sep07.pdf](http://www.acq.osd.mil/dpap/pacc/cc/docs/DepSecDef%20Memo%20Mgt%20of%20Contractors%2025Sep07.pdf); Department of Defense, Instruction 3020.50, Private Security Contractors (PSCs) Operating in Contingency Operations (2009), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/302050p.pdf>.

14. See *supra* text accompanying note 9.

15. Headquarters, Department of the Army, FM 2-22.3, Human Intelligence Collector Operations (Sept. 2006), *available at* http://www.fcml.org/pdfs/civ_liberties/Field_Manual_Sept06.pdf.

16. Commission on Army Acquisition and Program Management in Expeditionary Operations, Urgent Reform Required: Army Expeditionary Contracting (Oct. 31, 2007), *available at* http://www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf.