

Khobar Towers' Aftermath: The Development of Force Protection

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In the past twenty years, terrorist attacks claimed the lives of over 300 Department of Defense-affiliated personnel.² However, the recent high-priority emphasis on force protection did not occur until after the 1995 and 1996 terrorist attacks against American military forces in Saudi Arabia. On 13 November 1995, a car bomb exploded near the Riyadh headquarters of the Office of the Program Manager, Saudi Arabian National Guard (OPM/SANG), killing five Americans and injuring thirty-five others.³ Less than eight months later, on June 25, 1996, terrorists conducted a more devastating attack on United States Air Force personnel living in the Khobar Towers⁴ complex in Dhahran, Saudi Arabia. A fuel truck loaded with 20,000 pounds of explosives killed nineteen Air Force members and wounded hundreds of others.⁵ Afterwards, Secretary of Defense William J. Perry declared that "the Khobar Towers attack should be seen as a watershed event pointing the way to a radically new mind-set and dramatic changes in the way we protect our forces deployed overseas from this growing threat."⁶ This "watershed event" has led to a number of new developments in how the military exercises its force protection responsibilities. Although there is almost no new statutory authority regarding force protection, numerous new agreements, directives, and instructions have been either completed or revised. Because the greatest force protection emphasis is placed on protecting troops when they are in foreign countries, this article will address the legal aspects of force protection for Department of Defense personnel located overseas.

BACKGROUND

Prior to the Khobar Towers bombing, military members rarely heard the words "force protection". "Anti-terrorism" was the expression used to describe the measures taken to prevent terrorist attacks. After Khobar Towers, the term "force protection" became familiar to every military member located overseas. In every operational mission that takes place today, force protection is an overriding concern that often dictates how the mission is performed, where military personnel live, and how military personnel conduct themselves on and off duty.

Force protection is not a synonym for "anti-terrorism". Instead, force protection is a larger effort designed to provide comprehensive security for military members, with "anti-terrorism" being a subset of force protection.⁷ The Department of Defense definition of force protection is:

"the security program designed to protect soldiers, civilian employees, family members, facilities, and equipment, in all locations and situations, accomplished through planned and integrated application of combating terrorism (antiterrorism and counterterrorism), physical security, operations security, personal protective services, and supported by intelligence, counterintelligence, and other security programs."⁸

The most important phrase in this definition is "the security program designed to protect." The very first issue in establishing a force protection program is determining who is responsible for

establishing and administering this "security program designed to protect". For personnel located overseas, the responsibility belongs to either the Secretary of State or the Secretary of Defense.

The Secretary of State

The Omnibus Diplomatic Security Act of 1986 directs the Secretary of State to develop and implement policies and programs to provide for the security of United States Government operations of a diplomatic nature, to include the protection of all government personnel on official duty abroad.⁹ Although the term "all government personnel" can include military personnel, the statute goes on to specifically exclude "personnel under the command of a United States area military commander".¹⁰ The "area military commander" refers to the combatant commanders of the combatant or unified commands.¹¹ Because these commanders are assigned a geographically specific "area of responsibility" (AOR), they are also referred to as "geographic commanders" or "geographic CINCs".¹² However, this does not mean that the "geographic CINC" is responsible for all military personnel stationed in a foreign country. Numerous Department of Defense personnel located or operating in foreign countries are not "under the command of a United States area military commander". According to 22 U.S.C. 4802, the Secretary of State has the force protection responsibility for these individuals, not the area military commander. These personnel are often assigned to a United States embassy in organizations such as the Marine Security Guard Detachment, Defense Attaché Office or the Office of Defense Cooperation.

The Secretary of State does not have to perform this force protection mission by himself. Through the use of inter-agency agreements, other federal agencies must support the Secretary of State, to the maximum extent possible, in his effort to protect United States government personnel.¹³ However, the Secretary of State may agree to delegate operational control of his security and protection responsibilities of other federal agencies to the heads of those federal agencies.¹⁴ In a foreign country, the chief of mission¹⁵ acts on behalf of the Secretary of State for the direction, coordination, and supervision of all Government executive branch employees.¹⁶

Secretary of Defense

The Secretary of Defense is responsible for establishing Department of Defense (DoD) policies and assigning responsibilities for implementing the DoD Force Protection Program.¹⁷ From the Secretary of Defense, various specific responsibilities flow down through the Under Secretaries of Defense, the Secretaries of the military departments, the Chairman of the Joint Chiefs of Staff, and eventually reach the geographic CINCs.¹⁸ For DoD personnel overseas, the geographic CINC is the most important link in the DoD force protection chain. As mentioned above, the geographic CINC has the force protection responsibility for all personnel under his command.¹⁹ Although the Secretary of Defense remains at the top of the responsibility pyramid, DoD policy is that force protection is the responsibility of anyone in a command position.²⁰ For personnel overseas, the geographic CINC is responsible for the success or failure of the force protection program.

Ensuing Confusion

For force protection purposes, the applicable statute recognizes two categories of Department of Defense personnel stationed overseas: those who are the responsibility of the chief of mission and those who are the responsibility of the geographic CINC. The geographic CINC has force protection responsibility for DoD personnel directly under his command and the chief of mission is responsible for everyone else, with the proviso that the Secretary of State may agree to delegate force protection responsibility to the Secretary of Defense.²¹ As simple as the arrangement sounds, there were several problems with this approach. In some countries, there were disputes between the Department of State and the Department of Defense over who had force protection responsibilities for certain Department of Defense organizations. In the case of some countries, no one had a list of all the Department of Defense organizations actually stationed within the country,²² making it difficult to identify who had force protection responsibility for whom. In Spain, the American Embassy's "1995 Annual Report of DoD Elements Under COM Authority" listed a total of sixty DoD military and civilian personnel who were the force protection responsibility of the chief of mission.²³ The American Embassy in Madrid conducted a recount, this time counting all DoD personnel who were not under the command of the "area military commander", or geographic CINC. By using the correct counting method, the number of DoD personnel for whom the chief of mission had force protection responsibility rose from what was originally thought to be sixty to 962.²⁴ A Secretary of State message to all diplomatic and consular posts addressed this confusion.²⁵ The message stated that because the Secretary of State, and by extension the chief of mission, "has ultimate responsibility for the protection of all United States government employees who are not clearly repeat clearly the authority of an area military commander, it is crucial that you be completely familiar with the situation in your country of assignment."²⁶

After Khobar Towers, the need to address these issues in a new Memorandum of Understanding between the Department of State and the Department of Defense became obvious. The first step was a Memorandum of Understanding on the security of DoD elements and personnel on the Arabian Peninsula. The Secretary of State and the Secretary of Defense signed this agreement on September 15, 1996, less than three months after the attack on Khobar Towers.²⁷ The second step was a universal Memorandum of Understanding (MOU) between the Department of State and the Department of Defense, signed on December 16, 1997.²⁸

THE MOU FOR THE ARABIAN PENINSULA

One of the findings of the Downing Commission²⁹ was that the current division of responsibility for force protection in the 1992 Department of State and the Department of Defense Memorandum of Understanding did not adequately support American forces in countries with a large American military presence.³⁰ In the case of Saudi Arabia, some forces fell into a "seam", where neither the chief of mission nor the geographic CINC exercised force protection responsibility.³¹ The purpose of the Memorandum of Understanding for the Arabian Peninsula was to eliminate "gray areas" by clearly assigning security responsibilities for all DoD elements and personnel either to the Department of Defense or to the Department of State.³²

The countries to be covered by the Memorandum of Understanding for the Arabian Peninsula were Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates, and Yemen,³³ all of whom are located in the United States Central Command (USCENTCOM) area of responsibility.

A "bright-line" rule was established giving the Department of Defense responsibility for all DoD elements and personnel on the Arabian Peninsula, except for Defense Attaché Offices, Marine Security Guard Detachments, and DoD personnel detailed to other United States government agencies.³⁴ An exceptions mechanism allowed the force protection responsibility for a DoD element to revert back to the chief of mission when it was the most reasonable or practicable arrangement.³⁵ The reallocation had to be specific and in writing.³⁶ The next step was for the chief of mission in each of these countries to negotiate a Memorandum of Agreement with USCINCENT regarding the security responsibility for each DoD element within that country. The standard format for each of these Memorandums of Agreement is approximately two pages outlining responsibilities, roles, and relationships, followed by two Annexes. The two Annexes specifically list every DoD element within the country and assign them, for force protection purposes, to either the chief of mission or USCINCENT.

Once the agreements were signed, a fundamental problem became apparent. In the Kingdom of Saudi Arabia the senior military officer in the country was to assume force protection responsibility for all DoD elements in Saudi Arabia not the responsibility of the chief of mission. For Saudi Arabia, this was accomplished by USCINCENT issuing USCINCENT OPORDER 1-96, FORCE PROTECTION, dated 14 Jul 96,³⁷ which appointed the Commander, Joint Task Force, Southwest Asia (JTF/SWA) this task.³⁸ USCINCENT OPORDER 1-96 gave the Commander, JTF/SWA, force protection responsibility for the DoD elements assigned in Saudi Arabia which were not the force protection responsibility of the chief of mission. The problem with this approach was that the Commander, JTF/SWA only exercised tactical control (TACON) over air assets being used in Operation SOUTHERN WATCH.³⁹ The Commander, Joint Task Force, Southwest Asia, would need either operational control (OPCON) or TACON over the units located in Saudi Arabia in order to direct with authority that specific force protection measures be taken. This created an untenable problem if left unresolved. The initial effect of OPORD 1-96 was to give force protection responsibility to a commander who had no authority to order specific force protection measures be taken.⁴⁰ Since this was the commander who would be held accountable if there was a successful terrorist attack on DoD personnel in Saudi Arabia, the policy amounted to liability without authority. The issue was finally resolved by what is known as "dual-hatting". The Commander, JTF/SWA was appointed to also serve as the Commander, CENTAF Forward. As Commander, CENTAF⁴¹ Forward, the Commander, JTF/SWA, was given the command authority needed to resolve force protection issues. When a force protection issue arose, he could take off his JTF/SWA "hat" and put on his Commander, CENTAF Forward "hat", and he would have the appropriate authority to direct the necessary force protection measures.

THE UNIVERSAL MOU

A more difficult task was to draft a new memorandum of understanding that could be applied on a world-wide basis yet still be acceptable to both the Department of State and the Department of Defense. On December 16, 1997, Secretary of Defense William Cohen and Secretary of State Madeline Albright co-signed a Memorandum of Understanding whose purpose was to "clearly define the authority and responsibility for the security of DoD elements and personnel in foreign areas not under the command of a geographic CINC."⁴² By allowing the transfer of operational force protection authority for DoD elements and personnel back and forth between the

geographic CINC and the chief of mission, the Universal MOU provided a more logical allocation of force protection responsibilities between the geographic CINCs and the chiefs of mission. In some countries, the chief of mission might have had the force protection responsibility for a Department of Defense element, even though the geographic CINC might have been in the best position to provide this assistance, or vice versa. The Universal MOU was designed to rectify this problem, and establish the principle that force protection for DoD elements should be assigned to either the geographic CINC or the chief of mission, based on who is in the best position to provide force protection.⁴³

This new "Universal" MOU on force protection adapted and superseded the 1996 Arabian Peninsula MOU.⁴⁴ Initially, the Universal MOU applied to nine countries: Bahrain, Kuwait, The Republic of the Marshall Islands, Oman, Qatar, Saudi Arabia, Turkey, United Arab Emirates, and Yemen.⁴⁵ For these countries, the geographic CINC and the chief of mission had either negotiated or started negotiations on country-specific memorandums of agreement regarding the force protection of military elements and personnel. This list was not intended to remain static. In the future, other countries were to be added to the "covered countries" list once the country-specific memorandums of agreement were signed. The Department of Defense gave priority to certain countries by providing a list of "intended countries" that were to be added to the Universal MOU at a future date.⁴⁶ The Secretary of Defense emphasized that there was an urgency in finalizing the memorandums of agreement for the "intended countries", and gave a target date of six months from the signing of the Universal Memorandum of Understanding to complete the country-specific memorandums of agreement.⁴⁷

Before a country can be added to the "covered country" list in the Universal MOU, the geographic CINC and the country's chief of mission must negotiate a memorandum of agreement. Each memorandum of agreement outlines the chief of mission's responsibility, the geographic CINC's responsibility, the responsibility for temporary duty personnel, direction for the Emergency Action Committee (EAC), and direction on coordination.⁴⁸ As described above, each memorandum of agreement must also include an "Annex A" and an "Annex B". "Annex A" consists of an inventory of the Department of Defense elements and personnel for whom the chief of mission retains or assumes force protection responsibility.⁴⁹ "Annex B" consists of an inventory of the Department of Defense elements and personnel for whom the geographic CINC agrees to assume force protection responsibility.⁵⁰ Annex B includes CINC-assigned forces for which the geographic CINC has always had force protection responsibility, as well as the non-CINC-assigned forces which were previously the force protection responsibility of the chief of mission.

Once a memorandum of agreement is negotiated between the chief of mission and the geographic CINC, the chief of mission must submit the draft memorandum of agreement to the Department of State for approval. In contrast, the geographic CINC is not required to submit the document to the Department of Defense for approval.⁵¹ The chief of mission and geographic CINC will sign but not date the document. After the signing, the chief of mission and geographic CINC will transmit messages to the Department of State and the Department of Defense respectively, stating that the country-specific memorandum of agreement has been signed. The Department of State and the Department of Defense will then take action to place the country on the "covered countries" list in the Universal MOU. The effective date for adding a country to the

"covered country" list is the date the memorandum was signed by the Secretaries of State and Defense or their representatives, unless the parties agree to a different effective date.⁵² Once signed, the date is annotated on the country-specific memorandum of agreement. This date indicates when the memorandum of agreement went into effect. The Departments of State and Defense will then transmit messages informing the chief of mission and the geographic CINC of the date when the country in question was placed on the "covered country" list.⁵³

There is also a provision to remove a country from the "covered country" list. The first step is for the party who desires the removal, either the Department of State or the Department of Defense, to give written notice to the other party. Either the Secretary of Defense or the Secretary of State, or their designated representatives, must sign this notice. The country in question will be deleted from the "covered country" list effective sixty days from the date of the original notice, unless the parties agree to a different time period.⁵⁴

The issue of dispute resolution is addressed in the Universal MOU. If the chief of mission and the geographic CINC are unable to resolve an issue, they are directed to refer the issue to Secretary of Defense and Secretary of State-designated representatives in Washington, D.C. If these designated representatives fail to resolve the problem, the issue will then be forwarded to the Under Secretary of State for Management and the Under Secretary of Defense for Policy. If the matter can not be resolved at this level, the final step is to refer the issue directly to the Secretary of Defense and the Secretary of State.⁵⁵ The Universal MOU itself may be terminated. Termination occurs sixty days after one party gives notice to the other party of its intention to withdraw from the agreement, unless the parties agree to a different termination date.⁵⁶

FORCE PROTECTION AND COMMAND RELATIONSHIPS

When a geographic CINC assumes force protection responsibility under a country-specific memorandum of agreement for DoD elements and personnel not previously in his chain of command, another hurdle is created. The geographic CINC assumes responsibility for forces with which he has no command relationship. Another big issue is who has force protection responsibility for personnel who are either in a temporary duty status in or are passing through a foreign country. Some of the possible scenarios that are potential problem areas are Joint Task Forces (JTFs), naval personnel making port calls, Air Mobility Command aircrews transiting through a geographic CINC's area of responsibility, personnel assigned to NATO, peacekeepers, and even Department of Defense contractors. The crux of the problem is that when a geographic CINC assumes force protection responsibility through a country-specific memorandum of agreement for military personnel not normally under his command, the geographic CINC does not have any inherent command authority over those forces.⁵⁷ This is the same problem encountered on the Arabian Peninsula: without command authority over these forces, the geographic CINC can not give the necessary orders to ensure that force protection measures are taken.

Types of Command Authority

To better understand the dilemma, it is necessary to review the types of command authority and their definitions. There are four basic types of command relationships: combatant command

(COCOM); operational control (OPCON); tactical control (TACON); and Support.⁵⁸ Combatant commanders, i.e., geographic CINCs, exercise combatant command⁵⁹ over forces assigned or reassigned by the National Command Authority (NCA).⁶⁰ Combatant command is the authority to "perform those functions of command over assigned forces involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction over all aspects of military operations, joint training, and logistics necessary to accomplish the missions assigned to the command."⁶¹ Combatant command authority can not be delegated or transferred.⁶² The commanders of unified commands exercise combatant command.

Operational control, or OPCON, is inherent in COCOM, and is the command authority that may be exercised by commanders at any echelon at or below the level of combatant commander.⁶³ Operational control gives a commander the authority to perform virtually the same tasks as listed above for combatant command, with the very important difference that OPCON can be transferred or delegated.⁶⁴

Tactical control, or TACON, is command authority over assigned or attached forces or commands, that is "limited to the detailed and usually local direction and control of movements or maneuvers necessary to accomplish assigned missions or tasks."⁶⁵

"Support" is a relationship established by a superior commander between subordinate commanders when one organization should aid, protect, complement, or sustain another force.⁶⁶

When military units are operating within a geographic CINC's area of responsibility, unless the President or the Secretary of Defense directs otherwise, these forces are to be assigned or attached to the command of the CINC.⁶⁷ For instance, during the Persian Gulf War, units that were deployed to the USCENCOM area of responsibility from the European Command were assigned or attached to the command of USCINCCENT. However, transient forces, such as transient aircrews, do not come under the chain of command of the geographic CINC solely by their movement across area of responsibility boundaries.⁶⁸ The elements and personnel that are the force protection responsibility of the chief of mission are in this position because the Secretary of Defense has "directed otherwise", i.e.; they have been assigned to someone other than the geographic CINC. If a geographic CINC does not have COCOM, OPCON, or TACON over a unit, then he lacks the necessary authority to order that unit to take specific force protection actions.

The Proposed Solution

The Joint Staff decided to use the same solution that was used on the Arabian Peninsula. On 15 October 1996, Secretary of Defense William J. Perry delegated to USCINCCENT tactical control over non-CINC assigned forces for force protection purposes.⁶⁹ This authority covered all DoD personnel assigned or temporarily assigned to the Arabian Peninsula. In April 1998, the Joint Staff responded to an inquiry from USEUCOM with a message stating that the Secretary of Defense "will delegate" tactical control for force protection to the geographic CINCs.⁷⁰ This delegation did not officially occur until 28 September 1998, when Secretary of Defense William Cohen sent a memorandum to the geographic CINCs informing them of their new authority to

exercise tactical control for force protection purposes.⁷¹ The geographic CINCs were now allowed to exercise tactical control for force protection purposes over the personnel who previously had been the force protection responsibility of the chief of mission but have been transferred to the force protection responsibility of the geographic CINC under the country-specific MOA process.⁷² Tactical control for force protection enables the geographic CINCs to "order implementation of force protection measures and to exercise the security responsibilities outlined in the MOU."⁷³ The authority also applies to DoD personnel temporarily assigned to the geographic CINC's area of responsibility, "to include aircraft and their aircrews."⁷⁴ The Secretary of Defense's memorandum also authorized the geographic CINCs to "change, prescribe, modify, and enforce force protection measures for covered forces", "inspect and assess security requirements," and "direct immediate force protection measures (including temporary relocation) when, in the judgment of the responsible CINC, such measures must be accomplished without delay to ensure the safety of the DoD personnel involved."⁷⁵ With this solution, the geographic CINCs now had the force protection authority they had previously lacked.

Accountability Review Boards

The negotiating and signing of all memoranda of agreement was halted in June, 1998, because of a concern by DoD attorneys that the geographic CINCs could become subject to State Department Accountability Review Boards.⁷⁶ The Secretary of State is directed to convene an Accountability Review Board in "any case of serious injury, loss of life, or significant destruction of property at or related to a United States Government mission abroad".⁷⁷ The Board consists of four members appointed by the Secretary of State and one appointed by the Director of the Central Intelligence Agency.⁷⁸ This Board has the power to administer oaths, require depositions be given, require the attendance and testimony of individuals, as well as the authority to make findings and recommendations.⁷⁹ A point of contention developed between the Department of Defense and the Department of State. The disagreement was over who would conduct an investigation if a terrorist attack was made against one of the elements for which force protection responsibility had transferred from the chief of mission to the geographic CINC. The Department of Defense did not like the idea of a geographic CINC having to answer to a Department of State Accountability Review Board. Part of the problem may have been caused by a clause in the Universal MOU which states "it is understood between the parties that all DoD elements and personnel in the covered countries identified as not under CINC command remain under COM (chief of mission) authority, as provided in Section VI, but that security responsibility for such elements and personnel is assumed by DoD, unless security responsibility is otherwise allocated pursuant to their MOU."⁸⁰ It is unclear why a non-CINC assigned DoD element that becomes the force protection responsibility of the geographic CINC would remain "under the authority" of the chief of mission. At the time this article was written, the issue had not been resolved. However, a decision was made to continue with the memorandum of agreement process for the countries where there would not be a transfer of security responsibility.⁸¹

TAKING CARE OF THE STRAYS

As force protection responsibilities were sorted out, difficult questions began to arise regarding who had the responsibility for the various "stray" units that are routinely spread across a

geographic CINC's area of responsibility. These "strays" include personnel assigned to the military arm of the North Atlantic Treaty Organization (NATO), "stovepipe" organizations,⁸² "peacekeepers", and even DoD contractors. Typically, these issues are handled as they arise on a case-by-case basis.

NATO Personnel

When United States military personnel are assigned to NATO, they do not have a command relationship with USCINCEUR unless they are "dual-hatted".⁸³ "Dual-hatted" in this case means that a United States service member could fill a NATO billet, while at the same time filling a United States billet. If the United States half of the "dual-hatted" position is in the USCINCEUR chain of command, then it is through this United States billet that USCINCEUR will exercise force protection responsibility over that individual. If the United States service member in this example is not "dual-hatted" and belongs solely to NATO, then he becomes the force protection responsibility of the chief of mission.⁸⁴ As discussed above, force protection responsibility is simply divided between the geographic CINC, in this case USCINCEUR, and the chief of mission. USCINCEUR is responsible for all personnel with whom he has a command relationship, and the chief of mission is responsible for the remaining military personnel within that country. In the case of NATO-assigned personnel, this could create a situation where a United States service member is the force protection responsibility of USCINCEUR, while the United States service member in an office across the hallway is the responsibility of the chief of mission. This is precisely the situation that the Universal MOU along with the country-specific memorandums of agreement was designed to correct. Unfortunately, at the time this article was written the Memorandum of Agreement for Belgium, where a significant number of NATO personnel are stationed, had not been negotiated. However, the issue was addressed in the Memorandum of Agreement for Turkey, which has been negotiated, signed, and is in effect. USCINCEUR and the chief of mission for Turkey agreed to assign force protection responsibility for all NATO assigned personnel in Turkey to USCINCEUR.⁸⁵ When the memorandum of agreement for Belgium is completed, it is highly probable that, similar to the Turkish agreement, many NATO personnel will be assigned to USCINCEUR for force protection purposes.

Peace Observers

United States military personnel assigned as peace observers are another group that occasionally falls through the force protection net. These personnel are assigned to multinational United Nations organizations and are usually in remote locations far from other DoD personnel.⁸⁶ The normal rules for force protection responsibilities apply to peace observers: since they are not under the command of the geographic CINC they are the responsibility of the chief of mission. In the case of the Multinational Force and Observers (MFO), stationed in the Sinai Peninsula of Egypt, the Department of the Army was actually performing the role of providing force protection.⁸⁷ The Department of the Army was in this position because the Egyptian chief of mission was uncomfortable accepting force protection responsibility of such a large and combat-like unit, while USCINCENT had not performed these duties in the past because of political sensitivities.⁸⁸ Since political sensitivities in the region had changed, a recommendation was made to reassign force protection responsibility to USCINCENT.⁸⁹

Another interesting issue arose concerning peacekeeping forces in Morocco, which is in the USEUCOM area of responsibility. Approximately thirty United States military personnel are assigned to a United Nations operation known as the "Mission for a Referendum in Western Sahara", better known as MINURSO. This peacekeeping force operates in a disputed area of Morocco, referred to as the Western Sahara. Originally twenty-six countries contributed over 1,700 military observers, 300 policemen, and 800 to 1,000 civilian personnel to MINURSO. Because the sovereignty of the Western Sahara was in dispute, the chief of mission in Morocco did not normally exercise security functions in the disputed region, which meant that the chief of mission would not exercise force protection responsibility for the thirty American personnel assigned to MINURSO.⁹⁰ However, an agreement was reached that directed the chief of mission in Morocco to assume force protection responsibility for all personnel assigned to or on temporary duty (TDY) to MINURSO.⁹¹

DoD Contractors

Another complex issue regarding force protection responsibility involves contractors hired by the Department of Defense. Oftentimes, contract employees will accompany United States forces on contingency operations and provide services ranging from food services to computer support to engineering support. For example, the engineering firm of Brown and Root provided support to deployed United States forces in contingency operations in Somalia and Bosnia. Contractors will oftentimes eat, work and live alongside deployed military personnel. The question is "who provides force protection for these contractors?"

By law, the chief of mission has responsibility for DoD contractors and their employees.⁹² There does appear to be an exception for situations that are declared a "crisis" by the National Command Authority (NCA) or the geographic CINC.⁹³ When a "crisis situation" is declared, the DOD components are to work with contractors performing essential services to develop and implement plans and procedures to ensure the contractor can continue to perform.⁹⁴ Although the direction given is vague, it can be interpreted as direction to DoD components to provide force protection for contractors when either the NCA or the geographic CINC declares a crisis. In routine cases, however, DoD has no legal obligation to provide force protection for contractors or their employees unless specific language is included in the contract.⁹⁵ The Department of Defense attempted to strengthen force protection for contractors performing outside of the United States by requiring them to do the following:

1. If the contractors are U.S. companies, affiliate with the Overseas Security Advisory Council;
2. Ensure their personnel who are U.S. nationals register with the U.S. Embassy and third country nationals comply with the requirements of the Embassy of their nationality;
3. Prior to their travel outside the U.S., provide AT/FP awareness information to personnel commensurate with that which DoD provides to the military, DoD civilian personnel, and their families to the extent such information can be made available, and
4. Receive the most current AT/FP guidance for personnel and comply with the DoD Foreign Clearance Guide (DoD 4500.54-G), as appropriate.⁹⁶

Despite this guidance, the fact remains that a contractor and his employees can not force DoD to provide them force protection. Other than the provisions listed above, DoD can not force contractors and their employees to follow all force protection guidelines in a foreign country, unless these requirements are specified in the contract.

FORCE PROTECTION AND INTERNATIONAL AGREEMENTS

When DoD personnel are assigned to an overseas location, they must abide by the laws of the United States as well as the laws of the host nation. A force protection program must operate within the same restraints. Multilateral and bilateral international agreements create the framework within which overseas force protection programs must operate. All actions to combat terrorism outside the United States must comply with applicable Status of Forces Agreements, international agreements, and memoranda of understanding.⁹⁷

One of the most basic principles of international law is a nation's right to control its sovereign territory.⁹⁸ This means that the host nation has the ultimate responsibility to prevent terrorist attacks against American installations overseas.⁹⁹ Overseas, American forces are normally allowed to police inside the fence at American installations, while the host nation is responsible for policing everything outside of the installation. However, when a host nation fails to control its territory, it can have disastrous results for American military installations. The failure by the Saudi Arabian government to control a public parking lot next to the Khobar Towers complex was perhaps the major factor in the failure to prevent that terrorist attack. Terrorists were able to park an explosives-laden truck in a parking lot only eighty feet from the building they ultimately destroyed.¹⁰⁰ On two previous occasions, officials from the 4404th Wing in Dhahran had asked the Saudi government to move the parking lot fence in order to create a larger buffer zone between the parking lot and the installation's buildings.¹⁰¹ The Saudi government refused both requests, presumably because the parking lot serviced a public park and a mosque.¹⁰²

The NATO SOFA

The largest number of United States military personnel stationed overseas are found in European countries that are members of the North Atlantic Treaty Organization (NATO).¹⁰³ Their status in NATO countries is controlled by what is known as the NATO Status of Forces Agreement (SOFA).¹⁰⁴

The NATO SOFA provides a good example of the relationship the United States has with most nations hosting American personnel. Provisions in the NATO SOFA create the framework by which American installations are protected.¹⁰⁵ Article VI of the NATO SOFA allows members of a visiting force to possess and carry arms, provided it is authorized in their orders.¹⁰⁶ The NATO SOFA further provides that military units or formations have the right to police any installations that they occupy pursuant to an agreement with the receiving state, or host nation.¹⁰⁷ "To police" means that the visiting American forces can "take all appropriate measures to ensure the maintenance of order and security on such premises."¹⁰⁸ American forces may police outside of American installations only if an arrangement or agreement has been made with the host nation.¹⁰⁹ Originally, the concept of American forces patrolling or policing outside of an installation was limited to American military police attempting to quell disorders caused by

American personnel.¹¹⁰ With the advent of force protection, this Article of the NATO SOFA can be used as the authority by which the host nation can allow American forces to police and patrol outside of overseas American installations. However, American forces arresting non-Americans on foreign soil is a major stumbling block. The NATO SOFA does not give American forces the authority to arrest a national of the host nation while he is on an American installation, except in an emergency situation.¹¹¹

Outside of an American installation, the general rule is that American forces have the authority to arrest American personnel only.¹¹² The only exception to this rule appears to be if American military forces arrest a foreign national while he is in flagrante delicto.¹¹³ For instance, if American military police caught a terrorist outside of an American installation placing a bomb next to the perimeter fence, the military police would be within their rights to arrest the terrorist and then hand him over to the law enforcement authorities of the host nation.¹¹⁴ In Germany, under certain conditions, American military authorities may take into "temporary custody" a person not subject to their jurisdiction.¹¹⁵ The person must be caught or pursued in flagrante delicto, and either their identity cannot be established immediately or there is reason to believe the person will flee from justice.¹¹⁶ The German government can also request that the American military authorities make such an arrest.¹¹⁷ American military authorities may also take a person into temporary custody if there is danger in delay, a German police officer cannot be called in time, and the person has committed or is attempting to commit an offence within, or directed against an American installation.¹¹⁸ This second provision only applies if the person is a fugitive from justice or there are good reasons to fear that he will seek to evade criminal prosecution after committing the offence.¹¹⁹ Under both exceptions, the military authorities taking the individual into temporary custody may disarm the detainee.¹²⁰ They may also search for and seize any items in the possession of the detainee that may be used as evidence.¹²¹ The detainee then must be delivered without delay, along with the seized weapons and evidence, to the nearest German public prosecutor or police officer.¹²²

The NATO SOFA also requires the host nation and the sending state "seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations...of other Contracting parties, and the punishment of persons who may contravene laws enacted for that purpose."¹²³

The Middle East

Some countries where DoD personnel are stationed do not have official agreements with the United States. Many countries in the Middle East either do not have a status of forces agreement with the United States or have an agreement that is classified. A classified agreement makes it difficult for the personnel deployed to or stationed in these countries to know the limitations of their force protection authority.

One Middle Eastern country that does have an unclassified agreement with the United States regarding status of forces is Egypt.¹²⁴ Throughout the agreement with Egypt, United States military personnel are referred to as "special missions". The only section of the agreement that addresses force protection is a statement that the Egyptian government "shall spare no effort, as far as possible, in providing assistance for the safety of the members of the special missions in

carrying out their activities mentioned in this Agreement."¹²⁵ The assistance is to conform to all Egyptian laws and regulations.¹²⁶ The Agreement limits the "policing" powers of the American military in Egypt. While on Egyptian military facilities, American military police "may take all appropriate measures over United States personnel to ensure the maintenance of order and security".¹²⁷ Outside of Egyptian military facilities, American military police may be employed only as necessary to maintain order and discipline among American troops, and only by prior arrangement with the appropriate Egyptian authorities.¹²⁸ This agreement seems to allow American military police in Egypt the right to police its own forces for the maintenance of order and discipline, and little else.

When American forces are based on overseas installations, they must rely on the local government for force protection support. Because of the limited American authority outside of an installation, the host nation authorities have to provide the essential security outside the fence line, or through an agreement, allow the American forces the authority to do so. Even if the host nation refuses or fails to protect an American installation, the United States always reserves the right of self-defense to protect American facilities, property, and personnel.¹²⁹ All overseas installations need some type of agreement with the local authorities to delineate the type of support that will be provided by the host nation and the amount of authority that will be granted to American forces policing outside the installation fence.

THE PROTECTION OF THE FORCE

The signing of the Universal MOU and the subsequent negotiations were a significant step forward, but these steps only relate to who has responsibility for the force protection of military units. The Universal MOU and country-specific memorandums of agreement do not provide specific guidance as to "how" to protect Department of Defense personnel. The "how to" guidance is found in a series of Department of Defense Directives and Instructions. These publications begin by creating a hierarchy of responsibility and then devolve down into the specifics of protecting the force.

Department of Defense Directive 2000.12

The publication that establishes the DoD force protection program is Department of Defense Directive 2000.12.¹³⁰ The primary purposes of this Directive are to assign responsibilities for the protection of DoD personnel and their families, facilities and other resources from terrorism, to establish the Chairman, Joint Chiefs of Staff as the focal point in DoD for force protection issues, and to expand the responsibilities of the combatant commanders "to ensure the force protection of all DoD activities in their geographic area of responsibility."¹³¹ The Directive assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, the Chairman of the Joint Chiefs of Staff, the Under Secretary of Defense (Comptroller), the Under Secretary of Defense for Acquisition and Technology, the Under Secretary of Defense for Policy, the Assistant Secretary of Defense for Force Management Policy, the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, the Director, Defense Intelligence Agency, the Secretaries of the Military Departments, and last but probably most importantly, the Commanders of the Combatant Commands, i.e.; the geographic CINCs.¹³²

The first responsibility listed for the geographic CINCs is to review the force protection status of all military activities within their geographic area of responsibility.¹³³ Other requirements include identifying force protection resource requirements, assessing command relationships as they relate to force protection,¹³⁴ identifying predeployment training requirements,¹³⁵ establishing command policies and programs for force protection,¹³⁶ assessing the terrorist threat and disseminating that information to subordinate commanders,¹³⁷ and coordinating force protection measures with the host nation.¹³⁸

Department of Defense Instruction 2000.14

More responsibilities are spelled out for the geographic CINCs in Department of Defense Instruction 2000.14.¹³⁹ This Instruction is designed to accompany DoD Directive 2000.12 by establishing policy, assigning responsibilities, and prescribing procedures for its sister Directive.¹⁴⁰ Broad policy concepts are stated, such as "it is DoD policy to protect DoD personnel and their families, facilities, and other material resources from terrorist acts,"¹⁴¹ DoD Instruction 2000.14 assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, the Secretaries of the Military Departments, the Chairman of the Joint Chiefs of Staff, the Commanders of the Unified Combatant Commands, and the Assistant Secretary of Defense for Command, Control, Communication, and Intelligence.¹⁴² Many of the responsibilities assigned by DoD Instruction 2000.14 to the parties listed above are similar to the responsibilities assigned to the same parties in DoD Directive 2000.12. For instance, DoD Directive 2000.12 assigns the Secretaries of the Military Departments the task of providing "resident training to personnel assigned to high-risk billets and others, as appropriate."¹⁴³ This task is given a bit more specificity in DoD Instruction 2000.14, where the Secretaries of the Military Departments are directed to "ensure high-risk personnel and individuals assigned to high-risk positions attend the "Individual Terrorism Awareness Course".¹⁴⁴ The Instruction also includes a list of fourteen anti-terrorism related courses and schools.

Department of Defense Instruction 2000-16

The main purpose of this Instruction, DoD Combating Terrorism Program Standards, is to implement policy and prescribe performance standards for the protection of personnel as directed by DoD Directive 2000.12.¹⁴⁵ This Instruction only assigns responsibilities to the Assistant Secretary of Defense for Special Operations and Low Intensity Conflict and the heads of other DoD components.¹⁴⁶ The prescribed procedures are found in Enclosure 1 of the Instruction. These prescribed procedures are set out in the form of thirty-three program or "DOD Standards". These standards affirmatively require that certain actions be taken. These standards are addressed to two categories of people or organizations: (1) "Combatant Commanders, Chiefs of Service, and Directors of DoD Agencies and Field Activities," and (2) Commanders.¹⁴⁷ These Standards range from broad generalizations, such as "Combatant Commandersare responsible for the implementation of DoD Antiterrorism/Force Protection (AT/FP) policies within their organizations"¹⁴⁸ to more specific requirements, like "CINC.....shall ensure that an AT/FP Officer,, is assigned at each installation or base, and deploying organization (e.g., battalion, ship, squadron)".¹⁴⁹

This Instruction also has some standards whose requirements are certain to be difficult to establish and enforce. DOD Standard 19 requires a commander in an area with a Medium, High, or Critical Terrorist Threat Level, to "conduct physical security assessments of off-installation residences for permanently assigned and temporary-duty DoD personnel."¹⁵⁰ After the review is completed, the commander will recommend to the appropriate authorities, as necessary, the lease or construction of housing in safer areas.¹⁵¹ The difficulty with complying with DOD Standard 19 is that in countries like Italy and Germany, literally thousands of DoD families live off base on the civilian economy. Many installations will not have the time, money, or manpower to conduct such assessments. Another difficult standard to comply with is DoD Standard 33, which states "commanders at levels shall take appropriate measures to protect DoD personnel and reduce the vulnerability to terrorist use of WMD (weapons of mass destruction)."¹⁵² At best, this standard is vague as to precisely what is required of commanders. It also creates a potentially expensive requirement without any recommendation regarding how to fund such measures.

DOD Standard 5 creates a requirement that each geographic CINC publish an anti-terrorism/force protection plan or Operations Order (OPORD).¹⁵³ The plan is to be clear in its intent and should be written from the geographic CINC level down to the installation or base level.¹⁵⁴ Although the format of the plan or OPORD is not specified, the plan must include procedures to collect and analyze terrorist threat information, procedures to analyze vulnerabilities to terrorist attacks, procedures for enhanced antiterrorism protection, and procedures for responding to terrorist attacks.¹⁵⁵ In USEUCOM, the geographic CINC has issued USCINCEUR OPORD 98-01 that implements the guidance in DoD Directive 2000.12, DoD Handbook O-2000.12-H, and the standards in DoD Instruction 2000.16.¹⁵⁶ The OPORDs produced by the geographic CINCs must meet all the requirements contained in DoD Directive 2000.12 and DoD Instruction 2000.16.

An issue arose regarding whether the DoD personnel assigned to the chief of mission for force protection have to comply with the standards established in DoD Instruction 2000.16. The Instruction also required the geographic CINC to review the force protection status of all DoD personnel assigned within the geographic CINC's area of responsibility. The Joint Staff finally concluded that DoD personnel under the force protection responsibility of the chief of mission must follow and meet the State Department Overseas Security Policy Board (OSPB) standards.¹⁵⁷ There is no additional requirement that these personnel meet DoD force protection standards. The geographic CINC should periodically review the force protection status of all DoD personnel who are the responsibility of the chief of mission.¹⁵⁸ If the geographic CINC has a concern over the force protection being provided by the chief of mission, the CINC and the chief of mission are to try to work out their differences. If the problem can not be resolved, the issue must be forwarded through DoD and DoS channels for resolution.¹⁵⁹

Department of Defense Handbook O-2000.12-H

The Department of Defense publication that provides the nuts and bolts guidance for force protection is the Handbook known as DoD O-2000.12-H. The Handbook is published under the authority of DoD Directive 2000.12, to serve as the practical companion to that Directive. The stated purpose of this Handbook is to serve as a reference document for the military services.¹⁶⁰ Several hundred pages of material provide information to help develop programs for

antiterrorism awareness, education, and training.¹⁶¹ Topics covered range from broad, general areas such as the methodology behind terrorist threat analysis to more specific subjects, such as how to properly plug a sewer pipe. This vast amount of material has become the basis for most antiterrorism training programs, as it is the most comprehensive, practical and useful DoD publication regarding force protection measures.

FINANCING FORCE PROTECTION

A sticking point in almost any modern military plan or operation is "how do you pay for it?" There are now several options when it comes to paying for force protection measures. Force protection measures can always be funded in the same way most military projects are funded, which is through the Programming, Planning and Budgeting System (PPBS).¹⁶² However, this method can take years to produce a tangible result. The stated purpose of the PPBS Planning phase is to define "the national military strategy necessary to help maintain national security and support U.S. foreign policy two to seven years in the future."¹⁶³ Many force protection problems are time sensitive, and this two to seven year time lag is not going to be responsive to time sensitive situations. Two better alternatives remain for funding force protection measures: the CINC Initiatives Fund¹⁶⁴ and the Combating Terrorism Readiness Initiatives Fund.¹⁶⁵

CINC Initiatives Fund

The CINC Initiatives Fund (CIF) allows the military, under special circumstances, to obtain funds quickly and avoid the time-consuming PPBS process. The stated purpose of this fund is "to support unforeseen contingency requirements critical to CINC joint warfighting readiness and national security interests."¹⁶⁶ Funds may be provided for nine authorized activities listed in the statute enacting the CIF.¹⁶⁷ The ninth item on the authorized activities list is "force protection."¹⁶⁸ Force protection was not one of the original authorized activities when the statute was enacted in 1991, but was added by amendment in 1997, in the wake of the Khobar Towers bombing.¹⁶⁹ Requests for funds must be submitted in a specific format found in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01, Enclosure B. Before the submission can be forwarded to the Joint Staff for action, either the geographic CINC or his deputy must approve it.¹⁷⁰ Once the request reaches the Joint Staff, the Chairman of the Joint Chiefs of Staff is the final approval authority.¹⁷¹ Although funds can be obtained for force protection purposes by using the CIF, the Combating Terrorism Readiness Initiatives Fund has been the preferred method of obtaining money for force protection projects. It should be noted that the most recent version of CJCSI 7401.01 is dated 11 June 1993, and does not reflect the 1997 amendment to 10 U.S.C. 166a, which added "force protection" as an activity authorized to receive CINC Initiative Funds.

Combating Terrorism Readiness Initiatives Fund

The Combating Terrorism Readiness Initiatives Fund (CbTRIF)¹⁷² can be used in situations characterized as "unforeseen", "emergency", and "unanticipated". The CbTRIF policy statement makes clear that this fund is only to be used "to fund emergency or other unforeseen high priority combating terrorism requirements",¹⁷³ or to allow a geographic CINC to "react to unanticipated requirements from changes in terrorist threat level or force protection doctrine/standards."¹⁷⁴

These exigent circumstances must be legitimate, and should not be a cover to "subsidize ongoing projects, supplement budget shortfalls, or support routine activity that is normally a Service responsibility."¹⁷⁵

The process begins when the service components within a geographic CINC's area of responsibility submit a request that a project be approved for funding under the CbTRIF.¹⁷⁶ CJCSI 5261.01, Enclosure A, requires that each request follow a specific format.¹⁷⁷ The geographic CINC or his deputy will review the requests, approve or disapprove them, then forward the requests to the Chairman of the Joint Chiefs of Staff.¹⁷⁸ The forwarded requests remain in the same format found in Enclosure A.¹⁷⁹ The Chairman of the Joint Chiefs of Staff is the final approval authority for CbTRIF requests. The Chairman is to evaluate each request on its individual merit, and is not to apportion a fixed percentage of the CbTRIF funds to each geographic CINC.¹⁸⁰

All CbTRIF funds are in the Operation and Maintenance (O&M) appropriation, so the restrictions placed on the use of O&M funds also apply to the use of CbTRIF funds.¹⁸¹ Expenditure of CbTRIF funds is limited to things such as equipment, minor construction, supplies, materials, rent, communication, and utilities.¹⁸² Although exceptions may apply, CbTRIF funds should not normally be used to fund civilian personnel positions.¹⁸³ The key fiscal law concept that must be remembered is that CbTRIF funds must be obligated before the end of the fiscal year for the bona fide needs of that fiscal year.¹⁸⁴ To make certain that this principle not be forgotten, the Joint Staff sent a message to the unified commands. The primary purpose of this message was to remind the unified commands to obligate CbTRIF funds received for fiscal year 1998 before the end of the fiscal year.¹⁸⁵

CONCLUSION

The emphasis on force protection is not a passing fad. As long as terrorist attacks remain a threat, force protection will remain an essential feature of military life. The foundation for the Department of Defense force protection program is a scattered mishmash of statutes and regulations. These statutes and regulations must be pieced together and understood before an effective force protection program can be established. Before a judge advocate can advise a commander on force protection, he must understand the governing statutes and regulations as well as the concepts of force protection.

The first and most important step in any force protection program is to determine who is responsible for every military unit located overseas. If another terrorist attack similar to the Khobar Towers attack occurs, the chain of responsibility will be the first thing analyzed. After the Khobar Towers attack, Congress put "considerable pressure" on then Secretary of Defense William Perry to find someone culpable.¹⁸⁶ The result was that Brigadier General Terryl Schwalier, the Commander of the 4404th Wing Provisional in Dhahran, Saudi Arabia, was denied promotion to Major General by Secretary of Defense William Cohen. There is no reason to think that after the next terrorist attack the reaction will be any different.

Notes

- 1.
2. CJCS Handbook 5260, "Commander's Handbook for Antiterrorism Readiness", 1 January 1997, p. 1.
3. Id. at p. 1.
4. Khobar Towers is a housing compound built by the Saudi Arabian government near Dhahran, Saudi Arabia. The compound consists primarily of high-rise apartment buildings. These buildings were the residential quarters of the personnel assigned to the 4404th Air Wing (Provisional).
5. CJCS Handbook 5260, supra note 1, at p. 1.
6. "Report to the President: The Protection of U.S. Forces Deployed Abroad"; submitted by The Secretary of Defense, the Honorable William J. Perry; September 15, 1996.
7. CJCS Handbook 5260, supra note 1, at p.20. For instance, "anti-terrorism" and "counter-terrorism" both fall under the umbrella of force protection, but they are two very different things. "Anti-terrorism" actions are defensive measures used to reduce the vulnerability to terrorism, to include limited response and containment. "Counter-terrorism" actions are offensive measures taken to prevent, deter, and respond to terrorism. Force protection is even used to describe protective health measures. When the recent announcement was made regarding mandatory anthrax vaccinations for DoD personnel, it was described as a "force protection" issue.
8. Id. at p. 20.
9. 22 U.S.C.A. 4802.
10. 22 U.S.C.A. 4802 (a) (1) (A)
11. CJCS Handbook 5260, supra note 1 at p. 34. These unified commanders which would also be "area military commanders" are USCINCEUR (European Command); USCINCPAC (Pacific Command); USCINACOM (Atlantic Command); USCINCCENT (Central Command); and USCINCSO (Southern Command).
12. For the remainder of this article, the unified commander will be referred to as the "geographic CINC."
13. 22 U.S.C.A. 4805 (a).
14. Id.
15. The chief of mission is the senior ranking American at the Embassy or consulate, most usually the ambassador.
16. 52 U.S.C.A. 3927.
17. DEP'T OF DEFENSE, DIR 2000.12, DOD ANTITERRORISM/FORCE PROTECTION PROGRAM, Sep. 15, 1996, [hereinafter-DoD Directive 2000.12.]
18. Id.
19. 22 U.S.C. 4802.
20. See DEP'T OF DEFENSE, INSTRUCTION 2000.16, DOD COMBATTING TERRORISM PROGRAM STANDARDS(Sep. 15, 1996), [hereinafter DOD Instr. 2000.16], para. 4.1.3. This statement is taken to mean that every commander, down to the lowest level, is responsible for the protection of the personnel under his command. It is expected that he will take appropriate measures to protect his troops from problems ranging from terrorism to disease.
21. 22 U.S.C. 4805(a)
22. For instance, in the United Kingdom there are over 150 different DoD units or elements scattered across the country.

23. Unclassified message, from AMEMBASSY MADRID, 220752Z AUG 96, Subject: COM Authority Over and Responsibility for USG Executive Branch Employees - Spain.
24. Id.
25. Unclassified message, from SECSTATE WASH DC, 301519Z JUL 96, Subject: Chief of Mission Authority Over and Responsibility For USG Executive Branch Employees.
26. Id. In fairness to the Madrid Embassy, this same confusion was experienced by many embassies around the world.
27. Unclassified message, from SECSTATE WASHDC, 190156Z SEP 96, Subject: DOD Elements and Personnel on the Arabian Peninsula.
28. Unclassified message, from SECDEF WASHINGTON DC, 162100Z Dec 97, Subject: MOU Between DOS and DOD on Security of DOD Elements and Personnel in Foreign Areas.
29. The Secretary of Defense appointed Gen. Wayne Downing, the retired former Commander-in-Chief of U.S. Special Operations Command, to conduct an assessment of the Khobar Towers bombing. His investigation into the bombing is referred to as the "Downing Commission".
30. The Downing Commission Report, Executive Summary, p. ix.
31. Id.
32. Unclassified message, from SECSTATE WAHSDC, 190156Z SEP 96, supra note 26, para. 2.
33. Id., para. 7.
34. Id. at para. 2.
35. Id.
36. Id.
37. USCINCCENT OPORDER 1-96, FORCE PROTECTION, dated 14 Jul 96, which replaced USCINCCENT Letter of Instruction (LOI) for Force Protection (FP) in Kingdom of Saudi Arabia (KSA), dated 12 Apr 96.
38. The Commander, JTF/SWA, was an Air Force Major General. The only other permanently assigned general officers in country were the Commander, United States Military Training Mission (USMTM), who was an Army Major General, and the Commander, 4404th Wing in Dhahran, who was an Air Force Brigadier General.
39. This meant that the commander of JTF/SWA basically controlled aircraft while they were in the air in the Persian Gulf region. He had no control over support units on the ground in the Persian Gulf region. SOUTHERN WATCH is the name of the mission to enforce the no-fly zone over southern Iraq.
40. For instance, since he only had TACON over air assets while they were flying in support of SOUTHERN WATCH, the Commander, JTF/SWA could not have ordered the 4409th Operations Group in Riyadh, Saudi Arabia, to increase security police patrols, set up barricades, build walls of sandbags, etc.
41. CENTAF is the United States Central Command Air Forces, headquartered at Shaw AFB, SC. This is the air arm of the United States Central Command.
42. Unclassified message, from SECDEF WASHINGTON DC, 162100Z Dec 97, Subject: MOU Between DOS and DOD on Security of DOD Elements and Personnel in Foreign Areas.
43. Id., para. 4.

44. Id. The message stated that for the original seven countries on the Arabian peninsula, there was to be no change to the security relationships that had been worked out with the respective chiefs of mission.
45. Id.
46. Unclassified message, from SECDEF WASHINGTON DC, 162100Z Dec 97, supra note 41. The "intended countries" were Djibouti, Ethiopia, Kenya, Jordan, Eritrea, Pakistan, Egypt, Rwanda, Algeria, Spain, Belgium, Israel, United Kingdom, Bosnia, Morocco, Croatia, Serbia, Italy, Germany, Netherlands, Greece, Cyprus and Japan.
47. Id. As noted above, the Universal MOU was signed on Dec. 16, 1997. At the six-month point, the memorandum of agreement process had been completed for only one country on the "intended country" list, Cyprus.
48. Memorandum of Understanding Between the Department of State and the Department of Defense on Security of DoD Elements and Personnel in Foreign Areas, signed Dec. 16, 1997.
49. Unclassified message, from SECDEF WASHINGTON DC, 162100Z Dec 97, supra note 41.
50. Id. The inventory in Annex B is made up of two categories of DoD personnel. The first category consists of CINC-assigned forces for which the geographic CINC has always had force protection responsibility. The second category consists of the non-CINC-assigned forces that were previously the force protection responsibility of the chief of mission but by agreement are now the force protection responsibility of the geographic CINC.
51. Id.
52. Memorandum of Understanding Between the Department of State and the Department of Defense on Security of DoD Elements and Personnel in Foreign Areas, signed Dec. 16, 1997.
53. Unclassified message, from SECDEF WASHINGTON DC, 162100Z Dec 97, supra note 41.
54. Id.
55. Id.
56. Unclassified message, from SECDEF WASHINGTON DC, 162100Z Dec 97, supra note 41, para. X., A.
57. Unclassified Message from JOINT STAFF WASHINGTON DC, 220043Z Apr 98, Subject: Clarification of Policy in DOD 2000.12 and 2000.16.
58. JOINT PUB 0-2, UNIFIED ACTION ARMED FORCES (UNAAF), 24 February 1995, [hereinafter JOINT PUB 0-2], p. III-3, (see Figure III-2).
59. See 10 U.S.C.A. 161. Two types of combatant commands are established by statute; unified combatant commands and specified combatant commands. A unified combatant command has broad, continuing missions and is composed of forces from two or more military departments. A specified combatant command also has a broad, continuing missions but is composed of forces from a single military department. For the purposes of this article, references to the combatant commander refer to a unified combatant command.
60. See JOINT PUB 0-2, supra note 57, p. III-3.
61. Id. at p. GL-4.
62. Id. at p. III-5.

63. Id. at p. III-8.
64. Id. at p. III-8.
65. Id. at p. III-9.
66. Id. at p. III-10.
67. Id. at p. III-5. The various military organizations that are normally the force protection responsibility of the chief of mission have not been assigned or attached to the command of the geographic CINC by the Secretary of Defense.
68. Id. at p. III-5. A typical example of this situation would be when a TRANSCOM C-141 stops at Rota Naval Air Station, Spain, to refuel and spend the night while on its way to Saudi Arabia. Rota NAS is in the EUCOM area of responsibility (AOR), but the C-141 is flying to Saudi Arabia to conduct operations in the CENTCOM AOR. This C-141 aircrew is not in the EUCOM chain of command while it is on the ground at Rota NAS.
69. MEMORANDUM FOR THE COMMANDER IN CHIEF, US CENTRAL COMMAND, Subject: Delegation of Force Protection Responsibility and Authority for the Arabian Peninsula, From: Secretary of Defense, dated 15 Oct 96. This action should not be confused with the action USCINCCENT took with respect to the Commander, JTF/SWA, discussed on p. 6 supra.. In each case, there was a problem of a lack of a command relationship with the DoD elements for which the commander was being assigned force protection responsibility. Although each problem was solved by different methods, the net result was that each commander was given the authority to exercise force protection responsibility over DoD elements with which he previously lacked a command relationship.
70. Unclassified message, from JOINT STAFF WASHINGTON DC, 220043Z APR 98, Subject: Clarification of Policy Described in DOD 2000.12 and 2000.16.
71. MEMORANDUM FOR THE COMMANDER IN CHIEF, US ATLANTIC COMMAND, US CENTRAL COMMAND, US EUROPEAN COMMAND, US PACIFIC COMMAND, US SOUTHERN COMMAND, Subject: Delegation of Outside Continental United States Force Protection Responsibility and Authority to Geographic Combatant Commanders, From: Secretary of Defense, dated 28 Sep 1998.
72. Id. The qualifier in this case is that force protection responsibility for these personnel must first be transferred from the chief of mission to the geographic CINC under a country-specific memorandum of agreement. The geographic CINC does not have force protection responsibility for the transferred forces until the MOA is signed and placed on the covered country list.
73. Id.
74. Id.
75. Id.
76. Unclassified message from USCINCEUR VAHINGEN GE//ECSM//, 181352Z Aug 98, Subject: COM-CINC Agreement on Security. Many of these countries are in Africa, where the only DoD presence is found at the Embassy.
77. 22 U.S.C. 4831. The Secretary of State may also authorize a board in any case of a serious breach of security involving intelligence activities of a foreign government directed at a United States Government mission abroad.
78. 22 U.S.C. 4832.
79. See 22 U.S.C. 4833.

80. See Memorandum of Understanding Between the Department of State and the Department, *supra* note 47, para. VII., C.
81. See Unclassified message, note 75 *supra*.
82. Stovepipe organizations are military units which are stationed outside the United States and are thus within a geographic CINC's AOR. However, the stovepipe organization's chain of command does not go through the geographic CINC, but instead goes directly back to a parent organization in the U.S.
83. Interestingly enough, USCINCEUR is also dual hatted. USCINCEUR is not only the combatant commander of USEUCOM, commanding all U.S. military personnel assigned to him in the USEUCOM theater, he also serves as SACEUR, the Supreme Allied Commander, Europe, which is the commander of NATO's military arm. However, the fact that USCINCEUR is also SACEUR does not change the force protection relationships for NATO-assigned personnel.
84. See Unclassified message from JOINT STAFF WASHINGTON DC, 011614Z Jun 98, Subject: Responsibility for Force Protection of NATO Assigned Forces.
85. See MEMORANDUM OF AGREEMENT BETWEEN COMMANDER IN CHIEF, U.S. EUROPEAN COMMAND AND CHIEF OF MISSION, AMERICAN EMBASSY ANKARA FOR SECURITY AND FORCE PROTECTION OF DOD ELEMENTS AND PERSONNEL IN TURKEY, Annex B. The U.S. personnel assigned to NATO billets in Turkey are located in Ankara and Izmir.
86. Some of these multinational peacekeeping forces are located in Guatemala, Georgia, Western Sahara, Jerusalem, Iraq/Kuwait, and Egypt.
87. MEMORANDUM FOR THE SECRETARY OF DEFENSE, Subject: Force Protection Responsibilities for Peace Observer Forces, From: Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, dated 6 May 97.
88. *Id.* It should be noted that USCINCENT would have lacked a command relationship with U.S. personnel in the MFO-Egypt, and thus would not have had the authority to exercise force protection responsibilities.
89. *Id.*
90. Unclassified Message from SECSTATE WASHINGTON DC, 102133Z Mar 98, Subject: State-DoD MOU on Security – Rabat.
91. *Id.*
92. Unclassified message from USCINCEUR VAIHINGEN GE//ECSM//, 201545Z Jan 98, Subject: Antiterrorism Force Protection Guidance for DoD Entities Employing DoD Contractors.
93. See DEPT OF DEFENSE, INSTRUCTION 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES, (January 26, 1996), [hereinafter DOD Instr. 3020.37]. This Instruction defines "crisis situation" as "Any emergency so declared by the National Command Authority (NCA) or the overseas Combatant Commander, whether or not U.S. Armed Forces are involved, minimally encompassing civil unrest or insurrection, civil war, civil disorder, terrorism, hostilities buildup, wartime conditions, disasters, or international conflict presenting a serious threat to DoD interests."
94. *Id.*, para. D.3.
95. Unclassified message from USCINCEUR VAIHINGEN GE//ECSM//, note 91 *supra*.

96. Defense Fed. Acquisition Reg. Supp. 252.225-7043, Force Protection for Defense Contractors Outside the United States [hereinafter DFARS]. See also MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS, et al., SUBJECT: Interim Antiterrorism/Force Protection (AT/FP) Policy for Defense Contractors Overseas; From: Deputy Secretary of Defense; January 28, 1998. This Memorandum defines a defense contractor as: "Any individual, firm, corporation, partnership, association, or other legal nonfederal entity that enters into a contract directly with DoD or a DoD component to furnish services, supplies, or both, including construction. Thus, Defense Contractors may include U.S. nationals, local citizens, or third country nationals. For purposes of this interim policy, Defense Contractors do not include foreign government or representatives of foreign governments that are engaged in selling to DoD or a DoD component or foreign corporations wholly-owned by foreign governments." The policy set out in the Memorandum was to be incorporated in the new version of DOD Directive 2000.12.
97. DEPARTMENT OF DEFENSE, INSTRUCTION 2000.14, DOD COMBATING TERRORISM PROGRAM PROCEDURES (June 15, 1994), [hereinafter DOD Instr. 2000.14] para. D.1.c..
98. See *Island of Palmas Case (U.S. v. Neth.)*, 2 U.N. Rep. Int'l Arb. Awards 829, (Perm. Ct. Arb. 1928).
99. See DEPARTMENT OF DEFENSE HANDBOOK O-2000.12-H, PROTECTION OF DOD PERSONNEL AND ACTIVITIES AGAINST ACTS OF TERRORISM AND POLITICAL TURBULENCE (February, 1993)[hereinafter DOD O-2000.12-H], at p. 4-3.
100. Matt LaBash, *Scapegoat:: How a Terrorist Bombing Destroyed a General's Career*, Air Force Times, Dec. 8, 1997, at p. 10.
101. *Id.* at p. 14.
102. *Id.* at p. 14.
103. Approximately 110,000 U.S. personnel are stationed in the European theater. Congress has mandated that this number be reduced to 100,000.
104. See *Agreement Between the Parties to the North Atlantic Treaty Regarding the Status Of Forces*, June 19, 1951, 4 UST 1792 [hereinafter NATO SOFA].
105. It should be noted that the discussion about the NATO SOFA also applies to the Partnership for Peace (PfP) SOFA, since the PfP SOFA and the NATO SOFA have identical terms. As of February 1, 1998, the PfP SOFA is in effect in the following countries: Albania, Austria, Bulgaria, Czech Republic, Estonia, Finland, Georgia, Hungary, Kazakhstan, Latvia, Lithuania, Macedonia, Moldova, Poland, Romania, Slovak Republic, Slovenia, Sweden, and Uzbekistan.
106. NATO SOFA, *supra* at note 103, Article VI.
107. *Id.*, Article VII, para 10(a).
108. *Id.*
109. *Id.*, Article VII, para 10(b).
110. See Serge Lazareff, *Status of Military Forces Under Current International Law*, (1971) at p. 254.
111. *Id.* at p. 252.
112. *Id.* at p. 254.
113. *Id.* at p. 255. *In flagrante delicto* is defined as "in the very act of committing the crime." The Japanese government expressly granted American Forces in Japan the right

to arrest in flagrante delicto. In flagrante delicto is not mentioned in the NATO SOFA, but it is alluded to in a statement made by the Juridical Sub-Committee (negotiating the NATO SOFA) that if the military authorities of the sending state arrest a national of the receiving state, the arrestee must be handed over immediately to the receiving state police.

114. An interesting issue arises over who has the right to prosecute the terrorist in this example, especially if the terrorist succeeded in killing an American national. Once again, the issue of territorial sovereignty arises, which gives the nation where the crime was committed the primary jurisdiction in prosecuting the crime. However, the United States has enacted 18 U.S.C. 2332, which makes it a violation of United States law to kill, conspire to kill, or cause serious bodily injury to a United States citizen when he is outside of the United States. The United States Attorney General must certify in writing that in his judgement the offense was intended to coerce, intimidate, or retaliate against a government or civilian population. This legislation gives the United States the extraterritorial jurisdiction it needs to prosecute terrorists in its own courts, but it does not solve the problem that this principle is not generally accepted in international law, i.e., many nations will not hand jurisdiction over to the United States.
115. The Supplementary Agreement to the Agreement between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces With Respect to Foreign Forces Stationed in the Federal Republic of Germany, (August 3, 1959, amended October 21, 1971, and May 18, 1981), 1 UST 531.
116. *Id.*, Article 20, para. 1(a).
117. *Id.*, Article 20, para. 1(b).
118. *Id.*, Article 20, para. 2.
119. *Id.* This second exception for arresting a person not subject to U.S. jurisdiction in Article 20, paragraph 2, is very similar to the exception in paragraph 1. Paragraph 1 has the in flagrante delicto requirement, while paragraph 2 seems to allow the taking into custody of a person who has already committed the offence, with the proviso that it must be dangerous to delay the arrest because the person will probably flee.
120. *Id.*, Article 20, para. 3.
121. *Id.*
122. *Id.*, Article 20, para. 4.
123. NATO SOFA, *supra* note 103, Article VII, para. 11.
124. Agreement Concerning Privileges and Immunities of United States Military and Related Personnel in Egypt, with Related Letter and Agreed Minute. Exchange of Notes at Cairo on July 26, 1981; entered into force December 5, 1981. 33 UST 3353, TIAS 10349.
125. *Id.*, para. II, (B).
126. *Id.*
127. *Id.*, para. II, (F), 9., A.
128. *Id.*, para. II, (F), 9., B.
129. DOD O-2000.12-H, *supra* note 98, at p. 4-3.
130. DOD Dir. 2000.12, *supra* note 16. At the time this article was written, a draft revision of this Directive was pending but not finalized.
131. *Id.*, para. A.
132. *Id.*

133. Id., para. E., 9.
134. Id., para. E., 9, d.
135. Id., para. E., 9, f.
136. Id., para. E., 9, g.
137. Id., para. E., 9, h, i.
138. Id., para. E., 9, j.
139. DOD Instr. 2000.14, supra note 96.
140. Id., para. A.
141. Id., para. D., 1., a.
142. Id., para. E.
143. See DOD Dir. 2000.12, supra note 16, para. E., 8., e.
144. DOD Instr. 2000.14, supra note 96, para. E., 2., a. There are many similarities between DoD Dir. 2000.12 and DoD Instr. 2000.14, but they are separate and not combined for a reason. DoD Dir. 2000.12 was issued by the Secretary of Defense, William Perry. DoD Instr. 2000.14 was issued by the Assistant Secretary of Defense for Special Operations/Low Intensity Conflict, as part of his responsibilities assigned to him under DoD Dir. 2000.12.
145. DOD Instr. 2000.16, supra note 19, para. 1.1.
146. Id., para. 5.
147. Id. at Enclosure 1. The term "commanders" is not well-defined in this Instruction. Paragraph E1.1.6. reads "Commanders (as identified in paragraph 5.3.3..." Paragraph 5.3.3. reads "The Heads of Other DoD Components shall: Identify the level of command (i.e., the specific subordinate commanders) required to meet these standards."
148. Id., para. E1.1.1. DOD STANDARD 1.
149. Id., para. E1.1.23. DOD STANDARD 23.
150. Id., para. E1.1.19. DOD STANDARD 19.
151. Id.
152. Id., para. E1.1.33. DOD STANDARD 33.
153. Id., para. E1.1.5. DOD STANDARD 5.
154. Id.
155. Id.
156. USCINCEUR OPERATIONS ORDER 98-01, Antiterrorism/Force Protection, 21 Feb 98. This OPOD is classified For Official Use Only (FOUO).
157. Unclassified message from JOINT STAFF WASHINGTON DC//J34//, 182225Z Aug 98, Subject: Applicability of DoD Instr 2000.16 Standards to DoD Personnel Under the Force Protection Responsibility of a Chief of Mission.
158. Id.
159. Id.
160. DOD O-2000.12-H, supra note 98, at p. 1-3.
161. Id.
162. DEP'T OF DEFENSE, DIRECTIVE 7045.14, THE PLANNING, PROGRAMMING, AND BUDGETING SYSTEM (May 22, 1984), [hereinafter DOD Dir. 7045.14].
163. Id., para. 4.1.

164. 10 U.S.C.A. 166a. See also CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTRUCTION 7401.01, CINC INITIATIVES FUND, (June 11, 1993), [hereinafter CJCSI 7401.01].
165. Chairman, Joint Chief of Staff Instruction 5261.01, COMBATING TERRORISM READINESS INITIATIVES FUND, (August 1, 1998), [hereinafter CJCSI 5261.01].
166. CJCSI 7401.01, supra. note 163.
167. 10 U.S.C.A. 166a. The nine activities are force training, contingencies, selected operations, command and control, joint exercises, humanitarian and civic assistance, military training and education of foreign personnel, personnel expenses of defense personnel for bilateral or regional cooperation programs, and force protection.
168. Id.
169. See 10 U.S.C.A. 166a, Historical and Statutory Notes; Amendments.
170. CJCSI 7401.01, supra note 163, at p. 2.
171. Id. at p. 2.
172. CJCSI 5261.01, supra note 164.
173. Id., para. 4.a.
174. Id., para. 4.b.
175. Id., para. 4.b.
176. For instance, in the EUCOM area of responsibility, United States Army Europe (USAREUR), United States Air Force Europe (USAFE), and United States Navy Europe (NAVEUR), must all submit their requests to EUCOM for initial review and approval before the requests are forwarded to the Joint Chiefs of Staff. Naturally, the very beginning of the process is when someone at the local base level identifies a problem or a need, which is then submitted by the local commander to the component command.
177. CJCSI 5261.01, supra note 164, at p. A-1.
178. Id., para. 4.g.
179. Id., para. 4.h.
180. Id., para. 4.c
181. Id., para. 4.d. The fiscal principles that apply to CbTRIF also apply to the CIF.
182. Id., para. 4.e.
183. Id., para. 4.d.
184. Id.
185. Unclassified Message, from JOINT STAFF WASHINGTON DC, 310045Z Jul 98, Subject: CBT Readiness Initiatives Fund Obligation.
186. See LaBash, supra note 99, at p. 11.