

PERSPECTIVES IN SECURITY ASSISTANCE MANAGEMENT

a focus on special topics of interest



INTERNATIONAL AGREEMENTS AND FOREIGN MILITARY SALES -- THE JUDGE ADVOCATE'S ROLE

By Major Daniel J. Gallington, USAF

If judge advocates don't get involved in Security Assistance (which they usually don't), then why an article linking them to it? Moreover, since foreign military sales are, by definition, not "international agreements,"¹ what do they have in common?

Perhaps an example will best explain why: Colonel Jet McZoom is the U.S. Air Force commander at Boondock Air Base in Futura, a country with a mutual defense treaty (MDT) and a "NATO type" status of forces agreement (SOFA) with the United States. Col McZoom has done his best to develop a close working relationship with his Futurian air force counterpart, Colonel Zark, the commander of a nearby Futurian fighter base. Such "cooperation and coordination" has been encouraged by the in-country combined command, the United States-Futurian Defense Command (USFDC). At a counterpart meeting one day, Col Zark says, "You know, Col McZoom, we are having a serious problem with the engines on our US-made ZIP-5 fighters. Our maintenance people just don't seem to understand how they work. We can't be 100% combat-ready unless we get some help. Your ZIP-5s

use the same engines as ours do, and your people really know how to keep them flying. Can I send my mechanics to your shop for some tips on better engine flying. Can I send my mechanics to your shop for some tips on better engine maintenance?" Col McZoom answers, "Well, I'll have to find out whether we can support a request like that or not. I'll get back to you tomorrow." Next day, at the Boondock Air Base staff meeting, Col McZoom tells of Col Zark's request and asks his Boondock staff to "look into the matter." In parting, Col McZoom says "I'd like to support his request if we can." The Boondock maintenance officer says that it would be "no problem" to allow Futurian jet mechanics into the engine shops and to learn how the ZIP-5 engines are maintained. The services officer wonders how long the Futurian mechanics would stay at Boondock, but concludes that if it's no longer than a week or so they can be accommodated at the local transient bachelor quarters. Feeding the Futurians, he says, will be a simple matter because "they can eat at the mess hall along with our own troops." The staff judge advocate thinks that it would probably be best to "reduce the arrangement to writing" for a number of reasons. First, what if a Futurian mechanic were to injure himself or someone else at Boondock? Also, what about responsibility for tools and equipment? Finally, (heaven forbid), what if one of the ZIP-5 engines were damaged by a Futurian mechanic? The written agreement, of course, would be an international agreement and accomplished in accordance with DOD Directive 5530.3.² Accompanying the agreement, as it was forwarded through channels to the Department of State, would be a required "legal memorandum" stating the legal authority for carrying out each obligation to be assumed and a "fiscal memorandum" detailing the estimated cost (if any) to be assumed together with the source of funds to be obligated. At this point, the comptroller states that there would be "no cost" associated with the agreement, so long as the Futurians paid for their rooms at the bachelor quarters and their meals consumed at the mess hall. The staff officers go their separate ways, and each begins to work on their particular part of what becomes known as the "Futurian ZIP-5 maintenance package."

End of hypothetical. What's really happened at Boondock AB in Futuria with regard to Col Zark's request? Security assistance experts will know in a minute that a potential problem has gone unnoticed by the Boondock AB staff, including the staff judge advocate. The security assistance expert, for example, would realize that probably what Col Zark wants is some training for his maintenance people. Such requests are not uncommon at DOD installations in foreign countries. If the staff judge advocate knew something about security assistance matters, he would realize that approval of this kind of project might violate a provision of the Military Sales and Assistance Manual (MASM).³

Recall that, outside the context of exercises conducted to test and evaluate mutual capabilities, the United States Government cost of providing training for foreign military personnel must be borne by the foreign government under an FMS case (unless there is separate and specific statutory authorization for such training). Existing authority and regulations do not permit formal and informal training (to include "orientation," "observation," or "familiarization") on a non-reimbursable or quid pro quo basis. However, a real MASM expert would also know that something called a "short informal visit" would not require an FMS case.⁴

Does Col Zark's request amount to "training" or not? Remember, it doesn't matter whether it's called "orientation," "observation" or "familiarization." In order for it to be legally carried out, the Futurian mechanics would have to come to Boondock AB for a "short and informal visit." This is a judgment call, but staff judge advocates should know something about security assistance if they are to first realize that there is a serious legal question involved with providing informal training to foreign military personnel. What compounds the felony is that all international agreements concluded within DOD must be forwarded through channels to eventually reach the State Department. Once there, and in

accordance with the "Case Act,"⁵ they are to be forwarded to Congress within 60 days after the agreement enters into force. If Col Zark's proposal really amounts to "training," then what will happen is an expenditure of DOD O&M resource for the benefit of a foreign military force outside the requirement for full cost reimbursement via FMS.

The Boondock hypothetical could be rewritten in a number of ways to present even more difficult questions which the staff judge advocate should be able to identify. What if Col Zark proposed that the Futurian and Boondock ZIP-5s engage in a combined tactical exercise? Such would appear to be "legal" if it were conducted to test and evaluate mutual capabilities, but what if the "exercise" were conducted on a daily or weekly basis? Could this amount to "training"? Even if it didn't, of course, Boondock AB could not directly pay or reimburse the costs of Futurian participation in such exercises. Security assistance experts know that DOD funds can bear only costs of DOD participation in exercises; these are costs which would have been incurred in the absence of foreign participation. The bottom line is that the cost of any US support provided to the Futurians for training exercises must be reimbursed under an FMS case.⁶

Another reason why staff judge advocates should know something about security assistance is because they serve as general "counsel to their commanders." At headquarters level, senior officers are often asked by their foreign counterparts for various forms of "logistic support" which may often translate into basic requests for nonreimbursable assistance. Most commanders and senior staff officers are not security assistance experts and their evaluation of requests for foreign logistic support is often limited to whether or not the request can actually be honored, not whether there is any legal authority to provide the support. It is the staff judge advocate's responsibility to see that his commander

"gets smart" about the constraints on providing nonreimbursable support for foreign military forces.

What should overseas staff judge advocates know about security assistance? For starters, they should know the basics about existing security assistance legislation and programs -- what programs are authorized, how they are funded, how security assistance requirements are assessed, evaluated, approved and administered.⁷ If there is one legal principle that will suffice in a pinch, however, it is one that is often too obvious to be thought of: Money appropriated to run the Department of Defense is intended to be spent running the Department of Defense, not as a supplement or enhancement to approved security assistance programs. It is the Secretary of State who is chartered to supervise and direct security assistance programs. The Department of Defense and its various military departments implement these programs. While Col Zark's request would certainly result in a "closer working relationship" between Futurian and US forces, it is perhaps one which should be part of the integrated security assistance program for Futuria (e.g., paid for in full pursuant to an FMS case).

As world defense dollars get tighter and tighter, overseas staff judge advocates can expect to see more and more local requests to provide various kinds of support for host country forces. Such is understandable. Foreign military forces no doubt desire to save their FMS dollars to buy high technology systems rather than pay for the more mundane costs of operating and maintaining their already established forces. In their zeal to enhance readiness, US commanders want to do all they legally can to assist the development of combat-capable host nation forces. But, as can be seen above, a fine line often separates the kind of "logistic support" which can be provided by US forces as a legitimate expenditure of their O&M money and those kinds of programs which must be bought and paid for as FMS transactions.

FOOTNOTES

1. Paragraph C.1.c.(3), DOD Directive 5530.3, 6 December 1979.
2. The implementing regulation in the Air Force is AFR 11-21.
3. DOD 5105.38-M.
4. Ibid. at Paragraph 2.a.(5), Chapter J, Part III.
5. 1 USC 112b.
6. See note 4, supra.
7. See, Chapters A, B & C of Part I, Chapter A of Part II and Chapters A, B & C of Part III, MASM.

ABOUT THE AUTHOR

Major (Lieutenant Colonel Select) Gallington is the Director of International Law, Headquarters Pacific Air Forces, Hickam Air Force Base, Hawaii. He has been an Air Force judge advocate since 1967 and is a graduate of the University of Illinois (B.S. 1964), the University of Illinois College of Law (J.D. 1967) and the University of Michigan Law School (LL.M. 1973). Major Gallington is a recent DISAM graduate (SAM-C-2-80).

Readers are invited to submit articles for future publication in the Perspectives in Security Assistance Management section of the Newsletter. Full credit will be given to the author of the article. Any proposed article should be accompanied by a statement to the effect that any necessary clearance action has been accomplished by the command or agency Public Affairs office. Articles relating to special security assistance policies, programs, processes, management innovations or problems, etc., are especially encouraged.