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UNITED STATES OF AMERICA

9 UNITED STATES DISTRICT COURT
10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

11
12 UNITED STATES OF AMERICA,) No. ED CR 07-127(A)-SGL
13 Plaintiff,) GOVERNMENT'S TRIAL MEMORANDUM
14 v.) [18 U.S.C. §§ 1112, 3261(a)(2):
15 JOSE LUIS NAZARIO, JR.,) Voluntary Manslaughter; 18
16 Defendant.) U.S.C. §§ 113(a)(2),
17) 3261(a)(2): Assault With A
18) Dangerous Weapon; 18 U.S.C.
19) §§ 924(c)(1)(A)(iii),
20) 3261(a)(2): Discharging Firearm
During A Crime Of Violence; 18
U.S.C. § 2(b): Causing An Act
To Be Done]
Trial Date: August 19, 2008
Time: 9:30 a.m.

21 Plaintiff, United States of America, through its counsel of
22 record, Assistant United States Attorneys Jerry A. Behnke and
23 Charles J. Kovats, hereby submits its trial memorandum.

24 I.

25 CASE SCHEDULING MATTERS

26 Jury trial is scheduled for August 19, 2008 at 9:30 a.m.
27 The government estimates that its case-in-chief will last
28 approximately four days.

1 II

2 THE INDICTMENT

3 Defendant is charged in a three-count superseding indictment
4 with violating 18 U.S.C. §§ 1112, 3261(a)(2) (Voluntary
5 Manslaughter); 18 U.S.C. §§ 113(a)(2), 3261(a)(2) (Assault With A
6 Dangerous Weapon); 18 U.S.C. §§ 924(c)(1)(A)(iii), 3261(a)(2)
7 (Discharging Firearm During A Crime Of Violence); and 18 U.S.C.
8 § 2(b) (Causing An Act To Be Done).

9 A. Elements of the Offenses

10 Count one charges defendant with voluntary manslaughter,
11 which has the following elements: first, the defendant unlawfully
12 killed a human being; and second, while in the heat of passion,
13 caused by adequate provocation: (a) the defendant intentionally
14 killed the human being; or (b) the defendant killed the human
15 being recklessly with extreme disregard for human life. Heat of
16 passion may be provoked by fear, rage, anger or terror.
17 Provocation, in order to be adequate, must be such as might
18 arouse a reasonable and ordinary person to kill. Ninth Circuit
19 Criminal Jury Instruction No. 8.91 (2003).

20 Count two charges defendant with assault with a dangerous
21 weapon, which has the following elements: first, the defendant
22 intentionally struck or wounded a human being; second, the
23 defendant acted with the specific intent to do bodily harm to
24 that human being; and third, the defendant used a firearm. Ninth
25 Circuit Criminal Jury Instruction No. 8.5 (2003).

26 Count three charges defendant with discharging a firearm
27

1 during a crime of violence, which has the following elements:
2 first, the defendant committed the crime of voluntary
3 manslaughter as charged in Count One of the First Superseding
4 Indictment or assault with a dangerous weapon as charged in Count
5 Two of the First Superseding Indictment; second, the defendant
6 knowingly discharged a firearm; and third, the defendant
7 discharged the firearm during and in relation to the crime. The
8 defendant discharged a firearm "in relation to the crime" if the
9 discharge of the firearm facilitated or played a role in the
10 crime. Ninth Circuit Criminal Jury Instruction No. 8.65 (2003).

11 The defendant may be found guilty of voluntary manslaughter
12 or assault with a dangerous weapon as charged in Counts One and
13 Two of the First Superseding Indictment even if the defendant did
14 not personally commit the act or acts constituting the crime but
15 caused its commission. To prove the defendant guilty of causing
16 a crime to be committed, the government must prove the following
17 beyond a reasonable doubt: first, voluntary manslaughter or
18 assault with a dangerous weapon was committed by someone; second,
19 the defendant knowingly and intentionally caused the person to
20 commit voluntary manslaughter or assault with a dangerous weapon;
21 and third, the defendant acted before the crime was completed.
22 Ninth Circuit Criminal Jury Instruction No. 5.1 (2003).

23 B. Jurisdictional Matters

24 While the charged offenses were committed outside the United
25 States, this Court has jurisdiction over the offenses pursuant to
26 18 U.S.C. § 3261, et seq. Section 3261(a) states in pertinent
27

1 K Company, 3rd Battalion, 1st Marine Regiment, 1st Marine Division.
2 November 9, 2004, was the first day of defendant's involvement in
3 combat operations in the city of Fallujah, Iraq, as part of
4 Operation Phantom Fury.

5 A. Training and Procedures Regarding Treatment of Detainees

6 Beginning in basic training and continuing up to the
7 beginning of the combat operations on November 9, 2004, defendant
8 had repeatedly received training regarding the lawful treatment
9 of detainees. Defendant (and all other Marines) were repeatedly
10 taught the nine principles of the law of war,¹ which includes the
11 rule that they must allow the enemy to surrender if the enemy
12 wishes to do so. Once a person is detained, the Marines must do
13 no harm to that person.

14 Defendant first received this training in institutional
15 training environments, such as basic training ("Boot Camp") and
16 at the School of Infantry, as well as within his unit. The unit
17

18 ¹ The killing of unresisting detainees violates the basic
19 tenants of the law of war (also known as law of armed conflict).
20 See United States v. Griffen, 39 C.M.R. 586, 588-589 (1968). Law
21 of war establishes the basic ground rules that all armed forces
22 must follow at all times. The "rules of engagement" (ROE) are
23 directives issued by competent military authority to delineate
24 the circumstances and limitations under which its own forces will
25 initiate and/or continue combat engagement with other forces.
26 The ROE may vary depending upon the particular mission and
27 operating conditions. However, the ROE never exceed the
28 limitations imposed by the law of war. The law of war requires
that enemy combatants must be allowed to surrender if they wish
to do so and, once an enemy surrenders, the capturing forces must
treat the detainee humanely and must do no harm to the detainee,
except in self defense. As a result, in this case, the
particular ROE in effect at the time of the offense are
irrelevant. Defendant's squad captured then killed four males
who had surrendered and were not resisting, which is a clear law
of war violation.

1 training included both classroom instruction and practical
2 exercises on the law of war and proper detainee handling. Both
3 the classroom instruction and practical exercises not only
4 reinforced defendant's previous instruction on the nine
5 principles of the law of war and proper detainee handling, but
6 also included briefings on Iraq-specific operational instructions
7 regarding these same topics.

8 During Operation Phantom Fury, the Marines had established
9 detailed guidelines for the proper handling of detainees. All
10 Marine units carried flex ties that were to be used to handcuff
11 detainees. Once persons were captured and searched, they were to
12 be transported to the train station just north of the city, which
13 served as a base of operation for U.S. forces. At the train
14 station, an officer was designated to process the detainees. On
15 November 9, the first day of the ground assault, defendant's
16 battalion captured approximately 25 detainees. Overall,
17 throughout the entire battle hundreds of enemy insurgents were
18 captured and detained.

19 B. Defendant's Squad Captures and Summarily Executes Four
20 Detainees

21 On November 8, 2004, defendant's unit was staged just north
22 of the city. On the morning of November 9, 2004, the Marines
23 were transported to the northern portion of the city where they
24 dismounted and moved south through the city on foot.

25 After advancing several blocks through the city and
26 participating in firefights with enemy insurgents, defendant's
27

1 squad was ordered to search a nearby house. When the Marines
2 entered the house, they immediately encountered four unarmed
3 males. As the Marines entered the house, the four males were
4 seated against the wall with their hands raised in the air.
5 Defendant and other Marines stood watch over the detainees and
6 questioned them while other Marines searched the house. After
7 searches of the house revealed firearms and ammunition, defendant
8 placed a call over his radio.² Following the radio call,
9 defendant executed two of the detainees and ordered two of his
10 subordinates, Ryan Weemer and Jermaine Nelson, to execute two of
11 the detainees.³ None of the detainees were armed and none of the
12 detainees resisted defendant or his subordinates in any way.

13 After the shootings, defendant's squad exited the house.
14 One of the Marines who witnessed the incident appeared visibly
15 shaken. Another Marine who had been outside during the incident
16 went into the house to see what had happened. Inside the house,
17 he saw four dead male bodies. Three of the victims had gunshot
18

19
20 ² Witness accounts of the radio call and defendant's
21 statements after the radio call show that defendant reported
22 having four males and then was asked, "Are they dead yet?" The
23 witnesses in the house only heard defendant's side of the radio
24 call. Their account of the radio call is based upon defendant's
25 statements on the radio and his statements to the other Marines
just after the conversation. Regardless of whether any hearsay
exception may apply to introduction of these statements, the
radio conversation is not relevant because defendant cannot rely
on obedience to orders as a defense to this act. See United
States v. Griffen, 39 C.M.R. 586 (1968) (finding obedience to
orders is no defense to killing unresisting prisoner).

26 ³ These two individuals are both currently in the USMC and
27 are being prosecuted by military court-martial for their roles in
this offense.

1 wounds to the head and the fourth had gunshot wounds to his
2 chest. The four victims were left behind and their bodies were
3 never recovered.

4 C. Ryan Weemer's Interview With Secret Service

5 This offense was first reported by Ryan Weemer during a
6 recorded pre-polygraph interview as part of his application to
7 become a uniformed division officer with the United States Secret
8 Service. The interview occurred on October 3, 2006, at the St.
9 Louis field office and was conducted by Special Agent (SA)
10 Dezeeuw. SA Dezeeuw explained to Weemer that the interview would
11 be considered during the application process to determine his
12 suitability for employment.

13 During the interview, SA Dezeeuw questioned Weemer about
14 crimes he had committed. Weemer said that he struggled with
15 things he had done in the military. SA Dezeeuw told Weemer that
16 he was not concerned with justified acts like self defense. SA
17 Dezeeuw then explained to Weemer that if someone in law
18 enforcement or the military were to "take somebody down a back
19 alley and shoot them in the back of the head" he would not be
20 able to justify that as that would be a criminal act. Weemer
21 then stated, "That actually did happen to be honest."

22 Weemer then described beginning the foot patrol through
23 Fallujah. He explained that the Marines were engaged in
24 firefights immediately. He said that at some point his friend
25 was shot by sniper fire and about 20 minutes later Weemer learned
26
27
28

1 that he had died.⁴ Thereafter, a Platoon Sergeant ordered Weemer
2 and other Marines to search a nearby house in order to "get their
3 heads back in the game." To that point, houses had always been
4 empty so Weemer assumed the Sergeant just wanted them to "go
5 through the motions."

6 Weemer said that upon entering the house they encountered
7 four or five males. The Marines also found weapons. Weemer said
8 that his squad leader was there and that they called up to the
9 Platoon Sergeant or Platoon Commander to report the situation.
10 Weemer said they were asked "are they dead yet?" Weemer said
11 they then just ended up shooting them. Weemer explained that the
12 killings were not vengeful, but that they had orders to
13 essentially take care of it.

14 Weemer then elaborated, explaining that they had the males
15 sitting there. They were unarmed. Weemer said the Marines
16 argued about it, but they had to move. Weemer took one and shot
17 him. He then took his team⁵ outside. Weemer then looked back
18 and saw that other Marines had killed the rest of the detainees.

19 D. January 8, 2007 Recorded Telephone Call Between Defendant
20 and Jermaine Nelson

21 In January 2007, Jermaine Nelson agreed to assist in the
22 investigation of this matter by engaging in recorded telephone
23 conversations with defendant. During one of these recorded calls
24 _____

25 ⁴ Lance Corporal Juan Segura was killed by enemy fire at
26 approximately 9:25 a.m. on November 9, 2004.

27 ⁵ Weemer was a fire team leader. The members of his fire
28 team were in the house when Weemer shot one of the detainees.

1 on January 8, 2007, defendant and Nelson discussed the killings
2 at issue in this case. During the conversation, Nelson asked
3 defendant how he should respond if asked on a polygraph whether
4 he ever murdered somebody. Nelson then discussed the shootings
5 at issue and asked defendant, "I mean, we had the right orders,
6 didn't we?" Defendant responded, "Yeah." Nelson then asked,
7 "Who gave us the orders though, nigger?" Defendant responded, "I
8 did." A few lines later, defendant explained further, "That shit
9 is coming from the Battalion Commanders. We got to get from
10 point A to point B and we ain't got time to throw mutherfuckers
11 on the truck 'cause we moving." Then, defendant explained, "It
12 was, you know, a decision we made because it was the outcome
13 that's the best. So it was, it was a decision. You can't play
14 Monday morning quarterback, bro."

15 IV.

16 STIPULATIONS

17 The parties have agreed to stipulate to the following
18 matters:

- 19 1. Jose Luis Nazario, Jr., entered service in the United
20 States Marine Corps on September 10, 1997.
- 21 2. Jose Luis Nazario, Jr., was a member of the United
22 States Marine Corps on November 9, 2004.
- 23 3. Jose Luis Nazario, Jr., was honorably discharged from
24 the United States Marine Corps on October 11, 2005.
- 25 4. Following his discharge from service on October 11,
26 2005, Jose Luis Nazario, Jr., is no longer subject to
27

1 Chapter 47 of Title 10 (the Uniform Code of Military
2 Justice).

3 5. Venue for trial of the offenses charged in the First
4 Superseding Indictment lies within the Central District
5 of California.

6 6. Foundation for admission of photographs taken by
7 photographer Lucian Reed while embedded with Kilo
8 Company in Fallujah.⁶

9 V.

10 LEGAL AND EVIDENTIARY ISSUES

11 A. The Killing of Unresisting Detainees Is Patently Unlawful

12 In order to ensure compliance with the law of war, the USMC
13 has implemented Marine Corps Order 3300.4, attached Exhibit 1.
14 Order 3300.4 is aimed, in part, at ensuring that Marines comply
15 with the law of war in all armed conflicts.

16 The law of war includes nine basic principles. Two of these
17 basic principles as set forth in Order 3300.4 are:

18 (2) Marines do not harm enemy soldiers who surrender.
19 Marines disarm them and turn them over to their
20 superiors.

21 (3) Marines do not torture or kill enemy prisoners of
22 war or detainees.

23 (Exhibit 1, encl. 2, p. 2). Marines, including defendant, are
24 taught that violating the law of war dishonors the Marine Corps
25

26 ⁶ The parties reserve the right to object to admission of
27 photographs on other grounds such as relevance or Rule 403.

1 and the nation and strengthens the enemy's will to fight. These
2 basic principles are stressed through repeated training.

3 While this may be the first case in which a District Court
4 is hearing a case based upon a law of war violation, military
5 appellate courts have spoken in several such cases, including a
6 case in which a soldier was charged with executing a detainee
7 during combat in Vietnam.

8 On April 4, 1967, an Army platoon was providing security for
9 an engineering element in a hostile area in Vietnam. United
10 States v. Griffen, 39 C.M.R. 586, 587 (1968). The platoon
11 captured a "male of military age" and evacuated him for
12 interrogation, which revealed that he was an enemy member of the
13 Viet Cong. Later, as the platoon prepared to cross a large rice
14 paddy, soldiers captured a male who had been hiding in a bunker.
15 Id. Soldiers also noticed another male who appeared to be
16 observing the activities of the platoon. The soldiers attempted
17 but failed to capture him. There was concern in the unit because
18 they had possibly been detected by the enemy and, several months
19 earlier, an entire platoon had been killed or wounded in that
20 same location. Id. at 588. The platoon commander contacted the
21 company commander by radio to arrange for air evacuation of a
22 wounded soldier (the soldier had been wounded during operations
23 to clear bunkers around the platoon's position). The precise
24 conversation was not clear, but the company commander's orders
25 appeared to have been that the prisoner should be killed. Id.
26 After the radio call, the platoon commander gave a direct order

1 to a subordinate, Griffen, to kill the prisoner. Id. Griffen
2 and another soldier carried out the order by shooting the
3 prisoner with their M-16 rifles. Id.

4 Griffen was convicted of unpremeditated murder. At trial,
5 he requested a jury instruction on the defense of obedience to
6 orders. The trial court refused. Id. On appeal, the court
7 affirmed. The panel explained that "the killing of a docile
8 prisoner taken during military operations is not justifiable."
9 Id. The court further explained that, pursuant to the Army's Law
10 of Land Warfare, a prisoner may not be put to death even where
11 the prisoner retards the movements of the unit or diminishes the
12 power of the unit "by necessitating a large guard, or by reason
13 of their consuming supplies, or because it appears certain that
14 they will regain their liberty through the impending success of
15 their forces." Id. at 589. The court concluded that the trial
16 court did not err. The court found that the order to kill the
17 prisoner was "so palpably illegal on its face as to admit no
18 doubt of its unlawfulness." Id. at 590.

19 Similarly, in the present case, defendant's squad had
20 captured and detained four males who surrendered to defendant's
21 squad as they entered the house. After securing the males and
22 searching the house multiple times, defendant ordered the
23 execution of the detainees. The unlawfulness of these acts is
24 clear. As Griffen instructs, even if the evidence establishes
25 that defendant was acting pursuant to orders from a superior,
26 that does not justify his actions nor make the killings lawful.

27
28

1 B. Ryan Weemer's Statement to SA Dezeeuw Is Admissible

2 Federal Rule of Evidence 807 provides that a hearsay
3 statement is admissible, regardless of whether the declarant is
4 available at trial, if the Court determines (A) the statement is
5 material; (B) the statement is more probative than other evidence
6 reasonably available to the proponent; and © the general purpose
7 of the Rules and the interests of justice are best served by its
8 admission. Here, the statement by Ryan Weemer about the charged
9 offense is material. It is reliable because the statement
10 amounts to a criminal confession during a job application with
11 the Secret Service. This certainly is the type of highly
12 incriminating statement that one would only expect the declarant
13 to make if it was true. Additionally, unlike some instances
14 where a confession may contain attempts to shift blame to others,
15 Weemer did not name any other participants in the crime and only
16 spoke directly about his own act of shooting the detainee. While
17 he did reference the fact that other Marines killed the rest, the
18 statement is not an untrustworthy attempt to minimize or shift
19 blame to another. Lastly, if Weemer is unavailable, this would
20 be the only evidence of his account that is available to the
21 government (and that is not barred from admission by Crawford,
22 discussed below). Thus, the interests of justice would be served
23 by its admission.

24 If Weemer is unavailable at trial, then the statement is
25 also admissible under Rule 804(b)(3) as a statement against
26 interest. As discussed above, the statement was so far against
27

1 Weemer's interest at the time and under the circumstances of the
2 statement, that a reasonable person in his position would not
3 have made the statement if it were not true.

4 The statement to SA Dezeeuw was not "testimonial" within the
5 meaning of Crawford v. Washington, 541 U.S. 36 (2004). There,
6 the Supreme Court held that testimonial statements are not
7 admissible against a defendant unless the defendant had a prior
8 opportunity to examine the declarant about the statements,
9 explaining that admission of such testimonial statements violates
10 the Confrontation Clause. Id. at 68. However, the Supreme Court
11 also explained that non-testimonial statements are admissible
12 according to standard hearsay rules and are exempted from
13 Confrontation Clause scrutiny. Id. The Supreme Court explained
14 that the term testimonial applies, at a minimum: "to prior
15 testimony at a preliminary hearing, before a grand jury, or at a
16 former trial; and to police interrogations." Id.

17 The Supreme Court later addressed whether all statements to
18 law enforcement officers during 911 calls or at the scene of
19 crimes are "testimonial" for Confrontation Clause purposes.
20 Davis v. Washington, 547 U.S. 813 (2006). In finding that not
21 all statements to law enforcement officers are testimonial, the
22 Court explained:

23 The text of the Confrontation Clause reflects this focus [on
24 testimonial hearsay]. It applies to 'witnesses' against the
25 accused-in other words, those who 'bear testimony.' . . .
26 'Testimony,' in turn, is typically 'a solemn declaration or
affirmation made for the purpose of establishing or proving
some fact.' . . . An accuser who makes a formal statement
to government officers bears testimony in a sense that a

1 person who makes a casual remark to an acquaintance does
2 not.

3 Id. at 823-824 (citations omitted and emphasis added). The Court
4 went on to explain what it meant by the term "interrogation" in
5 Crawford, stating "we had immediately in mind (for that was the
6 case before us) interrogations solely directed at establishing
7 the facts of a past crime, in order to identify (or provide
8 evidence to convict) the perpetrator." Id. at 826.

9 The Ninth Circuit has also explained that not all statements
10 made to law enforcement officers fall within Crawford's
11 proscription. Rather, the statements must be the result of
12 interrogation aimed at building a criminal case before they will
13 be deemed "testimonial." See Leavitt v. Arave, 383 F.3d 809, 830
14 n.22 (9th Cir. 2004) (murder victim's statements to police, who
15 arrived in response to her 911 call, that prowler whom she
16 believed to be defendant tried to enter her home did not
17 implicate Confrontation Clause concerns identified in Crawford);
18 see also United States v. Cervantes-Flores, 421 F.3d 825, 833
19 (9th Cir. 2005) (explaining distinction between testimonial and
20 non-testimonial statements exists in Confrontation Clause
21 analysis in part because of "skepticism of government officers
22 preparing evidence against a defendant"). As in Leavitt, the
23 involvement of the government official here (Dezeeuw) was not
24 made "with an eye toward trial" and was not designed to build a
25 criminal case against defendant. Accordingly, the statements do
26 not raise the potential for prosecutorial abuse underpinning the
27

1 Supreme Court's construction of the Confrontation Clause.

2 Crawford, 541 U.S. at 56, n.7.

3 Weemer's statements to SA Dezeeuw should be admitted.

4 DATED: August 13, 2008

Respectfully submitted,

5 THOMAS P. O'BRIEN
6 United States Attorney

7 SHERI PYM
8 Assistant United States Attorney
9 Chief, Riverside Office

/s/

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DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

MCO 3300.4
JAO
20 Oct 03

MARINE CORPS ORDER 3300.4

From: Commandant of the Marine Corps
To: Distribution List

Subj: MARINE CORPS LAW OF WAR PROGRAM

Ref: (a) DOD Directive 5100.77 of 9 Dec 98
(b) CJCSI 5810.01B
(c) SECNAVINST 3300.1A
(d) Geneva Conventions of 1949 for the Protection of War Victims
(e) Hague Convention No. IV of 1907 Respecting the Law and Customs of War on Land
(f) MCO 1510.89A
(g) MCO 1510.90
(h) MCO 1510.97

Encl: (1) Definitions
(2) Entry-Level Training Objectives
(3) Follow-On Training Objectives
(4) Specialized Training Objectives
(5) Detailed Training Objectives
(6) Report, Investigation, and Disposition of Alleged Law of War Violations ("Reportable Incidents")

1. Situation

a. Reference (a) directs the Armed Forces of the United States to comply with the law of war during the conduct of military operations, provides policy and guidance, and institutes and assigns responsibilities for implementing the Department of Defense (DOD) Law of War Program. Specifically, reference (a) requires that the Commandant of the Marine Corps (CMC):

(1) ensures that Marines comply with the law of war during all armed conflicts, however characterized, and with the principles and spirit of the law of war during all other operations;

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MCO 3300.4
20 Oct 03

(2) implements effective programs to prevent violations of the law of war, including law of war training and dissemination;

(3) ensures that qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations; and

(4) implements programs to report and investigate alleged law of war violations.

b. Reference (b) implements the DOD Law of War Program (reference (a)), establishing joint policy, assigning responsibilities, and providing guidance regarding United States law of war obligations, enabling the military services and combatant commands to effect common policy for coordinated actions.

c. Reference (c) implements the DOD Law of War Program (reference (a)), within the Department of the Navy (DON). In addition to the requirements established in reference (a), reference (c) requires that the CMC:

(1) implements programs providing accession (hereinafter referred to as entry level) and specialized law of war training for Marines, as required by their duties and responsibilities;

(2) identifies billets requiring special knowledge of aspects of the law of war, and assigns appropriately trained personnel to those billets;

(3) establishes policies, procedures, and directives to ensure compliance with the law of war; and

(4) implements internal policies and procedures for the prompt reporting of alleged violations of the law of war committed by or against members of the naval establishment.

2. Mission

a. To establish the Marine Corps Law of War Program which complies with DOD requirements, implements doctrine, and establishes appropriate training requirements to

MCO 3300.4
20 Oct 03

ensure Marines and civilian members of Marine Corps activities conduct military operations in accordance with applicable laws, regulations, and policies.

b. This Order implements the requirements established in the references within the Marine Corps.

c. Enclosure (1) contains definitions applicable to this order.

3. Execution

a. Commander's Intent and Concept of Operations

(1) Commander's Intent

(a) Marines and all personnel accompanying Marine Corps forces will conduct all military operations in accordance with applicable laws, regulations, and policies. In particular, they will comply with the law of war during all armed conflicts and with the principles and spirit of the law of war during all other military operations.

(b) All plans, policies, directives, publications, and training programs will be consistent with applicable law, regulation, and policy.

(2) Concept of Operations

(a) All Marines will receive law of war or operational law training as outlined below. The training program established in this Order is derived from references (d) and (e), other international treaties and agreements to which the United States is a party, customary international law, United States domestic law, regulation, and policy; and various service and joint directives, publications, and instructions.

(1) Formal Law of War Training. In accordance with references (a) and (c), Marines will receive the following law of war training:

(a) Entry-Level Training. All entry-level Marines will receive law of war training as set forth in enclosure (2).

MCO 3300.4
20 Oct 03

(b) Follow-On Training. Marines attending Marine Corps formal or unit-run schools (not including entry-level formal schools), operational units prior to deployment, and Marines identified by billet in enclosure (3) will receive follow-on law of war training as set forth in enclosure (3).

(c) Specialized Training. Additional law of war training depends upon a Marine's billet or assigned duties and responsibilities. In particular, all personnel responsible for *directing or planning* combat operations will receive law of war training sufficient to enable them to comply with applicable law, regulation, and policy in all situations reasonably contemplated. Marines serving in functions specified by enclosure (4) will receive "specialized" law of war training as set forth in enclosure (4).

(d) Detailed Training. All Marine Corps judge advocates will receive "detailed" operational law training as set forth in enclosure (5).

(2) Follow-on Training Applications. Follow-on level law of war training will be incorporated into realistic training exercises at all operational levels through use of realistic mission-oriented scenarios derived from the training objectives outlined in enclosure (3).

b. Report, Investigation, and Disposition of Alleged Law of War Violations. All suspected law of war violations committed by or against Marines of personnel accompanying Marine Corps forces will be promptly reported and thoroughly investigated. If appropriate, disciplinary or administrative action will be taken. See enclosure (6) for specific guidance.

c. Evaluation. The effectiveness of the Marine Corps Law of War Program will be evaluated through the following:

- (1) the Marine Corps Common Skills (MCCS);
- (2) the Marine Air-Ground Task Force (MAGTF) Staff Training Program (MSTP);
- (3) the Marine Expeditionary Unit Special Operations Capable (MEU (SOC)) Certification process, although this

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20 Oct 03

training is not a prerequisite for a MEU to receive SOC certification; and

(4) the Naval Inspector General (Deputy Inspector General for Marine Corps Matters) (IGMC) inspections.

4. Subordinate Element Tasks

a. Deputy Commandant for Plans, Policies, and Operations (DC PP&O) will:

(1) act as primary staff sponsor of the Marine Corps Law of War Program;

(2) ensure that all plans, orders, policies, directives, publications, and other documents concerning Marine Corps operational matters under his/her cognizance are reviewed by the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) for consistency with applicable laws, regulations, and policies, including the law of war; and

(3) coordinate with the SJA to CMC to provide overall coordination, approval, and promulgation of major Marine Corps policies, plans, and training involving the Marine Corps Law of War Program.

b. Commanding General, Marine Corps Combat Development Command (CG MCCDC) will:

(1) In coordination with SJA to CMC, ensure that formal law of war and operational law training required by this Order are incorporated into existing training programs under the cognizance of CG MCCDC, to include:

(a) entry-level law of war training to be provided in accordance with enclosure (2);

(b) follow-on law of war training to be provided in accordance with enclosure (3) at formal schools (other than entry-level formal schools), including The Basic School, Expeditionary Warfare School, Command and Control Systems School, MAGTF Intelligence Officers Course, Command and Staff College, Marine Corps War College, and the staff noncommissioned officer academies (including the sergeants courses); and

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(c) "detailed" operational law training that meets the training objectives contained in enclosure (5) to be provided to newly accessing Marine Corps judge advocates in conjunction with the Basic Lawyer Course, Naval Justice School, Naval Education & Training Command, Newport, Rhode Island.

(2) In coordination with SJA to CMC, employ qualified legal instructors, if available, to conduct law of war training during all existing training programs under the cognizance of CG MCCDC, as required in this Order.

(3) In coordination with SJA to CMC, establish law of war evaluation standards to be incorporated into MCCS.

c. Marine Forces (MARFOR) Commanders, including Commander, Marine Forces Reserve (COMMARFORRES) will:

(1) as Service component commanders of unified commands, ensure that all plans, policies, directives, orders, letters of instruction, rules of engagement, and similar documents concerning operational matters, prepared by or subject to review by them, are reviewed by their judge advocates for consistency with applicable laws, regulations, and policies, including the law of war;

(2) include law of war issues in unit training and evaluation, including MSTP and MEU (SOC) Certification (this Order is not intended to add another requirement to attaining SOC certification);

(3) make available/provide qualified legal instructors for, and conduct:

(a) follow-on law of war training, in accordance with paragraphs 3a(2)(a)(1)(b) and 3a(2)(a)(2) of this Order;

(b) "specialized" law of war training in accordance with paragraph 3a(2)(a)(1)(c) of this Order;

(4) ensure qualified legal advisors are immediately available to operational commanders at all levels of command, in coordination with Deputy Commandant for Manpower & Reserve Affairs (DC M&RA), and SJA to CMC, to provide advice concerning law of war compliance; and

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(5) ensure that judge advocates assigned as staff judge advocates, deputy staff judge advocates, or legal advisors to operational commands are granted appropriate clearances and access to classified information and command spaces necessary to carry out their responsibilities under this Order.

d. SJA to CMC will:

(1) provide overall legal guidance for the Marine Corps Law of War Program, including:

(a) development, oversight, and review of all plans, policies, directives, orders, letters of instruction, and similar documents involving or related to operational matters; and

(b) coordination of operational law matters with other Federal departments and agencies, including the DOD General Counsel, and the DOD Law of War Working Group;

(2) conduct periodic reviews of the Marine Corps Law of War Program;

(3) oversee, approve, coordinate, and monitor Marine Corps plans and policies, curriculum, and instruction for training and education in the law of war and operational law for the "specialized" and "detailed" training levels;

(4) assist DC PP&O in developing and coordinating Marine Corps plans and policies involving operational law issues, and in reviewing international agreements, treaties, and other matters involving these issues;

(5) review Headquarters Marine Corps staff agency policies, procedures, plans, directives, publications, and similar documents pertaining to operational matters for conformity with applicable laws, regulations, and policies;

(6) In coordination with CG MCCDC, create and conduct detailed operational law training required for judge advocates, in accordance with enclosure (5);

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(7) Support CG MCCDC:

(a) Assist in the development and implementation of Marine Corps law of war and operational law training programs, to include providing qualified legal instructors, when available, to conduct Marine Corps follow-on law of war training during all existing training programs under the cognizance of CG MCCDC;

(b) monitor and review all entry-level and follow-on instruction and instructional materials related to law of war and operational law to ensure the instruction is relevant and consistent with current international law and domestic laws, regulations, and policies; and

(c) assist in the development and implementation of evaluation standards to be incorporated into MCCS;

(8) Support MARFOR Commanders:

(a) assist, approve, develop, and implement law of war training and evaluation programs, including those incorporated into the MSTP and MEU (SOC) Certification process (this Order is not intended to add another requirement to attaining SOC certification);

(b) review and approve all instruction and instructional materials related to law of war and operational law; and

(9) assist the Naval Inspector General (Deputy Inspector General for Marine Corps Matters) in developing and implementing inspection procedures to evaluate the Marine Corps Law of War Program.

e. The Naval Inspector General (Deputy Inspector General for Marine Corps Matters) will:

(1) ensure that the inspection program monitors the adequacy of law of war training and the review of Marine Corps plans for conformity with reference (c), and that Marine operations are executed consistent with reference(c);

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(2) ensure that reportable incidents involving alleged violations of the law of war committed by or against Marines are investigated; and

(3) provide a copy of all such investigations to the SJA to CMC.

5. Administration and Logistics. Violations of the law of war and failure to report and investigate possible law of war violations as required by this Order are punishable under the Uniform Code of Military Justice.

6. Command and Signal

a. Signal. This order is effective the date signed.

b. Command. This Order is applicable to the Marine Corps Total Force.



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DEFINITIONS

1. Law of War. The "law of war" is that part of international law that regulates the conduct of armed hostilities. Frequently, it is referred to as the "law of armed conflict." The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

2. Operational Law. "Operational law" is that body of international, foreign (host nation), and United States domestic laws, regulations, and policies that directly affect United States military operations across the operational spectrum--from peacetime activities to combat operations. Many relevant laws, including domestic laws, regulations, and policies, fall outside the "law of war."

a. International Law. The law of war is but one part of international law binding on the United States that may directly affect military operations. Other treaties, international agreements, and customary law norms governing air, sea, and space use, arms control, status of forces agreements (SOFAs), basing rights, human rights, communications, sovereign and diplomatic relations, criminal jurisdiction, treaty law, and international organizations also comprise critical aspects of "operational law." Some international agreements, like arms control and human rights agreements, may produce legal obligations that overlap with or require interpretation under the "law of war," while other agreements are entirely distinct from it. Certain international law obligations between states may change once those states are involved in armed conflict against each other.

b. Foreign Law. Except as modified by a SOFA or other multilateral or bilateral agreement with the state concerned, United States peacetime military operations are also subject to the domestic law of nations in which United States forces are deployed. Armed conflict between two or more states will generally modify the legal obligations between those states, but not as between those states and friendly and neutral nations.

c. Domestic Law, Regulation, and Policy. Transcending traditional legal disciplines, operational law also incorporates

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relevant aspects of diverse bodies of United States domestic law; as well as executive orders, administrative regulations, and Department of Defense, Joint, and Service directives and policies that directly affect military operations. Although domestic laws, regulations, and policies affecting United States military activities, including combat operations, may be related to the "law of war," they are technically distinct from it.

3. Reportable Incident. A possible, suspected, or alleged violation of the law of war.

4. Law of War Program. The title "Law of War Program" is used in this Order because the United States is bound under international law, as implemented in DOD Directive 5100.77 of 9 Dec 98 and SECNAVINST 3300.1A or their current editions and this Order, to educate its military forces in the "law of war," and to provide legal advisors at all levels to advise commanders concerning "law of war" compliance. All Marines must, therefore, receive formal "law of war" training. Marines also require training in certain other aspects of international law and domestic laws, regulations, and policies directly affecting military activities, including combat operations, which fall outside the "law of war." Accordingly, any reference to "law of war" training in this Order implies an approach incorporating critical relevant aspects of these rules, commensurate with a Marine's duties and responsibilities.

a. The term "operational law" is used in this Order in connection with the training and mission-support activities of Marine judge advocates. These officers will receive detailed training in the myriad laws, regulations, and policies comprising the wider discipline of "operational law." Any reference to "operational law" training or duties in this Order inherently includes the "law of war."

b. Despite association of its title with armed conflict, the DOD Law of War Program implemented by this Order establishes requirements, doctrine, and training that apply to all Marines, at all times, across the spectrum of Marine Corps activities, during peacetime and during any combat operations.

5. Qualified Legal Instructor. For purposes of this Order, "qualified legal instructors" in the law of war and operational law are persons, who by their training, education, or

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experience, have acquired special expertise in the law of war and operational law sufficient to fully and completely address the objectives identified for the program(s); they are expected to teach.

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ENTRY-LEVEL TRAINING OBJECTIVES

1. Background

a. Teaching the basic principles of the law of war at the entry level is an essential element in the establishment of good order and discipline within the Marine Corps, especially as it relates discipline to the use of force in combat. Consequently, all newly accessing Marines must receive entry-level law of war training that meets the training objectives as outlined in paragraph 3 of this enclosure.

b. Entry-level training must be clear and direct, positive in substance, and dynamic in approach. It will express in simple, succinct form, those restrictions on conduct in combat that are absolute. This training will be designed to ensure that all Marines are aware of, can understand, remember, and meet their responsibilities under the law of war.

c. Training will emphasize the compatibility of the law of war with the principles of war, tactical considerations, and good leadership. It will stress the overall effective philosophy of the law of war and the United States dedication to adherence to the law of war during the conduct of military operations.

2. Training Requirements

a. Entry-level law of war training will be provided at the entry-level school deemed appropriate by CG MCCDC, but must be provided to every newly accessing Marine, whether officer or enlisted.

b. Students will be tested on their understanding of their entry-level training to reinforce that instruction and determine its effectiveness.

c. Under no circumstances will law of war instruction be merged with any block or area of instruction that will have the effect of minimizing the importance of the law of war or placing in doubt the absoluteness of its principles.

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3. Entry-Level Training Objectives. Entry-level training will teach the following.

a. Basic Principles of the Law of War

(1) Marines fight only enemy combatants.

(2) Marines do not harm enemy soldiers who surrender. Marines disarm them and turn them over to their superiors.

(3) Marines do not torture or kill enemy prisoners of war or detainees.

(4) Marines collect and care for the wounded, whether friend or foe.

(5) Marines do not attack medical personnel, facilities, equipment, or chaplains.

(6) Marines destroy no more than the mission requires.

(7) Marines treat all civilians humanely.

(8) Marines do not steal; they respect private property and possessions.

(9) Marines do their best to prevent violations of the law of war, and report all violations to their superiors.

b. Summary. Marines are disciplined in combat. Violating the law of war dishonors our Nation, our Marine Corps, and ourselves. Far from weakening our enemy's will to fight, disobeying the law of war strenghtens it. Disobeying the law of war is also a crime punishable under the Uniform Code of Military Justice.

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FOLLOW-ON TRAINING OBJECTIVES

1. Follow-On Training

a. Follow-on training builds upon the basic concepts imparted during entry-level training, exploring them in more depth and detail, and employing traditional law of war terminology. In addition to fundamental concepts of the law of war, follow-on training teaches Marines central aspects of other laws, regulations, and policies directly affecting military operations.

b. Follow-on training establishes a baseline for Marines whose military assignment may involve exposure to combat or direct confrontation with a hostile force, or whose military assignment plans for such operations. Marines must possess sufficient comprehension of these rules to enable them to comply with them in the performance of their duties.

c. Follow-on training must be tailored to the depth and detail commensurate with the Marine's billets, duties, and responsibilities.

d. Follow-on training will stress the foundational principles upon which the law of war is built; to include, "military necessity" or "military objective", "humanity" or the "avoidance of unnecessary suffering", "proportionality", and "distinction" or "discrimination." These principles are expressed in treaties, principally the Geneva Conventions of 1949 for the protections of war victims, which established humanitarian protections for the victims of war; Hague Convention No. IV of 1907 respecting the law and customs of war on land and its annexed regulations, which regulate the means and methods of conducting warfare; and, in customary international law. Other treaties, such as the Geneva Gas Protocol of 1925 protocol for the prohibition of poisonous gases and bacteriological methods of warfare, the Biological Weapons of 10 Apr 72 Convention, the Chemical Weapons Convention, and the United Nations Convention on Certain Conventional Weapons and its Protocols, also restrict specific aspects of warfare; and important principles of these treaties are included in the training objectives in paragraph 3 of this enclosure. Follow-on training will incorporate central tenets of some or all of the above, as well as relevant domestic laws, regulations, and

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policies, as appropriate for the audience as outlined in the training objectives in paragraph 3 of this enclosure.

2. Training Requirements

a. Follow-on law of war training will:

(1) be taught at all Marine Corps formal schools beyond the entry level, including The Basic School, Expeditionary Warfare School, Command and Control Systems School, MAGTF Intelligence Officers Course, Command & Staff College, staff noncommissioned officers academies, and at locally conducted schools such as sergeants and corporals courses, during operational pre-deployment unit training;

(2) be incorporated into tactical exercises at all operational levels through use of realistic mission-oriented scenarios derived from the training objectives outlined in paragraph 3 of this enclosure

(3) meet the training objectives set forth in paragraph 3 of this enclosure; and

(4) employ instructional materials approved by CG MCCDC, in coordination with the SJA to CMC.

b. Follow-on law of war training is especially appropriate and highly recommended for Marines serving in the following billets:

(1) company/battery commanders and executive officers and platoon commanders serving with the operating forces;

(2) Marine special agents assigned to the Naval Criminal Investigative Service (NCIS) as investigators, and military police investigators in the operating forces;

(3) civilian NCIS special agents/investigators under the operational control of USMC units; and

(4) members of interrogator-translator and counterintelligence teams.

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3. Follow-On Training Objectives. Follow-on training will address, at a level of depth and detail as appropriate, the following:

a. Definition, discussion, and illustration of the four major Principles of the law of war in the context of lawful targeting. The four major principles are:

- (1) Principle of Military Necessity;
- (2) Principle of Distinction or Discrimination;
- (3) Principle of Unnecessary Suffering or Humanity; and,
- (4) Principle of Proportionality.

b. Discuss and illustrate the specific protections accorded the following category of persons under the law of war:

- (1) civilians;
- (2) prisoners of war;
- (3) wounded and sick in the field and at sea; and,
- (4) medical personnel, medical units and establishments, and chaplains.

c. Define, discuss, and illustrate the following tactics, stratagems, and concepts:

- (1) ruses;
- (2) use of enemy property, to include:
 - (a) enemy uniforms;
 - (b) colors; and
 - (c) equipment.
- (3) treachery and perfidy, to include:
 - (a) feigning incapacitation;

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- (b) feigning surrender;
- (c) feigning civilian or other noncombatant status;
- (d) feigning protected status;
- (e) misuse of Red Cross, Red Crescent, or cultural property; and,
- (f) certain uses of "booby traps;"

(4) assassination;

(5) espionage; and,

(6) reprisals.

d. Discussion the law, regulation, and policy governing the use of certain weapons and munitions, to include the following:

(1) Certain small arms projectiles; including hollow point ammunition, sniper rifles, .50 caliber machine guns, and shotguns;

(2) fragmentation weapons;

(3) landmines and booby traps;

(4) incendiaries;

(5) lasers;

(6) chemical and biological weapons;

(7) riot control agents; and,

(8) non-lethal weapons.

e. Discussion reasons and obligations to comply with the law of war (even if the enemy does not), the duty to report violations, and the consequences for failing to comply.

f. Definition, discussion, and illustration rules of engagement and particularly the concept of self-defense, as articulated in CJCSI 3121.01A, or its current edition.

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