

# 6.2: U.S. and International Support for National Security Cases in Afghanistan

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## Summary

This chapter provides an overview of the United States (U.S.) and other international support for proper adjudication of national security cases in Afghanistan.

## Introduction

National security is vital to the stability of Afghanistan. As a sovereign nation with its own criminal justice system, the Government of Afghanistan must be able to adjudicate national security cases under Afghan law. Foreign nations need to be able to properly transfer custody of suspected insurgents captured on the battlefield to the Government of Afghanistan for prosecution in an Afghan court. The mechanism to process national security cases, however, has not been transparent. The perception by the International Security Assistance Forces Afghanistan (ISAF) was the Afghan justice system was a “revolving door” or a “catch-and-release” system. That is, insurgents captured by ISAF were acquitted and released back on the battlefield despite the transfer of physical or photographic evidence to Afghan authorities. As a result, the U.S. developed various programs to more fully understand the process of national security cases and support the Government of Afghanistan “to facilitate fair and transparent prosecutions of national security cases within the Afghan criminal justice system.”<sup>1</sup>

## U.S. Support to National Security Cases

### Operation Tombstone<sup>2</sup>

Operation Tombstone was a program developed in 2009 to specifically address the “catch-and-release” detention issue by the U.S. Department of Defense (DOD) Asymmetric Warfare Group (AWG) Judge Advocate General (JAG)/Special Advisor Group (SAG) in coordination with the U.S. Department of State Bureau of International Narcotics and Law Enforcement Affairs (INL), Combined Joint Task Force (CJTF)-82, CJTF Paladin, Joint Task Force-435 (now Combined Joint Interagency Task Force-435), Task Force Yukon/Rakkasans, and Afghanistan’s Attorney General’s Office (AGO) Directorate of Prosecution of Crimes against Internal and External Security (PIES).

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<sup>1</sup> U.S. Department of State, Corrections Programs in Afghanistan Fact Sheet, Bureau of International Narcotics and Law Enforcement Affairs (INL), May 4, 2012: <http://www.state.gov/j/inl/rls/fs/189319.htm>.

<sup>2</sup> Information regarding Operation Tombstone was provided by the Department of Defense, Group Judge Advocate, Asymmetric Warfare Group and the author of the Primer, Kristine Ziems, INL Justice Advisor Kabul (2009-2010).

Once the U.S. transfers custody of a suspected insurgent to Afghan authorities the suspect becomes an Afghan detainee awaiting trial for crimes against the state. From most accounts, the Afghan conviction rate of transferred suspected insurgents was low. A variety of reasons contributed to the lack of prosecution success, mainly the lack of evidence and failure to develop cases in accordance with Afghan criminal law. Material evidence seized by the U.S. on objectives was typically exploited at one of several forensic labs rather than retained for Afghan prosecution. Once forensic analysis was complete, materials were either stored or destroyed. The primary goal for forensic analysis was to develop intelligence packets for future targeting. The forensic products, once sanitized, were thought to be sufficient for Afghan courts to admit as evidence. There was no emphasis to retain the physical evidence for admission at trial. Even if evidence was preserved, U.S. forces were collecting and preserving the evidence in accordance with U.S. policy as opposed to collection practices spelled out in Afghan law and procedure. Consequently, the physical evidence was not considered against a suspected insurgent at trial because no Afghan official established the link between the material and the suspect. As a result, confusion and mistrust developed when Afghan judges would acquit suspected insurgents despite the transfer of physical and photographic evidence by ISAF. There was an appearance of judicial corruption. Afghan judges, however, expressed several grounds to acquit, including improperly gathered evidence not linked to the suspect by an Afghan investigator/prosecutor using the proper forms. It was learned that Afghan forms and procedures exist for establishing the linkage.

Understanding the gap between U.S. detention and Afghan criminal prosecution led to the development of Operation Tombstone whereby PIES prosecutors were embedded with U.S. forces. The prosecutors were able to properly develop and process cases for prosecution under Afghan law officially establishing the link between the material and the suspect. The initial pilot project embedded PIES prosecutors with U.S. forces as well as in two forensic labs. The results were significant. In the pilot province with the embedded PIES prosecutors, the release rate for suspected insurgents declined from 60 percent to 0 percent. Within the first three weeks, cases against eight insurgents were developed and indictments filed, including indictments for a family of four bomb makers responsible for over five improvised explosive device (IED) incidents that injured six U.S. service members. In addition, the embedded prosecutors provided training for U.S.-Afghan partnered forces. Notably, the lines of communication with PIES were opened for the first time and are now engaged regularly. This has allowed for additional support to be provided to PIES including material and equipment support, as well as trainings.

## Evidence Collection Guides

Based in large part on the information gathered leading up to and during Operation Tombstone, two evidence collection guides were developed. In July 2010, ISAF published an Evidence Collection Guide to help capturing units provide evidence and witness statements against the suspects for use in an Afghan court of law.<sup>3</sup> In February 2012, CJIATF-435's Legal Operations Directorate, "in conjunction with the Detainee Criminal Investigation and Prosecution Training Team and the Regional Command Battlespace Owners and their Afghan partners," released a more detailed Afghanistan Theater of Operations Evidence Collection Guide "to assist Coalition Forces and Afghan partners throughout Afghanistan in properly handling and documenting evidence."<sup>4</sup> The Guide is available in Dari, Pashto, and English, and helps security forces to obtain evidence in support of the prosecution of detainees initially captured in military operations:<sup>5</sup>

The Guide is meant to provide practical means and methods to properly identify, collect, preserve, and provide evidence that will be recognized and accepted by the Afghan criminal justice system. ... this Guide will assist Coalition Forces and partnered Afghan units in properly handling and documenting evidence. While each nation within the Coalition Forces may have independent national authorities to adhere to in the detention process, the techniques provided in this Guide will assist all Coalition Forces to understand the importance of the collection of evidence for each suspect in order to continue the transition to evidence based-criminal detentions.

## The Justice Center in Parwan

Afghan detainees who were originally held by the U.S. under the Law of Armed Conflict, but subsequently transferred to the Government of Afghanistan for prosecution are tried at the Justice Center in Parwan (JCIP).<sup>6</sup> JCIP is an Afghan court that adjudicates criminal cases under Afghan law. The JCIP consists of Afghan judges, prosecutors, defense attorneys, and investigators. There are two primary courts (adult and juvenile), and two appellate courts (adult and juvenile). The Afghan representatives at JCIP include the Supreme Court, the AGO, the Ministry of Justice (MOJ), NDS, the Ministry of Interior, and the Ministry of Defense.<sup>7</sup> Four

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<sup>3</sup> ISAF Evidence Collection Guide: Supporting the Prosecution of Insurgency Crimes, July 2010: <http://publicintelligence.net/isaf-guide-to-collecting-evidence-for-prosecution-in-afghan-courts/>.

<sup>4</sup> U.S. Embassy, Interagency Rule of Law (IROL) Update, Volume 1, Issue 2, 7 January 2011, previously available on HarmonieWeb Afghanistan ROL Worksite: <https://www.harmonieweb.org>. All ROL Worksite documents have reportedly been transferred to All Partners Access Network (APAN): <https://community.apan.org/default.aspx>. At the time of this writing, however, no ROL Worksite documents could be accessed on APAN. Afghanistan Theater of Operations Evidence Collection Guide, February 2012: <http://publicintelligence.net/us-army-afghanistan-evidence-collection-guide/>.

<sup>5</sup> Afghanistan Theater of Operations Evidence Collection Guide, February 2012: <http://publicintelligence.net/us-army-afghanistan-evidence-collection-guide/>.

<sup>6</sup> INL Justice Center in Parwan Fact Sheet, September 2012.

<sup>7</sup> Ibid.

Afghan non-governmental organizations (NGOs) also provided services at JCIP including the Legal Aid Organization of Afghanistan and the Center for Afghan Peace and Security.<sup>8</sup>

JCIP is currently supported by INL, CJIATF-435, and the Australian Agency for International Development (AusAID).<sup>9</sup> Specifically, INL supports approximately 100 personnel; provides equipment and supplies for most JCIP partners; operates the food court; provides non-forensic training events including topical legal issues, computers, and English; and with CJIATF-435 supports the construction and maintenance of the JCIP facilities.<sup>10</sup> CJIATF-435 also mentors the Afghan personnel and contributes to the security, forensics, and docketing at the JCIP. AusAID provides mentoring to the Afghan personnel as well.

In 2010, when JCIP was opened the average number of cases per month was less than 20.<sup>11</sup> In 2011, the monthly average grew to just under 40.<sup>12</sup> In 2012, the average number of cases expanded to over 80 a month.<sup>13</sup> In 2013, the average number of cases increased dramatically to 334 a month.<sup>14</sup> The most common charges at the JCIP are based on the Law on Combat against Terrorist Offenses, the Law on Crimes against Internal and External Security, and the Law of Firearms, Ammunition and Explosives.<sup>15</sup>

| <b>Common Charges at the JCIP</b>  |   |   |
|--|---|---|
| <b>Law on Combat against Terrorist Offenses (2008)</b>   | <b>Law on Crimes against Internal and External Security (1987)</b>  | <b>Law of Firearms, Ammunition and Explosives (2005)</b>  |
| <p><b>Art. 14:</b> Offenses related to the use of explosives and other lethal devices</p> <p><b>Art. 17:</b> Attempt to commit the offense or participation</p> <p><b>Art. 19:</b> Supporting or service to the offense (i.e., membership in a terrorist organization)</p> | <p><b>Art. 5:</b> Subversive activities</p> <p><b>Art. 27:</b> Failure to report about crimes that are against the internal and external security</p> | <p><b>Art. 9:</b> Deadline for registration of guns and ammunition</p> <p><b>Art. 10:</b> Violation of registration</p> <p><b>Art. 11:</b> Unlawful possession of firearms and ammunition</p> |

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Information provided by INL/AP, February 2014.

<sup>15</sup> INL Justice Center in Parwan Fact Sheet, September 2012. Law on Combat against Terrorist Offenses, Official Gazette No. 952, 1 July 2008, English translation cross checked with Official Gazette by JSSP Translators, March 13,

## The Leahy Law

The U.S. is obligated to vet Department of State assistance and DOD-funded training programs for foreign security forces units to ensure that recipients have not committed gross human rights abuses. If an individual or unit is discovered to have committed a gross violation of human rights, U.S. assistance is withheld. This is commonly referred to as the Leahy Law.

The Leahy Law refers to discreet sections in the U.S. Foreign Assistance Act (FAA) of 1961, as amended,<sup>16</sup> and the U.S. Defense Appropriations Act.<sup>17</sup> The FAA, as amended, applies to all assistance to foreign security forces under the FAA and the Arms Export Control Act.<sup>18</sup> The Defense Appropriations Act is specific to DOD-funded training programs for security forces or police of a foreign country. The Leahy provision in the FAA cannot be waived, but the Leahy prohibition in the Defense Appropriations Act can be waived if the Secretary of Defense, after consultation with the Secretary of State, determines that “extraordinary circumstances” require it.

The Leahy provision within the FAA provides:<sup>19</sup>

(a) **IN GENERAL:** No assistance shall be furnished under this chapter or the Arms Export Control Act [22 U.S.C. 2751 et seq.] to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.

(b) **EXCEPTION:** The prohibition in subsection (a) shall not apply if the Secretary determines and reports to the Committee on Foreign Relations of the Senate, the Committee on Foreign Affairs of the House of Representatives, and the Committees on Appropriations that the government of such country is taking effective steps to bring the responsible members of the security forces unit to justice.

(c) **DUTY TO INFORM:** In the event that funds are withheld from any unit pursuant to this section, the Secretary of State shall promptly inform the foreign government of the basis for such action and shall, to the maximum extent practicable, assist the foreign government in taking effective measures to bring the responsible members of the security forces to justice.

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2013. Law on Crimes against Internal and External Security of the Democratic Republic of Afghanistan, Decree No. 153, Oct. 1987, Cheechi Translation Unit/Fayeq/Ashraf/Sharif, June 23, 2005. The Law on Fire Weapons, Ammunitions and Explosive Materials, Official Gazette No. 855, 21 June 2005 (1384), translation unknown.

<sup>16</sup> U.S. Foreign Assistance Act of 1961, as amended, Public Law 87-195, September 4, 1961; 22 U.S.C. §2151 et seq. (hereinafter FAA).

<sup>17</sup> Consolidated and Further Continuing Appropriations Act, 2013, 113<sup>th</sup> Congress HR 933:

<http://www.gpo.gov/fdsys/pkg/BILLS-113hr933enr/pdf/BILLS-113hr933enr.pdf>.

<sup>18</sup> U.S. Arms Export Control Act, Pub. L. 90-629, Oct. 22, 1968, 22 U.S.C. § 2751 et seq.

<sup>19</sup> FAA, *supra* note 16, section 620M; see also Cornell University Law School, Legal Information Institute, 22 U.S.C. § 2378d - Limitation on assistance to security forces: <http://www.law.cornell.edu/uscode/text/22/2378d>.

(d) CREDIBLE INFORMATION: The Secretary shall establish, and periodically update, procedures to—

(1) ensure that for each country the Department of State has a current list of all security force units receiving United States training, equipment, or other types of assistance;

(2) facilitate receipt by the Department of State and United States embassies of information from individuals and organizations outside the United States Government about gross violations of human rights by security force units;

(3) routinely request and obtain such information from the Department of Defense, the Central Intelligence Agency, and other United States Government sources;

(4) ensure that such information is evaluated and preserved;

(5) ensure that when vetting an individual for eligibility to receive United States training the individual's unit is also vetted;

(6) seek to identify the unit involved when credible information of a gross violation exists but the identity of the unit is lacking; and

(7) make publicly available, to the maximum extent practicable, the identity of those units for which no assistance shall be furnished pursuant to subsection (a).

The Leahy provision in the Defense Appropriations Act states:<sup>20</sup>

(a) None of the funds made available by this Act may be used to support any training program involving a unit of the security forces or police of a foreign country if the Secretary of Defense has received credible information from the Department of State that the unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken.

(b) The Secretary of Defense, in consultation with the Secretary of State, shall ensure that prior to a decision to conduct any training program referred to in subsection (a), full consideration is given to all credible information available to the Department of State relating to human rights violations by foreign security forces.

(c) The Secretary of Defense, after consultation with the Secretary of State, may waive the prohibition in subsection (a) if he determines that such waiver is required by extraordinary circumstances.

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<sup>20</sup> Consolidated and Further Continuing Appropriations Act, 2013, *supra* note 17, Section 8057.

(d) Not more than 15 days after the exercise of any waiver under subsection (c), the Secretary of Defense shall submit a report to the congressional defense committees describing the extraordinary circumstances, the purpose and duration of the training program, the United States forces and the foreign security forces involved in the training program, and the information relating to human rights violations that necessitates the waiver.

Allegations of torture and ill-treatment by NDS when detaining suspects could trigger application of the Leahy Law.<sup>21</sup> The State Department has defined “the unit to be trained as the unit to be vetted. Thus, for individual training, the individual will be vetted. For unit-level training, the unit itself will be vetted. For example, if the training is targeted at a platoon, only the platoon will be vetted, not the parent unit.”<sup>22</sup> In Afghanistan, and particularly in support of national security cases, the U.S. would be prohibited from providing funding, weapons or training to NDS if the Secretary of State has credible evidence that gross human rights violations have been committed by NDS, unless the Secretary of State determines that the Government of Afghanistan is taking effective remedial measures. Traditionally, the State Department has taken the view that civilian prosecutors assigned to the Attorney General’s Office are not members of a foreign security force. Accordingly, support could continue for PIES because it is an independent directorate of the Attorney General’s Office and answers to the Attorney General. There has been confusion regarding training PIES prosecutors because they were not properly defined as a separate “unit” from NDS. This is in part because PIES prosecutors are detailed to the NDS (as the lead intelligence organization responsible for the internal and external security of the state) and they work closely with NDS intelligence and investigation departments to develop cases. There is also confusion between the application of the Leahy Law and the withholding of certain assistance as a policy decision because of concerns about human rights violations.

It should be noted that partly in response to the United Nations Assistance Mission in Afghanistan’s (UNAMA) report of abuse by the NDS and the decertification of NDS facilities by ISAF, the NDS trained human rights officers and deployed them to 16 of their facilities.<sup>23</sup> The NDS officers were tasked with training prison guards on human rights standards, investigating and documenting any allegations of abuse within their assigned facility, and reporting their

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<sup>21</sup> See Treatment of Conflict Related Detainees in Afghan Custody, United Nations Assistance Mission in Afghanistan (UNAMA) and UN Office of the High Commissioner for Human Rights (UNHCHR), October 2011: [http://unama.unmissions.org/Portals/UNAMA/Documents/October10 %202011 UNAMA Detention Full-Report ENG.pdf](http://unama.unmissions.org/Portals/UNAMA/Documents/October10%202011%20UNAMA%20Detention%20Full-Report%20ENG.pdf); see also Treatment of Conflict Related Detainees in Afghan Custody: One Year On, UNAMA and UNHCHR, January 2013: <http://unama.unmissions.org/LinkClick.aspx?fileticket=VsBLOS5b37o%3D&tabid=12323&language=en-US>.

<sup>22</sup> U.S. General Accounting Office, Military Training: Management and Oversight of Joint Combined Exchange Training, GAO/NSIAD-99-173, July 1999, p. 53: <http://www.gao.gov/assets/160/156645.pdf>.

<sup>23</sup> Information provided by the U.S. Embassy, Interagency Rule of Law Office (IROL), February 2014.

findings to the NDS headquarters in Kabul.<sup>24</sup> The international community and ISAF continue to monitor the performance of the NDS human rights officers.<sup>25</sup>

## International Support to NDS

Limited information is available on international support provided to the NDS or PIES. According to UNAMA, the United Kingdom of Great Britain (UK) and the United Nations Development Programme (UNDP) have provided training and assistance to NDS officials.<sup>26</sup>

### The United Kingdom of Great Britain

According to the UK embassy in Afghanistan, between November 2011 and March 2012, the UK funded the UK's National Policing Improvement Agency to train around 80 NDS investigators in interview skills and using evidence. The investigators came from across Afghanistan but principally from NDS Department 40 [Investigations] and NDS Department 124 [Counter-Terrorism]. This training aimed to help NDS develop alternative sources of evidence for conviction, rather than confessions. A broader programme of training and professional development for NDS investigators [was] scheduled to be delivered between April 2012 and March 2013. This include[d] crime scene investigation, crime scene photography, initial and advance investigation courses, special financial investigation training, internal disciplinary investigation and a study visit to the UK for senior NDS officers and selected prosecutors. In addition, the UK Embassy advised that the UK is assisting the NDS to develop their own forensic capability in support of evidence collection and examination.<sup>27</sup>

Moreover, “the UK provides mentors to NDS and Anti-Terrorism prosecutors to improve their understanding of the law and evidence, and their use of human rights compliant interview techniques.”<sup>28</sup> In 2011 and 2012, approximately 90 anti-terrorist prosecutors received training.<sup>29</sup> In 2013, the UK started working with anti-terrorist prosecutors in Kabul to “identify problems in the system and see what can be done to improve its effectiveness.”<sup>30</sup> The UK also provides financial support “to improve conditions in NDS detention facilities. The UK is working with NDS and the [General Directorate of Prisons and Detention Centers] to install [closed-circuit television] to record activity and video and audio recording equipment to be used during detainee interviews.”<sup>31</sup>

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> See Treatment of Conflict Related Detainees in Afghan Custody: One Year On, *supra* note 21, p. 81-83.

<sup>27</sup> Ibid, p. 81-82.

<sup>28</sup> Ibid, p. 82.

<sup>29</sup> Ibid, p. 82, ftnt. 282.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid, p. 82.



Of note, in November 2012, the UK Defense Secretary imposed a complete moratorium on the transfer of UK detainees to NDS custody on the grounds that there was reasonable belief that transferred detainees would be at risk of serious mistreatment.<sup>32</sup> As mentioned earlier, the NDS has taken steps to remediate the situation by training and deploying NDS human rights officers to train other NDS personnel.

### **The United Nations Development Programme**

Through Phase I of the Justice and Human Right in Afghanistan (JHRA) project, UNDP supported the MOJ Human Rights Support Unit, which provides human rights training to NDS officials.<sup>33</sup> “In collaboration with the British embassy, this inter-ministerial mechanism (NDS and MOJ) has been delivering the human rights component of the NDS Academy training curriculum. Since this initiative began in early 2012, all NDS officers at NDS Department 40 [Investigations] have participated in the training.”<sup>34</sup> Moreover, UNDP through the MOJ Human Rights Support Unit worked to build sustainability into the initiative by developing a Training of Trainers (ToT) program.<sup>35</sup> The long term objective is “to integrate and mainstream human rights training into all NDS training programmes by 2015 through delivering three month human rights training refresher courses to all NDS staff to institutionalize human rights within NDS.”<sup>36</sup>

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<sup>32</sup> See Leigh Day & Co Solicitors, Ban on transfer of Afghan prisoners reinstated after Court battle, Nov. 29, 2012: <http://www.leighday.co.uk/News/2012/November-2012/Ban-on-Transfer-of-Afghan-Prisoners-reinstated-aft>.

<sup>33</sup> Treatment of Conflict Related Detainees in Afghan Custody: One Year On, *supra* note 21, p. 82. Phase II of UNDP’s JHRA project began in January 2013 and is focused on three areas: 1) Establishing high-level coordination mechanisms for developing policy and legislation in State justice institutions; 2) Providing quality access to justice services to vulnerable groups; and 3) Establishing public participation processes for improving access to justice and human rights compliance. See Chapter 1.4: The International Community and Rule of Law Implementers in Afghanistan.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

## Resources

- U.S. Department of State, Corrections Programs in Afghanistan Fact Sheet, Bureau of International Narcotics and Law Enforcement Affairs, May 4, 2012: <http://www.state.gov/j/inl/rls/fs/189319.htm>.
- ISAF Evidence Collection Guide: Supporting the Prosecution of Insurgency Crimes, July 2010: <http://publicintelligence.net/isaf-guide-to-collecting-evidence-for-prosecution-in-afghan-courts/>.
- Afghanistan Theater of Operations Evidence Collection Guide, February 2012: <http://publicintelligence.net/us-army-afghanistan-evidence-collection-guide/>.
- Law on Combat against Terrorist Offenses, Official Gazette No. 952, 1 July 2008, English translation cross checked with Official Gazette by JSSP Translators, March 13, 2013.
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- The Law on Fire Weapons, Ammunitions and Explosive Materials, Official Gazette No. 855, 21 June 2005 (1384), translation unknown.
- Treatment of Conflict Related Detainees in Afghan Custody, United Nations Assistance Mission in Afghanistan (UNAMA) and UN Office of the High Commissioner for Human Rights (UNHCHR), October 2011: [http://unama.unmissions.org/Portals/UNAMA/Documents/October10\\_%202011\\_UNAMA\\_Detention\\_Full-Report\\_ENG.pdf](http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf).
- Treatment of Conflict Related Detainees in Afghan Custody: One Year On, UNAMA and UNHCHR, January 2013: <http://unama.unmissions.org/LinkClick.aspx?fileticket=VsBL0S5b37o%3D&tabid=12323&language=en-US>.
- U.S. General Accounting Office, *Military Training: Management and Oversight of Joint Combined Exchange Training*, GAO/NSIAD-99-173, July 1999: <http://www.gao.gov/assets/160/156645.pdf>.
- Congressional Research Services Report for Congress R40089, *Foreign Assistance Act of 1961: Authorizations and Corresponding Appropriations*, by Dianne E. Rennack and Susan G. Chesser, July 29, 2011: <http://www.fas.org/sgp/crs/row/R40089.pdf>.