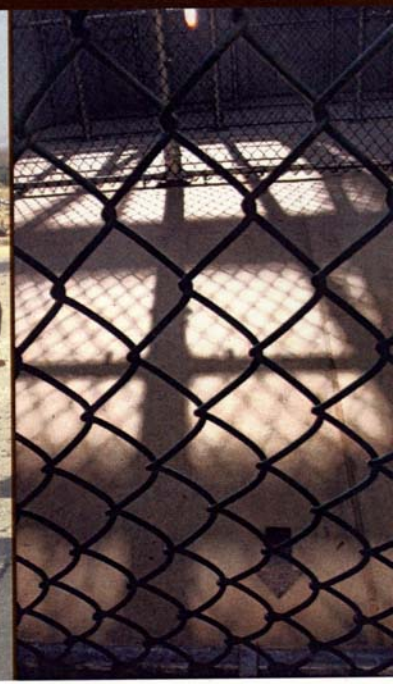
RULE OF LAW
HANDBOOK

A Practitioner's Guide for Judge Advocates



CENTER FOR LAW AND MILITARY OPERATIONS
The Judge Advocate General's
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JOINT FORCE JUDGE ADVOCATE
U.S. Joint Forces Command
Norfolk, Virginia

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Preface

Judge Advocates have been significantly involved in rule of law projects since shortly after the successful invasion of Afghanistan in 2001. The best and brightest of the Judge Advocate General's Corps have been on the cutting edge of the effort to bring stability and rule of law support to the embryonic and fragile democratic governments in both Afghanistan and Iraq, and the US Government (USG) presence in the Horn of Africa also includes a broad range of rule of law activities. There is every reason to believe that if the Global War on Terror (GWOT) is indeed the "long war" as so many have predicted, these legal pioneers will continue to perform such missions for the foreseeable future.

Why a Practitioner's Guide

The Center for Law and Military Operations (CLAMO) specializes in the collection of after action reports (AARs) from Judge Advocates and paralegals recently returned from deployments in either Operation Iraq Freedom (OIF) or Operation Enduring Freedom (OEF). There are two constantly re-occurring themes that surface in these AARs. The first is the command naturally turns to the legal expert within the task force to plan, execute, coordinate, and evaluate rule of law efforts. The second is that no comprehensive resource exists to assist practitioners in fulfilling this task.

It is highly likely the GWOT will require the US military to engage in operations that include rule of law operations as an essential part of the overall mission. The term was mentioned nine times in the 2002 National Security Strategy, and *sixteen* times in the 2006 National Security Strategy (NSS). As the 2002 NSS explains:

> America must stand firmly for the nonnegotiable demands of human dignity: **the rule of law**; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.[1]

The need for such a practitioner's guide for rule of law is therefore irrefutable. A much more challenging and debatable question, however, is what such a guide should contain and what should be the primary focus. Perhaps an even more fundamental and important question is exactly what is meant by the term "rule of law"? There are divergent, and often conflicting, views among academics, various USG agencies, US allies and even within the Department of Defense (DOD), on what is meant by the "rule of law". As in the case of any emerging area of legal practice or military specialty, doctrine is non-existent, official guidance is incomplete, and educational opportunities are limited.

While acknowledging the above challenges, the Judge Advocate General's Corps leadership still recognizes the inevitability that Judge Advocates on the ground under extraordinarily difficult conditions will be called upon to execute the rule of law mission. The JAG Corps owes these lawyers at the tip of the spear practical guidance in the form of a comprehensive resource that discusses the other rule of law players and the challenges that exist

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[1] The National Security Strategy of the United States of America, September 2002, p.3. *See also* The National Security Strategy of the United States, March 2006, available at http://www.whitehouse.gov/nsc/nss.html.

in coordination with them, a broad discussion of the fundamental principles that most experts agree describe the all-encompassing term of rule of law, some guidance on how to plan for and execute rule of law operations, and a discussion of some prior lessons learned. That then is the genesis, purpose, and rational for this, *The Rule of Law Handbook: A Practitioner's Guide for Judge Advocates*.

What is agreed upon by almost every individual who has worked in this area is that **joint, inter-agency and multinational coordination is the basic foundation upon which all rule of law efforts must be built.** In the past, military services, US government agencies, and coalition partners have often conducted the rule of law mission in isolation. History has shown, however, that such an approach often results in much energy expended in a wasted effort. To maximize rule of law reform efforts, we must achieve synchronization and integration across the spectrum of rule of law. Indeed if the reader takes nothing else from this *Handbook*, they should recognize this one central concept. Without coordination with other players in the rule of law arena, the efforts of a single contributor in isolation are at best less than optimal and at worst counter-productive to the overall rule of law reform objectives being pursued. Quite simply, coordination and synchronization is to the rule of law effort what fires and maneuver is to the high intensity conflict.

Recognizing that the rule of law mission occurs in the joint operational environment, CLAMO has partnered with the lawyers of the Joint Legal Training Cell and other subject matter experts at US Joint Forces Command (USJFCOM) to produce this *Handbook*. USJFCOM as the DOD's designated lead for the training of joint forces, development of joint doctrine, resourcing of joint trained forces, and capturing joint lessons learned is uniquely positioned to coordinate and leverage the rule of law expertise developed within the Services and among USG agencies, and to help bring it to the Judge Advocates of all Services who are tasked support rule of law missions in joint operations. While not joint doctrine, this *Handbook* is intended to be a valuable legal resource for all military lawyers conducting future rule of law operations.

What the Handbook Is Not

The *Handbook* is not intended to serve as US policy or military doctrine for rule of law operations. CLAMO has neither the resources, nor more importantly the mission, to propose or institute doctrine on a topic upon which no consensus has been achieved.

The *Handbook* is not intended to offer guidance or advice to other military professionals involved in the rule of law mission. It was written by Judge Advocates for Judge Advocates and its scope and purpose is limited to providing the military attorney assistance in the accomplishment of the rule of law mission. While others involved in rule of law missions may find the *Handbook* helpful, they should understand its intended audience is the Judge Advocate or paralegal involved in the rule of law mission during on-going military operations.

Finally, the *Handbook* is not only intended as a resource for Judge Advocates serving in the OIF and OEF theaters. A conscious decision was made to make the lessons learned and principles discussed as universal in application as possible. The *Handbook* is not meant to offer an all inclusive formula on how to conduct rule of law operations, nor does the book provide an exhaustive prescriptive list of tactical plans to implement rule of law missions. Although the GWOT rule of law mission today is being conducted primarily in Iraq and Afghanistan, it would be shortsighted and counterproductive to make the *Handbook* only applicable to missions

conducted in those theaters. Instead, the *Handbook* pre-supposes that within the next ten years, Judge Advocates will find themselves conducting these rule of law missions in a variety of different circumstances, environments, and locations. The *Handbook* and its contents must therefore be flexible and geographically universal in application. As such, this *Handbook* should be regarded as one reference source for Judge Advocates to begin developing and planning their rule of law missions. Rule of law operations are complex, highly context specific, and novel – this *Handbook* is more a compass than a map.

What the Handbook Is

As previously discussed, this publication is primarily designed to assist Judge Advocates as they practice law during military operations in the currently ill-defined realm of rule of law. There was much debate and discussion from this publication's authors and contributors on its final form and content. Was it to use the typical "pilot's checklist" type of format that is so popular in military circles? Should it follow the traditional AAR format and only provide a brief summation of issues faced and the reasons for the successes and failures of Judge Advocates who have participated in rule of law missions? Should it be an introduction and synopses of the key issues and overall themes on the current status on the rule of law perspective within the US military, government, and academic circles?

In the end it was decided that, to fully understand the complexity of the rule of law mission, the *Handbook* should combine all three of the above formats – but without ever forgetting its primary audience – the practicing Judge Advocate in the field striving to accomplish his commander's intent. Although the checklist approach has great utility for the time sensitive and result oriented military officer, it was determined that while implementation of rule of law may be assisted by the use of such checklists and matrixes, success could not be ensured without practitioners understanding why they were implementing the measures on the list. Rule of law is simply too complex to limit our effort to listing physical actions performed such as "build courthouse in province X" or "provide computers to judge Y."

It was also determined that it would be insufficient to produce a work that was a mere recitation of recent lessons learned about rule of law operations from Judge Advocates who had participated in such missions. While useful for understanding what we have accomplished (and failed to accomplish) to date – standing alone they simply lack the refinement and comprehensive analysis to truly assist the practitioner.

It was also decided that it would be impractical to make the *Handbook* a legal text to debate the pros and cons of the different types and approaches involved with rule of law missions. While a solid foundation in the theory of what rule of law is and its overall goals are important for the practitioner, theory without practice is like faith without works – empty and meaningless.

It is also hoped that the *Handbook* will serve as an educational resource for Judge Advocates who are preparing to practice in the field. There currently exists very little information on this emerging discipline. Even if the *Handbook* only serves as an introductory resource to further their professional education on the topic – it will have served a vital purpose. Much like the realm of cyber law ten years ago, rule of law is a field that everyone is talking about, but because of the lack of educational resources, discussions are taking place without defined parameters or boundaries.

Finally, it is also hoped that the introduction of this *Handbook* will serve as a catalyst to begin a more meaningful debate within the US military on the resourcing, responsibility, and doctrinal development on rule of law as a core competency. It is hoped that in ten years there will exist a comprehensive body of US military doctrine and publications that will build upon the suggestions, ideas, and principles put forth in this *Handbook*. However, even if such forthcoming doctrine and guidance for proposed rule of law solutions are completely different from those presented in this publication – it is hoped that the initial misguided direction we provided contributed in some small way to the eventual true azimuth.

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I. Introduction

The *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates*, is intended to provide a starting place for Judge Advocates deployed or being deployed to work on rule of law operations. As such, the *Handbook* is based on assumptions about both the background knowledge of its intended audience and the operational posture of rule of law operations. The *Handbook* presupposes basic knowledge of military terms and organizational structure as well as a basic understanding of US military law. Because most American Judge Advocates currently engaged in rule of law operations are doing so in the context of reconstruction in the wake of armed conflict, the *Handbook* is oriented toward rule of law operations occurring during and immediately following armed conflict, and is not intended as a guide for more general "nation building" missions in permissive environments.

The *Handbook* was developed with three over-arching themes, which reflect a combination of experience, doctrine, and the inherent limitations of any publication of this type.

First, and foremost, is that coordination with other agencies is the single most important indicator of the likely success of a rule of law mission. The rule of law cannot be made in isolation. Consequently, the *Handbook* includes extensive information about the interagency relationships necessary to any rule of law operation.

Second, the *Handbook* places rule of law operations squarely within the developing doctrine on Stability Operations.[1] In order for rule of law operations to be effective, they have to fit within the larger framework of how the US military conducts the growing stability mission.

Third, the *Handbook* is an acknowledgement that there exists no "cookbook" solution to rule of law operations. Rather, the *Handbook* is designed to allow deploying Judge Advocates to think constructively and creatively about rule of law operations while providing them with a practical framework for fitting rule of law operations into the legal and operational framework for all US joint deployed operations.

The book's organization reflects all three themes, with Chapters II-V setting the stage for Chapter VI, which describes the planning and execution of rule of law operations. In this way, while Chapters II-V should be read prior to Chapter VI, they may be most helpful during the planning and execution phases, as references. Chapters VII and VIII follow up with practical applications in specific contexts.

Chapter II sets a theoretical framework for rule of law operations to give Judge Advocates to necessary background to think about the rule of law problem creatively and to be able to discuss rule of law issues with others both within and outside of the military, while at the same time it suggests ways in which the theory can impact day-to-day operations.

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[1] Stability operations are "various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief." JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS GL-28 - GL-29 (17 Sept. 2006).

Chapter III describes the inter-agency atmosphere in which rule of law operations take place, and describes the various agencies – governmental and non-governmental – most likely to be involved in rule of law operations.

Chapter IV discusses the legal framework and provides an overview of the international legal obligations facing any nation that undertakes rule of law operations during and immediately following armed conflict.

Chapter V describes aspects of the legal systems that are the objects of rule of law operations, with special emphasis on the ways in which host nation legal systems (and other post-conflict-specific reconciliation measures) may differ from the American legal system that US Judge Advocates are most likely to be familiar with.

Chapter VI describes the planning process for rule of law operations as well as mechanisms for evaluating the efficacy of such projects.

Chapter VII lists many, but certainly not all, of the major challenges facing rule of law projects and is intended to provide more practical flesh on the theoretical framework laid out earlier in the book.

Chapter VIII follows Chapter VII's practical focus with narratives from previously deployed rule of law practitioners. Although their experiences will differ substantially from recently or to-be deployed Judge Advocates, individual accounts provide the most practical, if potentially least generalizable, information about how rule of law operations actually take place in a deployed environment.

Rule of law operations can take a variety of forms (from completely replacing an illegitimate or non-existent legal system to slight modification of an existing administration), in a variety of operational environments (from active combat to counterinsurgency operations to approaching stable peace), among a variety of partners (from simple inter-agency arrangements dominated by USG entities to coalition partnerships to multilateral arrangements organized through the UN or other international organizations), affecting local populations with vastly differing preconceptions about the form and content of law. This *Handbook* can give you no more than a framework for conducting rule of law operations, but it is a framework gleaned from the experiences of practitioners. Although they are challenging, rule of law operations – those that seek to restore civil order and a society's reliance on government by law – offer the possibility to fulfill the highest aspirations of every Soldier and lawyer: to bring the blessings of peace, security, and justice to those who lack them.

II. Defining the Rule of Law Problem

From the perspective of a Judge Advocate working within a deployed unit, **rule of law operations constitute the legal aspect of stability operations.**[1]

Joint Publication 3-0, *Joint Operations*, breaks operations into three categories: offensive operations, defensive operations, and stability operations. Any major campaign will require a combination of all three types of operations, to be carried out in different, appropriate balance during the different phases of the campaign.[2] Stability operations are "various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief."[3] Although stability operations have particular emphasis during the later phases of the campaign, they will take place even during the initial combat phase,[4] and they need to be planned for as part of the overall campaign. The termination of a major campaign cannot be take place until local civil authorities are in a position to administer the host nation,[5] and stability operations are critical to the final two phases of the campaign (Stabilize and Enable Civil Authority)[6] leading to the campaign's termination and the redeployment of US forces.[7]

The conduct of stability operations is in turn dictated by *DOD Directive 3000.05*, which defines stability operations as: "Military and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions."[8] *DOD Directive*

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[1] *See* U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, para. 4.2 (28 Nov. 2005) [hereinafter DOD DIR. 3000.05] ("Stability operations are conducted to help establish order that advances US interests and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, *rule of law*, democratic institutions, and a robust civil society.") (emphasis added). *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS V-1 (17 Sept. 2006) (Stability operations "seek to maintain or reestablish a safe and secure environment and provide essential governmental services, emergency infrastructure reconstruction, or humanitarian relief.").

[2] JOINT PUB. 3-0, *supra* note 1, at V-1 - V-2 (17 Sept. 2006).

[3] *Id.* at GL-28 - GL-29.

[4] *Id.* at V-15.

[5] *Id.* at IV-29.

[6] As a matter of doctrine, joint operations have six phases: Shape, Deter, Seize the Initiative, Dominate, Stabilize, and Enable Civil Authority. *Id.* at IV-26-29.

[7] *See id.* at V-2, figure V-1 (illustrating the balance of offensive, defensive, and stability operations in the different phases of major campaigns). *See also id.* at IV-7 ("To facilitate development of effective termination criteria, it must be understood that US forces must follow through in not only the 'dominate' phase, but also the 'stabilize' and 'enable civil authority' phases to achieve the leverage sufficient to impose a lasting solution."); *id.* at xii ("Stability operations will be required to enable legitimate civil authority and attain the national strategic end plan. Termination of operations must be considered from the outset of planning.") (emphasis in original).

[8] DOD DIR. 3000.05, *supra* note 1, para. 3.1. Stability operations, in turn, are a critical aspect of counterinsurgency operations (COIN). U.S. DEP'T OF ARMY, FIELD MANUAL 3-24 COUNTERINSURGENCY 2-5 (15 Dec. 2006) ("Most valuable to long-term success in winning the support of the populace are the contributions land forces make by conducting stability operations."). Reference to how rule of law operations relate to COIN will be made as appropriate throughout this *Handbook*.

3000.05 includes three general tasks involved in stability operations: rebuilding indigenous institutions (e.g. security forces, correctional facilities, and judicial systems); reviving and rebuilding the private sector; and developing representative government institutions.[9] Because the military will almost exclusively undertake rule of law efforts within the context of stability operations, it is especially important for deploying Judge Advocates to focus on the sub-set of rule of law operations that fall within stability operations, and such operations are the focus of this *Handbook* throughout.

Moreover, almost any rule of law effort in which a deployed Judge Advocate participates will be an *interagency* one. As a matter of US policy, the Department of State is the lead agency in conducting stability and reconstruction activities,[10] and virtually all stability operations will involve international and non-governmental organizations as participants. It is important to keep in mind not only the broader context of stability operations, but also the broader participatory base of non-US-military partners, who have differing priorities and operating procedures when conducting rule of law operations.[11]

From an operational standpoint, any approach to actually *implementing* the rule of law as part of stability operations must take into account so many variables – cultural, economic, institutional, and operational – that it may seem futile to seek a single definition for the rule of law or how it is to be achieved. Deployed Judge Advocates need to be flexible in not only their understanding of what the rule of law is but also in their approach to bringing it about in a particular context. But, when dealing with an operational imperative as based in philosophy as "law," it is impossible to separate the *how* of rule of law from the *what* of rule of law. Consequently, any understanding about rule of law operations needs to start with a discussion about what exactly is the rule of law.

A. Describing the Rule of Law

There is no widespread agreement on what exactly constitutes the rule of law, just as there is no widespread agreement on what exactly it means to have a "just society." But there is common ground regarding some of the basic features of the rule of law and even more so regarding rule of law activities.

1. Definitions of the Rule of Law

The first step to defining the rule of law is to ask what the *purpose* of law is. Although there is some philosophical disagreement about why we have law, there is widespread acceptance that the rule of law has essentially three purposes, as described by Richard Fallon:

> First the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions.

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[9] DOD DIR. 3000.05, *supra* note 1, para. 4.3.

[10] National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstructing and Stabilization, Dec. 7, 2005. *See also* JOINT PUB. 3-0, *supra* note 1, at V-24 (explaining that, while other agencies may have the lead, US military forces must be prepared to carry out all aspects of stability operations).

[11] Chapter III deals explicitly with the issue of how best to work with other agencies, international and non-governmental organizations, and coalition partners in the context of rule of law operations.

> Third, the Rule of Law should guarantee against at least some types of official arbitrariness.[12]

Put somewhat more simply, the purpose of law is to provide a government of security, predictability, and reason.

According to Prof. Fallon, the purpose of law is served by five "elements" of the rule of law:

> (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
> (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz's phrase, "people should be ruled by the law and obey it."
> (3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.
> (4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.
> (5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.[13]

In applying these principles, though, context is critical. For example, the paper in which Prof. Fallon provided his definition was one on constitutional interpretation, not stability operations. Consequently, he emphasized some points (such as stability over time) that may be less important to rule of law efforts within stability operations than others he did not emphasize (such as providing physical security).

Another approach to the rule of law is offered by Rachel Kleinfeld, who defines the concept in terms of five (different) "goals" of the rule of law:

- **making the state abide by the law**
- **ensuring equality before the law**
- **supplying law and order**
- **providing efficient and impartial justice, and**
- **upholding human rights**[14]

Countless other individuals and agencies have offered their own definitions of the rule of law, each reflecting their own institutional goals. Deployed Judge Advocates participating in rule of law operations will more than likely do so either during or in the immediate wake of high intensity conflicts. As a result, some aspects of the rule of law will be particularly salient, such as those emphasizing physical security.[15]

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[12] Richard H. Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7-8 (1997) (footnotes omitted).
[13] *Id.* at 8-9 (footnotes omitted).
[14] Rachel Kleinfeld, *Competing Definitions of the Rule of Law, in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 35 (Thomas Corothers ed., 2006).
[15] Compare, for example, the definition offered by the Secretary General of the United Nations, which, although written with post-conflict circumstances in mind, does not emphasize the role of security. *See*

2. *A Definition of the Rule of Law for Deployed Judge Advocates*

This *Handbook* defines the rule of law as existing when:

- **the state monopolizes the use of force in the resolution of disputes**
- **individuals are secure in their persons and property**
- **the state is itself bound by law and does not act arbitrarily**
- **the law can be readily determined and is stable enough to allow individuals to plan their affairs**
- **individuals have meaningful access to an effective and impartial legal system**
- **basic human rights are protected by the state**
- **individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives**[16]

This definition represents an ideal. The seven elements exist to greater or lesser degrees in different legal systems and are not intended as a checklist for a society that abides by the rule of law.[17] Every society will satisfy the list of factors more or less completely, and what one person thinks satisfies one factor another person may not. Societies can abide by the rule of law to different degrees according to geography (the rule of law may be stronger in some places than others), subject matter (the rule of law may apply more completely with regard to some laws than others), institutions (some may be more efficient or corrupt than others), and subjects (some individuals may have greater access to the rule of law than others). Because any meaningful definition of the rule of law represents an ideal, Judge Advocates should view the success of rule of law projects as a matter of the host nation's movement toward the rule of law, not the full satisfaction of anyone's definition of it.

The deployed captain or major who is this *Handbook*'s audience will hopefully be part of an operation that already has a definition of the rule of law – one that has been adopted by policymakers. With that in mind, the seven elements emphasize effects and values, ones that are likely to be represented in any definition one is likely to encounter in a rule of law operation. In

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Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict And Post-Conflict Societies, U.N. Doc. S/2004/616, at 4 (2004):

> The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

[16] Of the many definitions of the rule of law in common use, this one most closely hews to that suggested in JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 78 (2006).

[17] *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 79; Fallon at 9. Indeed, given the value-laden character of the factors, there is not even widespread agreement over how to measure deviation from them. *Id.*

this way, the seven elements can not only supply a definition of the rule of law, they can complement one, providing more specific guidance about the effects Judge Advocates should be working toward to help bring about the rule of law.

What follows is a discussion of each element in-turn.

The State Monopolizes the Use of Force in the Resolution of Disputes

It is impossible to say it a society is governed by the rule of law if compulsion is not the sole province of the state. A country in which the use of violence is out of the state's control is out of control in the worst possible way. The alternative to state control over force is warlordism, which is a legally illegitimate form of security.

That is not to say that only state instruments can wield violence as an instrument of state policy. It is possible for the state to delegate the use of force to subsidiary bodies such as state and local governments or even non-state security providers, who may or may not be accountable to local interests. Local security forces such as police, private security firms,[18] and even less professional arrangements such as militias, can have a role in a recovering state's security structure, however, the state must be able to retain ultimate control over the use of force. Any local entity's power must be effectively regulated by the state in order for it to be considered a legitimate exercise in state power.

[18] *See* section V.G on Non-State Security Providers.

Militias and Organized Crime

In Iraq and Afghanistan, militias established themselves as extragovernmental arbiters of the populace's physical security. They often use the promise of security, or threat to remove it, to maintain control of cities and towns. Additionally, sectarian violence, a weak central government, problems in basic services, and high unemployment are causing the Iraqis to turn to militias and other groups outside the government for their basic needs, further imperiling Iraqi unity.[19] Militias often operate outside the law. Iraq's constitution prohibits the formation of military militias outside the framework of the armed forces.[20] This prohibition has not stopped the militias from flourishing in that nation, and further contributing to violence, instability and insecurity.[21] Also, militias often operate under the protection of the Iraqi police to detain, torture, and kill suspected insurgents, and other innocent civilians. Militias constitute a long term threat to law and order.

Organized crime and criminal gangs contribute to dire security situations. Criminal gangs often engage in kidnappings and robberies. In Iraq, they have targeted aid workers, translators, drivers, private contractors, aid workers, journalists, and others, as well professionals and individuals from wealthy families.[22] In certain areas of Iraq, there have been reports of social freedoms being curtailed by roving bands of self appointed religious police.[23]

Individuals are Secure in Their Persons and Property

In many ways, providing security is the ultimate purpose of any state. For a Judge Advocate as part of a deployed force, providing security is going to be the first element in any rule of law plan and, depending on the status of operations, it may be the only real contribution that US forces can make to implementing the rule of law.[24] But it is an important contribution nevertheless. From an operational standpoint, without basic security, the rule of law itself is an unaffordable luxury. The basic needs of the people, including not only physical security but also basic civil services and utilities have to be provided before one can undertake any long-term attempt to improve the rule of law. Thus, the interconnected nature of rule of law projects also requires that rule of law efforts be tied to other reconstruction efforts in order to provide the kind

[19] LTG Michael Maples, Defense Intelligence Agency, The Current Situation in Iraq and Afghanistan, Statement for the Record before the Senate Armed Services Committee (Nov. 15, 2006) [hereinafter Maples Statement].

[20] *See* IRAQI CONST. art 9.

[21] Maples Statement, *supra* note 19, at 3.

[22] Human Rights Watch, A Face and a Name Civilian Victims of Insurgent Groups in Iraq 20 (October 3, 2005).

[23] Julian Borger, *Official US Agency Paints Dire Picture of "Out of Control" Iraq*, THE GUARDIAN UNLIMITED (Jan. 18, 2006), available at http://www.guardian.co.uk/international/story/0,,1688677,00.html.

[24] Establishing tight border security is essential for maintaining the rule of law. Insurgencies rely heavily on freedom of movement across porous borders, as they usually cannot sustain themselves without substantial external support. In western Iraq. For example, insurgents take advantage of the sheer size of the area and its long borders which permit the easy smuggling of fighters and weapons. *See* UNHCR COI Report October 2005.

of livable society in which the rule of law can flourish.[25] Time, however, is of the essence in establishing security. In addition to the problem of security in the immediate aftermath of major combat (such as the prevention of looting), there is a window following the conclusion of major combat during which destabilizing elements are themselves likely to be too overwhelmed to put up major opposition.[26] It is critical during that period to establish security, but the task of reconfiguring military forces and adjusting ROE from a combat to security mission is a substantial one – it needs to be planned for and anticipated *before* the start of combat operations.[27]

In some societies in which the rule of law has been lacking, such as totalitarian dictatorships, the primary protection to be offered by the rule of law may be protection *from the state.*

The State is Itself Bound by Law and Does Not Act Arbitrarily

The conduct of state actors must be bound by established rules. Of course, it does no good for the state to be bound by rules if the rules themselves can be changed according to fiat or if they bear no relation to reason. The need for reasoned decisionmaking applies across executive, judicial, and legislative actors.

In enforcing the law, the executive must be prevented from acting with complete autonomy to achieve its chosen end lest order be obtained through terror or intimidation, which would not be an exercise of the rule of law. Limits on the power of the police to search or detain individuals, for instance, control the exercise of executive authority while simultaneously furthering the value of providing security to persons and their property. Corruption, too, can erode the function of the legal system into one in which a state is ruled not by laws but rather by the imposition of illegitimate restrictions that are withdrawn through the payment of bribes. And, of course, if an individual buys an exception to a legitimate regulation, the failure to apply the regulation is itself a failure of the rule of law. "[T]he abuse of public power for private gain"[28] is a prototypical example of the subversion of the rule of law.

Judges, too, must be bound by law – statute law or precedent – in their decisionmaking in order for a legal system to function. If judges simply decide each case on first principles, it is impossible for a sense of the law to develop in a community. In this way, judges must be faithful to legislative acts (assuming there are any to be faithful to) and must also seriously engage precedent to prevent their decisions from becoming arbitrary.[29] That is not to say that there is no room for development in the law; the development of the common law over the past several

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[25] *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 135.

[26] *Id.* at 145-47.

[27] *See* FM 3-24, *supra* note 8, at 7-5 ("There is a clear difference between warfighting and policing. COIN operations require that every unit be adept at both and capable of moving rapidly between one and the other.").

[28] *Combating Corruption for Development: The Rule of Law, Transparency and Accountability* , p. 3 (quoting World Bank, *World Development Report 1997* (Washington DC: Oxford University Press 1997), p. 102).

[29] Fallon, *supra* note 12, at 18-19 (describing the Legal Process approach to the rule of law). Of course, precedent does not figure as strongly in civil law systems, but past decision of the same court are considered at least persuasive, and those of higher courts are frequently considered to be binding. *See* section V.B at p. 85.

centuries is an indication that judges can both adapt the law to new circumstances and introduce new methods of legal thinking without entirely abandoning precedent.[30] Of course, there is likely to be little precedent in host nations in which stability operations are taking place, and in some cases that precedent will be positively rejected as illegitimate.

Dedication to reason also suggests that judges should not base their decisions on *other* considerations, including the giving of bribes (corruption) or the social status of a particular litigant, and thus forms an important element of the state's protection of basic human rights against certain forms of discrimination.

Legislatures, too, must be bound by rules. As is the case in many republics, the reason offered by legislatures will be political rather than legal, but even the exercise of political will has constraints. Legislatures must follow established procedures when making law, and most societies include substantive limitations on the power of legislatures, whether in written or unwritten constitutions (such as the United Kingdom's). Identifying and establishing the substantive limits of legislative authority is likely to be one of the most difficult problems any rule of law project faces. Although stability operations pertaining to law frequently start with written constitutions that impose substantive limitations on legislatures, the value of such limits to truly constrain the actions of legislatures is a matter of dispute.[31]

The Law Can be Readily Determined and is Stable Enough to Allow Individuals to Plan Their Affairs

A basic premise of a society governed by law is that there is widespread agreement on what the law is: a rule for recognizing what is law and what is not.[32] Any society that has advanced beyond anarchy is likely to have such an agreement, which in countries that are the subject of stability operations, may be in the form of a newly authored constitution. Of course, in many countries, there will already be established legislatures and courts, and it will be important for anyone undertaking rule of law projects in such countries to quickly determine whether existing institutions have the necessary political legitimacy to continue. The converse is that, when setting up new legal institutions, the most important thing will be to go through a process that produces the necessary agreement in order to have that institution's decisions recognized by the society as law.

Laws must be recorded in a way that makes them reasonably accessible, so that even if the average citizen does not read the law, they are able to understand its content through practice.[33]

Similarly, if the law is constantly reversing itself, it is impossible for the law to become a tool by which people can plan their affairs. It may be necessary to undertake many dramatic changes in a host nation's legal system (such as adopting new criminal or civil codes), but the

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[30] Fallon, *supra* note 12, at 20-21.

[31] *See generally* A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1968).

[32] H.L.A. HART, THE CONCEPT OF LAW 94-95 (2d ed. 1994) (describing the "rule of recognition" that societies use to identify law).

[33] Similarly, informal unwritten rules can form the basis of legal systems, but the legitimacy of those systems is frequently predicated on the shared social understanding of the group to which they are applied and are therefore usually applied through non-legal institutions. *See generally* Robert C. Ellickson, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

rate of change cannot be so fast that it is impossible for individuals to build a habit of reliance on the law.

Individuals Have Meaningful Access to an Effective and Impartial Legal System

It means little to have laws on the books if there is no mechanism for the enforcement of that law to redress criminal and civil wrongs. Thus, in order to have a working legal system, judicial and enforcement institutions must exist, and the people must have practical access to those institutions. In many environments in which deployed Judge Advocates find themselves, such institutions may be completely absent. Even when those institutions do exist, their efficacy may be completely compromised by corruption; racial, ethnic, religious, or gender bias; or simple inefficiency. Corruption, other illegitimate motives, or systematic inefficiency in the police force or the judiciary can prevent just laws from having any real effect on society, and in order for the state to be bound to its own laws, the judiciary must be able to exercise judgment independently of influence from the other branches.

The need for working legal institutions extends not only to police and courts, but also to the correctional system. In developing and reconstructing nations, prisons may fail the rule of law in two opposite ways: either there is no effective correctional system and convicts are routinely released or prisoners are treated in ways inconsistent with basic human rights protections. A society cannot be said to be governed by the rule of law if criminals are not adequately punished or if the state fails to treat those subject to its complete control in a humane, rational manner.

Basic Human Rights are Protected by the State

It is not possible to entirely separate the form of a legal system from its content. Most would agree, for instance, that a legal system in which judges applied the law as given to them and police arrested and incarcerated offenders without corruption or bias would nevertheless fail to qualify as applying the rule of law if the law applied was merely the fiat of a dictator or of a ruling majority acting without regard to basic human rights and dignities. In the twenty-first century, it would be hard to find anyone who would acknowledge the meaningful existence of the rule of a law in a society in which individuals (or an entire minority group) were considered personal property, to be openly bought and sold at market.[34] It is meaningless to say that the law protects individuals without at least some concept of what it is that the law must protect.

There is widespread disagreement, however, on exactly what rights the law must protect. Some, especially those active in the rule of law community, define the obligation as one of equal treatment regardless of gender or economic, racial, or religious status.[35] While most would agree that equality is an important value, many disagree on exactly what forms of equality are necessary to the rule of law. In many societies, unequal treatment is a cultural fact that there is no popular will to change. Others define the necessary rights substantively, for instance the right to security in one's person[36] or the right to free speech,[37] but doing so is unlikely to avoid disputes over which rights are essential to establishing the rule of law. US Judge Advocates need look no

[34] Universal Declaration of Human Rights art. 4, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].
[35] UDHR art. 7; Kleinfeld, *supra* note 14, at 38.
[36] U.S. CONST. amends. V, XIV, sec. 5; UDHR art. 3.
[37] U.S. CONST. amend. I; UDHR art. 19.

further than our own, ongoing debates over constitutional rights for an example of how lengthy and divisive social debates over fundamental rights, both egalitarian (e.g. Fourteenth Amendment) and substantive (e.g. First Amendment) can be.

Nevertheless, the deployed Judge Advocate who works on rule of law projects needs to keep in mind that basic human rights are an important component of the rule of law and that different participants in the rule of law enterprise are likely to have very different understandings of the content of those rights. It is important for deploying Judge Advocates to research the human rights values of other partners, and most importantly those of the host nation's culture, before attempting to undertake a rule of project.[38] Certain human rights abuses by host nations may trigger restrictions on US funding,[39] and systematic mistreatment of citizens and prisoners is likely to lead to substantial international resistance from non-governmental organizations, international organizations, and coalition partners in any rule of law project.

Individuals Rely on the Existence of Legal Institutions and the Content of Law in the Conduct of Their Daily Lives

Although one can arguably achieve order through threat alone, law is not compliance achieved through threat.[40] In order for a rule to be said to be a *legal* rule, sanction for the rule's violation must be justifiable by reference to the rule itself, not merely by the ability of the government to impose a sanction or compel compliance through force.[41] A state can only be truly said to be governed by the rule of law if the state, and its law, is viewed as legitimate by the populace – if the law is internalized by the people.[42] From a moral perspective, it is problematic for a state to impose a legal system that does not reflect its society's values. From a practical perspective, the failure of a legal system to become internalized can devastate the official legal infrastructure either because of constant resistance (through political or more violent means) or by requiring the state to rely on its coercive power to resolve more legal disputes than it has the capacity to handle. That legitimacy can take multiple forms:

First, citizens must choose to rely on the legal system. A court system cannot function without judges, but it also needs litigants. A government whose laws are ignored by the people must rely instead on force to impose its policies, which in turn is likely to increase resistance[43] (and fuel insurgency).[44] It is not necessary for the people to internalize every legal rule in order to say that the legal system is legitimate. Perhaps the greatest testament to the legitimacy of a legal system is when a portion of the population disagrees with a particular legal outcome (legislative or judicial) but nevertheless complies with it because of their dedication to the

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[38] It is Army policy that respect for the full panoply of human rights should be the goal of the host nation" as part of counterinsurgency operations. *See* FM 3-24, *supra* note 8, at D-8 (citing the United Nations Declaration on Human Rights and the International Convention for Civil and Political Rights as "guide[s] for the applicable human rights.").

[39] *See, e.g.*, Leahy Amendment, Pub. L. No. 104-208, 110 Stat. 3009-133 (1996). *See generally* section VI.D.

[40] HART, *supra* note 32, at 22-24.

[41] *Id.* at 54-58.

[42] *See* US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 7-8 (forthcoming 2007); STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 75-76.

[43] *See* JOINT PUB. 3-0, *supra* note 1, at V-26.

[44] *See* FM 3-24, *supra* note 8, at 1-27.

institution that produced it – when it is the source of the law, not its content, that provides its justification.[45] Again, there are strong connections between this element and others, specifically the state's willingness to bind *itself* to the rule of law; it would be unreasonable, for instance, to expect a populace to accept the decisions of the judiciary or the legislature if the executive ignores them.

Second, legitimacy is critical for resolving the 99% of legal disputes that never see a courtroom. Most dispute resolution in any society occurs "in the shadow of the law,"[46] which requires that members of the society have internalized the society's legal rules and are comfortable using them to conduct their affairs. While a functioning court system, for instance, is one level of success for a rule of law project, a society that truly lives under the rule of law is one in which individuals themselves resolve disputes in ways *consistent* with the law even without invoking the judicial system.[47]

The legitimacy of a nation's legal system is in many ways the ultimate expression of the rule of law, and is likely to take many years, if not decades, to develop. Again, Judge Advocates need look no further than America's own constitutional experience. The constitutional order that we now take for granted remained fragile for decades after the Constitution's adoption, and many would argue became cemented only after the Civil War and Reconstruction. A deployed Judge Advocate is unlikely to witness the full social acceptance of a legal system in a post-conflict country, but even local acceptance of a single court, police force, or town council is a major step on the road to achieving the rule of law, and Judge Advocates should conduct rule of law projects with this end in mind.

3. Formalist vs. Substantive Conceptions of the Rule of Law

Identifying conditions necessary for a society to be said to be subject to the rule of law does not tell one much about the content of the society's laws, and there is widespread disagreement over exactly what that content must be. Some thinkers in the area focus on the existence of a structure and fair procedures for making and enforcing laws. Others focus more heavily on the content of the law itself.

The two concerns are reflected by two views of the rule of law, a *formalist* one that emphasizes the procedures for making and enforcing law and the structure of the nation's legal system or *substantive* one, in which certain rights are protected.[48] Using the list of rule law values described above, the transparency and stability of the law is more closely a formalist concern, while the protection of basic human rights is a substantive one. While it is important to recognize that legal systems can be described both along formalist and substantive lines, the two are not mutually exclusive (for instance, protection against arbitrary state action). One can be committed to both a formalist and substantive requirements for the rule of law, and indeed it is difficult to find someone with a strong substantive approach to rule of law who would not also insist that the state in question follow certain procedures in making and enforcing law. Thus, one set of authors on the subject distinguish between "minimalist" approaches that may be merely

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[45] *See* HART, *supra* note 32, at 57-58.
[46] STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 78.
[47] *Id.* at 78-79.
[48] *See* Paul Craig, *Formalist and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467.

formalist and "maximalist" approaches that include both formalist and relatively strong substantive components.[49]

The distinction is a matter of emphasis and priority rather than a choice between one approach or the other, but the degree to which any a rule of law project's goal is either formalist or substantive will vastly affect how the project is carried out (and by whom) and will determine in many regards what strategies will be necessary to ensure the successful completion of the project. As Judge Advocates consider rule of law projects, the formalist/substantive distinction needs to remain at the forefront of their thinking.

As one might guess, rule of law projects with formalist goals are, all other things being equal, less likely to result in controversy and confusion among both international and host-nation participants than projects with substantive goals simply because there is less disagreement over the formal criteria for the rule of law than there is regarding the substantive criteria.[50] Formalist projects are also much less likely to upset established political power relationships, which means that they are less likely to engender resistance from local, established elites, who may now find themselves at the mercy of their former rivals for alleged wrongs committed under the previous regime.[51] Similarly, formalist projects are frequently less likely to threaten the cultural identity of the host nation and its population than substantive projects.[52] While formalist projects are less likely to result in attack from both the local and international community as being culturally imperialist, it is unlikely in today's environment that purely formalist projects are likely to receive the kind of broad international support they require if they completely ignore substantive rights,[53] , and US law may place explicit limits on assistance to host nations guilty of human rights abuses. Neither model exists in a vacuum; even in undertaking what might at first blush be considered a purely formalist project, participants should consider the substantive ramifications of altering the structure of the legal system.

B. Rule of Law Operations

There are as many ways to undertake a rule of law project as there are definitions of the rule of law and organizations undertaking them. The nature of the rule of law efforts that Judge Advocates are part of will vary based on the nature of the operational environment. In an area subject to active combat, for instance, the rule of law effort may be no more than providing order. In a post-conflict environment, it may include setting up police and judicial training programs, assisting a new legislature pass new laws, or undertaking public relations campaigns to heighten the awareness of the rule of law. The kind of all-consuming occupations that the US undertook in Germany and Japan following World War II are not likely models for future stability operations, suggesting an approach that is more openly cooperative with the host nation

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[49] STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 70-71.

[50] Robert Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1709-10 (1991).

[51] Kleinfeld, *supra* note 14, at 38.

[52] *See id.* at 38 (citing the example of gender equality as a threat to some conceptions of Islamic culture).

[53] The resources available to a project may also depend on its character as either formalist or substantive. Many more international and non-governmental organizations are dedicated to bringing about substantive change in the world than are devoted to the change of legal formalities or structure, and so projects with substantive goals are also likely to trigger broad involvement from the international and non-governmental community (the advantages of challenges of which are addressed below).

and its population.[54] The status of the host nation also affects the nature of the projects to be undertaken. There may be illegitimate laws that need to be changed, written laws that are not being followed, or even no laws at all regarding certain important subjects. It is possible there will be complete, established structures that need to be remade in order to purge corrupt or illegitimate elements, such as the program of de-Baathification that followed the major combat phase of Operation Iraqi Freedom. The only thing certain is that a Judge Advocate deploying on a combat or stability operations mission will never confront a legal system that is complete and operating pursuant to the rule of law.

Rule of law operations cover a wide variety of subjects, not all of which are immediately obvious to lawyers. For instance, most rule of law efforts emphasize reform of the criminal law and its institutions, but it is similarly impossible for a society to function or produce the economic prosperity necessary for the rule of law without a vibrant civil law system for managing property, handling commercial transactions, and addressing civil wrongs. Furthermore, because a basic level of not only physical security but physical and economic wellbeing is necessary for the rule of law, Judge Advocates working on rule of law projects may find themselves working on projects that do not have an obvious, direct connection to law, such as ensuring that clean water, food, and basic medical care is are available to the local population. In many nations, many industries are traditionally public, meaning that rule of law values are implicated in the *operation* of those industries.

There are countless aspects of rule of law operations, but this *Handbook* emphasizes three that are particularly salient to deploying Judge Advocates: the role of rule of law operations as an aspect of stability operations, the operational impact of rule of law operations, and the need to adopt an effects-based approach to the rule of law.

1. Rule of Law Operations as an Aspect of Stability Operations

Conducting rule of law operations within the context of stability operations requires that any rule of law effort be coordinated with other activities (such as security and the restoration of civilian infrastructure and essential services)[55] and with other agencies. It is DOD policy that "[m]any stability operations tasks are best performed by indigenous, foreign, or US civilian professionals. Nonetheless, US military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so."[56] Thus, Judge Advocates can expect a

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[54] STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 3.

[55] *See id.* at 9; JOINT PUB. 3-0, *supra* note 1, at xii ("An essential consideration is ensuring that the longer-term stabilization and enabling of civil authority needed to achieve national strategic objectives is supported following the conclusion of sustained combat. These stability and other operations **require detailed planning, liaison, and coordination** at the national level and in the theater among diplomatic, military, and civilian leadership.")[emphasis in original]; FM 3-24, *supra* note 8, at 5-2 (the second stage of COIN "expands to include governance, provision of essential services, and stimulation of economic development.").

[56] DOD DIR. 3000.05, *supra* note 1, para. 4.3. *See also* JOINT PUB. 3-0, *supra* note 1, at V-24 ("US military forces should be prepared to lead the activities necessary to [secure and safeguard the populace, reestablishing civil law and order, protect or rebuild key infrastructure, and restore public services] when indigenous civil, USG, multinational or international capacity does not exist or is incapable of assuming responsibility. Once legitimate civil authority is prepared to conduct such tasks, US military forces may support such activities as required/necessary.").

particularly close working relationship with a multitude of not only US, but also coalition, non-governmental, and indigenous participants in rule of law projects. Much of the work Judge Advocates perform in early rule of law efforts will involve working with others whose primary mission is not specifically rule of law but rather other projects to enhance stability, such as physical infrastructure improvements and providing essential services (such as food, water, and medical care). All of these activities may be taking place even during the early, active combat phase of a campaign,[57] raising the issue of how rule of law operations should fit within the larger campaign.

2. *Operational Impact*

> Stability operations are a core US military mission that the Department of Defense shall be prepared to conduct and support. *They shall be given priority comparable to combat operations* and be explicitly addressed and integrated across all DoD activities including doctrine, organizations, training, education, exercises, materiel, leadership, personnel, facilities, and planning.[58]

As *DOD Directive* 3000.05's placement of stability operations as having the same priority as combat operations suggests, stability operations, including rule of law operations, cannot be performed without a cost. It is imperative that Judge Advocates explain to their commanders that any rule of law effort will require the dedication of resources in order to be successful. In addition to drawing away resources that might otherwise be devoted to combat operations or other stability operations, rule of law operations may impact traditional operations in other ways as well.

First, just as the state's willingness to comply with law is a necessary step to developing the legitimacy of law, the regard US forces display for law is likely to be widely noted by the host nation population. Any act that the populace considers to be illegitimate (such as the mistreatment of detainees or other criminal acts by soldiers acting in either their individual or official capacity, even as seemingly insignificant as the failure to obey traffic laws) is likely to discourage the populace from viewing legal rules as binding. A command's ability to establish the rule of law within its area of control is dependent in large part on its *own* compliance with legal rules restricting soldiers' (and the command's own) discretion.

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[57] J-P 3.0 at xxiv ("Consequently, the [Joint Force Commander] may need to realign forces and capabilities or adjust force structure to begin stability operations in some portions of the operational area, even while sustained combat operations still are ongoing in other areas. Of particular importance will be civil-military operations initially conducted to secure and safeguard the populace, reestablish civil law and order, protect or rebuild key infrastructure, and restore public services."); *id.* at V-15.

[58] DOD DIR. 3000.05, *supra* note 1, para. 4.1 (emphasis added).

Cooperative Extension of the Rule of Law Through Assistance to Claims Services

In Baghdad, members of the local bar association asked for training on the Military Claims Act procedure. This was a successful program in that it was forum to distribute examples of forms used for the process and the legal reasons why some claims could not be paid. For instance, general hostility toward claims denials by members of the bar declined once the standards were explained. Although no statistics exist as to the number of claims filed by lawyers, members of the bar were active in assisting local nationals in preparing their claims especially in more remote areas where the population tended to be less literate. It was a method for attorneys to help the local population while also improving their professional opportunities while helping local nationals who were illiterate or fearful of US forces.

Second, US forces may need to alter their tactical stance in order to convey to the population that they are governing through law rather than merely through the threat of force. For example, from mid 2003 to late 2005, British commanders in southern Iraq encouraged patrols to adopt a "low key" posture typified by wearing berets instead of Kevlar helmets and a policy of interacting with the local population in an attempt to engender support.[59] As major combat operations end, combat forces may need to adopt different and more engaging tactics as they transition into their role as a stabilizing force. Recalling Joint Publication 3-0's phases of joint operations, while Dominate is an important aspect of combat operations, transition into the next phases, Stabilize and ultimately Enable Civil Authorities, include a reduction in dominating activities.[60] This reduction is not only a matter of force economy. "When combatants conduct stability operations in a way that undermines civil security, they undermine the moral and practical purposes they serve."[61] Dominating activities may actually thwart stability operations and hinder the ability of US forces to transition tasks to local civil authorities. A recognition of the role of force in the *long-term* resolution of conflicts is reflected in the addition of three new Principles of Joint Operations, Restraint, Perseverance, and Legitimacy, in the 2006 version of JP 3-0.[62] With regard to the role of Restraint in stability operations, Joint Publication 3-0 explains:

> During stability operations, military capability must be applied even more prudently since the support of the local population is essential for success. The actions of military personnel and units are framed by the disciplined application of force, including specific ROE. These ROE often will be more restrictive and detailed when compared to those for sustained combat operations due to national policy concerns. Moreover, these rules may change frequently during operations. Restraints on weaponry, tactics, and levels of violence characterize the environment. The use of excessive force could adversely affect

[59] Interview with Lt Col Alex Taylor, British Army, in Charlottesville, Vir. (May 21, 2007).
[60] JOINT PUB. 3-0, *supra* note 1, at IV-26-IV-29 and fig. IV-6. *See also* STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 136 ("Winning wars and maintaining order are two very different tasks.").
[61] FM 3-24, *supra* note 8, at 7-6.
[62] JOINT PUB. 3-0, *supra* note 1, at II-2. The nine Principles of War are: Objective, Offensive, Mass, Economy of Force, Maneuver, Unity of Command, Security, Surprise, and Simplicity. *See also* STROMSETH, WIPPMAN & BROOKS, *supra* note 16, at 135 ("[S]ecurity cannot depend solely or even primarily on coercion.").

> efforts to gain or maintain legitimacy and impede the attainment of both short- and long-term goals.[63]

Legitimacy, too, is key to the long term campaigns typified by stability operations. "Legitimacy is frequently a decisive element," in joint operations.[64] And, of course, Restraint is closely tied to Legitimacy, especially in the context of stability operations. "Excessive force antagonizes those parties involved, thereby damaging the *legitimacy* of the organization that uses it while potentially enhancing the legitimacy of the opposing party."[65] When conducting stability operations generally and rule of law operations in particular, the relationship between commanders and the local population (and other rule of law participants) must be one of cooperation and persuasion rather than commanding and directing.[66]

Because rule of law operations are inherently cooperative enterprises, rule of law practitioners must have flexibility not only as to possible end states, but also to the means they undertake to reach those end states. Moreover, because the governed have the final say over the nature of the law that rules them, whatever means for accomplishing the rule of law must be ones that the local population views as legitimate. The means, as well as the goal, of rule of law projects must be meaningful to those who would be governed by the legal system in question, a requirement that imposes substantial limits on the ability of commanders and others participating in rule of law projects to "do" rule of law.

It is critical for Judge Advocates to establish up front that efforts to inculcate the rule of law through deed rather than word are likely to have a very real operational cost, in the form of both reduced mission capability and potentially even in the form of casualties.[67] The criminals who go free every day in the United States because of illegal searches – and the police officers who are killed because they are limited in their power to search – are all the reminder that anyone needs of the human cost of a state that is itself bound by legal rules. Similarly, US commanders will need to be prepared to respect – and have their power constrained by – host nation legal rules as host nation legal institutions assert their authority.[68] Moreover, the operational costs of both operating according to pre-established and well-known rules and of taking a protective rather than combative operational stance are likely to be incurred in the short term, while the benefits of those efforts likely to be realized only over the very long term, and it may be particularly hard for commanders to accept those short-term and certain costs in exchange for long-term and uncertain benefits. It will be up to Judge Advocates to educate their

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[63] JOINT PUB. 3-0, *supra* note 1, at V-26. *See also* FM 3-24, *supra* note 8, at 1-27 ("Some of the best weapons for counterinsurgents do not shoot.").

[64] JOINT PUB. 3-0, *supra* note 1, at A-4 ("Committed forces must sustain the legitimacy of the operation and of the host government, where applicable.").

[65] *Id.* at A-3; *id.* at A-4 ("Restricting the use of force, restructuring the type of forces employed, and ensuring the disciplined conduct of the forces involved may reinforce legitimacy.").

[66] LT Vasilios Tasikas, *Developing the Rule of Law in Afghanistan, The Need for a New Strategic Paradigm*, ARMY LAW. (forthcoming July 2007).

[67] *See* JOINT PUB. 3-0, *supra* note 1, at A-4 ("Security actions must be balanced with legitimacy concerns.").

[68] For instance, commanders may have to confront not only the delay and effort of having to obtain search warrants from host nation judges prior to conducting searches but also the possibility that they will be *denied* those search warrants, restricting their operational capacity significantly. *See* section VIII.B, note 1.

commanders about the importance of the rule of law mission and to prepare them for the costs of undertaking that mission. Commanders need to know that these operations will cost Soldiers' lives and that, while loss of life is always tragic, it is no more or less acceptable as part of rule of law operations than it is as part of high-intensity conflict.

Rule of law operations are long-term ones, and the rule of law is not free, either financially or operationally. The worst thing commanders can do for the rule of law is to commit themselves to an approach that they are not prepared to maintain and eventually wind up reversing, an act that is likely to be viewed by the populace as an arbitrary (and consequently lawless) one.

3. An Effects-Based Approach

The preference in all operations is to set goals based on tangible, measurable criteria. In rule of law projects, temptation to set measurable goals pushes rule of law projects toward either making physical infrastructure improvements, such as building courthouses or jails, or implementing programs whose completion can be easily monitored, such as establishing training programs and measuring the number of graduates of the program.

Such *institutional* improvements can be valuable, but rule of law projects should ultimately focus on bringing about particular *effects*,[69] not on the institutions that may exist following the completion of the project. Thus, it is critical to keep in mind what values are represented by the rule of law so that those values, not some intermediate, institutionally focused objective, drive the rule of law effort.[70] A nation with beautifully constructed courthouses may nevertheless fail to achieve the rule of law if the judges in those courthouses are either arbitrary or corrupt. The same is true of a well-established police or correctional force that regularly violates citizens' and prisoners' human rights. By failing to focus on effects, some institutional projects may actually thwart the long-term adoption of the rule of law in a society. It may very well that, especially during early-stage interventions, the only types of measurable change can take place at the institutional level, but the ultimate goal of a rule of law project is not to bring about institutional change – it is to bring about the conditions described by the term "rule of law".

Focusing on the value of effects and their place in the planning process along with specific objectives or end-states also highlights both the extremely long duration of rule of law projects and the relative inability of armed forces and other rule of law participants to actually bring about the rule of law. Although adequate resources, security, and thoughtful planning and execution may be *necessary* to rule of law projects, they are not sufficient for establishing the rule of law. In the end, the rule of law reflects a recognition among the governed that compliance with and participation in the legal system is valuable. Rule of law projects may help a society move toward that ultimate understanding, but because the law is never successfully imposed at

[69] "An effect is a physical and/or behavioral state of a system that results from an action, a set of actions, or another effect." JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATIONS PLANNING III-12 (26 Dec. 2006) (describing the relative role of objectives, effects, and end states in military planning).
[70] Kleinfeld, *supra* note 14, at 61-62.

the end of a gun, merely applying greater resources or asserting greater control cannot lead to success, and frequently may hinder it.[71]

[71] *See* Rule Of Law Lessons Learned MNC-I Rule Of Law Section Operation Iraqi Freedom 05-07 (Dec. 10 2006):

> Since MNC-I uses an effects-based approach to their operations, the MNC-I RoL Section will need to continually emphasize the principle that RoL progress cannot be easily and quantifiably measured in days and weeks, rather, it is primarily a qualitative area measured in months and years. We would do well to heed the advice of T.E. Lawrence: "Better to let them do it imperfectly than to do it perfectly yourself, for it is their country, their way, and your time is short."

III. Key Players in Rule of Law

Rule of law missions typically require myriad of international, multinational, and national participation. This panoply of actors has its trade-offs. "It necessitates trade-offs between unity of command and broad burden-sharing. Both are desirable, but each can be achieved only at some expense to the other."[1] Nevertheless, Judge Advocates should recognize that rule of law operations will rarely, if ever, be exclusively a military activity, and that other US agencies, international organizations, non-governmental organizations, and coalition forces will be part of this collaborative effort on the ground.

It is critical that all rule of law participants make a concerted effort to develop and maintain strong interpersonal relationships. This is true not only among the USG agency representatives, but also between those representatives and host-nation government officials, international community representatives, and Non-governmental Organization (NGO) representatives. Potential interagency and interpersonal conflicts may be resolved earlier and easier among individuals who have developed a personal affinity with and understanding of others involved in similar activities. Such interpersonal relationships improve communication and cooperation.

Of course, Judge Advocates should be mindful of official channels when dealing with other agency officials and representatives. Guidance must be sought through the lead rule of law agency, military command channels, and senior DOD rule of law representatives on the ground when attempting to influence other agencies, both USG and otherwise.

Lastly, when identifying the key players to rule of law missions, practitioners must also identify host nation institutions essential to rule of law. Because each rule of law mission will depend upon specific host nation governmental structure, legal apparatus, and mission context, this *Handbook* does not discuss who the key host nation actors will be. However, in order for rule of law mission to be legitimate, practitioners must keep in mind that the "rule of law" is conducted by host nation institutions, officials, and populace, with international and coalition entities providing only developmental support. Whatever the international or national mandate, it is necessary and critical to have host nation institutions and officials involved in all stages of rule of law operations. Thus, the rule of law practitioner must establish and maintain meaningful collaboration with key host nation players, giving local national institutions and officials as much responsibility as possible in running their own country's affairs.

A. US Policy and Players – Interagency Coordination

Joint Publication 3-08 defines "Interagency Coordination" as the "interaction that occurs between agencies of the USG, including the DOD, for the purpose of accomplishing an objective."[2] Planning and executing interagency operations involving many federal departments and agencies is a complicated and difficult undertaking in any environment. This is true because agencies in the USG are organized to manage specific and often narrow instruments of national

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[1] JAMES DOBBINS, ET AL., THE BEGINNER'S GUIDE TO NATION-BUILDING 6 (2007).

[2] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-08, INTERAGENCY, INTERGOVERNMENTAL ORGANIZATION, AND NONGOVERNMENTAL ORGANIZATION COORDINATION DURING JOINT OPERATIONS I-1 (17 Mar. 2006).

power. These separate agencies tend to operate in legislatively created stovepipes (and funding streams). Consequently, they have developed their own agency-specific goals, priorities, terminology, and entrenched bureaucratic cultures that reflect and support their legal mandates.

Getting various agencies to pursue common and coherent policies is a recurrent issue and problem of government. However, there are circumstances in which these disparate parts of the USG are called upon by political leaders to plan and execute a specific mission in consonance with one another. When this occurs, these governmental entities must work together within a formal or informal interagency framework. Within the post-conflict stabilization and reconstruction context, interagency coordination has become increasingly important. As a result, USG agencies have moved from a largely informal framework to a more formalized interagency structure.

For the Judge Advocate, understanding the relevant framework for interagency coordination in post-conflict missions is critical to his or her ability to effectively and accurately advise the commander and execute rule of law related missions. Appreciating the utility of an effective interagency framework will produce a consistent and aligned national policy when implementing rule of law operations in these post-conflict stability missions. While understanding this interagency process may seem like an uninteresting exercise in drawing elaborate wiring diagrams and convoluted charts, the ramifications of an uncoordinated plan in post-conflict countries will undoubtedly be serious and dangerous. Working effectively with the interagency minimizes waste of limited resources, prevents redundancy in operations, increases legitimacy with the indigenous population, optimizes chances for stability and security, and prevents loss of innocent life.

B. Post-Conflict Interagency Structure

The recent post-conflict experiences in Afghanistan and Iraq have driven policy makers within the US government to improve both the planning and execution of post-conflict stability operations. The Bush Administration, which came into power generally opposed to the notion of using armed forces to engage in nation-building, has acknowledged that the United States "must also improve the responsiveness of our government to help nations emerging from tyranny and war ... and that means our government must be able to move quickly to provide needed assistance."[3] The two directives that define the federal government's organization for stability operations are the *National Security Presidential Directive 44* (NSPD-44) and *Department of Defense Directive 3000.05* (DOD Directive 3000.05).

1. National Security Presidential Directive 44

On December 7, 2005, President Bush promulgated National Security Presidential Directive 44 (NSPD-44) entitled the "Management of Interagency Efforts Concerning Reconstruction and Stabilization." This Presidential directive affirms that stability operations as a central governmental function that serves not only the nation's humanitarian values, but also US national interests, particularly in fighting "extremists, terrorists, organized crime groups, or

[3] President George W. Bush, Speech at International Republican Institute Dinner, Renaissance Hotel, Washington D.C (May 18, 2005) *available at* http://www.whitehouse.gov/news/releases/2005/05/20050518-2.html

others who pose a threat to US foreign policy, security, or economic interests."[4] Most important, from a military planning perspective, it designates the Secretary of State as the USG lead for reconstruction and stabilization operations. NSPD-44 was not in place when operations in Afghanistan and Iraq were planned or executed initially; this represents a significant paradigm shift from previous operational thinking.

NSPD-44 was issued for the primary purpose of improving "coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife."[5] NSPD-44 provides an overarching interagency coordinating structure to manage post-conflict operations.

NSPD-44 explicitly assigns to the Secretary of State, the responsibility to prepare for, plan, coordinate, and implement reconstruction and stabilization operations in a wide range of contingencies, ranging from complex emergencies to failing and failed states, and war-torn countries.[6] The State Department is to serve as the focal point for creating, managing and deploying standing civilian response capabilities for a range of purposes, including to advance "internal security, governance and participation, social and economic well-being, and justice and reconciliation."[7] To assist in the execution of this directive, the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) was created, and the Secretary was given the authority to use this element as the coordination lead.

NSPD-44 establishes a Policy Coordination Committee (PCC)[8] for Reconstruction and Stabilization Operations, a formal interagency coordination mechanism to be co-chaired by the head of the State Department's Office of the Coordinator for Reconstruction and Stabilization and a member of the National Security Council staff. This PCC is charged with overseeing and facilitating the integration of all military and civilian contingency planning.

NSPD-44 further stresses coordination in post-conflict prevention and response between the State Department and the Defense Department.[9] Lastly, the directive highlights the requirement to develop a joint framework for harmonizing reconstruction and stabilization plans with military activities.[10]

2. *Department of Defense Directive 3000.5*

Department of Defense has made parallel set of doctrinal and institutional innovations in the arena of stability operations. In November 2005, the Deputy Secretary of Defense issued Directive 3000.05, entitled "Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations."[11] The directive is an initiative to declare stability operations

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[4] National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstructing and Stabilization 1 (7 Dec. 2005).
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, 2 (28 Nov. 2005) [hereinafter DOD DIR. 3000.05].

a "core US military mission that the [military] shall be prepared to conduct and support."[12] Moreover, the publication directs stability operations "shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DOD activities."[13] As such, this directive now mandates military planners to integrate stability operations with every war plan.[14]

DOD Directive 3000.5 maintains that military forces are to defer responsibility to appropriate civilian agencies when feasible.[15] The directive also calls for the development and employment of field civilian-military teams as a necessary element in post-conflict operations.[16]

The directive places the Under Secretary of Defense for Policy (USD(P)) and the Chairman of the Joint Chiefs of Staff in charge of DOD stability operations preparedness.[17] The USD(P) is to advise the Secretary of Defense in the area of stability operations policy, providing the Secretary with a semiannual report on the Department's progress in implementing the directive. The Chairman is to identify and lead the development of DOD capabilities for stability operations, which includes developing joint doctrine for stability operations, overseeing the development and assessment of relevant training, and establishing effectiveness standards to measure overall progress towards building the needed capabilities.[18]

While the Directive acknowledges that many stability and reconstruction tasks are more appropriately carried out by civilians, it notes that this may not always be possible in chaotic environments or when civilian capabilities are unavailable.[19] Accordingly, the Directive includes a long list of reconstruction and stabilization undertakings that US military must be trained and equipped to carry out, ranging from rebuilding infrastructure to reforming security sector institutions to reviving the private sector to developing representative government.[20]

The Directive calls on DOD to coordinate with Office of the Coordinator for Reconstruction and Stabilization (S/CRS) and other civilian agencies and to support the creation of civilian-military teams in the field.[21]

3. US Officials Influencing Post-Conflict Operations

As explained in the previous section, the USG has promulgated guidance that embraces post-conflict operations. Today, there are an extensive number of US governmental officials who

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[12] *Id.*
[13] *Id. See also* REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON INSTITUTIONALIZING STABILITY OPERATIONS WITHIN DOD (Sept. 2005) (urging the Pentagon to accelerate its capabilities to conduct post-conflict stability operations).
[14] DOD DIR. 3000.05, *supra* note 11, at 3.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

may influence post-conflict and stability policy. Past experience demonstrates that the following offices are usually involved.[22]

Department of Defense (DOD)

- ➢ *Secretary of Defense*
  - Deputy Secretary of Defense
    - Secretary of the Army
      - Army War College Peacekeeping and Stability Operations Institute
  - Joint Chiefs of Staff (JCS)
    - Chairman of JCS
    - Joint Chiefs: J1-J8
  - Under Secretary of Defense for Policy
    - Assistant Secretary for Legislative Affairs
    - Assistant Secretary for Stability Operations and Low Intensity Conflict
      - Deputy Assistant Secretary of Defense for Stability Operations

Department of State (DOS)

- ➢ *Secretary of State*
  - The Director of US foreign Assistance (F)
  - Deputy Secretary of State
    - Ambassador at Large for War Crimes Issues
    - Assistant Secretary for Legislative Affairs
    - Office of the US Global AIDS Coordinator
    - Policy Planning Staff (Special Projects)
    - Office of the Coordinator for Reconstruction and Stabilization
  - Under Secretary for Management
    - Representative to the President Management Council
  - Under Secretary for Arms Control and International Security Affairs
    - Assistant Secretary for Political-Military Affairs (Pol-Mil)
    - Deputy Assistant Secretary for Plans, Policy and Analysis
    - Political-Military Policy and Planning Team
    - Director of International Security Operations (ISO)
    - Office of Contingency Planning and Peacekeeping (CPP)
  - Under Secretary for Political Affairs
    - Assistant Secretaries of Regional Offices (AF, EUR, NEA, WHA, EAP, SA)
      - Country desk officers
    - Office of International Organizations (IO)
    - Policy, Public and Congressional Affairs
  - Under Secretary for Public Diplomacy and Public Affairs
    - Bureau of International Information Programs
  - Under Secretary for Global Affairs

[22] List modified from The Partnership for Effective Peacekeeping, *US Government Officials Who Impact Peacekeeping and Peacebuilding Policy Decisions* (Dec. 2004) available at http://www.effectivepeacekeeping.org/bn-us/ (last visited May 29, 2007).

- Assistant Secretary for Population, Refugees and Migration
- Assistant Secretary for Democracy, Human Rights and Labor
- Office of International Women's Issues
- Office to Monitor and Combat Trafficking in Persons

Department of Treasury

- *Secretary of Treasury*
  - Under Secretary for International Affairs
    - Assistant Secretary for International Affairs
      - Deputy Assistant Secretary for Regions (Africa/ME/South Asia, LA/Europe/Eurasia)
      - Deputy Assistant Secretary for Technical Assistance Policy
      - Deputy Assistant Secretary for Trade and Investment Policy
      - Deputy Assistant Secretary for Multilateral Development Institutions and Policy

Department of Justice

- *Attorney General*
  - Assistant Attorney General
    - Deputy Assistant Attorney General
      - International Criminal Investigation Training Assistance Program (ICITAP)
      - Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT)
  - Federal Bureau of Investigations (FBI) Director
  - US Marshals Service
  - Bureau of Alcohol, Tobacco and Firearms
  - Drug Enforcement Administration
  - Federal Bureau of Prisons

National Security Council (NSC)

- *National Security Advisor*
  - Policy Coordination Committee (PCC) for Reconstruction and Stabilization Operations
  - Ad Hoc Special Coordinators

Office of the President, Office of Management and Budget (OMB)

- *Director of the OMB*
  - Director of the International Affairs Division

US Agency for International Development (USAID)

- *Administrator of USAID*
  - Regional Bureaus (Africa, Asia/Near East, Europe/Eurasia, Latin America/Caribbean)
  - Bureau for Democracy, Conflict and Humanitarian Assistance

- Office of Democracy and Governance
  - Rule of Law Division
  - Governance Division
  - Elections and Political Processes Division
  - Civil Society Division
- Director of the Office of Transition Initiatives (OTI)
  - Deputy Director of OTI
    - Regional and Topical Team Leaders
- Office of Conflict Management and Mitigation
- Office of Foreign Disaster Assistance (OFDA)

- Bureau for Economic Growth, Agriculture and Trade
- Bureau for Global Health
- Bureau for Legislative and Public Affairs

C. *US Governmental Agencies Involved in Rule of Law*

There is a whole host of governmental entities who participate in rule of law operations within and outside the context of stability operations. Each of these departments and agencies has a somewhat different emphasis and approach to the rule of law. A brief description of the various perspectives by major USG department and agencies involved in rule of law is set forth below.

1. Department of State

The Department of State is responsible for planning and implementing US foreign policy. As mentioned above, NSPD-44 assigns the Department of State as the pivotal organizer of US reconstruction and development assistance, including rule of law. The State Department is responsible to prepare for, plan, coordinate, and implement reconstruction and stabilization operations in a wide range of contingencies, including disaster relief emergencies, failing and failed states, and post-war areas. Thus, the State Department is to serve as the center of federal action in creating, managing, and deploying response capabilities for a variety of purposes, including advancing host-nation security, good governance, free elections, human rights, and rule of law. Where the US military may be involved, the State Department will coordinate with the Defense Department to synchronize military and civilian participation.

As the interagency structure currently stands, the Secretary of State has overall responsibility to lead contingency planning in operations and coordinate federal agencies' respective response capabilities. The Secretary's specific tasks include:

- **Informing US decision makers of viable options for stabilization activities**
- **Coordinating US efforts with those of other governments, international and regional organizations, NGOs and private companies**
- **Seeking input from individuals and organizations with country-specific expertise**
- **Leading development of a robust civilian response capability with a prompt deployment capacity and civilian reserve**
- **Gleaning lessons learned and integrating them into operations**

- **Coordinating and harmonizing military and civilian participation**
- **Resolving relevant policy, program or funding disputes among US agencies and departments**

Congress funds rule of law programs and related activities primarily through a variety of international affairs appropriations for Department of State. The State Department has overall responsibility for coordinating the funding for foreign assistance programs, including rule of law programs and activities. USAID and the Department of Justice, discussed below, are the primary implementing agencies under normal circumstances. State also funds other rule of law activities implemented by US law enforcement agencies. In Afghanistan and particularly Iraq, DOD, also discussed below, was given specific legislative authority to execute many rule of law programs, including some civilian law enforcement training, civilian justice capacity building, and economic reconstruction. This type of authority is unique to these two operations, and therefore, Judge Advocates should be cautious about trying to extrapolate programs and initiatives from those operations into other conflict settings where the military is deployed such as the Horn of Africa, Sub-Saharan Africa, Latin America and the Philippines.

2. Office of the Coordinator for Reconstruction and Stabilization

The Department of State created the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) in order "to enhance our nation's institutional capacity to respond to crises involving failing, failed, and post-conflict states and complex emergencies."[23] Its mission is to "lead, coordinate, and institutionalize U.S. Government civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife so they can reach a sustainable path toward peace, democracy, and a market economy."[24]

Since it was created, S/CRS has been pursuing an ambitious agenda with limited resources. These tasks include:

- **Creating a monitoring system to identify states at risk of instability**
- **Developing a Strategic Planning Template for use in preparing and running missions, as well as a doctrine for joint civilian-military planning**
- **Building standing operational capabilities for rapid civilian response, including: diplomatic "first responders," enhanced technical capabilities within partner agencies; a wide network of civilian reservists; and a set of pre-positioned contracts**
- **Creating interagency mechanisms to manage operations, including in Washington at the interagency level and with the military at Regional Combatant Commands and in the field**
- **Providing consulting services for State Bureaus facing actual crise**

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[23] *See* Department of State, Office of the Coordinator for Reconstruction and Stabilization website, at http://www.state.gov/s/crs/ (last visited May 29, 2007).

[24] Department of State, Fact Sheet, Office of the Coordinator for Reconstruction and Stabilization, March 11, 2005 (S/CRS) at http://www.state.gov/s/crs/rls/43327.htm (last visited May 29, 2007).

- **Mainstreaming Conflict Prevention and Transformation across the government, including by developing an Interagency Methodology to Assess instability and Conflict**
- **Engaging other national governments and international organizations**
- **Conducting exercises with military counterparts**
- **Compiling lessons learned and best practices**

S/CRS is tasked with developing strategies and identifying states which may become unstable and may require stabilization and reconstruction. In addition to coordinating the overall USG response, S/CRS is responsible for coordinating with foreign countries, the private sector, non-governmental organizations, and international organizations. Finally S/CRS is tasked with developing a strong civilian agency response capacity for reconstruction and stabilization operations. Planning for and coordinating the establishment of the rule of law in war-torn countries is one of the primary activities for which the S/CRS has responsibility.

3. Bureau for International Narcotics and Law Enforcement Affairs (INL)

Within the State Department, the Bureau for International Narcotics and Law Enforcement Affairs (INL) also has significant responsibility for the actual implementation of rule of law initiatives.

INL advises the Secretary of State, other bureaus in the Department of State, and other USG departments and agencies on the development of policies and programs to combat international narcotics and crime. INL programs support two of the Department's strategic goals: (1) to reduce the entry of illegal drugs into the United States; and (2) to minimize the impact of international crime on the United States and its citizens. Counternarcotics and anticrime programs also complement the war on terrorism, both directly and indirectly, by promoting modernization of, and supporting operations by, foreign criminal justice systems and law enforcement agencies charged with the counter-terrorism mission.

INL works with law enforcement, judges, prosecutors, defense attorneys, border security officials, financial intelligence units, anticorruption units, narcotics control units, economic development organizations, non-governmental organizations, and other counterparts to reinforce partner governments' efforts to promote the rule of law.

INL's programs and are tailored to bolster capacities of partner countries around the globe through multilateral, regional, and country-specific programs. For example, the International Narcotics Control element of the US foreign assistance program enhances the institutional capabilities of foreign governments to define and implement their strategies and national programs to prevent the production, trafficking, and abuse of illicit drugs. These programs focus on interdiction capabilities, eradication, sustainable alternative development, and demand reduction. This includes reducing drug crop cultivation through a combination of law enforcement, eradication, and alternative development programs in key source countries as well as improving the capacity of host nation police and military forces to attack narcotics production and trafficking centers. It also includes strengthening the ability of law enforcement and judicial authorities in both source and transit countries to investigate and prosecute major drug trafficking organizations and their leaders and to seize and block their assets.

4. United States Agency for International Development (USAID)

The United States Agency for International Development plays both a major role in US foreign policy and a principal role in interagency coordination. It is an autonomous agency under the policy direction of the Secretary of State through the International Development Cooperation Agency, which is headed by the Administrator of USAID.

USAID administers and directs the US foreign economic assistance program and acts as the lead Federal agency for US foreign disaster assistance. USAID works largely in support of the Department of State and manages a worldwide network of country programs for natural response, economic and policy, encourages political freedom and good governance, and invests in human resource development. Rule of law is also one of USAID's core missions.

USAID has rule of law and justice sector assistance programs in more than 100 countries. Ordinarily USAID provides its assistance through the use of private contractors. USAID funding for Democracy and Governance programs for FY 2007 is approximately $833 million. This effort is directed towards four primary goals: to promote justice and human rights through the rule of law; to promote citizen voice, advocacy and participation; to strengthen democratic, accountable and competent governance; and to expand political freedom and competition.

USAID views rule of law as an essential component for security, as a basis for democratic governance, to protect human rights and resolve conflict, and for social and economic recovery. USAID views the successful establishment of the rule of law as having five essential elements. First, there must be a firm basis of public order and security. Next, that the public perceives the constitution, laws and legal institutions as having legitimacy. Also, that there must be an independent judiciary to provide checks and balances on other holders of power. Further, that the access to justice, due process, and human rights protection must be seen as fair. Finally, that the administration and operation of the legal system must have a reasonable level of effectiveness.

USAID strategies to strengthen the rule of law typically include several aspects. Initial efforts by the Office of Transition Initiatives (USAID/OTI) focus on small, fast, flexible and high-impact activities to support transitions before longer-term activities can get underway. DCHA/OTI typically provides assistance on transitional justice, human rights, and good governance, responding to the needs of the transition, and working closely with other interagency partners.

Longer-term efforts to establish the rule of law are carried out by the USAID Field Mission in country, with support from the Office of Democracy and Governance (DCHA/DG). The beginning is to support local efforts to place the rule of law on the political agenda of the country to be affected. USAID wants to help people decide for themselves that the rule of law is essential for development, that genuine progress in advancing the rule of law is achievable, and that international cooperation towards that end is useful. Since local leadership on these issues is critical for program interventions to be sustained over time, USAID supports strategic planning and coordination processes for justice sector reform. USAID assistance efforts are focused on reforming laws and legal procedures, in particular to introduce open trials, and public, oral and adversarial processes where defendants have the right to confront and challenge evidence and witnesses. Next is an effort to reform and strengthen the judiciary and judicial institutions aimed at producing an independent, capable, competent and honest justice system, including courts, prosecutors, police, ministries of justice, judicial councils, and other oversight institutions. A key

aspect here is the transparency of judicial selection and performance, along with improving the administration and management capacity of these institutions. Moreover, USAID supports public awareness, access to justice, and advocacy programs to support for reforms and addressing the needs of citizens, and has supported improved legal education to increase practical skills and to improve professional ethics.[25] USAID also supports the protection of human rights, through direct interventions to address immediate needs, and by building the capacity of local human rights organizations and institutions.

5. Department of Justice (DOJ)

The Department of Justice provides legal advice to the President, represents the Executive Branch in court, investigates Federal crimes, enforces Federal laws, operates Federal prisons, and provides law enforcement assistance to states and local communities. The Attorney General heads the Department of Justice; supervises US attorneys, marshals, clerks, and other officers of Federal courts; represents the US in legal matters; and makes recommendations to the President on Federal judicial appointments and positions within the DOJ. While primarily focused on domestic legal activities, the DOJ's role in rule of law operations abroad is growing.

The DOJ has an important role in helping to improve the legal and law enforcement systems of many countries through its numerous training programs. The DOJ rule of law focus is chiefly in the areas of criminal justice (courts, prosecutors), law enforcement, and security. DOJ rule of law programs are carried out in reconstruction and stabilization operations. DOJ also provides substantial technical assistance through specialized functional bureaus such as the Drug Enforcement Agency, the US Attorney's Office, and the Bureau of Prisons, among others. DOJ provides direct protection and security assistance the US Marshals Service, and other agencies and bureaus within DOJ. Most of DOJ's development assistance and training is funded through INL in the State Department. There are several different components of DOJ engaged in rule of law, typically funded through INL or USAID.

a) Criminal Division's International Criminal Investigative Training Assistance Program (ICITAP)

One of DOJ's agencies involved in rule of law is the International Criminal Investigative Training Assistance Program (ICITAP). ICITAP's rule of law mission is to serve as the source of support for foreign policy goals by assisting foreign governments in developing the capacity to provide professional law enforcement services based on democratic principles and respect for human rights. ICITAP's activities have expanded to encompass two principle types of assistance projects: (1) the development of police forces in the context of international peacekeeping operations, and (2) the enhancement of capabilities of existing police forces in emerging democracies. Assistance is based on internationally recognized principles of human rights, rule of law, and modern police practices.

ICITAP's training and assistance programs are intended to develop professional civilian-based law enforcement institutions. This assistance is designed to: (1) enhance professional capabilities to carry out investigative and forensic functions; (2) assist in the development of

[25] OFFICE OF DEMOCRACY AND GOVERNANCE, US AGENCY FOR INTERNATIONAL DEVELOPMENT, OCCASIONAL PAPERS SERIES, DOC. #PN-ACR-220, ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW 2-6, (Nov. 2002).

academic instruction and curricula for law enforcement personnel; (3) improve the administrative and management capabilities of law enforcement agencies, especially their capabilities relating to career development, personnel evaluation, and internal discipline procedures; (4) improve the relationship between the police and the community its serves; and (5) create or strengthen the capability to respond to new crime and criminal justice issues. Since its creation, ICITAP has conducted projects in nearly 40 countries.

b) Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT)

Another DOJ entity is the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT). OPDAT rule of law goals are related to initiatives in international training and criminal justice development. In this regard, OPDAT provides technical support, training and instruction to judges, court staff, prosecutors, and law enforcement officers on management and substantive and procedural law. The Office is involved in such training programs in South and Central America, the Caribbean, Russia, other Newly Independent States, and Central and Eastern Europe.

OPDAT also serves as the Department's liaison between various private and public agencies that sponsor visits to the United States for foreign officials who are interested in the United States legal system. OPDAT makes or arranges for presentations explaining the US criminal justice process to hundreds of international visitors each year.

6. United States Institute of Peace (USIP)

The United States Institute of Peace is an independent, nonpartisan, national institution established and funded by Congress. Its goals are to help prevent and resolve violent international conflicts, promote post-conflict stability and democratic transformations, and increase peacebuilding capacity, tools, and intellectual capital worldwide. The Institute does this by empowering others with knowledge, skills, and resources, as well as by its direct involvement in peacebuilding efforts around the globe

In order to achieve the above goals, USIP "thinks, acts, teaches, and trains," providing a unique combination of nonpartisan research, innovative programs, and hands-on support. USIP provides on-the-ground operational support in zones of conflict, including Afghanistan, Bosnia, Kosovo, Indonesia, Iraq, Liberia, Philippines, Rwanda, Sudan, and the Palestinian Territories. Among the many specific roles and missions, USIP staff and grantees are heavily involved in promoting the rule of law.

The USIP is very concerned with the rule of law and engages in extensive activities and projects world-wide to assist in the establishment of the rule of law in post-conflict societies. The USIP premise is that adherence to the rule of law entails far more than the mechanical application of static legal technicalities, but instead requires an evolutionary search for those institutions and processes that will best bring about stability through justice.

According to USIP, the most important objective in the immediate post-conflict period is to establish the rule of law. The initial phase is to be focused on security and stopping criminal behavior. Post conflict states must provide their populations with security, stability, personal

safety, and the assurance that transparent law enforcement and judicial processes provide the same protections and penalties for all citizens.[26]

Given some reasonable assurance of security, the main task facing the establishment of the rule of law in reconstruction and stabilization missions in war-torn or failed states is effective governance. Effective governance faces a number of challenges: restoration of public order; resurrection of legitimate political authority; refashioning the institutions of the state; creating a political process leading to a representative government; writing a constitution; ensuring the delivery of essential services and repair of basic infrastructure; creation of jobs; establishing a functioning legal system; inculcating a culture of civic participation; and holding free and fair elections. As these challenges are overcome then the establishment of the rule of law will be significantly enhanced.[27]

The USIP also places particular emphasis on constitution-making in its rule of law projects. The USIP considers a new constitution to often be a key element of democratization and state building in many countries making the transition from conflict, oppression or other major political crises. Drafting a constitution assists in outlining the vision of a new society, defining the fundamental principles by which the country will be reorganized, and redistributing political power. Additionally, the USIP sees the constitution making process provides an opportunity for competing perspectives and claims in a post-conflict or transitional society to be aired and reflected in the state's foundational document. Moreover, creating a constitution can be a vehicle for national dialogue and the consolidation of peace.[28]

7. Department of Defense (DOD)

The DOD's policy on rule of law operations is most completely stated in Directive 3000.05 regarding Military Support for Stability, Security, Transition, and Reconstruction. As explained above, this Directive, applicable to all DOD components, situates rule of law operations within the larger field of stability operations. In addition to the immediate goals of providing security, restoring essential services, and meeting humanitarian needs, "the long-term goals are to develop local capacity for securing essential services, a viable market economy, *rule of law,* democratic institutions and a robust civil society."[29] This directive establishes DOD policy, provides guidance on stability operations and assigns responsibilities within DOD for planning, training, and preparing to conduct and support stability operations pursuant to the legal authority of the Secretary of Defense. The Directive establishes DOD policy that stability operations are a core US military mission that shall be given priority comparable to combat operations, and are to be explicitly addressed and integrated across all DOD activities including doctrine, organizations, training, education, exercises, material, leadership, personnel, facilities, and planning.

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[26] *See* UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO.104, ESTABLISHING THE RULE OF LAW IN IRAQ 2-3 (Apr. 2003).

[27] *See* UNITED STATES INSTITUTE OF PEACE, STABILIZATION AND RECONSTRUCTION SERIES NO.2, TRANSITIONAL GOVERNANCE: FROM BULLETS TO BALLOTS 1-5 (Jun. 2006).

[28] *See* UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT 107, DEMOCRATIC CONSTITUTION MAKING (July 2003).

[29] DOD Directive 3000.5, *supra* note 11, at 2. (emphasis added).

While the Directive acknowledges that many stability and reconstruction tasks are more appropriately carried out by civilians, it notes that this may not be possible in chaotic environments or when civilian capabilities are unavailable. Accordingly, the Directive includes a long list of stabilization and reconstruction undertakings that US military must be trained and equipped to carry out, ranging from rebuilding infrastructure to reforming security sector institutions to reviving the private sector to developing representative government.

The purpose of DOD stability operations efforts is to instill order in a society in a manner helpful to the advancement of US interests. In the short-term, stability operations aim to provide immediate security and attend to humanitarian concerns in a region affected by armed hostilities, while the long-term goal is to establish an indigenous capacity to sustain a stable, democratic and free-market society that abides by the rule of law.

The DOD emphasis in the rule of law is to create security and stability for the civilian population by restoring and enhancing the effective and fair administration and enforcement of justice. DOD expects rule of law operations to be particularly important in the immediate aftermath of major ground combat operations, when it is imperative to restore order to the civilian population when the routine administration of the society is disrupted by combat. The actual rule of law operations are carried out by a whole host of military entities, including Judge Advocates, Civil Affairs, and Military Police.

8. Judge Advocates

The consequences for the JAG community of the Pentagon's recent embrace of stability operations cannot be fully realized at this point. However, one thing has become apparent as a constant in current military operations: Judge Advocates are conducting of rule of law operations in post-conflict Iraq and Afghanistan. Judge Advocates' involvement in rule of law takes on one of several roles, including as an adviser to commanders and their staff on legal reform initiatives, as an instructor to host nation attorneys on military justice, as a mentor to judges and governmental officials, as a drafter of host-nation laws and presidential decrees, and as a facilitator at rule of law conferences. Some of the specific tasks performed by Judge Advocates are:

- **Advising Commanders on the operations that support rule of law initiatives**
- **Determining the capabilities and effectiveness of host nation legal systems**
- **Reviewing statutes, codes, decrees regulations, procedures, and legal traditions of the host nation**
- **Reviewing relevant laws and regulations for compliance with international standards**
- **Identifying and assessing indigenous public safety systems, services, personnel and resources**
- **Advising and assisting in the process of developing transitional codes and long-term legal reform**
- **Evaluating the personnel judicial infrastructure and equipment of the court system**

- **Mentoring host-nation judges, magistrates, prosecutors, defense counsel, legal advisors and court administrators**
- **Coordinating rule of law efforts involving US personnel, coalition military, NGOs and host nation authorities**
- **Assisting in the establishment of government public safety systems to support government administration such as police, law enforcement administration and penal systems**

Coordination of Legal Resources in *OIF 05-07*[30]

A big hindrance in coordinating [rule of law (RoL)] efforts within [MNC-I] was the lack of knowledge by the RoL Section as to where the incoming RoL JAs were being assigned. Even worse, the MNF-I SJA was not provided advance information of sister service JAs reporting into theater nor informed as to their duty assignments once they arrived. This resulted in several sister service JAs being assigned to non-JA positions for their entire tour, when they could have been better utilized in vacant RoL JA positions in the MNDs and Brigades. Another result was that several JAs that were assigned to RoL positions at the lower unit levels, such as CATAs, did not receive any support from the RoL Section and did not keep the RoL Section updated on their progress in their area, which led to duplication of efforts of the PRT RLAs and MND RoL JAs.

To address this issue, each sister service that plans to deploy JAs to theater, needs to contact the MNF-I SJA about those pending deployments so that [MNC-I] and [MNF-I] can maintain awareness of all JA assets coming into theater.

9. Civil Affairs

Military Civil Affairs (CA) units can also play a key role in building host nation's legal capabilities. Capable of supporting strategic, operational, and tactical levels of command, CA units assist long-term institution building through the use of "functional area" teams working in the "public safety" specialty.[31] As stated in CA joint doctrine, the public safety team can:

- **Provide technical expertise, advice, and assistance in identifying and assessing foreign nations public safety systems, agencies, services, personnel, and resources**
- **Determine the capabilities and effectiveness of public safety systems and the impact of those systems on civil-military operations (CMO)**
- **Advise and assist in establishing the technical requirements for government public safety systems to support government administration (police and law enforcement administration, fire protection, emergency rescue, and penal systems)**
- **Assist in employing public safety resources to support government administration, CMO, and military use**

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[30] From Rule Of Law Lessons Learned MNC-I Rule Of Law Section Operation Iraqi Freedom 05-07 (Dec. 10, 2006).

[31] JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-57.1, JOINT DOCTRINE FOR CIVIL AFFAIRS, at V-1 TO V-2 (14 Apr. 2003).

- **Assist in coordinating assistance and resources from foreign nations, intergovernmental organizations (IGOs), nongovernmental organizations (NGOs), and USG civilian agencies to support local government public safety systems as part of CMO**
- **Develop plans and provide operational oversight and supervision in rehabilitating or establishing public safety systems, equipment, and facilities**
- **Advise and assist in rehabilitating, establishing, and maintaining government public safety systems and agencies**[32]

10. Military Police

Military police (MP) units specifically train to support law and order missions. MP units are specifically trained to operate detention facilities and prisoner of war camps.

The US military also possesses criminal investigation units, such as the Air Force Office of Special Investigations (AFOSI), Naval Criminal Investigative Service (NCIS) and Army Criminal Investigation Command (USACIDC). These units provide the full range of investigative capabilities comparable to a civilian law enforcement agency, including forensic laboratories, ballistics experts, narcotics experts, computer crimes specialists, and polygraphists.

MPs and investigators can be deployed in support of rule of law missions by training host-nation military personnel in the full spectrum of police tasks, including:

- **Arrest and interrogation techniques**
- **Prison security and procedures**
- **Tactical doctrine**
- **Crowd control**
- **Combating organized crime**
- **Forensics and evidence collection**
- **Protection of sensitive facilities**
- **Election security**
- **VIP security**

11. Defense Institute of International Legal Studies (DIILS)

In addition to Military Police, Judge Advocates, and Civil Affairs, the Defense Institute of International Legal Studies (DIILS) can provide rule of law training assistance to host-nation institution building. The DIILS' mission is to provide "expertise in over 300 legal topics of Military Law, Justice Systems, and the Rule of Law, with an emphasis on the execution of disciplined military operations through both resident courses and mobile education teams."[33]

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[32] *Id.* at V-3 to V-4. Army doctrine concerning rule of law operations performed by CA units is established in U.S. DEP'T OF ARMY, FM 3-05.40, CIVIL AFFAIRS OPERATIONS (Sep. 2006).

[33] Defense Institute of International Legal Studies website *at* http://www.dsca.mil/diils/ (last visited May 1, 2007).

DIILS, a part of the Defense Security Cooperation Agency (DSCA), works with US Embassy Country Teams and host nations to provide timely, effective and practical seminars to lawyers and non-lawyers with the goal of teaching operations, including post-conflict reconstruction, within the parameters of international law.[34]

D. US Embassy Country Team

Because DOS has the lead on reconstruction and stability operations, it is critical for Judge Advocates to be able to work with the US embassy country team of each host nation. The Ambassador and the Deputy Chief of Mission (DCM) at each US embassy head the team of USG personnel assigned to each host-nation, collectively known as the "Country Team." DOS members of the team, in addition to the Ambassador and the DCM, are heads of the Political, Economic, Administrative, Consular, and Security sections of the embassy. The remainder of the team encompasses the senior representatives of each of the other USG agencies present at the embassy.

The Country Team system provides the foundation for interagency consultation, coordination, and action on recommendations from the field and effective execution of US missions, programs, and policies. The Country Team concept encourages agencies to coordinate their plans and operations and keep one another and the Ambassador informed of their activities. Although the US area military commander (the combatant commander or a subordinate) is not a member of the embassy, the commander may participate or be represented in meetings and coordination by the Country Team.

Assuming there is a US Embassy in the host-nation, the Judge Advocate conducting rule of law operations should ensure close coordination with the pertinent members of the US Embassy Country Team. The composition of Country Teams may vary from one embassy to the next. For rule of law operations, the key players at the US embassy the Judge Advocate will need to form a working relationship with are:

- **The US Ambassador/Chief of Mission**
- **The Deputy Chief of Mission (DCM)**
- **The Political Officer (POL OFF)**
- **The Regional Security Officer (RSO)**
- **The Legal Attaché (LEGATT)**
- **The Defense Attaché (DATT)**
- **USAID Mission Director**
- **USAID Democracy and Governance Officer**

Each member of the Country Team has a different portfolio and is bound by the parent organization's authorities, policies, and resources. For example, the LEGATT can be an FBI Special Agent who, as part of his or her portfolio, conducts Department of Justice business writ large. International Narcotics and Law Enforcement Affairs (INL) is also active in of the rule of

[34] *Id.*

law operations and may or may not be present on a Country Team. USAID may have several personnel in the country managing a multitude of programs, many pertaining to stability operations. In reconstruction and stabilization operations, under the S/CRS Interagency Management Framework, forward deploying Advanced Civilian Teams (ACTs) will fall under the authority and control of the Chief of Mission. In the absence of a functioning Country Team, the ACT will form the nucleus until one can be established.

The Judge Advocate who is responsible for aligning the command's rule of law activities with those of other USG departments and agencies must therefore put many pieces of a interagency puzzle together to develop a cohesive plan or make progress in the identified problem areas. In any event, the DATT is a likely entry point for approaching and dealing with the Country Team.

E. International Players

The nature of the level of international involvement largely depends on the purpose and scope of the mission. Even a unilateral, nation-led intervention by the US intervention will involve some level of participation from coalition countries, the United Nations, and non-governmental organizations. Thus, rule of law operations will require some level of integration of national and international efforts.

Most major post-conflict operations will involve several entities to effectively implement rule of law programs. Theses international entities will undoubtedly involve major powers, such as the United States, United Kingdom, France, Germany, China, and Russia. It will also involve regional or neighboring powers, for example Pakistan's influence in Afghanistan, or Iran's involvement in Iraq. Moreover, large international endeavors will require the commitment of major financial donors. Lastly, the host-country itself will have a considerable involvement and input in post-conflict development and reconstruction, including rule of law. Each of these sovereigns will have different goals and different priorities. Judge Advocates must be able to work with these layers of bureaucratic machinery in order to garner greater legitimacy, widen the burden-sharing, and earn local acceptance.

There are some restrictions as to the level of involvement by international actors. International participation in the planning and implementation of rule of law programs will likely involve an invitation from the legitimate host-country political leader, or, in the alternative, a United Nations Security Council mandate that provides international actors with the required authority to intervene in the domestic affairs of a host-country. As to the latter situation, a international mandate will define the scope of intervention: from taking the lead on judicial reform, to implementing transitional legal reform, to assisting in training and mentoring governmental officials on the rule of law, to providing resources and monitoring the situation.

1. United Nations

Multidimensional UN operations assist efforts to preserve and consolidate peace in the post-conflict period by helping to rebuild basic foundations of a secure, functioning state. Among international organizations, the United Nations has the most widely accepted legitimacy and the greatest formal authority. Its actions, by definition, enjoy international approval. The UN can call upon its member governments (even those opposed to the intervention in question) to fund international operations.

The United Nations has a simple political decision-making apparatus, and a unified command-and-control arrangement. Decisions to intervene are made by the UN Security Council. The Security Council takes all decisions by qualified majority; although five of its members (United States, United Kingdom, France, China, and Russia) have the capacity to block decisions unilaterally. Once the Security Council determines the purpose of a mission and decides to launch it, further operational decisions are left largely to the Secretary-General and his staff, at least until the next Security Council review, which is generally six months thereafter.

UN peace operations and post-conflict operations can undertake a broad range of tasks, as mandated by the UN Security Council, to support the implementation of an agreed process. These include:

- **Helping the parties maintain stability and order**
- **Helping the state re-establish its authority and secure its monopoly over the legitimate use of force**
- **Supporting the emergence of legitimate political institutions and participatory processes to manage conflict without recourse to violence**
- **Building and sustaining a national, regional and international political consensus in support of the peace process**
- **Supporting the early re-establishment of effective police, judicial and corrections structures to uphold the rule of law**
- **Providing interim public security functions (e.g. policing, courts, corrections) until indigenous capacities are sufficient**

Coordination with the UN begins at the national level with DOS, through the US permanent representative (PERMREP) to the UN, who has the rank and status of ambassador extraordinary and plenipotentiary. The US PERMREP is assisted at the US Mission to the UN by a military assistant who coordinates appropriate military interests primarily with the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) and UN Department of Peacekeeping Operations (UNDPKO).

The UN normally conducts operations under the provisions of a resolution or mandate from the Security Council or the General Assembly. Mandates are developed through a political process which generally requires compromise, and sometimes results in ambiguity. As with all military operations, UN mandates that contain a US military component are implemented by US forces through orders issued by the Secretary of Defense through the CJCS. During such implementation, the political mandates are converted to workable military orders.

At the headquarters level, the Secretariat plans and directs missions. Normally, the UNDPKO serves as the HQ component during contingencies involving substantial troop deployments. Some 'peace building' missions with small numbers of military observers are directed by UNOCHA. UNOCHA is a coordinating body that pulls together the efforts of numerous humanitarian/relief organizations and is the vehicle through which official requests for military assistance are normally made.

Field level coordination is normally assigned on an ad hoc basis, depending on which relief organization is playing the major role. The United Nations Office of the High

Commissioner for Refugees, the World Food Program, and UNDPKO are often the logical candidates. UNOCHA may deploy a field team to coordinate foreign humanitarian assistance or the Emergency Relief Coordinator may designate the resident UN coordinator as Humanitarian Coordinator. Coordination with the UN Resident Coordinator may be degraded if a declining security situation requires removal of UN personnel.

One of the first tasks for a Judge Advocate conducting rule of law operations should be to consult various components of the UN mission in order to identify potential partners and develop a consensus around a common political strategy for strengthening the justice system. Taking advantage of these linkages, and pursuing joint approaches where possible will lead to greater fulfillment of the rule of law mission

2. International Monetary Fund (IMF)

The United Nations does not have all the capabilities needed for effective state-building and rule of law implementation. While the United Nations has the ability to perform military, humanitarian, and political tasks, it generally shares responsibility for reconstruction and economic development with institutions such as the World Bank and the International Monetary Fund (IMF), which are outside the UN family of agencies. The World Bank and the IMF have substantial capabilities in the area of reconstruction and the provision of financial assistance.

The IMF is an international organization of 185 member countries. It was established to promote international monetary cooperation, market exchange stability and orderly exchange arrangements. It also has a mandate to foster economic growth and high levels of employment; and to provide temporary financial assistance to countries to help ease balance of payments.

The IMF has been encouraging the rule of law for many years. In 1966, the Board of Governors urged the IMF to promote good governance by helping countries ensure the rule of law, improve the efficiency and accountability of their public sectors, and tackle corruption. The role of the IMF, however, is mainly limited to economic aspects of good governance that could have a significant macroeconomic impact and especially those related to international trade. It provides policy advice to member countries by means of a system of surveillance reports prepared by IMF personnel that cover economic activity and welfare of the subject country. These reports also pay explicit attention to governance and corruption.

IMF rule of law activity includes a number of other initiatives. The IMF encourages member countries to adopt internationally recognized standards and codes that cover the government, the financial sector, and the corporate sector. The IMF has also developed its own transparency codes, in particular the Code of Good Practices in Fiscal Transparency and the Code of Good Practice on Transparency in Monetary and Financial Policies. Also, the IMF has introduced minimum standards for control, accounting, reporting and auditing systems of central banks of countries to which it lends money. Finally, the IMF emphasizes adequate systems for tracking public expenditures and participating in international efforts to combat money laundering and terrorist financing.

In assessing rule of law in particular countries, the IMF uses a number of specific measures. First, is the efficiency of the judicial system, and here the IMF assesses the efficiency and integrity of the legal environment as it affects business. Next it assesses the law and order tradition. Then it assesses corruption in government, with particular reference to demands for bribes connected to import and export licenses, exchange controls, tax assessments and loans.

Also, the IMF examines the risk of expropriation and the likelihood of repudiation of contracts by government. Finally an index of accounting standards is created by examining and rating local companies' annual reports.[35]

3. World Bank

The World Bank is a vital source of financial and technical assistance to developing countries around the world. The World Bank is not a bank in the common sense. Rather, it is made up of two unique development institutions: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Each institution plays a different but supportive role in its mission of global poverty reduction and the improvement of living standards.

The IBRD focuses on middle income and creditworthy poor countries, while IDA focuses on the poorest countries in the world. Together each agency provides low-interest loans, interest-free credit, and grants to developing countries for education, health, infrastructure, communications, and many other purposes.

It is not surprising that the World Bank's focus in rule of law projects is on property rights. Consequently, the World Bank's definition on the rule of law is limited. "By the *rule of law,* we mean well-defined and enforced property rights, broad access to those rights, and predictable rules, uniformly enforced, for resolving property rights disputes. By *no rule of law,* we mean a legal regime that does not protect minority shareholders' rights from [vitiation], does not enforce contract rights, and does not protect investors' returns from confiscation by the state."[36]

For the most part, the World Bank experience in the rule of law has been acquired in the conversion of the economies of former communist states to market based economies. Nevertheless, the World Bank regards property rights as very important for both transitioning and developing countries. The argument is that building a political consensus for the rule of law and an efficient economy is best done by building a political consensus that will govern the allocation of property rights.[37]

The question of assignment of property rights and their legitimacy has been a problem for developing and former-communist countries. In Western Europe property rights evolved gradually and incrementally, however in transitioning and developing countries today, the challenge is expediting the process. The initial efforts to do this focused on privatization, which was expected to create a demand for property rights for private owners who would, in turn, be an economically and politically powerful lobby to demand property rights institutions and the rule of law. [38]

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[35] SWATI GHOSH AND ATISH R. GHOSH, INTERNATIONAL MONETARY FUN, POLICY DEVELOPMENT AND REVIEW DEPARTMENT, IMF WORKING PAPER NO. 02/9, STRUCTURAL VULNERABILITIES AND CURRENCY CRISES 501-2 (Jan. 2002).

[36] KARLA HOFF AND JOSEPH E. STIGLITZ, WORLD BANK, DEVELOPMENT ECONOMICS GROUP,WORLD BANK RESEARCH WORKING PAPER 3779, THE CREATION OF THE RULE OF LAW AND THE LEGITIMACY OF PROPERTY RIGHTS: THE POLITICAL AND ECONOMIC CONSEQUENCES OF A CORRUPT PRIVATIZATION 7 (Dec. 2005).

[37] *Id.* at 1-6.

[38] *Id.* at 2-3.

The rule of law enforces property rights and expands access to markets. The value of assets obtained legitimately is higher under the rule of law and it is in the interest of individuals to maximize the value of assts because they are assured of being able to retain that value. A social consensus about the fairness and legitimacy of the distribution of property rights is needed to establish the security of such rights, and in order to establish the rule of law after a long period of no rule of law either the distribution of property or the fairness of the distribution must change.[39]

4. The North Atlantic Treaty Organization (NATO)

The North Atlantic Treaty Organization is a military alliance established in 1949 after the signing of the North Atlantic Treaty. With its headquarters in Brussels, Belgium, the organization's primary purpose was to establish a stem of collective security among its members, whereby each member state agrees to mutual defense in response to an attack by an enemy state or external entity. However, since the end of the Cold War, NATO has an increasing role in security operations in post-conflict regions, including Bosnia, Kosovo, Afghanistan, Iraq, and Darfur.

NATO is capable of deploying powerful forces in large numbers and of using them to force entry where necessary. But NATO has limited capacity to implement civilian operations; it depends on the United Nations and other institutions or nations to perform all the nonmilitary functions essential to the success of any nation-building operation. NATO decisions are by consensus; consequently, all members have a veto. The NATO Council's oversight is more continuous, its decision-making more incremental then other international organizations. Member governments consequently have a greater voice in operational matters, and the NATO civilian and military staffs have correspondingly less. This level of control makes governments more ready to commit troops to NATO for high-risk operations than to the United Nations. It also ensures that the resultant forces are often employed conservatively.

National caveats limiting the types of missions to which any one member's troops may be assigned are a fact of life in all coalition operations, but have lately proved even more pervasive in NATO than in UN operations. NATO troops are much better equipped than most of those devoted to UN operations and are correspondingly more expensive. The resultant wealth of staff resources ensures that NATO operations are more professionally planned and sustained, but the proportion of headquarters personnel to fielded capacity is quite high and correspondingly more costly.

NATO's policy on post-conflict security operations is can be found in MC 411/1 NATO Military Policy on Civil – Military Co-Operation (CIMIC). NATO defines CIMIC as:

> [t]he co-ordination and co-operation, in support of the mission, between the NATO Commander and civil actors, including national population and local authorities, as well as international, national, and non-governmental organizations and agencies.

NATO policy on CIMIC recognizes that the military will generally only be responsible for security-related tasks and support to the appropriate civil authority – within means and capabilities – for the implementation of civil tasks when this has been agreed by the military commander in accordance with the mission's mandate and OPLAN.

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[39] *Id.* at 38.

CIMIC personnel are charged to work closely with the civil organizations, national governments, and local authorities. Co-operation and consensus between the various organizations may be difficult to achieve due to the requirement for each to maintain relationships on three levels: tactical, operational, and strategic

Relationships must be maintained in the field at the tactical level; with the national parties (host government or authorized governmental body) at the operational level; and the international community and supporting donors at the strategic level. In some cases, the military will only play a supporting role. In other situations, CIMIC participation and co-ordination may be the main focal point for the establishment and development of the necessary initial contacts. This type of situation can occur when no civil authority is in place, which is a common occurrence in post-conflict stability operations.

Fundamentally, NATO commanders understand that tension among political, military, humanitarian, economic, and other components of a civil-military relationship is detrimental to the overall goal. Transparency in effort is considered vital in preventing and defusing such potentially volatile situations because transparency instills trust, increases confidence, and encourages mutual understanding.

US Judge Advocates should understand that NATO staffs are comprised of individuals assigned to operational manning billets and often come from several different nations, each with varying traditions of law as well as different expectations regarding the involvement of military legal advisors in operations.

NATO staffs also do not have access to funding in the same manner as US commands, but often must coordinate smaller levels of funding from the contributing nations or, in rare occasions, from a "trust fund" of common funding, again provided by donor nations.

Finally, the NATO force will itself be comprised of individual units, from different nations, again with varying expectations or understandings regarding the role and use of Legal Advisors.

As a result, Legal Advisors in a NATO-led operation will often not be a part of a NATO CIMIC unit, but will instead be assigned only to the higher headquarters such as ISAF or KFOR. Accordingly, there are fewer opportunities for NATO legal advisors to interact with and affect the conduct of CIMIC efforts, including support to rule of law efforts, without significant outreach efforts being made to the CIMIC commander. Legal Advisor involvement with such efforts will instead normally occur only at the operational level of command, and will therefore be limited to much more traditional lawyering roles.

F. Non-Governmental Organizations (NGO)

NGOs are playing an increasingly important role in the international arena. Working alone, alongside the US military, with other US agencies, or with coalition partners, NGOs are assisting in all the world's trouble spots where humanitarian or other assistance is needed. NGOs may range in size and experience from those with multimillion dollar budgets and decades of global experience in developmental and humanitarian relief to newly created small organizations dedicated to a particular emergency or disaster.

NGOs are involved in such diverse activities, such as education, relief activities, refugee assistance, public policy, and development programs. An increasing number are involved in rule of law endeavors.

While the military's initial objective is stabilization and security for its own forces, NGOs typically seek to address humanitarian needs and are often unwilling to subordinate their objectives to achievement of an end state which they had no part in determining. The extent to which specific NGOs are willing to cooperate with the military can thus vary considerably. NGOs often desire to preserve the impartial character of their operations, at times accepting only minimal assistance from the military. While some organizations will seek the protection afforded by armed forces or the use of military transport to move relief supplies to, or sometimes within, the operational area, others may avoid a close affiliation with military forces, preferring autonomous, impartial operations. This is particularly the case if US military forces are a belligerent to a conflict in the operational area.

Most NGOs are outfitted with very little, if any, equipment for personal security, preferring instead to rely upon the good will of the local populace for their safety. Any activity that strips an NGO's appearance of impartiality, such as close collaboration with one particular military force, may well eliminate that organization's primary source of security. NGOs may also avoid cooperation with the military forces out of suspicion that military intend to take control of, influence, or even prevent their operations. Commanders and their staffs should be sensitive to these concerns and consult these organizations, along with the competent national or international authorities, to identify local conditions that may impact effective military-NGO cooperation.

Further, NGOs frequently act to ensure that military actions in the relief and civic action are consistent with the standards and priorities agreed on within the civilian relief community. The extensive involvement, local contacts, and experience gained in various nations make private NGOs valuable sources of information about local and regional affairs and civilian attitudes, and they are sometimes willing to share such information on the basis of collegiality. Virtually all NGO operations interact with military operations in some way – they use the same lines of communications; they draw on the same sources for local interpreters and translators; and they compete for buildings and storage space. Thus, sharing of operational information in both directions is an essential element of successful rule of law operations.

Judge Advocates' rule of law planning should include the identification of POCs with NGOs that will operate in the area. The creation of a framework for structured civil-military interaction allows the military and NGOs to meet and work together in advancing common goals in rule of law missions. Accordingly, a climate of cooperation between NGOs and military forces should be the goal, although it is important to remember that commanders are substantially restricted in what types of support they can provide non-federal entities such as NGOs. Judge Advocates should ensure that any support to NGOs complies with statutory and regulatory restrictions.[40]

[40] *See e.g.* Dep't of Defense, DOD 5500.7-R, Joint Ethics Regulation.

G. Coalition Partners

Given the dominance of coalition operations, it is essential for Judge Advocates to know about the philosophy, goals, and structure of coalition forces.[41] Judge Advocates need to know that the national approach of military operations and the national responsibilities for rule of law related activities, especially state building activities, vary for different coalition partners.

While US military operations are primarily motivated by national interests, some coalition partners, follow the concept of a "civil power".[42] Civil powers focus on the prevention and the ending of violence, the establishment of the rule of law in international relations, and support of underdeveloped countries, even independent from national interests.[43]

When speaking about rule of law programs some coalition partners focus on civilian reconstruction and economical support.[44] Military means are only seen as appropriate to end violence and establish conditions under which the causes of conflict can be addressed by civilian means.[45] Some coalition forces may be reluctant to initiate laws, courts, and police reforms, but rather support host government reform efforts beneficial for the establishment of the rule of law.[46]

Consequently, France, for example, sees its contribution to the achievement of the rule of law in three kinds of assistance: (1) training (of police officers and judges), (2) support in the field of legislation reform and updating (e.g. support in establishing codes) and (3) making available documentation of legal or technical kind.[47] An additional example is the German approach to rule of law operations in post-conflict areas, which similarly focuses on technical and logistical support as well as support concerning judicial administration, administrative development, and medical services.[48]

As a result of different approaches, the structure of coalition forces being tasked with rule of law issues is also different. The focus on civilian reconstruction work done in connection with rule of law issues is linked for most coalition partners in an inter-ministerial approach. For some coalition partners, this inter-ministerial approach has resulted in the establishment of mixed military and civilian teams.[49]

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[41] *See* CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 312 (2006) [hereinafter FORGED IN THE FIRE].

[42] *See, e.g.*, MARKUS WÖLFLE, DIE AUSLANDSEINSÄTZE DER BUNDESWEHR 116 (2005) (discussing Germany).

[43] *Id.* at 18-19.

[44] *See, e.g.*, Joschka Fisher, German Minister for Foreign Affairs, Speech at the Afghanistan Support Group (2001) (stating that the main task for the international community is economical reconstruction while the responsibility for the establishment of the rule of law lies in the hands of the Afghan people).

[45] *See* German Action Plan, *Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peacebuilding* 10 (2004), available at http://www.nowar.no/documents/germanactionplan.pdf [hereinafter Action Plan].

[46] *Id.* at 58. *See also* French Ministry of Foreign Affairs, Direction Générale de la Coopération Internationale et du Développement (French International Cooperation) 31 (2005).

[47] *Id.* at 32-33.

[48] *See* Action Plan, *supra* note 45, at 19.

[49] Germany has had positive experience establishing two mixed military and civilian "Provincial Reconstruction Teams" in Afghanistan since 2003. The concept of "Provincial Reconstruction Teams"

In sum, coalition partners' approach towards a military operation might differ significantly. Anybody dealing with rule of law issues needs to know that the coalition partners' understanding of rule of law activities might be very different to the US understanding.

1. Coalition Restrictions

Coalition partners will be bound to comply with obligations which arise from national laws or regulations as well as from the treaties to which they are party. As national laws and regulations are naturally different and not all coalition partners are parties to the same treaties, this may create a marked disparity among the partners as to what they can or cannot do. Judge Advocates therefore need to have an appreciation for laws and legal traditions of coalition partners and the extent of the applicability of treaties to which coalition partners are party.[50]

As this *Handbook* cannot itemize all relevant national regulations and treaties, below is an attempt to point out some specific legal restrictions, as examples of the kinds of legal restrictions on coalition partners.

a) Legal Restrictions by Domestic Law

It might not be necessary for members of a coalition to have detailed knowledge of the other partner's applicable domestic law and policy, but even a limited comprehension can aid understanding. Legal restrictions on coalition partners can be based on constitution, ordinary law or administrative regulations, like Rules of Engagement (RoE).

Constitutional restrictions are often connected with the legality of an operation under international law and with the extraterritorial application of constitutional rights. The missing legitimacy, for example by a United Nations Security Council Resolution or by acting in self-defense, might cause constitutional problems for some coalition partners in joining the operation.[51] Different constitutional problems might be based on the extraterritorial application of constitutions. Although domestic laws and international treaties are often not applicable extraterritorially, or are overridden, for example, by resolutions of the United Nations Security Council, some coalition partners will be bound to comply with their constitutions, especially with regulations concerning human rights and freedoms.[52]

In addition to constitutions, ordinary statutes often constitute restrictions on coalition operations. For the participation of some coalition partners, military operations need to be

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was originally developed by the US DOD in early 2003 and is executed also by Canada, which has sent 24 Provincial Reconstruction Teams. *See* the Department of National Defence at http://www.forces.gc.ca/site/kprt-eprk/prt_e.asp.

[50] *See* FORGED IN THE FIRE, *supra* note 41, at 69.

[51] For Germany, for example, the participation in an operation missing international legitimacy is unconstitutional. *See* Basic Law (German Constitution), Article 24, paragraph 2 (allowing military operations abroad only in the frame of "a system of mutual collective security" (for example the United Nations)).

[52] *See, e.g.*, German Constitution, Article 19, paragraph 3. The Federal Constitutional Court clarified that the commitment of the executive power to be bound by German law applies extraterritorially. This means the executive power has to take into account German domestic law, especially the constitution. In addition, anybody residing in Germany who is affected by an action of an executive power can complain about the violation of constitutional rights at the Federal Constitutional Court. *See* German Federal Constitutional Court, BVerfGE 100, 313 of July 14, 1999, paragraphs 152 and 156.

approved by their national parliaments. In some coalition partner's states this is done by statute. The German participation in the International Security Assistance Force (ISAF) military operation in Afghanistan was approved by the German Parliament in the form of statutes. These statutes determine the frame (including goals and limits) of the German participation. The statutes have determined, for example, the area and duration of the operation and operational limitations (e.g. limitation on self-defense).

Restrictions by statutes may also have a significant impact on the conduct of the operation if the statutes have an extraterritorial effect. Statutes describing the obligations and rights of soldiers usually have this effect.[53] Under these statutes most coalition soldiers are entitled to refuse unlawful orders.[54] The test of lawfulness includes generally the application of international law.[55]

Furthermore, domestic penal laws may have an impact on coalition operations. The French penal law, for example, applies for crimes conducted by French citizens outside France.[56] Germany has had a Code of Crimes against International Law since 2002. It enables the German Federal Prosecutor to investigate and prosecute crimes constituting a violation of the Code, irrespective of the location of the defendant or plaintiff, the place where the crime was carried out, or the nationality of the persons involved.

Further restrictions by domestic law can result from administrative regulations, like the Rules of Engagement for an operation. Administrative regulations handbooks for coalition military lawyers are of high interest as they mirror the opinion of the concerned national Ministry of Defense and the Government.[57]

b) Legal Restrictions by Treaties

Not all coalition partners are party to the same treaties. This fact often creates a marked disparity between partners as to what they can or cannot do. Even for coalition partners who are party to a treaty, the question of whether a treaty applies or if it is overridden by any other international rule is an open question for coalition international lawyers.

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[53] *See, e.g.*, German "Soldatengesetz" or the British Army Act.

[54] *See, e.g.*, French Statut Général des Militaires, Article 15;German Soldatengesetz, Article 11 (1); United Kingdom, Manual of Military Law, Army Act 1955, Section 34, footnote 3a.

[55] *See, e.g.*, French "Manuel de Droit des Conflicts Armés," (Handbook of the Law of War), ch. "Responsabilité" [hereinafter Manuel de Droit des Conflicts Armés]; United Kingdom, Manual of Military Law, Army Act 1955, Section 34, footnote 3a.

In the court martial case of Malcolm Kendall-Smith, the Flight Lieutenant Kendall-Smith was to face criminal charges for challenging the legality of the war against Iraq and for disobeying a lawful command and refusing deployment to Iraq in June 2005. During the procedure the court examined the lawfulness of the British operation in Iraq as matter of international law.

The German Federal Administrative Court (Bundesveraltungsgericht), BVerwG 2 WD 12.04 of June 21, 2005, also examined the legality of the military operation in Iraq as a matter of international law concerning the legality of the refusal of a German army officer to obey an order fearing that he would in effect support the US invasion in Iraq.

[56] Manuel de Droit des Conflicts Armés, *supra* note 55, ch. "Responsabilité pénale".

[57] *See, e.g.*, the German *Handbuch für den Rechtsberaterstabsoffizier im Auslandseinsatz.*

From the perspective of many coalition partners, the most important rule to possibly supersede international treaties is Article 103 of the UN Charter.[58] Considering that decisions of the United Nations Security Council (within the meaning of Article 25 and under chapter VII of the Charter) will typically provide the legal mandate for coalition operations, it is critical to understand whether Article 103 of the Charter applies to these decisions. It is commonly accepted that Security Council resolutions result in one of three forms: (1) as a binding or instructive decision creating an obligation on all UN members; (2) as an authorization allowing UN members states to act in a particular case; or (3) as non-binding recommendations.

Authorizations and recommendations of the Security Council were not foreseen by the drafters of the UN Charter. It was originally envisaged that the action of the Security Council under Chapter VII would take, where necessary, the form of binding decisions. However, the Council found itself unable to act commonly on the basis of binding decisions as a result of the excessive use of veto during the Cold War. Thus, a device of recommending or authorizing member States to use all necessary means, including the use of force, was resorted to.[59]

Some legal writers advance the view that Article 103 of the Charter applies only to instructive decisions of the United Nations Security Council but not to ordinary authorizations or even recommendations,[60] a view with which the European Court of Justice has registered agreement.[61] Other commentators[62] and the England and Wales High Court and Court of Appeal endorsed the latter view by advancing the view that authorizing resolutions can override international conventional obligations pursuant to Article 103 of the UN Charter.[63] Representatives of this opinion argue that only this interpretation ensures effectiveness to the measures of the Security Council in the field of maintenance of peace.[64] However, this view corresponds with many coalition partners practice, since States did not oppose such authorizations on the ground of conflicting treaty obligations.[65]

Despite this, international treaties to which coalition partners are party still have some meaning for coalition operations on the basis of Security Council resolutions. Since not all treaties are overridden by Security Council resolutions. Furthermore, where a Security Council

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[58] UN Charter, art. 103. ("In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.").

[59] *See* Nils Blokker, *Is the Authorization authorized?*, 11.3 EUROPEAN JOURNAL OF INTERNATIONAL LAW 542 (2000).

[60] *See* B. SIMMA, ED, THE CHARTER OF THE UNITED NATIONS – A COMMENTARY 1296, vol. II, (2d ed. 2002); *see also* Lauwaars, *The Interrelationship between United Nations Law and the Law of Other International Organizations*, 82 Mich. L. Rew 1604 (1984).

[61] *See* Robert Kolb, *Does Article 103 of the Charter of the United Nations apply only to Decisions or also to Authorizations adopted by the Security Council?*, 64 HEIDELBERG JOURNAL 21, 29 (2004).

[62] *See* SIMMA, *supra* note 60, at 729.

[63] Al-Jedda v. Secretary of Defence, England and Wales High Court and Court of Appeal, EWCA 1809 (2005).

[64] *See* Kolb, *supra* note 61, at 25.

[65] *See* SIMMA, *supra* note 60, at 759. *But see* Kolb, *supra* note 61, at 27.

resolution overrides a part of an international treaty, the remaining provisions of the treaty retain their validity.[66]

c) European Convention on Human Rights (ECHR)

One of the most important international treaties for European coalition partners is the European Convention on Human Rights (ECHR) of 1950. Because E.U. citizenship is not a requirement for application to the European Court of Human Rights, whether the Convention applies extraterritorially is a critical question.

Article 1 of the ECHR says that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention." As other international and regional treaties on human rights, the ECHR has a territorial scope. This means, generally, parties to the ECHR are obliged to guarantee the rights recognized in the ECHR to all the individuals within their territory. However, the European Court on Human Rights in Strasbourg has accepted some exceptions from this general rule of exclusively territorial application.

From 1975 through 2001, the Court and the European Commission on Human Rights recognized an obligation of the member parties to the ECHR to guarantee the rights recognized in the ECHR not only to individuals within their territory but also to individuals under their actual authority and responsibility.[67] This was called the "doctrine of personal jurisdiction." Following this approach, the Court considered the ECHR applicable in the case of an arrest abroad, even when the arrest took place in a state not being a member state of the Convention.[68]

In *Loizidou v. Turkey*,[69] the European Court on Human Rights (ECHR) added to the concept of "actual authority" and the doctrine of "personal jurisdiction" to the concept of "effective overall control" and the doctrine of "territorial jurisdiction." Thus, the court generally required a state's effective control of an area for the extraterritorial application of the ECHR. This new approach focused much stronger on territorial jurisdiction, rather than a personal jurisdictional approach.

In *Bankovic v. Belgium*,[70] the ECHR changed its jurisdiction significantly and cut back the extraterritorial application of the ECHR. This case concerned the killing of 16 individuals caused by a NATO air strike against the Serbian Radio and Television building during the air

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[66] *See* England and Wales Court of Appeals (2006) EWCA which expressively states that UNSCR 1546 (2004) overrides only Article 5 (1) of the European Convention on Human Rights while the remaining regulations of the Convention retain their validity.

[67] *See* Cyprus v. Turkey, European Commission on Human Rights, application numbers 6780/74 and 6950/75 of May 26, 1975, at 133 ("It is clear from the language ... and object of this Article [1], and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority was exercised within their own territory or abroad.").

[68] *See* Stocké v. Germany, European Commission on Human Rights, application number 11755/85 of October 12, 1989 (concerning the transfer of a German citizen from France to Germany without his cognition and agreement).

[69] *See* Loizidou v. Turkey, European Court on Human Rights, application number 15318/89 of November 28, 1996.

[70] *See* Bankovic v. Belgium, European Court on Human Rights (admissibility decision), application number 52207/99 of December 12, 2001.

campaign against the Federal Republic of Yugoslavia in 1999. The applicants complained that the states participating in the campaign violated Articles 2 (the right to life), 10 (freedom of expression) and Article 13 (the right to an effective remedy). Specifically, the applicants argued, referring to *Loizidou*, that the jurisdiction of the concerned states was determined by effective (airspace) control of these states during the air strike.

The court did not follow the applicant's argument and stated that the application of the Convention is generally limited to the legal space (espace juridique) of the ECHR member states. To accept an exception from this rule, there needs to be a "jurisdictional link between the persons who were victims of the act complained of and the respondent state."[71]

To ascertain a state's jurisdiction "actual authority" or "effective control," which the Court had not accepted in this case, is not enough. Moreover, the term jurisdiction has to be interpreted in a normative way, which means the effective control of one state over areas of another state needs to be legally justified regarding international law to create the former jurisdiction.[72] Such legal justification could result from a military occupation in-line with international law or a consent or invitation of the host nation.

The *Bankovic Decision* was affirmed by the ECHR's decision in *Öcalan v. Turkey.*[73] The Grand Chamber of the Court emphasized the "jurisdictional link," which was that *Öcalan* was handed over from Kenyan to Turkish officials on board a Turkish airplane and therefore under "effective Turkish authority" and within the jurisdiction of the Turkish state.

In the *Issa* decision of the European Court on Human Rights the Court rejected the approach of a normative interpretation of jurisdiction and turned back to the approach taken in the *Loizidou* judgment, adopting the wording as used in the *Loizidou* case.[74]

Over and above the decision in *Loizidou*, the Court clarified limiting *Bankovic* that the Convention rights and freedoms can apply outside the *espace juridique* of the Convention's member states. The future will show, if the European Court on Human Rights will follow the path of the *Loizidou* and *Issa* decisions or the more restrictive approach of the *Bankovic* decision. However, in each case the European Convention on Human Rights might have some influence on coalition operations.

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[71] Examples of such jurisdictional links resulting in extraterritorial jurisdiction of a state are cases involving activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. *See Bankovic* at para 73.

[72] *See Loizidou* at para 52. (European Court had stated: "that the responsibility of a Contracting Party could lso arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.").

[73] Öcalan v. Turkey, European Court on Human Rights, application number 46221/99 of May 12, 2005.

[74] Issa and Others v. Turkey, European Court on Human Rights, application number 31821/96 of March 30, 2005.

H. Two Models Regarding International Involvement

1. Afghanistan

a) The "Lead Nation" Approach

As part of the broader effort to establish a stable Afghan government, a group of nations met with several representatives of the Afghan people under the auspices of the United Nations in Bonn in December of 2001 and reached an agreement regarding the structure of two successive interim governments of Afghanistan and the effort to assist Afghanistan in its reconstruction.[75]

Pursuant to the Bonn Agreement, the rule of law effort in Afghanistan was organized by a "lead nation" approach, with different countries taking the lead in developing different aspects of the rule of law in Afghanistan.[76] Germany became the lead nation for developing the Afghan police force, while Italy was given responsibility for developing the judicial sector. The Germans opened a police academy in Kabul to train new police officers, an effort that was eventually augmented considerably by the United States, which opened an academy designed to provide training to existing Afghan police officers.[77] The Italians focused on building the judicial system at the local level by establishing a system of courts of first instance (the "district courts"), limited training programs for judges and prosecutors, and the adoption of a new criminal procedure code. All concerned agree that these judicial efforts were largely under-funded. The United States, while not the lead nation in any of these reforms, in addition to its supplementation of the German effort on police, also undertook considerable rule of law work in its efforts to establish a comprehensive system of *military* justice as part of its role as lead nation for the development of the Afghan National Army. The United Nations Assistance Mission in Afghanistan has proven largely ineffectual in the rule of law area, with most of the progress being made by specific reforms led by individual nations.[78]

The split international effort has proven unwieldy for many reasons, since a rule of law effort has to address police and judicial reform in concert (not to mention prison operations, which were largely ignored under the Bonn Agreement framework). In addition, the division of tasks among nations did not necessarily match the structure of the Afghan government's legal administrative apparatus. A Judicial Reform Commission was created within the Afghan government and supported in particular by the Italians, although doing so created additional political difficulties within the Afghan government as the dominant participants in the Afghan legal system, the Ministry of Justice, the Attorney General, the Supreme Court, and the newly created Judicial Reform Commission struggled for control.[79] Outside of Kabul, the rule of law effort is being conducted through US inter-agency Provincial Reconstruction Teams (PRTs) that

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[75] *See* Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001).

[76] CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II, 267 (2005) [hereinafter OEF/OIF, VOL. II].

[77] LAUREL MILLER & ROBERT PERITO, UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT 117, ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 11-12 (Mar. 2004) (hereinafter Afghanistan Report).

[78] *Id.* at 4.

[79] *Id.* at 6

have a broader mandate to effect infrastructure improvement in Afghanistan.[80] The rule of law portion of that effort operates through the legal advisors to those PRTs. The role of lead nations is currently under review, with future changes likely to include increased sharing of responsibilities within areas among various nations and the growth of United States' involvement in the rule of law effort.

Rule of law operations in Afghanistan during the period 2005-2007 were notable for the strengthening of United States Government (USG) interagency cooperation with common goals established and coordinated by the United States Embassy Kabul as lead with the cooperation and contribution of other participating agencies. In addition, during the period 2006-2007, unprecedented progress was made in achieving coordination and cooperation between USG agencies and various international community donor nation representatives and non-governmental organizations (NGOs). The impact of such cooperation between organizations with such diverse (and often competing) national and agency interests, statutory authorities, funding levels, and agency representative subject-matter expertise levels has been significant assistance in the delivery of justice services at both national and provincial levels in Afghanistan.[81] Although such assistance marks merely a beginning in the much greater context of Afghan rule of law building/rebuilding needs, it is nonetheless instructive on the effects of positive interagency relations in the post-conflict operations in general and rule of law operations in specific.

b) US Lead Agency Leadership and Interagency Participation

In early 2006, a Special Counselor on the Rule of Law was appointed by the DOS to coordinate interagency rule of law efforts in Afghanistan, to assure that gaps and overlaps in such efforts were corrected, and to assist in the development of a broader USG rule of law agenda. The first Counselor held the title of Ambassador from a previous posting and while effective, was only Special Counselor for less than 4 months. A committee[82] of representatives from each USG agency involved in rule of law activities was organized and was chaired by the Special Counselor, who was subsequently replaced by a senior lawyer who currently holds the title of Rule of Law Coordinator. He is supported by a Deputy Coordinator, who, while not a

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[80] *Id.* at 4.

[81] The formal state-run justice system in Afghanistan has been almost wholly dismantled by nearly continuous war and internal conflict since 1979, when the forces of the former Union of Soviet Socialist Republics invaded Afghanistan and continuing through the internal strife caused by the rise of the *mujaheddin* and the takeover by the Taliban. This lack of an effective formal legal system has been marked by rampant corruption at all levels of government, the destruction of all legal infrastructure, the lack of any meaningful training for judges and prosecutors, and the complete absence of defense counsel to represent accused persons in criminal cases. Furthermore, there is no reliable land-titling system, no enforcement mechanisms for civil judgments, and no effective oversight for the treatment of incarcerated persons and the enforcement of human rights – either locally or nationally. In response to the lack of a fair and trust-worthy justice system, especially at the provincial and district levels in Afghanistan, many Afghans have returned to the *shuras* (councils of tribal elders) to resolve legal disputes on an informal basis. Such *shuras* do not apply positive law (even if such law exists), have little or no education or training, are often arbitrary in their decisions, and order compensation (such as the exchange of female relatives) that violates international human rights standards.

[82] The Special Committee on the Rule of Law meets weekly at the US Embassy Kabul to discuss issues and resolve conflicts.

lawyer, is a career Foreign Service Officer. Regular and frequent rule of law meetings have resulted in much greater coordination of rule of law efforts at the strategic level, the development of strong interpersonal and cooperative relationships, and a greater awareness of each agency's rule of law activities among and between all participants and the rule of law Coordinator.

When the Special Counselor was appointed in Afghanistan, it became obvious that it would be critical to the success of the USG rule of law mission that each USG agency representative provide consistent assistance and support to both the Special Counselor and to the other members of the Special Counselor on the Rule of Law to the largest extent possible. While each agency expected (legitimately) to be able to advance its own rule of law agenda within the Special Counselor on the Rule of Law framework, the common goals of the group dictated essential information-sharing, as well as the sharing of assets and capabilities. For example, a contractor for one USG agency had superior translation services available. Another agency, greatly in need of such services on a time-sensitive basis, was able to access those translation capabilities by the use of a Memorandum of Understanding between the agencies. Information-hoarding, misinformation, and isolation of effort by any participating agency inures to the detriment not only of the group and its goals, but also to the agency itself and its goals. Of course, it is important for the practitioner to note that research must be conducted to assure that no agency implementing or fiscal laws are broken when contemplating such an agreement.

US military forces in Afghanistan now operate under ISAF, which supports the PRTs directly. Folding the US military mission under ISAF also means that DOD support for US rule of law efforts must also be coordinated with the larger military effort in Afghanistan.

2. Iraq

a) A Non-UN Model

Unlike Afghanistan, there is no larger UN-organized division of rule of law tasks among lead nations in Iraq. Given the absence of UN assistance and other substantial international presence, the task of post-conflict operations, including rule of law, fell almost exclusively to the United States. According to a 2005 assessment by the State Department Inspector General, "A fully integrated approach to rule of law programs in Iraq is essential and does not exist at present."[83] The United Nations now maintains a specific operation for Iraq (the United Nations Assistance Mission for Iraq), as does the European Union and several NGOs.[84] However, with the continued insecurity, few non-military international players are involved in rule of law operations.

b) The Coalition Provisional Authority and US Military Participation in Rule of Law Efforts

Because the coalition forces served as occupiers of Iraq, US Judge Advocates have at times been required to not only help plan for rule of law reforms, but also to operate the Iraqi justice system.[85] In the early days of the war, that effort was undertaken by division SJA offices

[83] Office of the Inspector General, Inspection of Rule-of-Law Programs, Embassy Baghdad 1 (2005) available at http://oig.state.gov/documents/organization/55815.pdf

[84] MNF-I (OSJA) Rule-of-Law Programs in Iraq: March 2006 Inventory 5-7 (2006) (hereinafter MNF-I Rule-of-Law Inventory).

[85] OEF/OIF, VOL. II, *supra* note 76, at 253.

as well as Judge Advocates serving in CA brigades and battalions.[86] The US military was authorized to create a governing body, the Coalition Provisional Authority (CPA), for Iraq until a formal indigenous government could be stood up. The CPA maintained authority over all legal, political practical, economic, and security activities in Iraq.

DOD rule of law efforts continue to be operated through unit SJA offices. In addition, rule of law efforts are conducted through PRTs, perhaps even more so than in Afghanistan. As a result, the efforts vary widely based on the needs of individual locations, from judicial training programs to improving the computer infrastructure used by local courts and police. As of May of 2006, many of the PRT rule of law efforts were just standing up.[87]

I. Interagency Process Case Studies from Afghanistan

It is critical that the rule of law practitioner be alert for opportunities to build on the successes of other agencies and organizations in post-conflict operations to provide a greater benefit to the host nation than such contributions might otherwise provide if made separately and without coordination. In post-conflict Afghanistan, senior rule of law personnel in the Combined Forces Command – Afghanistan (CFC-A), like every other USG agency, developed strategic goals based upon commanders' guidance, rule of law regulatory authorities, funding constraints, treaties and international agreements, and host-nation priorities. However, in the fluid rule of law environment of post-conflict Afghanistan, unique opportunities arose – almost spontaneously – where individual agency efforts conjoined and complemented each other so that, in the confluence, much more was achieved by building on the prior successes of others.

a) Wardak Model Justice Project

Nowhere was the interagency success more evident than the justice sector achievements in the Wardak province known as the Wardak Model Justice Project. In late 2005, the Justice Sector Support Program (JSSP), a contractor of the DOS International Narcotics and Law Enforcement Affairs Bureau (INL), began a training program for provincial and district level judges and prosecutors in Maydan Wardak. Almost simultaneously, but without advanced coordination, DOD rule of law and CA personnel teamed up to build a justice administration building in Maydan Shar. Using CERP[88] funds, available to tactical commanders for urgent and humanitarian rebuilding projects in post-conflict Afghanistan and Iraq, the CFC-A rule of law and CA team obtained the blueprints for a generic administration building from USAID. USAID was using the blueprints to build up to 40 provincial courthouses throughout Afghanistan. Using these blueprints, CFC-A began construction in early 2006 on the justice administration building in Maydan Shar.

Momentum gathered as the people of Maydan Wardak generated more enthusiasm for the improvements being made. The USG agencies began to look more carefully at each other's rule of law activities in Maydan Wardak, and, aided by strong leadership on the Special Committee for the Rule of Law began a concerted coordination effort to build on those successes. Lessons

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[86] *Id.* at 254-55.

[87] *See* MNF-I Rule-of-Law Inventory, *supra* note 84 at 21-24.

[88] Commander's Emergency Response Program, *see* OPERATIONAL LAW HANDBOOK, ch. 11, paragraph IX.C.4 (2006), for a full-discussion of CERP authorities, implementation, and regulatory guidance.

learned were shared among the Special Counselor on the Rule of Law agency representatives, resulting in more efficient delivery of proposed projects.

USAID began construction on a new courthouse, and one of its contractors offered to introduce its new paper-based court administration system in Maydan Shar. CFC-A also provided a justice motor-pool (with maintenance and fuel packages) and sponsored a public awareness campaign to let the citizens of the province know the steps being taken to improve the delivery of justice services. At the same time, CFC-A contracted with an Afghan NGO to provide defense counsel services to criminal defendants in Wardak and five other provinces. Ultimately, building on the combined efforts of the other USG agencies, the DOS announced in late 2006 that it would build a new, state-of-the-art prison and national corrections training facility in Maydan Wardak. The result of the ongoing combined efforts of these agencies was the Wardak Model Justice Project, the name reflecting the goal of the agencies involved that the justice system in Maydan Wardak should be rebuilt to serve as a model for the international community and the GoA for such improvements in other provinces,.

Interagency cooperation and communications between the agencies involved in Wardak continues in 2007. A group of agency representatives and provincial justice and government officials gathers monthly in Wardak to discuss problems with and future plans for further expansion of the Wardak Model Justice Project. Visibility on this project remains high as the provincial governor continues to chair each monthly meeting. Participants from all USG agencies are invited to these meetings, as well as representatives of the international community and various NGOs. The recently arrived Turkish Provincial Reconstruction Team (PRT) brought a police training team with them, and this program has been incorporated into the Wardak Model Justice Project. Similar efforts are being planned for Nangarhar, Bamyian, and Logar provinces as part of w wider DOS strategic plan for implementation of its rule of law program.

b) Provincial Justice Conferences (PJCs)

Two of the most persistent obstacles to the establishment of rule of law in Afghanistan are the inability to extend the reach of the central Government of Afghanistan (GoA) in Kabul into the provinces and the persistent and pervasive corruption at all levels of government. Both problems arise from a lack of communications infrastructure, difficulty of travel, security instability, inadequate salaries for government and justice officials, and lack of education and training among provincial government and justice officials.

The Provincial Justice Conferences (PJCs) program attempts to alleviate a measure of these problems by bringing GoA justice officials from Kabul to meet their counterparts in the provinces to discuss the obstacles to delivery of justice services to the province and to identify solutions that can be instituted expediently and in a cost-effective way. Follow-up PJCs are generally scheduled within a period of three to six months to check on progress made on the identified solutions and to discuss outstanding issues. One essential key to a successful PJC has been the invitation and inclusion of all interested USG agencies, the international community, and NGO representatives. Each agency or organization has the benefit of significant, specialized, and diverse experience. With the inclusion of as many subject-matter experts as possible, new ideas may emerge to correct persistent problems.

As of the first quarter of 2007, PJCs and follow-up PJCs have been conducted in six provinces[89] in Afghanistan. The first PJCs drew small attendance from among the provincial justice officials, but more recent PJCs have drawn upwards of 150 people from the national, provincial, and district levels, and, in some cases, from neighboring provinces. A typical PJC program consists of several distinct parts. First, all participants are taken on a tour of justice facilities in the provincial capital, to include the prison, police headquarters/detention centers, judges' office, prosecutor's office, courthouse, and defense counsel offices (if any). This feature gives participants a first-hand view of the justice infrastructure and an opportunity to observe justice officials in their own environments. Second, a general session of all participants is convened and hosted by the provincial governor. Brief comments from the governor, justice officials, and USG/international participants are presented. After a communal lunch, hosted by one or more of the USG participants, conferees are divided into groups representing their individual justice interests – police, judges, prosecutors, defense counsel, and prison administrators. These groups discuss specialized problems and their potential solutions. The small groups take notes on their discussions from which a work plan can be developed. Finally, the small group leaders from either GoA or the provincial government present summaries of their discussions to a final general session at the end of the day.

Organization of a PJC in Afghanistan is a difficult, time-consuming, and complex task for the rule of law officer. It is critical that the rule of law practitioner begin the preparations and planning for a PJC early and maintain consistent coordination with everyone involved in the planning. At the central GoA level, transportation for GoA justice officials must be arranged; invitations and agendas in Dari/Pashto and English must be delivered to all participants; funding for the lunch must be obtained, if needed (typically using the Command's Official Representation Funds); and coordination with organizers at the provincial level must be maintained. In the PJCs conducted during the period of 2005-2007, much of the organization tasks at the provincial level were accomplished by the Provincial Reconstruction Teams (PRTs). A PRT action officer was assigned, and he or she made local arrangements with the governor and justice officials; arranged for meeting space and lunch catering; arranged for security forces to protect the meeting facility and participants; provided travel routes and grid coordinates for all meeting/tour locations; and supplied intelligence on security and logistics issues in their area.

[89] Ghazni, Nangarhar, Parwan, Logar, Bamiyan and Balkh.

IV. The International Legal Framework for Rule of Law Operations

It would be ironic if rule of law operations were conducted without regard to the legal restrictions on military operations. Different sets of international legal norms will apply to each conflict, and the decision of which norms apply will be decided at the highest policy levels. Nevertheless, deployed Judge Advocates working on rule of law operations need to be mindful of the universe of international legal rules applicable to rule of law operations, and especially how those rules may vary from those applicable to more traditional military operations.

Some of the norms and mandates of these varied disciplines apply universally, requiring Judge Advocates ensure compliance in all operations. Other disciplines, however, are quite limited in application. The extraterritorial setting of most modern stability operations, for instance, calls into question the relevance and applicability of many legal frameworks. Still other international legal frameworks, such as the law of war, rely on strict classification regimes to restrict their application by operation and by persons protected. The first section of this chapter discusses how to determine which legal framework applies to a particular operation; the second is an overview of the various substantive requirements of those frameworks (although, by necessity, its coverage is quite limited). Regardless of the setting or the particular regime applicable, though, rule of law operations call for adherence to the requirements of international law not only as a matter of legal compliance, but as a matter of US policy and good practice.

A. Identifying a Rule of Law Legal Framework

The aim of this section is to illustrate some of the various mandates that may govern military deployments overseas and the impact these have on rule of law operations. From a legal perspective the mandate defines the nature, scope and limits of any military deployment. It provides the *raison d'etre* of the military mission and sets the boundaries of all military activity. The mandate may take one, or more, of many forms. Indeed, it may expand and evolve as the operation progresses or, by contrast, may become more limited as an operation matures. This section will outline many basic principles of international law, however, given spatial limitations should be not used as an authoritative guide.

1. UN Mandates

a) UN Security Council Resolutions

The UN consists of 192 member states. Indeed, very few states are not parties to the UN Charter. The Security Council is the principal organ within the UN with primary responsibility for the maintenance of international peace and security.[1] Chapter VII of the UN Charter enumerates the Council's compulsory powers to restore international peace and security. Security Council Resolutions require support from nine out of fifteen members, provided none of the five permanent representatives[2] votes against or vetoes the proposal. Pursuant to Article 25 of the Charter, UN members are required to honor and carry out Security Council resolutions.

[1] U.N. CHARTER art. 24(1).

[2] USA, Russia, The United Kingdom, China and France.

The Use of Force

The UN Charter's general prohibition on the use of force is relatively well accepted.[3] Intervention, whether by direct military action or indirectly by support for subversive or terrorist armed activities, fall squarely within this prohibition.[4] The prohibition on the use of force is, however, subject to two important exceptions. The first, contained in Article 51 of the Charter, recognizes the right of individual and collective self defense for States if an armed attack has occurred. The second, contained in Article 42, which empowers the Security Council to authorize the use of force in order to restore international peace and security. Resolutions empowering military operations overseas can be passed under Chapters VI or VII of the Charter. The former providing for the pacific settlement of disputes, the latter permitting action with respect to threats to the peace, breaches of the peace, and acts of aggression.

Judge Advocates may expect to support rule of law operations governed by UN Security Council mandates. In addition to advancing efforts to restore peace, such resolutions may also include developmental mandates. Particularly in missions undertaken in under-developed states, Judge Advocates should expect Security Council resolutions to address economic, financial, health, human rights, as well as goals related to self-determination. UN Security Council Resolution 1483, regarding the reconstruction of Iraq, is representative.[5] Frequently, Security Council and Secretary General have relied on Special Rapporteurs to provide detailed guidance on implementation of such resolutions and to report to the Council on progress in their execution.[6]

Judge Advocates may find, within UN Security Council resolutions, mandates or directives that are in apparent conflict with pre-existing or concurrent legal norms. UN Charter article 103 directs Member States confronted with competing legal duties to give priority to obligations arising under the Charter. Judge Advocates should identify such conflicts early, alerting technical legal channels at the highest levels. Resolution of competing legal duties may ultimately require political as well as legal determinations.

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[3] "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the purposes of the United Nations." U.N. CHARTER art. 2(4).

[4] *See* G. A. Res. 2625 (XXV), U.N. Doc. A/8082 (1970).

[5] In response to the 2003 invasion and occupation of Iraq, the United Nations Security Council passed Resolution 1483. S.C. Res. 1483, U.N. Doc. S/RES/1483 (2003). In addition to a directive to comply with the law of occupation, Resolution 1483 instructed the coalition to work toward a number of developmental and humanitarian goals. Paragraph 14 directed the coalition to repair infrastructure and meet the "humanitarian needs of the Iraqi people." *Id.* Several months later, the Secretary General issued a report on implementation of 1483. *See Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483*, U.N. Doc. S/2003/715 (2003). The report frequently exhorted the coalition to speed reconstruction and development efforts, often through transformative means. For instance, the report observed "the development of Iraq and the transition from a centrally planned economy needs to be undertaken." *Id.* at 16.

[6] *See* Sec Gen's Comment on UNSCR 1483; Report of the Panel on United Nations Peace Operations (The Brahimi Report), A/55/305 - S/2000/809 (2000), available at http://www.un.org/peace/reports/peace_operations/docs/full_report.htm.

b) Resolutions passed under Chapter VI

Chapter VI of the Charter deals with attempts to resolve disputes by pacific means. Indeed, it states that parties to any dispute must first attempt to seek resolution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.[7] The Security Council has wide powers under Chapter VI. It may, at any stage of a situation which might lead to international friction or give rise to a dispute, recommend appropriate procedures or methods of adjustment. The key to resolutions passed under Chapter VI is that they only permit the presence of military forces with the consent of the host government and do not sanction the use of force other than that which is necessary for self defense.

Due to the permissive nature of Chapter VI missions, Judge Advocates should expect host nation legal norms to govern most operations. Relations between the sending and receiving state will in all likelihood be governed by a Status of Forces Agreement. Chapter VI missions that include a rule of law aspect may call on supporting Judge Advocates to assist the host nation in implementing its international legal obligations. During planning for such operations, the JA contribution to the Military Decision Making Process (MDMP) should include a detailed legal estimate, outlining host nation international and domestic legal obligations. Though not envisioned as offensive operations, Judge Advocates should pay particular attention to detention procedures, law enforcement provisions, and property dispute resolution.

c) Resolutions passed under Chapter VII

Chapter VII of the UN Charter provides an important caveat to the prohibition on the use of force contained within Article 2(4). Along with Article 51, it constitutes the modern *jus ad bellum*. The prohibition on UN intervention in domestic affairs of a nation is specifically excluded in relation to action taken under Chapter VII, which are predicated on threats to the peace, breaches of the peace, or acts of aggression.[8] By far the most common method for the Security Council to pass a resolution under Chapter VII is for the members to determine that there exists a threat to the peace.

Article 39 of the Charter enables the Security Council in the event of "any threat to the peace, breach of the peace, or act of aggression," to take measures to "maintain or restore international peace and security."[9] Once the Council has made an Article 39 determination, it can then prescribe what measures are necessary for the restoration of peace and security using its powers under Chapter VII, specifically measures provided for in Article 41 and 42.

Article 41 allows the Council to require Member States to apply affirmative measures short of the use of force. Theses measures include, but not limited to "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."[10] Judge Advocates must understand that the imposition by the Security Council of economic sanctions against a state pursuant to Article 41 may be either recommended or mandatory in nature, which is a matter to be ascertained from the language of the resolution

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[7] U.N. CHARTER art. 33(1).
[8] U.N. CHARTER art. 2(7).
[9] U.N. CHARTER art. 39.
[10] U.N. CHARTER art. 41.

Article 42 empowers the Security Council to authorize the use of force. The Security Council may authorize Member States to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security."[11] These measures include, but are not limited to, "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."[12] A Security Council resolution under Chapter VII is binding on all member States. This does not mean that all members must participate in military operations, but they cannot work counter to the UN effort.

The legal effect of the passing of a resolution under Chapter VII that authorizes the use of all necessary means should not be underestimated. It offers the military commander enormous freedom to prosecute any campaign. Resolutions passed under Chapter VII have been aimed at both state and non-state actors. Examples of the latter include the Resolutions passed against National Union for the Total Independence of Angola (UNITA) following their breach of terms of cease-fire in Angola[13] and those against the Taliban[14] following the attacks on the US embassies in East Africa and the first bomb attack on the World Trade Center in 1993.

Judge Advocates may find familiar legal territory when supporting missions executed pursuant to Chapter VII authority. Such missions are typically coercive, thus obviating, at least during early phases, detailed consideration of host nation legal frameworks. The nature and international scope of such missions, particularly those carried out under Article 42, will likely trigger application of the full body of the law of war. Given the requisite international consensus and support for such operations, however, Judge Advocates may reasonably anticipate rapid completion of decisive operations and subsequent transition to stability or post-conflict missions, and should expect considerable escalation of legal complexity in these latter phases. Judge Advocates should pay particular attention to extension and modification of legal mandates through subsequent Security Council resolutions. Mandates subsequent to successful decisive operations may include broader developmental and transformative goals.[15]

2. *Mandates Pursuant to Bilateral and Multi-lateral Agreements*

Because of political considerations and structural obstacles, the UN system has not operated as many envisioned. Though nearly all states have delegated responsibility for maintenance of international peace and security to the UN, bilateral security agreements form an integral part of the international security framework. States have frequently resorted to operations outside the context of the UN Security Council to restore peace and security. In addition to bilateral agreements on security cooperation, states have preserved regional security arrangements to supplement both the United Nations system as well as their indigenous capacity for self-defense. Occasionally states have concluded ad hoc arrangements as well.

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[11] U.N. CHARTER art. 42.

[12] *Id.*

[13] Most recently, UN Security Council Resolution 1295 established a monitoring mechanism to supervise implementation of previous Security Council resolutions issued against UNITA. U.N. Doc. S/Res/1295 (18 April 2000). Resolution 1295 invoked the Council's powers under Chapter VII and called on states to consider action under article 41 of the Charter. *Id.* at para 6.

[14] The Taliban were not generally recognized by the International Community to be the legitimate Government of Afghanistan and as such were "non State actors".

[15] *See* fn. 5.

Security arrangements are not the exclusive source of bilateral military mandates, however. States have also concluded developmental and other assistance agreements that may regulate or govern military contingency operations. Economic, educational, and other developmental agreements may prove highly relevant to contingency operations, particularly during long-term or preventive stability operations. Such agreements may include specific provisions on military support, military and police training, or support to civil infrastructure projects.

Judge Advocates detailed to support missions carried out pursuant to bilateral agreements should coordinate closely with the appropriate geographic Combatant Command. Interagency coordination is also essential to appreciating the implementation strategy of bilateral development or security agreements. The DOS is the lead agency for negotiation and execution of international agreements, and typically manages obligations stemming from such agreements through regional and country bureaus.

3. Mandates pursuant to National Legislation

Finally, military missions, particularly those involving the use of force, are frequently governed by national legislation. The Constitution entrusts Congress with significant responsibilities related to employment and regulation of the armed forces. Even outside instances of declared war, congressional resolutions and bills have regulated the scope, duration, and nature of military operations. Authorizations, appropriations or restrictions on expenditure of funds are the primary means by which Congress can regulate contingency operations.

Judge Advocates should anticipate national legislation, both standing and ad hoc, regulating armed forces' activities during rule of law ops. Fiscal law restrictions will undoubtedly impact mission planning and execution.[16] Other reporting and operating requirements, such as human rights Leahy amendment[17] vetting should be anticipated as well.

B. The Rule of Law Legal Framework

As mentioned at the outset of this chapter, currently, no single body of law regulates the conduct of rule of law operations. Rather, rule of law operations appear better suited to highly context-specific classifications, accounting for geographic, conflict, and cultural settings. This section will survey potential application of three major legal disciplines with apparent relevance to many rule of law operations: the law of war, occupation law, and human rights law.

1. The Law of War

Rule of law operations occur within the broader context of stability operations.[18] Department of Defense doctrine emphasizes that stability operations occur both along and beyond the conflict spectrum. Doctrine notwithstanding, major combat operations are sure to present significant obstacles to effective rule of law operations. Mission sets, personnel, and resources must be tailored to accommodate the realities and demands of the battlefield.

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[16] *See* section VI.D.

[17] Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

[18] *See* U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, para. 4.2 (28 Nov. 2005).

Similarly, rule of law operations occurring during combat must account for operation of the law of war.

In some instances, the law of war may operate as an enabler, facilitating the imposition of law and order. At the same time, the law of war may impose seemingly onerous and elaborate treatment obligations straining resources and personnel. Judge Advocates must ensure that rule of law plans and operations executed during armed conflict leverage such enablers while respecting at all times relevant obligations.

a) Treaty Law

The majority of the modern law of war is found in treaty law. Some commentators have found utility in bifurcating the positive law of war into obligations concerned with treatment of victims of war (the Geneva tradition) and obligations to be observed in the conduct of hostilities (the Hague tradition). While the academic nomenclature of this bifurcation may no longer accurately reflect the respective treaty sources of these norms, the functional separation of rules remains useful. Bearing this bifurcation in mind, the treatment obligations of the Geneva tradition appear to have the most direct application to rule of law operations.

The four 1949 Geneva Conventions form the backbone of the law relevant to treatment of victims of war. Almost all states, including the United States, are parties to the Geneva Conventions. Despite their impressive size, 419 articles in all, the majority of the Conventions regulate a narrow class of armed conflict – so-called international armed conflict. In fact, application of all but one article of each of the four Conventions is conditioned on existence of armed conflict between opposing state parties to the Conventions. Thus Judge Advocates must reserve *de jure* application of the provisions of each Convention to international armed conflict. All other armed conflicts, namely those between state parties and non-state actors, such as civil wars and insurgencies are governed by Common Article 3 of the Conventions.

Though conflict classification is usually determined at the highest levels of national government, Judge Advocates in rule of law operations must remain attuned to evolutions in the character of conflict. Recent operations have featured complex and even counter-intuitive conflict classifications. Armed conflicts among diverse groups within the same state territory have been considered single conflicts for purposes of application of the Conventions. Other armed conflicts involving multiple parties in a single state have been carefully parsed into separate conflicts for legal purposes.

In addition to a restrictive conflict classification regime, each of the Conventions reserves the majority of its protective provisions to a class of "protected persons." Only persons or groups satisfying these often stringent criteria are covered by the Conventions' treatment obligations. Judge Advocates must ensure rigorous classification of persons placed in the hands of friendly and allied forces. Rule of law operations, especially police, detention, and court functions, will regularly implicate provisions of the Conventions.

b) Customary International Law

Customary international law (CIL) is a second major source of law of war obligations. Given its largely uncodified form, CIL can be difficult to discern. Many treaty provisions, including the Hague Regulations of 1907, the Geneva Conventions of 1949, and portions of the 1977 Additional Protocols to the 1949 Geneva Conventions are considered reflective of CIL.

Provisions of the latter treaties have proven particularly troublesome for US Judge Advocates because the US is not a party to either Protocol. The majority of Protocol I provisions reflective of CIL relate to targeting operations and are not of primary concern to rule of law operations. The US has not expressed explicit support for most of the Protocol I supplements to treatment of war victims, however, reducing the legal significance of these provisions during exclusively US operations. Judge Advocates should bear in mind, however, that many US allies and potential rule of law host nations have ratified or acceded to the Protocols or may view their provisions as more fully reflective of CIL.

It is important to remember that legal norms mature with their triggering mechanisms. That a norm develops, through state practice and *opinio juris*, into CIL does not of necessity expand its scope of application. For example, while combatant immunity for the former lawful warlike acts of certain POWs is likely reflective of CIL, such immunity is restricted to international armed conflict. The CIL status of combatant immunity does not imply its application to non-international armed conflicts.

c) Policy

United States DOD policy directs its armed forces to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations".[19] The policy is intended to apply the law of armed conflict for international armed conflict across the conflict spectrum. This provides a standard that military personnel can train to in all situations, applying the *lex specialis* of the law of war to their conduct, as a matter of policy, even when it may not apply as a matter of law.

2. Occupation Law

Though largely in the latter half of the twentieth century, occupation law has experienced a recent revival in both international practice and litigation.[20] Like most international law, occupation law exists in two forms: treaty and custom. This section will outline issues concerning both formal application of occupation law and its potential for application by analogy during rule of law operations.

a) Treaty Law

Most norms of occupation law are found in international treaties. The 1907 Hague IV Regulations and the 1949 Fourth Geneva Convention are the primary sources of positive law. Generally speaking, rules of governance and handling of property may be found in the former, while norms applicable to treatment of persons are found in the latter. Collectively, occupation law offers nearly complete instructions on the temporary administration of foreign sovereign territory and persons. These include responsibilities for food and medical supplies, hygiene and public health.

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[19] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.1 (9 May 2006).

[20] Adam Roberts, *What is a Military Occupation?*, *in* THE BRITISH YEAR BOOK OF INTERNATIONAL LAW (1985); Adam Roberts, *Transformative Military Occupation: Applying the Laws of War and Human Rights*, 100 AM. J. INT'L L. 580, (2006).

Whether forces are in occupation is a question of fact which depends largely on the prevailing conditions on the ground. Guidance is provided by Article 42 of the Hague Regulations:

> Territory is considered occupied when it is actually placed under the authority of the hostile army [and] extends only to the territory where such authority has been established and can be exercised.

Accordingly, it is entirely possible that a portion of contiguous territory would be deemed occupied while another would not. Indeed, a divide can exist within a single city or town depending on conditions and the ability of the forces to establish and exercise their authority. Potential occupants often go to great lengths to distinguish themselves as mere invaders, liberators, or invited civil administrators to prevent the operation of occupation law.

Occupation law has been characterized as conservationist in nature. Article 43 of the Hague Regulations and Article 64 of the Fourth Geneva Convention direct occupants to preserve and adopt existing systems of government. When applicable, these provisions may present obstacles to rule of law projects that modify existing legal regimes and institutions. Exceptions are primarily related to establishing and maintaining security and observance of fundamental humanitarian norms. The occupation phase of Operation Iraqi Freedom presented Judge Advocates with just such a challenge. Reform of Iraqi criminal, commercial, and electoral systems required legal authorization superior to the restrictive norms of occupation law. The Coalition Provisional Authority (CPA) relied heavily on United Nations Security Council resolutions to justify legal innovations that would otherwise have run contrary to occupation law's rules of preservation. Specifically, the CPA relied on articles 25 and 103 of the United Nations Charter to justify observance of the Security Council's development mandate in Resolution 1483, notwithstanding apparent friction with occupation law's direction to preserve the status quo.

During occupation, Judge Advocates should ensure rule of law projects that alter existing governmental structures are grounded in either legitimate security concerns or fall under a superseding international mandate for development.

b) Customary International Law

Because occupation law is found in such well-established treaties, many argue that its norms constitute CIL. While probably true, Judge Advocates should remember that norms attaining customary status retain the conditions of their application. That is, when a treaty provision matures into custom, the primary effect is to bind non-parties – customary status does not mandate application beyond the scope of conditions originally attendant to the relevant norm. For example, while Article 49 of the Fourth Geneva Convention prohibits transfers of inhabitants of occupied territory, its status as a likely customary norm does not extend its application beyond the preconditions established in common Article 2 and Article 4 of the Fourth Convention. Thus, Article 49 only operates as customary law in "cases of partial or total occupation of the territory of a High Contracting Party"[21] and with respect to "[p]ersons . . . in the hands of [an] . . . Occupying Power of which they are not nationals."[22]

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[21] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2.
[22] *Id.*, art. 4.

It is possible, notwithstanding the preceding distinction, some provisions of occupation law extend to territory that is not occupied in the technical or legal sense. For instance, foreign courts have explored the boundaries of occupation law applicable to situations short of those described in common article 2. The content of this variant of customary occupation law is unclear. The United States has not clearly expressed its views in this regard. A recent study of customary international humanitarian law is similarly silent on occupation law.[23]

c) Policy

In addition to guidance directing US forces to comply with the law of war in all operations, Judge Advocates will find support for application of occupation law beyond its legal limits as a matter of policy. US Army Field Manual 27-10, paragraph 352(b) encourages forces to apply occupation law to areas through which they are merely passing and even to the battlefield.[24] Thus, stability and rule of law operations, which may not formally trigger application of occupation law, may nonetheless call for observance of norms applicable to occupation. Occupation rules for the treatment of property, public and private, seem particularly appropriate for such expansive observance.

3. Human Rights Law

Where international law generally governs relationships between states, human rights law, though also international law, regulates relationships between states and individuals. While the content and character of human rights law has expanded greatly, three principles restrict the relevance of human rights law during US military operations: First, the US regards most human rights law as non-extraterritorial. That is, under the US view, the majority of human rights law obligations do not extend beyond the boundaries of the United States. Second, during combat operations the United States regards the law of war as an exclusive legal regime or a *lex specialis*. Under this view, the law of war operates to the exclusion of competing legal frameworks such as human rights law. Finally, the US and many other states view human rights treaties as non-self-executing – they require implementation through constitutional or legislative procedures. For these reasons, US armed forces have given comparatively little attention to human rights law as such.[25]

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[23] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

[24] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10 LAW OF LAND WARFARE 352(b) (18 July 1956).

[25] The United States' position on the question of whether human rights treaties apply extra territorially or during periods of armed conflict may be summarized by the comments of Michael Dennis of the US Department of State:

> The obligations assumed by states under the main international human rights instruments were never intended to apply extraterritorially during periods of armed conflict. Nor were they intended to replace the *lex specialis* of international humanitarian law. Extending the protections provided under international human rights instruments to situations of international armed conflict with military occupation offers a dubious route toward increased state compliance with international norms.

Michael Dennis, *Application of Human Rights Extraterritorially in Ties of Armed Conflict and Military Occupation* 99 AM. J. INT'L L. 119 (2005).

Even if one were to ignore legal obligations, in post-conflict situations, rule of law operations should be guided and informed by human rights law purely as a matter of efficacy. While US operations are controlled, as a matter of policy, by the *lex specialis* of the law of war, the host nation may be bound by other human rights obligations. US forces should model behavior for, and encourage actions by, the host nation government that will encourage the host nation to adopt and practice strong human rights norms. For example, while detention operations by US forces may legally be conducted in accordance with law of war requirements, the detention procedures adopted by US forces during the post-conflict phase may serve as a model for the administrative detention procedures that the host nation adopts for domestic use, and should consequently comply with international human rights norms. Judge Advocates should assist host nation institutions in building their capacity to comply with binding human rights standards that are consistent with their domestic legal regime.

a) Treaty Law

International law has experienced a rapid expansion in human rights treaties since the Second World War. Examples include the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950,[26] the 1966 International Covenant on Civil and Political Rights,[27] the 1966 International Covenant on Economic, Social and Cultural Rights,[28] and the 1984 UN Convention against Torture.[29] Beginning in the late twentieth century, the United States ratified a number of international human rights treaties. The US, however, has consistently restricted application of these instruments to its own territory. Through reservations and through precise interpretation of the treaties themselves, the US insists that its armed forces are not technically bound by human rights treaties when operating extraterritorially.

This narrow interpretation of the applicability of human rights treaties allows the US military comparatively greater freedom of action than many coalition partners when conducting operations overseas. The impact of the ECHR on military operations conducted by European coalition partners, for instance, may substantially curtail their freedom of action as compared to the United States.

Other human rights treaties may be applicable to the host nation, however. At the outset of rule of law operations, Judge Advocates should review the human rights law instruments ratified by the host state. Rule of law missions may call upon Judge Advocates to develop plans to implement host nation human rights treaty obligations. Judge Advocates should appreciate and account for the complexities of implementing such obligations consistent with host nation legal and cultural traditions. For instance, though many Muslim states have ratified the Convention for the Elimination of Discrimination Against Women, most included significant reservations to account for Sharia legal traditions.

b) Customary International Law

The Judge Advocate General's Legal Center and School has consistently included customary human rights norms as part of the legal framework applicable in all operations. There

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[26] www.echr.coe.int/ECHR.
[27] www.ohchr.org/english/law/ccpr.htm.
[28] www.unhchr.ch/html/menu3/b/a_cescr.htm.
[29] www.unhchr.ch/html/menu3/b/h_cat39.htm.

is much disagreement, though about the particular human rights that have matured into customary law. The following are likely prohibited as violations of fundamental human rights, applicable as CIL: genocide; slavery; murder or causing the disappearance of individuals; torture or other cruel, inhumane or degrading treatment or punishment; violence to life or limb; taking of hostages; punishment without fair and regular trial; prolonged arbitrary detention; systematic racial discrimination; failure to care for and collect the wounded and sick; consistent patterns of gross violations of internationally recognized human rights.

C. *Conclusion*

Rule of law operations present significant challenges to identifying a comprehensive underlying legal framework. No single legal discipline purports to operate as the *lex specialis* of rule of law missions. Instead, rule of law operations require Judge Advocates to draw from a broad spectrum of legal disciplines. This chapter provides an overview of both how to identify the correct legal framework for a particular operation and of particular legal frameworks likely to apply to rule of law operations. Moreover, US policy may require adherence to international norms that exceed those strictly applicable to a particular operation. Especially when considered in light of the need to establish the legitimacy of the rule of law among the host nation's populace, conduct by US forces that would be questionable under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations.

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V. Institutional and Social Context for the Rule of Law

A frequent problem encountered by US Judge Advocates in rule of law operations is a lack of experience with non-US legal traditions.[1] Past efforts in establishing the rule of law have too often ignored the "morality of society,"[2] which is necessary to establishing a legal regime that will eventually be viewed by the populace as legitimate, the ultimate goal for any rule of law operation. Operations in Iraq, for instance, have shown that US officials involved in the reform of law often lacked background information about Iraqi law and the civil law system.[3]

What follows is a short review of the major legal traditions and some applicable considerations to establishing the rule of law in non-US environments. The chapter begins with a discussion of legal institutions, focusing on fundamental aspects of legislatures, courts, police, corrections, and even military justice (and its differing role in different societies) that may be unfamiliar to lawyers. Following that are discussions of legal systems unfamiliar to most common law practitioners, including civil law systems and legal systems in which religion plays an explicit part (with special emphasis on Islamic Sharia law) and combined systems. Next is discussion of some alternatives to traditional courts, some of which are found in virtually all societies and some of which are particular to post-conflict societies. Finally, the chapter discusses some influential participants in the legal system not usually considered by lawyers: civil society and non-state security providers.

A. Legal Institutions

1. Legislatures

A legislature is a representative body that makes statute law through a specified process.

Although many deployed Judge Advocates will have little contact with the legislative side of rule of law operations, recent experience of US or other coalition Judge Advocates has demonstrated that they may be called upon to advise upon the legislative procedures of the host country or, indeed, may be personally involved in the creation of such legislation, especially that relating to the host nation armed forces.[4]

Typically, the detail of legislation is the responsibility of civil servants or government employees. But, in failed states or those requiring overseas military support, individuals with the

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[1] *See* BRIAN Z. TAMANTHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 133 (2004).
[2] *Id.* at 138.
[3] *See* JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 323 (2006).
[4] In Afghanistan US Judge Advocates were involved in the process of drafting legislation that provided for a code of military discipline for the Afghan National Army (ANA) and various Presidential Decrees. In Sierra Leone, East Timor, and Brunei British Legal Officers were involved in drafting legislation pertaining to the host state armed forces.

relevant experience or ability may not be available. It is in these circumstances that Judge Advocates may become involved in the process of drafting new or refining existing legislation.[5]

The legislative process of each host nation will likely differ substantially from the US model with which most Judge Advocates are familiar. Some will have similar features such as a bicameral system, but the process by which the bill passes into law may differ tremendously. If the host nation's legal system benefits from a constitution, the process may be derived from the constitution itself;[6] in other nations the process may be defined by statute.[7] Typically, however, a Judge Advocate may encounter significant difficulties in understanding the legislative process of a host nation and finding authoritative guides to the same.

The process of enacting legislation is almost universally cumbersome and fraught with bureaucracy. Given the level of effort involved in using the legislative process, it is frequently tempting to by-pass the legislative system and attempt to effect reform by resort to executive action. Even if this is constitutionally permissible, resort to executive decree should be considered a last resort. Making policy through unilateral executive action rather than through legislative action is likely to damage the legitimacy of the new host nation government and the policies so made. The process of legislation is often as important as the product, both as a matter of substance and popular perception. Moreover, a habit of executive lawmaking is likely to result in a practical shift in power from the legislature to the executive – a shift that may outlive the exigency.[8] Where military advisers are trying to promote the rule of law, the use of a system that bypasses the legislative process does little to promote adherence to the concept.

Experience has demonstrated that attempts to overhaul the host nation legal system to match the US model will lead to difficulties and is often not the best solution. Although less familiar to the Judge Advocate, the local legal system may be as refined and developed as that in the US, but more importantly will tend to benefit from a degree of legitimacy that a newly imposed system will lack. If tasked with such responsibilities, Judge Advocates should be wary of relying too heavily on the familiar US models.[9] That does not mean that US sources should be disregarded, and several organizations, including the American Law Institute and the American Bar Association[10] produce model acts for legislatures.

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[5] If the deployment results in the military becoming an occupying power, the ability of the power to refine existing legislation and to enact new legislation is limited by the Fourth Geneva Convention. *See* section IV.B.2.

[6] *See, e.g.*, U.S. CONST. art. I, sec. 7.

[7] *See, e.g.*, Parliament Act 1949, 12, 13 & 14 Geo. 6. c. 103 (Eng.).

[8] *See, e.g.*, European Commission Regular Reports on Romania 2000-2002 (noting with alarm the widespread use of presidential decree by Romania).

[9] The experiences of those founding the ANA reflect the problem well. *See* MAJ Sean M. Watts & CPT Christopher E. Martin, *Nation Building in Afghanistan – Lessons Identified in Military Justice Reform*, ARMY LAW. 1 (May 2006).

[10] *See* www.ali.org and www.abanet.org.

Forcing New Laws in the Face of an Established Legal System

Attempting to supersede locally accepted law with a foreign model may result in judges adopting the old law and refusing to adhere to the newly created law. In Iraq, even as late as 2005, judges still refused to impose the minimum sentences required by CPA order for possession of crew-served weapons and imposed sentences reflective of the previous legal regime.

2. Courts

The military may be involved in both restructuring and reconstructing aspects of domestic legal systems. Judge Advocate involvement in the judicial aspects of rule of law operations can take two general forms: actually operating a court system in the absence of civil authority (especially during and immediately following high intensity conflict) and helping to reconstruct the host nation civilian (and military) court system. The former mission is essentially the operation of provost courts during a period of occupation.[11] The latter is a reconstruction mission that requires a broader understanding of the overall reconstruction mission and will involve involvement from a variety of participants, DOD, other USG agencies, host nation, and IOs and NGOs. In support of both missions, Judge Advocates may be required to advise on court structures, practices and procedures as well as assessing and analyzing the ongoing performance of such systems, and in conducting both missions Judge Advocates need to keep mindful of the generally recognized standards for the operation of civilian courts, since those are the standards by which both the local population and the international community are likely to judge the legitimacy of whatever court system is operating under US supervision.

It may not be possible to operate domestic court systems to international standards, but guidance remains important by providing goals for reconstruction efforts.

The tendency in most, if not all, rule of law missions to focus on domestic criminal justice (vs. civil legal) system is virtually universal. Military deployments, necessitated by some form of disorder often involving large scale criminal activity, seek to re-establish or maintain law and order by bringing those responsible to account for their wrong doing. Unless the criminal justice system is seen to be a demonstrable success, public support is likely to be limited and the rule of law mission will be severely handicapped.

As lawyers, most Judge Advocates are already intimately familiar with the basic requirements for a criminal justice system. This section will cover the substantive requirements in only the slightest detail, with some additional attention to the administrative aspects of court systems and the particular challenge faced by attempting to reconstruct a court system.

Procedural Requirements and Openness

Procedure in any criminal trial should reflect certain basic standards. All individuals tried for criminal offenses should benefit from the presumption of innocence and must not be forced to testify against themselves. The right to a public trial without undue delay not only ensures public confidence in the court system but also protects individuals from the administration of justice in secret. The right of an individual to know promptly the nature of the allegations is a

[11] *See* U.S. DEP'T OF ARMY, PAM 27-9-2, MILITARY JUDGES' BENCHBOOK FOR PROVOST COURTS (4 Oct. 2004).

basic tenet of all criminal justice systems. The concept of "equality of arms" dictates that neither the prosecution nor the defense should have a substantial advantage in conduct of an inquiry.[12] The defendant has the right to be tried in person and through legal assistance of ones choosing and to examine witnesses against him, call witnesses on his behalf[13] and, if convicted, the right of appeal.

Guidelines on the role of prosecutors were adopted by the UN in 1990,[14] and by the International Association of Prosecutors in 1995.[15] Both documents seek to advance the principles founded in the Universal Declaration of Human Rights. The guidelines were formulated to assist states in securing and promoting the effectiveness, impartiality, and fairness of prosecutors. They serve as an excellent reference point for any Judge Advocate required to provide advice or guidance on the duties and responsibilities of those in public office charged with the prosecution of offenses.

In many societies emerging from long-term conflict, though, defense lawyers may be practically unknown, and rule of law missions (which frequently concentrate on ensuring that the judges and prosecutors are of an acceptable standard) will often need to focus more heavily on training and deploying a competent corps of defense lawyers than prosecutors.

Judicial Independence, Impartiality, and Training

No set of procedural protections will provide a court with legitimacy if the court dealing with a criminal matter is not both independent of the state and impartial. The right for an individual to have recourse to courts and tribunals which are independent of the state and who resolve disputes in accordance with fair procedures is fundamental to the protection of human rights.

In order to establish whether a tribunal can be considered "independent," regard must be had to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures, and the question whether the body presents an appearance of independence.

Systems of electing and appointing judges have their own inherent strengths and weaknesses. If judges stand for election, they may be required to espouse personal views on certain contentious issues and areas of the law which may raise questions over their independence and impartiality. Indeed, if dependent on the electoral system, an elected judiciary

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[12] Equality of arms is central to any adversarial justice system. *See* Martin Blackmore, Equality of Arms in An Adversary System, http://www.iap.nl.com/speeches/2000_j.html. The right is expressly protected in International Human Rights treaties. *See* International Covenant on Civil and Political Rights, art. 14; European Convention on Human Rights, art. 6.

[13] International human rights standards do not generally recognize trial in absentia. The United States position was discussed by the Supreme Court in *Crosby v United States*, 506 U.S. 255 (1993), which concluded that the right is not an absolute one and can be waived by the defendant.

[14] Eighth Congress on the Prevention of Crime and the Treatment of Offenders, Havana Cuba 1990, Guidelines on the Role of Prosecutors, available at http://www.unhchr.ch/html/menu3/b/h_comp45.htm.

[15] The International Association of Prosecutors was established in June 1995 to promote and enhance the standards which are generally recognized internationally as necessary for the proper and independent prosecution of offenses. *See* http://www.iap.nl.com/stand.2.htm.

may preclude representation in the judiciary from all ethnic communities in a state.[16] On the other hand elections allow for direct public participation in the appointment process, thus creating a greater level of public acceptance and support.

Judicial Tenure in East Timor

Experience has shown that it is not always possible to provide members of the judiciary with complete security of tenure. In East Timor, due to legal vacuum created by the departing Indonesian Regime, almost all qualified personnel had left the country, including all experienced judges, prosecutors or defense lawyers. A decision was taken to appoint East Timorese nationals who had law degrees but no prior professional experience as judges. They were appointed to initial two-year terms.

There are two aspects to impartiality: First, the tribunal must be subjectively free of personal prejudice or bias. Second, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[17]

The level of education and experience of judges will vary tremendously between countries, indeed, it will often vary tremendously between different provinces within a country. In some countries judges have little or no formal training and preside over courts who act, in essence, as courts of equity.

Judicial Education in Afghanistan

Judges from many of the provinces of Afghanistan in 2003 had received less than a high school education.[18] Priority for those seeking to improve aspects of the rule of law was, therefore, concentrated on creating a widespread program of judicial training.[19] Courses lasting several weeks were run in Kabul and provided basic guidance to several hundred regional judges. The training focused on human rights, international conventions, judicial skills and attitudes, and judicial independence. Judges also received resource materials covering regulations on counter narcotics, juvenile violations, anti-corruption, and the structure of courts in Afghanistan. Centralizing such training provided a rare opportunity for judges from far flung provinces to meet and share experiences whilst providing a basic level of instruction.

Training of the judiciary may be guided by the roles and responsibilities of judges which were adopted by the United Nations in 1985[20] which along with the *Bangalore Principles of*

[16] A system of proportional representation may be useful in providing representation proportionate to the ethnography of a state.

[17] *See* R. v. Dundon EWCA 621 (2004), Grieves v. United Kingdom, 39 Eur. H.R. Rep. 2 ¶ 69 (2004).

[18] USAID, GENERAL ACTIVITY REPORT FOR 8 – 28 DECEMBER 2005.

[19] Training sessions were held at the Supreme Court for some of Afghanistan's least educated judges from Kapisa, Parwan, Ghazni, Wardak and Logar Provinces.

[20] *See* Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary (1985), adopted by the General Assembly by resolutions 40/32 of 29th November 1985 and 40/146 of 13th December 1985.

Judicial Conduct[21] serve as an excellent template as to the standards to be upheld when exercising of judicial office.

Other solutions to the lack of trained local judiciary include importing international judges to fill the vacancies. This has the distinct advantage of establishing a fully trained and highly educated judiciary in a very short time frame. Such an approach can, however, hinder legitimacy and develop reliance on outside support and should be done in conjunction with the development of local assets and resources.[22]

Screening Judges in Iraq[23]

The process of screening of the judiciary was undertaken by the Coalition Provisional Authority (CPA) in Iraq. It was deemed necessary to remove any full members of the Ba'ath party from public office. The CPA then allowed the Iraqi Council of Judges to reassume responsibility for judicial appointments and promotions. Moreover, the Council, headed by the Supreme Court's Chief Justice, held responsibility for investigation into alleged misconduct or professional incompetence. This locally administered process was not only widely perceived as successful but maintained the necessary independence of the judiciary from the executive.

Adequate Physical Infrastructure

The construction or reconstruction of the physical aspects of the justice system is a concurrent requirement along with the training and education of the personnel to man it. In some theaters, the need to provide for physical venues initially outstrips the need to provide for judges and prosecutors. Iraq provides a classic case in point.[24] The need to involve and consult the local judiciary in all aspects of the reconstruction process must not be underestimated. A "West is Best" mentality to reconstruction should be avoided at all costs; locally based solutions are often far more effective in the long term.

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[21] BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002), available at http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf. The *Bangalore Principles* arose from a UN initiative with the participation of Dato Param Cumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers. A draft code was discussed at several conferences attended by judges from both the common law and civil codes and were endorsed by the 59th session of the UN Human Rights Commission at Geneva in 2003.

[22] Michael E Hartmann, International Judges and Prosecutors in Kosovo: A New Model for Post Conflict Peace (U.S. Inst. for Peace Spec. Rep. No. 112 October 2003).

[23] For information on vetting public employees see OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE OF LAW TOOLS FOR POST-CONFLICT STATES – VETTING: AN OPERATIONAL FRAMEWORK (2006), available at http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Vetting_en.pdf. For further information about the ICTJ research project on vetting and additional guidelines being developed see http://www.ictj.org/en/research/projects/vetting/index.html.

[24] Efforts to reconstruct courthouses and refurbish others were estimated in 2005 to amount to $62.8 million. US DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2005 – IRAQ. Reviews conducted in Iraq suggested that almost all court buildings lacked adequate perimeter and barrier protection.

Computers in Iraqi Courthouses

The provision of computers and other information technology assets to many of Iraq's courthouses was of little benefit, rendered ineffective by the lack of electricity or inability of any of the court staff to use them. Iraqi judges stated that they would have preferred a generator and air conditioning to abate the 120 degree temperatures endured in the summer months rather than a computer which served no useful purpose.

Engineers may take the lead on physical reconstruction projects like court buildings, but they will require specialist advice from Judge Advocates. It is prudent for the Judge Advocate to attempt to consult with and actively involve the local judiciary in the process. As with any development mission, the projects should, as far as possible, be tailored according to the local requirements. Factors such as accessibility for the population, reliability of power supplies, ability to hold prisoners on remand, and security needs, all blend into the equation when deciding the location of court buildings. In some situations, it will be desirable to benefit from the agglomeration economies from court buildings offering several courtrooms. This may be preferable in areas where the security of the court buildings is the highest priority.

Adequate Administrative Infrastructure

Along with reconstructing the physical infrastructure of a legal system, Judge Advocates are likely to be involved in reconstructing the administrative aspects of a judicial system. It is easy to overlook the importance of court reporters, case tracking systems, and office equipment. The Judge Advocate and others involved in these assessments should closely scrutinize the "system of systems" that the courts use to conduct their work. How do they interface with the police after an arrest is made? How is the docket prepared? How are cases tracked from arrest, to trial to incarceration to release? During this process, focus on whether the process is transparent and whether there are nodes in the system that would permit an individual to dispose of cases (or people) outside of the legitimate process and with little likelihood of detection. In most cases, this analysis will reveal significant structural weaknesses in the system in place. These weaknesses will likely involve both internal tracking within a court and the systems that connect them with both the police and the penal system. Once the weaknesses are identified, Judge Advocates should work through their command to seek the advice and assistance of professionals who have experience in developing administrative systems for courts in transitional or developing societies.

Even worse than overlooking administrative needs is the instinct to apply the standards of highly developed nations to the administrative structure of courts in areas undergoing reconstruction. Thus, it is usually better to favor low-tech solutions, such as manual court reporting and paper filing systems. Major electronic improvements are likely to require substantial investment in both money and training, and they will operate at the mercy of the power grid, which itself is unlikely to be reliable in a post-conflict environment, a lesson learned by many recently deployed Judge Advocates. Furthermore, the labor-intensive nature of manual system is frequently a positive feature in environments where job creation itself can contribute to the restoration of civil authority.[25] When it comes to administrative infrastructure, the clear lesson is that simplicity is key.

[25] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24 COUNTERINSURGENCY 5-17 (15 Dec. 2006).

Problems of Communication in East Timor

Problems with communication can be substantially exacerbated by administrative burdens. In East Timor, for instance, problems arose with translation because United Nations Transitional Administration in East Timor (UNTAET) adopted four official languages for the new domestic Court system, a decision which created significant additional translation costs.

Security

The question of security for judges and other court staff is often a high priority. Security must be afforded to all those who serve in the legal system, including judges, prosecutors, defense attorneys, translators, court recorders, and witnesses alike. Without individuals prepared to serve in the criminal justice system, criminals and insurgents will continue to enjoy relative impunity.

Security for Judges in Iraq

While the more senior judges in Basra, for instance, have had the benefit of civilian lightly armored vehicles and bodyguards, many enjoyed no such security benefits when they left their offices. One regularly received death threats and felt forced to move his wife and children to the home of another family member to increase their security. The death toll amongst the judiciary at the hands of the insurgency has been tragic. Twenty-nine judges were killed in Iraq in 2005 and there were attempts on the lives of the several ministers including the Deputy Minister of Justice. Moreover, these figures do not include family members who were assassinated throughout the period. Many Iraqi ministers live in their offices in the heavily secured Green Zone and visit their ministerial headquarters outside the secure area perhaps once a week due to the security concerns associated with public office.

3. Police

Rule of law operations involve policing at two separate levels. First, as the Dominate phase evolves into the Stabilize phase, combat forces previously engaged in high intensity conflict will shift over to a police role. Second, as the theater matures into one in which full-scale stability operations are underway, US forces are likely to participate in the reestablishment of civilian police functions.

a) Conducting Police Operations

The history of military deployments in the late 20th and early 21st Century is littered with examples of the military being tasked to perform policing functions.[26] In Kosovo, for instance, military forces were tasked to perform investigative, detention, arrest and peacekeeping functions. MPs will take the lead in the police elements of rule of law missions.[27] Commanders need to understand that the application of force in a police context is very different than in major

[26] Report of the Panel on United Nations Peace Operations (*The Brahimi Report*), A/55/305 - S/2000/809 (2000), available at http://www.un.org/peace/reports/peace_operations/docs/full_report.htm.

[27] The MP branch is currently producing training plans and is currently revising FM 3-19.10, Law and Order Operations, to include coverage of the police (and prisons) aspects of rule of law operations.

combat operations, and they will need to recognize (often with the help of Judge Advocates) the point at which they need to change force models. Assuring that military forces receive adequate training, and that appropriate ROE are promulgated and understood by coalition military forces is critical to successfully policing in the aftermath of high intensity conflict, and will be critical to developing both the good will of the populace and establishing the legitimacy of the legal rules that are being enforced. Both MPs and Judge Advocates may be central in helping shape the Soldiers and commanders' thinking in such an environment.

b) Re-establishing Host Nation Police Functions

In addition to actually providing the security that police provide, US forces are will also be working to re-establish a civilian police capability.

Police Force Composition

The importance in recruiting and training an indigenous police force is paramount in all situations where security is compromised. The process of identifying, recruiting, and training police and related justice experts is often time-consuming, resulting in delays in deploying an effective police force.[28] One solution in such cases is to import civilian police in the form of international police, which can be an effective and powerful short-term solution superior to re-tasking infantry and other combatant units to police duties. But, as with many aspects of rule of law operations a 60% solution achieved by the local population is likely to be far more effective than attempting to impose a 100% solution by overseas forces. Indeed, the UN has tended to shift focus from importing their own international police force to focus primarily on the reform and restructuring of local police forces. Moreover, police forces should aim to be representative of all cultural aspects of society, not only assisting in the level of acceptance by the local population but stressing the importance of equal treatment under the law.

One of the first decisions that will have to be made in any particular stability operation will be whether to retain (and retrain) an existing police force or simply to start from scratch. Whether recruitment from scratch is superior to reforming existing resources will be theater specific. A corrupt police establishment which provides a modicum of security may, in the short term, prove better than no police force at all. If, as experienced by the British Forces in Iraq, police units are central in serious human rights abuses it may prove necessary to effect complete reform.[29] Whether starting from scratch or reforming an existing establishment, it will be necessary to vet[30] both existing police and new recruits to assure that they are not disqualified from service due to past participation in human rights violations or other misconduct.

As with other areas in rule of law operations, flexibility and sensitivity to local culture cannot be overstressed. Given the variety of policing arrangements in different countries, it may be necessary to have a local legal expert, or an entire advisory legal staff, if necessary to help

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[28] *See The Brahimi Report*, *supra* note 26.

[29] *See* JAMES DOBBINS, ET AL., THE BEGINNER'S GUIDE TO NATION-BUILDING 50-51 (2007).

[30] For information on vetting public employees see OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE OF LAW TOOLS FOR POST-CONFLICT STATES – VETTING: AN OPERATIONAL FRAMEWORK (2006), available at http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Vetting_en.pdf. For further information about the ICTJ research project on vetting and additional guidelines being developed see http://www.ictj.org/en/research/projects/vetting/index.html.

manage the formation of a new police force or the reform of an old one.[31] For instance, as opposed to the model adopted in the US, in many nations, the use of police forces with close or formal ties to the military is common, for example the Italian Carabinieri[32] and the availability of quasi-military models for police may be particularly appropriate for those seeking to police in non permissive environments.

Training

Although not all-inclusive, some of the important skills training that officer candidates receive should include:

- **interpretation and application of federal, provincial and municipal statutes, codes, and rules**
- **apprehending violators**
- **use of graduated force**
- **proper treatment of detained individuals**
- **interviewing and interrogating suspects**
- **conducting investigations and effective documentation/collection of evidence**
- **crisis management**
- **weapons use, maintenance, and marksmanship**
- **physical fitness**
- **self-defense, and control/arrest tactics**
- **operation of police equipment including vehicles, communication systems, and police computer systems**
- **effective oral and written communication**
- **first aid/CPR**
- **defensive driving**
- **participating in the judicial process with other members of the criminal justice system**

Improper arrest and detention issues are best addressed through successful completion of a comprehensive training program and by implementation of thorough standard operating procedures (SOPs).

[31] *Id.* It may be necessary to employ persons with different areas of expertise, to include criminal law, civil law, human rights law, Shari'a, etc.
[32] The Carabinieri are a separate branch of the Italian armed forces.

The Impact of Police on Both Criminal and Civil Courts in Iraq

In many assessments, local Iraqi judges "emphasized that the lack of police personnel and the lack of cooperation from police agencies had a direct impact upon the operations of the courts. The criminal courts cannot operate without the police to refer cases to them, carry out investigative functions and serve process. The police also serve legal process upon individuals in civil cases, such that lack of cooperation from the police in that function can gridlock the entire civil court system. The civil court judge in Ad Diwaniyah specified the lack of police cooperation in this regard as the major reason why there were no civil lawsuits being adjudicated in his court."[33]

4. Detention and Corrections

All systems of justice must be able to *confine and protect* detainees. A state with no pre-trial detention capability cannot hold trials, and one lacking long-term confinement facilities cannot punish convicts,[34] and in neither case will the state have any reasonable prospect of instituting the rule of law. However, a state that systematically mistreats the incarcerated or fails to provide for their subsistence has no greater claim to the rule of law than one with no prisons at all. In post-conflict societies, it is likely that there will have been a recent history of poor conditions in detention facilities, as a matter of either intentional mistreatment (of both criminal and political prisoners) or simply as a matter of poverty. In Iraq, numerous assessments of the police and court systems identified the inability of criminal courts to commit sentenced prisoners to a specified prison term when such correctional facilities did not exist.[35]

As is the case with policing MPs are likely to take the lead with regard to the necessary reform.[36]

a) Basic Facility Requirements

There is a wide spectrum of considerations regarding what constitutes an adequate confinement facility, which will differ depending upon the circumstances in any given situation. For example, a temporary detainee holding area consisting merely of concertina wire, a sentry or guard, and a tent to provide shelter might be adequate in an austere environment.

In more mature areas of operation, however, there are a number of characteristics to which many prison facilities either adhere or aspire to. Some features and facilities of most well-equipped prisons include:[37]

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[33] LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade (2003) [hereinafter Legal Assessment of Southern Iraq].

[34] Throughout this section, this *Handbook* will use the terms "jail" and "prison" to refer respectively to short- and long-term detention facilities.

[35] Legal Assessment of Southern Iraq, *supra* note 33.

[36] *See* the text accompanying note 27.

[37] This list is not intended to be all-inclusive. As always, the facilities listed above are subject to the resources available at the time and should not be construed as necessities unless required by domestic, international, or customary international law; humane treatment remains the standard by which facilities and personnel are ultimately judged.

- **walls or other security enclosures that prevent both escape from the facility and infiltration from outside the facility**[38]
- **an exercise yard or gymnasium**
- **a chapel, mosque, synagogue or other area dedicated to religious observances**
- **facilities for individual and group counseling**
- **a healthcare facility**
- **a segregation area, used to separate unruly, dangerous, or vulnerable prisoners from the general population. Incarcerated persons may be placed in segregation to maintain the safety and security of the institution or any person within the prison, to preserve the integrity of an ongoing investigation, or when no other accommodation is available.**[39]
- **monitored safe cells, to protect certain detainees who pose a risk of harm to themselves**
- **a library or book distribution program**
- **visiting areas where detainees can meet with family, friends, clergy, or attorneys**

b) Human Rights

Of all the considerations which must be addressed when running a confinement facility, few issues have more visibility to outside scrutiny than human rights. Within the broad spectrum of various human rights concerns, there are a host of issues to be considered. Although not a comprehensive list, several of these issues which must be addressed include:

- **housing that adequately protects detainees from the elements**
- **adequate food and water (the provision of which should accommodate to the extent possible the detainee's religious dietary practices)**
- **care for detainees with dental and medical conditions (including pregnancy)**
- **care for detainees with potential mental health conditions**
- **handling juvenile and female detention and other segregation requirements**
- **force-feeding hunger-striking detainees**
- **detainee escape, recapture, and misconduct**
- **press interviews with detainees**

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[38] Prisons are normally surrounded by a number of barriers to prevent escape, which may include fencing, walls, berms, inaccessible geographical features, concertina wire, electric fencing, secured main gates and doors, guard towers, floodlights, motion sensors, working dogs, patrols, alarms, and countless combinations of these or other security measures.

[39] The term "segregation" should be distinguished from "isolation," which is used by some institutions as a form of punishment for misbehavior by the detainee. Some types of detainees should be segregated from the general population, including persons accused of sex offenses (particularly against children) and informants.

- **access to detainees by family, local medical personnel, and local court personnel**
- **religious accommodation**
- **detainee labor**
- **use of force within the detention facility and maintaining good order and discipline**

Although many international agreements provide for differing forms of treatment of detainees based on status (e.g. prisoners of war, retained personnel, and civil internees), the standard baseline treatment for any detainee, regardless of status, is humane treatment.[40]

The best way to ensure that proper treatment standards are being enforced is for Judge Advocates to personally review conditions of detention facilities and personally interview detainees on a random, unannounced basis. It is important to interview multiple detainees outside the presence of facility staff. Although it may be tempting to discount claims of abuse from individual detainees (particularly since detainees from some organizations are taught to routinely allege abuse), experience has shown that repeated and consistent detainee reports of abuse or mistreatment can be reliable indications of a problem and should be investigated further. Detainee conditions should also be reviewed by outside sources to promote legitimacy and transparency of the detention process. Several entities that routinely conduct such inspections include The International Committee of the Red Cross (ICRC), the Organization for Security and Co-operation in Europe, the United Nation's Children's Fund, Amnesty International, and various other human rights organizations. Of course, coordination with such outside entities is a matter that must be raised to and approved by commanders.

5. Military Justice

A state's survival is often dependent upon a disciplined armed force capable of ensuring its sovereign independence. But an armed force without effective discipline is easily turned to a disruptive force, and overreaching by military forces is a prime example of the kinds of arbitrary state actions whose eradication is a primary component of the rule of law. In order to become disciplined, military forces have traditionally been subject to (and adhered to) their own internal military codes.

One of the many tasks given to the military conducting rule of law operations includes the restructuring and training of the host nation's armed forces. Recent examples of this practice

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[40] Humane treatment is the standard under numerous authorities, including international law, customary international law, domestic law (in a majority of countries, to include the United States and most allied nations). *See generally* the Second, Third, and Fourth Geneva Conventions; AR 27-10; AR 27-100; AR 190-8; AR 381-10; DoDD 5240.1-R; Executive Order 12333; Army FM 2-22.3; and The Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739. Prisoners are specifically covered by certain international agreements, such as article 10 of the International Covenant on Civil and Political Rights. Other than the Geneva Conventions and other legal principles accepted as customary international law, many of these resources will not be applicable or may merely be advisory in nature, depending upon both the US's and the host nation's views regarding these international norms. For US forces, however, the Detainee Treatment Act of 2005 prohibits inhumane treatment without regard to the status or location of the detainee. *See* 42 U.S.C. 2000dd(a) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

include Iraq, Afghanistan, Sierra Leone and East Timor. Moreover, due to the ability to limit the number of variables during such missions, the military have enjoyed some success in this field.

A justice system involving military courts may, however, be overly burdensome to a nascent system of military discipline. Such was the conclusion of those responsible for drafting a military discipline system for the newly established East Timorese Defense Force (ETDF).[41] If the civilian court system is a strong one, and military commanders have little or no experience in exercising quasi judicial powers, ceding the power to administer military justice to civilian courts may be appropriate. If a separate system of military courts is adopted, trials should adopt standards of criminal procedure similar to those afforded to individuals tried in the civilian criminal justice system.

The structure of military courts does not follow any universal standard. Many military courts are made up solely of military officers, while others are presided over by civilian judges with military personnel acting as the fact finding panel.[42] In the European Union, for instance, the necessity for civilian, as opposed to military, judges in courts-martial is considered a matter of human rights law, as confirmed by the European Court of Human Rights in several recent cases. The concern in such cases is that the central role of the civilian judge was an important factor in ensuring the impartiality of proceedings, and unlike in the US system, the court determined that a uniformed judge offered no such guarantees.[43]

Although representation by military defense lawyers is taken as a given in the US system, the use of military defense lawyers is not universal. In the British courts-martial system, for instance, the ability of the military lawyers to represent the defendant has been curtailed by human rights legislation in order to foster the independence necessary for defense counsel to operate. Consequently, both British Army and Air Force courts martial no longer offer the opportunity for the defendant to be represented by military counsel.[44]

The extent and scope of the jurisdiction of military courts and tribunals also varies greatly from nation to nation. Some systems follow the US model and allow for concurrent jurisdiction for offenses that violate both military and civilian law. Some military justice systems have jurisdiction for "on duty" offenses, and others are more limited still, dealing only with minor military matters and allowing the civilian courts to have exclusive jurisdiction over more serious offenses.

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[41] Interview with Lt Col J. Johnston, British Army (ALS) (Oct. 2006) [hereinafter Johnston Interview].

[42] British Courts Martial are presided over by civilian judge advocates. The judge advocates are judges appointed by the Lord Chancellor, the head of the Department for Constitutional Affairs who is responsible for the appointment of all civilian judges in all English Courts. An Army lawyer will prosecute while the defendant will be represented by a civilian barrister or solicitor. The fact finding body are comprised of military officers and warrant officers. For further guidance see the Army Act 1955 and the Courts Martial (Army) Rules (1997).

[43] *See* Grieves v. United Kingdom, *supra*; Cooper v. United Kingdom, 39 Eur. H.R. Rep. 8 ¶ 104 (2004).

[44] Following Findlay v United Kingdom 3 C.L. 342, 24 Eur. H.R. Rep. 221 (1997), policy was adopted by the newly formed Army Prosecuting Authority that they would not offer representation to RAF defendants.

Given the unique nature of military service, a number of military specific offenses[45] may have to be included in any code of military discipline. Recent examples drafted by military lawyers practicing in this sphere include those used by the ETDF and Iraqi army.[46] In the former the challenges of converting a former guerilla force (the Falantil) into a regular army led to the decision to limit the number of offenses within the military criminal code and cede control of most offenses to the civilian courts.[47] The reverse decision was taken in Afghanistan where, historically, the military and civilian criminal courts had almost become conjoined. A new system of military courts and non-judicial punishment ceded wider jurisdiction back to the military.[48]

B. Civil Law Systems

The term "civil law" is commonly used in two different meanings: First, to distinguish the law that applies to private rights from the law that applies to criminal matters. Second, the term is used to describe a legal system distinguishable from common law systems. This section addresses the latter meaning and draws comparison with the common law method which will be more familiar to the JA.

Civil law is a dominant legal tradition in countries based on Roman law, especially the Corpus Juris Civilis of 534 as later developed through the Middle Ages by legal scholars. Civil law systems, also called Romano-Germanic law, exist all over continental Europe, South America, and parts of Asia (including Iraq) and Africa.[49] Civil law systems are commonly associated with the concept of codification while Common Law systems rely more heavily on precedent and case law and are found in all the United States (except Louisiana), the United Kingdom, and most British Commonwealth nations.

The first civil law codifications in modern times originated in France with the Code Civil of 1804 and in Germany with the Prussian Landrecht of 1794 and the German Civil Code of 1896.[50] The codifications were an expression of the ideas of enlightenment including the concept of rule of law, however, as codification also occurs in common law systems, it does not of itself provide an adequate criterion for distinguishing between the two systems.[51]

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[45] Such offenses have no equivalent in domestic criminal law. For example absence without leave may be deemed to be a matter between the employer and the employee resulting in termination of service but would not lead to criminal censure potentially leading to deprivation of liberty.

[46] *See* Creation of a Code of Military Discipline for the New Iraqi Army - CPA Order No 23. The offenses are set out in Section 3 of the order. The elements of the offenses are included in Annex A to the Order. http://www.cpa-iraq.org/regulations/20030820_CPAORD_23_Creation_of_a_Code_with_Annex.pdf. *See also* UNTAET/REG/2001/12 dated 20 July 2001 Regulation No. 2001/12 On the Establishment of a Code of Military Discipline for the Defense Force of East Timor. Section 4 sets out the military offenses deemed to be breaches of service discipline, the annex to the regulation details the elements of each offense. www.un.org/peace/etimor/untaetR/2001-12.pdf

[47] Johnston Interview, *supra* note 41.

[48] *See* Watts & Martin, *supra* note 9.

[49] *See* JOHN MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 2 (2d ed. 1985).

[50] The Code Civil of 1804 and the Civil Code of 1896 are still in force in France and Germany.

[51] *See* MERRYMAN, *supra* note 49, at 26.

1. The Civil Law Ideal of Separation of Powers

The most important specific of the civil law systems is their emphasis on *complete separation of powers*, with all lawmaking power assigned to a representative legislature. The idea of (complete) separation of powers was advanced by Montesquieu as part of the intellectual revolution taking place at the eve of the French revolution in 1789.[52]

Although common law systems like the US system also accept the principle of separation of powers, their approach and philosophy in applying this principle differs from that in civil law countries. In both the US and the United Kingdom, the judiciary served as a progressive force on the side of the individual against abuse of power by the state.[53] But experiences in civil law countries furthered the idea of restricting judicial power by emphasizing the separation of powers. As a result of this emphasis, civil law systems consider any judicial lawmaking power as undemocratic and consequently illegitimate, resulting in some question over whether judges have the power to interpret law at all. Given this approach to judicial power, from the civil law perspective, a legal system that gives judges lawmaking power violates the rule of law.[54]

Thus, it is not the *form* of codifications that distinguishes common from civil law systems but the *ideal* that the codes reflect. Contrary to the ideology of common law systems' codifications, which make no pretense of completeness, codifications in civil law systems, in the spirit of legal positivism, are intended to regulate a legal field exclusively. Judges in civil law systems are compelled to find a basis for their decisions within the code.

Furthermore, to fulfill the goal of the separation of powers and to prevent any lawmaking function of judges, codes in civil law systems are theoretically supposed to leave no gap that a judge would need to close. There is no space for considerations of justice outside the codified law, even if the price for this is an unjust or unrealistic decision. Thus, for instance, the Prussian Landrecht of 1794 included more than *17,000 articles*, along with a prohibition against judicial interpretation of the law.[55] While most common law systems incorporate legislation, much of the detail and interpretation of the statute is left to the case law.

While the civil law systems described above are theoretical models, in practice most civil law systems adopt elements from common law systems, especially the lawmaking function of judges, at least for some fields of law. In Germany, for example, the constitutional court acts more like a common law court than a classical civil law court.

2. Specific Aspects of Civil Law

Sources of Law

The ideology of civil law systems is based on the completeness of written formal law. Therefore, original sources of law are the constitution and laws passed by legislation, with the constitution overriding all other legislation.

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[52] *See id.* at 15.
[53] *See id* at 16.
[54] *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 124-25 (2004).
[55] *See* MERRYMAN, *supra* note 49, at 39.

Most civil law systems accept neither the principle of *stare decisis*[56] nor custom as a primary sources of law, but most civil law systems do use court decisions and custom to greater or lesser degrees as sources of law.[57] Moreover, precedents serve a persuasive role in most civil law systems under the concept of "constant jurisdiction,"[58] which is somewhat analogous to the common law consideration of "persuasive authority." Constant jurisdiction suggests that judges should follow or at least take into account decisions of courts of the higher or the same level. Although in most civil law countries this concept is not a legal obligation, it affects some civil law systems by requiring a court that wants it to deviate from the decision of a superior court to transfer the case to a higher level.[59] In some civil law systems, failing to adhere to constant jurisdiction opens at least the possibility of appeal.[60] Custom, which is frequently used in common law systems to give shape to both judge-made and statute law, can play a role in civil law systems, but only if expressly referred to in statute law.[61]

Judges

The French and German fear of a "government of judges" in the 18th and 19th century, and under the prevalence of the dogma of the separation of powers resulted in the power of civil law judges being dramatically restricted. When compared to their common law brethren, civil law judges are not widely known, their judicial opinions are not studied, and courts are instead viewed as faceless institutions.

Legal Science and Techniques

Legal science in the civil law world is primarily the creation of German legal scholars of the nineteenth century.[62] The concept of legal science rests on the assumption that the subjects of law can be seen as natural phenomena from whose study the legal scientist can discover inherent principles and relationships.[63] Therefore, legal science emphasizes systematic values like general definitions, classifications, and abstractions, and uses formal logic as its primary procedure.

This thinking directly influences the way the rule of law needs to be established in civil-law-descendant host nations. The foundation for a common law regime can consist of a few general rules, and the legal system can develop by applying those principles to case as they arise, with the rulings in those cases serving as rules for future ones. In a civil law regime, though, a complete set of specific rules (a code) must be established *before* courts begin hearing cases, and the adaptation of the law to new circumstances has to happen through legislative rather than

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[56] Art.5 of the French Civil Code expressively prohibits the setting of precedents. Only very few civil law systems contain the concept of stare decisis, for example the Mexican civil law system.

[57] *See* MERRYMAN, *supra* note 49, at 83.

[58] This concept is known in civil law countries under the term jurisprudence constante.

[59] This is the case for administrative courts in Germany if one Senate of the Federal Supreme Administrative Court wants to deviate from the decision of another Senate. *See* Section 11 VwGO.

[60] In Germany, for example, an administrative court needs formally to permit the appeal. But if it deviated from decisions of the Federal Supreme Administrative Court or the State's Supreme Administrative Courts, it has to permit the appeal. *See* Section 124 VwGO.

[61] *But see* MERRYMAN, *supra* note 49, at 23 (recognizing the application of custom in many civil law countries).

[62] *See* MERRYMAN, *supra* note 49, at 61.

[63] *Id.* at 62.

judicial action.[64] This difference is important, as it influences not only the process that rule of law projects must follow, but also the people's perception of the new or amended law in the respective country.

The Division of Jurisdiction

Most common law jurisdictions divide their courts between criminal and civil forums. In the civil law system, however, the courts are divided into "ordinary" courts (which include civil, criminal, and usually commercial courts), administrative courts, and a constitutional court. Following the French model, the highest level of the ordinary courts is usually the Supreme Court of Cassation. That court normally reviews only the legal determinations of lower courts; reconsideration of the facts of the case is usually excluded.[65] The Court of Cassation will not usually decide a case and issue a judgment. If it decides that the lower court has made a mistake in interpreting the law it states the correct interpretation and orders the lower court to reconsider the case.

Civil Procedure

As is typical in common law systems, most civil law systems include separate codes for criminal and civil procedure as they have separate civil and criminal courts.

A typical civil proceeding in civil law countries is, however, divided into three stages: a brief preliminary stage, in which the pleadings are submitted and the judge is appointed; an evidence-taking stage, in which the judges take evidence; and a decision making stage in which the judges hear the arguments and render decisions.[66]

In many of the civil law systems, judges put questions to witnesses (after one party has offered a witness as a proof) and generally play a much more active role in the proceedings than judges in adversarial proceedings, where the majority of questions are put by counsel representing the parties, with judges ensuring the compliance with procedural rules.[67]

Civil law systems do have juries in civil cases.

Criminal Law and Procedure

What constitutes a crime and how criminals should be punished are similarly treated in both civil law and common law countries. However, there are significant differences in procedure.

Unlike some common law systems, civil law systems require that every crime and every punishment be embodied in a statute enacted by a legislature.[68] Although uncommon, uncodified crimes are not unheard of in common law systems; murder, manslaughter and perverting the course of justice have no statutory basis in England and Wales.

Prosecutors play a more significant role in investigation under the civil law system than in most common law systems. In civil law systems, investigation and detention of suspects is the

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[64] *Id.* at 67.
[65] *Id.* at 87.
[66] *Id.* at 114.
[67] *Id.* at 115.
[68] In most civil law countries this principle is even codified in their constitutions; *see, e.g.*, NETHERLANDS CONST., art. 16; GERMAN CONST., art. 103 (2).

primary responsibility of the prosecutor, with the police conducting the arrest acting under the direction of the state prosecutor.

Arrest is generally more restricted in civil law systems than in common law ones. Arrest generally requires a judicial warrant, whereas in common law systems serious offenses allow for arrest without warrant on probable cause. In civil law regimes, state prosecutors may authorize arrest in cases where there is a threat of death or bodily injury or in cases in which there is strong suspicion that someone who has committed a crime will flee. If the state prosecutor is not available to order the arrest, the police can arrest the suspect person. In such a case, the state prosecutor has to apply for a warrant immediately. If the warrant is not written out in a specific time (usually 24 or 48 hours) the arrested person has to be set free.

Civil law systems provide similar rights to suspects as those in common law jurisdictions. Suspects have the right to counsel and are required to be warned of their right against self-incrimination, much like the American *Miranda* warning. Confessions made before the state prosecutor or the police by a suspect who has been informed of his rights can be admitted as evidence.

Unlike the common law model, civil law criminal cases are commonly divided into three phases: the investigative phase, the examining phase, and the trial. In the investigative phase, a public investigator tries to establish the facts of the case and to collect evidence of the guilt or innocence of the suspect. In the examining phase, the examining judge prepares a complete written record containing all relevant evidence. If the examining judge concludes that a crime was committed by the accused, the case then goes to a trial. The examining phase is primarily written and not public. In the trial, contrary to common law systems, the defendant can be questioned but may refuse the answer. The defendant has the procedurally secured right to lie; defendants cannot be sworn. The defendant's refusal to answer, as well as any answer given, is taken into account by the court.

Civil Law Procedural Changes Can Drive Assessments

Civil law systems often operate through a variety of investigative and trial chambers that may be located throughout its jurisdiction. It will be counterproductive to undertake reform in those courts without first understanding how civil law procedure affects how courts are organized. In order to learn about the locations of the various chambers and the types of cases that are heard before them and their physical location and key personnel, you must first learn about how the prevailing legal system requires courts and court officers to be organized.

Guilty pleas do not play a major role in civil law systems as they do under the common law where the defendant usually benefits from a significant reduction in his sentence by an early admission. Under civil law the defendant cannot forgo trial by pleading guilty, a confession is merely evidence that is introduced in the trial.

C. *Religious Legal Systems and Sharia Law*

The main religious legal systems of the world are Hindu law, Islamic law and Jewish law, but this *Handbook* will focus on Islamic law based on its major impact on secular legal systems in the world and the location of today's ongoing stability operations. One of the fundamental

features of modern Islamic movements is their call to restore the Sharia,[69] which, as demonstrated by the Taliban's[70] rule in Afghanistan, can affect world politics.

Islamic Law Systems and the Sharia

In the 6th century, when the prophet Muhammad was born in Mecca, there were many different legal systems prevalent. Justinian's Digest had been completed three decades before, and the Jerusalem Talmud a century or two before. These sources of law were well known by Muslim jurists. Although the influence of these legal traditions to Islamic law and legal science has been the source of controversy, the emergence of Islam meant a turning point in the Middle East's legal tradition.[71]

Muslims believe that God revealed his teaching to Muhammad, word for word, over a period of twenty-three years. These written revelations are contained in the *Quran*. The *Quran* does not contain much law; only around 500 of the 6,000 verses of the *Quran* pertain to law.[72] Further sources of Islamic law were later developed, each dependent on its predecessor, and each ultimately on the *Quran*.

The totality of Islamic law is known as the "Sharia," which means the path to follow. The substance of Sharia is found in the corpus of Fiqh (Islamic jurisprudence) as the expansion of the Sharia, complemented by the rulings or the science of ascertaining the precise terms of the Sharia. The Sharia includes not only civil and criminal law, but also etiquette, dietary, and hygienic rules.

The Sharia is composed of four sources, although the identity of those four sources is a matter of dispute between Sunni and Shiite muslims.[73]

Under the *Quran*, there are the Sunna, the actions and sayings of the Prophet as a clear manifestation of God's will. It was believed that the actions and sayings of the Prophet reflected the general provisions of the *Quran*, and also gave guidance on matters on which the *Quran* was silent.[74] The content of the Sunna is found in the form of Hadith,[75] statements which have been passed on in a continuous and reliable chain of communication, from the prophet himself, to present adherents. A Hadith contains two parts: the normative statement and the chain (isnad) of the tradition which it has followed.[76] In the Muslim community, though, there is disagreement over the authenticity of these statements. Sunnis and Shiites have their own Hadith collections.[77]

Under the Hadith, there is the Ijma, an explicit source of human origin in the form of a doctrinal consensus (between the Ulema as Islamic legal scholars). Under the Ijma, there is split

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[69] *See* WAEL B. HALLAQ, THE ORIGINS AND EVOLUTION OF ISLAMIC LAW 1 (2005).

[70] On the Taliban, see THE MIDDLE EAST AND ISLAMIC WORLD READER 243 (Marvin E. Gettleman and Stuart Schaar eds., 2003).

[71] There is some debate whether Muslim jurists chose to ignore existing law or if Islamic law is a pastiche of the law existing at the time. *See* H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 204 (2000).

[72] *Id.* at 172.

[73] HALLAQ, *supra* note 69, at 119.

[74] ELIE ELHADJ, THE ISLAMIC SHIELD 43 (2006).

[75] Hadith was originally not synonymous with the verbal expression of the Sunna. HALLAQ, *supra* note 69, at 71.

[76] *Id.*, at 103.

[77] *See* ELHADJ, *supra* note 74, at 46.

between the Sunni and Shiite traditions, with the Sunni adopting the Qiyas, (or analogical deduction),[78] and Shiites following the Aql (or intellectual reasoning).

The consequence of Islamic law being derived from the *Quran* is that violating Islamic law is tantamount to violating God's instruction. Law and religion are inseparably connected in the Islamic tradition. That connection culminates in the Islamic doctrines of heresy and apostasy, which in their strictest application suggest that every unbeliever (kafir) should be killed as should anyone wishing to leave the Islamic community.[79] Islamic law does contain pacts of protection between Muslims and non-Muslims, providing non-Muslims who are People of the Book (Jews and Christians), called "dhimmis," a special status. Especially the Ottomans, after they had conquered Constantinople, granted local autonomy to protected communities of Christians and Jews. A dhimmi had generally more rights than other non-Muslim subjects, but fewer rights than Muslim subjects.

From the Western perspective, questions of constitutionalism, human rights and equality are central. From the Islamic perspective, it is the recognition of God's word that drives the legal system.[80] These two approaches can be very hard to reconcile in a single legal system. Consequently, Western countries doing rule of law operations in Islamic countries must be particularly conscious of imposing a Western legal point of view, since doing so is likely to create substantial resistance and will prevent the legal system from being internalized by a Muslim populace. Unlike the set of highly specific religious Christian laws, Islamic law is very broad and is therefore easily violated by an insensitively designed secular system.

Qadi Justice and Mufti Learning

The Qadi is a judge under Islamic law. The Qadi dispute resolution is a kind of "law finding trial" not connected with the simple application of pre-existing norms, or simple subsumption of facts under norms. The dispute resolution is a dynamic process, one in which all cases may be seen as different and particular. The "law" of each case is thus different from the law of every other case. The parties are seen as partners of the Qadi in the law-seeking process, which gives the procedure some similarities to mediation.The Qadi does not give written reasons for his decision, cases are not reported. Precedent, therefore, is lacking.

The Mufti or jurisconsult plays a role similar to the scholar under civil law systems. Possessing immensely useful knowledge and great analytical ability, the mufti comes to be the most effective means of bringing law to bear on highly particular cases. The opinion of the Mufti, the fatwah, is often filed in court.

Substantive Sharia

Family law in the Sharia is profoundly marked by the Arabic chthonic law which Muhammad encountered, and by his reaction to it. While it is the prevailing opinion that the Islamic law improved the status of women compared with the regulations of pre-Islamic law,[81]

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[78] *See* HALLAQ, *supra* note 69, at 115, 129.

[79] There are more modest variations of these concept stating that unbelievers have only to be killed if they denied essential elements of Islam and that only the formal conversion to another religion has to be sanctioned. *See* GLENN, *supra* note 71, at 207.

[80] *See id.* at 208.

[81] Although some writers proclaim that this is only a rumor put out by Islamic scholars. *See* ELHADJ, *supra* note 74, at 61.

the principle of equality of men and women as represented by Western law systems is not dominant in Islamic law. The *Quran* contains some verses which have been used to suggest that men and women are not equal.[82]

Gender Equality and Sharia

Gender equality is likely to be an issue in any host nation in which Sharia is a strong legal influence. Not even the recent Iraqi constitution clearly resolves the potential conflict between Sharia and gender equality. While Article 14 of the Iraqi constitution states "Iraqis are equal before the law without discrimination based on gender, race, ethnicity ... ." Article 2 states "No law that contradicts the established provisions of Islam may be established." The constitution may prohibit discrimination, but any ordinary law based on the principle of equality between men and women may contradict Islamic law. The contradiction at the very least opens the door to arbitrary decisions by Islamic clerics and judges in Iraq.

Marriage is potentially polygamous, and divorce has historically been executed by the husband's pronouncement. While before Islam divorce was complete upon its declaration by a husband, the *Quran* introduced a waiting period imposed on divorced women.

Islamic law generally has granted women substantial rights and financial security. A daughter was granted a share of inheritance, and a woman could keep all property that she brought into a marriage or that she acquired during marriage.[83]

Civil and commercial law is influenced by the *Quran*, which generally prohibits speculation and the unfair distribution of risks. Thus, unlike in Western societies in which debt is fundamentally distinguished from equity by the allocation of risk, in Islamic countries, banks frequently assume a portion of the risk. As H. Patrick Glenn explains:

> [B]anks...cannot simply charge interest on loans but must acquire goods or take equity in the financially-supported enterprise, sharing the risk of loss and the possibility of profit. There are highly developed commercial vehicles for doing so, and here the law of partnership ... assumes crucial importance. Three forms of partnership (with banks) are most frequent, all with names perilously close to one another. For financing of sales, absent interest-bearing loans, there is murabaha, where the bank acquires property first and the sells to the eventual purchaser, at a markup. For general partnership, with both partners pooling resources (e.g. bank and an entrepreneur) and management stipulated for both or all, there is musharaka, and even "diminishing musharaka," where the bank's share is re-imbursed over time. Finally, for pure invenstment; there is mudaraba, resembling a musharak, but in which only one partner provides the funds and the other manages the investment.[84]

[82] *E.g.*, THE QURAN 2:228: "Women also have recognized rights as men have, though men have an edge over them;" *id.* 4:34: "Men are the masters (protectors, maintainers) over women .... The righteous women are devoutly obedient ... ."

[83] HALLAQ, *supra* note 69, at 23.

[84] GLENN, *supra* note 71, at 183.

Sunnis and Shiites

The difference between Sunni and Shiite is a matter of tremendous geopolitical importance, but it is frequently poorly understood by Westerners. Although a complete treatment of the issue is beyond the scope of this *Handbook*, it is helpful for rule of law practitioners to understand the distinction, especially as is applies to law.

After Muhammad's death, Muslims discussed who should become the rightful caliph or Imam (leader of the community of believers).

Sunni Muslims, who today represent approximately 85% of the world's 1.25 billion Muslims[85] (and are the majority in most Islamic countries except Iran, Iraq, Bahrain, Azerbaijan, Yemen, Oman, and Lebanon), believed in hereditary succession for caliphs based on descent from Muhammad's clan, the Quraysh, but *also* stressed the need for new caliphs to obtain community allegiance.[86]

Shiites[87] were of the view that succession was by divine right and that *only* descendants of Muhammad's son in law Ali, the fourth caliph, have the legitimacy to become Imam.[88]

This originally political dispute has had a direct impact on the religious Sunni and Shiite life, causing different Sunni and Shiite Hadith collections of laws. Shiite Muslims reject the first three caliphs as usurpers of the caliphate from Ali, the husband of the Prophet's daughter Fatima, and later the fourth caliph. Shiite Muslims think that the Prophet's companions who supported the intervening three caliphs are not reliable transmitters of tradition.[89] Sunni collections, however, refer to the first three caliphs and their supporters as well as to Ali.

A further difference between Sunnis and Shiites is that the Hadith collections of the Sunnis record exclusively sayings and actions of the Prophet, while Shiites include the sayings and actions of the twelve infallible Imams.

Another important difference is that Sunnis do not accept intellectual reasoning as a source of law. That is why for them interpreting the *Quran* and the Sunna or forming new opinions by analogy are unacceptable forms of legal reasoning.[90] Shiites, on the other hand, accept the intellectual reasoning as a source of law. The Shiite scholar (called Mujtahid, Faqih, Marjaa Taqlid or Ayatullah) interprets the *Quran* and the Shiite Hadith. He is free to change his rulings and opinions over time and to evolve religious law with the modern times.[91]

The enmity between Sunni and Shiite Muslims has lasted now for 14 centuries and it is today no less fanatic than it was after the prophet's death, as exemplified by the late Iraqi Sunni Jihadist Abu Musab Al-Zarqawi. According to Al-Zarqawi, Shiism is "the lurking snake, the crafty and malicious scorpion, the spying enemy, and the penetrating venom ... Shiism is a religion that has nothing in common with Islam."[92] It has been intensified over history by two fatal events: the Mongols' destruction of Baghdad in 1258 and the Christian Crusades in the 12th

[85] ELHADJ, *supra* note 74, at 42.
[86] GETTLEMAN & SCHAAR, *supra* note 70 at 21.
[87] Shiites means "Ali's partisans".
[88] GLENN, *supra* note 71, at 197.
[89] ELHADJ, *supra* note 74, at 46.
[90] *Id.* at 48, 134.
[91] *Id.* at 135.
[92] *Id.* at 145.

and 13th century. Sunnis believe that Shiites collaborated with both the Mongols and the Crusaders.

Some Sunnis today discriminate against Shiites while many Shiites believe that they are the true Muslims.[93]

Jihad

The word jihad does not mean "war" but rather "effort" or "striving". It means the obligation to spread the word of the Prophet and to defend the faith against outside aggression.[94] Jihadists try to justify their actions with several Quranic verses such as "Against them make ready your strength to the utmost, that you may strike terror into the enemies of God and your enemies..." (Verse 8:60) and "Fight those who believe not in God..." (Verse 9:29). Jihad itself does not mean to kill unbelievers but together with the Islamic doctrine of heresy it can adopt that meaning. Public schools and colleges in Islamic countries still teach Jihad as a legal way of God and as the summit of Islam.[95] Some radical Islamic movements proclaim Jihad as an obligation for every Muslim.[96]

D. Combined Systems

In addition to civil law, common law, religious systems, there are also mixed legal systems.

The family of mixed law systems consists mainly of two different mixtures of legal systems: the mixture of civil and common law systems and the mixture of civil law systems and religious legal systems.

Systems representing a mixture of civil and common law systems are Botswana, Lesotho, the US State of Louisiana, Namibia, the Philippines, Puerto Rico, Quebec, Scotland, South Africa, Sri Lanka, Swaziland, and Zimbabwe.[97] The European Union, too, is something of a mixed common/civil system. Civil/religious mixed systems frequently involve Islamic law, including Algeria, Egypt, Indonesia, Iran, Iraq, and Syria.[98]

Particularly relevant for the rule of law practitioner is that mixed systems are generally not organically developed legal systems. Usualy, mixed legal systems are created when one culture, imposes its legal system on another culture, usually by conquest.[99] Thus, the presence of a mixed system is a likely indication of some tension between the populace's underlying norms and the legal system they live under. Frequently, however, the foreign legal system will have

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[93] *Id.*

[94] GLENN, *supra* note 71, at 216.

[95] In Osama Bin Laden's native Saudi Arabia, for example, even after September 11, 2001, the public schools religious curriculums continue to propagate an ideology of hate toward the "unbeliever" and contains the religious obligation to fight against unbelievers in the way of jihad. *See* CENTER FOR RELIGIOUS FREEDOM OF FREEDOM HOUSE, SAUDI ARABIA'S CURRICULUM OF INTOLERANCE 13 (2006).

[96] *See* Charter of the Islamic Resistance Movement of Palestine (Hamas), 1988.

[97] *See* William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 679 (2000).

[98] *Id.*

[99] *Id.* at 725.

been internalized over time (e.g., in the case of India), rendering it legitimate in the eyes of the populace.

E. Recognized Alternatives to the Court System

Although lawyers tend to focus on courts, many other dispute resolution mechanisms are available for use in conducting rule of law operations. Some of them, like mediation and arbitration, have become part of the legal mainstream in developed countries, while others, including traditional clan-oriented remedies, have strong bases in some portions of the developing world. Others, like truth and reconciliation commissions and property claims commissions, are specific to the post-conflict environment. But whatever the environment, Judge Advocates should be aware of and consider the use of less traditionally legal dispute resolution mechanisms for their ability to engender legitimacy and avoid some of the problems likely to face attempts to establish a novel legal system.

1. Mediation

Mediation involves the participation of a third party in an attempt to resolve a dispute between two parties. Formal definitions of the process vary from simple efforts of encouraging to the two parties to resume negotiation to more active approaches bordering on conciliation, where the mediator is expected to investigate the facts of the dispute and advance his own solutions.

Mediation is characterized by the consent of the parties to the process and the non-binding nature of the proposed solutions. Thus, mediation can only be as effective as the parties wish it to be. It relies on the parties' willingness to make concessions but the fact that communication is ongoing often assists in promoting an atmosphere of resolution. Mediation has the distinct advantage over more formal methods of dispute resolution of allowing the parties to retain control of the dispute.

Non-governmental organizations are often willing to mediate over issues such as treatment of detainees. The ICRC, for instance, traditionally avoids involvement in any form of political dispute in order to preserve its neutrality, however, it will often intervene or volunteer to mediate over questions involving the treatment of detainees raising humanitarian questions.

Judge Advocates may not be the best placed person to act as the mediator given their seeming lack of independence and position within the military. But Judge Advocates may be in a position to recommend mediation and to use their skills to appoint the correct person or persons to act as mediator.

2. Arbitration

As opposed to mediation, arbitration provides for a solution that is both binding and enforceable.[100] Arbitration allows for more a flexible and tailored solution to dispute resolution and traditionally tends to be limited in its application to commercial disputes both domestic and international.

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[100] Enforceability of arbitral awards outside the local nation was created by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2417, 330 U.N.T.S. 38.

Although arbitral awards are binding, the arbitration process itself is entirely defined by the parties. As such, there is no one method or practice of aribitration. Standing arbitral bodies[101] have detailed rules of procedure that are often adopted by parties in clauses dealing with dispute resolution. Historically, arbitration decisions were provided without reasoning, but today, most if not all arbitral awards come with a full written decision.

The flexibility of arbitration allows for many perceived advantages over traditional forms of litigation. The parties are free to agree over what laws or procedures the panel will use in resolving the dispute, to ensure confidentiality (important in sensitive commercial matters) and to allow for finality by preventing further appeals from the decision of the arbitrators.

When assessing the capacity of civil courts in any theater of operations, Judge Advocates should not underestimate the value of arbitration and its ability to reduce the burden on the domestic judicial system. Many national and regional arbitral bodies exist to resolve such disputes. They may have the advantage of maintaining the support of the local population as a locally/regionally based solution to any problem while maintain independence from (and impartiality toward) a contested government.

3. Other Traditional Remedies

Dispute resolution of non judicial or quasi judicial practice has long been practiced in many societies. Moreover, it is a resource which has often been overlooked in the recent UN sanctioned attempts to reconstruct effective and efficient judicial systems in former conflict zones.[102]

Dispute resolution through traditional methods is particularly varied, making any systematic approach to it impossible. Although it can be particularly effective in restoring the rule of law, because it will frequently lack the formal structure that makes many legal systems transparent, it also presents risk of arbitrary or even discriminatory conduct by appointed authorities. Judge Advocates are wise to consider traditional dispute resolution methods, but they must be approached with particular caution and a very strong awareness of the social and cultural context in which they will operate.

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[101] For example the London Court of International Arbitration, the American Arbitration Association and The Middle East Center for International Commercial Law.

[102] In East Timor, for instance, criticism was made of the United Nations Transitional Administration in East Timor's (UNTAET) failure to promote and develop customary legal structures. An East Timorese suggestion to incorporate such traditional methods into the new judicial structure was not acted upon, and may have been a lost opportunity to provide for dispute resolution at an appropriate level and an effective method of reducing the burden on a nascent legal system. *See* Kings College London – International Policy Institute, East Timor Post Operation Report, http://www.ipi.sspp.kcl.ac.uk/rep006.

Traditional Remedies in Sierra Leone

Traditional remedies are often characterized as local forms of dispute resolution headed by a village chief or tribal leader. In Sierra Leone, for example, some 149 chiefdoms make up the lowest tier of government in the country. Each chiefdom benefits from an elected leader and an elected council of elders from local villages. Moreover, the chiefdoms serve as the basic jurisdictional area for the local or customary courts. These courts cover 80% of the cases in the provinces and provide an effective, efficient, and perhaps most importantly, local method of dispute resolution. The Sierra Leonean customary courts deal with largely minor land, family or petty trade issues, they also have jurisdiction to deal with minor crimes of violence. Appeal from the decisions of the customary courts lies to the Magistrates court. While such systems do not offer a panacea to all problems they are often well supported and trusted by the local population.

4. Truth and Reconciliation Commissions

Although not a part of the regular legal dispute resolution process, Truth and Reconciliation Commissions (TRC) have been used with increasing frequency in post-conflict settings as a method for helping society move past a period of past governmental abuses as part of the restoration of the rule of law. The concepts underlying the process of TRCs are by no means new. Society has regularly adopted such practices and procedures in an attempt to come to terms with dark chapters of their history. After the de-nazification of Germany, the process of *Vergangenheitsbewältigung* allowed for individuals to admit the horrors of the former regime, attempting to remedy as far as possible the wrongs while attempting to move on from the past.

Since the mid-1970s, an unprecedented number of states have attempted the transition to democracy. One of the significant issues many of these states have had to deal with is how to induce different groups to peacefully co-exist after years of conflict. Particularly since the early 1990s, the international human rights community has advocated TRCs as an important part of the healing process. Indeed, they have been suggested as part of the peace process of virtually every international or internal conflict that has come to an end since.[103]

Long-term conflicts often involve such widespread criminality of a heinous nature that the domestic legal systems would become overburdened by any attempt to bring to justice those who participated in such activity. That said, TRCs do not provide impunity for all. Those deemed to be responsible for organizing or orchestrating the violence are frequently tried while the vast majority of others may be granted amnesties if they participate in TRC process and thereby accept their actions. The balance between individual criminal responsibility and national reconciliation is a fine one that is not easily achieved.

[103] Twenty-seven nations have adopted such an approach since 1970. On TRCs generally, see the US Institute of Peace web site, which has an extensive library on TRCs, http://www.usip.org/library/trush.html.

The Role of Truth and Reconciliation

One form of truth and reconciliation was undertaken by the Special Representative to the Secretary General (SRSG) in Afghanistan. Complaints have been made of serious crimes committed by the Northern Alliance during the military campaign in which the Taliban regime was removed from power. These serious allegations possibly implicated senior members of the current regime. The unwillingness of the UN to conduct a thorough investigation into such allegations was based on jurisdictional concerns but was heavily swayed by the risk of undermining the current transitional administration. The SRSG concluded, on balance: "(O)ur responsibility to the living has taken precedence over justice to the dead[104]."

In an attempt to promote the political stability, investigations into allegations of previous offenses were limited. The concept, while at first blush may seem abhorrent to most legal officers, is not at great variance with the TRCs established in several nations in an attempt to bring dispute and friction to an end.

TRCs are far from a panacea for the post-conflict society. It can take TRC many years to hear evidence from a wide number of witnesses before typically producing written reports. Some feel that the publication of such reports, many years after events, tend not to serve to heal wounds, rather re-open them.

5. Property Claims Commissions

Like TRCs, property claims commissions are another exceptional form of dispute resolution in post-conflict societies. If large portions of land and property were expropriated from individuals in the course of a conflict, property claims commissions can be an important process in promoting equality amongst citizens who suffered.

Such a body was set up by the CPA[105] in Iraq and has as of October 2005 distributed $36 million to those who were wronged. The commission is quasi legal in nature but while not a court of law *per se*, it can be a powerful tool in rectifying past injustices and can do so in a way that is consistent with rule of law values.

F. Civil Society

Civil society can be defined as the political space between the individual and the government that is occupied by NGOs, social groups, associations, and other social actors, such as non-profit and for-profit service providers. Civil society organisations (CSOs) include organised NGOs, community-based organisations, faith groups, professional and interest groups such as trade unions, the media, private business companies, bar associations, human rights groups, universities, and independent policy think tanks.

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[104] United Nations Special Representative of the Secretary General, Jean Arnault.

[105] *See* Coalition Provisional Authority Regulation 8, as amended by Regulation 12. http://www.cpa-iraq.org/regulations/20040114_CPAREG_8_Property_Claims_Commission_and_Appendix__.pdf and http://www.cpa-iraq.org/regulations/20040624_CPAREG_12_Iraq_Property_Claims_Commission_with_Annex_A_and_B.pdf.

The involvement of civil society in rule of law programs is important for wider and more inclusive local involvement in rule of law operations and, ultimately, their sustainability. CSOs have an important role to play owing to their potential to give voice to the interests and concerns of the wider population, to encourage reforms that are responsive to popular security and justice needs, and to actually perform the work of reconstruction and social support that leads to increased stability and recognition of the rule of law.

Too often, rule of law programs are focused primarily on government and fail to adequately engage civil society. While short-term progress may be possible by working solely with state institutions, longer-term effectiveness requires the development of a popular and vibrant semi-public constituency for social progress. CSOs have a critical role to play in rule of law as service providers, as well as beneficiaries, informal overseers, partners, and advocates of reform. Judge Advocates need to be aware of ongoing efforts and partnering opportunities and to ensure that related military initiatives are compatible with credible CSO efforts in their sector. Political legitimacy of the law – the ultimate goal of every rule of law project – can only come with the kind of broad social involvement that civil society represents.

1. Operational Objectives for Engaging, Leveraging, and Supporting Civil Society

- **Increase the capacity of civil society to monitor government policy and practice on security and justice issues.**
- **Strengthen the legal and regulatory framework within which civil society can operate.**
- **Build trust and partnership between governments and civil society on security and justice issues.**
- **Improve the research capacity of CSOs and their role in representing the views of local communities.**
- **Develop CSOs' technical capacity to provide policy advice and provide security and justice services**
- **Build wider constituencies in support of rule of law through increasing media coverage and raising public awareness.**
- **Facilitate the emergence of a broader and more representative civil society.**

2. How to Engage with Civil Society in Rule of Law

These are some specific strategies that the rule of law practitioner can use to help leverage the impact of the CSOs operating in the host nation.

Police reform. CSOs can play a valuable role in working to minimize distrust between communities and the police. For instance, community-based policing forums should be explored as a way to build confidence and help tackle crime.

Human rights and access to justice. CSOs play an important role in advocating for human rights and increasing access to justice. Many bar associations, independent lawyers groups and NGOs work to promote human rights through training of security forces, campaigning for legislation, monitoring allegations of abuses, and providing legal and paralegal assistance. Work in these areas is particularly important in countries with a repressive state or

countries emerging from violent conflict and political transitions where rights are often not respected.

Peace processes. Civil society can play a central role in peace processes and sometimes even in peace negotiations, as was the case in Guatemala during the 1990s. Their active role could be used to press for the inclusion of relevant rule of law provisions in peace agreements.

National development plans. Governments and international actors are wise to consult civil society in the development of poverty reduction strategies and country assistance plans. This creates an opportunity to hear the views of CSOs on security and justice issues, providing them with a chance to help set development priorities, have direct input into policy-making, and mobilize local and national ownership in the process.

Delivering justice services. In many countries, CSOs deliver essential justice services that the state fails to provide and have a significant impact in advancing justice by addressing grassroots needs. Common examples are those of lawyers, paralegals, legal aid centers, victims' support groups and refuges from domestic violence, which deliver services on a pro-bono basis or for a relatively small fee.

Providing Legal Aid in Bangladesh

One of the main challenges facing states in countries with large numbers of deprived populations like Bangladesh is the provision of public goods. This shortcoming is especially critical in relation to the judicial system, which tends to exclude poor people. The Bangladesh Legal Aid and Services Trust (BLAST) raises legal awareness, conducts research and advocacy, and provides services such as mediation and free legal support in the form of litigation, investigation, and monitoring of violation of law and human rights.

BLAST has been able to make a significant difference through its advocacy activities including public interest litigation and public lobby events on justice issues. Successes have included the enactment of legal aid legislation by the government, protection of slum dwellers from eviction, and the reduction of arbitrary arrests.

Public education programs. In many countries, ongoing public education programs focusing on the rule of law (from human rights to the proliferation of small arms) are run by CSOs.

La Strada Foundation and Human Trafficking in Poland

In Poland, La Strada (a CSO that works to raise awareness and knowledge on the problem of trafficking of women as well as directly providing services for victims of human trafficking) lobbies national authorities on the human rights aspects of human trafficking and the need for reform. It has an active prevention program that aims to raise the awareness of potential victims on the dangers of human trafficking and it provides direct assistance, referrals and counseling for victims of trafficking. Within the security sector, La Strada has trained 120 law enforcement representatives as trainers within the police and border guard academies. The training focuses on raising the awareness of border guards and the police on the complexity of the problem, developing strategies to monitor and prevent trafficking, and how to deal with its victims. This resulted in the police academy adding the issue of human trafficking to their curriculum and the harmonization between the police and border guards of procedures to combat trafficking.[106]

Oversight of the security system. CSOs can help inform, influence and assess the performance of formal civilian oversight bodies and security system institutions.

3. Conducting a Baseline Assessment in this Sector

Rule of law programs should include a firm analysis of the context, role and position of CSOs, since their capacity, effectiveness and space to engage varies greatly from country to country. Civil society assessments must take into account the range of local actors beyond those approved by the state and identify those that genuinely focus on improving the human security of the poor, women, and other groups often excluded from security debates. The following are example questions for civil society assessments, and should also be submitted as intelligence requirements to the G-2 for additional collection and analysis.

Baseline Assessment for roles of Civil Society in Rule of Law[107]

Context

What are the political, social, and legal frameworks (e.g., social pressures, legal restrictions, and history) in which civil society operates?

Is there a national NGO network that provides coordination and support for CSOs?

When does government take an adversarial or a partnering relationship with CSOs?

Which CSOs work on security and justice issues and how credible are they? What is their relationship with the government?

Accountability and Oversight

Which CSOs help oversee the security and justice systems?

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[106] Source: La Strada Foundation, http://www.strada.org.pl/index_en.html.

[107] *See also* section B on Assessments for direction on how to conduct the assessment and how to use these questions as measures of effectiveness to monitor progress.

Which mechanisms exist to ensure that CSOs are equally accountable to their populations and their external partners?

Capacity

Which CSOs are the possible agents of change in the security system? What are their key sources of influence? Are they effective and efficient?

Have certain CSOs demonstrated a capacity to engage security-related issues?

What capacity do CSOs have for research, advocacy, training and policy advice?

Management

How strong are the internal managerial systems of relevant CSOs?

Do they handle budgeting activities competently and transparently?

Coordination with other parts of the security system

Which CSOs have connections to security and justice actors?

What institutional mechanisms exist for CSOs and state security and justice sectors' interaction?

What state or coalition activities can be used as a vehicle for engaging with civil society?

Are members of CSOs put at a security risk by interacting with the security sector?

External Partners Engagement

What is the relationship between CSOs and international NGOs and external partners?

Is there primarily a need for programmatic or institutional support to CSOs, or both?

How can sustainability be built among targeted CSOs?

Are there any potential risks involved in interacting with specific CSO groups?

What is the likely impact of external partners' involvement or assistance on the local conflict dynamics? How can negative impacts be avoided or, at least, minimized?

Is there a risk that external support may endanger members of CSOs and how can they be protected from human rights abuses?

4. Common Challenges and Lessons Learned to Guide Implementation

Support capacity development. Building the capacity of CSOs requires a long-term perspective in programme planning, particularly when civil society is weak or under-developed.

Consider the role of International CSOs in capacity-building. International CSOs can help strengthen their equivalents in the partner countries by assisting in creating political space for engagement with their governments on security and justice issues, as well as providing moral

support, protection, and security. International NGOs can also provide important technical and capacity-building support through, for example, skills development and training programs.

Ensure transparency of engagement with CSOs. It is important that governments and international actors are transparent in their dealings with CSOs to avoid misperceptions. Opaque engagement risks the population or other CSOs growing suspicious of the relationship between governments and CSOs and national governments becoming distrustful of the relationship between external actors and local CSOs.

Coordinate assistance. Coordination with other local and international actors is essential to avoid duplication, to pool resources, and to concentrate efforts in supporting CSOs, while fostering their independence and sustainability.

Institutional funding and sustainability. In countries with emerging CSOs acting in the security and justice arena, it is important to ensure provision for core institutional funding. Although practice demonstrates that external partners are more disposed to support project-based activities, this limits CSOs' ability to engage in the longer-term and to develop or seize emerging opportunities in domestically driven security reforms. On the other hand, openness towards longer-term funding must be balanced with concerns of sustainability. There is a requirement for CSOs to develop balanced sources of funding in order to sustain their independence and avoid both donor fatigue and the appearance of dependence on a particular interest group (including foreign nations and the national government itself if it is a source of CSO funding). This can be done, for example, through harnessing the support of the private business sector and charity campaigns.

Support regional and international networks and partners as a bridge to the national level. In many countries it may be difficult for CSOs to engage directly in security and justice issues at the national level. Participation in security-related discussions and mechanisms at the regional level tends to be a good means of exerting indirect pressure on the national level as local CSOs are normally seen to have more credibility if they are members of regional or international networks or have international partners.

Build media capacity to report on rule of law and include media strategies into programming. The media is one of the main channels to help raise public awareness on issues pertaining to the rule of law. In many countries, especially post-conflict ones, the media is under-developed and journalists lack the capacity and knowledge to effectively cover security and justice issues. CSOs can play an important role in helping to develop these skills and developing the capacity of CSOs to effectively engage with the media can be an important area for assistance.

Train the trainers. Experience shows that cascade training in which representatives of leading CSOs train others can be very effective. It helps in building local training capacity, ensures that contents are relevant and sensitive to local contexts, and maximises the outreach to community level.

Support research institutions. Developing the capacity of academic and research institutes can help generate a better understanding of the context, situation, relevant actors and challenges faced in a given country. Law schools, for instance, are a critical element of the civil society infrastructure supporting the rule of law.

Beware of any lack of domestic legitimacy. Supporting CSOs without broad domestic legitimacy may jeopardize reforms with the government and alienate wider civil society. Some CSOs are more closely connected to national elites and external partners than to local communities.

The tension between role as watchdog and partner. When CSOs move from playing a watchdog role and start to participate in actually helping to implement the rule of law, their domestic audience may perceive them as no longer being neutral. On the other hand, governments may not trust them as partners if they are being publicly critical. Some compromises will have to be made and training in how to raise sensitive issues without being overtly confrontational may be essential for CSOs performing advocacy roles. For example, both in the Democratic Republic of Congo and Liberia, civil society became party to the peace agreement ending the conflict, taking up seats in transitional parliament and management of government parastatals. This had implications for perceptions of its neutrality.

Be aware of potential negative role of some civil society groups. Violent conflict often engulfs, politicizes and splinters civil society. Some organizations, which may be considered to have played a negative role in the conflict, could act as a spoiler to peace processes.

Ensure the security of NGO and CSO partners. In many contexts NGOs are targeted with violence by belligerent factions or insurgents, and they are almost invariably ill-prepared to provide their own security in a non- or semi-permissive environment. Security failures that affect CSOs can devastate reconstruction efforts, including rule of law operations. Deployed Judge Advocates need to be aware of the security risks that CSOs face and to either work to provide security or, if the situation is untenable, help to arrange for their exit from the AO.

G. Non-State Security Providers

Non-state security providers encompass a broad range of security forces with widely varying degrees of legal status and legitimacy. Government regulated private security companies (PSCs) and some neighborhood protection programs are examples of legitimate services; some political party militias are acceptable in certain countries, while for the most part guerilla armies, warlord militias, and so-called "liberation armies" are generally illicit and counterproductive to any peace process or stabilization effort. The key characteristic that all of these non-state actors share, however, is that they provide some form of security to someone. While private security forces can and do provide critical, legitimate security functions, unlike traditional police they do not serve the general public. In attempting to bring them and their actions within the rule of law, the role of private actors in providing security services has to be recognized and addressed. Non-state actors provide many different types of security services:

Military Services

Military training/consulting

Military intelligence

Arms procurement

Combat and operation support

Humanitarian de-mining

Maintenance

Security Services

Physical security (static/transport)

Close protection (body guarding)

Rapid response

Technical security

Surveillance service

Investigative services

Risk assessment and analysis

The "private security sector," as distinct from other types of non-state security actors, is generally defined as those commercial companies directly providing military or security-related services (of a more protective nature) for profit, whether domestically or internationally. The number of PSC personnel and the size of PSC budgets exceeds public law enforcement agencies in many countries, including South Africa, Philippines, Russia, US, UK, Israel, and Germany. The private security sector is rarely addressed in any systematic way in rule of law programming or assessment. As a result, there is a considerable lack of practical experience for practitioners to draw on.

It is tempting to ignore non-state security actors or treat them as a host nation problem. However, if the sector is neglected in broader rule of law programming, it may come to represent an essentially parallel and largely unaccountable sector in competition with state justice and security provision. Without effective regulation, the PSCs are often narrowly accountable to clients and shareholders, rather than democratically accountable to public law, and over reliance on PSCs can reinforce exclusion of vulnerable populations and unequal access to security. Unaccountable non-state security actors can facilitate human rights abuses or inappropriate links between the private security sector and political parties, state agencies, paramilitary organizations and organized crime.

Security Contractors

A 2005 private security sector assessment in the Republic of Moldova found that the State Guard Service, within the Ministry of Interior, was directly competing with national PSCs for guarding contracts, while at the same time operating as national regulator for the private security sector. PSCs were also found to have been actively employed by the police to undertake police tasks, such as arresting criminals and combating organized crime.

Recently, private contractors from firms providing military-related services have become more prominent in theaters of operations, particularly armed contractors providing security services to the USG. In these situations, the principle of unity of command should apply.

1. Assessing the Role of Non-State Security Providers

A professional, accountable and well-regulated private security industry can complement, rather than undermine, the state's ability to provide security. A healthy private security sector can allow scarce public resources to be usefully redirected for other purposes, including the public provision of security to those who cannot afford it by private means. Within this context, the issues that may need to be addressed can be summed up as follows:

- **Clarifying the roles of the private security sector and its relationship with public security agencies, and increasing cooperation**
- **Statutory regulation and government oversight, perhaps through licensing**
- **Professionalism and voluntary regulation**
- **Transparency, accountability, and oversight**
- **Training for private security staff in human rights and humanitarian law, use of force and firearms, first aid, and professional operating standards**
- **Integration of private security sector reforms into broader Security Sector Reform (SSR) programs.**

Recognizing that non-state security actors can potentially provide a valuable function, it is important to understand the development cycle of the private security industry that can lead to more effective control of all non-state security forces. In general, regardless of the context, as host nation governance is restored and strengthened, a relatively unregulated and rapid proliferation of non-state security providers is often followed by a period of consolidation and professionalization, in which a more sophisticated domestic control regime is established and the most questionable operators are marginalized. A baseline assessment should include viewing the varying roles of non-state security providers as a sector, and analyzing the existing governance or regulatory framework in which they exist.

Context

What are the factors contributing to supply of and demand for private security services and other non-state security providers?

Who are their clients and what security threats are they hired to protect clients from?

How does the public perceive them?

Is there demand for reform of the sector from government, civil society, client groups, or from legitimate PSCs?

To what extent are PSC employees affiliated and identified with former armed groups (e.g. militias), ex-combatants, and arms trafficking?

What is the impact of non-state security providers, including the private security sector, on public law enforcement services, crime levels, public safety, human rights, and business confidence?

Regulation and Oversight

What laws and regulations are in place to govern the private security sector and the use of firearms by civilian corporate entities?

Which government agencies or ministries are involved in the control and regulation of PSCs?

What procedures and criteria exist for licensing and registering PSCs? What systems and standards exist for vetting and licensing private security personnel?

Have PSCs or other non-state security actors or their personnel been implicated in crime, and have incidents led to trials or prosecutions?

What voluntary codes of conduct, industry bodies and standards exist, if any? Do enforcement mechanisms exist?

Do procurers of private security services have selective procurement criteria or report information on the companies or individuals that they employ?

Capacity

What is the size and profile of the private security industry operating in the country and overseas (e.g. size and number of companies, number of personnel, annual turnover)?

What services can they offer and which do they provide?

What is the capacity and coverage of private security provision compared with the police and public providers?

Management

What is the ownership structure of the private security industry (e.g. national, international, subsidiaries of international companies)?

What kind of training is provided to staff? Is there a code of conduct? Is it enforced by the companies on their staff?

What are the human resource and recruitment policies and practices?

Do they vet recruits for criminal convictions, disorderly conduct or in post-conflict situations, for human rights abuses?

What are the command and control arrangements for staff while on duty?

How are small arms and ammunition controlled, stored and managed by PSCs?

Coordination with Other Parts of the Security System

What affiliations and relationships do companies have with government officials, law enforcement agencies, military, intelligence agencies, political parties, criminal groups, and militias?

What is the functional relationship and division of responsibilities between public and private security providers?

How are state security providers involved in training, licensing and support of private security providers?

Donor Engagement

Do existing SSR programs contain a private security component?

Have donors undertaken a security or conflict assessment prior to their SSR interventions and if so, was the private security sector considered as a factor?

Do international actors operating in-country, such as humanitarian and donor agencies, procure private security services, and what are their procurement criteria?

2. Ten Lessons Learned

(1) *Avoid creating a security vacuum.* Non-state security actors may be the only providers of security in areas or sectors where state provision of security is weak. To avoid creating a security vacuum, it may be necessary to strengthen state security provision and capacity for oversight as a precondition for effectively regulating the private security sector.

(2) *Control the activities of personnel wherever they are working.* This is essential to ensure that they are accountable for all wrongful acts wherever they are committed, particularly when the domestic regulatory environment is weak.

(3) *Clarify the roles and functions of private security providers.* Issues include private sector involvement in law enforcement or military operations, procedures for reporting to the police, and the role of the police in enforcing private security sector legislation.

(4) *Establish transparent licensing criteria.* Licensing criteria might include adherence to standards related to vetting and training, equal employment practices, recording and reporting operations, oversight and management structures, responsibilities to the public, and relations with public service providers.

(5) *Do not overlook criteria for licensing host nation security providers who operate externally.* Regulation should include whether the company or its proposed activities are likely to pose a threat to law and order, undermine economic development, enhance instability and human suffering, increase threat perceptions in neighboring countries, contribute to or provoke internal or external aggression; or violate international embargoes or sanctions.

(6) *Avoid immunity agreements that insulate outside PSCs.* International private security providers may acquire immunity agreements from HN governments to prevent prosecution under national laws. These agreements are often a condition of undertaking work on behalf of governments, particularly in conflict or post-conflict situations. Despite their apparent utility, these agreements can weaken the rule of law in the host nation, often at a time when establishing and enforcing it is essential to the provision of security.

(7) *Prescribe basic PSC training.* Regulatory authorities should establish and oversee training for private security providers that give personnel a good grounding in human rights and humanitarian law, first aid and gender issues.

(8) *Assure accountability extends to owners, not just employees, of PSCs.* In post-conflict, a thorough assessment of the ownership and command and control structure of PSCs is essential in order to ensure that they do not operate based on previous or on-going affiliations with criminal groups, armed combatants, or political parties and that they are not ethnically or religiously exclusive in their recruitment of personnel or areas of operations.[108]

(9) *Address the links to DDR.* Disarmament, demobilization and reintegration (DDR) programs need to specifically include private security personnel, who are often recruited locally and may have played an active role in conflict. Former combatants may provide a recruitment pool because they frequently possess specialized military skills but lack alternative economic opportunities. This can lead to problems if former combatants are not adequately vetted and trained. If not carefully monitored, PSCs in a post-conflict environment can contribute to insecurity through maintaining command structures and legitimizing weapons possession under the guise of legitimate private security provision.

(10) *Remember that PSCs are part of the broader civil society.* Where possible, align efforts to deal with the problem of non-state security providers with civil society and community safety initiatives. In addition to the involvement of CSOs, community safety programs are also useful tools that can help increase the oversight of the private security sector by local authorities and community groups, encouraging dialogue between communities and all security providers, and encouraging local cooperative agreements between security providers and communities that outline the roles and practices of the different actors in maintaining local security, law, and order.

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[108] For information on vetting public employees see OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE OF LAW TOOLS FOR POST-CONFLICT STATES – VETTING: AN OPERATIONAL FRAMEWORK (2006), available at http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Vetting_en.pdf. For further information about the ICTJ research project on vetting and additional guidelines being developed see http://www.ictj.org/en/research/projects/vetting/index.html.

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VI. Planning for Rule of Law Operations

Mission planning does not occur in a vacuum. It is subject to the demands of available resources, time, and the operational goal to be obtained. Planning for the rule of law mission is no different. Hindsight and analysis of past post-conflict operations suggest that their must be a thoughtful, systematic, and phased rule of law planning strategy.

Recent rule of law endeavors have been hindered from a notable lack of strategic planning. Given the interrelated nature of the legal system, the multiple players involved in legal reform, and the nature and breadth of the institutional changes sought, it is difficult to be effective without a coherent and compressive plan.

This chapter begins with an in-depth discussion on rule of law planning in three distinct phases: pre-deployment, initial deployment, and sustained deployment. The chapter then describes a three-phased process of assessing the status of rule of law in the host nation, which provides the context for using the command elements to develop appropriate rule of law initiatives. The chapter also provides guidance on the utility of metrics applied to rule of law operations in order to measure rule of law progress, evaluate individual programs cause-and-effects, and appraise whether initiatives reflect host-country needs. This chapter ends with a brief discussion of the fiscal law environment Judge Advocates can expect when preparing for (and conducting) rule of law operations.

Given this complex nature of rule of law, both in the theoretical and operational sense, it would be difficult, and more likely counterproductive, to devise rule of law programs without first developing a strategy based on comprehensive assessments and well structured metrics. This chapter attempt to provide the Judge Advocate with some direction in programming future rule of law missions.

A. Planning Phases

Experience has shown the benefit of breaking the planning phase of rule of law missions into three distinct timeframes. In each of these phases, the nature of the planning will necessarily be different, as the conditions confronting the Judge Advocate planner will vary. Accordingly, this *Handbook* divides planning for rule of law missions into the following phases:

- **Pre-deployment (-180 to -30 days prior to deployment)**
- **Initial deployment (-30 to +90 days of arrival in the area of operations)**
- **Sustained deployment (+91 days to indefinite)**

There is nothing set in stone about these suggested timeframes. They will vary depending upon the nature of the conflict, the manner of entry into theater, the nature of the mission (whether occupation or permissive), and whether this is an initial entry into the area of operations (AO) or a follow-on rotation. If a unit is performing an initial entry into a nation with significant infrastructure damage, the duration of the initial deployment phase, as described below, may extend well beyond 90 days. If a unit is part of a follow-on rotation into a semi-stable environment, where Judge Advocate personnel can benefit from the experience of their predecessors, the duration of the initial deployment phase might be a few weeks, instead of months.

Regardless of the exact duration of these planning periods, their relevance is that the nature of the planning for the rule of law mission and the measure of its success (metrics) varies significantly from phase to phase. The three phases provide a general compass to planning that should be considered as the mission evolves. The discussion below is to emphasize the tools required at each stage of planning for the rule of law mission, but is not intended to be an exact road map, as planning for any operation will be situation specific.

1. Pre-deployment Planning (-180 to -30 D day)

Pre-deployment planning for the rule of law mission may begin before operations are imminent. In the case of a major natural disaster, a unit might have only days to plan before arriving in the theater of operations. Operations over the past two decades (Haiti, Bosnia-Herzegovina, Desert Storm, and Operation Iraqi Freedom (OIF)) have repeatedly shown that there is often a substantial period of diplomatic and other political activity that provide signals to the Judge Advocate that informal planning for a rule of law mission should begin well in advance of receipt of a warning order. Even where available time is short, as was the case with Operation Enduring Freedom (OEF), the principles of pre-deployment planning for the rule of law mission remain the same – they are simply packed into a shorter timeframe.

a) Understand the Level at which you will be Operating within the Command Structure.

The nature of the mission that will be assigned to rule of law practitioners will necessarily impact planning in the pre-deployment phase. There will be significant planning differences depending upon whether the JA personnel will be operating from a centralized location at a division or joint task force headquarters, as is often the case with Judge Advocates from a division SJA office, versus Judge Advocates operating in a Civil Affairs (CA) unit, who are frequently dispersed across the breadth of the area of operations in one-man JA detachments.

At the most fundamental level, knowing whether the Judge Advocate will be working in a centralized headquarters environment with other Judge Advocates or by him/herself with a tactical unit impacts planning for:

- **the numbers of sets of legal resources (manuals/cds, computers) that must be taken**
- **communications capabilities (phones, email, and technical reporting channels)**
- **chain of command issues, such as whether the solo Judge Advocate assigned to a provincial or other remote location works for the tactical unit commander or is a representative of higher headquarters co-located with the tactical unit**

Coordination in OIF-1

During OIF-1, the CA legal reconstruction effort in southern Iraq was disjointed, as the Judge Advocates operating in each province did not have the communications capabilities to coordinate with each other and there was confusion within the chain of command structure. Further, some Judge Advocates had unclassified email access, some had only classified email access, and others had none at all. Initial planning deficiencies that failed to consider the chain of command, reporting, and communications issues led to two months of duplicated effort and lack of regional coordination that unnecessarily delayed restoring courthouse operations across the southern region by several months in some instances.[1]

b) Know the Foreign Legal System.

To rebuild a legal system one must understand the legal system. This might sound like an obvious truism, but the fact is that many units that ultimately became responsible for restoring the legal system in Iraq went into the mission with very little understanding of the Iraqi civil law system and no copies of the Iraqi laws whatsoever.[2] The pre-deployment phase provides the best opportunity to gain the general, but invaluable, understanding of the legal system of the nation where operations will occur. Understanding which organization or element within the justice system is supposed to do what, as well as understanding the lines of accountability, prior to arrival in theater will enable more effective pre-deployment planning concerning how to engage that system in a reform effort.

There are several steps toward understanding the foreign legal system to consider during planning in the pre-deployment phase:

Step 1. Take into account the political and historical context. This step helps identify events that shape the environment, such as a recent conflict or the creation of a new state. It also develops information on the country's legal traditions and the origins of its current laws.

Step 2. Understand the roles of major players and political will. This step helps identify the roles, resources, and interests of those who might potentially support reform as well as those who stand to benefit from retaining the *status quo*. It also guides an assessment of the strength of political will and options for capitalizing on it, strengthening it, or working around its absence.

Step 3. Examine program options beyond the justice sector. This step broadens the assessment beyond the justice sector to the overall state of the polity and its legitimacy. It helps determine whether conditions are ripe for direct rule of law programming, or whether programming should support precursors to the rule of law, such as political party development or legislative strengthening.

Step 4. Assess the justice sector. This step provides for a structured assessment of each essential element in terms of the two components of the justice sector, the legal framework and justice institutions. Assessments are discussed in greater detail in section B below.

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[1] CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOL. II, FULL SPECTRUM OPERATIONS 254 (2006).

[2] LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade (2003).

Capitalize on USG and JA Resources

For mature theaters, it is virtually certain that your predecessors will have developed a briefing on the host nation's laws. For instance, the MNC-I rule of law office has a briefing available on Iraq that it has transmitted to the Rule of Law Program Director at the US Army Civil Affairs and Psychological Operations Command (USACAPOC), Ft. Bragg, for use in their RoL Conferences for deploying JAs.[3] An obvious source of information about not only the mission but the context for the rule of law is the unit you are replacing.

Also, the Law Library of Congress can provide assistance in this area. The Law Library has a librarian assigned to numerous regional law collections. An appointment can be made to meet with the librarian and Judge Advocates assigned at OTJAG could facilitate this process by obtaining copies of relevant materials and providing them to the field for use.

c) Plan for Coordination with other Agencies Having an Interest in the Rule of Law Mission

Rule of law operations in Iraq and Afghanistan have repeatedly demonstrated that rule of law practitioners who seek to coordinate efforts, funding, and resources with other agencies and organizations yield the most effective results. The Judge Advocate who tries to do everything himself may expend significant effort, but over the long run not significantly impact reform. It is frequently the case that during initial-entry into a non-permissive environment the Judge Advocate will indeed be alone, with only other military operators such as military police and CA personnel, in attempting to assess and improve justice sector operations. The non-permissive environment makes it a virtual certainty that NGOs and IOs will not be present. Consequently, the practitioner will likely have to rely on other military assets during the initial phase of rule of law operations, and so the coordination activity must at the very least include other military agencies that will be extensively involved in reconstruction, such as Military Police, Engineers, and the G-3. Setting up a rule of law working group at the division level early in the planning process is an outstanding way to help ensure that rule of law and other reconstruction efforts will be unified ones.

However, as hostilities come to a close other USG agencies such as USAID or Department of Justice, IOs, and NGOs will arrive in theater. Regional, state-based economic and security organizations such as the Gulf Cooperative Council or the Organization for Security and Cooperation in Europe (OSCE) may have a presence. The United Nations may, depending upon the operation have a presence, as may nongovernmental agencies with an interest in human rights and justice. Each of these organizations is a tool and potential force multiplier for the rule of law Judge Advocate to maximize the effect of his efforts. Having awareness during the pre-deployment stage of the number and nature of such organizations, the capabilities they bring, and the availability of potential funding streams from these sources, will permit more meaningful planning for future operations during the pre-deployment phase.

[3] Rule Of Law Lessons Learned MNC-I Rule Of Law Section Operation Iraqi Freedom 05-07 (Dec. 10 2006).

Civil Affairs Soldiers who have been engaged in government support missions over the past two decades often state that they know they have reached a level of success in their operations when they have "worked themselves out of a job" by handing off future support operations to host nation, nongovernmental organizations or international organizations. In mission planning, the JA rule of law planner should likewise consider in planning whether success will be measured by continuing to oversee the successful operations of a host nation justice sector agency (e.g., a court) or by reaching the stage where the Judge Advocate is no longer needed.

d) Priorities for Justice Sector Programming

Because rule of law establishes conditions on which democracy depends, there are inherent priorities among the essential elements. Providing security while acting in ways that reinforce legitimacy are the highest priority because doing so establishes democratic legal authority and has the most immediate impact upon reducing violence. Impartiality and lack of evident bias are the second priority because they not only strengthen legitimacy but also serve to guarantee rights. Efficiency and access are the third priority, because they improve the provision of justice services. These "priorities" should not be confused with mandatory sequencing. Country conditions, revealed through the assessment, may not permit addressing the highest priorities first. Nevertheless, the links to the rule of law that these priorities represent are important to keep in mind. When addressing a lower priority first, programming should set the stage for later work at a higher level.

e) Pre-Deployment Resources

Begin developing a library of local national legal materials during the pre-deployment stage, which will continue to grow and expand upon reaching the area of operations. The core materials should include (in English):

- **the foreign state's constitution**
- **criminal code**
- **criminal procedure code**
- **civil code**
- **civil procedure code**
- **administrative law**
- **citizenship law**
- **property laws**
- **laws on organization of the government in general and courts in particular**
- **laws on organization of the police and prisons**

These resources may often be found in English translation through:

- **The Library of Congress**
- **law school libraries (domestic and foreign)**

- **large civilian law firms**[4]

In addition to obtaining the black letter law of the concerned state, the JA rule of law planner can avail himself of years of experience in post-conflict rule of law planning by other nonmilitary agencies including:

- **USAID (State Department) Justice/Rule of Law guides**
- **Office of the United Nations High Commissioner for Human Rights (www.ohchr.org)**
- **US Department of State Regional and Global Bureaus**
- **US Embassy Country teams in the expected area(s) of operation**

The ability with which the Judge Advocate preparing for a rule of law mission is able to openly solicit information on a foreign nation's legal system is necessarily tied to operational security considerations.

f) Anticipate and Plan for Translator Assets

Be aware of the need for translators, including awareness that within a single country several languages or dialects may be spoken. In planning for and working with translators, always be aware of cultural/sectarian divisions within the AO that might impact the effectiveness of your translator. E.g., a Serbian born translator who speaks Serbo-Croatian might not be effective in interviewing Croat civilians about their views on legal reform due to long term ethnic tensions between the Serbs and Croats. Often a rule of law team will not have their free choice of translator assets, but awareness that the cultural/social background of your translators may impact the level of their effectiveness and your ability to gather information essential for mission success is important to consider in planning the scope of the team's activities.

g) Tactical Considerations

The scope of this *Handbook* is not to comprehensively discuss the myriad tactical equipment issues that will affect the daily lives of those engaged in the rule of law mission. However, the reality on the ground is often that those engaged in rule of law missions must be mobile, able to communicate across distances ranging from a few kilometers to dozens of kilometers, and must be competent to provide much of their own security. The stereotype of the JA officer bearing only a holstered sidearm hopefully has finally been put to rest in OIF and OEF.

A rule of law team that deploys without the ability to defend itself during convoy operations is a team that will be largely ineffective in a non-permissive environment, as they will be unable to move beyond the wire of the base camp out of which they operate. Accordingly, decisions made at home station about weapons and other tactical considerations may have a large impact on subsequent success in coordinating a rule of law mission once in theater.

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[4] Firms engaged in international business may have treaties/civil codes for foreign nations. Many such firms also have Judge Advocate reservists or former Judge Advocates employed who are often willing to be of assistance to direct you to source materials.

Judge Advocates have historically been hampered in movement within an area of operations by a lack of organic transportation capability. Civil Affairs units, in contrast, often deploy with their own transportation capability. If possible, find out who will be the CA assets in your area during the period of your deployment and make preliminary contacts (with the battalion or brigade International Law Officer) to build rapport for the future when you may need to coordinate convoy operations with CA Soldiers to move about within the AO.

h) Conduct Briefings to Make Commanders Aware of ROL Impact on Mission Success

Judge Advocates can shape their battlefield just as commanders can. One way this is done in the rule of law context is by educating commanders prior to deployment upon how justice issues will impact security and stability following the end of high intensity conflict. One cannot presume that war fighting battalion and brigade commanders will appreciate how something as intangible as the foreign citizenry's attitude toward their legal institutions will have a direct impact upon the commander's ability to secure and stabilize his assigned geographic area. Pre-deployment briefings that succinctly educate how the rule of law has operational benefits will assist your commander in including rule of law issues in his planning priorities once in theater. Operating courts, effective police, quiet prisons, and the reduction of street violence reduce operational effort substantially, and familiarizing the commander with the impact of the rule of law will help the commander appreciate the need to make the rule of law a planning and resource priority.

2. Initial Deployment Planning (-30 to +90 D day)

The initial deployment period begins prior to arrival in the country where operations will occur. Several weeks of this time is often spent in mobilization stations or intermediate staging bases (ISBs), where access to the same planning resources that were available at the home station diminishes.

The period from -30 days before arrival (D day) in the host nation is often occupied with the logistical details of mobilizing. Soldier Readiness Processing, preparing equipment for shipment, medical screening, personal issues (particularly for reservists wrapping up civilian commitments) and countless mobilization administrative requirements will render significant planning for the rule of law mission difficult in the -30 to D day timeframe. Accordingly, it is unrealistic to consider the rule of law pre-deployment planning window to run up to the point at which operations begin. While plans may always be tweaked to some extent at the last minute, the plan that the rule of law practitioner has at 30 days prior to arrival in country will largely be the plan on arrival at the ISB.

During transition through an ISB,[5] reliable information concerning current developments within the host nation will be haphazard at best. The S2 section of the ISB may be a resource for current information that will allow revisions to planning during the initial deployment period. However, while a unit transitions though an ISB, the focus often remains upon movement issues and the tactical preparation for entry into the area of operations.

Upon arrival in the area of operations, the planning cycle again goes into high gear. Frequently, the nature of the expected assignment changes upon arrival, and command and

[5] *E.g.*, Hungary for Joint Endeavor; Saudi Arabia for Desert Storm; Kuwait for OIF.

reporting relationships anticipated during the pre-deployment stage are altered to meet the reality on the ground. Further, and most significantly, the rule of law team planners now come into contact for the first time with the infrastructure and personnel (country nationals, coalition allies, other USG agencies, NGOs, and IOs) with whom they will be directly conducting the rule of law operation. There is a veritable hose-feeding of new information available within a very short period of time that frequently renders portions of the pre-deployment plan irrelevant, or at a minimum, in need of major revision. This phase of planning requires an immediate and current assessment of the host nation's legal system.

Upon arrival in the host nation, the JA rule of law practitioner will begin the initial hands-on work of restoring the rule of law. Every day, through that on-the-ground experience, the Judge Advocate will in turn gain more information and insight into the workings of the host nation's legal system, and thereby will be creating the planning foundation from which sustained deployment planning will begin to develop.

The nature of initial deployment planning.

The action plan during the initial deployment phase:

- **Identify short-term goals, activities, and strategies to provide quick successes that will generate political support in post-conflict settings where conditions are evolving.**
- **Assign responsibilities, designate timelines, and provide performance benchmarks for both the initial deployment phase and the longer term sustained deployment phase.**

a) Provide for Small, Early Successes in the Rule of Law Operation

In the initial days following the close of armed conflict or on the heels a natural disaster, appearances are extremely important to securing the confidence and support of the foreign population. The most intelligent, ambitious, and strategically oriented plan to restore the rule of law may quickly become irrelevant unless some simple "quick wins" are front-loaded into the plan to create an atmosphere of progress and a return to normalcy.

Early Successes in OIF-1

In southern Iraq during OIF-1, many of the major provincial courthouses suffered damage during looting by local nationals following the fall of Saddam Hussein. While it would take months to repair the courthouses, merely cleaning up the broken glass and garbage and reopening the doors of those facilities so local nationals could come ask questions created the first fledgling appearance of a return to normalcy, which bought time in the public's attitudes for more ambitious projects to occur. Also, many outlying magistrate level courts did not suffer significant damage at all. These courts were the first to resume operation, creating a "quick win" that sent a message to the locals that there was once again a legal system in operation.

There will be many difficult and time intensive tasks that must be accomplished before the rule of law is restored in a devastated country. In your planning priorities, front-load a few quick and simple tasks to build rapport and confidence with the locals. The intent is not to

perform a superficial or meaningless task, but to quickly defuse flash points for renewed violence by demonstrating some level of justice mechanisms are functioning within the society at the earliest opportunity.

b) Create Mechanisms for Locals to positively Interface with their legal system

In many authoritarian states, the judicial system and the police are tools for a regime to keep the population under control. The laws are often unknown to the man in the street and being in a courthouse or police station is a moment of terror, not an opportunity to learn about their government. By planning mechanisms for positive interaction, such as manning an "information table" staffed by local government employees or creating informational flyers, the legal system can be made more transparent and thereby trustworthy. Merely posting copies of laws or changes to the law in the native language in a publicly accessible location can be a positive step in creating an atmosphere where the citizens begin to believe they have a meaningful role in their legal system.

c) Monitor and Mentor Local Officials and Professionals

Particularly in an occupation environment, the physical presence of a JA rule of law practitioner in almost daily contact with local justice officials is necessary for progress toward the rule of law to occur. A system that has been historically politicized or corrupt will not readily change or improve where contact with the US Judge Advocate is sporadic. Frequent, in-person contact, in the form of oversight, mentoring, and instruction is absolutely necessary to make any change in the system.

The Resilience of Old Practices in Iraq

In OIF-1, Iraqi judges would frequently and enthusiastically accept all of the guidance or instructions from Coalition Judge Advocates up until the moment the Judge Advocate departed the courthouse facility. They then immediately returned to doing business in the way that was familiar to them, including permitting pro-Baathist judges who had been dismissed by the Coalition to sneak back onto the courthouse and occupy their former offices. It required continuous physical presence by Judge Advocates in the courthouse to make change take root.

d) Plan Security for Justice Sector Personnel

Foreign judges who have survived under an authoritarian, corrupt, or politicized legal system will not readily embrace the more democratic traditions of the rule of law if it means their death at the hands of those who have a vested interest in seeing judicial reform fail. The success of the rule of law mission depends upon judicial personnel being secure, so they need to be protected in the same manner that any other mission essential asset is protected. While the point may seem superficially obvious, protection of judges is frequently a low to nonexistent priority in rule of law efforts following directly on the heels of major combat operations.

Protection of Judges in Early Rule of Law Efforts in Iraq

Lack of funding and personnel was most often cited by the Coalition Provisional Authority as a reason for leaving Iraqi judges, who were cooperating with the coalition, to protect themselves from anti-coalition elements. The consequence of this lack of security planning was the subsequent murder of many pro-coalition Iraqi judges and their family members, including the Chief Judge of Najaf, by criminal and insurgent forces. The result was a chilling effect on other Iraqi judges and their willingness to embrace rule of law reforms.[6]

e) "Plan B"

On the battlefield, communications are frequently unreliable and operational contingencies arise rapidly. Therefore, it is critical to not only have a plan for operations in cases in which the rule of law team is in regular contact with higher headquarters, but also to have a back-up plan of what to do if operational contingencies and limitations on communications gear render the team unable to communicate on a regular basis.

Planning vs. Execution in OIF-1

In OIF-1, the Coalition Provisional Authority announced in May 2003 that it had reserved all authority to reform the Iraqi legal system unto itself,[7] but then did not possess the communications assets or personnel outside the Green Zone carry out such a program. For approximately two months after the fall of the Baathist regime, CPA personnel overseeing the Ministry of Justice in Baghdad were largely unable to communicate plans or directions to CA units, Government Support Teams , or SJA offices in the provinces, who were actively engaged with the Iraqis in rule of law missions.

Despite the mandate on paper that CPA was in charge of the efforts to restore the rule of law, the military units seeking to establish the rule of law in each province had to engage in their own planning at the local provincial level, with almost no centralized guidance.

f) Coordinate with NGOs/IOs, but Recognize their Limitations.

Because they are plentiful and their capabilities are frequently unknown, it is easy to become overly optimistic in reliance during planning upon expected support from IOs and NGOs. Such organizations are frequently either unable or unwilling to maintain a presence in post-conflict AOs, especially those subject to active insurgencies. For instance, many IOs that had begun reconstruction assistance in Iraq withdrew in 2003 after the UN headquarters in Baghdad was car bombed. Any plan for the initial deployment period should be realistically premised upon the capability of the unit to accomplish goals *without* outside agency assistance. If additional outside support becomes available, incorporate it into the existing plans, but it is important for the deployed Judge Advocate to remain cautious of building the foundation of the rule of law mission during the initial deployment stage upon civilian resources that may arrive late or not materialize at all due to a non-permissive environment.

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[6] LTC Craig Trebilcock, *Justice Under Fire*, ARMY LAW. (Nov. 2006).
[7] Coalition Provisional Authority, Gen. Order No. 1 (16 May 2003).

3. Sustained Deployment Planning (+91 to indefinite)

The necessary focus for rule of law planners during the initial deployment stage is on the tangible infrastructure, such as the existence and operating condition of courthouses, police stations, prisons, and upon the availability of personnel. If one does not have the physical tools and personnel to implement plans, the more sophisticated aspects of the rule of law mission cannot be accomplished.

However, it is important to recognize that, as the rule of law mission enters the sustained deployment phase, planning, assessments, and metrics that continue to focus primarily upon tangible resources like infrastructure and do not progress to a more complex, effects-based understanding of the rule of law mission, will miss the ultimate goal of creating a system of law that is viewed as legitimate, relevant, and trustworthy in the eyes of the local population. Built upon the assessment process discussed in section VI.B below, a well-conceived plan during the sustained deployment phase should reflect a vision of justice (a vision that will be determined at the highest levels) and present a plan to achieve that end state. A tyrannical and unjust legal system may be well-funded by a despot and have significant institutional resources. Such an illegitimate legal system, viewed purely through the lens of infrastructure metrics, might well yield superficially impressive statistics concerning number of courthouses operating, the number of judges hearing cases, and the number of cases being adjudicated. All of the standing court buildings in a nation mean little to the stability operations mission, however, if the citizenry does not seek to access the system to resolve grievances and instead, due to mistrust, continues to rely upon violence in the streets for resolving disputes.

The concept of the rule of law within a society is an intangible that the infrastructure metrics, so important during the initial deployment phase, do not capture. Accordingly, the savvy rule of law planner must recognize when it is time for the mission to evolve from the infrastructure-focused initial deployment phase to the effects-based sustained deployment phase. Failure to recognize the need for transition in planning can lead to a cycle of repeatedly counting and reporting of the number of operating courthouses, etc., while failing to qualitatively analyze whether the existence of those facilities is making a positive impact upon the perceived legitimacy of the legal system in the eyes of the population.

The USAID recognizes that the narrow focus that necessarily control the initial phase of a rule of law mission must evolve into a broad-based, effects-driven plan that considers both justice and political factors within a society in order to have long-term success in establishing the rule of law:

> Past tendencies to respond to rule of law problems by focusing primarily on the courts and other components of the formal justice system have led to three problems. First, strategic planners have not been open to the full range of options for addressing rule of law problems, instead focusing more narrowly on such problems as court inefficiency or criminal procedure. This has resulted in the second problem, which is neglecting to treat the justice system as part of the larger political scheme. Third, judicial and legal rule of law programs have been overburdened with unrealistic expectations. They cannot solve complex and fundamental societal problems, while the social structures and values that led to the rule of law problems remain in place.[8]

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[8] US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS 4 (forthcoming 2007). [hereinafter GUIDE TO RULE OF LAW COUNTRY ANALYSIS]. *See also* Rachel

As such, the rule of law planner must recognize that the nature of planning will necessarily become more sophisticated and complex from a social and political viewpoint during the sustained deployment phase, even as the emergency conditions that dominated the initial deployment phase (rebuilding of destroyed infrastructure, for example) are ameliorated.

Rule of law planning objectives

Each rule of law mission will have differing needs and priorities due to the unique nature of the society in which it occurs, including the history and legal traditions of that culture. However, in creating a sustained deployment plan, rule of law practitioners should consider whether the following actions, which have yielded success in prior operations, will positively impact current mission objectives:

- **Law school curriculum reform.**
- **The establishment of community based legal services clinics sponsored by local bar associations or law schools to provide legal help to the indigent.**
- **Creating or strengthening professional associations for attorneys and judges that provide instruction on issues supportive of the rule of law.**
- **Attendance at international or regional legal conferences for judges and leaders in the legal system that will expose them to international norms of justice.**
- **Seek support for legal resources such as books and equipment from friendly neighboring countries that have a vested interest in restoration of security and stability on their border. For example, the Kuwait Government sponsored a Humanitarian Operations Center (HOC) in Kuwait City during OIF-1 that provided support to print and distribute the Iraqi laws and procedural codes, as many of the hard copy Iraqi resources for the law had been destroyed during looting.**
- **Encourage coalition building between host nation government legal organizations and law-related NGOs. For example, the American Bar Association conducts rule of law programs in many developing countries, including several former Soviet republics.**
- **Develop meaningful oversight mechanisms, such as ombudsman offices or judicial/police inspection offices to discourage corruption or misuse of government resources for private gain.**[9]
- **Consider crime prevention, with community involvement in problem solving, planning, and implementation, as an effective way to reform police. Civilian policing programs reorient the police away from a focus on state security (protecting a regime) to personal security (protecting the average citizen).**
- **Disarmament/weapons buy back programs.**

Kleinfeld, *Competing Definitions of the Rule of Law, in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 61-62 (Thomas Corothers ed., 2006).

[9] Particular care needs to be exercised in setting up oversight organizations, since they can themselves become corrupt and improperly use their oversight positions as a platform from which to exert a coercive or corrupting influence over the courts.

- **Constitutional drafting processes.**
- **Evaluation of pay scales for judicial and other legal system personnel. Underpaid officials may be more susceptible to corruption.**
- **Oversight and citizen awareness of court programs, including public awareness programs and judicial outreach and education programs designed to familiarize citizens with the work of the courts. Citizens that understand the process can become an advocate for the legitimacy of the judicial branch.**

Interim measures

Immediate interim measures are often needed to jump-start a criminal justice system in the wake of widespread violence. When short-term measures are used, they should, if at all possible, be performed under a mantle of authority consistent with the preexisting criminal code. It will be easier to move to longer term reform if the emergency measures initially relied upon have some grounding in the host nation law. Adherence to a legal code at each step of the rule of law reform process strengthens, rather than undermines, the legitimacy of actions in the eyes of the population.

B. Assessments (Methodology & Framework)

An assessment is the factual foundation upon which effective planning for the rule of law mission occurs. It is a study of conditions existing within the area of operations at any given time. Civil Affairs officers often generate assessments of a foreign nation's courts, prosecutors, police, and detention facilities as well as the public health capability, agriculture, economics, government capabilities, and utilities in developing plans to assist in stabilizing an area. The Judge Advocate engaged in the rule of law mission must become comfortable with creating and reviewing assessments of foreign nations' legal systems, including courts, private legal organizations, police, and prisons. An assessment may be informal or formal in nature, ranging from a couple of pages of hastily created observations upon initial entry into an area of operations to thorough studies that are dozens of pages long during the sustained deployment phase.

Assessments are a living document that should always be evolving to reflect changing conditions on the ground. If assessments are not updated on a regular basis to reflect changes in the country's legal system, planning will likewise be out-of-step with the reality on the ground. A current and accurate assessment assists in keeping the focus upon whether the actions being taken in pursuit of establishing the rule of law are making a difference.

Too often, mission activities and priorities are established without the benefit of a systematic assessment that looks at all elements, their context, and options. In the absence of such an assessment, tools become ends unto themselves. Example: A JA planner could plan and spend substantial funds and effort creating a sophisticated plan of legal instruction for judges in a particular province. Such an initiative might well look impressive in reports to higher authority. But, if the assessment reveals that lack of security and lack of funding are causing those provincial courts to limit operations, the legal training mission might be better delayed until, after the more immediate needs of security and funding are provided.

Mirroring the planning stages discussed above, there are three major time junctures where assessments will need to occur – Pre-deployment, Initial Deployment, and Sustained Deployment.

1. Assessments During the Pre-deployment Phase (-180 to -30 D day)

Assessments during the pre-deployment stage should focus upon general country conditions including legal institutions, the nature of the disruption that has led to the absence of the rule of law, the geographic area and characteristics of the AO in which the rule of law team will operate, and the major players and trends impacting the legal institutions of the nation that will be the subject of the rule of law mission.

If a unit is fortunate enough to be following a predecessor into the theater of operations, it should seek to benefit from the predecessor's experience by obtaining its assessments while still at home station. However, the ability of the newly deploying unit to conduct its own highly detailed assessments is necessarily constrained by the fact it is not in immediate contact with the situation on the ground. As such, JA planners preparing to deploy for a rule of law mission should recognize that, while pre-deployment planning is invaluable in order to be prepared to engage in the mission as soon as possible, the process has limitations, and attempting to engage in too highly detailed an assessment from home station may consume energy better focused on other aspects of pre-deployment planning.

a) Assess the History and Traditions of the Legal System

One critical but often overlooked contextual factor is the tradition on which a country's legal system was founded. That tradition affects the basic structural arrangements and functions of the judiciary and related institutions. For example, judiciaries in some civil law systems are, or may recently have been, part of the executive branch, and dependent upon the ministry of justice. The prosecutor may have a very dominant or very weak role compared with that of the judge.[10] Although structural arrangements have changed over the years in most civil law countries to enhance judicial independence, they often still differ in fundamental respects from those found in common law countries. In most cases, countries considering structural reforms will look to other countries with a similar legal tradition for models.[11] Accordingly, one might look to French legal reforms as a model for progress toward the rule of law in a former French colony, as opposed to relying upon the British/US common law tradition.

b) Understand the Roles of Major Players and Political Will

This step develops information on the roles, resources, and interests of leaders and others whose support is necessary for rule of law reforms. Those working within justice sector institutions, the rank and file as well as the leadership, will always be important actors. They can either support a reform program or sabotage it. Other bureaucrats and political figures may also have a significant role that needs to be understood, such as a ministry of finance which frequently controls the funds necessary for justice sector institutions to operate. During pre-

[10] The Latin American civil law tradition features a strong investigative judge and a weak prosecutor; by contrast, under communist legal systems, the prosecutor (or procuracy) completely dominated procedures. Reforms in both regions have sought to bring about greater balance in both roles while respecting other aspects of the civil law tradition.

[11] GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 8, at 16.

deployment, the ability to gather detailed information about important, but lower level players within the foreign nation's bureaucracy may be limited, especially if the mission is a non-permissive initial entry. However, as a theater becomes more mature and follow-on rotations begin, coordination with predecessor units will provide this information as well.

Also major players may exist outside of the government bureaucracy. These can include tribal or religious leaders who engage in informal justice systems, NGO and IO staffers, and neighboring foreign officials with an interest in the progress toward the rule of law of their neighbor. It is virtually inevitable that the quality of specific information available to the rule of law planner will increase with arrival in the area of operations. Accordingly, more suggestions concerning the types of players to include within an assessment continues in the initial deployment phase below. The importance of the pre-deployment assessment is that it enables the subsequent, more detailed information gained in-country to be placed into a broader context and lessens the time involved in assimilating that information into a usable resource once the unit hits the ground.

2. Assessments During Initial Deployment (-30 to +90 D day)

Assessments during the initial deployment stage will take on a greater level of detail than in the pre-deployment stage. For example rather than a general study and list of names, titles, and relationships, which was adequate at home station, the Judge Advocate must now know exactly how to find and communicate with these personnel, including the various commercial numbers, email addresses, and addresses or grid coordinates where they can be located.

a) Identify Who the Players Are

Initial assessments should include contact information for:

- **Judges**
- **Court clerks and administrative personnel (who make the judicial system work)**
- **Law enforcement officers**
- **Prosecutors and defense counsel**
- **Private attorneys (including bar association or legal union leaders)**
- **Religious leaders and other core opinion makers (who may have an influential role upon the local population and its perception of the law)**
- **Prison and jail officials**
- **Police academies**
- **Judicial training centers**
- **Coalition partners and host nation militia exercising police powers**

In addition to identifying the national bureaucrats, officials, and staff, the assessment needs to analyze whether legal institutions (including police, courts, and prisons) have the personnel, resources, and systems to handle the current and near-future caseload. The most ambitious plans for reform can be undermined by the simple fact that the host nation personnel

needed to perform the tasks are not available due to pre-war understaffing, civilian casualties, or refugee movements.

Engage Host Nation Judicial Hierarchy

Initial site visits should focus on identifying and meeting key judicial personnel and to conduct a visual assessment of the physical structure. When meeting with the local judicial officials, try to develop an understanding of the organizational structure of the court. Initial visits can be used to explore the inter-relationship of the courts such as the hierarchy of judges, the supervision of lower court chambers, the appellate process and the administrative functions of the court such as the scheduling of cases and the management of court records and dockets.

Follow on efforts should be coordinated to the extent possible with the chief or senior judge of the court. This coordination will demonstrate proper respect for the senior judge. Further, you can request that the judge inform lower judges and their staff that you will be visiting their chambers. Absent such coordination, some lower chamber judges may be resistant to meeting at all unless they are confident that their superiors are aware of the meeting.

Other than the host nation personnel carrying out the justice mission on a daily basis, external organizations will also impact justice reform. Coordination with such entities will often bring additional funding, personnel, or other resources to supplement military efforts. Accordingly, an initial assessment of the justice sector should include a complete listing of:

- **NGOs (e.g., human rights organizations, national bar associations)**
- **IOs (e.g., United Nations, ICRC)**
- **Victim's associations**
- **Coalition partners**
- **Educational institutions, especially law schools**
- **Other host government officials who impact rule of law issues (e.g., interior ministry, finance ministry)**
- **Neighboring country agencies and personnel with a positive interest in rule of law issues in the AO**
- **USG civilian personnel acting in a supporting or oversight capacity with US military forces**
- **Media organizations**

All such listings should include when, where, and how can these personnel be contacted by name, addresses, grid coordinate, phone & fax numbers, and email.

An assessment is not merely a list of agency and personnel contacts. An assessment should provide information and analysis of the capabilities and inter-relationships of the various participants in the rule of law process. It should also assess for agencies and personnel:

- **What influences are their personnel subject to? (positive and negative)**

- **Where do their loyalties lay? (tribal, ethnic, religious, bureaucratic, financial)**
- **Where do their obligations lay? (tribal, ethnic, religious, bureaucratic affiliations, financial)**
- **What influences adverse to establishing the rule of law exist? (corruption, poverty, foreign influences, crime, fear, insurgency, lack of education)**

b) What are the Capabilities and Needs on the Ground?

An initial assessment should also reveal what capabilities and tools are available within the host nation to conduct justice sector operations and reform. Such an assessment should reveal:

- **The number and physical capacity of courts, law enforcement & detention facilities – by number, location (grid), and an assessment of structural condition.**
- **The status of supplies and equipment, if any – furniture, office equipment and supplies, utilities, legal texts, including both materials already in place and those being brought by other agencies.**

Be aware that the mere existence of equipment without a plan for how to utilize it effectively in support of rule of law operation is not necessarily a positive or relevant factor the rule of law mission. Donor nations and organizations often want to contribute what they *have*, rather than what the distressed country actually *needs*.

The Judge Advocate conducting the rule of law assessment must rely upon his own judgment and expertise, as well in culling through requests for assistance from host nation officials.

c) Assess who Controls Funding in the Host Government

Justice agencies will not continue to operate without funds to pay staff and judges or to replace destroyed equipment. The rule of law Judge Advocate must become familiar with the local nations budget process and allotments, accounting procedures, and where the choke points exist within the bureaucracy that may delay funds from reaching the agencies that need them.

There should also be an assessment as to whether preconditions exist to access host nation funds, which might reveal corruption controlling the process.

Judicial Sector Salaries and Corruption in Pre-War Iraq

During OIF-1 Judge Advocates seeking the release of funds from the Iraqi Ministry of Finance to pay court personnel salaries could not understand the source of continuous delays in getting funds released to the judiciary. After much frustration, the provincial judges explained that under Saddam that the chief judge from the province had to personally travel to Baghdad and provide 'favors' for Finance Ministry personnel before funds would be released. Such favors might include kickbacks or agreeing to employ a relative of a finance Ministry official. The Iraqi Finance Ministry officials were simply waiting for their customary favors to be performed prior to funds being released.

d) Assess who has Custody of Prior Legal (criminal, civil judgments), Property, and Vital (marriage, divorce, births, and citizenship) Records

In the period following the cessation of the rule of law caused by natural disaster or war, local citizens may need to reestablish their entitlement to certain social benefits or possession of property. Where a civil war or sectarian violence has occurred or there has been the presence of hostile foreign troops in the country the ability for an individual to prove that he has legal status to be in a nation can be a matter of life and death. Locating and securing legal records proving status and property rights should be a major initial priority of the initial deployment assessment.

Locating Court Records in Iraq

One week prior to the US invasion of Iraq under OIF, Iraqi courthouse employees were directed to take court records home and store them in their private homes, as it was believed the Americans would hit Iraqi government buildings with air strikes, but would likely seek to avoid hitting private residences. Recovering those temporarily displaced records following the end of hostilities was an important step toward restoring normalcy in court operations.

In looking for a potential "quick win" in terms of reforming a justice sector organization, bringing simple organization principles to record keeping can be a significant improvement. For example, when a court institutes a transparent case tracking system, it becomes very difficult to alter or steal case files, a relatively common method of changing the outcome of cases in many courts systems.

e) Juvenile Justice

Children, and especially orphans, are particularly vulnerable following a period of unrest. They are liable to find themselves before the judicial system under a variety of circumstances including theft, vagrancy, and as victims of sex or labor exploitation. Gaining an awareness of how the host nation legal system handles child offenders and victims and assessing the capacity of the system to do so following a conflict is an important component of establishing a popularly recognized justice system within the society. The United Nation's Children's Fund (UNICEF) has developed training and monitoring tools for juvenile justice systems.

3. Assessments During Sustained Deployment (+90 D day to indefinite)

The nature of planning in the sustained phase moves beyond the short term focus of helping a battered legal system back up onto shaky legs. There will be elements of the initial deployment phase operations still underway, such as courthouse or other infrastructure improvements, but the horizon for planning now moves to thinking in terms of months and years, as opposed to days and weeks. The focus also shifts from merely accounting for available facilities and personnel (an infrastructure focus important during the initial deployment phase) to an effects-based view that considers how best to employ the available assets to accomplish the long term reestablishment of the rule of law.

Rebuilding often involves not just re-tailoring or changing existing functions, but supplanting them with new ones. The assessment must answer if – and how much – such replacement is possible or desirable. It requires political scientists and conflict management or organizational specialists to work alongside indigenous experts, especially those excluded from pre-conflict power structures, to complement the usual cadre of judges, prosecutors, and other legal consultants involved in rule of law assessments.[12] The effects focused assessment serves two basic purposes: (1) providing a systemic perspective for rule of law planning and reform; and (2) creating avenues for local involvement and participation in reconstruction.

In pursuit of these longer term goals the sustained deployment assessment should develop information regarding:[13]

- **Sovereignty issues.** Where applicable, the relationship between US, other international forces and local sovereignty and institutions. If the US is acting as an occupation authority, its ability to control the timing and nature of reform is much different than if it is present as the guest of a sovereign government
- **Security and capacity gaps.** The level and nature of ongoing disorder (such as organized crime, looting, weapons/drug smuggling, and trafficking in persons) and the kind of mechanisms in place, if any, to address it
- **"Applicable law."** The formal legal framework that was in place prior to the conflict or that is considered to be valid in the country, including any interim laws that are being applied pending the passage of permanent legislation
- **Formal justice.**[14] The extent to which formal institutions remain intact or functional, and *the availability of qualified professionals to staff them*
- **Informal justice**. The informal justice and dispute resolution mechanisms that citizens are using – such as tribal justice mechanisms – how they relate to each other and to the formal

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[12] US AID FOR INTERNATIONAL DEVELOPMENT, REBUILDING THE RULE OF LAW IN POST-CONFLICT ENVIRONMENTS 12 (forthcoming 2007) [hereinafter REBUILDING THE RULE OF LAW].

[13] *See id.*, at 12-13.

[14] The terms "formal" and "informal" justice have been used consistently in order to avoid confusion and to maintain distinction between two systems. The terms do not necessarily accurately describe the systems and mechanisms of justice. The term "formal" justice mostly to refer to state justice institutions and processes. The term "informal" refers loosely to a variety of mechanisms and processes that include non-state mechanisms, traditional practices, and customary law; the term does not imply procedural informality.

justice system, how they might relieve pressure on the formal justice system, and the extent to which their traditional practices reflect or violate human rights standards

- **Stakeholder opinions and expectations.** How key stakeholders feel about systematic rule of law rebuilding components (e.g., human rights, institutional redesign, legal empowerment, and reconciliation efforts) and how the intervention process can help manage their expectations. Key stakeholders include host country public and private sector counterparts, political and opposition leaders, NGOs, other civil society organizations (such as professional associations, business alliances, and community-based groups), previously marginalized populations (such as women, ethnic groups, the poor, and youth), and donors.
- **Potential private sector reform partners.** Civil society, business, and human rights actors who are likely to play a leadership role in advocating for reform or in overseeing and reporting on efforts to rebuild the formal sector as they take shape. (It is important to assess the past histories of local NGO leaders before giving them unqualified support, as some may be associated with the former regime or, for other reasons, may not necessarily be committed to democratic principles.)
- **Potential public sector and political champions.** Government officials, politicians, and others at various levels who were neither part of the patronage system nor participants in corruption or oppression, and could serve as internal champions for rule of law reform. (These types of resources exist in some post-conflict countries. Examples include members of opposition parties, younger civil servants, and regional government representatives. Such individuals may not have actively opposed the prior regime, but in principle would support reform.)
- **Potential for mutual donor leveraging.** The degree to which the US rule of law effort can enter into mutually beneficial relationships with other rule of law participants.

Assessments regarding potential funding are necessary in the sustained deployment stage, but where time and the nature of the mission permits, funding considerations should be a prime consideration during pre-deployment assessments and planning as well. It is simply easier and more time efficient to utilize the extensive resources and domestic telephone contacts available at home station rather than trying to coordinate new funding streams once deployed to an austere environment with minimal communications capabilities. This is particularly true for follow-on rotations once the long term nature of the mission has become clearer and OPSEC concerns may be somewhat diminished.

In addition to the guidance on assessments provided above, the Office of the United Nations High Commissioner for Human Rights has put together a very detailed and useful manual suggesting methods for assessing progress in rule of law operations, titled Rule-of Law-Tools For Post-Conflict States, Mapping the Justice Sector (2006).[15]

Control the scope of your assessment

As with any project, placing a realistic scope upon the breadth of an assessment is important. An assessment that focuses upon a few disjointed factors will be of little utility in planning, while an assessment that seeks to capture every nuance of a legal system will become

[15] Available at: www.ohchr.org/english/about/publications/docs/ruleoflaw-mapping_en.pdf.

so bogged down by its level of detail and the burden of collecting information that it can be as equally useless as a superficial product. A detailed description of optimal assessment scope is beyond the scope of this *Handbook*; such determinations have to be driven by the peculiar facts and goals in a particular area of operations. However, listed below is a menu of assessment issues suggested by USAID that address the high-priority areas of security, impartiality, efficiency, and ultimately legitimacy. Although not suited to every situation, this list of questions is likely to assist the JA rule of law planner in assessing some of the important aspects of the host nation legal system issues in the sustained deployment phase This list is intended to further thought:

Assessment Framework[16]

Security

Legal Framework

Is a cease-fire or peace accord working?

Are the constitution or other basic laws in effect?

Is society under martial law or other exceptional law (e.g., laws of foreign occupation, UN Security Council Resolution)?

If constitutional order is effective, how effective are the criminal code and criminal procedure code?

Do police and prosecutors have sufficient legal authority to investigate and prosecute crime, including complex cases such as organized crime, drug and human trafficking, and financial crimes? Is there a modern criminal code which conforms to international standards and provides a sufficient basis for dealing with most types of crime?

Institutional Framework

Is there an effective police force?

Are the missions or mandates of the police forces codified or mandated in statutory law?

What is the role of the military in internal security and how is it distinguished from that of the police, and from paramilitary forces?

What are the rules and procedures of triggering a military response to internal security crisis? How do the military and other elements of the security system cooperate in such situations?

Are there prosecutors?

Are courts open and are there judges?

Are prisons operating?

Are the security sector employees getting paid a wage adequate to live on (to avoid resort to corruption)?

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[16] GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 8, at 33-40.

Are the different security sector agencies interoperable? What agencies are essential to the justice system and what is the best method to ensure coordination and synchronization?

Are charges brought only when there is adequate evidence of the commission of a crime? Are a large number of cases dismissed for lack of adequate evidence or because of unfounded or incorrect charges?

Effects-Based Assessment

Are citizens or foreigners safe? Are crime rates rising, remaining the same, or declining?

Do police cooperate well with prosecutors and the courts in the gathering of evidence and prosecution of criminal cases?

Do police control crime or contribute to crime? Do citizens trust and actively assist police in solving crime? Do citizens engage in vigilantism of any kind?

Do prosecutors try cases effectively in practice? Do prosecutors have the knowledge and skills required to present criminal cases effectively and properly?

Are prisoners regularly subjected to inhuman conditions or abuse? Are prisoners regularly released because prisons are incapable of housing them?

Are judges, lawyers, police, or prison officials being targeted or intimidated?

Are there armed groups that harm and intimidate citizens with seeming impunity?

Are there armed groups that harm and intimidate citizens with seeming impunity?

Legitimacy

Legal Framework

What is the source of law? What is its history? What groups in society wrote the laws?

What is the legal basis for maintaining order? Is there a criminal code which conforms to international standards and provides a sufficient basis for dealing with most types of crime?

Are there statutory penalties or punishments for discriminatory or abusive police conduct?

Do the constitution and laws of the country provide that the judiciary is an independent branch of government? Does the legal framework guarantee judicial and prosecutorial independence, impartiality, and accountability?

Are there legally recognized and binding codes of conduct in effect for judges, prosecutors, and lawyers?

Are armed forces held legally accountable for their actions when performing law enforcement or public safety functions?

How are the laws viewed today by different social groups? Are any laws resisted?

How long has the constitution been in effect? How often has it been amended? Have amendments been made by a process which includes a genuine opportunity for public participation and decision-making?

Institutional Framework

How long have the key institutions been in place? How are they viewed by the public? By different social groups?

Which institutions command respect, disrespect, or fear? How do they rate against other institutions in the state or society? Is law respected by elites? Do elites suffer if they break the law?

Effects-Based Assessment

Do prosecutors prosecute or not prosecute individuals or organizations for political, social, corrupt, or other illegitimate reasons (or are they perceived as acting in this way)? Do they consistently fail to act to protect certain persons or groups from rights violations?

Do police and other bodies performing law enforcement/public order functions consistently act within the law? Do police routinely violate human rights with relative impunity?

Do courts routinely accept and consider illegally obtained evidence (coerced confessions or items obtained as the result of illegal searches)?

Are armed forces held legally accountable for their actions when performing law enforcement or public safety functions?

Do substantial portions of the population conduct activities outside of the formal legal system?

Do portions of the population resort to self help (such as shootings, lynching, or other violence) to protect their property or personal rights or to punish transgressors?

Are historical or ethnic enmities present that could threaten civic cooperation?

What role do customary, religious, or community institutions play in practice in the justice sector? Are they regarded as more legitimate and credible than institutions of the state?

What is the place of customary or religious law? Is it recognized as part of the country's laws, or is its status unclear? Does it conflict with laws which are part of the formally adopted legal system?

Impartiality

Legal Framework

Do the laws relating to the structure and operations of the judiciary place the principal control over most judicial operations in the hands of the judiciary itself?

Is there a law on freedom of information held by government agencies?

Do existing laws provide for appropriate external and internal oversight mechanisms for reviewing and acting upon complaints of police brutality or other misconduct?

Are there legally recognized and binding codes of conduct in effect for judges, prosecutors, and lawyers?

Institutional Framework

Do the constitution and laws of the country provide that the judiciary is an independent branch of government?

Are judicial disciplinary and removal decisions made by a body and process that is not under the exclusive control of the executive and legislature? Are disciplinary/removal decisions subject to judicial review?

Does the selection system for judges and prosecutors limit the ability of the executive and the legislature to make appointments based primarily on political considerations?

Are judges entitled to security of tenure?

Once appointed, can judges be removed for non-feasance or mal-feasance in the performance of their duties?

Are there internal or external (civilian) boards which review police conduct? Do these bodies aggressively review and act upon complaints of misconduct? Are there mechanisms to ensure that ethical codes for judges are prosecutors are effectively enforced?

Does civil society scrutinize the justice system? Does the media? What is the role of the bar?

Effects-Based Assessment

Do the courts and other elements of the justice system enforce law in a way which favors certain persons or groups over others?

Can citizens bring suit and obtain relief against the state? Against powerful interests?

Do the actions of the courts reflect a heavy bias in favor of the government's position in almost all cases that come before them (whether civil, criminal, or administrative)?

Is the independence of the judiciary respected in practice? Do high ranking government officials frequently and strongly criticize the courts, judges, or their decisions?

To what extent do judges or prosecutors leave their positions before the end of their terms? Why?

Do influential officials engage in "telephone justice?" Under what circumstances?

Are police held accountable to civilians? How?

Are judges and prosecutors harassed, intimidated, or attacked? Are courthouses secure?

Does the body that disciplines and removes judges and prosecutors act fairly, openly, and impartially? Are its decisions based solely on the criteria established by law for discipline and removal? Does it aggressively investigate complaints of misconduct, malfeasance, and non-feasance and resolve them in a timely manner?

Are all parties treated the same in the courtroom? Do judges and other parties act with decorum and with respect for all parties?

Are judges' rulings consistent regardless of the status of the parties before the court?

Efficiency and Access

Legal Framework

Does the criminal law provide for periodic review of the decision to keep an individual in pre-trial detention by someone other than the prosecutor or police and in accordance with internationally accepted standards?

Does the criminal procedure code provide for a right to a speedy and public trial before an impartial judge, notice of all charges, right to review the prosecution's evidence and cross examine witnesses, right to present evidence and witnesses in defense, right to legal representation, a presumption of innocence, and a right against self-incrimination?

Does the country's civil procedure code provide that parties to civil proceedings have a right to proper and timely notice of all court proceedings, a fair opportunity to present evidence and arguments in support of their case, review evidence and cross-examine witnesses, have their case decided within a reasonable period of time, and appeal adverse judgments?

Do existing laws provide sufficient authority to judges to ensure that criminal and civil procedures are followed?

Are prescribed procedures overly complex and unnecessarily time-consuming?

Can courts issue injunctions against executive/legislative actions? Actions of private interests?

Institutional Framework

What mechanisms are in place for defense of indigents accused of crimes (such as public defenders service or court-appointed counsel)? Does the mechanism used provide, in practice, competent legal counsel for indigent criminally accused?

Is there a separate juvenile justice system?

Are there victim and witness support units within police stations? Do they include the presence of female officers?

Effects-Based Assessment

Are civil and criminal procedures, as set forth in the codes, consistently followed in practice?

Do judges consistently respect the procedural rights of all parties and sanction those participants (lawyers, prosecutors, witnesses, and parties) who violate the rules?

Are judges' decisions well-reasoned, supported by the evidence presented, and consistent with all applicable law? In cases in which judges have discretion in the enforcement of trial procedures, do they exercise that discretion reasonably and in a way which encourages the fair and expeditious resolution of cases?

Do most segments of society understand their legal rights and the role of the legal system in protecting them? Do they understand how the courts work and how to access them effectively?

Do lawyers have the knowledge and skills necessary to advise parties competently and advocate their interests in court?

In practice, are civil judgments enforced in an effective and timely manner?

Do women use the justice system, and what are the results?

Where do poor people go to obtain justice? Other social groups and classes? Is free or affordable legal advice available to medium- or low-income groups on civil matters (such as family, contract, or property law)?

Are most citizens represented by legal counsel when they go into court, or do many represent themselves in court (pro se representation)? Do the courts provide assistance of any kind to such parties? Does the local bar association provide any kind of low- or no-cost (pro bono) legal services to individuals or groups?

Are the courts user friendly and customer service oriented?

A sample set of court and prison assessment documents taken from OIF 05-07 are appended to the end of this chapter.

C. Metrics

A "metric" is a means by which one can measure productivity, achievement of goals or objectives and performance of tasks or actions. Metrics are generally quantitative or qualitative units of measurement. All military operations have techniques for measuring success or failure of a particular mission, and no military operation exists without reporting requirements that require the application of metrics. Meaningful metrics permit the Judge Advocate engaged in rule of law missions to not only measure whether the mission is accomplishing its goals, but to also convey information to superiors and policy makers in a quantifiable manner that is not purely anecdotal.

1. Pre-deployment Metrics

The metrics at the pre-deployment stage should be focused on your unit's capability and readiness to perform its assigned mission rather than mission accomplishment. Does the unit have the requisite knowledge and resources to successfully undertake the rule of law mission? Does the unit have the requisite soldier tools and equipment to be able to conduct the rule of law mission in a non-permissive environment? These issues are discussed in more detail section A.1.e) pertaining to pre-deployment planning.

If the mission is a follow-on rotation to replace another unit already in theater, the metrics for pre-deployment planning will necessarily include the progress and assessments of the unit already in theater. The follow-on unit obviously cannot control the content of those metrics, but obtaining that information early in the pre-deployment planning process for the follow-on unit will allow it to generate realistic assumptions and courses of action under the military decision making process.

2. Initial Deployment Metrics (-30 D day to +90)

Metrics in the initial deployment stage frequently focus upon facilities and personnel. The newly arriving Judge Advocate needs to understand the capabilities and resources will be required before meaningful planning and assessment can occur. Although each circumstance will vary, examples of early metrics include:

Courts and Judiciary:

- **Number of courthouses that are structurally capable of operation.**
- **Number of trained judicial and law enforcement personnel available.**
- **Availability of functioning utilities necessary to operate facilities.**
- **The amount of funding needed to repair physical damage to buildings, to include labor and materials.**

Police and Jails:

The rule of law planner should have a solid understanding of the ability of the local system to detain those persons arrested for criminal misconduct, to include both short-term and long-term circumstances. The metrics for this area include:

- **The number and geographic distribution of confinement facilities.**
- **A numerical breakdown of bed capacity in maximum and medium security long term facilities, as well as local short term detention space.**
- **The number and nature of currently detained/imprisoned persons.**
- **The rate at which newly detained/arrested personnel are growing versus capacity.**

Physical Security and Police Institutions in the Wake of Major Combat

During OIF-1 there was a period of 4-8 weeks during which the number of persons being arrested overwhelmed the capacity of the available facilities to hold them. Petty thieves and non-violent looters had to be released back into the population in order to create detention capacity for violent offenders. Awareness of detention metrics impacts all justice assessments and planning.

In addition, metrics should permit an assessment of the capabilities (and adequacy) of the local law enforcement entities. Military Police are likely to be an excellent source of both planning resources and metrics in this area.

Other agency metrics

Another important metric in measuring what capabilities exist and what operations can be sustained is the existence of other USG, international and nongovernmental agencies in the area of operations. Knowledge of their capabilities in terms of personnel, funding, and equipment is a quantifiable factor that will have bearing upon mission planning.

Track public requests for information

The establishment of help desks or public information centers in courthouses and police stations creates an ongoing opportunity to track the number of people seeking access to the system by their questions on legal rights and court processes. While JA personnel may need to initially generate the initiative for such a program, it should be staffed by local nationals who have been provided training on the services and information they are to provide, as well as instruction on tracking inquiries.

Track complaints

Similarly, creation of a mechanism for accepting public complaints provides not only the opportunity to assess and fix flaws in the system, but to track the number of people willing to speak out on inadequacies in the system. In this regard, tracking an increase in the number of complaints is not necessarily a negative factor. Persons who are oppressed and live in fear of their legal system are less likely to openly complain, while those who feel they have a meaningful voice in the system are more apt to lodge complaints.

Track case processing statistics

In the initial deployment phase, the number of criminal cases being adjudicated is a good initial metric as to whether the system is operating at all. Such numbers do not reflect the quality of justice, but the mere fact that cases are being adjudicated is a positive first step. Early judicial actions in the initial deployment phase are analogous to emergency medicine. They may not be pretty, but their successful completion is critical for any subsequent improvements to occur.

Beware of stale metrics

As the mission evolves, merely counting things like the number of court cases become less relevant as an accurate metric for rule of law analysis. For instance, nearly as important as the number of cases being adjudicated is the quality and due process which is offered by the system. For instance, persons who spend more time in pretrial detention than their ultimate sentence may not necessarily be receiving adequate due process. Additionally, parties who must wait years to present civil disputes to any level of court may not feel the benefit of the rule of law

and turn instead to resolving disputes through private and coercive means. As the legal system begins basic function, rule of law practitioners should adjust their metrics to account for the changed environment. Eventually, metrics will have to evolve beyond a purely quantitative, institutional focus to a qualitative one emphasizing the effects that the legal system is having on the populace.

3. Metrics During Sustained Deployment (91+ D day to indefinite)

Effects-based metrics

Many of the metrics during the initial deployment stage are designed to measure resource availability. As the mission evolves beyond initial entry into sustained operations, the mission becomes more complex. Accordingly, the metrics during this phase also become more complex beyond the mere counting of cases. The metrics during sustained operations seek in many instances to capture intangibles, such as the attitudes of the population toward their justice institutions.

At the sustained deployment stage, merely focusing upon the number of court houses operating, the number of prison cells available, and the number of judges hearing a given number of cases begins to tell an increasingly irrelevant story. Now operations are moving into the higher realm of what constitutes establishment of the rule of law. A tyrannical system despised by its population can have courthouses, cells, and case adjudication statistics and yet the rule of law does not exist. Once a plateau of recovery is reached where the facilities and personnel exist to operate the legal system, then the metrics upon which assessments and planning are built must shift to analyzing the *efficacy* and *legitimacy* of the system.

Again, because the specific metrics to be used will be situation and mission specific, this non-exclusive list of metrics should be used more as a guide for discussion and development of mission-appropriate metrics than as a checklist:

- **Conviction/acquittal rates. Figures that reflect a lack of balance (either way) in the system may suggest the need for additional training (judicial, prosecutorial, or defense counsel) or problems of either mishandling of cases or evidence or corruption.**
- **The number of civil legal actions being filed each month. Comparisons between pre-conflict and post conflict statistics are particularly revealing as to whether the people believe they can receive justice from the nation's court system.**
- **Case processing times for the civil court docket. If cases are not being decided in a timely fashion, one cannot expect the population to rely upon the system and they will turn to other methods, sometimes violent, to resolve disputes.**
- **Case processing statistics for criminal cases. How long it takes for each case to come before the bench for resolution will reflect the health of the system over time.**
- **Case statistics (both civil and criminal) should be compared from different portions of the country to determine if rule of law progress is lagging in certain parts of the country.**
- **Serious crime statistics. The number of occurrences and whether people report such crimes to the police may reflect trust or mistrust of the police. A generally**

recognized high incidence of crime with a low reporting record may reflect that the population does not trust the police and would rather endure the crime than place themselves within reach of law enforcement personnel.

The Aftermath of Extensive Police Corruption in Iraq
After the fall of the Baathist regime in Iraq, many citizens related they had not reported crimes to the police under Saddam's rule because the police would not leave their station house to investigate unless they were promised money or a cut of the recovery if they reclaimed the stolen property.

- **Formal or informal surveys pertaining to level of public trust in the police and the judiciary. Such surveys can be coordinated to occur contemporaneously with public education forums concerning the justice system.**
- **The number of personnel assigned to police internal affairs offices, the number of filed, pending, and completed investigations, and outcome statistics. As with criminal trial statistics, disproportionately high findings of either misconduct or no basis may reflect that the oversight agency itself is subject to bribery and corruption.**
- **The existence of judicial/legal training centers that provide ongoing instruction in concepts of the rule of law is one metric to gauge the evolution of legal thought in a country. Perhaps more important is measuring the number of personnel from around the concerned nation who receive instruction through such institutions. If training is limited to a few favored elite, the existence of such institutions is not as meaningful as if it is available to all judges, prosecutors, and other key legal personnel.**
- **Public Information /outreach. Public forums and education programs provide another opportunity to gauge the extent to which the local population views themselves as having a role in their legal system by monitoring attendance and the number and nature of inquiries that follow the program.**

Intangibles should not be disregarded

It is important to recognize that metrics when applied to the rule of law mission is an attempt to place numbers upon an intangible – the level of trust and reliance the population has in its legal institutions. Such metrics are important for attempting to convey a subjective and intangible concept to higher headquarters and civilian policy makers. However, metrics have limitations and should never be a complete replacement for the insight, common sense, and intuition of the Judge Advocate in the rule of law team as to whether the population has confidence that the rule of law is growing or diminishing in their society. Attorneys perform these missions, not accountants, because of their legal training and judgment, which enables them to discern patterns and trends out of otherwise seemingly chaotic circumstances. Thus, the metrics are merely a tool from which to create an assessment of objective and subjective factors impacting the rule of law mission.

D. Fiscal Considerations in Rule of Law Operations

Funding rule of law operations is, to some extent, an exercise in exceptions to fiscal law. Overhanging all military rule of law operations is a general rule, contained in § 660 of the Foreign Assistance Act (FAA), which makes it unlawful for US civilian and military agencies to "provide training or advice or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government ... ."[17] This general rule, though, is rife with exceptions applicable to rule of law operations, including in the FAA itself, which was amended in 1996 to allow

> assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy.[18]

The result is that despite the general prohibition, most rule of law operations occurring as part of a larger military effort will fit into the exception. But locating an exception to the FAA prohibition is not the same as identifying the funds one will use to conduct them. The DOS's position as lead agency in foreign assistance and reconstruction is mirrored in the fiscal organization for rule of law and other reconstruction activities. Funding for some post-conflict security efforts in Afghanistan and Iraq, for example, has come not from DOD funds but from DOS "Title 22" authority.[19] In these circumstances, DOD agencies effectively operate as a "subcontractor" for DOS on DOS-controlled projects.[20] Two more specific exceptions to the FAA prohibition have also figured prominently in recent rule of law operations:

First, because the bulk of rule of law operations will take place as part of specific contingency operations, there is likely to be an appropriation for rule of law (or other civil reconstruction) operations in the operative supplemental appropriation legislation covering the operation, such as the Iraq Relief and Reconstruction Fund.[21] Of course, if there is an express appropriation for specific rule of law activities, the existence of that appropriate may seriously limit the degree to which O&M funding can be used to perform development activities, especially if the command has established a more restrictive policy regarding the use of O&M funds for non-traditionally military expenditures.[22]

Second, the Commander's Emergency Response Program (CERP) has been a major source of funding for development operations requiring maximal flexibility in how funds are used, such as rule of law operations. Originally resulting from the capture of Iraqi currency

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[17] 22 U.S.C. § 2420(a).

[18] 22 U.S.C. § 2420(b)(6). *See generally* CENTER FOR LAW AND MILITARY OPERATIONS, INTERAGENCY HANDBOOK 207-12 (2004).

[19] CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 220 (regarding the Afghan National Army) [hereinafter FORGED IN THE FIRE].

[20] THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 255 (Aug. 2006); INTERAGENCY HANDBOOK, *supra* note 18, at 210.

[21] For more information on the Iraq Relief and Reconstruction Fund and its use for rule of law operations, see the Special Inspector General for Iraq Reconstruction at http://www.sigir.mil/.

[22] *See* FORGED IN THE FIRE, *supra* note 19, at 219-23 (describing the series of debates occurring during OEF regarding the use of O&M funding for humanitarian and development-like activities).

during OIF, the CERP program has been established using appropriated funds (CERP-APF) but still retains most of its flexibility,[23] and is likely to be an ideal (if limited) source of funding for rule of law activities in future operations.

Foreign Assistance Reform

In 2006, the US reformed the organization, planning, and implementation of foreign assistance. New leadership was established with the creation of a Director of United States Foreign Assistance, who serves concurrently as the Administrator of the United States Agency for International Development (USAID). In this capacity, the Director of Foreign Assistance developed a Strategic Framework for all US Foreign Assistance administered by Department of State and USAID, as well as resources provided by the Millennium Challenge Fund (MCC). This process includes military assistance programs such as FMF, FMS, IMET, and peacekeeping operations. Most foreign rule of law programs that Judge Advocates will encounter in the field, whether planned and executed by DOD, its civilian interagency partners, or through international financial institutions that the US funds, including the World Bank, will likely fall under the foreign assistance framework.

E. Conclusion

Planning, assessment, and metrics are critical aspects of any military operation. Rule of law operations are no different. Planning a rule of law mission, assessing the host nation's legal system, and measuring progress provide not only a roadmap for the operation but also provide guidance on whether the mission is successful and whether what is working in one AO should be exported to other ones. Thorough planning, assessment, and metrics are necessary for organizing the rule of law effort, but, because the rule of law is itself so intangible a concept, it will take more than reliance on successful completion of particular tasks or numeric measures of effect in order for all involved to conclude that they have furthered the rule of law through their actions - that conclusion is instead more likely to come from introspection – how the *practitioners themselves* perceive the system.

[23] *See id.* at 230-34.

Appendix to Chapter VI

COURTHOUSE ASSESSMENT FORM

Administrative Data	
a. Court Name:	g. Grid Coordinate (from main entrance):
b. Date Inspected/Assessed:	h. Type of Court (criminal, family, appeals, etc.):
c. Inspector/Assessor Info: - CFO - _____ - IGO - _____	
d. City and Neighborhood Name:	i. Court Phone Number:
	Landline: Cell phone:
e. Chief Judge:	j. Ethnic Composition of Community:
f. Any other Judges' names:	k. Size of Community:

I. Infrastructure
1. Does the building appear to be structurally sound? If not, explain:
2. Is there a latrine that functions? Are there sufficient latrines? Does the existing sanitation/plumbing appear to be adequate?
3. Is there adequate electricity? How many hours per day? Does the wiring appear safe? Is there a generator?
4. Are there computers? Internet connectivity? Personnel trained on existing technology? Is there tech support for computers? Does the court need these things to function?
5 Is there adequate furniture? What shortfalls does staff identify?
6 Is there sufficient space for judges, court personnel, and participants?
7 OVERALL: Based on data above, is the courthouse inhabitable providing sufficient workspace and equipment necessary to conduct court business? YES ___ No ___

II. Security		
1. Do judges have a personal weapon and a weapons card? Are they assigned a trained and equipped PSD?		
2. Is there adequate "stand off" distance between courthouse and surrounding roads? Approx. distance in meters?		
3. Is there adequate external security barriers for secure entrance/exit point? If so, what type (eg., Alaska, Jersey, Concrete walls, etc.)?		
4. Does a prisoner holding area exist for criminal courts? If no, where and by whom are they held? Is there a handling/transportation system for prisoners?		
5. Are there FPS or other security presence inside and/or outside courthouse? If so, what type & how many? Are they adequately armed and trained?		
6. Is there a screening system? Is there a separate area for males and females with female screeners available?		
7. OVERALL: Based on data above, does Courthouse have necessary security? YES ___ No ___		
III. Personnel		
1. Specify number of Staff positions currently employed:		
• Judges:	• Stenographers:	• Judicial Investigators (IPS):
• Investigative Judges:	• Storage/Filing Clerks:	• Male Security Guards:
• Judges' Assistants:	• General Admin Clerks:	• Female Security Guards:
• Paralegals:	• Computer/IT Specialists:	• Other:
2. Is Chief Judge satisfied with number of personnel performing current duties? If not, describe identified shortfalls:		
3. Is Chief Judge satisfied with level of training and ability of personnel in performance of duties? If not, describe identified shortfalls:		
4. OVERALL: Based on data above, does courthouse have necessary personnel to meet caseload requirements? YES ___ No ___		
IV. Insurgent Cases		
1. Does court have jurisdiction to try or investigate AIF type cases?		
2. Does IJ/M investigate AIF type cases?		
3. Has HJC or CCCI given direction to court on handling of AIF cases?		
4. If court does not handle AIF type cases, what does it do with them?		
5. OVERALL: Based on data above, are judges investigating and/or trying AIF cases, as appropriate to their jurisdiction? YES ___ No ___		
V. Judicial Intimidation		
1. Do judges complain of threats made by AIF or others sources?		
2. Do judges complain of having been targeted with violence by AIF or other sources?		
3. OVERALL: Based on data above, do judges feel intimidated by AIF, tribal leaders, or other inappropriate sources? YES ___ No ___		

VI. Case Management
1. Is there a case management numbering system? Describe.
2. Is there a dedicated clerk?
3. Judge's monthly caseload? **Backlog (if available)**
4. Are records kept on site? **If not, where?**
5. Are cases transcribed?
6. Are cases available for review by higher courts?
7. Is there a computerized tracking system?
8. If there is a computerized system is it linked with other courts?
9. Does this court need a computerized tracking system?
10. OVERALL: Based on data above, does court adequately track cases and maintain files? YES ___ No ___
VII. Communications
1. Is the court able to communicate with other courts? **Communication with the IP?**
2. What type of communications? (phones, email, postal, courier, etc)
3. Is the means of communication adequate for court's needs? **What shortfalls do staff identify?**
4. OVERALL: Based on data above, does court have sufficient communication assets to conduct business with other courts and IPS? YES ___ No ___
VIII. Judge & IPS Cooperation
1. Do judges acknowledge receiving sufficient investigative packets from Judicial and Police Investigators?
2. Are the Investigative Judge/Magistrates assigned a Judicial Investigators from the IPS? Are they adequate?
3. Do IPS Investigators have any role in preparing cases for trial? **If so, describe:**
4. Briefly describe the relationship between judges and IPS (eg., attitude, trust, cooperation):
5. OVERALL: Based on data above, are judges satisfied with the investigative support received from IPS Investigators? YES ___ No ___
Assessing RoL Advisor/Judge Advocate Forum
• **Suggestions for Future Improvements:** • **Recommended Future Projects:** • **General Notes and Observations:**

PRISON ASSESSMENT FORM

I. Administrative Data	
a. Prison/Jail Name	**b. City and Neighborhood Name**
c. Chief Administrator	**Overall Description:**
d. Other Key Leaders	
e. Grid Coordinate (from main entrance)	
f. Type of Facility (Pre-trial, Post trial, IPS station)	
g. Prison Phone Number Landline? Cell phone?	

II. Infrastructure
1. Is the building structurally sound?
2. Is there adequate sanitation/plumbing? Describe. 3. Is there adequate electricity? How many hours? Is there a generator?
4. Is there adequate communication equipment? What shortfalls do staff identify?
5. Is there adequate furniture? What shortfalls do staff identify? 6. Is there space for recreation/worship?

III. Security
1. Are there external security barriers (Alaska, Jersey, etc.)?
2. Are there IPS or other security presence inside and/or outside?
3. Are there guard towers?
4. Is there a visitor screening system? Is there a separate screening area for males and females (i.e. female screeners)?
5. Ratio of prisoners to guards?

IV. Personnel
1. Are there adequate personnel to handle daily requirements?
2. Are employees trained for their respective jobs? What type of training? What is the ratio of trained/untrained personnel?
V. Capacity
1. What is the intended capacity level of the facility? 2. What is the actual current capacity?
VI. Medical Facilities
1. Is there an on-site medical facility? Are there on-site medical personnel? 2. Is there a procedure for getting inmates medical attention if no on-site facilities exist? Describe.
VII. Life Support
1.Is there adequate food, water, and hygiene provisions to meet the basic needs of prisoners?
VIII. Prisoner Mistreatment
1. Number of reports of prisoner abuse that are reasonably substantiated? Describe basic observations of prisoner condition.
IX. Tracking
1. Is there a system to track prisoners' biographical/administrative data? Describe
2. Is there information retrieval capacity?
3. Is there connectivity to other prisons?
4. Can prison director/administrator access information?
X. General Notes, Observations, Suggested Improvements

RULE OF LAW ASSESSMENT

POLICE JUDICIARY INTERACTION	Comments
◯ Police Work Cooperatively With Courts	
◯ Police Follow Orders of Judges	◯ OVERALL

DETENTION/PRISON FACILITIES	Comments
◯ Average of Detainee Population vs. Maximum Capacity	
◯ % of Detainees Detained Over 24 hrs w/o Judicial Review	
◯ Average of Prisoner Population vs. Maximum Capacity	◯ OVERALL

ACCESS TO JUSTICE/TRANSPARENCY	Comments
◯ Citizens Have a Capable Legal Aid Office	
◯ Citizens Have the Opportunity To Redress Government	
◯ Media Has Access to Government	◯ OVERALL

COURT HOUSES	Comments
◯ Court Houses with Adequate Facilities and Equipment	
◯ Court Houses with Adequate Security Measures	
◯ Court Houses with Sufficient Administrative Personnel	
◯ Case Management System is In Place and Functional	◯ OVERALL

JUDICIAL SYSTEM	Comments
◯ % Investigative Judges Working vs. Number Assigned	
◯ % Judicial Investigators Working vs. Number Assigned	
◯ Judges with Trained PSD vs. Those Requiring a PSD	◯ OVERALL

LEGAL FRAMEWORK	Comments
◯ Laws are Published, Reported And Widely Disseminated	
◯ Provincial Council Provide Over-sight of executive agencies	◯ OVERALL

RULE OF LAW (Part 1 of 2)						
Indicator		**Measure**	**GREEN**	**AMBER**	**ORANGE**	**RED**
Police Judiciary Interaction	50%	Police work cooperatively with courts in case development and processing	**Nature of police/court interaction defined and agreed to by police and courts, and interaction is sophisticated and routine**	**Nature of police/court integration defined and agreed to by police and courts, interaction at developmental stage**	**Nature of police/court integration defined, but little or no cooperation exists between the two groups**	**Nature of police/court integration poorly defined and little or no cooperation exists between the two**
	50%	Police follow orders of judges	**Judicial orders rarely ignored for political, security or sectarian reasons**	**Judicial orders occasionally ignored for political, security or sectarian reasons**	**Judicial orders often ignored for political, security or sectarian reasons**	**Judicial orders routinely ignored for political, security or sectarian reasons**
Court Houses	30%	% court houses with adequate facilities and equipment to conduct daily business	**>80% have adequate facilities and equipment (see App 2, Annex G)**	**50% - 80% have adequate facilities and equipment**	**35% - 49% have adequate facilities and equipment**	**<35% have adequate facilities and equipment**
	30%	% court houses with adequate security measures	**>80% have adequate security measures**	**50% - 80% have adequate security measures**	**35% - 49% have adequate security measures**	**<35% have adequate security measures**
	30%	Court administrative personnel are qualified and adequately trained	**>80% of personnel are rated as qualified and trained**	**50% - 80% of personnel are rated as qualified and trained**	**35% - 49% of personnel are rated as qualified and trained**	**<35% of personnel are rated as qualified and trained**
	10%	Case management and tracking system in place and functional	**Modern system in place that is transparent and effectively manages and tracks cases**	**Plan to modernize current system is in place and resourced**	**Current system is antiquated but adequate to handle current caseload**	**Current system is inadequate with files frequently lost or compromised**
Judicial System	40%	% Investigative Judges working out of total number assigned	**>80% or more IJ's working on a daily basis**	**50% - 80% or more IJ's working on a daily basis**	**35% - 49% or more IJ's working on a daily basis**	**<35% or more IJ's working on a daily basis**
	30%	% Judicial Investigators working out of total number assigned	**>80% or more JI's working on a daily basis**	**50% - 80% or more JI's working on a daily basis**	**35% - 49% or more JI's working on a daily basis**	**<35% or more JI's working on a daily basis**
	30%	% Judges with a trained PSD out of total number of judges that require a PSD	**>80% of those Judges identified have a PSD**	**50% - 80% of those Judges identified have a PSD**	**35% - 49% of those Judges identified have a PSD**	**<35% of those Judges identified have a PSD**

RULE OF LAW (Part 2 of 2)						
Indicator		Measure	GREEN	AMBER	ORANGE	RED
Detention/ Prison Facilities	30%	Average of current population of each detention facility vs. maximum capacity of facility	Population is <85% of maximum capacity	Population is 85% - 94% of maximum capacity	Population is 95% - 100% of maximum capacity	Population is >100% of maximum capacity
	40%	% of detainees who have been detained for over 24 hours without judicial review of file	0%	1% -10% of detainees have been detained over 24 hours	11% - 25% of detainees have been detained over 24 hours	>25% of detainees have been detained over 24 hours
	30%	Average of inmate population vs. maximum capacity at prison	Population is <85% of maximum capacity	Population is 85% - 94% of maximum capacity	Population is 95% - 100% of maximum capacity	Population is >100% of maximum capacity
Access to Justice/ Transparency	35%	Citizens have a capable legal aid office	One or more functioning, capable and funded legal aid offices, sufficient for workload	A legal aid office functioning, capable and funded, but insufficient for workload	A legal aid office is established but not yet funded or functioning	Citizens have no legal aid office
	35%	Citizens have opportunity to redress provincial government	Citizens are free to redress provincial government systemically and are free from excessive bureaucracy	Citizens have generally free redress through courts and/or local government, though some barriers exist	Significant institutional or security barriers to citizen redress	No real possibility of redress to provincial authorities
	30%	Media access to government meetings	Press allowed to virtually all government meetings	Press allowed to some meetings, but significant blockage by government and/or PC	No press allowed to meetings; press conferences may occur	No media access
Legal Framework	75%	Laws are published, reported, and widely disseminated	All laws passed are publicly disseminated	Majority of laws passed are publicly disseminated	Majority of law passed are not publicly disseminated	Laws are passed without dissemination
	25%	Provincial council provides effective oversight of executive agencies by way of a system of subcommittees or legislation	Subcommittee and legislation effectively provides oversight of executive agencies	System exists, but is only partially implemented	Subcommittee formed or legislation passed, but is not functional	No system established

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VII. Challenges to the Rule of Law

It is difficult to overstate the challenges facing any rule of law operation. Most would agree with UN Secretary-General Kofi Annan's assertion that assisting "societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task."[1] It goes without saying that rule of law missions are complex, arduous, and painstaking.[2] There are limitless challenges to rule of law operations, and this *Handbook* cannot possibly address all the unique challenges and complex problems encountered in rule of law operations. But certain elements, conditions, and obstacles are present that encumber the capacity and quality for rule of law interventions.[3] This chapter examines some of these challenges.

A. Security

Probably the most important concern for the rule of law practitioner is security. Most rule of law efforts, at least the kind that most Judge Advocates will find themselves in, will often take place in harsh and non-permissive or semi-permissive environments. Thus, the Judge Advocate must be cognizant that security issues will likely impede efforts to implement rule of law programs. The security concern manifests itself in several ways:

- **Insurgent fighting may surface after the general cessation of hostilities**
- **Political power struggles between warring factions could lead to violence**
- **Local police capacity to enforce law and order will likely be inadequate**
- **Courts may be seriously compromised by corruption and/or political intimidation**
- **Prison and detention facilities may be severely degraded or non-existent**
- **Violent organized crime and illicit economies may emerge**
- **Rioting, looting, abductions, revenge killings, and other civilian-on-civilian violence may become recurrent**

In the aftermath of conflict in a failed or collapsed state, intervening military forces often are required to fill a "security gap" resulting from the breakdown of the prior regime. "At the same time, military or security forces may be exercising police-type functions without any judicial or civilian oversight."[4]

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[1] The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 3, U.N. Doc. S/2004/616 (Aug. 23, 2004).

[2] JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 11 (2006).

[3] *See* Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137-159.

[4] UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, PRIMER FOR JUSTICE COMPONENTS IN MULTIDIMENSIONAL PEACE OPERATIONS: STRENGTHENING THE RULE OF LAW 4 (2006), available at http://pbpu.unlb.org/pbpu/view/viewdocument.aspx?id=2&docid=851.

Deficient security environments will place pressure on the ability of host-governments to implement new laws, promote national reconciliation, and provide basic legal services. "No government, least of all one committed to the rule of law, can function effectively if its people cannot go about their daily life without fear of being shot, tortured, raped, or bombed."[5]

Security also refers to force protection. The inability of the host nation to create a stable situation will potentially require the commander to dedicate resources to force protection and to use force in order to protect the force and to accomplish the mission. Use of force, however may come with a price: it may be an obstacle to inculcating the population to the notion that no one person is above the law and disputes should be resolved by non-violent means.[6]

B. Military Bias for Lethal Operations and Competing Priorities

Military planners are typically experienced in planning military operations aimed at subduing or neutralizing a threat. Even in nation building operations, the emphasis tends to be on enforcing security, allowing other actors to execute their missions. For the military these operations are "enemy centric."

Rule of law and stability operations are, however, "population-centric" activities. Their objective is to create organic governmental institutions and a stable environment for the population to enjoy and expand. Concentrating on attacking problems from the perspective of defeating or otherwise affecting the conduct of an enemy, the military organization is often ill-equipped to bring the resources to bear on a problem set where the "enemy" is a system rather than a dangerous actor.

Moreover, rule of law operations are intended to build institutions that advance the host nation's governance. Residual fighting, however, may well cause the diversion of resources to combat and force protection. The military commander will be concerned about force protection and locating, closing with and destroying the adversary. This is a traditional military role and what the military is organized to do. Rule of law operations are ideally non-kinetic. This distinction places great pressures on the military staff to plan and act in support of operations that are not part of their traditional skill set. This diversion of resources is, in a sense, a competing priority.

It is important that rule of law operations be incorporated throughout the planning process, and considered for applicability during all phases of a campaign so that commanders will plan for the effect stability operations will have on their resources and the way they fight the rest of the campaign.[7] Stability operations require both a different mindset in planning and an ability to bring different skill sets to bear.

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[5] STROMSETH, WIPPMAN & BROOKS, *supra* note 2, at 137.

[6] *See* section II.B.2.

[7] U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS para. 4 (28 Nov. 2005).

C. *Interagency Friction and Coordination*

As noted in Chapter III, an alphabet soup of interagency, IOs, and NGOs will be present and will have different mandates, authorities, and capabilities. While these actors will bring a vast array of technical assistance and expertise, a judge advocate must remember that these agencies and organization will undoubtedly have competing visions and priorities, and that the influx is likely to lead to a lack of organization and coordination.

From this muddle of uncoordinated activity within the US interagency relationship alone, what follows is commonly an overlapping of effort, wasted resources, gaps in programmatic decisions, diverse and inconsistent messages, and lost time. Unchecked, this disorganization and political turf-fighting will confound rule of law efforts.

Ultimately, this challenge can only be overcome by close collaboration with various US and other players in rule of law operations. A participatory strategic planning process can help provide some order and direction and avoid harmful effects. When initiating a rule of law project, one of the first things a Judge Advocate should do is learn their place within the larger US, coalition, or multinational rule of law effort and find the other international, national, and local partners who can maximize its effectiveness and increase its likelihood for success. The key, though, is to remain open and to act in a spirit of good faith with good will toward agencies involved in the rule of law process. Although they may have slightly different vision and methods of operation, other actors working toward the rule of law have more in common than they do disagreement, and they can bring critical assets to bear on a problem.

Beyond these US institutional obstacles, there are a large number of other interested parties in rule of law operations. Obviously, the host nation will have its own priorities and, often, some bureaucratic inertia, to pursue those interests. Coalition partners and NGOs will often have their goals that could be different than the military's goals.

D. *Forces that Oppose Rule of Law*

Countries emerging from war or internal strife often suffer years or decades under the hands of brutal leaders and corrupt officials. Constraining or altering the power of officials who were once part to of an absolute regime will be a highly political process. Many will stand to lose long-standing authority, social status, and financial interests. These actors, accustomed to unconstrained power, will seek to prevent the implementation of sustained rule of law initiatives. Rule of law practitioners will have to expect real and substantial resistance to legal and judicial reforms meant to alter the center of power in a post-conflict society.[8]

The forces opposed to the rule of law can be wide ranging based on the specific situation, and countries confronting violent political instability or emerging from post-conflict situations are often unable to maintain full governance within their boundaries. In addition to the security challenges that these countries face, the ungoverned space is ripe for exploitation by forces, formal and informal, that oppose the legitimate authority of central government and the rule of law efforts being pursued.

Rule of law efforts from the outset must include plans for dealing not only with physical security threats posed by opposing forces, but also for establishing dialogue and accountability

[8] *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 2, at 37.

over the different factions and forces that oppose sustained legitimate judicial reform. A "spoiler" force may directly sabotage rule of law efforts through violence, manipulation, or simply stalling rule of law implementation.

While formal opposition forces such as national opposition political parties and vocal religious institutions may pose the most visible challenge to rule of law efforts, it is the informal and illicit opposition forces that can be the real threat. The objectives, goals, and leadership hierarchy of informal forces are more difficult to assess and accordingly are more difficult to combat. Informal forces that oppose rule of law efforts may include tribes or familial groups, non-national insurgents or third party forces, local indigenous militias, para-military or former legitimate military units, warlords, private "for hire" armed forces, organized crime cartels, extremist ideology organizations and economic organizations.[9] While these forces may use violence as a means to oppose legitimate rule of law, they may also use economic and social pressures to subvert rule of law reform efforts.

Keys to dealing with the challenge of opposing forces include early identification of potential opposing forces and a timely assessment of their objectives and goals. Potential hidden objectives must also be considered and weighed even in the face of declared support for reform objectives. Active dialogue with the population and broadening the focus of issues can improve rule of law success. The benefit of this wider public discussion is increased legitimacy for the new regime and consequently the erosion of opposing force's influence. Additionally, it may improve the public perception of the supporting security forces, increasing credibility.

E. A Legacy of Suffering and Destruction

In the aftermath of war, a society may exist in a state of physical and psychological trauma that has dramatic implications for rule of law initiatives. Years of armed conflict may have undermined governmental institutions, destroyed vital infrastructure, and driven out skilled professionals (such as lawyers and judges). Moreover, after years of despotic rule and political repression, ordinary citizens will feel resentment of rule of law institutions, most notably the police.

Some of the biggest challenges in post-conflict countries will be the lack of judicial institutions, such as courts and prisons. Lack of resources may cause dysfunctional and inefficient justice systems manifested by outdated legal texts, inadequate case load management, evidence tampering, and ill-trained court personnel.

For the deployed Judge Advocate, this will mean that a broader array of programs and initiatives will be required to cultivate a legitimate and functional legal system. Efforts will be required not only to build the physical aspects of rule of law, but also the psychological aspects as well. After years of civil strife, local citizens may have suspicions that the legal apparatus is a vehicle of governmental control and repression. Initiatives must be geared towards building confidence in the population that the legal system can fairly resolve disputes. Thus, the rule of law practitioner must understand what ordinary citizens, especially marginalized segments of the population, view as urgent priorities in reforming legal apparatus of a country.

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[9] *Id.* at 13-15.

F. Corruption

All public and private sectors of rule of law are vulnerable to corruption, particularly in post-conflict countries where public institutions are developing and often weak. Corruption erodes public confidence and undermines institution integrity. Social scientists have defined corruption in many ways, but a useful yet simple definition for addressing public sector rule of law reform is "the abuse of public power for private gain."[10] Regardless of the form – bribery, kickbacks, protection, unlawful authorizations and approvals, awarding fraudulent procurement contracts, hiring nepotism, predetermined verdicts, or vote rigging – corruption subverts the rule of law and is an ever present challenge to rule of law reforms.

While corruption can broadly be viewed as prejudicial to rule of law efforts, it must also be viewed in the specific context of the societal, cultural, and customary norms of the population where rule of law reforms are being instituted.[11] What may be characterized as bribery in one culture may be considered respectful, gracious, and proper in another culture. This does not obviate the need to combat corruption, but rather highlights the need to understand how the transplantation of definitions and rules from one culture to another may affect rule of law efforts.

At the national level and below, keys to combating corruption begin with an assessment and understanding of the unique historical cultural, social, legal, and administrative situation in the supported country. Corruption does not occur in a vacuum. Underlying causes of corruption may include low wages of public officials, security concerns, scarcity of food, fuel, or consumer goods, lack of accountability of officials, or no investigative or enforcement mechanism. By eliminating or reducing the incentives for corruption, the rule of law institutional reforms have a better chance of success. It is critical to assess the underlying cause of corruption in each specific case during the rule of law planning process. To assist nations in developing a strategy to combat corruption, several IOs have offered varied conceptual frameworks.[12] Some of the key components to reducing corruption typically include informing the public about governance, opening up government processes, and establishing public official accountability.

"Corruption, like terrorism, thrives on a lack of reliable information."[13] Experience has shown that corruption has been reduced in countries where the population is more informed on political issues and more active in governance. Populations that are educated about the governmental functions, processes, responsibilities, and rights can serve as a countervailing force to corruption. An assessment of how each population is informed is critical in rule of law planning. Considerations of literacy and access to information are similarly crucial. Using a

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[10] Elia Armstrong, Combatting Corruption for Development: the Rule of Law, Transparency & Accountability, Combating Corruption for Development: The Rule of Law, Transparency and Accountability, Fourth Global Forum on Reinventing Government - Citizens, Businesses, and Governments: Partnerships for Development and Democracy, 11-13 December 2002, at 3, available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan005786.pdf (quoting WORLD BANK, WORLD DEVELOPMENT REPORT 1997 102 (1997)).

[11] Rory O'Hare, *ASCOPE, Planning Acronym for the New Generation of Warfare*, MARINE CORPS GAZETTE 46 (Jan. 2007).

[12] STROMSETH, WIPPMAN & BROOKS, *supra* note 2, at 11.

[13] ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFFICE OF THE CO-ORDINATOR FOR ECONOMIC AND ENVIRONMENTAL ACTIVITIES, BEST PRACTICES IN FIGHTING CORRUPTION (2004), available at http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan019187.pdf.

method of disseminating information that the population does not either use or trust is ineffective.

Secret or closed governmental processes and procedures present opportunities for corruption. Excessive secrecy by governmental organizations and a lack of information leads to mistrust and misunderstanding by the public. Courts, police, and other governmental institutions acting in secret may undermine the acceptance of the rule of law reforms. While secrecy may be important in the short term for certain security issues, efforts should be taken to keep the public informed to the greatest extent possible about governmental functions. Robust procedures that disclose and inform the public about governmental actions improve the transparency and fairness of governmental processes. Clearly established procedures and laws regarding due process and disclosure of information about governmental functions will enhance the chances of rule of law.

Public official accountability is another cornerstone of an anti-corruption strategy. The approach to public accountability needs to be comprehensive in application and phased in implementation. The components of accountability include: developing standards or codes of conduct, training those standards, establishing safe forums to raise grievances, establishing investigative and enforcement mechanisms, and providing adequate resources to undertake enforcement. When one of the components of accountability is not functioning, then the whole process is compromised. If an aggrieved party suffers retaliation for raising a corruption complaint, if there is no way to investigate or sanction a corrupt judge, or if there is no funding or personnel to implement enforcement, then the system will be ineffective and potentially counter-productive to the anti-corruption effort.

While all of the components of an anti-corruption program need to be in place for it to be effective, the implementation of the program may need to be approached in phases. Changing a culture of corruption will not occur immediately. Incremental steps may be needed to ensure acceptance and ultimate success. Interim measures like amnesty programs, limited temporary immunity agreements, or integrity pacts[14] may be required as the government transitions to a culture of integrity. Similarly, it is important that the enforcement mechanism include positive inducement and not just sanctions. Long term culture change will likely occur only when the incentives to avoid corruption outweigh those to be corrupt. Effective incentives for a specific anti-corruption program are typically related to the underlying causes of the corruption.

The legal advisors to rule of law programs must be involved in recommending laws, regulations and policy changes that can reduce corruption. Additionally, lawyers should be assisting in drafting accountability agreements and developing investigative and enforcement mechanism for anti-corruption programs. Reducing corruption is a crucial consideration in rule of law reform planning.

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[14] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, A HANDBOOK ON SSR, SUPPORTING SECURITY AND JUSTICE, CONFLICT, PEACE AND DEVELOPMENT CO-OPERATION 118 (2007), available at www.oecd.org/dac/conflict/if-ssr. (discussing the use of "defense integrity pacts" (DPIs) to combat corruption in the procurement process by attempting to bind all bidders to agreed standards of ethical conduct).

G. Language and Notional Barriers

Language and cultural challenges can be an overwhelming obstacle to success in rule of law operations. An example of such difficulties can be found in a rule of law practitioners' observations and experiences in Afghanistan.

> Afghanistan's eclectic legal system is an inevitable byproduct of the country's tumultuous political history. We found that many fundamental and widely-accepted legal precepts were either not familiar to Afghan legal personnel or entirely absent from the Afghan system. After encountering difficulty relating seemingly basic criminal law concepts (at least from a Western understanding), we quickly realized that much of the failing was our own. To effectively develop a new military legal regime requires an understanding of existing systems and the history of the indigenous military justice system.[15]

In the future, the US will more than likely participate in rule of law efforts in countries and regions that do not necessarily share our language, traditions, and legal concepts. In order to be effective and proceed with a sense of credibility, our personnel must be knowledgeable and cognizant of the cultures, languages, and traditions of the people that we are assisting.[16]

The challenge in overcoming such barriers will be significant, requiring a cadre of personnel that thoroughly understand the history, traditional cultures, and languages of the indigenous population for each potential scenario. It would be unrealistic to expect that every rule of law practitioner to be fluent in the local language and deeply familiar with the local legal system. However, in order to overcome this challenge planning considerations must be made well in advance in order to mitigate any gaps or seams, such as hiring contractors who are fluent in the native language or competent in the local legal system. The thoughtful rule of law practitioner should require pre-deployment training for their personnel that emphasizes the language, traditions, and legal systems of the subject country.

An example of this is seen in the rule of law traditions of many Islamic nations. Often times, legal disputes are settled by a local religious leader acting as a sort of a magistrate. This practice has developed over time, is accepted by the population as legitimate, and is largely viewed as effective. It is also part of the religion, which is itself frequently an important component of host-nation law. Efforts to replace this practice with a national government-centric judicial system are likely to be resisted, undermining not only the rule of law effort but also the institutions trying to implement the change.[17] It is important that rule of law planners understand not only what works in the country they seek to support, but also be ready to accept those notions that are foreign to the West but work.

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[15] MAJ Sean M. Watts & CPT Christopher E. Martin, *Nation Building in Afghanistan – Lessons Identified in Military Justice Reform*, ARMY LAW. 1 (May 2006).

[16] *See generally* COMBATING SERIOUS CRIMES IN POST-CONFLICT SOCIETIES, A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS (Colette Rausch, ed. 2006).

[17] Dr. Frank Vogel, presentation to USACAPOC(A)/PKSOI 3d Rule of Law Workshop (October 2006).

Computers as Status Symbols

In OIF-1, when many Iraqi judges in provincial capitals were surveyed as to what tools they needed to restart their court operations, many of them declared that computers were an essential item. Some brief inquiries by Judge Advocates revealed that no computers had been used in provincial courts prior to the war, and that all official records were maintained in hand-written ledgers. Further, none of the judges or staff were skilled in the use or maintenance of computer equipment, and there were no IT personnel available to set up or maintain a computer system. The computers were requested purely as status items and had they been provided without a comprehensive plan to automate the provincial courthouses, they would have quickly become expensive paper weights, as well as an ongoing distraction from more immediate needs.

H. *Cultural Blindness or a "West is Best" Mentality*

Even if a rule of law practitioner is able to understand local culture and language, there is still a risk of imposing Western legal values on the host nation. The foundation of rule of law reform is the understanding that law and its application are immensely contextual and deeply intertwined with the social, religious, and political aspects of a country. Crucial to establishing rule of law is understanding what is culturally acceptable for the developing nation. Legal reforms will only take hold if they are sensitive to the culture and legal tradition of the host country.[18] A nation will have its own distinct culture and tradition that has developed over time. Even when that tradition is dominated by authoritarian actors and corrupt governance, the society will have developed processes and expectations about how to do everyday activities.

Although it is critical to respect local institutions and norms, in order to obtain the stability and security sought by the rule of law mission, it will often be necessary to encourage or require the rejection of certain foreign nation laws that promote violence, discrimination, or other social divisiveness in the concerned country. The inability of host nation legal institutions to operate in a post-conflict environment will present the temptation for those with the physical capabilities – frequently coalition forces – to simply take over legal functions, imposing a US-oriented system in the process. Rule of law planners should not view their mission as writing upon a blank slate, seeking to transplant a US style, common law system in the place of the host nation's preexisting system, and the low capabilities of host nation institutions a the beginning of a rule of law project should not lead US rule of law practitioners to ignore the importance of maximizing participation by host nation officials in rule of law efforts.[19] After all, the host nation, not coalition forces, that both defines and lives under the rule of law.

The rule of law is not Western, European, or American. It is available to all societies. States differ in terms of laws, and in terms of the treaties they have signed with respect to human rights. Legal cultures differ depending upon history, with the majority basing their laws on the civil law tradition, while others (including the US) build on the common law tradition. In many

[18] UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, PRIMER FOR JUSTICE COMPONENTS IN MULTIDIMENSIONAL PEACE OPERATIONS: STRENGTHENING THE RULE OF LAW 6 (2006), available at http://pbpu.unlb.org/pbpu/view/viewdocument.aspx?id=2&docid=851.

[19] *See* section IV.B.2 on the legal obligations of occupiers.

countries, religious law provides the foundation for family and other laws. Societies differ in terms of the values they ascribe to law versus other means of social organization, such as personal or family loyalty. Respect for specific laws and other norms varies depending upon cultures and circumstances. The general rule of law principle, however, transcends all these differences.[20]

Westernization of the Iraqi Legal System

An example of overreaching in reforming the legal system of an occupied nation occurred in Najaf during Operation Iraqi Freedom during 2003. Having made significant progress in restoring the provincial courts and in vetting judges to remove those who would be resistant to reform, the Marine military governor on the scene proposed to place an Iraqi female on the bench. The well intentioned idea was to signal that there was a new day in Iraq under which women would have a greater rights and a say in their governance. The reaction from the population, however, was a turbulent protest, supported by many local women, who felt that the Americans were imposing their social values upon the Iraqis. Due to the passionate local reaction the plan was scrapped at the last minute and calm returned to the judicial reform process.[21]

Some changes may be necessary, and for those that are, attempting to implement new (but foreign) tenets and processes for organizing society requires patience, as the audience will likely not understand, or even worse, appreciate it. Developing law is not solely a legal function, but a political function that includes the cooperation of local actors. The law is not an output, but rather a process that balances international expertise, local legal traditions, societal values, and cultural norms.[22]

I. Sustainability and Resources

A common issue within the rule of law community is that the time and money afforded to the process of reform is insufficient. For Judge Advocates conducting rule of law missions, this issues is compounded. Most military units are understaffed and underfunded for stability operations, including rule of law.

[20] US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS 5 (forthcoming 2007).
[21] CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE, LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994-2006 22 (2006).
[22] *Id.* at 29

Capitalizing on Paralegals[23]

There is a need for Paralegals in [rule of law (RoL)], as they bring their expertise in legal office management and administrative procedures to the RoL mission. At the Corps and Division level, a Paralegal could take the lead in legal office administration and automation, including but not limited to, database management, maintaining a RoL electronic (unclassified) RoL library and database, monitoring and recording National laws enacted by the Council of Representatives as well as decisional law at the provincial and local levels. At the Brigade and Battalion level, paralegals could take a more active role in RoL missions by assisting in conducting RoL assessments, helping to train local Iraqis in organizing and maintaining legal records, databases and files, and in providing insight and training into the needs and capabilities of a functioning legal aid center. In Brigades and Battalions that are short JAs, the Paralegal could be the primary person performing courthouse assessments by working in conjunction with the respective [CA team] or [Provincial Reconstruction Team], or offering guidance to [CA teams] on RoL projects and initiatives.

A Paralegal can sift through the Significant Actions and numerous intelligence and situation reports in order to determine items of significance to RoL and highlight them for the RoL JA. As no one person can possibly keep up with all the reporting available, the Paralegal could also accompany the RoL JA on inspection trips and offer a second set of eyes to those individuals involved in the inspection/assessment.

Rule of law practitioners must be wise to invest scarce resources to targeted projects where they can a significant impact on the community. The underlining assumption is that financial resources are not finite. Rule of law practitioners should be selective in directing scarce funds based on strategic planning, urgent need, and buy-in by host-nation leaders.

In addition to the obvious problem of finite resources, time is a major concern in conducting rule of law operations. Most legitimate legal reform programs run from 5 to 10 years. However, the military tends to focus its operational tasks in six months to one year objectives. To offset this issue, rule of law programmers should design programs to ensure that their impact endures beyond the project itself. While it may not always be possible, rule of law initiatives should be tailored to have a lasting and sustainable effect. Put simply, even the most capable judges or best-trained police force will languish and deteriorate without ongoing support. This will mean fining local tax-revenue schemes and commitment of local leaders. Thus, rule of law planners must balance the need for a one-year quick fix with the necessity to develop sustainable and enduring legal programs.

J. Tyranny of Distance

Logistics, in terms of moving personnel and resources will likely present major challenges to any rule of law initiative. For instance, the "tyranny of distance" in places like Afghanistan and Iraq speaks for itself. The amount of money and equipment required to sustain

[23] From Rule Of Law Lessons Learned MNC-I Rule Of Law Section Operation Iraqi Freedom 05-07 (Dec. 10 2006).

any operation located on the other side of the world will likely require heavy planning and assessment of the resources required to start a deployment and sustain it through completion.

In addition, cognizance of the Commander's Decision Cycle as it relates to higher headquarters and the civilian leadership should be a mindful consideration in your planning cycle. For example, the normal working hours in the subject theater of operations may be the end of the workday or in the middle of the night at your higher headquarters.

K. Legal Obligations

The legal obligations and policy decisions of both the supported nation and the supporting nations can challenge rule of law reform efforts. The supported nation may be limited in its initial rule of law reforms by obligations that it incurred during agreements to end political or armed conflict. As an example, the Bonn Agreement[24] that served as the interim framework for the reestablishment of Afghanistan contained provisions that mandated the reconstructed judicial system to be based on existing laws and also based on Islamic principles.

These national obligations of Afghanistan potentially complicate rule of law reform efforts. [25] Similarly, each nation supporting rule of law may have national caveats based on their laws or national policies that limit certain aspects of its rule of law support. The US, for example, may be more constrained than another nation in its ability to quickly contract for necessary services in support of a rule of law program because of its national contracting laws and regulations. When a coalition of nations is providing the rule of law support, each nation brings its own constraints or national caveats to the rule of law program. Deconflicting these many national caveats can be challenging. However, a rule of law program planner and legal advisor must coordinate and plan for these caveats to ensure effective rule of law support.

Identification of participating nations and their national caveats to rule of law support should be accomplished early in the rule of law planning process. A matrix that lists the rule of law support objectives and the nations that have caveats that prevent or limit their participation in specific objectives is helpful for commanders supporting rule of law reform. Once identified, the challenge for the planners is to leverage each nation's strengths while avoiding conduct that would violate a national caveat. It is important to realize that some nations providing rule of law support may have their own rule of law values, and will be less than willing to modify their activities to work in concert with other participants, but finding a way to work with coalition partners in a way consistent with their national caveats is still superior to a stove-piped rule of law effort by a single nation.[26]

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[24] The Bonn Agreement, officially the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001), called for the interim rebuilding of the justice system on existing laws in accordance with Islamic principles, international standards, the rule of law, and Afghan legal traditions. The agreement can be found at http://www.afghangovernment.com/AfghanAgreementBonn.htm.

[25] LAUREL MILLER & ROBERT PERITO, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT NO. 117 – ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 9 (2004), available at http://www.usip.org/pubs/specialreports/sr117.html.

[26] *Id.* at 5 (discussing how the "lead" nation for justice sector reform (Italy) has "focused mainly on implementation of its own projects, rather than coordination of broader [rule of law] efforts. As a

L. Unrealistic Expectations

The military cannot complete stability missions alone. The workload of conducting stability operations, including rule of law endeavors, must be shared and borne by other agencies of the USG. Essentially, all aspects of national power must be leveraged and applied to these types of operations. A military solution alone will not suffice. However, it is apparent that other agencies are not adequately resourced to deploy the appropriate skill sets of personnel and in the number of personnel needed.[27]

Perhaps even more important, though, is the realization that the no amount of military power can force the local population to embrace the rule of law. It may very well be that social, cultural, and historical factors will foil even the most perfectly designed and executed rule of law project. Success in stability operations to include rule of law will not come quickly or easily and will likely not be susceptible to readily identifiable pillars of victory. In the end, it is the local population that adopts the rule of law, not the institutions of international development.

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consequence and despite the presence of some Afghan officials who are committed to reform, since the fall of the Taliban little progress has been made toward building a functioning justice system.").

[27] Secretary of Defense Gates emphasized this point in a recent Senate hearing by stating "...that Ms. Rice had told him that her department needed six months to locate and prepare civil servants and contractors to send abroad. It is illustrative of the difficulty of getting other agencies to provide people on a timely basis...." Thom Shanker and David S. Cloud, *Military Wants More Civilians to help in Iraq*, N.Y. TIMES (Feb. 6, 2007). This gap in identifiable and ready resources has been recognized and one possible solution is the recommendation offered by the United States Institute for Peace in creating a ready pool of personnel with the requisite skill sets to perform rule of law missions. "One reason for this gap is the total absence of any U.S. civilian capacity to deploy organized units of police with specialized equipment necessary to perform crucial public order function such as crowd control of law and the curbing of rampant lawlessness. ROBERT PIRITO, MICHAEL DZIEDZIC AND BETH DEGRASSE, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT NO. 118 – BUILDING CIVILIAN CAPACITY FOR U.S. STABILITY OPERATIONS: THE RULE OF LAW COMPONENT 2 (2004), available at http://www.usip.org/pubs/specialreports/sr118.pdf.

VIII. Rule of Law Project Narratives

Editors' Note: The following chapter contains the experiences of two Judge Advocates who conducted rule of law missions in Iraq and Afghanistan between 2003 and 2005. It is a compilation of their lessons learned written from the first-person perspective. Their accounts are included in this Handbook's illustrate three important premises: First – that before the publishing of this Handbook, rule of law missions followed no set format or guidelines. These pioneering Judge Advocates literally made it up as the went forward. Second – that the implementation for every rule of law mission will vary according to the operational environment and political/military context of the mission. Third – to illustrate that Judge Advocates are performing (and will continue to perform) the rule of law mission because commanders see them as trained and prepared to deal with the unique issues presented in the operational environment dominated by rule of law concerns. Note that throughout this chapter the authors discuss tactics, techniques and procedures that are at odds with some of the principles set forth elsewhere in this Handbook. Again, this chapter was included not to reflect the perfect implementation of rule of law operations, but to illustrate the challenges that are inherent in such operations.

A. Rule of Law Operations in Southern Iraq During OIF-1[*]

The role of the Judge Advocate in the rule of law mission is largely defined by the variety of situations encountered in the area of operations and must consider the nature of the prior legal infrastructure and local cultural expectations regarding justice

This section contains observations and comments based upon a JA mission to restore the rule of law in southern Iraq during Operation Iraqi Freedom beginning in April 2003, immediately following the cessation of large scale military operations. From April 2003 through March 2004 a political power vacuum arose in Iraq largely caused by the fall of the Baathist regime resulting in the complete absence of Iraqi governmental functions. One week before the coalition invasion in March 2003, the Iraqi legal system ceased operations, in anticipation of the fighting. Iraqi civilians destroyed and looted many courthouses. The judges from the Baathist regime fled their provincial capitals out of fear of civilian violence or arrest by the Coalition forces. Accordingly, Army and Marine Corps Judge Advocates assumed responsibility at the provincial level for a system with no functioning courthouses, no judges, and little clarity regarding the laws of occupied Iraq.

A collection of Army and Marine Corps military commands, acting as an occupation force, established military governorships over the eighteen provinces of Iraq. These military governors, typically combat arms battalion commanders from the Marine Corps and Army, coordinated with CA personnel, their supporting JA personnel, and Coalition Provisional Authority (CPA) civilians in the Ministry of Justice (MoJ) in Baghdad to restore the rule of law amidst a turbulent "peace" and a growing insurgency. Under this arrangement, the JA mission evolved over time, and required coordination with Iraqi tribal leaders, local provincial officials,

[*] LTC(P) Craig Trebilcock, JA, USAR, served as 358th Civil Affairs Brigade's International Law Officer during OIF-1 from March 2003 through March 2004. The author of this section, while an Army Judge Advocate, was assigned to provide legal support to the 1st Marine Expeditionary Force (I MEF) during OIF-1, thus explaining the frequent references to the US Marine Corps. The observations herein apply equally to US Army operations as well.

NGOs, and coalition military partners, each of whom played a role in the likelihood of mission success.

Rather than attempt to describe the myriad tasks that a Judge Advocate must undertake as part of a rule of law operation, the chapter focuses on the issues that Judge Advocates are likely to encounter when working on rule of law issues.

1. Advising Commanders

a) Advise the command that establishing rule of law impacts security.

The rule of law mission that follows major combat operations will likely be a low priority for a military commander during the planning phase of combat operations. The commander, along with his planners will likely be focused on kinetic operations and thus have an eye toward winning the "fight". The JA advisor needs to recognize this and wait until the correct moment to mention that an integral component of reestablishing security in an occupied territory is the need to establish the rule of law. The JA staff must use the time while major combat operations are still underway to plan when and how to advise the commander on the rule of law mission. The moment will occur when the commander turns from his maps and asks, "What about the courts, judge?" and that is not the time to begin planning.

As US operations in Iraq transitioned from major combat operations to occupation and reconstruction, the non-lawyer, long term planning staff within the 1st Marine Expeditionary Force (I MEF) G3 section viewed legal operations as an option to deal with after other critical infrastructure, such as waste treatment and hospitals, were reestablished. Preliminary discussions within the I MEF long range planning cell reached a consensus to begin rule of law operations 90-120 days post-hostilities.

The long range planning cell failed to recognize a functioning legal system as an integral prerequisite to reestablish security. This led to immediate problems for the US military governors. The absence of a functioning Iraqi court system quickly led to overcrowding in jails and coalition detention facilities throughout the provinces which became a human rights issue within 30-60 days of entering the reconstruction mission. Military governors were forced to choose between attracting criticism from human rights organizations or releasing potentially destabilizing criminals back into the civilian population. In short, by attempting to push the rule of law mission to the back burner due to a large number of other competing priorities, the commanders created a security and stability challenge for their command. A strong JA voice stressing the importance of the rule of law mission might have avoided this problem.

Once the Iraqi courts in the South began to operate in summer of 2003, even at a fraction of their pre-war levels, prison overcrowding was alleviated. Truly dangerous criminals remained incarcerated, while petty thieves were fined and released. This not only reduced allegations of human rights violations and contributed to security, but also contributed to promoting a sense of "normalcy" returning to the Iraqi population. As a result, reconstruction efforts moved forward.

The rule of law mission must not take a back seat during a military occupation. The restoration of justice enables all other societal functions to succeed. The deployed Judge Advocate must advocate the rule of law mission in all staff planning as major combat operations come to a close, even while the command's primary focus may still be upon combat operations.

b) Be the honest broker concerning mission risks.

The Judge Advocate is not only a subject matter expert on the law and legal systems, he is also the member of the commander's special staff. As such, when a commander proposes a plan that may adversely impact the mission, the Judge Advocate must act as a voice of caution and be the honest broker.

A prime example of this occurred in OIF-1. The military governor of Najaf, one of the most fundamentally conservative Shiite provinces, approved plans to place a female judge on the provincial bench. The decision to place the female judge on the bench was a part of a larger social experiment to give increased responsibility to women in Najaf. Although the decision was based upon good intentions, the decision-making process neglected the history and legal traditions of the Iraqis in that area. Instead of success this move generated a subsequent raucous civil disturbance that occurred when the local population (men and women) protested the swearing-in ceremony. The Judge Advocate needs to be intimately involved in the decision-making process in order to avoid situations such as this one.

c) Be aware that command structure impacts mission success.

In the northern half of Iraq in 2003-04 the reconstruction of the Iraqi Legal system was coordinated by Division SJA offices with the assistance of local CA units. In the South this mission was performed by the US Army CA Government Support Teams (GSTs)[1] under the operational control of I MEF. GSTs in the South worked at the battalion level within each province and coordinated directly with their battalion commanders and local Iraqi officials.[2] Divisional and corps-level (the corps level being the I MEF) Judge Advocates played more of a general oversight and advisory role. In short, the rule of law mission was more of a top-down affair in the North, while in the South it was a loose confederation of GSTs directing matters at the local level.

The decentralized employment of CA forces (including their organic JA personnel carrying out the rule of law mission) in the South was to have significant consequences for communication and efficiency in national and regional legal reconstruction efforts. Rather than establishing a central coordinating JA or CA authority, the CA battalion commanders were directly responsible to the maneuver commanders and G3 sections at the battalion and divisional level. The units conducting the rule of law mission only had an accountability relationship with the 352nd Civil Affairs Command (CACOM) headquarters in Baghdad.[3] There existed no CA or JA personnel directing or coordinating rule of law reconstruction operations across southern Iraq.

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[1] GSTs were the CA organization established in each province to serve as an interface between the Iraqi populace and officials and the military and to be the civil administration face of the local military governor. The GSTs were tasked by the military governors with getting the provincial Iraqi bureaucracies running again and overseeing the reconstruction of critical infrastructure within the province. Ranging in size from twelve to twenty four CA operators, GSTs were comprised of CA officers with subject matter expertise on issues ranging from public health to law enforcement to civil engineering. A typical GST would have a Judge Advocate, a fiscal officer, a logistics and engineering officer, a medical expert, an education officer, and a law enforcement officer, among other specialties. Most GSTs had a Judge Advocate in the rank of captain or major to conduct the rule of law mission.

[2] Interview with COL Michael O'Hare, SJA, 358th CA BDE, in Camp Doha, Kuwait (Nov. 14, 2003).

[3] The 352d Civil Affairs Command (CACOM), assigned to the Green Zone in Baghdad, had no authority to task CA units in the field that were assigned to the Marine Corps or Army divisions.

Rather, the 352nd CACOM was relegated to a command headquarters whose area of direct influence was the Green Zone in Baghdad, with a liaison mission with the several fledgling Iraqi Ministries established by Coalition Provisional Authority.[4] Accordingly, US forces across southern Iraq conducted rule of law missions in a decentralized fashion and depended on the priorities, resources, and understanding of the provincial level military governors acting relatively independently from what was occurring in the neighboring province.

Civil Affairs Judge Advocates had a substantial degree of discretion in southern Iraq by virtue of the fact that the US Marine Corps has at its disposal tactical Civil Affairs Group (CAG) units of several dozen personnel. Marine CAGs are very experienced in short-term missions involving emergency civil administration and relocating or evacuating civilian personnel. Their mission history and doctrine, however, does not allow for the type of long term national and regional reconstruction projects necessary to build a government from the ground up. Recognizing that their own doctrine and training did not readily fit the large scale Civil Military Operations (CMO) mission likely to be encountered in Iraq,[5] the Marines requested US Army CA units to operate with them. Largely due to the difference in force structure and doctrine the Marines also did not fully appreciate the doctrine and capabilities of an army CA battalion or brigade before the Coalition entered Iraq.[6]

> I worked in the I MEF future plans cell from April through September 2003 as a liaison for my Army CA brigade. It was clear that the Marines did not know what to do with the CA brigades, with their high rank structure and their minimal vehicular and logistic support. It took until late June 2003 for them to understand the capability the brigade brought to them in terms of subject matter expertise and their ability to coordinate between CPA, NGOs and the military.[7]

Thus, the command structure in southern Iraq during OIF-1 provided the individual Judge Advocate, operating within a GST, a substantial level of professional latitude to set priorities for the rule of law mission. Conversely, the rule of law mission lacked coordination across the

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[4] In a talk with the troops of the 358th CA BDE before they crossed into Iraq, BG Kern, CDR, 352d CACOM told the unit officers, "Do what is necessary. I'll back you up." BG Kern, Arifjan, Kuwait (Mar. 24, 2003). That general encouragement was the scope of direction provided y the highest ranking CA officer in theater at the time as to what Civil Military Operations (CMO) would be in Iraq.

[5] Despite lacking a long term doctrine, the USMC CAGs performed extremely well in Iraq, being largely responsible for the rapid reestablishment of modest civil Government and essential government services in An Nasariyah and Al Kut within weeks of those provincial capitals being occupied by the Coalition.

[6] During training with 2 MEB forces at Camp Lejeune, NC in the Fall of 2002, it became clear that the Marine planners believed that a CA brigade was a self-supporting brigade akin to an infantry brigade, comprised of a couple thousand troops, with their own vehicles and logistics support, rather than the 145 person CA headquarters unit that it actually was. 358th After Action Report, MEFEX 2002. The Marines were also overwhelmed by the high rank structure of an Army CA unit, with its more senior and experienced civilians coming from legal, medical, engineering, and other professional backgrounds. The lean Marine Corps had one officer in the rank of LTC wearing the dual hats of battalion commander and military governor to oversee each of its seven provinces. The 358th Civil Affairs Brigade, which supported the I MEF in that mission, sent a 145 person brigade headquarters consisting of sixteen 06's, and twenty three 05s, among other officer ranks. The supporting CA battalions brought a dominating rank structure as well, containing more CA 05s and 04s than an entire Marine combat brigade. This made integration difficult.

[7] Interview with LTC John Taylor, CA, USAR, in Camp Babylon, Iraq (Sept. 14, 2003).

region. This lack of coordination made it difficult to plan for materiel resources and funding or to communicate a coherent message to the policy planners in Baghdad regarding the challenges of restoring the rule of law.

In the North,[8] the Judge Advocates in CA units were under direct US Army control. The SJA offices of the 4th Infantry Division and the 101st Airborne Division (Air Assault) assumed direct responsibility to rebuild the legal system.[9] They relied upon CA more for planning advice than for executing courthouse projects, appointing and dismissing judges, and directly overseeing court operations.[10] Thus, the challenge was not a lack of coordination, but rather the non-permissive security situation in the Sunni triangle. Additionally, Judge Advocates were also tasked with a large number of other Divisional level JA functions, such as military justice, administrative law, and claims.

For future rule of law missions conducted on a large scale, a combination of the approaches of the coalition in northern and southern Iraq may yield the best results. The GST model of Judge Advocates operating at the local level in the North and focusing exclusively upon the rule of law mission worked at the tactical level, but was largely ineffective on a regional level due to lack of coordination across provincial/command boundaries. The Marine Corps chain of command structure in the South initially prohibited lateral communications between JA personnel in different provinces and required all such messages to proceed through formal G3 channels where they were reviewed and often delayed by combat arms personnel with no expertise in evaluating the importance of the legal issues transmitted. These delays often rendered the reply moot by the time it was received as events overtook and bypassed the issue of the moment. As such, a GST structure for the rule of law mission that is coordinated by JA or CA personnel through technical channels on a regional or national level, would likely be the most effective in a rule of law mission.

2. Planning

The deploying Judge Advocate must depend upon himself and his technical chain of command to plan and prepare for the rule of law mission. In the pre-deployment stage the planners and commanders will likely not focus extensively upon the rule of law mission. Rather, they expect the Judge Advocate to know what is required for rule of law mission success.

a) Anticipate and bring foreign legal resources.

During the planning stage of an operation be cognizant of the personnel and supplies needed for mission accomplishment. In OIF, the battalion and brigade level CA Judge Advocates responsible for restoring the southern Iraqi legal system deployed without a copy of the laws of Iraq. Despite six months of preparation for operations in Iraq for prior to commencement of

[8] Described generally as from the northern outskirts of Baghdad to the northern Iraq border.

[9] The legal system of the Kurdish (northern) area of Iraq required very little assistance from US forces, as the Kurds had been operating their own semi-autonomous government structure in northern Iraq since the imposition of the "No-fly" zone by US forces following the first Gulf War. This system was free of the Baathist influences of the South and did not suffer extreme physical damage during OIF.

[10] The 358th CA Bde placed a planning team with the 4th ID in Tikrit in September 2003 to develop a strategic plan for restoring Government functions, including courts. However this team, with its one JA Captain was engaged only in planning, not in the oversight of the courts or the implementation of policy. Interview with CPT Frank McGovern, JA, in Tikrit, Iraq (Feb. 12, 2004).

hostilities, no one responsible for administering the provinces in the wake of hostilities actually knew the laws of Iraq. Coalition forces arrived in Iraq only to find courthouses looted and destroyed. This led to great inefficiency and initial misunderstandings that hindered the restoration of the Iraqi court system.[11]

The absence of written legal authority was not a mere inconvenience, but a major problem impacting coalition operations and security. Without having a translation of the laws in English the deployed Judge Advocates could not administer and supervise the implementation of the new Iraqi legal system. Delays of several weeks occurred where neither the judges in the provinces nor the military governors knew which laws were in effect and which had been rescinded. Once major combat operations ceased, the CPA declared it was responsible for all executive, judicial, and legislative functions within Iraq[12] but did not execute, legislate, or distribute the new laws to the provinces for nearly three months. The uncertainty as to applicable law led Iraqi judges to refuse to adjudicate cases. As a result, no cases were adjudicated in April and May of 2003 – even in the few provinces with undamaged court facilities and available judges. The overcrowding of prisons became an increasing problem as coalition troops continued their law enforcement activity.[13] Thus, one can argue that some of the prevalent security problems on the ground can be traced to Judge Advocates who deployed without possession or knowledge of the laws of Iraq.

In retrospect it may seem bizarre for a Judge Advocate to deploy to a rule of law mission without a copy of the laws of the occupied nation. This raises another good planning lesson. A Judge Advocate must anticipate how the mission might change without notice. In the terminology of a planner this is known as a branch planning. Prior to deployment to Iraq the CA Judge Advocates prepared for a massive humanitarian crisis involving Iraqi civilians. Weeks of training went into the anticipated refugee mission, including decontaminating "gassed" refugees, emergency medical care, and the establishing short term refugee camps. In accordance with International Committee of the Red Cross (ICRC) and Geneva Convention requirements, Judge Advocates wrote draft rules for governing refugee camps and returning refugees to their homes. Separate from the refugee flow, Judge Advocates also prepared for Article 5 Tribunals and the administration of detention facilities for enemy prisoners of war (EPWs).[14] Although the deploying Judge Advocate received hundreds of hours of tactical training, no training on the Iraqi legal system or government structure occurred at the CA brigade or battalion level. The mission was refugee focused and requests through command channels for a copy of the laws of Iraq prior to deployment went unanswered.[15] Judge Advocates attended a three day seminar at Fort Dix, NJ in early 2003 learning extremely valuable cultural background information on the Iraqi Kurds, Sunnis and Shiites, and other important information concerning the religion of

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[11] Our British comrades in arms fared no better, having to arrange a helicopter flight to Kuwait a month after hostilities began to obtain a copy of Iraqi laws in English from a US Army CA unit.

[12] CPA General Order Number 1 (May 16, 2003), available at http://www.iraqcoalition.org/regulations/20030516_CPAORD_1_De-Ba_athification_of_Iraqi_Society_.pdf.

[13] Interview with CPT William Britt, CJA, 432d CA Bn, Ad Diwaniyah, GST (June 6, 2004).

[14] Interview with COL Michael O'Hare, SJA, 358th CA BDE, in Norristown, PA (Dec. 1, 2004).

[15] "We requested a copy of the Iraqi Constitution and the criminal laws months before deploying, but we repeatedly ran into higher echelons who were too focused upon the huge logistical strain of the deployment, rather than upon details like 'how will we run the country?'" *Id.*

Islam. However, with the exception of a general description of Saddam's security apparatus, no briefing or outline regarding the structure of the Iraqi civil government and its legal system was available.[16]

The saying goes, "no plan survives first contact with the enemy," and OIF was no exception. With the brief exception of a water shortage in Um Qasr in the opening days of the war, the expected massive civilian emergency and significant displaced persons mission did not materialize. The locals remained in their homes and did not take to the roads. The high intensity conflict, projected to last as long as six months, lasted only three weeks. Civil Military Operations (CMO) planners, who had anticipated the active combat operations to continue for additional weeks or months, suddenly found a stability operation dropped in their laps, without warning, and with only the broadest outline of a plan.[17] The various commanders tasked the restoration of the rule of law mission to Army and Marine Corps civil affairs Judge Advocates in southern Iraq, and to divisional SJA staffs with the Army divisions in Baghdad and the North.

Accordingly, with the exception of products pulled by individual units from the Internet, the Judge Advocates who deployed to Iraq in anticipation of a major humanitarian emergency, found themselves in charge of a foreign legal system without a copy of its laws, procedures, and traditions. Fortunately, several members of the Free Iraqi Forces who entered Iraq with the Coalition had been attorneys in Iraq before becoming expatriates living abroad.[18] These Iraqi attorneys provided substantive information regarding the structure and day to day operations of the Iraqi legal system enabling the Coalition Judge Advocates to assist in its restoration.

From a rule of law mission perspective, OIF-1 was planned and performed on the fly.[19] Future Judge Advocates deploying to any mission that could potentially evolve into a rule of law mission should find a copy of the major criminal laws and procedure of the area of operations and pack those with their other legal resources without, of course, jeopardizing operational security. These resources are generally available from the Library of Congress or from major law school libraries.

b) Plan in advance for a structure through which to communicate with local officials.

When the planned-for refugee mission in OIF-1 did not develop, a lull of several critical weeks in rule of law operations occurred while staff planners deliberated how to utilize their CA/JA assets to control the Iraqi bureaucracy and restore the rule of law. The planners devised the concept of CA GSTs and initiated expedited training in Kuwait for Army CA troops who had yet to cross into Iraq. GSTs were established in each southern province establishing an interface between the Iraqi populace/officials and the US military. Ranging in size from twelve to twenty four CA operators, the GSTs acted as the civil administration face of the local military governor.

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[16] *Id.*

[17] "The transition from Phase 3 to Phase 4 operations occurred abruptly and much sooner than we expected. The Marines, who had seemed to forget their Army Civil Affairs units even existed during the drive on Baghdad were screaming for them to get into action as soon as possible when the fighting stopped. The only problem was that there was no plan for what many of the units were supposed to do." Interview with LTC John Taylor, *supra* note 7.

[18] Interview with COL O'Hare, *supra* note 14.

[19] The training of the GST personnel from the Army CA battalions who were to administrate the southern Iraqi provinces for the I MEF did not occur until April 6-8, 2003.

A typical GST consisted of a minimum of a Judge Advocate, a fiscal officer, a logistics/engineering officer, a medical expert, an education officer and a law enforcement officer. The military governors tasked the GSTs with getting the provincial Iraqi bureaucracies functioning again and overseeing the reconstruction of critical infrastructure within the province.

The GSTs became a very successful tool for providing direction to Iraqi bureaucrats at the provincial level and for receiving feedback from the Iraqis as to their concerns. This structure could have been even more valuable had the plans for its implementation been conceived prior to the end of major hostilities and had training been conducted prior to deployment.

From the JA perspective, GST training, albeit belated, was important to convey the nuances of a civil law based court system (akin to the French magistrate code system), to military attorneys who were used to operating in a system characterized by common law court precedents.[20]

A lesson from OIF-1 was that valuable time was lost in carrying out reconstruction operations and restoring government services when Judge Advocates were deployed without needed legal resources and did not receive advance training for their mission. Assumptions that there would be adequate time to conduct such training in theater were wrong.

c) Do not expect local officials to be of initial assistance.

In Iraq one of the initial challenges was simply finding Iraqi officials and judicial personnel. Fearing the Coalition invasion and possible post-hostilities retaliation against those who had supported the Baathist regime, many Iraqi judges and prosecutors fled.

Accordingly, there was a vacuum of authority and very few persons remaining in the provincial capitals who would even inform the coalition of the identity or location of former members of the Iraqi judiciary. Court records were either hidden in advance of the invasion or destroyed by Iraqi looters.

Those who state, with hindsight, that it is best to allow local officials to control government operations during an occupation may be correct in theory, but in practical application those planning a rule of law mission must anticipate how that will be accomplished if the local officials are simply no longer physically present.

In OIF-1 it took several weeks of inquiries and coordination across command lines to locate the Iraqi judicial officials and convince them to return to their provinces. Once they became convinced that US troops were looking for cooperation, not retaliation, this became an easier task.

3. Coordinating Among Participants in Rule of Law Operations

In the summer of 2003 the lack of communication and coordination was one of the major challenges to the rule of law mission in Iraq. Even in the absence of extensive insurgent activity, implementing the rule of law mission in Iraq was difficult and uncoordinated. Lateral communication across provincial lines was limited by the inadequacy of communication

[20] "We wasted so much time just learning their system that could have been put to better use actually doing something. We lost at least a month just trying to understand how the Iraqi system operated. By losing that month we lost a lot of local goodwill that we had to struggle to get back." Interview with CPT David Ashe, JA, USMC, in Samawah, Iraq (Aug. 2003).

equipment and command channels that limited coordination to formal G3 channels. Although the CPA possessed political authority on paper, it maintained few assets or any meaningful presence beyond the Baghdad Green Zone. This led to two parallel organizations attempting to conduct a rule of law mission. One focused upon Baghdad (CPA), and the second, carried out by Judge Advocates working in CA units or in divisional SJA offices in the provinces, carried out separate missions. There was only passing coordination between the two. Thus, there was much confusion, duplication of effort, and repeated mistakes across the breadth of the area of operations that might have been avoided with better coordination.

a) The government support team (GST) model for civil administration works, but its effectiveness can be reduced by lack of centralized coordination.

The GST model placed JA resources with expertise in civil government administration in direct contact with Iraqi officials who required direction and coordination. The GST teams brought legal, public health, medical, logistic, engineering, and law enforcement officers from CA units to the Iraqi provinces to restore necessary government services.[21] By coordinating policy from the Coalition military governor with local Iraqi leaders there was a constant flow of information between the Coalition and Iraqis that promoted cooperation and accurate communication ensuring all resources pulled in the same direction. Civil Affairs Judge Advocates in GSTs worked directly with the local judiciary to provide supplies, reconstruction assistance for damaged courthouses, payment of court workers salaries, replacement of corrupt/highly placed Baathist judges, etc.[22] Accordingly, within most provinces there was a unity of effort to restore the legal system, resulting in some courts restoring operations within 60 – 90 days after the cessation of high intensity combat. This all in spite of significant physical damage from looters.[23]

In the spring and summer of 2003, the lack of any coordination from any central or regional authority from the Iraqi MoJ operating under the CPA served to limit the effectiveness of the GST reconstruction and aid efforts. GSTs operated autonomously but remained subject to direction from the battalion commanders serving as provincial military Governors. Accordingly, GSTs encountered similar problems in each province but each GST separately devised a policy to solve the problem. By way of example, there were significant problems convincing the MoJ to release funds to pay judges and court personnel.[24] This was an issue common to each province and one universal policy or solution should have been instituted. There existed no central coordination of overall efforts of the GSTs either on a regional or national basis. As a result, each GST attempted to communicate its own priorities to the CPA controlled MoJ and Ministry

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[21] LTC Craig Trebilcock, 358th Civil Affairs Brigade After Action Review, Legal Assessment of Southern Iraq (2006) (hereinafter Legal Assessment of Southern Iraq).

[22] *Id.*

[23] The courts in Babil, Karbala, and Najaf provinces were operating by the end of June 2003. Interview with MAJ Craig Bennett, JA, Al Hillah GST (July 2003).

[24] Other issues of common interest that were handled in a decentralized fashion on a province by province manner were obtaining funding for courthouse reconstruction, replacing legal resources and libraries that had been destroyed by looters, obtaining general operational funds for each courthouse, and devising methods to replace corrupt Baathist judges and select new judges.

of Finance in Baghdad.[25] Messages forwarded through G3 channels often simply disappeared as they went from division to I MEF (or corps level) to CPA and back down again.

In the absence of communications equipment that could reach Baghdad from the outlying provinces, a GST Judge Advocates had to personally travel up to ten hours by HMMWV each time he needed to communicate needs and problems to the MoJ. Had the CPA or the Coalition commanders appointed a regional coordinator, this would have streamlined the process.[26] By July 2003, LtGen Conway, I MEF Commander, recognized the fact that each province was separately reinventing the wheel. LtGen Conway appointed a JA liaison to act as the voice between the GSTs in southern Iraq and the MoJ in Baghdad. As a result, utilizing a single conduit to communicate common issues arising in the provinces saved hours of travel for the GST Judge Advocates, reduced the flow of repetitive requests, and provided consistency in the communications from the CPA to the GSTs.[27] Thus, providing a communications avenue through technical channels to the policy makers in Baghdad improved coordination of the rule of law mission.

b) The Judge Advocate can play an important role interfacing with government and non-governmental organizations.

During OIF Judge Advocates performed many missions to include that of liaison officer with NGOs operating in the area of operations. There is often a strained relationship between many NGOs and the military. Many NGOs wish to rely solely upon the intelligence available through military briefings as to the level of danger in a given region, such as minefields. Yet those same NGOs often have strong policies against direct cooperation with the Coalition due to the fear of being viewed as an agent of the USG or military and thereby becoming targets of anti-Coalition attacks. Many NGOs are philosophically opposed to the use of military force, but may work towards the same goals as military units to provide humanitarian assistance and stabilize the occupied country.

Civil Affairs Judge Advocates found a positive role to play in interfacing with NGOs through the Humanitarian Operations Center (HOC), For instance, the government of Kuwait established the HOC in Kuwait City to coordinate humanitarian aid to Iraq. Additionally, Judge Advocates also interfaced with NGOs within Iraq in Humanitarian Assistance Coordination Centers (HACC) established regionally within Iraq.[28]

One of the roles that the CA Judge Advocate played in the HOC was to resolve border crossing issues for NGOs. Both US forces and Kuwaiti forces controlled access points from Kuwait into Iraq. NGOs were permitted to use only certain crossing points for security reasons

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[25] Legal Assessment of Southern Iraq, *supra* note 21.

[26] CPA repeatedly expressed plans to appoint legal regional coordinators to improve coordination and efficiency, but was hampered by lack of available personnel in theater. Interview with Mike Dittoe, CPA, Ministry of Justice, in Baghdad, Iraq (July 2003). Through August 2003, the CPA Ministry of Justice responsible for legal affairs in the entire country consisted of a retired military Judge Advocate acting as Minister, one Department of Justice attorney acting as an operations officer, and a USAR JA 1LT, supported by a minimal local national Administrative staff. These resources were barely adequate to administer legal affairs and operations in Baghdad, but overwhelmed with working on issues in the other 17 provinces. *Id.*

[27] Interview with COL O'Hare, *supra* note 14.

[28] Interview with CPT Frank McGovern, JA, in Al Hillah, Iraq (July 2003).

and were subject to search for those same reasons. This became a potential international issue when US and Kuwaiti forces searched UN vehicles driven by local national contractors. Under the UN Charter, UN vehicles are exempt from search or seizure in the countries in which they operate. Civil Affairs JA personnel within the HOC timely intervened to establish coordination between the UN, Kuwaiti, and US military forces, thus resolving the issue before it elevated into a formal protest by the UN against the USG.[29]

Keeping the avenues of communication with NGOs open, Judge Advocates were able to obtain forewarning when the security environment became too hostile for the NGOs to continue operations. As the insurgency developed, CA frequently assumed the responsibilities left behind by NGOs that withdrew from Iraq. Open lines of communication with the NGOs provided advance notice to US troops that they would have to assume additional duties in the near future.[30]

c) Be prepared to operate without the benefit of communication assets or direction from superiors.

The limited communications assets hampered the Judge Advocates ability to successfully conduct rule of law missions and restore and coordinate Government offices across hundreds of miles. SINCGAARS is a tactical system effective, when working, only for communications within the immediate region such as a provincial capital or on tactical convoy movements.

In an austere environment such as Iraq, a satellite phone would be ideal for CA reconstruction missions. The satellite phone should be part of the standard equipment for any Judge Advocate conducting a rule of law mission. Satellite phones were available during OIF, but provided primarily to unit commanders and primary staff to communicate with and report to higher headquarters. Such phone assets were not employed at the tactical level. As a result, a Judge Advocate was unable to instantly communicate with CPA or higher headquarters across long distances. A satellite phone may have solved this problem and made it possible to restore provincial government operations within weeks instead of within months.

In the absence of such assets, communication with the provinces in OIF-1 was essentially done by the equivalent of pony express. Judge Advocates operating in the provinces found themselves personally organizing convoys on a weekly basis to carry information or queries to CPA officials in Baghdad. The closer the province was to Baghdad, the more able it was to regularly maintain contact, provide information, and receive feedback. A Judge Advocate in a distant provincial capital in southern Iraq such as Samawah or An Nasariyah could not attend CPA reconstruction meetings in Baghdad and still maintain day to day contact with his province. A trip to Baghdad for a Judge Advocate in an outlying province turned into a two or three day affair. Accordingly, the further away that a GST was from Baghdad, the worse the communication and coordination. Progress in reestablishing the rule of law in those outlying provinces lagged due to lack of direction, coordination, and assets.

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[29] Interview with COL O'Hare, *supra* note 14.

[30] Interview with MAJ Chris Stockel, CA, GST coordinator for An Nasariyah (July 2003).

d) Lack of coordination not only leads to inefficiency, but can undermine the rule of law mission by diminishing the confidence of the local population.

During the first three months of OIF, it was imperative to promptly remove judges with close ties to the Baathist regime, or known to be notoriously corrupt.[31] The local population, especially in the southern portions of the country, viewed the courts as a tool used by the Baathists to maintain the Hussein regime in power.[32] Accordingly, as soon as the high intensity conflict ended in a particular province and attempts to restore civil order began, the vetting of judges to determine who would stay and who would go became a main priority and was of national importance.[33] Nonetheless, the CPA in Baghdad, acting as the de facto MoJ for Iraq during the Spring and Summer of 2003, was not prepared to implement a vetting and judicial review program outside of Baghdad.[34] This was due to several factors, including the lack of US civilian personnel to run the MoJ in Baghdad, nonexistent lines of communication between the CPA and military governors in each of the Provinces, and no CPA personnel from the MoJ present on a provincial or regional level to oversee the courts.[35]

Accordingly, faced with prisons and jails overcrowded with looters and criminals released by Saddam immediately before the war, and confronted by the expectations of the liberated Iraqis to remove the remaining remnants of the Baath regime, military governors, by sheer necessity, assumed responsibility for vetting judges so that the courts could begin working again.[36]

Lacking central guidance, each military governor, in coordination with his SJA and supporting CA Judge Advocates, created procedures for vetting incumbent judges to determine whether they would remain on the bench.[37] The common tools employed to screen judges were:

- **To poll the local provincial legal union (bar association) for its collective opinion of the judges Baathist sympathies and reputation for corruption**
- **To poll the opinions of the local tribal sheikhs and municipal officials**
- **To question each judge individually as to his prior links to the Baath regime, as well as those of other local judges**
- **To discuss with local business persons the reputations of the various judges**

None of these procedures was reliable to measure judicial ethics and suitability. Many factors influenced the opinions of those questioned. Religion, as always, was a complicating factor, with

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[31] *Id.*
[32] *Id.*
[33] I MEF Weekly Legal Report (July 23, 2003).
[34] Interview with Mike Dittoe, CPA Ministry of Justice, in Baghdad, Iraq (July 14, 2003).
[35] CPA Ministry of Justice plans to install Regional Directors who would provide oversight and consistency between the different provincial courts were repeatedly delayed throughout 2003-2004 by lack of available personnel from the US Department of Justice and the unavailability of funds to support the positions. Interview with Mike Dittoe, CPA Ministry of Justice, in Baghdad, Iraq (Aug. 15, 2003).
[36] *See* I MEF Weekly Report input by SPC Rachel Roe, (July 17, 2003) (indicating the ongoing vetting of judges by the military governor of Najaf, due to the absence of any activity in restoring the provincial court system by CPA). Although not a JA, SPC Roe, a lawyer, was in charge of administering legal affairs and restoration of the Najaf court system for the Najaf GST.
[37] Legal Assessment of Southern Iraq, *supra* note 21.

those in the Shiite portions of the country typically chafing at the presence of a Sunni judge, regardless of his qualifications. Legal union leaders were influenced to seek the removal of certain judges in the hopes of opening new job opportunities for themselves. Judges pointed fingers at other judges out of professional jealousy, as payback for prior slights, or to distract attention from themselves. Only by looking at the totality of all of this feedback and looking for consistent themes did a reliable picture begin to develop as to who was acceptable for continued service to the Coalition.[38]

Military governors struggled with the issue of corruption while making their decisions. An overwhelming majority of Iraqi judges took bribes and rendered unjustified favorable verdicts for persons of prominence in the local community and Baath party.[39] This was partially a cultural phenomenon – one had to do so to survive in the harsh Baathist system – and partially a product of the fact that Saddam paid his judges extremely low salaries. One could not apply western standards of judicial ethics to Iraq without disqualifying virtually every sitting judge and rendering the country without any functioning legal system.[40]

Accordingly, Judge Advocates compromised and only judges who continued to accept bribes and issue improperly influenced verdicts after the Coalition assumed civil control were removed.[41] Pursuant to CPA direction, judges who were in the top four tiers of the Baath party were also removed but it often took months to determine who those persons were, as many records were destroyed and Iraqis were always accusing each other of being Baathists for a variety of personal motivations.[42] With one exception in Wassit province, every judge interviewed in the seven provinces under I MEF control denied ever having been a Baath party member.[43] This denial was made despite the fact that it was common knowledge within the MoJ that one was not appointed as a judge without Baath party membership.[44]

Coalition military governors used different mechanisms to remove and replace judges. Each of them contained some level of Iraqi input and ownership in the decision. This was a very important message to send early in the occupation to convince local Iraqis that the purpose of military intervention was liberation, not domination.[45] While the situation in 2003 was not stable enough to organize popular elections, coalition military governors established committees of local authorities to make recommendations to retain or fire judges. These local provincial committees were often comprised of the legal union members, tribal leaders, other community leaders of note, and a Coalition Judge Advocate.[46]

Due to the lack of CPA presence or action in the provinces beyond Baghdad, the vetting process functioned at the provincial level, with the authority to recommend removal of corrupt/Baathist judges and to nominate new judges, typically from the local legal union.[47] The

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] I MEF Weekly Legal report (July 17, 2003).
[42] Interview with Capt. Sean Dunn, JA, USMC, in Al Kut, Iraq (Aug. 2003).
[43] Interview with LTC(P) Michael O'Hare, Acting SJA, 358th CA BDE, in Camp Babylon, Iraq (Aug. 9, 2003).
[44] Interview with Mike Dittoe, *supra* note 35.
[45] Interview with MAJ Craig Bennett, JA, in Al Hillah, Iraq (Jun. 15, 2003).
[46] *Id.*
[47] Legal Assessment of Southern Iraq, *supra* note 21.

CA Judge Advocate functioned on the committee to ensure the intent of the military governor was clear as to the qualifications of proposed judges and to act as a mediator between the often competing political and personal agendas of those on the committee. A local battalion commander acting in the role of military governor made the final decision to remove or appoint a judge.[48]

Although established on an *ad hoc* basis without a well established set of procedures, the provincial legal selection and vetting committees performed very well, permitting the local provincial governors to reestablish the rule of law under a quasi-democratic system that gave local Iraqi community leaders input into the selection of their judicial leaders for the first time. The process, borne of necessity, permitted courts in some portions of Iraq to return to a functioning state as early as June 2003.[49]

Unfortunately, some of the positive steps and credibility gained in this more informal selection process were later set back by a formal, belated vetting process conducted by the CPA in August through October 2003. Attempting to demonstrate centralized control over the judiciary by the MoJ in Baghdad, the CPA repeated the same vetting and selection process already conducted by the military governors. The CPA established a formal judicial review committee in Baghdad that conducted its review process well into October 2003. While well-intentioned, this process consumed many man hours and came too late to be of relevance to ensure it purged the judicial system of corrupt or anti-coalition elements.[50] In the overwhelming majority of instances the committee simply validated what military governors had done months before. Repeating the process was a source of confusion and anxiety to the local judges who were confused why they were subject to further review after having already been approved by the military governor. In addition, allowing a different Coalition body to repeat the same review process undercut the local authority of the military governor.[51]

The lesson learned is that, in order to restore the rule of law and security in a prompt manner, there must be a timely judicial review process established simultaneously with any attempt to restore civil order. This process should be done only once. Also, as uncooperative local officials will seize upon any appearance of inconsistency or divisiveness, there must be coordination of effort and communication between the designated civilian leadership and the military authorities tasked to carry out the reconstruction mission.

e) Establish avenues of communication between civilian occupational authorities and military governors.

The model for military governance of occupied Iraq under OIF-1 largely mirrored the Iraqi civil system it replaced in structure. The ministries in Baghdad, administered by CPA officials, remained the centers of political power and promulgated laws, policies, and guidance to the eighteen provinces of Iraq,[52] but the centralized ministries under CPA were understaffed, not

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[48] I MEF Weekly Legal Report (July 17, 2003).
[49] Legal Assessment of Southern Iraq, *supra* note 21.
[50] *Id.*
[51] "Our judges got the first sense that there were rifts in the Coalition that they could exploit for their advantage when CPA began repeating the vetting process. After that they began to resist direction from Judge Advocates in the field, often indicating they wanted direction from Baghdad." Interview with CPT Dunn, *supra* note 42.
[52] Legal Assessment of Southern Iraq, *supra* note 21.

provided with funds in a timely manner, and did not have the communications capability to direct the provincial bureaucracies.

CPA planned and established regional offices in several areas of Iraq to act as a coordinating authority for four to five provinces and as a proposed conduit for the flow of information and policies from Baghdad to the provinces. In the end, however, the communication did not work, for several reasons.

The primary reason was that there was not long range communication capability between CPA in Baghdad and JA operators in the provinces. Long distance telephone service was not restored until August of 2003, nearly five months after the cessation of major combat operations. Cell phone service was nonexistent. Tactical military communications systems had inadequate range to transmit across the vast distances between the provincial capitals or to Baghdad. Even had the range been adequate, the CPA did not have any military communications system capabilities. Accordingly, the first critical months of the OIF occupation were characterized by the provinces under military governorship communicating by tactical military communications, while CPA officials operated internally on civilian Baghdad phone lines or by email.[53]

Even the several regional CPA offices were essentially isolated from the military operations conducted right in their immediate vicinity. CPA South-Central, located in Al Hillah, Iraq, maintained communications with CPA in Baghdad by email and satellite phones during the summer of 2003. Yet the battalion level Judge Advocates who were reconstructing the legal systems under CPA South Central jurisdiction had neither email nor satellite phones. Accordingly, the CPA regional administrators rarely coordinated with the JA operators located only 10 kilometers away in their own back yard.[54]

> No one could talk to anyone else during the several months after the fighting stopped. CPA was speaking one language, military commanders were using tactical nets within their province, and the GSTs had neither system, largely relying upon travel by HMMWV to find or convey information. This led to a lack of information flow from CPA that turned each province into a separate fiefdom lacking centralized direction.[55]

The lack of communications capability led to lack of coordination of effort between CPA in Baghdad and CA/JA reconstruction efforts within each province. GST teams responsible for coordinating the reestablishment of essential government functions in each province did so through their own initiative, ignorant of policies and laws promulgated in Baghdad. This led to occasional embarrassment and an appearance of disorganization in the eyes of the Iraqis.[56]

For instance, CA Judge Advocates in the southern half of Iraq were completely unaware that the CPA published a new code of laws for the country and a Legal Gazette in August 2003. This undercut the authority of the GSTs who previously provided guidance to the Iraqi judges as to which laws were to be enforced and which were suspended.[57]

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[53] Interviews with MAJ Craig Bennett, *supra* note 23 and Mike Dittoe, *supra* note 35.
[54] *Id.*
[55] Interview with MAJ Craig Bennett, *supra* note 23.
[56] Such as when provincial judicial elections organized in Najaf by the GST and military governor were cancelled one week before they were to be held, when Ambassador Bremer belatedly became aware of them. I MEF Weekly Legal Report (July 11, 2003).
[57] Interview with CPT Dunn, *supra* note 42.

> It really made us look stupid when we had been telling the Iraqi judges that we [Judge Advocates] were the source of changes to their system and then CPA sent the Legal Gazette with the new code of laws directly to the Iraqi judges, but not to the JAs. That put the judges back in the driver's seat. [58]

Conversely, the CPA was operating in an informational vacuum from April through July 2003 as to the state of the legal system in Iraq outside of Baghdad. There were no regular reporting channels for such information from the field to CPA,. Beginning in August 2003 the I MEF commander, LtGen Conway, frustrated by lack of communication and coordination between CPA and the field, directed brigade-level CA Judge Advocates to drive to Baghdad in weekly convoys to ensure that CPA was aware of the status of the legal system in each province of southern Iraq as well as other government reconstruction issues.[59] This method of in-person communication, while cumbersome and occurring only on a weekly basis, was essential to create a link between the perception at CPA in Baghdad of the state of legal affairs in the provinces and the reality occurring on the ground.

> Once the meetings began in Baghdad between CPA MoJ and the CA JAGs began we began to step on each other's toes a little less often.[60]

The lesson learned from this experience is that there must be coordination between the occupational government setting policies and the military personnel tasked with restoring government functions. If technical issues or the physical environment prevent audio communications across long distances, the Judge Advocate must establish a system to report and share information immediately following the cessation of major hostilities. This will avoid duplication of effort, inefficiency, and the appearance of an inability to maintain effective control of the occupied territory.

f) Communications for the rule of law mission has to occur outside normal command channels (as well as within) in order to be effective.

The US Marine commanders during OIF, whose own CAG assets are designed to operate at the tactical level for short periods of time, did not initially understand the need for lateral and informal communications across command lines. The Commander, 1st Marine Division (1st MARDIV), who had operational command authority over operations south of Baghdad, initially ordered all Marine and Army Judge Advocates in southern Iraq to provide their reports and recommendations solely to the 1st MARDIV G3, who would in turn forward that information (if deemed important) to the I MEF (Corps level) G3. The I MEF G3 would then provide any information deemed important to the commanders of CA units and to the G3 of Joint Task Force 7.

While such an arrangement is expected in combat operations to control information flow, it was less useful in reconstruction operations, where informal coordination was needed. This arrangement turned military operations personnel, without any JA or legal training whatsoever, into gatekeepers, determining what legal information to communicate up and down the various

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[58] *Id.*

[59] Interview with LTC John Taylor, *supra* note 7.

[60] Interview with COL Durrett, I MEF SJA, in Camp Babylon, Iraq (June 20, 2003).

command levels. Many times important legal information was not communicated at all due to lack of understanding.[61]

Under these rigid military reporting channels, CA battalions in each province were not coordinating their legal operations directly with the brigade Judge Advocates responsible for oversight of the entire I MEF region. This also meant that when the CPA asked I MEF for timely and accurate information on the rule of law mission in southern Iraq, there was none to transmit.[62]

> There were many times when I wanted to get help from the CA brigade headquarters that was sitting at Camp Babylon ten kilometers away. However, I was told not to talk to them because they were an I MEF asset and we answered to the marine battalion commander in charge of Babil Province and to the CDR 1st MARDIV. This bureaucracy killed our ability to coordinate and limited our effectiveness.[63]

The consequence of the lack of information sharing was that vital information necessary to reconstruct the Iraqi legal system on a regional and national basis was not forwarded up to the command levels in Baghdad and coordination of effort from the higher echelons did not reach the battalion level Judge Advocates restoring provincial level government operations.

This reporting arrangement continued from April 2003 until July 2003, when the real world consequences of the lack of coordination became apparent. Overcrowded jails plagued the provinces and criminals were released without trial. The lack of funding from the MoJ to repair damage caused by Iraqi looting left many courts inoperable in mid-summer 2003. Those in need of funding did not properly communicate their need through Marine Corps operational channels to I MEF and JTF 7. Non-legal operational personnel in the G3 section viewed courts and legal issues as a matter to deal with at an unspecified future date akin to schools and libraries and not as an essential government function such as finance, public health, or restoring the flow of oil.[64]

A Judge Advocate adds value to the command by his ability to operate independently and establish relationships, locate human and material resources, and bring organizations together across municipal, provincial, and national levels of government. Inadequate reporting and command channels, which was inconsistent with the CA mission to restore and coordinate local, provincial, and national level government functions prevented the Judge Advocate from adding value in this regard.

A Judge Advocate's ability to control his own reporting channels and directly influence the structure of command relationships is limited. However, as a legal advisor to commanders, the lesson learned is that it is critical that the Judge Advocate voice his/her opinion when command structure and its attendant restrictions impair accomplishment of mission goals. During OIF reconstruction of the Iraqi legal system could have occurred in a coordinated manner, but precious months were lost due to senseless restrictions on information flow. These restrictions on direct coordination were removed in July 2003. In mid-June 2003, LtGen Conway, CDR I MEF, authorized brigade level CA elements attached to the I MEF to begin direct coordination with their counterparts in the 352d CACOM in Baghdad and with the battalion level CA operators

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[61] Legal Assessment of Southern Iraq, *supra* note 21.

[62] 350th CACOM Judge Advocates wore the dual hats of CA advisors for Commander, JTF 7 and as liaisons to the CPA-controlled MoJ in Baghdad.

[63] Interview with MAJ Craig Bennett, *supra* note 23.

[64] Interview with COL Michael O'Hare, SJA 358th CA BDE, in Norristown, PA (Jan. 5, 2005).

running the provincial level GSTs for 1st MARDIV. This provided the necessary "bridge" that had been missing in the flow of information concerning the status of the Iraqi courts and other government institutions in the provinces to reach Baghdad. After that, brigade and battalion level Judge Advocates coordinated common issues across the breadth of southern Iraq, preventing the same mistakes from being repeated in each province. It also opened lines of communication both to and from CPA that enabled the need for resources on the ground to reach the MoJ in Baghdad and for CPA to directly send policy and legal changes through CA channels to the operators on the ground that needed to implement them in a timely fashion.

4. Conducting Rule of Law Operations

a) Ensure a continuous and active JA presence at the courthouse to implement US policy.

While it was important to give the Iraqis a sense of responsibility for their own legal system, they must be reminded they were occupied, in part, due to a previously dysfunctional political and legal system known for human rights abuses, rejecting the rule of law, and widespread corruption. The Judge Advocate played a central role in OIF as the US official responsible for bringing change to the Iraqi court system.

Army Judge Advocates with the Marine Corps in southern Iraq found that Iraqi judges really did not operate as "judges" in the sense we understand in the West by examining testimony and evidence under applicable law and then making an impartial decision based upon the application of the law to the given set of facts. Rather, Iraqi judges operated in an environment characterized by competing partial forces that regularly influenced court proceedings.[65] If a case was not simply adjudicated at the outset by a special military or security court, it was nonetheless subject to direction from the MoJ in Baghdad as to outcome.[66]

If the case was not of concern to the Baath party, then the judge was subject to examine the tribal implications of the case. As a tribal society, local sheikhs possessed significant political and economic power and many cases developed under the lens of how the outcome might influence relations with a particular sheikh or whether the sheikh might have connections within the Baath party that might bring influence upon the judge.[67]

In addition, bribery and financial influence under the former Iraqi legal system was much more widespread and accepted than would be tolerated in the West. While not officially condoned, bribery was widespread and persons of means could easily buy the outcome of a case that was important to them.[68]

Against this background, Judge Advocates attempting to instill concepts of impartiality and adherence to the rule of law quickly learned that merely talking about such concepts led nowhere. Physical presence by Judge Advocates in the newly reopened and restored courthouses was necessary on almost a daily basis to force adoption of these concepts.

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[65] Interview with CPT Ashe, *supra* note 20; interview with CPT Britt, *supra* note 13.
[66] Interview with Chief Judge Shuadi, in Najaf (June 2, 2003).
[67] Interview with Free Iraqi Forces Attorney Kamal Hassani, in Camp Commando, Kuwait, (Mar. 28, 2003).
[68] Interview with Judge Mohound, in Al Kut, Iraq (June 2003).

> If I wasn't at the court every day or at least every other day, any progress we had made would evaporate. People I had replaced would sneak back in, the judges would sit around and not hear cases, [and] supplies we had obtained for the court would disappear, as someone sold them for personal profit.[69]

By way of example, occasionally judges who were fired from their positions during initial vetting by military governors simply refused to leave the courthouse.[70] Other judges would turn a blind eye while the terminated judge simply relocated his office to a less trafficked corner of the courthouse and continued to occupy office space until a Judge Advocate escorted him from the building.

The Coalition left the overwhelming majority of Iraqi laws in place but used its occupational authority to rescind any law pertaining to support of the Baathist regime and several that failed to protect women from violence.[71] In addition, the coalition implemented several new legal protections for accused persons such as the right to counsel during interrogation and the right to be free from a coerced confession. These concepts, second nature to most persons in the US, were completely foreign to Iraqi judges and required the attentive presence of CA Judge Advocates to train the judges to implement these laws.

> The first time that an accused tried to plead guilty before an investigating magistrate in Al Kut the judge rejected the plea and told him he must return to his cell until he located a lawyer pursuant to the new law. The accused indicated that he did not want a lawyer and that he was guilty and wanted to be sentenced. The judge refused to accept the plea and admonished the accused that he would be in even more trouble if he refused to get a lawyer because the Coalition required every accused to have a lawyer whether he wanted one or not.[72]

At this point in the proceedings the Judge Advocate intervened to explain that the intent of the right to counsel law was to protect the accused, not to use it against him. While the law drafted by CPA at that time stated the right to counsel, it did not explain the right to waive if an accused wished to do so. The Iraqi system is a civil code system based upon the literal application of the written legal code without regard to precedent as in the common law system. Thus, it took significant explanation to the very literal Iraqi judge for him to understand the intent behind the law and to agree to allow the accused go forward without an attorney present.[73] The point of this example is that the application of the pure letter of the law without understanding the intent of the provision could have led to this accused and others similarly situated facing additional incarceration for refusing to get a lawyer to protect their rights. The presence of the Judge Advocate on the premises prevented this from occurring.

The presence of the Judge Advocate in the courthouse also became a clear necessity in order to motivate the slow Iraqi legal system into efficient operation. Bureaucrats in Iraq were universally motivated by the fear of drawing undue or negative attention from Baghdad. Once the regime in Baghdad fell there was a clear lack of motivation on the part of many judges to

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[69] Interview with CPT Dunn, *supra* note 42.
[70] *Id.*
[71] *See* Coalition Provisional Authority General Orders 1 through 8 (2003-2004), available at http://www.iraqcoalition.org/regulations/index.html#Regulations.
[72] Interview with CPT Dunn, *supra* note 42.
[73] *Id.*

hear cases.[74] As jails swelled with accused persons apprehended by the Coalition there was little judicial activity apparent and few cases being heard. Only after Coalition Judge Advocates informed the new judge that his future paycheck depended on assuming and adjudicating a reasonable caseload did the courts begin working again.[75] The Judge Advocate's presence in the courthouse and the perception that the military governor could fire a judge served to get the system working once again.

b) Be prepared to apply your analytical skills to assessing the local legal system.

The value of the Judge Advocate to the command is not only his substantive knowledge of laws and government systems, but also his ability to think critically and provide a succinct evaluation of circumstances to the field commander.

The CA branch in particular works through the concept known as the "assessment."[76] Similarly, in carrying out the rule of law mission the Judge Advocate must provide situational assessment on the ground from a legal perspective and decide what goals he may or may not attain. An incomplete or poor assessment can seriously impact mission success.

The initial legal assessment that the Judge Advocate should perform in beginning the rule of law mission includes at a minimum:

- **the location of the legal institutions within his area of operations, including courts, jails, prisons, and other law enforcement assets**
- **knowledge of the laws and cultural traditions applicable to the AO**
- **knowledge of any informal legal traditions, such as the power of the tribal sheikh in handling crimes that occur within a tribe**
- **the names, location, and contact information for local legal system personnel**
- **ethnic, tribal, racial, or religious bias that may impact the legal system**
- **knowledge of the type of legal system (common law versus civil, for example) and how those differences may impact the administration of law**

From this basic foundation the JA can begin to evaluate the mission parameters and the assets at the command's disposal in order to develop the proposed course of action to establish the rule of law.

c) Avoid imposing foreign values that may prove destabilizing unless militarily necessary.

As the occupying power, the Coalition possessed significant power and influence within Iraq. Despite this great power and influence, however, it was important not to overreach and seek to impose Western values and beliefs upon a society not built upon the same traditions. Civil Affairs officers are trained to be sensitive to local values and beliefs, yet errors still happen under the well intentioned desire to "make things better."

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[74] *Id.*
[75] I MEF Weekly Legal Report (July 31, 2003).
[76] *See* section VI.B.

Such an occasion occurred in Najaf in September 2003 when the military governor proposed to appoint a woman judge to the bench.[77] Despite numerous indications that locals in Najaf did not welcome such a proposition, the CPA and the military governor for that province sought to swear a woman judge onto the bench in the holiest city to Shiite Muslims in September 2003. The attempt was met with boisterous and embarrassing protests outside the swearing-in ceremony and was halted at the last minute due to the threat of violence. This event undercut the authority of the military governor and made the Coalition appear insensitive to local concerns in ultra-conservative Najaf.[78]

While well intentioned and apparently built upon the belief that the Coalition was seeking greater equality for women – a Western value – this ceremony alienated the local population and was potentially destabilizing. To his credit, the military governor realized at the last minute that he was about to open a Pandora's Box in his province. As the risk was much greater than the potential payoff, the battalion commander made the prudent decision to abandon the initiative.

d) You are your own security.

Judge Advocate and CA operators often hear at home station that they will operate in impermissible environments with security support of some type, such as an escort with crew served weapons. OIF should finally put that fairy tale to rest. With the multiple demands on an occupying force, the deployed Judge Advocate carrying out his rule of law mission quickly finds out that he and his supporting legal team act as their own security.

In theater, the ability to conduct the rule of law mission is often dependent upon the Judge Advocate's ability to coordinate travel with other staff sections to meet force protection requirements as to number of vehicles or crew served weapons. There is often mission overlap between CA operators and Judge Advocate personnel and they frequently find themselves operating in close proximity to each other and coordinating convoys.

During OIF, JA and CA personnel were not only in convoys but frequently organizing and leading them. As soon as civilian contractors, medical personnel, and other non-combat arms personnel throughout southern Iraq recognized that Judge Advocates traveled frequently, they sought to link themselves to JA-led convoys to Baghdad or throughout the provinces to accomplish their own respective missions.

In order to conduct these missions, JA personnel had to possess or quickly develop map reading, GPS operation, signals/communication, vehicle maintenance, weapons, and emergency medical skills. Soldier skills, perhaps previously viewed as secondary by some for Judge Advocates prior to OIF, are indeed as critical to the rule of law mission as any legal knowledge. A Judge Advocate who cannot move, shoot, and communicate with a respectable level of soldier skills is a Judge Advocate who cannot successfully carry out his rule of law mission, as he will be unable to carry out the extensive coordination and travel that such a mission requires.

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[77] Saddam Hussein had appointed a handful of women judges during his rule, who served primarily in Baghdad and were responsible for adjudicating inheritance and other family matters that would not put them in direct control over a man and his rights. However, even Saddam's initiative to place women on the bench was not well received by the Iraqis and, hence, was not expanded. Interview with Judge Shuadi, *supra* note 66.

[78] Interview with SPC Rachael Roe, in Najaf, Iraq (Sept. 2003).

e) Be prepared to perform non-JA functions on a regular basis, without losing sight of your primary mission.

Many Judge Advocates deploying in support of OIF-1 found that they did not perform any legal work for months.[79] Judge Advocates were used as money agents to run local financial institutions, conducted security missions including convoy security, coordinated local election activities, stocked hospitals with supplies, obtained clean drinking water for Iraqis, and coordinated with engineers and contractors to fix sewage systems, repaire the refrigeration at a morgue, or lay power lines.

When other staff resources are unavailable to fill these roles, the JA operational lawyer becomes a jack of all trades. The challenge for the Judge Advocate in this situation is to remain a valuable resource to the commander, but not get so sidetracked by collateral general civic support missions that his ability to perform his main MOS is hindered. The Judge Advocate must continuously work to educate his commander as to his best use. The organizational and communication skills that a Judge Advocate brings to the table enable him/her to fulfill many different nontraditional lawyer roles are of great value to a commander.

While responding to demands, it is important to remain a team player within the commander's staff, these other responsibilities can water down the Judge Advocate's ability to function as a legal advisor and operator. In several instances during the summer of 2003 Judge Advocates' assumption of non-legal functions, in addition to the traditional JA tasks many Judge Advocates provide for their units – such as initiating soldier claims for destroyed property, legal assistance, and general military justice advice – meant that no one assumed responsibility for restoring the Iraqi court system, and that task was consequently delayed.

Judge Advocates who tried to do everything in an environment where there was an endless demand for human resources would find themselves working tirelessly, yet accomplishing little because they were pulled in too many directions. While the concept that "The Mission Comes First" is true, in order to remain effective, the challenge to the Judge Advocate is to keep a focus on his actual mission.

f) Judge Advocates will be called upon to conduct or coordinate investigations of corruption and human rights violations in the prior government.

By the end of May 2003, US military officials were flooded with Iraqi complaints and accusations against Iraqi officials, religious leaders, and laypersons on a wide range of criminal activity ranging from embezzlement to extortion to genocide. With the regime of Saddam Hussein destroyed, people became increasingly bold in coming forward with accusations against officials and their neighbors. Some were credible but many were inspired by petty jealousies, the desire for revenge from some prior slight, or the desire to get an official fired in the hope that the accuser might become his replacement. In the absence of a functioning Iraqi court system the Coalition was the only authority in the country to sort through these accusations.

These accusations resulted from 35 years of pent-up frustration within the Iraqi populace and the Coalition did not have the necessary personnel to actively pursue them all. However, the Coalition also did not want to appear unconcerned or disengaged from the prior crimes inflicted

[79] Anne K. Mcmillan, *Lawyers in Arms: War Memories Linger as Former Soldiers Resume Their Legal Lives*, TEXAS LAWYER (Sept. 27, 2004) (interviewing CPT Allen R. Vaught).

by the Hussein regime. It would have been ideal for the Iraqis (not the US military) to adjudicate all the disputes but this was not possible. Therefore, several military governors established grievance committees to accept complaints for further investigation.

The GSTs were often the recipients of such complaints. Iraqis quickly came to know that the GST offices were a place where they could vent frustration over a perceived injustice. In many instances nothing could be done until additional Governmental capacity became available in Baghdad. Subsequently, a commission was established to investigate the illegal seizure of private homes and property by the Baathists over a four decade period. However, when issues arose concerning the misuse of power by local Iraqi officials the existence of an independent investigating body during the first few chaotic months of the occupation again gave an appearance of credibility to the Coalition. These bodies were *ad hoc* creations of the GSTs, staffed by locally selected Iraqi officials operating under the authority of the military governor. They had the power to receive complaints and recommend action, but could not take corrective action without Coalition approval.[80]

The CPA reestablished the lower level Iraqi magistrate courts over the summer of 2003 and the long term need for such a separate investigative body quickly diminished. In the future, higher level courts and tribunals would investigate higher crimes and crimes against humanity. However, in the first weeks of the occupation such *ad hoc* committees freed up US military resources from a parade of local issues, gave the Iraqis a forum for expressing their complaints, and gave the local provinces a semblance of control over their own local affairs that had been absent under the Baathists.

g) Even as part of an occupying force the Judge Advocate must negotiate local cooperation.

One of the great successes of Judge Advocates in OIF-1 was recognizing that they did not have the necessary local cultural, political, and legal knowledge of the Iraqi judicial system to simply create a legal system from scratch and impose it upon the ancient Iraqi society. Knowing one's limitations is an essential element of JA operations – this can avoid serious impediments to reestablishing order. Judge Advocates in OIF-1 recognized that, for the new legal system to have legitimacy in the eyes of a populace recently abused by the Baathists, its roots would have to come from the Iraqis themselves. Due to lack of communications capability with Baghdad and the absence of CPA guidance during the April-August 2003 timeframe, military governors in the seven provinces of southern Iraq, utilizing their CA Judge Advocates, developed their own mechanisms to determine[81] who would remain on the bench.

Each provincial military governor used a different model but each had a common theme. In each instance it was the Iraqis from the concerned province who proposed the persons to remain on the bench or assume judgeship for the first time.

Each province had distinct political, tribal, and cultural issues that affected whether the provincial governors, provincial mayors, and chief judges had credibility in the eyes of the local populace. Local Iraqi officials in each province established a nominating and vetting committee with the consent of the Coalition military governor. Civil Affairs personnel formally and informally interviewed members of the provincial legal union, tribal leaders, sitting judges, and

[80] Legal Assessment of Southern Iraq, *supra* note 21.
[81] Interview with CPT Britt, *supra* note 13.

laypersons of note within the community to select members of the committee. Using information from these interviews and information derived from returning Iraqi expatriates[82] military governors made informed choices to determine who to trust to recommend people to serve as judges in the provincial courts.[83]

In order to maintain control over the process, the Coalition ensured that an Army or Marine Judge Advocate was an active member of the judicial selection committees. The coalition also made clear that, although it would give great weight to the committees proposed candidates, the military governor remained the ultimate arbiter on all judicial selection.[84] As a result, there were no candidates proposed that were intolerable to the Coalition. Addressing the concerns of the widely diverging parties seeking input into judicial selections required deft negotiating skills and sensitivity to local concerns and prejudices.

The Iraqi populace viewed the US military administration in the southern provinces as credible because it gave the Iraqis a voice in determining their judges. The Iraqis existed under a rigid socialist system for thirty-five years during which Baghdad dictated every significant action.[85] The fact that the Coalition provided the provinces with a voice in their own judicial leadership helped establish that the Coalition intent was to liberate Iraq from oppression, not to merely replace one oppressor with another. Iraqi judges, provincial governors, legal union leaders, and local tribal leaders throughout the southern portion of Iraq were amazed and expressed gratitude to the Coalition for respecting the Iraqis enough to give them a voice in their own governance.[86]

The early decision to permit the Iraqis a role in selecting their own future leaders helped guide future interactions with the provincial leaders. In contrast to criticism in the international press about US aggression and accusations about US intent to control Middle Eastern oil fields, the Iraqis living under the military governors in southern Iraq experienced a victorious US military that sought to provide them with authority, support, and respect. This led to a spirit of cooperation between provincial officials and the US forces. Had the US forces sought to unilaterally select Iraqi judges and ignore Iraqi wishes under a mantle of occupational authority, a much more adversarial tone might well have evolved in US administration efforts.

h) The Judge Advocate will negotiate and mediate international agreements.

A Judge Advocate operating in a mature theater or in CONUS must be extremely careful not to create agreements with foreign governments without high level coordination. The Judge Advocate operating in the atmosphere of a post-hostility occupied theater may find himself entering into such agreements on a regular basis. It is important that the Judge Advocate coordinate such agreements with proper command levels. Unlike in a mature theater, however,

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[82] Several members of the Free Iraqi Forces that accompanied Coalition troops into Iraq were former practicing attorneys who had local ties and knowledge as to who was pro-Baathist, corrupt, or had other undesirable character flaws inappropriate for a sitting judge.

[83] Legal Assessment of Southern Iraq, *supra* note 21.

[84] I MEF Weekly Legal Report of MAJ Craig Bennett, Al Hillah GST (June 4, 2004).

[85] Interview with Judge Mohound, *supra* note 68.

[86] Interviews with Governor of Babil Province (July 2003), Magistrate Judge Ali, in An Nasariyah (Apr. 8, 2003), Chief Judge Shuadi, *supra* note 66, and Interview with Najaf Legal Union Chairman (June 2003).

mission success may often depend upon a certain level of initiative and "leaning forward in the foxhole."

During OIF-1 one of the JA success stories involved a Judge Advocate coordinating a judicial conference between the Iraqi judiciary and their Kuwaiti counterparts. As a result of the Iraqi occupation of Kuwait, the level of trust between those two nations was virtually nonexistent at the time of OIF. A number of Army Judge Advocates encouraged the Kuwaiti government to coordinate a judicial conference in Kuwait City during the spring of 2004 to open lines of communication between the Iraqi MoJ and the Kuwaiti Ministry of Justice. Judge Advocates negotiated the conditions of this conference to include a visit with both the Kuwaiti government and the fledgling Iraqi government and led to reestablishing communications between the two nations.

Judge Advocate personnel were part of the staff of the HOC in Kuwait City, whose purpose was to coordinate international relief support to Iraqi civilians. In this role Judge Advocates worked closely with government and nongovernment international organizations to negotiate and coordinate the shipment of relief supplies to Iraq.

Other missions in which Judge Advocates served as active negotiating participants included moving relief supplies to Iraq from Jordan and quelling a border crossing point dispute between United Nations' relief convoys and the Kuwaiti government. Judge Advocate involvement in this cross border dispute likely quelled a formal protest at the United Nations in New York.

i) While displaying respect, do not be deferential to foreign judicial officials in an occupied territory.

In both OIF and OEF, Judge Advocates found themselves working to reestablish or restore a judicial system whose credibility was damaged under the prior regime. In conducting such a rule of law mission, the Judge Advocate walks a narrow tightrope between showing appropriate respect to local judicial officials' desires and providing them direction consistent with Coalition commander's goals.

A lesson quickly learned by Judge Advocates in Iraq was that one should not be overly deferential to Iraqi judges. It was very important for restoration of the Iraqi legal system during the first year that the US Judge Advocates establish they were in charge and that the Iraqis worked for them. Iraq under Saddam Hussein was a strict, hierarchal system under which judges were used to being told what to do and when to do it. Provincial judges had little latitude making decisions and, accordingly, it was very foreign to them to be asked to develop plans or to provide input on how to reconstruct the Iraqi legal system. In the initial weeks of the occupation of Iraq in April and May 2003 it became clear that providing the Iraqi judges with too much discretion and latitude in restoring courthouse operations led to them doing nothing at all.[87]

> Over a period of several weeks we visited the same Iraqi courthouses in Al Kut, Ad Diwaniyah, and Najaf several times, where we requested information on the necessary supplies and support needed to run the courts. Each time we found the judges sitting together in a lounge drinking Pepsi and smoking cigarettes and doing nothing toward restoring courthouse operations. They were never able or willing to provide the requested

[87] Interviews with CPT Britt, *supra* note 13, CPT Ashe, *supra* note 20, and CPT Dunn, *supra* note 42.

information. Only after they were told that they would be fired by the military governor if they did not begin cooperating did they respond with meaningful information.[88]

Thus, dealing with Iraqi judges often required balancing a firm and demanding approach with permitting the official to save face when possible, especially in the eyes of courthouse personnel and other local officials with whom the judge had to continue to work.

j) Judge Advocate personnel should avoid appearing as attorneys in foreign tribunals over which they exercise authority.

Another issue impacting Coalition relations with the Iraqi judiciary was the occasional appearance of JA officers in Iraqi courts to present cases against persons who had allegedly committed crimes against or in the presence of Coalition personnel. This occurred early in 2003 due to the absence of qualified or committed Iraqi prosecutors. In order to help alleviate the overcrowding present in provincial jails as well as to preserve the integrity of the cases presented, some Judge Advocates played an active role in presenting evidence in Iraqi courts.[89]

Judge Advocates operating in this fashion need to be cognizant of two important issues: First, that, by appearing before an Iraqi judge as a litigating attorney, there is the appearance that the Judge Advocate is placing himself subject to Iraqi legal procedures and the authority of the court itself. As an occupying authority, the Coalition was not subject to Iraqi law, yet one could view the appearance as a practicing attorney before the Iraqi court as contrary to that position. Second, that if the Iraqi judge unduly defers to the authority of the Judge Advocate during the legal proceeding as the representative of the occupying power, the impartiality of the judge is undermined and an appearance may arise in the serviced community that the Iraqi judge is merely a puppet for imposing the will of the Americans. One cannot be both the supervisory authority for a court in the role of the legal advisor for the occupying commander and a subordinate authority to that same court by appearing as an attorney in a contested proceeding.

While this policy was apparently employed without long term adverse consequences, and assisted in the reduction of case backlogs and jail overcrowding, the above legal issues must be carefully considered and weighed against possible alternatives before a Judge Advocate places himself as a litigating attorney before the national courts of an occupied country.

[88] Interview with COL O'Hare, *supra* note 14.
[89] Interview with MAJ Bernard Bercik, JA, in Karbala, Iraq (Aug. 2003).

B. *Rule of Law Operations in North Central Iraq During OIF-2**

During OIF-2, First Infantry Division (1 ID) conducted a detailed assessment of the Iraqi courts in the 1 ID area of responsibility (AOR).[1] The effort is most accurately described as a *re*-assessment, because it followed and built upon the Fourth Infantry Division's (4 ID) initial work in the same AOR during OIF-1. The idea was to clearly identify the most immediate and persistent obstacles to restoring rule of law and improving judicial output. We wanted to know what we – the Coalition – could do to help each court overcome its particular problems. The objective was to help the courts become more efficient and effective, while at the same time building public confidence in the judiciary.

Once sovereignty was returned to the Iraqis at the end of June 2004, local Iraqi courts were expected to play a larger role in the battle against the insurgency. It was evident that Iraq would be neither stable nor secure until its courts were consistently capable of impartially and effectively enforcing the law as part of a larger security strategy. Cultivating and nurturing a trustworthy and resolute court system was an implied if not explicit end-state in the mandated shift from full-spectrum combat operations to stability operations. Obviously, before a commander could rely upon the Iraqi courts to serve as an effective part of a counter-insurgency plan, he needed to know something about each court and its capacity to function effectively and to fairly consider each case. The commander needed to know what the Coalition could do to help fix an ineffective or corrupt court and he needed to actually begin making those changes before he could confidently transition authority to Iraqi security forces and shift responsibility for governance back to local control. The court assessment mission was intended to help commanders to optimize the use of the Iraqi legal system.

1. Court Assessment Project

We divided the court assessment mission into three parts: (1) conduct an initial assessment of each courthouse,[2] (2) initiate projects to address deficiencies identified during the

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* COL Bruce Pagel, JA, USAR, served as the First Infantry Division's rule of law officer during OIF-2 from May 2004 to February 2005.

[1] During the same period, we also conducted a second mission, closely related to the first. This mission involved developing a process for smoothly transferring detainees from US control to local Iraqi custody for purposes of further investigation and possible prosecution. This included helping establish improved procedures for developing and transferring evidence to Iraqi courts in a manner and form that would improve the chances for successful prosecution.. Although not strictly a rule of law mission, the detainee transfer mission had major implications for the rule of law mission, since it not only helped re-establish the Iraqi courts system (specifically the Central Criminal Court of Iraq (CCCI), but also required 1 ID to consider the effect of complying with the rule of law in the conduct of its own mission. For instance, using the Iraqi court system in order to obtain warrants to search potential insurgents' homes raised a multitude of issues, including how to deal with an Iraqi judge's refusal to issue a warrant and potential OPSEC concerns (among them the Iraqi practice of providing advance warning of a search). Unfortunately, fire and maneuver continued to dominate operational thinking, much to the detriment of the rule of law mission.

[2] We completed the assessment for approximately 2/3 of the courthouses in our AOR before the end of our tour. We were not able to assess the courts in Tamin (Kirkuk) Province.

initial assessment; and (3) monitor the status and condition of each courthouse on a continuing basis.

a) Conducting the Initial Court Assessment and Identifying Specific Needs

(1) Collecting Initial Information

First, prior to conducting site visits, we collected as much information as was available about each courthouse. We looked to a variety of sources, including the 4 IDs previous assessment, CA evaluations, and other staff reports.

(2) Visiting the Courthouses

The second and most important step involved conducting site visits to each courthouse. Each visit consisted of an inspection or survey of the courthouse itself, interviews with each available judge and, when circumstances permitted, interviews with senior police leaders and local lawyers. We conducted the interviews using a standardized checklist which we continued to modify as we learned more about the Iraqi legal system, and a separate list of biographical questions for each individual judge. Among other things, we asked the local police leadership to assess the status of each courthouse and asked courthouse personnel to assess police performance. Where possible, we also visited the nearest detention facility, assessing conditions inside the facility and evaluating its relationship with the local court. We captured the collected data in both spread sheet and narrative form and prepared a power-point version to more easily include relevant photographs. Attached are the documents we used to create the data base. See **Attachments 1-6.**

The courthouse visits were both challenging and exceptionally productive. There was no better way to obtain the information we needed than to meet and spend time with local judges. We became familiar with conditions at each courthouse and observed how each court dealt with its cases. A Judge Advocate from each Brigade Operational Law Team (BOLT) took responsibility for planning the courthouse visits in each brigade AOR. The BOLT Judge Advocate arranged for whoever in the brigade was most familiar with the local court to accompany the assessment team in order to make introductions and provide both strategic and tactical context for that particular courthouse. Having someone familiar to the judges introduce us proved very useful and helped us gain influence and credibility with the judges at each courthouse. Since the 1 ID OSJA had no organic translators, the BOLT Judge Advocate also arranged for translators to accompany us to each courthouse. For the most part, the brigade and battalion level staffs supported the mission and responded to our life support requests. This was due, in part, to a division FRAGO that made the court assessment mission a priority and directed all subordinate units to assist our courthouse visits. The FRAGO proved to be most helpful. Without it, support in the field would have been far less generous.

We quickly became aware of several practical constraints in conducting courthouse visits. First, we did not always have enough time to complete all the tasks on the checklist. In some cases, the threat level was such that remaining at one location for more than a couple of hours was not safe. On other occasions, our escort team was diverted to higher priority missions, causing the courthouse visit to be cancelled, delayed or cut short. Depending on the number of individuals to be interviewed, the courthouse visit, including the walk-around survey, usually took between 3 and 4 hours per courthouse once the team arrived at the site. That did not include

the detention facility visit or meeting with the Iraqi police or Facility Protection Service (FPS)[3] personnel. As a consequence, at least in our AOR, it was difficult to visit more then one courthouse per day even when the courthouses were located relatively close to one another.

The second constraint had to do with translators. Because they were recruited by the individual BOLTs, the quality was uneven and we could not predict from mission to mission how the assigned translator might perform. Some were outstanding, while others were either too impatient for the long interviews or simply incapable of delivering high quality, technically accurate translations. When possible, we briefed the translators in advance on the technical nature of the interview and allowed them to review relevant documents, including the checklists, before the interview. That often helped the translator relax and sometimes improved the quality of the translation.

The third major constraint concerned the interview methodology. The integrity of the data was inevitably dependent upon the candor and truthfulness of those interviewed. Judges in several courthouses were clearly pandering, telling us what they believed we wanted to hear. While some judges were evidently motivated by the possibility of obtaining additional resources, adding to their prestige and improving their efficiency, others quickly fell back on pre-war habits, simply deferring to authority no matter who it was. Although we attempted to validate the data by cross-checking the information between sources, we could not entirely dismiss the possibility of translation errors and the potential for judges and others to exaggerate or lie during the interview. As a result, we remained open to re-evaluating our conclusions in face of new or conflicting information.

There were other problems worth noting. For a variety of reasons, the initial interviews did not always produce all the necessary information. For example, in several courthouses not all the judges were available for interviews during the initial site visit. As a result, we asked the unit that was most familiar with the particular courthouse to conduct a follow-up visit and obtain the missing information they were asked to send the missing information to the BOLT Judge Advocate who, in turn, sent it to the division. This process proved to be both ineffective and unreliable. The response to these requests was often very poor and when the information was provided, it was often garbled or incomplete. We needed a more reliable process for submitting and tracking request for information (RFIs).

Another problem involved the Iraqi police chief, or other Iraqi police officers, sitting in during the judicial interviews. This discouraged the judges from providing a candid evaluation of the Iraqi police. In several courts, the judges allowed too many people, Iraqi police and others, to participate in the interview process, slowing down the interview and undermining the professional environment we had hoped to create.

If a dedicated Iraqi lawyer/translator had been permanently assigned to each assessment team and available to assist with the initial assessment and subsequent monitoring it would have been an enormous advantage and would have overcome a myriad of problems, including the problems resulting from not having a high quality translator available for each courthouse visit. If available, an Iraqi lawyer could serve as a continuing source of institutional knowledge as units change-over, as well as provide local legal expertise on Iraqi law and procedure. It was all

[3] The Facility Protection Service is the national-level organization tasked with guarding the courthouses (and other government buildings).

the better if the Iraqi lawyer was known to the local judges and was well-respected within the local legal community. This would most certainly provide the assessment team with additional credibility and increase its influence with the courts and lawyers.[4]

(3) Identifying Needs

Our main objective during the initial courthouse assessment was to determine what additional resources or support each court needed to become more effective and orderly. There were certain basic things every courthouse required. There were several courthouses that had additional, more individualized needs as well. The most critical included: (1) new courthouses (in several districts); (2) the substantial renovation of others (many courthouses still suffered from inadequate power, water and sanitary service); (3) improved communications (many courthouses had no means of communicating other than by messengers); (4) official vehicles; (5) office automation (most courthouses lacked computers, copiers, etc.); and (6) improved courthouse and judicial security. This, of course, set the stage for the second part of the assessment – helping the Iraqis initiate rule of law projects and identify resources that would meet the identified needs of each courthouse.

Property ownership issues often complicated new construction and renovation projects. Neither the Coalition nor the Iraqis were interested in investing resources in property not owned by the Council of Judges (CoJ) or the Ministry of Justice (MoJ), which was the case with more than several courthouses in our AOR. Not unexpectedly, it was often the courthouses not owned by the CoJ or MoJ that needed the most work. This meant that, since the US would not buy land for the Iraqi government, and the CoJ was terribly slow to act, the neediest courthouses were the last to receive help.

Moreover, it quickly became obvious that the Iraqi courts stood little chance of being effective if neither the judges nor the public felt secure. Acting on that premise, the 1 ID made court and judicial security the highest priority in our project planning. Communication and infrastructure were the next highest priorities. Obviously, the communication and infrastructure projects overlapped with our efforts to improve security. The ability to reliably communicate with emergency and military authorities, along with improved barrier security and making the points of entry more secure, all contributed to making the courts safer.

In addition, the assessment team consistently found that the FPS was slow to deploy to our AOR. When FPS personnel were present they were often unarmed, unpaid and untrained, and rarely had uniforms or identification. In addition, only a smattering of judges were provided with Personnel Security Details (PSDs) who, when available, were often unarmed and untrained, and deployed in insufficient numbers. As a result, with good reason, we agreed when asked to provide many judges with side-arms for personal protection. This became a source of tension, however, as we learned that the CoJ did not approve of judges carrying weapons. Nonetheless, without adequate PSD and FPS protection, most judges understandably elected to ignore

[4] As an aside, having an Iraqi lawyer available would also assist the division in areas other than the court assessment mission. Many units – units serving in Iraq at different places and at different times -- have reported that having a capable Iraqi lawyer/translator available on a regular basis was or would have been very helpful.

Baghdad, opting instead to carry the weapons we provided.[5] Pay was also an issue with the PSDs.[6]

(4) "Measures of Effectiveness"

One of the more important objectives of the initial assessment was to identify both explicit and implicit court- and justice sector-related measures of effectiveness (MOEs). The MOE that emerged from our data fell into four broad categories – Security, Rule of Law[7], Infrastructure and "Crimes Against Coalition Capable Courts". The 4 ID, in its initial assessment of the same courthouses during OIF-1, focused on "Pay", "Judges", "Facilities" and "Equipment" as their MOE. They, of course, faced a legal system that was completely shut down in the aftermath of the war. The 4 ID had to concentrate its efforts on getting the courthouses open and minimally functional. Thanks to the 4 ID, the 1 ID found most, if not all, the courts to be operating, although at varying levels of effectiveness. As a result, our goal was to help the Iraqis take the next steps toward recovery and modernization, and in fulfillment of that goal, we tried to move from physical and institutional metrics to effects-based metrics requiring more qualitative evaluation, although we certainly did not entirely abandon institutional metrics. The 1 ID MOE reflected our effort to further improve the *functionality* of each courthouse.

The 1 ID attempted to develop both objective and subjective criteria for each MOE category. Using these criteria, we made judgments for each of the four MOE categories for each courthouse that we visited. See **Attachment 7.** Although our analytical scheme was reasonably objective, we could have improved this approach by developing an even more rigorous and uniform process for making these qualitative MOE judgments.

b) Initiating Projects and Meeting the Identified Needs at Each Courthouse

We broke the projects down into brigade- and division-level projects. For example, we recommended that the brigade focus on: (1) providing at least one vehicle to each courthouse to accommodate official travel; (2) providing weapons to judges and prosecutors (and helping the Iraqis obtain the necessary weapons permit once it was established who would have authority to re-issue permits at the national level); (3) providing an appropriate number of cellular telephones to each courthouse; (4) providing miscellaneous office supplies and equipment (as recommended

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[5] We also attempted to provide weapons training along with the weapons. Many judges, however, believed the training to be unnecessary in view of their military and other experiences with firearms. In a country awash in weapons, this was not surprising. Nonetheless, judges in one brigade AOR did receive weapons training. We should have made training mandatory for all judges receiving US-sponsored weapons.

[6] We made known to the Embassy at every opportunity that neither the FPS nor the PSD teams were completely or effectively deploying to our AOR. This continued to be a problem throughout our tour.

[7] Among the criteria used to assess the "Rule of Law" category was the extent to which each court was subject to "External Influence". This was broken down into: AIF intimidation; excessive tribal interference; undue religious influence; criminal corruption; political intervention and any other threats against judges or staff. We also took into consideration the following: whether defendants were seeing a judge within 24 hours; whether defendants were being advised of their right to remain silent and right to counsel; whether the police were still arresting victims or witnesses without warrants, or arresting family members in order to compel fugitives to surrender; whether females and juveniles were being held in segregated facilities; whether the police were providing food to inmates; and whether cases were being disposed of within 6 months.

by the assessment and not covered by the division's office automation project); and (5) providing upgraded barrier protection around each courthouse (although this became intertwined in a division level program that involved a separate security-specific assessment of each courthouse that we hoped would result in a FPS/ MNSTCI funded security project at each courthouse).

The division, on the other hand, took responsibility for cajoling the CoJ and CPA/ Embassy into expediting the manning, training and equipping of FPS personnel and PSDs. The division also coordinated courthouse renovation/reconstruction planning and developed a plan to install an office automation/ Information Technology (IT) system at each courthouse (starting with Salah ad Din and Diyala Provinces). An Information Paper explained this division of labor. See **Attachment 8.**

With respect to the later project, we discovered that most, if not all, court-related documents were handwritten. Moreover, the documents were almost always communicated or delivered by messenger, including those documents going to the higher courts and administrative offices in Baghdad and the provincial capitals (mostly using personal vehicles or taxi cabs, often incurring un-reimbursed expenses). As a result, we believed that having upgraded office automation capacity available, particularly the network and internet features, would provide the courts with the ability to scan and electronically communicate messages and documents, improving courthouse efficiency in significant measure. We expected the same improved efficiency with respect to docket management, statistical compilation, record keeping and budgeting responsibilities. Using a USAID contractor, we planned to provide much needed computers, scanners, printers, generators and internet access, along with continuing on-site training and long-term technical support to each set of judges and courthouse staff. The USAID grants used to fund the IT projects together totaled more then $1,000,000 in hardware, software, training and other related services.

Initiating the project was often the most difficult step in the court assessment process was, in some ways. It was certainly the most frustrating. Prior to transferring sovereignty to the Iraqis, when the Commander's Emergency Response Program (CERP) was both robust and in full stride, construction projects were initiated at the division level, which was relatively easy. However, after transfer of sovereignty, we ceded control of much of the previously available money (Development Fund Iraq) back to the Iraqis. While there were still US funds available for reconstruction projects in Iraq, our inability to easily access those funds, mainly the Iraq Reconstruction Relief Funds (IRRF) /Project Contracting Office (PCO) funds, proved to be a significant obstacle to efficiently initiating and managing projects in the justice sector.

In particular, the division was advised that PCO Justice Sector funds, as allocated according to the PCO project list, would be available to be used to renovate courthouses in the 1ID AOR. While this was encouraging, the courthouses named on the original PCO list were not the courthouses most in need of repair or renovation, and in some cases the military had already completed some of the work. The PCO list also included references to cities or villages that did not appear to exist and allocated excessive amounts of money to rebuild courthouses in villages where the allocated funds would have been sufficient to rebuild the entire village. The OSJA had some influence over the projects, but the policies, approval authority and other PCO- imposed constraints for spending this money remained unclear. Gaining access to this funding was neither

easy nor quick.[8] If, in consultation with our local Iraqi counter-parts, the division had been given the authority to reprogram PCO money and use it where it was most needed, then we could have completed these projects far more expeditiously and in a manner that made sense to the Iraqis and others working directly with the Iraqi courts than was possible with a centralized planning scheme that was necessarily insensitive to local needs and opportunities. However, the PCO in Baghdad insisted on maintaining direct control over the projects, causing frustrating delays and making courthouse construction projects much more difficult to launch.

The centralized planning process also created problems with regard to the baseline functional requirements of each courthouse. Through the assessment process, our team determined that to be minimally effective, every courthouse should have certain features – a functional courtroom, a detention cell/room, a privacy room at the gate for female searches, an FPS office/barracks, and a single well-protected point of entry. See **Attachment 9.** Nevertheless, it was difficult to persuade the PCO, which was responsible for the full range of government reconstructive efforts, to include these features and approve courthouse-specific statements of work. Because of their generalist approach, some at the PCO were intent on treating courthouses as just another building. This discussion also caused delay.

We became aware of multiple sources for funding rule of law projects, but identifying and accessing available funding sources were not the only problems in dealing with these various projects. Traversing the complex contracting and fiscal landscape, to include dealing with sole source restrictions and other US fiscal law constraints, also proved challenging and caused additional delay. In retrospect, we should have been better prepared to deal with these issues and made better use of the contracting expertise that was already available within the OSJA.

From the 1 ID point of view, some of these projects were "fire and forget," requiring little oversight or advance work on our part. The funding sources delivered the "product" directly to the Iraqis, using mostly Iraqi vendors and contractors. However, we planned to monitor all projects, including the "fire and forget" projects, to ensure that the courthouses received the hoped-for benefits. Other projects required more direct, day to day management. In those cases, identifying and contracting a reliable contractor – Iraqi or otherwise – was the first step and often the most difficult. It was made more so by the ever changing security situation and the targeting of Iraqis who worked with the Coalition. The CA community, the Corps of Engineers and the division contracting office were the best sources of assistance in dealing with contractors.

Security concerns were another major obstacle to completing courthouse projects. Even when funding was available and the project was approved, there were the inevitable delays due to security concerns and the additional planning that was required.

Other project related issues included: (1) monitoring quality control; (2) mitigating corruption and theft; and (3) arranging for the donated property to be protected by some type of maintenance plan and supporting budget. Most of the Coalition-led renovation and construction projects were beset with theft and poor workmanship. Our ability to recognize and correct design and construction deficiencies was limited. Although efforts were being made to improve our capabilities in that regard, to include adding engineers to the oversight effort, it remained a

[8] Even the amount of money available was unclear. In June, 2004, the PCO list reflected in excess of $21 million dollars to be dedicated to courts in North-Central Iraq (1 IDs AOR). At different times, that amount went from $21 million dollars to $1.4 million, to $750,000, to $550,000, then back up to $1.1 million dollars. The dissipation was attributed to PCO "overhead".

struggle and offered the stark choice of either doing nothing or accepting less than high quality work. We believed that something was better than nothing and sometimes went forward with projects under less then ideal circumstances. Moreover, it was almost inevitable that unless adequate precautions were taken (and even that was no guarantee), equipment and supplies would quickly disappear, often taken either by guards or the courthouse staff to whom the property was entrusted. We were particularly concerned as to what might happen to the computer equipment, knowing there was a growing black market for stolen property.

In addition, as noted above, the Iraqis often failed to plan or budget for extended operational and maintenance costs (O&M). This significantly reduced the durability and usefulness of US-donated property and all too often required premature replacement, or expensive repair. We solved this, when possible, by including an O&M feature in each project. The idea was for the US to fund O&M for at least a year, allowing the Iraqis an extended opportunity to use the equipment or technology with minimal interruption. They would hopefully become dependant and skilled enough with the technology that they would become both confident and compelled to continue to use and maintain it. With funding set aside, and the technicians already identified, there would be no excuse for not properly maintaining the equipment. It was in this context – poor stewardship - that we took past experience was taken into account when determining future division priorities. If equipment provided previously had not been well used, we were less likely to make a project in that courthouse a priority.

Another important issue, and sometime war-stopping problem, was the need to coordinate with the Iraqi judicial leadership in regards to each court-related project. This was critical in order to ensure that: (1) they agreed that the particular project was needed and among their priorities; (2) that they were prepared to support the construction, training and maintenance elements of each project; and (3) they had not already planned and budgeted an identical project on their own, thus avoiding conflict or redundancy. Coordination with Iraqi judges was always made more complicated and slowed by their habitual need to submit every decision – no matter how inconsequential - to their leadership in Baghdad, where action was often ponderous and sadly un-informed. Having a responsive liaison in Baghdad would have helped us improve coordination between local judges and authorities in Baghdad.

Clearly, the need to initiate and manage court-related projects will continue until the already identified needs are met, as well as any additional needs that might be identified in the future. At the same time, everyone agreed that the Iraqis needed to be made full partners in this modernization effort and to take more responsibility for improving their own courts. Most of the Iraqis we worked with did not disagree. Many had an appetite for restoring Iraqi courts to the proud status they once enjoyed as the most modern and admired legal system in the region. However, in this confused post-conflict environment, the local Iraqis simply lacked the authority to initiate action and had no access to the necessary resources.

c) The Courthouse Monitoring Mission

There was a continuing need to stay engaged with the local courts beyond the initial assessment. First, we wanted to know whether we implemented our projects and recommendations effectively. Second, we wanted to know whether any courthouses were backsliding and giving-in to extra-legal external influences or slipping back into bad habits. Lastly, we wanted to be in position to assess what more might be done to assist the Iraqis in taking the next steps toward further modernization.

It was obvious that without continued monitoring the initial assessment would soon be outdated and not helpful to anyone. We believed that careful and disciplined monitoring would help determine whether the Iraqis were being good stewards of the donated resources, as well as whether the new equipment and/or procedures were actually being used and found useful. A well-crafted monitoring program would also provide continuing security updates at each courthouse and help commanders stay current as to the likely and evolving threats in the justice sector. Most importantly, by closely monitoring each courthouse, commanders would be better able to evaluate whether the courthouses in their AORs were capable of fairly and efficiently handling cases in which the coalition has an interest. A very important question as more responsibility for security is transferred to the Iraqis.

At the end of our tour, we drafted a FRAGO that tasked the BCTs with a "monitoring" mission as described above. It required regular courthouse visits by the unit most engaged with that particular court. We provided the BCTs with a standardized checklist of tasks, including questions for the chief judge and other courthouse personnel. After collecting the information, the FRAGO required the unit to pass it to the brigade Judge Advocate, who would capture the data for the brigade data base and then pass the same to division for updating the division data base. We used this data base, in part, to update the court assessment graphics. We also recommended passing the data to Corps or higher for use at the most senior decision-making level. Since the collectors would most likely not be lawyers, the checklist needed to be simple, clear and direct. See **Attachment 10.**

We believed that division level personnel should also participate in the ongoing monitoring of each courthouse. Regular visits to each courthouse would help maintain and establish essential relationships within the Iraqi legal community – relationships that would undoubtedly prove valuable across the full spectrum of rule of law operations.

In addition, patterning their assessment process after ours, the Military Police (MPs), along with the International Police Advisors (IPA)[9], began collecting detailed information concerning the Iraqi police stations. As part of their date collection efforts, we asked the IPA to collect data concerning the number of defendants being taken to court within 24 hours, complaints of judicial corruption, and incidents involving improper arrests. They forwarded this information to us and we folded it into our assessment.

2. *Additional Courthouse Assessment Observations:*

Not all of these observations be relevant to each deployment. Conditions will vary based upon your location and when you deploy in relation to the beginning of the operation. During the later phases of an operation, as the work done by your predecessors matures, the legal issues will

[9] The IPA's mission is to mentor, monitor and, to some extent, train the Iraqi police. The IPA is made up of experienced US police officers, federal agents and deputy sheriffs. They had deployed to most of the Forward Operating Bases (FOBs) in 1 IDs AOR and have embedded themselves with the Iraqi police and the US units that support the police. The IPA mission includes regularly reporting on the status of the Iraqi police units that they monitor. The IPA has agreed to include in their monitoring checklists questions concerning judicial performance and judicial corruption. These would be judgments from the Iraqi police perspective. The court assessment and IPA missions clearly overlap, sharing many common concerns or issues in regards to the Iraqi criminal justice system. Although we made a good start in coordinating with the IPA, much more could have been accomplished with a more dedicated effort on our part. *See* **Attachment 11**.

be different compared to the beginning of the operation, when lawyers were compelled to deal with a completely collapsed legal system.

(a) *Rule of Law Officer.* At the division level, this type of work – rule of law development and judicial reconstruction planning (court assessments) - is best accomplished by a senior Judge Advocate (05 or above). This Officer's primary, if not exclusive responsibility, should be to become an expert on local courts, Iraqi law and Iraqi legal practice. He or she should become familiar with all the leaders in the local legal community, including judges and police officers, and serve as the commander's liaison to the local Iraqi courts. The senior Judge Advocate's key task is to track strategic legal issues for the command, to include managing the court assessment program. The more senior the officer, the easier it is to establish credibility with Iraqi judges and other senior Iraqi leaders. It also helps gain access to important US and Coalition leaders. Being more senior also provides better access to transportation and force protection resources, ensuring much needed mobility, and gives greater command emphasis to the mission. Most importantly, brigade commanders will likely spend more time with and take more seriously a more senior officer as compared to a young JA CPT, however capable he or she may be.

(b) *Division-Brigade Relationship.* The BOLT Judge Advocates need to be assured that the Judge Advocate assigned to the division-level court assessment mission is not a threat to the brigade Judge Advocate's relationship with the brigade commander and that a division-led mission is not the result of a failure on the brigade's part.

(c) *Rule of Law Working Group.* A more formal coordinating arrangement with other military staff elements and the IPA would have aided our effort. We recommended that the division establish a working group consisting of representatives from the Provost Marshall, Staff Judge Advocate, G-3, Engineers, G-5, IPA and G-2. The concept, while considered worthwhile, was never acted upon. Instead, the division relied upon a set of *ad hoc*, informal relationships, making it more difficult to formulate a cohesive strategy and limited our ability to coordinate and share information.

(d) *Utilizing Local Courts.* Positioning commanders to use local courts more effectively was an explicit task in MNF-I's post-sovereignty strategy. It had been suggested that the division identify a "go to" judge - a trusted, capable, fully vetted investigative judge – that would be available on little or no notice to consider arrest and search warrants connected to US-Iraqi operations. We discussed whether it would be possible to assign a particular Iraqi investigative judge to work out of and with a Joint Coordination Center. We recognized that this arrangement would pose jurisdictional, security and other problems, but the first step was to obtain approval for the idea from senior judicial personnel in Baghdad. We asked the Embassy to help resolve this issue, but never received a reply. This is another example how useful it would have been to have available a reliable, well-informed liaison in Baghdad. The division was not able to successfully act upon this proposal on its own.

(e) *Courthouse Statistics.* The division asked each court to produce certain statistics (e.g. number of new cases, cases closed and felony cases sent to the felony court between 1 January and 1 July). These statistics were to be delivered to the brigade and then to the division for review. Unfortunately, the data was slow in arriving, often not complete, and did not fully comply with what we had requested. In addition, we failed to fully optimize the statistics that did arrive or aggressively pursue the missing data. This was a missed opportunity. There is no doubt we should have taken more care in compiling and reviewing court-related statistics. Among other

things, we should have constructed a reliable statistical baseline for use in evaluating future caseloads and assessing courthouse activity over time.

(f) *Threat Assessment.* Courthouse evaluations would have been even more meaningful had we been able to fold-in a concise threat assessment (unclassified) in regards to the area around each courthouse. This would have provided a more complete picture of what each courthouse was up against in terms of external influence and overt threats of violence.

(g) *Courts and Cops.* The 1 ID saw its mission transitioning from an occupation force with the direct responsibility for dealing with the insurgency to conducting security and stability operations in what had become a sovereign nation. Explicit in this new mission was the need to establish an effective Iraqi security force and shift more responsibility to the Iraqi authorities. However, not fully recognized in this new strategy is the integral role the Iraqi courts must inevitably play in dealing with the security problem. Arrests without convictions are of little consequence and do nothing to advance the broader security strategy. As a result, the best police force in the world would be next to useless if not supported by effective courts and prisons. Setting the conditions for a fully functioning, orderly and impartial legal system, capable of enforcing the rule of law, should have been among the division commander's key tasks and end-states. The same is true with respect to subordinate commanders. We failed to sufficiently emphasize the mutually dependent relationship between police and the criminal courts and to press that point more coherently in redefining the 1 ID mission following the transfer of sovereignty. In what everyone understands to be a criminal justice *system*, we did not pay enough attention to perhaps the most vital component: the courts.

(h) *Judicial Independence.* In several courthouses we found that the investigative judge who conducted the investigation and certified the case for trial also served as the "small crimes" trial judge, trying the same cases he investigated. CPA advisors in southern Iraq complained of the same problem. While most Iraqi judges agreed that this arrangement created an obvious conflict, there is nothing in Iraqi law explicitly forbidding the practice, and they were slow to do anything to ameliorate the problem. Another structural issue concerned the court's continued oversight of the "Executions Office." Among other things, the Executions Office assisted parties with enforcing civil judgments. In creating an independent judiciary, and separating the courts from the Ministry of Justice, many believed the "Execution's Office" should have remained an executive function and under the control of the Ministry of Justice. The concern was that courts were putting their independence at risk by not relinquishing control of this office.

(i) *Budget.* Local judges were required to rely upon the provincial court to make all official purchases, including office supplies. The judges complained bitterly that this procedure was both inefficient and unreliable, although the provincial chief judges saw this practice as an anti-corruption measure. We recommended that each courthouse be given its own budget and that the chief judge in each courthouse be given a reasonable amount of spending authority. We asked the US Embassy to take our recommendation to the CoJ, but no action was taken.

(j) *Judicial Identification Cards.* More than a year after the collapse of the former regime, none of the judges in this region had an Iraqi-produced identification card that identified them as an Iraqi judge. Most judges had identification cards provided either by the US or the old regime. US produced identification cards were usually issued at the brigade level and their validity was often questioned outside the brigade AOR and by successor units. The CoJ had been inexplicably slow off the mark in producing official identification cards for judges. This was particularly

surprising inasmuch as the CPA had provided the CoJ with two identification card-making machines. Without a convincing, universally recognizable Iraqi-produced identification card, judges and other key criminal justice personnel risked, on a daily basis, being delayed, arrested, embarrassed or killed, particularly at checkpoints,[10] all of which interfered with their work as judges and kept them from moving freely about their respective jurisdictions. While it would seem to be a matter best left to the Iraqis, the US has an interest in ensuring that authentic identification cards are made available to judicial personnel. Where necessary, and possible, judicial identification cards should also double as weapons permits. This, too, will spare judges an enormous amount of anxiety and make dealing with their personal security far less complicated.

(k) *Judicial Salaries.* Although Iraqi judges were paid generously compared to most Iraqis, the judges still suffered in terms of relative buying power compared to their income before the war, when the Ba'ath party provided houses, cars and generously supplemented their salaries. Although the CPA increased judicial salaries just prior to transfer of sovereignty, the pay raise was not that helpful to the more senior judges, whose salaries did not increase as much as the more junior judges. The judges in our AOR were preoccupied with this issue, bringing it up at every meeting.

(l) *Bail.* Defendants in Iraq were often released pending trial based upon a responsible person agreeing to sign a bond. These documents were often executed at the police station. In some areas, it was not uncommon for the police to use the bond process as yet another opportunity to extort money from the defendant or his family. Because this problem appeared to be mitigated to some extent when bond was arranged at the courthouse, we recommended moving the bond execution process from the police stations to the courthouses. The judges tended to agree, but only acted on our suggestion in a couple of courthouses.

(m) *Iraqi Police Serving as Bailiffs Inside and Around the Courthouses.* We were concerned that once the FPS was fully deployed, the local police chiefs would pull the remaining Iraqi police officers out of the courthouses, leaving internal courthouse security to the FPS. The problem was that FPS guards had neither the authority nor the training to make arrests (in relation to crimes occurring in and around the courthouse). Equally important, unlike the Iraqi police, the FPS guards would not be able to coordinate between the judges and the police in regards to transporting prisoners, contacting witnesses, and other important scheduling and investigative matters. This coordination function was particularly vital in those courthouses without any other means of communication. It is important that some of the court security personnel have the status of police officers.

(n) *Bar Association.* A purposeful bar association is one of the foundations of a fully serviceable legal system. Bar associations play different roles in different legal cultures, so understanding the character and reputation of the local bar will help determine whether it is likely to be a good resource, cause mischief or be of little consequence. Make an effort to meet its leaders and assess its capabilities. That knowledge will help answer a variety of questions concerning the host nation's legal system. It may also help identify some of the obstacles to broader reform efforts.

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[10] In fact, most agree that it can be very dangerous for Iraqis to carry Coalition issued identification cards. If an Iraqi is stopped by the AIF and found with a CF identification card it can be a virtual death sentence.

(o) *Defense Attorneys*. There will inevitably be significant interest in the status of the defense bar. Are lawyers available to represent defendants, do they have the skills and knowledge needed to effectively assist the accused, are lawyers being paid an adequate fee and what additional training or resources are needed to make the defense bar a more meaningful participant in the process. Be prepared to help make that assessment and support outside efforts to help improve the capabilities of the defense bar.

(p) *Judicial Training*. We assumed that as a major component of our rule of law program we would be expected to develop a substantial judicial training program. This proved to be incorrect. The program we contemplated would have combined both substantive and administrative training, along with an introduction to any new technology or equipment that was being made available. However, the Iraqi judges in our AOR expressed only limited interest in Coalition sponsored training. They requested training in computer skills, investigative techniques (including forensic evidence) and international law (particularly if the training was outside Iraq), but nothing more. Most judges would have also benefited from training in regard to CPA orders, the applicable UN resolutions and the Transitional Administrative Law, and eventually their new constitution. We realized, however, that Iraqi judges traditionally believed that once they have graduated from the Judicial Training Institute they know all they need to know to be effective judges and often resisted additional training as insulting to their status. In addition, we appreciated that our efforts would need to be coordinated with the judicial training programs being implemented at the national level, particularly those being conducted by the CPA/ US Embassy. We wanted to make sure our curriculum did not duplicate or contradict their efforts. However, other then in Dahok, the CPA's so-called "quick start" program was not available outside Baghdad, at least not in the MND-NC AOR. If any of our judges were included in the Baghdad sessions, we were not informed. Various international organizations also offered training to selected judges in places like Prague, London and Washington, DC, but these opportunities were not readily available to most judges and were not focused on trial level issues. Judicial training programs were not well coordinated with rule of law personnel in the field. Local judges were invited without notice to or consultation with us and the selections were not always consistent with our view as to who among the local judges would most benefit from the training or who should be rewarded for good work. Also, to be coherent, judicial training needed to be oriented around the civil law traditions of this country. Common law lawyers sometimes lack the credibility to be effective trainers in places like Iraq.[11] Notwithstanding the constraints described above, this is an area where the division could have done better. Our judicial training was mostly *ad hoc* and limited in scope. The exception was computer training, which was provided to everyone who needed it.

(q) *Juvenile Court*. If there had been more time, and the higher priority missions had not been such a struggle, we would have focused more on the juvenile courts in this region. There is great potential for abuse in how juveniles charged with crimes are handled in Iraqi courts. The facilities in which juveniles are held were antiquated and unsafe. Children were often charged and treated as adults without the benefit of juvenile court waiver procedures. Under Iraqi law, before a person is entitled to status as a juvenile, the individual must be examined by a medical doctor who must certify the individual's age and eligibility for juvenile court. The accused must pay a fee for the examination. If the fee is not paid, the individual remains in adult court. We

[11] The 1 ID had the benefit of having a Louisiana / civil code – trained attorney on the BRO legal team. He had a variety of responsibilities, to include some judicial training which was very well received.

recommended to the 42 ID, the unit that replaced the 1 ID, that juvenile court be an area in which they concentrate. There was also potential for enlisting a Non-Governmental Organization (NGO), or even another Coalition partner, as an ally in future juvenile justice projects.

(r) *Regional Detention Facilities.* Defendants detained pending trial are either held in an Iraqi police station detention cell (typically a large single cell with no beds, putrid bathroom facilities and no recreational services) or at the provincial detention facility in the provincial capital, which is usually not much better. More often than not, the prisoner is responsible for arranging his own meals as the Iraqi police did not provide food. Inmates from outside the area must bribe police officers, rely on relatives to travel regularly to the jail, or attempt to bully other inmates in order to obtain food. This, by the way, does not trouble most Iraqis. However, the Iraqi criminal justice system would benefit from having available in each province a modern, centralized detention facility, carefully monitored by judges and Coalition personnel. This would greatly reduce the reliance on local, substandard jails and measurably improve the conditions for all prisoners and help the Iraqis meet international human rights standards. A regional prison was to be built at Khan Bani Sa'ad, but what type of prisoners would be housed there was unclear. It was to be controlled by the Iraqi Corrections Service, who were not yet present in our AOR.

(s) *Coordination.* It quickly became apparent that we lacked a reliable or regular means for communicating with authorities in Baghdad, either Iraqi or US. We had an interest in knowing what plans and policy intentions were being formulated at the Council of Judges level (CoJ)(formerly the Ministry of Justice) so that we could better synchronize our plans with theirs. In addition, there were many instances where local judges either did not know what the CoJ was planning, or needed CoJ approval prior to moving forward with projects the 1 ID had proposed. Neither the planning information nor project approval was readily available and made working with the local courts much more complicated and difficult. Conversely, it would have been helpful at times to have been able to communicate our plans directly to the CoJ and report to them what we had observed in the local courts. The idea was to find a way to de-conflict our local projects with national level planning and avoid potential redundancy and inevitable delay. There were also times when we had questions or concerns about emerging policy, new laws or other issues that were best put directly to the senior leadership. We were largely unsuccessful in communicating with Baghdad and rarely received answers. A more dependable and formalized communication channel would have been enormously valuable. MNF-I or MNF-C are potentially in a position to build a regular liaison relationship directly with the senior Iraqi judicial leadership, allowing the divisions to RFI through MNF-C to the CoJ and other relevant ministries and pass information in both directions through the military chain of command.

(t) *Police Training.* Training indigenous security forces to serve the public under the new government is a key task in any post-conflict situation. The goal is to mesh the courts, police and prisons into a fully integrated criminal justice system. This requires careful coordination among a range of subject matter experts and is at the very heart of rule of law operations. A well-conceived police training program is an essential element in that effort. According to the IPA, the Iraqi police in our AOR continued to be mostly dysfunctional and often unreliable. In some courts there are no criminal dockets because the police were simply not making arrests. During our tour, the principal performance measures were the number of Iraqi police officers who had been through basic training; and how many had weapons, uniforms, vehicles and radios, rather than the number or quality of arrests, however, those metrics did not fully measure Iraqi police agencies' capabilities. Judge Advocates were asked to assist the IPA and the MPs in training

Iraqi police officers at the Iraqi Police Academy in Tikrit. We quickly recognized that many Iraqi police officers had difficulty understanding the rule of law concept. They had little understanding of existing law and it was obvious that there were cultural and religious experiences that made the rule of law idea difficult to embrace. It was clear that these police officers needed comprehensive instruction on what it means to be a police officer in a genuine democracy and not just a thug for the old regime. Most everyone in Baghdad and in the field endorsed the idea of using carefully selected Iraqi investigative judges to provide legal training to the Iraqi police. The local judges agreed and were willing to help train the police, but had not yet been included in the training program. If police training is developed and conducted separately, without reference to the law, courts and prisons, the criminal justice system will never reach its full potential. The goal is to cultivate among the three components a shared understanding of applicable law and procedure, a common operating plan for meeting all essential procedural requirements and a mutual awareness of how to make arrests and conduct investigations that result in convictions.

(u) *Elections.* Elections will often be part of a post-conflict operation. The courts will undoubtedly play some type of role in administering elections and sorting out applicable "election law". Be prepared to represent the local court's interests in staff discussions concerning US support to the elections process. Be familiar with election issues and election law.

(v) *Judicial Vetting.* In a post conflict environment there will inevitably be concern that the judges serving the previous regime are corrupt, incompetent or not likely to support the new government. The same may be true of prosecutors and other courthouse personnel. As a consequence there will be calls to establish some type of vetting and removal process. Who can best serve in this capacity may not be entirely clear. Some would argue that host nation authorities are best suited, while others would insist that the Coalition must participate, if not lead this effort. The criteria to be used to remove judges will also be controversial. The standards that should be used in removing a judge, to whom should the appeal be taken, the sources of information should be relied upon and how the judges who are removed will be replaced are all critical issues that will impact local judges. Although dealing with judges appointed under the old regime is a legitimate issue, the vetting and removal process is fraught with risk. Even the judges who survive the vetting can be demoralized and until the vetting is complete the continuing uncertainty as to the status of each judge will hamper efforts to make the courts fully functional. Those concerned with rule of law at the division and brigade level should be prepared to deal with complaints and questions from judges and staff.

(w) *Weapons Offenses.* In a post-conflict environment, a great deal of attention is given to the illegal use and possession of weapons. New laws are often created to deal with increasing violence and diminishing security. Be prepared to advise on what conduct is illegal, which courts are available to prosecute weapons offenses and how these offenses are best proved. Training the local courts in regard to weapons offenses is also helpful and ensures that their understanding matches US expectations as to how weapons offenses will be handled.

(x) *Emergency Law.* Post-conflict governments may have reason to resort to some form of martial law or to take-on other extraordinary legal authority. This was certainly true in Iraq. Be prepared to become expert on the substance of the emergency powers and to act as a liaison to the host nation's courts to ensure a common understanding on the part of US forces operating in the area and local courts as to how the emergency law will operate.

(y) *Property Claims.* Supporting a new government's ability to adjudicate claims for property taken by the former regime or its supporters has been a critical task in both the Balkans and Iraq. Much has been written on this subject, however, it is well established that the failure to fairly dispose of these claims represents a continuing and genuine threat to security and stability. A detailed understanding of how this process is supposed to work, the role of the local courts and what precisely is expected of US forces will be very valuable in dealing with the host nation on this subject. One of the threshold questions is whether this kind of claim should be submitted to the ordinary courts, and resolved applying existing law, or would it be more efficient to create a separate process and establish a new set of principals by which the claims would be resolved. While much of this is handled at the highest levels of government, be prepared to support the implementation of those aspects of a property claims process that will operate at the brigade level.

(z) *Military-to-Host Nation Court Liaison.* In a post conflict environment there will inevitably be tension between the local courts and military operations. At both the division and brigade level, Judge Advocates should be prepared to serve as the link between judges and commanders in cases where either the military had interfered with the courts or the courts have in some way interfered in a military operation. For example, there were several instances when the US military unilaterally intervened and obtained the release of individuals lawfully detained based upon a judge's order. Sometimes these individuals were informants, Iraqi Army personnel, or employed by the Coalition. While intervention in some cases was understandable, it was no less problematic for the Iraqi judges or the rule of law program. Likewise, there were at least two occasions when the Iraqi police, along with the local courts, stopped a Coalition convoy and inexplicably detained the Turkish drivers, all of whom were lawfully in Iraq as Coalition contractors. This action delayed delivery of critical goods to a nearby FOB, causing significant disruption to operations within the brigade AOR. It is under these various circumstances that a Judge Advocate can usefully serve as an honest broker and help resolve these disputes in an informed manner and on a minimally disruptive basis.

3. Themes

Finally, the following represents several themes that if kept in mind will serve well in shaping post-conflict rule of law operations:

Modernization. Characterizing our efforts in support of host nation justice sector development as "reform" can be a mistake. It was more realistic and significantly less frustrating to treat this work more in terms of modernization rather than reform. It is important to convey that our objective is to help the host nation courts become more effective and efficient, not to change their legal system or legal traditions except for those features of their practice that do not meet minimal international standards of due process (e.g. requiring defense counsel, prohibiting torture and secret trial, etc.).

Personal Relationships. It is imperative that anyone working with the courts establish good working relationships with the senior judges and lawyers in the relevant AOR. Among other things, this requires regular visits with serious agendas (not just an occasional drive-by) and a demonstrated understanding of their legal traditions and the important issues they face. You do not want to be regarded as a legal tourist. Most importantly, be prepared to work hard to deliver meaningful support to each courthouse in whatever form it might take. Do not make

promises that you cannot keep. A business-like relationship is key – "going native" is not usually helpful.

Modeling. Look for opportunities for the US to "model" best practices. US supported host nation courts like the CCCI or Iraqi Special Tribunal, or US supported investigative task forces, can sometimes serve that purpose. Any court or office using modern procedures or concepts successfully can serve as a model for other, less effective courts to emulate.

Train the Trainers. Plan every training event to afford the opportunity to cultivate host nation expertise on the subject. By partnering with host nation lawyers and developing them as experts we create a base of knowledge that will remain available long after we leave and will give the subject credibility it may not have when taught by US lawyers.

Sustainability. Consider sustainability in connection with every program or project. It can take the form of long term training and technical maintenance contracts that would be funded for periods of time beyond the completion of the project itself. Without sustained support, otherwise useful projects may be prematurely abandoned. It is not always self evident to host nation personnel that a particular project will be helpful and improve productivity. New concepts and modern technology often take time to gain credibility and work their way into the culture. Extended training and O&M agreements provide that opportunity. Not every program is sustainable but it is important to at least examine the possibility.

Attachment 1

Work Plan for BCT's Visits

1. Identify each courthouse, with grid number and photograph:

    a. Identify each police station by the Investigative court it serves
    b. Identify each judge by name and by courthouse (determine if there are any vacancies)
    c. Assess physical security (PSD, T-wall barriers, FPS, metal detectors, IPS, detention cell, weapons and ID cards) by each courthouse (coordinate with USMS checklist)
    d. Assess courthouse renovation/construction requirements
    e. Assess ability to communication with other courts and IPS or ICS

2. Meet with the chief judge in each courthouse and discuss the following:

    - Judicial pay (did all Judges get the pay raise)
    - Where are pretrial defendants being detained
    - Where are post trial defendants being held
    - Ability to communication with other courts and IPS or ICS
    - Court administration/Automation requirements
    - Are indigent defendants receiving appointed counsel (if not, why not) and are indigent counsel being paid
    - Judicial training requirements
    - Courthouse renovation/construction requirements
    - Criminal court efficiency/productivity
    - Effectiveness of Judicial Counsel's administrative support and concept of an independent judiciary
    - Relationship with the IPS (corruption)

    NOTE: Cross check Trial Judge's view with Chief Appellate Judge's assessment.

3. See police stations and D-cells and meet police leadership (coordinate with IPA).

4. Review with JA and CA the work that has been completed and the on-going or proposed projects. Meet with BCT Commander to discuss his assessment of justice sector in his AO.

5. Prepare Courthouse map by province.

6. Evaluate the Executions Office, Notary Public and any other office or institution that supports the courts.

Attachment 2

Check List

Name/City:
Owner:
Grid number:
Photograph:
Telephone #:
Population:
Appellate Court Boundaries:

Judicial pay (did all Judges get the pay raise):

Staff:

- Judges / more needed or expected:
- Clerk/Support staff (not gardener, tea guys, etc):
- Bailiffs/ in court police:
- Court Administrator:
- Judicial investigators:
  - Lawyers
  - Do they work in the police stations
  - Any more needed
- Prosecutors (how many courts):

Type of Courts:

Use of translators/ who pays

Judges Weapons/ source:

Weapons cards/ source:

Judges PSD:

- Armed
- Trained
- Paid

Judicial ID/ source:

Access to TAL/ CPA orders:

Current Legal Gazette:

Other needs:

Copy machine
Office Furniture
Power/ Generator
A/C
Office Supplies
Other Office equipment
Vehicles

Communication with outside (at a minimum BAGHDAD, Ct of Appeals and IPS):

Landline availability

Messengers (who/ what form of transportation / is it reimbursed)

Cellular network available

Enough incoming lines

Satellite TV

Court administration/automation requirements:

Computers/ printers (source)/ training / maintenance

Internet Cafe

SECURITY:

Perimeter barriers (reinforced walls / stand-off

Metal detectors/ are they used

FPS/IPS (how many of each)(will IPS stay after full deployment of FPS)

Female Guards

Armed / Permits

Trained / Uniforms

24 hour coverage

Search
Single entry control point
Male/female

Paid/ who

Detention cell

Proximity to ING or IPS facility

[COMMANDER threat level in area]

[IPA TEAM AVAILABILITY]

Courthouse renovation/construction history (who paid and the cost and type of work):
(was the courthouse looted and were records destroyed):

Current requirements -- plumbing/ water/ electrical/ courtroom (use it)/ space/ trash:

Aware of independent judiciary and separation of courts from ministry of justice:

How effective is Judicial Counsel's administrative support

How effective is the Court of Appeals administrative support

Are indigent defendants receiving appointed counsel (if not,why not)

Are indigent counsel being paid; are they being paid according to new fee schedule; are they being paid quickly enough.

How many lawyers are in the lawyers room (is there A/C and enough space) and do they have access to computers, Legal Gazette, TAL and CPA orders.

Are defendants being advised of right to counsel and right to remain silent by the police and at their first hearing.

Judicial training requirements:

Related Offices:

Executions Office (where/ who supervises/ problems)

Notory Public (any problems)

Property Records Office (where/ who supervises/ problems)

"Scribes" (any problems)

Where are bail documents prepared:

Identify each police station that brings cases to your court:

Relationship with the IPS:

Evidence of corruption or prior cases

Evidence of prisoner abuse or prior cases
Access to hospital for required examination

Do they consistently arrest on warrant; do they ever use exigent circumstances

Do police get defendants to court within 24 hours of arrest

Do police get defendants to court for trial on schedule

Do they arrest witnesses or victims (other than on warrant approved by the court)

Do they arrest family members in lieu of fugitives

Are cases being completed in 6 months:

What is your assessment of the quality of the cases:

Do you meet with the IPS Chief:

Where are pretrial defendants being detained (small crimes and big crimes):

How many detention facilities in this area

Who transports prisoners

Who feeds defendants

Jail conditions generally

Visit the jail

Are juveniles segregated

Are females segregated

Any contact with ICS

What happens to post-trial defendants; who transports; any reason for delay;

External influence:

Tribal influence

Religious intimidation (Sharia'a law apply in personal status court)

Any evidence of separate courts

Political intervention

[Criminal corruption]

Have Judges received any threats:

Criminal court efficiency; what are the obstacles to having a normal caseload, if any:

IPCC awareness; any contact; could this court handle property cases involving land taken by the old regime:

Cases in which Coalition has an interest; Use of court for S/W and A/W AND prosecution of cases; any problem using US witnesses; would you be willing to help track cases:

Remarks:

1. SEE IPA notes.

Attachment 3

Judges Checklist

Name:

Duties:

Telephone #:

Education:

Experience:

Ethnicity:

Tribe:

Religion:

How appointed:

Judicial Review Commission:

Pay:

Weapon:

Weapon Card:

PSD:

ID:

City:

Attachment 4

Security

T-walls and other barriers:

Stand-off:

PSD:

Weapons / permits (judges):

Bailiffs/IPS:

Metal Detectors:

Detention cells:

FPS:

IPS:

24 Hour protection:

Search:

ID cards:

Attachment 5

EXECUTIVE SUMMARY – ABU SAIDA (RED)

ABU SAIDA has a population of approximately 40,000 people and is located in DIAYLA. There is an Investigative Court, Small Crimes Trial Court, a Personal Status Court and a Court of First Instance. There are 2 judges, each of whom serves in two courts, and 1 prosecutor. More judges are not expected. This court has 6 employees, including a judicial investigator (whose status as a lawyer is unknown). An additional judicial investigator is needed. IPA has recently established a team at NORMANDY. There is an Execution Office (supervised by a Judge) and Notary Public service, with no problems reported in regard to either office. Land Registration Office is off-site. The Legal Gazette is current and they have a copy of the TAL. Bond is executed at the Police Station. None of the Judges have a weapon, but one has a 4th ID permit. None have PSD or current judicial ID, other than the 4th ID card. Pay is current, including salary increase. Judges use translators (volunteers and paid) as required. The Judges are aware of the IPCC and understand that the judiciary is now separate from the MoJ. The Judges are interested in training in human rights law and as to changes in Iraqi law.

The Courthouse has 10 FPS, including a woman, sharing 2 Ak-47's, but no training (except former military experience). They also have 2 armed IPS guards who provide security inside the courthouse and may serve as bailiffs. 24-hour coverage is provided. There is moderate set-off, but perimeter barrier is inadequate, although Judges are satisfied. There is no metal detector or detention cell but everyone is searched at a single point of entry. There are no working landlines or cellular telephones available to the courthouse; nor is there an Internet café. The Court relies on messengers using taxi's without reimbursement. Did not see detention facility due to time. Judges claim that females are sent to Ba'qubah (or to Muktiar) and juveniles are segregated. Judges visit the detention facility on a regular basis and report that conditions are good and food is provided by the IPS. Judges meet with IPS as needed. Most arrests are made on warrant, but Judges acknowledge exigent circumstances exception. IPS does not arrest family, but does arrest victims/witnesses, but only on warrant and never for more than a day unless being prosecuted for failing to appear 3 times. IPS complies with 24-hour rule and they have a courtroom which they use. Cases are being completed in less than 6 months and no contact with ICS. The IPS transports prisoners.

Indigent defendants are being provided attorneys during investigative proceedings and defendants are being advised of their rights, but most if not all are still talking. Defense attorneys are being paid according to the new fee schedule and some are using the new law. There are approximately 12 attorneys working in the Courthouse. They purchase own legal materials (no library).

This Courthouse was looted, but has recently been renovated by the 4th ID. Judges claim that they are as busy now as they were before the war in all the courts. They report that the public fears tribal and gang retaliation and with so many weapons available that fear is an obstacle to a fully functioning court. The Judges report no evidence of prisoner abuse or IP corruption since the war, although they "hear" things. The Judges deny direct tribal, religious or AIF influence, but acknowledge tribal courts are very active. One case of an IPS officer

convicted for refusing to release a prisoner. The Judges report no obstacles to ISF/CF use of the courts. They have been threatened.

REQUIREMENTS: (1) Computers, printers, scanners, printers, training, technical support and Internet (will need bigger generator); (2) Weapons, new weapons permits, PSD's and Judicial ID cards; (3) At least one vehicle; (4) Communication (satellite telephones and/or cellular telephones when available; (5) metal detectors; (6) Two new rooms; (7) Additional armed and trained FPS guards (including additional females) providing 24hour coverage; and (8) Want one more Judicial Investigator and 2 more clerks.

[Judges interviewed at the FOB]

MUQDADIYAH Courthouse

Name	LOCATION	COMMUNICATION	SECURITY	ATTORNEYS	COUNSEL APPOINTED	APPOINTED COUNSEL PAID	OWNERSHIP				
MUQDADIYAH (RED)	MC 91826 59006	LANDLINES IN USE	14 FPS AND IPS STATUS UNKNOWN (INCLUDING A FEMALE)	FIFTY	YES	YES	MOJ/COJ				
				STAFFING							
		TOTAL									
JUDGES		5									
CLERKS		23									
BAILIFFS		?									
COURT ADMINISTRATOR		1									
INVESTIGATORS		2									
PROSECUTOR		2									

JUDGES AND OTHER PERSONNEL

NAMES	DUTIES	PHONE	EDUCATION	EXPERIENCE	ETHNICITY	TRIBE	HOW APPOINTED	PAY	WEAPON/ CARD	PSD	ID
ABED RAZAQ MUHSEIN	IJ	722-238	UNIVERSITY OF BAGHDAD, SCHOOL OF LAW	JUDGE 2000	ARAB/ SUNNI	JAURANY	OLD REGIME	OK	YES/ 4TH ID (HOGG)	YES-1- (UN-ARMED)	4TH ID
MAHDI KADORI KAREEM	IJ	722-443	UNIVERSITY OF BAGHDAD, SCHOOL OF LAW	JUDGE 2003	ARAB/ SUNNI	JUMALLI	CPA	OK	NO/ 4TH ID (HOGG)	YES-2- (UN-ARMED)	4TH ID
SAAD JARYAN ABED	CHIEF; FI	722-122	UNIVERSITY OF BAGHDAD, SCHOOL OF LAW	JUDGE 1997	ARAB/ SHIA	TAMINI	OLD REGIME	OK	YES/ 4TH ID (HOGG)	YES-2- (UN-ARMED)	4TH ID
ZIAD NAJAT NAWRI	SC	722-238	UNIVERSITY OF BAGHDAD, SCHOOL OF LAW	JUDGE 1999	KURDISH/ SUNNI	BERAJANCHI	OLD REGIME	OK	YES/ 4TH ID (HOGG)	NO	4TH ID
MAHDI ABBASS MUHAMMED	PROSECUTOR	722-663	UNIVERSITY OF BAGHDAD, SCHOOL OF LAW	JUDGE 1981	ARAB/ SHIA	TAMINI	OLD REGIME	OK	NO/ 4TH ID (HOGG)	YES-2- (UN-ARMED)	4TH ID
SALAMAN HUMADI ABDULLAH	PROSECUTOR	722-238	UNIVERSITY OF BAGHDAD, SCHOOL OF LAW	JUDGE 1998	ARAB/ SUNNI	JOBOURRI	OLD REGIME	OK	NO/ 4TH ID (HOGG)	YES -2- (UN-ARMED)	4TH ID
ABBASS OBAID MAYUF	PS	NO	UNIVERSITY OF BAGHDAD, SCHOOL OF LAW	JUDGE 2003	ARAB/ SHIA	MIFRAGY	CPA	OK	NO/ 4TH ID (HOGG)	NO	4TH ID

CURRENT NEEDS

IT PACKAGE, TO INCLUDE COMPUTERS, PRINTERS, SCANNERS, EXTENDED TRAINING, CONTINUING TECHNICAL SUPPORT AND INTERNET ACCESS; GENERATOR; A VEHICLE; WEAPONS AND PERMITS FOR THE JUDGES; PSD AND WEAPONS FOR PSD; ADDITIONAL FPS WITH WEAPONS AND TRAINING, TO INCLUDE FEMALE GUARDS; CELL PHONES FOR EACH JUDGE; AND FURNITURE

SECURITY ASSESSMENT

SET OFF AND BARRIER PROTECTION ARE ACCEPTABLE; MOST JUDGES HAVE PSD BUT THEY ARE UNARMED AND UNTRAINED; SOME JUDGES HAVE WEAPONS; 14 FPS ARE PRESENT BUT WITH ONLY 3 WEAPONS; THEY HAVE A METAL DETECTOR AND SEARCH EVERYONE AT A SINGLE POINT OF ENTRY; IPS STATUS AT COURTHOUSE IS UNKNOWN. THEY HAVE A DETENTION CELL; 2 MOJ GUARDS; 24 HOUR COVERAGE; JUDGES WANT 27 FPS

Attachment 7

Ministry Slide Criteria

SECURITY

Criteria:

Judges are issued weapons and valid permits

Judges have PSD protection

Each courthouse has adequate perimeter barrier protection (and set off)

Male and Female are searched at a single entry control point

Court has and uses metal detectors

Armed and Trained guards provide 24 hour protection at each courthouse (FPS)

Iraqi Judges are satisfied with courthouse security

CDR's and/or Sphere of Influence (SOI) Point of Contact (POC) are satisfied with courthouse security

[Detention cell at Courthouse where needed]

Green: Most, if not all, criteria must be satisfied.

Amber: Must have armed guards providing 24 hour security, everyone is searched (including females) at single point of entry and guards use metal detectors.

Red: Failure to meet the criteria for Amber.

RULE OF LAW

Criteria:

Court is not subject to outside influence (as determined by Iraqi Judge's and the CDR's/ SOI POC evaluation of outside influence in each court); including, but not limited to:

AIF intimidation
Excessive Tribal interference
Religious influence
Criminal corruption
Political (Party) intervention

Other threats against the Judges or staff

Suspicious incidents are eliminated or explained

Ethnic make-up of the Court should be diverse and similar to population it serves

Court must comply with Iraqi law and procedure (to include compliance with the TAL and CPA orders) and has a current edition of the Legal Gazette

Green: Most, if not all, criteria must be satisfied, to include no suspicious incidents (defined as defendants inexplicably released or acquitted, baseless refusals to issue warrants, unexplained detentions, complete failure to enforce the law, etc.), CDR and/or SOI POC agree that the court appears to be free of outside influence, Judges themselves report no outside influence and the court is ethnically diverse and reasonably matches the population in the jurisdiction it serves.

Amber: No more than one suspicious incident, CDR and/or SOI POC concerned about outside influence but not recommending direct intervention, Judges report no more than minor outside interference with the court, the court has a current edition of the Legal Gazette and there are no systemic failures in following Iraqi law or procedure, and there have been no complaints concerning ethnic makeup of the court.

Red: CDR or SOI POC's recommendation and/or failure to meet the criteria for Amber.

Infrastructure

Criteria:

Courthouse building (basic): Minimally adequate roof, water, windows, doors, electrical and sanitary conditions (restrooms)

Courthouse building (specialized): Adequate air conditioning, functional courtroom, adequate furniture and office supplies, sufficient space for courthouse staff and courthouse property is free from trash

Court has adequate office automation/ internet capacity (at least one copy machine, computers, scanners, printers, appropriate software, continuing IT training and technical support)

Court has access to working telecommunications (landlines and/or cellular telephones)

Court has adequate number of vehicles

CoJ owns property/building

Green: Most, if not all, criteria must be satisfied.

Amber: Courthouse must have effective telecommunication capacity, meet the criteria set forth in "Courthouse building (basic)" and be owned by the CoJ.

Red: The failure to meet the criteria for Amber.

Crimes Against Coalition (CAC) Capable

Criteria:

CDR'S assessment:

Past experience with CAC and/or related cases has been positive

AIF threat level in area is low

SOI history with Court has been positive

Judges and/or staff have not been identified as associating with the AIF or other criminal elements

There is an active JCC in the community

There is an effective/ reliable Iraqi Police infrastructure (including a functional detention facility)

There is a demonstrated ability to use arrest and search warrants in conjunction with US/ Iraqi operations

There have been successful Coalition projects in the community
Senior Iraqi Police and other ISF leaders have not complained about the integrity of the court and report it to be cooperative

Chief Judge does not object to or express concern in connection with handling CF cases

Judges and/or staff have not been threatened

There have been successful Coalition projects at the courthouse

No other Iraqi Judges have warned against using a particular court

Green: CDR's/ SOI POC assessment that court is trustworthy and that he has either successfully referred cases in the past or is confident that cases could be reliably referred in the future and the Chief Judge voiced no objection to handling Coalition related cases or Coalition witnesses and there have been no suspicious incidents involving cases in which the Coalition has an interest and the Iraqi Police are able to competently support the investigation and prosecution.

Amber: There are no objections on the part of the Chief Judge but there have been suspicious incidents involving cases in which the Coalition has an interest and the CDR is prepared to assume some risk and proceed with caution.

Red: Chief Judge either objects to or expresses some concerns in connection with cases in which the Coalition either has an interest or a role or the CDR/ SOI POC recommends that the Coalition not engage with a particular court or there has been a blatant incident involving the corruption of a coalition case or there is some other factor (outside influence, etc.) that would interfere with the integrity of a prosecution.

NOTE 1: *Security* and *Rule of Law* categories should be considered again in this category (*CAC*) with a specific focus on whether any of the factors considered in each of these two separate categories would effect whether a particular Iraqi court could reliably and effectively handle prosecutions in which the Coalition and either an interest or a role.

NOTE 2: This analysis also takes into account a particular court's ability to handle cases involving crimes or attacks that threaten the stability of the government.

Attachment 8

Information Paper

AETV-BGJA 21 December 2004

SUBJECT: Support to Local Courts

1. The court assessment project has been completed in Salah ad Din and Diayla Provinces. Each courthouse has been evaluated in terms of (1) courthouse security (including the personal security of each Judge); (2) the status of the infrastructure (including the functionality of the courthouse, access to telecommunication resources and IT capacity); (3) the ability to comply with rule of law requirements generally; and (4) whether the court is able to impartially and effectively handle matters in which the Coalition has an interest. The assessment consisted of a physical inspection of the courthouse, interviews with Judges, court staff, local Iraqi lawyers and Iraqi Police Commanders. We have also solicited an evaluation from US Commanders in whose AO the court was located.

2. The assessment has produced recommendations for what can be done to immediately help the courts in TF Danger's AO become more effective, modern and orderly. Both categorical and courthouse specific requirements have been identified. The rationale for making support to the courts a high priority is as follows:

a. A stable and secure Iraq cannot be established without ensuring a reliable and effective judicial system. Like the police and the prisons, the courts play an inescapably essential role in protecting the Iraqi public and enforcing the rule of law. A legitimate and respected judicial system is inextricably tied to our ability to successfully and reliably shift to the Iraqis the responsibility for dealing with the continuing and imperative security problems in Iraqi. Fully functioning and impartial courts are essential to Iraqi civil and military self reliance, one of the Division's end-states.

b. Courts cannot be effective unless they are secure. The functionality of every courthouse is directly dependent on both judicial and courthouse security;

c. Much can be accomplished in improving courthouse security and judicial efficiency with a modest investment of resources.

3. The following represents our recommendations for addressing the identified requirements at the Division level or higher:

a. The Division/Corps will coordinate with the Council of Judges, the Court of Appeals and the PCO in an effort to expedite the use of IRRF funds in renovating existing courthouses and constructing new courthouses where appropriate;

b. The Division/Corps will also work with USAID, OTI, RTI and the Courts of

Appeal in developing and funding an information technology package that will consist of computers (to be integrated with existing hardware), printers, scanners, LAN, computer furniture, a generator* and, most importantly, access to the internet. This package will also include onsite training and technical support components that will both be available for an extended period of time. This will hopefully provide enough positive momentum that the Iraqi's will continue to invest in, sustain and use the IT system on their own. Having word processing capacity and the ability to communicate files and messages electronically will address a myriad of problems. The vendor will provide internet service for 90 days. The Iraqi's will be obligated to fund the internet service after the initial 90 day period.

c. The Division/Corps will also work with senior judicial leaders in Baghdad to expedite the deployment of trained and fully armed FPS and judicial PSD.

4. The following represents what can be done at the Brigade level to meet the immediate needs of local courts:

a. Provide at at least one vehicle to each court;

b. Provide an adequate generator if not already purchased as part of the IT package (e.g. Khaniqin and Kifri, two courthouses that will not be receiving the IT package);

c. Provide miscellaneous office equipment (varying by court, to include copy machines, furniture and air conditioners);

d. Provide cellular telephones to each judge once working cellular networks are available in order to facilitate communication when judges are working out of the office as they are required to do (investigating crimes, interviewing witnesses, etc.);

e. Arrange for a serviceable sidearm to be provided to each judge and prosecutor. The DIV will look for alternatives should the BDE's not be able to identify a source of weapons.

f. Initiate/support S-5 courthouse renovation projects using CERP or other BDE funding as it becomes available. These projects must be coordinated with PCO and FPS projects described in (g). **Care should be taken to ensure that in whatever combination the scopes of work, however derived, include the Courthouse specific elements described in Attachment A, subject to the identified exceptions and to Iraqi judicial buy-in.**

g. In addition, almost every courthouse lacks adequate perimeter barrier protection. This requirement will be met as part of a separate project, funded by FPS money, that will include a site survey to be conducted by a team consisting of BDE Engineers, a Provincial FPS representative, the BDE JA

and a Provincial Court representative. The team will also meet with and include the Chief Judge at each courthouse. This project will be tasked by FRAGO and will be synchronized/de-conflicted with the PCO and CERP projects. CPT Chris Simpson will be the POC.

6. Iraqi requests for office supplies, parking garages, or requests to fix broken equipment are not being included in this particular project. While the Brigade is, of course, free to address these needs, none are deemed critical and are more appropriately dealt with by the Iraqi's. In addition, this does not cover requests for more staff and/or judges, or demands for government provided judicial housing, all of which are internal matters best left to the Council of Judges and the Court of Appeals at this time.

Bruce A. Pagel
LTC, JA
Iraqi Court Liasion

* The fact that a generator is being provided by the IT project must be synchronized with other Courthouse projects.

Attachment 9

Checklist for Court Specific Planning Considerations and Requirements for Building or Renovating Iraqi Courthouses

- Detention Room/ Cell
  - This is a security issue. If the courthouse is located near the IP detention facility then a lockup within the courthouse may not be necessary.

- Improved Perimeter Security and Barrier Protection*

- Single Point of Entry*

- Search Room*

- FPS Office/ Quarters*
  - DIV Engineers recommend a single, two room building to be located adjacent to the single point of entry; one room to be used to search visitors and the other for FPS offices and quarters.

- Functional Courtroom
  - In most cases this will mean renovation while in others new construction may be required. We should defer to the Chief Judge as to whether a courtroom is necessary in the courthouses that are now without.

* These features will be part of a separate project, funded by FPS money, that will include a site survey to be conducted by a team consisting of CF Engineers, a Provincial FPS representative, the BDE JA and a Provincial Court representative. The team will meet with and include as part of the survey team the Chief Judge at each courthouse. This project will be tasked by FRAGO and will be synchronized/de-conflicted with PCO, CERP and IT projects. **However, we should take care to ensure that in whatever combination the statements or scopes of work, however derived, include the above elements, subject to the exceptions and to Iraqi judicial buy-in.** CPT Chris Simpson will be the POC.

Attachment 10

Court Monitoring Checklist

1. Each responsible unit will obtain the required information and report to the Brigade Judge Advocate at least once a month. At a minimum, the monitoring mission should include: interviewing the chief judge, consulting IPA personnel (if available), interviewing the FPS supervisor, interviewing the lead Iraqi lawyer in the "lawyers room", visiting the detention facility and visiting the courthouse itself. Units are to report the following information:

a. The status of any renovation or construction projects involving the courthouse or ancillary buildings;

b. Any changes in the Judicial (including prosecutors) or support staff and if there are new Judges or Prosecutors:

1. Prepare the attached biographical worksheet
2. Take a digital photograph

c. The status of each Judge's Personal Security Detail:

3. Are they armed (with necessary weapons permits)
4. Are they trained (other then prior military service)
5. Is each team complete
4. Are they being paid

d. The status of the Facility Protection Service (FPS) assigned to each courthouse:

1. Are FPS personnel armed (with necessary weapons permits)
2. Are FPS personnel adequately trained
3. Are they in uniform with proper identification
6. How many are available for duty (one or two shifts)
5. Do they have an operations center
6. Are they being paid

e. The status of the Iraqi Police who work at the courthouse:

1. How many are available for duty
2. Are they working inside or outside the courthouse
2. Are they working in a court security capacity inside the courthouse

f. Is a female guard present during business hours (IP or FPS);

c. Do the guards have a metal detector and is it being used;

d. Is everyone being searched (male and female) at a single point of entry;

e. Is the courthouse guarded on a 24 hour basis by armed guards;

f. If the court has a vehicle is it in working order;

g. If the court has a computer network in place (scanners and internet capacity), is it in working order (including the generator);

h. Is the court able to communicate outside the local area using either landlines or cellular telephones;

i. What edition of the Legal Gazette does the court have available;

j. Is there an Executions Office; where is it located and who supervises it;

k. Do the Judges have personal weapons and carry permits;

l. Has the site security survey been completed;

m. The Chief Judge's opinion on the level of security; is he satisfied with courthouse and judicial security;

2. The Commander will also include his subjective assessment of the court, to include any significant events or reports involving the courts, the threat level in that area or any other engagement with the legal system. The IPA personnel in that AO should be utilized if available. The Court Assessment Team is interested in the following:

a. External influence: Tribal intimidation, interference by religious leaders, criminal corruption, or intervention by political leaders or political parties (and whether there is any evidence of separate tribal or religious courts);

b. Are indigent defendants receiving appointed lawyers and are the lawyers being paid;

c. Are Iraqi Police and the Judges advising defendants of their right to remain silent and to have an attorney provided if they can't afford one;

d. Iraqi Police Performance, to include the following:

1. Evidence of Iraqi Police corruption
2. Evidence of prisoner abuse
3. Do the police consistently arrest on warrant; and do they ever use exigent circumstances
4. Do police get defendants to court within 24 hours of arrest
5. Do police get defendants to court for trial on schedule
6. Do they arrest witnesses or victims (other than on warrant approved by the court)
7. Do they arrest family members in lieu of fugitives

8. Are cases being completed within 6 months.

e. The condition of the detention facility, to include who feeds defendants; does the Investigative Judge visit the detention facility on a regular basis; are juveniles segregated from adults and are females segregated from males.

Attachment 11

IPLO Daily Activity SITREP

Date:

Area:

Area Supervisor:

IPLO Teams Assignments:

IPLO PROBLEMS/EQUIPMENT ISSUES:

IPLO PERSONNEL ON DUTY / CTO/LEAVE/TDY:

ATTACKS ON IP PERSONNEL:

- Attacks against IP Stations
- Attacks against IP Personnel

- Kidnappings:
- Equipment Issues:
- Raw Intelligence:
- Other SIGACTs:

Hostile Action at FOB:

Hostile Action Involving IPLO's:

Number of PSMR's completed (list by station name & grid):

Number of station visits (list by station name & grid:

Check on the following issues at each station visited talk with IP & detained persons (check Jail conditions):

1. List any allegations by the IP of Judicial corruption:
2. List any incidents involving individuals being arrested by IP, but not taken to court in a timely manner (72 hours):
3. List any incidents involving the IP arresting witnesses and victims along with the defendant.

4. List the conditions at the Station Jail & photograph the jail area.

Additional comments:

Report prepared by: