RULE OF LAW

HANDBOOK

A Practitioner's Guide for Judge Advocates

Rule ('rül): noun. a prescribed guide for conduct or action. one of a set of explicit or understood regulations or principles governing conduct or procedure within a particular area of activity.

Of (uhv, ov): preposition. used to indicate derivation, origin, or source; relating to.

Law ('lo): noun. a binding custom or practice of a community. the principles and regulations established in a community by some authority and applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decision.

Rule of Law: ('rül ☒äv ☒lo☒): doctrine. 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 principles.

THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY

CENTER FOR LAW AND MILITARY OPERATIONS

2011

RULE OF LAW HANDBOOK
A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES

2011

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The 2011 *Rule of Law Handbook* is dedicated to all those who promote the rule of law in the most difficult of circumstances, especially the members of the U.S. Armed Forces as well as our interagency and coalition partners.

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Although the Center for Law and Military Operations (CLAMO) publishes the *Rule of Law Handbook*, it is the product of contributions by dozens of authors from a multitude of agencies, both U.S. and foreign, non-governmental and international organizations, military and civilian, over the course of several years. Due to its iterative nature, it would be difficult to list all those who have contributed to the development of this, the fifth, edition of the *Handbook*. Official clearance processes required by some agencies to ascribe individual authorship credit makes doing so even less practical. Suffice it to say, the current editor is indebted to the past and current contributors, and in particular to the CLAMO 2011 interns who have helped bring this publication together.

Editor: Lt Col Mike Cole, British Army

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FOREWORD

Rule of Law practitioners around the world have relied on this Handbook for almost five years now. In fact, I have found this volume used by both civilian and military rule of law practitioners from many agencies across Afghanistan. Rule of law operations are conceptually difficult and hard to convert into tangible successes on the ground. This handbook has helped to make such operations easier to understand and execute. No other single volume has been as complete a reference for military and civilian practitioners alike.

This year, the staff that worked so hard to produce this volume reflects the multi-national nature of rule of law efforts today. British Army Lieutenant Colonel Mike Cole has gathered an outstanding and diverse group of military, civilian, and international experts to update the 2011 version of the Rule of Law Handbook. I've known Mike since 2008, when he served on a multi-national and interagency assessment team for rule of law to advise on coalition strategy in the Central Command area of responsibility. He performed rule of law work in Afghanistan's Helmand Province and in a range of assignments involving rule of law planning and academics. He exemplifies the knowledge and practical orientation of the many contributors to this year's handbook. He and his team have brought that expertise together to produce an outstanding handbook.

Although the rule of law in Afghanistan remains mostly just a goal, it is an indispensable goal. It also requires more than high sounding ideals—organization, resources, people, time, concepts, and much hard work are required to make progress in this critical line of effort. Over the past year, we have seen extraordinary advances in military efforts to support rule of law. In September 2010, the Chairman of the Joint Chiefs of Staff activated the U.S. Rule of Law Field Force-Afghanistan. On July 4, 2011, the Commander of the International Security Assistance Force, the NATO Senior Civilian Representative to Afghanistan, and the Deputy Minister of Justice of Afghanistan presided over the activation of the NATO Rule of Law Field Support Mission in Kandahar. As the commander for both these units, I know that my staff and key leaders relied on the Rule of Law Handbook as they addressed thorny problems confronting governance and rule of law here.

Rule of law development is particularly important to the "comprehensive civil-military approach" adopted by NATO and ISAF members at Lisbon in order to set conditions for transition of security responsibility to the Afghan government. As General David Petraeus has emphasized repeatedly, delivery of dispute resolution is a key sector in which the Taliban competes effectively with the Afghan government. The Judge Advocate General's Legal Center and School and the Center for Law and Military Operations help prepare our ranks to confront this challenge. And confront it we must, because stability in Afghanistan is critical to security in the region and throughout the globe.

I look forward to seeing the 2011 Rule of Law Handbook on bookshelves in far flung locations over the coming year. The need to strengthen the rule of law will exist wherever people and their governments cope with conflict and instability. Whether you are reading this handbook out of academic curiosity or because you are working in this area, I trust you will appreciate it for the first class reference book that it is. Good luck!

Brigadier General Mark S. Martins, USA
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NATO Rule of Law Field Support Mission &
Rule of Law Field Force-Afghanistan
Kandahar, Afghanistan

PREFACE

> *America's commitment to the rule of law is fundamental to our efforts to build an international order that is capable of confronting the emerging challenges of the 21st century.*[1]

This is the fifth edition of the Rule of Law Handbook published by the Center for Law and Military Operations (CLAMO) at The Judge Advocate General's Legal Center and School (TJAGLCS). Much has changed since the publication of the first volume in July of 2007. At that time, "surge" operations in Iraq had just begun and the eventual outcome of that tremendous commitment of resources was far from certain. The fight in Afghanistan, while no less important, drew relatively little public attention.

Four years on, the violence in Iraq has dropped precipitously, allowing the Iraqi people to assert their rightful sovereignty in very real and dynamic ways. American forces have redeployed from Iraqi cities, ended their combat mission, and commenced Operation New Dawn. Their presence in Iraq is now subject to the terms of the US-Iraqi Security Agreement.[2] Afghanistan has, for some time now, been at the forefront of public attention as it experienced its own surge of resources designed to move it along a similar path to success.

Throughout these changes, judge advocates and their joint, interagency, intergovernmental and multinational (JIIM) partners have quietly gone about advancing the rule of law (ROL) in these locations and others.[3] In time, our military commitments in Iraq and Afghanistan will end. And so, it is fair to ask if there is still a need for judge advocates to concern themselves with rule of law missions, current or future? To answer anything other than "Yes!" would be shortsighted[4] and unrealistic given our history and hopes for the future. It would also condemn us to repeating past mistakes, forgetting lessons learned, and weakening the strong JIIM relationships that we have built along the way.

When called upon to conduct ROL operations, a judge advocate's response must be effective and, more so now than ever, economic. Although recent experiences will inevitably inform that response, judge advocates must also be agile and innovative in their thinking, planning and execution to ensure that their response meets these requirements. The battle for resources will become all the more consuming. As such, the design of ROL operations that make the best use of *all* available resources, from wherever they may come, is likely to be a critical factor in the efficacy of future endeavors in this field, and the overall success of the military mission. NATO's Rule of Law Field Support Mission is a perfect example of how the U.S. led Rule of Law Field Force – Afghanistan (ROLFF-A) has leveraged NATO resources to enhance the overall efficacy of its ROL mission.

We are well past the conflict stage in Kosovo, yet judge advocates are still there participating in rule of law missions in welcome partnership with civilian practitioners.[5] It is no doubt the hope of all

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[1] The White House, *National Security Strategy*, 37 (May 2010), *available at* http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf (last visited July 27, 2011).

[2] *Id.* at 25.

[3] *See infra* Appendix A, "The Rule of Law and Judge Advocates: A Short History".

[4] *See, e.g.* Center for Law and Military Operations, *Brigade Judge Advocate Symposium Report*, at 5 (May 2010) ("ROL is one area where JAs [judge advocates] have the opportunity to act as a force multiplier, instead of simply fulfilling their traditional advisory role."), *available at* https://www.jagcnet2.army.mil/8525751D00557EFF (Army Knowledge Online authentication required).

[5] Task Force Falcon, 40th Infantry Division, California National Guard, Office of the Command Judge Advocate, After Action Report, Kosovo Forces 11, Deployed February 2009 – November 2009, at 6 (9 January 2010) ("Trainers actively discouraged participation in ROL activities for fear the unit might step on the toes of

ROL practitioners that the environments in Iraq and Afghanistan will, one day, be similarly benign so as to make ongoing rule of law efforts there "un-newsworthy." Such an environment should not be seen as diminishing the value of that work. Indeed, given that successful ROL operations have the potential to prevent conflict breaking out, it may be that we should actively plan to increase ROL activities in not only the post-, but also the pre-conflict phase of stability operations.[6]

While rule of law efforts may become more or less newsworthy depending on the circumstances in which they are conducted, their conceptual value remains constant. Anyone who doubts that point need only look to the fourteen references to "rule of law" in the 2010 National Security Strategy, one of which describes the rule of law as an "essential [source] of our strength and influence in the world."[7] If you value the role that judge advocates play in helping maintain that strength and influence, then read on.

The 2011 Edition

Like the 2010 edition, this edition of the *Handbook* is not a complete re-write of the one before it. That said, it does contain new material, updates and improvements throughout. Many members of the JIIM ROL community have devoted time and effort to ensuring the sections describing their work and spheres of influence are current. As ever, CLAMO is deeply in their debt for those contributions.

Some chapters, by their nature, require updating every year; others do not. Funding sources and authorities change from year to year, and sometimes even more often. A Fiscal Law instructor at TJAGLCS has previously remarked "It's all theoretical until you figure out how to pay for it." That sentiment is equally as well expressed, albeit in a less eloquent but perhaps more catchy manner, by the refrain, "Show me the money!" in the film, *Jerry McGuire*. Given that any ROL program, no matter how modest, will need to be funded, and regardless of which expression you prefer, it is a sentiment worth bearing in mind. As such, if you read nothing else in this 2011 edition, Chapter 6 is a "must read."

Judge advocates who find themselves assigned to a ROL billet may wish to consult the new Appendix B, which contains a list of available Rule of Law Training Courses, with a view to preparing for their new role. In order to keep the *Handbook* to manageable proportions, some important ROL areas (for instance non-state or customary justice systems) are, unfortunately, under-represented. Where this is the case, the *Handbook* provides some select, but extremely valuable, footnote references to other, often hot off the press, publications, to satiate the ROL practitioner's thirst for knowledge. In a similar vein, where there has been repetition, the text has been streamlined – for instance, merging the separate 2010 Edition chapters on "Planning" and "Measuring" into a single, more comprehensive, chapter. Hopefully this will prove the old adage that less, [really] is more.

This edition continues to draw upon the personal experiences of those who are actively involved in the rule of law mission, whether at the tactical or strategic level. In keeping with the "less is more" mantra, the number of narratives has been reduced, while the breadth of their subject matter has been expanded. Some articles describe the "nuts and bolts" of how a particular ROL mission has been approached. Others take a broader look, reflecting on issues such as the ROL as an insurgent's center of gravity, or the developing interagency ROL landscape. And, almost by way of demonstrating the

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EULEX [European Union Rule of Law Mission in Kosovo]. . . . When TFF [Task Force Falcon] attorneys began working in this area, the EULEX and UN lawyers welcomed the help and wondered aloud why TFF attorneys had not come aboard in this area earlier."), *available at* https://www.jagcnet2.army.mil/8525751D00557EFF (Army Knowledge Online authentication required).

[6] *See e.g.* ch. 2, pt. F, the UK's "Building Stability Overseas Strategy" and the investment in "upstream prevention".

[7] The White House, *supra* note 1, at 2.

interagency dynamic, there is also a narrative from a USAID country officer who conducted Rule of Law operations in Afghanistan while deployed in his capacity as a National Guard officer. But the "narrative" that records the most fundamental change in ROL operations since the 2010 *Handbook* went to press is the Chapter 7 description of the ROLFF-A, which details the organizational composition, interaction with other ROL players, and substantive output that this judge advocate-led command has delivered.

What? No Template Solution?

The *Handbook* is not intended to serve as U.S. policy or military doctrine for rule of law operations. Written primarily for judge advocates, its scope and purpose are to provide the military attorney assistance in accomplishing the ROL mission. That said, it is hoped that others involved in ROL will find the *Handbook* helpful.

The *Handbook* does not serve as a complete solution, but rather as a starting place and a supplement for other materials and, crucially, individual thought. When combined with resources such as the ROL courses available at TJAGLCS,[8] and the many and varied documents written by other agencies and organizations that are referenced in this *Handbook*, ROL judge advocates will quickly realize that there is a wealth of information available to them to draw upon. The difficulty they face is in knowing *what* to read, rather than in finding *something* to read, in an often busy pre-deployment timetable. *Any* judge advocate deploying in support of the current conflict should be familiar with Field Manual 3-24, *Counterinsurgency* (2006),[9] Field Manual 3-07, *Stability Operations* (2008),[10] the *USMC Small Wars Manual* (1940),[11] and the recently published US Joint Forces Command *Handbook for Military Support to Rule of Law and Security Sector Reform*,[12] as well as other, more judge advocate centric, publications such as the *Operational Law Handbook* (2010),[13] and Field Manual 1-04, *Legal Support to the Operational Army* (2009).[14] In addition, within the Army, we do well to remember that Civil Affairs units have often performed rule of law activities, and their doctrine discusses them in detail. As such, Field Manual 3-05.40, *Civil Affairs* Operations (2006)[15] and Joint Publication 3-57, *Civil-Military Operations* (2008)[16] are also recommended reading for a judge advocate deploying to support ROL projects.

Notwithstanding this wealth of reference material, no course, handbook, manual or "think tank" publication can provide judge advocates with a template solution for how to support the development of the ROL in any one particular deployed environment. Any reader who discovers such a template is invited to contact CLAMO so that it can be given pride of place in future editions of the *Handbook.*

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[8] TJAGLCS offers two residential programs, the one-week Rule of Law Short Course and a rule of law elective to its Graduate Course, as well as online training via JAG University, available at https://jag.ellc.learn.army.mil/ (last visited July 27, 2011).

[9] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24].

[10] U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008) [hereinafter FM 3-07].

[11] U.S. MARINE CORPS, SMALL WARS MANUAL (1940).

[12] *U.S. JOINT FORCES COMMAND, UNIFIED ACTION HANDBOOK SERIES BOOK FIVE, MILITARY SUPPORT TO RULE OF LAW AND SECURITY SECTOR REFORM (13 June 2011).*

[13] INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2011 OPERATIONAL LAW HANDBOOK (2010) [hereinafter 2010 OPLAW HANDBOOK].

[14] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (6 Oct. 2008) [hereinafter FM 3-07].

[15] U.S. DEP'T OF ARMY, *FIELD MANUAL 3-05.40 (FM 41-10), CIVIL AFFAIRS OPERATIONS (29 Sep. 2006) [hereinafter FM 3-05.40].

[16] CHAIRMAN, U.S. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-57, CIVIL MILITARY OPERATIONS (8 Jul. 2008) [hereinafter JP 3-57].

While this *Handbook*, hopefully, provides food for thought and points to some resources, it is no substitute for agile innovation, intelligence, and resourcefulness.

The intent is that the *Handbook* serves as an educational, introductory, resource for judge advocates who are preparing to practice in the field. If readers believe that the *Handbook* fails in meeting that intent, or that they can in any way contribute to its efficacy, they should not hesitate to contact CLAMO with their suggestions for improvement.

CHAPTER 1
THE RULE OF LAW: CONCEPTUAL CHALLENGES

"Rule of law" (ROL) is an inherently (and frequently intentionally) vague term. Making matters worse, the term is used differently in different contexts, and judge advocates (JAs) are likely to encounter "rule of law" in a variety of circumstances. Some JAs are engaged in ROL operations by helping to build courthouses and jails. Some "do" rule of law by helping to revise a host nation's legal code. Some ROL coordinators are leading meetings among various coalition or host nation justice sector officials. Others are practicing ROL by processing detainees held by U.S. forces in a speedy and just manner or advising their commanders on host nation search and seizure law applicable to U.S. forces conducting security operations. JAs are engaged in ROL operations as Staff Judge Advocates (SJAs), Brigade Judge Advocates (BJAs), members of Civil Affairs teams, members of regimental, brigade, division, corps, multi-national-force, or geographic combatant command staffs, or as detailed to other U.S. or foreign agencies. ROL operations take place in a variety of operational environments, from active combat to approaching stable peace.

Most JAs are currently engaged in ROL operations in the context of larger campaigns of counterinsurgency (COIN),[1] as in Iraq and Afghanistan. Rule of law operations are central to COIN,[2] but the principles underlying ROL operations apply regardless of the operational environment in which they occur.

Moreover, almost any ROL effort in which a deployed JA participates will be an *interagency* one. As a matter of U.S. policy, the Department of State (DOS) is the lead agency in conducting most stability and reconstruction activities unless otherwise specified,[3] and virtually all stability operations will involve international and non-governmental organizations as participants. It is important to keep in mind the broader participatory base of non-U.S. military partners, who have differing priorities and operating procedures when conducting ROL operations.[4] The military role in ROL capacity-building will end with the redeployment of U.S. forces, but the effort will likely continue with civilian agencies assuming an increasingly central role. In order for those follow-on efforts to be successful, civilian agencies need to be involved at the earliest stages.

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

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[1] "Counterinsurgency is military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency." U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-1 (15 Dec. 2006) [hereinafter FM 3-24].

[2] *Id*. ("Over time, counterinsurgents aim to enable a country or regime to provide the security and *rule of law* that allow establishment of social services and growth of economic activity.") (emphasis added). *See also* U.S. GOVERNMENT COUNTERINSURGENCY GUIDE 38 (Jan. 2009) ("Most countries affected by insurgency do not have robust, transparent and effective rule of law systems. Indeed, real or perceived inequalities in the administration of the law and injustices are often triggers for insurgency.").

[3] *Presidential Policy Directive - 1* (PPD-1). *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS V-25 (22 Mar. 2010) [hereinafter JOINT PUB. 3-0] (explaining that, while other agencies may have the lead, US military forces must be prepared to carry out all aspects of stability operations).

[4] Ch. 2 provides detailed information about the key players that operate within the rule of law arena.

I. Describing the Rule of Law

There is no widespread agreement on what exactly constitutes the ROL, 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 ROL and even more so regarding ROL operations.

A. Definitions of the Rule of Law

A first step in defining the ROL 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 ROL has essentially three purposes, as described by Richard Fallon:

> First the ROL should protect against anarchy and the Hobbesian war of all against all. Second, the ROL should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the ROL should guarantee against at least some types of official arbitrariness.[5]

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 ROL:

(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 ROL 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 ROL 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.[6]

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 military intervention. Consequently, he emphasized some points (such as stability over time) that may be less important to ROL efforts within military intervention than others he did not emphasize (such as providing physical security).

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

- making the state abide by the law
- ensuring equality before the law
- supplying law and order
- providing efficient and impartial justice
- upholding human rights.[7]

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[5] Richard H. Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7-8 (1997) (footnotes omitted).
[6] *Id*. at 8-9 (footnotes omitted).
[7] 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).

Countless other individuals and agencies have offered their own definitions of the ROL, each reflecting their own institutional goals. Deployed JAs participating in ROL 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 ROL will be particularly salient, such as those emphasizing physical security.

B. A Definition of the Rule of Law for Deployed Judge Advocates

No matter what level of academic disagreement exists about a ROL definition, JAs need look no further[8] than the U.S. Army doctrinal definition:

> Rule of law is 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 principles.[9]

This Army doctrinal definition is, to all intents and purposes, the same as the U.S. Government (USG) interagency definition.[10]

The ROL principle can be broken down into seven effects:[11]

- 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
- The state protects basic human rights and fundamental freedoms
- Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.[12]

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[8] This is not meant to suggest that JAs should not be aware of definitions used by other organizations, for instance the UN's understanding of ROL (See below, note 9), but that for their own purposes, there *is* a settled definition that should be utilized.

[9] U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1–9 (Oct. 2008). This definition is based in part on that contained in the *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.

This definition was also adopted by the Corps Commander in Iraq as early as 2006. *See* Appendix 2 to Annex G to MNC-I Operation Order 06-03.

[10] U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. DEPT. OF STATE, U.S. DEPT. OF DEFENSE, SECURITY SECTOR REFORM 4 (Feb. 2009) [hereinafter SECURITY SECTOR REFORM] ("Rule of Law is a principle under 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 law").

[11] The JFCOM Handbook for Military Support to Rule of Law and Security Sector Reform (13 Jun 2011) [Hereinafter "JFCOM Handbook"] refers to these "effects" as "indicators" and adds a further, useful consideration, being that "mechanisms are in place for the peaceful resolution of disputes."

The complete realization of these effects represents an ideal. The seven effects of the ROL exist to greater or lesser degrees in different legal systems and are not intended as a checklist for a society that abides by the ROL.[13] 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 ROL to different degrees according to geography (the ROL may be stronger in some places than others), subject matter (the ROL 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 ROL than others). Because any meaningful definition of the ROL represents an ideal, JAs should view the success of ROL operations as a matter of the host nation's *movement* toward the ROL, not the full satisfaction of anyone's definition of it.

The deployed captain or major who is this *Handbook*'s intended audience will hopefully be part of an operation that already has a definition of the ROL—one that has been adopted by policymakers. With that in mind, the effects and values represented by the list are ones that are likely to be present in any definition one is likely to encounter in a ROL operation. In this way, the seven effects can not only supply a definition of the ROL, they can complement one, providing more specific guidance about the effects JAs should be working to help bring about the ROL. See Chapter 5 on ROL metrics.

What follows is a discussion of these seven effects.

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

It is impossible to say that a society is governed by the ROL 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,[14] and even less professional arrangements such as militias, can have a role in a recovering state's security structure. But 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.

2. Individuals are Secure in Their Persons and Property

In many ways, providing security is the ultimate purpose of any state. For a JA as part of a deployed force, providing security is going to be the first element in any ROL plan and, depending on the status of operations, it may be the only real contribution that U.S. forces can make to implement the ROL.[15] But it is an important contribution nevertheless. From an operational standpoint, without basic

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[12] FM 3-07, *supra* note 9 at 1–9. Of the many definitions of the rule of law in common use, the list of seven effects 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).

[13] *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 12, at 79; Fallon, *supra* note 5, 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*.

[14] *See* ch. 5, sec. VIII. on Non-State Security Providers.

[15] 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.

security, the ROL 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 ROL. Thus, the interconnected nature of ROL projects also requires that ROL efforts be tied to other reconstruction efforts in order to provide the kind of livable society in which the ROL can flourish.[16] 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.[17] It is critical during that period to establish security, but the task of reconfiguring military forces and adjusting rules of engagement from a combat to security mission is a substantial one—it needs to be planned for and anticipated *before* the start of combat operations.[18]

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

3. 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 decision-making 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 ROL. 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 ROL. Corruption, or "the abuse of public power for private gain,"[19] is a prototypical example of the subversion of the ROL.

Judges, too, must be bound by law—statute law or precedent—in their decision-making 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.[20] 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 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.[21] Of course, there is likely to be little precedent in host nations in which U.S. military operations are taking place, and in some cases that precedent will be positively rejected as illegitimate.

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[16] *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 12, at 135.
[17] *Id*. at 145-47.
[18] *See* FM 3-24, *supra* note 1, 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.").
[19] WORLD BANK, WORLD DEVELOPMENT REPORT 1997, at 102 (1997).
[20] Fallon, *supra* note 5, 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 decisions of the same court are considered at least persuasive, and those of higher courts are frequently considered to be binding. *See* ch. 5. sec. B.
[21] Fallon, *supra* note 5, at 20-21.

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. It thus forms an important element of the state's protection of human rights and fundamental freedoms 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 ROL project faces. Although major ROL programs 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.[22]

4. 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.[23] Any society that has advanced beyond anarchy is likely to have such an agreement, which in countries that are the subject of U.S. military intervention, 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 ROL 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 reasonably accessible so that citizens are able to understand and rely upon them.[24] 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 rate of change cannot be so fast that it is impossible for individuals to build a habit of reliance on the law.

5. 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 JAs 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.

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[22] *See generally* A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1968).
[23] H.L.A. HART, THE CONCEPT OF LAW 94-95 (2d ed. 1994) (describing the "rule of recognition" that societies use to identify law).
[24] 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).

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 ROL in two opposite ways: either there is no effective correctional system and convicts are routinely released or prisoners are treated in ways inconsistent with human rights protections. A society cannot be said to be governed by the ROL if criminals are not adequately punished or if the state fails to treat those subject to its complete control in a humane, rational manner**.**

6. Human Rights and Fundamental Freedoms are Protected by the State

It is not possible to completely separate the form of a legal system from its content. Consider, for instance, a legal system in which judges applied the law as given to them and police arrested and incarcerated offenders without corruption or bias. Most would agree it nevertheless would fail to qualify as applying the ROL if the law applied was merely the fiat of a dictator or of a ruling majority acting without regard to human rights and fundamental freedoms. 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. It is meaningless to say that the law protects individuals without at least some concept of what it is that the law must protect.

The standards for the minimum protection of a country's inhabitants are embodied in the Universal Declaration of Human Rights (UDHR)[25] and the treaties to which the country is a party,[26] such as the International Covenant on Civil and Political Rights (ICCPR).[27] There is disagreement, however, on exactly what rights the law must protect to be considered a society governed by the ROL. Some, especially those active in the ROL community, define the most important obligation as one of equal treatment regardless of gender or economic, racial, or religious status.[28] While most would agree that equality is an important value, many disagree on exactly what forms of equality are necessary to the ROL. 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[29] or the right to free speech[30]—but doing so is unlikely to avoid disputes over which rights are essential to establishing the ROL. U.S. JAs need look no 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 JA who works on ROL projects needs to keep in mind that protection of human rights and fundamental freedoms is an important component of the ROL and that different participants in the ROL enterprise are likely to have very different understandings of the content of those rights and their relative importance. It is important for deploying JAs to research the human rights treaty obligations of the host nation, becoming familiar both with the underlying obligation contained in the treaty, any reservations or understandings that country made to it, whether other states have objected,[31] and the likely USG views of the obligation, before attempting to undertake a ROL project. If the country has not become party to the ICCPR, the UDHR should serve as the

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[25] Universal Declaration of Human Rights [hereinafter UDHR], G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).
[26] *See* FM 3-07, *supra* note 9, at 1-7.
[27] Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www2.ohchr.org/English/law/ccpr.htm (last visited June 9, 2011).
[28] UDHR art. 7; Kleinfeld, *supra* note 7, at 38.
[29] U.S. CONST. amends. V, XIV, sec. 5; UDHR art. 3.
[30] U.S. CONST. amend. I; UDHR art. 19.
[31] A full list of human rights treaties to which a country is a party and that country's reservations and declarations, as well as any objections to them by other states, can be found at http://www2.ohchr.org/English/law/ (last visited June 9, 2011).

guiding document for JAs.[32] It is also useful to understand the values of other partners and those of the host nation's culture. Certain human rights abuses by host nations may trigger restrictions on U.S. funding.[33] 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 ROL project.

7. 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.[34] 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.[35] A state can only be truly said to be governed by the ROL if the state, and its law, is viewed as legitimate by the populace—if the law is internalized by the people.[36] 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[37] (and fuel insurgency).[38] 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 institution that produced it—when it is the source of the law, not its content, that provides its justification.[39] Again, there are strong connections between this element and others, specifically the state's willingness to bind *itself* to the ROL. 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,"[40] 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 ROL project, a society that truly lives under the ROL is one in which individuals themselves resolve disputes in ways *consistent* with the law even without invoking the judicial system.[41]

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[32] It is Army doctrine that "[r]espect 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 1, at D-8 (citing the UDHR and the ICCPR as "guide[s] for the applicable human rights.").
[33] *See, e.g.*, Leahy Amendment, Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).
[34] HART, *supra* note 23, at 22-24.
[35] *Id*. at 54-58.
[36] *See* US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 7 (2008); STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 75-76.
[37] *See* JOINT PUB. 3-0, *supra* note 3, at V-26.
[38] *See* FM 3-24, *supra* note 1, at 1-27.
[39] *See* HART, *supra* note 23, at 57-58.
[40] STROMSETH, WIPPMAN & BROOKS, *supra* note 12, at 78.
[41] *Id*. at 78-79.

The legitimacy of a nation's legal system is in many ways the ultimate expression of the ROL, and is likely to take many years, if not decades, to develop. Again, JAs 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 JA 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 ROL. Judge advocates should conduct ROL projects with this end in mind.

C. Formalist v. Substantive Conceptions of the Rule of Law

Identifying conditions necessary for a society to be said to be subject to the ROL 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 ROL, a *formalist* one, that emphasizes the procedures for making and enforcing law and the structure of the nation's legal system, or a *substantive* one, in which certain rights are protected.[42] Using the list of ROL values described above, the transparency and stability of the law is more closely a formalist concern, while the protection of human rights and fundamental freedoms 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 formalist and substantive requirements for the ROL. Indeed it is difficult to find someone with a strong substantive approach to ROL 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 formalist and "maximalist" approaches that include both formalist and relatively strong substantive components.[43]

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 ROL 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 JAs consider ROL projects, the formalist/substantive distinction needs to remain at the forefront of their thinking.

As one might guess, ROL 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 ROL than there is regarding the substantive criteria.[44] Formalist projects are also much less likely to upset established political power relationships, which mean 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.[45] Similarly, formalist projects are frequently less likely to threaten the cultural identity of the host nation and its population than substantive projects.[46] 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

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[42] *See* Paul Craig, *Formalist and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467.
[43] STROMSETH, WIPPMAN & BROOKS, *supra* note 12, at 70-71.
[44] Robert Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1709-10 (1991).
[45] Kleinfeld, *supra* note 7, at 38.
[46] *See id*. at 38 (citing the example of gender equality as a threat to some conceptions of Islamic culture).

they completely ignore substantive rights,[47] and U.S. law may place explicit limits on assistance to host nations guilty of human rights abuses. These models do not exist 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 host nation legal system.

II. Rule of Law Operations

There are as many types of "rule of law operations"—in the parlance of this *Handbook*, any project, program, or planned action whose specific goal is to help a host nation move toward the realization of one or more of the seven effects previously described—as there are definitions of the ROL. The nature of the ROL operations that JAs are part of will vary based on the nature of the operational environment. In an area subject to active combat, for instance, the ROL 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 ROL. The kind of all-consuming occupations that the U.S. undertook in Germany and Japan following World War II are not likely models for future campaigns, suggesting an approach that is more openly cooperative with the host nation and its population.[48] 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 (OIF). In many nations, many industries are traditionally public, meaning that ROL values are implicated in the *operation* of those industries.

Moreover, ROL operations can take very different forms. Many ROL operations are designed to improve the capacity of host nation government or social institutions in realizing the ROL. Such "capacity-building" projects have traditionally been performed by civilian organizations of all kinds, and many necessarily so as a matter of U.S. law, which limits the U.S. military's role in providing assistance to many foreign government institutions.[49] But ROL operations can also focus on the effects that U.S. forces themselves have on the state of the ROL in a host nation. Improving the detention policies followed by U.S. forces, such as a preference for relying on the host nation criminal justice system rather than U.S. military "security detention," can go a long way toward a host nation's realization of the seven ROL effects. Consequently, JAs concerned with the ROL (as all lawyers should be) must necessarily concern themselves not only with the operation of the host nation's legal

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[47] 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).

[48] STROMSETH, WIPPMAN & BROOKS, *supra* note 12, at 3.

[49] One form of rule of law operation directed toward reforming the institutions that provide security is "security sector reform." "Security Sector Reform" is

> the set of policies, plans, programs, and activities that a government undertakes to improve the way it provides safety, security, and justice. The overall objective is to provide these services in a way that promotes an effective and legitimate public service that is transparent, accountable to civilian authority, and responsive to the needs of the public. From a donor perspective, SSR is an umbrella term that might include integrated activities in support of: defense and armed forces reform; civilian management and oversight; justice; police; corrections; intelligence reform; national security planning and strategy support; border management; disarmament, demobilization and reintegration (DDR); and/or reduction of armed violence.

SECURITY SECTOR REFORM, *supra* note 10, at 3.

institutions, but with the conduct of the operational force. Many types of projects, both capacity-building and operational, fall under the umbrella of "ROL," and they are as varied as the problems they are intended to address.

There are countless aspects of ROL operations, but this *Handbook* emphasizes three that are particularly salient to deploying JAs: the role of ROL operations within full spectrum operations, the operational impact of ROL operations, and the need to adopt an approach to the ROL that focuses on effects rather than institutions.

A. Rule of Law Operations Within the Context of Full Spectrum Operations

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 appropriate balance during the different phases of the campaign.[50] Army doctrine refers to the mix of offensive, defensive, and stability operations as "full spectrum operations."[51]

Stability operations, in turn, 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."[52] Although stability operations have particular emphasis during the later phases of the campaign, they will take place even during the initial combat phase,[53] and they need to be planned for as part of the overall campaign. The termination of a major campaign cannot take place until local civil authorities are in a position to administer the host nation,[54] and stability operations are critical to the final two phases of the campaign (Stabilize and Enable Civil Authority)[55] leading to the campaign's termination and the redeployment of U.S. forces.[56] Stability operations are also a critical component of counterinsurgency.[57]

DODI 3000.05 explains that stability operations are "a core U.S. military mission that the DOD shall be prepared to conduct with proficiency equivalent to combat operations." But it also emphasizes DOD's need to support stability operations led by other USG agencies, "foreign governments and security forces, international governmental organizations or when otherwise directed." Of note, although recognizing the possibility that DOD may be required to lead stability operations activities to "establish civil security and civil control and provide essential services, repair and protect critical

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[50] JOINT PUB. 3-0, *supra* note 3, at V-1 - V-2.

[51] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 3-1 (27 Feb. 2008). In addition, full spectrum operations include "civil support operations," which is the domestic counterpart to stability operations, which are performed overseas.

[52] JOINT PUB. 3-0, *supra* note 3, at GL-26. *See also* U.S. DEP'T OF DEFENSE, INSTR. 3000.05, STABILITY OPERATIONS, (16 Sept. 2009) [hereinafter DODI 3000.05], at 1.

[53] JOINT PUB. 3-0, *supra* note 3, at V-15 - V-16.

[54] *Id*. at IV-29 - IV-30.

[55] 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.

[56] *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.")

[57] FM 3-24, *supra* note 1, at 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").

infrastructure, and deliver humanitarian assistance," it should do so with a view to transition that lead responsibility to other entities when feasible. This policy demands that ROL project transition planning must be included in any military ROL line of operations. In performing that lead role, the DOD will operate within "U.S. Government, and as appropriate, international structures for managing civil-military operations "and will seek to enable the deployment and utilization of "appropriate civilian capabilities."[58]

Many ROL operations will take place as components of stability operations, helping to establish (or reestablish) the host nation's capacity to maintain the ROL. Such projects may include reconstruction of the physical infrastructure of the host nation's legal system, providing training programs for host nation justice sector personnel, or simply serving as a coordinator between the many, many participants in such projects. Conducting ROL operations within the context of stability operations requires that any ROL effort be coordinated with other activities (such as security and the restoration of civilian infrastructure and essential services)[59] and with other agencies. Within the Army, Civil Affairs (CA) forces have a particular expertise in many aspects of stability operations, and JAs should seek out CA personnel (who are frequently attached to both Army and Marine Corps units) when tasked to conduct ROL operations as part of stability operations.[60]

DODI 3000.05 clearly recognizes that "[I]ntegrated civilian and military efforts are essential to the conduct of successful stability operations." To this end the DOD policy directs that DOD shall: "Support the stability operations planning efforts of other U.S. Government agencies; Collaborate with other U.S. Government agencies and with foreign governments and security forces, international governmental organizations, nongovernmental organizations, and private sector firms as appropriate to plan, prepare for, and conduct stability operations";[61] and "continue to support the development, implementation, and operations of civil-military teams and related efforts aimed at unity of effort in rebuilding basic infrastructure; developing local governance structures; fostering security, economic stability, and development; and building indigenous capacity for such tasks."[62] Thus, JAs can expect a particularly close working relationship with a multitude of not only U.S., but also coalition, non-governmental, and indigenous participants in ROL projects.

Notwithstanding this Stability Operations emphasis, the ROL plays an important role across the full spectrum of operations. The objective of any campaign is to leave in place a "*legitimate* civil authority"[63] within the host nation. "Legitimacy is frequently a decisive element" in joint

[58] DODI 3000.05, *supra* note 52, at 2.
[59] *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 12, at 9; JOINT PUB. 3-0, *supra* note 9, at JOINT PUB. 3-0, *supra* note 3, at V-1 ("To reach the national strategic end state and conclude the operation/campaign successfully, JFCs must integrate and synchronize stability operations with other operations (offense and defense) within each major operation or campaign phase."); FM 3-24, *supra* note 1, at 5-2 (the second stage of COIN "expands to include governance, provision of essential services, and stimulation of economic development").
[60] *See* JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS (8 July 2008); U.S. DEP'T OF ARMY, FM 3-05.40, CIVIL AFFAIRS OPERATIONS (29 Sep. 2006).
[61] DODI 3000.05, *supra* note 52, at 2.
[62] DODI. 3000.05, *supra* note 52, at para. 4.3. *See also* JOINT PUB. 3-0, *supra* note 3, 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").
[62] DODI 3000.05, *supra* note 52, at 2-3.
[63] JOINT PUB. 3-0, *supra* note 3, at IV-29 - IV-30 (emphasis added).

operations.[64] Similarly, in COIN, "victory is achieved when the populace consents to the government's legitimacy and stops actively and passively supporting the insurgency."[65] In this sense, for U.S. forces engaged in COIN, the most important of the seven effects described above is the last one: individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives. That legitimacy is the desired end state for any campaign, but it is the only real objective in a counterinsurgency.

Because of the special relationship between the ROL and the legitimate exercise of force, actions that contribute to the realization of the ROL not only include formal projects to rebuild host nation capacity, but also actions to assure that U.S., coalition, and host nation security forces themselves operate in ways that encourage respect for the ROL while engaged in the full spectrum of operations, including offensive and defensive operations. Field Manual 3-24 suggests that:

> Efforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. Moreover, participation in COIN operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is party, and certain [host nation (HN)] laws. Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.[66]

Legitimacy is the watchword of COIN, which means that every operation undertaken during a counterinsurgency—offensive, defensive, or stability—has a ROL component. 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 ROL 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 and protecting the population from the seemingly arbitrary use of force.

Judge advocates have a long tradition of advising commanders on the legal aspects of conducting operations, which puts them in a prime position to inject the concept of legitimacy into the full spectrum of operations undertaken during a campaign. That advice may be particularly important as the conflict progresses and operations change over time from an early stage high-intensity conflict (as during a forced entry) to a long-term counterinsurgency, and from resembling military conflict to more closely resembling law enforcement.[67]

As U.S. forces work closely with coalition and host nation forces, the role of JAs as advisors on matters of legitimacy may expand to include helping to assure that host nation forces also employ force in legitimate ways. For instance, JAs can help to define rules for the use of force by joint U.S./host nation operations—which are likely to eventually develop into host nation-only operations—that comply with U.S., international, and host nation law; help to develop training programs in the legitimate use of force by host nation security forces; and mentor host nation personnel in the legitimate use of force. Throughout the period of U.S. military involvement, JAs will further the ROL mission by advising commanders on the legal restrictions on the use of force by U.S. forces, thereby setting the appropriate example for host nation forces.

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[64] *Id.*, at A-4 ("Committed forces must sustain the legitimacy of the operation and of the host government, where applicable.").
[65] FM 3-24, *supra* note 1, at 1-3.
[66] *Id.* at 1-24.
[67] *See* FM 3-24, *supra* note 1, 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.").

B. Operational Impact

Notwithstanding the long term benefits that the conduct of legitimate operations delivers, there is no denying that there may be short-term costs. It is imperative that JAs explain to their commanders that any ROL 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, ROL operations may impact traditional operations in other ways as well.

U.S. forces may need to alter their tactical stance in order to convey to the population that they are operating according to law rather than merely exercising control through the threat of force. 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. Recall Joint Pub 3-0's phases of joint operations: while *Dominate* is an important aspect of combat operations, transitioning into the next phases, *Stabilize* and ultimately *Enable Civil Authorities*, include a reduction in dominating activities.[68] 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 in 2006: *Restraint*, *Perseverance*, and, of course, *Legitimacy*.[69] When conducting stability operations generally, and ROL operations in particular, the relationship between commanders and the local population (and other ROL participants) must be one of cooperation and persuasion rather than commanding and directing.[70]

Because ROL operations are inherently cooperative enterprises, ROL practitioners must have flexibility not only as to possible end states, but also as 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, the means for accomplishing the ROL must be ones that the local population views as legitimate. The means, as well as the goal, of ROL operations must be meaningful to those who would be governed by the legal system in question. That requirement applies to both formal projects undertaken as part of stability operations (for example, it would be illegitimate for a commander to unilaterally appoint host nation judges) and to the conduct of offensive and defensive operations by coalition and host nation forces (for example, the use of warrantless "cordon and search" methods). Injecting legitimacy into operations is likely to substantially limit commanders' operational flexibility.

It is critical for JAs to establish up front that efforts to inculcate the ROL 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.[71] The criminals who go free every day in the U.S. 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, U.S. 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.[72] 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 are likely to be realized only over the very long term. It

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[68] JOINT PUB. 3-0, *supra* note 3, at IV-26—IV-30 and fig. IV-6. *See also* STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 136 ("Winning wars and maintaining order are two very different tasks").

[69] JOINT PUB. 3-0, *supra* note 3, at II-2xii. 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 12, at 135 ("[S]ecurity cannot depend solely or even primarily on coercion.").

[70] LCDR Vasilios Tasikas, *Developing the Rule of Law in Afghanistan, The Need for a New Strategic Paradigm*, ARMY LAW. 45 (July 2007).

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

[72] 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.

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 JAs to educate their commanders about the importance of the ROL mission and to prepare them for the costs of undertaking that mission. Commanders need to know these operations, like any other, may cost Soldiers' lives and that, while loss of life is always tragic, it is no more or less acceptable as part of ROL operations than it is as part of a high-intensity conflict.

Rule of law operations are long-term ones, and the ROL is not free, either financially or operationally. The worst thing commanders can do for the ROL 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.

C. The Importance of Focusing on Effects

The preference in all operations is to set goals based on tangible, measurable criteria. [73] In ROL projects, temptation to set measurable goals pushes ROL 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 ROL projects should ultimately focus on bringing about particular *effects*[74] along the path towards a specific end-state.[75] Thus, it is critical to keep in mind what values are represented by the ROL so that those values, not some intermediate, institutionally focused objective, drive the ROL effort.[76] A nation with beautifully constructed courthouses may nevertheless fail to achieve the ROL 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.

Of course, metrics must be "measurable," and some institutional improvements can point to underlying effects. For instance, attendance and graduation from training programs by the judiciary or police may indicate that their superiors recognize the value of the content of the program. Nevertheless, by failing to recognize that institutional improvements are only valuable if they are connected to an effect, some institutional projects may actually thwart the long-term adoption of the ROL in a society. It may very well be 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 ROL 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 ROL projects and the relative inability of armed forces and other ROL participants to actually bring about the ROL. Although adequate resources, security, and thoughtful planning and execution may be *necessary* for ROL projects, they are not *sufficient* for establishing the ROL. In the end, the ROL 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

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[73] *See* ch. 5, *Planning, Assessment and Metrics.*

[74] "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).

[75] *Id.* at 6 ("A clearly defined military end state complements and supports attaining the specified termination criteria and objectives associated with other instruments of national power.").

[76] Kleinfeld, *supra* note 7, at 61-62.

never successfully imposed at the end of a gun, merely applying greater resources or asserting greater control cannot lead to success, and frequently may hinder it.

CHAPTER 2

KEY PLAYERS IN RULE OF LAW

Rule of law missions typically involve joint,[1] interagency, intergovernmental and multi-national (JIIM) participation. Involving so many participants 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."[2] ROL operations are not, and are unlikely to ever be, an exclusively military activity. Other U.S. agencies, international and non-governmental organizations, coalition forces, private sector partners, and host nation agencies, will all, to a greater or lesser degree, help carry the ROL burden. However, even in an environment in which security is not a critical issue, the military can still play an effective and important role in ROL activities, for example, by way of its support to Security Sector Reform (SSR) programs.

Success or, more realistically, "progress" in the ROL arena derives from the pursuit of a common strategic plan by all the relevant players within it. A common strategy sets the rules, establishes roles and missions, helps manage expectations, obtains early "buy in," and holds those involved to account. It is the focused efforts of all participants, each of whom brings a unique perspective and skill set, which is critical for success. Recognizing the value added, and understanding the roles, responsibilities, strengths and constraints, of the other members of the team is crucial. That recognition, and understanding, will help foster and maintain strong professional and interpersonal relationships, which, in turn will inevitably, help enhance communication and cooperation.

When identifying the key players in any particular ROL mission, practitioners must identify, and engage early with, relevant host nation ROL institutions (both national and local) in order that they own, and are responsible for, ROL reform efforts. That said, because each ROL 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. Instead, this Chapter describes the key USG agencies and departments, institutions and international actors that typically operate in the ROL environment.[3]

I. U.S. Policy for Conflict Prevention and Response: Interagency Coordination and Structure

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."[4] Several decades of civilian-military operations have resulted in U.S. government leadership directing

[1] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 283 (as amended through 30 May 2008) (defining "joint" as: "activities, operations, organizations, etc., in which elements of two or more Military Departments participate").
[2] JAMES DOBBINS, ET AL., THE BEGINNER'S GUIDE TO NATION-BUILDING 6 (2007).
[3] JA ROL practitioners should understand that the medium for communication with the relevant host nation officials will be a matter for the overall USG strategy and policy guidance to determine. JAs should be mindful of official channels when dealing with other agency officials and representatives. Guidance must be sought through the lead ROL agency, military command channels, and senior DOD ROL representatives on the ground when attempting to coordinate with other agencies, both USG and otherwise.
[4] JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERAGENCY, INTERGOVERNMENTAL ORGANIZATION, AND NONGOVERNMENTAL ORGANIZATION COORDINATION DURING JOINT OPERATIONS I-1 (17 Mar. 2006).

executive branch agencies to accomplish that objective more effectively, by improving both the planning and execution of conflict prevention and response operations.

Early directives issued for this purpose included President George W. Bush's *National Security Presidential Directive 44* (NSPD-44) and *Department of Defense Directive 3000.05*[5] (which was later reissued as *Department of Defense Instruction 3000.05* (DODI 3000.05)).[6] The current overarching framework for interagency coordination has been established by President Barack H. Obama in *Presidential Policy Directive - 1* (PPD-1).[7] PPD-1 sets out the National Security Council (NSC) structure, establishes the general framework for interagency coordination, and continues to be the coordinating framework used for operations in Iraq and Afghanistan. *The 2010 Quadrennial Diplomacy and Development Review*[8] (QDDR) details requirements for the U.S. Department of State and the U.S. Agency for International Development to improve their ability to anticipate and address the crises and conflicts associated with state weakness, instability, and disasters, and to support stability and transition following conflict. Chapter 4 of the QDDR identifies recommendations for the Department of State and USAID to prevent and respond to crisis, conflict and instability, including, through building a long-term foundation for peace under law, security and justice sector reform.

Planning and executing interagency operations involving many federal departments and agencies is a complicated and difficult undertaking in any environment. This is, in part, due to the manner in which USG agencies are organized to manage specific, and often narrow, instruments of national power. These separate agencies tend to operate in legislatively-created stovepipes (and funding streams). They may also be constrained, by the same laws, from performing functions that fall outside of their core missions. In turn, this has led them to develop their own agency-specific goals, priorities, terminology, and bureaucratic cultures that reflect and support those missions.

The pursuit of common and coherent policies among the USG interagency community is a recurrent challenge in government. Notwithstanding that, when political leaders call upon disparate parts of the USG to plan and execute a specific mission, the governmental entities involved must be able to work together and effectively, whether within a formal or informal interagency framework. Within the conflict prevention, transition, and stabilization 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. The creation of the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) was a tangible example of just such a structure.

Understanding the relevant framework for interagency coordination in conflict prevention and response operations (to include Stability Operations) is critical for a JA to be able to advise the Commander effectively and accurately about, and execute, ROL related lines of operation.[9] As USG

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[5] U.S. DEP'T OF DEFENSE DIRECTIVE 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, (November 28, 2005) [hereinafter DODD 3000.05].

[6] U.S. DEP'T OF DEFENSE, INSTR. 3000.05, STABILITY OPERATIONS, 2-3 (16 Sept. 2009) [hereinafter DODI 3000.05].

[7] Presidential Policy Directive – 1, 13 February 2009 [hereinafter PPD-1].

[8] *The 2010 Quadrennial Diplomacy and Development Review* (available at: http://www.state.gov/s/dmr/qddr/) [hereinafter QDDR] identifies key capabilities for the U.S. Department of State and the United States Agency for International Development to achieve their mission. The U.S. Congress has encouraged interagency, post-conflict efforts by creating the Civilian Stabilization Initiative and appropriating funds to support, maintain, and deploy a Civilian Response Corps to conduct reconstruction and stabilization operations designed to prevent or respond to conflict in foreign countries, *see*: Consolidated Appropriations Act, 2010, Public Law 111-117, December 16, 2009.

[9] While this *Handbook* is primarily aimed at the JA ROL practitioner, its readership is not limited to that audience. Rather than plough through the following pages which describe, perhaps, their own agencies, civilian practitioners who find themselves about to be thrust into an alien military environment could do no better than read Colonel (Ret'd) Gary Anderson's *The Closers Part VI Dealing with the US Military* (one of a series of

agencies other than DOD usually have the lead on ROL programs, appreciating the utility of an effective interagency framework, and understanding the national policy aims within which it works, can only enhance the efficacy of the JAs role in implementing a ROL program. Working effectively with interagency partners delivers a more economic use of resources, increases legitimacy with the indigenous population, and optimizes prospects for stability and security. And as we have seen in Chapter 2, it is also directed by DODI 3000.05.[10] A tangible example of the desire to improve interagency ROL coordination is the Congress approved $0.5 million interagency training program authorized in the 2010 National Defense Authorization Act. Following a competitive bidding process, this new ROL training initiative is now being led by the Office of The Judge Advocate General (OTJAG) in partnership with the University of South Carolina's ROL Collaborative (USC ROLC).

A. The Civilian Approach to Conflict Prevention and Response

Editor's Note: This section is, in parts, forward looking, reflecting aspirational changes contemplated in the QDDR, rather than the status quo.

At the highest policy level, the National Security Council Interagency Policy Committees (NSC/IPCs) manage the development and implementation of national security policies by the multiple agencies of the USG. These committees are stood up to address specific issues or crisis and are the main day-to-day forums for interagency coordination of national security policy. Direction starts with committees under the leadership of principals and their deputies from the Executive Agencies and guidance flows to the reconstruction and stabilization interagency policy committee (IPC) of the NSC. The IPC is the day-to-day forum for interagency coordination of national policy on reconstruction and stabilization. National Security Staff provide overall policy leadership and coordinate the interagency in responding to major crises.

The QDDR sets out that the Department of State and USAID will adopt a lead agency approach during crisis situations whereby, "[U]nder the guidance of the National Security Staff, the State Department will lead for operations responding to political and security crises, while USAID will lead for operations in response to humanitarian crises resulting from large-scale natural or industrial disasters, famines, disease outbreaks, and other natural phenomena."[11]

The critical role of both USAID and State is recognized in the QDDR, together with the fact that, while the focus of State and USAID's roles is different, their capabilities often overlap. The challenge being, of course, to ensure that the efforts of both are integrated, not replicated. To illustrate this, the QDDR provides the example that, "when State leads operations in response to a political or security crisis, it will provide direction on objectives and resources to be deployed, but USAID will retain operational control over how to deploy its resources to the field. Similarly, when a natural or industrial disaster, famine, disease, or other natural phenomenon strikes and USAID takes the lead, State has a diplomatic and, often, also an operational role to play in support."[12]

In the field, subject to a few exceptions such as those personnel under the command of a U.S. Combatant Commander, the Chief of Mission will have full responsibility for the direction, coordination, and supervision of all in-country USG executive branch employees. In Washington, State and USAID will work closely with the National Security Staff and other federal agency partners

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articles with a civilian focus theme), Small Wars Journal (http://smallwarsjournal.com), *available at* http://smallwarsjournal.com/blog/journal/docs-temp/819-anderson.pdf (last visited July 27, 2011).

[10] DODI 3000.05, *supra* note 6 at 4b.

[11] QDDR, *supra* note 8, p. xiii.

[12] QDDR, *supra* note 8, p. 133.

to ensure unified interagency guidance, planning, and execution. In situations that call for a joint civil-military approach, State and USAID will coordinate with DOD.[13]

The QDDR has mandated the development of a new process to coordinate stability and transition operations, the International Operational Response Framework (IORF). Under the IORF, State and USAID will coordinate with interagency partners, through a National Security Staff led process using established systems and procedures to ensure transparent and accountable leadership structures and clear agency lines of responsibility. The IORF will, in its design, draw upon relevant aspects of the National Incident Management System utilized by the Federal Emergency Management Agency (when it responds to domestic disasters) as well as other international response mechanisms. Like its domestic counterparts, the IORF will be designed to govern how the U.S. government conducts crisis response by addressing coordination among agencies, ensuring flexibility and speed of response, and providing staffing to meet urgent needs.[14]

A further objective of the QDDR is to elevate and improve strategic planning within the Department of State. In this respect, the newly formed Bureau for Conflict and Stabilization Operations (CSO) will serve as the institutional focal point for policy and operational solutions for crisis, conflict, and instability.[15]

B. The Department of Defense Approach

The DOD's Capstone Concept for Joint Operations (CCJO) and DODI 3000.05 establish DOD instruction for the conduct and support of stability operations.[16] While JA ROL practitioners *should* be aware of PPD-1, they *must* be conversant with DODI 3000.05. This Instruction sets out DOD roles, responsibilities and requirements in the stability operations arena. Originally issued as a Directive in November 2005, DODI 3000.05 (issued in September 2009) explains the interagency context within which DOD will conduct stability operations. Although recognizing that stability operations[17] are a "core U.S. military mission" that "the [military] shall be prepared to conduct,"[18] DODI 3000.05 consistently reiterates the supporting role that DOD will often play in stability operations. It explicitly states that DOD shall assist USG agencies (along with other relevant organizations) in planning and executing R&S efforts to include, amongst other matters, "strengthening governance and the rule of law."[19] However, that supporting role should not be taken as a sign that the ROL component parts of stability operations are something that judge advocates should not meticulously prepare for. Indeed, the Instruction directs that DOD must be able to conduct stability operations with a "proficiency equivalent to combat operations."[20]

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[13] QDDR, *supra* note 8, p. 134.
[14] QDDR, *supra* note 8, p. 141.
[15] QDDR, *supra* note 8, p. 135.
[16] There is ongoing work to relate DODI 3000.05 to PPD-1 and the QDDR vis-à-vis conflict prevention and response operations.
[17] Stability Operations are those missions, tasks, and activities seek to maintain or reestablish a safe and secure environment and provide essential governmental services, emergency infrastructure reconstruction, or humanitarian relief. Many of these missions and tasks are the essence of CMO. JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS V-1 (13 Feb. 2008).
[17] DODI 3000.05, *supra* note 6.
[18] *Id.* at 4.a.2.
[19] *Id.* at 3.
[20] *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).

As former Secretary of Defense Gates noted on several occasions,[21] a robust civilian foreign affairs capability, coupled with a strong defense capability, is essential to preserving U.S. national security interests, including the ROL. When civilian agencies cannot operate independently in insecure environments, civilian-military teams work together to implement ROL programs and other forms of support. In cases where a host nation's legal infrastructure has ceased to exist or function, U.S. forces may play a more significant role in establishing and sustaining the ROL than they would otherwise. Even when host-nation judicial capacity is restored, U.S. forces may provide logistical and security support to their civilian counterparts.

Where DOD takes the lead in stability operation activities (such as the establishment of civil security and civil control, the restoration of essential services or the repair and protection of critical infrastructure), DODI 3000.05 directs that it should do so only until such time as it is feasible to transition that lead responsibility to other USG agencies or other organizations. Even during that lead phase, DOD is to operate within USG, and as appropriate, "international structures for managing civil-military operations, and will seek to enable the deployment and utilization of the appropriate civilian authorities."[22]

Suffice it to say, after reading DODI 3000.05, no ROL JA should be left in any doubt about the implicit requirement to understand the interagency structure and the explicit requirement for interagency coordination in this area of stability operations work.

C. U.S. Agencies Influencing Stability Operations

There are an extensive number of individuals and U.S. governmental offices that influence stability operations policy. There follows an overview of some of the relevant directives, offices or positions at the NSC and at USG agencies. This is followed by a detailed description of the key agencies that ROL Judge advocates are likely to encounter during the course of their work.

1. National Security Council (NSC) System[23]

- National Security Council
  - NSC Principals Committee (PC) (DC)
  - NSC Interagency Policy Committees (IPC) (organized on a regional and/or functional basis)

[21] For example, U.S. Department of Defense. Speech by former Secretary of Defense Robert M. Gates, delivered at Kansas State University, Manhattan, KA (the "Landon Lecture"), November 26, 2007, and U.S. Department of Defense, Speech by former Secretary of Defense Robert M. Gates at the AFRICOM Activation Ceremony, Washington, DC, October 1, 2008, http://www.defenselink.mil/speeches/secdef.aspx. The May 11th and June 4th 2009 Memos concerning the "Department of Defense (DoD) Civilian Support to Global Expeditionary Requirements" codified these sentiments.

[22] DODI 3000.05, *supra* note 6 *at 2*.

[23] *See* PPD-1, *supra* note 7.

2. Department of State[24] (DOS)[25]

- **Secretary of State (S)**
  - Deputy Secretary (D)
  - Deputy Secretary for Management and Resources (DMR)
  - Director of U.S. Foreign Assistance (F)
  - Counselor of the Department (C)
- **Under Secretaries for:**
  - Arms Control and International Security **(T)**
  - Economic, Energy and Agricultural Affairs **(E)**
  - Democracy and Global Affairs **(G)**
  - Management **(M)**
  - Political Affairs **(P)**
  - Public Diplomacy and Public Affairs **(R)**
- **Special Envoys and Special Representatives**
  - Coordinator, Threat Reduction Programs
  - Special Adviser for Nonproliferation and Arms Control
  - Special Envoy for Climate Change
  - Special Envoy for Conventional Armed Forces in Europe
  - Special Envoy for Eurasian Energy
  - Special Envoy for Holocaust Issues
  - Special Envoy for Middle East Peace
  - Special Envoy for North Korean Human Rights Issues
  - Special Envoy for the Six-Party Talks
  - Special Envoy to Monitor and Combat Anti-Semitism
  - Special Envoy to Sudan
  - Special Representative for Global Partnerships
  - Special Representative for North Korea Policy
  - Special Representative of the President for Nuclear Nonproliferation
  - Special Representative to Afghanistan and Pakistan
  - Special Representative to Muslim Communities
- **Bureaus and Offices**
  - Administration (A)
  - African Affairs (AF)
  - Allowances (A/OPR/ALS)
  - Arms Control, Verification and Compliance (AVC)
  - Authentication Division (A/OPR/GSM/AUTH)
  - Coordinator for Counterterrorism (S/CT)

[24] The QDDR (*see supra* note 8, ch. 4) contains organizational recommendations that would change this listing, including but not limited to the creation of a Bureau for Conflict and Stabilization Operations (CSO) that would subsume S/CRS. Note, underlined entries in this list are hyperlinked in the electronic version.

[25] But note, by way of example of causing inadvertent interagency tension, although "DOS" is used by DOD in its Joint Pub 1-02, Dictionary of Military and Associated Terms, it is not a recognized/accepted abbreviation, nor is it used, within the Department of State.

- Coordinator for Reconstruction and Stabilization (S/CRS)
- Chief Information Officer (CIO)
- Chief of Staff (S)
- Civil Rights, Office of Consular Affairs (CA)
- Democracy, Human Rights, and Labor (DRL)
- Diplomatic Security (DS)
- Director General of the Foreign Service and Director of Human Resources (DGHR)
- East Asian and Pacific Affairs (EAP)
- Economic, Energy and Business Affairs (EEB)
- Educational and Cultural Affairs (ECA)
- European and Eurasian Affairs (EUR)
- Executive Secretariat (S/ES)
- Foreign Service Institute (FSI)
- Foreign Missions, Office of Global AIDS Coordinator, Office of (S/GAC)
- Global Women's Issues (S/GWI)
- Human Resources (M/HR)
- Information Resource Management (IRM)
- Inspector General (OIG)
- Intelligence and Research (INR)
- International Information Programs (IIP)
- International Narcotics and Law Enforcement Affairs (INL)
- International Organization Affairs (IO)
- International Security and Nonproliferation (ISN)
- Legal Adviser (L)
- Legislative Affairs (H)
- Management Policy, Rightsizing and Innovation (M/PRI)
- Medical Services (M/MED)
- Near Eastern Affairs (NEA)
- Oceans and International Environmental and Scientific Affairs (OES)
- Overseas Buildings Operations (OBO)
- Policy, Planning, and Resources for Public Diplomacy and Public Affairs, Office of (R/PPR)
- Policy Planning Staff (S/P)
- Political-Military Affairs (PM)
- Population, Refugees, and Migration (PRM)
- Protocol (S/CPR)
- Public Affairs (PA)
- Resource Management (RM)
- Rightsizing the U.S. Government's Overseas Presence (M/R)
- Science & Technology Adviser (G/STAS)
- South and Central Asian Affairs (SCA)
- Trafficking in Persons (G/TIP)
- War Crimes Issues (S/WCI)
- Western Hemisphere Affairs (WHA)

3. U.S. Agency for International Development (USAID)

- Administrator of USAID

- Regional Bureaus (Africa (AFR), Asia/Near East (ANE), Europe/Eurasia (E&E), Latin America/Caribbean (LAC), Middle East)
    - South Asian Affairs (ANE/SAA)
    - Iraq Reconstruction (ANE/IR)
- Bureau for Democracy, Conflict and Humanitarian Assistance (DCHA)
    - Democracy and Governance
- Rule of Law Division
- Governance Division
- Elections and Political Processes Division
- Civil Society Division
    - Office of Transition Initiatives (OTI)
- Management and Program Operations Team
- Field Operations Team
    - Conflict Management and Mitigation
    - U.S. Foreign Disaster Assistance (OFDA)
    - Volunteers for Prosperity
    - Military Affairs
- Planning Division
- Operations Division
- Bureau of Economic Growth, Agriculture and Trade (EGAT)
    - Women in Development
    - Economic Growth
- Economic Policy and Governance Team
    - Poverty Reduction
- Microenterprise Development Team
- Poverty Analysis and Social Safety Net Team
    - Infrastructure and Engineering
    - Agriculture
- Agriculture and Rural Policy/Governance Team
- Agricultural Technology Generation and Technological Outreach Team
- Agribusiness and Markets Team
    - Bureau for Global Health
    - Bureau for Legislative and Public Affairs

4. Department of Justice (DOJ)

- Attorney General
    - Deputy Attorney General
        - Assistant Attorney General, Criminal Division
            - International Criminal Investigation Training Assistance Program (ICITAP)

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

- Director, Federal Bureau of Investigations (FBI)
- Director, U.S. Marshals Service (USMS)
- Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)
- Administrator, Drug Enforcement Administration (DEA)
- Director, Federal Bureau of Prisons
- Office of Legal Policy (OLP)
- Office of Intergovernmental and Public Liaison
- Office of Legal Counsel (OLC)

5. Department of Defense (DOD)

- Secretary of Defense
  - Deputy Secretary of Defense
    - Secretary of the Army
  - Joint Chiefs of Staff (JCS)
    - Chairman of JCS
    - Joint Chiefs
    - Joint Staff: J-1 – J-9
  - 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
  - Office of General Counsel

6. U.S. Department of Agriculture (USDA)

- Secretary of Agriculture
  - Office of Scientific and Technical Affairs
  - Office of Country and Regional Affairs
  - Office of Capacity Building and Assistance
  - Employees detailed to serve as agriculture advisors to Provincial Reconstruction teams in Iraq and Afghanistan

7. Department of Commerce

- Secretary of Commerce
  - Afghanistan Investment and Reconstruction Task Force
  - Iraq Investment and Reconstruction Task Force

8. Department of the Treasury

- Secretary of Treasury
  - Under Secretary for International Affairs

- Assistant Secretary for International Affairs

- Deputy Assistant Secretary for Regions (Africa/ME, South and East Asia, WHA, Europe/Eurasia)
- Deputy Assistant Secretary for International Technical Assistance Policy
- Deputy Assistant Secretary for Trade and Investment Policy
- Deputy Assistant Secretary for Monetary and Financial Policy
- Deputy Assistant Secretary for International Development Finance and Debt
- Deputy Assistant Secretary for Investment Security

9. Executive Office of the President, Office of Management and Budget (OMB)

- Director of the OMB
  - National Security Programs
    - International Affairs Division
    - National Security Division

II. U.S. Governmental Agencies Involved in Rule of Law

A number of USG entities participate in ROL operations within, and outside of, the context of stability operations. Each of these departments and agencies has a somewhat different emphasis and perspective to the ROL. Many of them have extensive deployed experience to draw upon. A brief description of the major USG Departments and Agencies involved in ROL is set out below.[26]

A. Department of State

The Department of State is responsible for planning and implementing U.S. foreign policy. It has the mandate to prepare for, plan, coordinate, and implement U.S. reconstruction and stabilization operations in a wide range of contingencies, including disaster relief emergencies, failing and failed states, and post-war arenas. Thus, the Department of State serves 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 U.S. military is involved, the Department of State coordinates with DOD to synchronize military and civilian activities. The Secretary of State has overall responsibility to lead both steady-state and contingency planning in operations and coordinate federal agencies' respective response capabilities. The Secretary's specific responsibilities include:

- Informing U.S. decision makers of viable options for stabilization activities
- Coordinating U.S. 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 U.S. agencies and departments

[26] The *Editor* is particularly grateful for the support and cooperation of various individuals within these government agencies in producing this *Handbook.* However, any errors in this *Handbook* are the responsibility of the *Editor* alone.

- Implementing foreign assistance programs around the world, in coordination with USAID and DOD, and in partnership with other U.S. agencies and departments.

Congress funds ROL programs and related activities primarily through appropriations for the Department of State and the U.S. Agency for International Development (USAID).[27] The Office of the Director of Foreign Assistance (F) has overall responsibility for coordinating the funding for U.S. foreign assistance programs, including ROL programs and activities. It works closely with Department of State and USAID bureaus responsible for designing and implementing this assistance—including within State the Bureau for International Narcotics and Law Enforcement Affairs (INL) and Bureau of Democracy, Human Rights and Labor (DRL), in consultation with the appropriate regional bureau. These entities identify program priorities and determine the appropriate mechanisms through which to execute the assistance, e.g., through transfers to other agencies (such as DOJ, DHS, and Treasury), contracts, grants, and agreements with international organizations. Regional bureaus and relevant country desk officers assist in the coordination of efforts on a country-by-country basis.

Functional bureaus, such as INL, may take the lead for particular issues or programs in a country. For example, INL has program offices focused on specific regions of the world. There is an INL Office for Afghanistan & Pakistan as well as an INL Office for Iraq. These program offices design, implement and manage capacity-building programs addressing a myriad of ROL issues. In Afghanistan and Iraq, DOD received specific legislative authority to execute many ROL programs, primarily the training of the Iraqi Police, but also 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, JAs should be aware that DOD does not have the statutory authority to engage in similar activities in other parts of the world, and therefore must be cautious about generalizing from programs conducted in those theaters.

As previously stated, the QDDR indicates that Department of State[28] will lead operations in response to political and security crises and conflicts where there is a challenge to or a breakdown of authority resulting from internal or external conflict or destabilizing activities by state or non-state actors. This is not limited to acute crises but includes persistent conflict and instability such as severe state fragility, extremist activity, endemic criminality, and civil unrest.

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

a. Introduction and Overview

The Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) develops policies and programs to combat international narcotics and transnational crime. INL leads within the State Department on these narcotics and law enforcement issues. It also serves as the lead U.S. government agency on overseas criminal justice sector reform. Its counternarcotics programs focus on building interdiction capabilities, eradication, sustainable alternative development, and reducing drug use. Its criminal justice reform programs cover a diverse range of initiatives, including work with law enforcement officers, correction officials, prosecutors, defense attorneys, civil society, legal educators, court employees, and judges. INL employs approximately 7,000 people (including civil servants, foreign service officers, contractors, and local hires) on programs in more than 70 countries.

[27] *But see* §I B *supra* for details of an exception to this rule, namely the DOD funded JAGC / USC ROLC interagency training program.
[28] For the second (USAID) limb of the QDDR lead agency approach to crisis operations, see § II B *infra*.

In addition to the program offices, INL has several functional bureaus that provide technical guidance to program officers on ROL issues. Specifically, within INL's Office of Criminal Justice Assistance and Partnership (INL/CAP) and the Office of Anti-Crime Programs, there are senior advisors dedicated to providing advice and subject matter expertise on policing, criminal justice development, anticorruption, transnational criminal matters, and corrections reform. The INL/CAP also serves as INL's link to S/CRS and is home to INL's Civilian Response Corps Active Component members with expertise in civilian police, criminal justice development, corrections assistance, and post-conflict ROL programming. The guidance from State's regional and functional bureaus provides the framework within a country for carrying out U.S. missions, programs, and policies in a country, but it is the country team system that provides the foundation for interagency consultation, coordination, and action in the field.

b. INL Mission

The INL Bureau's Strategic and Resource Plan states that "[t]he mission of the Bureau of International Narcotics and Law Enforcement Affairs (INL) is to minimize the impact of international crime and illegal drugs on the United States, its citizens, and partner nations by providing effective foreign assistance and fostering global cooperation." This mission centers on helping partner nations establish a capable and accountable criminal justice sector, expanded during the past decade to include stabilizing post-conflict societies through criminal justice sector reform. INL's work seeks to strengthen justice sector institutions in order to promote peace and security, good governance and the ROL, with its programs supporting three inter-related objectives:

- **Building Criminal Justice Systems** - Institutionalize ROL by developing and expanding criminal justice systems to strengthen partner country justice sector effectiveness, foster cooperation in legal affairs, and advance respect for human rights;
- **Counter Narcotics** - Disrupt the overseas production and trafficking of illicit drugs through targeted counternarcotics and institution-building assistance and coordination with foreign nations and international organizations; and
- **Transnational Crime** - Minimize the impact of transnational crime and criminal networks on the U.S. and its allies through enhanced international cooperation and foreign assistance.

c. Criminal Justice System Components

INL views criminal justice systems holistically, recognizing the need for all basic components to work effectively. The basic components of criminal justice systems and what is required to build each are:

- **Legal Foundation** – general criminal code and procedural reform, specific transnational crime legislation (counter-terrorism, trafficking in persons).
- **Police** – compliance with international human rights standards for all aspects of police conduct, including detention; expertise in gender-based and child-related crimes with appropriate services; public accountability and trust; ethics and disciplinary systems; transparent, accountable recordkeeping and case management; organizational management and operations; professional development.
- **Prosecutors** – case preparation, transparent, accountable recordkeeping and case management, organizational management and operations, victim and witness services, ethics and disciplinary systems, professional development and continuing legal education, public accountability and trust.
- **Defense Bar** – access to justice; compliance with international human rights standards; professional standards; professional associations and advocacy; continuing legal education; ethics

and disciplinary systems that include a requirement of zealous representation of the defendant; organizational management and operations.

- **Judiciary and Courts** – compliance with international human rights standards; public accountability and trust; ethics and disciplinary systems; transparent, accountable recordkeeping and case management; organizational management and operations; effective, accountable court administration; judicial selection and disciplinary systems; judicial independence; court and witness security; continuing judicial education; professional development; coordination with informal dispute resolution mechanisms.
- **Corrections** - compliance with international human rights standards in the treatment of prisoners and their living conditions, including security; expertise in appropriate handling of women and children; public accountability and trust; ethics and disciplinary systems; transparent, accountable recordkeeping and case management; organizational management and operations; professional development.
- **Civil Society** – promoting citizen knowledge about the law and ensuring access to justice for citizens; holding government accountable for abiding by the ROL.

d. INL Organization

INL implements its programs through:

- Funding to federal, state and local agencies. For example, at the federal level, INL provides funds to the Department of Justice Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) and International Criminal Investigative Training Assistance Program (ICITAP). At the state and local level, INL has relationships with police, judicial and corrections agencies and associations;
- Contracts with individuals and private firms chosen through a competitive process;
- Contracts with host country subject matter experts;
- Grants to nonprofits and universities; and
- Contributions and secondments to multilateral organizations, such as the United Nations and European Union missions.

e. Regional & Functional Offices

To advance the INL mission and promote a holistic approach to strengthening criminal justice systems, INL is organized into regional and functional offices in Washington, DC, with varied field presence throughout the world. There are five INL regional offices: (1) Iraq Office; (2) Afghanistan & Pakistan Office; (3) Europe & Asia Office; (4) Latin America Office; and (5) Africa and Middle East. An overview of the work performed by INL's Iraq and Afghanistan Offices, being those that JA will be most familiar or likely to work with, follows.

(1) Office of Iraq Programs (INL/I)

INL's mission is an integral player in U.S. Government efforts to help the Government of Iraq and the Iraqi people to promote security, stability, and respect for the ROL in Iraq. INL provides assistance on all three major aspects of criminal justice development: police, courts, and corrections. A common thread throughout these programs is tackling corruption issues. With respect to police, INL is now implementing the transition from the U.S. military's International Training and Assistance Mission to an INL-led program that will employ U.S. police advisors and mentors drawn from the senior ranks of many U.S. law enforcement organizations. The focus of the INL program, which will build on the progress over recent years in basic training and professional skills, will be to develop leadership and management capability in the Ministry of Interior and police forces throughout Iraq.

The program will also seek to establish sustainable Iraqi-managed training programs at all levels. On the corrections side, through interagency agreements, INL provided funds to the Department of Justice to deploy corrections advisors and trainers, who will work with the Iraqi Corrections Service (ICS). This work helped raise Iraq's corrections services to internationally accepted standards of humane treatment. With respect to the judiciary, INL supports a broad range of programs including developing the judiciary's skills and procedures to investigate and process criminal cases, updating court administration, augmenting judicial security, and improving the judiciary's coordination with the Iraqi law enforcement and corrections agencies. Finally, INL also supports a number of programs to help the Iraqi government combat corruption and help it meet its obligations under the United Nations Convention Against Corruption, to which Iraq became a state party in 2008.

(2) Office of Afghanistan and Pakistan Programs (INL/AP)

INL is the largest single provider of ROL assistance in Afghanistan. INL's Justice Sector Support Program (JSSP) and Corrections System Support Program (CSSP) are nationwide criminal justice sector development programs focused on institutional capacity building as well as training and mentoring in Kabul and in key provinces. JSSP and CSSP currently have a permanent presence at the Afghan National Police (ANP) Regional Training Centers in Konduz, Jalalabad, Gardez, Bamiyan, Herat, and Mazar-i-Sharif; CSSP also has a permanent advisory team based at Sarposa prison in Kandahar and at the Provincial Reconstruction Team in Uruzgan. INL is also developing a Central ROL Training Center in Kabul. JSSP employs over 60 American attorneys and over 90 Afghan attorneys to work with the Ministry of Justice, Attorney General's Office, Supreme Court, and Ministry of Women's Affairs.

JSSP trained over 2,700 Afghan investigators, prosecutors, judges, and defense attorneys across the country. In regards to the corrections program, CSSP employs over 70 American corrections advisors and over 170 Afghans to work with the Afghan Central Prison Directorate and the Afghan Juvenile Rehabilitation Directorate to develop a safe, secure, and humane Afghan corrections system, which meets international standards and Afghan cultural requirements. CSSP has trained over 6500 Central Prison Directorate personnel nationwide. INL also provides corrections infrastructure assistance to the Afghan Government, including the renovation of Pol-i-Charkhi prison, building new provincial prisons in Baghlan and Wardak, and security and humanitarian renovation projects nationwide.

In addition to CSSP and JSSP, INL maintains gender-focused programs, including those that provide women's shelters, train female judges, and support a Violence Against Women unit in the Attorney General's Office. Other INL programs expand legal aid services to the indigent in most provinces in Afghanistan, and; increase public awareness of legal rights, issues, and services. INL supports programs fighting major crime in Afghanistan, including narcotics, corruption, national security, and kidnapping. INL also supports a Judicial Security Unit to protect Afghan Justice Officials. INL funds the United States Institute of Peace to work on connecting informal, community-based justice mechanisms with formal, government-provided mechanisms. INL also funds a visiting scholars grant with the University of Washington, and 58 Afghan Law Professors and Deans have travelled to Seattle for study trips, with 15 graduating with LLM degrees. Additionally, INL supports other scholarship programs, clinical legal education, text book writing, and curriculum and teaching reform in law schools throughout the country.

Finally, INL is working with CJIATF-435 to partner with the Afghan Government in the development of the Justice Center in Parwan (JCIP), which enables the transition of U.S. military detainees from Law of Armed Conflict (LOAC) status into the Afghan criminal justice system.

(3) Functional Offices

In addition to the five regional program offices, INL has a number of functional offices. Some of the offices that JAs may come in contact with include the Office of Criminal Justice Assistance and Partnership (INL/CAP), Office of Anti-Crime Programs (INL/C), Office of Aviation (INL/A), and Office of Policy, Planning and Coordination (INL/PC). INL/CAP provides technical support to INL offices through its subject matter experts in law enforcement, justice and corrections. Through its Office of Anti-Crime Programs, INL works to combat transnational crimes and illicit networks by helping to fight organized crime, kleptocracy and other forms of corruption, money-laundering and terrorist financing, cyber and intellectual property crimes, and narcotics trafficking as well as other smuggling and trafficking crimes. The Office of Policy, Planning and Coordination is the primary point of contact for all transnational crime and drug issues involving the UN, OAS, G-8, the EU and other multilateral institutions. INL's Office of Aviation provides centralized services for counternarcotics and border security aviation programs.

f. INL Contacts and Further Information

Subject Matter Expertise	Contact
Police	INLCAPJOBS@state.gov
Rule of Law	INLCAPJustice@state.gov
Corrections	INLCorrectionsJobs@state.gov
INL Program Offices	
INL/AP Justice	Inl-ap-rol-dl@state.gov
INL/Iraq Rule of Law Team	Pf-INL-I-ROL3@state.gov
General Information	http://www.state.gov/p/inl

2. Bureau for Conflict and Stabilization Operations (CSO)

In October 2008, Congress authorized the State Department's Office of the Coordinator for Reconstruction and Stabilization (S/CRS) and the establishment of the Civilian Response Corps (CRC). As part of the QDDR, S/CRS will be disbanded and its roles and functions will be subsumed by the Bureau for Conflict and Stabilization Operations (CSO). The new bureau will serve as the institutional focal point for policy and operational solutions for crisis, conflict, and instability with the Assistant Secretary of CSO serving as the Secretary of State's senior advisor on conflict and instability.

CSO will build upon the original mandate and capabilities of S/CRS to coordinate early efforts at conflict prevention and rapid deployment of civilian responders as crises unfold, working closely with the senior leadership of USAID's Bureau of Democracy, Conflict, and Humanitarian Assistance. CSO will continue to develop the capabilities and systems of the Civilian Response Corps (CRC), interagency surge teams, and other deployable assets to meet urgent operational requirements in the field. Internationally, CSO will continue to assist efforts to build civilian capacity among key U.S. allies and emerging partners to strengthen interoperability and cooperation.

Established under S/CRS,[29] [30] and continuing under CSO, the CRC comprises a cadre of experts that are trained and equipped to deploy to support conflict prevention efforts and be prepared to rapidly respond to countries in crisis or emerging from conflict. The CRC will participate in Washington and

[29] *See* Department of State, Office of the Coordinator for Reconstruction and Stabilization website, http://www.state.gov/s/crs/ (last visited June 9, 2011).

[30] Department of State, Office of the Coordinator for Reconstruction and Stabilization, Mission statement, http://www.state.gov/s/crs/about/index.htm (last visited July 25, 2011).

regionally-based planning and collaborative civilian-military exercises. The CRC provides expertise in conflict prevention and stabilization to address these problems systematically. It is made up of specially trained USG civilians who are able to deploy rapidly to help countries mitigate conflict. The CRC provides a surge in civilian power at more than two dozen posts overseas, including national security priorities such as Afghanistan and Sudan. The CRC is comprised of diplomats, development specialists, public health officials, law enforcement and corrections officers, engineers, economists, lawyers, and others who help fragile states restore stability.

This expeditionary diplomacy represents a new approach to fragile, conflict-prone countries. It also represents an important capability to further extend the reach and impact of U.S. foreign policy, using civilian power from the across the USG to support U.S. embassies in their efforts to help fragile states. The QDDR recommends a greater commitment to these civilian efforts. While the CRC provides a new approach, the central purpose of the work of the CRC is: to help countries facing conflict find and implement their own solutions, and to advance America's core interests: security, prosperity, universal values of democracy and human rights, and a just international order.

B. U.S. Agency for International Development

Editor's Note: This section gives a broad overview of USAID's global mission. For Iraq and Afghanistan-specific ROL programs the reader should look at USAID's missions' websites for those two countries at: http://www.usaid.gov/iraq/ *and* http://afghanistan.usaid.gov/en/index.aspx *(and for USAID's ROL programs in Afghanistan, see Appendix, Table 2). Understanding how USAID functions will, undoubtedly, assist judge advocates in implementing ROL projects.*

1. Introduction

The United States Agency for International Development (USAID) plays both a major role in U.S. 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.

As stated in the National Security Strategy, development stands with diplomacy and defense as one of three key pieces of the nation's foreign policy apparatus. USAID promotes peace and stability by fostering economic growth, protecting human health, providing emergency humanitarian assistance, and nurturing democracy in developing countries. These efforts to improve the lives of millions of people around the globe represent U.S. values and advance U.S. interests by building a safer, more prosperous world.

As previously stated, the QDDR has indicated that USAID will lead on operations responding to humanitarian crises resulting from large-scale natural or industrial disasters, famines, disease outbreaks, and other natural phenomena.[31] This approach reaffirms the 1993 Executive Order designating the USAID Administrator as the U.S. government's International Disaster Relief Coordinator, with broad responsibilities to lead all agencies in U.S. government disaster response. USAID will also drive the humanitarian response under State's overall lead when such disasters occur in acute political and security situations, such as the floods in Pakistan in the summer of 2010.

USAID provides assistance in sub-Saharan Africa, Asia and the Near East, Latin America and the Caribbean, and Europe and Eurasia. With headquarters in Washington, D.C., USAID's strength is its field offices in many countries around the world.

[31] *Cf.* State's lead on operations in response to political and security crises and conflicts. *See* § II A above.

The Agency operates in approximately 100 developing countries (the number varies from year to year), working closely with private voluntary organizations (PVOs), indigenous groups, universities, American businesses, international organizations, other governments, trade and professional associations, faith-based organizations, and other U.S. government agencies. Through contracts and grant agreements, USAID partners with more than 3,500 companies and over 300 U.S.-based PVOs.

This section seeks to provide a basic primer to JAs who are either working stateside or overseas and who may or may not encounter USAID programming. It outlines the goals, types of assistance and authorities that USAID has to conduct development work overseas. The guide reviews the financial mechanisms USAID has for implementation, the partners with whom USAID works and the field and Washington presence of USAID. More specifically, this guide discusses further USAID's work in democracy, governance and human rights, with a focus on ROL, security sector reform and DDR activities—all three areas in which you may find yourself working alongside in partnership with USAID.

2. Goals, Types of Assistance and Authorities

USAID has embraced five core goals:

- supporting transformational development
- strengthening fragile states
- supporting U.S. geostrategic interests
- addressing transnational problems
- providing humanitarian relief

Each of these goals is vitally relevant to development, including combating terrorism and strengthening American security at home and abroad.

The types of assistance USAID provides include:

- technical assistance and capacity building
- training, scholarships and grants
- food aid and commodity purchases
- construction of infrastructure (e.g., roads, water systems)
- small-enterprise loans
- budget support
- enterprise funds supporting transition to a free market society
- credit guarantees

The Foreign Assistance Act (FAA) of 1961, as amended, is the major law authorizing foreign economic assistance programs. The FAA provides the policy framework within which all economic aid is furnished, along with the legal powers (authorities) to implement FAA assistance programs. Other legislation—such as the FREEDOM Support Act for the states of the former Soviet Union, Public Law (PL) 480 Title II for food aid, and the 2003 U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act—authorize additional foreign aid programs. Some of these acts amend the FAA or rely on its authorities. Others are stand-alone legislation authorizing additional foreign assistance programs. In addition to this authorizing legislation, annual appropriations acts provide funding for FAA and other aid programs.

Both authorizing and appropriations legislation provide various authorities that permit considerable flexibility in managing assistance programs. However, they also place limits on how and where particular programs may be administered. In addition to the enacted law itself, reports accompanying the various pieces of legislation provide guidance to the executive branch on the congressional intent behind provisions in the law or how Congress wishes it to be implemented.

Most limitations affecting foreign assistance programs are set out in appropriations legislation and in reports issued by Congress' appropriations committees. The most relevant limitations include:

- Prohibitions on assistance to certain countries, such as those that support international terrorism or engage in gross violations of internationally recognized human rights; those that are in arrears on their loan repayments to the United States; or those whose elected head of government has been overthrown by a military coup.
- Provisions that limit or prohibit USAID assistance for certain activities or programs, for example, certain policing activities.

Congressional earmarks require USAID to spend minimum amounts from certain accounts—for specific purposes, or in specific countries—reducing the amount that can be spent on other programs or in other countries. For USAID, the more significant earmarking is in committee reports. In 2001, there were approximately 250 statutory and report-language earmarks and directives from Congress affecting development assistance.

USAID sets targets and measures results at various levels—the overall Agency, bureau, and field mission—and in various country environments that range from fragile states to those with more advanced economies.

3. USAID Financial Mechanisms for Implementation

USAID uses a variety of financial mechanisms to implement its assistance programs:

- Contracts purchase services, equipment, or commodities according to a specified scope of work (SOW). The SOW is a statement that spells out the exact nature of the purchase, when and where it is to be delivered, and other particulars as needed (e.g., cost, special supplier qualifications).
- Cooperative agreements are usually awarded to nonprofit organizations or educational institutions to accomplish a public purpose. Typically USAID is substantially involved in carrying out the program, at a level specified by the agreement.
- Grants are much the same as cooperative agreements, but allow the recipient more freedom to pursue its stated program without substantial involvement from USAID.
- Strategic objective agreements (SOAgs) are formal agreements between USAID and a host government that set forth specific development activities to be undertaken, along with mutually agreed-upon timeframes, expected results, means of measuring the results, resources, responsibilities, and estimated contributions of the parties involved.
- Collaborative agreements were pioneered in FY 2005 as a flexible, streamlined alternative to traditional grants and contracts for work with nontraditional partners in the private sector.

For large efforts, USAID may employ flexible variations of the above tools. For example, an indefinite quantity contract (IQC) may be used where the purpose is to provide an unfixed amount of supplies and services within stated limits over a set period; as needs become defined, the contractor meets them using task orders (TOs). Another example is the leader with associate (LWA) mechanism, which allows a USAID mission to propose and manage a subsidiary (associate) agreement that piggybacks onto a larger (leader) contract or collaborative agreement.

While it is a USAID contracting officer or agreement officer who awards contracts, grants, and cooperative or collaborative agreements, the "eyes and ears" for managing programs is the Contracting Officer's Technical Representative, or COTR. The COTR monitors technical performance and reporting for any potential or actual problem. The COTR is primarily responsible for ensuring compliance with the terms of the award. Together with the contracting or agreement officer, the COTR is responsible for managing U.S. taxpayer funds. The COTR for any particular project is a critical point of contact at the Mission for any information on that project, and may be a resource for further direction on other projects similar to the one in question.

USAID may also use other types of formal arrangements to accomplish its goals, including:

- transfers to other federal agencies
- contributions to international organizations such as the UN
- implementation letters with host-country governments
- university partnerships
- public-private alliances, a new business model for partnerships with the private sector to achieve high-impact sustainable development.

4. USAID and Partner Organizations

USAID almost always implements its programs through partner organizations. Thus, field staff oversee and fund work with agencies and firms that, for example, develop new seed varieties, train healthcare professionals, rebuild roads, or run elections. In a limited number of countries where accountability for aid funds and competent program implementation are assured, USAID also disburses aid directly to governments.

In countries where USAID has a field office, staff are heavily engaged in policy dialogue, writing analytical documents, and monitoring project implementation, whether USAID's partners are from the private sector or affiliated with foreign governments. USAID also coordinates programs with other donors such as the UN, the World Bank, and the foreign aid agencies of other countries.

A wide variety of partners implement USAID programs, including:

- Private voluntary organizations (PVOs): nonprofit groups operated primarily for charitable, scientific, educational, or service purposes. Some PVOs working with USAID are international, but the majority are U.S.-based (to be eligible for USAID grants, the latter must obtain at least 20 percent of their funding from non–U.S. government sources). Examples include CARE, WildAid, Save the Children, Catholic Relief Services, and World Vision.
- Local and regional nongovernmental organizations (NGOs): voluntary nonprofit organizations based in developing countries or regions in which USAID operates. Examples include Bosnia's Center for Civic Cooperation, Guatemala's Genesis Empresarial, Sri Lanka's Multi Diverse Community, and the Forum for African Women Educationalists.
- Public international organizations (PIOs): organizations whose members are chiefly governments (including the U.S.). Examples include UN agencies, the International Committee of the Red Cross, the World Bank, and regional development banks.
- Contractors: private companies with legally binding agreements to supply goods or services to the U.S. government under a specified scope of work.

Its reliance on partners does not mean that USAID is merely a "pass-through" or contracting agency. For all programs, staff members are significantly involved in:

- influencing host-country policies through negotiations
- evaluating needs for aid through field visits, surveys, and interviews
- deciding what types of programs to prioritize by assessing U.S. legislative and policy requirements, host-country needs, and funding availability
- monitoring program progress by visiting sites, reviewing implementers' reports, and meeting frequently with counterparts in the host-country government, donor community, and private sector
- reporting to Washington, including to Congress.

By federal statute, grants are given to implementing agencies or grantees with few strings attached, so USAID oversight is limited. However, besides carrying out the responsibilities listed above, USAID still must evaluate grant proposals before awards are made, and grantees must report to USAID

regularly on the status of their activities. Furthermore, funding beyond a defined time period is not guaranteed.

For **contracts**, USAID staff direct the implementation of all aspects of a program. In managing contracts, USAID:

- defines the exact type, scope, and location of the program by setting out the requirements in a request for proposals (RFP)
- evaluates competing proposals using specified criteria
- provides funding, normally in installments (tranches)
- identifies and approves individual tasks if the contract is a broad one, with flexibility built into it.

5. USAID Presence: Field and Washington

USAID can be noted for its strong field presence and the strong work of Washington-based colleagues. There are few civilian agencies in the USG comparable. Field staff are essential for understanding a country's situation, choosing appropriate objectives and strategies, and effectively managing the resulting programs. Washington-based staff support field missions and represent technical areas that provide expertise in their subject matter areas.

a. Field Missions

The U.S. citizens (expatriates) on the staff of USAID missions are only the tip of the iceberg of the Agency's field presence. Expatriate employees in the field manage a larger staff of locally recruited specialists. Non-U.S. staff range from technical experts (e.g., agronomists advising on farming programs) to support staff (e.g., accountants and administrative workers). USAID staff manage implementing partners (agencies receiving USAID funds) primarily through contracts and grants. These partners, in turn, employ expatriate and national staff.

USAID operating units located overseas are known as field missions. The field mission workforce is typically composed of three major categories of personnel: U.S. direct hire (USDH) employees, U.S. personal services contractors (USPSCs), and foreign service nationals (FSNs). USDHs are career foreign service employees assigned to missions for two- to four-year tours. USPSCs are contractors hired for up to five years to carry out a scope of work specified by USAID. FSNs—professionals and other skilled employees recruited in their host countries by USAID—make up the core of the USAID work-force.

Full field missions usually consist of 9–15 USDH employees, along with a varying number of other personnel, including U.S. personal services contractors. They conduct USAID's major programs worldwide, managing a program of four or more strategic objectives (SOs). Medium-sized missions (5–8 USDH) manage a program targeting two to three SOs, and small missions (3–4 USDH) manage one or two SOs. These missions assist their host countries based on an integrated strategy that includes clearly defined program goals and performance targets.

Regional support missions (typically 12–16 USDH), also known as regional hubs, provide a variety of services. The hubs house a team of legal advisors, contracting and project design officers, and financial services managers to support small and medium-sized missions. In countries without integrated strategies, but where aid is necessary, regional missions work with NGOs to implement programs that help to facilitate the emergence of civil society, alleviate repression, head off conflict, combat epidemics, or improve food security. Regional missions can also have their own program of strategic objectives to manage.

USAID missions operate under decentralized program authorities (legal powers) allowing missions to design and implement programs and negotiate and execute agreements. These authorities are

assigned to senior field officers in accordance with each officer's functions. For example, mission directors and principal officers are given authority to:

- conduct strategic planning and develop country strategic plans
- waive source, origin, and nationality requirements for procurement of goods and services
- negotiate and execute food aid agreements
- implement loan and credit programs; and
- coordinate with other U.S. government agencies.

b. USAID Washington

At its Washington, D.C., headquarters, USAID's mission is carried out through four regional bureaus: Africa (AFR), Asia and the Near East (ANE), Latin America and the Caribbean (LAC), and Europe and Eurasia (E&E). These are supported by three technical (or pillar) bureaus that provide expertise in democracy promotion, accountable governance, disaster relief, conflict prevention, economic growth, agricultural productivity, environmental protection, education reform, and global health challenges such as maternal/child health and AIDS. The pillar bureaus are known as Democracy, Conflict and Humanitarian Affairs (DCHA); Economic Growth, Agriculture and Trade (EGAT) and Global Health (GH). Finally, within geographic bureaus, there are technical specialists, such as in democracy and governance, which focus on specific geographic areas and work closely with their counterparts in the pillar bureaus.

The work of these bureaus is supported by several other USAID units. The Bureau for Policy and Program Coordination provides overall policy guidance and program oversight. The Bureau for Management administers a centralized support services program for the Agency's worldwide operations. The Bureau for Legislative and Public Affairs conducts outreach programs to promote understanding of USAID's missions and programs. The Office for Global Development Alliance operates across the four regional bureaus to support the development of public-private alliances. Other USAID offices support the Agency's security, business, compliance, and diversity efforts, as well as its faith-based and community initiatives.

6. USAID Post-Conflict and Transition Activities

In many situations USAID's presence will be focused on post-conflict or transition activities, both of which may take a slightly different focus than longer-term democracy and governance (DG) programming. Though there are many different activities USAID may do in a post-conflict or recovery/transition period, the ones most likely to be encountered—and to transition into longer term democracy and governance programming—are transition initiatives.

The USAID Office of Transition Initiatives (OTI) supports U.S. foreign policy objectives by helping local partners advance peace and democracy in priority countries in crisis. Seizing critical windows of opportunity, OTI works on the ground to provide fast, flexible, short-term assistance targeted at key political transition and stabilization needs.

Since 1994, OTI, part of USAID's Bureau for Democracy, Conflict, and Humanitarian Assistance, has laid the foundation for long-term development in thirty-one conflict-prone countries by promoting reconciliation, jumpstarting local economies, supporting nascent independent media, and fostering peace and democracy through innovative programming. In countries undergoing a transition from authoritarianism to democracy, violent conflict to peace, or pivotal political events, initiatives serve as catalysts for positive political change. OTI programs are short-term, typically two to three years in duration. OTI works closely with regional bureaus, missions, and other counterparts to identify programs that complement other assistance efforts and lay a foundation for longer-term development. OTI programs often are initiated in fragile states that have not reached the stability needed to initiate

longer-term development programs. OTI strategies and programs are developed and designed to meet the unique needs of each situation.

Many, if not all, OTI programs contribute to longer term democracy and governance programming and often handover to a democracy and governance program in a country, when the situation in that country has stabilized and a longer term investment can be more realistically made.

7. USAID and Democracy, Governance and Human Rights

USAID has several discrete objectives in democracy, governance and human rights programming, both at field and Washington level to include:

- Strengthen the Justice Sector. Promote the ROL by improving the independence and effectiveness of justice sector institutions and increasing citizens' access to justice.
- Strengthen the Legislative Function / Legal Framework. Promote democratic practices by improving the framework of laws to increase the effectiveness and accountability of legislatures to the people.
- Strengthen Public Sector Executive Function. Promote democratic practices by improving the effectiveness and accountability of executive offices to the people.
- Support Democratic Local Government and Decentralization. Promote the devolution of political authority and effective, democratic local governance by strengthening local government functions and citizen participation.
- Promote and Support Credible Elections Processes. Establish an impartial framework of electoral laws and regulations to support the credible administration of elections and foster voter participation to help support electoral outcomes that reflect the will of the people.
- Strengthen Democratic Political Parties. Promote democracy by supporting the development of competitive, representative, and transparent political parties.
- Strengthen Civil Society. Nurture a democratic citizenry by promoting pluralism and public dialogue and investing in civic education.
- Establish and Ensure Media Freedom and Freedom of Information. Independent media disseminating uncensored information promote the development of a well-informed populace.
- Promote and Support Anticorruption Reforms. Fight corruption by making government institutions and processes more transparent and accountable.
- Protect Human Rights. Improve due process, nondiscrimination, and representation of all groups of society to guarantee citizens' rights.
- Promote Effective and Democratic Governance of the Security Sector. Increase civilian oversight to enhance transparency and accountability and improve public order and security.

Not every one of these objectives is addressed in each country in which USAID works; it depends upon the demonstrated needs and funding and capacity available to address. In all countries in which there is a ROL problem, moreover, USAID may not be involved due to, again, funding and capacity.

USAID uses contracts, grants and other mechanisms mentioned previously to program funding to these objectives. Both missions and Washington staff work in tandem towards these goals. ROL and security sector reform programming are but two facets of these overall goals but remain linked and relevant to all other DG sector programming.

8. USAID Rule of Law Activities

USAID ROL programming has several key aspects. This section will present these core aspects and a case study example to illustrate USAID analysis and approach.

The term "rule of law" is used frequently in reference to a wide variety of desired end states. Neither scholars nor practitioners have settled upon an accepted definition. ROL is understood to refer to the principle of the supremacy of the law, equality before the law, accountability to the law, fair and impartial application of the law. ROL is intended to be a safeguard against arbitrary governance.

Long-term, sustainable economic and social development requires democratic governance rooted in the ROL. USAID provides leadership on ROL issues, justice sector reform to USAID field missions and bureaus; other USG entities; and the broader democracy and governance community. USAID supports program development through five essential elements to support the establishment or long term functioning of ROL.

- **Order and security**—ROL cannot flourish in crime-ridden environments or where public order breaks down and citizens fear for their safety. The executive branch has immediate responsibility for order and security, but the judiciary has an important role as well in protecting rights and providing for the peaceful resolution of disputes. In addition, informal methods of resolving disputes, such as mediation or truth and reconciliation commissions, can promote order and security. USAID programs in this sector help to support order and security.

  Case Study: Lack of Basic Order and Security in Nepal

  In Nepal, the foremost challenge to rule of law, and therefore a priority for USAID programming, was the widespread impunity that is impeding law enforcement, fueling a breakdown in law and order, and enabling crime and violence to proliferate. The assessments concluded that politics had been criminalized; crimes were regularly ignored; long simmering disputes often boiled over into violence; and citizens regularly took the law into their own hands. According to the National Human Rights Commission, not a single human rights abuse had been prosecuted in Nepal.

  Where law enforcement authorities had the space to act, they suffered from limitations in capacity. The inability of the government to enforce, and refusal to respect the law fueled a growing lack of trust in the government and the legitimization of violence. USAID logically has focused on interventions to reduce political pressure on law and security institutions and increase resources and training. These steps were an initial way forward to support law enforcement authorities to restore public trust and confidence.

- **Legitimacy**—Laws are legitimate when they represent societal consensus. Legitimacy addresses both the substance of the law and the process by which it is developed. This process must be open and democratic. In some societies, legitimacy can be derived through religion, traditions, customs, or other means. Laws do not need to be written in order to be legitimate, since traditional/customary laws are often passed on through oral traditions. USAID seeks to promote legitimacy through different country specific strategies. Below is a case study of one such approach.

  Case Study: Legitimacy of the Source of Law in Morocco

  In Morocco, the legitimacy of the legal framework suffers due to the legislative process and the source of the law. Most laws are drafted by executive branch ministries and then are forwarded to the legislative branch; laws tend to be amended or enacted with little to no consultation from the public. Laws are published in a subscription based Gazette that is not widely available. Another problem area of the law-making process results from the legacy of colonial laws that were inherited, together with the continuing practice of adopting foreign laws, sometimes with few modifications. This is particularly true regarding commercial codes, where frequently the text of French laws is simply transferred into the Moroccan system—a practice that has caused difficulty, notably regarding the law on bankruptcy.

- **Checks and balances**—The ROL depends on a separation of governmental powers among both branches and levels of government. An independent judiciary is seen as an important "check." At the same time, checks and balances make the judiciary accountable to other branches of government. Like all branches, the judiciary is also accountable to the public. An independent and strong bar association can also help support the judiciary and serve as a check against abuse of judicial power.

  Case Study: Strengthening Judicial Governance in Russia

  A recent rule of law assessment in Russia found that one of the principal challenges to democracy and the rule of law in Russia is safeguarding judicial independence in the face of growing executive power. To this end, the assessment team recommended that USAID focus programming on strengthening judicial self-governance as a check on the executive branch.

  Factors supporting this recommendation included: the strong link between effective judicial governance and judicial independence; the government had declared a policy to promote judicial independence; the demonstrated interest of Russian judicial leaders in U.S. judicial governance models and the role that ongoing U.S.-Russian international judicial exchanges could play; and the benefit of improved judicial governance on sustainability of USAID assistance.

- **Fairness**—Fairness consists of four sub-elements: (1) equal application of the law, (2) procedural fairness, (3) protection of human rights and civil liberties, and (4) access to justice. These sub-elements are keys to empowering the poor and disadvantaged, including women. The justice sector bears primary responsibility for ensuring that these sub-elements are in place and implemented.

  Case Study: Fairness in Zambia

  A recent rule of law assessment in Zambia found that fairness is a mixed picture in Zambia. On the one hand, there is broad respect for law and the courts command a higher degree of public confidence than most other public institutions. On the other hand, weaknesses in the performance of the justice system, combined with widespread poverty in Zambia and limited resources available for investment in improving access to justice, raise serious issues about the system's fairness.

  The poor (majority of the population) cannot afford lawyers or the time and expense of litigation in backlogged formal courts. Public defenders and pro bono lawyers are scarce. In rural areas, the magistrate courts are located at great distances from where the parties live. The language of the formal courts is English, and interpreters are not always available. Access to legal services from the government or from civil society groups is quite limited. All this means that for most people the only recourse is local courts. The local courts do an impressive job in dispensing justice rapidly and at low cost, applying customary (or traditional) law. That said, the well-to-do enjoy the luxury of a choice between customary/traditional and formal courts. The poor do not have that choice.

  Unfairness is also evident in the criminal justice system. The poor are often held in pretrial detention for months and even years, while those with the means or some connections are set free. Despite recent attention on gender equality, historical gender-based discrimination persists in many criminal justice proceedings.

- **Effective application**—This element pertains to enforcing and applying laws. Without consistent enforcement and application for all citizens and other inhabitants, there can be no ROL. The judiciary is an important element of the enforcement process.

  Case Study: Effectiveness of the Application of Laws in Zambia

As with fairness, a good example of a lack of effectiveness of application comes from Zambia. Some steps have been taken, including an expedited system for rapid adjudication in the High Court, which has reduced the backlog and improved the clearance rate. That said, delays in legislative and judicial processes and also in the dissemination of new laws and judicial decisions cause uncertainty about what is the law. Legal representation of the poor and disadvantaged is inadequate to serve the needs. Judges lack training and often operate in sub-standard conditions. Financial shortfalls also affect the police, prosecutors, legal aid providers and prison services.

There are delays in both civil and criminal prosecutions due to numerous factors, including: complex procedures; lax case management procedures; lack of automated information management systems; absence of recording equipment to create court records; and judicial vacancies or absences in lower courts.

9. Strategic Goals

Increasing Democratic Legal Authority: By definition, ensuring that legal authority extends to the entire territory of the country and applies to all citizens; ensuring that the justice system has a legitimate foundation in the democratic process; eliminating control by armed militias, criminal gangs, or warlords. USAID supports programming in constitutional and legal drafting, civilian and community policing, gang prevention, criminal justice and security sector reform. In post-conflict environments, the agency fosters rebuilding the justice sector, increasing access to justice, enhancing oversight of the security sector, working with non-state justice actors and dealing with past abuses.

Guaranteeing Rights and the Democratic Process: Promoting the independence of the judiciary; ensuring the constitutionality of government action; and eliminating politically motivated prosecutions. USAID supports programming in human rights, judicial independence, access to justice, legal empowerment of the poor and the disadvantaged, civil society oversight of the justice system and building a culture of lawfulness.

Increasing Access to Justice: Providing more effective and efficient justice services such as enforcing contracts and appealing administrative decisions. USAID supports the strengthening of justice institutions to deliver legal services, with particular focus on the vulnerable and disenfranchised populations. Programs to support this objective include working with: the judiciary, ministries of justice, parliaments, prosecutors' offices, public defenders, ombudsman's offices, law enforcement agencies, legal aid/law clinics, regulatory bodies, law schools, bar associations and non-state (informal) justice institutions and relevant ADR mechanisms.

10. USAID and Security Sector Reform (SSR)

A safe and secure environment is a key building block for development and democracy building. Communities that live in fear cannot engage in productive economic, social or political activity. Recognizing that effective and responsible governance of the security sector is critical to ensuring that societies evolve in democratic and prosperous ways, USAID engages in Security Sector Reform programming under the Democracy and Governance portfolio. This work may likely cross paths with the U.S. military's work overseas.

Security sector reform is the set of policies, plans, programs and activities that a government undertakes to improve the way it provides safety, security, and justice. The overall objective is to promote an effective and legitimate public service that is transparent, accountable to civilian authority and responsive to the needs of the public. From a donor perspective, SSR is an umbrella term that might include integrated activities in support of:

- Defense and armed forces reform

- Civilian management and oversight
- Justice
- Police
- Corrections
- Intelligence reform
- National security planning and strategy support
- Border management
- Disarmament, Demobilization and Reintegration (DDR)
- Reduction of armed violence.

The security sector includes three primary sets of actors: state security providers (armed forces, police, paramilitary or intelligence services); governmental management and oversight bodies (civilian ministries, local government, legislators, judiciary); and civil society (media, community groups, special commissions and research institutes).

Two other sets of actors directly influence the security environment: non-state actors and external constituencies, such as neighboring states and regional organizations.

USAID's efforts target the *civilian actors engaged in, or affected by, the security sector.* USAID is restricted by Congress to focusing on this particular area of SSR. The agency's primary SSR role therefore falls under three umbrellas: civilian management and oversight; justice and public safety; and peace building and post-conflict reconstruction.

11. USAID Practice Areas and Illustrative Activities

Civilian Management and Oversight focuses on individual and institutional capacity to direct, participate in and monitor security policy, strategy, and performance. Illustrative activities include:

- Ministry of Interior reform
- Parliamentary Oversight and Legislative Drafting
- Support to National Security Councils
- Public Expenditure Management Reviews.

Justice and Public Safety describes activities that help foster a safe environment so that citizens can live "free from fear." These programs focus on the citizen security and criminal justice. USAID is restricted by Congress within policing activities to focusing on "community based police assistance," to enhance effectiveness and accountability and to foster civilian police roles that support democratic governance. Illustrative activities include:

- Police reform
- Community policing
- Crime Prevention activities
- Anti-Violence initiatives
- Access to Justice.

Peace-building and Post Conflict Reconstruction addresses the trans-national threats that affect the safety and well-being of citizens everywhere, particularly in countries emerging from conflict. Illustrative activities include:

- Disarmament, Demobilization and Reintegration programs (see below)
- Peace Process Support
- Confidence Building between Communities and Security Services
- Border Security
- Post Conflict Reconciliation

- Transitional Justice
- Efforts to prevent terrorism.

Congress has allowed USAID to include police in its SSR and ROL programs, as an exception to Section 660 of the FAA. These changes, however, do not affect the agency's inability to provide military assistance. Applicable principles of appropriations law provide that funds appropriated to USAID at present may not be used for military purposes. Therefore, within DDR, for example, USAID may only facilitate components of reintegration programming, not disarmament and not demobilization.

USAID has learned some emerging lessons from SSR. For one, SSR is a whole of government effort and requires the full support of all Federal departments and agencies with an SSR role. USAID is more effective when it collaborates with other USG actors, such as the Departments of Defense, Justice and State. For another, coordinating SSR projects may be more complicated than in other sectors since each donor likely represents an array of actors sponsoring security-related activities. Therefore it is imperative for U.S. government staff on the ground to coordinate not only with other development agencies but relevant defense and law enforcement liaisons as well.

12. USAID Disarmament, Demobilization and Reintegration (DDR) Activities

DDR supports the re-establishment of order and the authority of the state by disarming and demobilizing former combatants and reintegrating them back into society in a more productive way. DDR is a critical activity because it can contribute to breaking the conflict cycle; tackling the root causes of conflict; and can make peace, in large part, "irreversible."

There are several prerequisites for a successful DDR program:

- It is a political process: without political will on the part of the government in the country of assistance, it cannot happen.
- There must also be indigenous military support: without support from statutory or irregular force commanders, DDR cannot take place.
- There must be a ceasefire or peace agreement in place before successful DDR can take place.
- There must be a national DDR plan, including: guiding principles, phases and procedures, eligibility, implementation arrangements, supervision and monitoring and evaluation.
- With every situation, there may be context-specific technical assistance that has to be provided—every case is different.

A typical DDR process takes place in three parts:

Disarmament: the collection, documentation, control and disposal of small arms, ammunition, explosives and light and heavy weapons. This takes place in several steps:

- Weapons survey
- Weapons collection
- Weapons storage
- Weapons destruction
- Weapons reutilization.

Demobilization: formal and controlled discharge of active combatants from armed forces or other armed groups. The first stage may include the processing of combatants in temporary centers or camps. The second stage is called *reinsertion,* a form of transitional assistance to help cover the basic needs of ex-combatants and their families. Demobilization can be formal or informal: an agreement can be signed by parties to a conflict (formal), or individuals can demobilize individually, outside the command of their former leaders (informal). USAID assistance to reintegration is dependent upon

the demobilization status of ex-combatants—they must be demobilized. In summary, demobilization activities include:

- Planning
- Encampment
- Registration/Data Collection
- Orientation
- Final Discharge/Issuance of Documentation

Reintegration (where USAID has a role to play) is the process by which ex-combatants acquire civilian status and gain sustainable employment and income. It is a social, legal and economic process with an open time-frame, taking place primarily in communities at the local level and in the place of origin of ex-combatants. It often requires long term, external assistance. USAID often programs in supporting temporary employment in public works projects, vocational skills training or on the job training/apprenticeships. There are also opportunities for literacy or numeracy programs, access to grants or microcredit, civic education as well as psychosocial and vocational counseling. In sum, the components of reintegration are as follows:

- Support to Regional Implementation Agencies
- Transport to Home Region
- Discharge Payments
- Reinsertion Packages
- Reintegration Programs.

Community focused reintegration works to reintegrate both ex-combatants and their home communities together. It has several advantages and can be used in a situation of return of displaced persons as well as demobilization of combatants. Some features:

- Provides practical skills to both former combatants and community members
- Targets vulnerable, war-affected populations
- Creates safe environments in which divided communities interact
- Incorporates traditional mediation and conflict resolution
- Offers a mix of targeted training programs and small grants for community projects (which apply the new skills and foster cooperation among community members)
- Rebuilds community infrastructure.

13. References and Contacts for Further Research

Several websites have been listed below that may be of particular relevance to your work as judge advocates in the field.

- USAID Primer: http://www.usaid.gov/about_usaid/primer.html
- USAID Office of Democracy and Governance: http://www.usaid.gov/our_work/democracy_and_governance/
- USAID Office of Military Affairs: http://www.usaid.gov/our_work/global_partnerships/ma/
- USAID Office of Foreign Disaster Assistance: http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/
- USAID Office of Transition Initiatives: http://www.usaid.gov/our_work/cross-cutting_programs/transition_initiatives/
- USAID and Security Sector Reform: http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/SSR_JS_Mar2009.pdf

- USAID Rule of Law Strategic Framework: http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Sept_08.pdf
- USAID Iraq Mission: http://www.usaid.gov/iraq/
- USAID Afghanistan Mission: http://afghanistan.usaid.gov/en/index.aspx
- USAID Pakistan Mission: http://pakistan.usaid.gov
- USAID Ethiopia Mission: http://www.usaid.gov/locations/sub-saharan_africa/countries/ethiopia/
- USAID Somalia Mission: http://eastafrica.usaid.gov/en/Country.1012.aspx
- USAID East Africa Regional Mission: http://eastafrica.usaid.gov/
- USAID West Africa Regional Mission: http://westafrica.usaid.gov
- USAID Southern Africa Regional Mission: http://sa.usaid.gov/
- USAID Haiti Mission: http://www.usaid.gov/ht/

Subject Matter Expertise	Phone (202)
Access to justice	712-0304
Policing	712-5416
Policing	712-1842
Judicial Reform	712-1471
Division Chief	712-1113
Human Rights / Criminal Justice / Anti-Gang Programming	712-5346
Legal empowerment of the poor	712-1821
Liaison to the Administrative Offices of the U.S. Courts (AOUSC)	712-4447
Security Sector Reform	712-1711

The USAID mission or the Embassy in your country of work will have relevant in-country contacts for you regarding democracy and governance, ROL, security sector reform and other USAID projects. This section cannot answer all questions that may come up and mission-specific focal points can address more detailed queries. Within the USAID Washington headquarters, the following telephone points of contact are provided to access sector specific subject matter expertise:

C. Department of Justice

The Department of Justice (DOJ) 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 DOJ; supervises U.S. attorneys, marshals, clerks, and other officers of Federal courts; represents the U.S. 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 ROL operations abroad is growing.

In cooperation with the DOD, the DOS, and other interagency actors, and with funding from DOS, DOJ is now engaged in more than 60 countries in overseas ROL work. DOJ works with foreign governments around the world to develop professional and accountable law enforcement institutions

that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism. It does this through the overseas work of its law enforcement agencies—including the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the U.S. Marshals Service (USMS), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The Bureau of Prisons also contributes. For example, the assistant program manager for the corrections development program in Iraq is an active duty warden who is detailed to the International Criminal Investigative Training Assistance Program (ICITAP). It also does so through its specialized international prosecutorial and police development offices within the Criminal Division, the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), and the ICITAP. The Office of the Deputy Attorney General provides policy oversight and coordination of DOJ's many efforts, while DOS, principally through the DOS / INL Bureau, provides funding and policy guidance for all DOJ capacity-building programs. This includes those of OPDAT and ICITAP, which place federal prosecutorial and law enforcement experts, respectively, in foreign countries for long-term assignments designed to focus on the comprehensive development of all pillars of the criminal justice system.

1. Office of the Deputy Attorney General

The Office of the Deputy Attorney General issues policy guidance and direction to DOJ components involved in ROL activities. Three career Department lawyers act as counsel to the Deputy Attorney General on ROL matters. One Counsel is responsible for providing leadership and coordination for all DOJ component activities in Iraq. This attorney acts as the Deputy's focal point of information for all capacity building and operational matters involving Iraq. Similarly, another Counsel is responsible for the Afghanistan mission and, likewise, is responsible for providing leadership and coordination for all DOJ component activities in Afghanistan. Finally, a Senior Counsel advises the Deputy on broader ROL matters that intersect with the Department's equities and expertise.

Additionally, at the request of the former Ambassador to Iraq, the Attorney General deployed a senior attorney to serve as the Rule of Law Coordinator for Iraq. The Rule of Law Coordinator serves as the Ambassador's principal agent for coordination of all ROL programs and activities, whether performed by DOJ components or other departments and agencies represented at the U.S. Mission to Iraq. The Rule of Law Coordinator serves under the authority of the Chief of Mission and is the senior DOJ official in Iraq.

Finally, the Office of the Deputy Attorney General oversees the activities of other senior DOJ officials deployed to Iraq and Afghanistan, including the Justice Attachés in Baghdad and Kabul. The Justice Attaché in Kabul is the senior DOJ official in Afghanistan. The Rule of Law Coordinator in Iraq and Justice Attaches in both Iraq and Afghanistan are selected by and report to the Deputy Attorney General.

2. Criminal Division's International Criminal Investigative Training Assistance Program

One of DOJ's agencies involved in ROL in a number of countries is the International Criminal Investigative Training Assistance Program (ICITAP). The Program's ROL mission is to support 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, combating corruption, and reducing the threat of transnational crime and terrorism. ICITAP's activities encompass two principle types of assistance projects: (1) the development of police forces and prison systems in the context of international peacekeeping operations, and (2) the enhancement of capabilities of existing police forces and prison systems in emerging democracies. Assistance is

based on internationally recognized principles of human rights, ROL, and modern police and corrections practices.

The intent of ICITAP's training and assistance programs is to develop professional civilian-based law enforcement institutions.[32] ICITAP assistance is designed to: (1) enhance professional capabilities to carry out investigative and forensic functions; (2) assist in the development of 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 it serves; (5) create or strengthen the capability to respond to new crime and criminal justice issues; and (6) develop corrections systems that foster public safety and demonstrate respect for the human rights of those incarcerated. Since its creation, ICITAP has conducted projects in nearly 40 countries.

Individuals assigned to ICITAP have been working in Iraq since 2003. ICITAP personnel have provided assistance to the Government of Iraq through the Civilian Police Assistance Training Teams (CPATT) under a program funded by DOS / INL Bureau, and currently assist the Government of Iraq in corrections and anticorruption investigations development programs.[33] After helping to found the Baghdad Police College, ICITAP personnel engaged in mentoring and advising Iraqi police who serve as instructors at the Police College. Additionally, ICITAP has served as implementing partner in a DOS program to develop the investigative capabilities of the Commission on Public Integrity, an independent, autonomous division of the Iraqi government that focuses on preventing government corruption, and promoting transparency and the ROL in Iraq. It has provided significant assistance in training and mentoring Iraqi Anti-Corruption Units, Iraqi Special Investigative Units, and Facilities Protections Service guards.[34] Finally, ICITAP brings extensive experience and expertise in assessing Iraqi correctional facilities against international prison standards. ICITAP has helped reestablish the Iraq Corrections Service (ICS) and worked with Iraqi leaders to develop a national prison system. It has also deployed a team of 80 corrections training officers to provide on-site training and mentoring to Iraqi staff at prison facilities throughout the country and to assist the Iraq Ministry of Justice in strengthening the overall management of the corrections service.

3. Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT)[35]

Another DOJ entity is the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT). OPDAT's mission is "to develop and administer technical assistance designed to enhance the capabilities of foreign justice sector institutions and their law enforcement personnel, so they can effectively partner with DOJ in combating terrorism, trafficking in persons, organized crime, corruption, and financial crimes."[36] OPDAT ROL goals relate 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

[32] ICITAP possesses the following expertise: basic police skills, corrections, public integrity and anti-corruption, criminal justice coordination, forensics, organizational development, academy and instructor development, community policing, transnational crime, specialized tactical skills, marine and border security and information systems. Fact Sheet, The Department of Justice Mission in Iraq: International Criminal Investigative Training Assistance Program (ICITAP) *available at* http://www.justice.gov/iraq/icitap.htm (last visited June 9, 2011).
[33] *Id.*
[34] *Id.*
[35] For more information, follow the URL in Table 2 of Appendix.
[36] Fact Sheet, OPDAT - OPDAT Mission, *available at* http://www.justice.gov/criminal/opdat/about/mission.html (last visited June 9, 2011).

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 has more than 40 Resident Legal Advisers (RLAs) in 30 countries. RLAs are experienced federal or state prosecutors stationed in a host country for at least one year. They provide full-time advice and technical assistance in establishing fair and professional justice sector institutions and practices.[37]

At this time, there are now 10 RLAs in Iraq. RLAs are assigned to Provincial Reconstruction Teams. These individuals have helped facilitate the creation of Central Criminal Court panels, often referred to as Major Crimes Courts, for Mosul, Tikrit, and Kirkuk. Finally, OPDAT personnel have created courses designed to train Iraqi judicial officials in topics ranging from human rights to scientific evidence to special challenges presented by the prosecution of insurgency and terrorist cases.

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 U.S. criminal justice process to hundreds of international visitors each year, most through the State Department's International Visitor Leadership Program (IVLP).

4. Other DOJ Activities in Iraq

The Department of Justice's law enforcement components have long provided special investigative training and assistance to Iraqi law enforcement through different components. One of the primary activities has been the Major Crimes Task Force (MCTF), supported by a program funded by DOS. The MCTF is a unique joint Iraqi-U.S. organization providing on-the-job training, support and mentoring to Iraqi law enforcement and task force members. Law enforcement agents from the FBI, ATF, DEA, and the USMS, work in close partnership with their Iraqi counterparts to conduct investigations of serious and often highly sensitive criminal acts. In 2011, the MCTF will transition to independent operations led exclusively by Iraqi investigators. The FBI will continue a liaison relationship with the MCTF, with a primary focus on major cases of mutual interest to the U.S. and Iraq.

The FBI has deployed a Legal Attaché (Legat) to Iraq who, as a senior-level Special Agent, serves as the FBI liaison to the Embassy, U.S. Forces-Iraq (USF-I), and the international community. The Legat office provides guidance and assistance on a variety of law enforcement issues, including criminal investigations, hostage rescue, counter-intelligence and training, biometrics, and public corruption, as well as serves in a supervisory role over the MCTF. The FBI also has a counterterrorism unit in Iraq that deploys rotating teams of specialists to provide training to the Iraqi police.

ATF has an Attaché Office in the U.S. Embassy in Baghdad. Its mission is to create the Iraq Weapons Investigation Cell to investigate and account for U.S. Government issued munitions; establish the ATF Combined Explosives Exploitation Cell which will seek to identify the source countries for explosives recovered in Iraq; and to engage in a targeted effort to investigate diversion, contraband, and cigarette theft throughout the country. ATF also has provided post-blast investigation and explosives/IED-related training to the Iraqi police.

[37] Fact Sheet, USDOJ: The Department of Justice Mission in Iraq: Office of Overseas Prosecutorial Development, Assistance and Training *available at* http://www.justice.gov/iraq/opdat.htm (last visited June 9, 2011).

Finally, the DEA and USMS[38] have a small presence, having delivered courses in intelligence and intelligence analysis to the Iraqi police and advised on procedures and technologies that will improve the safety of civil and criminal courts throughout Iraq. Both DEA and USMS currently support the MCTF.

To support Iraqi efforts to prosecute members of the former Iraqi regime, DOJ established the Regime Crimes Liaison Office (RCLO). With more than 140 personnel at its height, serving a variety of advisory, security, investigative and support functions, the RCLO supports and assists the Iraqi High Tribunal (IHT). RCLO completed its mission, and the function of IHT advisor is now filled by a member of the Rule of Law Coordinator's office.

5. Other DOJ Activities in Afghanistan

The Department of Justice has a large presence in Afghanistan coming from the DEA, FBI, USMS, counter-narcotic criminal investigator trainers/mentors, and experienced DOJ attorneys. The attorneys serve as trainers/mentors to a select group of Afghan investigators, prosecutors and judges at the Criminal Justice Task Force (CJTF)[39] and the Central Narcotics Tribunal (CNT). In addition, the attorneys assist Afghan national security prosecutors in the Antiterrorism Prosecution Directorate (ATPD)[40] and other members of the Afghan justice sector through mentoring and focused training. A detailed description of the CNT and how JAs may be able to use it was contained in Chapter 11 of the 2010 *Handbook*.

The DEA has stationed Special Agents and Intelligence Analysts to enhance counternarcotics capabilities in Afghanistan. The DEA provides counternarcotics training to Afghan security forces such as the Counternarcotics Police – Afghanistan (CNP-A). Together with the DOD, DEA trainers have embarked on a multi-year mission to make the CNP-A's National Interdiction Unit capable of independent operations within Afghanistan. DEA has also established specially trained, Foreign-deployed Advisory Support Teams (FAST). The FAST program currently consists of three teams of ten specially trained agents and analysts, who deploy to Afghanistan for 120 days at a time to assist the Kabul Country Office and the CNP-A in the development of their investigations. FAST members are DEA agents who are trained criminal investigators with some military training. FAST teams provide guidance to their Afghan counterparts while also conducting bilateral investigations aimed at the region's narcotics trafficking organizations. FAST operations, which DOD supports and largely funds, also help with the destruction of existing opium storage sites, clandestine heroin processing labs, and precursor chemical supplies directly related to U.S. investigations.

As of 2011, DOJ has eleven attorneys engaged in the rule of law mission and three senior criminal investigator trainers/mentors at the CJTF and the CNT. Each attorney serves a minimum one-year tour of duty. To date, DOJ attorneys have helped the Afghans craft a comprehensive counternarcotics law that created a specialized investigative/prosecutorial task force and a specialized court with exclusive nationwide jurisdiction for drug trafficking (and related corruption) cases in Afghanistan. With the law, and with training and mentoring, the Afghans have begun the use of new and advanced investigative techniques and prosecutorial methods and tools. The CNT has successfully heard hundreds of cases. The attorneys have also been instrumental in assisting in the removal of narco-traffickers to the U.S. for trial. These experienced attorneys routinely provide guidance and advice to

[38] As of April 15, 2010, Iraq has not had a USMS presence since September 30, 2009.
[39] Under Afghan law, the CJTF has exclusive nationwide jurisdiction over threshold drug cases and drug-related corruption.
[40] By the end of 2011, DOJ expects to have an attorney located at the Justice Center in Parwan (JCIP) to provide assistance and training to Afghan national security prosecutors.

the Afghan Attorney General, U.S. Embassy officials, and various U.S. law enforcement entities operating in-country.[41]

The ATF also has some presence in Afghanistan, having completed Military Post-blast Investigation Techniques courses for all services, with more planned.

The FBI personnel in Afghanistan work on criminal investigations and counter-terror missions. Currently, the FBI has a Legal Attaché and two Assistant Legal Attachés stationed at the U.S. Embassy in Kabul, as well as numerous Special Agents, technicians, and analysts on details in Afghanistan. Their priorities include conducting detainee interviews and biometric processing; providing technical support and intelligence in order to identify trends, target IED makers and enable both offensive and defensive counter operations by coalition forces; exploiting the thousands of documents seized from Al Qaeda and Anti-Coalition Forces; and providing counterterrorism training. The FBI also established a Major Crimes Task Force with Afghanistan, which focuses on Afghan-led investigations of corruption, kidnapping, and other serious criminal acts. The FBI has provided Special Agents to mentor the Afghan investigators to build their capacity to investigate cases and further ROL efforts.

As of August 2011, ICITAP continues to offer assistance to CJIATF-435, a military led task force having command and control of U.S. detention operations and has helped Combined Security Transition Command-Afghanistan (CSTC-A) develop a way-forward for the development of the CNPA.

Finally, rotating teams of Deputies from the Special Operations Group (SOG) of the USMS provide security to personnel at the CJTF and help to establish a judicial security force for the CNT. The Judicial Security Unit (JSU) is expected to be staffed with approximately 1,500 Afghan police and will focus their efforts on protecting a wider array of courts and judges throughout Afghanistan. Additionally, the SOG USMS provided security design advice for the Counternarcotics Justice Center in Kabul, which opened in May 2009. This new facility not only provides a secure environment for the daily activities of the CJTF and CNT, but also includes prisoner detention facilities, secure courtrooms, and a dining facility for the Afghan security forces and judicial personnel.

D. Department of Defense

The Department of Defense (DOD) engages in ROL operations within the full spectrum of operations, both by *how* it engages in offensive and defensive operations and *where* it engages in stability operations.

The conduct of offensive and defensive operations in accordance with the ROL is not the subject of a distinct policy or organization within DOD, but rather a core value of a force committed to compliance with both host nation and international law.

The Department of Defense's approach to ROL operations (within the context of stability operations) can be found in DODI 3000.05, *Stability Operations.* Pursuant to the legal authority of the Secretary of Defense, this Instruction establishes DOD policy on, and responsibilities for, planning, training, preparation, conduct, and support of, Stability Operations. It directs that stability operations are to be a core U.S. military mission with a 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.

DODI 3000.05 identifies the ROL as one of four key components of stability operations, stating at paragraph 4.d. that "The Department shall assist other U.S. Government agencies, foreign

[41] Most PRTs are staff with contract attorneys hired through the Department of State.

governments and security forces, and international governmental organizations in planning and executing reconstruction and stabilization efforts, to include … (3) Strengthening governance and the rule of law."

The Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD SO/LIC) is the lead for DODI 3000.05 implementation across DOD.[42] The Office of the Special Coordinator for Rule of Law and International Humanitarian Policy (RHP) was established in June 2010. RHP worked to offer policy guidance and support to those working in the field, identify best practices and lessons learned that can strengthen and guide current and future operations, and integrate ROL policies into doctrine, planning, and strategy. In February 2011, RHP established a new DOD-wide rule of law working group to strengthen policy coordination on ROL issues. Its purpose was to identify and address potential challenges, strengthen lines of communication, and coordinate DOD's response to, and its role within, the USG interagency processes. Since June 2011, this ROL policy work is now performed by the, newly formed, Office for the Rule of Law and Detainee Policy (RDP).

While it is accepted that many stability and reconstruction tasks are more appropriately carried out by civilians, this may not always be possible in chaotic environments or when civilian capabilities are unavailable. Accordingly, the Instruction describes the R&S undertakings the U.S. military must train and equip itself to carry out. These range from rebuilding infrastructure to reforming security sector institutions, reviving the private sector, and developing representative government.[43]

All of the services responded to the DODI 3000.05 (and its DODD predecessor) by identifying a proponent for stability operations initiatives. Within the Army, there are significant restructuring initiatives tied to fulfilling the DODI 3000.05 mandate. These include establishing a "division within the Army G-3/5 dedicated to stability operations" and expanding the Peacekeeping and Stability Operations Institute (PKSOI) at Carlisle Barracks. It also includes establishing the "Culture Center within the Army's Training and Doctrine Command [which] provides exportable training materials and mobile training teams to better prepare deploying units to more effectively operate in foreign cultures" and creating additional psychological operations and civil affairs billets. The Air Force "designated the Director of Operational Plans and Joint Matters as the lead agent for its stability operations initiatives" which included creating the Coalition Irregular Warfare Center. The Department of the Navy "designated the Deputy Chief of Naval Operations, as the Navy's Lead Officer for Stability, Security, Transition and Reconstruction Operations" and established the Naval Expeditionary Combat Command (NECC) which includes the Maritime Civil Affairs Group. Finally, the Marine Corps created "the Center for Irregular Warfare, the Center for Advanced Operational Culture Learning (CAOCL) and a Stability, Security, Transition and Reconstruction (SSTR) section within the Headquarters, U.S. Marine Corps."[44]

Each service has also addressed the DODI 3000.05 requirement to improve military doctrine, education and training for stability operations.[45] Recent doctrine updates emphasizing stability operations include Joint Publication 3-0, *Joint Operations*, Field Manual 3-0, *Full Spectrum Operations*, Field Manual 3-07, *Stability Operations*, Field Manual 3-24 / MCWP 3-33.5, *Counterinsurgency*, as well as the reorganization of the Air Force's doctrinal hierarchy. Field Manual 1-04, *Legal Support to the Operational Army* addresses the roles and responsibilities of judge advocates in stability operations, as does Field Manual 3.05-40, *Civil Affairs Operations* and in Joint Publication 1-04, *Legal Support to Military Operations.* DOD's promotion of the ROL into its

[42] DODI 3000.05, *supra* note 6, at 7.
[43] *Id.* at 2.
[44] Secretary of Defense, Report to Congress on the Implementation of DOD Directive 3000.05 Military Support for Stability, Security, Transition and Reconstruction (SSTR) Operations (1 April 2007) [hereinafter Sec Def DODI 3000.05 Report].
[45] *Id.* at 12-13.

doctrine has been integrated into this Doctrine. Joint Publication (JP) 3-07, *Stability Operations* (forthcoming[46]), and JP 3-24, *Counterinsurgency*, October 2009, identify the promotion of the ROL as an essential component of stability and COIN operations.

Enhanced educational initiatives include expanding language and cultural skills training and including stability operations exercises in the professional military education curriculum for intermediate level education as well as at each of the senior service schools. Specifically, SSTR training initiatives include:

- an integrated USG pre-deployment training regimen built on Iraq and Afghanistan Provincial Reconstruction Team (PRT) training concepts
- a process for DOD to obtain subject matter experts from other USG agencies to support DOD training and exercises
- the adjudication of requests for interagency integrated training through a single point of contact in each agency
- the development of a USG-wide web-based training knowledge portal that allows participating agencies to have visibility to other agencies' training opportunities.[47]

Many of these initiatives have been completed, and all are under way. All the services have also incorporated individual[48] and collective training on SSTR. The training centers placed additional emphasis on SSTR tasks by employing "civilian role players and foreign language speakers to replicate indigenous populations, security forces, and representatives from governmental and private relief organizations."[49] Ultimately, these updates to unit structure, doctrine, training, and education reflect the fact DODI 3000.05 "establishes enduring policies and broad implementing actions that are integrated into the Department [of Defense's] force development mechanisms in a way that balances current operational requirements with projected needs and risk parameters."[50]

The purpose of DOD stability operations efforts is to increase security by supporting stability in a society in a manner that advances U.S. interests. In the short-term, stability operations aim to provide immediate security and attend to humanitarian concerns in regions affected by armed hostilities. The long-term goal is to establish an indigenous capacity to sustain a stable, democratic and free-market society that abides by the ROL. As such, DOD expects ROL 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 DOD emphasis in the ROL is to foster security and stability for the civilian population by supporting the effective and fair administration and enforcement of justice, preferably by host nation institutions.

DOD plays a crucial supporting in U.S. Government ROL operations. Its existing efforts include both traditional military-to-military engagement and, under special authority in Iraq and Afghanistan, field support for stability and COIN operations. At home and overseas, DOD personnel provide training in international humanitarian law, building accountable security and justice sectors, civilian control of the military, and human rights.

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[46] The Joint Staff's Joint Doctrine Branch is in the process of developing a Joint publication, JP 3-07, "Stability Operations," based in part on U.S. Army Field Manual (FM) 3-07, Stability Operations.
[47] Sec Def DODI 3000.05 Report, *supra* note 44, at 16-7.
[48] Training opportunities include the following: 80 hour modular cultural awareness training program developed by the Army Intelligence Center, online cultural awareness available through Army Knowledge Online, mobile training teams on fundamental language and culture "survival skills" provided by the Defense Language Institute. *Id*. at 18. *See also* Table 1 of Appendix for ROL-specific training programs and short courses available for USG civilians and JAs.
[49] *See* Sec Def DODI 3000.05 Report, *supra* note 44.
[50] *Id*. at 4.

In Iraq and Afghanistan, U.S. Army Civil Affairs and Psychological Operations (USACAPOC) units, Judge advocates of all Services, and other Service components such as Civil Affairs and Military Police have helped promote respect for and adherence to international human-rights standards, and have helped local governments develop effective judicial systems by training judges, prosecutors, police, and corrections officials. DOD personnel have worked closely with their interagency colleagues in the respective U.S. Embassies and on Provincial Reconstruction Teams (PRTs) to help build sustainable legal institutions that will promote a movement towards the ROL. Interagency coordination in this area is at a truly dynamic stage, with events in Afghanistan driving that dynamism. The creation of a DOD led Rule of Law Field Force – Afghanistan (ROLFF-A) is representative of the innovative manner in which DOD is supporting the interagency rule of law effort.

1. Judge Advocates

The full implications for the JAG Corps of DOD's approach to stability operations remain to be seen. However, it is apparent from its conduct of ROL operations in Iraq and Afghanistan that the JAG Corps has embraced the challenges that this line of operation entails. Judge advocates' involvement in ROL takes on many roles. These include acting 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 ROL conferences. Specific ROL tasks performed by JAs include:

- Determining which host nation (HN) offices, ministries, or departments have the legal authority to evaluate, reform, and implement the law and execute its mandates.
- Evaluating and assisting in developing transitional decrees, codes, ordinances, courts, and other measures intended to bring immediate order to areas in which the HN legal system is impaired or nonfunctioning.
- Evaluating HN law, legal traditions, and administrative procedures in light of international legal obligations and human rights standards and when necessary, providing appropriate assistance to their reform.
- Evaluating training given in light of international legal obligations and human rights standards and providing assistance to improve training. This training is given to HN judges, prosecutors, defense counsel, legal advisors, court administrators, and police and corrections officials.
- When necessary, serving as legal advisors for transitional courts.
- Advising commanders and others on the application of international, U.S. domestic, and HN law that is considered in restoring and enhancing ROL in the host nation.
- Advising commanders and U.S., international, and HN authorities on the legality, legitimacy, and effectiveness of the HN legal system including its government's compliance with international legal obligations and domestic law.
- Supporting the training of U.S. personnel in the HN legal system and traditions.[51]

Further, and to a certain extent it almost goes without saying, because they serve as legal advisors to commanders, judge advocates have a special role in assisting U.S. forces to comply with the ROL in their own offensive and defensive operations or in joint U.S./host nation operations.

The JAG Corps has also recognized the importance of the DODI 3000.05 mandated, and strategically vital, requirement for interagency coordination and planning in ROL operations. The JAG Corps /USC ROLC partnership[52] will deliver interagency training for judge advocates and ROL

[51] U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY D-2 – D-3 (April 15, 2009).
[52] *See supra* note 27.

practitioners from, amongst others, the Departments of State and Justice. The intent is that this partnership will also develop a web-based repository for ROL practitioners and conduct interagency ROL strategic planning. All these initiatives will further the work undertaken by the Judge Advocate General's Legal Center and School (TJAGLCS) through its ROL training course and this *Handbook*, and the ROL instruction for deploying personnel provided at the Brigade Judge Advocate's Mission Primer (BJAMP).

2. Civil Affairs

Military Civil Affairs (CA) units can also play a key role in building host nation legal capabilities. Capable of supporting strategic, operational, and tactical levels of command, CA units assist long-term institution building through "functional specialty area" teams. The CA functional specialty areas include ROL, economic stability, governance, public health and welfare, infrastructure, and public education and information.[53] Civil Affairs doctrine indicates the ROL section has the following capabilities:

- Determine the capabilities and effectiveness of the HN legal systems and the impact of those on joint force civil military operations (CMO) strategy.
- Evaluate the HN legal system, to include, reviewing statutes, codes, decrees, regulations, procedures, and legal traditions for compliance with international standards, and advising and assisting the HN and other ROL participants in the process of developing transitional codes and procedures and long term legal reform.
- Evaluate the personnel, judicial infrastructure, and equipment of the HN court system to determine requirements for training, repair, construction, and acquisition.
- Provide support to transitional justice, to include acting as judges, magistrates, prosecutors, defense counsel, legal advisors, and court administrators when required.
- Coordinate ROL efforts involving U.S. and coalition military, other U.S. agencies, intergovernmental organizations (IGOs), non-governmental organizations (NGOs), and HN authorities.
- Assist the Staff Judge Advocate (SJA) in educating and training U.S. personnel in indigenous legal systems, obligations, and consequences.
- Advise and assist the SJA in international and HN legal issues as required.
- Assist the SJA with regard to status of forces agreement (SOFA) and status of mission agreement issues.
- Provide technical expertise, advice, and assistance in identifying and assessing indigenous public safety systems, agencies, services, personnel, and resources.

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[53] JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL MILITARY OPERATIONS at I-20 (8 July 2008). Civil Military Operations (CMO) are "the activities of a commander that establish collaborative relationships among military forces, governmental and nongovernmental civilian organizations and authorities, and the civilian populace in a friendly, neutral, or hostile operational area in order to facilitate military operations are nested in support of the overall U.S. objectives**."** *Id* at vii. At the operational level, CMO take the form of missions supporting security cooperation feature programs to build relationships and mitigate the need for force; improve health service infrastructure; movement, feeding, and sheltering of dislocated civilians (DCs); police and security programs; building FN government legitimacy; synchronization of CMO support to tactical commanders; and the coordination, synchronization, and, where possible, integration of interagency, IGO, and NGO activities with military operations." At the tactical level, CMO include "support of stakeholders at local levels, and promoting the legitimacy and effectiveness of U.S. presence and operations among locals, while minimizing friction between the military and the civilian organizations in the field. Tactical-level CMO normally are more narrowly focused and have more immediate effects. These may include local security operations, processing and movement of DCs, project management and project nomination, civil reconnaissance, and basic health service support (HSS).

- Advise and assist in establishing the technical requirements for government public safety systems to support government administration (police and law enforcement administration and penal system.)[54]

Many judge advocates serve in CA units and will be particularly familiar with CA capabilities. Judge advocates not part of CA units should seek out available CA resources and expertise whenever contemplating a ROL project.

3. Military Police

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

The U.S. 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 deploy in support of ROL missions to train 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

The MP community conceives of ROL projects as the restoration of the civil authority triad: judicial systems, law enforcement, and penal systems. To assist in the restoration process, the MPs are focusing on "police services with a greater emphasis on ROL through the issuance, execution, and disposition of warrants, evidence and records as well as detention operations focused to achieve uniform effects in transitioning to judicial procedures and oversight, across the theater." Drawing from one of their MP skills, strategic law enforcement operations and training, MPs are filling billets within Police Transition / Mentor Teams (PTT / PMT) to train host nation police in apprehension, in-processing, investigation, adjudication, and incarceration.

In the area of detention operations, MPs are shifting focus from a law of armed conflict model of detain and release to a ROL model based on indictments and convictions. While detention operations continue to emphasize proper care and custody of detainees, the ROL model builds on care and custody to include population engagement. The population engagement model is a four step process involving detention, assessment, reconciliation, and transition. Ultimately, this model defines victory as establishing alliances with moderate detainees, empowering moderates to marginalize violent extremists, and providing momentum to the process of reconciliation with host nation society.

As operational environments shift from conflict to order, leaders must maintain awareness of MP capabilities to ensure their effective utilization. Typically, within a Brigade Combat Team, there is a Provost Marshal cell and a military police platoon within the Brigade Special Troops Battalion.

[54] U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 2-8 – 2-9 (29 Sept. 2006).

These Soldiers offer a range of skills on law enforcement techniques. These range from the ability to train on effective tactical site exploitation and handling of evidence to more sophisticated methods of investigating complex crimes. As operations shift from active combat to a law-enforcement-intensive model, MP organizations can serve as valuable resources. In addition to serving as training resources for host nation agencies, they can also provide training to U.S. troops conducting security operations, both on how to conduct police-oriented population engagements effectively and on important matters such as evidence collection and preservation. These will become increasingly important as the host nation judicial system becomes capable of criminalizing insurgent activities. The organic availability of MPs, along with their versatility, makes them extremely effective in supporting the ROL.

4. Defense Institute of International Legal Studies

In addition to Military Police, Judge Advocates, and Civil Affairs, the Defense Institute of International Legal Studies (DIILS) can provide ROL training assistance to host-nation institution building. The DIILS' mission is to provide expertise over a broad range of legal topics of Military Law, Justice Systems, and the ROL, with an emphasis on "the execution of disciplined military operations through both resident courses and mobile education teams."[55] DIILS, a part of the Defense Security Cooperation Agency (DSCA), works with U.S. Embassy Country Teams and host nations, through the medium of mobile education teams, resident and other programs, to provide timely, effective and practical seminars to lawyers and non-lawyers. The goal is teaching operations, including post-conflict reconstruction, equitable and accountable security and justice systems, civilian control of the military, human rights and democracy, within the parameters of international law. DIILS also offers a ROL short course for foreign military officials at various military schools around the U.S. (See Table 2 in Appendix for a URL with more information.)

5. All Operational Forces

While judge advocates, Civil Affairs personnel, and Military Police may have specialized skills for some specialized roles, ROL practitioners should never forget that all operational forces have a role to play in furthering the seven ROL effects. The vital role of every Soldier and Marine is recognized in doctrine by DODI 3000.05 and the Field Manual 3-24, *Counterinsurgency*.[56] OIF and OEF are replete with examples of Second Lieutenants giving classes on human rights to Iraqi police[57] or infantry companies partnering with Iraqi police to maintain security in their communities.[58] JAs, MPs, and CA personnel should mainstream ROL operations so that all deployed personnel participate. If they fail to do so, they will not only miss out on a tremendously powerful resource of accomplishing the ROL mission, they also run the risk of losing the command's attention to ROL as merely a "specialized" line of operation. Moreover, it is only the operational forces themselves that can further the effects of the ROL by actually observing the ROL—and engaging host nation institutions wherever possible—in the conduct of operations. Any approach to ROL that views it as the purview of lawyers ignores that, in any society that has some claim to the principle, the ROL is claimed not by the lawyers but by the citizenry writ large.

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[55] Defense Institute of International Legal Studies website *at* http://www.diils.org (last visited June 9, 2011).
[56] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-131 (15 Dec. 2006). ("Soldiers and Marines help establish HN institutions that sustain that legal regime, including police forces, court systems, and penal facilities").
[57] *See* Michael J. Totten, *Final Mission Part III*, MIDDLE EAST JOURNAL, Feb. 12, 2008, http://www.michaeltotten.com/archives/2008/02/the-final-missi-2.php (last visited June 9, 2011).
[58] *See* Herschel Smith, *Operation Alljah and the Marines of 2nd Battalion, 6th Regiment*, THE CAPTAIN'S JOURNAL, http://www.captainsjournal.com/2007/08/22/operation-alljah-and-the-marines-of-2nd-battalion-6th-regiment/ (last visited June 9, 2011).

E. United States Institute of Peace

The United States Institute of Peace (USIP) is an independent, nonpartisan, federal 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 peace building capacity, tools, and intellectual capital worldwide. USIP does this by empowering others with knowledge, skills, and resources, as well as by its direct involvement in peace building efforts around the globe.

To achieve these 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 recently Afghanistan, Kosovo, Iraq, Liberia, Nepal, Nigeria, Philippines, Sudan, the Palestinian Territories, and Uganda. USIP's Academy for International Conflict Management and Peacebuilding conducts training on-site at the Institute's Washington headquarters, in the field, and on-line in several languages. The classes can be geared toward U.S. practitioners or foreign officials. One such class for U.S. ROL attorneys is the Rule of Law Practitioner Course offered multiple times a year on their Washington, D.C. headquarters for five days. This course, as a comprehensive introduction to ROL assistance in conflict-afflicted states, provides practitioners with skills and knowledge to effectively promote ROL. For more information, follow the URL in Table 1 of Appendix.

With many roles and missions, USIP is heavily involved in promoting the ROL. The USIP premise is that adherence to the ROL 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. In other words, the ROL is not only about codes, courts, and policy, but includes also the relationship between citizens and the law within the context of a country's recent history and current political, social, and economic environment. In this regard, USIP also focuses on traditional or community based justice systems and their relationship to formal institutions.[59]

According to USIP, establishing the ROL is a critical objective in any post-conflict effort. The focus of the initial phase is on security and stopping criminal behavior. Post conflict states must provide their populations with security, stability, personal safety, and the transparent and accountable law enforcement and judicial processes that provide the same protections and penalties for all citizens. At the same time, the combination of national and international actors that shape a new government and a new state after conflict must be able to address the legacy of past violence and abuse that often accompanies violent conflict. They must also look ahead to developing effective domestic mechanisms and institutions that are capable of combating impunity, corruption, and serious crimes, while at the same time delivering justice, once international security assistance is withdrawn.

1. USIP Activities in Iraq and Afghanistan

USIP has focused on five major areas to help build ROL in Iraq. First, USIP provided substantial assistance during the constitution-making process and constitutional review. This assistance included convening meetings of senior legal advisors which allowed Iraqi government officials the chance to talk with representatives from South Africa, Afghanistan, Albania, East Timor, Switzerland, Germany, Nigeria, Brazil, Cambodia and Rwanda on the their constitutional frameworks, arrangements and institutions, and constitution-making experiences. Second, USIP worked to strengthen and build capacity within the Iraq judiciary. USIP helped create the Iraqi Committee on Judicial Independence, an NGO dedicated to working with government and civil society to promote

[59] *See* CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES (Deborah Isser ed., 2011, U.S. Institute of Peace Press).

judicial capacity and independence. USIP also convened officials of the federal and Kurdistan regional judiciaries to resolve challenges to access to justice created by the dual judicial system. Third, USIP worked with judicial, ministerial, parliamentary, and security officials, as well as members of civil society, to design and implement policies to address property claims of Iraq's 4 million displaced citizens. USIP has been working with minority leaders through a series of dialogues to identify and address challenges to Iraq's minority communities. Finally, USIP emphasized the importance of transitional justice by providing advice on the establishment of the Iraqi Special Tribunal and disseminating a film entitled *Confronting the Truth: Truth Commissions and Societies in Transition* to stress the importance of dealing with the former regime's human rights abuses.

USIP has also been heavily involved in ROL reform in Afghanistan since 2002. USIP projects in Afghanistan began with developing a framework for establishing ROL in Afghanistan after the Bonn Agreement. USIP has also worked since 2002 on studying how traditional dispute resolution mechanisms are used to resolve civil and criminal conflicts. This has led to a series of district-level pilot projects that explore ways to better link the formal and informal justice sectors and inform a national policy dialogue on the subject. USIP has also promoted accountability and good governance by supporting the Afghan government and leading NGOs to implement the national Action Plan on Peace, Justice, and Reconciliation. USIP has played an instrumental role on promoting sound vetting policies, most notably drafting guidelines used for barring members of illegal armed groups from the 2009 elections. USIP's comparative research led to a series of consultations with Afghan justice officials on criminal law reform and combating serious crimes in Afghanistan. Finally, USIP has supported research on constitutional analysis and interpretation in Afghanistan, bringing experts in a variety of constitutional systems to Afghanistan to provide comparative examples of Constitutional implementation. USIP frequently publishes Special Reports and shorter Peace Briefs on all of its Afghanistan work, and hosts a regular Afghanistan Working Group series of public discussions in Washington on Afghanistan policy.

Extremely useful for JAs and other legal practitioners in Iraq and Afghanistan may be the International Network to Promote the Rule of Law (INPROL) (www.inprol.org) set up by USIP. Established in 2007, INPROL is a global, online community of practice comprised of some 1,600 ROL practitioners from 128 countries and 300 organizations. Members come from a range of relevant disciplines and backgrounds, and include, police officers, judges, lawyers, prosecutors, corrections officials, and judicial administrators. INPROL aims to assist specialists in their efforts to prevent conflict and stabilize war-torn societies. It is a unique reach-back mechanism for those who are deployed in peacebuilding missions, helping them solve the immediate problems they face in theater. It seeks to ensure that knowledge and expertise is shared among the community and that "lessons learned" in one post-conflict state become "lessons applied" in others. In addition, it is a valuable capacity development resource that allows practitioners to learn, innovate and develop professionally. Participation in the network is membership based. Applicants may apply online at www.inprol.org.

III. International Actors

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 U.S. will involve some level of coordination with coalition countries, the United Nations, and non-governmental organizations. Thus, ROL operations will require some level of integration of national and international efforts.

Most major post-conflict operations will involve several international actors to implement effective ROL programs. These international entities will undoubtedly involve major powers, such as the United States, United Kingdom, France, Germany, China, and Russia. Other factors to consider are the effects of activities of 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, such as international financial institutions. As is repeated throughout this *Handbook*, it, of course, goes without saying that the host-country itself should have ownership over post-conflict development and reconstruction, including ROL. Each of these actors will have different goals and different priorities. Judge advocates must be able to work with these layers of organizational machinery in order to garner greater legitimacy, widen the burden sharing, and earn local acceptance. It is important to remember, however, that most USG relationships with international actors are a matter of U.S. foreign policy and are consequently managed by DOS; coordination with that agency is critical whenever attempting to work with international organizations.

There are some restrictions as to the level of involvement by international actors. International participation in the planning and implementation of ROL programs will likely involve an invitation from the legitimate host-country political leader, and/or a United Nations Security Council mandate that provides international actors with the requisite legal authority to assist the host-country. As to the latter situation, an international mandate will generally define the scope of intervention: from providing for the lead on ROL assistance efforts, to supporting national actors in implementing transitional legal reform, to assisting in training and mentoring governmental and non-governmental actors on the ROL, to providing resources and monitoring the situation.

A. United Nations

Multidimensional UN operations assist efforts to preserve and consolidate peace in the post-conflict period by helping to rebuild the basic foundations of a secure, functioning state in accordance with international human rights standards. The United Nations has a widely accepted legitimacy and authority and its actions, by definition, are based on approval and funding by its Member States (even those opposed to the intervention in question).

The UN Security Council may make decisions to intervene in a state without its consent. 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 substantive decisions unilaterally. Once the Security Council determines the purpose of a mission and decides to launch it, it leaves further operational decisions 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 peace 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 disputes 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 ROL
- Providing, on an exceptional basis, 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 U.S. permanent representative (PERMREP) to the UN, who has the rank and status of ambassador extraordinary and

plenipotentiary. A military assistant assists the U.S. PERMREP at the U.S. Mission to the UN by coordinating 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 authorizes peace enforcement (without the consent of the host nation) or peacekeeping (with the consent of the host nation) operations through the adoption of a resolution by the Security Council setting the terms of its mandate. Mandates are developed through a political process that generally requires compromise, and sometimes results in ambiguity. As with all military operations, U.S. forces implement UN mandates that contain a U.S. military component through orders issued by the Secretary of Defense through the CJCS. During such implementation, the political mandates undergo conversion to workable military orders.

At the headquarters level, the UN Secretariat plans and directs UN peacekeeping missions. Normally, the UNDPKO serves as the headquarters component during contingencies involving substantial troop deployments. 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 normally occur.

Under the ultimate authority and direction of the Secretary-General of the United Nations, responsibility for the overall coordination and coherence of ROL within the United Nations rests with the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit and chaired by the Deputy Secretary-General. Members of the Group are the Department of Political Affairs, the Department of Peacekeeping Operations, Office of the High Commissioner for Human Rights, the Office of Legal Affairs, United Nations Development Programme, the Office of the United Nations High Commissioner for Refugees, the United Nations Children's Fund, the United Nations Entity for Gender Equality and the Empowerment of Women and the United Nations Office on Drugs and Crime. The Group serves as a UN Headquarters coordination body and the implementation of the operational mandates remains with the individual members of the Group.[60]

Field level coordination is normally determined on an ad hoc basis, depending on which 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.

The UN also funds programs for educating both ROL practitioners and for the Host Nation. UNDPKO offers the Rule of Law Training Programme for Judicial Affairs Officers in various parts of the world twice a year for six days.[61] Further, the Global Programme on Strengthening Rule of Law in Conflict and Post-Conflict Nations provides operational, technical and financial support to the host nation.

One of the first tasks for a judge advocate conducting ROL operations should be to become familiar with the various components of the UN mission in country in order to understand the types of activities already underway or likely to be undertaken. Further cooperation with international institutions engaged in ROL operations in order to identify potential partners or to develop a common strategy should be coordinated with the Country Team or DOS.

[60] For further information, see, the DPKO Justice and Corrections Newsletter published for the first time in May 2011 by the Criminal Law and Judicial Advisory Service (CLJAS) of the Office of Rule of Law and Security Institutions (OROLSI) in the Department of Peacekeeping (contact dpko-cljas@un.org) and http://www.un.org/en/peacekeeping/issues/ruleoflaw/ (last visited July 27, 2011).
[61] *See* Table 1 of Appendix.

B. International Monetary Fund

The International Monetary Fund (IMF) is an independent international organization of 186 member countries.[62] Under its Articles of Agreement,[63] it was established in 1946 with a mandate, among other things, to promote international monetary cooperation, facilitate the expansion and balanced growth of international trade, promote market exchange stability and orderly exchange arrangements, and assist in correcting balance of payments problems.

In pursuing its mandate, the Fund has emphasized the promotion of good governance among its membership. In this regard, in September 1996, the IMF's policy advisory body, the Interim Committee,[64] issued a declaration entitled *Partnership for Sustainable Global Growth.*[65] The declaration emphasized that "promoting good governance in all its aspects, including ensuring the ROL, improving the efficiency and accountability of the public sector, and tackling corruption" was an essential element of a framework within which economies can prosper. The IMF Executive Board followed up in 1997 with a Guidance Note on the role of the Fund in governance issues.[66] The role of the IMF, however, is limited to economic aspects of good governance that could have a significant macroeconomic impact or that could impair the ability of the authorities to credibly pursue policies aimed at external viability and sustainable growth.[67]

In light of the foregoing, the IMF has a number of 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. Additionally, to safeguard its financial resources, the IMF assesses the control, accounting, reporting and auditing systems of central banks of countries to which it lends money. Further, the IMF emphasizes the development and maintenance of a transparent and stable economic and regulatory environment, the need for adequate systems for the management and tracking of public expenditures, and adherence to international standards on the combating of money laundering and terrorist financing. In furtherance of these goals, the IMF provides both policy and technical advice, often in the context of an economic program supported with Fund financial resources.[68]

1. IMF Support to Afghanistan

The IMF became involved in Afghanistan in 2002, sending staff teams to assist in rebuilding economic institutions and provide advice to the government on macroeconomic policy and reform. The relationship strengthened in 2004 with a staff monitored program that established a record of accomplishment for a full program supported by the Poverty Reduction and Growth Facility (converted into the Extended Credit Facility (ECF)) that began in 2006.

The ECF-supported program aims to continue the process of rebuilding key economic institutions, putting public finances on a sustainable path, and laying the foundation for economic stability and low inflation, sustained growth, and poverty reduction. A key long-run objective of the program is

[62] The IMF has a relationship with the United Nations, the terms of which are defined in the 1947 "Agreement Between the United Nations and the International Monetary Fund."
[63] The agreement is *available at* http://www.imf.org/external/pubs/ft/aa/index.htm (last visited June 9, 2011).
[64] This committee is now known as the International Financial and Monetary Committee (IMFC).
[65] More information on the declaration is *available at* http://www.imf.org/external/np/sec/nb/1997/nb9715.htm (last visited June 9, 2011).
[66] *See* "The Role of the Fund in Governance Issues—Guidance Note," *available at* http://www.imf.org/external/np/sec/nb/1997/nb9715.htm (last visited June 9, 2011).
[67] *Id*.
[68] *Id*.

also to set the basis for higher domestic revenues and reduce Afghanistan's heavy dependence on aid. The program addresses these goals by supporting reforms and governance enhancements in tax and customs administration, strengthening treasury and central bank operations, and reducing risks and improving the transparency of key public enterprises.[69]

Satisfactory performance under the program and other conditions for debt relief allowed the Executive Boards of the IMF and the World Bank to give the go ahead for debt relief from key creditors of Afghanistan under the Heavily Indebted Poor Countries (HIPC) Initiative. Debt relief from key creditors (especially Russia) will lead to a 96 percent reduction in Afghanistan's 2006 stock of external debt of nearly $12 billion.[70] Under the three-year ECF arrangement $120 million has been disbursed.

2. IMF Support to Iraq

The IMF has been closely engaged with Iraq since 2003. Initial work focused on providing policy advice, mainly on monetary and fiscal policies, and technical assistance to rebuild essential economic institutions. In September 2004, the IMF approved Emergency Post Conflict Assistance for Iraq, which—in combination with a debt sustainability analysis—paved the way for an agreement with Paris Club creditors, providing substantial debt relief. Since then, Iraq successfully completed two (precautionary) Stand-By Arrangements (SBA). The main objective was to achieve macroeconomic stability, promote growth, and continue with the process of structural and institutional reform. The last precautionary SBA expired on March 18, 2009.[71]

On February 24, 2010, the IMF's Executive Board approved a new two-year (later extended by 5 months) SBA in the amount of $3.6 billion, as the Iraqi economy was severely affected in 2009 by the drop in international oil prices. The new program has been designed to provide a sound macroeconomic framework during a period of high economic and political uncertainty. The new program will also help to move forward the structural reform agenda, which focuses on modernizing Iraq's public financial management to improve the allocation, execution, transparency, and accountability of the mobilization and use of public resources.[72]

C. World Bank

The World Bank is an independent specialized agency of the UN.[73] Since its inception in 1944, the World Bank expanded from a single institution to an associated group of coordinated development institutions. The Bank's mission evolved from a facilitator of post-war reconstruction and development to its present day mandate of worldwide poverty alleviation.

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 consists 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

[69] *Id.*
[70] *Id.*
[71] IMF, Program Note "Iraq," last updated: March 31, 2011, *available at* http://www.imf.org/external/np/country/notes/iraq.htm (last visited July 28, 2011).
[72] IMF Press Release No. 10/60 of February 24, 2010, *available* at http://www.imf.org/external/np/sec/pr/2010/pr1060.htm (last visited June 9, 2011).
[73] *See* The World Bank, "United Nations," (June 30, 2003), http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040610~menuPK:41691~pagePK:43912~piPK:44037,00.html (last visited July 28, 2011).

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.

1. Rule of Law and Development

The World Bank's overarching mission is to reduce poverty.[74] Over the past two decades, the Bank has promoted adherence to the ROL as a fundamental element of economic development and poverty reduction, given that the absence of well-functioning law and justice institutions and the presence of corruption are oft-cited constraints to economic growth and to the sustainability of development efforts.[75] A well-functioning legal and judicial system is critical not only as an end in itself, but also as a means of facilitating the achievement of other development objectives.[76] The importance of a sound justice sector to development is illustrated in cross-country data sets such as the World Bank's Country Policy and Institutional Assessment Indicators[77] and the World Bank Institute's Governance Indicators.[78] The findings of those analyses demonstrate the correlation between deficiencies in the ROL and negative economic and social development.[79]

Thus a significant number of Bank loans contain justice reform activities or components.[80] This focus reflects an understanding by the Bank and its member countries that the ROL and justice are crucial to both growth and equity in countries throughout the world.[81]

Good governance and anticorruption efforts are an increasingly important focus of the World Bank's work.[82] Weak, corrupt, inaccessible, or untrustworthy justice sector institutions enable corruption and injustice.[83] Fostering change in the justice sector requires long-term strategies that focus not only on the supply side but also on the demand side to strengthen public recourse to justice.[84] Greater transparency in the courts—through streamlined procedures, better application of the law, and improved business processes—increases unbiased legal information and public access to laws and regulations for individuals and businesses alike.[85]

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[74] *See* The World Bank Group, www.worldbank.org (last visited June 9, 2011).

[75] *See* WORLD BANK LEGAL VICE PRESIDENCY, INITIATIVES IN JUSTICE REFORM (2009), at p. 1-6, *available at* http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JRInitiativestext2009.pdf (last visited July 11, 2011). Additional information on justice reform topics, and links to World Bank projects, can be found on the Law and Justice Institutions page of the World Bank's Web site at www.worldbank.org/lji (last visited July 11, 2011).

[76] *Id*.

[77] The World Bank, *IDA Resource Allocation Index (IRAI) – 2010* [hereinafter World Bank IRAI], available at http://go.worldbank.org/S2THWI1X60 (last visited June 9, 2011).

[78] The World Bank, *Governance and Anti-corruption*, available at http://www.worldbank.org/wbi/governance/govdata/ (last visited June 9, 2011).

[79] World Bank IRAI, *supra* note 75.

[80] *Id*.

[81] *Id*.

[82] *Id*.

[83] *Id*.

[84] *Id*.

[85] *Id*.

2. Justice Reform Projects

The World Bank provides significant financial and technical assistance for justice reform to developing countries around the world through two of its five institutions—the aforementioned IBRD and IDA—by investment loans, development policy loans, and several types of grants.

Justice reform programming is a relatively new and developing focus of World Bank assistance. Initially, the Bank focused on working with client countries to improve commercial aspects of justice and support changes to the legal framework in order to improve the business environment. This work remains an important part of the Bank's justice portfolio. In subsequent years, and at the request of client countries, the Bank began to work with countries on institutional capacity building in the judiciary more broadly as an aspect of public sector reform. Three general themes emerge as common elements in World Bank justice reform assistance: (1) court management and performance, (2) access to justice, and (3) information and education.[86]

The World Bank funds numerous programs to address the needs of local and state governance including any ROL needs. For more information, follow the URL in Table 2 of Appendix B.

3. Projects in Afghanistan and Iraq

As of 8 Aug 2011, the World Bank was supporting 116 different projects in Afghanistan. Some of them can be considered as supporting the establishment of the ROL, of which the "Judicial Sector Reform Project" (with a grant of $27.75 million) is the most significant. The project's objective is to enhance the capacity of the justice sector institutions to deliver legal services. It comprises three components: (1) enhancement of the capacity of legal institutions; (2) empowerment of the people; and (3) strengthening of implementation capacity. The first component includes activities to improve strategic management of human capital and physical infrastructure, increase the skills of justice sector professionals, and provide rapid information, communications, and technology enhancements. The second component will improve legal awareness, as well as the capacity to provide legal aid throughout the country. The third component will provide support to Afghan justice sector institutions to implement the National Justice Sector Strategy and Program.

The World Bank supports 34 projects in Iraq,[87] supporting the development of its financial institutions, healthcare and education. These efforts hopefully will merge into ongoing ROL initiatives. As noted above, economic stimulus can also help drive changes in the ROL.

D. The North Atlantic Treaty Organization

The North Atlantic Treaty Organization (NATO) is an international organization[88] chartered on the North Atlantic Treaty signed on 4 April 1949 in Washington D.C. by the U.S. and 11 other countries.[89] Today, NATO consists of 28 Member States,[90] including most of the Western and Eastern European States.

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[86] *Id.* Detailed information about projects, grants, and components is available at the World Bank's website at www.worldbank.org (last visited July 28, 2011). Additional information on justice reform topics, and links to World Bank projects, can be found on the Law and Justice Institutions page of the World Bank's Web site *available at* www.worldbank.org/lji (last visited June 9, 2011).

[87] *Id.*

[88] NATO is a consensus based international organization, with decision making powers being reserved to the North Atlantic Council (NAC), a body that consists of representatives of the Member States.

[89] The Washington Treaty was signed–apart from the USA–by Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United Kingdom.

NATO is an intergovernmental military alliance which constitutes a system of collective defense whereby its Member States agree to mutual defense in response to an attack by any external party (see art. 5 of the NATO Treaty). To date, NATO has only invoked Article 5 once: on 4 October 2001 in response to the terroristic attacks of 11 September 2001.

Despite its nature as a system of collective self-defense (see also art. 52 of the UN Charter), NATO conducts various military operations within the context of the UN peace-keeping and peace-enforcement framework. Apart from situations of collective self-defense and from the controversially discussed exception of *Operation Allied Force* in Kosovo 1999 (24 March – 10 June 1999), NATO typically acts on the basis of UN Security Council authorizations pursuant to arts. 39, 41, and 42 of the UN Charter.

Although NATO has historically tended not to engage in direct ROL endeavors, through its training mission support in Iraq (NTM-I) and Afghanistan (NTM-A), its counter piracy operations off the Horn of Africa and, more recently (as of 9 June 2011) its NATO Rule of Law Field Support Mission (NROLFSM) in Afghanistan, its contribution to the ROL writ large is significant.[91] By way of example, NTM-A/CSTC-A Coalition JAs work closely as advisors/mentors for senior leadership of the ANA and ANP. Senior Coalition JAs at Camp Eggers, Kabul, provide one-on-one counsel and advice to the Judge Advocate General of the ANA, the general counsel for the Afghanistan Ministry of Defence, leadership of the ANA's Training and Education Command (ANATAC) and other ANA and ANP senior leaders and staff elements. Working under the auspices of NTM-A/CSTC-A, coalition judge advocates also comprise an Operational Mentor and Liaison Team that directly supports the leadership and faculty of the ANA's Legal School. Formally established in 2010, the ANA Legal School (which is currently located at the Kabul Military Training Center) provides advice on, amongst other matters, school management, curriculum development, instruction techniques and logistics support.

E. Non-Governmental Organizations

Non-governmental organizations (NGOs) are playing an increasingly important role in the international arena.[92] Working alone, alongside the U.S. military, with other U.S. agencies, or with coalition partners, NGOs are assisting in all the world's trouble spots where there is a need for humanitarian or other assistance. 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 a diverse range of activities, with an increasing number now focusing on ROL endeavors.

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[90] As of 10 June 2011 NATO Member States are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxemburg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and the USA.

[91] For further information on NROLFSM, *see* http://www.nato.int/nato_static/assets/pdf/pdf_2011_06/20110609-Backgrounder-Rule_of_Law-en.pdf. In Afghanistan, in addition to NTM-A and NROLFSM, there are numerous examples of ISAF component led ROL initiatives. *E.g.* the Australian Defence Force's Special Operations Task Group (SOTG) training regime for Afghan police, prosecutors and judges to bolster the ROL in southern Afghanistan. *Editors note: The fact that, notwithstanding NATO's political difficulties with ROL specific operations, or those that carry ROL nomenclature, its personnel are involved in such operations is an example of how operational necessity can, sometimes, overcome political myopia or risk aversion.*

[92] *See Lynn Lawry, Guide to Nongovernmental Organizations for the Military* (Center for Disaster and Humanitarian Assistance Medicine 2009), *available at* http://www.fas.org/irp/doddir/dod/ngo-guide.pdf (last visited June 9, 2011).

The extent to which specific NGOs are willing to cooperate with the military can vary considerably. In general, NGOs desire to preserve the impartial non-governmental character of their operations, at times accepting only minimal or no 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 those forces are conducting combat operations in the operational area.

Many NGOs consider their perceived impartiality as their greatest security asset. Any activity that might strip an NGO of its appearance of impartiality, such as close collaboration with one particular military force, is likely to be viewed as undermining that asset. NGOs may also avoid cooperation with the military forces out of suspicion that the military intends to take control of, influence, or even prevent their operations. Commanders and their staffs should recognize these concerns, whether valid or not, and where necessary, consult these organizations, along with the competent national or international authorities, to identify local conditions that may impact effective military-NGO cooperation.[93]

NGOs frequently act to ensure military actions in relief and civic actions 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, that they are sometimes willing to share on a collegial basis, about local and regional affairs and civilian attitudes. 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. Establishing mechanisms by which NGOs and the military can work effectively, in harmony, within any given operational area is an essential element of successful ROL operations, and one that is likely to make the overall ROL product more effective.

A judge advocate's ROL planning should include the identification of points of contact (POCs) with NGOs that will operate in the area. Frequently, other organizations, such as CA Units and PRTs, in the area will already have identified those POCs and have working relationships with them and will be able to provide assistance in contacting and working with, or in the same battlespace as, NGOs. The creation of a framework for structured civil-military interaction, which is one of the primary functions of Civil Affairs,[94] allows the military and NGOs to meet and work together in advancing common goals in ROL missions. Accordingly, a climate of cooperation between NGOs and military forces should be the goal. It is important to remember, though, that commanders are restricted in what types of support they can provide non-federal entities such as NGOs and, as such, JAs should ensure that any support to NGOs complies with statutory and regulatory restrictions.[95]

Doctrinally, relationships between the military and civilian organizations such as NGOs and intergovernmental organizations (IGOs) are focused in three formal organizations. These organizations and their functions are as follows:

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[93] *See* the following guidelines, which have been endorsed by the US military and many US NGOs: USIP, *Guidelines for Relations Between US Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments*, *available at* http://www.usip.org/files/resources/guidelines_handout.pdf (last visited June 9, 2011).

[94] FM 3-05.40, *supra* note 69, at 1-16 ("The primary function of all Army CA units is to support the warfighter by engaging the civil component of the battlefield. CA forces interface with IPI, IGOs, NGOs, other civilian and government organizations, and military forces to assist the supported commander to accomplish the mission").

[95] *See e.g.* U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION.

- Humanitarian Operations Center (HOC) – A senior level international and interagency coordination body that seeks to achieve unity of effort among all participants in a large foreign humanitarian assistance operation. Normally, HOCs are established during an operation under the direction of the government of the affected country or the UN, or possibly under the Office of U.S. Foreign Disaster Assistance (OFDA). Because the HOC operates at the national level, it typically consists of senior representatives from the affected country, the U.S. embassy or consulate, joint forces, OFDA, NGOs, IGOs, and other major organizations involved in the humanitarian assistance operation.
- Humanitarian Assistance Coordination Center (HACC) – Created by the combatant command's crisis action organization to assist the interagency, IGOs, and NGOs to coordinate and plan foreign humanitarian assistance. Normally, the HACC is a temporary body that operates during the early planning and coordination stages of the operation. Once a Civil-Military Operations Center (CMOC) (see below) or HOC is in place, the role of the HACC diminishes, and its functions are accomplished through the normal organization of the combatant command's staff and crisis action organization.
- Civil-Military Operations Center (CMOC) **–** Normally, the CMOC is a mechanism for the coordination of civil-military operations that can serve as the primary coordination interface providing operational and tactical level coordination between the Joint Force Commander and other stakeholders. Members of a CMOC typically include representatives of U.S. military forces, other government agencies, IGOs, the private sector, and NGOs.[96]

F. Coalition Partners

Given the importance of coalition operations, it is essential for JAs to understand the philosophy, goals, and structure of coalition forces, including their national approaches to military operations and their national responsibilities for ROL related activities, and in particular nation building activities.[97] Those approaches and responsibilities vary between coalition partners.

Some coalition partners view ROL programs in a different light to, for example, civilian reconstruction and economic support,[98] their use of military resources being used only to end violence and establish conditions under which the causes of conflict can be addressed by civilian means.[99] Specific coalition forces may be more, or less, reluctant to initiate laws, courts, and police reforms, than others, instead preferring to support host government reform efforts beneficial to the establishment of the ROL.[100]

France, for example, sees its contribution to the achievement of the ROL through the provision of 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 a legal or technical nature.[101] A practical example of this contribution is its

[96] JOINT PUB. 3-57, *supra* note 68, at II-26.
[97] *See* CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 312 (2006) [hereinafter FORGED IN THE FIRE].
[98] *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).
[99] *See* German Action Plan, *Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peacebuilding* 10 (2004), *available at* http://www.auswaertiges-amt.de/diplo/de/Aussenpolitik/Themen/Krisenpraevention/Downloads/Aktionsplan-En.pdf (last visited June 9, 2010) [hereinafter Action Plan].
[100] *Id*. at 58. *See also* French Ministry of Foreign Affairs, Direction Générale de la Coopération Internationale et du Développement (French International Cooperation) 31 (2005).
[101] *Id*. at 32-33.

framework-nation role for the institution of the Afghan Parliament. This program provides training to Afghan parliamentarians.

The German approach to ROL operations in post-conflict areas focuses on technical and logistics support, as well as support concerning judicial administration, administrative development, and medical services.[102] For example, since January 2009, German police mentoring teams have helped develop the Afghan National Police in Northern Afghanistan through the Focused District Development program (FDD), which trains Afghan police units on a district by district level.

Because of different approaches, the structure of coalition forces tasked with ROL issues is also different. The focus on civilian reconstruction work done coupled with the development of the ROL is linked for most coalition partners through an inter-ministerial approach. For some coalition partners, this inter-ministerial approach has resulted in the establishment of mixed military and civilian teams, such as provincial reconstruction teams. It also incorporates ROL work streams into a wider strategic framework.

The U.K.'s recently released Building Stability Overseas Strategy (published on 19 July 2011) outlines how the U.K. will help to stop serious conflict from taking hold in unstable countries. Of particular note for the ROL practitioner is its emphasis on investing in "upstream prevention": helping to build strong, legitimate institutions and robust societies in fragile, and often pre conflict, countries that are capable of managing tensions and shocks so there is a lower likelihood of instability and conflict.[103]

An understanding of who does what in the coalition partner's structure will facilitate enhanced efficacy. For instance, when working with the U.K. on ROL issues, it is more likely that JA ROL practitioners will interact with civilians from the U.K.'s Department for International Development (DFID) or members of the interagency (or "cross Government") Stabilisation Unit (SU) than with, say, British Army legal advisors.[104] While a JA's initial contact with DFID or SU personnel may come via their connections with a U.K. military legal advisor, it is unusual for that military advisor to work with solely ROL issues. Within the U.K. military, the Military Stabilisation Support Group (MSSG) delivers civil effect and civil-military co-operation (CIMIC) training, as well as deploying Military Stabilisation Support Teams (MSSTs).[105]

DFID's development expertise is recognized throughout the world, and its methodology fully recognizes the importance of security, law and justice as core state functions. DFID's historic, but often extant, practice papers, policy and research often provide useful reference points for future work and include a plethora of examples taken from DFID's ROL and development related work. In particular, DFID's 2010 Practice Paper "Building Peaceful States and Societies,"[106] which outlines the UK's approach at putting state-building and peace-building at the center of their work in fragile and conflict-affected countries is worthy of note. The Practice Paper sets out the importance of security, law and justice as core functions of the state and provides useful illustrative examples of the importance of access to justice and ROL work within an integrated approach. Also of note, and more

[102] *See* Action Plan, *supra* note 99, at 19.
[103] http://www.dfid.gov.uk/Documents/publications1/Building-stability-overseas-strategy.pdf
[104] For more about the role of the SU's role, one of which is to Formulate best practice with international partners, see http://www.stabilisationunit.gov.uk/about-us/more-about-the-unit.html
[105] MSSTs have the following roles: Coordinating between military and civilian organizations; gathering and analyzing civil information; providing assistance to planning operations; and identifying and aiding the delivery of consent winning activities, reconstruction and development projects.
[106] http://www.dfid.gov.uk/Documents/publications1/governance/Building-peaceful-states-and-societies.pdf

fully referred to in Chapter 5, is DFID's approach to measuring and using results in Security and Justice Programmes.[107]

In the same way that they do for U.S., coalition partners will be bound to comply with their own legal (both national and international) and policy obligations. These may create a marked disparity among the partners as to what they can or cannot do. JAs 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.[108]

These differences should not, necessarily, be viewed negatively. They provide opportunities for coalition partners to advance the rule of law in different, but hopefully complementary, manners in operations throughout the world. The following European Union examples are given, by way of highlighting the non-NATO led support that is provided by our coalition allies in helping to foster the ROL in Afghanistan, Iraq and Kosovo.

Afghanistan. The European Union (EU) launched the Police Mission in Afghanistan (EUPOL Afghanistan) in June 2007.[109] Its current mandate expires on 31 May 2013. That mandate is to contribute to the establishment of sustainable and effective policing arrangements in all parts of Afghanistan. EUPOL Afghanistan works towards local police reform which respects human rights and operates within the framework of the ROL, and in accordance with the National Police Strategy.[110] It continues to work in cooperation with the NATO Training Mission Afghanistan.

EUPOL Afghanistan is deployed at central (Kabul), regional and provincial levels, through the Provincial Reconstruction Teams (PRTs). As of June 2011 EUPOL had 300 international staff, 175 local staff, and a budget of 54.6 million Euros for the year ending 31 May 2011. The contributing states are 21 EU Member States, Canada, Croatia, New Zealand and Norway.

The mission monitors, mentors, advises and trains at the level of the Afghan Ministry of Interior, central Afghan administrations, regions, provinces and districts. EUPOL has also established the Anti-Corruption Prosecutor's Office. These specialized prosecutors are developing cases against high-profile public officials suspected of corruption. EUPOL has trained more than 300 inspectors within the Ministry of Interior in basic anti-corruption investigation techniques.

Iraq. The EU launched the Integrated Rule of Law Mission for Iraq (EUJUST LEX), a civilian crisis management mission, on 1 July 2005. The Mission's mandate has been extended on a number of occasions, most recently to 30 June 2012.[111] EUJUST LEX was established to strengthen the ROL and promote a culture of respect for human rights in Iraq by providing professional development opportunities for senior Iraqi officials in the criminal justice system. The core aim is to foster confidence, mutual respect and operational cooperation between the different branches of the Iraqi criminal justice system (police, judiciary and penitentiary), with specialist courses being developed for, in particular, senior officers, to meet the specific needs of the Iraqi criminal justice system while maintaining a focus on human rights issues.

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[107] U.K. Department for International Development Practice Paper, *Measuring and Using Results in Security and Justice Programmes* (August 2010).

[108] *See* FORGED IN THE FIRE, *supra* note 97, at 69.

[109] *See* EU COUNCIL JOINT ACTION 2007/369/CFSP of 30 May 2007 on establishment of the European Union Police Mission in Afghanistan, *available at* http://www.eupol-afg.eu/legal_basis.php (last visited June 10, 2011).

[110] *See* EUPOL Afghanistan, Fact Sheet, updated April 2010, *available at* http://www.eupol-afg.eu/pdf/100426FACTSHEET.pdf (last visited 10 June, 2011).

[111] *See* EUJUST LEX/Iraq homepage *available at* http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eujust-lex.aspx?lang=en (last visited 29 July 2011).

EUJUST LEX also facilitates a practical program of work experience which allows Iraqi criminal justice professionals to work alongside their EU counterparts.

Kosovo. The EU Rule of Law Mission in Kosovo (EULEX Kosovo) is based upon a decision by EU member states in February 2008.[112] It is the largest civilian mission ever launched under the European Security and Defense Policy (ESDP) of the European Union.[113] EULEX Kosovo does not replace the UN Mission in Kosovo (UNMIK), but instead aims to assist and support ROL institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability. EULEX Kosovo is engaged with all ROL issues, but prioritizes war crimes, corruption, organized crime, inter ethnic crimes, money laundering, terrorism and property related issues.[114] The mission is a technical one, to monitor, mentor and advise, rather than govern or rule, although it does retain a number of limited executive powers.[115] As of 29 April 2011, EULEX Kosovo comprised of approximately 1950 international staff, 1250 local staff, and operated with a budget of Euro 165 million for the year to October 2011.

[112] *See* http://www.eulux-kosovo.eu.
[113] The European Union's European Security and Defense Policy (ESDP) includes the gradual framing of a common defense policy. The ESDP allows the EU to develop its civilian and military capacities for crisis management and conflict prevention at international level, thus helping to maintain peace and international security. The ESDP includes a strong conflict prevention element, *see* http://www.consillium.europa.eu/esdp.
[114] *See* Council Joint Action 2008/124/CFSP (4 February 2008) mission statement, art 2, and tasks, art 3.
[115] EULEX Kosovo prosecutors and judges have executive powers in relation to certain serious and sensitive crimes.

CHAPTER 3

THE INTERNATIONAL LEGAL FRAMEWORK FOR RULE OF LAW OPERATIONS

It would be ironic if ROL operations were conducted without regard to the applicable law. Different sets of international legal norms will apply to each operation, and the decision as to which norms apply will be articulated at the highest policy levels. Deployed JAs working on ROL operations must be mindful of which international legal rules apply to their own particular circumstances.

Some of these legal norms apply universally, requiring JAs to ensure compliance in all operations. Others have a more limited application. For example, the extraterritorial setting of most modern stability operations may limit the applicability of certain legal frameworks, such as some human rights treaties, to which the United States is a party. Other international legal frameworks, such as the law of war, rely on strict classification regimes to determine their application to a particular operation or persons.

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 applicable regime, ROL operations call for adherence to the requirements of international law not only as a matter of legal compliance, but as a matter of U.S. policy and good practice. To that extent, JA ROL practitioners must also be cognizant of that policy and practice.

I. Identifying a Rule of Law Legal Framework

The aim of this section is to illustrate, in outline rather than by way of a comprehensive narrative, some of the various mandates that may govern military deployments overseas and the impact these have on ROL operations. From a legal perspective the mandate defines the nature, scope and limits of any military deployment. It provides the *raison d'être* 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.

A. United Nation Mandates

1. UN Security Council Resolutions

The Security Council is the principal body 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. Most UN Security Council Resolutions (UNSCR) 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] United States, Russia, United Kingdom, China and France.

2. The Use of Force

The UN Charter's general prohibition on recourse to 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, falls squarely within this prohibition.[4] The prohibition on the use of force is, however, subject to several exceptions, two of which are paramount. The first, contained in Article 51 of the Charter, recognizes the right of individual and collective self defense for states in the event of an armed attack. The second, contained in Article 42, empowers the Security Council to authorize the use of force in order to restore international peace and security based on a determination of the existence of a "threat to the peace, breach of the peace, or act of aggression."[5] Resolutions empowering military operations overseas can be passed under Chapters VI or VII of the Charter. The former provides for the pacific settlement of disputes with the consent of the host nation, while the latter permits action with respect to threats to the peace, breaches of the peace, and acts of aggression even without the consent of the host nation.

Judge advocates can expect to support operations, often with a ROL line of operation within them, that are governed by UN Security Council mandates. In addition to advancing efforts to restore peace, such resolutions may include developmental mandates. Particularly in missions undertaken in under-developed states, JAs should expect Security Council resolutions to explicitly address perceived ROL deficiencies as well as economic, financial, health, and human rights issues. UN Security Council Resolutions 1483 (2003) (regarding the reconstruction of Iraq) and 1917 (2010) (regarding the situation in Afghanistan), are representative.[6] Frequently, the Security Council and Secretary General have relied on Special Rapporteurs and/or Special Representatives to provide detailed guidance on the implementation of such resolutions and to report to the Council on progress in their execution.[7]

UN Security Council resolutions, mandates, and directives may be in apparent conflict with pre-existing or concurrent international 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 and alert their 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] U.N. Charter art. 39.

[6] 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) [hereinafter S.C. Res. 1483]. 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.

[7] *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 (last visited June 13, 2011).

a. 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.[8] The Security Council has wide powers under Chapter VI. It may, at any stage of a situation that 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, JAs 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 (SOFA). Chapter VI missions that include a ROL aspect may call on supporting JAs 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, JAs should pay particular attention to detention procedures, law enforcement provisions, and property dispute resolution.

b. 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 actions which are predicated on threats to the peace, breaches of the peace, or acts of aggression.[9] 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. A Security Council resolution under Chapter VII is binding on all member States.

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."[10] 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, or some variation thereof.

Article 41 allows the Council to require member states to apply affirmative measures short of the use of force. These measures include, but are 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."[11] Depending on the language used in the resolution, the imposition by the Security Council of economic sanctions against a state pursuant to Article 41 may be either recommended or mandatory in nature.

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."[12] These measures include, but are not limited to, "demonstrations, blockade, and other operations by air, sea, or land forces of members of the

[8] U.N. Charter art. 33(1).
[9] U.N. Charter art. 2(7).
[10] U.N. Charter art. 39.
[11] U.N. Charter art. 41.
[12] U.N. Charter art. 42.

United Nations."[13] When this provision was drafted, it had originally been envisioned that an Article 42 action that would be taken by countries under a unified UN command. That type of action has been rare. Instead, a practice has developed whereby the Security Council authorizes states to take all necessary measures, in which case, there is no unified UN command. Member states are not mandated to participate in a Chapter VII military operation, 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 is significant. 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 resolutions passed against the National Union for the Total Independence of Angola (UNITA) following their breach of terms of cease-fire in Angola[14] and the Taliban and Al Qaeda[15] after 9/11.

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. However, the longevity of that application must also be considered and anticipated. The completion of decisive operations will typically transition to stability or post-conflict missions, which will often be accompanied by increased legal complexity. 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.[16]

B. Mandates Pursuant to Bilateral and Multi-lateral Agreements

Because of political considerations and structural obstacles, the UN system has rarely 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 utilized multi-lateral, often of a regional nature, 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.

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.

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[13] *Id.*

[14] 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.

[15] *See* S.C. Res 1373. The Taliban were not generally recognized by the International Community to be the legitimate Government of Afghanistan and as such were "non State actors."

[16] *See* S.C. Res. 1483, *supra* note 6.

Judge advocates, and other ROL practitioners that often work alongside them, 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.

C. 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 been brought to bear on 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 ROL operations. Fiscal law restrictions will undoubtedly impact mission planning and execution.[17] Other reporting and operating requirements, such as vetting under the Leahy amendment[18] for past human rights violations should also be anticipated.

II. The Rule of Law Legal Framework

As mentioned at the outset of this chapter, currently, no single body of law regulates the conduct of ROL operations. Rather, ROL operations, or *line of operation* within a wider operational context, tend to demand highly context-specific legal frameworks that account for geographic, conflict, and cultural settings. This section considers the potential application of three major legal disciplines with apparent relevance to many ROL operations: the law of war, its subset of occupation law, and human rights law.

A. The Law of War

Rule of law operations typically occur within the broader context of stability operations. Department of Defense doctrine emphasizes that stability operations occur both along and beyond the conflict spectrum.[19] Doctrine notwithstanding, major combat operations are sure to present significant obstacles to effective ROL operations. Mission sets, personnel, and resources must be tailored to accommodate the realities and demands of the battlefield. Similarly, ROL operations occurring during combat are subject to the law of war.

In some instances, the law of war may operate as an enabler, facilitating the imposition of law and order. For example, application of "Prisoner of War" or "Civilian Internee" standards to detention, under the Third and Fourth Geneva Conventions, respectively, demonstrates a principled application of the Rule of Law and may facilitate an orderly transition to civilian detention regimes in a post-conflict phase of operations. Judge advocates must ensure that ROL plans and operations executed during armed conflict leverage such enablers, while respecting relevant obligations.

1. Treaty Law

Much of the contemporary corpus of the law of war is contained in treaty law. Some commentators have found utility in bifurcating the positive law of war into obligations concerned with treatment of

[17] *See* ch. 6 of this *Handbook*.
[18] Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).
[19] *See* U.S. DEP'T OF DEFENSE, INSTR. 3000.05, STABILITY OPERATIONS, para. 4.a.

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.

The four 1949 Geneva Conventions form the backbone of the law relevant to treatment of victims of war. 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 (Common Article 3) of the four Conventions is conditioned on existence of armed conflict between opposing state parties to the Conventions. As such, Common Article 3 apart, the *de jure* application of the provisions of each Convention relate only 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, JAs in ROL operations must remain attuned to evolutions in the character of conflict. Recent operations have featured complex conflict classifications, for example when armed conflicts among diverse groups within the same state territory have been considered single conflicts for purposes of application of the Conventions, while other armed conflicts involving multiple parties in a single state have been 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.

2. 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.[20] 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 U.S. JAs because the U.S. is not a party to either Additional Protocol. The majority of Protocol I provisions reflective of CIL relate to targeting operations and are not of primary concern to ROL operations. The U.S. 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 U.S. operations. [21] Judge advocates should bear in mind, however, that many U.S. allies and potential ROL host nations have ratified or acceded to the Protocols or may view their provisions as 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

[20] *But see* Customary International Humanitarian Law Volumes 1 & II (Henckaerts & Doswald-Beck eds., 2005) [hereinafter Henckaerts & Doswald-Beck].

[21] *But see* for a more nuanced understanding of the U.S. approach to the Additional Protocols and in particular Article 75 of Additional Protocol 1: The White House Office of the Press Secretary "*Fact Sheet: New Actions on Guantanamo and Detainee Policy"* (March 07, 2011), a*vailable at* http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy (last visited Aug 3, 2011); and Statement Before the House Armed Services Committee Hearing on Detainees, delivered by Deputy Secretary of Defense William J. Lynn, III , House of Representatives, Thursday, March 17, 2011, a*vailable at* http://www.defense.gov/speeches/speech.aspx?speechid=1548 (last visited Aug 3, 2011).

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.

3. 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."[22] 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.

B. Occupation Law

Though largely unused in the latter half of the twentieth century, occupation law has experienced a recent revival in both international practice and litigation.[23] 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 ROL operations.

1. 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.

Whether forces are in occupation is a question of fact that 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 is intended to preserve the *status quo ante*; it is conservationist in nature. Both 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 ROL projects that modify existing legal regimes and institutions. Exceptions are primarily related to establishing and maintaining security and observance of

[22] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.1 (9 May 2006) [hereinafter DOD LAW OF WAR PROGRAM].
[23] 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).

fundamental humanitarian norms. The occupation phase of Operation Iraqi Freedom presented JAs 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, JAs should ensure ROL projects that alter existing governmental structures are grounded in either legitimate security concerns or fall under a superseding international mandate for development.

2. Customary International Law

Because occupation law is found in such well-established treaties, many argue that its norms constitute CIL. While probably true, JAs should remember that the applicability of norms attaining customary status remains conditions based. 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"[24] and with respect to "[p]ersons . . . in the hands of [an] . . . Occupying Power of which they are not nationals."[25]

It is possible, notwithstanding the preceding distinction, that 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. A recent study of CIL is similarly silent on occupation law.[26] The United States has not clearly expressed its views in this regard, although the application of the law of international armed conflict to "all other military operations" may provide a policy solution to this CIL conundrum.[27]

3. Policy

In addition to guidance directing U.S. forces to comply with the law of war in all operations, JAs will find support for application of occupation law beyond its legal limits as a matter of policy. U.S. 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.[28] Thus, stability and ROL 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.

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[24] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2.
[25] *Id.*, at art. 4.
[26] *See* Henckaerts & Doswald-Beck, *supra*, note 20.
[27] *See infra* note 22, accompanying text, and section II.B.3.
[28] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE 352(b) (18 July 1956). *See also* DOD LAW OF WAR PROGRAM, *supra*, note 22.

C. Human Rights Law

Where international law generally governs relationships between states, human rights law (although a form of public international law) regulates relationships between states and individuals. Human rights law can be applicable to JAs engaged in ROL operations in two ways: through the application of customary international human rights law to their activities or through the application of the host nation's human rights (treaty-based) obligations. If engaged in combat operations, the U.S. regards the law of war as an exclusive legal regime, or a *lex specialis.* Under this view, the law of war, as the more specific law pertaining to military operations, displaces the more general framework of human rights law.[29] Moreover, the U.S. considers its obligations under the International Covenant on Civil and Political Rights[30] to be territorial in scope, because the treaty applies in a State's "territory *and* jurisdiction" (emphasis added). That position is not necessarily shared by other nations, due to domestic obligations and the wording of regional human rights treaties, which apply in situations where a government has jurisdiction *or* control and authority over persons, such as in detention operations. For that reason, Council of Europe countries, party to the European Convention on Human Rights, may be bound to ECHR obligations when operating outside of their domestic territories.[31]

Irrespective of the specific legal context, ROL operations, integrated with host nation governance, should be guided and informed by human rights law purely as a matter of efficacy. U.S. 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 U.S. forces may legally be conducted in accordance with law of war requirements, the detention procedures adopted by U.S. forces during the *post*-conflict phase may serve as a model for the administrative or criminal detention procedures that the host nation later adopts for domestic use. Judge advocates should assist host nation institutions in building capacity that complies with human rights standards that are consistent with the host nation's legal regime.

1. Treaty Law

There has been a rapid expansion in human rights treaties since the Second World War. Internationally, there are a number of major human rights treaties to which the host nation may be party.[32] These include the Genocide Convention; the International Covenant on Civil and Political

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[29] 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).

[30] Dec. 16, 1966, 999 U.N.T.S. 171, *available at* http://www2.ohchr.org/English/law/ccpr.htm (last visited June 13, 2011).

[31] *See, e.g.,* Al Skeini and Others v the United Kingdom [GC] no. 55721/07 Eur. Ct. H.R. (2011) [hereinafter Al Skeini v. U.K.], and Al-Jedda v the United Kingdom [GC] no. 27021/08 Eur. Ct. H.R. (2011) [hereinafter Al-Jedda v. U.K.].

[32] There are also a number of labor law treaties to which a country may be a party, with which a rule of law practitioner should become familiar, particularly if international investment in the host nation is being

Rights (ICCPR);[33] the International Covenant on Economic, Social and Cultural Rights (ICESCR);[34] the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);[35] the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);[36] the Convention on the Elimination of All Forms of Racial Discrimination (CERD);[37] the Convention on the Rights of the Child (CRC)[38] and its two Optional Protocols, one on the involvement of children in armed conflict[39] and the other on the sale of children, child prostitution and child pornography;[40] the Convention on the Rights of Persons with Disabilities (CRPD);[41] and the International Convention for the Protection of All Persons from Enforced Disappearances.[42] Regionally, there are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950,[43] the American Convention on Human Rights (ACHR),[44] and the African Charter on Human and Peoples' Rights.[45]

The United States is party to the ICCPR, the CAT, the CERD, and the two optional protocols to the CRC. However, the U.S. does not consider that the majority of its human rights treaty obligations apply extraterritorially, nor during periods of armed conflict.[46] Notwithstanding this, JAs need to be aware that the U.S. position is not universally accepted and that they may be called upon to respond to human rights complaints submitted to the United Nations. The treaty bodies interpreting the treaties to which the U.S. is party typically expect the U.S. to account for its actions wherever they take place.

Moreover, there are some 40 UN special procedures,[47] such as a Working Group on Arbitrary Detention, Special Rapporteurs on torture and on extrajudicial, summary or arbitrary executions, and a Representative of the Secretary-General on the human rights of internally displaced persons, which review complaints from any individual purporting to be a victim of a human rights violation, including in Iraq and Afghanistan. Although the U.S. position is that the laws of war are the relevant *lex specialis* for military operations and that the human rights treaty bodies and the special mechanisms do not have jurisdiction over the laws of war, as a matter of policy and transparency, the U.S. responds to these inquiries.

In addition, although the United States is not party to its regional human rights treaty, the ACHR, it is a party to the Organization of American States, which created the Inter-American Commission on Human Rights. That body has a non-binding dispute settlement mechanism that allows it to opine on the consistency of U.S. activities with international law by reference to the ACHR. It has issued precautionary measures pertaining to detainees at Guantanamo Bay and opined on the consistency of certain aspects of U.S. military actions in Grenada with the American Declaration on Human Rights.

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encouraged. For a list of labor treaties to which a country is party, *see* http://www.ilo.org/ilolex/english/newratframeE.htm (last visited July 20, 2010).

[33] *See* http://www2.ohchr.org/english/law/ccpr.htm (last visited June 13, 2011).

[34] *See* http://www2.ohchr.org/english/law/cescr.htm (last visited June 13, 2011).

[35] *See* http://www2.ohchr.org/english/law/cat.htm (last visited June 13, 2011).

[36] *See* http://www2.ohchr.org/english/law/cedaw.htm (last visited June 13, 2011).

[37] *See* http://www2.ohchr.org/english/law/cerd.htm (last visited June 13, 2011).

[38] *See* http://www2.ohchr.org/english/law/crc.htm (last visited June 13, 2011).

[39] *See* http://www2.ohchr.org/english/law/crc-conflict.htm (last visited June 13, 2011).

[40] *See* http://www2.ohchr.org/english/law/crc-sale.htm (last visited June 13, 2011).

[41] *See* http://www.un.org/disabilities/convention/conventionfull.shtml (last visited June 13, 2011).

[42] *See* http://www2.ohchr.org/english/law/disappearance-convention.htm (last visited June 13, 2011).

[43] *See* http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG (last visited June 13, 2011).

[44] *See* www.oas.org/juridico/english/treaties/b-32.html (last visited July 20, 2011).

[45] *See* http://www1.umn.edu/humanrts/instree/z1afchar.htm (last visited July 20, 2011).

[46] *Surpa*, note 29.

[47] *See* http://www2.ohchr.org/English/ (last visited June 13, 2011) for complete list of UN special procedures.

The United States' interpretation of the applicability of human rights treaties allows the U.S. military comparatively greater freedom of action than many coalition partners when conducting operations overseas. For instance, as previously discussed, the seemingly increasing extra territorial application of the ECHR on certain military operations conducted by European coalition partners may substantially impact upon their freedom of action as compared to the U.S.[48]

Human rights treaties may also apply to the host nation within which the U.S. military are operating. At the outset of ROL operations, JAs should review the human rights law instruments to which the host state is a party, as well as their reservations and declarations.[49] Rule of law missions may call upon JAs to develop plans to assist in the implementation of 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, but at the same time bear in mind U.S. views of the host nation's obligations. For instance, although many Muslim states have ratified the Convention for the Elimination of Discrimination Against Women, most included significant reservations to account for Sharia which would be counter to U.S. views on the rights of women.

2. Customary International Law

To the extent that human rights norms have attained a CIL status, they will be part of the applicable legal framework. However, there is much disagreement as to which human rights have matured into customary law. The Universal Declaration of Human Rights (UDHR) serves as a baseline guide,[50] or an aspirational document that is not legally binding on states; the U.S. practitioner, therefore, must look to other sources of law. According to the Restatement (Third) of Foreign Relations Law of the United States, the United States accepts the position that certain fundamental human rights fall within the category of customary international law, and it violates international law when a state practices, encourages, or condones the following practices:

- Genocide
- Slavery or the slave trade
- Murder or causing the disappearance of individuals
- Torture or other cruel, inhuman, or degrading treatment or punishment
- Prolonged arbitrary detention
- Systematic racial discrimination, or
- A consistent pattern of gross violations of internationally recognized human rights.[51]

In addition, the recent statement of the President on Article 75 of Additional Protocol I and the administration's intent to seek ratification of Additional Protocol II (particularly with respect to Articles 4-6) indicate the current U.S. view of human rights norms applicable in international and non-international armed conflict, respectively.[52]

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[48] *See, e.g.,* Al-Jedda v. U.K. and Al Skeini v. U.K. *supra, note 31.*

[49] A full list of human rights treaties to which a country is a party and that country's reservations and declarations, as well as any objections to them by other States, can be found at http://www2.ohchr.org/english/law/ (last visited June 13, 2011).

[50] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24,COUNTERINSURGENCY D-8 (15 Dec. 2006). (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.").

[51] See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §702 (1987).

[52] See FACT SHEET, *supra* note 22.

III. Conclusion

Rule of law operations require the identification of the comprehensive underlying legal framework; no single legal discipline purports to operate as the *lex specialis* of ROL missions. Instead, JAs involved in ROL lines of operation are required to draw from a broad spectrum of legal disciplines. Moreover, the JA must be mindful that U.S. policy and practice may require adherence to more stringent international norms. This chapter provides the JA a means of identifying the correct legal framework for a particular operation and an overview of those particular legal frameworks likely to apply to ROL operations. Considering the challenges associated with establishing legitimate and sustainable ROL in a conflict or post-conflict nation, it is especially important that the conduct of U.S. forces in such environments comport not only with our own notions of law, policy and practice, but those of the international community as well, to include international human rights law.

CHAPTER 4

THE INSTITUTIONAL AND SOCIAL CONTEXT FOR THE RULE OF LAW

One of the greatest challenges for ROL practitioners is the requirement to understand the contextual basis of the ROL environment within which they are operating.[1] Too often, past efforts in establishing the ROL have 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 ROL operation. Operations in Iraq, for instance, have shown that U.S. officials involved in the reform of specific laws often lacked background information about Iraqi culture and their complex legal system.[3] The importance in Afghanistan of customary justice mechanisms is increasingly widely recognized, although their part in an overall ROL strategy is still under debate.

This chapter provides a short review of the major legal traditions and some applicable considerations to establishing the ROL in non-U.S. environments. The chapter begins with a discussion of ROL activities focusing on some of the fundamental component parts of legal institutions. Following that are discussions of legal systems unfamiliar to most common law practitioners, including civil law and legal systems in which religion plays an explicit part (with special emphasis on Islamic Sharia) and combined systems. Next is a 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 the impact that some sociopolitical influences can have on the legal system and the efficacy of ROL programs, namely: gender, civil society, and non-state security providers.

I. Legal Institutions

A. Legislatures

A legislature is a representative body that has the responsibility and power to make laws in accordance with a specified process.

Until recently, few deployed JAs had any contact with the legislative side of ROL operations. However, recent experiences have changed that. U.S. and other coalition JAs find themselves being called upon to advise upon the legislative procedures of the host country or, even, becoming personally involved in the creation of legislation, especially where that legislation relates to the host nation's armed forces.[4]

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

[1] *See* BRIAN Z. TAMANAHA, 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 U.S. 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 Army Legal Services officers were involved in drafting legislation pertaining to the host state armed forces.

experience or ability may not be available. It is in these circumstances that JAs are most likely to 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 U.S. model with which most JAs are familiar. Some legislative processes will have similar features such as a bicameral system, but the process by which a bill passes into law may differ tremendously. If the host nation's legal system is founded on a constitution, the process may, at least in theory, be derived from the constitution itself.[6] In other nations the process may be defined by statute.[7] Typically, however, a JA may encounter significant difficulties in establishing exactly what the legislative process of a host nation entails, or in finding authoritative guides to the same.

The process of enacting legislation is almost universally cumbersome, fraught with bureaucracy and time consuming. Given this, it is frequently tempting to bypass 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. In some circumstances, policy making via unilateral executive action rather than legislative process may, in itself, undermine the legitimacy of not only the policy, but also the host nation government. 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 ROL, 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 U.S. model will lead to difficulties and is often not the best solution. Although less familiar to the JA, the local legal system may be as refined and developed as that in the United States, but more importantly, it will tend to benefit from a degree of legitimacy that a newly imposed system will lack. If tasked with such responsibilities, JAs should be wary of relying too heavily on the familiar U.S. models.[9] That does not mean that U.S. sources should be disregarded, and several organizations, including the American Law Institute and the American Bar Association[10] produce model acts for legislatures.

B. Courts

The military may be called upon to assist in both restructuring and reconstructing aspects of domestic legal systems. Judge advocate involvement in the judicial aspects of ROL operations typically takes 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 mission is a reconstruction mission that requires a broader understanding of the domestic legal system and will involve a variety of participants, including DOD, other U.S. agencies, the host nation, IOs, and NGOs. In support of both missions, JAs may be

[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* ch. 3. B.
[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 (last visited July 21, 2010) and www.abanet.org (last visited July 21, 2010).
[11] *See* U.S. DEP'T OF ARMY, PAM 27-9-2, MILITARY JUDGES' BENCHBOOK FOR PROVOST COURTS (4 Oct. 2004).

required to advise on court structures, practices and procedures, as well as assess and analyze the ongoing performance of such systems. In conducting both missions, JAs need to be 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 U.S. supervision.

In resource-challenged environments, it may not be possible to operate domestic court systems in accordance with international standards, but that should not rule out using those standards as long-term goals in relevant ROL lines of operation.

Given that military deployments are most often necessitated by instability and security needs, in the past, the tendency in most, if not all, ROL missions was to focus on domestic criminal justice issues (vs. civil legal), in order to reestablish 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 ROL mission will be severely handicapped.

As lawyers, most JAs are already intimately familiar with the basic requirements of 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 challenges associated with attempting to reconstruct a court system.

1. 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 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 one's choosing 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 JA required to provide advice or guidance on the duties and responsibilities of those in public office charged with the prosecution of offenses.

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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.odpp.nsw.gov.au/speeches/Final%20paper%20Capetown.htm (last visited July 11, 2011). 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 U.S. position was discussed by the Supreme Court in *Crosby v United States*, 506 U.S. 255 (1993), concluding that the right is not absolute 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://www2.ohchr.org/english/law/prosecutors.htm (last visited June 13, 2011).

[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* The Hague Justice Portal, "International Association of Prosecutors" (n.d.), http://www.haguejusticeportal.net/eCache/DEF/317.html (last visited June 13, 2011).

In many societies emerging from long-term conflict, the availability of defense lawyers may be limited or non existent. Rule of Law missions (which frequently concentrate on ensuring that the judges and prosecutors are of an acceptable standard) may need to focus more heavily on training and deploying a competent corps of defense lawyers than prosecutors. Judge advocates should be mindful that the role of defense lawyers may be much less central to the judicial process in some non-adversarial systems.

2. 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.

There are two aspects to impartiality. First, the tribunal must be subjectively free of personal prejudice or bias. Second, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.[16]

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 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 may preclude representation in the judiciary from all ethnic communities in a state.[17] On the other hand, elections allow for direct public participation in the appointment process, thus creating a greater level of public acceptance and support.

The levels of education and experience of judges will vary tremendously between countries; moreover, they 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.

[16] *See* R. v. Dundon EWCA 621 (2004), Grieves v. United Kingdom, 39 Eur. H.R. Rep. 2 ¶ 69 (2004).
[17] A system of proportional representation may be useful in providing representation proportionate to the ethnography of a state.

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 ROL 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 while they received a basic level of instruction.

The roles and responsibilities of judges which were adopted by the United Nations in 1985[20], together with the *Bangalore Principles of Judicial Conduct*[21] provide an excellent standards of conduct template for those who hold 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]

[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.

[21] BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002), *available at* http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf (last visited June 13, 2011). 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 was 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).

Screening Judges in Iraq[23]

The process of screening 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.

3. 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.

Computers in Iraqi Courthouses

The provision of computers and other information technology assets to many of Iraq's courthouses was of little benefit; computers were 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 that served no useful purpose.

Engineers may take the lead on physical reconstruction projects like court buildings, but they will require advice from JAs. Wise JAs will 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, as will the economies of scale and network benefits that come from co-locating courtrooms and their supporting infrastructure. This may be preferable in areas where the security of the court buildings is the highest priority.

[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/Documents/Publications/RuleoflawVettingen.pdf (last visited June 13, 2011) [hereinafter VETTING]. 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 (last visited June 13, 2011).

[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.

4. Adequate Administrative Infrastructure

Along with reconstructing the physical infrastructure of a legal system, JAs 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. Judge advocates 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 the entire process, focus should be placed on whether the process is transparent and whether there are nodes in the system that 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, JAs 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 JAs. 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.

5. 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.

C. 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, U.S. forces are likely to participate in the reestablishment of civilian police functions.

1. 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

[25] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 5-17 (15 Dec. 2006).
[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 (last visited June 13, 2011).

the lead in the police elements of ROL missions. Commanders need to understand that the application of force in a police context is very different than in major combat operations, and they will need to recognize (often with the help of JAs) 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 developing both the good will of the populace and establishing the legitimacy of the legal rules that are being enforced. Both MPs and JAs may be central in helping shape the Soldiers' and commanders' thinking in such an environment.

2. Reestablishing Host Nation Police Functions

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

a. Police Force Composition

The importance of 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.[27] 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 combat units to police duties. But, as with many aspects of ROL 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 also 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 that 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, where certain police units were complicit in serious human rights abuses, it may prove necessary to effect complete reform.[28] Whether starting from scratch or reforming an existing establishment, it will be necessary to vet 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.[29]

As with other areas in ROL operations, flexibility and sensitivity to local culture cannot be overstated. 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 manage the formation of a new police force or the reform of an old one.[30] For instance, as opposed to the model adopted in the U.S., in many nations, the use of police forces with close or formal ties to the military is common, for

[27] *Id.*
[28] *See* JAMES DOBBINS, ET AL., THE BEGINNER'S GUIDE TO NATION-BUILDING 50-51 (2007).
[29] For information on vetting public employees *see* VETTING, *supra* note 23.
[30] *Id*. It may be necessary to employ persons with different areas of expertise, to include criminal law, civil law, human rights law, Sharia, etc.

example the Italian Carabinieri[31] and the availability of quasi-military models for police may be particularly appropriate for those seeking to police in non permissive environments.

b. 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 communications
- 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).

D. 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; likewise, a state lacking long-term confinement facilities cannot punish convicts.[32] In both cases, the state does not have any reasonable prospect of instituting the ROL. Separately, a state that systematically mistreats the incarcerated or fails to provide for their subsistence has no greater claim to the ROL 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.[33]

1. 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

[31] The Carabinieri are a separate branch of the Italian armed forces.
[32] Throughout this section, this *Handbook* will use the terms "jail" and "prison" to refer respectively to short- and long-term detention facilities.
[33] LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade (2003).

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:[34]

- walls or other security enclosures that prevent both escape from the facility and infiltration from outside the facility[35]
- 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.[36]
- 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.

2. Humane Treatment

Of all the considerations which must be addressed when running a confinement facility, few issues have more visibility to outside scrutiny than the conditions under which detainees are held. Within the broad spectrum of various human rights concerns, there are a host of issues to be considered. Although not a comprehensive list, those issues 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
- access to detainees by family, local medical personnel, and local court personnel
- religious accommodation
- detainee labor

[34] 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.

[35] 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.

[36] 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.

- 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.[37]

The best way to ensure that proper treatment standards are being enforced is for JAs 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 Nations' 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.

E. 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 ROL. 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 ROL operations includes the restructuring and training of the host nation's armed forces. Recent examples of this practice include Iraq, Afghanistan, Sierra Leone, and East Timor. Moreover, due to the ability to limit the number of variables during such missions, the military has 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).[38] 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.

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[37] 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*, 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; U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006); 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 U.S., and host nation, views regarding these international norms. For U.S. 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.").

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

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.[39] 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 U.S. system, the court determined that a uniformed judge offered no such guarantees.[40]

Although representation by military defense lawyers is taken as a given in the U.S. 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.[41]

The extent and scope of the jurisdiction of military courts and tribunals also varies greatly from nation to nation. Some systems follow the U.S. 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.

Given the unique nature of military service, a number of military specific offenses[42] 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.[43] 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.[44] 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.[45]

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[39] 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 is comprised of military officers and warrant officers. For further guidance, see the Armed Forces Act 2006 and subordinate legislation.

[40] *See* Grieves v. United Kingdom, *supra* note 16; Cooper v. United Kingdom, 39 Eur. H.R. Rep. 8 ¶ 104 (2004).

[41] 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.

[42] 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.

[43] *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. *See* http://en.wikisource.org/wiki/Order_22:_Creation_of_A_New_Iraqi_Army (last visited July 11, 2011). *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, *see* www.un.org/peace/etimor/untaetR/2001-12.pdf (last visited July 11, 2011).

[44] Johnston Interview, *supra* note 38.

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

II. Civil Law Systems

The term "civil law" is commonly used in two different meanings: First, it distinguishes the law that applies to disputes between private individuals from the law that governs the relationship between individuals and the state (e.g., criminal law or constitutional law). Secondly, the term is used to describe a legal system distinguishable from common law systems. This section addresses the latter meaning, describing its characteristics, principles and drawing comparisons with a common law system.

The civil law system is predominant in most of the world, in particular in continental Europe, South America, parts of Asia (including Iraq) and Africa,[46] while the common law system, on the other hand, is found in the United States (except Louisiana), the United Kingdom, Canada (except Quebec) and other former colonies of the British Empire.

The historical origins of civil law can be traced back to Roman law, especially the *Corpus Juris Civilis* of 534 as later developed through the Middle Ages by legal scholars. However, Canon law, local legal traditions, the philosophical developments of the Enlightenment, and elements of the Islamic legal tradition have also had a significant impact on its development.

Civil law today is predominantly characterized by the legislative efforts of continental European states to transcend legal influences and customs into a modern, coherent and complete system of legal codification in the 18th and 19th century. The most influential codifications originated from France (Civil Code of 1804[47] and Code of Criminal Procedure of 1808[48]) and Germany (Civil Code of 1896[49])[50]. These codifications became the basis for the methodological concepts and principles of civil code systems world-wide.[51]

A. The Civil Law Ideal of Separation of Powers

The most important characteristic of the civil law system is its 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 U.S. system also incorporate the principle of separation of powers, their approach and philosophy in doing so differs from that in civil law countries. In both the United States and the United Kingdom, the judiciary serves as a progressive force on the side of the individual against abuse of power by the state.[53] Experiences in civil law countries, on the other hand, where judges had often served as the extended arm of repressive governments, supported the

[46] *See* JOHN MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA 2 (2d ed. 1985) [hereinafter "MERRYMAN"].
[47] Also referred to as *Code Napoleon* or *Code Civil*.
[48] Also referred to as *Code d'Instruction Criminelle* or CIC.
[49] The *Bürgerliches Gesetzbuch* or BGB.
[50] The Code Civil of 1804 and the Civil Code of 1896 are still in force in France and Germany; of course, being frequently amended by the respective legislative powers since that time.
[51] It is noticeable that the spread did not singularly occur through military conquest but often occurred voluntarily in an effort at modernization, in particular in Asian countries. In many cases, the adaptation of the foreign code was almost identical to the donor system, while in other cases the codification added elements of the local legal traditions to the foreign body of law that was adapted.
[52] *See* MERRYMAN, *supra* note 46, at 15.
[53] *See id* at 16.

idea of restricting judicial power by emphasizing the primacy of the legislative power.[54] As a result of this emphasis, civil law systems consider any judicial lawmaking power as undemocratic and consequently illegitimate. Given this approach to judicial power, from the civil law perspective, a legal system that gives judges lawmaking power, violates the ROL.[55] Though, the jurisprudence does shape the existing laws by interpreting the law, and especially defining the meaning of abstract terms used in the respective codes.

Judges in civil law systems are thus compelled to find a basis for their decisions within the code. This will often reflect in the style of legal opinions, which tend to be more formal in civil law systems as judges generally focus their reasoning to the application and interpretation of the wording of the code as well as of its spirit and purpose to the factual situation presented to them.

This theoretical model, however, applies differently to criminal law than to civil law. While in both areas of law courts have to reason on the basis of a code, it is only in criminal law that a strict prohibition to apply analogies in disfavor of the accused persists. In matters strictly between individuals, in contrast, judges will often draw analogies from statutory provisions to fill lacunae and to achieve coherence. By contrast, in most common law systems, "civil" cases are still frequently governed by case law, with statutes serving to provide specific rules in specific areas.

One notable exception is the practice of modern constitutional courts. Such courts act in many aspects more like common law courts than classical civil law courts. In Germany, for example, the constitutional court possesses the authority to declare void acts of the legislator for incoherence with the German constitution, the *Grundgesetz*, as interpreted by the court.

B. Specific Aspects of Civil Law

1. Sources of Law and the Role of Judges

The methodology of civil law systems is by and large based on the completeness of written, formal, and hierarchically organized law. Therefore, original sources of law are the constitution and laws passed by legislation, with the constitution overriding all contradicting legislation, and the legislation enjoying primacy over all acts of the executive branch of governance.

Most civil law systems accept neither the principle of *stare decisis*[56] nor custom as a primary source of law. They do, however, 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, somewhat analogous to the common law consideration of "persuasive authority." In practice, judges are generally expected to follow or at least take into account decisions of courts of the higher or the same level.

The French and German fear of a "government of judges" in the 18th and 19th century, and the prevalence of the dogma of the separation of powers, resulted in the power of civil law judges being restricted. While they usually enjoy great respect in general, when compared to their common law brethren, civil law judges are less-widely known and courts are viewed as faceless institutions, but ones that are objective and impartial in their findings, and which seek the absolute "truth" and justice.

[54] Ironically, this idea of limiting judicial authority somewhat resembled the position taken by the monarchical rulers which had likewise attempted to restrict judicial power by demanding strict adherence to their legislation.
[55] *See* TAMANAHA, *supra* note 1, at 124–25.
[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 allows for *stare decisis*.
[57] *See* MERRYMAN, *supra* note 46, at 83.

2. Legal Science and Techniques

Legal science in the civil law world is primarily the creation of German legal scholars of the nineteenth century.[58] 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.[59] Therefore, legal science emphasizes systematic values like general definitions, classifications, and abstractions, and uses formal logic as its primary procedure.

This "legal science" thinking directly influences the way the ROL 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 cases as they arise, with the rulings in those cases serving as rules for future ones. In a civil law regime, 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 judicial action.[60]

3. Civil and Criminal Courts and Procedure

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 only reviews the legal determinations of lower courts; reconsideration of the facts of the case is usually excluded.[61] 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.

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 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.[62]

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.[63]

Civil law countries tend to have abolished, or greatly reduced, the role of juries, with "bench" trials by professional judges alone being perceived as being more practical and objective. That said, some civil law systems do have juries in civil cases, while others ensure popular participation through a tribunal made up of lay judges.

The questions of what constitutes a crime and how criminals should be punished are in principle similarly approached in both civil law and common law countries. Both systems share many similarities such as the strict separation between investigative and trial authority, the presumption of innocence, the right to remain silent, or the general right to counsel.[64]

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[58] *See* MERRYMAN, *supra* note 46, at 61.
[59] *Id*. at 62.
[60] *Id*. at 67.
[61] *Id*. at 87.
[62] *Id*. at 114.
[63] *Id*. at 115.
[64] *Cf*. EUROPEAN CRIMINAL PROCEDURES (Mirrielle Delmas-Marty & J.R. Spencer eds.) (2005).

On an abstract level it can be said that the purpose of the criminal procedure for the civil law system is the revealing of the material or absolute truth while the common law system considers it sufficient to establish the procedural or relative truth between the two parties in dispute. This distinction between the common law and civil law approaches to criminal justice has lost some of its significance due to similarities in the developments of the law in European States and the United States over the last century. However, the criminal procedure in civil law systems, often described as inquisitorial,[65] in contrast to the common law's adversarial or accusatorial process, still operates quite differently and still attributes somewhat different responsibilities to the actors of the process of criminal justice.

4. Pre-Trial Phase

One of the fundamental differences between the two systems is the operation of the pre-trial proceedings and their relevance for the actual trial. In civil law systems, the pre-trial investigation is a part of the process of adjudication of criminal cases. The pre-trial phase, which will be primarily written and non-public, will often but not necessarily be separated into an investigative and an examining phase. During this phase, a governmental official (usually a judge, a judicial magistrate, or a prosecutor) oversees or directs the police's efforts to establish the facts of the case and collect evidence of the guilt or innocence of the suspect. Where the investigation is not overseen by a judge, a decision by an investigative judge will often be required for certain investigative activities such as detention or searches.

The investigative efforts will eventually result in a complete written record containing all relevant evidence. If an examining judge subsequently evaluating the record concludes that a crime was committed by the accused, the case will be taken to trial, if not, the accusations will be dropped.[66] The investigative record and the evidence contained therein will often provide the basis of the trial judge's decision.[67] The common law, in contrast, strictly separates between the investigation and the trial and allows only the evidence collected during the trial to be used as a basis for the judge's decision.

Accordingly, the pre-trial phase and its actors play a more significant role in the criminal process under the civil law system than in most common law systems.[68] While arguably the investigative phase of the civil law system is more suitable to establish all relevant facts before a decision on the proceedings to the trial stage is taken, JAs should be aware that the traditional role of the pre-trial phase in civil law systems historically often meant that pre-trial proceedings were kept secret, substantially fewer rights were granted to the defendant, and pre-trial proceeding were much more prone to abuse. The pre-trial phase may also delay the procedure significantly. In many states, significant developments over recent decades—in particular due to international human rights obligations—have been undertaken to remedy these potential weaknesses.

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[65] The term "inquisitorial" is rarely used in civil law countries as it invokes somewhat misleading associations to the criminal justice process that existed prior to the 18th and 19th century European reform in this field. To many civil code lawyers, the "inquisitorial procedure" nomenclature is more associated with a procedure in which a single person initiates the criminal process, directs the investigation, conducts the trial and decides on the verdict. They would consider their own system rather to be "mixed" or "hybrid" with inquisitorial elements. Likewise common law criminal procedure is not strictly "adversarial" given to the role of the police in gathering evidence both for and against the defendant.

[66] Some civil law countries, such as Germany and Italy, have diminished the role of the examining phase and transferred most of its responsibilities to the prosecution.

[67] The practical and legal relevance of the pre-trial results may vary widely between jurisdictions.

[68] The impact of the pre-trial investigation on the actual trial decision may have been what has caused the historically widespread perception of the civil law system lacking a presumption of innocence as trials initiated on the basis of the pre-trial record were more likely to lead to a conviction.

5. Trial and Appeal

As a result of the thoroughness of the pre-trial phase(s), the trials in civil law and in common law systems differ significantly. Perhaps the most striking difference is that the investigative record is equally available to the defense, the prosecution, and the trial judge in advance of trial in civil law systems. The main function of a criminal trial is to present the case to the trial judge and, in certain cases, the jury, and to allow the lawyers to present oral arguments in public.

During the trial phase, JAs should be aware of the different role of the judge. In civil law systems the judge "owns" the trial, calling and examining witnesses, determining when it will commence and end, and reaching a decision, on the basis of a personal conviction of the truth, after a free evaluation of the evidence. As a consequence, no cross-examination of witnesses takes place; confessions of a defendant are seen as evidence to be freely evaluated by the judge and, in principle, no plea bargaining takes place.[69] Contrary to common law systems, the defendant can be questioned by the judge but may refuse to answer. He cannot be sworn, as that would be seen to conflict with his right not to incriminate himself and thus is procedurally protected from the normal consequences of lying under oath. The defendant's refusal to answer, as well as any answer given, is taken into account by the court.

Civil law systems tend to offer more possibilities of appealing a decision, as the notion of appeal is seen as a natural instrument of hierarchical court control. However, JAs should be aware that, unlike in common law systems, governmental appeals (e.g., by the public prosecutor) requesting a reversal of an acquittal or harsher punishment are often permitted.

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 would 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, their physical location, and key personnel, you must first learn about how the prevailing legal system requires courts and court officers to be organized.

III. Religious Legal Systems and Sharia

The main religious legal systems of the world are Hindu law, Islamic law, and Jewish law, but this *Handbook* will focus on Islamic law due to its significant impact on secular legal systems in many parts of the world and, of course, the location of current ongoing stability operations. One of the fundamental features of modern Islamist movements is their call to restore the Sharia as the dominant, if not sole, source of law in Muslim countries. As was demonstrated by the Iranian Revolution[70] and

[69] However, some civil law systems have developed instruments that allow to a limited extent for the prosecution to suggest punishments that, if the defendant does not object to their application, permit the prosecution to drop the case and avoid trial. Those instruments, as the plea bargaining process does, always invoke questions with regard to credibility, equality and transparency of justice and require effective remedies and checks to ensure that consent to a punishment without trial is conscious and real.

[70] On the Iranian Revolution of 1979, see NIKKI R. KEDDIE, MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION (2003).

the Taliban's[71] rule in Afghanistan, such a move has the capacity to affect world politics and international security.

A. The Sharia

The totality of Islamic law is known as the "Sharia,"[72] which literally means the path to follow. The substance of the Sharia is found in the primary sources of the *Quran* and the Sunna, as well as in the corpus of Islamic jurisprudence (fiqh), which is the work of the Muslim legal scholars or jurists (fuqaha) who have interpreted those primary sources. The Sharia includes not only relations between humans (muamalat), such as property rights and contracts, but also "religious" obligations (ibadat), such as dietary rules, the methods of prayer, and the punishments for certain offenses against God (such as theft and adultery).

In the sixth century, when the Prophet Muhammad was born in Mecca, there were many different legal systems prevalent in the Near and Middle East. Justinian's Digest had been completed three decades before, and the Jerusalem Talmud a century or two before that. These sources of law were well known by Muslim jurists. Although the influence of these legal traditions on Islamic law and legal science has been the source of controversy, the emergence of Islam was clearly a turning point in the Middle East's legal tradition.[73]

Muslims believe that God's directions to the community of Muslims (the umma) were revealed to the Prophet Muhammad over a period of twenty-three years in the early seventh century C.E. Shortly after the Prophet's death, these revelations were compiled in the *Quran*. The *Quran* does not contain much law in the modern western sense; only around 500 of the approximately 6,000 verses of the *Quran* pertain to such "positive" law. Nevertheless, it constitutes the first of the two primary sources of the Sharia.

The Sunna, the actions and sayings of the Prophet as a clear manifestation of God's will, constitutes the second of the two primary sources of Islamic law. It is believed that the actions and sayings of the Prophet reflect the general provisions of the *Quran*, and also give guidance on matters on which the *Quran* is silent. The content of the Sunna is found in the form of hadiths, reports of what the Prophet said or did which can be traced back through a continuous and reliable chain of transmission to the Prophet himself. Much early Islamic scholarship was devoted to determining the authenticity of the many reported hadith. Eventually the Sunnis (those who follow the Sunna of the Prophet, who now constitute the majority of Muslims) settled on six so-called "canonical" or authoritative collections of hadith, while Shiites (a term discussed below) have their own collections based on the hadiths of both the Prophet and the Shiite Imams.

The third source of law is ijma, which consists of a doctrinal consensus on specific issues among all the fuqaha (legal scholars). Ijma covers some settled issues such as the direction of the required daily prayer (toward Mecca), but there continues to be considerable debate among legal scholars about the scope and substance of matters on which ijma may exist. It is thus a limited source of legal rules. Finally, Sunni legal scholars use various forms of qiyas, or analogical deduction, to determine the correct legal ruling on matters for which there is no specific rule in the primary sources, or on which there is no ijma. Qiyas is best considered as a method of legal interpretation rather than a source of law, although it is sometimes stated to be the fourth source of the Sharia. It should be noted that Shiite scholars do not employ qiyas to derive legal rulings; rather, they use a broader range of logical analysis to apply to new legal problems, subsumed under the concept of aql, or intellectual reasoning.

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[71] Regarding the Taliban, see THE MIDDLE EAST AND ISLAMIC WORLD READER 243 (Marvin E. Gettleman and Stuart Schaar eds., 2003).
[72] *See* WAEL B. HALLAQ, SHARIA: THEORY, PRACTICE, TRANSFORMATIONS (2009).
[73] *See* CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW (2007).

B. The Application of the Sharia

The qadi is a judge in the classical Islamic legal system. Sharia dispute resolution is a kind of "law-seeking 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. Oral testimony is preferred over written evidence, the qadi does not give written reasons for his decision, and cases are not reported. Precedent, therefore, is lacking.

The mufti (jurisconsult) plays a role similar to that of the university legal scholar in civil law systems. Coming from the ranks of the fuqhaha, and possessing years of study and great analytical ability, the mufti brings the law to bear on particular cases. An opinion of the mufti, the fatwa, may be sought by private persons who desire an answer to a legal problem, or by judges in Sharia or other courts who need to know the Sharia rule applicable in a given case. Today, muftis often issue fatwas over the internet to Muslims worldwide who seek to know what the Sharia requires in a given situation. Again, Shiite tradition is slightly different in this regard; the appropriate term for a Shiite jurisconsult is mujtahid, and they have wider scope of interpretive authority, as noted below.

It should be understood that even in the classical era, Sharia courts, along with qadis, were not the only legal bodies operating in Muslim areas. The secular rulers had their own courts and procedures to deal with matters that fell outside the scope of the Sharia, although they were always subordinate to the Sharia. In the modern Muslim world, Sharia courts and law have often been relegated to a subordinate role to that of state judicial bodies and legal codes. Sharia courts may exist side-by-side with secular ones (such as Indonesia), they may be relegated to certain areas of the law, such as family law courts (as in Egypt), they may be eliminated almost entirely from the public sphere (as in Turkey), or in some cases (such as Saudi Arabia) they may retain substantial jurisdiction over legal disputes. Similarly, during the Ottoman era, muftis were increasingly absorbed into the state bureaucracy, and today many Sunni Muslim countries have official muftis appointed by governmental authority. However, many muftis both within and outside official channels do continue to exercise independent authority and influence among much of the population. Judge advocates performing ROL operations in the Muslim world would be wise to know the importance of these muftis.

C. The Substantive Sharia

The Sharia seeks to promote and protect five primary values: religion, life, offspring, property, and rationality.[74] Moreover, it classifies all actions as either forbidden (haram), discouraged, neutral, recommended, or obligatory. In the western sense, only the first and the last of these constitute legal categories, strictly speaking, and in the Islamic tradition only those two categories are deemed enforceable by temporal religious or secular authorities.

Based on the five values noted above, much of the Sharia is devoted to the areas of family law (marriage, divorce, and inheritance), commercial transactions (including contracts, taxes, and waqfs, or trusts), and a relatively narrow area of criminal law. 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 traditions of pre-Islamic law, the principle of equality of men and women as understood in Western law systems is not reflected in the Sharia. The *Quran* contains some verses that have been used to

[74] *See* BERNARD G. WEISS, THE SPIRIT OF ISLAMIC LAW 146 (1998).

suggest that men and women are not equal.[75] On the other hand, Islamic law generally has granted women substantial rights and financial security. A daughter is granted a share of inheritance, and a woman can keep all property that she brings into a marriage or that she acquires during marriage. Shiite law generally provides greater rights for women within this field than Sunni law. Reform of family law has taken place in most modern Muslim countries, and further reform is a high priority among many Muslim feminist scholars.[76]

At first sight, this discussion of rights without equality may appear somewhat contradictory. However, it is a useful reminder that Western concepts of "equality" are not analogous *per se* to "rights". It should also serve as a cautionary note that JAs, inculcated, as they are likely to be, in Western thinking, should be cautious about rushing to judgment on the basis of their, most likely, limited reading, knowledge, and understanding of Sharia. Notwithstanding their own personal views, a JA who is engaged in ROL work, particularly in a country where observance of Sharia may well be a constitutionally mandated requirement, would be well advised to remember the importance of ROL program design that is, as one coalition military legal advisor put it "Culturally [and host nation legal] compliant, not Western reliant."[77]

Commercial law is characterized by a positive view of business and commerce, but with an emphasis on fairness that limits the scope of commercial transactions. This is reflected primarily in the prohibition on interest and the unfair distribution of risks. For example, unlike in Western societies in which debt is fundamentally distinguished from equity by the allocation of risk, in Islamic countries, banks frequently share a portion of the risk in the form of partnerships with depositors. Islamic banking that seeks to promote commerce within the limits set by these prohibitions is an expanding and increasingly important area of international finance.[78]

Criminal law was and is primarily a matter left to the secular or state rulers. However, five offenses (hudud) were deemed to be offenses against God, as they violated the five primary values noted earlier. Thus, the *Quran* and Sunna prescribe specific punishments for theft, highway robbery, fornication, false accusation of fornication, and (according to some schools of jurisprudence) apostasy, as these acts especially threatened religion, property, family and offspring. Other offenses that threatened public order (tazir or siyasa) were left to the discretionary punishment by state authorities. Acts resulting in personal injury were punished or not according to the victim, though state authorities could also enforce sanctions in such cases. Importantly, the hudud offenses were rarely imposed throughout most of Islamic history, as the standards of proof were very high, and their frequent use by the Taliban in Afghanistan was inconsistent with this tradition.[79]

D. International Law and Jihad

International law, especially the law of war, plays an important role in the Sharia. Here the central concept is jihad, which encompasses both the *jus ad bellum* and the *jus in bello*. Like the law of war in the West, but beginning much earlier and, in the classical era, in comparatively more sophisticated forms, jihad as interpreted and developed by the jurists was transformed over time and in response to

[75] *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 . . ."
[76] *See* JUDITH E. TUCKER, WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW (2008).
[77] There is also anecdotal evidence to suggest that actions which fail to follow this "bumper sticker" quote reinforce the perceived belief by some that Islam itself is in some way under attack from Western ideology. Such a belief, whether valid or otherwise, is likely to undermine not only ROL efforts but also COIN principles and stability operations efforts.
[78] *See* MAHMOUD A. EL-GAMAL, ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE (2006).
[79] *See* RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW (2005).

particular historical developments, particularly the preservation of the original umma in Medina against its Arab and other tribal enemies, the rapid and extensive conquests of the Arab armies in the first two centuries of the Islamic era, the destruction of the caliphate by non-Muslim conquerors beginning in the thirteenth century, and European colonialism commencing in the nineteenth century. Moreover, jihad has always been subject to a diversity of views within the ranks of the scholars and among Muslims in general. This diversity, and the intensity of the debate, has become especially pronounced in the current era, as the Muslim world both integrates into and seeks a recognizable voice in the western-dominated system of international law.

Many current Muslim scholars, referring to the original practice of the earliest Muslim community, insist that jihad has a primary meaning of an individual's effort or struggle to comply with the Sharia, and only secondarily does it refer to the (only) legitimate reason for engaging in armed conflict. Moreover, they also argue that in the latter sense, it authorizes only defensive warfare. The later Arab conquests required a rethinking of the grounds for engaging in jihad, but many scholars claim that in the modern era only the original, defensive concept is legitimate. Moreover, virtually all of the classical jurists stated that jihad in any form may only be declared by properly designated legal authority. Finally, all of the sources of law contain rules for the conduct of warfare that reflect principles similar to the modern western law of armed conflict, such as a prohibition on poisonous weapons, protection of noncombatants, and accepting surrender without reprisals.[80] Although it is possible to extract phrases and passages from the *Quran* and the Sunna that seem to justify constant and aggressive war against non-Muslims, this is not the mainstream interpretation of the sources by the majority of legal scholars.

Other aspects of international law addressed within the Sharia include the treatment of non-Muslims in Muslim lands. This was historically relatively favorable, with so-called people of the book (those who adhered to a monotheistic faith) usually (though not always) allowed to conduct their own affairs, upon payment of special taxes and certain other legal liabilities. International agreements require compliance (the principle of *pacta sunt servanda*).

E. Sunnis and Shiites

The difference between Sunnis and Shiites is a matter of geopolitical importance, but it is frequently poorly understood by Westerners. Although a complete treatment of the issue is beyond the scope of this *Handbook*,[81] it is helpful for ROL practitioners to understand the basic distinction, especially as it applies to law.

After the Prophet Muhammad's death, the issue arose of succession to the leadership of the community of believers (umma). The prevailing view was that the leader should be selected by the close companions of the Prophet from among the leading members of the Prophet's tribe. Within a few decades the leadership became hereditary, but this came to be accepted as legitimate as long as those rulers (caliphs, sultans, etc.) protected the Muslim realms and sustained the Islamic faith within their realms.

In contrast, Shiites (the "party of Ali") were of the view that Muhammad had designated his cousin and son-in-law Ali as his rightful successor, and that only Ali's descendants (the five, seven, or twelve Shiite Imams, depending on the branch of Shiism) had the legitimacy to become the leader of the Muslim community. The majority of Shiites came to believe that the twelfth Imam was secreted away in the ninth century to protect him from the illegitimate Sunni caliph, and that he remains alive

[80] *See* MICHAEL BONNER, JIHAD IN ISLAMIC HISTORY: PRINCIPLES AND PRACTICES (2006); RUDOLPH PETERS, JIHAD IN CLASSICAL AND MODERN ISLAM (2005).

[81] For a fuller explanation of this topic, *see* VALI NASR, THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE (2006).

though hidden (ghaybah, or occultation), and will return in the future as the Mahdi to usher in an era of peace and justice. "Twelver Shiism" is the official religion of Iran today.

This originally political dispute had a direct impact on Sunni and Shiite legal and political thought, resulting, for instance, in different Sunni and Shiite hadith collections. For Sunnis only the hadiths of the Prophet Muhammad became a valid source of law (the Sunna). Shiites, on the other hand, rely primarily on the hadiths (referred to as akhbar) of the Imams, who while not prophets, are deemed to have possessed special insight and knowledge of the Sharia.

Another important difference is that Sunnis do not accept broad-based forms of intellectual reasoning as a source of law. That is why for them methods of interpreting the *Quran* and the Sunna to form new opinions, apart from fairly limited reasoning by analogy, are unacceptable. Moreover, Sunni muftis rely on the prior doctrinal teachings of earlier scholars within one of the four existing Sunni schools of jurisprudence (Shafii, Hanafi, Maliki, or Hanbali). Shiites, on the other hand, accept a wider scope of intellectual reasoning (aql) in interpreting the sources of the law. A Shiite legal scholar (called a mujtahid, rather than a mufti), among the most learned of whom may be called ayatollah or, at the top level, marja at-taqlid ("source of emulation"), interprets the *Quran* and the akhbar directly, and is less bound by the prior teachings of earlier scholars. He is thus somewhat freer than his Sunni counterparts to change his rulings and opinions over time and to evolve religious law with the modern times.

Enmity between Sunni and Shiite Muslims has erupted periodically since the formative years of Islam, although Sunnis and Shiites have also often coexisted peacefully in many places. Today, some "radical" Sunni traditionalists consider Shiism to be heretical, and therefore a primary target of jihad.

Sunni Muslims today represent approximately 85% of the world's 1.25 billion Muslims, and are the majority in most Islamic countries except Iran, Iraq, Bahrain, Azerbaijan, Yemen, Oman, and Lebanon. In some places Sunnis discriminate against Shiites, though much of the discrimination has economic rather than religious or legal roots.

F. Conclusion

From the Western perspective, questions of constitutionalism, human rights and equality are central to legal thought. From the Islamic perspective, it is the recognition of God's word that drives the legal system. These two approaches can often be difficult to reconcile in a single legal system. Consequently, Western countries conducting ROL operations in Islamic countries must be particularly conscious of problems 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, which are separate from state law, Islamic law is very broad and is therefore easily violated by an insensitively designed secular system.

IV. Combined Systems

In addition to civil law, common law, and religious systems, there are also mixed legal systems in much of the world. 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 include Botswana, Lesotho, Namibia, the Philippines, Puerto Rico, Quebec, Scotland, South Africa, Sri Lanka, Swaziland,

Zimbabwe, and Louisiana here in the U.S.[82] The European Union, too, is something of a mixed common/civil system. Civil/religious mixed systems frequently involve Islamic law, including Algeria, Egypt, Indonesia, Iraq, and Syria. Iran claims to have an exclusively Sharia-based legal system, but in practice it too is a mixed civil/Islamic system, one that often finds it difficult to reconcile the various traditions within its revolutionary Islamic framework.[83]

Particularly relevant for the ROL practitioner is that mixed systems are generally not organically developed legal systems. Usually, mixed legal systems are created when one culture imposes its legal system on another culture, usually by conquest. 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 been internalized over time (e.g., in the case of India), rendering it legitimate in the eyes of the populace.

V. Recognized Alternatives to the Formal Court System

Although lawyers tend to focus on courts, many other dispute resolution mechanisms are available for use in conducting ROL operations. Some of them, like mediation and arbitration, have become part of the legal mainstream in developed countries. Others, including traditional, or customary, justice systems and remedies, are more widely utilized in certain some portions of the developing world. Some, such as truth and reconciliation commissions and property claims commissions, are specifically used in the post-conflict environment. But whatever the environment, JAs should be aware of and consider the use of less traditional legal dispute resolution mechanisms.

A. 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 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 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.

A judge advocate may not be the best person to act as the mediator given their lack of independence and position within the military. However, JAs may be in a position to recommend mediation and to use their skills to appoint the correct person or persons to act as mediator.

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

[83] *See* ASHGAR SCHIRAZI, THE CONSTITUTION OF IRAN (1997).

B. Arbitration

As opposed to mediation, arbitration provides for a solution that is both binding and enforceable.[84] Arbitration allows for a more flexible and tailored solution to dispute resolution and traditionally tends to be limited in its application to commercial disputes, both domestic and international.

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 arbitration. Standing arbitral bodies[85] 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, JAs 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 maintaining independence from (and impartiality toward) a contested government.

C. Customary, Traditional, or Informal Justice[86]

Those who crave justice will not necessarily care whether it is state provided or locally resourced, as long as it exists in one form or another. The Taliban's ability to provide justice (that was accessible and effective), albeit not in the sense that many readers of this *Handbook* will recognize, is often credited as being one of the major reasons for their historic, and ongoing support in Afghanistan.

Dispute resolution by way of customary justice systems has a long history of use in many societies. Notwithstanding that fact, it is a resource which has historically been overlooked in some recent UN sponsored attempts to reconstruct effective and efficient judicial systems in former conflict zones.[87] That is, perhaps, understandable if ROL efforts are simply seen as being part of a government based, state building exercise. But it is less so when one realizes that in many, particularly conflict affected, countries, customary justice systems are often viewed as being the most legitimate and most widely

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[84] 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.

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

[86] For reasons of expediency alone, this *Handbook* typically uses the term "Customary Justice". *Editor's Note: The Editor recognizes that this Handbook does not, in any sense, do justice to this complex, but crucial, part of the ROL jigsaw. It is intended that future editions will remedy that issue.* For an excellent introduction to this subject, including seven country-specific case studies, within the specific context of conflict affected societies, *see* CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR TORN SOCIETIES (Deborah Isser ed.) (U.S. Institute of Peace Press, 2011). *See also* John Dempsey & Noah Coburn, *Traditional Dispute Resolution and Stability in Afghanistan*, USIP PeaceBrief 10 (Feb 16, 2010).

[87] 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* King's College London – International Policy Institute, East Timor Post Operation Report, http://www.jsmp.minihub.org/Reports/otherresources/Peace4Timor_10_3_03.pdf (last visited June 13, 2011).

accessible dispute resolution mechanism. However, the very recent history, and development, of ROL thinking and practice now appears to have begun to recognize the importance, and utility, of this form of justice mechanism, and particularly so in conflict affected countries.

While they are unlikely to deliver the ROL writ large, customary justice systems certainly have a role to play in restoring the ROL. Judge advocates would be wise to consider whether, and how, such methods should be incorporated into their ROL programs, not forgetting that, by doing so, it is likely to bring its own challenges. For instance, despite the fact that they are often viewed as "local level" issues, the JA ROL practitioner must understand that incorporating customary justice systems in the ROL line of operation will require a "high level" acceptance, not only from the JA's own chain of command, but also from the host nation within which they are working. Questions of how, if at all, customary justice should be integrated into the formal state justice system will need considering. Will any such association, particularly where the state system is viewed with mistrust, in fact undermine the perceived legitimacy of a customary system? Will outside "assistance" from well intentioned ROL practitioners do likewise? How, if at all, should the ROL practitioner attempt to address customary dispute resolution practices that violate human rights norms? One thing is clear, customary justice systems must be approached with a very strong awareness of the social and cultural context in which they operate if ROL programs which engage with them are not to fall foul of the law of unintended consequences. That awareness will take time, and resources – things that JAs will rarely have an abundance of in a deployed environment – and it is for that reason, as well as those mentioned above, that engagement in this area must be properly planned for in the wider ROL mission.

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 largely with 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 goes to the Magistrate's court. While such systems do not offer a panacea to all problems, they are often well supported and trusted by the local population.

D. 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 ROL. 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 its 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.[88]

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.

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."[89]

In an attempt to promote 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 TRCs 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, can re-open, rather than heal, wounds.

E. 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[90] in Iraq. While not a court of

[88] 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/resources-tools/usip-library (last visited July 11, 2011).

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

[90] *See* Coalition Provisional Authority Regulation 8, as amended by Regulation 12. http://www.iraqcoalition.org/regulations/20040114_CPAREG_8_Property_Claims_Commission_and_Appendix__.pdf (last visited June 13, 2011) and http://www.iraqcoalition.org/regulations/20040624_CPAREG_12_Iraq_Property_Claims_Commission_with_Annex_A_and_B.pdf (last visited June 13, 2011).

law *per se*, it can be a powerful tool in rectifying past injustices and can do so in a way that is consistent with ROL values.

VI. The Implications of Gender for Rule of Law Programs

Gender issues can play an important role in the ROL and consequently in ROL operations. First, measures to provide for the protection of basic human rights and fundamental freedoms will likely include some provisions to eliminate discrimination against women. Women and women's issues are often marginalized in societies subject to U.S. ROL programs and, therefore, likely to require some degree of reform in order to bring the host nation law into line with basic international human rights norms, as discussed earlier. Such substantive rights are a matter of considerable cultural sensitivity and are likely to be addressed by senior civilian leaders, leaving little room for JAs to engage in substantive gender discrimination reform.

But there is a second way in which JAs may become directly involved in gender-related issues in the conduct of ROL operations. Importantly, JAs should not overlook the role of women in the establishment of the ROL. Although women's inclusion and equal participation can be a source of *resistance* in some cultures, the participation of women in government and the reconstruction process can also be a tremendous *opportunity*. In many post-conflict societies, the ranks of qualified men will be dramatically limited, either through long-running warfare or by their having had principal roles in a previous, illegitimate regime. Moreover, it is difficult to reverse longstanding discrimination against women and other human rights violations without the participation of many previously disenfranchised segments of society in the establishment and development of a legitimate and capable government, including women.[91] The role of women as key players in sustaining viable peace in many post-conflict societies is well documented. Where the legal and social framework of the country has allowed women the opportunity to participate fully, women have sustained critical sectors such as agriculture, education, and local commerce.[92] Moreover, as household leaders, women are frequently opinion-shapers, and therefore need to be specifically targeted in efforts to establish the legitimacy of the host nation's legal system.

In 2000, Security Council Resolution 1325 put women onto the international agenda for peacemaking, peace-keeping, and peace-building for the first time.[93] It called for attention to be given to two separate concepts: gender balance in negotiation processes for societal reconstruction[94] and gender mainstreaming in the terms of the agreements reached and their implementation. The latter concept—gender mainstreaming[95]—can be particularly useful in the development and implementation of ROL operations.

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[91] *See* Robert Orr, *Governing When Chaos Rules: Enhancing Governance and Participation*, 25 WASH. Q. 139 (2002). According to Winie Byanyima, director of the United Nations Development Program's gender team, "We have overwhelming evidence from almost all the developing regions of the world that [investment in] women make better economics." Anthony Faiola, *Women Rise in Rwanda's Economic Revival*, WASH. POST, May 16, 2008, at A01.

[92] *See* Faiola, *id* (citing examples from Rwanda, Bangladesh, India, and Brazil).

[93] *See, e.g.*, UN Security Council Resolution 1325 (2000). ("*Reaffirming* the important role of women in the prevention and resolution of conflicts and in peace-building, and *stressing* the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution").

[94] Gender balance is the inclusion of both women and men at all stages and in all roles within such processes, for example as members of the parties' negotiating teams, as mediators, as members of contact groups or as "friends of the Secretary-General" assisting in the process, as advisors or consultants, and in any civilian or military implementing body. *See* Christine Chinkin, *Gender, Human Rights, and Peace Agreements*, 18 OHIO ST. J. ON DISP. RESOL. 867 (2003).

[95] Gender mainstreaming is:

In order to permit practical involvement by women in ROL and other development programs, proactive steps may be needed at the outset to compensate for entrenched gender disparities in rights, education, and resources.[96] Activities should aim at leveling the playing field to redress gross inequities.[97]

Increasing Women's Political Participation: Quotas or Capacity-Building

Many post-conflict countries have taken steps to increase women's political participation. In order to redress deficits and disparities that have occurred in Afghanistan because of the previous regime's fundamentalist religious culture, a quota was adopted allowing women to occupy at least 25 percent of lower parliament seats. This resulted from pressure by Afghan women's groups and the international community. The dominant parties in South Africa (ANC), Mozambique (Frelimo), and Namibia (Swapo) established women's quotas on candidate lists. Other regimes have focused on women's ability to run for office and hold office effectively. When the national council in Timor Leste rejected quotas, women's networks sought UN funding to train women to compete effectively in elections. Women now comprise 26 percent of elected constituent assembly members. In Rwanda, where women comprise over 60 percent of the post-genocide population, women captured 49 percent of parliamentary seats in fall 2003 elections. Rwanda now has the largest female parliamentary representation worldwide.[98]

Because so much of discrimination is de facto rather than de jure, effects-oriented metrics are critical to any ROL program intended to enable women to participate in the political process. Legal reform alone may lead to little change in participation by women if the ability to exercise their legal and political rights is limited by societal or cultural obstacles. Activities could encourage, for example: the creation of gender focal points in key ministries; capacity building for women candidates, judges, educators, and other professionals; activities addressing the specific societal or cultural obstacles hindering the full participation and empowerment of women,[99] such as their equal right to own property or to receive an inheritance; programs addressing violence against women by state security

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> "[T]he process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in any area and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programs in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated."

See Christine Chinkin & Florence Butegwa, Gender Mainstreaming in Legal and Constitutional Affairs 12 (2001).

[96] Elaine Zuckerman & Marcia Greenberg, *The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers*, 12 GENDER AND DEVT. 70 (2004), *available at* http://www.informaworld.com/smpp/content~db=all?content=10.1080/13552070412331332330 (last visited June 11, 2011).

[97] The Geneva Center for the Democratic Control of Armed Forces has a series of assessment tools devoted to gender issues in security sector reform, *available at* http://www.dcaf.ch/publications/kms/series_gssr-toolkit.cfm?nav1=5&nav2=6 (last visited June 13, 2011).

[98] *Id*.

[99] *Id*.

forces, as well as by private actors; or media initiatives that highlight women's contributions to society, emphasize human rights, and present role models for women.[100]

Enhancing Economic Development through Female Empowerment: Rwanda

In the 14 years since the genocide, when 800,000 people died during three months of violence, Rwanda has become perhaps the world's leading example of how empowering women can fundamentally transform post-conflict economies and fight the cycle of poverty. Reports indicate that women showed more willingness than men to embrace new farming techniques aimed at improving quality and profit. Moreover, while women make up the majority of borrowers, only one out of five defaulters is a woman. What does this have to do with the ROL? The answer is that these advances would not have happened had reforms not been passed in Rwanda after the genocide enhancing the legal status of women, which, for example, finally enabled women to inherit property. Today, forty-one percent of Rwandan businesses are owned by women.[101]

Focus may also be needed on incorporating or promoting gender initiatives within the security forces. For example, even if a country's legal system prohibits violence against women, the legal system may inadvertently discourage women or girls from reporting such violence. Activities could include gender-sensitive training for law enforcement agencies; special units staffed by women trained to deal with such crimes; increasing the number of female law enforcement officers; providing temporary shelter; or creating victim-friendly counseling and courts.

In societies where the armed forces have a history of engaging in sexual violence against women and children or recruitment of child Soldiers, additional programs should be considered to combat impunity and tolerance for such crimes. Activities to address such issues could focus on promoting changes to the organizational culture within the security forces wherein commanders prevent, identify, halt, and punish sexual and other exploitation; the development of selection guidelines in order to prevent the worst offenders from staying or integrating into the new armed forces; or providing explicit guidelines on what is and what is not permitted behavior.[102] Community reconciliation and trust-building measures could also be carried out to address legacies of fear and to build popular confidence in the security forces.

[100] For links to reports describing other activities taken in various countries and regions of the world to promote women's roles in advancing peace and security, *see* www.peacewomen.org (last visited June 13, 2011).
[101] Faiola, *supra* note 91.
[102] Training for Peace Support Operations (PSO) can provide an entry point to raise issues such as sexual exploitation, using the UN Code of Conduct for Blue Helmets.

Examples - Responsive Policing Initiatives

Law enforcement processes can often be traumatizing for victims, making them reluctant to come forward and report crimes. In an increasing number of reform efforts, special police units are created to assist the victims and witnesses of crime. In **Namibia**, a Women and Child Protection Unit was created within the police force to address the problem of domestic violence. It includes counseling by social workers and the provision of temporary shelter. A more victim-friendly court system was established as the cross-examination process was found to be traumatizing to victims. They are now able to testify behind a one-way mirror so they do not have to see their assailant while testifying.[103] In **Sierra Leone**, female victims had also been reluctant to come forward and seek help from police. The UN Mission in Sierra Leone helped create a Family Support Unit within the police department that included the presence of female police officers. This more compassionate environment for victims to report crimes resulted in 3,000 reports of sexual and physical violence in 2003— 90% of these victims were women and girls.[104] In **Nicaragua**, the GTZ project "Combating Gender-Specific Violence" partnered with a GTZ program that advised the Nicaraguan police on the "Roles and Rights of Women in the Nicaraguan Police." A manual on *Gender specific violence and public safety* was developed in cooperation with the Security Sector Reform Advisory Program for targeted groups within the police and a media recruitment campaign was launched to increase the number of female officers. The project included a four-week regional course on "multipliers-training in security and gender" for women police officers from Central America and the Caribbean. This approach was so well-received it was adopted by the Commission of Central American and Caribbean Police Chiefs to integrate gender equality into their institutional reform efforts in the region.[105]

VII. Civil Society

According to the USAID Glossary on Violent Conflict, civil society is defined as, "the collective entity composed of NGOs, social movements, and professional and voluntary associations that functions independent of the state. Civil society occupies a public space between citizen and government and between economy and state. It creates a network of pressure groups able to resist the holders of state power, if necessary."[106] Civil society organizations (CSOs) include organized NGOs, community-based organizations, 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.

The involvement of civil society in ROL programs is important for wider and more inclusive local involvement in ROL 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

[103] Iivula-Ithana, Peace Needs Women, and Women Need Justice, New York Gender Justice Conference: UNIFEM/ILAC, 2004.
[104] Women as Partners in Peace and Security, "Policing with Compassion: Sierra Leone," *available at* http://www.un.org/womenwatch/osagi/resources/faces/9-Police_fsaces_en.pdf (last visited June 13, 2011).
[105] *See* Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), http://www.gtz.de/en/ (last visited July 29, 2011).
[106] CENTER FOR CONFLICT OPERATIONS, COMPLEX OPERATIONS LEXICON 35 (R. Scott Moore et al. eds., 4th ed. 2011).

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 ROL.

Too often, ROL 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 ROL 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 ROL project—can only come with the kind of broad social involvement that civil society represents.

A. 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 ROL through increasing media coverage and raising public awareness.
- Facilitate the emergence of a broader and more representative civil society.

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

These are some specific strategies that the ROL 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 ROL 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.

Providing Legal Aid in Kirkuk

One of the key challenges to promoting the ROL in Iraq is ensuring public education about and access to the legal system. While developing a plan to improve public access to the legal system, the PRT ROL team in Kirkuk learned of an organization of Iraqi attorneys in the area with similar goals: the Kirkuk Jurist Union (KJU). The KJU, which is an organization of Iraqi lawyers and other legal professionals which operates somewhat like a bar association, had also identified the problem of public education and access to the legal system and was doing what it could (with very few resources) to address the issue, including publishing pamphlets and brochures to increase public awareness.

The PRT attorneys decided to put aside their original project and to work with the KJU to develop a project proposal that would build on the ongoing efforts of the KJU. Working with the US Agency for International Development (USAID) partners, the team developed a program to expand the KJU's publication of pamphlets and brochures, increase its distribution, fund legal assistance lawyers within the KJU offices, and eventually open offices in each of the districts. The project not only provides face-to-face legal consultations, but also funds informational workshops for both laymen and legal professionals to increase their awareness of the legal system. This proposal, at a total cost of less than $150,000, was quickly approved for funding under USAID's Civil Society Conflict Mitigation program.[107] The end result was a project that met the needs of the Iraqi public and was consistent with the goals of both the Government of Iraq and Coalition Forces.

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.

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

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

C. 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

[107] Civil Society Conflict Mitigation funds are a component of USAID's Iraq Rapid Assistance Program. These funds can be used for activities that build stronger bridges between the government and civil society. USAID's Iraq programs are described at http://www.usaid.gov/iraq/ (last visited July 21, 2011).

assessments, potentially useful as a starting place for a set of intelligence requirements to be submitted to the G-2 for additional collection and analysis.[108]

- 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?
  - 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?

[108] Ch. 5 provides detailed guidance on how to conduct the assessment and how to use these questions as measures of effectiveness to monitor progress.

D. Common Challenges and Lessons Learned to Guide Implementation

Support capacity development. Building the capacity of CSOs requires a long-term perspective in program 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 when 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 ROL. 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.

Train the trainers. Experience shows that this form of 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 maximizes 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 ROL.

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 ROL, 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-owned industries. 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 ROL operations. Deployed JAs should be aware of the security risks that CSOs face and be prepared to either provide security or, if the situation is untenable, help to arrange for their exit from the AO.

VIII. 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 and legitimate security functions, unlike traditional police, they do not serve the general public. In attempting to bring them and their actions within the ROL, 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.

A. 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 exceed public law enforcement agencies in many countries, including South Africa, Philippines, Russia, United States, UK, Israel, and Germany. The private security sector is rarely addressed in any systematic way in ROL 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 ROL programming, it may come to represent an essentially parallel and largely unaccountable sector in competition with state justice and security provision. Without effective regulation and oversight, 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

The role of private security contractors (PSCs) in areas of combat operations has received significant public attention, due largely in part to a number of high-profile incidents in Iraq, including the September 2007 incident in Nisour Square, Baghdad involving Blackwater in which 17 Iraqis were killed. Since then, one contractor has pled guilty to manslaughter and five others are being tried for the shootings in federal court. The incident brought several critical issues to the forefront, including the nature of the Iraqi licensing regime; the extent of contractor immunity under Iraqi law; the question of US jurisdiction; the appropriate rules for the use of force for PSCs in a war zone; etc. The incident led to numerous improvements in the oversight and accountability measures implemented by DOS and DOD in Iraq, and the degree of USG communication and cooperation with the Iraqi authorities. As part of the 2008 Security Agreement, the Iraqi government insisted on a provision providing for Iraqi jurisdiction over such cases.

B. 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
- Clarifying the legal status of PSCs, and how it may change depending on factors such as nationality, type of services offered, and clients
- 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. At the same time, it is critical not to view the sector as one undifferentiated mass; there might be great variety among private security providers. Several factors—including nationality, mission, and for whom they are working—can affect the legal status of any particular provider.

- 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 many works on behalf of host government entities, foreign governments or militaries, foreign-funded reconstruction entities, international organizations, purely commercial companies, etc.?
    - 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—both domestic and foreign—are in place to govern the private security sector and the use of firearms by civilian corporate entities?
    - How do those laws and regulations apply differently depending on the nature of a given security provider?
    - 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?
    - Where foreign militaries or governments procure private security providers, what oversight and accountability measures have they put in place? How do these entities communicate and

cooperate with the host government? How effective is the host government's ability to regulate PSCs employed by foreign forces?

- 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?

C. 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. Especially in areas of active combat, however, it must be recognized that there are substantial challenges to designing and enforcing effective and fair accountability measures. For example, security concerns may prevent the return of investigators to the scene of a firefight.

3. Clarify the roles and functions of private security providers and their clients

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. Also, especially where PSCs are working on behalf of a foreign government or military, that entity should have adequate oversight and accountability controls to control such PSCs, and to ensure proper communication and cooperation with the host government.

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 in other countries

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. Be cautious of 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 ROL in the host nation, often at a time when establishing and enforcing it is essential to the provision of security. If such immunity is granted, it is important to ensure effective alternative accountability measures.

7. Prescribe basic PSC training

Regulatory authorities should establish and oversee training for private security providers that, in addition to ensuring proper training on use of force law and policies, 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.[109]

9. Address the links to DDR

Disarmament, demobilization and reintegration (DDR) programs may 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. They do so by 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. At the same time, encourage the host government and civil society to educate the public about the role and authorities of PSCs to align expectations and reduce miscommunications.

[109] For information on vetting public employees *see supra* note 23.

CHAPTER 5
PLANNING FOR RULE OF LAW OPERATIONS

Planning for ROL operations must be thoughtful, systematic and continuous. It must also take account of the fact that ROL operations are likely to be but one line of effort (LOE) within the context of the overall mission. Because planning is a continuous and iterative process, whether a JA is taking over an existing rule of law operation or creating one *de novo*, he will need to understand how to advance that operation through the same planning process as the unit's other lines of operation, and to compete with those operations for scarce resources. As one ROL practitioner in Iraq explained, "The military decision making process (MDMP) detailed in FM 5-0 applies as much to a ROL advisor as to any staff officer."[1]

This chapter begins with an overview the State Department's framework for reconstruction and stability operations and the implementation of that framework in Army doctrine. This starting point enables ROL planners to understand how their efforts must integrate within the wider context of COIN and stability operations. Section II provides a summary of the Military Decision Making Process (MDMP), which is used in developing a ROL LOE, together with ROL specific considerations. Section III considers pre deployment planning considerations for a ROL Team. The chapter concludes, in Section IV, with a discussion of baseline assessments and the use of metrics to gauge progress in ROL development.

I. Interagency Reconstruction and Stabilization Planning Framework

A. Introduction

In an attempt to synchronize reconstruction efforts involving multiple agencies, National Security Presidential Directive 44 (NSPD-44), gave the Secretary of State the responsibility to coordinate and lead U.S. government reconstruction and stabilization (R&S) activities.[2] The military is not the lead agency in formulating reconstruction policy. However, it retains considerable responsibility for engaging in R&S activities (particularly in non-permissive or semi-permissive environments).[3] In order to enhance stability operations planning, coordination, and implementation efforts, the DOD has delineated (in DODI 3000.05) key reconstruction and stabilization (R&S) responsibilities[4] and directs that "military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so."[5] These framework documents demonstrate the comprehensive nature of R&S efforts, as well as help ROL planners identify interagency partners who may possess the capabilities to best accomplish specific R&S tasks. This section will describe the State Department's

[1] *See also generally* NORMAN M. WADE, THE BATTLE STAFF SMARTBOOK (2d rev. ed. 2005), a practical guide for staff planning.
[2] National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstruction and Stabilization, Dec. 7, 2005 [hereinafter NSPD-44], *available at* http://www.fas.org/irp/offdocs/nspd/nspd-44.html (last visited 13 June 2011).
[3] U.S. ARMY FM 3-07: STABILITY OPERATIONS (Oct. 6, 2008) [hereinafter FM 3-07] (discussing these five Army primary stability tasks).
[4] U.S. DEP'T OF DEFENSE, INSTR. 3000.05, STABILITY OPERATIONS, 2 (Sep. 16, 2009) [hereinafter DODI 3000.05].
[5] *Id*, para. 4.3. Note that this may quickly lead to circumstances in which commanders expect tactical-level JAs to provide briefings on host nation commercial, banking, or private property ownership laws. Prior to deployment, great effort is needed to gather all available translations of local laws and regulations to facilitate this analysis as required.

approach to R&S, discuss the military's own set of primary stability tasks (that map the State Department's approach), and offer broad lines of effort for each primary stability task.[6]

B. The State Department's Five-Sector Framework for Reconstruction and Stabilization

The Office of the Coordinator for Reconstruction and Stabilization (S/CRS) published the Post-Conflict Reconstruction Essential Tasks Matrix in order to provide R&S personnel a common framework to assess, plan, and synchronize efforts among all participating organizations.[7] The S/CRS framework is a comprehensive task list built on five broad "stability sectors". Each stability sector reflects a specific societal function. A country that displays some degree of success in all five stability sectors will generally be stable. Conversely, a country that displays some degree of instability in one or more of these sectors is apt to suffer some degree (great or small) of instability.

The S/CRS framework uses a three-phased approach to R&S efforts in each stability sector:

- Initial response (immediate actions of reconstruction and stabilization personnel)
- Transformation (short term development)
- Fostering sustainability (long term development).

The three-phase approach is not necessarily sequential. Situations may warrant the implementation of certain tasks drawn from a later phase. For example, R&S personnel may plan and coordinate monetary policy programs in the early stages of the stabilization effort, even before the country enters the post-conflict phase. Rule of law planners should always consider the fluidity of the conditions on the ground, and plan their tasks to account for it.

The five stability sectors defined by the S/CRS framework are as follows:

- Security
- Justice and Reconciliation
- Humanitarian Assistance and Social Well-Being
- Governance and Participation
- Economic Stabilization and Infrastructure.

These five sectors are not independent of each other. Rather, they work in concert to promote and maintain stability. Planners should ensure, therefore, that R&S plans account for the effect each LOE will have on one or more stability sectors.

Sources of instability can affect more than one stability sector. For example, illicit drug trafficking threatens individual and community security, poses significant challenges to the law enforcement community, and generates income that not only de-stabilizes the legitimate economy of the country but is also used to fund malign actors. Sources of instability will often be found outside the borders of the host nation. For example, terrorist networks often recruit, train, seek funding, and plan in multiple countries.

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[6] This discussion contains only a brief overview of these frameworks. It is not intended to be a substitute for a full reading of all the documents referenced in this section.

[7] The Post Conflict Reconstruction Essential Tasks Matrix can be found at: http://www.state.gov/documents/organization/161791.pdf (last visited 13 June 2011). Though this framework is entitled an "Essential Task Matrix," its title should not be construed to mean that planners must complete every task on the matrix in order to achieve stability. Every situation is different, requiring effective mission analysis and course of action development. Readers should use the S/CRS Essential Task List as a baseline framework. For purposes of this *Handbook*, the product will be hereinafter referred to as the "S/CRS framework."

It is important, therefore, to understand the meaning and application of each stability sector as well as the linkages between sectors. Planners must understand the effect of a source of instability on each stability sector, as well as on stability in general. Doing so will enable them to better comprehend the importance of related tasks, impacts on mission success, and the consequences of failing to complete the task.

1. Security

Security is the foundation for broader success across the other stability sectors. In less than permissive environments, security must be established before other U.S. government partners can engage in reconstruction and stabilization efforts. Efforts within the security sector focus on establishing a stable security environment and developing legitimate institutions and infrastructure to maintain that environment.

2. Justice and Reconciliation

This sector centers on justice reform and the ROL, supported by efforts to rebuild the host nation courts systems, prosecutorial and public defense arms, police forces, investigative services, and penal systems. It also includes helping the host nation select and enforce an appropriate body of laws that protects the integrity of host nation governance institutions.

Initially, reconstruction and stabilization personnel develop mechanisms for addressing past and ongoing grievances that give rise to civil unrest. Once a rudimentary system takes hold, personnel initiate efforts to build of a more robust legal system and a process for reconciliation. As the legal system takes root, reconstruction and stabilization personnel will work to ensure the host nation operates the legal system in a manner that the population accepts as legitimate.

3. Humanitarian Assistance and Social Well-being

This sector focuses on basic needs such as food distribution, housing refugees and displaced persons, and providing sanitation. Such relief contributes to establishing security, and the perception of the host nation government's legitimacy by providing for the welfare of its citizens. Long term social well-being development in programs such as education and public health ensure the host nation government can develop its citizens' abilities to provide for their own welfare, which further sustains stability and minimizes the potential drivers of conflict.

Initially, reconstruction and stabilization personnel work to provide emergency humanitarian needs. As immediate issues subside, the personnel establish a program to develop the host nation government's capability to meet these needs over the long term with little or no outside assistance. Once the host nation demonstrates its ability to provide basic services, reconstruction and stabilization personnel institutionalize the long-term development program so it functions with little or no outside assistance.

4. Governance and Participation

Governance is the state's ability to serve the citizens, to include the processes by which interests are articulated, resources managed, and powers exercised. Participation includes methods that actively involve the local populace in forming their government. This, in turn, encourages public debate and the exchange of new ideas. Both governance and participation require effective, legitimate political and administrative institutions.

Initially, reconstruction and stabilization personnel assist the host nation in determining the most effective governance structure and establishing the foundations for citizen participation. Once the

basic structure and foundation find support among the key elements of the host nation government, reconstruction and stabilization personnel work to promote legitimate political institutions and processes. After the political institutions and processes take root, reconstruction and stabilization personnel foster them so they can operate with little or no outside assistance.

5. Economic Stabilization and Infrastructure

Economic stabilization and infrastructure involves the state's programs and facilities (including roads, railways, and ports) which generate revenue. Economic growth has often received little attention from donors working on post-conflict problems. This is in part due to the tendency to focus first on security, humanitarian assistance, and other short-term needs. It is also due to the fact that economic growth and stability is complicated, involving the intersection of the public and private sectors over an extended period of time. Therefore, planning, coordinating, and implementing economic growth programs across the interagency community poses great challenges, requiring both short and long term planning, patience, and strong coordination among the interagency partners.

In this sector, personnel work toward long term development to enable local and provincial government to benefit from national-level programs affecting trade, monetary and banking policy, and various other economic areas with little or no outside assistance.

C. Military Primary Stability Tasks[8]

Although Civil Affairs (CA) has the lead for ROL in doctrine, SJAs preparing for an upcoming deployment should anticipate that commanders and staffs will expect the OSJA (hopefully in conjunction with CA and MP representatives) to take on operational responsibilities for ROL activities. Understanding where those activities sit within the military's primary stability tasks is an important foundation in building a robust and defensible ROL program. The military's five primary stability tasks closely mirror the S/CRS stability sectors:

- Establish civil security
- Establish civil control
- Restore essential services
- Support to governance
- Support to economic infrastructure and development

As is the case with the S/CRS stability sectors, the stability tasks are intertwined. The combination of tasks conducted during a stability operation will depend on the situation. Planners may, however, use the primary stability tasks as a basic framework for their lines of effort. Keep in mind that a source of instability may impact more than one LOE.

1. Establish Civil Security

Civil security is most closely tied to the S/CRS "security" sector. Civil security involves protecting the populace from external and internal threats. Ideally, Army forces defeat external threats posed by enemy forces that can attack population centers. Simultaneously, they assist host nation police and security elements as the host nation maintains internal security against terrorists, criminals, and small, hostile groups. In some situations, no adequate host nation capability for civil security exists. Then, Army forces provide most civil security while developing host nation capabilities. For the other stability tasks to be effective, civil security is required. As soon the host nation security forces can safely perform this task, Army forces transition civil security responsibilities to them.

[8] *See* U.S. ARMY FM 3-0: OPERATIONS [WITH CHANGE 1] (Feb. 22, 2011), para. 3-65 [hereinafter FM 3-0].

Civil security lines of effort include, among other things:

- Establishing public order and safety
- Protecting indigenous individuals, institutions, and infrastructure
- Protecting reconstruction and stabilization personnel.

2. Establish Civil Control

Effective civil control reduces risk to the public and corruption by the host nation officials responsible for providing civil security and civil control. Military forces, in close coordination with State and Justice Departments personnel, plan and implement programs that build the capabilities of host nation executive, legislative, judicial, law enforcement, and penal systems.

Civil control lines of effort include, where appropriate:

- Constituting an interim criminal justice system
- Building or sustaining an effective police force
- Training or sustaining judicial personnel and infrastructure
- Preventing property conflicts
- Reforming the legal system
- Preventing human rights abuses
- Building or sustaining adequate corrections systems
- Establishing legitimate war crimes tribunals
- Establishing community rebuilding programs.

3. Restore Essential Services

Restoring essential services involves establishing basic services until a civil authority or the host nation can provide them. Normally, military forces support USG and host nation agencies. Essential services include, where appropriate:

- Assistance to refugees
- Food security; shelter and non-food relief
- Humanitarian demining
- Public health, including potable water, medical care, and sanitation
- Education
- Social protection.

4. Support to Governance

Military support to governance includes:

- Developing host-nation control of public activities, the rule of law, and civil administration
- Maintaining security and essential services through host-nation agencies (including training and equipping host-nation security forces and police)
- Supporting host-nation efforts to normalize the succession of power (elections and appointment of officials). In addition to working with the host government, military personnel liaise with local leaders and business owners, encourage peaceful resolution of disputes among rival factions, and build or restore critical infrastructure.

Governance lines of effort include, where appropriate:

- National constituting processes

- Transitional governance
- Executive authority
- Legislative strengthening
- Local governance
- Transparency and anti-corruption
- Elections
- Political parties
- Civil society and media
- Public information and communications.

5. Support to Economic and Infrastructure Development

Economic and infrastructure development involves both the ability of the host nation to sustain its economic viability and the individual citizen's ability to obtain basic needs. Military forces can significantly improve the economic viability of a local population, either by injecting money directly into the economy through construction and service contracts, or by improving the infrastructure that supports the economic base. This development can be done in conjunction with obtaining local business support for other civil society focused ROL initiatives.

Given the complex nature of the economic stabilization and infrastructure sector, military forces should ensure their stability task plans are properly synchronized into overarching economic and infrastructure development plans at the strategic and operational levels.

Economic and infrastructure development lines of effort include, where appropriate:

- Transportation infrastructure (such as roads, railways, airports, ports, and waterways)
- Telecommunications
- Energy development, mines, energy production and distribution infrastructure
- Public services.

D. The Interagency Planning Framework: Concluding Thoughts

Reconstruction and stabilization efforts involve complex problems and even more complex solutions. No two situations will look the same, even within the same country or region. The framework offered by FM 3-0 (which nests within the S/CRS framework) presents a conceptual approach that serves as a starting point for planning, coordination, and implementation. Situations on the ground can and will require ROL planners to produce a plan that best suits those conditions by using one of the military planning methods.

II. Military Planning

A. Why Planning is Critical

Due to the complex and uncertain nature of COIN and stability operations, planners often encounter disagreement on what objectives should be pursued, their priority, and perhaps even on what the end state should look like. Without a plan, the chances of producing effects that endure beyond a unit's redeployment are extraordinarily low.

In any mission, there will be numerous lines of effort (LOEs), in addition to ROL, that compete for military support and resources. Utilizing a military planning process allows the JA to prioritize and to integrate ROL LOEs into the commander's overarching set of concerns. It will also prevent ROL

operations from becoming "something the JAGs do." The effective JA will inform this process with a thorough knowledge of the ROL's impact on COIN and stability operations. This will ensure, in turn, that the commander's ROL vision is properly informed; that effort and resources are devoted to programs necessary to stability and COIN success; and that efforts are coordinated with coalition forces and host nation and interagency partners.

Coordination in OIF-1

During OIF-1, the legal reconstruction effort in southern Iraq was disjointed, as the JAs 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 JAs 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.[9]

B. What is Planning?

Planning translates the commander's vision into a specific course of action that will create a desired end state.[10] The outcome is a plan or an order that provides all the information subordinates need for execution.

Army planning doctrine (found in FM 5-0 *The Operations Process* and outlined in figure 6-1, below) may leave the JA with the impression that planning is always conducted during set times around a conference table with other members of the staff fully engaged. This ideal is seldom achieved. The sub-optimal reality is that in many cases the JA tasked with ROL planning drafts the plan with only *ad hoc* interactions with other members of the staff, with updates to the commander (and guidance from him or her) coming during staff meetings. It must also be remembered that planning does not end when the plan is produced. Planning (in the form of adaptations to the plan) will continue for the duration of the deployment as the JA observes the effects of his or her actions, and of other developments in the ROL environment.

When planning ROL LOEs, the planner should attempt to plan in conjunction with (if not in the company of) the ROL counterparts in their superior and subordinate units. For example, division level ROL planners should invite the BCT JAs to join them during pre-deployment planning.[11] At every level, JAs should be prepared for a consuming planning effort. Understanding planning procedures will not only allow the JA's efforts to integrate with those of the staff, but more importantly, it will help to ensure the JA's plan is feasible, properly resourced, acceptable to the command, and be capable of producing results. Notwithstanding its formulaic process, planning is an art. That art cannot be learned from FM 3-0 and FM 5-0 alone. As such, JAs should be ready to turn to the Operations section or (if the unit has one) the Planning section for assistance if it is needed.

[9] CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOL. II, FULL SPECTRUM OPERATIONS 254 (2006) [hereinafter OEF/OIF LL, Vol II].

[10] FM 3-0, *supra* note 8, para. 5-30

[11] 25th Infantry Div., Staff Judge Advocate Iraq After Action Report, Multi-National Division – North, Contingency Operating Base Speicher, Iraq, November 2008 – November 2009, (11 March 2010) [hereinafter 25ID IZ AAR, NOV 08 – NOV 09; on file with CLAMO].

Division Level Staff Interaction

While staff interaction is critical to success, it can also become extremely time-consuming. During the course of one deployment, ROL attorneys participated in at least eight weekly staff meetings, including the Joint Assessments Working Group, the Future Plans Joint Planning Group, the Joint Effects Working Group, the Joint Effects Synchronization Meeting, the R&D [reconstruction and development] Coordination Meeting, and the Joint Effects Coordination Board. Many of the meetings overlapped in substance. Most often, ROL was a small, or nonexistent item on the agenda. Nevertheless, it was important to attend these meetings to ensure that ROL issues were being properly defined and discussed. For example, on a few occasions, other staff members had placed ROL bullets into briefing slides that had not been seen or discussed. On other occasions, staff members expressed confusion as to what ROL is or does. Many staff members incorrectly defined ROL as anything involving a lawyer. Find a balance where you attend some internal staff meetings, inter-agency ROL meetings, and coordinating with the subordinate task forces on ROL initiatives. Do not allow internal staff planning to take up all your time or it will.[12]

C. The Military Decision Making Process

The *military decision making process* is an iterative planning methodology that integrates the activities of the commander, staff, subordinate headquarters, and other partners to:

- Understand the situation and mission
- Develop and compare courses of action;
- Decide on a course of action that best accomplishes the mission
- produce an operation plan or order for execution.

The Marine Corps Planning Process (MCPP), described in MCWP 5-1, *Marine Corps Planning Process* and the Joint Operation Planning Process (JOPPS), described in JP 5-0, *Joint Operation Planning*, are analogous to the Army's Military Decision Making Process (MDMP) which is described in FM 5-0, *The Operations Process*.[13] Because these processes are functionally identical, the below discussion will serve JAs planning under any of these systems.

It is important to note that the MDMP assumes full staff involvement. It will be impossible for the JA to carry out the MDMP in isolation. Thus, it is critical that the JA planning ROL operations form good working relationships with the other cells in the commander's staff.

An overview of the 7 step MDMP is set out in Figure 6.1.

[12] 82d Airborne Div., Office of the Staff Judge Advocate Afghanistan After Action Report, Regional Command – East, Bagram Airfield, Afghanistan, February 2007 – April 2008 [hereinafter 82d ABN AF AAR, FEB 07-APR 08].

[13] A training program in the Military Decision Making Process is available to Army Judge Advocates online through JAG University. Go to https://jag.ellc.learn.army.mil/ (last visited 1 August 2011) and enroll in the "JATSOC Elective." MDMP is the sixth module in the course.

Key Inputs	Step	Key Outputs
• Higher headquarters' plan or order or a new mission anticipated by the commander	Step 1: **Receipt of Mission**	• Commander's initial guidance • Initial allocation of time
• Higher headquarters' plan or order • Higher headquarters' knowledge and intelligence products • Knowledge products from other organizations • Design concept (if developed)	Step 2: **Mission Analysis**	• Mission statement • Initial commander's intent • Initial planning guidance • Initial CCIRs and EEFIs • Updated IPB and ruining estimates • Assumptions
• Mission statement • Initial commander's intent, planning guidance, CCIRs, and EEFIs • Updated IPB and running estimates • Updated assumptions	Step 3: **Course of Action (COA) Development**	• COA statements and sketches • Tentative task organization • Broad concept of operations • Revised planning guidance • Updated assumptions
• Updated running estimates • Revised planning guidance • COA statements and sketches • Updated assumptions	Step 4: **COA Analysis (War Game)**	• Refined COAs • Potential decision points • War-game results • Initial assessment measures • Updated assumptions
• Updated running estimates • Refined COA • Evaluation criteria • War-game results • Updated assumptions	Step 5: **COA Comparison**	• Evaluated COAs • Recommended COAs • Updated running estimates • Updated assumptions
• Updated running estimates • Evaluated COAs • Recommended COA • Updated assumptions	Step 6: **COA Approval**	• Commander-selected COA and any modifications • Refined commander's intent, CCIRs, and EEFIs • Updated assumptions
• Commander-selected COA and any modifications • Refined commander's intent, CCIRs, and EEFIs • Updated assumptions	Warning Order Step 7: **Orders Production**	• Approved operation plan or order

CCIR	commander's critical information requirement	EEFI	essential element of friendly information
COA	course of action	IPB	intelligence preparation of the battlefield

Fig 6-1. The 7 step military decisison making process

- **Step 1: Receipt of Mission**

The popular maxim "begin with the end in mind" should guide all ROL planning. The "end", in this context, is the commander's objective (discussed later). The "end *state*" is a set of required conditions that defines the achievement of the commander's objective. All actions taken under the plan must be focused on the end state.

In accordance with FM 3-07, the ultimate ROL end state, writ large, is a situation where:

> all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publically promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.[14]

However, this utopian end state will, most likely, need to be adapted for any given mission to meet the situation specific requirements that will meet the commander's objective. For example, in a COIN environment, host-nation forces and their partners operate to defeat armed resistance, and establish or reestablish the host-nation government's legitimacy.[15] The perceived legitimacy of the host-nation government is pivotal to success in COIN. In stability operations the goal is a civil order sustainable by host nation assets without support from foreign military forces.[16] In each circumstance, the desired ROL end state will need to be finessed to accurately reflect the specific objective.

Under ideal circumstances, any given ROL Line of Operation (LOO) will be accompanied by a vision of the requisite end state,[17] any specific objectives, and how those objectives nest with higher headquarters objectives. In many situations (as happened in Iraq and Afghanistan) the complexity of the issue will prevent this. Individuals as low as battalion level may be left to define the criteria of their local ROL end state. The ROL planner must be proactive about proceeding with his or her planning effort despite the absence of clear direction. Planning is continuous, so if the requested information or guidance does arrive later, the JA can adapt the plan to integrate the new guidance at that time.

Rule of Law planners at higher echelons are responsible for ensuring lower echelons are provided clear ROL objectives. In formulating these objectives, the ROL planner may feel pressured by the military commander's desire for immediate and tangible success. In ROL programs, however, "success" may require generational change and, given the long-term, inherently developmental, nature of ROL objectives, the ROL JA will often need to articulate the ineffectiveness of short-term objectives. A collateral consideration is that for ROL operations to have a lasting effect, they must be designed to survive the end-of-deployment relief in place (RIP).[18] Long term objectives generally focus on creating or enhancing governance capability rather than, for instance, providing items like computers and furniture.[19]

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[14] FM 3-07, *supra* note 3, para. 1-40.
[15] *Id.* at para 2-55. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (Dec. 15, 2006) [hereinafter FM 3-24].
[16] FM 3-0, *supra* note 8, para 3-73.
[17] JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATIONS PLANNING III-27 (26 Dec. 2006) [hereinafter JP 5-0].
[18] 82d Airborne Div., Staff Judge Advocate Afghanistan After Action Report, Regional Command – East, Bagram Airfield, Afghanistan, June 2009 – June 2010, (23 Jun 2010) [hereinafter 82d ABN AF AAR, JUN 09 - JUN 10; on file with CLAMO].
[19] 1st Armored Div., Office of the Staff Judge Advocate Iraq After Action Report, Multi-National Division – North, Contingency Operating Base Speicher, Iraq, September 2007 – December 2008, (19 February 2009) [hereinafter 1AD IZ AAR, SEP 07 – DEC 08; on file with CLAMO].

A concise tool that may be of help in developing specific ROL objectives is to select mission specific criteria from the World Justice Project's Rule of Law Index.

The World Justice Project Rule of Law Index[20]

Limited Government Powers	Absence of Corruption	Order and Security	Fundamental Rights Guaranteed	Open Government
• Government powers are defined in the fundamental law • Government powers are effectively limited by the legislature • Government powers are effectively limited by the judiciary • Government powers are effectively limited by independent auditing and review • Government officials are sanctioned for misconduct • Government powers are effectively limited by non-governmental checks • Transfers of power occur in accordance with the law	• Government officials in the executive branch do not use public office for private gain • Government officials in the judicial branch do not use public office for private gain • Government officials in the police and military do not use public office for private gain • Government officials in the legislature do not use public office for private gain	• Crime is effectively controlled • Civil conflict is effectively limited • People do not resort to violence to redress personal grievances	• Equal treatment and absence of discrimination • The right to life and security of the person • Due process of law and rights of the accused • Freedom of opinion and expression • Freedom of belief and religion • The right to privacy • Freedom of assembly and association • Fundamental labor rights	• The laws are comprehensible to the public • The laws are publicized and widely accessible • The laws are stable • The right of petition and public participation is effectively guaranteed • Official drafts of laws are available to the public • Official information is available to the public

Effective Regulatory Enforcement	Access to Civil Justice	Effective Criminal Justice	Informal Justice
• Government regulations are effectively enforced • Government regulations are applied and enforced without improper influence • Due process is respected in administrative proceedings • The Government does not expropriate without adequate compensation	• People are aware of available remedies • People can access and afford legal advice and representation • People can access and afford civil courts • Civil justice is free of discrimination • Civil justice is free of corruption • Civil justice is free of improper government influence • Civil justice is not subject to unreasonable delays • Civil justice is effectively enforced • ADR systems are accessible, impartial, and effective	• Crimes are effectively investigated • Crimes are effectively and timely adjudicated • The correctional system is effective in reducing criminal behavior • The criminal justice system is impartial • The criminal justice system is free of corruption • The criminal justice system is free of improper government influence • The criminal justice system accords the accused due process of law	• Informal justice is timely and effective • Informal justice is impartial and free of improper influence • Informal justice respects and protects fundamental rights

[20] *The World Justice Project Rule of Law Index 2011*, (The World Justice Project, Washington, D.C.), 2011, at 11.

Notwithstanding that ROL problems invariably require long term solutions, time is rarely a luxury that MDMP planners have an abundance of. The more that ROL planning is delayed, the longer it will take for improvements to commence, and the more costly, in terms of dollars, resources and lives, will be the bill. Therefore, when developing ROL objectives, and the requisite information is not immediately available, the JA's default response must be to press on while remaining prepared to adapt and integrate new information as it becomes available.

The mission is unlikely to have ROL as its sole focus. Instead, ROL is likely to be one of a number of lines of operation (LOOs). Within the ROL LOO, certain essential ROL elements will emerge that, in combination, deliver the ROL end state. They may include: providing security in ways that reinforce legitimacy, protect human rights and afford due process, thereby building the government's moral authority; addressing perceived bias (for example between different ethnicities and tribes) strengthens legitimacy and (when it is not just perception but actuality) serves to guarantee rights; or improving the efficiency of, and access to, the justice sector has a direct and positive impact on citizens' lives. These elements are rarely sequential in nature. Breaking the ROL LOO down into separate lines of effort (LOEs) will assist in synchronizing priorities and ensuring that all actions are oriented on the end state.

A ROL LOO might be broken down into, for example, five LOEs:

- Resources & References
- Human Capacity & Training
- Proper Development and Use of the Law (to ensure that after officials are trained for their job, they are actually performing it)
- Infrastructure (note the need to ensure any projected buildings are desired and needed, and will be maintained)
- Connecting Government to the People (which should NOT commence until the government is relatively competent and—more importantly—unlikely to victimize the population through corruption).[21]

Step 1 will also, typically, encompass conducting a baseline assessment of the current situation. That, particularly involved, process is discussed in Section IV of this chapter.

- **Step 2: Mission Analysis**

Mission analysis contrasts the understanding of the situation gained following mission receipt with the desired end state or objectives. Of course, if no end state was received, the JA will have formulated his own (perhaps using the above index). While resisting pressure to focus on short-term, temporary gains, he will then need to gain buy-in from other staff sections, and approval from the commander, for the end state he has produced.

In this stage, objectives will be defined, with more refinement to come in the future as events unfold. The goal is to understand the problem in the context of the situation, and identify *what* tasks the command must undertake to achieve the end state, and *when* and *where* it must be done. Results must be self-sustaining so that the situation does not deteriorate upon the withdrawal of coalition forces. The focus must be on root cause impediments to the desired end state or the achievement will not have any lasting value. Absent a careful analysis of root causes, commanders and staff are likely to default to strictly institutional projects such as building courthouses or training judges, which may not have any impact on enhancing the ROL. Because building ROL depends on understanding the root

[21] 1st Combat Support Brigade (Maneuver Enhancement), Task Force Warrior, Brigade Judge Advocate Afghanistan After Action Report, Bagram Airfield, Afghanistan, June 2008 – September 2009 After Action Report, (20 October 2009).) [hereinafter 1st CSB (ME) AF AAR, JUN 08 – SEP 09; on file with CLAMO].

causes of its absence, the success of mission analysis is dependent in large part on the quality of the initial assessment (see Section IV of this chapter, below).

The security environment may limit the ability of civilian agencies to operate. Thus, while others may have the lead, military forces must be prepared to carry out all aspects of stability operations.[22] Military planners should also understand the institutional perspectives of our interagency and international partners. Sometimes agencies are limited in authority, or by fiscal constraints, and so adopt a correspondingly limited outlook on what the host nation's ROL system includes. Understanding whether the military will be supporting or leading the ROL line of operation guides development of LOEs.

Lines of effort lay out visually how individual actions relate to each other to achieve the end state. Because all action must be oriented on the end state, and any action that does not directly or indirectly further the end state is waste, the LOE should focus on a clearly defined end state. As mentioned above, the end state can be understood as the minimum set of criteria that, if accomplished, would complete the ROL mission, or shift it from 'build' to 'sustain' while the other COIN lines of effort are achieved. The criteria may contain both quantitative as well as qualitative elements (see "metrics" below for descriptions of qualitative and quantitative criteria). Quantitative metrics (e.g. failed prosecutions) are the easiest to work with, but without a qualitative component, the numbers may lack context (failure due to corruption or failure due to lack of admissible evidence).[23]

All of the criteria should build toward the objectives of higher headquarters—up to two echelons above the planner, by doctrine—if those higher headquarters have provided objectives. The ideal[24] is unified action, which is the integration of the activities of governmental and nongovernmental entities. In this regard, when the battle space is shared with multinational forces and civilian organizations, LOEs are additionally valuable in clarifying intent to build unity of effort.[25]

A critical component of the mission analysis is understanding the purpose of the mission. The JA, in particular, must understand and articulate to the staff and commander the purpose of the ROL LOO within the context of the overall mission. In COIN, host-nation forces and their partners operate to defeat armed resistance, reduce passive opposition, and establish or reestablish the host-nation government's legitimacy.[26] Legitimacy of the host-nation government and its legal system is pivotal to overall success. Similarly, in stability operations the goal is a stable civil situation sustainable by host nation assets without foreign military forces.[27] The objectives of the Justice and Reconciliation Sector of Stability Operations are to establish public order and safety and provide for social reconciliation. The host nation aims to establish self-sustaining public law and order that operates according to internationally recognized standards and respects human rights and freedoms.[28]

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[22] *See* ch. 2 of this *Handbook*.
[23] 2d Brigade Combat Team, 1st Cavalry Division, Brigade Judge Advocate Iraq After Action Report, Forward Operating Base Warrior, Kirkuk, Iraq, January 2009 – December 2009, (4 & 9 February 2010) [hereinafter 2-1 CAV IZ AAR, JAN 09 – DEC 09; on file with CLAMO].
[24] FM 3-0, *supra* note 8, para 1-45.
[25] *Id.* at para. 6-66.
[26] *Id.* at para 2-55; *See also* FM 3-24, *supra* note 15.
[27] FM 3-0, *supra* note 8, para. 3-73.
[28] FM 3-0, *supra* note 8, para. 3-91.

The Role of ROL in COIN

Judge Advocates involved in ROL initiatives must understand ROL's importance in the larger strategic context in order to function effectively as part of the staff. If the government is not able to develop a legitimate and effective justice system, the insurgents may seek, for example, to develop a *de facto* system of justice. Once this is in place, it will be used to usurp governmental authority and intimidate or to execute locals who support the government. Although many successful or enduring insurgencies from Algeria to Nepal have utilized these tactics to varying degrees, many planners do not immediately recognize the connection of ROL programs to the ultimate objective of defeating an insurgency. Establishing an effective justice system provides a forum for the legitimate processing of captured insurgents, while also denying "key terrain" to the insurgents.[29]

A successful COIN strategy may include the following ROL attributes:

- Insurgents punished in host nation courts[30]
- Public perceives insurgents as criminals[31]
- Public not motivated by revenge and resentment[32]
- Former insurgents rehabilitated and not part of the fight[33]
- Host nation government seen as legitimate[34]

As the foregoing list suggests, military ROL practitioners are likely to be concerned primarily with the criminal justice component of the ROL environment. However, as the five LOEs set out above indicate, there is much more to the ROL environment than police, courts, and prisons. Because a goal of stability operations is to establish self-sustaining public law and order, the ROL practitioner should not overlook programs that will develop the ROL culture and support an indigenous, self-sustaining demand for the ROL. Such programs may include support to civil society groups (that inform the public about legal rights), to bar associations, to groups that monitor the court system for accountability, and to groups that represent those who are poorly served by the extant legal system. The JA should advocate for such programs as part of the mission analysis. The tendency of the commander and staff may be to put such programs off until later phases of the operation. However, when the goal is self-sustaining public law and order, long term success may well be found in supporting efforts that create an indigenous demand for, and popular investment in, the ROL rather than merely developing the institutions and capacity to supply the ROL.

[29] *See* David Galula, COUNTERINSURGENCY WARFARE: THEORY & PRACTICE (Preager 1964), at 78-79 (noting that popular support is conditional and that this support can only be obtained after effective "military and police operations against the guerrilla units" has been achieved). *See also* John A. Nagl, LEARNING TO EAT SOUP WITH A KNIFE xiv-xvi (Chicago ed. 2005).
[30] FM 3-24, *supra* note 15, para. D-15.
[31] FM 3-24, *supra* note 15, para. 1-13, D-15.
[32] FM 3-24, *supra* note 15, para. 1-128.
[33] FM 3-24, *supra* note 15, Table 1-1.
[34] FM 3-24, *supra* note 15, para. 1-123.

Example: Rule of Law Mission Analysis

Your division commander has received the mission to improve the ROL in his AO. Intelligence resources and your communication with the host nation and interagency ROL partners in the region all indicate that the popular perception is that the police and courts are sectarian in their administration of justice. This popular perception is fueled by insurgent leaders and insurgent propaganda. Currently, most of the population does not trust the criminal justice system, views judges and police as controlled by sectarian influences, and seeks protection and justice through militias of their own sect.

The center of gravity that must be defeated is the popular perception that the judges and police are corrupt because they are motivated by sectarian influences instead of following the law. A Commander's Critical Information Requirement (CCIR) will be developed to determine whether there is a factual basis for the popular perception. If there is no factual basis, then the commander and ROL team are faced with a public information challenge. If there is a factual basis for the popular perception, then the problem is more challenging.

The staff and commander decide to assess their progress with measures of effectiveness that will include the number of crimes reported to the police by the minority sect, and measures of effectiveness including periodic interviews with community and tribal leaders concerning the legitimacy of the police and courts, and periodic informal surveys of opinion leaders in the community.

This example shows how the commander and staff sought to understand the underlying problems concerning the ROL operational environment, identified a center of gravity, identified critical information needed for further decision making, and developed some measures that relate to their progress in achieving the desired ROL end state.

- **Step 3: Course of Action Development**

As the result of the first two steps, the commander and staff will understand the desired end state in the context of the ROL situation, as informed by the baseline assessment. Using the commander's guidance to develop various methods to move from the current situation to the desired end state is known as course of action (COA) development.

In developing courses of action (COAs), staff members will normally determine the doctrinal requirements for each type of operation being considered, including doctrinal tasks for subordinate units.[35] The ROL practitioner will be invaluable in this process as, unlike for kinetic operations, there is no well established doctrine that informs the conduct of ROL operations. The ROL practitioner must be both well-read in stability operations doctrine, COIN doctrine, and past ROL programs and must be creative in devising new programs to accomplish the desired effects in the operational environment.

Creative or innovative thinking leads to new insights, novel approaches, fresh perspectives, and whole new ways of understanding and conceiving things.[36] Creative thinking is not a mysterious gift,

[35] U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS (Mar. 18, 2010) [hereinafter FM 5-0], para. B-84.
[36] *Id.* at paras. 1-29 and 1-30.

nor does it have to be outlandish. The need for innovation and creative thinking is particularly relevant in the ROL arena as it is one in which the commander and staff may have limited training or experience. Armed with the comprehensive situational understanding and sound grasp of the desired end state derived from the mission analysis, the innovative ROL practitioner can help the staff in developing alternative ways to accomplish the desired effects. Collaboration with host nation resources and interagency partners is essential in brainstorming possible courses of action.

A good COA positions the force for follow-on action and provides flexibility to meet unforeseen events. The staff should remain unbiased and open-minded in evaluating proposed COAs. Other staff members must be engaged with to identify COAs that are not feasible due to factors in their functional areas. They can then decide if a COA can be modified to accomplish the objecitve or should be eliminated from consideration.[37] All COAs must meet the following screening criteria:

- **Feasible**. The unit must be able to accomplish the mission within the available time, space, and resources.
- **Acceptable**. The advantage gained by executing the COA must justify the cost in resources, especially casualties. This assessment is largely subjective.
- **Suitable**. A COA must accomplish the mission and comply with the commander's planning guidance. The COA cannot lose sight of the desired end state. For instance, if that is a legal system that is perceived by the population to be legitimate, it will be important not to overlook public education and information operations components of any course of action.
- **Distinguishable**. Each COA must differ significantly from the others. This criterion is also largely subjective.
- **Complete**. A COA must show how:
    - The decisive operation accomplishes the mission.
    - Shaping operations create and preserve conditions for success of the decisive operation.
    - Sustaining operations enable shaping and decisive operations.[38]

Avoid suggesting a COA simply because it is the accepted way of doing things. Seek novel approaches and avoid preconceived opinions, but do not gratuitously re-invent the wheel. Proceed with a rational basis and sufficient knowledge.

Step 3 of the MDMP will also require consideration of "metrics" (measures with which the command and staff can assess the progress towards the desired end state). These are all too often developed as an afterthought in the planning and conduct of ROL operations, and indeed in planning more generally. However they are essential in determining whether actions are having a positive, negative or even nugatory (indicating perhaps that scarce military resources are, in effect, being wasted) effect on the ROL. Although metrics should be developed in conjunction with COAs, given their complexity, they are more fully discussed in Sections IV - V, below.

After developing COAs, the staff briefs them to, and receives further guidance from, the commander. If one or more of the COAs are accepted, COA analysis commences.

- **Step 4: Course of Action Analysis (Wargaming)**

Wargaming is a critical step in the MDMP and should be allocated more time than any other step. COA analysis allows the staff to identify the COA that best accomplishes the mission. Wargaming helps to:

- Visualize the COA's progress and anticipate events
- Determine unanticipated conditions and resources required

[37] See FM 5-0, *supra* note 35,p. B-15, Figure B-3 (COA development)
[38] *Id.*, *supra* note 35, at para. B-75

- Identify necessary coordination
- Determine the most flexible COA.[39]

For each COA, wargamers need to:

- Accurately record advantages and disadvantages as they emerge
- Continually assess feasibility, acceptability, and suitability. If a COA fails any of these tests, they reject it
- Avoid comparing one COA with another during the wargame. This occurs during COA comparison.[40]

The JA can play an important role in the COA analysis by ensuring that the staff avoids "groupthink." Groupthink is a common failing of people or groups who work together to make decisions or solve problems. In doing so, they override the requirement to realistically evaluate alternative courses of action. The group makes a collective decision and feels good about it because all members favor the same decision. In the interest of unity and harmony, there is no debate or challenge to the selected solution. It is a barrier to creativity that combines habit (the reluctance to change from accepted ways of doing things), fear (the feeling of agitation and anxiety caused by being uneasy or apprehensive about: both fear of discarding the old to adopt the new and fear of being thought of as a fool for recommending the new), and prejudice (opinion formed without a rational basis or with insufficient knowledge). The risk of prejudice is a particular danger in ROL planning conducted within a military environment. JAs have professional training that aids them in approaching problems in innovative ways and in expressing divergent opinions – they should not be afraid to do so.

- **Step 5: Course of Action Comparison**

The COA comparison is intended to identify the COA with the highest probability of success against the most likely enemy COA and the most dangerous enemy COA. The selected COA should also:

- Pose the minimum risk to the force and mission accomplishment
- Place the force in the best posture for future operations
- Provide maximum latitude for initiative by subordinates
- Provide the most flexibility to meet unexpected threats and opportunities.[41]

The ROL practitioner provides an important function in this step of the MDMP by ensuring that the courses of action are evaluated critically with regard to the desired ROL effects. The ROL practitioner must be vigilant that the staff remains focused on the end state and does not stray into "bricks and mortar" or other overly simplistic capacity building projects that are readily quantifiable and subject to logical, sequential planning but that do not decisively address the underlying legitimacy challenges in the ROL environment.

- **Step 6: Course of Action Approval**

In this step, the staff recommends a COA (being the one that they believe will best accomplish the mission), usually in a decision briefing. The commander decides which COA to approve, and then issues the final planning guidance and CCIRs.[42]
The decision briefing includes an explanation of: the assumptions used; a summary of the wargame for each COA to include critical events; modifications to any COA; wargame results; and the advantages and disadvantages (including risk) of each COA.

[39] *See id., supra* note 35, at para. B-110.
[40] *See id., supra* note 35, at para. B-112.
[41] *See id., supra* note 35, at para. B-167-B173.
[42] *See id., supra* note 35, at para. B-177.

- **Step 7: Orders Production**

The staff prepares the order or plan by turning the selected COA into a clear, concise concept of operations with required supporting information.

D. Military Planning and Rule of Law Operations: Some Final Thoughts

By utilizing the MDMP, the commander, staff, and ROL practitioner analyze the complex rule of law environment in a systematic way that is familiar to the commander and staff. This planning tool establishes procedures for: analyzing a mission; developing, analyzing, and comparing courses of action against criteria of success and each other; selecting the optimum course of action; and producing a plan or order. Through the MDMP, the ROL practitioner can take a mission as complex and ill-defined as "improve the rule of law in this region" and convert that mission into a concept of operations that represents the best way to achieve the desired rule of law effects.

The MDMP and Interagency/Coalition Efforts in Iraq

In May of 2008, Multi-National Force-Iraq (MNF-I) and United States Mission-Iraq (USM-I) convened the 4th Annual Rule of Law Conference in Baghdad's International Zone. The conference provided a forum for USM-I agencies, military personnel, United Nations, and NGOs to report on their efforts and achievements across the spectrum of ROL projects.

Military participants noted that the detailed plans and guidance produced by MDMP were noticeably absent in the broader ROL mission. At that time, there had not been a comprehensive plan to structure the efforts and projects of the civilian agencies and non-governmental organizations. That failing was identified and discussed at the Rule of Law Conference.

Planning Rule of Law Operations Internal to the Force: Hypocrisy Helps the Enemy

Conduct by our forces or those acting with us that appears to be contrary to the rule of law will not go unnoticed by our host nation partners and the international community, and will be exploited by our enemies. This was readily demonstrated by the situation at Abu Ghraib on our mission in Iraq and the ill-will created by the September 2007 shootings by U.S. security contractors in Nisour Square, Baghdad. Our response to crimes committed by U.S. forces must be transparent and communicated effectively to the local citizenry and the world to preserve our credibility as we attempt to build ROL.[43]

The effective rule of law practitioner will obtain the commander's guidance on training to minimize the possibility of any criminal, negligent, or culturally insensitive acts undermining the mission and will plan for the mitigation of any adverse consequences when any such acts do occur.

[43] FM 3-24, *supra* note 15, at 1-24.

III. Planning to Deploy

This section of the *Handbook* discusses planning for a deployment (as distinct from planning a LOO) in three timeframes:[44]

- Pre-deployment (approximately -180 to -30 days prior to deployment)
- Initial deployment (approximately -30 to +90 days of arrival in the area of operations)
- Sustained deployment (approximately +91 days to indefinite)

The discussion below is to emphasize the tools required at each stage of planning for the ROL mission. It is not intended to be an exact road map, as planning for any operation will be situation specific.

A. Pre-deployment Planning (D minus 180 to 30)

The build up to many operations over the past two decades (Haiti, Bosnia-Herzegovina, Desert Storm, and Iraq (OIF)) displayed a substantial period of prior diplomatic activity that signaled to JAs, well in advance of receipt of a warning order, that informal planning for the ROL mission should begin. Even when available time is short, as was the case with Afghanistan in 2001, the principles of pre-deployment planning for the ROL mission remain the same; albeit compressed into a shorter timeframe. This planning involves the following:

1. Staffing Considerations

The assigned ROL JA is a member of the staff, not the commander's JA. The proper use of staffing processes (vice JAG to JAG telephone calls) will ensure that, notwithstanding JA rank disparities between higher and lower authorities, ROL operations are conducted efficiently. It goes without saying that the ROL JA will need to be a proficient briefer, and be able to use PowerPoint effectively.[45] The division and brigade staffs should have at least one NCO in support to ensure information flow while the attorney(s) are circulating in the AO.[46]

At the brigade level and in SOTFs, JAs may have to perform the rule of law mission in addition to traditional legal work. As a note of caution, when a commander's JA is also responsible for the ROL LOE, the JA must understand that these are distinct roles. Rule of Law issues must go through staffing as regular issues of the command. Dual hatted JAs should not use their access to the commander as a member of his personal staff for UCMJ and ethics issues to circumvent the staffing requirements entailed by the ROL LOO.[47]

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[44] The timelines are indicative and 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 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 where JAs can benefit from the experience of their predecessors, the duration of the initial deployment phase might be shorter.

[45] 34th Infantry Division, Minnesota Army National Guard, Staff Judge Advocate Iraq After Action Report, Multi-National Division – South, Basra, Iraq, April 2009 – February 2010, (23 February 2010) [hereinafter 34ID IZ AAR, APR 09 – FEB 10; on file with CLAMO]. *But see* Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, April 27, 2010, at A1 (*available at* http://www.nytimes.com/2010/04/27/world/27powerpoint.html).

[46] *Id.*

[47] XVIII Airborne Corps, Office of the Staff Judge Advocate Iraq After Action Report, Multi-National Corps – Iraq, Baghdad, Iraq, February 2008 – April 2009, (9-11 June 2009) [hereinafter XVIII ABC IZ AAR, FEB 08 – APR 09; on file with CLAMO].

Nonetheless, Brigade Judge Advocates (BJAs) have found that the combined workload generally requires more than two attorneys.[48] One attorney should be specifically tasked and trained for the ROL role. 49 Ideally one or more civil affairs specialists and military police (preferably CID who can train investigators) will also be dedicated to the effort.[50] Units might seek out reserve JAs with special skill sets that will compliment their ROL effort.[51] And in any event, they should attempt to involve company level leaders in their pursuit of ROL objectives.[52]

Beyond the permanent staff, the ROL mission requires that transportation and security be available.[53] The staff might also be occasionally augmented by a detention operations JA who has been cross-trained for the purpose of mitigating the ROL workload.[54] Staffing requirements will shift as the operational environment develops. JAs in leadership roles should be prepared to plus up or reduce ROL manning as the situation dictates.[55]

Knowing whether JAs will be working in a centralized headquarters environment with other JAs 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 JA assigned to a provincial or other remote location works for the tactical unit commander or is a local representative of higher headquarters.

2. Understand the Host Nation Legal Environment.

Influencing the ROL will inevitably require an understanding of the local legal system and the societal context within which it operates. Many units that ultimately became responsible for restoring the Iraqi legal system went into the mission with very little understanding of civil law systems, let alone knowledge or copies of pertinent Iraqi laws.[56] The pre-deployment phase can be used to fill this knowledge gap and gain a general but invaluable understanding of the host nation legal system, thereby allowing a more immediate and effective engagement of that system upon arrival in theater.

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[48] 2d Battalion, 10th Special Forces Group (Airborne), Special Operations Task Force Legal Advisor Iraq After Action Report, Victory Base Complex, Baghdad, Iraq, July 2009 – March 2010, (15 June 2010) [hereinafter 2d BN 10th SFG(A) IZ AAR, JUL 09 - MAR 10; on file with CLAMO].

[49] 1st Brigade Combat Team, 4th Infantry Division, Brigade Judge Advocate Iraq After Action Report, March 2008 – March 2009, (28 April 2009) [hereinafter 1BCT, 4ID IZ AAR, MAR 08 – MAR 09; on file with CLAMO]; 1st Armored Div., Office of the Staff Judge Advocate Iraq After Action Report, Multi-National Division – North, Contingency Operating Base Speicher, Iraq, September 2007 – December 2008, (19 February 2009) [hereinafter 1AD IZ AAR, SEP 07 – DEC 08; on file with CLAMO].

[50] XVIII ABC IZ AAR, FEB 08 – APR 09, *supra* note 47.

[51] Combined Forces Special Operations Component Command – Afghanistan, Staff Judge Advocate Afghanistan After Action Report, Kabul, Afghanistan, August 2009 – November 2009, (27 May 2010) [hereinafter CFSOCC-A AF AAR, AUG 09 – NOV 09; on file with CLAMO].

[52] 3d Brigade Combat Team, 10th Mountain Division, Brigade Judge Advocate Afghanistan After Action Report, November 2008 – January 2010, (29 January 2010) [hereinafter 3BCT, 10th MTN AF AAR, NOV 08 – JAN 10; on file with CLAMO].

[53] 1BCT, 4ID IZ AAR, MAR 08 – MAR 09, *supra* note 49; 1AD IZ AAR, SEP 07 – DEC 08, *supra* note 49.

[54] 10th Mountain Division (Light Infantry), Office of the Staff Judge Advocate Iraq After Action Report, Multi-National Division – Center/Multi-National Division – South, Camp Victory/Basra, Iraq, May 2008 – May 2009, (25 June 2009) [hereinafter 10th MTN DIV IZ AAR, MAY 08 – MAY 09; on file with CLAMO].

[55] 4th Infantry Div., Office of the Staff Judge Advocate, Iraq After Action Report, Multi-National Division – Baghdad, Camp Liberty, Iraq, November 2007 – February 2009, (30 April 2009) [hereinafter 4ID IZ AAR, NOV 07 – FEB 09; on file with CLAMO]; XVIII ABC IZ AAR, FEB 08 – APR 09, *supra* note 47.

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

A four step approach to understanding a host nation legal system in the pre-deployment phase may, by way of example, look like this:

- **Step 1. Understand the political and historical context.** Identifying legal traditions and origins helps the JA understand the current environment.
- **Step 2. Understand the roles and interests of major players and political will.** Pay particular attention to those who might potentially support reform as well as those who benefit from the *status quo*. Assess the strength of political will to reform and options for capitalizing on it, strengthening it, or working around its absence. Be prepared to protect reformers. Solutions may include housing them and their families in fortified compounds and (in the specific case of judges) holding hearings at internment facilities or on protected compounds.[57]
- **Step 3. Examine program options across the spectrum of Rule of Law.** Do not be confined to formal justice sector initiatives. Examine the overall state of the polity and its legitimacy. Consider actions such as political party development and legislative strengthening.
- **Step 4. Assess the justice sector.** Assess the legal framework as well as justice institutions. Assessments are discussed in greater detail in Sections IV and V, below.

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 ROL office has a briefing available on Iraq used in ROL Conferences for deploying JAs.[58]

Another source of information about not only the mission but the context for the ROL is the unit you are replacing.

Also, the Law Library of Congress can provide assistance. The Law Library has a librarian assigned to numerous regional law collections. In addition to appointments with the librarian and JAs assigned at OTJAG, the OTJAG-IO Pre-Deployment Preparation (PDP) Program can facilitate this process by obtaining copies of relevant materials and providing them for field use.

These resources, and others, will help develop a country law pack as part of the pre deployment staff estimate process.

Commanders often require JA's advice on issues related to host nation commercial and business law, the resolution of which may affect operations designed to improve the economy, and how to utilize the local judicial system most efficiently (e.g., to resolve issues related to squatters).[59] Arrest and release procedures, warrants, and detention orders often have the greatest operational impact as success in this area prevents detainees from being released and resuming their violence against

[57] *Id.*
[58] Rule of Law Lessons Learned, MNC-I Rule of Law Section, Operation Iraqi Freedom 05-07 (Dec. 10 2006).
[59] This can be a very difficult undertaking and relates to the need to establish a good network of contacts within the legal community. For example, there is a significant problem with squatters in Iraq but it is a difficult area of the law to develop. One unit was able to utilize its connectivity to obtain a copy of a pre-invasion Ministerial Order that served to provide severe criminal punishment for squatting without a color of right. Once obtained and translated, the unit was able to better advise Iraqis with disputes on how to utilize the courts as a tool for the resolution of such issues.

coalition forces.[60] An understanding that, for example, arrest warrants may be available from more than one source (e.g. in Iraq they may be obtained from local judges or the CCCI), will be of considerable benefit.[61] That understanding will only come through a detailed knowledge of the local law.

Aside from supporting the commander and staff, JAs often serve as mentors to local judges and prosecutors. They enter this role frequently at a disadvantage because of their youth relative to those they advise. This initial lack of credibility is compounded if the JA fails to understand basic host nation law. This combination of factors will fatally undermine their own credibility as a mentor.[62] Judge advocate mentors should not burden those who they are mentoring with basic questions that could have been answered in their own time, or attempt to indiscriminately foist U.S. procedure or law upon them.

3. Plan for Coordination with other Rule of Law Participants

Rule of law operations in Iraq and Afghanistan have repeatedly demonstrated that ROL practitioners who coordinate efforts, funding, and resources with other agencies and organizations yield the most effective and lasting results. During initial-entry into a non-permissive environment, the JA will often be alone among other military operators such as Military Police and CA personnel. A non-permissive environment will limit the number of NGOs and IOs who are active in theater. Consequently, coordination activity will be limited, in the main, to other military entities, such as Military Police, Engineers, and the G-3. Setting up a ROL working group at the division level early in the planning process helps to ensure that ROL and other reconstruction efforts are unified.

Once significant hostilities have concluded, other agencies such as DOS, USAID, DOJ, and non-U.S. IOs, and NGOs are likely to increase their in theater activity. Of the IOs and NGOs, a portion will have a direct interest in human rights and justice. Being aware during the pre-deployment stage of the number and nature of such organizations, and the capabilities and potential funding they bring, permits more meaningful planning for future operations. The ROL practitioner may exchange contact information with other field representatives through the chain of command (back to the interagency and intergovernmental coordination in Washington) and through local organizations (such as the Humanitarian Operations Center, Joint Interagency Coordination Group, or other similar mechanisms).

Civil Affairs team members who have been engaged in government support missions over the past two decades often state that they know they have "worked themselves out of a job" by handing off future support operations to developed, competent host nation, nongovernmental organizations or international organizations. In many cases, this may be the desired end state in ROL mission planning. Specifically, where DOD has been given a lead on certain stability operation activities (which include certain ROL related operations), DODI 3000.05 requires that that lead responsibility is transitioned, as soon as feasible, to other USG Agencies, foreign governments and security forces, or international governmental organizations.

4. Anticipate and Plan for Linguist Assets

Be aware of the need for translators and interpreters, including that, within a single country, several languages or dialects may be spoken. In planning for and working with linguists, always be aware of

[60] Sea, Air, Land (SEAL) Team 7, Special Operations Task Force – West (SOTF-W) Detachment Judge Advocate Iraq After Action Report, Al Asad Airbase/Ramadi, Iraq, March 2009 – September 2009, (14 April 2010) [hereinafter SOTF-W IZ AAR, MAR 09 – SEP 09; on file with CLAMO].
[61] *Id.*
[62] 25ID IZ AAR, NOV 08 – NOV 09, *supra* note 11.

cultural/sectarian divisions within the AO that might impact the effectiveness of your translator. For example, 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. Although a ROL team may not have its free choice of translator assets, it must remain aware that the cultural/social background of the assigned translators may impact their effectiveness. Finally, remember that a linguist with a lay background offers different capabilities than one with a legal background or training.

It is highly beneficial to have an English-speaking local attorney in support of the ROL staff. Other interpreters, even highly proficient ones, will still confuse legal terminology or be imprecise in translation. Local attorneys can assist in warrant-based detentions, translating legal terms of art, and facilitating KLEs. Local attorneys are also invaluable because there are few libraries holding host nation law, and the available English translations found on-line are frequently inaccurate.[63] A unit may hire several in order to spread them throughout their battle space to give classes to local police and religious leaders, to spread awareness and to provide civics lectures for the public, and to assist their PRTs.[64]

When hiring a local attorney, it should be noted that many attorneys in Iraq and Afghanistan have no legal education. Therefore, the interview process should be thorough,[65] and opinions offered after hire must be understood as having limitations.

5. Tactical Considerations

Those engaged in ROL missions must generally be mobile, have effective communication systems and plans (including a "Plan B"), and be able to provide their own security. A ROL team that deploys to a non-permissive environment without the ability to defend itself in a convoy will be largely ineffective. Although JAs added value is in their legal training and subject matter expertise, that does not mean that their warrior skills should not be equally as proficient.

Deployed judge advocates have historically been hampered by a lack of organic transportation capability in conducting their ROL role. Civil Affairs units, in contrast, often deploy with their own transportation capability. If possible, find out which CA assets will be operating in your area during the period of your deployment and make preliminary contacts with them (with the battalion or brigade International Law Officer) to build rapport for the future when you may need to coordinate convoy operations.

6. Rule of Law Pre Deployment Briefings for Commanders

Judge advocates should consider educating commanders, operations officers, and staff planners prior to deployment upon how ROL issues can impact mission accomplishment. The JA should not assume that war fighting battalion and brigade commanders will readily appreciate how something as intangible as the local populace's attitude toward their legal institutions can have a direct impact upon

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[63] Individual Augmentee, Multi-National Force-Iraq, Office of the Staff Judge Advocate (Rule of Law Section) Iraq After Action Report, October 2008 – December 2008, (9 February 2009) [hereinafter MNF-I Individual Augmentee IZ AAR, OCT 08 – DEC 08; on file with CLAMO].

[64] 3d Brigade Combat Team, 1st Infantry Div., Brigade Judge Advocate Afghanistan After Action Report, Forward Operating Base Fenty, Jalalabad, Afghanistan, July 2008 – June 2009, (29 August 2009) [hereinafter 3BCT 1ID AF AAR, JUL 08 – JUN 09; on file with CLAMO].

[65] XVIII ABC IZ AAR, FEB 08 – APR 09, *supra* note 47; 2d Brigade Combat Team, 101st Airborne Division (Air Assault), Brigade Judge Advocate Iraq After Action Report, Camp Liberty, Iraq, October 2007 – November 2008, (13 January 2009) [hereinafter 2BCT, 101st ABN DIV (AASTL) IZ AAR, OCT 07 – NOV 08; on file with CLAMO]; 1AD IZ AAR, SEP 07 – DEC 08, *supra* note 49.

security and stability. To this end, JAs must understand, and be able to explain, how ROL nests within the elements of stability operations and COIN. Operating courts, effective police forces, functioning prisons, and a reduction of violence materially benefit mission accomplishment. Pre-deployment briefings on ROL considerations (and in particular, operational benefits) will help the commander appreciate the need to make the ROL a planning and resource priority.

7. Pre-Deployment Resources

Judge advocates should develop a library of theater specific legal materials during the pre-deployment stage. This library will continue to grow following deployment. Core materials should include (in English and the local language) a host nation's:

- Constitution
- Criminal code
- Criminal procedure code
- Civil code
- Civil procedure code
- Administrative law
- Citizenship law
- Property law
- Laws on organization of the government in general and courts in particular
- Laws on organization of the police and prisons.

Much of this information can be obtained through consultation with the DOS, to include relevant DOS country teams. However, if regular channels are unable to provide the necessary materials, these resources may often be found in English translation through:

- The Library of Congress
- Law school libraries (domestic and foreign)
- Large civilian law firms.[66]

In addition to obtaining relevant host nation black letter law, the JA ROL practitioner should draw upon the extensive post conflict ROL experience that other non-military organizations possess. These include:

- USAID (State Department) Justice/Rule of Law guides
- The United Nation's Rule of Law Coordination and Resource Group
- Department of State Regional and Global Bureaus
- U.S. Embassy country teams in the expected area(s) of operation.

It goes without saying that operational security requirements may influence the manner in which information is solicited.

[66] Firms engaged in international business will have treaties/civil codes or practice notes for foreign nations. Many such firms also have JA reservists or former JAs employed who are often willing to be of assistance to direct you to source materials.

The Pre-Deployment Preparation (PDP) Program

In January 2009, The Judge Advocate General established the Pre-Deployment Preparation (PDP) Program to identify and coordinate resources for deploying JAs, paralegals, and warrant officers. The program, which falls under the International and Operational Law Division of OTJAG, is a source of invaluable information in all aspects of deployed legal practice, including ROL. Deploying JAs are encouraged to contact the PDP Program for timely information on how ROL and other OPLAW missions are being conducted downrange.[67]

B. Initial Deployment Planning (D minus 30 to plus 90)

Immediately before deployment, ROL planners will likely be occupied with pre-deployment processing, preparing equipment for shipment, and personal issues. Accordingly, the D-30 ROL team plan will most probably be that which exists upon arrival in theater. Following deployment, ROL teams may spend several weeks at intermediate staging bases (ISBs).[68] The ROL team should make contact with the ISB's S-2 section in order to determine what local information it has that is of relevance to ROL.

The planning cycle will go into high gear upon arrival in theater. Frequently, the nature of the expected mission or individual assignment changes, and command and reporting relationships are altered to meet the reality on the ground. Further, and most significantly, the ROL 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 ROL operation. The ROL team will be awash with new information as they begin to update their assessment of host nation ROL. As the team begins to understand the interrelationships and systems affecting ROL, they create the foundation from which sustained deployment planning will develop.

1. The Nature of Initial Deployment Planning.

During the initial deployment phase the ROL planner may need to:

- Identify short-term goals, activities, and strategies that will demonstrate early success and generate political support in a post-conflict setting where conditions are evolving rapidly.
- Assign responsibilities, designate timelines, and provide performance benchmarks for both the initial deployment phase and the longer term sustained deployment phase.

a. Provide for Demonstrable Early Success

The conclusion of armed conflict, or the immediate aftermath of a natural disaster, provides a limited window of time within which to secure the confidence and support of the local population. The most intelligent, ambitious, and strategically oriented plan to restore the ROL may rapidly become irrelevant unless some simple "quick wins" are front-loaded into the plan to create an atmosphere of progress and a return to normalcy. Be prepared to use these kinds of projects throughout the operational effort in order to maintain momentum and continually reinforce positive perceptions.

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 succeed in long-term reform if the emergency measures initially relied upon are grounded in the host nation law.

[67] The PDP Program may be contacted at pdp@conus.army.mil or (571) 256-2913.
[68] *E.g.*, Hungary for Joint Endeavor; Saudi Arabia for Desert Storm; Kuwait for OIF.

Adherence to a legal code at each step of the ROL reform process strengthens, rather than undermines, the legitimacy of actions in the eyes of the population.

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 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.

As security is established, legislative and executive (to include policing) functions can be restored, and judges can begin working. When necessary, these officials can work from temporary facilities until new structures are built in the secure environment. For example, court can be held in a school or warehouse until a court house becomes available. However, constructing infrastructure, such as government buildings, courts, police stations and prisons, is counterproductive if it is then destroyed or left vacant. Whatever the security situation, ROL JAs should expect their role to grow throughout the deployment, and perhaps rapidly so.[69]

b. Create Mechanisms for Locals to Interface Positively with their Legal System

Strive to increase the opportunities for the populace to interface with, be educated on, and access relevant ROL institutions. Foster a popular demand for, and investment in, the ROL. In many authoritarian states, the judicial system and the police are regime tools used to control the population. Endeavour to make local ROL institutions transparent and trustworthy by planning mechanisms for positive interaction. These could include manning an "information table" staffed by local government employees, or distributing informational flyers. Posting copies of laws, or changes to them, in the local language in a publicly accessible location can be beneficial if host nation officials are actually enforcing the law and the postings are not just further evidence of officials' corruption or incompetence. Even where the latter is the case, an increased transparency about the legal process will help hold such officials to account.

Encouraging a local law school to sponsor conferences (e.g. on the constitution, human rights, etc.) involving government officials and the public, and having no overt U.S. presence (to ensure it bore the face of the host nation), proved to be a great success in one instance in Iraq.[70] In another instance, the Iraqi constitution, and the rights it created, were explained to citizens through the medium of a stage production, with a local law professor introducing the show. DVDs of the show were produced and distributed.[71]

Because of the necessity to involve foreign nationals in ROL efforts, JAs should ensure they classify their materials at the appropriate level, and build unclassified information packets in conjunction with

[69] XVIII ABC IZ AARIZ2009 OIF AAR, FEB 08 – APR 09, *supra* note 47.
[70] 41st Fires Brigade, Brigade Judge Advocate Iraq After Action Report, Forward Operating Base Delta, Iraq, February 2008 – July 2009, (7 July 2009) [hereinafter 41st Fires BDE IZ AAR, FEB 08 – JUL 09; on file with CLAMO].
[71] *Id.*

their unit's foreign disclosure officer, so that useful material is not needlessly withheld from those would benefit from it.[72]

The problem of government corruption is exacerbated by public tolerance, and a feeling of helplessness when it confronts them. Educating the public about their rights under the law builds an expectation that, ideally, leads to public demand for accountability, or at least a reduced tolerance when it is encountered and an increased likelihood of it being reported. Measures to increase accountability will fail if the public remains passive. Programs that educate the public about their rights and corruption reporting mechanisms, pressure officials to perform their roles in a less predatory manner. Public education can be accomplished through a number of different mediums such as classes, radio programs, billboards, or printed literature (to include books, newspapers and comics etc.).[73]

Public education programs can be pursued even in poor security environments where other substantive ROL projects would be premature. For instance, U.S. forces in Khowst Province built a program where the local law school provided interns to *jirgas* to advise the elders on legal issues and aspects of the Afghan Constitution that applied to cases it was hearing, as well as to record the outcomes of the hearing. The project was Afghan owned, with local national attorneys, rather than U.S. JAs, liaising between the *jirgas* and the law school.[74]

c. Monitor and Mentor Local Officials and Professionals

The ROL practitioner must make frequent contact (at least daily in an occupation environment) with local justice officials to ensure progress toward ROL. Where the logistical and security situation allows, consideration should be given to establishing an embed program. Oversight, mentoring, and instruction are absolutely necessary to achieve change in the system.

The Resilience of Old Practices in Iraq

In OIF-1, Iraqi judges would appear to enthusiastically accept all of the guidance or instructions given by Coalition JAs. As soon as the JA departed the courthouse facility, the judges returned to doing business in the way that was familiar to them, including permitting judges dismissed by the Coalition to re-enter the courthouse and occupy their former offices. It required a continuous physical JA presence in the courthouse to make change take root.

The absence of a safe and secure environment should not prevent training and networking of government officials and ROL related facilitators (for example, in order to ensure that the police know what prosecutors require to try a case) from taking place. This will improve their efficacy when the security situation allowed them to recommence work. Building relationships with

[72] Individual Augmentee, Combined Joint Task Force – 82, Rule of Law Section Afghanistan After Action Report, Bagram Airfield, Afghanistan, October 2009 – January 2010, (18 February 2010) [hereinafter IA CJTF-82 RoL Sec AF AAR, OCT 09 – JAN 10; on file with CLAMO].
[73] 4th Brigade Combat Team (Airborne), 25th Infantry Division, Brigade Judge Advocate Afghanistan After Action Report, Forward Operating Base Salerno, Afghanistan, February 2009 – February 2010, (27 March 2010) [hereinafter 4BCT 25ID AF AAR, FEB 09 – FEB 10; on file with CLAMO].
[74] *Id.*

appointed officials and jurists takes time. It is never too early to begin developing these relationships.[75]

Relationship building—by Commanders and JAs—requires more than an occasional visit. Regular and frequent visits should be conducted where social matters, and not just work, are discussed.[76] However, JAs should be aware that impromptu visits can be disruptive, or even endanger, host nationals. Where that is judged to be the case, a JA should consider maintaining contacts via less intrusive means such as telephone calls.[77]

Prior to engaging local lawyers, judges, ministers or community leaders, JAs should work with cultural advisors to gain an understanding of local social customs and protocols.[78] This is particularly important in societies such as Afghanistan where the local population has historically been suspicious of outsiders and the judiciary.[79] Similarly, locals are more likely to embrace ROL initiatives when they think the idea is their own, or failing that, that it is the idea of one of their countrymen.[80]

Key Leader Engagements (KLEs) must be thoroughly planned. The intent of the engagement (deliver a message, build rapport, gather information) must be determined, with questions and follow up action planned in advance. Given that such engagements invariably expose personnel involved to harm, poorly planned and consistently unproductive engagements should not be conducted.[81]

When engaging key figures, U.S. participants should prepare for the engagement meticulously. They must share talking points with all other coalition participants to ensure they are sending a single, unmixed message, and that other entities who engage with the host nation official are not inadvertently undermining their goals. ROL practitioners working in adjoining localities should similarly remain connected with regularly scheduled meetings (online or videoconference if available).[82] Even when no other parties are involved, "shooting from the hip" can result in confusion, loss of credibility, and failure to achieve goals.[83]

Track events following visits and KLEs (see Chapter 6 of FM 5-0 regarding assessment) to assess their efficacy. If KLE's result in reduced productivity, or if local nationals suffer repercussions as the

[75] 3d Brigade Combat Team, 4th Infantry Division, Brigade Judge Advocate Iraq After Action Report, Forward Operating Base War Eagle, Iraq, December 2007 – February 2009, (6 May 2009) [hereinafter 3BCT, 4ID IZ AAR, DEC 07 – FEB 09; on file with CLAMO].
[76] Asymmetric Warfare Group, Judge Advocate Iraq After Action Report, November 2008 – April 2009, (17 April 2009) [hereinafter AWG IZ AAR, NOV 08 – APR 09; on file with CLAMO].
[77] 2d Brigade Combat Team, 1st Armored Division, Brigade Judge Advocate Iraq After Action Report, Camp Stryker, Iraq, July 2008 – June 2009, (25 September 2009) [hereinafter 2BCT, 1AD IZ AAR, JUL 08 – JUN 09; on file with CLAMO].
[78] JUDY BARSALOU, TRAUMA AND TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES 8 (USIP 2005).
[79] *See* LAUREL MILLER & ROBERT PERITO, SPECIAL REPORT: ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 6 (USIP 2004) [hereinafter AFGHANISTAN REPORT].
[80] 1st Battalion, 9th Marines, Battalion Judge Advocate Iraq After Action Report, March 2008 – October 2008, (9 January 2009) [hereinafter 1/9 Marines IZ AAR, MAR 08 – OCT 08; on file with CLAMO].
[81] 25ID IZ AAR, NOV 08 – NOV 09, *supra* note 11.
[82] 1BCT, 4ID IZ AAR, MAR 08 – MAR 09, *supra* note 49; *see also*, 4ID IZ AAR, NOV 07 – FEB 09, *supra* note 55; 1st Brigade Combat Team, 101st Airborne Division (Air Assault), Brigade Judge Advocate Iraq After Action Report, Contingency Operating Base Speicher, Iraq, September 2007 – November 2008, (15 January 2009) [hereinafter 1BCT, 101st ABN DIV (AASLT) IZ AAR, SEP 07 – NOV 08; on file with CLAMO].
[83] Director, Interagency Rule of Law Coordinating Center Iraq After Action Report, U.S. Embassy, Baghdad, Iraq, June 2008 –June 2009, (29 June 2009) [hereinafter Director IROCC IZ AAR, JUN 08 – JUN 09; on file with CLAMO]; 25ID IZ AAR, NOV 08 – NOV 09, *supra* note 11.

result of their interactions with coalition personnel, the method of engagement will need to be reassessed to achieve the desired effect.[84]

For a justice system to function efficiently, its constituent parts must be able to work together. Assessments must consider not only the internal functioning of institutions, but the manner in which they interact with one another.[85] Solutions for dysfunctional systems may be non-traditional. In Wasit Province, Iraq, a dysfunctional relationship between the police and the courts was alleviated by encouraging the chief judge to organize investigative training for the local police. This not only educated the police on the requirements for successful case disposition, it built relationships and networks. The initial success led to the training expanding into a number of regularly held sessions. When these were complete, the judiciary then designed, of their own volition, an advanced course for graduates of the first training package.[86]

Once mentors for police and judges are in place, there are two primary obstacles to the just resolution of a case, security and corruption. Judges may dismiss on scant grounds, and prosecutors may actually argue in favor of dismissing their case.[87] The impact of corruption can be lessened by having independent law enforcements mechanisms overseeing, and, maintaining checks, on each other. The difficulty with this approach lies in motivating local nationals to implement such procedures. While officials will be against corruption conceptually, they may be understandably reluctant to jeopardize their own income streams or those of their personal networks—those to whom they are loyal and who are loyal to them.

Some problems that appear to be caused by corruption may, instead, be due to the security situation. When security is low, the police may be unwilling to investigate cases or witnesses to testify. Where witness testimony is given, it may be intentionally vague or misleading. Similarly, judges may understandably find excuses to dismiss a case when their lives, or those of their family, are threatened by groups or individuals who are sympathetic to the accused.[88] An interim solution may be the use of traveling judges with no ties to the area where the trial will be held.[89] These judges can also be used as a comparative assessment tool. If traveling judges generate the same sort of findings as the local judges, the problem may be an evidentiary one rather than that relating to corruption or a lack of security.[90]

JAs should not assume that another unit's or organization's conclusion about the cause of problems in the local system is accurate, but rather should determine the cause themselves before committing additional resources to a solution.

d. Plan Security for Justice Sector Personnel

Unsurprisingly, judges will not readily embrace ROL initiatives if it means their death at the hands of those who have a vested interest in seeing judicial reform fail. If the success of a ROL mission depends upon judicial personnel being secure, they should be protected in the same manner as any other mission essential asset. While the point may seem obvious, protection of judges is frequently a low or nonexistent ROL priority in the aftermath of major combat operations.

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[84] 2d Stryker Cavalry Regiment, Regimental Judge Advocate Iraq After Action Report, Camp Stryker, Iraq, August 2007 – May 2008, (17 February 2009) [hereinafter 2SCR IZ AAR, AUG 07 – MAY 08; on file with CLAMO].
[85] *See* CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM HAITI (1995) [hereinafter HAITI LL] at 102-05.
[86] 41st Fires BDE IZ AAR, FEB 08 – JUL 09, *supra* note 70.
[87] *Id*.
[88] *Id.*
[89] 25ID IZ AAR, NOV 08 – NOV 09, *supra* note 11.
[90] *Id.*

Protection of Judges in Early Rule of Law Efforts in Iraq

Lack of funding and personnel were 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 attempts at ROL reform.[91]

e. Coordinate with Non Governmental and International Organizations - but Recognize their Limitations.

Because they are plentiful and their capabilities are frequently unknown, it is easy to become overly reliant during planning upon expected support from International Organizations (IOs) and Non Governmental Organizations (NGOs). Such organizations are often either unable or unwilling to maintain a presence in post-conflict areas of operation (AO), 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 bombed. Any plan for the initial deployment period should be realistically premised upon the capability of the unit to accomplish goals *without* outside organization assistance.

Rule of law plans should, at the very least, be coordinated among JAs and police trainers (military police and Law Enforcement Professionals). However, other agencies in the AO should also be coordinated with to prevent repetition (e.g. duplicate training of a subject area) and waste (e.g. duplicating construction of facilities), maximize effects, and to prevent confusion among third country nationals and loss of our credibility.[92] The need to coordinate with other USG agencies does not relieve U.S. forces of the requirement to execute ROL operations unilaterally when necessary.[93] While other USG agencies are tasked with responsibility for developing comprehensive ROL programs and strategies, a variety of operational or financial issues, or internal hurdles may prevent rapid execution by lead agencies for a significant period of time. As a result, JAs at all levels must be prepared to execute such programs until such time as they can be merged into a larger framework. These operations should be carefully crafted and integrated into the campaign planning process and tied to the accomplishment of desired objectives.[94]

[91] LTC Craig Trebilcock, *Justice Under Fire*, ARMY LAW. (Nov. 2006).
[92] 2SCR IZ AAR, AUG 07 – MAY 08, *supra* note 84; 1AD IZ AAR, SEP 07 – DEC 08, *supra* note 49; XVIII ABC IZ AAR, FEB 08 – APR 09, *supra* note 47.
[93] DOD DIR 3000.05, *supra* note 4.
[94] OEF/OIF LL, Vol. II, *supra* note 9, at 24-28.

Existing ROL Activities

When entering mature theaters such as Iraq and Afghanistan, it is critical for JAs to become aware of existing ROL activities. In Iraq, the MNF-I OSJA developed a fully integrated relationship with the broader ROL community, and compiled a detailed roster of offices and individuals involved in justice operations, as well as a guide to the various activities conducted by various governmental and non-governmental actors supporting the ROL mission.[95] The MNF-I ROL inventory noted that coordination among the stakeholders in this arena had "proven difficult" and that the guide's purpose was to provide an overview of participants as well as points of contact to facilitate coordination.[96] This MNF-I product should be considered as a model for use in other theaters. Effective interagency coordination such as this will help operators strengthen ROL efforts that suffer from "a lack of strategy and a lack of capacity."[97]

C. Sustained Deployment Planning (D plus 91)

As the deployment progresses, the focus should shift almost exclusively to building the conditions for lasting, long-term ROL—those goals that make a system of law legitimate, relevant, and trustworthy in the eyes of the local population. "Condition building" should not be confused with constructing buildings. The number of operating courthouses, etc. is a metric of negligible value in assessing stability operation success if the citizenry does not seek to access the system to resolve grievances, but instead relies upon violence or non-governmental bodies.[98] That said, tangible infrastructure, such as the existence and operating condition of courthouses, police stations, prisons, and upon the availability of personnel should not be overlooked. If one does not have the physical tools and personnel to implement plans, the more sophisticated aspects of the ROL mission cannot be accomplished.

However, it is important to recognize that, as the ROL 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-oriented understanding of the ROL mission, will miss the ultimate ROL goal. That of creating a system that is viewed as legitimate, relevant, and trustworthy in the eyes of the local population. Built upon the assessment process discussed 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 the 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

[95] MNF-I (OSJA), Rule of Law Programs in Iraq: March 2006 Inventory (March 2006).
[96] *Id*. at 4.
[97] AFGHANISTAN REPORT, *supra* note 79. It should be noted that no agency appears to have an organic capability to conduct ROL operations. At best, such a capability can be cobbled together from skill sets from among the various agencies. In environments where active combat operations are ongoing, the military may be the only agency that can provide the force protection necessary to maintain freedom of movement. Efforts to conduct ROL operations from the relatively safe confines of a "green zone" by having local judicial personnel travel to the FOB for meetings is ineffective and may signal fear or a lack of commitment.
[98] *See* Rachel 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).

mission if the citizenry does not seek to access the system to resolve grievances and instead continues to rely upon violence in the streets for resolving disputes.

The concept of the ROL within a society is an intangible that the infrastructure metrics, so important during the initial deployment phase, do not capture. Accordingly, the wise ROL planner must recognize when it is time for the mission to evolve from the infrastructure-focused initial deployment phase to the effects-focused 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 narrow focus that necessarily controls the initial phase of a ROL 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 ROL.[99]

As such, the ROL 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 (such as the rebuilding of destroyed infrastructure, for example) are ameliorated.

Sustainable ROL operations will, for example, strive to educate officials, while creating checks within the system so that the officials do not misuse their power. Concurrently, they may engender civil society pressure to build a non-acquiescent, hostile environment for corrupt officials. Specific lines of effort might include:

- Law school curriculum reform
- Establishing community based legal service 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 ROL
- Educating judges and leaders in the legal system on international norms of justice
- Linking host nation government legal organizations with law-related NGOs. For example, the American Bar Association conducts ROL programs in many developing countries, including several former Soviet republics.[100]
- Develop meaningful oversight mechanisms, such as ombudsman offices or judicial/police inspection offices, to check corruption or misuse of government resources for private gain[101]
- Bolstering crime prevention through 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).
- Educating police and prosecutors on evidentiary requirements for a successful prosecution.
- Establishing disarmament/weapons buyback programs
- Encouraging the formation of civil political interest groups
- Addressing salary levels that make underpaid officials more susceptible to corruption

[99] *Id.*
[100] For more information on the ABA's ROL HN programs, see Table 2 in the Appendix B.
[101] 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.

- Building oversight and citizen awareness of court programs, including judicial outreach and education programs that familiarize citizens with the law and courts. (Citizens that understand the process are more likely to advocate for the legitimacy in government).

IV. Conducting Initial Situation Analysis / Baseline Assessment[102]

Dr. David Kilcullen proposed that a snapshot of rule of law at a given point in time can be had by answering two questions. First, where do the judges sleep? If they "commute in" to their districts from another area, or if they never visit their assigned districts at all, then rule of law, and likely security, are lacking. Second, if your bicycle were stolen, to whom would you report it? If the answer is someone other than the police, then the police do not have the confidence of the people—indeed, they may be seen as an officially-empowered predatory group to be avoided.[103]

While Kilcullen's two stage test may be, superficially attractive, its pragmatic efficacy is questionable. There are, for instance, many legitimate reasons why a judge may, or may not, reside in the locale in which he resides. Any operation requiring a rule of law component is probably complex—possibly so complex as to defy simplistic methods of measurement and analysis. The often cited – almost impenetrable – diagram depicting the Afghan Stability / COIN dynamics[104] is demonstrative of that fact. But that does not mean that rule of law cannot be assessed or measured; rather, that linear, mechanical approaches will produce only part of the picture. Rule of law programs are designed by judge advocates for two reasons: their substantive expertise in providing justice in a life-threatening environment, and their procedural skill in evaluating complex and ambiguous situations. Conducting an assessment and designing metrics for a ROL program will test the limits of both capabilities.

The military ROL practitioner will be familiar with a military commander's inherent desire for immediate and tangible success. That success is particularly hard to demonstrate in ROL programs, where "success" or an ultimate end state may require generational change. Given the long term, inherently developmental, nature of ROL strategy, effective ROL measurement systems typically attempt to track the advancement of a rule of law program, or *movement towards* end states, rather than its *achievement of* definitive set criteria. The basic component of such measurement systems typically comprise assessment, monitoring, and evaluation phases. The assessment creates a baseline to work from and develops the indicators that will be used to measure change. Consistent monitoring of both qualitative and quantitative indicators allows for an appraisal of progress against the goals that have been set. Evaluation provides a more detailed assessment of progress during particular points in time.[105] All of these tools work together to measure change and determine whether the program design is proving successful, or whether it requires enhancement, or reassessment.

Some confusion exists in the use of the term "assessment" because it encompasses a process with two distinctly different activities that, in practice, overlap and work together to provide a running estimate of the ROL situation. The first, the baseline assessment, involves an analysis of the ROL environment as you find it. The second relates to measuring your progress in achieving the tasks set out in your plan. The latter is covered below in Section VI, Metrics.

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[102] The foundation of the sections on assessment and metrics in this chapter is the "Measuring Rule of Law" chapter in the 2010 *Handbook*, written by Thomas C. Wingfield, Professor of International Law, George C. Marshall European Center for Security Studies.

[103] *See generally* David Kilcullen, *Measuring Progress in Afghanistan*, in COUNTERINSURGENCY (Oxford University Press, 2010).

[104] http://catastrophist.files.wordpress.com/2009/12/afghan-stability-coin-draft.jpg.

[105] U.K. Department for International Development. [DFID], *How To Note: Measuring and Using Results in Security and Justice Programmes*, at 16 (Aug. 2010) [hereinafter DFID Metrics Practice Paper].

A. The Data Collection Phase

Essential questions to ask when beginning an assessment are: what are the needs; and what is the desired outcome? According to FM 3-24 (at D-38):

> "Establishing the rule of law is a key end state in COIN. Defining that end state requires extensive coordination between the instruments of U.S. power, the host nation, and multinational partners. Additionally, attaining that end state is usually the province of HN authorities, international and intergovernmental organizations, the Department of State, and other U.S. governmental agencies, with support from U.S. forces in some cases."

Once the ROL end state has been defined, a baseline assessment must be compiled to formulate a starting point from which to work towards that end state. In this phase, a typical JA "judicial" based ROL assessment may consider the number of courthouses, location of judges, education of prosecutors, drivers of corruption, strength, or otherwise, of defense attorneys, and competence of administrators in each region, province, and district (or host nation specific geographical division) of the host nation. A justice system is, typically, a vertically and horizontally integrated system of systems. An evaluation of the quality of the existing civil and criminal systems as a whole will almost certainly add to the efficacy of the assessment. To accomplish this assessment, you should consult sources of data, such as intelligence, interagency colleagues, coalition partners, surveys and polling, statistics, experts, and content analysis.[106] Gathering information from other agencies, NGOs and IOs is a good way to meet the other ROL practitioners in your area and plant the seeds for an integrated and synchronized ROL effort. However, these parties may be consumed with their immediate priorities, so do not sacrifice valuable planning and execution time waiting for others who are unable to respond. At a minimum; however, the JA must know exactly how to find and communicate with key personnel (building stronger relationships whenever possible), including the various commercial numbers, email addresses, and addresses or grid coordinates where they can be located.[107]

Given the plethora of individual ROL actors, drawing upon the findings of other governments, donors and stakeholders is an economic manner in which to collect data. It can also address the most often criticized aspect of ROL assistance – the piece meal, uncoordinated and donor driven approach to justice (and security) institutions.[108] Perhaps most importantly, the people who are affected most by the ROL, or lack of it, should be asked for their views and recommendations.

Partnership with the host nation in the assessment phase is crucial. It will encourage the host nation to take a role in designing, implementing, monitoring and "owning" its development, in turn furthering the twin goals of sustaining and legitimatizing reform.[109] This approach is in keeping with the "Sector Wide Approach" (SWAp) to international ROL development programs, and indeed to international aid programs generally,[110] the theory being that the host nation's involvement from the earliest phases of development will create an incentive for it to maintain a functioning rule of law

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[106] U.S. JOINT FORCES COMMAND, UNIFIED ACTION HANDBOOK SERIES BOOK FIVE, HAND BOOK FOR MILITARY SUPPORT TO RULE OF LAW AND SECURITY SECTOR REFORM, Ch. VII at 3-4 (June 13, 2011) [hereinafter JFCOM UNIFIED ACTION HANDBOOK SERIES BOOK FIVE]; *see infra* the U.S. Institute of Peace's MPICE example found in Part V of this chapter for a more comprehensive treatment of the subject.

[107] *Id*. at 27-29.

[108] *See* 2011 United Nations Rule of Law Unit report on *National Perspectives on Rule of Law Assistance* [6 April 2011] at p 1.

[109] *Id.* at 1.

[110] SWAp – an approach that aims to bring stakeholders together under one umbrella and which is characterized by a set of operating principles rather than a specific package of policies or activities. Other benefits attributed to this approach are the production of a single (vice public and private) sector policy, and common, realistic and agreed procedures for funding, expenditure, and monitoring.

system after its foreign partners have departed. The key to success is that all parties involved be on the same page when it comes to expectations and the desired outcome.

The ROL team should focus on learning what is known and, of at least equal importance, what is not known about the ROL environment in his area of concern. This process is referred to as either situation analysis or assessment. An assessment is the factual foundation upon which effective planning for the ROL mission occurs and is a study of conditions existing within the area of operations at any given time. In addition to developing plans to stabilize an area, ROL teams generate assessments of: a foreign nation's courts, prosecutors, police, and detention facilities (in essence, its ability to contribute to security provisions). An assessment may be informal or formal in nature, ranging from a couple of pages of hastily created observations at the beginning stages of deployment, to thorough studies that are dozens of pages long which reflects date from a sustained deployment cycle.

In addition to reporting the ground truth, analysis must be done to determine which information explains the difference between the desired ROL condition and the current conditions. In identifying problem areas, the ROL practitioner should seek to identify the root cause of the problem, not merely the symptoms.[111] From this, the ROL team will extrapolate the centers of gravity – there will be more than one due to the numbers of players needed to deliver the rule of law – for ROL issues in the area of operations. A center of gravity is the set of characteristics, capabilities, and sources of power from which a system derives its moral or physical strength, freedom of action, and will to act.[112] [113] Simply put: What allows the obstacle to ROL to be an obstacle? Conversely, what makes a beneficial state (e.g. local goodwill) remain beneficial? Obstacles will need to be eliminated and beneficial effects protected. A problem with rule of law operations in Afghanistan was that advocates for change were supported and encouraged, but not protected. As soon as the advocate gained traction or had positive effects, individuals benefitting from the absence of law would kill or otherwise silence (e.g. by kidnapping or killing family members of) the advocate.

Assessment Fatigue and Coordination

Many redeploying JAs have identified "assessment fatigue"— repeated assessments from different agencies or multiple levels of headquarters — as a major problem in conducting ROL operations. When different USG agencies ask for duplicative or similar information, it demonstrates to their HN counterparts that there is no single plan or coordinated ROL effort (which may be the case but is best not advertised). For example, local HN officials related to the USG (in the ROL arena, frequently a PRT ROL advisor or BJA), that multiple confusing assessments erode professional respect for, and personal trust, in the point of contact. Consequently, it is critical to coordinate assessments with all levels and agencies operating in the ROL arena and to the extent possible, to rely on information already collected; each new assessment imposes costs, seen and unseen, on the ROL program. Similarly, anyone deploying to a theater with an ongoing ROL program should familiarize him or herself with existing assessments before embarking on new ones.

An important by-product of the assessment process is identifying information that is not known but is critical to decision-making. Oftentimes, information gained from assessments – which is critical to

[111] *Id* at para 3-26.
[112] JP 5-0, *supra* note 17, at IV-8.
[113] For a narrative version of a justice center of gravity analysis, see ch. 9, sec. 1

decision-making – may ultimately become part of a Commander's Critical Information Requirement (CCIR).

Completed baseline assessments become a running estimate[114] as the ROL situation develops. Developments result from both the product of, and independent of, the ROL the plan. As a running estimate, the assessment incorporates both metrics collected about the efficacy of actions taken under the ROL plan, and intelligence and open-source information regarding other events that bear on the ROL situation.

1. The Starting Point

A review of the rule of law definition from FM 3-07 – printed at the beginning of this section – reminds us that the ROL LOE extends beyond the common view of "cops, courts and corrections" and looks to whether the laws are equitable and fairly applied, via the separation of powers which generally involve the legislative branch, and the executive branch (likely a governor) beyond the police force, judges, and prison administrators. For instance, one common ROL obstacle is corruption, which most often occurs in procurement and extortion – not the legally required fees – for basic government services such as (among many other possibilities) driver's licenses and deeds.

Additionally, ROL will involve institutional and societal dynamics. Systems analysis can be used to understand the system of systems that compose the ROL environment.[115] How do ROL actors in the area of operations link with the rest of society, government, and the economic system?

The situation analysis also encompasses more concrete matters such as: the physical environment and infrastructure; the state of governance; technology; local resources; and the culture. For example, are the criminal courts trying insurgent cases, and if not, why not? If the clerks were given computers, would they know how to use them? Could they maintain them? Is the population choosing to use the government's court systems to resolve its disputes, and if not, why not? Do the police have the confidence of the population, and if not, why not?

The sheer number of considerations can be overwhelming. Unless time and resources are limitless, adopting an 80% solution that produces a plan, vice a 100% solution that never leaves the drawing board, will be the practitioner's best bet - remembering, of course, that the drawing board does not need to start with a blank piece of paper. There are many resources that can help inform the contents of the assessment.

2. Generic Assessment Questions

Below is a list of questions generated from a conference on the ROL held at Georgetown Law Center in Washington, D.C.[116] and during the 2009 Rule of Law Short Course held at TJAGLCS.[117] What follows provides a starting point for an assessment. Because it was developed in 2009, during a time at which most military ROL deployments were to mature theaters, it heavily emphasizes gaining information on *existing* programs, which will not be the case for an initial deployment phase, such as OIF-1.

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[114] See FM 5-0.

[115] On the "systems perspective" and its place assessing the environment, *see* JP 5-0, *supra* note 17, at III-16 – III-19.

[116] The Fourth Annual Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions, March 19-20, 2009.

[117] Suggestions for additions or deletions are welcome. Please email them to the Center for Law and Military Operations' email addresses listed at the front of this *Handbook*.

a. Host Nation Rule of Law Structure

- What is the nature of the formal legal system in place?
  - Is it a civil or a common law model?
  - To what degree are the ROL effects described in FM 3-07 present?
  - Where can English copies of the HN's laws be obtained?
  - What does the current JA wish s/he would have brought with him/her; what resources are needed?
- What is the governmental structure for ROL institutions in host nation (i.e., What HN agencies control which elements of the ROL)?
  - What contacts exist with and for the local legal system?
  - What is the role of traditional / informal dispute resolution systems?
  - Does the traditional system differ from the formal host nation legal structure and law?
  - Is there a local bar association / legal centers / legal clinics?
  - Who are the local officials with whom you meet?
  - What is the HN legal training infrastructure? Are there any law schools?

- HN Criminal Justice
  - What is the capacity of the HN criminal justice system?
  - Is there a police force? What is the structure of the police force? Does the HN military have a role in law enforcement? Is there a secret police?
  - How do evidentiary rules differ from the U.S. model? How are hearings conducted?

b. Plans

- What is the higher headquarters plan?
  - Get the plan for the next two higher military headquarters (e.g., Joint Campaign Plan) and focus on the intent.
  - What is the host nation plan? (For example, consider the Afghan National Development Strategy).
  - What is the USG plan? (Focus on obtaining plans from interagency personnel to include DOS / USAID / DOJ).
- Do the above referenced plans include ROL?
  - Is there a Rule of Law Annex?
  - Are there any specific FRAGOs that address or modify the base order or plan?
  - What are the foundation documents for the intervention?
    - What is the authority for U.S. military presence in the host nation?
    - Are there any applicable UNSCRs?
    - Are there any international agreements (e.g., SOFA)?
  - What are the significant planned events in the coming year?
    - What are the critical events in the USG plan?
    - Are there significant HN events that are not part of the plan (e.g., elections)?

c. Rule of Law and Detention

- Who is operating detention facilities, U.S. or HN forces (or others)?
- Are detainee facilities available to the U.S.? Where are they and what condition are they in?
- Are there jails? Do they need to be expanded?
- Under what authority are detentions being conducted? How can a copy be obtained?
- Who is responsible for apprehending and detaining HN nationals?

d. Projects

- (Past) What ROL projects have units attempted or completed?
  - What plans were successful?
  - Why did projects fail?
- (Current) What ROL projects are currently going on?
  - What is the status of the projects?
  - Who has the lead for each project?
  - What is the transition plan?
  - What is the estimated completion date for the project?
  - What are the next steps that need to be planned, funded, or executed to complete each project?
- (Future) What projects are you planning?
  - What are the next steps in those plans?
  - What projects do you anticipate transitioning to my unit?
- What are the fiscal authorities (to the extent they differ from the standard ones) used for ROL?
  - Are there any formats necessary to request a project?
  - What is the process for obtaining approval?

e. Structure

- What is the ROL coordination structure?
  - What is the structure among military units?
  - What is the relationship – horizontally – between military and civilian ROL practitioners?
  - What is the relationship – vertically (two HQ up) – between military and civilian ROL practitioners?
  - How does information flow along these channels?
- Is there a PRT or ePRT in the area?
- Do the ROL practitioners hold meetings?
  - What is the frequency of these meetings?
  - Where are these meeting held?
  - Who attends these meetings?
  - Is there a briefing responsibility for the JA? If so, what is the format for the briefing responsibility?
- Who, practically, is calling the shots in ROL and how does that flow work?

- What information is regularly requested and collected from you and by whom?
- What other USG agencies are currently in your sector doing ROL?
- What other countries are in place, what is their mission?
- What NGOs are in place?
- What foreign government agencies are in place?
- What IOs are in place?
- What projects do these agencies have ongoing, and what contractors are the various agencies using to identify them with the agency?

  - USAID
  - INL
  - DOJ/ICITAP
  - DOJ/OPDAT
  - DEA
  - U.S. Marshals
  - ATF
  - FBI
  - U.S. Embassy
  - NGOs
  - IOs
  - USIP
  - UN

f. Rule of Law POCs

- name / email / location / agency /phone numbers
- Collect the above information for all of the agencies listed above under the structure questions.
- Is there a HN lawyer or Bilingual Bicultural Advisor (BBA) associated with your unit?
- Who is the Contracting Officer at the higher headquarters?

g. Current assessment

- Obtain a copy of the current ROL assessment.
- What are the metrics currently being used for ROL?
- Are the metrics effective?

Some sources outside home organizations that can be consulted in answering many questions about the culture, society, and laws of many nations and the law applicable to U.S. operations in many countries:

- Center for Law and Military Operations
- International and Operational Law Dept., TJAGLCS
- International and Operational Law Division, OTJAG
- CIA World Factbook
- DOS country desks
- USAID website
- Subject-matter experts at universities, USMA, TJAGLCS, etc.
- Law libraries with international collections
- Comparative law review articles
- U.S. Embassy FAO

3. Area Focused Assessment Questions

What follows is a menu of assessment issues suggested by USAID that focus on the high-priority areas of security, legitimacy, impartiality, and efficacy (including access). Each

focus area is sub-divided into legal framework, institutional framework, and effects oriented questions. Although not suited to every situation, this list of questions should assist the JA ROL planner in assessing those parts of a host nation legal system that are most relevant to the desired end state. Such an approach may also help in placing a realistic scope upon the breadth of an assessment.

a. 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 that 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)?
  - 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-Oriented 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?

b. 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 that 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-Oriented 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 that are part of the formally adopted legal system?

c. 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 malfeasance in the performance of their duties?
  - Are there internal or external (civilian) boards that review police conduct? Do these bodies aggressively review and act upon complaints of misconduct? Are there mechanisms to ensure that ethical codes for judges and prosecutors are effectively enforced?
  - Does civil society scrutinize the justice system? Does the media? What is the role of the bar?
- Effects-Oriented 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?

d. 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-Oriented 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 that 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?

4. An Assessment Matrix Approach

An alternative ROL assessment framework, which may be of particular use in an anticorruption ROL program, is that offered by the World Governance Assessment (WGA) Matrix.[118]

Principle → **Arena ↓**	**Participation**	**Fairness**	**Decency**	**Accountability**	**Transparency**	**Efficiency**
Civil Society	Freedom of Association	Society free from discrimination	Freedom of expression	Respect for governing rules	Freedom of the media	Input in policy making
Political Society	Legislature representative of society	Policy reflects public preferences	Peaceful competition for political power	Legislators accountable to public	Transparency of political parties	Efficiency of legislative function
Government	Intra-governmental consultation	Adequate standard of living	Personal security of citizens	Security forces subordinated to civilian government	Government provides accurate information	Efficiency of executive branch
Bureaucracy	Civil servants shape policy	Equal opportunities to public services	Civil servants respectful toward citizens	Civil servants accountable	Civil service decision making transparent	Merit-based system for recruitment
Economic Society	Private sector consulted on policy	Regulations applied equally	Governments respect private property	Regulating private sector to protect workers	Transparent international trade policy	Interventions free from corruption
Judiciary	Non-formal processes of conflict resolution	Equal access to justice for all citizens	Human rights incorporate in national practice	Judicial officers held accountable	Clarity in administering justice	Efficiency of the judicial system

An optimal assessment might require that all 36 measures would be mapped against each level of host nation government—national, regional, provincial, and district (as appropriate in any one host nation), and possibly beyond, down to, for instance, the village level. Armed with this detailed information, it becomes possible to make informed judgments on larger, and perhaps systemic, issues facing anticorruption programs: transparency (public visibility through press, IA/IG departments, professional organizations, and monitors); professionalization (training and pride to offset "everybody else is doing it" ethic), and resourcing (pay sufficient to prevent poverty of honest officials and "excusable" corruption).

[118] World Governance Assessment, *Indicators for Assessing Governance*, available at http://www.odi.org.uk/work/projects/00-07-world-governance-assessment/Indicators.html

5. Other Underpinning Issues

a. Assess the History and Traditions of the Legal System

One critical but often overlooked 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.[119] 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.[120] Accordingly, one might look to French legal reforms as a model for progress toward the ROL in a former French colony, as opposed to relying upon the British/U.S. common law tradition.

Beyond, or more likely in parallel with, the formal judicial system, circumstance dependent, you may also need to assess the role and effectiveness of any existing customary justice system (tribal, religious, or other). Should this be relevant, evaluate the extent to which the formal and customary judicial systems interact. The formal system may be viewed as slow, uncertain, expensive, and corrupt. The informal system – which historically may have delivered a significant element of a society's dispute resolution functions – may be broken or suffer from its own inherent problems. The goal may be to develop both systems, linking them where appropriate to enhance their overall efficacy and legitimacy. Often, one of the programmatic challenges in dealing with a customary justice system relates to how it can be developed to meet minimum human rights standards. In the planning domain, the challenge is more likely to be in understanding the complexity of the system, and its interaction, if any, with the formal system. And having done so, designing meaningful, and operationally significant, measurements to record its effect and performance over time.[121]

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 ROL reforms. Those working within justice sector institutions, the rank and file, as well as the leadership, will always be important actors. These individuals can either support a reform program or sabotage it. Understand positive and negative influences, such as:

- Where do their loyalties lay (tribal, ethnic, religious, bureaucratic, financial)?
- Where do their obligations lay (tribal, ethnic, religious, bureaucratic affiliations, financial)?

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[119] The Latin American civil law tradition features a strong investigative judge and a weak prosecutor; by contrast, under communist legal systems, the prosecutor 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.

[120] USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 12 (2008).

[121] *See generally* Thomas Barfield, Neamat Nojumi, and J. Alexander Their, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, United States Institute of Peace (2008). This report is considered one of the most comprehensive single sources for all the factors which must be considered in analyzing, comparing, and harmonizing a Host Nation's formal and informal judicial systems. It has now been incorporated into CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR TORN SOCIETIES, (Deborah Isser ed., United States Institute of Peace, 2011). Among other issues covered, this study offers an analytical framework for assessing customary justice systems that can be applied to any country.

- What influences opposed to establishing the ROL exist (corruption, poverty, foreign influences, crime, fear, insurgency, lack of education)?

Do not assume away a conflict of interest. Regardless of how polite and accommodating an official is in your presence, their ability to undermine ROL efforts in your absence should not be underestimated. During pre-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.

Major players also exist outside the government bureaucracy. These include tribal and religious leaders, academics (take particular note of any local law schools), businesses (which, when legitimate, generally see greater profit in secure environments), unions or associations (e.g. a bar association), the media, NGO and IO staffers, and neighboring foreign officials with an interest in the progress toward ROL of their neighbor. It is virtually inevitable that the quality of specific information available to the ROL planner will increase with arrival in the area of operations. Accordingly, more suggestions concerning the players – including those 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.

c. Identify Who the Players Are

Verify who is in place. 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, casualties, or refugee movements.

Engage Host Nation Judicial Hierarchy

Initial site visits should focus on identifying and meeting key judicial personnel and conducting a visual assessment of the physical structure. When meeting with the local judicial officials, try to understand the organizational structure of the court. Initial visits can explore 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 to demonstrate proper respect for the office (in the event the judge is not an obstacle to progress who gains more local credibility from the deference you give him). 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 for fear of their superiors.

d. 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, such as: 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 ROL operation is not necessarily a positive or relevant factor to the ROL mission. Donor nations and organizations often want to contribute what they *have*, rather than what the distressed country actually *needs*.

The JA conducting a physical assessment must rely upon his own judgment and expertise, as well the requests for assistance from host nation officials.

e. Funding

To a greater or lesser degree, all formal, and some informal, ROL systems require funding; whether to pay staff and judges, to maintain or replace needed infrastructure and equipment, to fund education and training or deliver public awareness and information programs. Furthermore, the cost of the assessment, and metrics / monitoring and evaluation aspect of the ROL program must not be forgotten. The ROL JA must become familiar with the host nation and external funding systems and constraints in order to ensure that current and future requirements are identified and planned for. That, in turn will help evaluate the viability and sustainability of the program design.

Payroll and Rule of Law

A common practice among police chiefs in Afghanistan is to pad the payroll with the names of officers who do not exist, or friends who appear only to collect a paycheck and for head-counts used by coalition forces. Such leadership often gained further income by either skimming from each officer's salary, or by requiring them to kick-back a portion of their pay after receipt (in instances where the distribution of pay had been monitored to prevent prior skimming).

f. Assess the status of Trial (criminal, civil judgments), Property, and Vital (marriage, divorce, births, and citizenship) Records

In the period following the cessation of the ROL 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.

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.

g. Juvenile Justice

Children, and especially orphans, are particularly vulnerable following a period of unrest. Assess the juvenile justice system as well as the adult system. The United Nations' Children's Fund (UNICEF) has developed training and monitoring tools for juvenile justice systems.

6. Additional Assessment Guidance

For additional guidance on assessments, the Office of the United Nations High Commissioner for Human Rights has put together a very detailed and useful manual, titled Rule-of Law-Tools for Post-Conflict States, Mapping the Justice Sector (2006).[122]

V. Beginning the Running Estimate: Metrics

In addition to his two question ROL snapshot assessment proposal, Dr Kilcullen offers three key pieces of cautionary guidance which the JA would be wise to consider when designing rule of law metrics:

- Organizations manage what they measure, and they measure what their leaders tell them to report on.[123]
- It is essential to maintain a common set of core metrics, as well as to maintain a consistent methodology, so that second-order effects and trends can be analyzed over time.[124]
- Interpretation of indicators is critically important and requires informed expert judgment. It is not enough merely to count incidents or conduct quantitative analysis—interpretation is a qualitative activity based on familiarity with the environment, and it needs to be conducted by experienced personnel who have worked in that environment for long enough to detect trends by comparison with previous conditions.[125]

Assessment is critical to reaching objectives efficiently, yet crafting effective metrics is difficult, as is finding resources to actually collect them. Despite the critical role of assessment, few units will be willing to dedicate resources to a significant collection effort. Seek out other parties who may already be collecting the information you or your HHQ need.[126] For example, in Iraq the High Judicial Council (HJC) receives reports from many of the lower courts that contain statistics useful for assessment.[127] However, JAs should ensure they understand the nature of what is being provided (e.g. does "prison releases" include prisoners being transferred to a different holding facility).[128]

In general, "metrics" are criteria that measure achievement of goals and performance of tasks. Metrics answer two questions in regard to actions taken pursuant to the rule of law plan:

- Have we selected the correct objectives (or "are we doing the right things)? and
- Are we pursuing those objectives effectively (or "are we doing things right")?

Metrics related to pursuing goals effectively are Measures of Performance (MOPs), while those related to selecting the correct goals to achieve are called Measures of Effectiveness (MOEs). The MOPs intends to determine if you completed the task you set out to do (e.g. train judges, restore court houses) and so may be very quantitative in nature, while the MOEs seek to determine if completing those actions had the expected effects (e.g. having trained the judges and restored the court houses, has the number of cases heard per time period increased to the desired level), and so may rely more on qualitative assessment than quantitative measurement.

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[122] *Available at*: http://www1.umn.edu/humanrts/monitoring/Ruleoflaw-Monitoring.pdf (last viewed June 13, 2011).
[123] Kilcullen, s*upra* note 103 at 1.
[124] Kilcullen, s*upra* note 103 at 2.
[125] Kilcullen, s*upra* note 103 at 5.
[126] MNF-I Individual Augmentee IZ AAR, OCT 08 – DEC 08, *supra* note 63.
[127] XVIII ABC 2009 OIF AAR *supra* note 47.
[128] Director IROCC IZ AAR, JUN 08 – JUN 09, *supra* note 83.

Does Your Metric Really Measure Progress?

"Money spent" is NOT a measurement of progress. Resist pressure (though it may be heavy) to spend reconstruction funds on projects that are not linked to objectives, or where the cost outweighs the value.[129] Likewise, "items purchased" is an inadequate metric when it does not ask qualitative questions. Giving computers to a courthouse may indicate success in terms of performance (task completion), but it fails to measure effectiveness. Qualitative assessment should identify whether a plan to train local nationals to use, sustain, and maintain the item is in place (computers are always useless to the illiterate, and useless to everyone once they break down).[130]

Metrics will apply to both single, milestone-type objectives (such as establish a reliable means for local police to obtain warrants from the Central Criminal Court) and to more enduring objectives (raise docket throughput to match the rate of arrests). In both cases there may be multiple criteria that define the desired effect of the objective. With increasing docket throughput, for example, the ROL team will want to measure not just cases tried, but also violations of due process, and the percentage of cases dismissed for various reasons, among other things, in order to determine if the desired effects are being achieved.

The importance of choosing the correct metrics cannot be overstated. Once put in place, the ROL program will "work to the metric," managing what they measure, so an incorrect metric will hopelessly derail progress toward the intended effect. Consequently, metrics should be carefully designed to serve the longer-term outcomes—not to demonstrate short-term success. Furthermore, all metrics are based on an assumption—stated or implicit—that there is a connection between what is being measured and the desired outcome. Since these assumptions may prove to be incorrect, the development of metrics should not be seen as a one-time event; rather, the metrics themselves should be evaluated periodically to ensure their validity and utility.

Long-term progress is furthered by designing metrics in coordination with host nation counterparts. This gives them understanding and ownership of the process, which can provide near-term enthusiasm (or at least tolerance) for the ROL goals, and in the long term will allow them to continue programs with the same focus as you both have coordinated in designing them. There is danger in that, knowing the specific metrics, the officials will doctor the data flow to create artificial results. However, that is a danger regardless, as little data can be collected without officials being aware of what is being tracked.

[129] 1st Cavalry Division, Staff Judge Advocate Iraq After Action Report, Multi-National Division – Baghdad/Multi-National Division – Center, Camp Liberty, Iraq, January 2009 – January 2010, (1 April 2010) [hereinafter 1CD IZ AAR, JAN 09 – JAN 10; on file with CLAMO].

[130] 2d Heavy Brigade Combat Team, 1st Infantry Division, Brigade Judge Advocate Iraq After Action Report, Camp Liberty, Iraq, October 2008 – September 2009, (24 November 2009) [hereinafter 2HBCT, 1ID IZ AAR, OCT 08 – SEP 09; on file with CLAMO].

Measures of Performance

Prior to the Battle of Marjeh in Afghanistan, a hasty mapping of detainee-handling revealed disturbing trends: the conviction rate for Coalition-captured detainees was 30-40%, and the conviction rate for Afghan-captured detainees was 3-4%. The largest "leak" in the system was not the National Directorate of Security (NDS) intelligence officers or the Attorney General's Office (AGO) prosecutors (although their lack of training and resources slowed their work), but rather it was the judges who ordered the release of a large number of detainees. Some of this was due to poor evidence collection on the battlefield, and some was due to the pressure of legislators, forcefully advocating for the release of detainees with powerful, and possibly dangerous, patrons in their home districts. While this problem was not easily solved, effective metrics helped determine that it was not driven primarily by resources or training, and coalition authorities were able to bring influence to bear where it most mattered.

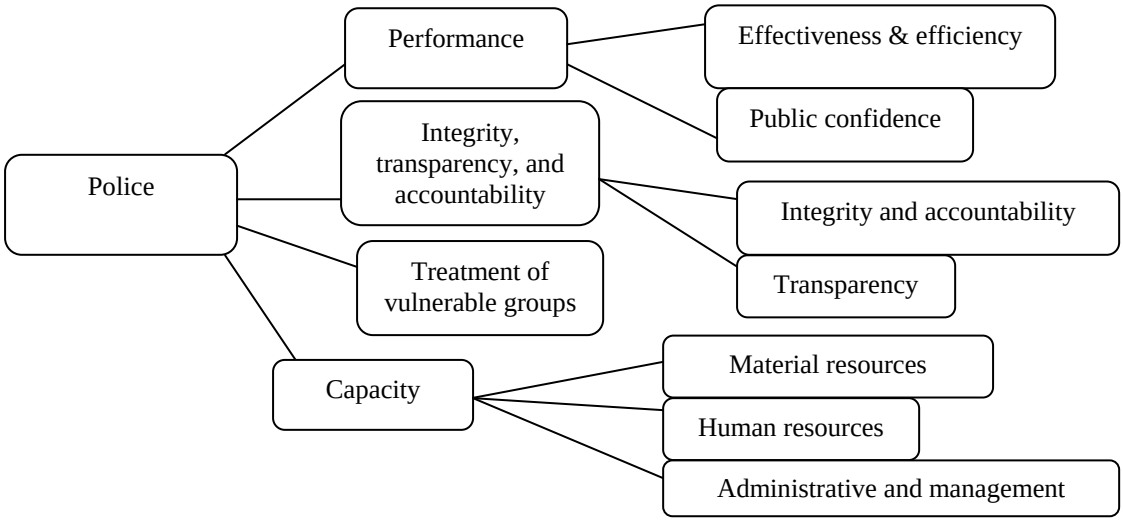
A. Developing Metrics

Use various data sources to develop metrics. If feasible, include public surveys, expert surveys, administrative data, etc, as doing so allows for rule of law initiatives to be measured from diverse perspectives.[131] The Vera Institute for Justice offers a number of different methods that are traditionally used in developing metrics:

- Proportions and Rates (e.g., changes in the rate of homicides per month)
- Ranks (e.g., asking residents of a town to rank the biggest problems in their community)
- Dichotomous indicators (non-numerical indicators identifying whether an institution, policy, function, or law exists; e.g., recognition of domestic violence as a crime)
- Indices (multiple indicators combined into single measures, where each measure is assigned an individual weight based on the weight of its association to the concept the index represents)[132]

To prevent skewed results, indicators can be grouped into "baskets" which in turn generate a more nuanced assessment of progress. This method makes it more likely that biases will be canceled out and will help compensate for limitations in any one source of data.[133] An excellent description of this technique can be found in the United Nations Rule of Law Implementation Guide, of which there is an example below:[134]

[131] *Id.* at 14-15; *see also* U.N. Dep't of Peacekeeping Operations [DPKO] and Office of the U.N. High Comm'r for Human Rights [OHCHR], *The United Nations Rule of Law Indicators Implementation Guide and Project Tools*, at 1 (2011) [hereinafter *U.N. ROL Indicators*].
[132] *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (Vera Inst. of Justice), Nov. 2003, at 11 [hereinafter *Measuring Progress toward Safety and Justice*].
[133] DFID Metrics Practice Paper, *supra* note 105, at 11; *U.N ROL Indicators*, *supra* note 131, at 3.
[134] *U.N. ROL Indicators*, *supra* note 131, at 4.



In the above example, the institution being measured is the police. Four dimensions radiate out from it: performance; integrity, transparency, and accountability; treatment of vulnerable groups; and capacity. Each dimension in turn consists of "baskets" of indicators that measure performance.[135]

This approach could also be applied to various ROL component "conditions", as opposed to component "institutions." The USIP and the U.S. Army Peacekeeping and Stability Operations Institute jointly published *Guiding Principles for Stabilization and Reconstruction* which describes five such conditions for the growth of rule of law in a society: just legal frameworks, public order, accountability to the law, access to justice, and a culture of lawfulness. The guide's definitions of each are useful in scoping the appropriate metrics for each area, ensuring that no critical process is left unaddressed. [136] [137]

In essence, a "basket" type of structure, by drawing information from a variety of data sources, allows for a more comprehensive framework from which to monitor progress. However, it is also essential

[135] *Id*. at 4-5;

[136] UNITED STATES INSTITUTE OF PEACE AND UNITED STATES ARMY PEACEKEEPING AND STABILITY OPERATIONS INSTITUTE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION (2009).

[137] The five necessary conditions are defined below:

> *Just Legal Frameworks* is a condition in which laws are consistent with international human rights norms and standards; are legally certain and transparent; are drafted with procedural transparency; are equitable, and are responsive to the entire population, not just powerful elites.
> *Public Order* is a condition in which laws are enforced equitably; the lives, property, freedoms, and rights of individuals are protected; criminal and politically motivated violence has been reduced to a minimum; and criminal elements (from looters and rioters to leaders of organized crime networks) are pursued, arrested, and detained.
> *Accountability to the Law* is a condition in which the population, public officials, and perpetrators of past conflict-related crimes are held legally accountable for their actions; the judiciary is independent and free from political influence; and horizontal and vertical accountability mechanisms exist to prevent the abuse of power.
> *Access to Justice* is a condition in which people are able to seek and obtain a remedy for grievances through formal or informal institutions of justice that conform with international human rights standards, and a system exists to ensure equal and effective application of the law, procedural fairness, and transparency.
> *Culture of Lawfulness* is a condition in which the general population follows the law and seeks to access the justice system to address its grievances.

Id. at 7-65.

that the "baskets" be balanced in terms of the criteria the indicators are evaluating. This means assessing the reasons why a particular indicator might go up or down, and then choosing other indicators that would help resolve this ambiguity.[138] An unbalanced basket results in the same danger of manifesting skewed results.[139]

An important factor to consider when developing metrics is whether they can accurately reflect changes throughout short periods of time (i.e., a month, quarter, or year).[140] This requires a certain level of sensitivity that would make any developments clear during those time periods.[141] Doing this allows for growth to be tracked with some consistency and would make apparent what areas require improvement.

Another concern is that results will only reflect the experience and viewpoint of the dominant group. Disaggregating the data into groups, for example by income, gender, age or region, would provide the ability to see the discrepancies in progress, if any, that exist across different groups.[142]

1. Initial Assessment Metrics

Metrics in the initial deployment stage frequently focus upon facilities and personnel. The newly arriving JA needs to understand that capabilities and resources will be required before meaningful planning and assessment can occur. Although each circumstance will vary, elements to be taken account of include:

a. Courts and Judiciary:

- Number of courthouses that are structurally capable of operation, in relation to how many are needed to handle the jurisdiction's case load
- Number of trained, available judicial and law enforcement personnel, in relation to how many are needed to handle the population and area of the jurisdiction
- Availability of utilities necessary to operate facilities
- The amount of funding needed for labor and materials to repair buildings

b. Police and Jails

The ROL 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

[138] *Measuring Progress toward Safety and Justice*, *supra* note 132, at 15.
[139] *Id.* at 5.
[140] *Id.* at 12.
[141] *Id.*
[142] *Id.*

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. Given their expertise in the field, military police should take an active role in both designing and measuring these metrics.

c. 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.

d. 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 JAs 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.

e. 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 about 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.

f. 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.

g. Beware of Stale Metrics

As the mission evolves, counting things like the number of court cases becomes less relevant for ROL assessment. For instance, nearly as important as the number of cases being adjudicated is the quality and due process 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 ROL and turn instead to resolving disputes through private and coercive means. As the legal system begins basic function, ROL 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.

2. Long-term Metrics

a. Effects-Oriented Metrics

Metrics related to long-term effects become more complex than those for initial short-term goals. The metrics during sustained operations seek in many instances to capture intangibles, such as the attitudes of the population toward their government, as well as the *efficacy* and *legitimacy* of the system.

Again, because the specific metrics to be used will be situation and mission specific, this list of metrics is focused on the justice system and meant only to prompt thought. Also, as noted above, ROL is broader than "cops, courts and corrections." so other metrics will definitely need to be developed. These are merely a guide for development of mission-appropriate metrics.

- 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 ROL 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 ROL 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.

b. Capture Intangibles

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.

c. Measuring and Describing Change

After information has been collected over at least two consecutive time periods, change can begin to be assessed.[143] The U.N. Rule of Law Indicators guide suggests three different ways to measure and describe change:

- **Dynamic ratings**: comparisons between the current and immediately preceding set of data collection, which indicate *positive*, *negative*, or *no* change over time.
- **Narrative descriptions**: puts ratings into context, along with information not included elsewhere.
- **Trend data**: summarizes the results of all the different sets of data, to show recent change as well as long-term changes.[144]

When metrics are grouped together in baskets, you can monitor a basket's "collective trend" whether it be positive, negative, mixed, or constant (no change over time).[145]

B. U.S. Institute of Peace: Measuring Progress in Conflict Environments Metrics Framework

One of the single most useful frameworks for rule of law metrics is the USIP's "Measuring Progress in Conflict Environments (MPICE) framework."[146] The USIP MPICE process uses four distinct

[143] *U.N. ROL Indicators*, *supra* note 131, at 33.
[144] *Id.*
[145] *Id.* at 35.

methodologies to evaluate the success of operations as they proceed from Stage 0 "Imposed Stability" through Stage I "Assisted Stability" into Stage II "Self-Sustaining Peace." The four methodologies are:

Content Analysis (CA): Involves surveying media publications using Boolean phrases that represent the indicators to track the salience of issues, identify perceptions and determine trends. For example, the Fund for Peace Conflict Assessment System Tool (CAST) incorporates reports from more than 11,000 sources at the national and regional level of countries likely to require rule of law assistance.

Expert Knowledge (EK): Panels of 5 independent subject matter experts are used to provide their judgment on issues of interest, typically using a scale (e.g., from strong agreement to strong disagreement). Specifying evaluation criteria allow panel findings to be replicated over time.

Quantitative Data (QD): Statistical data. References to existing sources of quantitative data related to MPICE are provided in the handbook.

Survey/Polling Data (S/PD): Conducting public opinion surveys to directly assess public attitudes and perceptions.

If the JA is relying on these methodologies for situational awareness, it is critical that he or she fully understand the strengths and limitations of each. Substantively, the MPICE Framework states Stage I and Stage II objectives (Stage 0 is the baseline condition at the point of intervention), overall goals, and the drivers of conflict. Following this are extensive requirements for institutional capacity—the "nuts and bolts" of rule of law capability—that will allow the host nation to move toward a self-sustaining system of law enforcement, adjudication, and detention.

Stage I Objective: Impunity, injustice, and criminalization of state institutions are diminished to the point that domestic justice systems, both formal and informal, supported by a sustainable level of essential international involvement, provide an accepted process for resolving disputes peacefully by maintaining public order and safety, bringing perpetrators of major crimes to justice, holding governing authorities accountable through an independent judiciary, protecting fundamental human rights, and applying the law equally, in increasing compliance with international norms and standards.

Stage II Objective: The domestic justice system, both formal and informal, without international involvement, provides a well-functioning and accepted process for resolving disputes peacefully by maintaining public order and safety, bringing perpetrators of crimes to justice, holding governing authorities accountable through an independent judiciary, protecting fundamental human rights, applying the law equally and efficiently, and providing equal access to justice, in compliance with international norms and standards.

Goals:

I. Diminish the Drivers of Conflict
   - A. Injustice Diminished
   - B. Impunity Diminished
   - C. Criminalization of State Institutions Diminished

II. Strengthen Institutional Performance
   - A. Public Order and Safety Strengthened
   - B. Administration of Justice Strengthened

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[146] John Agoglia, Michael Dziedzic, and Barbara Sotirin, and eds., *Measuring Progress in Conflict Environments (MPICE): A Metrics Framework*, United States Institute of Peace (2010).

C. Judicial Independence and Government Accountability Strengthened

D. Respect for Human Rights Strengthened

E. Equality before the Law Strengthened

F. Societal Support for Rule of Law Strengthened

1. Diminish the Drivers of Conflict

a. Injustice Diminished

Is the legal system used as an instrument of repression?

- Percentage of citizens who fear law enforcement agencies as instruments of repression or that they will be treated unfairly if arrested. (by province and identity group). (S/PD)
- Detainees/prisoners are subjected to torture, cruel, or inhumane treatment, beatings or psychological pressures (by identity group). (EK, S/PD, QD)
- Percentage of known prison population detained beyond the period specified in the law who have not had their case reviewed by an appropriate authority (by identity group). (QD)

Is there discrimination in the treatment of disempowered or opposition groups throughout the legal process (by identity group)?

- Percentage of prison population (by identity group) relative to their proportion of the overall population (QD)

Are traditional/non-state justice systems an instrument of repression or discrimination?

- Traditional or other non-state justice systems give preference to specific identity groups. (EK)
- Traditional or other non-state justice systems have been co-opted or distorted resulting in discriminatory treatment of specific identity groups. (EK)

b. Impunity Diminished

Can political elites be held accountable for crimes they commit?

- Ability or willingness of the legal system to investigate, prosecute, and convict perpetrators of politically destabilizing crimes (e.g., inter-group murder, use of political violence against rivals, and terrorism) when political leaders/elites are suspected of involvement in these crimes. (EK)
- Perceptions of law enforcement officials and victims of the potentially destabilizing crimes cited above that suspects involved are untouchable and that cases are abandoned for this reason. (S/PD) (CA)
- Ratio of incidence of politically destabilizing crimes to investigations, prosecutions, and convictions for these crimes. (QD)

Is justice obstructed in cases of crimes conducted by political elite?

- Percentage of legal cases where witnesses recant testimony. (QD)
- Number of witnesses, police, judges, prosecutors, defense attorneys and their family members who suffer assaults or assassination. (QD)

- Percentage of judges with personal security details, or who have taken other security precautions (e.g., sleeping in their offices or sending their family members to safer locations). (S/PD, EK, QD)

c. Criminalization of State Institutions Diminished

Do parallel or informal governing structures sustained by illicit revenue exist within formal government institutions?

- Political leaders/ruling elites are involved in or linked to criminal looting of natural resources, drug trade, human trafficking, money laundering, smuggling of arms or contraband. (EK)
- Public perception that organized crime has a substantial influence on the development of national policies, operation of ministries, and allocation of resources. (S/PD)
- Known criminals or individuals linked to crime syndicates occupy key government positions. (EK)
- Extent to which government expenditures are unaccounted for or are hidden. (EK)
- Militias/paramilitary groups allied with the government operate with government issue equipment and/or funding. (EK)

2. Strengthen Institutional Performance

a. Public Order and Safety Strengthened

Do national and local law enforcement agencies enforce the law and maintain public order (by province or equivalent locality)?

- Percent of population who have been the victims of violent crime in the past month/year. (S/PD)
- Safe and sustainable return of displaced persons and refugees to former neighborhoods. (QD, S/PD)
- Use of public/private institutions, such as schools, banks, etc. for their intended purposes. (QD, EK)
- Level of market activity. (QD, EK)
- Amount spent by businesses on private security. (QD, S/PD)

Are law enforcement agencies held accountable for serious misconduct (by province or equivalent locality)?

- Percentage of complaints of serious misconduct such as excessive use of force by law enforcement agencies that are properly investigated and prosecuted or pursued through administrative procedures. (EK/QD)
- Percentage of public complaints that are investigated and sanctions that are imposed by an independent agency with subpoena power. (QD, EK)
- Codes of conduct emphasizing adherence to law and to international standards of human rights are enforced by the courts and by supervisors in law enforcement agencies. (EK) (CA)

Does the public have confidence in law enforcement agencies?

Survey questions:

- "Whom do you trust to protect your personal safety?" (Police as opposed to other relevant alternatives such as a violent opposition group) (S/PD)
- "Do you feel safer in your neighborhood today compared to six months ago?" (S/PD)
- "Do you feel safe walking in your neighborhood?" (S/PD)

- "How would you rate security conditions today?" (S/PD)
- "Have you been the victim of a crime?" (S/PD)
    - "Did you report the crime to the police?"
    - "Were you satisfied with the response?"
- "Do you teach your children to contact the police if they feel they are in danger and need help?" (S/PD)

b. Administration of Justice Strengthened

Does the legal system (formal and informal) provide a nonviolent mechanism for the resolution of disputes (by identity group)?

- Percentage of citizens who say that they have access to and are willing to use court systems to resolve criminal disputes (by identity group). (S/PD)
- Percentage of citizens who say they have access to and are willing to use traditional, customary, or informal systems of justice to resolve criminal disputes (by identity group). (S/PD)
- Percentage of population who perceive they have been treated fairly by the formal court system in the past and/or expect to be treated fairly in the future (by province and identity group). (S/PD)
- Percentage of population who perceive they have been treated fairly by the traditional, customary, or informal court system in the past and/or expect to be treated fairly in the future (by province and identity group). (S/PD)
- Extent to which citizens resort to use of the formal legal system to settle inter-group conflicts. (QD, S/PD)
- Extent to which citizens resort to the use of traditional, customary or informal legal systems to settle intergroup conflicts. (QD, S/PD)

Does the criminal justice system perform essential functions effectively?

- Criminal Laws and Procedures:
    - Criminal laws and criminal procedures address contemporary criminal activity and provide effective means of law enforcement for combating terrorist financing, trafficking, transnational and organized crime (e.g., extradition, mutual legal assistance, cyber crime, etc.). (EK)
- Entry into the System:
    - Average times after detention until formal charges are brought. (QD)
    - Percentage of those arrested, detained, or charged with a crime who have access to legal representation. (QD, S/PD)
    - Percentage of pre-trial detention facilities operating in compliance with international human rights standards. (EK)
- Prosecution and pre-trial services:
    - Average time from entry into system on serious crimes charges until seeing a lawyer. (QD)
    - Number of convictions for serious crimes as a percentage of indictments for serious crimes per province. (QD)
- Adjudication:
    - Average time between filing of formal charges and trial. (QD)
    - Percentage of those accused of serious crimes not represented at trial. (QD)

- Sentencing and sanctions:
  - Sentences in criminal cases comply with international standards for proportionality. (EK)
  - Prison terms and fines are enforced. (EK)
- Incarceration:
  - The penal system is able to enforce sentences on political leaders/elites and the most dangerous criminals. (EK)
  - Percent of prison population beyond stated capacity of prison system. (QD)
  - Number of prisoners who escape per year. (QD)
- Appeals:
  - There is a fair and authentic appeals process (as indicated by cost, time required, and access). (QD, EK)

Does the civil justice system (where there is a separate civil justice system) perform essential functions effectively?

- Civil Laws and Procedures:
  - Civil laws and procedures address contemporary civil needs for adjudication, enforcement and recordkeeping. (EK)
- Entry into the system:
  - Percentage of those involved in a civil case who have access to legal representation. (S/PD)
  - Percentage of citizens who say that they have access to court systems to resolve civil disputes. (S/PD)
  - Percentage of citizens who are aware of what forms of recourse are available to them to resolve a dispute. (S/PD)
- Adjudication:
  - Average time between filing of claim and adjudication. (QD)
  - Percent of claims that remain un-adjudicated. (QD)
- Enforcement of Judgments and Orders:
  - Percentage of judgments enforced relative to the number awarded. (QD)
- Appeals:
  - There is a fair and authentic appeals process. (EK, S/PD)
  - Percentage of property dispute claims adjudicated relative to claims registered (by identity group and province). (QD)
  - Percentage of property dispute claims resolved relative to claims registered (by identity group). (QD)
  - Perception of parties involved with property disputes that the process was fair and the case resolved satisfactorily (by identity group and province). (S/PD)
  - Property settlements and contracts are enforced (QD)

How complementary are formal and traditional/non-state justice systems?

- Extent of inconsistencies in substance or process between traditional/non-state justice systems and the formal legal system that lead to tension and confusion. (EK)

- Extent of inconsistencies traditional/non-state justice systems and international human rights standards (Negative indicator). (EK)
- Boundaries between formal and informal dispute resolution mechanisms are clear and uncontested. (EK, CA)
- Restoration of traditional/non-state justice systems that contributed to the peaceful resolution of dispute (if deliberately weakened or eliminated during the conflict). (EK)

Are judges, prosecutors, lawyers, and penal system employees held accountable?

- Perceptions of the public about the integrity of judges, prosecutors, lawyers, and penal system employees. (S/PD)
- Percentage of complaints against judges, prosecutors, lawyers, and penal system employees that result in disciplinary action. (QD)
- Percentage of those involved in legal proceedings who report paying bribes to judges. (S/PD)

c. Judicial Independence and Government Accountability

Is the judiciary independent?

- The selection and promotion of judges is based on objective, merit-based criteria or elections as opposed to identity group membership, political affiliation, or patronage. (EK)
- Removal of judges is limited to specified conditions such as gross misconduct. (EK)
- Judicial expenditures are not controlled by the executive. (EK)

Are governing authorities held accountable?

- Government officials have been tried and convicted of abuse of authority. (EK)
- In cases where the state is one of the litigants, outcomes are not automatically in the state's favor. (QD/EK)

d. Respect for Human Rights Strengthened

Do civilian government authorities respect human rights?

- Number of political prisoners. (EK, QD)
- Percentage of prisons and detention centers operating in compliance with international human rights standards. (EK)
- Frequency with which lawyers suffer retribution on account of representing controversial clients. (EK)

Are human rights codified by the government?

- Laws conform to international human rights standards. (EK)
- Human rights (e.g., freedom of religion, assembly, press, speech, association and movement, and other civil rights) are effectively protected under the law. (EK, CA)

Are measures to protect human rights (e.g., human rights commission, human rights courts, or ombudsman) effective?

- Percentage of people who feel they could file a human rights complaint without fear of reprisal (by identity group). (S/PD)
- Percentage of people who have confidence they will obtain a fair hearing (by identity group). (S/PD)
- Percentage of people who perceive the government is committed to pursuing human rights cases (by identity group). (S/PD)

- Percentage of human rights cases that result in remedies (by identity group). (QD)

e. Equality before the Law Strengthened

Is the law applied equally?

- Percentage of victims who reported crimes to law enforcement authorities and percent who were satisfied with the response (by identity group). (S/PD)
- Perception of the population that the judicial system and law enforcement agencies apply the law equally to all identity groups. (S/PD)
- Assessments of the fairness of the judicial system. (EK)
- The staffing of the judiciary, law enforcement agencies, and penal system is reflective of the demographic composition of the broader society. (QD, S/PD)

Is there access to justice?

- Right to legal counsel is recognized by law. (EK)
- Laws, codes or other normative acts set forth a standard timeframe by which persons detained shall be given access to a lawyer. (EK)
- Individuals are regularly informed of their right to counsel at the time of arrest or detention. (EK)
- Extent of availability of legal aid or public defense. (EK)
- Percentage of population less than one half-day removed from nearest court house or police post. (QD)
- Number of interpreters per 100,000 minority language population. (QD)
- Percentage of court cases dropped due to inability of victim to pay. (QD, S/PD)
- Public perception that corruption has lessened, increased or stayed the same. (S/PD)

f. Societal Support for Rule of Law Strengthened

Are social attitudes and norms supportive of peaceful resolution of disputes (by identity group)?

- Extent of voluntary compliance with the law. (S/PD)
- Perception of the population who would consult with a formal legal advisor and use the formal court system if they have a dispute. (S/PD)
- Efforts to arrest identity group leaders who commit serious crimes are violently resisted by their identity group. (EK)

How professional is the legal profession?

- There is a process of accreditation to enter the legal profession and for sanctioning misconduct. (EK)
- Laws and normative acts establish the independence of the profession and set forth professional standards and ethics that are binding. (EK)
- Cases have been successfully brought to court involving claims that the independence of lawyers has been violated through interference or intimidation by state authorities or non-state actors. (EK)
- Number of practicing lawyers and other legal advisors (such as notaries) per capita (by identity group). (QD)
- Continuing legal education programs and practical training/apprenticeships are available to the legal profession (by identity group). (QD)
- Presence and strength of professional associations for members of the legal profession. (EK)

C. Interagency Conflict Assessment Framework[147]

The Interagency Conflict Assessment Framework (ICAF) is the U.S. interagency process for developing a common understanding of a crisis across all of the government agencies responsible for some part of the response. It is employed at the strategic and operational levels for steady state engagement, crisis prevention, contingency planning, and crisis action planning. The two principal components of the ICAF are conflict diagnosis and planning.

The ICAF process is complemented by the Tactical Conflict Assessment and Planning Framework (TCAPF). These four open-ended questions are particularly useful for collecting rule of law metrics for three reasons: they are a bottom-up source of information from the people of the host nation; they allow unforeseen factors to enter the evaluation process; and they avoid the common problem of leading questions which suggest the answer desired, particularly troublesome in cultures which place a high premium on politeness and telling the questioner what he wants to hear. Although the TCAPF process requires training in collection and judgment in evaluation, it is an excellent source of rule of law metrics "beyond the checklist."

D. Counterinsurgency Advisory and Assistance Team (CAAT) operating in support of COMISAF

Metrics and Benchmarks				
Indicator	Past Impact	Incentive	Benchmark	Action Indicated
Routine Inspections	Too Many/ Variable: Extortion Too Few: Supervisor Bribe	Pay on Spot Reward Relationship Reward Relationship	Citation frequency Case Settled Informally	Set Reasonable Targets
Benefit Payments	Too Many: Kickbacks Too Few: Favoritism	Too Many: Bribe Benefit Too Few: Politics	Other Jurisdiction Comparison	More Legislation Review Internal Control
Basic Services	High: Skimming Low: Favoritism	Extra Revenue/Graft Low Variable: Favoritism	Market Price Price Other Agency	Publish Prices Monitor Prices
Price for fuel, food, concrete, vehicles, tools	High: Embezzlement	Extra Revenue/Graft	Market Price	Publish Ceiling Price
Quantity and Quality of items	High: Kickback Low: Favoritism	High: Kickback Low Variables: Vendor Exploited	Markey Price	Publish Ceiling Price Monitor Quality Enhance Supervision Warnings/Suspension Publish Vendor Data
Outsourcing of Work	Political Consultants	Too High: No oversight Unskilled Labor	Market Skill Training Levels	Increase Oversight Unproductive Fired
Staffing Level of Departments	Too High: Politics Too Few: Illegal Activity Ghost Workers: Payroll Diverted	Too Many: Weak Auditing Too Few: Weak Auditing Ghost Workers: Very Weak (Leadership Involvement)	Agency Comparison	Tighten Ext. O/sight and Auditing / Management Revise Personnel Practices
Budget Levels	Too High: Diverted/Wasted Too Low: Political Diversion	Too High: Political Slush Too Low: Diverted Prior	Agency Comparison	Tighten O/Sight of budget / Sup. Function Set Agency Goals - Move Upward over time
Supervisory Staff vs. Workers	Too Many: Colonized by Too High: Slush Fund Too Many Workers: Political	Too Many: Payroll Abuse Too Large: Theft/Diversion Too Many Line Employees: Demand Money	Agency Comparison	Tighten Auditing Normalize Size/Pay Exam. Personnel Hiring and day-to-day Supervision

[147] U.S. ARMY, FM 3-07: *STABILITY OPERATIONS*, (6 Oct. 2008), Appendix D.

E. The United Nations Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems[148]

- Lack of trained judicial officials; assess the impact of any training given to judicial officials: performance improved, same, worse. How? Why? Try to identify reasons for any change or failure to change.
- Lack of infrastructure, materials or equipment necessary to perform duties. Are the materials appropriate to the environment, e.g., have computers been sent to a court that does not have electricity? Are there vehicles or are they in need of repair?
- Lack of will to fulfill obligations, conduct investigations, create dossiers, show up for work on time.
- Interference by the military, police, local officials or other Government agents in judicial matters.
- Corruption/extortion, bribery or other inducements intended to affect a judicial decision.
- Evidence of bias (ethnic, religious, racial, national or social class) in any judicial decisions. Are people from different groups treated differently for the same acts/offenses?
- Threats against judicial officials, from whom and for what reasons.
- Access by defense lawyers to their clients: immediate, in conditions respecting confidentiality.
- Are arrest warrants legally issued and executed? Is it possible to challenge pretrial detention decisions in a court and to have this decision reviewed by a higher court? Are pretrial or pre-charge detention periods longer than the law allows and, if so, why?
- Timeliness and conduct of trials and other judicial proceedings.
- Number of judges and prosecutors serving, vacancies, transfers and salaries and working conditions and number of available lawyers to defend the indigent (structures for legal aid?).
- Appropriate use of Government resources for the court system and comparative analysis between budgetary allocations to the ministry of justice and the judiciary as opposed to other Government functions.
- Involvement of and oversight by the authorities, such as the ministry of justice or the chief of the judiciary. Does anyone from the ministry of justice ever come to inspect the courts, prosecutor's office or prisons? Is there any sign of the inspector general from the justice minister exerting some control or oversight over judicial officers' performance? Have any judges, prosecutors or lawyers been punished for failing to perform their professional duties?[149]

F. Gathering the Data

Ensure subordinate units understand the intent of your metrics and the role they play in adapting the ROL plan so that you and the subordinate will share a common understanding of what is to be accomplished and its value.[150] If requested information does not survive a cost-benefit analysis in terms of the other operational requirements that will have to be dropped to ensure collection and the risk imposed in gathering the information, then the collection requirement must be reframed.[151] When two separate sets of metrics (i.e. for detention operations and for the judiciary) ask for the same

[148] Office of the U.N. High Comm'r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems* (2006).
[149] *Id*. at 51-52.
[150] 41st Fires BDE IZ AAR, FEB 08 – JUL 09, supra note 70.
[151] 4th Brigade Combat Team, 1st Cavalry Division, Brigade Judge Advocate Iraq After Action Report, Tallil Airbase, Iraq, June 2008 – June 2009, (14 Aug 2009) [hereinafter 4-1 CAV IZ AAR, JUN 08 – JUN 09; on file with CLAMO].

information, then at least one set of metrics is improperly off-point. Also, of course, units should not squander limited manpower by tasking subordinate units with duplicative reporting requirements.[152]

G. Conclusion

The point that bears most repeating is that your measurement system must be tailored to suit the situation at hand. There is no cookie-cutter approach to measuring success for every rule of law program. Adjusting your plan to the specific needs of your area of responsibility will encourage success. In light of this, it is important to note that coordination with all parties involved is essential to this endeavor. It is rare for a single authority to have visibility, let alone control, of the dozens of rule of law initiatives in country. Stovepipes lead to gaps and overlaps. Projects are frequently unconnected to any strategic framework. Few people are on the ground for more than six months, leading to a low average level of experience and poor programmatic continuity. What coordination does exist is usually personality-driven and not institutional. Set your replacement up for success by readily transferring your knowledge and experience. This will help alleviate redundancy and prevent the process of "reinventing the wheel." Consistency allows for progress to be measured far more accurately.

[152] 41st Fires BDE IZ AAR, FEB 08 – JUL 09, supra note 70.

CHAPTER 6

FISCAL CONSIDERATIONS IN RULE OF LAW OPERATIONS

The U.S. Constitution grants Congress the "power of the purse,"[1] a function that both appropriates public funds for a federal activity and defines a specific use for those funds. The principles of federal appropriations law[2] permeate all federal activity, both within the United States and overseas. Thus, there are no "contingency" or "deployment" exceptions to the fiscal principles, including the funding of ROL operations. Because fiscal issues will arise during every ROL operation, a failure to understand the nuances of fiscal law may lead to the improper obligation and/or disbursement of appropriated funds.[3] The improper obligation of appropriated funds may result in negative administrative and/or criminal sanctions against those responsible for violations of fiscal law. As a result, ROL advisors need a solid understanding of the basic fiscal principles prior to advising their commands on the legality of funding ROL activities.

Fiscal law can rapidly change in response to both the operating environment (OE) and the will of the U.S. public, manifested in congressional appropriations and authorizations.[4] The DOD and Full-Year Continuing Appropriations Act 2011, enacted on April 15, 2011, demonstrates how quickly the fiscal landscape can change.[5] The 2011 Appropriations Act provided $400 million in a new fund, the Afghanistan Infrastructure Fund (AIF), for water, power, transportation, and other infrastructure projects in support of the counterinsurgency strategy. These projects are to be jointly formulated and concurred in by the Secretary of State and the Secretary of Defense.[6] Meanwhile, in the same Act, Congress authorized only $500 million in Operations and Maintenance, Army (OMA) funding for the Commander's Emergency Response Program (CERP), a decline from $1.2 billion in CERP funding the previous year. Congress also capped CERP projects at $20 million, clearly establishing the new

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[1] *See* U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law ...").

[2] The terms "federal fiscal law" and "federal appropriations law" are used interchangeably to refer to the "body of law that governs the availability and use of federal funds." *See* PRINCIPLES OF FED. APPROPRIATIONS LAW, Ch. 1, 1-2, GAO-04-261SP (U.S. Gov't Accountability Office, Office of the General Counsel) (3d ed. vol. I 2004).

[3] An obligation arises when the government incurs a legal liability to pay for its requirements, *e.g.*, supplies, services, or construction. From a legal standpoint, the obligation is a government promise to pay a certain amount to a contractor in consideration for their promise to provide goods, services or construction. A disbursement (or expenditure) is an outlay of funds to satisfy a legal obligation. For example, a contract award for construction normally triggers a fiscal obligation. The government may pay the contractor, or disburse funds from that recorded obligation, later in time as the construction is completed. The obligation for the full estimated amount, however, is recorded against the proper appropriation at the time the government makes the promise to pay (usually at contract award). Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. Although both obligations and disbursements are important fiscal events, the time of obligation is generally the critical point of focus for the fiscal advisor. *See* Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook, Chapter 3 and 5 (2011) [Hereinafter "the TJAGLCS Fiscal Deskbook], *available at* https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/tjaglcsdoclib.nsf (last visited April 21, 2011).

[4] *See, e.g.*, Congressional Research Service RL33837, *Congressional Authority to Limit U.S. Military Operations in Iraq* (February 27, 2008).

[5] Pub. L. No. 112-10 (2011).

[6] The AIF was authorized in § 1217 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 (FY11 NDAA), Pub. L. No. 111-383, 124 Stat. 4137, 4393 (2011).

AIF as the source for large-scale infrastructure projects.[7] Rule of law practitioners must follow developments in both DOD and partner agency appropriations and authorizations in order to best assist commanders in ROL functions. There is no overarching ROL funding source, so familiarity with new funding developments is essential to an effective, efficient and responsible ROL fiscal practice.

Congress generally imposes legislative fiscal controls through three basic mechanisms, each implemented by one or more statutes. The three basic fiscal controls are:

1. Obligations and expenditures must be for a proper purpose;[8]

2. Obligations must occur within the time limits (or "period of availability") applicable to the appropriation (e.g., operation and maintenance (O&M) funds are available for obligation for one fiscal year); [9] and

3. Obligations must not exceed the amounts authorized by Congress, and must not violate the Antideficiency Act (ADA).[10]

These controls are enforced, in part, by the "congressional watchdog," the Comptroller General of the United States, who heads the independent, nonpartisan U.S. Government Accountability Office (GAO). GAO audits executive agency operations regularly to determine whether federal funds are being spent efficiently, effectively, and in compliance with fiscal statutes and regulations. Congress likewise requires significant reporting on agency programs and activities. For example, section 1217 of the National Defense Authorization Act for Fiscal Year 2011, in authorizing the new AIF, also requires annual reporting regarding program implementation and a description of all projects carried out under the authority.[11] Congress also previously required the President to provide reports detailing performance indicators and measures for Provincial Reconstruction Teams in Afghanistan.

Before a JA advises the command on whether a specific ROL operation is fiscally sound, the JA needs a solid understanding of the basic Purpose, Time, and Amount fiscal controls that Congress imposes on executive agencies. Although each fiscal control is important, the "purpose" control is most likely to become an issue during military operations and ROL activities, and so it is treated in detail here. Following that is a discussion of the basic fiscal framework of operational funding, of which ROL activities are a subset. As the DOS is the primary agency responsible for foreign reconstruction efforts, including ROL activities, following the general discussion of operational funding is a discussion of the appropriations and authorizations available to the DOS to conduct ROL activities, which the DOD may access via Interagency Acquisitions. There follows a discussion of some of the current appropriations and authorizations available to the DOD to conduct ROL activities. Finally, the chapter concludes with a discussion of the specific issues that arise in the context of funding ROL activities, with a particular focus on Provincial Reconstruction Teams (PRTs).[12]

[7] These changes to CERP were also initiated in the FY11 NDAA, § 1212.
[8] 31 U.S.C. § 1301(a).
[9] 31 U.S.C. § 1552.
[10] *See* 31 U.S.C. §§ 1341 & 1342 (2008); 31 U.S.C. § 1342 (2008). For more information on the basic fiscal legislative controls of Purpose, Time, and Amount (ADA), see the TJAGLCS Fiscal Deskbook, chs. 2-5.
[11] Pub. L. No. 111-383, § 1217 (i).
[12] PRTs are discussed in detail in chs. 2 and 7 of this *Handbook.*

I. Purpose

A. Introduction

The Purpose Statute provides that "[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."[13] Thus, expenditures must be authorized by law[14] or be "reasonably related" to the purpose of an appropriation. In determining whether expenditures conform to the purpose of an appropriation, JAs should apply the GAO's *Necessary Expense Doctrine*, which allows for the use of an appropriation if:

1. An expenditure is specifically authorized in the statute, *or* is for a purpose that is "necessary and incident" to the general purpose of an appropriation;

2. The expenditure is not prohibited by law; and

3. The expenditure is not provided for otherwise, i.e., it does not fall within the scope of another, more specific, appropriation.[15]

B. General Prohibition on Retaining Miscellaneous Receipts and Augmenting Appropriations

Absent a statutory exception, a federal agency that receives any funds other than the funds appropriated by Congress for that agency *must* deposit those funds into the U.S. Treasury.[16] Therefore, if an agency retains funds from a source outside the normal appropriated fund process, the agency violates the Miscellaneous Receipts Statute.[17] When an agency expends funds that were not specifically appropriated for that agency, it may be violating the constitutional requirement that agencies only expend funds appropriated by Congress.[18]

A corollary to the prohibition on retaining Miscellaneous Receipts is the prohibition against augmentation.[19] Absent a statutory exception, an agency augments its funds when it *expends*

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[13] 31 U.S.C. § 1301(a).

[14] For DOD, this includes permanent legislation (Title 10) and annual appropriations/authorizations acts (DODAA/NDAA). For the State Department, this includes permanent legislation (Title 22) and annual appropriations/authorization acts.

[15] For in-depth legal analysis of the Necessary Expense Doctrine, s*ee* the TJAGLCS Fiscal Deskbook, ch. 2: Purpose.

[16] *See* 31 U.S.C. § 3302(b): "[A]n official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."

[17] *See* 31 U.S.C. § 3302(b); s*ee also, Interest Earned on Unauthorized Loans of Fed. Grant Funds*, B-246502, 71 Comp. Gen. 387 (1992).

[18] *See Use of Appropriated Funds by Air Force to Provide Support for Child Care Centers for Children of Civilian Employees*, B-222989, 67 Comp. Gen. 443 (1988); *see also, Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations-Replacement of Autos by Negligent Third Parties*, B-226004, 67 Comp. Gen. 510 (1988).

[19] An augmentation is an action by an agency that increases the effective amount of funds available in an agency's appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress. Absent an exception, augmenting appropriated funds will likely violate one or more of the following: the U.S. Constitution, the Purpose Statute, the Miscellaneous Receipts Statute, and the Antideficiency Act (ADA); *see* the TJAGLCS Fiscal Deskbook, ch. 2: Purpose; s*ee also Nonreimbursable Transfer of Admin. Law Judges*, B-221585, 65 Comp. Gen. 635 (1986); *cf.* 31 U.S.C. § 1532 (prohibiting transfers from one appropriation to another except as authorized by law).

nonappropriated funds[20] *or* expends funds that were appropriated to a different federal agency. Appropriated funds designated for one agency may generally not be used by a different agency.[21] If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund.[22] The election is binding even after the chosen appropriation is exhausted.[23]

Congress, however, has enacted limited statutory exceptions to the Miscellaneous Receipts and Augmentation prohibitions. The most significant of these statutory exceptions are the various authorities allowing for *Interagency Acquisitions*, and the limited *Transfer Authority* that Congress provides to DOD to transfer funds between congressionally specified appropriations.

"Interagency Acquisition" (IA) is the term used to describe the procedure by which an agency that requires supplies or services (the *requesting agency*) obtains them through another federal government agency (the *servicing agency*). The IA authorities allow agencies, under certain circumstances, to retain funds from other agencies and/or augment their appropriations with appropriations from other agencies.[24] The Economy Act is an example of a statutory authority that permits a Federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services.[25] IAs may become prominent during ROL activities when DOD executes DOS-funded missions, and vice-versa. Individual agency regulations must be consulted for IA order procedural and approval requirements.[26] When DOS transfers foreign assistance funds to DOD, it relies upon a provision in the Foreign Assistance Act, section 632, which authorizes the transfer of funds to other agencies. While this is similar to the Economy Act in some regards, there are significant differences, including the fact that certain section 632 transfers serve to obligate the funds transferred, without the need to deobligate unused funds at the end of the fiscal year, as is required with Economy Act transactions.[27]

Transfer authority is a second major exception to the miscellaneous receipts and augmentation prohibitions that affect ROL activities. Transfer authorities are "annual authorities provided by the Congress via annual appropriations and authorization acts to transfer budget authority from one

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[20] Nonappropriated funds are monies that are not appropriated by the Congress to incur obligations and make payments out of the United States Treasury. DOD 7000.14-R, Financial Management Regulation, vol. 13, ch. 1, para. 010213 (Sep. 2008).

[21] *See Secretary of the Navy*, B-13468, 20 Comp. Gen. 272 (1940); *Bureau of Land Management—Disposition of Water Res. Council Appropriations Advanced Pursuant to the Economy Act*, B-250411, 72 Comp. Gen. 120 (Mar. 1, 1993).

[22] *See Funding for Army Repair Projects*, B-272191, Nov. 4, 1997.

[23] *Honorable Clarence Cannon*, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard).

[24] *See, e.g.*, Economy Act, 31 U.S.C. § 1535; Foreign Assistance Act (FAA), 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); Emergency Presidential drawdown authority. 10 U.S.C. § 2205 (exception to Miscellaneous Receipts Statute).

[25] *See Washington Nat'l Airport; Fed. Aviation Admin.*, B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); *Obligation of Funds Under Mil. Interdepartmental Purchase Requests*, B-196404, 59 Comp. Gen. 563 (1980); s*ee also* DOD Financial Management Regulation, 7000.14-R, vol. 11A, ch. 1, para. 010203.J (March 2011) (waiving overhead for transactions within DOD).

[26] *See* Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; DoD Financial Management Regulation vol. 11A, ch. 3 (Feb. 2008); *see also*, Army Federal Acquisition Regulation Supplement Subpart 17.5.

[27] *But see Expired Funds and Interagency Agreements between GovWorks and the Dep't of Defense*, B-308944, July 17, 2007 (finding that DOD improperly extended the availability of funds by "parking" them at GovWorks).

appropriation or fund account to another."[28] In other words, statutory transfer authority[29] allows an agency to "shift funds" between different appropriations without violating the miscellaneous receipts prohibitions, the augmentation prohibitions, or the Antideficiency Act (ADA).[30] Unless provided for within the statutory transfer authority, however, the transferred funds retain the same Purpose, Time, and Amount restrictions after the funds have been transferred to a different appropriation.[31] For the purposes of ROL activities, the most significant appropriations with transfer authority are the Iraq Security Forces Fund (ISFF), the Afghanistan Security Forces Fund (ASFF), and the new AIF. These appropriations, and their respective transfer authorities, are discussed in further detail below.

II. Operational Funding, Foreign Assistance, and Rule of Law Activities

A. Foreign Assistance Generally

There is no "deployment exception" to the general fiscal law framework. The same fiscal limitations regulating the obligation and expenditure of funds in garrison apply to operational funding. The focus of operational funding is how to fund operations whose primary purpose is to benefit foreign militaries, foreign governments, and foreign populations, which are all forms of foreign assistance. Rule of law activities fall within the operational funding framework because their primary intent is to improve the ROL of *foreign* government agencies, *foreign* government institutions, and *foreign* civil institutions.

The general rule in operational funding is that DOS funds Foreign Assistance. Foreign Assistance includes (1) Security Assistance to a foreign military, police forces or other security-related government agency, (2) Development Assistance for infrastructure projects, and (3) Humanitarian Assistance directed to a foreign population. As a result, ROL activities will generally be classified as Foreign Assistance, and will be funded, as per the general rule, by the DOS.

For DOD operational funding purposes, there are two exceptions to the general rule that DOS funds Foreign Assistance. The first is the narrow "Interoperability, Safety, and Familiarization Training" exception, colloquially referred to as the "little t" training exception. DOD may fund the *training* (as opposed to goods and services) of *foreign militaries* with its operations and maintenance funds (O&M) only when the purpose of the training is to enhance the [I]nteroperability, [F]amiliarization, and [S]afety of the foreign military with U.S. military units, and when it does not rise to the level of Security Assistance Training.[32] This exception applies only to training of foreign militaries, *not*

[28] Dep't of Defense Financial Mgmt. Reg. (DOD FMR), vol. 2A, ch. 1, para. 010107.B.58. (Oct. 2008); *see also* DOD FMR, vol. 3, ch. 3, para. 030202 (Nov. 2008) (transfers often require notice to the appropriate Congressional subcommittees. Most DOD transfers require the approval of the Secretary of Defense or his/her designee, but some transfers require the approval of the Office of Management and Budget (OMB), or even the President).

[29] 31 U.S.C. § 1532.

[30] An unauthorized transfer also violates the Purpose Statute, 31 U.S.C. § 1301(a), because it constitutes an unauthorized augmentation of the receiving appropriation. For detailed legal analysis of transfer authorities, s*ee* the TJAGLCS Fiscal Deskbook, ch. 12.

[31] PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-24-28, GAO-04-261SP (U.S. Gov't Accountability Office, Office of the General Counsel) (3d ed. vol. I 2004). (several GAO decisions have interpreted 31 U.S.C. § 1532 to mean that unless a particular statute authorizing the transfer provides otherwise, transferred funds are subject to the same purpose and time limitations applicable to the donor appropriation—the appropriation from which the transferred funds originated; for example, if funds from a one-year appropriation were transferred into a five-year appropriation, the transferred funds would be available only for one year).

[32] *See The Honorable Bill Alexander, House of Representatives*, B-213137, Jan. 30, 1986 (unpublished GAO opinion) ("[M]inor amounts of interoperability and safety instruction [do] not constitute "training" as that term is used in the context of security assistance, and could therefore be financed with O&M appropriations."); *see*

police forces or other foreign government agencies, and as a result will not normally apply to ROL activities.

The second exception to the operational funding general rule is that DOD may fund Foreign Assistance operations if Congress has provided a specific authorization and appropriated funds to execute the contemplated mission. Therefore, ROL activities may be funded with DOD appropriations if Congress has provided specific authority and appropriated funds for the ROL operation contemplated by the command. Section III will discuss selected appropriations and authorizations available to DOS to fund these activities, which DOD may access in some instances via IAs. Section IV details selected appropriations and authorizations available to DOD.

B. Foreign Assistance Specific Limitations

Overhanging all military ROL activities are two general statutory prohibitions on the provision of USG assistance to foreign governments. The first prohibition is a general statutory prohibition on funding foreign law enforcement with Foreign Assistance Act (FAA) funds. Specifically, section 660 of the FAA prohibits the provision of "training or advice or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government..."[33] There are a number of exceptions to this restriction, including one enacted in 1996 to fund law enforcement and ROL activities, specifically allowing:

> 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 ROL, anti-corruption, and the promotion of civilian police roles that support democracy.[34]

The result is that despite the general prohibition, most ROL operations properly funded by DOS will fit into the exception *authorizing* the provision of the law enforcement and ROL aid, so long as it is funded with DOS appropriations and authorizations.

The second prohibition is commonly referred to as the "Leahy Amendment." The Leahy Amendment was first enacted as an amendment in the 1997 Foreign Operations Appropriation Act (FOAA is the annual DOS Appropriations Act, most recently enacted as Division F of the Department of Defense and Full-Year Continuing Appropriations Act, 2011) and is now codified in the Foreign Assistance Act.[35] It prohibits the USG from providing assistance under the Foreign Assistance Act or Arms Export Control Act to units of foreign security forces if the DOS has credible evidence that such units have committed gross violations of human rights, unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice. Similar language is also found in annual DOD Appropriations Acts, prohibiting the DOD from funding any training program involving a unit of the security forces of a foreign country if the DOS has credible information that the unit has committed a gross violation of human rights unless all necessary corrective steps have been taken or the Secretary of Defense, in

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also the TJAGLCS Fiscal Deskbook, ch. 10, Operational Funding (provides the legal requirements to apply the "little t" training exception, along with examples of what constitutes "little t" training versus Security Assistance Training.).

[33] 22 U.S.C. § 2420(a).

[34] 22 U.S.C. § 2420(b)(6).

[35] 22 U.S.C. § 2378d.

consultation with the Secretary of State, decides to waive the prohibition due to extraordinary circumstances.[36]

The DOS position as lead agency in foreign assistance and reconstruction is mirrored in the fiscal organization for ROL and other reconstruction activities. Funding for some post-conflict security efforts in Afghanistan and Iraq, for example, has come not from DOD "Title 10" authority but from DOS "Title 22" authority.[37] When DOD executes these DOS-funded missions via IAs, DOD agencies effectively operate as a "subcontractor" for DOS on DOS-controlled projects.[38]

III. Department of State Appropriations for Rule of Law Activities

The exact contours of the ROL activity being considered by the unit and its interagency partners will determine if an appropriation and/or authorization may be available from a Purpose standpoint. For a detailed discussion of all of the relevant appropriations and authorizations, including their respective Purpose, Time, and Amount restrictions, *see* the Fiscal Law Deskbook, Chapter 10: Operational Funding.[39] In addition, the DOS has two appropriations that have acquired a primary role in funding ROL activities executed by PRTs. These two appropriations are the Economic Support Fund (ESF) and funds provided under the heading International Narcotics and Law Enforcement. Each is discussed below in detail. While these sources provide the bulk of U.S. funding for ROL activities, there are several other funding sources from DOS and other agencies. A ROL practitioner should seek out other agency representatives and coordinate funding for proposed projects.

A. Economic Support Fund

The Economic Support Fund (ESF) is a prominent DOS funding source for ROL operations. The FAA authorizes ESF assistance in order to promote the economic or political stability of foreign countries.[40] USAID, with overall foreign policy guidance from DOS, implements most ESF-funded programs.[41] The ESF funds programs all over the world; its application is not limited to efforts in Iraq and Afghanistan. Generally, the ESF has a 2-year period of availability, with funds appropriated annually in the FOAA, the DOS equivalent to the annual DOD Appropriations Act. In FY 2010, Congress appropriated $6.3 billion to the ESF in the Consolidated Appropriations Act, 2010,[42] available for new obligations until September 2011, and an additional $2.49 billion in the Supplemental Appropriations Act, 2010,[43] available for new obligations until September 2012. For FY 2011, Congress has appropriated $5.9 billion to the ESF in the FY11 Full-Year Continuing Appropriations Act,[44] available for new obligations until September 2012. These funds are sometimes earmarked for certain countries or efforts in a particular region; the amounts are not for Iraq and Afghanistan exclusively. Rule of law practitioners should be aware of specific requirements that may be imposed on the use of funds, such as a "matching fund" requirement in Iraq that may

[36] *See, e.g.*, Dep't of Defense and Full-Year Continuing Appropriations Act, 2011, § 8058, Pub. L. No. 112-10 (2011).
[37] CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 220 (2006) (regarding the Afghan National Army).
[38] THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 274 (2010).
[39] the TJAGLCS Fiscal Deskbook, ch. 10, Operational Funding; *see also* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 211, ch. 15: Fiscal Law (2010).
[40] *See* 22 U.S.C. § 2346.
[41] UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, AGENCY FINANCIAL REPORT FY 2010 82, *available at* http://www.usaid.gov/performance/afr/afr10 (last visited April 21, 2011).
[42] Pub. L. No. 111-117, 123 Stat. 3034, 3328 (2009).
[43] Pub. L. No. 111-212, 124 Stat. 2302, 2322 (2010).
[44] Pub. L. No. 112-10 (2011).

apply to ESF or other DOS funds. Specifically, the 2009 Supplemental Appropriations Act added a requirement for the Government of Iraq to also contribute financially to certain programs.[45]

1. Iraq

As U.S. forces in Iraq drawdown, significant organizational transitions are underway. Rule of law practitioners must ensure that they do appropriate research and coordination, as the programs and organizations described in this section may change rapidly. For example, as PRTs close or transition into consulates and Embassy Branch Offices (EBOs), many aspects of ESF programs are likely to change.[46]

ESF in Iraq has been used to pursue one of three foreign assistance objectives: the Security Track, the Political Track, or the Economic Track. Each of the three major ESF tracks is allocated into several subprograms that target specific initiatives that support the primary purpose of the ESF, which is to improve infrastructure, promote democracy and civil society, and support capacity building and economic development.[47]

Currently, the ESF's Security Track is allocated into six different subprograms[48] designed to reduce violence, improve infrastructure security, and strengthen government accountability.[49] Three of those subprograms are generally available to fund ROL activities: the Provincial Reconstruction Team/Provincial Reconstruction Development Council (PRT/PRDC) Projects Program, the Local Governance Program, and the PRT Quick Response Fund (PRT QRF).[50]

The primary purpose of the PRT/PRDC Projects Program funds is for small projects (average: $1.5 million) that improve provincial government capacity to provide essential services. It is implemented and overseen by DOS. It is executed for the DOS, however, by the U.S. Army Corps of Engineers, Gulf Region Division (USACE GRD) via DOS FAA section 632 Interagency Acquisitions (IAs) authority, through Military Interdepartmental Purchase Requests (MIPRs). (Note, however, that GRD has begun transferring command and control of Iraqi reconstruction efforts to the USACE Middle

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[45] Pub. L. No. 111-32, 123 Stat. 1859. (Section 1106(b) includes a "matching requirement," implemented by the Department of State's April 9, 2009, "Guidelines for Government of Iraq Financial Participation in United States Government-Funded Civilian Assistance Programs and Projects").

[46] The Department of State Bureau of Near Easter Affairs Iraq Policy & Operations Groupstated, in the February 17, 2011 edition of its biweekly Iraq Status Report, that "[a]s the PRTs close, established relationships in the provinces will be maintained through a variety of measures, including contact from Embassy, Consulates, and Embassy Branch Offices (EBOs), locally engaged staff, and using networds or trained Iraqis developed by USAID and others over the more than seven-year period of assistance efforts in Iraq." *Available at* http://www.state.gov/p/nea/rls/rpt/c42598.htm (last visited August 3, 2011).

[47] SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, January 2011 Quarterly Report and Semiannual Report to the United States Congress, *available at* http://www.sigir.mil/publications/quarterlyreports/index.html (last visited August 3, 2011) [hereinafter SIGIR].

[48] The six subprograms under the ESF's Security Support Track are: PRT/PRDC Projects, the Local Governance Program, the PRT Quick Response Fund (PRT QRF), the Community Stabilization Program, the Infrastructure Security Protection(for Oil, Water, and Electricity), and the Community Action Program. *See* SIGIR, *supra* note 47, at 27; *see also*, Department of State Report on Iraq Relief and Reconstruction, July 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* http://2001-2009.state.gov/documents/organization/109441.pdf (last visited April 21, 2011) [hereinafter APPENDIX III] (the FY 2005 Continuing Resolution and FY04 Emergency Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan required quarterly reports for the use of Reconstruction efforts in Iraq. This is an example of a fiscal control mechanism employed by Congress).

[49] SIGIR, *supra* note 47.

[50] As PRTs close during 2011, the programs and funds they administer will be subject to change.

East District, which will be establishing a new Iraq Area Office.)[51] PRT/PRDC programs are approved by the DOS at the U.S. Embassy, Iraq.[52]

The primary purpose of the Local Governance Program is to promote diverse and representative citizen participation in provincial, municipal, and local councils. It is implemented and overseen by USAID. These projects have been executed by the PRTs and "embedded" PRTs (ePRTs) on behalf of USAID via FAA Section 632 IAs, through MIPRs. The approval authorities for these projects are USAID program managers at the U.S. Embassy, Iraq.[53]

The PRT QRF is the least cumbersome subprogram of the ESF Security Track, due to its broad purpose and lower approval authorities. (There is no counterpart to QRF in Afghanistan.)[54] As a result, it has been the most accessible ESF subprogram to fund the smaller-scale ROL activities that PRTs and ePRTs execute. The primary purpose of the PRT QRF is for grants (to non-governmental organizations or NGOs) and purchases/micro-purchases (to contractors) so the PRTs/ePRTs can support local neighborhoods and government officials or members of community-based organizations, as well as small project needs for the provinces.

The ESF's Economic Track is also allocated into seven different subprograms.[55] Of those six subprograms, only the Targeted Development Program (TDP) is significant for ROL activities. The other subprograms focus on large scale economic support infrastructure and will generally be unavailable for most ROL activities. The purpose of the TDP is for grants for NGO's to support economic, social, and governance initiatives in areas of conflict in Iraq. The focus of the TDP is on conflict mitigation, building national unity, and other developmental efforts. The Ambassador, Iraq, is the approval level for the TDP grants.

Finally, the ESF's Political Track is allocated into eight different subprograms.[56] While not robustly used early on in stability operations in Iraq, funds from this track have supported several large scale ROL projects, including case support for on-going high-visibility criminal trials and the coordination of legal matters related to the transfer of detainees to Government of Iraq custody. Democracy and Civil Society programs in the Political Track have also funded programs such as judicial procedural awareness training to legal and security force professionals.[57]

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[51] *See* News Release, USACE Middle East District, MED taking responsibility for Iraq projects (Nov. 17, 2010), http://www.tam.usace.army.mil/MED10-11-17-02.asp (last visited April 22, 2011) [hereinafter News Release].
[52] *Id.*
[53] *Id.*
[54] H. COMM. ON ARMED FORCES, 110TH CONG., AGENCY STOVEPIPES VS. STRATEGIC AGILITY: LESSONS WE NEED TO LEARN FROM PROVINCIAL RECONSTRUCTION TEAMS IN IRAQ AND AFGHANISTAN 22 (Comm. Print Apr. 2008) [hereinafter AGENCY STOVEPIPES] ; Office of the Special Inspector General for Iraq Reconstruction, Opportunities to Improve the Management of the Quick Response Fund, SIGIR-09-011 (Jan. 29, 2009).
[55] The seven subprograms under the ESF's Economic Track are: the O&M Sustainment of Infrastructure (executed by the Army Corps of Engineers, Gulf Region Division (USACE GRD) through an Interagency Agreement), the *Inma* Agriculture Private Sector Development Project (executed by USAID), the *Tijara* Provincial Economic Growth Program, the Targeted Development Program (implemented by the Ambassador, Iraq), the Plant-Level Capacity Development & Technical Training Program, the Izdihar Program, and the Financial Sector Development Program. SIGIR, s*ee supra* note 47. *See also* APPENDIX III, *supra* note 48.
[56] The eight subprograms under the ESF's Political Track are: the *Tatweer* National Capacity Development Program; the Democracy and Civil Society Program; the Iraqi Refugees Program; the Economic Governance II (Policy and Regulatory Reforms) Program; the Ministerial Capacity Development Program; the Regime Crimes Liaison Office; the Elections Support Program; and the Monitoring and Evaluation Program, *see* APPENDIX III, *supra* note 48.
[57] *See* News Release, *supra* note 51.

2. Afghanistan

In Afghanistan, the DOS and USAID are focusing effort on improving governance and the ROL through increased resources. To this end, "ESF programs support counter-terrorism; bolster national economies; and assist in the development of effective, accessible, independent legal systems for a more transparent and accountable government."[58] As of December 2010, cumulative funding for ESF amounted to more than $11.14 billion.[59] The DOS has requested an additional $1.58 billion in ESF funding for Afghanistan for FY12 Supplemental Appropriations to fund the following foreign assistance objectives: Governing Justly and Democratically (including Rule of Law and Human Rights, Good Governance, Political Competition and Consensus-Building, and Civil Society); Investing in People (Including Health, Education, and Social and Economic Services and Protection for Vulnerable Populations; and Economic Growth (including Macroeconomic Foundation for Growth, Trade and Investment, Financial Sector, Infrastructure, Agriculture, Private Sector Competitiveness, Economic Opportunity, and Environment). Specifically, DOS has requested $35.2 million for ROL and human rights activities, and $789.1 million for Good Governance programs.[60]

B. Bureau of International Narcotics and Law Enforcement Affairs

The DOS has statutory authority to "furnish assistance to any country or international organization ... for the control of narcotic and psychotropic drugs and other controlled substances, or for *other anticrime purposes*."[61] Congress appropriates funds for these purposes on an annual basis in the FOAA, the annual appropriations act for the DOS, under the International Narcotics Control and Law Enforcement (INCLE) account. For the conflicts in Iraq and Afghanistan, Congress has provided additional funds as well through supplemental appropriations. Notably, INCLE funding supports multiple countries in anti-narcotic and anti-crime efforts, not just in Iraq and Afghanistan.

Although one of the primary purposes of INCLE funds is counter-narcotics, Congress has also authorized the use of INCLE funds "for other anticrime purposes."[62] This broad purpose mandate allows INCLE to be used for a majority of ROL activities, since many of these operations are generally intended to decrease crime in some fashion.

The mission of the DOS's Bureau of International Narcotics and Law Enforcement Affairs (INL) is to:

> Minimize the impact of international crime and illegal drugs on the United States, its citizens, and partner nations by providing effective foreign assistance and fostering global cooperation. This mission, which centers on helping our partner nations establish a capable and accountable criminal justice sector, was expanded during the past decade to include stabilizing post-conflict societies through criminal justice sector development and reform. The bureau supports the State Department Goal of Peace and Security by stabilizing and strengthening security institutions to build a global security capacity and by combating narcotrafficking and other transnational crimes such as money laundering and criminal gangs. The bureau supports the State Department goal of

[58] *See* SIGIR, *supra* note 47.
[59] *Id.*
[60] *See* U.S. DEP'T OF STATE, Fiscal Year 2012 Foreign Operations Congressional Budget Justification Annex: Regional Perspectives, at 603, *available at* http://www.state.gov/documents/organization/158268.pdf (last visited April 22, 2011).
[61] 22 U.S.C. § 2291 (4) (emphasis added).
[62] *Id*. *See also* Pub. L. No. 104-164, 110 Stat. 1429 (1996) (amending the Foreign Assistance Act to broaden International Narcotics Control Assistance).

> Governing Justly and Democratically by strengthening justice sector institutions, good governance and respect for human rights.[63]

In FY2010, Congress appropriated $1.6 billion to the INCLE account in the Consolidated Appropriations Act, 2010,[64] available until September 2011, and an additional $1.12 billion in the Supplemental Appropriations Act, 2010,[65] available for obligation until September 2012. For FY 2011, Congress has appropriated $1.6 billion to the INCLE account, available for obligation until September 2012.[66] Among the programs funded by INL in Afghanistan are the Judicial Sector Support Program,[67] the Corrections System Support Program, the Senior Federal Prosecutors Program, and a Legal Education program.[68]

Use of FY2010 INCLE funds on rule of law projects provides a snapshot of INCLE fund versatility. Congress appropriated to the INCLE fund $155 million for administration of justice programs in Afghanistan. This funding is being spent on capacity building support for the Ministry of Justice, Attorney General's Office, Supreme Court, and Ministry of Women's Affairs. Programs also include training courses for police investigators, prosecutors, judges, defense attorneys, and corrections officers. Specialized support is going to the Independent National Legal Training Center and non-governmental organizations supporting the provision of defense attorneys to the poor and emergency shelter services to female victims of violent crime. INL programs fund a case management system to bring greater efficiency and transparency to the entire criminal justice process. INL also funds programs to combat major crime such as corruption and narcotics and supports a Judicial Security Unit. Corrections development programs include mentoring and capacity building at the headquarters and facility level, salary support through an international trust fund, construction and renovation of correctional facilities, and targeted support for vulnerable populations within the prison system. Using 2010 funds, INL is also supporting Afghan law schools through a visiting scholar program where law professors undertake graduate level and clinical work in the U.S. and U.S. professors support reform in Afghan law schools. INL also partners with the military to provide mentoring and physical facility support to prosecutors, judges, investigators, and defense attorneys working to transition battlefield detainees into the civilian criminal system.

INL has also received funding from DOD's ISFF and ASFF appropriations via IAs and interagency transfer of funds. As of May 2010, DOD had transferred approximately $2.1 billion in ISFF funds to the INL for police advisors and support since the enactment of the ISFF in fiscal year 2005.[69] Beginning on October 1, 2011, DOS and INL will assume full responsibility for the current DOD (USF-I) police training program in Iraq.[70] As previously noted, it will be essential for ROL practitioners to be aware of the current status of programs and funding during these transitions in Iraq.

IV. Department of Defense Appropriations for Rule of Law Operations

Recall that the general rule in operational funding is that the DOS, and not DOD, funds Foreign Assistance. Rule of law activities will generally be classified as Foreign Assistance, and therefore

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[63] *See* Bureau of International Narcotics and Law Enforcement Affairs, Frequently Asked Questions, http://www.state.gov/p/inl/faqs/index.htm (last visited April 25, 2011).
[64] Pub. L. No. 111-117, 123 Stat. 3034, 3335 (2009).
[65] Pub. L. No. 111-212, 124 Stat. 2302, 2324 (2010).
[66] Pub. L. No. 112-10 (2011).
[67] For more information on the Judicial Sector Support Program, follow the URL in Table 2 of the Appendix.
[68] CONGRESSIONAL RESEARCH SERVICE, R41484, Afghanistan: U.S. Rule of Law and Justice Sector Assistance 28-34 (Nov. 9, 2010).
[69] Bureau of International Narcotics and Law Enforcement Affairs Fact Sheet, *Police Programs: Iraq* (May 11, 2010), http://www.state.gov/p/inl/rls/fs/141756.htm (last visited April 26, 2011).
[70] SIGIR, *supra* note 47.

should be funded by DOS unless one of the two exceptions applies. When considering the fiscal aspects of ROL activities, the second exception is the focus for the advising JA.

The second exception to the operational funding general rule that DOS funds Foreign Assistance is that DOD may fund Foreign Assistance operations if Congress has provided a specific appropriation and/or authorization to execute the contemplated mission. Therefore, ROL activities may be funded with DOD appropriations if Congress has provided a specific appropriation, or an authorization to access an appropriation, for the ROL operation contemplated by the command.

The DOD has three appropriations available to it that have acquired a primary role in funding ROL activities by PRTs and, previously in Iraq, the "embedded" Provincial Reconstruction Teams (ePRTs). These three appropriations are: the ISFF, the ASFF, and the CERP fund. In addition to these three congressional appropriations, Iraqi-funded Commander's Emergency Response Program (I-CERP) has also played a key role in funding ROL activities in Iraq. Each of these funding mechanisms is discussed in greater detail below.

As previously noted in the section describing DOS funding for ROL activities in Iraq, the drawdown of U.S. forces in Iraq brings with it significant organizational transitions. Rule of law practitioners must ensure that they conduct appropriate research and coordination, as the programs and organizations described in this section may change rapidly.

A. Afghanistan Security Forces Fund / Iraq Security Forces Fund

Congress created two appropriations, the ASFF and the ISFF, on May 11, 2005, to enable the DOD to "train and equip" the security forces of Afghanistan and Iraq, respectively.[71] Congress initially appropriated $1.285 billion for the ASFF and $5.7 billion for the ISFF, to remain available for new obligations until Sept. 30, 2006.[72] Since fiscal year 2005, Congress has generally appropriated ISFF/ASFF funds on a yearly basis with a period of availability of two years. Most recently, Congress appropriated an additional $11.6 billion for the ASFF and $1.5 billion for the ISFF, available for obligation until September 2012.[73] The ASFF is available to the SECDEF "for the purpose of allowing the Commander, Combined Security Transition Command-Afghanistan, or the Secretary's designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding[.]"[74] The purpose language accompanying the ISFF is very similar, although the applicable command authority for ISFF is currently United States Forces-Iraq, and "construction" and "funding" are not among its specifically delineated purposes.[75]

For the ROL practitioner, minor differences such as those between the ISFF and ASFF could be key, and how they come about reflects the need to track changes to statutory authorizations and appropriations. The original purpose of both the ASFF and ISFF included facility repair and construction, but in the FY09 National Defense Authorization Act (NDAA) Congress specifically prohibited obligating or expending ISFF for "acquisition, conversion, rehabilitation, or installation of

[71] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13, 119 Stat. 231, 235-237 (2005). Prior to the creation of the ASFF and ISFF, Congress authorized the training and equipping of forces in Iraq and Afghanistan from O&M accounts. At the onset, only the New Iraqi Army and the Afghan National Army could receive support. Later authorizations expanded the statutory language to include "security forces." *Compare* Pub. L. No. 108-106 with Pub. L. No. 109-13.
[72] *Id.*
[73] Pub. L. No. 112-10 (2011).
[74] *Id.*
[75] *Id.*

facilities in Iraq for the use of the Government of Iraq…."[76] As noted in Senate committee report language, "the committee believes the Iraqi Government is well able to afford to finance its own infrastructure needs at this point."[77] This illustrates the precept that, because so much of operational funding is dependent upon the political, economic, and security situation in a given environment, ROL JAs must stay current on fiscal law issues.

The ISFF and ASFF appropriations do not specifically define what forces are considered to be the "security forces" of Iraq or Afghanistan. DOD has typically defined the term "security forces" to include, however, both military and police forces under the direct control of the governments of Iraq and Afghanistan.[78] This determination is based on DOD budget request submissions to Congress that identify both the military and police forces that will be trained and equipped using ISFF and ASFF.[79] Generally, however, the ISFF and ASFF may not be used to fund police forces that are not under the direct control of the governments of Iraq and Afghanistan.[80] The Department of Defense had also, as of May 2010, transferred approximately $2.1 billion in ISFF funds to the INL for police advisors and support since the enactment of the ISFF in fiscal year 2005.[81]

B. Commander's Emergency Response Program

The second major statutory authorization that allows DOD to fund many ROL activities is the Commander's Emergency Response Program. CERP is a statutory authorization to obligate funds from DOD Operations and Maintenance (O&M) appropriations[82] for the primary purpose of authorizing U.S. military commanders "to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within their areas of responsibility" that provide an "immediate and direct benefit to the people of Iraq or Afghanistan."[83]

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[76] Pub. L. No. 110-417, §1508 (2008). *See also* Pub. L. No. 111-383, § 1533 (2011).
[77] S. Rep. No. 110-335, at 428 (May 12, 2008).
[78] The following security forces are considered to be under the "direct control" of the Government of Iraq (and the equivalent forces for the Government of Afghanistan), and may therefore be funded with ISFF and ASFF, respectively: Ministry of Defense Activities (including the Army, Navy, Air Force, and Intelligence Service); Ministry of Interior activities (including the Iraqi Police Service, National Police, Intelligence Agency, Facility Protection Service, Dept. of Border Enforcement, and Dir. of Ports of Entry); Iraqi Special Operations Forces, and; Iraqi Corrections Service Officers of the Ministry of Justice.
[79] DOD budget request documentation typically breaks down funding into separate budget activities for "defense" forces (e.g., the Army), "interior" forces (the policy), and other activities. *See, e.g.*, Office of the Secretary of Defense, *Department of Defense Budget Fiscal Year (FY) 2012, Justification for FY 2012 Overseas Contingency Operations Afghanistan Security Forces Fund (ASFF),* (Feb. 2011) *available at* http://asafm.army.mil/Documents/OfficeDocuments/Budget/BudgetMaterials/FY12/OCO//asff.pdf (last visited April 25, 2011).
[80] The following "security forces," for example, are NOT considered to be under the "direct control" of the Government of Iraq (and any equivalent forces for the Government of Afghanistan), and may therefore generally NOT be funded with ISFF and ASFF, respectively: Concerned Local Citizens (also known as "Sons of Iraq"), Kurdish Peshmerga, and Iraqi Civil Defense Corps. Additionally, the following Iraqi forces are under the control of the GoI, but are not considered to fall within the definition of "security forces": Iraqi Firefighters of the Ministry of Interior's Objective Civil Security Forces, and the Iraqi Railroad Police.
[81] Bureau of International Narcotics and Law Enforcement Affairs Fact Sheet, *Police Programs: Iraq* (May 11, 2010), http://www.state.gov/p/inl/rls/fs/141756.htm (last visited April 26, 2011).
[82] The actual funds available for CERP are from the Operations and Maintenance, Army (OMA) appropriation. *See* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10 (2011).
[83] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1212, 124 Stat. 4137, 4391 (2011).

The CERP authorization for FY 2011 is $500 million, contained in the 2011 NDAA, of which $400 million is specific for Afghanistan and $100 million for Iraq.[84]

In addition to the broad purpose of CERP, Congress has also authorized the Secretary of Defense to "*waive any provision of law* not contained in this section that would (but for the waiver) prohibit, restrict, limit, or otherwise constrain the exercise of that authority."[85] The Secretary or Deputy Secretary of Defense have routinely waived various statutes that would limit the execution of CERP, including the Competition in Contracting Act (CICA) and the Foreign Claims Act (FCA).[86] The combination of the broad statutory purpose of CERP, the low-level approval authority to authorize the use of CERP,[87] and the waiver of CICA and the FCA, has provided military commanders with an incredibly flexible authorization to conduct Humanitarian Assistance operations outside of Department of State Foreign Assistance funding channels and restrictions.[88]

CERP, however, is restricted to the "urgent humanitarian needs" of the Iraqi and Afghan *people* and may therefore not be used to fund the military and police forces under the direct control of the governments of Iraq and Afghanistan.[89] As a result, CERP funds are restricted to ROL activities that target the "urgent humanitarian needs" or "urgent reconstruction requirements" of the Iraqi and Afghan populations, and may generally not be used for any ROL security operations with forces under the direct control of the governments of Iraq or Afghanistan.[90] Prior to advising units on the legality of using CERP funds to execute any ROL activity, JAs should scrutinize the statutory and policy restrictions outlined in the Money As A Weapon System (MAAWS) SOPs (there are versions for both Iraq and Afghanistan) and the most recent DOD Comptroller's CERP policy guidance in the DOD Financial Management Regulation (DOD FMR).[91]

A recent development in CERP-funded ROL projects concerns the distinction between *construction* and *reconstruction* of facilities. Slight changes in policy guidance between 2008 and 2009 raised

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[84] *Id.*

[85] *See, e.g.*, 2005 NDAA, Pub. L. 108-375, § 1202 (Oct. 28, 2004), as amended by 2008 NDAA, Pub. L. No. 110-181, § 1205, 2009 NDAA, Pub. L. No. 110-41,7 § 1214, 2010 NDAA, Pub. L. No. 111-84, § 1222, and 2011 NDAA, Pub. L. No. 111-383, § 1212. (Emphasis added).

[86] *See, e.g.*, Memorandum from the Honorable William J. Lynn, Deputy Secretary of Defense, to the Secretaries of the Military Departments, et. al, subject: Waiver of Limiting Legislation for Commander's Emergency Response Program (CERP) for FY 2010 (May 24, 2010), *available at* http://www.oaa.army.mil/FetchFile.ashx?DocID=350 (last visited Apr. 26, 2011).

[87] 2005 NDAA, Pub. L. 108-375, Section 1201 (Oct. 28, 2004). The CERP authorization allows "military commanders" to authorize the obligation of CERP funds. Military commanders include company commanders, generally the rank of a U.S. Army Captain. This statutory low-level approval authority, however, has generally been limited to higher ranks by DOD policy.

[88] As a result of the waiver of CICA for CERP, for example, CERP-funded projects need not adhere to the competition requirements of the Federal Acquisition Regulation (FAR). This waiver led directly to the development of the "Iraqi First" and "Afghan First" acquisition programs, which indirectly provided numerous Iraqis and Afghans jobs by restricting CERP-funded acquisitions to Iraqi and Afghan contractors. The waiver of the FCA allows CERP to fund condolence payments and battle damage claims that are normally barred by the FCA when the injuries and/or damages occur during combat operations.

[89] *See, e.g.*, Department of Defense Appropriations Act for Fiscal Year 2006, Section 9007, Pub. L. 109-148 (CERP funds "may not be used to provide goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces").

[90] *Id.*

[91] *See* Money As A Weapons System (MAAWS), Multi-National Corps – Iraq, USF-I J8 SOP, Mar. 1, 2010 (on file with author); MAAWS-Afghanistan, USFOR-A Pub. 1-06, Commander's Emergency Response Program (CERP) SOP, February 2011 (on file with author); *see also* DOD FMR, vol. 12, ch. 27 (January 2009); *see also* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 241-242 (July 2010).

concerns about a possible limitation on building ROL facilities "from the ground up" in Afghanistan. (In Iraq, this was not an issue because there were existing structures and Iraq reconstruction efforts had been robust for several years.) The most current version of the DOD FMR no longer includes the concept of "build" and instead focuses on "reconstruction" and "restore."[92] This focus on reconstruction does not, however, limit efforts to restore "preexisting elements of Afghan society, such as ROL, if the projects are otherwise in accordance with CERP guidance."[93] This does require high level approval authority.[94] Judge advocates should ensure that they have the most current guidance on ROL facility construction.

C. Iraqi Funded Commander's Emergency Response Program

On 3 April 2008, Multi-National Force – Iraq (MNF-I) and the Iraqi Supreme Reconstruction Council (I-SRC) signed a Memorandum of Understanding (MOU) which authorized MNF-I units to execute an Iraqi-funded reconstruction program modeled after (U.S. funded) CERP, named the Government of Iraq CERP (I-CERP).[95] I-CERP was initially funded with $270 million from the Government of Iraq, with an additional $30 million subject to transfer to the I-CERP upon the approval of the I-SRC.[96] Although similar to CERP in purpose, the I-CERP has significant differences of which JAs need to be aware. The purpose of I-CERP is for coalition force commanders to execute urgent reconstruction projects for the benefit of the Iraqi people in the fifteen non-Kurdish provinces of Iraq.[97] Under the same monetary approval authorities as CERP, commanders in Iraq may authorize the use of I-CERP to repair or reconstruct the following four types of infrastructure projects: water purification plants, health clinics, and city planning facilities (including the planning facilities owned by the Government of Iraq, the provincial governments, and the local governments).[98] By exception, and upon the approval of the Major Subordinate Commanding General, I-CERP may also be used to repair and reconstruct: roads, sewers, irrigation systems, and non-reconstruction projects that promote small business development.[99] The initial intent of I-CERP was for the Iraqis to match the reconstruction funding of CERP in Iraq.[100] I-CERP has become increasingly important as Congress intends for the government of Iraq to assume all financial responsibility and phase out the use of CERP.[101] One fiscal law issue raised by I-CERP involved the Miscellaneous Receipts Statute. Recall that an agency must deposit funds it receives into the U.S. Treasury General Account, unless

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[92] DOD FMR, vol 12, ch. 27, para. 270103D.
[93] Commander, United States Central Command, Memorandum to Undersecretary of Defense, subject: Commander's Emergency Response Program (CERP) Waiver Guidance Request (June 11, 2009) (on file with author).
[94] *Id.*
[95] Memorandum of Understanding Between Supreme Reconstruction Council of the Secretariat of the Council of Ministers and the Multi-National Force – Iraq, Concerning the Implementation of the Government of Iraq Commanders' Emergency Response Program (I-CERP) [hereinafter I-CERP MOU], agreed to and signed by MNF-I on 25 March 2008 and by I-SRC on 3 April 2008 (on file with author).
[96] *Id*. at 3.
[97] Money As A Weapons System (MAAWS), Multi-National Corps – Iraq, Combined Joint Staff Resource Management Standard Operating Procedure (MNC-I CJ8 SOP) (26 January 2009), Appendix C: I-CERP (on file with author).
[98] *Id*.
[99] *Id*.
[100] I-CERP MOU, *supra* note 95 at 2.
[101] Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1214(e), 122 Stat. 4356, 4630-4632 (2008) (stating "[i]t is the sense of Congress that the Government of Iraq should assume increasing responsibility for funding and carrying out projects currently funded by the United States through the Commanders' Emergency Response Program...").

Congress authorizes otherwise. With respect to I-CERP, Congress has indicated that it does not consider I-CERP funding to be an illegal augmentation.[102]

V. Funding Rule of Law Through Provincial Reconstruction Teams

To access the appropriations and authorizations available for stability and ROL operations, advising JAs will need to understand the basic strategy and structure of the PRTs. Provisional Reconstruction Teams currently exist only in Iraq and Afghanistan, and will be phased out in Iraq by the end of 2011, but may well provide a model for future civil-military operations worldwide.

A. Provincial Reconstruction Teams and Embedded Provincial Reconstruction Teams

Provincial Reconstruction Teams[103] are civil-military organizations (CMOs) that are staffed by U.S. government (USG) civilian and military personnel to assist foreign provincial governments with their reconstruction efforts; their security and ROL efforts; and their political and economic development.[104] PRTs were first deployed in Afghanistan in 2002; the PRTs in Afghanistan generally number between fifty and one hundred members, including a force protection element for the primary interagency PRT staff.[105] The success of the PRTs in Afghanistan led the USG to incorporate the PRT concept into its new stability and reconstruction strategy.[106] PRTs were first established in Iraq in November 2005. PRTs in Iraq and Afghanistan provide their own force protection, but the PRTs in Iraq have a smaller force protection element since they are generally co-located with large coalition Forward Operating Bases (FOBs) which provides some of the needed force protection.[107]

Embedded Provincial Reconstruction Teams were a second type of PRT formed in Iraq as part of the "surge" in early 2007. They were directly assigned to Army Brigade Combat Teams (BCTs) or Marine Corps Regiments (MCRs), who provide the ePRTs' force protection.[108] As a result, ePRTs were staffed solely by the primary interagency civil-military staff and were significantly smaller.[109] Unlike PRTs, who report directly to their respective embassies, ePRTs reported to the military commander of the BCT or MCR to which they were assigned.[110] The ePRTs, however, generally conduct the same types of missions as PRTs, possibly on a slightly smaller scale.

Both PRTs and ePRTs in Iraq were led by the Department of State Foreign Service Officer assigned to the PRT/ePRT, but they tended to fund operations differently due to their structural differences.

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[102] *Id.*
[103] *See generally,* Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW. (Oct. 2008) (providing a comprehensive overview of the strategic development of the PRT concept, its central role in executing the U.S. government's pre- and post-conflict stabilization and reconstruction strategic policies, and the significant fiscal law challenges faced by the PRTs in legally funding stabilization and reconstruction missions worldwide).
[104] *See* Furin, *supra*; *see also* PRT (Provincial Reconstruction Teams) Fact Sheet, U.S. Embassy, Iraq (Sept. 15, 2009), http://iraq.usembassy.gov/iraq_prt/provincial-reconstruction-teams-fact-sheet.html (last visited July 21, 2010); NIMA ABBASZADEH ET AL., PROVINCIAL RECONSTRUCTION TEAMS: LESSONS AND RECOMMENDATIONS 4 (Jan. 2008), *available at* http://wws.princeton.edu/research/pwreports_f07/wws591b.pdf (last visited July 21, 2010).
[105] *See* Furin, *supra* note 103, at 43.
[106] *Id*. at 42.
[107] *Id*. at 44.
[108] *Id*. at 45.
[109] *Id*.
[110] *Id.*

PRTs tended to have greater access to DOS appropriations like the Economic Support Fund (ESF), the INCLE, and INL. PRTs tended to access DOD appropriations and authorizations like CF-CERP as a supplement to the DOS funds that they receive.[111] The ePRTs reversed the funding model of PRTs by funding the large majority of their operations with DOD appropriations like CF-CERP and accessing DOS appropriations as a supplement.[112] As previously noted, ePRTs have been phased out in Iraq, and all remaining PRTs are scheduled to close or be transformed into new organizations during 2011.[113]

PRTs in Afghanistan are led by both the United States and various International Security Assistance Force (ISAF) coalition partners.[114] The U.S.-led PRTs in Afghanistan have a military commander, unlike those in Iraq which are led by civilian partners, but military commanders do not command non-DOD civilians.[115]

B. Funding Rule of Law Operations via PRTs, ePRTs and other CMOs

Regardless of what type of civil-military organization (CMO) funds a ROL activity, whether a PRT, an ePRT, or any other CMO outside of Iraq or Afghanistan, advising JAs (JAs) must understand the basic fiscal restrictions for the fund(s) contemplated to execute the mission, with a primary focus on the basic purpose of each appropriation. As the discussion of DOS funds and DOD funds indicates, each fund has different Purpose, Time, and Amount restrictions.

Due to the dramatically increased Operational Tempo (OPTEMPO) in ROL activities, the PRT, ePRT, or CMO normally requires the appropriate funds faster than the DOS may be able to provide them. As a result, the unit should coordinate with the deployed DOS Political Advisor (POLAD) located at the Combined Joint Task Force (CJTF), or division level, as early as possible in the planning stages. The unit may also coordinate with the DOS Foreign Officers located at the PRTs.

In advising their Units, JAs should be aware of the cultural, structural, and procedural differences between DOD and DOS.[116] DOD has the cultural and structural capability to plan for operations far in advance via MDMP. DOS, on the other hand, generally has neither the structural capability nor the organizational culture that would allow it to plan for operations as far in advance or with such detailed specificity as DOD. These structural differences between DOD and DOS may affect the speed with which the DOS may be able to provide its appropriated funds for ROL activities.

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[111] *Id*. at 47.
[112] *Id.*
[113] *See supra*, note 50.
[114] STAFF OF HOUSE ARMED SERVICES SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 110TH CONG., AGENCY STOVEPIPES VERSUS STRATEGIC AGILITY: LESSONS WE NEED TO LEARN FROM PROVINCIAL RECONSTRUCTION TEAMS IN IRAQ AND AFGHANISTAN 13 (Comm. Print 2008), *available at*: http://democrats.armedservices.house.gov/index.cfm/files/serve?File_id=20ca518e-0183-433f-be5a-7e872dbc41b7 (last visited April 26, 2011).
[115] *Id.*
[116] *See* Rosemary Hansen, "Defense is from Mars, State is from Venus: Improving Communications and Promoting National Security," U.S. Army War College Strategy Research Project (1998).

CHAPTER 7

THEATER-SPECIFIC INFORMATION ON RULE OF LAW: AFGHANISTAN AND IRAQ

This *Handbook* is intended to be more than simply a narrative on ROL in Iraq or Afghanistan. That said, *this* chapter unashamedly focuses on exactly those two theaters of operation. Both have undergone significant change since the 2010 edition of the *Handbook*.

I. Afghanistan

A. Overview

It is difficult to exaggerate the difficulties that confront the development of the ROL in Afghanistan. Afghanistan is a poor, mountainous country with bad communications. Its people are from a patchwork of ethnic groups with a preference for identifying themselves by their racial and tribal backgrounds rather than by their nationality. Local warlords are able to assert their independence from the central government, and corruption is widespread. War and political upheaval have bedeviled Afghanistan for decades. British Army veteran and Afghan commentator Rory Stewart reminds us that "every Afghan ruler in the 20th century was assassinated, lynched or deposed."[1] This is unpromising soil in which to grow the ROL. Yet, for all these challenges, the Afghan people have a hunger for the ROL, a concept that is deeply engrained in their profound attachment to Islam and the tenets of Sharia. Rule of law practitioners in Afghanistan can attest to the presence of many Afghans of all generations with dedication and willingness to sacrifice much in order to improve ROL institutions in this beleaguered country.

American civil and military efforts have not always been consistent or synchronized. In the past year, the U.S. Government has initiated a number of significant changes to ROL efforts. Key players and activities are rapidly evolving as the Afghan government and international community strive to achieve positive change in the nation's ROL institutions. This trend will probably continue through 2011 and 2012 as the Afghan government and coalition prepare for transition. The insurgents will continue to subvert this process. Thus, readers may find that organizational structures and key plans will have changed by the time they deploy to Afghanistan. With this in mind, this chapter of the *Handbook* provides a snapshot of a fluid and ever-changing series of organizational structures that reflect senior government and military leaders' commitment to strengthening Afghan ROL and achieving strategic change for the benefit of the Afghan people and the long term stability of the region.

B. The Plans for Rule of Law

There are a number of key documents that provide plans and guidance for ROL efforts in Afghanistan. The primary strategic plan for ROL development in Afghanistan is the Afghan National Development Strategy (ANDS).[2] The ANDS consists of a variety of plans for different "sectors" (such as agriculture, education, health, water, etc.); the plan for ROL is one of the sectors nested within the ANDS. The specific document

[1] Rory Stewart, *Afghanistan: A War We Cannot Win*, THE TELEGRAPH (July 10, 2009, 7:00 PM BST), http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/5797197/Afghanistan-a-war-we-cannot-win.html (last visited Aug. 22, 2011).

[2] Government of the Islamic Republic of Afghanistan, Afghanistan National Development Strategy, http://www.embassyofafghanistan.org/documents/resume_ANDS.pdf (last visited Aug. 22, 2011) [hereinafter ANDS].

outlining the ROL sector is the National Justice Sector Strategy (NJSS),[3] which, in turn, contains the National Justice Program (NJP). The NJP is the fundamental document used by the international donor community to explain the development of the ROL in Afghanistan over a five year time frame. It attempts to describe the effects that must be achieved in order to establish ROL in this environment. The document reflects an almost herculean effort to gain consensus amongst the Afghan and international ROL community stakeholders. It also reflects a policy decision at senior national leadership levels to commit resources and effort to the stated goals. President Karzai approved the ANDS on 21 April 2008.[4]

The NJP has six justice components:[5]

- Effectively organized and professionally staffed, transparent and accountable justice institutions.
- Sufficient infrastructure, transportation, equipment and supplies adequate to support the effective delivery of justice services.
- Justice professionals adequately educated and trained with sufficient know-how to perform their tasks.
- Clearly drafted constitutional statutes produced by a consultative drafting process.
- Coordinated and cooperative justice institutions able to perform their functions in a harmonized and interlinked manner.
- Awareness amongst citizens of their legal rights and how to enforce them.

In theory, if these six components are all in place, the ROL should exist in Afghanistan. Listing the components in this way is a useful guide, but it is necessarily over simplistic. For instance, the list does not provide any guidance as to relative importance to be attached to each component. Infrastructure, for example, is not necessarily a very important component. Far more important is the quality of the people serving the system: justice systems have operated effectively with good people working in bad facilities. But the quality of people is hard to measure, and people take time to develop. In comparison, the construction and counting of buildings is easy. There is consequently a temptation to focus on infrastructure, a relatively easy and straightforward "metric," as opposed to people, who are messy and hard to quantify in any meaningful way.

The NJP aims to be a comprehensive statement of the requirements for the ROL in Afghanistan. It establishes an end state, defines performance indicators, and outlines methods for monitoring and evaluation.[6]

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[3] Government of the Islamic Republic of Afghanistan, Justice & Rule of Law Sector Strategy (Mar. 2008), http://www.idlo.int/english/Resources/ROL/JusticeAndRuleOfLawSectorStrategies/Pages/..%5CNJSDocs%5CAfgh-Combined%20NJSS-NJP.pdf [hereinafter NJSS]. Confusingly the document is also entitled the "Justice and Rule of Law Sector Strategy," the title that appears on the cover of its English translation. NJSS is the more commonly used title that was agreed at the Rome Conference of July 2007. NJSS is the title that will be used here. Variations in language between documents that are translated into English from their native Dari or Pashtu are common.

[4] The critical observer might be forgiven for asking why it took almost seven years from the date of the establishment of an Interim Afghan government by the Bonn Agreement, to establish a strategy for developing Afghanistan. The answer to that question is beyond the scope of this section; suffice it to say that there is wisdom in the frequently repeated truism that the development of rule of law in Afghanistan is a "work of decades, not years."

[5] Note that the NJP places policing in a security - rather than a justice - line of operation. This has the unfortunate effect of dividing the efforts of rule of law practitioners since organic rule of law practitioners only focus on the Ministry of Justice, the Attorney General's Office, and the Supreme Court. The police are the responsibility of Combined Security Transition Command – Afghanistan (CSTC-A). The U.S. Embassy is aware of the potential for incoherence that this brings and is working to rectify it.

[6] NJSS, *supra* note 3. The responsibility for oversight is shared between the Program Oversight Committee (POC) and the Board of Donors (BoD). The first joint meeting between the POC and the BoD was held on 14 May 2009. Coordinating work on the NJP is unusually complicated because it involves so many different groups. These include: U.S.A; UK; Italy; Germany; Canada; NGOs; the World Bank (the Afghanistan Reconstruction Trust Fund); IDLO; ISISC; UNDP; UNODC; UNICEF; and UNIFEM.

In 2010, the international community and Afghan government further modified the ANDS by adopting the "Priority and Implementation Plan 2010-2013 (PIP)." The PIP establishes new Strategic Objectives for the ANDS for governance efforts. To further implement this, the Afghan government has developed six new National Priority Programs (NPPs). National Priority Program #5 is entitled National Program for Law and Justice for All. This NPP is still being finalized as of the writing of this handbook.

In addition to this effort to update the ANDS, the Afghan government has worked closely with NATO to define how security transition will proceed over the next few years. This process is called "Inteqal" which is Dari and Pashto for "transition." The Joint Afghanistan-NATO Inteqal Board (JANIB) process helps the Afghan government and the ISAF coalition to collaboratively define the conditions for transition of security responsibilities for a specific territorial area from ISAF to Afghanistan's security and police forces. As the JANIB process assesses provinces, all parties agree on specific provinces or municipalities to transition. Rule of law figures prominently in this plan. There are assessment tools being developed in the JANIB process that should be considered as ROL practitioners continue their work.

The U.S. Embassy adopted the U.S. Government Rule of Law Strategy in November 2010. This document is the result of several years of effort to develop a plan that was acceptable to all stakeholders on the Kabul country team and that would be approved by the interagency experts and policy makers in Washington. This national strategy was also written to support the ANDS, the NJSS, and the NJP. The objectives of the Strategy are to focus U.S. ROL assistance in Afghanistan on constructive programs that will offer Afghans meaningful access to fair, efficient, and transparent justice based on Afghan law while helping to eliminate the reach and influence of Taliban "justice." It also intends to increase the legitimacy of the Afghan government by promoting a culture that values the ROL. The Strategy recognizes that the U.S. has no goal to replace traditional justice systems or to impose an alien western style justice system.

The U.S. Embassy is working closely with ISAF in order to maximize civil agency and military command cooperation. The U.S. Embassy and COMISAF/COMUSFOR-A published the U.S. Government Integrated Civilian-Military Campaign Plan for Support to Afghanistan in August 2009, and they revised it in February 2011.[7] This attempt to replicate similar planning conducted in Iraq a few years previously sought to provide clear guidance how the military, diplomatic, and development assets in Afghanistan should work cooperatively in the effort to secure and stabilize the country. With the JANIB process and U.S. Government transition efforts rapidly evolving, the U.S. Embassy and military commands are working very hard to develop similar guidance to allow all to take a reasoned and methodical approach to security transition over the next few years.

The U.S. and coalition military commands in Afghanistan have considered or issued plans for ROL efforts within their areas of responsibility. For example, Regional Command (East) (RC(E)[8]) has placed a Rule of Law Annex in its campaign plan for the past several years. The 2008 Rule of Law Annex was written by selecting those NJP components the military could advance. The 2010 Annex incorporated elements of the draft U.S. Government Rule of Law Strategy. An important underlying assumption was that the lead in ROL development is the civilian international and interagency community, and military efforts support the civilian led effort. For instance, the organization of—and coordination between—justice institutions, and the drafting of legislation are not issues that can be addressed from the tactical RC(E) level. These are strategic and operational challenges may best be overcome by the ministries in Kabul advised and mentored by civilian specialists. Accordingly the 2010 RC(E) annex prioritized efforts at District level in order to achieve the following: (1) linking the formal and informal justice sectors; (2) increasing public confidence and

[7] *Available at* http://thesimonscenter.org/wp-content/uploads/2011/02/ICMCP_Feb_2011final.pdf.

[8] One of five "cardinal" ISAF regional HQs in Afghanistan and, before the U.S. surge into RC(S) in the Spring of 2009, the main U.S. AO. Regional Command (East) surrounds Kabul and abuts against the lawless and Taliban-dominated Khyer-Pakhtun Khwa Province and Federally Administered Tribal Area of Pakistan. Regional Command (East) consists of the following provinces: Parwan, Panjshir, Kapisa, Nuristan, Laghman, Konar, Nangarhar, Logar, Paktya, Khowst, Paktika, Ghazni, Wardak and Bamyan.

awareness in the Justice system; (3) building human capacity in the Justice system; (4) building infrastructure and providing transportation and other supplies for the courts and other Justice institutions; (5) directing support to Afghan prosecutions of security related crimes; and (6) supporting a major anti- or counter-corruption effort involving either prosecution or administrative removal of public officials. This approach plays to one of the military's key strengths: a field presence in areas that might be too dangerous for civilian ROL advisors.

Regional Command (South) (RC(S)), formed around the Headquarters, 10th Mountain Division, issued a similar plan shortly after their deployment to Kandahar in 2010. The ISAF and ISAF Joint Command (IJC) Headquarters seriously considered issuing ROL plans during 2010 and 2011.

The North Atlantic Treaty Organization Training Mission-Afghanistan (NTM-A) and its U.S.-led companion command Combined Security Transition Command-Afghanistan (CSTC-A) have incorporated ROL as a major element in their plan for building the institutional capacity of Afghanistan's security forces.

The IJC was established in 2009 to command and control the Regional Commands throughout Afghanistan. As this *Handbook* went to print (in August 2011), the IJC was preparing to issue a FRAGO specifying how ROL would fit into its campaign plan, tasking the Regional Commands with action and reporting requirements.

C. The International Framework

The military approach to ROL may be realistic, but it raises the further problem of coordinating ROL efforts. Since the military does not own the whole problem of ROL, it must cooperate with the other "stakeholders" involved in building ROL. But who are these other stakeholders? The most important stakeholder is the Afghan government. The method by which a state will exercise its sovereignty, the essence of the ROL, is a deeply political question specific to each individual host nation. We should not be surprised, as strangers in a foreign country, when the Afghan government approaches the ROL with a perspective that is alien to us, frustrating though this might be on occasion. If ROL does come to Afghanistan, we must expect it to have an Afghan complexion: it would be naïve to expect otherwise.

Working with the Afghan government on ROL issues is complicated by the fact that there are five main ministries and executive agencies involved in providing ROL: the Ministry of Justice, the Supreme Court, the Attorney General's Office, the National Directorate of Security, and the Ministry of the Interior.

- **Ministry of Justice**.[9] Responsible for prisons, the Huqooq,[10] legislative review, and supervising the courts.
- **Supreme Court**.[11] Responsible for the judges.[12]
- **Attorney General's Office**. Responsible for prosecutors.

[9] *See* http://www.moj.gov.af/en (last visited Aug. 23, 2011).

[10] The Huqooq is described as the "face of the Ministry of Justice." There are Huqooq offices in every province. The Huqooq is the first place in the formal justice system where people take their disputes for resolution. These include mediation, family and commercial law, and land disputes. Anecdotally, the Huqooq appears to have a positive relationship with the informal justice system. Cases are referred between the two systems. Individuals will reportedly take an informal justice decision to the Huqooq for validation: in effect a symbiotic relationship appears to exist between the informal system and the Huqooq. Rule of law SJAs in RC(E) have forged good relationships with their local Huqooq representatives. A typical rule of law project will involve providing legal training for Huqooq officials: an important "small step forward" in building up the rule of law.

[11] *See* http://www.supremecourt.gov.af/en (last visited Aug. 23, 2011).

[12] The Afghan Constitution formally establishes separation of powers, and the Afghan Supreme Court is acutely conscious of its judicial independence from the executive ministries. *See* The Constitution of Afghanistan Jan. 3, 2004, art. 116 [hereinafter Constitution].

- **National Directorate of Security**. Responsible for investigation of internal and external national security threats and terrorism.
- **Ministry of the Interior**. Responsible for the police.

The departments are independent of each other, while the Supreme Court, in particular, is constitutionally independent of the executive, similar to the American concept of judicial independence. This division of responsibility between independent departments introduces the potential for bureaucratic frictions and misunderstandings among potentially competing government bureaucracies—again similar to the American concept of bureaucratic infighting.

Outside the Afghan government, there are a large number of stakeholders with an interest in ROL. These include IOs, various USG agencies, other foreign national agencies, and NGOs. The military ROL practitioner must have an understanding of who they are and how (and if) they fit together.

The United Nations Assistance Mission in Afghanistan (UNAMA) is the most important IO operating to develop the ROL in Afghanistan.[13] It has a mandate from the UN Security Council (UNSCR 1868 of 29 Mar 09)[14] that it "will continue to lead the international civilian efforts … to support and strengthen efforts to improve governance and the rule of law."[15] UNAMA works to support the Afghan government's efforts in reaching its NJP objectives. UNAMA has had regional offices at the provincial level, which have frequently assisted JAs in gaining situational awareness and in coordinating ROL development efforts with other actors.[16] Furthermore UNAMA, in partnership with UN Development Program (UNDP),[17] sponsors the Provincial Justice Coordination Mechanism (PJCM) which was launched on 1 July 2008 and is responsible for coordinating ROL efforts. A judge advocate, or a PRT commander, working on ROL would be well advised to coordinate his efforts with UNAMA and the PJCM.

The European Union also engages in ROL efforts in Afghanistan. The staff of the European Union's Special Representative to Afghanistan is highly influential among international donors, although they have a limited field presence. Under the European Union, the European Union Police mission (EUPOL) also has a significant role in police training and capacity building. EUPOL has more of a field presence, although personnel and security concerns limit their ability to engage in sustained mentoring efforts at the provincial and district level.

D. U.S. Government Efforts

The U.S. Government's contribution to the ROL in Afghanistan is significant in scale and range. Indeed the U.S. contribution has been so large that coordinating the various efforts has been a challenge.[18]

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[13] *See* http://unama.unmissions.org/default.aspx? (last visited Aug. 23, 2011).
[14] S.C. Res. 1868, U.N. Doc. S/RES/1868 (Mar. 23, 2009), *available at* http://www.unhcr.org/refworld/country,,,RESOLUTION,AFG,4562d8cf2,49c9f9992,0.html (last visited Aug. 23, 2011).
[15] *Id*.
[16] For instance, the UNAMA representative in Jalalabad, the provincial capital of Nangahar Province, attends regular meetings hosted by the U.S. BCT Rule of Law Coordinator who is stationed at Jalalabad. This greatly assists the planning and coordination of rule of law efforts in Nanagahar Province.
[17] *See* http://www.undp.org/governance/focus_justice_law.shtml (last visited Aug. 23, 2011).
[18] Department of State and the Broadcasting Board of Governors, Office of Inspector General, Rep. No. ISP-I-08-09, Rule-of-Law Programs in Afghanistan 7 (2008), *available at* http://oig.state.gov/documents/organization/106946.pdf (last visited Aug. 23, 2011) "[T]he inspection team found that since 2002 the different civilian and military agencies engaged in aspects of ROL development have approached their tasks with different goals, methodologies, and timelines, and have often been unaware of each other's efforts." *Id*. At 7. Moreover, "[a]t the embassy in Kabul, . . . by late 2005, internal U.S. coordination meetings on ROL were best characterized as shouting matches between representatives of different agencies." *Id*. at 8.

The U.S. Government has reorganized the structure for ROL operations in Afghanistan in order to create a more unified approach to civil-military and interagency ROL efforts. The new structure resulted from an agreement between the U.S. Ambassador and the COMUSFOR-A / COMISAF. The Ambassador created a Coordinating Director for Rule of Law and Law Enforcement.[19] This position is of Ambassadorial rank and oversees unified military and Embassy efforts through existing agencies and commands, as well as through new structures and military commands. The new Coordinating Director oversees a decision-making process modeled after the U.S. National Security Council structure involving a policy-making body known as the "Deputies Committee." Another body created in this restructuring was the "Interagency Planning and Implementation Team (IPIT)," a civil-military team that analyzes, plans, tracks progress of projects and programs, and that develops concepts for consideration by the Deputies Committee. On the other side of the coin, Joint Task Force-435 became a Combined Joint Interagency Task Force.[20] It created a one-star military command known as the Rule of Law Field Force-Afghanistan (ROLFF-A) that fields ROLFF-A Teams dedicated to implement interagency projects at selected Provincial Justice Centers and to control Field Support Teams and Officers working at the district level.

The U.S. Embassy has recently reorganized these elements by merging the existing U.S. Embassy Rule of Law Coordinator's office with the Interagency Planning and Implementation Team (IPIT). This new organization is renamed "Interagency Rule of Law (IROL)" and maintains its two separate offices in the Embassy and at a facility in Camp Phoenix (on the northeastern edge of Kabul city). The IROL serves as a special staff under the Coordinating Director for Rule of Law and Law Enforcement. Judge advocates are assigned to both portions of the IROL. The Deputy to the Coordinating Director for Rule of Law and Law Enforcement is a one-star judge advocate.[21]

Corruption is a grave threat to the development of the ROL in Afghanistan. The Coordinating Director for Rule of Law and Law Enforcement also supervises U.S. Government civil and military counter corruption efforts. A major and long-awaited development has been the establishment of an Afghan Anti-Corruption Tribunal. The U.S. Embassy, and other coalition partners, have devoted significant resources to supporting the new Tribunal. The Anti-Corruption Tribunal is closely modeled on the successful Anti-Narcotics Tribunal.[22] It receives special support and protection, and employs vetted judges and staff to minimize opportunities for corruption. It is hoped the Anti-Corruption Tribunal will go some way to reducing the impression that corrupt officials are unlikely to be caught. ISAF has also created Combined Joint Interagency Task Force Shafafiyat that oversees all counter corruption efforts of the military coalition.

It should be noted that the U.S. Department of State and USAID have become more aggressive in deploying their ROL staffs into new areas as part of the new "civilian surge" strategy. Thus, military practitioners are likely to find "governance" or "rule of law" specialists at regional platforms of the U.S. Embassy (normally co-located with a Regional Command headquarters), at a Brigade Task Force Senior Civilian Representative (SCR) office, at a Provincial Reconstruction Team (PRT), or at a District Support Team (DST) working with Afghan district government officials. In addition, the Bureau of International Narcotics and Law Enforcement Affairs (INL) and USAID have an extensive network of U.S. and Afghan staff and contractors working at regional centers and in other locations at provincial level throughout the country. Many of these ROL specialists are working closely with military counterparts. This is a very positive development for the ROL in Afghanistan.

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[19] *See* http://kabul.usembassy.gov/klemm.html.

[20] HEADQUARTERS, UNITED STATES FORCES – AFGHANISTAN, FRAGMENTARY ORDER 10-279, ANNOUNCES THE TRANSITION OF JOINT TASK FORCE (JTF)-435 TO COMBINED JOINT INTERAGENCY TASK FORCE (CJIATF)-435 (311839Z Aug. 10) (SECRET//REL to USA, NATO//MR).

[21] Currently Brigadier General Daniel Fincher. *See* http://www.af.mil/information/bios/bio.asp?bioID=13170.

[22] *See*: http://kabul.usembassy.gov/media/inl-ap-factsheet-8-27-08.pdf (last visited Aug. 23, 2011).

In addition to DOD, prominent USG agency participants in Afghanistan include:

- **Department of State – Bureau of International Narcotics and Law Enforcement Affairs (DOS/ INL)**: INL works in Afghanistan through two separate programs: the Justice Sector Support Program (JSSP) and the Corrections Systems Support Program (CSSP). Their specific responsibilities:
    - **JSSP**: Supports the Afghan Attorney General's Office and the MOJ, provides regional training programs, and supports the Independent National Legal Training Center (INLTC) in Kabul.[23]
    - **CSSP**: Supports the prison system, develops corrections infrastructure, and provides training.
- **USAID**: Supports the Supreme Court, law reform and legislative drafting, law schools, and informal dispute resolution. It produces a range of useful legal reference materials. It also provides a link to the informal justice system and supports legal aid.[24]
- **Department of Justice**: DOJ has the lead with certain specialized investigative and prosecutorial efforts in Kabul, such as the Counter Narcotics Justice Center, the Criminal Justice Task Force (the specialist counternarcotics task force), the Anti-Corruption Unit in the Attorney General's Office, and the U.S. Marshals Service efforts to build an Afghan Judicial Security Unit and support ROLFF-A with judicial security and investigative expertise. In addition, the Drug Enforcement Agency has had a longstanding presence supporting Afghan counter narcotics units and other law enforcement investigative activities.
- **U.S. Institute of Peace**: Governmentally funded but staffed by international experts, the USIP studies ROL issues such as informal dispute resolution.

1. CJIATF-435

On September 18, 2009, the Secretary of Defense established Joint Task Force-435 (JTF-435) to assume command, control, oversight and responsibility for all U.S. detainee operations in Afghanistan.

JTF-435 assumed responsibility for U.S. detention operations from Combined Joint Task Force-82, including the care and custody of detainees at the Detention Facility in Parwan (DFIP), oversight of detainee review processes, programs for the peaceful reintegration of detainees into society, and coordination with other agencies for the promotion of the ROL in Afghanistan.

JTF-435 focused its efforts on:

- Safe, secure, humane care and custody of detainees consistent with law
- Detainee Review Board (DRB) procedures
- Reintegration and Rehabilitation of detainees
- Education and vocational training for eligible detainees
- Rule of law

As part of the restructuring described above, JTF-435 became a Combined Joint Interagency Task Force on 3 September 2010.

Besides overseeing U.S. detention operations, CJIATF-435 is preparing to have other partners join the command. Instead of being comprised of only U.S. military members, the goal is for the task force to include officials from Afghan and U.S. organizations, such as the Afghan Ministry of Defense and Ministry of Justice, the U.S. State Department, and the U.S. Department of Justice as well as military and civilians from other coalition nations.

[23] *See* http://www.inltc.af/home.htm (last visited Aug. 23, 2011).
[24] *See* http://afghanistan.usaid.gov/en/USAID/Activity/85/Afghanistan_Rule_of_Law_Project_ARoLP (last visited Aug. 23, 2011).

2. Rule of Law Field Force - Afghanistan (ROLFF-A) and NATO Rule of Law Field Support Mission – Afghanistan (NROLFSM-A)

The Rule of Law Field Force-Afghanistan (ROLFF-A) was established on 3 September 2010 as a subordinate command to USFOR-A and CJIATF-435. On 4 July 2011, the command assumed an additional role as the NATO Rule of Law Field Support Mission-Afghanistan (NROLFSM-A) under direct command of the International Security Assistance Force (ISAF).[25]

The mission of NROLFSM-A is to provide essential field capabilities, liaison, and security to Afghan and international civilian providers of technical assistance supporting the building of Afghan criminal justice capacity, increase access to dispute resolution services, fight corruption, and promote the legitimacy of the Afghan government. Headquarters, NROLFSM-A is at Kandahar Airfield in Kandahar Province. The command has deployed its subordinate Rule of Law Field Support Teams to provincial capitals around the country in order to strengthen selected Provincial Justice Centers in Kandahar, Khost, and Jalalabad. In addition, the command has deployed Field Support Officers and teams to the district level in these provinces and other key locations around the country.

The command employs a "hub and spoke" approach in which it helps the Afghan legal institutions at the provincial capital to create a strong hub of governance and to project government officials and services to Districts (the "spokes"). This sometimes entails helping Afghan officials to establish secure facilities that enable inter-ministerial functionality and cooperation. These facilities also allow international mentors to live on-site and provide around the clock support to their Afghan counterparts. General Petraeus often referred to these as "Rule of Law Green Zones." Simultaneously, Field Support Officers work with District officials to assist them to perform their constitutional and statutory duties. Rule of Law Field Support Teams and Field Support Officers are multi-functional and bring capabilities such as engineering, contracting, financial, law enforcement, investigative, and legal expertise to bear on complex problems. NROLFSM-A personnel help Afghan officials to identify capability gaps, resource requirements, and other challenges. Then they help to facilitate USG and international experts in their efforts to mentor, train, and advise Afghans at the provincial and district level.

3. Combined Security Transition Command – Afghanistan (CSTC-A) / NATO Training Mission – Afghanistan (NTM-A)

The North Atlantic Treaty Organization Training Mission-Afghanistan (NTM-A) and its U.S.-led companion command Combined Security Transition Command-Afghanistan (CSTC-A) have historically been engaged in limited ROL efforts. The Office of the Staff Judge Advocate (OSJA) focused its work on building the legal advisor capacity of the Ministry of Interior and Ministry of Defense. In addition, they ensured that the Afghanistan National Army (ANA) had its own corps of legal advisors, prosecutors, and judges to administer the military justice system within the ANA. Finally, the SJA served as the proponent for legal blocks of instruction in the institutional training systems for both the ANA and the Afghanistan National Police (ANP).

Recently, NTM-A's Deputy Commander for Police Development has taken a strong interest in ROL. As a result, a Senior Executive Service level position was created to advise the command on ROL matters. As mentioned above, this has resulted in incorporating ROL as a major element in the command's long term strategic plan for transition of the Afghan security forces over the next few years. Given the need to strengthen the ANP's criminal investigative capacity and law enforcement capability as a whole, this development will be crucial to coalition efforts to build credible and effective law enforcement institutions in Afghanistan.

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[25] The current Commander, ROLFF-A and NROLFSM-A, is Rear Admiral James W. Crawford III. *See Judge Advocate Named Commander, Rule of Law Field Force-Afghanistan*, FROM THE FLAGS (The Judge Advocate General and Deputy Judge Advocate General of the Navy), Aug. 4, 2011.

E. Provincial Reconstruction Teams

Provincial Reconstruction Teams in Afghanistan play an important role in reconstruction.[26] They have matured since November 2002 from a single U.S.-led pilot project in Gardez to an international effort involving 25 teams in most of Afghanistan's 34 provinces.[27] Twelve of the Afghanistan PRTs are led by the United States, and 13 by coalition partners throughout the country.[28] All fall under the broad authority of ISAF. All PRTs receive general guidance through the ANDS process described above. "For the International Security and Assistance Force, the PRT is now the principal vehicle to leverage the international community and Afghan government reconstruction and development programs."[29] Provincial Reconstruction Teams operate under tactical control to their battlespace task force, which is usually a BCT. In practice, this means that the PRT's ROL efforts are often directed by the staff of the Brigade Legal Section.

United States PRTs in Afghanistan are commanded by an Army lieutenant colonel or Navy commander and composed almost entirely of military personnel. As described above, DOS is now starting to send civilian ROL specialists to U.S. PRTs as part of the "civilian surge," a welcome development. The "PRTs typically consist of 50-100 personnel, of which only 3 or 4 members are USG civilians or contractors;" however, the civilian representation is starting to increase.[30] Civilian PRT staff may be from the State Department, USAID, or the Agriculture Department. The PRT's military commander does not command the non-DOD civilians.[31]

> In addition, PRTs have two Army civil affairs teams with four soldiers each. The U.S. model also typically includes a military police unit, a psychological operations unit, an explosive ordnance/demining unit, an intelligence team, medics, a force protection unit, and administrative and support personnel. An Afghan representing the Ministry of Interior may also be part of the team. These PRTs should include a single representative from each of the U.S. Department of State (DOS), the U.S. Agency for International Development (USAID),

[26] As described in ch. 2, there are a number of other programs at the provincial level. For example, Regional Training Centers (RTC) are built and managed by INL to support the Afghanistan Police Program and other provincial activities. These seven RTCs, located in Herat, Balkh, Konduz, Nangarhar, Paktia, Kandahar, and Bamiyan, serve as important regional centers for USG police, justice and corrections assistance. In particular, INL supports 24 U.S. justice and corrections advisors deployed at the Herat, Balkh, Konduz, Nangarhar and Paktia RTCs. Advisors at these RTCs are part of the INL Justice Sector Support Program (JSSP) or the INL Corrections System Support Program (CSSP) contracts. Each of these programs has around 70 contracted U.S. advisors, along with around 40 Afghan Legal Consultants (ALCs). United States advisors are selected and trained in Washington, and reflect a variety of identified skill sets and backgrounds, including line-prosecution work as state and local attorneys; criminal defense work, both private and public; civil law and sharia law expertise; legal training experience; and State corrections systems. JSSP and CSSP advisors based at RTCs report to their respective program directors in Kabul, who report to the INL Narcotics Affairs Section (NAS) Program Manager at the U.S. Embassy.

[27] Donna Miles, *PRTs Showing Progress in Afghanistan, Iraq; Civilian Reserve Needed*, U.S. DEP'T OF DEF. (Oct. 5, 2007), http://www.defense.gov/news/newsarticle.aspx?id=47700.

[28] *Id.*

[29] *Id*. General Wilkes also told the Subcommittee, "The activities of the PRTs are setting the conditions that bring more local support to the central government, further separating the local population from the insurgency, and continuing to transform the lives of the Afghan people … . The PRT is an entity to facilitate progress and ensure both the counterinsurgency and national development efforts are complementary and ultimately successful."

[30] STAFF OF HOUSE ARMED SERVICES SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 110TH CONG., AGENCY STOVEPIPES VERSUS STRATEGIC AGILITY: LESSONS WE NEED TO LEARN FROM PROVINCIAL RECONSTRUCTION TEAMS IN IRAQ AND AFGHANISTAN 13 (Comm. Print 2008) [hereinafter Subcommitee Report] , *available at* http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA480736&Location=U2&doc=GetTRDoc.pdf (last visited Aug. 23, 2011).

[31] *Id*.

> and the U.S. Department of Agriculture (USDA). . . . PRTs are usually co-located on a military base with combat maneuver units operating in the same area or battlespace.[32]

The Kunar PRT:
A Case Study in Elegant and Effective Support for Rule of Law

The PRT in Kunar Province has enjoyed particular success in developing ROL. The PRT has a dedicated civilian Department of State Rule of Law Coordinator. This individual reached out to the Afghan prosecutors and judges at the provincial level in a process of mentoring and encouraging the local officials. The fruits of this engagement were three trials involving allegations of corruption and murder. The first trial attracted relatively little public interest, but this changed over the course of the trials. The third trial was conducted before a packed public gallery and was televised. Even the Provincial Governor attended and—very significantly as an acknowledgement of the independent status of the judiciary and the trial—observed from the body of the courthouse. We can draw a number of conclusions from the Kunar PRT experience in ROL. The first is that infrastructure improvements, while often important, are not essential: people matter more than structures. The second is that personal relationships; the building of trust and some encouragement, can go a long way. There is, of course, a converse side: if there are no local officials with potential who can be mentored and brought on, then the prospects for improvement are moot. Finally, we can see from the increasing interest from the Afghan public an acceptance of, and support for, trials in the formal justice system. This is an encouraging precedent for the future.

The PRTs are often divided into teams, with one team responsible for building small, quick-impact development projects using local contractors and the other for running the PRT civil military operations center (CMOC), which coordinates activities with the UN and NGOs.

Even though a PRT might not have a civilian ROL coordinator assigned to it (and this is starting to change), there are still ways in which PRTs can contribute to justice reform in Afghanistan:

- Building judicial infrastructure;
- Facilitating information-sharing (PRTs are popular with Afghan nationals, which gives them strong local connections and good situational awareness);
- Advising on best use of donor funds;
- Helping to coordinate reconstruction efforts with the UNAMA PJCM.

[32] *Id.* at 13-14.

Preparing for "Whole of Government" Counterinsurgency and Stability Operations: The Interagency Afghanistan Integrated Civilian-Military Pre-Deployment Training Course

Recognizing the need to improve interagency training for personnel being deployed to Afghanistan, an Interagency Working Group made up of representatives from the Departments of Defense, State—including the U.S. Agency for International Development (USAID)—and Agriculture developed the Interagency Afghanistan Integrated Civilian-Military Pre-Deployment Training Course. This course supports the comprehensive new strategy designed by President Obama, the former Special Representative for Afghanistan and Pakistan, Ambassador Richard Holbrooke, and the former Commander of U.S. Central Command, General David Petraeus, that seeks to increase civilian capabilities—the "civilian uplift"—and improve coordination among U.S. government agencies in promoting a more capable, accountable, and effective government and economy in Afghanistan. The course also answers the call from Congress that civilian personnel assigned to serve in Afghanistan receive civilian-military coordination training that focuses on counterinsurgency and stability operations. Representatives of the Departments of Defense, State, Agriculture, and USAID implement the training in collaboration with the Indiana National Guard and its partners, including Indiana University and Purdue University. The course is conducted at the Muscatatuck Urban Training Center, the premier interagency training facility associated with the Camp Atterbury/Muscatatuck Center for Complex Operations in Indiana. This training course began in July 2009 and will run monthly for Afghanistan-bound USG civilians and military members.

The one-week course provides U.S. civilian government personnel from DOD, DOS, USAID, and USDA with training on working within the civilian-military interagency contexts of Provincial Reconstructions Teams (PRTs) and District Support Teams (DSTs) deployed in Afghanistan. The training simulates interagency coordination tasks civilian and military personnel face in Afghanistan, including taking convoys to meetings with Afghan officials, responding to security threats against forward operating bases, and sharing information and ideas on how to make progress on the lines of operation and effort that guide counterinsurgency and stability operations. The course also provides trainees with numerous role-playing scenarios with Afghan role-players and interpreters that simulate the tasks the trainees will face once deployed in Afghanistan. These scenarios include missions related to improving the ROL, such as visiting a district court and district prison to assess challenges facing central and provincial efforts to improve the ROL.[33]

F. The Legal System of Afghanistan

For centuries, Afghan history has been dominated by internal political and religious conflict, foreign invasion, and civil war. These circumstances have contributed to an overall lack of a single coherent, functioning, and generally recognized legal system in Afghanistan.

The 2004 Afghan Constitution formally created a modern Islamic state with a tripartite structure familiar to western lawyers: an executive central government with extensive regulatory authority,[34] a bi-cameral

[33] *See* http://www.mutc.in.ng.mil/OPERATIONS/CivilianMilitaryTraining/tabid/864/Default.aspx (last visited Aug. 23, 2011).

[34] *See* Ramin Moschtaghi, *Organisation and Jurisdiction of the Newly Established Afghan Courts – the Compliance of the Formal System of Justice with the Bonn Agreement*, 10 Max Planck Y.B. of U.N. L. 531, 584, *available at*

legislature and an independent judiciary.[35] Presidential as well as parliamentarian elections have been held. A substantial number of new statutes have been passed.[36] The rebuilding of the legal infrastructure (e.g., courthouses, prisons, and law schools) has begun. Significant funds have been spent on the buildup of the Afghan National Army and Afghan National Police.[37]

In spite of the hard work exerted to bring the ROL to Afghanistan,[38] the results have generally been seen as falling far short of the initial hopes and expectations: a dramatic discrepancy persists between the formal legal provisions and the present *de facto* order. In spite of improvement in some areas, the security situation in large parts of the country is volatile, corruption is rampant, there is a continuing lack of professionally trained government personnel[39] and the legal infrastructure is basic at best and non-existent in some parts of the country.[40] Furthermore, there is a widespread lack of respect for the ROL as set by the central government and the legitimacy of Afghan national law continues to be challenged by alternate power structures, such as tribal and militia leaders.

In practice, Afghanistan's legal system is characterized by the co-existence of two separate judicial systems:

- A formal system of law practiced by state authorities[41] relying on a mixture between the civil law system and elements of Islamic law; and
- An informal customary legal system based on customary tribal law and local interpretations of Islamic law.

The "dual nature" of the Afghan legal system stems to some degree from the limited reach of state authority in Afghanistan. However, it is also emblematic of the historic and continuing tensions inherent to an ethnically diverse Afghan society.[42]

The three sources of law formal and informal institutions rely on—positive secular law, Islamic law, and customary law—overlap in subject matter and can provide contradictory guidance. Tribal law and Sharia

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http://www.mpil.de/shared/data/pdf/moschtaghi_organisation_and_juristiction_of_newly_established_afghan_courts1.pdf (last visited Aug. 23, 2011).

[35] Article 97 of the 1964 Constitution and the Bonn Agreement guarantee the independence of the judiciary.

[36] For more information, *see* the Ministry of Justice's website at http://www.moj.gov.af/en (last visited Aug. 23, 2011).

[37] *See* U.S. DEP'T OF DEF., REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN, at 16-29 (June 2008), *available at* http://www.defenselink.mil/pubs/Report_on_Progress_toward_Security_and_Stability_in_Afghanistan_1230.pdf (last visited Aug. 23, 2011).

[38] *See* JOINT COORDINATION MONITORING BOARD SECRETARIAT, BENCHMARK STATUS REPORT MARCH 2007 – MARCH 2008, at paras. 2.7.1. - 2.7.4 (Apr. 2008), available at http://www.motca.gov.af/uploads/media/Benchmarks_Status_Report-Eng.pdf (last visited Aug. 23, 2011).

[39] According to a recent Human Development Report, little more than half of the judges have the relevant formal higher education and have completed the required one-year period of judicial training. The remaining judges have graduate from madrassas or have a non-legal academic education, with 20 percent having no university training at all. *See* CENTER FOR POLICY AND HUMAN DEVELOPMENT, AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007, at 43 (2007) [hereinafter HUMAN DEVELOPMENT REPORT], *available at* http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/nhdr2007.pdf (last visited Aug. 23, 2011).

[40] Some court facilities lack even the most basic physical requirements. In addition, according to the Human Development Report 2007, 36 percent of judges have no access to statutes, 54 percent have no access to legal textbooks, and 82 percent have no access to decisions of the Afghan Supreme Court. Prisons are often overcrowded and do not met international standards. *Id*. at 71.

[41] It should be noted that official courts often apply positive law as well as customary and Islamic law.

[42] According to Art. 4 of the 2004 Afghan constitution, the nation of Afghanistan is comprised of the following ethnic groups: Pashtun, Tajik, Hazara, Uzbek, Turkman, Baluch, Pashai, Nuristani, Aymaq, Arab, Qirghiz, Qizilbash, Gujur, Brahwui and others, of which the Pashtun with approximately 42% and the Tajik with approximately 27% are the largest groups. *See* Constitution, *supra* note 12, art. 4.

often seem to contradict the provisions of the 2004 constitution and Afghanistan's international human rights obligations, particularly with regard to women's rights and freedom of religion.[43]

Because 99% of the country is Muslim, the Sharia plays a major role as the common denominator between the formal and the informal system,[44] but its interpretation varies widely both by location and among different schools of Islamic jurisprudence. Islamic legal scholars play an important role as custodians of Islamic law, and their importance within the legal system should not be underestimated. Frequently, Afghans see little difference between a mullah and a judge; religious training is considered equivalent to studying law at a university.[45] There exists neither a single, generally accepted supreme authority on the content of Islamic law in Afghanistan nor a coherent and complete system to resolve competing interpretations.[46]

1. The Formal Legal System

Until 1964, Afghanistan's state-administered court system had essentially a dual structure, in which clergy-led religious courts applying Sharia co-existed with state courts handling secular law.[47] Under the liberal 1964 constitution, and similarly under the 2004 constitution, the state court system is united under a hierarchical structure of secular courts. The formal relationship between state law and Sharia however is less clear. The 2004 constitution states that only measures that pass the legislative process can be considered law[48] and that courts may only refer to the Hanafi jurisprudence of Islamic law[49] when there is no provision of the Afghan Constitution or other laws applicable.[50] However, it also states that no law shall contravene Islam[51] and prohibits amendment of this principle,[52] leaving the relationship between positive state law, international obligations, and Islamic law uncertain.

a. Court System[53]

The Afghan court system is a three-tiered system consisting of a Supreme Court located in Kabul, Courts of Appeal in each of the thirty-four provinces, and Primary Courts in the districts.

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[43] Afghanistan is party to a number of human rights treaties, including the ICCPR, ICESCR, CAT, CRC, CEDAW, and the Rome Statute. Notably, under Islamic Law blasphemy and apostasy are punishable by death while Art. 18 of the ICCPR guarantees freedom of religion.

[44] *See* J. Alexander Their, *Reestablishing the Judicial System in Afghanistan* 5 (Stanford Inst. for Int'l Studies Center on Democracy, Development and the Rule of Law Working Paper No. 19 2004), *available at* http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf (last visited Aug. 23, 2011).

[45] *See infra* note 60.

[46] *See* Chapter 4 of this Handbook for a more complete account of Islam and Islamism in Afghanistan. *See also* Kristin Mendoza, Islam and Islamism in Afghanistan (unpublished paper) (on file with the Harvard Law School Afghan Legal History Project), *available at* http://www.law.harvard.edu/programs/ilsp/research/mendoza.pdf (last visited Aug. 23, 2011).

[47] Islamic Law was introduced in Afghanistan as a consequence of the Islamic conquest in the 9th century. With regard to the development of the Afghan State and its legal system from Kingdom to its present status, *see* Moschtaghi, *supra* note 34, at535.

[48] Constitution, *supra* note 12, art. 97.

[49] The Hanafi school is the oldest of the four schools of thought (Madhhabs) or jurisprudence (Fiqh) within Sunni Islam.

[50] Constitution, *supra* note 12, art. 130.

[51] Constitution, *supra* note 12, art. 3.

[52] Constitution, *supra* note 12, art. 149.

[53] The Court System is regulated by the Constitution and the 2005 Law of the Organization and Authority of the Courts of Islamic Republic of Afghanistan [hereinafter Law of the Courts], *see* http://supremecourt.gov.af/Content/Media/Documents/Law_on_Org_juris_courts_English112011121448474.pdf (last visited Aug. 23, 2011). Note that up to 2005, a four-tiered system was prescribed by law even though not functioning in practice.

The Supreme Court is the formal head of the judiciary.[54] Headed by the Chief Justice, it is constitutionally responsible for the organization and administration of the lower courts[55] and has as many managerial functions as it has judicial responsibilities.[56] Besides its appellate functions, the Supreme Court has the significant power of judicial review of the laws, legislative decrees, international treaties, and international covenants for their compliance with the Afghan Constitution,[57] and has reserved itself the right to review their consistency with Sharia.[58]

At the second level of this hierarchy are the Courts of Appeal based in each of the thirty-four provinces.[59] Each of the Courts of Appeal is headed by a Chief Judge and divided into different divisions.[60] The Courts of Appeal review the decisions of the Primary Courts.

The official courts of first instance are the Primary Courts, which consist of a central provincial primary court and various district primary courts as well as certain specialized courts, such as the Family Issues Primary Courts, Commercial Primary Court and the Juvenile Court.[61] A number of other national specialized courts also exist, among them the Courts for Offences against National Security, and the Central Narcotics Tribunal.

The President appoints Afghan judges based upon the recommendation of the Chief Justice of the Supreme Court. According to the 2005 Law on the Organization and Authority of the Courts, an individual must hold a degree from either a Faculty of Law or a Faculty of Sharia, must have completed the practical stage of legal professional training and must be older than 25 years in order to be appointed as a judge.[62] Only a minority of sitting judges presently satisfy these requirements. The 2005 law also allows holders of diplomas on religious studies from an officially recognized center to serve as judges on the Primary Courts.[63]

Afghan court hearings usually consist of three-judge benches. Judges often convene trials in their offices due not only to limited infrastructure, but also custom—the notion of justice being done in open court is foreign to many Afghans.

b. Sources of Law

The Afghan legal system is a mixed one. Under the 2004 constitution, the official courts shall apply, in principle, only positive law—law that has passed the formal legislative process—however, they also may consider Sharia. The Afghan Government is passing an increasing body of law.[64] Constitutionally, only in situations where no formal law is applicable can decisions be based on the Hanafi interpretation of Islamic law,[65] or, in cases where all parties involved are Shia, the Shiite interpretation.[66] If neither formal law nor Sharia is applicable in a particular dispute then customary law may be consulted.

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[54] Constitution, *supra* note 12, art. 116.
[55] Law of the Courts, *supra* note 53, art. 29.
[56] *See* Their, *supra* note 44, at 10.
[57] Constitution, *supra* note 12, art. 121; Law of the Courts, *supra* note 53, art. 24.
[58] Notably, the Supreme Court has created within its administrative structure a council composed of clerics that reviews questions of Islamic law, and has, on its own initiative, issued rulings even in matters not actually brought to the Supreme Court by any parties.
[59] The "Courts of Appeal" prior to 2005 were known as "Provincial Courts."
[60] These courts are designed to have six "dewans" -- General Criminal, Public or National Security, Civil and Family, Public Rights, Commercial, and Juvenile. Law of the Courts, *supra* note 53, art. 32.
[61] *See* Law of the Courts, *supra* note 53, art. 40.
[62] *See* Law of the Courts, *supra* note 53, art. 58 para. 1.
[63] *See* Law of the Courts, *supra* note 53, art. 59, para. 2.
[64] According to the Afghan Ministry of Justice, close to 200 legislative documents including laws, regulations and charters have been enacted in the past 5 years with a significant additional number currently being drafted.
[65] Constitution, *supra* note 12, art. 130.
[66] Constitution, *supra* note 12, art. 131.

There is currently a major Afghan-international effort underway to rewrite the Interim Criminal Procedure Code of Afghanistan.

c. Problems in the Formal System

In practice, court activity is largely limited to the urban centers. Courts of Appeal and Primary Courts have taken up work in some, but not yet all, provinces, partly due to the security situation but also because of a lack of resources and international community support. Respect for the government's judicial institutions in rural areas remains very limited.[67] Indeed a 2010 survey notes "many Afghans continue to view traditional dispute resolution mechanisms such as jirga and shura more positively than they do the modern formal justice system such as state courts."[68]

In some provinces (Ghazni is one example) it is too dangerous for the District Courts to operate in their districts and so they sit in the provincial capital, with obvious repercussions for the ability of residents of those districts to access justice. In other districts, the Supreme Court is unable to hire judges who are willing to be appointed to the districts, so courts are unable to conduct trials.[69]

The court system struggles against logistical constraints as well as a lack of qualified personnel, intimidation, corruption, and threats to the livelihood of judges.[70] These deficiencies are linked to the security situation, the salary level of judges, and a lack of professionalism, integrity, and qualification in some of the judicial personnel. Similar problems exist with regard to other government actors involved in the administration of justice such as the police, prosecutors, and the correctional services. All of these factors impede the ability of the court system to work in a fair and effective manner.

Many judges do not have access to legal texts or simply lack any appropriate legal training on constitutional or positive law. Instead they apply their own version of Sharia or customary law to cases, even though the Afghan Constitution has effectively limited the application of Islamic law and does not recognize customary law as law at all.[71]

Even where sufficiently trained judges have access to legal resources, problems persist due to the numerous regime changes since 1964, making it difficult for courts to determine which positive law to apply. Courts do not have internet access, and mail service is non-existent in many areas, hindering both legal research and regular communication with the national legal infrastructure. Many local courts must rely on often incomplete or out of date printed legal texts. The Bonn Agreement establishing the Afghan government recognized all existing law and regulations "to the extent that they are not inconsistent with this agreement or with international legal obligations." Some laws, especially from the Taliban era, are obviously inconsistent. However, many of the laws passed over the years may not be inconsistent with the Afghan Constitution, international law, or the Bonn Agreement, but nonetheless are inconsistent with each other. This situation is bound to cause confusion. It is often unclear to what extent old laws can still be relied upon or enforced.

Moreover, the lack of trained prosecutors, defense attorneys, and justice administrators (such as those who run MOJ offices in the provinces) inhibits the work of the courts. Indeed, there are only between 600 and 1000 defense attorneys for the entire country.[72]

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[67] *See* THE ASIA FOUNDATION, AFGHANISTAN IN 2010: A SURVEY OF THE AFGHAN PEOPLE (2010), *available at* http://asiafoundation.org/resources/pdfs/Afghanistanin2010survey.pdf (last visited Aug. 23, 2011).
[68] *Id.* at 134.
[69] International and U.S. Government experts have been assisting the court with hiring efforts to fill these critical vacancies.
[70] A number of judges have been murdered, and many have received death threats.
[71] *See* Constitution, *supra* note 12, art. 97.
[72] Many of whom work in Kabul or other major cities.

The Afghan government continues to implement the Afghanistan Compact's Rule of Law benchmarks and to alleviate justice sector problems under the framework of the ANDS and the more specific National Justice Sector Strategy.[73] However, the level of success of these efforts remains uncertain.

2. The Informal Legal System

Due to the tribal structure of Afghan society, customary methods of conflict resolution continue to play a significant role, particularly in rural areas. It has been claimed that more than 80 percent of social conflicts in Afghanistan are resolved through the non-governmental system.[74] This reliance on the informal system is due to the loyalty of Afghans toward their family, village, or ethnic group, which traditionally exceeds that to the distant central government in Kabul. There are also strong cultural incentives in keeping disputes within the informal system. However, there are also practical reasons for Afghans to prefer the informal system: it is accessible, fast and unburdened by legalistic process; and it resolves disputes while keeping the mutual honor of the litigants intact. Furthermore, it does not have the same reputation for corruption that mires the state system.

The defining features of the informal system are its goals of restitution, collective reconciliation, and restoration of the victim's honor and social harmony. This can be contrasted with the more retributive system common to western justice. The primary means of conflict resolution are forgiveness and compensation ("*Poar*" or blood money) in order to forego blood feuds, even though other forms of punishment do exist. The best known of these customary rules is *pashtunwali*, the traditional honor code of the Pashtun people. In *pashtunwali* compensation can include cash, services, animals, or even the transfer of women.[75]

The informal system generally depends on a consensus of the parties involved, and the decisions are self-enforcing. Social pressure or punishment for those failing to abide by decisions of the peer community ensures reasonably effective enforcement.

a. The Councils: Shuras and Jirgas

The customary legal system is exercised through *jirgas* ("circle" or "council" in Pashto) and *shuras* ("consultation" in Arabic). These institutions are local mediation or arbitration panels that resolve day-to-day disputes in their communities. Their members are recruited from community members or respected outsiders and most commonly consist of older, respected men. Cases are discussed and decided orally. Council gatherings may occur in private chambers, common gathering places, or a local mosque. While the public is often free to attend, women and children are commonly excluded. There is also an appellate structure. A plaintiff dissatisfied with the decision of a *jirga* may request a review of the case by a new *jirga*.

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[73] *See* THE LONDON CONFERENCE ON AFGHANISTAN, THE AFGHANISTAN COMPACT (Feb. 2006), *available at* http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf (last visited Aug. 23, 2011).

[74] *See* HUMAN DEVELOPMENT REPORT, *supra* note 39, at p. 9. It should be noted that accurate statistics are difficult to collect in Afghanistan. It is possible that litigants are pursuing cases concurrently through both the formal and informal systems, a type of forum shopping.

[75] For additional information on *Pashtunwali*, *see* generally Thomas H. Johnson & Chris M. Mason, *No Sign until the Burst of Fire: Understanding the Pakistan-Afghanistan Frontier*, 32 INT'L SEC'Y, no. 4, pp. 41–77 (Spring 2008), *available at* http://belfercenter.ksg.harvard.edu/publication/18241/no_sign_until_the_burst_of_fire.html (last visited Aug. 23, 2011). "The very concept of justice is wrapped up in a Pashtun's maintenance of his honor and his independence from external authority. Action that must be taken to preserve honor but that breaks the laws of a state would seem perfectly acceptable to a Pashtun. In fact, his honor would demand it." *Id*. at 62.

b. Sources of Law

Each local council will apply its own historically evolved, non-codified canons of tribal law, often combining arguments from local customary law (*urf)* with aspects of Sharia. As Afghanistan is home to about 55 distinct ethnic groups, customary legal rules and the interpretation of the Sharia vary by tribe and location.

c. Problems, Strengths and Opportunities in the Informal System

The decisions of the informal justice system cannot be accepted uncritically. There are significant problems with it: women and children are often barred from attending *jirgas*, effectively cutting them off from access to justice. *Jirga* settlements might include marrying a female from an offender's family to a close relative of the victim, with anecdotal evidence suggesting that this can sometimes include the forcible transfer of girls as young as six years old. Similarly there has been a habitual denial of women's property rights, including rights to inheritance. Decisions inconsistent with the guarantees given under the Afghan Constitution, state laws, or Afghanistan's human rights obligations, undermine state authority and contradict the goal of elevating human rights to the international standard. Further, non-governmental law enforcement challenges the state's monopoly on the use of force.

Despite these very significant problems, the informal system enjoys certain key strengths, and it is widely accepted, respected, and used by the Afghan people. It has legitimacy in the eyes of the majority of Afghans. Most commentators on the ROL in Afghanistan (a wide and disparate community) accept that the informal system will continue to play some part in the future Afghan justice system.[76] But there is less agreement as to how this will work in practice. The U.S. Government has not yet reached a conclusive policy position regarding the informal justice system.[77] Meanwhile, ROL practitioners recognize the existence of this dual system and are trying to mitigate its problems. Most troubling are attempts to use the informal system in response to serious crimes. Land disputes are also a major issue. They might seem trivial when compared to serious violence but unresolved, they are a significant cause of violence. Even where land disputes are amicably resolved within the informal system, there is no mechanism for recording the outcome. This can result in future disputes, especially among non-resident family members who may be refugees in Pakistan or Iran. Education and awareness training will broadcast the message that crimes against the person must be dealt with by the state acting through the formal justice system and not through informal tribunals. At the other end of the spectrum most people accept that the informal system will continue to play a role in resolving minor legal disputes, such as access to grazing and water rights. In those cases the quality of the decision-making by informal tribunals can be improved if the informal decision-makers have received some legal training.

In short, the current approach is to educate people as to which cases are not suitable for informal dealing and to improve the standard of decision-making in those cases that can remain in the informal system. The place of the informal justice system is an interesting and far from straightforward issue. The practitioner is advised to keep an eye on the developing policy debate.

One of the key formal government institutions that engages the informal dispute resolution systems in the communities is the Ministry of Justice Huqooq. The Huqooq has officers at national, provincial, and district levels of government. These officials help private citizens to seek redress through statutory mechanisms in Afghan law, and are often seen to be a critical bridge between the informal and formal legal systems. The

[76] Indeed the Huqooq officials of the MOJ have encouraged parties to take their disputes to the informal system before resorting to formal litigation.

[77] That being said, the U.S. Agency for International Development has contracted for a "Rule of Law Stabilization Program – Informal" with the stated goal of re-establishing "traditional dispute-resolution councils (shuras) . . ., while familiarizing them with Afghan law, ... and connecting them in a more formalized manner with the district courts." *Rule of Law Stabilization Program – Informal Component*, USAID.COM, http://afghanistan.usaid.gov/en/USAID/Activity/163/Rule_of_Law_Stabilization_Program__Informal_Component (last visited Aug. 23, 2011).

Rule of Law Field Force-Afghanistan and other commands have been actively supporting efforts to staff and assist the Huqooq in critical regions of the country.

Another area in which ROL practitioners interact with the informal system is through community engagement and training opportunities. Some Brigade Judge Advocates (BJAs) have deliberately sought opportunities to work with community leaders who lead jirgas and shuras, serve in tribal or community elder positions, and otherwise have positive and influential status within the community. For example, Task Force Red Bulls in Regional Command East has developed a training program called "District Leader Training." The program seeks to acquaint local district leaders with their country's laws and Sharia in order to improve the quality of decisions by local decision-making bodies. It is hoped that the human rights laws, Constitutional protections for minority and gender groups, and even the protection of minorities and women in Sharia can help to reduce the application of draconian custom in local informal decision-making bodies. The Task Force hires local national attorneys to present the training using curricula developed in consultation with Afghan university faculties. Initial indications are that this is both well received and having a positive effect on the attitudes of local leaders toward the treatment of parties in community disputes.

Bridging the Gap between the Formal and Informal Systems:
Not as Easy as it Looks

Pragmatists claim that the informal and formal justice systems can be grafted together. In fact, this is a leading tenet of the U.S. Government Strategy for Rule of Law. However, this claim must always be approached with caution. For instance, there is currently a proposal that shuras review detention cases. Instinctively this feels correct: it appears to be an appropriate Afghan solution to a difficult problem. Also, since surveys indicate that more than 80% of disputes are resolved through informal systems it seems like a much larger opportunity to address concerns about human rights and due process issues. However, there is currently nothing in the Afghan Criminal Code or Constitution to support such proceedings. In fact, a draft statute that would recognize and regulate traditional dispute resolution bodies has not gained sufficient consensus to be presented to the legislature. As such, these informal justice system bodies operate without statutory recognition and thus, without anything more, they are outside the formal system for ROL. The ROL practitioner must always keep the first principles of the ROL in view and ensure that new proposals accord with the fundamental principles.

Despite the widespread popular support for informal dispute resolution systems, these community based fora often misapply legal standards and Sharia law in a way that victimizes minority groups and women. The U.S. Agency for International Development, the U.S. Institute of Peace, the French government, and military ROL practitioners have sought to train local leaders who serve in these jirga and shuras about Afghan law and human rights. They have also sought to strengthen the Ministry of Justice office of the Huqooq, a legal aid official who can serve as a link between the informal system and the government and courts. The challenge is that it will be difficult to determine the effectiveness of these efforts. Anecdotal reports indicate that local leaders are receptive to them. The question is whether positive engagement with the informal sector offers hope or whether it is better to distance ourselves from this community and allow it to carry on as it already does because of the potential for human rights abuses.

G. Successful Rule of Law Practices in Afghanistan

Successful Practices:

- Strive to understand the culture and the law, both in theory and in practice.
- Seek to build simultaneously formal sector institutional capacity at the provincial and district levels in order to ensure that the political and budgetary power remains connected to the needs of the people.
- Establish and maintain strong, open, and trusting relationships with all actors (Afghan, U.S. and International).
- Employ Afghan attorneys to gain information, coordinate, train and put an Afghan face on your efforts. Many Afghan attorneys are very brave and highly dedicated. They can frequently go places where foreigners cannot and they will find out things that foreigners (especially members of a foreign military) would not. They understandably see themselves as working for the good of Afghanistan, not the U.S. Government.
- Keep it simple. Pursue simple and practical schemes for building infrastructure, training, and raising legal awareness in accordance with the NJP and more detailed direction from higher headquarters.
- Focus on people. Infrastructure and process are important, but educating, developing, mentoring and empowering Afghans is always best.
- Understand how to leverage your ROL efforts with the resources of other U.S. and international agencies.
- Understand CERP, Afghanistan Infrastructure Fund, ASFF, and how they may be used in supporting ROL projects.
- Ensure coordination of ROL operations with other actors, such as civil affairs and civilian agencies as part of the larger governance strategy.

Unsuccessful practices include a "go it alone" mentality that disregards the expertise and experience of others. Remember that many have come before you and are working alongside you albeit outside of your immediate view, including civilian agencies and, most importantly, the Afghans themselves. It is the Afghan peoples' country, administered by their government and ministries. There simply is no purely local ROL problem in a country with a national government developing as quickly as Afghanistan's. Any project that ignores the necessary relationships among foreign and host nation stakeholders is bound to fail in the long run, if for no other reason that there will be no national support to sustain it. Finally, analyze justice sector problems from a "system of systems" approach, do not just try to cultivate one justice actor, try to get him or her to work with others from different agencies (attorney generals, defense attorneys, criminal or national security investigators, or the huqooq).

H. References and Further Reading

1. Afghanistan Development Efforts

- Afghan National Development Strategy, including JCMB reports: http://www.embassyofafghanistan.org/documents/Afghanistan_National_Development_Strategy_eng.pdf
- ACBAR Guide to ANDS: http://www.crc-afghanistan.org/documents/acbar-s-guide-to-the-ands
- Benchmark Status Report: http://www.tpc.org/reports/status/default.asp
- International Crisis Group, Afghanistan's Endangered Compact: http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/B059-afghanistans-endangered-compact.aspx

- Status Report on Provincial Justice Coordination Mechanism: http://www.undp.org.af/Projects/Q1.ProgRep.2010/PJCM_Q1_2010.pdf
- National Justice Program Rome Conference Follow-Up: http://www.undp.org.af/whoweare/undpinafghanistan/Projects/dcse/prj_just.htm
- Ashraf Haidari, Paris Conference: http://www.ia-forum.org/Content/ViewInternalDocument.cfm?ContentID=6295
- Report on Progress toward Security and Stability in Afghanistan: http://www.defenselink.mil/pubs/Report_on_Progress_toward_Security_and_Stability_in_Afghanistan_1230.pdf
- Special Inspector General for Afghan Reconstruction Quarterly Report on Governance (July 2011): http://www.sigar.mil/pdf/quarterlyreports/Jul2011/LoresPDF/Governance.pdf
- Secretary General's Reports 2011: http://www.un.org/Docs/sc/sgrep11.htm
- For a number of reports on Afghanistan: http://milnewstbay.pbwiki.com/CANinKandahar-Bkgnd

2. The Afghan Legal System

- A Guide to Researching the Law of Afghanistan at the University of Michigan Law Library (2003) http://www.law.umich.edu/library/students/research/Documents/afghanistan.pdf
- Omar Sial, Islamic Republic of Afghanistan Legal System and Research (2006), available at http://www.nyulawglobal.org/globalex/afghanistan.htm
- Hossein Gholami, Basics of Afghan Law and Criminal Justice, available at https://cac.tkeportal.army.mil/sites/jagkm/clamo/repository/whatshot/OEF%20%20Training%20%20Education/Basics%20of%20Afghan%20Law%20and%20Criminal%20Justice.pdf (AKO or CAC authentication required)
- The Clash of Two Goods—State and Non-State Dispute Resolution in Afghanistan (2006) http://www.usip.org/files/file/clash_two_goods.pdf
- The Customary Laws of Afghanistan—A Report by the International Legal Foundation (2004) http://www.usip.org/files/file/ilf_customary_law_afghanistan.pdf
- Justice in Afghanistan, Rebuilding Judicial Competence After the Generation of War (2007) http://www.mpil.de/shared/data/pdf/armytage-justice_in_afghanistan.pdf
- Afghan Legal History Project of Harvard Law School's Islamic Legal Studies Program http://www.law.harvard.edu/programs/ilsp/research/alhp.php
- Afghanistan's Legal System and its Compatibility with International Human Rights Standards http://www.unhcr.org/refworld/pdfid/48a3f02c0.pdf
- Official Site of the Afghan Ministry of Justice http://www.moj.gov.af/en
- Official Site of the Afghan Supreme Court http://www.supremecourt.gov.af/en
- Organisation and Jurisdiction of the Newly Established Afghan Courts—The Compliance of the Formal System of Justice with the Bonn Agreement http://www.mpil.de/shared/data/pdf/moschtaghi_organisation_and_juristiction_of_newly_established_afghan_courts1.pdf
- Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan (2006) http://www.usip.org/files/file/barfield_report.pdf
- Development Report, Bridging Modernity and Tradition: Rule of Law and the Search for Justice (2007) http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name,3408,en.html
- Afghan Customary Law and its relationship to Formal Judicial Institutions. http://www.usip.org/files/file/barfield2.pdf

II. Iraq

A. International Framework

Initially after the liberation of Iraq, unlike Afghanistan, there was no overarching UN-organized coordination of ROL tasks among lead nations. Given the initial absence of UN assistance and other substantial international presence, the task of post-conflict operations, including ROL, fell almost exclusively to the United States. However, as of 2010, international presence and assistance in ROL has increased substantially. The UN maintains a specific operation for Iraq (the United Nations Assistance Mission for Iraq), as do the European Union and several NGOs.[78] In 2010, international partners, including U.S. representatives from the Chief of Mission-Iraq formed the Rule of Law International Policy Committee (RIPC) to coordinate ROL efforts in Iraq. In 2011, leadership of the RIPC was assumed by the UN, with several issue-oriented working groups created to provide more detailed coordination in areas such as extraditions, mutual legal assistance, juvenile justice, and trafficking in persons.

B. U.S. Rule of Law Efforts: Transition from Military to Civilian Lead

After the fall of Saddam Hussein's regime, the U.S. Government formed 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. Initially, the U.S. military performed the large majority of ROL efforts. U.S. JAs helped plan for ROL reforms, and in the early stages of reconstruction in Iraq, they had to oversee the Iraqi justice system.[79] Division SJAs and JAs serving in civil affairs brigades and battalions conducted a large majority of this early ROL effort.[80] Over the years, the Iraqi justice system gained capacity and independence of operations and no longer needs heavy support from U.S. forces.

The 1968 Iraqi Constitution was annulled in 2003. An interim Iraqi Constitution was promulgated in 2004 which was followed, after a transitional period, in 2005 by the current Iraq Constitution. That document established and laid the foundation for the current government and disestablishment of the CPA. By this point, the State Department and Multi-National Forces-Iraq were fully engaged in ROL efforts. Initially, according to a 2005 assessment by the State Department Inspector General, "A fully integrated approach to ROL programs in Iraq is essential and does not exist at present."[81]

The ROL coordination structure for Iraq has varied during the course of operations.[82] The U.S. Embassy in Baghdad is currently the largest in the world, having more personnel and more agencies represented than any

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

[79] CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II, 253 (2005).

[80] *Id*. at 254–55.

[81] OFFICE OF THE INSPECTOR GENERAL, INSPECTION OF RULE-OF-LAW PROGRAMS, EMBASSY BAGHDAD 1 (2005), *available at* http://oig.state.gov/documents/organization/103473.pdf (last visited August 16, 2011).

[82] Several NSPDs have been adopted pertaining to Iraq, which set policy and allocated responsibilities among the various USG agencies. NSPD-24, adopted in 2003, which is no longer in effect, set forth the framework for post-war Iraq reconstruction. It remains classified. In May 2004, NSPD-36 set forth inter-agency responsibilities that would control subsequent to the Coalition Provisional Authority (which ceased operations on June 28, 2004). National Security Presidential Directive/NSPD-36, United States Government Operations in Iraq, May 11, 2004, *available at* http://www.fas.org/irp/offdocs/nspd/nspd051104.pdf (last visited August 14, 2011). It provides that the Chief of Mission in Iraq is "responsible for direction, coordination and supervision of all United States Government employees, policies, and activities in country, except those under the command of an area military commander, and employees seconded to an International Organization." It states that the Secretary of State "shall be responsible for the continuous supervision and general direction of all assistance for Iraq," but, it reserves the authority for the Commander,

other U.S. Embassy—even more so than in Afghanistan. As a result, the efforts vary widely based on the needs of individual locations, from judicial education programs to improving the security infrastructure of local courts and police.

To improve the oversight and coordination of ROL programs in Iraq, the Chief of Mission established the Rule of Law Coordinator's (RoLC) office (see organization chart below). The RoLC provides direction, oversight and support to the approximately 200 Embassy personnel engaged in promoting justice in Iraq, ensuring that they design and implement ROL programs consistent with the Embassy's overall plan. The RoLC office attempts to establish a fully integrated approach that works in partnership with the USF-I Office of the Staff Judge Advocate (OSJA) Rule of Law section and personnel from the Bureau of International Narcotics and Law Enforcement Affairs (INL).

By 2009, the lead for ROL efforts in Iraq began to slowly transform from a DOD lead implemented by JAs at various Brigade, Division, Corps, and Force Headquarters levels to a DOS lead through the RoLC implemented by Resident Legal Advisors (DOJ AUSAs) and Rule of Law Advisors (DOS-hired legal practitioners). Several members in the RoLC are personnel from DOJ that contribute to DOS' ROL mission.

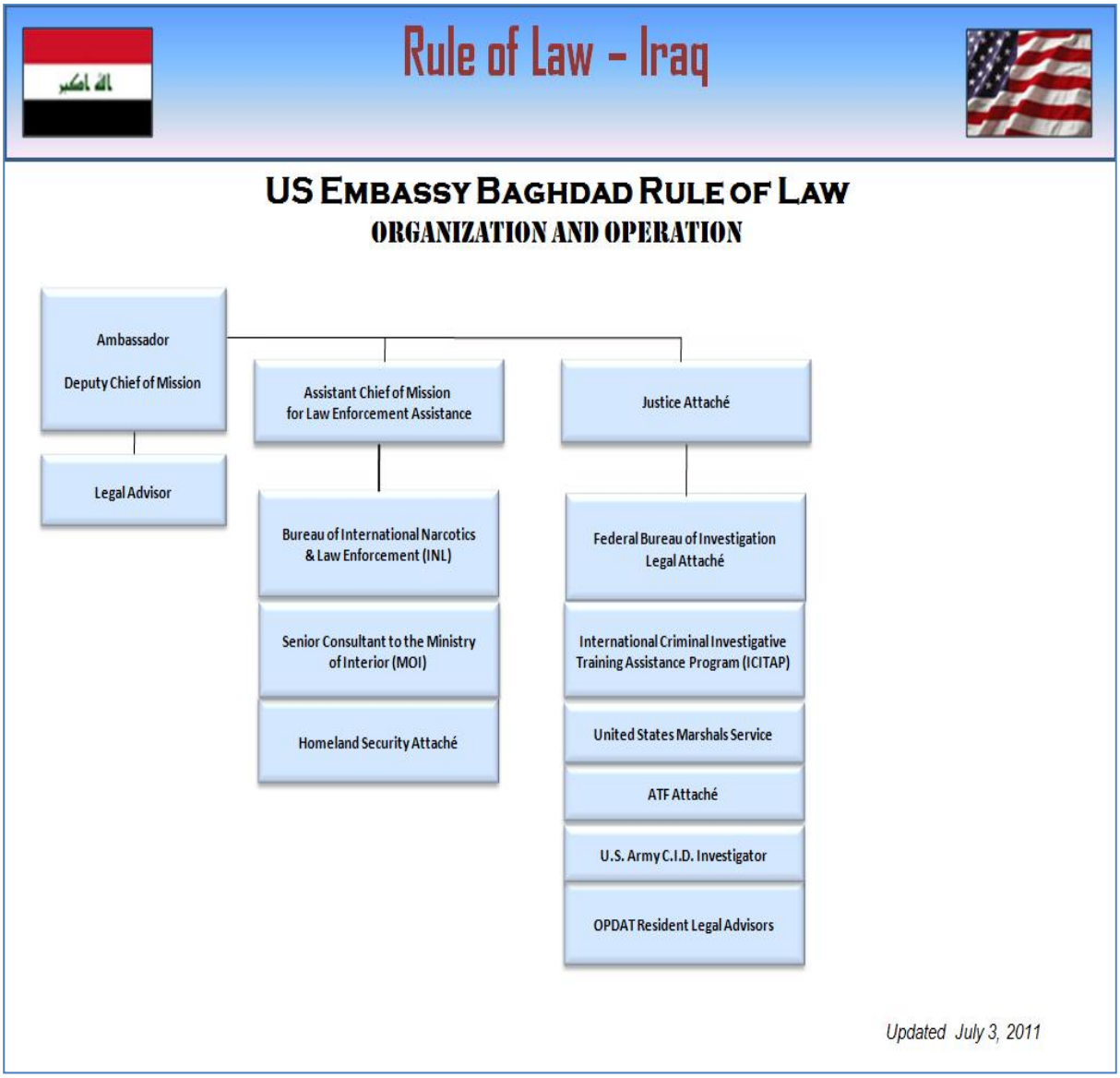
In August 2010, USF-I successfully transitioned the ROL Line of Operation under the JCP to the U.S. Embassy's RoLC office. In mid-2011 the Chief of Mission created a new position, Assistant Chief of Mission for Law Enforcement Assistance. Although the primary objective of this new position is to oversee the INL-run Police Development Program (PDP), the Assistant Chief of Mission for Law Enforcement Assistance will also coordinate law enforcement and ROL assistance programs, which were responsibilities originally assigned to the RoLC. Accordingly, in late 2011 the office of the RoLC was ended, and supervision of DOJ personnel in Iraq was assumed by the Justice Attaché.

Editor's Note: If the above description of the historic ROL work in Iraq appears complex and confusing, imagine how it must have appeared to Iraqi personnel who were on the receiving end of the programs? Conversations with a Ministry of Interior Iraqi lawyer indicate that they felt overwhelmed and confused by the myriad of programs and foreign personnel that they were required to deal with. And interestingly, notwithstanding the interagency nature of these personnel, he and his colleagues tended to view all those foreign personnel, including PRT members, as being in some way linked to the U.S. military.

C. Current U.S. Rule of Law Strategy – Implemented Through Interagency Rule of Law Coordination Center (IRoCC)

The governing strategy for ROL efforts in Iraq is contained within the U.S. Embassy Baghdad and United States Forces-Iraq co-signed Joint Campaign Plan (JCP). The JCP includes a ROL annex. By early 2010, the newly issued JCP shifted the lead for ROL efforts from the military to the RoLC with substantial support by USF-I JAs and JAs at the division and brigade levels, working in support of ROL personnel at the Embassy and PRTs. Thus, the RoLC took lead while USF-I's Rule of Law section was fully integrated within the RoLC.

USCENTCOM, coupled with the policy guidance from the Chief of Mission, to direct all USG efforts and coordinate international efforts in support of organizing, equipping, and training all Iraqi security forces. It notes that "[a]t the appropriate time, the Secretary of State and the Secretary of Defense shall jointly decide when these functions shall transfer to a security assistance organization and other appropriate organizations under the authority of the Secretary of State and the Chief of Mission…." NSPD-37, also adopted in 2004, directed the Attorney General to establish an office to provide support to the GOI efforts to investigate and try former regime officials. Its charge was limited to assisting the Iraqi Higher Tribunal. *See* NSPD-37, Relating to Support of Iraqi Government, May 13, 2004. It is not publically available. *See* index of NSPDs at http://www.fas.org/irp/offdocs/nspd/index.html (last visited August 16, 2011).



US Embassy Iraq – Rule of Law Organization

Flowing from the JCP, all USG ROL efforts are succinctly organized into subject matters broken down into six categories: (1) Judiciary; (2) Law Enforcement; (3) Corrections and Detentions; (4) Commercial and Property Law; (5) Anti-Corruption; and (6) Access to Justice and Enhancement of the Legal Profession. Because multiple U.S. agencies are involved in these efforts, achieving unity of command or control of these agencies' ROL efforts is not mandated. Historically, these agencies' efforts were coordinated through the Interagency Rule of Law Coordination Center (IRoCC). The IRoCC was comprised of working groups geared to various subject matters, which mirrored the JCP Lines of Operations, including Judiciary, Law Enforcement, Corrections/Detentions, Anti-Corruption, Commercial and Property Law, Access to Justice/Enhancing the Legal Profession, and Information Technology. In July 2011, with the transfer of the IRoCC's Law Enforcement working group from military to civilian control, the transfer of the IRoCC was completed.

Currently, the six categories mentioned in the previous paragraph are headed by the Department of State, which focuses on categories: 2 (Law Enforcement); 5 (Anti-Corruption); and 6 (Access to Justice and Enhancing the Legal Profession), and the Department of Justice, which focuses on categories: 1 (Judiciary); 3 (Corrections and Detentions); and 4 (Commercial and Property Law). As stated above, the efforts of the Department of State are overseen by the Assistant Chief of Mission for Law Enforcement Assistance, and the Department of Justice efforts are overseen by the Justice Attaché. The two agency heads coordinate their respective efforts through the Law Enforcement Working Group, which is chaired by the Deputy Chief of Mission.

1. Provincial Reconstruction Teams

Iraq's Provincial Reconstruction Team program concluded operations during the late summer of 2011 when the last PRTs closed. The robust physical presence that the PRTs provided in Iraq's provinces was an unusual arrangement for the United States, which normally only maintains a diplomatic presence in the capitals of countries where it has an embassy. Below is a brief narrative of the history and structure of Iraq's PRTs followed by a description of the current plan for USG provincial engagement in Iraq after the PRTs cease operations.

Secretary of State Condoleezza Rice inaugurated the first PRT in Iraq in November 2005 by saying that these new entities would "marry our economic, military, and political people in teams to help local and provincial governments get the job done."[83] PRTs existed to "assist Iraq's provincial governments with developing a transparent and sustained capacity to govern, promoting increased security and ROL, promoting political and economic development, and providing provincial administration necessary to meet the basic needs of the population."[84]

U.S.-led PRTs in Iraq differed significantly from their counterparts operating in Afghanistan. The PRTs were composed primarily of civilians and led by a senior State Department official, as opposed to the military-led Afghanistan PRTs. Moreover, the PRTs in Iraq emphasized shaping the political environment rather than building infrastructure as in Afghanistan.[85]

The initial PRTs included representatives from the Departments of State, Justice, and Agriculture, as well as USAID, Army Civil Affairs teams and other military units. U.S. military forces or commercial contractors provided security and force protection for the PRTs, which resided at either a Regional Embassy Office or a military FOB.

PRTs were expected to build the capacity of Iraqi government officials, foster development, promote the ROL, and promote reconciliation among different factions of the provincial populations. The goal was to create areas where provincial governments would have political space to operate and violent extremists could be brought under control.

In 2007, the PRT program in Iraq created *embedded* PRTs (ePRTs) – PRTs working alongside Brigade Combat Teams ("BCTs"). The idea behind the new ePRTs was to allow for more unity of effort between the BCT and the PRT. The new ePRTs focused on Iraq's lower-level district governments, while the original PRTs worked predominately with provincial governments.

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[83] Robert Perito, Provincial Reconstruction Teams in Iraq, USIP Special Report 185, March 2007, *available at* http://www.usip.org/resources/provincial-reconstruction-teams-iraq (last visited July 22, 2010).

[84] *Id.*

[85] *See* Miles, *supra* note 27, Statement of Mark Kimmitt, Deputy Assistant Secretary of Defense, Near Eastern and South Asian Affairs, pointing out that PRTs in Iraq have a different function and role than those in Afghanistan "and are achieving different effects." Their mission is to help Iraq's provincial and local governments by promoting security, rule of law, and political and economic development. Meanwhile, they also help the government provide provincial administration necessary to meet the people's basic needs. *Id.*

In this configuration, the BCT and PRT worked cooperatively as a team, receiving guidance from both the Ambassador and the USF-I Commander. The BCT commander took the lead on issues related to security and movement. The PRT team leader bore primary responsibility for engaging with the provincial government, particularly with respect to political, economic, and development issues. The BCTs provided the PRTs with security, life support, and operational support. PRT members traveled outside their forward operating bases with military movement teams. This arrangement made it easier for civilian PRT members to work "outside the wire" and increased PRT contact with their Iraqi counterparts.

Each PRT was led by a senior State Department Foreign Service Officer. The team's composition varied depending on the province's circumstances and the team leader's vision. Each team generally included several State Department FSOs in addition to State-contracted experts (3161s) in subject matters such as business development, city management, ROL, and governance. The PRT usually included a USAID representative. The Departments of Justice and Agriculture provided subject matter experts to serve on many provincial teams. Additionally, DOD service members filled select PRT billets (e.g., Deputy Team leaders), as well as contracted bilingual-bicultural advisors (BBAs). Military civil affairs units also worked closely with PRTs throughout Iraq.

Initially, the goals of the PRT program were vague.[86] As the House Armed Services Committee put it in a 2008 report, "Nor are there agreed objectives, delineation of authority and responsibility between the civilian and military personnel plans, or job descriptions."[87] However, progress towards addressing some of these problems occurred on 19 August 2008, when DOS and MNF-I issued a joint strategy titled *Strategic Framework to Build Capacity and Sustainability in Iraq's Provincial Governments*, which replaced the original cable establishing the PRT program.[88]

Multi-National Force-Iraq and the Embassy agreed to a Joint Campaign Plan to build Iraq's civil capacity in governance, economics, ROL, and political reconciliation. The Embassy's Office of Provincial Affairs (OPA) managed the PRTs in Iraq. OPA coordinated PRT activities and provided administrative support for all PRT civilians, whereas USF-I provided military personnel and supported PRTs operating from U.S. military bases.

At the beginning of 2011, there were 16 PRTs still in operation. The Iraqi Kurdistan Region had a regional reconstruction team that operated like a PRT. Iraq's fifteen other provinces each had a PRT. Karbala's PRT was the first to close down on May 1, 2011. The final PRTs in Anbar, Diyala, and Ninewa are scheduled to begin closing down in early September 2011.

D. The Way Forward

The United States has expended vast resources since 2003 towards developing the capacities of Iraq's provincial governments. Valuable knowledge and relationships have resulted from this unprecedented level of engagement with officials in Iraq's 18 provinces. The U.S. Embassy is committed to maintaining provincial engagement going forward, while recognizing that the robust presence provided by the PRTs will no longer be a reality.

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[86] *See* Perito, *supra* note 83.

[87] *Id. See also* House Armed Services Committee, Sub-Committee on Oversight and Investigations, Agency Stovepipes vs. Strategic Agility: Lessons We Need to Learn from Provincial Reconstruction Teams in Iraq and Afghanistan (April 2008) 18.

[88] The Strategic Framework Agreement provided that :
The framework identifies, at the PRT level, three separate elements that are linked in the coordinated assessment and planning process: the quarterly maturity modeling assessments, the Unified Common Plans which are developed in partnership by PRTs and their partnered military units, and actionable PRT work plans linked to the Unified Common Plans and assessments. These three documents are critical to achieving the events that will trigger the drawdown and close out of PRTs.

The Embassy's plan going forward includes hiring a number of Iraqi nationals as cultural advisors (CAs), in order to provide the Embassy with situational awareness of the provinces. Each of these Iraqis has served as a linguist for their respective PRT and comes well-recommended by the PRT for character, loyalty and initiative. The official job requirements for the CA include:

- Serving as a liaison with provincial leadership, political parties, and other leaders;
- Arranging and attending meetings between Embassy representatives and local officials, NGOs and other individuals and organizations;
- Being cognizant of political, educational, and economic developments; and
- Being aware of provincial media, particularly of news stories that impact U.S. policy.

The CA will submit weekly reports describing his work and observations to a Virtual Principal Officer (VPO) at the Embassy. The VPO is responsible for monitoring both the substance of the CA's reports and his weekly work schedule. The nine provinces nearest to Baghdad (Ninewa, Diyala, Salah ad Din, Anbar, Karbala, Najaf, Wasit, Babil, and Diwaniyah) will each have one CA and one VPO assigned. Therefore, the PRT, with its numerous civilians and military support, will be replaced by one CA and one VPO. Clearly the level of provincial engagement will be much reduced, but this program will allow the USG to maintain some level of awareness of and influence in Iraq's provinces. Similar provincial engagement plans have been executed successfully in other countries, but under different conditions than the United States will face in Iraq.

As Iraq's political and commercial capital, Baghdad province will be treated differently. There will be five CAs assigned to Iraq's most populous province. The Embassy's Economics, Political, Rule of Law, Public Affairs and Refugee Coordination Sections will each supervise one CA, who will focus his efforts upon that particular subject matter (e.g., Rule of Law will supervise a CA who will focus on ROL issues).

The Provincial Coordination Cell will direct policy for the nine provinces outside Baghdad. Each Embassy section will have a representative on this team that will provide direction for the Cultural Advisors and their Virtual Principal Officers. For Baghdad, similar functions will be directed by the Baghdad Provincial Team. The Provincial Engagement Working Group, chaired by the Embassy's Deputy Chief of Mission, will serve as higher headquarters for both the Provincial Coordination Cell and the Baghdad Provincial Team.

In July 2011, the Embassy opened Consulates General (CG) in Erbil and Basrah. The Erbil Consulate General has responsibility for the northern provinces of Dohuk, Erbil, and Sulamaniyah, and it will oversee the CAs assigned to those provinces. CG Basrah will supervise the CAs in Dhi Qar, Muthanna, Maysan, and Basrah. Kirkuk will open as a consulate in the Fall of 2011 and will have three CAs assigned to that province and consulate.

E. Iraqi Criminal Law and Criminal Procedure

1. Legal History

Iraq has a long and complex history as the center of Islamic jurisprudence. Practice developed initially from laws promulgated by city-states,[89] and multiple conquerors brought their respective legal customs and traditions.

Following the Mongol invasion in the thirteenth century, the Ottoman Empire controlled much of the region (including Basra, Baghdad, and Mosul) from the fourteenth to the twentieth century. The legal system

[89] By the 18th Century BC, rulers from the city of Babylon had created a detailed unifying code, covering all aspects of the law, in a language ("cuneiform") broadly understood by the people of the region. The carving of the laws into stone monuments ensured they were publically available and understood.

included aspects of both the Sharia and an Ottoman Code.[90] As Ottoman influence over the region decreased in the nineteenth century, however, significant reforms based on the European civil law system took place. These reforms included the establishment of secular (non-religious) legal schools (which were originally known as a "College of Rights") and led to the generation of legal codes[91] with heavy influence from the European civil law system.

The creation of a British Mandate during the early twentieth century saw the establishment of a governing elite of state officials and officers. The British formed a government to administer Iraq, adopting a constitutional monarchy with a parliament and a king.[92] The British introduced, with some success, a Tribal Civil and Criminal Disputes Regulation modeled after a similar law in India. This gave certain selected sheiks the authority to settle all disputes within their tribes and to collect taxes for the government. In 1932, the British Government supported Iraq's membership in the League of Nations, which led to Iraq becoming an independent state.

Several attempts at legal reform followed. A quest for codification began in 1933, and after several interruptions, codification was completed in the early 1950s. Abdul al-Razzar Al-Sanhuri, a French-educated Egyptian legal scholar who had drafted the Egyptian legal code, oversaw the process.[93] Although based on the European civil law model, the Iraqi legal code still referenced Islamic law. For example, in cases not provided for by the code, the Iraqi Courts could turn to the Islamic Sharia to decide the merits of the dispute.

Following a series of coups d'etat, the Iraqi arm of the Arab Ba'ath party, led by Hassan al-Bakr,[94] came to power in 1968. The Ba'athists introduced a new constitution in 1970. Subordinate to it were five major codes legal codes forming the main legal pillars. These governed civil law, civil procedure, commercial law, criminal law, and criminal procedure.[95] During the Ba'ath party rule, there was, effectively, no independent judiciary. Instead, the judiciary fell under the Ministry of Justice, which was itself under the control of the Prime Minister, who was also the President (of the Revolutionary Council). The Revolutionary Council had the constitutional power to issue orders that had the force of law. To further weaken the ROL, the Legislature, which in theory made the law, was itself widely viewed as a puppet of the Executive. Furthermore, all judges were required to be members of the Ba'ath Party. The impact of this requirement, had, unsurprisingly, far reaching effects on the Iraqi judiciary when CPA Order 1 (De-Ba'athification of Iraqi Society) was promulgated.

2. Judicial Structure and Division of Powers - Penal System[96]

The Iraqi Criminal Courts operate on a hierarchical system from the highest appellate court[97] (the Court of Cassation) to lower appellate courts and the courts of first instance. All are nationally controlled and the

[90] The *"majele al akhaam al-'adliyyah". Editor's Note: This "code" has also been described as being more akin to a set of judicial procedural rules than a "Code" proper.*

[91] A Penal Code introduced in 1858 used the French Penal Code of 1808 as a model, followed by a Commercial Procedures Law of 1861 and a Civil Code of 1876.

[92] The British appointed as the first monarch Prince Faisal Hussein, a Sunni member of an influential family in the Arab world, but not an Iraqi.

[93] The Egyptian code was the model for the legal systems of Libya, Qatar, Sudan, Somalia, Algeria, Jordan, and Kuwait.

[94] Al-Bakr was the head of the Revolutionary Command Council. Saddam Hussein was al-Bakr's vice president. The Arab Ba'ath party was led, at this time, by the Syrian born Michel Aflaq.

[95] The Civil Code law No. 40 of 1952 (as amended). Civil Procedures law No. 83 of 1969. Law of Commerce No. 30 of 1984. Law of Criminal Proceedings with amendments No 23 of 1971.

[96] This summary concentrates solely on the criminal law system. Judge advocates wishing to research aspects of the Iraqi Civil and Commercial Laws may wish to study the summary produced by the Office of the General Counsel at the U.S. Department of Commerce, *available at* http://trade.gov/iraq/ (last visited July 22, 2010).

[97] The Court of Cassation is the highest appellate court for criminal and civil cases. This is not to be confused with the Federal Supreme Court which is a separate court designated by the Iraqi Constitution. The Federal Supreme Court

former has jurisdiction over all Iraqi territory. The appellate and courts of first instance are organized provincially and have jurisdiction over offenses committed within their own provinces.

The criminal trial courts are subdivided into felony courts, which deal with cases where the maximum penalty is more than 5 years imprisonment, and misdemeanor courts, which have jurisdiction over offenses where the maximum penalty is 5 years or less.

There are 18 appellate regions nationwide, largely based on the geographic provincial boundaries. These serve as courts of appeal for lower courts.[98] Moreover, the Federal Court of Cassation hears appeals from Courts of Appeal and the Central Criminal Court of Iraq (CCCI).[99]

Special Juvenile Courts deal with offenses committed by minors, defined as those under 18. The minimum age of criminal responsibility under Iraqi law is 7 years. Limitations exist on the sentencing of juveniles: offenders aged between 9 and 14 may be sentenced to a maximum of 12 months detention. Offenders ages 14–18 may receive a maximum of 5 years.

As in most civil code (criminal) systems, investigative judges collect and review all evidence during the investigative phase of proceedings and determine whether to transfer the case for trial. They exist within most, if not all, of Iraq's courthouses.

3. Sources of Iraqi Criminal Law

Following the establishment of the Coalition Provisional Authority (CPA) (after the U.S.-led invasion in 2003), the CPA took steps to reintroduce the Iraqi Law in existence before Saddam Hussein became head of state in 1979. As far as the criminal code and procedure were concerned, this was the result of two CPA Orders. CPA Order No 7[100] reintroduced the Penal Code of 1969, and CPA Memo No 3[101] reintroduced the Law of Criminal Procedure of 1971.

The following is a working summary of both codes aimed at JAs working within the ROL arena.

4. Iraqi Criminal Procedure[102]

On paper, the Iraqi law of criminal procedure is one of the most advanced secular systems in the region. As with most civil law systems, there are two distinct limbs: the investigative phase and the trial process. Unlike their common law counterparts, however, both phases have significant judicial involvement.

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does not serve a traditional appellate function. Under the Constitution, the Federal Supreme Court is empowered to interpret the Constitution, settle matters related to application of legislation, and certify election results among other matters. *See* Iraqi Constitution, Articles 92–94.

[98] *See generally* Book Four and Para 177 Law on Criminal Proceedings No 23 of 1971.

[99] On 22 April 2004, CPA Order 13 created the CCCI. The intent was for CCCI to serve as a complementary court to assist the existing misdemeanor and felony courts. Originally based in Baghdad, the CCCI expanded to other provinces before being reduced to the original Baghdad location. The CCCI has jurisdiction over all offenses that felony and misdemeanor courts may hear. By design, it concentrates on serious crimes, terrorism, organized crime, and government corruption. Since its creation in 2004, the CCCI has heard over 10,000 cases (Y '06- 2,620 cases, Y '07- 2,875 cases Y '08- 2,193 cases, Y '09- 3,172 cases, and Y '10- 2,016 cases). This includes many cases referred by TF 134. As of 2010, the size of the staff and judges of CCCI has shrunk considerably within Baghdad.

[100] *See* http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf (last visited Aug 9, 2011).

[101] *See* http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf (last visited Aug 9, 2011).

[102] *See* http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf (last visited Aug 9, 2011).

a. The Investigation

Initiation of criminal proceedings occurs through an oral or written complaint to an investigative judge (IJ), police investigator or official, or member of the judicial system. IJs[103] or investigators acting under their supervision,[104] often called Judicial Investigators, conduct the criminal investigation. This includes examining the scene and noting evidence of the offense and injuries sustained.

Police who receive allegations about an offense have a requirement to immediately record the informant's statement and immediately inform the IJ, further emphasizing the IJ's role at the heart of a case.

The respective roles undertaken by IJs and the police vary tremendously in Iraq today. Some units report that the police play a dominant role in the investigative process. Others suggest the IJ is the driving force behind the investigation. Whatever the practical reality is, as a matter of law, the IJ must be involved in the process as it is the IJ who sends the case forward to the trial court. It is likely that the enormous disparity in resources between the police and judiciary is producing a systemic change in the dynamics of the investigatory process, with the police increasingly leading that effort.

The basic obligations of the investigators commences with the recording of the deposition of the person making the allegation. This is followed by testimony from the victim and other witnesses or persons whom the parties or IJ wish to hear.[105] Witnesses who are over fifteen years old give evidence under oath.[106]

The IJ will supervise the police investigators throughout the investigation phase.[107] The defendant has the right to present his own evidence, and make comments on the evidence. Additionally, subject to the consent of the IJ, the defendant can put questions to the witness.[108] Indeed, the investigator can compel the complainant or defendant to co-operate in a physical examination, or in the taking of photographs or samples.[109]

Routine searches require a warrant issued by an IJ,[110] except in cases of necessity.[111] There are also provisions for the preservation of evidential integrity.

b. Arrest and Pre-trial Custody[112]

For offenses subject to a sentence of one year imprisonment or less, the IJ invites (by way of a summons) the accused to appear before him. If the accused fails to attend, the IJ will issue an order requiring the accused to attend. If the accused still fails to attend, the IJ will issue an arrest warrant which the police will then execute. For offenses subject to a sentence of more than one year imprisonment or the death penalty, an arrest warrant will be immediately issued by the IJ.[113] The police have a duty to arrest those carrying arms openly in violation of the law. Moreover, any person may arrest someone who is accused of a felony or misdemeanor where they have personally witnessed the commission of a crime.[114]

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[103] Art. 51 Law on Criminal Proceedings No 23 of 1971.
[104] Art. 52 Law on Criminal Proceedings No 23 of 1971.
[105] Art. 58 Law on Criminal Proceedings No 23 of 1971.
[106] Art. 60 B Law on Criminal Proceedings No 23 of 1971.
[107] Art. 51 Law on Criminal Proceedings No 23 of 1971
[108] Art. 63 B Law on Criminal Proceedings No 23 of 1971.
[109] Art. 70 Law on Criminal Proceedings No 23 of 1971.
[110] Arts. 72–86 Law on Criminal Proceedings No 23 of 1971.
[111] This includes searches of a location to undertaken to locate someone who has sought assistance from authorities and in cases of fire or suspected drowning.
[112] Art. 92s–120 Law on Criminal Proceedings No 23 of 1971.
[113] The warrant, which is valid in all provinces and remains current until executed or cancelled, should include details of the accused, the type of offense, and be signed and stamped by the court. Art. 99 Law on Criminal Proceedings No 23 of 1971.
[114] Art. 102 Law on Criminal Proceedings No 23 of 1971.

If the suspected offense carries imprisonment as a possible sentence, the IJ may initially order the detention of the accused for a period of up to 15 days. If the offense carries a maximum sentence of 3 or more years, or the death penalty, the IJ must order custody. The IJ may renew this order at the termination of the period for up to an additional 15 days. This process of renewed police custody authorization is subject to a maximum period that is determined by the length of the potential maximum sentence, but which in any event cannot exceed 6 months.[115] Where the IJ considers that more than 6 months custody is necessary, a decision on further custody will be taken by a panel of judges sitting (*Heiah*) in the felony court. If the panel of judges orders continued custody, the accused will be transferred from MOI police custody into Ministry of Justice (MOJ) prison custody. This control over pre-trial detention should place the case of any detainee within both the knowledge and control of the judiciary. In theory, it provides an important check and balance to instances of police wrongdoing. In practice, detention within the Iraqi criminal justice system has garnered much criticism in recent years.[116]

Release on bail is possible if the IJ, or felony court panel of judges, determine that the release will not lead to escape or prejudice the investigation. As previously mentioned, theory does not equate to practice in many respects. The large numbers held in by the Iraqi criminal justice system and the speed with which Iraqi courts are able to dispose of cases has hampered efforts to adhere to these strict time limits.

c. Questioning the Accused

The IJ or investigator is required to question the accused within 24 hours of arrest and record the statement of the accused. If the statement includes a confession, the IJ must record the statement personally, read it back to the accused, and then both the IJ and the accused must sign it. CPA Memo 3 incorporated into Iraqi Law the right to silence and the right to legal representation (which can be waived).[117]. However, in some circumstances the IJ can conduct a "closed" investigation where no legal representation is permitted.

The law does not permit the use of illegal methods to influence the accused or extract a confession. These methods include: mistreatment, threats, injury, enticement, promises, psychological influence, and the use of drugs or intoxicants.[118]

d. Trial

At the end of the investigation, the IJ decides if there is an offense over which he has authority to act, and if there is sufficient evidence for a trial. If there is sufficient evidence, the IJ transfers the case to the appropriate court.[119] If the evidence does not meet the requisite standard, the authorities must release the accused or return the accused to confinement and order further investigation. In practice, many detainees are not released because the releasing orders often have contained the qualifier that release is conditional on there being no other charges pending. The lack of an easily searched database of such other charges often means the detainee remains in custody for a prolonged time.

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[115] Art. 109 Law on Criminal Proceedings No 23 of 1971.

[116] Various reports have documented the abuse and torture of those in police detention. *See* United Nations Assistance Mission for Iraq, Human Rights Report, 1 July – 31 December 2008, *available at* http://www.uniraq.org/documents/UNAMI_Human_Rights_Report_July_December_2008_EN.pdf (last visited Aug 9, 2011); and US Department of State, 2008 Human Rights Report: Iraq *available at* http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119116.htm (last visited Aug 9, 2011). Unfortunately, these reports continue. *See* Human Right's Watch *Iraq – Secret Jail Uncovered in Baghdad, http://www.hrw.org/news/2011/02/01/iraq-secret-jail-uncovered-baghdad.*

[117] CPA Memo 3, Section 4c.

[118] Art. 127 Law on Criminal Proceedings No 23 of 1971.

[119] Art. 130 Law on Criminal Proceedings No 23 of 1971.

If the court determines that a trial should take place, the court prosecutor is appointed.[120] The prosecutor, or the trial court, may refer the file back to the IJ if they deem it necessary to collect additional evidence. Additionally, the trial court may summon a witness to attend at the court hearing. The charge is presented to the accused by the trial court.[121]

The burdens and standards of proof are similar to common law systems. The Iraqi Law requires a "sufficiency of evidence" for conviction.[122] In practice, this is similar to a "beyond a reasonable doubt" standard.

When compared to criminal trial under a common law system, the significant judicial involvement in the investigative phase often reduces the extent to which evidence requires testing at trial. It is common for the trial judge to be satisfied with the IJ's investigation of the evidence. Rather, the trial judge tends to focus on certain aspects of the evidence with which he or she wishes to take issue.[123]

The role of counsel at trial also differs significantly when compared to the common law system. Again, as characterized by an inquisitorial process, the trial judge will undertake much of the questioning. Indeed, in some trials, the role of the advocates may be effectively limited to making opening and closing addresses. The court may ask the defendant any questions he or she deems relevant.[124] While the right to counsel is enshrined in Article 19 of Iraq's new Constitution and the criminal code, counsel will often not have had time to take effective instructions from their client. Indeed, some may only meet their client for the first time on the morning of trial—even for capital offenses.

In order to secure a conviction, the court must have evidence from at least two sources.[125] This may include individual witness testimony supported by physical evidence, forensic evidence, etc.

If a confession obtained by the police is before the court, this may end the trial process—akin to a guilty plea. However, the court will often examine the validity of the confession before accepting it. Iraqi Courts provide written reasoning along with their findings as well as, if appropriate, reasons for the sentence.

5. The Substantive Criminal Law: Iraqi Penal Code – No 111 of 1969[126]

In 1918, the Supreme Commander of British Forces of Occupation in Iraq created "The Baghdad Penal Code." As the title suggests, it was initially limited to the capital. However, it later had national application. Although a new draft code was produced in 1957, it was not until 1969 that the Iraqi Penal Code No 111 replaced the Baghdad Penal Code.

The Code, which in translation runs some 139 pages, was the result of jurisprudential study, scholarly research, and judicial pronouncements, as well as findings of Arab, regional, and international committees. A detailed study of the individual offenses it contains is beyond the scope of this *Handbook*, but it contains a two-part structure. Part One provides detailed guidance on matters such as jurisdiction, elements of crimes, defenses, secondary participation, penalties, and amnesties. Part Two contains the full catalog of criminal offenses including offenses against person, property, state, against the due process of law, offenses that endanger the public, drunkenness, sexual offenses, trespass, and defamation.

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[120] Art. 143 Law on Criminal Proceedings No 23 of 1971.
[121] Art. 181 Law on Criminal Proceedings No 23 of 1971.
[122] Art. 182 Law on Criminal Proceedings No 23 of 1971.
[123] Art. 170 Law on Criminal Proceedings No 23 of 1971.
[124] Art. 179 Law on Criminal Proceedings No 23 of 1971.
[125] Art. 213B Law on Criminal Proceedings No 23 of 1971.
[126] *See* http://www.worldlii.org/catalog/54829.html (last visited Aug 9, 2011).

a. Recent Amendments

Of the more recent amendments to the substantive criminal law, perhaps two are worthy of detailed comment.

(1) Terrorism Law

In November 2005, the Transitional Government enacted the Terrorism Law. The offense is widely defined as "any criminal activity … aiming to disturb the national security and to society and cause riot and disturbance among people."[127] The sanctions for such offenses are understandably draconian. Article 4 stipulates that anyone convicted of terrorist activity may receive a death sentence. Those who hide information about a terror activity or information that could lead to the arrest of terrorists can be sentenced to a maximum of 20 years imprisonment.[128]

(2) Amnesty Law[129]

An amnesty law, passed on February 27, 2008, allows for those under investigation for or convicted of the majority[130] of offenses under the Iraqi Criminal code to be eligible to apply for amnesty. The decision as to whether an applicant receives amnesty rests with a committee made up of judges and public prosecutors. It should be noted, however, that that this only applies to offenses committed prior to February 27, 2008. Offenses *not* covered by the amnesty, include, terrorist activity that caused death or permanent disability, drug related offenses, and homosexuality. Within recent history, the allegations against a large percentage of detainees have tended to include charges under the Terrorism Law. While the detainee may receive amnesty for a minor charge, the detainee will remain in custody and investigation for the terrorism charge.

The amnesty law also provides for procedure-related amnesty. Individuals detained for 6 months and not brought before the IJ must receive amnesty, as must those who have been detained for 12 months without their case being transferring to an appropriate court. These safeguards apply regardless of the suspected crime. By January 2009, amnesty review committees had granted amnesty to 23,500 Iraqis in detention, of whom 6,300 had been ordered released.[131]

F. Security Agreement

Commencing in 2004, MNF-1 activities were authorized in accordance with UN Security Council Resolutions (UNSCRs).[132] However, UNSCR 1790, the most recent UNSCR to authorize MNF-1 activities, was due to expire on 31 December 2008. Consequently, the United States and Iraq entered into a bilateral Security Agreement on 18 November 2008. This agreement became effective on 1 January 2009, it

[127] *See* Art. 1 Terrorism Law 2005.
[128] *Editor's Note: Although the Iraqi penal code 111-1969 refers a sentence of "forever," in practice, this equates to a sentence of 20 years. The concept of life imprisonment does not exist in Iraqi law.*
[129] Law No 19 of 2008.
[130] The law specifies that those sentenced to death or convicted of thirteen listed offenses are NOT eligible to apply under the amnesty law.
[131] *See* DOD Report to Congress, Measuring Security and Stability in Iraq 3 (March 2009), *available at* http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf (last visited Aug 9, 2011).
[132] UNSCR 1546, 8 June 2004 (authorizing internment where necessary for "imperative reasons of security"), *available at* http://www.iamb.info/pdf/unsc1546.pdf (last visited August 19, 2011); UNSCR 1790, 18 December 2007 (renewing MNF-I mandate until 31 December 2008).

authorized continued U.S. military activities in Iraq, and it required the redeployment of all U.S. Forces from Iraq by 31 December 2011.[133]

In contrast with previous authorizing UNSCRs, the Security Agreement requires U.S. forces to arrest, search, and detain in accordance with Iraqi law.[134] In most cases, this requires U.S. forces conducting such operations to obtain Iraqi arrest and search warrants. The exceptions to this rule include the ability to arrest without a warrant upon witnessing a crime, and to arrest or search during combat operations.[135]

The Security Agreement also requires U.S. operations to be "fully coordinated" with Iraqi authorities.[136] In most cases, this requirement is met by U.S. forces conducting combined operations with their Iraqi Security Force (ISF) counterparts. Ideally, those counterparts will obtain any necessary warrants from a local IJ. Exceptionally, U.S. JAs may be required to assist in obtaining warrants from local or CCCI IJs. Similarly, ISF partners rather than U.S. forces will normally be responsible for any detainees. U.S. forces who do detain Iraqis must obtain the consent of a competent Iraqi authority (a "CIZA") to do so.[137]

G. Engaging Iraqi Judges

U.S. ROL practitioners' ability to effectively conduct ROL operations largely depends on the degree of influence they have with the Iraqi judiciary. This influence is often derived from the level of respect the Iraqi judges have for their USG partners and advisors. The vast majority of the Iraqi judiciary are intelligent, educated and dedicated. As a result, coalition capacity building efforts with the judiciary have been tremendously successful, and the judiciary far exceeds most other Iraqi Government organizations in terms of transition, growth, and independence since 2003. In order to understand the dynamic relationship between the Iraqi judiciary and other branches of the Iraqi government, the ROL practitioner must understand that "judicial independence" is a relatively new concept in Iraq. While Iraqi judges have made great strides towards exercising more judicial independence, those working with them must always remain sensitive to the cultural and historical norms that tend to hinder judicial independence in Iraq.

Relationships start with respect, dignity, and hospitality. Just as in the United States, Iraqi judges expect a level of respect and honor. A failure by ROL practitioners to engage with the requisite amount of respect will result in weaker relationships and limited accomplishments. Conversely, the willingness of ROL practitioners to be sensitive to Iraqi and Arab cultural mores makes all the difference in the development of the relationship.[138] The educated Iraqi judiciary has upfront expectations and assumes that coalition forces are educated and sophisticated enough to engage properly. These expectations must be met.

The perception of a judge that he is being shown respect commensurate with his position is by far the most significant area to leverage. Respect is shown in many ways. First it is shown in the consistency of the engagements, their length, and their tone. Judges should be engaged regularly. To establish the relationship consider more frequent engagements at the beginning. Respect is also shown in the use of proper Arabic phrases and acknowledgement of basic Iraqi culture. Addressing judges in honorific terms, in Arabic, shows a judge that you have made the effort to show respect. This will help achieve reciprocal treatment and further the goals of the engagement.

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[133] Agreement Between the United States and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, (Nov. 17, 2008), *available at* http://www.usf-iraq.com/images/CGs_Messages/security_agreement.pdf (last visited Aug 9, 2011).
[134] *Id*. Art. 22; *see also* Commander Trevor A. Rush, *Don't Call It a SOFA! An Overview of the New U.S.-Iraq Security Agreement*, May Army Lawyer, 34 (2009).
[135] Rush, *supra* note 134, at 43–44.
[136] Security Agreement, Art. 4(2).
[137] Security Agreement, Art. 22(2).
[138] *See Arab Culture Awareness: 58 Fact Sheets*, TRADOC DCSINT Handbook No.2, January 2006.

While Iraqi relationships and government structures are dominated by Islamic tradition, most judges are secular in their professional roles. Moreover, they are sophisticated enough to realize that many coalition engagement "blunders" are due to ignorance, with no offense intended. Judges may overlook insensitive and disrespectful behavior if it is believed to be unintentional. However, if the goal is to build an effective professional relationship, the coalition engager must take the time to learn things the "Iraqi way."

It is important to engage the right personnel. The Iraqi legal system is hierarchical; the local investigative judge answers to his court's chief judge. That judge answers to the chief provincial judge. That judge alone has access to the Higher Juridical Council, the body that governs judges in Iraq. Iraqi judges adhere to this chain of command. Not following it is a sign not just of ignorance but of disrespect. At the division level, the focus of engagement will frequently be on chief provincial and chief appellate court judges.

Local judges cannot make important administrative or logistical decisions without the concurrence of their superior judges, regardless of their own seeming agreement or enthusiasm, and so it is necessary to gain the concurrence of that superior for most projects. This dynamic also matters at the brigade level. BCT ROL personnel can be included in engagements with the chief appellate and chief provincial judges involving their local courts, enhancing the credibility of the BCT personnel with their respective local court judges.

With status-conscious Iraqis, the more senior the engager, the better the results will be. In general, the servicing Provincial Reconstruction Team DOJ Resident Legal Adviser (RLA) or, in those areas without an RLA, the Rule of Law Advisor will take the lead. As of 2010, almost all PRTs had a Resident Legal Advisor (AUSA) or Rule of Law Advisor assigned. Generally, this senior civilian legal presence serves as the lead engager to the Judiciary for the USG, accompanied primarily by the BCT JA counterpart. On other occasions, BCT commanders and other U.S. Forces leadership will engage with the Judiciary in conjunction with the PRT RLA. Lower court judges are required to report to their superiors about administrative matters affecting the operation of their courts.

Iraqi judges are proud of their legal heritage and will routinely have prints or tapestries of Hammurabi on their walls.[139] They may also have a framed *Qur'anic* verse relating to a judge's duty to be fair and impartial. Respectfully acknowledging the same is a small but important aspect of initial engagement. The *Qur'an* is typically on the judge's desk and covered to keep it dust-free. Do not ask to peruse it; the request would probably be granted out of politeness, but it would likely be seen as inappropriate.

Judges in Iraq have not historically had significant relationships with the military (Iraqi Army and National Police). The need for security in postwar Iraq has required judges to form new relationships with the army and police. Both entities have varying levels of trust of the judiciary and vice versa.[140] U.S. forces need to be sensitive to this dynamic and realize that army and police issues will typically require more finesse. Do not expect rapid trust from a judge.

Agree to meet judges at their courts. It supports the perception of security. One of the recurring problems for judges is lack of adequate personal security. U.S. presence at the courthouse helps demonstrate that the courthouse environment has an acceptable level of security. Finally, it is the best way to gauge the status of the court.

[139] Hammurabi was the sixth King of Babylon and is known for the set of laws called Hammurabi's Code, one of the first written codes of law.

[140] The relationship between Iraqi security forces and the judiciary is critical for local security and the functioning of the prosecution of terror suspects. Attention and time by coalition forces is needed to nurture these relationships. Senior Iraqi army officers reported to the author that prior to the 2003 invasion and the subsequent disbanding of the Iraqi army, the army enjoyed a higher standing with the judiciary than the police.

Coordinating Local RoL Events with the Higher Judicial Council (HJC) through the ROLC and USF-I OSJA

Lower court Iraqi judges fully brief to their superiors all contact with USG personnel. It is respectful and advisable for the U.S. engager to request permission of the chief appellate or chief provincial judge before setting an engagement with a lower court in the jurisdiction. This technique can be very helpful in showing judges that their system was understood and followed. Furthermore, lower court personnel will be much more amenable to developing positive relationships with collation forces with the permission, or at the direction, of their chief judge. If this courtesy is ignored, the chief judge will eventually still find out about the engagement, and it may cause unneeded pressure on the lower court judges and ultimately strain or irreparably harm your relationship.

Iraqi judges are smart and educated. Many speak formal Arabic in addition to their Iraqi dialect. They know their law, which has changed little substantively since 2003. Even if there is some indication that local judges are not similarly competent, the wise ROL practitioner should not suggest anything except respect for the tradition and competence of the judiciary. Shame and honor can easily converge when working on issues requiring the cooperation of the judiciary. One should avoid statements that may be construed as accusations of error, lack of diligence, or incompetence. The judge will typically protect and defend his and the court's honor at all costs. Criticisms are taken very seriously and can cause unintended consequences.

While U.S. forces have become a normal fixture in Iraq, courts may still be uncomfortable with the presence of servicemembers and weapons. If the security situation is permissive, remove all protective gear as soon as practicable and conduct the engagement without holding weapons. Keep personal security details out of the meeting room, if possible. Civilians engaging with judges should wear appropriate attire. Ties and sport coats suggest respect to the judge. Women should always dress professionally and conservatively. Remove headgear, sunglasses, and gloves as soon as possible and before shaking hands. Be sensitive to the fact that you are in a court.

Spend plenty of time greeting. Always greet the senior person first. Work your way around and shake hands[141] with each person as practicable. Putting one's hand over the heart connotes respect and sincerity. After taking one's place, be prepared to spend plenty of time on extended greetings and initial discussion. Do not go right into business as it is contrary to the Iraqi way. Spend time asking the judge about current events but don't expect to engage on such issues until your relationship is well-developed. Similarly, expect the first meetings to be more cordial than substantive. As the relationship develops, judges will gradually engage on more substantive issues and work towards resolving coalition issues of interest.

Do not ask questions about a judge's female family members including his spouse. Openness and friendliness, while sincere, may offend. Sensitivity to this Islamic tradition shows respect. Iraqis do, however, greatly appreciate your interest in their culture, language, and history and welcome appropriate questions. Expressed interest in Iraqi history can demonstrate respect for both the judiciary and legal system. When engaging Iraqi officials both male and female, remember to maintain eye contact; not looking at someone suggests they are unimportant.

Engage in friendly discussion and do it leisurely. Engagements with judges should typically last one to three hours. "Drive-bys" should be avoided and suggest lack of respect. Judges will not rush and will make a great effort to be hospitable, attempting to show respect. An Arabic word, "*karamah*," partially captures the approach: it suggests granting others respect, honor and dignity, and treating others with generosity. Doing

[141] However, in Iraqi culture a male should never shake hands with a female.

so is part of the "righteous path" and consistent with the *Qur'an's* teachings.[142] Judges may take phone calls during the engagement. This is not a sign of disrespect. Also, interruptions by other court personnel may occur, very often this will be to offer tea and other assorted desserts. When offered such items of hospitality, you should graciously accept the first round.

Use the same coalition interpreter or advisor whenever possible. The judge will form a concurrent relationship with this person. A savvy and motivated advisor can make a tremendous difference in the growth of the relationship with the judge. Uneducated or otherwise unsophisticated interpreters hamper engagements. As relationships mature, the level of privacy and trust accorded to the ROL practitioner will increase. Having the same Arabic speaker at each engagement will hasten this process. Furthermore, much of the contact with the judge will occur over the phone. If the judge trusts and likes the interpreter, he will be more willing to engage remotely. Be cognizant of ethnic and tribal affiliations.[143] Work in advance with your interpreters to prepare them for engagements. The judges will be able to quickly discern if the interpreters are aware of the agenda. It indicates respect that preparation occurred.

Strive to avoid uncertainty. The strict rules and laws in Iraqi culture reduce the tolerance for ambiguity.[144] Judges will seek to avoid risk and the chance of the unexpected occurring. They will invariably become uncomfortable and resistant if coalition personnel advocate situations with uncertain outcomes. In general, they will not accept risk. Decisions are typically made gradually. The dynamic changes that occur with shifting coalition personnel and issues, battlespace boundaries, and Iraqi government development are all contrary to traditional Iraqi thought. With judges, be sensitive to questions that may force an "I don't know" response, as this is distasteful for Arabs.

Build your relationship by following through on "promises." Be careful what you agree to do. If you agree or promise to do something and fail to follow through, you risk reinforcing the common Arab perception that "America never keeps its promises." Iraqi judges are very conscious of USF-I efforts, whether they are sustained engagement efforts or tangible ROL initiatives. Do not risk a loss of credibility early on by promising the unobtainable. Rather, indicate that you will "look into it."

Engaging key judges can be the most significant of any ROL initiatives. The dividends from consistent judicial engagement can range from security solidification, increased judicial capacity, and the growing confidence of court personnel and host nation citizens. Investing time and effort in judicial relationships is likely to remain one of the most critical parts of reinforcing the ROL.

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[142] *See* "Understanding Islam" at www.understanding-islam.com (last visited August 19, 2011).
[143] Some USF personnel believe that non-Iraqi Arabs (e.g., Egyptian, Moroccan) are more effective with Iraqi judges due to continued issues of sectarian mistrust.
[144] JODIE R. GORRILL, DOING BUSINESS IN IRAQ: IRAQI SOCIAL AND BUSINESS CULTURE (2007).

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CHAPTER 8

HUMAN TERRAIN TEAMS: AN ENABLER FOR RULE OF LAW JUDGE ADVOCATES AND PARALEGALS[1]

There can be no government without an army, no army without money, no money without prosperity, and no prosperity without justice and good administration.

Abu Muhammad Abdullaah Ibn Qutaybah Ad-Dinawaree[2]

I. Introduction

The Human Terrain System (HTS) Project is an initiative to provide socio-cultural teams to commanders and staffs to improve the understanding of the local population. Its mission is to "[r]ecruit, train, deploy, and support an embedded, operationally focused socio-cultural capability; conduct operationally relevant, socio-cultural research and analysis; develop and maintain a socio-cultural knowledge base."[3]

Human Terrain Teams (HTTs) are typically composed of "one team leader, one-two social scientists, one research manager, and one-two human terrain analysts with specific local knowledge."[4] The members of a HTT are recruited and trained as a team for a specific region, then embedded with their supported unit, which normally is a brigade combat team (BCT).[5]

The team leader could be an active or reserve component officer, possibly even a retired military officer with a primary duty of ensuring the integration of human terrain analysis with the Military Decision Making Process.[6] The team will probably have at least two social scientists, one with an emphasis on ethnographic/social science research and analysis and the other with a fluency in the indigenous language to facilitate focus groups with the local population.[7] Other team members will be military human terrain analysts trained in debriefings and data research and military terrain researchers that integrate the human terrain research plan with the intelligence collection plan.[8]

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[1] *Editorial Note: CLAMO After Action Reports (AAR) for the 09/10 year recorded only one HTT related comment, regarding concerns of criminal jurisdiction with the recent implementation of The Security Agreement between the U.S. and Iraq. Inferring that the silence concerning HTTs in so many AARs reflected a knowledge gap between HHTs and BCT judge advocates and paralegals, this Chapter was included in the 2009 Handbook to encourage JAs and paralegals to "think outside of the box" and employ their adaptive thinking skill-set to take advantage of the HTT enabler. The number of HTT capability AAR references has increased significantly since the original chapter was published. The original text for this chapter was written by LTC Dan Tanabe, former Deputy Director, Future Concepts Directorate, TJAGLCS,, Charlottesville, Virginia. It has been modified and updated for the 2011 edition of the Handbook.*

[2] This quotation is historically attributed to this Ninth century Islamic scholar. *See, e.g.* Malik Qasim Mustafa, "The Responsibility to Protect a Fragile State: A Case Study of Post-Intervention Afghanistan," http://catalogo.casd.difesa.it/GEIDEFile/THE_RESPONSIBILITY_TO_PROTECT_A_FRAGILE_STATE%C3%8A_A_CASE_STUDY_OF_POST-INTERVENTION_AFGHANISTAN.HTM?Archive=191548091972&File=THE+RESPONSIBILITY+TO+PROTECT+A+FRAGILE+STATE%A0+A+C (last visited June 14, 2011).

[3] U.S. Army, *Welcome to the HTS Home Page*, http://humanterrainsystem.army.mil (last visited Aug. 22, 2011).

[4] U.S. Army, *HTS Components*, http://humanterrainsystem.army.mil/htsComponentsDeployed.aspx (last visited August 22, 2011).

[5] *Id.*

[6] Human Terrain System Information Briefing presented to the Brigade Judge Advocate Mission Primer, Rosslyn, Virginia, December 16, 2009.

[7] *Id.*

[8] *Id.*

Once embedded, "HTTs conduct field research among the local population and represent the 'human terrain' in planning, preparation, execution, and assessment of operations."[9] The HTT can be sub task organized into smaller teams to support subordinate units based on mission requirements.[10] Human Terrain Teams are formed and deployed only as needed and are not a permanent structure.[11]

II. Background

The collective experiences of recent special operations forces deployments to Iraq tasked to conduct foreign internal defense (FID) shows that navigating the socio-cultural landmines between the Iraqi security force apparatus and the Iraqi judiciary is time and resource intensive. Successfully discerning the finer aspects of social science armed only with a law degree was probably more a function of luck than of deliberate planning. As noted elsewhere, but for the comparable HTT-like capabilities of the Operational Detachment Alphas (ODA), the odds of success of many initiatives would have been very low.[12]

This practice note is neither doctrine nor "rocket science" but rather evolved from an attendance at an interdisciplinary conference where an anthropologist presented a narrative entitled "Judicial Practices and Rhetoric of Memory in Gaza Strip."[13] This narrative provided an in-depth comparative analysis between the formal judicial system of the Palestinian Authority, and informal tribal judicial systems in Gaza. The final determination was that the informal judicial system was actually undermining the formal judicial system rather than complementing it.[14] While the means by which this determination was reached are beyond the scope of this note and most JAs' expertise, for purposes of context this practice note will try to describe the methodology used.

The anthropological approach initially established a context through a historical analysis of social/political disruptions as well as physical/geographical migration and relocation. Data was then collected across generational lines on specific topics concerning individual values and national identity, as well as data concerning case adjudications for similar type cases in both the formal and informal judicial systems. The analysis of this data within this historical context demonstrated that the tribal values associated with the informal judicial system, which presumably complemented the formal judicial system, had been significantly altered and politicized. In effect, the informal judicial system had become a subterfuge to circumvent the formal judicial system. Specifically, the pre-1948 generation's norms and values associated with tribal social construct were strikingly different from those of the younger generation of post-1948 Gaza. Further, the pre-1948 norms and values that were assumed to exist in the informal judicial system had since been replaced by the politicized post-1948 norms and values as reflected in the polling comparisons and backstopped by the case adjudication analysis. The faulty assumption regarding the tribal informal judicial system allowed the legitimization of a means to circumvent the formal judicial system and undermine public trust in the formal judicial system and, ultimately, the Palestinian Authority.[15] This interesting narrative leads one to think that

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[9] *Id.*
[10] Afghan Commander AAR Book, Currahee Edition at 30 (electronic version *available at* http://cc.army.mil) (last visited June 14, 2011).
[11] U.S. Army, *HTS Components* (Aug. 22, 2011), http://humanterrainsystem.army.mil/htsComponentsDeployed.aspx (last visited Aug. 22, 2011).
[12] *See* LTC Dan Tanabe & MAJ Joe Orenstein, *Integrating The Rule of Law with FID in Iraq*, Special Warfare Magazine, Nov.- Dec. 2009, at 7-11. Since 2003, ODAs have deployed more frequently on shorter deployments than conventional units, but usually returned to the same deployed location with the same enduring partnered FID force creating a practical equivalent for that specific location to the academic expertise of a social scientist.
[13] Christine Pirinoli, Universite de Lausanne – Institute d'Anthropologie et Sociologie, Narrative at the Franklin College Intersections of Law and Culture Conference (October 4, 2009), this is part of a larger book entitled, *Jeux et enjeux de memoire a Gaza* [Collective Memory and National Identity: Gaza] (May 2009), *see* http://www.lcdpu.fr/livre/?GCOI=27000100250790 (last visited Aug. 22, 2011).
[14] *Id.*
[15] *Id.*

an anthropological approach could be useful in many of our legal support mission-sets, since in many instances we are attempting to work "by, with, and through" a partnered force through their system.

III. Why Use a Human Terrain Team?

Training and Doctrine Command (TRADOC) recently published the Operational Environment (OE) 2009-2025.[16] This publication identifies trends to help describe the current and foreseeable OE in which the Army will conduct missions. While some identified trends may be new, they are largely restatements of a reality with which JAs and paralegals are all too familiar. However, they do build the context that can illustrate the enabling capability of an HTT.

One trend identified in the OE is a notion of "cultural standoff" whereby an adversary will employ asymmetric tactics that seek to alienate the local population from U.S. forces through perceptions that U.S. forces are violating cultural norms.[17] Likewise, the OE identifies a competition of "cultures, civilizations, and associated ideologies" that raises the concept of "human terrain" on a level equal to, if not higher in importance to, mission accomplishment than physical terrain, for "[c]ulture and ideology may be the center of gravity in future conflict."[18]

The Australian Army has identified similar trends in their Army's Future Land Operating Concept.[19] In the chapter that discusses "Indigenous Capacity Building," the Australians note the significance of cultural sensitivities and how this knowledge could help identify and empower those indigenous leaders and traditional structures that will deliver effective outcomes for the local population.[20] On the other end of the spectrum, moving towards lethal effects, the Australians identify a concept of "Discrimination Threshold."[21] This concept relies heavily on human terrain to define culturally where the boundary is between acceptable and undesirable outcomes when prosecuting targets.[22]

The Army Capstone Concept[23] (ACC) broadly describes the capabilities the Army will require to meet the threats and adversaries envisioned in the OE. The ACC prioritizes "operational adaptability," requiring flexible leaders "who are comfortable with collaborative planning and decentralized execution, have a tolerance for ambiguity, and possess the ability and willingness to make rapid adjustments according to the situation" while "[developing] the situation through action."[24] This methodology's implied task is to understand the particular OE to a degree of familiarity that will allow operators to set conditions, if necessary shape, then assess for further adaptation. If, while you are attempting to accomplish this implied task, the adversary is employing the previously mentioned asymmetric tactic of "cultural standoff" then it is critical to gather as many available tools for your Operational Law kit bag in order to assist your commander in disrupting your adversary's decision making cycle and overwhelm his operational tempo.

One such available tool is the HTT. What better tool to employ and leverage social and anthropological understandings of your particular OE, especially if the local population is the center of gravity? Just as commanders and other members of the battlestaff will generally defer legal issues to their JAs as the legal subject matter expert (SME), cultural issues should also be deferred to the relevant SME. However, JAs need to bring the SMEs to the table and one cannot do this if one does not know who they are or where to

[16] TRADOC, Operational Environment 2009-2025(v6).
[17] *Id.* at 8.
[18] *Id.* at 19.
[19] Director Future Land Warfare and Strategy – Australian Army Headquarters, Adaptive Campaigning 09 (Sep. 2009).
[20] *Id.* at 54.
[21] *Id.* at 8.
[22] *Id.* at 19-20.
[23] TRADOC Pamphlet 525-3-0, The Army Capstone Concept (21 December 2009) [hereinafter Army Capstone Concept].
[24] Id. at i.

find them. Once found, effective employment of an HTT could enable the unit to defend against and even counter the "cultural standoff" tactic, isolating the enemy from the population. This capability would allow the unit's targeting methodology to remain below the "Discrimination Threshold" as it applies lethal and non-lethal means and effects in prosecuting targets and accomplishing the mission.

As one "peels back the onion" with an HTT enabler, like the Palestinian judicial system study mentioned earlier, current reporting from Afghanistan also shows some possible false assumptions. In particular, the emerging orientation towards tribal engagement is drawing warnings from the HTS. Social scientists familiar with Afghanistan are presenting data that aligning a new strategy along tribal affiliations "is deceptive" for "[m]aybe those groups were once tightly-knit. But decades of war with the Soviets and with the Taliban has changed all that."[25]

Recently, an HTT was able to provide a company commander tribal mapping and market flow for the specific area of operation which allowed the company commander to understand how the different tribes were interrelated.[26] HTTs as part of the HTS also have direct links to the Department of State (DOS) via the HTT liaison officer embedded in the DOS Humanitarian Information Unit.[27] As pointed out recently by the British Military, "[a] little knowledge can be dangerous, masking important nuances and subtleties…[f]requent reference to subject matter experts may be necessary."[28]

IV. How a Human Terrain Team Might Be Employed

After the evening commander's update brief, the battle captain hands you a daily FRAGO that tasks your BCT to develop a plan to integrate the informal tribal court system in your province with the formal court system. The battle captain is giving you a heads up since he is pretty sure the S3 is going to "pin the rose on you" to brief the BCT commander on how the BCT plans to accomplish this specified task.

As you begin to think about all the possible implied tasks, you recall the numerous reports that identified the lack of communication between the informal court leaders and the formal court judges, similar to the communication problems between the police and the investigative judges on your last deployment.

Your figurative light bulb flickers towards illumination and a viable solution, as your thoughts focus on how to get these two groups to communicate with one another. Immediately you begin to write yourself notes on coordinating a time and place, coordinating security for the meeting, coordinating the logistics for the meeting, etc…and so goes your initial plan towards holding this "grand meeting of the minds" between the informal tribal court leaders and the formal court judges. As you begin to conceptualize how to set the conditions for success or to avoid disaster, the data you pull from your predecessor's legal database begins to show a troubling picture. You realize that neither group, the tribal judges or the formal judges, have ever been extensively targeted by the insurgents—so fear is not a factor, and even more troubling, all sets of individuals appear to reside in close proximity of each other—so logistics is not a factor. You begin to wonder if there is something else that is preventing these sets of individuals from communicating with each other.

As you dwell on this thought, you walk into Ms. Preston, one of the anthropologists on the BCT HTT, while exiting your office. As a matter of courtesy, you ask Ms. Preston how her trip went today, knowing that she was apprehensive of doing focused polling since the recent death of a fellow HTT member from an IED attack last month. Ms. Preston tells you that the focused polling went well and that they were able to

[25] Noah Shachtman, *Army Researchers Warn Against Tribal War in Afghanistan*, Danger Room, November 30, 2009, *available at* http://www.wired.com/dangerroom/2009/11/army-researchers-warn-against-tribal-war-in-afghanistan/#more-19988 (last visited Aug. 21, 2011).
[26] Afghan Commander AAR Book, Currahee Edition at 30 (electronic version *available at* http://cc.army.mil) (last visited June 14, 2011).
[27] Humanitarian Information Unit, *Welcome to HIU*, http://hiu.state.gov (last visited July 12, 2011).
[28] Ministry of Defense Joint Doctrine Note 1-09, *The Significance of Culture to The Military*, at I-7 (Jan. 2009).

determine that future CERP projects given in "the name of the mosque" would be acceptable to the tribal elders since such "gifts" are considered "gifts to god" and would not put the villagers at risk from the insurgents. Her response triggers a synaptic event and you quickly relay to her your current thoughts on your recent tasking. After a few seconds, Ms. Preston tells you that there might be something else, along tribal lines, that is preventing these two groups from talking with one another.

Immediately after exchanging best regards, you walk to the BCT commander and explain to him that in order for you to accomplish this tasking, you will need assistance from the HTT. After the "old man" blesses off on your request, you set the wheels in motion.

As you reach out to the HTT to sit down and explain the tasking and desired endstate, you also work with your S2 to see if the operational management team that runs the BCT's human intelligence teams has any background information on the potential host nation participants. Taking the unclassified information provided to you by your S2 and giving it to the HTT, the HTT begins to analyze this information along with the tribal mapping. Based on this initial analysis, the HTT establishes focus areas for near-future local population polling to assess and backstop their initial thesis.

Over the next week, the HTT travels to the towns in which the tribal judges and formal judges either reside or operate and conducts the focused polling. After the analysis of the local population polling, the HTT advises that key members of the informal and formal court systems are of tribes that are currently undergoing a tribal mediation over a very lucrative patch of land that is being used to canalize water to multiple towns.

Armed with this information, you begin to conceptualize how you might leverage it to set the conditions for mission accomplishment. Maybe you can meet separately with each group first and offer to them the BCT's assistance towards a solution on the land/water dispute in exchange for worthwhile discussions between the two groups? Maybe you can bring the two groups together along with the tribal mediators and in the presence of all the stakeholders offer them the BCT's assistance on the land/water issue if they can agree to earnestly discuss the informal/formal court issues? Then it dawns on you that one course of action may be more culturally acceptable than the other, so you depart your office to find Ms. Preston for more HTT expertise.

This hypothetical illustrates how an HTT could facilitate the accomplishment of an operational law mission. This possibility takes on a significance when faced with the realization that our "egocentric thinking—our unrealistic sense that we have fundamentally figured out the way things actually are" can be our biggest hindrance.[29]

Editor's Note: Since this FCD thought piece was written, it is still not clear that we have, "fundamentally figured out" HTTs. As the Nov 2010 Congressionally directed assessment of the US Army's Human Terrain System indicates, while the HTS concept is, generally, validated, its execution to date appears to have some significant flaws.[30] Those flaws should not, in themselves, rule out the use of HTTs in ROL work. However, like any enablers, they should be used with a clear understanding of their potential limitations.

[29] Foreign Internal Defense Joint Integrating Concept (FIDJIC)(v9) at 29. FIDJIC recognizes that the ability to effectively expand the capabilities of FID, leaders will need to exercise the ability to "think critically" enabling them to momentarily step back and determine if the identified problem/challenge has been accurately or fully articulated within the specific operating environment.

[30] Clinton, McQuaid et al, *Congressionally Directed Assessment of the Human Terrain System* (CRM D0024031 A1/Final), CAN, (Nov 2010) *available at* http://openanthropology.files.wordpress.com/2011/02/gettrdoc.pdf (last visited Aug 9, 2011).

CHAPTER 9
RULE OF LAW NARRATIVES

Editor's Note: This Edition of the Handbook has a somewhat reduced narratives chapter than in previous years.[1] *"Reduced", that is, in terms of numbers, not quality. Further breaking with tradition, it also features two "think pieces" that are less the ground level, theatre specific, personal experiences of deployed personnel, and more a (hopefully) thought-provoking discussion about the conduct of ROL operations generally. None of the narratives in this chapter should be taken to necessarily represent any official position of the units, organizations, or countries the authors work for or are affiliated with.*

I. Justice – A Centre of Gravity Analysis[2]

Editor's Note: The following article suggests that it is time to take the insurgents' ability to provide "justice", albeit not necessarily of a form to our, or the local population's liking, seriously. Although the justice situation in, for example, Lashkar Gah may have improved somewhat since this article was written, its underlying premise remains sound – the provision of justice, or the rule of law, is often an insurgent's centre of gravity, and one that we ignore at our peril. In deference to the author's (and the Editor's) nationality, English spellings have been used throughout.

Missing a trick – Justice and Insurgency[3]

"And most difficult of all they came armed with laws and regulations which had not necessarily any relevance whatever to the standards by which a Pathan society lived."[4]

The Ken Loach film "The Wind that shakes the Barley" did not attract the approval of the establishment. It was a one-sided picture of the IRA campaign against the British between 1919 and 1921. That may well be so. It is also a picture of an insurgency from the insurgent's perspective, a point of view all too often dismissed as "giving aid and comfort to the enemy." One scene in the film presents a key element to insurgency that has been and remains almost ignored. In this scene, set in what appears to be a village hall or school, a court has been set up. Its function is not to decide the fate of traitors or collaborators, as insurgent courts are regularly thought to do. What is being decided is whether a particular debt should be paid. Putting aside the political aspect of this particular debt, (it is owed to a loan shark who bankrolls the local IRA unit that is are trying to ensure it is paid) this kind of case is the meat and bread of courts all over the world every day. The court portrayed is a Dail (pronounced "Daul") Court, run by officials of Sinn Fein on legal principles adapted from the English system. By the end of the so-called Irish War of Independence there was a national network of working "parish courts" arbitrated by IRA members, parish clergy, republican lawyers, or Sinn Fein figures. Their decisions were enforced. And more than that, they were

[1] *Editor's Comment: Readers who feel short changed by the reduced number of theatre specific narratives in this edition of the Handbook, could do no better than refer to the seven, in depth, case specific studies articulated in* CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR TORN SOCIETIES (Deborah Isser ed.) (U.S. Institute of Peace Press, 2011).

[2] Article by Frank Ledwidge, an English Barrister. He was the first Justice Advisor to the U.K. PRT in Helmand Province, Afghanistan. He has also served as a reservist military intelligence officer in the Balkan Wars and Iraq. He is the author of "Losing Small Wars" (Yale University Press 2011).

[3] Originally published in the British Army Review, Number 150, at 38 - 42 (2010/11)

[4] OLAF CAROE, THE PATHANS, at 347 (Oxford 1958) [hereinafter *Pathans*]. This is the "must read" on Pashtun history and culture. Caroe can be heard talking about his work at length at the UK's Imperial War Museum tape number IWM 4909/07.

respected. They succeeded in marginalizing the British state in the key area of justice and had in doing this entrenched their own shadow state's legitimacy.

"So what?" you might be thinking. What has this to do with the wars we are fighting today? It is the thesis of this article that justice, by which I mean the mechanism of dispute resolution, is central to the war in Afghanistan and indeed almost any counterinsurgency. The "so what?" here is that the Dail Courts, once established, provided a visible manifestation of the legitimacy of the IRA's cause. They were not simply "terrorist courts" or another example of what we are pleased to call "the shadow state." Whether consciously or not, Loach and his scriptwriters realised that once you have an accepted court system, with its hinterland of enforcement and popular acceptance, once you have a working system of justice set up, relying on a body of law and most importantly with the consent of its "customers," you are a very great distance along the road to what the "US Army / Marine Corps Manual of Counterinsurgency" -hereafter FM 3-24 - calls "legitimacy." Unfortunately neither FM 3-24 or the British Army's own glossy Field Manual challenger "Countering Insurgency" see the centrality or implications of "justice" both in its abstract or its physical manifestations to success in a resistance war.

To illustrate my point I will, for a moment, come home. There may be some readers who have at one time or another found themselves in a British Court. The fact of being in such a place has deep implications beyond the fate of one's personal liberty or driving licence. For a start there is an implicit acceptance of the court's authority. The presumption of legitimacy is so deep it is almost never articulated. One will sit in English courts for many years without hearing the phrase "I deny the right of this court to decide my case." There may be those who find its rulings misconceived or plain wrong. Arguments are often made about *jurisdiction* but few outside the small "insurgent" community of this country deny *the right* of the court to make those rulings. Facing everyone in the UK courts except the judge or magistrate is a large Royal Crest, sitting above the judge's seat. For those who care to consider it the implication is clear. Here resides authority based around common acceptance. There are no rivals to the courts here. Any proposed or indeed existing Sharia or Beth Din courts (largely dealing with family cases with the consent of the litigants) will derive their authority, and more importantly the enforceability of their decisions, from United Kingdom law. When something goes wrong, whether this is government misfeasance or private crime, we rely on courts to sort it out.

For a system of "justice" is where the rubber of government meets the road of the people. The ability and acceptance of the right to adjudicate disputes is the ultimate expression of the right to rule – indeed of "legitimacy." Once that sense is lost, as it was in early 1920s Ireland or indeed early 21st Century Afghanistan, it is a slogging uphill struggle to get it back. Complex insurgencies are powered by injustice, corruption, and a sense of illegitimacy. They are not generally, contrary to received governmental wisdom, driven by a desire to see free and fair elections. Most ordinary right-thinking people have the provenance of their government well down their list of priorities. What is important is knowing that if you have a dispute with your neighbour over land, or with an individual over whether he stole your television set, it will be resolved fairly. Your livelihood may depend on that. In the absence of provision of such a service, insurgents will happily and gratefully provide it themselves.

Justice is a doubly dangerous weapon in the hands of an information-literate indigenous insurgent operation like the Taliban. "Sometimes the best weapons are those which do not shoot" as the U.S. Counterinsurgency Manual[5] puts it, not only does the insurgent's ability to adjudicate disputes in an accepted and purportedly fair fashion reinforce his claims to legitimacy, it bleeds that legitimacy away from the government. As one commentator has put it, the setting up of separate courts is the ultimate "*non serviam.*"[6]

[5] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter FM 3-24], para. 1-197.
[6] Mary Kotonouris. Lecture on Dail Courts RTE 27th February 2009, Dublin, a*vailable at* http://www.rte.ie/radio1/thomasdavis/1251899.html.

The Formal System in Afghanistan

Even in relatively well-developed countries in the region such as (sic) Kyrgyzstan, Tajikistan, and Kazakhstan, all with the benefit of decades of Soviet influence, it will take decades to create a system that is not besmirched in what we would call, and in fact what Central Asians call, corruption, inefficiency, and incompetence. The point about Soviet influence is not meant to be facetious. The importance of Soviet control for those decades is threefold. First and most basically, there is a relatively sound and accepted legal basis upon which the justice system can operate. There are accepted laws. Second, there is physical infrastructure – courts, and so on. Finally and equally importantly, there is a well-trained and prepared professional base. In other words there are lawyers. None of these factors apply in Afghanistan. There is no agreed legal basis. There is of course the latest of six constitutions.[7] Even if the constitution were clear, few judges could read or interpret it. There remains a fundamental problem from the structural perspective. Each region operates on very different legal foundations. The questions remain: Does Islamic law apply? Is it the law applicable before 1979? Or is it customary law (about which more later)?

Court buildings are a relatively simple problem to crack, although this itself has often proven difficult. Buildings can be built, prosecutors supplied with computers, and case-management systems installed. The final question, personnel, is a serious problem. There are very few trained lawyers outside Kabul. Anyone in any doubt as to the value of defence lawyers might be inclined to modify their views after a few hours in the prison in Lashkar Gah – the capital of a province without a single lawyer. Such legal expertise as there is in Helmand is confined to the prosecutor's office where the Soviet trained Chief Prosecutor holds sway.[8] There is little reason to believe that the situation is substantially better in other Pashtun provinces of the South East.

Nationally, the justice reform programme [in Afghanistan], set up by the "international community," has totally failed. This is due to a complex series of factors ranging from a poor to non-existent appreciation of the culture and background against which the planned reform was to take place, to a lamentable lack of appreciation of this area as a priority. Great efforts were made to support an excessive focus on largely pointless, and often counterproductive, human rights measures which *might* begin to work in Ukraine or Albania but which were not appropriate for Afghanistan. The fact that the entire programme was placed largely in the hands of foreign "experts" who were neither equipped nor resourced for the task did not help. Here is not the place to go into detail about the shambolic state of legal and justice reform in Afghanistan as a whole.

Even in more favourable environments the results of such efforts take many years, even decades to appear, if they appear at all. Kabul was not a favourable environment. The overriding consequence was that in much of the country a justice vacuum appeared alongside poor governance in other sectors. In the Pashtun lands this was compounded by the fraying of social and tribal structures which have been very damaging to traditional methods of dispute resolution – Afghan customary law. The Taliban were well-equipped to fill this space.

Taliban Justice

The central importance of justice continues, as we shall see, to evade the theorists and, to a lamentable degree, practitioners of "counterinsurgency." Successful insurgents place it at or near the top of their objectives. All successful insurgents know the implications of providing fair fora for dispute resolution; not *necessarily* the same as courts. None know this better than the Islamic Emirate of Afghanistan – the Taliban. It is common knowledge that they were founded and grew on a manifesto, if one can call it that, of justice. In 1994, goes the legend – a legend that in its essence appears to be true – Kandahar was beset by gangs of

[7] The latest Afghan Constitution was established in 2004. Previous versions were promulgated in 1923, 1964, 1976, 1987, and 1990.
[8] Most NDS prosecutors are also Soviet trained.

mini warlords and thugs. The rape of two boys impelled Mullah Omar to action. Two of these criminals were hung from a tank, to the resounding approval of local folk. One senior Taliban official, a former anti-Soviet Mujahedeen recalls "we would prosecute vice and promote virtue, and would stop those who were bleeding the land . . . we immediately began to implement Sharia in the surrounding area."[9] The group Omar led, supported of course by the Pakistani Inter-Services Intelligence, went on to take control of most of the country. What is less well known is that as a movement the Taliban are much older than that. They certainly existed in the Soviet period, "Many people talked about the Taliban, even then. They were respected by other mujahedeen. Some of them even consulted the Taliban Courts to settle their disputes or came to seek advice."[10] Whatever the history of the movement, its achievements, or lack of them in most respects, are well known. In only one area did it provide a service that had never been available from the state before and certainly is not available now. It provided a system of resolving disputes that was generally regarded as fair – if rather more robust than most human rights enthusiasts (I include myself in their number) would approve. Matters have not significantly changed. The "motorcycle courts" operating in Kandahar, Helmand and other provinces are testament to this.

In an environment where 90% of the land is under insurgent control, like the old IRA in the West of Ireland, they have established a system of working courts as the only effective and above all trusted tribunals of justice.[11] Above all although they are reputed to charge fees for their work, as indeed do English courts, their decisions are not dependent on the ability to pay bribes. When I was working in Helmand there was said to be a cadre of four Taliban judges "learned in the law" (Sharia in this instance) travelling the area dispensing justice in cases referred to them by elders or individuals. Three or four itinerant judges are reported to travel Maiwand District, not far from Gereshk. They are reported to "deal with a number of cases: land disputes, family disputes, loan disputes, robbery, killing, fighting . . . and the people are happy with them."[12] In Kandahar itself it is said to be well-known that there are at least two static established courts where cases can be heard and settled. They have established a reputation, allegedly fiercely guarded, for propriety and incorruptibility. These tribunals are sanctioned by a leadership keenly aware of the social and indeed political importance of being seen to excel in this area. They are said to have the power to issue what we would call witness summons and warrants for arrest.[13] Such courts are common throughout the Pashtun South. They deal with all manner of cases, ranging from land disputes to what we call criminal cases. Over the last thirty years, land has passed through various hands, where people have been driven from their lands by foreign or indeed government action, replaced perhaps by those internally displaced who have taken on land as their own. This, as it would anywhere, has given rise to disputes that, if not resolved would certainly give rise to violence. The governmental system is far more part of this problem than the solution.[14] I dealt with several cases in Helmand where government officials, and I am talking here of judges and prosecutors, used the power they had essentially to steal land. In one case in Gereshk, men were arrested and held for murders they almost certainly had not committed and sentenced to death. It was made very clear to me that once they had signed over a rather valuable parcel of land to a district Prosecutor - a man somewhat curiously described to me by a British officer as "well regarded and honest" - the sentence would be commuted and the men released.

Whether this is true or not, and the evidence was overwhelming that this was indeed what had happened, this was in no way an isolated case. Not a single person of the dozens I met as Justice Advisor in Helmand would consider voluntarily handing a case to the state, formal courts for adjudication. The situation was so bad in 2007 that one female member of the Provincial council, someone who for very many reasons might be resumed to have no sympathy with Taliban aims or methods told me that there were times when she felt a

[9] MULLAH ABDUL SALAM ZAEEF, MY LIFE WITH THE TALIBAN, 65 (Hurst) (2010).
[10] *Id,* at 22.
[11] ANTONIO GIUSTOZZI, KORAN, KLASHNIKOV AND LAPTOP, at 111 (2007).
[12] Cited in http://www.understandingwar.org/files/QuettaShuraTaliban_1.pdf.
[13] *Id.*
[14] http://www.npr.org/templates/story/story.php?storyId=98261034.

certain nostalgia for Taliban times to the extent that in those days, if nothing else, you could be sure that criminals would be dealt with in a suitably condign fashion.

One case I came across, illustrates the dilemma of Helmandis:

In 2007, the District of Garmsir a man was killed over a land dispute. The killer was arrested, taken to court and given a short prison sentence of six months. There was a strong inference that his family had intervened with the judge to ensure a short sentence. This is highly likely to have happened. The victim's family was not satisfied with the State's response. They presented the case six months later, when the man had been released, to the Taliban in Garmsir. None of the four Taliban judges were in the district at that time, so the case was sent to Bahramshah, on the junction of the provincial border of Helmand and Pakistan. The Taliban judges of the relevant level were sitting there at that time. The case was heard, with the accused present. The judgment was that the victim's brother should have the opportunity to kill the murderer. He did, and professed himself very satisfied with the outcome.[15]

Undoubtedly such cases literally happen every day, and with every such decision the legitimacy of the insurgent courts is entrenched ever further and that of the government bled away. Clearly this is a highly dangerous blind-spot for the counterinsurgency effort. The opposition has identified a key centre of gravity of the state, attacked it and taken its ground.

Customary Justice

The sharia system of the Taliban itself has a rival. No one who has served or taken an interest in the Pashtun lands will be unfamiliar with the concept if not the practice of *Pashtunwalli.* Where, one might fairly ask, does that come in? The answer seems to be that over the last thirty years tribal systems have frayed so far that the social binding needed for the Pashtunwalli to function is seriously compromised. It is not however destroyed. Pastunwalli flourished in the so-called lawless areas of what is now Afghanistan and Pakistan for centuries. Historically this was, and to a great degree is, Yaghestan –variously translated as "land of the ungoverned/unruly" or more in accordance with Pashtun sensibility "land of the free." The expression of that freedom, as distinct from lawlessness is the Pashtunwalli. It is the paradigm of law without a state. Codes such as the Pashtunwalli are to be found even today in the mountains of Albania, some remote parts of the Caucasus and the Sinai and Negev Deserts of Egypt and Israel. All of these tribal societies have "codes." None of which rely in any way on the interference of the state. It is not a coincidence that all of them place the highest importance on notions of honour and what we call "revenge." It is far more complex and rational than mere revenge. "The point to realise is this. Pathan custom requires the satisfaction of the aggrieved rather than the punishment of the aggressor."[16] None of this should be in any way confused with Islamic Law. The two are very different.

In the absence of a state to impose "justice," such complex and highly developed systems as the Pashtunwalli ensure that it is the duty of the individual to ensure that wrongs are righted. If necessary he can call upon the assistance of his tribe. There is no such thing as what we call crime. Crime is an offence against the state. "The Pathan in fact treats crime as a kind of tort"[17] that is to say an essentially private matter between two individuals or tribal interests. The same is true of the other major surviving tribal legal systems. When one hears the old British Political Officers talk (unfortunately none are now alive and we must rely on recordings or their writings)[18] one is struck by the stress they place on justice, echoing the importance all societies place on good and accepted dispute resolution.

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[15] Frank Ledwidge, *Justice in Helmand –The Challenge of Law Reform in a Society at War* [hereinafter Justice in Helmand], Asian Affairs, 40: 1, 77 - 89 at 87 (2009).
[16] Pathans, *supra* note 4, at 355.
[17] *Id.* at 357.
[18] *See* OLAF CAROE, THE PATHANS, *supra* note 4.

"Abdul," an employee of the PRT, found himself in a dispute with his mother in law who had formed the view that he had kidnapped his wife (her daughter) by virtue of having failed to pay the full bride price. She reported Abdul to the local police checkpoint. The checkpoint commander, Khan and several of his men apprehended Abdul and over several hours beat him, causing acute pain and some internal and external injury. He reported the matter to the police unit (part of the PRT). They considered that the matter would provide a good test case for a police complaints procedure they had instituted as part of their reform programme.

Khan had requested the intervention of a group of elders from his own tribe and that of Abdul. The group, or "jirga," met and discussed the case, suggesting that the police commander apologise. Abdul was told that the formal system he had been encouraged to consult was inappropriate. He was told that it had been agreed that he had to let the matter rest and withdrew his complaint. It was made very clear to him that if he elected to pursue this matter through formal channels his life would be threatened. In view of that, and not wishing to move to Pakistan as a refugee, Abdul did not proceed any further with his complaint. Abdul states that he would not have begun to consider reporting the matter to the police had he not been an employee of the PRT and supported by police mentors.

As a postscript, the perpetrator of this beating, Khan, was killed along with two other policemen (he was the main target of the killing) three weeks later in a raid by Taliban. It is said that local people were supportive of this killing. The Taliban were seen as carrying out justice.[19]

Counterinsurgency Response

What then has been the response of COIN? As in any other area, it is important that any alternative to Taliban governance offers a better deal. In terms of health, road building, provision of water or electricity, security permitting, the government supported by ISAF and the international community will always be able to out-provide the Taliban. It may even, from time to time with well-selected and secured personnel, be able to provide some degree of governance allowing for communities to have some say in what happens in the area in which they live. It is however the ability to resolve disputes that essentially defines legitimacy.

Unfortunately doctrine has yet to appreciate these realities. In setting out "legitimacy" as the underpinning of counterinsurgency, FM 3-24 is undoubtedly right. "An insurgency is an organised, protracted politico-military struggle designed to weaken the control and legitimacy of an established government."[20] The recently published British equivalent has a more questionable definition, reflective perhaps of the kinetic focus of UK forces (as distinct from traditional colonial civilian approach) – "an organised, violent subversion used to effect or prevent political control as a challenge to established authority." The important element of any successful insurgency is of course the subversion rather than the *supporting* violence. The key point recognised implicitly in 3-24 is the struggle. Those "subversives" successful in today's struggle will form tomorrow's government. Success in the struggle is largely dependent on offering a better deal.

With "legitimacy as the main objective"[21] both doctrinal documents prescribe the usual nostrums for inculcating this elusive quality of legitimacy. FM 3-24 sets out six indicators of legitimacy including: the ability to provide security; selection of leaders in a just manner with public participation; acceptable rates of corruption and development; and a high level of regime acceptance. Nowhere amongst this list is the ability to solve disputes. All of those indicators are of little use if the host population turn to the insurgent to solve their problems. In addressing this difficulty, our counterinsurgency doctrine briefly adopts the solution of "building courts and training lawyers."[22] AFM 3-40 mandates military lawyers to undertake "rule of law

[19] *See* Justice in Helmand, *supra* note 15, at 86.
[20] *See* FM3-24 *supra* note 5, ¶ 1-2, at 2.
[21] *Id*. para. 1-113, at 37.
[22] *Id*, para. 6, 101-106.

activities." These prescriptions are nothing more than afterthoughts representing the notion that justice is an easy fix. Doctrine has failed in this respect.

Few have met a LEGAD who has the time for such matters on operations. In the short term, the formal courts installed as part of the "governments in a box" concept, may function if closely monitored. In normal circumstances, no Afghan would trust their land or freedom to the judges in what amount to Potempkin Courts.

The importance of the "justice sector" is now beginning to dawn on counterinsurgents on the ground in Helmand and elsewhere. A more realistic approach is beginning to be taken with respect to the primacy in most Pashtun minds of customary justice. A series of shuras dealing with justice at provincial and district levels have been instituted in some districts of Helmand leading to a degree of improvement. The idea is that only what we would regard as very serious criminal cases are taken by formal courts. Even then, there have been reports of men accused of offences against ISAF forces being referred to local shuras for decision and disposal of their cases. Moves have been made to have decisions made in jirgas or shuras – the terms are interchangeable by the way – officially recognised.

These are realistic solutions that the political officers of the North West Frontier of the Raj would have recognised and approved. They struggled for just under one hundred years with exactly the same problems. For them the administration of justice, in what was the longest insurgency fought by British Imperial Forces, was not peripheral. It was, if anything, *the* central problem.

All of these questions are, or should be, of intimate concern to the military officer on the ground. Once ground is taken and held, a condition which may well be beginning to happen, the question as to how disputes are to be solved and who is to solve them becomes rather more immediate. The reality is that it will be some time before well-qualified and well-informed civilian justice advisors exist in sufficient numbers to advise competently on practical solutions. If the Afghan mission is realistically to continue for any length of time, consideration must be given to the selection and appointment of military justice officers. These officers and senior ranks could be briefed on policy and practice and ensure that when questions arise relating to dispute resolution they have the basic knowledge and appropriate and consistent policy guidance to provide answers, or have the contacts to reach back and find them. It may well be that this should, or could, be a role of the much-heralded "cultural officers", whenever the relevant course and qualifications are nailed down. With justice and security having such vast importance, the area of provision of justice deserves dedicated military or civil/military personnel.

Justice is vital if counterinsurgency is to be taken seriously. Whilst COIN treats this field as subsidiary, insurgents put it at, or near to, the top of their priorities. It is time for this to change.

II. Finding Help in the Right Places for a Counterinsurgency Strategy[23]

Editor's Note: Although somewhat of an oxymoron, the author of this narrative (a USAID Country officer who conducted Rule of Law operations in Afghanistan while deployed there in his capacity as a National Guard officer) singlehandedly demonstrates the benefits that flow from and understanding of, and empathy for, interagency cooperation. On reading the narrative, one is struck by the importance the author placed on program sustainability and program design – two concepts that were, historically, more likely to be found in USAID development projects rather than military quick impact projects. Who would bet against a future edition of this Handbook, similarly, featuring the narrative of an active duty Judge Advocate, seconded to work for, say, the CRC or ICITAP?

[23] Article by CPT Adam Bushey, U.S. Army National Guard. He administered more than 20 USG governance programs totaling several million dollars. With a significant focus on anti-corruption measures, his team helped train and develop the justice sector skills of over 2,000 Afghan attorneys, judges, prosecutors, police, and local leaders during his 2010 tour. Based on evaluations, these events were both well designed and extremely well received. His full-time job is a Desk Officer for USAID.

Winning the hearts and minds is a challenging endeavor, particularly in a nation as impoverished as Afghanistan.[24] In his 2009 Counterinsurgency (COIN) Guidance, General McChrystal stated that "we don't have to be stupid or ineffective to fail – just misguided in our approach." I believe the only way to effectively implement a COIN strategy is to employ and receive guidance from the best and brightest locals within the area in which we work.

Local National Attorneys

To assist and support our TF with the ROL and governance mission within our four-province AO, we hired ten Afghan attorneys and one afghan engineer, forming Teeme Mushawereen-e Hoqoqi (Legal Advisor Team), to interface with local government leaders.[25] To be consistent with our Afghan-Lead-Afghan-Owned strategy, we emphasized capacity building of the legal advisor team by focusing on their training and largely entrusting our governance mission to them, while simultaneously decreasing brigade ROL mission travel.[26]

The benefits of the decision to make Teeme Mushawereen-e Hoqoqi (TMH) the face of our governance mission were both vast and deep. These local experts had invaluable insight into the local area, people, and customs. They effectively represented the ROL Mission on our behalf, and as respected members of the community, they were able to contact almost any local leader at any time. Moreover, empowering local staff gave the mission credibility amongst the Afghan leaders, thereby strengthening our partnerships and improving implementation.

Sustainability

The success of our mission was sustainable on two fronts. First, our programs were properly tailored to their respective beneficiaries, thereby providing trainings and resources in critically needed areas. This is largely in part because as we created, contracted, implemented, monitored, and evaluated our more than 20 separate governance programs, the legal advisors regularly proposed programs or alterations to programs based on beneficiaries assessed needs, culture, and capabilities. For example, a vast majority of the programs outlined in our TF Governance Campaign Plan were designed strategically for our sub-national area by our legal advisor team.[27]

Second, hiring local experts allows institutional knowledge to continue following the transfers of authority (TOA). Repetitive assessments are often performed by replacement brigades as detailed assessments die on an unknown share drive.[28] Not only does this loss of knowledge slow down project implementation, but it appears suspicious and disorganized to our Afghan counterparts. Hiring Afghan attorneys remedies this negative cycle that inevitably occurs during TOAs.

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[24] After ten years of U.S. presence in Afghanistan, the UNDP's 2010 Human Development Report ranks Afghanistan as the 155 of 169 least-developed country in the world (it was second to last in 2009). Afghanistan has one of the lowest life expectancy and adult literacy rates, and it is in the top ten for women's inequality in the world. Only 15% of the population has electricity.

[25] I was often asked if I could trust our legal advisors. First, we made sure to hire the best and brightest. Second, we became a true team, interdependent on one another to succeed. We created a culture of hard work, honesty, and collaboration. The legal advisors cared deeply about the team and the mission.

[26] Coincidently, decreasing brigade travel provided us more time at HQ to formulate and shepherd programs through the chain of command approval process.

[27] The TF Governance Campaign Plan focused on the Afghan justice sector holistically, including police, prosecutors, defense counsel, judges, law schools, the corrections system, civil society, and traditional and formal judicial mechanisms. It was written in strict adherence of: 1) USG strategy; 2) Afghan government priorities; 3) division guidance; and 4) the Commander's priorities.

[28] A civil affairs officer in our operational environment was not permitted to participate in meetings by Afghan officials for this very reason.

The Proper Spotlight

Every program was designed and evaluated based on how well the program increased the authority and capacity of the government in the eyes of the populace. As such, it was critical that local media and participant reports center on the Afghan government's ability to govern and function, not on what the Americans provided. By having TMH monitor and evaluate our trainings, resource distributions, and other ROL programs, we effectively focused the attention of the program's success on the Afghan government by keeping coalition participation absent and in the background.[29]

Hiring Mechanism

Local staff are hired through O&M, not CERP funding. The O&M hiring process is a simple six step process:

- Step 1. Assemble a Joint Acquisition Review Board (JARB) packet, which typically requires a detailed Statement of Work (SOW), a Letter of Justification (LOJ), a Purchase Request & Commitment (PR&C) form, and a photocopy of your nomination letter and certificates designating you as a Contracting Officer Representative;
- Step 2. Submit the packet to the S-8 (or whoever is collecting them at the Brigade level);
- Step 3. S-8 sends it to the JARB for approval;
- Step 4. The approved packet is forwarded to the financing office who certifies the funds and forwards the packet to the contracting office;
- Step 5. The Contracting Officer publishes request for proposals/bids;
- Step 6. You select the strongest bid.

A JARB packet can be completed in about a day if you use an existing SOW as a model intended for hiring local nationals.

One must pay careful attention to the cost section of the SOW. For example, fair payment for an Afghan attorney is approximately $2,000 USD/month.[30] Fair pay is essential for a trustworthy team with high morale. Although a specific salary amount cannot be indicated in a SOW, you should explicitly state that the contractor must provide a sufficient salary, comparable to other organizations, to recruit and retain candidates with adequate experience. Attention to salary at the outset will decrease the likelihood of losing strong staff to higher paying jobs.[31]

Reinventing the Wheel

Given the turnover rate and distinct chains of command, there is an astounding amount of knowledge lost amongst ROL JAs. There were a dozen other JAs doing the same job in other parts of the country and some of us were creating and implementing similar projects from scratch every time. Do not let this happen; work with your higher command to get names of high-performing JAs so you can learn from their experiences and attain their project templates to use in your operational environment.

[29] However, coalition attendance at ribbon-cutting events (e.g. opening of a new courthouse or legal library) is both expected and encouraged.

[30] The bidding contractor will have to take his cut and pay his employment tax, so the contractor would need to receive more than $2,000 USD/month per attorney.

[31] The decision on which contractor to hire should be based in part on the bidder's cost estimates and not simply on who made the lowest bid. I found that contract bidders would low ball a bid proposal to win the contract, but then be unable to retain the most competent attorneys because the pay offered was not comparable to similar positions offered by the international community.

For example, I implemented a district leader training program with district-governors, other local officials, and a local Sharia science organization to train Mullahs, Maliks, and Shura leaders on: 1) the importance of registering Shura decisions with the formal government, 2) anti-corruption laws and how to report corruption; 3) the Afghan Constitution and its strong relationship to Islam; and 4) basic civil and human rights afforded by the law, including women's rights.[32] I was then able to forward already approved project materials like the SOW, LOJ, and slide deck to other JAs. All they needed to do was work with their local officials, conform the documents to their particular AO, and the paperwork was already done. Similarly, I also shared the aforementioned documents needed for the JARB packet to hire local nationals; there was no need to reinvent the wheel.

Conclusion

My mission would not have been successful without the guidance I received from the top-performing JAs who came before me, and, more importantly the advice and counsel of Teeme Mushawereen-e Hoqoqi. By working with Afghan civic society organizations and Afghan government leadership, our legal advisors offered Afghans meaningful access to fair, efficient, and transparent justice based on the specific needs of our battle space through an Afghan-Led, Afghan-Owned COIN strategy. Only with the assistance of TMH were we able to increase the government's legitimacy and public standing by promoting a culture that values governance.

III. National Security Prosecutions in Afghanistan[33] [34]

Editor's Note: The following narrative records the significant advances that can be made by engaging with, and learning from, host nation legal experts. Not so much a case of T.E Lawrence's maxim about "Better [they] do it tolerably than that you do it perfectly," but more a case of "they can probably do it better than us." And in case we forget, footnote 47 reminds us that, by doing so, "they" put themselves as much at risk of violence as do coalition forces.

Introduction

In the spring of 2010 several Army Judge Advocates were deployed to Regional Command-East (RC-East) as dedicated Rule of Law Attorneys. As one of those attorneys I was embedded with Task Force Rakkasan (3BCT 101) whose area of operation was Khost, Paktya, and Paktika Provinces.[35] I was very fortunate to have a readymade Rule of Law project just getting started when I arrived in April of 2010. The focus of this

[32] Additional governance projects completed by members of my team included: 1) providing resources (e.g. legal books, police investigative tool kits) and training to the police to improve their professionalism, understanding of the law, and ability to perform their duties; 2) collaboration with the Afghan government to build nine legal libraries to expand citizen knowledge of their rights; 3) the establishment of a partnership to create a legal defense clinic that protected the rights of prisoners; and 4) working with a local NGOs to train citizens on women's rights.

[33] Article by MAJ Jeremy W. Steward, who was deployed to Khost, Afghanistan from April 2010 – April 2011 as a Rule of Attorney for TF Rakkasan, and later as the Team Chief, Team Khost – Rule of Law Field Force Afghanistan.

[34] *See* MAJ Griffin P. Mealhow, *Operation "Tombstone" and Summary of JAG Responsibilities* in THE RULE OF LAW HANDBOOK: A PRACTITIONERS GUIDE 259-261 (Center for Law and Military Operations 2009 ed.) and MAJ Kiaesha N. Wright and CPT Stephen Patten, From The Battlefield To The Courtroom: "Prosecuting Insurgents In Afghanistan" in THE RULE OF LAW HANDBOOK: A PRACTITIONERS GUIDE 261-267 (Center for Law and Military Operations 2009 ed.). This narrative takes up at the point where operation "Tombstone" is up and running and provides the actual nuts and bolts of how cases are processed in Khost Province.

[35] Very fortunate to have the leadership of Brigade Commander COL Viet Luong and Brigade Judge Advocate MAJ Anthony Adolph who had the patience to allow the embed program to work through its growing pains.

narrative will be on that project which was at the time termed the National Directorate of Security (NDS) Embed Pilot Program.

NDS Embed Pilot Program

A common problem that has plagued commanders in Afghanistan, and in particular those in RC-East, is the revolving door of insurgents from operational environment-detention-back to the operational environment. In an effort to slow down and close that door, an innovative program was proposed in Khost Province to embed an Afghan National Security Prosecutor on a FOB with Coalition Forces. The thinking was that if an Afghan prosecutor had the full security and support of coalition forces then he would be able to effectively perform his duties as a national security prosecutor and help slow, and eventually stop, the door from spinning.

It was March 2010 when Colonel Fazel Habibi arrived on FOB Salerno as the assigned provincial level national security prosecutor for Khost Province. His positive impact was evident immediately.[36] Colonel Habibi was able to investigate insurgent crimes in a manner that coalition forces simply could not. Within two months of his arrival COL Habibi had investigated nearly 30 cases and had obtained his first two convictions at the primary trial level.[37] But this was simply the beginning of a program that would eventually spread throughout Afghanistan.[38]

The Role of the Rule of Law Judge Advocate

Perhaps one of the greatest aspects, but at the same time most frightening, of being the first dedicated rule of law attorney in a particular AO working on a project such as the NDS Embed Pilot Program was the freedom to create and mold a rule of law program from its inception. While the learning curve was steep, the knowledge of the inner workings of the Afghan Judicial System from COL Habibi and the brigade legal advisor were invaluable in being able to effectively help the Afghans bring to justice bad actors from the operational environment.[39]

The one thing that all judge advocates should remember when working in the rule of law arena, particularly as in close quarters as our team with our embedded Afghan Attorneys, is that it is their system not ours. Many times avenues of thought on how to prosecute a particular case seemed very foreign to how I would approach a case as a trial counsel. In fact, in many ways I often felt as an apprentice to COL Habibi and our other Afghan attorneys and judicial officials as they tried to teach me how to best assist them. But one of the biggest lessons I learned was that the more effectively one is able to build the human relationship between his Afghan partners the more effective he will be in his rule of law endeavors.

As a result, my role, and the role of my other coalition forces team members, of what became known as "Team Habibi," was to help our Afghan partners effectively and legally prosecute bad actors from the

[36] Colonel Habibi has over 30 years experience in prosecuting national security crimes.

[37] Joint cases of *Ishaq* and *Noorudin* who were convicted of transporting Ammonium Nitrate into Afghanistan from Pakistan and sentenced to three months in prison. Outraged by such a light sentence COL Habibi immediately called for a provincial level meeting with the governor and all Khost judicial officials to air his complaints with the judicial system. Interestingly enough, several months later in a meeting with a member of the Afghan Supreme Court an innovative solution was reached regarding light sentences at the primary trial court. Supreme Court justices were concerned for the safety of primary court trial judges who would impose severe punishments, as a result encouraged some primary court judges in volatile areas, such as Khost, to adjudge sentences only severe enough to ensure incarceration long enough for the accused to remain incarcerated through the appellate process. Then once at the Supreme Court, where the justice are in relative safety could the proper punishment be imposed.

[38] In addition, Khost based judge advocates are working side by side with Afghan Prosecutors in Paktika and Khandahar Provinces as well as others.

[39] I cannot express my thanks enough to our Afghan Legal Advisor Mr. Ahmad. He was an incredibly gracious mentor and friend.

operational environment. That may seem very vague and broad, and that is because it is. My day to day duties could have included all of the following: intense legal discussions on proper case structure; arguments and charging decisions; drafting indictments and appellate documents; transporting evidence and detainees to Afghan pretrial confinement; and any number of miscellaneous tasks from office cleaning to B-Hut remodeling, to entertaining Afghan judicial officials. Essentially, anything that the team deemed would further our prosecution program was fair game as a daily tasking.

Working as a Team – "Team Habibi"

In a criminal law shop it takes many players to effectively ensure that justice is done through the courts-martial process. The Afghan system is no different. There are different players with different roles. In order to effectively help COL Habibi and later our other Afghan Attorney Embeds perform their duties we had a dedicated team of coalition force players each with their own expertise in a particular area of case processing. I acted as the lead for legal issues, we had a CID insert as the lead on proper evidence collection and investigative techniques, a Law Enforcement Professional (LEP) who organized initial intake of detainees and evidence, a very experienced interpreter, but most importantly, an extremely gifted Afghan attorney legal advisor at the brigade level. Each team member had his own lane, and the process ran very smoothly once we were able to clear all the hurdles that the Afghan Justice System placed in our path on the way to successful prosecutions.

Working Through a Case

The Afghan judicial process is straightforward; the path to a successful conviction is not. Corruption, incompetence, laziness, and judicial officials fearing for their lives are outside factors that are present in most, if not all cases. What follows is a description of how cases are processed in Khost, the anatomy of a case file, and best practice tips learned from our Afghan partners.

Arrest/Capture

In most National Security Crimes cases there is little investigative work done before an individual is arrested or captured. This is especially true if the individual is caught in the act of a security crimes violation, such as on the operational environment or nearby when a roadside IED explodes. In most other cases, an individual is targeted as a known threat to national security, but the real investigation and exploitation of evidence does not begin until after the arrest of the individual. Because of this, national security crimes investigators/interrogators are forced to work at an accelerated pace to connect all the dots, exploit evidence, and conduct interviews with witnesses and the accused.

Investigation – First 72 Hours

The law in Afghanistan only provides investigators 72 hours from the time of capture/arrest to prepare a case file to present to the pursuing *saranwal* (prosecutor).[40] With this compressed timeline it is imperative that the investigator gets the evidence and appropriate paperwork in line before presenting the case to the prosecutor for further action. In Khost, the practice is that if an individual is captured jointly by Afghan and Coalition Forces and brought to the Field Detention Site (FDS) on FOB Salerno the clock starts at time of capture, but is paused once Coalition Forces take control of the detainee to transport him to the FDS and remains paused until an Afghan Investigator/Prosecutor is afforded the opportunity to interview the detainee. Practically this will usually mean that the 72 hour clock is started for a very brief period perhaps for only an

[40] *See* Afghan Criminal Procedure Law, 1965, art. 29. "When the police finds lawful and well grounded evidence for the inculpation of the suspect, he shall propose the matter to the Saranwal within 72 hours."

hour or so during the initial stages of the investigation at the point of capture and then immediately paused once CF have taken transport control.

What if the Detainee is Brought to an FDS?

If a detainee is captured and brought to the Salerno FDS the 72 hour clock is paused until an investigator/prosecutor is afforded the opportunity to interview the detainee. In these cases the investigators are under two timelines, their own under Afghan Law, and ISAF Detention Rules. The investigators/prosecutors who prepare cases on FOB Salerno are from the Attorney General's Office. Since they are responsible for ultimately making the decision to prosecute, the investigators/prosecutors are afforded 15 days (with an option of an additional 15 days with judicial approval) to present a case to the court.

First 15 Days and Court Authorized 15 Day Extension

At the expiration of 72 hours, a case file must be turned over to the pursuing *saranwal*. At this point the *saranwal* has 15 days to prepare the case for court. Should the *saranwal* determine that he needs more time to properly develop a case for the court he may seek approval from the court for an additional 15 days to continue to work the case. This gives the prosecutor approximately one month to prepare a case and formally file the case with a claim paper/indictment with the court.[41]

Primary Trial – 60 Days

Once a *saranwal* has his case prepared he files it with the appropriate court, which, in the case of National Security Crimes, is the Public Security Division Primary Trial Court. The court has 60 days from the date of filing to hold the primary trial.[42] During this time the court reviews the file, and in some cases may ask the *saranwal* to clarify certain points or provide additional evidence. It is not uncommon for the court in Khost to hold judicial meetings to discuss cases with the prosecutors and the evidence that is to be presented in court at trial.

Provincial Appeal – 60 days

Once the primary trial court has heard the case, it may reach the provincial appellate court. Only one of the two parties (either the saranwal or accused or both may appeal the case) has to appeal to the provincial appellate court in order to obligate the court to hear the appeal. The provincial appellate court has 60 days to hear the appeal. The case is reviewed de novo. Thus, an individual may be found guilty at an appeal if he was found not guilty at the primary trial. Further, the court may enhance or reduce punishment. As is the case at the primary court, the provincial appellate court in Khost will often hold judicial meetings with the pursuing *saranwal* to clarify certain points within the case file before formally hearing the appeal.

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[41] *See* Afghan Interim Criminal Procedure Code for Courts, 2004 (hereinafter "ICPC"), art. 36, a*vailable at* http://www.icrc.org/ihlnat.nsf/6fa4d35e5e3025394125673e00508143/2ee7715e48bfca37c1257114003633af/$FILE/Criminal%20Procedure%20Code%20-%20Afghanistan%20-%20EN.pdf (last visited Aug 15, 2011) "When the arrest performed by the Judicial Police is sanctioned or when the arrest has been ordered by the Saranwal and it remains in force, the arrested person shall be released if the Saranwal has not presented the indictment to the court within 15 days from the moment of the arrest except when the court, at the timely request of the Saranwal, has authorized the extension of the term for not more than fifteen additional days."

[42] *See* ICPC, *id.*, art. 6. "During the trial at the primary level, the Court can extend the detention for two additional months; during the trial at the appeal level the Court can extend the detention for another two months term; during the trial before the Supreme Court the detention can be further extended by the same Court for [an] additional five months."

Supreme Court – 5 months

If either or both the prosecutor or accused is still not satisfied with the result of the case after the provincial appellate court has ruled, an appeal may be made to the Afghan Supreme Court in Kabul. If a case is appealed to the Court it must take the case. The Afghan Constitution does not allow for the final publishing of a decision unless and until one of two events occurs; either both parties in the case are satisfied with the decision or the Supreme Court makes its ruling. In most instances the latter occurs. The Supreme Court has five months to hear a case and make its ruling from the time it receives the case from the provincial appellate court. Like the provincial appellate court the Supreme Court too may hear the case de novo; however, it may also limit its findings to errors of law.[43]

Anatomy of a Case File

While most National Security Crimes Cases Files that are created in Khost are handwritten by the investigators and prosecutors, and on their face appear rudimentary compared to what we might see in the United States; there is a very specific method that the Afghan investigators and prosecutors use when putting together a case file for presentation to the court.

Arrest Form

When an accused is arrested it is imperative that the proper Afghan Arrest Form is completed. In Khost Province COL Habibi created a standardized form based on forms he has used over his 30 plus year career. The form is straightforward and an English copy is available for joint CF and ANA missions. Some of the information included on the form is the "roster" of those who are conducting the arrest. The names and addresses of those being arrested, items seized, and most importantly the signature or thumbprint of the suspect being detained. This form is always the first page in a case file and builds the foundation for the case. Without proper documentation at the time of arrest an investigator, and later the prosecutors, will have a difficult time preparing the rest of the case.

Search Report and List of Items from Search of Property and Person

The next two pages of every case file are the Search Report and the List of Items from the Search of Property and Person. The information included on this form again is straightforward to include names of those conducting the search and names and addresses of persons and places searched. Additionally, witnesses to the search are listed and sign or thumbprint both documents as do those who conducted the search and the subject of the search. Accountability and transparency are the main reasons for this. A record must be kept as to who conducted the search and what items were seized from the person or his property so as to prevent corruption from seeping into the system. These two documents ensure that the intent of the Afghan Constitution is fulfilled when a search and subsequent seizure of personal property is conducted.

Evidence From an Objective

Without the above-mentioned foundational forms, a case may not make it off the ground. Likewise, without proper physical evidence a case will go nowhere fast. It is important that evidence is properly collected, preserved, and maintained during the course of the investigation, and properly presented to the prosecutors for inclusion in the indictment and claim papers.

[43] *See* ICPC, *id.*, chs 9 and 10, discussing the Appellate Process.

Evidence Collection

Just as important as properly completing the arrest and search report forms is the collection and recording of evidence found at an objective. The tactical site exploitation (TSE) of an operational environment or mission objective, is a vital part of case preparation. While an operational environment is not normally thought of as a crime scene, in relation to Afghan National Security Crimes, to the maximum extent possible, it should be treated as such. We have learned a great many lessons from our Afghan partners on how to properly collect evidence and record the scene. Chief among those lessons is the proper way to photograph evidence. COL Habibi instructed coalition force partners to take photographs of the evidence where it was found (from a distance to close-up), to include the suspect in pictures, but not to include coalition force personnel. Afghan National Army (ANA) and other Afghan National Security Force (ANSF) personnel were acceptable to include in photographs. It is worth noting that the "Money Shot", where all the evidence is displayed and organized, will most likely not be used in court. When collecting evidence, especially from a complex *qalat*[44] scene, ensure to properly identify what room the evidence came from, and keep the evidence from each room separated. Additionally, try to identify the individual who may be staying in the room, or most frequently uses the room.

Evidence Brought to the FDS

When a suspect is brought to the Salerno FDS all evidence collected at the scene of arrest is transported with him. While any weapons, explosive parts, etc. may not be brought into the FDS, a dedicated ROL Law Enforcement Professional (LEP) is present to take the evidence to the consolidated evidence room on FOB Salerno. It is during this time that for U.S. chain of custody requirements, and also for Afghan accountability, that the DA Form 4137 (chain of custody document) is properly completed and annotated with all the evidence associated with the detainee. A separate DA Form 4137 is completed by the FDS for all evidence that is on the person of the detainee at the time of presentation of the detainee to the FDS. It is important that both DA Form 4137s are included in the case file, and that when the detainee is transferred from the FDS to Afghan custody for prosecution that the Afghans sign the DA Form 4137 and take control of all physical evidence associated with the case. In many cases however, evidence is sent for exploitation to a laboratory. In those cases, perhaps only preliminary lab results are available for inclusion in the case file. In such cases, the prosecutor creates a memo for the file indicating this fact, and stating that as soon as the evidence is returned it will be placed with all the other physical evidence for that particular case.

LEP Report/Photos/Detainee In-processing Packet

The important coalition force documents that can help to build the foundation of a case are portions of LEP Reports, coalition-taken Photos, and the FDS Detainee In-processing Packet. After a detainee is brought to the FDS, the dedicated ROL LEP will create a case file on that detainee (or co-accused detainees). Included in that file is the "LEP Report" that provides the "who, what, where, why, and when" (5Ws) of the case. This information is a vital resource with which to gain an understanding of the case in order that our Afghan partners can be briefed effectively. Often, pictures are (and should always be taken at the scene of capture), part of a case. These become part of the file created by the ROL LEP, and provide a necessary visual background of a case. Additionally, laboratory reports and results will also be included in the case file created by the ROL LEP for presentation to Afghan Partners. The Detainee In-processing Packet, provided by the FDS, may include sworn statements from ANA, coalition forces, and others present at the scene of capture, and provides the first hand witness knowledge of a case that is essential for a prosecution.

[44] *Qalat* – Afghan for "home" or "house."

CID Special Agent – Compiles Case Information for Presentation to Afghan Partners

Once the ROL LEP has created a case file on the internal FOB Salerno NDS "Portal Page," the ROL CID Special Agent (SA) prepares a briefing packet for the Afghan security crimes investigators/prosecutors.[45] This packet then becomes the basis for which the Afghan Partners formulate their case strategy to include, the formulation of interview questions. It is important that as much information as possible is presented at this time to ensure that a complete and accurate picture of the case is presented. In Khost great care is taken to make sure that new or conflicting information is not accidentally omitted from the case file, with the potential for it to create confusion further down the road on a case. Typically, the only new information that will become part of the case file will be lab results. Once he has been briefed by the ROL CID SA, the Afghan investigator/prosecutor begins his investigation. An interview time is set, and the Afghan timeline begins again once the interview commences.

Afghan Investigator/Prosecutor Conducts an Interview

Interviews are conducted on suspected national security crime violators by a proper Afghan authority, and can take place at any number of locations, to include special rooms in the Afghan detention facilities, investigative offices, or in the cases of detainees at FOB Salerno at the FDS. One important step Colonel Habibi has tried to take as the Chief and now Zone Chief for National Security Prosecutions in Khost, Paktya and Paktika is the use of standardized biographical background and interview forms. There are four forms that the investigator/prosecutors use during the course of an interview. All forms are signed or thumb printed by the accused. During the course of the interview, the first questions, aside from background information questions, are a series of "rights" statements and questions. The investigator, following ICPC Article 5, will ask about the health of the suspect, whether or not he would like an attorney, whether he would like to discuss the events, and whether he would like to write his own answers or would like the investigator to write and read the answers back to him.[46] Depending on the type of case other forms may be used as well, but all cases will include the above-mentioned forms.

Afghan Investigator/Prosecutor Makes a Prosecution Decision

Once the interview is complete, a decision to prosecute or release the suspect is made. For cases originating on FOB Salerno the Afghan investigator/prosecutor consults with his ROL advisors to include a dedicated ROL JA to determine whether enough credible evidence exists to pursue a prosecution under the Law on Crimes Against Internal and External Security or the relevant Penal Code Articles.

Release

In some cases a decision is made to release the individual. This decision is usually reached for one of two reasons. First, there simply may not be enough evidence to prosecute the individual. Just like the U.S. system, hunches and innuendo do not count as evidence, and forcing "bad" cases through the system will only do more harm than good to the system. Second, during the course of the investigation it may become apparent that the suspect is not guilty. In both cases however, whatever file has been created on the suspect is kept for future reference, and the individual is released. When an individual is released he signs a form that states that he promises not to engage in activities against the government. This is important if, at some

[45] A web page was created specifically for the NDS Embed program to allow all "Team Habibi" members to view all case files and case documents at any time. Additionally, the portal page serves as an electronic back-up to all case files and judicial opinions. All information from the portal page was posted on Harmonie Web for all rule of law practitioners in Afghanistan to view.

[46] *See* ICPC, *id.*, art. 5. "The police, the Saranwal, and the Court are duty bound to clearly inform the suspect and the accused before interrogation and at the time of arrest about his or he right to remain silent, right to representation at all times by defense counsel, and right to be present during searches, line-ups, expert examination and trial."

stage in the future, he is captured again, but with more substantial evidence, as it may provide evidence of a pattern of behavior.

Prosecute

When an investigation yields convincing evidence that a national security crime occurred, it must be determined what type of crime occurred and what the charges will be. For cases originating from FOB Salerno, the Afghan investigators/prosecutors will consult with the ROL JA to determine what the proper charges should be. In no way does the ROL JA make the decision for the Afghan officials. The role is simply one of guidance, to find the crime that best fits the evidence discovered during the course of the investigation. A crime may be found in the Law on Crimes Against Internal and External Security, or Articles 173-253 of the Penal Code. From there an outline of the facts and evidence to the elements of the crime is created to make sure the crime can be proven in court. Once the crime/crimes of the case are settled on, the Afghan investigator/prosecutor prepares the formal case file.

Afghan Investigator/Prosecutor Prepares the Formal Case File

The case file is prepared and contains four distinct parts: arrest and search forms; a case preparation created by coalition forces; Afghan background and interview forms; and the claim paper and indictment. For cases originating out of FOB Salerno, three copies of the case file are made. One of the copies stays with the accused and is used by the court. One copy stays with the Khost security crimes prosecution office. The third stays on FOB Salerno. Each page of the file is numbered to ensure the integrity of the file.

Transfer from FDS Salerno to Afghan Custody

If a case originates from FOB Salerno, transfer to Afghan custody is an extra step in the process that must be accomplished. In Khost there are two Afghan options for moving suspects from the FDS to Afghan Custody: NDS Khost, or MOJ Khost – Provincial Prison Facility. In both cases coordination for the move is made through Afghan partner personnel embedded on FOB Salerno.

NDS Khost

While NDS has primary investigative and detention authority over national security/political crimes in Afghanistan, experience shows that the NDS Khost were reluctant at best, and at worst sometimes refused, to take detainees and their case files from FOB Salerno. It was often claimed that the detention facility located at the NDS Compound in Khost to house pre and post trial detainees was full.

Ministry of Justice (MOJ) Khost Provincial Prison

Khost is fortunate to have a very good provincial prison warden who takes detainees from the FDS when a case has been created. The detainee goes to the provincial prison while the evidence and case file stay in the prosecution office in downtown Khost until the court is ready to hear the case. Typically, ANP will come to the Entry Control Point at FOB Salerno and take custody of the detainees; from that point on, the detainee is fully in the Afghan system.

Indictment and File Transfer to Court

Once a file is completed with a claim paper by the investigators, the file is reviewed by the pursuing prosecutor (although in some cases the investigative file is actually completed by the pursuing prosecutor). The pursuing prosecutor is formally recorded as such via a letter to the court that accompanies the case file. In addition to this letter, a formal indictment is prepared and signed by the pursuing prosecutor. The

indictment recites the facts and circumstances of the case and the charges against the accused. The indictment will also request a guilty verdict from the court and the award of a punishment in accordance with statutory guidance. From this point forward the case is in the hands of the court, with the pursuing prosecutor presenting the case to the court at the appropriate time.

Final Thoughts

Great strides were made on the prosecution front during my time in Afghanistan. Colonel Habibi, with the help of some very courageous judges, was able to successfully bring to trial and convict over 50 insurgents.[47] The first ever open public trials were held in Khost Province.[48] The Khost Justice Center is being utilized and the Rule of Law Field Force – Afghanistan, Team Khost has brought an incredible amount of manpower and energy to all rule of law endeavors. Needless to say, much further work is required. Maintaining current successes will be difficult as both Afghan and coalition force personnel rotate in and out of post. But the change in the rule of law landscape in Khost Province during this period was truly astounding and, by and large, can be credited to a small handful of dedicated Afghan Patriots who were determined to make the Afghan legal system work.

IV. When Mars and Venus Align: The Next Step in Interagency Cooperation[49]

Editor's Note: While noting the progress that has been made to date, the following narrative considers, from an inter-planetary perspective, what remains to be done to enhance rule of law interagency unity of effort. The author also encourages a more effective use of Civil Affairs personnel in the rule of law environment, noting (correctly) that "rule of law" is not in the sole preserve of lawyers.

Nearly ten years after the U.S.-led coalition went to war in Afghanistan and eight years after the invasion of Iraq, the Department of Defense (DOD) has made significant progress in developing, adapting, and executing rule of law operations. However major challenges remain with respect to integrating military efforts in rule of law with counterpart civilian agencies in order to ensure a truly effective and "comprehensive"[50] approach to such operations. This essay briefly summarizes military rule of law efforts vis-à-vis the interagency process, recommends new policy to ensure that the appropriate civilian agencies are part of the strategic planning process in the future, and proposes that a serious option to bridge the civilian-military gap with respect to rule of law operations would be to make a more consistent and effective use of Civil Affairs (CA) personnel[51] who are organized and trained for future rule of law deployments.

U.S. military rule of law operations in conflict and post-conflict theaters is nothing new. As pointed out in the Introduction to this volume, it is the soldier-lawyers of the Army Judge Advocate General's Corps who have, throughout their history, played a major role in defining international rule of law operations for more than two hundred years. When Andrew Birtle wrote the *U.S. Army Counterinsurgency and Contingency Operations Doctrine (1860 - 1941),* he defined rule of law as the mission of Army officers to aid countries in

[47] Unfortunately the judge who served as the catalyst for Khost's first open public trials was killed in a suicide bomb attack in the summer of 2011.

[48] Being able to personally witness these first open public trials is a memory that will last a lifetime and I am truly blessed to have been afforded the opportunity to be a spectator.

[49] Dr. Ellen Klein is currently employed as a Foreign Affairs Specialist for the Office of the Secretary of Defense, Deputy Secretary of Defense for Rule of Law and Detainee Policy. She served in Iraq for the Department of State as a Rule of Law Advisor. These are her personal views and do not necessarily reflect the views of the U.S. Government, the Department of Defense, or its components.

[50] Admiral James G. Stavridis, "*The Comprehensive Approach in Afghanistan*" Prism 2, No.2, 03/2011, pp.65-76.

[51] Input is need from commanders on the ground to determine the optimum size of the CA units that would be most effective.

developing legal systems similar to those in the United States. Such actions were clearly grounded in the "deep faith in America's political and economic system," a system the U.S. military "believed the rest of the world would do well to emulate."[52] However, current rule of law initiatives go far beyond advising on law and legal systems. When reconstruction and stabilization in Iraq and Afghanistan began in earnest, the rule of law mission quickly expanded to encompass a myriad of sectors in the public sphere, private enterprise, and civil society. Such a mission required that the military coordinate and work in conjunction with the range of other U.S. civilian government agencies; in particular, the Department of State (DOS), the U.S. Agency for International Development (USAID) and the Department of Justice (DOJ).

The new paradigm for nation building and Counterinsurgency (COIN) operations includes a rule of law piece, the understanding of which has morphed into whatever the commander on the ground needs it to mean to achieve security in his area of responsibility. For instance, rule of law may begin with trying to reform the justice sector, but in so doing it becomes necessary to assist with the proper administration and budget management of the judiciary, which in turn, requires a functioning Ministry of Justice and Ministry of Finance, both of which may suffer from endemic nepotism, corruption, and a general lack of competence. Corruption and incompetence lead to poor public services, which breeds discontent in the local population. Thus, an initiative to establish security in a particular area of operations by ensuring criminals are prosecuted in local courts is affected by the need to build sufficient capacity to do so throughout the entire host nation government. By 2005 it had become obvious that U.S. rule of law efforts were too hefty for any one department, agency or bureau, to manage alone. What started as a purely military mission has, over time, become something much broader and inexorably linked to civil society development and democracy building.

The realization that coordination of this swath of activities needed focused leadership led the Bush Administration to issue *National Security Presidential Directive 44* (NSPD-44) in 2005. The primary purpose of NSPD-44 was to improve "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." NSPD-44 provided an overarching interagency coordinating structure to manage reconstruction and stabilization operations, and designated the Secretary of State as the U.S. government lead for all rule of law activities.[53] In 2009, DOD issued DOD Instruction 3000.05 on *Stability Operations* (DODI 3000.05), recognizing that security operations and long-term rule of law capacity building are both necessary for COIN success, and directing DOD components to assist the civilian agencies in "strengthening governance and the rule of law."[54]

Conventional wisdom tells us "that Defense is from Mars and State is from Venus,"[55] and despite multiple attempts to establish an official understanding of exactly what is and what is not a rule of law activity,[56]

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[52] Andrew J. Birtle, *U.S. Army Counterinsurgency and Contingency Operations, 1860 - 1941*, 2004, p.101.

[53] Absent any new Presidential Directives that suspends the processes established by NSPD-44, this directive continues to hold. However, authorities established by the original NSPD-44 have been subsumed by the *Reconstruction and Stabilization Civilian Management Act* of 2008 which was included as Title XVI of the *Duncan Hunter National Defense Authorization Act* for Fiscal Year 2009, signed into law by the President on October 14, 2008, as Pub. L. 110-417. Title XVI amends the *Foreign Assistance Act* of 1961 (22 U.S.C. 2151 et seq.) and the *State Department Basic Authorities Act* of 1956 (22 U.S.C. 2651a et seq.), authorizing the *Civilian Response Corps*, and establishing S/CRS in the Department of State. Much has been written about S/CRS.

[54] U.S. Department of Defense Directive 3000.05, *Military Support for Stability, Security, Transition, and Reconstruction Operations* (November 28, 2005) cancelled and reissued as U.S. Department of Defense Instruction 3000.05, *Stability Operations* (September 16, 2009).

[55] Major Tonya L. Jankunis, "Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform," *Military Law Review*, 197, Fall 2008, p. 16-102.

[56] For an in depth discussion of the competing definitions, see, for example, Rachel Kleinfeld Belton, "Competing Definitions of the Rule of Law: Implications for Practitioners," *Carneige Papers*, January 2005, p.5; and Stephen

differing mission requirements of DOD and DOS mean that the two departments continue to pursue different objectives. For the military, rule of law operationally translates into those activities needed to generate and maintain a secure environment. For DOS and other the civilian agencies, rule of law is viewed as long-term reconstruction and capacity building of government and private institutions in the host nation. While there are obvious overlaps of these two missions, such as the criminal justice triumvirate of cops, courts, and corrections, the lessons coming out of both Iraq and Afghanistan demonstrates that a sharp divide remains between the civilian and military approaches to the rule of law concept.

Ad hoc training by, with, and about, the interagency process, though valuable and productive for military personnel,[57] is often too ephemeral to ensure that civilian agencies are ready to dovetail effectively with a military mission. What is needed is specific policy that enables these civilian agencies to integrate into the military planning process from the beginning of kinetic operations sustaining this interaction throughout the various stages of the mission as it evolves into stability operations, and eventually the advanced stages of COIN. Rule of law operations undertaken by the military, such as those which have been recently transitioned in Iraq, are ultimately inherited by civilian agencies when the military redeploys and the host nation begins to normalize relations with the United States. These agencies (given the way they have been and are currently resourced) cannot be expected to take ownership of, let alone sustain, projects created with the manpower and resources that DOD can sometimes dedicate to the mission. Thus, it may be appropriate for the military to adjust its mission to engage in more modest, yet more sustainable, projects. Moreover, if the civilian agencies are brought into a DOTMLPF[58] process for rule of law in stability operations from the beginning, any handoff to civilian ownership will be smoother and more effective.

Although some predict that a top-down Goldwater-Nichols like legislative change is on the cards, as recommended by a number of academics, practitioners, and leadership,[59] current operations have generated a bottom-up need for DOD to continue the process of interagency integration. While Joint Publication 3-08, *Interagency Coordination During Joint Operations VII*, charts interagency "dotted line" access during military operations, there are no mechanisms at present to foster the synchronization of all the elements of national power "simultaneously at the tactical, operational and strategic levels,"[60] to create an integrated approach to planning, doctrine development and training. Since DOD components have been instructed to assist the civilian agencies with rule of law activities in post-conflict arenas, we need to look for ways to better ready the force for this capability now.[61]

Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Option," *Carneige Working Papers*, October 2003, p.1-46, p. 3.

[57] The NDAA for 2010 mandated interagency Rule of Law training. The USG contractor, the University of South Carolina Rule of Law Collaborative, focuses on training relating to interagency understanding and processes.

[58] **Doctrine**: the way we fight, e.g., emphasizing maneuver warfare combined air-ground campaigns; **Organization**: how we organize to fight, e.g., divisions, air wings, Marine-Air Ground Task Forces (MAGTFs), etc.; **Training**: how we prepare to fight tactically; **Materiel**: that which is necessary to equip our forces, e.g., weapons; **Leadership** and education: how we prepare our leaders to lead the fight from squad leader to 4-star general/admiral; professional development; **Personnel**: availability of qualified people for peacetime, wartime, and various contingency operations; **Facilities**: real property; installations and industrial facilities (e.g. government owned ammunition production facilities) that support our forces.

[59] A number of scholars and practitioners have made recommendations for congressional action to pass legislation to foster better interagency efforts, including rule of law activities in theater. See, e.g., Joel Bagnal, "Goldwater-Nichols for the Executive Branch: Achieving Unity of Effort," *White House Homeland Defense* white paper,; Martin Gorman and Alexander Krongard, "A Goldwater-Nichols Act for the U.S. Government: Institutionalizing the Interagency Process," Joint Forces Quarterly, Issue 39, p.51-58. *See also* "Beyond Goldwater-Nichols: Defense Reform for a New Strategic Era," *Center for Strategic and International Studies* (CSIS), Phase I-IV, (Washington, DC: CSIS, 2004-2008) http://csis.org/node/13584/publication.

[60] Mathew Bogdanos, "Joint Interagency Cooperation: A First Step," *Joint Forces Quarterly*, Issue 37, pp.10-18.

[61] See Thomas Szayna, Derek Eaton, James Barnett II, Brooke Stearns Lawson, Terrence Kelly, Zachary Haldeman, "Integrating Civilian Agencies in Stability Operations," *RAND*, 2009, p. 48.

A recommended first step toward aligning the two different spheres of influence is that DOD rethink the utilization of military personnel already functionally available for rule of law tasks. While judge advocates (JAs) have taken the lead on rule of law deployment and force training to date, missions within that category often encompass diverse aspects of national development. As an example we have found that much of what has been done in Iraq and Afghanistan does not require legal expertise per se. It is true that "many activities conducted in rule of law operations involve the practice of law, and therefore must be performed by a JA or other attorneys under JA supervision."[62] However, rule of law practitioners are now frequently involved in many development and governance activities, such as building capacity in the host nation civil service, building capacity in local government entities, and empowering civil society organizations. These projects may be best served by other kinds of subject matter experts with a non-legal focus.[63]

The military has a ready force of such experts in its CA personnel. CA personnel has historically been involved in security and stabilization activities and continue under the formal mission of closely coordinating "between the Rule of Law Section and the Governance Section for synchronization and synergy . . . ."[64] In addition, CA has one of its stated functional specialties area studies and assessments,[65] a necessary ingredient in effective rule of law planning, tracking and measuring strategies and tactics.[66] As Soldiers, CA personnel understand the mission, goals, and planning processes of the military. As varied professionals, especially those from Reserve units, they understand the complexities of the functions of government entities and civil society. With both these skill sets, CA personnel are ideally positioned to assist with the alignment of the military and civilian (agencies) ROL intent as the host nation normalizes throughout the post-conflict mission. Additionally, CA personnel can use their current doctrine, and take the initiative in managing transition between the military and civilian missions while policy for interagency integration is being developed and implemented.

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[62] Army Field Manual (FM 3-05.40) on *Civil Affairs Operations*, chapter 2.21-22. For instance, evaluating and assisting in developing transitional decrees, codes, ordinances; or the reformation of host nation laws to ensure compliance with international legal standards; providing appropriate assistance to the drafting and review process when necessary; and most importantly the advising U.S. military commanders and others on the application of international law, U.S. domestic law, and host nation laws as they impact the military mission. (Note that this is not exhaustive, pending further analysis and doctrine development in the next iteration of Civil-Military Operations FM 3-57.)

[63] See, for example, Jane Stromseth, David Wippman & Rosa Brooks, *Can Might Make Rights?*, New York: Cambridge University Press, 2006, at 389. "If past rule of law programs have been disappointing, one major reason is that far too many past programs have been based on simplistic assumptions about the relationship between formal legal institutions and durable cultural change. As we have emphasized throughout this book, policymakers and interveners have tended to conflate 'rule of law' with the formal legal institutions that support rule of law in complex democracies. As a result, far too many rule of law programs have focused mainly on judicial training, law reform, and similar forms of technical assistance, failing to understand that these programs alone cannot produce rule of law."

[64] FM 3-05.40 *Civil Affairs Operations* (2006), "Rule of law operations include measures to (1) provide for the restoration of order in the immediate aftermath of military operations, (2) provide for reestablishing routine police functions, such as controlling the population, crime prevention, investigating crimes, and arresting those who commit crimes, (3) restore and enhance the operation of the court system, to include vetting and training judges, prosecutors, defense counsel, legal advisors and administrators, and restoring and equipping court and administrative facilities, (4) restore and reform the HN [host nation] civil and criminal legal system, to include reviewing and revising statutes, codes, decrees, and other laws to ensure compliance with international legal standards, as well as adopting transitional measures for the immediate administration of justice, and (5) provide for an effective corrections system that complies with international standards, to include selecting, vetting, and training corrections officials, and constructing or renovating appropriate facilities.

[65] FM 3-05.40 *Civil Affairs Operations* (2006), 2-24.

[66] According to a number of sources, assessments have not kept up with need. See, for example Gordon Adams and Rebecca Williams, "A New Way Forward," *Stimson Report*, March 2011, p.10, "Security assistance programs have never had, but badly need, systematic performance evaluation. Under State Department leadership, the executive branch needs to develop metrics for such evaluation, aligned to purposes and outcomes, rather than current output measures."

However the training of our CAs, many of whom are former JAs (or who are attorneys in their civilian lives), needs to be modernized with the lessons learned from the past ten years. Their role in rule of law activities in the field has yet to be made a part of doctrine, and therefore their expertise remains underutilized. What is needed is a modernization of the CA organizational structure and a revamping of its rule of law capabilities, such that units of rule of law trained CA personnel can be quickly mobilized and integrated into existing Brigade Command Teams (BCTs) or with Provincial Reconstruction Teams (PRTs) working alongside civilian rule of law practitioners. Training for such teams would not include training in their subject matter expertise, but would focus on how to manage the myriad challenges of working with the interagency, the international community, and the national or tribal requirements of host governance institutions.

There is consensus that there is better coordination amongst USG stakeholders than any time in our history.[67] However, to ensure these gains are not lost, DOD and its civilian counterpart agencies should develop policy that capitalizes on lessons learned and facilitates doctrine for civil-military coordination and transition of rule of law activities. To execute this policy on the ground, the military should consider using CA personnel as the mission-constant to shape and implement the transition of the rule of law mission from military to civilian control. These efforts will provide for a more efficient use of resources and more effective rule of law initiatives. Finally, CA personnel should be trained and deployed as the first bottom-up step toward future policy development toward sustainable interagency integration. Fighting terrorism through the medium of global stability demands that the hard-won rule of law successes from Iraq and Afghanistan are recognized by DOD and DOS alike for the utility that they have delivered. Will that recognition allow the planets to align to deliver the true unity of effort that the rule of law universe craves?

V. The Rule of Law at Dawn: A Judge Advocate's Perspective on Rule of Law Operations in Operation Iraqi Freedom from 2008 to 2010[68]

Editor's Note: In a year that has seen the transfer of US led Iraqi rule of law initiatives from the military to the civilian component, it is timely that the Handbook features a narrative that reflects upon the military's (recent) involvement in this line of operations, and the challenges that lie ahead. This article, written over the course of two deployments, does just that.

Abstract

Through the observations of a judge advocate assigned to the Rule of Law mission within Iraq between 2008 and 2010, the critical aspects of successful Rule of Law operations are: Unity of Effort; Interagency and Host Nation Relationships; synchronization of efforts with the host nation Internal Defense and Development (IDAD) Strategy; Prioritization of effort based on need and resource availability; and thorough but fluid planning. Each of these must be considered during the planning, execution and assessment of Rule of Law operations to ensure the success of those operations. Unity of Effort within a Rule of Law mission refers to the need to synchronize information and efforts of Rule of Law actors in order to effectively marshal resources towards achieving the desired Rule of Law objectives and end states. Deployed Rule of Law

[67] The rule of law lessons learned first in Iraq, and then refitted for the even more challenging environment of Afghanistan, must not be lost. While much interagency success is due to the personalities on the ground, sustainability can be achieved through careful doctrine and policy initiatives including the capacity building of the rule of law practitioners throughout the U.S. government. The Rule of Law Field Force in Afghanistan (ROLFF-A), initially commanded by a judge advocate general officer, and now dual-hatted with the NATO Rule of Law Support Mission (NROLSM) has set a new standard for the success of interagency and international cooperation.

[68] This article, written by Captain Geoff Guska, is reprinted, with permission, from Small Wars Journal per the SWJ Creative Commons license. The SWJ article is available at http://smallwarsjournal.com/blog/journal/docs-temp/674-guska.pdf.

operations are, by their nature, a joint interagency effort that relies on effective and constructive relationships to connect those agencies with the appropriate host nation partners in order to accomplish their assigned tasks. This synchronization and relationships building is done with the primary focus of working "by, with and through" host nation partners in the furtherance of the Rule of Law components of the host nation IDAD strategy. Once the Rule of Law components of the host nation IDAD strategy is identified, the Rule of Law practitioner needs to prioritize the available resources against the host nation IDAD objectives in order to ensure effective application of limited resources towards achieving those objectives. The above process is made possible through a continuous planning cycle that considers the host nation IDAD strategy in light of available resources, the tactical situation and the ground commander's desired end states. The consideration of these factors will assist the Rule of Law practitioner in developing and implementing Rule of Law projects to assist the Host Nation in the advancement of its IDAD strategy.

Introduction

The end of Operation Iraqi Freedom and the subsequent rise of Operation New Dawn offers a unique opportunity to reflect on Coalition and U.S. efforts to stabilize and grow the Rule of Law[69] in Iraq. In the course of Operation New Dawn, distinct new challenges will face Rule of Law practitioners in their continued efforts to enhance the Rule of Law in Iraq. These challenges will be the result of changing authorities, reduced resources and limited access to host nation Rule of Law institutions and actors. In order to assist Judge Advocates and Rule of Law practitioners in developing a workable and effective way forward on Rule of Law operations, this article highlights effective Rule of Law Tactics, Techniques and Procedures (TTPs) observed between 2008 and 2010.[70] These observations are primarily from the foxhole of one judge advocate during that time period; however, when effective TTPs are coupled with applicable doctrine,[71] such observations may prove useful to Rule of Law practitioners in planning future Rule of Law operations. From those observations and experiences, the TTPs that are essential components of a successful Rule of Law effort are: *Unity of Effort*; *Relationships*; working *By, With, and Through* host nation partners; *Change We Can Accomplish*; and effective *Planning*.

[69] Rule of Law is an expansive concept for which no singular definition exists. The "Rule of Law" is a wide ranging aspirational goal for what a "just" society should look like. As such, much ink could be spilt over what is the proper definition of "Rule of Law." However, in the counter-insurgency or stability operations environment, the definition of "Rule of Law" must be driven by the host nation and it's Internal Defense And Development (IDAD) strategy. As a result, the Rule of Law practitioner must be able to understand and articulate the legal theories, and practical components, of the "Rule of Law." Thereby allowing the Rule of Law practitioner to outline, to their Commanders, the necessary components and steps required to achieve appreciable gains in the "Rule of Law." From there, Commanders can develop an operationalized "Rule of Law" objective or end-state that is properly nested within the host nation IDAD. From that operational definition, the Rule of Law practitioner can focus their efforts towards the Commander's "Rule of Law" end-state.

[70] The author served with the 25th Infantry Division during its deployment to the Iraqi Joint Area of Operations (IJOA) as Multi-National Division North (MND-N) between 2008 and 2009. During that the deployment, the author was assigned as the MND-N Command Post - South (CP-S) Judge Advocate where he dealt with Operational Law and Rule of Law matters covering the full spectrum of Rule of Law operations, including; judicial development, police training, warrant based targeting and attempts at criminal prosecution through the Iraqi criminal justice process. In 2010, the author again deployed to the IJOA as the Special Operations Task Force – Central (SOTF-C) Judge Advocate where he assisted with Rule of Law matters in the context of warrant based operations.

[71] *See generally* JOINT CHIEFS OF STAFF, JOINT PUB. 3-22, FOREIGN INTERNAL DEFENSE (FID) (JUL. 2010) [hereinafter JOINT PUB. 3-22]; U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (Oct. 2008) [hereinafter FM 3-07]; U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (Dec. 2006) [hereinafter FM 3-24]; U.S DEP'T OF ARMY, FIELD MANUAL 1-04 LEGAL SUPPORT TO THE OPERATIONAL ARMY (Apr. 2009) [hereinafter FM 1-04]; THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES (2008).

Unity of Effort

"Come together, right now, over me" – The Beatles

The most critical aspect of successful Rule of Law efforts is unity of effort.[72] It is essential to effectively marshal the wide range of organizations, entities, expertise, information and resources required to achieve success in Rule of Law operations.[73]

During pre-mission training, for a deployment with the 25th Infantry Division to Iraq, the author had several opportunities to glimpse the wide array of organizations and entities working Rule of Law efforts.[74] To the uninitiated, the alphabet soup of organizational abbreviations is formidable, but the true challenge facing the Rule of Law practitioner is synchronizing the information flow and operations of those organizations in order to effectively utilize available resources to achieve the desired Rule of Law objectives.[75]

Unity of effort through synchronization of information and action is essential for Rule of Law operations to achieve their desired end state.[76] Synchronization is critical because the interconnected nature of the criminal justice process means that a slight twitch at one point within the process can easily be amplified in its downstream second and third order effects. Without a comprehensive and inclusive approach that coordinates the actions and inputs of the organizations and agencies impacting Rule of Law operations, individual organizations may be duplicating efforts, or worse, taking actions that create counter-productive, contradictory or undesired outcomes later in the system.[77] Furthermore, Rule of Law operations themselves do not occur in a vacuum. The majority, if not all, will be conducted within the context of counter-insurgency or stability operations. As a result, the Rule of Law practitioner must also ensure that Rule of Law operations are properly nested within the overall counter-insurgency strategy, thereby ensuring a greater unity of effort towards the common objective.[78] Therefore, properly coordinating and synchronizing the

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[72] *See* FM 3-24 para 2-13; FM 3-07 para 1-14 through 1-16.

[73] What "success" looks like in terms of a Rule of Law mission or operation depends heavily upon the operationalized definition of Rule of Law itself and the Commander's desired Rule of Law end-state. While there may be many different ways to grow and build a host nation's Rule of Law capacity, if such efforts are not properly nested in the commander's desired end-states and objectives, which in turn must be driven by the host nation IDAD strategy, the Rule of Law efforts are liable to hinder other efforts aimed at achieving the host nation's IDAD goals.

[74] These opportunities came through a variety of sources that included: the review of U.S. Army JAG Corps publications and with After Action Reviews from deployed judge advocates; attendance at TJAGLCS short course on Rule of Law operations; attendance at a conference on Rule of Law and Business Development sponsored by the Business Transformation Agency; along with conversations with judge advocates in theater who the 25th Infantry Division was to replace.

[75] *See generally* FM 3-07 para 1-14; FM 3-24 ch. 2 (Discusses integration of Civilian and Military efforts in the context of COIN operations).

[76] This requirement is specifically articulated in JOINT PUB. 3-22, wherein it notes that Foreign Internal Defense (FID) missions are, "a multinational and interagency effort, requiring integration and synchronization of all instruments of national power." It continues by stating that "U.S. military support also requires joint planning and execution to ensure that the efforts of all participating combatant commands, subordinate joint force commands, and/or Service or functional components are mutually supportive and focused." *Id* at ch. I, para.(5)(e). Consequently, Rule of Law operations, being a subcomponent of the larger FID mission, must be properly synchronized and nested for them to be successful.

[77] *See* FM 3-24 para 1-121.

[78] The broad nature of the "Rule of Law" allows for varying approaches to how the Rule of Law can be built or enhanced. Without proper synchronization with the host nation IDAD strategy, efforts to build host nation capacity can result in projects that do not advance the host nation IDAD goals and objectives. An example of this was seen in Kirkuk with a Civil Affairs effort to enhance the capabilities of the Iraqi Inspector General's office. While such efforts, undoubtedly, would promote the Rule of Law within Iraq, they were not attached to any other aspect of the Rule of Law goals within the overall counter-insurgency and stability operations strategy. As a result, while the project may have had positive results for the Rule of Law in a specific area, those advances did little to assist in achieving the host nation's or senior mission commander's specific Rule of Law end state goals.

efforts of all, or at least the major rule of law players, will ensure that limited resources are effectively employed towards achieving Rule of Law objectives as outlined by the commander's objectives as informed by the host nation's Internal Defense and Development (IDAD) strategy.[79]

When the 25th Infantry Division assumed the role of Multi-National Division North (MND-N) in Operation Iraqi Freedom phase 09-11, the task organization of entities involved in Rule of Law operations in Iraq was driven by the partnership and assistance mission.[80] This task organization for Rule of Law operations resulted in numerous entities that interacted with the host nation criminal justice system. However, none of these organizations had responsibility for the entirety of that system.[81] As a result, multiple organizations provided assistance across a wide spectrum of subject areas, ranging from training and capacity growth of the Iraqi Police[82] to mentorship and assistance for the Judiciary[83] and all aspects in between. The wide range of organizations involved requires the Rule of Law practitioner to understand the mission, nuanced capabilities and limitations of each particular organization, along with the ground truth of what the organization really does. Once those capabilities and missions are understood collectively, the critical component for success is the synchronization of those efforts to achieve the desired end-state as articulated by the senior mission commander.

While conceptually this synchronization appears simple, its application in Diyala province was far from. Within days of arriving at the MND-N Command Post in Diyala, it became clear that understanding the micro (i.e. within the province) and macro (i.e MND-N and beyond) nesting of Rule of Law actors and missions was critical to accomplishing the Rule of Law mission. Gaining an understanding of the expanse and capabilities of Rule of Law actors at all levels required a two step analysis.

First, it was necessary to identify the principal actors working within the Rule of Law sphere of influence in the province and uncover what they actually did.[84] The initial assessment identified a minimum of eleven separate USF/Coalition organizations or actors within the province that touched "Rule of Law" in some way.[85] Additionally, numerous other organizations existed at higher echelons that also impacted Rule of Law operations.[86] This analysis provided the overview of what capabilities existed within the province,

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[79] *See* FM 3-07, para 2-21.

[80] Force, Corps and Division Operations Orders (OPORDs) and Fragmentary Orders (FRAGOs) defined the roles of military and enabler organizational responsibilities and inputs to Rule of Law operations. Additionally, U.S. Government civilian Agencies (Department of State (DoS) and Department of Justice (DoJ)) provided guidance to their respective organizations as to their duties and responsibilities within Rule of Law operations.

[81] The difficulty posed by this lack of a singular entity responsible for providing direction for Rule of Law efforts was two-fold. First, and most obvious was the lack of a singular entity to articulate the host nation IDAD strategy and provide direction for subordinate actors to implement that strategy. Second, was that without a singular connection with the host nation, the ability to offer potential refinements or shifts in the host nation IDAD strategy was not readily available, potentially degrading the ability to implement effective programs to grow the Rule of Law. See JOINT PUB. 3-22 ch. II, para. (1).

[82] Most notably were the Police Transition Teams (PTTs), International Police Advisors (IPAs), Law Enforcement Professionals (LEPs) in addition to other U.S. private and governmental assistance teams along with other international initiatives.

[83] This was primarily done through the DoJ Office of Overseas Prosecutorial Development and Training (OPDAT), Provincial Reconstruction Team (PRT) Rule of Law Advisors (RLAs), USF judge advocates along with international judicial assistance programs.

[84] It was quickly discovered that there were several organizations that briefed well on paper, but it was unclear as to what value they actually brought to the warfighter on the ground. Rule of Law practitioners need to be keenly aware of the "it briefed well" organizations by having a solid understanding what that organization is actually doing.

[85] The identified organizations were: the Provincial – Police Transition Team (P-PTT); PTTs; Corrections Assistance Training Teams (CATTs); IPAs; LEPs; PRT RLAs; judge advocates; the Provost Marshall/Military Police; Civilian Affairs teams; individual units; and Special Forces Operational Detachments.

[86] For the most part these organizations requested and received information, and coordinated resources on larger Rule of Law projects.

where those capabilities were partnered, and what shortfalls or gaps in Rule of Law partnership or expertise existed. That understanding proved to be critical in planning and executing of Rule of Law operations and initiatives within the province.

Second, was the analysis of how the organizations engaged in Rule of Law operations within the province synchronized their efforts. It was quickly determined that there was no significant provincial level coordination for Rule of Law efforts and operations. Due to meeting overload, the bi-weekly Provincial Rule of Law meeting attendance steadily declined until it was cancelled due to the lack of participation.[87] Additionally, the parallel commands[88] within the province led to additional challenges in synchronizing not only efforts, but also information flow.[89] While information on Rule of Law efforts and events did flow to higher echelons through separate reporting channels, many times that information did not filter back down to the front-line Rule of Law practitioners in a timely or predictable manner.[90, 91] The failure to create a unity of effort amongst differing commands severely degraded the effectiveness of Rule of Law operations, which was visible in the warrant based targeting process[92] and in unsuccessful training efforts.[93]

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[87] This cancellation was significant as it removed the only forum through which efforts and information of all Rule of Law actors could be cross-leveled at the provincial level. The importance of such forums cannot be understated. While Situation Reports (SITREPs) are useful, actually being able to sit down and discuss events and issues enhances the overall understanding of the Rule of Law situation and allows greater opportunities to develop effective and workable solutions to those issues.

[88] Within the province was found a Brigade Combat Team (BCT), the PRT, Transition Teams (MiTTs/P-PTTs/PTTs) and Special Forces Operational Detachments, all of whom had separate reporting channels that did not necessarily converge at the provincial level.

[89] A salient example of this was seen during an iteration of the Traveling Judge program in Diyala. A civilian augmentee member of the 5th Iraqi Army Military Transition Team would report information about the Iraq Army Detention facility at FOB Khamees directly to the Multi-National Corps – Iraq Provost Marshall's Office for Detainee Operations. As a result of this, information would flow directly from the tactical level to the Corps level command and vice-versa without any input or cross-leveling from the Division or Brigade commands. In this particular instance, a MNC-I PMO official saw Iraqi judges getting on a helicopter and reported, incorrectly, to his 5IA MiTT augmentee that judges were moving to FOB Khamees in Diyala. The MNC-I PMO officer was unaware that, due to other operational needs, these judges had been tasked to Mosul. From there, the augmentee proceeded to pass information on these judges to the Brigade. This informational short circuit resulted in a six hour SPINEX as the Brigade, Division and Corps headquarters attempted to uncover which judges were moving to Diyala. While comical, this situation was sadly repeated due to the informational gaps created by separate, non-unified, reporting channels.

[90] MND-N made several attempts at centralizing rule of law informational inputs to the Division headquarters, however, due to the large number of organizations participating in Rule of Law operations it was unclear by the end of the Division's deployment whether all information relating to Rule of Law operations was flowing into a single Rule of Law node.

[91] One example of this was the reporting requirements imposed by Multi-National Corps – Iraq (MNC-I) for Judicial KLEs. The applicable FRAGO required the Rule of Law practitioner, when conducting a courthouse KLE, to obtain a wide scope of information about the courthouse that would then be sent up to MNC-I. However, information regarding trends and other observations and analysis from these visits would rarely, if ever, flow back down through reporting channels to the Rule of Law practitioner on the ground which could have been used to better guide Rule of Law practitioners in conducting KLEs and developing projects. As a result, the Rule of Law practitioner should continually assess reporting requirements to ensure that meaningful analysis of requests for information (RFIs) reported up the chain, filters back down so as to assist in refining operations to achieve the desired Rule of Law objectives found within the host nation IDAD strategy.

[92] Successful execution of warrant based operations requires significant coordination with both the US and host nation organizations. Unfortunately, much of the coordination needed to build successful warrants was not seen within the province. Efforts to obtain warrants were stove-piped within a particular staff section, which invariably failed to capture information, know-how, and host nation contacts possessed by other Rule of Law practitioners, that was required to work within the Iraqi criminal justice process. This fundamental misunderstanding of the criminal justice process coupled with the lack of contacts within the system led to many abortive efforts to obtain warrants.

Contrasted to this was the Rule of Law effort one province over in Salah ad Din province. There, the effectiveness of unity of effort was seen through that Brigade Combat Team's (BCT) warrant-based targeting process which prosecuted targeted individuals with a notable degree of success. This success stemmed from a unified process which brought together capabilities and experience, from different staff sections and outside organizations to work on a common problem. Specifically, information regarding the targeted individual was properly declassified[94] and then passed to the BCT Judge Advocate who consolidated the declassified information with witness statements and other evidence in order to build a criminal complaint. The complaint was then filed by the BCT Judge Advocate in the appropriate courthouse or police station, thereby injecting the case in to the host nation criminal justice system. The benefit of this system was that it turned the USF criminal complaint into a "test case" which allowed the various Rule of Law participants to help their host nation partner's process improve, and develop their own skills as the case worked its way through the criminal justice process. Two distinct successes are exhibited in this unified system. First, it allowed the BCT and other USF actors to provide assistance and mentor the host nation criminal justice system actors. Second, and more importantly, it legitimized the criminal justice process it sought to help by working within the host nation system, thereby achieving one of the cornerstone goals of stability and counter insurgency operations.[95] Neither of which would have been achieved without a unified approach on the part of the BCT.

An additional benefit of unity of effort in Rule of Law operations is its ability to act as a force multiplier. Inclusion of other Rule of Law practitioners and organizations within an effort ensures that the varied knowledge, experience, and information networks of those individuals or organizations are available for the particular Rule of Law project or initiative. An example of this force multiplier effect of unity of effort is seen through the warrant based targeting method utilized by subordinate units of Special Operations Task Force Central (SOTF-C) in Iraq. There, a partnered force had executed a warrant, but lacked the institutional knowledge of how to get the detained individual in front of the specific investigative judge that issued the warrant for an initial hearing. Through a unified flow of information, the Task Force Judge Advocate was notified and was then able to work both with the subordinate unit, SOTF-C's higher headquarters and laterally with the Law and Order Task Force (LAOTF) to gather additional information necessary to coordinate for the Iraqi investigative judge that issued the warrant to hear the case. Through leveraging assets available to them, specifically the Task Force Judge Advocate, the SOTF-C subordinate unit was able to assist their partner force in securing a detention order on their detainee. These host-nation to host-nation connections are the end state of a successful Rule of Law operation because it is precisely those connections that will sustain and build host nation capacity and legitimacy after the Rule of Law practitioner has redeployed to home station.

These examples highlight the effectiveness of a unified approach to Rule of Law efforts. The synchronization of information and efforts is essential in all military missions, but it is acutely important

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[93] The impact of the lack of unity of effort was exemplified through a training event sponsored by an Explosive Ordnance Disposal (EOD) company. The EOD element had scheduled a training event on finger print evidence on a US Forward Operating Base (FOB). An invitation to the provincial judiciary had been passed through the BCT Judge Advocate to the Provincial Deputy Chief Judge. Unfortunately, but not surprisingly, no one from the Iraqi judiciary or the local Iraqi Police attended the training. While this effort worked through the military chain of command, it failed to integrate the PRT Department of Justice Rule of Law Advisor (RLA). Including the RLA, who had weekly meetings with the Provincial Chief Judge, would have revealed that the Chief Judge had explicitly stated that none of his judges would attend events on a U.S. military base due to concerns for their safety. If they had properly synchronized their efforts with other Rule of Law actors, the EOD Company could have better directed their efforts to achieve the desired end state, such as bringing the training to the Judges at the provincial courthouse or at another designated location. Therefore, it is essential to cross level Rule of Law plans with the relevant actors and organizations to ensure vital information is obtained in order to maximize the expenditure of resources in achieving the desired outcome.

[94] Proper declassification occurred through the authorized Foreign Disclosure Officer, which was coordinated through intelligence channels.

[95] FM 3-24, para. 1-119.

when working with multiple inter-agency and intra-agency organizations involved in Rule of Law operations.[96] It allows for critical information and experience to be cross-leveled and considered in the planning and execution phases of Rule of Law operations, thereby ensuring that second and third order effects of those operations are understood and that the operations themselves are successful. Unity of effort is critical to the success of Rule of Law operations, and Rule of Law practitioners should take concerted efforts to unify both information and operations.

Relationships

"I get by with a little help from my friends" – The Beatles

The ability to build, use and leverage professional relationships is another one of the critical skills for working effectively as a Rule of Law practitioner. Deployed Rule of Law operations, by nature, are a joint interagency endeavor that intersects with host nation actors in order to influence and shape perceptions and attitudes in order to guide outcomes is critical to mission success.[97] As a result, the importance of effective "people skills" in the pursuit of these goals cannot be understated. Positive professional and interagency relationships developed by the Rule of Law practitioner are an undeniable facilitator of the unified effort required to conduct successful and effective Rule of Law operations.

Any effective attorney will readily admit that the practice of law is built around relationships and reputations. That understanding, coupled with an appreciation of the importance of productive work relationships proved to be extremely helpful for the author in forging relationships with other Rule of Law practitioners and actors at the tactical level and at higher echelons. These positive relationships proved useful in facilitating Rule of Law initiatives and projects. Specifically, a positive relationship with the Provincial Reconstruction Team (PRT) Rule of Law Advisor (RLA) allowed wide access to judicial Key Leader Engagements (KLEs) and information on Rule of Law efforts, access to the PRT's interpreters and linguists along with Department of Justice (DoJ) and Department of State (DoS) resources. More importantly, the positive relationships built with the PRT allowed for synchronization and nesting of operations, unifying PRT efforts with the overall Division Rule of Law goals and objectives. Likewise, positive relationships built with the Provincial MiTTs opened opportunities for additional KLEs and movement related support without having to go through the cumbersome tasking process.

However, the relationships built with host nation partners were the most important ones for facilitating Rule of Law operations. Counter insurgency and Stability Operations can only be successfully performed by working "by, with and through" host nation actors and organizations.[98] As such, building relationships with key host nation actors is a critical task. Careful thought and research is needed to understand the cultural nuances and substantive informational aspects[99] required to build a productive relationship. In Diyala, these relationships were built over tea and discussions about both Iraqi and U.S. law, which provided critical information and insights into developing and implementing effective Rule of Law operations there. While time is limited in those KLEs and meetings, it is crucial to spend time building relationships that can then be

[96] The "who" and "how" of how this synchronization will occur are the pieces that the Rule of Law practitioner must determine in light of the organizations on the ground. The operational environment facing Rule of Law practitioners will vary based on the organizations involved and their command authorities and relationships, making it impossible to articulate a "one size fits all" approach to command and control for Rule of Law operations. However, the importance of ensuring unified efforts requires the Rule of Law practitioner to identify this need to commanders prior to deployment or early on within Rule of Law operations to ensure lines of communication and command are clearly articulated in order to facility unity of effort.

[97] FM 3-24, para. 1-119

[98] *See* FM 3-07, para. 2-32; *See generally* FM 3-24 Chapter 2; FM 3-07 ch. 2.

[99] Understanding and being able to converse intelligently about the host nation law is extremely important in building credibility with the host nation partner and in identifying and avoiding possible friction points. Rule of Law practitioners must have a solid grasp of the substantive material that is going to be discussed with their host nation partners to ensure the maximum benefit is achieved from those meetings.

leveraged for operational and informational purposes later. KLEs that only seek to extract information from the host nation partner without cultivating the underlying relationship will limit or reduce the long term effectiveness of that partner by failing to build the trust and rapport needed to gain critical information or assistance with projects and initiatives.

Understanding the nuances and complexities of interagency operations and host nation interactions are essential components of deployed Rule of Law operations. The interconnected and joint nature of Rule of Law operations requires positive relationships to facilitate information flow and operational effectiveness. When relationships between the practitioners and players are dysfunctional or broken, the overall effectiveness of rule of law mission will be degraded. It is understood that not everyone will get along or sing the proverbial "kumbaya" together; however, Rule of Law practitioners must ensure that relationships are professional enough to effectively work together towards a common objective and end state. As a result, Rule of Law practitioners must be able to build and maintain positive working relationships with other rule of law actors, both inter and intra agency, along with host nation rule of actors, in order to effectively conduct Rule of Law operations.

By, With, and Through

"Legitimacy is the Center of Gravity for Both the Insurgents and the Counterinsurgents" – FM 100-20[100]

The most effective Rule of Law operations are those that work within the host nation Rule of Law framework and have host nation support. Deployed Rule of Law operations are a subcomponent of FID activities, which takes place within counter-insurgency and stability operations aimed at assisting the host nation with its IDAD strategy. The end state of those activities is to assist the host nation government in freeing and protecting its "society from subversion, lawlessness, insurgency, terrorism, and other threats to their security."[101] To achieve this in the context of Rule of Law operations, the Rule of Law mission must be properly nested within the host nation IDAD strategy in order to achieve lasting success. This requires Rule of Law practitioners to work "by, with and through" their host nation counterparts to ensure that projects and initiatives are based on the host nation's needs and goals as related to its IDAD strategy. This nesting of action within the greater IDAD strategy should help to ensure Rule of Law efforts are viewed as legitimate, and credible efforts towards building the effectiveness of the host nation Rule of Law processes by both host nation Rule of Law actors, and the host nation population.[102,103] Furthermore, the limited resources available for Rule of Law efforts requires that those resources be applied to projects that are most likely to succeed.[104] Failure to work by, with and through host nation rule of law actors in developing rule of law projects and plans threatens the effectiveness and success of those initiatives and could result in wasted resources, or worse, a de-legitimization of the host nation Rule of Law processes.

Successful counter-insurgency operations are driven by host nation needs and objectives.[105] Within the Rule of Law context, this means successful operations will be the result of understanding and then responding to the local population needs in formulating projects and assistance plans for the host nation Rule of Law process. Enabling the host nation to stabilize, improve and refine its Rule of Law processes and procedures helps not only build effectiveness but also foster legitimacy, one of the key end states of stability and counter

[100] *See* U.S. DEP'TS OF ARMY AND AIR FORCE, FIELD MANUAL 100-20 / AIR FORCE PAMPHLET 3-20, MILITARY OPERATIONS IN LOW INTENSITY CONFLICT (Dec. 1990)(Inactive) Chapter 2.
[101] JOINT PUB. 3-22, Ch. 1, para. 1.a.
[102] "Commanders and staffs must continually diagnose what they understand legitimacy to mean to the [host nation] population. The population's expectations will influence all ensuing operations." *FM 3-24*, ch. 1-118.
[103] "But the most important attitude remains that of the [Host Nation] population. In the end, its members determine the ultimate victor." *Id.*
[104] Limitations exist as to time, manpower and funding on both the Coalition side and host nation side.
[105] *See generally* JOINT PUB. 3-22, ch. 2.

insurgency operations.[106] To effectively accomplish this, information relating to the host nation's Rule of Law specific IDAD goals, along with identified deficiencies and needs, must be communicated through reporting channels so that appropriate planning and allocation of resources can occur. Projects and assistance plans must take into account the disparities found within the host nation's processes and systems, in that what is needed in one area was not necessarily required in another.[107] For example, during 2008 through 2009, the observed capabilities of Iraqi courts varied widely throughout the country. Provincial courts in the South worked on electronic case file management systems, whereas courts in the North were content when a week went by without a direct threat on a judge. Therefore, a "one size fits all" approach to Rule of Law projects is unlikely to be successful if it does not address the local population's Rule of Law needs and desires.

Additionally, working "by, with, and through" host nation partners provides the Rule of Law practitioner with relevancy and legitimacy in the eyes of their host nation counterparts. Not all counter-insurgency and stability operations are conducted in permissive environments. As such, the Rule of Law practitioner must be able to communicate to their host nation counterparts the reasons to work with the Rule of Law practitioner. Supporting the host nation IDAD strategy is one method to do so. Such support leverages the Rule of Law practitioner's available resources to support projects desired by the host nation, thereby advancing the desired host nation's Rule of Law end states and objectives. Failure to convey how the Rule of Law practitioner can be relevant to a host nation counterpart, in a non-permissive environment, may result in the loss of that counterpart's willingness to work with the counter-insurgent Rule of Law practitioner. As such, the Rule of Law practitioner must conduct periodic assessments to ensure that the collective "we" working together on projects includes both their host nation counterparts and their desires and projects.[108]

Two compelling examples of effective Rule of Law initiatives that were conducted "by, with, and through" host nation counterparts are the Rule of Law conferences facilitated by MND-N and one of its subordinate BCTs. The first example is seen through the BCT working within Salah ad Din province that facilitated a Judicial Conference that had been sought by the Provincial chief judge. This conference brought together all of the Judges in Salah ad Din province to discuss issues facing the provincial judiciary. The plan was warmly accepted by the Salah ad Din judicial leadership along with the rank and file judges and prosecutors. This acceptance, and desire to build internal bridges, led to a successful conference that established positive momentum needed to achieve other Rule of Law improvements and objectives.[109] Based on the success of this provincial level conference, an MND-N wide conference was planned and implemented which brought together judges from the provinces of northern Iraq to discuss issues facing them. The significance of this conference was that the Iraqi judges were provided an entire day to discuss issues that they wanted to discuss without any coalition input or questions, thereby allowing the Iraqis to take lead and drive the conversation in directions that they desired it to go. As a result of this MND-N wide conference, the judges who attended developed a prioritized list of issues facing the judiciary in Northern Iraq to address with the Higher Juridical Council,[110] along with a desire to hold future conferences. The success of this conference was the direct result of host-nation participant "buy-in" to the initiative along with the willingness of MND-N facilitators to allow their host nation counterparts to use the conference to meet host nation needs.

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[106] FM 3-24, para 1-131, *Id* at 1-132.
[107] FM 3-24, para. 1-155.
[108] Rule of Law practitioners need to be cognizant of the host nation IDAD strategy and host nation Rule of Law structure to ensure that efforts and initiatives are enhancing or improving host nation systems and goals, rather than creating new systems or procedures that are foreign to the host nation and unsustainable absent outside assistance or support.
[109] It was discovered that judges within the province did not know each other and were excited at the prospect of meeting their fellow judges to discuss issues facing the judiciary. These conferences facilitated a stated desire on the part of host nation counterparts.
[110] The Higher Juridical Council is the body that it provides oversight and management for all courts in Iraq.

Contrasting these successful efforts was the failure of the Provincial Justice Committee (PJC) initiative in Diyala Province, an initiative that failed to garner host-nation support. The PJC construct sought to bring together key actors in the criminal justice process to discuss issues facing the criminal justice process in Diyala. These forums were initiated and facilitated by U.S. Rule of Law practitioners in an attempt to overcome the lack of communication between host nation actors in the criminal justice process.[111] It was hoped that improved communication between senior leaders in the Police, Judiciary and Corrections agencies within the province would assist with reducing detainee overcrowding and speed criminal case processing. The first PJC meeting was well attended by all but the Iraqi Security Forces (ISF). The lack of key individuals from the ISF, specifically the Provincial Chief of Police, along with any representative from the Iraqi Army, raised concerns on the part of the Diyala judiciary as to the effectiveness and relevance of the meetings. This first PJC, while productive, ended with the Provincial Chief Judge noting that future meetings "must" include the Provincial Chief of Police and Iraqi Army leadership in order for the PJC to be a meaningful forum. A second PJC was attempted two months later after the Provincial Chief of Police and Iraqi Army had been invited to the forum through their U.S. advisors. Again, neither appeared, leading the Provincial Chief Judge to state that he would not attend another meeting unless the Chief of Police and heads of the security forces in Diyala attended. A third attempt at the PJC was made by the land owning BCT, however only members of the Diyala Judiciary arrived at the PJC. This proved to be the last PJC meeting held in Diyala during the author's deployment. While several factors led to the failure of this effort, the primary factor was the lack of "buy in" by the required host nation participants, specifically the Iraqi Police. This lack of host nation support for the initiative led to its collapse. In other provinces, where there was appropriate host nation support, PJCs became a successful tool for improving the criminal justice process through increased communication between key players in the criminal justice process.

The examples above highlight that the effectiveness of Rule of Law projects and initiatives depends heavily upon how well they are nested within the host nation's Rule of Law objectives and goals. Supporting host nation initiatives and goals is critical to both legitimizing the effort itself, and enhancing the host nation's Rule of Law capacity. Furthermore, working within the host nation's identified IDAD strategy needs for Rule of Law initiatives ensures that limited resources are effectively used. As a result, Rule of Law practitioners must work "by, with and through" their host nation counterparts by understanding and considering the host nation's Rule of Law needs and desires in determining which projects or initiatives would effectively further the desired Rule of Law objectives and end states.

Change We Can Accomplish

"Small is Beautiful" – FM 3-24

In addition to working "by, with, and through" host nation Rule of Law counterparts, an effective Rule of Law practitioner must understand the importance of undertaking projects that can be accomplished given limited time and resource availability. The nature of most military deployments places defined limits on both the duration of Rule of Law efforts along with the resources available for such efforts. The impact of these limitations must be considered when developing rule of law projects. Rule of Law practitioners must counter-balance time and resource restraints against working "by, with, and through"; even though there may be a host nation desire for a particular product, the Rule of Law practitioner must be able to assess whether he or she can provide the resources to assist in that project. This requires the practitioner to prioritize operations based on the current mission set and available resources. An effective TTP for prioritizing Rule of Law efforts based on internal limitations was the use of a two part assessment.

[111] Significant distrust existed between the police and courts within Diyala and neither was willing to extend an olive branch to the other. As a result, it was hoped the PJC would offer both parties neutral ground to come together to discuss their differences and develop solutions to problems facing the criminal justice process.

First, an honest assessment needs to be made of potential Rule of Law projects to understand how they fit within the host nation IDAD programs and objectives. This assessment must look at the threats and instability facing the host nation in light of the existing legal, organizational and cultural frameworks of the host nation along with the host nation's IDAD programs and initiatives. From there, the Rule of Law practitioner can understand whether the proposed project is designed to improve the host nation processes and procedures, or whether it seeks to bring about a fundamental shift in how the host nation conducts business. This allows a better understanding of whether the assistance to the host nation going to be accepted and used and if the project will help legitimize to their existing processes. Understanding the scope of the project and how the project will impact the current system allows the Rule of Law practitioner to gauge the value of proposed project in light of its impact on the host nation Rule of Law objectives and goals.

Second, the practitioner must examine the availability of resources to complete the Rule of Law project. This examination is a function of the nature of military deployments, which currently cover a finite period of time. Practitioners must consider what types of projects and initiatives can be implemented within that time frame. If the project appears to be a long-term project that exceeds the duration of the assignment, then the Rule of Law practitioner must address the question of who will be responsible for oversight when the initiating unit or organization departs theater and what resources will remain. Armed with these assessments, the Rule of Law practitioner will be able to understand what resources can be brought to the fight, and determine what Rule of Law projects may be successfully undertaken.

These assessments are critical to understanding how best to apply limited resources towards improving host nation Rule of Law capabilities. Understanding potential pitfalls and resource limitations prior to starting a project will allow the Rule of Law practitioner to effectively plan and implement Rule of Law projects that will achieve the desired end state. In order to be effective, a Rule of Law project must not only fit within the host nation rule of law structures and organizations, it must also be sufficiently resourced to ensure the project is successfully completed.

Planning

"Plans are Nothing, Planning is Everything." – Dwight D. Eisenhower

Limited time and resources available to the Rule of Law practitioner requires thorough planning, both prior to deployment and in theater, in order to maximize outcomes. Many of the requirements of effectively planning a Rule of Law mission have been noted above and are laid out in the applicable field manuals.[112] However, the concept of planning, in and of itself, cannot be overlooked by the Rule of Law practitioner. The Military Decision Making Process[113] should be familiar to the military Rule of Law practitioner; however, practitioners should keep in mind that not all of the players in Rule of Law operations are members of the military community. The joint nature of counter-insurgency and stability operations ensures that many, if not all, Rule of Law operations will be inter-agency missions that bring together military and civilian personnel. As a result, Rule of Law practitioners must ensure that adequate planning is occurring at all stages of Rule of Law missions and operations.

While it may be a case of stating the obvious, a Rule of Law practitioner must "plan to plan" in order to ensure successful missions and operations. This requirement ranges from pre-deployment training and planning to the systematic planning at the tactical level, that which is required for successful KLEs,[114] to the broad, strategic-level planning needed to assist with developing Rule of Law campaign plans. The

[112] FM 3-07, ch. 4; FM 3-24, app. A.
[113] DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS (Mar. 2010) [hereinafter FM 5-0].
[114] Specifically, it should be understood what the agenda of the KLE will be, who will be in attendance, what questions will be asked, who is doing the talking and what point needs to be conveyed. Additionally, ensuring that an interpreter with understanding of the subject matter of the conversation is present is also key as the Rule of Law practitioner is only as effective as their translator when dealing with host nation partners who do not speak English.

considerations noted in the paragraphs and sections above are the means and methods to develop accurate information and assess inputs to the planning process that are critical to building successful operations. Further, proper planning helps ensure that limited resources available to the Rule of Law practitioner are targeted to effectively match resources against identified needs that will advance host nation Rule of Law capacity and legitimacy. Incorporating the correct data points and assessments into the planning process will ensure that the Rule of Law practitioner is able to effectively develop, implement and execute missions and operations in the joint environment that defines current counter-insurgency and stability operations.

Conclusion

Successful Rule of Law operations require the choreography of a major Broadway production to ensure that ideas, resources, and willpower are marshaled to achieve concrete end-states and objectives. As with any complex task, significant planning and analysis must occur prior to embarking on the road to task completion. When this is applied to deployed Rule of Law operations, the Rule of Law practitioner must ensure that operations and initiatives are properly nested within desired end-states of both their commanders and their host nation partners. Simply stated, the joint intra, and inter-agency along with host nation coordination needed to accomplish this task is daunting if the practitioner has not considered the essential components of successful Rule of Law efforts identified above: *Unity of Effort*; *Relationships*; working *By, With and Through* host nation partners; *Change We Can Accomplish*; and effective *Planning.* With these factors in mind, the Rule of Law practitioner should be well-armed to face and tackle the complexities of Rule of Law operations within counter-insurgency and stability operations in the coming New Dawn

APPENDIX A

THE RULE OF LAW AND JUDGE ADVOCATES: A SHORT HISTORY[1]

Americans have long believed that a major reason for the longevity and vitality of the United States as a nation-state—and its success as a stable and prosperous democracy—is its foundation on the rule of law. This has meant that lawyers serving as Army Judge Advocates (JAs) with expeditionary U.S. forces, sharing this deep belief in the importance of the rule of law in American society, have looked for ways to enhance the rule of law elsewhere. Starting in the Philippines at the end of the 19th century, JAs began promoting the rule of law as a valuable component in a larger strategy to defeat an enemy and strengthen a friendly government. These rule of law efforts continued in Germany and Japan in the aftermath of World War II and in Vietnam in the 1960s and 1970s. Today, Army lawyers deployed in Afghanistan and Iraq are helping to run robust rule of law operations as part of overall counterinsurgency operations.

This history essay begins by examining what is meant by the term "rule of law," why it is the foundation of the United States, and why Army JAs have been receptive to it. It next looks at how Army lawyers serving in the Philippine Islands in the aftermath of the Spanish-American War of 1898 first attempted to implement American legal principles, including the rule of law, in the Philippines as part of pacification efforts. This essay then discusses how Army JAs serving forty-five years later in occupied Germany and Japan used the law to reform both German and Japanese society, and how they intentionally worked to graft the rule of law permanently onto German and Japanese institutions. Twenty years later, as this essay will show, Army lawyers in South Vietnam used the rule of law to enhance mission success in the larger fight against communist Viet Cong guerillas and their North Vietnamese allies. Finally, this essay looks at rule of law projects in Afghanistan and Iraq, which are part of an overall strategy to demonstrate to Afghan and Iraqi leaders that their societies will be better (politically, socially and economically) if they embrace the rule of law, since citizens who believe that their leaders adhere to the law will be loyal to them. At the same time, these rule of law projects seek to prove to the average Afghan and Iraqi citizen that the rule of law will safeguard their rights and property—while collaborating with insurgent forces will not.

A final introductory note: While Army JAs have been involved in rule of law programs for over one hundred years, this is not to say that there has been an official, codified, written rule of law program in The Judge Advocate General's Corps for this entire period. On the contrary, institutional recognition that the rule of law is part and parcel of JA doctrine is very recent and was not a part of the Army's operational doctrine until December 2006, when it first appeared in Field Manual (FM) 3-24, *Counterinsurgency*. Nevertheless, America's JAs have long been involved in designing, implementing, and participating in programs that seek to graft the rule of law onto the social organizations of other nations, and this is almost certain to continue.

I. Rule of Law as the Foundation of the United States

What is the "rule of law"? While there are many definitions, including those identified in this *Handbook*, the U.S. Government (USG) defines the idea in the following manner: Everyone must follow the law, leaders must obey the law; the Government must obey the law; and no one is above the law.[2] Regardless of how the three-word phrase is defined, however, there is no question that the rule of law is the foundation of the

[1] Written by Mr. Fred L. Borch, the Regimental Historian & Archivist of The Judge Advocate General's Corps.

[2] U.S. Citizenship and Immigration Serv., Civics (History and Government) Questions for the Naturalization Test, *available at* http://www.uscis.gov/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publications/100q.pdf (last visited July 12, 2011).

United States. A quick look at why this is true provides a context for explaining why JAs have conducted rule of law operations for more than a century.

As the American Revolution got underway, lawyers in the colonies were among the most radical thinkers. Believing that the tyranny of the Parliament in London was just as bad as the tyranny of George III, "many American colonists put their faith in fundamental law enshrined in a constitution—as John Adams famously put it, 'a government of laws and not men.'"[3] But Thomas Paine's statement about the law in his pamphlet *Common Sense* best captures why the rule of law is the foundation of the United States. Wrote Paine: "[I]n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law *ought* to be King."[4]

It follows that at the time of the Founding—and the drafting of the Constitution that resulted in the creation of the United States in 1787—Americans had a special relationship with the law. This relationship has continued, underscoring Alexander Hamilton's observation more than 200 years ago that Americans had a "sacred respect for constitutional law," which is just as true today, as U.S. citizens consistently look **to** courts—and the rule of law—as the best way to safeguard their rights and freedoms.[5]

Whether the law is a "civil religion"[6] in secular America is an open question. But there is no doubt that Army officers serving in the late 19th century shared the view of their fellow Americans that the rule of law was at the root of America's democratic tradition. This explains why historian Andrew Birtle writes in his authoritative *U.S. Army Counterinsurgency and Contingency Operations Doctrine 1860-1941*, that Army officers "had a deep faith in America's political and economic system, a system that they generally believed the rest of the world would do well to emulate."[7] When one remembers that Army officers of this period also believed in "respect for authority" and had "a fondness for efficiency and order, and a high regard for such public virtues as honesty, honor and self-sacrifice,"[8] this explains why the Army serving overseas—and its Judge Advocates—wanted to export American rule of law ideas and attitudes.

II. Rule of Law Efforts in the Philippines and Cuba (1898-1902)

The first JA involvement in establishing the rule of law occurred at the end of the 19th century, when the United States successfully invaded—and then occupied—Cuba, Puerto Rico, and the Philippine Islands during the Spanish-American War. After Spain sold the Philippines to the United States for $20 million, relinquished control of Cuba and Puerto Rico, and also ceded Guam to the United States, the American government suddenly discovered that it was responsible for governing more than ten million Cubans, Puerto Ricans, Filipinos, and Guamanians.[9]

The Army initially established military governments in all of these former Spanish colonies, although it was expected that Congress and the President would replace Army governors with civilian officials as soon as

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[3] James Grant, *Juristocracy*, WILSON Q. (Spring 2010), at 16, 18.
[4] Thomas Paine, COMMON SENSE (1776), 50.
[5] Grant, *supra* note 3, at 19.
[6] Civil religion "is essentially about those public rituals and myths that express for most Americans the nexus of the political order to the divine reality." Derek H. Davis, "Competing Notions of Law in American Civil Religion," 5 LAW, TEXT, CULTURE 265 (2000).
[7] ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 1860-1941, at 101 (1998).
[8] *Id.*
[9] *Id.* at 99. From the outset, lawyers, scholars, and politicians argued about the legal principles by which the United States would rule these new territories. Ultimately, the "doctrine of incorporation" became the politico-legal framework for America's new colonial empire. *Id.* This meant the Philippines, Puerto Rico, and Cuba would be "unincorporated territories" that were "under the sovereignty of the United States but outside its body politic." *Id.* But until the Congress passed legislation reflecting this doctrine of incorporation, these new territories were under Army rule. PAUL A. KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES AND THE PHILIPPINES 163 (2006).

possible. In Puerto Rico, Soldiers served as administrators until 1900, and Army officers governed the Philippine Islands until 1902. Military government remained in place in Cuba until 1902 but, even after that time, Army officers were involved in establishing—and running—new government institutions in Cuba for many years.

From 1899 to 1902, virtually every officer in the Army served in either Cuba, Puerto Rico, or the Philippines,[10] and Judge Advocates were no exception. From the beginning, these uniformed lawyers were convinced that these ex-colonial possessions would best be served if their existing Spanish-based legal systems were jettisoned in favor of American-style government. These views were hardly unique. On the contrary, they reflected the prevailing opinion, as expressed by President William McKinley, that the United States was obligated not only to liberate the former Spanish colonials, but also must guide them toward a prosperous, self-governing, democratic society.

Integral to this view was the idea that the inhabitants of Cuba, Puerto Rico, Guam and the Philippines would best be served if they had an American form of government that included an Anglo-American judicial framework. This explains why, from the outset, Judge Advocates were heavily involved in efforts to establish new legal institutions. In the Philippines, for example, the American occupation forces were convinced that the existing Spanish colonial legal system was corrupt. There "was a well-founded belief that lawsuits were won through influence or bribery" and this "wretched system" needed to be reformed.[11]

One of the first projects in the reform of the existing legal system was the "reestablishment" of a Philippine Supreme Court. While some of the members of the court (including the chief justice) were Filipino jurists, military governor Major General (MG) Elwell S. Otis also appointed an Army lawyer, then Lieutenant Colonel (LTC) Enoch H. Crowder to the new court. On 29 May 1899, Crowder (who would later serve as The Judge Advocate General (TJAG) for the Army from 1911 to 1921) was made an "associate justice" and appointed to the civil division of the Philippine Supreme Court. Crowder's appointment made sense, as he had drafted the document that reestablished the court. While serving as an associate justice, Crowder used his skills as an Army lawyer to overhaul the Philippine criminal justice system. He "made an exhaustive study of Spanish criminal laws recently in force in the Philippines" and then drafted a new Code of Criminal Procedure. This new Code was promulgated by MG Otis as General Orders No. 58 and took effect on 15 May 1900.[12]

But the Army also looked for ways to impress upon Filipinos that Americans believed in the rule of law. In this regard, MG Otis, by virtue of his authority as military governor, created a Board of Claims to hear civil complaints against the United States. Crowder, who was the president of the board, heard evidence in suits filed by Filipino citizens for money damages arising out of the loss of horse, livestock and other supplies, and the destruction of homes and other buildings. Crowder and three other Army officers heard suits without a jury and then made findings and recommendations to MG Otis. While the United States refused to pay for damages incurred incident to combat, it did pay a large number of claims—illustrating that the Americans believed in the rule of law and were committed to fair and equitable treatment.

According to James H. Blount, who served first as an Army officer and later as a district judge in the Philippines, Crowder "was the brains of the Otis government"[13] and Crowder continued his good works in Cuba, where Judge Advocates also busied themselves in establishing new legal institutions. Then Colonel (COL) Crowder, fresh from his experiences in Manila, was the chief legal advisor to the American-sponsored Provisional Government of Cuba. Although Cuba was granted formal independence in 1902, Army lawyers continued to be involved in its legal affairs. Crowder, for example, was Supervisor of its State and Justice

[10] BIRTLE, *supra* note 6, at 100.
[11] DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 77 (1955).
[12] *Id*. at 76.
[13] *Id*. at 75.

Departments from 1906 to 1909. At the same time, Crowder headed the Cuban Advisory Law Commission and Central Election Board.[14]

While JA rule of law efforts in Cuba were relatively short-lived (and Cuba was formally independent after 1902), bloody resistance to American rule in the Philippines meant that the U.S. Army—and Judge Advocates—had an active role in reshaping Philippine institutions for a longer period. It was not until 1913 that President Woodrow Wilson began the process that would gradually lead to independence. Consequently, the grafting of American jurisprudence onto Filipino society continued for many years, as did JA involvement.

III. Rule of Law Efforts in Germany and Japan (1945-1950)

The next Army JA involvement in rule of law efforts came in the aftermath of World War II, when American policy makers decided that Germany and Japan must be re-made if future conflict with them was to be avoided.

In Japan, a team of lawyers on General of the Army Douglas MacArthur's staff participated in drafting a new constitution for Japan—one that "established the principle of popular sovereignty for the first time, guaranteed a more extensive range of human rights than even the U.S. Constitution, and set antimilitarist ideals at the very center of the national charter."[15] More than anything else, however, the new Japanese constitution enshrined American ideas about the rule of law as the basis for a democratic form of government.

While no judge advocates worked on the committee that drafted this unique legal document, the presence of MG Myron C. Cramer, the recently retired Army Judge Advocate General, as the lone American judge on the International Military Tribunal of the Far East proves that Army lawyers were critical to the grafting of rule of law principles onto Japanese society. After all, a chief purpose of the Tokyo War Crimes Trial (as the tribunal was also called) was to "uphold democratic ideals and humanitarian principles as the foundation of international law."[16]

In the occupation of Germany after 1945, Army lawyers were particularly involved in running military courts. Shortly after General of the Army Dwight D. Eisenhower arrived in Germany, he ordered the publication of Proclamation No. 1. This document provided that all German courts in occupied territories were suspended.[17] Ordinance No. 2, promulgated at the same time as Proclamation No. 1, established Military Government courts "for the trial of offenses against the interests of the Allied Forces." These courts had jurisdiction over all offenses committed in the United States Zone against the legislation enacted by the Allies or existing German law. By 1946, these courts had tried more than 220,000 cases ranging from murder, theft, possession of a deadly weapon to false statements, curfew violations, and failure to have a valid identification card.[18]

These occupation courts existed to do justice, but judge advocates recognized at the time that these courts furthered the development of the rule of law in Germany. In 1949, Eli E. Nobleman, an Army Reserve Judge Advocate who served as Chief of the German Courts Branch of the Office of Military Government for Bavaria, wrote that over 350,000 cases had been tried by U.S. Military Government Courts in Germany. Nobleman noted that, while the Military Government Courts had delivered justice, they also had "… gone a

[14] JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY. THE ARMY LAWYER 1775-1975, at 105 (1975).
[15] JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II, at 244 (1999).
[16] YUMA TOTANI, THE TOKYO WAR CRIMES TRIALS: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II, at 259 (2008). For more on Crowder, see Fred L. Borch, Sitting in Judgment, PROLOGUE (Summer 2009), 34-41.
[17] Military Government—Germany, Supreme Commander's Area of Control, Proclamation No. 1, Military Government Regulation 23-200 (1945).
[18] Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A. B. A. 777, 778 (1947).

long way to toward teaching the democracy and the democratic system to the German people. All of the democratic safeguards mean absolutely nothing in the absence of impartial courts to protect fundamental rights. It has been correctly stated that the true administration of justice is the firmest foundation of good government."[19]

IV. Rule of Law Efforts in Southeast Asia (1964-1973)

The next JA involvement in rule of law operations occurred in Southeast Asia in 1964, when then COL George S. Prugh was the Staff Judge Advocate for Military Assistance Command, Vietnam (MACV). Shortly after arriving in Saigon, Prugh wrote a report in which he stressed that, as "there cannot be a successful counterinsurgency program until there is established a respect for law and order,"[20] Judge Advocates must look for ways to use the law to enhance mission success. As Prugh observed,

> [The] law could have a special role in Vietnam because of the unusual circumstances of the war, which was a combination of internal and external war, of insurgency and nation-building, and of development of indigenous legal institutions and rapid disintegration of the remnants of the colonial French legal establishment.[21]

In any event, until he returned to the U.S. in 1966, Prugh undertook a number of initiatives to demonstrate the value of law in society—all of which were continued by those Judge Advocates who followed him at MACV. First, Prugh organized a Law Society that sponsored lectures and talks on different aspects of U.S. jurisprudence. These were attended by Vietnamese lawyers and government officials, and provided a forum for discussing the role of law in a democratic society. This was an important initiative, as the South Vietnamese were "building their own rule of law, creating a bench and bar, and establishing a civil service where none had existed before."[22]

Second, Prugh formally established an "advisory" program and tasked the Army, Navy, Air Force, and Marine Corps Judge Advocates assigned to MACV to advise their South Vietnamese Army (ARVN) lawyer counterparts. The focus of these American lawyers was on creating, strengthening and re-organizing military and military-related governmental institutions. For example, judge advocates helped to reorganize the Vietnamese military prison system. They also gave advice to their Vietnamese counterparts on prisoners of war and war crimes. Finally, convinced that Vietnamese military institutions would be improved if they were injected with American ideas and attitudes on law and justice, Judge Advocates presented papers, held seminars, and taught courses at Saigon University. Vietnamese military lawyers also attended the Judge Advocate Officer Basic and Graduate Courses at The Judge Advocate General's School (TJAGSA).[23] Starting in 1967, TJAGSA also held a one-week long "Law in Vietnam" course. Most of the instruction was given "by guest speakers recently returned from South Vietnam with firsthand knowledge of the country and the problems involved."[24]

In the end, MACV Judge Advocates not only cultivated valuable friendships, but also assisted ARVN judge advocates in using laws and regulations to promote efficiency in the ARVN and deter the subversive activities of the Viet Cong. Perhaps most importantly, the rule of law efforts spearheaded by Prugh (who served as Army TJAG from 1971 to 1975) were intended to promote loyalty to the Saigon government. If

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[19] Eli E. Nobleman, *Civilian Military Government Courts in Germany*, JUDGE ADVOCATE J. (June 1949), 37.
[20] GEORGE S. PRUGH, LAW AT WAR 13 (1975).
[21] *Id*. at v.
[22] JUDGE ADVOCATE GEN'S CORPS, *supra* note 13, at 222.
[23] *Id*. For example, Second Lieutenant Nguyen Dinh Hung and First Lieutenant Lt. Nguyen Tri Tu attended the 60th Basic Course in 1971. THE JUDGE ADVOCATE GENERAL'S CORPS, U.S. DEP'T OF ARMY, ANNUAL REPORT, TJAGSA app. VIII, at 83 (1970-1971).
[24] THE JUDGE ADVOCATE GENERAL'S CORPS, U.S. DEP'T OF ARMY, COMMANDANT'S ANNUAL REPORT, TJAGSA 20 (1967-68).

the Vietnamese people understood—and saw—that their leaders believed in the rule of law, this would generate confidence and trust in the actions of the Government of South Vietnam.

While the withdrawal of U.S. forces in 1973 and the collapse of the South Vietnamese government in 1975 means that nothing remains of these JA rule of law efforts, there is no doubt that uniformed lawyers considered their work in the area to be part of defeating the Viet Cong and their North Vietnamese allies.

V. Rule of Law Operations in Afghanistan and Iraq (2001 to present)

After the deployment of U.S. military personnel to Afghanistan in 2001 and Iraq in 2003, Army Judge Advocates began looking for ways to use the law to enhance mission success in both geographic locations. Rule of law projects became increasingly important after stability operations were underway and an insurgency had emerged in both Afghanistan and Iraq.

The central weakness of any insurgency is not its military capabilities but its reliance on the local populace for legitimacy, recruits, financing, sanctuary, intelligence and other material support.[25] Consequently, Judge Advocates understood that rule of law projects demonstrating that the central government followed the law and was fair and just in its dealings with all citizens would promote loyalty to that central government—thereby weakening the guerrillas.

At first, such efforts were very much *ad hoc*—largely dependent on the interest of the individual Army lawyers and legal offices in reaching out to their Afghan and Iraqi counterparts. These early rule of law missions "followed no set format or guidelines … these pioneering Judge Advocates literally made it up as they went forward."[26] In April 2003, for example, then LTC Craig Trebilcock was in southern Iraq and serving as the International Law Officer in the 358th Civil Affairs Brigade. As U.S. forces transitioned from combat operations to occupation and reconstruction, Trebilcock convinced his commander that the rule of law was "an integral component of reestablishing security in an occupied territory."[27] Projects subsequently undertaken included: obtaining money for court-house reconstruction; replacing legal books and other library resources that had been stolen by looters or destroyed by vandals; obtaining general funding for the operation of courthouses; and devising methods to remove and replace Baathist party judges and select new judges.[28]

The experiences of COL Bruce Pagel, an Army Reservist serving in north central Iraq, were similar. Pagel, who had extensive criminal experience as an Assistant U.S. Attorney, served as the rule of law officer in the 1st Infantry Division from May 2004 to February 2005. Pagel and his fellow JAs built on rule of law efforts started by the 4th Infantry Division, which had previously operated in their geographic area. Their principal goal "was to clearly identify the most persistent obstacles to restoring rule of law and improving judicial output."[29] In furtherance of this goal, JAs visited Iraqi courthouses, identified needs (e.g., security, equipment) and worked to establish both credibility and a working relationship with the local Iraqi legal community, including judges and police officers.

While the experiences of Trebilcock and Pagel were the norm from 2003 through 2006, that changed with the emergence of a new Army counterinsurgency (COIN) doctrine, announced with the publication of FM 3-24 *Counterinsurgency* in December 2006. For the first time, Army COIN doctrine formally embraced rule of law projects. As Appendix D, "Legal Considerations," puts it, "establishing rule of law is a key goal and end state in COIN."[30] While recognizing that achieving this end state "is usually the province of H[ost] N[ation]

[25] Bart Schuurman, *Clausewitz and the "New Wars" Scholars*, PARAMETERS (Spring 2010), at 98.
[26] CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., U.S. ARMY, RULE OF LAW HANDBOOK 163 (2007) [hereinafter ROL HANDBOOK].
[27] *Id*. at 164.
[28] *Id*. at 171, n. 24.
[29] *Id*. at 189.
[30] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY, at D-8 (15 Dec. 2006).

authorities, international and intergovernmental organizations, the Department of State (DOS), and other U.S. Government agencies," Appendix D also stresses that "support from U.S. forces in some cases" also is required.[31]

Even before the appearance of FM 3-24 in December 2006, JAs serving at the Center for Law and Military Operations (CLAMO) recognized that these *ad hoc* rule of law projects—regardless of their success—must be replaced with a more formal and uniform program. They began authoring a "practitioner's guide" in late 2006, with much of the writing being done by Coast Guard Lieutenant Vasilios Tasikas and Army Reserve Captain Thomas Nachbar. Their guide, published in July 2007 as the *Rule of Law Handbook*, recognized that Judge Advocates deployed as part of Operations Enduring and Iraqi Freedom would continue to use their legal skills and talents "to bring stability and rule of law support to the embryonic and fragile democratic governments in both Afghanistan and Iraq."[32] It follows that the intent of the *Handbook* was to provide Army lawyers conducting rule of law activities as part of stability operations with an "educational resource" that would provide practical tips and guidance in the area. The *Handbook* has been updated and republished since.

Since the initial publication of the *Handbook* in 2007, rule of law projects have continued in Afghanistan and Iraq. At the strategic level, senior Army JAs have been appointed as Rule of Law Coordinators at the U.S. Embassies in both countries.[33] Additionally, while *ad hoc* Rule of Law missions continue at the Brigade Combat Team (BCT) level, there have also been separate major commands established to oversee Rule of Law missions, generally in the area of establishing security forces and prison operations.

In Iraq, for example, the Multi-National Security Transition Command-Iraq (MNSTC-I) was created to oversee the establishment and training of Iraqi Security Forces, including both Army and police forces.[34] A similar organization was established in Afghanistan, the Combined Security Transition Command-Afghanistan (CSTC-A). Each organization has a commander and a senior Army Judge Advocate serving as the SJA for the command.

The commitment of commanders to on-going Rule of Law operations is best illustrated by the activities of the Law and Order Task Force (LAOTF) created to work with Iraqi judges at the Central Criminal Court Iraq located in the Rusafa district on the east side of Baghdad (CCCI-Rusafa).[35] While LAOTF had been established in 2006, a major innovation in its operations occurred in November 2008, when Army and Air Force JAs at LAOTF and the Iraqi judges at CCCI-Rusafa created the Joint Investigative Committee (JIC). The intent of the JIC was to work through the issues that both U.S. and Iraqi lawyers realized would result from the implementation of the U.S-Iraq Security Agreement (effective 1 January 2009). Since this agreement, in recognition of Iraqi sovereignty, prohibited coalition forces from detaining anyone without a warrant issued from an Iraqi judge, it was critical to put in place procedure that would comply with this new legal regime. Now in its third year of operation, the JIC consists of American JAs, Iraqi investigators and Iraqi investigative judges. All work in concert to obtain warrants for coalition targets, issue detention orders, and move the cases through the Iraqi criminal justice process. The JIC has been a major Rule of Law success because it focuses on strengthening the Iraqi criminal justice process by, with, and through Iraqi personnel.[36]

Another good example of the commitment of commanders to Rule of Law operations is the Rule of Law Field Force-Afghanistan (ROLFF-A), which was established in 2010 and is commanded by a Judge

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[31] *Id.*
[32] ROL HANDBOOK, *supra* note 26, at i.
[33] In Afghanistan, for example, LTC Dean Vlahopoulos served as the Rule of Law Coordinator from 2008-2009; COL Fred Taylor from 2009-2010; LTC Paula Schasberger is the current coordinator.
[34] MNSTC-I is now closed and its functions fall under USF-I.
[35] CCCI-R was different from CCCI-Karkh, which was located on the west side of the Tigris River in the Green Zone. Judges at CCCI-Karkh tried cases of detainees housed in the coalition operated Cropper detention facility.
[36] The first Officer in Charge (OIC) for the JIC was LTC Jeff Bovarnick (2008-2009). He was followed by MAJ Sean Mangan (2009-2010) and MAJ Philip Staten (2010-2011).

Advocate brigadier general. The ROLFF-A focuses exclusively on establishing, securing, and assisting the Afghans in implementing their own criminal justice system. The ROLFF-A, which is referred to in more detail in Chapter 7, is a combined, joint, interagency task force that has established Justice Centers around Afghanistan. It also oversees Rule of Law efforts being conducted by subordinate commands, such as at Combined Joint Task Force (CJTF) 82.[37]

At CJTF-82, four JAs at the Office of the Staff Judge Advocate work with their Afghan counterparts in the prosecution of "security criminals." The "Rule of Law objective was … to develop a system for successfully prosecuting insurgents, removing them from the battlefield." This objective was based on the premise that an incarcerated insurgent cannot manufacture improvised explosive devices, bribe public officials, or undermine the legitimacy of the government. Working as an "Afghan Prosecutions Team," these Army lawyers train others "to focus on evidence collection and development, local and provincial prosecution and case tracking, and strategic level corruption."[38] Judge advocates also "partner" with National Directorate of Security personnel (Afghanistan's Federal Bureau of Investigation equivalent) to better "detect, investigate and prosecute insurgents on multiple fronts simultaneously."[39] These efforts—and similar rule of law projects in Iraq—continue today.

With this history as background, it is clear that JA involvement in rule of law operations is nothing new. If anything, the only new development is a formal, institutional recognition that rule of law operations are an integral part of JA doctrine in military operations—and that written guidance on how to establish and implement a rule of law program is a necessary aspect of what has been part of the JA mission for over a century.

[37] BG Mark S. Martins, the ROLFF-A commander, had previously been the Deputy Commander of Joint Force (JTF) 435 (later Combined Joint Interagency Task Force (CJIATF 435). This unit, created by Secretary of Defense Robert Gates in September 2009, had the mission, in part, "to ensure [that] U.S. detainee operations in Afghanistan [were] aligned effectively with Afghan criminal justice efforts to support the overall strategy of defeating the Taliban insurgents." Given BG Martins work with CJIATF 435, it was logical for him to take command of ROLFF-A when it was created in 2010. Jeff A. Bovarnick, "Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy," ARMY LAWYER (June 2010), 9, 25-26.

[38] Combined Joint Task Force-82 [hereinafter CJTF-82], Information Paper, *From the Battlefield to the Courtroom: Prosecuting Insurgents in Afghanistan*, at 1, n.d. (June 2010).

[39] *Id*. at 8.

APPENDIX B
RULE OF LAW TRAINING

This appendix provides information about Rule of Law (ROL) training courses and programs. Table 1 contains a list of short courses for ROL practitioners, including military personnel or civilians who practice in the area of ROL. Table 2 contains a list of ROL outreach programs that provide training for legal personnel and foreign officials from host nations within which ROL operations are being delivered. It is not a comprehensive list of all the training opportunities and programs available, but is intended to provide insight into the diversity of educational opportunities and training providers that exist. These program providers are not sponsored or endorsed by the Editor or Authors of this *Handbook*, nor is every program offered by these institutions listed.

For further information about any program, follow the URL to obtain detailed information including program availability and cost.

Table 1: Courses suitable for USG [and coalition] ROL Practitioners

Agency/Organization	Course Title	URL for More Information	Course Location	Frequency/Length
U.S. Army, TJAGLCS	Rule of Law	https://www.jagcnet.army.mil/8525736A005BC8F9/0/84843E08984787C18525735500653845?opendocument&noly=1	Charlottesville, VA	Annual/4.5 days
Dep't of State Foreign Service Institute	Interagency Integrated Civilian-Military Training Exercise for Afghanistan	http://www.ccoportal.org/course/interagency-integrated-civilian-military-training-exercise-afghanistan	Butlerville, IN	Several times a year/6 days
Dep't of State Foreign Service Institute	Various	http://fsitraining.state.gov	Washington, DC	Depends on course/varies from 1 day to 2 weeks
Univ. of South Carolina Walker Institute of International and Area Studies	Rule of Law Collaborative Interagency Training	http://www.cas.sc.edu/lis/ROLC/ROLCHome1.html	Washington, D.C. or Columbia, S.C.	Periodically/various
United Nations Dep't for Peacekeeping Operations (UNDPKO)	Rule of Law Training Programme for Judicial Affairs Officers	http://unrol.org/article.aspx?article_id=135	Various locations around world	2x a year/6 days
United States Institute of Peace[1] Academy for	Rule of Law Practitioners Course	http://www.usip.org/education-training/courses/rule-law-practioners-course	Washington, DC	Several times a year/5 days

[1] For more information on USIP, see ch. 2, sec. II, subsec. E *supra*.

Agency/Organization	Course Title	URL for More Information	Course Location	Frequency/Length
International Conflict Management and Peacebuilding		(for a list of other USIP courses in relevant areas of law: http://www.usip.org/education-training/courses-simulations)		
Center for Security Sector Management at Cranfield Univ.	Managing Public Security and the Rule of Law	http://www.cranfield.ac.uk/cds/shortcourses/managingpublicsecurityandtheruleoflaw.html	Shrivenham, Swindon, UK	Annual/ 4 days
International Law Institute	Various	http://www.ili.org/training.html	Washington, DC	Depends on course/varies from 4 to 18 days
Center for International Peace Operations (ZIF)	Rule of Law in Peace Operations	http://www.zif-berlin.org/en/training/training-courses/specialisation-courses/rule-of-law.htm	Sando, Sweden or Berlin, Germany	Annual/13 days
Folke Bernadotte Academy	Rule of Law Course	http://www.folkebernadotteacademy.se/en/Training/Courses1/Rule-of-Law-Course	Berlin, Germany	Annual/12 days
International Human Rights Network	Justice Sector Reform: Applying Human Rights Approaches	http://www.ihrnetwork.org/justice-sector-reform_202.htm	Maynooth, Ireland	Annual/5 days
NATO School	Various (note: NATO School does not have any RoL-specific classes but offers a number of legal and planning courses that may be relevant)	https://www.natoschool.nato.int/academics.asp	Oberammergau, Germany	Depends on course/4-7 days
George C. Marshall European Center for Security Studies	Program for Security, Stability, Transition and Reconstruction (SSTaR)	www.marshallcenter.org/mcpublicweb/en/nav-college/nav-academics-resident-courses/nav-col-sstar.html	Garmisch-Partenkirchen, Germany	2x a year/3 weeks
Univ. of Birmingham	HMG Security and Justice Training Course	http://www.idd.bham.ac.uk/events/security-justice.shtml	Birmingham, UK	4x a year/3.5 days

Table 2: Outreach programs providing Training and Development opportunities for Host Nations

Agency	Program Title	URL for more information	Overview
Defense Institute of International Legal Studies[2]	Rule of Law and Disciplined Military Operations Course	http://www.diils.org/rule-of-law-and-disciplined-military-operations-course-offered-at-various-u-s-military-schools	A one-week course available at various U.S. Military Schools. DIILS provides legal education, training, and rule of law programs for international military and related civilians.
Dep't of State (INL)	Afghanistan Justice Sector Support Program[3]	http://www.jssp-afghanistan.com	Through capacity building, technical advice, and direct assistance, JSSP helps justice institutions and justice professionals perform their roles in delivering fair and effective justice services to the citizens of Afghanistan.
Dep't of State (INL)	Iraq Justice Development Program	http://www.state.gov/p/inl/rls/fs/150854.htm	In partnership with other USG agencies including U.S. Marshals service and the DOJ, INL funds and oversees a wide range of ROL programs within seven functional areas: judicial security, justice integration, judicial professional development, public integrity/anti-corruption, judicial capacity development, legislative assistance and judicial outreach.
Dep't of Justice	Overseas Prosecutorial Development Assistance and Training[4]	http://www.justice.gov/criminal/opdat/	Mission is to help prosecutors and judicial personnel in other countries develop and sustain effective criminal justice institutions.
United Nations[5]	Global Programme on Strengthening the Rule of Law in Conflict and Post-Conflict Situations	http://www.undp.org/cpr/documents/UNDP%20Rule%20of%20Law_web_FINAL_PRINT.pdf	Offers comprehensive operational, technical and financial support to host countries to build capacities to implement comprehensive rule of law, justice and security programs.
European Union/United	Iraq – Support to the Rule of Law and	http://www.unrol.org/article.aspx?article_id=155	A program in collaboration with the Iraqi government to improve the efficiency of the Iraqi justice system and strengthen the capacity of

[2] For more information on DIILS, *see supra* Chapter 2, Section II, Subsection D, Part 4.
[3] *See supra* Chapter 2, Section II, Subsection A, Part 1 for a discussion on the programs and operations of INL.
[4] For more information on DOJ OPDAT, see Chapter 2, Section II, Subsection C, Part 3.
[5] The UN has over 40 entities engaged in ROL activities all around the world. The programs listed on this table are merely examples of the many UN ROL programs. For more information on UN ROL activities, visit the website: http://www.unrol.org/ (last visited July 27, 2011). In addition, *see* Second Annual Report on strengthening and coordinating United Nations rule of law activities: Report of the Secretary-General, A/65/318, at http://www.unrol.org/doc.aspx?d=2994 (last visited July 27, 2011).

Agency	Program Title	URL for more information	Overview
Nations Development Programme	Justice		government ROL institutions.
United Nations	Programme on Governance in the Arab Region	http://www.undp-pogar.org/governance/ruleoflaw.aspx	Assists governments in achieving a sufficient level of human development through good governance and protection of human rights.
United Nations Office for Project Services	Justice and Security Sector Reform	http://www.unops.org/english/whatwedo/focus-areas/public-order-security/Pages/public-order-security.aspx	Provides support services in administration and project management in post-conflict areas to reduce risk and improve speed, quality or cost-effectiveness to allow partners to focus on their policy objectives.
USAID	Rule of Law Stabilization – Formal Program[6]	http://afghanistan.usaid.gov/en/USAID/Activity/182/Rule_of_Law_Stabilization_Program_Formal_Component	This program develops the human and institutional capacity of the justice sector, increases access to justice (particularly for women), and increases public demand for ROL.
USAID	Rule of Law Stabilization Program – Informal Component	http://afghanistan.usaid.gov/en/USAID/Activity/163/Rule_of_Law_Stabilization_Program_Informal_Component	This program helps re-establish traditional dispute-resolution councils (shuras) in areas recently stabilized while familiarizing them with Afghan national law.
Univ. of South Carolina Walker Institute of International and Area Studies	Rule of Law Collaborative	http://www.cas.sc.edu/Iis/ROLC/ROLCHome1.html	Provides programs, research and training to develop Rule of Law as a discipline, intended especially for Foreign Area Officers (but can provide for anyone working in a ROL related field). Short courses, conferences, and lectures are offered periodically, typically within the U.S.
American Bar Association	Rule of Law Initiative / Legal Profession Reform	http://apps.americanbar.org/rol/programs/legal-profession.html	By providing technical assistance with trial advocacy skills, law practice management and substantive areas of law, ABA ROLI enhances the professionalism and expertise of lawyers in host countries.
The World Justice Project	Opportunity Fund	http://www.worldjusticeproject.org/opportunity-fund	This program provides seed grants to establish further multidisciplinary ROL initiatives around the world.
The World Bank[7]	State and Peace-Building Fund	http://web.worldbank.org/WBSITE/EXTERNAL/STRATEGIES/EXTLICUS/0,,content	Establishes programs that address the needs of state and local governance in fragile, conflict-prone and conflict-affected situations,

[6] USAID is heavily involved in many programs in addition to ROL in many countries. Listed here are just two ROL-specific programs in Afghanistan. For an in-depth discussion of USAID and its global mission, see *supra* ch. 2, sec. II, subsec. B.

[7] For more information on World Bank involvement, *see supra* Chapter 2, Section III, Subsection C.

Agency	Program Title	URL for more information	Overview
		MDK:21836102~pagePK:6417531~piPK:64171507~theSitePK:511778,00.html	including ROL programs.
The Arab Center for the Development of the Rule of Law and Integrity	Various ongoing projects	http://www.arabruleoflaw.org	As a non-governmental, non-profit organization with headquarters located in Beirut, ACRLI works with other regional and international organizations to develop and reinforce ROL, integrity and good governance in the Arab countries.

APPENDIX C
ACRONYMS

AAA	Afghan Attorney Advisor
AAR	After Action Report
ACC	U.S. Army Capstone Concept
ACO	North Atlantic Treaty Organization, Allied Command Operations
ADA	Antideficiency Act
ADCC	Afghan Detention and Corrections Cell
ADR	Alternative Dispute Resolution
AFOSI	Air Force Office of Special Investigations
AFR	Africa
AGA	Agricultural Advisor (U.S. Embassy)
A&T	Advising and Training
ANA	Afghan National Army
ANDF	Afghan National Detention Facility
ANDS	Afghan National Development Strategy
ANE	Asia and the Near East
ANP	Afghan National Police
ANSF	Afghan National Security Forces
AO	Area of Operations
AOB	Advanced Operating Base
ARTF	Afghanistan Reconstruction Trust Fund
ASD SO/LIC	Assistant Secretary for Defense for Special Operations and Low Intensity Conflicts
ASFF	Afghan Security Forces Fund
ASOP	Afghanistan Social Outreach Program
ATF	U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives
AUP	Afghan Uniformed Police
AWG	Asymmetric Warfare Group, U.S. Army
BBA	Bilingual Bicultural Adviser
BCT	Brigade Combat Team
BIAP	Baghdad International Airport
BJA	Brigade Judge Advocate
BTIF	Bagram Theater Internment Facility
CA	Civil Affairs
CAAT	Counterinsurgency Advisory and Assistance Team
CAST	The Fund for Peace Conflict Assessment System Tool
CAOCL	U.S. Marine Corps, Center for Irregular Warfare / Center for Advanced Operational Culture Learning
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment **or** Civil Affairs Team
CCCI	Central Criminal Court of Iraq
CCCI-K	Central Criminal Court of Iraq-Karkh
CCIR	Commander's Critical Information Requirements
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women

CENTCOM	U.S. Central Command
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CEXC	Combined Explosives Exploitation Cell
CJCS	Chairman of the Joint Chiefs of Staff
CICA	Competition in Contracting Act
CID	Criminal Investigation Division (U.S. Army) and/or Criminal Investigative Directorate (Iraq)
CIDA	Canadian International Development Agency
CIL	Customary international law
CIV-MIL	civilian-military
CIVPOL	UN Civilian Police
CIZA	Competent Iraqi Authority (IZ is an acronym used to indicate "Iraq")
CJ	Chief Judge (Iraq)
CJIATF	Combined Joint Interagency Task Force
CJSOTF-AP	Combined Joint Special Operations Task Force – Arabian Peninsula
CJTF	Criminal Justice Task Force (Afghanistan) and/or Counter-Narcotics Justice Task Force (Afghanistan)
CLAMO	Center for Law and Military Operations, The Judge Advocate General's Legal Center and School
CMO	Civil-Military Operations
CMOC	Civil-Military Operations Center
CNJC	Counter Narcotics Justice Center (Afghanistan)
CNP-A	Counternarcotics Police - Afghanistan
CNT	Central Narcotics Tribunal (Afghanistan)
COIN	Counterinsurgency
CoK	Charge of the Knights (Iraq)
COTR	Contracting Officer's Technical Representative
CPA	Coalition Provisional Authority (Iraq)
CPATT	U.S. Central Command, Civilian Police Assistance Training Teams (Iraq)
CRC	U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization, Civilian Response Corps
CRPD	Convention on the Rights of Persons with Disabilities
CSDP	European Union, Common Security and Defense Policy
CSTs	Crime Scene Technicians
CSOs	Civil society organizations / U.S. Department of State Bureau for Conflict and Stabilization Operations
CSTC-A	Combined Security Transition Command - Afghanistan
DATT	U.S. Embassy, Defense Attaché
DCHA	U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs
DCM	U.S. Embassy, Deputy Chief of Mission
DDR	Disarmament Demobilization and Reintegration
DEA	U.S. Department of Justice, Drug Enforcement Administration
DETs	Detachments
DFID	U.K. Departement for International Development
DFIP	Detention Facility in Parwan
DG	Democracy and Governance
DHS	U.S. Department of Homeland Security
DIILS	Defense Institute of International Legal Studies

DLI	Iraq, Defense Language Institute
DO	Development Officer (USAID representative at U.S. Embassy) and/or Detention Order (Iraq)
DOD	U.S. Department of Defense
DODAA	U.S. Department of Defense Appropriations Act
DODD	U.S. Department of Defense Directive
DODI	U.S. Department of Defense Instruction
DOJ	U.S. Department of Justice
DOMEX	Document Media Exploitation
DOS[1]	U.S. Department of State
DPG	World Bank, Development Policy Grant
DRB	Detainee Review Board
DRL	U.S. Department of State, Bureau of Democracy, Human Rights and Labor
DSCA	Defense Security Cooperation Agency
DSSI	Iraq, Defense and Strategic Studies Institute
DTL	Deputy Team Leader
E	U.S. Department of State, Under Secretary for Economic, Business Energy and Agricultural Affairs
ECA	U.S. Department of State, Bureau of Education and Cultural Affairs
ECF	International Monetary Fund, Extended Credit Facility
ECP	Entry Control Point
ECHR	European Convention on Human Rights
ECtHr	European Court of Human Rights
E&E	Europe and Eurasia
EEB	U.S. Department of State, Bureau of Economic, Energy and business Business Affairs
EGAT	U.S. Agency for International Development, Bureau for Economic Growth, Agriculture and Trade
ENG	Engineer
EOD	Explosive Ordnance Disposal
ePRT	embedded Provincial Reconstruction Team
ESF	Economic Support Fund
ETDF	East Timorese Defense Force
EU	European Union
EUJUST LEX	European Union Integrated Rule of Law Mission for Iraq
EUPOL Afghanistan	European Union Police Mission - Afghanistan
F	U.S. Department of State, Office of the Director of U.S. Foreign Assistance
FAA	The Foreign Assistance Act of 1961
FACT	U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization, Field Advance Civilian Teams
FAST	Drug Enforcement Administration, Foreign-deployed Advisory Support Team
FBI	U.S. Department of Justice, Federal Bureau of Investigation
FCD	Future Concepts Directorate, The Judge Advocate General's Legal Center and School
FDS	Field Detention Site

[1] *But see supra* ch. 2 note 26

FDD	Focused District Development
FID	Foreign Internal Defense
FM	Field Manual
FOB	Forward Operating Base
FOAA	Foreign Operations Appropriations Act
FSN	Foreign Service Nationals
FSO	Foreign Service Officer
FTF	Focused Targeting Force
FUSMO	Funding U.S. Military Operations
FY	financial year
G	U.S. Department of State, Under Secretary for Democracy and Global Affairs
GAO	U.S. Government Accountability Office
GH	U.S. Agency for International Development, Bureau for Global Health
GIRoA	Government of the Islamic Republic of Afghanistan
G/S/GWI	U.S. Department of State, Bureau of Office of Global Women's Issues
G/TIP	U.S. Department of State, Office to Monitor and Combat Trafficking in Persons
HACC	Humanitarian Assistance Coordination Center
HCT	Human Intelligence Collection Team
HIIDE	Handheld Interagency Identity Detection Equipment
HIPC	Heavily Indebted Poor Countries
HJC	High Judicial Counsel (Iraq)
HN	Host Nation
HOC	Humanitarian Operations Center
HQ	Headquarters
HTT	Human Terrain Team
IA	Interagency Acquisition
IAF	Iraqi Armed Forces
IBRD	World Bank, International Bank for Reconstruction and Development
ICAF	Interagency Conflict Assessment Framework
ICCPR	International Covenant of Civil and Political Rights
I-CERP	Iraq Commander's Emergency Response Fund
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICITAP	U.S. Department of Justice, Criminal Division, International Criminal Investigative Training Assistance Program
ICRC	International Committee of the Red Cross
ICS	Iraqi Corrections System
IDA	World Bank, International Development Association
IDLG	Independent Directorate of Local Governance (Afghanistan)
IED	Improvised Explosive Device
IGFC	Iraqi Ground Forces Command
IGOs	Intergovernmental Organizations
IH	Investigative Hearing
IHT	Iraqi High Tribunal
IIP	U.S. Department of State, Bureau of International Information Programs
IJ	Investigative Judge

IJPO	Italian Justice Project Office (for Afghanistan)
ILF-A	International Legal Foundation-Afghanistan
IMAR	Iraqi Military Academy, Ar Rustamiyah
IMF	International Monetary Fund
IMS	Interagency Management System
INCLE	International Narcotics, Crime Control and Law Enforcement
INL	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs
INL/AAE	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Asia, Africa and Europe Programs
INL/AP	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Asia, Africa and Multilateral Programs
INL/CIV	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Civilian Police and Rule of Law Programs
INL/I	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Iraq Programs
INL/LP	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Americas Program
INLTC	Independent National Legal Training Center
INPROL	United States Institute of Peace, International Network to Promote the Rule of Law
INR	U.S. Department of State, Bureau of Intelligence and Research
IO	International Organizations
IOC	Initial Operations Capability
IORF	International Operational Response Framework
IP	Iraqi Police
IPA	International Police Assistance
IPAO	Iraq Provincial Action Officer (U.S. Embassy)
IPB	Intelligence Preparation of the Battlefield
IPC	Interagency Policy Committee / National Security Council Integration Interagency Planning Cell / Interagency Management System
IPOG	National Security Council, Deputies Committee, Iraq Policy Operations Group
IQC	Indefinite Quantity Contract
IR	Iraq Reconstruction
IRoCC	Interagency Rule of Law Coordination Center
ISAF	International Security Assistance Force (Afghanistan)
ISOF	Iraqi Special Operations Forces
ISB	Intermediate Staging Base
ISF	Iraqi Security Forces
ISFF	Iraqi Security Forces Fund
ISN	U.S. Department of State, Bureau of International Security and Nonproliferation
I-SRC	Iraqi Supreme Reconstruction Council
ITDC	Iraqi training and Doctrine Command
IVLP	U.S. Department of State, International Visitor Leadership Program
IZ	International Zone or Iraq
JA	Judge Advocate
JAGC	The Judge Advocate General's Corps, U.S. Army
JCP	Joint Campaign Plan
JCS	U.S. Department of Defense, Joint Chiefs of Staff
JEFF	Joint Expeditionary Forensic Facility

JIIM	Joint, Interagency, Intergovernmental and Multi-National
JOPPs	Joint Operation Planning Process
JSU	Judicial Security Unit (Afghanistan)
KJU	Kirkuk Jurist Union
KRG	Kurdish Regional Government (Iraq)
L	U.S. Department of State, Office of the Legal Adviser / U.S. Embassy, Legal Adviser
LAC	Latin America and the Caribbean
LAOTF	Law and Order Task Force (Iraq)
LEP	law enforcement professional
LL	Lessons Learned
LNO	Liaison Officer
LOFTA	Law and Order Trust Fund for Afghanistan
LWA	Leader with Associate
M	U.S. Department of State, Under Secretary for Management
MAAWS	Money As A Weapon System
MACV	Military Assistance Command, Vietnam
MAMT	NATO Training Mission – Iraq, Mobile Advising and Mentoring Team
MCPP	Marine Corps Planning Process
MCR	Marine Corps Regiments
MCTF	Major Crimes Task Force (Iraq)
MCWP	Marine Corps Warfighting Publication
MDMP	Military Decision Making Process
MIPR	Military Interdepartmental Purchase Request
MiTT	Military Training Team
MNC-I	Multi-National Corps – Iraq
MND-B	Multi-National Division-Baghdad (Iraq)
MND-C	Multi-National Division- Center (Iraq)
MND-N	Multi-National Division-North (Iraq)
MNF-I	Multi-National Force – Iraq
MoI	Ministry of Interior (Iraq)
MoJ	Ministry of Justice (Iraq)
MoD	Ministry of Defense (Iraq)
MOU	Memorandum of understanding
MP	Military Police
MPICE	U.S. Institute of Peace Measuring Progress in Conflict Environments
NAC	North Atlantic Treaty Organization, North Atlantic Council
NAS	Narcotics Affairs Section (INL Office at Embassies)
NATO	North Atlantic Treaty Organization
NCC	Iraq, National Command Center
NCIS	Naval Criminal Investigative Service
NCO	Non-commissioned Officer
NDAA	National Defense Authorization Act

NDS	National Directorate of Security (Afghanistan)
NDSPD	National Directorate of Security Prosecution Department (Afghanistan)
NDU	Iraq, National Defense University
NEA/I	U.S. Department of State, Bureau of Near Eastern Affairs / Iraq
NECC	U.S. Navy, Naval Expeditionary Combat command
NGOs	Non-governmental Organizations
NIIA	National Information and Investigative Directorate/Agency (Iraq)
NJP	National Justice Program (Afghanistan)
NJSS	National Justice Sector Strategy (Afghanistan)
NROLFSM-A	NATO Rol of Law Field Support Mission-Afghanistan
NSC	National Security Council
NSPD	National Security Presidential Directives
NTM-A	NATO Training Mission – Afghanistan
NTM-I	NATO Training Mission – Iraq
OAG	Office of the Attorney General (Afghanistan)
ODA	Operational Detachment-Alpha
OE	Operating Environment
OEF	Operation Enduring Freedom
OET	Iraq, Officer Education and Training
OES	U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs
OFDA	U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs, Office of Foreign Disaster Assistance
OIF	Operation Iraqi Freedom
OLC	U.S. Department of Justice, Deputy Attorney General, Office of Legal Counsel
OLP	U.S. Department of Justice, Office of Legal Policy
O&M	Operations and Maintenance Funds
OMB	Executive Office of the President, Office of Management and Budget
OMLT	NATO Training Mission – Afghanistan, Operational Mentor and Liaison Team
OPA	U.S. Embassy, Office of Provincial Affairs
OPDAT	U.S. Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training
OPTEMPO	Operational Tempo
OSCE	Organization for Security and Cooperation in Europe
OTI	U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs, Office of Transition Initiatives
PA	Public Affairs
PAO	Public Affairs Officer or Provincial Action Officer
PCC	National Security Council, Policy Coordinating Committee
PDO	Public Diplomacy Officer (U.S. Embassy)
PDoP	Provincial Director of Police
PDP	Pre-Deployment Preparation
PERMREP	U.S. Permanent Representative to the United Nations
PIOs	Public International Organizations
PJCC	Provincial Joint Coordination Center
PJCM	Provincial Justice Coordination Mechanism
PKSOI	U.S. Army, Peacekeeping and Stability Operations Institute

PL	Public Law
PM	U.S. Department of State, Bureau of Political-Military Affairs
PM NOC	Iraq, Prime Minister's National Operations Center
PMT	Police Mentor Teams
POC	Point of Contact
PoJ	Palace of Justice (Iraq)
POL OFF	U.S. Embassy, Political Officer
POMLT	NATO Training Mission – Afghanistan, Police Operational Mentor and Liaison Team
PRM	U.S. Department of State, Bureau of Population, Refugees and Migration
PRT	Provincial Reconstruction Team
PRT/PRDC	Provincial Reconstruction Team/Provincial Reconstruction Development Council Projects Program
PRT/QRF	Provincial Reconstruction Team/Quick Response Fund
PSCs	Private Security Companies
PTT	Police Transition Teams
PVOs	Private Voluntary Organizations
R	U.S. Department of State, Under Secretary for Political Affairs
RAC	Rusafa Area Command (Iraq)
RC-E	Regional Command-East
RCLO	U.S. Department of Justice, Regime Crimes Liaison Office (Iraq)
REO	Regional Embassy Office
RFP	Request for Proposals
RHP	Office of the Special Coordinator for Rule of Law and International Humanitarian Policy
RIAB	Radio in a Box
RIPC	Rule of Law International Policy Committee (Iraq)
RLA	Resident Legal Adviser
ROI	Report of Investigation
ROL	Rule of Law
RoLC	Rule of Law coordinator (U.S. Embassy)
RoLFF-A	Rule of Law Field Force - Afghanistan
R&S	Reconstruction and stabilization
RSO	U.S. Embassy, Regional Security Officer
SA	Security Agreement between the U.S. and Iraq
SAA	South Asian Affairs
SBA	Stand-By Agreements
SCA/A	U.S. Department of State, Bureau of South and Central Asian Affairs / Afghanistan
S/CRS	U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization
SCROL	The Special Committee on the Rule of Law
S/CT	U.S. Department of State, Office forof the Coordinator for Counterterrorism
SF	Special Forces (U.S. Army)
S/GAC	U.S. Department of State, Office of the U.S. Global AIDS Coordinator
SHAPE	North Atlantic Treaty Organization, Supreme Headquarters Allied Powers, Europe
SJA	Staff Judge Advocate

SJSR	Security and Justice Sector Reform
SME	Subject Matter Expert
SOs	Strategic Objectives
SOAgs	Strategic Objective Agreements
SOFA	Status of Forces Agreement
SOG	U.S. Marshals Service, Special Operations Group
SOTF	Special Operations Task Force
SOW	Scope of Work
S/P	U.S. Department of State, Policy Planning Staff
SRSG	Special Representative to the Secretary General
SSR	Security Sector Reform
SSTR	Stability, Security, Transition, and Reconstruction
STT	NATO Training Mission – Iraq, Specialist Training Team
SU	U.K. Stabilisation Unit
S/WCI	U.S. Department of State, Office of War Crimes Issues
T	U.S. Department of State, Under Secretary for Arms Control and International Security Affairs
TCAPF	Tactical Conflict Assessment and Planning Framework
TDP	Targeted Development Program
TESC	NATO Training Mission – Iraq, Training and Equipment Synchronization
THF	Temporary Holding Facility
TJAGLCS	The Judge Advocate General's Legal Center and School
TL	Team Leader
TO	Task Orders
TRC	Truth and Reconciliation Commissions
TSE	Tactical Site Exploitation
TTPs	Tactics, Techniques and Procedures
TU	Task Units
TWG	Technical Working Groups
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Program
UNDPKO	United Nations Department of Peacekeeping Operations
UNICEF	United Nations Children Fund
UNITA	National Union for the Total Independence of Angola
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNSCR	United Nations Security Council Resolution
U.S.	United States
USACE GRD	U.S. Army Corps of Engineers, Gulf Region Division
USACIDC	U.S. Army Criminal Investigation Command
USAID	U.S. Agency for International Development
U.S.C.	U.S. Code
USDA	U.S. Department of Agriculture
USDH	U.S. Direct Hires
USD(P)	U.S. Under Secretary of Defense for Policy

USF-I	U.S. Forces - Iraq
USG	U.S. Government
USIP	United States Institute of Peace
USMS	U.S. Department of Justice, U.S. Marshals Service
USPSCs	U.S. Personal Services Contractors
USSF	United States Special Forces
VBC	Victory Base Complex, Iraq
VCI	U.S. Department of State, Bureau of Verification, Compliance and Implementation
VTC	Video Teleconference
WG	Working Group
WHT	Witness Handling Teams

Rule ('rül): noun. a prescribed guide for conduct or action. one of a set of explicit or understood regulations or principles governing conduct or procedure within a particular area of activity.

Of (uhv, ov): preposition. used to indicate derivation, origin, or source; relating to.

Law ('lo): noun. a binding custom or practice of a community. the principles and regulations established in a community by some authority and applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decision.

Rule of Law: ('rül □äv □lo□): doctrine. 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 principles.