

RULE OF LAW

HANDBOOK

A Practitioner's Guide for Judge Advocates



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

CENTER FOR LAW AND MILITARY OPERATIONS

2008

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

2008

The Judge Advocate General's Legal Center and School, U.S. Army

Center for Law and Military Operations

Charlottesville, Virginia 22903

**The 2008 edition of the Rule of Law Handbook is dedicated
to the memory of**

Charles R. Oleszycki

1944-2008

Colonel, USMCR (Ret.)

**Editor of the 2007 edition of the Rule of Law Handbook
and U.S. Dept. of State representative to CLAMO, 2005-2007**

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Preface

Why a Practitioner's Guide

The Judge Advocate General's Legal Center and School (TJAGLCS) trains and educates military, civilian, and international personnel in legal and leadership skills; develops doctrine and captures lessons learned; and conducts strategic planning in order to provide trained and ready legal personnel, imbued with the Warrior Ethos, to perform the JAGC mission in support of a Joint and Expeditionary Force. Within TJAGLCS, the Center for Law and Military Operations (CLAMO) specializes in the collection of after action reports (AARs) from Judge Advocates and paralegals recently returned from deployments. There are two constantly re-occurring themes that surface in these AARs. The first is that commanders naturally turn to their legal experts to plan, execute, coordinate, and evaluate rule of law efforts. The second is that no comprehensive resource exists to assist practitioners in fulfilling this task.

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

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

While there is little debate over the need for such a practitioner's guide, there is little else in the rule of law arena upon which there is widespread agreement. There are divergent, and often conflicting, views among academics, various USG agencies, US allies and even within the Department of Defense (DOD), as to whether to conduct rule of law operations, what constitutes a rule of law operation, how to conduct a rule of law operation, or even what is meant by the term "rule of law." As in the case of any emerging area of legal practice or military specialty, doctrine is non-existent, official guidance is incomplete, and educational opportunities are limited.

While acknowledging the above challenges, the Judge Advocate General's Corps leadership still recognizes the inevitability that Judge Advocates on the ground under extraordinarily difficult conditions will be called upon to support, and even directly participate in and lead, rule of law operations. The JAG Corps owes these lawyers at the tip of the spear practical guidance in the form of a resource that contains at least the fundamentals of how to establish the rule of law in the context of a US military intervention. That, then, is the genesis, purpose, and rationale for this, *The Rule of Law Handbook: A Practitioner's Guide for Judge Advocates*.

What is agreed upon by almost every individual who has worked in this area is that **joint, inter-agency and multinational coordination is the basic foundation upon which all rule of**

¹ The National Security Strategy of the United States 3 (2002). *See also* The National Security Strategy of the United States (2006), available at <http://www.whitehouse.gov/nsc/nss.html>.

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

The Nature of a Handbook for Judge Advocates

The *Handbook* is not intended to serve as US policy or military doctrine for rule of law operations.

Nor is the *Handbook* intended to offer guidance or advice to other military professionals involved in the rule of law mission. It was written primarily by Judge Advocates for Judge Advocates and its scope and purpose is limited to providing the military attorney assistance in accomplishing the rule of law mission. Moreover, the vast majority of Judge Advocates will engage in rule of law activities in the context of US military interventions, and the *Handbook* was written with that context in mind. It is not a general guide to conducting rule of law assistance in host nations lacking a substantial, active US military presence. While others involved in rule of law missions may find the *Handbook* helpful, they should understand its intended audience is the Judge Advocate or paralegal involved in the rule of law mission during on-going military operations.

The goal of the *Handbook* is to go beyond a mere recitation of recent lessons learned about rule of law operations from Judge Advocates who had participated in such missions. While useful for understanding what we have accomplished (and failed to accomplish) to date, standing alone they simply lack the refinement and comprehensive analysis to truly assist the practitioner.

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

The *Handbook* is intended not to serve as a complete solution, but rather as a starting place and a supplement for other materials. In addition to courses available through TJAGLCS,² there are many resources for information on rule of law activities are covered extensively in documents written by other agencies, many of which are referenced throughout the *Handbook*. Some documents are required reading for *any* Judge Advocate deploying in support of the current conflict, such as Field Manual 3-24, *Counterinsurgency* (2006), Field Manual 3-07, *Stability Operations* (currently in revision), the *USMC Small Wars Manual* (1940). Moreover, the *Handbook* is designed to be used with other references familiar to Judge Advocates, such as

² 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.learn.army.mil>.

the *Operational Law Handbook* (2008), and Field Manual 1-04, *Legal Support to the Operational Army* (currently in revision).

In addition, within the Army, rule of law activities have often been performed by Civil Affairs units, and their doctrine discusses them in detail. Both Field Manual 3-05.40, *Civil Affairs Operations* (2006) and Joint Publication 3-57, *Civil-Military Operations* (2008) are also very helpful reading for the Judge Advocate deploying to support rule of law projects.

Nevertheless, no course, handbook, or manual can provide a Judge Advocate a “cookbook solution” for how to support the development of the rule of law in a deployed environment. This *Handbook* hopefully provides both some food for thought and points to some resources, but it is no substitute for flexibility, intelligence, and resourcefulness. Hopefully, the *Handbook* will serve as an educational resource for Judge Advocates who are preparing to practice in the field. Even if the *Handbook* only serves as an introductory resource to further Judge Advocates’ professional education on the topic, it will have served a vital purpose.

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Foreword

*The Rule of Law and Judge Advocates: A Short History**

Army Judge Advocates have been involved in rule of law programs for over 100 years. This is not to say there has been an official, codified, written rule of law program in the Judge Advocate General's Corps for more than a century; in fact, institutional recognition that the rule of law is part and parcel of JA doctrine is very recent. But America's Judge Advocates have long been involved in designing, implementing, and participating in programs that sought to graft the rule of law onto another nation's social organization.

The first JA involvement in establishing the rule of law occurred at the end of the nineteenth 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 10 million Cubans, Puerto Ricans, Filipinos, and Guamanians.¹

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 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 Cuba, Puerto Rico, or the Philippines,² 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. From the outset, Judge Advocates were heavily involved in efforts to establish new legal institutions. In 1899, for example, then Lt. Col. Enoch H. Crowder (who would later serve as Army TJAG from 1911 to 1921) wrote the new Philippine criminal code. Crowder also filled many important posts during his duty in Manila, including serving as head of the Board of Claims and sitting on the Philippine Supreme Court.

* Mr. Fred L. Borch is the Regimental Historian & Archivist of the Judge Advocate General's Corps.

¹ ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE, 1860-1941 at 99 (Center of Military History 1998).

² *Id.*, at 100.

Similarly, Judge Advocates busied themselves in establishing new legal institutions in Cuba. Then-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 Departments from 1906 to 1909. At the same time, Crowder headed the Cuban Advisory Law Commission and Central Election Board.³

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.

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, Judge Advocates on Gen. Arthur MacArthur's staff participated in drafting a new constitution for Japan – one that enshrined American ideas about the rule of law as the basis for a democratic form of government.

In the occupation of Germany after 1945, Army lawyers were particularly involved in running military courts. 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 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.⁴

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,”⁵ 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

³ JUDGE ADVOCATE GENERAL'S CORPS, U.S. ARMY. *THE ARMY LAWYER* 105 (1975). For more on Crowder's rule of law activities in the Philippines and Cuba, see DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN (1955).

⁴ Eli E. Nobleman, *Civilian Military Government Courts in Germany*, JUDGE ADVOCATE J., June 1949, at 37.

⁵ MG GEORGE S. PRUGH, *LAW AT WAR: VIETNAM 1964-1973* 13 (1975).

nation-building, and of development of indigenous legal institutions and rapid disintegration of the remnants of the colonial French legal establishment.⁶

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. 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. As a result, 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 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.

With this history as background, it is clear 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 development of 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.

⁶ *Id.*, at v.

I. Introduction

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

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

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

Second, the *Handbook* places rule of law operations squarely within Full Spectrum Operations.¹ In order for rule of law operations to be effective, they have to fit within the larger framework of how the US military conducts offensive and defensive operations as well as the growing stability mission.

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

The book's organization reflects all three themes, covering the theory, interagency relationships, and practice of rule of law activities, but it is notably absent of checklists. Chapters II-V provide a general background to rule of law activities, setting the stage for Chapter VI, which describe the planning of rule of law operations, and Chapter VII, which describes the funding rules for current rule of law operations. Chapter VIII describes practical challenges faced in rule of law operations. Chapter IX provides theater-specific information regarding current ongoing operations, and Chapters X, and XI follow up with practical applications in specific contexts.

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

¹ See U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 3-1 (27 Feb. 2008).

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

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

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

Chapter VI covers basic military planning doctrine for Judge Advocates as well as mechanisms for assessing the state of the rule of law in a host nation and evaluating the efficacy of such rule of law activities.

Chapter VII discusses the fiscal law aspects of conducting rule of law operations.

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

Chapter IX provides detailed information about the legal systems and the structure of rule of law efforts in two theaters in which substantial rule of law operations are currently taking place: Afghanistan and Iraq.

Chapter X follows Chapter IX's country-specific focus with narratives from recently deployed rule of law practitioners describing their experiences.

Chapter XI similarly describes recent operations, but instead of providing comprehensive narratives of individual deployments, it provides several examples of recently conducted rule of law projects.

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

II. Defining the Rule of Law Problem

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

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

Moreover, almost any rule of law effort in which a deployed Judge Advocate participates will be an *interagency* one. As a matter of US policy, the Department of State is the lead agency in conducting 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-US-military partners, who have differing priorities and operating procedures when conducting rule of law operations.⁴ The military role in rule of law capacity-building will end with the redeployment of US 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.

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).

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).

³ National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstructing and Stabilization, Dec. 7, 2005; *but see* section III.B.1 (discussing the interagency coordination for operations in Afghanistan and Iraq, which are not carried out pursuant to NSPD-44) and fn. 100 in Chapter IX (describing the inter-agency allocations of responsibility in Iraq). *See also* JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS V-24 (17 Sept. 2006) (explaining that, while other agencies may have the lead, US military forces must be prepared to carry out all aspects of stability operations).

⁴ Chapter III deals explicitly with the issue of how best to work with other agencies, international and non-governmental organizations, the host nation, and coalition partners in the context of rule of law operations.

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

A. Describing the Rule of Law

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

1. Definitions of the Rule of Law

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

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

- (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
- (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz’s phrase, “people should be ruled by the law and obey it.”
- (3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.
- (4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.

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

(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 rule of law efforts within military intervention than others he did not emphasize (such as providing physical security).

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

- **making the state abide by the law**
- **ensuring equality before the law**
- **supplying law and order**
- **providing efficient and impartial justice, and**
- **upholding human rights⁷**

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

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

According to the latest draft revision of Army Judge Advocate doctrine:

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 norms and standards.⁸

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).

⁸ U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY D-1 (draft July 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.

That principle can be broken down into seven effects:

- **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**
- **human rights and fundamental freedoms are protected by the state**
- **individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives**⁹

The complete realization of these effects represents an ideal. The seven effects of the rule of law exist to greater or lesser degrees in different legal systems and are not intended as a checklist for a society that abides by the rule of law.¹⁰ Every society will satisfy the list of factors more or less completely, and what one person thinks satisfies one factor another person may not. Societies can abide by the rule of law to different degrees according to geography (the rule of law may be stronger in some places than others), subject matter (the rule of law may apply more completely with regard to some laws than others), institutions (some may be more efficient or corrupt than others), and subjects (some individuals may have greater access to the rule of law than others). Because any meaningful definition of the rule of law represents an ideal, **Judge Advocates should view the success of rule of law projects as a matter of the host nation's movement toward the rule of law, not the full satisfaction of anyone's definition of it.**

The deployed captain or major who is this *Handbook's* intended audience will hopefully be part of an operation that already has a definition of the rule of law – one that has been adopted by policymakers. With that in mind, the 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 rule of law operation. In this way, the seven effects can not only supply a definition of the rule of law, they can complement one, providing more specific guidance about the effects Judge Advocates should be working to help bring about the rule of law.

What follows is a discussion of each effect.

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

It is impossible to say it a society is governed by the rule of law if compulsion is not the sole province of the state. A country in which the use of violence is out of the state's control is

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.

⁹ FM 1-04 (draft), *supra* note 8, at D-2. Of the many definitions of the rule of law in common use, this one most closely hews to that suggested in JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 78 (2006).

¹⁰ *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 9, 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.*

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,¹¹ 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.

¹¹ See section V.H on Non-State Security Providers.

Militias and the Sons of Iraq

In Iraq and Afghanistan, militias established themselves as extra-governmental arbiters of the populace's physical security. Sectarian violence, a weak central government, problems in basic services, and high unemployment have caused Iraqis to turn to militias and other groups outside the government for their basic needs, imperiling Iraqi unity.¹² Militias often operate outside the law. Iraq's constitution prohibits the formation of military militias outside the framework of the armed forces.¹³ This prohibition has not stopped the militias from further contributing to violence, instability and insecurity.¹⁴ Militias have often operated under the protection of the Iraqi police to detain, torture, and kill suspected insurgents, and other innocent civilians. In this form, militias constitute a long-term threat to law and order.

In 2007 and 2008, coalition forces in Iraq began seeking to co-opt the "awakening" movement, enlisting former Sunni insurgents in informal security organizations. These "Sons of Iraq" have been an important part of the coalition plan to improve security, and by all accounts have had a largely positive effect on the security situation, as insurgents turn to patrolling their neighborhoods and cooperating with coalition forces. The employment of potential (and even former) insurgents is a classic method for cutting off a source of recruits for insurgents.

It is not clear the degree to which the positive relationship with the Sons of Iraq is sustainable. The hope is that many of them will transition into the Iraqi Security Forces. Many, however, are not physically qualified for entry into the Iraqi Security Forces, and the predominately Sunni character of the Sons of Iraq places them somewhat at odds with the Shiite-majority government. According to General David Petraeus, "There are understandable concerns on the part of a government that is majority Shiite that, what they [would be] doing was hiring former Sunni insurgents, giving them a new lease on life, and that when this is all said and done they may turn against the government or the Shiite population."¹⁵

Although enlisting informal security organizations can provide stability, as the assessment by General Petraeus explains, such groups can be relied on only "as long as it is in their interests."¹⁶

¹² LTG Michael Maples, Defense Intelligence Agency, The Current Situation in Iraq and Afghanistan, Statement for the Record before the Senate Armed Services Committee (Nov. 15, 2006) [hereinafter Maples Statement].

¹³ See IRAQI CONST. art 9.

¹⁴ Maples Statement, *supra* note 12, at 3.

¹⁵ See Walter Pincus, *U.S. Unsure About the Future of Iraq's 'Sons'*, WASH. POST., Mar. 31, 2008, at A17.

¹⁶ *Id.*

Individuals are Secure in Their Persons and Property

In many ways, providing security is the ultimate purpose of any state. For a Judge Advocate as part of a deployed force, providing security is going to be the first element in any rule of law plan and, depending on the status of operations, it may be the only real contribution that US forces can make to implementing the rule of law.¹⁷ But it is an important contribution nevertheless. From an operational standpoint, without basic security, the rule of law itself is an unaffordable luxury. The basic needs of the people, including not only physical security but also basic civil services and utilities have to be provided before one can undertake any long-term attempt to improve the rule of law. Thus, the interconnected nature of rule of law projects also requires that rule of law efforts be tied to other reconstruction efforts in order to provide the kind of livable society in which the rule of law can flourish.¹⁸ 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.¹⁹ 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.²⁰

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

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

The conduct of state actors must be bound by established rules. Of course, it does no good for the state to be bound by rules if the rules themselves can be changed according to fiat or if they bear no relation to reason. The need for reasoned 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 rule of law. Limits on the power of the police to search or detain individuals, for instance, control the exercise of executive authority while simultaneously furthering the value of providing security to persons and their property. Corruption, too, can erode the function of the legal system into one in which a state is ruled not by laws but rather by the imposition of illegitimate restrictions that are withdrawn through the payment of bribes. And, of course, if an individual buys an exception to a legitimate regulation, the failure to apply the

¹⁷ 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.

¹⁸ See STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 135.

¹⁹ *Id.* at 145-47.

²⁰ 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.”).

regulation is itself a failure of the rule of law. Corruption, or “the abuse of public power for private gain,”²¹ is a prototypical example of the subversion of the rule of law.

Judges, too, must be bound by law – statute law or precedent – in their 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.²² 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.²³ Of course, there is likely to be little precedent in host nations in which US military operations are taking place, and in some cases that precedent will be positively rejected as illegitimate.

Dedication to reason also suggests that judges should not base their decisions on *other* considerations, including the giving of bribes (corruption) or the social status of a particular litigant, and thus forms an important element of the state’s protection of 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 rule of law project faces. Although major rule of law 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.²⁴

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.²⁵ Any society that has advanced beyond anarchy is likely to have such an agreement, which in countries that are the subject of US 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 rule of law projects in such countries to quickly determine whether existing institutions have the necessary political legitimacy to continue. The converse is

²¹ WORLD BANK, WORLD DEVELOPMENT REPORT 1997, at 102 (1997).

²² 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 decision of the same court are considered at least persuasive, and those of higher courts are frequently considered to be binding. *See* section V.B.

²³ Fallon, *supra* note 5, at 20-21.

²⁴ *See generally* A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1968).

²⁵ H.L.A. HART, *THE CONCEPT OF LAW* 94-95 (2d ed. 1994) (describing the “rule of recognition” that societies use to identify law).

that, when setting up new legal institutions, the most important thing will be to go through a process that produces the necessary agreement in order to have that institution's decisions recognized by the society as law.

Laws must be recorded in a way that makes them reasonably accessible, so that even if the average citizen does not read the law, they are able to understand its content through practice.²⁶

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.

Individuals Have Meaningful Access to an Effective and Impartial Legal System

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

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

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. Most would agree, for instance, that a legal system in which judges applied the law as given to them and police arrested and incarcerated offenders without corruption or bias would nevertheless fail to qualify as applying the rule of law if the law applied was merely the fiat of a dictator or of a ruling majority acting without regard to 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.

²⁶ 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).

Although the standards for the minimum protection of a country's inhabitants are embodied in the Universal Declaration of Human Rights (UDHR)²⁷ and the treaties to which the country is a party, such as the International Covenant on Civil and Political Rights (ICCPR),²⁸ there is disagreement, on exactly what rights the law must protect to be considered a society governed by the rule of law. Some, especially those active in the rule of law community, define the most important obligation as one of equal treatment regardless of gender or economic, racial, or religious status.²⁹ While most would agree that equality is an important value, many disagree on exactly what forms of equality are necessary to the rule of law. In many societies, unequal treatment is a cultural fact that there is no popular will to change. Others define the necessary rights substantively – for instance, the right to security in one's person³⁰ or the right to free speech³¹ – but doing so is unlikely to avoid disputes over which rights are essential to establishing the rule of law. US Judge Advocates need look no further than our own, ongoing debates over constitutional rights for an example of how lengthy and divisive social debates over fundamental rights, both egalitarian (e.g. Fourteenth Amendment) and substantive (e.g. First Amendment) can be.

Nevertheless, the deployed Judge Advocate who works on rule of law projects needs to keep in mind that protection of human rights and fundamental freedoms is an important component of the rule of law and that different participants in the rule of law enterprise are likely to have very different understandings of the content of those rights and their relative importance. It is important for deploying Judge Advocates 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,³² and the likely USG views of the obligation, before attempting to undertake a rule of law project. If the country has not become party to the ICCPR, the UDHR should serve as the guiding document for Judge Advocates.³³ 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 US funding,³⁴ and systematic mistreatment of citizens and prisoners is likely to lead to substantial international resistance from non-governmental organizations, international organizations, and coalition partners in any rule of law project.

²⁷ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

²⁸ Dec. 16, 1966, 999 U.N.T.S. 171, available at www2.ohchr.org/English/law/ccpr.htm.

²⁹ UDHR art. 7; Kleinfeld, *supra* note 7, at 38.

³⁰ U.S. CONST. amends. V, XIV, sec. 5; UDHR art. 3.

³¹ U.S. CONST. amend. I; UDHR art. 19.

³² 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 www2.ohchr.org/English/law (last visited August 15, 2008).

³³ 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.”).

³⁴ See, e.g., Leahy Amendment, Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

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.³⁵ 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.³⁶ A state can only be truly said to be governed by the rule of law if the state, and its law, is viewed as legitimate by the populace – if the law is internalized by the people.³⁷ 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 resistance³⁸ (and fuel insurgency).³⁹ 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.⁴⁰ Again, there are strong connections between this element and others, specifically the state's willingness to bind *itself* to the rule of law. It would be unreasonable, for instance, to expect a populace to accept the decisions of the judiciary or the legislature if the executive ignores them.

Second, legitimacy is critical for resolving the 99% of legal disputes that never see a courtroom. Most dispute resolution in any society occurs “in the shadow of the law,”⁴¹ which requires that members of the society have internalized the society's legal rules and are comfortable using them to conduct their affairs. While a functioning court system, for instance, is one level of success for a rule of law project, a society that truly lives under the rule of law is one in which individuals themselves resolve disputes in ways *consistent* with the law even without invoking the judicial system.⁴²

The legitimacy of a nation's legal system is in many ways the ultimate expression of the rule of law, and is likely to take many years, if not decades, to develop. Again, Judge Advocates need look no further than America's own constitutional experience. The constitutional order that

³⁵ HART, *supra* note 25, at 22-24.

³⁶ *Id.* at 54-58.

³⁷ See US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 7-8 (2007 draft); STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 75-76.

³⁸ See JOINT PUB. 3-0, *supra* note 3, at V-26.

³⁹ See FM 3-24, *supra* note 1, at 1-27.

⁴⁰ See HART, *supra* note 25, at 57-58.

⁴¹ STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 78.

⁴² *Id.* at 78-79.

we now take for granted remained fragile for decades after the Constitution's adoption, and many would argue became cemented only after the Civil War and Reconstruction. A deployed Judge Advocate is unlikely to witness the full social acceptance of a legal system in a post-conflict country, but even local acceptance of a single court, police force, or town council is a major step on the road to achieving the rule of law, and Judge Advocates should conduct rule of law projects with this end in mind.

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

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

The two concerns are reflected by two views of the rule of law, a *formalist* one that emphasizes the procedures for making and enforcing law and the structure of the nation's legal system or *substantive* one, in which certain rights are protected.⁴³ Using the list of rule of law 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 a formalist and substantive requirements for the rule of law, and indeed it is difficult to find someone with a strong substantive approach to rule of law who would not also insist that the state in question follow certain procedures in making and enforcing law. Thus, one set of authors on the subject distinguish between "minimalist" approaches that may be merely formalist and "maximalist" approaches that include both formalist and relatively strong substantive components.⁴⁴

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 rule of law project's goal is either formalist or substantive will vastly affect how the project is carried out (and by whom) and will determine in many regards what strategies will be necessary to ensure the successful completion of the project. As Judge Advocates consider rule of law projects, the formalist/substantive distinction needs to remain at the forefront of their thinking.

As one might guess, rule of law projects with formalist goals are, all other things being equal, less likely to result in controversy and confusion among both international and host-nation participants than projects with substantive goals simply because there is less disagreement over the formal criteria for the rule of law than there is regarding the substantive criteria.⁴⁵ Formalist projects are also much less likely to upset established political power relationships, which means that they are less likely to engender resistance from local, established elites, who may now find themselves at the mercy of their former rivals for alleged wrongs committed under the previous

⁴³ See Paul Craig, *Formalist and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467.

⁴⁴ STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 70-71.

⁴⁵ Robert Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1709-10 (1991).

regime.⁴⁶ Similarly, formalist projects are frequently less likely to threaten the cultural identity of the host nation and its population than substantive projects.⁴⁷ While formalist projects are less likely to result in attack from both the local and international community as being culturally imperialist, it is unlikely in today's environment that purely formalist projects are likely to receive the kind of broad international support they require if they completely ignore substantive rights,⁴⁸ and US law may place explicit limits on assistance to host nations guilty of human rights abuses. Neither model exists in a vacuum; even in undertaking what might at first blush be considered a purely formalist project, participants should consider the substantive ramifications of altering the structure of the legal system.

B. Rule of Law Operations

There are as many types of rule of law activities as there are definitions of the rule of law, and rule of law activities reach as many types of conduct as the rule of law itself.

The nature of the rule of law efforts that Judge Advocates are part of will vary based on the nature of the operational environment. In an area subject to active combat, for instance, the rule of law effort may be no more than providing order. In a post-conflict environment, it may include setting up police and judicial training programs, assisting a new legislature pass new laws, or undertaking public relations campaigns to heighten the awareness of the rule of law. The kind of all-consuming occupations that the US undertook in Germany and Japan following World War II are not likely models for future campaigns, suggesting an approach that is more openly cooperative with the host nation and its population.⁴⁹ 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. In many nations, many industries are traditionally public, meaning that rule of law values are implicated in the *operation* of those industries. Many types of reform projects fall under the umbrella of "rule of law," and they are as varied as the problems they are intended to address.

One thing that will be constant for every Judge Advocate engaged in a rule of law mission will be that it takes place in an area subject to US, coalition, and host nation military operations. As a result, a Judge Advocate concerned with the rule of law (as all lawyers should be) must necessarily concern himself not only with the operation of the host nation's legal institutions, but with the conduct of the operational force.

There are countless aspects of rule of law operations, but this *Handbook* emphasizes three that are particularly salient to deploying Judge Advocates: the role of rule of law operations

⁴⁶ Kleinfeld, *supra* note 7, at 38.

⁴⁷ *See id.* at 38 (citing the example of gender equality as a threat to some conceptions of Islamic culture).

⁴⁸ 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).

⁴⁹ STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 3.

within full spectrum operations, the operational impact of rule of law operations, and the need to adopt an approach to the rule of law that focuses on effects rather than institutions.

1. *Rule of Law Activities 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 different, 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 be 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 US forces.⁵⁶ Stability operations are also a critical component of counterinsurgency.⁵⁷

The conduct of stability operations is dictated by *DOD Directive 3000.05*, which defines stability operations as: “Military and civilian activities conducted across the spectrum from peace

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-28 – GL-29. *See also* U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, para. 4.2 (28 Nov. 2005) [hereinafter DOD DIR. 3000.05] (“Stability operations are conducted to help establish order that advances US interests and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, *rule of law*, democratic institutions, and a robust civil society.”) (emphasis added).

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

⁵⁴ *Id.* at IV-29.

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.”) (emphasis in original).

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.”).

to conflict to establish or maintain order in States and regions.”⁵⁸ *DOD Directive 3000.05* includes three general tasks involved in stability operations: rebuilding indigenous institutions (including various security forces, correctional facilities, and judicial systems); reviving and rebuilding the private sector; and developing representative government institutions.⁵⁹

Many rule of law operations will take place as components of stability operations, helping to establish (or reestablish) the host nation’s capacity to maintain the rule of law. 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 rule of law operations within the context of stability operations requires that any rule of law effort be coordinated with other activities (such as security and the restoration of civilian infrastructure and essential services)⁶⁰ and with other agencies. Within the Army, Civil Affairs forces have a particular expertise in many aspects of stability operations, and Judge Advocates should seek out Civil Affairs personnel (who are frequently attached to both Army and Marine Corps units) when tasked to conduct rule of law activities as part of stability operations.⁶¹

It is DOD policy that “[m]any stability operations tasks are best performed by indigenous, foreign, or US civilian professionals. Nonetheless, US military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.”⁶² Thus, Judge Advocates can expect a particularly close working relationship with a multitude of not only US, but also coalition, non-governmental, and indigenous participants in rule of law projects.

But rule of law activities have a place across the full spectrum of operations, not just within stability 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 operations.⁶⁴ Similarly, in COIN, “victory is achieved when the populace consents to the

⁵⁸ DOD DIR. 3000.05, *supra* note 52, para. 3.1.

⁵⁹ *Id.* at para. 4.3.

⁶⁰ See STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 9; JOINT PUB. 3-0, *supra* note 3, at xii (“An essential consideration is ensuring that the longer-term stabilization and enabling of civil authority needed to achieve national strategic objectives is supported following the conclusion of sustained combat. These stability and other operations **require detailed planning, liaison, and coordination** at the national level and in the theater among diplomatic, military, and civilian leadership.”)(emphasis in original); FM 3-24, *supra* note 1, at 5-2 (the second stage of COIN “expands to include governance, provision of essential services, and stimulation of economic development.”).

⁶¹ 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).

⁶² DOD DIR. 3000.05, *supra* note 1, 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.”).

⁶³ JOINT PUB. 3-0, *supra* note 3, at IV-29 (emphasis added).

⁶⁴ *Id.*, at A-4 (“Committed forces must sustain the legitimacy of the operation and of the host government, where applicable.”).

government's legitimacy and stops actively and passively supporting the insurgency."⁶⁵ In this sense, for US forces engaged in COIN, the most important of the seven effects described above is the last one – that 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 rule of law and the legitimate exercise of force, rule of law activities not only include formal projects to rebuild host nation capacity, but also actions to assure that US, coalition, and host nation security forces themselves operate in ways that encourage respect for the rule of law while engaged in the full spectrum of operations, including offensive and defensive operations.

Efforts to build a legitimate government though 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 rule of law 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 rule of law within its area of control is dependent in large part on its *own* compliance with legal rules restricting soldiers' (and the command's own) discretion 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 US forces work closely with coalition and host nation forces, the role of Judge Advocates 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, Judge Advocates can help to define rules for the use of force by joint US/host nation operations – which are likely to eventually develop into host nation-only operations – that comply with US, international, and host nation law; by helping to develop training programs in the legitimate use of force by host

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.”).

nation security forces; and by mentoring host nation personnel in the legitimate use of force. Throughout the period of US military involvement, Judge Advocates will further the rule of law mission by advising commanders on the legal restrictions on the use of force by US forces, thereby setting the appropriate example for host nation forces.

Rule of Law and Detention Operations in Iraq

The Rule of Law section of Task Force 134 was created in December 2006. The operations of the Task Force Rule of Law team were focused on four lines of operations.

The first line of operations consisted of initiatives to improve the capacity and quality of the Iraqi criminal justice system. This line of operation was critical to the counter-insurgency mission of the Task Force. The goal was to assist the Government of Iraq to improve criminal justice systems capable of trying and detaining insurgents. Developing Iraqi capacity was a critical part of the desired end state of having the Iraqi justice sector investigate, adjudicate, and punish convicted insurgents in a legitimate manner versus holding large numbers of insurgents in coalition detention.

The second line of operations concerned the Central Criminal Court of Iraq (CCCI) and has as its goal to have CCCI recognized as the premier felony court in Iraq and as independent and fair by the international and Iraqi community.

The third line of operations concerned parole and conditional release of coalition detainees. The goal of this line of operation was to release from coalition detention former insurgents under conditions that minimized the likelihood that they would return to the fight. The method that was developed with considerable coordination with the Chief Justice of Iraq was a pledge by the detainee to an Iraqi judge (and enforceable in Iraqi courts) that he would not violate the peace if released. This pledge program assisted in reducing the numbers of Iraqis held in coalition detention who posed a marginal threat to the coalition or Iraq.

The final line of operations concerned due process in coalition detention operations. The Rule of Law team assisted the Task Force Legal Advisor in developing improved administrative due process for detainees held by the coalition. The Rule of Law team met frequently with the Iraqi Ministries of Justice and Human Rights to explain the improvements in detainee due process. The Rule of Law team led the MNF-I efforts to develop a strategy for treatment of those detainees who posed a serious and enduring threat to the United States.

2. Operational Impact

Although ensuring that operations are carried out with legitimacy in mind has long-term benefits, there is no denying that there may be short-term costs. It is imperative that Judge Advocates explain to their commanders that any rule of law effort will require the dedication of resources in order to be successful. In addition to drawing away resources that might otherwise be devoted to combat operations or other stability operations, rule of law operations may impact traditional operations in other ways as well.

US 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. Recalling Joint Publication 3-0's phases of joint operations, while *Dominant* is an important aspect of combat operations, transition into the next phases, *Stabilize* and ultimately *Enable Civil Authorities*, include a reduction in dominating activities.⁶⁸ A recognition of the role of force in the *long-term* resolution of conflicts is reflected in the addition of three new Principles of Joint Operations in 2006: *Restraint*, *Perseverance*, and, of course, *Legitimacy*.⁶⁹ When conducting stability operations generally, and rule of law operations in particular, the relationship between commanders and the local population (and other rule of law participants) must be one of cooperation and persuasion rather than commanding and directing.⁷⁰

Because rule of law operations are inherently cooperative enterprises, rule of law practitioners must have flexibility not only as to possible end states, but also 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, whatever means for accomplishing the rule of law must be ones that the local population views as legitimate. The means, as well as the goal, of rule of law activities must be meaningful to those who would be governed by the legal system in question. That requirement applies both 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 Judge Advocates to establish up front that efforts to inculcate the rule of law through deed rather than word are likely to have a very real operational cost, in the form of both reduced mission capability and potentially even in the form of casualties.⁷¹ The criminals who go free every day in the United States because of illegal searches – and the police officers who are killed because they are limited in their power to search – are all the reminder that anyone needs of the human cost of a state that is itself bound by legal rules. Similarly, US commanders will need to be prepared to respect – and have their power constrained by – host nation legal rules as host nation legal institutions assert their authority.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

⁶⁸ JOINT PUB. 3-0, *supra* note 3, at IV-26-IV-29 and fig. IV-6. See also STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 136 ("Winning wars and maintaining order are two very different tasks.").

⁶⁹ JOINT PUB. 3-0, *supra* note 3, at II-2. The nine Principles of War are: Objective, Offensive, Mass, Economy of Force, Maneuver, Unity of Command, Security, Surprise, and Simplicity. See also STROMSETH, WIPPMAN & BROOKS, *supra* note 9, at 135 ("[S]ecurity cannot depend solely or even primarily on coercion.").

⁷⁰ LtCdr 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.

term, while the benefits of those efforts are likely to be realized only over the very long term. It may be particularly hard for commanders to accept those short-term and certain costs in exchange for long-term and uncertain benefits. It will be up to Judge Advocates to educate their commanders about the importance of the rule of law mission and to prepare them for the costs of undertaking that mission. Commanders need to know 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 rule of law operations than it is as part of a high-intensity conflict.

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

3. *The Importance of Focusing on Effects*

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

Such *institutional* improvements can be valuable, but rule of law projects should ultimately focus on bringing about particular *effects*⁷³ along with a specific end-state.⁷⁴ Thus, it is critical to keep in mind what values are represented by the rule of law so that those values, not some intermediate, institutionally focused objective, drive the rule of law effort.⁷⁵ A nation with beautifully constructed courthouses may nevertheless fail to achieve the rule of law if the judges in those courthouses are either arbitrary or corrupt. The same is true of a well-established police or correctional force that regularly violates citizens' and prisoners' human rights.

Of course, metrics must be "measurable," and some institutional improvements can point to underlying effects. (For instance, attendance and graduation from training programs by judicial 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 rule of law 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 rule of law project is not to bring about institutional change – it is to bring about the conditions described by the term "rule of law".

Focusing on the value of effects and their place in the planning process along with specific objectives or end-states also highlights both the extremely long duration of rule of law projects and the relative inability of armed forces and other rule of law participants to actually

⁷³ "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).

⁷⁴ *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.")

⁷⁵ Kleinfeld, *supra* note 7, at 61-62.

bring about the rule of law. Although adequate resources, security, and thoughtful planning and execution may be *necessary* to rule of law projects, they are not *sufficient* for establishing the rule of law. In the end, the rule of law reflects a recognition among the governed that compliance with and participation in the legal system is valuable. Rule of law projects may help a society move toward that ultimate understanding, but because the law is never successfully imposed at the end of a gun, merely applying greater resources or asserting greater control cannot lead to success, and frequently may hinder it.

III. Key Players in Rule of Law

Rule of law missions typically require broad joint,¹ interagency, intergovernmental and multi-national (JIIM) participation. Involving so many participants has its trade-offs. “It necessitates trade-offs between unity of command and broad burden-sharing. Both are desirable, but each can be achieved only at some expense to the other.”² Judge Advocates should recognize that rule of law operations are not and will never be exclusively military activities, and that other US agencies, international organizations, non-governmental organizations, coalition forces, private sector partners, and host nation agencies, will be part of this collaborative effort on the ground. Indeed, in an environment in which security is not a critical issue, the military is unlikely to play a role in such activities.

Success in the rule of law area comes from a common strategy among all USG and host-nation participants for achieving the rule of law. To maximize resources and capacity and avoid duplication of efforts, each agency should ensure that their activities fit within any USG-approved strategic plan that has been approved by the host nation. A common strategy sets the rules, establishes roles and missions, and goes a long way toward managing expectations. Like most military operations, the focused efforts of all the participants, each of whom brings a unique perspective and skill set, is critical. Each individual needs to understand the roles and responsibilities of the other members of the team. To maximize the effectiveness of each member, rule of law participants should make a concerted effort to develop and maintain strong professional and interpersonal relationships. This is true not only among the USG agency representatives, but also among those representatives and others from the host-nation government, the international community, non-governmental organizations (NGOs), and the private sector. Potential interagency and interpersonal conflicts may be resolved earlier and easier among individuals who have developed a personal affinity with and understanding of others involved in similar activities. Such interpersonal relationships improve communication and cooperation.

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

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

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).

collaboration with key host nation players, giving local national institutions and officials as much responsibility as possible in running their own country's affairs, although he should bear in mind that any USG strategy and policy guidance likely establishes the medium for communication with the relevant host nation officials.

A. US Policy and Players – Interagency Coordination

Joint Publication 3-08 defines “Interagency Coordination” as the “interaction that occurs between agencies of the USG, including the DOD, for the purpose of accomplishing an objective.”³ Planning and executing interagency operations involving many federal departments and agencies is a complicated and difficult undertaking in any environment. This is true because agencies in the USG are organized to manage specific and often narrow instruments of national power. These separate agencies tend to operate in legislatively-created stovepipes (and funding streams). Consequently, they have developed their own agency-specific goals, priorities, terminology, and bureaucratic cultures that reflect and support their core missions, and they may also be constrained by the same laws from performing missions outside their core missions.

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

For the Judge Advocate, understanding the relevant framework for interagency coordination in post-conflict missions is critical to his or her ability to advise the commander effectively and accurately and to execute rule of law related missions. As USG agencies other than DOD usually have the lead on rule of law, appreciating the utility of an effective interagency framework will produce a consistent and aligned national policy when implementing rule of law operations in these post-conflict stability missions. The ramifications of an uncoordinated plan in post-conflict countries will undoubtedly be serious and dangerous. Working effectively with the interagency minimizes waste of limited resources, prevents redundancy in operations, increases legitimacy with the indigenous population, optimizes chances for stability and security, and prevents loss of innocent life.

B. Post-Conflict Interagency Structure

The recent post-conflict experiences in Afghanistan and Iraq have driven policy makers within the US government to improve both the planning and execution of post-conflict stability operations. The Bush Administration, which came into power generally opposed to the notion of using armed forces to engage in nation-building, has acknowledged that the United States “must also improve the responsiveness of our government to help nations emerging from tyranny and war ... and that means our government must be able to move quickly to provide needed

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

assistance.”⁴ Two fairly recent key directives that define the federal government’s organization for stability operations are *National Security Presidential Directive 44* (NSPD-44)⁵ and *Department of Defense Directive 3000.05* (DOD Directive 3000.05). But also relevant is the general framework for interagency coordination set forth in *National Security Presidential Directive 1* (NSPD-1)⁶, which, for example, has been and continues to be, the coordinating framework used for operations in Iraq and Afghanistan because they were planned and commenced before NSPD-44 was promulgated.

1. US National Security Presidential Directive 1 (NSPD-1)

In general, NSPD-1, adopted in February 2001, establishes a framework within the National Security Council for inter-agency coordination. It provides for:

- the composition of the National Security Council (NSC) itself
- the continuation of the Principals Committee (NSC/PC) as the “senior interagency forum for consideration of policy issues affecting national security,” as it has since 1989.⁷
- the continuation of the NSC Deputies Committee (NSC/DC) as the “senior sub-Cabinet interagency forum for consideration of policy issues affecting national security.” The NSC/DC “can prescribe and review the work of the NSC” Policy Coordinating Committees (PCCs) and “also help ensure that issues being brought before the NSC/PC or the NSC have been properly analyzed and prepared for decision.”⁸
- the establishment of a number of Policy Coordination Committees for both regions and functional topics, which serve as the main day-to-day fora for interagency coordination of national security policy by providing policy analysis for consideration by the more senior committees of the NSC system and ensuring timely responses to decisions made by the President

Since the promulgation of NSPD-1, further PCCs have been established, for example, NSPD-44 established a new PCC for reconstruction and stabilization (R&S) operations.

Because operations in Afghanistan and Iraq were planned and commenced before NSPD-44 was promulgated, this pre-existing interagency framework has guided operations in Afghanistan and Iraq. For Afghanistan, the interagency work has occurred within a modified NSPD-1 framework, with day-to-day policy development coordinated by the Afghanistan

⁴ President George W. Bush, Speech at International Republican Institute Dinner, Renaissance Hotel, Washington D.C (May 18, 2005), available at <http://www.whitehouse.gov/news/releases/2005/05/20050518-2.html> (last visited Aug. 28, 2008).

⁵ 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 Sept. 1, 2008).

⁶ National Security Presidential Directive/NSPD-1, Organization of the National Security Council System, Feb. 13, 2001 [hereinafter NSPD-1], available at <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm> (last visited Sept. 1, 2008).

⁷ The NSC/PC consists of the heads of several cabinet-level departments, including the Secretaries of State, Treasury, Defense, as well as the President’s Chief of Staff, and the Assistant to the President for National Security Affairs. Other agency heads “attend meetings pertaining to their responsibilities.”

⁸ The NSC/DC, in large part, consists of the Deputy Secretaries of the departments included in the NSC/PC.

Interagency Operations Group (AIOG). Similarly, for Iraq, policy development and coordination occurs through the Iraq Policy Operations Group (IPOG). Both the AIOG and the IPOG provide policy recommendations to the NSC Deputies Committee, which for these two areas is chaired by the Assistant to the President and Deputy National Security Advisor for Iraq and Afghanistan.

2. *US National Security Presidential Directive 44 (NSPD-44)*

On December 7, 2005, President Bush promulgated NSPD-44, entitled the “Management of Interagency Efforts Concerning Reconstruction and Stabilization.”⁹ NSPD-44 was issued for the primary purpose of improving “coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife.”¹⁰ NSPD-44 provides an overarching interagency coordinating structure to manage reconstruction and stabilization operations. Most important, from a military planning perspective, it designates the Secretary of State as the USG lead for reconstruction and stabilization operations.

NSPD-44 explicitly assigns to the Secretary of State the responsibility to prepare for, plan, coordinate, and implement reconstruction and stabilization operations in a wide range of contingencies, ranging from complex emergencies to failing and failed states, and war-torn countries.¹¹ The State Department is to serve as the focal point for creating, managing and deploying standing civilian response capabilities for a range of purposes, including to advance “internal security, governance and participation, social and economic well-being, and justice and reconciliation.”¹² To execute this directive, the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) was created, and the Secretary delegated authority under NSPD-44 to the Coordinator for Reconstruction & Stabilization.

NSPD-44 established a PCC for R&S Operations, which is co-chaired by the head of S/CRS and a member of the National Security Council staff. This PCC is charged with overseeing and facilitating the integration of all military and civilian contingency planning, and civilian R&S operations, possibly in collaboration with another PCC or other structure in place for a particular country, region, or matter.

NSPD-44 further stresses coordination in conflict mitigation and prevention and planned responses for R&S between the State Department and the Defense Department.¹³ Lastly, the directive highlights the requirement to develop a joint framework for harmonizing R&S plans with military activities.¹⁴

⁹ NSPD-44, *supra* note 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

To implement its mandate under NSPD-44, S/CRS followed a three-pronged approach¹⁵ to would allow the USG to plan, prepare and conduct operations in a stabilization and reconstruction operation. First, various agencies (including DOD) agreed on a “USG Planning Framework for Stabilization and Reconstruction”. The idea behind the Planning Framework was not only to have the ability to plan as a government from the strategic level on down, but also to have a structure within which civilian personnel could be organized, furthering the capacity for expeditionary civilian personnel. Thus, the Planning Framework is a civilian planning template, which allows for planning across sectors for the particular mission, based on defined objectives that directly support USG national interests. This strategic level planning forms the basis for the operational and tactical level planning that goes on at the mission level or gets integrated with COCOM level planning, after it is presented to the NSC Deputies or Principals Committee for approval.

Second, an interagency management system (IMS) was adopted at the NSC Deputies Committee level in order to more effectively coordinate R&S activities among the agencies. The IMS is designed to provide coordinated, interagency policy and program management for highly complex crises and operations that are national security priorities; involve widespread instability; may require military operations; and engage multiple US agencies.¹⁶ The IMS clarifies “roles, responsibilities, and processes for mobilizing and supporting interagency [reconstruction and stabilization] operations,” and provides the structure that personnel fall into when they are called upon to participate in project run pursuant to the IMS. The IMS is comprised of the Coordination of Reconstruction and Stabilization Group (CRSG), which is a PCC-level decision making body that is supported by a Secretariat¹⁷ to support decision and policy making; an Integration Planning Cell (IPC), which deploys to the relevant combatant command to ingrate civilian and military plans; and a field headquarters and implementation elements, called Advance Civilian Teams (ACT) and Field Advance Civilian Teams (FACT), respectively.¹⁸ To support planning elements, S/CRS coordinated with other USG agencies to publish a Post-Conflict Reconstruction Essential Tasks Matrix to assist planners.¹⁹

¹⁵ It’s important to note that, while S/CRS plays an important role in the overall process, it does not establish policy. It co-chairs a NSC PCC on R&S that develops policy initiatives for the NSC decision-making process. For example, the PCC developed the three of its products in different ways. The Integrated Management System (IMS), which was approved by the Deputies Committee, Essential Tasks Matrix, which the PCC coordinated and approved, and the Civilian Reserve Corps concept, which was developed by the PCC, but ultimately had to be approved by the Deputies and Principals Committees.

¹⁶ John E. Herbst, Coordinator for the Office of Reconstruction and Stabilization, Statement Before the House Armed Services Subcommittee on Oversight and Investigations: Stabilization and Reconstruction Operations Learning from the Provincial Reconstruction Team (PRT) Experience (Oct. 30, 2007), available at <http://www.state.gov/s/crs/rls/rm/94379.htm> (last visited September 1, 2008) [hereinafter Herbst Statement].

¹⁷ To facilitate its operations, a Secretariat run by S/CRS will be established for each CRSG. The Secretariat ensures that there is a single channel for providing information, helping to formulate options, and monitoring the implementation of policy decisions. The Secretariat oversees the writing of a unified plan taking account of all U.S. Government capabilities that will be used in the crisis. *Id.*

¹⁸ *Id.*

¹⁹ The Post Conflict Reconstruction Essential Tasks Matrix can be found at: <http://www.state.gov/s/crs/rls/52959.htm> (last visited August 12, 2008), which builds upon the Joint CSIS/AUSA Post-Conflict Reconstruction (PCR) Task Framework” from WINNING THE PEACE: AN

Third, S/CRS is increasing civilian readiness capacity, either to conduct or assist the military with reconstruction and stabilization operations. To that end, the DOS, managed by S/CRS, is coordinating the establishment of the Civilian Response Corps (CRC). The Civilian Response Corps is a group of full-time civilian federal employees in Active and Standby capacity for international R&S work, and, eventually is planned to include individuals from the private sector and state and local governments who will serve as CRC Reservists.²⁰

The CRC will be trained and equipped to deploy rapidly to countries in crisis or emerging from conflict, as well as to participate in Washington and regionally-based planning and collaborative civilian-military exercises, in order to provide coordinated R&S assistance. The CRC will be composed of a plurality of law enforcement and corrections officers, prosecutors and other justice and rule of law personnel, and also by diplomats, development specialists, public health officials, engineers, economists, public administrators, agronomists and others – offering the full range of skills needed to help fragile states restore stability and the rule of law. Because no single government entity has all of the relevant expertise, the Civilian Response Corps is a collaboration of eight departments and agencies: the Department of State, US Agency for International Development, Department of Agriculture, Department of Commerce, Department of Health and Human Services, Department of Homeland Security, Department of Justice, and Department of the Treasury.

The CRC established a pilot program of the Active and Standby components within the Department of State, beginning in 2006. In September 2008, the Active and Standby components expanded beyond S/CRS and the Department of State to other Department of State Bureaus and other US Agencies.²¹ The Active Component is composed of full-time, USUSG personnel who are employed by a US agency to conduct R&S activities compatible with that agency's mission, whose primary duties involve training and planning for, providing direct support to, and conducting USG R&S field operations. Active members are required to be available to deploy worldwide within 48 hours of call-up. The Standby Component also is comprised of full-time USG personnel whose primary duties do not necessarily directly support R&S activities, but who have pertinent expertise and can be called upon to deploy to provide expertise supplemental to other civilian responders. Lastly, the Reserve component will be USG personnel drawn from state and local government entities and private sector.²² During training, Reservists will be hired as temporary appointees, and when deployed, they will be USG term appointees. The CRC Reserves will complement the Active, Standby and other response capacity of US civilian agencies. The Reserves will offer American citizens another opportunity to serve their country and provide the USG with a group of individuals with broader degree and depth of expertise in areas such as public security and rule of law specialties.²³

The pilot Active and Standby components of the CRC within the Department of State have deployed members to Sudan, Chad, Haiti, Lebanon, Liberia, Kosovo, Georgia, Iraq, and

AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION, (Robert C. Orr, ed. 2004). The S/CRS Essential Tasks Matrix is discussed in greater detail in Chapter VI.

²⁰ As of September 1, 2008, the active and standby components has been funded in FY2009 supplemental. The civilian reserve, however, is not yet addressed.

²¹ *Id.*

²² *Id.*

²³ *Id.*

Afghanistan, among others, to assist with conflict prevention and mitigation, and reconstruction and stabilization.

In 2008 Congress provided initial funding for the Active and Standby components of the Civilian Response Corps. In 2009, the Department of State received supplemental funding to be able to:

Establish 100 full-time positions for members of the Active component of the Civilian Response Corps across the participating US departments and agencies. These “first responders” are experts who can deploy to a crisis with as little as 48 hours’ notice.

Train 400 “Standby” members of the Civilian Response Corps in the same departments and agencies. These are current federal employees who volunteer to undertake additional training and to be available to serve in stabilization missions in case of need. Standby Members are deployable within 30 days for up to 180 days.

Although the viability and effectiveness of these deployable civilian personnel remains an issue that only time can determine, they represent significant first steps in enhancing civilian expeditionary capacity. S/CRS itself is described in further detail below.

3. *Department of Defense Directive 3000.5*

The Department of Defense has adopted a parallel set of doctrinal and institutional innovations in the arena of stability operations. In November 2005, the Deputy Secretary of Defense issued Directive 3000.05, entitled “Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations.”²⁴ The directive is an initiative to declare stability operations²⁵ a “core U.S. military mission that the [military] shall be prepared to conduct and support.”²⁶ Moreover, the publication directs stability operations “shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DOD activities.”²⁷ As such, this directive mandates military planners to integrate stability operations with every war plan.²⁸

DOD Directive 3000.5 maintains that military forces are to defer responsibility to appropriate civilian agencies when feasible.²⁹ The directive also calls for the development and employment of field civilian-military teams as a necessary element in post-conflict operations.³⁰

The directive places the Under Secretary of Defense for Policy (USD(P)) and the Chairman of the Joint Chiefs of Staff in charge of DOD stability operations preparedness.³¹ The

²⁴ U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, 2 (28 Nov. 2005) [hereinafter DOD DIR. 3000.05].

²⁵ 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).

²⁶ DOD DIR. 3000.05, *supra* note 24.

²⁷ *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).

²⁸ DOD DIR. 3000.05, *supra* note 24, at 3.

²⁹ *Id.*

³⁰ *Id.*

USD(P) is to advise the Secretary of Defense in the area of stability operations policy, providing the Secretary with a semiannual report on the Department's progress in implementing the directive. The Chairman is to identify and lead the development of DOD capabilities for stability operations, which includes developing joint doctrine for stability operations, overseeing the development and assessment of relevant training, and establishing effectiveness standards to measure overall progress towards building the needed capabilities.³²

While the Directive acknowledges that many stability and reconstruction tasks are more appropriately carried out by civilians, it notes that this may not always be possible in chaotic environments or when civilian capabilities are unavailable.³³ Accordingly, the Directive includes a long list of reconstruction and stabilization undertakings that US military must be trained and equipped to carry out, ranging from rebuilding infrastructure to reforming security sector institutions to reviving the private sector to developing representative government.³⁴

The Directive calls on DOD to coordinate with Office of the Coordinator for Reconstruction and Stabilization (S/CRS) and other civilian agencies and to support the creation of civilian-military teams in the field.³⁵ The Department of Defense recognizes that "military action alone cannot bring longer term peace and prosperity; therefore we need to include all elements of national and institutional power."³⁶

To fulfill this mandate to improve interagency cooperation, the USD(P) "designated the Assistant Secretary for Defense for Special Operations and Low Intensity Conflict (ASD SO/LIC) to lead DOD Directive 3000.05 implementation."³⁷ In turn, the ASD SOLIC established the Stability Operations Capabilities directorate.³⁸

Similarly, all of the services responded to the directive by identifying a proponent for stability operations initiatives. Within the Army, significant restructuring initiatives tied to fulfilling the DOD Directive 3000.50 mandate include establishing a "division within the Army G-3/5 dedicated to stability operations,"³⁹ expanding the Peacekeeping and Stability Operations Institute (PKSOI) at Carlisle Barracks; and 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.⁴⁰ 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.⁴¹ 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

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 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 Apr. 2007), at 5.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 6.

Naval Expeditionary Combat Command (NECC) which includes the Maritime Civil Affairs Group.⁴² Finally, the Marine Corps created “the Center for Irregular Warfare, the Center for Advanced Operational Culture Learning (CAOCL) and an SSTR section within the Headquarters, U.S. Marine Corps.”⁴³

In addition to restructuring, each service addressed the requirement within DOD Directive 3000.05 to improve military doctrine, education and training for stability operations. 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.⁴⁴ Roles and responsibilities of Judge Advocates in stability operations are addressed in Field Manual 1-04, *Legal Support to the Operational Army*, as well as in Field Manual 3.05-40, *Civil Affairs Operations* and in Joint Publication 1-04, *Legal Support to Military Operations*.

Enhanced educational initiatives include expanding language and culture skills training, 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:

- Institutionalize an integrated USG pre-deployment training regimen that is built on Iraq and Afghanistan Provincial Reconstruction Team (PRT) training concepts

- Develop and implement a process for DOD to obtain subject matter experts from other USG agencies to support DOD training and exercises

- Adjudicate requests for interagency integrated training through a single point of contact in each agency

- Develop a USG-wide web-based training knowledge portal that allows participating agencies to have visibility to other agencies’ training opportunities.⁴⁵

All the services have also incorporated individual⁴⁶ 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.”⁴⁷ Ultimately, these updates to unit structure, doctrine, training, and education reflect the fact that DOD Directive 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.”⁴⁸

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* 11-12.

⁴⁵ *Id.* at 16-7.

⁴⁶ 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.

⁴⁷ *Id.* at 17.

⁴⁸ *Id.* at 4.

4. **US Officials Influencing Post-Conflict Operations**

As explained in the previous section, the USG has promulgated guidance that embraces post-conflict operations. Today, in addition to Congress, there are an extensive number of US governmental offices and individuals that may influence post-conflict and stability policy. Also critically important is the role of the National Security Council. What follows is an overview of some of the relevant directives, offices or positions at the NSC and at USG agencies.⁴⁹ Following this listing, a few key agencies are described in greater detail.

National Security Council (NSC) System⁵⁰

➤ *National Security Council*

- NSC Principals Committee
- NSC Deputies Committee
 - NSC/Policy Coordination Committees (PCCs) for different regions of world
 - Afghanistan Inter-Agency Operations Group (AIOG)
 - Iraq Policy and Operations Group (IPOG)
 - NSC/PCCs for functional topics
 - Reconstruction and Stabilization Operations
 - Democracy, Human Rights and International Organizations
 - Afghanistan Interagency Operations Group

Department of Commerce (DOC)

➤ *Secretary of Commerce*

- Afghanistan Investment and Reconstruction Task Force
- Iraq Investment and Reconstruction Task Force

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: J1-J8
- Under Secretary of Defense for Policy
 - Assistant Secretary for Legislative Affairs
 - Assistant Secretary for Stability Operations and Low Intensity Conflict
 - Deputy Assistant Secretary of Defense for Stability Operations
 - Office of General Counsel

Department of Justice (DOJ)

➤ *Attorney General*

⁴⁹ List modified from The Partnership for Effective Peacekeeping, *US Government Officials Who Impact Peacekeeping and Peacebuilding Policy Decisions* (Dec. 2004), available at <http://www.effectivepeacekeeping.org/bn-us/> (last visited September 1, 2008).

⁵⁰ See NSPD-1, *supra* note 6.

- 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, US Marshalls 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)

Department of State (DOS)

➤ *Secretary of State*

- The Director of U.S. Foreign Assistance (F)
- War Crimes Issues (S/WCI)
- U.S. Global AIDS Coordinator (S/GAC)
- Policy Planning Staff (Special Projects) (S/P)
- Intelligence and Research (INR)
- Coordinator for Reconstruction and Stabilization (S/CRS)
- Counterterrorism Coordinator (S/CT)
- Legal Adviser
- Under Secretary for Arms Control and International Security Affairs
 - Political-Military Affairs (PM)
 - International Security and Nonproliferation (ISN)
 - Verification, Compliance and Implementation
- Under Secretary for Political Affairs
 - Assistant Secretaries of Regional Offices (AF, EUR, NEA, WHA, EAP, SCA)
 - Country desk officers
 - Iraq (NEA/I), further divided into sections, focusing on different issues, e.g., political-military affairs, political affairs, and provincial reconstruction teams.
 - Afghanistan (SCA/A)
 - International Organizations (IO)
 - International Narcotics and Law Enforcement Affairs (INL)⁵¹
 - Civilian Police and Rule of Law (CIV)
 - Afghanistan and Pakistan (AP)
 - Iraq Programs (I)

⁵¹ INL has the lead for DOS on many, if not most, of the rule of law activities currently in Afghanistan and Iraq, funding DOJ and other actors to carry out programs.

- Africa, Asia and Europe (AAE)
- Americas Programs (LP)
 - Policy, Public and Congressional Affairs
- Under Secretary for Public Diplomacy and Public Affairs (R)
 - International Information Programs (IIP)
 - Public Affairs (PA)
 - Education and Cultural Affairs (ECA)
- Under Secretary for Global Affairs
 - Population, Refugees and Migration (PRM)
 - Democracy, Human Rights and Labor (DRL)
 - Oceans and International Environmental and Scientific Affairs (OES)
 - International Women's Issues (G/IWI)
 - Office to Monitor and Combat Trafficking in Persons (G/TIP)
- Under Secretary for Economic, Business and Agricultural Affairs (E)
 - Economic, Energy and Business Affairs (EEB)
- Under Secretary for Management

Department of Treasury (DOT)

➤ *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

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

➤ *Director of the OMB*

- National Security Programs
 - International Affairs Division
 - National Security Division

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

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

C. US Governmental Agencies Involved in Rule of Law

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

1. *Department of State*

The Department of State (DOS) is responsible for planning and implementing US foreign policy. As described above, NSPD-44 assigns the DOS as the pivotal coordinator of US reconstruction and development assistance, including rule of law, for present and future conflicts. But, for Afghanistan and Iraq, the coordination mechanisms in place prior to NSPD-44 continue to control, e.g., NSPD-1. The DOS has the mandate to prepare for, plan, coordinate, and implement reconstruction and stabilization operations in a wide range of contingencies, including disaster relief emergencies, failing and failed states, and post-war arenas. Thus, the DOS 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 US military may be involved, the DOS will coordinate with the DOD to synchronize military and civilian participation.

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

- **Informing US decision makers of viable options for stabilization activities**
- **Coordinating US efforts with those of other governments, international and regional organizations, NGOs and private companies**
- **Seeking input from individuals and organizations with country-specific expertise**
- **Leading development of a robust civilian response capability with a prompt deployment capacity and civilian reserve**
- **Gleaning lessons learned and integrating them into operations**
- **Coordinating and harmonizing military and civilian participation**
- **Resolving relevant policy, program or funding disputes among US agencies and departments**

Congress funds rule of law programs and related activities primarily through appropriations for the DOS. The Director of Foreign Assistance (F) has overall responsibility for coordinating the funding for US foreign assistance programs, including rule of law programs and activities. It works closely with the DOS bureaus responsible for designing and implementing this assistance – typically INL, the appropriate regional bureau, or USAID. These entities then identify mechanisms through which to execute the assistance, e.g., through transfers to other agencies (such as the DOJ), contracts, and grants. In Afghanistan and particularly Iraq, DOD, also discussed below, was given specific legislative authority to execute many rule of law 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, Judge Advocates should be cautious about trying to extrapolate programs and initiatives from those operations into other conflict settings where the military is deployed such as the Horn of Africa, Sub-Saharan Africa, Latin America and the Philippines.

Within the State Department, there is no single office charged with planning a rule of law operation, although the Bureau for International Narcotics and Law Enforcement Affairs (INL)

often has the lead. If the mission in question qualifies as a reconstruction & stabilization mission, however, the Country Reconstruction and Stabilization Group will be the hub for planning.⁵²

Within the purview of the Under-Secretary for Political Affairs (P) are the regional bureaus and the relevant Country Desk Officers, who have much of the responsibility for coordinating efforts on a country-by-country basis. But functional bureaus, such as INL (also falling under P), may take the lead for particular issues or programs in a country. For example, INL has offices focused on Afghanistan and Iraq that design, implement and manage programs addressing traditional rule of law activities, such as justice reform and law enforcement. Those offices in INL manage and oversee the majority of the rule of law funds designated for those two countries. INL also manages and oversees rule of law programs (police, criminal justice and corrections) in Pakistan, Kosovo, Haiti, Liberia, Sudan, and Lebanon. It partners with DOJ, USIP, and a variety of other non-governmental organizations in implementing rule of law programs in Africa, South and Central Asia, Eastern Europe, and Latin America. In addition to the subject matter experts in its program offices, INL has three senior advisors in the Office of Civilian Police and Rule of Law, dedicated to providing advice and subject matter expertise on international policing, criminal justice development, and corrections reform. While the guidance from State's regional and functional bureaus provides the framework within a country for carrying out US missions, programs, and policies in a country, it is the Country Team system that provides the foundation for interagency consultation, coordination, and action that actually executes.

Within the purview of the Under-Secretary for Global Affairs, there are offices which may also play a role in rule of law related activities. DRL has smaller programs pertaining to governance issues in Iraq and Afghanistan. PRM manages and oversees any humanitarian assistance that may be required to care for refugees or to assist in their resettlement. G/IWI brings awareness and attention to women's issues. For example, it has supported programs to build the capacity of Iraqi women so that they can participate more fully as political and economic leaders. It is also providing support to programs aimed at eliminating violence against women and increasing awareness of gender-based violence.

a) Bureau for International Narcotics and Law Enforcement Affairs (INL)

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

INL advises the Secretary of State, other bureaus in the DOS, and other USG departments and agencies on policies to combat international narcotics and crime, and develops programs to support those policies. INL programs support two of the Department's strategic goals: (1) achieving peace and security and (2) governing justly and democratically. Counternarcotics and anticrime programs also complement the war on terrorism, both directly and indirectly, by promoting modernization of, and supporting operations by, foreign criminal justice systems and law enforcement agencies charged with the counter-terrorism mission.

INL works with law enforcement, judges, prosecutors, defense attorneys, border security officials, financial intelligence units, anticorruption units, narcotics control units, economic development organizations, non-governmental organizations, and other criminal justice system

⁵² See *supra* note 17 and accompanying text.

counterparts to reinforce host nation governments' efforts to promote the rule of law. INL also funds and oversees US participation in civilian police operations that are assisting U.N. peacekeeping missions.

INL's programs are tailored to bolster capacities of countries around the globe through multilateral, regional, and country-specific programs. For example, the International Narcotics Control element of the US foreign assistance program enhances the institutional capabilities of foreign governments to define and implement their strategies and national programs to prevent the production, trafficking, and abuse of illicit drugs. It also includes strengthening the ability of law enforcement and judicial authorities in both source and transit countries to investigate and prosecute major drug trafficking organizations and their leaders and to seize and block their assets.

In addition to playing a key role in early development and management of post-conflict police and corrections programs since the 1990s, such as in Kosovo and Haiti, INL has played an increasingly important role in US rule of law operations in recent years, including in Afghanistan, Iraq, Sudan, and Lebanon.

In Afghanistan, INL supports regional training centers in Kandahar, Konduz, Jalalabad, Gardez, Bamiyan, Herat and Mazar-i-Sharif; a Central Training Center in Kabul; and a Forward Operating Base in Islam Qala. INL efforts in Afghanistan focus primarily on providing salary and logistical support for more than "500 police training advisors and mentors" who "engage with local Afghan police officials to develop skills and capacity to extend the rule of law throughout Afghanistan."⁵³ In addition to training police in the field, INL works with the Afghan Ministry of Interior on payroll and rank reform.⁵⁴ INL programs in Afghanistan are not limited solely to working with the Afghan National Police (ANP). INL is also the largest single provider of rule-of-law assistance in Afghanistan, maintaining a full-scale program focused on nationwide criminal justice sector development. Based in Kabul and in five provinces, INL supports around 70 US justice and corrections advisors for training, legal reform, infrastructure support, and capacity-building of the Ministry of Justice, Attorney General's Office, the Supreme Court,⁵⁵ the Central Prison Directorate, and provincial and district justice systems.

In Iraq, INL's mission is to help the Government of Iraq develop a criminal justice system that is sufficiently fair and effective that Iraqi citizens will turn to their courts and legitimate government institutions, not militias or other forms of "alternative" justice, to resolve their disputes. INL provides assistance on all three major aspects of criminal justice development – police, courts, and prisons – and on some anti-corruption matters as well. With respect to police, INL efforts focus on funding personnel for CENTCOM's Civilian Police Assistance Training Teams (CPATT). These police advisors help "advise, train, and mentor the Iraqi Police Service, Ministry of Interior, and Department of Border Enforcement."⁵⁶ Additionally, INL provides funds to support the Major Crimes Task Force, a USG, DOJ-led interagency law enforcement task force that advises specially vetted Iraqi police on the investigation of high-

⁵³ Fact Sheet, Civilian Police and Rule of Law Programs, Jan. 2, 2008, *available at* <http://www.state.gov/p/inl/rls/fs/98167.htm> (last visited August 28, 2008).

⁵⁴ *Id.*

⁵⁵ USAID has purview of Supreme Court reform in Afghanistan.

⁵⁶ *Id.*

profile crimes.”⁵⁷ On the corrections side, through interagency agreements, INL has provided funds to DOJ to deploy corrections advisors and trainers to work with the Iraqi Corrections Service (ICS) to help ensure that Iraqi prisons conform to internationally accepted standards of humane treatment. With respect to courts and the judiciary, INL supports a broad range of programs to assist the Iraqi judiciary in developing skills to more effectively investigate and process criminal cases, administer the courts and the judiciary, assist the Government of Iraq with court and judicial security needs, and assist the judiciary in better coordinating with Iraqi police and corrections entities. Finally, INL supports a number of programs to help the Iraqi government combat corruption.

b) Office of the Coordinator for Reconstruction and Stabilization (S/CRS)

The Secretary of State created the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) in order “to enhance our nation’s institutional capacity to respond to crises involving failing, failed, and post-conflict states and complex emergencies.”⁵⁸ Its mission is to “lead, coordinate, and institutionalize USG civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife so they can reach a sustainable path toward peace, democracy, and a market economy.”⁵⁹ Although central to DOS’s long-term approach to reconstruction, S/CRS is not tasked with such activities in Afghanistan or Iraq.

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

- **Building standing operational capabilities for rapid civilian response, including: Active, Standby and Reserve responders with specialized technical skills, coordinated among partner agencies**
- **Creating a monitoring system to identify states at risk of instability; Developing the Interagency Conflict Assessment Framework for use by different USG department and agencies to work together to reach a shared understanding of a country’s conflict dynamics and consensus on potential entry points for additional USG efforts.**
- **Developing a Strategic Planning Template for use in preparing and running missions, as well as a doctrine for joint civilian-military planning**
- **Creating interagency mechanisms, including the Interagency Management System, to manage operations in Washington at the interagency level. with the military at Regional Combatant Commands, and in the field**
- **Providing consulting services for State Bureaus facing actual crises**

⁵⁷ *Id.*

⁵⁸ See Department of State, Office of the Coordinator for Reconstruction and Stabilization website, at <http://www.state.gov/s/crs/> (last visited Sept. 1, 2008).

⁵⁹ Department of State, Fact Sheet, Office of the Coordinator for Reconstruction and Stabilization, March 11, 2005 (S/CRS), available at <http://www.state.gov/s/crs/rls/43327.htm> (last visited Sept. 1, 2008).

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

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

2. **United States Agency for International Development (USAID)**

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

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

USAID has rule of law and justice sector assistance programs in more than 100 countries.⁶⁰ Ordinarily USAID provides its assistance through the use of private contractors. This effort is directed towards four primary goals: to promote justice and human rights through the rule of law; to promote citizen voice, advocacy and participation; to strengthen democratic, accountable and competent governance; and to expand political freedom and competition.⁶¹

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

⁶⁰ USAID is supporting rule of law operations in both Iraq and Afghanistan. See Provincial Reconstruction Team http://www.usaid.gov/iraq/pdf/iraqrpts_1007.pdf; Press Release, Judge Walks Eight Days for Rule of Law Training, (Aug. 8, 2008), available at <http://afghanistan.usaid.gov/en/Article.353.aspx> (last visited Aug. 28, 2008).

⁶¹ In FY 2008, USAID increased its budget request for democracy and governance programs to \$1.447 million. USAID, Governing Justly and Democratically Summary of FY2009 Request, available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/FY2009GJD_Request_Summary.pdf (last visited Aug. 28, 2008).

governance, responding to the needs of the transition, and working closely with other interagency partners.

Longer-term efforts to establish the rule of law are carried out by the USAID Field Mission in country, with support from the Office of Democracy and Governance (DCHA/DG). The beginning is to support local efforts to place the rule of law on the political agenda of the country to be affected. USAID wants to help people decide for themselves that the rule of law is essential for development, that genuine progress in advancing the rule of law is achievable, and that international cooperation towards that end is useful. Since local leadership on these issues is critical for program interventions to be sustained over time, USAID supports strategic planning and coordination processes for justice sector reform. USAID assistance efforts are focused on reforming laws and legal procedures, in particular to introduce open trials, and public, oral and adversarial processes where defendants have the right to confront and challenge evidence and witnesses. Next is an effort to reform and strengthen the judiciary and judicial institutions aimed at producing an independent, capable, competent and honest justice system, including courts, prosecutors, police, ministries of justice, judicial councils, and other oversight institutions. A key aspect here is the transparency of judicial selection and performance, along with improving the administration and management capacity of these institutions. Moreover, USAID supports public awareness, access to justice, and advocacy programs to support for reforms and addressing the needs of citizens, and has supported improved legal education to increase practical skills and to improve professional ethics.⁶² USAID also supports the protection of human rights, through direct interventions to address immediate needs, and by building the capacity of local human rights organizations and institutions.

a) USAID Programs in Iraq

USAID has several programs aimed at facilitating democratic transformation in Iraq, having worked to support the constitutional referendum and two national elections, in 2005; several capacity-building programs; and one program assessing the nature of community conflicts in order to build conflict mitigation networks.⁶³

On the economic front, USAID has worked with the Department of the Treasury, and other agencies to help build Iraqi governing capacity, particularly at the Central Bank of Iraq and Ministry of Finance. Assistance has included: for the Ministry of Finance, the design and placement of a Financial Management Information System (FMIS), to track its budget and expenses; technical assistance for Iraqi World Trade Organization accession; and a private-sector development program, known as *Izdihar* (“prosperity” in Arabic), which has helped provide more than \$150 million in micro-loans since 2003,⁶⁴ along with the establishment of microfinance institutes. USAID has also had infrastructure programs, which, for example, have focused on electrical generation, sewage treatment, and water treatment systems.

⁶² OFFICE OF DEMOCRACY AND GOVERNANCE, US AGENCY FOR INTERNATIONAL DEVELOPMENT, OCCASIONAL PAPERS SERIES, DOC. #PN-ACR-220, ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW 2-6, (Nov. 2002).

⁶³ <http://www.usaid.gov/press/releases/2007/pr071009.html> (last visited Aug. 28, 2008)

⁶⁴ <http://www.usaid.gov/press/releases/2008/pr080325.html> (last visited Aug. 28, 2008).

USAID has also had programs focused on strengthening the essential primary health care services throughout Iraq, supporting immunizations, and improving access to education through rehabilitating schools and providing textbooks.

Of particular interest to Judge Advocates engaged in rule of law work is USAID's Iraq Rapid Assistance Program (IRAP). It is a two-year, \$130 million program that will allow Provincial Reconstruction Teams (PRTs) and embedded Provincial Reconstruction Teams (e-PRTs) to provide grants in support of activities that meet essential needs in the PRTs' and e-PRTs' areas of operation. IRAP will allow PRTs and e-PRTs to design and generate grant proposals and provide funding with speed and flexibility, while maintaining administrative and management control.

In coordination with DOS, a database was created, which includes information on IRAP.⁶⁵ Specifically, the database provides information on type of grant proposals being funded under this mechanism as well as copies of all proposals received from PRTs/ePRTs in its database. It also includes the policy guidelines for ranking of proposals.

b) USAID Programs in Afghanistan

In Afghanistan, USAID has engaged in economic infrastructure projects, economic growth programs, and improvements of educational and health service capacity. Economic infrastructure projects include: rehabilitating roads; expanding access to reliable, low-cost electricity; and establishing irrigation systems to improve lands and health of livestock. USAID's economic growth programs assist Afghanistan's businesses with credit, training, and other support services; strengthen land titling and property rights; help Afghanistan develop a market-driven agricultural sector by improving linkages between suppliers, producers, and markets and providing farmers with improved farm technologies and increased access to financial services; work with Afghanistan to increase revenue collection; improve the legal and regulatory framework to increase private sector investment, and build the government's capacity to manage the economy.

Its improvements to educational and health service capability are multifold. In terms of education, USAID has constructed or refurbished over 680 schools; distributed more than 60 million textbooks; created an accelerated learning program which is made up by more than 50% women; supported more than 45,000 students in community-based education classes in areas where there is no access to formal schools; implements the Ministry of Education's teacher training program in 11 provinces; and supported more than 50,000 teachers in the formal school system. In terms of health, USAID has constructed or refurbished over 670 clinics throughout the country and established over 360 health facilities. USAID has also trained over 1,000 midwives to work in hospitals and clinics throughout the country.

Besides educational program, USAID also has programs that support the empowerment of women in that country, from basic education to training programs for female judges and journalists. USAID also has programs to foster the growth of self-help savings and investment groups for women.

⁶⁵ The database is at: <http://iraqdb.msi-inc.com> (last visited Sept. 1, 2008). For log on, a password is required, which you can request by sending an e-mail to the following help desk at: prs-help@msi-inc.com. Passwords are usually created within 24 hours.

Going forward, USAID support will focus on building the capacity of democratic institutions to strengthen governance and civil society and improve the management of human resources, financial resources, and service delivery of priority national ministries and municipalities.

3. *Department of Justice (DOJ)*

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

In cooperation with DOD, DOS, and other interagency actors, and with funding from DOS, DOJ is now engaged in more than 60 countries in overseas rule of law 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 US Marshalls Service (USMS), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) – and 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 International Criminal Investigative Training Assistance Program (ICITAP). The Office of the Deputy Attorney General provides policy oversight and coordination of the Department's many efforts, while DOS, principally through DOS/INL, provides funding for all DOJ capacity-building programs, including those of OPDAT and ICITAP, which place federal prosecutorial and police experts, respectively, in foreign countries for long-term assignments designed to focus on the comprehensive development of all pillars of the criminal justice system.

a) Office of the Deputy Attorney General.

The Office of the Deputy Attorney General issues policy guidance and direction to DOJ components involved in rule of law activities and a representative of that office represents DOJ in the Reconstruction and Stabilization PCC and other interagency policy bodies. The Deputy Attorney General created the position of Counselor for Rule of Law to focus exclusively on this mission, which is also responsible, in particular, for coordination of DOJ activities in Iraq and Afghanistan.

In addition, in the case of Iraq, the Attorney General, at the request of the former Ambassador to Iraq, deployed a senior attorney to serve as the Embassy's Rule of Law Coordinator, who serves as the Ambassador's principal agent for coordination of all rule of law programs and activities in Iraq, whether performed by DOJ components or other departments and agencies represented at the US Mission to Iraq. While serving under the authority of the Chief of Mission, the Coordinator reports directly to the Deputy Attorney General for technical policy guidance.

Finally, the Office of the Deputy Attorney General oversees the activities of the other senior DOJ officials deployed to Iraq, including the Justice Attaché, who is the senior DOJ official in Iraq coordinating DOJ activities in support of the Mission, the Director of the LAOTF, and the Regime Crimes Liaison. Each of these officials reports directly to the Deputy Attorney General.

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

One of DOJ's agencies involved in rule of law in a number of countries is the International Criminal Investigative Training Assistance Program (ICITAP). ICITAP's rule of law 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 in the context of international peacekeeping operations, and (2) the enhancement of capabilities of existing police forces in emerging democracies. Assistance is based on internationally recognized principles of human rights, rule of law, and modern police practices.

ICITAP's training and assistance programs are intended to develop professional civilian-based law enforcement institutions.⁶⁶ This 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 its serves; and (5) create or strengthen the capability to respond to new crime and criminal justice issues. Since its creation, ICITAP has conducted projects in nearly 40 countries.

Individuals assigned to ICITAP have been working in Iraq since 2003. ICITAP personnel previously provided assistance through the Civilian Police Assistance Training Teams (CPATT) under a program funded and managed by DOS/INL, and currently assist in a forensics program.⁶⁷ 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 rule of law in Iraq. It has provided significant assistance in training and mentoring Iraqi Anti-Corruption Units, Iraqi Special Investigative Units, and Facilities Protections Service guards.⁶⁸ Finally,

⁶⁶ 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.usdoj.gov/iraq/icitap.html> (last visited Aug. 13, 2008).

⁶⁷ *Id.*

⁶⁸ *Id.*

ICITAP brings extensive experience and expertise in assessing Iraqi correctional facilities against international prison treatment standards. ICITAP has helped reestablish the Iraq Corrections Service (ICS), worked with Iraqi leaders to develop a national prison system, and 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.

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

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 the Department of Justice in combating terrorism, trafficking in persons, organized crime, corruption, and financial crimes."⁶⁹ OPDAT rule of law goals are related to initiatives in international training and criminal justice development. In this regard, OPDAT provides technical support, training and instruction to judges, court staff, prosecutors, and law enforcement officers on management and substantive and procedural law. The Office is involved in such training programs in South and Central America, the Caribbean, Russia, other Newly Independent States, and Central and Eastern Europe.

OPDAT 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 where they provide full-time advice and technical assistance in establishing fair and professional justice sector institutions and practices.⁷⁰

At this time, there are now 10 RLAs in Iraq. RLAs are assigned to Provincial Reconstruction Teams in Iraq, the Law and Order Task Force (LAOTF), at the Rusafa Rule of Law Complex, and Embassy Baghdad.⁷¹ 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."⁷²

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

⁶⁹ Fact Sheet, OPDAT-OPDAT Mission, *available at* <http://www.usdoj.gov/criminal/opdat/mission/mission.html> (last visited Aug. 13, 2008).

⁷⁰ Fact Sheet, USDOJ: The Department of Justice Mission in Iraq: Office of Overseas Prosecutorial Development, Assistance and Training *available at* <http://www.usdoj.gov/iraq/opdat.html> (last visited Aug. 13, 2008).

⁷¹ <http://www.usdoj.gov/criminal/opdat/recent-achieve/rachieve.html> (last visited Aug. 10, 2008).

⁷² <http://www.usdoj.gov/iraq/opdat.html> (last visited Aug. 13, 2008).

d) *Other DOJ Activities in Iraq*

The Department of Justice's law enforcement components provide special investigative training and assistance to Iraqi law enforcement through its different components. One of the primary activities, through a DOS-funded program, has been the establishment of the Major Crimes Task Force (MCTF), a unique joint Iraqi-US organization, which provides on-the-job training, support and mentoring to Iraqi law enforcement and task force members. Law enforcement agents from the FBI, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the Drug Enforcement Administration (DEA), and the US Marshals Service (USMS), work in close partnership with their Iraqi counterparts to conduct investigations of serious and often highly sensitive criminal acts.

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, MNF-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 serving 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 US Embassy in Baghdad whose mission is to create the Iraq Weapons Investigation Cell to investigate and account for USG-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.

The US Marshals Service (USMS) is also present in Iraq. With funding and policy guidance from DOS/INL, the USMS has provided safe housing for Iraqi judges, security for high-profile prisoners awaiting trial, safe houses and secure courthouses, and implemented a witness security program for Iraqi trials. US Deputy Marshals have conducted numerous courthouse security assessments, advising Iraqis on procedures and technologies that will improve the safety of civil and criminal courts throughout Iraq. The USMS has also trained hundreds of security personnel, including 120 Iraqi police assigned to the Iraqi High Tribunal courthouse.

Finally, the DEA also has a small presence, having delivered courses in intelligence and intelligence analysis to the Iraqi police, and currently supporting the MCTF.

In February 2007, the MNF-I formed the Law and Order Task Force at the Rusafa Rule of Law Complex in order to build Iraqi capacity for independent, evidence-based, transparent, and evenhanded investigation and trial of major crimes before the Central Criminal Court of Iraq. At DOD's request, DOJ has deployed personnel to serve as the Director of the Task Force, as well as other attorney and investigative personnel. The task force, which consists of coalition civilian and military attorneys, paralegals, and criminal investigators, train, mentor and assist Iraqi police and judges to reform, strengthen and expand the rule of law. The LAOTF compound also provides secure housing for judges and a secure courthouse allowing members of the Iraqi judiciary to adjudicate cases in a safe environment.

To support Iraqi efforts to prosecute members of the former Iraqi regime, the Justice Department established the Regime Crimes Liaison Office (RCLO), supporting and assisting the Iraqi High Tribunal (IHT) with more than 140 personnel at its height who served a variety of advisory, security, investigative and support functions. RCLO is currently in transition into a more supportive role which will continue to advise the IHT until the court has completed its caseload.

e) Other DOJ Activities in Afghanistan

DOJ's largest presence in Afghanistan comes from the DEA, but also present are the FBI, USMS, police investigation trainers/mentors, and Senior Federal Prosecutors. The prosecutors serve as trainers/mentors to a select group of Afghan investigators, prosecutors and judges at the Criminal Justice Task Force (CJTF) and the Central Narcotics Tribunal (CNT) located in Kabul.

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 Department of Defense, 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). FAST 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 are supported and largely funded by DOD, also help with the destruction of existing opium storage sites, clandestine heroin processing labs, and precursor chemical supplies directly related to US investigations.

As of 2008, DOJ has six Senior Federal Prosecutors and two (soon three) senior criminal investigator trainers/mentors at the Criminal Justice Task Force (CJTF) and the Central Narcotics Tribunal (CNT). Each prosecutor serves a minimum one-year tour of duty. To date, Assistant United States Attorneys (AUSAs) have helped the Afghans craft a comprehensive counternarcotics law that created a specialized investigative/prosecutorial task force and a specialized court that has exclusive nationwide jurisdiction for mid and high level narcotics trafficking cases in Afghanistan. With the new laws, 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 AUSA's have also been instrumental in assisting in the removal for trial of narco-traffickers to the United States, including the removal and conviction for narco-terrorism of Khan Mohammed. A member of the Taliban, Mohammed marked the first ever conviction for narco-terrorism in the United States. These experienced prosecutors routinely provide guidance and advice to the Afghan Attorney General, United States Embassy officials, and various US law enforcement entities operating in-country.

The ATF has also some presence in Afghanistan, having completed its first Military Post-blast Investigation Techniques course for all services in Afghanistan recently and more are 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 US Embassy in Kabul, as well as more than 33 Special Agents, technicians, and analysts who serve 90-day 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.

Finally, rotating teams of Deputies from the USMS provide security to personnel at the CJTF, and are helping to establish a judicial security force for the CNT. Additionally, they have provided security design advice for the soon to open Counternarcotics Justice Center in Kabul. This new facility will not only provide a secure environment for the daily activities of the CJTF and CNT, but will also include prisoner detention facilities, secure courtrooms, and a dining facility for the Afghan security forces and judicial personnel.

4. Department of Defense (DOD)

As conceptualized by this *Handbook*, DOD engages in rule of law activities in the full spectrum of operations, both by how it engages in offensive and defensive operations and when it engages in stability operations.

The conduct of offensive and defensive operations in accordance with the rule of law 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.

DOD's policy on rule of law operations conducted in the context of stability operations is most completely stated in DODD 3000.05, *Military Support for Stability, Security, Transition, and Reconstruction*. This directive establishes DOD policy, provides guidance on stability operations and assigns responsibilities within DOD for planning, training, and preparing to conduct and support stability operations pursuant to the legal authority of the Secretary of Defense. The Directive establishes DOD policy that stability operations are a core US military mission that shall be given priority comparable to combat operations, and are to be explicitly addressed and integrated across all DOD activities including doctrine, organizations, training, education, exercises, material, leadership, personnel, facilities, and planning.

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

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

a) Judge Advocates

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

- **Determining which 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 non-functioning;**
- **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 to HN judges, prosecutors, defense counsel, legal advisors, court administrators, and police and corrections officials, in light of international legal obligations and human rights standards and when necessary, providing assistance to improve training;**
- **When necessary, serving as legal advisors for transitional courts;**
- **Advising US military commanders and others on the application of international law, US domestic law, and HN law that must be considered in restoring and enhancing rule of law in the HN;**
- **Advising US military commanders and US, 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, and**
- **Supporting the training of US personnel in the HN legal system and traditions.⁷³**

Further, because they serve as legal advisors to commanders, Judge Advocates have a special role in assisting US forces to comply with the rule of law in their own offensive and defensive operations or in joint US/host nation operations.

b) Civil Affairs

Military Civil Affairs (CA) units can also play a key role in building host nation's legal capabilities. Capable of supporting strategic, operational, and tactical levels of command, CA units assist long-term institution building through the use of "functional area" teams. The CA functional areas include rule of law, economic stability, governance, public health and welfare,

⁷³ U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY D-2 – D-3 (draft July 2008)

infrastructure, and public education and information.⁷⁴ Civil Affairs doctrine indicates that the rule of law section has the following capabilities:

- **Determine the capabilities and effectiveness of the HN legal systems and the impact of those on civil military operations (CMO).**
- **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 rule of law 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 and 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 rule of law efforts involving US and coalition military, other US agencies, intergovernmental organizations (IGOs), non-governmental organizations (NGOs), and HN authorities.**
- **Assist the Staff Judge Advocate (SJA) in educating and training US personnel in indigenous legal system, obligations, and consequences.**
- **Advise and assist the SHA in international and HN legal issues as required.**
- **Assist the SHA 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.**

⁷⁴ 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.)**⁷⁵

Many Judge Advocates serve in CA units and will be particularly familiar with CA capabilities. For Judge Advocates not part of CA units, they should seek out available CA resources and expertise whenever contemplating a rule of law project.

c) Military Police

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

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

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

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

The MP community conceives of rule of law 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 rule of law 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, inprocessing, 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 rule of law model based on indictments and convictions. While detention operations continue to emphasize proper care and custody of detainees, the rule of law

⁷⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 2-8 – 2-9 (29 Sept. 2006).

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 effectively 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 so that they can be effectively utilized. Typically, within a Brigade Combat Team, there is a Provost Marshall cell and a military police platoon within the Brigade Special Troops Battalion. These Soldiers offer a range of skills on law enforcement techniques, ranging 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 US troops conducting security operations, both on how to effectively conduct police-oriented population engagements and on important matters such as evidence collection and preservation, which 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 furthering rule of law activities.

d) Defense Institute of International Legal Studies (DIILS)

In addition to Military Police, Judge Advocates, and Civil Affairs, the Defense Institute of International Legal Studies (DIILS) can provide rule of law training assistance to host-nation institution building. DIILS' mission is to provide "expertise in over 300 legal topics of Military Law, Justice Systems, and the Rule of Law, with an emphasis on the execution of disciplined military operations through both resident courses and mobile education teams."⁷⁶ DIILS, a part of the Defense Security Cooperation Agency (DSCA), works with US Embassy Country Teams and host nations to provide timely, effective and practical seminars to lawyers and non-lawyers with the goal of teaching operations, including post-conflict reconstruction, within the parameters of international law.⁷⁷

e) All Operational Forces

While Judge Advocates, Civil Affairs personnel, and Military Police may have specialized skills for some specialized roles, rule of law should never forget that it does not take a law degree or years of specialized training to understand what a criminal justice system is supposed to accomplish. The vital role of every Soldier and Marine is recognized in doctrine by DOD Directive 3000.05 and the Field Manual 3-24, *Counterinsurgency*.⁷⁸ OIF and OEF are replete with examples of Second Lieutenants giving classes on human rights to Iraqi police⁷⁹ or

⁷⁶ Defense Institute of International Legal Studies website at <http://www.diils.org> (last visited Aug. 10, 2008).

⁷⁷ *Id.*

⁷⁸ 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.")

⁷⁹ 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 Sept. 1, 2008).

infantry companies partnering with Iraqi police to maintain security in their communities.⁸⁰ If JAs, MPs, or CA personnel fail to mainstream rule of law operations so that the burden is shared by all deployed personnel, they will not only miss out on a tremendously powerful resource of accomplishing the rule of law mission, they run the risk of losing the command's attention to rule of law as merely a "specialized" line of operation.

D. US Embassy and its Country Team

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

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

Assuming there is a US Embassy in the host-nation, the Judge Advocate conducting rule of law operations should ensure close coordination directly or through his chain of command with the pertinent members of the US Embassy Country Team or their offices. The composition of Country Teams may vary from one embassy to the next. For rule of law operations, the key players at the US embassy the Judge Advocate are:

- **The US Ambassador/Chief of Mission**
- **The Deputy Chief of Mission (DCM)**
- **The Political Officer (POL OFF)**
- **The Regional Security Officer (RSO)**
- **Department of Justice (Senior Legal Advisor/Resident Legal Advisor/Judicial Attaché)**
- **The FBI Legal Attaché (Legat)**
- **The Legal Adviser (L, Staffed by DOS - only in Baghdad, The Hague and Geneva)**
- **The Defense Attaché (DATT)**
- **USAID Mission Director**

⁸⁰ 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 Sept. 1, 2008).

- **USAID Democracy and Governance Officer**

Each member of the Country Team has a different portfolio and is bound by the parent organization's authorities, policies, and resources. For example, the Legat is a FBI Special Agent who, as part of his or her portfolio, conducts FBI business writ large. The Bureau of International Narcotics and Law Enforcement Affairs (INL) is also active in the rule of law operations and may or may not be present on a Country Team; the INL Office at Embassies abroad is often known as the Narcotics Affairs Section (NAS). USAID may have several personnel in the country managing a multitude of programs, many pertaining to stability operations. If S/CRS' Interagency Management Framework is utilized in a reconstruction and stabilization operation, forward deployed Advanced Civilian Teams (ACTs) will fall under the authority and control of the Chief of Mission. In the absence of a functioning Country Team, the ACT would form the nucleus until one can be established.

The Judge Advocate who is responsible for aligning the command's rule of law activities with those administered by other USG departments and agencies under Chief of Mission authority must therefore coordinate with be aware of the Country' Team's activities and priorities, either through developing contacts with members of the Country Team or their offices or through his chain of command, in order to develop a cohesive plan or make progress in the identified problem areas. In any event, the DATT is a likely entry point for approaching and dealing with the Country Team.

E. United States Institute of Peace (USIP)

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

To achieve the above goals, USIP "thinks, acts, teaches, and trains," providing a unique combination of nonpartisan research, innovative programs, and hands-on support. USIP provides on-the-ground operational support in zones of conflict, including Afghanistan, Bosnia, Kosovo, Indonesia, Iraq, Liberia, Philippines, Rwanda, Sudan, and the Palestinian Territories. Among many roles and missions, USIP staff and grantees are heavily involved in promoting the rule of law. The USIP premise is that adherence to the rule of law entails far more than the mechanical application of static legal technicalities, but instead requires an evolutionary search for those institutions and processes that will best bring about stability through justice.

According to USIP, the most important objective in the immediate post-conflict period is to establish the rule of law. The initial phase is to be focused on security and stopping criminal behavior. Post conflict states must provide their populations with security, stability, personal safety, and the transparent law enforcement and judicial processes that provide the same protections and penalties for all citizens.⁸¹

⁸¹ See UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 104, ESTABLISHING THE RULE OF LAW IN IRAQ 2-3 (Apr. 2003).

The USIP places particular emphasis on constitution-making in its rule of law projects. The USIP often considers a new constitution to be a key element of democratization and state building in many countries making the transition from conflict, oppression or other major political crises. Drafting a constitution assists in outlining the vision of a new society, defining the fundamental principles by which the country will be reorganized, and redistributing political power. Additionally, the USIP sees the constitution making process provides an opportunity for competing perspectives and claims in a post-conflict or transitional society to be aired and reflected in the state's foundational document. Moreover, creating a constitution can be a vehicle for national dialogue and the consolidation of peace.⁸²

USIP Activities in Iraq and Afghanistan

The USIP has focused on four major areas to help build rule of law in Iraq. First, USIP provided substantial assistance during the constitution making process.⁸³ 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, Cambodia and Rwanda on their constitution making experiences.⁸⁴ Second, USIP helped create the Iraqi Committee on Judicial Independence. The Institute's third primary concern relates to researching a solution with key Iraqi and international policymakers to address the potential property claims from 4 million displaced Iraqis.⁸⁵ 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 regimes human rights abuses.⁸⁶

The USIP has also been heavily involved in rule of law reform in Afghanistan. USIP projects in Afghanistan include the following: developing a framework for establishing rule of law in Afghanistan (2001); locating, reproducing, and distributing copies of the Afghan legal code (2002); conducting a workshop with Afghan justice officials on the future of the Afghan justice system (2003); and publishing a Special Report, *Establishing the Rule of Law in Afghanistan* (2004).⁸⁷ USIP currently has an office in Kabul, Afghanistan.⁸⁸ Ongoing projects include the following: examining ways to further collaboration between the state and non-state (informal) justice systems to improve the delivery of justice, resolve disputes, and protect rights; enhancing capabilities for transitional justice in Afghanistan; consulting on criminal law reform and combating serious crimes in Afghanistan; holding workshops to assist with Afghan Supreme Court reform; and hosting an Afghanistan Working Group for the purposes of education on different topics.⁸⁹

⁸² See UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 107, DEMOCRATIC CONSTITUTION MAKING (July 2003).

⁸³ Fact Sheet, Rule of Law Country Specific Projects: Iraq, *available at* <http://www.usip.org/ruleoflaw/projects/countries/iraq.html> (last visited Aug. 13, 2008).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Fact Sheet, Rule of Law Country Specific Projects: Afghanistan, *available at* <http://www.usip.org/ruleoflaw/projects/countries/afghanistan.html> (last visited Aug. 13, 2008).

⁸⁸ *Id.*

⁸⁹ *Id.*

Extremely useful for Judge Advocates in Iraq and Afghanistan may be the International Network to Promote the Rule of Law (INPROL), set up by USIP. It is a consortium of practitioners joined together to promote the rule of law in societies transitioning from war to peace. As an internet-based network, INPROL allows those serving in the field to exchange information with other experienced practitioners, as well as to access relevant documents, best practices, and related materials. It also has a digital library with numerous resources. There are over 800 hundred active members, in more than 70 countries, representing over 300 organizations. Participation in the network is membership based; applicants for membership must be nominated by an INPROL member. Applicants may apply online (and search for current members to nominate them) at www.inprol.org/user/register.

F. 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 US will involve some level of participation from coalition countries, the United Nations, and non-governmental organizations. Thus, rule of law operations will require some level of integration of national and international efforts.

Most major post-conflict operations will involve several international actors to implement effectively rule of law 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. Lastly, the host-country itself will have ownership over post-conflict development and reconstruction, including rule of law. Each of these actors will have different goals and different priorities. Judge Advocates must be able to work with these layers of bureaucratic machinery in order to garner greater legitimacy, widen the burden-sharing, and earn local acceptance.

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

1. United Nations

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

The United Nations has a simple political decision-making apparatus. Decisions to intervene in a state without its consent are normally made by the UN Security Council. The Security Council takes all decisions by qualified majority; although five of its members (United States, United Kingdom, France, China, and Russia) have the capacity to block substantive decisions unilaterally. Once the Security Council determines the purpose of a mission and decides to launch it, further operational decisions are left largely to the Secretary-General and his staff, at least until the next Security Council review, which is generally six months thereafter.

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

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

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

The UN normally authorizes enforcement (without the consent of the host nation) or peace-keeping (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 which generally requires compromise, and sometimes results in ambiguity. As with all military operations, UN mandates that contain a US military component are implemented by US forces through orders issued by the Secretary of Defense through the CJCS. During such implementation, the political mandates are converted to workable military orders.

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

Field level coordination is normally assigned on an ad hoc basis, depending on which relief organization is playing the major role. The United Nations Office of the High Commissioner for Refugees, the World Food Program, and UNDPKO are often the logical candidates. UNOCHA may deploy a field team to coordinate foreign humanitarian assistance or the Emergency Relief Coordinator may designate the resident UN coordinator as Humanitarian Coordinator. Coordination with the UN Resident Coordinator may be degraded if a declining security situation requires removal of UN personnel.

One of the first tasks for a Judge Advocate conducting rule of law operations should be to familiarize himself with 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 rule of law operations in order to identify potential partners or to develop a common strategy should be properly coordinated with the Country Team or DOS.

2. *International Monetary Fund (IMF)*

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

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

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

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

In assessing rule of law in particular countries, the IMF uses a number of specific measures. First, is the efficiency of the judicial system, judged by assessing the efficiency and

integrity of the legal environment as it affects business. Next it assesses the law and order tradition. Then it assesses corruption in government, with particular reference to demands for bribes connected to import and export licenses, exchange controls, tax assessments and loans. Also, the IMF examines the risk of expropriation and the likelihood of repudiation of contracts by government. Finally an index of accounting standards is created by examining and rating local companies' annual reports.⁹⁰

3. *World Bank*

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

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

It is not surprising that the World Bank's focus in rule of law projects is on property rights. Consequently, the World Bank's definition on the rule of law is limited. "By the *rule of law*, we mean well-defined and enforced property rights, broad access to those rights, and predictable rules, uniformly enforced, for resolving property rights disputes. By *no rule of law*, we mean a legal regime that does not protect minority shareholders' rights from [vitiation], does not enforce contract rights, and does not protect investors' returns from confiscation by the state."⁹¹

For the most part, the World Bank experience in the rule of law has been acquired in the conversion of the economies of former communist states to market based economies. Nevertheless, the World Bank regards property rights as very important for both transitioning and developing countries. The argument is that building a political consensus for the rule of law and an efficient economy is best done by building a political consensus that will govern the allocation of property rights.⁹²

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

⁹⁰ SWATI GHOSH AND ATISH R. GHOSH, INTERNATIONAL MONETARY FUND, POLICY DEVELOPMENT AND REVIEW DEPARTMENT, IMF WORKING PAPER NO. 02/9, STRUCTURAL VULNERABILITIES AND CURRENCY CRISES 501-2 (Jan. 2002).

⁹¹ KARLA HOFF AND JOSEPH E. STIGLITZ, WORLD BANK, DEVELOPMENT ECONOMICS GROUP, WORLD BANK RESEARCH WORKING PAPER 3779, THE CREATION OF THE RULE OF LAW AND THE LEGITIMACY OF PROPERTY RIGHTS: THE POLITICAL AND ECONOMIC CONSEQUENCES OF A CORRUPT PRIVATIZATION 7 (Dec. 2005).

⁹² *Id.* at 1-6.

economically and politically powerful lobby to demand property rights institutions and the rule of law.⁹³

The rule of law enforces property rights and expands access to markets. The value of assets obtained legitimately is higher under the rule of law and it is in the interest of individuals to maximize the value of assets because they are assured of being able to retain that value. A social consensus about the fairness and legitimacy of the distribution of property rights is needed to establish the security of such rights, and in order to establish the rule of law after a long period of no rule of law, either the distribution of property or the fairness of the distribution must change.⁹⁴

4. *The North Atlantic Treaty Organization (NATO)*

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

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

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

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

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

⁹³ *Id.* at 2-3.

⁹⁴ *Id.* at 38.

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

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

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

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

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

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

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

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

G. Non-Governmental Organizations (NGOs)

NGOs are playing an increasingly important role in the international arena.⁹⁵ Working alone, alongside the US military, with other US agencies, or with coalition partners, NGOs are assisting in all the world's trouble spots where humanitarian or other assistance is needed. NGOs may range in size and experience from those with multimillion dollar budgets and decades of global experience in developmental and humanitarian relief to newly created small organizations dedicated to a particular emergency or disaster.

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

While the military's initial objective is stabilization and security for its own forces, NGOs typically seek to address humanitarian needs. The extent to which specific NGOs are willing to cooperate with the military can thus vary considerably. NGOs often 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 US military forces are a belligerent to a conflict in the operational area.

Most NGOs are outfitted with very little, if any, equipment for personal security, preferring instead to rely upon the good will of the local populace for their safety. Any activity that strips an NGO's appearance of impartiality, such as close collaboration with one particular military force, may well eliminate that organization's primary source of security. NGOs may also avoid cooperation with the military forces out of suspicion that military intend to take control of, influence, or even prevent their operations. Commanders and their staffs should be sensitive to these concerns and consult these organizations, along with the competent national or international authorities, to identify local conditions that may impact effective military-NGO cooperation.⁹⁶

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

⁹⁵ See Grey Frandsen, *A Guide to NGOs* (Center for Disaster and Humanitarian Assistance Medicine 2003), available at <http://www.cdham.org/> (last visited Sept. 1, 2008).

⁹⁶ See the following guidelines, which have been endorsed by the US military and many US NGOs, USIP/InterAction, Guidelines for Relations Between U.S. Armed Forces and Non-Governmental Humanitarian Organizations, at <http://www.usip.org/pubs/guidelines.html> (last visited Sept. 1, 2008).

Judge Advocates' rule of law planning should include the identification of POCs with NGOs that will operate in the area. Frequently, other organizations in the area will already have identified those POCs and have working relationships with them. Specifically, Judge Advocates should look to local PRTs and CA units for help in contacting and working with NGOs. The creation of a framework for structured civil-military interaction, which is one of the primary functions of Civil Affairs,⁹⁷ allows the military and NGOs to meet and work together in advancing common goals in rule of law missions. Accordingly, a climate of cooperation between NGOs and military forces should be the goal, although it is important to remember that commanders are substantially restricted in what types of support they can provide non-federal entities such as NGOs. Judge Advocates should ensure that any support to NGOs complies with statutory and regulatory restrictions.⁹⁸

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:

- **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. HOCs are normally established under the direction of the government of the affected country or the UN, or possibly under the Office of US Foreign Disaster Assistance (OFDA), during an operation. Because the HOC operates at the national level, it typically consists of senior representatives from the affected country, the US 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 CMOC (see below) or HOC has been established, 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 US military forces, other government agencies, IGOs, the private sector, and NGOs.⁹⁹

⁹⁷ FM 3-05.40, *supra* note 75, 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.”).

⁹⁸ See e.g. U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION.

⁹⁹ JOINT PUB. 3-57, *supra* note 74, at II-26.

H. Coalition Partners

Given the dominance of coalition operations, it is essential for Judge Advocates to know about the philosophy, goals, and structure of coalition forces.¹⁰⁰ Judge Advocates need to know that the national approach of military operations and the national responsibilities for rule of law related activities, especially state building activities, vary for different coalition partners.

While US military operations are primarily motivated by national interests, some coalition partners, follow the concept of a “civil power”.¹⁰¹ Civil powers focus on the prevention and the ending of violence, the establishment of the rule of law in international relations, and support of underdeveloped countries, even independent from national interests.¹⁰²

When speaking about rule of law programs some coalition partners focus on civilian reconstruction and economic support.¹⁰³ Military means are only seen as appropriate to end violence and establish conditions under which the causes of conflict can be addressed by civilian means.¹⁰⁴ Some coalition forces may be reluctant to initiate laws, courts, and police reforms, but rather support host government reform efforts beneficial for the establishment of the rule of law.¹⁰⁵

Consequently, France, for example, sees its contribution to the achievement of the rule of law 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.¹⁰⁶ An additional example is the German approach to rule of law operations in post-conflict areas, which similarly focuses on technical and logistics support, as well as support concerning judicial administration, administrative development, and medical services.¹⁰⁷

As a result of different approaches, the structure of coalition forces being tasked with rule of law issues is also different. The focus on civilian reconstruction work done coupled with the development of the rule of law 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 (described in Chapter IX below).

¹⁰⁰ See CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 312 (2006) [hereinafter FORGED IN THE FIRE].

¹⁰¹ See, e.g., MARKUS WÖLFLE, DIE AUSLANDSEINSÄTZE DER BUNDESWEHR 116 (2005) (discussing Germany).

¹⁰² *Id.* at 18-19.

¹⁰³ 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).

¹⁰⁴ See German Action Plan, *Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peacebuilding* 10 (2004), available at <http://www.nowar.no/documents/germanactionplan.pdf> [hereinafter Action Plan].

¹⁰⁵ *Id.* at 58. See also French Ministry of Foreign Affairs, Direction Générale de la Coopération Internationale et du Développement (French International Cooperation) 31 (2005).

¹⁰⁶ *Id.* at 32-33.

¹⁰⁷ See Action Plan, *supra* note 104, at 19.

In sum, coalition partners' approach towards a military operation might differ significantly. Judge Advocates should be aware that the coalition partners' understanding of their mandate to support and undertake rule of law activities might be very different from the US understanding.

I. Coalition Restrictions

Coalition partners will be bound to comply with obligations which arise from national laws or regulations as well as from the treaties to which they are party. As national laws and regulations are naturally different and not all coalition partners are parties to the same treaties, this may create a marked disparity among the partners as to what they can or cannot do. Judge Advocates therefore need to have an appreciation for laws and legal traditions of coalition partners and the extent of the applicability of treaties to which coalition partners are party.¹⁰⁸

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

a) Legal Restrictions by Domestic Law

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

Constitutional restrictions are often connected with the legality of an operation under international law and with the extraterritorial application of constitutional rights. For example, if an operation is conducted without Security Council authorization, there will may be constitutional problems for some potential allies, effectively prohibiting them from joining or assisting the operation.¹⁰⁹ Different constitutional problems might arise from the extraterritorial application of constitutions. Although domestic laws and international treaties are often not applicable extraterritorially, or are overridden, for example, by resolutions of the United Nations Security Council, some coalition partners will be bound to comply with their constitutions in all circumstances, especially with requirements to protect human rights and fundamental freedoms.¹¹⁰

In addition to constitutions, ordinary statutes often restrict whether a country can participate in an operation. For some, military operations not only need to be approved by

¹⁰⁸ See FORGED IN THE FIRE, *supra* note 100, at 69.

¹⁰⁹ For Germany, for example, the participation in an operation missing international legitimacy is unconstitutional. See Basic Law (German Constitution), Article 24, paragraph 2 (allowing military operations abroad only in the frame of "a system of mutual collective security" (for example the United Nations)).

¹¹⁰ See, e.g., German Constitution, Article 19, paragraph 3. The Federal Constitutional Court clarified that the commitment of the executive power to be bound by German law applies extraterritorially. This means the executive power has to take into account German domestic law, especially the constitution. In addition, anybody residing in Germany who is affected by an action of an executive power can complain about the violation of constitutional rights at the Federal Constitutional Court. See German Federal Constitutional Court, BVerfGE 100, 313 of July 14, 1999, paragraphs 152 and 156.

national parliaments, but require statutory authorization. For example, the German participation in the International Security Assistance Force (ISAF) military operation in Afghanistan was approved by the German Parliament in the form of statutes. These statutes determine the framework (including goals and limits) of the German participation. The statutes have determined, for example, the area and duration of the operation and operational limitations (e.g., limitations on self-defense).

Restrictions by statutes may also have a significant impact on the conduct of the operation if the statutes themselves have an extraterritorial effect. Statutes describing the obligations and rights of soldiers usually have this effect.¹¹¹ Under these statutes soldiers are entitled to refuse unlawful orders.¹¹² The test of lawfulness includes generally the application of international law.¹¹³

Furthermore, domestic penal laws may have an impact on coalition operations. The French penal law, for example, applies to crimes conducted by French citizens outside France.¹¹⁴ Germany has had a Code of Crimes against International Law since 2002. It enables the German Federal Prosecutor to investigate and prosecute crimes constituting a violation of the Code, irrespective of the location of the defendant or plaintiff, the place where the crime was carried out, or the nationality of the persons involved.

Further restrictions by domestic law can result from administrative regulations, like the Rules of Engagement for an operation. Administrative regulations handbooks for coalition military lawyers are of high interest as they mirror the opinion of the concerned national Ministry of Defense and the Government.¹¹⁵

b) Legal Restrictions by Treaties

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

¹¹¹ See, e.g., German “Soldatengesetz” or the British Army Act.

¹¹² See, e.g., French Statut Général des Militaires, Article 15; German Soldatengesetz, Article 11 (1); United Kingdom, Manual of Military Law, Army Act 1955, Section 34, footnote 3a.

¹¹³ See, e.g., French “Manuel de Droit des Conflicts Armés,” (Handbook of the Law of War), ch. “Responsabilité” [hereinafter Manuel de Droit des Conflicts Armés]; United Kingdom, Manual of Military Law, Army Act 1955, Section 34, footnote 3a.

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

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

¹¹⁴ *Id.*, ch. “Responsabilité pénale”.

¹¹⁵ See, e.g., the German *Handbuch für den Rechtsberaterstabsoffizier im Auslandseinsatz*.

From the perspective of many coalition partners, the most important rule possibly to supersede international treaties is Article 103 of the UN Charter.¹¹⁶ Considering that decisions of the United Nations Security Council (within the meaning of Article 25 and under chapter VII of the Charter) will typically provide the legal mandate for coalition operations, it is critical to understand whether Article 103 of the Charter applies to these decisions. Security Council resolutions generally result in one of three forms: (1) as a binding or instructive decision creating an obligation on all UN members; (2) as an authorization allowing UN members states to act in a particular case; or (3) as non-binding recommendations.

Some legal writers advance the view that Article 103 of the Charter applies only to instructive decisions of the United Nations Security Council but not to ordinary authorizations or even recommendations,¹¹⁷ a view with which the European Court of Justice has registered agreement.¹¹⁸ Other commentators¹¹⁹ and the England and Wales High Court and Court of Appeal endorsed the latter view by advancing the view that authorizing resolutions can override international treaty obligations pursuant to Article 103 of the UN Charter.¹²⁰ Advocates of this approach contend that only this interpretation ensures effectiveness to the measures of the Security Council.¹²¹ This view also corresponds with the practice of many, since states did not oppose such UN authorizations on the ground of conflicting treaty obligations.¹²²

Despite this, international treaties to which coalition partners are party still have some meaning for coalition operations on the basis of Security Council resolutions, because not all treaties are overridden by Security Council resolutions. Furthermore, where a Security Council resolution overrides a part of an international treaty, the remaining provisions of the treaty retain their validity.¹²³

c) *European Convention on Human Rights (ECHR)*

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

¹¹⁶ UN Charter, art. 103. (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”).

¹¹⁷ See B. SIMMA, ED, *THE CHARTER OF THE UNITED NATIONS – A COMMENTARY* 1296, vol. II, (2d ed. 2002); see also Lauwaars, *The Interrelationship between United Nations Law and the Law of Other International Organizations*, 82 MICH. L. REV. 1604 (1984).

¹¹⁸ See Robert Kolb, *Does Article 103 of the Charter of the United Nations apply only to Decisions or also to Authorizations adopted by the Security Council?*, 64 HEIDELBERG J. 21, 29 (2004).

¹¹⁹ See SIMMA, *supra* note 117, at 729.

¹²⁰ *Al-Jedda v. Secretary of Defence, England and Wales High Court and Court of Appeal*, EWCA 1809 (2005), R (on the application of Al Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent) [2007] UKHL 58..

¹²¹ See Kolb, *supra* note 118, at 25.

¹²² See SIMMA, *supra* note 117, at 759. *But see* Kolb, *supra* note 118, at 27.

¹²³ See England and Wales Court of Appeals (2006) EWCA which expressively states that UNSCR 1546 (2004) overrides only Article 5 (1) of the European Convention on Human Rights while the remaining regulations of the Convention retain their validity.

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

From 1975 through 2001, the Court and the European Commission on Human Rights recognized an obligation of the member parties to the ECHR to guarantee the rights recognized in the ECHR not only to individuals within their territory but also to individuals under their actual authority and responsibility.¹²⁴ This was called the “doctrine of personal jurisdiction.” Following this approach, the Court considered the ECHR applicable in the case of an arrest abroad, even when the arrest took place in a state not being a member state of the Convention.¹²⁵

In *Loizidou v. Turkey*,¹²⁶ the European Court on Human Rights (ECHR) added to the concept of “actual authority” and the doctrine of “personal jurisdiction” to the concept of “effective overall control” and the doctrine of “territorial jurisdiction.” Thus, the court generally required a state’s effective control of an area for the extraterritorial application of the ECHR. This new approach focused much stronger on territorial jurisdiction, rather than a personal jurisdictional approach.

In *Bankovic v. Belgium*,¹²⁷ the ECHR changed its jurisdiction significantly and cut back the extraterritorial application of the ECHR. This case concerned the killing of 16 individuals caused by a NATO air strike against the Serbian Radio and Television building during the air campaign against the Federal Republic of Yugoslavia in 1999. The applicants complained that the states participating in the campaign violated Articles 2 (the right to life), 10 (freedom of expression) and Article 13 (the right to an effective remedy). Specifically, the applicants argued, referring to *Loizidou*, that the jurisdiction of the concerned states was determined by effective (airspace) control of these states during the air strike.

The court did not agree with the applicant’s argument and stated that the application of the Convention is generally limited to the legal space (*espace juridique*) of the ECHR member

¹²⁴ See *Cyprus v. Turkey*, European Commission on Human Rights, application numbers 6780/74 and 6950/75 of May 26, 1975, at 133 (“It is clear from the language ... and object of this Article [1], and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority was exercised within their own territory or abroad.”).

¹²⁵ See *Stocké v. Germany*, European Commission on Human Rights, application number 11755/85 of October 12, 1989 (concerning the transfer of a German citizen from France to Germany without his cognition and agreement).

¹²⁶ See *Loizidou v. Turkey*, European Court on Human Rights, application number 15318/89 of November 28, 1996.

¹²⁷ See *Bankovic v. Belgium*, European Court on Human Rights (admissibility decision), application number 52207/99 of December 12, 2001.

states. To accept an exception from this rule, there needs to be a “jurisdictional link between the persons who were victims of the act complained of and the respondent state.”¹²⁸

To ascertain a state’s jurisdiction “actual authority” or “effective control,” which the Court had not accepted in this case, is not enough. Moreover, the term jurisdiction has to be interpreted in a normative way, which means the effective control of one state over areas of another state needs to be legally justified regarding international law to create the former jurisdiction.¹²⁹ Such legal justification could result from a military occupation in-line with international law or a consent or invitation of the host nation.

The *Bankovic Decision* was affirmed by the ECHR’s decision in *Öcalan v. Turkey*.¹³⁰ The Grand Chamber of the Court emphasized the “jurisdictional link,” which was that *Öcalan* was handed over from Kenyan to Turkish officials on board a Turkish airplane and therefore under “effective Turkish authority” and within the jurisdiction of the Turkish state.

In the *Issa* decision of the European Court on Human Rights the Court rejected the approach of a normative interpretation of jurisdiction and turned back to the approach taken in the *Loizidou* judgment, adopting the wording as used in the *Loizidou* case.¹³¹

In *Al Skeini and Others v Secretary of State for Defence*¹³² the British House of Lords was charged with analyzing the respective approaches adopted by the European Court in *Bankovic* and *Issa*. The unanimous Grand Chamber decision in *Bankovic* was preferred to that in *Issa*, the primary territorial basis of jurisdiction was reaffirmed. The exceptions were found to include effective control of territory by a member state within the espace juridique of the convention and individuals under the authority of a state agent. It was the latter basis upon which *Al Skeini* was able to assert his claim to European convention rights because he had been in the exclusive custody of British forces in Iraq at the time the alleged abuses occurred.

Following this decision, one of the security internees held by the British military in Iraq challenged the legal basis for his detention, in *Al Jedda v Secretary of State for Defence*.¹³³ Here the House of Lords had to distinguish between the ability of the military to intern individuals deemed to represent an imperative threat to security as empowered by UNSCR 1546 and the Convention rights of the internee following the reasoning in *Al Skeini*. The Court concluded on the facts that the obligations created by Articles 25 and 103 of the UN charter superseded the Convention rights in question.

¹²⁸ Examples of such jurisdictional links resulting in extraterritorial jurisdiction of a state are cases involving activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that state. See *Bankovic* at para 73.

¹²⁹ See *Loizidou* at para 52. (European Court had stated: “that the responsibility of a Contracting Party could also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory.”)

¹³⁰ *Öcalan v. Turkey*, European Court on Human Rights, application number 46221/99 of May 12, 2005.

¹³¹ *Issa and Others v. Turkey*, European Court on Human Rights, application number 31821/96 of March 30, 2005.

¹³² *R(Al Skeini and others) v Secretary of State for Defence* (The Redress Trust intervening)[2007] UKHL 26

¹³³ *R (on the application of Al Jedda) (FC) (Appellant) v Secretary of State for Defence* (Respondent) [2007] UKHL 58.

Most recently the interrelationship between UN controlled operations and the Convention obligations of member states was examined by the European Court in *Behrami v France and Saramati v Norway*.¹³⁴ The Court determined that the activities of the nations participating in operations in Kosovo were attributable to the UN¹³⁵ not the individual member states. Furthermore as the UN is not a signatory to the ECHR any claims thereunder fail. This argument was unsuccessfully deployed by the British Government in the House of Lords decision in *Al Jedda*, the Court distinguishing between the level of UN control over operations in Kosovo and Iraq.

d) Canadian Charter of Rights and Freedoms

In 2008 the Canadian Federal Court was asked to consider the application of the Canadian Charter of Rights & Freedoms, which since 1982 is part of the Constitution of Canada, to the handling and transfer of detainees held by Canadian Forces (CF) personnel in Afghanistan. The case was brought, on the basis of public interest standing, by two Canadian human rights groups. Also sought was an injunction to prevent the transfer of detainees to Afghan authorities. The injunction was initially denied after the CF revealed that it had suspended transfers as of Nov 07, due to credible allegations of mistreatment by Afghan authorities. Transfers were then reinstated after several changes were made to deal with those concerns. Canada's Federal Court ruled that the Charter does not apply to the handling and transfer of detainees held by CF personnel in Afghanistan because the detainees are instead protected by Afghan and international law.¹³⁶ This decision is currently being appealed to Canada's Federal Court of Appeal, after which it can still go to Canada's Supreme Court.

¹³⁴ *Behrami and Behrami v. France* Application No. 71412/01 and *Saramati v. France, Germany And Norway* Application No. 78166/01 EUROPEAN COURT OF HUMAN RIGHTS Grand Chamber Decision As to Admissibility (2 May 2007).

¹³⁵ Following Article 5 of the ILC Draft Articles on the Responsibility of International Organizations (UN Doc. A/59/10, p. 109).

¹³⁶ See <http://decisions.fct-cf.gc.ca/en/2008/2008fc336/2008fc336.pdf> (last visited Aug. 28, 2008).

IV. The International Legal Framework for Rule of Law Operations

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

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

A. Identifying a Rule of Law Legal Framework

The aim of this section is to illustrate some of the various mandates that may govern military deployments overseas and the impact these have on rule of law operations. From a legal perspective the mandate defines the nature, scope and limits of any military deployment. It provides the *raison d'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. This section will outline many basic principles of international law, however, given space limitations, should be not used as an authoritative guide.

1. United Nation (UN) Mandates

a) UN Security Council Resolutions (UNSCR)

The UN consists of 192 member states. The Security Council is the principal organ within the UN with primary responsibility for the maintenance of international peace and security.¹ Chapter VII of the UN Charter enumerates the Council's compulsory powers to restore international peace and security. Most Security Council Resolutions require support from nine out of fifteen members, provided none of the five permanent representatives² votes against or

¹ U.N. Charter art. 24(1).

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

vetoed the proposal. Pursuant to Article 25 of the Charter, UN members are required to honor and carry out Security Council resolutions.

The Use of Force

The UN Charter's general prohibition on the use of force is relatively well accepted.³ Intervention, whether by direct military action or indirectly by support for subversive or terrorist armed activities, fall squarely within this prohibition.⁴ The prohibition on the use of force is, however, subject to 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 providing for the pacific settlement of disputes with the consent of the host nation, the latter permitting 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 may expect to support rule of law operations governed by UN Security Council mandates. In addition to advancing efforts to restore peace, such resolutions may also include developmental mandates. Particularly in missions undertaken in under-developed states, Judge Advocates should expect Security Council resolutions to address economic, financial, health, and human rights issues, as well as goals related to self-determination. UN Security Council Resolution 1483, regarding the reconstruction of Iraq, is representative.⁶ Frequently, Security Council and Secretary General have relied on Special Rapporteurs to provide detailed guidance on implementation of such resolutions and to report to the Council on progress in their execution.⁷

Judge Advocates may find, within UN Security Council resolutions, mandates or directives that are 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

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). 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.

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.

b) Resolutions passed under Chapter VI

Chapter VI of the Charter deals with attempts to resolve disputes by pacific means. Indeed, it states that parties to any dispute must first attempt to seek resolution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.⁸ The Security Council has wide powers under Chapter VI. It may, at any stage of a situation which might lead to international friction or give rise to a dispute, recommend appropriate procedures or methods of adjustment. The key to resolutions passed under Chapter VI is that they only permit the presence of military forces with the consent of the host government and do not sanction the use of force other than that which is necessary for self defense.

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

c) Resolutions passed under Chapter VII

Chapter VII of the UN Charter provides an important caveat to the prohibition on the use of force contained within Article 2(4). Along with Article 51, it constitutes the modern *jus ad bellum*. The prohibition on UN intervention in domestic affairs of a nation is specifically excluded in relation to action taken under Chapter VII, which are predicated on threats to the peace, breaches of the peace, or acts of aggression.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

⁸ U.N. Charter art. 33(1).

⁹ U.N. Charter art. 2(7).

¹⁰ U.N. Charter art. 39.

interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”¹¹ Judge Advocates must understand that the imposition by the Security Council of economic sanctions against a state pursuant to Article 41 may be either recommended or mandatory in nature, which is a matter to be ascertained from the language of the resolution

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 United Nations.”¹³ When this provision was drafted, it had originally been envisioned that an Article 42 action would be taken by countries under a unified UN command. But, 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. Not all States must 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 should not be underestimated. It offers the military commander enormous freedom to prosecute any campaign. Resolutions passed under Chapter VII have been aimed at both state and non-state actors. Examples of the latter include the Resolutions passed against National Union for the Total Independence of Angola (UNITA) following their breach of terms of cease-fire in Angola¹⁴ and those against the Taliban¹⁵ following the attacks on the US embassies in East Africa and the first bomb attack on the World Trade Center in 1993.

Judge Advocates may find familiar legal territory when supporting missions executed pursuant to Chapter VII authority. Such missions are typically coercive, thus obviating, at least during early phases, detailed consideration of host nation legal frameworks. The nature and international scope of such missions, particularly those carried out under Article 42, will likely trigger application of the full body of the law of war. Given the requisite international consensus and support for such operations, however, Judge Advocates may reasonably anticipate rapid completion of decisive operations and subsequent transition to stability or post-conflict missions, and should expect considerable escalation of legal complexity in these latter phases. Judge Advocates should pay particular attention to extension and modification of legal mandates through subsequent Security Council resolutions. Mandates subsequent to successful decisive operations may include broader developmental and transformative goals.¹⁶

¹¹ U.N. Charter art. 41.

¹² U.N. Charter art. 42.

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 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* fn. 6.

2. Mandates Pursuant to Bilateral and Multi-lateral Agreements

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

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

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

3. Mandates pursuant to National Legislation

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

Judge Advocates should anticipate national legislation, both standing and ad hoc, regulating armed forces' activities during rule of law ops. Fiscal law restrictions will undoubtedly impact mission planning and execution.¹⁷ Other reporting and operating requirements, such as human rights Leahy amendment¹⁸ vetting should be anticipated as well.

B. The Rule of Law Legal Framework

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

¹⁷ See Chapter VII.

¹⁸ Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

1. *The Law of War*

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

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

a) *Treaty Law*

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

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

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

In addition to a restrictive conflict classification regime, each of the Conventions reserves the majority of its protective provisions to a class of “protected persons.” Only persons or groups satisfying these often stringent criteria are covered by the Conventions’ treatment obligations.

¹⁹ See U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, para. 4.2 (28 Nov. 2005).

Judge Advocates must ensure rigorous classification of persons placed in the hands of friendly and allied forces. Rule of law operations, especially police, detention, and court functions, will regularly implicate provisions of the Conventions.

b) Customary International Law

Customary international law (CIL) is a second major source of law of war obligations. Given its largely uncodified form, CIL can be difficult to discern. Many treaty provisions, including the Hague Regulations of 1907, the Geneva Conventions of 1949, and portions of the 1977 Additional Protocols to the 1949 Geneva Conventions are considered reflective of CIL. Provisions of the latter treaties have proven particularly troublesome for US Judge Advocates because the US is not a party to either Protocol. The majority of Protocol I provisions reflective of CIL relate to targeting operations and are not of primary concern to rule of law operations. The US has not expressed explicit support for most of the Protocol I supplements to treatment of war victims, however, reducing the legal significance of these provisions during exclusively US operations. Judge Advocates should bear in mind, however, that many US allies and potential rule of law host nations have ratified or acceded to the Protocols or may view their provisions as more fully reflective of CIL.

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

c) Policy

United States DOD policy directs its armed forces to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations”.²⁰ The policy is intended to apply the law of armed conflict for international armed conflict across the conflict spectrum. This provides a standard that military personnel can train to in all situations, applying the *lex specialis* of the law of war to their conduct, as a matter of policy, even when it may not apply as a matter of law.

2. Occupation Law

Though largely in the latter half of the twentieth century, occupation law has experienced a recent revival in both international practice and litigation.²¹ Like most international law, occupation law exists in two forms: treaty and custom. This section will outline issues concerning both formal application of occupation law and its potential for application by analogy during rule of law operations.

²⁰ U.S. DEP’T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.1 (9 May 2006).

²¹ 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).

a) *Treaty Law*

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

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

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

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

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

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

b) *Customary International Law*

Because occupation law is found in such well-established treaties, many argue that its norms constitute CIL. While probably true, Judge Advocates should remember that norms attaining customary status retain the conditions of their application. That is, when a treaty provision matures into custom, the primary effect is to bind non-parties – customary status does not mandate application beyond the scope of conditions originally attendant to the relevant norm. For example, while Article 49 of the Fourth Geneva Convention prohibits transfers of inhabitants

of occupied territory, its status as a likely customary norm does not extend its application beyond the preconditions established in Common Article 2 and Article 4 of the Fourth Convention. Thus, Article 49 only operates as customary law in “cases of partial or total occupation of the territory of a High Contracting Party”²² and with respect to “[p]ersons . . . in the hands of [an] . . . Occupying Power of which they are not nationals.”²³

It is possible, notwithstanding the preceding distinction, some provisions of occupation law extend to territory that is not occupied in the technical or legal sense. For instance, foreign courts have explored the boundaries of occupation law applicable to situations short of those described in common article 2. The content of this variant of customary occupation law is unclear. The United States has not clearly expressed its views in this regard. A recent study of customary international humanitarian law is similarly silent on occupation law.²⁴

c) *Policy*

In addition to guidance directing US forces to comply with the law of war in all operations, Judge Advocates will find support for application of occupation law beyond its legal limits as a matter of policy. US Army Field Manual 27-10, paragraph 352(b) encourages forces to apply occupation law to areas through which they are merely passing and even to the battlefield.²⁵ Thus, stability and rule of law operations, which may not formally trigger application of occupation law, may nonetheless call for observance of norms applicable to occupation. Occupation rules for the treatment of property, public and private, seem particularly appropriate for such expansive observance.

3. *Human Rights Law*

Where international law generally governs relationships between states, human rights law, though also international law, regulates relationships between states and individuals. Human rights law can be applicable to Judge Advocates engaged in rule of law 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 obligations. If engaged in combat operations, however, the U.S. regards the law of war as an exclusive legal regime or a *lex specialis*. Under this view, the law of war operates to the exclusion of competing legal frameworks such as human rights law. That position, however, is not necessarily shared by other nations, particularly in situations where a government has jurisdiction and control over persons, such as in detention operations. Moreover, while the US considers its obligations under the International Covenant and Civil and Political Rights²⁶ to be territorial in scope because of the treaty’s wording, European countries party to the European Convention on Human Rights may be bound outside of their territories to that treaty’s obligations. Because traditionally, the US military infrequently

²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 2.

²³ *Id.*, art. 4.

²⁴ JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

²⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE 352(b) (18 July 1956).

²⁶ Dec. 16, 1966, 999 U.N.T.S. 171, available at www2.ohchr.org/English/law/ccpr.htm.

engaged in rule of law operations, US armed forces have given comparatively little attention to how human rights applies to rule of law operations.²⁷

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

a) *Treaty Law*

International law has experienced a rapid expansion in human rights treaties since the Second World War. Internationally, there are a number of major human rights treaties to which the host nation may be party²⁸, in addition to the Genocide Convention: the International Covenant on Civil and Political Rights (ICCPR),²⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),³⁰ the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);³¹ the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);³² the Convention on the Elimination of All Forms of Racial Discrimination (CERD),³³ the Convention on the Rights of the Child (CRC)³⁴ and its two Optional Protocols, one on the involvement of children in armed conflict³⁵

²⁷ 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).

²⁸ 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 encouraged. For a list of labor treaties to which a country is party, see <http://www.ilo.org/ilolex/english/newratframeE.htm> (last visited Sept. 1, 2008).

²⁹ www2.ohchr.org/english/law/ccpr.htm.

³⁰ www2.ohchr.org/english/law/cescr.htm.

³¹ www2.ohchr.org/english/law/cat.htm.

³² www2.ohchr.org/english/law/cedaw.htm

³³ www2.ohchr.org/english/law/cerd.htm.

³⁴ www2.ohchr.org/english/law/crc.htm.

³⁵ <http://www.unhcr.ch/html/menu2/6/protocolchild.htm>.

and the other on the sale of children, child prostitution and child pornography;³⁶ the Convention on the Rights of Persons with Disabilities (CRPD);³⁷ and the International Convention for the Protection of All Persons from Enforced Disappearances³⁸ (not yet in force). Regionally, there are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950,³⁹ the American Convention on Human Rights,⁴⁰ and the African Charter on Human and Peoples' Rights.⁴¹ The United States is party to the ICCPR, the CAT, the CERD, and the two optional protocols to the Convention on the Rights of the Child. Through precise interpretation of the treaties themselves, the US considers the majority of its human rights treaty obligations as inapplicable to US actors, including US forces, outside US territory. But, Judge Advocates need to be aware that the US 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 US is party expect the US to account for its actions wherever they take place. Moreover, there are some 40 UN special procedures,⁴² 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 US 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 US 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, which allows it to opine on the consistency of US activities with international law by reference to the American Declaration on Human Rights. That body has issued precautionary measures pertaining to detainees at Guantanamo Bay and opined on the consistency of certain aspects of US military actions in Grenada with the American Declaration on Human Rights.

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

Other human rights treaties may be applicable to the host nation, however. At the outset of rule of law operations, Judge Advocates should review the human rights law instruments to which the host state has become party, as well as their reservations and declarations.⁴³ Rule of

³⁶ <http://www.unhcr.ch/html/menu2/6/crc/treaties/opsc.htm>

³⁷ <http://www.un.org/disabilities/convention/conventionfull.shtml>

³⁸ <http://www2.ohchr.org/english/law/disappearance-convention.htm>

³⁹ www.echr.coe.int/ECHR.

⁴⁰ www.oas.org/juridico/english/treaties/b-32.html.

⁴¹ www.hrcr.org/docs/

⁴² See www2.ohchr.org/English/bodies/chr/special/index.htm for complete list of UN special procedures.

⁴³ 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 www2.ohchr.org/English/law (last visited August 15, 2008).

law missions may call upon Judge Advocates to develop plans to implement host nation human rights treaty obligations. Judge Advocates should appreciate and account for the complexities of implementing such obligations consistent with host nation legal and cultural traditions, but at the same time bearing in mind U.S. views of the host nation's obligations. For instance, though many Muslim states have ratified the Convention for the Elimination of Discrimination Against Women, most included significant reservations to account for Sharia legal traditions – which would likely be counter to U.S. views of the rights of women.

b) Customary International Law

Customary human rights norms are part of the applicable legal framework. There is much disagreement, though about the particular human rights that have matured into customary law and the USG seldom opines. The UDHR should serve as a guide,⁴⁴ although the United States has not taken the position that everything in that Declaration is customary international law.

C. Conclusion

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

⁴⁴ 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.").

V. The Institutional and Social Context for the Rule of Law

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

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

A. Legal Institutions

1. Legislatures

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

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

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

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 US Judge Advocates were involved in the process of drafting legislation that provided for a code of military discipline for the Afghan National Army (ANA) and various Presidential Decrees. In Sierra Leone, East Timor, and Brunei British Legal Officers were involved in drafting legislation pertaining to the host state armed forces.

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

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

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

Experience has demonstrated that attempts to overhaul the host nation legal system to match the US model will lead to difficulties and is often not the best solution. Although less familiar to the Judge Advocate, the local legal system may be as refined and developed as that in the US, but more importantly will tend to benefit from a degree of legitimacy that a newly imposed system will lack. If tasked with such responsibilities, Judge Advocates should be wary of relying too heavily on the familiar US models.⁹ That does not mean that US sources should be disregarded, and several organizations, including the American Law Institute and the American Bar Association¹⁰ produce model acts for legislatures.

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

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

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

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

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

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

Forcing New Laws in the Face of an Established Legal System

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

2. Courts

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

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

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

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

Procedural Requirements and Openness

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

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

basic tenet of all criminal justice systems. The concept of “equality of arms” dictates that neither the prosecution nor the defense should have a substantial advantage in conduct of an inquiry.¹² The defendant has the right to be tried in person and through legal assistance of ones’ choosing and to examine witnesses against him, call witnesses on his behalf¹³ and, if convicted, the right of appeal.

Guidelines on the role of prosecutors were adopted by the UN in 1990,¹⁴ and by the International Association of Prosecutors in 1995.¹⁵ Both documents seek to advance the principles founded in the Universal Declaration of Human Rights. The guidelines were formulated to assist states in securing and promoting the effectiveness, impartiality, and fairness of prosecutors. They serve as an excellent reference point for any Judge Advocate required to provide advice or guidance on the duties and responsibilities of those in public office charged with the prosecution of offenses.

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

Judicial Independence, Impartiality, and Training

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

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

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

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

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

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

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

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

Judicial Tenure in East Timor

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

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

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

Judicial Education in Afghanistan

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

Training of the judiciary may be guided by the roles and responsibilities of judges which were adopted by the United Nations in 1985²⁰ which along with the *Bangalore Principles of*

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

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

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

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

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

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

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

Screening Judges in Iraq²³

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

Adequate Physical Infrastructure

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

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

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

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

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

Computers in Iraqi Courthouses

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

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

Adequate Administrative Infrastructure

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

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

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

Problems of Communication in East Timor

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

Security

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

3. Police

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

a) Conducting Police Operations

The history of military deployments in the late 20th and early 21st Century is littered with examples of the military being tasked to perform policing functions.²⁶ In Kosovo, for instance, military forces were tasked to perform investigative, detention, arrest and peacekeeping functions. MPs will take the lead in the police elements of rule of law missions.²⁷ Commanders need to understand that the application of force in a police context is very different than in major combat operations, and they will need to recognize (often with the help of Judge Advocates) the point at which they need to change force models. Assuring that military forces receive adequate training, and that appropriate ROE are promulgated and understood by coalition military forces is critical to successfully policing in the aftermath of high intensity conflict, and will be critical to developing both the good will of the populace and establishing the legitimacy of the legal rules that are being enforced. Both MPs and Judge Advocates may be central in helping shape the Soldiers and commanders' thinking in such an environment.

b) Re-establishing Host Nation Police Functions

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

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

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

Police Force Composition

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

One of the first decisions that will have to be made in any particular stability operation will be whether to retain (and retrain) an existing police force or simply to start from scratch. Whether recruitment from scratch is superior to reforming existing resources will be theater specific. A corrupt police establishment which provides a modicum of security may, in the short term, prove better than no police force at all. If, as experienced by the British Forces in Iraq, police units are central in serious human rights abuses it may prove necessary to effect complete reform.²⁹ Whether starting from scratch or reforming an existing establishment, it will be necessary to vet³⁰ both existing police and new recruits to assure that they are not disqualified from service due to past participation in human rights violations or other misconduct.

As with other areas in rule of law operations, flexibility and sensitivity to local culture cannot be overstressed. Given the variety of policing arrangements in different countries, it may be necessary to have a local legal expert, or an entire advisory legal staff, if necessary to help manage the formation of a new police force or the reform of an old one.³¹ For instance, as opposed to the model adopted in the US, in many nations, the use of police forces with close or formal ties to the military is common, for example the Italian Carabinieri³² and the availability of quasi-military models for police may be particularly appropriate for those seeking to police in non permissive environments.

Training

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

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

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

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

³¹ *Id.* It may be necessary to employ persons with different areas of expertise, to include criminal law, civil law, human rights law, Sharia, etc.

³² The Carabinieri are a separate branch of the Italian armed forces.

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

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

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

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

Progress has come slowly, but the Council of Representatives in Iraq passed in 2008 legislation for a disciplinary code and court system for the Iraqi police to conduct internal discipline. They have already been successful and are making great progress in training their new judges.

4. Detention and Corrections

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

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

a) Basic Facility Requirements

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

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

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

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

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

³⁶ See the text accompanying note 27.

- **walls or other security enclosures that prevent both escape from the facility and infiltration from outside the facility³⁸**
- **an exercise yard or gymnasium**
- **a chapel, mosque, synagogue or other area dedicated to religious observances**
- **facilities for individual and group counseling**
- **a healthcare facility**
- **a segregation area, used to separate unruly, dangerous, or vulnerable prisoners from the general population. Incarcerated persons may be placed in segregation to maintain the safety and security of the institution or any person within the prison, to preserve the integrity of an ongoing investigation, or when no other accommodation is available.³⁹**
- **monitored safe cells, to protect certain detainees who pose a risk of harm to themselves**
- **a library or book distribution program**
- **visiting areas where detainees can meet with family, friends, clergy, or attorneys**

b) Human Rights

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

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

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

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

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

- **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**
- **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 civilian internees), the standard baseline treatment for any detainee, regardless of status, is humane treatment.⁴⁰

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

5. *Military Justice*

A state's survival is often dependent upon a disciplined armed force capable of ensuring its sovereign independence. But an armed force without effective discipline is easily turned to a disruptive force, and overreaching by military forces is a prime example of the kinds of arbitrary

⁴⁰ Humane treatment is the standard under numerous authorities, including international law, customary international law, domestic law (in a majority of countries, to include the United States and most allied nations). See generally the Second, Third, and Fourth Geneva Conventions; AR 27-10; AR 27-100; AR 190-8; AR 381-10; DODD 5240.1-R; Executive Order 12333; 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 US's and the host nation's views regarding these international norms. For US forces, however, the Detainee Treatment Act of 2005 prohibits inhumane treatment without regard to the status or location of the detainee. See 42 U.S.C. 2000dd(a) ("No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.").

state actions whose eradication is a primary component of the rule of law. In order to become disciplined, military forces have traditionally been subject to (and adhered to) their own internal military codes.

One of the many tasks given to the military conducting rule of law operations includes the restructuring and training of the host nation's armed forces. Recent examples of this practice include Iraq, Afghanistan, Sierra Leone and East Timor. Moreover, due to the ability to limit the number of variables during such missions, the military have enjoyed some success in this field.

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

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

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

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

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

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

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

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

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 offenses⁴⁵ 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 ETRF and Iraqi army.⁴⁶ In the former the challenges of converting a former guerilla force (the Falantil) into a regular army led to the decision to limit the number of offenses within the military criminal code and cede control of most offenses to the civilian courts.⁴⁷ The reverse decision was taken in Afghanistan where, historically, the military and civilian criminal courts had almost become conjoined. A new system of military courts and non-judicial punishment ceded wider jurisdiction back to the military.⁴⁸

B. Civil Law Systems

The term “civil law” is commonly used in two different meanings: First, to distinguish the law that applies to 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. It intends to introduce JAs to the main characteristics and basic principles of the civil law system, with regard in particular to criminal procedure. This section will also draw comparisons between civil law and the common law systems typically more familiar to the JA.

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,⁴⁹ 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 529 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 likewise had a significant impact on its development.

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

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

⁴⁷ Johnston Interview, *supra* note 41.

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

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

Civil law today is predominantly characterized by the legislative efforts of continental European states to transcend legal influences and customs into a modern, coherent, complete and entirely rational system of legal codification in the 18th and 19th century. The most influential codifications originated from France (Civil Code of 1804⁵⁰ and Code of Criminal Procedure of 1808⁵¹) and Germany (Civil Code of 1896⁵²)⁵³. These codifications became the basis for legal systems world-wide.⁵⁴ However, it should not be assumed that the laws in countries belonging to the civil law tradition are largely similar or even identical. Rather, they share common methodological concepts and principles.

Because of the influential legislative initiatives mentioned above, civil law systems are commonly associated with the concept of abstract codification. In contrast, common law systems are seen to rely more heavily on binding precedent and case law. However, as codification also occurs in common law systems and precedence, albeit generally not formally binding, is also known to civil law systems, these elements do not of themselves provide an adequate criterion for distinguishing between the two systems.⁵⁵ The differences are rather to be found in the methodological approach to law.

1. *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 1789.⁵⁶

Although common law systems like the US system also accept the principle of separation of powers, their approach and philosophy in applying this principle differs from that in civil law countries. In both the US and the United Kingdom, the judiciary served as a progressive force on the side of the individual against abuse of power by the state.⁵⁷ Experiences in civil law countries, on the other hand, where judges had often served as the extended arm of repressive governments, supported the idea of restricting judicial power by emphasizing the primacy of the legislative power.⁵⁸ As a result of this emphasis, civil law systems consider any judicial lawmaking power as undemocratic and consequently illegitimate. Given this approach to judicial

⁵⁰ Also referred to as 'Code Napoleon' or 'Code Civil'.

⁵¹ Also referred to as 'Code d'instruction criminelle' or 'CIC'.

⁵² The 'Bürgerliches Gesetzbuch' or 'BGB'.

⁵³ The Code Civil of 1804 and the Civil Code of 1896 are still in force in France and Germany.

⁵⁴ 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.

⁵⁵ See MERRYMAN, *supra* note 49, at 26.

⁵⁶ See *id.* at 15.

⁵⁷ See *id.* at 16.

⁵⁸ 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.

power, from the civil law perspective, a legal system that gives judges lawmaking power, violates the rule of law.⁵⁹

Thus, it is the *ideal* that codes reflect that distinguishes common from civil law systems. Contrary to the methodology of common law systems' codifications, which make no pretense of completeness, codification in civil law systems, in the spirit of legal positivism, intends to regulate a legal field exhaustively and exclusively. In other words, to fulfill the goal of the separation of powers and to prevent any lawmaking function of judges, codes in civil law systems are theoretically supposed to leave no gap that a judge would need to close. At least in theory, there is no space for considerations of justice outside the codified law, even if the price is a decision that may seem unjust or unrealistic. Under the civil law system's ideology, the requirement for judicial consistency and predictability requires a legislative predetermination of what is "just", at least to the extent possible.⁶⁰

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 shorter and more formal in civil law systems as judges generally strictly limit their reasoning to the application of the wording of the code to the factual situation presented to them.

This theoretical model, however, applies differently to criminal law than to "civil" law (in the first sense). 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 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 caselaw, with statutes serving to provide specific rules in specific areas.

While the theoretical models described above do generally apply for most civil law systems, one notable exception are modern constitutional courts, which 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.

2. *Specific Aspects of Civil Law*

Sources of Law

The methodology of civil law systems is 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.

⁵⁹ See TAMANAHA, *supra* note 1, at 124-25.

⁶⁰ The Prussian Landrecht of 1794 is the most rigid legislative attempt (and simultaneously the most spectacular failure) to predetermine the judicial resolution of all legal conflicts and to thereby curtail judicial competencies as it consisted of more than 17,000 articles, considered to cover any imaginable legal situation that could arise along with a prohibition against judicial interpretation of the law. Subsequent legislation in civil law systems has taken a far more realistic approach and accordingly drafted significantly shorter and more abstract codifications.

Most civil law systems accept neither the principle of *stare decisis*⁶¹ nor custom as a primary source of law. Most civil law systems do, however, use court decisions and custom to greater or lesser degrees as sources of law.⁶² Moreover, precedents serve a persuasive role in most civil law 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. Although in most civil law countries this concept is not a legal obligation, judges will not risk having their decision overturned on appeal unless they are convinced that the precedent has been incorrectly decided and should be reconsidered. Where there is no possibility of appeal, some civil law systems require a court that wants to deviate from the decision of a superior court to transfer the case to a higher level.⁶³ In other civil law systems, failing to adhere to constant jurisdiction opens at least the possibility of appeal.⁶⁴ Custom, which is frequently used in common law systems to give shape to both judge-made and statute law, can play a role in civil law systems, but only if expressly referred to in statute law.⁶⁵

Judges

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 dramatically restricted. With the role of judges limited to applying and “declaring” the law rather than creating it, their standing in society was likewise limited. While they certainly enjoy usually great respect in general, when compared to their common law brethren, civil law judges are not widely known, their judicial opinions are not studied outside the legal profession, and courts are viewed as faceless institutions. This may also be related in part to their recruitment process, as judges and prosecutors are usually not recruited from the ranks of legal practitioners but will be career civil servants that are hired out of law school and may advance through the judicial system during their career without ever working in private practice.

Legal Science and Techniques

Legal science in the civil law world is primarily the creation of German legal scholars of the nineteenth century.⁶⁶ 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.⁶⁷ Therefore, legal science emphasizes systematic values like general definitions, classifications, and abstractions, and uses formal logic as its primary procedure.

This thinking directly influences the way the rule of law needs to be established in civil-law-descendant host nations. The foundation for a common law regime can consist of a few

⁶¹ Art.5 of the French Civil Code expressly prohibits the setting of precedents. Only very few civil law systems contain the concept of *stare decisis*, for example the Mexican civil law system.

⁶² See MERRYMAN, *supra* note 49, at 83.

⁶³ This is the case for administrative courts in Germany if one Senate of the Federal Supreme Administrative Court wants to deviate from the decision of another Senate. See Section 11 VwGO.

⁶⁴ In Germany, for example, an administrative court needs formally to permit the appeal. But if it deviated from decisions of the Federal Supreme Administrative Court or the State’s Supreme Administrative Courts, it has to permit the appeal. See Section 124 VwGO.

⁶⁵ But see MERRYMAN, *supra* note 49, at 23 (recognizing the application of custom in many civil law countries).

⁶⁶ See MERRYMAN, *supra* note 49, at 61.

⁶⁷ *Id.* at 62.

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, though, a complete set of specific rules (a code) must be established *before* courts begin hearing cases, and the adaptation of the law to new circumstances has to happen through legislative rather than judicial action.⁶⁸ This difference is important, as it influences not only the process that rule of law projects must follow, but also the people's perception of the new or amended law in the respective country.

The Division of Jurisdiction

Most common law jurisdictions divide their courts between criminal and civil forums. In the civil law system, however, the courts are divided into "ordinary" courts (which include civil, criminal, and usually commercial courts), administrative courts, and a constitutional court. Following the French model, the highest level of the ordinary courts is usually the Supreme Court of Cassation. That court normally reviews only the legal determinations of lower courts; reconsideration of the facts of the case is usually excluded.⁶⁹ The Court of Cassation will not usually decide a case and issue a judgment. If it decides that the lower court has made a mistake in interpreting the law it states the correct interpretation and orders the lower court to reconsider the case.

Civil Procedure

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

A typical civil proceeding in civil law countries is, however, divided into three stages: a brief preliminary stage, in which the pleadings are submitted and the judge is appointed; an evidence-taking stage, in which the judges take evidence; and a decision making stage in which the judges hear the arguments and render decisions.⁷⁰

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.⁷¹

Some civil law systems do have juries in civil cases. Others will ensure popular participation through the use of lay judges in a panel of judges.

Criminal Law and Procedure

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. However, Judge Advocates should be aware of certain structural differences.

⁶⁸ *Id.* at 67.

⁶⁹ *Id.* at 87.

⁷⁰ *Id.* at 114.

⁷¹ *Id.* at 115.

For example, the separation of power ideal of civil law systems described above leads to a strict requirement for every crime and every punishment to be embodied in precise language in a statute enacted by a legislature prior to the action that is under investigation.⁷² Likewise, the criminal procedure is laid out in specific codifications. In contrast, although uncommon, uncodified crimes are not unheard of in common law systems; murder, manslaughter and perverting the course of justice have no statutory basis in England and Wales.

Significant differences in criminal procedure between the two systems stem from the separate historical development in Great Britain and continental Europe. These differences have in different variations permeated in line with the spread of the respective legal systems throughout the world. On an abstract level it can be said that the purpose of the criminal procedure for 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's and the civil law's approach to criminal justice has lost some of its significance due to similarities in the developments of the law in European States and the US over the last century. However, the criminal procedure in civil law systems, often described as inquisitorial⁷³ 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. Many of the procedural characteristics associated with the civil law system of criminal justice originate from the French Code of Criminal Procedure of 1808.⁷⁴ Judge Advocates should, however, be aware that while certain commonalities permit to speak of a system of criminal procedure typical for civil law systems, most criminal justice systems in the world today will combine elements traditionally associated with either the civil law or the common law system and no two systems will be alike.

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. During the pre-trial phase, which will be primarily written and non-public, and will often but not necessarily be separated into an investigative and an examining 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

⁷² In some civil law countries this principle, commonly referred to in Latin as *nullum crimen, nulla poena sine lege* (no crime, no punishment without (written) law) is even codified in their constitutions; see, e.g., NETHERLANDS CONST., art. 16; GERMAN CONST., art. 103 (2).

⁷³ The term 'inquisitorial' is, however, rarely used in civil law countries themselves as it invokes somewhat misleading associations to the criminal justice process preceding the reform efforts outgoing from the intellectual and political revolution in continental Europe in the late 18th and early 19th century. To most civil lawyers the term "inquisitorial procedure" is associated with a procedure in which a) a single person initiates the criminal process, directs the investigation, conducts the trial and takes the decision and b) that is secret, solely in writing, uses strictly formalized rules of evidence and permits torture to force a defendant into self-incrimination under certain circumstances. They would consider their own system rather to be "mixed" or "hybrid" with inquisitorial elements. Likewise common law criminal procedure can said to be not strictly adversarial due to the role of the police in the gathering of evidence for and against the defendant.

⁷⁴ Code d'instruction criminelle.

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 dropped⁷⁵. The investigative record and the evidence contained therein will often provide the basis of the trial judge's decision⁷⁶. 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.⁷⁷ 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, Judge Advocates 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 proceedings were much more prone to abuse. The pre-trial phase may also delay the procedure significantly. In many states, significant developments over the last decades – in particular due to international human rights obligations – have been undertaken to remedy these potential weaknesses, and in many civil law countries suspects often have similar if not more extensive rights and safeguards than in common law systems. But some civil law systems Judge Advocates may encounter may not have undergone an equivalent evolution.

Trial

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. 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, in that he names and examines the witnesses, determines the beginning and the end of the trial, and reaches the decision on the basis of his personal conviction of the truth after a free evaluation of the evidence at his disposal. 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 place⁷⁸. Contrary to

⁷⁵ 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.

⁷⁶ The practical and legal relevance of the pre-trial results may vary widely between jurisdictions. For example, in the German system evidence, in principle, has to be fully introduced into the trial orally; a judge cannot base his decision solely on pre-trial records.

⁷⁷ 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.

⁷⁸ 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

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 in lying. The defendant's refusal to answer, as well as any answer given, is taken into account by the court.

Countries under the civil law system tend to have abolished or greatly reduced the role of juries, as bench trials by professional judges alone are often perceived to be more practical as well as more objective. However, bench trials occasionally ensure popular participation through a tribunal involving lay judges.

Appeal

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 and generally does not involve the challenge of overturning a jury decision. However, Judge Advocates should be aware that, unlike in common law systems, governmental appeals 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.

3. Recommended Readings

John Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition* (3d ed. 2007).

James G. Apple & Robert P. Deyling, *A Primer on the Civil Law System*, (Federal Judicial Center) available at [http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/\\$file/CivilLaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/CivilLaw.pdf/$file/CivilLaw.pdf)

Mirrielle Delmas-Marty & J.R. Spencer [ed.], *European Criminal Procedures* (2005)

C. Religious Legal Systems and Sharia Law

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

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

features of modern Islamic movements is their call to restore the Sharia,⁷⁹ which, as demonstrated by the Taliban's⁸⁰ rule in Afghanistan, can affect world politics.

Islamic Law Systems and the Sharia

In the 6th century, when the prophet Muhammad was born in Mecca, there were many different legal systems prevalent in the Near and Middle East. Justinian's Digest had been completed three decades before, and the Jerusalem Talmud a century or two before. These sources of law were well known by Muslim jurists. Although the influence of these legal traditions on Islamic law and legal science has been the source of controversy, the emergence of Islam meant a turning point in the Middle East's legal tradition.⁸¹

Muslims believe that God revealed his teaching to Muhammad, word for word, by revelation over a period of twenty-three years. These written revelations are contained in the *Quran*. The *Quran* does not contain much law in the secular sense; only around 500 of the approximately 6,000 verses of the *Quran* pertain to law.⁸² Further sources of Islamic law were later developed, each dependent on its predecessor, and each ultimately on the *Quran*.

The totality of Islamic law is known as the "Sharia," which means the path to follow. The substance of Sharia is found in the corpus of *fiqh* (Islamic jurisprudence), which is the work of the Muslim legal scholars or jurists to interpret the revealed sources of law (the Quran and the Sunna). The Sharia includes not only human relations, such as civil and criminal law, but also "religious" obligations such as etiquette, dietary, and hygienic rules.

The Sharia is composed of four sources, although the identity of those four sources is a matter of some dispute between Sunni and Shiite Muslims.⁸³

Along with the *Quran*, 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 was believed that the actions and sayings of the Prophet reflected the general provisions of the *Quran*, and also gave guidance on matters on which the *Quran* was silent.⁸⁴ The content of the Sunna is found in the form of hadith,⁸⁵ statements which have been passed on in a continuous and reliable chain of communication from the Prophet himself. Any single hadith contains two parts: the normative statement and the chain (*isnad*) of the tradition which can be traced back to the Prophet (or, for Shiites, to an Imam).⁸⁶ Much early Islamic scholarship was devoted to determining the authenticity of the many reported hadith. Eventually the Sunnis settled on six so-

⁷⁹ See WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 1 (2005).

⁸⁰ On the Taliban, see *THE MIDDLE EAST AND ISLAMIC WORLD READER* 243 (Marvin E. Gettleman and Stuart Schaar eds., 2003).

⁸¹ There is some debate whether Muslim jurists chose to ignore existing law or if Islamic law is a pastiche of the law existing at the time. See H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 204 (2000).

⁸² *Id.* at 172.

⁸³ HALLAQ, *supra* note 79, at 119.

⁸⁴ ELIE ELHADJ, *THE ISLAMIC SHIELD* 43 (2006).

⁸⁵ Hadith was originally not synonymous with the verbal expression of the Sunna. HALLAQ, *supra* note 79, at 71.

⁸⁶ *Id.*, at 103.

called “canonical” or authoritative collections of hadith, while Shiites have their own collections based on the hadith of both the Prophet and the Imams.⁸⁷

Another source of law is ijma, which consists of a doctrinal consensus on specific issues among all the legal scholars). These may include issues such as the direction of daily prayer. Finally, the Sunnis use various forms of qiyas, or analogical deduction,⁸⁸ to determine the correct legal ruling on matters for which there is no specific rule in the primary sources or for which there is no ijma. Shiites, however, use a broader range of logical analysis to apply to new legal problems, subsumed under the concept of aql, or intellectual reasoning.

The consequence of Islamic law being derived from the two primary sources of the *Quran* and the Sunna is that violating Islamic law is tantamount to violating God’s instruction. Law and religion are inseparably connected in the Islamic tradition. That connection culminates in the Islamic doctrines of heresy and apostasy, which in their strictest application suggest that every unbeliever (kafir) should be fought, as should anyone wishing to leave the Islamic community.⁸⁹ Islamic history at the time of the Prophet and thereafter does contain instances of pacts of protection between Muslims and non-Muslims, providing the non-Muslims are People of the Book (Jews and Christians), called “dhimmis,” a special status. Especially the Ottomans, after they had conquered Constantinople, granted local autonomy to protected communities of Christians and Jews. A dhimmi had generally more rights than other non-Muslim subjects, but fewer rights than Muslim subjects.

From the Western perspective, questions of constitutionalism, human rights and equality are central to legal thought. From the Islamic perspective, it is the recognition of God’s word that drives the legal system.⁹⁰ These two approaches can often be difficult to reconcile in a single legal system. Consequently, Western countries conducting rule of law 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.

Qadi Justice and Mufti Learning

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

⁸⁷ See ELHADI, *supra* note 84, at 46.

⁸⁸ See HALLAQ, *supra* note 79, at 115, 129.

⁸⁹ There are more modest variations of these concepts stating that unbelievers have only to be killed if they denied essential elements of Islam and that only the formal conversion to another religion has to be sanctioned. See GLENN, *supra* note 81, at 207.

⁹⁰ See *id.* at 208.

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

It should be understood that even in the classical era, Sharia courts, along with qadis, were not the only legal systems operating in Muslim areas. The state had its own courts and procedures to deal with matters that fell outside the scope of the Sharia, although they were always subordinate to the Sharia.

Substantive Sharia

Family law in the Sharia is profoundly marked by the Arabic chthonic law which Muhammad encountered, and by his reaction to it. While it is the prevailing opinion that the Islamic law improved the status of women compared with the regulations of pre-Islamic law,⁹¹ the principle of equality of men and women as represented by Western law systems is not dominant in Islamic law. The *Quran* contains some verses that have been used to suggest that men and women are not equal.⁹²

Gender Equality and Sharia

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

Marriage is potentially polygamous, and divorce has historically been executed by the husband's pronouncement. While before Islam divorce was complete upon its declaration by a husband, the Sharia introduced a waiting period imposed on divorced women. Reform of family law is a high priority among the strong and growing number of Muslim feminist scholars.

Islamic law generally has granted women substantial rights and financial security. A daughter was granted a share of inheritance, and a woman could keep all property that she brought into a marriage or that she acquired during marriage.⁹³ Shiite law generally provides greater rights for women within this field than does Sunni law.

Civil and commercial law is influenced by the *Quran*, which generally prohibits speculation and the unfair distribution of risks. Thus, unlike in Western societies in which debt is

⁹¹ Although some writers proclaim that this is only a rumor put out by Islamic scholars. See ELHADJ, *supra* note 84, at 61.

⁹² 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"

⁹³ HALLAQ, *supra* note 79, at 23.

fundamentally distinguished from equity by the allocation of risk, in Islamic countries, banks frequently assume a portion of the risk. As H. Patrick Glenn explains:

[B]anks...cannot simply charge interest on loans but must acquire goods or take equity in the financially-supported enterprise, sharing the risk of loss and the possibility of profit. There are highly developed commercial vehicles for doing so, and here the law of partnership ... assumes crucial importance. Three forms of partnership (with banks) are most frequent, all with names perilously close to one another. For financing of sales, absent interest-bearing loans, there is murabaha, where the bank acquires property first and then sells to the eventual purchaser, at a markup. For general partnership, with both partners pooling resources (e.g. bank and an entrepreneur) and management stipulated for both or all, there is musharaka, and even "diminishing musharaka," where the bank's share is reimbursed over time. Finally, for pure investment, there is mudaraba, resembling a musharak, but in which only one partner provides the funds and the other manages the investment.⁹⁴

Sunnis and Shiites

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

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

Sunni Muslims, who today represent approximately 85% of the world's 1.25 billion Muslims⁹⁵ (and are the majority in most Islamic countries except Iran, Iraq, Bahrain, Azerbaijan, Yemen, Oman, and Lebanon), eventually came to accept the hereditary succession for leaders of the state (caliphs). However, they *also* stressed the need for the caliphs to protect Muslim realms and to sustain the Islamic faith within those realms.

Shiites⁹⁶ 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) have the legitimacy to become the leader of the Muslim community.⁹⁷

This originally political dispute has had a direct impact on Sunni and Shiite legal and political thought, resulting, for instance, in different Sunni and Shiite Hadith collections. Shiite Muslims reject the first three caliphs as usurpers of the caliphate from Ali, the husband of the Prophet's daughter Fatima, and later the fourth caliph. Shiite Muslims consider that the Prophet's companions who supported the intervening three caliphs are not reliable transmitters of

⁹⁴ GLENN, *supra* note 81, at 183.

⁹⁵ ELHADJ, *supra* note 84, at 42.

⁹⁶ Shiites means "Ali's partisans".

⁹⁷ GLENN, *supra* note 81, at 197.

tradition.⁹⁸ Sunni collections, however, refer to the first three caliphs and their supporters, as well as to Ali.

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

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. 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 or faqih, 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 Hadith. He is freer than his Sunni counterparts to change his rulings and opinions over time and to evolve religious law with the modern times.⁹⁹

Enmity between Sunni and Shiite Muslims has erupted periodically since the formative years of Islam, though Sunnis and Shiites have also often coexisted peacefully in many places. Today, some “radical” Sunni traditionalists consider Shiism to be heretical, as exemplified by the late Iraqi Sunni Jihadist Abu Musab Al-Zarqawi. According to Al-Zarqawi, Shiism is “the lurking snake, the crafty and malicious scorpion, the spying enemy, and the penetrating venom ... Shiism is a religion that has nothing in common with Islam.”¹⁰⁰ Referring to the Mongols’ destruction of Baghdad in 1258 and the Christian Crusades in the 12th and 13th century, such people believe that Shiites collaborated with both the Mongols and the Crusaders.

Some Sunnis today discriminate against Shiites, though much of the discrimination has economic rather than religious or legal roots.

Jihad

The word jihad does not mean “war” but rather “effort” or “striving”. It means the obligation to spread the word of the Prophet and to defend the faith against outside aggression.¹⁰¹ Today, those often referred to as “jihadists” try to justify their violent actions with several Quranic verses such as “Against them make ready your strength to the utmost, that you may strike terror into the enemies of God and your enemies...” (Verse 8:60) and “Fight those who believe not in God...” (Verse 9:29). However, jihad itself does not mean to kill unbelievers, but together with the Islamic doctrine of heresy it can adopt that meaning. Public schools and colleges in Islamic countries still teach jihad as a legal way of God and as the summit of Islam.¹⁰² Some radical Islamic movements proclaim violent jihad as an obligation for every

⁹⁸ ELHADJ, *supra* note 84, at 46.

⁹⁹ *Id.* at 135.

¹⁰⁰ *Id.* at 145.

¹⁰¹ GLENN, *supra* note 81, at 216.

¹⁰² In Osama Bin Laden’s native Saudi Arabia, for example, even after September 11, 2001, the public schools religious curriculums continue to propagate an ideology of hate toward the “unbeliever” and contains the religious obligation to fight against unbelievers in the way of jihad. See CENTER FOR RELIGIOUS FREEDOM OF FREEDOM HOUSE, SAUDI ARABIA’S CURRICULUM OF INTOLERANCE 13 (2006).

Muslim,¹⁰³ while many other Muslims stress its emphasis on personal striving to live according to the Sharia.

D. 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, the US State of Louisiana, Namibia, the Philippines, Puerto Rico, Quebec, Scotland, South Africa, Sri Lanka, Swaziland, and Zimbabwe.¹⁰⁴ 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.¹⁰⁵ Iran claims to have an exclusively Sharia-based legal system, but in practice it too is a mixed civil/Islamic system.

Particularly relevant for the rule of law 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.¹⁰⁶ 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.

E. Recognized Alternatives to the Court System

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

1. Mediation

Mediation involves the participation of a third party in an attempt to resolve a dispute between two parties. Formal definitions of the process vary from simple efforts of encouraging to the two parties to resume negotiation to more active approaches bordering on conciliation,

¹⁰³ See Charter of the Islamic Resistance Movement of Palestine (Hamas), 1988.

¹⁰⁴ See William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 L.A. L. REV. 677, 679 (2000).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 725.

where the mediator is expected to investigate the facts of the dispute and advance his own solutions.

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

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

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

2. *Arbitration*

As opposed to mediation, arbitration provides for a solution that is both binding and enforceable.¹⁰⁷ Arbitration allows for more a flexible and tailored solution to dispute resolution and traditionally tends to be limited in its application to commercial disputes both domestic and international.

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 bodies¹⁰⁸ have detailed rules of procedure that are often adopted by parties in clauses dealing with dispute resolution. Historically, arbitration decisions were provided without reasoning, but today, most if not all arbitral awards come with a full written decision.

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

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

¹⁰⁷ 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.

¹⁰⁸ For example the London Court of International Arbitration, the American Arbitration Association and The Middle East Center for International Commercial Law.

3. *Other Traditional Remedies*

Dispute resolution of non judicial or quasi judicial practice has long been practiced in many societies. Moreover, it is a resource which has often been overlooked in the recent UN sanctioned attempts to reconstruct effective and efficient judicial systems in former conflict zones.¹⁰⁹

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

Traditional Remedies in Sierra Leone

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

4. *Truth and Reconciliation Commissions*

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

Since the mid-1970s, an unprecedented number of states have attempted the transition to democracy. One of the significant issues many of these states have had to deal with is how to

¹⁰⁹ In East Timor, for instance, criticism was made of the United Nations Transitional Administration in East Timor's (UNTAET) failure to promote and develop customary legal structures. An East Timorese suggestion to incorporate such traditional methods into the new judicial structure was not acted upon, and may have been a lost opportunity to provide for dispute resolution at an appropriate level and an effective method of reducing the burden on a nascent legal system. See Kings College London – International Policy Institute, East Timor Post Operation Report, <http://www.ipi.sppp.kcl.ac.uk/rep006>.

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.¹¹⁰

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 dead¹¹¹.”

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

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

5. Property Claims Commissions

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

¹¹⁰ Twenty-seven nations have adopted such an approach since 1970. On TRCs generally, see the US Institute of Peace web site, which has an extensive library on TRCs, <http://www.usip.org/library/trush.html>.

¹¹¹ United Nations Special Representative of the Secretary General, Jean Arnault.

Such a body was set up by the CPA¹¹² in Iraq and has as of October 2005 distributed \$36 million to those who were wronged. The commission is quasi legal in nature but while not a court of law *per se*, it can be a powerful tool in rectifying past injustices and can do so in a way that is consistent with rule of law values.

F. The Implications of Gender for Rule of Law Programs

Gender issues can play an important role in rule of law activities.

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. rule of law 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 in chapters II and IV. Such substantive rights are a matter of considerable cultural sensitivity and are likely to be addressed by senior civilian leaders, leaving little room for Judge Advocates to engage in substantive gender discrimination reform.

But there is a second way in which Judge Advocates may become directly involved in gender-related issues in the conduct of rule of law activities. Importantly, Judge Advocates should not overlook the role of women in the establishment of the rule of law. 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.¹¹³ 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.¹¹⁴ 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.

¹¹² See Coalition Provisional Authority Regulation 8, as amended by Regulation 12. http://www.cpa-iraq.org/regulations/20040114_CPAREG_8_Property_Claims_Commission_and_Appendix_.pdf and http://www.cpa-iraq.org/regulations/20040624_CPAREG_12_Iraq_Property_Claims_Commission_with_Annex_A_and_B.pdf.

¹¹³ 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.

¹¹⁴ See Faiola, *supra* note 113 (citing examples from Rwanda, Bangladesh, India, and Brazil).

In 2000, Security Council Resolution 1325 put women onto the international agenda for peacemaking, peace-keeping, and peace-building for the first time.¹¹⁵ It called for attention to be given to two separate concepts: gender balance in negotiation processes for societal reconstruction¹¹⁶ and gender mainstreaming in the terms of the agreements reached and their implementation. The latter concept – gender mainstreaming¹¹⁷ – can be particularly useful in the development and implementation of rule of law activities.

In order to permit practical involvement by women in rule of law and other development programs, proactive steps may be needed at the outset to compensate for entrenched gender disparities in rights, education, and resources.¹¹⁸ Activities should aim at leveling the playing field to redress gross inequities.¹¹⁹

¹¹⁵ 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”).

¹¹⁶ 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).

¹¹⁷ Gender mainstreaming is:

the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, 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 programmes in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated.

Christine Chinkin & Florence Butegwa, *GENDER MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS* 12 (2001).

¹¹⁸ 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://dx.doi.org/10.1080/13552070412331332330> (last visited August 12, 2008).

¹¹⁹ The Geneva Centre 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.

**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 per cent 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 per cent of elected constituent assembly members. In Rwanda, where women comprise over 60 per cent of the post-genocide population, women captured 49 per cent of parliamentary seats in fall 2003 elections. Rwanda now has the largest female parliamentary representation worldwide.¹²⁰

Because so much of discrimination is de facto rather than de jure, effects-oriented metrics are critical to any rule of law 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,¹²¹ such as their equal right to own property or to receive an inheritance; programs addressing violence against women by state security 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.¹²²

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 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 25, 2008).

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. This success never would 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.¹²³

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.¹²⁴ 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.

¹²³ Faiola, *supra* note 113.

¹²⁴ 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.¹²⁵

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. "Policing with Compassion, Sierra Leone," Women as Partners in Peace and Security www.un.org/womenwatch/osagi/resoures

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 SSR 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 program 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. <http://www.gtz.de/en/>

G. Civil Society

Civil society can be defined as the political space between the individual and the government that is occupied by NGOs, social groups, associations, and other social actors, such as non-profit and for-profit service providers. Civil society 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 rule of law programs is important for wider and more inclusive local involvement in rule of law operations and, ultimately, their sustainability. CSOs have an important role to play owing to their potential to give voice to the interests and concerns of the wider population, to encourage reforms that are responsive to popular security and justice

¹²⁵ Iivula-Ithana, Peace Needs Women, and Women Need Justice, New York Gender Justice Conference: UNIFEM/ILAC, 2004.

needs, and to actually perform the work of reconstruction and social support that leads to increased stability and recognition of the rule of law.

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

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

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

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

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

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

Human rights and access to justice. CSOs play an important role in advocating for human rights and increasing access to justice. Many bar associations, independent lawyers groups and NGOs work to promote human rights through training of security forces, campaigning for legislation, monitoring allegations of abuses, and providing legal and paralegal assistance. Work in these areas is particularly important in countries with a repressive state or countries emerging from violent conflict and political transitions where rights are often not respected.

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

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

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

Providing Legal Aid in Kirkuk

One of the key challenges to promoting the rule of law 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 rule of law 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 U.S. 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.¹²⁶ 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.

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

¹²⁶ 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/>. This project is discussed in greater detail in section XI.A.

La Strada Foundation and Human Trafficking in Poland

In Poland, La Strada (a CSO that works to raise awareness and knowledge on the problem of trafficking of women as well as directly providing services for victims of human trafficking) lobbies national authorities on the human rights aspects of human trafficking and the need for reform. It has an active prevention program that aims to raise the awareness of potential victims on the dangers of human trafficking and it provides direct assistance, referrals and counseling for victims of trafficking. Within the security sector, La Strada has trained 120 law enforcement representatives as trainers within the police and border guard academies. The training focuses on raising the awareness of border guards and the police on the complexity of the problem, developing strategies to monitor and prevent trafficking, and how to deal with its victims. This resulted in the police academy adding the issue of human trafficking to their curriculum and the harmonization between the police and border guards of procedures to combat trafficking.¹²⁷

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

3. Conducting a Baseline Assessment in this Sector

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

Baseline Assessment for roles of Civil Society in Rule of Law¹²⁸

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?

¹²⁷ Source: La Strada Foundation, http://www.strada.org.pl/index_en.html.

¹²⁸ See also section VI.C on Assessments for direction on how to conduct the assessment and how to use these questions as measures of effectiveness to monitor progress.

Capacity

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

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

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

Management

How strong are the internal managerial systems of relevant CSOs?

Do they handle budgeting activities competently and transparently?

Coordination with other parts of the security system

Which CSOs have connections to security and justice actors?

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

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

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

External Partners Engagement

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

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

How can sustainability be built among targeted CSOs?

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

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

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

4. Common Challenges and Lessons Learned to Guide Implementation

Support capacity development. Building the capacity of CSOs requires a long-term perspective in 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 itself if it is a source of CSO funding). This can be done, for example, through harnessing the support of the private business sector and charity campaigns.

Support regional and international networks and partners as a bridge to the national level. In many countries it may be difficult for CSOs to engage directly in security and justice issues at the national level. Participation in security-related discussions and mechanisms at the regional level tends to be a good means of exerting indirect pressure on the national level as local CSOs are normally seen to have more credibility if they are members of regional or international networks or have international partners.

Build media capacity to report on rule of law and include media strategies into programming. The media is one of the main channels to help raise public awareness on issues pertaining to the rule of law. In many countries, especially post-conflict ones, the media is underdeveloped and journalists lack the capacity and knowledge to effectively cover security and justice issues. CSOs can play an important role in helping to develop these skills and developing the capacity of CSOs to effectively engage with the media can be an important area for assistance.

Train the trainers. Experience shows that 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 rule of law.

Beware of any lack of domestic legitimacy. Supporting CSOs without broad domestic legitimacy may jeopardize reforms with the government and alienate wider civil society. Some

CSOs are more closely connected to national elites and external partners than to local communities.

The tension between role as watchdog and partner. When CSOs move from playing a watchdog role and start to participate in actually helping to implement the rule of law, their domestic audience may perceive them as no longer being neutral. On the other hand, governments may not trust them as partners if they are being publicly critical. Some compromises will have to be made and training in how to raise sensitive issues without being overtly confrontational may be essential for CSOs performing advocacy roles. For example, both in the Democratic Republic of Congo and Liberia, civil society became party to the peace agreement ending the conflict, taking up seats in transitional parliament and management of government parastatals. This had implications for perceptions of its neutrality.

Be aware of potential negative role of some civil society groups. Violent conflict often engulfs, politicizes and splinters civil society. Some organizations, which may be considered to have played a negative role in the conflict, could act as a spoiler to peace processes.

Ensure the security of NGO and CSO partners. In many contexts NGOs are targeted with violence by belligerent factions or insurgents, and they are almost invariably ill-prepared to provide their own security in a non- or semi-permissive environment. Security failures that affect CSOs can devastate reconstruction efforts, including rule of law operations. Deployed Judge Advocates need to be aware of the security risks that CSOs face and to either work to provide security or, if the situation is untenable, help to arrange for their exit from the AO.

H. Non-State Security Providers

Non-state security providers encompass a broad range of security forces with widely varying degrees of legal status and legitimacy. Government regulated private security companies (PSCs) and some neighborhood protection programs are examples of legitimate services; some political party militias are acceptable in certain countries, while for the most part guerilla armies, warlord militias, and so-called “liberation armies” are generally illicit and counterproductive to any peace process or stabilization effort. The key characteristic that all of these non-state actors share, however, is that they provide some form of security to someone. While private security forces can and do provide critical, legitimate security functions, unlike traditional police they do not serve the general public. In attempting to bring them and their actions within the rule of law, the role of private actors in providing security services has to be recognized and addressed. Non-state actors provide many different types of security services:

Military Services

- Military training/consulting
- Military intelligence
- Arms procurement
- Combat and operation support
- Humanitarian de-mining
- Maintenance

Security Services

Physical security (static/transport)

Close protection (body guarding)

Rapid response

Technical security

Surveillance service

Investigative services

Risk assessment and analysis

The “private security sector,” as distinct from other types of non-state security actors, is generally defined as those commercial companies directly providing military or security-related services (of a more protective nature) for profit, whether domestically or internationally. The number of PSC personnel and the size of PSC budgets exceeds public law enforcement agencies in many countries, including South Africa, Philippines, Russia, US, UK, Israel, and Germany. The private security sector is rarely addressed in any systematic way in rule of law programming or assessment. As a result, there is a considerable lack of practical experience for practitioners to draw on.

It is tempting to ignore non-state security actors or treat them as a host nation problem. However, if the sector is neglected in broader rule of law programming, it may come to represent an essentially parallel and largely unaccountable sector in competition with state justice and security provision. Without effective regulation 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

A 2005 private security sector assessment in the Republic of Moldova found that the State Guard Service, within the Ministry of Interior, was directly competing with national PSCs for guarding contracts, while at the same time operating as national regulator for the private security sector. PSCs were also found to have been actively employed by the police to undertake police tasks, such as arresting criminals and combating organized crime.

Recently, the role of 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 involving Blackwater in which several Iraqis were killed. This incident was referred to the DOJ for investigation and possible prosecution. 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. In addition, legislation was introduced in Congress to clarify and expand US criminal jurisdiction over security contractors overseas, although (as of August 2008) nothing has yet been signed into law.

I. 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 work 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?

2. *Ten Lessons Learned*

(1) *Avoid creating a security vacuum.* Non-state security actors may be the only providers of security in areas or sectors where state provision of security is weak. To avoid creating a security vacuum, it may be necessary to strengthen state security provision and capacity for oversight as a precondition for effectively regulating the private security sector.

(2) *Control the activities of personnel wherever they are working.* This is essential to ensure that they are accountable for all wrongful acts wherever they are committed, particularly when the domestic regulatory environment is weak. 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 rule of law 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.¹²⁹

(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, 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.

¹²⁹ For information on vetting public employees see OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, *RULE OF LAW TOOLS FOR POST-CONFLICT STATES – VETTING: AN OPERATIONAL FRAMEWORK (2006)*, available at http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Vetting_en.pdf. For further information about the ICTJ research project on vetting and additional guidelines being developed see <http://www.ictj.org/en/research/projects/vetting/index.html>.

VI. Planning for Rule of Law Operations

Mission planning does not occur in a vacuum. It is subject to the demands of available resources, time, and the operational goal to be obtained. Planning for the rule of law mission is no different. Hindsight and analysis of past post-conflict operations suggest that there must be a thoughtful, systematic, and phased rule of law planning strategy. That planning effort, in turn, is driven by a military and interagency planning methodologies with which Judge Advocates must be familiar in order to successfully support or lead rule of law operations.

This chapter begins with an overview of the Military Decision Making Process (MDMP) designed to familiarize Judge Advocates in rule of law operations with this common military planning methodology. Drawing on the MDMP, the chapter provides some substantive, albeit general, guidance on how to plan for deployment as a rule of law practitioner, to assess the state of rule of law, and measure progress in rule of law operations. The State Department's Office of the Coordinator for Reconstruction and Stabilization (S/CRS) has promulgated a framework for interagency reconstruction and stability operations, and the chapter discusses that framework along with the ongoing implementation of that framework in Army doctrine.

A. The Military Planning Process

Frequently, Judge Advocates find themselves responsible for rule of law operations with little previous experience or training in Army or Joint planning methodology. But no operation exists in a vacuum; it must be carried out as part of a set of operations undertaken by a particular unit. Consequently, the rule of law operations that Judge Advocates either support or lead must advance through the same planning process as the other operations the unit is currently undertaking, even competing with other operations and priorities for scarce resources both within the unit and to be obtained from outside resources. The military has a methodology for planning and assigning priority to operations, and Judge Advocates must understand that methodology well enough to intelligently participate in the planning process that will necessarily accompany any rule of law operation.¹

1. Why Planning is Important

“Begin with the end in mind.” This popular maxim should guide the Judge Advocate involved in planning for rule of law operations. The rule of law environment in COIN and stability operations is likely to be complex and uncertain. The mission of creating or enhancing the rule of law presents the rule of law practitioner with an “ill-structured” problem – one where no clear formulation of the problem appears possible, one without all the required information, one with multiple solutions and one requiring multiple solutions applied concurrently or sequentially.² The Judge Advocate in the field will be presented with complex rule of law challenges and many ideas and solutions that compete for military support and resources. The

¹ A training program in the Military Decision Making Process is available to Army Judge Advocates online through JAG University. Go to <https://jag.learn.army.mil> and enroll in the “JATSOC Elective”. MDMP is the sixth module in the course.

² U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION para. 2-22 (20 Dec. 2005).

military planning process provides a systematic and analytical process that helps to make decisions about military support to rule of law programs.

Utilizing the military planning process will help to ensure that the commander's rule of law vision is properly informed, that effort and resources are devoted to those programs that will create the desired effects, and that military rule of law operations are integrated and synchronized with our host nation and interagency partners. Utilizing the military planning process will allow the Judge Advocate to focus the commander and staff on rule of law issues in the same manner as other military operations and prevent rule of law operations from becoming "something the Judge Advocates do." The effective Judge Advocate will be an active participant in the military planning process by informing the process with a thorough knowledge of the rule of law aspects of COIN and stability operations and a thorough understanding of the process the commander and staff use to make decisions and plans. The military planning process will provide the Judge Advocate in the field with a system to address complex, uncertain, and challenging rule of law issues with synchronized, integrated and efficacious military support of rule of law programs.

The concept of planning for military support of rule of law operations should not be interpreted as meaning that the military operations in the rule of law arena are independent of host nation, coalition and interagency participants in the rule of law mission. An important aspect of the military planning process is that information is received from and coordination made with the other actors in the rule of law area.

Coordination in OIF-1

During OIF-1, the legal reconstruction effort in southern Iraq was disjointed, as the Judge Advocates operating in each province did not have the communications capabilities to coordinate with each other and there was confusion within the chain of command structure. Further, some Judge Advocates had unclassified email access, some had only classified email access, and others had none at all. Initial planning deficiencies that failed to consider the chain of command, reporting, and communications issues led to two months of duplicated effort and lack of regional coordination that unnecessarily delayed restoring courthouse operations across the southern region by several months in some instances.³

2. *What is Planning?*

Planning is the means by which the commander envisions a desired outcome, lays out effective ways of achieving it, and communicates to his subordinates his vision, intent, and decisions, focusing on the results he expects to achieve (FM 3-0). The outcome of planning is a plan or an order that:

- **Fosters mission command by clearly conveying the commander's intent**
- **Assigns tasks and purposes to subordinates**
- **Contains the minimum coordinating measures necessary to synchronize the operation.**

³ CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOL. II, FULL SPECTRUM OPERATIONS 254 (2006).

- **Allocates or reallocates resources.**
- **Directs preparation activities and establishes times or conditions for execution⁴**

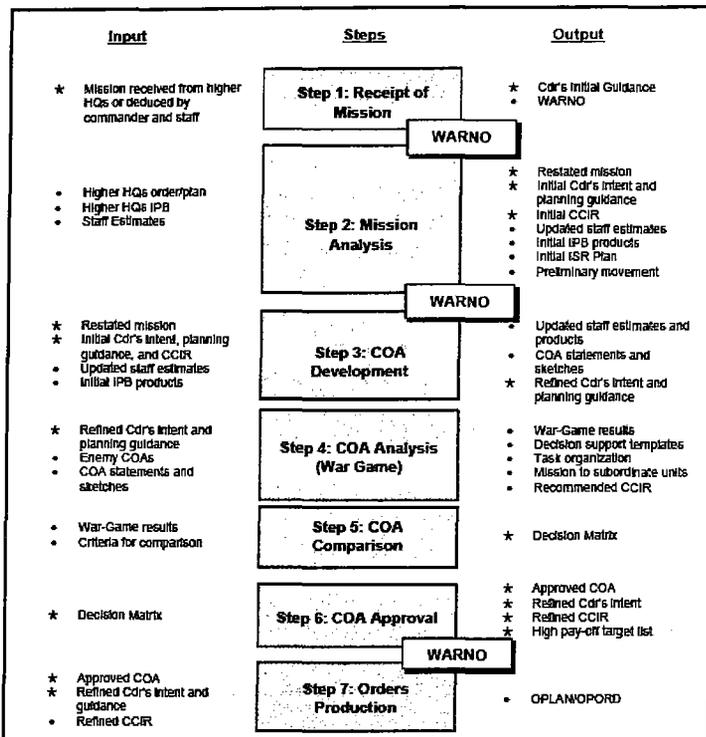
Planning for rule of law programs in COIN and stability operations will present the rule of law practitioner, commander, and staff with a complex and unfamiliar situation. Planning in these environments is best done using the analytic decision making process. (FM 5-0, para. 1-20) Analytic decision making approaches a problem systematically. Leaders analyze a problem, generate several possible solutions, analyze and compare them to a set of criteria, and select the best solution. The analytic approach aims to produce the optimal solution to a problem from among those solutions identified. This approach is methodical, and it serves well for decision making in complex or unfamiliar situations by allowing the breakdown of tasks into recognizable elements. It ensures that the commander and staff consider, analyze, and evaluate all relevant factors. (FM 5-0, para. 1-20) As one rule of law practitioner in Iraq explained, “the military decision making process (MDMP) detailed in FM 5-0 applies as much to a rule of law advisor as to any staff officer.”⁵

3. *The Military Decision Making Process*

The military decision making process (MDMP) is the analytic decision making approach that Army commanders and staffs use to plan operations at most levels of command. The military decision making process is described in detail in FM 5-0, *Army Planning and Orders Production*. The Marine Corps Planning Process (MCP), described in Marine Corps Warfighting Publication (MCWP) 5-1, *Marine Corps Planning Process*, is an analogous planning methodology. The Joint Operation Planning Process (JOPPS) is the related joint analytic decision making process for joint operations, and is described in JP 5-0, *Joint Operation Planning*, ch. III. The planning steps in the three systems are closely related. Because most readers of the *Handbook* will conduct planning in tactical and operational units that utilize MDMP and joint operations planning, this chapter will reference primarily the concepts contained in the Army and joint methodologies, but this description should generally apply with minor translation to the MCP as well.

⁴ FM 5-0, *supra* note 2, at para. 1-2.

⁵ See also generally NORMAN M. WADE, *THE BATTLE STAFF SMARTBOOK* (2d rev. ed. 2005), a practical guide for staff planning.



FM 5-0, fig. 3-1, The Military Decision Making Process

It is important to note that the MDMP assumes full staff involvement. It will be impossible for the Judge Advocate to carry out the MDMP in isolation. Thus, it is critical that the Judge Advocate planning rule of law activities form good working relationships with the other cells in the commander's staff.

a) Step 1: Receipt of Mission

The rule of law practitioner plays a key role on the MDMP for rule of law programs from the very first step in the process. As soon as the unit receives the mission, the staff gathers the tools needed to conduct the mission analysis. This process will include the orders or plans of the higher headquarters. Both the Joint Campaign Plan for Iraq and the Joint Campaign Plan for Afghanistan include a Rule of Annex, and that should be the case for any well-developed theater, but it may not always be the case.

Regardless of the stage of the campaign, though, the Judge Advocate should be careful to avoid the tendency to act as though he is the first one to operate in this area. This initial step of gathering existing plans will afford the rule of law practitioner the first opportunity to integrate programs with interagency, coalition, and host nation partners. Existing assessments of the rule of law environment may exist within USAID, host nation commissions or ministries, non-governmental organizations, civil-affairs teams, predecessor units, and offices within the US

mission. Embassies in both Iraq and Afghanistan have a Rule of Law Coordinator charged with coordinating USG rule of law programs within the country and Provincial Reconstruction Teams have embedded rule of law professionals. Gathering information from such sources will be a good way to meet the other rule of law practitioners in your area of concern and plant the seeds for an integrated and synchronized rule of law effort.

In this stage of the process the rule of law practitioner should be focused on learning what is known and, of at least equal importance, what is not known about the rule of law environment in his area of concern. Identifying what is not known will serve an important function in later steps as critical information requirements are identified and intelligence products requested.

The goal of the rule of law practitioner in this step should be to collect the information about the rule of law operational environment to give the commander and staff situational understanding. Operational environments are a composite of the conditions, circumstances, and influences that affect the employment of capabilities and bear on the decisions of the commander (JP 3-0 and FM 3-0, para 1-1)). While they include all enemy, adversary, friendly, and neutral systems across the spectrum of conflict, they also include an understanding of the physical environment, the state of governance, technology, local resources, and the culture of the local population. For example, are the criminal courts trying insurgent cases, and if not, why not? Is the population choosing to use the court system of the government to resolve its disputes, and if not, why not? Do the police have the confidence of the population, and if not, why not? In collecting the existing information concerning the rule of law operational environment, the rule of law practitioner should collect any information that explains the difference between the desired rule of law condition and the current conditions. In identifying problem areas, the rule of law practitioner should seek to identify the root cause of the problem, not merely the symptoms. (FM 5-0, para 2-26) Systems analysis should be used to understand the systems of systems that compose the rule of law environment.⁶

During this phase of MDMP, the rule of law practitioner should develop a broad and comprehensive understanding of what the rule of law consists of in the particular environment. How complex a system is it? How does it link with the rest of society, government, and the economic system of the country? Unlike most MDMP problem sets, rule of law will involve institutional and societal dynamics that go beyond the normal physical or geographical understanding of a military operational environment. In this step, reconsider how the definition of rule of law and its effects relates to the mission that you are receiving from your higher headquarters.

Awareness of cultural and political issues and conditions within the host nation may be critical to a proper understanding of the rule of law environment. Therefore, the gathering information phase may include contacting sources outside traditional rule of law entities, to include intelligence entities and host nation sources.

Although it is only part of the first step in the MDMP, assessment is going to be a major part of any rule of law program. Assessment products can also help to visualize the Rule of Law system or environment and ensure that you consider all aspects of the system. Section VI.C addresses assessment in greater detail.

⁶ On the “systems perspective” and its place assessing the environment, *see* JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATIONS PLANNING III-16 – III-19 (26 Dec. 2006).

b) Step 2: Mission Analysis

The primary purpose of mission analysis is to understand the problem and purpose of the operation and issue appropriate guidance to drive the rest of the planning process. (JP 5-0, para. III-12.) A detailed diagram of the mission analysis step is found at Figure III-4, JP 5-0. The rule of law practitioner has an important role in this step in assisting the commander and staff to understand the rule of law challenges, identify the root causes of those challenges and articulate the purpose of the rule of law operation. Careful analysis informed by proper assessments is the key to success in this step, and therefore the success of mission analysis is dependent in large part of the quality of the initial assessment, whose contents in turn must be driven by the needs of the mission analysis.

Understanding the root causes of the impediments to creating or enhancing a rule of law environment is critical to mission analysis in rule of law activities. 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 or may not have anything to do with remediating the impediments to enhancing the rule of law.

The mission analysis must include analysis of the human factors that will affect the rule of law mission. Incorporating human factors into mission analysis requires critical thinking, collaboration, continuous learning, and adaptation. It also requires analyzing local and regional perceptions. Many factors influence perceptions of the enemy, adversaries, supporters, and neutrals. These include:

- **Language**
- **Culture**
- **Geography**
- **History**
- **Education**
- **Beliefs**
- **Perceived objectives and motivation**
- **Communications media**
- **Personal experience**

Assessments that address primarily infrastructure and institutions will necessarily blind the mission analysis to the real issue – do the people believe that the legal system is legitimate and trust it to accomplish the effects discussed in Chapter II.

Commanders and staffs at the BCT and division levels may be familiar with the ASCOPE approach to assessing civil considerations that comprise the rule of law operational environment. Civil considerations reflect how the man-made infrastructure, civilian institutions, and attitudes and activities of the civilian leaders, populations, and organizations within an area of operations

influence the conduct of military operations.⁷ Commanders and staffs analyze civil considerations in terms of the categories expressed in the memory aid ASCOPE:

Areas

Structures

Capabilities

Organizations

People

Events⁸

Civil considerations help commanders develop an understanding of the social, political, and cultural variables within the area of operations and how these affect the mission. Understanding the relationship between military operations and civilians, culture, and society is critical to conducting full spectrum operations.⁹ These considerations relate directly to the effects of the other instruments of national power. They provide a vital link between actions of forces interacting with the local populace and the desired end state.

The assessment process should result in identifying the centers of gravity for the rule of law 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. (JP 5-0, page IV-8) In the context of a COIN operation, the essence of the operational art lies in being able to produce the right combination of effects in time, space, and purpose relative to an insurgent center of gravity to neutralize, weaken, defeat, or destroy it. In contingency operations like COIN and stability operations, the center of gravity is often an intangible, not a physical location or mass of enemy forces. (JP 5-0, Fig IV-2) Intelligence assets should be utilized to identify adversary and friendly centers of gravity. (JP 5-0, page IV-10) The planning effort will then seek to target insurgent centers of gravity and protect friendly centers of gravity, such as local goodwill.

An important by-product of the assessment process is identifying what information is not known that is critical to the decision-making of the staff and commander. This information is identified as Commander's Critical Information Requirements (CCIRs). CCIRs comprise information requirements identified by the commander as being critical to timely information management and the decision-making process that affect successful mission accomplishment. (JP 5-0, page III-27) The information needed may be about friendly forces (critical friendly force information) or about other forces or conditions (priority intelligence requirements). Identifying CCIRs will allow the commander to direct the staff to find the critical information and will guide the intelligence assets in the Intelligence Preparation of the Battlefield process (IPB). The rule of law practitioner must also ensure that the IPB considers more than the bilateral friendly/threat equation. In rule of law, stability, and COIN operations, the role of the populace and sometimes

⁷ See generally U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES (11 Aug. 2003).

⁸ See U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 5-36 (27 Feb. 2008).

⁹ The civil-military relationships is, of course, at the core of the Civil Affairs discipline, and is covered extensively in JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS (8 July 2008) and U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS (29 Sept. 2006).

even the role of the regional or international community can be decisive in the success of building legitimacy and defeating insurgent or other drivers of conflict. Therefore, IPB that supports this kind of planning must be more expansive and flexible. Rule of law practitioners must articulate this to the intelligence experts on the staff and work with them to build a proper model for analysis.

Careful analysis of the mission will address the proper role of the military within the rule of law effort in the area of concern. Ideally, the military rule of law efforts will be in support of efforts of our host nation and civilian interagency partners. However, the security environment may limit the ability of civilian agencies to operate. Thus, while others may have the lead, US military forces must be prepared to carry out all aspects of stability operations.¹⁰ US military planners should also understand the institutional perspectives of our interagency and international partners. Sometimes agencies are limited in authority or fiscal constraints and can adopt a correspondingly limited outlook on what the host nation's rule of law system includes. Understanding whether military rule of law efforts will be supporting or in the lead will guide the commander and staff in developing lines of operation or lines of effort that complement and reinforce partner efforts.

Because commanders typically visualize stability and COIN operations along lines of effort,¹¹ rule of law operations will generally be planned as lines of effort. A line of effort links multiple tasks and missions using the logic of purpose – cause and effect – to focus efforts toward establishing operational and strategic conditions. Commanders use lines of effort to describe how they envision their operations creating the more intangible end state conditions. These lines of effort show how individual actions relate to each other and to achieving the end state. Lines of effort are particularly helpful to operational design when positional references to an enemy or adversary have little relevance, as in many stability operations, including rule of law operations. In operations involving many nonmilitary factors, lines of effort may be the only way to link tasks, effects, conditions, and the desired end state. They are a particularly valuable tool when used to achieve unity of effort in operations involving multinational forces and civilian organizations, where unity of command is elusive, if not impractical. (FM 3-0, para. 6-66.)

The rule of law practitioner should also ensure that the planning principle of nested concepts is followed. "Nested concepts" is a planning technique to achieve unity of purpose whereby each succeeding echelon's concept of operations is embedded in the other. (FM 5-0, para. 1-62) Because successful rule of law programs are integrated and synchronized with the programs of other rule of law actors in the area of concern, this concept will require not only that the unit understand the rule of law concept of operations of its higher headquarters, but also that the unit understands the concept of rule of law operations for host nation, coalition, and interagency partners conducting rule of law operations in the area. The goal is unified action, which is the synchronization, coordination, and/or integration of the activities of governmental and nongovernmental entities with military operations to achieve unity of effort. (See FM 3-0, para 1-45)

¹⁰ See Chapter III.

¹¹ FM 3-0, *supra* note 8, at para 6-69. Moreover, stability operations have corresponding Department of State post-conflict technical sectors, *see id.* at paras. 3-88 – 3-95, and commanders may consider linking primary stability tasks to the DOS sectors.

A critical component of the mission analysis is understanding the purpose of the mission. The Judge Advocate has a vital role in this process. The Judge Advocate must understand and be able to articulate to the staff and commander the purpose of the rule of law operations in COIN and stability operations. Much of this book discusses the relationship between COIN, stability operations, and rule of law programs, but it is important to be able to align the effort to the doctrinal definitions and purposes of COIN and stability operations. 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.¹² Legitimacy of the host-nation government and its legal system is key. Similarly, in stability operations the goal is a stable civil situation sustainable by host nation assets without foreign military forces. (FM 3-0, para 3-73) 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. (FM 3-0, para. 3-91)

A successful COIN strategy may include the following rule of law attributes:

Insurgents punished in host nation courts (FM 3-24, para. D-15)

Public perceives insurgents as criminals (FM 3-24, para. 1-13, D-15)

Public not motivated by revenge and resentment (FM 3-24, para. 1-128)

Former insurgents rehabilitated and not part of the fight (FM 3-24, Table 1-1)

Host nation government seen as legitimate (FM 3-24, para. 1-123)

As the foregoing list suggests, military rule of law practitioners will be concerned primarily with the criminal justice component of the rule of law environment. There is much more to the rule of law environment than police, courts, and prisons, however. Because a goal of stability operations is to establish self-sustaining public law and order, the rule of law practitioner should not overlook programs that will develop the rule of law culture and support an indigenous, self-sustaining demand for the rule of law. 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 the under-privileged in the legal system. The Judge Advocate 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 rule of law rather than merely developing the institutions and capacity to supply the rule of law.

Part of the mission analysis process is developing mission success criteria. (JP 5-0, page III-27) Although creating or enhancing the rule of law is an ongoing mission, it is important to identify those measures with which the command and staff can assess the progress toward the desired end state. Such assessments are done with measures of performance and measures of effectiveness.

¹² *Id.* at , para 2-55. See also U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006).

As important as understanding the mission is selecting the correct measures of performance are used to evaluate whether the mission is succeeding. Measures of effectiveness are criteria used to assess changes in system behavior, capability or operational environment that are tied to measuring the attainment of an end state, achievement of an objective, or creation of an effect. (JP 5-0, page III-61). Simply put, measures of performance address whether we are doing things right, measures of effectiveness address whether we are doing the right things. Measures of effectiveness typically are more subjective and may be difficult to quantify with regard to rule of law efforts. However, the rule of law practitioner must be careful to avoid allowing the commander and staff to adopt measures of performance as the assessment metrics for rule of law operations. The readily quantifiable measures of performance, also known as output indicators, such as number of judges trained, square feet of courthouse space built, or number of laptops computers supplied to police stations assess the efficiency of actions of our forces to accomplish certain tasks. The critical assessment however is not whether we are accomplishing those tasks, it is whether those tasks are advancing the rule of law environment to create the desired effects. Because legitimacy of the legal system in the minds of the population is a critical desired effect, some ways to assess the public's perception of the legal system must be included in any measure of effectiveness in the rule of law arena. Frequently, the only real option is through public opinion polls, which have been used extensively in Iraq.

The importance of choosing the correct metrics cannot be overstated. Once put in place, the rule of law program will "work to the metric," meaning that an incorrect metric will hopelessly derail any project. Consequently, metrics should be carefully designed to serve the longer-term outcomes of programming – 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.

The successful rule of law practitioner will ensure that the commander and staff complete the mission analysis with a thorough understanding of the rule of law challenges informed by a comprehensive assessment and a sound grasp of the purpose of rule of law operations.

Example: Rule of Law Mission Analysis

Your division commander has received the mission to improve the rule of law in his AO. Intelligence resources and your communication with the host nation and interagency rule of law partners in the region all indicate that the popular perception is that the justice system and police are sectarian in their administration of justice. This popular perception is fueled by insurgent leaders and insurgent propaganda. The current state is that most of the population does not trust the criminal justice system, views the judges and police as controlled by sectarian influences, and seeks protection and justice through local militias of their own sect.

The center of gravity that must be defeated is the popular perception that the judges are police are corrupt because they are motivated by sectarian influences instead of following the law. A CCIR will be developed to determine whether there is a factual basis for the popular perception. If there is no factual basis for the popular perception, then the commander and rule of law practitioner 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 performance that will include the number crimes reported to the police by the sect not in power, 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 rule of law 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 rule law end state. The next step in the process is to develop various ways to create the desired end state. This next step is known as course of action development.

c) Step 3: Developing Courses of Action

As the result of the first two steps, the commander and staff will understand the current operational environment with regard to the rule of law and will understand the desired end state. The next step in the process is to develop various ways to get from the current condition to the desired end state, known as course of action (COA) development.

Based on the commander's guidance and the results of step 1, the staff generates options for COAs. A good COA will create the desired effects and end state. Brainstorming is the preferred technique for generating options. It requires time, imagination, and creativity, but it produces the widest range of choices. The staff should remain unbiased and open-minded in evaluating proposed options. Staff members quickly identify COAs that are not feasible due to factors in their functional areas. They also quickly decide if a COA can be modified to accomplish the requirement or should be eliminated immediately. (FM 5-0, para 3-124)

In developing COAs, staff members determine the doctrinal requirements for each type of operation being considered, including doctrinal tasks for subordinate units. (FM 5-0, para. 3-125) The rule of law practitioner will be invaluable in this process. Unlike kinetic operations, there is no well established doctrine that informs rule of law operations. The rule of law practitioner must be both well-read in stability operations doctrine, COIN doctrine, and past rule of law programs and must be creative in devising new programs to accomplish the desired effects in the operational environment.

Creative thinking is critical. Creative or innovative thinking is the kind of thinking that leads to new insights, novel approaches, fresh perspectives, and whole new ways of understanding and conceiving things. (FM 5-0, para. 2-14) Creative thinking is not a mysterious gift, nor does it have to be outlandish. Innovation and creative thinking are required as the commander and staff operating in the rule of law arena may be operating in an arena in which they have little training or experience, but working outside of the comfort zone encompassed by subject matter one has been thoroughly trained in is a requirement for all military officers, and it will be nothing new to your fellow staff officers. Collaboration with host nation resources and interagency partners is essential in brainstorming possible courses of action.

Armed with the comprehensive situational understanding and sound grasp of the desired end state derived from the mission analysis, the innovative rule of law practitioner can help the staff in developing alternative ways to accomplish the desired effects.

Staffs developing COAs ensure each one meets these screening criteria:

Feasible. The unit must be able to accomplish the mission within the available time, space, and resources.

Acceptable. The tactical or operational 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 rule of law practitioner should ensure that the staff does not lose sight of the desired end state- a legal system that is perceived by the population to be legitimate. Therefore, it is 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. (FM 5-0, para. 3-113)

After developing COAs, the staff briefs them to the commander. A collaborative session may facilitate subordinate planning. The COA briefing includes:

An updated IPB.

- Possible enemy COAs (event templates).
- The unit mission statement.
- The commander's and higher commanders' intent.
- COA statements and sketches.
- The rationale for each COA, including—
 - Considerations that might affect enemy COAs.
 - Critical events for each COA.
 - Updated facts and assumptions.
- Recommended evaluation criteria.

After the briefing, the commander gives additional guidance. If all COAs are rejected, the staff begins again. If one or more of the COAs are accepted, staff members begin COA analysis. The commander may create a new COA by incorporating elements of one or more COAs developed by the staff. The staff then prepares to wargame this new COA. (FM 5-0, para. 3-148)

d) Step 4: Course Of Action Analysis (Wargaming)

COA analysis allows the staff to synchronize the battlefield operating systems for each COA and identify the COA that best accomplishes the mission. It helps the commander and staff to:

- Determine how to maximize the effects of combat power while protecting friendly forces and minimizing collateral damage.
- Further develop a visualization of the battle.
- Anticipate battlefield events.
- Determine conditions and resources required for success.
- Determine when and where to apply force capabilities.
- Focus IPB on enemy strengths and weaknesses, and the desired end state.
- Identify coordination needed to produce synchronized results.
- Determine the most flexible COA.¹³

Wargaming stimulates ideas, highlights critical tasks, and provides insights that might not otherwise be discovered. It is a critical step in the MDMP and should be allocated more time than any other step.

Wargamers need to:

- Remain objective, not allowing personality or their sensing of “what the commander wants” to influence them. They avoid defending a COA just because they personally developed it.

- Accurately record advantages and disadvantages of each COA as they emerge.

¹³ See FM 5-0, *supra* note 2, para. 3-152.

Continually assess feasibility, acceptability, and suitability of each COA. If a COA fails any of these tests, they reject it.

Avoid drawing premature conclusions and gathering facts to support such conclusions.

Avoid comparing one COA with another during the wargame. This occurs during COA comparison.¹⁴

The Judge Advocate can play an important role in the course of action analysis and wargaming step 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. It is a barrier to creativity that combines habit, fear, and prejudice:

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.

Prejudice – preconceived opinion formed without a rational basis or with insufficient knowledge.

Groupthink refers to a mode of thinking that people engage in when they are deeply involved in a cohesive group. It occurs when members, striving for agreement, override their motivation 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. (FM 5-0, para. 2-16-17) Judge Advocates have professional training that aids them in approaching problems in innovative ways and in expressing divergent opinions. The staff and commander will benefit from the Judge Advocate’s candor and analytical skill in avoiding groupthink.

e) Step 5: Course of Action Comparison

The COA comparison starts with all staff members analyzing and evaluating the advantages and disadvantages of each COA from their perspectives. Staff members each present their findings for the others’ consideration. Using the evaluation criteria developed before the wargame, the staff outlines each COA and highlighting its advantages and disadvantages. Comparing the strengths and weaknesses of the COAs identifies their advantages and disadvantages with respect to each other. The staff compares feasible COAs to identify the one 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.¹⁵

¹⁴ See *id.* at para 3-153.

¹⁵ See *id.* at para 3-189 – 3-190.

The rule of law 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 rule of law effects. The rule of law practitioner must be vigilant that the staff remains focused on the end state and does not stray away into “bricks and mortar” or other overly simplistic capacity building projects that are readily quantifiable and subject to logical, sequential planning but not decisive to addressing the underlying legitimacy challenges in the rule of law environment.

f) Step 6: Course of Action Approval

COA approval has three components:

The staff recommends a COA, usually in a decision briefing.

The commander decides which COA to approve.

The commander issues the final planning guidance.¹⁶

After completing its analysis and comparison, the staff identifies its preferred COA and makes a recommendation. If the staff cannot reach a decision, the chief of staff/executive officer decides which COA to recommend. The staff then delivers a decision briefing to the commander. The chief of staff/executive officer highlights any changes to each COA resulting from the wargame. The decision briefing includes—

The intent of the higher and next higher commanders.

The status of the force and its components.

The current IPB.

The COAs considered, including—

Assumptions used.

Results of staff estimates.

Summary of wargame for each COA to include critical events, modifications to any COA, and wargame results.

Advantages and disadvantages (including risk) of each COA.

The recommended COA.

After the decision briefing, the commander selects the COA he believes will best accomplish the mission. After selecting a COA, the commander issues the final planning guidance. The final planning guidance includes a refined commander’s intent (if necessary) and new CCIR to support execution.

g) Step 7: Orders Production

The staff prepares the order or plan by turning the selected COA into a clear, concise concept of operations and required supporting information. The concept of operations for the approved COA becomes the concept of operations for the plan.

¹⁶ See *id.* at para. 3-194.

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 brought together over 150 attorneys, advisors, and other professionals working rule of law programs across the Iraqi Theater of Operations. 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 rule of law projects.

Military participants in the conference noted with special interest the role of formal military planning in the interagency / intergovernmental arena of rule of law programs. The detailed plans and guidance produced by MDMP is a critical gap in the rule of law mission. While rule of law is mentioned within the plans at all levels of command within the military forces, to date there has not been a comprehensive plan that structures the efforts and projects of the civilian agencies and non-governmental organizations. This gap was identified and discussed at the Rule of Law Conference and renewed efforts are underway to address the issue.

4. Conclusion

By utilizing the MDMP, the commander, staff, and rule of law 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 rule of law 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.

**Planning Rule of Law Operations Internal to the Force:
Hypocrisy Helps the Enemy**

The primary focus of planning for rule of law operations in this section has been on activities external to the US forces. However, the rule of law practitioner must be aware of any conduct of our forces, allies, partners or contractors that will damage our credibility to promote the rule of law. Conduct by our forces or those acting with us that appear to be contrary to the rule of law will not go unnoticed by our host nation partners and will be exploited by our enemies, as readily demonstrated by the effects of cases like Abu Ghraib on our mission in Iraq or the ill will created by the September 2007 Blackwater incident in Baghdad. US forces must reflect the rule of law in its actions. Our response to crimes committed by US forces will be scrutinized by the host nation population as well as the international community. The investigation and disposition of these cases must be transparent and communicated effectively to the local citizenry and the world.¹⁷

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 and will plan for the mitigation of any adverse consequences when any such acts do occur.

B. Practical Planning Considerations Specific to Rule of Law Operations

Experience has shown the benefit of breaking the planning phase of rule of law missions into three distinct timeframes. In each of these phases, the nature of the planning will necessarily be different, as the conditions confronting the Judge Advocate planner will vary. Accordingly, this *Handbook* divides planning for rule of law missions into the following phases:

- **Pre-deployment (-180 to -30 days prior to deployment)**
- **Initial deployment (-30 to +90 days of arrival in the area of operations)**
- **Sustained deployment (+91 days to indefinite)**

There is nothing set in stone about these suggested timeframes. They will vary depending upon the nature of the conflict, the manner of entry into theater, the nature of the mission (whether occupation or permissive), and whether this is an initial entry into the area of operations (AO) or a follow-on rotation. If a unit is performing an initial entry into a nation with significant infrastructure damage, the duration of the initial deployment phase, as described below, may extend well beyond 90 days. If a unit is part of a follow-on rotation into a semi-stable environment, where Judge Advocate personnel can benefit from the experience of their predecessors, the duration of the initial deployment phase might be a few weeks, instead of months.

Regardless of the exact duration of these planning periods, their relevance is that the nature of the planning for the rule of law mission and the measure of its success (metrics) varies significantly from phase to phase. The three phases provide a general compass to planning that

¹⁷ FM 3-24, *supra* note 12, at 1-24.

should be considered as the mission evolves. The discussion below is to emphasize the tools required at each stage of planning for the rule of law mission, but is not intended to be an exact road map, as planning for any operation will be situation specific.

1. Pre-deployment Planning (-180 to -30 D day)

Pre-deployment planning for the rule of law mission may begin before operations are imminent. In the case of a major natural disaster, a unit might have only days to plan before arriving in the theater of operations. Operations over the past two decades (Haiti, Bosnia-Herzegovina, Desert Storm, and Operation Iraqi Freedom (OIF)) have repeatedly shown that there is often a substantial period of diplomatic and other political activity that provide signals to the Judge Advocate that informal planning for a rule of law mission should begin well in advance of receipt of a warning order. Even where available time is short, as was the case with Operation Enduring Freedom (OEF), the principles of pre-deployment planning for the rule of law mission remain the same – they are simply packed into a shorter timeframe.

a) Understand the Level at which you will be Operating within the Command Structure.

The nature of the mission that will be assigned to rule of law practitioners will necessarily influence planning in the pre-deployment phase. There will be significant planning differences depending upon whether the JA personnel will be operating from a centralized location at a division or joint task force headquarters, as is often the case with Judge Advocates from a division SJA office, versus Judge Advocates operating in a Civil Affairs (CA) unit, who are frequently dispersed across the breadth of the area of operations in one-man JA detachments.

At the most fundamental level, knowing whether the Judge Advocate will be working in a centralized headquarters environment with other Judge Advocates or by him/herself with a tactical unit impacts planning for:

- **the numbers of sets of legal resources (manuals/cds, computers) that must be taken**
- **communications capabilities (phones, email, and technical reporting channels)**
- **chain of command issues, such as whether the solo Judge Advocate assigned to a provincial or other remote location works for the tactical unit commander or is a representative of higher headquarters co-located with the tactical unit**

b) Know the Foreign Legal System.

To rebuild a legal system one must understand the legal system. This might sound like an obvious truism, but the fact is that many units that ultimately became responsible for restoring the legal system in Iraq went into the mission with very little understanding of the Iraqi civil law system and no copies of the Iraqi laws whatsoever.¹⁸ The pre-deployment phase provides the best opportunity to gain the general, but invaluable, understanding of the legal system of the nation where operations will occur. Understanding which organization or element within the justice system is supposed to do what, as well as understanding the lines of accountability, prior to arrival in the theater will enable more effective pre-deployment planning concerning how to engage that system in a reform effort.

¹⁸ LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade (2003).

There are several steps toward understanding the foreign legal system to consider during planning in the pre-deployment phase:

Step 1. Take into account the political and historical context. This step helps identify events that shape the environment, such as a recent conflict or the creation of a new state. It also develops information on the country's legal traditions and the origins of its current laws.

Step 2. Understand the roles of major players and political will. This step helps identify the roles, resources, and interests of those who might potentially support reform as well as those who stand to benefit from retaining the *status quo*. It also guides an assessment of the strength of political will and options for capitalizing on it, strengthening it, or working around its absence.

Step 3. Examine program options beyond the justice sector. This step broadens the assessment beyond the justice sector to the overall state of the polity and its legitimacy. It helps determine whether conditions are ripe for direct rule of law programming, or whether programming should support precursors to the rule of law, such as political party development or legislative strengthening.

Step 4. Assess the justice sector. This step provides for a structured assessment of each essential element in terms of the two components of the justice sector, the legal framework and justice institutions. Assessments are discussed in greater detail in section C 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 rule of law office has a briefing available on Iraq that it has transmitted to the Rule of Law Program Director at the US Army Civil Affairs and Psychological Operations Command (USACAPOC), Ft. Bragg, for use in their RoL Conferences for deploying JAs.¹⁹ An obvious source of information about not only the mission but the context for the rule of law is the unit you are replacing.

During contingency operations, the Staff Judge Advocate responsible for operations in a foreign country should develop a country law study as part of the staff estimate process.

Also, the Law Library of Congress can provide assistance in this area. The Law Library has a librarian assigned to numerous regional law collections. An appointment can be made to meet with the librarian and Judge Advocates assigned at OTJAG could facilitate this process by obtaining copies of relevant materials and providing them to the field for use.

c) Plan for Coordination with other Agencies Having an Interest in the Rule of Law Mission

Rule of law operations in Iraq and Afghanistan have repeatedly demonstrated that rule of law practitioners who seek to coordinate efforts, funding, and resources with other agencies and organizations yield the most effective results. The Judge Advocate who tries to do everything

¹⁹ Rule Of Law Lessons Learned MNC-I Rule Of Law Section Operation Iraqi Freedom 05-07 (Dec. 10 2006).

himself may expend significant effort, but over the long run not significantly impact reform. It is frequently the case that during initial-entry into a non-permissive environment the Judge Advocate will indeed be alone, with only other military operators such as Military Police and Civil Affairs personnel, in attempting to assess and improve justice sector operations. The non-permissive environment makes it a virtual certainty that NGOs and IOs will not be present. Consequently, the practitioner will likely have to rely on other military assets during the initial phase of rule of law operations, and so the coordination activity must at the very least include other military agencies that will be extensively involved in reconstruction, such as Military Police, Engineers, and the G-3. Setting up a rule of law working group at the division level early in the planning process is an outstanding way to help ensure that rule of law and other reconstruction efforts will be unified ones.

However, as hostilities come to a close other USG agencies such as DOS, USAID, DOJ, IOs, and NGOs will arrive in theater. Regional, state-based economic and security organizations such as the Gulf Cooperative Council or the Organization for Security and Cooperation in Europe (OSCE) may have a presence. The United Nations may, depending upon the operation have a presence, as may nongovernmental agencies with an interest in human rights and justice. Each of these organizations is a tool and potential force multiplier for the rule of law Judge Advocate to maximize the effect of his efforts. Having awareness during the pre-deployment stage of the number and nature of such organizations, the capabilities they bring, and the availability of potential funding streams from these sources, will permit more meaningful planning for future operations during the pre-deployment phase. This knowledge will also enable the rule of law practitioner to exchange contact information with these other field representatives through the chain of command (back to the interagency and intergovernmental coordination in Washington) and through local organizations (like the Humanitarian Operations Center, Joint Interagency Coordination Group, or other similar mechanisms).

Civil Affairs Soldiers who have been engaged in government support missions over the past two decades often state that they know they have reached a level of success in their operations when they have “worked themselves out of a job” by handing off future support operations to host nation, nongovernmental organizations or international organizations. In mission planning, the JA rule of law planner should likewise consider in planning whether success will be measured by continuing to oversee the successful operations of a host nation justice sector agency (e.g., a court) or by reaching the stage where the Judge Advocate is no longer needed.

d) Priorities for Justice Sector Programming

Because rule of law establishes conditions on which democracy depends, there are inherent priorities among the essential elements. Providing security while acting in ways that reinforce legitimacy are the highest priority because doing so establishes democratic legal authority and has the most immediate impact upon reducing violence. Impartiality and lack of evident bias are the second priority because they not only strengthen legitimacy but also serve to guarantee rights. Efficiency and access are the third priority, because they improve the provision of justice services. These “priorities” should not be confused with mandatory sequencing. Country conditions, revealed through the assessment, may not permit addressing the highest priorities first. Nevertheless, the links to the rule of law that these priorities represent are

important to keep in mind. When addressing a lower priority first, programming should set the stage for later work at a higher level.

e) Pre-Deployment Resources

Begin developing a library of local national legal materials during the pre-deployment stage, which will continue to grow and expand upon reaching the area of operations. The core materials should include (in English):

- the foreign state's constitution
- criminal code
- criminal procedure code
- civil code
- civil procedure code
- administrative law
- citizenship law
- property laws
- laws on organization of the government in general and courts in particular
- laws on organization of the police and prisons

This effort should begin with the DOS resources dedicated to the host nation, such as the DOS country team. 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 firms²⁰

In addition to obtaining the black letter law of the concerned state, the JA rule of law planner can avail himself of years of experience in post-conflict rule of law planning by other nonmilitary agencies including:

- USAID (State Department) Justice/Rule of Law guides
- Office of the United Nations High Commissioner for Human Rights (www.ohchr.org)
- US Department of State Regional and Global Bureaus
- US Embassy Country teams in the expected area(s) of operation

The ability with which the Judge Advocate preparing for a rule of law mission is able to openly solicit information on a foreign nation's legal system is necessarily tied to operational security considerations.

²⁰ Firms engaged in international business may have treaties/civil codes for foreign nations. Many such firms also have Judge Advocate reservists or former Judge Advocates employed who are often willing to be of assistance to direct you to source materials.

f) *Anticipate and Plan for Linguist Assets*

Be aware of the need for translators and interpreters, including awareness that within a single country several languages or dialects may be spoken. In planning for and working with linguists, always be aware of cultural/sectarian divisions within the AO that might impact the effectiveness of your translator. E.g., a Serbian born translator who speaks Serbo-Croatian might not be effective in interviewing Croat civilians about their views on legal reform due to long term ethnic tensions between the Serbs and Croats. Often a rule of law team will not have their free choice of translator assets, but awareness that the cultural/social background of your translators may impact the level of their effectiveness and your ability to gather information essential for mission success is important to consider in planning the scope of the team's activities. Finally, remember that a linguist with a lay background offers different capabilities than one with legal background or training.

g) *Tactical Considerations*

The scope of this *Handbook* is not to comprehensively discuss the myriad tactical equipment issues that will affect the daily lives of those engaged in the rule of law mission. However, the reality on the ground is often that those engaged in rule of law missions must be mobile, able to communicate across distances ranging from a few kilometers to dozens of kilometers, and must be competent to provide much of their own security. The stereotype of the JA officer bearing only a holstered sidearm hopefully has finally been put to rest in OIF and OEF.

A rule of law team that deploys without the ability to defend itself during convoy operations is a team that will be largely ineffective in a non-permissive environment, as they will be unable to move beyond the wire of the base camp out of which they operate. Accordingly, decisions made at home station about weapons, training on handling of weapons, and other tactical considerations may have a large impact on subsequent success in coordinating a rule of law mission once in theater.

Judge Advocates have historically been hampered in movement within an area of operations by a lack of organic transportation capability. Civil Affairs units, in contrast, often deploy with their own transportation capability. If possible, find out who will be the CA assets in your area during the period of your deployment and make preliminary contacts (with the battalion or brigade International Law Officer) to build rapport for the future when you may need to coordinate convoy operations with CA Soldiers to move about within the AO.

h) *Conduct Briefings to Make Commanders Aware of ROL Impact on Mission Success*

Judge Advocates can shape their battlefield just as commanders can. One way this is done in the rule of law context is by educating commanders, operations officers, and staff planners prior to deployment upon how rule of law issues will impact security and stability following the end of high intensity conflict. One cannot presume that war fighting battalion and brigade commanders will appreciate how something as intangible as the foreign citizenry's attitude toward their legal institutions will have a direct impact upon the commander's ability to secure and stabilize his assigned geographic area. Pre-deployment briefings that succinctly educate how the rule of law has operational benefits will assist your commander in including rule of law issues in his planning priorities once in theater. Judge Advocates must understand how

rule of law nests within the elements of stability operations and COIN in order to make these briefings relevant for commanders and their staff. Operating courts, effective police, quiet prisons, and the reduction of street violence reduce operational effort substantially, and familiarizing the commander with the impact of the rule of law will help the commander appreciate the need to make the rule of law a planning and resource priority.

2. Initial Deployment Planning (-30 to +90 D day)

The initial deployment period begins prior to arrival in the country where operations will occur. Several weeks of this time is often spent in mobilization stations or intermediate staging bases (ISBs), where access to the same planning resources that were available at the home station diminishes.

The period from -30 days before arrival (D day) in the host nation is often occupied with the logistical details of mobilizing. Soldier Readiness Processing, preparing equipment for shipment, medical screening, personal issues (particularly for reservists wrapping up civilian commitments) and countless mobilization administrative requirements will render significant planning for the rule of law mission difficult in the -30 to D day timeframe. Accordingly, it is unrealistic to consider the rule of law pre-deployment planning window to run up to the point at which operations begin. While plans may always be tweaked to some extent at the last minute, the plan that the rule of law practitioner has at 30 days prior to arrival in country will largely be the plan on arrival at the ISB.

During transition through an ISB,²¹ reliable information concerning current developments within the host nation will be haphazard at best. The S2 section of the ISB may be a resource for current information that will allow revisions to planning during the initial deployment period. However, while a unit transitions through an ISB, the focus often remains upon movement issues and the tactical preparation for entry into the area of operations.

Upon arrival in the area of operations, the planning cycle again goes into high gear. Frequently, the nature of the expected assignment changes upon arrival, and command and reporting relationships anticipated during the pre-deployment stage are altered to meet the reality on the ground. Further, and most significantly, the rule of law team planners now come into contact for the first time with the infrastructure and personnel (country nationals, coalition allies, other USG agencies, NGOs, and IOs) with whom they will be directly conducting the rule of law operation. There is a veritable hose-feeding of new information available within a very short period of time that frequently renders portions of the pre-deployment plan irrelevant, or at a minimum, in need of major revision. This phase of planning requires an immediate and current assessment of the host nation's legal system.

Upon arrival in the host nation, the JA rule of law practitioner will begin the initial hands-on work of restoring the rule of law. Every day, through that on-the-ground experience, the Judge Advocate will in turn gain more information and insight into the workings of the host nation's legal system, and thereby will be creating the planning foundation from which sustained deployment planning will begin to develop.

The Nature of Initial Deployment Planning.

The action plan during the initial deployment phase:

²¹ E.g., Hungary for Joint Endeavor; Saudi Arabia for Desert Storm; Kuwait for OIF.

Identify short-term goals, activities, and strategies to provide quick successes that will generate political support in post-conflict settings where conditions are evolving.

Assign responsibilities, designate timelines, and provide performance benchmarks for both the initial deployment phase and the longer term sustained deployment phase.

a) Provide for Small, Early Successes in the Rule of Law Operation

In the initial days following the close of armed conflict or on the heels of a natural disaster, initial perceptions are extremely important to securing the confidence and support of the foreign population. The most intelligent, ambitious, and strategically oriented plan to restore the rule of law may quickly become irrelevant unless some simple “quick wins” are front-loaded into the plan to create an atmosphere of progress and a return to normalcy.

Early Successes in OIF-1

In southern Iraq during OIF-1, many of the major provincial courthouses suffered damage during looting by local nationals following the fall of Saddam Hussein. While it would take months to repair the courthouses, merely cleaning up the broken glass and garbage and reopening the doors of those facilities so local nationals could come ask questions created the first fledgling appearance of a return to normalcy, which bought time in the public’s attitudes for more ambitious projects to occur. Also, many outlying magistrate level courts did not suffer significant damage at all. These courts were the first to resume operation, creating a “quick win” that sent a message to the locals that there was once again a legal system in operation.

There will be many difficult and time intensive tasks that must be accomplished before the rule of law is restored in a devastated country. In your planning priorities, front-load a few quick and simple tasks to build rapport and confidence with the locals. The intent is not to perform a superficial or meaningless task, but to quickly defuse flash points for renewed violence by demonstrating some level of justice mechanisms are functioning within the society at the earliest opportunity. Be prepared to use these kinds of projects throughout the operational effort in order to maintain momentum and continually reinforce positive perceptions.

b) Create Mechanisms for Locals to positively Interface with their legal system

Strive to increase the opportunities for the people to access and see transparency in the rule of law in order to foster popular demand for and investment in the rule of law. In many authoritarian states, the judicial system and the police are tools for a regime to keep the population under control. The laws are often unknown to the man in the street and being in a courthouse or police station is a moment of terror, not an opportunity to learn about their government. By planning mechanisms for positive interaction, such as manning an “information table” staffed by local government employees or creating informational flyers, the legal system can be made more transparent and thereby trustworthy. Merely posting copies of laws or changes to the law in the native language in a publicly accessible location can be a positive step in creating an atmosphere where the citizens begin to believe they have a meaningful role in their legal system.

c) Monitor and Mentor Local Officials and Professionals

Particularly in an occupation environment, the physical presence of a JA rule of law practitioner in almost daily contact with local justice officials is necessary for progress toward the rule of law to occur. A system that has been historically politicized or corrupt will not readily change or improve where contact with the US Judge Advocate is sporadic. Frequent, in-person contact, in the form of oversight, mentoring, and instruction is absolutely necessary to make any change in the system.

The Resilience of Old Practices in Iraq

In OIF-1, Iraqi judges would frequently and enthusiastically accept all of the guidance or instructions from Coalition Judge Advocates up until the moment the Judge Advocate departed the courthouse facility. They then immediately returned to doing business in the way that was familiar to them, including permitting pro-Baathist judges who had been dismissed by the Coalition to sneak back onto the courthouse and occupy their former offices. It required continuous physical presence by Judge Advocates in the courthouse to make change take root.

d) Plan Security for Justice Sector Personnel

Foreign judges who have survived under an authoritarian, corrupt, or politicized legal system will not readily embrace the more democratic traditions of the rule of law if it means their death at the hands of those who have a vested interest in seeing judicial reform fail. The success of the rule of law mission depends upon judicial personnel being secure, so they need to be protected in the same manner that any other mission essential asset is protected. While the point may seem superficially obvious, protection of judges is frequently a low to nonexistent priority in rule of law efforts following directly on the heels of major combat operations.

Several years after our initial entry into Iraq and Afghanistan, many rule of law projects are currently being undertaken to establish secure “major crimes courts,”²² an effort to provide the security to the judicial branch that should be provided immediately upon U.S. forces taking over the role of security provider.

Protection of Judges in Early Rule of Law Efforts in Iraq

Lack of funding and personnel was most often cited by the Coalition Provisional Authority as a reason for leaving Iraqi judges, who were cooperating with the coalition, to protect themselves from anti-coalition elements. The consequence of this lack of security planning was the subsequent murder of many pro-coalition Iraqi judges and their family members, including the Chief Judge of Najaf, by criminal and insurgent forces. The result was a chilling effect on other Iraqi judges and their willingness to embrace rule of law reforms.²³

e) “Plan B”

On the battlefield, communications are frequently unreliable and operational contingencies arise rapidly. Therefore, it is critical to not only have a plan for operations in cases

²² See Chapter X for two recent examples.

²³ LTC Craig Trebilcock, *Justice Under Fire*, ARMY LAW. (Nov. 2006).

in which the rule of law team is in regular contact with higher headquarters, but also to have a back-up plan of what to do if operational contingencies and limitations on communications gear render the team unable to communicate on a regular basis.

f) Coordinate with NGOs/IOs, but Recognize their Limitations.

Because they are plentiful and their capabilities are frequently unknown, it is easy to become overly optimistic in reliance during planning upon expected support from IOs and NGOs. Such organizations are frequently either unable or unwilling to maintain a presence in post-conflict AOs, especially those subject to active insurgencies. For instance, many IOs that had begun reconstruction assistance in Iraq withdrew in 2003 after the UN headquarters in Baghdad was car bombed. Any plan for the initial deployment period should be realistically premised upon the capability of the unit to accomplish goals *without* outside agency assistance. If additional outside support becomes available, incorporate it into the existing plans, but it is important for the deployed Judge Advocate to remain cautious of building the foundation of the rule of law mission during the initial deployment stage upon civilian resources that may arrive late or not materialize at all due to a non-permissive environment.

3. Sustained Deployment Planning (+91 to indefinite)

The necessary focus for rule of law planners during the initial deployment stage is on the tangible infrastructure, such as the existence and operating condition of courthouses, police stations, prisons, and upon the availability of personnel. If one does not have the physical tools and personnel to implement plans, the more sophisticated aspects of the rule of law mission cannot be accomplished.

However, it is important to recognize that, as the rule of law mission enters the sustained deployment phase, planning, assessments, and metrics that continue to focus primarily upon tangible resources like infrastructure and do not progress to a more complex, effects-oriented understanding of the rule of law mission, will miss the ultimate goal of creating a system of law that is viewed as legitimate, relevant, and trustworthy in the eyes of the local population. Built upon the assessment process discussed in section VI.C below, a well-conceived plan during the sustained deployment phase should reflect a vision of justice (a vision that will be determined at the highest levels) and present a plan to achieve that end state. A tyrannical and unjust legal system may be well-funded by a despot and have significant institutional resources. Such an illegitimate legal system, viewed purely through the lens of infrastructure metrics, might well yield superficially impressive statistics concerning number of courthouses operating, the number of judges hearing cases, and the number of cases being adjudicated. All of the standing court buildings in a nation mean little to the stability operations mission, however, if the citizenry does not seek to access the system to resolve grievances and instead, due to mistrust, continues to rely upon violence in the streets for resolving disputes.

The concept of the rule of law within a society is an intangible that the infrastructure metrics, so important during the initial deployment phase, do not capture. Accordingly, the savvy rule of law planner must recognize when it is time for the mission to evolve from the infrastructure-focused initial deployment phase to the effects-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 USAID recognizes that the narrow focus that necessarily controls the initial phase of a rule of law mission must evolve into a broad-based, effects-driven plan that considers both justice and political factors within a society in order to have long-term success in establishing the rule of law:

Past tendencies to respond to rule of law problems by focusing primarily on the courts and other components of the formal justice system have led to three problems. First, strategic planners have not been open to the full range of options for addressing rule of law problems, instead focusing more narrowly on such problems as court inefficiency or criminal procedure. This has resulted in the second problem, which is neglecting to treat the justice system as part of the larger political scheme. Third, judicial and legal rule of law programs have been overburdened with unrealistic expectations. They cannot solve complex and fundamental societal problems, while the social structures and values that led to the rule of law problems remain in place.²⁴

As such, the rule of law planner must recognize that the nature of planning will necessarily become more sophisticated and complex from a social and political viewpoint during the sustained deployment phase, even as the emergency conditions that dominated the initial deployment phase (rebuilding of destroyed infrastructure, for example) are ameliorated.

Rule of Law Planning Objectives

Each rule of law mission will have differing needs and priorities due to the unique nature of the society in which it occurs, including the history and legal traditions of that culture. However, in creating a sustained deployment plan, rule of law practitioners should consider whether the following actions, which have yielded success in prior operations, will positively impact current mission objectives:

Law school curriculum reform.

The establishment of community based legal services clinics sponsored by local bar associations or law schools to provide legal help to the indigent.

Creating or strengthening professional associations for attorneys and judges that provide instruction on issues supportive of the rule of law.

Attendance at international or regional legal conferences for judges and leaders in the legal system that will expose them to international norms of justice.

²⁴ US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS 4 (2007 draft). [hereinafter GUIDE TO RULE OF LAW COUNTRY ANALYSIS]. See also 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).

Seek support for legal resources such as books and equipment from friendly neighboring countries that have a vested interest in restoration of security and stability on their border. For example, the Kuwait Government sponsored a Humanitarian Operations Center (HOC) in Kuwait City during OIF-1 that provided support to print and distribute the Iraqi laws and procedural codes, as many of the hard copy Iraqi resources for the law had been destroyed during looting.

Encourage coalition building between host nation government legal organizations and law-related NGOs. For example, the American Bar Association conducts rule of law programs in many developing countries, including several former Soviet republics.

Develop meaningful oversight mechanisms, such as ombudsman offices or judicial/police inspection offices to discourage corruption or misuse of government resources for private gain.²⁵

Consider crime prevention, with community involvement in problem solving, planning, and implementation, as an effective way to reform police. Civilian policing programs reorient the police away from a focus on state security (protecting a regime) to personal security (protecting the average citizen).

Disarmament/weapons buy back programs.

Constitutional drafting processes.

Evaluation of pay scales for judicial and other legal system personnel. Underpaid officials may be more susceptible to corruption.

Oversight and citizen awareness of court programs, including public awareness programs and judicial outreach and education programs designed to familiarize citizens with the work of the courts. Citizens that understand the process can become an advocate for the legitimacy of the judicial branch.

Interim Measures

Immediate interim measures are often needed to jump-start a criminal justice system in the wake of widespread violence. When short-term measures are used, they should, if at all possible, be performed under a mantle of authority consistent with the preexisting criminal code. It will be easier to move to longer term reform if the emergency measures initially relied upon have some grounding in the host nation law. Adherence to a legal code at each step of the rule of law reform process strengthens, rather than undermines, the legitimacy of actions in the eyes of the population.

C. Practical Approaches for Conducting Assessments within Rule of Law Activities

An assessment is the factual foundation upon which effective planning for the rule of law mission occurs. It is a study of conditions existing within the area of operations at any given

²⁵ 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.

time. Civil Affairs officers often generate assessments of a foreign nation's courts, prosecutors, police, and detention facilities as well as the public health capability, agriculture, economics, government capabilities, and utilities in developing plans to assist in stabilizing an area. The Judge Advocate engaged in the rule of law mission must become comfortable with creating and reviewing assessments of foreign nations' legal systems, including courts, private legal organizations, police, and prisons. An assessment may be informal or formal in nature, ranging from a couple of pages of hastily created observations upon initial entry into an area of operations to thorough studies that are dozens of pages long during the sustained deployment phase.

Assessments are a living document that should always be evolving to reflect changing conditions on the ground. If assessments are not updated on a regular basis to reflect changes in the country's legal system, planning will likewise be out-of-step with the reality on the ground. A current and accurate assessment assists in keeping the focus upon whether the actions being taken in pursuit of establishing the rule of law are making a difference.

Too often, mission activities and priorities are established without the benefit of a systematic assessment that looks at all elements, their context, and options. In the absence of such an assessment, tools become ends unto themselves. Example: A JA planner could plan and spend substantial funds and effort creating a sophisticated plan of legal instruction for judges in a particular province. Such an initiative might well look impressive in reports to higher authority. But, if the assessment reveals that lack of security and lack of funding are causing those provincial courts to limit operations, the legal training mission might be better delayed until, after the more immediate needs of security and funding are provided.

Mirroring the planning stages discussed above, there are three major time junctures where assessments will need to occur – Pre-deployment, Initial Deployment, and Sustained Deployment.

1. Assessments During the Pre-deployment Phase (-180 to -30 D day)

Assessments during the pre-deployment stage should focus upon general country conditions including legal institutions, the nature of the disruption that has led to the absence of the rule of law, the geographic area and characteristics of the AO in which the rule of law team will operate, and the major players and trends impacting the legal institutions of the nation that will be the subject of the rule of law mission.

If a unit is fortunate enough to be following a predecessor into the theater of operations, it should seek to benefit from the predecessor's experience by obtaining its assessments while still at home station. However, the ability of the newly deploying unit to conduct its own highly detailed assessments is necessarily constrained by the fact it is not in immediate contact with the situation on the ground. As such, JA planners preparing to deploy for a rule of law mission should recognize that, while pre-deployment planning is invaluable in order to be prepared to engage in the mission as soon as possible, the process has limitations, and attempting to engage in too highly detailed an assessment from home station may consume energy better focused on other aspects of pre-deployment planning.

a) Assess the History and Traditions of the Legal System

One critical but often overlooked contextual factor is the tradition on which a country's legal system was founded. That tradition affects the basic structural arrangements and functions of the judiciary and related institutions. For example, judiciaries in some civil law systems are, or may recently have been, part of the executive branch, and dependent upon the ministry of justice. The prosecutor may have a very dominant or very weak role compared with that of the judge.²⁶ 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.²⁷ Accordingly, one might look to French legal reforms as a model for progress toward the rule of law in a former French colony, as opposed to relying upon the British/US common law tradition.

b) Understand the Roles of Major Players and Political Will

This step develops information on the roles, resources, and interests of leaders and others whose support is necessary for rule of law reforms. Those working within justice sector institutions, the rank and file as well as the leadership, will always be important actors. They can either support a reform program or sabotage it. Other bureaucrats and political figures may also have a significant role that needs to be understood, such as a ministry of finance which frequently controls the funds necessary for justice sector institutions to operate. During pre-deployment, the ability to gather detailed information about important, but lower level players within the foreign nation's bureaucracy may be limited, especially if the mission is a non-permissive initial entry. However, as a theater becomes more mature and follow-on rotations begin, coordination with predecessor units will provide this information as well.

Also major players may exist outside of the government bureaucracy. These can include tribal or religious leaders who engage in informal justice systems, NGO and IO staffers, and neighboring foreign officials with an interest in the progress toward the rule of law of their neighbor. It is virtually inevitable that the quality of specific information available to the rule of law planner will increase with arrival in the area of operations. Accordingly, more suggestions concerning the types of players to include within an assessment continues in the initial deployment phase below. The importance of the pre-deployment assessment is that it enables the subsequent, more detailed information gained in-country to be placed into a broader context and lessens the time involved in assimilating that information into a usable resource once the unit hits the ground.

2. Assessments During Initial Deployment (-30 to +90 D day)

Assessments during the initial deployment stage will take on a greater level of detail than in the pre-deployment stage. For example rather than a general study and list of names, titles, and relationships, which was adequate at home station, the Judge Advocate must now know exactly

²⁶ The Latin American civil law tradition features a strong investigative judge and a weak prosecutor; by contrast, under communist legal systems, the prosecutor (or procuracy) completely dominated procedures. Reforms in both regions have sought to bring about greater balance in both roles while respecting other aspects of the civil law tradition.

²⁷ GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 24, at 16.

how to find and communicate with these personnel, including the various commercial numbers, email addresses, and addresses or grid coordinates where they can be located.

a) Identify Who the Players Are

Initial assessments should include contact information for:

Judges

Court clerks and administrative personnel (who make the judicial system work)

Law enforcement officers

Prosecutors and defense counsel

Private attorneys (including bar association or legal union leaders)

Religious leaders and other core opinion makers (who may have an influential role upon the local population and its perception of the law)

Prison and jail officials

Police academies

Judicial training centers

Coalition partners and host nation militia exercising police powers

Leveraging Existing Assessments in Mature Theaters

As of mid-2008, MNC-I had recently completed an assessment of virtually all the courthouses in Iraq. For new JAs rotating into the theater, that completed assessment should be the starting place for their own assessment.

In addition to identifying the national bureaucrats, officials, and staff, the assessment needs to analyze whether legal institutions (including police, courts, and prisons) have the personnel, resources, and systems to handle the current and near-future caseload. The most ambitious plans for reform can be undermined by the simple fact that the host nation personnel needed to perform the tasks are not available due to pre-war understaffing, civilian casualties, or refugee movements.

Engage Host Nation Judicial Hierarchy

Initial site visits should focus on identifying and meeting key judicial personnel and to conduct a visual assessment of the physical structure. When meeting with the local judicial officials, try to develop an understanding of the organizational structure of the court. Initial visits can be used to explore the inter-relationship of the courts such as the hierarchy of judges, the supervision of lower court chambers, the appellate process and the administrative functions of the court such as the scheduling of cases and the management of court records and dockets.

Follow on efforts should be coordinated to the extent possible with the chief or senior judge of the court. This coordination will demonstrate proper respect for the senior judge. Further, you can request that the judge inform lower judges and their staff that you will be visiting their chambers. Absent such coordination, some lower chamber judges may be resistant to meeting at all unless they are confident that their superiors are aware of the meeting.

Other than the host nation personnel carrying out the justice mission on a daily basis, external organizations will also impact justice reform. Coordination with such entities will often bring additional funding, personnel, or other resources to supplement military efforts. Accordingly, an initial assessment of the justice sector should include a complete listing of:

NGOs (e.g., human rights organizations, national bar associations)

IOs (e.g., United Nations, ICRC)

Victim's associations

Coalition partners

Educational institutions, especially law schools

Other host government officials who impact rule of law issues (e.g., interior ministry, finance ministry)

Neighboring country agencies and personnel with a positive interest in rule of law issues in the AO

USG civilian personnel acting in a supporting or oversight capacity with US military forces

Media organizations

All such listings should include when, where, and how can these personnel be contacted by name, addresses, grid coordinate, phone & fax numbers, and email.

An assessment is not merely a list of agency and personnel contacts. An assessment should provide information and analysis of the capabilities and inter-relationships of the various participants in the rule of law process. It should also assess for agencies and personnel:

What influences are their personnel subject to? (positive and negative)

Where do their loyalties lay? (tribal, ethnic, religious, bureaucratic, financial)

Where do their obligations lay? (tribal, ethnic, religious, bureaucratic affiliations, financial)

What influences adverse to establishing the rule of law exist? (corruption, poverty, foreign influences, crime, fear, insurgency, lack of education)

b) *What are the Capabilities and Needs on the Ground?*

An initial assessment should also reveal what capabilities and tools are available within the host nation to conduct justice sector operations and reform. Such an assessment should reveal:

The number and physical capacity of courts, law enforcement & detention facilities – by number, location (grid), and an assessment of structural condition.

The status of supplies and equipment, if any – furniture, office equipment and supplies, utilities, legal texts, including both materials already in place and those being brought by other agencies.

Be aware that the mere existence of equipment without a plan for how to utilize it effectively in support of rule of law operation is not necessarily a positive or relevant factor the rule of law mission. Donor nations and organizations often want to contribute what they *have*, rather than what the distressed country actually *needs*.

The Judge Advocate conducting the rule of law assessment must rely upon his own judgment and expertise, as well in culling through requests for assistance from host nation officials.

c) *Assess who Controls Funding in the Host Government*

Justice agencies will not continue to operate without funds to pay staff and judges or to replace destroyed equipment. The rule of law Judge Advocate must become familiar with the local nations budget process and allotments, accounting procedures, and where the choke points exist within the bureaucracy that may delay funds from reaching the agencies that need them.

There should also be an assessment as to whether preconditions exist to access host nation funds, which might reveal corruption controlling the process.

Judicial Sector Salaries and Corruption in Pre-War Iraq

During OIF-1 Judge Advocates seeking the release of funds from the Iraqi Ministry of Finance to pay court personnel salaries could not understand the source of continuous delays in getting funds released to the judiciary. After much frustration, the provincial judges explained that under Saddam that the chief judge from the province had to personally travel to Baghdad and provide ‘favors’ for Finance Ministry personnel before funds would be released. Such favors might include kickbacks or agreeing to employ a relative of a finance Ministry official. The Iraqi Finance Ministry officials were simply waiting for their customary favors to be performed prior to funds being released.

d) *Assess who has Custody of Prior Legal (criminal, civil judgments), Property, and Vital (marriage, divorce, births, and citizenship) Records*

In the period following the cessation of the rule of law caused by natural disaster or war, local citizens may need to reestablish their entitlement to certain social benefits or possession of

property. Where a civil war or sectarian violence has occurred or there has been the presence of hostile foreign troops in the country the ability for an individual to prove that he has legal status to be in a nation can be a matter of life and death. Locating and securing legal records proving status and property rights should be a major initial priority of the initial deployment assessment.

Locating Court Records in Iraq

One week prior to the US invasion of Iraq under OIF, Iraqi courthouse employees were directed to take court records home and store them in their private homes, as it was believed the Americans would hit Iraqi government buildings with air strikes, but would likely seek to avoid hitting private residences. Recovering those temporarily displaced records following the end of hostilities was an important step toward restoring normalcy in court operations.

In looking for a potential “quick win” in terms of reforming a justice sector organization, bringing simple organization principles to record keeping can be a significant improvement. For example, when a court institutes a transparent case tracking system, it becomes very difficult to alter or steal case files, a relatively common method of changing the outcome of cases in many courts systems.

e) Juvenile Justice

Children, and especially orphans, are particularly vulnerable following a period of unrest. They are liable to find themselves before the judicial system under a variety of circumstances including theft, vagrancy, and as victims of sex or labor exploitation. Gaining an awareness of how the host nation legal system handles child offenders and victims and assessing the capacity of the system to do so following a conflict is an important component of establishing a popularly recognized justice system within the society. The United Nation’s Children’s Fund (UNICEF) has developed training and monitoring tools for juvenile justice systems.

3. Assessments During Sustained Deployment (+90 D day to indefinite)

The nature of planning in the sustained phase moves beyond the short term focus of helping a battered legal system back up onto shaky legs. There will be elements of the initial deployment phase operations still underway, such as courthouse or other infrastructure improvements, but the horizon for planning now moves to thinking in terms of months and years, as opposed to days and weeks. The focus also shifts from merely accounting for available facilities and personnel (an infrastructure focus important during the initial deployment phase) to an effects-oriented view that considers how best to employ the available assets to accomplish the long term reestablishment of the rule of law.

Rebuilding often involves not just re-tailoring or changing existing functions, but supplanting them with new ones. The assessment must answer if – and how much – such replacement is possible or desirable. It requires political scientists and conflict management or organizational specialists to work alongside indigenous experts, especially those excluded from pre-conflict power structures, to complement the usual cadre of judges, prosecutors, and other legal consultants involved in rule of law assessments.²⁸ The effects focused assessment serves

²⁸ US AID FOR INTERNATIONAL DEVELOPMENT, REBUILDING THE RULE OF LAW IN POST-CONFLICT ENVIRONMENTS 12 (2007 draft) [hereinafter REBUILDING THE RULE OF LAW].

two basic purposes: (1) providing a systemic perspective for rule of law planning and reform; and (2) creating avenues for local involvement and participation in reconstruction.

In pursuit of these longer term goals the sustained deployment assessment should develop information regarding:²⁹

- **Sovereignty issues.** Where applicable, the relationship between US, other international forces and local sovereignty and institutions. If the US is acting as an occupation authority, its ability to control the timing and nature of reform is much different than if it is present as the guest of a sovereign government
- **Security and capacity gaps.** The level and nature of ongoing disorder (such as organized crime, looting, weapons/drug smuggling, and trafficking in persons) and the kind of mechanisms in place, if any, to address it
- **“Applicable law.”** The formal legal framework that was in place prior to the conflict or that is considered to be valid in the country, including any interim laws that are being applied pending the passage of permanent legislation
- **Formal justice.**³⁰ The extent to which formal institutions remain intact or functional, and the availability of qualified professionals to staff them
- **Informal justice.** The informal justice and dispute resolution mechanisms that citizens are using – such as tribal justice mechanisms – how they relate to each other and to the formal justice system, how they might relieve pressure on the formal justice system, and the extent to which their traditional practices reflect or violate human rights standards
- **Stakeholder opinions and expectations.** How key stakeholders feel about systematic rule of law rebuilding components (e.g., human rights, institutional redesign, legal empowerment, and reconciliation efforts) and how the intervention process can help manage their expectations. Key stakeholders include host country public and private sector counterparts, political and opposition leaders, NGOs, other civil society organizations (such as professional associations, business alliances, and community-based groups), previously marginalized populations (such as women, ethnic groups, the poor, and youth), and donors.
- **Potential private sector reform partners.** Civil society, business, and human rights actors who are likely to play a leadership role in advocating for reform or in overseeing and reporting on efforts to rebuild the formal sector as they take shape. (It is important to assess the past histories of local NGO leaders before giving them unqualified support, as some may be associated with the former regime or, for other reasons, may not necessarily be committed to democratic principles.)

²⁹ See *id.*, at 12-13.

³⁰ The terms “formal” and “informal” justice have been used consistently in order to avoid confusion and to maintain distinction between two systems. The terms do not necessarily accurately describe the systems and mechanisms of justice. The term “formal” justice mostly to refer to state justice institutions and processes. The term “informal” refers loosely to a variety of mechanisms and processes that include non-state mechanisms, traditional practices, and customary law; the term does not imply procedural informality.

- **Potential public sector and political champions.** Government officials, politicians, and others at various levels who were neither part of the patronage system nor participants in corruption or oppression, and could serve as internal champions for rule of law reform. (These types of resources exist in some post-conflict countries. Examples include members of opposition parties, younger civil servants, and regional government representatives. Such individuals may not have actively opposed the prior regime, but in principle would support reform.)
- **Potential for mutual donor leveraging.** The degree to which the US rule of law effort can enter into mutually beneficial relationships with other rule of law participants.

Assessments regarding potential funding are necessary in the sustained deployment stage, but where time and the nature of the mission permits, funding considerations should be a prime consideration during pre-deployment assessments and planning as well. It is simply easier and more time efficient to utilize the extensive resources and domestic telephone contacts available at home station rather than trying to coordinate new funding streams once deployed to an austere environment with minimal communications capabilities. This is particularly true for follow-on rotations once the long term nature of the mission has become clearer and OPSEC concerns may be somewhat diminished.

In addition to the guidance on assessments provided above, the Office of the United Nations High Commissioner for Human Rights has put together a very detailed and useful manual suggesting methods for assessing progress in rule of law operations, titled *Rule-of Law-Tools For Post-Conflict States, Mapping the Justice Sector (2006)*.³¹

Control the Scope of Your Assessment

As with any project, placing a realistic scope upon the breadth of an assessment is important. An assessment that focuses upon a few disjointed factors will be of little utility in planning, while an assessment that seeks to capture every nuance of a legal system will become so bogged down by its level of detail and the burden of collecting information that it can be as equally useless as a superficial product. A detailed description of optimal assessment scope is beyond the scope of this *Handbook*; such determinations have to be driven by the peculiar facts and goals in a particular area of operations. However, listed below is a menu of assessment issues suggested by USAID that address the high-priority areas of security, impartiality, efficiency, and ultimately legitimacy. Although not suited to every situation, this list of questions is likely to assist the JA rule of law planner in assessing some of the important aspects of the host nation legal system issues in the sustained deployment phase. This list is intended to further thought:

Assessment Framework³²

Security

Legal Framework

Is a cease-fire or peace accord working?

Are the constitution or other basic laws in effect?

³¹ Available at: www.ohchr.org/english/about/publications/docs/ruleoflaw-mapping_en.pdf.

³² GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 24, at 33-40.

Is society under martial law or other exceptional law (e.g., laws of foreign occupation, UN Security Council Resolution)?

If constitutional order is effective, how effective are the criminal code and criminal procedure code?

Do police and prosecutors have sufficient legal authority to investigate and prosecute crime, including complex cases such as organized crime, drug and human trafficking, and financial crimes? Is there a modern criminal code which conforms to international standards and provides a sufficient basis for dealing with most types of crime?

Institutional Framework

Is there an effective police force?

Are the missions or mandates of the police forces codified or mandated in statutory law?

What is the role of the military in internal security and how is it distinguished from that of the police, and from paramilitary forces?

What are the rules and procedures of triggering a military response to internal security crisis? How do the military and other elements of the security system cooperate in such situations?

Are there prosecutors?

Are courts open and are there judges?

Are prisons operating?

Are the security sector employees getting paid a wage adequate to live on (to avoid resort to corruption)?

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?

Are there armed groups that harm and intimidate citizens with seeming impunity?

Legitimacy

Legal Framework

What is the source of law? What is its history? What groups in society wrote the laws?

What is the legal basis for maintaining order? Is there a criminal code which conforms to international standards and provides a sufficient basis for dealing with most types of crime?

Are there statutory penalties or punishments for discriminatory or abusive police conduct?

Do the constitution and laws of the country provide that the judiciary is an independent branch of government? Does the legal framework guarantee judicial and prosecutorial independence, impartiality, and accountability?

Are there legally recognized and binding codes of conduct in effect for judges, prosecutors, and lawyers?

Are armed forces held legally accountable for their actions when performing law enforcement or public safety functions?

How are the laws viewed today by different social groups? Are any laws resisted?

How long has the constitution been in effect? How often has it been amended? Have amendments been made by a process which includes a genuine opportunity for public participation and decision-making?

Institutional Framework

How long have the key institutions been in place? How are they viewed by the public? By different social groups?

Which institutions command respect, disrespect, or fear? How do they rate against other institutions in the state or society? Is law respected by elites? Do elites suffer if they break the law?

Effects-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 which are part of the formally adopted legal system?

Impartiality

Legal Framework

- Do the laws relating to the structure and operations of the judiciary place the principal control over most judicial operations in the hands of the judiciary itself?
- Is there a law on freedom of information held by government agencies?
- Do existing laws provide for appropriate external and internal oversight mechanisms for reviewing and acting upon complaints of police brutality or other misconduct?
- Are there legally recognized and binding codes of conduct in effect for judges, prosecutors, and lawyers?

Institutional Framework

- Do the constitution and laws of the country provide that the judiciary is an independent branch of government?
- Are judicial disciplinary and removal decisions made by a body and process that is not under the exclusive control of the executive and legislature? Are disciplinary/removal decisions subject to judicial review?
- Does the selection system for judges and prosecutors limit the ability of the executive and the legislature to make appointments based primarily on political considerations?

Are judges entitled to security of tenure?

Once appointed, can judges be removed for non-feasance or mal-feasance in the performance of their duties?

Are there internal or external (civilian) boards which review police conduct? Do these bodies aggressively review and act upon complaints of misconduct? Are there mechanisms to ensure that ethical codes for judges are prosecutors are effectively enforced?

Does civil society scrutinize the justice system? Does the media? What is the role of the bar?

Effects-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?

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?

D. Practical Approaches for Measuring Progress within Rule of Law Activities

A “metric” is a means by which one can measure productivity, achievement of goals or objectives and performance of tasks or actions. Metrics are generally quantitative or qualitative units of measurement. All military operations have techniques for measuring success or failure of a particular mission, and no military operation exists without reporting requirements that require the application of metrics. Meaningful metrics permit the Judge Advocate engaged in rule of law missions to not only measure whether the mission is accomplishing its goals, but to also convey information to superiors and policy makers in a quantifiable manner that is not purely anecdotal.

1. Pre-deployment Metrics

The metrics at the pre-deployment stage should be focused on your unit’s capability and readiness to perform its assigned mission rather than mission accomplishment. Does the unit have the requisite knowledge and resources to successfully undertake the rule of law mission? Does the unit have the requisite soldier tools and equipment to be able to conduct the rule of law mission in a non-permissive environment? These issues are discussed in more detail section B.1.e) pertaining to pre-deployment planning.

If the mission is a follow-on rotation to replace another unit already in theater, the metrics for pre-deployment planning will necessarily include the progress and assessments of the unit already in theater. The follow-on unit obviously cannot control the content of those metrics, but obtaining that information early in the pre-deployment planning process for the follow-on unit will allow it to generate realistic assumptions and courses of action under the military decision making process.

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 which encourages the fair and expeditious resolution of cases?

2. **Initial Deployment Metrics (-30 D day to +90)**

Metrics in the initial deployment stage frequently focus upon facilities and personnel. The newly arriving Judge Advocate needs to understand the capabilities and resources will be required before meaningful planning and assessment can occur. Although each circumstance will vary, examples of early metrics include:

Courts and Judiciary:

- **Number of courthouses that are structurally capable of operation.**
- **Number of trained judicial and law enforcement personnel available.**
- **Availability of functioning utilities necessary to operate facilities.**
- **The amount of funding needed to repair physical damage to buildings, to include labor and materials.**

Police and Jails:

The rule of law planner should have a solid understanding of the ability of the local system to detain those persons arrested for criminal misconduct, to include both short-term and long-term circumstances. The metrics for this area include:

- **The number and geographic distribution of confinement facilities.**
- **A numerical breakdown of bed capacity in maximum and medium security long term facilities, as well as local short term detention space.**
- **The number and nature of currently detained/imprisoned persons.**
- **The rate at which newly detained/arrested personnel are growing versus capacity.**

Physical Security and Police Institutions in the Wake of Major Combat

During OIF-1 there was a period of 4-8 weeks during which the number of persons being arrested overwhelmed the capacity of the available facilities to hold them. Petty thieves and non-violent looters had to be released back into the population in order to create detention capacity for violent offenders. Awareness of detention metrics impacts all justice assessments and planning.

In addition, metrics should permit an assessment of the capabilities (and adequacy) of the local law enforcement entities. Given their expertise in the field, Military Police should take an active role in both planning and executing these aspects of most rule of law operations.

Other Agency Metrics

Another important metric in measuring what capabilities exist and what operations can be sustained is the existence of other USG, international and nongovernmental agencies in the area of operations. Knowledge of their capabilities in terms of personnel, funding, and equipment is a quantifiable factor that will have bearing upon mission planning.

Track Public Requests for Information

The establishment of help desks or public information centers in courthouses and police stations creates an ongoing opportunity to track the number of people seeking access to the

system by their questions on legal rights and court processes. While JA personnel may need to initially generate the initiative for such a program, it should be staffed by local nationals who have been provided training on the services and information they are to provide, as well as instruction on tracking inquiries.

Track Complaints

Similarly, creation of a mechanism for accepting public complaints provides not only the opportunity to assess and fix flaws in the system, but to track the number of people willing to speak out on inadequacies in the system. In this regard, tracking an increase in the number of complaints is not necessarily a negative factor. Persons who are oppressed and live in fear of their legal system are less likely to openly complain, while those who feel they have a meaningful voice in the system are more apt to lodge complaints.

Track Case Processing Statistics

In the initial deployment phase, the number of criminal cases being adjudicated is a good initial metric as to whether the system is operating at all. Such numbers do not reflect the quality of justice, but the mere fact that cases are being adjudicated is a positive first step. Early judicial actions in the initial deployment phase are analogous to emergency medicine. They may not be pretty, but their successful completion is critical for any subsequent improvements to occur.

Beware of Stale Metrics

As the mission evolves, merely counting things like the number of court cases become less relevant as an accurate metric for rule of law analysis. For instance, nearly as important as the number of cases being adjudicated is the quality and due process which is offered by the system. For instance, persons who spend more time in pretrial detention than their ultimate sentence may not necessarily be receiving adequate due process. Additionally, parties who must wait years to present civil disputes to any level of court may not feel the benefit of the rule of law and turn instead to resolving disputes through private and coercive means. As the legal system begins basic function, rule of law practitioners should adjust their metrics to account for the changed environment. Eventually, metrics will have to evolve beyond a purely quantitative, institutional focus to a qualitative one emphasizing the effects that the legal system is having on the populace.

3. *Metrics During Sustained Deployment (91+ D day to indefinite)*

Effects-Oriented Metrics

Many of the metrics during the initial deployment stage are designed to measure resource availability. As the mission evolves beyond initial entry into sustained operations, the mission becomes more complex. Accordingly, the metrics during this phase also become more complex beyond the mere counting of cases. The metrics during sustained operations seek in many instances to capture intangibles, such as the attitudes of the population toward their justice institutions.

At the sustained deployment stage, merely focusing upon the number of court houses operating, the number of prison cells available, and the number of judges hearing a given number of cases begins to tell an increasingly irrelevant story. Now operations are moving into the higher realm of what constitutes establishment of the rule of law. A tyrannical system despised by its population can have courthouses, cells, and case adjudication statistics and yet the rule of law

does not exist. Once a plateau of recovery is reached where the facilities and personnel exist to operate the legal system, then the metrics upon which assessments and planning are built must shift to analyzing the *efficacy* and *legitimacy* of the system.

Again, because the specific metrics to be used will be situation and mission specific, this non-exclusive list of metrics should be used more as a guide for discussion and development of mission-appropriate metrics than as a checklist:

Conviction/acquittal rates. Figures that reflect a lack of balance (either way) in the system may suggest the need for additional training (judicial, prosecutorial, or defense counsel) or problems of either mishandling of cases or evidence or corruption.

The number of civil legal actions being filed each month. Comparisons between pre-conflict and post conflict statistics are particularly revealing as to whether the people believe they can receive justice from the nation's court system.

Case processing times for the civil court docket. If cases are not being decided in a timely fashion, one cannot expect the population to rely upon the system and they will turn to other methods, sometimes violent, to resolve disputes.

Case processing statistics for criminal cases. How long it takes for each case to come before the bench for resolution will reflect the health of the system over time.

Case statistics (both civil and criminal) should be compared from different portions of the country to determine if rule of law progress is lagging in certain parts of the country.

Serious crime statistics. The number of occurrences and whether people report such crimes to the police may reflect trust or mistrust of the police. A generally recognized high incidence of crime with a low reporting record may reflect that the population does not trust the police and would rather endure the crime than place themselves within reach of law enforcement personnel.

The Aftermath of Extensive Police Corruption in Iraq

After the fall of the Baathist regime in Iraq, many citizens related they had not reported crimes to the police under Saddam's rule because the police would not leave their station house to investigate unless they were promised money or a cut of the recovery if they reclaimed the stolen property.

Formal or informal surveys pertaining to level of public trust in the police and the judiciary. Such surveys can be coordinated to occur contemporaneously with public education forums concerning the justice system.

The number of personnel assigned to police internal affairs offices, the number of filed, pending, and completed investigations, and outcome statistics. As with criminal trial statistics, disproportionately high findings of either misconduct or no basis may reflect that the oversight agency itself is subject to bribery and corruption.

The existence of judicial/legal training centers that provide ongoing instruction in concepts of the rule of law is one metric to gauge the evolution of legal thought in a country. Perhaps more important is measuring the number of personnel from around the concerned nation who receive instruction through such institutions. If training is limited to a few favored elite, the existence of such institutions is not as meaningful as if it is available to all judges, prosecutors, and other key legal personnel.

Public Information /outreach. Public forums and education programs provide another opportunity to gauge the extent to which the local population views themselves as having a role in their legal system by monitoring attendance and the number and nature of inquiries that follow the program.

Intangibles Should Not be Disregarded

It is important to recognize that metrics when applied to the rule of law mission is an attempt to place numbers upon an intangible – the level of trust and reliance the population has in its legal institutions. Such metrics are important for attempting to convey a subjective and intangible concept to higher headquarters and civilian policy makers. However, metrics have limitations and should never be a complete replacement for the insight, common sense, and intuition of the Judge Advocate in the rule of law team as to whether the population has confidence that the rule of law is growing or diminishing in their society. Attorneys perform these missions, not accountants, because of their legal training and judgment, which enables them to discern patterns and trends out of otherwise seemingly chaotic circumstances. Thus, the metrics are merely a tool from which to create an assessment of objective and subjective factors impacting the rule of law mission.

E. Interagency Reconstruction and Stabilization Planning Framework

1. Introduction

Reconstruction and stabilization efforts in recent years have presented many challenges in terms of planning, coordination, and implementation. In particular, efforts in Iraq and Afghanistan have highlighted differing approaches by the different arms of the US government. These different approaches have made planning, coordination, and implementation at the interagency level difficult at times.

In an effort to synchronize these processes, President George W. Bush signed National Security Presidential Directive 44, giving the Secretary of State the responsibility to coordinate and lead US government efforts at reconstruction and stabilization.³³ The Department of Defense followed the President's lead by publishing DODD 3000.05, which designated certain responsibilities to various organizations within DOD.³⁴ These two documents acknowledged the capabilities of both the Department of State and the Department of Defense, and served to

³³ National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstructing and Stabilization (7 Dec. 2005).

³⁴ U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).

delineate key reconstruction and stabilization responsibilities with a goal of enhancing the planning, coordination, and implementation efforts of all key US government participants.

While the military may not be the lead agency in formulating reconstruction policy, it not only has necessarily undertaken considerable responsibility for engaging in reconstruction and stabilization activities (particularly in non-permissive or semi-permissive environments), it also published doctrine to provide guidance in planning such operations.³⁵ However, any rule of law planner engaged in a rule of law operation in an interagency environment should have a basic grasp of both the interagency framework and the corresponding military doctrine in order to appreciate the comprehensive nature of reconstruction and stabilization efforts, as well as identify the interagency partners who may possess the capabilities to best accomplish specific reconstruction and stabilization tasks. This section will describe the State Department's approach to reconstruction and stabilization, discuss the Army's own set of primary stability tasks that follow the State Department's approach, and offer typical lines of effort for each primary stability task.³⁶

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

In April 2005, S/CRS published the Post-Conflict Reconstruction Essential Tasks Matrix in order to provide reconstruction and stabilization personnel, especially in post-conflict settings, with a common framework to assess, plan, and synchronize efforts among all participating organizations.³⁷ The S/CRS framework is a comprehensive task list built on five broad technical areas of society, or 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 a stable state. Conversely, a country that displays some degree of instability in one or more of these sectors will find itself in a more fragile state.

Additionally, the S/CRS framework sets forth a three-phased approach to reconstruction and stabilization efforts in each sector, generally viewed in terms of three phases:

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

It is important to note that the three-phase approach is not generally viewed as necessarily sequential. Situations may warrant the implementation of certain tasks in a subsequent phase

³⁵ See FM 3-0, *supra* note 8, at ch. 3 (27 Feb. 2008). (discussing these five Army primary stability tasks).

³⁶ This discussion of frameworks is intended to provide 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. Rule of law planners will find themselves more capable of understanding the differences between the two frameworks by taking the time to read and digest them in their entirety.

³⁷ The Post Conflict Reconstruction Essential Tasks Matrix can be found at: <http://www.state.gov/s/crs/rls/52959.htm> (last visited August 12, 2008). 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."

even though conditions presented may be best characterized as an earlier phase. For example, reconstruction and stabilization personnel may plan and coordinate monetary policy programs in the early stages of the US government 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 such fluidity.

The five stability sectors as defined by the S/CRS framework, which will be discussed in greater detail, are as follows:

Security

Justice and Reconciliation

Humanitarian Assistance and Social Well-Being

Governance and Participation

Economic Stabilization and Infrastructure

One must bear in mind that the five stability sectors do not operate independently of each other. Rather, all five sectors work in concert to promote and maintain stability. Planners should ensure, therefore, that any reconstruction and stabilization plans account for the effect each line of effort will have on one or more stability sectors.

Just as lines of effort can affect one or more stability sectors, so too can sources of instability. For example, illicit drug trafficking threatens individual or community security, poses great challenges to the law enforcement community (justice), and generates income that destabilizes the legitimate economy of the country. A particular source of instability can also exist outside the borders of the host nation. For example, terrorism often operates its recruiting, training, funding, and planning cells in multiple countries.

It is important, therefore, to understand the meaning and application of each stability sector as well as the linkages between sectors. Planners must also understand the effect of a source of instability on each stability sector, as well as stability in general. Doing so will enable planners and personnel completing that task to understand the importance of the specific task, its impact on mission success, and the consequences for failing to complete the task. It also enables planners to assess the effectiveness of certain courses of action, and use lessons learned to effectively plan future operations.

Security

Security is the foundation for broader success across the other stability sectors. In non-permissive or semi-permissive environments, security often must be established before other US 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. Its provision encompasses both individual and collective security.

Initially, reconstruction and stabilization personnel respond to establish a safe and secure environment. Afterward, they work to transform the host nation security institutions to make them legitimate and stable. Once host nation security institutions effectively take responsibility for providing security, reconstruction and stabilization personnel assist in consolidating indigenous capacity, and providing limited assistance where needed.

Justice and Reconciliation

This sector centers on justice reform and the rule of law, 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 to enforce 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, efforts are made to initiate the building 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 a functioning legal system that the population accepts as legitimate.

Humanitarian Assistance and Social Well-being

This sector focuses on the basic needs of the population, both in terms of immediate needs and long term sustainability. Effective humanitarian assistance efforts in such areas as food distribution, refugee and displaced persons, and sanitation provide immediate relief to host nation populations in desperate need of aid, especially those in post-conflict areas. Such relief contributes to the establishment of security, as well as the perception of legitimacy of the host nation government charged with providing for the welfare of its citizens. Long term social well-being development in programs such as education and public health systems ensure the host nation government possesses the capabilities and capacity to develop the abilities of its citizens to provide for their own welfare, which further sustains stability and eliminates or minimizes the potential drivers of conflict.

Initially, reconstruction and stabilization personnel work to provide emergency humanitarian needs. As the immediacy to address these needs subsides, reconstruction and stabilization personnel establish a foundation or program for host nation development to develop the capabilities and capacity to meet these needs in the long term. 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.

Governance and Participation

Governance is the state's ability to serve the citizens, to include the rules, processes, and behavior by which interests are articulated, resources are managed, and power is exercised in a society, as well as the representative participatory processes typically guaranteed under inclusive, constitutional authority. Participation includes methods that actively, openly involve the local populace in forming their government structures and policies that, in turn, encourage public debate and the generation and exchange of new ideas. Both governance and participation require the establishment of effective, legitimate political and administrative institutions and infrastructure.

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 among the host nation populace, reconstruction and stabilization personnel consolidate these institutions and processes so they can operate with little or no outside assistance.

Economic Stabilization and Infrastructure

Economic stabilization and infrastructure involves the state's programs, facilities, and transportation systems (e.g., roads, railways, and ports) that enable its population to generate income and tax revenue to sustain the state's economic base. Steven Hadley, Director of the Office of Economic Growth, Bureau for Economic Growth, Agriculture and Trade (EGAT), U.S. Agency for International Development, once remarked that "economic growth has often been treated as an afterthought in post-conflict recovery and has received relatively 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 a complicated sector involving the successful involvement of the public and private sectors over an extended period of time. Indeed, economic growth and stability can be difficult to accomplish in economically developed countries. Therefore, planning, coordinating, and implementing economic growth programs across the interagency community poses great challenges, requiring both short and long term planning, strategic patience, and strong coordination among the interagency partners.

Initially, reconstruction and stabilization personnel respond to immediate needs of the population. As security is established and initial needs are met, reconstruction and stabilization personnel establish a foundation or program for host nation development to develop the capabilities and capacity to foster economic and infrastructure development over the long term. Once the host nation, particularly at the local and provincial levels, demonstrates its ability to sustain a rudimentary economy, reconstruction and stabilization personnel institutionalize the long term development program so the local and provincial levels can benefit from national level economic programs affecting trade, monetary policy, banking policy, and various other economic facets with little or no outside assistance.

3. The Army Primary Stability Tasks³⁸

The Army's five primary stability tasks are intended to closely mirror the S/CRS stability sectors. Each stability task focuses military efforts on a functional area of society. They are:

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, each stability task does not operate in isolation, but rather in conjunction with one or more tasks. The combination of tasks conducted during stability operations depends on the situation. Planners should use the Army primary stability tasks as a basic framework for establishing lines of effort. Keep in mind that lines of

³⁸ See FM 3-0, *supra* note 8, at 3-12 – 3-16.

effort may impact more than one stability task, and a source of instability may impact more than one line of effort.

Establish Civil Security

Civil security is most closely tied to the S/CRS “security” sector. It involves providing for the safety of the host nation and its population, including protection from external and internal threats. Ideally, military 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 situations where the host nation does not possess sufficient capabilities, military forces provide most civil security while developing host nation capacity. Military forces then transition these responsibilities as soon as the host nation security forces can adequately maintain civil security with little or no assistance.

Civil security lines of effort include, where appropriate: disposing of opposition armed or other security forces, intelligence services, and belligerents; ensuring territorial security; establishing public order and safety; protecting indigenous individuals, institutions, and infrastructure; and protecting reconstruction and stabilization personnel.

Establish Civil Control

Civil control is most closely tied to the S/CRS “justice and reconciliation” sector. It involves the regulation of selected behavior and activities of individuals and groups. Effective civil control reduces risk to individuals or groups, as well as corruption by individuals responsible for providing civil security and civil control. Military forces, in close coordination with State and Justice Department personnel, plan and implement programs designed to build the capabilities of the host nation judicial system, law enforcement organizations, and penal systems. Additionally, judge advocates and attorneys from other interagency and multinational partners build legal institutions that effectively educate, train, and support the judges and lawyers of the host nation, enabling them to practice law according to their laws, regulations, customs, and internationally accepted standards of human rights.

Civil control lines of effort include, where appropriate: constituting an interim criminal justice system; building or sustaining an effective host nation police force; building or sustaining sufficient 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 and truth commissions; and establishing community rebuilding programs.

Restore Essential Services

Essential services is most closely tied to the S/CRS “humanitarian assistance and social well-being” sector. It involves the establishment or restoration of the most basic services such as food and water, emergency shelter, rescue, emergency medical care, and basic sanitation. Military forces, especially in the aftermath of armed conflict and major disasters, establish or restore these basic services and protect them until a civil authority or the host nation can provide them. Normally, military forces support civilian and host nation agencies. When the host nation cannot perform its role, military forces may temporarily provide the basics directly. Activities associated with this stability task extend beyond basic services, as broader humanitarian and

social well-being issues typically impact the host nation's institutional capacity to provide such services.

Essential services lines of effort include, where appropriate: assistance to refugees and internally displaced persons; food security; shelter and non-food relief; humanitarian demining; public health, including potable water, medical care, and sanitation; education; and social protection.

Support to Governance

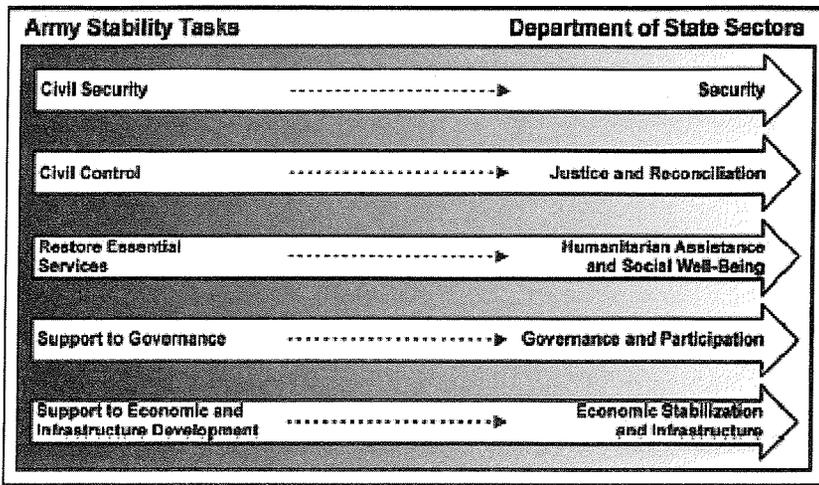
Governance is most closely tied to the S/CRS "governance and participation" sector. The State Department typically holds primary responsibility for most governance and participation efforts with the host nation government, but military forces, especially in post-conflict areas, often assume primary responsibility to support governance at the local and provincial levels. Military personnel establish liaison with local leaders and business owners, encourage peaceful resolution of disputes among rival factions, build or restore critical infrastructure, and establish liaison with the national government.

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; and public information and communications.

Support to Economic and Infrastructure Development

Economic and infrastructure development is most closely tied to the S/CRS "economic stabilization and infrastructure" sector. It involves both the ability of the host nation institutions to sustain its economic viability and the individual citizen's ability to provide for his basic needs. Many different factors can affect the economic viability of a state, some of which are not subject to influence by military forces. However, military forces can make significant improvements to the economic viability of a local or provincial population, either by injecting money directly into the economy through construction and service contracts, or by improving the infrastructure that supports the economic base. Given the complex nature of the economic stabilization and infrastructure sector, military forces should ensure their stability task plans are properly synchronized into an overarching economic and infrastructure development plan at the strategic and operational levels to ensure any plans do not provide short term success at the expense of long term stability.

Economic and infrastructure development lines of effort include, where appropriate: transportation infrastructure, such as roads, railways, airports, ports, and waterways; telecommunications; energy development, utilizing natural resources, electrical power, energy production and distribution infrastructure; and municipal and other public services.



FM 3-0, Operations, Fig. 3.3, Stability tasks and Department of State technical sectors

4. Conclusion

Reconstruction and stabilization efforts involve complex problems and even more complex solutions. Depending on the level of command military rule of law planners serve, no two situations will likely look the same, even within the same country or region. The two frameworks offered by S/CRS and FM 3-0 present similar conceptual approaches to stability operations from the strategic and operational levels, respectively. However, they are merely general frameworks that serve as starting points for planning, coordination, and implementation. Situations on the ground can and will require rule of law planners to conduct a thorough mission analysis and course of action development to tailor these frameworks in such a way that best suits the conditions presented in a particular area of operations.

F. Conclusion

Planning, assessment, and metrics are critical aspects of any military operation. Rule of law operations are no different. Planning a rule of law mission, assessing the host nation's legal system, and measuring progress provide not only a roadmap for the operation but also provide guidance on whether the mission is successful and whether what is working in one AO should be exported to other ones. Thorough planning, assessment, and metrics are necessary for organizing the rule of law effort, but, because the rule of law is itself so intangible a concept, it will take more than reliance on successful completion of particular tasks or numeric measures of effect in order for all involved to conclude that they have furthered the rule of law through their actions – that conclusion is instead more likely to come from introspection – how the *practitioners themselves* perceive the system.

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VII. Fiscal Considerations in Rule of Law Operations

The principles of Federal appropriations law permeate all Federal activity, both within the United States, as well as overseas. Thus, there are no “contingency” or “deployment” exceptions to the fiscal principles, including the funding of rule of law operations. Because fiscal issues will arise during every rule of law operation, a failure to understand the nuances of fiscal law may lead to the improper obligation and/or disbursement of appropriated funds.¹ 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, rule of law advisors need a solid understanding of the basic fiscal principles prior to advising their commands on the legality of funding rule of law activities.

Congress generally imposes legislative fiscal controls through three basic mechanisms, each implemented by one or more statutes. The U.S. Comptroller General, who heads the Government Accountability Office (GAO), audits executive agency accounts regularly, and scrutinizes compliance with the fund control statutes and regulations. The three basic fiscal controls are:

¹ 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, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 5: Obligations, *available at* <https://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/TJAGLCS> Publications (the Contracts and Fiscal Law Department updates the Fiscal Law Deskbook two times per year, once in the Spring and once in the Fall).

1. Obligations and expenditures must be for a **proper purpose**;
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)**; and
3. Obligations must not exceed the **amounts** authorized by Congress, and must not violate the Antideficiency Act (ADA).²

Before a JA advises the command on whether a specific rule of law 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 key, the “purpose” control is most likely to become an issue during military operations and rule of law activities, and so it is treated in detail here. Following that is a discussion of the basic fiscal framework of Funding U.S. Military Operations (FUSMO), of which rule of law activities are a subset. The DOS is the primary agency responsible for redevelopment, including rule of law activities, so following the general discussion of FUSMO is a detailed discussion of the appropriations and authorizations available to the Department of State to conduct rule of law activities, which the DOD will access via Interagency Acquisitions. Subsection Six will discuss the appropriations and authorizations available to the Department of Defense to conduct rule of law activities. The chapter concludes with a discussion of the specific issues that arise in the context of funding rule of law activities, with a particular focus on Provincial Reconstruction Teams (PRTs), and Embedded Provincial Reconstruction Teams (ePRTs).³

A. Purpose

1. 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.”⁴ Thus, expenditures must be authorized by law⁵ 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:

² For more information on the basic fiscal legislative controls of Purpose, Time, and Amount (ADA), see Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 1: Introduction to Fiscal Law.

³ PRTs are discussed in detail in Chapter IX.

⁴ See 31 U.S.C. § 1301(a).

⁵ For DOD, this includes permanent legislation (Title 10) and annual appropriations/authorizations acts (DODAA/NDAA).

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.⁶

2. **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.⁷ Therefore, if an agency retains funds from a source outside the normal appropriated fund process, the agency violates the Miscellaneous Receipts Statute.⁸ When an agency expends funds that were not specifically appropriated for that agency, this generally violates the constitutional requirement that agencies may only expend funds appropriated by Congress.⁹

A corollary to the prohibition on retaining Miscellaneous Receipts is the prohibition against augmentation.¹⁰ Absent a statutory exception, an agency augments its funds when it *expends* nonappropriated funds¹¹ *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.¹² If two funds are equally available for a given purpose, an agency may elect to use

⁶ For in-depth legal analysis of the Necessary Expense Doctrine, see Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 2: Purpose.

⁷ 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.”

⁸ See 31 U.S.C. § 3302(b); see also, *Interest Earned on Unauthorized Loans of Fed. Grant Funds*, B-246502, 71 Comp. Gen. 387 (1992).

⁹ 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).

¹⁰ 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 Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 2: Purpose; see 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).

¹¹ Nonappropriated funds are funds received by the agency from any entity other than Congress.

¹² See, *Secretary of the Navy*, B-13468, 20 Comp. Gen. 272 (1940).

either, but once the election is made, the agency must continue to charge the same fund.¹³ The election is binding even after the chosen appropriation is exhausted.¹⁴

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.

An Interagency Acquisition 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.¹⁵ The Economy Act authorizes 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.¹⁶ IAs become prominent during rule of law activities when DOD executes DOS-funded missions, and vice-versa. In these circumstances, DOD agencies effectively operate as a “subcontractor” for DOS on DOS-controlled projects.¹⁷ Consult agency regulations for IA order approval requirements.¹⁸ 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 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.

Transfer authority is a second major exception to the miscellaneous receipts and augmentation prohibitions that affect rule of law activities. A transfer is the “[a]uthority provided by Congress to transfer budget authority from one appropriation or fund account to another.”¹⁹ In

¹³ See, *Funding for Army Repair Projects*, B-272191, Nov. 4, 1997.

¹⁴ *Honorable Clarence Cannon*, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard.)

¹⁵ 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)

¹⁶ 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); see also, DOD 7000.14-R, vol. 11A, ch. 1, para. 010201.J. (waiving overhead for transactions within DOD).

¹⁷ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 210 (Aug. 2006); CENTER FOR LAW AND MILITARY OPERATIONS, INTERAGENCY HANDBOOK 207-12 (2004).

¹⁸ See, Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; see also, Army Federal Acquisition Regulation Supplement Subpart 17.5.

¹⁹ Department of Defense Financial Management Regulation (DOD FMR), vol. 2A, ch. 1, para. 010107 (June 2004); see also Department of Defense Financial Management Regulation (DOD FMR), vol. 3, ch. 3, para. 030202 (December 1996) (transfers often require notice to the appropriate Congressional subcommittees. Most DOD transfers require the approval of the Secretary of Defense or his/her designee,

other words, statutory transfer authority²⁰ allows an agency to “shift funds” between different appropriations without violating the miscellaneous receipts prohibitions, the augmentation prohibitions, or the Antideficiency Act (ADA).²¹ 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.²² For the purposes of rule of law activities, the most significant appropriations with transfer authority are the Iraq Security Forces Fund (ISFF) and the Afghanistan Security Forces Fund (ASFF). These appropriations, and their respective transfer authorities, are discussed in below.

B. Funding U.S. Military Operations (FUSMO) and Rule of Law Activities

1. 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 FUSMO. The focus of FUSMO is how to fund operations whose primary purpose is to benefit foreign militaries, foreign governments, and foreign populations. Rule of law activities fall within the FUSMO framework because their primary intent is improve the rule of law of *foreign* government agencies, *foreign* government institutions, and *foreign* civic institutions.

The general rule in FUSMO is that the Department of State, and not DOD, funds Foreign Assistance. Foreign Assistance includes Security Assistance to a foreign military, police forces or other security-related government agency, Development Assistance for major infrastructure projects, and Humanitarian Assistance directly to a foreign population. As a result, rule of law activities will generally be classified as Foreign Assistance, and will be funded by the DOS. The DOS appropriations and authorizations that are most commonly used for rule of law activities are discussed in Subsection Five.

There are two exceptions to the FUSMO general rule that DOS funds Foreign Assistance. The first exception is the “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 O&M only when the purpose of the training is to enhance the Interoperability, Familiarization, and Safety of the foreign military

but some transfers require the approval of the Office of Management and Budget (OMB), or even the President.

²⁰ 31 U.S.C. § 1532.

²¹ 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, see Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 8: Reprogramming and Transfers.

²² Principles of Fed. Appropriations Law, Government Accountability Office (GAO), p.2-28 (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.).

with U.S. military units, and does not rise to the level of Security Assistance Training.²³ This exception applies only to training of foreign militaries, *not police forces or other foreign government agencies*, and as a result will normally be inapplicable in most rule of law activities.

The second exception to the FUSMO 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, rule of law activities may be funded with DOD appropriations if Congress has provided a specific appropriation, or an authorization to access an appropriation, for the rule of law operation contemplated by the command. Subsection Five will discuss the appropriations and authorizations available to the Department of State to conduct rule of law activities. DOD normally accesses these DOS funds via Interagency Acquisitions.

Overhanging all military rule of law activities are two general statutory prohibitions on the provision of USG assistance to foreign governments. The first prohibition is the Leahy Law. The Leahy Law, first enacted in the 1997 Foreign Operations Appropriation Act (FOAA is the annual DOS Appropriations Act), and now enacted in the Foreign Assistance Act (Title 22), prohibits the USG from providing assistance under the Foreign Assistance 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 yearly DOD Appropriations Act 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. *See* DOD Appropriations Act for 2008, §8062.

The second prohibition is a general statutory prohibition on funding foreign law enforcement, contained in § 660 of the Foreign Assistance Act (FAA), which prohibits the use of funds available to carry out the FAA to “provide training or advice or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government . . .”²⁴ There are a number of exceptions to this restriction, including one enacted in 1996 to fund law enforcement and rule of law 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

²³ *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 also* Cont. & Fiscal L. Dep’t, *The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook* (Spring 2008), Chapter 12: Funding U.S. Military Operations (FUSMO) (provides the legal requirements to apply the “little t” training exception, along with examples of what constitutes “little t” training versus Security Assistance Training.

²⁴ 22 U.S.C. § 2420(a).

of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy.²⁵

The result is that despite the general prohibition, most rule of law operations properly funded by the Department of State will fit into the exception *authorizing* the provision of the law enforcement and rule of law aid, as long as it is funded with Department of State appropriations and authorizations.

The DOS's position as lead agency in foreign assistance and reconstruction is mirrored in the fiscal organization for rule of law and other reconstruction activities. Funding for some post-conflict security efforts in Afghanistan and Iraq, for example, has come not from DOD "Title 10" authority but from DOS "Title 22" authority.²⁶ When DOD executes these DOS-funded missions via Interagency Acquisitions, DOD agencies effectively operate as a "subcontractor" for DOS on DOS-controlled projects.²⁷

2. *Department of State Appropriations for Rule of Law Activities*

Depending on the exact contours of the rule of law activity being considered by the unit, the appropriations and authorizations on the previous flowchart 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 12: FUSMO.²⁸ In addition, the DOS has two appropriations that have acquired a primary role in funding rule of law activities executed by Provincial Reconstruction Teams (PRTs) and the embedded Provincial Reconstruction Teams (ePRTs). These two appropriations are the Economic Support Fund (ESF) and funding for the Bureau of International Narcotics and Law Enforcement Affairs (INL). Each is discussed below in detail.

3. *Department of State Economic Support Fund*

In addition to the DOS appropriations and authorizations identified in the DOS Funding flowchart on the previous page, the DOS also funds rule of law operations via its Economic Support Fund (ESF). The FAA authorizes ESF assistance in order to promote the economic or political stability of foreign countries.²⁹ Generally, the ESF has a 2 year period of availability and is appropriated annually in the Foreign Operation Assistance Act (FOAA), the DOS equivalent to the annual DOD Appropriations Act. The two most recent FOAA appropriations for the ESF were \$2.5 billion appropriated in the FY07 FOAA (P.L. 110-28), available for new obligations until 30 September 08; and \$2.99 billion appropriated in the FY08 Consolidated Appropriations Act (CAA) (P.L. 110-161), available for new obligations until 30 Sep 2009.

²⁵ 22 U.S.C. § 2420(b)(6). *See generally* INTERAGENCY HANDBOOK, *supra* note 18, at 207-12.

²⁶ CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 220 (2006) (regarding the Afghan National Army) [hereinafter FORGED IN THE FIRE].

²⁷ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 255 (Aug. 2006); INTERAGENCY HANDBOOK, *supra* note 18, at 210.

²⁸ Cont. & Fiscal L. Dep't, The Judge Advoc. Gen.'s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 12: Funding U.S. Military Operations (FUSMO); *see also* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 272 (Aug. 2008) Chapter 17: Fiscal Law.

²⁹ *See* 22 U.S.C. § 2346.

In Iraq, ESF is used in one of three foreign assistance programs: the Security Support Track, the Political Support Track, and the Economic Support Track. The Security Support Track consumes approximately 60% of the ESF appropriation, while the Political Support Track and the Economic Support Track consume approximately 20% each. Each of the three major ESF tracks is allocated into several subprograms which target specific initiatives that support the primary purpose of the ESF.

The ESF's Security Support Track is allocated into seven different subprograms.³⁰ Three of those subprograms are generally available to fund rule of law 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). Of these three programs, the PRT Quick Response Fund is generally the least cumbersome to access, due to its broad purpose and its lower approval levels.

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 the Department of State. It is executed for the DOS, however, by the Army Corps of Engineers, Gulf Region Division (ACoE GRD) via DOS FAA section 632 Interagency Acquisitions (IAs) authority, through Military Interdepartmental Purchase Requests (MIPRs). PRT/PRDC programs are approved by the DOS at the U.S. Embassy, Iraq.³¹

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 the U.S. Agency for International Development (USAID). These projects are executed by the PRTs and "embedded" PRTs (ePRTs) on behalf of USAID via FAA Section 632 IAs, through MIPRs. The approval level for these projects are USAID program managers at the U.S. Embassy, Iraq.³²

The PRT QRF is the least cumbersome subprogram of the ESF Security Support Track, due to its broad purpose and lower approval authorities. As a result, it is the most useful ESF subprogram to fund the smaller-scale rule of law 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 orgs, as well as small project needs for the provinces. The PRT QRF may be used for the following projects under its broad purpose:

³⁰ The seven subprograms under the ESF's Security Support Track are: the PRT/PRDC Funds, the Local Governance Program Funds, the PRT Quick Response Fund (PRT QRF), the Community Stabilization Program Fund, the Infrastructure Security Program Fund, the Community Action Program Fund, and the Marla Ruzicka Iraqi War Victims Fund. *See* Department of State Report on Iraq Relief and Reconstruction, April 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://www.state.gov/documents/organization/105344.pdf>.

³¹ Department of State Report on Iraq Relief and Reconstruction, April 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://www.state.gov/documents/organization/105344.pdf>.

³² *Id.*

Encouraging programs for youth and particularly those that provide youth with practical opportunities to prepare for a productive career and to make contributions to the improvement in their communities.

Fostering networks among local civil society groups, municipal governments, and the business community, as an avenue toward promoting effective and transparent delivery of government services at the local level.

Encouraging women's participation in the market based economy.

Promoting public accountability projects that include anti-corruption and transparency components.

Promoting the rule of law and legal reforms including legal rights educations and property rights administration.

Supporting specific projects for the environment or to promote public health.

The PRT QRF is implemented by DOS and/or USAID. PRTs and ePRTs execute these projects on behalf of DOS and USAID via DOS FAA Section 632 Act IA authority.³³ The approval levels vary on the type of purchase and/or grant. These various approval levels and program restrictions are summarized below:

1. Awards can be made through micro purchases, grants, and procurements. The approval authorities are highlighted in *Table 1* below.

³³ *Id.*

Tool	Description	Amount Deployable
Micro Purchases	1. Similar to the CERP process, micro purchases allow PRTs/ePRTs to procure items or services that PRT team leaders deem vital to their engagement with local and provincial communities. 2. No Embassy approval required.	<\$25K
Small Grant	1. One-time payment to an NGO/GoI to carry out activity. 2. Tracked at Embassy. Implemented by PRT/ePRT. 3. Post review and authorization of all grants. 4. Grants over \$25K reviewed by Washington.	<\$50K
Grant	1. One-time payment to an NGO/GoI to carry out activity. 2. Tracked at Embassy. Implemented & monitored by AID. 3. OPA review and handoff to AID.	\$50K-\$200K
Direct Procurement	1. Activity complex enough that it requires a contract/lengthy statement of work. PRT team leaders approves purchase request. 2. Procurement order executed by AID, JCCI, or GSO depending on core competency. ³⁴	<\$200K

Table 1: Approval Authorities for the QRF

Projects which require funds larger than \$200K or are complex in scope/statement of work should utilize PRDC methodology.

The PRT/ePRT Team Leader will determine whether a micro purchase, grant, or procurement is the proper vehicle and entity to use. Micro purchases are capped at \$25,000 and fall within “notwithstanding authority” provided by a memo from Department of State’s Assistant Secretary for Near East Asia (NEA) Affairs.

The PRTs/ePRTs may award grants or procurements up to \$200,000 primarily to non-profit organizations or government entities. OPA will provide grants officer approval and signature for grants up to \$100,000. Where USAID operates, it will be the grants officer for grants in excess of \$100,000, and depending on each province’s capabilities, may also be the grants officer for projects in excess of \$50,000.

For all contracts/procurements where micro purchase authority is not availed, USAID or JCCI/A (Joint Contracting Command-Iraq/Afghanistan) will be the contracting officer based on subject matter expertise, and not necessarily on a dollar threshold. Micro purchases up to \$25,000 may be made by a PRT/ePRT Team Member, if appropriate.

2. American or other donor country organizations and individuals are not eligible for grants under this program, unless already an existing implementing partner for USAID. Participation of organizations from other countries may be considered on a case-by-case basis to

³⁴ AID implementer, DOD’s Regional Contract Command (RCC) will handle monitoring component.

promote regional cooperation. Additionally, international organizations that agree to use an Iraqi implementation partner may be awarded grants.

3. For-profit businesses or private-sector individuals looking to avail QRF for personal business gain are not eligible.

4. While grants are normally made once, a repeat grant to a particularly worthy organization may be issued if the PRT/ePRT Team leader determines that the activity advances a clearly defined priority objective.³⁵

The ESF's Economic Support Track is allocated into five different subprograms.³⁶ Of those five subprograms, only the Targeted Development Program (TDP) is significant for rule of law activities. The other subprograms focus on large scale economic support infrastructure and will generally be unavailable for most rule of law 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 Support Track is allocated into four different subprograms.³⁷ Due to the limited (or exhausted) funds, the limited purposes for these subprograms, a lack of ability of PRTs and ePRTs to access these funds, and the large scope of the projects undertaken with these funds, the Political Support Track subprograms are currently not playing a key role in funding rule of law activities. In the future, however, these funds may play a greater role in funding rule of law activities that are executed by PRTs and ePRTs.³⁸

4. Bureau of International Narcotics and Law Enforcement Affairs Funding

The mission of the Department of State's Bureau of International Narcotics and Law Enforcement Affairs (INL) is to:

[A]dvise the President, Secretary of State, other bureaus in the Department of State, and other departments and agencies within the U.S. Government on the

³⁵ DOS Information Paper: PRT QRF Program Guidelines (2007) (Unpublished), on file with author.

³⁶ The five subprograms under the ESF's Economic Support Track are: the O&M Sustainment of Infrastructure (executed by ACoE GRD), the Agri-Business Development Fund (executed by USAID), the Plant-Level Capacity Development & Technical Training (executed by ACoE GRD), the Provincial Economic Growth Program (executed by USAID), and the Targeted Development Program (implemented by the Ambassador, Iraq and executed by PRTs/ePRTs). See Department of State Report on Iraq Relief and Reconstruction, April 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://www.state.gov/documents/organization/105344.pdf>.

³⁷ The four subprograms under the ESF's Political Support Track are: the Capacity Development Program; the Democracy and Civil Society Program; the Economic Governance II, Policy & Regulatory Reforms Program, and; the Iraqi Refugees Program (Jordan). See Department of State Report on Iraq Relief and Reconstruction, April 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://www.state.gov/documents/organization/105344.pdf>.

³⁸ Department of State Report on Iraq Relief and Reconstruction, April 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://www.state.gov/documents/organization/105344.pdf>.

development of policies and programs to combat international narcotics and crime INL programs support two of the State Department's strategic goals: (1) to reduce the entry of illegal drugs into the United States; and (2) to minimize the impact of international crime on the United States and its citizens. Counternarcotics and anticrime programs also complement the war on terrorism, both directly and indirectly, by promoting modernization of and supporting operations by foreign criminal justice systems and law enforcement agencies charged with the counter-terrorism mission.³⁹

Congress has permanently authorized the use of appropriated funds for INL-implemented foreign assistance programs “to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of narcotic and psychotropic drugs and other controlled substances, *or for other anticrime purposes*.”⁴⁰ Congress appropriates funds for these purposes on an annual basis in the Foreign Operations Appropriations Act (FOAA), the annual appropriations act for the Department of State under the International Narcotics, Crime and Law Enforcement (INCLE) account.

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.”⁴¹ This broad purpose mandate allows INCLE to be used for a majority of rule of law activities, since many of these operations are generally intended to decrease crime in some fashion. The amount of INCLE funds that Congress appropriates for Base fiscal years tends to be limited. In fiscal years 2007 and 2008, Congress appropriated slightly over \$550 million each year for INCLE rule-of-law related activities. However, State/INL’s actual operating budget over the past years has been significantly higher (in the billions), due to supplemental appropriations and inter-agency transfers. This allows State/INL to operate a substantial number of rule of law operations worldwide.

INL also receives funding, however, from the DOD’s Iraq Security Forces Fund (ISFF) and Afghanistan Security Forces Fund (ASFF) appropriations via interagency acquisitions (IAs) and interagency *transfer* of funds. The ISFF/ASFF contains Congressional “transfer authority,” which authorizes the DOD to transfer these ISFF/ASFF to other agencies to further the basic purposes of the ISFF/ASFF.⁴² DOD, for example, has transferred over \$1.42 billion to the Bureau of International Narcotics and Law Enforcement Affairs since the enactment of the ISFF in fiscal year 2005.⁴³ Whenever DOD transfers ISFF funds to the Bureau of International Narcotics and Law Enforcement Affairs, these funds are designated “ISFF/INL funds.”⁴⁴ DOD transfers funds to the INL so that the INL may execute some of the training of Iraqi police

³⁹ Bureau of International Narcotics and Law Enforcement Affairs Department of State Webpage, available at <http://www.state.gov/p/inl/>.

⁴⁰ 22 U.S.C. § 2291 (4) (Emphasis added).

⁴¹ *Id.*

⁴² See, e.g., Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005); see also 2008 Supplemental Appropriations Act, Pub. L. 110-252, Title IX, Ch. 2 (30 June 2008).

⁴³ 2008 SIGIR Report 25 (Jul. 30, 2008).

⁴⁴ *Id.*

forces, a mission which the INL has greater organizational expertise and capability to execute than DOD.⁴⁵ This allows the DOD to focus on the training of Iraqi military forces.⁴⁶

When ISFF/INL funds are transferred from DOD to the INL, however, they retain their basic statutory purpose limitations enacted by Congress in the ISFF.⁴⁷ The basic purpose of the ISFF is “[T]o train and equip the security forces of Iraq (ISF). . . .”⁴⁸ Note that the basic purpose of the ISFF/INL is much more restrictive than the broad “anticrime” purposes for which Congress appropriates INCLE funds. As a result, when considering whether a PRT or ePRT may fund a rule of law operation with funds available to the Bureau of International Narcotics and Law Enforcement Affairs, it will be critical for the advising Judge Advocate to identify which type of funding is available for the rule of law activity – ISFF/INL funds or INCLE funds.⁴⁹ Only then will the advising JA be able to provide a legal opinion as to whether the respective fund may be legally accessed to fund the rule of law operation in question. The ISFF and ASFF are discussed in greater detail below.

C. Department of Defense Appropriations for Rule of Law Operations

The general rule in FUSMO is that the Department of State, and not DOD, funds Foreign Assistance. Foreign Assistance includes Security Assistance to a foreign military, police forces or other security-related government agency, Development Assistance for major infrastructure projects, and Humanitarian Assistance directly to a foreign population. As a result, rule of law activities will generally be classified as Foreign Assistance, and will be funded by DOS. There are two exceptions to the FUSMO general rule: the Interoperability, Safety, and Familiarization exception (“little t” training that does not rise to the level of Security Assistance), and/or; a statutory authorization or appropriation from DOD to fund a Foreign Assistance Operation. When considering the fiscal aspects of rule of law activities, the second exception is the focus for the advising Judge Advocate.

The second exception to the FUSMO 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, rule of law activities may be funded with DOD appropriations if Congress has provided a specific

⁴⁵ Video-telephone conference presentation by Major Eugene Y. Kim, U.S. Army, Chief of Contracts and Fiscal Law, Multi-National Security Transition Command – Iraq (MNSTC-I), to the 56th Graduate Course Advanced Fiscal Law Elective, *Introduction to the Iraq Security Forces Fund*, 14 April 2008 (on file with author).

⁴⁶ *Id.* Multi-National Security Transition Command – Iraq (MNSTC-I) executes some of the training of the Iraqi police forces and is overall responsible for the training of the Iraqi police due to its status as the statutory steward of the ISFF.

⁴⁷ See *supra* note 22.

⁴⁸ 2008 Supplemental Appropriations Act, P. L. 110-252, Title IX, Ch. 2 (30 June 2008).

⁴⁹ For example, a unit may be considering a rule of law operation to employ a private security company for physical security to Iraqi judges to ensure their safety. This operation would not be able to be funded with ISFF/INL funds because a private security company is NOT considered to be under the “direct control” of the Government of Iraq (GOI). This operation, however, may be funded with INCLE funds since it arguably falls within the broad “anticrime” purpose of the INCLE appropriation.

appropriation, or an authorization to access an appropriation, for the rule of law operation contemplated by the command. This subsection will discuss the appropriations and authorizations available to the Department of Defense to conduct rule of law activities.

Depending on the exact contours of the rule of law activity being considered by the unit, there are various DOD appropriations and authorizations that may be available from a Purpose standpoint. For a detailed discussion of all of the appropriations and authorizations highlighted in the flowchart on the previous page, including their respective Purpose, Time, and Amount restrictions, *see* the Fiscal Law Deskbook, Chapter 12: FUSMO.⁵⁰ The Department of Defense has three appropriations available to it that have acquired a primary role in funding rule of law activities by Provincial Reconstruction Teams (PRTs) and the “embedded” Provincial Reconstruction Teams (ePRTs). These three appropriations are: the Iraq Security Forces Fund (ISFF), the Afghanistan Security Forces Fund (ASFF), and the Coalition Force Commander’s Emergency Response Program (CF-CERP). In addition to these three congressional appropriations, the new Iraqi-funded Commander’s Emergency Response Program (I-CERP) is also set to play a key role in funding rule of law activities in Iraq. Each of these funding mechanisms are discussed in greater detail below.

1. Iraq Security Forces Fund (ISFF) / Afghanistan Security Forces Fund (ASFF)

The ISFF and ASFF “shall be available to the SECDEF, notwithstanding any other provision of law, for the purpose of allowing the Commander [Combined Forces Command-Afghanistan for ASFF and Multi-National Security Transition Command-Iraq for ISFF], or the Secretary’s designee, to provide assistance, with the concurrence of the Secretary of State, to the security forces of [Afghanistan for ASFF, Iraq for ISFF] including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding”⁵¹ Congress enacted the Afghanistan Security Forces Fund and the Iraq Security Forces Fund on May 11, 2005, to enable the DOD to “train and equip” the security forces of Afghanistan and Iraq, respectively. 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, 2006.⁵² Since fiscal year 2005, Congress has generally appropriated ISFF/ASFF funds on a yearly basis with a period of availability of ISFF and ASFF of two years.⁵³ The current appropriations are Public Law 110-161 (26 Dec. 2007) (expiring 30 Sept. 2009) and Public Law 110-252, Title IX, Ch. 1 (30 June 2008) (expiring 30 Sept. 2009), and Public Law 110-252, Title IX, Ch. 2 (30 June 2008) (expiring 30 Sept. 2009).

The ISFF and ASFF appropriations do not clearly define what forces are considered to be the “security forces” of Iraq or Afghanistan. DOD considers the term “security forces” to

⁵⁰ Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 12: Funding U.S. Military Operations (FUSMO); *see also* THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 272 (Aug. 2008) Chapter 17: Fiscal Law.

⁵¹ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005).

⁵² *Id.*

⁵³ In the 2008 Supplemental Appropriations Act, however, Congress provided ISFF and ASFF funds for *fiscal year 2009* with a one year period of availability. *See* 2008 Supplemental Appropriations Act, P. L. 110-252, Title IX, Ch. 2 (30 June 2008).

include, however, both military and police forces under the direct control of the governments of Iraq and Afghanistan.⁵⁴ 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.⁵⁵ As a result, the ISFF and ASFF appropriations provide an authorization to DOD to provide assistance to non-military forces, which as a general matter, DOD is not authorized to do.⁵⁶ 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.⁵⁷

In every ISFF and ASFF appropriation, Congress has also provided DOD the ability to “transfer” funds to other appropriations.⁵⁸ The transfer authority of the ISFF and ASFF are identical.⁵⁹ The Department of Defense has used this transfer authority to transfer over \$1.42 billion to the INL since the enactment of the ISFF in fiscal year 2005.⁶⁰ DOD transfers funds to INL so that INL may execute some of the training of Iraqi police forces, a mission which INL has greater organizational expertise and capability to execute than DOD. This allows the DOD to focus on the training of Iraqi military forces.⁶¹

⁵⁴ See *supra* note 67 (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).

⁵⁵ For example, the DOD Global War on Terror Funding Requests to Congress generally separates the ISFF and ASFF funding request into two major categories: funds for the Iraq and Afghanistan National Armies, and funds for the Iraq and Afghanistan National Police. See, e.g., Fiscal Year 2008 Global War on Terror Request 35, Department of Defense (February 2007), available at <http://www.defenselink.mil/comptroller/defbudget/fy2008/>.

⁵⁶ 22 U.S.C. § 2420(a).

⁵⁷ See *infra* note 69 (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).

⁵⁸ See, e.g., Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005); see also 2008 Supplemental Appropriations Act, Pub. L. 110-252, Title IX, Ch. 2 (30 June 2008).

⁵⁹ See Supplemental Appropriations Act, P. L. 110-252, Title IX, (30 June 2008) (the ISFF/ASFF transfer authority includes the authorization for the Secretary of Defense to “transfer such funds to appropriations for military personnel; operation and maintenance; Overseas Humanitarian, Disaster, and Civic Aid; procurement; research, development, test and evaluation; and defense working capital funds to accomplish the purposes provided herein. . .”).

⁶⁰ July 2008 SIGIR Report 25 (Jul. 30, 2008).

⁶¹ See *infra* note 69 (Multi-National Security Transition Command – Iraq (MNSTC-I) executes some of the training of the Iraqi police forces and is overall responsible for the training of the Iraqi police due to its status as the statutory steward of the ISFF).

2. *Coalition Force Commander's Emergency Response Program (CF-CERP)*

The second major statutory authorization that allows DOD to fund many rule of law activities is the Coalition Force Commander's Emergency Response Program (CF-CERP). CF-CERP is a statutory authorization to obligate funds from the DOD Operations and Maintenance appropriation for the primary purpose of "enabling United States military commanders in Iraq to respond to urgent humanitarian relief and reconstruction requirements within their areas of responsibility by carrying out programs that will immediately assist the Iraqi people; and . . . for a similar program to assist the people of Afghanistan."⁶² The current CF-CERP authorization is contained in the 2008 NDAA, Public Law 110-181.

In addition to the broad purposes of CF-CERP, Congress 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 [CF-CERP] authority."⁶³ The Secretary of Defense subsequently waived various statutes that would limit the execution of CF-CERP, including the Competition in Contracting Act (CICA) and the Foreign Claims Act (FCA).⁶⁴ The combination of the broad statutory purpose of CF-CERP, the low-level approval authority to authorize the use of CF-CERP,⁶⁵ 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.⁶⁶

CF-CERP, however, is restricted to the "urgent humanitarian needs" of the Iraqi and Afghan *population* and may therefore not be used to fund the military and police forces under the direct control of the governments of Iraq and Afghanistan.⁶⁷ As a result, CF-CERP funds are

⁶² Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 [hereinafter 2005 NDAA], Pub. L. 108-375, Section 1201 (Oct. 28, 2004); *but see* the Supplemental Appropriations Act for Fiscal Year 2008 [hereinafter 2008 SAA], Pub. L. 110-252, Sec. 9104 (Jun. 30, 2008), extending the authorization for CF-CERP authorized in the 2008 SAA to the *Philippines, for the benefit of the Filipino population*. This extension of the CF-CERP to the Philippines is discussed in further detail on the following page.

⁶³ 2005 NDAA, Pub. L. 108-375, Section 1202 (Oct. 28, 2004) (Emphasis added).

⁶⁴ Memorandum from the Honorable Gordon England, 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 Fiscal Years 2006 and 2007 (Mar. 27, 2006) (on file with author).

⁶⁵ 2005 NDAA, Pub. L. 108-375, Section 1201 (Oct. 28, 2004) (The CF-CERP authorization allows "military commanders" to authorize the obligation of CF-CERP funds. Military commanders include company commanders, which may be of a rank of a U.S. Army Lieutenant. This statutory low-level approval authority, however, has generally been limited to higher ranks by policy.).

⁶⁶ As a result of the waiver of CICA for CF-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 CF-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.

⁶⁷ Department of Defense Appropriations Act for Fiscal Year 2006 [hereinafter 2006 DODAA], Section 9007, Pub. L. 109-148 (CF-CERP funds "may not be used to provide goods, services, or funds to national

restricted to rule of law activities that target the “urgent humanitarian needs” of the Iraqi and Afghan populations, and may generally not be used for any rule of law “security operations” with forces under the “direct control” of the governments of Iraq or Afghanistan.⁶⁸ As a result, prior to advising units on the legality of using CF-CERP funds to execute a rule of law activity, Judge Advocates should scrutinize the statutory and policy restrictions contained in the Money As A Weapon System (MAAWS) SOP and the most recent DOD Comptroller’s CF-CERP policy guidance.⁶⁹

The 2008 Supplemental Appropriations Act [*hereinafter* 2008 SAA] expanded the CF-CERP authorization significantly by allowing DOD to fund a CF-CERP program in the Philippines for the benefit of the Filipino population.⁷⁰ The CF-CERP authorization for the Philippines, however, is linked to the “funds made available for operation and maintenance in this chapter to the Department of Defense. . . .”⁷¹ Therefore, the CF-CERP for the Philippines is currently available until 30 September 2008 *only*, after which the 2008 SAA CF-CERP funds expire. Of course, Congress might re-authorize CF-CERP for the Philippines in future legislation. Finally, all of the statutory and policy restrictions that apply to the CF-CERP in Iraq and Afghanistan also apply to all CF-CERP obligations in the Philippines.

3. *Iraqi Funded Commanders’ Emergency Response Program (I-CERP)*

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 CF-CERP, named the Government of Iraq CERP (I-CERP).⁷² The I-CERP was initially funded with \$270 Million by the Government of Iraq, with an additional \$30 Million subject to transfer to the I-CERP upon the approval of the I-SRC.⁷³ Although similar to CF-CERP in purpose, however, the I-CERP has significant differences that Judge Advocates need to be aware of. The purpose of the I-CERP is for coalition force commanders to execute urgent reconstruction projects for the

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.”)

⁶⁸ *Id.*

⁶⁹ See Money As A Weapons System (MAAWS), Multi-National Corps – Iraq, Combined Joint Staff Resource Management Standard Operating Procedure (MNC-I CJ8 SOP) (15 May 2008) (on file with author); see also Memorandum from Tina Jonas, Under Secretary of Defense (Comptroller), to the Secretaries of the Military Departments, et. al., Subject: Commander’s Emergency Response Program (CERP) Guidance, (Jun. 6, 2008) (on file with author); see also DODFMR, vol. 12, chap. 27 (June 2008); see also Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, 78th Fiscal Law Course Deskbook (Spring 2008), Chapter 12: Funding U.S. Military Operations (FUSMO); see also THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 272 (Aug. 2008) Chapter 17: Fiscal Law.

⁷⁰ 2008 SAA, Pub. L. 110-252, Sec. 9104 (Jun. 30, 2008), extending the authorization for CF-CERP authorized in the 2008 SAA to the *Philippines, for the benefit of the Filipino population.*

⁷¹ *Id.*

⁷² 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).

⁷³ *Id.* at 3.

benefit of the Iraqi people in the fifteen non-Kurdish provinces of Iraq.⁷⁴ Under the same monetary approval authorities as CF-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).⁷⁵ By exception, and upon the approval of the Major Subordinate Commanding General (the Multi-National Division Commander), I-CERP may also be used to repair and reconstruct: roads, sewers, irrigation systems, and non-reconstruction projects that promote small business development.⁷⁶ The ultimate intent of the I-CERP is for the Iraqis to match the reconstruction funding of CF-CERP in Iraq.⁷⁷ As a result, the I-CERP may become increasingly important in the future.

D. Funding Rule of Law Operations Through Provincial Reconstruction Teams

Subsections five and six provided the detailed purpose, time, and amount restrictions of different funds available to conduct rule of law activities. The significant appropriations and authorizations available for rule of law activities include: the Department of State's Economic Support Fund (ESF) and its various subprograms, including the Provincial Reconstruction Team Quick Reaction Fund (PRT QRF); the DOS INCLE; the INL funds transferred from the Department of Defense ISFF and ASFF appropriations, or executed via an Interagency Acquisition (IA); the DOD ISFF and ASFF appropriations; the DOD CF-CERP authorization; and the new I-CERP. Each of these appropriations and authorizations currently play critical roles in funding various types of rule of law activities, or are likely to do so in the case of I-CERP.

It is likely, however, that to access these appropriations and authorizations, advising JAs will need to understand the basic strategy and structure of the Provincial Reconstruction Teams (PRTs) and the Embedded Provincial Reconstruction Teams (ePRTs). PRTs and ePRTs currently exist only in Iraq and Afghanistan, but are likely the model for future civil-military operations worldwide.

1. Provincial Reconstruction Teams and Embedded Provincial Reconstruction Teams

Provincial Reconstruction Teams (PRTs)⁷⁸ are civil-military organizations (CMOs) that are staffed by U.S. government (USG) civilian and military personnel to assist foreign provincial

⁷⁴ Money As A Weapons System (MAAWS), Multi-National Corps – Iraq, Combined Joint Staff Resource Management Standard Operating Procedure (MNC-I CJ8 SOP) (15 May 2008), Appendix C: I-CERP (on file with author).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ I-CERP MOU at 2.

⁷⁸ See generally, Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW. (forthcoming 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).

governments with their reconstruction efforts; their security and rule of law efforts; and their political and economic development.⁷⁹ 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.⁸⁰ The success of the PRTs in Afghanistan led the USG to incorporate the PRT concept into its new stability and reconstruction strategy.⁸¹ PRTs were first established in Iraq in November 2005 by Secretary of State Condoleezza Rice.⁸² PRTs in Iraq are staffed by approximately thirty to eighty personnel each.⁸³ The assigned personnel represent various USG agencies, and may include: DOS, USAID, U.S. and coalition military including the Corps of Engineers, the Department of Justice (DOJ), and the Department of Agriculture.⁸⁴ Many PRTs also include Iraqi Cultural Advisors.⁸⁵ PRTs in both 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.⁸⁶

Embedded Provincial Reconstruction Teams (ePRTs) are directly assigned to Army Brigade Combat Teams (BCTs) or Marine Corps Regiments (MCRs), who provide the ePRTs' force protection.⁸⁷ As a result, ePRTs are staffed solely by the primary interagency civil-military staff and tend to be significantly smaller.⁸⁸ The ePRTs first deployed attached to the "Surge" BCTs and MCRs in early 2007.⁸⁹ Unlike PRTs, who report directly to their respective embassies, ePRTs report to the military commander of the BCT or MCR to which they are assigned.⁹⁰ The ePRTs, however, generally conduct the same types of missions as PRTs, possibly on a slightly smaller scale.

Although both PRTs and ePRTs are led by the Department of State Foreign Officer assigned to the PRT/ePRT, they tend to fund operations differently due to their structural differences. PRTs tend to have greater access to DOS appropriations like the Economic Support Fund (ESF), the INCLE, and INL; they tend to access DOD appropriations and authorizations like CF-CERP as a supplement to the DOS funds that they receive.⁹¹ The ePRTs reverse 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.⁹²

⁷⁹ See Furin, *supra* note 78; see also PRT (Provincial Reconstruction Teams) Fact Sheet, U.S. Embassy, Iraq (Mar. 20, 2008), available at <http://iraq.usembassy.gov/root/pdfs/factsheetapril2008.pdf> [hereinafter PRT Fact Sheet]

⁸⁰ See Furin, *supra* note 78, at 43.

⁸¹ *Id.* at 42.

⁸² PRT Fact Sheet, *supra* note 79.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ See Furin, *supra* note 78, at 41.

⁸⁶ *Id.* at 44.

⁸⁷ *Id.* at 45

⁸⁸ *Id.* (ePRTs number between twelve and sixteen civil-military staff personnel).

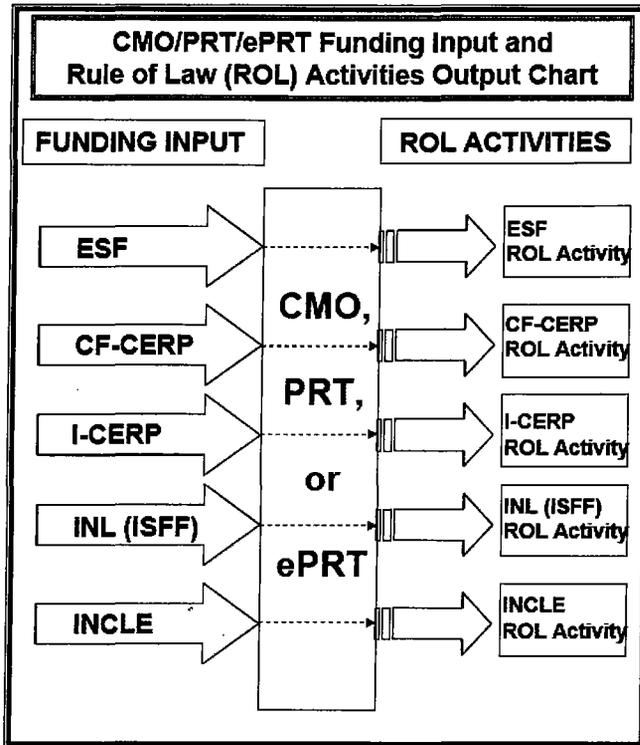
⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 47.

⁹² *Id.*

2. Funding Rule of Law Operations via PRTs, ePRTs and other CMOs



The Funding Input/Rule of Law Mission Output flowchart above provides a basic visual example of the relationship between different appropriations flowing into PRTs, ePRTs, and other CMOs (outside Iraq and Afghanistan) and different types of rule of law activities executed with the proper purpose funds.

Regardless of what type of civil-military organization (CMO) funds a rule of law activity, whether a PRT, an ePRT, or any other CMO outside of Iraq or Afghanistan, advising Judge Advocates (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 in Subsection Five and DOD funds in Subsection Six indicates, each fund has different Purpose, Time, and Amount restrictions.

Due to the dramatically increased Operational Tempo (OPTEMPO) in rule of law activities, the PRT, ePRT, or CMO normally requires the appropriate funds faster than the Department of State 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 and ePRTs.

In advising her unit, the Judge Advocate should be aware of the cultural, structural, and procedural differences between DOD and DOS.⁹³ DOD has the cultural and structural capability to plan for operations far in advance via the Military Decision-Making Process (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 rule of law activities.

⁹³ 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).

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VIII. Challenges to the Rule of Law

It is difficult to overstate the challenges facing any rule of law operation. Most would agree with former UN Secretary-General Kofi Annan's assertion that assisting "societies re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task."¹ It goes without saying that rule of law missions are complex, arduous, and painstaking.² There are limitless challenges to rule of law operations, and this *Handbook* cannot possibly address all the unique challenges and complex problems encountered in rule of law operations. But certain elements, conditions, and obstacles are present that encumber the capacity and quality for rule of law interventions.³ This chapter examines some of these challenges.

A. Security

Probably the most important concern for the rule of law practitioner is security. Most rule of law efforts, at least the kind that most Judge Advocates will find themselves in, will often take place in harsh and non-permissive or semi-permissive environments. Thus, the Judge Advocate must be cognizant that security issues will likely impede efforts to implement rule of law programs. The security concern manifests itself in several ways:

- **Insurgent fighting may surface after the general cessation of hostilities**
- **Political power struggles between warring factions could lead to violence**
- **Local police capacity to enforce law and order will likely be inadequate**
- **Courts may be seriously compromised by corruption and/or political intimidation**
- **Prison and detention facilities may be severely degraded or non-existent**
- **Violent organized crime and illicit economies may emerge**
- **Rioting, looting, abductions, revenge killings, and other civilian-on-civilian violence may become recurrent**

In the aftermath of conflict in a failed or collapsed state, intervening military forces often are required to fill a "security gap" resulting from the breakdown of the prior regime. "At the same time, military or security forces may be exercising police-type functions without any judicial or civilian oversight."⁴

¹ The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 3, U.N. Doc. S/2004/616 (Aug. 23, 2004).

² JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 11 (2006).

³ See Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137-159.

⁴ UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, PRIMER FOR JUSTICE COMPONENTS IN MULTIDIMENSIONAL PEACE OPERATIONS: STRENGTHENING THE RULE OF LAW 4 (2006), available at <http://pbpu.unlb.org/pbpu/view/viewdocument.aspx?id=2&docid=851>.

Deficient security environments will place pressure on the ability of host-governments to implement new laws, promote national reconciliation, and provide basic legal services. “No government, least of all one committed to the rule of law, can function effectively if its people cannot go about their daily life without fear of being shot, tortured, raped, or bombed.”⁵

Security also refers to force protection. The inability of the host nation to create a stable situation will potentially require the commander to dedicate resources to force protection and to use force in order to protect the force and to accomplish the mission. Use of force, however may come with a price: it may be an obstacle to inculcating the population to the notion that no one person is above the law and disputes should be resolved by non-violent means.⁶

B. Military Bias for Lethal Operations and Competing Priorities

Military planners are typically experienced in planning military operations aimed at subduing or neutralizing a threat. Even in nation building operations, the emphasis tends to be on enforcing security, allowing other actors to execute their missions. For the military these operations are “enemy centric.”

Rule of law and stability operations are, however, “population-centric” activities. Their objective is to create organic governmental institutions and a stable environment for the population to enjoy and expand. Concentrating on attacking problems from the perspective of defeating or otherwise affecting the conduct of an enemy, the military organization is often ill-equipped to bring the resources to bear on a problem set where the “enemy” is a system rather than a dangerous actor.

Moreover, rule of law operations are intended to build institutions that advance the host nation’s governance. Residual fighting, however, may well cause the diversion of resources to combat and force protection. The military commander will be concerned about force protection and locating, closing with and destroying the adversary. This is a traditional military role and what the military is organized to do. Rule of law operations are ideally non-kinetic. This distinction places great pressures on the military staff to plan and act in support of operations that are not part of their traditional skill set. This diversion of resources is, in a sense, a competing priority.

It is important that rule of law operations be incorporated throughout the planning process, and considered for applicability during all phases of a campaign so that commanders will plan for the effect stability operations will have on their resources and the way they fight the rest of the campaign.⁷ Stability operations require both a different mindset in planning and an ability to bring different skill sets to bear.

⁵ STROMSETH, WIPPMAN & BROOKS, *supra* note 2, at 137.

⁶ See section II.B.2.

⁷ U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS para. 4 (28 Nov. 2005).

Beware the Classified Information Dilemma

Operators in the rule of law arena should be mindful of the need to avoid the unnecessary use of classified information. Combat operations and stability operations generate much more classified information than the rule of law practitioner may be used to. Effective rule of law operations must be coordinated and synchronized with many others, including host nation agencies and courts, coalition partners, IOs, and NGOs. Sharing classified information is limited even among our coalition military partners and is prohibited with most host national, international, and non-governmental agencies. Rule of law operations that include classified information or plans reduce the possibility of necessary coordination with non-US partners. Consequently, the prudent rule of law practitioner will ensure that information concerning rule of law operations is classified only after thoughtful consideration.

C. Interagency Friction and Coordination

As noted in Chapter III, an alphabet soup of interagency, IOs, and NGOs will be present and will have different mandates, authorities, and capabilities. While these actors will bring a vast array of technical assistance and expertise, a judge advocate must remember that these agencies and organization will undoubtedly have competing visions and priorities, and that the influx is likely to lead to a lack of organization and coordination.

From this muddle of uncoordinated activity within the US interagency relationship alone, what follows is commonly an overlapping of effort, wasted resources, gaps in programmatic decisions, diverse and inconsistent messages, and lost time. Unchecked, this disorganization and political turf-fighting will confound rule of law efforts.

Ultimately, this challenge can only be overcome by close collaboration with various US and other players in rule of law operations. A participatory strategic planning process can help provide some order and direction and avoid harmful effects. When initiating a rule of law project, one of the first things a Judge Advocate should do is learn his place within the larger US, coalition, or multinational rule of law effort and find the other international, national, and local partners who can maximize its effectiveness and increase its likelihood for success. The key, though, is to remain open and to act in a spirit of good faith with good will toward agencies involved in the rule of law process. Although they may have slightly different vision and methods of operation, other actors working toward the rule of law have more in common than they do disagreement, and they can bring critical assets to bear on a problem.

Beyond these US institutional obstacles, there are a large number of other interested parties in rule of law operations. Obviously, the host nation will have its own priorities and, often, some bureaucratic inertia, to pursue those interests. Coalition partners and NGOs will often have their goals that could be different than the military's goals.

D. Forces that Oppose Rule of Law

Countries emerging from war or internal strife often suffer years or decades under the hands of brutal leaders and corrupt officials. Constraining or altering the power of officials who were once part of an absolute regime will be a highly political process. Many will stand to lose

long-standing authority, social status, and financial interests. These actors, accustomed to unrestrained power, will seek to prevent the implementation of sustained rule of law initiatives. Rule of law practitioners will have to expect real and substantial resistance to legal and judicial reforms meant to alter the center of power in a post-conflict society.⁸

The forces opposed to the rule of law can be wide ranging based on the specific situation, and countries confronting violent political instability or emerging from post-conflict situations are often unable to maintain full governance within their boundaries. In addition to the security challenges that these countries face, the ungoverned space is ripe for exploitation by forces, formal and informal, that oppose the legitimate authority of central government and the rule of law efforts being pursued.

Rule of law efforts from the outset must include plans for dealing not only with physical security threats posed by opposing forces, but also for establishing dialogue and accountability over the different factions and forces that oppose sustained legitimate judicial reform. A “spoiler” force may directly sabotage rule of law efforts through violence, manipulation, or simply stalling rule of law implementation.

While formal opposition forces such as national opposition political parties and vocal religious institutions may pose the most visible challenge to rule of law efforts, it is the informal and illicit opposition forces that can be the real threat. The objectives, goals, and leadership hierarchy of informal forces are more difficult to assess and accordingly are more difficult to combat. Informal forces that oppose rule of law efforts may include tribes or familial groups, non-national insurgents or third party forces, local indigenous militias, para-military or former legitimate military units, warlords, private “for hire” armed forces, organized crime cartels, extremist ideology organizations and economic organizations.⁹ While these forces may use violence as a means to oppose legitimate rule of law, they may also use economic and social pressures to subvert rule of law reform efforts.

Keys to dealing with the challenge of opposing forces include early identification of potential opposing forces and a timely assessment of their objectives and goals. Potential hidden objectives must also be considered and weighed even in the face of declared support for reform objectives. Active dialogue with the population and broadening the focus of issues can improve rule of law success. The benefit of this wider public discussion is increased legitimacy for the new regime and consequently the erosion of opposing force’s influence. Additionally, it may improve the public perception of the supporting security forces, increasing credibility.

E. A Legacy of Suffering and Destruction

In the aftermath of war, a society may exist in a state of physical and psychological trauma that has dramatic implications for rule of law initiatives. Years of armed conflict may have undermined governmental institutions, destroyed vital infrastructure, and driven out skilled professionals (such as lawyers and judges). Moreover, after years of despotic rule and political repression, ordinary citizens will feel resentment of rule of law institutions, most notably the police.

⁸ See STROMSETH, WIPPMAN & BROOKS, *supra* note 2, at 37.

⁹ *Id.* at 13-15.

Some of the biggest challenges in post-conflict countries will be the lack of judicial institutions, such as courts and prisons. Lack of resources may cause dysfunctional and inefficient justice systems manifested by outdated legal texts, inadequate case load management, evidence tampering, and ill-trained court personnel.

For the deployed Judge Advocate, this will mean that a broader array of programs and initiatives will be required to cultivate a legitimate and functional legal system. Efforts will be required not only to build the physical aspects of rule of law, but also the psychological aspects as well. After years of civil strife, local citizens may have suspicions that the legal apparatus is a vehicle of governmental control and repression. Initiatives must be geared towards building confidence in the population that the legal system can fairly resolve disputes. Thus, the rule of law practitioner must understand what ordinary citizens, especially marginalized segments of the population, view as urgent priorities in reforming legal apparatus of a country.

F. Corruption

All public and private sectors of rule of law are vulnerable to corruption, particularly in post-conflict countries where public institutions are developing and often weak. Corruption erodes public confidence and undermines institution integrity. Social scientists have defined corruption in many ways, but a useful yet simple definition for addressing public sector rule of law reform is “the abuse of public power for private gain.”¹⁰ Regardless of the form – bribery, kickbacks, protection, unlawful authorizations and approvals, awarding fraudulent procurement contracts, hiring nepotism, predetermined verdicts, or vote rigging – corruption subverts the rule of law and is an ever present challenge to rule of law reforms.

While corruption can broadly be viewed as prejudicial to rule of law efforts, it must also be viewed in the specific context of the societal, cultural, and customary norms of the population where rule of law reforms are being instituted.¹¹ What may be characterized as bribery in one culture may be considered respectful, gracious, and proper in another culture. This does not obviate the need to combat corruption, but rather highlights the need to understand how the transplantation of definitions and rules from one culture to another may affect rule of law efforts.

At the national level and below, keys to combating corruption begin with an assessment and understanding of the unique historical cultural, social, legal, and administrative situation in the supported country. Corruption does not occur in a vacuum. Underlying causes of corruption may include low wages of public officials, security concerns, scarcity of food, fuel, or consumer goods, lack of accountability of officials, or no investigative or enforcement mechanism. By eliminating or reducing the incentives for corruption, the rule of law institutional reforms have a better chance of success. It is critical to assess the underlying cause of corruption in each specific case during the rule of law planning process. To assist nations in developing a strategy to combat

¹⁰ Elia Armstrong, *Combating Corruption for Development: the Rule of Law, Transparency & Accountability*, *Combating Corruption for Development: The Rule of Law, Transparency and Accountability*, Fourth Global Forum on Reinventing Government - Citizens, Businesses, and Governments: Partnerships for Development and Democracy, 11-13 December 2002, at 3, available at <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan005786.pdf> (quoting WORLD BANK, *WORLD DEVELOPMENT REPORT 1997* 102 (1997)).

¹¹ Rory O’Hare, *ASCOPE, Planning Acronym for the New Generation of Warfare*, MARINE CORPS GAZETTE 46 (Jan. 2007).

corruption, several IOs have offered varied conceptual frameworks.¹² Some of the key components to reducing corruption typically include informing the public about governance, opening up government processes, and establishing public official accountability.

“Corruption, like terrorism, thrives on a lack of reliable information.”¹³ Experience has shown that corruption has been reduced in countries where the population is more informed on political issues and more active in governance. Populations that are educated about the governmental functions, processes, responsibilities, and rights can serve as a countervailing force to corruption. An assessment of how each population is informed is critical in rule of law planning. Considerations of literacy and access to information are similarly crucial. Using a method of disseminating information that the population does not either use or trust is ineffective.

Secret or closed governmental processes and procedures present opportunities for corruption. Excessive secrecy by governmental organizations and a lack of information leads to mistrust and misunderstanding by the public. Courts, police, and other governmental institutions acting in secret may undermine the acceptance of the rule of law reforms. While secrecy may be important in the short term for certain security issues, efforts should be taken to keep the public informed to the greatest extent possible about governmental functions. Robust procedures that disclose and inform the public about governmental actions improve the transparency and fairness of governmental processes. Clearly established procedures and laws regarding due process and disclosure of information about governmental functions will enhance the chances of rule of law.

Public official accountability is another cornerstone of an anti-corruption strategy. The approach to public accountability needs to be comprehensive in application and phased in implementation. The components of accountability include: developing standards or codes of conduct, training those standards, establishing safe forums to raise grievances, establishing investigative and enforcement mechanisms, and providing adequate resources to undertake enforcement. When one of the components of accountability is not functioning, then the whole process is compromised. If an aggrieved party suffers retaliation for raising a corruption complaint, if there is no way to investigate or sanction a corrupt judge, or if there is no funding or personnel to implement enforcement, then the system will be ineffective and potentially counter-productive to the anti-corruption effort.

While all of the components of an anti-corruption program need to be in place for it to be effective, the implementation of the program may need to be approached in phases. Changing a culture of corruption will not occur immediately. Incremental steps may be needed to ensure acceptance and ultimate success. Interim measures like amnesty programs, limited temporary immunity agreements, or integrity pacts¹⁴ may be required as the government transitions to a

¹² STROMSETH, WIPPMAN & BROOKS, *supra* note 2, at 11.

¹³ ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, OFFICE OF THE CO-ORDINATOR FOR ECONOMIC AND ENVIRONMENTAL ACTIVITIES, BEST PRACTICES IN FIGHTING CORRUPTION (2004), available at <http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan019187.pdf>.

¹⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, A HANDBOOK ON SSR, SUPPORTING SECURITY AND JUSTICE, CONFLICT, PEACE AND DEVELOPMENT CO-OPERATION 118 (2007), available at www.oecd.org/dac/conflict/if-ssr. (discussing the use of “defense integrity pacts” (DPIs) to combat corruption in the procurement process by attempting to bind all bidders to agreed standards of ethical conduct).

culture of integrity. Similarly, it is important that the enforcement mechanism include positive inducement and not just sanctions. Long term culture change will likely occur only when the incentives to avoid corruption outweigh those to be corrupt. Effective incentives for a specific anti-corruption program are typically related to the underlying causes of the corruption.

The legal advisors to rule of law programs must be involved in recommending laws, regulations and policy changes that can reduce corruption. Additionally, lawyers should be assisting in drafting accountability agreements and developing investigative and enforcement mechanism for anti-corruption programs. Reducing corruption is a crucial consideration in rule of law reform planning.

G. Language and Notional Barriers

Language and cultural challenges can be an overwhelming obstacle to success in rule of law operations. An example of such difficulties can be found in a rule of law practitioners' observations and experiences in Afghanistan.

Afghanistan's eclectic legal system is an inevitable byproduct of the country's tumultuous political history. We found that many fundamental and widely-accepted legal precepts were either not familiar to Afghan legal personnel or entirely absent from the Afghan system. After encountering difficulty relating seemingly basic criminal law concepts (at least from a Western understanding), we quickly realized that much of the failing was our own. To effectively develop a new military legal regime requires an understanding of existing systems and the history of the indigenous military justice system.¹⁵

In the future, the US will more than likely participate in rule of law efforts in countries and regions that do not necessarily share our language, traditions, and legal concepts. In order to be effective and proceed with a sense of credibility, our personnel must be knowledgeable and cognizant of the cultures, languages, and traditions of the people that we are assisting.¹⁶

The challenge in overcoming such barriers will be significant, requiring a cadre of personnel that thoroughly understand the history, traditional cultures, and languages of the indigenous population for each potential scenario. It would be unrealistic to expect that every rule of law practitioner to be fluent in the local language and deeply familiar with the local legal system. However, in order to overcome this challenge planning considerations must be made well in advance in order to mitigate any gaps or seams, such as hiring contractors who are fluent in the native language or competent in the local legal system. The thoughtful rule of law practitioner should require pre-deployment training for their personnel that emphasizes the language, traditions, and legal systems of the subject country.

An example of this is seen in the rule of law traditions of many Islamic nations. Often times, legal disputes are settled by a local religious leader acting as a sort of a magistrate. This practice has developed over time, is accepted by the population as legitimate, and is largely viewed as effective. It is also part of the religion, which is itself frequently an important

¹⁵ MAJ Sean M. Watts & CPT Christopher E. Martin, *Nation Building in Afghanistan – Lessons Identified in Military Justice Reform*, ARMY LAW. 1 (May 2006).

¹⁶ See generally COMBATING SERIOUS CRIMES IN POST-CONFLICT SOCIETIES, A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS (Colette Rausch, ed. 2006).

component of host-nation law. Efforts to replace this practice with a national government-centric judicial system are likely to be resisted, undermining not only the rule of law effort but also the institutions trying to implement the change.¹⁷ It is important that rule of law planners understand not only what works in the country they seek to support, but also be ready to accept those notions that are foreign to the West but work.

Computers as Status Symbols

In OIF-1, when many Iraqi judges in provincial capitals were surveyed as to what tools they needed to restart their court operations, many of them declared that computers were an essential item. Some brief inquiries by Judge Advocates revealed that no computers had been used in provincial courts prior to the war, and that all official records were maintained in hand-written ledgers. Further, none of the judges or staff were skilled in the use or maintenance of computer equipment, and there were no IT personnel available to set up or maintain a computer system. The computers were requested purely as status items and had they been provided without a comprehensive plan to automate the provincial courthouses, they would have quickly become expensive paper weights, as well as an ongoing distraction from more immediate needs.

H. Cultural Blindness or a “West is Best” Mentality

Even if a rule of law practitioner is able to understand local culture and language, there is still a risk of imposing Western legal values on the host nation. The foundation of rule of law reform is the understanding that law and its application are immensely contextual and deeply intertwined with the social, religious, and political aspects of a country. Crucial to establishing rule of law is understanding what is culturally acceptable for the developing nation. Legal reforms will only take hold if they are sensitive to the culture and legal tradition of the host country.¹⁸ A nation will have its own distinct culture and tradition that has developed over time. Even when that tradition is dominated by authoritarian actors and corrupt governance, the society will have developed processes and expectations about how to do everyday activities.

Although it is critical to respect local institutions and norms, in order to obtain the stability and security sought by the rule of law mission, it will often be necessary to encourage or require the rejection of certain foreign nation laws that promote violence, discrimination, or other social divisiveness in the concerned country. The inability of host nation legal institutions to operate in a post-conflict environment will present the temptation for those with the physical capabilities – frequently coalition forces – to simply take over legal functions, imposing a US-oriented system in the process. Rule of law planners should not view their mission as writing upon a blank slate, seeking to transplant a US style, common law system in the place of the host nation’s preexisting system, and the low capabilities of host nation institutions at the beginning of a rule of law project should not lead US rule of law practitioners to ignore the importance of

¹⁷ Dr. Frank Vogel, presentation to USACAPOC(A)/PKSOI 3d Rule of Law Workshop (October 2006).

¹⁸ UNITED NATIONS DEPARTMENT OF PEACEKEEPING OPERATIONS, PRIMER FOR JUSTICE COMPONENTS IN MULTIDIMENSIONAL PEACE OPERATIONS: STRENGTHENING THE RULE OF LAW 6 (2006), available at <http://pbpu.unlb.org/pbpu/view/viewdocument.aspx?id=2&docid=851>.

maximizing participation by host nation officials in rule of law efforts.¹⁹ After all, the host nation, not coalition forces, that both defines and lives under the rule of law.

The rule of law is not Western, European, or American. It is available to all societies. States differ in terms of laws, and in terms of the treaties they have signed with respect to human rights. Legal cultures differ depending upon history, with the majority basing their laws on the civil law tradition, while others (including the US) build on the common law tradition. In many countries, religious law provides the foundation for family and other laws. Societies differ in terms of the values they ascribe to law versus other means of social organization, such as personal or family loyalty. Respect for specific laws and other norms varies depending upon cultures and circumstances. The general rule of law principle, however, transcends all these differences.²⁰

Westernization of the Iraqi Legal System

An example of overreaching in reforming the legal system of an occupied nation occurred in Najaf during Operation Iraqi Freedom during 2003. Having made significant progress in restoring the provincial courts and in vetting judges to remove those who would be resistant to reform, the Marine military governor on the scene proposed to place an Iraqi female on the bench. The well intentioned idea was to signal that there was a new day in Iraq under which women would have a greater rights and a say in their governance. The reaction from the population, however, was a turbulent protest, supported by many local women, who felt that the Americans were imposing their social values upon the Iraqis. Due to the passionate local reaction the plan was scrapped at the last minute and calm returned to the judicial reform process.²¹

Some changes may be necessary, and for those that are, attempting to implement new (but foreign) tenets and processes for organizing society requires patience, as the audience will likely not understand, or even worse, appreciate it. Developing law is not solely a legal function, but a political function that includes the cooperation of local actors. The law is not an output, but rather a process that balances international expertise, local legal traditions, societal values, and cultural norms.²²

I. Sustainability and Resources

A common issue within the rule of law community is that the time and money afforded to the process of reform is insufficient. For Judge Advocates conducting rule of law missions, this issues is compounded. Most military units are understaffed and underfunded for stability operations, including rule of law.

¹⁹ See section IV.B.2 on the legal obligations of occupiers.

²⁰ US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS 5 (2007 draft).

²¹ CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE, LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994-2006 22 (2006).

²² *Id.* at 29

Capitalizing on Paralegals²³

There is a need for Paralegals in rule of law, as they bring their expertise in legal office management and administrative procedures to the RoL mission. At the corps and division level, a Paralegal could take the lead in legal office administration and automation, including but not limited to, database management, maintaining a rule of law electronic (unclassified) library and database, monitoring legislative actions as well as decisional law at the provincial and local levels. At the brigade and battalion level, Paralegals could take a more active role in rule of law missions by assisting in conducting rule of law assessments, helping to train local Iraqis in organizing and maintaining legal records, databases and files, and in providing insight and training into the needs and capabilities of a functioning legal aid center. In brigades and battalions that are short Judge Advocates, the Paralegal could be the primary person performing courthouse assessments by working in conjunction with the respective CA team or Provincial Reconstruction Team, or offering guidance to CA teams on rule of law projects and initiatives.

A Paralegal can sift through the Significant Actions and numerous intelligence and situation reports in order to determine items of significance to rule of law and highlight them for the rule of law Judge Advocate. As no one person can possibly keep up with all the reporting available, the Paralegal could also accompany the rule of law Judge Advocate on inspection trips and offer a second set of eyes to those individuals involved in the inspection and assessment.

Rule of law practitioners must be wise to invest scarce resources to targeted projects where they can a significant impact on the community. It is important to recognize that financial resources are finite. Rule of law practitioners should be selective in directing scarce funds based on strategic planning, urgent need, and buy-in by host-nation leaders.

In addition to the obvious problem of finite resources, time is a major concern in conducting rule of law operations. Most legitimate legal reform programs run from 5 to 10 years. However, the military tends to focus its operational tasks in six months to one year objectives. To offset this issue, rule of law programmers should design programs to ensure that their impact endures beyond the project itself. While it may not always be possible, rule of law initiatives should be tailored to have a lasting and sustainable effect. Put simply, even the most capable judges or best-trained police force will languish and deteriorate without ongoing support. This will mean fining local tax-revenue schemes and commitment of local leaders. Thus, rule of law planners must balance the need for a one-year quick fix with the necessity to develop sustainable and enduring legal programs and review such short-term operations for compatibility with long-term objectives.

J. Tyranny of Distance

Logistics, in terms of moving personnel and resources will likely present major challenges to any rule of law initiative. For instance, the “tyranny of distance” in places like

²³ From Rule Of Law Lessons Learned MNC-I Rule Of Law Section Operation Iraqi Freedom 05-07 (Dec. 10 2006).

Afghanistan and Iraq speaks for itself. The amount of money and equipment required to sustain any operation located on the other side of the world will likely require heavy planning and assessment of the resources required to start a deployment and sustain it through completion.

In addition, cognizance of the Commander's Decision Cycle as it relates to higher headquarters and the civilian leadership should be a consideration in your planning cycle. For example, the normal working hours in the subject theater of operations may be the end of the workday or in the middle of the night at your higher headquarters.

K. Legal Obligations

The legal obligations and policy decisions of both the supported nation and the supporting nations can challenge rule of law reform efforts. The supported nation may be limited in its initial rule of law reforms by obligations that it incurred during agreements to end political or armed conflict. As an example, the Bonn Agreement²⁴ that served as the interim framework for the reestablishment of Afghanistan contained provisions that mandated the reconstructed judicial system to be based on existing laws and also based on Islamic principles.

These national obligations of Afghanistan potentially complicate rule of law reform efforts.²⁵ Similarly, each nation supporting rule of law may have national caveats based on their laws or national policies that limit certain aspects of its rule of law support. The US, for example, may be more constrained than another nation in its ability to quickly contract for necessary services in support of a rule of law program because of its national contracting laws and regulations. When a coalition of nations is providing the rule of law support, each nation brings its own constraints or national caveats to the rule of law program. Deconflicting these many national caveats can be challenging. However, a rule of law program planner and legal advisor must coordinate and plan for these caveats to ensure effective rule of law support.

Identification of participating nations and their national caveats to rule of law support should be accomplished early in the rule of law planning process. A matrix that lists the rule of law support objectives and the nations that have caveats that prevent or limit their participation in specific objectives is helpful for commanders supporting rule of law reform. Once identified, the challenge for the planners is to leverage each nation's strengths while avoiding conduct that would violate a national caveat. It is important to realize that some nations providing rule of law support may have their own rule of law values, and will be less than willing to modify their activities to work in concert with other participants, but finding a way to work with coalition partners in a way consistent with their national caveats is still superior to a stove-piped rule of law effort by a single nation.²⁶

²⁴ The Bonn Agreement, officially the Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001), called for the interim rebuilding of the justice system on existing laws in accordance with Islamic principles, international standards, the rule of law, and Afghan legal traditions. The agreement can be found at <http://www.afghangovernment.com/AfghanAgreementBonn.htm>.

²⁵ LAUREL MILLER & ROBERT PERITO, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT NO. 117 – ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 9 (2004), available at <http://www.usip.org/pubs/specialreports/sr117.html>.

²⁶ *Id.* at 5 (discussing how the “lead” nation for justice sector reform (Italy) has “focused mainly on implementation of its own projects, rather than coordination of broader [rule of law] efforts. As a

L. Unrealistic Expectations

The military cannot complete stability missions alone. The workload of conducting stability operations, including rule of law endeavors, must be shared and borne by other agencies of the USG. Essentially, all aspects of national power must be leveraged and applied to these types of operations. A military solution alone will not suffice. However, it is apparent that other agencies are not adequately resourced to deploy the appropriate skill sets of personnel and in the number of personnel needed.²⁷

Perhaps even more important, though, is the realization that the no amount of military power can force the local population to embrace the rule of law. It may very well be that social, cultural, and historical factors will foil even the most perfectly designed and executed rule of law project. Success in stability operations to include rule of law will not come quickly or easily and will likely not be susceptible to readily identifiable pillars of victory. In the end, it is the local population that adopts the rule of law, not the institutions of international development.

consequence and despite the presence of some Afghan officials who are committed to reform, since the fall of the Taliban little progress has been made toward building a functioning justice system.”).

²⁷ Secretary of Defense Gates emphasized this point in a recent Senate hearing by stating “...that Ms. Rice had told him that her department needed six months to locate and prepare civil servants and contractors to send abroad. It is illustrative of the difficulty of getting other agencies to provide people on a timely basis....” Thom Shanker and David S. Cloud, *Military Wants More Civilians to help in Iraq*, N.Y. TIMES (Feb. 6, 2007). This gap in identifiable and ready resources has been recognized and one possible solution is the recommendation offered by the United States Institute for Peace in creating a ready pool of personnel with the requisite skill sets to perform rule of law missions. “One reason for this gap is the total absence of any U.S. civilian capacity to deploy organized units of police with specialized equipment necessary to perform crucial public order function such as crowd control of law and the curbing of rampant lawlessness. ROBERT PERITO, MICHAEL DZIEDZIC AND BETH DEGRASSE, UNITED STATES INSTITUTE OF PEACE SPECIAL REPORT NO. 118 – BUILDING CIVILIAN CAPACITY FOR U.S. STABILITY OPERATIONS: THE RULE OF LAW COMPONENT 2 (2004), available at <http://www.usip.org/pubs/specialreports/sr118.pdf>.

IX. Theater-Specific Information on Rule of Law – Afghanistan and Iraq

Most of the content of this *Handbook* is intended to give Judge Advocates an overview of the context and framework for rule of law activities, wherever they may take place. This chapter, however, focuses on today's reality: most Judge Advocates have deployed or are deploying to Afghanistan or Iraq and can use more detailed information on both theatres of operation. The chapter is divided into sections on Afghanistan and Iraq. The Afghanistan and Iraq sections are further divided between discussion of the framework for rule of law activities in each theater (including a description of the Provincial Reconstruction Team (PRT) and embedded-PRT (e-PRT) operations in each theater) and discussion of the legal system in each country.

A. Afghanistan

I. The International Framework

Afghanistan justice sector reform and development has lagged behind other sectors, but over the past two years major building blocks have been put in place to support a more holistic, coordinated and systematic effort by the international community and Afghan Government. That said, the sheer number of donors and non-governmental actors in rule of law will require continued cooperation by all to avoid wasteful duplication and contradictory legal reform efforts. For this reason, it is important for rule of law practitioners to understand the history of 2002–06 rule of law efforts and why they fell short. More importantly, field-level practitioners should be familiar with the new international framework that will lead rule of law efforts from Kabul in a more coordinated and systematic manner.

As part of the broader effort to establish a stable Afghan government, a group of nations met with several representatives of the Afghan people under United Nations (UN) auspices in Bonn in December 2001 and reached an agreement regarding the structure of an interim Afghan government and the effort to assist Afghanistan in its reconstruction.¹

Pursuant to the Bonn Agreement, the reconstruction effort in Afghanistan was organized by a “lead nation” approach, with different countries assuming responsibility developing different aspects of the rule of law in Afghanistan.² Germany became the lead nation for developing the Afghan police force, while Italy took on the judicial sector. The Germans opened a police academy in Kabul to train new police officers, an effort eventually augmented considerably by the United States, which assumed responsibility for providing training to existing Afghan police officers.³ The Italians focused on building the judicial system at the local level by establishing a system of courts of first instance (“district courts”), limited training

¹ See Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001).

² CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II, 267 (2005) [hereinafter OEF/OIF, VOL. II].

³ LAUREL MILLER & ROBERT PERITO, UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT 117, ESTABLISHING THE RULE OF LAW IN AFGHANISTAN 11-12 (2004), <http://www.usip.org/pubs/specialreports/sr117.pdf> [hereinafter MILLER & PERITO].

programs for judges and prosecutors, and a new criminal procedure code. All concerned agree that these judicial efforts were largely under-funded.

The United States, while not the lead nation in any of these areas, in addition to supplementing the German police effort, also undertook considerable rule of law work in its efforts to establish a comprehensive system of *military* justice as part of its role as lead nation for the development of the Afghan National Army. The United Nations Assistance Mission in Afghanistan (UNAMA) played only a minor role in the rule of law area, with most progress being made by specific reforms led by individual nations.⁴

The split international effort proved unwieldy for many reasons. For example, although progress in one area depended on progress in others, lead nations did not commit equivalent levels of resources, nor establish a coordination mechanism.⁵ This hampered rule of law efforts, which must address police and judicial reform in concert (as well as prison operations, largely ignored under the Bonn Agreement framework). In addition, the division of tasks among nations did not necessarily match the structure of the Afghan government's legal administrative apparatus. A Judicial Reform Commission was created within the Afghan government and was supported in particular by the Italians, although doing so created additional political difficulties as the dominant participants in the Afghan legal system – the Commission, Ministry of Justice, Attorney General, and Supreme Court – struggled for control.⁶

Outside Kabul, the rule of law effort was virtually nonexistent from 2002-04, and has only gradually grown despite significant pressure by the Afghan Government and USG. Provincial Reconstruction Teams (PRTs) have played a relatively limited role in rule of law, serving mostly as facilitators for Kabul-led efforts, though starting in 2007 RC-East has taken a more proactive approach in developing and implementing its own rule of law programs. For the most part, provincial rule of law efforts have used a combination of local NGOs, independent program offices in some large cities, and contract-based platforms (such as Police Regional Training Centers, or RTCs) for provincial rule of law work.

The Bonn Agreement process concluded with the creation of Afghanistan's elected bodies, following which the Afghan government and international community committed to the Afghanistan Compact at the 2006 London Conference. The Afghanistan Compact identified "three critical and interdependent areas or pillars of activity" over five years: security;

⁴ *Id.* at 4.

⁵ Oversight of U.S. Efforts to Train and Equip Police and Enhance the Justice System in Afghanistan: Hearing Before the Subcomm. on National Security and Foreign Affairs, 110th Cong. 2 (2008) (statement of David T. Johnson, Assistant Secretary for International Narcotics and Law Enforcement Affairs, Department of State) [hereinafter Johnson Statement]; see also M. ASHRAF HAIDARI, PARIS CONFERENCE: AN OPPORTUNITY TO ADDRESS AFGHANISTAN'S KEY REBUILDING CHALLENGES (2008), <http://www.ia-forum.org/Content/ViewInternalDocument.cfm?ContentID=6295>.

⁶ MILLER & PERITO, *supra* note 3, at 6; see also LAURA BARNETT, PARLIAMENTARY INFORMATION & RESEARCH SERVICE, AFGHANISTAN: THE RULE OF LAW 2 (2007), <http://www.parl.gc.ca/information/library/PRBpubs/prb0717-e.pdf> [hereinafter BARNETT]: In 2001, the Bonn Agreement created an independent Afghan Judicial Reform Commission to rebuild the justice system by reviewing structures and functions, facilitating law reform, strengthening resources, expanding legal aid, and promoting access to justice. However, the Commission was dissolved in June 2005, having achieved only limited success. BARNETT, *supra*.

governance, rule of law and human rights; and social and economic development.⁷ The “lead nation” concept was dropped at the London Conference, as the Afghan government assumed the lead in all areas, with countries formerly designated as lead nations now being referred to as “key partners.”⁸ A Joint Coordination and Monitoring Board (JCMB) was established, responsible for overseeing implementation of the Compact’s commitments.⁹ The JCMB is co-chaired by the Afghan President’s Senior Economic Advisor and the Special Representative of the UN Secretary General for Afghanistan, and is the primary coordination mechanism between the Afghan government and the international community.¹⁰

The Afghanistan Compact was followed up by the April 2008 Afghanistan National Development Strategy (ANDS), a five-year framework for achieving Afghanistan Compact and UN Millennium Development Goals (MDGs), which also serves as Afghanistan’s Poverty Reduction Strategy Paper (required by the World Bank and International Monetary Fund). The ANDS was drafted by the Afghan government, in consultation with major donors and international organizations, including the UN, World Bank, and Asian Development Bank, and provides the Afghan government and international community with a list of development priorities as well as a unified government strategy.¹¹ The JCMB has indicated that the Afghan government will be responsible for addressing ANDS objectives by developing, implementing, and monitoring programs, while the JCMB will focus on policy coordination between the government and international community, as well as providing strategic oversight of all efforts.¹²

The JCMB report at the June 2008 Paris Conference on implementation of the Afghanistan Compact identified two priorities, “building effective institutions” and “strengthening economic foundations.” Within the first category, the report indicated three key areas: supporting police and public administration reform, and strengthening rule of law.¹³ In

⁷ The Afghanistan Compact (2006),

<http://www.and.s.gov.af/ands/jcmb/site/src/Afghanistan%20Compact/The%20Afghanistan%20Compact%20English.pdf>.

⁸ 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 4 (2008), <http://oig.state.gov/documents/organization/106946.pdf> [hereinafter DOS OIG REPORT].

⁹ INTERNATIONAL CRISIS GROUP, AFGHANISTAN’S ENDANGERED COMPACT 6 (2007), <http://www.crisisgroup.org/home/index.cfm?l=1&id=4631>.

¹⁰ JOINT COORDINATION AND MONITORING BOARD, ANNUAL REPORT, MARCH 2007-MARCH 2008 1-2 (2008), <http://www.and.s.gov.af/ands/jcmb/site/index.asp?page=j8> [hereinafter JCMB ANNUAL REPORT].

¹¹ Islamic Republic of Afghanistan, Afghanistan National Development Strategy (2008), http://www.and.s.gov.af/ands/final_ands/src/final/Afghanistan%20National%20Development%20Strategy_eng.pdf (indicating that “[t]he current fragmented and uncoordinated approach to Afghanistan’s reconstruction and development must turn into an integrated and prioritized approach, as outlined in the ANDS.”); see also ACBAR’S GUIDE TO THE ANDS: A COMPREHENSIVE GUIDE TO THE AFGHANISTAN NATIONAL DEVELOPMENT STRATEGY 2-3 (2007), http://www.acbar.org/display.php?page_id=74.

¹² JOINT COORDINATION AND MONITORING BOARD CO-CHAIRS, REPORT ON THE IMPLEMENTATION OF THE AFGHANISTAN COMPACT 7-8 (2008), <http://www.and.s.gov.af/ands/jcmb/site/index.asp?page=j8> [hereinafter AFGHANISTAN COMPACT IMPLEMENTATION]; see also WORKING GROUPS, BENCHMARK STATUS REPORT, MARCH 2007 TO MARCH 2008 (2008), <http://www.and.s.gov.af/ands/jcmb/site/index.asp?page=j8> (describing progress toward achieving Afghanistan Compact benchmarks).

¹³ AFGHANISTAN COMPACT IMPLEMENTATION, *supra*, at 6-7; see also The Secretary General, *Special Report of the Secretary-General pursuant to Security Council Resolution 1806 (2008) on the United*

fact, the Afghan government and international community had recognized at the 2007 Rome Conference that progress in the rule of law area was lagging behind that achieved in other sectors,¹⁴ resulting in the decision to create a National Justice Sector Strategy (NJSS) and National Justice Program (NJP).¹⁵

The draft NJSS explicitly acknowledges the important role of rule of law as a precursor to improvements in other areas: “[a]lthough justice and the rule of law are not among the eight plus one MDGs, they form the necessary preconditions and provide the enabling environment for poverty reduction and economic development.”¹⁶ The NJSS brings together the five-year strategies originally drafted by the Ministry of Justice, Attorney General’s Office, and Supreme Court, and sets out three justice sector goals, including improving: (1) the integrity, performance and infrastructure of justice institutions; (2) the coordination and integration of the justice system with other government institutions as well as civil society; and (3) the quality of justice.¹⁷ The NJSS will be implemented by the Afghan government, in conjunction with the international community, through the NJP.

The NJP sets out a list of requirements for the three justice ministries, constitutes implementation of the justice portion of the ANDS, and will allow the government to set priorities and meet the rule of law benchmarks set out in the Afghanistan Compact.¹⁸ The NJP was adopted by the Afghan government and the international community at the June 2008 Paris Conference.¹⁹ It is funded in part through the Afghanistan Reconstruction Trust Fund, allowing donors to contribute without the need to establish bilateral projects.²⁰ Its first phase will include quick impact projects “to enhance human capital and physical infrastructure of justice institutions, empowering Afghans through legal aid and legal awareness and strengthening the implementation capacity of justice institutions.”²¹ The Afghan government will create two primary bodies to support NJP implementation: the Program Oversight Committee, and the Program Support Unit.²²

Nations Assistance Mission in Afghanistan, 3, U.N. Doc. S/2008/434 (July 3, 2008) (echoing these priorities).

¹⁴ M. CHERIF BASSIOUNI & DANIEL ROTHENBERG, AN ASSESSMENT OF JUSTICE SECTOR AND RULE OF LAW REFORM IN AFGHANISTAN AND THE NEED FOR A COMPREHENSIVE PLAN 10, 13 (2007), <http://www.rolafghanistan.esteri.it/NR/rdonlyres/F16F08B8-5C24-48C6-B0F0-8D65B4003521/0/Assessmentjusticesectorandruleoflawreform.pdf>.

¹⁵ ISLAMIC REPUBLIC OF AFGHANISTAN, MINISTRY OF JUSTICE, NATIONAL JUSTICE PROGRAM: ROME CONFERENCE FOLLOW-UP 1 (2008), <http://www.ands.gov.af/ands/jcmb/site/index.asp?page=j7> [hereinafter ROME CONFERENCE FOLLOW-UP].

¹⁶ DRAFT SUMMARY OF ANDS JUSTICE SECTOR STRATEGY 3 (2008), <http://www.ands.gov.af/ands/jcmb/site/index.asp?page=j7> [hereinafter DRAFT JUSTICE SECTOR STRATEGY].

¹⁷ *Id.* at 5.

¹⁸ The NJP is “rooted in the need for a coordinated approach to activities aimed at supporting the Justice sector, avoiding fragmentation, duplication and overlapping of interventions, building the implementation of the Justice institutions and increasingly resorting to funding the Government core budget instead of financing external budget projects.” ROME CONFERENCE FOLLOW-UP, *supra* note 15, at 2.

¹⁹ Johnson Statement, *supra* note 5, at 2.

²⁰ ROME CONFERENCE FOLLOW-UP, *supra* note 15, at 2.

²¹ JCMB ANNUAL REPORT, *supra* note 10, at 8.

²² *Id.*

In addition to these Afghan efforts, the international community has formed the International Coordination Group for Justice Reform (ICGJR) in order to bring greater coherence to its own approach. Co-chaired by UNAMA and Italy, the ICGJR coordinates international support to the NJP. As well, UNAMA is launching a Provincial Justice Coordination Mechanism (PJCM) which will establish eight regional offices to coordinate the increasing number of international rule of law assistance programs.²³ The PJCM's three strategic goals are to: "(1) to facilitate the comprehensive and consistent reform of justice systems at provincial and regional levels; (2) to ensure comprehensive regional assessments of the needs of the formal and assessment of the informal justice system in each PJCM area; (3) to expand justice programming by identifying and helping to target future justice assistance to the district level and more remote provinces."²⁴

The UN will provide provincial justice coordinators for these regional offices, the first of which are expected to open in summer 2008.²⁵ The coordinators are expected to work with UNAMA, the UN Development Program (UNDP), the Afghan government, and donor countries to coordinate justice efforts within their province and with other provinces.

It should be noted that the process for coordination of all manner of reconstruction activities is undergoing review and reform. The notional construct is that UNAMA will lead the effort to coordinate donor nations' support to the Afghan Government's implementation of the ANDS. How that will affect the operations of USG and coalition actors remains to be seen.

Like the international community, the Afghan government has experienced difficulty in extending its reach outside Kabul,²⁶ resulting in the August 2007 creation of the Independent Directorate for Local Governance (IDLG).²⁷ The IDLG is responsible for overseeing provincial governors and councils, district governors, and municipalities other than Kabul, and for appointing members of village and district *shuras*.²⁸ Although the Afghan government has yet to determine how the ANDS will be delivered to the provinces,²⁹ the ANDS drafting process did

²³ Johnson Statement, *supra* note 5, at 4.

²⁴ ROME CONFERENCE FOLLOW-UP, *supra* note 15, at 2.

²⁵ Johnson Statement, *supra* note 5, at 4.

²⁶ JCMB ANNUAL REPORT, *supra* note 10, at 7. "The disconnect and lack of coordination between provincial administrations and the central Government continues to frustrate efforts to promote good governance and improved public service delivery. The establishment of the ... IDLG has begun to remedy these problems, but sub-national governance institutions remain weak, due largely to the lack of clarity about functions, roles, and responsibilities, insufficient delegation of authority and inadequate coordination with and among the institutions of central government." *Id.*

²⁷ MOHAMMAD M. STANEKZAI, UNITED STATES INSTITUTE OF PEACE, AFGHANISTAN: NOT LOST BUT NEEDS MORE ATTENTION 6 (2008), <http://63.104.169.51/articles/1011729.979/1.PDF>.

²⁸ DEP'T OF DEFENSE, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN 41 (2008), http://www.defenselink.mil/pubs/Report_on_Progress_toward_Security_and_Stability_in_Afghanistan_1230.pdf [hereinafter AFGHANISTAN PROGRESS REPORT] (noting that the Afghan government worked with Provincial Development Committees and Provincial Councils to draft Provincial Development Plans for each province in 2007).

²⁹ JCMB ANNUAL REPORT, *supra* note 10, at 7. The IDLG is preparing a policy paper on sub-national governance. *Id.*

include provincial consultations which resulted in the identification of local priorities.³⁰ While the IDLG could play a potential role in sub-national justice systems,³¹ it has not been a key player in nationwide rule of law efforts to date. Practitioners should focus rule of law efforts on the existing governmental justice institutions, including criminal investigation departments, prosecution services, courts, detention centers and prisons, and Ministry of Justice offices. While a larger role for IDLG in provincial governance is possible, practitioners should seek clear guidance from US Embassy Kabul in advance to ensure consistency with central justice sector reform efforts.

In view of the number of participants involved in Afghan reconstruction, it is not surprising that both government and international community efforts have frequently been criticized for ineffective coordination:

A multiplicity of actors with overlapping mandates, competitive relations, and minimal accountability for performance, characterize international presence in Afghanistan. The divergent and diffuse efforts of donors have created diverse opportunities for peace spoilers including the Taliban, drug traffickers, and criminals to undermine and derail the nation-building process in Afghanistan. Efforts to enhance structures for strategic coordination on the ground, both within the UN and beyond, have been frustrated by the sheer numbers of actors, the limited extent to which these actors accept the coordination authority and the absence of policy coordination structures at the headquarters level. More than 70 countries, international organizations, and non-governmental organizations are present in Afghanistan. Yet, they have consistently worked outside of the Afghan government. For example, of all technical assistance to Afghanistan, which accounts for a quarter of all aid to the country, only one-tenth is coordinated among donors or with the government. Nor is there sufficient collaboration on project work, which inevitably leads to duplication or incoherence of activities by different donors. This has seriously undermined the Afghan government's ability to build its capacity for effective governance and implementation of the rule of law.³²

Although the above paragraph refers to all assistance, not specifically justice reform and rule of law assistance, it is clear that the difficulty of coordinating aid efforts has been increased by the lack of security in some areas of the country, which has resulted in significant international military involvement in the reconstruction process:

The wastage and duplication of aid, as well as the lack of strategic coherence between development and military activities, constitute significant obstacles to the success of the

³⁰ DRAFT JUSTICE SECTOR STRATEGY, *supra* note 16, at 7; *see also* INTEGRATION OF PROVINCIAL DEVELOPMENT PLANS INTO THE ANDS 1 (2008), <http://www.ands.gov.af/ands/jcmb/site/index.asp?page=j7> (noting that the ANDS included a sub-national consultation process, which brought together provincial, district, and community stakeholders, as well as PRT representatives, and produced Provincial Development Plans).

³¹ A 2008 USIP report indeed recommended that "The IDLG, UNAMA and the PRTs should coordinate support to provincial authorities based on IDLG priorities. There will be a coherent development strategy only when PRTs are harmonized with the ANDS and the IDLG." STANEKZAI, *supra* note 27, at 6. "Unfortunately, PRTs have varying capacities. Many of their activities are not coordinated with the Afghan government and do not necessarily follow ANDS priorities. Naturally, this leads to redundancy, wasted resources and confusion. In addition, the situation leads to puzzlement for the local population about who has the real authority." *Id.* at 6.

³² Haidari, *supra* note 5.

reconstruction and stabilization effort, and undermine public confidence in the Government and its international partners. The problem of aid coordination in Afghanistan is compounded by the large number of donors, and the combination of military and development activities. The continued prevalence of tied aid over direct budgetary support and the role of Provincial Reconstruction Teams blur the relationship between the Government and the Afghan people in public service delivery. Currently, over two thirds of all aid still by-passes the Afghan Government while, according to the OECD, only 40% of technical assistance is coordinated with the Government. The way in which donors spend their money is particularly significant as the economy still depends very significantly on external assistance. In Paris, donors are expected to commit to aligning their support behind the Afghanistan National Development Strategy; to make aid more predictable, effective and efficient; to provide aid in a more equitable way across Afghanistan; to supply full information on aid flows; to spend a larger proportion of assistance inside Afghanistan; to champion local procurement of goods and services; and to channel resources through Government systems to the extent possible.”³³

Practitioners who are planning and implementing rule of law activities should be aware that the way in which assistance is provided can be nearly as important as the substance of what is provided. In particular, any rule of law assistance should seek to enhance both the capacity and the legitimacy of the Afghan government. Unfortunately, there is a serious dilemma that military rule of law practitioners will encounter in the field: their efforts to improve the capacity and legitimacy of the Afghan Government could undermine that very objective for two reasons:

First, the Afghans are extremely sensitive to perceptions of “foreign interference” in their legal system. While practitioners are building organizational capacities of a governmental entity, they may be simultaneously and inadvertently undermining that entity if it is subsequently viewed as “corrupted” by western influence. Especially high-visibility involvement (such as military personnel or those traveling in heavily armed western convoys) can make building trust between Afghan citizens and their justice system difficult.

Second, the justice sector consists of civilian institutions that under ideal circumstances would be supported by a wide array of civilian legal expertise. However, realities on the ground, especially in non-permissive environments, require dedicated engagement by military rule of law practitioners. Nevertheless, “militarizing” civilian institutions through constant military oversight and support could damage the perception that justice institutions come under civilian control, as per the Afghan Constitution.

Thus, military practitioners should carefully balance between providing reliable support to justice institutions while at the same time managing to stay behind the scenes, and working closely with civilian rule of law practitioners whenever possible.

In addition, practitioners at the field level (both civilian and military) will leave the greatest impact if they assist in establishing not only a capable and legitimate local government system, but also one that applies the same set of laws, policies and procedures as those in other provinces. Ensuring standardization will require regular contact with a variety of actors at the provincial and capital level including the PJCM and US Embassy personnel. To maintain effective channels with the Afghan Government and international community, practitioners

³³ UNITED NATIONS ASSISTANCE MISSION IN AFGHANISTAN, CHALLENGES AND CONSTRAINTS (2008), http://www.diplomatie.gouv.fr/en/article-imprim.php?id_article=11425.

interested in engaging with Kabul-based Afghan authorities should do so through their respective command chains, or through the US Embassy Rule of Law Coordinator's office.

a) US Lead Agency Leadership and Interagency Participation

Rule of law operations in Afghanistan between 2005 and 2008 benefitted from the strengthening of United States Government (USG) interagency cooperation, as the U.S. Embassy in Kabul, with the support of other agencies, took the lead in establishing common goals and coordinating steps toward achieving them.³⁴ Progress has been made during 2006-2007 in achieving coordination and cooperation between USG agencies and various international community donor nation representatives and non-governmental organizations (NGOs).³⁵ The impact of such cooperation between organizations with diverse (and often competing) national and agency interests, statutory authorities, funding levels, and agency representative subject-matter expertise levels has been of significant assistance in the delivery of justice services at both the national and provincial levels in Afghanistan.³⁶ Although such assistance marks merely a beginning in the much greater context of Afghan rule of law reconstruction requirements, it is nonetheless instructive with respect to the effect of positive interagency relations in the area of post-conflict operations in general and rule of law operations in particular.

³⁴ DOS OIG REPORT, *supra* note 8, at 7 (“[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”; 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.

³⁵ However, as a member of Department of State Inspector General’s staff noted

Bureaucratic coordination on ROL issues has greatly improved but is a daunting task involving multiple participants with very different capacities and goals. The continuous turnover of U.S. government staff and the conflicting priorities among even U.S. government entities, in the context of the desperate straits of the Afghan justice sector, indicate that the challenges of the [Embassy Kabul] ROL coordinator will only continue to grow.

Oversight of U.S. Efforts to Train and Equip Police and Enhance the Justice System in Afghanistan: Hearing Before the Subcomm. on National Security and Foreign Affairs, 110th Cong. 3-4 (2008) (statement of Francis B. Ward, Deputy Assistant Inspector General, Department of State) [hereinafter Ward Statement].

³⁶ The formal state-run justice system in Afghanistan has been almost wholly dismantled by nearly continuous war and internal conflict since 1979, when the forces of the former Union of Soviet Socialist Republics invaded Afghanistan, and continuing through the internal strife caused by the rise of the *mujaheddin* and the Taliban takeover. This lack of an effective formal legal system has been marked by rampant corruption at all levels of government, the destruction of all legal infrastructure, the lack of any meaningful training for judges and prosecutors, and the complete absence of defense counsel to represent accused persons in criminal cases. Furthermore, there is no reliable land-titling system, no enforcement mechanisms for civil judgments, and no effective oversight for the treatment of incarcerated persons and the enforcement of human rights – either locally or nationally. In response to the lack of a fair and trustworthy justice system, especially at the provincial and district levels in Afghanistan, many Afghans have returned to the *shuras* (councils of tribal elders) to resolve legal disputes on an informal basis. Such *shuras* do not apply positive law (even if such law exists), have little or no education or training, are often arbitrary in their decisions, and order compensation (such as the exchange of female relatives) that violates international human rights standards.

In early 2006, a Special Counselor on the Rule of Law was appointed by the DOS to coordinate interagency rule of law efforts in Afghanistan, ensure that gaps and overlaps in such efforts were corrected, and assist in the development of a broader USG rule of law agenda. The first Counselor held the title of Ambassador from a previous posting and while effective, held the position for less than four months. A committee of representatives from each USG agency involved in rule of law activities was organized and chaired by the Special Counselor, subsequently replaced by a senior lawyer who holds the title of Rule of Law Coordinator. He is supported by a Deputy Coordinator, who, while not a lawyer, is a career foreign service officer. Regular and frequent rule of law meetings have resulted in much greater coordination of rule of law efforts at the strategic level, the development of strong interpersonal and cooperative relationships, and a greater awareness of each agency's rule of law activities among and between all participants and the Rule of Law Coordinator.³⁷ In 2008, an Army Judge Advocate (Lieutenant-Colonel) was added to the Rule of Law section.³⁸ The embassy officer assigned responsibility for the police training portfolio, currently an officer within the political-military section, now also attends Special Committee on the Rule of Law meetings in order to ensure coordination between DOD efforts to train police (for example, through the Focused District Development initiative),³⁹ and USG efforts in other justice sectors.⁴⁰

With the appointment of the Special Counselor, it became obvious that it would be critical to the success of the USG rule of law mission for each agency representative to provide consistent assistance and support to both the Special Counselor and other members of the Special Committee on the Rule of Law to the largest extent possible. While each agency expected (legitimately) to be able to advance its own rule of law agenda within the Special Committee on the Rule of Law framework, the group's common goals dictated the sharing of essential information, as well as assets and capabilities. For example, a contractor for one USG agency had superior translation services available. Another agency, greatly in need of such services on a time-sensitive basis, was able to access those capabilities under a Memorandum of Understanding between the agencies. Information-hoarding, misinformation, and isolation of effort by any participating agency inures to the detriment not only of the group and its goals, but also to the agency itself and its goals. Of course, it is important for the practitioner to note that research must be conducted to assure that no agency implementing or fiscal laws are broken when contemplating such an agreement.⁴¹

In terms of common USG goals, the U.S. Justice Sector Strategy for Afghanistan previously included three elements: strengthening the three central justice institutions; expanding justice programs to the provinces; and improving donor coordination. Now that the NJP provides

³⁷ The Special Committee on the Rule of Law meets weekly at the U.S. Embassy in Kabul to discuss issues and resolve conflicts. Interagency coordination is carried out in Washington as well as in Kabul; the Afghan Justice Coordination Committee, established in 2007, is chaired by the Principal Deputy Assistant Secretary of INL.

³⁸ Ward Statement, *supra* note 35, at 5.

³⁹ *Oversight of U.S. Efforts to Train and Equip Police and Enhance the Justice System in Afghanistan: Hearing Before the Subcomm. on National Security and Foreign Affairs, 110th Cong. (2008)* (statement of Major General Bobby Wilkes (Ret.), Deputy Assistant Secretary for Central Asia, Department of Defense) (describing Focused District Development and other DOD support to the Afghan National Police).

⁴⁰ Ward Statement, *supra* note 35, at 6-7.

⁴¹ See Chapter VII for fiscal law considerations.

a strategic framework, the U.S. Embassy in Kabul is coordinating the development of a new USG five-year strategy. It will be aligned with the Afghan NJSS, include a DOD component, and be approved by the National Security Council.⁴² The Special Committee on the Rule of Law will then draft a strategic implementation plan.⁴³

The current USG division of labor in rule of law assistance, based on ongoing programs, is as follows:

DOD: MOI legal affairs, police-prosecutor policies, field-level ROL assistance

DOS/INL: Nationwide development of criminal justice system, with a focus training and capacity-building of prosecution, defense and corrections services. INL supports a comprehensive police-prosecutor training and mentoring program

USAID: Nationwide development of civil/commercial law, as well as nationwide training of the judiciary and legal awareness

DOJ/Criminal Division: Counter-Narcotics prosecutions, removal/extradition of high-value traffickers, and anti-corruption (the latter together with INL)

DOJ/DEA: Counter-Narcotics investigative training

DOJ/FBI: Forensics training and fingerprint collection; and

DOJ/U.S. Marshalls Service: Judicial security

USG Interagency: INL and USAID are both involved in legal education and access to justice programs. Many agencies support legislative reform and procedural reform in their respective focal areas. DOD, INL, and DOJ have supported the Counter-Narcotics Justice Center (CNJC) in Kabul to detain and try narcotics defendants based the 2005 CN Law (with nationwide jurisdiction).⁴⁴

Given significant DOD capabilities and resources, DOD personnel engaging in rule of law activities in Afghanistan should take particular care to become informed about the efforts of other USG agencies and ensure coordination with them. Otherwise, as the January 2008 Department of State Office of the Inspector General (OIG) report on rule of law programs in Afghanistan observed, the effectiveness of USG rule of law initiatives may be decreased:

CJTF-82 determined, before its arrival in Afghanistan, that [rule of law] was to be one of its civil affairs priorities. Each task force commander is committed to implementing [a rule of law] program during the deployment. This has placed understandable pressure on the commanders and their staff legal officers to initiate [rule of law] efforts, such as training programs for Afghan justice officials. Those training programs have not always been coordinated with the other [rule of law] actors, either in the U.S. government or the government of Afghanistan. This was due, in part, to the fact that the task force implementers were not aware of other programs or, if aware, did not understand the reasons for the comparatively slower pace of the civilian programs or the sensitivities of the host country

⁴² AFGHANISTAN PROGRESS REPORT, *supra* note 28, at 34; DOS OIG REPORT, *supra* note 8, at 15.

⁴³ Ward Statement, *supra* note 35, at 10.

⁴⁴ Johnson Statement, *supra* note 5, at 5; AFGHANISTAN PROGRESS REPORT, *supra* note 28, at 35-38; DOS OIG REPORT, *supra* note 8, annexes B, C.

participants and other international donors. During the [October 2007] OIG visit, civilian and military [rule of law] officials began to meet to improve this situation, but some tensions remain. The task force commanders are under pressure to implement programs and obtain visible results during their deployment, and because they work independently, their units can execute programs quickly. Their need to act rapidly and their tendency to operate unilaterally conflicts with the efforts of the U.S. mission, the government of Afghanistan, and the international community, who after several years of uncoordinated, sometimes unsustainable or redundant [rule of law] projects, have only recently agreed on the need to plan and execute programs under a common strategy.⁴⁵

A number of U.S. forces in Afghanistan are now assigned to the International Security Assistance Force (ISAF), including all of the U.S. PRTs. This means that DOD support for US rule of law efforts must also be coordinated with the larger military effort in Afghanistan, but this is facilitated by ISAF participation in the ANDS framework. As noted above, at the end of the day, the intent is that the UNAMA-led effort will provide a framework to guide the development and execution of reconstruction strategies and implementing programs to guide nations' efforts in support of the Afghan Government. Those strategies and programs, in turn, will be the framework for development of USG implementing activities, whether executed by military or civilian agencies.

For example, in coordination with the international community, ISAF HQ requested its Regional Commands and PRTs to assess the state of "judicial infrastructure, equipment, and other capacity to identify deficiencies and areas in need of improvement." The survey was to be used to determine progress in the rule of law area; in addition, it would guide the World Bank in deciding how to commit Afghanistan Reconstruction Trust Fund resources.⁴⁶

⁴⁵ DOS OIG REPORT, *supra* note 8, at 12; Ward Statement, *supra* note 35, at 8-9. INL briefed CJTF-101 SJA personnel prior to departure, while INL participated in the first TJAGLCS rule of law short course in June 2008. The DOS OIG subsequently recommended that "Embassy Kabul should require the rule-of-law coordinator to develop and implement with other U.S. government training stakeholders a standardized notification of proposed training to be used and shared by all U.S. civilian military and contract training organizations." Embassy Kabul has agreed to implement this recommendation. Ward Statement, *supra*. See also *Oversight of U.S. Efforts to Train and Equip Police and Enhance the Justice System in Afghanistan: Hearing Before the Subcomm. on National Security and Foreign Affairs, 110th Cong.*, ___ (2008) (remarks of Francis B. Ward, Deputy Assistant Inspector General, Department of State) [hereinafter Ward Remarks]:

To promote better coordination with military task force officers with rule of law responsibilities, we have encouraged the rule of law coordinator and program experts to conduct in-depth rule of law briefings for incoming military commanders and JAG officers. Additionally, we recommended that the coordinator should develop a shared training schedule for use by all training providers in order to de-conflict work. Ward Statement, *supra*.

⁴⁶ AFGHANISTAN PROGRESS REPORT, *supra* note 28, at 34.

2. *Provincial Reconstruction Teams*

As described above, PRTs in Afghanistan play an important role in its reconstruction.⁴⁷ In Afghanistan, PRTs 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.⁴⁸ Twelve of the Afghanistan PRTs are led by the United States under the Regional Command East and 13 by coalition partners.⁴⁹ All fall under the broad authority of the NATO-led International Security Assistance Force. All PRTs receive general guidance through the form of the ANDS process described earlier. "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."⁵⁰

U.S. PRTs in Afghanistan are commanded by an Army lieutenant colonel or Navy commander and composed almost entirely of military personnel. To date, none of the U.S. PRTs in Afghanistan have a rule of law officer working with them (unlike the PRTs in Iraq, described below). This staffing reflects the emphasis of the PRTs on reconstruction. The PRTs typically consist of 50-100 personnel, of which only 3 or 4 members are USG civilians or contractors. Those may be from the State Department, USAID, or the Agriculture Department. The PRT's military commander does not command the non-DOD civilians.⁵¹ In addition, PRTs have two

⁴⁷ As described in Chapter III, 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 a small RTC in Bamian serve as important regional centers for USG police, justice and corrections assistance. In particular, INL supports 24 US justice and corrections advisors deployed at 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 supports a total of around 70 contracted US advisors, along with around 40 Afghan Legal Consultants (ALCs). US 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.

⁴⁸ Donna Miles, PRTs Showing Progress in Afghanistan, Iraq: Civilian Reserve Needed, Oct. 5, 2007, Statement of Mitchell Shivers, deputy assistant secretary of defense for Central Asia Affairs, to House Armed Services Committee's oversight and investigations subcommittee

⁴⁹ *Id.*, Statement of Air Force Maj. Gen. Bobby Wilkes, the Joint Staff's Deputy Director of Politico-Military Affairs for Asia to House Armed Services Committee's Oversight and Investigations Subcommittee, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=47700> (last visited August 8, 2008).

⁵⁰ *Id.* General Wilkes also told the Subcommittee: "[t]he 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."

⁵¹ Agency Stovepipes versus Strategic Agility: Lessons We Need to Learn from Provincial Reconstruction Teams in Iraq and Afghanistan, Report of U.S. House of Representatives, Committee of Armed Services, Subcommittee on Oversight and Investigation (hereinafter "Subcommittee Report"), Comm'ee Print 08,

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 ordinance/demining unit, an intelligence team, medics, a force protection unit, and administrative and support personnel.⁵² An Afghan representing the Ministry of Interior may also be part of the team. These PRTs should include a single representative each from DOS, USAID, and the U.S. Department of Agriculture. That is apparently still the case as of April 2008.⁵³ U.S.-led PRTs are usually co-located on a military base with combat maneuver units operating in the same area or battlespace.⁵⁴

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 the PRTs do not have a ROLC assigned to them, there are ways in which PRTs can contribute to justice reform in Afghanistan:

Facilitating information-sharing

Supporting Afghan reformers and local government advocacy

Help Afghan Government isolate criminal and corrupt Elements

Improving linkages of criminal justice “Chain”

Help direct donor and Afghan assistance programs

Use PRT resources to support justice system.

3. *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.

Since the U.S. invasion and the overthrow of the Taliban government in 2001, myriad efforts have been initiated by the international community and the new Afghan government to strengthen the state’s authority and to advance the rule of law: The 2004 Afghan Constitution formally created a modern Islamic state with a formal tripartition of power familiar to western lawyers: a central government with far reaching legal authority⁵⁵, a bi-cameral legislature and an independent judiciary.⁵⁶ Presidential as well as parliamentary elections have been held in 2004

April 2008, at 13, found at: http://armedservices.house.gov/pdfs/Reports/PRT_Report.pdf (viewed August 18, 2008).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ With rather extensive law-making authority, *see* Organisation and Jurisdiction of the Newly Established Afghan Courts – the Compliance of the Formal System of Justice with the Bonn Agreement, Ramin Moshtaghi, Max Planck Yearbook of United Nations Law, Volume 10 (2006), p. 584, available at http://www.mpil.de/shared/data/pdf/moshtaghi_organisation_and_jurisdiction_of_newly_established_afghan_courts1.pdf (last visited July 15, 2008).

⁵⁶ Article 97 of the 1964 Constitution and the Bonn Agreement guarantee the independence of the judiciary.

and 2005⁵⁷ respectively. A substantial number of new statutes have been passed.⁵⁸ 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.⁵⁹

In spite of the tremendous effort exerted to bring the rule of law to Afghanistan,⁶⁰ 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,⁶¹ and the legal infrastructure is basic at best and non-existent in some parts of the country.⁶² Furthermore there is a widespread lack of respect for the rule of law 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 and to a significant degree inconsistent judicial systems:

a formal system of law practiced by state authorities⁶³ relying on a mixture between the civil law system and elements of Islamic law and

an informal customary legal system practiced by non-state actors based on customary tribal law and the local interpretation of Islamic law.

The "dual nature" of the Afghan legal system stems to some degree from the limited reach of state authority in Afghanistan. But it is also emblematic of the historic and continuing tensions inherent to an ethnically diverse Afghan society.⁶⁴

⁵⁷ Elections are scheduled again for 2009 and 2010 respectively.

⁵⁸ See the site of the Afghan Ministry of Justice for further information at <http://www.moj.gov.af>.

⁵⁹ See Report on Progress toward Security and Stability in Afghanistan, June 2008, p. 16-29, available at http://www.defenselink.mil/pubs/Report_on_Progress_toward_Security_and_Stability_in_Afghanistan_1230.pdf (last visited July 16, 2008).

⁶⁰ See Benchmark Status Report March 2007 – March 2008 – 2.7.1 to 2.7.4.

⁶¹ 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: BRIDGING MODERNITY AND TRADITION AND RULE OF LAW AND THE SEARCH FOR JUSTICE 43, available at <http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name,3408,en.html>.

⁶² 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 meet international standards. See HUMAN DEVELOPMENT REPORT, *supra* note 61.

⁶³ It should be noted that official courts often apply positive law as well as customary and Islamic law.

⁶⁴ 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.

The three sources of law formal and informal institutions rely on – positive secular law, Islamic law, and customary law – overlap in subject matter, challenge each other’s validity, and provide often contradictory guidance. In particular, with regard to women’s rights and freedom of religion, tribal law and the Islamic Sharia often seem to contradict the provisions of the 2004 constitution and Afghanistan’s international human rights obligations.⁶⁵

With 99% of the country being Muslim, the Sharia has a role as a common denominator between the formal and the informal system,⁶⁶ but its interpretation varies both by location and among authorities. Islamic legal scholars play an important role as custodians of Islamic law, and their relevance for the coherence of the legal system should not be underestimated. But 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.⁶⁷

a) *The Formal Legal System*

Until 1964 Afghanistan’s state-administered court system had essentially a dual structure, in which clergy-led religious courts applying the Sharia co-existed with state courts handling state law.⁶⁸ Since 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 law⁶⁹ and that courts may only refer to the Hanafi jurisprudence of Islamic law⁷⁰ when there is no provision of the Afghan Constitution or other laws applicable.⁷¹ But it also states that no law shall contravene Islam⁷² and prohibits amendment of this principle,⁷³ leaving the relationship between positive state law, international obligations, and Islamic law somewhat unresolved.

⁶⁵ Afghanistan is party to a number of human rights treaties, including the ICCPR, ICESCR, CAT, CRC, CEDAW, and the Rome Statute. Noticeably, under Islamic Law blasphemy and apostasy are punishable by death while Art. 18 of the ICCPR guarantees freedom of religion.

⁶⁶ See J Alexander Their, *Restablishing the Judicial System in Afghanistan* at 5 (Stanford Institute for International Studies Center on Democracy, Development and the Rule of Law Working Paper 2004), available at http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf.

⁶⁷ For a more complete account of Islam and Islamism in Afghanistan see Kristin Mendoza at <http://www.law.harvard.edu/programs/ilsp/research/mendoza.pdf>.

⁶⁸ 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 presents status, see Moschtaghi, *Organisation and Jurisdiction of the Newly Established Afghan Courts – The Compliance of the Formal System of Justice with the Bonn Agreement*, p. 535f., accessible at http://www.mpil.de/shared/data/pdf/moschtaghi_organisation_and_jurisdiction_of_newly_established_afghan_courts1.pdf.

⁶⁹ Art. 97 of the Afghan Constitution of 2004.

⁷⁰ The Hanafi school is the oldest of the four schools of thought (*Madhhabs*) or jurisprudence (*Fiqh*) within Sunni Islam.

⁷¹ Art. 130 of the Afghan Constitution of 2004.

⁷² Art. 3 of the Afghan Constitution of 2004.

⁷³ Art. 149 of the Afghan Constitution of 2004.

Court System⁷⁴

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.

The Supreme Court is the formal head of the judiciary.⁷⁵ Headed by the Chief Justice, it is constitutionally responsible for the organization and administration of the lower courts⁷⁶ and has as many managerial functions as judicial responsibilities.⁷⁷ Beside 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,⁷⁸ and has reserved itself the right to also review their consistency with the Islamic Sharia.⁷⁹

At the second level of the hierarchy are the Courts of Appeal based in each of the thirty-four provinces.⁸⁰ Each of the Courts of Appeal is headed by a Chief Judge and divided into different divisions. The Courts of Appeal oversee 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 Court⁸¹. A number of other national specialized courts also exist, among them the Courts for Offences against National Security, and the Central Narcotics Tribunal.

Afghan judges are appointed by the President based upon the recommendation of the Chief Justice. 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

⁷⁴ The Court System is regulated by the Constitution and the 2005 Law on the Organization and Authority of the Courts, last accessed on July 15, 2008 at <http://supremecourt.gov.af/PDFFiles/Law%20on%20Organization%20and%20Jurisdiction%20of%20Courts%20of%20the%20Judiciary,%20English.pdf>. Note that up to 2005 a four-tiered system was prescribed by law even though not functioning in practice.

⁷⁵ Art. 116 of the Afghan Constitution of 2004.

⁷⁶ See Art. 29 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, accessible at

<http://www.supremecourt.gov.af/PDFFiles/Law%20on%20Organization%20and%20Jurisdiction%20of%20Courts%20of%20the%20Judiciary,%20English.pdf>.

⁷⁷ See Their, *supra* note 66, at 10.

⁷⁸ Art. 121 Afghan Constitution of 2004 and Art. 24 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan, available at

<http://www.supremecourt.gov.af/PDFFiles/Law%20on%20Organization%20and%20Jurisdiction%20of%20Courts%20of%20the%20Judiciary,%20English.pdf>.

⁷⁹ 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.

⁸⁰ The “Courts of Appeal” prior to 2005 were known as “Provincial Courts”.

⁸¹ See Art. 40 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

order to be appointed as a judge.⁸² 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.⁸³

Afghan court hearings usually consist of three-judge benches. It should be noted that that judges often convene trials in their offices due not only to limited infrastructure, but also custom.

Sources of Law

The Afghan legal system is a mixed legal system. Under the 2004 constitution, the official courts shall apply, in principle, only positive law – that is law that has passed the formal legislative process – however, they also may consider Sharia law. An ever increasing body of laws has been put in place by the Afghan government.⁸⁴ Under the Afghanistan Compact, the legal framework shall have met its benchmarks by the end of 2010.⁸⁵ Constitutionally, only in the narrow segment of cases to which no formal law is applicable can decisions be based on the Hanafi interpretation of Islamic law,⁸⁶ or, in case only Shiites are involved, the Shiite interpretation.⁸⁷

There is currently a major Afghan-international effort underway to rewrite the Interim Criminal Procedure Code of Afghanistan.

Problems

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. Respect for the government's judicial institutions in rural areas remains very limited.⁸⁸

The court system struggles from logistical constraints as well as from a lack of qualified personnel, intimidation, corruption, and threats to the livelihood of judges.⁸⁹ 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 governmental actors involved in the administration of justice such as the police,

⁸² See Article 58 para 1 Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

⁸³ See: Article 59, para 2, Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

⁸⁴ 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.

⁸⁵ After the formal conclusion of the Bonn process that oversaw the reconstruction process from 2001 to 2005, the Afghanistan Compact was concluded at the London Conference on Afghanistan in 2006. In this agreement the United Nations, the Afghan Government and the international community established an external framework for international cooperation with Afghanistan for the following five years, setting various benchmarks by which progress in the areas of security, Rule of Law and economic development is to be measured. See at http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf.

⁸⁶ Article 130, Ch. 7. Art. 15 of the Afghan Constitution of 2004.

⁸⁷ Article 131 Ch. 7. Art. 16 of the Afghan Constitution of 2004.

⁸⁸ See The Asia Foundation: Afghanistan 2007: A Survey of the Afghan People, October 2007, last accessed June 17, 2008 at <http://www.asiafoundation.org/resources/pdfs/AGsurvey07.pdf>.

⁸⁹ A number of judges have been subject to directly targeted, often deadly, attacks.

prosecutors, and the correctional services. All of these factors impede the ability of the court system to address conflicts 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 law or customary law to cases, even though the Afghan Constitution has effectively limited the application of Islamic law⁹⁰ and does not recognize customary law as law at all.⁹¹

Even where sufficiently trained judges have access to legal resources, problems persist because the numerous regime changes since 1964 can make it difficult for courts to determine the applicable positive law. 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... [.]” For some laws, especially from the Taliban era, such inconsistency is fairly clear. 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 inconsistent with each other. This situation is bound to cause confusion. It is 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 around 600-1000 defense attorneys for the entire country.

The Afghan government continues to implement the Afghanistan Compact’s Rule of Law-benchmarks and is committed to alleviate the problems in the justice sector under the framework of the Afghanistan National Development Strategy (ANDS)⁹² and the more specific National Justice Sector Strategy in line with the Afghanistan Compact by the end of 2010.⁹³ The level of success of these efforts remains, however, uncertain.

b) The Informal Legal System

Due to the tribal structure of Afghan society, customary methods of conflict resolution play a significant role, particularly in rural areas. It has been estimated that more than 80 percent of social conflicts in Afghanistan are resolved by the non-governmental system.⁹⁴ These numbers can be explained by the fact that the loyalty of Afghans toward their family, village or

⁹⁰ See above,

⁹¹ See Art. 97 of the Afghan Constitution of 2004.

⁹² The ANDS covers the five-year period from 2008 to 2013 and was approved by the Afghan President and his Cabinet on April 21, 2008. It builds upon earlier strategy papers.

⁹³ See *Afghanistan Compact* at http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf For the National Justice Sector Strategy, see <http://www.and.s.gov.af/ands/jcmb/site/src/Meeting%20and%20Documents/seventh%20JCMB/files/III.%20Reports%20and%20Supporting%20Documents/National%20Justice%20Program%20-%20Rome%20Conference%20Follow%20up%20-%20English.pdf>. These links may also be helpful <http://www.rolafghanistan.esteri.it/ConferenceRol> and <http://www.state.gov/p/inl/rls/rm/106015.htm>

⁹⁴ UNDP, “Afghanistan Human Development Report 2007” p. 9, available at http://www.undp.fi/julkaisut/afghanHDR_complete.pdf. However, a poll conducted by the Asia Foundations suggests a shift in attitudes more favorable to the formal courts in the past three years, with large regional differences, see The Asia Foundation > Afghanistan 2007: A Survey of the Afghan People, October 2007, p. 71, last accessed at <http://www.asiafoundation.org/resources/pdfs/AGsurvey07.pdf> on July 17, 2008.

ethnic group traditionally far exceeds that to the central government in Kabul and that general reservations against taking legal recourse outside the tribal framework are deeply ingrained. However, in addition to tradition, there are many practical reasons for Afghans to favor the informal system: its accessibility, the speediness of its process, its reconciliatory effect, the lack of legitimacy and unenforceability of formal judgments, and the substantial corruption present in the state's institutions.

Quite typical of tribal legal systems, the defining features of the informal system of conflict resolution are its primary goals of restitution, collective reconciliation, and restoring the victim's honor and social harmony in contrast to the more retributive system of western justice. The primary means of conflict resolution are requesting forgiveness and compensation ('*Poar*' or blood money) in order to forego blood feuds, even though other forms of punishment do exist. Among the Pashtun tribes, compensation can include cash, services, animals, or even the transfer of women.⁹⁵

The informal system depends generally on consensus of the parties involved and its decisions are self-enforcing. However, social pressure or punishment with regard to those failing to abide to decisions by the peer community ensures reasonably effective enforcement.

The Councils

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 will most commonly consist exclusively of older, respected men. Cases will be 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 also is an appellate structure. A disputant dissatisfied with the decision of a *jirga* may request that another *jirga* review the case.

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 as well as the interpretation of the Sharia vary by tribe and geography. The best known of the customary rules is the *pushtunwali*, the traditional honor code of the Pashtun people.

Problems

There are significant problems with the substance of some of the decisions generated by the informal system: Woman and children are often barred from attendance of council meetings and effectively cut off from seeking justice, and decisions have included the practice of marriage of a woman from an offender's family to a close relative of the victim, and there has been a habitual denial of women's legal rights to inheritance. Decisions that are inconsistent with the guarantees under the Afghan Constitution, state laws, or Afghanistan's human rights obligations, undermine state authority and contradict the policy goals of the international community to

⁹⁵ The latter being particularly practiced in Pashtun tribes.

establish human rights standards. Any form of non-governmental law enforcement without consent of the involved challenges directly the monopoly on the use of force essential to governance. In those ways, the informal system threatens to de-legitimize state-building efforts.

4. References and Further Reading

a) Afghanistan Development Efforts

Afghanistan National Development Strategy, including JCMB reports: <http://www.ands.gov.af/>

ACBAR Guide to ANDS: http://www.acbar.org/display.php?page_id=74

Benchmark Status Report: <http://www.ands.gov.af/ands/jcmb/site/index.asp?page=j8>

International Crisis Group, Afghanistan's Endangered Compact:

<http://www.crisisgroup.org/home/index.cfm?l=1&id=4631>

Paper on Provincial Justice Coordination Mechanism:

<http://www.rolafghanistan.esteri.it/NR/rdonlyres/93D822B1-3443-40A1-BB9D-E23FC879CEE7/0/PaperonProvincialJusticeCoordinationMechanism.pdf>

National Justice Program Rome Conference Follow-Up:

<http://www.ands.gov.af/ands/jcmb/site/src/Meeting%20and%20Documents/seventh%20JCMB/files/II.%20Reports%20and%20Supporting%20Documents/National%20Justice%20Program%20-%20Rome%20Conference%20Follow%20up%20-%20English.pdf>

Ashraf Haidari, Paris Conference: [http://www.ia-](http://www.ia-forum.org/Content/ViewInternalDocument.cfm?ContentID=6295)

[forum.org/Content/ViewInternalDocument.cfm?ContentID=6295](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

DOS Inspector General's Report on RoL Programs in Afghanistan (Jan 08):

<http://oig.state.gov/documents/organization/106946.pdf>

House Committee Hearings: <http://nationalsecurity.oversight.house.gov/story.asp?ID=2006> (including detailed description by each of the agencies of their programs)

Secretary General's Report:

<http://daccessdds.un.org/doc/UNDOC/GEN/N08/407/86/PDF/N0840786.pdf?OpenElement>

For a number of reports on Afghanistan: <http://milnewstbay.pbwiki.com/CANinKandahar-Bkgnd>

b) 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>

Afghanistan Legal Documents Exchange Center, Translations of Afghan Laws, available at <http://www.afghanstantranslation.com/>

- Hossein Gholami, *Basics of Afghan Law and Criminal Justice*, available at http://www.law.yale.edu/library/WebFiles/PDFs/Basics_of_Afghan_Law_and_Criminal_Justice-English.pdf
- The Clash of Two Goods – State and Non-State Dispute Resolution in Afghanistan (2006) http://www.usip.org/ruleoflaw/projects/clash_two_goods.pdf
- The Customary Laws of Afghanistan – A Report by the International Legal Foundation (2004) http://www.theilf.org/ILF_cust_law_afgh_10-15.doc
- Justice in Afghanistan, Rebuilding Judicial Competence After the Generation of War (2007) http://www.mpil.de/shared/data/pdf/armytag-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.icj.org/IMG/pdf/doc-51.pdf>
- Rebuilding the Judicial Sector in Afghanistan: the role of customary law (2006) http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf
- Official Site of the Afghan Ministry of Justice <http://www.moj.gov.af/>
- Official Site of the Afghan Supreme Court <http://www.supremecourt.gov.af/>
- 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_jurisdiction_of_newly_established_afghan_courts1.pdf
- Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan (2006) http://www.usip.org/ruleoflaw/projects/barfield_report.pdf
- Development Report, Bridging Modernity and Tradition: Rule of Law and the Search for Justice (2007) [http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/RMOI-793N8P-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2007.nsf/FilesByRWDocUnidFilename/RMOI-793N8P-full_report.pdf/$File/full_report.pdf)
- The customary law of Afghanistan – A Report by the International Legal Foundation <http://theilf.org/Customary%20Laws.pdf>
- Afghan Customary Law and its relationship to Formal Judicial Institutions. <http://www.usip.org/ruleoflaw/projects/barfield2.pdf>

B. Iraq

1. International Framework

Unlike Afghanistan, there is no larger UN-organized division of rule of law tasks among lead nations in Iraq. Given the absence of UN assistance and other substantial international presence, the task of post-conflict operations, including rule of law, fell almost exclusively to the United States. According to a 2005 assessment by the State Department Inspector General, “A fully integrated approach to rule of law programs in Iraq is essential and does not exist at

present.⁹⁶ The UN now maintains a specific operation for Iraq (the United Nations Assistance Mission for Iraq), as do the European Union and several NGOs.⁹⁷ However, with the continued insecurity, few non-military international players are involved in rule of law operations.

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

Because the coalition forces served as occupiers of Iraq, US Judge Advocates have at times been required to not only help plan for rule of law reforms, but also to operate the Iraqi justice system.⁹⁸ In the early days of the war, that effort was undertaken by division SJA offices as well as Judge Advocates serving in CA brigades and battalions.⁹⁹ The US military was authorized to create a governing body, the Coalition Provisional Authority (CPA), for Iraq until a formal indigenous government could be stood up. The CPA maintained authority over all legal, political practical, economic, and security activities in Iraq.

DOD rule of law efforts continue to be operated through unit SJA offices. In addition, rule of law efforts are conducted through PRTs, even more so than in Afghanistan. As a result, the efforts vary widely based on the needs of individual locations, from judicial training programs to improving the computer infrastructure used by local courts and police as described in some of the vignettes contained in Chapter XI.

b) US Embassy Baghdad and Interagency Coordination

As described in section III.D, the US Embassy Country team is where the detailed and continuous coordination occurs. The coordination structure for Iraq has varied during the course of operations.¹⁰⁰ The US Embassy in Baghdad is currently the largest in the world, having more personnel and more agencies represented than any other US Embassy.

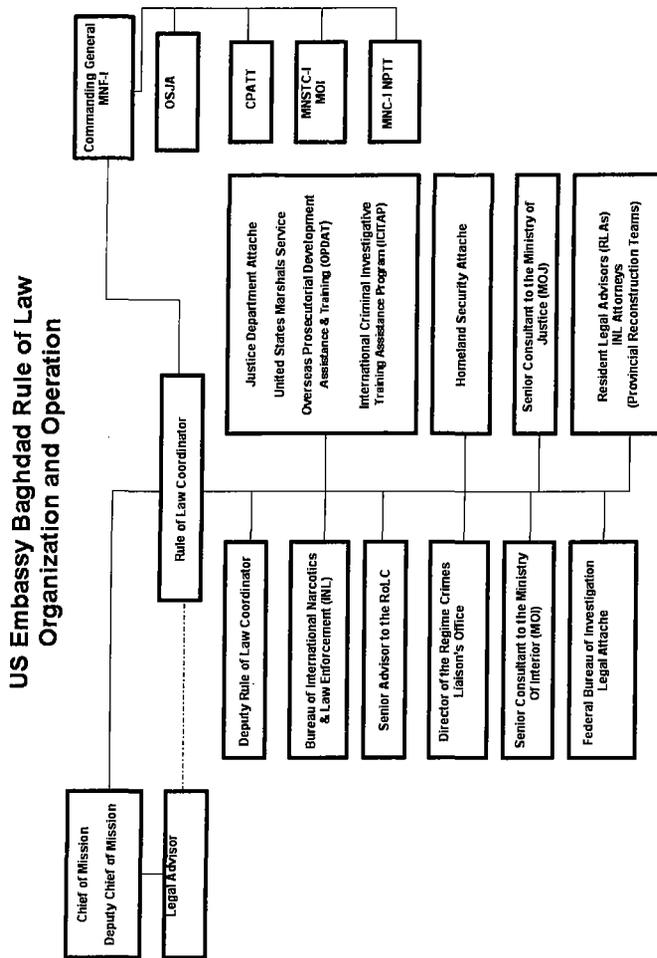
⁹⁶ OFFICE OF THE INSPECTOR GENERAL, INSPECTION OF RULE-OF-LAW PROGRAMS, EMBASSY BAGHDAD 1 (2005), <http://oig.state.gov/documents/organization/55815.pdf>.

⁹⁷ MNF-I (OSJA) Rule-of-Law Programs in Iraq: March 2006 Inventory 5-7 (2006) [hereinafter MNF-I Rule-of-Law Inventory].

⁹⁸ OEF/OIF, VOL. II, *supra* note 2, at 253.

⁹⁹ *Id.* at 254-55.

¹⁰⁰ 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 Sept. 1, 2008). 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, 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



US Embassy Iraq – Rule of Law Organization

As can be seen from the organizational chart above, within the Embassy is a Rule of Law Coordinator (RoLC). The RoLC coordinates the efforts of individuals in the US Embassy, service members assigned to MNF-I and relevant members of the Iraqi Ministry of Interior and Ministry of Justice.

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 Sept. 1, 2008).

Rule of Law Reporting in MNF-I

Every two weeks, every subordinate sector in MNC-I provides a Bi-weekly Rule of Law Report. This is a narrative composed of rule of law events over the past two weeks, rule of law events planned for the next two weeks, Ongoing Projects and Issues. It is generally a 25-page report that is then sent to all the key players in coalition rule of law activities in Iraq, including the US Embassy, DOS MNF-I, subordinate units, and separate commands. This document compliments the less-specific assessments provided for MNC-I Commander and provides a host of important information on ongoing rule of law projects.

2. *Provincial Reconstruction Teams*

The first PRT in Iraq began operations in November 2005. In inaugurating that first PRT, Secretary of State Condoleezza Rice said these new entities would “marry our economic, military, and political people in teams to help local and provincial governments get the job done.”¹⁰¹ According to their official mission statement in the PRT handbook (November 2006), the original teams were to “assist Iraq’s provincial governments with developing a transparent and sustained capacity to govern, promoting increased security and rule of law, promoting political and economic development, and providing provincial administration necessary to meet the basic needs of the population.”¹⁰²

PRTs in Iraq were modeled on similar groups operating in Afghanistan. The former U.S. Ambassador to Iraq, Zalmay Khalilzad, was credited with bringing the idea for PRTs from his previous assignment in Kabul.¹⁰³ In fact, PRTs in Afghanistan bore little resemblance to those in Iraq. U.S. PRTs established during 2006 in Iraq were led by a senior State Department official and composed primarily of civilian personnel, unlike those previously described for Afghanistan which are led by the US military. Unlike Afghanistan, where many of the PRTs are operated by other nations, only three coalition partners, Britain, Italy, and South Korea, operate PRTs in Iraq. Moreover, the emphasis of PRTs in Iraq is on shaping the political environment rather than building infrastructure as in Afghanistan.¹⁰⁴

The initial PRTs included representatives from the State, Justice, and Agriculture Departments and USAID, a USAID commercial-contract firm, plus Army Civil Affairs teams and other military personnel. U.S. military forces or commercial contractors provided security. PRTs resided at either an REO or a military FOB, where the host installation provided force

¹⁰¹ Robert Perito, Provincial Reconstruction Teams in Iraq, USIP Special Report 185, March 2007, at <http://www.usip.org/pubs/specialreports/sr185.pdf> (last visited August 10, 2008).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Miles, *supra* note 48, 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.*

protection. During the first year of PRT operations, there were many obstacles that hindered PRT operations, from the provision of security, to the lack of basic logistic support.¹⁰⁵

The hope behind the PRTs was that PRTs could bolster moderates, promote reconciliation, support counterinsurgency operations, foster development, and build the capacity of Iraqi government officials to perform their duties. New PRTs work at the city, district, and neighborhood level. The goal is to create areas where moderates will have political space to operate and violent extremists can be brought under control.

In 2007, the PRT program in Iraq was expanded and revised somewhat, with the standing up of *embedded* PRTs – PRTs embedded with the BCTs. The idea behind the new PRTs was to allow for more unity of effort between the goals of the BCT and the activities of the PRT. The critical distinction between newer ePRTs and original PRTs is that ePRTs focus on Iraq’s district level governments, while the original PRTs work predominately with provisional governments.

In theory, the BCT and PRT are one team, which receives guidance from both the U.S. ambassador in Baghdad and the commander of MNF-I. The BCT commander takes the lead on issues related to security and movement. The PRT leader from the State Department has responsibility for political and economic issues. Where a PRT is either embedded in or co-located with a BCT, the BCT provides security, life support, and operational support for the PRT. PRTs are composed of State Department and USAID Foreign Service officers and State-provided experts in subject matters, such as agriculture, business development, city management, and governance. Other agencies, including the Department of Justice and Agriculture, provide subject matter experts to serve on the teams. Additionally, the Department of Defense provides service members to fill select PRT billets (Deputy Team leaders for example), as well as contracted bilingual, bicultural advisors. Military Civil Affairs units also work closely with PRTs throughout Iraq. The composition of each individual team varies according to the needs in the particular area of operations and the requests of the PRT team leader. According to a Memorandum of Agreement between DOS and DOD, PRT members in embedded and co-located teams (the vast majority) travel with military movement teams under DOD security regulations. This arrangement makes it easier for civilian PRT members to work “outside the wire” and has increased PRT contact with Iraqi counterparts. Beyond “building sustainable capacity,” a term that refers to the “transfer of skills and knowledge from Coalition Forces to the Iraqi people,” there is no formal agreement among government agencies in Washington about what the PRTs are to accomplish. Ambassador Khalilzad and Multinational Force Commander General George Casey issued an “initial instructions” telegram establishing the PRTs, but no Washington interagency-approved doctrine or concept of operations governed the first PRTs in Iraq.¹⁰⁶ “Nor are there agreed objectives, delineation of authority and responsibility between the civilian and military personnel plans, or job descriptions.”¹⁰⁷

The U.S. Embassy Office of Provincial Affairs (OPA) is responsible for PRTs in Iraq. OPA coordinates PRT activities and provides administrative support, including all functions relating to civilian personnel. MNF-I provides military personnel and supports PRTs operating from U.S. military bases – the vast majority of teams. In practice the first ten PRTs had considerable latitude in determining their own priorities and method of operation, based on local

¹⁰⁵ *Id.*

¹⁰⁶ See Perito, *supra* note 101.

¹⁰⁷ *Id.*

conditions, available resources, logistic support, and personalities. This allowed for flexibility but also required PRT leaders to improvise.¹⁰⁸

A model PRT would have the following complement of personnel: State Department, six; senior U.S. military officers and staff, three; U.S. Army Civil Affairs soldiers, twenty; Agriculture Department, one; Justice Department, one; USAID Contractor for governance issues - RTI International, three; USAID, two; and a military or contract security force of indeterminate size, depending on local conditions.¹⁰⁹ Although the PRTs work closely with the Military Movement Teams and the CA teams, neither would be considered as part of the PRT. Most PRTs lack their full complement of personnel, however, and there are time gaps between assignments. Nonetheless, the program is operating at nearly 95 percent personnel capacity and expects to be at 100 percent by early fall 2008.¹¹⁰

PRT operations differ depending upon location, personnel, environment, and circumstances. In general, however, staff members assigned to PRTs serve the following functions¹¹¹:

- **Team Leader (TL):** Usually, a senior U.S. foreign service officer, the team leader represents the State Department, provides leadership, and chairs the executive steering committee, which sets priorities and coordinates activities. The TL meets with the provincial governor, the provincial council, mayors, tribal elders, and religious figures and is the primary contact with the national coordinating team and other officials in the U.S. Embassy in Baghdad. The TL is responsible for relations with the host institution and for ensuring that logistic and administrative arrangements are working properly. The TL's personality and experience strongly influence the PRT's objectives, activities, and success. As a civilian the TL does not command the PRT's military personnel, who remain subordinate to the commander of MNF-I.
- **Deputy Team Leader (DTL):** Normally an Army lieutenant colonel, the DTL serves as the PRT chief of staff and executive officer, managing daily operations, coordinating schedules, and liaising with the FOB commander on logistics, transportation, and security.
- **MNF-I Liaison Officer (LNO):** A senior military officer, the LNO coordinates PRT activities with the division and FOB commander. These include activities related to intelligence, route security, communication, and emergency response in case of attacks on convoys. The LNO tracks PRT movements and coordinates with other U.S. military units in the area of operations.
- **Rule of Law Coordinator (ROLC):** One or more attorneys from DOJ, DOS, or DOD monitor and report on the Iraqi judicial system and promote access to justice for Iraqi citizens. They visit judicial, police, and corrections officials and provide reports on rule of law activities in the provinces to the U.S. Embassy. The program emphasizes improvement of the judiciary at the provincial level.
- **Iraq Provincial Action Officer (PAO):** Usually a State Department foreign service officer, the PAO is the primary reporting officer. He meets frequently with local authorities and provides the embassy with daily reports on PRT activities, weekly summaries, analysis of

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

local political and economic developments, and reports on meetings with local officials and private citizens. Political and economic reporting by State Department officers in PRTs is valued because it provides firsthand information on conditions outside the Green Zone. The PAO assists others in the PRT with promoting local governance.

- **Public Diplomacy Officer (PDO):** A State Department foreign service officer, the PDO is responsible for press relations, public affairs programming, and public outreach through meetings at the PRT with local officials and escorting visitors to the PRT and its area of operations.
- **Agricultural Adviser (AGA):** A representative of the U.S. Agriculture Department, the AGA works with provincial authorities to develop agricultural assistance programs and promote agriculture-related industries.
- **Engineer (ENG):** A representative of the U.S. Army Corps of Engineers, the ENG trains and mentors Iraqi engineers working on provincial development projects. The ENG assists the PRT Provincial Reconstruction Development Committee in conducting project assessments, designing scope-of-work statements for contracts with local companies, site supervision, and project management. The ENG advises the TL on reconstruction projects and development activities in the province.
- **Development Officer (DO):** The USAID representative coordinates USAID assistance and training programs and works with provincial authorities to promote economic and infrastructure development. The DO coordinates development-related activities within the PRT and supervises locally hired USAID staff. The DO is usually a development specialist working under a personal services contract with USAID. The agency is working internally to obtain authority for the representative to participate in approving all USAID projects and coordinating all USAID activities within the province.
- **Governance Team (RTI):** Under a USAID contract, RTI International provides a three-person team that offers training and technical advice to members of provincial councils and provincial administrators to improve the operation, efficiency, and effectiveness of provincial governments. The team gives hands-on training in providing public services, finance, accounting, and personnel management. RTI International personnel take guidance from the USAID representative but function under a national contract administered from the embassy in Baghdad. RTI International maintains offices (nodes) in major cities that can provide additional specialists on request.
- **Bilingual Bicultural Adviser (BCA):** Normally an Iraqi expatriate with U.S. or coalition citizenship under contract to the Defense Department, the BCA serves as a primary contact with provincial government officials and local citizens. Advisers must have at least a BA degree and speak both English and Arabic. They also advise other PRT members on Iraqi culture, politics, and social issues.

3. *Iraqi Criminal Law and Criminal Procedure*

a) *Legal History*

Iraq has a long and complex history as the center of Islamic jurisprudence. Practice developed initially from laws promulgated by city-states,¹¹² and multiple conquerors brought their own respective legal custom and tradition.

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 included aspects of both Islamic law and an Ottoman Code. As the 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 and led to the generation of legal codes¹¹³ 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 who were almost exclusively Sunni in religion and Arab in ethnicity. The British formed a government to administer Iraq, adopting a constitutional monarchy with a parliament and a king.¹¹⁴ 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.

Thereafter, there were several attempts at legal reform. A quest for codification began in 1933 and, after several interruptions, reached completion in the early 1950s. Abdul al-Razzar Al-Sanhuri, a French-educated Egyptian legal scholar who had drafted the Egyptian legal code,¹¹⁵ oversaw the process. 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 can turn to the Islamic Sharia to decide the merits of the dispute.

In the latter half of the twentieth century, following a series of coups d'etat, the Ba'ath party led by Hassan al-Bakr¹¹⁶ 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

¹¹² 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 broadly understood by the people of the region. The carving of the laws into stone monuments ensured they were publically available and understood.

¹¹³ 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.

¹¹⁴ The British appointed as the first monarch Prince Faisal Hussein, a member of an influential family in the Arab world, but not an Iraqi.

¹¹⁵ The Egyptian code was the model for the legal systems of Libya, Qatar, Sudan, Somalia, Algeria, Jordan, and Kuwait.

¹¹⁶ Al-Bakr was the head of the Revolutionary Command Council. Saddam Hussein was al-Bakr's vice president.

pillars. These governed civil law, civil procedure, commercial law, criminal law, and criminal procedure.¹¹⁷

b) *Judicial Structure and Division of Powers - Penal system:*¹¹⁸

The Iraqi Criminal Courts operate on a hierarchical system from a supreme court (the Court of Cassation) to appellate courts and the courts of first instance. All are nationally controlled and the 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 province.

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 maximum penalty is 5 years or less.

There are 14 appellate regions nationwide, largely based on the geographic provincial boundaries. These serve as courts of appeal for inferior courts.¹¹⁹ Moreover, the Federal Court of Cassation hears appeals from Courts of Appeal and the Central Criminal Court of Iraq (CCCI).¹²⁰

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. Those aged 14-18 may receive a maximum of 5 years.

As in most civil systems, Investigative Courts 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.

c) *Sources of Iraqi Criminal Law*

Following the establishment of the Coalition Provisional Authority following the US-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

¹¹⁷ 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. Law on Criminal Proceedings No 23 of 1971.

¹¹⁸ 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 US Department of Commerce – see http://www.trade.gov/static/iraq_prewarcommmlaw.pdf.

¹¹⁹ See generally Book Four and Para 177 Law on Criminal Proceedings No 23 of 1971.

¹²⁰ On 22 April 2004, CPA Order 13 created the CCCI. The intent was for it to serve as a complimentary court to assist the existing misdemeanor and felony courts. Originally based in Baghdad, the CCCIs now holds court in most of Iraq 18 provinces. 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 2,500 cases. This includes many cases referred by TF 134.

concerned, this was the result of two CPA Orders. CPA Order No 7¹²¹ reintroduced the Penal Code of 1969 and CPA Memo No 3¹²² reintroduced the Law of Criminal Procedure of 1971.

The following is a working summary of both codes aimed at Judge Advocate practicing in the rule of law arena.

*d) Iraqi Criminal Procedure: Law of Criminal Proceedings with amendments No. 23 of 1971*¹²³

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.

The Investigation

Initiation of criminal proceedings occurs through an oral or written complaint to an examining magistrate, police investigator or official, or member of the judicial system. Examining magistrates¹²⁴ or investigators acting under their supervision,¹²⁵ 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 information concerning an offense have a requirement to immediately record the informant's statement and immediately inform the examining magistrate, further emphasizing the role of the examining magistrate.

The respective roles undertaken by examining magistrates and the police varies tremendously in Iraq today. Some units report the police played a dominant role in the investigative process. Others suggest the examining magistrate is intimately involved in a majority of the cases.

The basic obligations of the investigators commences with the recording of the deposition of the informant. Next is the testimony of the victim and other witnesses and anyone else from whom the parties or magistrate wish to hear.¹²⁶ When doing so, each witness over fifteen years old gives evidence under oath.¹²⁷

The process by which evidence collection occurs often happens either in open court or in the judge's chambers. The defendant has the right to be present and make comments. Additionally, subject to the consent of the magistrate, the defendant can put questions to the witness.¹²⁸ Indeed, the investigator can compel the complainant or defendant to co-operate in a physical examination, or in the taking of photographs or samples.¹²⁹

¹²¹ See http://www.cpa-iraq.org/regulations/20030610_CPAORD_7_Penal_Code.pdf

¹²² See http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf

¹²³ See law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf

¹²⁴ Para 51 Law on Criminal Proceedings No 23 of 1971

¹²⁵ Para 52 Law on Criminal Proceedings No 23 of 1971

¹²⁶ Para 58 Law on Criminal Proceedings No 23 of 1971

¹²⁷ Para 60 Law on Criminal Proceedings No 23 of 1971

¹²⁸ Para 63 B Law on Criminal Proceedings No 23 of 1971

¹²⁹ Para 70 Law on Criminal Proceedings No 23 of 1971

Routine searches require a warrant issued by examining magistrate,¹³⁰ except in cases of necessity.¹³¹ There are also provisions for the preservation of evidential integrity.

Arrest and Detention¹³²

For the majority of offenses, a warrant from a court or judge is required for arrest.¹³³ The police have a duty, however, to arrest those carrying arms openly in violation of the law. Moreover, any person may arrest another accused of a felony or misdemeanor, or if they witness the commission of an offense.¹³⁴

If the suspected offense carries imprisonment as a possible sentence, the investigative judge may order the detention of the suspect for a period of 15 days. The investigative judge may renew this decision at the termination of the period. 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.¹³⁵

The total period of pre-trial detention should not exceed one quarter of the maximum sentence for the offense, and should not in any case exceed 6 months. Release on bail is possible if the judge determines 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 the Iraqi Courts are able to dispose of cases has hampered efforts to adhere to these strict time limits.

A wide-ranging amnesty law introduced in February 2008, however, has the potential to ease the burdens. It may further reduce the numbers of those in custody both waiting for trial and in post-conviction detention.

Questioning the Accused

The examining magistrate or investigator should question the accused within 24 hours of arrest and record the statement of the accused. If the statement includes a confession, the magistrate must record the statement himself, read it back, and he and the accused must both sign it. CPA Memo 3 incorporated into Iraqi Law the right to silence and the right to legal representation.¹³⁶

The law does not permit the use of illegal methods to influence the accused or extract a confession. These include mistreatment, threats, injury, enticement, promises, psychological influence, and the use of drugs or intoxicants.¹³⁷

¹³⁰ Para 72 – 86 Law on Criminal Proceedings No 23 of 1971

¹³¹ 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.

¹³² Para 92 – 120 Law on Criminal Proceedings No 23 of 1971

¹³³ 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.

¹³⁴ Para 102 Law on Criminal Proceedings No 23 of 1971

¹³⁵ Various reports from human rights organizations have documented the abuse and torture of those in police detention – *see* Amnesty International – Iraq: Beyond Abu Ghraib: Detention and Torture in Iraq, 6/3/06; also Human Rights Watch – End Interior Ministry Death Squads, 29/10/2006.

¹³⁶ CPA Memo 3, Section 4c.

¹³⁷ Para 127 Law on Criminal Proceedings No 23 of 1971

Trial

At the end of the investigation, the magistrate decides if there is an offense over which he has authority and if there is sufficient evidence for a trial. If there is sufficient evidence, the magistrate transfers the case to the appropriate court.¹³⁸ If the evidence does not meet the requisite standard, authorities must release the accused or return the accused confinement and order further investigation..

In cases of sufficient evidence, the file next goes to the prosecutor, who will formally frame the charges and present them charges to the trial judge. The prosecutor may refer the file back to the examining magistrate if it is necessary to collect additional evidence.

The burdens and standards of proof are similar to common law systems. The Iraqi Law requires a “sufficiency of evidence.”¹³⁹ 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 the examining magistrate’s investigation of most of the evidence. Rather, the trial judge tends to focus effort on certain aspects of the evidence with which he or she wishes to take issue.¹⁴⁰

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.¹⁴¹ CPA Memo 3 deleted the provision that a refusal to answer can be considered as evidence against the defendant.¹⁴²

While the right to counsel is enshrined in the criminal code, many counsels will not have 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 two sources.¹⁴³ 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, as something akin to 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.

¹³⁸ Para 130 Law on Criminal Proceedings No 23 of 1971

¹³⁹ Para 182 Law on Criminal Proceedings No 23 of 1971

¹⁴⁰ Para 170 Law on Criminal Proceedings No 23 of 1971

¹⁴¹ Para 179 Law on Criminal Proceedings No 23 of 1971

¹⁴² CPA Memo 3, Section 4g

¹⁴³ Para 213B Law on Criminal Proceedings No 23 of 1971

*e) The Substantive Criminal Law: Iraqi Penal Code – No 111 of 1969*¹⁴⁴

In 1918, the Supreme Commander of British Forces of Occupation in Iraq drew up a penal code, “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.

f) Recent Amendments

Of the more recent amendments to the substantive criminal law, perhaps two are worthy of detailed comment.

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.”¹⁴⁵ The sanctions for such offenses are understandably draconian.

Article 4 stipulates anyone convicted of terrorist activity receive a death sentence. Those who hide information about a terror activity or information that could lead to the arrest of terrorists are to receive life imprisonment.

Amnesty Law¹⁴⁶

Perhaps the most significant amendment to the legal landscape was a new law passed on February 27, 2008, revolutionizing the existing amnesty laws. The new law allows for those under investigation for or convicted of the majority¹⁴⁷ 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.

Of the offenses *not* covered by the amnesty are terrorist activity that caused death or permanent disability, drug related offenses, and homosexuality (the latter being in line with Islamic thought).

The amnesty law also states individuals detained for 6 months and not brought before examining magistrate must receive amnesty, as must those detained for 12 months without the

¹⁴⁴ See <http://www.worldlii.org/catalog/54829.html>

¹⁴⁵ See Art. 1 Terrorism Law 2005.

¹⁴⁶ Law No 19 of 2008.

¹⁴⁷ The law specifies that those sentenced to death or convicted of thirteen listed offenses are NOT eligible to apply under the amnesty law.

transferring of their case to the appropriate court. This applies regardless of the suspected crime. The practical effect of the law is unclear, though. Indications are that the Iraqi Ministries of Justice, Interior, and Defense are responding very slowly, if at all, to the thousands of release orders they have received.

4. *Engaging Iraqi Judges*

Coalition forces' ability to effectively conduct rule of law activities 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 coalition 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 rule of law 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. Similar to other Arabs, Iraqi judges expect a level of respect and honor. A failure by coalition forces to engage with the requisite amount of respect will result in weaker relationships and will limit accomplishments. Conversely, the willingness of coalition forces to be sensitive to Iraqi and Arab cultural mores makes all the difference in the development of the relationship.¹⁴⁸ The educated Iraqi judiciary has upfront expectations and assumes that coalition forces are educated and sophisticated enough to engage properly. These expectations must be maintained.

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. They will help achieve reciprocal treatment and judicial actions consistent with coalition goals.

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

¹⁴⁸ See *Arab Culture Awareness: 58 Fact Sheets*, TRADOC DCSINT Handbook No.2, January 2006.

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 the chief provincial judge for most projects. This dynamic also matters at the brigade level. BCT rule of law 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 from coalition forces, the better the results will be. However, it is impractical to have BCT commanders consistently engage with the courts. Frequently, judge advocates will be the primary engagers.¹⁴⁹ In areas where there were fewer forces, the servicing Provincial Reconstruction Team (PRT) rule of law coordinator would take the lead. Even more important than seniority, however, is the repeated involvement of the same personnel in engaging judges. Soldier paralegals also serve an important function for engagement strategy. At MND-C, paralegals accompanied rule of law officers on most engagements and assisted by simultaneously engaging court administrators and other support staff. During engagements that involved tasks such as computer training, the paralegal interacted one-on-one with Iraqi judges.¹⁵⁰

Lower court judges are required to report to their chief provincial or chief appellate judges, often in writing. The Iraqi court system has tremendous documentation and scrupulous record-keeping. Lower court Iraqi judges fully brief to their superiors all contact with coalition forces. It is respectful and advisable for the coalition 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 coalition 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 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 coalition engager 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.

¹⁴⁹ One possibility at the brigade level is to have the Deputy BCT Commander as the engagement lead for their local court; that approach has worked in previous BCT engagements.

¹⁵⁰ The Soldier paralegal is also invaluable for assisting with engagement security by sharing knowledge of physical layout of courthouses and court personnel with the judge's personal security detail. The value of the paralegal can be seen in every aspect of rule of law operations. At MND-C, the ability to leverage paralegal assets was key to the mission's success.

Iraqi judges are proud of their legal heritage and will routinely have prints or tapestries of Hammurabi on their walls.¹⁵¹ 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 would likely be seen as inappropriate.

Judges in Iraq have not historically had significant relationships with the military (Iraqi Army and National Police). Similar to Western judges, they have a certain comfort level with the 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.¹⁵² Coalition 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 not only shows respect, it shows the capability to move around the operating environment – the ability to leverage a convoy of trucks and personnel. Freedom of movement is symbolic of power and authority, both of which are respected in Iraq. It also supports the perception of security. One of the recurring problems for judges is lack of adequate personal security. Coalition presence at the courthouse helps show adequate and improving security. Finally, it is the best way to gauge the status of the court.

While coalition 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 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. Don't go right into business as it is contrary to the Iraqi way. Spend time asking the judge about current events and his opinion of coalition forces or Iraqi Security Forces, 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

¹⁵¹ 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.

¹⁵² 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.

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 so is part of the “righteous path” and consistent with the Qur’an’s teachings.¹⁵³ 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 deserts. 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 coalition forces 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.¹⁵⁴ 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.¹⁵⁵ 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 Arabic perception that “America never keeps its promises.” Iraqi judges are very conscious of coalition efforts, whether they are sustained engagement efforts or tangible rule of law 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 rule of law 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.

¹⁵³ See “Understanding Islam” at www.understanding-islam.com (last visited 22 August 2008).

¹⁵⁴ Some coalition personnel believe that non-Iraqi Arabs (e.g., Egyptian, Moroccan) are more effective with Iraqi judges due to continued issues of sectarian mistrust.

¹⁵⁵ JODIE R. GORRILL, *DOING BUSINESS IN IRAQ: IRAQI SOCIAL AND BUSINESS CULTURE* (2007).

Investing time and effort in judicial relationships is likely to remain one of the most critical parts of reinforcing the rule of law.

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X. Rule of Law Narratives

Editors' Note: This chapter contains the experiences of two Judge Advocates who conducted rule of law missions in Iraq and Afghanistan during 2007 and 2008. It is a description of their experience written from their own perspective. The accounts in this chapter and the next are included in this Handbook to provide some flesh to the abstract discussion of concepts throughout the Handbook and to illustrate that rule of law missions follow no set format or guidelines, that the implementation for every rule of law mission will vary according to the operational environment and political/military context of the mission and that Judge Advocates are performing (and will continue to perform) the rule of law mission because commanders see them as trained and prepared to deal with the unique issues presented in the operational environment dominated by rule of law concerns.

A. Rule of Law Development in Counter-Insurgency Operations: An Afghanistan Case Study*

1. Background

The 4th Brigade Combat Team, 82nd Airborne Division deployed to Regional Command – East (RC-East) in southeastern Afghanistan in January 2007. During the following fifteen months, the Brigade refined its operational approach to the counterinsurgency fight for Afghanistan to include development of the rule of law sector in Afghanistan. The Brigade's area of operations (AO Fury) encompassed six provinces spanning over twenty-seven thousand square kilometers in the southeastern region of Afghanistan along a porous border with ungoverned northwestern frontier territory of Pakistan.¹ For the past several years of the current conflict, this rugged and isolated region has been a sanctuary for insurgents;² for thousands of years, armies operating in this region have been forced to battle foes from within and outside of the region.³ The region's populace is predominantly Pashtuns who practice the Sunni branch of Islam.⁴

* MAJ Robert A. Broadbent served as the Brigade Judge Advocate for the 4th Brigade Combat Team, 82nd Airborne Division in Afghanistan from January 2007 to January 2008.

¹ The Brigade assumed responsibility of the Paktya, Paktika, Khost, Ghazni, Logar and Wardak Provinces. The land area was approximately the size of the state of Texas with significant geographical features ranging from 20,000 foot mountains comprising the foothills of the Hindu Kush to vast high desert regions inhabited only by nomads.

² Seth G. Jones, *The Rise of Afghanistan's Insurgency: State Failure and Jihad*, INTEL SECURITY (Spring 2008), at 29-34. See also *CIA Director: Afghanistan-Pakistan Border Is 'Clear and Present Danger'*, Associated Press, (30 Mar. 2008), available at <http://www.foxnews.com/story/0,2933,343332,00.html> (quoting CIA Director Michael Hayden, who stated that "The situation on the Afghanistan-Pakistan border presents clear and present danger to Afghanistan, Pakistan, the West in general and United States in particular.")

³ See generally Jayshree Bajoria, *The Troubled Afghan-Pakistani Border*, (29 Nov. 29, 2007), Council on Foreign Relations Website, available at

http://www.cfr.org/publication/14905/troubled_afghanpakistani_border.html.

⁴ See CIA World Fact Book Afghanistan Country Page, available at <https://www.cia.gov/library/publications/the-world-factbook/print/af.html> (last visited 1 June 2008).

Coalition operations in the region over the course of the past five years had predominantly focused on kinetic or lethal operations to eliminate remnants of the former Taliban regime from within Afghanistan and terrorist networks operating in Afghanistan with sanctuaries within Pakistan.⁵ Numerous factors complicated initial efforts to define our battlespace and refocus our efforts.⁶ The previous unit responsible for the AO made a conscious decision to shift the nature of the operation to more closely align it with counterinsurgency (COIN) principles. Conducting these operations within a COIN methodology at first proved to be challenging but was incredibly effective as the methodology came to be applied throughout the area of operations at the tactical level. During our tenure, the COIN methodology described below was refined to enable the Brigade to create lasting effects not just from the strategic perspective but also from the psychological perspective of the Afghan populace. The commander identified rule of law as a central aspect of his COIN methodology. Lacking dedicated resources to implement rule of law as part of his COIN strategy, he turned to the BCT JA with the task to create immediate effects in the rule of law sector. The Brigade legal team had primacy in planning, coordinating, and executing the initial rule of law projects. As the Brigade staff observed the success of those initial projects, they became more receptive to integrating rule of law activities in all the Brigade's COIN activities.

a) *Brigade Counterinsurgency Methodology*

Operations during the first three years of Operation Enduring Freedom were not focused on defeating an insurgency, but rather with the extermination of terrorists and their support networks located within Afghanistan.⁷ The focus shifted when the 3rd Brigade of the 10th Mountain Division began to apply a counterinsurgency strategy. The methodology implemented was based on three non-sequential phases that included: first, separate the enemy from the populace; second, create effects among the populace; and, finally transform the environment.⁸ The 3rd Brigade created the initial separation through the physical presence of U.S. Forces with limited partnering with fledgling Afghan National Security Forces.⁹ Initial effects were created through dramatic increases in expenditures from the Commanders Emergency Response Program

⁵ See generally Thomas H. Johnson, *On the Edge of the Big Muddy: The Taliban Resurgence in Afghanistan*, CHINA AND EURASIA FORUM Q., (May 2007), at 93-129, available at http://www.silkroadstudies.org/new/docs/CEF/Quarterly/May_2007/Johnson.pdf.

⁶ Frank G. Hoffman, *Neo-Classical Counterinsurgency?*, PARAMETERS (Summer 2007), at 74. "The presence of the United Nations and myriad of regional relief agencies, coalition partners, private security forces or semi-military organizations, several dozen media entities, and a raft of commercial contractors make counterinsurgency planning and execution increasingly more difficult. The operational battlespace is further cluttered in terms of urban settings by foreign 'human terrain' and competing interest groups."

⁷ See Bradley J. Armstrong, *Rebuilding Afghanistan: Counterinsurgency and Reconstruction in Operation Enduring Freedom* (Dec. 2003) (unpublished NPS Thesis), at 13, available at <http://stinet.dtic.mil/cgi-bin/GetTRDoc?AD=ADA420361&Location=U2&doc=GetTRDoc.pdf>.

⁸ See generally Bard E. O'Neill, *INSURGENCY & TERRORISM: INSIDE MODERN REVOLUTIONARY WARFARE* (1990).

⁹ See CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, *AFGHANISTAN, POST-WAR GOVERNANCE, SECURITY, AND U.S. POLICY* 31 (1 Nov. 2007), available at <http://fpc.state.gov/documents/organization/96427.pdf>. [Hereinafter CRS AFGHANISTAN REPORT]

(CERP) during the same period, allowing both the brigade and battalion commanders to initiate large-scale development projects throughout the region.¹⁰

When the 4th Brigade, 82nd Airborne Division took over the AO, its commander, COL Martin P. Schweitzer, built upon this complex strategy by adding – or rather *bringing* – the Afghan element to the forefront of the methodology both in terms of security and development operations. Afghans were placed in the lead for all security operations, with coalition forces partnered with or subordinate to their Afghan counterparts. This allowed the Brigade to rapidly increase the capacity and capabilities of the various Afghan National Security Forces (ANSF)¹¹, which in turn created a more sustainable separation of the enemy from the populace that the populace viewed as less oppressive than the use of U.S. forces.¹² Five corps-level operations were planned and executed by the Afghan National Army 203rd Corps with the assistance of coalition forces during 2007 and early 2008.¹³ These were the first Afghan corps-level operations successfully conducted since the inception of the Afghan National Army and provided proof positive that the Afghan National Army was capable of conducting complex counterinsurgency operations.

At the same time, development activities were increased almost four-fold as provincial reconstruction team (PRT) and maneuver commanders were provided with additional CERP funds to increase development efforts across AO Fury.¹⁴ These development projects allowed coalition forces to create sustainable effects with the populace which in turn set the conditions for a change in how the populace perceived Afghan and coalition forces, or in terms of the counterinsurgency methodology, a transformation of the environment. As part of this development effort, rule of law sector development projects also became a priority for the command.

b) Rule of Law Development Baseline in AO Fury

“Weak governance is a common precondition of insurgencies.”¹⁵ This truism quickly became our reality as we grappled with ways to develop the governance sector that was fighting for survival throughout AO Fury. What we found when we conducted our initial assessment of the rule of law sector in March 2007 was the decayed foundation of a once-vibrant Afghan legal system. Following the 2002 intervention, incredible strides had been made at the national level with the reconstitution of the Supreme Court, Ministry of Justice, and Attorney General’s Office, yet little was being done to develop the justice sector outside of Kabul. This was primarily due to the large amounts of development dollars that were being spent at the national level to build and sustain the operational capacity of the various national legal institutions. Unfortunately, little

¹⁰Historical CERP spending for these six provinces was: 2004, \$8.1 mil; 2005, \$23.7 mil; 2006, \$22.3 mil; 2007, \$81.4 mil; 2008, \$42 mil as of February. Interview with MAJ Basil Catanzaro, Brigade Civil Affairs Officer, conducted 5 April 2008 at Bagram Airfield, Afghanistan.

¹¹ The ANSF is comprised of the Afghan National Army (ANA), the Afghan National Police (ANP), and the Afghan Border Police (ABP). During our tenure in AO Fury, we partnered with all three of these institutions, which allowed us to enhance the security situation at all the relevant levels.

¹² Afghan forces were understandably better received by the local populace than purely coalition operations.

¹³ CRS AFGHANISTAN REPORT, *supra* note 9, at 31..

¹⁴ See note 10 above.

¹⁵ Jones, *supra* note 2, at 8.

attention was being paid to development of legal institutions at the provincial and district levels of government. We assessed that this oversight was primarily attributable to an unstable security situation, lack of a comprehensive assessment of the sector, and lack of an overarching strategy to improve the rule of law sector nation-wide.

National rule of law development was the responsibility of the Italians;¹⁶ however, numerous nations, non-governmental organizations, and private organizations are presently contributing to development within the sector.¹⁷ This division of responsibility – and further interagency divisions within the U.S. government – has created a somewhat disjointed approach to development in the sector and left the needs of the rural populace neglected below the provincial level of government.¹⁸ Our spring 2007 assessment of the rule of law sector within our provinces was bleak.¹⁹ Almost none of the 79 districts that we were responsible for had a functioning contemporary justice system. Traditional legal systems were the predominant dispute resolution system for the entire rural populace.²⁰ Basic legal services and infrastructure were non-existent or barely functioning. The populace lacked an understanding of both the constitutional basis for their new government and the contemporary justice system established by that constitution.²¹ Addressing the issues within this sector was to be a daunting task for the Brigade.

c) *Ad Hoc Staffing for Rule of Law*

We began our effort to build capacity in the rule of law sector with no real organic Brigade expertise in the area. The *Rule of Law Handbook* had not yet been published, and civilian experts were reluctant to operate within our operational environment due to the security situation.²² Further, rule of law sector development had not been the focus of previous tactical level units. As the Brigade command and staff developed a better understanding of the operational environment and the application of the COIN methodology, it became evident that the rule of law sector had to be immediately addressed.²³ The Brigade staff looked to the Brigade Judge Advocate for expertise and assistance in “operationalizing” rule of law development

¹⁶ See section IX.A.1.

¹⁷ See AFGHANISTAN HUMAN DEVELOPMENT REPORT 2007 BRIDGING MODERNITY AND TRADITION: RULE OF LAW AND THE SEARCH FOR JUSTICE, 101-104, available at http://www.cphd.af/nhdr/nhdr07/download/download_eng.html (Estimating that there are over 2500 civil society (non-governmental) organizations operating in Afghanistan) [hereinafter AFGHANISTAN HUMAN DEVELOPMENT REPORT].

¹⁸ See Jim Arkedis, *Disjointed effort: After seven years, the U.S. still lacks a comprehensive anti-terror strategy*, BALTIMORE SUN (23 Apr. 2008), available at <http://www.baltimoresun.com/news/opinion/oped/bal-op.terrorism23apr23001520,0,5798321.story>.

¹⁹ See 2007 Rule of Law Assessments (on file with the author).

²⁰ See AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 17.

²¹ Only twenty-eight percent of the Afghan population can read and write. CIA World Fact Book, *supra* note 4. See also AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 17.

²² See RULE OF LAW HANDBOOK, A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES (2007). State challenges involved in bringing Afghan attorneys and judges together with other high level instructors and government officials for training in the provincial capitals.

²³ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-22 (15 Dec. 2006) (“The presence of the rule of law is a major factor in assuring voluntary acceptance of a government’s authority and therefore its legitimacy.”).

activities for the Brigade.²⁴ Unfortunately, the Brigade Judge Advocate had no experience in this area of the law and there were no civilian experts or other attorneys assigned to the Brigade to provide assistance.²⁵

To address these shortfalls in expertise and develop immediate capacity in the sector we adopted the same approach that the Special Forces utilized during their earlier forays into Afghanistan – we outsourced our requirements to indigenous providers. In early April 2007, we began the hiring process for an Afghan Attorney Advisor for the Brigade.²⁶ This position was developed to provide us with immediate indigenous expertise to focus specifically on the development of RoL capacities at the provincial and district level, in order to increase the legitimacy of the Afghanistan government and provide security and stability to the Afghan people. In layman's terms this Afghan attorney provided the Brigade Judge Advocate with immediate expertise in Afghan culture, the Afghan legal system and the ability to rapidly connect with key Afghan leaders and legal practitioners without having to leave the forward operating base. The way in which we utilized him and later a second Afghan attorney for the Brigade as well as for each PRT would be critical to the development our long-term rule of law development plan executed within the COIN methodology described in detail below.

2. *RoL in COIN (How we Applied the COIN Methodology to RoL Development)*

Counterinsurgency is by definition complex – as some scholars have stated, COIN is “graduate level warfare.”²⁷ Conducting rule of law development within a COIN methodology

²⁴ All things legal became the purview of the Brigade Judge Advocate.

²⁵ Rule of law development was not part of the TJAGLCS curriculum until 2007, and DOS and other federal agencies are woefully undermanned with attorneys with both expertise and willingness to work at the tactical level with DOD units.

²⁶ Our justification for an Afghan local national attorney included the following qualifications, duties and responsibilities.

Afghan advisor must be fluent in English, Dari and Pashto to provide assistance with the establishment of our RoL development program. This advisor will also assist units with coordination between multiple Afghan judicial agencies and personnel (to include communicating complex legal terms and concepts through the host nation language). Specifically, the Afghan Legal Advisor will assist CTF Fury in achieving the following objectives: (a) Ensuring that infrastructure exists at the district level to provide rule of law (i.e. District Centers and judicial buildings); (b) Ensuring District and Provincial level Rule of Law facilities have communications and record-keeping/publication capability (coordinating CERP funding requests/other agency funding); (c) Instituting legal training for Judicial officials at the provincial and district levels; (d) Ensuring elementary schools contain civics curricula and availability of Rule of Law information at secondary schools (coordination with Minister of Education and District/Provincial leaders); (e) Ensuring initiatives to increase detention capacity are nested within Department of State and IRoA plans (coordination with Department of State, DoJ, and Minister of Justice); (f) Monitoring courts' progress in ability to keep adequate records, produce documents, and publish/disseminate decisions (coordination with District/Provincial Court level officials); and (g) Increasing awareness of human rights among detention operations personnel (coordination with DoJ and Afghan Bar Association).

²⁷ Lt. Col. John A. Nagl & Lt. Col. Paul L. Yingling, *New Rules for New Enemies*, ARMED FORCES J. (Oct. 2006), available at <http://www.armedforcesjournal.com/2006/10/2088425>.

proved to be even more challenging. “Operationalizing” rule of law development activities required a long term plan with attainable goals that both advanced the needs of the Brigade and the Afghan populace. Effects had to be synchronized with other national level rule of law development efforts.²⁸

The national level synchronization was conducted through the Combined Joint Task Force – 82 (CJTF-82) Rule of Law Coordinator. He conducted daily coordination with the Standing Committee on the Rule of Law (SCROL) at the U.S. Embassy in Kabul. He further synchronized efforts across RC-East, ensuring that both brigade combat teams operating within the Command were achieving similar effects throughout their respective areas of operation. The CJTF-82 Rule of Law Coordinator also provided invaluable assistance in presenting our initiatives to the SCROL and garnering their support. Without his efforts, our efforts at the tactical level would surely have been stymied by U.S. and other national level agencies and organizations focusing their efforts on Kabul. To enhance future rule of law development activities at the operational level and below, we recommended that a rule of law fusion cell be created at the CJTF level. This cell would be comprised primarily of civilian legal experts with authority and funding to execute rule of law development projects focused on achieving short term effects while the SCROL continued with the development of a longer term development strategy to establish sustainable effects across the rule of law sector.²⁹

The Brigade took an approach to provide immediate tangible effects in the rule of law sector that could provide the basis for future development activities. We worked closely with each of the four U.S. PRTs and battalion commanders within the AO to develop programs tailored to their respective provinces. We executed these programs within previously planned COIN operations to synchronize our activities with other development activities being conducted by the Brigade to create effects in every phase of the COIN methodology. The projects, described below, provide examples of rule of law development programs that could be executed to achieve effects in a particular phase of the COIN methodology (the phases do not represent fixed criteria for success but rather set the conditions for achieving success within the populace).

a) *Phase 1: Separate the Enemy from the Populace: High-Value Case Prosecution Program*

Maneuver commanders within the Brigade quickly realized that ISAF rules governing detention operations created a zero-sum game with the insurgents and the Afghan populace. Detainees were required to be turned over to local Afghan government officials after a brief detention by ISAF forces.³⁰ The idea behind such brief detention was undoubtedly to jump-start the criminal justice system within Afghanistan – the idea was that detainees released to Afghan officials would then be prosecuted by Afghan authorities. Prosecution, however, was not occurring, and criminals and insurgents were being regularly released after brief detention with little recourse for either maneuver commanders or provincial or district level Afghan leaders.

²⁸ On the effects-based approach, see generally Milan N. Vego, *Effects-Based Operations: A Critique*, JOINT FORCES Q., (2d Quarter 2006), at 56 (“An effects-based approach to warfare in its essence represents application of the targeteering approach to warfare across all levels.”).

²⁹ This fusion cell concept will be discussed further later in this article.

³⁰ This would force commanders to rely on their Afghan counterparts even more heavily, requiring them to conduct detention operations when required and to pay the sometimes deadly consequences for systemic failures within the contemporary criminal justice system in Afghanistan.

This created immediate problems with no viable system available to separate insurgents from the populace short of direct action or kinetic operations by coalition forces, which would not only increase resentment of coalition forces but also perpetuate a negative perception among the populace that the government was inept and incapable of providing for basic security requirements. This problem represented the crux of broader problems facing COIN operations within Afghanistan. In short, the Afghan government at the provincial and district levels was regularly losing credibility with the populace because they were perceived as being unable to provide for the security and governance of the populace.³¹

This revolving door for insurgents had to be addressed quickly and with sustainable Afghan institutions.³² We determined that we could create immediate effects by empowering a discreet part of the extant Afghan legal system tailored to the prosecution of terrorists. The Afghan legal system had laws specially tailored to the prosecution of terrorists,³³ and we determined that there were two Afghan organizations with the necessary structure and size that could conduct investigation and prosecution of crimes pursuant to these laws. These organizations were the National Directorate of Security (NDS) and the Afghan National Police Provincial Terrorism Departments.

We focused our initial efforts in coordinating with the NDS to enhance their organic capacity to conduct investigations and prosecutions of terrorists and other associated organizations and individuals. We quickly found that there were insurmountable negative connotations associated with tying our efforts to the NDS. The NDS is Afghanistan's domestic intelligence organization, and it had dubious credibility among the Afghan populace and international community,³⁴ consequently (and at the urging of numerous other agencies and Afghan officials) we changed the name of the program to the "High Value Cases Prosecution Program".³⁵ The program we developed consisted of three phases designed to quickly establish a viable terrorist/insurgent/high value cases prosecution capacity at the provincial level.

The first phase of the program encompassed the design and construction of a facility necessary to conduct the investigation and prosecution of high value cases. We chose the province with the most capable and willing provincial government and coordinated the design and funding of the proposed facility through the PRT responsible for that province. We also coordinated our efforts with local and provincial Afghan government officials, judges, and attorneys as well as national-level ministries to ensure all Afghan organizations with a stake in such activities were kept abreast of our intent and activities. The design finally agreed upon

³¹ On the importance of popular perception, see Frank G. Hoffman, *Neo-Classical Counterinsurgency?*, PARAMETERS, (Summer 2007), at 83 ("Perception is the key that turns the population's neutrality into active acceptance.").

³² "Using a legal system established in line with local culture and practices to deal with such criminals enhances the HN government's legitimacy." FM 3-24, *supra* note 23, at 1-24.

³³ See Law on Crimes Against Internal and External Security, Approved by the Revolutionary Council of the Democratic Republic of Afghanistan by Decree No. 153 (Oct. 1987), available at http://www.afghanistantranslation.com/Laws/Law--Crimes_against_Internal_and_External_Security_1987_NDS_1987_Law_ET-Checchi-MAYBE_ET.pdf. These laws essentially criminalized many of the activities committed by terrorists within Afghanistan.

³⁴ See AMNESTY INTERNATIONAL REPORT, available at <http://thereport.amnesty.org/eng/regions/asia-pacific/afghanistan>, for a detailed quote.

³⁵ We had originally named the program the "NDS Terrorist Prosecution Program".

included a building with a courtroom, judge's office, prosecutors and defense attorney's offices, and a small living area. Another building would house pretrial detainees, and a separate judges' quarters was designed.³⁶ The project was submitted as a CERP project in late 2007 and construction commenced in January 2008 in Khost City after a suitable site was selected for the buildings. The site selection process with the provincial governor led to an expansion of the concept that coupled several rule of law projects together to achieve efficiencies. In short, we co-located our proposed facility with a new provincial prison and other associated administrative government offices. This allowed us to take advantage of the security and administrative services provided by the prison. It also reduced the exposure of pre-trial detainees and other government officials involved in investigation and prosecution to threats, intimidation, and attack.

The second phase was a training program to educate all participants in the terrorist prosecution process. We developed a program of instruction in conjunction with the Kabul University Law School and other international organizations. We utilized training materials developed by Global Rights and GTZ. We invited investigators, interrogators, government attorneys, and other field personnel from both the ANP and NDS. We also invited judges provincial government and national ministry officials to attend the training conducted in April 2008. The training was conducted by Afghans for Afghans and had no outside US or third country national instructors. Oversight was provided by local PRTs and other international organizations. This training was also funded as a CERP project.

The third phase has two components, both of which were in the staffing stage and was not complete at the time of my departure. The first was to initiate of supervised prosecutions after the conduct of several on-site training sessions and/or mock trials. The second was a separate CERP project to develop indigenous legal system monitoring capacity within Afghanistan is currently being staffed. It will provide specialized training to members of the Afghan Independent Human Rights Commission (AIHRC) on the investigation of war crimes and supervision of criminal prosecutions within Afghanistan. The project will enhance the competence and expertise of Afghan human rights legal practitioners by providing technical assistance on core legal and investigative skills, professional ethics, and substantive areas of Afghan criminal and civil law. It is hoped that providing this training and encouraging AIHRC's oversight of the cases prosecuted through the newly established Provincial High Value Case Legal Centers will build legitimacy and transparency into the criminal prosecution process and help to reduce systematic corruption. In addition, this program will increase transparency and legitimacy of fledgling contemporary Afghan legal institutions throughout AO Fury.

Once validated, the terrorist prosecution program described above will be rapidly replicated throughout the other provinces within RC-East and possibly nation-wide.³⁷ This program can successfully achieve separation by keeping convicted terrorists and insurgents off the streets. This will have several long term effects. First, successful prosecutions will build

³⁶ Judges were originally going to ride circuit from Kabul, but logistical constraints in addition to organizational and jurisdictional problems identified by the Afghan Supreme Court foreclosed this option and we were forced to rely upon general provincial level judges that would be brought into the compound and protected while they were hearing these cases. Obviously, the security issue for judges will need to be addressed in a more definitive manner as the system begins to process cases and judges grow in notoriety and stature.

³⁷ Costs to replicate infrastructure and training in each province would be approximately \$500,000.00 per province.

public confidence in the contemporary criminal justice system because the Afghan government will be able to legitimately argue that they are able to take on the terrorists and other related criminal activities and protect the populace. Second, future security operations will be enhanced because the populace will be more willing to cooperate with government security forces and other officials. Lastly, it will serve the overarching goal of providing additional legitimacy for the Afghan government.

b) Phase 2: Achieve Effects with the Population

The majority of our other initial rule of law development programs were focused on achieving effects with the populace. The programs were designed to provide education and meaningful access to contemporary rule of law institutions for the populace. Likewise, the activities generally corresponded to other Brigade Phase II COIN operations focused on achieving effects with the populace through governance and civics projects designed to connect the populace to their government.

Education Programs

Our rule of law education programs focused both on specific legal training for Afghan legal practitioners and broader governance/civics/rule of law education training for the Afghan populace. We assessed that there was a vast disparity amongst the various qualifications and education levels for Afghan legal practitioners in our operational environment and determined that a legal training program was immediately required to level the playing field. Other US organizations had legal training programs available, but, in many of our provinces, they were unwilling or unable to provide the training due the security situation.³⁸ We developed two legal practitioner continuing legal education programs. The first program provided training on basic criminal law and procedure to all known legal practitioners in each of our provinces. We funded this training with CERP funds and conducted the training in five provinces over the course of two months. Our Afghan attorney advisor conducted all of the course coordination and administration in each province. This eliminated logistical and security requirements for the respective PRTs responsible for each province and increased the legitimacy of the training because Afghans preferred to receive training from respected Afghan scholars instead of from foreign nationals. The second program we developed in conjunction with the Kabul University Law School provided a quarterly CLE program for legal practitioners for all six provinces for a year focusing on civil and criminal law and procedures. Now that it is in place, the program can easily be sustained as an ongoing rule of law CERP project and replicated to other AOs.

We also expanded the scope of existing United States Agency for International Development (USAID)³⁹ Afghanistan Rule of Law Development Program (AROLDP) projects focused on educating the populace by distributing radio programming to PRTs and rule of law comic book series to all of the provinces. The USAID radio spots were focused on the constitution and basic rights for Afghans. The USAID comic books also focused on

³⁸ The INL-managed Judicial Sector Support Program had executed Provincial Justice Conferences in one of our provinces but was unable to conduct similar conferences during our tenure due the security situation.

³⁹ See http://www.usaid.gov/locations/asia_near_east/countries/afghanistan.

constitutional basics and appropriate dispute resolution measures for day to day conflicts.⁴⁰ Lastly, we reproduced and disseminated bound seventeen volume legal desksets to hundreds of legal practitioners in all of our provinces.⁴¹ These projects, like all of the rule of law activities undertaken by the Brigade were funded as CERP projects.

Legal Assistance Centers

We began planning to provide access to contemporary legal institutions by establishing legal assistance centers in each province and select districts to provide a viable alternative forum for dispute resolution and a location to obtain practical legal advice on the myriad of legal issues facing the populace in any given area.⁴² Meaningful access can only be established if all of the organizations involved in the construction and establishment of the district government infrastructure ensures that rule of law requirements are not overlooked in the design and manning of these new facilities. The Afghan populace is clamoring for access to these institutions in most provinces where development is occurring. We must rapidly advance progress in this area if we are to achieve success in subsequent phase three operations.

c) Phase 3: Transform the Environment (Afghan Government Primacy)

We executed every project in our Brigade rule of law development program with an eye towards transforming the environment. This phase will ultimately be a reflection of the effects we achieve in the previous phases. We will have achieved success when the Afghan populace looks to their government to provide for their security and basic needs and the government is able to meet these demands. As FM 3-24, *Counterinsurgency* states, in this final stage of COIN operations, "...the host nation has established or reestablished the systems needed to provide effective and stable government that sustains the rule of law. The government secures its citizens continuously, sustains and builds legitimacy through effective governance, has effectively isolated the insurgency, and can manage and meet the expectations of the nation's entire population."⁴³ Continuing to build Afghan rule of law human capacity and physical infrastructure at the provincial level and below will be the keys to success in future COIN operations in Afghanistan and Judge Advocates will be at the forefront of this endeavor.

⁴⁰ This project provided for the reproduction and dissemination of a bound six-volume cartoon series for the Paktika, Paktya, Khost, Ghazni, Logar and Wardak provinces. This project provided thousands of Afghan children with basic information about the Afghan Constitution, basic rule of Law principles, and the latest easy to understand information on the current basis of governance and the rule of law within Afghanistan in Dari and Pashto.

⁴¹ This project enhanced the competence and expertise of Afghan legal practitioners by providing them with up to date legal references in Dari and Pashto. These desksets also provided lawyers with the latest Afghan laws and preclude them from having to purchase these references themselves or rely on outdated written legal materials rarely available in most provinces.

⁴² The population faces three systems of justice currently operating within Afghanistan (Tribal, Sharia, and Contemporary). See section IX.A.

⁴³ FM 3-24, *supra* note 23, at 5-2.

B. Brigade-Level Rule of Law Engagements in Iraq^{*}

Silent enim leges enter arma. (For the laws are silent in the midst of arms.)

- Cicero¹

1. Introduction

Throughout the world, Army Judge Advocates and paralegals are working closely with others to establish, re-establish, or strengthen the voice of the law in an attempt to render Cicero's maxim obsolete. These practitioners, by necessity, closely tailor their rule of law efforts to fit the local conditions. What follows describes a few of the efforts by one brigade and the Provincial Reconstruction Team (PRT) it supported in Diyala province during the period of November 2006 to November 2007.² It describes only the middle of a journey with no certainty yet the route taken will lead to the intended final destination, however promising the general azimuth may appear.

The engagements and efforts described here stemmed from the planning process used by the brigade. The brigade's effects coordinator led the brigade's non-combat planning. Every few weeks, the brigade staff would meet to begin the next effects cycle. Staff sections would present the results of the actions directed by the previous effects tasking order. These results would serve as the inputs for the current assessment. Based upon that assessment, the staff would identify actions necessary to move towards the realization of objectives along the brigade's various lines of operations (LOOs).

The staff would then "operationalize" these required actions into tasks to be carried out by the staff or subordinate units. For example, a rule of law task to a subordinate unit might include "Determine whether the courthouse at A is open" or "Provide a prioritized list of force protection measures for the jail at B." Tasks to the staff might include, "Obtain official X's support for the hiring of more investigators" or "Meet with Judge Y to determine the status of Z." The brigade then disseminated these tasks as part of the effects tasking order.³ Once

^{*} LTC Charles C. Poché served as Brigade Judge Advocate for the 3rd ("Greywolf") Heavy Brigade Combat Team, 1st Cavalry Division, in the city of Baqubah, Diyala Province, Iraq from November of 2006 to November of 2007.

¹ See generally *The Fremont Contract Cases*, 2 Ct. Cl. 1, 25 n.* (1866) (describing the evolution of the maxim); *Hamdi v. Rumsfeld*, 542 US 507, 579 (2004) (Scalia, J., dissenting) (using a derivation of the phrase, "inter arma silent leges," to describe the view "that war silences law or modulates its voice").

² The source of this material is the personal notes taken by the author during the various meetings described. These notes are on file with the author. More detailed engagement descriptions are available in the contemporaneous reports posted by the author to the Civil Information Management System (CIMS). CIMS resides on a Secure Internet Protocol Router website at <http://cims.1ad.army.smil.mil/default.aspx>. CIMS or similar reporting systems for other areas contain a wealth of historical information possibly of use to JAs and paralegals as they prepare to conduct rule of law operations.

³ The use of tasking orders and fragmentary orders is extremely important. As their name implies, they are orders. They carry the authority of the commander. Any other method the JA or any other staff officer uses to make a request of a unit or others is exactly that – a request. Good interpersonal relationships can make requesting such "favors" a highly effective and responsive means of obtaining support. However, units and their personnel have a great many competing requirements. If something must be a priority, it must appear in an order.

executed, the results of these actions formed the basis of the next assessment and the cycle began anew.

The Brigade JA served as the chief of the brigade's rule of law LOO. One of the defined intermediate objectives along this line towards full establishment of the rule of law was to have local courts open and effectively hearing the full range of possible cases. Another was to have the cases of detainees properly and efficiently processed. It was towards these objectives that the brigade directed a great deal of its efforts. As described below, the brigade made progress but was never able to realize fully these LOO intermediate objectives during its tenure.

2. *The Rule of Law "Hierarchy"*

The brigade arrived in Iraq in November of 2006. The brigade commander immediately set the framework for the brigade's interaction with the established DOS PRT by making support to the PRT a top priority. In accordance with the commander's published guidance, support to the PRT was second in priority only to support to the Iraqi people of the province as a whole. Because the DOD supports DOS efforts in Iraq, there was never any doubt the DOS PRT's Rule of Law Coordinator (ROLC)⁴ was the lead in the rule of law effort. The brigade legal personnel were in support. It is difficult to overstate the value of having clearly defined relationships to ensure unity of effort by the Rule of Law Team.⁵

There were also practical reasons for making non-uniformed personnel the "face" of the rule of law effort. In Iraq, officials have correctly come to view uniformed personnel as transient. The culture also sees age as indicative of wisdom and worthy of respect. Brigade legal personnel are usually much younger than the senior judicial officials with which they interact. Being partnered with a more senior and/or civilian PRT official was helpful in establishing credibility.

3. *Rule of Law Engagements*

a) *Background*

The level of violence in the province was very high during the brigade's initial months. Violence had recently claimed the lives of both an Iraqi prosecutor and the provincial Chief Judge's predecessor. The situation was such that government workers were unable to come to work. In some areas, judges constantly received death threats. An absence of basic security severely limited what the team could reasonably expect to accomplish in the rule of law arena. Judicial officials assumed a high level of physical risk merely by meeting with the Rule of Law

⁴ Prior and subsequent to the brigade's arrival, a Department of Justice civilian served as the ROLC for the PRT. Interestingly, a mobilized Reserve component JA replaced him in June of 2007. In turn, a DOS contractor next served as the ROLC, beginning in late October of 2007. In less than a year, the Province saw three different PRT ROLCs. While each certainly advanced the rule of law during their tenure, frequent turnover can be disruptive in an incrementally developing area with long-term objectives. In fairness, though, the brigade and its associated military legal personnel also changed three times during a similar period.

⁵ The ROLC, the Brigade JA, and a Bi-lingual/Bi-cultural Advisor (BBA) in the PRT made up the core of the "Rule of Law Team." More than just an interpreter, the BBA played a significant role in the rule of law effort. More generally, other team members included Civil Affairs personnel and various project managers. Only the core team typically attended the engagements described below.

Team.⁶ Simply keeping the channels of communication open in an area lacking communications infrastructure and requiring personal meetings was a significant task.

The brigade's first rule of law engagement occurred when the ROLC and the Brigade JA met with judicial officials in early November of 2006. The main concern of the judiciary was the presence of Iraqi Army (IA) soldiers on the roof of a local courthouse. This security outpost was drawing a significant amount of hostile fire. Additionally, the Iraqi soldiers were allegedly harassing the local judges. This had rendered the court ineffective. Coordination by the Brigade JA via email with the Military Training Team (MiTT)⁷ assigned to the local IA division resulted in an order from the higher IA headquarters to move the position (with unintended consequences described later). The MiTTs were always the first call when attempting to influence action by Iraqi Security Forces.

Discussion here and later often centered upon cases in which individuals had been languishing in pretrial confinement with no apparent movement towards trial. In this particular meeting, the judiciary thanked the team for bringing these cases to their attention and presented the results of the judicial officials' research into previously discussed cases. It was the judiciary's assessment these individuals were in custody for legitimate reasons.

The judiciary asked the team to continue to monitor detentions, as the security situation in the province prevented them from overseeing cases closely, if at all. They even provided a list of locations they felt needed monitoring. This included one town where the court had ceased functioning entirely, one where there was a high likelihood of languishing detainees, and two more that were in danger of failing due to the security situation. When routine travel is impossible, routine oversight ceases to exist and abuses become frequent.

The problem of overlong detentions would be a recurring theme throughout the brigade's time in Iraq. At the next meeting, judicial officials recounted how even individuals ordered released by judges were still in jail due to the unwillingness of the security forces to release them. They indicated the motivation for non-release could be monetary (contingent on a ransom payment) or sectarian. In this case, constant monitoring by the Police Training Teams⁸ (PTTs) and other non-Iraqi entities⁹ was essential to attempts to limit such abuses.

⁶ Out of concern for their safety and respect for their wishes, this article identifies these officials as generally as possible.

⁷ Military Training Teams are uniformed US military personnel who partner with Iraq units. These teams work closely with their partnered unit, often living at the same location. As the name implies, the MiTT's purpose is to train their Iraqi counterparts. Because the MiTTs are US forces, they maintain communications with the US Army unit responsible for the ground on which they operate. Consequently, it was always possible to communicate with a MiTT, whether by e-mail, secure voice over internet protocol, or at least tactical radio.

⁸ PTTs are to the Iraqi Police (IP) as MiTTs are to the IA. When there was a concern about a certain holding facility or official, a call or email to the associated PTT (or the overall PTT leadership) was usually sufficient to have the facility checked or to receive an assessment based upon the PTT's interactions with the IP official.

⁹ One such entity was the DoJ's International Criminal Investigative Training Assistance Program (ICITAP). ICITAP works with foreign governments to develop professional and transparent law enforcement institutions. Their experts in corrections often visited various Iraqi facilities. In our case, they lived on the same forward operating base as the brigade headquarters. They were great sources of information and monitoring.

A lack of cooperation and coordination between the various sections of the Iraqi government was also readily apparent during this period. The team asked a judicial official if he would be willing to approach the provincial governor to intervene with local sheikhs to have their tribes respect the security of the courts. The official was unwilling to approach the governor for fear of appearing involved in the province's volatile politics. He believed this would diminish the perceived neutrality he saw as his best defense. Moreover, the relations between the entirely Sunni judiciary and overwhelmingly Shia security forces were often openly antagonistic. There was no communication between the judiciary and any of the executive-branch officials of the province.

In trying to insulate itself from the violence around it, the courts were attempting to operate in a vacuum. In some areas, such as family or civil law, they were doing so with some success. However, in the area of criminal law, this was clearly an unworkable situation due to the necessary interaction with the security forces – both police and IA. The brigade seized upon this lack of coordination as a possible target to influence.

b) *The US Role in Establishing Communications between Branches of the Iraqi Government*

A short time later, the relationship between the judiciary and the IA hit what may have been an all-time low. As mentioned earlier, the IA moved at the insistence of the judiciary from the roof of one of the local courthouses. Hostile forces then immediately occupied the roof, with its commanding view of the local IA headquarters. They used it as a sniper position – killing three IA soldiers. The IA accused the local judge of collaborating with the terrorists. The soldiers then ransacked the courthouse, vandalized the judge's car, and even struck the judge. The judiciary was furious. They demanded an independent investigation of the incident and wanted the IA soldiers held accountable.

Also during this period, the IA conducted sweeping detention operations resulting in a great number of detainees. Under pressure to process these individuals, the IA dumped these hundreds of detainees into the criminal justice system, usually with little or no documentation. This quickly overwhelmed a system in which just getting officials to work was problematic.

The judiciary's relationship with the IP was not much better. Judicial officials alleged the head of the Diyala Bureau of Investigation¹⁰ (DBI) in Baqubah falsified records, ignored judicial release orders, and detained people illegally. DBI personnel also allegedly harassed the judges who went to hear cases there. Additionally, the rumored new head of the DBI (who had formerly held the position) was a man whom the judges knew was out on bond on a still-outstanding criminal charge. Finally, the current Provincial Director of Police¹¹ (PDoP) was allegedly involved in the prevalent sectarian violence.

To help address these issues, brigade legal personnel first made contact via email with the US Army commander who controlled the area in which the courthouse attack occurred. The commander agreed to address the issue with the commander of the IA battalion involved. After he did so, the IA commander met with the judge involved and fired the accused soldiers in front

¹⁰ Formerly known as the Major Crimes Unit, the DBI existed to process major violent crimes. It contained its own holding cells and had its own assigned IP and investigators.

¹¹ The PDoP was the highest-ranking IP official in the province.

of the judge. He also agreed to remove his soldiers from the roof during daylight, pay for any items damaged, and replace the unit with another.

Brigade legal personnel next coordinated with the local IA Division MiTT personnel to determine if the IA would be willing to transport their detainees to less crowded facilities. Because there were judges available in other areas, transferring the cases could lessen the overcrowding problem. The MiTT personnel obtained the IA Division Commander's support in transporting the detainees.

At about the same time, perhaps because of the allegations against him, Iraqi officials transferred the PDoP to another assignment. In response to this, one judicial official commented the most important characteristic of the new PDoP should be a willingness to work with the judiciary. Sensing an opportunity, the Rule of Law Team asked the PTT to provide information concerning the attitudes of the new PDoP.

Using the information provided, the Rule of Law Team discussed the new PDoP at a later meeting with the judiciary. One official stated he did not yet have an opinion, but if the PDoP wanted to speed up hearing and releases, it was a good change. The Brigade JA then engaged in shuttle diplomacy, relaying to the judicial official a statement by the PDoP indicating that, if a judge ordered a release, he (the PDoP) would release whomever the judge ordered. The Brigade JA offered to ask the PTT to facilitate a meeting between the judicial official and the PDoP, if the judicial official would agree to attend. The official agreed, but only if the PDoP could come to his office, as it was dangerous for him to go to the police station. This was a reasonable request by the official given the poor security environment, which currently included murders and threats against court employees.

A few days later, the judicial official and the PDoP met at the Baqubah courthouse. These two offices had not communicated with each other in over a year. The PDoP initially expressed his disappointment at the judiciary's slow processing of cases. The judicial official responded the processing had to be in accordance with the law and the investigative judges (IJs) had to adhere to the correct procedures. The judicial official pointed to police errors in swearing testimony as an example of the problem.¹² The PDoP responded by stating he was a soldier and did not know all the legal requirements,¹³ but he would ensure his investigators adhered to them.

The two officials engaged in an important exchange in which they resolved several major issues in the judicial/police relationship. The judicial official and the PDoP did agree the IJs should provide the reasons they were unable to certify a case for trial. This would allow the investigators to correct the errors. When the judicial official complained the judges did not feel safe in IP facilities, the PDoP stated he would send a security detail to watch over them at the facilities. When the PDoP indicated he wanted the IJs to train the investigators so they

¹² This exchange illustrates how knowledge of Iraqi criminal procedure is essential to JAs participating in rule of law activities. It is imperative one knows "what right looks like" before attempting to "fix" anything.

¹³ At this stage, the IP forces in this area functioned more as a military organization than a law enforcement agency. Consequently, many of its leaders were commanders by virtue of military, not police, experience.

understood the proper procedures, the judicial officials present agreed.¹⁴ At the urging of the Rule of Law Team, they established a day the following week to conduct the first training.

By acting as a go-between between these two Iraqi officials, the Rule of Law Team was able to build Iraqi-to-Iraqi coordination. The team did so without actually attempting to take control. While the Rule of Law Team was present, it was largely silent during the course of this meeting. Through US-led coordination, this became an instance of Iraqis working together to develop a mutual solution to a mutual problem. There was no need at this point for any interjections by outsiders.

This single meeting was the beginning of an unforeseeably significant set of exchanges. The next week, what was supposed to be a training event for investigative judges and police investigators ballooned, with no US urging, into a provincial-level summit on the problem of detainees. Present were the governor, the PDoP, the warden of the main jail, the head of the DBI, police investigators, investigative judges, and the top judicial officials, as well as a representative from the Iraqi Ministry of the Interior. The PDoP voiced his opinion this was the first time in four years such a meeting had occurred.

The governor set the tone by stating the province would operate according to the law and with respect for the rights of detainees and citizens. He indicated the law was a triangle between the police, the jailers, and the judiciary and the judiciary were to supervise.¹⁵ He indicated swift justice was necessary, but decisions had to be just and procedurally correct. He acknowledged the security situation had made some things impossible, but everyone could still work together to solve the problems. Several attendees complained about the IA overburdening the system and expressed regret there was no IA representative there to address this issue.

Although the meeting was not perfect (it did include a lot of finger pointing), the participants were sincerely trying to work through their issues. From that point forward, the communications between the executive and the judiciary occurred on a routine basis. Eventually, the IA also integrated into the efforts. The meeting appeared to cement a realization by all involved that the judiciary and the police would have to work together to address the province's detention issues. This cooperation continued to occur frequently in the transfer of prisoners and cases to other jurisdictions. However, the relationship remained troubled in the area of investigating and trying local major crimes cases.

c) Local/National Difficulties in Establishing a Major Crimes Court

As previously mentioned, an intermediate objective along the brigade's rule of law LOO was to have all courts open and hearing the full range of cases. The earliest assessments of the Rule of Law Team indicated that the civil and family courts were functioning as well as possible given the security environment. However, no judges were willing to investigate and try major crimes cases, especially those they characterized as "terrorist" cases. Given the vast majority of

¹⁴ This may appear self-evident, but it was a significant leap. These two integral parts of the criminal justice system had largely ceased to work together.

¹⁵ The governor's base of knowledge as a former lawyer was evident throughout these meetings.

the detainee cases at this time were “terrorist” cases,¹⁶ this was a significant shortfall in the rule of law.

The Rule of Law Team efforts to resolve this problem initially proceeded along a few different lines, all of which had seen some use in different parts of Iraq. One stop-gap measure was to move detainees to other locations outside of the province (usually to Baghdad) for investigation and trial.¹⁷ A second temporary approach was to utilize traveling judicial “Tiger Teams.” These were traveling teams of non-local IJs. They used local facilities to dispose of some cases in the investigative stage, usually by ordering release or by certifying a case ready for immediate trial. A third approach was to build extremely secure local Major Crimes Court (MCC) complexes in which *outside* judges were able to conclude major crimes cases without fear for their safety. These judges both lived and worked within these secure compounds when the MCC was in session.¹⁸

Building a secure MCC complex took time. Consequently, the other two approaches had to continue during the construction phase if local judges were not hearing cases. All of these approaches, of course, fell short of the long-term goal of having local officials in a local court hearing cases arising in their local jurisdictions. However, these other measures appeared to be a necessary intermediate step in the current security environment. The Rule of Law Team elected to pursue all of these options simultaneously.

Local vs. Distant Trials

In early spring of 2007, the ROLC spoke with US and Iraqi officials in an attempt to secure support for Tiger Team visits to the province. Provincial judicial officials were very supportive of outsiders coming to the province to hear the cases, as it would preclude the need

¹⁶ When reviewing local detention records, the Rule of Law Team noted the reason for detention listed in facility records for the overwhelming majority of detainees was “240 - Suspicion.” Because it seemed unreasonable to hold so many for so long on something as nebulous as “Suspicion,” the team engaged the judiciary about this practice. The judge questioned replied, “240 is like a tomato – you can have it at every meal.”

The judge went on to explain that, when in-processing someone into detention, the jailer involved did not necessarily have the training to know what precise crime to list in the facility documents. Consequently, they defaulted to “Suspicion” because it was akin to a disturbing the peace charge and the arresting official certainly suspected the individual of something. Later, when the judiciary became involved in the case, they would correct the court documents to reflect the specific charges supported by the evidence. However, there was no requirement to correct the original intake documents. Those documents were for use by the jail, not the courts.

In this case, there appeared to be a significant rule of law problem when viewed through the lens of the notice requirements of an adversarial system. However, it was not actually a problem at all under the Iraqi system, highlighting the importance of obtaining more than a basic knowledge of the procedures of the system one is attempting to support.

¹⁷ In local parlance, “sending a case to Baghdad” could mean to trial in Baghdad itself by the Central Criminal Court of Iraq, or to the court located in the highly secure rule of law complex in Rusafa, just outside of Baghdad.

¹⁸ It is important to distinguish the term “MCC” as it refers to the physical MCC complex from its use to refer to the actual court that exercises jurisdiction over major crimes. Once a MCC complex was complete, judicial officials in Baghdad could “certify” it to function as a MCC with jurisdiction over major crimes cases.

for them to do so. At about the same time, a judicial official informed us higher judicial authorities in Baghdad had ordered the transfer of all terrorist cases to Baghdad for trial.¹⁹

The local judicial officials indicted their task was now to determine which cases were appropriate for transfer. In what was a very positive sign, judicial officials indicated they had already sent a letter to the PDoP informing him of the order, since complying would require IP transportation resources. Once the IJs determined which cases were ready to go, the judicial officials would contact the PDoP to transport the detainees and cases to Baghdad.

At our next meeting, judicial officials informed the Rule of Law Team they had successfully transferred ten cases to Baghdad the previous week and they expected seven more to go this week. They indicated the chief difficulty lay in getting the IP assets for transport. The Rule of Law Team considered even this limited success at a coordinated effort to be a significant step forward.

Although the transfer process was a step forward, the judicial officials indicated they would really like to see a MCC complex established in the province.²⁰ They felt this would alleviate the problems of threats against the local judges and allegations of favoritism²¹ because it would remove the local judges from even the preliminary phases of the process. According to the officials, these favoritism allegations were the result of all the judges being Diyala natives.²² When asked about possible locations for the MCC complex, they indicated it could not be in the provincial capital of Baqubah because it simply was not secure enough. When the judicial officials explained the secure MCC complex concept to the governor and PDoP, who were both present at this meeting, they agreed to support it also.

Managing the Logistics of Operating a Local Major Crimes Court

Following this meeting, the Rule of Law Team visited a US forward operating base on the outskirts of Baqubah to assess it as a possible MCC complex location. It was already on a secure site and had buildings that could undergo major renovation for MCC purposes. It became the team's initial choice. Ultimately, however, the team chose another site, one on a much larger IA installation and located in a much more remote and secure location, well away from any major population centers. This site already had buildings appropriate to the project, requiring much less extensive construction than the first site chosen. Throughout these preliminary phases, the ROLC was coordinating with judicial officials in Baghdad to ensure their support and eventual certification of an MCC to sit at the new complex.

At a subsequent meeting with judicial officials a few weeks later, the ROLC informed the officials he had now twice visited the MCC complex site. After describing the location and layout of the facility, the officials commented that it appeared perfect and was definitely the proper way to set up a MCC. Estimates for completion were three to four months. The Rule of

¹⁹ According to judicial officials, they could no longer try these cases locally, though they were still responsible for the trial phases headed by the IJ. The reason for this withdrawal of jurisdiction was unclear. However, it was certain no one was currently trying these types of cases in the province, even if the authority to do so previously existed.

²⁰ The assumption was this MCC, once certified, would have full jurisdiction over all major crimes cases, including terrorist cases.

²¹ The judiciary in Diyala was 100% Sunni at this time, as were the overwhelming majority of detainees.

²² In hindsight, this statement by the officials should have set off alarm bells indicating the local officials were not themselves willing to try major crimes cases. At the time, it did not.

Law Team informed the judicial officials the staffing for the court would have to be ready at that time.

The ROLC pressed the officials to speak to judicial officials in Baghdad to determine what the Iraqis would need to do to make the MCC fully functional. The local officials indicated they would only need to prep the staff, as the judges would be coming from outside the province (another reference to outside judges). When reminded about the logistical requirements of moving prisoners there, the officials stated that was a police matter and that it would be up to the Coalition Forces to get the prisoners there.

The Rule of Law Team pressed the judicial officials to work with the IP to ensure the procedures for transferring prisoners were in place. When asked if the court personnel would live at the facility as intended, or travel to and from work, the officials responded the judges and mid-level staff would reside there. The low-level staff, however, would travel. The Rule of Law Team stressed that it was necessary to know exactly the number of personnel anticipated.

Additionally, the Iraqis would have to be prepared to assume responsibility for paying for the logistical support, since the US would not foot the bill for the facility indefinitely. While the US would fund the construction and renovation, there would be ongoing operating expenses for the housing and feeding of prisoners, judges, and staff. The officials stated they did not expect to resolve the details of ongoing funding until after the facility was actually set up. The officials then asked the ROLC if he was going to Baghdad to speak to Iraqi judicial officials there about providing the required support.

Throughout the process, the local judicial officials demonstrated the limits of their ownership over the project. The Iraqi officials were unprepared or unwilling to consider seriously the logistical requirements of the effort, even from a planning perspective. They assumed someone else, typically Coalition Forces, would simply handle the logistical details for them. Second, even in the area of coordinating with other Iraqis, they assumed Coalition Forces would take the lead.²³ Overcoming both of these attitudes would be essential to a sustainable project that would survive beyond the eventual absence of US personnel.

Progress ... and Breakdown

Into the summer, increased Coalition operations in Baqubah were resulting in reduced violence there, although the judiciary remained a target of violence elsewhere. A judge in an outlying city was killed, while another refused to hear major crimes cases due to continuing threats. Within this still-struggling security environment, the efforts to establish a MCC complex in the province took a significant blow.

In July, judicial officials in Baghdad indicated they had never intended travelling judges to be the norm for MCCs. They were no longer willing to send outside judges to staff future MCCs or serve as Tiger Teams. The local judiciary would have to hear these cases with its own judges. The meeting in which the Rule of Law Team relayed this information to the provincial judicial officials was one of the most frustrating of the brigade's tenure. In a strange turn of

²³ Indicative of this attitude was a comment by an Iraqi judicial official on an unrelated matter. When asked the best way to get an Iraqi official to perform a certain task, he responded with, "You (Coalition Forces) should just order him to do it. Everyone knows the Coalition Forces really run the country." This exchange occurred three years after the return of Iraqi sovereignty.

events, the judicial officials present reacted as though they were completely unaware of the MCC effort. This apparent confusion may have had two sources.

First, the news served as a wake-up call to the judiciary. Because they had previously thought outside judges would staff it, the MCC was perhaps, to the local judges' estimation, someone else's problem. Now, however, it was clearly their problem. They may have realized having their own secure facility would eliminate many of the excuses for not trying "terrorist" cases locally. They were understandably fearful of trying these cases. As a result, they now wanted all the information to which they had previously perhaps paid little attention. Second, the interpreter used during this engagement was not the Rule of Law Team's usual BBA.²⁴ The team received the distinct impression both sides were simply not communicating with each other very well during this exchange.²⁵

Subsequent developments, however, made the building of the facility less vital. In mid-July, judicial officials received a judicial order from Baghdad returning jurisdiction to try major crimes locally in the city of Baqubah. In effect, Baghdad officials had created a MCC within the Baqubah courthouse. Further, security in Baqubah had improved substantially since the initiation of the MCC complex project. During the first week in August, local judicial officials reported that the required local judges were present and security in the city was now sufficient for this newly established MCC to try these cases in the local courthouse.

That did not signal the beginning of local trials, however. The officials were waiting for the cases for trial to come *from Baghdad*. The Rule of Law Team explained the local MCC could now try major crimes cases without first sending them to Baghdad and that the cases previously sent to Baghdad were not returning. While relieved to hear the cases were not returning, the local judges were much less happy to hear there were cases in the local jails ready for trial. The process of handling local cases immediately bogged down. The judges insisted the PDoP was responsible for bringing those cases from the jail to the courthouse, even as they admitted they had not notified the PDoP of the change in authority or procedures.

Unacceptable Pre-Trial Detention Policies

The breakdown following the news that local judges would try local major crimes naturally led to lengthy pre-trial detention as cases languished. The judicial officials insisted there was nothing they could do if a case was incomplete, no matter how long the period of detention. Cases were not making it to trial locally. Moreover, despite the Rule of Law Team's emphatic encouragement, the judges would not order releases due to a lack of evidence.

²⁴ See *supra* note 5.

²⁵ The consistent use of an interpreter is extremely important. In Iraq, people conduct business on a very personal level. Friends do business. For better or worse, Iraqis view your interpreter as part of your inner circle of friends. To the extent your Iraqi counterpart is comfortable with your interpreter and enjoys speaking with him or her, the official also enjoys speaking with you. Having a different interpreter every engagement or every few engagements precludes the fostering of these very important interpersonal relationships. Additionally, when discussing a long-term project such as this, it is helpful if the interpreter already knows the background of what you are discussing. This prevents the confusion that can result from the insertion of an unfamiliar synonym for a previously well-understood term.

Judges simply continued cases in which the sole evidence was the verbal statement of a “secret witness” each time the “witness” failed to appear for trial. This detention could go on for years.²⁶

The judiciary repeated its desire to have outside judges hear these major crimes cases at a remote MCC complex. Because this was no longer an option, the Rule of Law Team asked the local judiciary if they were willing to staff the planned facility with local judges. They were not willing to do so. Accordingly, the Rule of Law Team informed the judiciary of the termination of the project. It made no sense to expend half a million dollars on a facility no one was willing to staff.

With the MCC complex project terminated, the question remained whether the local judiciary would exercise its authority to try major crimes locally. It took time for the team to provide an accurate assessment. The IPs had just days before transferred to Baghdad the 61 cases they had ready for trial. This act indicated two things. First, there were cases ready for trial locally after the courts had received authority to try them. Second, the IP were clearly unaware they could now move these detainees to trial 500 meters down the road, rather than taking them on a dangerous trip all the way to Baghdad.

By the final week of August, there had still been no local major crimes trials. The ROLC provided judicial officials with a list of five individuals whose cases were complete at the investigative level and were ready for trial before the end of the month. The judicial officials stated delays were most often the caused by mistakes in the police investigator files or claims of coerced confessions. The IP official present at the meeting responded that the actual reason for the delay was the investigative judges were not present at the facility often enough. Everyone agreed the police investigators were overwhelmed.²⁷ The judiciary, predictably, felt there was no need for the judge to be present if the cases were not properly prepared.

The Rule of Law Team eventually directly asked if the judges were too intimidated to try these cases. After some initial protestations, the judicial officials admitted the judges were indeed too intimidated to perform their duties properly. With the source of the foot-dragging finally in the open, the team worked with the officials to determine a way forward. The solution reached was for the investigative judges and police investigators to review the files and determine which cases were too sensitive to try locally. The judges would transfer these cases to Baghdad. The local MCC would try the rest. On 26 August, the five cases that had been moving towards trial by month’s end went to Baghdad, which left no cases on the local MCC docket.

A Tentative Solution to the Detention Problem

In early September, the governor toured a local IP facility. The number of persons he saw there who had not yet had any movement on their cases disappointed him. He called both senior judicial and police officials to his office to work out a way forward. The officials decided the governor would visit the facility the next week, along with judicial and police officials. This “committee” would speak to each detainee and review his or her file. Because there would be an

²⁶ In September of 2007, the ROLC presented judicial officials with a list of pre-trial detainees whose arrests occurred in 2005 and 2006.

²⁷ At the time, the local police had only four assigned investigators. It was clearly unworkable to have only four “detectives” on a police force covering a major metropolitan area. The Brigade JA requested the PTT advisor approach the PDOP about hiring more investigators. The advisor did so and the PDOP agreed.

executive judge on the committee, they would have the authority to order immediate releases. At the end of this review process, the committee would make recommendations on how to speed up the process.

From a systemic viewpoint, this solution was less than optimum in that it did not strengthen the properly constituted system. However, overcrowding and overlong detentions had pushed the system to the breaking point (the governor called it a sinking ship). This ad hoc arrangement, therefore, appeared acceptable as an emergency measure. It did serve to relieve some of the pressure in the system.²⁸

Notably, cases were also making their way towards the local MCC during this period. Three cases had gone before the investigative judge. Just as notably, the cases had gone before the judge lacking any reliable evidence. True to form and in perfect illustration of the current problem, the judge continued the cases and returned the detainees to confinement.

4. Conclusion: Halting Progress Toward Justice in Diyala

All the while that it was impossible to get a high-profile case tried locally, the courts were functioning. The civil and family courts had reopened in Baqubah following the major operations there during the summer. One criminal judge had heard a handful of murder cases and even handed out two death sentences. In a somewhat sad commentary on how specialized violence had become, judicial officials were quick to point out that these were “regular” murders. They were not the “terrorist” cases so troublesome to the MCC process.

At a meeting in early October, judicial officials indicated they hoped to hear a MCC case in one or two weeks. The month of October saw significant progress. By the end of the month, the MCC had tried five “terrorist” cases involving 13 defendants. While all of the trials ended in acquittals, this result was far more hopeful than still another set of continuances. Additionally, it was not surprising the court had decided to hear the least contentious cases first. Overall, the Rule of Law Team considered this a significant step forward.

There were other hopeful signs as well. The regular criminal court had tried 22 of the 48 open cases on its docket. The improving security situation had allowed the re-opening of the courthouse in a nearby town. Even with the previous loss of nine judges to violence, the judges were returning to work. The province had also recently received eight new judges and prosecutors. Significantly, a female judge and a female prosecutor were among these newly appointed officials.

At mid-November, the brigade was preparing to depart theater. The PRT’s new ROLC was fully established and the Brigade JA transitioned with the incoming brigade’s rule of law representative. The security situation was steadily improving. It appeared likely these improvements would facilitate further advances in the rule of law area.

²⁸ Within a month, this committee had released over 100 detainees and referred 15 cases for trial.

XI. Rule of Law Project Descriptions

Editors' Note: As with the previous chapter, this chapter contains practical discussions of the actual experiences. Rather than describe the experience of a particular individual, though, this chapter, provides descriptions of a variety of recent rule of law projects. Our hope is to provide an idea of the wide variety of projects being performed at many levels and types of organizations as well as to some ideas about what rule of law teams can do. As with the previous chapter, these are descriptions of recent operations that may not be applicable in other environments; many describe not only challenges but also successes achieved through application of the principles described elsewhere in the Handbook.

A. Improving Public Access to the Legal System in Kirkuk*

One of the key challenges to promoting the rule of law in Iraq is ensuring public education about and access to the legal system. Since 2003 there has been considerable turmoil in the Iraqi legal system as old laws were repealed and new regulations, laws, and even an interim constitution were rapidly promulgated. However, a reliable system for informing the public of changes in the law and educating them about their legal rights did not exist. The Kirkuk Rule of Law Team determined that public access to the legal system was a major issue in establishing the rule of law in the area of operations.

The Kirkuk Rule of Law Team, which consisted of two attorneys from the Kirkuk Provincial Reconstruction Team – a DOJ attorney, and a Reserve Civil Affairs officer who is an attorney – and the Brigade Judge Advocate for the combat brigade responsible of the AO. After it identified this issue, the Kirkuk rule of law team developed a plan to open legal information offices and assistance offices in the district courthouses. These offices would provide both legal consultations and printed materials aimed at educating the public. While developing this plan, the rule of law team learned of an organization of Iraqi attorneys in the area with similar goals: the Kirkuk Jurist Union (KJU). The KJU is an organization of Iraqi lawyers and other legal professionals which operates somewhat like a bar association. The KJU 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. The goal was to expand the availability of legal information and direct legal assistance across the Kirkuk Province. Working with the U.S. 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

* MAJ Kris Ailslienger, USAR, is a Civil Affairs officer in A Company, 418th CA Battalion and has served on the Kirkuk PRT RoL team since February 2008; MAJ Rose Bennett has served as the Brigade Judge Advocate for the 1st Brigade Combat Team, 10th Mountain Division in Kirkuk since September 2007.

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.¹

The success of this project was due to a successful partnership between Coalition Forces partners, including USAID personnel, and the local Iraqi attorneys. Rather than proceed with an exclusively Coalition-developed plan, the rule of law team took advantage of a pre-existing Iraqi solution and worked with the Iraqi attorneys to expand their efforts. 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.

B. Processing Detainees in Rusafa^{*}

Background

Team Rusafa (TR) sprung from the realization that there were (by the end of the first week of July, 2007) approximately 6,500 prisoners in the Rusafa Temporary Detention Facility ("*Rusafa Tasferaat*") (RTDF) (a number that would peak in the following weeks at close to 7,500) and no corresponding, commensurate judicial effort to review, investigate, or adjudicate the cases. The burgeoning RTDF population was the result, in large part, of Operation *Fardh Al Qanoon* (FAQ; "Imposing Law and Order") and the Coalition Force's (CF) "surge operations. FAQ/surge security efforts quickly overwhelmed local detention facilities throughout Baghdad. In February 2007, as part of creating the Law and Order Task Force (LAOTF), CF and Government of Iraq (GoI) personnel determined that the RTDF was to be the central pre-trial detention facility for Baghdad, with overflow from across the city (and in the case of Fallujah and Diyala, outlying provinces) pouring their excess pre-trial detainee population into its cellblocks.

At the Rusafa branch of Central Criminal Court of Iraq's (CCCI-R) then-current pace, the backlog would continue to grow and throughput (adjudicated cases; either sentences or releases) lagged far behind input pre-trial detainees transferred from elsewhere in Baghdad and Iraq) on an order of approximately 35:1. Admittedly recognized as the "least sexy" of the work the Law and Order Task Force (LAOW was going to undertake, TR's mission was simultaneously identified as a fundamental, critical effort (and would, at various times, become the TF's main effort) for building Iraqi judicial capacity.

In early July 2007, LAOTF leadership stood up TR with approximately six Judge Advocates, which was eventually reduced to five, (depending on the time period) five to either paralegals, and five translators.

The team's broad mission was to clear the backlog of cases in the RTDF. TR's leadership determined that in order to figure out how to clear the backlog, we first had to adequately define the problem. In order to define the problem, we had to have hard data about the CCCI-R and the RTDF. The CCCI-R was a nascent organization with no focal point for data collection. Thus, the logical start point was an assessment of the prisoner population. From there, TR could identify

¹ 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/>.

^{*} LTC Joseph B. Berger III served as a Team Leader on the Law and Order Task Force, MNF-I, Rusafa, Baghdad, from May 2007 to May 2008.

ad hoc as well as systemic, sustainable processes through which we could assist the Iraqis in clearing the apparent backlog of cases and ensuring that individual detainees had their day in court.

Prison File Review

U.S. civilian contractor personnel assigned to RTDF under the International Criminal Investigative Training Assistance Program (ICITAP) initially provided LAOTF 120 RTDF pre-trial detainee administrative files: These were divided between the then-existing LAOTF teams (which did not include TR) who reviewed them without applying consistent translation standards or evaluation criteria. That initial disparate effort was subsequently quickly consolidated into TR. ICITAP personnel then provided TR a large lot of approximately 1,000 pre-trial detainee files for review. TR immediately discovered these were administrative files with very limited information; they were not the substantive judicial investigative files required by the investigative judges (IJ) upon which the IJs could base a judicial decision to either release the pre-trial detainee or forward his case to trial. These administrative files usually contained three key documents: a printout from the RTDF's database (including basic information about arrest date, arresting authority, charged offense and personal data about the accused), an arrest warrant/detention order, and, where applicable, a transfer order from another detention facility. They contained no substantive evidence about the case, making it difficult to verify whether or not the pre-trial detainee's data sheet even had the charge correct.

In order to track these files, USAF personnel assigned to LAOTF developed the Law and Order Case Administration System (LAOCAS), an MS Access database which largely mirrored the USAF's AMJAMS program. Administrative data was translated into English and put into the database. In addition to challenges with translator proficiency regarding technical legal language, a huge stumbling block was the underlying data itself; the Arabic-language RTDF database from which the administrative data sheets were generated was (and remains) incomplete and/or inaccurate. Comparing an individual pre-trial detainee's data against those documents which had a greater likelihood of accuracy (e.g., the underlying arrest warrant/detention orders) highlighted this shortcoming with the RTDF database. Addressing issues with the RTDF database would eventually merit focus as a separate mission.

TR translated individual admin files, input the data into LAOCAS, and then "scrubbed" the names of the pre-trial detainees against CF intelligence databases, also capturing that screening in LAOCAS. The concept behind the intelligence screening was to ensure individuals wanted by CF were not inadvertently "slipping through the cracks." A number of databases were employed and this was the slowest part of the assessment of each individual prisoner file. While running 24 hour operations, approximately 100 cases could be screened per day, with about 10-15% requiring some type of follow-up (i.e., more detailed investigation) by our assigned U.S. Navy intelligence officers. Once "intel checked," these pre-trial detainees were deemed by LAOTF to be "cleared" for action by the CCCI-R. Initially, TR reviewed, screened against intelligence databases, and analyzed over 3,500 pre-trial detainee administrative files. Later, TR added an additional 1,200 names.

Data Analysis

The data from the scrub of prisoner administrative files revealed a number of facts and bends. The analysis reinforced many assumptions and assertions that, up until that time, had been

based solely on anecdotal evidence; it also led to the identification of some issues that would create long-term challenges.

As explained, the initial data points were established using data culled from hard copy administrative files provided by ICITAP, translated into English, and input into LAOCAS. Shortfalls of this approach became apparent over time. They included, but certainly were not limited to: lack of technical expertise in linguistic/translation capabilities, lack of standardization in translations, inconsistencies in the reverse translation from English back into Arabic in order to provide information to Iraqi authorities, and the compounding effect of errors created by each of these problems. These challenges were far less easily overcome than technical challenges of modifying LAOCAS to meet the evolving ability to generate various data reports.

TR's attempt to rectify some of these shortfalls was through its direct use of the RTDF's Arabic-language database. Based on data culled from the administrative files of each pre-trial detainee, TR discovered a number of gaps in the information. Additionally, without the complete database, TR was unable to have a complete picture of the data and would be forced to draw conclusions from a small, non-representative pool consisting of those files provided to us by ICITAF'. Although we lacked translators who were comfortable working with a database, two attorneys had Arabic-language proficiency that allowed TR to effectively utilize the RTDF's database without the onerous and time consuming steps of translation into English and then back into Arabic.

Some of the salient facts that emerged included:

The RTDF's Arabic-language database was an incomplete and inaccurate picture of the RTDFS population, but it was the best/most accurate TR had. For example, there was a greater than 6% error in raw numbers between what the database showed the RTDF population to be and what the individual, largely hand-written rosters of each cell (the more accurate count) showed the population to be;

Less than 1% of the prisoners' administrative files contained a current detention order and thus pre-trial detainees were being held without apparent/documented authority;

There were hundreds of cases from 2003 (260), 2004 (155), 2005 (341), and 2006 (465);

Most (70+%) of the pre-trial detainees were from 2007 (post FAQ);

Many pre-trial detainees (approximately 50) were found to have been in prison without any apparent due process longer than the likely sentence they would have received if a judge had timely found them guilty;

Pre-trial detainees were mixed in with post-trial prisoners who were awaiting transfer to elsewhere in the Iraqi Correctional System (ICS) for release;

The vast majority of prisoners (>80%) are charged with some terrorist-related act, most under Article 4 of the Anti-terrorism Law, which carries a mandatory death sentence. (The implications of this charging methodology would have a significant impact on the IJ's perception of their ability to dismiss cases for lack of evidence and are addressed below.)

There are over 100 different arresting authorities responsible for pre-trial detainees in the RTDF and it is impossible to tell from the prisoner's administrative file in which court his investigative file may have ended up; geographical boundaries did not always marry up to a court's jurisdiction.

As a result of this data, LAOTF's focus (and thus TR's) measure of effectiveness became, "How many prisoners can we get / have been released?" In hindsight, the correct measure of effectiveness, in light of the mission to build judicial capacity, should have been, "In how many cases have the judges reviewed and made a decision, either final or interim?" The systemic issue requiring a sustainable fix is one of due process, not one of mass release, assuming at some point in the near future the population will stabilize and input (arrests) and output (judicial decisions) will equalize. While not fatal, the incorrect measure of effectiveness appears to have caused TR to expend unnecessary effort continuing to "intel check" and entering files into LAOCAS, as LAOCAS was (and remains) solely a tool for our (LAOTF) use. LAOCAS, lacking Arabic inputs and requiring reverse translation to provide case-specific information back to the judges, had a limited useful lifespan and it eventually became more work "feeding" LAOCAS than benefit received from it.

Ministerial Pressure

Based on analysis of the data collected and entered into LAOCAS, TR was able to provide the LAOTF Director, the Multi-National Force - Iraq (MNF-I) Staff Judge Advocate, and the Legal Attaché previously unavailable hard data and analysis of that data on the RTDF population. With that information, key players in the Coalition's rule of law effort were able to leverage resources at the Ministerial level. The most tangible result of that effort was Chief Judge Medhat's granting jurisdiction to CCCI-R over all pre-trial detainees in the RTDF (which occurred in late September 2007) and, beginning in late October 2007, a corresponding increase in judicial resources (investigative judges, judicial investigators, and an additional trial panel). TR's data (even with the RTDFs database's inaccuracies) gave "teeth" to the anecdotal stories about pre-trial detainees being detained without detention orders, having expired detention orders or arrest warrants, having not seen a judge (or experience even the most basic levels of due process), or languishing in prison for various sectarian, extortion or other criminal reasons. In short, the data served to embarrass Iraqi authorities into action.

C. The 2008 Annual Iraq Rule of Law Conference^{*}

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 brought together over 150 attorneys, advisors, and other professionals working rule of law programs across the Iraqi Theater of Operations. The backgrounds of the participants were as disparate as the nations represented, which ranged from the United States to Japan to Denmark to Iraq. The conference provided a forum for USM-I agencies, military personnel, IOs, and NGOs to report on their efforts, achievements, and challenges across the spectrum of rule of law projects.

^{*} CPT Adam Brake, USAR, served as the Deputy Rule of Law Attorney and Legal Advisor for Strategy, Plans, and Assessments, Multi-National Force-Iraq from June 2007 to May 2008; CPT Rachel Landsee served as Operational Law Attorney, Multi-National Corps-Iraq from January to May 2008; MAJ Sara Root served as Chief, Rule of Law, Multi-National Corps-Iraq from January 2008 to June 2008.

The rule of law footprint in Iraq spans all 18 provinces. The USM-I includes a wide range of US Government agencies many of whom are directly involved in the rule of law mission. MNF-I includes personnel from over 30 countries, and almost all have some function relating to the rule of law mission. With this geographically diverse effort and broad spectrum of contributors, it was crucial to organize a central conference for those involved to meet, compare notes, and assess the accomplishments and challenges of the rule of law, and especially the way ahead.

The International Zone, centrally located in the capital city of Baghdad, is one of the few places in Iraq where such a conference is practical. Access to the US Embassy for such a diverse group is not practical. The Blackhawk Conference Facility, located just blocks away, provided conference facilities that allowed for large meetings and smaller rooms for private discussions.

Rule of law attorneys from the USM-I Rule of Law Coordinator's office, the Office of Provincial Assistance, and the Offices of the Staff Judge Advocate at both MNF-I and MNC-I worked together to organize the conference. Following the format of previous years, the conference was divided into a day of presentations focusing primarily on USM-I efforts, a day of MNF-I presentations, and a third day of presentations given by members of the Iraqi legal profession to include the Chief Justice of Iraq. While this format made the organization simple, it also highlighted the artificiality of the separation often drawn between military and civilian efforts in this field. This misleading distinction was one of the key lessons that emerged from the conference. Senior leaders from both USM-I and MNF-I stressed to their subordinate elements during the conference that they needed to plan and conduct all rule of law projects in a coordinated, synchronized fashion.

Within the wide variety of presentations and panels offered by Coalition Forces, Iraqis, and both governmental and non-governmental organizations, a few other consistent themes emerged. Three primary areas identified as crucial ongoing efforts and relevant to new initiatives in other developing countries were comprehensive planning, the management or oversight of rule of law projects and initiatives, and judicial professionalism.

Judicial Professionalism²

Five years into Operation Iraqi Freedom, Coalition efforts have moved away from physical reconstruction to greater emphasis on capacity building and helping the Iraqis use their own substantial resources to meet Iraq's urgent needs. The focus has increasingly shifted toward Iraqi participation, sustainability, and accountability. Within that capacity building priority, judicial professionalism stands out as the common denominator in the complex equation that must be solved to achieve the standard expected from the international legal community.

Rule of Law Conference presenters, panelists, and audience members consistently raised the issue of judicial professionalism and lack of adequate procedures for collecting, preserving, and presenting evidence from arrest through pretrial proceedings and even trials. The result is a system that frequently lacks a sufficient evidentiary basis for its actions. While tremendous progress has been made leveraging resources towards providing secure judicial facilities and new infrastructure to support the judiciary, many conference participants expressed concerns that these accomplishments did not address one of the most pressing issues retarding progress in the

² Comprehensive planning and project management are dealt with in greater detail elsewhere in the *Handbook*, and so we will focus on the conference's treatment of judicial professionalism.

rule of law mission: accepting responsibility to ensure due process to the approximately 25,000 personnel detained in Iraqi detention facilities. Conference attendees agreed that both judges and law enforcement personnel must collectively own this responsibility in order to realize the promise of the rule of law. Article 19 of the Iraqi Constitution embraces the concept of due process in a way that clearly falls within the international standard. With the approval of the Constitution in October 2005 one could argue rule of law was established in Iraq. However, the mechanics of implementing the processes guaranteed to the citizens remains an ongoing effort consuming years of effort and billions of dollars.

Judge Advocates who have convened courts-martial proceedings in tents and other makeshift courtrooms know well that administering justice does not require palatial surroundings. What is physically required is simple: a qualified judge and the officers of the court; what process and procedures the court follows is vastly more complex and a much greater challenge for rule of law advisors.

Because both the judiciary and the police are collectively responsible for case management and detainee administration, both must have a system that organizes basic information such as name of the incarcerated, length of incarceration and the pending charges. Most participants in the Rule of Law Conference highlighted deficiencies in these areas, and also discussed efforts to help the Iraqis make improvements.

As identified by the attendees at the conference, a major priority for rule of law operations is encouraging diligence in the Iraqi legal community and integrating Coalition Force law enforcement personnel into the Rule of Law team. While judge advocates work most closely with Iraqi judges and lawyers, military police and civilian police contractors mentor and train Iraqi law enforcement personnel.

The annual Rule of Law Conference in Baghdad afforded the opportunity to step back from the daily pressure of project management and analyze which efforts are improving judicial effectiveness. With five years of successful combat operations and billions of dollars spent rebuilding the Iraqi nation, finding the appropriate metrics by which to measure progress is often difficult. The rise and fall of security operations correlates to surges of increased numbers of detainees who will challenge the capacity of the courts and holding facilities. Extraordinary efforts and innovative solutions to these capacity issues allowed rule of law complexes to initially absorb surge populations. However, these achievements are only part of the equation and must be met by an equally robust increase in the commitment of the judges and court officers to process cases.

The lesson for the deploying JA or rule of law advisor is that imparting professional work ethics and commitments to accomplishing the mission of administering justice must be central to all activities. The Government of Iraq has the financial resources and is slowly gaining the skills needed to execute its own budget to provide its own infrastructure improvements. Coalition Force Rule of Law efforts should continue its shift to allocate resources towards the more difficult challenge of cultivating judicial and law enforcements professionalism. The success of the rule of law mission relies upon the commitment of the participants to use the infrastructure to improve due process for its thousands and thousands of incarcerated citizens.

D. Judicial-Police Interaction in Al Anbar Province*

Regimental Combat Team-2 (RCT-2), II Marine Expeditionary Force (Forward) deployed in January 2007 to Al Anbar, Iraq, as part of Multi National Force - West (MNF-West) during Operation Iraqi Freedom 06-08. Regimental Combat Team 2's (RCT-2) mission in Western Al Anbar Province was to establish security, stability, and support for the Iraqi people, transition COIN operations to the Iraqi Security Forces (ISF), defeat Al Qaeda in Iraq (AQI), and neutralize the Sunni insurgency. The RCT's area of operations (AO Denver) encompassed over thirty thousand square miles of the western region of Al Anbar comprising six separate Iraqi judicial districts and included borders with Saudi Arabia, Jordan, and Syria.³ During the Regiment's thirteen-month deployment, the RCT identified the rule of law as a key line of operation to criminalize the insurgency and establish legitimate Iraqi government institutions. The RCT developed the rule of law in AO Denver by reaching out to not only the judges, but also the local police and law enforcement, civic and tribal leaders, provincial leaders and courts, and the citizens subject to the courts' jurisdiction.

As of January 2007, in the judicial districts located in AO Denver, court staff personnel were non-existent, courthouses were unoccupied or used for other purposes, and no legitimate judges were willing to identify themselves or hear cases.⁴ The RCT-2 judicial engagement process started in April and May of 2007 with a thorough assessment of courthouses and court personnel. Courthouse locations and personnel were identified, and court personnel including the Iraqi judges were encouraged to return to work. Immediately, and as a result of improved security, the Iraqi judges began handling civil matters, including property transactions, notarizing and certifying documents and records, marriages, divorces, among others. Once the courthouses and judges were identified, Coalition Forces (CF) began conducting regular engagements with the Iraqi judges and coordinated Commander's Emergency Response Program (CERP) projects to rehabilitate the courthouses into functioning buildings. These judicial engagements laid the ground work for CF-Iraqi judicial relations and facilitated the discussion of adjudicating criminal and terrorism cases as the Iraqi criminal justice system matured.

Once the judicial engagements turned to processing criminal cases, it became readily apparent that the missing link during the engagements was the Iraqi police, specifically Iraqi police investigators. The Iraqi judges were quick to criticize and say that the police were not doing their job and were not investigating or forwarding cases to the investigative judges. Likewise, during engagements with the Iraqi police, the police would point blame and say that the investigative judges were unwilling to hear criminal cases so the police were forced to transfer detainees to CF custody. To solve this problem, RCT-2 started conducting courthouse engagements with both the investigative judges and the police investigators in attendance. Engagements conducted in this manner eliminated confusion about what cases were being

* Maj. David C. Morzenti, USMC, served as the Regimental Judge Advocate for Regimental Combat Team-2, II Marine Expeditionary Force (Forward), Multi National Force-West from July 2007 through January 2008.

³ AO Denver was the area of operations assigned to RCT-2. It included approximately the western two-thirds of Al Anbar province and was dominated by the Western Euphrates River Valley to the north and east; and international borders with Syria, Jordan, and Saudi Arabia to the south and west.

⁴ The six Iraqi judicial districts within AO Denver are the districts of Al Qaim, Rawah, Anah, Hadithah, Hit, and Ar Rutbah.

investigated by the police, who the police had in custody, and what cases were ready to be turned over to the courts.

Along these same lines, the investigative judges complained that the Iraqi police investigators lacked technical expertise in conducting criminal investigations. The Iraqi police force in AO Denver was comprised of mostly “shurta” (Iraqi police who have received only very basic training) and had very few formally trained officers. Slots for formal police training at the national police academies were difficult to obtain and were insufficient to satisfy the requirements of the quickly growing police force in AO Denver. In order to provide additional police training opportunities for Iraqi police in AO Denver, the RCT established the Hammurabi Training Center at Al Asad, Iraq. Courses taught at the Hammurabi Training Center included logistics, administration, first-line supervision, jailer, and investigations. The Basic Criminal Investigation Course was identified as a requirement and developed as a direct result of the judicial engagements and concerns of the local Iraqi judges.

The Basic Criminal Investigation Course was a five day course that covered various investigative techniques as well different types of investigations. The RCT-2 Rule of Law manager coordinated closely with the RCT-2 ISF Cell⁵ and Hammurabi Training Center personnel to create the specialized course for Iraqi police investigators. The RCT-2 ISF Cell coordinated the scheduling and logistics of the course with the assistance of the 170th Military Police Company.⁶ Police Transition Teams throughout AO Denver identified the Iraqi police investigators within their districts (or promising shurta who wanted to become police investigators) and arranged for their attendance at the course. The International Police Advisors obtained the course materials and worked with the RCT-2 Rule of Law manager and ISF Cell to hone and tailor the training for AO Denver.⁷ The course classes were taught primarily by Iraqi instructors with CF and International Police Advisor assistance. Iraqi instructors with significant subject matter expertise were identified and selected by the RCT-2 ISF Cell from Iraqi police officers throughout AO Denver.

Course topics included investigating crimes such as burglary, robbery, theft, sexual offenses, arson, drug offenses, and murder. Classes also covered evidence collection, interrogations, court trials, witness statements, and case preparation. Instructions on preparation and proper use of forms for fingerprints, witness statements, and evidence custody were taught,

⁵ The RCT-2 ISF Cell was an organization within the RCT-2 Operations Section designed to facilitate transition to Iraqi-led COIN operations and increase coordination and planning with both Iraqi Army and Iraqi police units. At its peak, the RCT ISF Cell consisted of 17 dedicated Marines filling various assignments such as the Transition LOO Manager and ISF Coordinator, Ministry of Interior Coordinator, Ministry of Defense Coordinator, Logistics Officer, Operations Officer, Operations Chief, Intelligence Officer, Logistics Chief, Operations Assistant, and Combined Military Coordination Center Representative. Additionally, liaison officers were established with the 7th Iraqi Army Division and Provincial Police Transition Team (P-PTT) in Ramadi.

⁶ The 170th Military Police Company was attached in direct support of RCT-2 and provided much of the day-to-day support for operations and logistics of the Hammurabi Training Center. Additionally, the Company provided soldiers for several Police Transition Teams (PTT) throughout AO Denver.

⁷ International Police Advisors are personnel assigned to the Civilian Police Assistance Training Team (CPATT), a subordinate command of Multi-National Security Transition Command Iraq. International Police Advisors are civilian personnel with substantial law enforcement experience who use their expertise to advise and train Iraqi police.

and standardized forms were distributed to the students for future use. Additionally fingerprinting kits were obtained from Civilian Police Assistance Training Team (CPATT) and distributed to Iraqi police investigators from each of the six judicial districts to take back with them to their police stations. Funding for the course was provided by both CPATT funds and RCT-2. The Basic Criminal Investigation Course was the first such course taught at the Hammurabi Training Center and had 24 graduates with representation from each of the six judicial districts in AO Denver.

The Iraqi police investigators became a critical link in the Iraqi criminal justice system. The formal training of the police investigators greatly enhanced the relations between the Iraqi judges, Iraqi police, and Coalition Forces. Furthermore, the enhanced proficiency of the Iraqi police investigators contributed significantly to the successful processing of criminal cases in AO Denver.

E. Baghdad Provincial Reconstruction Team Law School Book Purchase Program*

On the Baghdad Provincial Reconstruction Team (PRT) in 2007-08 the rule of law portfolio consisted of Iraqi professional legal organizations; law schools; the Access to Justice program; human rights (juveniles, women's issues, and NGOs); and courts, police, and prisons.

The methodology used to develop rule of law projects consisted of an evaluation and assessment phase, a determination-of-needs phase, and a courses-of-action phase. One such project was one designed to provide law books to the Baghdad Law School.

Evaluation and Assessment Phase

There are 27 law schools in Iraq. Some are public and others are private. The Baghdad Law School is a public institution and is the oldest law school in the Middle East; it will be celebrating its centennial in September 2008. Given the need for legal education in Iraq and the school's already-preeminent position, the PRT rule of law team identified it quickly as a potential target for rule of law projects. Initially, the ROL team encountered some reluctance on the part of the Law School's Deans to engage with the PRT and to have the PRT come to the campus. In order to alleviate this concern, the rule of law team arranged to meet with the Deans at the Al Rasheed Hotel, which is located inside the International Zone (formerly known as the Green Zone). The Al Rasheed is considered somewhat neutral and is a common and favorite place for Iraqis to gather and meet with non-Iraqis. It is safe and not threatening. There were a number of meetings over many months with the Baghdad Law School Deans and, over the course of time, the rule of law team was able to gain the confidences of the Deans so much so that the Deans were comfortable with the team. The rule of law team placed a premium on being able to develop a professional and personal relationship with the Deans.

The Deans had explained that the Baghdad Law School Library had been considered the main law library in Baghdad, but after the overthrow of Saddam Hussein the library was looted and the books either taken or destroyed. As a result their library was practically nonexistent.

* BG (Ret.) Coral Wong Pietsch served in a civilian capacity as the Deputy Rule of Law Coordinator for the Baghdad Provincial Reconstruction Team Rule of Law Section from May 2007 to April 2008.

Determination of Needs

Once this fact was known, well-intended donors donated large quantities of books to reestablish the Baghdad Law School Library. However, because these donors did not effectively consult with the Law School officials regarding their donations, the rows and rows of books that were donated were virtually useless—they were all in English, and consisted of outdated law school textbooks, various state and local laws, regulations, and city and county ordinances, as well as various and sundry case books on topics that were not relevant or known to Iraqi jurisprudence. Iraq is a civil code country and the books that were donated were largely focused on common law practice.

The rule of law team assessed that the Law School Library needed to be stocked with relevant and useable books, but unless the Dean came forth with a list of books that he believed was appropriate, the team did not want to impose any more irrelevant books on them. The numerous meetings with the Deans built a confident relationship between the rule of law team and the Law School that culminated in the Deans providing a list of books that they believed would help reestablish their library. The list consisted of over 200 Iraqi legal publications with over 800 books being requested (multiple copies of each publication). In addition, the Dean provided the cost breakdown of the books, which was about \$12,000. The rule of law team considered this a breakthrough in relations with the Deans of the Baghdad Law School. In fact, the Deans felt confident and comfortable enough with us that they invited us to the School—a major breakthrough in our relationship.

Courses of Action

Once we received this request, the rule of law team sought funding sources. Possible funding sources included Quick Reaction Funds, Commander's Emergency Response Funds, the Ambassador's Targeted Development Program funding, and possible European Community funding. However, the most immediate source of funding was the PRT Quick Reaction Funds (QRF), for which the PRT team leader had approval authority up to \$25,000. We approached the PRT team leader about this purchase, and the team leader enthusiastically agreed to fund this request as being one that advanced the rule of law, was enduring, did not require continuing funds for sustainability, and was a most appropriate gift for the Law School's upcoming centennial. The formalized request was submitted to the team leader and approved. The books were purchased from a local Iraqi vendor and delivered to the Baghdad Law School within 30 days of the team leader's approval. By purchasing from a local vendor (rather than an Egyptian vendor), the project had the additional benefit of supporting the Baghdad economy.

Epilogue

The success of this small but significant project led the rule of law team to conclude that the other Iraqi law schools might be interested. As a result, the rule of law sections in the other major PRTs throughout Iraq were provided the list of books (both in Arabic and English) for possible implementation with the law schools located in their areas of operations.

F. *Engaging Judges Effectively in Iraq* *

Nonlethal targeting of the Iraqi judiciary in Operation Iraqi Freedom (OIF) continues to be a force multiplier. Deliberate, strategic engagement of judges is an important part of the nonlethal targeting process and requires time, planning, and resources. During the 2007 coalition “surge” the Commanding General, Multi-National Division-Center (MND-C) emphasized a deliberate engagement strategy of key judges in the operating environment. The MND-C rule of law cell developed and executed an engagement strategy with the judiciary in Baghdad’s two southern Qadas, their respective chief appellate judges in the Karkh and Rusafa Districts, and chief appellate judges in five central provinces to leverage the command’s key rule of law objectives.⁸ The engagement of the judiciary was an early component of the Division’s nonlethal targeting process and was discussed weekly at the nonlethal targeting working group and briefed at the Commanding General’s nonlethal targeting meeting.⁹ In April 2007 the Commanding General stated that security improvements in the operating environment could only be sustained by concurrent capacity-building of elements of the Iraqi government beyond security forces. Using the window of opportunity created by early security successes such as Operation Marne Torch and the clearing of al Qaeda in Arab Jabour, judicial capacity expansion became the priority for the rule of law line of operation.¹⁰ The effort focused on judicial engagement with local Iraqi judges.

Outside of the International Zone, where there are institutionalized weekly engagements with senior members of the Higher Juridical Council and legal liaisons from the Department of State, Department of Justice, and Multi-National Force-Iraq (MNF-I), judicial engagement is highly varied and largely up to the coalition forces in the area.¹¹ Some jurists have had repeated contact with coalition forces and are used to the interaction. Other courts have never been engaged. Notably, the provincial judiciary does not have directly assigned coalition counterparts to facilitate capacity-building.¹² As a result, the MND has tremendous influence on how judicial engagement will occur.

* LTC(P) C.W. Royer, USAR, served as the Rule of Law Officer in Charge for Multi-National Division-Center (3rd Infantry Division), Baghdad, Iraq from April 2007 to June 2008.

⁸ The rule of law cell at MND-C was nested with Governance, but was a separate line of operation. Roughly the equivalent of a county in the United States, MND-C’s operating environment included the densely populated Baghdad Qadas of Mahmudiyah and Mada’in. The city of Baghdad is divided into two large administrative districts separated by the Tigris River. Karkh, including the International Zone, is west of the Tigris River. Rusafa, more densely populated and including Sadr City, is east.

⁹ The nonlethal targeting process is generally discussed in U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY ch. 5 (15 Dec. 2006).

¹⁰ Arab Jabour is the eastern part of the Rashid Nahia (subdistrict) and part of the Mahmudiyah Qada that runs along the Tigris River south of the Doura Nahia. It had developed into an al Qaeda sanctuary and was largely untouched by coalition forces prior to 2007’s “surge.”

¹¹ The Higher Judicial Council is headed by the Chief Judge of the Supreme Court and is responsible for all administrative matters relating to the courts. The chief appellate judges of each province and Baghdad’s two appellate districts, along with several judges from the Court of Cassation comprise the HJC.

¹² The ISF have coalition partnership in the form of Police Transition Teams (PTT), Military Transition Teams (MTT) and National Police Transition Teams (NPTT) (all under Multi-National Security Transition Command-Iraq). Additionally, for example, the Ministry of Interior, Iraqi Corrections Service,

MND-C Judicial Engagement Strategy

The MND-C commanding general viewed the Iraqi judiciary as an untapped engagement resource, capable of cementing security gains and hastening local nationals' perception of normalcy. In early April 2007, he directed the Division's rule of law cell to develop an engagement strategy focused on increasing rule of law capacity in the maneuver brigades' battlespaces. The rule of law cell decided to focus initial efforts on Baghdad's two appellate judges and local judges in two areas where the rule of law was characterized as a priority: the Mahmudiyah and Mada'in Courts. These spheres of influence became the rule of law cell's primary focus for the next six months.¹³

In conjunction with the land-owning BCT, MND-C applied a deliberate long-term engagement strategy approach to the chief appellate judge of Rusafa who had direct authority over the Mada'in Court, a court within the battlespace of a maneuver brigade.¹⁴ At the beginning of the deployment, the Qada court was collocated with the Karada court in the heart of Baghdad. Moving the court back to the Qada was the first task, with a longer-term goal of moving it to its historical site in Salman Pak, approximately twenty miles southeast of the International Zone. Engagement of the Rusafa chief appellate judge and the Mada'in Court occurred concurrently and repeatedly.

Over the Summer and Fall of 2007, the existing and empty courthouse in Salman Pak was completely renovated using MND-C CERP funds. This use of CF funds in coordination with the CAJ's direction on the project further enhanced the relationship. Additional leverage was created for the move from feelings of an obligation to occupy the renovated site that arose with the Iraqis. Simultaneous, concurrent, and consistent engagements took a variety of shapes. Some included the lower court's chief judge and the CAJ at the appellate courthouse. Some were with lower court judges at the Karada courthouse where they were sharing space. Some of the meetings involved the chief judge of the Karada Court, who was dual-hatted as the deputy to the CAJ for the Rusafa Appellate District. After familiarity was achieved, a larger engagement including key ISF, the Qada Mayor, and senior BCT leadership occurred at a nearby CF FOB.

MND-C Command Emphasis

The Deputy Commanding General-Support was the senior engager at MND-C for the Iraqi judiciary. The general hosted a meeting of five chief provincial judges in September 2007 at the regional embassy office in Hilla, Babil Province. It established MND-C's commitment to

and Ministry of Defense all have numerous coalition advisors assigned full-time to assist. Provincial Reconstruction Teams (PRT) have a rule of law coordinator position that, among other things, engages local judiciary based upon DOS and PRT operational goals. PRTs have historically had limited movement capability, reducing their engagement frequency. MND-C worked with the PRTs in its AO to encourage their regular engagement of chief provincial judges to facilitate relationship-building.

¹³ The Commanding General's other rule of law focus for the first six months was to open the completed but unopened "new" Hilla Jail, which had been unoccupied since its completion in 2006. Leveraging relationships developed with the Babil chief appellate judge and Ministry of Justice contacts, the MND-C was able to facilitate the opening of the 500-person pretrial and "light-sentence" facility in October 2007. It had an instant positive affect on Iraqi security forces and judicial capacity in the region.

¹⁴ Mada'in Qada is a part of the greater Baghdad Governorate (also known by coalition forces as part of the "Southern Belt"). Its main population centers include Jisr Diyala, Narhawan, and Salman Pak. The MND-C BCT in Mada'in was the 3rd Heavy Brigade Combat Team, 3rd Infantry Division.

the rule of law and provided referential credibility to MND-C rule of law personnel conducting engagements around the operating environment. The general also authored “star” notes to key judges and had rule of law personnel give them the MND-C coffee table book, “Building Iraq Together.”¹⁵ These gestures had a positive influence on judicial relationships throughout the operating environment. This helped create the perception with the judges that MND-C believed they merited general-officer-level engagement, a great relationship-builder.

The second half of MND-C’s surge deployment was driven by Operation Marne Fortitude II, which focused on governance and economic capacity building. Part of the ROL tasks required regular engagements of its key courts by each maneuver BCT. The institutionalization of judicial engagement into the Division operation order ensured BCT-level command attention to this important area. In conjunction with their area’s PRT or Embedded Provincial Reconstruction Team (ePRT), the BCT rule of law cells developed their own engagement strategies. For added emphasis, the Deputy Commanding General-Support hosted an MND-C rule of law dinner focused on engagement strategy and cultural awareness. A former Iraqi senior general officer was the guest speaker.¹⁶ The tactics, techniques, and procedures outlined in this article formed the basis of the instruction.

By the end of the deployment, mature relationships with rule of law spheres of influence paid off repeatedly. Relationships built on respect and trust, assembled brick-by-brick in earlier engagements with the head of the Iraq Corrections Service (an urgent detainee issue) and the chief provincial judge of Wasit Province (involving twenty impounded fuel trucks) resulted in quick late wins for the Division. Goodwill and familiarity resulted in resolutions of two complex problems. One problem took one day of coordination and a short engagement by the Deputy Commanding General-Support. The other was handled by a few phone calls from the rule of law officer in charge to the chief provincial judge. Early in the deployment when there was no dividend of trust to cash, both situations would have been difficult issues requiring significant coordination and negotiation to resolve. The results of the long-term relationship-building paid off, requiring no “heavy-lifting” by MND-C. It also deepened the cooperation between coalition forces and the Iraqi government in the task force’s operating environment. The desired results for coalition forces were achieved and it was done the Iraqi way.

Conclusion

In the MND-C operating environment, the surge has seen nonlethal efforts solidify security gains made from successful kinetic operations. The window of opportunity created by dramatic reductions in attacks was exploited by an aggressive rule of law capacity-building engagement strategy.¹⁷ The engagement of key judges was the most significant of MND-C’s rule of law initiatives. The dividend has been security solidification, an increased capacity and the growing confidence of court personnel and citizens in the operating environment. Investing time and effort in judicial relationships will continue to be the most critical part of solving rule of law problems in Iraq.

¹⁵ This hardback book, originally designed as a psychological operations product to counter improvised explosive device (IED) placement, became a command group “leave behind” gift during key leader engagements.

¹⁶ General Al-Ali H. Fawzi, former Chief of Staff, Iraqi Army 3rd Corps.

¹⁷ In the MND-C operations environment, attacks went from 25 per day in April 2007 to 2.4 per day in April 2008.

G. Rule of Law Green Zone Coordination Meetings^{*}

An excellent example of the importance of synchronization, integration, and coordination of rule of law operations are the “Rule of Law Green Zone Meetings.” The meetings began in March 2007 and are still ongoing. Chaired by the Commander, Task Force 134, Commander, Civilian Police Assistance Training Team (CPATT), and the MNF-I SJA, and attended by the Embassy Rule of Law Coordinator and representatives from the Department of Justice’s International Criminal Investigative Training Assistance Program (ICITAP) Prison Advisory Team, Corps of Engineers, Joint Contracting Command, Embassy Rule of Law sections, Justice Attaché, Legal Attaché, Multi-National Force and Corps Staff Judge Advocate offices, Corps Provost Marshal, and the Law and Order Task Force (LAOTF).

The meetings began initially to coordinate the efforts of TF 134 and CPATT concerning assisting the Government of Iraq by constructing temporary detention compounds to hold the detainees we anticipated would be captured by the Iraqi forces during the upcoming surge. The initial focus of these meetings was to coordinate land-use issues: construction and funding of the temporary detention compounds for the Iraqi prisoners. The first issue was obtaining permission to use the land. This issue was a challenge because the land we wanted to use was the subject of an ownership dispute between the Ministry of Interior and the Ministry of Justice. Task Force 134 was the lead liaison with the Ministry of Justice and CPATT was the lead liaison with the Ministry of Interior. The first success of the coordination meetings was on March 20, 2007 when the efforts of the coordination meeting resulted in a meeting between the Deputy Minister of Justice, Deputy Minister of Interior, Department of Justice Prison Advisory Team, Commander TF 134, and Commander, CPATT. This unprecedented meeting of the two ministries resulted in a compromise as to the use of the land that allowed the construction of the temporary detention compounds to proceed.

The coordination meetings continued every Monday afternoon thereafter. After the land use issue was resolved, the next issue the group addressed was hiring and training the Iraqi prison guards to man the temporary detention compounds. This effort required close coordination between ICITAP, CPATT, and TF 134. The efforts of the coordination meeting group, supported by Joint Contracting Command, resulted in the first ever program to train Iraqi prison guards at the International Police Training Center in Jordan. The group assisted ICITAP with coordinating the military, mission and Iraqi components of this massive training effort. Through the efforts of this group, the manning of the detention facilities was synchronized with the construction of the compounds and timed to address the anticipated need that the Iraqi security forces would have to detain prisoners.

The coordination meetings have also been devoted to coordinating the construction, funding and manning of the Rule of Law Green Zone – a secure complex for Iraqi judges, courts, witnesses, and detainees – and the supporting Law and Order Task Force. The meetings were used as project coordination meetings to monitor the construction of the Rule of Law Green Zone, provide input on design and funding issues, and provide a forum for all the interested parties to participate in the development of the Rule of Law Green Zone project. The lead for the Rule of Law Green Zone was the Staff Judge Advocate, MNF-I. But construction and manning

^{*} COL (Ret.) David Shakes, USAR, served as the Rule of Law Advisor to Task Force 134 from January 2007 to January 2008.

of the project required coordination with CPATT, FBI, DOJ ICITAP, TF 134, US Embassy, International Narcotics and Law Enforcement (INL), and the Government of Iraq.

An important aspect of these meetings is that the players attend voluntarily. The participants are present because they recognized the need to coordinate the various entities that had an interest in the Rule of Law Green Zone.

The success of this informal coordination group allowed the Monday afternoon meetings to evolve into one of the key rule of law meetings in Baghdad. Membership grew to include the UK Legal Advisor, Department of State INL, Baghdad Provincial Reconstruction Team Rule of Law coordinator, and the US Legal Advisor to the Iraqi Baghdad Operations Center. The scope of the meetings expanded to include addressing the problems of Iraqi detention facilities throughout Baghdad, coordinating efforts to train Iraqi Judicial Investigators, and developing and coordinating the US message and contacts with the ministries and courts of the Government of Iraq. Weekly “talking points” were developed that represented the integrated and coordinated message that each participant was to carry to their meetings with Iraqi officials. The participants report back to the group concerning the engagements with Iraqi officials. Through this coordination coalition military and US Embassy mission participants present a united and consistent message to our Iraqi partners.

The weekly coordination meetings also provide a forum in which to formulate and evaluate the planning and execution of several joint operations within Baghdad concerning Iraqi detention issues and improvements within the Iraqi criminal justice system and to assess the progress of current MNF-I taskings to subordinate and parallel organizations.

Although the weekly coordination meetings have been successful, as the scope of the meetings expanded beyond just project coordination for the Rule of Law Green Zone, at times the meetings became controversial because US Embassy rule of law actors became concerned that the military rule of law actors used the meetings as an alternative to – and in competition with – the rule of law meetings that were supposed to occur at the US Embassy. Overall, these informal and voluntary meetings of rule of law operators from the military, civilian and international communities provide a valuable source of synchronization, integration, and coordination for rule of law efforts in Iraq.