

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

2009

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

2009

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**The 2009 edition of the Rule of Law Handbook is dedicated
to**

Katherine Gorove

**Editor of the 2008 edition of the Rule of Law Handbook
and U.S. Dept. of State representative to CLAMO, 2007-2008**

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Although the Center for Law and Military Operations publishes the *Rule of Law Handbook*, it is the product of contributions by dozens of authors from a multitude of agencies, US, foreign, and non-governmental – military and civilian – over the course of several years. Before CLAMO took over sole publication in 2008, the *Handbook* was a joint publication of CLAMO and the Office of the Joint Judge Advocate at Joint Forces Command. But even that shared publication arrangement inadequately represents the breadth of contributions from other agencies. It would be difficult to list all who have contributed to the development of this, the third edition of the *Handbook*. Official clearance processes required by some agencies required to ascribe individual authorship credit makes doing so even less practical. The current editors are indebted to both our past and current contributors.

The contents of this publication are not to be construed as official positions, policies, or decisions of the United States Government or any department or agency thereof.

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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 reviews (AARs) from Judge Advocates, paralegals, and other legal professionals recently returned from deployments. These AARs reveal two constantly re-occurring themes. The first is that commanders naturally turn to their Judge Advocates 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 that ongoing overseas contingency operations will require the US military to engage in operations that include a rule of law component as an essential part of the overall mission. The 2002 National Security Strategy (NSS) mentioned the term nine times. In the 2006 NSS, the count was *sixteen*. As the 2002 NSS explains:

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

The current administration has also underscored its commitment to the rule of law. President Obama has remarked, "I believe that our nation is stronger and more secure when we deploy the full measure of both our power and the power of our values, including **the rule of law**."²

While there is little debate over the need for such a practitioner's guide, little else in the rule of law arena garners 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 the term "rule of law" means. As in the case of any emerging area of legal practice or military specialty, doctrine is in its infancy,³ 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

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>.

² President Barack Obama, Address at Central Intelligence Agency Headquarters (Apr. 20, 2009), *available at* <https://www.cia.gov/news-information/speeches-testimony/president-obama-at-cia.html> (last visited Sept. 3, 2009).

³ *See* U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, Appendix D (Apr. 2009) (doctrine addressing rule of law activities and the issues related to rule of law activities in which judge advocates may become involved).

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 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. Written primarily by Judge Advocates for Judge Advocates, the limits of its scope and purpose are to provide 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 writing of the *Handbook* occurred 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 AAR comments about rule of law operations from Judge Advocates who had participated in such missions. These comments are useful for understanding what we have accomplished (and failed to accomplish) to date. Standing alone, however, they simply lack the refinement and comprehensive analysis to assist the practitioner truly.

Nevertheless, 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 constitutes the rule of law is and its overall goals is important for the practitioner, theory without practice is of little utility when actually trying to take action.

The *Handbook* does 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,⁴ documents written by other agencies extensively cover many resources for information on rule of law activities. The *Handbook* references many of these. Any Judge Advocate deploying in support of the current conflict should make reading some of these a requirement. They include Field Manual 3-24, *Counterinsurgency* (2006), Field Manual 3-07, *Stability Operations* (2008), and the *USMC Small Wars Manual* (1940). Moreover, the design of the *Handbook* intends its use with other references familiar to Judge Advocates, such as the *Operational Law Handbook* (2009), and Field Manual 1-04, *Legal Support to the Operational Army* (2009).

In addition, within the Army, Civil Affairs units have often performed rule of law activities, 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 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.

The 2009 Edition

The 2009 edition of the *Handbook* is a minor update of the 2008 edition, with the exception of chapters X and XI, which have completely new narratives and project descriptions. Although there was a change of administration in early 2009 and there have been some important developments in the USG approach to reconstruction and stability operations, fairly little has changed from 2008 to 2009 in the principles behind the interagency approach to the rule of law.

Instead, this year’s revision to the *Handbook* reflects practical changes in the operating environment. In particular, the advent of the US/Iraq Security Agreement in that country has substantially shifted the approach US units must take toward the rule of law there. The loss of United Nations Security Council Resolution authority for US forces to detain individuals means units operating in Iraq must necessarily engage the Iraqi legal system to a greater degree, which necessarily increases the priority of standing up the capacity of Iraq’s own legal system. The *Handbook* also echoes a shift in emphasis toward Afghanistan and the troop build-up there, with two of the three narratives in Chapter X coming from that country. Other changes in the environment since 2008 include the increased capacity of the US Embassies in both Afghanistan and Iraq and the increased centralization of efforts in both counties, with narratives from the embassy perspective in both theaters.

⁴ 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>.

If it were possible to emphasize the interagency approach to rule of law more than the 2008 edition did, the 2009 edition does. In addition to updates from several interagency partners (most especially the legislative authorization to stand-up the Civilian Response Corps) and the above-mentioned narratives from the embassy perspective, the *Handbook* also includes a project description from a civilian USG perspective.

In many ways, the 2009 *Handbook* signals that both the theaters in which most JAs are undertaking rule of law missions, and the practices underlying those missions, are maturing. Many JAs in rule of law missions are on their second or third tour doing so. Long-promised civilian capacity is standing up, and JAs are now picking up existing rule of law projects rather than starting out on their own. To that end, the 2009 *Handbook* shifts some of its previous tone, which leaned toward the rule of law mission in the early stages of intervention and the “improvisational” nature of many rule of law programs. The reader of both the 2008 and 2009 editions will also notice the changing nature of the projects units undertake. Today’s projects are less likely to be physical improvements to infrastructure and less focused on the security of those institutions. They are more likely to be interagency and much more likely to place substantial responsibility on the host nation (HN) participants. Many of the successful projects described in chapter IX do no more than simply help HN agencies build relationships with each other.

It would be hard to overstate the number and variety of problems US forces and agencies have encountered and continue to encounter in the world of “rule of law.” We are starting to see some of the tangible benefits of that work as the security situation improves in Iraq. The hope of the 2009 edition of the *Handbook* is that the time has also come when we can reap the intangible rewards of learning we can glean from those hard experiences.

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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

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).

law could have a special role in Vietnam because of the unusual circumstances of the war, which was a combination of internal and external war, of insurgency and nation-building, and of development of indigenous legal institutions and rapid disintegration of the remnants of the colonial French legal establishment.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.

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I. Introduction

The *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates* is intended to provide a starting place for Judge Advocates deployed or being deployed to work on rule of law operations. As such, the *Handbook* is based on assumptions about both the background knowledge of its intended audience and the operational posture of rule of law operations. The *Handbook* presupposes basic knowledge of military terms and organizational structure, as well as a basic understanding of US military law. Because most American Judge Advocates currently engaged in rule of law operations are doing so in the context of reconstruction attendant to armed conflict and counterinsurgency, the *Handbook* is oriented toward rule of law operations occurring in those contexts. It 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” or “checklist” 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 describes 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. At the same time, it suggests 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 is most familiar to US Judge Advocates.

Chapter VI covers basic military planning doctrine for Judge Advocates, provides some practical tools for JAs deploying on rule of law missions, and describes some 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.

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). They occur 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) and affect 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 host nation search and seizure law applicable to US forces conducting security operations. Judge Advocates are engaged in rule of law operations 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 operations 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 operations in the context of larger campaigns of counterinsurgency (COIN),¹ as in Iraq and Afghanistan. Rule of law operations are central to COIN,² but the principles underlying rule of law operations 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

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). *See also* U.S. GOVERNMENT COUNTERINSURGENCY GUIDE 38 (Jan. 2009) (“Most countries affected by insurgency do not have robust, transparent and effective rule of law systems. Indeed, real or perceived inequalities in the administration of the law and injustices are often triggers for insurgency.”).

³ 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. 76 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.

central role. In order for those follow-on efforts to be successful, civilian agencies need to be involved at the earliest stages.

From an operational standpoint, any approach to actually *implementing* the 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 operations.

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.

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

- (4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.
- (5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.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 both Army doctrine and USG interagency agreement⁸:

Rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.⁹

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. AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. DEPT. OF STATE, U.S. DEPT. OF DEFENSE, *SECURITY SECTOR REFORM 4* (Feb. 2009) (“Rule of Law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law.”)

⁹ U.S. DEP’T OF ARMY, *FIELD MANUAL 3-07, STABILITY OPERATIONS 1-9* (Oct. 2008). This definition is based in part on that contained in the *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict And Post-Conflict Societies*, U.N. Doc. S/2004/616, at 4 (2004):

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**
- **The state protects basic human rights and fundamental freedoms.**
- **Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives¹⁰**

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.¹¹ 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 operations 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 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.

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

¹⁰ FM 3-07, *supra* at 1–9. Of the many definitions of the rule of law in common use, the list of seven effects most closely hews to that suggested in JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 78 (2006).

¹¹ *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 10, 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.*

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

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

That is not to say that only state instruments can wield violence as an instrument of state policy. It is possible for the state to delegate the use of force to subsidiary bodies such as state and local governments or even non-state security providers, who may or may not be accountable to local interests. Local security forces such as police, private security firms,¹² 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.

¹² 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.¹³ Militias often operate outside the law. Iraq's constitution prohibits the formation of military militias outside the framework of the armed forces.¹⁴ This prohibition has not stopped the militias from further contributing to violence, instability and insecurity.¹⁵ Militias have often operated under the protection of the Iraqi police to detain, torture, and kill suspected insurgents and 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."¹⁶

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."¹⁷

¹³ 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].

¹⁴ See IRAQI CONST. art 9.

¹⁵ Maples Statement, *supra* note 13, at 3.

¹⁶ See Walter Pincus, *U.S. Unsure About the Future of Iraq's 'Sons'*, WASH. POST., Mar. 31, 2008, at A17.

¹⁷ *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.¹⁸ 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.¹⁹ 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.²⁰ 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.²¹

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,

¹⁸ 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.

¹⁹ *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 135.

²⁰ *Id.* at 145-47.

²¹ *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.”).

of course, if an individual buys an exception to a legitimate regulation, the failure to apply the regulation is itself a failure of the rule of law. Corruption, or “the abuse of public power for private gain,”²² 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.²³ 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.²⁴ 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. It thus forms an important element of the state’s protection of human rights and fundamental freedoms against certain forms of discrimination.

Legislatures, too, must be bound by rules. As is the case in many republics, the reason offered by legislatures will be political rather than legal, but even the exercise of political will has constraints. Legislatures must follow established procedures when making law, and most societies include substantive limitations on the power of legislatures, whether in written or unwritten constitutions (such as the United Kingdom’s). Identifying and establishing the substantive limits of legislative authority is likely to be one of the most difficult problems any 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.²⁵

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.²⁶ 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

²² WORLD BANK, WORLD DEVELOPMENT REPORT 1997, at 102 (1997).

²³ 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.

²⁴ Fallon, *supra* note 5, at 20-21.

²⁵ *See generally* A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1968).

²⁶ H.L.A. HART, THE CONCEPT OF LAW 94-95 (2d ed. 1994) (describing the “rule of recognition” that societies use to identify law).

important for anyone undertaking rule of law projects in such countries to quickly determine whether existing institutions have the necessary political legitimacy to continue. The converse is that, when setting up new legal institutions, the most important thing will be to go through a process that produces the necessary agreement in order to have that institution's decisions recognized by the society as law.

Laws must be recorded in a way that makes them reasonably accessible, so that even if the average citizen does not read the law, they are able to understand its content through practice.²⁷

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. Consider, for instance, a legal system in which judges applied the law as given to them and police arrested and incarcerated offenders without corruption or bias. Most would agree it nevertheless would fail to qualify as applying the 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

²⁷ 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).

minority group) were considered personal property, to be openly bought and sold at market. It is meaningless to say that the law protects individuals without at least some concept of what it is that the law must protect.

The standards for the minimum protection of a country's inhabitants are embodied in the Universal Declaration of Human Rights (UDHR)²⁸ and the treaties to which the country is a party,²⁹ such as the International Covenant on Civil and Political Rights (ICCPR).³⁰ There is disagreement, however, 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.³¹ 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 person³² or the right to free speech³³ – 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,³⁴ 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.³⁵ 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,³⁶ and systematic mistreatment of citizens and prisoners is likely to

²⁸ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

²⁹ See FM 3-07, *supra* note 10, at 1-7

³⁰ Dec. 16, 1966, 999 U.N.T.S. 171, available at www2.ohchr.org/English/law/ccpr.htm.

³¹ UDHR art. 7; Kleinfeld, *supra* note 7, at 38.

³² U.S. CONST. amends. V, XIV, sec. 5; UDHR art. 3.

³³ U.S. CONST. amend. I; UDHR art. 19.

³⁴ 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).

³⁵ 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.”).

³⁶ See, e.g., Leahy Amendment, Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

lead to substantial international resistance from non-governmental organizations, international organizations, and coalition partners in any rule of law project.

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

Although one can arguably achieve order through threat alone, law is not compliance achieved through threat.³⁷ 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.³⁸ 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.³⁹ 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 resistance⁴⁰ (and fuel insurgency).⁴¹ 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.⁴² 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,”⁴³ 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

³⁷ HART, *supra* note 26, at 22-24.

³⁸ *Id.* at 54-58.

³⁹ See US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 7 (2008); STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 75-76.

⁴⁰ See JOINT PUB. 3-0, *supra* note 3, at V-26.

⁴¹ See FM 3-24, *supra* note 1, at 1-27.

⁴² See HART, *supra* note 26, at 57-58.

⁴³ STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 78.

one in which individuals themselves resolve disputes in ways *consistent* with the law even without invoking the judicial system.⁴⁴

The legitimacy of a nation's legal system is in many ways the ultimate expression of the rule of law, and is likely to take many years, if not decades, to develop. Again, Judge Advocates need look no further than America's own constitutional experience. The constitutional order that we now take for granted remained fragile for decades after the Constitution's adoption, and many would argue became cemented only after the Civil War and Reconstruction. A deployed Judge Advocate is unlikely to witness the full social acceptance of a legal system in a post-conflict country, but even local acceptance of a single court, police force, or town council is a major step on the road to achieving the rule of law. 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.⁴⁵ 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. 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.⁴⁶

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

⁴⁴ *Id.* at 78-79.

⁴⁵ See Paul Craig, *Formalist and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467.

⁴⁶ STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 70-71.

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.⁴⁷ Formalist projects are also much less likely to upset established political power relationships, which means that they are less likely to engender resistance from local, established elites, who may now find themselves at the mercy of their former rivals for alleged wrongs committed under the previous regime.⁴⁸ Similarly, formalist projects are frequently less likely to threaten the cultural identity of the host nation and its population than substantive projects.⁴⁹ 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,⁵⁰ 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 operations” – in the parlance of this *Handbook*, any project, program, or planned action whose specific goal is to help a host nation move toward the realization of one or more of the seven effects previously described – as there are definitions of the rule of law. Rule of law operations also 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.⁵¹ 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

⁴⁷ Robert Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1709-10 (1991).

⁴⁸ Kleinfeld, *supra* note 7, at 38.

⁴⁹ *See id.* at 38 (citing the example of gender equality as a threat to some conceptions of Islamic culture).

⁵⁰ 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).

⁵¹ STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 3.

nations, many industries are traditionally public, meaning that rule of law values are implicated in the *operation* of those industries.

Moreover, rule of law operations can take very different forms. Many rule of law operations are designed to improve the capacity of host nation government or social institutions in realizing the rule of law. Such “capacity-building” projects have traditionally been performed by civilian organizations of all kinds, and many necessarily so as a matter of US law, which limits the US military’s role in providing assistance to many foreign government institutions.⁵² But rule of law operations can also focus on the effects that US forces themselves have on the state of the rule of law in a host nation. Improving the detention policies followed by US forces, such as a preference for relying on the host nation criminal justice system rather than US military “security detention,” can go a long way toward a host nation’s realization of the seven rule of law effects. Consequently, Judge Advocates concerned with the rule of law (as all lawyers should be) must necessarily concern themselves not only with the operation of the host nation’s legal institutions, but with the conduct of the operational force. Many types of projects, both capacity-building and operational, fall under the umbrella of “rule of law,” and they are as varied as the problems they are intended to address.

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 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 Operations Within the Context of Full Spectrum Operations

Joint Publication 3-0, *Joint Operations*, breaks operations into three categories: offensive operations, defensive operations, and stability operations. Any major campaign will require a combination of all three types of operations, to be carried out in different, appropriate balance during the different phases of the campaign.⁵³ Army doctrine refers to the mix of offensive, defensive, and stability operations as “full spectrum operations.”⁵⁴

⁵² One form of rule of law operation directed toward reforming the institutions that provide security is “security sector reform”. “Security Sector Reform” is

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

SECURITY SECTOR REFORM, *supra* note 8, at 3.

⁵³ JOINT PUB. 3-0, *supra* note 3, at V-1 - V-2.

⁵⁴ 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.

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.”⁵⁵ Although stability operations have particular emphasis during the later phases of the campaign, they will take place even during the initial combat phase,⁵⁶ and they need to be planned for as part of the overall campaign. The termination of a major campaign cannot take place until local civil authorities are in a position to administer the host nation,⁵⁷ and stability operations are critical to the final two phases of the campaign (Stabilize and Enable Civil Authority)⁵⁸ leading to the campaign’s termination and the redeployment of US forces.⁵⁹ Stability operations are also a critical component of counterinsurgency.⁶⁰

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 to conflict to establish or maintain order in States and regions.”⁶¹ *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.⁶²

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

⁵⁵ 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).

⁵⁶ JOINT PUB. 3-0, *supra* note 3, at V-15.

⁵⁷ *Id.* at IV-29.

⁵⁸ 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.

⁵⁹ *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).

⁶⁰ 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.”).

⁶¹ DOD DIR. 3000.05, *supra* note 55, para. 3.1.

⁶² *Id.* at para. 4.3.

coordinated with other activities (such as security and the restoration of civilian infrastructure and essential services)⁶³ 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 operations as part of stability operations.⁶⁴

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.”⁶⁵ 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 the rule of law has 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”⁶⁶ within the host nation. “Legitimacy is frequently a decisive element,” in joint operations.⁶⁷ Similarly, in COIN, “victory is achieved when the populace consents to the government’s legitimacy and stops actively and passively supporting the insurgency.”⁶⁸ 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, actions that contribute to the realization of the rule of law 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.

⁶³ See STROMSETH, WIPPMAN & BROOKS, *supra* note 10, 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.”).

⁶⁴ 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).

⁶⁵ 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.”).

⁶⁶ JOINT PUB. 3-0, *supra* note 3, at IV-29 (emphasis added).

⁶⁷ *Id.*, at A-4 (“Committed forces must sustain the legitimacy of the operation and of the host government, where applicable.”).

⁶⁸ FM 3-24, *supra* note 1, at 1-3.

Efforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. Moreover, participation in COIN operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is party, and certain [host nation (HN)] laws. Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.⁶⁹

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.⁷⁰

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; help to develop training programs in the legitimate use of force by host nation security forces; and mentor host nation personnel in the legitimate use of force. Throughout the period of 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.

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

⁶⁹ *Id.* at 1-24.

⁷⁰ 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.”).

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 *Dominance* is an important aspect of combat operations, transition into the next phases, *Stabilize* and ultimately *Enable Civil Authorities*, include a reduction in dominating activities.⁷¹ 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*.⁷² 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.⁷³

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, the 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 operations 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.⁷⁴ 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

⁷¹ JOINT PUB. 3-0, *supra* note 3, at IV-26-IV-29 and fig. IV-6. *See also* STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 136 ("Winning wars and maintaining order are two very different tasks.").

⁷² 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 10, at 135 ("[S]ecurity cannot depend solely or even primarily on coercion.").

⁷³ LtCdr Vasilios Tasikas, *Developing the Rule of Law in Afghanistan, The Need for a New Strategic Paradigm*, ARMY LAW. 45 (July 2007).

⁷⁴ *See* JOINT PUB. 3-0, *supra* note 3, at A-4 ("Security actions must be balanced with legitimacy concerns.").

nation legal rules as host nation legal institutions assert their authority.⁷⁵ Moreover, the operational costs of both operating according to pre-established and well-known rules and of taking a protective rather than combative operational stance are likely to be incurred in the short term, while the benefits of those efforts are likely to be realized only over the very long term. It 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*⁷⁶ along with a specific end-state.⁷⁷ 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.⁷⁸ 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

⁷⁵ 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.

⁷⁶ "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).

⁷⁷ *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.").

⁷⁸ Kleinfeld, *supra* note 7, at 61-62.

interventions, the only types of measurable change can take place at the institutional level, but the ultimate goal of a rule of law project is not to bring about institutional change – it is to bring about the conditions described by the term “rule of law”.

Focusing on the value of effects and their place in the planning process along with specific objectives or end-states also highlights both the extremely long duration of rule of law projects and the relative inability of armed forces and other rule of law participants to actually bring about the rule of law. Although adequate resources, security, and thoughtful planning and execution may be *necessary* to rule of law projects, they are not *sufficient* for establishing the rule of law. In the end, the rule of law reflects a recognition among the governed that compliance with and participation in the legal system is valuable. Rule of law projects may help a society move toward that ultimate understanding, but because the law is never successfully imposed at 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 rule of law 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 a coordinated USG-approved strategic plan that has been developed with 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 will be a product of host nation institutions, officials, and populace conduct “rule of law,” with international and coalition entities providing only developmental support. Whatever the international or national mandate, it is necessary and critical to have host nation actors involved in all stages of rule of law

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).

operations. Thus, the rule of law practitioner must establish and maintain meaningful collaboration with key host nation officials and civil society leaders, enabling local, giving local national institutions and officials as much responsibility as possible in running their own country's affairs and building local government capacity. Meanwhile, the rule of law practitioner 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). They may also be constrained by the same laws from performing missions outside their core missions. Consequently, they have developed their own agency-specific goals, priorities, terminology, and bureaucratic cultures that reflect and support their core missions.

Getting various agencies to pursue common and coherent policies is a recurrent challenge in government. There are circumstances in which political leaders call upon these disparate parts of the USG 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 programs, 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 can be serious and even dangerous, possibly leading the host nation to slip back into violent means of addressing conflict. Working effectively with the interagency minimizes waste of limited resources, prevents redundancy in operations, increases legitimacy with the indigenous population, and optimizes chances for stability and security. It thereby helps prevent 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

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

using armed forces to engage in nation-building, came to acknowledge the United States “must also improve the responsiveness of our government to help nations emerging from tyranny and war ... and that means our government must be able to move quickly to provide needed assistance.”⁴ Two key directives from the Bush Administration that defined the federal government’s organization for stability operations were *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 It, for example, has been and continues to be, the coordinating framework used for operations in Iraq and Afghanistan because their planning and commencement occurred before promulgation of NSPD-44. Although there have been some changes, the Obama Administration has not made wholesale changes to the NSPD-1/-44 structure adopted in the previous administration.

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 been 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 (now called Interagency Policy Committees or “IPCs”) 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

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 Aug. 27, 2009).

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 Aug. 27, 2009).

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.

committees of the NSC system and ensuring timely responses to decisions made by the President

Since the promulgation of NSPD-1 in 2001, further PCCs have been established, for example, NSPD-44 established a new PCC for reconstruction and stabilization (R&S) operations.

As stated earlier, this pre-existing interagency framework has guided operations in Afghanistan and Iraq. For Afghanistan, policy development has been taking place through meetings led by the Special Representative for Afghanistan and Pakistan. Similarly, for Iraq, policy development and coordination occurs through the Iraq Policy Operations Group (IPOG). Both country-specific policy teams provide policy recommendations to the NSC Deputies Committee. For these two areas the Assistant to the President and Deputy National Security Advisor for Iraq and Afghanistan chairs these teams.

2. *US National Security Presidential Directive 44 (NSPD-44) and the Reconstruction and Stabilization Civilian Management Act of 2008*

On December 7, 2005, President Bush promulgated NSPD-44, entitled the “Management of Interagency Efforts Concerning Reconstruction and Stabilization.”⁹ The primary purpose of issuing NSPD-44 was to improve “coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife.”¹⁰ NSPD-44 provided 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 assigned 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 serves 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 and Stabilization.

NSPD-44 established a PCC for R&S Operations, co-chaired by the head of S/CRS and a member of the National Security Council staff. This PCC is responsible for 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.

⁹ NSPD-44, *supra* note 5.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

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

Absent new Presidential Directives from the Obama Administration that suspend the processes established by NSPD-44, those mechanisms continue, with the day-to-day management overseen by the R&S IPC. However, authorities established by the original NSPD-44 have been subsumed by the “Reconstruction and Stabilization Civilian Management Act of 2008,” which was included as Title XVI of the Duncan Hunter National Defense Authorization Act of Fiscal Year 2009, signed into law by the President on October 14, 2008, as P.L. 110-417. Title XVI amends the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) and the State Department Basic Authorities Act of 1956 (22 U.S.C. 2651a et seq.), authorizes the Civilian Response Corps, and permanently establishes S/CRS in the Department of State.

To implement the mandate originally established by NSPD-44, S/CRS followed a three-pronged approach¹⁵ that allows 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 for response, furthering the capacity for expeditionary civilian personnel. Thus, the Planning Framework is a civilian planning template allowing 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 Combatant Command-level planning, after presentation 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 personnel fall into when 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

¹³ *Id.*

¹⁴ *Id.*

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, with the NSC, a PCC on R&S (now called a R&S IPC) that develops policy initiatives for the NSC decision-making process.

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].

supported by a Secretariat¹⁷ to support decision and policy making; an Integration Planning Cell (IPC), which deploys to the relevant combatant command to integrate 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

Third, S/CRS is increasing civilian readiness capacity, either to conduct or assist the military with reconstruction and stabilization operations. To that end, S/CRS, is coordinating the establishment of an interagency Civilian Response Corps (CRC) comprised of three components: Active, Standby and Reserve. The Active and Standby components include USG employees. The Reserve component will include individuals from the private sector and state and local governments who agree to deploy up to one year of a four-year commitment.²⁰ Because no single government entity has all of the relevant expertise, the Active and Standby components of the CRC are 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.

Beginning in 2006, S/CRS established a pilot program of the Active and Standby components within DOS. In September 2008, the Active and Standby components expanded beyond S/CRS to other DOS Bureaus and other USG agencies. The Active Component is composed of full-time, USG personnel employed by a US agency to conduct R&S activities compatible with that agency's mission. Their primary duties involve training for, planning for, providing direct support to, and conducting USG R&S field operations. Active members must be available to deploy worldwide within 48 hours of call-up. The Standby Component also consists of full-time USG personnel whose primary duties do not necessarily directly support international R&S activities, but who have pertinent expertise and who agree to deploy to provide expertise supplemental to other civilian responders. Lastly, the Reserve component will be drawn from state and local government entities and private sector, and will serve as USG personnel. 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 and deeper expertise in areas such as public security and rule of law specialties.

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 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 The Reserve component has not yet been provided funding

The CRC Active and Standby components 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 consist 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. They will offer the full range of skills anticipated as 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 pilot Active and Standby components of the CRC within DOS have deployed members to assist with conflict prevention and mitigation, and reconstruction and stabilization to Sudan, Chad, Haiti, Lebanon, Liberia, Kosovo, Georgia, Iraq, and Afghanistan, among others.

In 2008 Congress provided initial funding for the Active and Standby components of the Civilian Response Corps under the FY2008 supplemental (P.L. 110-252). Additional funding was provided under Division H of P.L. 111-8, commonly known as the FY09 omnibus.

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

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.”²¹ The directive declares stability operations²² a “core U.S. military mission that the [military] shall be prepared to conduct and support.”²³ Moreover, the publication directs stability operations “shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DOD activities.”²⁴ As such, this directive mandates military planners to integrate stability operations with every war plan.²⁵

²¹ 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].

²² 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).

²³ DOD DIR. 3000.05, *supra* note 21.

²⁴ *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).

²⁵ DOD DIR. 3000.05, *supra* note 21, at 3.

DOD Directive 3000.5 maintains that military forces are to defer responsibility to appropriate civilian agencies when feasible.²⁶ The directive also calls for the development and employment of field civilian-military teams as a necessary element in post-conflict operations.²⁷

The directive places the Under Secretary of Defense for Policy (USD(P)) and the Chairman of the Joint Chiefs of Staff in charge of preparedness for DOD stability operations.²⁸ The USD(P) is to advise the Secretary of Defense in the area of stability operations policy, providing the Secretary with a semiannual report on the Department's progress in implementing the directive. The Chairman is to identify and lead the development of DOD capabilities for stability operations. This 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.²⁹

While the Directive acknowledges that many stability and reconstruction tasks are more appropriately carried out by civilians, it notes this may not always be possible in chaotic environments or when civilian capabilities are unavailable.³⁰ Accordingly, the Directive includes a long list of reconstruction and stabilization undertakings the US military must train and equip itself to carry out. These range from rebuilding infrastructure to reforming security sector institutions, reviving the private sector, and developing representative government.³¹

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.³² The Department of Defense recognizes "military action alone cannot bring longer term peace and prosperity; therefore we need to include all elements of national and institutional power."³³

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."³⁴ In turn, the ASD SO/LIC established the Stability Operations Capabilities directorate.³⁵

Similarly, all of the services responded to the directive by identifying a proponent for stability operations initiatives. Within the Army, there are significant restructuring initiatives tied to fulfilling the DOD Directive 3000.50 mandate. These include establishing a "division within the Army G-3/5 dedicated to stability operations"³⁶ and expanding the Peacekeeping and Stability Operations Institute (PKSOI) at Carlisle Barracks. It also includes establishing the

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ 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.

³⁵ *Id.*

³⁶ *Id.*

“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.³⁷ 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.³⁸ The Department of the Navy “designated the Deputy Chief of Naval Operations, as the Navy’s Lead Officer for Stability, Security, Transition and Reconstruction Operations” and established the Naval Expeditionary Combat Command (NECC) which includes the Maritime Civil Affairs Group.³⁹ 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.”⁴⁰

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.⁴¹ Field Manual 1-04, *Legal Support to the Operational Army* addresses the roles and responsibilities of Judge Advocates in stability operations, as does 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 and including stability operations exercises in the professional military education curriculum for intermediate level education as well as at each of the senior service schools. Specifically, SSTR training initiatives include:

- An integrated USG pre-deployment training regimen built on Iraq and Afghanistan Provincial Reconstruction Team (PRT) training concepts

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

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

- The development of a USG-wide web-based training knowledge portal that allows participating agencies to have visibility to other agencies’ training opportunities.⁴²

Many of these initiatives have been completed, and all are under way. All the services have also incorporated individual⁴³ and collective training on SSTR. The training centers placed additional

³⁷ *Id.*

³⁸ *Id.* at 6.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* 11-12.

⁴² *Id.* at 16-7.

⁴³ Training opportunities include the following: 80 hour modular cultural awareness training program developed by the Army Intelligence Center, online cultural awareness available through Army

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.”⁴⁴ Ultimately, these updates to unit structure, doctrine, training, and education reflect the fact 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.”⁴⁵

4. *US Agencies Influencing Post-Conflict Operations*

As explained in the previous section, the USG has promulgated guidance embracing post-conflict operations. Today, in addition to Congress, there are an extensive number of individuals and US governmental offices 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.⁴⁶ Following this listing, a few key agencies are described in detail.

National Security Council (NSC) System⁴⁷

- *National Security Council*
 - NSC Principals Committee
 - NSC Deputies Committee
 - NSC/Interagency Coordination Committees (IPCs) for different regions of world
 - Special Representative for Afghanistan and Pakistan (Amb. Richard Holbrooke)
 - Iraq Policy and Operations Group (IPOG)
 - NSC/IPCs for functional topics
 - Reconstruction and Stabilization Operations
 - Democracy, Human Rights and International Organizations

Department of State (DOS)

- *Secretary of State*
 - Policy Planning Staff (S/P)
 - Counterterrorism Coordinator (S/CT)
 - War Crimes Issues (S/WCI)
 - U.S. Global AIDS Coordinator (S/GAC)
 - Coordinator for Reconstruction and Stabilization (S/CRS)
 - Intelligence and Research (INR)

Knowledge Online, mobile training teams on fundamental language and culture “survival skills” provided by the Defense Language Institute. *Id.* at 18.

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 4.

⁴⁶ 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).

⁴⁷ See NSPD-1, *supra* note 6.

- Legal Adviser (L)
- Special Representative for Afghanistan and Pakistan
- The Director of U.S. Foreign Assistance and USAID Administrator (F)
- Under Secretary for Political Affairs (R)
 - Assistant Secretaries of Regional Offices
 - 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)⁴⁸
 - Civilian Police and Rule of Law (CIV)
 - Afghanistan and Pakistan (AP)
 - Iraq Programs (I)
 - Africa, Asia and Europe (AAE)
 - Americas Programs (LP)
 - Policy, Public and Congressional Affairs
- Under Secretary for Economic, Business and Agricultural Affairs (E)
 - Economic, Energy and Business Affairs (EEB)
- Under Secretary for Arms Control and International Security Affairs (T)
 - Political-Military Affairs (PM)
 - International Security and Nonproliferation (ISN)
 - Verification, Compliance and Implementation (VCI)
- Under Secretary for Management (M)
- Under Secretary for Democracy and Global Affairs (G)
 - 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 Public Diplomacy and Public Affairs (R)
 - International Information Programs (IIP)
 - Public Affairs (PA)
 - Education and Cultural Affairs (ECA)

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)

⁴⁸ 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.

- 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

Department of Justice (DOJ)

➤ *Attorney General*

- Deputy Attorney General
 - Assistant Attorney General, Criminal Division
 - International Criminal Investigation Training Assistance Program (ICITAP)
 - Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT)
 - Director, Federal Bureau of Investigations (FBI)
 - Director, US Marshals Service (USMS)
 - Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)
 - Administrator, Drug Enforcement Administration (DEA)
 - Director, Federal Bureau of Prisons
 - Office of Legal Policy (OLP)
 - Office of Intergovernmental and Public Liaison
 - Office of Legal Counsel (OLC)

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

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

Department of Commerce

➤ *Secretary of Commerce*

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

Department of the Treasury

➤ *Secretary of Treasury*

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

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

➤ *Director of the OMB*

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

C. US Governmental Agencies Involved in Rule of Law

A number of governmental entities 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 perspective 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, federal statute 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 and the 2009 statute continue to control, i.e., NSPD-1, although S/CRS has recently been contributing to civilian planning efforts in Afghanistan.⁴⁹ 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**

⁴⁹ See also U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, U.S. DEPT. OF STATE, U.S. DEPT. OF DEFENSE, SECURITY SECTOR REFORM 3 (Feb. 2009) ("The Department of State leads U.S. interagency policy initiatives and oversees policy and programmatic support to [security sector reform] through its bureaus, offices, and overseas missions as directed by NSPD-1, and leads integrated USG reconstruction and stabilization efforts as directed by NSPD-44. The Department of State's responsibilities also include oversight of other USG foreign policy and programming that may have an impact on the security sector.").

- **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, received 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 aware that DOD does not have the statutory authority to engage in similar activities in other parts of the world, and therefore must be cautious about generalizing from programs conducted in those theaters.

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 may be the hub for coordinating planning and civilian operations.⁵⁰

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. 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 capacity-building programs addressing traditional aspects of the rule of law, 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, USAID 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. 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, but it is the Country Team system that provides the foundation for interagency consultation, coordination, and action in the field.

Within the purview of the Under-Secretary for Global Affairs, there are offices which that may also play a role in rule of law related activities. The Bureau of Democracy, Human Rights and Labor has smaller programs pertaining to governance issues in Iraq and Afghanistan.

⁵⁰ See *supra* note 17 and accompanying text.

The Bureau of Population, Refugees and Migration manages and oversees any humanitarian assistance that may be required to care for refugees or to assist in their resettlement. The Bureau of International Women's Issues 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 policy design and overseeing 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. They do so 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 counterparts to reinforce host nation governments' efforts to promote the rule of law. INL also funds and oversees US participation in civilian police operations assisting U.N. peacekeeping missions.

INL tailors its programs 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.”⁵¹ In addition to training police in the field, INL works with the Afghan Ministry of Interior on payroll and rank reform.⁵² 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,⁵³ the Central Prison Directorate, and provincial and district justice systems.

In Iraq, INL’s mission is to help the Government of Iraq develop a sufficiently fair and effective criminal justice system so 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.”⁵⁴ 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-profile crimes.”⁵⁵ 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 Iraqi prisons conform to internationally accepted standards of humane treatment. With respect to courts and the judiciary, INL supports a broad range of programs. Included are programs to assist the Iraqi judiciary in developing skills to more effectively investigate and process criminal cases and administer the courts and the judiciary, to assist the Government of Iraq with court and judicial security needs, and to 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.”⁵⁶ 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

⁵¹ 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).

⁵² *Id.*

⁵³ USAID has purview of Supreme Court reform in Afghanistan.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *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).

economy.”⁵⁷ Although central to DOS’s long-term approach to reconstruction, S/CRS was originally not tasked with such activities in Afghanistan or Iraq but, recently, has been contributing to civilian planning efforts in Afghanistan.

Since its creation, 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 and civilian contingency planning for State Bureaus facing actual crises**
- **Seeking to mainstream 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**
- **Engaging in exercises with military counterparts**
- **Providing instruction to military counterparts on civilian-military coordinating, particularly regarding rule of law operations; and**
- **Compiling lessons learned and best practices, and applying such**

As described above, S/CRS is tasked with developing strategies and identifying states that 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 has the task of 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.

⁵⁷ 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).

In rule of law specifically, S/CRS has made advances in coordinating the rule of law activities of the DOS Bureaus, USAID, DOJ, and other civilian partners, and has been active in collecting and disseminating lessons learned with civilian and military rule of law experts. S/CRS, together with USAID, is in the process of working on a Lessons Learned project covering civilians returning from Iraq and Afghanistan PRTs. An indication of how central a place rule of law has in civilian R&S efforts, a plurality of the positions in the CRC from each of the participating agencies with rule of law responsibilities will be rule of law positions.

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 is the lead Federal agency for US foreign disaster assistance and economic and democratic development. USAID manages a worldwide network of country programs for natural disaster response and economic and policy development, encourages political freedom and good governance, and investing in human resource development. Strengthening the rule of law is also one of USAID's core missions. Within the construct of security sector reform, USAID has the lead for building the capacity of host nation institutions related to the rule of law.⁵⁸

USAID has rule of law and justice sector assistance programs in more than 100 countries.⁵⁹ Ordinarily USAID provides its assistance through 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.⁶⁰

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

⁵⁸ See SECURITY SECTOR REFORM, *supra* note 49 at 3 (“USAID’s primary SSR role is to support governance, conflict mitigation and response, reintegration and reconciliation, and rule of law programs aimed at building civilian capacity to manage, oversee, and provide security and justice.”).

⁵⁹ USAID is supporting rule of law operations in both Iraq and Afghanistan. See Provincial Reconstruction Team http://www.usaid.gov/iraq/pdf/iraqprts_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. 27, 2009).

⁶⁰ 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. 22, 2009).

The USAID Field Mission in country, with support from the Office of Democracy and Governance (DCHA/DG), carries out longer-term efforts to establish the rule of law. The beginning is to support local efforts to place the rule of law on the political agenda of the country of concern. 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. Because 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 focuses rule of law support efforts on three inter-connected priority areas: supporting legal reform, improving the administration of justice, and increasing citizens' access to justice. Legal reform programs include establishing relevant legal and policy frameworks, introducing community policing, open and public trials, and training court officials on oral and adversarial processes where defendants have the right to confront and challenge evidence and witnesses. Additionally, USAID efforts to improve the administration of justice are 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, improvement of professional education and ethics⁶¹ and improving the administration and management capacity of legal institutions.

USAID also supports access to justice programs by increasing public awareness of the judicial system, fostering advocacy programs to support reforms and address the needs of citizens, and supporting programs targeting special populations (women, persons with disabilities and indigent persons). Finally, 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. It worked to support the constitutional referendum and two national elections in 2005. It also has several capacity-building programs, and is supporting one program assessing the nature of community conflicts in order to build conflict mitigation networks.⁶²

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 for the Ministry of Finance has included the design and implementation 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*, meaning “prosperity” in Arabic. *Izdihar* has helped provide more than \$150 million in micro-loans since 2003,⁶³ along with the establishment of

⁶¹ 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).

⁶² <http://www.usaid.gov/press/releases/2007/pr071009.html> (last visited Aug. 27, 2009)

⁶³ <http://www.usaid.gov/press/releases/2008/pr080325.html> (last visited Aug. 27, 2009).

microfinance institutes. USAID has also had infrastructure programs, focusing, for example on electrical generation, sewage treatment, and water treatment systems.

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 three-year (Sept 2007 – Sept 2010), \$165 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 their 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. Types of activities funded include women's programs, economic development, governance, rule of law, education, environment, elections, agriculture and youth activities. Targeted beneficiaries include but are not limited to indigenous groups, cooperatives, NGOs, associations, media, local government, private sector and student groups.

In coordination with DOS, USAID created a database was created, which includes information on IRAP.⁶⁴ Specifically, the database provides information on the type of grant proposals funded under this mechanism as well as copies of all proposals received from PRTs/ePRTS. It also includes the policy guidelines for the 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. They also strengthen land titling and property rights; and help Afghanistan develop a market-driven agricultural sector by improving linkages between suppliers, producers, and markets. Furthermore, the growth programs provide farmers with improved farm technologies and increased access to financial services. The programs 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.

USAID's 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, and supported more than 45,000 students in community-based education classes in areas where there is no access to formal schools. USAID also implemented 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 services, USAID has constructed or refurbished over 670 clinics throughout the country and established over 360 health facilities.

⁶⁴ The database is at: <http://iraqdb.msi-inc.com> (last visited Aug. 27, 2009). 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.

USAID has also trained over 1,000 midwives to work in hospitals and clinics throughout the country.

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

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 Marshals Service (USMS), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). It also does so through its specialized international prosecutorial and police development offices within the Criminal Division, the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), and the International Criminal Investigative Training Assistance Program (ICITAP). The Office of the Deputy Attorney General provides policy oversight and coordination of DOJ's many efforts, while DOS, principally through DOS/INL, provides funding and policy guidance 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. A representative of the 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. He or she is also responsible, in particular, for coordination of DOJ activities in Iraq and Afghanistan.

Additionally, at the request of the former Ambassador to Iraq, the Attorney General deployed a senior attorney to serve as the Embassy's Rule of Law Coordinator. The Rule of Law Coordinator 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. The Justice Attaché who is the senior DOJ official in Iraq coordinating DOJ activities in support of the Mission, the Director of the Law and Order Task Force (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.

The intent of ICITAP's training and assistance programs is to develop professional civilian-based law enforcement institutions.⁶⁵ ICITAP designs 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 assists in corrections,

⁶⁵ 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/criminal/icitap/programs/iraq/> (last visited Sept. 3, 2009).

anticorruption, border security, forensics, and judicial investigations programs.⁶⁶ 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.⁶⁷ Finally, 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) and worked with Iraqi leaders to develop a national prison system. It has also deployed a team of 80 corrections training officers to provide on-site training and mentoring to Iraqi staff at prison facilities throughout the country and to assist the Iraq Ministry of Justice in strengthening the overall management of the corrections service.

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."⁶⁸ OPDAT rule of law goals relate to initiatives in international training and criminal justice development. In this regard, OPDAT provides technical support, training and instruction to judges, court staff, prosecutors, and law enforcement officers on management and substantive and procedural law. The Office is involved in such training programs in South and Central America, the Caribbean, Russia, other Newly Independent States, and Central and Eastern Europe.

OPDAT has more than 40 Resident Legal Advisers (RLAs) in 30 countries. RLAs are experienced federal or state prosecutors stationed in a host country for at least one year. They provide full-time advice and technical assistance in establishing fair and professional justice sector institutions and practices.⁶⁹

At this time, there are now 10 RLAs in Iraq. RLAs are assigned to Provincial Reconstruction Teams, LAOTF, and at the Rusafa Rule of Law Complex, and Embassy Baghdad.⁷⁰ 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

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Fact Sheet, OPDAT-OPDAT Mission, *available at* <http://www.usdoj.gov/criminal/opdat/mission/mission.html> (last visited Aug. 13, 2008).

⁶⁹ 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).

⁷⁰ <http://www.usdoj.gov/criminal/opdat/recent-achieve/rachieve.html> (last visited Aug. 10, 2008).

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.”⁷¹

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.

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 different components. Through a DOS-funded program, one of the primary activities has been the establishment of the Major Crimes Task Force (MCTF). The MCTF is a unique joint Iraqi-US organization providing 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 serves in a supervisory role over the MCTF. The FBI also has a counterterrorism unit in Iraq that deploys rotating teams of specialists to provide training to the Iraqi police.

ATF has an Attaché Office in the US Embassy in Baghdad. Its 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 supports the MCTF.

⁷¹ <http://www.usdoj.gov/iraq/opdat.html> (last visited Aug. 13, 2008).

In February 2007, 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 consists of coalition civilian and military attorneys, paralegals, and criminal investigators. It trains, mentors, and assists 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). With more than 140 personnel at its height, serving a variety of advisory, security, investigative and support functions, the RCLO supports and assists the Iraqi High Tribunal (IHT). RCLO is currently in transition into a more supportive role in which it 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), the Central Narcotics Tribunal (CNT), and assisting the FBI in the establishment of a Major Crimes Task Force, which should be in place by the end of 2009.

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). The FAST program currently consists of three teams of ten specially trained agents and analysts, who deploy to Afghanistan for 120 days at a time to assist the Kabul Country Office and the CNP-A in the development of their investigations. FAST members are DEA agents who are trained criminal investigators, with some military training. FAST teams provide guidance to their Afghan counterparts while also conducting bilateral investigations aimed at the region's narcotics trafficking organizations. FAST operations, which DOD supports and largely funds, also help with the destruction of existing opium storage sites, clandestine heroin processing labs, and precursor chemical supplies directly related to US investigations.

As of 2008, DOJ has six Senior Federal Prosecutors and remain funded for 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 with 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 AUSAs have also

been instrumental in assisting in the removal of narco-traffickers to the United States for trial. 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 recently completed its first Military Post-blast Investigation Techniques course for all services, with more planned.

The FBI personnel in Afghanistan work on criminal investigations and counter-terror missions. Currently, the FBI has a Legal Attaché and two Assistant Legal Attachés stationed at the 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. The FBI is also in the process of establishing a Major Crimes Task Force for Afghanistan.

Finally, rotating teams of Deputies from the USMS provide security to personnel at the CJTF and help to establish a judicial security force for the CNT. Additionally, they have provided security design advice for Counternarcotics Justice Center in Kabul, which opened in May 2009. 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 operations within 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.

DODD 3000.05, *Military Support for Stability, Security, Transition, and Reconstruction* most completely states DOD's policy on rule of law operations conducted in the context of stability operations. 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 as 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 increase security by supporting stability in a society in a manner that advances 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. 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.

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 DOD emphasis in the rule of law is to foster security and stability for the civilian population by supporting the effective and fair administration and enforcement of justice, preferably by host nation institutions. A whole host of agencies, including the civilian agencies discussed elsewhere in this chapter carry out rule of law operations, frequently in conjunction military participants, including Judge Advocates, Civil Affairs, and Military Police.

a) Judge Advocates

It is impossible to understand fully at this point the implications for the JAG Corps of the Pentagon's recent embrace of stability operations. However, it is apparent 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. These include acting as an adviser to commanders and their staff on legal reform initiatives, as an instructor to host nation attorneys on military justice, as a mentor to judges and governmental officials, as a drafter of host-nation laws and presidential decrees, and as a facilitator at 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 nonfunctioning.**
- **Evaluating HN law, legal traditions, and administrative procedures in light of international legal obligations and human rights standards and when necessary, providing appropriate assistance to their reform.**
- **Evaluating training given in light of international legal obligations and human rights standards and providing assistance to improve training. This training is given to HN judges, prosecutors, defense counsel, legal advisors, court administrators, and police and corrections officials.**
- **When necessary, serving as legal advisors for transitional courts.**
- **Advising commanders and others on the application of international, U.S. domestic, and HN law that is considered in restoring and enhancing rule of law in the host nation.**
- **Advising commanders and U.S., international, and HN authorities on the legality, legitimacy, and effectiveness of the HN legal system including its government's compliance with international legal obligations and domestic law.**

- **Supporting the training of US personnel in the HN legal system and traditions.**⁷²

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 "functional area" teams. The CA functional areas include rule of law, economic stability, governance, public health and welfare, infrastructure, and public education and information.⁷³ Civil Affairs doctrine indicates 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.**

⁷² U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY D-2 – D-3 (April 15, 2009)

⁷³ 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).

- **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 SJA in international and HN legal issues as required.**
- **Assist the SJA with regard to status of forces agreement (SOFA) and status of mission agreement issues.**
- **Provide technical expertise, advice, and assistance in identifying and assessing indigenous public safety systems, agencies, services, personnel, and resources.**
- **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.)⁷⁴**

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

c) Military Police

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

The 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 deploy in support of rule of law missions to train host-nation military personnel in the full spectrum of police tasks, including:

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

⁷⁴ U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 2-8 – 2-9 (29 Sept. 2006).

- **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 model builds on care and custody to include population engagement. The population engagement model is a four step process involving detention, assessment, reconciliation, and transition. Ultimately, this model defines victory as establishing alliances with moderate detainees, empowering moderates to marginalize violent extremists, and providing momentum to the process of reconciliation with host nation society.

As operational environments shift from conflict to order, leaders must maintain awareness of MP capabilities to ensure their effective utilization. Typically, within a Brigade Combat Team, there is a Provost Marshal cell and a military police platoon within the Brigade Special Troops Battalion. These Soldiers offer a range of skills on law enforcement techniques. These range from the ability to train on effective tactical site exploitation and handling of evidence to more sophisticated methods of investigating complex crimes. As operations shift from active combat to a law-enforcement-intensive model, MP organizations can serve as valuable resources. In addition to serving as training resources for host nation agencies, they can also provide training to US troops conducting security operations, both on how to conduct police-oriented population engagements effectively and on important matters such as evidence collection and preservation. These will become increasingly important as the host nation judicial system becomes capable of criminalizing insurgent activities. The organic availability of MPs, along with their versatility, makes them extremely effective in supporting the rule of law.

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.”⁷⁵ 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.

⁷⁵ Defense Institute of International Legal Studies website at <http://www.diils.org> (last visited Aug. 10, 2008).

The goal is teaching operations, including post-conflict reconstruction, within the parameters of international law.⁷⁶

e) All Operational Forces

While Judge Advocates, Civil Affairs personnel, and Military Police may have specialized skills for some specialized roles, rule of law practitioners should never forget that all operational forces have a role to play in furthering the seven rule of law effects. The vital role of every Soldier and Marine is recognized in doctrine by DOD Directive 3000.05 and the Field Manual 3-24, *Counterinsurgency*.⁷⁷ OIF and OEF are replete with examples of Second Lieutenants giving classes on human rights to Iraqi police⁷⁸ or infantry companies partnering with Iraqi police to maintain security in their communities.⁷⁹ JAs, MPs, and CA personnel should mainstream rule of law operations so that all deployed personnel participate. If they fail to do so, they will not only miss out on a tremendously powerful resource of accomplishing the rule of law mission, they also run the risk of losing the command's attention to rule of law as merely a "specialized" line of operation. Moreover, it is only the operational forces themselves that can further the effects of the rule of law by actually observing the rule of law – and engaging host nation institutions wherever possible – in the conduct of operations. Any approach to rule of law that views it as the purview of lawyers ignores that, in any society that has some claim to the principle, the rule of law is claimed not by the lawyers but by the citizenry writ large.

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

⁷⁶ *Id.*

⁷⁷ 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.").

⁷⁸ 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).

⁷⁹ 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 Aug. 27, 2009).

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 for 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**
- **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.

In many theaters subject to US military intervention and heightened rule of law activities, such as in Afghanistan and Iraq, the embassy may have a dedicated Rule of Law Coordinator. The role of such coordinators in Afghanistan and Iraq is treated in chapter IX.

The Judge Advocate who is responsible for aligning the command's rule of law operations 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. In order to develop a cohesive plan or make progress in the identified problem areas, this can occur either through developing contacts with members of the Country Team or their offices or through his chain of command. 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 focus of the initial phase is on security and stopping criminal behavior. Post conflict states must provide their populations with security, stability, personal safety, and the transparent law enforcement and judicial processes that provide the same protections and penalties for all citizens.⁸⁰

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 as providing 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.⁸¹

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.⁸² 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.⁸³ Second, USIP helped

⁸⁰ See UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 104, ESTABLISHING THE RULE OF LAW IN IRAQ 2-3 (Apr. 2003).

⁸¹ See UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 107, DEMOCRATIC CONSTITUTION MAKING (July 2003).

⁸² 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).

⁸³ *Id.*

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 of 4 million displaced Iraqis.⁸⁴ Finally, USIP emphasized the importance of transitional justice by providing advice on the establishment of the Iraqi Special Tribunal and disseminating a film entitled *Confronting the Truth: Truth Commissions and Societies in Transition* to stress the importance of dealing with the former regime's human rights abuses.⁸⁵

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).⁸⁶ USIP currently has an office in Kabul, Afghanistan.⁸⁷ 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.⁸⁸

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 provides access to 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; in INPROL emer must nominate applicants for membership. 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.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ 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).

⁸⁷ *Id.*

⁸⁸ *Id.*

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. It is important to remember, however, that most USG relationships with international actors are a matter of US foreign policy and are consequently managed by DOS; coordination with that agency is critical whenever attempting to work with international organizations.

There are some restrictions as to the level of involvement by international actors. International participation in the planning and implementation of 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 the 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. The UN Security Council normally makes decisions to intervene in a state without its consent. The Security Council takes all decisions by qualified majority; although five of its members (United States, United Kingdom, France, China, and Russia) have the capacity to block substantive decisions unilaterally. Once the Security Council determines the purpose of a mission and decides to launch it, it leaves further operational decisions largely to the Secretary-General and his staff, at least until the next Security Council review, which is generally six months thereafter.

UN peace operations and post-conflict operations can undertake a broad range of tasks, as mandated by the UN Security Council, to support the implementation of an agreed 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. A military assistant assists the US PERMREP at the US Mission to the UN by coordinating appropriate military interests primarily with the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) and UN Department of Peacekeeping Operations (UNDPKO).

The UN normally authorizes 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 that generally requires compromise, and sometimes results in ambiguity. As with all military operations, US forces implement UN mandates that contain a US military component through orders issued by the Secretary of Defense through the CJCS. During such implementation, the political mandates undergo conversion 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. UNOCHA directs some peace-building missions with small numbers of military observers. UNOCHA is a coordinating body that pulls together the efforts of numerous humanitarian/relief organizations and is the vehicle through which official requests for military assistance normally occur.

Field level coordination normally is 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. If a declining security situation requires removal of UN personnel, it may degrade coordination with the UN Resident Coordinator.

One of the first tasks for a Judge Advocate conducting rule of law operations should be to become familiar with the various components of the UN mission in country in order to understand the types of activities already underway or likely to be undertaken. Further cooperation with international institutions engaged in rule of law operations in order to identify potential partners or to develop a common strategy should be 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. The United Nations has the ability to perform military, humanitarian, and political tasks, but 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. Additionally, 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. The IMF also 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.⁸⁹

⁸⁹ 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).

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 consists of two unique development institutions: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). Each institution plays a different, but supportive role, in its mission of global poverty reduction and the improvement of living standards.

The IBRD 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."⁹⁰

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.⁹¹

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

⁹⁰ 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).

⁹¹ *Id.* at 1-6.

consensus; consequently, all members have a veto. The North Atlantic Council's oversight is more continuous and 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 often ensures the conservative employment of the resultant forces.

National caveats limiting the types of missions to which any one member's troops may be assigned are a fact 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.

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

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

NATO policy on CIMIC recognizes 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 the military commander agrees 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 tension among political, military, humanitarian, economic, and other components of a civil-military relationship is detrimental to the overall goal. They consider transparency in effort vital in preventing and defusing such potentially volatile situations because transparency instills trust, increases confidence, and encourages mutual understanding.

Judge Advocates should understand NATO staffs consist of individuals assigned to operational manning billets and often come from several different nations. Each person comes 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 consist 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 have assignments 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 making significant outreach efforts 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 lawyer roles.

G. Non-Governmental Organizations (NGOs)

NGOs are playing an increasingly important role in the international arena.⁹² 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 there is a need for humanitarian or other assistance. NGOs may range in size and experience from those with multimillion dollar budgets and decades of global experience in developmental and humanitarian relief to newly created small organizations dedicated to a particular emergency or disaster.

NGOs are involved in such diverse activities 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 have 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 the military intends to take control of, influence, or even prevent their operations. Commanders and their staffs should be sensitive to these concerns

⁹² See Grey Frandsen, *A Guide to NGOs* (Center for Disaster and Humanitarian Assistance Medicine 2003), available at <http://www.cdham.org/> (last visited Aug. 27, 2009).

and consult these organizations, along with the competent national or international authorities, to identify local conditions that may impact effective military-NGO cooperation.⁹³

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

Judge Advocates' rule of law planning should include the identification of POCs with NGOs that will operate in the area. 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,⁹⁴ 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. It is important to remember, though, that commanders are substantially restricted in what types of support they can provide non-federal entities such as NGOs. Judge Advocates should ensure any support to NGOs complies with statutory and regulatory restrictions.⁹⁵

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

- **Humanitarian Operations Center (HOC)** – A senior level international and interagency coordination body that seeks to achieve unity of effort among all participants in a large foreign humanitarian assistance operation. Normally, HOCs are established during an operation under the direction of the government of the affected country or the UN, or possibly under the Office of US Foreign Disaster Assistance (OFDA). 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.

⁹³ 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).

⁹⁴ FM 3-05.40, *supra* note 74, at 1-16 (“The primary function of all Army CA units is to support the warfighter by engaging the civil component of the battlefield. CA forces interface with IPI, IGOs, NGOs, other civilian and government organizations, and military forces to assist the supported commander to accomplish the mission.”).

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

- **Humanitarian 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 is in place, the role of the HACC diminishes, and its functions are accomplished through the normal organization of the combatant command’s staff and crisis action organization.
- **Civil-Military Operations Center (CMOC)** – Normally, the CMOC is a mechanism for the coordination of civil-military operations that can serve as the primary coordination interface providing operational and tactical level coordination between the Joint Force Commander and other stakeholders. Members of a CMOC typically include representatives of US military forces, other government agencies, IGOs, the private sector, and NGOs.⁹⁶

H. Coalition Partners

Given the dominance of coalition operations, it is essential for Judge Advocates to know understand the philosophy, goals, and structure of coalition forces.⁹⁷ Judge Advocates need to know national approaches for military operations and the national responsibilities for rule of law related activities, especially state building activities, vary for different coalition partners.

While national interests primarily motivate US military operations, some coalition partners, follow the concept of a “civil power”.⁹⁸ 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.⁹⁹

When speaking about rule of law programs some coalition partners focus on civilian reconstruction and economic support.¹⁰⁰ Military means are seen only as appropriate to end violence and establish conditions under which the causes of conflict can be addressed by civilian means.¹⁰¹ Some coalition forces may be reluctant to initiate laws, courts, and police reforms, but

⁹⁶ JOINT PUB. 3-57, *supra* note 73, at II-26.

⁹⁷ See CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 312 (2006) [hereinafter FORGED IN THE FIRE].

⁹⁸ See, e.g., MARKUS WÖLFLE, DIE AUSLANDSEINSÄTZE DER BUNDESWEHR 116 (2005) (discussing Germany).

⁹⁹ *Id.* at 18-19.

¹⁰⁰ 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).

¹⁰¹ 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].

rather support host government reform efforts beneficial to the establishment of the rule of law.¹⁰²

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.¹⁰³ An additional example is the German approach to rule of law operations in post-conflict areas. It similarly focuses on technical and logistics support, as well as support concerning judicial administration, administrative development, and medical services.¹⁰⁴

Because of different approaches, the structure of coalition forces 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).

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

1. Coalition Restrictions

Coalition partners will be bound to comply with obligations that 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.¹⁰⁵

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 types 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 stem from a constitution, ordinary law or administrative regulations, like Rules of Engagement (RoE).

¹⁰² *Id.* at 58. See also French Ministry of Foreign Affairs, Direction Générale de la Coopération Internationale et du Développement (French International Cooperation) 31 (2005).

¹⁰³ *Id.* at 32-33.

¹⁰⁴ See Action Plan, *supra* note 101, at 19.

¹⁰⁵ See FORGED IN THE FIRE, *supra* note 97, at 69.

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 occurs without Security Council authorization, there will be constitutional problems for some potential allies, effectively prohibiting them from joining or assisting the operation.¹⁰⁶ Different constitutional problems might arise from the extraterritorial application of constitutions. Domestic laws and international treaties are often not applicable extraterritorially, or are overridden, for example, by resolutions of the United Nations Security Council. But some coalition partners will be bound to comply with their constitutions in all circumstances, especially with requirements to protect human rights and fundamental freedoms.¹⁰⁷

In addition to constitutions, ordinary statutes often restrict whether a country can participate in an operation. For some, military operations not only need approval from national parliaments, but also require statutory authorization. For example, approval from the German Parliament for the German participation in the International Security Assistance Force (ISAF) military operation in Afghanistan came 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.¹⁰⁸ Under these statutes soldiers are entitled to refuse unlawful orders.¹⁰⁹ The test of lawfulness includes generally the application of international law.¹¹⁰

¹⁰⁶ 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)).

¹⁰⁷ *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.

¹⁰⁸ *See, e.g.*, German “Soldatengesetz” or the British Army Act.

¹⁰⁹ *See, e.g.*, French Statut Général des Militaires, Article 15; German Soldatengesetz, Article 11 (1); United Kingdom, Manual of Service Law JSP 830 p. 1-7-39.

¹¹⁰ *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

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.¹¹¹ 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 occurred, 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.¹¹²

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 is overridden by any other international rule is an open question for coalition international lawyers.

From the perspective of many coalition partners, the most important rule possibly to supersede international treaties is Article 103 of the UN Charter.¹¹³ 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,¹¹⁴ a view with which the European Court of Justice has registered agreement.¹¹⁵ Other commentators¹¹⁶ and the England and Wales High Court and Court of Appeal endorsed the latter view by advancing the view that authorizing resolutions can override

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.

¹¹¹ *Id.*, ch. “Responsabilité pénale”.

¹¹² *See, e.g.*, the German *Handbuch für den Rechtsberaterstaboffizier im Auslandseinsatz*.

¹¹³ 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.”).

¹¹⁴ *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).

¹¹⁵ *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).

¹¹⁶ *See* SIMMA, *supra* note 114, at 729.

international treaty obligations pursuant to Article 103 of the UN Charter.¹¹⁷ Advocates of this approach contend that only this interpretation ensures effectiveness to the measures of the Security Council.¹¹⁸ This view also corresponds with the practice of many, since states did not oppose such UN authorizations on the ground of conflicting treaty obligations.¹¹⁹

Despite this, international treaties to which coalition partners are party still have some meaning for coalition operations based on 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.¹²⁰

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

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

Article 1 of the ECHR states that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.” As with 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.¹²¹ This is 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.¹²²

¹¹⁷ *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.*

¹¹⁸ *See Kolb, supra note 115, at 25.*

¹¹⁹ *See SIMMA, supra note 114, at 759. But see Kolb, supra note 115, at 27.*

¹²⁰ *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.*

¹²¹ *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.”).*

¹²² *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).*

The ECHR at least arguably applies extraterritorially,¹²³ and so it necessarily must be taken into consideration when cooperating with any nation that is a signatory to the ECHR. Moreover, the relationship between the ECHR and UN resolutions (whether UN resolutions authorizing operations effectively preempt application of the ECHR) is itself a matter of debate.¹²⁴ Consequently, any JA working with forces from countries that are signatories to the ECHR will have to work with their legal staffs and be sensitive to the possibility that the ECHR will dictate some aspects of coalition members' operations.

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 based upon 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 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 the Charter does not apply to the handling and transfer of detainees held by CF personnel in Afghanistan because Afghan and international law protect detainees instead.¹²⁵ This decision is under appeal to Canada's Federal Court of Appeal, after which it can still go to Canada's Supreme Court.

¹²³ Compare *Loizidou v. Turkey*, European Court on Human Rights, application number 15318/89 of November 28, 1996 (broad extra-territorial application of the ECHR) with *Bankovic v. Belgium*, European Court on Human Rights (admissibility decision), application number 52207/99 of December 12, 2001 (applying a stronger concept of territorial, rather than personal, jurisdiction). See also *Öcalan v. Turkey*, European Court on Human Rights, application number 46221/99 of May 12, 2005;

¹²⁴ See generally *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); *R(AI Skeini and others) v Secretary of State for Defence* (The Redress Trust intervening)[2007] UKHL 26; *R (on the application of Al Jedda) (FC) (Appellant) v Secretary of State for Defence (Respondent)* [2007] UKHL 58.

¹²⁵ See <http://decisions.fct-cf.gc.ca/en/2008/2008fc336/2008fc336.pdf> (last visited Aug. 27, 2009).

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 United States, Russia, United Kingdom, China and France.

vetoes 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

UN Security Council resolutions, mandates, and directives may be in apparent conflict with pre-existing or concurrent international legal norms. UN Charter article 103 directs Member

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.

States confronted with competing legal duties to give priority to obligations arising under the Charter. Judge Advocates should identify such conflicts early and alert their technical legal channels at the highest levels. Resolution of competing legal duties may ultimately require political as well as legal determinations.

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 that might lead to international friction or give rise to a dispute, recommend appropriate procedures or methods of adjustment. The key to resolutions passed under Chapter VI is that they only permit the presence of military forces with the consent of the host government and do not sanction the use of force other than that which is necessary for self-defense.

Due to the permissive nature of Chapter VI missions, 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 actions 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.

⁸ U.N. Charter art. 33(1).

⁹ U.N. Charter art. 2(7).

¹⁰ U.N. Charter art. 39.

Article 41 allows the Council to require Member States to apply affirmative measures short of the use of force. These measures include, but are not limited to “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”¹¹ 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

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”.

through subsequent Security Council resolutions. Mandates subsequent to successful decisive operations may include broader developmental and transformative goals.¹⁶

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 operations. Fiscal law restrictions will undoubtedly impact mission planning and execution.¹⁷ Other reporting and operating requirements, such as vetting under the Leahy amendment¹⁸ for past human rights violations should be anticipated as well.

¹⁶ See fn. 6.

¹⁷ See Chapter VII.

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

B. The Rule of Law Legal Framework

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

1. The Law of War

Rule of law operations occur within the broader context of stability operations.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 treaty 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 (Common Article 3) 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.

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).

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

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

b) Customary International Law

Customary international law (CIL) is a second major source of law of war obligations. Given its largely uncodified form, CIL can be difficult to discern. Many treaty provisions, including the Hague Regulations of 1907, the Geneva Conventions of 1949, and portions of the 1977 Additional Protocols to the 1949 Geneva Conventions are considered reflective of CIL. Provisions of the latter treaties have proven particularly troublesome for US Judge Advocates because the US is not a party to either Additional 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.

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

2. *Occupation Law*

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

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 that depends largely on the prevailing conditions on the ground. Guidance is provided by Article 42 of the Hague Regulations:

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

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

Occupation law 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

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).

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 (although a form of international law) regulates relationships between states and individuals.

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).

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 US 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 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. As a matter of policy, then, they 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 party.²⁸ These include the Genocide Convention; the International

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

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).

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 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

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>.

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.

Commission on Human Rights. That body has a non-binding dispute settlement mechanism, that 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 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 US 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 US 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

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).

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.").

populace, conduct by US forces that would be questionable under any mainstream interpretation of international human rights law is unlikely to have a place in rule of law operations.

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V. 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.

Many deployed Judge Advocates will have little contact with the legislative side of rule of law operations, but 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 a variety of participants, including the DOD, other USG agencies, the 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. In conducting both missions Judge Advocates need to be mindful of the generally recognized standards for the operation of civilian courts, since those are the standards by which both the local population and the international community are likely to judge the legitimacy of whatever court system is operating under 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

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

justice in secret. The right of an individual to know promptly the nature of the allegations is a basic tenet of all criminal justice systems. The concept of “equality of arms” dictates that neither the prosecution nor the defense should have a substantial advantage in conduct of an inquiry.¹² The defendant has the right to be tried in person and through legal assistance of one’s choosing 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. Judge Advocates should be mindful, though, that the role of defense lawyers may be much less central to the judicial process in some non-adversarial systems.

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

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>.

certain contentious issues and areas of the law, which may raise questions over their independence and impartiality. Indeed, if dependent on the electoral system, an elected judiciary may preclude representation in the judiciary from all ethnic communities in a state.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 the 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 made 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.

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), *Grievs v. United Kingdom*, 39 Eur. H.R. Rep. 2 ¶ 69 (2004).

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

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

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

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

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

²¹ BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002), available at http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf. 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).

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.

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 that 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

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.

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.

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 that 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.

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

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.

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.

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.

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

One of the first decisions that will have to be made in any particular stability operation will be whether to retain (and retrain) an existing police force or simply to start from scratch. Whether recruitment from scratch is superior to reforming existing resources will be theater specific. A corrupt police establishment that provides a modicum of security may, in the short term, prove better than no police force at all. If, as experienced by the British Forces in Iraq, 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:

- **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**

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.

- **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 in 2008 the Council of Representatives in Iraq passed 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

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.

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

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

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

³⁶ See the text accompanying note 27.

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

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.

- **a library or book distribution program**
- **visiting areas where detainees can meet with family, friends, clergy, or attorneys**

b) Human Rights

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

- **housing that adequately protects detainees from the elements**
- **adequate food and water (the provision of which should accommodate to the extent possible the detainee's religious dietary practices)**
- **care for detainees with dental and medical conditions (including pregnancy)**
- **care for detainees with potential mental health conditions**
- **handling juvenile and female detention and other segregation requirements**
- **force-feeding hunger-striking detainees**
- **detainee escape, recapture, and misconduct**
- **press interviews with detainees**
- **access to detainees by family, local medical personnel, and local court personnel**
- **religious accommodation**
- **detainee labor**
- **use of force within the detention facility and maintaining good order and discipline**

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

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.").

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 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,

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).

the necessity for civilian, as opposed to military, judges in courts-martial is considered a matter of human rights law, as confirmed by the European Court of Human Rights in several recent cases. The concern in such cases is that the central role of the civilian judge was an important factor in ensuring the impartiality of proceedings, and unlike in the US system, the court determined that a uniformed judge offered no such guarantees.⁴³

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

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

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

⁴³ See *Grievances 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.

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.

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.

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 precedent, albeit generally not formally binding, is also known to civil law systems, these elements do not of themselves provide an adequate criterion

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

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.

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 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

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.

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.

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.

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

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

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.

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 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

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.

⁶⁸ *Id.* at 67.

⁶⁹ *Id.* at 87.

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;⁷⁰ 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.

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 the civil law system is the revealing of the material or absolute truth while the common law system considers it sufficient to establish the procedural or relative truth between the two parties in dispute. This distinction between the common law'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

⁷⁰ *Id.* at 114.

⁷¹ *Id.* at 115.

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).

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. The pre-trial phase, which will be primarily written and non-public, will often but not necessarily be separated into an investigative and an examining phase. During this, a governmental official (usually a judge, a judicial magistrate or a prosecutor) oversees or directs the police's efforts to establish the facts of the case and collect evidence of the guilt or innocence of the suspect. Where the investigation is not overseen by a judge, a decision by an investigative judge will often be required for certain investigative activities such as detention or searches.

The investigative efforts will eventually result in a complete written record containing all relevant evidence. If an examining judge subsequently evaluating the record concludes that a crime was committed by the accused, the case will be taken to trial, if not, the accusations will be 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.

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 is not strictly "adversarial" given to the role of the police in gathering evidence both for and against the defendant.

⁷⁴ Code d'instruction criminelle.

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.

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 in civil law systems. The main function of a criminal trial is to present the case to the trial judge and, in certain cases, the jury, and to allow the lawyers to present oral arguments in public.

During the trial phase, JAs should be aware of the different role of the judge. In civil law systems the judge “owns” the trial, 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 place.⁷⁸ Contrary to common law systems, the defendant can be questioned by the judge but may refuse to answer. He cannot be sworn, as that would be seen to conflict with his right not to incriminate himself and thus is procedurally protected 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

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 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.

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 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

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).

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-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.

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.

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

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

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. 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.

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

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.

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 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

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.

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 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

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.

⁹⁸ ELHADJ, *supra* note 84, at 46.

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 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,

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 contain 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).

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

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, 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

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

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 725.

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.

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

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.

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

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 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

method of reducing the burden on a nascent legal system. See Kings College London – International Policy Institute, East Timor Post Operation Report, <http://www.ipi.sspp.kcl.ac.uk/rep006>.

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>.

who participated in such activity. That said, TRCs do not provide impunity for all. Those deemed to be responsible for organizing or orchestrating the violence are frequently tried while the vast majority of others may be granted amnesties if they participate in TRC process and thereby accept their actions. The balance between individual criminal responsibility and national reconciliation is a fine one that is not easily achieved.

The Role of Truth and Reconciliation

One form of truth and reconciliation was undertaken by the Special Representative to the Secretary General (SRSG) in Afghanistan. Complaints have been made of serious crimes committed by the Northern Alliance during the military campaign in which the Taliban regime was removed from power. These serious allegations possibly implicated senior members of the current regime. The unwillingness of the UN to conduct a thorough investigation into such allegations was based on jurisdictional concerns but was heavily swayed by the risk of undermining the current transitional administration. The SRSG concluded, on balance: “(O)ur responsibility to the living has taken precedence over justice to the dead.”¹¹¹

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

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

5. Property Claims Commissions

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

Such a body was set up by the 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.

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

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.

F. The Implications of Gender for Rule of Law Programs

Gender issues can play an important role in the rule of law and consequently in rule of law operations.

First, measures to provide for the protection of basic human rights and fundamental freedoms will likely include some provisions to eliminate discrimination against women. Women and women's issues are often marginalized in societies subject to US 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 operations. 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.

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

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).

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").

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 operations.

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

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 Sept. 4, 2009).

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.¹²⁶

In Nicaragua, the GTZ project “Combating Gender-Specific Violence” partnered with a GTZ program that advised the Nicaraguan police on the “Roles and Rights of Women in the Nicaraguan Police.” A manual on *Gender specific violence and public safety* was developed in cooperation with the Security Sector Reform Advisory Program for targeted groups within the police and a media recruitment campaign was launched to increase the number of female officers. The project included a four-week regional course on “multipliers- training in security and gender” for women police officers from Central America and the Caribbean. This 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.¹²⁷

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

¹²⁵ Iivula-Ithana, Peace Needs Women, and Women Need Justice, New York Gender Justice Conference: UNIFEM/ILAC, 2004.

¹²⁶ “Policing with Compassion, Sierra Leone,” Women as Partners in Peace and Security www.un.org/womenwatch/osagi/resoures.

¹²⁷ <http://www.gtz.de/en>.

have an important role to play owing to their potential to give voice to the interests and concerns of the wider population, to encourage reforms that are responsive to popular security and justice needs, and to actually perform the work of reconstruction and social support that leads to increased stability and recognition of the rule of law.

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

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

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

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

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

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

Human rights and access to justice. CSOs play an important role in advocating for human rights and increasing access to justice. Many bar associations, independent lawyers groups and NGOs work to promote human rights through training of security forces, campaigning for legislation, monitoring allegations of abuses, and providing legal and paralegal assistance. Work in these areas is particularly important in countries with a repressive state or countries emerging from violent conflict and political transitions where rights are often not respected.

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

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

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

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

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

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 US Agency for International Development (USAID) partners, the team developed a program to expand the KJU's publication of pamphlets and brochures, increase its distribution, fund legal assistance lawyers within the KJU offices, and eventually open offices in each of the districts. The project not only provides face-to-face legal consultations, but also funds informational workshops for both laymen and legal professionals to increase their awareness of the legal system. This proposal, at a total cost of less than \$150,000, was quickly approved for funding under USAID's Civil Society Conflict Mitigation program.¹²⁸ 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.

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 Law¹²⁹

Context

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

¹²⁸ 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.C.

¹²⁹ 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.

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

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

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

Accountability and Oversight

Which CSOs help oversee the security and justice systems?

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

Capacity

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

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

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

Management

How strong are the internal managerial systems of relevant CSOs?

Do they handle budgeting activities competently and transparently?

Coordination with other parts of the security system

Which CSOs have connections to security and justice actors?

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

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

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

External Partners Engagement

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

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

How can sustainability be built among targeted CSOs?

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

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

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

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 under-developed and journalists lack the capacity and knowledge to effectively cover security and justice issues. CSOs can play an important role in helping to develop these skills and developing the capacity of CSOs to effectively engage with the media can be an important area for assistance.

Train the trainers. Experience shows that 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-owned industries. This had implications for perceptions of its neutrality.

Be aware of potential negative role of some civil society groups. Violent conflict often engulfs, politicizes and splinters civil society. Some organizations, which may be considered to have played a negative role in the conflict, could act as a spoiler to peace processes.

Ensure the security of NGO and CSO partners. In many contexts NGOs are targeted with violence by belligerent factions or insurgents, and they are almost invariably ill-prepared to provide their own security in a non- or semi-permissive environment. Security failures that affect CSOs can devastate reconstruction efforts, including 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

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

1. Assessing the Role of Non-State Security Providers

A professional, accountable and well-regulated private security industry can complement, rather than undermine, the state's ability to provide security. A healthy private security sector can allow scarce public resources to be usefully redirected for other purposes, including the public provision of security to those who cannot afford it by private means. Within this context, the issues that may need to be addressed can be summed up as follows:

- **Clarifying the roles of the private security sector and its relationship with public security agencies, and increasing cooperation**
- **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.¹³⁰

¹³⁰ 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

(9) *Address the links to DDR.* Disarmament, demobilization and reintegration (DDR) programs may need to specifically include private security personnel, who are often recruited locally and may have played an active role in conflict. Former combatants may provide a recruitment pool because they frequently possess specialized military skills but lack alternative economic opportunities. This can lead to problems if former combatants are not adequately vetted and trained. If not carefully monitored, PSCs in a post-conflict environment can contribute to insecurity through maintaining command structures and legitimizing weapons possession under the guise of legitimate private security provision.

(10) *Remember that PSCs are part of the broader civil society.* Where possible, align efforts to deal with the problem of non-state security providers with civil society and community safety initiatives. In addition to the involvement of CSOs, community safety programs are also useful tools that can help increase the oversight of the private security sector by local authorities and community groups. They do so by encouraging dialogue between communities and all security providers, and encouraging local cooperative agreements between security providers and communities that outline the roles and practices of the different actors in maintaining local security, law, and order. At the same time, encourage the host government and civil society to educate the public about the role and authorities of PSCs, to align expectations and reduce miscommunications.

http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Vetting_en.pdf. For further information about the ICTJ research project on vetting and additional guidelines being developed see <http://www.ictj.org/en/research/projects/vetting/index.html>.

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VI. Planning for Rule of Law Operations

Mission planning does not occur in a vacuum. It is subject to the demands of available resources, time, and the operational goal to be obtained. Planning for the rule of law mission is no different. Hindsight and analysis of past post-conflict operations suggest that there must be a thoughtful, systematic, and phased rule of law planning strategy. That planning effort, in turn, is driven by 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**

³ CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: VOL. II, FULL SPECTRUM OPERATIONS 254 (2006).

- **Contains the minimum coordinating measures necessary to synchronize the operation.**
- **Allocates or reallocates resources.**
- **Directs preparation activities and establishes times or conditions for execution**⁴

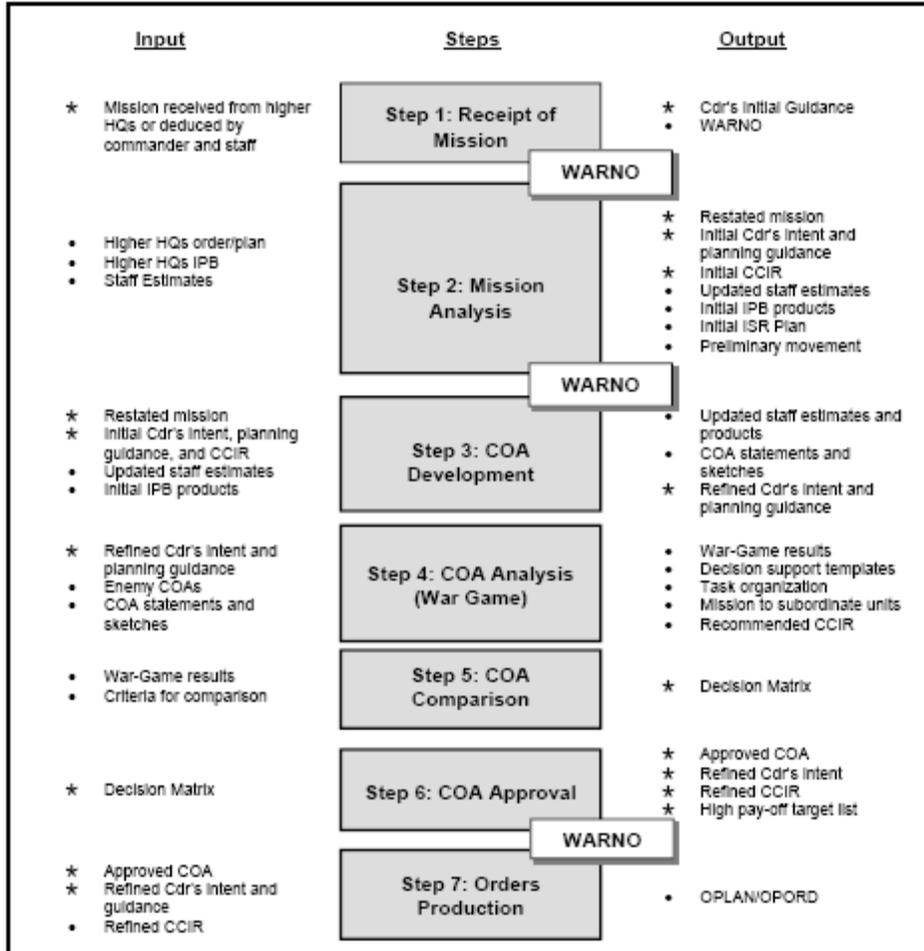
Planning for rule of law programs in COIN and stability operations will present the rule of law practitioner, commander, and staff with a complex and unfamiliar situation. Planning in these environments is best done using the analytic decision making process. (FM 5-0, para. 1-20) Analytic decision making 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 operations 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 in 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 Law 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 or she 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

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).

system or environment and ensure that you consider all aspects of the system. Section VI.C addresses assessment in greater detail.

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 operations. 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

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 relationship 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).

equation. In rule of law, stability, and COIN operations, the role of the populace and sometimes 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) Successful rule of law programs are integrated and synchronized with the programs of other rule of law actors in the area of concern. Consequently, 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

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.

and nongovernmental entities with military operations to achieve unity of effort. (See FM 3-0, para 1-45)

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

¹² *Id.* at para 2-55. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006).

desired end state. Such assessments are done with measures of performance and measures of effectiveness.

As important as understanding the mission is, selecting the correct measures of performance to evaluate whether the mission is succeeding is also important. 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 and 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:

¹³ See FM 5-0, *supra* note 2, para. 3-152.

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.

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—

¹⁴ See *id.* at para 3-153.

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

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

¹⁵ See *id.* at para 3-189 – 3-190.

¹⁶ See *id.* at para. 3-194.

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.

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. This was readily demonstrated by the effects of cases like Abu Ghraib on our mission in Iraq or the ill will created by the September 2007 shootings by US security contractors in Nisour Square, Baghdad. US forces must reflect the rule of law in their 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.

¹⁷ FM 3-24, *supra* note 12, at 1-24.

Regardless of the exact duration of these planning periods, their relevance is that the nature of the planning for the rule of law mission and the measure of its success (metrics) varies significantly from phase to phase. The three phases provide a general compass to planning that should be considered as the mission evolves. The discussion below is to emphasize the tools required at each stage of planning for the rule of law mission, but is not intended to be an exact road map, as planning for any operation will be situation specific.

1. Pre-deployment Planning (-180 to -30 D day)

Pre-deployment planning for the rule of law mission may begin before operations are imminent. In the case of a major natural disaster, a unit might have only days to plan before arriving in the theater of operations. Operations over the past two decades (Haiti, Bosnia-Herzegovina, Desert Storm, and Operation Iraqi Freedom (OIF)) have repeatedly shown that there is often a substantial period of diplomatic and other political activity that provide signals to the Judge Advocate that informal planning for a rule of law mission should begin well in advance of receipt of a warning order. Even where available time is short, as was the case with Operation Enduring Freedom (OEF), the principles of pre-deployment planning for the rule of law mission remain the same – they are simply packed into a shorter timeframe.

a) Understand the Level at which you will be Operating within the Command Structure.

The nature of the mission that will be assigned to rule of law practitioners will necessarily influence planning in the pre-deployment phase. There will be significant planning differences depending upon from where the JA personnel will be operating. This may be 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-person 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

¹⁸ LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade (2003).

opportunity to gain the general, but invaluable, understanding of the legal system of the nation where operations will occur. Understanding which organization or element within the justice system is supposed to do what, as well as understanding the lines of accountability, prior to arrival in theater will enable more effective pre-deployment planning concerning how to engage that system in a reform effort.

There are several steps toward understanding the foreign legal system to consider during planning in the pre-deployment phase:

Step 1. Take into account the political and historical context. This step helps identify events that shape the environment, such as a recent conflict or the creation of a new state. It also develops information on the country's legal traditions and the origins of its current laws.

Step 2. Understand the roles of major players and political will. This step helps identify the roles, resources, and interests of those who might potentially support reform as well as those who stand to benefit from retaining the *status quo*. It also guides an assessment of the strength of political will and options for capitalizing on it, strengthening it, or working around its absence.

Step 3. Examine program options beyond the justice sector. This step broadens the assessment beyond the justice sector to the overall state of the polity and its legitimacy. It helps determine whether conditions are ripe for direct rule of law programming, or whether programming should support precursors to the rule of law, such as political party development or legislative strengthening.

Step 4. Assess the justice sector. This step provides for a structured assessment of each essential element in terms of the two components of the justice sector, the legal framework and justice institutions. Assessments are discussed in greater detail in section 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. In addition to appointments with the librarian and Judge Advocates assigned at OTJAG, the OTJAG-IO Pre-Deployment Preparation (PDP) Program can facilitate this process by obtaining copies of relevant materials and providing them to the field for use.

c) Plan for Coordination with other Agencies Having an Interest in the Rule of Law Mission

Rule of law operations in Iraq and Afghanistan have repeatedly demonstrated that rule of law practitioners who seek to coordinate efforts, funding, and resources with other agencies and organizations yield the most effective results. The Judge Advocate who tries to do everything himself may expend significant effort, but over the long run not significantly impact reform. It is frequently the case that during initial-entry into a non-permissive environment, the Judge Advocate will indeed be alone, with only other military operators such as Military Police and 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

¹⁹ Rule of Law Lessons Learned, MNC-I Rule of Law Section, Operation Iraqi Freedom 05-07 (Dec. 10 2006).

Advocate to maximize the effect of his or her 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) 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. For example, a Serbian born translator who speaks Serbo-Croatian might not be effective in interviewing Croat civilians about their views on legal reform due to long-term ethnic tensions between the Serbs and Croats. 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 a legal background or training.

f) 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.

g) Conduct Briefings to Make Commanders Aware of Rule of Law 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.

h) 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.

The Pre-Deployment Preparation (PDP) Program

In January 2009, The Judge Advocate General established the Pre-Deployment Preparation (PDP) Program to identify and coordinate resources for deploying Judge Advocates, paralegals, and warrant officers. The program, which falls under the International and Operational Law Division of OTJAG, is a source of invaluable information in all aspects of deployed legal practice, including rule of law. Deploying Judge Advocates are encouraged to contact the PDP Program for timely information on how rule of law and other OPLAW missions are being carried out downrange.²¹

i) Pre-Deployment Questions

Because of the variety of situations in which Judge Advocates will confront rule of law issues, it is impossible to provide a roadmap to rule of law. At the same time, the sheer number of considerations can be overwhelming. Below is a list of questions that is the result of several sessions, both during a conference on the rule of law held at Georgetown Law Center in Washington, D.C.²² and during the 2009 Rule of Law Short Course held at The Judge Advocate General's Legal Center and School.²³ What follows cannot be comprehensive, but it does provide a starting place for those facing rule of law assignments to ask questions before they are in theater and is based on the experience of many who have deployed. This list is designed to uncover information about rule of law programs more so than the nature of the host nation's law, and because it was developed in 2009, during a time at which most military rule of law deployments were to mature theaters, it heavily emphasizes gaining information on *existing* programs, which will not be the case for initial entry deployments, such as OIF-1. We have included some substantive legal questions, but that topic is given more detailed coverage in the sample Assessment Framework contained on pp. 176–181 below.

Host Nation (HN) Rule of Law Structure

What is the nature of the formal legal system in place?

Do they follow a civil or common law model?

To what degree are the rule of law effects described in FM 3-07 realized under the HN system as it is operating?

Where can English copies of the HN's laws be obtained?

What does the current JA wish s/he would have brought with him/her; what resources are needed?

What is the governmental structure for rule of law institutions in host nation?

(i.e. What HN agencies control which elements of the rule of law?)

²¹ The PDP Program may be contacted at pdp@conus.army.mil or (703)588-8459.

²² The Fourth Annual Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions, March 19-20, 2009.

²³ Suggestions for additions or deletions are welcome. Please email them to the Center for Law and Military Operations' email addresses listed at the front of this book.

What contacts exist with and for the local legal system?

What is the role of traditional / informal dispute resolution systems?

Does the traditional system differ from the formal host nation legal structure and law?

Is there a local bar association / legal centers / legal clinics?

Who are the local officials with whom you meet?

What is the HN legal training infrastructure? Are there any law schools?

HN Criminal Justice

What is the capacity of the HN criminal justice system?

Is there a police force? What is the structure of the police force? Does the HN military have a role in law enforcement? Is there a secret police?

How do evidentiary rules differ from the US model? How are hearings conducted?

Plans

What is the higher headquarters plan?

Get the plan for the next two higher military headquarters (e.g. Joint Campaign Plan) and focus on the intent.

What is the host nation plan? (For example, consider the Afghan National Development Strategy)

What is the USG plan? (Focus on obtaining plans from interagency personnel to include DOS / USAID / DOJ)

Do the above referenced plans include rule of law?

Is there a Rule of Law Annex?

Are there any specific FRAGOs that address or modify the base order or plan?

What are the foundation documents for the intervention?

What is the authority for US military presence in the host nation?

Are there any applicable UNSCRs?

Are there any international agreements (e.g. SOFA)?

What are the significant planned events in the coming year?

What are the critical events in the USG plan?

Are there significant HN events that are not part of the plan (e.g. elections)?

Rule of Law and Detention

Who is operating detention facilities, US or HN forces (or others)?

Are there detainee facilities available to the US, where are they located and what condition are they in?

Are there jails? Do they need to be expanded?

Under what authority are detentions being conducted and how can a copy of that authority be obtained?

Who is responsible for apprehending and detaining HN nationals?

Projects

(Past) What rule of law projects has your unit attempted or completed?

What plans were successful?

Why did projects fail?

(Current) What rule of law projects are currently going on?

What is the status of the projects?

Who has the lead for each project?

What is the transition plan?

What is the estimated completion date for the project?

What are the next steps that need to be planned, funded, or executed to complete each project?

(Future) What projects are you planning?

What are the next steps in those plans?

What projects do you anticipate transitioning to my unit?

What are the fiscal authorities (to the extent they differ from the standard ones) used for rule of law?

Are there any formats necessary to request a project?

What is the process for obtaining approval?

Structure

What is the rule of law coordination structure?

What is the structure among military units?

What is the relationship horizontal relationship between military and civilian rule of law practitioners?

What is the relationship vertically (two HQ up) between military and civilian rule of law practitioners?

How does information flow along these channels?

Is there a PRT or ePRT in the area?

Do the rule of law practitioners hold meetings?

What is the frequency of these meetings?

Where are these meeting held?

Who attends these meetings?

Is there a briefing responsibility for the JA? If so, what is the format for the briefing responsibility?

Who, practically, is calling the shots in rule of law and how does that flow work?

What information is regularly requested and collected from you and by whom?

What other USG agencies are currently in your sector doing rule of law?

What other countries are in place, what is their mission?

What NGOs are in place?

What foreign government agencies are in place?

What IOs are in place?

What projects do these agencies have ongoing? (What contractors are the various agencies using to identify them with agency?)

USAID

INL

DOJ/ICITAP

DOJ/OPDAT

DEA

US Marshals

ATF

FBI

US Embassy

NGOs

IOs

USIP

UN

Rule of Law POCs

name / email

location / agency

phone numbers

Collect the above information for all of the agencies listed above under the structure questions.

Is there a HN lawyer or Bilingual Bicultural Advisor (BBA) associated with your unit?

Who is the Contracting Officer at the higher headquarters?

Current assessment

Obtain a copy of the current rule of law assessment.

What are the metrics currently being used for rule of law?

Are the metrics effective?

Some sources outside home organizations that can be consulted in answering many questions about the culture, society, and laws of many nations and the law applicable to US operations in many countries:

Center for Law and Military Operations

International and Operational Law Dept., The Judge Advocate General's Legal Center and School

CIA World Factbook

DOS country desk

USAID website

Subject-matter experts at universities, USMA, TJAGLCS, etc.

Law libraries with international collections

Comparative law review articles

US Embassy FAO

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,²⁴ 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.

²⁴ *E.g.*, Hungary for Joint Endeavor; Saudi Arabia for Desert Storm; Kuwait for OIF.

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:

Identify short-term goals, activities, and strategies to provide quick successes that will generate political support in post-conflict settings where conditions are evolving.

Assign responsibilities, designate timelines, and provide performance benchmarks for both the initial deployment phase and the longer term sustained deployment phase.

a) *Provide for Small, Early Successes in the Rule of Law Operation*

In the initial days following the close of armed conflict or on the heels a natural disaster, 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,” an effort to provide the

security to the judicial branch that should be provided immediately upon US 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.²⁵

e) “Plan B”

On the battlefield, communications are frequently unreliable and operational contingencies arise rapidly. Therefore, it is critical to not only have a plan for operations in cases in which the rule of law team is in regular contact with higher headquarters, but also to have a back-up plan of what to do if operational contingencies and limitations on communications gear render the team unable to communicate on a regular basis.

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

²⁵ LTC Craig Trebilcock, *Justice Under Fire*, ARMY LAW. (Nov. 2006).

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 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.²⁶

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.

²⁶ See Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 61-62 (Thomas Corothers ed., 2006).

Attendance at international or regional legal conferences for judges and leaders in the legal system that will expose them to international norms of justice.

Seek support for legal resources such as books and equipment from friendly neighboring countries that have a vested interest in restoration of security and stability on their border. For example, the Kuwait Government sponsored a Humanitarian Operations Center (HOC) in Kuwait City during OIF-1 that provided support to print and distribute the Iraqi laws and procedural codes, as many of the hard copy Iraqi resources for the law had been destroyed during looting.

Encourage coalition building between host nation government legal organizations and law-related NGOs. For example, the American Bar Association conducts rule of law programs in many developing countries, including several former Soviet republics.

Develop meaningful oversight mechanisms, such as ombudsman offices or judicial/police inspection offices to discourage corruption or misuse of government resources for private gain.²⁷

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 buyback 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.

²⁷ 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.

C. Practical Approaches for Conducting Assessments within Rule of Law Operations

An assessment is the factual foundation upon which effective planning for the rule of law mission occurs. It is a study of conditions existing within the area of operations at any given time. Civil Affairs officers often generate assessments of a foreign nation's courts, prosecutors, police, and detention facilities as well as the public health capability, agriculture, economics, government capabilities, and utilities in developing plans to assist in stabilizing an area. The Judge Advocate engaged in the rule of law mission must become comfortable with creating and reviewing assessments of foreign nations' legal systems, including courts, private legal organizations, police, and prisons. An assessment may be informal or formal in nature, ranging from a couple of pages of hastily created observations upon initial entry into an area of operations to thorough studies that are dozens of pages long during the sustained deployment phase.

Assessments are a living document that should always be evolving to reflect changing conditions on the ground. If assessments are not updated on a regular basis to reflect changes in the country's legal system, planning will likewise be out-of-step with the reality on the ground. A current and accurate assessment assists in keeping the focus upon whether the actions being taken in pursuit of establishing the rule of law are making a difference.

Too often, mission activities and priorities are established without the benefit of a systematic assessment that looks at all elements, their context, and options. In the absence of such an assessment, tools become ends unto themselves. Example: A JA planner could plan and spend substantial funds and effort creating a sophisticated plan of legal instruction for judges in a particular province. Such an initiative might well look impressive in reports to higher authority. But, if the assessment reveals that lack of security and lack of funding are causing those provincial courts to limit operations, the legal training mission might be better delayed until, after the more immediate needs of security and funding are provided.

Assessment Fatigue and Assessment Coordination

Many redeploying JAs have identified “assessment fatigue” – repeated assessments from different agencies or multiple levels of headquarters – as a major problem in conducting development operations. Multiple assessments can result in various agencies gathering slightly different information that does not allow them to synchronize their activities. Further, when different USG agencies ask for duplicative or similar information, it demonstrates to their HN government counterparts that there is no single plan or coordination in rule of law efforts. When HN personnel conduct their relationship with the USG through a particular individual (in the rule of law arena, frequently a PRT rule of law advisor or Brigade Judge Advocate), multiple confusing assessments can erode the professional and personal trust so essential to successful development programs. Consequently, it is critical to coordinate assessments with all levels and agencies operating in the rule of law arena and to the extent possible, rely on information already collected; each new assessment imposes costs, both seen and unseen, on the rule of law program. Similarly, anyone deploying to a theater with an ongoing rule of law program should become aware of the existing assessments before devising new ones.

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. 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.²⁸ 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.²⁹ 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 that 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.

In addition, major players may exist outside of the government bureaucracy. These can include tribal or religious leaders who engage in informal justice systems, NGO and IO staffers, and neighboring foreign officials with an interest in the progress toward the rule of law of their neighbor. It is virtually inevitable that the quality of specific information available to the rule of law planner will increase with arrival in the area of operations. Accordingly, more suggestions concerning the types of players to include within an assessment continues in the initial deployment phase below. The importance of the pre-deployment assessment is that it enables the subsequent, more detailed information gained in-country to be placed into a broader context and lessens the time involved in assimilating that information into a usable resource once the unit hits the ground.

2. Assessments During Initial Deployment (-30 to +90 D day)

Assessments during the initial deployment stage will take on a greater level of detail than in the pre-deployment stage. For example rather than a general study and list of names, titles, and relationships, which was adequate at home station, the Judge Advocate must now know exactly how to find and communicate with these personnel, including the various commercial numbers, email addresses, and addresses or grid coordinates where they can be located.

²⁸ 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.

²⁹ USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 12 (2008).

a) Identify Who the Players Are

Initial assessments should include contact information for:

Judges

Court clerks and administrative personnel (who make the judicial system work)

Law enforcement officers

Prosecutors and defense counsel

Private attorneys (including bar association or legal union leaders)

Religious leaders and other core opinion makers (who may have an influential role upon the local population and its perception of the law)

Prison and jail officials

Police academies

Judicial training centers

Coalition partners and host nation militia exercising police powers

In addition to identifying the national bureaucrats, officials, and staff, the assessment needs to analyze whether legal institutions (including police, courts, and prisons) have the personnel, resources, and systems to handle the current and near-future caseload. The most ambitious plans for reform can be undermined by the simple fact that the host nation personnel needed to perform the tasks are not available due to pre-war understaffing, civilian casualties, or refugee movements.

Engage Host Nation Judicial Hierarchy

Initial site visits should focus on identifying and meeting key judicial personnel and to conduct a visual assessment of the physical structure. When meeting with the local judicial officials, try to develop an understanding of the organizational structure of the court. Initial visits can be used to explore the inter-relationship of the courts such as the hierarchy of judges, the supervision of lower court chambers, the appellate process and the administrative functions of the court such as the scheduling of cases and the management of court records and dockets.

Follow on efforts should be coordinated to the extent possible with the chief or senior judge of the court. This coordination will demonstrate proper respect for the senior judge. Further, you can request that the judge inform lower judges and their staff that you will be visiting their chambers. Absent such coordination, some lower chamber judges may be resistant to meeting at all unless they are confident that their superiors are aware of the meeting.

Other than the host nation personnel carrying out the justice mission on a daily basis, external organizations will also impact justice reform. Coordination with such entities will often bring additional funding, personnel, or other resources to supplement military efforts. Accordingly, an initial assessment of the justice sector should include a complete listing of:

NGOs (e.g., human rights organizations, national bar associations)

IOs (e.g., United Nations, ICRC)

Victim's associations

Coalition partners

Educational institutions, especially law schools

Other host government officials who impact rule of law issues (e.g., interior ministry, finance ministry)

Neighboring country agencies and personnel with a positive interest in rule of law issues in the AO

USG civilian personnel acting in a supporting or oversight capacity with US military forces

Media organizations

All such listings should include when, where, and how can these personnel be contacted by name, addresses, grid coordinate, phone & fax numbers, and email.

An assessment is not merely a list of agency and personnel contacts. An assessment should provide information and analysis of the capabilities and inter-relationships of the various participants in the rule of law process. It should also assess for agencies and personnel:

What influences are their personnel subject to? (positive and negative)

Where do their loyalties lay? (tribal, ethnic, religious, bureaucratic, financial)

Where do their obligations lay? (tribal, ethnic, religious, bureaucratic affiliations, financial)

What influences adverse to establishing the rule of law exist? (corruption, poverty, foreign influences, crime, fear, insurgency, lack of education)

b) *What are the Capabilities and Needs on the Ground?*

An initial assessment should also reveal what capabilities and tools are available within the host nation to conduct justice sector operations and reform. Such an assessment should reveal:

The number and physical capacity of courts, law enforcement & detention facilities – by number, location (grid), and an assessment of structural condition.

The status of supplies and equipment, if any – furniture, office equipment and supplies, utilities, legal texts, including both materials already in place and those being brought by other agencies.

Be aware that the mere existence of equipment without a plan for how to utilize it effectively in support of rule of law operation is not necessarily a positive or relevant factor the rule of law mission. Donor nations and organizations often want to contribute what they *have*, rather than what the distressed country actually *needs*.

The Judge Advocate conducting the rule of law assessment must rely upon his own judgment and expertise, as well in culling through requests for assistance from host nation officials.

c) *Assess who Controls Funding in the Host Government*

Justice agencies will not continue to operate without funds to pay staff and judges or to replace destroyed equipment. The rule of law Judge Advocate must become familiar with the local nations budget process and allotments, accounting procedures, and where the choke points exist within the bureaucracy that may delay funds from reaching the agencies that need them.

There should also be an assessment as to whether preconditions exist to access host nation funds, which might reveal corruption controlling the process.

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.

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.³⁰ The effects focused assessment serves two basic purposes: (1) providing a systemic perspective for rule of law planning and reform; and (2) creating avenues for local involvement and participation in reconstruction.

In pursuit of these longer term goals the sustained deployment assessment should develop information regarding:³¹

- **Sovereignty issues.** Where applicable, this includes 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.**³² 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

³⁰ US AGENCY FOR INTERNATIONAL DEVELOPMENT, REBUILDING THE RULE OF LAW IN POST-CONFLICT ENVIRONMENTS 12 (2007 draft) [hereinafter REBUILDING THE RULE OF LAW].

³¹ *See id.*, at 12-13.

³² 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 refers mostly 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.

assess the past histories of local NGO leaders before giving them unqualified support, as some may be associated with the former regime or, for other reasons, may not necessarily be committed to democratic principles.)

- **Potential public sector and political champions.** Government officials, politicians, and others at various levels who were neither part of the patronage system nor participants in corruption or oppression, and could serve as internal champions for rule of law reform. (These types of resources exist in some post-conflict countries. Examples include members of opposition parties, younger civil servants, and regional government representatives. Such individuals may not have actively opposed the prior regime, but in principle would support reform.)
- **Potential for mutual donor leveraging.** The degree to which the US rule of law effort can enter into mutually beneficial relationships with other rule of law participants.

Assessments regarding potential funding are necessary in the sustained deployment stage. But where time and the nature of the mission permits, funding considerations should be a prime consideration during pre-deployment assessments and planning as well. It is simply easier and more time efficient to utilize the extensive resources and domestic telephone contacts available at home station rather than trying to coordinate new funding streams once deployed to an austere environment with minimal communications capabilities. This is particularly true for follow-on rotations once the long term nature of the mission has become clearer and OPSEC concerns may be somewhat diminished.

In addition to the guidance on assessments provided above, the Office of the United Nations High Commissioner for Human Rights has put together a very detailed and useful manual suggesting methods for assessing progress in rule of law operations, titled *Rule-of-Law-Tools For Post-Conflict States, Mapping the Justice Sector* (2006).³³

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:

³³ Available at: www.ohchr.org/english/about/publications/docs/ruleoflaw-mapping_en.pdf.

Assessment Framework³⁴

Security

Legal Framework

Is a cease-fire or peace accord working?

Are the constitution or other basic laws in effect?

Is society under martial law or other exceptional law (e.g., laws of foreign occupation, UN Security Council Resolution)?

If constitutional order is effective, how effective are the criminal code and criminal procedure code?

Do police and prosecutors have sufficient legal authority to investigate and prosecute crime, including complex cases such as organized crime, drug and human trafficking, and financial crimes? Is there a modern criminal code that conforms to international standards and provides a sufficient basis for dealing with most types of crime?

Institutional Framework

Is there an effective police force?

Are the missions or mandates of the police forces codified or mandated in statutory law?

What is the role of the military in internal security and how is it distinguished from that of the police, and from paramilitary forces?

What are the rules and procedures of triggering a military response to internal security crisis? How do the military and other elements of the security system cooperate in such situations?

Are there prosecutors?

Are courts open and are there judges?

Are prisons operating?

Are the security sector employees getting paid a wage adequate to live on (to avoid resort to corruption)?

Are the different security sector agencies interoperable? What agencies are essential to the justice system and what is the best method to ensure coordination and synchronization?

Are charges brought only when there is adequate evidence of the commission of a crime? Are a large number of cases dismissed for lack of adequate evidence or because of unfounded or incorrect charges?

³⁴ This assessment framework is adapted from a draft version of the USAID GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 29, at 36-44.

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 that conforms to international standards and provides a sufficient basis for dealing with most types of crime?
- Are there statutory penalties or punishments for discriminatory or abusive police conduct?
- Do the constitution and laws of the country provide that the judiciary is an independent branch of government? Does the legal framework guarantee judicial and prosecutorial independence, impartiality, and accountability?
- Are there legally recognized and binding codes of conduct in effect for judges, prosecutors, and lawyers?
- Are armed forces held legally accountable for their actions when performing law enforcement or public safety functions?
- How are the laws viewed today by different social groups? Are any laws resisted?
- How long has the constitution been in effect? How often has it been amended? Have amendments been made by a process which includes a genuine opportunity for public participation and decision-making?

Institutional Framework

- How long have the key institutions been in place? How are they viewed by the public? By different social groups?

Which institutions command respect, disrespect, or fear? How do they rate against other institutions in the state or society? Is law respected by elites? Do elites suffer if they break the law?

Effects-Oriented Assessment

Do prosecutors prosecute or not prosecute individuals or organizations for political, social, corrupt, or other illegitimate reasons (or are they perceived as acting in this way)? Do they consistently fail to act to protect certain persons or groups from rights violations?

Do police and other bodies performing law enforcement/public order functions consistently act within the law? Do police routinely violate human rights with relative impunity?

Do courts routinely accept and consider illegally obtained evidence (coerced confessions or items obtained as the result of illegal searches)?

Are armed forces held legally accountable for their actions when performing law enforcement or public safety functions?

Do substantial portions of the population conduct activities outside of the formal legal system?

Do portions of the population resort to self-help (such as shootings, lynching, or other violence) to protect their property or personal rights or to punish transgressors?

Are historical or ethnic enmities present that could threaten civic cooperation?

What role do customary, religious, or community institutions play in practice in the justice sector? Are they regarded as more legitimate and credible than institutions of the state?

What is the place of customary or religious law? Is it recognized as part of the country's laws, or is its status unclear? Does it conflict with laws that are part of the formally adopted legal system?

Impartiality

Legal Framework

Do the laws relating to the structure and operations of the judiciary place the principal control over most judicial operations in the hands of the judiciary itself?

Is there a law on freedom of information held by government agencies?

Do existing laws provide for appropriate external and internal oversight mechanisms for reviewing and acting upon complaints of police brutality or other misconduct?

Are there legally recognized and binding codes of conduct in effect for judges, prosecutors, and lawyers?

Institutional Framework

Do the constitution and laws of the country provide that the judiciary is an independent branch of government?

Are judicial disciplinary and removal decisions made by a body and process that is not under the exclusive control of the executive and legislature? Are disciplinary/removal decisions subject to judicial review?

Does the selection system for judges and prosecutors limit the ability of the executive and the legislature to make appointments based primarily on political considerations?

Are judges entitled to security of tenure?

Once appointed, can judges be removed for non-feasance or malfeasance in the performance of their duties?

Are there internal or external (civilian) boards that review police conduct? Do these bodies aggressively review and act upon complaints of misconduct? Are there mechanisms to ensure that ethical codes for judges and prosecutors are effectively enforced?

Does civil society scrutinize the justice system? Does the media? What is the role of the bar?

Effects-Oriented Assessment

Do the courts and other elements of the justice system enforce law in a way which favors certain persons or groups over others?

Can citizens bring suit and obtain relief against the state? Against powerful interests?

Do the actions of the courts reflect a heavy bias in favor of the government's position in almost all cases that come before them (whether civil, criminal, or administrative)?

Is the independence of the judiciary respected in practice? Do high ranking government officials frequently and strongly criticize the courts, judges, or their decisions?

To what extent do judges or prosecutors leave their positions before the end of their terms? Why?

Do influential officials engage in "telephone justice?" Under what circumstances?

Are police held accountable to civilians? How?

Are judges and prosecutors harassed, intimidated, or attacked? Are courthouses secure?

Does the body that disciplines and removes judges and prosecutors act fairly, openly, and impartially? Are its decisions based solely on the criteria established by law for discipline and removal? Does it aggressively

investigate complaints of misconduct, malfeasance, and non-feasance and resolve them in a timely manner?

Are all parties treated the same in the courtroom? Do judges and other parties act with decorum and with respect for all parties?

Are judges' rulings consistent regardless of the status of the parties before the court?

Efficiency and Access

Legal Framework

Does the criminal law provide for periodic review of the decision to keep an individual in pre-trial detention by someone other than the prosecutor or police and in accordance with internationally accepted standards?

Does the criminal procedure code provide for a right to a speedy and public trial before an impartial judge, notice of all charges, right to review the prosecution's evidence and cross examine witnesses, right to present evidence and witnesses in defense, right to legal representation, a presumption of innocence, and a right against self-incrimination?

Does the country's civil procedure code provide that parties to civil proceedings have a right to proper and timely notice of all court proceedings, a fair opportunity to present evidence and arguments in support of their case, review evidence and cross-examine witnesses, have their case decided within a reasonable period of time, and appeal adverse judgments?

Do existing laws provide sufficient authority to judges to ensure that criminal and civil procedures are followed?

Are prescribed procedures overly complex and unnecessarily time-consuming?

Can courts issue injunctions against executive/legislative actions? Actions of private interests?

Institutional Framework

What mechanisms are in place for defense of indigents accused of crimes (such as public defenders service or court-appointed counsel)? Does the mechanism used provide, in practice, competent legal counsel for indigent criminally accused?

Is there a separate juvenile justice system?

Are there victim and witness support units within police stations? Do they include the presence of female officers?

Effects-Oriented Assessment

Are civil and criminal procedures, as set forth in the codes, consistently followed in practice?

Do judges consistently respect the procedural rights of all parties and sanction those participants (lawyers, prosecutors, witnesses, and parties) who violate the rules?

Are judges' decisions well-reasoned, supported by the evidence presented, and consistent with all applicable law? In cases in which judges have discretion in the enforcement of trial procedures, do they exercise that discretion reasonably and in a way that encourages the fair and expeditious resolution of cases?

Do most segments of society understand their legal rights and the role of the legal system in protecting them? Do they understand how the courts work and how to access them effectively?

Do lawyers have the knowledge and skills necessary to advise parties competently and advocate their interests in court?

In practice, are civil judgments enforced in an effective and timely manner?

Do women use the justice system, and what are the results?

Where do poor people go to obtain justice? Other social groups and classes? Is free or affordable legal advice available to medium- or low-income groups on civil matters (such as family, contract, or property law)?

Are most citizens represented by legal counsel when they go into court, or do many represent themselves in court (pro se representation)? Do the courts provide assistance of any kind to such parties? Does the local bar association provide any kind of low- or no-cost (pro bono) legal services to individuals or groups?

Are the courts user friendly and customer service oriented?

D. Practical Approaches for Measuring Progress within Rule of Law Operations

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?

If the mission is a follow-on rotation to replace another unit already in theater, the metrics for pre-deployment planning will necessarily include the progress and assessments of the unit already in theater. The follow-on unit obviously cannot control the content of those metrics, but obtaining that information early in the pre-deployment planning process for the follow-on unit will allow it to generate realistic assumptions and courses of action under the military decision making process.

2. *Initial Deployment Metrics (-30 D day to +90)*

Metrics in the initial deployment stage frequently focus upon facilities and personnel. The newly arriving Judge Advocate needs to understand the capabilities and resources will be required before meaningful planning and assessment can occur. Although each circumstance will vary, examples of early metrics include:

Courts and Judiciary:

- **Number of courthouses that are structurally capable of operation.**
- **Number of trained judicial and law enforcement personnel available.**
- **Availability of functioning utilities necessary to operate facilities.**
- **The amount of funding needed to repair physical damage to buildings, to include labor and materials.**

Police and Jails:

The rule of law planner should have a solid understanding of the ability of the local system to detain those persons arrested for criminal misconduct, to include both short-term and long-term circumstances. The metrics for this area include:

- **The number and geographic distribution of confinement facilities.**
- **A numerical breakdown of bed capacity in maximum and medium security long term facilities, as well as local short term detention space.**
- **The number and nature of currently detained/imprisoned persons.**
- **The rate at which newly detained/arrested personnel are growing versus capacity.**

Physical Security and Police Institutions in the Wake of Major Combat

During OIF-1 there was a period of 4-8 weeks during which the number of persons being arrested overwhelmed the capacity of the available facilities to hold them. Petty thieves and non-violent looters had to be released back into the population in order to create detention capacity for violent offenders. Awareness of detention metrics impacts all justice assessments and planning.

In addition, metrics should permit an assessment of the capabilities (and adequacy) of the local law enforcement entities. 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 that 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 courthouses 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.³⁵ The Department of Defense

³⁵ National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstructing and Stabilization (7 Dec. 2005).

followed the President's lead by publishing DODD 3000.05, which designated certain responsibilities to various organizations within DOD.³⁶ These two documents acknowledged the capabilities of both the Department of State and the Department of Defense, and served to 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.³⁷ 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.³⁸

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.³⁹ 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:

³⁶ U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005).

³⁷ See FM 3-0, *supra* note 8, at ch. 3 (27 Feb. 2008). (discussing these five Army primary stability tasks).

³⁸ 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.

³⁹ 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."

- 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 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 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), US 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 Tasks*⁴⁰

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:

⁴⁰ See FM 3-0, *supra* note 8, at 3-12 – 3-16.

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 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.

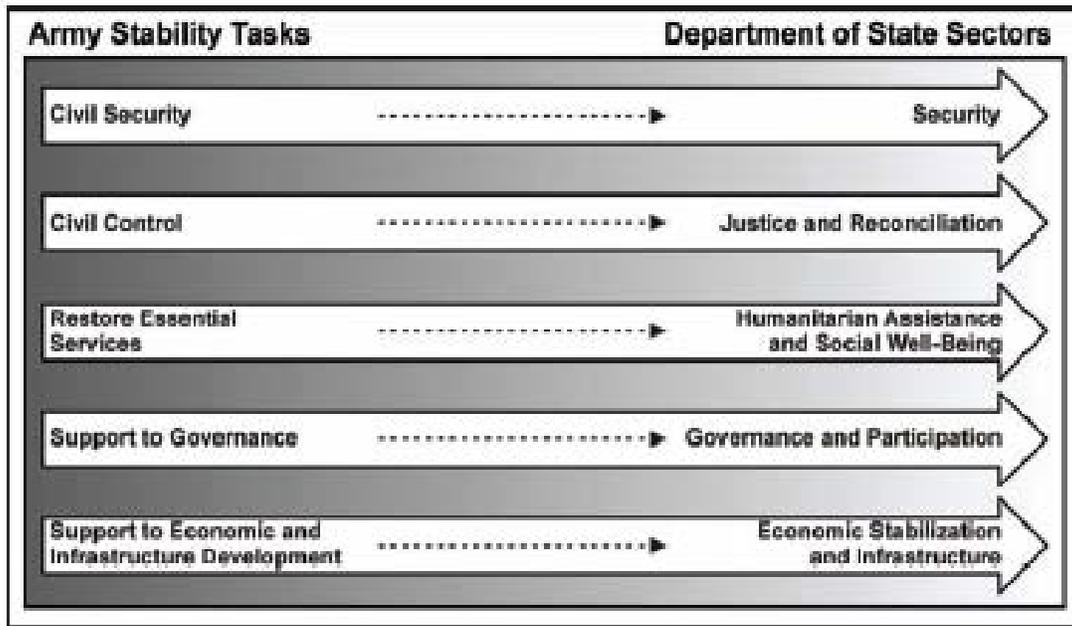
Governance lines of effort include, where appropriate: national constituting processes; transitional governance; executive authority; legislative strengthening; local governance; transparency and anti-corruption; elections; political parties; civil society and media; and public information and communications.

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.

VII. Fiscal Considerations in Rule of Law Operations

The US Constitution grants Congress the “power of the purse,”¹ a function that both appropriates public funds for a federal activity and defines a specific use for those funds. The principles of Federal appropriations law² 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.³ The improper obligation of appropriated funds may result in negative administrative and/or criminal sanctions against those responsible for violations of fiscal law. As a result, 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.

Fiscal law can rapidly change in response to both the operating environment (OE) and the will of the US public, manifested in congressional appropriations and authorizations.⁴ The 2009 Supplemental Appropriations Act, enacted on June 24, 2009, demonstrates how quickly the fiscal landscape can change. The Supplemental Appropriation provides two new funds, the Pakistan Counterinsurgency Fund and the Pakistan Counterinsurgency Capability Fund.⁵ The purpose of both funds (one administered by DOD, the other by DOS) is to build and maintain

¹ See U.S. CONST. art. I, § 9, cl. 7 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law ...”).

² The terms “federal fiscal law” and “federal appropriations law” are used interchangeably to refer to the “body of law that governs the availability and use of federal funds.” See PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 1, 1-2, GAO-04-261SP (U.S. Gov’t Accountability Office, Office of the General Counsel) (3d ed. vol. I 2004).

³ An obligation arises when the government incurs a legal liability to pay for its requirements, *e.g.*, supplies, services, or construction. From a legal standpoint, the obligation is a government promise to pay a certain amount to a contractor in consideration for their promise to provide goods, services or construction. A disbursement (or expenditure) is an outlay of funds to satisfy a legal obligation. For example, a contract award for construction normally triggers a fiscal obligation. The government may pay the contractor, or disburse funds from that recorded obligation, later in time as the construction is completed. The obligation for the full estimated amount, however, is recorded against the proper appropriation at the time the government makes the promise to pay (usually at contract award). Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. Although both obligations and disbursements are important fiscal events, the time of obligation is generally the critical point of focus for the fiscal advisor. See Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook, ch. 5 (2009), available at <https://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/TJAGLCS Publications>.

⁴ See, *e.g.*, *Can Appropriation Riders Speed Our Exit from Iraq?*, Charles Tiefer, 42 STAN. J. INT’L L. 291, 297 (Summer 2006) (stating that the use of riders to appropriations could be used to reflect the American public’s “highest priority on speeding the troops’ exit from Iraq.”)

⁵ Act of June 24, 2009, Pub. L. No. 111-32, 123 Stat. 1859 (2009).

Pakistani counterinsurgency capability, which can inherently involve rule of law functions. Rule of law practitioners must follow developments in both DOD and partner agency appropriations and authorizations in order to best assist commanders in rule of law functions. There is no overarching rule of law funding source, so familiarity with new funding developments is essential to an effective, efficient and responsible rule of law fiscal practice.

Congress generally imposes legislative fiscal controls through three basic mechanisms, each implemented by one or more statutes. The three basic fiscal controls are:

1. Obligations and expenditures must be for a **proper purpose**;⁶
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**⁷
3. Obligations must not exceed the **amounts** authorized by Congress, and must not violate the Antideficiency Act (ADA).⁸

In addition to these controls, the US Comptroller General, who heads the Government Accountability Office (GAO), audits executive agency accounts regularly, and it scrutinizes compliance with the fund control statutes and regulations. Congress likewise may require significant reporting requirements. For example, in section 1215 of the 2009 National Defense Authorization Act, Congress required the President to provide reports detailing performance indicators and measures for Provincial Reconstruction Teams in Afghanistan.⁹

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 US Military Operations (FUSMO), of which rule of law activities are a subset. The DOS is the primary agency responsible for foreign reconstruction efforts, 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. Then this chapter will discuss some of the current 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).¹⁰

⁶ 31 U.S.C. § 1301(a).

⁷ 31 U.S.C. § 1552.

⁸ See 31 U.S.C. § § 1341 & 1342 (2008); 31 U.S.C. § 1342 (2008). For more information on the basic fiscal legislative controls of Purpose, Time, and Amount (ADA), see Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook, chs. 2-4 (2009).

⁹ Duncan Hunter National Defense Authorization Act of 2009, Pub. L. No. 110-417, § 1213, 122 Stat. 4632 (2008).

¹⁰ PRTs are discussed in detail in Chapter IX.

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.”¹¹ Thus, expenditures must be authorized by law¹² or be “reasonably related” to the purpose of an appropriation. In determining whether expenditures conform to the purpose of an appropriation, JAs should apply the GAO’s Necessary Expense Doctrine, which allows for the use of an appropriation if:

1. An expenditure is specifically authorized in the statute, *or* is for a purpose that is “necessary and incident” to the general purpose of an appropriation;
2. The expenditure is not prohibited by law; and
3. The expenditure is not provided for otherwise, *i.e.*, it does not fall within the scope of another, more specific, appropriation.¹³

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 US Treasury.¹⁴ Therefore, if an agency retains funds from a source outside the normal appropriated fund process, the agency violates the Miscellaneous Receipts Statute.¹⁵ 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.¹⁶

A corollary to the prohibition on retaining Miscellaneous Receipts is the prohibition against augmentation.¹⁷ Absent a statutory exception, an agency augments its funds when it

¹¹ 31 U.S.C. § 1301(a).

¹² For DOD, this includes permanent legislation (Title 10) and annual appropriations/authorizations acts (DODAA/NDAA). For the State Department, this includes permanent legislation (Title 22) and annual appropriations/authorization acts.

¹³ 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, Fiscal Law Deskbook, ch. 2: Purpose (2009).

¹⁴ 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.”

¹⁵ 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).

¹⁶ 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).

¹⁷ 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

expends nonappropriated funds¹⁸ 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.¹⁹ If two funds are equally available for a given purpose, an agency may elect to use either, but once the election is made, the agency must continue to charge the same fund.²⁰ The election is binding even after the chosen appropriation is exhausted.²¹

Congress, however, has enacted limited statutory exceptions to the Miscellaneous Receipts and Augmentation prohibitions. The most significant of these statutory exceptions are the various authorities allowing for *Interagency Acquisitions*, and the limited *Transfer Authority* that Congress provides to DOD to transfer funds between congressionally specified appropriations.

“Interagency Acquisition” 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.²² The Economy Act is an example of a statutory authority that permits a Federal agency to order supplies or services from another agency. For these transactions, the requesting agency must reimburse the performing agency fully for the direct and indirect costs of providing the goods and services.²³ 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-funded projects.²⁴ Consult agency regulations for IA order approval requirements.²⁵ 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

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, Fiscal Law Deskbook, ch. 2: Purpose (2009); *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).

¹⁸ Nonappropriated funds are funds received by the agency from any entity other than Congress.

¹⁹ *See, Secretary of the Navy*, B-13468, 20 Comp. Gen. 272 (1940); *Bureau of Land Management—Disposition of Water Res. Council Appropriations Advanced Pursuant to the Economy Act*, B-250411, 72 Comp. Gen. 120 (Mar. 1, 1993).

²⁰ *See Funding for Army Repair Projects*, B-272191, Nov. 4, 1997.

²¹ *Honorable Clarence Cannon*, B-139510, May 13, 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard.)

²² *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).

²³ *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).

²⁴ THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 299 (July 2009).

²⁵ *See* Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; *see also*, Army Federal Acquisition Regulation Supplement Subpart 17.5.

Act in some regards, there are significant differences, including the fact that certain section 632 transfers serve to obligate the funds transferred, without the need to deobligate unused funds at the end of the fiscal year, as is required with Economy Act transactions.²⁶

Transfer authority is a second major exception to the miscellaneous receipts and augmentation prohibitions that affect rule of law activities. Transfer authorities are “annual authorities provided by the Congress via annual appropriations and authorization acts to transfer budget authority from one appropriation or fund account to another.”²⁷ In other words, statutory transfer authority²⁸ allows an agency to “shift funds” between different appropriations without violating the miscellaneous receipts prohibitions, the augmentation prohibitions, or the Antideficiency Act (ADA).²⁹ 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.³⁰ 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 US 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

²⁶ *But see, Expired Funds and Interagency Agreements between GovWorks and the Dep’t of Defense*, B-308944, July 17, 2007 (finding that DOD improperly extended the availability of funds by “parking” them at GovWorks).

²⁷ Dep’t of Defense Financial Mgmt. Reg. (DOD FMR), vol. 2A, ch. 1, para. 010107. 58. (Oct. 2008); *see also* DOD FMR, vol. 3, ch. 3, para. 030202 (Nov. 2008) (transfers often require notice to the appropriate Congressional subcommittees. Most DOD transfers require the approval of the Secretary of Defense or his/her designee, but some transfers require the approval of the Office of Management and Budget (OMB), or even the President.).

²⁸ 31 U.S.C. § 1532.

²⁹ 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, Fiscal Law Deskbook*, ch. 12 (2009).

³⁰ PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-24-28, GAO-04-261SP (U.S. Gov’t Accountability Office, Office of the General Counsel) (3d ed. vol. I 2004). (several GAO decisions have interpreted 31 U.S.C. § 1532 to mean that unless a particular statute authorizing the transfer provides otherwise, transferred funds are subject to the same purpose and time limitations applicable to the donor appropriation—the appropriation from which the transferred funds originated; for example, if funds from a one-year appropriation were transferred into a five-year appropriation, the transferred funds would be available only for one year.).

FUSMO framework because their primary intent is improve the rule of law of *foreign* government agencies, *foreign* government institutions, and *foreign* civil 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.

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 with US military units, and it does not rise to the level of Security Assistance Training.³¹ 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 a general statutory prohibition on funding foreign law enforcement, contained in section 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”³² 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

³¹ 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, Fiscal Law Course Deskbook*, ch. 10, *Funding U.S. Military Operations (FUSMO)* (2009) (provides the legal requirements to apply the “little t” training exception, along with examples of what constitutes “little t” training versus Security Assistance Training.).

³² 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.³³

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 second prohibition is commonly referred to as the “Leahy Amendment.” The Leahy Amendment was first enacted as an amendment in the 1997 Foreign Operations Appropriation Act (FOAA is the annual DOS Appropriations Act), and is now enacted in the Foreign Assistance Act (Title 22). It prohibits the USG from providing assistance under the Foreign Assistance Act or Arms Export Control Act to units of foreign security forces, if the DOS has credible evidence that such units have committed gross violations of human rights, unless the Secretary of State determines and reports that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice.³⁴ 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.³⁵

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.³⁶ When DOD executes these DOS-funded missions via Interagency Acquisitions, DOD agencies effectively operate as a “subcontractor” for DOS on DOS-controlled projects.³⁷

2. Department of State Appropriations for Rule of Law Activities

The exact contours of the rule of law activity being considered by the unit and its interagency partners will determine if an appropriation and/or authorization may be available from a Purpose standpoint. For a detailed discussion of all of the relevant appropriations and authorizations, including their respective Purpose, Time, and Amount restrictions, *see* the Fiscal Law Deskbook, Chapter 10: FUSMO.³⁸ In addition, the DOS has two appropriations that have

³³ 22 U.S.C. § 2420(b)(6). *See generally* CENTER FOR LAW AND MILITARY OPERATIONS, INTERAGENCY HANDBOOK, 207-12 (2004) [hereinafter INTERAGENCY HANDBOOK].

³⁴ 22 U.S.C. § 2304(a)(2).

³⁵ *See, e.g.*, Consolidated Security, Disaster Assistance, and Continuing Appropriations Act of 2009, § 8061, Pub. L. No. 110-329 (Sep. 30, 2008).

³⁶ CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 220 (2006) (regarding the Afghan National Army) [hereinafter FORGED IN THE FIRE].

³⁷ THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 255 (Aug. 2006); INTERAGENCY HANDBOOK, *supra* note 33, at 210.

³⁸ Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook, ch. 10, Funding U.S. Military Operations (FUSMO) (2009); *see also* THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 245, ch. 17: Fiscal Law (July 2009).

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. While providing a bulk of US funding for rule of law activities, there are several other funding sources from other agencies. A rule of law practitioner should seek out other agency representatives and coordinate funding for proposed projects.

3. *Department of State Economic Support Fund*

The Economic Support Fund (ESF) is a prominent DOS funding source for rule of law operations. The FAA authorizes ESF assistance in order to promote the economic or political stability of foreign countries.³⁹ The ESF funds programs all over the world; its application is not limited to efforts in Iraq and Afghanistan. Generally, the ESF has a 2-year period of availability and is appropriated annually in the Foreign Operation Assistance Act (FOAA), the DOS equivalent to the annual DOD Appropriations Act. The 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; \$2.99 billion appropriated in the FY08 Consolidated Appropriations Act (CAA) (P.L. 110-161), available for new obligations until 30 Sep 2009. Additionally, the 2009 Supplemental Appropriation Act includes an additional amount for the ESF of \$2.97 billion to remain available until September 2010.⁴⁰ (These funds are sometimes earmarked for certain countries or efforts in a particular region; the amounts are not for Iraq and Afghanistan exclusively.) In Iraq, rule of law practitioners should also be aware of “matching fund” requirements that may apply to ESF or other Department of State funds. The 2009 Supplemental Appropriations Act added a requirement for the Government of Iraq to also contribute financially to certain programs.⁴¹

In Iraq, ESF is used to pursue one of three foreign assistance objectives: the Security Track, the Political Track, and the Economic Track. Each of the three major ESF tracks is allocated into several subprograms that target specific initiatives that support the primary purpose of the ESF.

The ESF’s Security Track is allocated into six different subprograms.⁴² Three of those subprograms are generally available to fund rule of law activities: the Provincial Reconstruction

³⁹ See 22 U.S.C. § 2346.

⁴⁰ Act of June 24, 2009, Pub. L. No. 111-32, 123 Stat. 1859, 1892-93 (2009). Notably, this supplemental appropriation discusses “cross border stabilization and development programs,” which are administered by DOS’s Special Representative for Afghanistan and Pakistan.

⁴¹ *Id.* (Section 1106(b) includes a “matching requirement,” implemented by the Department of State’s April 9, 2009, “Guidelines for Government of Iraq Financial Participation in United States Government-Funded Civilian Assistance Programs and Projects.”)

⁴² The six 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 (for Oil, Water, and Electricity), the Community Action Program, which manages the Marla Ruzicka Iraqi War Victims Fund. See Department of State Report on Iraq Relief and Reconstruction, July 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at*

Team/Provincial Reconstruction Development Council (PRT/PRDC) Projects Program, the Local Governance Program, and the PRT Quick Response Fund (PRT QRF).

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 (USACE 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 US Embassy, Iraq.⁴³

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 US 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 authorities for these projects are USAID program managers at the US Embassy, Iraq.⁴⁴

The PRT QRF is the least cumbersome subprogram of the ESF Security Track, due to its broad purpose and lower approval authorities. The DOS approved the QRF resource stream in August 2007 in Iraq to enable PRTs a “flexible mechanism” to fund local or provincial level capacity building projects.⁴⁵ (There is no counterpart to QRF in Afghanistan.)⁴⁶ As a result, it is the most accessible 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 organizations, as well as small project needs for the provinces. The PRT QRF may be used for the following projects under its broad purpose: (1) 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; (2) 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; (3) encouraging women’s participation in the market-based economy; (4) promoting public accountability projects that include anti-corruption and transparency components, (5) *promoting the rule of law and legal reforms* including legal rights educations and property rights

<http://www.state.gov/documents/organization/109441.pdf> (the FY 2005 Continuing Resolution and FY04 Emergency Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan required quarterly reports for the use of Reconstruction efforts in Iraq. This is an example of a fiscal control mechanism employed by congress.).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ H. COMM. ON ARMED FORCES, 110TH CONG., AGENCY STOVEPIPES VS. STRATEGIC AGILITY: LESSONS WE NEED TO LEARN FROM PROVINCIAL RECONSTRUCTION TEAMS IN IRAQ AND AFGHANISTAN 22 (Comm. Print Apr. 2008) [hereinafter AGENCY STOVEPIPES] ; Office of the Special Inspector General for Iraq Reconstruction, Opportunities to Improve the Management of the Quick Response Fund, SIGIR-09-011 (Jan. 29, 2009).

⁴⁶ AGENCY STOVEPIPES, *supra*, at 22.

administration, and (6) supporting specific projects for the environment or to promote public health. The PRT QRF is implemented by DOS and/or USAID. The approval levels vary on the type of purchase and/or grant.

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 memorandum from Department of State’s Assistant Secretary for Near East Asia (NEA) Affairs.

For all contracts/procurements where micro purchase authority is not used, 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.

The ESF’s Economic Track is allocated into four different subprograms.⁴⁷ Of those four 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 Track is allocated into four different subprograms.⁴⁸ While not robustly used early on in stability operations in Iraq, funds from this track have supported several large scale rule of law projects, including case support for on-going high-visibility criminal trials and the coordination of legal matters related to the transfer of detainees to Government of Iraq custody. Democracy and Civil Society programs in the Political Track have also funded programs such as judicial procedural awareness training to legal and security force professionals.⁴⁹

⁴⁷ The four subprograms under the ESF’s Economic Track are: the O&M Sustainment of Infrastructure (executed by the Army Corps of Engineers, Gulf Region Division (USACE GRD) through an Interagency Agreement), the *Inma* Agriculture Private Sector Development Project (executed by USAID), the Infrastructure Capacity Development Training & Technical-Level Management Program (executed by USACE GRD), and the Targeted Development Program (implemented by the Ambassador, Iraq.). See Department of State Report on Iraq Relief and Reconstruction, July 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://2001-2009.state.gov/documents/organization/109441.pdf> (last visited Aug. 23, 2009).

⁴⁸ The four subprograms under the ESF’s Political Track are: the Ministerial Capacity Development Program; the Policy, Legal and Regulatory Reform Program, the Democracy and Civil Society Program, and the Regime Crimes Liaison Office programs (executed by the Department of Justice). See Department of State Report on Iraq Relief and Reconstruction, July 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://2001-2009.state.gov/documents/organization/109441.pdf>

⁴⁹ *Id.*

4. *Bureau of International Narcotics and Law Enforcement Affairs Funding*

The Department of State has statutory authority to “furnish assistance to any country or international organization ... for the control of narcotic and psychotropic drugs and other controlled substances, or for *other anticrime purposes*.”⁵⁰ 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. In the conflicts in Iraq and Afghanistan, Congress has provided additional funds as well through supplemental appropriations. Notably, INCLE funding supports multiple countries in anti-narcotic and anti-crime efforts, not only Iraq and Afghanistan.

Although one of the primary purposes of INCLE funds is counter-narcotics, Congress has also authorized the use of INCLE funds “for other anticrime purposes.”⁵¹ 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 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 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.⁵²

The Office of Civilian Police and Rule of Law Programs (CIVPOL) falls under the INL umbrella. The CIVPOL has the broad mission of providing law enforcement, criminal justice, and corrections experts and assistance in “post-conflict societies and complex security environments.”⁵³ The FY2009 Supplemental Appropriation request and subsequent congressional conference report provide a snapshot of INLCE fund versatility. The Department of State requested \$129 billion additional INCLE funds for activities such as counter-narcotics planning and rule of law in its Foreign Operations supplemental request. Congress gave the INCLE fund \$4 million above the request and included additional purposes for the funds, such as rule of law programs that combat violence against women and girls, and a “good performers

⁵⁰ 22 U.S.C. § 2291 (4) (emphasis added).

⁵¹ *Id.* (See Act of July 21, 1996, Pub. L. No. 104-164, 110 Stat. 1429 (amending the Foreign Assistance Act to broaden International Narcotics Control Assistance).

⁵² Bureau of International Narcotics and Law Enforcement Affairs Department of State Webpage, available at <http://www.state.gov/p/inl/>.

⁵³ See Office of Civilian Police and Rule of Law Programs, <http://www.state.gov/p/inl/civ/index.htm> (last visited on 20 Aug. 2009).

initiative,” which rewards provinces that show a reduction in poppy cultivation.⁵⁴ Examples of other INCLE-funded rule of law programs in Afghanistan include: legal education redesign for core curriculum at Kabul University encompassing legal writing, teaching methodology, and computer research; courthouse renovation and construction; training for judicial officials and judicial candidates; educational opportunities for Afghan law professors to earn US degrees; building prisons and mentoring corrections personnel, and programs to introduce legal rights education to women audiences and increase legal aid to women and girls.⁵⁵

INL also receives funding 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.⁵⁶ 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 2005.⁵⁷ Whenever DOD transfers ISFF funds to the Bureau of International Narcotics and Law Enforcement Affairs, these funds are designated “ISFF/INL funds.”⁵⁸ DOD transfers funds to the INL so that the INL may execute some of the training of Iraqi police forces.

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.⁵⁹ The basic purpose of the ISFF is “[T]o train and equip the security forces of Iraq (ISF)... .”⁶⁰ 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.⁶¹ 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.

⁵⁴ Act of June 24, 2009, Pub. L. No. 111-32, 123 Stat. 1859, 1892-93 (2009).

⁵⁵ CONGRESSIONAL RESEARCH SERVICE, AFGHANISTAN: U.S. FOREIGN ASSISTANCE 6-8 (July 8, 2009).

⁵⁶ *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).

⁵⁷ 2008 SIGIR Report 25 (Jul. 30, 2008).

⁵⁸ *Id.*

⁵⁹ *See supra* note 22.

⁶⁰ 2008 Supplemental Appropriations Act ,P. L. 110-252, Title IX, Ch. 2 (30 June 2008).

⁶¹ 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.

C. Department of Defense Appropriations for Rule of Law Operations

Recall that general rule in FUSMO is that the DOS, and not DOD, funds Foreign Assistance. Rule of law activities will generally be classified as Foreign Assistance, and therefore should be funded by DOS unless one of the two exceptions applies. 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 appropriation, or an authorization to access an appropriation, for the rule of law operation contemplated by the command.

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 Commander’s Emergency Response Program (CERP) fund. In addition to these three congressional appropriations, Iraqi-funded Commander’s Emergency Response Program (I-CERP) also plays a key role in funding rule of law activities in Iraq. Each of these funding mechanisms is 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”⁶² Congress created two appropriations, 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. (Prior to the creation of the ASFF and ISFF, Congress authorized the training and equipping of forces in Iraq and Afghanistan from O&M accounts. At the onset, only the New Iraqi Army and the Afghan National Army could receive support. Later authorizations expanded the statutory language to include “security forces.”)⁶³ 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, 2006.⁶⁴ Since fiscal year 2005,

⁶² Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005).

⁶³ Compare Pub. L. No. 108-106 with Pub. L. No. 109-13.

⁶⁴ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005).

Congress has generally appropriated ISFF/ASFF funds on a yearly basis with a period of availability of ISFF and ASFF of two years.⁶⁵ Current funds for the ISFF (available until 30 September 2010) come from the 2009 Supplemental Appropriation, which actually *rescinds* \$1 billion from a previous appropriation, but then adds \$1 billion back into the ISFF account.⁶⁶ The Department of Defense requested this change in order to extend the period of availability. The 2009 Supplemental Appropriation significantly increased funding to the ASFF by providing \$3.6 billion, available until September 30, 2010.⁶⁷ The Department of Defense is requesting \$7.46 billion in additional funding for the ASFF in the 2010 appropriation.⁶⁸ The 2010 budget request does not include any language regarding the ISFF, but it does request an addition to the Iraq Freedom Fund, a flexible account established for “additional expenses for ongoing military operations in Iraq”⁶⁹ The House of Representatives and Senate versions of bills for 2010 defense appropriations and authorizations contemplate continued funding for the ASFF; neither mention the ISFF.⁷⁰ Note though, that when the final appropriations and authorizations are enacted, they could include additional or entirely new funds with similar purposes to the ISFF or ASFF. Because so much of FUSMO is dependent upon the security situation in a given environment, fiscal lawyers must stay current.

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 include, however, both military and police forces under the direct control of the governments of Iraq and Afghanistan.⁷¹ 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.⁷² As a result, the ISFF and ASFF appropriations provide an authorization to

⁶⁵ 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).

⁶⁶ Act of June 24, 2009, Pub. L. No. 111-32 § 306 (2009).

⁶⁷ Act of June 24, 2009, Pub. L. No. 111-32, 123 Stat. 1859, 1892-93 (2009).

⁶⁸ COMPTROLLER, U.S. DEP’T OF DEFENSE, BUDGET AMENDMENT TO THE FY 2010 PRESIDENT’S BUDGET REQUEST FOR OVERSEAS CONTINGENCY OPERATIONS (OCO), 7 (Aug. 2009) available at http://www.defenselink.mil/comptroller/defbudget/fy2010/fy2010_oco.pdf.

⁶⁹ *See id.*; Emergency Wartime Supplemental Appropriations Act of Apr. 16, 2003, Pub. L. No. 108-11, 117 Stat. 563 (2003).

⁷⁰ *See, e.g.*, S. 1390, 111th Cong. § 1507 (July 23, 2009); H.R. 2647, 111th Cong. § 1513 (as introduced June 2, 2009). At the time of this writing, no 2010 defense appropriation or authorization had been passed by the Congress.

⁷¹ *See infra* note 84 (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).

⁷² 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

DOD to provide assistance to non-military forces, which as a general matter, DOD is not authorized to do.⁷³ 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.⁷⁴ In every ISFF and ASFF appropriation, Congress has also provided DOD the ability to “transfer” funds to other appropriations.⁷⁵ The transfer authority of the ISFF and ASFF are identical.⁷⁶ 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 2005.⁷⁷

2. *Commander’s Emergency Response Program (CERP)*

The second major statutory authorization that allows DOD to fund many rule of law activities is the Commander’s Emergency Response Program (CERP) fund. CERP is a statutory authorization to obligate funds from the DOD Operations and Maintenance (O&M) 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.”⁷⁸ The current CERP authorization is \$1.5 billion, contained in the 2009 National Defense Authorization Act (NDAA). The Department of Defense requested \$1.3 billion in the 2010 NDAA, which had not yet been enacted at publication time.

In addition to the broad purposes of 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 authority.”⁷⁹ The Secretary of Defense subsequently waived various statutes that would limit the execution of CERP, including the Competition in Contracting Act (CICA) and the Foreign Claims Act

on Terror Request 35, Department of Defense (February 2007), *available at* <http://www.defenselink.mil/comptroller/defbudget/fy2008/> (last visited Aug. 23, 2009).

⁷³ 22 U.S.C. § 2420(a).

⁷⁴ *See infra* note 84 (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).

⁷⁵ *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).

⁷⁶ *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...”).

⁷⁷ July 2008 SIGIR Report 25 (Jul. 30, 2008).

⁷⁸ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 [hereinafter 2005 NDAA], Pub. L. 108-375, § 1201 (Oct. 28, 2004).

⁷⁹ 2005 NDAA, Pub. L. 108-375, § 1202 (Oct. 28, 2004) (Emphasis added).

(FCA).⁸⁰ The combination of the broad statutory purpose of CERP, the low-level approval authority to authorize the use of CERP,⁸¹ 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.⁸²

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.⁸³ As a result, CERP funds are 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.⁸⁴ As a result, prior to advising units on the legality of using 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) SOPs (there are versions for both Iraq and Afghanistan) and the most recent DOD Comptroller’s CERP policy guidance.⁸⁵

A recent development in CERP-funded rule of law projects concerns the distinction between *construction* and *reconstruction* of facilities. Slight changes in policy guidance between 2008 and 2009 raised concerns about a possible limitation on building rule of law facilities “from ground up” in Afghanistan. (In Iraq, this was not an issue because there were existing structures and Iraq reconstruction efforts had been robust for several years.) Judge Advocates should ensure

⁸⁰ 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).

⁸¹ 2005 NDAA, Pub. L. 108-375, Section 1201 (Oct. 28, 2004) (The CERP authorization allows “military commanders” to authorize the obligation of CERP funds. Military commanders include company commanders, generally the rank of a U.S. Army Captain. This statutory low-level approval authority, however, has generally been limited to higher ranks by policy.).

⁸² As a result of the waiver of CICA for CERP, for example, CERP-funded projects need not adhere to the competition requirements of the Federal Acquisition Regulation (FAR). This waiver led directly to the development of the “Iraqi First” and “Afghan First” acquisition programs, which indirectly provided numerous Iraqis and Afghans jobs by restricting CERP-funded acquisitions to Iraqi and Afghan contractors. The waiver of the FCA allows CERP to fund condolence payments and battle damage claims that are normally barred by the FCA when the injuries and/or damages occur during combat operations.

⁸³ Department of Defense Appropriations Act for Fiscal Year 2006 [hereinafter 2006 DODAA], Section 9007, Pub. L. 109-148 (CERP funds “may not be used to provide goods, services, or funds to national armies, national guard forces, border security forces, civil defense forces, infrastructure protection forces, highway patrol units, police, special police, or intelligence or other security forces.”).

⁸⁴ *Id.*

⁸⁵ See Money As A Weapons System (MAAWS), Multi-National Corps – Iraq, Combined Joint Staff Resource Management Standard Operating Procedure (MNC-I CJ8 SOP) (Jan. 26, 2009) (on file with author); MAAWS-Afghanistan, 15 May 2009 (on file with author); see also DODFMR, vol. 12, chap. 27 (January 2009); see also THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 282 (July 2009).

that they have the most current guidance on rule of law facility construction, which likely requires senior approval authority.⁸⁶

3. *Iraqi Funded Commander's 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).⁸⁷ 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.⁸⁸ Although similar to CERP in purpose, , the I-CERP has significant differences of which Judge Advocates need to be aware. The purpose of the I-CERP is for coalition force commanders to execute urgent reconstruction projects for the benefit of the Iraqi people in the fifteen non-Kurdish provinces of Iraq.⁸⁹ Under the same monetary approval authorities as CERP, commanders in Iraq may authorize the use of I-CERP to repair or reconstruct the following four types of infrastructure projects: water purification plants, health clinics, and city planning facilities (including the planning facilities owned by the Government of Iraq, the provincial governments, and the local governments).⁹⁰ 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.⁹¹ The initial intent of the I-CERP was for the Iraqis to match the reconstruction funding of CERP in Iraq.⁹² I-CERP has become increasingly important as Congress intends for the government of Iraq to assume all financial responsibility and phase out the use of CERP.⁹³ One issue fiscal raised by I-CERP involved the Miscellaneous Receipts Statute. Recall that an agency must deposit funds it receives into the US Treasury General Account, unless Congress authorizes otherwise. In response to I-CERP, Congress provided approval to hold and disperse I-CERP funds.

⁸⁶ Commander, United States Central Command, Memorandum to Undersecretary of Defense, subject: Commander's Emergency Response Program (CERP) Waiver Guidance Request (June 11, 2009) (on file with author).

⁸⁷ 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).

⁸⁸ *Id.* at 3.

⁸⁹ Money As A Weapons System (MAAWS), Multi-National Corps – Iraq, Combined Joint Staff Resource Management Standard Operating Procedure (MNC-I CJ8 SOP) (26 January 2009), Appendix C: I-CERP (on file with author).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² I-CERP MOU at 2.

⁹³ National Defense Authorization Act of 2009, Pub. L. No. 110-417, 122 Stat. 4630, §1214e (Oct. 14, 2008) (stating “[i]t is the sense of Congress that the Government of Iraq should assume increasing responsibility for funding and carrying out projects currently funded by the United States through the Commanders' Emergency Response Program ...”).

D. Funding Rule of Law Operations Through Provincial Reconstruction Teams

To access the appropriations and authorizations available for stability and rule of law operations, 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)⁹⁴ are civil-military organizations (CMOs) that are staffed by US government (USG) civilian and military personnel to assist foreign provincial governments with their reconstruction efforts; their security and rule of law efforts; and their political and economic development.⁹⁵ 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.⁹⁶ The success of the PRTs in Afghanistan led the USG to incorporate the PRT concept into its new stability and reconstruction strategy.⁹⁷ PRTs were first established in Iraq in November 2005. As of January 2008, there were 50 PRTs across Iraq and Afghanistan; the US is the lead for 12 in Afghanistan and 22 in Iraq.⁹⁸ (The remainder are lead by coalition partners: Canada, Germany, Italy, Lithuania, and the United Kingdom.⁹⁹) PRTs in Iraq are staffed by approximately thirty to eighty personnel each.¹⁰⁰ The assigned personnel represent various USG agencies, and may include: DOS, USAID, US and coalition military including the Corps of Engineers, the Department of Justice (DOJ), and the Department of Agriculture.¹⁰¹ Many PRTs also include Iraqi Cultural Advisors.¹⁰² PRTs in both Iraq and Afghanistan provide their own force protection, but the PRTs in Iraq have a smaller

⁹⁴ See generally, Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction Operations*, ARMY LAW. (Oct. 2008) (providing a comprehensive overview of the strategic development of the PRT concept, its central role in executing the U.S. government's pre- and post-conflict stabilization and reconstruction strategic policies, and the significant fiscal law challenges faced by the PRTs in legally funding stabilization and reconstruction missions worldwide).

⁹⁵ See Furin, *supra*; 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], NIMA ABBASZADEH ET AL., PROVINCIAL RECONSTRUCTION TEAMS: LESSONS AND RECOMMENDATIONS 4 (Jan. 2008), available at http://wws.princeton.edu/research/pwreports_f07/wws591b.pdf.

⁹⁶ See Furin, *supra* note 95, at 43.

⁹⁷ *Id.* at 42.

⁹⁸ NIMA ABBASZADEH ET AL., PROVINCIAL RECONSTRUCTION TEAMS: LESSONS AND RECOMMENDATIONS 4 (Jan. 2008), available at http://wws.princeton.edu/research/pwreports_f07/wws591b.pdf.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Furin, *supra* note 94, at 41.

force protection element since they are generally co-located with large coalition Forward Operating Bases (FOBs) which provides some of the needed force protection.¹⁰³

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.¹⁰⁴ As a result, ePRTs are staffed solely by the primary interagency civil-military staff and tend to be significantly smaller.¹⁰⁵ The ePRTs first deployed attached to the "Surge" BCTs and MCRs in early 2007.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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.¹⁰⁹

¹⁰³ *Id.* at 44.

¹⁰⁴ *Id.* at 45.

¹⁰⁵ *Id.* (ePRTs number between twelve and sixteen civil-military staff personnel).

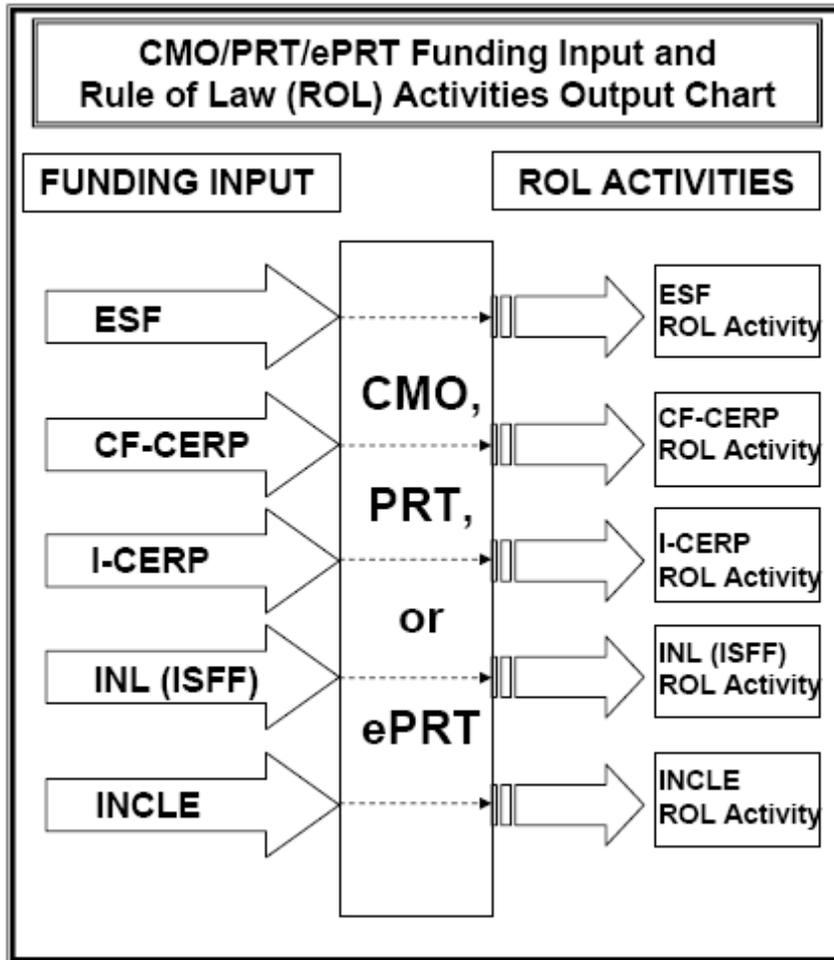
¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 47.

¹⁰⁹ *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.¹¹⁰ 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.

¹¹⁰ 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 that to which the rule of law practitioner may be accustomed. 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 from 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 caseload 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

¹⁰ Elia Armstrong, *Combatting Corruption for Development: the Rule of Law, Transparency & Accountability*, *Combatting 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).

case during the rule of law planning process. To assist nations in developing a strategy to combat corruption, several IOs have offered varied conceptual frameworks.¹² Some of the key components to reducing corruption typically include informing the public about governance, opening up government processes, and establishing public official accountability.

“Corruption, like terrorism, thrives on a lack of reliable information.”¹³ Experience has shown that corruption has been reduced in countries where the population is more informed on political issues and more active in governance. Populations that are educated about the governmental functions, processes, responsibilities, and rights can serve as a countervailing force to corruption. An assessment of how each population is informed is critical in rule of law planning. Considerations of literacy and access to information are similarly crucial. Using a 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

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.

combat corruption in the procurement process by attempting to bind all bidders to agreed standards of ethical conduct).

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).

An example of this is seen in the rule of law traditions of many Islamic nations. Often times, legal disputes are settled by a local religious leader acting as a sort of a magistrate. This practice has developed over time, is accepted by the population as legitimate, and is largely viewed as effective. It is also part of the religion, which is itself frequently an important component of host-nation law. Efforts to replace this practice with a national government-centric judicial system are likely to be resisted, undermining not only the rule of law effort but also the institutions trying to implement the change.¹⁷ It is important that rule of law planners understand not only what works in the country they seek to support, but also be ready to accept those notions that are foreign to the West but work.

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-

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>.

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. Additionally, 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 maximizing participation by host nation officials in rule of law efforts.¹⁹ After all, it is 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

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: THE STRATEGIC RULE OF LAW FRAMEWORK 5 (2008).

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

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 issue is compounded. Most military units are understaffed and underfunded for stability operations, including rule of law.

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 rule of law 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 finding local tax-revenue schemes and commitment of local leaders. Thus, rule of law

²³ From Rule of Law Lessons Learned MNC-I Rule Of Law Section Operation Iraqi Freedom 05-07 (Dec. 10 2006).

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 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

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>.

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

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.

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 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 operations, 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 operations 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

1. Overview

It is difficult to exaggerate the difficulties that confront the development of the rule of law in Afghanistan. Afghanistan is a poor, mountainous country with bad communications. Its people are from a patchwork of ethnic groups with a preference for identifying themselves by their racial and tribal backgrounds rather than by their nationality. Local warlords are able to assert their independence from the central government and corruption is widespread. War and political upheaval has bedeviled Afghanistan for decades. Rory Stewart reminds us that “every Afghan ruler in the 20th century was assassinated, lynched or deposed.”¹ This is unpromising soil in which to grow the rule of law. And yet, for all these challenges, the Afghan people have a hunger for the rule of law, a concept that is deeply engrained in their profound attachment to Islam and the tenets of Sharia law.

2. The Plan for Rule of Law

The strategic plan for rule of law development in Afghanistan is the Afghan National Development Strategy (ANDS).² The ANDS consists of a variety of plans for different “sectors” (such as agriculture, education, health, water, etc.); the plan for rule of law is one of the sectors nested within the ANDS. The specific document outlining the rule of law sector is the National Justice Sector Strategy (NJSS),³ which, in turn, contains the National Justice Program (NJP). The NJP is the fundamental document explaining the development of the rule of law in Afghanistan,

¹ Rory Stewart, *Afghanistan: A War We Cannot Win*, available at <http://www.hks.harvard.edu/news-events/news/commentary/stewart-oped-jul09> (last visited July 27, 2009).

² <http://www.ands.gov.af/> (last visited July 27, 2009).

³ Confusingly the document is also entitled the “Justice and Rule of Law Sector Strategy”, the title that appears on the cover of its English translation. NJSS is the more commonly used title that was agreed at the Rome Conference of July 2007. NJSS is the title that will be used here. Variations in language between documents that are translated into English from their native Dari or Pashtu are common.

and it describes the effects that must be achieved in order to establish rule of law in Afghanistan. The ANDS was approved by President Karzai on 21 April 2008.⁴

The NJP has six justice components:⁵

1. Effectively organized and professionally staffed, transparent and accountable justice institutions.
2. Sufficient infrastructure, transportation, equipment and supplies adequate to support the effective delivery of justice services.
3. Justice professionals adequately educated and trained with sufficient know-how to perform their tasks.
4. Clearly drafted constitutional statutes produced by a consultative drafting process.
5. Coordinated and cooperative justice institutions able to perform their functions in a harmonized and interlinked manner.
6. Awareness amongst citizens of their legal rights and how to enforce them.

In total, if these six components are all in place, the rule of law should exist in Afghanistan. Listing the components in this way is a useful guide, but it is necessarily oversimplistic. For instance, the list does not provide any guidance as to relative importance to be attached to each component. Infrastructure, for example, is not necessarily a very important component. Far more important is the quality of the people serving the system: justice systems have operated effectively with good people working in bad facilities. But the quality of people is hard to measure, and people take time to develop. In comparison, the construction and counting of buildings is easy. There is consequently a temptation to focus on infrastructure, a relatively easy and straightforward “metric,” as opposed to people, who are messy and hard to quantify in any meaningful way.

The NJP aims to be a comprehensive statement of the requirements for the rule of law in Afghanistan. It establishes an endstate, defines performance indicators, and outlines methods for monitoring and evaluation.⁶ But it describes itself as a “process” rather than an “implementation”

⁴ The critical observer might be forgiven for asking why it took almost seven years from the date of the establishment of an Interim Afghan government by the Bonn Agreement, to establish a strategy for developing Afghanistan. The answer to that question is beyond the scope of this section; suffice it to say that there is wisdom in the frequently repeated truism that the development of rule of law in Afghanistan is a “work of decades, not years.”

⁵ Note that the NJP places policing in a security- rather than a justice-line of operation. This has the unfortunate effect of dividing the efforts of rule of law practitioners since organic rule of law practitioners only focus on the Ministry of Justice, the Attorney General’s Office, and the Supreme Court. The police are the responsibility of CSTC-A. The US Embassy is aware of the potential for incoherence that this brings and is working to rectify it.

⁶ NJP Pt 1 C 1. The responsibility for oversight is shared between the Programme Oversight Committee (POC) and the Board of Donors (BoD). The first joint meeting between the POC and the BoD was held on 14 May 09. Coordinating work on the NJP is unusually complicated because it involves so many different groups. These include: USA; UK; Italy; Germany; Canada; NGOs; the World Bank (the Afghanistan Reconstruction Trust Fund); IDLO; ISISC; UNDP; UNODC; UNICEF; and UNIFEM.

methodology.⁷ In other words, it says what must be done without specifying who must do what work. At the time of this writing, July 2009, the US Embassy, under the direction of Ambassador Holbrooke,⁸ has taken in hand the task of producing a US Rule of Law Strategy that will define in operational terms how the “process” of the NJP will be implemented in detail. The production of this new strategy will be a significant advance for the rule of law in Afghanistan.

The US military has not been idle while waiting for an implementation plan or a formal rule of law strategy. Regional Command (East) (RC(E))⁹ placed a Rule of Law Annex in the RC(E)/CJTF-82 FRAGO. The rule of law FRAGO was written by selecting those NJP components the military could advance. An important underlying assumption was that the military cannot lead in rule of law development. For instance, the organization of – and coordination between – justice institutions, and the drafting of legislation are not issues that can be addressed from the tactical RC(E) level. These are strategic and operational challenges that are best overcome by the ministries in Kabul advised and mentored by civilian specialists. Accordingly RC(E) selected (1) infrastructure; (2) training (3) legal awareness and (4) accountable institutions as the four components of the NJP towards which they would direct their rule of law efforts. It is worth noting that these four components are geographically fixed to some extent (infrastructure and the people – along with their legal awareness – will not move, and it is time-consuming and expensive to send judicial officials to Kabul for training when that training can be done locally). This plays to one of the military’s key strengths: being present in areas which might be too dangerous for civilian rule of law advisors to work in. The US Department of State is becoming more aggressive in deploying its staff into new areas as part of the new “civilian surge” strategy, though. For instance the DOS has recently sent civilian rule of law advisors to three of the four task forces in RC(E) and one to Helmand Province. This is a very positive development for the rule of law in Afghanistan.

3. *The International Framework*

The RC(E) approach to rule of law may be realistic, but it raises the further problem of coordinating rule of law efforts. Since the military does not own the whole problem of rule of law it must cooperate with the other “stakeholders” involved in building rule of law. But who are these other stakeholders? The most important stakeholder is the Afghan government. The method by which a state will exercise its sovereignty, the essence of the rule of law, is a deeply political question specific to every host nation. We should not be surprised, as strangers in a foreign country, when the Afghan government approaches the rule of law with a perspective that is alien to us, frustrating though this might be on occasion. If rule of law does come to Afghanistan we must expect it to have an Afghan complexion: it would be naïve to expect otherwise.

⁷ NJP Pt 1 A.

⁸ Ambassador Richard C. Holbrooke was appointed Special Representative for Afghanistan and Pakistan in January 2009. *See generally* <http://www.state.gov/secretary/rm/2009a/02/116314.htm>

⁹ One of four “cardinal” ISAF regional HQs in Afghanistan and, before the US surge into RC(S) in the Spring of 2009, the main US AO. RC(E) surrounds Kabul and abuts against the lawless and Taliban-dominated North West Frontier Province and Federally Administered Tribal Area of Pakistan. RC(E) consists of the following provinces: Parwan, Panjshir, Kapisa, Nuristan, Laghman, Konar, Nangarhar, Logar, Paktya, Khowst, Paktika, Ghazni, Wardak and Bamyan.

Working with the Afghan government on rule of law issues is complicated by the fact that there are four main ministries involved in providing rule of law: the Ministry of Justice, the Supreme Court, the Attorney General's Office and the Ministry of the Interior.

1. Ministry of Justice.¹⁰ Responsible for prisons, the Huqooq,¹¹ legislative review, and supervising the courts.
2. Supreme Court.¹² Responsible for the judges.¹³
3. Attorney General's Office.¹⁴ Responsible for prosecutors.
4. Ministry of the Interior. Responsible for the police.

The departments are independent of each other, while the Supreme Court, in particular, is constitutionally independent of the executive, similar to the American concept of judicial independence. This division of responsibility between independent departments introduces the potential for bureaucratic frictions and misunderstandings among potentially competing government bureaucracies – again similar to the American concept of bureaucratic infighting.

Outside the Afghan government there are a large number of stakeholders with an interest in rule of law. These include IOs, various USG agencies, and NGOs. The military rule of law practitioner must have some understanding of who they are and how (and if) they fit together.

The United Nations Assistance Mission in Afghanistan (UNAMA) is the most important IO operating to develop the rule of law in Afghanistan¹⁵ because it has a mandate from the UN Security Council (UNSCR 1868 of 29 Mar 09)¹⁶ that it “will continue to lead the international civilian efforts ... to support and strengthen efforts to improve governance and the rule of law.”¹⁷ UNAMA works to support the Afghan government's efforts in reaching its NJP objectives. UNAMA has regional offices at the provincial level, which has frequently assisted Judge Advocates in gaining situational awareness and in coordinating rule of law development efforts

¹⁰ <http://www.moj.gov.af/>

¹¹ The Huqooq is described as the “face of the Ministry of Justice.” There are Huqooq offices in every province. The Huqooq is the first place in the formal justice system where people take their disputes for resolution. These include mediation, family and commercial law, and land disputes. Anecdotally the Huqooq appears to have a positive relationship with the informal justice system. Cases are referred between the two systems. Individuals will reportedly take an informal justice decision to the Huqooq for validation: in effect a symbiotic relationship appears to exist between the informal system and the Huqooq. Rule of law SJAs in RC(E) have forged good relationships with their local Huqooq representatives. A typical rule of law project will involve providing legal training for Huqooq officials: an important “small step forward” in building up the rule of law.

¹² <http://www.supremecourt.gov.af/> (last visited July 28, 2009)

¹³ The Afghan Constitution formally establishes separation of powers, and the Afghan Supreme Court is acutely conscious of its judicial independence from the executive ministries.

¹⁴ <http://www.ago.gov.af/> (last visited July 28, 2009)

¹⁵ <http://unama.unmissions.org/default.aspx?/> (last visited July 29, 2009).

¹⁶ <http://www.unhcr.org/refworld/country,,,RESOLUTION,AFG,4562d8cf2,49c9f9992,0.html> (last visited July 29, 2009)

¹⁷ *Id.*

with other actors.¹⁸ Furthermore UNAMA, in partnership with UN Development Programme (UNDP¹⁹), sponsors the Provincial Justice Coordination Mechanism (PJCM) which was launched on 1 Jul 08 and is responsible for coordinating rule of law efforts. A Judge Advocate, or a PRT commander, working on rule of law would be well advised to coordinate his efforts with UNAMA and the PJCM.

4. US Government Efforts

The US Government's contribution to the rule of law in Afghanistan is significant in scale and range. Indeed the US contribution has been so large that coordinating the various efforts has been a challenge.²⁰ A major step forward in coordinating the various efforts has been the creation of a Special Committee on the Rule of Law (SCROL). The SCROL is chaired by the Rule of Law Coordinator in the US Embassy and it meets weekly. It provides a valuable opportunity for the many arms and agencies of the USG to coordinate their work and to maintain shared situational awareness across the rule of law effort by means of operational updates. The US Embassy also has a senior Judge Advocate²¹ whose duties include coordinating US military rule of law efforts with that of other US agencies. Any new rule of law practitioner in Afghanistan should ensure that her rule of law efforts are coordinated through the SCROL and the Interagency-Civilian -Military Action Group (ICMAG – phonetically “Ick-Mag”) at the Embassy. In addition to other benefits of coordination, working closely with the Embassy can help ensure that no fiscal laws are broken, since rule of law programs undertaken by the military are subject to specific fiscal law limitations.²²

Among the prominent USG agency participants in Afghanistan:

1. Department of State – Bureau of International Narcotics and Law Enforcement Affairs (DOS/ INL): INL works in Afghanistan through two separate programs: the Justice Sector Support Program (JSSP) and the Corrections Systems Support Program (CSSP). Their specific responsibilities:
 - a. JSSP. Supports the Afghan Attorney General's Office and the MOJ, provides regional training programs, and supports the International Legal Training Center (INLTC) in Kabul.²³

¹⁸ For instance: the UNAMA representative in Jalalabad, the provincial capital of Nangahar Province, attends regular meetings hosted by the US BCT Rule of Law Coordinator who is stationed at Jalalabad. This greatly assists the planning and coordination of rule of law efforts in Nanagahar Province.

¹⁹ <http://www.undp.org/>

²⁰ Department of State and the Broadcasting Board of Governors, Office of Inspector General, Rep. No. ISP-I-08-09, Rule of Law Programs in Afghanistan 7 (2008), available at <http://oig.state.gov/documents/organization/106946.pdf> (last visited Sept. 7, 2009) (“[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.

²¹ See section X.C, *infra*.

²² See Chapter VII for fiscal law considerations.

²³ <http://www.inlclawlibrary.org/index-en.html> (last visited July 30, 2009)

- b. CSSP. Supports the prison system, develops corrections infrastructure, and provides training.
2. USAID: USAID supports the Supreme Court, law reform and legislative drafting. It produces a range of useful legal reference materials. It also provides a link to the informal justice system and supports legal aid.
3. Department of Justice: DOJ has the lead with the Criminal Justice Task Force (the specialist counternarcotics task force), the Anti-Corruption Unit in the Attorney General's Office, and the US Marshals Service protection efforts.

5. *Provincial Reconstruction Teams*

PRTs in Afghanistan play an important role in reconstruction.²⁴ In Afghanistan, PRTs have matured since November 2002 from a single US-led pilot project in Gardez to an international effort involving 25 teams in most of Afghanistan's 34 provinces.²⁵ Twelve of the Afghanistan PRTs are led by the United States, and 13 by coalition partners throughout the country.²⁶ All fall under the broad authority of the NATO-led International Security Assistance Force. All PRTs receive general guidance through the ANDS process described above. "For the International Security and Assistance Force, the PRT is now the principal vehicle to leverage the international community and Afghan government reconstruction and development programs."²⁷ PRTs operate under tactical control to their battlespace task force, which is usually a BCT. In

²⁴ 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 Bamiyan 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 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.

²⁵ 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

²⁶ *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).

²⁷ *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."

practice this means that the PRTs rule of law efforts are often directed by the staff of the Brigade Legal Section.

US PRTs in Afghanistan are commanded by an Army lieutenant colonel or Navy commander and composed almost entirely of military personnel. As described above, DOS is now starting to send civilian rule of law specialists to US PRTs as part of the “civilian surge,” which is a welcome development. The PRTs typically consist of 50-100 personnel, of which only 3 or 4 members are USG civilians or contractors, but the civilian representation is now starting to increase. Civilian PRT staff may be from the State Department, USAID, or the Agriculture Department. The PRT’s military commander does not command the non-DOD civilians.²⁸ In addition, PRTs have two Army Civil Affairs teams with four soldiers each. The US model also typically includes a military police unit, a psychological operations unit, an explosive ordnance/demining unit, an intelligence team, medics, a force protection unit, and administrative and support personnel.²⁹ 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 US Department of Agriculture. PRTs are usually co-located on a military base with combat maneuver units operating in the same area or battlespace.³⁰

The PRTs are often divided into teams, with one team responsible for building small, quick-impact development projects using local contractors and the other for running the PRT civil military operations center (CMOC), which coordinates activities with the UN and NGOs.

Even though a PRT might not have a civilian Rule of Law Coordinator assigned to it (and this is starting to change), there are still ways in which PRTs can contribute to justice reform in Afghanistan:

1. Building judicial infrastructure;
2. Facilitating information-sharing (PRTs are popular with Afghan nationals, which gives them strong local connections and good situational awareness);
3. Advising on best use of donor funds;
4. Helping to coordinate reconstruction efforts with the UNAMA PJCM.

²⁸ STAFF OF HOUSE ARMED SERVICES SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, 110TH CONG., AGENCY STOVEPIPES VERSUS STRATEGIC AGILITY: LESSONS WE NEED TO LEARN FROM PROVINCIAL RECONSTRUCTION TEAMS IN IRAQ AND AFGHANISTAN 13 (Comm. Print 2008)[hereinafter Subcommittee Report] , available at: http://armedservices.house.gov/pdfs/Reports/PRT_Report.pdf (last visited Aug. 18, 2008).

²⁹ *Id.*

³⁰ *Id.*

Preparing for “Whole of Government” Counterinsurgency and Stability Operations: The Interagency Afghanistan Integrated Civilian-Military Pre-Deployment Training Course

Recognizing the need to improve interagency training for personnel being deployed to Afghanistan, an Interagency Working Group made up of representatives from the Departments of Defense, State—including the U.S. Agency for International Development (USAID)—and Agriculture developed the Interagency Afghanistan Integrated Civilian-Military Pre-Deployment Training Course. This course supports the comprehensive new strategy designed by President Obama, the Special Representative for Afghanistan and Pakistan, Ambassador Richard Holbrooke, and the Commander of U.S. Central Command, General David Petraeus, that seeks to increase civilian capabilities—the “civilian uplift”—and improve coordination among U.S. government agencies in promoting a more capable, accountable, and effective government and economy in Afghanistan. The course also answers the call from Congress that civilian personnel assigned to serve in Afghanistan receive civilian-military coordination training that focuses on counterinsurgency and stability operations. Representatives of the Departments of Defense, State, Agriculture, and USAID implement the training in collaboration with the Indiana National Guard and its partners, including Indiana University and Purdue University. The course is conducted at the Muscatatuck Urban Training Center, the premier interagency training facility associated with the Camp Atterbury/Muscatatuck Center for Complex Operations in Indiana. This training course began in July 2009 and will run monthly for Afghanistan-bound USG civilians and military members.

The one-week course provides U.S. civilian government personnel from DoD, DoS, USAID, and USDA with training on working within the civilian-military interagency contexts of Provincial Reconstructions Teams (PRTs) and District Support Teams (DSTs) deployed in Afghanistan. The training simulates interagency coordination tasks civilian and military personnel face in Afghanistan, including taking conveyances to meetings with Afghan officials, responding to security threats against forward operating bases, and sharing information and ideas on how to make progress on the lines of operation and effort that guide counterinsurgency and stability operations. The course also provides trainees with numerous role-playing scenarios with Afghan role-players and interpreters that simulate the tasks the trainees will face once deployed in Afghanistan. These scenarios include missions related to improving the rule of law, such as visiting a district court and district prison to assess challenges facing central and provincial efforts to improve the rule of law.

6. *The Legal System of Afghanistan*

For centuries Afghan history has been dominated by internal political and religious conflict, foreign invasion, and civil war. These circumstances have contributed to an overall lack of a single coherent, functioning, and generally recognized legal system in Afghanistan.

The 2004 Afghan Constitution formally created a modern Islamic state with a tripartite structure familiar to western lawyers: an executive central government with extensive regulatory

authority³¹, a bi-cameral legislature and an independent judiciary.³² Presidential as well as parliamentary elections have been held in 2004 and 2005³³ respectively and presidential elections are due in August, 2009. A substantial number of new statutes have been passed.³⁴ 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.³⁵

In spite of the hard work exerted to bring the rule of law to Afghanistan,³⁶ 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,³⁷ and the legal infrastructure is basic at best and non-existent in some parts of the country.³⁸ 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 judicial systems:

- a formal system of law practiced by state authorities³⁹ relying on a mixture between the civil law system and elements of Islamic law; and

³¹ See *Organisation and Jurisdiction of the Newly Established Afghan Courts – the Compliance of the Formal System of Justice with the Bonn Agreement*, Ramin Moschtaghi, Max Planck Yearbook of United Nations Law, Volume 10 (2006), p. 584, available at http://www.mpil.de/shared/data/pdf/moschtaghi_organisation_and_jurisdiction_of_newly_established_afghan_courts1.pdf (last visited July 15, 2008).

³² Article 97 of the 1964 Constitution and the Bonn Agreement guarantee the independence of the judiciary.

³³ Elections are scheduled again for 2009 and 2010 respectively.

³⁴ See the site of the Afghan Ministry of Justice for further information at <http://www.moj.gov.af>.

³⁵ 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).

³⁶ See Benchmark Status Report March 2007 – March 2008 – 2.7.1 to 2.7.4.

³⁷ 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>.

³⁸ 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*.

³⁹ It should be noted that official courts often apply positive law as well as customary and Islamic law.

an informal customary legal system based on customary tribal law and local interpretations of Islamic law.

The “dual nature” of the Afghan legal system stems to some degree from the limited reach of state authority in Afghanistan. But it is also emblematic of the historic and continuing tensions inherent to an ethnically diverse Afghan society.⁴⁰

The three sources of law formal and informal institutions rely on – positive secular law, Islamic law, and customary law – overlap in subject matter and can provide contradictory guidance. Tribal law and the Islamic Sharia often seem to contradict the provisions of the 2004 constitution and Afghanistan’s international human rights obligations, particularly with regard to women’s rights and freedom of religion.⁴¹

Because 99% of the country is Muslim, the Sharia plays a major role as the common denominator between the formal and the informal system,⁴² but its interpretation varies widely both by location and among different schools of Islamic jurisprudence. Islamic legal scholars play an important role as custodians of Islamic law, and their importance within the legal system should not be underestimated. Frequently, Afghans see little difference between a mullah and a judge; religious training is considered equivalent to studying law at a university.⁴³ 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.⁴⁴

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 Sharia co-existed with state courts handling secular law.⁴⁵ Under the liberal 1964 constitution, and similarly under the 2004 constitution, the state court system is united under a hierarchical structure of secular courts. The formal relationship between state law and Sharia however is less clear: The 2004 constitution states that only

⁴⁰ 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.

⁴¹ 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.

⁴² 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.

⁴³ See note 59 below.

⁴⁴ For a more complete account of Islam and Islamism in Afghanistan see Chapter V.C and Kristin Mendoza at <http://www.law.harvard.edu/programs/ilsp/research/mendoza.pdf>.

⁴⁵ 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., available at http://www.mpil.de/shared/data/pdf/moschtaghi_organisation_and_jurisdiction_of_newly_established_afghan_courts1.pdf (last visited Sept. 3, 2009).

measures that pass the legislative process can be considered law⁴⁶ and that courts may only refer to the Hanafi jurisprudence of Islamic law⁴⁷ when there is no provision of the Afghan Constitution or other laws applicable.⁴⁸ But it also states that no law shall contravene Islam⁴⁹ and prohibits amendment of this principle,⁵⁰ leaving the relationship between positive state law, international obligations, and Islamic law uncertain.

Court System⁵¹

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.⁵² Headed by the Chief Justice, it is constitutionally responsible for the organization and administration of the lower courts⁵³ and has as many managerial functions as judicial responsibilities.⁵⁴ 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,⁵⁵ and has reserved itself the right to review their consistency with the Islamic Sharia.⁵⁶

At the second level of this hierarchy are the Courts of Appeal based in each of the thirty-four provinces.⁵⁷ Each of the Courts of Appeal is headed by a Chief Judge and divided into different divisions. The Courts of Appeal review the decisions of the Primary Courts.

⁴⁶ Art. 97 of the Afghan Constitution of 2004.

⁴⁷ The Hanafi school is the oldest of the four schools of thought (*Madhhabs*) or jurisprudence (*Fiqh*) within Sunni Islam.

⁴⁸ Art. 130 of the Afghan Constitution of 2004.

⁴⁹ Art. 3 of the Afghan Constitution of 2004.

⁵⁰ Art. 149 of the Afghan Constitution of 2004.

⁵¹ 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.

⁵² Art. 116 of the Afghan Constitution of 2004.

⁵³ See Art. 29 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan.

<http://www.supremecourt.gov.af/PDFFiles/Law%20on%20Organization%20and%20Jurisdiction%20of%20Courts%20of%20the%20Judiciary,%20English.pdf>.

⁵⁴ See Their, *supra* note 42, at 10.

⁵⁵ 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>.

⁵⁶ 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.

⁵⁷ The “Courts of Appeal” prior to 2005 were known as “Provincial Courts”.

The official courts of first instance are the Primary Courts, which consist of a central provincial primary court and various district primary courts as well as certain specialized courts, such as the Family Issues Primary Courts, Commercial Primary Court and the Juvenile Court.⁵⁸ 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 of the Supreme Court. According to the 2005 Law on the Organization and Authority of the Courts, an individual must hold a degree from either a Faculty of Law or a Faculty of Sharia, must have completed the practical stage of legal professional training and must be older than 25 years in order to be appointed as a judge.⁵⁹ 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.⁶⁰

Afghan court hearings usually consist of three-judge benches. Judges often convene trials in their offices due not only to limited infrastructure, but also custom – the notion of justice being done in open court is foreign to many Afghans.

Sources of Law

The Afghan legal system is a mixed one. Under the 2004 constitution, the official courts shall apply, in principle, only positive law – law that has passed the formal legislative process – however, they also may consider Sharia law. The Afghan Government is passing an increasing body of law.⁶¹ Under the Afghanistan Compact, the legal framework shall have met its benchmarks by the end of 2010.⁶² Constitutionally, only in situations where no formal law is applicable can decisions be based on the Hanafi interpretation of Islamic law,⁶³ or, in case only Shiites are involved, the Shiite interpretation.⁶⁴ If neither formal law nor Sharia law is applicable in a particular dispute then customary law may be consulted.

There is currently a major Afghan-international effort underway to rewrite the Interim Criminal Procedure Code of Afghanistan.

⁵⁸ See Art. 40 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

⁵⁹ See Article 58 para 1 Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

⁶⁰ See: Article 59, para 2, Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

⁶¹ 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.

⁶² 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, available at http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf (last visited Sept. 3, 2009).

⁶³ Article 130, Ch. 7. Art. 15 of the Afghan Constitution of 2004.

⁶⁴ Article 131 Ch. 7. Art. 16 of the Afghan Constitution of 2004.

Problems in the Formal System

In practice, court activity is largely limited to the urban centers. Courts of Appeal and Primary Courts have taken up work in some, but not yet all, provinces, partly due to the security situation but also because of a lack of resources. Respect for the government's judicial institutions in rural areas remains very limited.⁶⁵ In some provinces (Ghazni is one example) it is too dangerous for the District Courts to operate in their Districts and so they sit in the Provincial capital, with obvious repercussions for the ability of residents of those districts to access justice.

The court system struggles against logistical constraints as well as a lack of qualified personnel, intimidation, corruption, and threats to the livelihood of judges.⁶⁶ These deficiencies are linked to the security situation, the salary level of judges, and a lack of professionalism, integrity, and qualification in some of the judicial personnel. Similar problems exist with regard to other government actors involved in the administration of justice such as the police, prosecutors, and the correctional services. All of these factors impede the ability of the court system to work in a fair and effective manner.

Many judges do not have access to legal texts or simply lack any appropriate legal training on constitutional or positive law. Instead they apply their own version of Sharia law or customary law to cases, even though the Afghan Constitution has effectively limited the application of Islamic law and does not recognize customary law as law at all.⁶⁷

Even where sufficiently trained judges have access to legal resources, problems persist due to the numerous regime changes occurring since 1964, making it difficult for courts to determine which positive law to apply. Courts do not have internet access, and mail service is non-existent in many areas, hindering both legal research and regular communication with the national legal infrastructure. Many local courts must rely on often incomplete or out of date printed legal texts. The Bonn Agreement establishing the Afghan government recognized all existing law and regulations, "to the extent that they are not inconsistent with this agreement or with international legal obligations" Some laws, especially from the Taliban era, are obviously inconsistent. However, many of the laws passed over the years may not be inconsistent with the Afghan Constitution, international law, or the Bonn Agreement, but nonetheless be inconsistent with each other. This situation is bound to cause confusion. It is often unclear to what extent old laws can still be relied upon or enforced.

Moreover, the lack of trained prosecutors, defense attorneys, and justice administrators (such as those who run MOJ offices in the provinces) inhibits the work of the courts. Indeed, there are only between 600 and 1000 defense attorneys for the entire country.

The Afghan government continues to implement the Afghanistan Compact's Rule of Law-benchmarks and is committed by the end of 2010 to alleviating justice sector problems under the framework of the ANDS and the more specific National Justice Sector Strategy in line

⁶⁵ 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>.

⁶⁶ A number of judges have been murdered, and many have received death threats.

⁶⁷ See Art. 97 of the Afghan Constitution of 2004.

with the Afghanistan Compact.⁶⁸ 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 continue to play a significant role, particularly in rural areas. It has been estimated that more than 80 percent of social conflicts in Afghanistan are resolved through the non-governmental system.⁶⁹ This reliance on the informal system is due to the loyalty of Afghans toward their family, village or ethnic group which traditionally far exceeds that to the distant central government in Kabul. There are also strong cultural incentives in keeping disputes within the informal system. But there are also practical reasons for Afghans to prefer the informal system: it is accessible, speedy and unburdened by legalistic process; and it resolves disputes while keeping the mutual honor of the litigants intact, finally it does not have the same reputation for corruption that mires the state system.

The defining features of the informal system are its goals of restitution, collective reconciliation, and restoration of the victim's honor and social harmony. This can be contrasted with the more retributive system common to western justice. The primary means of conflict resolution are forgiveness and compensation ("*Poar*" or blood money) in order to forego blood feuds, even though other forms of punishment do exist. The best known of these customary rules is *pashtunwali*, the traditional honor code of the Pashtun people. In *pashtunwali* compensation can include cash, services, animals, or even the transfer of women.⁷⁰

The informal system generally depends on a consensus of the parties involved and the decisions are self-enforcing. Social pressure or punishment on those failing to abide by decisions of the peer community ensures reasonably effective enforcement.

The Councils: *Shuras* and *Jirgas*

The customary legal system is exercised through *jirgas* ("circle" or "council" in Pashto) and *shuras* ("consultation" in Arabic). These institutions are local mediation or arbitration panels

⁶⁸ See *Afghanistan Compact* at http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf. See also be helpful <http://www.rolafghanistan.esteri.it/ConferenceRol> and <http://www.state.gov/p/inl/rls/rm/106015.htm>

⁶⁹ 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, available at <http://www.asiafoundation.org/resources/pdfs/AGsurvey07.pdf> (last visited Sept. 3, 2009). It should be noted that these statistics are contradictory. Apart from the difficulty of collecting accurate statistics in Afghanistan it may be that litigants are pursuing cases through both the formal and informal systems concurrently, a type of forum shopping.

⁷⁰ For additional information on *Pashtunwali*, see generally Thomas H. Johnson & Chris M. Mason, *No Sign until the Burst of Fire: Understanding the Pakistan-Afghanistan Frontier*, INT'L SEC'Y, v. 32, no. 4, pp. 41–77 (Spring 2008). See *id.* at 62. ("The very concept of justice is wrapped up in a Pashtun's maintenance of his honor and his independence from external authority. Action that must be taken to preserve honor but that breaks the laws of a state would seem perfectly acceptable to a Pashtun. In fact, his honor would demand it.").

that resolve day-to-day disputes in their communities. Their members are recruited from community members or respected outsiders and most commonly consist of, but not exclusively, older, respected men. Cases are discussed and decided orally. Council gatherings may occur in private chambers, common gathering places, or a local mosque. While the public is often free to attend, women and children are commonly excluded. There is also an appellate structure. A plaintiff dissatisfied with the decision of a *jirga* may request a review of the case by a new *jirga*.

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 location.

Problems, Strengths & Opportunities in the Informal System

The decisions of the informal justice system cannot be accepted uncritically. There are significant problems with it: women and children are often barred from attending *jirgas*, effectively cutting them off from access to justice. *Jirga* settlements might include marrying a female from an offender's family to a close relative of the victim, with anecdotal evidence suggesting that this can sometimes include the forcible transfer of girls as young as six years old. Similarly there has been a habitual denial of women's property rights, including rights to inheritance. Decisions inconsistent with the guarantees given under the Afghan Constitution, state laws, or Afghanistan's human rights obligations, undermine state authority and contradict the goal of elevating human rights to the international standard. Further, non-governmental law enforcement challenges the state's monopoly on the use of force.

Despite these very significant problems, the informal system enjoys certain key strengths, and it is widely accepted, respected and used by the Afghan people. It has legitimacy in the eyes of the majority of Afghans. Most commentators on the rule of law in Afghanistan (a wide and disparate community) accept that the informal system will continue to play some part in the future Afghan justice system.⁷¹ But there is less agreement as to how this will work in practice. The US government has not yet reached a conclusive policy position regarding the informal justice system. Meanwhile, rule of law practitioners recognize the existence of this dual system and are trying to mitigate its problems. The most troubling problems result when informal justice actors attempt to resolve serious crimes. But land disputes are also a major issue as they are the cause of a significant amount of violence; even if they are amicably resolved, the informal decision may not be recorded within the formal system. This can result in future disputes, especially among non-resident family members who may be refugees in Pakistan or Iran. Education and awareness training will broadcast the message that crimes against the person must be dealt with by the state acting through the formal justice system and not through informal tribunals. At the other end of the spectrum most people accept that the informal system will continue to play a role in resolving minor legal disputes, such as access to grazing and water rights. In those cases the quality of the decision-making by informal tribunals can be improved if the informal decision-makers have received some legal training.

⁷¹ Indeed the Huqooq officials of the MOJ have encouraged parties to take their disputes to the informal system before resorting to formal litigation.

In short, the current approach is to educate people as to which cases are not suitable for informal dealing and to improve the standard of decision-making in those cases that can remain in the informal system. The place of the informal justice system is an interesting and far from straightforward issue. The practitioner is advised to keep an eye on the developing policy debate.

7. *Successful Rule of Law Practices in Afghanistan*

Successful Practices:

- Strive to understand the culture and the law, both in theory and in practice.
- Establish and maintain strong, open, and trusting relationships with all actors (Afghan, US and International).
- Employ Afghan attorneys to gain information, coordinate, train and put an Afghan face on your efforts. Many Afghan attorneys are very brave and highly dedicated. They can frequently go places where foreigners cannot and they will find out things that foreigners (especially members of a foreign military) would not. They understandably see themselves as working for the good of Afghanistan, not the US government.
- Keep it simple. Pursue simple and practical schemes for building infrastructure, training, and raising legal awareness in accordance with the NJP and more detailed direction from higher headquarters.
- Focus on people. Infrastructure and process are important, but educating, developing, mentoring and empowering Afghans is better.
- Understand how to leverage your rule of law efforts with the resources of other US and international agencies.
- Understand CERP and how it may be used in supporting rule of law projects.
- Ensure coordination of rule of law operations with other actors, such as civil affairs and civilian agencies as part of the larger governance strategy.

Unsuccessful practices include a “go it alone” mentality that disregards the expertise and experience of others. Remember that many have come before you and are working alongside you albeit outside of your immediate view, including civilian agencies and, most importantly, the Afghans themselves. It is their country, administered by their government and ministries. There simply is no purely local rule of law problem in a country with a national government developing as quickly as Afghanistan’s. Any project that ignores the necessary relationships among foreign and host nation stakeholders is bound to fail in the long run, if for no other reason that there will be no national support to sustain it.

8. *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 Rule of Law 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.afghanistantranslation.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/files/file/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.”⁷² US government rule of law efforts are now guided by an Embassy and military Joint Campaign Plan, which includes a rule of law annex. The UN also maintains a specific operation for Iraq (the United Nations Assistance Mission for Iraq), as do the European Union and several NGOs.⁷³

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 oversee the Iraqi

⁷² OFFICE OF THE INSPECTOR GENERAL, INSPECTION OF RULE-OF-LAW PROGRAMS, EMBASSY BAGHDAD 1 (2005), <http://oig.state.gov/documents/organization/55815.pdf>.

⁷³ MNF-I (OSJA) Rule-of-Law Programs in Iraq: March 2006 Inventory 5-7 (2006) [hereinafter MNF-I Rule-of-Law Inventory].

justice system.⁷⁴ In the early days of the war, that effort was undertaken by division SJA offices as well as Judge Advocates serving in Civil Affairs brigades and battalions.⁷⁵ 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 JAs at various levels. 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 education programs to improving the security infrastructure of local courts and police

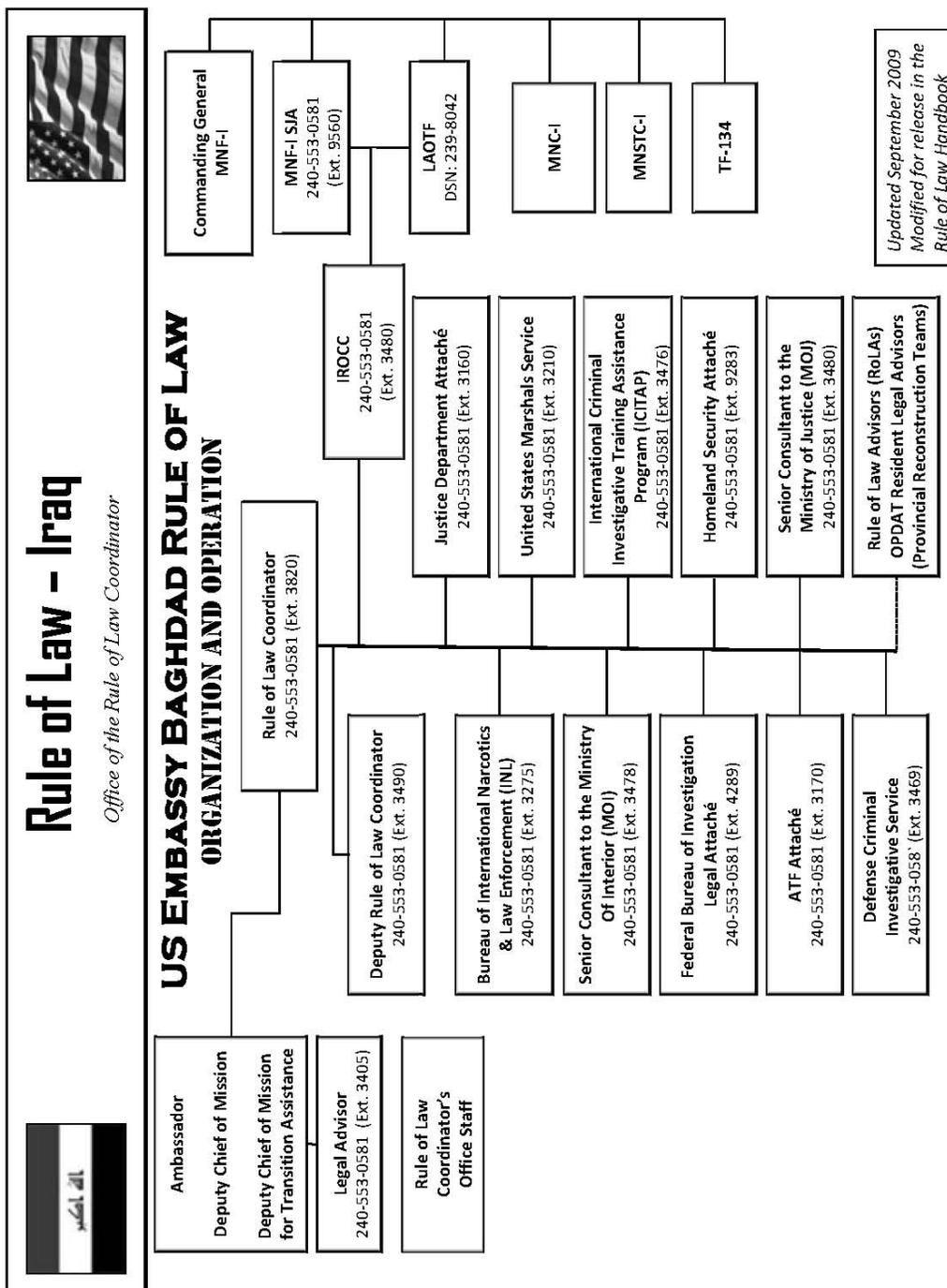
b) US Embassy Baghdad and Interagency Coordination

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.⁷⁶ The US Embassy in Baghdad is currently the largest in the world, having more personnel and more agencies represented than any other US Embassy.

⁷⁴ CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II, 253 (2005).

⁷⁵ *Id.* at 254-55.

⁷⁶ 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 State 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 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).



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 provides direction, oversight and support to the approximately 200 Embassy personnel engaged in promoting justice in Iraq, ensuring that they design and implement their rule of law programs consistent with the Embassy's overall plan.⁷⁷

⁷⁷ US Embassy Baghdad, http://iraq.usembassy.gov/offices_rol.html (last visited Sept. 8, 2009).

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 US rule of law players in Iraq, including the US Embassy, 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.”⁷⁸ 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.”⁷⁹

PRTs in Iraq were modeled on similar groups operating in Afghanistan. The former US Ambassador to Iraq, Zalmay Khalilzad, was credited with bringing the idea for PRTs from his previous assignment in Kabul.⁸⁰ In fact, PRTs in Afghanistan bore little resemblance to those in Iraq. US 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. Moreover, the emphasis of PRTs in Iraq is on shaping the political environment rather than building infrastructure as in Afghanistan.⁸¹

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. US military forces or commercial contractors provided security. PRTs resided at either a Regional Embassy Office (REO) or a military FOB, where the host installation provided force protection. During the first year of PRT operations, many obstacles hindered PRT operations, from the provision of security, to the lack of basic logistic support.⁸²

⁷⁸ 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).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Miles, *supra* note 25, 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.*

⁸² *Id.*

PRTs were expected to 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 provincial governments.

In theory, the BCT and PRT are one team, which receives guidance from both the US 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.⁸³ “Nor are there agreed objectives, delineation of authority and responsibility between the civilian and military personnel plans, or job descriptions.”⁸⁴

Progress has been made since those early days, though. On August 19, 2008, DOS and MNF-I issued a joint strategy titled *Strategic Framework to Build Capacity and Sustainability in Iraq’s Provincial Governments*, which replaced the original cable establishing the PRT program:

⁸³ See Perito, *supra* note 78.

⁸⁴ *Id.* See also House Armed Services Committee, Sub-Committee on Oversight and Investigations, Agency Stovepipes vs Strategic Agility: Lessons We Need to Learn from Provincial Reconstruction Teams in Iraq and Afghanistan (April 2008) 18, http://armedservices.house.gov/pdfs/Reports/PRT_Report.pdf.

The framework identifies, at the PRT level, three separate elements that are linked in the coordinated assessment and planning process: the quarterly maturity modeling assessments, the Unified Common Plans which are developed in partnership by PRTs and their partnered military units, and actionable PRT work plans linked to the Unified Common Plans and assessments. These three documents are critical to achieving the events that will trigger the drawdown and close out of PRTs.⁸⁵

The US 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 US 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 conditions, available resources, logistic support, and personalities. This allowed for flexibility, but also required PRT leaders to improvise.⁸⁶

A model PRT would have the following complement of personnel: State Department, six; senior US military officers and staff, three; US 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.⁸⁷ Although the PRTs work closely with the Military Movement Teams and CA teams, neither are 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.⁸⁸

PRT operations differ depending upon location, personnel, environment, and circumstances. In general, however, staff members assigned to Iraq PRTs serve the following functions⁸⁹:

- **Team Leader (TL):** Usually, a senior US 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 OPA and other officials in the US 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 MNF-I commander.

⁸⁵ Special Inspector General for Iraq Reconstruction, SIGIR-09-013, Provincial Reconstruction Teams' Performance Measures Process Has Improved 10 (29 January 2009), <http://www.sigir.mil/reports/pdf/audits/09-013.pdf>

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

- **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 US military units in the area of operations.
- **Rule of Law Advisor or Resident Legal Advisor:** 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 US 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 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 US Agriculture Department, the AGA works with provincial authorities to develop agricultural assistance programs and promote agriculture-related industries.
- **Engineer (ENG):** A representative of the US 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 (BBA):** Normally an Iraqi expatriate with US or coalition citizenship under contract to the DOD, the BBA 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,⁹⁰ and multiple conquerors brought their 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 codes⁹¹ 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.⁹² The British introduced with some success a Tribal Civil and Criminal Disputes Regulation modeled after a similar law in India. This gave certain selected sheiks the authority to settle all disputes within their tribes and to collect taxes for the government. In 1932, the British Government supported Iraq's membership in the League of Nations, which led to Iraq becoming an independent state.

Several attempts at legal reform followed. A quest for codification began in 1933 and, after several interruptions, reached completion in the early 1950s. Abdul al-Razzar Al-Sanhuri, a French-educated Egyptian legal scholar who had drafted the Egyptian legal code,⁹³ 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.

⁹⁰ 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.

⁹¹ A Penal Code introduced in 1858 used the French Penal Code of 1808 as a model, followed by a Commercial Procedures Law of 1861 and a Civil Code of 1876.

⁹² The British appointed as the first monarch Prince Faisal Hussein, a member of an influential family in the Arab world, but not an Iraqi.

⁹³ The Egyptian code was the model for the legal systems of Libya, Qatar, Sudan, Somalia, Algeria, Jordan, and Kuwait.

Following a series of coups d'état, the Ba'ath party led by Hassan al-Bakr⁹⁴ came to power in 1968. The Ba'athists introduced a new constitution in 1970. Subordinate to it were five major codes legal codes forming the main legal pillars. These governed civil law, civil procedure, commercial law, criminal law, and criminal procedure.⁹⁵

b) *Judicial Structure and Division of Powers - Penal System:*⁹⁶

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.⁹⁷ Moreover, the Federal Court of Cassation hears appeals from Courts of Appeal and the Central Criminal Court of Iraq (CCCI).⁹⁸

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.

⁹⁴ Al-Bakr was the head of the Revolutionary Command Council. Saddam Hussein was al-Bakr's vice president.

⁹⁵ The Civil Code law No. 40 of 1952 (as amended). Civil Procedures law No. 83 of 1969. Law of Commerce No. 30 of 1984. Law of Criminal Proceedings with amendments No 23 of 1971. Law on Criminal Proceedings No 23 of 1971.

⁹⁶ This summary concentrates solely on the criminal law system. Judge Advocates wishing to research aspects of the Iraqi Civil and Commercial Laws may wish to study the summary produced by the Office of the General Counsel at the US Department of Commerce http://www.trade.gov/static/iraq_prewarcommmlaw.pdf.

⁹⁷ See generally Book Four and Para 177 Law on Criminal Proceedings No 23 of 1971.

⁹⁸ 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.

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 concerned, this was the result of two CPA Orders. CPA Order No 7⁹⁹ reintroduced the Penal Code of 1969 and CPA Memo No 3¹⁰⁰ 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 1971¹⁰¹

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 magistrates¹⁰² or investigators acting under their supervision,¹⁰³ 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.¹⁰⁴ When doing so, each witness over fifteen years old gives evidence under oath.¹⁰⁵

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.

⁹⁹ See http://www.cpa-iraq.org/regulations/20030610_CPAORD_7_Penal_Code.pdf.

¹⁰⁰ See http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf.

¹⁰¹ See law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf.

¹⁰² Para 51 Law on Criminal Proceedings No 23 of 1971.

¹⁰³ Para 52 Law on Criminal Proceedings No 23 of 1971.

¹⁰⁴ Para 58 Law on Criminal Proceedings No 23 of 1971.

¹⁰⁵ Para 60 Law on Criminal Proceedings No 23 of 1971.

Additionally, subject to the consent of the magistrate, the defendant can put questions to the witness.¹⁰⁶ Indeed, the investigator can compel the complainant or defendant to co-operate in a physical examination, or in the taking of photographs or samples.¹⁰⁷

Routine searches require a warrant issued by examining magistrate,¹⁰⁸ except in cases of necessity.¹⁰⁹ There are also provisions for the preservation of evidential integrity.

Arrest and Detention¹¹⁰

For the majority of offenses, a warrant from a court or judge is required for arrest.¹¹¹ 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.¹¹²

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.¹¹³

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

¹⁰⁶ Para 63 B Law on Criminal Proceedings No 23 of 1971.

¹⁰⁷ Para 70 Law on Criminal Proceedings No 23 of 1971.

¹⁰⁸ Para 72 – 86 Law on Criminal Proceedings No 23 of 1971.

¹⁰⁹ 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.

¹¹⁰ Para 92 – 120 Law on Criminal Proceedings No 23 of 1971.

¹¹¹ 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.

¹¹² Para 102 Law on Criminal Proceedings No 23 of 1971.

¹¹³ Various reports have documented the abuse and torture of those in police detention – *see* United Nations Assistance Mission for Iraq, Human Rights Report, 1 July – 31 December 2008, http://www.uniraq.org/documents/UNAMI_Human_Rights_Report_July_December_2008_EN.pdf; and US Department of State, 2008 Human Rights Report: Iraq - <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119116.htm>.

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.¹¹⁴

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.¹¹⁵

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.¹¹⁶ 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.”¹¹⁷ 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.¹¹⁸

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.¹¹⁹ CPA Memo 3 deleted the provision that a refusal to answer can be considered as evidence against the defendant.¹²⁰

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!

¹¹⁴ CPA Memo 3, Section 4c.

¹¹⁵ Para 127 Law on Criminal Proceedings No 23 of 1971.

¹¹⁶ Para 130 Law on Criminal Proceedings No 23 of 1971.

¹¹⁷ Para 182 Law on Criminal Proceedings No 23 of 1971.

¹¹⁸ Para 170 Law on Criminal Proceedings No 23 of 1971.

¹¹⁹ Para 179 Law on Criminal Proceedings No 23 of 1971.

¹²⁰ CPA Memo 3, Section 4g.

In order to secure a conviction, the court must have evidence from two sources.¹²¹ 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.

e) The Substantive Criminal Law: Iraqi Penal Code – No 111 of 1969¹²²

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.”¹²³ 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 Law¹²⁴

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

¹²¹ Para 213B Law on Criminal Proceedings No 23 of 1971.

¹²² See <http://www.worldlii.org/catalog/54829.html>.

¹²³ See Art. 1 Terrorism Law 2005.

¹²⁴ Law No 19 of 2008.

under investigation for or convicted of the majority¹²⁵ 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 transferring of their case to the appropriate court. This applies regardless of the suspected crime. By January 2009, amnesty review committees had granted amnesty to 23,500 Iraqis in detention, of whom 6,300 had been released.¹²⁶

4. *Security Agreement*

The United States signed a Security Agreement with Iraq on 18 November 2008¹²⁷ that came into force on 1 January 2009, upon expiry of the UN Security Council Resolutions (UNSCR) previously authorizing MNF-I activities.¹²⁸

In contrast to the UNSCRs, the Security Agreement requires US forces to arrest, search, and detain in accordance with Iraqi law.¹²⁹ In most cases, this requires US forces conducting such operations to obtain Iraqi arrest and search warrants. The exceptions to this rule include the ability to arrest without a warrant upon witnessing a crime, and to arrest or search during combat operations.¹³⁰

The Security Agreement also requires US operations to be “fully coordinated” with Iraqi authorities.¹³¹ In most cases, this requirement is met by US forces conducting combined operations with their Iraqi Security Force (ISF) counterparts. Ideally, those counterparts will obtain any necessary warrants from a local investigative judge (IJ). Exceptionally, US JAs may be required to assist in obtaining warrants from local or CCCI IJs. Similarly, ISF partners rather

¹²⁵ The law specifies that those sentenced to death or convicted of thirteen listed offenses are NOT eligible to apply under the amnesty law.

¹²⁶ DOD Report to Congress, *Measuring Security and Stability in Iraq 3* (March 2009), http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf.

¹²⁷ Agreement Between the United States and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, (Nov. 17, 2008), available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (last visited Aug. 14, 2009).

¹²⁸ UNSCR 1546, 8 June 2004 (authorizing internment where necessary for “imperative reasons of security”), <http://www.iamb.info/pdf/unsc1546.pdf>; UNSCR 1790, 18 December 2007 (renewing MNF-I mandate until 31 December 2008),

<http://daccessdds.un.org/doc/UNDOC/GEN/N07/650/72/PDF/N0765072.pdf?OpenElement>.

¹²⁹ *Id.* at Art. 22. See also Trevor A. Rush, *Don’t Call It a SOFA! An Overview of the New U.S.-Iraq Security Agreement*, Army Lawyer 34 May 2009, http://www.loc.gov/rr/frd/Military_Law/pdf/05-2009.pdf [hereinafter *Don’t Call It a SOFA*].

¹³⁰ *Don’t Call It a SOFA*, at 43-44.

¹³¹ Security Agreement, Art. 4(2).

than US forces will normally be responsible for any detainees. US forces who do detain Iraqis must obtain the consent of a competent Iraqi authority (a “CIZA”) to do so.¹³²

5. *Engaging Iraqi Judges*

Coalition forces’ ability to effectively conduct rule of law operations largely depends on the degree of influence they have with the Iraqi judiciary. This influence is often derived from the level of respect the Iraqi judges have for their 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.¹³³ 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.”

¹³² Security Agreement, Art. 22(2).

¹³³ See *Arab Culture Awareness: 58 Fact Sheets*, TRADOC DCSINT Handbook No.2, January 2006.

Insurgent Responses to Changing Procedures in Iraq

Savvy insurgents have adapted to the new environment under the US/Iraq Security Agreement by developing tactics, techniques, and procedures to subvert and sabotage the warrant and detention process.

For instance, insurgents recognize that coalition and Iraqi security force operations depend on witness or “source” testimony, and thus regularly rely on fear and intimidation to control witnesses, sources, police, judges, and anyone else involved in the legal process. Not even family members of key participants in the legal system players are safe from violent insurgent tactics, such as kidnapping for ransom or assassination; in fact, families are the most vulnerable since they do not have personal security detachments assigned to them as do judges or high-value witnesses or informants.

One response is to stand up special witness handling teams (WHT). The early iterations of WHT recognized that witnesses must be (1) properly identified and vetted, (2) handled and protected by individuals familiar with confidentiality and capable of traveling discreetly, (3) obliged (committed) to testify when the time comes, and (4) prepared for the inquisitorial style of the investigative judge (IJ). Proper witness handling must be discreet in practice, coordinated with CCCI and/or a trusted IJ, and managed by the BCT's subject matter expert, often the brigade law enforcement professional (LEP) contractor, Rule of Law JAG, Human Intelligence Collection Team (HCT), S2 on a Military Training Team (MiTT), a specially-tasked Army CID agent, or some other designated “case agent” tasked by the BCT Commander.. Proper protocols for witness protection and transportation should be planned and rehearsed.

Another insurgent technique is to readily admit to terrorist acts or recent crimes during tactical questioning or subsequent interrogation. Recent cases suggest that insurgents who rapidly satisfy the unit’s written list of tactical questions do so as to cut short the entire operation and specifically to avoid thorough site exploitation. Insurgents recognize that the information they give security forces on-scene, even if incriminating, has to be supported by other evidence to be believed by an Iraqi judge. In response, Iraqi judges encourage security forces to “frontload” their “warrant” packets with any conceivable corroborating evidence. After trial and error, United States and Iraqi security forces developed unique items that judges consider evidence for inclusion in the eventual criminal case files. For example, some units draw sanitized link diagrams to show the insurgent’s connection to the terror network, which gives the judge more background of the suspect’s associates and ammunition during questioning. More Iraqi judges are accepting forensics, but wider acceptance and understanding will take time. The uncorroborated confession is seen by IJs as a waste of time, inhibiting flow-through of good cases and chips away at the rapport and trust that units have worked hard to establish with the judiciary.

It is important to engage the right personnel. The Iraqi legal system is hierarchical; the local investigative judge answers to his court’s chief judge. That judge answers to the chief provincial judge. That judge alone has access to the Higher Juridical Council, the body that

governs judges in Iraq. Iraqi judges adhere to this chain of command. Not following it is a sign not just of ignorance, but of disrespect. At the division level, the focus of engagement will frequently be on chief provincial and chief appellate court judges. Local judges cannot make important administrative or logistical decisions without the concurrence of their superior judges, regardless of their own seeming agreement or enthusiasm, and so it is necessary to gain the concurrence of 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.¹³⁴ In areas where there were fewer forces, the servicing Provincial Reconstruction Team (PRT) rule of law advisor 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.¹³⁵

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 harm your relationship.

Iraqi judges are smart and educated. Many speak formal Arabic in addition to their Iraqi dialect. They know their law, which has changed little substantively since 2003. Even if there is some indication that local judges are not similarly competent, the wise 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.

¹³⁴ 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.

¹³⁵ 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.¹³⁶ 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). 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.¹³⁷ 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. Do not 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.

¹³⁶ 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.

¹³⁷ 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.

Do not ask questions about a judge's female family members including his spouse. Openness and friendliness, while sincere, may offend. Sensitivity to this Islamic tradition shows respect. Iraqis do however greatly appreciate your interest in their culture, language, and history and welcome appropriate questions. Expressed interest in Iraqi history can demonstrate respect for both the judiciary and legal system. When engaging Iraqi officials both male and female, remember to maintain eye contact; not looking at someone suggests they are unimportant.

Engage in friendly discussion and do it leisurely. Engagements with judges should typically last one to three hours. "Drive-bys" should be avoided and suggest lack of respect. Judges will not rush and will make a great effort to be hospitable, attempting to show respect. An Arabic word, "*karamah*," partially captures the approach: it suggests granting others respect, honor and dignity, and treating others with generosity. Doing so is part of the "righteous path" and consistent with the Qur'an's teachings.¹³⁸ 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.¹³⁹ 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.¹⁴⁰ 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."

¹³⁸ See "Understanding Islam" at www.understanding-islam.com (last visited 22 August 2008).

¹³⁹ 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.

¹⁴⁰ JODIE R. GORRILL, *DOING BUSINESS IN IRAQ: IRAQI SOCIAL AND BUSINESS CULTURE* (2007).

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. Investing time and effort in judicial relationships is likely to remain one of the most critical parts of reinforcing the rule of law.

6. References and Further Reading

Law Library of Congress – Iraq - www.loc.gov/law/help/guide/nations/iraq.html

World Legal Information Institute Country Studies Iraq - www.worldlii.org/iq/

Iraqi Corporate Law – www.gulf-law.com/iraq_law.html

CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* (2007).

Zuhair E. Jwaideh, *The New Civil Code of Iraq*, 22 *GEO. WASH. L. REV.* 176 (1953).

Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 *J. TRANSNAT'L L. & POL'Y* 1 (2006)

Haider Ala Hamoudi, *Baghdad Booksellers, Basra Carpet Merchants, and the Law of God and Man: Legal Pluralism and the Contemporary Muslim Experience*, 1 *BERK. J. MIDDLE EASTERN AND ISLAMIC L.* (2008).

Dan E. Stigall, *A Closer Look at Iraqi Property and Tort Law*, 68 *LA. L. REV.* 765 (2008).

Global Justice Project: Iraq (English translations of some Iraqi legislation) - <http://www.gjpi.org/library/primary/iraqi-legislation/>

Global Justice Project: Iraq (criminal law and procedure resources) - <http://www.gjpi.org/central-activities/criminal-procedures/>

United Nations Development Programme Iraqi Legal Database (in Arabic) - <http://www.iraq-ild.org/AboutEn.htm>

US Department of State, 2008 Human Rights Report: Iraq - <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119116.htm>

Human Rights Watch, “The Quality of Justice, Failings of Iraq’s Central Criminal Court” - <http://www.hrw.org/sites/default/files/reports/iraq1208webwcover.pdf>

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X. Rule of Law Narratives

Editors' Note: This chapter contains the experiences of three Judge Advocates who conducted rule of law missions in Iraq and Afghanistan during 2008 and 2009. These are descriptions of their experience written from their own perspectives. The first narrative is from a Judge Advocate who replaced the author of one of the narratives written for the 2008 edition of the Handbook. The other two entries are from individuals who occupied similar coordinating positions in both Iraq and Afghanistan and allow some comparison of the centralized coordination mechanism at the respective US embassies in those two countries.

A. A Continued[†] Case Study: Rule of Law in Afghanistan Counter-Insurgency Operations^{*}

1. Introduction

The 4th Brigade Combat Team¹ (4BCT), 101st Airborne Division (Air Assault) deployed to Regional Command - East (RC-East) in southeastern Afghanistan in March 2008. Under the leadership of Brigade Commander, Colonel John “Pete” Johnson, 4BCT was focused on the counter-insurgency (COIN) fight, but well-trained and prepared for the many kinetic engagements that took place during the year long deployment. The mission was to separate the insurgents from the Afghan populace and support the Afghan government in a manner where the Afghan leaders were at the forefront.

As the Brigade Judge Advocate, I took over² rule of law as my piece of the counter-insurgency fight.³ I was not overly prepared for the intricacies of initiating rule of law projects in Afghanistan when I first deployed. My real training was more on-the-job training I received

[†] See MAJ Robert A. Broadbent, *Rule of Law Development in Counter-Insurgency Operations: An Afghanistan Case Study*, in THE RULE OF LAW HANDBOOK: A PRACTITIONERS GUIDE 257-66 (Center for Law and Military Operations 2008 ed.) [hereinafter Broadbent, *Rule of Law Development*]. This narrative takes up at the point of then-MAJ Broadbent’s redeployment.

^{*} MAJ Jeffrey J. Mullins served as the Brigade Judge Advocate for the 4th Brigade Combat Team (CTF Currahee), 101st Airborne Division (Air Assault), in Southeastern Afghanistan from March 2008 to March 2009.

¹ The 4th Brigade Combat Team was known as Combined Task Force Currahee operating in AO Currahee that included six provinces of southeastern Afghanistan (Khost, Paktya, Paktika, Logar, Wardak, and Ghazni) that, together, were roughly the size of the state of West Virginia.

² My predecessor was then-MAJ Robert A. Broadbent, Brigade Judge Advocate, 4th BCT, 82nd Airborne Division, who was instrumental in preparing me for the long, and sometimes frustrating, rule of law road I was set to travel.

³ COL Johnson granted me authority to “move out aggressively” with the rule of law programs with the understanding that I kept him well informed of each project and how it affected the Afghan government, Afghan people, other U.S. Agencies, and our mission. Each project incorporated his guidance, the mission focus and the idea of providing substantial progress to the Afghan people.

when I reached Afghanistan.⁴ I noticed from the start that, if allowed, I could spend every minute of the deployment day⁵ on initiating rule of law programs, interacting with Afghan judicial officials and leaders, and working closer with other U.S. and international agencies conducting rule of law programs throughout Afghanistan.⁶

Rule of law in Afghanistan can be characterized as having two distinct parts: the city of Kabul and everywhere else. Many Afghan people feel safer in Kabul than anywhere else in Afghanistan, and outside of Kabul, the existence of laws and enforcement of the laws vary greatly. Rule of law projects also vary greatly depending on which agency initiates them, how much they cost, and whether they are supported by the U.S. Embassy, National Afghan Agencies, and the local Afghan government. What follows describes my receiving the rule of law baton, my leg of the race, and my somewhat reluctant passing of the baton as I redeployed.

2. Receiving the Rule of Law Baton

Although the rule of law may not be well-developed in Afghanistan, the theater itself is mature, and when I arrived, I inherited a number of existing rule of law initiatives. On the third day of my scheduled 15-month deployment, I headed out on a convoy to get a feel for one of the largest rule of law projects ever initiated in Afghanistan: the Khost Justice Center.⁷ The Justice Center was initiated to be a “one-stop shopping” judicial center. It is a large Commander’s Emergency Response Program (CERP) project constructed on an area roughly 300 yards long and 150 yards wide. It contains 13 judicial buildings, to include a judge’s quarters, prosecuting attorney quarters, defense attorney quarters, a pre-trial confinement facility for suspected insurgents,⁸ an administrative building, and conference hall, among others. The Justice Center also included a new courthouse with separate office space for prosecuting attorneys and defense attorneys during trials, permanent office space for judges, and an office for court clerks.⁹ This became my pet project.

⁴ My rule of law pre-deployment training included a Rule of Law elective class in the 55th Graduate Course at The Judge Advocate General’s Legal Center and School in 2007. However, there was very little Afghan specific rule of law training during the Leadership Training Program (LTP) or during 4BCT’s rotation at the Joint Readiness Training Center at Fort Polk, LA.

⁵ The deployment day typically lasted 18-20 hours during the spring/summer/fall months and 14-16 hours during the winter months. It is the only time in my life I wished for more winter.

⁶ Other U.S. and International Agencies included the U.S. State Department, U.S. Agency for International Development, the U.S. Department of Justice, U.S. Institute of Peace, the United Nations Assistance Mission in Afghanistan (UNAMA), and the World Bank.

⁷ The Khost Justice Center was originally called the Terrorist Prosecution Center and later changed to the High Value Cases Justice Center and lastly, the Khost Justice Center. The Rule of Law office in the U.S. Embassy encouraged the name changes due to feedback they received from the Afghan Supreme Court, Afghan Ministry of Justice, Afghan Ministry of Interior and the Afghan Attorney General’s Office. *See Broadbent, Rule of Law Development* at 262-65 (discussing the “High-Value Case Prosecution Program”).

⁸ A separate pre-trial confinement facility for suspected insurgents was vital to keeping with Afghan law because insurgents were not allowed to be confined with general criminals. Prior to the construction of the Justice Center, there were no prosecutions of suspected insurgents in AO Currahee.

⁹ The courthouse also included a modern latrine, kitchen and break area.

Another pre-existing project in the area of operations (AO) was a large scale Quarterly Continuing Legal Education (CLE) Program.¹⁰ The idea was to coordinate and conduct quarterly CLEs for a large number of Afghan Judges and attorneys living and working throughout AO Currahee. In keeping with my Brigade Commander's intent that all rule of law initiatives be Afghan-centric, the CLEs were organized by the BJA staff and supported by CERP funds, but the CLEs were taught by Afghan professors from Kabul University Law School.

Another rule of law project I inherited was the Jingle Truck Initiative.¹¹ This project held contractors and drivers accountable when the contracted trucks arrived at their final destination without all the invoiced property.¹² It was also a means of generating revenue for the local government by fining drivers who were found guilty of stealing property or letting others steal the property. All of these rule of law programs had several hurdles to be overcome while moving them forward for the benefit of the Afghan populace.

Finally, I inherited a huge number of *ideas* for smaller rule of law projects. Some of the ideas were easy to implement, some of the ideas were a little more challenging, and some of the ideas were ahead of their time. But the most valuable rule of law asset I inherited was the Afghan Attorney Advisor. He knew every prominent legal official in the country, was passionate about forwarding rule of law in his homeland, and worked tirelessly and at the risk of his own life to make Afghanistan a better place.¹³

3. Racing Afghan Rule of Law Programs Forward

a) Quarterly Continuing Legal Education Program

The operational tempo combined with never ending administrative issues precluded full-time attention to the rule of law, the best COIN weapon available.¹⁴ My Afghan Attorney Advisor was able to streamline interaction with Afghan agencies by speaking with the Director of the Afghan Supreme Court, the assistant to the Attorney General, and the Deputy Chief of the Ministry of Justice. He could also schedule individual meetings with and among those high-level

¹⁰ Smaller scale CLEs had been conducted throughout the six provinces in the preceding 12 months, but they were mostly limited to province-specific locations. See Broadbent, *Rule of Law Development*, at 264-65.

¹¹ Jingle Trucks were the type of Afghan truck contracted to ship gas, PX items, military containers and vehicles, etc. to different Forward Operating Bases and Combat Outposts throughout Afghanistan.

¹² There were many instances of drivers claiming ignorance of the missing property, but very few instances of drivers reporting theft of property to the proper authorities.

¹³ See Broadbent, *Rule of Law Development*, at 261. The local national attorney, known as "The Professor" for teaching English to so many Afghans in Khost Province, graduated second in his class from Kabul University Law School. He often received "night letters" threatening his life and his family's lives for working with Coalition Forces, but he continued to work harder and longer hours despite the threats.

¹⁴ Rule of law is the best counter-insurgency weapon because it will enable the country to increase security by prosecuting insurgents and, if guilty, imprison them and remove them from the battlefield. Security is a huge issue throughout Afghanistan, but it is impossible to have security if the country lacks the ability to enforce its laws.

Afghan officials. Outside the Afghan agencies, I was responsible for coordinating and interacting with the Rule of Law section at the U.S. Embassy, UNAMA and the World Bank.¹⁵

The Quarterly CLE program was the first project I worked on. The first step was to obtain approval for the program from the Afghan Supreme Court; providing legal training to Afghan Judges and attorneys in the same venue could not take place without the Afghan Supreme Court's blessing. Through my Afghan Attorney Advisor, I was able to submit my request directly to the Director of the Afghan Supreme Court and we received an affirmative written response within a week of submitting my official request.¹⁶

The Quarterly CLE topics were created using Afghan Judicial Desk Sets.¹⁷ It was the best resource for creating the CLE topics because the Judicial Desk Sets were both modeled after the Afghan Constitution and in very high demand. We contracted with the Kabul University Law School professors to create the actual CLE class material based on the syllabus derived from the desk set.¹⁸ In addition to creating the CLE class material, the professors were also contracted to actually provide a majority of the CLE training. By the second and third Quarterly CLEs, though, the attendees also received CLE training from an Afghan Supreme Court Judge, attorneys from the Attorney General's office, attorneys from the Ministry of Justice, and the Dean of Kabul University Law School. Obtaining additional instructors was easy because each of the Quarterly CLE sessions were conducted at the Kabul University Law School facility.¹⁹

The first Quarterly CLE covered both criminal law practice and procedure and civil law practice and procedure. It received high praise from all the attendees and there were many requests to extend the one-week program to two weeks.²⁰ Attendees included Supreme Court Judges, prominent Provincial Judges, attorneys from the Attorney General's office, and local Judges and attorneys from the six different provinces.

¹⁵ Although there was some tension between the U.S. Department of State and the U.S. military officials working in the rule of law arena, it was clear to everyone that the State Department had the lead when it came to the Afghan rule of law mission. It was also clear that the U.S. military had both excellent rule of law ideas and the means to implement them. Over time, the relationship between the two U.S. agencies moved forward in a positive direction

¹⁶ Because we had gone directly to the Afghan Supreme Court, the Rule of Law section at the U.S. Embassy was initially unaware that the Court had approved the request. A copy of the approval letter was forwarded to the Rule of Law Coordinator at the U.S. Embassy, which eventually paved the way for additional CLE projects throughout Afghanistan.

¹⁷ The Afghan Judicial Desk Set was a 17 volume judicial guide derived from the Afghan Constitution. The Desk Sets were originally created and paid for by the USAID. Each province was given approximately 600 sets to distribute to Judges and attorneys. It was such a popular product that an additional 600 sets were distributed to each of the six provinces in AO Currahee.

¹⁸ Once the CLE class material was prepared, it was collected and taken to a publishing company to manufacture 120-150 CLE booklets.

¹⁹ After conducting smaller provincial level CLEs it was decided that large scale CLEs involving 120-150 Judges and attorneys from six provinces would work better in Kabul. Most of the judicial officials and legal practitioners felt safe in Kabul and were willing to travel there for the CLEs.

²⁰ The Rule of Law section at the U.S. Embassy implemented a policy in late 2008 that any Afghan CLEs created and resourced by U.S. agencies were limited to one-week durations.

The second Quarterly CLE focused primarily on the civilian legal practice. It covered topics such as divorces, family law, property disputes, insurance and financial laws. This CLE was also well received and we also received additional requests for CLE training in these area of law.²¹

The third iteration of the Quarterly CLE program focused on corruption in the courtroom. Corruption was a topic of much interest because of the numerous claims of corrupt Afghan officials, including judicial officials.²² Like the two before, this CLE included a mock trial as part of the training. The mock trial was an essential part of the program that allowed the attendees to actually practice what they were learning, which was particularly important because some Afghan judges had very little legal training, if any.

The fourth iteration of the Quarterly CLE was scheduled to occur after my redeployment, but the CLE program continued to be modified and updated. It was during the planning stage of the fourth Quarterly CLE that the idea to expand the Quarterly CLE Program to other provinces was initiated. It was a bold step forward to expand the program to include each Afghan Province from RC-East, but doing so would require coordination among all the brigades in RC-East²³ with the support and guidance of the CJTF-101 SJA and his Rule of Law Coordinator.²⁴

b) Khost Justice Center

The project I made my highest priority, the Khost Justice Center, was more like an 800 pound gorilla than a 25 pound dog. However, it was the most necessary of all rule of law projects. Insurgents need to be prosecuted and convicted if guilty. Judges and prosecutors need a safe work environment where they are not gunned down walking to work.²⁵ Afghanistan needs provincial level justice centers in each province. The establishment and enforcement of laws cannot only take place in Kabul, but must take place throughout the entire country.

²¹ The enthusiasm that Afghan judges and attorneys displayed over civilian legal practice was taken as an indication that the program was successful, but more importantly, that legal practice was headed in the right direction. Their realization of the value of civil law was taken as a sign of development. Under the prior regime, Afghans had largely ignored courts as a mechanism for resolving civil disputes, and civil practice consequently had been a low priority.

²² Many judges' salaries were between 50 and 200 dollars a month. Without judicial pay reform judges were unlikely to risk their lives and their family's lives convicting terrorists who could pay much better for acquittals and who had connections throughout the country.

²³ Each BCT in RC-East had considerable leeway to organize their rule of law projects as they deemed appropriate, complicating the coordination effort.

²⁴ CJTF-101 was very supportive of the rule of law efforts made in AO Currahee. The projects received considerable command attention. For instance, the CTF Currahee Commander briefed the CJTF-101 Commander after each CLE was conducted. The CJTF-101 Commander openly acknowledged the Quarterly CLE program as a great rule of law project during his Commander's Update Brief and encouraged the expansion of the program.

²⁵ A month into my tour, the Deputy Prosecuting Attorney in Khost Province was shot four times walking to work in Khost city. He miraculously survived the attack and, recovering in the hospital, he said "I want to get the men who did this." Four months later, the insurgents fired multiple shots at the Chief Provincial Judge for Khost as he walked to work one morning. He died from that attack.

It quickly became clear that coming up with the idea behind the justice centers, submitting the CERP project for funding, and even constructing the justice centers was the easy part. Just because a justice center is built does not mean that Afghan judicial officials will use it. Coordination among Afghan institutions was the hardest part. Because the Khost Justice Center was included all the functions of a justice center, the various agencies representing the different functions (the Afghan Supreme Court, Attorney General's office, the Ministry of Justice, and the Ministry of Interior) had to agree to work together at this one site.²⁶ Even before obtaining an agreement among the Afghan agencies, an agreement between the U.S. agencies needed to be reached on how the Khost Justice Center would operate. The justice center concept was not initially approved by all the relevant USG agencies. What was agreed was that the justice center would be run completely by the Afghan government; the U.S. military would not play any role in its operations, the justice center would try both insurgents and general criminals and, if convicted, would imprison both insurgents and general criminals given the large prison and the ability to keep the two groups separated.

Once the USG agencies agreed on the overall justice center concept, it was time to brief the national Afghan leaders in Kabul. The first meeting took place in July 2008 at the U.S. Embassy in Kabul. A joint U.S. agency front on the Khost Justice Center was presented to the Afghan Supreme Court Director and Chief Financial Officer, Afghan Attorney General, and the Chief Deputy of the Ministry of Justice. A second meeting took place in August 2008 at the Embassy and it included the prior attendees and the Chief Deputy of the Ministry of Interior.²⁷ The Afghan agency leaders recessed from the second meeting and took several months to meet independently and contemplate the Memorandum of Agreement (MOA) provided to them.²⁸ Finally, in December 2008 the MOA was signed by all parties to the agreement. The Khost Justice Center was an official judicial Afghan compound. The only problem is that no one is using it.

In addition to the problems getting all the parties to agree, there was a problem with funding the daily operations of the compound. The funding issue was two-fold: the funding requirements would cut into Kabul funds²⁹ and three Afghan agencies would need to contribute proportionally to the operating costs, which was not covered in the MOA.³⁰ The final problem, but the easiest to fix, was that the compound did not contain a water well. The water well was

²⁶ This was an exceptionally daunting task because, following the communist model of the 80s, each agency was highly independent and the government lacked a culture of working with the other agencies for the common good.

²⁷ The Ministry of Interior (MOI) was reluctant to participate originally and did not want any ownership stake in physical buildings in the Khost Justice Center compound. However, by the end of the agreement process the MOI agreed to provide support by using Afghan police forces to escort judges to and from the Khost Justice Center.

²⁸ The MOA was revised several times and was no longer than 3 pages in length. It was a short concise agreement that included each Afghan agency's roles and responsibilities.

²⁹ No one ever explained the breakdown of the Kabul funding process, but the operating costs of the Khost Justice Center would only be a fraction of the total money given to the Afghan government.

³⁰ Under the MOA the Ministry of Justice (MOJ) was the overall caretaker of the Khost Justice Center. The MOJ was responsible for guarding the compound and had administrative responsibility over eight of the thirteen buildings. The Attorney General's office was responsible for four buildings. The Supreme Court was responsible for the remaining two buildings.

submitted as an additional CERP project and was quickly processed and approved. Unfortunately, even with the additional water well project complete and very small operating costs, no trials or prosecutions have taken place at the Khost Justice Center.

Although the Khost Justice Center remains empty, it is not for lack of a strong concept. Like the Quarterly CLE program, the Khost Justice Center was briefed by the brigade commander to the CJTF-101 commander after significant milestones were crossed. The justice center concept was so well received by military officials that additional justice centers were planned for Paktya and Paktika Provinces in AO Currahee. Likewise, the justice center concept was well received by representatives from the World Bank, who indicated that the justice center compound was similar to the idea they were independently considering. The problems with initiating operations at Khost Justice Center have never been attributed to the merits of the program; rather the problem seems to be one internal to the way funds are allocated and spent within the Afghan government. If those internal financing problems can be overcome, the Khost Justice Center concept can be tested in action.

Failing to use the Khost Justice Center has a cost that goes beyond the wasted time and resources that went into building it; building the justice center and not using is likely worse than not building it in the first place. If, even with a safe, secure location for prosecutions, insurgents are still not being prosecuted, the insurgents have won.

c) *Jingle Truck Initiative*

The Jingle Truck Initiative was the smallest of the big three rule of law projects that were conducted during my deployment. It was a means of recouping for lost/stolen US property, enforcing local laws, and generating local Afghan district revenue. It was only implemented in Khost Province, but it had the potential to expand to others.

Jingle trucks delivering goods (which can be broken down into two categories: fuel and everything else) were quickly assessed to determine if items or amounts were missing upon arrival to the final destination. If items were missing, the MPs were called to interview the driver, conduct Biometric scans, and file a report. The report included the driver's name, the contract company responsible for delivering the goods, the type and amount of the missing item(s), and the shipment tracking number.³¹ The drivers were then turned over to the Afghan National Police (ANP) for detention and interview. Based on the MP report and the information obtained by the ANP, the local prosecutor decided whether to prosecute the driver before the local judge. If prosecuted and convicted, the driver would be fined, required to pay restitution,³² and write an apology letter indicating he will never steal from the US government again.

The jingle trucks were impounded on the forward operating base (FOB) until the above requirements were satisfied. Once they were satisfied, the driver or a contract company

³¹ The shipment tracking number was essential because the shipments normally originated at Bagram Airfield, Afghanistan and it was used by the military and contractor representative to identify the specific contract responsible for delivering the goods. This was important because some contracts contained specific reimbursement clauses and other contracts did not.

³² The contract company would often pay the restitution, but the driver would have to show proof of restitution.

representative returned to the FOB and provided proof of restitution, payment of the fine (if convicted) and the apology letter.³³

The Jingle Truck Initiative gained notoriety with many of the contract drivers guilty of stealing property or letting others steal the property. The guilty drivers began stopping short of their final destination and recruiting local and unsuspecting, villagers to drive the jingle trucks just a short distance onto the FOB. The local villagers were paid well for the amount of work they were required to conduct, but they were sure to be detained once they reached the final destination and in some cases required to pay a fine. We worked closely with the CTF Currahee Information Operations (IO) Officer to combat this growing trend. Several information operation campaigns were successful in informing the local villagers that driving the jingle trucks could result in their arrest and a possible court case against them due to the original driver's theft.

The Jingle Truck Initiative was in affect and was having positive effects on reducing the amount of stolen U.S. property, except in one area; winter fuel transport. A majority of the power in rural Afghanistan came from fuel powered generators. It runs the generators on the FOB, the generators attached to a CERP projects (in this way, the proliferation of CERP projects added to the generator power problem; the generators were new and operated perfectly, except for when they ran out of fuel) and the generators in local villages. However, fuel was expensive and hard to obtain for many local nationals. The insurgents could wield considerable influence with the local population by controlling fuel and giving it to the locals. They could also negatively influence the heavily fuel-dependent coalition force operations if they stole fuel and used it for the insurgency.

The Jingle Truck Initiative was not revered in all coalition circles, especially as it related to jingle trucks transporting fuel. Impounding the fuel trucks had a predictably negative impact on the ability to transport fuel and became a cause for concern with the logistics unit responsible for moving fuel throughout Afghanistan. At one point, I had the same conversation with 6 different people explaining the Jingle Truck Initiative process and how it should not delay fuel transport if the contractor quickly paid restitution and encouraged their drivers to pay the fine if convicted, because the local Afghan court system was fast at hearing the driver's cases and making a decision. A driver detained in the morning could have his case heard and receive the Judge's decision by afternoon. Eventually, the initiative was modified for fuel shipments,³⁴ but it remains a valuable rule of law venture.

d) *Small Rule of Law Projects*

Several small rule of law projects were also conducted throughout AO Currahee. Six hundred additional Afghan Judicial Desk Sets were produced and distributed to judges and

³³ The apology letter is a cultural idea that impacts the individual by calling on their honor by promising to never steal again. This was another great idea made possible by my Afghan Attorney Advisor's sensitivity to local Afghan culture.

³⁴ The logistical unit provided the shipment tracking number for all the jingle trucks under contracts requiring the contractor to pay restitution. If the drivers of those trucks were detained, then they would have to provide proof of all the requirements before the truck would be released, but if the driver was not detained then the truck would be released to the contractor's representative.

attorneys in AO Currahee's six provinces. The desk sets were highly coveted; the goal was to provide one set to every judge and attorney in AO Currahee.

Local level CLE programs were also implemented and conducted during CTF Currahee's tenure. These CLE programs took place in different districts and focused on local level legal issues.³⁵ They were limited to small groups of attorneys, justice officials and corrections officials.³⁶ The legal issues discussed included local level prosecutions for misdemeanor type offenses, evidence collection, women's rights, and alternative dispute resolution. These programs also received high praise from the Afghan attendees, who indicated that they prefer being taught by Afghan instructors.³⁷

Several legal Shuras³⁸ were also conducted during the deployment. We met with Provincial Judges and prosecutors, local judges and prosecutors, ANP prosecutors and civilian attorneys to discuss their concerns with judicial pay reform, prosecutions of insurgents, personal security and logistical needs for their practice of law. Several CERP projects were initiated from the issues discussed during these Shuras. Two projects included: providing concertina wire for an existing prison to deter escape and providing office supplies to Judges and attorneys to assist with their legal practice. The Shuras also provided a means for the provincial and local level judicial officials to raise concerns that were then addressed at meetings with their leaders at the national level.³⁹

One of the most notable smaller scale rule of law projects involved producing a criminal law manual by an Afghan Supreme Court Judge and distributing it to judicial officials in AO Currahee and Kabul. Three thousand copies of the manual were produced and provided to Judges and prosecuting attorneys. This project was not only beneficial to the Judges and attorneys who received a copy, but it was beneficial to CTF Currahee and all coalition forces. It continued building upon a great relationship with national level judicial officials and helped obtain their support on our larger rule of law projects.⁴⁰

4. *Passing the Rule of Law Baton*

When 4BCT redeployed, the Khost Justice Center was complete and capable of prosecuting and imprisoning insurgents and criminals while protecting judicial officials, and setting an example for other Afghan Provinces. Yet, it remained unoccupied, and the plan to build two additional justice centers in AO Currahee remained just a plan. Countless additional rule of law projects listed on the whiteboard in my office when I first arrived in Afghanistan

³⁵ Each Afghan Province contained multiple districts similar to counties in the United States.

³⁶ The local CLE programs normally had 15-25 participants.

³⁷ Other international organizations provided training to Afghan judicial, justice and corrections officials, but they used US and international instructors instead of Afghan instructors. The Afghan led courses received high praise because the instructors were more familiar with Afghan customs and traditions in addition to the laws and constitution.

³⁸ Shura is an Arabic word for "consultation".

³⁹ Many of the provincial and local level judicial officials were concerned about pay reform, transportation and security. We forwarded those concerns during meetings with the Afghan Supreme Court, Afghan Attorney General, Ministry of Justice and Ministry of Interior.

⁴⁰ We requested support from the Supreme Court on three separate projects and received their support each time without hesitation.

were still on the whiteboard without a checkmark next to them. Most importantly, Afghan judicial positions remained one of the lowest paying positions within the Afghan government.

In the end, however, I did feel like the CTF Currahee rule of law program had a positive impact on Afghan judges, attorneys, and citizens. Many of our projects could be used as models for other areas in Afghanistan. We were able to creatively accomplish many projects and I believe we left a lasting impression on southeastern Afghanistan and advanced rule of law in AO Currahee. Lastly, although I miss many of the great and inspirational Afghan citizens, I feel a deep sense of professional satisfaction for my role in advancing rule of law in their country.

B. Reconciling Security and Rule of Law While Coordinating US Military and Civilian Efforts*

In the summer of 2008, Multi-National Forces-Iraq (MNF-I) and the US Embassy, Iraq (the Mission), conducted a periodic review of progress in achieving the goals of the Joint Campaign Plan (JCP) for Iraq. At that time, the JCP focused upon four lines of operation (LOO): security, economic, political, and diplomatic. Significant progress had been achieved in each of the LOOs. Of particular note, the “Awakening” (see below), the surge of US forces, and the increases in the Iraqi security forces (ISF) had resulted in a dramatic improvement of the security environment; by virtually every statistical measure, acts of violence had reached levels last seen in 2003. The same could not be said for the establishment of the rule of law.

The Iraqi judiciary was legally independent of the other branches of government, but it was overwhelmed. The High Judicial Council recognized a need for 3,000 judges, but there were only approximately 1,250 in office. In addition, judicial security was a significant problem; dozens of judges had been assassinated since 2003. These problems led to significant backlogs of cases, which exacerbated the existing pre-trial detention challenges. Pre-trial detention conditions rarely met the most basic international standards. Conditions of over-crowding, inadequate hygiene facilities, and very limited medical support existed in nearly every pre-trial detention facility. Forcing confessions from prisoners was a well-established police practice; MNF-I police training teams reported scores of these cases every month supported by physical evidence. Official corruption was endemic, and the Government of Iraq (GOI) had not developed the oversight mechanisms needed to combat it. Ministry inspectors general were neither resourced nor empowered to act. The Board of Supreme Audit and the Commission on Integrity were similarly hampered. Most problematic was Article 136b of the Criminal Procedure Code, which gave individual ministers the authority to block the criminal prosecution of any member of their ministry. When the assessments were completed, the Ambassador and MNF-I Commander decided to make the Rule of Law a separate line of operation of the JCP.

This was the context for USG rule of law capacity building efforts in Iraq in 2008-09. A review of those efforts offers insights into the tensions that can arise between competing

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priorities in a theater where counterinsurgency and stability operations are being conducted simultaneously, as well as the tensions between competing models of how to achieve a unity of effort in the rule of law capacity building.

1. Rule of Law, Security, and Stability

Rule of law¹ capacity-building is only one aspect of a broader national strategic goal of reconstruction and stabilization of “fragile, conflict-prone, and post-conflict states.”² In a typical post-conflict situation, the state’s ability to keep the peace by enforcing the law has been compromised. Police, courts, and detention capacity may be limited or not exist at all. But just as important to stability operations is the state’s ability to provide for the essential needs of its citizenry: clean water, adequate food and shelter, a secure environment, and a functioning economy with legitimate employment opportunities. Rule of law plays a key role in establishing and maintaining stability, particularly in disciplining the actions of the state, but it is only one part of the good governance needed to help stabilize and rebuild a weakened state. Within DOD, the reconstruction and stabilization mission is described as Stability Operations.³

Rule of law capacity-building cannot be conducted in an operational vacuum. Some degree of security must exist for technical advisors to focus on a state’s compliance with its own laws, building up a functional court system, protecting the due process rights of pre-trial detainees, and all the many other rule of law capacity-building missions. There are always cases in which security and the types of protections associated with the rule of law will come into tension. In those cases, senior leaders will have to make the strategic decision to improve security that some may criticize as compromising the principle of the rule of law. There will be times during an active counterinsurgency when the long-term goals of the rule of law mission will necessarily be a lower priority than establishing and maintaining short-term security.

a) The Awakening

In 2007, many of the Sunni Insurgency leadership realized that it was in their best interests to come to terms with Coalition Forces (CF) and the government in Iraq.⁴ The movement, which began in Anbar Province, became known as the Awakening. As the movement spread, MNF-I entered into agreements with regional Awakening leaders – literally bringing former Sunni insurgents, the Sons of Iraq (SOI), into a contractual relationship with CF. The SOI were paid salaries by CF and were incorporated into CF security plans and operations. Some observers believe this event was a greater contributor to the improvement in security than the increase in combat forces commonly referred to as the Surge.⁵ In late 2007, the Awakening

¹The definition of the rule of law used by both the US Mission - Iraq (the Mission) and Multi-National Forces-Iraq (MNF-I) in their Joint Campaign Plan (JCP) was that contained in the *Rule of Law Handbook*, and adopted in Army doctrine in the fall of 2008. See ch. II, supra.

²Nina M. Serafino, *Peacekeeping/Stabilization and Conflict Transitions: Background and Congressional Action on the Civilian Response/ Reserve Corps and other Civilian Stabilization and Reconstruction Capabilities 3* (Congressional Research Service Report July 23, 2009).

³U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1–9 (Oct. 2008)

⁴Thomas Ricks & Stephen Biddle, “*The Gamble*”: *Did the Surge Work?*, washingtonpost.com, (Feb. 9, 2009).

⁵See *id.*

movement began to bear political fruit: MNF-I negotiated an agreement with the GOI to incorporate a portion of the SOI into government positions, and many SOI were hired into positions at the Ministry of Interior and incorporated into the Iraqi Army. This partial “reconciliation” between the GOI and former insurgents was strategically key to improving security across the country; wherever these agreements were put in place, acts of violence decreased dramatically. Even though the agreements were effective, they were also extraordinarily difficult to maintain politically for both the Sunni insurgency leadership and the primarily Shia elected government officials. Elected leaders felt the SOI had boycotted earlier national elections and chosen to become terrorists while the SOI felt the elected government had been complicit in the vicious sectarian ethnic cleansing that had paralyzed the country since the Samarra Mosque bombing in February 2007. This political compromise was both strategically important and extremely fragile.

As insurgents, many of the SOI had committed criminal acts before this reconciliation. In many cases arrest warrants had been legally issued by Iraqi judges, and these arrest warrants had not been withdrawn with the advent of the Awakening nor when CF – and later the GOI – entered into agreements with the SOI. In 2008 there were several instances of Iraqi Security Forces (ISF) arresting senior Sunni Awakening leaders based upon these “pre-Awakening” warrants. These arrests led the SOI to believe the GOI was breaking faith with their agreements, creating a very real risk that the security situation would backslide and the SOI would turn back to the insurgency. Although the arrests on their face may have been lawful, they also created the strategic risk of destabilizing the fragile political agreements.

At first glance, CF and Mission leadership seemed to be placed in the position of having to choose between supporting the rule of law by supporting the arrest and prosecution of Sunni leaders for criminal acts or to discourage enforcement of the law (essentially to encourage Iraqi officials to ignore judicial arrest orders) in order to support a political agreement that improved the nation’s short-term security. In fact, there was no choice in the matter; the realities on the ground dictated that security be maintained and the warrants should not be executed. Given the circumstances in Iraq at the time, short-term security necessarily took priority over long-term realization of the principles underlying the rule of law.

In the end, this compromise not only preserved the most important principles of the rule of law but also recognized the importance of reconciliation in post-conflict environments. Members of the Awakening leadership were not prosecuted for allegations of criminal acts related to the insurgency that *preceded* their agreements with CF and the GOI. Criminal allegations that arose for acts committed *after* these agreements, however, did result in arrests and prosecutions. This political resolution was not formally approved by the Iraqi Parliament; the Executive Branch simply did not execute the legally valid arrest warrants issued by the courts. In principle, this undercut the rule of law in Iraq. In reality, it made it possible for the SOI to begin a reconciliation process with the GOI and improved security nation-wide. The improved security environment made it possible for the GOI, USG, and the international community to expand their reconstruction efforts, to include trying to establish the rule of law. Ultimately, the leadership realized that rule of law capacity-building must not block political accommodations between disputing factions that make stability possible.

b) UNSCR Detainees

Another example of the tension between rule of law capacity-building and maintaining security was the disposition of individuals detained by CF under the authority of the UN Security Council resolution (“legacy detainees”) after the expiration of the resolution on 31 December 2008 and the implementation of the US/Iraq Security Agreement (SA).⁶ On 1 January 2009, when the SA came into effect, US Forces held in excess of 15,000 security detainees that the US no longer had the authority to detain.⁷ The challenge was to devise a process that complied with the SA in a way that supported the establishment of the rule of law without undercutting security. The end result was a qualified success.

Under the SA, detainees had to either be prosecuted pursuant to Iraqi criminal law or they had to be released. At the time, nearly 2,000 detainees held by CF under the authority of the UNSCR were in some stage of criminal prosecution in an Iraqi court, and those detainees could be transferred into the Iraqi pre-trial detention system as space became available. Both the GOI and CF were concerned that releasing the remaining thousands of detainees at one time could not be done “in a safe and orderly manner.” It would put the hard-earned security improvements at risk. CFs established a review and release plan for the remaining legacy detainees. Lists of detainees were given to the GOI each month together with releasable information that supported each detention. Frequently, the classified nature of most of the information meant that very limited information was provided, most disclosures consisted of only a conclusory statement that the detainee was involved in supporting the insurgency. The GOI, in turn, either acceded to the releases or provided warrants for the arrests of the detainees. To the surprise of many, the GOI began to produce hundreds of warrants for detainees CF intended to release. It quickly became evident that the GOI was not issuing warrants as the result of an independent assessment of evidence pursuant to Iraqi criminal and constitutional law but rather simply to transfer detainees taken and held under the UNSCR from US custody into Iraqi pre-trial detention.

It was felt by many within the GOI leadership as well as US forces leadership that the legacy detainees MNF-I held were security threats and if released would destabilize the country. As far as many CF leaders were concerned, the more warrants issued the better. Because a warrant enabled CF to transfer the detainees into the Iraqi criminal justice system rather than release the detainees into Iraqi society, many US military leaders welcomed the flood of Iraqi

⁶ Agreement Between the United States and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, (Nov. 17, 2008), available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (last visited Aug. 14, 2009).

⁷ Article 22 of the Security Agreement states:

Upon entry into force of this Agreement, the United States Forces shall provide to the Government of Iraq available information on all detainees who are being held by them. Competent Iraqi authorities shall issue arrest warrants for persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement..

Id. art. 22.

warrants as a good thing rather than a violation of the principles underlying the rule of law. As a result, US forces made no effort to encourage the GOI to limit warrants to those cases that were in fact supported by evidence. Keeping detainees off the streets was deemed more important than ensuring that their deprivation of liberty was done in accordance with the law. The result was to move even more pre-trial detainees into a criminal justice system that was already glutted and dysfunctional.

One of the many organizations that worked closely with Iraqi officials to help establish the rule of law, the Law and Order Task Force (LAOTF), had studied the detainee population records at Rusafa Prison, Iraq's largest detention facility.⁸ LAOTF's study showed that over 20% of the prison population had been arrested by the Iraqi Army and no action had been taken on their cases since their detention order. Over 500 of these detainees had been in pre-trial confinement over a year without any action taken on their case; over 290 of these had been in pre-trial confinement for over two years with no action taken. This research project highlighted violations of Iraqi law and a significant cause of the constant overcrowding and inhumane conditions for the detainees. The US was quick to bring this to the attention of the Minister of Justice for corrective action.

Despite this information, US detention leaders chose to continue to equate warrants with success. It remains to be seen whether the USG detention leaders have created a longer term strategic risk by taking advantage of the GOI's eagerness to continue to hold CF detainees and accepting these mass-produced warrants unchallenged. The rule of law, efforts at reconciliation, and the cause of de-radicalizing the SOI may eventually suffer as a result of this perceived short-term security gain. The least that can be said is that this was a lost opportunity to show the executive branch of the GOI that it must comply with its own laws.

2. *The Civil/Military Tension in Rule of Law Capacity Building: Establishment of the IROCC*

The persons tasked to lead the LOOs were the senior officers responsible for the USG efforts in those areas: the MNF-I Deputy Commanding General for Operations for the Security LOO, and the Mission's senior Political, Economic, and Diplomatic officers for those LOOs. The lead for the Rule of Law LOO was shared by the Mission's civilian Rule of Law Coordinator (ROLC) and the MNF-I Staff Judge Advocate (SJA). This was a reflection of both the realities on the ground and the manner in which the US had conducted operations in Iraq since the invasion. While the Ambassador was the senior representative of the United States, there was an overwhelming military presence in Iraq. In August 2008 there were over 160,000 Coalition Forces in Iraq with nearly as many contractors supporting the military presence. These military and civilian assets were spread across the country. The number of Mission personnel and contractors was a small fraction by comparison, and most were concentrated in Baghdad.

The organization of the US capacity-building effort in Iraq reflects how DOD Stability Operations Doctrine tries to reconcile two conflicting understandings: that reconstruction and stabilization efforts are best conducted and led by civilians and that military personnel will

⁸ See generally Processing Detainees in Rusafa in THE RULE OF LAW HANDBOOK: A PRACTITIONERS GUIDE 280-83 (Center for Law and Military Operations 2008 ed.).

oftentimes be the only assets available to perform these tasks.⁹ This conflict has at times defined the USG's ad hoc reconstruction and stabilization efforts in Iraq since the invasion, as demonstrated by the development of the Interagency Rule of Law Coordinating Center (IROCC). In order to understand the IROCC, some background on the organization of rule of law efforts in Iraq is helpful.

a) *Civilian-Led Rule of Law Capacity-Building Assets*

The ROLC at the Mission was a senior executive service officer seconded from the DOJ. Rule of law capacity building was only part of his responsibilities; both DOJ and the Mission looked to that person to oversee all USG justice activity in Iraq, basically serving the role of legal attaché as well as ROLC. In August 2008, the number of personnel under the ROLC's technical supervision included personnel from the US Marshals Service, the Federal Bureau of Investigation, and Homeland Security, but few of these assets were in Iraq primarily to support the rule of law capacity building mission. ROLC personnel dedicated to the rule of law mission included full-time liaisons to the Ministry of Justice (MOJ), Ministry of the Interior (MOI), and the Iraqi High Tribunal (IHT) and, on the US side, to the Bureau of International Narcotics and Law Enforcement (INL) office, the International Criminal Investigative Training Assistance Program (ICITAP) office, the ROLC deputy, and one action officer. There were also resident legal advisors (RLA) located at most of the Provincial Reconstruction Teams (PRTs). The numbers and sizes of PRT offices fluctuated frequently but in the summer of 2008 there were about 26 PRTS spread across the country. The PRTs and their RLAs fell under the authority of the Chief of the Office of Provincial Reconstruction (OPA) and not the ROLC.

The ROLC MOJ and MOI liaisons had limited impact. The capacity building mission for MOI rested with MNF-I.¹⁰ Thus, the Mission's liaison was an observer of events within the Ministry and had developed a network within the Ministry to arrange key leader engagements. This was an important function but did not make a critical contribution to rule of law capacity building. The MOJ liaison similarly met with limited success, largely because, in the summer of 2008, the Acting Minister of Justice who had been in place for nearly a year refused to cooperate with either CF or the Mission. This continued until early 2009, when a new Minister was appointed. The IHT liaison office was known as the Regime Crimes Liaison Office from 2003 to 2007 and provided significant amounts of technical assistance to the IHT. By 2008 the IHT had matured and required less support; the liaison's role was limited to observing court activities and coordinating assistance when needed. The bulk of the rule of law capacity building contributions by the ROLC were made by ICITAP, INL, and the RLAs at the PRTs.

ICITAP's role was to provide technical assistance to the GOI to improve the quality of correctional facilities and the professionalism of the Iraqi Corrections Service. ICITAP had been

⁹ U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, para. 4.3 (28 Nov. 2005); JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS V-24 (Sept. 2006) ("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.").

¹⁰ In the summer of 2009, an assessment was conducted to determine how this might be shifted to the Mission but, to date, providing technical assistance to the MOI remains with the military.

present in Iraq since 2003 and helped the GOI make enormous strides in its correctional system. In 2008, it had a senior corrections professional in the ROLC managing over 80 contractors divided into teams and spread across 11 prisons and 6 detention facilities. Although ICITAP's focus was on post-trial detention facilities, it maintained a presence in some pre-trial facilities. ICITAP worked closely with MNF-I's Task Force 134 to train Iraqi Corrections Officers and help the GOI institutionalize this training capacity. The ICITAP contractors were the USG's eyes and ears into Iraqi corrections facilities. ICITAP was greatly responsible for the fact that, by 2008, MOJ-run facilities usually met international standards and rarely generated allegations of detainee abuse.¹¹

The RLAs focused upon rule of law capacity building at the provincial level and below. As mentioned above, they were part of the PRTs and therefore fell under the authority of the Embassy's Office of Provincial Reconstruction, not the ROLC. The PRTs had the broader reconstruction and stabilization goals of supporting good governance by improving the local government's ability to provide essential services, employment and educational opportunities, and health services, as well as increasing the transparency of government to battle corruption. The RLAs focused upon the rule of law aspect of reconstruction and stabilization, tailoring their efforts to the needs of a given region. The RLAs frequently served in austere and dangerous environments and relied on MNF-I assets for security and movement support. Several RLAs were retired military lawyers or assistant US attorneys on detail and served for at least a year.

Although the INL office had no rule of law capacity building practitioners in Iraq, it was the funding source for the civilian rule of law capacity building efforts and managed related contracts. For example, INL funded ICITAP, most of the RLAs, Iraqi Judicial and Law Enforcement Assistance Programs, various information technology initiatives, and the construction of five prisons. INL also managed a \$400 million contract for the DOD to provide over 750 police and border advisors. The ROLC had no authority over the director of the INL office, which created significant problems for the Mission's rule of law capacity building efforts. Frequently, the INL office would act independently without coordinating its actions with the ROLC. At other times, the INL office would disagree with the rule of law priorities set by the ROLC and refuse to fund them. To some extent, the tension between these offices reflected the greater tension between the Departments of Justice and State. The DOS lacked subject matter expertise in rule of law capacity building and turned to DOJ for this support. Yet DoS refused to give DOJ officers authority over the funding of rule of law capacity building. This fundamental gap between DOS capabilities and responsibilities is at the heart of USG failings in reconstruction and stabilization efforts.

b) Military-Led Rule of Law Capacity-Building Assets

The US military in Iraq applied extraordinary assets to the stabilization and reconstruction mission, including rule of law capacity building. In 2004, then Major General Patreus built the Multi-National Security Transition Command-Iraq (MNSTC-I), consolidating Mission-led and military-led efforts to provide technical assistance to the GOI in rebuilding the Ministries of Defense and Interior as well as the Iraqi military and police forces. MNSTC-I

¹¹ Conditions in pre-trial detention facilities were appalling, but those facilities were run by the MOI and not supported by ICITAP.

assisted both the MOI and MOD in developing codes of conduct and establishing open and transparent internal court systems to discipline their forces. Dozens of MNSTC-I advisors and contractors worked within the ministries to institutionalize oversight mechanisms (inspectors general and human rights offices) and at the training bases to assist in establishing training standards and “train the trainer” programs that included respect for basic human rights and the rule of law. MNSTC-I also trained CF training teams that were then assigned to the field commanders within Multi-National Corps Iraq (MNC-I), MNF-I’s subordinate, operational command.

In 2008, MNC-I had 120 Military Training Teams, 35 National Police Training Teams, and 244 Police Training Teams operating in Iraq. These teams were partnered with Iraqi units and worked with them on a daily basis to provide technical assistance in conducting operations and professionalizing the forces. MNC-I required each subordinate command to inspect all Iraqi detention facilities within their area of responsibility every quarter, and training teams were often used to conduct these assessments. Monthly reports were provided to the MNC-I Provost Marshal and proved an invaluable tool to identify the areas with the most significant problems. MNC-I also had a contract for law enforcement support in addition to the \$400 million dollar contract managed by INL referred to above. About 150 civilian law enforcement professionals (LEPs) were provided under this contract and were distributed down to the battalion level to work with the police training teams and partnered Iraqi units. In 2008, MNC-I had over 200 JAs and paralegals serving within MNC-I; many of them worked with the PRT RLAs and local Iraqi judicial and law enforcement officers on various rule of law capacity building projects.

Task Force 134 (TF 134) was created in 2004 to manage detention operations for CFs. Although the TF’s principal mission was running detention facilities at Camps Cropper and Bucca, which housed thousands of security detainees, it also made significant contributions to rule of law capacity building. The TF 134 legal office was staffed with dozens of attorneys whose mission was to support the prosecution of security detainees in the Central Criminal Court of Iraq (CCCI). Although this effort was intended primarily to prosecute and punish those who attacked CFs, it had the added benefit of improving the efficiency and professionalism of one of Iraq’s largest criminal courts.¹² TF 134 also conducted inspections of Iraqi prison facilities to ensure that the facilities met basic standards before transferring detainees that were charged with or convicted of committing offenses under Iraq law. In addition, TF 134 trained Iraqi Corrections Officers (ICO) and integrated them into the guard force rotations at Camps Cropper and Bucca, providing carefully supervised job training. In 2009, TF 134 initiated and oversaw, in coordination with ICITAP, the construction of a multi-million dollar training center near Camp Cropper. This effort included the development of programs of instruction and training Iraqi trainers. Despite the downsizing of MNF-I, TF 134 also built a capability to field nine corrections assistance transition teams. Much like the police training teams described above, these teams travel to Iraqi detention facilities ICITAP cannot support and provide technical assistance to the Iraqi guard force and facility managers.

MNF-I also created the LAOTF in 2008. It was intended to help build “Iraqi capacity for independent, evidence based, and transparent investigation and trial of major and other crimes

¹² TF 134 supported prosecutions maintained about a 50% conviction rate while the rest of Iraqi criminal courts conviction rate hovered around 10%.

before the Central Criminal Court of Iraq (CCCI).¹³ LAOTF was located at Forward Operating Base Shield near Iraq's largest detention facility, Rusafa Prison, and the Rusafa Criminal Courts. Rusafa prison was Iraq's largest¹⁴ and included both sentenced prisoners and pre-trial detainees. Although the conditions were better than most Iraqi pre-trial detention facilities, it was notoriously overcrowded. The detention facility was poorly managed; corruption and sectarian bias were rampant. ICITAP's efforts were frequently frustrated by the inertia of the Rusafa Criminal Courts. In August 2008, the courts were so slow that it would take three years to retire the backlog of cases. Thousands of pre-trial detainees languished awaiting trial. LAOTF's mission was to improve the Rusafa Criminal Court's throughput.

LAOTF was initially staffed with US military lawyers and criminal investigators from Australia, the United Kingdom, and the US military. It was intended that the criminal investigators would be paired with Iraqi criminal investigators to improve the quality and efficiency of their investigations. The military lawyers were titled "mentors" for the Iraqi investigative and trial judges.¹⁵ LAOTF also established Iraq's first defense clinic near the prison. The clinic was run by an experienced senior DOJ civilian attorney and a JA. It was comprised of about 20 Iraq defense counsel who were "mentored" on how to provide support to Rusafa detainees. In the inquisitorial system in Iraq, there is a very limited role for defense counsel. Most western trained attorneys found it difficult to accept that the investigative judge served the role of prosecutor, defense counsel, as well as independent judge.¹⁶ The goal of the Defense Clinic was not to change Iraqi criminal law or practice but a more modest one of providing detainees with advocates who might be able to move their cases through the investigative process more quickly.

LAOTF also assumed a role in coordinating Iraqi judicial support to military operations after the expiration of UNSCR 1790. As the expiration approached, MNF-I conventional forces began to conduct all operations "by, through, and with" their Iraqi counterparts. These operations were based upon warrants issued by Iraqi criminal courts. LAOTF worked closely with the units and CCC-I court judges to assist in the presentation of evidence supporting the issuance of warrants and the follow on prosecution of those cases. This support helped to some degree in disciplining the operations of the Iraqi security forces, which were not used to conducting counterinsurgency operations with a goal of criminally prosecuting the detainees, an important rule of law goal.

¹³ MNF-I Commander's Memo

¹⁴ The Rusafa Prison population fluctuated between 6,000 and 7,000, about 20% of all detainees held by the GOI.

¹⁵ None of these military lawyers could speak Arabic nor were they experienced or schooled in Iraqi law, rendering the title "mentor" presumptuous. Accepting this criticism, the JAs assigned to these duties normally established close ties with the Iraqi judges who took pride in teaching the US lawyers about their legal system and traditions. The JAs also shared with the Iraqi jurists US legal practices and traditions. The end results included small improvements in judicial efficiency and work ethics. Like so many areas within rule of law capacity building, however, these incremental improvements are nearly impossible to measure.

¹⁶ Of particular note is the lack of a right to be warned against self-incrimination. For a detailed analysis of the issue and the "corrective" action taken during the occupation by the Coalition Provisional Authority see Dan E. Stigall, *Comparative Law and State-Building: The "Organic Minimalist" Approach to Legal Reconstruction*, 29 LOY. L.A. INT'L & COMP. L. REV. 1, 30-31 (2007).

c) *The Interagency Rule of Law Coordinating Center*

As the importance of rule of law capacity-building was being recognized by the Mission and MNF-I leadership by making it a separate line of operation in the JCP, the ROLC and MNF-I Staff Judge Advocate recognized that the many separate efforts taking place were being conducted by separate commands and agencies; there was no unity of command. To achieve a unity of effort, they decided to create the Interagency Rule of Law Coordinating Center (IROCC). The IROCC was intended to coordinate and synchronize rule of law capacity building. In military parlance, it would serve the role of a fusion cell.

The concept of the IROCC was initially opposed by the senior DOS leadership in the Mission, a result of the well-established institutional concern about the “militarization of diplomacy.” Only after repeated assurance that the IROCC would have no tasking authority over any DOS assets and would operate under the ROLC and MNF-I SJA supervision did the Mission relent.

The concept was that the IROCC would be staffed with action officers from the ROLC office and the MNF-I SJA’s ROL office. Those officers would continue to work rule of law issues but do so together in one office ensuring that all would have a broad situational awareness, redundancies would be avoided, and synergies achieved. The IROCC would be led by an Army JA colonel working for both the ROLC and the MNF-I SJA. When the draft fragmentary order (FRAGO) was initially staffed, the civilians within the ROLC office who would be working within the IROCC objected. These were DOJ employees who balked at working within an organization led by a military officer. Once again, it was necessary to reiterate that the IROCC was a coordinating body and had no tasking authority over DOS or DOJ personnel.

Once the FRAGO was issued by the MNF-I Commander,¹⁷ the military entities involved in rule of law capacity building (MNC-I, MNSTC-I, TF 134, and LAOTF) immediately engaged in the coordination process led by the IROCC. Mission representatives (ROLC, OPA, ICITAP, MOJ and MOI liaisons, INL, Baghdad PRT RLAs) also participated. At the action officer level, it was quickly discovered that the IROCC was a useful (and non-threatening) coordinating body. Weekly video-teleconferences were held with all rule of law capacity builders at the operational level and above.

Initially the IROCC focused on Iraqi detention facility inspections. A central database, accessible to all rule of law capacity builders, was developed for inspection reports, as was a central inspection/ assessment calendar to de-conflict the oversight process. MNSTC-I advisors to the Ministry of Defense Human Rights Office and Ministry of Interior Inspector General offices were able to better coordinate logistical support for Iraqi inspections of their own facilities. MNC-I was able to more quickly provide reports of inspections and serious incident reports to the MNSTC-I liaison officers to ensure inspection reports were not stale and could be investigated by the Iraqis. The results of all inspections were more efficiently and broadly shared across the inspecting community. Significant incidents or particularly bad conditions could be quickly brought to the attention of both the Mission and MNF-I leadership. The IROCC process supported a “targeting” process for key leader engagements.

¹⁷ Copy on file with Center for Law and Military Operations.

The IROCC became the established mechanism for rule of law capacity builders to coordinate and deconflict their efforts. During the weekly meetings, rule of law capacity building initiatives were presented ranging from real property dispute resolution to coupons for access to legal representation for the indigent. For example, the IROCC held a separate forensics forum, gathering subject matter experts from MNSTC-I, MNC-I, ROLC, MNF-I, LAOTF, TF 134, and the UK Mission, to discuss initiatives to help the Iraqis develop a forensic capability within its Ministry of Interior and courts. It was quickly discovered that there were overlapping efforts and opportunities that had not been identified earlier. The forum helped the leadership dispel the enduring myth that the Iraqi courts would not accept forensic evidence and to focus efforts on the weakest link in the forensic arena: police training. The IROCC also held an IT forum during which it gathered all those who were working on developing databases or information management systems for the Iraqis (TF 134, LAOTF, INL, MNC-I). The goal was to achieve compatibility and avoid creating a series of separate, unique, and incompatible information management systems.

The International Committee for the Red Cross attended several IROCC meetings as did the UK Mission legal advisors. After 6 months, the IROCC attempted to engage with the international community to coordinate rule of law capacity building efforts there as well. The Mission leadership objected, arguing that relations with international actors was the exclusive province of the DOS and the ROLC office. To date, there is no organization comparable to the IROCC within the international community in Iraq.

Despite the bureaucratic hesitation, the IROCC proved to be a useful coordinating mechanism. It remains to be seen whether the various agencies involved in reconstruction and stabilization operations in the future will embrace the concept of a fusion cell in the field.

3. *State Department Leadership in Reconstruction and Stabilization*

With very limited exceptions, virtually all of the USG rule of law practitioners currently working in Iraq are military, DOJ, or contractor personnel. Although INL and USAID administer many large rule of law-related contracts, neither organization has a DOS rule of law subject matter expert serving in Iraq. It is particularly noteworthy that the Mission's Rule of Law Coordinator is seconded to the mission from DOJ. In Iraq, the State Department outsources the management of rule of law capacity building and contracts out all reconstruction and stabilization efforts. It is unclear whether either DOS or USAID has the subject matter expertise on staff to manage these contracts.

Although it is widely accepted, including in Army doctrine, that civilians should lead reconstruction efforts, including rule of law capacity building efforts, that ideal has not been realized in Iraq. Treating civilian agencies as the optimal lead places military commanders in the position of having to plan for the inability of another governmental agency to accomplish its mission. The consequences in Iraq have been stark. It remains to be seen what lessons the civilian/military relationship in Iraq will provide for future conflicts.

4. *Conclusion*

Rule of law operations are necessarily complex and, at times, tension-filled. Some of those tensions reflect conflicts between values like judicial process and the need for security. The response to those tensions has been imperfect, but it is undeniable that the security situation in

Iraq is vastly improved. Whether that security has been bought at too high a price remains to be seen.

Rule of law capacity building also creates tensions among those charged with carrying it out. The USG's rule of law capacity building efforts in Iraq have been and continue to be extensive in terms of both manpower and funding. These efforts have been well intentioned and in many areas have accomplished a great deal. The USG rule of law capacity building community in Iraq, however, lacks unity of command and often unity of effort. This is a result of DOS's lack of capacity and willingness to assume its leadership role. The DOS institutional concern over the "militarization of diplomacy" focuses upon DOD's intrusion into what DOS believes is its area of responsibility. It fails to recognize, however, that DOD is filling a void that would otherwise remain empty.

C. Rule of Law in Afghanistan: A View from the Top*

My tour as the Senior Legal Advisor for Rule of Law in Afghanistan proved to be an exciting and challenging assignment in a unique operating environment. The position I occupied did not exist prior to my deployment; but the senior JAG Corps leadership, attuned to the changing national priorities, foresaw the imminent increased emphasis of the Afghan theater of operations and determined the need to establish the position. The idea was to place a JA in the office of the Rule of Law Coordinator (ROLC) coordinator who could help integrate civilian and military rule of law efforts. After many moves, the position is now a permanent one within U.S. Forces-Afghanistan.

1. Differing Institutional Cultures in USG Agencies and the Role of the Rule of Law Coordinator

Another reason for establishing the position was to help close a perceived gap between the Department of State and Department of Defense . A disconnect between those agencies had contributed to the souring of working relationships between the Embassy staff and certain parts of the US military in Afghanistan.

This disconnect can be partly attributed to the different organizational cultures of DOS and DOS. Those differences have been frequently experienced and commented upon by those who have worked in interagency assignments. A prime example of friction was in the area of planning. Military servicemembers are accustomed to working from an operations order that establishes the commander's intent, assigns specified and implied tasks to subordinate units, and allows for flexibility as to how these tasks are accomplished. The US strategy for Afghanistan, as approved by the National Security Council in July 2008, had designated DOS as lead agency for rule of law development. From the Embassy staff's perspective, this meant that the military was under an obligation to inform and clear actions with the Embassy prior to carrying them out. From the perspective of the military servicemembers involved in rule of law development, there was an expectation that DOS would provide guidance as to what tasks would have to be executed under the framework of a greater plan. Unfortunately, this greater plan did not exist.

* LTC Dean Vlahopoulos served as Senior Legal Advisor for Rule of Law at the US Embassy Afghanistan from May 2008 to May 2009.

The office of the ROLC is an office that does not normally exist in US embassies. It exists in the US embassies in Afghanistan and Iraq to assist in the coordination of rule of law development in these war-torn societies. When I arrived in Kabul the ROLC office was manned by a dedicated and hardworking individual serving his third consecutive year in Afghanistan. Although serving in a DOS position, he was employed not by DOS but by DOJ. Originally a federal prosecutor, he had only limited experience and training applicable to managing and supervising the legal reconstruction of an entire nation. To make things worse, his office was severely undermanned. Until my arrival, it consisted of himself, his Afghan secretary, and occasional short-term DOS augmentees. During my deployment, DOS assigned an additional career Foreign Service Officer to the office for a year-long tour .

The breadth of the responsibilities of the ROLC made actual planning impossible. The ROLC served as the Ambassador's point person on all legal matters. He was the face of the United States on all international meetings involving legal matters and the principle point of contact with the Afghan justice sector officials. The time requirements of those tasks eliminated the possibility of any time for strategic planning, even by the most dedicated and best-intentioned individual. Moreover, ROLC had very limited powers. I would often joke with him that the ROLC had no rule of law budget, runs no rule of law programs, and does not evaluate any of the rule of law personnel. In terms of what constitutes power within the federal bureaucracy, he had none. His only power was that he spoke on behalf of the Ambassador on rule of law issues.

2. *The State of Development Efforts in Afghanistan*

The challenges facing rule of law in Afghanistan are formidable. Afghanistan is a nation that has suffered thirty years of consecutive conflict; it is an Islamic, multi-ethnic, tribal and decentralized society. The human capacity of Afghanistan is very low. It lacks an educated middle class to run the machinery of government; many of the educated have either been killed or have fled.

Development efforts have been halting and inadequate. After the 9-11 terrorist attacks on the United States and the subsequent liberation of Afghanistan from Taliban rule in December 2001, the international community held the Bonn Conference to agree on how to govern the country. The development efforts organized pursuant to the Bonn framework have suffered from a lack of resources and unity of effort. The events that led to the liberation of Iraq from Ba'athist rule focused the attention of the United States and the international community away from Afghanistan. For US policy makers, in regards to personnel and funding priorities, Afghanistan was clearly a secondary effort.

In an effort to reinvigorate what was obviously the lagging success of the international community's' rule of law efforts in Afghanistan, a subsequent conference was held in Dubai, United Arab Emirates in December 2006. The timing of this new effort was closely tied to the Government of Afghanistan's own establishment of the Afghan National Development Strategy (ANDS) framework, a clear Afghan commitment to justice sector reform, and a growing international interest in improving justice sector assistance to meet the needs of the Afghan people. This was followed by the July 2007, Rome conference that further defined rule of law goals and resulted in an additional \$98 million in pledges earmarked for rule of law development. Finally, a June 2008 conference in Paris reaffirmed the importance of rule of law in Afghanistan and further increased the pledges by the donor nations.

International development efforts in Afghanistan are spearheaded by the United Nations Assistance Mission in Afghanistan (UNAMA), which was established on 28 March, 2002 by UN Security Council Resolution 1401. Its original mandate was to support the Bonn Agreement. Reviewed annually, this mandate has been altered over time to reflect the needs of the country and was recently extended until 23 March 2010 by UN Security Council Resolution 1746. UNAMA's mandate currently has the following elements: providing political and strategic advice for the peace process; providing good offices, helping the government to implement the Afghanistan Compact, assisting with the Afghanistan National Development Strategy and the National Drugs Control Strategy, promoting human rights; providing technical assistance, ; and continuing to manage and coordinate all UN-led humanitarian relief, recovery, reconstruction and development activities in Afghanistan. These elements of the UNAMA mandate were endorsed by the UN Security Council in Resolution 1662. The international conferences are important because they provide guidance and direction from the donor nations (including the United States) as to the development framework the international community is attempting to establish in Afghanistan.

3. The View of the International Development Effort From the Ground in Kabul

For practical purposes, what mattered was that the Afghan National Development Strategy (ANDS) approved in July 2008, established three overarching objectives for the rule of law development in Afghanistan: establish improved institutional capacity to deliver sustainable justice services; establish improved coordination and integration within the justice system and other state institutions; and improved quality of justice services. These objectives were further refined in the National Justice Sector Strategy (NJSS) which finally generated the National Justice Plan (NJP). This is the key document regarding all rule of law development efforts in Afghanistan because it establishes specific rule of law objectives in six areas: accountable institutions; infrastructure; human capacity; legal framework; integrated justice; and citizen rights awareness. The NJP is in theory an Afghan government plan; the Afghan government maintains responsibility for its implementation.

It is important to understand that the US government is a significant, but not the only entity implementing rule of law programs in Afghanistan. Our efforts are loosely nested under the UNAMA umbrella and complemented by the efforts of other donor countries (UK, Canada, Italy, the Netherlands, Germany, and others) and organizations such as the International Security Assistance Force (ISAF), the United Nations office for Drugs and Crime (UNODC), the European Police mission in Afghanistan (EUPOL) and the World Bank. Simply going by the commitment of financial resources and manpower, though, the United States was definitely the most important single contributor for rule of law development in Afghanistan.

4. The US Rule of Law Effort in Afghanistan

The U.S efforts to implement rule of law in Afghanistan were a joint civilian-military effort. Five major separate US agencies had rule of law development programs, with separate streams of funding and assigned personnel. The three main civilian agencies were: DOS Bureau of International Narcotics and Law Enforcement (INL), the United States Agency for International Development (USAID), and the Department of Justice. The military had two main implementers: Combined Joint Task Force-101 (CJTF-101) and the Combined Security Transition Command-Afghanistan (CSTC-A).

INL was by far the single greatest US contributor in terms of assets committed to Afghan rule of law reconstruction. INL was responsible for the administration of two major U.S. programs: First, INL ran the Justice Sector Support Program (JSSP), which provided direct support to the Afghan Attorney General's Office, supported the Afghan Ministry of Justice with embedded mentors, and provided additional advisors to the Afghan legal aid and defense attorney support programs. Second, INL had a regional training program for justice officials and supported the Independent National Legal Training Center, a training facility tasked to provide common baseline training for all Afghan legal professionals entering public service. INL also administered the Corrections Sector Support Program (CSSP) which was responsible for corrections infrastructure development, a corrections training program, and direct support to the Afghan Central Prisons Directorate (CPD). The majority of deployed INL personnel were contractors.

USAID provided direct support to the Afghan Supreme Court, provided support to legislative drafting for the Afghan government, published and distributed a wide variety of legal reference materials, provided support to legal outreach and efforts to better understand the Afghan informal (tribal) justice system, and provided support to legal aid efforts. The USAID efforts were managed by government employees but the implementation was similarly accomplished by contractors.

DOJ was tasked to create and mentor the Afghan Counternarcotics Justice Task Force (CnJTF). The CnJTF was a special counternarcotics entity within the Afghan government and the only court of special jurisdiction in Afghanistan. It was designed to litigate drug cases involving quantities above a certain threshold. The task force was mentored round-the-clock by a DOJ team of experienced federal prosecutors and was able to create a cadre of trusted Afghan judges and prosecutors that could pass a US-administered polygraph. This Afghan team was compensated significantly in excess of regular Afghan salaries, which provided an incentive to remain free of the corruption frequently associated with narcotics law enforcement. The CnJTF was considered the best trained and least corrupt judicial body within the Afghan government. One judge paid with his life for upholding this standard. DOJ also spearheaded additional efforts in anti-corruption and was considering programs involving the United States Marshals Service to enhance judicial security.

The Combined Security Transition Command-Afghanistan's (CSTC-A) primary mission in the rule of law arena was to administer the Focused District Development program (FDD). This program was a detailed, district-by-district training program for the Afghan National Police (ANP). The ANP, as an organization, seemed woefully unprepared to assume law enforcement duties across the nation, and even less prepared to stand as a co-equal partner with the Afghan National Army (ANA) in the counterinsurgency fight. Despite less than adequate training, the ANP was the most frequent target of the Taliban since they often manned static checkpoints and represented the power of the central government in many remote areas. The ANP suffered from low morale and low pay, and was perceived by the Afghan public as a very corrupt institution. CSTC-A was also involved in assisting the preparation of police legislation, facilitating police-prosecutor interaction, developing of military justice for the ANA, and assisting in the transfer of detainees from US custody for prosecution by the Afghan courts.

While police mentoring programs technically fell outside the purview of rule of law, the general consensus was that, unless the police and prosecutor mentoring were working in tandem, there would be no long term progress in rule of law development. An obvious problem was that

the ANP was currently being trained and utilized as a fighting gendarmerie participating a tough counterinsurgency conflict. Under the conditions prevalent at the time, traditional law enforcement training came second.

The final US implementer in the rule of law arena was CJTF-101. Headquartered out of Bagram Airfield, the CJTF fielded four separated brigade-sized task forces and was responsible for securing Regional Command-East (RC-East) as part of ISAF's fighting forces. The CJTF-101 Staff Judge Advocate had a separate rule of law officer to supervise the brigade rule of law efforts and would implement rule of law guidance through the traditional FRAGO process. CJTF-101's main advantage was that it was forwardly located in provinces and could directly impact local rule of law developments. CJTF-101's main disadvantage was that RC-East was hostile territory, and it was difficult to make meaningful connections with local justice officials spread over such a large geographical area. Brigade legal sections were simply not manned or equipped to serve as the rule of law development offices for an area larger than some US states. The Provincial Reconstruction Teams (PRT) joint, multi-disciplined interagency force provided some possible additional resources to each brigade to assist rule of law efforts, but until mid 2008, the PRTs lacked specific rule of law expertise.

The main asset in the CJTF-101 inventory was the availability of CERP funding. Using this funding, the brigades could fund additional infrastructure for the provincial level of the Afghan justice sector. In simple terms, they could build courthouses, justice centers, and jails. CJTF-101 had the limited ability to interact with local government officials through what they called "Key Leader Engagements" (KLEs). These, essentially, were periodic visits and discussions of legal issues with Afghan provincial justice sector officials. Low manning levels did not allow for any meaningful ongoing mentoring efforts. CJTF-101 was very effective in distributing legal reference materials, leveraging the training opportunities provided by other US Government entities, and supporting rule of law through a variety of radio and other information operations campaigns. CJTF-101 was instrumental in the creation and funding of the Independent Afghan Bar Association. This was a prime example of the successful use of CERP funding to accomplish a strategic national level objective.

5. Coordinating US Efforts

All these activities were monitored on a weekly basis by the Special Committee on the Rule of Law (SCROL). The SCROL brought together these five implementers as well as the representatives of the PRT office, the Embassy political section, the FBI, the US Treasury Department, and ISAF. The SCROL served to keep the Embassy ROLC informed of other ongoing activities, but was not able to provide any meaningful strategic guidance or direction. The document that guided the US rule of law efforts in Afghanistan was a short document approved by the National Security Council in 2008. But this document was not intended to provide a programmatic approach to integrate and manage all USG efforts in Afghanistan.

One of the major efforts during my time in Afghanistan was to draft a document that created a single plan that accounted for the over 120 different rule of law activities taking place in theater by five separate implementing agencies. All US efforts were anchored to one of the six categories of the NJP and managed both geographically and as part of a national, strategic plan. The draft plan provided one- and three-year objectives and established a six-month periodic review allowing for adjustment of the stated objectives. More importantly, it leveraged the power of the newly created Integrated Civil Military Action Group, which provided a mechanism to

assign specific actions to the various US agencies. While it is still too early to determine the success of this program, the Embassy was able to use it to successfully prioritize all the future judicial construction within RC-East with the Afghan government, resolving the longstanding problem of haphazard construction efforts, which had been a source of disagreement between military implementers and the Embassy.

6. *The Way Ahead*

Tremendous challenges lay ahead in rule of law development in Afghanistan. One tempting avenue would be to create a “Rule of Law Czar” assigned specific objectives and armed with real power to assign people and control budgets. Given the nature of the interagency environment, though, this is unlikely to occur. Other issues remain equally challenging. Corruption remains endemic across the Afghan government; opium production remains the staple of the Afghan economy; the physical and human infrastructure is lacking and may take a generation to improve; there are limits to Afghan federal power and a lack of physical security limits the reach of the central government. There is also the need to incorporate and co-opt the informal justice system and legitimize the legal practices that are probably currently providing more legal services to Afghan citizens than the formal justice sector. Finally, there must be increased political will by both the Afghan and US governments to enforce the rule of law. The task is not impossible but it will be a long and hard fight.

XI. Rule of Law Project Descriptions

Editors' Note: As with the previous chapter, this chapter contains practical discussions of 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 by various 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. Prosecution Task Forces and Warrant Applications in Multinational Division-Center*

The US-Iraq Security Agreement that went into effect on 1 January 2009¹ marked a significant milestone in the six-year conflict in Iraq. It not only signified an important political turning point, it also radically changed the legal operating environment for US forces in Iraq. Compliance with Iraqi law, particularly Iraqi criminal law and procedure, became a priority under the agreement, and as the primary interface between US forces and Iraqi judges and judicial institutions at the division level, the Rule of Law Working Group experienced an added sense of urgency. MND-C established Prosecution Task Forces (PTFs) to ensure an accurate understanding of and proper compliance with Iraqi criminal law and procedure. The PTFs served two functions: They helped ensure US compliance with Iraqi law under the Security Agreement and helped strengthen local criminal investigations and prosecutions. In practice, however, both missions overlapped, particularly in the area of criminal investigations.

US understanding of Iraqi law prior to the implementation of the US-Iraq Security Agreement was limited, primarily because operations under the United Nations Security Council resolutions did not require compliance with Iraqi law.² Prior to the Security Agreement, multinational forces had conducted operations in Iraq in accordance with a series of Security Council resolutions adopted pursuant to Chapter VII of the U.N. Charter. The resolutions authorized multinational forces to take “all necessary measures to contribute to the maintenance of security and stability in Iraq.”³ The provisions of the Security Agreement, however, were

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¹ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008 [hereinafter Security Agreement], available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

² See, e.g., S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) [hereinafter UNSCR 1546].

³ UNSCR 1546, *supra*, ¶ 10. The last in the series of U.N. resolutions extending the mandate of the multinational force was U.N. Security Council Resolution 1790, which expired on 31 December 2008. S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

more restrictive than the broad mandate of the UNSCRs. Notably, the Security Agreement declared that it was the “duty” of US forces to “respect Iraqi laws, customs, traditions, and conventions” and to take “all necessary measures for this purpose.”⁴ Provincial Iraqi Control (PIC) Agreements completed prior to implementation of the Security Agreement helped familiarize US forces with Iraqi law but did not compel compliance with local laws.

The PTFs, meanwhile, were responsible for guiding criminal investigations and ensuring compliance with local evidentiary standards and procedures. The PTFs generally took the form of committees comprised of US military personnel (e.g., PMO, JAG, S2), US law enforcement contractors (e.g., Law Enforcement Professionals or “LEPs”), and members of the Iraqi Security Forces (ISF). Some PTFs included local judges as well, although the level of judicial involvement in the committees varied by province.

The PTFs met regularly, usually on a weekly basis, to review criminal evidence and to focus investigations. Frequent key leader engagements (KLEs) with local judges, conducted primarily by brigade-level judge advocates and civilian PRT rule of law advisors, helped clarify what evidence the judges required (e.g., eyewitness statements, documentary evidence, forensic evidence) in order to approve warrant applications. Feedback from judges also identified areas where law enforcement investigations needed improvement. In one province, for example, arrest warrants applied for by the Iraqi Police (IP) were consistently rejected by the local Investigative Judge (IJ). Frustrated by the apparent intransigence of the IJ, the IPs eventually stopped applying for warrants altogether. During a meeting between the judge and the brigade rule of law attorney, however, the IJ expressed his own frustration with the quality of evidence presented in support of the IPs’ warrant applications. After explaining what evidence he expected to receive and consider, the PTF worked with the IPs to develop evidentiary packets sufficient to meet the IJ’s evidentiary threshold. Warrant applications accompanied by adequate supporting evidence were approved by the IJ thereafter.

The PTFs also helped the ISF collect and analyze criminal evidence. As part of the division’s wider effort to professionalize the ISF, law enforcement personnel received training on subjects ranging from basic law enforcement techniques to crime scene management and forensics. Working through the PTFs, the ISF gained practical experience dealing with real world exigencies, particularly in the area of evidence analysis. US forces held training sessions for the ISF and local judges that explained the collection, preservation, and analysis of scientific and forensic evidence. These training sessions noticeably increased the acceptance of physical evidence in a society still largely reliant on eyewitnesses and testimonial evidence. By highlighting the value of physical evidence in pending cases, the PTFs helped improve the investigative proficiency of the ISF while promoting the use of scientific techniques by both judges and the police.

Finally, in some provinces, IJs participated directly in the PTFs. Sitting with the committees, the judges reviewed evidence and could identify evidentiary gaps in ongoing criminal investigations. The judges regularly pointed out weaknesses in cases and could direct further investigation when necessary. The judges’ participation, moreover, was not limited to reviewing evidence for warrant applications. The judges, providing guidance similar to the direction they might give to Judicial Investigators (JIs) at an Investigative Hearing, could specify

⁴ Security Agreement, *supra* note 1, art. 3, para. 1.

what additional evidence would be needed for a successful prosecution. By providing a forum for direct communication between judges and the police, these PTFs promoted an unprecedented level of communication and cooperation that helped strengthen local prosecutions.

Ultimately, the PTFs were an invaluable tool for ensuring compliance with Iraqi law and respect for the rule of law in the provinces. Working directly with judges and the police, the PTFs helped improve the effectiveness of criminal investigations and prosecutions by sharing information and building local relationships that should endure even after the withdrawal of US forces from Iraq.

B. Linking Up Investigative Judges with Investigators*

Soon after the Law and Order Task Force (LAOTF) expanded its Investigative Judge Team in the summer of 2008, it became apparent that the Investigative Judges (IJs) working at the Central Criminal Court of Iraq – Rusafa (CCCI-Rusafa) had little to no personal interaction with their Iraqi Police Investigators stationed throughout the Rusafa (east) side of Baghdad. The only apparent solution was for US JAs to serve as a conduit to build relationships between the Iraqi IJs and the Iraqi investigators. In order to do so, JAs not only had to build relationships with the 26 CCCI-Rusafa IJs, but also to identify, find, and build relationships with the investigators assigned to investigate the IJs' cases. The link-up between the IJs and their investigators was absolutely essential to progressing a case through the Iraqi criminal justice system and therefore essential to the overall advancement of the rule of law in Iraq.

With the implementation of the 1 January 2009 Security Agreement,¹ Coalition Forces (CF) must obtain an Iraqi arrest warrant prior to detaining a suspected terrorist.² Although IJs issue the warrants; investigators build the cases and present them to the IJ for issuance of a warrant and after arrest, for issuance of a detention order. They are also responsible for follow-up as the IJ prepares the case for forwarding to the trial court. As a result of this interaction, in addition to building relationships with the IJs in their area of operations, it is equally important

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¹ Agreement Between the United States of American and the Republic of Iraq on the Withdrawal of the United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, Nov. 17, 2008 [hereinafter SA], available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (last visited Aug. 24, 2009).

² SA, *supra* note 1, art. 22, para. 1. The full paragraph reads: “No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4.” In addition to certain exceptions to the warrant requirement under Iraqi law, the SA itself provides CF an exception “in the case of combat operations conducted pursuant to Article 4.” *Id.*, art. 22, para. 5. Article 4 (Missions) of the SA describes “[T]he Government of Iraq[’s request for] the temporary assistance of the United States Forces for the purposes of supporting Iraq in its efforts to maintain security and stability in Iraq, including cooperation in the conduct of operations against al-Qaeda and other terrorist groups, outlaw groups, and remnants of the former regime.” *Id.* Art. 4, para. 1. See also CDR Trevor Rush, *Don’t Call It a SOFA! An Overview of the U.S.-Iraq Security Agreement*, ARMY LAW., May 2009, at 38-39, 42.

for CF to know and build relationships with the Iraqi investigators that work within the investigative judges' jurisdictions. Although IJs use both Judicial Investigators and Police Investigators, in the types of terrorism cases relevant to CF, Police Investigators are almost exclusively used, and, more specifically those investigators that work with the IJs from the Central Criminal Court of Iraq (CCCI).³

In Baghdad, the Central Criminal Court of Iraq has two locations, one courthouse on the west side of the Tigris River (commonly referred to as the Karkh district) and one courthouse on the east side of the river (or Rusafa district). These two courts, CCCI-Karkh and CCCI-Rusafa, have primary jurisdiction over all terrorist cases for Iraq. From May 2008-May 2009, there were approximately 25 IJs in each CCCI court. While IJs from CCCI-Karkh and CCCI-Rusafa have worked with CF since their inceptions in 2003 and 2007, respectively, the interaction with investigators from those courts was limited prior to the implementation of the SA. Beginning in June 2008, the Law and Order Task Force expanded its interaction with Iraqi investigators to assist in the overall rule of law project within the CCCI-Rusafa.⁴

Investigative Judge “Jurisdictions”

All of the IJs at CCCI-Rusafa have either a “subject matter jurisdiction” or an “area/location jurisdiction” (with a subject matter jurisdiction within that location). While not referred to by the Iraqis as “jurisdictions,” for explanatory purposes, that term is the closest analogy for how the caseload is divided among the IJs by jurisdictions. Focusing on the Rusafa side of the Tigris River,⁵ the 26 IJs at CCCI-Rusafa cover eight primary jurisdictions spread out among eight different Iraqi “police station” locations.

There are essentially two agencies within the Ministry of the Interior that investigate terrorism cases, the Iraqi Criminal Investigation Directorate (CID)⁶ and the National Information and Investigation Agency (NIIA).⁷

³ Police Investigators are separate and distinct from Judicial Investigators (JIs). Judicial Investigators are civil servants that work within the court and they are employed by the High Judicial Council (HJC) and, as a result, they can be held accountable by court personnel, whether it is Chief Appellate Judge or Investigative Judge. Police Investigators are employed by the Ministry of the Interior (MoI) and, consequently, IJs have less authority over a Police Investigator than a JI. While IJs may reprimand an investigator, only the MoI can discipline them, the. While IJs would prefer to use trained JIs to assist on investigations, reality on the ground in Iraq, at least between June 2008 and June 2009, was that CCCI-Rusafa IJs almost exclusively used Police Investigators to conduct investigations.

⁴ Prior to June 2008, LAOTF worked with only one IJ, the Chief IJ, Judge Hussein on all of the cases that LAOTF helped to initiate within the CCCI-Rusafa jurisdiction. Between June and December of 2008, one LAOTF team focused on expanding its interaction with all 26 CCCI-Rusafa IJs and assisting on the processing of terrorist cases that originated solely within the Iraqi criminal justice system. After the implementation of the 1 Jan 09 SA, LAOTF's focus again shifted to assisting CF to obtain warrants and detention orders from CCCI-Rusafa IJs, as well as coordinating investigative hearings.

⁵ The author worked exclusively with CCCI-Rusafa IJs and their investigative agencies; however, through numerous conversations with IJs, investigators, and CF familiar with the Karkh side of the river, it became apparent that the Karkh and Rusafa jurisdictions were similar in their operations.

⁶ Iraqi CID was established by Major General Dhia Hossein, Director, CID, in close coordination with then LTG David Petraeus in his role as the Commander, Multi-National Security Transition Command-

Including its headquarters building, Iraqi CID has approximately 11 offices throughout Baghdad. The first nine offices are called CID #1 through CID #9 and the other two offices, those utilized most frequently by CF are called Rusafa Operations and Karkh Operations.⁸ Generally, each CID office has the following subsections: counter-terrorism, counter-kidnapping, counter-organized crime. Each subsection has multiple investigators and each is overseen by one or more IJs from CCCI.

While CID started out as an investigative agency focused on the national level major crimes, NIIA started out as an intelligence agency with relatively few investigators compared to CID. With the fall of Saddam Hussein, as the number of terrorists in Iraq grew, NIIA expanded from solely intelligence gathering against terrorists into investigations. As of the summer of 2009, the NIIA had two primary locations dedicated to the investigation of terrorist cases.

Each IJ is assigned to a jurisdiction that has investigators assigned to CID or NIIA and for CCCI-Rusafa, this includes one of eight locations on the east side of the river. For example, an IJ with a “narrow jurisdiction” could be assigned to work with the counter-terrorism section of CID #2 in the Adamiyah area of east Baghdad or an IJ may have a broader jurisdiction working with the al-Masbah NIIA office which covers all major terrorist cases that could originate anywhere in Iraq. Rusafa Operations IJs will handle all cases in which CF are attacked and all cases where Iraqi Security Forces are targeting terrorists.

Linking Up IJs with Investigators

Due to the security environment in Baghdad, with few exceptions, IJs work out of their offices at the court. With good reason, primarily fear of assassination, IJs very rarely visit the Iraqi police stations where their case files are located. Instead, they rely on the daily courier service between the IP stations and the court. Each day at approximately 1000, a trusted courier brings approximately 30 files from the IP to the IJ at the court. The courier then waits in the hallway while the IJ reviews the case files, issues judicial orders in green ink on the case file and returns the files to the courier anytime between 1300-1400. The courier then returns the files to the IP station where the investigator assigned to the case is responsible for following up on the judicial order. Similar to the IJ, the investigators rarely venture out of their IP station, but they will draft hand-written correspondence that is forwarded to another agency for assistance in gathering the judicially-requested information. When the investigator gets a response to his memorandum, then he will forward that response to the IJ. Essentially every action requires a memorandum and most times, this antiquated process can cause the system to come to a slow crawl.

One suggestion from LAOTF Judge Advocates was to marry up the IJs with their investigators. Because the pretrial detainees and case files are both located at the IP stations, the initial suggestion was to get IJs out to the IP stations rather than have the investigators come to

Iraq between June 2004 and September 2005. Author interview with MG Dhia, Fall 2008. See also <http://en.wikipedia.org/wiki/MNSTC-I> (last visited Aug. 24, 2009).

⁷ Formerly known as the National Intelligence and Investigation Agency. “Intelligence” was changed to “Information” due to its negative connotations. Author interview with Brigadier General Salim Qassim, Lead Investigator, Baghdad Operations Center, Summer 2008.

⁸ These latter two CID offices are co-located with the Rusafa Area Command (RAC) (at the Old Ministry old Defense complex) and the Karkh Area Command (KAC) (located at Forward Operating Base Justice).

the IJ. This suggestion was met by resistance from the vast majority of the IJs for a variety of reasons, with safety and security, both long-term and short-term, as the primary factors. When CF volunteered to provide the secure means of transportation to get the IJs out to the IP stations, the idea gained momentum. While the primary focus of this rule of law effort was to follow the “by, with, and through” directive, this initial means of secure transportation was solely to get momentum in the process. Despite CF best efforts, an order from Chief Justice Medhat, issued through the Chief Appellate Judge at CCCI-Rusafa, Judge Ja’far, was still required to get the IJs to make bi-monthly trips to their respective IP stations.

In addition to travel and security concerns, initiating face-to-face meetings between the judges and the investigators had other challenges. In the Iraqi criminal justice system, there was a clear hierarchy, and the judges clearly viewed themselves as well above the investigators. The judges expected preferential treatment when they visited the police stations, and when the police stations complied, things went smoothly. But when the police did not show deference to the judges, it would be a wasted trip. Through much trial and error, the LAOTF JAs were able to assess the different personalities to make sure each IJ visit to a police station was productive. In addition to visiting their IP stations to meet with investigators to review case files, the IJs also met with detainees, inspected detention facilities, and interviewed witnesses. As the judges and investigators got to know and trust each other, their working relationship helped to increase case throughput, both by decreasing the time for investigations and increasing the volume of cases investigated.

Bringing It All Together – Warrants, Detention Orders, and Investigative Hearings

Between June and December 2008, LAOTF’s work with IJs and investigators was focused on the increasing the efficiency and throughput of cases handled exclusively within the Iraqi criminal justice system. This work led to LAOTF’s discovery that IJs and their police investigators rarely, if ever, met and their lack of personal interaction led to numerous cases deficiencies and delays. During this time prior to the implementation of the Security Agreement, the majority of CF units were not concerned with getting warrants or detention orders because they were not required before 1 January 2009. As a result, the CF that did not need to build cases within the Iraqi criminal justice system did not fully appreciate the role and relationships between IJs and their police investigators.

With the implementation of the SA on 1 Jan 09, CF outside of LAOTF quickly learned that IJs relied heavily on their investigators for the processing of cases. The need for CF to identify, locate, and build relationships with the IJs’ investigators became just as important as knowing the IJ himself. During the six months following the implementation of the SA, essentially all CF Warrant Task Forces throughout Iraq had successfully identified the key judicial personnel in their sectors and forged the relationships essential to the process of obtaining warrants, follow-on detention orders, and ultimately, investigative hearings.

Rule of law efforts focused on identifying and building relationships of trust with both the IJs and their investigators is not only essential to case processing of terrorists cases, but also to rebuilding and reinvigorating the Iraqi criminal justice process, which in many locations moves slowly due to the lack of face-to-face working relationships and communications between IJs and their police investigators.

C. Scenario Based Criminal Investigator Training for Iraqi Police in Northern Iraq*

Background

During 1st Armored Division's deployment to northern Iraq from September 2007 to December 2008, the extreme overcrowding of Iraqi pretrial detention facilities was a major, persistent issue. The overcrowding led to a worsening of already poor living conditions, an increase in detainee abuse, and a general lack of respect for the criminal justice system by the local population. The division Rule of Law team (composed of three JAs and two paralegals) was able to identify poor criminal investigative techniques as a major contributing factor to the backlog in several provinces in northern Iraq and undertook a program to correct the problem, realizing several collateral benefits in the process.

The Basis of the Problem

Under Iraqi law, Iraqi police investigators conduct criminal investigations under the direction of an investigative judge or judicial investigator and are authorized to collect evidence and question witnesses. The Ministry of Interior (MoI) requires every police investigator to attend a police college for several years. But many of the investigators in Salah ad Din never attended police college. Rather, they had been transferred directly from the Iraq Army and had been promoted to fill senior positions, even though they had never received any training on criminal investigations. The police investigators' lack of witness interviewing skills and understanding of forensic techniques led them to abuse detainees in order to procure confessions. Investigative judges also played a part: upon receiving a reportedly poor investigation, they would authorize continued pretrial detention while sending the case back to the police for further investigation. This stalled the case with the detainee in confinement but gave the police little incentive to conduct a proper investigation (as would have been the case if detainees were released if the investigation was inadequate). The breakdown between judges and police was compounded by a significant social disparity between the two professions. In Iraq, judges are members of the highest echelon of society, whereas police officers are considered common and unprofessional. As a result, the judges and the police rarely spoke. One step toward solving the problem was for judges and police officers to collegially discuss the requirements of a criminal investigation in the abstract, without the outcome in any particular case, and the political consequences, depending on the conversation.

Proposed Solution

Although the problem of overcrowding was ubiquitous throughout northern Iraq, the rule of law team decided to address the problem in Salah ad Din province first. Salah ad Din offered several advantages as a pilot location: the strong working relationship between the division, the local BCT (1/101 ABN), the Salah ad Din PRT, and the Salah ad Din International Police Advisors (IPAs);¹ the proximity of the local police training facility to the rule of law team's

* CPT Emilee Elbert served as a Rule of Law Attorney for the First Armored Division, Multi-National Division-North from September 2007 to December 2008.

¹ The IPAs worked for the Civilian Police Assistance Training Team (CPATT). CPATT, a subordinate command to Multi-National Security Transition Command- Iraq (MNSTC-I), is charged with

location; and the relationship between the coalition forces and the Iraqi police and the judiciary. Through a rule of law working group, which included staff members from the division and representatives from each of the previously mentioned groups, the rule of law team developed and implemented a scenario-based training program for the Salah ad Din police investigators.

Implementation

Based on the group's assessment, the course had to include scenario-based training and legal training from an Iraqi judge. According to the IPAs, some of whom had been training Iraqi police for over three years, students did not respond well to classroom instruction. The Iraqi police were inattentive and had trouble retaining information that was presented to them, particularly when the class was given using a computer-generated slide show (a medium frequently used by CPATT and MNSTC-I).² The IPAs believed that training that included realistic scenarios would be far more effective. Their training plan consisted of class-room instruction developed by CPATT and approved by MoI, but also included the use of physical objects, such as cars and containers; real property, including buildings; and actual participants in the local jail and legal system, including corrections officers, the local police chief, and investigative judges.³

From the rule of law perspective, instruction by an Iraqi judge in the classroom and the inclusion of an investigative judge during the scenario-based training modules were essential. Through a series of engagements with the provincial Chief Judge in coordination with the Salah ad Din PRT, we convinced the judge to provide an investigative judge to instruct the police investigators on the legal standards for arrest and detention, evidence collection, and presenting evidence at the investigative hearing; the Chief Judge also agreed to have that same judge participate in the scenarios. Including the judiciary in the training accomplished two important goals: (1) it provided the police investigators with an understanding of the judges' requirements for conviction in accordance Iraqi Criminal Procedure Code, and (2) it helped build relationships between the judges and the police by requiring them to work together in a neutral environment devoid of the conflicting political pressures that surrounded the performance of their duties in actual cases.

manning, training, and equipping the civil security forces of the Ministry of Interior in Iraq. This includes the Iraqi Police Service, the Department of Border Enforcement, the National Police, and additional specialized units.

² Through the proctoring of simple tests to the police investigators in Salah ad Din, we determined that all ranks of investigator, including the provincial police chief, lacked even basic knowledge of criminal investigative techniques and the legal standards for arrest and detention.

³ According to the Salah ad Din IPAs' proposal document, the "training will focus on proper emergency call logging, handling, and dispatching procedures followed by the deployment and operations of patrol or line officers, carrying over to criminal investigations, evidence handling, interview and interrogation of suspects and witnesses, report writing, and finally presenting a case to the courts. It will allow for multiple scenarios to be running simultaneously creating a realistic work environment for the Iraqi police in which they can safely be mentored in the carrying out of daily business." Iraqi Police Scenario Based Training Initiative, Salah ad Din Province International Police Advisors (3 March 2008) (on file with author).

Sustainment

Since 2004, many attempts had been made by coalition forces to train the Iraqi police. Some were successful, but many did not survive the redeployment of the unit sponsoring the training. The lack of follow-through eroded the confidence of the Iraqi police in our methods and created confusion among the judiciary. Perhaps the most important part of our plan was to lay the groundwork to sustain the training beyond 1st Armored Division's departure. First, the training was designed to be transplanted to other provinces in northern Iraq based on the success of the first US-run course in Salah ad Din province. Second, the course was designed to be turned over to permanent Iraqi instructors at the provincial police academy prior to our departure from theater. When the course was successfully transferred to Iraqi control, several positive secondary effects became apparent: (1) the Iraqis were able to take control of the course, ensuring it would continue indefinitely; (2) we were able to assess the success of the course and make necessary adjustments before implementing the course in other provinces; and (3) high ranking police officers in other provinces saw the success of the course and agreed to initiate similar courses.

Conclusion

By emphasizing scenario-based training, which included instruction from a local investigative judge, the rule of law team was able to improve the rule of law in Salah ad Din province in three distinct ways. First, with their improved investigative skills, Iraqi police investigators were able to conduct basic criminal investigations in a timely manner that was effective at investigative hearings. With improved investigations, the judges could process the detainees more quickly through the justice system (either by convicting the detainees and transferring them to the prison system, or by dismissing meritless cases and releasing the detainees back to their families), thus alleviating some of the strain on the detention system in the province. Second, relying on Iraqi judges to conduct the training made the training sustainable beyond our unit's (and indeed US forces') redeployment. Finally, the form of the training allowed the investigators and judges, both of whom are critical to the effective operation of the criminal justice system, to build a working relationship in a safe environment that can improve their combined effectiveness in countless cases to come.

D. Mudhouse is Born in Wasit Province^{*}

Background

By October 2008, the rule of law in Wasit was advancing and developing. Security forces were stabilizing, and the courthouses throughout Wasit were functioning well. Conviction rates were rising, crime had decreased, human rights violations by the police and other governmental agencies were virtually non-existent and perhaps most importantly, the judiciary and security forces were beginning to work together for the populace. The only problem was the populace was not aware of any of this. It became very clear to the Wasit Rule of Law Team, consisting at the time of a Rule of Law Coordinator for the PRT and the Brigade Judge Advocate for the maneuver brigade responsible for Wasit, that an information operations (IO) campaign had to be

^{*} CPT E. Patrick Gilman served as a Brigade Judge Advocate for the 41st Fires Brigade, Multi-National Division – Center (South) from June 2008 to July 2009.

waged. It would attempt to spread the word to the people of Wasit that security was improving, the judiciary was working for them, that Iraq is their country, and they need to stand up to protect it.

Several months earlier, the PRT Public Diplomacy Officer (PDO) had reached out, through local media contacts, to a group known as Mudhouse: a local sitcom broadcast on Sumaria Satellite Television. The show, a satire filmed in Wasit Province, is most easily identified as a series similar to Seinfeld: a show about nothing. It is set in the 1950s against a backdrop of an Iraqi family living in a mud house and deals with the traditions and customs prevailing in the agricultural segments of Iraqi society during that time. The series, which airs weekly and had just begun filming its third season, highlights the spontaneity and simplicity of Iraqi life during that period. In May 2008, the PDO had worked with the cast of Mudhouse to put on a comedy show for the populace of Al Kut, which had been the first such entertainment in Wasit Province since the fall of the former regime in 2003. Its purpose was twofold: to determine if the populace of the Shia dominated Wasit Province would be receptive to a secular, nonreligious family activity, and would turn out to attend in large numbers an event associated with Coalition forces. By all accounts, the show was a huge success. It was hosted in an indoor theater and in attendance was approximately 3000 over two nights. Subsequently, the Rule of Law Team began exploring with the PDO the idea of using a Mudhouse comedy production as a method to expose the populace to rule of law themes.

At first glance, enlisting Mudhouse as a vehicle to reach the relevant Iraqi population seemed futile. It was assumed that the demographic for Mudhouse was those alive during the period covered by the show –the 1950s – which is not a major target audience for a program seeking to reach a younger demographic. What the Rule of Law Team came to realize, with the assistance of the PDO, was that Mudhouse’s popularity cuts across a broad spectrum of society including the younger generations. Once they realized that Mudhouse had such intergenerational appeal, the Rule of Law Team and the PDO began the process of putting Mudhouse II together.

Developing Mudhouse II

Planning for an early October show, , the Wasit PRT PDO and the Rule of Law Team sat down in late September 2008 and began discussing possible messages for a new production. The team decided to convince the producers of Mudhouse to provide a message of civil liberties, constitutional rights, civic education, voting, and the ills of political corruption – essentially to convey the idea that Iraqis own their own collective destiny. The goal was to reach as many people as possible over the course of three evenings and the team agreed to meet with the main character and producer of Mudhouse to get his opinion and creative ideas.

The combined Rule of Law Team and the PRT PDO had two meetings with the producer of Mudhouse prior to the October production. The first meeting lasted 45 minutes and mostly consisted of a discussion of ideas. During that meeting, the Rule of Law Team pitched its proposed message and explained the goal of reaching as many people as possible. The second meeting dealt with logistics: money, venue, dates, and times. At that second meeting, the parties agreed to the budget for the production (\$25,000.00 for three nights), the message, the venue (an open air theater was constructed at the Al Kut Hotel), and the cast. Also present at that meeting was the Associate Dean of the Wasit Law School. He was present to develop a 15-20 minute speech to be delivered prior to the beginning of the play on each of the three nights. His speech

would be used to set the backdrop of the production in order to ensure that the audience understood exactly what Mudhouse II represented.

At the completion of that second meeting, the preparations for Mudhouse II were in full swing. The dates were set, the stage was constructed, seating was set up, the site was surveyed by the Rule of Law Team and various Coalition and Iraqi Personal Security Details, security was arranged by the ISF, a guest list was developed, and invitations were sent. All media and promotion for the event were coordinated and carried out by the Iraqi producer of Mudhouse rather than by coalition forces or the PRT. The Iraqi producer subcontracted to have flyers and leaflets made advertising the show and to distribute and display them throughout the city and province. To promote its legitimacy with the populace, the promotion of the event and all of its public aspects contained no reference to Coalition forces in any way, but were instead promoted as being sponsored and produced by Iraqis.

Mudhouse II – the Production

On 3 October 2008, at approximately 1700 hours, only two weeks after the initial meeting with the producer, and without Coalition Force pre-reviewing the script, the first of three Mudhouse II productions began. The dean delivered his speech to a crowd of approximately 1500 inside the hotel grounds and an additional 3500 people standing outside and on rooftops. Though the speech went on a bit longer than expected, it was well received. When the cast of Mudhouse took the stage, the grounds and the streets erupted in cheer. Throughout the show, the crowd was in a constant state of laughter and at the end of the production the cast took the stage for a final bow and led the crowd in song as copies of the Iraqi Constitution were distributed to everyone present.

The production was covered by multiple media outlets including Iraqiya SAT TV, Sumeria SAT TV, Baghdadiya SAT TV, Al-Kut TV and Radio (Terrestrial), Nahrain TV and Radio (Terrestrial), Wasit Forum (Newspaper), and a Reuters reporter. For its first two nights, there was no American presence. It was not until the third and final night Americans and Iraqi VIPs attended the production. By its close on the third night, Mudhouse II was seen by more than 15,000 people in Wasit Province.

The Aftermath of Mudhouse II

In the days, weeks, and months following the shows, the cast of Mudhouse took to the road contracting with PRTs all over the country to hold similar performances in their respective provinces. In Wasit, the Rule of Law Team saw an immediate increase in civic involvement from members of the populace filing complaints with the police (instead of about the police), cooperating with investigations, appearing before judges to testify, and turning out to vote during the provincial elections.

Subsequently, twenty-five thousand DVDs, containing both the speech by the professor and the comedy production, were produced through PRT QRF funding to be distributed by members of the ISF at security check-points throughout Wasit Province.

By all accounts, Mudhouse II was a phenomenal success resulting in a third Mudhouse production, which took place over three nights in December 2008. The themes for the third production included citizens demanding accountability from their elected public officials to reduce corruption and the necessity of their participating in the 31 January elections for that reason. For Mudhouse III, the introductory remarks were made by a female human rights

attorney, chosen by the Iraqi producer as the best speaker available on the subject. Because of the trust and confidence between the Rule of Law Team and the Iraqi producers of the event, Coalition forces did not know it was a female until she presented herself at the event.

As with Mudhouse II, Mudhouse III contained no official statement of Coalition sponsorship (although it was funded with Quick Reaction Fund). After Mudhouse III, the concept was adopted by the Rule of Law Coordinator's Office at the US Embassy and division-level rule of law team at Multi-National Division – Center (South), where it was adopted for dissemination throughout the division's AOR and subsequently throughout other provinces in Iraq.

By relying almost entirely on local, Iraqi producers, writers, and actors, the PDO and Rule of Law Teams were able to come up with a public education campaign that was readily accepted by the local population. Moreover, by relying on a program with proven entertainment value in an environment where real entertainment had been lacking for years, the team was assured of exceptionally high interest in the production and a sense of local commitment to both the production and the messages it conveyed.

E. Finding an Iraqi Solution to Overcrowded Prisons in Basrah*

One of the greatest challenges to rule of law in Basrah province¹ throughout 2008 was the severe overcrowding in the prisons and detention facilities and the lack of due process for criminal suspects. The problems facing the criminal justice system were caused by breakdowns throughout every step of the process, from arrest to investigation to trial. Although the Provincial Reconstruction Team (PRT) and Coalition Forces (CF) were continuously working to build capacity among the Iraqi judiciary and security forces, a major obstacle to solving the detainee² problem was a lack of cooperation and trust among Iraqi officials in the justice institutions (police, courts, prisons, and the army to an extent). It became increasingly obvious that a solution would not occur unless the Iraqis themselves could identify specific breakdowns in the justice process and work together to address them. Coordinated efforts between the PRT, U.K. Civilian Police Advisors (CivPol), and CF were needed to bring Iraqi counterparts to the table and foster greater cooperation and coordination among high-ranking justice officials.

Throughout 2007 and the spring of 2008, the city of Basrah was under the brutal and chaotic control of various militias, the most dominant being Jaish al Mahdi (JAM)³, led by the anti-American Shiite cleric, Muqtada al Sadr. During this period, rule of law was in state of

* Timothy Kotsis served in the State Department as Rule of Law Advisor for the Basrah Provincial Reconstruction Team from December 2007 to June 2009.

¹ Basrah province is an area of great commercial and strategic importance. It contains vast oil reserves, Iraq's only deep-water port, and shares borders with Kuwait, Saudi Arabia, and Iran. The provincial capital, Basrah city, is the second largest in Iraq. Basrah was a British area of operation, with a British-led PRT, until the transfer of authority to U.S. forces on March 31, 2009.

² The term "detainee" in this context means a criminal suspect that has been incarcerated and is awaiting trial. Basrah also had a large number of convicted prisoners mixed with pre-trial detainee populations; however, pre-trial detainees made up the vast majority of those held in prisons and detention sites.

³ Translated as, the Mahdi Army.

failure: the courts suffered daily intimidation and threats from insurgents, the police force was heavily infiltrated by militia members, and the prisons were used to punish political enemies. However, a dramatic turn for the better began at the end of March 2008 with the Iraqi-led/Coalition-supported Operation Charge of the Knights. The operation decisively wrested control of the city from JAM, allowing Iraqi Security Forces (ISF) to re-establish relative stability and security throughout the province. The success of Charge of the Knights had the consequence, however, of exacerbating the already dire situation in Basrah's prisons by filling them with hundreds of detainees swept up during the operation. The sudden influx of detainees resulted in overcrowding in the prisons and major backlog in the courts, which threatened to crush the already fragile criminal justice system in Basrah. Suspects were imprisoned for excessive periods without trial, lacked access to legal representation, and were held in dire conditions⁴.

A deep distrust between the judiciary and police, and a lack of high-level engagement among judges and police commanders, contributed to the breakdown of the criminal justice process. Each side would always blame the other for the backlog of detainees, insisting that the other was not doing its job. The fact that the Iraqi Army also conducted arrests and detention further complicated matters and caused consternation among the judiciary.⁵ Dealing with this problem required the PRT, CivPol, and Coalition Forces to bring the respective entities together. The PRT Rule of Law section was the focal point for the judiciary and prison officials. U.K. CivPol advised the Provincial Director of Police (PDOP) and his staff, and CF worked with the Iraqi military. Each organization had to work to convince their relative Iraqi counterparts of the benefit of high-level engagements and the need take other parties' concerns into account.

First, it was incumbent on the PRT to demonstrate to the British and US military commanders that the plight of detainees in Basrah's prisons should be a priority⁶. By the beginning of 2009, Basrah was doing well from a military perspective. Security, while not ideal, continued to improve; the Iraqi Army steadily improved its effectiveness in disrupting insurgent activity; and the police, though lagging behind the army, began to make high-value arrests. Additionally, a priority was placed on economic development, given the province's vast oil reserves, deep-water port, and proximity to international borders. While conditions that potentially violated human rights were always a concern, due process for terrorist suspects was generally viewed by Iraqi and Coalition forces as collateral damage resulting from efforts to improve the security situation. The negative impact to security that could result if dangerous detainees were released back on the streets of Basrah because the poor quality of case files was a

⁴ Basrah has two prisons, Al Maqal Prison and Al Minah Prison, neither of which were built as prisons. Al Maqal was converted from a hospital built in the 1920s; Al Minah is a converted warehouse in a port area on the Shatt al Arab river. Various police divisions also have detention facilities, only one of which is built for that purpose and in suitable condition.

⁵ Basrah's judges were concerned with the legality of arrests and investigations conducted by the Iraqi Army, and the army's general lack of knowledge of criminal procedure. The power of law enforcement fell upon the army because it was the only effective security force during Operation Charge of the Knights and the following interim period, as responsibility for security slowly transferred from the army to police.

⁶ This is not to imply that Coalition military commanders were not concerned with the lack of due process for detainees, just that security was always their foremost priority. Indeed, the British commander for Multi-national Division Southeast, Major General Andy Salmon, placed a high emphasis on the rule of law mission, and readily supported the PRT in this area.

legitimate concern, but the Rule of Law mission required a practical solution that considered both security and due process under Iraqi law.

Second, the Coalition had to collect the data regarding the number of detainees; where they were being held; and the status of their cases in the criminal justice process⁷. When engaged on the issue of the detainee backlog, Iraqi judges and police tended to minimize the extent of the problem, understate the number in detention, and insist that most detainees were receiving timely process. Therefore, they claimed, no high-level meeting was necessary. In order to motivate judges and ISF to deal with the problem, the Coalition needed to present them with the overwhelming evidence that the system was in crisis. This was especially crucial in bringing the judges to the table. They were understandably apprehensive of the police, given the recent history of infiltration of the police by JAM. To accomplish the collection of data on detainees, the PRT relied on CivPol and CF to engage with their counterparts in order to ensure access to police and army detention sites.

Third, the PRT required CivPol and CF to emphasize to the police and the Iraqi Army the primacy of the judiciary in the Iraqi criminal justice system.⁸ This was important in order to give the judges the confidence to productively confront the security forces about what they saw as violations of Iraqi law. Additionally, the high-level meetings that were eventually arranged took place in the provincial courthouse, with the Chief Judge or Deputy Chief Judge chairing. This was important to send a message to ISF commanders that the justice system was an inherently civilian function, controlled by the judiciary, and strictly governed by law.

Two meetings between senior judiciary and ISF commanders led to incremental, but important, steps toward solving the detainee crisis and establishing better cooperation among the justice actors. For instance, the judiciary established a committee to specifically address the detainee problem; police and military officers promised greater cooperation with judges regarding the disposition of evidence and case files; and a member of the judiciary was given a seat on the Basrah Security Council in order to provide better institutional coordination with ISF.

The extent of the detainee problem in Basrah did not lend itself to high-profile quick wins, or simple solutions. It was an Iraqi problem that could only be solved by Iraqis. However, Coalition members were able to play an important role by bringing judges and ISF commanders together, advising on possible solutions to the problem, and provided targeted resources to build capacity in the justice system⁹.

⁷ A thorough assessment of the legal status of detainees was difficult for logistical and security reasons. Assessments were usually conducted by polling sample sets among the detention populations and corroborating the data with various independent reports.

⁸ The judiciary, while legally the most powerful institution in the justice process, relied heavily on the police and army to keep them safe from militias, including from militia members and sympathizers within the ranks of the ISF.

⁹ The Coalition provided training and support to police and correctional officers, including instruction in human rights and humane detention procedures. In addition, construction of the U.S.-funded Basrah Central Prison is underway, which will provide the province with a built-for-purpose facility and adequate space to house prisoners.

F. Bringing Rule of Law to a Developing National Operations Center*

In June 2009 the Afghan National Army (ANA) conducted a week-long national exercise to prepare for the Presidential election in August. In addition to the ever-present threats of Taliban infiltration of local communities and improvised explosive devices (IEDs), the ANA anticipated additional, election-specific threats of voter intimidation, assassination of candidates, as well as attacks on international election observers, local officials, polling places and supporting convoys. The Combined Security Transition Command – Afghanistan (CSTC-A), the coalition unit whose primary mission is to mentor and train the ANA, designed the exercise.

Coalition mentors from CSTC-A consisted of American, British, Canadian, Romanian, Polish, Italian, Austrian and French officers and enlisted from every staff section. All worked for months with their Afghan counterparts preparing for the exercise. Coalition mentors developed scenarios to test the ability of the ANA National Military Command Center (NMCC),¹ the subordinate Tactical Operation Center (TOC), and field unit leaders to respond to the potential threats that might emerge in the weeks before and during the election. The exercise also represented the first time that ANA General Staff lawyers were invited to participate in an operations center at the national level.

Even in a developing army, it is easy for commanders to understand the role lawyers play in the unique military justice system. It is more difficult for Afghan commanders to imagine how their lawyers can contribute in the operational arena. Exercises such as this one allowed commanders to see the effect that rule of law can have on operations.

With that in mind, legal mentors developed exercise scenarios emphasizing the need for operational legal advice to assess the ability of the participating lawyers to give that advice. Without any operational experience guiding them, ANA lawyers participated in the exercise to observe and learn as well as contribute.

Much like a law school exam question, legal mentors developed fact patterns to test the ability of the ANA lawyers to apply rather than recite the law. The first challenge for the ANA lawyers was to spot legal issues. The second was to communicate those issues to the TOC commander and make useful recommendations. Once each issue was identified and addressed, the legal mentors adjusted the scenarios in order to raise other issues.

Many important lessons were learned throughout the exercise, some regarding operational law and others about practicing law in an operations center. ANA lawyers quickly learned the importance of distinguishing between combatants and noncombatants, separating tactical areas where the ANA should be involved from those where it would be more appropriate for other ministries (such as the Afghan National Police) to exercise jurisdiction, and the levels

* Maj. Kurt Sanger, USMCR, served with the Combined Security Transition Command – Afghanistan as the Senior Legal Mentor to the Afghan National Army General Staff Legal Section from March 2009 to September 2009.

¹ The National Military Command Center, the Afghan equivalent to that of the same name in the Pentagon, is the primary source of information and communication flow for the Afghan President and all Ministries to and from the ANA.

of force necessary to meet nonviolent and violent situations where threat levels escalated from rock throwing to the use of deadly force.

In addition to developing their legal skills, ANA lawyers also recognized many important aspects of their duties as staff officers: building relationships with each of the staff sections and to solve problems in a cramped, loud tent where everyone competed for workspace and resources as well as the TOC commander's attention.

Coalition mentors learned equally vital lessons that could improve future mentoring. For example, in the US, an insurgent (or vandal) caught in the act of tampering with an election ballot box who otherwise posed no threat to life or limb would probably not merit a violent response and would likely be addressed by law enforcement officials. In Afghanistan, the same action could threaten the legitimacy of the election and the entire Afghan Government and might need to be addressed by soldiers with force.

ANA lawyers recognized the unique equities at stake in this election – the failure to fairly and safely execute the vote at this stage in Afghanistan's development represented an existential threat to the country and its government – and recommended changes to the use of force to ensure those interests were protected. It is imperative that legal mentors understand that what may properly address the legal and operational issues in their own countries will not necessarily provide the appropriate answer for host nations, such as Afghanistan, facing very different political, cultural, and legal challenges.

Although originally designed to address the specific question of how to provide security during a national election, the election exercise improved relations between ANA lawyers and their commanders and staff sections. Exercises such as this give staff lawyers a chance to show their own security forces the value legal advice during operational planning. This exercise was the first time ANA lawyers had been invited to take a seat at the operational table. By providing useful advice, the ANA lawyers demonstrated to commanders and staff members that they should keep that seat at the table. Their contributions were so valuable that they have been invited to have a permanent seat in Afghanistan's NMCC.

Because this exercise focused on the operational planning process, it not only improved the security conditions for an event as important as the national election, it also gave the national staff experience working with their military lawyers. By focusing on process, the exercise produced a long-term, sustainable improvement to the conduct of military operations in Afghanistan by improving the capacity of the ANA NMCC to conduct all operations in accordance with the rule of law.

G. Integrating Rule of Law with Foreign Internal Defense*

For multiple rotations, the primary line of operation (LOO) for Combined Joint Special Operations Task Force – Arabian Peninsula (CJSOTF-AP) has been Foreign Internal Defense (FID). Because FID inherently involves operations “by, with, and through” our partnered Iraqi

* LTC Dan Tanabe served as the Command Judge Advocate for Combined Joint Special Operations Task Force – Arabian Peninsula from November of 2007 to June of 2008 and from February of 2009 to June of 2009.

Security Forces (ISF), CJSOTF-AP has been able to build sustainable capacity within multiple partnered ISF units throughout Iraq.

In late November of 2007, the CJSOTF-AP J3 (Operations), Deputy J3 along with the command judge advocate (CJA) realized many of the detainees held in Camp Bucca and Camp Cropper were being held as “security detainees.” As such, they would eventually be released, possibly in large numbers in the near future due to the sheer number of detainees at these locations and the looming expiration of the U.N. Security Council Resolution authorizing continued US detention of Iraqis.¹ If, however, a detainee entered Camp Cropper pursuant to a “referral to trial” by an Iraqi Investigative Judge in accordance with Iraq Criminal Procedures Law, then the detainee would be a “criminal detainee”. Unlike security detainees, criminal detainees would not be considered for mass release and would instead be detained to await trial in “pre-trial” status.

Recognizing the importance of these distinctions under Iraqi law, the CJSOTF-AP commander authorized the establishment of a “Rocket Docket” to undertake the necessary criminal process for on High Value Individuals (HVIs) or targets of a national value to our partnered ISF units. The implemented concept of operation was to bring Iraqi witnesses before an Iraqi Investigative Judge immediately after the point-of-capture to seek a “referral to trial” before placing the detainee into a U.S detention facility. This CONOP was successfully executed over the next seven months resulting in nearly 33% of all CJSOTF-AP detainees being inprocessed into U.S detention facilities as “criminal detainees” with a “referral to trial” by an Investigative Judge, as opposed to as “security detainees” detained under the authorities of the United Nations Security Council Resolution then in force.

By June of 2008, the Iraqi Special Operations Force (ISOF) and Emergency Response Brigade (ERB) along with their regional subordinate units (regional commando battalions (RCB) and regional emergency response units (R-ERU)) were capable of unilateral counterterrorism operations as well as facilitating national scalable strike force packages capable of quelling flare ups such as the Basra Uprising of 2008. Along with this growing capability was the requirement of ensuring such partnered ISF units followed the rule of law.

The US/Iraq Security Agreement of January, 2009² required a shift to Iraqi legal detention rather than security detention, mandating what has come to be called “warrant-based targeting” in most cases. This requirement fit nicely with the requirement to ensure that partnered ISF units adhered to the rule of law. In order to achieve this desired endstate, in late-January 2009 the CJSOTF-AP commander tasked the CJSOTF-AP CJA along with the J3, Deputy J3, J3 ISF Planner and the J5 (Future Plans), to develop an expedited process similar to the initial “Rocket Docket” that nested the targeting methodology within the Iraqi Criminal Procedures Law. The resulting process needed to balance targeting responsiveness without being a “rubber stamp,” thereby creating a sustainable yet functional process that disrupted terrorist and insurgent activity while being viewed as legitimate by the local and regional population.

¹ See generally section IX.B.4.

² Agreement Between the United States and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, (Nov. 17, 2008), available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf (last visited Aug. 14, 2009).

The guiding principle from the start was to ensure we only adopted and implemented sustainable processes and techniques that our partnered ISF forces could readily continue once US forces began the eventual withdrawal and took their advanced technology and resources with them. While techniques involving fingerprints and explosive x-spray, for example, were occasionally accepted in Baghdad at the Investigative Hearings, their success at the trial level was about 1%. Not only were such techniques frequently viewed with suspicion by magistrates, the technological support necessary for these techniques was often lacking in more remote locations such as Jalula or Amarah. In light of these realities, CJSOTF-AP decided to remain within the accepted practices of the Iraqi criminal judicial system and to defer any notions of modernization for another time and agency.

Based on this guiding principle and our assessment of the Iraq criminal procedure as practiced by the Investigative Judges we had previously worked with, we determined that the key critical requirement from an evidentiary standpoint was live witness testimony, preferably from an Iraqi. While hard physical evidence was important and some Investigative Judges were issuing arrest warrants on minimal non-live witness-based evidence, the follow-up requirements for post-capture process under Iraqi law were not sustainable for our partnered ISF units due to logistical short falls. Therefore, CJSOTF-AP decided to “front-load” our arrest warrants with the quality and quantity of live testimony we knew based on detailed guidance from the Investigative Judges would be required in order to justify continued detention under Iraqi criminal procedure. We brought in several Iraqi witnesses to testify before an Investigative Judge, and only after the arrest warrant³ was comfortably issued by the presiding Investigative Judge was that individual targeted for capture. This process consistently provided CJSOTF-AP a streamlined process that required minimal follow-up requirements post-capture other than bringing the criminal detainee before the Investigative Judge along with all the physical evidence secured during the site exploitation on the objective.

A FRAGO written by a team that consisted of the CJSOTF-AP CJA, Deputy J3, and J35 ISF Planner was published at the beginning of February 2009. The importance of setting up a team to draft and publish this FRAGO was to ensure that the legal principles and technical points were written in a manner that the operators could readily understand and put into the context of their operating environment. With the evolution towards transparent targeting with our partnered ISF units, it is important to understand that in essence the “Rocket Docket,” while managed by the legal team, belonged to the commander and J3. The plan became the process for our overall targeting methodology and included within it decisions on whether or not most missions were approved. In this way, this ostensibly “legal” element was the commander’s, much in the way that ROE, which may be managed by the SJA, are owned by the commander & J3.

Beginning in February 2009, teams located in the Baghdad area and nearby towns like Taji and Fallujah began to coordinate local national witness appearances with the CJSOTF-AP legal team. In an attempt to promote transparent targeting and legitimacy, the use of “secret sources” was discouraged and instead the focus was on “vetting” the Iraqi Investigative Judge in order to protect the identities of sources and sub-sources. Such vetting was conducted by our

³ Under the Iraqi Criminal Procedures Law, a validly issued arrest warrant has no time limitation and is valid until rescinded by the issuing Investigative Judge or higher authority.

ISOF counter-intelligence team and backstopped by OCE reporting through their source networks.

In order to set the conditions for success in this process of requesting traveling judges, CJSOTF-AP took a “white paper” drafted by a Baghdad OCE and published it across CJSOTF-AP as guidance to the teams in how to prepare local national witnesses for testifying before an Investigative Judge. It also contained smaller points such as requirements of lodging, Iraqi food, and a general template on how to set up a room for the Investigative Judge – all of these small points focused towards building rapport and mutual respect between CJSOTF-AP and the Investigative Judges.

Near the middle of May 2009, the Law and Order Task Force (LAOTF) that had worked with a set of Investigative Judges, the Joint Investigative Committee (JIC) out of CCCI-Rusafa, extended its operations to Central Criminal Court of Iraq – Khark (CCCI-K). Through coordination with Multi-National Force-Iraq SJA and Rule of Law Coordinator, CJSOTF-AP began discussions with LAOTF to employ the CCCI-K JIC Investigative Judge for CJSOTF-AP “Rocket Docket.” After vetting of this JIC Investigative Judge through ISOF counterintelligence and the CJSOTF-AP J2, a proof-of-principle (PoP) CONOP was developed between CJSOTF-AP and LAOTF to bring this JIC Investigative Judge to Mosul and Baqubah to support the ISF units at these locations that were partnered with CJSOTF-AP assets. Bringing an Investigative Judge from Baghdad was essential because local Iraqi witnesses were willing to testify before an Investigative Judge from Baghdad, but not before a local Investigative Judge. It was also impractical to use the other existing mechanism, rotating circuit judges, because of inconsistencies in the standards applied by new judges when they arrived in Mosul. Having a single Investigative Judge from Baghdad provided both the legitimacy and consistency necessary.

Upon arrival at Mosul, the JIC Investigative Judge and his criminal investigators were greeted and by the Mosul ISOF RCB reconnaissance commander, who also provided lodging and food. After breakfast the morning after their arrival, the IJ and the criminal investigators sat down with the Mosul ISOF RCB reconnaissance commander and discussed the general situation in Mosul, what types of targets they were focusing on, and the general details for the source network that the witnesses would be coming from to testify before the IJ.

After this professional discussion, the witnesses were brought in one by one, first to the criminal investigators for their preliminary testimony and then to the IJ. Over two days 15 local national witnesses testified against various terrorist and insurgent networks. Based on the testimony of the 13 local Iraqi witnesses who testified,⁴ the IJ issued of 86 arrest warrants. Near the end of the second day, another professional discussion was held so that the JIC Investigative Judge could provide both positive feedback on the hearings as well as suggestions for improvement, a degree of professional and cooperation we found quite impressive.

After Mosul, the mobile judicial team travelled to Baqubah, where the Baqubah R-ERU followed a similar procedure, providing the criminal investigators and the IJ with testimony from six local Iraqi witnesses who testified on various terrorist and insurgent networks operating in the

⁴ Two of the 15 witnesses failed to bring their required four forms of identification and were consequently not heard by the IJ.

Baqubah area. Based on the testimony of these six local national witnesses, 38 arrest warrants were issued by the IJ. A similar professional development session was conducted between the JIC Investigative Judge and the Baqubah R-ERU deputy commander.

After about a week following the CJSOTF-AP and LAOTF liaison officers' return to base (RTB), the Baqubah R-ERU captured nine of the criminal detainees based on the recently issued Arrest Warrants. Based on the initiatives of the team leader in Baqubah, he requested the authorization to have the Baqubah R-ERU convoy the nine criminal detainees to Victory Base Complex (VBC) for transfer into the CJSOTF-AP Temporary Holding Facility (THF). The team leader believed that this would give the local population an understanding of the professionalism of the Baqubah R-ERU and also allow the Baqubah R-ERU "pride in ownership" of this operation from start to finish, both top-priority goals of CJSOTF-AP's FID LOO. The transport to Baghdad was successfully completed, and the detainees, with their Gensia cards and physical evidence from the site exploitation were transported to the CJSOTF-AP THF for inprocessing without incident. Once inprocessed into the CJSOTF-AP THF, the LAOTF liaison officer was informed and began coordinating the docketing of the Investigative Hearings for the nine criminal detainees before the JIC Investigative Judge. Because, under Iraqi Criminal Procedures, criminal investigators are not allowed in Iraqi Courts, we had to provide separate facilities for the criminal investigators and the IJ to conduct their separate interviews of the detainees. CJSOTF-AP THF assets lead by a CJSOTF-AP liaison officer escorted the criminal detainees to their preliminary interviews with the criminal investigators and later escorted the criminal detainees to their Investigative Hearings at CCCI-K before the JIC Investigative Judge in order to gain a Detention Order / Referral to Trial. The results of the Investigative Hearings were then related through the SOTF to the Baqubah team leader to be shared with the Baqubah R-ERU commander and then disseminated among the local population in order to foster a sense of professionalism and legitimacy in the eyes of the local population for the Baqubah R-ERU.

By undertaking a functional approach to the targeting problem, we were able to put in place a sustainable process that took the targeting methodology used by our partnered ISF forces, nested it within the Iraqi Criminal Procedures Law, and made it responsive to the mission of disrupting terrorist and insurgent activity.