

# 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**

**2010**

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A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES**

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

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The 2010 *Rule of Law Handbook* is dedicated to all those who promote the rule of law in the most difficult of circumstances, especially the members of the U.S. Armed Forces as well as our interagency and coalition partners.

# **RULE OF LAW HANDBOOK**

## **A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES**

### **2010**

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, U.S., 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 fourth 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 and look forward to working closely with them in the future.

**Cover design by Dr. iur. Katharina Ziolkowski, LL.M. (UNSW)**  
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## PREFACE

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

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

In the three years since, violence in Iraq has dropped precipitously, allowing the Iraqi people to assert their rightful sovereignty in very real and dynamic ways. American forces have withdrawn from Iraqi cities, will end their combat mission in August of 2010, and completely exit Iraq by the end of 2011.<sup>2</sup> Afghanistan is now at the forefront of public attention as it experiences its own surge of resources designed to move it down a similar path to success before U.S. combat forces possibly begin reducing their presence in July of 2011.<sup>3</sup>

Throughout these changes in circumstances, Judge Advocates and their joint, interagency, and multinational partners have quietly gone about advancing the rule of law (RoL) in these locations and others. However, as our military commitments in Iraq and Afghanistan wane or will soon wane, it is fair to ask if there is still a need for Judge Advocates to concern themselves with the rule of law mission. To answer anything other than "Yes!" would be shortsighted<sup>4</sup> and unrealistic given our history and hope for the future.

Chapter 1 of the present handbook presents some of that history. It describes how Judge Advocates have been involved in rule of law efforts for over a century. It also makes clear how fertile the post-conflict ground is for cultivating the rule of law. When security is no longer the most pressing need, rule of law efforts can truly flourish.<sup>5</sup> We are well past the conflict stage in Kosovo, yet Judge Advocates are still there participating in rule of law missions in welcome partnership with civilian practitioners.<sup>6</sup> It is no doubt the sincere hope of all rule of law practitioners that the environments in Iraq and Afghanistan one day will similarly be so benign as to make ongoing rule of law efforts there "un-newsworthy."

While rule of law efforts may become more or less newsworthy depending on the circumstances, they will always be important. One of the fourteen references to "rule of law" in the current National Security Strategy holds rule of law as one of the "essential sources of our strength and influence in the world."<sup>7</sup> To

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<sup>1</sup> The White House, *National Security Strategy*, 37 (May 2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf) (last visited July 27, 2010).

<sup>2</sup> *Id.* at 25.

<sup>3</sup> *Id.* at 21.

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

<sup>5</sup> *Id.* ("When a security situation is poor, trying to advance a sweeping RoL plan may be too optimistic. RoL needs an improved security situation with stability to be able to proceed. It is difficult to find judges and prosecutors willing to risk their lives in places where violence and death threats are common.")

<sup>6</sup> Task Force Falcon, 40th Infantry Division, California National Guard, Office of the Command Judge Advocate, After Action Report, Kosovo Forces 11, Deployed February 2009 – November 2009, at 6 (9 January 2010) ("Trainers actively discouraged participation in RoL activities for fear the unit might step on the toes of EULEX [European Union Rule of Law Mission in Kosovo]. . . . When TFF [Task Force Falcon] attorneys began working in this area, the EULEX and UN lawyers welcomed the help and wondered aloud why TFF attorneys had not come aboard in this area earlier."), available at <https://www.jagcnet2.army.mil/8525751D00557EFF> (Army Knowledge Online authentication required).

<sup>7</sup> The White House, *supra* note 1, at 2.

maintain that strength and influence, rule of law will undoubtedly remain part of Judge Advocate practice into the future.

## **The 2010 Edition**

This edition of the *Handbook* is not a complete re-write of the 2009 version. It does contain, however, updates and improvements throughout. Many members of the interagency team have devoted time and effort to ensuring the sections describing their agencies and spheres of influence are current. We here at CLAMO are deeply in their debt.

Some chapters, by their nature, require updating every year. Funding sources and authorities change from year to year, and sometimes even more often! Any chapter on funding rule of law operations necessarily must also change. Chapter 7 presents the authorities in place as of this writing. As one Fiscal Law instructor here at The Judge Advocate General's School has remarked, "It is all theoretical until you figure out how to pay for it."

Chapter 5 on Sharia law and combined legal systems also appears in a substantially reorganized and revised form. It provides a broad introduction to the subject. Space constraints in a handbook of this size preclude covering this rich subject in great detail, but the chapter's footnote references will prove exceptionally valuable for practitioners desiring to do further reading.

This edition is not devoid of entirely new material, though. There are completely new sections in addition to the history chapter already mentioned. For example, practitioners have long struggled with how to objectively and effectively measure progress (or the lack thereof) in rule of law operations. Chapter 9 on rule of law metrics may help inform this process. Chapter 10 is also new and describes how practitioners could use Human Terrain Teams to help design rule of law projects.

As always, the handbook presents the recent experiences of those actively involved in the rule of law mission. This year the offerings are as diverse as the rule of law mission itself. One article provides a British perspective on supporting the informal justice sector in Helmand Province, Afghanistan. In another, an Air Force practitioner provides her perspective on the Central Criminal Court of Iraq. A Department of Justice attorney also describes the success of the Counter-Narcotics Justice Task Force in Afghanistan.

One U.S. Army Judge Advocate shares her division's efforts to bridge the gap between the Kurdish and Arab judicial systems in northern Iraq. Another depicts brigade-level efforts in eastern Afghanistan, while still another recounts division-level efforts in Baghdad, Iraq. Outside of conventional forces, an Asymmetric Warfare Group Judge Advocate details his role in a rule of law effort developed in coordination with the Department of State's International Narcotics & Law Enforcement, Afghanistan's National Directorate of Security, and Afghanistan's Office of the Attorney General. Finally, a Judge Advocate advising a Special Forces battalion portrays his experiences with the rule of law mission in a fluid environment.

## **The Nature of a Handbook for Judge Advocates**

The *Handbook* is not intended to serve as U.S. 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 for Judge Advocates, the limits of its scope and purpose are to provide the military attorney assistance in accomplishing the rule of law mission. While others involved in rule of law missions may find the *Handbook* helpful, they should understand its intended audience is the Judge Advocate or paralegal involved in the rule of law mission during on-going military operations.

The *Handbook* does not serve as a complete solution, but rather as a starting place and a supplement for other materials. In addition to courses available through The Judge Advocate General's Legal Center and

School (TJAGLCS),<sup>8</sup> documents written by other agencies extensively cover many resources providing 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* (2010), 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. The intent is the *Handbook* serve as an educational resource for Judge Advocates who are preparing to practice in the field. Even if the *Handbook* only serves as an introductory resource to further Judge Advocates’ professional education on the topic, it will have served a vital purpose.

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<sup>8</sup> TJAGLCS offers two residential programs, the one-week Rule of Law Short Course and a rule of law elective to its Graduate Course, as well as online training via JAG University, available at <https://jag.ellc.learn.army.mil/> (last visited July 27, 2010).





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## CHAPTER 1

# THE RULE OF LAW AND JUDGE ADVOCATES: A SHORT HISTORY\*

Americans have long believed that a major reason for the longevity and vitality of the United States as a nation-state—and its success as a stable and prosperous democracy—is its foundation on the rule of law. This has meant that American lawyers serving as Army Judge Advocates (JAs), sharing this deep belief in the importance of the rule of law and convinced that the rest of the world would be better if it emulated the United States, have looked for ways to graft American legal ideals onto other societies. Starting in the Philippines at the end of the 19<sup>th</sup> century, JAs began promoting the rule of law as a valuable component in a larger strategy to defeat an enemy and strengthen a friendly government. These rule of law efforts continued in Germany and Japan in the aftermath of World War II and in Vietnam in the 1960s and 1970s. Today, Army lawyers deployed in Afghanistan and Iraq **are helping to run robust rule of law operations as part of overall counterinsurgency efforts.**

This essay begins by examining what is meant by the term “rule of law,” why it is the foundation of the United States, and why Army JAs have been receptive to it. It next looks at how Army lawyers serving in the Philippine Islands in the aftermath of the Spanish-American War of 1898 first attempted to implement American legal principles, including the rule of law, in the Philippines as part of pacification efforts. This essay then discusses how Army JAs serving forty-five years later in occupied Germany and Japan used the law to reform both German and Japanese society, and how they intentionally worked to graft the rule of law permanently onto German and Japanese institutions. Twenty years later, as this essay will show, Army lawyers in South Vietnam used the rule of law to enhance mission success in the larger fight against communist Viet Cong guerillas and their North Vietnamese allies. Finally, this essay looks at rule of law projects in Afghanistan and Iraq, which are part of an overall strategy to demonstrate to Afghan and Iraqi leaders that their societies will be better (politically, socially and economically) if they embrace the rule of law, since citizens who believe that their leaders adhere to the law will be loyal to them. At the same time, these rule of law projects seek to prove to the average Afghan and Iraqi citizen that the rule of law will safeguard their rights and property—while collaborating with insurgent forces will not.

A final introductory note: While Army JAs have been involved in rule of law programs for over one hundred years, this is not to say that there has been an official, codified, written rule of law program in The Judge Advocate General’s Corps for this entire period. On the contrary, institutional recognition that the rule of law is part and parcel of JA doctrine is very recent and was not a part of the Army’s operational doctrine until December 2006, when it first appeared in Field Manual (FM) 3-24, *Counterinsurgency*. Nevertheless, America’s JAs have long been involved in designing, implementing, and participating in programs that seek to graft the rule of law onto the social organizations of other nations, and this is almost certain to continue.

## I. Rule of Law as the Foundation of the United States

What is the “rule of law?” While there are many definitions, including those identified in this *Rule of Law Handbook*, the U.S. Government defines the idea in the following manner: Everyone must follow the law, leaders must obey the law; the Government must obey the law; and no one is above the law.<sup>1</sup> Regardless of how the three-word phrase is defined, however, there is no question that the rule of law is the foundation of the United States. A quick look at why this is true provides a context for explaining why JAs have conducted rule of law operations for more than a century.

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

<sup>1</sup> U.S. Citizenship and Immigration Serv., Civics (History and Government) Questions for the Naturalization Test, available at <http://www.uscis.gov/files/nativedocuments/100q.pdf> (last visited June 1, 2010).

As the American Revolution got underway, lawyers in the colonies were among the most radical thinkers. Believing that the tyranny of the Parliament in London was just as bad as the tyranny of George III, “many American colonists put their faith in fundamental law enshrined in a constitution—as John Adams famously put it, ‘a government of laws and not men.’”<sup>2</sup> But Thomas Paine’s statement about the law in his pamphlet *Common Sense* best captures why the rule of law is the foundation of the United States. Wrote Paine: “[I]n America THE LAW IS KING. For as in absolute governments the King is law, so in free countries the law ought to be King.”<sup>3</sup>

It follows that at the time of the Founding—and the drafting of the Constitution that resulted in the creation of the United States in 1787—Americans had a special relationship with the law. This relationship has continued, underscoring Alexander Hamilton’s observation more than 200 years ago that Americans had a “sacred respect for constitutional law,” which is just as true today, as U.S. citizens consistently look to courts—and the rule of law—as the best way to safeguard their rights and freedoms.<sup>4</sup>

Whether the law is a “civil religion”<sup>5</sup> in secular America is an open question. But there is no doubt that Army officers serving in the late 19<sup>th</sup> century shared the view of their fellow Americans that the rule of law was at the root of America’s democratic tradition. This explains why historian Andrew Birtle writes in his authoritative *U.S. Army Counterinsurgency and Contingency Operations Doctrine 1860-1941*, that Army officers “had a deep faith in America’s political and economic system, a system that they generally believed the rest of the world would do well to emulate.”<sup>6</sup> When one remembers that Army officers of this period also believed in “respect for authority” and had “a fondness for efficiency and order, and a high regard for such public virtues as honesty, honor and self-sacrifice,”<sup>7</sup> this explains why the Army serving overseas—and its Judge Advocates—wanted to export American rule of law ideas and attitudes.

## II. Rule of Law efforts in the Philippines and Cuba (1898-1902)

The first JA involvement in establishing the rule of law occurred at the end of the 19<sup>th</sup> century, when the United States successfully invaded—and then occupied—Cuba, Puerto Rico, and the Philippine Islands during the Spanish-American War. After Spain sold the Philippines to the United States for \$20 million, relinquished control of Cuba and Puerto Rico, and also ceded Guam to the United States, the American government suddenly discovered that it was responsible for governing more than ten million Cubans, Puerto Ricans, Filipinos, and Guamanians.<sup>8</sup>

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

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<sup>2</sup> James Grant, *Juristocracy*, WILSON Q. (Spring 2010), at 16, 18.

<sup>3</sup> Thomas Paine, COMMON SENSE (1776), 50.

<sup>4</sup> Grant, *supra* note 2, at 19.

<sup>5</sup> Civil religion “is essentially about those public rituals and myths that express for most Americans the nexus of the political order to the divine reality.” Derek H. Davis, “Competing Notions of Law in American Civil Religion,” 5 LAW, TEXT, CULTURE 265 (2000).

<sup>6</sup> ANDREW J. BIRTLE, U.S. ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 1860-1941, at 101 (1998).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 99. From the outset, lawyers, scholars, and politicians argued about the legal principles by which the United States would rule these new territories. Ultimately, the “doctrine of incorporation” became the politico-legal framework for America’s new colonial empire. *Id.* This meant the Philippines, Puerto Rico, and Cuba would be “unincorporated territories” that were “under the sovereignty of the United States but outside its body politic.” *Id.* But until the Congress passed legislation reflecting this doctrine of incorporation, these new territories were under Army rule. PAUL A. KRAMER, THE BLOOD OF GOVERNMENT: RACE, EMPIRE, THE UNITED STATES AND THE PHILIPPINES 163 (2006).

time, Army officers were involved in establishing—and running—new government institutions in Cuba for many years.

From 1899 to 1902, virtually every officer in the Army served in either Cuba, Puerto Rico, or the Philippines,<sup>9</sup> and Judge Advocates were no exception. From the beginning, these uniformed lawyers were convinced that these ex-colonial possessions would best be served if their existing Spanish-based legal systems were jettisoned in favor of American-style government. These views were hardly unique. On the contrary, they reflected the prevailing opinion, as expressed by President William McKinley, that the United States was obligated not only to liberate the former Spanish colonials, but also must guide them toward a prosperous, self-governing, democratic society.

Integral to this view was the idea that the inhabitants of Cuba, Puerto Rico, Guam and the Philippines would best be served if they had an American form of government that included an Anglo-American judicial framework. This explains why, from the outset, Judge Advocates were heavily involved in efforts to establish new legal institutions. In the Philippines, for example, the American occupation forces were convinced that the existing Spanish colonial legal system was corrupt. There “was a well-founded belief that lawsuits were won through influence or bribery” and this “wretched system” needed to be reformed.<sup>10</sup>

One of the first projects in the reform of the existing legal system was the “reestablishment” of a Philippine Supreme Court. While some of the members of the court (including the chief justice) were Filipino jurists, military governor Major General (MG) Elwell S. Otis also appointed an Army lawyer, then Lieutenant Colonel (LTC) Enoch H. Crowder to the new court. On 29 May 1899, Crowder (who would later serve as The Judge Advocate General (TJAG) for the Army from 1911 to 1921) was made an “associate justice” and appointed to the civil division of the Philippine Supreme Court. Crowder’s appointment made sense, as he had drafted the document that reestablished the court. While serving as an associate justice, Crowder used his skills as an Army lawyer to overhaul the Philippine criminal justice system. He “made an exhaustive study of Spanish criminal laws recently in force in the Philippines” and then drafted a new Code of Criminal Procedure. This new Code was promulgated by MG Otis as General Orders No. 58 and took effect on 15 May 1900.<sup>11</sup>

But the Army also looked for ways to impress upon Filipinos that Americans believed in the rule of law. In this regard, MG Otis, by virtue of his authority as military governor, created a Board of Claims to hear civil complaints against the United States. Crowder, who was the president of the board, heard evidence in suits filed by Filipino citizens for money damages arising out of the loss of horse, livestock and other supplies, and the destruction of homes and other buildings. Crowder and three other Army officers heard suits without a jury and then made findings and recommendations to MG Otis. While the United States refused to pay for damages incurred incident to combat, it did pay a large number of claims—illustrating that the Americans believed in the rule of law and were committed to fair and equitable treatment.

According to James H. Blount, who served first as an Army officer and later as a district judge in the Philippines, Crowder “was the brains of the Otis government”<sup>12</sup> and Crowder continued his good works in Cuba, where Judge Advocates also busied themselves in establishing new legal institutions. Then Colonel (COL) Crowder, fresh from his experiences in Manila, was the chief legal advisor to the American-sponsored Provisional Government of Cuba. Although Cuba was granted formal independence in 1902, Army lawyers continued to be involved in its legal affairs. Crowder, for example, was Supervisor of its State and Justice Departments from 1906 to 1909. At the same time, Crowder headed the Cuban Advisory Law Commission and Central Election Board.<sup>13</sup>

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<sup>9</sup> BIRTLE, *supra* note 6, at 100.

<sup>10</sup> DAVID A. LOCKMILLER, ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN 77 (1955).

<sup>11</sup> *Id.* at 76.

<sup>12</sup> *Id.* at 75.

<sup>13</sup> JUDGE ADVOCATE GEN’S CORPS, U.S. ARMY. THE ARMY LAWYER 1775-1975, at 105 (1975).



While JA rule of law efforts in Cuba were relatively short-lived (and Cuba was formally independent after 1902), bloody resistance to American rule in the Philippines meant that the U.S. Army—and Judge Advocates—had an active role in reshaping Philippine institutions for a longer period. It was not until 1913 that President Woodrow Wilson began the process that would gradually lead to independence. Consequently, the grafting of American jurisprudence onto Filipino society continued for many years, as did JA involvement.

### **III. Rule of Law efforts in Germany and Japan (1945-1950)**

The next Army JA involvement in rule of law efforts came in the aftermath of World War II, when American policy makers decided that Germany and Japan must be re-made if future conflict with them was to be avoided.

In Japan, a team of lawyers on General of the Army Douglas MacArthur's staff participated in drafting a new constitution for Japan—one that “established the principle of popular sovereignty for the first time, guaranteed a more extensive range of human rights than even the U.S. Constitution, and set antimilitarist ideals at the very center of the national charter.”<sup>14</sup> More than anything else, however, the new Japanese constitution enshrined American ideas about the rule of law as the basis for a democratic form of government.

While no judge advocates worked on the committee that drafted this unique legal document, the presence of MG Myron C. Cramer, the recently retired Army Judge Advocate General, as the lone American judge on the International Military Tribunal of the Far East proves that Army lawyers were critical to the grafting of rule of law principles onto Japanese society. After all, a chief purpose of the Tokyo War Crimes Trial (as the tribunal was also called) was to “uphold democratic ideals and humanitarian principles as the foundation of international law.”<sup>15</sup>

In the occupation of Germany after 1945, Army lawyers were particularly involved in running military courts. Shortly after General of the Army Dwight D. Eisenhower arrived in Germany, he ordered the publication of Proclamation No. 1. This document provided that all German courts in occupied territories were suspended.<sup>16</sup> Ordinance No. 2, promulgated at the same time as Proclamation No. 1, established Military Government courts “for the trial of offenses against the interests of the Allied Forces.” These courts had jurisdiction over all offenses committed in the United States Zone against the legislation enacted by the Allies or existing German law. By 1946, these courts had tried more than 220,000 cases ranging from murder, theft, possession of a deadly weapon to false statements, curfew violations, and failure to have a valid identification card.<sup>17</sup>

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

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<sup>14</sup> JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II*, at 244 (1999).

<sup>15</sup> YUMA TOTANI, *THE TOKYO WAR CRIMES TRIALS: THE PURSUIT OF JUSTICE IN THE WAKE OF WORLD WAR II*, at 259 (2008). For more on Crowder, see Fred L. Borch, *Sitting in Judgment*, *PROLOGUE* (Summer 2009), 34-41.

<sup>16</sup> Military Government—Germany, Supreme Commander's Area of Control, Proclamation No. 1, Military Government Regulation 23-200 (1945).

<sup>17</sup> Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A. B. A. 777, 778 (1947).

rights. It has been correctly stated that the true administration of justice is the firmest foundation of good government.”<sup>18</sup>

#### IV. The Rule of Law in Southeast Asia (1964-1973)

The next JA involvement in rule of law operations occurred in Southeast Asia in 1964, when then COL George S. Prugh was the Staff Judge Advocate for Military Assistance Command, Vietnam (MACV). Shortly after arriving in Saigon, Prugh wrote a report in which he stressed that, as “there cannot be a successful counterinsurgency program until there is established a respect for law and order,”<sup>19</sup> judge advocates must look for ways to use the law to enhance mission success. As Prugh observed,

[The] law could have a special role in Vietnam because of the unusual circumstances of the war, which was a combination of internal and external war, of insurgency and nation-building, and of development of indigenous legal institutions and rapid disintegration of the remnants of the colonial French legal establishment.<sup>20</sup>

In any event, until he returned to the U.S. in 1966, Prugh undertook a number of initiatives to demonstrate the value of law in society—all of which were continued by those judge advocates who followed him at MACV. First, Prugh organized a Law Society that sponsored lectures and talks on different aspects of U.S. jurisprudence. These were attended by Vietnamese lawyers and government officials, and provided a forum for discussing the role of law in a democratic society. This was an important initiative, as the South Vietnamese were “building their own rule of law, creating a bench and bar, and establishing a civil service where none had existed before.”<sup>21</sup>

Second, Prugh formally established an “advisory” program and tasked the Army, Navy, Air Force, and Marine Corps Judge Advocates assigned to MACV to advise their South Vietnamese Army (ARVN) lawyer counterparts. The focus of these American lawyers was on creating, strengthening and re-organizing military and military-related governmental institutions. For example, judge advocates helped to reorganize the Vietnamese military prison system. They also gave advice to their Vietnamese counterparts on prisoners of war and war crimes. Finally, convinced that Vietnamese military institutions would be improved if they were injected with American ideas and attitudes on law and justice, Judge Advocates presented papers, held seminars, and taught courses at Saigon University. Vietnamese military lawyers also attended the Judge Advocate Officer Basic and Graduate Courses at The Judge Advocate General’s School (TJAGSA).<sup>22</sup> Starting in 1967, TJAGSA also held a one-week long “Law in Vietnam” course. Most of the instruction was given “by guest speakers recently returned from South Vietnam with firsthand knowledge of the country and the problems involved.”<sup>23</sup>

In the end, MACV Judge Advocates not only cultivated valuable friendships, but also assisted ARVN judge advocates in using laws and regulations to promote efficiency in the ARVN and deter the subversive activities of the Viet Cong. Perhaps most importantly, the rule of law efforts spearheaded by Prugh (who served as Army TJAG from 1971 to 1975) were intended to promote loyalty to the Saigon government. If 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.

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<sup>18</sup> Eli E. Nobleman, *Civilian Military Government Courts in Germany*, JUDGE ADVOCATE J. (June 1949), 37.

<sup>19</sup> GEORGE S. PRUGH, *LAW AT WAR* 13 (1975).

<sup>20</sup> *Id.* at v.

<sup>21</sup> JUDGE ADVOCATE GEN’S CORPS, *supra* note 13, at 222.

<sup>22</sup> *Id.* For example, Second Lieutenant Nguyen Dinh Hung and First Lieutenant Lt. Nguyen Tri Tu attended the 60th Basic Course in 1971. THE JUDGE ADVOCATE GEN’S CORPS, U.S. DEP’T OF ARMY, ANNUAL REPORT, TJAGSA app. VIII, at 83 (1970-1971).

<sup>23</sup> THE JUDGE ADVOCATE GENERAL’S CORPS, U.S. DEP’T OF ARMY, COMMANDANT’S ANNUAL REPORT, TJAGSA 20 (1967-68).

While the withdrawal of U.S. forces in 1973 and the collapse of the South Vietnamese government in 1975 means that nothing remains of these JA rule of law efforts, there is no doubt that uniformed lawyers considered their work in the area to be part of defeating the Viet Cong and their North Vietnamese allies.

## V. Rule of Law Operations in Afghanistan and Iraq (2001 to present)

After the deployment of U.S. military personnel to Afghanistan in 2001 and Iraq in 2003, Army Judge Advocates began looking for ways to use the law to enhance mission success in both geographic locations. Rule of law projects became increasingly important after stability operations were underway and an insurgency had emerged in both Afghanistan and Iraq.

The central weakness of any insurgency is not its military capabilities but its reliance on the local populace for legitimacy, recruits, financing, sanctuary, intelligence and other material support.<sup>24</sup> Consequently, Judge Advocates understood that rule of law projects demonstrating that the central government followed the law and was fair and just in its dealings with all citizens would promote loyalty to that central government—thereby weakening the guerrillas.

At first, such efforts were very much *ad hoc*—largely dependent on the interest of the individual Army lawyers and legal offices in reaching out to their Afghan and Iraqi counterparts. These early rule of law missions “followed no set format or guidelines ... these pioneering Judge Advocates literally made it up as they went forward.”<sup>25</sup> In April 2003, for example, then LTC Craig Trebilcock was in southern Iraq and serving as the International Law Officer in the 358<sup>th</sup> Civil Affairs Brigade. As U.S. forces transitioned from combat operations to occupation and reconstruction, Trebilcock convinced his commander that the rule of law was “an integral component of reestablishing security in an occupied territory.”<sup>26</sup> Projects subsequently undertaken included: obtaining money for court-house reconstruction; replacing legal books and other library resources that had been stolen by looters or destroyed by vandals; obtaining general funding for the operation of courthouses; and devising methods to remove and replace Baathist party judges and select new judges.<sup>27</sup>

The experiences of COL Bruce Pagel, an Army Reservist serving in north central Iraq, were similar. Pagel, who had extensive criminal experience as an Assistant U.S. Attorney, served as the rule of law officer in the 1<sup>st</sup> Infantry Division from May 2004 to February 2005. Pagel and his fellow JAs built on rule of law efforts started by the 4<sup>th</sup> Infantry Division, which had previously operated in their geographic area. Their principal goal “was to clearly identify the most persistent obstacles to restoring rule of law and improving judicial output.”<sup>28</sup> In furtherance of this goal, JAs visited Iraqi courthouses, identified needs (e.g., security, equipment) and worked to establish both credibility and a working relationship with the local Iraqi legal community, including judges and police officers.

While the experiences of Trebilcock and Pagel were the norm from 2003 through 2006, that changed with the emergence of a new Army counterinsurgency (COIN) doctrine, announced with the publication of FM 3-24 *Counterinsurgency* in December 2006. For the first time, Army COIN doctrine formally embraced rule of law projects. As Appendix D, “Legal Considerations” puts it, “establishing rule of law is a key goal and end state in COIN.”<sup>29</sup> While recognizing that achieving this end state “is usually the province of H[ost] N[ation] authorities, international and intergovernmental organizations, the Department of State (DOS), and other

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<sup>24</sup> Bart Schuurman, *Clausewitz and the “New Wars” Scholars*, PARAMETERS (Spring 2010), at 98.

<sup>25</sup> CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., U.S. ARMY, RULE OF LAW HANDBOOK 163 (2007) [hereinafter ROL HANDBOOK].

<sup>26</sup> *Id.* at 164.

<sup>27</sup> *Id.* at 171, n. 24.

<sup>28</sup> *Id.* at 189.

<sup>29</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY, at D-8 (15 Dec. 2006).

U.S. Government agencies,” Appendix D also stresses that “support from U.S. forces in some cases” also is required.<sup>30</sup>

Even before the appearance of FM 3-24 in December 2006, JAs serving at the Center for Law and Military Operations (CLAMO) recognized that these *ad hoc* rule of law projects—regardless of their success—must be replaced with a more formal and uniform program. They began authoring a “practitioner’s guide” in late 2006, with much of the writing being done by Coast Guard Lieutenant Vasilios Tasikas and Army Reserve Captain Thomas Nachbar. Their guide, published in July 2007 as the *Rule of Law Handbook*, recognized that Judge Advocates deployed as part of Operations Enduring and Iraqi Freedom would continue to use their legal skills and talents “to bring stability and rule of law support to the embryonic and fragile democratic governments in both Afghanistan and Iraq.”<sup>31</sup> It follows that the intent of the *Handbook* was to provide Army lawyers conducting rule of law activities as part of stability operations with an “educational resource” that would provide practical tips and guidance in the area. The *Handbook* has been updated and republished since.

Since the publication of the *Handbook*, rule of law projects have continued in Afghanistan and Iraq. At Combined Joint Task Force (CJTF) 82, for example, four JAs at the Office of the Staff Judge Advocate work with their Afghan counterparts in the prosecution of “security criminals.” The “Rule of Law objective was ... to develop a system for successfully prosecuting insurgents, removing them from the battlefield.” This objective was based on the premise that an incarcerated insurgent cannot manufacture improvised explosive devices, bribe public officials, or undermine the legitimacy of the government. Working as an “Afghan Prosecutions Team,” these Army lawyers train others “to focus on evidence collection and development, local and provincial prosecution and case tracking, and strategic level corruption.”<sup>32</sup> Judge advocates also “partner” with National Directorate of Security personnel (Afghanistan’s Federal Bureau of Investigation equivalent) to better “detect, investigate and prosecute insurgents on multiple fronts simultaneously.”<sup>33</sup> These efforts—and similar rule of law projects in Iraq—continue today.

With this history as background, it is clear that JA involvement in rule of law operations is nothing new. If anything, the only new development is a formal, institutional recognition that rule of law operations are an integral part of JA doctrine in military operations—and that written guidance on how to establish and implement a rule of law program is a necessary aspect of what has been part of the JA mission for over a century.

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<sup>30</sup> *Id.*

<sup>31</sup> ROL HANDBOOK, *supra* note 23, at i.

<sup>32</sup> Combined Joint Task Force-82 [hereinafter CJTF-82], Information Paper, *From the Battlefield to the Courtroom: Prosecuting Insurgents in Afghanistan*, at 1, n.d. (June 2010).

<sup>33</sup> *Id.* at 8.



## CHAPTER 2

# 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 U.S. forces in a speedy and just manner or advising their commanders on host nation search and seizure law applicable to U.S. forces conducting security operations. 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 U.S. 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),<sup>1</sup> as in Iraq and Afghanistan. Rule of law operations are central to COIN,<sup>2</sup> 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 U.S. policy, the Department of State (DOS) is the lead agency in conducting most stability and reconstruction activities unless otherwise specified,<sup>3</sup> and virtually all stability operations will involve international and non-governmental organizations as participants. It is important to keep in mind the broader participatory base of non-U.S. military partners, who have differing priorities and operating procedures when conducting rule of law operations.<sup>4</sup> The military role in rule of law capacity-building will end with the redeployment of U.S. forces, but the effort will likely continue with civilian agencies assuming an increasingly central role. In order for those follow-on efforts to be successful, civilian agencies need to be involved at the earliest stages.

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

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<sup>1</sup> “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).

<sup>2</sup> *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.”).

<sup>3</sup> National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstructing and Stabilization, Dec. 7, 2005. *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).

<sup>4</sup> Chapter 3 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.

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.

## **I. 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.

### **A. 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.<sup>5</sup>

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

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

- (1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.
- (2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for the most part. In Joseph Raz’s phrase, “people should be ruled by the law and obey it.”
- (3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.
- (4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.
- (5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedures.<sup>6</sup>

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

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

<sup>6</sup> *Id.* at 8-9 (footnotes omitted).

- supplying law and order
- providing efficient and impartial justice, and
- upholding human rights<sup>7</sup>

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.

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

According to both Army doctrine and U.S. Government (USG) interagency agreement<sup>8</sup> :

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.<sup>9</sup>

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 lives<sup>10</sup>

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

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<sup>7</sup> 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).

<sup>8</sup> 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.”).

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

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.

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.

<sup>10</sup> 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).



that abides by the rule of law.<sup>11</sup> 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. See Chapter 9 on rule of law metrics.

What follows is a discussion of these seven effects.

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

It is impossible to say that a society is governed by the 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,<sup>12</sup> and even less professional arrangements such as militias, can have a role in a recovering state's security structure. But the state must be able to retain ultimate control over the use of force. Any local entity's power must be effectively regulated by the state in order for it to be considered a legitimate exercise in state power.

## **2. Individuals are Secure in Their Persons and Property**

In many ways, providing security is the ultimate purpose of any state. For a 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 U.S. forces can make to implement the rule of law.<sup>13</sup> 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

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<sup>11</sup> 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.*

<sup>12</sup> See Chapter 5. VIII. on Non-State Security Providers.

<sup>13</sup> 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.

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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup>

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*.

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

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

In enforcing the law, the executive must be prevented from acting with complete autonomy to achieve its chosen end lest order be obtained through terror or intimidation, which would not be an exercise of the rule of law. Limits on the power of the police to search or detain individuals, for instance, control the exercise of executive authority while simultaneously furthering the value of providing security to persons and their property. Corruption, too, can erode the function of the legal system into one in which a state is ruled, not by laws, but rather by the imposition of illegitimate restrictions that are withdrawn through the payment of bribes. And, of course, if an individual buys an exception to a legitimate regulation, the failure to apply the regulation is itself a failure of the rule of law. Corruption, or “the abuse of public power for private gain,”<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> Of course, there is likely to be little precedent in host nations in which U.S. military operations are taking place, and in some cases that precedent will be positively rejected as illegitimate.

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

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<sup>14</sup> See STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 135.

<sup>15</sup> *Id.* at 145-47.

<sup>16</sup> 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.”).

<sup>17</sup> WORLD BANK, WORLD DEVELOPMENT REPORT 1997, at 102 (1997).

<sup>18</sup> 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 Chapter 5. B.

<sup>19</sup> Fallon, *supra* note 5, at 20-21.

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.<sup>20</sup>

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

A basic premise of a society governed by law is that there is widespread agreement on what the law is: a rule for recognizing what is law and what is not.<sup>21</sup> Any society that has advanced beyond anarchy is likely to have such an agreement, which in countries that are the subject of U.S. military intervention, may be in the form of a newly authored constitution. Of course, in many countries, there will already be established legislatures and courts, and it will be important for anyone undertaking 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.<sup>22</sup>

Similarly, if the law is constantly reversing itself, it is impossible for the law to become a tool by which people can plan their affairs. It may be necessary to undertake many dramatic changes in a host nation's legal system (such as adopting new criminal or civil codes), but the rate of change cannot be so fast that it is impossible for individuals to build a habit of reliance on the law.

#### **5. Individuals Have Meaningful Access to an Effective and Impartial Legal System**

It means little to have laws on the books if there is no mechanism for the enforcement of that law to redress criminal and civil wrongs. Thus, in order to have a working legal system, judicial and enforcement institutions must exist, and the people must have practical access to those institutions. In many environments in which deployed 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

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<sup>20</sup> See generally A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1968).

<sup>21</sup> H.L.A. HART, *THE CONCEPT OF LAW* 94-95 (2d ed. 1994) (describing the "rule of recognition" that societies use to identify law).

<sup>22</sup> 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).

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.

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

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

The standards for the minimum protection of a country's inhabitants are embodied in the Universal Declaration of Human Rights (UDHR)<sup>23</sup> and the treaties to which the country is a party,<sup>24</sup> such as the International Covenant on Civil and Political Rights (ICCPR).<sup>25</sup> 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.<sup>26</sup> While most would agree that equality is an important value, many disagree on exactly what forms of equality are necessary to the rule of law. In many societies, unequal treatment is a cultural fact that there is no popular will to change. Others define the necessary rights substantively—for instance, the right to security in one's person<sup>27</sup> or the right to free speech<sup>28</sup>—but doing so is unlikely to avoid disputes over which rights are essential to establishing the rule of law. U.S. 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

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<sup>23</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>24</sup> See FM 3-07, *supra* note 10, at 1-7.

<sup>25</sup> Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/English/law/ccpr.htm> (last visited July 19, 2010).

<sup>26</sup> UDHR art. 7; Kleinfeld, *supra* note 7, at 38.

<sup>27</sup> U.S. CONST. amends. V, XIV, sec. 5; UDHR art. 3.

<sup>28</sup> U.S. CONST. amend. I; UDHR art. 19.

understandings that country made to it, whether other states have objected,<sup>29</sup> 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.<sup>30</sup> It is also useful to understand the values of other partners and those of the host nation's culture. See article on how Human Terrain Teams could be helpful to JAs in Chapter 10 of this *Handbook*. Certain human rights abuses by host nations may trigger restrictions on U.S. funding,<sup>31</sup> and systematic mistreatment of citizens and prisoners is likely to lead to substantial international resistance from non-governmental organizations, international organizations, and coalition partners in any rule of law project.

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

Although one can arguably achieve order through threat alone, law is not compliance achieved through threat.<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> From a moral perspective, it is problematic for a state to impose a legal system that does not reflect its society's values. From a practical perspective, the failure of a legal system to become internalized can devastate the official legal infrastructure either because of constant resistance (through political or more violent means) or by requiring the state to rely on its coercive power to resolve more legal disputes than it has the capacity to handle. That legitimacy can take multiple forms:

First, citizens must choose to rely on the legal system. A court system cannot function without judges, but it also needs litigants. A government whose laws are ignored by the people must rely instead on force to impose its policies, which in turn is likely to increase resistance<sup>35</sup> (and fuel insurgency).<sup>36</sup> 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.<sup>37</sup> 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.

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<sup>29</sup> A full list of human rights treaties to which a country is a party and that country's reservations and declarations, as well as any objections to them by other states, can be found at <http://www2.ohchr.org/English/law/> (last visited July 19, 2010).

<sup>30</sup> 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.”).

<sup>31</sup> See, e.g., Leahy Amendment, Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

<sup>32</sup> HART, *supra* note 21, at 22-24.

<sup>33</sup> *Id.* at 54-58.

<sup>34</sup> 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.

<sup>35</sup> See JOINT PUB. 3-0, *supra* note 3, at V-26.

<sup>36</sup> See FM 3-24, *supra* note 1, at 1-27.

<sup>37</sup> See HART, *supra* note 21, at 57-58.

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,”<sup>38</sup> which requires that members of the society have internalized the society’s legal rules and are comfortable using them to conduct their affairs. While a functioning court system, for instance, is one level of success for a rule of law project, a society that truly lives under the rule of law is one in which individuals themselves resolve disputes in ways *consistent* with the law even without invoking the judicial system.<sup>39</sup>

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.

### C. 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.<sup>40</sup> 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 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.<sup>41</sup>

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

As one might guess, rule of law projects with formalist goals are, all other things being equal, less likely to result in controversy and confusion among both international and host-nation participants than projects with substantive goals simply because there is less disagreement over the formal criteria

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<sup>38</sup> STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 78.

<sup>39</sup> *Id.* at 78-79.

<sup>40</sup> See Paul Craig, *Formalist and Substantive Conceptions of the Rule of Law: An Analytical Framework*, 1997 PUB. L. 467.

<sup>41</sup> STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 70-71.

for the rule of law than there is regarding the substantive criteria.<sup>42</sup> Formalist projects are also much less likely to upset established political power relationships, which mean that they are less likely to engender resistance from local, established elites, who may now find themselves at the mercy of their former rivals for alleged wrongs committed under the previous regime.<sup>43</sup> Similarly, formalist projects are frequently less likely to threaten the cultural identity of the host nation and its population than substantive projects.<sup>44</sup> 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,<sup>45</sup> and U.S. law may place explicit limits on assistance to host nations guilty of human rights abuses. These models do not exist in a vacuum; even in undertaking what might at first blush be considered a purely formalist project, participants should consider the substantive ramifications of altering the structure of the host nation legal system.

## **II. Rule of Law Operations**

There are as many types of “rule of law operations”—in the parlance of this *Handbook*, any project, program, or planned action whose specific goal is to help a host nation move toward the realization of one or more of the seven effects previously described—as there are definitions of the 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 U.S. undertook in Germany and Japan following World War II are not likely models for future campaigns, suggesting an approach that is more openly cooperative with the host nation and its population.<sup>46</sup> The status of the host nation also affects the nature of the projects to be undertaken. There may be illegitimate laws that need to be changed, written laws that are not being followed, or even no laws at all regarding certain important subjects. It is possible there will be complete, established structures that need to be remade in order to purge corrupt or illegitimate elements, such as the program of de-Baathification that followed the major combat phase of Operation Iraqi Freedom (OIF). In many nations, many industries are traditionally public, meaning that 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 U.S. law, which limits the U.S. military's role in providing assistance to many foreign government institutions.<sup>47</sup> But rule of law operations can also

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<sup>42</sup> Robert Summers, *The Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1709-10 (1991).

<sup>43</sup> Kleinfeld, *supra* note 7, at 38.

<sup>44</sup> *See id.* at 38 (citing the example of gender equality as a threat to some conceptions of Islamic culture).

<sup>45</sup> 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).

<sup>46</sup> STROMSETH, WIPPMAN & BROOKS, *supra* note 10, at 3.

<sup>47</sup> One form of rule of law operation directed toward reforming the institutions that provide security is “security sector reform.” “Security Sector Reform” is

focus on the effects that U.S. forces themselves have on the state of the rule of law in a host nation. Improving the detention policies followed by U.S. forces, such as a preference for relying on the host nation criminal justice system rather than U.S. military “security detention,” can go a long way toward a host nation’s realization of the seven 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.

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

Joint Publication 3-0, *Joint Operations*, breaks operations into three categories: offensive operations, defensive operations, and stability operations. Any major campaign will require a combination of all three types of operations, to be carried out in appropriate balance during the different phases of the campaign.<sup>48</sup> Army doctrine refers to the mix of offensive, defensive, and stability operations as “full spectrum operations.”<sup>49</sup>

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.”<sup>50</sup> Although stability operations have particular emphasis during the later phases of the campaign, they will take place even during the initial combat phase,<sup>51</sup> 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,<sup>52</sup> and stability operations are critical to the final two phases of the campaign (Stabilize and Enable Civil

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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.

<sup>48</sup> JOINT PUB. 3-0, *supra* note 3, at V-1 - V-2.

<sup>49</sup> 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.

<sup>50</sup> 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).

<sup>51</sup> JOINT PUB. 3-0, *supra* note 3, at V-15.

<sup>52</sup> *Id.* at IV-29.



Authority)<sup>53</sup> leading to the campaign's termination and the redeployment of U.S. forces.<sup>54</sup> Stability operations are also a critical component of counterinsurgency.<sup>55</sup>

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."<sup>56</sup> *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.<sup>57</sup>

Many rule of law operations will take place as components of stability operations, helping to establish (or reestablish) the host nation's capacity to maintain the rule of law. Such projects may include reconstruction of the physical infrastructure of the host nation's legal system, providing training programs for host nation justice sector personnel, or simply serving as a coordinator between the many, many participants in such projects. Conducting rule of law operations within the context of stability operations requires that any rule of law effort be coordinated with other activities (such as security and the restoration of civilian infrastructure and essential services)<sup>58</sup> 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.<sup>59</sup>

It is Department of Defense (DOD) policy that "[m]any stability operations tasks are best performed by indigenous, foreign, or U.S. civilian professionals. Nonetheless, U.S. military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so."<sup>60</sup> Thus, Judge Advocates can expect a particularly close working relationship with a multitude of not only U.S., but also coalition, non-governmental, and indigenous participants in rule of law projects.

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<sup>53</sup> 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.

<sup>54</sup> 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).

<sup>55</sup> 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.").

<sup>56</sup> DOD DIR. 3000.05, *supra* note 50, para. 3.1.

<sup>57</sup> *Id.* at para. 4.3.

<sup>58</sup> 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.").

<sup>59</sup> 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).

<sup>60</sup> DOD DIR. 3000.05, *supra* note 50, 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.").

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”<sup>61</sup> within the host nation. “Legitimacy is frequently a decisive element,” in joint operations.<sup>62</sup> Similarly, in COIN, “victory is achieved when the populace consents to the government’s legitimacy and stops actively and passively supporting the insurgency.”<sup>63</sup> In this sense, for U.S. forces engaged in COIN, the most important of the seven effects described above is the last one—individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives. That legitimacy is the desired end state for any campaign, but it is the only real objective in a counterinsurgency.

Because of the special relationship between the 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 U.S., coalition, and host nation security forces themselves operate in ways that encourage respect for the rule of law while engaged in the full spectrum of operations, including offensive and defensive operations.

Efforts to build a legitimate government 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.<sup>64</sup>

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.<sup>65</sup>

As U.S. 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 U.S./host nation operations—which are likely to eventually develop into host nation-only operations—that comply with U.S., international, and host nation law; help to develop training programs in the legitimate use of force by host nation security forces; and mentor host nation

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<sup>61</sup> JOINT PUB. 3-0, *supra* note 3, at IV-29 (emphasis added).

<sup>62</sup> *Id.*, at A-4 (“Committed forces must sustain the legitimacy of the operation and of the host government, where applicable.”).

<sup>63</sup> FM 3-24, *supra* note 1, at 1-3.

<sup>64</sup> *Id.* at 1-24.

<sup>65</sup> *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.”).

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

## B. Operational Impact

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

U.S. forces may need to alter their tactical stance in order to convey to the population that they are operating according to law rather than merely exercising control through the threat of force. As major combat operations end, combat forces may need to adopt different and more engaging tactics as they transition into their role as a stabilizing force. Recalling Joint Publication 3-0's phases of joint operations, while *Dominant* is an important aspect of combat operations, transition into the next phases, *Stabilize* and ultimately *Enable Civil Authorities*, include a reduction in dominating activities.<sup>66</sup> 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*.<sup>67</sup> 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.<sup>68</sup>

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 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.<sup>69</sup> The criminals who go free every day in the U.S. because of illegal searches—and the police officers who are killed because they are limited in their power to search—are all the reminder that anyone needs of the human cost of a state that is itself bound by legal rules. Similarly, U.S. commanders will need to be prepared to respect—and have their power constrained by—host nation legal rules as host nation legal institutions assert

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<sup>66</sup> 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.").

<sup>67</sup> 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.").

<sup>68</sup> LCDR Vasilios Tasikas, *Developing the Rule of Law in Afghanistan, The Need for a New Strategic Paradigm*, ARMY LAW. 45 (July 2007).

<sup>69</sup> *See* JOINT PUB. 3-0, *supra* note 3, at A-4 ("Security actions must be balanced with legitimacy concerns.").

their authority.<sup>70</sup> 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.

### C. The Importance of Focusing on Effects

*In response to numerous recommendations and requests for information, this year's Handbook contains a chapter on metrics at Chapter 9.*

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*<sup>71</sup> along with a specific end-state.<sup>72</sup> 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.<sup>73</sup> A nation with beautifully constructed courthouses may nevertheless fail to achieve the rule of law if the judges in those courthouses are either arbitrary or corrupt. The same is true of a well-established police or correctional force that regularly violates citizens' and prisoners' human rights.

Of course, metrics must be "measurable," and some institutional improvements can point to underlying effects. (For instance, attendance and graduation from training programs by judicial or police may indicate that their superiors recognize the value of the content of the program.) Nevertheless, by failing to recognize that institutional improvements are only valuable if they are connected to an effect, some institutional projects may actually thwart the long-term adoption of the rule of law in a society. It may very well be that, especially during early-stage interventions, the only types of measurable change can take place at the institutional level, but the ultimate goal of a rule of law project is not to bring about institutional change—it is to bring about the conditions described by the term "rule of law."

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<sup>70</sup> 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.

<sup>71</sup> "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).

<sup>72</sup> *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.").

<sup>73</sup> Kleinfeld, *supra* note 7, at 61-62.

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.

## CHAPTER 3

# KEY PLAYERS IN RULE OF LAW

Rule of law missions typically require broad joint,<sup>1</sup> 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.”<sup>2</sup> Judge Advocates should recognize that rule of law operations are not and will never be exclusively military activities, and that other U.S. 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. Whatever the international or national mandate, it is necessary and critical to have host nation actors involved in all stages of rule of law operations. Thus, the rule of law practitioner must establish and maintain meaningful collaboration with key host nation officials and civil society leaders, enabling and giving local and 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.

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<sup>1</sup> 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”).

<sup>2</sup> JAMES DOBBINS, ET AL., *THE BEGINNER’S GUIDE TO NATION-BUILDING* 6 (2007).

## I. U.S. 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.”<sup>3</sup> 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 interagency partners minimizes the 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.

## II. Post-Conflict Interagency Structure

The recent post-conflict requirements for civilian-military operations in Afghanistan and Iraq have driven policy makers within the U.S. government to improve both the planning and execution of post-conflict stability operations. During the Cold War and for some time after, Presidents and the Congresses, who grew up in a bi-polar political environment were reluctant to use military force solely for purpose of “nation-building.” But as the world became a more complex and dangerous place for its civilian population, our leaders realized that a well-executed military response, alone, is not enough.<sup>4</sup> Two key directives define the federal government’s organization for stability operations—*National Security Presidential Directive 44*

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

<sup>4</sup> As this *Handbook* goes to press the Department of State and the United States Agency for International Development are reviewing their tactical capability to implement the President’s National Security Strategy 2010 using the Quadrennial Diplomacy and Development Review, see: U.S. Department of State, “The Department of State’s Quadrennial Diplomacy and Development Review,” Press Release of 10 July 2009, available at <http://www.state.gov/r/pa/prs/ps/2009/july/125956.htm> (last visited May 25, 2010). To improve tactical capabilities Congress has encouraged interagency, post-conflict efforts by creating the Civilian Stabilization Initiative and appropriating funds to support, maintain, and deploy a Civilian Response Corps to conduct reconstruction and stabilization operations designed to prevent or respond to conflict in foreign countries, see: Consolidated Appropriations Act, 2010, Public Law 111-117, December 16, 2009.

(NSPD-44)<sup>5</sup> and *Department of Defense Directive 3000.05* (DOD Directive 3000.05)<sup>6</sup>. Also relevant is the general framework for interagency coordination set forth in *National Security Presidential Directive 1* (NSPD-1).<sup>7</sup> 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.

### **A. U.S. 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.<sup>8</sup>
- 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.”<sup>9</sup>
- the establishment of a number of Policy Coordination Committees (now called Interagency Policy Committees or “IPC”) for both regions and functional topics, which serve as the main day-to-day forum for interagency coordination of national security policy by providing policy analysis for consideration by the more senior committees of the NSC system and ensuring timely responses to decisions made by the President

Since the promulgation of NSPD-1 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. The Assistant to the President and Deputy National Security Advisor for Iraq and Afghanistan chairs these teams.

### **B. U.S. 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.”<sup>10</sup> The primary purpose of NSPD-44 was to improve

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<sup>5</sup> 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 May 25, 2010).

<sup>6</sup> U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, 2 (16 September 2009).

<sup>7</sup> 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 May 25, 2010).

<sup>8</sup> 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.”

<sup>9</sup> The NSC/DC, in large part, consists of the Deputy Secretaries of the departments included in the NSC/PC.

<sup>10</sup> NSPD-44, *supra* note 5.



“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.”<sup>11</sup> 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 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.<sup>12</sup> 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.”<sup>13</sup> To execute this directive, the Secretary of State delegated the authority under NSPD-44 to the Office of the Coordinator for Reconstruction and Stabilization (S/CRS), stood up earlier in 2004.

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.

NSPD-44 further stressed coordination in conflict mitigation and prevention and planned responses for R&S between the State Department and the Defense Department.<sup>14</sup> Lastly, the directive highlighted the requirement to develop a joint framework for harmonizing R&S plans with military activities.<sup>15</sup>

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 Pub. L. 110-417. Title XVI amends the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) and the State Department Basic Authorities Act of 1956 (22 U.S.C. 2651a et seq.), authorizing the Civilian Response Corps, and permanently established S/CRS in the Department of State.

To implement the mandate originally established by NSPD-44, S/CRS followed a three-pronged approach<sup>16</sup> 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.

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 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.

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 U.S. agencies.<sup>17</sup> 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 supported by a Secretariat<sup>18</sup> 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.<sup>19</sup> To support planning elements, S/CRS coordinated with other USG agencies to publish a Post-Conflict Reconstruction Essential Tasks Matrix to assist planners.<sup>20</sup>

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.<sup>21</sup> 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, U.S. 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 U.S. 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 and 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 U.S. civilian agencies. The Reserves

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<sup>17</sup> 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://merln.ndu.edu/archivepdf/nss/state/94379.pdf> (last visited May 25, 2010) [hereinafter Herbst Statement].

<sup>18</sup> 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.*

<sup>19</sup> *Id.*

<sup>20</sup> The Post Conflict Reconstruction Essential Tasks Matrix can be found at: <http://www.crs.state.gov/index.cfm?fuseaction=public.display&id=10234c2e-a5fc-4333-bd82-037d1d42b725> (last visited May 25, 2010), 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).

<sup>21</sup> The Reserve component has not yet been provided funding.

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.

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, as well as diplomats, development specialists, public health officials, engineers, economists, public administrators, agronomists and others. They will offer the full range of skills anticipated to help fragile states restore stability and the rule of law. Because no single government entity has all of the relevant expertise, the CRC is a collaboration of eight departments and agencies: the Department of State, U.S. 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.

To date, 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 in the Sudan, Chad, Haiti, Lebanon, Liberia, Kosovo, Georgia, Iraq, and Afghanistan.

In 2008 Congress provided initial funding for the Active and Standby components of the CRC under the FY2008 supplemental (Pub. L. 110-252). Additional funding was provided under Division H of Pub. 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 a significant first step in enhancing civilian expeditionary capacity. The following sections describe S/CRS itself in further detail.

### **C. 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 (updated and reissued in September 2009) the Deputy Secretary of Defense issued Directive 3000.05, entitled “Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations.”<sup>22</sup> The directive declares stability operations<sup>23</sup> are a “core U.S. military mission” that “the [military] shall be prepared to conduct.”<sup>24</sup> Moreover, the publication directs stability operations to have “proficiency equivalent to combat operations.”<sup>25</sup> As such, this directive mandates military planners to integrate stability operations with every war plan.<sup>26</sup>

DOD Directive 3000.5 maintains that military forces are to defer responsibility to appropriate civilian agencies when feasible.<sup>27</sup> The directive also calls for the development and employment of field civilian-military teams as a necessary element in post-conflict operations.<sup>28</sup>

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<sup>22</sup> DOD DIR. 3000.05, *supra* note 6.

<sup>23</sup> 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).

<sup>24</sup> DOD DIR. 3000.05, *supra* note 6 at 4.a.

<sup>25</sup> *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).

<sup>26</sup> DOD DIR. 3000.05, *supra* note 6.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

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.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> Accordingly, the Directive includes a long list of reconstruction and stabilization undertakings the U.S. military must train and equip itself to carry out. These range from rebuilding infrastructure to reforming security sector institutions, reviving the private sector, and developing representative government.<sup>32</sup>

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.<sup>33</sup> DOD recognizes military action alone cannot bring long term peace and prosperity.<sup>34</sup>

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."<sup>35</sup> In turn, the ASDSO/LIC established the Stability Operations Capabilities directorate.<sup>36</sup>

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"<sup>37</sup> and expanding the Peacekeeping and Stability Operations Institute (PKSOI) at Carlisle Barracks. It also includes establishing the "Culture Center within the Army's Training and Doctrine Command [which] provides exportable training materials and mobile training teams to better prepare deploying units to more effectively operate in foreign cultures" and creating additional psychological operations and civil affairs billets.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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."<sup>41</sup>

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

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 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.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

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.<sup>42</sup> Field Manual 1-04, *Legal Support to the Operational Army* addresses the roles and responsibilities of Judge Advocates in stability operations, as does Field Manual 3.05-40, *Civil Affairs Operations* and in Joint Publication 1-04, *Legal Support to Military Operations*.

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

- an integrated USG pre-deployment training regimen built on Iraq and Afghanistan Provincial Reconstruction Team (PRT) training concepts,
- a process for DOD to obtain subject matter experts from other USG agencies to support DOD training and exercises,
- the adjudication of requests for interagency integrated training through a single point of contact in each agency,
- the development of a USG-wide web-based training knowledge portal that allows participating agencies to have visibility to other agencies' training opportunities.<sup>43</sup>

Many of these initiatives have been completed, and all are under way. All the services have also incorporated individual<sup>44</sup> and collective training on SSTR. The training centers placed additional emphasis on SSTR tasks by employing "civilian role players and foreign language speakers to replicate indigenous populations, security forces, and representatives from governmental and private relief organizations."<sup>45</sup> 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."<sup>46</sup>

## **D. U.S. 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 U.S. 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. Following this listing, a few key agencies are described in detail.

### **1. National Security Council (NSC) System<sup>47</sup>**

- National Security Council
  - NSC Principals Committee
  - NSC Deputies Committee

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<sup>42</sup> *Id.* 11-12.

<sup>43</sup> *Id.* at 16-7.

<sup>44</sup> Training opportunities include the following: 80 hour modular cultural awareness training program developed by the Army Intelligence Center, online cultural awareness available through Army Knowledge Online, mobile training teams on fundamental language and culture "survival skills" provided by the Defense Language Institute. *Id.* at 18.

<sup>45</sup> *Id.* at 17.

<sup>46</sup> *Id.* at 4.

<sup>47</sup> See NSPD-1, *supra* note 7.

- 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

## **2. 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)
  - 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)<sup>48</sup>
      - 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)

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<sup>48</sup> 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.

- 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)

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

- Administrator of USAID
  - Regional Bureaus (Africa (AFR), Asia/Near East (ANE), Europe/Eurasia (E&E), Latin America/Caribbean (LAC), Middle East)
    - South Asian Affairs (ANE/SAA)
    - Iraq Reconstruction (ANE/IR)
  - Bureau for Democracy, Conflict and Humanitarian Assistance (DCHA)
    - Democracy and Governance
      - Rule of Law Division
      - Governance Division
      - Elections and Political Processes Division
      - Civil Society Division
    - Office of Transition Initiatives (OTI)
      - Management and Program Operations Team
      - Field Operations Team
    - Conflict Management and Mitigation
    - U.S. Foreign Disaster Assistance (OFDA)
    - Volunteers for Prosperity
    - Military Affairs
      - Planning Division
      - Operations Division
  - Bureau of Economic Growth, Agriculture and Trade (EGAT)
    - Women in Development
    - Economic Growth
      - Economic Policy and Governance Team
    - Poverty Reduction
      - Microenterprise Development Team

- Poverty Analysis and Social Safety Net Team
- Infrastructure and Engineering
- Agriculture
  - Agriculture and Rural Policy/Governance Team
  - Agricultural Technology Generation and Technological Outreach Team
  - Agribusiness and Markets Team
- Bureau for Global Health
- Bureau for Legislative and Public Affairs

#### **4. Department of Justice (DOJ)**

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

#### **5. Department of Defense (DOD)**

- Secretary of Defense
  - Deputy Secretary of Defense
    - Secretary of the Army
  - Joint Chiefs of Staff (JCS)
    - Chairman of JCS
    - Joint Chiefs
    - Joint Staff: J-1 – J-8
  - Under Secretary of Defense for Policy
    - Assistant Secretary for Legislative Affairs
    - Assistant Secretary for Stability Operations and Low Intensity Conflict
      - Deputy Assistant Secretary of Defense for Stability Operations
  - Office of General Counsel



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

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

## **7. Department of Commerce**

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

## **8. Department of the Treasury**

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

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

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

## **III. U.S. 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. As noted earlier, this *Handbook* would not be possible without the support and cooperation of various individuals within the government agencies listed below.

## A. Department of State

The Department of State (DOS) is responsible for planning and implementing U.S. foreign policy. In July 2004, Congress authorized the reprogramming of funds to create the State Department's Office of the Coordinator for Reconstruction and Stabilization (S/CRS). Since 2005, federal appropriations statutes<sup>49</sup> direct the DOS to coordinate U.S. reconstruction and development assistance, including rule of law assistance, for present and future conflicts and provide funds for those purposes. But, for Afghanistan and Iraq, the coordination mechanisms put in place by supplemental appropriations prior to NSPD-44 and the 2009 statute<sup>50</sup> continue to control, i.e., NSPD-1. Recently, the two systems are working more smoothly together, and S/CRS has been contributing to civilian planning efforts in Afghanistan.<sup>51</sup> 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 U.S. military is involved, the DOS coordinates with the DOD to synchronize military and civilian activities.

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

- Informing U.S. decision makers of viable options for stabilization activities
- Coordinating U.S. efforts with those of other governments, international and regional organizations, NGOs and private companies
- Seeking input from individuals and organizations with country-specific expertise
- Leading development of a robust civilian response capability with a prompt deployment capacity and civilian reserve
- Gleaning lessons learned and integrating them into operations
- Coordinating and harmonizing military and civilian participation
- Resolving relevant policy, program or funding disputes among U.S. agencies and departments
- Implementing foreign assistance programs around the world, in coordination with USAID and DOD, and in partnership with other U.S. agencies and departments.

Congress funds 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 U.S. 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 Bureau for International Narcotics and Law Enforcement Affairs (INL) and Bureau of Democracy, Human Rights and Labor (DRL)—based on policies set by the appropriate regional bureau, along with USAID. These entities then identify mechanisms through which to execute the assistance, e.g., through transfers to other agencies (such as DOJ, DHS, and Treasury), contracts, grants, and agreements with international organizations. 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

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<sup>49</sup> See H.R.4818 Consolidated Appropriations Act, 2005, Public Law No: 108-447.

<sup>50</sup> See Omnibus Appropriations Act, 2009, Public Law No: 111-8.

<sup>51</sup> 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.”).

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 INL often has the lead. If the mission in question qualifies as a reconstruction & stabilization mission and the Interagency Management System is activated, the Country Reconstruction and Stabilization Group may be the hub for coordinating planning and civilian operations.

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 Programs (INL/CIV), dedicated to providing advice and subject matter expertise on international policing, criminal justice development, and corrections reform. The INL/CIV office also serves as INL's link to S/CRS, and is home to INL's Civilian Response Corps Active Component members with expertise in civilian police, criminal justice development, corrections assistance, and post-conflict rule of law programming. The guidance from State's regional and functional bureaus provides the framework within a country for carrying out U.S. missions, programs, and policies in a country, but it is the Country Team system that provides the foundation for interagency consultation, coordination, and action in the field.

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

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

Within the DOS, the 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 U.S. 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 U.S. 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 U.S. 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, 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.”<sup>52</sup> In addition to training police in the field, INL works with the Afghan Ministry of Interior on payroll and rank reform.<sup>53</sup> 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 U.S. 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,<sup>54</sup> the Central Prison Directorate, and provincial and district justice systems. These programs are currently being expanded.

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.”<sup>55</sup> 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.<sup>56</sup> 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.

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<sup>52</sup> Fact Sheet, Civilian Police and Rule of Law Programs, Jan. 20, 2009, *available at* <http://www.state.gov/documents/organization/115512.pdf> (last visited May 2, 2010).

<sup>53</sup> *Id.*

<sup>54</sup> USAID has purview of Supreme Court reform in Afghanistan.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

## **2. 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.”<sup>57</sup> Its mission is to “lead, coordinate, and institutionalize USG civilian capacity to prevent or prepare for post-conflict situations, and to help stabilize and reconstruct societies in transition from conflict or civil strife so they can reach a sustainable path toward peace, democracy, and a market economy.”<sup>58</sup> 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 and in the field with the military at Regional Combatant Commands
- 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.

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 reconstruction and stabilization 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.

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<sup>57</sup> See Department of State, Office of the Coordinator for Reconstruction and Stabilization website, *available at* <http://www.state.gov/s/crs/> (last visited May 2, 2010).

<sup>58</sup> Department of State, Office of the Coordinator for Reconstruction and Stabilization, Mission statement, *available at* <http://www.crs.state.gov/index.cfm?fuseaction=public.display&shortcut=4QXJ> (last visited May 3, 2010).

## **B. U.S. Agency for International Development (USAID)**

*Editor's Note: This section gives a broad overview of USAID's global mission. For Iraq and Afghanistan-specific rule of law programs the reader should look at USAID's missions' websites for those two countries at: <http://www.usaid.gov/iraq/> and <http://afghanistan.usaid.gov/en/index.aspx>. However, understanding how USAID functions will undoubtedly assist Judge Advocates in implementing rule of law projects.*

### **1. Introduction**

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

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

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

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

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

### **2. Goals, Types of Assistance and Authorities**

USAID has embraced five core goals:

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

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

The types of assistance USAID provides include:

- technical assistance and capacity building
- training, scholarships and grants

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

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

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

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

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

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

USAID sets targets and measures results at various levels—the overall Agency, bureau, and field mission—and in various country environments that range from fragile states to those with more advanced economies. The upcoming 2010 Quadrennial Diplomacy and Development Review, as well as Presidential Study Directive 7, will outline further inter alia the strategic planning framework for both agencies and will hopefully describe key activities USAID will undertake in the coming years to further the joint mission of creating “a more secure, democratic, and prosperous world.”

### **3. USAID Financial Mechanisms for Implementation**

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

- **Contracts** purchase services, equipment, or commodities according to a specified scope of work (SOW). The SOW is a statement that spells out the exact nature of the purchase, when and where it is to be delivered, and other particulars as needed (e.g., cost, special supplier qualifications).

- **Cooperative agreements** are usually awarded to nonprofit organizations or educational institutions to accomplish a public purpose. Typically USAID is substantially involved in carrying out the program, at a level specified by the agreement.
- **Grants** are much the same as cooperative agreements, but allow the recipient more freedom to pursue its stated program without substantial involvement from USAID.
- **Strategic objective agreements (SOAgs)** are formal agreements between USAID and a host government that set forth specific development activities to be undertaken, along with mutually agreed-upon timeframes, expected results, means of measuring the results, resources, responsibilities, and estimated contributions of the parties involved.
- **Collaborative agreements** were pioneered in FY 2005 as a flexible, streamlined alternative to traditional grants and contracts for work with nontraditional partners in the private sector.

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

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

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

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

#### **4. USAID and Partner Organizations**

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

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

A wide variety of partners implement USAID programs, including

- **private voluntary organizations (PVOs):** nonprofit groups operated primarily for charitable, scientific, educational, or service purposes. Some PVOs working with USAID are international, but the majority



are U.S.-based (to be eligible for USAID grants, the latter must obtain at least 20 percent of their funding from non-U.S. government sources). Examples include CARE, WildAid, Save the Children, Catholic Relief Services, and World Vision.

- **local and regional nongovernmental organizations (NGOs):** voluntary nonprofit organizations based in developing countries or regions in which USAID operates. Examples include Bosnia's Center for Civic Cooperation, Guatemala's Genesis Empresarial, Sri Lanka's Multi Diverse Community, and the Forum for African Women Educationalists.
- **public international organizations (PIOs):** organizations whose members are chiefly governments (including the United States). Examples include UN agencies, the Committee of the International Red Cross, the World Bank, and regional development banks.
- **contractors:** private companies with legally binding agreements to supply goods or services to the U.S. government under a specified scope of work.

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

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

By federal statute, **grants** are given to implementing agencies or grantees with few strings attached, so USAID oversight is limited. However, besides carrying out the responsibilities listed above, USAID still must evaluate grant proposals before awards are made, and grantees must report to USAID regularly on the status of their activities. Furthermore, funding beyond a defined time period is not guaranteed.

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

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

## **5. USAID Presence: Field and Washington**

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

### **a. Field Missions**

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

receiving USAID funds) primarily through contracts and grants. These partners, in turn, employ expatriate and national staff.

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

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

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

USAID missions operate under decentralized program authorities (legal powers) allowing missions to design and implement programs and negotiate and execute agreements. These authorities are assigned to senior field officers in accordance with each officer’s functions. For example, mission directors and principal officers are given authority to:

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

#### **b. USAID Washington**

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

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

## 6. USAID Post-Conflict and Transition Activities

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

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

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

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

## 7. USAID and Democracy, Governance and Human Rights

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

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

- *Protect Human Rights.* Improve due process, nondiscrimination, and representation of all groups of society to guarantee citizens' rights.
- *Promote Effective and Democratic Governance of the Security Sector.* Increase civilian oversight to enhance transparency and accountability and improve public order and security.

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

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

## **8. USAID Rule of Law Activities**

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

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

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

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

*Case Study: Lack of Basic Order and Security in Nepal*

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

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

- **Legitimacy**—Laws are legitimate when they represent societal consensus. Legitimacy addresses both the substance of the law and the process by which it is developed. This process must be open and democratic. In some societies, legitimacy can be derived through religion, traditions, customs, or other

means. Laws do not need to be written in order to be legitimate, since traditional/customary laws are often passed on through oral traditions. USAID seeks to promote legitimacy through different country specific strategies. Below is a case study of one such approach.

*Case Study: Legitimacy of the Source of Law in Morocco*

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

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

*Case Study: Strengthening Judicial Governance in Russia*

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

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

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

*Case Study: Fairness in Zambia*

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

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

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

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

*Case Study: Effectiveness of the Application of Laws in Zambia*

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

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

## 9. Strategic Goals

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

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

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

## 10. USAID and Security Sector Reform (SSR)

A safe and secure environment is a key building block for development and democracy building. Communities that live in fear cannot engage in productive economic, social or political activity. Recognizing that effective and responsible governance of the security sector is critical to ensuring that societies evolve in democratic and prosperous ways, USAID engages in Security Sector Reform

programming under the Democracy and Governance portfolio. This work may likely cross paths with the U.S. military's work overseas.

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

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

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

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

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

## **11. USAID Practice Areas and Illustrative Activities**

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

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

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

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

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

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

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

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

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

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

There are several prerequisites for a successful DDR program:

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

### **A typical DDR process takes place in three parts:**

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

- Weapons survey
- Weapons collection
- Weapons storage
- Weapons destruction



- Weapons reutilization

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

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

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

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

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

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

### 13. Contacts / References for Further Research

The USAID mission or the Embassy in your country of work should have relevant in-country contacts for you regarding democracy and governance, rule of law, security sector reform and other USAID projects. This section cannot answer all questions that may come up and mission-specific focal points can address more detailed queries. Within the USAID Washington headquarters, the following persons can also assist:

Name	Expertise	Phone (202)	Email
Achieng Akumu	Access to justice	712-0304	<a href="mailto:aakumu@usaid.gov">aakumu@usaid.gov</a>

Name	Expertise	Phone (202)	Email
Eric Beinhart	Policing	712-5416	<a href="mailto:ebeinhart@usaid.gov">ebeinhart@usaid.gov</a>
John Buchanan	Policing	712-1842	<a href="mailto:jbuchanan@usaid.gov">jbuchanan@usaid.gov</a>
Keith Crawford	Judicial Reform	712-1471	<a href="mailto:kcrawford@usaid.gov">kcrawford@usaid.gov</a>
Victoria Donovan		712-4827	<a href="mailto:vdonovan@usaid.gov">vdonovan@usaid.gov</a>
Brad Fujimoto	Division Chief	712-1113	<a href="mailto:bfujimoto@usaid.gov">bfujimoto@usaid.gov</a>
Jean Garland	Human Rights / Criminal Justice / Anti-Gang Programming	712-5346	<a href="mailto:ggarland@usaid.gov">ggarland@usaid.gov</a>
Susan Pologruto	Legal empowerment of the poor	712-1821	<a href="mailto:spologruto@usaid.gov">spologruto@usaid.gov</a>
Tamaira Rivera	Liaison to the Administrative Offices of the U.S. Courts (AOUSC)	712-4447	<a href="mailto:trivera@usaid.gov">trivera@usaid.gov</a>
Julie Werbel	Security Sector Reform	712-1711	<a href="mailto:jwerbel@usaid.gov">jwerbel@usaid.gov</a>

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

- USAID Primer: [http://www.usaid.gov/about\\_usaid/primer.html](http://www.usaid.gov/about_usaid/primer.html)
- USAID Office of Democracy and Governance: [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/](http://www.usaid.gov/our_work/democracy_and_governance/)
- USAID Office of Military Affairs: [http://www.usaid.gov/our\\_work/global\\_partnerships/ma/](http://www.usaid.gov/our_work/global_partnerships/ma/)
- USAID Office of Foreign Disaster Assistance: [http://www.usaid.gov/our\\_work/humanitarian\\_assistance/disaster\\_assistance/](http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/)
- USAID Office of Transition Initiatives: [http://www.usaid.gov/our\\_work/cross-cutting\\_programs/transition\\_initiatives/](http://www.usaid.gov/our_work/cross-cutting_programs/transition_initiatives/)
- USAID and Security Sector Reform: [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/SSR\\_JS\\_Mar2009.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/SSR_JS_Mar2009.pdf)
- USAID Rule of Law Strategic Framework: [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/ROL\\_Strategic\\_Framework\\_Sept\\_08.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Sept_08.pdf)
- USAID Iraq Mission: <http://www.usaid.gov/iraq/>
- USAID Afghanistan Mission: <http://afghanistan.usaid.gov/en/index.aspx>
- USAID Pakistan Mission: <http://pakistan.usaid.gov>
- USAID Ethiopia Mission: [http://www.usaid.gov/locations/sub-saharan\\_africa/countries/ethiopia/](http://www.usaid.gov/locations/sub-saharan_africa/countries/ethiopia/)
- USAID Somalia Mission: <http://eastafrika.usaid.gov/en/Country.1012.aspx>
- USAID East Africa Regional Mission: <http://eastafrika.usaid.gov/>
- USAID West Africa Regional Mission: <http://westafrika.usaid.gov>
- USAID Southern Africa Regional Mission: <http://sa.usaid.gov/>
- USAID Haiti Mission: <http://www.usaid.gov/ht/>

### C. Department of Justice (DOJ)

The Department of Justice (DOJ) provides legal advice to the President, represents the Executive Branch in court, investigates Federal crimes, enforces Federal laws, operates Federal prisons, and provides law

enforcement assistance to states and local communities. The Attorney General heads the DOJ; supervises U.S. attorneys, marshals, clerks, and other officers of Federal courts; represents the U.S. in legal matters; and makes recommendations to the President on Federal judicial appointments and positions within the DOJ. While primarily focused on domestic legal activities, the DOJ's role in rule of law operations abroad is growing.

In cooperation with Department of Defense (DOD), Department of State (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 U.S. Marshals Service (USMS), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The Bureau of Prisons also contributes. For example, the assistant program manager for the corrections development program in Iraq is an active duty warden who is detailed to International Criminal Investigative Training Assistance Program (ICITAP). It also does so through its specialized international prosecutorial and police development offices within the Criminal Division, the Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT), and the ICITAP. The Office of the Deputy Attorney General provides policy oversight and coordination of DOJ's many efforts, while DOS, principally through DOS/INL, provides funding and policy guidance for all DOJ capacity-building programs, including those of OPDAT and ICITAP, which place federal prosecutorial and law enforcement experts, respectively, in foreign countries for long-term assignments designed to focus on the comprehensive development of all pillars of the criminal justice system.

### **1. Office of the Deputy Attorney General**

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

Additionally, at the request of the former Ambassador to Iraq, the Attorney General deployed a senior attorney to serve as the Rule of Law Coordinator for Iraq.<sup>59</sup> The Rule of Law Coordinator serves as the Ambassador's principal agent for coordination of all rule of law programs and activities, whether performed by DOJ components or other departments and agencies represented at the U.S. Mission to Iraq. The Rule of Law Coordinator serves under the authority of the Chief of Mission and is the senior DOJ official in Iraq.

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

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<sup>59</sup> As of April 15, 2010, the Rule of Law Coordinator position in Afghanistan is filled by a Department of State Foreign Service Officer.

## **2. 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 and prison systems in the context of international peacekeeping operations, and (2) the enhancement of capabilities of existing police forces and prison systems in emerging democracies. Assistance is based on internationally recognized principles of human rights, rule of law, and modern police and corrections practices.

The intent of ICITAP's training and assistance programs is to develop professional civilian-based law enforcement institutions.<sup>60</sup> ICITAP assistance is designed to: (1) enhance professional capabilities to carry out investigative and forensic functions; (2) assist in the development of academic instruction and curricula for law enforcement personnel; (3) improve the administrative and management capabilities of law enforcement agencies, especially their capabilities relating to career development, personnel evaluation, and internal discipline procedures; (4) improve the relationship between the police and the community it serves; (5) create or strengthen the capability to respond to new crime and criminal justice issues; and (6) develop corrections systems that foster public safety and demonstrate respect for the human rights of those incarcerated. Since its creation, ICITAP has conducted projects in nearly 40 countries.

Individuals assigned to ICITAP have been working in Iraq since 2003. ICITAP personnel previously provided assistance to the Government of Iraq through the Civilian Police Assistance Training Teams (CPATT) under a program funded by DOS/INL, and currently assist the Government of Iraq in corrections and anticorruption investigations development programs.<sup>61</sup> 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.<sup>62</sup> Finally, ICITAP brings extensive experience and expertise in assessing Iraqi correctional facilities against international prison standards. ICITAP has helped reestablish the Iraq Corrections Service (ICS) and worked with Iraqi leaders to develop a national prison system. It has also deployed a team of 80 corrections training officers to provide on-site training and mentoring to Iraqi staff at prison facilities throughout the country and to assist the Iraq Ministry of Justice in strengthening the overall management of the corrections service.

## **3. Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT)**

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 DOJ in combating terrorism, trafficking in persons, organized crime, corruption, and

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<sup>60</sup> ICITAP possesses the following expertise: basic police skills, corrections, public integrity and anti-corruption, criminal justice coordination, forensics, organizational development, academy and instructor development, community policing, transnational crime, specialized tactical skills, marine and border security and information systems. Fact Sheet, The Department of Justice Mission in Iraq: International Criminal Investigative Training Assistance Program (ICITAP) available at <http://www.justice.gov/iraq/icitap.htm> (last visited May 6, 2010).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

financial crimes.”<sup>63</sup> 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.<sup>64</sup>

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

OPDAT also serves as the Department’s liaison between various private and public agencies that sponsor visits to the United States for foreign officials who are interested in the United States legal system. OPDAT makes or arranges for presentations explaining the U.S. criminal justice process to hundreds of international visitors each year, most through the State Department’s International Visitor Leadership Program (IVLP).

#### **4. Other DOJ Activities in Iraq**

The Department of Justice’s law enforcement components 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-U.S. organization providing on-the-job training, support and mentoring to Iraqi law enforcement and task force members. Law enforcement agents from the FBI, ATF, DEA, and the USMS, work in close partnership with their Iraqi counterparts to conduct investigations of serious and often highly sensitive criminal acts.

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

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

Finally, the DEA and USMS<sup>65</sup> have small presences, having delivered courses in intelligence and intelligence analysis to the Iraqi police and advised on procedures and technologies that will improve the safety of civil and criminal courts throughout Iraq. Both DEA and USMS currently support the MCTF.

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<sup>63</sup> Fact Sheet, OPDAT - OPDAT Mission, *available at* <http://www.justice.gov/criminal/opdat/about/mission.html> (last visited May 6, 2010).

<sup>64</sup> Fact Sheet, USDOJ: The Department of Justice Mission in Iraq: Office of Overseas Prosecutorial Development, Assistance and Training *available at* <http://www.justice.gov/iraq/opdat.htm> (last visited May 6, 2010).

<sup>65</sup> As of April 15, 2010, Iraq has not had a USMS presence since 9/30/2009.

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

## **5. Other DOJ Activities in Afghanistan**

DOJ has a large presence in Afghanistan coming from the DEA, FBI, USMS, police investigation trainers/mentors, and experienced Department attorneys. The attorneys 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), the Major Crimes Task Force, Anti-Corruption Unit, and Anti-Corruption Tribunal. A description of the CNT and how Judge Advocates may be able to use it is contained in Chapter 11 of this *Handbook*.

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

As of 2010, DOJ has seven attorneys and remains funded for three senior criminal investigator trainers/mentors at the CJTF and the CNT. Each attorney serves a minimum one-year tour of duty. To date, DOJ attorneys have helped the Afghans craft a comprehensive counternarcotics law that created a specialized investigative/prosecutorial task force and a specialized court with exclusive nationwide jurisdiction for 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 attorneys have also been instrumental in assisting in the removal of narco-traffickers to the U.S. for trial. These experienced attorneys routinely provide guidance and advice to the Afghan Attorney General, U.S. Embassy officials, and various U.S. law enforcement entities operating in-country. Recruitment efforts are underway to add eight new Department attorneys (total 15) by the end of calendar year 2010, with aspirations to have 21 attorneys by the end of calendar year 2011. No DOJ attorney is permanently stationed in the provinces.<sup>66</sup>

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

The FBI personnel in Afghanistan work on criminal investigations and counter-terror missions. Currently, the FBI has a Legal Attaché and two Assistant Legal Attachés stationed at the U.S. Embassy in Kabul, as well as numerous Special Agents, technicians, and analysts on details in Afghanistan. Their priorities include conducting detainee interviews and biometric processing; providing technical support and intelligence in order to identify trends, target IED makers and enable both offensive and defensive counter operations by coalition forces; exploiting the thousands of documents seized from Al Qaeda and Anti-

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<sup>66</sup> Most PRTs are staff with contract attorneys hired through the Department of State.

Coalition Forces; and providing counterterrorism training. The FBI also established a Major Crimes Task Force with Afghanistan, which focuses on Afghan-led investigations of corruption, kidnapping, and other serious criminal acts. The FBI has provided Special Agents to mentor the Afghan investigators to build their capacity to investigate cases and further rule of law efforts.

As of April 2010, ICITAP currently has two individuals assigned to Joint Task Force-435, a military led task force having command and control of U.S. detention operations. ICITAP also has one individual assigned to Combined Security Transition Command-Afghanistan (CSTC-A) to help develop a way-forward for the development of the CNPA.

Finally, rotating teams of Deputies from the Special Operations Group (SOG) of the USMS provide security to personnel at the CJTF and help to establish a judicial security force for the CNT. The Judicial Security Unit (JSU) is expected to be staffed with approximately 1500 Afghan police and will focus their efforts on protecting a wider array of courts and judges throughout Afghanistan. Additionally, the SOG USMS provided security design advice for Counternarcotics Justice Center in Kabul, which opened in May 2009. This new facility not only provides a secure environment for the daily activities of the CJTF and CNT, but also includes prisoner detention facilities, secure courtrooms, and a dining facility for the Afghan security forces and judicial personnel.

## **D. Department of Defense (DOD)**

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 U.S. 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 U.S. interests. In the short-term, stability operations aim to provide immediate security and attend to humanitarian concerns in regions affected by armed hostilities. The long-term goal is to establish an indigenous capacity to sustain a stable, democratic and free-market society that abides by the 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 with military participants, including Judge Advocates, Civil Affairs, and Military Police.

The most significant development in the rule of law in Afghanistan was the creation of Joint Task Force 435 (JTF-435) in September 2009. The creation and mission of JTF-435 is discussed below.

## **1. JTF-435**

On September 18, 2009 the Secretary of Defense established Joint Task Force 435 (JTF-435) to assume command, control, oversight and responsibility for all U.S. detainee operations in Afghanistan.

JTF-435 assumed responsibility for U.S. detention operations from Combined Joint Task Force-82, including the care and custody of detainees at the Detention Facility in Parwan (DFIP), oversight of detainee review processes, programs for the peaceful reintegration of detainees into society, and coordination with other agencies for the promotion of the rule of law in Afghanistan.

JTF-435 achieved Initial Operations Capability (IOC) on January 07, 2010 to assume command, oversight and responsibility for U.S. detainee operations in Afghanistan. Upon achieving IOC, the joint task force garnered the capability to conduct command and control of subordinate units and operate as a headquarters. JTF-435 focuses its efforts on:

- Safe, secure, humane care and custody of detainees consistent with law
- Detainee Review Board (DRB) procedures
- Reintegration and Rehabilitation of detainees
- Education and vocational training for eligible detainees
- Rule of law

With policy guidance from the U.S. Embassy, and in cooperation with Afghan, interagency, coalition and international counterparts, JTF-435 is working with the Government of the Islamic Republic of Afghanistan (GIROA) for self-sustaining Afghan national detention facilities and rule of law (corrections) institutions that are compliant with Afghan and international law.

Besides overseeing U.S. detention operations, JTF-435 is preparing to have other partners join the command. Instead of being all U.S. military members, the goal is for the task force to include officials from Afghan and U.S. organizations, such as the Afghan Ministry of Defense and Ministry of Justice, the U.S. State Department, and the U.S. Department of Justice. The official term for what leaders of the task force plan to become is a Combined Joint Interagency Task Force, or CJIATF.

Joint Task Force 435 members will, ultimately, serve as detention operations advisors and provide mentorship and partnership to the Afghan government so these operations can be transitioned back to the Afghan government, in accordance with all applicable international and national laws. JTF-435 will also coordinate with other agencies such as the International Committee of the Red Cross and coalition partners.

Afghan government officials signed a memorandum of understanding on January 9, 2010 that will guide the process for the Ministry of Defense to take the lead on assuming responsibility for the newly-completed U.S. DFIP.

The memo has the key ministries agreeing to identify and assign personnel to staff the facility, working alongside American personnel through the transition process. The Afghan National Army will train, equip and assign the bulk of necessary personnel for the guard force and headquarters staff, with the Ministry of Justice, Supreme Court, Attorney General's Office, National Directorate of Security and Ministry of Interior assigning key staff to support the facility.

## **2. 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. 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 host nation (HN) offices, ministries, or departments have the legal authority to evaluate, reform, and implement the law and execute its mandates.
- Evaluating and assisting in developing transitional decrees, codes, ordinances, courts, and other measures intended to bring immediate order to areas in which the HN legal system is impaired or nonfunctioning.
- Evaluating HN law, legal traditions, and administrative procedures in light of international legal obligations and human rights standards and when necessary, providing appropriate assistance to their reform.
- Evaluating training given in light of international legal obligations and human rights standards and providing assistance to improve training. This training is given to HN judges, prosecutors, defense counsel, legal advisors, court administrators, and police and corrections officials.
- When necessary, serving as legal advisors for transitional courts.
- Advising commanders and others on the application of international, U.S. domestic, and HN law that is considered in restoring and enhancing 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 U.S. personnel in the HN legal system and traditions.<sup>67</sup>

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

### **3. 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.<sup>68</sup> 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

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<sup>67</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY D-2 – D-3 (April 15, 2009).

<sup>68</sup> 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).

rule of law participants in the process of developing transitional codes and procedures and long term legal reform.

- Evaluate the personnel, judicial infrastructure, and equipment of the HN court system to determine requirements for training, repair and construction, and acquisition.
- Provide support to transitional justice, to include acting as judges, magistrates, prosecutors, defense counsel, legal advisors, and court administrators when required.
- Coordinate rule of law efforts involving U.S. and coalition military, other U.S. agencies, intergovernmental organizations (IGOs), non-governmental organizations (NGOs), and HN authorities.
- Assist the Staff Judge Advocate (SJA) in educating and training U.S. personnel in indigenous legal 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.)<sup>69</sup>

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.

#### **4. Military Police**

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

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

MPs and investigators deploy in support of 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
- 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,

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<sup>69</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.40, CIVIL AFFAIRS OPERATIONS 2-8 – 2-9 (29 Sept. 2006).

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 U.S. troops conducting security operations, both on how to conduct police-oriented population engagements effectively and on important matters such as evidence collection and preservation. These will become increasingly important as the host nation judicial system becomes capable of criminalizing insurgent activities. The organic availability of MPs, along with their versatility, makes them extremely effective in supporting the rule of law.

## **5. 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."<sup>70</sup> DIILS, a part of the Defense Security Cooperation Agency (DSCA), works with U.S. Embassy Country Teams and host nations to provide timely, effective and practical seminars to lawyers and non-lawyers. The goal is teaching operations, including post-conflict reconstruction, within the parameters of international law.<sup>71</sup>

## **6. 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*.<sup>72</sup> OIF and OEF are replete with examples of Second Lieutenants giving classes on human rights to Iraqi police<sup>73</sup> or infantry companies

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<sup>70</sup> Defense Institute of International Legal Studies website at <http://www.diils.org> (last visited July 20, 2010).

<sup>71</sup> *Id.*

<sup>72</sup> 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.")

<sup>73</sup> 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 July 20, 2010).

partnering with Iraqi police to maintain security in their communities.<sup>74</sup> 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.

## **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. USIP does this by empowering others with knowledge, skills, and resources, as well as by its direct involvement in peace building efforts around the globe.

To achieve 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 recently Afghanistan, Kosovo, Iraq, Liberia, Nepal, Nigeria, Philippines, Sudan, the Palestinian Territories, and Uganda.

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. In other words, the rule of law is not only about codes, courts, and policy, but includes also the relationship between citizens and the law within the context of a country's recent history and current political, social, and economic environment. In this regard, USIP also focuses on traditional or community based justice systems and their relationship to formal institutions. USIP's research on the topic will be published in an edited volume on customary justice systems in Fall 2010.

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

### **1. USIP Activities in Iraq and Afghanistan**

USIP has focused on five major areas to help build rule of law in Iraq. First, USIP provided substantial assistance during the constitution-making process and constitutional review. This assistance included convening meetings of senior legal advisors which allowed Iraqi government officials the chance to talk with representatives from South Africa, Afghanistan, Albania, East Timor, Switzerland, Germany, Nigeria, Brazil, Cambodia and Rwanda on the their constitutional frameworks, arrangements and institutions, and

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<sup>74</sup> 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 July 20, 2010).

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

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

Extremely useful for Judge Advocates and other legal practitioners 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 1200 active members, in more than 80 countries, representing over 300 organizations. Participation in the network is membership based. Applicants may apply online at [www.inprol.org](http://www.inprol.org).

#### **IV. International Actors**

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

Most major post-conflict operations will involve several international actors to implement effectively rule of law programs. These international entities will undoubtedly involve major powers, such as the United States, United Kingdom, France, Germany, China, and Russia. Other factors to consider are the effects of activities of regional or neighboring powers, for example Pakistan's influence in Afghanistan, or Iran's involvement in Iraq. Moreover, large international endeavors will require the commitment of major financial donors, such as international financial institutions. Lastly, the host-country itself will have ownership over post-conflict development and reconstruction, including rule of law. Each of these actors will have different goals and different priorities. Judge Advocates must be able to work with these layers of bureaucratic

machinery in order to garner greater legitimacy, widen the burden sharing, and earn local acceptance. It is important to remember, however, that most USG relationships with international actors are a matter of U.S. foreign policy and are consequently managed by DOS; coordination with that agency is critical whenever attempting to work with international organizations.

There are some restrictions as to the level of involvement by international actors. International participation in the planning and implementation of 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.

## **A. United Nations**

Multidimensional UN operations assist efforts to preserve and consolidate peace in the post-conflict period by helping to rebuild the basic foundations of a secure, functioning state. 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 U.S. permanent representative (PERMREP) to the UN, who has the rank and status of ambassador extraordinary and plenipotentiary. A military assistant assists the U.S. PERMREP at the U.S. Mission to the UN by coordinating appropriate military interests primarily with the UN Office for the Coordination of Humanitarian Affairs (UNOCHA) and UN Department of Peacekeeping Operations (UNDPKO).

The UN normally authorizes 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, U.S. forces implement UN

mandates that contain a U.S. military component through orders issued by the Secretary of Defense through the CJCS. During such implementation, the political mandates undergo conversion to workable military orders.

At the headquarters level, the UN Secretariat plans and directs UN 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.

## **B. International Monetary Fund (IMF)**

### **1. Introduction**

The International Monetary Fund (IMF) is an independent international organization of 186 member countries.<sup>75</sup> Under its Articles of Agreement<sup>76</sup>, it was established in 1946 with a mandate, among other things, to promote international monetary cooperation, facilitate the expansion and balanced growth of international trade, promote market exchange stability and orderly exchange arrangements, and assist in correcting balance of payments problems.

In pursuing its mandate, the Fund has emphasized the promotion of good governance among its membership. In this regard, in September 1996, the IMF's policy advisory body, the Interim Committee<sup>77</sup>, issued a declaration entitled "*Partnership for Sustainable Global Growth*."<sup>78</sup> The declaration emphasized that "promoting good governance in all its aspects, including ensuring the rule of law, improving the efficiency and accountability of the public sector, and tackling corruption" was an essential element of a framework within which economies can prosper. The IMF Executive Board followed up in 1997 with a Guidance Note on the role of the Fund in governance issues.<sup>79</sup> The role of the IMF, however, is limited to economic aspects of good governance that could have a significant macroeconomic impact or that could impair the ability of the authorities to credibly pursue policies aimed at external viability and sustainable growth.<sup>80</sup>

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<sup>75</sup> The IMF has a relationship with the United Nations, the terms of which are defined in the 1947 "Agreement Between the United Nations and the International Monetary Fund."

<sup>76</sup> The agreement is available at <http://www.imf.org/external/pubs/ft/aa/index.htm> (last visited June 22, 2010).

<sup>77</sup> This committee is now known as the International Financial and Monetary Committee (IMFC).

<sup>78</sup> More information on the declaration is available at <http://www.imf.org/external/np/sec/nb/1997/nb9715.htm> (last visited June 22, 2010).

<sup>79</sup> See "The Role of the Fund in Governance Issues—Guidance Note," available at <http://www.imf.org/external/np/sec/nb/1997/nb9715.htm> (last visited June 22, 2010).

<sup>80</sup> *Id.*

In light of the foregoing, the IMF has a number of initiatives. The IMF encourages member countries to adopt internationally recognized standards and codes that cover the government, the financial sector, and the corporate sector. The IMF has also developed its own transparency codes, in particular the Code of Good Practices in Fiscal Transparency and the Code of Good Practice on Transparency in Monetary and Financial Policies. Additionally, to safeguard its financial resources, the IMF assesses the control, accounting, reporting and auditing systems of central banks of countries to which it lends money. Further, the IMF emphasizes the development and maintenance of a transparent and stable economic and regulatory environment, the need for adequate systems for the management and tracking of public expenditures, and adherence to international standards on the combating of money laundering and terrorist financing. In furtherance of these goals, the IMF provides both policy and technical advice, often in the context of an economic program supported with Fund financial resources.<sup>81</sup>

## **2. IMF Support to Afghanistan**

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

The ECF-supported program aims to continue the process of rebuilding key economic institutions, putting public finances on a sustainable path, and laying the foundation for economic stability and low inflation, sustained growth, and poverty reduction. A key long-run objective of the program is also to set the basis for higher domestic revenues and reduce Afghanistan's heavy dependence on aid. The program addresses these goals by supporting reforms and governance enhancements in tax and customs administration, strengthening treasury and central bank operations, and reducing risks and improving the transparency of key public enterprises.<sup>82</sup>

Satisfactory performance under the program and other conditions for debt relief allowed the Executive Boards of the IMF and the World Bank to give the go ahead for debt relief from key creditors of Afghanistan under the Heavily Indebted Poor Countries (HIPC) Initiative. Debt relief from key creditors (especially Russia) will lead to a 96 percent reduction in Afghanistan's 2006 stock of external debt of nearly \$12 billion.<sup>83</sup> Under the three-year ECF arrangement \$120 million has been disbursed. The Afghan authorities have expressed interest in a subsequent Fund-supported program after the expiration of the current one in September 2010.<sup>84</sup>

## **3. IMF Support to Iraq**

The IMF has been closely engaged with Iraq since 2003. Initial work focused on providing policy advice, mainly on monetary and fiscal policies, and technical assistance to rebuild essential economic institutions. In September 2004, the IMF approved Emergency Post Conflict Assistance for Iraq, which—in combination with a debt sustainability analysis—paved the way for an agreement with Paris Club creditors, providing substantial debt relief. Since then, Iraq successfully completed two, (precautionary) Stand-By Arrangements

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> IMF, Program Note "Islamic Republic of Afghanistan," last updated: February 3, 2010, *available at* <http://www.imf.org/external/np/country/notes/afghanistan.htm> (last visited May 11, 2010).



(SBA), the main objective was to achieve macroeconomic stability, promote growth, and continue with the process of structural and institutional reform. The last precautionary SBA expired on March 18, 2009.<sup>85</sup>

On February 24, 2010, the IMF's Executive Board approved a new two-year SBA in the amount of \$3.6 billion, as the Iraqi economy was severely affected in 2009 by the drop in international oil prices. The new program has been designed to provide a sound macroeconomic framework during a period of high economic and political uncertainty. The new program will also help to move forward the structural reform agenda, which focuses on modernizing Iraq's public financial management to improve the allocation, execution, transparency, and accountability of the mobilization and use of public resources.<sup>86</sup>

## **C. World Bank**

### **1. Introduction**

The World Bank is an independent specialized agency of the UN.<sup>87</sup> Since its inception in 1944, the World Bank expanded from a single institution to an associated group of coordinated development institutions. The Bank's mission evolved from a facilitator of post-war reconstruction and development to its present day mandate of worldwide poverty alleviation.

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

### **2. Rule of Law and Development**

The World Bank's overarching mission is to reduce poverty.<sup>88</sup> Over the past two decades, the Bank has promoted adherence to the rule of law as a fundamental element of economic development and poverty reduction, given that the absence of well-functioning law and justice institutions and the presence of corruption are oft-cited constraints to economic growth and to the sustainability of development efforts.<sup>89</sup> A well-functioning legal and judicial system is critical not only as an end in itself, but also as a means of facilitating the achievement of other development objectives.<sup>90</sup> The importance of a sound justice sector to development is illustrated in cross-country data sets such as the World Bank's Country Policy and

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<sup>85</sup> IMF, Program Note "Iraq," last updated: February 26, 2010, *available at* <http://www.imf.org/external/np/country/notes/iraq.htm> (last visited May 11, 2010).

<sup>86</sup> IMF Press Release No. 10/60 of February 24, 2010, *available at* <http://www.imf.org/external/np/sec/pr/2010/pr1060.htm> (last visited May 11, 2010).

<sup>87</sup> *See* <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040610~menuPK:41691~pagePK:43912~piPK:44037,00.html> (last visited May 7, 2010).

<sup>88</sup> *See* [www.worldbank.org](http://www.worldbank.org) (last visited May 7, 2010).

<sup>89</sup> *See* WORLD BANK LEGAL VICE PRESIDENCY, INITIATIVES IN JUSTICE REFORM (2009), at p. 1-6, *available at* <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JRInitiativestext2009.pdf> (last visited May 7, 2010). Additional information on justice reform topics, and links to World Bank projects, can be found on the Law and Justice Institutions page of the World Bank's Web site at [www.worldbank.org/lji](http://www.worldbank.org/lji) (last visited May 7, 2010).

<sup>90</sup> *Id.*

Institutional Assessment Indicators<sup>91</sup> and the World Bank Institute's Governance Indicators<sup>92</sup>. The findings of those analyses demonstrate the correlation between deficiencies in the rule of law and negative economic and social development.<sup>93</sup>

Thus a significant number of Bank loans contain justice reform activities or components.<sup>94</sup> This focus reflects an understanding by the Bank and its member countries that the rule of law and justice are crucial to both growth and equity in countries throughout the world.<sup>95</sup>

Good governance and anticorruption efforts are an increasingly important focus of the World Bank's work.<sup>96</sup> Weak, corrupt, inaccessible, or untrustworthy justice sector institutions enable corruption and injustice.<sup>97</sup> Fostering change in the justice sector requires long-term strategies that focus not only on the supply side but also on the demand side to strengthen public recourse to justice.<sup>98</sup> Greater transparency in the courts—through streamlined procedures, better application of the law, and improved business processes—increases unbiased legal information and public access to laws and regulations for individuals and businesses alike.<sup>99</sup>

### 3. Justice Reform Projects

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

Justice reform programming is a relatively new and developing focus of World Bank assistance. Initially, the Bank focused on working with client countries to improve commercial aspects of justice and support changes to the legal framework in order to improve the business environment. This work remains an important part of the Bank's justice portfolio. In subsequent years, and at the request of client countries, the Bank began to work with countries on institutional capacity building in the judiciary more broadly, as an aspect of public sector reform. Three general themes emerge as common elements in World Bank justice reform assistance: (1) court management and performance, (2) access to justice, and (3) information and education.<sup>100</sup>

### 4. Projects in Afghanistan and Iraq

As of 7 May 2010, the World Bank was supporting 102 different projects in Afghanistan. Some of them can be considered as supporting the establishment of the rule of law, as, e.g., “The Strengthening Institutions Development Policy Grant (DPG) Program” or the “Pension Administration and Safety Net Project.”<sup>101</sup>

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<sup>91</sup> <http://go.worldbank.org/S2THWI1X60> (last visited May 7, 2010).

<sup>92</sup> <http://www.worldbank.org/wbi/governance/govdata/> (last visited May 7, 2010).

<sup>93</sup> See *supra* note 89.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* Detailed information about projects, grants, and components is available at the World Bank's website at [www.worldbank.org](http://www.worldbank.org) (last visited May 7, 2010). Additional information on justice reform topics, and links to World Bank projects, can be found on the Law and Justice Institutions page of the World Bank's Web site available at [www.worldbank.org/lji](http://www.worldbank.org/lji) (last visited May 7, 2010).

<sup>101</sup> See the project database available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,menuPK:41389~pagePK:95863~piPK:95983~tgDetMenuPK:228424~tgProjDetPK:73230~tgProjResPK:95917~tgResMenuPK:232168~theSitePK:40941,00.html> (last visited May 7, 2010).

The Bank also supports a “**Judicial Sector Reform Project**” in Afghanistan with a grant of \$27.75 million (May 2008 – June 2011). The project’s objective is to enhance the capacity of the justice sector institutions to deliver legal services. It comprises three components: (1) enhancement of the capacity of legal institutions; (2) empowerment of the people; and (3) strengthening of implementation capacity. The first component includes activities to improve strategic management of human capital and physical infrastructure, increase the skills of justice sector professionals, and provide rapid information, communications, and technology enhancements. The second component will improve legal awareness, as well as the capacity to provide legal aid throughout the country. The third component will provide support to Afghan justice sector institutions to implement the National Justice Sector Strategy and Program.

The World Bank supports 34 projects in Iraq,<sup>102</sup> supporting the development of its financial institutions, healthcare and education. These efforts hopefully will merge into ongoing rule of law initiatives. As noted above, economic stimulus can also help drive changes in the rule of law.

## **D. The North Atlantic Treaty Organization (NATO)**

### **1. Introduction**

The North Atlantic Treaty Organization (NATO) is an international organization<sup>103</sup> based on the North Atlantic Treaty signed on 4 April 1949 in Washington D.C. by the U.S. and 11 other European countries.<sup>104</sup> Today, NATO consists of 28 Member States<sup>105</sup>, including most of the western and eastern European States.

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

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

Currently, NATO is supporting the rule of law endeavors in Afghanistan and in Iraq through training missions.

### **2. NATO Training Mission – Afghanistan (NTM-A)**

In May 2002, an initial Security Sector Reform was agreed upon at the UN Donor’s conference in Geneva. The U.S. was assigned lead nation responsibility for military reform and Germany for police reform. In 2006, the U.S. Government established the Combined Security Transition Command-Afghanistan (CSTC-A) from the Office of Security Cooperation – Afghanistan, to assist the Government of the Islamic Republic of Afghanistan (GIROA) and the international community to reform, train, equip and operationalize the Afghan

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<sup>102</sup> *Id.*

<sup>103</sup> As NATO is an international organization, all decisions are taken unanimously. The only body with decision-making powers is the North Atlantic Council (NAC), consisting of representatives of the Member States. Those are Heads of State or Government, Defense Ministers or Ambassadors to NATO.

<sup>104</sup> The Washington Treaty was signed—apart from the USA—by Belgium, Canada, Denmark, France, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, and the United Kingdom.

<sup>105</sup> As of 7 May 2010 NATO Member States are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxemburg, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and the USA.

National Security Forces (ANSF), the Ministry of Interior (MoI) and the Ministry of Defense (MoD). Until the NTM-A activation, NATO's assistance focused primarily on building the capability and reach of the Afghan National Army (ANA) through the fielding of Operational Mentor and Liaison Teams (OMLTs).

The decision to establish the NTM-A was taken by Heads of State of NATO Member States at the Strasbourg-Kehl Summit in April 2009. The mission was formally activated on 21 November 2009. The mission provides a higher-level training for the ANA, including defense colleges and academies, as well as being responsible for doctrine development, and training and mentoring for the Afghan National Police (ANP).

NTM-A brings together efforts to train the ANSF with the aim of increasing coherence and effectiveness among all contributors. NTM-A's key tasks include:

- development of the ANSF through mentor and partnership programs including the vertical integration required to assist the Afghans in recruiting, training, fielding, and developing these units, and
- support to the ANSF including the building of an Afghan institutional training base for both ANA and ANP and coordinating international efforts to train, equip and sustain these forces.

Additionally, NTM-A works in close cooperation with the Afghan government and G8 partners for ANSF development to field and sustain a professional Army, synchronize Police Reform at the district level, and execute NATO's ANA Trust Fund (for ANA), the United Nations Development Program (UNDP), Law and Order Trust Fund for Afghanistan (for ANP), and other financial conduits for the international community to support the long-term sustainment of the ANSF. Ultimately, NATO is preparing the ANSF to progressively increase responsibility for their internal security, province by province, with international forces in decreasing role.

Each ANA HQ above battalion level has an embedded OMLT of NATO trainers and mentors acting as liaisons between ANA and ISAF. The OMLTs coordinate operational planning and ensure that the ANA units receive enabling support. Individual basic training is conducted primarily by ANA instructors and staff at ANATC's Kabul Military Training Center, situated on the eastern edge of the capital. The ANA are still supported, however, with various levels of CSTC-A oversight, mentorship, and assistance.

The commander of NTM-A reports to the commander of ISAF. Commander NTM-A focuses on the strategic level coordination and preparation of OMLTs and Police Operational Mentor and Liaison Teams (POMLTs), while the ISAF Joint Command has the responsibility for developing fielded ANSF.

The troop contributing states are:

- For OMLT: Australia, Belgium, Bulgaria, Canada, Croatia, Denmark, France, Germany, Hungary, Italy, Latvia, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Turkey, and United Kingdom.
- For POMLTs: Canada, France, Germany, Italy, Netherlands, Poland, and United Kingdom.

For more information visit the NTM-A website at <http://ntm-a.com/home> or contact the NTM-A PAO at [cstc-apao@afghan.swa.army.mil](mailto:cstc-apao@afghan.swa.army.mil), DSN: 318-275-3514.

### **3. NATO Training Mission – Iraq (NTM-I)**

#### **a. Introduction**

In accordance with UN Security Council Resolution 1546, the NATO Training Mission-Iraq (NTM-I) was set up in 2004 at the request of the Iraqi Interim Government. The aim of NTM-I is to help Iraq to develop a democratically-led and enduring security sector. To reinforce this initiative, NATO is working with the Iraqi government on a structured cooperation framework to develop the Alliance's long-term relationship with Iraq. NTM-I's operational emphasis is on training and mentoring, equipment donation and coordination.

22 NATO Member States and one NATO Partner State (Ukraine) are contributing to the training effort either in or outside Iraq, through financial contributions or donations of equipment. As of May 2010, 14 nations had staff in theater.<sup>106</sup>

### **b. Aim and Contours of NTM-I**

While NATO does not have a direct role in the international stabilization force that has been in Iraq since May 2003, it is helping the Iraqi government build the capability to ensure, by its own means, the security needs of the Iraqi people.

Operationally, NTM-I has specialized at the strategic level with the training of mid- to senior-level officers. By providing mentoring, advice and instruction support through in- and out-of-country training and the coordination of deliveries of donated military equipment, NTM-I has made a tangible contribution to the rebuilding of military leadership in Iraq and the development of the Iraqi Ministry of Defense and the Iraqi Security Forces (ISF). In 2007, Allies decided to extend their training assistance to Iraq by including gendarmerie-type training of the federal police in order to bridge the gap between routine police work and military operations. In December 2008 NATO expanded the Mission to other areas including navy and air force leadership training, defense reform, defense institution building, and small arms and light weapons accountability.

NTM-I now focuses mainly on Advising and Mentoring through the deployment of Mobile Advising and Mentoring Teams (MAMT), while a Specialist Training Team (STT) is standing-by to meet any ad-hoc training needs. An NTM-I MAMT has advised the leadership at the Prime Minister's National Operations Center (PM NOC). The latest addition to the NTM-I organization is a MAMT at the National Command Center (NCC), positioned within the Ministry of the Interior (MoI) in September 2007. This team will help the NCC improve the command structure to successfully monitor all police operations in Iraq.

The NTM-I delivers its training, advice and mentoring support in a number of different settings.

#### **• In-country training and coordinating**

- *The Strategic Security Advisor and Mentoring Division.* The Strategic Security Advisor and Mentoring Division within NTM-I consists of three mobile teams of advisors who work in close cooperation with the Iraqi leadership in the Prime Minister's National Operation Center, the Minister of Defense's Joint Operations Center, and the Minister of Interior's National Command Center. Through intensive training programs and daily mentoring support NATO is helping the Iraqis to achieve Full Operational Capability in the three operations centers by mid-2010.
- *The NATO Training, Education and Doctrine Advisory Division.* The National Defense University (NDU)<sup>107</sup> is the overarching institution under which Iraqi Officer Education and Training (OET) is

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<sup>106</sup> Those are: Albania, Bulgaria, Denmark, Estonia, Hungary, Italy, Lithuania, the Netherlands, Poland, Romania, Turkey, Ukraine, the United Kingdom and the USA.

<sup>107</sup> The NDU consists of the following units:

- The National Defense College offers a one year graduate program in National Security Studies, giving flag-level and strategic decision-makers a higher-level education in the field of leadership.
- The Defense Language Institute teaches foreign languages to personnel in the Iraqi Armed Forces and Iraqi government administration. It also trains English language teachers who are then deployed to military bases throughout Iraq to enhance the English language skills of Iraqi military personnel.
- The Defense Strategic Studies Institute focuses on independent analysis at the strategic level in order to formulate policies and make recommendations to leaders.
- The Center for Military Values, Principles and Leadership develops and assesses Training and Education programs. The center paves the way towards Iraqi Armed Forces that are ethically-based and competently led.
- The Joint Staff College at Ar Rustamiyah has courses for junior and senior officers. The Junior Course instructs Captains and Majors while the Senior Course is open to the ranks of Lieutenant Colonel up to Colonel. The Joint

managed. A NATO advisory mentoring team, within the NATO Training, Education and Doctrine Advisory Division, is assisting the Iraqi Ministry of Defense with the development of a three-year degree course at the military academy at Ar Rustamiyah and a War College to compliment the Joint Staff College for senior security officials. It focuses on the training of middle and senior-level personnel so as to help develop an officer corps trained in modern military leadership skills. It also aims to introduce values that are in keeping with democratically-controlled armed forces.

- *The National Defense College.* The North Atlantic Council agreed to support the establishment of the Iraqi National Defense College on 22 September 2004. It was officially opened by NATO Secretary General Jaap de Hoop Scheffer and Prime Minister Al-Jafaari on 27 September 2005. In 2010, NTM-I personnel will advise and assist the Iraqi Ministry of Defense with the development of syllabi and lectures.
- *The Defense Language Institute (DLI) and Defense and Strategic Studies Institute (DSSI).* Located in Baghdad, DLI is teaching civilian and military officials English. It is attached to the National Defense College. NATO played a key role in its establishment by advising on the course curriculum and assisting in the acquisition of its facilities, computers and furniture. NTM-I advisors are also assisting Iraqis in the DSSI with the establishment of a digital military library capability.
- *The Armed Forces Training and Education Branch.* The Armed Forces Training and Education Branch is part of the on-going standardization of educational facilities at Ar Rustamiyah. Through this branch, NATO personnel continue to develop and assist the Non-Commissioned Officer and Battle Staff Training courses.
- *Carabinieri training of the Iraqi Federal Police.* In October 2007, the Italian Carabinieri began delivering a tailor-made eight-week course to the Iraqi Federal Police. In March 2009, the class size was doubled to 900 students because of the positive impact course graduates had on Iraqi Security Force operations. This practical training component of NTM-I will enable the Iraqi Federal Police to train themselves in techniques, tactics and procedures overlaid with ethical standards to which they should aspire. The current training mandate has been extended until the end of 2010.
- **Out-of-country training.** Over one thousand Iraqis, both military officers and civil administration staff, have received out-of-country training in NATO countries, either at NATO schools or at national establishments. Courses have ranged from specialized civil and military administration subjects to handling EOD dogs.
  - *NATO training schools.* Training is also conducted outside Iraq in NATO education and training facilities and national Centers of Excellence throughout NATO member countries. In order to allow an increasing number of Iraqi personnel to take part in specialized training outside of Iraq, NATO supported the establishment of the Defense Language Institute as above.
  - *The NATO Training and Equipment Coordination Group.* This group, under the control of NATO Allied Command Transformation (based in Norfolk, VA), was established on 8 October 2004. Based in Brussels, it works with the Training and Education Synchronization Cell in Baghdad to coordinate the requirements of the Iraqi government for out-of-country training and equipment that is offered by NATO as a whole or by individual NATO member countries.

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Staff College was re-established with NTM-I assistance in 2005 and has received NTM-I support ever since. It reached full operational capability in July 2007.

- The four Iraqi Military Academies are located in Ar Rustamiyah, Qualachulon, Zakho and Tallil. NTM-I has supported the first Iraqi Military Academy at Ar Rustamiyah (IMAR) since 2006, helping it reach full operational capability in July 2007. The academies' graduate cadre will provide the future leaders of the Iraqi Armed Forces. Since August 2007, NTM-I has dedicated a mentor for the Basic Officer Commissioning Course, which is taught at the Military Academies, and an advisor dedicated to the establishment of a Senior NCO Academy and the development of training plans for Iraqi NCOs.

- *Coordinating bilateral assistance.* Additionally, NATO is helping to coordinate bilateral assistance provided by individual NATO member countries in the form of additional training, equipment donations and technical assistance both in and outside Iraq.

**c. Command of NTM-I**

NTM-I is a mission under the political control of NATO's North Atlantic Council. Nonetheless, NATO's training missions are coordinated with Iraqi authorities and U.S. Forces-Iraq (USF-I).

The NTM-I commander, who commands the NATO effort in the country, is dual-hatted: he is also U.S. Forces Iraq (USF-I) Deputy Commanding General for Advising and Training (A&T). He reports to the Supreme Allied Commander Operations (ACO, formerly Supreme Headquarters Allied Powers Europe, SHAPE), Belgium for all matters related to NATO efforts in the country. The latter then reports, via the Chairman of the Military Committee, to the North Atlantic Council.

**d. NTM-I Training and Equipment Synchronization Cell (TESC)**

The out-of-country training, as well as the equipment donations, are coordinated by NTM-I's Training and Equipment Synchronization Cell (TESC) based in Baghdad, where NTM-I staff have developed a smooth and effective process to ensure that the equipment and training provided accurately meets the Iraqis' needs. TESC coordinates all out-of-country training, as well as equipment donations from donor nations to the Iraqi Armed Forces.

TESC assists the Ministry of Defense in evaluating the equipment requirements for the following calendar year, and helps determine which of these requirements can be met through NATO donations. It has developed an effective process to coordinate equipment offers from NATO countries with the requests from the Iraqi Authorities, ensuring that everything is appropriate to Iraqi needs.

However, it should always be considered that it is the Iraqi Training and Doctrine Command (ITDC) which controls all training of the Iraqi Armed Forces (IAF). NTM-I mentors the ITDC staff at different levels, from the leadership of the ITDC to the staff of individual institutions.

**e. NTM-I Locations in Theater**

NTM-I operates in four different areas in theater.

- The Headquarters resides within the Cultural Center Compound in the International Zone (IZ), which is also the seat of the Iraqi Training and Doctrine Command, and some of its main institutions. The HQ staff travel to different locations within the IZ to provide training, advice and mentoring.
- Another major area of interest is the NTM-I Forward Operated Base at Ar Rustamiyah. NTM-I supports the Iraqi Military Academy at Ar Rustamiyah and the Joint Staff College, as well as the Base Defense Battalion that maintains security at Ar Rustamiyah.
- At Victory Base Complex (VBC), just north of Baghdad International Airport (BIAP), NTM-I has a training team at the Iraqi Ground Forces Command (IGFC). Additionally, Camp Dublin, which is south of BIAP, is currently being prepared to house the *Gendarmerie*-type training for the Iraqi National Police which will be carried out by the Italian *Carabinieri*.
- NTM-I also operates at the Ministry of the Interior, where an NTM-I Training Team is helping to develop the National Command Center.

For more information on NTM-I visit the website of the NATO Joint Forces Command Naples at [http://www.jfcnaples.nato.int/ntmi/ntmi\\_index.html](http://www.jfcnaples.nato.int/ntmi/ntmi_index.html) or contact the NTM-I PAO at NATO HQ in Baghdad at phone no. +170 334 377 98.

## E. Non-Governmental Organizations (NGOs)

NGOs are playing an increasingly important role in the international arena.<sup>108</sup> Working alone, alongside the U.S. military, with other U.S. agencies, or with coalition partners, NGOs are assisting in all the world's trouble spots where there is a need for humanitarian or other assistance. NGOs may range in size and experience from those with multimillion dollar budgets and decades of global experience in developmental and humanitarian relief to newly created small organizations dedicated to a particular emergency or disaster.

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

The extent to which specific NGOs are willing to cooperate with the military can vary considerably. In general, NGOs desire to preserve the impartial non-governmental character of their operations, at times accepting only minimal or no assistance from the military. While some organizations will seek the protection afforded by armed forces or the use of military transport to move relief supplies to, or sometimes within, the operational area, others may avoid a close affiliation with military forces, preferring autonomous, impartial operations. This is particularly the case if U.S. military forces are conducting combat operations 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 and consult these organizations, along with the competent national or international authorities, to identify local conditions that may impact effective military-NGO cooperation.<sup>109</sup>

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 points of contact (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 Provincial Reconstruction Teams (PRTs) and Civil Affairs (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,<sup>110</sup> 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

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<sup>108</sup> See, Lynn Lawry, *Guide to Nongovernmental Organizations for the Military* (Center for Disaster and Humanitarian Assistance Medicine 2009), available at <http://www.fas.org/irp/doddir/dod/ngo-guide.pdf> (last visited May 10, 2010).

<sup>109</sup> See the following guidelines, which have been endorsed by the US military and many US NGOs, USIP / *Guidelines for Relations Between US Armed Forces and Non-Governmental Humanitarian Organizations in Hostile or Potentially Hostile Environments*, available at [http://www.usip.org/files/resources/guidelines\\_handout.pdf](http://www.usip.org/files/resources/guidelines_handout.pdf) (last visited May 10, 2010).

<sup>110</sup> FM 3-05.40, *supra* note 69, at 1-16 (“The primary function of all Army CA units is to support the warfighter by engaging the civil component of the battlefield. CA forces interface with IPI, IGOs, NGOs, other civilian and government organizations, and military forces to assist the supported commander to accomplish the mission.”).



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.<sup>111</sup>

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 U.S. Foreign Disaster Assistance (OFDA). Because the HOC operates at the national level, it typically consists of senior representatives from the affected country, the U.S. embassy or consulate, joint forces, OFDA, NGOs, IGOs, and other major organizations involved in the humanitarian assistance operation.
- **Humanitarian Assistance Coordination Center (HACC)** – Created by the combatant command's crisis action organization to assist the interagency, IGOs, and NGOs to coordinate and plan foreign humanitarian assistance. Normally, the HACC is a temporary body that operates during the early planning and coordination stages of the operation. Once a Civil-Military Operations Center (CMOC) (see below) or HOC is in place, the role of the HACC diminishes, and its functions are accomplished through the normal organization of the combatant command's staff and crisis action organization.
- **Civil-Military Operations Center (CMOC)** – Normally, the CMOC is a mechanism for the coordination of civil-military operations that can serve as the primary coordination interface providing operational and tactical level coordination between the Joint Force Commander and other stakeholders. Members of a CMOC typically include representatives of U.S. military forces, other government agencies, IGOs, the private sector, and NGOs.<sup>112</sup>

## **F. Coalition Partners**

Given the dominance of coalition operations, it is essential for Judge Advocates to know and understand the philosophy, goals, and structure of coalition forces.<sup>113</sup> 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 U.S. military operations, some coalition partners, follow the concept of a "civil power."<sup>114</sup> 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.<sup>115</sup>

When speaking about rule of law programs some coalition partners focus on civilian reconstruction and economic support.<sup>116</sup> 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.<sup>117</sup> Some coalition forces may be

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<sup>111</sup> See e.g. U.S. DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION.

<sup>112</sup> JOINT PUB. 3-57, *supra* note 68, at II-26.

<sup>113</sup> See CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 312 (2006) [hereinafter FORGED IN THE FIRE].

<sup>114</sup> See, e.g., MARKUS WÖLFLE, DIE AUSLANDSEINSÄTZE DER BUNDESWEHR 116 (2005) (discussing Germany).

<sup>115</sup> *Id.* at 18-19.

<sup>116</sup> 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).

<sup>117</sup> See German Action Plan, *Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peacebuilding* 10 (2004), available at <http://www.auswaertiges-amt.de/diplo/de/Aussenpolitik/Themen/Krisenpraevention/Downloads/Aktionsplan-En.pdf> (last visited July 20, 2010) [hereinafter Action Plan].

reluctant to initiate laws, courts, and police reforms, but rather support host government reform efforts beneficial to the establishment of the rule of law.<sup>118</sup>

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.<sup>119</sup> In fact, since 2004 France has been the framework-nation for the institution of the Afghan Parliament. This program provides training to Afghan parliamentarians.

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.<sup>120</sup> Moreover, since January 2009 German police mentoring teams have helped legitimize the Afghan National Police in Northern Afghanistan through the Focused District Development program (FDD), which trains Afghan police units on a district by district level.

Because of different approaches, the structure of coalition forces tasked with 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.

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 U.S. understanding.

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.<sup>121</sup>

This is not to say that our coalition partners are not helping to advance the rule of law in Afghanistan and Iraq. Below are brief examples of how our coalition allies are helping to foster the rule of law in Afghanistan and Iraq.

## **1. Afghanistan**

The European Union (EU) launched the Police Mission in Afghanistan (EUPOL Afghanistan) in June 2007.<sup>122</sup> The EUPOL mandate is to contribute to the establishment of sustainable and effective policing arrangements in all parts of Afghanistan. EUPOL Afghanistan works towards local police reform which respects human rights and operates within the framework of the rule of law.<sup>123</sup> In 2010, cooperation with the NATO Training Mission Afghanistan was activated.

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<sup>118</sup> *Id.* at 58. See also French Ministry of Foreign Affairs, Direction Générale de la Coopération Internationale et du Développement (French International Cooperation) 31 (2005).

<sup>119</sup> *Id.* at 32-33.

<sup>120</sup> See Action Plan, *supra* note 117, at 19.

<sup>121</sup> See FORGED IN THE FIRE, *supra* note 113, at 69.

<sup>122</sup> See EU COUNCIL JOINT ACTION 2007/369/CFSP of 30 May 2007 on establishment of the European Union Police Mission in Afghanistan, available at [http://www.eupol-afg.eu/legal\\_basis.php](http://www.eupol-afg.eu/legal_basis.php) (last visited May 23, 2010).

<sup>123</sup> See EUPOL Afghanistan, Fact Sheet, updated April 2010, available at <http://www.eupol-afg.eu/pdf/100426FACTSHEET.pdf> (last visited May 25, 2010).

EUPOL Afghanistan is deployed at central (Kabul), regional and provincial levels, through the Provincial Reconstruction Teams (PRTs). As of 19 April 2010 EUPOL had 284 international staff, 162 local staff, and a budget of 81.4 million Euros for the period December 2008 - May 2010. The contributing states are 21 EU Member States, Canada, Croatia, New Zealand and Norway.

The mission is supporting the reform process towards a trusted police service working within the framework of the rule of law and respecting human rights. The mission monitors, mentors, advises and trains at the level of the Afghan Ministry of Interior, central Afghan administrations, regions, provinces and districts. Since March 2009 EUPOL has worked to improve the policing standards in Kabul to better secure the capital. EUPOL hopes to introduce the Kabul model to other parts of Afghanistan including Herat, Kandahar, and Mazar-e-Sharif.

EUPOL is also providing training in important special policing techniques. For example, over 1000 Afghan police officers received training in basic criminal investigation techniques, such as Crime Scene Investigation. EUPOL has trained some 675 Afghan Police trainers. After years of stalemate in this area, EUPOL has taken the lead within the international community to develop the training curricula for the civilian police and the anti-crime police.

EUPOL has also established the Anti-Corruption Prosecutor's Office. These specialized prosecutors are developing cases against high-profile public officials suspected of corruption. EUPOL has trained more than 300 inspectors within the Ministry of Interior in basic anti-corruption investigation techniques.

For more information on EUPOL Afghanistan visit the website <http://www.eupol-afg.eu> or contact the EUPOL PAO at [press.office@eupol-afg.eu](mailto:press.office@eupol-afg.eu), phone no. +93 793 990 103 / +93 701 104 149.

## **2. Iraq**

The EU launched the Integrated Rule of Law Mission for Iraq (EUJUST LEX), a civilian crisis management mission, on 1 July 2005.<sup>124</sup>

EUJUST LEX was established to strengthen the rule of law and promote a culture of respect for human rights in Iraq by providing professional development opportunities for senior Iraqi officials in the criminal justice system. The core aim is to foster confidence, mutual respect and operational cooperation between the different branches of the Iraqi criminal justice system (police, judiciary and penitentiary).

EUJUST LEX developed “specialist courses” for senior officials in order to meet the specific needs of the Iraqi criminal justice system while maintaining a focus on human rights issues. The following courses were conducted:

- Police Courses
  - Senior Police Leadership
  - Managing Murder Investigations
  - Public Order Management and Human Rights
  - Management of Training
  - Major and Critical Incident Management
  - Train the Trainer
- Judicial Courses
  - Fair Trial and Human Rights (Juvenile Justice)

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<sup>124</sup> See EU Integrated Rule of Law Mission for Iraq (EUJUST LEX), Fact Sheet, updated April 2010, *available at* [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/missionPress/files/100423%20%20FACTSHEET%20EUJUST%20LEX%20-%20version%2018\\_EN.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/missionPress/files/100423%20%20FACTSHEET%20EUJUST%20LEX%20-%20version%2018_EN.pdf) (last visited May 26, 2010).

- Financial Crime (Money Laundering)
- Forensic Science (Serious Crime & Modern Techniques of Investigation)
- Organized and Terrorist Crime
- Penitentiary Courses
  - Senior Prison Leadership
  - Developing Prison Standards within a Human Rights Framework
  - Strategies for Managing Vulnerable Prisoners - Females, Juveniles and Ethnic Minorities
  - Contingency Planning and Crisis Management
  - Train the Trainer

Another EUJUST LEX training intervention is a practical program of work experience which allows Iraqi criminal justice professionals to work alongside their EU counterparts.

The courses and work experience are being held in EU member states. These courses offer learning opportunities and demonstrate best practice in the rule of law. In addition, the mission's activities facilitate an exchange of views between the EU trainers and the Iraqi participants.

EUJUST LEX has been very successful. As of 22 April 2010, 3151 Iraqi judges, investigating magistrates, senior police and penitentiary officers in senior management positions had participated in 116 integrated and specialist courses, 22 practical work experiences and in country training activities. In addition to the EU based training events, the mission has already delivered 3 preliminary and 13 in-country pilot activities training more than 685 students. More training activities and another 6 pilot projects are expected to be conducted by the end of June 2010.

For more information on EUJUST LEX visit the website [www.consilium.europa.eu/eujust-lex](http://www.consilium.europa.eu/eujust-lex), contact the mission at [general@eujust-lex.eu](mailto:general@eujust-lex.eu), or the PAO at [press@eujust-lex.eu](mailto:press@eujust-lex.eu), phone no. +32 2 234 63 29.

In closing, Judge Advocates must know that certain national caveats may preclude our allies from undertaking certain activities. However, this does not mean that they are unwilling and/or unable to help advance the rule of law in Afghanistan and Iraq.



## CHAPTER 4

# 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 U.S. is a 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 U.S. policy and good practice.

### I. 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, Judge Advocates should not use it as an authoritative guide.

#### A. United Nation (UN) Mandates

##### 1. 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.<sup>1</sup> 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 representatives<sup>2</sup> votes against or vetoes the proposal. Pursuant to Article 25 of the Charter, UN members are required to honor and carry out Security Council resolutions.

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<sup>1</sup> U.N. Charter art. 24(1).

<sup>2</sup> United States, Russia, United Kingdom, China and France.

## 2. The Use of Force

The UN Charter's general prohibition on the use of force is relatively well accepted.<sup>3</sup> Intervention, whether by direct military action or indirectly by support for subversive or terrorist armed activities, fall squarely within this prohibition.<sup>4</sup> 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."<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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

### a. Resolutions passed under Chapter VI

Chapter VI of the Charter deals with attempts to resolve disputes by pacific means. Indeed, it states that parties to any dispute must first attempt to seek resolution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.<sup>8</sup> The Security Council has wide powers under Chapter VI. It may, at any stage of a situation

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<sup>3</sup> "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).

<sup>4</sup> See G. A. Res. 2625 (XXV), U.N. Doc. A/8082 (1970).

<sup>5</sup> U.N. Charter art. 39.

<sup>6</sup> 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.

<sup>7</sup> 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](http://www.un.org/peace/reports/peace_operations/docs/full_report.htm) (last visited July 20, 2010).

<sup>8</sup> U.N. Charter art. 33(1).

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.

#### **b. Resolutions passed under Chapter VII**

Chapter VII of the UN Charter provides an important caveat to the prohibition on the use of force contained within Article 2(4). Along with Article 51, it constitutes the modern *jus ad bellum*. The prohibition on UN intervention in domestic affairs of a nation is specifically excluded in relation to actions taken under Chapter VII, which are predicated on threats to the peace, breaches of the peace, or acts of aggression.<sup>9</sup> 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.”<sup>10</sup> Once the Council has made an Article 39 determination, it can then prescribe what measures are necessary for the restoration of peace and security using its powers under Chapter VII, specifically measures provided for in Article 41 and 42, or some variation thereof.

Article 41 allows the Council to require Member States to apply affirmative measures short of the use of force. These measures include, but are not limited to “complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup> 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.

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<sup>9</sup> U.N. Charter art. 2(7).

<sup>10</sup> U.N. Charter art. 39.

<sup>11</sup> U.N. Charter art. 41.

<sup>12</sup> U.N. Charter art. 42.

<sup>13</sup> *Id.*



The legal effect of the passing of a resolution under Chapter VII that authorizes the use of all necessary means should not be underestimated. It offers the military commander enormous freedom to prosecute any campaign. Resolutions passed under Chapter VII have been aimed at both state and non-state actors. Examples of the latter include the Resolutions passed against National Union for the Total Independence of Angola (UNITA) following their breach of terms of cease-fire in Angola<sup>14</sup> and those against the Taliban<sup>15</sup> following the attacks on the U.S. embassies in East Africa and the first bomb attack on the World Trade Center in 1993.

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

## **B. 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.

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<sup>14</sup> 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.

<sup>15</sup> The Taliban were not generally recognized by the International Community to be the legitimate Government of Afghanistan and as such were "non State actors."

<sup>16</sup> See *supra* note 6.

### **C. Mandates Pursuant to National Legislation**

Finally, military missions, particularly those involving the use of force, are frequently governed by national legislation. The Constitution entrusts Congress with significant responsibilities related to employment and regulation of the armed forces. Even outside instances of declared war, congressional resolutions and bills have 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.<sup>17</sup> Other reporting and operating requirements, such as vetting under the Leahy amendment<sup>18</sup> for past human rights violations should be anticipated as well.

## **II. The Rule of Law Legal Framework**

As mentioned at the outset of this chapter, currently, no single body of law regulates the conduct of 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.

### **A. The Law of War**

Rule of law operations occur within the broader context of stability operations.<sup>19</sup> 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.

#### **1. 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

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<sup>17</sup> See Chapter 7 of this *Handbook*.

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

<sup>19</sup> 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).

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.

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.

## **2. Customary International Law**

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

## **3. Policy**

United States DOD policy directs its armed forces to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”<sup>20</sup> 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.

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

## **B. Occupation Law**

Though largely unused in the latter half of the twentieth century, occupation law has experienced a recent revival in both international practice and litigation.<sup>21</sup> 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.

### **1. Treaty Law**

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

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

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

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

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

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

### **2. 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

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<sup>21</sup> 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).

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”<sup>22</sup> and with respect to “[p]ersons . . . in the hands of [an] . . . Occupying Power of which they are not nationals.”<sup>23</sup>

It is possible, notwithstanding the preceding distinction that some provisions of occupation law extend to territory that is not occupied in the technical or legal sense. For instance, foreign courts have explored the boundaries of occupation law applicable to situations short of those described in common article 2. The content of this variant of customary occupation law is unclear. 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.<sup>24</sup>

### 3. Policy

In addition to guidance directing U.S. 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. U.S. Army Field Manual 27-10, paragraph 352(b) encourages forces to apply occupation law to areas through which they are merely passing and even to the battlefield.<sup>25</sup> 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.

### C. 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. Human rights law can be applicable to Judge Advocates engaged in rule of law operations in two ways: through the application of customary international human rights law to their activities or through the application of the host nation’s human rights obligations. If engaged in combat operations, however, the U.S. regards the law of war as an exclusive legal regime or a *lex specialis*. Under this view, the law of war operates to the exclusion of competing legal frameworks such as human rights law. That position, however, is not necessarily shared by other nations, particularly in situations where a government has jurisdiction and control over persons, such as in detention operations. Moreover, while the U.S. considers its obligations under the International Covenant and Civil and Political Rights<sup>26</sup> 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 U.S. military infrequently engaged in rule of law operations, U.S. armed forces have given comparatively little attention to how human rights applies to rule of law operations.<sup>27</sup>

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

<sup>23</sup> *Id.*, art. 4.

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

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

<sup>26</sup> Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/English/law/ccpr.htm> (last visited July 20, 2010).

<sup>27</sup> 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:

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. U.S. forces should model behavior for, and encourage actions by, the host nation government that will encourage the host nation to adopt and practice strong human rights norms. For example, while detention operations by U.S. forces may legally be conducted in accordance with law of war requirements, the detention procedures adopted by U.S. forces during the post-conflict phase may serve as a model for the administrative 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.

## 1. 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.<sup>28</sup> These include the Genocide Convention; the International Covenant on Civil and Political Rights (ICCPR);<sup>29</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>30</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>31</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>32</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD);<sup>33</sup> the Convention on the Rights of the Child (CRC)<sup>34</sup> and its two Optional Protocols, one on the involvement of children in armed conflict<sup>35</sup> and the other on the sale of children, child prostitution and child pornography;<sup>36</sup> the Convention on the Rights of Persons with Disabilities (CRPD);<sup>37</sup> and the International Convention for the Protection of All Persons from Enforced Disappearances<sup>38</sup> (not yet in force). Regionally, there are the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950,<sup>39</sup> the American Convention on Human Rights,<sup>40</sup> and the African Charter on Human and Peoples' Rights.<sup>41</sup>

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 U.S.

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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).

<sup>28</sup> 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 July 20, 2010).

<sup>29</sup> See <http://www2.ohchr.org/english/law/ccpr.htm> (last visited July 20, 2010).

<sup>30</sup> See <http://www2.ohchr.org/english/law/cescr.htm> (last visited July 20, 2010).

<sup>31</sup> See <http://www2.ohchr.org/english/law/cat.htm> (last visited July 20, 2010).

<sup>32</sup> See <http://www2.ohchr.org/english/law/cedaw.htm> (last visited July 20, 2010).

<sup>33</sup> See <http://www2.ohchr.org/english/law/cerd.htm> (last visited July 20, 2010).

<sup>34</sup> See <http://www2.ohchr.org/english/law/crc.htm> (last visited July 20, 2010).

<sup>35</sup> See <http://www2.ohchr.org/english/law/crc-conflict.htm> (last visited July 20, 2010).

<sup>36</sup> See <http://www2.ohchr.org/english/law/crc-sale.htm> (last visited July 20, 2010).

<sup>37</sup> See <http://www.un.org/disabilities/convention/conventionfull.shtml> (last visited July 20, 2010).

<sup>38</sup> See <http://www2.ohchr.org/english/law/disappearance-convention.htm> (last visited July 20, 2010).

<sup>39</sup> See <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (last visited July 20, 2010).

<sup>40</sup> See [www.oas.org/juridico/english/treaties/b-32.html](http://www.oas.org/juridico/english/treaties/b-32.html) (last visited July 20, 2010).

<sup>41</sup> See <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (last visited July 20, 2010).

considers the majority of its human rights treaty obligations as inapplicable to U.S. actors, including U.S. forces, outside U.S. territory. But, Judge Advocates need to be aware that the U.S. position is not universally accepted and that they may be called upon to respond to human rights complaints submitted to the United Nations. The treaty bodies interpreting the treaties to which the U.S. is party expect the U.S. to account for its actions wherever they take place.

Moreover, there are some 40 UN special procedures,<sup>42</sup> such as a Working Group on Arbitrary Detention, Special Rapporteurs on torture and on extrajudicial, summary or arbitrary executions, and a Representative of the Secretary-General on the human rights of internally displaced persons, which review complaints from any individual purporting to be a victim of a human rights violation, including in Iraq and Afghanistan. Although the U.S. position is that the laws of war are the relevant *lex specialis* for military operations and that the human rights treaty bodies and the special mechanisms do not have jurisdiction over the laws of war, as a matter of policy and transparency, the U.S. responds to these inquiries.

In addition, although the United States is not party to its regional human rights treaty, the ACHR, it is a party to the Organization of American States, which created the Inter-American Commission on Human Rights. That body has a non-binding dispute settlement mechanism that allows it to opine on the consistency of U.S. activities with international law by reference to the 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 U.S. 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 U.S. military comparatively greater freedom of action than many coalition partners when conducting operations overseas. As discussed in earlier, 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.<sup>43</sup> 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 U.S. views of the host nation's obligations. For instance, though many Muslim states have ratified the Convention for the Elimination of Discrimination Against Women, most included significant reservations to account for Sharia legal traditions—which would likely be counter to U.S. views of the rights of women.

## **2. 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,<sup>44</sup> although the United States has not taken the position that everything in that Declaration is customary international law.

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<sup>42</sup> See <http://www2.ohchr.org/English/> (last visited July 20, 2010) for complete list of UN special procedures.

<sup>43</sup> A full list of human rights treaties to which a country is a party and that country's reservations and declarations, as well as any objections to them by other States, can be found at <http://www2.ohchr.org/english/law/> (last visited July 20, 2010).

<sup>44</sup> 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.").

### **III. 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, U.S. policy may require adherence to international norms that exceed those strictly applicable to a particular operation. Especially when considered in light of the need to establish the legitimacy of the rule of law among the host nation's populace, conduct by U.S. 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.





## CHAPTER 5

# THE INSTITUTIONAL AND SOCIAL CONTEXT FOR THE RULE OF LAW

A frequent problem encountered by U.S. Judge Advocates in rule of law operations is a lack of experience with non-U.S. legal traditions.<sup>1</sup> Past efforts in establishing the rule of law have too often ignored the “morality of society,”<sup>2</sup> 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 U.S. officials involved in the reform of law often lacked background information about Iraqi law and the civil law system.<sup>3</sup>

What follows is a short review of the major legal traditions and some applicable considerations to establishing the rule of law in non-U.S. 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.

## I. Legal Institutions

### A. 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 U.S. 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.<sup>4</sup>

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 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.<sup>5</sup>

The legislative process of each host nation will likely differ substantially from the U.S. 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

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<sup>1</sup> See BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 133 (2004).

<sup>2</sup> *Id.* at 138.

<sup>3</sup> See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 323 (2006).

<sup>4</sup> 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.

<sup>5</sup> 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 Chapter 4.B.2.

from a constitution, the process may be derived from the constitution itself;<sup>6</sup> in other nations the process may be defined by statute.<sup>7</sup> 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.<sup>8</sup> 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 U.S. 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 U.S., 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 U.S. models.<sup>9</sup> That does not mean that U.S. sources should be disregarded, and several organizations, including the American Law Institute and the American Bar Association<sup>10</sup> produce model acts for legislatures.

## **B. 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.<sup>11</sup> 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 U.S. 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

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<sup>6</sup> See, e.g., U.S. CONST. art. I, sec. 7.

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

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

<sup>9</sup> 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).

<sup>10</sup> See [www.ali.org](http://www.ali.org) (last visited July 21, 2010) and [www.abanet.org](http://www.abanet.org) (last visited July 21, 2010).

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

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.

## **1. Procedural Requirements and Openness**

Procedure in any criminal trial should reflect certain basic standards. All individuals tried for criminal offenses should benefit from the presumption of innocence and must not be forced to testify against themselves. The right to a public trial without undue delay not only ensures public confidence in the court system but also protects individuals from the administration of justice in secret. The right of an individual to know promptly the nature of the allegations is a basic tenet of all criminal justice systems. The concept of “equality of arms” dictates that neither the prosecution nor the defense should have a substantial advantage in conduct of an inquiry.<sup>12</sup> The defendant has the right to be tried in person and through legal assistance of one’s choosing to examine witnesses against him, call witnesses on his behalf<sup>13</sup> and, if convicted, the right of appeal.

Guidelines on the role of prosecutors were adopted by the UN in 1990,<sup>14</sup> and by the International Association of Prosecutors in 1995.<sup>15</sup> 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.

## **2. Judicial Independence, Impartiality, and Training**

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

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<sup>12</sup> Equality of arms is central to any adversarial justice system. See Martin Blackmore, Equality of Arms in An Adversary System, <http://www.odpp.nsw.gov.au/speeches/Final%20paper%20Capetown.htm> (last visited July 21, 2010). 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.

<sup>13</sup> 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.

<sup>14</sup> Eighth Congress on the Prevention of Crime and the Treatment of Offenders, Havana Cuba 1990, Guidelines on the Role of Prosecutors, available at <http://www2.ohchr.org/english/law/prosecutors.htm> (last visited July 21, 2010).

<sup>15</sup> 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.haguejusticeportal.net/eCache/DEF/317.html> (last visited July 21, 2010).

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

Systems of electing and appointing judges have their own inherent strengths and weaknesses. If judges stand for election, they may be required to espouse personal views on certain contentious issues and areas of the law, which may raise questions over their independence and impartiality. Indeed, if dependent on the electoral system, an elected judiciary may preclude representation in the judiciary from all ethnic communities in a state.<sup>16</sup> On the other hand elections allow for direct public participation in the appointment process, thus creating a greater level of public acceptance and support.

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.<sup>17</sup>

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

#### Judicial Education in Afghanistan

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

Training of the judiciary may be guided by the roles and responsibilities of judges which were adopted by the United Nations in 1985<sup>20</sup> which along with the *Bangalore Principles of Judicial Conduct*<sup>21</sup> 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

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

<sup>17</sup> See *R. v. Dundon* EWCA 621 (2004), *Grievs v. United Kingdom*, 39 Eur. H.R. Rep. 2 ¶ 69 (2004).

<sup>18</sup> USAID, GENERAL ACTIVITY REPORT FOR 8 – 28 DECEMBER 2005.

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

<sup>20</sup> 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.

<sup>21</sup> BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002), available at [http://www.ajs.org/ethics/pdfs/Bangalore\\_principles.pdf](http://www.ajs.org/ethics/pdfs/Bangalore_principles.pdf) (last visited July 21, 2010). 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.

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.<sup>22</sup>

#### **Screening Judges in Iraq<sup>23</sup>**

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.

### **3. Adequate Physical Infrastructure**

The construction or reconstruction of the physical aspects of the justice system is a concurrent requirement along with the training and education of the personnel to man it. In some theaters, the need to provide for physical venues initially outstrips the need to provide for judges and prosecutors. Iraq provides a classic case in point.<sup>24</sup> 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 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.

<sup>22</sup> 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).

<sup>23</sup> For information on vetting public employees see OFFICE OF THE UN HIGH COMMISSIONER FOR HUMAN RIGHTS, RULE OF LAW TOOLS FOR POST-CONFLICT STATES – VETTING: AN OPERATIONAL FRAMEWORK (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf> (last visited July 21, 2010). For further information about the ICTJ research project on vetting and additional guidelines being developed see <http://www.ictj.org/en/research/projects/vetting/index.html> (last visited July 21, 2010).

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

#### 4. Adequate Administrative Infrastructure

Along with reconstructing the physical infrastructure of a legal system, 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.<sup>25</sup> When it comes to administrative infrastructure, the clear lesson is that simplicity is key.

#### 5. Security

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

#### C. Police

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

##### 1. Conducting Police Operations

The history of military deployments in the late 20th and early 21st Century is littered with examples of the military being tasked to perform policing functions.<sup>26</sup> 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.<sup>27</sup> Commanders need to understand that the application of force in a police

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

<sup>26</sup> 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](http://www.un.org/peace/reports/peace_operations/docs/full_report.htm) (last visited July 21, 2010).

<sup>27</sup> 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.

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.

## **2. Re-establishing Host Nation Police Functions**

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

### **a. Police Force Composition**

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

One of the first decisions that will have to be made in any particular stability operation will be whether to retain (and retrain) an existing police force or simply to start from scratch. Whether recruitment from scratch is superior to reforming existing resources will be theater specific. A corrupt police establishment 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.<sup>29</sup> Whether starting from scratch or reforming an existing establishment, it will be necessary to vet<sup>30</sup> 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.<sup>31</sup> For instance, as opposed to the model adopted in the U.S., in many nations, the use of police forces with close or formal ties to the military is common, for example the Italian Carabinieri<sup>32</sup> and the availability of quasi-military models for police may be particularly appropriate for those seeking to police in non permissive environments.

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<sup>28</sup> See *The Brahimi Report*, *supra* note 26.

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

<sup>30</sup> For information on vetting public employees see *supra* note 23.

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

<sup>32</sup> The Carabinieri are a separate branch of the Italian armed forces.



## **b. Training**

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

- interpretation and application of federal, provincial and municipal statutes, codes, and rules
- apprehending violators
- use of graduated force
- proper treatment of detained individuals
- interviewing and interrogating suspects
- conducting investigations and effective documentation/collection of evidence
- crisis management
- weapons use, maintenance, and marksmanship
- physical fitness
- self-defense, and control/arrest tactics
- operation of police equipment including vehicles, communication systems, and police computer systems
- effective oral and written 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).

## **D. Detention and Corrections**

All systems of justice must be able to *confine and protect* detainees. A state with no pre-trial detention capability cannot hold trials, and one lacking long-term confinement facilities cannot punish convicts,<sup>33</sup> and in neither case will the state have any reasonable prospect of instituting the rule of law. However, a state that systematically mistreats the incarcerated or fails to provide for their subsistence has no greater claim to the rule of law than one with no prisons at all. In post-conflict societies, it is likely that there will have been a recent history of poor conditions in detention facilities, as a matter of either intentional mistreatment (of both criminal and political prisoners) or simply as a matter of poverty. In Iraq, numerous assessments of the police and court systems identified the inability of criminal courts to commit sentenced prisoners to a specified prison term when such correctional facilities did not exist.<sup>34</sup>

As is the case with policing, MPs are likely to take the lead with regard to the necessary reform.<sup>35</sup>

### **1. Basic Facility Requirements**

There is a wide spectrum of considerations regarding what constitutes an adequate confinement facility, which will differ depending upon the circumstances in any given situation. For example, a 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.<sup>36</sup>

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<sup>33</sup> Throughout this section, this *Handbook* will use the terms “jail” and “prison” to refer respectively to short- and long-term detention facilities.

<sup>34</sup> LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358<sup>th</sup> Civil Affairs Brigade (2003).

<sup>35</sup> See *supra* note 27.

- walls or other security enclosures that prevent both escape from the facility and infiltration from outside the facility<sup>37</sup>
- 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.<sup>38</sup>
- monitored safe cells, to protect certain detainees who pose a risk of harm to themselves
- a library or book distribution program
- visiting areas where detainees can meet with family, friends, clergy, or attorneys

## **2. 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.<sup>39</sup>

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<sup>36</sup> 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.

<sup>37</sup> 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.

<sup>38</sup> 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.

<sup>39</sup> 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

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 Cooperation in Europe, the United Nations' Children's Fund, Amnesty International, and various other human rights organizations. Of course, coordination with such outside entities is a matter that must be raised to and approved by commanders.

### **E. Military Justice**

A state's survival is often dependent upon a disciplined armed force capable of ensuring its sovereign independence. But an armed force without effective discipline is easily turned to a disruptive force, and overreaching by military forces is a prime example of the kinds of arbitrary state actions whose eradication is a primary component of the 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).<sup>40</sup> 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.<sup>41</sup> In the European Union, for instance, the necessity for civilian, as opposed to

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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.").

<sup>40</sup> Interview with Lt Col J. Johnston, British Army (ALS) (Oct. 2006) [hereinafter Johnston Interview].

<sup>41</sup> 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).

military, judges in courts-martial is considered a matter of human rights law, as confirmed by the European Court of Human Rights in several recent cases. The concern in such cases is that the central role of the civilian judge was an important factor in ensuring the impartiality of proceedings, and unlike in the U.S. system, the court determined that a uniformed judge offered no such guarantees.<sup>42</sup>

Although representation by military defense lawyers is taken as a given in the U.S. system, the use of military defense lawyers is not universal. In the British courts-martial system, for instance, the ability of the military lawyers to represent the defendant has been curtailed by human rights legislation in order to foster the independence necessary for defense counsel to operate. Consequently, both British Army and Air Force courts martial no longer offer the opportunity for the defendant to be represented by military counsel.<sup>43</sup>

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

Given the unique nature of military service, a number of military specific offenses<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup>

## II. Civil Law Systems

The term “civil law” is commonly used in two different meanings: First, it distinguishes the law that applies to disputes between private individuals from the law that governs the relationship between individuals and the state (e.g., criminal law or constitutional law). Secondly, the term is used to describe a legal system distinguishable from common law systems. This section addresses the latter meaning. It intends to introduce JAs to the main characteristics and basic principles of the civil law system, 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.

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<sup>42</sup> See *Grieves v. United Kingdom*, *supra*; *Cooper v. United Kingdom*, 39 Eur. H.R. Rep. 8 ¶ 104 (2004).

<sup>43</sup> 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.

<sup>44</sup> 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.

<sup>45</sup> See Creation of a Code of Military Discipline for the New Iraqi Army - CPA Order No 23. The offenses are set out in Section 3 of the order. The elements of the offenses are included in Annex A to the Order. See [http://en.wikisource.org/wiki/Order\\_22:\\_Creation\\_of\\_A\\_New\\_Iraqi\\_Army](http://en.wikisource.org/wiki/Order_22:_Creation_of_A_New_Iraqi_Army) (last visited July 21, 2010). See also UNTAET/REG/2001/12 dated 20 July 2001 Regulation No. 2001/12 On the Establishment of a Code of Military Discipline for the Defense Force of East Timor. Section 4 sets out the military offenses deemed to be breaches of service discipline, the annex to the regulation details the elements of each offense, see [www.un.org/peace/etimor/untaetR/2001-12.pdf](http://www.un.org/peace/etimor/untaetR/2001-12.pdf) (last visited July 21, 2010).

<sup>46</sup> Johnston Interview, *supra* note 40.

<sup>47</sup> See Watts & Martin, *supra* note 9.

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,<sup>48</sup> 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 1804<sup>49</sup> and Code of Criminal Procedure of 1808<sup>50</sup>) and Germany (Civil Code of 1896<sup>51</sup>)<sup>52</sup>. These codifications became the basis for legal systems world-wide.<sup>53</sup> 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 for distinguishing between the two systems.<sup>54</sup> The differences are rather to be found in the methodological approach to law.

### A. The Civil Law Ideal of Separation of Powers

The most important characteristic of the civil law system is its emphasis on *complete separation of powers*, with all lawmaking power assigned to a representative legislature. The idea of (complete) separation of powers was advanced by *Montesquieu* as part of the intellectual revolution taking place at the eve of the French revolution in 1789.<sup>55</sup>

Although common law systems like the U.S. 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 U.S. and the United Kingdom, the judiciary served as a progressive force on the side of the individual against abuse of power by the state.<sup>56</sup> 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

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

49 Also referred to as *Code Napoleon* or *Code Civil*.

50 Also referred to as *Code d'Instruction Criminelle* or CIC.

51 The *Bürgerliches Gesetzbuch* or BGB.

52 The Code Civil of 1804 and the Civil Code of 1896 are still in force in France and Germany; of course, being frequently amended by the respective legislative powers since that time.

53 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.

54 See MERRYMAN, *supra* note 48, at 26.

55 See *id.* at 15.

56 See *id.* at 16.

emphasizing the primacy of the legislative power.<sup>57</sup> 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.<sup>58</sup> Though, the jurisprudence does shape the existing laws by interpreting the law, and especially defining the meaning of abstract terms used in the respective codes.

Codes are what distinguish common from civil law systems if taken in their purest forms. 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 as little a gap as possible that a judge would need to close. At least in theory, there is no space for considerations of justice outside the codified law. Under the civil law system's ideology, the requirement for judicial consistency and predictability requires a general legislative predetermination of what is "just," at least to the extent possible.<sup>59</sup> However, considerations of justice are taken into account by the judges when analyzing the respective code's spirit and purpose when interpreting abstract terms of the code.

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

This theoretical model, however, applies differently to criminal law than to "civil" law (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 in disfavor of the accused persists. In matters strictly between individuals, in contrast, judges will often draw analogies from statutory provisions to fill lacunae and to achieve coherence. By contrast, in most common law systems, "civil" cases are still frequently governed by case law, with statutes serving to provide specific rules in specific areas.

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.

## B. Specific Aspects of Civil Law

### 1. Sources of Law

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

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<sup>57</sup> 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.

<sup>58</sup> See TAMANAHA, *supra* note 1, at 124-25.

<sup>59</sup> The former Prussian *Landrecht* of 1794 is the most rigid legislative attempt (and simultaneously the most spectacular failure) to predetermine the judicial resolution of all legal conflicts and to thereby curtail judicial competencies as it consisted of more than 17,000 articles, considered to cover any imaginable legal situation that could arise along with a prohibition against judicial interpretation of the law. Subsequent legislation in civil law systems has taken a far more realistic approach and accordingly drafted significantly shorter and more abstract codifications.

Most civil law systems accept neither the principle of *stare decisis*<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup> In other civil law systems, failing to adhere to constant jurisdiction opens at least the possibility of appeal.<sup>63</sup> 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.<sup>64</sup>

## 2. 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 restricted. While they certainly enjoy usually great respect in general, when compared to their common law brethren, civil law judges are not widely known and courts are viewed as faceless institutions. This reflects the general idea of courts being objective and impartial in their findings, and seeking the absolute “truth” and justice.

## 3. Legal Science and Techniques

Legal science in the civil law world is primarily the creation of German legal scholars of the nineteenth century.<sup>65</sup> 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.<sup>66</sup> 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.<sup>67</sup> 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.

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

61 See MERRYMAN, *supra* note 48, at 83.

62 E.g. in Germany, a case must be submitted to the Grand Senate of the Federal Administrative Court if one Senate of the court wants to deviate from the jurisdiction of another Senate or if one of the Higher Administrative Courts wants to deviate from the jurisdiction of the Federal Administrative Court. See para. 11, 12 of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung – VwGO*).

63 E.g., in Germany, an appeal against a judgment of an Administrative Court must be formally admitted within the judgment. In some cases, the admission of an appeal shall be granted, e.g., if an Administrative Court deviates from the jurisdiction of the Federal Administrative Court or the State’s Higher Administrative Courts. See para. 124 no.4 of the German Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung – VwGO*).

64 *But see* MERRYMAN, *supra* note 48, at 23 (recognizing the application of custom in many civil law countries).

65 See MERRYMAN, *supra* note 48, at 61.

66 *Id.* at 62.

67 *Id.* at 67.

#### 4. 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.<sup>68</sup> The Court of Cassation will not usually decide a case and issue a judgment. If it decides that the lower court has made a mistake in interpreting the law, it states the correct interpretation and orders the lower court to reconsider the case.

#### 5. Civil Procedure

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

A typical civil proceeding in civil law countries is, however, divided into three stages: a brief preliminary stage, in which the pleadings are submitted and the judge is appointed; an evidence-taking stage, in which the judges take evidence; and a decision making stage in which the judges hear the arguments and render decisions.<sup>69</sup>

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.<sup>70</sup>

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.

#### 6. 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, JAs 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.<sup>71</sup> Likewise, the criminal procedure is laid out in specific codifications. In contrast, although uncommon, uncoded 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

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68 *Id.* at 87.

69 *Id.* at 114.

70 *Id.* at 115.

71 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).



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 U.S. over the last century. However, the criminal procedure in civil law systems, often described as inquisitorial<sup>72</sup> 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.<sup>73</sup> JAs 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.

## **7. 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 dropped.<sup>74</sup> The investigative record and the evidence contained therein will often provide the basis of the trial judge's decision.<sup>75</sup> The common law, in contrast, strictly separates between the investigation and the trial and allows only the evidence collected during the trial to be used as a basis for the judge's decision.

Accordingly, the pre-trial phase and its actors play a more significant role in the criminal process under the civil law system than in most common law systems.<sup>76</sup> While arguably the investigative phase of the civil law system is more suitable to establish all relevant facts before a decision on the proceedings to the trial stage is taken, JAs should be aware that the traditional role of the pre-trial phase in civil law systems historically often meant that pre-trial proceedings were kept secret, substantially fewer rights were granted to the defendant, and pre-trial proceeding were much more prone to abuse. The pre-trial phase may also delay the

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72 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.

73 *Code d'Instruction Criminelle*.

74 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.

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

76 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.

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 JAs may encounter may not have undergone an equivalent evolution.

## **8. 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.<sup>77</sup> 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.

## **9. Appeal**

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

### **Civil Law Procedural Changes Can Drive Assessments**

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

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<sup>77</sup> 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.

### C. 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).

## III. 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 many parts of the world and the location of today's ongoing stability operations. One of the fundamental features of modern Islamist movements is their call to restore the Sharia as the dominant if not sole source of law in Muslim countries, which, as demonstrated by the Iranian Revolution<sup>78</sup> and the Taliban's<sup>79</sup> rule in Afghanistan, can affect world politics and international security.

### A. The Sharia

The totality of Islamic law is known as the "Sharia,"<sup>80</sup> which literally means the path to follow. The substance of the Sharia is found in the primary sources of the *Quran* and the Sunna, as well as in the corpus of Islamic jurisprudence (fiqh), which is the work of the Muslim legal scholars or jurists (fuqaha) who have interpreted those primary sources. The Sharia includes not only relations between humans (muamalat), such as property rights and contracts, but also "religious" obligations (ibadat), such as dietary rules, the methods of prayer, and the punishments for certain offenses against God (such as theft and adultery).

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

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

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

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<sup>78</sup> On the Iranian Revolution of 1979, see NIKKI R. KEDDIE, *MODERN IRAN: ROOTS AND RESULTS OF REVOLUTION* (2003).

<sup>79</sup> On the Taliban, see *THE MIDDLE EAST AND ISLAMIC WORLD READER* 243 (Marvin E. Gittleman and Stuart Schaar eds., 2003).

<sup>80</sup> See WAEL B. HALLAQ, *SHARIA: THEORY, PRACTICE, TRANSFORMATIONS* (2009).

<sup>81</sup> See CHIBLI MALLAT, *INTRODUCTION TO MIDDLE EASTERN LAW* (2007).

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

## **B. The Application of the Sharia**

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

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

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

## **C. The Substantive Sharia**

The Sharia seeks to promote and protect five primary values: religion, life, offspring, property, and rationality.<sup>82</sup> Moreover, it classifies all actions as either forbidden (haram), discouraged, neutral, recommended, or obligatory. In the western sense, only the first and the last of these constitute legal

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<sup>82</sup> See BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 146 (1998).

categories, strictly speaking, and in the Islamic tradition only those two categories are deemed enforceable by temporal religious or secular authorities.

Based on the five values noted above, much of the Sharia is devoted to the areas of family law (marriage, divorce, and inheritance), commercial transactions (including contracts, taxes, and waqfs, or trusts), and a relatively narrow area of criminal law. Family law in the Sharia is profoundly marked by the Arab chthonic law which Muhammad encountered, and by his reaction to it. While it is the prevailing opinion that the Islamic law improved the status of women compared with the traditions of pre-Islamic law, the principle of equality of men and women as understood in Western law systems is not necessarily reflected in the Sharia. The *Quran* contains some verses that have been used to suggest that men and women are not equal.<sup>83</sup> On the other hand, Islamic law generally has granted women substantial rights and financial security. A daughter is granted a share of inheritance, and a woman can keep all property that she brings into a marriage or that she acquires during marriage. Shiite law generally provides greater rights for women within this field than Sunni law. Reform of family law has taken place in most modern Muslim countries, and further reform is a high priority among many Muslim feminist scholars.<sup>84</sup>

Commercial law is characterized by a positive view of business and commerce, but with an emphasis on fairness that limits the scope of commercial transactions. This is reflected primarily in the prohibition on interest and the unfair distribution of risks. For example, unlike in Western societies in which debt is fundamentally distinguished from equity by the allocation of risk, in Islamic countries, banks frequently share a portion of the risk in the form of partnerships with depositors. Islamic banking that seeks to promote commerce within the limits set by these prohibitions is an expanding and increasingly important area of international finance.<sup>85</sup>

Criminal law was and is primarily a matter left to the secular or state rulers. However, five offenses (hudud) were deemed to be offenses against God, as they violated the five primary values noted earlier. Thus, the *Quran* and Sunna prescribe specific punishments for theft, highway robbery, fornication, false accusation of fornication, and (according to some schools of jurisprudence) apostasy, as these acts especially threatened religion, property, family and offspring. Other offenses that threatened public order (tazir or siyasa) were left to the discretionary punishment by state authorities. Acts resulting in personal injury were punished or not according to the victim, though state authorities could also enforce sanctions in such cases. Importantly, the hudud offenses were rarely imposed throughout most of Islamic history, as the standards of proof were very high, and their frequent use by the Taliban in Afghanistan was inconsistent with this tradition.<sup>86</sup>

#### **D. International Law and Jihad**

International law, especially the law of war, plays an important role in the Sharia. Here the central concept is jihad, which encompasses both the *jus ad bellum* and the *jus in bello*. Like the law of war in the West, but beginning much earlier and, in the classical era, in comparatively more sophisticated forms, jihad as interpreted and developed by the jurists was transformed over time and in response to particular historical developments, particularly the preservation of the original umma in Medina against its Arab and other tribal enemies, the rapid and extensive conquests of the Arab armies in the first two centuries of the Islamic era, the destruction of the caliphate by non-Muslim conquerors beginning in the thirteenth century, and European colonialism commencing in the nineteenth century. Moreover, jihad has always been subject to a diversity of views within the ranks of the scholars and among Muslims in general. This diversity, and the intensity of the debate, has become especially pronounced in the current era, as the Muslim world both integrates into and seeks a recognizable voice in the western-dominated system of international law.

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<sup>83</sup> 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 . . . .”

<sup>84</sup> See JUDITH E. TUCKER, *WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW* (2008).

<sup>85</sup> See MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE* (2006).

<sup>86</sup> See RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW* (2005).

Many current Muslim scholars, referring to the original practice of the earliest Muslim community, insist that jihad has a primary meaning of an individual's effort or struggle to comply with the Sharia, and only secondarily does it refer to the (only) legitimate reason for engaging in armed conflict. Moreover, they also argue that in the latter sense, it authorizes only defensive warfare. The later Arab conquests required a rethinking of the grounds for engaging in jihad, but many scholars claim that in the modern era only the original, defensive concept is legitimate. Moreover, virtually all of the classical jurists stated that jihad in any form may only be declared by properly designated legal authority. Finally, all of the sources of law contain rules for the conduct of warfare that reflect principles similar to the modern western law of armed conflict, such as a prohibition on poisonous weapons, protection of noncombatants, and accepting surrender without reprisals.<sup>87</sup> Although it is possible to extract phrases and passages from the *Quran* and the Sunna that seem to justify constant and aggressive war against non-Muslims, this is not the mainstream interpretation of the sources by the majority of legal scholars.

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

### **E. Sunnis and Shiites**

The difference between Sunnis and Shiites is a matter of geopolitical importance, but it is frequently poorly understood by Westerners. Although a complete treatment of the issue is beyond the scope of this *Handbook*,<sup>88</sup> it is helpful for rule of law practitioners to understand the basic distinction, especially as it applies to law.

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

In contrast, Shiites (the "party of Ali") were of the view that Muhammad had designated his cousin and son-in-law Ali as his rightful successor, and that only Ali's descendants (the five, seven, or twelve Shiite Imams, depending on the branch of Shiism) had the legitimacy to become the leader of the Muslim community. The majority of Shiites came to believe that the twelfth Imam was secreted away in the ninth century to protect him from the illegitimate Sunni caliph, and that he remains alive though hidden (ghaybah, or occultation), and will return in the future as the Mahdi to usher in an era of peace and justice. "Twelver Shiism" is the official religion of Iran today.

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

Another important difference is that Sunnis do not accept broad-based forms of intellectual reasoning as a source of law. That is why for them methods of interpreting the *Quran* and the Sunna to form new opinions, apart from fairly limited reasoning by analogy, are unacceptable. Moreover, Sunni muftis rely on the prior

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<sup>87</sup> See MICHAEL BONNER, *JIHAD IN ISLAMIC HISTORY: PRINCIPLES AND PRACTICES* (2006); RUDOLPH PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM* (2005).

<sup>88</sup> For a fuller explanation of this topic, see VALI NASR, *THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE* (2006).

doctrinal teachings of earlier scholars within one of the four existing Sunni schools of jurisprudence (Shafii, Hanafi, Maliki, or Hanbali). Shiites, on the other hand, accept a wider scope of intellectual reasoning (aql) in interpreting the sources of the law. A Shiite legal scholar (called a mujtahid, rather than a mufti), among the most learned of whom may be called ayatollah or, at the top level, marja at-taqlid (“source of emulation”), interprets the *Quran* and the akhbar directly, and is less bound by the prior teachings of earlier scholars. He is thus somewhat freer than his Sunni counterparts to change his rulings and opinions over time and to evolve religious law with the modern times.

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

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

## **F. Conclusion**

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

## **IV. Combined Systems**

In addition to civil law, common law, and religious systems, there are also mixed legal systems in much of the world. The family of mixed law systems consists mainly of two different mixtures of legal systems: the mixture of civil and common law systems and the mixture of civil law systems and religious legal systems.

Systems representing a mixture of civil and common law systems include Botswana, Lesotho, Namibia, the Philippines, Puerto Rico, Quebec, Scotland, South Africa, Sri Lanka, Swaziland, Zimbabwe, and Louisiana here in the U.S.<sup>89</sup> The European Union, too, is something of a mixed common/civil system. Civil/religious mixed systems frequently involve Islamic law, including Algeria, Egypt, Indonesia, Iraq, and Syria. Iran claims to have an exclusively Sharia-based legal system, but in practice it too is a mixed civil/Islamic system, one that often finds it difficult to reconcile the various traditions within its revolutionary Islamic framework.<sup>90</sup>

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. 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.

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<sup>89</sup> See William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 679 (2000).

<sup>90</sup> See ASHGAR SCHIRAZI, *THE CONSTITUTION OF IRAN* (1997).

## **V. 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.

### **A. Mediation**

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

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

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

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

### **B. Arbitration**

As opposed to mediation, arbitration provides for a solution that is both binding and enforceable.<sup>91</sup> 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 bodies<sup>92</sup> 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.

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<sup>91</sup> 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.

<sup>92</sup> For example the London Court of International Arbitration, the American Arbitration Association and The Middle East Center for International Commercial Law.



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 maintaining independence from (and impartiality toward) a contested government.

### C. 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.<sup>93</sup>

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.

### D. Truth and Reconciliation Commissions

Although not a part of the regular legal dispute resolution process, Truth and Reconciliation Commissions (TRC) have been used with increasing frequency in post-conflict settings as a method for helping society move past a period of past governmental abuses as part of the restoration of the 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 its history. After the de-nazification of Germany, the process of *Vergangenheitsbewältigung* allowed for individuals to admit the horrors of the former regime, attempting to remedy as far as possible the wrongs while attempting to move on from the past.

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<sup>93</sup> In East Timor, for instance, criticism was made of the United Nations Transitional Administration in East Timor's (UNTAET) failure to promote and develop customary legal structures. An East Timorese suggestion to incorporate such traditional methods into the new judicial structure was not acted upon, and may have been a lost opportunity to provide for dispute resolution at an appropriate level and an effective method of reducing the burden on a nascent legal system. See King's College London – International Policy Institute, East Timor Post Operation Report, [http://www.jsmp.minihub.org/Reports/otherresources/Peace4Timor\\_10\\_3\\_03.pdf](http://www.jsmp.minihub.org/Reports/otherresources/Peace4Timor_10_3_03.pdf) (last visited July 21, 2010).

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.<sup>94</sup>

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

#### **The Role of Truth and Reconciliation**

One form of truth and reconciliation was undertaken by the Special Representative to the Secretary General (SRSG) in Afghanistan. Complaints have been made of serious crimes committed by the Northern Alliance during the military campaign in which the Taliban regime was removed from power. These serious allegations possibly implicated senior members of the current regime. The unwillingness of the UN to conduct a thorough investigation into such allegations was based on jurisdictional concerns but was heavily swayed by the risk of undermining the current transitional administration. The SRSG concluded, on balance: “(O)ur responsibility to the living has taken precedence over justice to the dead.”<sup>95</sup>

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 TRCs many years to hear evidence from a wide number of witnesses before typically producing written reports. Some feel that the publication of such reports, many years after events, tend not to serve to heal wounds, rather re-open them.

### **E. Property Claims Commissions**

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

Such a body was set up by the CPA<sup>96</sup> 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.

<sup>94</sup> Twenty-seven nations have adopted such an approach since 1970. On TRCs generally, see the US Institute of Peace web site, which has an extensive library on TRCs, <http://www.usip.org/resources-tools/usip-library> (last visited July 21, 2010).

<sup>95</sup> United Nations Special Representative of the Secretary General, Jean Arnault.

<sup>96</sup> See Coalition Provisional Authority Regulation 8, as amended by Regulation 12.

[http://www.iraqcoalition.org/regulations/20040114\\_CPAREG\\_8\\_Property\\_Claims\\_Commission\\_and\\_Appendix\\_.pdf](http://www.iraqcoalition.org/regulations/20040114_CPAREG_8_Property_Claims_Commission_and_Appendix_.pdf)

## VI. 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 U.S. rule of law programs and, therefore, likely to require some degree of reform in order to bring the host nation law into line with basic international human rights norms, as discussed earlier. Such substantive rights are a matter of considerable cultural sensitivity and are likely to be addressed by senior civilian leaders, leaving little room for 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.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> It called for attention to be given to two separate concepts: gender balance in negotiation processes for societal reconstruction<sup>100</sup> and gender mainstreaming in the terms of the agreements reached and their implementation. The latter concept—gender mainstreaming<sup>101</sup>—can be particularly useful in the development and implementation of rule of law operations.

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(last visited July 21, 2010) and

[http://www.iraqcoalition.org/regulations/20040624\\_CPAREG\\_12\\_Iraq\\_Property\\_Claims\\_Commission\\_with\\_Annex\\_A\\_and\\_B.pdf](http://www.iraqcoalition.org/regulations/20040624_CPAREG_12_Iraq_Property_Claims_Commission_with_Annex_A_and_B.pdf) (last visited July 21, 2010).

<sup>97</sup> 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.

<sup>98</sup> See Faiola, *supra* note 97 (citing examples from Rwanda, Bangladesh, India, and Brazil).

<sup>99</sup> 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").

<sup>100</sup> 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).

<sup>101</sup> Gender mainstreaming is:

"the process of assessing the implications for women and men of any planned action, including legislation, policies or programs, in any area and at all levels. It is a strategy for making women's as well as men's concerns and

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.<sup>102</sup> Activities should aim at leveling the playing field to redress gross inequities.<sup>103</sup>

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

Many post-conflict countries have taken steps to increase women's political participation. In order to redress deficits and disparities that have occurred in Afghanistan because of the previous regime's fundamentalist religious culture, a quota was adopted allowing women to occupy at least 25 percent of lower parliament seats. This resulted from pressure by Afghan women's groups and the international community. The dominant parties in South Africa (ANC), Mozambique (Frelimo), and Namibia (Swapo) established women's quotas on candidate lists. Other regimes have focused on women's ability to run for office and hold office effectively. When the national council in Timor Leste, rejected quotas, women's networks sought UN funding to train women to compete effectively in elections. Women now comprise 26 percent of elected constituent assembly members. In Rwanda, where women comprise over 60 percent of the post-genocide population, women captured 49 percent of parliamentary seats in fall 2003 elections. Rwanda now has the largest female parliamentary representation worldwide.<sup>104</sup>

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,<sup>105</sup> 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.<sup>106</sup>

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experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programs in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated.”

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

<sup>102</sup> Elaine Zuckerman & Marcia Greenberg, *The Gender Dimensions of Post-Conflict Reconstruction: An Analytical Framework for Policymakers*, 12 GENDER AND DEVT. 70 (2004), available at <http://www.informaworld.com/smpp/content~db=all?content=10.1080/13552070412331332330> (last visited July 21, 2010).

<sup>103</sup> The Geneva Center for the Democratic Control of Armed Forces has a series of assessment tools devoted to gender issues in security sector reform, available at [http://www.dcaf.ch/publications/kms/series\\_gssr-toolkit.cfm?nav1=5&nav2=6](http://www.dcaf.ch/publications/kms/series_gssr-toolkit.cfm?nav1=5&nav2=6) (last visited July 21, 2010).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> 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](http://www.peacewomen.org) (last visited July 21, 2010).

### **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.<sup>107</sup>

### **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.<sup>108</sup>

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.<sup>109</sup>

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.<sup>110</sup>

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

<sup>107</sup> Faiola, *supra* note 97.

<sup>108</sup> Iivula-Ithana, Peace Needs Women, and Women Need Justice, New York Gender Justice Conference: UNIFEM/ILAC, 2004.

<sup>109</sup> "Policing with Compassion, Sierra Leone," Women as Partners in Peace and Security, *see* [http://www.un.org/womenwatch/osagi/resources/faces/9-Police\\_faces\\_en.pdf](http://www.un.org/womenwatch/osagi/resources/faces/9-Police_faces_en.pdf) (last visited July 21, 2010).

<sup>110</sup> *See* <http://www.gtz.de/en> (last visited July 21, 2010).

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.<sup>111</sup> 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.

## **VII. Civil Society**

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

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

### **A. Operational Objectives for Engaging, Leveraging, and Supporting Civil Society**

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

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<sup>111</sup> 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.

## B. 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.

### 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.<sup>112</sup> 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.

<sup>112</sup> Civil Society Conflict Mitigation funds are a component of USAID's Iraq Rapid Assistance Program. These funds can be used for activities that build stronger bridges between the government and civil society. USAID's Iraq programs are described at <http://www.usaid.gov/iraq/> (last visited July 21, 2010).

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

*Public education programs.* In many countries, ongoing public education programs focusing on the 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.

### **C. Conducting a Baseline Assessment in this Sector**

Rule of law programs should include a firm analysis of the context, role and position of CSOs, since their capacity, effectiveness and space to engage varies greatly from country to country. Civil society assessments must take into account the range of local actors beyond those approved by the state and identify those that genuinely focus on improving the human security of the poor, women, and other groups often excluded from security debates. The following are example questions for civil society 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.<sup>113</sup>

- Context
  - What are the political, social, and legal frameworks (e.g., social pressures, legal restrictions, and history) in which civil society operates?
  - Is there a national NGO network that provides coordination and support for CSOs?
  - When does government take an adversarial or a partnering relationship with CSOs?
  - Which CSOs work on security and justice issues and how credible are they? What is their relationship with the government?
- Accountability and Oversight
  - Which CSOs help oversee the security and justice systems?
  - Which mechanisms exist to ensure that CSOs are equally accountable to their populations and their external partners?
- Capacity
  - Which CSOs are the possible agents of change in the security system? What are their key sources of influence? Are they effective and efficient?
  - Have certain CSOs demonstrated a capacity to engage security-related issues?
  - What capacity do CSOs have for research, advocacy, training and policy advice?
- Management
  - How strong are the internal managerial systems of relevant CSOs?
  - Do they handle budgeting activities competently and transparently?
- Coordination with other parts of the security system
  - Which CSOs have connections to security and justice actors?
  - What institutional mechanisms exist for CSOs and state security and justice sectors' interaction?
  - What state or coalition activities can be used as a vehicle for engaging with civil society?

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<sup>113</sup> See also Chapter 6.III. for direction on how to conduct the assessment and how to use these questions as measures of effectiveness to monitor progress.



- 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?

#### **D. Common Challenges and Lessons Learned to Guide Implementation**

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

*Consider the role of International CSOs in capacity-building.* International CSOs can help strengthen their equivalents in the partner countries by assisting in creating political space for engagement with their governments on security and justice issues, as well as providing moral support, protection, and security. International NGOs can also provide important technical and capacity-building support through, for example, skills development and training programs.

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

*Coordinate assistance.* Coordination with other local and international actors is essential to avoid duplication, to pool resources, and to concentrate efforts in supporting CSOs, while fostering their independence and sustainability.

*Institutional funding and sustainability.* In countries with emerging CSOs acting in the security and justice arena, it is important to ensure provision for core institutional funding. Although practice demonstrates that external partners are more disposed to support project-based activities, this limits CSOs' ability to engage in the longer-term and to develop or seize emerging opportunities in domestically driven security reforms. On the other hand, openness towards longer-term funding must be balanced with concerns of sustainability. There is a requirement for CSOs to develop balanced sources of funding in order to sustain their independence and avoid both donor fatigue and the appearance of dependence on a particular interest group (including foreign nations and the national government when it is a source of CSO funding). This can be done, for example, through harnessing the support of the private business sector and charity campaigns.

*Support regional and international networks and partners as a bridge to the national level.* In many countries it may be difficult for CSOs to engage directly in security and justice issues at the national level. Participation in security-related discussions and mechanisms at the regional level tends to be a good means of exerting indirect pressure on the national level as local CSOs are normally seen to have more credibility if they are members of regional or international networks or have international partners.

*Build media capacity to report on rule of law and include media strategies into programming.* The media is one of the main channels to help raise public awareness on issues pertaining to the 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.

*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 be prepared to either provide security or, if the situation is untenable, help to arrange for their exit from the AO.

## **VIII. Non-State Security Providers**

Non-state security providers encompass a broad range of security forces with widely varying degrees of legal status and legitimacy. Government regulated private security companies (PSCs) and some neighborhood protection programs are examples of legitimate services; some political party militias are acceptable in certain countries, while for the most part guerilla armies, warlord militias, and so-called “liberation armies” are generally illicit and counterproductive to any peace process or stabilization effort. The key characteristic that all of these non-state actors share, however, is that they provide some form of security to someone. While private security forces can and do provide critical, 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

### **A. Risk assessment and analysis**

The “private security sector,” as distinct from other types of non-state security actors, is generally defined as those commercial companies directly providing military or security-related services (of a more protective nature) for profit, whether domestically or internationally. The number of PSC personnel and the size of PSC budgets exceed public law enforcement agencies in many countries, including South Africa, Philippines, Russia, U.S., 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.

### **B. Assessing the Role of Non-State Security Providers**

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

- Clarifying the roles of the private security sector and its relationship with public security agencies, and increasing cooperation
- Clarifying the legal status of PSCs, and how it may change depending on factors such as nationality, type of services offered, and clients
- Statutory regulation and government oversight, perhaps through licensing
- Professionalism and voluntary regulation
- Transparency, accountability, and oversight
- Training for private security staff in human rights and humanitarian law, use of force and firearms, first aid, and professional operating standards
- Integration of private security sector reforms into broader Security Sector Reform (SSR) programs.

Recognizing that non-state security actors can potentially provide a valuable function, it is important to understand the development cycle of the private security industry that can lead to more effective control of all non-state security forces. In general, regardless of the context, as host nation governance is restored and strengthened, a relatively unregulated and rapid proliferation of non-state security providers is often followed by a period of consolidation and professionalization, in which a more sophisticated domestic control regime is established and the most questionable operators are marginalized. A baseline assessment should include viewing the varying roles of non-state security providers as a sector, and analyzing the existing governance or regulatory framework in which they exist. At the same time, it is critical not to view the sector as one undifferentiated mass; there might be great variety among private security providers. Several factors—including nationality, mission, and for whom they are working—can affect the legal status of any particular provider.

- Context
  - What are the factors contributing to supply of and demand for private security services and other non-state security providers?
  - Who are their clients and what security threats are they hired to protect clients from? How many 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?

## **C. Ten Lessons Learned**

### **1. Avoid creating a security vacuum.**

Non-state security actors may be the only providers of security in areas or sectors where state provision of security is weak. To avoid creating a security vacuum, it may be necessary to strengthen state security provision and capacity for oversight as a precondition for effectively regulating the private security sector.

**2. Control the activities of personnel wherever they are working.**

This is essential to ensure that they are accountable for all wrongful acts wherever they are committed, particularly when the domestic regulatory environment is weak. Especially in areas of active combat, however, it must be recognized that there are substantial challenges to designing and enforcing effective and fair accountability measures. For example, security concerns may prevent the return of investigators to the scene of a firefight.

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

Issues include private sector involvement in law enforcement or military operations, procedures for reporting to the police, and the role of the police in enforcing private security sector legislation. Also, especially where PSCs are working on behalf of a foreign government or military, that entity should have adequate oversight and accountability controls to control such PSCs, and to ensure proper communication and cooperation with the host government.

**4. Establish transparent licensing criteria.**

Licensing criteria might include adherence to standards related to vetting and training, equal employment practices, recording and reporting operations, oversight and management structures, responsibilities to the public, and relations with public service providers.

**5. Do not overlook criteria for licensing host nation security providers who operate in other countries.**

Regulation should include whether the company or its proposed activities are likely to pose a threat to law and order, undermine economic development, enhance instability and human suffering, increase threat perceptions in neighboring countries, contribute to or provoke internal or external aggression; or violate international embargoes or sanctions.

**6. Be cautious of immunity agreements that insulate outside PSCs.**

International private security providers may acquire immunity agreements from HN governments to prevent prosecution under national laws. These agreements are often a condition of undertaking work on behalf of governments, particularly in conflict or post-conflict situations. Despite their apparent utility, these agreements can weaken the 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.<sup>114</sup>

**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.

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<sup>114</sup> For information on vetting public employees *see supra* note 23.

## **CHAPTER 6**

# **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.

### **I. 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.<sup>1</sup>

#### **A. 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 without agreement on how to solve or even what the end state should be or whether the desired end state is achievable.<sup>2</sup> 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 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.

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<sup>1</sup> A training program in the Military Decision Making Process is available to Army Judge Advocates online through JAG University. Go to <https://jag.elic.learn.army.mil/> (last visited July 23, 2010) and enroll in the “JATSOC Elective.” MDMP is the sixth module in the course.

<sup>2</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, THE OPERATIONS PROCESS (26 Mar. 2010).



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.<sup>3</sup>

### **B. What is Planning?**

Planning is the process by which commanders (and the staff, if available) translate the commander’s visualization into a specific course of action for preparation and execution, focusing on the expected results. (FM 3-0, para. 5-94). The outcome of planning is a plan or an order that provides all the information subordinates need for execution.

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 possibly unfamiliar situation. Judge Advocates should be familiar with and participate in the Military Decision Making Process (MDMP). 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.”<sup>4</sup>

### **C. The Military Decision Making Process**

The *military decision making process* is an iterative planning methodology that integrates the activities of the commander, staff, subordinate headquarters, and other partners to understand the situation and mission; develop and compare courses of action; decide on a course of action that best accomplishes the mission; and produce an operation plan or order for execution. The military decision making process is described in detail in FM 5-0, *The Operations Process*. The Marine Corps Planning Process (MCP), described in Marine Corps Warfighting Publication (MCWP) 5-1, *Marine Corps Planning Process*, is an analogous planning

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

<sup>4</sup> See also generally NORMAN M. WADE, THE BATTLE STAFF SMARTBOOK (2d rev. ed. 2005), a practical guide for staff 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 MCPP as well.

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.

### **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. Planning begins with receipt of mission. The receipt of mission alerts the staffs who begin updating their running estimates and gather the tools necessary for mission analysis and continued planning. Specific tools and information gathered regarding assessment include, but are not limited to—

- The higher headquarters' plan or order, including the assessment annex if available.
- If replacing a unit, any current assessments and assessment products.
- Relevant assessment products (classified or open-source) produced by civilian and military organizations.
- The identification of potential data sources, including academic institutions and civilian subject matter experts.

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 U.S. 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.

Key Inputs	Step	Key Outputs	
<ul style="list-style-type: none"> <li>Higher headquarters' plan or order or a new mission anticipated by the commander</li> </ul>	<p>Step 1: <b>Receipt of Mission</b></p>	<ul style="list-style-type: none"> <li>Commander's initial guidance</li> <li>Initial allocation of time</li> </ul>	
<b>Warning Order</b>			
<ul style="list-style-type: none"> <li>Higher headquarters' plan or order</li> <li>Higher headquarters' knowledge and intelligence products</li> <li>Knowledge products from other organizations</li> <li>Design concept (if developed)</li> </ul>	<p>Step 2: <b>Mission Analysis</b></p>	<ul style="list-style-type: none"> <li>Mission statement</li> <li>Initial commander's intent</li> <li>Initial planning guidance</li> <li>Initial CCIRs and EEFI</li> <li>Updated IPB and running estimates</li> <li>Assumptions</li> </ul>	
<b>Warning Order</b>			
<ul style="list-style-type: none"> <li>Mission statement</li> <li>Initial commander's intent, planning guidance, CCIRs, and EEFI</li> <li>Updated IPB and running estimates</li> <li>Updated assumptions</li> </ul>	<p>Step 3: <b>Course of Action (COA) Development</b></p>	<ul style="list-style-type: none"> <li>COA statements and sketches</li> <li>Tentative task organization</li> <li>Broad concept of operations</li> <li>Revised planning guidance</li> <li>Updated assumptions</li> </ul>	
<ul style="list-style-type: none"> <li>Updated running estimates</li> <li>Revised planning guidance</li> <li>COA statements and sketches</li> <li>Updated assumptions</li> </ul>	<p>Step 4: <b>COA Analysis (War Game)</b></p>	<ul style="list-style-type: none"> <li>Refined COAs</li> <li>Potential decision points</li> <li>War-game results</li> <li>Initial assessment measures</li> <li>Updated assumptions</li> </ul>	
<ul style="list-style-type: none"> <li>Updated running estimates</li> <li>Refined COA</li> <li>Evaluation criteria</li> <li>War-game results</li> <li>Updated assumptions</li> </ul>	<p>Step 5: <b>COA Comparison</b></p>	<ul style="list-style-type: none"> <li>Evaluated COAs</li> <li>Recommended COAs</li> <li>Updated running estimates</li> <li>Updated assumptions</li> </ul>	
<ul style="list-style-type: none"> <li>Updated running estimates</li> <li>Evaluated COAs</li> <li>Recommended COA</li> <li>Updated assumptions</li> </ul>	<p>Step 6: <b>COA Approval</b></p>	<ul style="list-style-type: none"> <li>Commander-selected COA and any modifications</li> <li>Refined commander's intent, CCIRs, and EEFI</li> <li>Updated assumptions</li> </ul>	
<b>Warning Order</b>			
<ul style="list-style-type: none"> <li>Commander-selected COA and any modifications</li> <li>Refined commander's intent, CCIRs, and EEFI</li> <li>Updated assumptions</li> </ul>	<p>Step 7: <b>Orders Production</b></p>	<ul style="list-style-type: none"> <li>Approved operation plan or order</li> </ul>	
CCIR	commander's critical information requirement	EEFI	essential element of friendly information
COA	course of action	IPB	intelligence preparation of the battlefield

The steps in the military decision making process

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 3-26) Systems analysis should be used to understand the systems of systems that compose the rule of law environment.<sup>5</sup>

During this phase of MDMP, the rule of law practitioner should develop a broad and comprehensive understanding of what the rule of law consists of in the particular environment. How complex a system is it? How does it link with the rest of society, government, and the economic system of the country? Unlike most MDMP problem sets, rule of law will involve institutional and societal dynamics that go beyond the normal physical or geographical understanding of a military operational environment. In this step, reconsider how the definition of rule of law and its effects relates to the mission that you are receiving from your higher headquarters.

Awareness of cultural and political issues and conditions within the host nation may be critical to a proper understanding of the rule of law environment. Therefore, the gathering information phase may include contacting sources outside traditional rule of law entities, to include intelligence entities and host nation sources. Although it is only part of the first step in the MDMP, assessment is going to be a major part of any rule of law program. Assessment products can also help to visualize the rule of law system or environment and ensure that you consider all aspects of the system.

## Step 2: Mission Analysis

The commander and staff conduct mission analysis to better understand the situation and problem, and identify *what* the command must accomplish, *when* and *where* it must be done, and most importantly *why*—the purpose of the operation. 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 on 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:

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<sup>5</sup> 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).

- 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 2.

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.<sup>6</sup> Commanders and staffs analyze civil considerations in terms of the categories expressed in the memory aid ASCOPE:

Areas

Structures

Capabilities

Organizations

People

Events<sup>7</sup>

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.<sup>8</sup> 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.

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<sup>6</sup> See generally U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, MISSION COMMAND: COMMAND AND CONTROL OF ARMY FORCES (11 Aug. 2003).

<sup>7</sup> See U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS para. 5-36 (27 Feb. 2008).

<sup>8</sup> 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).

An important by-product of the assessment process is identifying what information is not known that is critical to the decision-making of the staff and commander. This information is identified as Commander's Critical Information Requirements (CCIRs). CCIRs comprise information requirements identified by the commander as being critical to timely information management and the decision-making process that affect successful mission accomplishment (JP 5-0, page III-27). The information needed may be about friendly forces (critical friendly force information) or about other forces or conditions (priority intelligence requirements). Identifying CCIRs will allow the commander to direct the staff to find the critical information and will guide the intelligence assets in the Intelligence Preparation of the Battlefield process (IPB). The rule of law practitioner must also ensure that the IPB considers more than the bilateral friendly/threat equation. In rule of law, stability, and COIN operations, the role of the populace and sometimes 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, U.S. military forces must be prepared to carry out all aspects of stability operations.<sup>9</sup> U.S. 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,<sup>10</sup> 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. 2-95). 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 and nongovernmental entities with military operations to achieve unity of effort (See FM 3-0, para 1-45).

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<sup>9</sup> See Chapter 3.

<sup>10</sup> FM 3-0, *supra* note 7, at para 6-69. Moreover, stability operations have corresponding Department of State post-conflict technical sectors, *see id.* at paras. 3-88 – 3-95, and commanders may consider linking primary stability tasks to the DOS sectors.

A critical component of the mission analysis is understanding the purpose of the mission. The Judge Advocate has a vital role in this process. The Judge Advocate must understand and be able to articulate to the staff and commander the purpose of the rule of law operations in COIN and stability operations. Much of this book discusses the relationship between COIN, stability operations, and rule of law programs, but it is important to be able to align the effort to the doctrinal definitions and purposes of COIN and stability operations. In COIN, host-nation forces and their partners operate to defeat armed resistance, reduce passive opposition, and establish or reestablish the host-nation government's legitimacy.<sup>11</sup> Legitimacy of the host-nation government and its legal system is pivotal to overall success. Similarly, in stability operations the goal is a stable civil situation sustainable by host nation assets without foreign military forces (FM 3-0, para 3-73). The objectives of the Justice and Reconciliation Sector of Stability Operations are to establish public order and safety and provide for social reconciliation. The host nation aims to establish self-sustaining public law and order that operates according to internationally recognized standards and respects human rights and freedoms (FM 3-0, para. 3-91).

A successful COIN strategy may include the following rule of law attributes:

- Insurgents punished in host nation courts (FM 3-24, para. D-15)
- Public perceives insurgents as criminals (FM 3-24, para. 1-13, D-15)
- Public not motivated by revenge and resentment (FM 3-24, para. 1-128)
- Former insurgents rehabilitated and not part of the fight (FM 3-24, Table 1-1)
- Host nation government seen as legitimate (FM 3-24, para. 1-123)

As the foregoing list suggests, military rule of law practitioners will be concerned primarily with the criminal justice component of the rule of law environment. There is much more to the rule of law environment than police, courts, and prisons, however. Because a goal of stability operations is to establish self-sustaining public law and order, the rule of law practitioner should not overlook programs that will develop the rule of law culture and support an indigenous, self-sustaining demand for the rule of law. Such programs may include support to civil society groups that inform the public about legal rights, to bar associations, to groups that monitor the court system for accountability, and to groups that represent the under-privileged in the legal system. The Judge Advocate should advocate for such programs as part of the mission analysis. The tendency of the commander and staff may be to put such programs off until later phases of the operation. However, when the goal is self-sustaining public law and order, long term success may well be found in supporting efforts that create an indigenous demand for and popular investment in the rule of law rather than merely developing the institutions and capacity to supply the rule of law.

Part of the mission analysis process is developing mission success criteria (JP 5-0, page III-27). Although creating or enhancing the rule of law is an ongoing mission, it is important to identify those measures with which the command and staff can assess the progress toward the desired end state. Such assessments are done with measures of performance and measures of effectiveness.

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

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<sup>11</sup> *Id.* at para 2-55. See also U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006).

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 of 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 of 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.



### **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 positions the force for sequels and provides flexibility to meet unforeseen events. 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. See Figure B-3 COA development in FM 5-0, page B-15.

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. B-84). 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, paras. 1-29 and 1-30). 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. B-75).

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. B-106).

#### **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.<sup>12</sup>

Wargaming stimulates ideas, highlights critical tasks, and provides insights that might not otherwise be discovered. It is a critical step in the MDMP and should be allocated more time than any other step.

Wargamers need to:

- Remain objective, not allowing personality or their sensing of “what the commander wants” to influence them. They avoid defending a COA just because they personally developed it.
- Accurately record advantages and disadvantages of each COA as they emerge.
- 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.<sup>13</sup>

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:

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<sup>12</sup> See FM 5-0, *supra* note 2, para. B-110.

<sup>13</sup> See *id.* at para B-112.

- **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. 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.

### **Step 5: Course of Action Comparison**

The COA comparison starts with all staff members analyzing and evaluating the advantages and disadvantages of each COA from their perspectives. Staff members each present their findings for the others' consideration. Using the evaluation criteria developed before the wargame, the staff outlines each COA and highlighting its advantages and disadvantages. Comparing the strengths and weaknesses of the COAs identifies their advantages and disadvantages with respect to each other. The staff compares feasible COAs to identify the one with the highest probability of success against the most likely enemy COA and the most dangerous enemy COA. The selected COA should also—

- Pose the minimum risk to the force and mission accomplishment.
- Place the force in the best posture for future operations.
- Provide maximum latitude for initiative by subordinates.
- Provide the most flexibility to meet unexpected threats and opportunities.<sup>14</sup>

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.

### **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.<sup>15</sup>

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.

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<sup>14</sup> See *id.* at para B-167-B173.

<sup>15</sup> See *id.* at para. B-177.

- The current IPB.
- The COAs considered, including—
  - Assumptions used.
  - Results of staff estimates.
  - Summary of wargame for each COA to include critical events, modifications to any COA, and wargame results.
  - Advantages and disadvantages (including risk) of each COA.

### **The recommended COA.**

After the decision briefing, the commander selects the COA he believes will best accomplish the mission. After selecting a COA, the commander issues the final planning guidance. The final planning guidance includes a refined commander's intent (if necessary) and new CCIR to support execution.

### **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.

### **D. 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 U.S. 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 U.S. security contractors in Nisour Square, Baghdad. U.S. forces must reflect the rule of law in their actions. Our response to crimes committed by U.S. 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.<sup>16</sup>

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.

## II. Practical Planning Considerations Specific to Rule of Law Operations

Experience has shown the benefit of breaking the planning phase of rule of law missions into three distinct timeframes. In each of these phases, the nature of the planning will necessarily be different, as the conditions confronting the Judge Advocate planner will vary. Accordingly, this *Handbook* divides planning for rule of law missions into the following phases:

- Pre-deployment (-180 to -30 days prior to deployment)
- Initial deployment (-30 to +90 days of arrival in the area of operations)
- Sustained deployment (+91 days to indefinite)

There is nothing set in stone about these suggested timeframes. They will vary depending upon the nature of the conflict, the manner of entry into theater, the nature of the mission (whether occupation or permissive), and whether this is an initial entry into the area of operations (AO) or a follow-on rotation. If a unit is performing an initial entry into a nation with significant infrastructure damage, the duration of the initial deployment phase, as described below, may extend well beyond 90 days. If a unit is part of a follow-on rotation into a semi-stable environment, where Judge Advocate personnel can benefit from the experience of their predecessors, the duration of the initial deployment phase might be a few weeks, instead of months.

Regardless of the exact duration of these planning periods, their relevance is that the nature of the planning for the rule of law mission and the measure of its success (metrics) varies significantly from phase to phase. The three phases provide a general compass to planning that 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.

### A. 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

<sup>16</sup> FM 3-24, *supra* note 11, at 1-24.

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.

### **1. 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

### **2. 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.<sup>17</sup> The pre-deployment phase provides the best opportunity to gain the general, but invaluable, understanding of the legal system of the nation where operations will occur. Understanding which organization or element within the justice system is supposed to do what, as well as understanding the lines of accountability, prior to arrival in theater will enable more effective pre-deployment planning concerning how to engage that system in a reform effort.

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

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

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

**Step 3. Examine program options beyond the justice sector.** This step broadens the assessment beyond the justice sector to the overall state of the polity and its legitimacy. It helps determine whether conditions

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<sup>17</sup> LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade (2003).

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 III 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 U.S. Army Civil Affairs and Psychological Operations Command (USACAPOC), Ft. Bragg, for use in their RoL Conferences for deploying JAs.<sup>18</sup> 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.

### **3. 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 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

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<sup>18</sup> Rule of Law Lessons Learned, MNC-I Rule of Law Section, Operation Iraqi Freedom 05-07 (Dec. 10 2006).

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.

#### **4. 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.

#### **5. 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.

#### **6. 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.

## **7. 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.

## **8. 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 firms<sup>19</sup>

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](http://www.ohchr.org))
- U.S. Department of State Regional and Global Bureaus
- U.S. 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.

### **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.<sup>20</sup>

## **9. 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.<sup>21</sup> and during the 2009 Rule of Law Short Course held at The Judge Advocate General's Legal Center and School.<sup>22</sup> 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.

### **a. 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?

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<sup>19</sup> 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.

<sup>20</sup> The PDP Program may be contacted at [pdp@conus.army.mil](mailto:pdp@conus.army.mil) or (571)256-2913.

<sup>21</sup> The Fourth Annual Samuel Dash Conference on Human Rights: Rule of Law in the Context of Military Interventions, March 19-20, 2009.

<sup>22</sup> Suggestions for additions or deletions are welcome. Please email them to the Center for Law and Military Operations' email addresses listed at the front of this *Handbook*.

- 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?)
  - What contacts exist with and for the local legal system?
  - What is the role of traditional / informal dispute resolution systems?
  - Does the traditional system differ from the formal host nation legal structure and law?
  - Is there a local bar association / legal centers / legal clinics?
  - Who are the local officials with whom you meet?
  - What is the HN legal training infrastructure? Are there any law schools?
- HN Criminal Justice
  - What is the capacity of the HN criminal justice system?
  - Is there a police force? What is the structure of the police force? Does the HN military have a role in law enforcement? Is there a secret police?
  - How do evidentiary rules differ from the U.S. model? How are hearings conducted?

#### **b. Plans**

- What is the higher headquarters plan?
  - Get the plan for the next two higher military headquarters (e.g., Joint Campaign Plan) and focus on the intent.
  - What is the host nation plan? (For example, consider the Afghan National Development Strategy)
  - What is the USG plan? (Focus on obtaining plans from interagency personnel to include DOS / USAID / DOJ)
- Do the above referenced plans include 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 U.S. military presence in the host nation?
  - Are there any applicable UNSCRs?
  - Are there any international agreements (e.g., SOFA)?
- What are the significant planned events in the coming year?
  - What are the critical events in the USG plan?
  - Are there significant HN events that are not part of the plan (e.g., elections)?

#### **c. Rule of Law and Detention**

- Who is operating detention facilities, U.S. or HN forces (or others)?
- Are there detainee facilities available to the U.S., 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?

**d. 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?

**e. 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 meetings 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
- U.S. Marshals
- ATF
- FBI
- U.S. Embassy
- NGOs
- IOs
- USIP
- UN

**f. Rule of Law POCs**

- name / email
- location / agency
- phone numbers
- Collect the above information for all of the agencies listed above under the structure questions.
- Is there a HN lawyer or Bilingual Bicultural Advisor (BBA) associated with your unit?
- Who is the Contracting Officer at the higher headquarters?

**g. Current assessment**

- Obtain a copy of the current 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 U.S. 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
- U.S. Embassy FAO

**B. 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,<sup>23</sup> reliable information concerning current developments within the host nation will be haphazard at best. The S2 section of the ISB may be a resource for current information that will allow revisions to planning during the initial deployment period. However, while a unit transitions through an ISB, the focus often remains upon movement issues and the tactical preparation for entry into the area of operations.

Upon arrival in the area of operations, the planning cycle again goes into high gear. Frequently, the nature of the expected assignment changes upon arrival, and command and reporting relationships anticipated during the pre-deployment stage are altered to meet the reality on the ground. Further, and most significantly, the rule of law team planners now come into contact for the first time with the infrastructure and personnel (country nationals, coalition allies, other USG agencies, NGOs, and IOs) with whom they will be directly conducting the rule of law operation. There is a veritable hose-feeding of new information available within a very short period of time that frequently renders portions of the pre-deployment plan irrelevant, or at a minimum, in need of major revision. This phase of planning requires an immediate and current assessment of the host nation's legal system.

Upon arrival in the host nation, the JA rule of law practitioner will begin the initial hands-on work of restoring the rule of law. Every day, through that on-the-ground experience, the Judge Advocate will in turn gain more information and insight into the workings of the host nation's legal system, and thereby will be creating the foundation from which sustained deployment planning will begin to develop.

### **1. 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.

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.

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<sup>23</sup> *E.g.*, Hungary for Joint Endeavor; Saudi Arabia for Desert Storm; Kuwait for OIF.

**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.

**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 U.S. 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 U.S. forces taking over the role of security provider.

**Protection of Judges in Early Rule of Law Efforts in Iraq**

Lack of funding and personnel was most often cited by the Coalition Provisional Authority as a reason for leaving Iraqi judges, who were cooperating with the coalition, to protect themselves from anti-coalition elements. The consequence of this lack of security planning was the subsequent murder of many pro-coalition Iraqi judges and their family members, including the Chief Judge of Najaf, by criminal and insurgent forces. The result was a chilling effect on other Iraqi judges and their willingness to embrace rule of law reforms.<sup>24</sup>

**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 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.

**C. Sustained Deployment Planning (+91 to indefinite)**

The necessary focus for rule of law planners during the initial deployment stage is on the tangible infrastructure, such as the existence and operating condition of courthouses, police stations, prisons, and upon the availability of personnel. If one does not have the physical tools and personnel to implement plans, the more sophisticated aspects of the rule of law mission cannot be accomplished.

However, it is important to recognize that, as the rule of law mission enters the sustained deployment phase, planning, assessments, and metrics that continue to focus primarily upon tangible resources like infrastructure and do not progress to a more complex, effects-oriented understanding of the rule of law mission, will miss the ultimate goal of creating a system of law that is viewed as legitimate, relevant, and trustworthy in the eyes of the local population. Built upon the assessment process discussed below, a well-

<sup>24</sup> LTC Craig Trebilcock, *Justice Under Fire*, ARMY LAW. (Nov. 2006).



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 if the citizenry does not seek to access the system to resolve grievances and instead continues to rely upon violence in the streets for resolving disputes.

The concept of the 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.<sup>25</sup>

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.

## **1. Rule of Law Planning Objectives**

Each rule of law mission will have differing needs and priorities due to the unique nature of the society in which it occurs, including the history and legal traditions of that culture. However, in creating a sustained deployment plan, rule of law practitioners should consider whether the following actions, which have yielded success in prior operations, will positively impact current mission objectives:

- Law school curriculum reform.
- The establishment of community based legal services clinics sponsored by local bar associations or law schools to provide legal help to the indigent.
- Creating or strengthening professional associations for attorneys and judges that provide instruction on issues supportive of the rule of law.
- Attendance at international or regional legal conferences for judges and leaders in the legal system that will expose them to international norms of justice.
- Seek support for legal resources such as books and equipment from friendly neighboring countries that have a vested interest in restoration of security and stability on their border. For example, the Kuwait Government sponsored a Humanitarian Operations Center (HOC) in Kuwait City during OIF-1 that provided support to print and distribute the Iraqi laws and procedural codes, as many of the hard copy Iraqi resources for the law had been destroyed during looting.
- Encourage coalition building between host nation government legal organizations and law-related NGOs. For example, the American Bar Association conducts rule of law programs in many developing countries, including several former Soviet republics.

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<sup>25</sup> 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).

- Develop meaningful oversight mechanisms, such as ombudsman offices or judicial/police inspection offices to discourage corruption or misuse of government resources for private gain.<sup>26</sup>
- 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.

## **2. 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.

## **III. 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

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<sup>26</sup> 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.

funding are causing those provincial courts to limit operations, the legal training mission might be better delayed until, after the more immediate needs of security and funding are provided.

Mirroring the planning stages discussed above, there are three major time junctures where assessments will need to occur—Pre-deployment, Initial Deployment, and Sustained Deployment.

#### **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.

### **A. 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.

#### **1. 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.<sup>27</sup> Although structural arrangements have changed over the

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<sup>27</sup> 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.

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.<sup>28</sup> 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/U.S. common law tradition.

## **2. 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.

### **B. 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.

#### **1. 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

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<sup>28</sup> USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 12 (2008).

- 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 U.S. 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)

## **2. 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 to 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.

## **3. 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 nation's 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.

## **4. 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.

## **5. 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.

### C. 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.<sup>29</sup> 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:<sup>30</sup>

- **Sovereignty issues.** Where applicable, this includes the relationship between U.S., other international forces and local sovereignty and institutions. If the U.S. 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.**<sup>31</sup> 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.

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<sup>29</sup> US AGENCY FOR INTERNATIONAL DEVELOPMENT, REBUILDING THE RULE OF LAW IN POST-CONFLICT ENVIRONMENTS 12 (2007 draft) [hereinafter REBUILDING THE RULE OF LAW].

<sup>30</sup> See *id.*, at 12-13.

<sup>31</sup> 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.

- **Potential private sector reform partners.** Civil society, business, and human rights actors who are likely to play a leadership role in advocating for reform or in overseeing and reporting on efforts to rebuild the formal sector as they take shape. (It is important to assess the past histories of local NGO leaders before giving them unqualified support, as some may be associated with the former regime or, for other reasons, may not necessarily be committed to democratic principles.)
- **Potential public sector and political champions.** Government officials, politicians, and others at various levels who were neither part of the patronage system nor participants in corruption or oppression, and could serve as internal champions for rule of law reform. (These types of resources exist in some post-conflict countries. Examples include members of opposition parties, younger civil servants, and regional government representatives. Such individuals may not have actively opposed the prior regime, but in principle would support reform.)
- **Potential for mutual donor leveraging.** The degree to which the U.S. 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).<sup>32</sup>

## D. 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:

## E. Assessment Framework<sup>33</sup>

### 1. Security

- Legal Framework
  - Is a cease-fire or peace accord working?

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<sup>32</sup> Available at: <http://www1.umn.edu/humanrts/monitoring/Ruleoflaw-Monitoring.pdf> (last reviewed 22 July 2010).

<sup>33</sup> This assessment framework is adapted from a draft version of the USAID GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 28, at 36-44.



- Are the constitution or other basic laws in effect?
- Is society under martial law or other exceptional law (e.g., laws of foreign occupation, UN Security Council Resolution)?
- If constitutional order is effective, how effective are the criminal code and criminal procedure code?
- Do police and prosecutors have sufficient legal authority to investigate and prosecute crime, including complex cases such as organized crime, drug and human trafficking, and financial crimes? Is there a modern criminal code that conforms to international standards and provides a sufficient basis for dealing with most types of crime?
- Institutional Framework
  - Is there an effective police force?
  - Are the missions or mandates of the police forces codified or mandated in statutory law?
  - What is the role of the military in internal security and how is it distinguished from that of the police, and from paramilitary forces?
  - What are the rules and procedures of triggering a military response to internal security crisis? How do the military and other elements of the security system cooperate in such situations?
  - Are there prosecutors?
  - Are courts open and are there judges?
  - Are prisons operating?
  - Are the security sector employees getting paid a wage adequate to live on (to avoid resort to corruption)?
  - Are the different security sector agencies interoperable? What agencies are essential to the justice system and what is the best method to ensure coordination and synchronization?
  - Are charges brought only when there is adequate evidence of the commission of a crime? Are a large number of cases dismissed for lack of adequate evidence or because of unfounded or incorrect charges?
- Effects-Oriented Assessment
  - Are citizens or foreigners safe? Are crime rates rising, remaining the same, or declining?
  - Do police cooperate well with prosecutors and the courts in the gathering of evidence and prosecution of criminal cases?
  - Do police control crime or contribute to crime? Do citizens trust and actively assist police in solving crime? Do citizens engage in vigilantism of any kind?
  - Do prosecutors try cases effectively in practice? Do prosecutors have the knowledge and skills required to present criminal cases effectively and properly?
  - Are prisoners regularly subjected to inhuman conditions or abuse? Are prisoners regularly released because prisons are incapable of housing them?
  - Are judges, lawyers, police, or prison officials being targeted or intimidated?
  - Are there armed groups that harm and intimidate citizens with seeming impunity?

## **2. 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?

### **3. 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?

#### **4. 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?

#### **IV. Practical Approaches for Measuring Progress within Rule of Law Operations**

*Editor's Note: In response to concerns of recently deployed Judge Advocates this year's Handbook includes a section dealing specifically with metrics. Chapter 9 looks specifically at this challenging issue. The following is included under the assumption that there is no such thing as too much information in this challenging area of rule of law.*

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.

### **A. 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.

### **B. 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 that capabilities and resources will be required before meaningful planning and assessment can occur. Although each circumstance will vary, examples of early metrics include:

#### **1. 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.

#### **2. 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.

### **3. 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.

### **4. 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.

### **5. 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.

### **6. 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.

### **7. 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.

## C. Metrics During Sustained Deployment (91+ D day to indefinite)

### 1. 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.

## **2. 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.

# **V. Interagency Reconstruction and Stabilization Planning Framework**

## **A. 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 U.S. 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 U.S. government efforts at reconstruction and stabilization.<sup>34</sup> The Department of Defense followed the President's lead by publishing DODD 3000.05, which designated certain responsibilities to various organizations within DOD.<sup>35</sup> 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 U.S. 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

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<sup>34</sup> 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 May 25, 2010).

<sup>35</sup> U.S. Dep't of Defense, Dir. 3000.05, Military Support for Stability, Security, Transition and Reconstruction (SSTR) Operations, 2 (17 September 2009).



guidance in planning such operations.<sup>36</sup> 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.<sup>37</sup>

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

In April 2005, the Office of the Coordinator for Reconstruction and Stabilization (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.<sup>38</sup> 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:

- Initial response (immediate actions of reconstruction and stabilization personnel);
- Transformation (short term development); and
- 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 U.S. 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

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<sup>36</sup> See FM 3-0, *supra* note 7 (discussing these five Army primary stability tasks).

<sup>37</sup> 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.

<sup>38</sup> The Post Conflict Reconstruction Essential Tasks Matrix can be found at: <http://www.crs.state.gov/index.cfm?fuseaction=public.display&id=10234c2e-a5fc-4333-bd82-037d1d42b725> (last visited May 25, 2010). 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."

- 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 de-stabilizes 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.

### **1. 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 U.S. government partners can engage in reconstruction and stabilization efforts. Efforts within the security sector focus on establishing a stable security environment and developing legitimate institutions and infrastructure to maintain that environment. 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.

### **2. 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.

### **3. 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.

#### **4. 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.

#### **5. 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), USAID, 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.

### **C. The Army Primary Stability Tasks<sup>39</sup>**

The Army's five primary stability tasks are intended to closely mirror the S/CRS stability sectors. Each stability task focuses military efforts on a functional area of society. They are:

- Establish civil security.
- Establish civil control.
- Restore essential services.
- Support to governance.
- Support to economic infrastructure and development.

As is the case with the S/CRS stability sectors, each stability task does not operate in isolation, but rather in conjunction with one or more tasks. The combination of tasks conducted during stability operations depends on the situation. Planners should use the Army primary stability tasks as a basic framework for establishing lines of effort. Keep in mind that lines of effort may impact more than one stability task, and a source of instability may impact more than one line of effort.

#### **1. Establish Civil Security**

Civil security is most closely tied to the S/CRS "security" sector. Civil security involves protecting the populace from external and internal threats. Ideally, Army forces defeat external threats posed by enemy forces that can attack population centers. Simultaneously, they assist host nation police and security elements as the host nation maintains internal security against terrorists, criminals, and small, hostile groups. In some situations, no adequate host nation capability for civil security exists. Then, Army forces provide most civil security while developing host nation capabilities. For the other stability tasks to be effective, civil security is required. As soon the host nation security forces can safely perform this task, Army forces transition civil security responsibilities to them.

Civil security lines of effort include, where appropriate: disposing of armed opposition 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.

#### **2. 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

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<sup>39</sup> See FM 3-0, *supra* note 7, para. 3-72.

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.

### **3. 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.

### **4. Support to Governance**

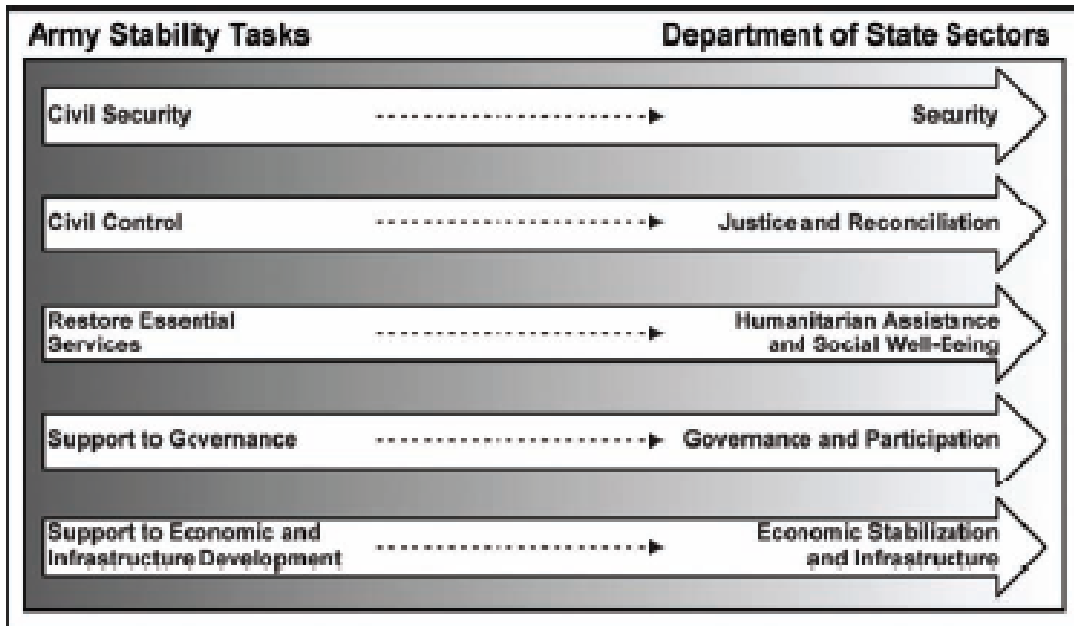
Governance is most closely tied to the S/CRS “governance and participation” sector. The State Department typically holds primary responsibility for most governance and participation efforts with the host nation government. Military forces establish conditions that enable actions by civilian and host-nation agencies to succeed. By establishing security and control, stability operations provide a foundation for transitioning authority to civilian agencies and eventually to the host nation. Once this transition is complete, commanders focus on transferring control to a legitimate civil authority according to the desired end state. Support to governance includes the following; (1) developing and supporting host-nation control of public activities, the rule of law, and civil administration, (2) maintaining security, control, and essential services through host-nation agencies. This includes training and equipping host-nation security forces and police, and (3) supporting host-nation efforts to normalize the succession of power (elections and appointment of officials). 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.

### **5. 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

#### D. 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.



## CHAPTER 7

# FISCAL CONSIDERATIONS IN RULE OF LAW OPERATIONS

The U.S. Constitution grants Congress the “power of the purse,”<sup>1</sup> a function that both appropriates public funds for a federal activity and defines a specific use for those funds. The principles of Federal appropriations law<sup>2</sup> 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.<sup>3</sup> 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 U.S. public, manifested in congressional appropriations and authorizations.<sup>4</sup> 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.<sup>5</sup> The purpose of both funds, one administered by the Department of Defense (DOD) and the other by the Department of State (DOS), is to build and maintain 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:

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<sup>1</sup> 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 ...”).

<sup>2</sup> 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, Chapter 1, 1-2, GAO-04-261SP (U.S. Gov’t Accountability Office, Office of the General Counsel) (3d ed. vol. I 2004).

<sup>3</sup> An obligation arises when the government incurs a legal liability to pay for its requirements, e.g., supplies, services, or construction. From a legal standpoint, the obligation is a government promise to pay a certain amount to a contractor in consideration for their promise to provide goods, services or construction. A disbursement (or expenditure) is an outlay of funds to satisfy a legal obligation. For example, a contract award for construction normally triggers a fiscal obligation. The government may pay the contractor, or disburse funds from that recorded obligation, later in time as the construction is completed. The obligation for the full estimated amount, however, is recorded against the proper appropriation at the time the government makes the promise to pay (usually at contract award). Commands also incur obligations when they obtain goods and services from other U.S. agencies or a host nation. Although both obligations and disbursements are important fiscal events, the time of obligation is generally the critical point of focus for the fiscal advisor. See Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook, Chapter 3 and 5 (2010), available at <https://www.jagcnet.army.mil/JAGCNETPortals/Internet/DocLibs/tjaglcsdoclib.nsf> (last visited July 21, 2010).

<sup>4</sup> 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.”).

<sup>5</sup> Act of June 24, 2009, Pub. L. No. 111-32, 123 Stat. 1859 (2009). The Pakistan Counterinsurgency Fund (PCF) was reauthorized in of the National Defense Authorization Act of 2010, § 1224, Pub. L. No. 111-84, 123 Stat. 2190 (2009).



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

In addition to these controls, the U.S. 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.<sup>9</sup>

Before a JA advises the command on whether a specific rule of law operation is fiscally sound, the JA needs a solid understanding of the basic Purpose, Time, and Amount fiscal controls that Congress imposes on executive agencies. Although each fiscal control is key, the “purpose” control is most likely to become an issue during military operations and rule of law activities, and so it is treated in detail here. Following that is a discussion of the basic fiscal framework of Funding U.S. Military Operations (FUSMO), of which rule of law activities are a subset. As the DOS is the primary agency responsible for foreign reconstruction efforts, including rule of law activities, following the general discussion of FUSMO is a discussion of the appropriations and authorizations available to the DOS 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. Finally, 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).<sup>10</sup>

## I. Purpose

### A. Introduction

The Purpose Statute provides that “[a]ppropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”<sup>11</sup> Thus, expenditures must be authorized by law<sup>12</sup> 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;

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<sup>6</sup> 31 U.S.C. § 1301(a).

<sup>7</sup> 31 U.S.C. § 1552.

<sup>8</sup> 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, Chapters 2-5 (2010).

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

<sup>10</sup> PRTs are discussed in detail in Chapter 3 of this *Handbook*.

<sup>11</sup> 31 U.S.C. § 1301(a).

<sup>12</sup> 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.

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.<sup>13</sup>

## **B. General Prohibition on Retaining Miscellaneous Receipts and Augmenting Appropriations**

Absent a statutory exception, a federal agency that receives any funds other than the funds appropriated by Congress for that agency *must* deposit those funds into the U.S. Treasury.<sup>14</sup> Therefore, if an agency retains funds from a source outside the normal appropriated fund process, the agency violates the Miscellaneous Receipts Statute.<sup>15</sup> 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.<sup>16</sup>

A corollary to the prohibition on retaining Miscellaneous Receipts is the prohibition against augmentation.<sup>17</sup> Absent a statutory exception, an agency augments its funds when it *expends* nonappropriated funds<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> The election is binding even after the chosen appropriation is exhausted.<sup>21</sup>

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

“Interagency Acquisition” (IA) is the term used to describe the procedure by which an agency that requires supplies or services (the *requesting agency*) obtains them through another federal government agency (the *servicing agency*). The IA authorities allow agencies, under certain circumstances, to retain funds from other

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<sup>13</sup> 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, Chapter 2: Purpose (2010).

<sup>14</sup> 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.”

<sup>15</sup> 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).

<sup>16</sup> 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).

<sup>17</sup> An augmentation is an action by an agency that increases the effective amount of funds available in an agency’s appropriation. Generally, this results in expenditures by the agency in excess of the amount originally appropriated by Congress. Absent an exception, augmenting appropriated funds will likely violate one or more of the following: the U.S. Constitution, the Purpose Statute, the Miscellaneous Receipts Statute, and the Antideficiency Act (ADA); see Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook, Chapter 2: Purpose (2010); 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).

<sup>18</sup> Nonappropriated funds are funds received by the agency from any entity other than Congress.

<sup>19</sup> 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).

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

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

agencies and/or augment their appropriations with appropriations from other agencies.<sup>22</sup> 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.<sup>23</sup> IAs may become prominent during rule of law activities when DOD executes DOS-funded missions, and vice-versa. Individual agency regulations must be consulted for IA order procedural and approval requirements.<sup>24</sup> When DOS transfers foreign assistance funds to DOD, it relies upon a provision in the Foreign Assistance Act, section 632, which authorizes the transfer of funds to other agencies. While this is similar to the Economy Act in some regards, there are significant differences, including the fact that certain section 632 transfers serve to obligate the funds transferred, without the need to deobligate unused funds at the end of the fiscal year, as is required with Economy Act transactions.<sup>25</sup>

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.”<sup>26</sup> In other words, statutory transfer authority<sup>27</sup> allows an agency to “shift funds” between different appropriations without violating the miscellaneous receipts prohibitions, the augmentation prohibitions, or the Antideficiency Act (ADA).<sup>28</sup> 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.<sup>29</sup> 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 further detail below.

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<sup>22</sup> 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).

<sup>23</sup> 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).

<sup>24</sup> See Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; DoD Financial Management Regulation vol. 11A, ch. 3 (Feb. 2008); see also, Army Federal Acquisition Regulation Supplement Subpart 17.5.

<sup>25</sup> 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).

<sup>26</sup> 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.).

<sup>27</sup> 31 U.S.C. § 1532.

<sup>28</sup> 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, Chapter 12 (2010).

<sup>29</sup> 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.).

## II. Funding U.S. Military Operations (FUSMO) and Rule of Law Activities

### A. Foreign Assistance Generally

There is no “deployment exception” to the general fiscal law framework. The same fiscal limitations regulating the obligation and expenditure of funds in garrison apply to FUSMO. The focus of FUSMO is how to fund operations whose primary purpose is to benefit foreign militaries, foreign governments, and foreign populations. Rule of law activities fall within the FUSMO framework because their primary intent is to improve the rule of law of *foreign* government agencies, *foreign* government institutions, and *foreign* civil institutions.

The general rule in FUSMO is that DOS funds Foreign Assistance. Foreign Assistance includes (1) Security Assistance to a foreign military, police forces or other security-related government agency, (2) Development Assistance for major infrastructure projects, and (3) 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 its operations and maintenance funds (O&M) only when the purpose of the training is to enhance the Interoperability, Familiarization, and Safety of the foreign military with U.S. military units, and when it does not rise to the level of Security Assistance Training.<sup>30</sup> This exception applies only to training of foreign militaries, *not police forces or other foreign government agencies*, and as a result will not normally apply to 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 C will discuss the appropriations and authorizations available to DOS to fund these activities. DOD normally accesses these DOS funds via IAs.

### B. Foreign Assistance Specific Limitations

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 with any funds available to carry out the Foreign Assistance Act (FAA). Specifically, section 660 of the FAA prohibits the provision of “training or advice or provide any financial support, for police, prisons, or other law enforcement forces for any foreign government...”<sup>31</sup> 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

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<sup>30</sup> 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, Chapter 10, Funding U.S. Military Operations (FUSMO) (2010) (provides the legal requirements to apply the “little t” training exception, along with examples of what constitutes “little t” training versus Security Assistance Training.).

<sup>31</sup> 22 U.S.C. § 2420(a).

provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy.<sup>32</sup>

The result is that despite the general prohibition, most rule of law operations properly funded by DOS will fit into the exception *authorizing* the provision of the law enforcement and rule of law aid, so long as it is funded with DOS appropriations and authorizations.

The second prohibition is commonly referred to as the “Leahy Amendment.” The Leahy Amendment was first enacted as an amendment in the 1997 Foreign Operations Appropriation Act (FOAA is the annual DOS Appropriations Act currently included within the Consolidated 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.<sup>33</sup> 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.<sup>34</sup>

The DOS 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.<sup>35</sup> When DOD executes these DOS-funded missions via Interagency Acquisitions, DOD agencies effectively operate as a “subcontractor” for DOS on DOS-controlled projects.<sup>36</sup>

### **III. 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.<sup>37</sup> In addition, the DOS has two appropriations that have acquired a primary role in funding rule of law activities executed by Provincial Reconstruction Teams (PRTs) and 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 U.S. 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.

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<sup>32</sup> 22 U.S.C. § 2420(b)(6).

<sup>33</sup> 22 U.S.C. § 2304(a)(2).

<sup>34</sup> *See, e.g.*, Department of Defense Appropriations Act of 2010, § 8061, Pub. L. No. 111-118 (Dec. 19, 2009).

<sup>35</sup> CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 220 (2006) (regarding the Afghan National Army) [hereinafter FORGED IN THE FIRE].

<sup>36</sup> THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 274 (2010).

<sup>37</sup> Cont. & Fiscal L. Dep’t, The Judge Advoc. Gen.’s Legal Center & Sch., U.S. Army, Fiscal Law Deskbook, Chapter 10, Funding U.S. Military Operations (FUSMO) (2010); *see also* THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 211, Chapter 15: Fiscal Law (2010).

## A. 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.<sup>38</sup> USAID, with overall foreign policy guidance from DOS, implements most ESF-funded programs.<sup>39</sup> 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 FOAA, the DOS equivalent to the annual DOD Appropriations Act. The most recent appropriations for the ESF were \$2.5 billion appropriated in the FY07 FOAA (Pub. L. 110-28), available for new obligations until 30 September 08; \$2.99 billion appropriated in the FY08 Consolidated Appropriations Act (CAA) (Pub. L. 110-161), available for new obligations until 30 Sep 2009; an additional \$2.97 billion appropriated in the FY09 Supplemental Appropriation Act (SAA)<sup>40</sup>, available for new obligations until September 2010; and \$6.3 billion appropriated in the FY10 CAA (Pub. L. 11-117), available for new obligations until September 2011. (These funds are sometimes earmarked for certain countries or efforts in a particular region; the amounts are not for Iraq and Afghanistan exclusively). Rule of law practitioners should be aware of “matching fund” requirements in Iraq that may apply to ESF or other DOS funds. Specifically, the 2009 Supplemental Appropriations Act added a requirement for the Government of Iraq to also contribute financially to certain programs.<sup>41</sup>

### 1. Iraq

In Iraq, ESF is used to pursue one of three foreign assistance objectives: the Security Track, the Political Track, or the Economic Track. Each of the three major ESF tracks is allocated into several subprograms that target specific initiatives that support the primary purpose of the ESF, which is to improve infrastructure, promote democracy and civil society, and support capacity building and economic development.<sup>42</sup> With the current drawdown of troops in Iraq, DOS focus for ESF budget requests and subprograms is shifting towards focus on building Iraqi capacity.<sup>43</sup>

Currently, the ESF’s Security Track is allocated into six different subprograms<sup>44</sup> designed to reduce violence, improve infrastructure security, and strengthen government accountability.<sup>45</sup> Three of those subprograms are

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<sup>38</sup> See 22 U.S.C. § 2346.

<sup>39</sup> UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, AGENCY FINANCIAL REPORT FY 2009 72, available at <http://www.usaid.gov/policy/afr09/FY2009AFR11-16-09.pdf> (last visited July 21, 2010).

<sup>40</sup> 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.

<sup>41</sup> *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.”).

<sup>42</sup> SPECIAL INSPECTOR GENERAL FOR IRAQ RECONSTRUCTION, April 2010 Quarterly Report to Congress [hereinafter SIGIR], available at <http://www.sigir.mil/files/quarterlyreports/April2010/Report - April 2010.pdf> (last visited July 21, 2010).

<sup>43</sup> *Id.*

<sup>44</sup> 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 <http://2001-2009.state.gov/documents/organization/109441.pdf> (last visited July 21, 2010) (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.).

<sup>45</sup> *Supra*, note 42.

generally available to fund rule of law activities: the Provincial Reconstruction Team/Provincial Reconstruction Development Council (PRT/PRDC) Projects Program, the Local Governance Program, and the PRT Quick Response Fund (PRT QRF).

The primary purpose of the PRT/PRDC Projects Program funds is for small projects (average: \$1.5 million) that improve provincial government capacity to provide essential services. It is implemented and overseen by DOS. It is executed for the DOS, however, by the U.S. Army Corps of Engineers, Gulf Region Division (USACE GRD) via DOS FAA section 632 Interagency Acquisitions (IAs) authority, through Military Interdepartmental Purchase Requests (MIPRs). PRT/PRDC programs are approved by the DOS at the U.S. Embassy, Iraq.<sup>46</sup>

The primary purpose of the Local Governance Program is to promote diverse and representative citizen participation in provincial, municipal, and local councils. It is implemented and overseen by USAID. These projects 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 U.S. Embassy, Iraq.<sup>47</sup>

The PRT QRF is the least cumbersome subprogram of the ESF Security Track, due to its broad purpose and lower approval authorities. (There is no counterpart to QRF in Afghanistan.)<sup>48</sup> 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 ESF’s Economic Track is also allocated into six different subprograms.<sup>49</sup> Of those six 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 eight different subprograms.<sup>50</sup> 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

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<sup>46</sup> *Supra*, note 44.

<sup>47</sup> *Id.*

<sup>48</sup> H. COMM. ON ARMED FORCES, 110<sup>TH</sup> 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).

<sup>49</sup> The six 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 Provincial Economic Growth Program, the Targeted Development Program (implemented by the Ambassador, Iraq), the Plant-Level Capacity Development & Technical Training Program, and the Izdihar Program, *see supra* note 42. *See also* Department of State Report on Iraq Relief and Reconstruction, Oct. 2008, Section 2207 Report to Congress, APPENDIX III: Economic Support Funds (ESF) and Other Fund Sources, *available at* <http://www.state.gov/documents/organization/115745.pdf> (last visited July 21, 2010).

<sup>50</sup> The eight subprograms under the ESF’s Political Track are: the National Capacity Development Program; the Democracy and Civil Society Program; the Iraqi Refugees Program; the Economic Governance II Program; the Ministerial Capacity Development Program; the Regime Crimes Liaison Office; the Elections Support Program; and the Monitoring and Evaluation Program, *see supra* note 42.

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.<sup>51</sup>

## 2. Afghanistan

In Afghanistan, DOS is focusing effort on improving governance and the rule of law through increased resources. To this end, “ESF programs support counter-terrorism; bolster national economies; and assist in the development of effective, accessible, independent legal systems for a more transparent and accountable government.”<sup>52</sup> The DOS is requesting an additional \$1.57 billion in ESF funding in FY10 Supplemental Appropriations to fund the following foreign assistance objectives: Peace and Security; Governing Justly and Democratically; Investing in People; and Economic Growth. Within Governing Justly and Democratically objective, DOS specifically is requesting \$50 million to fund rule of law activities and \$760 million for Good Governance programs.<sup>53</sup>

### B. 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*.”<sup>54</sup> Congress appropriates funds for these purposes on an annual basis in the 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 just in Iraq and Afghanistan.

Although one of the primary purposes of INCLE funds is counter-narcotics, Congress has also authorized the use of INCLE funds “for other anticrime purposes.”<sup>55</sup> 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.<sup>56</sup>

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<sup>51</sup> See *supra*, note 44.

<sup>52</sup> See SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION, April 30, 2010, Quarterly Report to Congress [hereinafter SIGAR], available at [http://www.sigar.mil/pdf/quarterlyreports/Apr2010/SIGARApril\\_Lores.pdf](http://www.sigar.mil/pdf/quarterlyreports/Apr2010/SIGARApril_Lores.pdf) (last visited July 21, 2010).

<sup>53</sup> See U.S. DEP’T OF STATE & U.S. AGENCY FOR INT’L DEVELOPMENT Supplemental Budget Justification Fiscal Year 2010 at 15-22, available at <http://www.usaid.gov/policy/budget/cbj2010/> (last visited July 21, 2010).

<sup>54</sup> 22 U.S.C. § 2291 (4) (emphasis added).

<sup>55</sup> *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).

<sup>56</sup> Bureau of International Narcotics and Law Enforcement Affairs Department of State Webpage, available at <http://www.state.gov/p/inl/> (last visited July 21, 2010).



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.”<sup>57</sup> In FY2010, Congress appropriated \$1.6 billion to the INCLE available for obligation until September 2011.

The FY2009 Supplemental Appropriation request and subsequent congressional conference report provide a snapshot of INCLE 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 initiative,” which rewards provinces that show a reduction in poppy cultivation.<sup>58</sup> 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 U.S. 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.<sup>59</sup>

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.<sup>60</sup> DOD, for example, has transferred over \$1.42 billion to INL since the enactment of the ISFF in fiscal year 2005.<sup>61</sup> Whenever DOD transfers ISFF funds to the INL, these funds are designated “ISFF/INL funds.”<sup>62</sup> 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.<sup>63</sup> The basic purpose of the ISFF is “[T]o train and equip the security forces of Iraq (ISF)...”<sup>64</sup> 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 INL, 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.<sup>65</sup> 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.

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<sup>57</sup> See Office of Civilian Police and Rule of Law Programs, <http://www.state.gov/p/inl/civ/index.htm> (last visited on July 21, 2010).

<sup>58</sup> Act of June 24, 2009, Pub. L. No. 111-32, 123 Stat. 1859, 1892-93 (2009).

<sup>59</sup> CONGRESSIONAL RESEARCH SERVICE, AFGHANISTAN: U.S. FOREIGN ASSISTANCE 6-8 (July 8, 2009).

<sup>60</sup> 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).

<sup>61</sup> 2008 SIGIR Report 25 (Jul. 30, 2008).

<sup>62</sup> *Id.*

<sup>63</sup> See *supra* note 22.

<sup>64</sup> 2008 Supplemental Appropriations Act, P. L. 110-252, Title IX, ch. 2 (30 June 2008).

<sup>65</sup> 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.

## IV. Department of Defense Appropriations for Rule of Law Operations

Recall that the 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 DOD 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.

### A. 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<sup>66</sup>, 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 ... .”<sup>67</sup> 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.”)<sup>68</sup>

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.<sup>69</sup> Since fiscal year 2005, Congress has generally appropriated ISFF/ASFF funds on a yearly basis with a period of availability of ISFF and ASFF of two years.<sup>70</sup> 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.<sup>71</sup> The Department of Defense requested this change in order to extend the period of availability.

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<sup>66</sup> Effective 1 January 2010, the Secretary of Defense designated the Commander, US Forces-Iraq to oversee the ISFF when MNSTC-I stood down.

<sup>67</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005).

<sup>68</sup> Compare Pub. L. No. 108-106 with Pub. L. No. 109-13.

<sup>69</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13 (May 11, 2005).

<sup>70</sup> 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).

<sup>71</sup> Act of June 24, 2009, Pub. L. No. 111-32 § 306 (2009).

The 2009 Supplemental Appropriation significantly increased funding to the ASFF by providing \$3.6 billion, available until September 30, 2010,<sup>72</sup> the 2010 Department Of Defense Appropriations Act (DODAA) appropriated an additional \$6.5 billion, available until September 30, 2011. There is no appropriation for ISFF in the 2010 DODAA, however the Senate Committee on Appropriations contemplates additional funding for both ISFF and ASFF in the 2010 Supplemental Appropriations, consistent with DOD requested amounts.<sup>73</sup> Note though, that when the final appropriations and authorizations are enacted in future years, they could include additional or entirely new funds with similar purposes to the ISFF and ASFF or restrictions on the uses or purpose of the funds. For example, although the original purpose of both ASFF and ISFF includes facility repair and construction, in the FY09 National Defense Authorization Act (NDAA) Congress specifically prohibited obligating or expending ISFF for “acquisition, conversion, rehabilitation, or installation of facilities in Iraq for the use of the Government of Iraq...”<sup>74</sup> Because so much of FUSMO is dependent upon the security situation in a given environment, rule of law JAs must stay current on fiscal law issues.

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.<sup>75</sup> 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.<sup>76</sup> As a result, the ISFF and ASFF appropriations provide an authorization to DOD to provide assistance to non-military forces, which it generally is not authorized to do.<sup>77</sup> 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.<sup>78</sup> In every ISFF and ASFF appropriation, Congress has also provided DOD the ability to “transfer” funds to other appropriations.<sup>79</sup> The transfer authority of the ISFF and ASFF are identical.<sup>80</sup> 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.<sup>81</sup>

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<sup>72</sup> Act of June 24, 2009, Pub. L. No. 111-32, 123 Stat. 1859, 1892-93 (2009).

<sup>73</sup> See S.Rept 111-188 (To accompany H.R. 4899), Title I, ch. 3 (May 14, 2010). The Senate approved the Committee Report on May 27, 2010. At the time of this writing, no 2010 supplemental appropriation had been passed by Congress.

<sup>74</sup> Act of Oct. 14, 2008, Pub. L. No. 110-417 §1508 (2008).

<sup>75</sup> 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).

<sup>76</sup> For example, the DOD Global War on Terror Funding Requests to Congress generally separates the ISFF and ASFF funding request into two major categories: funds for the Iraq and Afghanistan National Armies, and funds for the Iraq and Afghanistan National Police. See, e.g., Fiscal Year 2008 Global War on Terror Request 35, Department of Defense (February 2007), available at <http://www.defenselink.mil/comptroller/defbudget/fy2008/> (last visited July 21, 2010).

<sup>77</sup> 22 U.S.C. § 2420(a).

<sup>78</sup> 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).

<sup>79</sup> 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).

<sup>80</sup> 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;

## B. 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."<sup>82</sup> The current CERP authorization is \$1.3 billion, contained in the 2010 NDAA.

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."<sup>83</sup> 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 (FCA).<sup>84</sup> The combination of the broad statutory purpose of CERP, the low-level approval authority to authorize the use of CERP,<sup>85</sup> 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.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> 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

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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... ").

<sup>81</sup> July 2008 SIGIR Report 25 (Jul. 30, 2008).

<sup>82</sup> Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 [hereinafter 2005 NDAA], Pub. L. 108-375, § 1201 (Oct. 28, 2004).

<sup>83</sup> 2005 NDAA, Pub. L. 108-375, § 1202 (Oct. 28, 2004), as amended by 2008 NDAA, Pub. L. No. 110-181 § 1205, 2009 NDAA, Pub. L. No. 110-417 § 1214, and 2010 NDAA, Pub. L. No. 111-84 § 1222 (Emphasis added).

<sup>84</sup> 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).

<sup>85</sup> 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.).

<sup>86</sup> 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.

<sup>87</sup> 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.").

<sup>88</sup> *Id.*

System (MAAWS) SOPs (there are versions for both Iraq and Afghanistan) and the most recent DOD Comptroller's CERP policy guidance.<sup>89</sup>

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.) The most current version of the DOD FMR no longer includes the concept of “build” and instead focuses on “reconstruction” and “restore.”<sup>90</sup> This refocus on reconstruction does not, however, limit efforts to restore “preexisting elements of Afghan society, such as rule of law, if the projects are otherwise in accordance with CERP guidance.”<sup>91</sup> This does require high level approval authority.<sup>92</sup> Judge Advocates should ensure that they have the most current guidance on rule of law facility construction.

### C. 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 U.S.- CERP, named the Government of Iraq CERP (I-CERP).<sup>93</sup> I-CERP was initially funded with \$270 million from the Government of Iraq, with an additional \$30 million subject to transfer to the I-CERP upon the approval of the I-SRC.<sup>94</sup> Although similar to CERP in purpose, the I-CERP has significant differences of which Judge Advocates need to be aware. The purpose of I-CERP is for coalition force commanders to execute urgent reconstruction projects for the benefit of the Iraqi people in the fifteen non-Kurdish provinces of Iraq.<sup>95</sup> 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).<sup>96</sup> By exception, and upon the approval of the Major Subordinate Commanding General, I-CERP may also be used to repair and reconstruct: roads, sewers, irrigation systems, and non-reconstruction projects that promote small business development.<sup>97</sup> The initial intent of I-CERP was for the Iraqis to match the reconstruction funding of CERP in Iraq.<sup>98</sup> 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.<sup>99</sup>

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<sup>89</sup> 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, ch. 27 (January 2009); see also THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, OPERATIONAL LAW HANDBOOK 241-242 (July 2010).

<sup>90</sup> DoD FMR, vol 12, ch. 27, para. 270103D.

<sup>91</sup> 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).

<sup>92</sup> *Id.*

<sup>93</sup> 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).

<sup>94</sup> *Id.* at 3.

<sup>95</sup> 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).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> I-CERP MOU at 2.

<sup>99</sup> 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

One fiscal law issue raised by I-CERP involved the Miscellaneous Receipts Statute. Recall that an agency must deposit funds it receives into the U.S. Treasury General Account, unless Congress authorizes otherwise. In response to I-CERP, Congress provided approval to hold and disperse I-CERP funds.

## V. 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.

### A. Provincial Reconstruction Teams and Embedded Provincial Reconstruction Teams

Provincial Reconstruction Teams (PRTs)<sup>100</sup> are civil-military organizations (CMOs) that are staffed by U.S. government (USG) civilian and military personnel to assist foreign provincial governments with their reconstruction efforts; their security and rule of law efforts; and their political and economic development.<sup>101</sup> 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.<sup>102</sup> The success of the PRTs in Afghanistan led the USG to incorporate the PRT concept into its new stability and reconstruction strategy.<sup>103</sup> PRTs were first established in Iraq in November 2005. PRTs in Iraq and Afghanistan provide their own force protection, but the PRTs in Iraq have a smaller force protection element since they are generally co-located with large coalition Forward Operating Bases (FOBs) which provides some of the needed force protection.<sup>104</sup>

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.<sup>105</sup> As a result, ePRTs are staffed solely by the primary interagency civil-military staff and tend to be significantly smaller.<sup>106</sup> The ePRTs first deployed attached to the "Surge" BCTs and MCRs in early 2007.<sup>107</sup> Unlike PRTs, who report directly to their respective embassies, ePRTs report to the military commander of the BCT

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carrying out projects currently funded by the United States through the Commanders' Emergency Response Program ... .").

<sup>100</sup> 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).

<sup>101</sup> See Furin, *supra*; see also PRT (Provincial Reconstruction Teams) Fact Sheet, U.S. Embassy, Iraq (Sept. 15, 2009), available at [http://iraq.usembassy.gov/iraq\\_prt/provincial-reconstruction-teams-fact-sheet.html](http://iraq.usembassy.gov/iraq_prt/provincial-reconstruction-teams-fact-sheet.html) (last visited July 21, 2010) [hereinafter PRT Fact Sheet], NIMA ABBASZADEH ET AL., *PROVINCIAL RECONSTRUCTION TEAMS: LESSONS AND RECOMMENDATIONS* 4 (Jan. 2008), available at [http://www.princeton.edu/research/pwreports\\_f07/wws591b.pdf](http://www.princeton.edu/research/pwreports_f07/wws591b.pdf) (last visited July 21, 2010).

<sup>102</sup> See Furin, *supra* note 100, at 43.

<sup>103</sup> *Id.* at 42.

<sup>104</sup> *Id.* at 44.

<sup>105</sup> *Id.* at 45.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

or MCR to which they are assigned.<sup>108</sup> 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. PRTs tend to access DOD appropriations and authorizations like CF-CERP as a supplement to the DOS funds that they receive.<sup>109</sup> 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.<sup>110</sup>

## **B. Funding Rule of Law Operations via PRTs, ePRTs and other CMOs**

The Funding Input/Rule of Law Mission Output flowchart below 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 and DOD funds 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 DOS may be able to provide them. As a result, the unit should coordinate with the deployed DOS Political Advisor (POLAD) located at the Combined Joint Task Force (CJTF), or division level, as early as possible in the planning stages. The unit may also coordinate with the DOS Foreign Officers located at the PRTs and ePRTs.

In advising her unit, the Judge Advocate should be aware of the cultural, structural, and procedural differences between DOD and DOS.<sup>111</sup> DOD has the cultural and structural capability to plan for operations far in advance via MDMP. DOS, on the other hand, generally has neither the structural capability nor the organizational culture that would allow it to plan for operations as far in advance or with such detailed specificity as DOD. These structural differences between DOD and DOS may affect the speed with which the DOS may be able to provide its appropriated funds for rule of law activities.

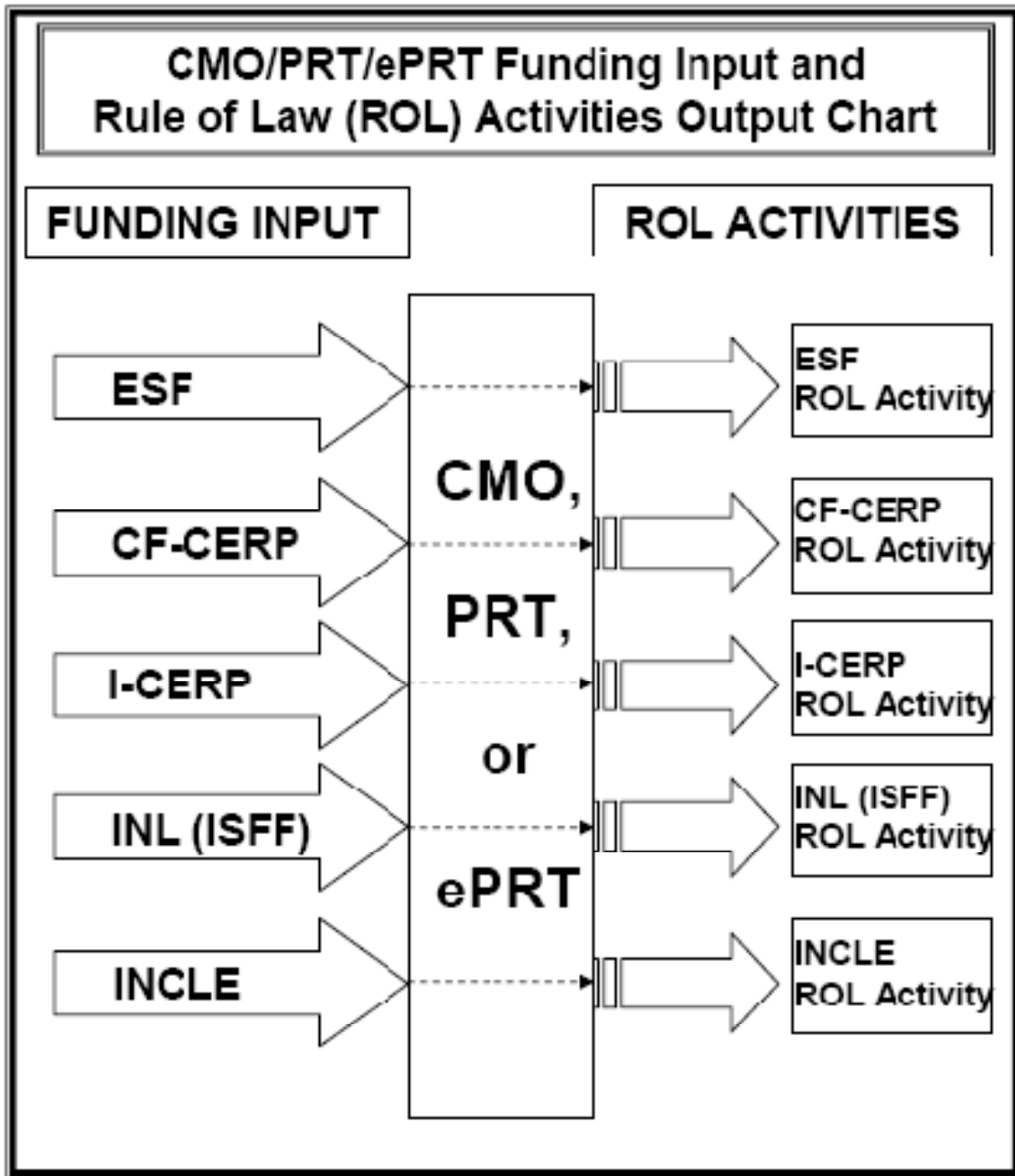
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<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 47.

<sup>110</sup> *Id.*

<sup>111</sup> See Rosemary Hansen, "Defense is from Mars, State is from Venus: Improving Communications and Promoting National Security," U.S. Army War College Strategy Research Project (1998).







## CHAPTER 8

# 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 theaters 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.

### I. Afghanistan

*Editor's Note: Judge Advocates preparing to deploy to Afghanistan must know that, effective 07 January 2010, Joint Task Force 435 assumed command, oversight, and responsibility for all U.S. detainee operations in Afghanistan. JTF-435 is discussed in greater detail in Chapter 3 of the Handbook.*

#### A. 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.”<sup>1</sup> This is unpromising soil in which to grow the rule of law. 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.

#### B. The Plan for Rule of Law

The strategic plan for rule of law development in Afghanistan is the Afghan National Development Strategy (ANDS).<sup>2</sup> 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),<sup>3</sup> which, in turn, contains the National Justice Program (NJP). The NJP is the fundamental document explaining the

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<sup>1</sup> Rory Stewart, Afghanistan: A War We Cannot Win, available at <http://www.hks.harvard.edu/news-events/news/commentary/stewart-oped-jul09> (last visited June 11, 2010).

<sup>2</sup> See <http://www.and.s.gov.af/> (last visited Jun 11, 2010 – currently under reconstruction) See also: [http://www.embassyofafghanistan.org/documents/resume\\_ANDS.pdf](http://www.embassyofafghanistan.org/documents/resume_ANDS.pdf) (last visited June 11, 2010).

<sup>3</sup> 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.

development of the rule of law in Afghanistan, and it describes the effects that must be achieved in order to establish rule of law in Afghanistan. President Karzai approved the ANDS on 21 April 2008.<sup>4</sup>

The NJP has six justice components:<sup>5</sup>

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

In 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 over simplistic. For instance, the list does not provide any guidance as to relative importance to be attached to each component. Infrastructure, for example, is not necessarily a very important component. Far more important is the quality of the people serving the system: justice systems have operated effectively with good people working in bad facilities. But the quality of people is hard to measure, and people take time to develop. In comparison, the construction and counting of buildings is easy. There is consequently a temptation to focus on infrastructure, a relatively easy and straightforward “metric,” as opposed to people, who are messy and hard to quantify in any meaningful way.

The NJP aims to be a comprehensive statement of the requirements for the rule of law in Afghanistan. It establishes an end state, defines performance indicators, and outlines methods for monitoring and evaluation.<sup>6</sup> At the time of writing, June 2010, the new U.S. Government Rule of Law Strategy is almost complete. Some limited aspects of the Strategy remain under review. Nevertheless, the Strategy is almost complete, such that practitioners in Afghanistan are using it now as a reference. The objectives of the Strategy are to focus U.S. rule of law assistance in Afghanistan on constructive programs that will offer Afghans meaningful access to fair, efficient, and transparent justice based on Afghan law while helping to eliminate the reach and influence of Taliban ‘justice.’ And, further, to increase the legitimacy of the Afghan government by promoting a culture that values the rule of law. The Strategy recognizes that the U.S. has no goal to replace traditional justice systems or to impose an alien western style justice system.

The U.S. military has not been idle while waiting for an implementation plan or a formal rule of law strategy. Regional Command (East) (RC(E))<sup>7</sup> placed a Rule of Law Annex in the RC(E)/CJTF-82 FRAGO. The rule

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<sup>4</sup> 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.”

<sup>5</sup> 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.

<sup>6</sup> NJP Pt 1 C 1. The responsibility for oversight is shared between the Program Oversight Committee (POC) and the Board of Donors (BoD). The first joint meeting between the POC and the BoD was held on 14 May 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.

<sup>7</sup> 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,

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, that might be too dangerous for civilian rule of law advisors to work in. It should be noted that the U.S. Department of State has become more aggressive in deploying its staff into new areas as part of the new “civilian surge” strategy. Civilian rule of law advisors are becoming more common. This is a very positive development for the rule of law in Afghanistan.

### **C. 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 each individual 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.

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.

- Ministry of Justice.<sup>8</sup> Responsible for prisons, the Huqooq,<sup>9</sup> legislative review, and supervising the courts.
- Supreme Court.<sup>10</sup> Responsible for the judges.<sup>11</sup>
- Attorney General’s Office. Responsible for prosecutors.
- Ministry of the Interior. Responsible for the police.

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Panjshir, Kapisa, Nuristan, Laghman, Konar, Nangarhar, Logar, Paktya, Khowst, Paktika, Ghazni, Wardak and Bamyan.

<sup>8</sup> See <http://www.moj.gov.af/> (last visited July 22, 2010).

<sup>9</sup> 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.

<sup>10</sup> See <http://www.supremecourt.gov.af/> (last visited July 22, 2010).

<sup>11</sup> The Afghan Constitution formally establishes separation of powers, and the Afghan Supreme Court is acutely conscious of its judicial independence from the executive ministries.

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 an understanding of who they are and how (and if) they fit together.

The United Nations Assistance Mission in Afghanistan (UNAMA) is the most important IO operating to develop the rule of law in Afghanistan<sup>12</sup> because it has a mandate from the UN Security Council (UNSCR 1868 of 29 Mar 09)<sup>13</sup> that it “will continue to lead the international civilian efforts ... to support and strengthen efforts to improve governance and the rule of law.”<sup>14</sup> UNAMA works to support the Afghan government’s efforts in reaching its NJP objectives. UNAMA has regional offices at the provincial level, which have frequently assisted Judge Advocates in gaining situational awareness and in coordinating rule of law development efforts with other actors.<sup>15</sup> Furthermore UNAMA, in partnership with UN Development Program (UNDP)<sup>16</sup>, 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.

#### **D. U.S. Government Efforts**

The U.S. Government’s contribution to the rule of law in Afghanistan is significant in scale and range. Indeed the U.S. contribution has been so large that coordinating the various efforts has been a challenge.<sup>17</sup> The Special Committee on the Rule of Law (SCROL), a regular meeting of all interested U.S. parties, continues to meet but has been renamed the Rule of Law Working Group (RoL WG). The RoL WG is chaired by the Rule of Law Coordinator in the U.S. Embassy. 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 meetings of the RoL WG alternate, on alternate weeks, with a Working Group on corruption. This highlights the high-level emphasis aimed at efforts to fight corruption.

The U.S. Embassy has on its staff a senior Judge Advocate whose duties include coordinating U.S. military rule of law efforts with that of other U.S. agencies. Any new rule of law practitioner in Afghanistan must ensure that her rule of law efforts are coordinated through the RoL WG. In addition to other benefits of

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<sup>12</sup> See <http://unama.unmissions.org/default.aspx?/> (last visited July 22, 2010).

<sup>13</sup> See <http://www.unhcr.org/refworld/country...RESOLUTION,AFG,4562d8cf2,49c9f9992,0.html> (last visited July 22, 2010).

<sup>14</sup> *Id.*

<sup>15</sup> 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.

<sup>16</sup> See [http://www.undp.org/governance/focus\\_justice\\_law.shtml](http://www.undp.org/governance/focus_justice_law.shtml) (last visited June 10, 2010).

<sup>17</sup> 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 June 10, 2010) (“[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.

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.<sup>18</sup>

Corruption is a grave threat to the development of the rule of law in Afghanistan. We have seen that the U.S. Embassy rule of law meetings now alternate between rule of law and corruption. A major and long-awaited development has been the establishment of an Afghan Anti-Corruption Tribunal. The U.S. Embassy, and other coalition partners, have devoted significant resources to supporting the new Tribunal. The Anti-Corruption Tribunal is closely modeled on the successful Anti-Narcotics Tribunal.<sup>19</sup> It receives special support and protection, and employs vetted judges and staff to minimize opportunities for corruption. It is hoped the Anti-Corruption Tribunal will go some way to reducing the impression that corrupt officials are unlikely to be caught.

Prominent USG agency participants in Afghanistan include:

- Department of State – Bureau of International Narcotics and Law Enforcement Affairs (DOS/ INL): INL works in Afghanistan through two separate programs: the Justice Sector Support Program (JSSP) and the Corrections Systems Support Program (CSSP). Their specific responsibilities:
- JSSP: Supports the Afghan Attorney General’s Office and the MOJ, provides regional training programs, and supports the Independent National Legal Training Center (INLTC) in Kabul.<sup>20</sup>
- CSSP: Supports the prison system, develops corrections infrastructure, and provides training.
- 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.<sup>21</sup>
- 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 U.S. Marshals Service protection efforts.

## **E. Provincial Reconstruction Teams**

PRTs in Afghanistan play an important role in reconstruction.<sup>22</sup> In Afghanistan, PRTs have matured since November 2002 from a single U.S.-led pilot project in Gardez to an international effort involving 25 teams in most of Afghanistan’s 34 provinces.<sup>23</sup> Twelve of the Afghanistan PRTs are led by the United States, and 13

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<sup>18</sup> See Chapter 7 for fiscal law considerations.

<sup>19</sup> See: <http://kabul.usembassy.gov/media/inl-ap-factsheet-8-27-08.pdf> (last visited June 10, 2010).

<sup>20</sup> See <http://www.inltc.af/home.htm> (last visited July 22, 2010).

<sup>21</sup> See: <http://afghanistan.usaid.gov/en/Program.21.aspx> (last visited June 9, 2010).

<sup>22</sup> As described in Chapter 3, 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.

<sup>23</sup> 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.

by coalition partners throughout the country.<sup>24</sup> 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.”<sup>25</sup> PRTs operate under tactical control to their battlespace task force, which is usually a BCT. In practice this means that the PRTs rule of law efforts are often directed by the staff of the Brigade Legal Section.

**The Kunar PRT:  
A Case Study in Elegant and Effective Support for Rule of Law**

The PRT in Kunar Province has enjoyed particular success in developing rule of law since the last edition of this handbook (2009). The PRT has a dedicated civilian Department of State Rule of Law Coordinator. This individual reached out to the Afghan prosecutors and judges at the provincial level in a process of mentoring and encouraging the local officials. The fruits of this engagement were three trials involving allegations of corruption and murder. The first trial attracted relatively little public interest, but this changed over the course of the trials. The third trial was conducted before a packed public gallery and was televised. Even the Provincial Governor attended and—very significantly as an acknowledgement of the independent status of the judiciary and the trial—observed from the body of the courthouse. We can draw a number of conclusions from the Kunar PRT experience in rule of law. The first is that infrastructure improvements, while often important, are not essential: people matter more than structures. The second is that personal relationships; the building of trust and some encouragement, can go a long way. There is, of course, a converse side: if there are no local officials with potential who can be mentored and brought on, then the prospects for improvement are moot. Finally, we can see from the increasing interest from the Afghan public an acceptance of, and support for, trials in the formal justice system. This is an encouraging precedent for the future.

U.S. 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 U.S. PRTs as part of the “civilian surge,” a welcome development. The PRTs typically consist of 50-100 personnel, of which only 3 or 4 members are USG civilians or contractors, 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.<sup>26</sup> In addition, PRTs have two Army Civil Affairs teams with four Soldiers each. The U.S. model also typically includes a military police unit, a psychological operations unit, an explosive ordnance/demining unit, an intelligence team, medics, a force protection unit, and administrative and support

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<sup>24</sup> *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 June 9, 2010).

<sup>25</sup> *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.”

<sup>26</sup> 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](http://armedservices.house.gov/pdfs/Reports/PRT_Report.pdf) (last visited June 9, 2010).

personnel.<sup>27</sup> An Afghan representing the Ministry of Interior may also be part of the team. These PRTs should include a single representative each from DOS, USAID, and the U.S. Department of Agriculture. PRTs are usually co-located on a military base with combat maneuver units operating in the same area or battlespace.<sup>28</sup>

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.

**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 convoys to meetings with Afghan officials, responding to security threats against forward operating bases, and sharing information and ideas on how to make progress on the lines of operation and effort that guide counterinsurgency and stability operations. The course also provides trainees with numerous role-playing scenarios with Afghan role-players and interpreters that simulate the tasks the trainees will face once deployed in Afghanistan. These scenarios include missions related to improving the 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.<sup>29</sup>

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See: <http://www.mutc.in.ng.mil/OPERATIONS/CivilianMilitaryTraining/tabid/864/Default.aspx> (last visited June 9, 2010).



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:

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

## **F. The Legal System of Afghanistan**

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

The 2004 Afghan Constitution formally created a modern Islamic state with a tripartite structure familiar to western lawyers: an executive central government with extensive regulatory authority<sup>30</sup>, a bi-cameral legislature and an independent judiciary.<sup>31</sup> Presidential as well as parliamentary elections have been held. A substantial number of new statutes have been passed.<sup>32</sup> 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.<sup>33</sup>

In spite of the hard work exerted to bring the rule of law to Afghanistan,<sup>34</sup> 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<sup>35</sup> and the legal infrastructure is basic at best and non-existent in some parts of the country.<sup>36</sup> 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.

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<sup>30</sup> 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](http://www.mpil.de/shared/data/pdf/moschtaghi_organisation_and_jurisdiction_of_newly_established_afghan_courts1.pdf) (last visited June 9, 2010).

<sup>31</sup> Article 97 of the 1964 Constitution and the Bonn Agreement guarantee the independence of the judiciary.

<sup>32</sup> See the site of the Afghan Ministry of Justice for further information at <http://www.moj.gov.af> (last visited July 22, 2010).

<sup>33</sup> 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](http://www.defenselink.mil/pubs/Report_on_Progress_toward_Security_and_Stability_in_Afghanistan_1230.pdf) (last visited June 9, 2010).

<sup>34</sup> See Benchmark Status Report March 2007 – March 2008 – 2.7.1 to 2.7.4.

<sup>35</sup> 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 education 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](http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name_3408,en.html) (last visited June 9, 2010).

<sup>36</sup> 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*.

In practice, Afghanistan's legal system is characterized by the co-existence of two separate judicial systems:

- A formal system of law practiced by state authorities<sup>37</sup> relying on a mixture between the civil law system and elements of Islamic law; and
- An informal customary legal system based on customary tribal law and local interpretations of Islamic law.

The "dual nature" of the Afghan legal system stems to some degree from the limited reach of state authority in Afghanistan. However, it is also emblematic of the historic and continuing tensions inherent to an ethnically diverse Afghan society.<sup>38</sup>

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.<sup>39</sup>

Because 99% of the country is Muslim, the Sharia plays a major role as the common denominator between the formal and the informal system,<sup>40</sup> 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.<sup>41</sup> 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.<sup>42</sup>

## 1. The Formal Legal System

Until 1964 Afghanistan's state-administered court system had essentially a dual structure, in which clergy-led religious courts applying Sharia co-existed with state courts handling secular law.<sup>43</sup> Under the liberal 1964 constitution, and similarly under the 2004 constitution, the state court system is united under a hierarchical structure of secular courts. The formal relationship between state law and Sharia however is less clear. The 2004 constitution states that only measures that pass the legislative process can be considered law<sup>44</sup> and that courts may only refer to the Hanafi jurisprudence of Islamic law<sup>45</sup> when there is no provision

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<sup>37</sup> It should be noted that official courts often apply positive law as well as customary and Islamic law.

<sup>38</sup> 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, Brahwi and others, of which the Pashtun with approximately 42% and the Tajik with approximately 27% are the largest groups.

<sup>39</sup> Afghanistan is party to a number of human rights treaties, including the ICCPR, ICESCR, CAT, CRC, CEDAW, and the Rome Statute. Notably, under Islamic Law blasphemy and apostasy are punishable by death while Art. 18 of the ICCPR guarantees freedom of religion.

<sup>40</sup> 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](http://iis-db.stanford.edu/pubs/20714/Reestablishing_the_Judiciary_in_Afghanistan.pdf) (last visited June 9, 2010).

<sup>41</sup> See *intra* note 57.

<sup>42</sup> For a more complete account of Islam and Islamism in Afghanistan see Chapter 5. C. and Kristin Mendoza at <http://www.law.harvard.edu/programs/ilsp/research/mendoza.pdf> (last visited June 9, 2010).

<sup>43</sup> Islamic Law was introduced in Afghanistan as a consequence of the Islamic conquest in the 9<sup>th</sup> 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](http://www.mpil.de/shared/data/pdf/moschtaghi_organisation_and_jurisdiction_of_newly_established_afghan_courts1.pdf) (last visited June 9, 2010).

<sup>44</sup> Art. 97 of the Afghan Constitution of 2004.

of the Afghan Constitution or other laws applicable.<sup>46</sup> However, it also states that no law shall contravene Islam<sup>47</sup> and prohibits amendment of this principle,<sup>48</sup> leaving the relationship between positive state law, international obligations, and Islamic law uncertain.

**a. Court System<sup>49</sup>**

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.<sup>50</sup> Headed by the Chief Justice, it is constitutionally responsible for the organization and administration of the lower courts<sup>51</sup> and has as many managerial functions as judicial responsibilities.<sup>52</sup> 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,<sup>53</sup> and has reserved itself the right to review their consistency with the Islamic Sharia.<sup>54</sup>

At the second level of this hierarchy are the Courts of Appeal based in each of the thirty-four provinces.<sup>55</sup> 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.

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.<sup>56</sup> A number of other national specialized courts also exist, among them the Courts for Offences against National Security, and the Central Narcotics Tribunal.

The President appoints Afghan Judges based upon the recommendation of the Chief Justice of the Supreme Court. According to the 2005 Law on the Organization and Authority of the Courts, an individual must hold a degree from either a Faculty of Law or a Faculty of Sharia, must have completed the practical stage of legal professional training and must be older than 25 years in order to be appointed as a judge.<sup>57</sup> Only a minority

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<sup>45</sup> The Hanafi school is the oldest of the four schools of thought (Madhhabs) or jurisprudence (Fiqh) within Sunni Islam.

<sup>46</sup> Art. 130 of the Afghan Constitution of 2004.

<sup>47</sup> Art. 3 of the Afghan Constitution of 2004.

<sup>48</sup> Art. 149 of the Afghan Constitution of 2004.

<sup>49</sup> The Court System is regulated by the Constitution and the 2005 Law on the Organization and Authority of the Courts, *see*

<http://supremecourt.gov.af/PDFFiles/Law%20on%20Organization%20and%20Jurisdiction%20of%20Courts%20of%20the%20Judiciary,%20English.pdf> (last visited June 9, 2010). Note that up to 2005 a four-tiered system was prescribed by law even though not functioning in practice.

<sup>50</sup> Art. 116 of the Afghan Constitution of 2004.

<sup>51</sup> *See* Art. 29 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan.

<sup>52</sup> *See* Their, *supra* note 40, at 10.

<sup>53</sup> 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> (last visited June 11, 2010).

<sup>54</sup> 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.

<sup>55</sup> The “Courts of Appeal” prior to 2005 were known as “Provincial Courts.”

<sup>56</sup> *See* Art. 40 of the Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

<sup>57</sup> *See* Article 58 para 1 Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

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.<sup>58</sup>

Afghan court hearings usually consist of three-judge benches. Judges often convene trials in their offices due not only to limited infrastructure, but also custom—the notion of justice being done in open court is foreign to many Afghans.

### **b. Sources of Law**

The Afghan legal system is a mixed one. Under the 2004 constitution, the official courts shall apply, in principle, only positive law—law that has passed the formal legislative process—however, they also may consider Sharia law. The Afghan Government is passing an increasing body of law.<sup>59</sup> Under the Afghanistan Compact, the legal framework shall have met its benchmarks by the end of 2010.<sup>60</sup> Constitutionally, only in situations where no formal law is applicable can decisions be based on the Hanafi interpretation of Islamic law,<sup>61</sup> or, only in cases where all parties are Shias are involved, the Shiite interpretation.<sup>62</sup> 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.**

### **c. Problems in the Formal System**

In practice, court activity is largely limited to the urban centers. Courts of Appeal and Primary Courts have taken up work in some, but not yet all, provinces, partly due to the security situation but also because of a lack of resources. Respect for the government’s judicial institutions in rural areas remains very limited.<sup>63</sup> Indeed the 2009 survey notes: “confidence in the formal justice system is particularly low in the South East, West and South West where around half of respondents have little or no confidence that state law enforcing organizations and the judicial system would punish the guilty” noting that these same regions “report the highest level of insecurity.”<sup>64</sup>

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.<sup>65</sup> These deficiencies are linked to the security situation,

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<sup>58</sup> See Article 59, para 2, Law of the Organization and Authority of the Courts of the Islamic Republic of Afghanistan (2005).

<sup>59</sup> 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.

<sup>60</sup> 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](http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf) (last visited June 9, 2010).

<sup>61</sup> Article 130, Ch. 7. Art. 15 of the Afghan Constitution of 2004.

<sup>62</sup> Article 131 Ch. 7. Art. 16 of the Afghan Constitution of 2004.

<sup>63</sup> See The Asia Foundation: Afghanistan 2009: A Survey of the Afghan People, *available at* <http://asiafoundation.org/country/afghanistan/2009-poll.php> (last visited June 9, 2010).

<sup>64</sup> *Id.* at 88.

<sup>65</sup> A number of judges have been murdered, and many have received death threats.

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.<sup>66</sup>

Even where sufficiently trained judges have access to legal resources, problems persist due to the numerous regime changes since 1964, making it difficult for courts to determine which positive law to apply. Courts do not have internet access, and mail service is non-existent in many areas, hindering both legal research and regular communication with the national legal infrastructure. Many local courts must rely on often incomplete or out of date printed legal texts. The Bonn Agreement establishing the Afghan government recognized all existing law and regulations, “to the extent that they are not inconsistent with this agreement or with international legal obligations.” Some laws, especially from the Taliban era, are obviously inconsistent. However, many of the laws passed over the years may not be inconsistent with the Afghan Constitution, international law, or the Bonn Agreement, but nonetheless are inconsistent with each other. This situation is bound to cause confusion. It is often unclear to what extent old laws can still be relied upon or enforced.

Moreover, the lack of trained prosecutors, defense attorneys, and justice administrators (such as those who run MOJ offices in the provinces) inhibits the work of the courts. Indeed, there are only between 600 and 1000 defense attorneys for the entire country.

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 with the Afghanistan Compact.<sup>67</sup> The level of success of these efforts remains, however, uncertain.

## **2. The Informal Legal System**

Due to the tribal structure of Afghan society, customary methods of conflict resolution continue to play a significant role, particularly in rural areas. It has been claimed that more than 80 percent of social conflicts in Afghanistan are resolved through the non-governmental system.<sup>68</sup> This reliance on the informal system is due to the loyalty of Afghans toward their family, village, or ethnic group, which traditionally exceeds that to the distant central government in Kabul. There are also strong cultural incentives in keeping disputes within the informal system. However, there are also practical reasons for Afghans to prefer the informal system: it is accessible, fast and unburdened by legalistic process; and it resolves disputes while keeping the mutual honor of the litigants intact, 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

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<sup>66</sup> See Art. 97 of the Afghan Constitution of 2004.

<sup>67</sup> See *Afghanistan Compact* at [http://www.nato.int/isaf/docu/epub/pdf/afghanistan\\_compact.pdf](http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf) and <http://www.rolafghanistan.esteri.it/ConferenceRol> (last visited June 9, 2010).

<sup>68</sup> See p. 9 of UNDP publication “Afghanistan Human Development Report 2007” available at <http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/nhdr2007.pdf> (last visited June 9, 2010). It should be noted that accurate statistics are difficult to collect in Afghanistan. It is possible that litigants are pursuing cases concurrently through both the formal and informal systems, a type of forum shopping.

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.<sup>69</sup>

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.

**a. The Councils: *Shuras* and *Jirgas***

The customary legal system is exercised through *jirgas* (“circle” or “council” in Pashto) and *shuras* (“consultation” in Arabic). These institutions are local mediation or arbitration panels that resolve day-to-day disputes in their communities. Their members are recruited from community members or respected outsiders and most commonly consist of, 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*.

**b. Sources of Law**

Each local council will apply its own historically evolved, non-codified canons of tribal law, often combining arguments from local customary law (*urf*) with aspects of Sharia. As Afghanistan is home to about 55 distinct ethnic groups, customary legal rules as well as the interpretation of the Sharia vary by tribe and location.

**c. 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.<sup>70</sup> But there is less agreement as to how this will work in practice. The U.S. government has not yet reached a conclusive policy

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<sup>69</sup> 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.”), available at [http://belfercenter.ksg.harvard.edu/publication/18241/no\\_sign\\_until\\_the\\_burst\\_of\\_fire.html](http://belfercenter.ksg.harvard.edu/publication/18241/no_sign_until_the_burst_of_fire.html) (last visited June 9, 2010).

<sup>70</sup> Indeed the Huqooq officials of the MOJ have encouraged parties to take their disputes to the informal system before resorting to formal litigation.

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. Most troubling are attempts to use the informal system in response to serious crimes. Land disputes are also a major issue. They might seem trivial when compared to serious violence but unresolved, they are a significant cause of violence. Even where land disputes are amicably resolved within the informal system, there is no mechanism for recording the outcome. This can result in future disputes, especially among non-resident family members who may be refugees in Pakistan or Iran. Education and awareness training will broadcast the message that crimes against the person must be dealt with by the state acting through the formal justice system and not through informal tribunals. At the other end of the spectrum most people accept that the informal system will continue to play a role in resolving minor legal disputes, such as access to grazing and water rights. In those cases the quality of the decision-making by informal tribunals can be improved if the informal decision-makers have received some legal training.

In short, the current approach is to educate people as to which cases are not suitable for informal dealing and to improve the standard of decision-making in those cases that can remain in the informal system. The place of the informal justice system is an interesting and far from straightforward issue. The practitioner is advised to keep an eye on the developing policy debate.

**Bridging the Gap between the Formal and Informal Systems:  
Not as Easy as it Looks**

Pragmatists claim that the informal and formal justice systems can be easily grafted together, but this claim must always be approached with caution. For instance, there is currently a proposal that shuras review detention cases. Instinctively this feels correct: it appears to be an appropriate Afghan solution to a difficult problem. However, there is currently nothing in the Afghan Criminal Code or Constitution to support such proceedings. As such, they operate outside the law and thus, without anything more, they are outside the rule of law. The rule of law practitioner must always keep the first principles of the rule of law in view and ensure that new proposals accord with the fundamental principles. In this case, the shura detention review process might be made to accord with rule of law principles if it was made subordinate to an independent prosecutorial decision. The challenge is to prevent pragmatism from defeating the very rule of law it is trying to support.

## **G. 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, U.S. and International).
- Employ Afghan attorneys to gain information, coordinate, train and put an Afghan face on your efforts. Many Afghan attorneys are very brave and highly dedicated. They can frequently go places where foreigners cannot and they will find out things that foreigners (especially members of a foreign military) would not. They understandably see themselves as working for the good of Afghanistan, not the U.S. government.
- Keep it simple. Pursue simple and practical schemes for building infrastructure, training, and raising legal awareness in accordance with the NJP and more detailed direction from higher headquarters.
- Focus on people. Infrastructure and process are important, but educating, developing, mentoring and empowering Afghans is always best.
- Understand how to leverage your rule of law efforts with the resources of other U.S. 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.

## **H. References and Further Reading**

### **1. Afghanistan Development Efforts**

- Afghan National Development Strategy, including JCMB reports: [http://www.embassyofafghanistan.org/documents/Afghanistan\\_National\\_Development\\_Strategy\\_eng.pdf](http://www.embassyofafghanistan.org/documents/Afghanistan_National_Development_Strategy_eng.pdf)
- ACBAR Guide to ANDS: [http://acbarjobs.com/ACBAR%20Publications/The%20ACBAR%20Guide%20\(final%20hand-in%20draft\).pdf](http://acbarjobs.com/ACBAR%20Publications/The%20ACBAR%20Guide%20(final%20hand-in%20draft).pdf)
- Benchmark Status Report: <http://www.tpc.org/reports/status/default.asp>
- International Crisis Group, Afghanistan’s Endangered Compact: <http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/B059-afghanistans-endangered-compact.aspx>
- 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.undp.org.af/whoweare/undpinafghanistan/Projects/dcse/prj\\_just.htm](http://www.undp.org.af/whoweare/undpinafghanistan/Projects/dcse/prj_just.htm)
- Ashraf Haidari, Paris Conference: <http://www.ia-forum.org/Content/ViewInternalDocument.cfm?ContentID=6295>
- Report on Progress toward Security and Stability in Afghanistan: [http://www.defenselink.mil/pubs/Report\\_on\\_Progress\\_toward\\_Security\\_and\\_Stability\\_in\\_Afghanistan\\_1230.pdf](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 2010): [http://www.sigar.mil/pdf/quarterlyreports/jan2010/pdf/SIGAR\\_Jan2010.pdf](http://www.sigar.mil/pdf/quarterlyreports/jan2010/pdf/SIGAR_Jan2010.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 Reports 2010: <http://www.un.org/Docs/sc/sgrep10.htm>
- For a number of reports on Afghanistan: <http://milnewstbay.pbwiki.com/CANinKandahar-Bkgnd>

### **2. The Afghan Legal System**

- A Guide to Researching the Law of Afghanistan at the University of Michigan Law Library (2003) <http://www.law.umich.edu/library/students/research/Documents/afghanistan.pdf>
- Omar Sial, Islamic Republic of Afghanistan Legal System and Research (2006), available at <http://www.nyulawglobal.org/globalex/afghanistan.htm>
- Afghanistan Legal Documents Exchange Center, Translations of Afghan Laws, available at <http://www.afghantranslation.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](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/files/file/clash\\_two\\_goods.pdf](http://www.usip.org/files/file/clash_two_goods.pdf)
- The Customary Laws of Afghanistan—A Report by the International Legal Foundation (2004) [http://www.usip.org/files/file/ilf\\_customary\\_law\\_afghanistan.pdf](http://www.usip.org/files/file/ilf_customary_law_afghanistan.pdf)
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- Afghan Legal History Project of Harvard Law School's Islamic Legal Studies Program <http://www.law.harvard.edu/programs/ilsp/research/alhp.php>
- Afghanistan's Legal System and its Compatibility with International Human Rights Standards <http://www.unhcr.org/refworld/pdfid/48a3f02c0.pdf>
- Rebuilding the Judicial Sector in Afghanistan: the role of customary law (2006) [http://fletcher.tufts.edu/al\\_nakhlah/archives/spring2006/senier.pdf](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](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/files/file/barfield\\_report.pdf](http://www.usip.org/files/file/barfield_report.pdf)
- Development Report, Bridging Modernity and Tradition: Rule of Law and the Search for Justice (2007) [http://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)
- Afghan Customary Law and its relationship to Formal Judicial Institutions. <http://www.usip.org/files/file/barfield2.pdf>

## **II. Iraq**

### **A. International Framework**

Initially after the liberation of Iraq, unlike Afghanistan, there was no overarching UN-organized coordination of rule of law tasks among lead nations in Iraq. Given the initial 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. However, as of 2010, international presence and assistance in rule of law has increased substantially. The UN maintains a specific operation for Iraq (the United Nations Assistance Mission for Iraq), as do the European Union and several NGOs.<sup>71</sup> In 2010, international partners, including U.S. representatives from the Chief of Mission-Iraq formed the Rule of Law International Policy Committee (RIPC) to coordinate rule of law efforts in Iraq.

### **B. U.S. Rule of Law Efforts – Transformation from military to civilian lead**

After the fall of Saddam Hussein's regime, the U.S. government formed the Coalition Provisional Authority (CPA) for Iraq until a formal indigenous government could be stood up. The CPA maintained authority over all legal, political, economic, and security activities in Iraq. Initially, the U.S. military performed the large majority of rule of law efforts. U.S. Judge Advocates helped plan for rule of law reforms and in the early

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<sup>71</sup> MNF-I (OSJA) Rule-of-Law Programs in Iraq: March 2006 Inventory 5-7 (2006) [hereinafter MNF-I Rule-of-Law Inventory].

stages of reconstruction in Iraq, had to oversee the Iraqi justice system.<sup>72</sup> Division SJAs and JAs serving in Civil Affairs brigades and battalions conducted a large majority of this early rule of law effort.<sup>73</sup> Over the years, the Iraqi justice system has gained capacity and independence of operations and no longer needs heavy support or oversight by U.S. forces.

After a transitional period, by 2005, the Iraq Constitution was established and laid the foundation for the current government and disestablishment of the CPA. By this point, the State Department and Multi-National Forces-Iraq were fully engaged in rule of law efforts. Initially, 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.”<sup>74</sup>

The rule of law coordination structure for Iraq has varied during the course of operations.<sup>75</sup> The U.S. Embassy in Baghdad is currently the largest in the world, having more personnel and more agencies represented than any other U.S. Embassy, even more so than in Afghanistan. As a result, the efforts vary widely based on the needs of individual locations, from judicial education programs to improving the security infrastructure of local courts and police.

To improve the oversight and coordination of rule of law programs in Iraq, the Chief of Mission established the Rule of Law Coordinator’s (RoLC) office (see organization chart below). The RoLC provides direction, oversight and support to the approximately 200 Embassy personnel engaged in promoting justice in Iraq, ensuring that they design and implement their rule of law programs consistent with the Embassy’s overall plan.<sup>76</sup> The RoLC’s office attempts to establish a fully integrated approach that works in partnership with the USF-I Office of the Staff Judge Advocate (OSJA) Rule of Law section and personnel from the Bureau of International Narcotics and Law Enforcement Affairs (INL). RoLC, OSJA Rule of Law and INL personnel are co-located in office spaces at the Embassy and regularly exchange ideas and coordinate interagency rule of law efforts.

By 2009, the lead for rule of law efforts in Iraq began to slowly transform from a DOD lead implemented by JAs at various Brigade, Division, Corps and Force Headquarters levels to DOS lead through the RoLC implemented by Resident Legal Advisors (DOJ AUSAs) and Rule of Law Advisors (DOS-hired legal

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<sup>72</sup> CENTER FOR LAW AND MILITARY OPERATIONS, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ, VOLUME II, 253 (2005).

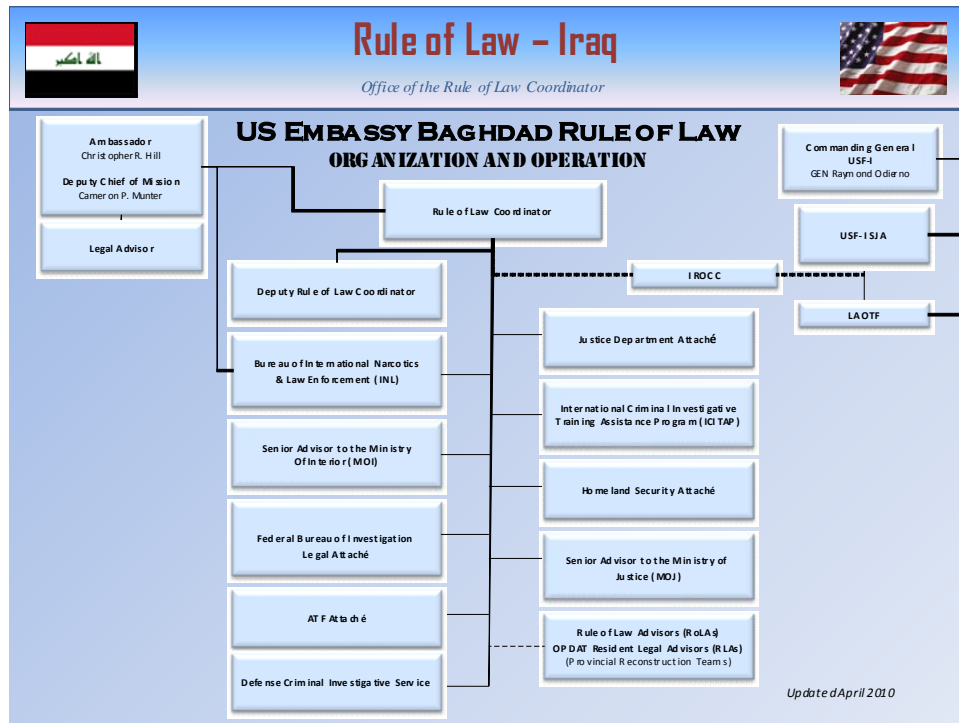
<sup>73</sup> *Id.* at 254-55.

<sup>74</sup> OFFICE OF THE INSPECTOR GENERAL, INSPECTION OF RULE-OF-LAW PROGRAMS, EMBASSY BAGHDAD 1 (2005), <http://oig.state.gov/documents/organization/103473.pdf> (last visited July 22, 2010).

<sup>75</sup> 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 July 22, 2010). It provides that the Chief of Mission in Iraq is “responsible for direction, coordination and supervision of all United States Government employees, policies, and activities in country, except those under the command of an area military commander, and employees seconded to an International Organization.” It states that the Secretary of State “shall be responsible for the continuous supervision and general direction of all assistance for Iraq,” but, it reserves the authority for the Commander, USCENTCOM, coupled with the policy guidance from the Chief of Mission, to direct all USG efforts and coordinate international efforts in support of organizing, equipping, and training all Iraqi security forces. It notes that “[a]t the appropriate time, the Secretary of State and the Secretary of Defense shall jointly decide when these functions shall transfer to a security assistance organization and other appropriate organizations under the authority of the 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 July 22, 2010).

<sup>76</sup> US Embassy Baghdad, [http://iraq.usembassy.gov/offices\\_rol.html](http://iraq.usembassy.gov/offices_rol.html) (last visited July 22, 2010).

practitioners). Several members in the RoLC are personnel from DOJ that contribute to DOS' rule of law mission.



US Embassy Iraq – Rule of Law Organization

### C. Current U.S. Rule of Law Strategy – Implemented Through Interagency Rule of Law Coordination Center (IRoCC)

The governing strategy for rule of law efforts in Iraq is contained within the U.S. Embassy Baghdad and United States Forces-Iraq co-signed Joint Campaign Plan (JCP). The JCP includes a rule of law annex. By early 2010, the newly issued JCP shifted the lead for rule of law efforts from the military to the RoLC with substantial support by USF-I JAs and JAs at the division and brigade level working in support of rule of law personnel at the Embassy and PRTs. Thus, the RoLC took lead while USF-I's Rule of Law section was fully integrated within the RoLC. In fact, the USF-I Rule of Law Chief serves as one of two deputies to the RoLC.

Flowing from the JCP, all USG rule of law efforts are succinctly organized into subject matters broken down into six categories: (1) Judiciary; (2) Law Enforcement; (3) Corrections and Detentions; (4) Commercial and Property Law; (5) Anti-Corruption; and (6) Access to Justice and Enhancement of the Legal Profession. Because several U.S. agencies are involved in these efforts achieving unity of command or control of these agencies' rule of law efforts is not mandated. However, all practitioners resoundingly agree that coordination and synchronization of efforts are necessary to maximize the USG's effectiveness in assisting Iraq's rule of law systems. Thus, in order to achieve at least a unity of effort, several representatives from various agencies participate in the Interagency Rule of Law Coordination Center (IRoCC).

### **Interagency Rule of Law Coordination Center (IRoCC)**

Beginning in 2008, the IRoCC overcame some initial interagency hesitation and concern and by 2010, it has become the focal point and established mechanism for rule of law capacity builders to coordinate and deconflict their efforts. Initially, the IRoCC focused primarily on detention facility issues and met on a weekly basis. As the IRoCC continued its operations, a wide variety of topics and issues were addressed to include real property dispute resolution, judicial reform, courthouse administrative projects and developing Iraqi forensic evidence capabilities.

With the development of the 2010 JCP, the utility of the IRoCC was taken to new heights as it has become the central mechanism to coordinate all activities within the six subject matters mentioned above. In place of a weekly meeting, the IRoCC has formed focused working groups geared to various subject matters including the Judiciary, Law Enforcement, Corrections/Detentions, Anti-Corruption, Commercial and Property Law, Access to Justice/Enhancing the Legal Profession and Information Technology. Further sub-working groups branching from these core groups meet as well to tackle difficult issues such as Judicial Security, improving Criminal Case Processing and dealing with particularly thorny issues presented in Ninewa and Diyala provinces.

Each working group has a civilian and military co-chair. The Deputy civilian RoLC and Deputy military RoLC (the USF-I Rule of Law Chief) share the responsibility for leading the Judicial IRoCC working group. As further examples of growing interagency cooperation, the Deputy INL director in Iraq serves as the co-chair for the Law Enforcement Working Group, the Embassy's Anti-Corruption Coordinator (a previously-served Ambassador and career Foreign Service Officer) leads the Anti-Corruption working group and an official at USAID serves as the co-chair for the Access to Justice working group.

The various working groups of the IRoCC structure meet once or twice per month which is always conducted from the Embassy by video teleconference that links the U.S. divisions, brigades and PRTs. It is not unheard of to have upwards of 10 remote sites linking ground-level rule of law practitioners representing several provinces within Iraq at any given VTC meeting.

The groups operate under a set schedule offering continuity and predictability which maximizes participation from the field. The culminating events for the IRoCC involve a sequence of important coordination meetings and briefs. First, an Executive IRoCC (E-IRoCC) meeting is held each month to receive a report from the various working groups to highlight important issues requiring higher level attention for resolution and coordination. The E-IRoCC is chaired by the RoLC and USF-I SJA while General Officer and Senior Executive Service representatives from various organizations and units are also in attendance. The E-IRoCC functions to highlight executive issues that will be raised at executive coordination meetings involving the Deputy Chief of Mission and Chief of Staff for United States Forces-Iraq. Ultimately, each month, these issues are presented to the Chief of Mission and Commanding General, United States Forces-Iraq.

While interagency coordination challenges will always exist, the IRoCC's evolution and its crucial importance to implementing the JCP Rule of Law strategy serves as a model for overcoming these interagency challenges.

## **1. 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.”<sup>77</sup> 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.”<sup>78</sup>

PRTs in Iraq were modeled on similar groups operating in Afghanistan. The former U.S. Ambassador to Iraq, Zalmay Khalilzad, was credited with bringing the idea for PRTs from his previous assignment in Kabul.<sup>79</sup> In fact, PRTs in Afghanistan bore little resemblance to those in Iraq. U.S. PRTs established during 2006 in Iraq were led by a senior State Department official and composed primarily of civilian personnel, unlike those previously described for Afghanistan which are led by the U.S. military. Moreover, the emphasis of PRTs in Iraq is on shaping the political environment rather than building infrastructure as in Afghanistan.<sup>80</sup>

The initial PRTs included representatives from the State, Justice, and Agriculture Departments and USAID, a USAID commercial-contract firm, plus Army Civil Affairs teams and other military personnel. U.S. military forces or commercial contractors provided security. PRTs resided at either 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.<sup>81</sup>

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 ePRTs 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 U.S. ambassador in Baghdad and the commander of USF-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 Departments 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 (BBAs). Military Civil Affairs units also work closely with PRTs throughout Iraq.

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<sup>77</sup> Robert Perito, Provincial Reconstruction Teams in Iraq, USIP Special Report 185, March 2007, *available at* <http://www.usip.org/resources/provincial-reconstruction-teams-iraq> (last visited July 22, 2010).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See Miles, *supra* note 23, 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.*

<sup>81</sup> *Id.*

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.<sup>82</sup> “Nor are there agreed objectives, delineation of authority and responsibility between the civilian and military personnel plans, or job descriptions.”<sup>83</sup>

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:

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.<sup>84</sup>

Further, in 2009, MNF-I (USF-I in 2010) and the U.S. Embassy agreed to a Joint Campaign Plan that governs the relationship between MNF-I and the U.S. Embassy in a joint plan to build Iraq’s civil capacity in governance, economics, rule of law, and political reconciliation. The U.S. Embassy’s Office of Provincial Affairs (OPA) manages the PRTs in Iraq. OPA coordinates PRT activities and provides administrative support, including all functions relating to civilian personnel. USF-I provides military personnel and supports PRTs operating from U.S. military bases, which are the vast majority of teams.

A model PRT would have the following complement of personnel: State Department, six; senior U.S. military officers and staff, three; U.S. Army Civil Affairs Soldiers, twenty; Agriculture Department, one; Justice Department, one; USAID Contractor for governance issues - RTI International, three; USAID, two; and a military or contract security force of indeterminate size, depending on local conditions.<sup>85</sup> Although the PRTs work closely with the Military Movement Teams and CA teams, neither are be considered as part of the PRT. PRT operations differ depending upon location, personnel, environment, and circumstances. In general, however, staff members assigned to Iraq PRTs serve the following functions<sup>86</sup>:

**Team Leader (TL):** Usually, a senior U.S. Foreign Service Officer, the team leader represents the State Department, provides leadership, and chairs the executive steering committee, which sets priorities and coordinates activities. The TL meets with the provincial governor, the provincial council, mayors, tribal elders, and religious figures and is the primary contact with OPA and other officials in the U.S. Embassy in Baghdad. The TL is responsible for relations with the host institution and for ensuring that logistic and administrative arrangements are working properly. The TL’s personality and experience strongly influence

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<sup>82</sup> See Perito, *supra* note 77.

<sup>83</sup> *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, available at [http://armedservices.house.gov/pdfs/Reports/PRT\\_Report.pdf](http://armedservices.house.gov/pdfs/Reports/PRT_Report.pdf) (last visited July 22, 2010).

<sup>84</sup> Special Inspector General for Iraq Reconstruction, SIGIR-09-013, Provincial Reconstruction Teams’ Performance Measures Process Has Improved 10 (29 January 2009), available at <http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA493604> (last visited July 22, 2010).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

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 USF-I commander.

**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.

**USF-I Liaison Officer (LNO):** A senior military officer, the LNO coordinates PRT activities with the division and FOB commander. These include activities related to intelligence, route security, communication, and emergency response in case of attacks on convoys. The LNO tracks PRT movements and coordinates with other U.S. military units in the area of operations.

**Rule of Law 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 U.S. Embassy. The program emphasizes improvement of the judiciary at the provincial level.

**Iraq Provincial Action Officer (PAO):** Usually a State Department foreign service officer, the PAO is the primary reporting officer. He meets frequently with local authorities and provides the Embassy with daily reports on PRT activities, weekly summaries, analysis of local political and economic developments, and reports on meetings with local officials and private citizens. Political and economic reporting by State Department officers in PRTs is valued because it provides firsthand information on conditions outside the Green Zone. The PAO assists others in the PRT with promoting local governance.

**Public Diplomacy Officer (PDO):** A State Department foreign service officer, the PDO is responsible for press relations, public affairs programming, and public outreach through meetings at the PRT with local officials and escorting visitors to the PRT and its area of operations.

**Agricultural Adviser (AGA):** A representative of the U.S. Agriculture Department, the AGA works with provincial authorities to develop agricultural assistance programs and promote agriculture-related industries.

**Engineer (ENG):** A representative of the U.S. Army Corps of Engineers, the ENG trains and mentors Iraqi engineers working on provincial development projects. The ENG assists the PRT Provincial Reconstruction Development Committee in conducting project assessments, designing scope-of-work statements for contracts with local companies, site supervision, and project management. The ENG advises the TL on reconstruction projects and development activities in the province.

**Development Officer (DO):** The USAID representative coordinates USAID assistance and training programs and works with provincial authorities to promote economic and infrastructure development. The DO coordinates development-related activities within the PRT and supervises locally hired USAID staff. The DO is usually a development specialist working under a personal services contract with USAID. The agency is working internally to obtain authority for the representative to participate in approving all USAID projects and coordinating all USAID activities within the province.

**Governance Team (RTI):** Under a USAID contract, RTI International provides a three-person team that offers training and technical advice to members of provincial councils and provincial administrators to improve the operation, efficiency, and effectiveness of provincial governments. The team gives hands-on training in providing public services, finance, accounting, and personnel management. RTI International personnel take guidance from the USAID representative but function under a national contract administered from the Embassy in Baghdad. RTI International maintains offices (nodes) in major cities that can provide additional specialists on request.

**Bilingual Bicultural Adviser (BBA):** Normally an Iraqi expatriate with U.S. 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.

## D. Iraqi Criminal Law and Criminal Procedure

### 1. Legal History

Iraq has a long and complex history as the center of Islamic jurisprudence. Practice developed initially from laws promulgated by city-states,<sup>87</sup> 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 codes<sup>88</sup> 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.<sup>89</sup> 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,<sup>90</sup> 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.

Following a series of coups d'état, the Ba'ath party led by Hassan al-Bakr<sup>91</sup> came to power in 1968. The Ba'athists introduced a new constitution in 1970. Subordinate to it were five major legal codes forming the main legal pillars. These governed civil law, civil procedure, commercial law, criminal law, and criminal procedure.<sup>92</sup>

### 2. Judicial Structure and Division of Powers - Penal System<sup>93</sup>

The Iraqi Criminal Courts operate on a hierarchical system from the highest appellate court<sup>94</sup> (the Court of Cassation) to lower appellate courts and the courts of first instance. All are nationally controlled and the

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<sup>87</sup> 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.

<sup>88</sup> 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.

<sup>89</sup> The British appointed as the first monarch Prince Faisal Hussein, a member of an influential family in the Arab world, but not an Iraqi.

<sup>90</sup> The Egyptian code was the model for the legal systems of Libya, Qatar, Sudan, Somalia, Algeria, Jordan, and Kuwait.

<sup>91</sup> Al-Bakr was the head of the Revolutionary Command Council. Saddam Hussein was al-Bakr's vice president.

<sup>92</sup> 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.

<sup>93</sup> This summary concentrates solely on the criminal law system. Judge Advocates wishing to research aspects of the Iraqi Civil and Commercial Laws may wish to study the summary produced by the Office of the General Counsel at the US Department of Commerce, see <http://trade.gov/iraqi/> (last visited July 22, 2010).



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 15 appellate regions nationwide, largely based on the geographic provincial boundaries. These serve as courts of appeal for lower courts.<sup>95</sup> Moreover, the Federal Court of Cassation hears appeals from Courts of Appeal and the Central Criminal Court of Iraq (CCCI).<sup>96</sup>

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.

### **3. Sources of Iraqi Criminal Law**

Following the establishment of the Coalition Provisional Authority following the U.S.-led invasion in 2003, the CPA took steps to reintroduce the Iraqi Law in existence before Saddam Hussein became head of state in 1979. As far as the criminal code and procedure were concerned, this was the result of two CPA Orders. CPA Order No 7<sup>97</sup> reintroduced the Penal Code of 1969 and CPA Memo No 3<sup>98</sup> reintroduced the Law of Criminal Procedure of 1971.

The following is a working summary of both codes aimed at Judge Advocates working within the rule of law arena.

### **4. Iraqi Criminal Procedure: Law of Criminal Proceedings with Amendments No. 23 of 1971<sup>99</sup>**

On paper, the Iraqi Law of Criminal Procedure is one of the most advanced secular systems in the region. As with most civil law systems, there are two distinct limbs: the investigative phase and the trial process. Unlike their common law counterparts, however, both phases have significant judicial involvement.

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<sup>94</sup> The Court of Cassation is the highest appellate court for criminal and civil cases. This is not to be confused with the Federal Supreme Court which is a separate court designated by the Iraqi Constitution. The Federal Supreme Court does not serve a traditional appellate function. Under the Constitution, the Federal Supreme Court is empowered to interpret the Constitution, settle matters related to application of legislation, and certify election results among other matters. See Iraqi Constitution, Articles 92-94.

<sup>95</sup> See generally Book Four and Para 177 Law on Criminal Proceedings No 23 of 1971.

<sup>96</sup> 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 CCCI expanded to other provinces before being reduced to the original Baghdad location. The CCCI has jurisdiction over all offenses that felony and misdemeanor courts may hear. By design, it concentrates on serious crimes, terrorism, organized crime, and government corruption. Since its creation in 2004, the CCCI has heard over 2,500 cases. This includes many cases referred by TF 134. As of 2010, the size of the staff and judges of CCCI has shrunk considerably within Baghdad.

<sup>97</sup> See [http://www.iraqcoalition.org/regulations/20030610\\_CPAORD\\_7\\_Penal\\_Code.pdf](http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf) (last visited July 22, 2010).

<sup>98</sup> See [http://www.iraqcoalition.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_Rev\\_.pdf](http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf) (last visited July 22, 2010).

<sup>99</sup> See [http://law.case.edu/saddamtrial/documents/Iraqi\\_Criminal\\_Procedure\\_Code.pdf](http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf) (last visited July 22, 2010).

**a. The Investigation**

Initiation of criminal proceedings occurs through an oral or written complaint to an Investigative Judge (IJ) (an examining magistrate), police investigator or official, or member of the judicial system. IJs<sup>100</sup> or investigators acting under their supervision,<sup>101</sup> 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 IJ, further emphasizing the IJ's role.

The respective roles undertaken by IJs and the police varies tremendously in Iraq today. Some units report the police played a dominant role in the investigative process. Others suggest the IJ is intimately involved in a majority of the cases. In fact, the IJ must remain involved by law since the IJ sends the case forward to the trial court but the enormous disparity in resources between the police and judiciary is forcing a shift in the investigatory process with the police increasingly leading that effort.

The basic obligations of the investigators commences with the recording of the deposition of the person making the allegation. Next is the testimony of the victim and other witnesses and anyone else from whom the parties or magistrate wish to hear.<sup>102</sup> When doing so, each witness over fifteen years old gives evidence under oath.<sup>103</sup>

The process by which evidence collection occurs often happens either in open court or in the judge's chambers. The defendant has the right to be present and make comments. Additionally, subject to the consent of the magistrate, the defendant can put questions to the witness.<sup>104</sup> Indeed, the investigator can compel the complainant or defendant to co-operate in a physical examination, or in the taking of photographs or samples.<sup>105</sup>

Routine searches require a warrant issued by examining magistrate,<sup>106</sup> except in cases of necessity.<sup>107</sup> There are also provisions for the preservation of evidential integrity.

**b. Arrest and Detention<sup>108</sup>**

For the majority of offenses, a warrant from a court or judge is required for arrest.<sup>109</sup> 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.<sup>110</sup>

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

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<sup>100</sup> Para 51 Law on Criminal Proceedings No 23 of 1971.

<sup>101</sup> Para 52 Law on Criminal Proceedings No 23 of 1971.

<sup>102</sup> Para 58 Law on Criminal Proceedings No 23 of 1971.

<sup>103</sup> Para 60 Law on Criminal Proceedings No 23 of 1971.

<sup>104</sup> Para 63 B Law on Criminal Proceedings No 23 of 1971.

<sup>105</sup> Para 70 Law on Criminal Proceedings No 23 of 1971.

<sup>106</sup> Para 72 – 86 Law on Criminal Proceedings No 23 of 1971.

<sup>107</sup> 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.

<sup>108</sup> Para 92 – 120 Law on Criminal Proceedings No 23 of 1971.

<sup>109</sup> 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.

<sup>110</sup> Para 102 Law on Criminal Proceedings No 23 of 1971.

instances of police wrongdoing. In practice, detention within the Iraqi criminal justice system has garnered much criticism in recent years.<sup>111</sup>

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 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.

### **c. Questioning the Accused**

The IJ or investigator should question the accused within 24 hours of arrest and record the statement of the accused. If the statement includes a confession, the magistrate must record the statement himself, read it back, and he and the accused must both sign it. CPA Memo 3 incorporated into Iraqi Law the right to silence and the right to legal representation.<sup>112</sup>

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.<sup>113</sup>

### **d. Trial**

At the end of the investigation, the IJ 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.<sup>114</sup> If the evidence does not meet the requisite standard, authorities must release the accused or return the accused to confinement and order further investigation. In practice, many detainees are not released because the releasing orders often have contained the qualifier that release is conditioned on there being no other charges pending. The lack of an easily searched database of such other charges often means the detainee remains in custody for a prolonged time.

In cases of sufficient evidence, the file next goes to the prosecutor, who will formally frame the charges and present the charges to the trial judge. The prosecutor or the trial court may refer the file back to the IJ 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.”<sup>115</sup> In practice, this is similar to a “beyond a reasonable doubt” standard.

When compared to criminal trial under a common law system, the significant judicial involvement in the investigative phase often reduces the extent to which evidence requires testing at trial. It is common for the trial judge to be satisfied with the IJ’s investigation of 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.<sup>116</sup>

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<sup>111</sup> Various reports have documented the abuse and torture of those in police detention – see United Nations Assistance Mission for Iraq, Human Rights Report, 1 July – 31 December 2008, available at [http://www.uniraq.org/documents/UNAMI\\_Human\\_Rights\\_Report\\_July\\_December\\_2008\\_EN.pdf](http://www.uniraq.org/documents/UNAMI_Human_Rights_Report_July_December_2008_EN.pdf) (last visited July 22, 2010); and US Department of State, 2008 Human Rights Report: Iraq available at <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119116.htm> (last visited July 22, 2010).

<sup>112</sup> CPA Memo 3, Section 4c.

<sup>113</sup> Para 127 Law on Criminal Proceedings No 23 of 1971.

<sup>114</sup> Para 130 Law on Criminal Proceedings No 23 of 1971.

<sup>115</sup> Para 182 Law on Criminal Proceedings No 23 of 1971.

<sup>116</sup> Para 170 Law on Criminal Proceedings No 23 of 1971.

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.<sup>117</sup> While the right to counsel is enshrined in Article 19 of Iraq's new Constitution and the criminal code, many counsels will not have time to take effective instructions from their client. Indeed, some may only meet their client for the first time on the morning of trial—even for capital offenses.

In order to secure a conviction, the court must have evidence from two sources.<sup>118</sup> 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.

## **5. The Substantive Criminal Law: Iraqi Penal Code – No 111 of 1969<sup>119</sup>**

In 1918, the Supreme Commander of British Forces of Occupation in Iraq created “The Baghdad Penal Code.” As the title suggests, it was initially limited to the capital. However, it later had national application. Although a new draft code was produced in 1957, it was not until 1969 that the Iraqi Penal Code No 111 replaced the Baghdad Penal Code.

The code, which in translation runs some 139 pages, was the result of jurisprudential study, scholarly research, and judicial pronouncements, as well as findings of Arab, regional, and international committees. A detailed study of the individual offenses it contains is beyond the scope of this *Handbook*, but it contains a two-part structure. Part One provides detailed guidance on matters such as jurisdiction, elements of crimes, defenses, secondary participation, penalties, and amnesties. Part Two contains the full catalog of criminal offenses including offenses against person, property, state, against the due process of law, offenses that endanger the public, drunkenness, sexual offenses, trespass, and defamation.

### **a. Recent Amendments**

Of the more recent amendments to the substantive criminal law, perhaps two are worthy of detailed comment.

#### **(1) Terrorism Law**

In November 2005, the Transitional Government enacted the Terrorism Law. The offense is widely defined as “any criminal activity ... aiming to disturb the national security and to society and cause riot and disturbance among people.”<sup>120</sup> 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.

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<sup>117</sup> Para 179 Law on Criminal Proceedings No 23 of 1971.

<sup>118</sup> Para 213B Law on Criminal Proceedings No 23 of 1971.

<sup>119</sup> See <http://www.worldlii.org/catalog/54829.html> (last visited July 22, 2010).

<sup>120</sup> See Art. 1 Terrorism Law 2005.

## (2) Amnesty Law<sup>121</sup>

A new Amnesty Law was passed on February 27, 2008. The new law allows for those under investigation for or convicted of the majority<sup>122</sup> 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 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).

While appearing promising in theory, the law has fallen short of expectations. In practice, the exceptions to the Amnesty Law almost always include the allegations against a vast majority of detainees most of whom are charged under the Terrorism Law. While the detainee may receive amnesty for a minor charge, the detainee will remain in custody and investigation for the terrorism charge.

The amnesty law also 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 ordered released.<sup>123</sup>

## E. Security Agreement

The United States signed a Security Agreement with Iraq on 18 November 2008<sup>124</sup> that came into force on 1 January 2009, upon expiry of the UN Security Council Resolutions (UNSCR) previously authorizing MNF-I activities.<sup>125</sup>

In contrast to the UNSCRs, the Security Agreement requires U.S. forces to arrest, search, and detain in accordance with Iraqi law.<sup>126</sup> In most cases, this requires U.S. forces conducting such operations to obtain Iraqi arrest and search warrants. The exceptions to this rule include the ability to arrest without a warrant upon witnessing a crime, and to arrest or search during combat operations.<sup>127</sup>

The Security Agreement also requires U.S. operations to be “fully coordinated” with Iraqi authorities.<sup>128</sup> In most cases, this requirement is met by U.S. forces conducting combined operations with their Iraqi Security Force (ISF) counterparts. Ideally, those counterparts will obtain any necessary warrants from a local IJ. Exceptionally, U.S. JAs may be required to assist in obtaining warrants from local or CCCI IJs. Similarly,

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<sup>121</sup> Law No 19 of 2008.

<sup>122</sup> The law specifies that those sentenced to death or convicted of thirteen listed offenses are NOT eligible to apply under the amnesty law.

<sup>123</sup> See DOD Report to Congress, *Measuring Security and Stability in Iraq 3* (March 2009), available at [http://www.defenselink.mil/pubs/pdfs/Measuring\\_Stability\\_and\\_Security\\_in\\_Iraq\\_March\\_2009.pdf](http://www.defenselink.mil/pubs/pdfs/Measuring_Stability_and_Security_in_Iraq_March_2009.pdf) (last visited July 22, 2010).

<sup>124</sup> Agreement Between the United States and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, (Nov. 17, 2008), available at [http://www.usf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.usf-iraq.com/images/CGs_Messages/security_agreement.pdf) (last visited July 22, 2010).

<sup>125</sup> UNSCR 1546, 8 June 2004 (authorizing internment where necessary for “imperative reasons of security”), available at <http://www.iamb.info/pdf/unsc1546.pdf> (last visited July 22, 2010); UNSCR 1790, 18 December 2007 (renewing MNF-I mandate until 31 December 2008), available at <http://daccess-ods.un.org/TMP/377989.411354065.html> (last visited July 22, 2010).

<sup>126</sup> *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, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/05-2009.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/05-2009.pdf) (last visited July 22, 2010) [hereinafter *Don’t Call It a SOFA*].

<sup>127</sup> *Don’t Call It a SOFA*, at 43-44.

<sup>128</sup> Security Agreement, Art. 4(2).

ISF partners rather than U.S. forces will normally be responsible for any detainees. U.S. forces who do detain Iraqis must obtain the consent of a competent Iraqi authority (a “CIZA”) to do so.<sup>129</sup>

## **F. Engaging Iraqi Judges**

U.S. Rule of Law practitioners’ 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 USG partners and advisors. The vast majority of the Iraqi judiciary are intelligent, educated and dedicated. As a result, coalition capacity building efforts with the judiciary have been tremendously successful and the judiciary far exceeds most other Iraqi Government organizations in terms of transition, growth, and independence since 2003. In order to understand the dynamic relationship between the Iraqi judiciary and other branches of the Iraqi government, the 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 rule of law practitioners to engage with the requisite amount of respect will result in weaker relationships and will limit accomplishments. Conversely, the willingness of rule of law practitioners to be sensitive to Iraqi and Arab cultural mores makes all the difference in the development of the relationship.<sup>130</sup> The educated Iraqi judiciary has upfront expectations and assumes that coalition forces are educated and sophisticated enough to engage properly. These expectations must be maintained.

The perception of a judge that he is being shown respect commensurate with his position is by far the most significant area to leverage. Respect is shown in many ways. First it is shown in the consistency of the engagements, their length, and their tone. Judges should be engaged regularly. To establish the relationship consider more frequent engagements at the beginning. Respect is also shown in the use of proper Arabic phrases and acknowledgement of basic Iraqi culture. Addressing judges in honorific terms, in Arabic, shows a judge that you have made the effort to show respect. They will help achieve reciprocal treatment and judicial actions consistent with coalition goals.

While Iraqi relationships and government structures are dominated by Islamic tradition, most judges are secular in their professional roles. Moreover, they are sophisticated enough to realize that many coalition engagement “blunders” are due to ignorance, with no offense intended. Judges may overlook insensitive and disrespectful behavior if it is believed to be unintentional. However, if the goal is to build an effective professional relationship, the coalition engager must take the time to learn things the “Iraqi way.”

It is important to engage the right personnel. The Iraqi legal system is hierarchical; the local investigative judge answers to his court’s chief judge. That judge answers to the chief provincial judge. That judge alone has access to the Higher Juridical Council, the body that governs judges in Iraq. Iraqi judges adhere to this chain of command. Not following it is a sign 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.

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<sup>129</sup> Security Agreement, Art. 22(2).

<sup>130</sup> See *Arab Culture Awareness: 58 Fact Sheets*, TRADOC DCSINT Handbook No.2, January 2006.

With status-conscious Iraqis, the more senior the engager, the better the results will be. In general, the servicing Provincial Reconstruction Team (PRT) DOJ Resident Legal Adviser or, in those areas without an RLA, the Rule of Law Advisor will take the lead. As of 2010, almost all PRTs had a Resident Legal Advisor (AUSA) or Rule of Law Advisor assigned. Generally, this senior civilian legal presence serves as the lead engager to the Judiciary for the USG accompanied primarily by the BCT JA counterpart. On other occasions, BCT commanders and other USF leadership will engage with the Judiciary in conjunction with the PRT RLA. Lower court judges are required to report to their chief provincial or chief appellate judges, often in writing.

Lower court Iraqi judges fully brief to their superiors all contact with USG personnel. It is respectful and advisable for the U.S. engager to request permission of the chief appellate or chief provincial judge before setting an engagement with a lower court in the jurisdiction. This technique can be very helpful in showing judges that their system was understood and followed. Furthermore, lower court personnel will be much more amenable to developing positive relationships with 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 rule of law practitioner should not suggest anything except respect for the tradition and competence of the judiciary. Shame and honor can easily converge when working on issues requiring the cooperation of the judiciary. One should avoid statements that may be construed as accusations of error, lack of diligence, or incompetence. The judge will typically protect and defend his and the court's honor at all costs. Criticisms are taken very seriously and can cause unintended consequences.

**Coordinating Local RoL Events with HJC through the RoLC and USF-I OSJA**

Regarding the hierarchical nature of the Judiciary, on several occasions, local rule of law practitioners learned the lesson that even fairly benign activities or events that would include investigative judge or other lower-level judicial involvement must be coordinated through the provincial Chief Judge and Chief Justice at the Higher Juridical Council. For example, rule of law personnel at the PRT and BCT attempted to coordinate provincial and regional rule of law conferences. In order to properly secure judicial attendance, a formal request letter addressed to the Chief Justice was needed to obtain HJC's permission for the local judges to attend.

Securing training visits abroad for Iraqi judges via PRT or other programs is another particularly sensitive issue that requires close coordination with the RoLC and HJC. Often, the choice of judges is a sensitive matter and prone to causing disagreements and tension between judges selected and not selected for these prestigious opportunities. The best practice is for local practitioners to avoid raising the hopes of a local judge and instead work through the RoLC and HJC and suggest judges they believe are worthy of participating in these programs.

Iraqi judges are proud of their legal heritage and will routinely have prints or tapestries of Hammurabi on their walls.<sup>131</sup> They may also have a framed *Quranic* verse relating to a judge's duty to be fair and impartial.

<sup>131</sup> 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.

Respectfully acknowledging the same is a small but important aspect of initial engagement. The *Quran* 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.<sup>132</sup> U.S. forces need to be sensitive to this dynamic and realize that army and police issues will typically require more finesse. Do not expect rapid trust from a judge.

Agree to meet judges at their courts. It supports the perception of security. One of the recurring problems for judges is lack of adequate personal security. U.S. presence at the courthouse helps show adequate and improving security. Finally, it is the best way to gauge the status of the court.

While U.S. forces have become a normal fixture in Iraq, courts may still be uncomfortable with the presence of servicemembers and weapons. If the security situation is permissive, remove all protective gear as soon as practicable and conduct the engagement without holding weapons. Keep personal security details out of the meeting room, if possible. Civilians engaging with judges should wear appropriate attire. Ties and sport coats suggest respect to the judge. Women should always dress professionally and conservatively. See Chapter XI for a female Judge Advocate's take on rule of law. 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 but don't expect to engage on such issues until your relationship is well-developed. Similarly, expect the first meetings to be more cordial than substantive. As the relationship develops, judges will gradually engage on more substantive issues and work towards resolving coalition issues of interest.

Do not ask questions about a judge's female family members including his spouse. Openness and friendliness, while sincere, may offend. Sensitivity to this Islamic tradition shows respect. Iraqis do however greatly appreciate your interest in their culture, language, and history and welcome appropriate questions. Expressed interest in Iraqi history can demonstrate respect for both the judiciary and legal system. When engaging Iraqi officials both male and female, remember to maintain eye contact; not looking at someone suggests they are unimportant.

Engage in friendly discussion and do it leisurely. Engagements with judges should typically last one to three hours. "Drive-bys" should be avoided and suggest lack of respect. Judges will not rush and will make a great effort to be hospitable, attempting to show respect. An Arabic word, "*karamah*," partially captures the approach: it suggests granting others respect, honor and dignity, and treating others with generosity. Doing so is part of the "righteous path" and consistent with the *Quran's* teachings.<sup>133</sup> Judges may take phone calls during the engagement. This is not a sign of disrespect. Also, interruptions by other court personnel may occur, very often this will be to offer tea and other assorted desserts. When offered such items of hospitality, you should graciously accept the first round.

Use the same coalition interpreter or advisor whenever possible. The judge will form a concurrent relationship with this person. A savvy and motivated advisor can make a tremendous difference in the growth of the relationship with the judge. Uneducated or otherwise unsophisticated interpreters hamper

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<sup>132</sup> 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.

<sup>133</sup> See "Understanding Islam" at [www.understanding-islam.com](http://www.understanding-islam.com) (last visited July 22, 2010).



engagements. As relationships mature, the level of privacy and trust accorded to the rule of law practitioner will increase. Having the same Arabic speaker at each engagement will hasten this process. Furthermore, much of the contact with the judge will occur over the phone. If the judge trusts and likes the interpreter, he will be more willing to engage remotely. Be cognizant of ethnic and tribal affiliations.<sup>134</sup> 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.<sup>135</sup> 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 USF-I efforts, whether they are sustained engagement efforts or tangible rule of law initiatives. Do not risk a loss of credibility early on by promising the unobtainable. Rather, indicate that you will “look into it.”

Engaging key judges can be the most significant of any rule of law initiatives. The dividends from consistent judicial engagement can range from security solidification, increased judicial capacity, and the growing confidence of court personnel and host nation citizens. Investing time and effort in judicial relationships is likely to remain one of the most critical parts of reinforcing the rule of law.

## **G. References and Further Reading**

- Law Library of Congress – Iraq - [www.loc.gov/law/help/guide/nations/iraq.html](http://www.loc.gov/law/help/guide/nations/iraq.html)
- World Legal Information Institute Country Studies Iraq - [www.worldlii.org/iq/](http://www.worldlii.org/iq/)
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- 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-law/>
- United Nations Development Program 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>

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<sup>134</sup> Some USF personnel believe that non-Iraqi Arabs (e.g., Egyptian, Moroccan) are more effective with Iraqi judges due to continued issues of sectarian mistrust.

<sup>135</sup> JODIE R. GORRILL, *DOING BUSINESS IN IRAQ: IRAQI SOCIAL AND BUSINESS CULTURE* (2007).

- Human Rights Watch, “The Quality of Justice, Failings of Iraq’s Central Criminal Court” - <http://www.hrw.org/sites/default/files/reports/iraq1208webwcover.pdf>



## CHAPTER 9

# MEASURING RULE OF LAW<sup>1</sup>

*“Perhaps the key indicator of the extent to which any government has real legitimate traction is the efficiency of its justice system.”<sup>2</sup>*

A stand-alone work on rule of law metrics would necessarily include a complete restatement of all of the tasks and sub-tasks necessary to reinforce or reintroduce the rule of law in a host nation. As part of this *Handbook*, it is sufficient to discuss the processes that will allow a deployed Judge Advocate to take the lead in the rule of law line of operation.

The simplest rule of law monitoring program is that proposed by Dr. David Kilcullen, who suggested that the answers to two questions will give an accurate assessment in any given district. First, where do the judges sleep? If they feel secure, it will be in their districts. If they “commute in” from a regional or national capital, or if they never visit their assigned districts at all, that suggests a low level of confidence in their personal security, and the people will have a correspondingly weak opinion of that judge’s commitment to them. Second, if your bicycle were stolen, to whom would you report it? If the answer is someone other than the police, then the police do not have the confidence of the people—indeed, they may be seen as an officially-empowered predatory group to be avoided.<sup>3</sup>

Kilcullen’s two tests capture the essence of rule of law: a people’s faith in the fairness and effectiveness of law enforcement, adjudication, and detention (“cops, courts, and corrections”). He offers three key pieces of guidance for the JA designing rule of law metrics:

- Organizations manage what they measure, and they measure what their leaders tell them to report on.<sup>4</sup>
- It is essential to maintain a common set of core metrics, as well as to maintain a consistent methodology, so that second-order effects and trends can be analyzed over time.<sup>5</sup>
- Interpretation of indicators is critically important, and requires informed expert judgment. It is not enough merely to count incidents or conduct quantitative analysis—interpretation is a qualitative activity based on familiarity with the environment, and it needs to be conducted by experienced personnel who have worked in that environment for long enough to detect trends by comparison with previous conditions.<sup>6</sup>

There are two critical components to rule of law metrics: front-end assessments, and mid-course measures of progress. Assessments focus on needs: it is the process of determining what is working and what is not prior to planning and executing a rule of law program. In this phase, the number of courthouses, location of judges, education of prosecutors, corruption of defense attorneys, and competence of administrators in each region, province, and district of the host nation are determined. The quality of existing civil and criminal systems are evaluated, as are the effectiveness of the police and corrections systems. Finally, and perhaps most importantly, the people themselves are consulted for their views and recommendations. All of this will help shape the clearest path to a sustainable, culturally acceptable, and fundamentally just system. See also Chapter 6 of this Handbook for information on assessments.

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<sup>1</sup> Thomas C. Wingfield is a Professor of International Law at the George C. Marshall European Center for Security Studies and the Rule of Law Advisor to the COIN Advisory and Assistance Team.

<sup>2</sup> Frank Ledwidge, *Justice in Helmand—the Challenge of Law Reform in a Society at War*, XL ASIAN AFFAIRS 77, March 2009 at 77.

<sup>3</sup> See generally David Kilcullen, *Measuring Progress in Afghanistan*, (2009).

<sup>4</sup> *Id.* at 1.

<sup>5</sup> *Id.* at 2.

<sup>6</sup> *Id.* at 5.

Mid-course evaluation, on the other hand, is part of a continuous process that measures the effectiveness of actions taken against the goals that have been set. It is not an end-of-operation wrap-up, but rather a regular flow of information to and from lawyers on the ground, resulting in small adjustments and occasionally wholesale changes to a rule of law program. In the absence of front-end assessments and midcourse measures of progress, even the most superbly designed rule of program will fail, and with it, the larger mission.

Coordination is often lacking in rule of law programs. It is rare for a single authority to have visibility, let alone control, of the dozens of rule of law initiatives in country. Stovepipes lead to gaps and overlaps. Projects are frequently unconnected to any strategic framework. Few people are on ground for more than six months, leading to a low average level of experience and poor programmatic continuity. What coordination does exist is usually personality-driven, and not institutional. The JA may be surprised and possibly frustrated at the lack of authoritative guidance for rule of law programs, and the complex interaction of multiple Plans, Assessments, Guides, and Criteria from Joint, Interagency, Coalition, NGO, IGO, and Host Nation sources. Given the complex nature of these operations, and the cultural tensions between the institutions involved, this will probably be the norm in future operations. The JA will be most effective if he or she takes on the role of integrator, evaluating the full spectrum of capabilities and metrics available, paying particular attention to areas of redundant measurements. Factors which appear on more than one set of proposed metrics are worth a close look in formulating the final, authoritative set.

At the beginning of an operation, there is no substitute for a clear understanding of the overall mission and the role rule of law will play in its accomplishment. Army doctrine is clear on the centrality of rule of law in stability and counterinsurgency operations. According to FM 3-07:

Rule of law is the principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publically promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, and legal certainty.<sup>7</sup>

Rule of law establishes principles that limit the power of the government by setting rules and procedures that prohibit the accumulation of autocratic or oligarchic power. It dictates government conduct according to prescribed and publically recognized regulations while protecting the rights of all members of society. It also provides a vehicle to resolve disputes nonviolently and in a matter integral to establishing enduring peace and stability. In general terms, rule of law exists when:

- The state monopolizes the use of force in the resolution of disputes.
- Individuals are secure in their persons and property.
- The state is 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 judicial system.
- The state protects basic human rights and fundamental freedoms.
- Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.<sup>8</sup>

Planning, preparing, and executing the transfer of responsibility from military to host-nation control for rule of law, although critical for building public confidence is often the most difficult and complex transition conducted in a stability operation.<sup>9</sup>

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<sup>7</sup> U.S. ARMY, FM 3-07: *STABILITY OPERATIONS*, (6 Oct. 2008), para. 1-40.

<sup>8</sup> U.S. ARMY, FM 3-07: *STABILITY OPERATIONS*, (6 Oct. 2008), para. 1-41.

<sup>9</sup> *Id.* at para. 1-83.

According to FM 3-24:

D-38. Establishing the rule of law is a key end state in COIN. Defining that end state requires extensive coordination between the instruments of U.S. power, the host nation, and multinational partners. Additionally, attaining that end state is usually the province of HN authorities, international and intergovernmental organizations, the Department of State, and other U.S. governmental agencies, with support from U.S. forces in some cases. Some key aspects of rule of law include:

- **A government that derives its power from the governed** and competently manages, coordinates, and sustains collective security, as well as political, social, and economic development. This includes local, regional, and national government.
- **Sustainable local institutions.** These include a civilian-controlled military as well as police, court, and penal institutions. The latter should be perceived by the local populace as fair, just, and transparent.
- **Fundamental human rights.** The United Nations Declaration on Human Rights and the International Convention for Civil and Political Rights provide a guide for applicable human rights. The latter provides for derogation from certain rights, however, during a state of emergency. Respect for the full panoply of human rights should be the goal of the host nation; derogation and violation of these rights by HN security forces, in particular, often provides an excuse for insurgent activities.

D-39. In periods of extreme unrest and insurgency, HN legal structures—courts, prosecutors, defense assistance, and prisons—may cease to exist or function at any level. Under these conditions, counterinsurgents may need to undertake a significant role in the reconstruction of the HN judicial system in order to establish legal procedures and systems to deal with captured insurgents and common criminals. During judicial reconstruction, counterinsurgents can expect to be involved in providing sustainment and security support. They can also expect to provide legal support and advice to the HN judicial entities. Even when judicial functions are restored, counterinsurgents may still have to provide logistic and security support to judicial activities for a prolonged period. This support continues as long as insurgents continue to disrupt activities that support the legitimate rule of law.<sup>10</sup>

Any operation requiring a rule of law component is probably complex—possibly so complex as to defy simplistic methods of measurement and analysis. FM 3-24 captures the complexity of a generic counterinsurgency operation:

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<sup>10</sup> U.S. ARMY, FM 3-24: *COUNTERINSURGENCY OPERATIONS*, (15 Dec. 2006) paras. D-38 through D-39.



When conducting an initial assessment, it is important to connect the rule of law assessment with the commander’s broader operational assessment. To this end, it is helpful to identify and collect the ASCOPE/PMESII elements at each jurisdictional level (e.g., national, regional, provisional, and district).

	P Political	M Military/Security	E Economic	S Social	I Infrastructure	I Information
A Areas	Political Areas	Military Areas	Economic Areas	Social Areas	Infrastructure Areas	Information Areas
S Structures	Political Structures	Military Structures	Economic Structures	Social Structures	Infrastructure Structures	Information Structure
C Capabilities	Political Capabilities	Military Capabilities	Economic Capabilities	Social Capabilities	Infrastructure Capabilities	Information Capabilities
O Organizations	Political Organizations	Military Organizations	Economic Organizations	Social Organizations	Infrastructure Organizations	Information Organizations
P People	Political People	Military People	Economic People	Social People	Infrastructure People	Information People
E Events	Political Events	Military Events	Economic Events	Social Events	Infrastructure Events	Information Events

For particular areas of rule of law there are metrics which already exist and which may be applied much as ASCOPE/PMESII may be applied to the larger operation. For example, one of the most useful tools in measuring anticorruption efforts is the WGA Matrix:

Principle/ Arena	Participation	Fairness	Decency	Accountability	Transparency	Efficiency
Civil Society	1. Freedom of association	2. Society free from discrimination	3. Freedom of expression	4. Respect for governing rules	5. Freedom of the media	6. Input in policy making
Political society	7. Legislature representative of society	8. Policy reflects public preferences	9. Peaceful competition for political power	10. Legislators accountable to public	11. Transparency of political parties	12. Efficiency of legislative function
Government	13. Intra-governmental consultation	14. Adequate standard of living	15. Personal security of citizens	16. Security forces subordinated to civilian government	17. Government provides accurate information	18. Efficiency of executive branch
Bureaucracy	19. Civil servants shape policy	20. Equal opportunities to public services	21. Civil servants respectful toward citizens	22. Civil servants accountable	23. Civil service decision making transparent	24. Merit-based system for recruitment
Economic society	25. Private sector consulted on policy	26. Regulations applied equally	27. Governments respect private property rights	28. Regulating private sector to protect workers	29. Transparency in international trade policy	30. Interventions free from corruption
Judiciary	31. Non-formal processes of conflict resolution	32. Equal access to justice for all citizens	33. Human rights incorporated in national practice	34. Judicial officers held accountable	35. Clarity in administering justice	36. Efficiency of the judicial system

*Accountability to the Law* is a condition in which the population, public officials, and perpetrators of past conflict-related crimes are held legally accountable for their actions; the judiciary is independent and free from political influence; and horizontal and vertical accountability mechanisms exist to prevent the abuse of power.

*Access to Justice* is a condition in which people are able to seek and obtain a remedy for grievances through formal or informal institutions of justice that conform with international human rights standards, and a system exists to ensure equal and effective application of the law, procedural fairness, and transparency.

*Culture of Lawfulness* is a condition in which the general population follows the law and seeks to access the justice system to address its grievances.

*Id.* at 7-65.



Ideally, all 36 measures should be taken at each level of Host Nation government—national, regional, provincial, and district (and possibly down to the village level). Armed with this detailed information, the JA can make informed judgments on the larger issues of anticorruption programs: transparency (public visibility through press, IA/IG departments, professional organizations, and monitors); professionalization (training and pride to offset “everybody else is doing it” ethic), and resourcing (pay sufficient to prevent poverty of honest officials and “excusable” corruption). There are several assessments which are common to almost any rule of law operation. The first is to map the existing criminal code, however well or poorly developed, as a point of departure for an effective program. Below is an example from the Afghan legal system:

Murder Crimes	Theft Crimes	Moral Crimes	Contraband Crimes	Traffic Incidents	Financial Crimes	National Security Crimes
Intentional Homicide	Banditry	Running away	Drinking alcohol	Traffic incident death	Fraud	Escape from Prison
Quasi-intentional homicide	Stealing	Pederasty	Smuggling	Accidental injuries	Forgery	Threat
Unintentional homicide	Pick-pocketing	Adultery	Drug usage		Falsification in Medicine	Arson
	Seizure	Delinquency			Bribery	Abduction
	Breach of Trust	Abortion			Embezzlement	Suicide bombing
	Looting	Gambling			Counterfeit of currency	Treason

Case management is another challenging area of rule of law metrics. Instantiating a sustainable system which captures all of the relevant data to make the host nation’s judicial system transparent enough requires a balance between comprehensiveness and simplicity. The example below, employed in Afghanistan, is an excellent generic example:

ISLAMIC REPUBLIC OF AFGHANISTAN

CRIMINAL CASE TRACKING FORM

ARREST – MINISTRY OF INTERIOR				
FIRST NAME	FAMILY NAME	FATHER’S FIRST NAME	GRANDFATHER’S FIRST NAME	ARREST CASE NUMBER
INITIAL CRIME DETECTION POLICE NATIONAL SECURITY THE ATTORNEY GENERAL’S OFFICE CENTRAL CONTROL AND INSPECTION OFFICE INTERNAL MONITORING DEPARTMENT OF ENTITIES ANTI-CORRUPTION	GENDER A) MALE B) FEMALE	DATE OF BIRTH or AGE	PLACE OF BIRTH (PROVINCE, DISTRICT, SUB-DISTRICT, VILLAGE)	NATIONAL ID NUMBER
	TYPE OF CRIME	DATE AND TIME OF CRIME COMMITTED	PLACE OF CRIME (PROVINCE, DISTRICT, SUB-DISTRICT, VILLAGE)	PLACE OF CUSTODY/DETENTION
	ARRESTING OFFICER NAME	DATE AND TIME OF ARREST	PLACE OF ARREST (PROVINCE, DISTRICT, SUB-DISTRICT, VILLAGE)	DATE CASE REFERRED TO NEXT AUTHORITY

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REMARKS:

**INVESTIGATION – ATTORNEY GENERAL’S OFFICE**

DATE CASE RECEIVED (RELATED PROSECUTION OFFICE)	INVESTIGATION CASE NUMBER	INVESTIGATIVE PROSECUTOR’S NAME	INVESTIGATIVE PROSECUTOR’S DECISION DROP INDICT	DATE CASE REFERRED TO NEXT AUTHORITY
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REMARKS:

**PRIMARY COURT LEVEL**

DATE CASE RECEIVED	CASE NUMBER	HEARING DATES	PROSECUTOR’S NAME	PLAINTIFF DECISION ACCEPTED APPEALED
JUDICIAL RULING DATE	JUDICIAL RULING NUMBER	TYPE OF JUDICIAL RULING	DEFENSE ATTORNEY’S NAME	DEFENSE DECISION ACCEPTED APPEALED
DECISION DATE	DECISION NUMBER	COURT DECISION	JUDGES’ NAMES	DATE CASE REFERRED TO NEXT AUTHORITY

REMARKS:

**APPELLATE COURT LEVEL**

DATE CASE RECEIVED	CASE NUMBER	HEARING DATES	PROSECUTOR’S NAME	PLAINTIFF DECISION ACCEPTED APPEALED
JUDICIAL RULING DATE	JUDICIAL RULING NUMBER	TYPE OF JUDICIAL RULING	DEFENSE ATTORNEY’S NAME	DEFENSE DECISION ACCEPTED APPEALED
DECISION DATE	DECISION NUMBER	COURT DECISION	JUDGES’ NAMES	DATE CASE REFERRED TO NEXT AUTHORITY

REMARKS:

**SUPREME COURT LEVEL**

DATE CASE RECEIVED	CASE NUMBER	HEARING DATES	PROSECUTOR’S NAME	JUDICIAL RULING DATE
JUDICIAL RULING NUMBER	TYPE OF JUDICIAL RULING ACCEPTED REPEALED	DEFENSE ATTORNEY’S NAME	DECISION DATE	
DECISION NUMBER	COURT DECISION	JUDGES’ NAMES	APPLICATION AND DATE OF REVISING THE SC DECISION	DATE CASE REFERRED TO NEXT AUTHORITY

REMARKS:

**HOLDINGS**

DATE DEFENDANT RECEIVED	PRISONER IDENTIFICATION NUMBER	LOCATION NAME (PROVINCE, DISTRICT, CELL/WING/BLOCK)	EXPECTED RELEASE DATE	ACTUAL RELEASE DATE
HAS THE INMATE BEEN BENEFITED FROM PRESIDENTIAL DECREE OF COMMUTATION	CONDITIONAL RELEASE	OTHER CONDITIONS FOR RELEASE SUCH AS ILLNESS OR OLD AGE	IS THE EXECUTION ORDER SIGNED BY THE PRESIDENT	

REMARKS:

Beyond these assessments of the formal judicial system, it is important to assess the effectiveness of the Host Nation’s informal system (tribal, religious, or other), and then to measure the extent to which the formal and informal judicial systems are interacting. Formal system may be viewed as slow, uncertain, expensive, and

corrupt. The informal system—which may provide upward of 90% of a traditional society’s dispute resolution—usually provides no systematic recordation, making enforcement or appeal difficult. It is often less accessible to minority tribal/ethnic groups, and virtually inaccessible to women. In some traditional societies, girls age 9-15 may be awarded as restorative damages. The goal, therefore, is to link a familiar and popular informal system to the legitimate formal system that meets minimum standards of human rights. The challenge in metrics is to capture the complexity of this interaction with clear and operationally significant measurements.<sup>13</sup>

Rule of law metrics often have a tactical focus of immediate concern to the battlefield commander. An excellent example of this is the rule of law planning that immediately preceded the Battle of Marjeh in Afghanistan. Coalition commanders were concerned about the “revolving door” problem of captured enemy combatants. Under U.S. policy, battlefield detainees could be held only 96 hours (with some exceptions requiring high-level approval) before transfer to the Afghan National Security Forces (ANSF) or release. As a practical matter, the only Afghan organization equipped to deal with detainees was the National Directorate of Security (NDS), the Afghan paramilitary intelligence service. The NDS is a hybrid organization, not only in its mission, but in its composition: in addition to the intelligence professionals within the NDS proper, prosecutors are assigned by the Attorney General’s Office (AGO) and judges detailed by the Supreme Court (SCT). Since the NDS would be charged with accepting detainees at the 96-hour mark, several rule of law questions became central to Coalition planning:

1. Competency and corruption assessments of NDS assigned judges, prosecutors, and investigators, to include names of each person and educational level (university-level degree in secular or Islamic law, Madrassa, or other).
2. Infrastructure assessment as to location and condition of prosecution offices and courthouses used by NDS.
3. Identify locations, conditions, and capacity of jails used to house pre-trial NDS detainees. Include assessment of how future ISAF operations will affect this capacity.
4. Number of cases per month, number of cases 120 days old or older without disposition, number of convictions, number of acquittals, conviction rates for ISAF and non-ISAF detainees, number of cases dismissed by judges, and number of cases dismissed by prosecutors.
5. What agencies (if any) are working with the prosecutors and judges assigned to NDS in either a mentoring or support capacity.

As these criteria show, the initial concern was that transport and facilities were physically incapable of dealing with a vastly increased number of battlefield detainees. However, the next questions were more problematic: how many detainees would “leak” out of the system to return to the fight, at what point in the process was that most likely to happen? After hastily mapping the NDS detainee-handling process, a disturbing answer emerged: the conviction rate for Coalition-captured detainees was 30-40%, and the conviction rate for Afghan-captured detainees was 3-4%. The largest “leak” in the system was not the NDS intelligence officers or the AGO prosecutors (although their lack of training and resources slowed their work), but rather it was the judges who ordered the release of a large number of detainees. Some of this was due to poor evidence collection on the battlefield, and some was due to the pressure of legislators, forcefully advocating for the release of detainees with powerful, and possibly dangerous, patrons in their home districts. While this problem was not easily solved, effective metrics helped determine that it was not driven primarily by resources or training, and Coalition authorities were able to bring influence to bear where it most mattered.

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<sup>13</sup> See generally Thomas Barfield, Neamat Nojumi, and J. Alexander Their, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, United States Institute of Peace (2008). This report is considered one of the most comprehensive single sources for all the factors which must be considered in analyzing, comparing, and harmonizing a Host Nation’s formal and informal judicial systems.

The final role of metrics in a rule of law program is monitoring—measuring not the program itself, but rather the performance of the society in sustaining it. The United Nations has published the definitive guide to continued rule of law monitoring, *Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems*.<sup>14</sup> This guide includes a great deal of practical advice for designing and implementing an effective monitoring scheme. Most import for the purposes of this *Handbook*, however, is a concise list of thirteen high-interest areas that must be continually measured to ensure the ultimate success of a rule of law program:

1. Lack of trained judicial officials; assess the impact of any training given to judicial officials: performance improved, same, worse. How? Why? Try to identify reasons for any change or failure to change.
2. Lack of infrastructure, materials or equipment necessary to perform duties. Are the materials appropriate to the environment, e.g., have computers been sent to a court that does not have electricity? Are there vehicles or are they in need of repair?
3. Lack of will to fulfill obligations, conduct investigations, create dossiers, show up for work on time.
4. Interference by the military, police, local officials or other Government agents in judicial matters.
5. Corruption/extortion, bribery or other inducements intended to affect a judicial decision.
6. Evidence of bias (ethnic, religious, racial, national or social class) in any judicial decisions. Are people from different groups treated differently for the same acts/offenses?
7. Threats against judicial officials, from whom and for what reasons.
8. Access by defense lawyers to their clients: immediate, in conditions respecting confidentiality.
9. Are arrest warrants legally issued and executed? Is it possible to challenge pretrial detention decisions in a court and to have this decision reviewed by a higher court? Are pretrial or pre-charge detention periods longer than the law allows and, if so, why?
10. Timeliness and conduct of trials and other judicial proceedings.
11. Number of judges and prosecutors serving, vacancies, transfers and salaries and working conditions and number of available lawyers to defend the indigent (structures for legal aid?).
12. Appropriate use of Government resources for the court system and comparative analysis between budgetary allocations to the ministry of justice and the judiciary as opposed to other Government functions.
13. Involvement of and oversight by the authorities, such as the ministry of justice or the chief of the judiciary. Does anyone from the ministry of justice ever come to inspect the courts, prosecutor's office or prisons? Is there any sign of the inspector general from the justice minister exerting some control or oversight over judicial officers' performance? Have any judges, prosecutors or lawyers been punished for failing to perform their professional duties?<sup>15</sup>

## **I. Interagency Conflict Assessment Framework<sup>16</sup>**

The Interagency Conflict Assessment Framework (ICAF) is the U.S. interagency process for developing a common understanding of a crisis across all of the government agencies responsible for some part of the response. It is employed at the strategic and operational levels for steady state engagement, crisis prevention, contingency planning, and crisis action planning. The two principal components of the ICAF are conflict diagnosis and planning.

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<sup>14</sup> OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *RULE-OF-LAW-TOOLS FOR POST-CONFLICT STATES: MONITORING LEGAL SYSTEMS* (2006).

<sup>15</sup> *Id.* At 51-52.

<sup>16</sup> U.S. ARMY, FM 3-07: *STABILITY OPERATIONS*, (6 Oct. 2008), Appendix D.

The ICAF process is complemented by the Tactical Conflict Assessment and Planning Framework (TCAPF). These four open-ended questions are particularly useful for collecting rule of law metrics for three reasons: they are a bottom-up source of information from the people of the host nation; they allow unforeseen factors to enter the evaluation process; and they avoid the common problem of leading questions which suggest the answer desired, particularly troublesome in cultures which place a high premium on politeness and telling the questioner what he wants to hear. Although the TCAPF process requires training in collection and judgment in evaluation, it is an excellent source of rule of law metrics “beyond the checklist.”

**A. Tactical Conflict Assessment and Planning Framework Process<sup>17</sup>**

1. Has the population of the village changed in the past twelve months? Why? Why? Why?
2. What are the greatest problems facing the village? Why? Why? Why?
3. Who is trusted to resolve problems? Why? Why? Why?
4. What should be done first to help the village? Why? Why? Why?

Measurements in a rule of law program reach beyond simple programmatics (courthouses built, judges trained, criminals prosecuted), because the rule of law touches almost every public aspect of a society. In addition to the sheer quantity of factors to be evaluated, there is the problem of complexity. The metrics must enable the JA to make informed judgments about the nature of legal shortcomings and the appropriate remedy. The following examples from the Counterinsurgency Advisory and Assistance Team (CAAT) operating in support of COMISAF demonstrates complexities involved, and suggests the metrics necessary to scope the underlying problem in each case:

Metrics and Benchmarks				
Indicator	Past Impact	Incentive	Benchmark	Action Indicated
Routine Inspections	Too Many/ Variable: Extortion Too Few: Supervisor Bribe	Pay on Spot Reward Relationship Reward Relationship	Citation frequency Case Settled Informally	Set Reasonable Targets
Benefit Payments	Too Many: Kickbacks Too Few: Favoritism	Too Many: Bribe Benefit Too Few: Politics	Other Jurisdiction Comparison	More Legislation Review Internal Control
Basic Services (Food/Telephone)	High: Skimming Low: Favoritism	Extra Revenue/Graft Low Variable: Favoritism	Market Price Price Other Agency	Publish Prices Monitor Prices
Price for fuel, food, concrete, vehicles, tools	High: Embezzlement	Extra Revenue/Graft	Market Price	Publish Ceiling Price
Quantity and Quality of items	High: Kickback Low: Favoritism	High: Kickback Low Variables: Vendor Exploited	Market Price	Publish Ceiling Price Monitor Quality Enhance Supervision Warnings/Suspension Publish Vendor Data
Outsourcing of Work	Political Consultants	Too High: No oversight Unskilled Labor	Market Skill Training Levels	Increase Oversight Unproductive Fired
Staffing Level of Departments	Too High: Politics Too Few: Illegal Activity Ghost Workers: Payroll Diverted	Too Many: Weak Auditing Too Few: Weak Auditing Ghost Workers: Very Weak (Leadership Involvement)	Agency Comparison	Tighten Ext. O/sight and Auditing / Management Revise Personnel Practices
Budget Levels	Too High: Diverted/Wasted Too Low: Political Diversion	Too High: Political Slush Too Low: Diverted Prior	Agency Comparison	Tighten O/Sight of budget / Sup. Function Set Agency Goals - Move Upward over time
Supervisory Staff vs. Workers	Too Many: Colonized by Too High: Slush Fund Too Many Workers: Political	Too Many: Payroll Abuse Too Large: Theft/Diversion Too Many Line Employees: Demand Money	Agency Comparison	Tighten Auditing Normalize Size/Pay Exam. Personnel Hiring and day-to-day Supervision

<sup>17</sup> *Id.*

## **II. Sample Checklists**

While no existing “checklist” should be viewed as an off-the-shelf set of metrics for a new rule of law program, consulting several of the best will enable the JA to formulate his or her own tailored set of metrics for the operation at hand. Included below are an operational/military version of the metrics employed by COMISAF in Afghanistan, and a strategic/civilian set developed by the U.S. Institute of Peace, which includes a useful discussion of the methodologies to be used in collecting rule of law data.

### **A. COMISAF**

Notional Listing of Measures and Indicators

(Adapted from ISAF Effects-Based Operational Analysis)

**Line of Operation:** Governance

Area 1: Corruption

Measure A: Assessment of where corruption drives increased instability (source and frequency of each must be specified)

1. Geographic: Percentage of elected, appointed, and civil service officials assessed as corrupt at each level of government (e.g., national, regional, provincial, and district)
2. Functional: Percentage of elected, appointed, and civil service officials assessed as corrupt in the executive, legislative, and judiciary branches of government.
  - a. net worth analyses of senior officials
  - b. contracting process analysis
3. Security: Percentage of military, intelligence, and law enforcement personnel assessed as corrupt.
4. Taxation: Percentage of income reported, tax collected, and revenue deposited.
  - a. Extraction industries (mines, wells, etc.)
  - b. Border customs
  - c. Sales/business tax
  - d. Individual/income tax
5. Transparency: Country’s rating on international anticorruption indices (Transparency International, World Bank).

**Measure B:** Correlation between corruption and government’s capability to meet popular expectations.

1. Percentage of population which believes corruption is unacceptable for effective governance.
2. Percentage of population which believes corruption affects their daily lives.
3. Percentage of population which believes government is effectively fighting corruption.

**Measure C:** Evaluation of anticorruption mechanisms

1. Constitutional, legal, and administrative reform
2. Establishing tax system to ensure government revenue
3. Provision of minimal salary levels to avoid “justifiable” corruption
4. Promulgation of an ethical code for public servants

5. Emplace mechanisms of transparency (press, public access, professional ethics boards, internal affairs divisions and inspectors general)
6. Investigation and prosecution of corrupt officials
7. Public awareness campaign

**Area 2: Justice Sector**

**Measure A: Police**

1. Infrastructure
  - a. Buildings
  - b. Equipment
2. Operations
  - a. Uniforms
  - b. Weapons
  - c. Communications
  - d. Transportation
3. Personnel
  - a. Quality
    - i. Criminal record
    - ii. Literacy
    - iii. Performance
  - b. Quantity
    - i. Number Selected
    - ii. Attrition Rate
4. Training
  - a. Quality
    - i. Selection Criteria
    - ii. Performance Requirements
    - iii. Attrition Criteria
  - b. Quantity
    - i. Numbers Selected
    - ii. Attrition Rates
    - iii. Numbers Graduated
5. Perceptions
  - a. Percentage of People Who Would Report a Crime to Police
  - b. Percentage of Parents Who Would Encourage Child to Become Police Officer
  - c. Police Officers Who Must Pay a Portion of Salary to Superior

**Measure B: Courts**

1. Infrastructure
  - a. Buildings
  - b. Equipment
2. Operation
  - a. Communications
  - b. Transportation
  - c. Security
3. Personnel
  - a. Judges
  - b. Prosecutors
  - c. Defenders
  - d. Administrators
  - e. Marshals
4. Training
  - a. General education (literacy, etc.)
  - b. Professional qualification training (job-specific)
  - c. Refresher/development training (continuous improvement)
5. Performance
  - a. Facilities Operating
  - b. Case Tracking System in Use
  - c. Number and Type of Cases per Month
  - d. Conviction Rates
  - e. Sentences per Type of Case
  - f. Salaries of All Personnel
  - g. Public/Press/Auditor Access to Trials and Hearings
6. Perceptions
  - a. Percentage of Population Who Believe Court System is Corrupt
  - b. Percentage of Population Who Believe Court System is Effective
  - c. Relative Faith in Formal vs. Informal Courts
  - d. Relative Faith in Government vs. Insurgent Courts
  - e. Choice of Citizen in Where to Bring Dispute

**Measure C: Corrections**

1. Locations
  - a. National penitentiary



- b. Provincial prison
- c. District jail
- d. Village detention capability
- 2. Infrastructure
  - a. Building
  - b. Heating
  - c. Potable Water
  - d. Ablution Facilities
  - e. Dining Facilities
  - f. Sleeping Quarters
  - g. Day Quarters
- 3. Personnel
  - a. Authorized
  - b. Assigned
  - c. Trained
- 4. Programs
  - a. Medical
  - b. Drug Treatment
  - c. Vocational
  - d. Educational
- 5. Operation
  - a. Inmate Administrative Tracking System
  - b. Segregation
    - i. Women
    - ii. Juveniles
    - iii. High-risk prisoners
  - c. Visitation
    - i. Family and friends
    - ii. Press and external auditors
  - d. Prisoner Release
    - i. End of sentence
    - ii. Within x months in absence of timely case adjudication
  - e. Disciplinary Issues
    - i. Prisoners
    - ii. Guards

6. Perception
  - a. Percentage of population who believe prisons are humane
  - b. Prisoner exit interview
  - c. Recidivism rate

## **B. Measuring Progress in Conflict Environments (MPICE)**

One of the most useful single frameworks for rule of law metrics is the U.S. Institute of Peace “Measuring Progress in Conflict Environments (MPICE).”<sup>18</sup> Procedurally, it recommends using four distinct methodologies to evaluate the success of operations as they proceed from Stage 0 “Imposed Stability” through Stage I “Assisted Stability” into Stage II “Self-Sustaining Peace.” The four methodologies are:

**Content Analysis (CA):** Media reviews to determine popular and elite perceptions. The Fund for Peace Conflict Assessment System Tool (CAST) is the most comprehensive content analysis system, incorporating reports from more than 11,000 sources at the national and regional level of countries likely to require rule of law assistance.

**Expert Opinion (EO):** Panels of 3-5 experts observe and report on issues of interest in the field. Specifying collection and evaluation criteria allow panel findings to be replicated over time.

**Statistical Analysis (SA):** Using multi-source quantifiable data to assess the security situation in a country.

**Survey/Polling Data (S/PD):** Conducting public opinion surveys to directly assess public attitudes and perceptions.

If the JA is relying on these methodologies for situational awareness, it is critical that he or she fully understand the strengths and limitations of each.<sup>19</sup> Substantively, the MPICE states Stage I and Stage II

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<sup>18</sup> Michael Dzedzic, Barbara Sotirin, and COL John Agoglia, eds., *Measuring Progress in Conflict Environments (MPICE): A Metrics Framework for Assessing Conflict Transformation and Stabilization*, United States Institute of Peace (2008) at 24.

<sup>19</sup> The MPICE gives the following guidance on the advantages and disadvantages of each methodology:

**Content Analysis (CA):**

*Advantages:* Relies on readily available publications; newspapers, in particular, can be important shapers of public opinion.

*Disadvantages:* Difficult to choose which publications to survey; labor-intensive process of conducting the analysis

**Expert Opinion (EO):**

*Advantages:* Experts have the knowledge and expertise to offer informed and useful opinions on a situation and can make sound qualitative judgments in a relatively short period. They may be used to study program documents, interview participants, and make observations in the field. The major costs involved are salaries and travel rather than complicated data-collection procedures.

*Disadvantages:* Experts may have political agendas to advance; one needs to be wary of relying on a biased sample of experts. It is especially important that the panelists be capable of independent judgment. They cannot be permanent employees of the contracting agency or have a financial stake in the future of the program being evaluated.

**Statistical Analysis (SA):**

*Advantages:* Statistics can appear to be a more objective way of assessing progress; Provide a useful standard for comparing progress at two different times.

*Disadvantages:* Can be difficult to locate reliable indicators of the larger issue one is assessing—for example, some have argued that the number of deaths per month is not a particularly good indicator of the strength of the insurgency in Iraq; Statistics are easily manipulated to accommodate a variety of interpretations.

**Survey/Polling Data (S/PD):**

objectives (Stage 0 objectives are driven by the law of occupation and presume a lack of host nation institutional capacity), overall goals, and the drivers of conflict. Following this are extensive requirements for institutional capacity—the “nuts and bolts” of rule of law capability—that will allow the host nation to move toward a self-sustaining system of law enforcement, adjudication, and detention.

Stage I Objective: Impunity, injustice, and criminalization of state institutions are diminished to the point that the justice system, supported by a sustainable level of essential international involvement, provides an accepted process for resolving disputes peacefully by maintaining public order and safety, bringing perpetrators of major crimes to justice, holding governing authorities accountable through an independent judiciary, protecting fundamental human rights, and applying the law equally, in increasing compliance with international norms and standards.

Stage II Objective : The domestic justice system, without international involvement, provides a well-functioning and accepted process for resolving disputes peacefully by maintaining public order and safety, bringing perpetrators of crimes to justice, holding governing authorities accountable through an independent judiciary, protecting fundamental human rights, applying the law equally and efficiently, and providing equal access to justice, in compliance with international norms and standards.

Goals:

- I. Diminish the Drivers of Conflict
  - A. Impunity Diminished
  - B. Injustice Diminished
  - C. Criminalization of State Institutions Diminished
- II. Strengthen Institutional Performance
  - A. Public Order and Safety Strengthened
  - B. Administration of Justice Strengthened
  - C. Judicial Independence and Government Accountability Strengthened
  - D. Respect for Human Rights Strengthened
  - E. Equality before the Law Strengthened
  - F. Societal Support for Rule of Law Strengthened

### **1. Drivers of Conflict:**

**Injustice** (use of the legal system as an instrument of repression)

- Percent of citizens who fear law enforcement agencies as instruments of repression or that they will be treated unfairly if arrested. (by province and identity group) (S/PD)
- Whether detainees/prisoners are subjected to torture, cruel, or inhuman treatment, beatings or psychological pressures (by identity group). (EO/Human rights assessments) (CA)

**Discrimination** (by identity group)

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*Advantages:* Can provide useful general overview of societal views and values; can easily be conducted on a large number of people, which provides more confidence in the findings.

*Disadvantages:* Surveys must be carefully designed to ensure that the sampled public is representative; Poorly-worded questions or untrained survey conductors can lead to inaccurate responses.

- Percentage of known prison population detained beyond the period specified in the law who have not had their case reviewed by an appropriate authority. (by identity group) (SA)
- Percentage of prison population (by identity group) relative to their proportion of the overall population. (SA)
- Use of traditional/non-state justice systems as an instrument of repression or discrimination
- Traditional or other non-state justice systems give preference to specific identity groups. (EO)
- Traditional or other non-state justice systems have been co-opted or distorted resulting in discriminatory treatment of specific identity groups. (EO)

**Impunity** (untouchable political elites)

- Inability or unwillingness of the legal system to investigate, prosecute, and convict perpetrators of politically destabilizing crimes (e.g., inter-group murder, use of political violence against rivals, and terrorism) when political leaders/elites are suspected of involvement. (EO)
- Perceptions of law enforcement officials and victims of the crimes cited above that suspects involved are untouchable and that cases are abandoned for this reason. (S/PD) (CA)
- Ratio of incidence of politically destabilizing crimes to investigations, prosecutions, and convictions for these crimes. (SA)

**Obstruction of justice in cases involving political elites**

- Percent of cases where witnesses recant testimony. (SA)
- Number of witnesses, police, judges, prosecutors, defense attorneys and their family members who suffer assaults or assassination. (SA)
- Percent of judges with personal security details, or who have taken other security precautions (e.g., sleeping in their offices or sending their family members to safer locations). (S/PD)

**2. Criminalization of State Institutions**

Existence of parallel or informal governing structures sustained by illicit revenue within formal government institutions

- Political leaders/ruling elites are involved in or linked to criminal looting of natural resources, drug trade, human trafficking, money laundering, smuggling of arms or contraband. (EO)
- Public perception that organized crime has a substantial influence on the development of national policies, operation of ministries, and allocation of resources. (S/PD)
- Known criminals or individuals linked to crime syndicates occupy key government positions. (EO)
- Extent to which government expenditures are hidden and unaccounted for. (EO)
- Militias/paramilitary groups allied with the government operate with government issue equipment and/or funding. (EO)

**3. Institutional Performance**

**Public order and Safety** (by province)

- Patterns of daily activity:
  - Safe and sustainable return of displaced persons and refugees to former neighborhoods.
  - Use of public/private institutions, such as schools, banks, etc.
  - Level of market activity.
  - Amount spent by businesses on private security. (SA) (S/PD) (CA)
- Percent of population that has been the victim of violent crime in the past month/year. (S/PD)

**Accountability of law enforcement agencies** (by province)

- Complaints of serious misconduct such as excessive use of force by law enforcement agencies are properly investigated and prosecuted or pursued through administrative procedures. (EO) (SA)
- Public complaints are registered and investigated and sanctions are imposed by an independent agency with subpoena power external to the police. (SA) (EO)
- Codes of conduct emphasizing adherence to law and to international standards of human rights are enforced by the courts and by supervisors in law enforcement agencies. (EO) (CA)

**Public confidence in law enforcement agencies**

- “Whom do you trust to protect your personal safety?” (S/PD)
- “Do you feel safer in your neighborhood today compared to six months ago?” (S/PD)
- “Do you feel safe walking in your neighborhood?” (S/PD)
- “How would you rate security conditions today?” (S/PD)
- Victims report crimes to the police and are satisfied with the response. (S/PD)
- (Survey questions)
  - “Have you been a victim of crime?”
  - “Did you report the crime to the police?”
  - “Were you satisfied with the response?”
- Parents teach their children that when they need help they should seek out the police. (S/PD)

**Administration of Justice**

Willingness to use the justice system (formal and informal) for non-violent resolution of disputes (by identity group)

- Percent of citizens who say that they have access to and are willing to use court systems to resolve criminal disputes. (By identity group) (S/PD)
- Percent of population who perceive they have been treated fairly by the legal system in the past and/or expect to be treated fairly in the future. (By province and identity group)(S/PD)
- Extent to which citizens resort to use of the legal system to settle inter-group conflicts. (SA) (S/PD)

**Effectiveness of the criminal justice system**

Criminal laws and procedures

- Criminal laws and criminal procedures address contemporary criminal activity and provide effective means of law enforcement for terrorist financing, trafficking, transnational and organized crime, extradition, mutual legal assistance, cyber crime, etc. (EO)

Entry into the system

- Average time after detention until formal charges are brought. (SA)
- Percent of those arrested, detained, or charged with a crime that have access to legal representation. (SA) (S/PD)
- Percent of pre-trial detention facilities operating in compliance with international human rights standards. (EO)

Prosecution and pre-trial services

- Average time from entry into system on serious crimes charges until seeing a lawyer. (SA)
- Number of convictions for serious crimes as a percent of indictments for serious crimes per province. (SA)

Adjudication

- Average time between filing of formal charges and trial. (SA)
- Percent of those accused of serious crimes not represented at trial. (SA)

#### Sentencing and sanctions

- Sentences in criminal cases comply with international standards for proportionality. (EO)
- Prison terms and fines are enforced. (EO)

#### Incarceration

- The penal system is able to enforce sentences on political leaders/elites and the most dangerous criminals. (EO)
- Percent of prison population beyond stated capacity of prison system. (SA)
- Number of prisoners who escape per year. (SA)

#### Appeals

- There is a fair and authentic appeals process, as measured by:
  - Cost
  - Access (By identity group)
  - Time
- Appeals by prosecutors are disproportionately used against disadvantaged identity groups. (SA)

**Effectiveness of the civil justice system** (where there is a separate civil justice system) (At national, provincial, and local levels)

#### Civil Laws and Procedures

- Civil laws and procedures address contemporary civil needs for adjudication, enforcement and recordkeeping. (EO)

#### Entry into the system

- Percent of those involved in a civil case who have access to legal representation. (SA) (S/PD)
- Percent of citizens who say that they have access to court systems to resolve civil disputes. (S/PD)
- Percent of citizens who are aware of what forms of recourse are available to them to resolve a dispute. (S/PD)

#### Adjudication

- Average time between filing of claim and adjudication. (SA)
- Percent of claims that remain un-adjudicated. (SA)

#### Enforcement of Judgments and Orders

- Percent of judgments enforced relative to the number awarded. (SA)

#### Appeals

- There is a fair and authentic appeals process, as measured by:
  - Cost
  - Access (By identity group)
  - Time

#### Complementarity of formal and traditional/non-state justice systems

- Inconsistencies in substance or process between traditional/non-state justice systems and the formal legal system that lead to tension and confusion. (EO)

- Inconsistencies traditional/non-state justice systems and international human rights standards (Negative indicator). (EO)
- Boundaries between formal and informal dispute resolution mechanisms are clear and uncontested. (EO) (CA)
- Restoration of traditional/non-state justice systems that contributed to the peaceful resolution of disputes that may have been deliberately weakened or eliminated during the conflict. (EO)

Accountability of judges, prosecutors, lawyers, and penal system employees

- Perceptions of the public about the probity of judges, prosecutors, lawyers, and penal system employees. (S/PD)
- Percentage of complaints against judges, prosecutors, lawyers, and penal system employees that result in disciplinary action. (SA)
- Percent of those involved in legal proceedings who report paying bribes to judges. (S/PD)

### **Judicial Independence and Government Accountability**

Judicial independence

- The selection and promotion of judges is based on objective, merit-based criteria (e.g., training, education and performance), or elections as opposed to identity group membership, political affiliation, or patronage. (EO)
- Removal of judges is limited to specified conditions such as gross misconduct. (EO)
- Judicial expenditures are not controlled by the executive. (EO)

Accountability of governing authorities

- Government officials have been tried and convicted of abuse of authority. (SA) (EO)
- In cases where the State is one of the litigants, outcomes are not automatically in the State's favor. (SA) (EO)

### **Respect for Human Rights**

Respect for human rights by government authorities

- The legal framework conforms to international human rights standards. (EO)
- Freedom of religion, assembly, press, speech, association and movement, and other civil rights are effectively protected under law. (EO) (CA)
- Identify if they are in compliance with treaties they have ratified.
- Number of political prisoners. (EO)
- Percent of prisons and detention centers operating in compliance with international human rights standards. (EO)
- Frequency with which lawyers suffer retribution on account of representing controversial clients. (EO)

Effectiveness of measures to protect human rights (e.g., human rights commission, human rights court, or ombudsman)

- Percentage of citizens who (By identity group): (S/PD)
  - Feel they could file a human rights complaint without fear of reprisal.
  - Have confidence that they will obtain a fair hearing.
  - Perceive that the government is committed to pursuing human rights cases.
  - Percentage of human rights cases that result in remedies (By identity group). (SA)

Property dispute resolution

- Percent of property dispute claims adjudicated relative to claims registered (By identity group and province). (SA)
- Percent of claims adjudicated relative to the number enforced (By identity group and province). (SA)
- Perception of parties involved with property disputes that the process was fair and the case resolved satisfactorily (By identity group and province). (S/PD)

### **Equality before the Law**

Equal protection before the law

- Percent of victims who reported crimes to law enforcement authorities and percent who were satisfied with the response (By identity group). (S/PD)
- Perception of the population that the judicial system and law enforcement agencies apply the law equally to all identity groups. (S/PD)(CA)
- Assessments by human rights or other independent professional organizations about the fairness of the judicial system. (EO/ direct observation of court proceedings)
- The staffing of the judiciary, law enforcement agencies, and penal system is reflective of the demographic composition of the broader society. (SA) (S)

Access to justice

- Right to legal counsel is recognized by law. (EO)
- Laws, codes or other normative acts set forth a standard timeframe by which persons detained shall be given access to a lawyer. (EO)
- Individuals are regularly informed of their right to counsel at the time of arrest or detention. (EO) (See ABA)
- Extent of availability of legal aid or public defense. (EO)
- Percent of population at least half-a-day removed from nearest court house or police post. (SA)
- Number of interpreters per 100,000 minority language population. (SA)
- Percent of court cases dropped due to inability of victim to pay. (SA) (S/PD)
- Corruption in public office.
- If available, use Transparency International Percent of citizens reporting that a gift or informal payment is required to obtain:
  - A government service
  - A government job
  - To avoid arrest or a fine by police or to pass through a police checkpoint. (S/PD)
- Percent of businesses reporting that a 'gift' or informal payment was required to obtain:
  - A construction permit
  - An import license
  - An operating license (S/PD)
- Public perception that corruption has lessened, increased or stayed the same. (S/PD)

### **Societal Support for Rule of Law**

Support for peaceful resolution of disputes from social attitudes and norms (By identity group)

- Extent of voluntary compliance with the law. (S/PD)
- Percent of the populace who would consult with a legal advisor and use the formal court system if they have a dispute. (S/PD)
- Knowledge of population about their legal and civil rights and the legal process, including how to access the legal system. (S/PD)



- Belief that justice is administered fairly by members of other identity groups (by identity group). (S/PD)
- Efforts to arrest identity group leaders who commit serious crimes are violently resisted by their identity group.

Strength of legal profession

- Laws and normative acts establish the independence of the profession and sets forth professional standards and ethics that are binding. (EO)
- Cases have been successfully brought to court involving claims that the independence of lawyers has been violated through interference or intimidation by state authorities or non-state actors. (EO)
- There is a process of accreditation to enter the legal profession and for sanctioning misconduct. (EO)
- Number of practicing lawyers and other legal advisors (such as notaries) per capita (by identity group). (SA)
- Access to continuing legal education programs and practical training/apprenticeship (by identity group). (SA)
- Presence and strength of professional associations, such as a Bar Association, for members of the legal profession. (EO)

## CHAPTER 10

# HUMAN TERRAIN TEAMS: AN ENABLER FOR JUDGE ADVOCATES AND PARALEGALS<sup>1</sup>

*There can be no government without an army, no army without money, no money without prosperity, and no prosperity without justice and good administration*

--Abu Muhammad Abdullaah Ibn Qutaybah Ad-Dinawaree<sup>2</sup>

### I. Introduction.

The team leader could be an active or reserve component officer, possibly even a retired military officer with a primary duty of ensuring the integration of human terrain analysis with the Military Decision Making Process.<sup>3</sup> The team will probably have at least two social scientists, one with an emphasis on ethnographic/social science research and analysis and the other with a fluency in the indigenous language to facilitate focus groups with the local population.<sup>4</sup> Other team members will be military human terrain analysts trained in debriefings and data research and military terrain researchers that integrate the human terrain research plan with the intelligence collection plan.<sup>5</sup> This is what the Human Terrain Team (HTT) looks like.

### II. Background.

Looking at the collective experiences of recent special operations forces deployments to Iraq tasked to conduct foreign internal defense (FID), the reality is that navigating the socio-cultural landmines between the Iraqi security force apparatus and the Iraqi judiciary is time and resource intensive. Successfully discerning the finer aspects of social science armed only with a law degree was probably more a function of luck than of deliberate planning. As noted elsewhere, but for the comparable HTT—like capabilities of the Operational Detachment Alphas (ODA), the odds of success of many initiatives would have been very low.<sup>6</sup> Realizing that the majority of deployed judge advocates and paralegals will not have the support of ODAs in accomplishing their legal support missions, Future Concepts Directorate (FCD) offers this practice note in the hopes of identifying an additional enabler that can be leveraged to accomplish the complex missions that

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<sup>1</sup> LTC Dan Tanabe, Currently Deputy Director, Future Concepts, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The author wishes to thank the following individuals for their assistance during the preparation of this article: Lieutenant Colonel Chuck Poche, Lieutenant Colonel Jay McKee, Mr. Patrick O'Hare, and Major Joe Orenstein.

<sup>2</sup> This quotation is historically attributed to this Ninth century Islamic scholar. *See, e.g.* Malik Qasim Mustafa, "The Responsibility to Protect a Fragile State: A Case Study of Post-Intervention Afghanistan,"

[http://catalogo.casd.difesa.it/GEIDFile/THE\\_RESPONSIBILITY\\_TO\\_PROTECT\\_A\\_FRAGILE\\_STATE%C3%8A\\_A\\_CASE\\_STUDY\\_OF\\_POST-INTERVENTION\\_AFGHANISTAN.HTM?Archive=191548091972&File=THE+RESPONSIBILITY+TO+PROTECT+A+FRAGILE+STATE%A0+A+C](http://catalogo.casd.difesa.it/GEIDFile/THE_RESPONSIBILITY_TO_PROTECT_A_FRAGILE_STATE%C3%8A_A_CASE_STUDY_OF_POST-INTERVENTION_AFGHANISTAN.HTM?Archive=191548091972&File=THE+RESPONSIBILITY+TO+PROTECT+A+FRAGILE+STATE%A0+A+C) (last visited July 23, 2010).

<sup>3</sup> Human Terrain System Information Briefing presented to the Brigade Judge Advocate Mission Primer, Rosslyn, Virginia, Dec. 16, 2009.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *See* LTC Dan Tanabe & MAJ Joe Orenstein, *Integrating The Rule of Law with FID in Iraq*, Special Warfare Magazine, Nov.-Dec. 2009, at 7-11. Since 2003, ODAs deploy more frequently on shorter deployments than conventional units, but usually return to the same deployed location with the same enduring partnered FID force creating a practical equivalent for that specific location to the academic expertise of a social scientist.

Judge Advocates and paralegals invariably encounter in deployments. That enabler is the HTT which is discussed in detail below.

This practice note is neither doctrine; nor “rocket science” but rather evolved from an attendance at an interdisciplinary conference where an anthropologist presented a narrative entitled “Judicial Practices and Rhetoric of Memory in Gaza Strip.”<sup>7</sup> This narrative provided an in-depth comparative analysis between the formal judicial system of the Palestinian Authority, and informal tribal judicial systems in Gaza.<sup>8</sup> The final determination was that the informal judicial system was actually undermining the formal judicial system rather than complementing it.<sup>9</sup> While the means by which this determination was reached are beyond the scope of this note and most Judge Advocates’ expertise, for purposes of context this practice note will try to describe the methodology used.

The anthropological approach initially established a historical context through a historical analysis of social/political disruptions as well as physical/geographical migration and relocation.<sup>10</sup> With this context established, data was collected across generational lines on specific topics concerning individual values and national identity, as well as data concerning case adjudications for similar type cases in both the formal and informal judicial systems.<sup>11</sup> The analysis of this data within this historical context was able to demonstrate that the tribal values associated with the informal judicial system, that presumably would have complemented the formal judicial system, had been significantly altered and politicized.<sup>12</sup> In effect, the informal judicial system had become a façade to circumvent the formal judicial system.<sup>13</sup> Specifically, that norms and values of the elder generation pre-1948 Gaza associated with tribal social construct were strikingly different from the younger generation of post-1948 Gaza.<sup>14</sup> Further, that the pre-1948 norms and values that were assumed to exist in the informal judicial system had since been replaced by the politicized post-1948 norms and values as reflected in the polling comparisons and backstopped by the case adjudication analysis.<sup>15</sup> The faulty assumption regarding the tribal informal judicial system allowed the legitimization of a means to circumvent the formal judicial system and instead undermines the public trust in the formal judicial system and ultimately the Palestinian Authority.<sup>16</sup>

This interesting narrative leads one to think that an anthropological approach could be useful in many of our legal support mission-sets, since in many instances we are attempting to work “by, with, and through” a partnered force through their system. A quick internet search found the Human Terrain System which was established in 2006 with its first HTT deployed to Afghanistan in 2007.<sup>17</sup> With the assistance of the Director of the Center for Law and Military Operations (CLAMO), a query was made of the data mine of Lessons Learned (LL) and After Action Reports (AAR) for the past year. It was discovered that only one AAR mentioned HTTs and only because the members on the HTT had concerns of criminal jurisdiction with the recent implementation of The Security Agreement between The United States and Iraq.<sup>18</sup> Inferring that the silence concerning HTTs in so many AARs reflects a knowledge gap between HHTs and BCT judge

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<sup>7</sup> Christine Pirinoli, Universite de Lausanne – Institute d’Anthropologie et Sociologie, Narrative at the Franklin College Intersections of Law and Culture Conference (Oct. 4, 2009), this is part of a larger book entitled, *Jeux et enjeux de memoire a Gaza* [Collective Memory and National Identity: Gaza] (May 2009), see <http://www.lcdpu.fr/livre/?GCOI=27000100250790> (last visited July 22, 2010).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> <http://humanterrainsystem.army.mil/default.htm> (last visited July 23, 2010).

<sup>18</sup> E-mail from LTC Poche, CLAMO Director, to LTC Tanabe, Deputy Director FCD (Oct. 28, 2009, 09:10 EST)(on file with author).

advocates and paralegals,<sup>19</sup> FCD hopes that this practice note will at a minimum push Judge Advocates and paralegals to “think outside of the box” and employ their adaptive thinking skill-set and take advantage of the HTT enabler.

### III. What is and is not an HTT?

In a broad sense, an HTT is the fundamental component towards “anthropologizing the military.”<sup>20</sup> HTTs “are composed of military personnel, linguists, area studies specialists, and civilian social scientists.”<sup>21</sup> The members of an HTT are “recruited and trained as a team for a specific region, then embedded with their supported unit” which normally is a brigade combat team (BCT).<sup>22</sup> Once embedded, the BCT commander “determines the extent of the HTT’s interaction and relationships with the rest of the BCT staff and subordinate units.”<sup>23</sup> The HTT can be sub task organized into smaller teams to support subordinate units based on mission requirements.<sup>24</sup>

HTTs are not covert or clandestine intelligence enablers and do not conduct human intelligence operations or close target reconnaissance.<sup>25</sup> HTTs are also not civil affairs or civil military operations enablers and do not conduct infrastructure project management.<sup>26</sup> Lastly, HTTs are not mobile cultural training teams similar to the enablers that exist at the Defense Language Institute, so they do not “provide schoolhouse pre-deployment cultural training.”<sup>27</sup>

HTTs have the capability to provide social science advice “on economic development, political systems, tribal structures,” conduct research on relevant topics presented to the HTT by the brigade commander and staff, as well as reach back to the socio-cultural human terrain mapping database.<sup>28</sup> Recently an HTT was able to provide a company commander tribal mapping and market flow for the specific area of operation which allowed the company commander to understand how the different tribes were interrelated.<sup>29</sup> HTTs as part of the HTS also have direct links to the Department of State (DOS) via the HTT liaison officer embedded in the DOS Humanitarian Information Unit.<sup>30</sup>

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<sup>19</sup> “Brigade and regimental combat teams currently deployed to Iraq and Afghanistan often lack the operationally relevant socio-cultural knowledge and expert staff necessary to optimize their military decision-making process... While processes and organizations exist to assist commanders in visualizing friendly and enemy forces, no similar system exists for providing understanding of the local civilian population. This deficiency is felt most by the battalions, companies, platoons, and squads that are closest to the local population in their daily tactical actions.”

<http://humanterrainsystem.army.mil/overview.html> (last visited July 23, 2010). Secretary of Defense Robert M. Gates, Landon Lecture Address at Kansas State University (Nov. 26, 2007) (transcript available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1199>) (last visited July 23, 2010).

<sup>20</sup> Secretary of Defense Robert M. Gates, Landon Lecture Address at Kansas State University (Nov. 26, 2007)

(transcript available at <http://www.defenselink.mil/speeches/speech.aspx?speechid=1199>) (last visited July 23, 2010).

<sup>21</sup> <http://humanterrainsystem.army.mil/default.htm> (last visited July 23, 2010).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Afghan Commander AAR Book, Currahee Edition at 30 (electronic version available at <http://cc.army.mil>) (last visited July 23, Sep. 2010).

<sup>25</sup> <http://humanterrainsystem.army.mil/default.htm> (last visited July 23, 2010).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> <http://humanterrainsystem.army.mil/default.htm> (last visited July 23, 2010).

<sup>29</sup> Afghan Commander AAR Book, Currahee Edition at 30 (electronic version available at <http://cc.army.mil>) (last visited July 23, Sep. 2010).

<sup>30</sup> <http://hiu.state.gov> (last visited July 23, 2010).

#### IV. Why Use an HTT?

Training and Doctrine Command (TRADOC) recently published the Operational Environment (OE) 2009-2025.<sup>31</sup> This publication identifies trends to help describe the current and foreseeable OE in which the Army will conduct missions. While some identified trends may be new, they are largely restatements of a reality with which Judge Advocates and paralegals are all too familiar. For purposes of this note, I'll present a couple of these trends that I think will begin to build the context that will illustrate the enabling capability of an HTT.

One trend identified in the OE is a notion of “cultural standoff” whereby an adversary will employ asymmetric tactics that seek to alienate the local population from U.S. forces through perceptions that U.S. forces are violating cultural norms.<sup>32</sup> Likewise, the OE identifies a competition of “cultures, civilizations, and associated ideologies” that raises the concept of “human terrain” on a level equal to, if not higher in importance to, mission accomplishment than physical terrain, for “Culture and ideology may be the center of gravity in future conflict.”<sup>33</sup>

The Australian Army has identified similar trends in their Army's Future Land Operating Concept.<sup>34</sup> In the chapter that discusses “Indigenous Capacity Building” the Australians note the significance of cultural sensitivities and how this knowledge could help identify and empower those indigenous leaders and traditional structures that will deliver effective outcomes for the local population.<sup>35</sup> On the other end of the spectrum, moving towards lethal effects, the Australians identify a concept of “Discrimination Threshold.”<sup>36</sup> This concept relies heavily on human terrain to define culturally where the boundary is between acceptable and undesirable outcomes when prosecuting targets.<sup>37</sup>

The Army Capstone Concept<sup>38</sup> (ACC) broadly describes the capabilities the Army will require to meet the threats and adversaries envisioned in the OE. The ACC proposes a methodology that “is an interdependent, continuous, and simultaneous cycle of action” that seeks to “develop the situation through action.”<sup>39</sup> This methodology's implied task is to understand the particular OE to a degree of familiarity that will allow operators to set conditions, if necessary shape, then assess for further adaptation. If, while you are attempting to accomplish this implied task, the adversary is employing the previously mentioned asymmetric tactic of “cultural standoff” then it's probably a good idea to gather as many available tools for your Operational Law kit bag in order to assist your commander in disrupting your adversary's decision making cycle and overwhelm their operational tempo.

One such available tool is the HTT. What better tool to employ and leverage social and anthropological understandings of your particular OE, especially if the local population is the center of gravity? Just as commanders and other members of the battlestaff will generally defer legal issues to their Judge Advocates as the legal subject matter expert (SME), cultural issues should also be deferred to the relevant SME. First, however, Judge Advocates need to bring the SMEs to the table and one can't do this if one doesn't know who they are or where to find them. Once found, and effectively employed, an HTT could enable the unit to not only defend against the “cultural standoff” tactic, but eventually be able to counter this tactic, employ it against the adversary and isolate them from the population, allowing the unit's targeting methodology to

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<sup>31</sup> TRADOC, Operational Environment 2009-2025(v6).

<sup>32</sup> *Id.* at 8.

<sup>33</sup> *Id.* at 19.

<sup>34</sup> Director Future Land Warfare and Strategy – Australian Army Headquarters, Adaptive Campaigning 09 (Sep. 2009).

<sup>35</sup> *Id.* at 54.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.* at 19-20.

<sup>38</sup> TRADOC Pamphlet 525-3-0, Military Operations, The Army Capstone Concept (DRAFT), ver. 2.7 (21 September 2009).

<sup>39</sup> TRADOC, Army Capstone Concept (Sep. 14, 2009). The acronym associated with this logic methodology is UAACT or UA<sup>3c</sup>CT, which stands for Understand, Act, Assess/Adapt, Consolidate, and Transition.

remain below the “Discrimination Threshold” as unit applies lethal and non-lethal means and effects in prosecuting targets and accomplishing mission.

As one “peels back the onion” with an HTT enabler, like the Palestinian judicial system study mentioned earlier, current reporting from Afghanistan also shows some possible false assumptions. In particular, the emerging orientation towards tribal engagement is drawing warnings from the HTS. Social scientists familiar with Afghanistan are presenting data that aligning a new strategy along tribal affiliations “is deceptive” for [m]aybe those groups were once tightly-knit. But decades of war with the Soviets and with the Taliban has changed all that.”<sup>40</sup> As pointed out recently by the British Military, “[a] little knowledge can be dangerous, masking important nuances and subtleties...[f]requent reference to subject matter experts may be necessary.”<sup>41</sup>

## **V. How an HTT Might Be Employed.**

After the evening commander’s update brief, the battle captain hands you a daily FRAGO that tasks your BCT to develop a plan to integrate the informal tribal court system in your province with the formal court system. The battle captain is giving you a heads up since he’s pretty sure the S3 is going to “pin the rose on you” to brief the BCT commander on how the BCT plans to accomplish this specified task.

As you begin to think about all the possible implied tasks, you recall the numerous reports that identified the lack of communication between the informal court leaders and the formal court judges, similar to the communication problems between the police and the investigative judges on your last deployment.

Your figurative light bulb flickers towards illumination and a viable solution, as your thoughts focus on how to get these two sets of individuals to communicate with one another. Immediately you begin to write yourself notes on coordinating a time and place, coordinating security for the meeting, coordinating the logistics for the meeting, etc...and so goes your initial plan towards holding this “grand meeting of the minds” between the informal tribal court leaders and the formal court judges. As you begin to conceptualize how to set the conditions for success or to avoid disaster the data you pull from your legal database from your predecessors begins to show a troubling picture. You realize that neither sets of individuals, tribal judges or formal judges have ever been extensively targeted by the insurgents—so fear isn’t a factor, and even more troubling, all sets of individuals appear to reside in close proximity of each other—so logistics isn’t a factor. You begin to wonder if there is something else that is preventing these sets of individuals from communicating with each other.

As you dwell on this thought, you walk into Ms. Preston, one of the anthropologists on the BCT HTT, while exiting your office. As a matter of courtesy you ask Ms. Preston how her trip went today, knowing that she had some apprehensions of doing focused polling since the recent death of a fellow HTT member from an IED attack last month. Ms. Preston tells you that the focused polling went well and that they were able to determine that future CERP projects given in “the name of the mosque” would be acceptable to the tribal elders since such “gifts” are considered “gifts to god” and would not put the villagers at risk from the insurgents. Her response triggers a synaptic event and you quickly relay to her your current thoughts on your recent tasking. After a few seconds, Ms. Preston tells you that there might be something else along tribal lines that are causing these two sets of individuals from talking with one another.

Immediately after exchanging best regards, you walk to the BCT commander and explain to him that in order for you to accomplish this tasking, you’ll need assistance from the HTT. After the “old man” blesses off on your request you set the wheels in motion.

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<sup>40</sup> Noah Shachtman, *Army Researchers Warn Against Tribal War in Afghanistan*, Danger Room, Nov. 30, 2009, available at <http://www.wired.com/dangerroom/2009/11/army-researchers-warn-against-tribal-war-in-afghanistan/#more-19988> (last visited July 23, 2010).

<sup>41</sup> Ministry of Defense Joint Doctrine Note 1-09, *The Significance of Culture to The Military*, at I-7 (Jan. 2009).

As you reach out to the HTT to sit down and explain the tasking and desired endstate, you also work with your S2 to see if the operational management team that runs the BCT's human intelligence teams has any background information on the potential host nation participants. Taking the unclassified information provided to you by your S2 and giving it to the HTT, the HTT begins to analyze this information along with the tribal mapping. Based on this initial analysis, the HTT establishes focus areas for near-future local population polling to assess and backstop their initial thesis.

Over the next week the HTT travels out to the towns from which the tribal judges and formal judges either reside or operate in while performing their judicial functions and conducts the focused polling. After the analysis of the local population polling, the HTT advises that key members of the informal and formal court systems are of tribes that are currently undergoing a tribal mediation over a very lucrative patch of land that is currently being used to canalize water to multiple towns.

Armed with this information, you begin to conceptualize how you might leverage this information to set the conditions for your mission's success. Maybe you can meet separately with each group first and offer to them the BCT's assistance towards a solution on the land/water dispute in exchange for worthwhile discussions between the two groups? Maybe you can bring the two groups together along with the tribal mediators and in the presence of all the stakeholders offer them the BCT's assistance on the land/water issue if they can agree to earnestly discuss the informal/formal court issues? Then it dawns on you that one course of action may be more culturally acceptable than the other, and so you depart your office to find Ms. Preston for more HTT expertise. While realizing this is a hypothetical example of how an HTT could enable the success or avoid disaster to an operational law mission, it does present the possibility. This possibility takes on a significance when faced with the realization that our "egocentric thinking—our unrealistic sense that we have fundamentally figured out the way things actually are" can be our biggest hindrance.<sup>42</sup>

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<sup>42</sup> Foreign Internal Defense Joint Integrating Concept (FIDJIC)(v9) at 29. FIDJIC recognizes that the ability to effectively expand the capabilities of FID, leaders will need to exercise the ability to "think critically" enabling them to momentarily step back and determine if the identified problem/challenge has been accurately or fully articulated within the specific operating environment. Often in such moments, reaching out to SMEs not normally associated with military operations can reap benefits of fresh insight.

## CHAPTER 11

# RULE OF LAW NARRATIVES

*Editor's Note: This chapter contains practical discussions of actual experiences. The following articles describe a variety of recent rule of law projects in both Afghanistan and Iraq, as seen through the eyes of the Judge Advocates, and civilians that conducted them. Our hope is to provide an idea of the wide variety of projects being performed at many levels by various types of organizations. These descriptions may not be applicable in all environments. Most importantly, these are descriptions of their own experiences as seen through their eyes. The descriptions are not doctrine and do not represent any official positions of the units, organizations or countries the authors work for.*

### I. Afghanistan

#### A. Operation “Tombstone” and Summary of JAG Responsibilities

*Editor's Note: The following article describes a pilot program implemented by the Asymmetric Warfare Group, and others and provides an example of how to establish close ties with host nation prosecutors thereby allowing these prosecutors to secure convictions based upon their own criminal procedure standards and timelines.<sup>1</sup>*

Operation “Tombstone” is a program developed by AWG (Team Tombstone) in coordination with DOS-International Narcotics & Law Enforcement (INL), CJTF Paladin, CJTF-82, JTF-435, TF Rakkasans, and Afghanistan’s National Directorate of Security (NDS) and Office of the Attorney General (OAG) and designed to address the ‘revolving door’ detention of insurgents (real or perceived) in Afghanistan.

Detainees captured by U.S. forces are transferred to Afghan authorities more frequently than in Iraq due to different detention regulations and procedures. In Afghanistan, and specifically in Regional Command-East (RC-E), detainees transferred from U.S. to Afghan custody are typically prosecuted by the OAG attorneys that work with the NDS. The conviction rate of former U.S. detainees is low due to a variety of reasons, namely (1) the lack of material evidence present/preserved against suspects and (2) the lack of guidance from Afghan legal authorities to prosecutors that evidence/suspects seized by U.S. forces under international law of armed conflict rules are not necessarily bound by Afghan procedural timelines.

Team Tombstone spent roughly 45 days embedding with battalion-level units in RC-E to examine local and provincial NDS prosecutions and then presented its findings to the various levels of U.S. military leadership. The common belief previously held was that the low conviction rate was due to lack of a criminal prosecution system. However, our findings indicated that a criminal prosecution system existed, but that the evidence of and witnesses to insurgency-related crimes were not processed in accordance with Afghan procedure or not collected at all. As a result, Afghan prosecutors have been reluctant to present weak cases to the judiciary. Even if prosecutors present weak cases at trial, judges typically acquit or sentence insurgents to time served.

Team Tombstone developed a plan to address the gap between U.S. detention, evidence transfer, and Afghan criminal prosecution. The plan is premised on partnership, security, and sustainability—that U.S. and Afghan partners are able to conduct evidence gathering and case development in a secure setting and that the program continues unabated as U.S. forces draw down and civilian enablers emerge. The plan consists of identifying, vetting, and empowering the primary legal figure responsible for developing and prosecuting terrorism cases: NDS Prosecutors. These officials are most effective at or near the point of capture (or

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<sup>1</sup> MAJ Griffin P. Mealhow deployed to Afghanistan with the Asymmetric Warfare Group from October 2009 through April 2010.



evidence/intelligence exploitation) based on the fact that evidence and witnesses must be identified and exploited soon after a suspect is arrested/detained to meet the Afghan criminal procedure timeline.

Operation Tombstone includes 1 NDSPD embed at FOB Salerno and 2 NDSPD embeds at the CJTF Paladin CEXC Level II lab at Bagram. These prosecutors, or “Saranwals,” technically answer to the Attorney General but are detailed to the NDS Prosecution Department (NDSPD). Since NDS (a national intelligence organization) is responsible for the internal and external security of the GIRoA, NDSPD works closely with NDS intelligence and investigation departments to develop cases. The Tombstone pilot program is designed to test the hypothesis that by bringing U.S. BSOs and operators in closer contact with NDS Prosecutors—allowing them to live and work on the forward operating base (FOB)—the prosecutors will have the support and security they need to perform their work and have the oversight necessary to prevent outside influences from corrupting their decisions. Ideally, as security and stability increases, the NDS Prosecutors can return to a normal work environment provided and secured by GIRoA.

At the Brigade and Battalion-level, MPRI contractors known as Law Enforcement Professionals (LEP) provide subject matter expertise in evidence gathering/preservation, investigation, and witness / suspect interviewing techniques to the command and Afghan counterparts. As the role of NDS Prosecutors continues to emerge, today’s COIN-experienced Judge Advocates are needed to facilitate, observe, collect, and share best practices in insurgent prosecutions by host nation (HN) prosecutors. A basic understanding and familiarity with HN criminal law and procedure is required. The “Tombstone” model in Afghanistan provides one example of the means to closely liaise with HN Prosecutors while enabling them to enforce Afghan rule of law.

Given a basic knowledge of Afghan criminal (anti-terrorism) law and the NDS Prosecutor that executes it, the below list includes the specific areas that a COIN-focused JA is most value-added in insurgent prosecutions:

- Intelligence to Evidence: (ICW Fusion Cell, S2, S2X, HCT, Technical Surveillance, CSG, Interrogators, BN and Co LNOs to Brigade, CEXC/CSE Level 1, LEP-IS) to advise what types of intelligence would be helpful to declassify to improve a HN investigation/prosecution packet, and/or what intelligence (information) could lead HN investigators/prosecutors to evidence without necessarily declassifying sources and methods.
- Exploitation: (ICW CEXC/CSE Level 1, JEFF-5, DOMEX, TF Biometrics) advice in identifying the materials seized from OBJ that could be exploited and then the process/means to transfer to NDSPD for use as evidence in trials according to recommendations by NDSPD and Afghan judiciary, rather than sent to higher labs for redundant exploitation.
- Investigations: (ICW PMO, LEPs, FTF, ODA, TF, ANSF) advice on types of information, materials, and witnesses that are useful in HN prosecutions (may or may not be similar to U.S.-style prosecutions) how best to collect and preserve evidence that will support the HN Prosecutor’s needs for eventual presentation at trial.
- Interrogations/Law Enforcement Interviews: (ICW S2X, LEPs) assist development of SOPs for combined or partnered interviews that are video/audio recorded to review and analyze techniques used by NDS Prosecutor.
- Afghan Criminal Procedures: (ICW NDSPD Directors, NDSPD embed, Interpreters, DOS/INL, USFOR-A Rule of Law ) advise on military regulations and procedures; coordinate with BN/FTF leadership/enablers on the benefits and limitations to following Afghan criminal procedures, codes, and laws; facilitate case preparation with the NDS Prosecutor; explain nuances involved in U.S. detention policy vs. Afghan pretrial confinement; advise on venue choices, decision-making, and drafting change of venue requests; develop SOPs to facilitate uniform, theater-wide guidance.
- Transportation: (ICW LEP, TF Rakkasan, 82<sup>nd</sup> CJ3-Air, INL Airwing, Air Interdiction Unit (AIU), CSTC-A) advise on different options of military, DOS, and Afghan-mentored air and ground transport

systems and procedures to facilitate; assist with coordinating transport of detainees to GIROA prison for pretrial confinement depending on venue.

- **Funding:**(ICW JTF-435, USFOR-A, CJTF-82, AOB/203 Kandak) make recommendations on language and funding sources (i.e., ASFF, ACSA) and advocate for a more permanent line of funding for NDSPD embeds.
- **KLE:** (ICW TF Rakkasan, CJTF-82, CJTF Paladin, USFOR-A, IJC, CSTC-A, JTF 435, CJSOTF, TF, NATO, DoS/INL and NDSPD) JA personnel are present at each level and connect key players to proper points of contact. At the tactical level, JAs assist the Focused Targeting Force (FTF) and Law Enforcement Personnel (LEP) with developing evidence (whether on the objective or deriving from intelligence) and cases, ICW NDS Prosecutor embeds. At the operational level (BCT), JAs provide background and continuity on prosecution-based targeting efforts to key staff and sub-command elements. At the strategic level (Division and higher), JAs provide advisory assistance on prosecution-based targeting efforts, to include authorities, funding sources, logistical support, measures of success, and network with key interagency and host nation officials. Units and organizations should look to local and provincial NDS Prosecutors for advice on specific legal issues related to actual case prosecutions. Conversely, issues or problems experienced by the NDS Prosecutor embeds that need attention of NDSPD or U.S. leadership will need to be championed by the NDS embed's primary "advocate" and facilitator, most likely a JA. This NDSPD "advocate" or liaison officer (LNO) may need to track the issue up through USFOR-A/ISAF Rule of Law, DoS/INL, and JTF-435 to engage directly with NDSPD HQ in Kabul.

## **B. From The Battlefield To The Courtroom: "Prosecuting Insurgents In Afghanistan"**

*Editor's Note: The following article describes the Afghan judicial system and the challenges U.S. forces face in securing prosecutions. The article describes how CJTF-82 dealt with the issue and sets forth a framework for the way ahead.<sup>2</sup>*

As the Government of the Islamic Republic of Afghanistan (GIROA) strives to promote the rule of law and cut down on corruption, enemy fighters, facilitators, suppliers and supporters continued to benefit from a fledgling justice system's lack of resources or support needed to protect the Afghan populace. Afghan justice lacked effective means to hold insurgents accountable for violent crimes that had claimed the lives of countless Afghans, Americans and members of the Coalition Forces. Justice institutions lacked transparency and accountability on the part of Afghan law enforcement or the Afghan judiciary. There was a perception among many that the Afghan legal system was a "revolving door" for releasing captured insurgents.

This was the state of affairs in June 2009 when the 82nd Airborne Division assumed command of Combined Joint Task Force-82 and International Security Assistance Force (ISAF) Regional Command- East. Combined Joint Task Force-82's rule of law objective was to partner with the Afghans to develop a system for successfully prosecuting insurgents, removing them from the battlefield. An incarcerated insurgent cannot make or emplace IEDs, bribe public officials or undermine the legitimacy of GIROA. However, creating and executing a plan to increase Afghan judicial capacity was difficult and would require a change in attitude and approach towards the insurgency. The CJTF-82 plan relied heavily on two points, (1) properly collected and presented evidence would shift accountability to the judiciary to answer for inconsistent verdicts; and (2) developing working relationships with Afghan national level investigators and prosecutors would vastly improve the level of transparency and visibility within the present legal system. Any transition would have to carefully consider past experiences with the Afghan justice system before moving forward.

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<sup>2</sup> MAJ Kaiesha N. Wright and CPT Stephen Patten were members of CJTF-82 Afghan Prosecutions Team.

## **1. Trial And Error: Lessons Learned from the Field**

Presently, in Afghanistan, insurgents are almost exclusively prosecuted at either the Afghan National Detention Facility (ANDF) or at the provincial and district courts. Neither system is effective. Transparency and accountability are limited. However, it was the trial and error approach at these courts that yielded valuable lessons on how to develop stronger cases that comply with Afghan law and in the near future will lead to the successful removal of insurgents from the fight.

### **a. ANDF Trials and the Development of “Revolving Door Syndrome”**

Insurgents are often captured on an objective placing IEDs or engaging in small arms fire. These insurgent acts are also violations of the Afghan criminal law. Many of the most dangerous insurgents are transferred to the Detention Facility In Parwan (DFIP).

Upon arrival at the DFIP, detainees are again medically screened and are biometrically enrolled. Meanwhile, their personal property and any evidence collected from the objective are logged into and stored at an evidence room. After sixty (60) days the Detainee Review Board (DRB) will decide whether continued internment is appropriate. This occurs when a detainee meets the objective criteria for continued internment, a discussion of which is beyond the scope and classification of this article. If continued internment is recommended, additional reviews are held every six (6) months. A second option is transferring detainees into GIRoA custody for criminal prosecution at the Afghan National Detention Facility (ANDF).<sup>3</sup>

On March 2, 2008, President Hamid Karzai issued a Presidential Decree creating an inter-agency delegation comprised of representatives from the Afghan Supreme Court, Ministry of National Defense (MOD) and National Directorate of Security (NDS).<sup>4</sup> President Karzai assigned the delegation “to thoroughly and carefully check the complaints, problems, documents and files of the prisoners transferred from the prisons in Guantanamo and Bagram and submit their report to the Presidency.” If a decision is made to transfer a detainee to the ANDF, the detainee’s name will be submitted for consideration by the Aloko Delegation which visits the DFIP monthly. The delegation consists of six members divided into two groups of three screeners. Each group meets with nine detainees and reviews an unclassified Report of Investigation (ROI).

Prior to transfer, the ROI is delivered to the Foreign Disclosure Office for approval and is then sent to Kabul for translation into Dari. Once translated, the ROI and detainee are transferred to the ANDF. This procedure just begins the arduous and often unpredictable process of Afghan prosecution. Evidence files created from formerly classified information are generally weak prosecution files. This highlights the need to create standardized and strong evidence files from the point of capture that would follow the detainee through the entire legal process.

Next, the transferring agency or task force conducting detention operations at the DFIP, presently Task Force Protector, notifies the Afghan Detention and Corrections Cell (ADCC) about the number of detainees to be transferred. The ADCC translates evidentiary files, typically a Report of Investigation (ROI), into Dari (if not previously arranged by the Detainee Assessment Branch located at the DFIP). Near the day of transfer, the ADCC delivers a copy of the translated evidentiary files to the U.S. Embassy in Kabul. Three days prior to the transfer, the ADCC notifies the ANDF. The day before transfer, the ANDF sends an escort team to the DFIP that stays overnight and conducts rehearsal. As soon as transportation can be arranged ANDF escorts fly to the ANDF on U.S. helicopters with the detainees. Once at the ANDF, the transfer is made and GIRoA assumes custody of the detainees.

Following transfer, the U.S. Embassy provides the Aloko Delegation with a copy of the evidentiary files and the translated ROI. The ANDF then notifies the International Committee of the Red Cross (ICRC) and defense counsel. It is not uncommon for the Aloko Delegation to review the evidence file or ROI and release

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<sup>3</sup> Policy authorizing the transfer of detainees to ANDF.

<sup>4</sup> March 2, 2008 Presidential Decree.

the detainee pre-trial citing a lack of evidence or documentation even though the Aloko Delegation had already approved the case for prosecution when first shown the evidence at the DFIP.

After a detainee is transferred to the ANDF, an independent investigation of each detainee's case is conducted by Afghanistan's FBI equivalent, the National Directorate of Security (NDS). NDS investigates suspected violations of the national internal and external security law.<sup>5</sup> NDS has agents in all 31 provinces of Afghanistan to receive the ROI, any photographs and witness statements from U.S. and Coalition Forces. The investigating NDS agent uses internal forms to contact the provincial NDS office closest to the location of the offense or where the detainee was captured and requests any information about the detainee's alleged crime. The provincial office responds to NDS headquarters in Kabul with a summary of its findings. An NDS investigator and NDS prosecutor then interview the detainee.<sup>6</sup> An indictment is then drafted based on information provided by the provincial NDS office and U.S. authorities. Thereafter, NDS has 15 days to present the indictment to the Court.<sup>7</sup> If necessary, NDS can request that the Court grant an additional 15 day extension in order to complete the investigation.<sup>8</sup>

At the conclusion of the investigation, any evidence collected and statements taken become part of the indictment that is submitted to the Court. If the indictment is approved then the records contained therein is evidence for the Court to consider. When NDS recommends prosecution and the prosecuting Saranwal concurs, a minimum of 5 days notice of trial will be given to the detainee and defense counsel.<sup>9</sup> The defense counsel has little background on the case and little time to prepare for trial.

The trial court that hears detainee cases is located on the grounds of the ANDF within the Pol-e-Charkhi Prison Complex. The basis for charging and trying detainees is the 1987 Law on Crimes against Internal and External Security. The most often charged articles are respectively Article 5 (Subversive Activities), Article 23 (Assistance to the Forces of the Enemy) and Article 9 (Propaganda Against the Government).<sup>10</sup>

The International Legal Foundation-Afghanistan (ILF-A) provides criminal defense services to detainees at the ANDF. Initially established in August 2003, ILF-A maintains 13 offices across Afghanistan with 57 local defense attorneys. ILF-A has received \$2.9M in funding from the Canadian International Development Agency (CIDA) under a project spanning from June 2007 through March 2010. Private attorneys and members of the nearby Kabul Bar Association also represent detainees at the ANDF.<sup>11</sup>

CJTF-82 Judge Advocates had made multiple attempts to view trials at the ANDF in order to gain lessons learned on ways to improve the evidence collection process; identify any issues or concerns regarding the prosecution of cases (the need for mentorship or training of counsel and/or judges, resources availability, etc.); and establish a basis for holding the justice system accountable for its actions, particularly in instances where detainees are released or acquitted despite the presentation or existence of strong evidence. After all, this forum would provide the final resolution and accountability for those who had committed horrific acts against coalition, U.S. and Afghan forces, as well as civilians. However, there were several impediments to the execution of this critical endeavor, not the least of which included discouragement from U.S. organizations relying on unverified assertions of high level prohibitions on observing ANDF trials—the trials of the very insurgents who contribute to the contained instability of the GIRoA and adversely affect our mission.

There was some push back from Afghans as well. For example, a recent request to observe the trials was denied by the ANDF Legal Advisor, an ANA Soldier (and non-lawyer) who attends the trials himself. The

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<sup>5</sup> National Security Law of Afghanistan (2009).

<sup>6</sup> Article 38, Interim Criminal Procedure Code (2004).

<sup>7</sup> Article 36, Interim Criminal Procedure Code (2004).

<sup>8</sup> *Id.*

<sup>9</sup> Article 42, Interim Criminal Procedure Code (2004).

<sup>10</sup> Based on statistics prepared by CJTF-82 using the Afghan Detention and Corrections Cell ANDF Tracker.

<sup>11</sup> International Legal Foundation – Afghanistan website.

Legal Advisor refused to reduce his response to writing and instead stated that there is no schedule for when a trial will take place. Despite these obstacles, there were organizations and Afghans who supported our efforts to crack the code that had been in place for three years during which time ANDF trials were not being observed by U.S. personnel. For example, the Chief NDS prosecutor for Afghanistan did mention that express permission to attend ANDF trials could be granted by the Director General of NDS. Additionally, in a November 2009 meeting, ANDF and other Afghan judges and prosecutors welcomed the prospect of U.S. personnel observing trials. This sentiment is consistent with Afghan law which expressly requires open trials. Article 128 of the Constitution reads, "In the courts in Afghanistan, trials shall be held openly and every individual shall have the right to attend in accordance with the law."<sup>12</sup>

Things changed on Tuesday, 11 May 2010, when, with the help of the U.S. Judge Advocate assigned to mentor the 201<sup>st</sup> Afghan National Army Corps legal personnel, CJTF-82 personnel were finally able to observe the trial of a detainee at the ANDF. The experience was extraordinary and highlighted significant and legitimate evidentiary concerns that task forces, detention facility officials, and leaders should be aware of to improve the quality of evidence collection and development.

Since late 2007, the Afghan Detention and Corrections Cell (ADCC) has compiled records on the results of trials at the ANDF. By January 2008, ADCC was able to provide much insight into the charging and sentencing of detainees. The data revealed that few cases are heard each day. Typically, a three judge panel hears the cases of detainees. Their written verdicts, called verdict slips, include little relevant trial information. There is currently a lack of real-time feedback on ANDF trials.

Concerned by this absence of accountability and transparency, CJTF-82 Afghan Prosecutions Attorneys analyzed the strength of cases prior to transfer to the ANDF for prosecution and compared its analysis with the results of trials at ANDF. From April 2008 through September 2009 there was a steady increase of CAT III (weakest) cases being transferred to the ANDF. At the same time there were decreases in the transfer of both CAT I (strongest) and CAT II (borderline) cases. Concerned by this information the Afghan Prosecutions Team focused on the CAT III cases and observed several alarming trends. From April 2007 through September 2009 the number of CAT III acquittals rose considerably. More importantly, beginning in October 2008 the number of CAT III pre-trial releases had drastically increased.

Additionally, from October 23, 2007 through April 11, 2010 approximately 780 detainees were transferred to the ANDF from the now closed Bagram Theater Internment Facility (BTIF) and the current Detention Facility In Parwan (DFIP). Of those transfers 42% received actual jail sentences. Conversely, the other 58% were either released pre-trial, acquitted of serious offenses, received a sentence of time served or were released without even completing their sentence. Further, from 8-Aug-09 through 26-Oct-09, an alarming 71% of all detainees tried at the ANDF were either found not guilty or convicted and almost immediately released. The message was clear, the cases being sent to the ANDF contained serious evidentiary deficiencies. Reports from DFIP personnel detailed the detainee population's awareness that transfer to ANDF meant they would soon be released.

The lack of unclassified evidence, the absence of mentors for judges and the failure to monitor the court process over time has turned ANDF trials into a revolving door for returning insurgents to the battlefield. In fact, the DFIP has ceased transfers of detainees to the ANDF with the last transfer occurring in March 2010. Accordingly, the Aloko Commission no longer screens detainee cases. However, efforts are being made to prosecute detainees at the DFIP using Afghan judges and NDS prosecutors.

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<sup>12</sup> Constitution of Afghanistan (2004).

**b. Provincial and District Prosecutions “Down the Rabbit Hole”**

In Afghanistan, insurgents may also be prosecuted on the district or provincial level. By law, cases should first be brought at the district level.<sup>13</sup> In the absence of a functioning district court, cases may be initiated at the provincial level.<sup>14</sup>

The same criminal procedures are followed in district and provincial cases that are followed during the course of cases prosecuted at the ANDF. The police have 24 hours to report suspected crime to the saranwal (prosecutor).<sup>15</sup> The saranwal then has 15 days from the time of the arrest to present an indictment to the court.<sup>16</sup> If a timely request is made by the saranwal an additional 15 day extension may be granted.<sup>17</sup> Once the investigative phase is completed and the suspect is indicted, the saranwal has two months to try the suspect for all charges contained in the indictment.<sup>18</sup>

Charges involving insurgent activities are brought under the 1987 Law on Crimes against Internal and External Security and the 1976 Afghan Penal Code. District and provincial saranwals are free to seek indictments against insurgents, unlike the ANDF trials exclusively prosecuted by NDS. Frequently, these cases are initially investigated by civilian U.S. law enforcement professionals (LEPs) in conjunction with an Afghan law enforcement partner following a planned mission involving insurgent activity or in response to an insurgent making or emplacing IEDs, bribing public officials or otherwise undermining the legitimacy of GIRoA.

The majority of LEP-initiated cases contain photographs of the crime scene, statements by witnesses and are thoroughly investigated by U.S. standards. However, when a case is turned over to the police or a saranwal for prosecution it is quickly lost down the rabbit hole of the Afghan justice system. In the past, the act of turning over a case to the police or a saranwal for prosecution would typically signify the conclusion of the matter. This experience highlighted the need for U.S. LEP mentors to retain a copy of evidence packets turned over to the Afghans for follow-up on the case.

There are many reasons why cases are lost within the justice system. Bribery or threats of violence routinely lead to the release of insurgents from Afghan police stations and jails. Even strong cases against insurgents can be derailed as a result of political pressure. It is not unusual to learn that a case has disappeared in the hands of a saranwal in Afghanistan.

Even the filing system at most courts is problematic. For instance, cases throughout Afghanistan are prepared in paper form and are not stored in electronic databases. Courts file cases by name. In cases involving more than one suspect the files are merged making it nearly impossible to find the inserted cases.<sup>19</sup>

Whether the police or the saranwal are actively engaged in corruption or are succumbing to pressure from outside sources, they have mastered the “slow roll” or art of delay. LEPs often contact the local saranwal to check the status of a case or to request notice of the trial date, which is only obtained with much effort by the LEP, if at all.

Without question, the greatest challenge to prosecuting insurgents at the district and provincial level is tracking cases after they have been turned over to the Afghans for prosecution. LEPs have started requesting hand-receipts for case files and evidence turned over in an attempt to create some level of accountability. Still, the best approach to both developing and tracking cases would be to directly partner with Afghans on the investigation and prosecution of cases.

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<sup>13</sup> Chapter 4, Interim Criminal Procedure Code (2004).

<sup>14</sup> *Id.*

<sup>15</sup> Article 21, Interim Criminal Procedure Code (2004).

<sup>16</sup> Article 36, Interim Criminal Procedure Code (2004).

<sup>17</sup> *Id.*

<sup>18</sup> Article 6, Interim Criminal Procedure Code (2004).

<sup>19</sup> Report by CSSP personnel during the April 2010 Rule of Law Conference in Kabul, Afghanistan.

**c. Their System of Justice is Not Our System of Justice**

U.S. Soldiers and civilian law enforcement professionals are educated and experienced in the adversarial system of justice. The police detect and investigate crime and attorneys prosecute in court. However, Afghan law limits police to the detection of crime. Afghan *saranwals* (prosecutors) investigate crime remaining neutral and impartial until a formal indictment has been approved by a court of competent jurisdiction. A basic understanding of these fundamental differences is essential to the successful prosecution of insurgents in Afghan courts.

In November 2009, Army Judge Advocates participated in meetings with a group of Afghan judges and NDS prosecutors from various courts in Kabul, Afghanistan. The Afghan judges expressed concern over the manner in which evidence against insurgents was collected. Judges often inquired why an Afghan was not present at the point of capture or to take statements from witnesses who were there while the crime was committed. Both the lack of Afghan involvement and the absence of physical evidence were identified as grounds for releasing detainees pre-trial, findings of not guilty or inadequate sentences in light of the serious facts alleged at trial. It became clear that the successful prosecution of insurgents equated to an Afghan face collecting, exploiting and introducing evidence such as command wires, fingerprints and photographs in court as part of a combined effort with U.S. and coalition forces.

**2. Blazing a Trail to Afghan Justice Requires “A Change in the Way We Do Business”**

In January 2010, the Commanding General, CJTF-82 and Regional Command East (RC-East), issued a policy memorandum recognizing that all insurgents are criminal suspects and potential targets for prosecution under the laws of GIRoA.<sup>20</sup> However, if criminal prosecution was to serve as an effective tool for removing insurgents from the battlefield, intelligence personnel and law enforcement would have to collaborate efficiently from the detection of crime through resolution in the Afghan justice system. Collaboration between the groups would not happen overnight and instead would result from a change in attitude and approach toward the insurgency. The greatest impact on the criminal prosecution of insurgents would result from focusing on the areas of evidence collection and joint operations with Afghan investigators and prosecutors. In the words of the RC-East Commander, “This will not only assist in the training of Afghans to effectively prosecute crime it will allow U.S. forces to hold Afghan officials and institutions accountable.”<sup>21</sup>

**a. “Successful Prosecution Begins With Effective Evidence Collection”**

A successful transition would require a unified effort throughout the planning, execution and post-capture phases of operations. Therefore, it was necessary to proscribe the duties and responsibilities of those involved in the detection, investigation and prosecution of crime in a standard operating procedure. A collective effort produced the CJTF-82 Evidence SOP. CJTF-82 OSJA personnel spent months diligently drafting an Evidence SOP that would unify the efforts of task forces across RC-East.

Signed into effect by the CJTF-82 Commander in January 2010, the Evidence SOP requires that all CONOPs now include an evidence collection plan.<sup>22</sup> After evidence is fully exploited it must be carefully logged and securely stored until trial.<sup>23</sup> Case Management Teams are assigned to track criminal cases and evidence turned over for prosecution in the GIRoA court system.<sup>24</sup>

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<sup>20</sup> MG Scaparrotti’s memorandum dated 22-Jan-10, subject Evidence Development Policy.

<sup>21</sup> *Id.*

<sup>22</sup> CJTF-82 Evidence Collection Standard Operating Procedure dated 22-Jan-10.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

Proper evidence collection would result from practical hands-on training within each task force. Accordingly, Judge Advocates from the 82nd Airborne Division travelled to each AO in RC-East. There, task force commanders were briefed on the Evidence SOP and were provided the information necessary to effectively train their Soldiers.

**b. Partnering with NDS Will Remove Insurgents from the Battlefield While Simultaneously Building the Afghan Capacity to Prosecute Crime**

Many provinces in RC-East have been assigned to specific units or task forces. Frequently, the LEPs work directly with the ANA, the Afghan Uniformed Police (AUP) and the NDS to secure an objective, search the objective, and investigate insurgent activities, respectively. However, even highly capable units, backed by strong relationships with Afghan leaders, experience difficulty in tracking their cases through the Afghan court system. The absence of transparency in the prosecution phase of a case can lead to mistrust between U.S. and Afghan personnel and could eventually disrupt an otherwise harmonious relationship.

In early 2010, Judge Advocates from the 82nd Airborne Division, Combined Joint Task Force (CJTF) Paladin and the Asymmetric Warfare Group (AWG) further developed their relationship with NDS. Several trips were made to NDS headquarters in Kabul. What emerged was a CJTF-82 inspired, AWG and CJTF-Paladin implemented, pilot program named "Operation Tombstone." For the first time U.S. and coalition forces would partner with the Afghans in a coordinated effort to detect, investigate and prosecute insurgents on multiple fronts simultaneously.

For several weeks, Afghanistan's Chief NDS prosecutor, AWG and CJTF-Paladin personnel interviewed NDS investigators and prosecutors to be embedded with U.S. and coalition forces. After a rigorous vetting process three NDS agents were selected. The first was a 30 year veteran NDS prosecutor. He agreed to live and work on FOB Salerno where he could investigate, indict and prosecute insurgents with the assistance of law enforcement professionals and judge advocates from Task Force Rakkasan. The NDS prosecutor immediately went to work conducting interrogations at the FOB Salerno field detention site. His work quickly translated into active Afghan prosecutions.

Two additional NDS investigators were selected to work at Bagram's Combined Explosives Exploitation Cell (CEXC) where they would develop physical evidence against the insurgency under the mentorship of CJTF-Paladin. CJTF-Paladin's mission is to counter the influence of improvised explosive devices (IED) and networks in Afghanistan. The high-tech CEXC lab has the capacity to exploit evidence for fingerprints and other means of exposing the identity of bomb makers and emplacers. With two seasoned NDS agents to partner with U.S. and coalition technicians, there was now a greater likelihood that evidence collected by Soldiers in the field would be accepted in Afghan courts.

Ideally, partnered pilot programs like this will be started in all of the provinces. By continuing to develop methods to remove insurgents from the battlefield and into the courtroom for prosecution, Afghanistan will be safer and could one day possess the capacity to protect its citizens from the harsh violence of Taliban justice.

**C. Case Study April 2009: Support to the Informal Justice Sector in Helmand**

*Editor's Note: The following article gives the author's opinion on the way ahead in supporting the informal justice sector in Helmand Province. His views do not reflect those of anyone else, or the British Government. This article is included here to provide another perspective on the rule of law in Afghanistan.<sup>25</sup>*

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<sup>25</sup> The case study reflects efforts to support the informal justice sector in Helmand as of April 2009 and is authored by the Provincial Reconstruction Team Justice Adviser at that time, Fraser Hirst. It should be noted that since this case study was written there has been considerable progress within the justice sector in Helmand. This article expresses his own views and not that of the British Government.



## **1. Executive Summary**

During the period 2008/2009 there has been significant progress made in relation to support for the informal justice systems in Helmand. Structures and mechanisms have been put in place at a district level which aim to:

- address identified problems and concerns with the community justice systems, and
- strengthen links between the communities and government.

The foundations are now in place to build future development programs to support the informal justice sector. However, the support initiatives are still at a very early stage and it is essential that continued monitoring, support and technical assistance is provided to enable the program of support to be translated into positive and practical benefits for Helmandis.

## **2. Introduction**

This report provides: (i) an overview of the status and problems within the informal justice systems in Helmand as of April 2009 (with a focus on the districts outside Lashkar Gah); (ii) a summary of the initiatives to support the informal justice sector in Helmand; and (iii) a brief analysis of the situation and recommendations as to the way forward.

## **3. Current situation (April 2009)**

**Formal Justice System:** The formal justice institutions in the province<sup>26</sup> have no presence outside the urban Centers of Lashkar Gah and Gereshk<sup>27</sup>. Whilst there have been noticeable improvements over the year the fact remains that the formal justice system is extremely weak with very limited capacity. In Helmand, only approximately five criminal cases per week are lodged with the court and the proportion of those cases handled by the court in Gereshk amounts to just two to three cases per month<sup>28</sup>.

The Judiciary, the Office of the Chief Prosecutor and the Ministry of Justice departments have expressed<sup>29</sup> an inability to deploy staff to districts outside Lashkar Gah and Gereshk due to security concerns<sup>30</sup>. In addition there is a shortage of qualified judges and prosecutors in the province and no formal justice sector infrastructure in the districts<sup>31</sup>.

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<sup>26</sup> The provincial justice institutions which report to the Supreme Court, Attorney General's Office and Ministry of Justice in Kabul, which notionally, provide oversight and links to national level justice programs. These comprise the formal courts, the Office of the Chief Prosecutor for the province, and the various Ministry of Justice components including the Huquq (Civil Rights) Department, the Kazai Dowlat (Land Registry Court), the Juvenile Justice Administration Department and the Prison Service.

<sup>27</sup> This was the situation at the time of the case study in April 2009. As of May 2010 there are now prosecutors in Garmsir, Marjah, Sangin, Nawa and Nad Ali (where there is also a judge hearing cases on a rotational basis). Gereshk is now handling a significantly higher workload and also has an active and established Huquq handling civil cases.

<sup>28</sup> Information received from the judiciary (2008/2009) indicates that approximately 160 criminal cases have been handled by the Gereshk Court over the last five years.

<sup>29</sup> To note this was an expression made in 2008/2009. Since the report there has been a considerable increase in the formal sector presence in Helmand.

<sup>30</sup> In 2007 the Judge for Garmsir was murdered, and in 2008 the Judge for Gereshk was murdered and the Judge for Nad-e-Ali survived an assassination attempt.

<sup>31</sup> As of April 2009.

The absence of a formal justice system in the districts has led to problems relating to the processing of persons arrested by the Afghan National Security Forces (ANSF). Identified problems include:<sup>32</sup>

- No clear or transparent system in place for the processing of detainees in the districts;
- Detainees held for excessive periods without their cases being reviewed;
- Prisoners detained in the absence of any evidence to suggest they are guilty of an offence;
- Prolonged imprisonment of persons for extremely minor offences<sup>33</sup>;
- Ad hoc transfer of cases to Lashkar Gah for processing in the formal justice system;
- Transfer of prisoners to Lashkar Gah with no record or details of any evidence against the prisoners—this results in the release of prisoners in Lashkar Gah and/or dismissal of their cases by the courts; and
- Public perceptions of impropriety and corrupt practices by the ANSF, as well as disillusionment with the formal justice system resulting from the lack of successful convictions and lack of transparency of the process.

For non-criminal disputes, access to the formal justice system for people in the districts is through Lashkar Gah or Gereshk: for the majority of Helmandis this is not a feasible option.

***Informal Justice Systems:*** Most justice/dispute resolution in Helmand (estimated at least 90%) is dispensed outside the formal justice system. Justice in the districts comprises Taliban justice systems, traditional customary law mechanisms, resolution of cases by the ANA, ANP and other security agencies and militias, and justice dispensed by district officials. There are a number of positive aspects to the (non-Taliban) informal justice systems, which have been used to resolve conflicts and disputes for hundreds of years and have a high level of acceptance and legitimacy.

- *Taliban justice systems:* Taliban justice systems are prevalent in all Taliban controlled/influenced areas. In some districts there are permanent Taliban court centers. In addition, there are numerous roaming Taliban “judges” who visit affected communities dispensing “justice.” Through their control of the justice systems, the Taliban gain a level of control, influence and support which tends to undermine the links between communities and the government. In many areas, people have little option but to use the Taliban to solve their disputes due to direct intimidation of community elders and community members.
- Reasons for choosing the Taliban system include:
  - lack of effective alternatives;
  - expectation of receiving a more favorable result;
  - swifter and more effective enforcement of decisions;
  - faster decision making process;
  - accessibility;
  - intimidation.

There are also some perceptions that the strict and harsh punishments of Taliban justice mechanisms act as a deterrent and are effective in reducing criminality.

- Perceived weaknesses in the Taliban system include:
  - Public resentment of the constant intimidation and requests for money received from the Taliban;
  - Loss of public support by threatening and killing tribal and religious elders who are engaged in solving community disputes;
  - Corruption and tribal discrimination;

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<sup>32</sup> As outlined later in the case study, the setting up of Prisoner Review Shuras (PRS) has ensured that in a number of districts there is a bridging mechanism to the statutory sector and prisoners are not detained longer than the statutory time limits.

<sup>33</sup> In Musa Qala a prisoner was imprisoned in June 2008 for the purported offence of selling unleavened bread at leavened bread prices.

- Taliban justices not perceived as fair and unbiased—popular perception that they treat Taliban sympathisers more favourably than other persons;
- Lack of sufficient investigative infrastructure and information on which to make fair and informed decisions, resulting in mistakes and miscarriages of justice;
- Lack of facilities for the imprisonment of accused persons results in a high proportion of executions which may not always be perceived as appropriate in the circumstances of the case;
- Public resentment of the fact that the Taliban justices take orders and direction on particular cases from Pakistan<sup>34</sup>

***Community and religious elders:*** The traditional customary law dispute resolution systems are based on a combination of community traditions, customs and religious beliefs, and involve senior community and religious elders in the decision-making process. In resolving disputes, the overriding aim is to reduce conflict and promote community peace and harmony. These dispute resolution systems are present throughout the province, although they have been severely weakened over the last 30 years by the policies of successive government regimes and the insurgency. The systems deal with both criminal and non-criminal (involving land, water, tribal, family disputes etc.) cases. The religious elders in particular pay attention to Islamic teachings and law when reaching their decisions.

- Strengths of the community and religious elders include:
  - Perceived as playing a positive role in promoting and maintaining peace in the communities;
  - Community elders are knowledgeable about and make decisions in accordance with the customs and traditions of the communities;
  - The religious elders are viewed as extremely learned with a deep knowledge of Sharia and Islamic legal principles;
  - Community and religious elders are highly trusted and respected within the communities which gives greater legitimacy and acceptance to their decisions;
  - Accessibility.
- Weaknesses of the traditional customary law system:
  - Not considered to be appropriate for dealing with the most serious criminal cases;
  - Taliban intimidation and killing of community and religious has undermined the role and influence of the elders;
  - Difficulties in enforcing decisions, particularly in Taliban controlled areas;
  - Inconsistencies/arbitrary decision making;
  - Concern about alleged instances of human rights violations and discrimination against vulnerable groups including women and children—this concern was raised by the Provincial Governor;
  - Lack of support and perceptions of interference by Government officials and the security forces.
- *ANA, ANP, other security agencies, militia groups, district officials:* These agencies and groups are involved in dispute resolution throughout the province.

***Formal/informal justice system linkages:*** The distinction between the formal and informal justice system and their principles can be somewhat blurred at times. For example, the former Judge for Gereshk who was murdered in August 2008 used to request the attendance of family members and community elders to represent all parties appearing before the court. The elders and family members were instructed to try to resolve the dispute and the judge then endorsed the agreement reached; in the absence of an agreement the judge would decide the appropriate sentence himself. Further, the former Chief Judge of Helmand, Judge

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<sup>34</sup> In Garmsir the Taliban Justice Commission reports to the Taliban High Command in Quetta in Pakistan which issues orders relating to executions and hudud punishments. In Gereshk the Taliban Justice Commissions include foreign Taliban judges.

Afghani, who was replaced in June 2008 issued four orders for *Qasas* executions (beheadings etc.) over a five year period based upon his interpretation of Sharia law and evidence principles.

In the districts where there is no judge and no prosecutor the links between the formal and informal justice systems is effectively non-existent.<sup>35</sup> The formal justice system is of very limited relevance to the people in such districts, and the only entry point to the formal system is the transfer of selected prisoners to LKG who have been arrested by the ANSF in the district.

***Issues/concerns over the current state of the informal justice sector:***

- The level of influence and control gained by the Taliban as a result of their control of the justice systems.
- The eroding of the power, influence and effectiveness of the community and religious elders who are currently the only alternative to the Taliban for the resolution of community level disputes in the districts of Helmand.
- The lack of any link between the government and the district communities in relation to the resolution of disputes—including the lack of any clear link to the formal justice systems, and the lack of government support to the community and religious elders<sup>36</sup>.
- The lack of linkages between the communities in the districts and the justice and human rights support institutions such as the Huquq Department, the Afghanistan Independent Human Rights Commission (AIHRC), the Women and Children Justice Group, legal aid providers etc.
- Inconsistent and arbitrary decision making, alleged human rights violations and discriminatory practices against vulnerable groups including women and children—this is coupled with a lack of knowledge by community elders and community members of basic justice, legal and rights issues relevant to their communities.

#### **4. Current informal justice support initiatives in Helmand**

The overall aim of the initiatives which have been introduced is to address the issues and problems listed above. The initiatives are based on the premise that the formal justice system is the most appropriate forum for handling serious criminal cases and that more minor criminal matters and other non-criminal community disputes are most appropriately dealt with through the community and religious elders at the community level, thereby achieving solutions which are acceptable within the communities and promote positive community relations. The initiatives involve the establishment at the district level of Prisoner Review Shuras (detainee review/processing mechanism) and Councils of Elders/Justice Sub-committees of the District Community Councils (community justice support mechanism).

##### **a. Prisoner Review Shuras**

Prisoner review shuras are local-level Afghan led detainee review and processing mechanisms. Prisoner review shuras have been established in Musa Qala, Sangin and Nad-e-Ali and agreement was reached for the establishment of a prisoner review shura in Garmsir in April 2009. Terms of Reference were developed which provide full details of the constitution of the shura and the procedures which it follows.

The aim of the shura is to:

- Prevent excessive detention in the districts,
- Ensure the timely release of prisoners against whom there is no evidence,

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<sup>35</sup> Since the case study in April 2009, security sub committees, which are discussed later, set up as part of the community council in Garmsir, Nawa and Gereshk play a key role in providing a bridge between the community and statutory sectors.

<sup>36</sup> Please see previous footnote relating to security sub committees.

- Ensure that the most serious cases are transferred to Lashkar Gah for processing in the formal justice system,
- Provide a link to the informal justice systems for resolution of more minor disputes,
- Ensure that evidential issues and concerns are addressed at the district level, thereby improving the chances of successful prosecutions in the most serious cases,
- Provide an open and transparent procedure for the processing of detainees.

The shuras have proved reasonably successful; they are locally led and appear to have the acceptance and support of the communities.

Membership of the shura includes one of the members of the Justice Sub-committee of the District Community Council. The role of the Council member, who is a senior community elder from the district, is to represent the interests of members of the community, to ensure that the agreed procedures are followed, to ensure that the shura is conducted in a fair and transparent manner and to provide a degree of public oversight and accountability.

#### **b. Councils of Elders / Justice Sub-committee of the Community Council**

Councils of elders were established in Gereshk and Sangin in September and October 2008 respectively. The councils are community justice support mechanisms which are comprised of representative groups of senior tribal elders representing all the major tribes and sub-districts of a district.

This initiative has since been incorporated within the district roll-out of the Afghanistan Social Outreach Program (ASOP), an Afghan led program which is being co-ordinated through the Independent Directorate of Local Governance (IDLG) at a national level in close co-operation with senior representatives from the office of the Provincial Governor and an Afghan implementation partner (WADAN). Under the ASOP program a group of the most senior community elders is appointed to form a council of community representatives. Each community council is to have three sub-committees dealing with the areas of justice, security and social and economic development—these had been identified as three key areas for community support and development. The Nad-e-Ali and Garmsir Justice Sub-Committees were established in February and March 2009 respectively. In April 2009 a Justice Sub-Committee was established in Gereshk which subsumed the role and function of the Council of Elders for the district. The community councilors receive some basic training and in addition attend a four-day workshop during which they work to develop a community plan which includes plans of activities for the various sub-committees.

The overall vision of the Justice Committees is: to promote peace in the communities; to strengthen links between the government and the communities; to promote respect for the rights of all members of the communities; and to improve access to justice.

The roles of the Justice Committee (as identified by the Nad-e-Ali and Garmsir Committees) are:

- Solving disputes
- Provide encouragement and support to the existing (non-Taliban) community and religious elders who currently solve disputes in the communities
- Promoting respect for basic rights in the communities to include providing advice and information to communities on basic justice, legal and rights issues
- Ensuring a key link between the communities, the government and justice sector support providers
- Participate in the prisoner review shura with a view to providing community oversight and accountability in the detainee review process

In Gereshk, the Justice Committee has, in addition to the above roles, adopted an oversight and accountability role in relation to the formal security and justice institutions. The Committee members have visited the prison and police detention facilities to review the records to ensure that the correct procedures have been followed; in addition, they interview prisoners and follow up identified issues of concern.

*Solving disputes:* Details of the activities, procedures and guiding principles of the Committees are included in Committee plans. In essence, the Committee will deal with minor criminal cases and some non-criminal disputes. As the Committee comprises the most senior community elders in the district, their decisions are expected to have a high degree of legitimacy and acceptance. The Committee will record all decisions in writing in an attempt to obtain greater transparency and consistency. The Committees are also keen to ensure full respect for the rights of all parties and to avoid discriminatory practices. The Committee has no power to order imprisonment or physical punishments and their decisions will be based on restorative justice and conflict prevention principles.

*Support for community and religious elders:* The Committees have taken the view that if the community and religious elders are seen to be fair and effective, there will be greater public confidence in their abilities to solve community disputes and more people will turn to them when they have a problem. The Committee will try to strengthen the work of the elders by: providing an opportunity for referral of the more complicated disputes; provide assistance with enforcement of decisions by liaising with State institutions; following up (at the district center or provincial level) specific issues of concern raised by community and religious elders; providing information on basic legal and rights issues; actively encouraging the work of the elders to include community outreach programs to encourage members of communities to use the community and religious elders; and work closely with the Security Sub-Committee<sup>37</sup> of the community council to address issues of Taliban intimidation and community insecurity.

*Promoting respect for basic rights:* Members of the Justice Committees are to be trained on basic justice, legal and rights issues. Local facilitators will be used including the Huquq Department, Kazai Dowlat, AIHRC, defense lawyers, the Women and Children Justice Group and senior religious scholars. The Committee will then arrange a series of shuras in the communities to disseminate the relevant messages. This will be reinforced by holding large district legal education shuras organized through the Huquq Department—shuras have already taken place in Gereshk and Garmsir for 250 and 300 community elders respectively.

*Ensuring a key link between communities, Government and justice sector support providers:* The Justice Committee will form and maintain close working links with:

- Communities
- Community and religious elders
- District Governor
- ANP, ANA and NDS
- Judges, prosecutors and lawyers
- Huquq Department, Kazai Dowlat, AIHRC, the Women and Children Justice Group, religious scholars

The aim is to encourage all of the above parties to work together with the Committee to address justice issues in a co-ordinated manner, thereby improving the overall effectiveness of the justice system.

*Huquq Department, AIHRC, Women and Children Justice Group, Defense Lawyers:*

- *Huquq Department:* The PRT has provided support to enable the Huquq Department to hold a series of legal education shuras in the districts. Co-facilitators have included the Kazai Dowlat, AIHRC, the Provincial Governor's Legal Adviser and the Women and Children Justice Group. The aim of the shuras is to provide information on the role of the formal justice institutions, give details on basic legal and rights issues and give advice on the handling of common community disputes. The shuras provide a link between the communities, the informal and the formal justice institutions.
- *AIHRC:* Established a presence in Helmand in May 2008 and opened an office in March 2009. AIHRC agreed a 12 month plan of activities for Helmand in August 2008 which includes provision for support to the Justice Committees in the districts.

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<sup>37</sup> Details of the community security plans developed by the community councils are not included in this report.

- *Women and Children Justice Group:* Established in August 2008 to provide practical support activities in the area of women and children's justice. Women members of the group have received basic rights training from AIHRC, rudimentary psychosocial counseling provided by an Afghan NGO and some paralegal training from UNIFEM. The entry point for the group's activities at the district level will be through the Justice Committees.
- *Defense Lawyers:* International Legal Foundation - Afghanistan established an office in Helmand in September 2008. Prior to that date there had been no defense lawyers in the province. The lawyers have indicated an intention to work closely with other justice support institutions and to be involved in the proposed training and outreach programs.

*Land and Tribal Dispute Commission:* This Commission was established in May 2008; its purpose is to address some of the most serious land and tribal dispute issues in the province. The Commission is chaired by the Provincial Governor. The Commission is a basic conflict resolution mechanism which performs an extremely important function. It is hoped that the work of the Commission can be spread out into the districts in due course through forging links with the Justice Committees.

### **c. Human Rights issues**

The Justice Committees aim to promote improved respect for human rights through all aspects of their work. Concerns as to human rights violations in the communities are to be addressed through the Justice Committees' outreach programs and will be reinforced by the large scale legal education shuras. The work of the Prisoner Review Shuras also emphasizes respect for rights and attempts to reduce the incidence of illegal and excessive pre-trial detention.

### **d. Gender issues**

Women and Children justice issues will be addressed through the training provided to the Justice Committees and the subsequent outreach programs in the communities. As previously stated the Justice Committees will provide a link for the implementation of activities and support services to be provided through the Women and Children Justice Group. In addition, in Gereshk, where a sub-group of the Women and Children Justice Group was established in December 2008, there are 2 female members on the Justice Committee<sup>38</sup>.

## **5. Analysis and Conclusions**

The informal justice systems deal with at least 90% of all dispute resolution in Helmand. It is essential that emphasis is placed on constructively addressing the current problems and concerns identified in the informal justice systems, with a view to strengthening links between the government and the communities, providing linkages between the formal and informal justice systems, and addressing the issues relating to the level of influence and control gained by the Taliban arising from their control of the informal justice systems.

The current initiatives in support of the informal justice systems are Afghan led and owned and have relied on the strong commitment and support of key stakeholders such as the Provincial Governor, district officials and community elders.

The initiatives and activities are based on the premise that the formal justice system is the most appropriate forum for handling serious criminal cases and that more minor criminal matters and other non-criminal community disputes are most appropriately dealt with through the community and religious elders at the community level, thereby achieving solutions which are acceptable within the communities and promote community peace and harmony. This approach would appear entirely reasonable given the current situation.

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<sup>38</sup> As of April 2009, the total number of members of the Gereshk Justice Committee was nine.

Further, the activities are expected to strengthen the outreach and relevance of the formal system in the districts and improve links between the government and the communities.

The current initiatives seek to build upon and strengthen the existing non-Taliban community justice systems which are known and accepted within the communities. The aim is to give practical support to help communities help themselves to resolve internal disputes and take responsibility for addressing justice and criminality issues in the community.

The activities seek to promote full co-operation between the communities, community elders, government and justice support providers to ensure a co-ordinated joined-up approach to address the district justice problems.

The establishment of prisoner review shuras and Justice Committees in the districts are extremely positive developments and their continued roll-out to other accessible districts should be supported.

The current activities actively address human rights and gender concerns relating to the informal justice sector.

The implementation of the initiatives and activities set out in this report represent a significant achievement and are the foundations for the development of future support to the informal justice sector in Helmand. It must, however, be recognized that the new initiatives are at a very early stage of implementation. It will be essential to provide ongoing monitoring, support and technical assistance to the new mechanisms to ensure that progress is maintained and that the initiatives are translated into positive and practical benefits for Helmandis.

Whilst significant progress has been made over the last year, we must be realistic in our expectations, accepting that strengthening Helmand's informal justice systems will be a long haul.

## **D. Counter-Narcotics Justice Task Force (CJTF): An Afghan Success Story**

*Editor's Note: The following article describes the success of the Counter-Narcotics Justice Task Force (CJTF) in Afghanistan and how U.S. Forces may be able to utilize the existing system to their benefit. Again, this article is described from the point of view of one of the Department of Justice's attorneys. The opinions expressed here are the author's own and are not those of the U.S. Department of Justice.<sup>39</sup>*

### **1. Background**

In 2005, Department of Justice attorneys, working with their Afghan counterparts in the Ministry of Justice, crafted the Counter Narcotics Law, which was passed by decree of the president. Among the important features of this law is the creation of the Central Narcotics Tribunal (CNT) in Kabul, mandated to have seven Primary Court and seven Appellate Court judges. This Court is empowered to hear all narcotics and narcotics-related cases that concern drug quantities in excess of two kilograms of heroin, ten kilograms of opium, and 50 kilograms of hashish or precursor chemicals, no matter where in Afghanistan the case originates.

The Counter Narcotics Law also mandated the creation of a "special counter narcotics prosecutor" within the office of the Attorney General, to prosecute the cases that would be heard by the Central Narcotics Tribunal. This specialized office has exclusive jurisdiction over the cases that meet the threshold quantities of drugs. The consequence of this statutory scheme is that in serious drug trafficking cases, the wealthy and powerful drug traffickers are not tried in their home provinces where they may wield disproportionate influence;

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instead, they have their day in court in a secure facility in Kabul, where prosecutors and judges are safe from unwanted visits and undue outside influence.

Under the Counter Narcotics Law, the Counter Narcotics Police of Afghanistan (CNPA) is tasked with detecting all drug trafficking offenses in Afghanistan. Any seizure of illegal drugs, no matter the quantity, must be turned over to the CNPA as soon as possible after the seizure. When the amount involved meets the threshold quantities mentioned above, the case is transferred to Kabul where a special unit of 35 CNPA personnel is tasked to work with the special narcotics prosecutors. Together, the 30 special narcotics prosecutors and 35 assigned CNPA officers constitute the Counter-Narcotics Justice Task Force (CJTF).

The CJTF has been in existence since 2005 and is founded upon a memorandum of understanding signed by the Ministry of Interior (MOI), the Attorney General's Office (AGO), and the Supreme Court. The United Kingdom (UK) is also a signatory to the MOU because the UK provides salary enhancements to all personnel assigned to the CJTF and the CNT. Salary enhancements help create conditions that discourage corruption by providing a living wage, and enable the UK to insist upon a vetting process for CJTF personnel that includes mandatory polygraphs, with a no-tolerance policy for polygraph failures. The UK also staffs, monitors, and mentors the administrative offices of the CJTF.

In May 2009, the CJTF moved into a \$12 million purpose-built facility donated by the U.S.; the Counter Narcotics Justice Center (CNJC). The CNJC compound has office space for the investigators, prosecutors and judges, two courtrooms, a dining facility, and a detention center. The U.S. staffs, monitors, and mentors the facility management office of the CNJC, and pays the annual cost of operations and maintenance. Access to the facility is controlled via a dedicated entry control point (ECP) for vehicles and a center for the identification of all personnel entering the compound (CAC). All personnel are provided with identification badges and encouraged to wear them at all times. Everything in the facility is Afghan-run, including the detention center. The CNJC is clean, spacious, well-run, and a pleasant place to work.

## **2. Model for Afghan Rule of Law Institutions**

Last year, the CJTF/CNT handled almost 600 cases and achieved a conviction rate over 90%, with sentences for convicted traffickers averaging 16 years. The success of the institution is due to the salutary conditions created by the physical compound, the salary enhancements, and the security, but also to the daily mentoring of all personnel by an international team comprised of U.S., UK, and Norwegian mentors. Mentoring is critical. The presence of international mentors provides not only daily guidance on routine matters, but also expertise and experience in handling more complex cases and cases in which there may be political interference.

Many important criminal cases in Afghanistan are never brought to justice because of corruption and political pressure. In ordinary circumstances, a CNPA sergeant, or a line prosecutor, working on a case involving a major trafficker, might be intimidated from pursuing the case aggressively. With mentors in the picture investigators and prosecutors feel empowered, knowing that they have the support of the international community behind them.

Mentors have also been essential in developing capacity in all aspects of the CN justice system. For example, the assignment of CNPA personnel to the CJTF, formerly looked upon as a prerogative of CNPA generals as a benefit to those in their favor, is now accomplished through an application and interview process. The use of voice-recorded evidence at trial, from wiretaps or undercover operations, was rare. Now, with the guidance of the mentors, prosecutors are becoming adept at introducing such evidence and judges are becoming more accepting of that evidence as valid. The detention center is run on a simple system devised by mentors to be practical and sustainable. The administration, communications office, and facility management of the CNJC is similarly guided by the international community but always with an emphasis on developing systems that will continue after the mentors withdraw.

The CN justice system works because of the CN statute, donor contributions, and the ongoing presence of international mentors. In order to replicate this success in the areas of anti-corruption and counter-terrorism rule of law, similar conditions must be created. It will not be sufficient to pour money into facilities without providing the necessary statutory framework and ongoing daily mentoring.

### **3. Using the CN Criminal Justice System to Prosecute Insurgent Drug Traffickers**

Unfortunately, the track record of the Afghan criminal justice system in non-narcotics cases is not good. Cases against suspected insurgents are handled by investigators and prosecutors assigned to the Afghan National Directorate of Security (NDS). The NDS has suffered from a lack of resources for many years, and the police investigators, prosecutors and judges in the NDS system lack adequate capabilities. This has led to poorly prepared, poorly prosecuted, and poorly understood cases.

The NDS prosecution office is notorious for its susceptibility to political pressure, and many cases are dropped or the suspects simply released before the cases get to court. Because of the success of the CN justice system, the high conviction rate, and the relatively long sentences achieved for convicted drug traffickers, it makes sense to transfer Afghan suspects arrested in the battlespace to the CN system whenever possible. That is, when drugs are encountered in the course of other operations, it is preferable to move the suspect into the CN system, rather than transferring him/her for prosecution in the NDS system.

In order to make this work, military personnel must be prepared to collect and preserve drug-related evidence whenever they encounter it in connection with an arrest. Understanding that, in a kinetic environment, careful evidence collection is not always possible, and evidence must sometimes be destroyed in situ, the prosecutors and judges in the CN system are prepared to accept photographs, sketches, verbal descriptions, and the like in lieu of actual drugs and/or weapons. However, there are certain statutory requirements in narcotics cases that cannot be avoided: a “scene report,” and a “drug destruction report.” Both reports are relatively simple and can be prepared after-the-fact.

The best option is to identify a local CNPA officer and turn over the case as directed under the CN law. In reality, however, CNPA personnel are not available in every district or may be untrustworthy. If it is possible, securing the presence of a prosecutor is a next best solution. In any event, it is best to try to have an Afghan partner prepare the required reports in their native language. Because the Afghan police or military may not know what is required under the CN law, it is best for the platoon leader to know the necessary contents of the scene report and use an interpreter to ensure that the report is properly prepared.

A scene report must include:

- Name, DOB, and address of the suspect, and signature or fingerprint,
- A description of the drugs seized, including packaging
- The type and approximate weight of the drugs
- A description of the circumstances of the seizure, including time, date, and place, and
- **The report must be signed by the person who is reporting.**

Experience has shown that the one omission that is absolutely fatal to a case is the signature of the person with knowledge of the circumstances. Since most cases are reviewed and verdicts rendered based upon the contents of the scene report, it is essential that the scene report be carefully prepared and that all required elements be included. It is senseless to lose a hard-fought case because the signature is not on the document.

When drugs are destroyed, rather than being transported with the prisoner to the CNPA lab, the law requires that a CNPA officer and a prosecutor weigh, photograph and take samples of the drugs involved; the prosecutor issues a written destruction order and prepares a drug destruction report; and, the remaining drugs should be destroyed in the presence of the prosecutor. If it is not possible to secure the presence of a prosecutor a good substitute is a local mullah, tribal elder, or trusted neighbor to witness the weighing,

sampling, and destruction of the drugs and sign and/or fingerprint the drug destruction report. Photographs are important as well and can aid in supporting the estimate of the weight of the drugs.

However, it is important to establish communication with a local prosecutor wherever possible because the law requires that the case must be turned over to a prosecutor within 72 hours of arrest. If the case meets the threshold for prosecution at the CNT, then that prosecutor will not actually be handling the case, but if the seizure is below the threshold, the prosecution will be local. When a drug trafficking suspect is arrested in any province other than Kabul, the law provides that the case must be transferred to the CNT within 15 days. This effectively means that there is a period of 15 days during which additional investigation can be conducted, search warrants can be sought, witnesses interviewed and reports prepared.

Once the case is received at the CJTF, the special counter narcotics prosecutor can apply to the court for an additional 15 days in which to indict the case. The total time for indictment cannot exceed thirty days.

The Primary Court must hear the case within two months after it is received from the prosecutor. After a verdict is reached, the case is returned to the prosecutor as soon as possible, and the case is prepared for transfer to the Appellate Court, usually within about two weeks. The Appellate Court will hear the case *de novo* within two months. New evidence may be introduced and old arguments rehashed. Thereafter, the case is transferred back to the prosecution, which prepares it to be heard by the Supreme Court. Almost all cases go to the Supreme Court, which has five months either to affirm the decision of the Appellate Court, or send the case back for re-trial. In all, the process takes approximately nine months to one year.

Given the success of the CN justice system, and the opportunity to deny drug trafficking insurgents their place on the battlefield, it is important that military personnel understand and feel comfortable using the CN law. Department of Justice attorneys, who mentor the investigators and prosecutors of the CJTF, and the judges of the CNT, are happy to provide advice and counsel to anyone preparing a CN case for transfer to Kabul.

## **E. Rule of Law Activities at Brigade Level in Eastern Afghanistan**

*Editor's Note: The following article describes conducting rule of law at the brigade level in Eastern Afghanistan and gives examples of some rule of law activities the brigade was able to accomplish.*<sup>40</sup>

Deploying with a Brigade Combat Team (BCT) to do rule of law (RoL) is both a highly rewarding and frustrating job. Rewarding because you will have the opportunity to do and see things other attorneys will never get. You will see progress in the legal system over your deployment and meet and work with genuinely good judges and other legal professionals that have a true desire to see their legal system work. At the same time you, will be frustrated with how slow the progress is (and feel the pressure from your command for quick results), frustrated by knowing that the legal system and most of the people in it are corrupt but no way of truly knowing who these people are. You will have to compete for assets to go out and meet legal officials. You will "know" certain officials are negative influencers in the legal arena but lack the evidence to prove to their superiors in Kabul that they should be removed (it might take years to get someone removed). At the end of your deployment though, so long as you place the importance on this mission that it deserves, you will see progress and lay the groundwork for a better program for the team that follows.

You have to be realistic, you're about to deploy to the third poorest and second most corrupt nation in the world, but you also have to set your goals high and continue to press forward even when you think you're not making headway. The 4<sup>th</sup> BCT, 4<sup>th</sup> ID (TF Mountain Warrior) deployed to the Nangarhar, Nuristan, Kunar, and Laghman (N2KL) region of eastern Afghanistan in June of 2009. Of the four provinces, three had

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<sup>40</sup> CPT Craig Scrogam deployed with the 4<sup>th</sup> BCT, 4<sup>th</sup> ID (TF Mountain Warrior) to eastern Afghanistan from June 2009 through June 2010.

functioning legal systems and one, Nuristan, had no functioning government and only 3% of our region's population. We focused our efforts solely on Nangarhar, Kunar, and Laghman.

While each of the three provinces had functioning legal systems, "functioning" is a strong word. The courthouse and prosecutor's office might have their full tashkil (authorized number of employees) but they were often undertrained, not at work, or simply not doing anything. For instance, the Chief Prosecutor of Nangarhar, our busiest and most important province, wasn't even an attorney, but rather a tribal elder and self attributed "Mujahedeen General" that claimed he had a green-card from Nebraska and that Hamid Karzai used to work for him when he was the Minister of Education during the Mujahedeen days. They had no efficient system to track cases from arrest through conviction. While it was relatively easy to track a case once we learned of it at the prosecutor's office, it was the cases lost in between that we were truly interested in.

If a person had a trial, it was never public and was typically held in the Chief Judge's chambers because it was a "convenient" place. We dealt primarily with the Chief Judge, Chief Prosecutor, and Chief of Huqoq for each province. While it seemed they were doing some work, the officials could tell you anything they wanted and you had little ability or power to verify any of it.

The districts were in a much different state of affairs. While most districts had their full tashkil of legal officials, most were never there. Many prosecutor's offices and courthouses were locked up most days of the week and their officials living in the provincial capitals. To be honest, they had little to no work. While there were a handful of districts around the provincial capitals that had semi-functioning offices, the vast majority of districts' legal issues were decided by that district's tribal elders.

There are two different legal systems in Afghanistan, the formal and informal system. Whether the legal issue is criminal or civil, the elders for that area will convene a Jirga and the two sides of the dispute will try to find a mutual resolution. Although many in Afghanistan describe it as having two distinct legal systems, the tribal elder's power and the public's adherence to local custom reaches far into the formal system. The differences between the two systems lead to two different approaches in our RoL efforts.

We focused on the urban areas and their legal officials with training, case-tracking, and pressure for public trials, while in the more rural areas we focused on legal awareness for the tribal elders and ANP in the districts.

A major factor that will affect your ability to do RoL will be how much effort the team before you placed in it. Some units will fall into a robust RoL program, while others will be starting from scratch. RoL for the Brigade we replaced was lead by the senior paralegal, who truly enjoyed working with the Afghans and his duties. He took a non-existent program and laid a great foundation for our team, making relationships with many of the local officials, but there seemed little support and interest from their Brigade as a whole. Our Brigade noticed quickly that this was much more than a one man show.

One person travelling across the entire AO meeting the legal officials every month or two was not accomplishing much beyond shaking hands and hearing from every official about all the things they wanted for their office. While we were able to focus more on the province of Nangarhar, since our FOB was located by its capital, we could not spend the time with the other provincial officials that they needed. As the third attorney with a BCT, you'll most likely be doing the RoL piece, but you'll also be in charge of legal assistance, fiscal law, foreign claims, and anything else you're asked to do.

The Brigade Judge Advocate was very involved in the many different aspects of RoL operations, and while our unit was able to help conduct some training and purchase some much needed supplies or equipment early on in the deployment, it was difficult to truly assess what was going on and where we needed to focus our efforts to affect positive change. The only true way to know these things and accomplish this change is by constant coordination, presence, and building of relationships. Due to the operational environment, this could be tough for a BCT legal office that is multitasked. Our Division headquarters (CJTF-82) and the Department of State realized this problem early on and augmented our unit with much needed help.

Four months into our deployment we were augmented by a number of Dept. of State RoL Advisors. This proved to be exactly what the RoL program needed. Three advisors were sent, two of whom went to PRT's and one that stayed at the brigade. The two advisors who worked at the PRTs did incredible work and were able to make the connections with the officials that we were not. We were eventually augmented with a RoL Attorney from Division and a RoL Advisor for our third province (a Major who was a prosecutor in Connecticut and a member of a reserve battalion that augmented our taskforce). In the end, the RoL team at TF Mountain Warrior consisted of a BJA, one full time Brigade RoL Attorney and myself, 8 Afghan Attorney Advisors, 3 DOS RoL Advisors, 1 BN RoL advisor, and the Brigade's Law Enforcement Professional (LEP).

The most important part of our team was our Afghan Attorney Advisors (AAAs). When we arrived in country, the prior team had moved their Afghan attorneys out to the PRTs. Two attorneys were sent to the Kunar PRT, one attorney to the Laghman PRT, and two remained in the legal annex on FOB Fenty to work with the BCT. This allowed the Afghan attorneys to build relationships with legal officials, go places where Soldiers could not, and get information quickly and easily. Their knowledge and understanding of the Afghan legal system was second to none and their understanding of the culture made life much easier and our operations more effective. They are a necessity to effectively plan projects and to interface with officials.

## **1. Projects / Initiatives**

You need to keep things simple but be creative. There are boundless opportunities and ways of doing quick, inexpensive projects that have a tangible effect on the community rather than taking the easy road out and buying some office supplies or looking to build an office. While a ribbon cutting ceremony makes a great picture, it's the people inside that we must impact and influence to affect real change in the legal system. That is not to say building some courthouses is not important, our taskforce approved two new appellate courts during our stay, but serious thought and planning must be placed in these big projects.

Our office saw a shift in project ideas during our stay as we became increasingly more comfortable and knowledgeable of the system and who we were working with. Initially, you will be bombarded with requests for supplies, computers, security walls, new buildings, new furniture, gasoline, generators, and so forth. Some purchases were absolutely worthwhile. For instance, the juvenile detention centers had no beds and children were sleeping on the floor. Our section helped organize the purchase of bunk-beds, mattresses, and blankets. Near the end of our deployment, our Brigade initiated a program called "CERP as a budget," where government ministries and their various offices (when assembled were called Technical Working Groups (TWG)) were given a quarterly budget and they voted on and prioritized between their various proposed projects. Once this was put in place, the amount of time saved not talking about these requests was immeasurable.

The biggest enabler for projects will be your AAAs, who are able to coordinate and lead projects that cost nothing but a little time from their day, especially legal awareness projects. The following are a list of projects our BCT sponsored and coordinated with the local legal officials:

"Legal Aid Day" - We used the Nangarhar Univ. Law School to help with legal awareness events as much as we could. Law students, along with some local defense attorneys and our AAAs, went to our three provincial prisons and interviewed detainees, learning about why they were in prison, how long they had been there, and then explaining their rights and how the process should look like from there on out.

Legal Literature - We published a legal dictionary in both Pashto and Dari, thousands of constitutions, and worked on a "Tribal Elder's Legal Guide" with some of the local judges. We also purchased four legal libraries (consisting of around 200 books each) for each provincial courthouse and the Nangarhar Law School.

Huqoq Legal Training/Continuing Legal Education Conferences – These projects were easy to coordinate and the AAAs did most of the legwork. The Chief Judge of Nangarhar, at the time, was a former trainer for the Supreme Court and embraced legal education for all legal professionals in the area. He led most of the trainings, actively helped in the planning, and allowed us to use his training hall for any event. We began both a basic and advanced legal training conference for the Huqoq (the civil dispute resolution arm of the ministry of justice) and CLEs for judges and defense attorneys. It is essential to incorporate the local officials to the greatest extent possible in the event’s planning.

Legal Basic Training – One of the easiest projects, and the most bang for the buck, our AAAs would go out to district level Police Headquarters and provide legal classes to the police. Our MP units who were partnering and mentoring ANP stations throughout our AO would coordinate with our office for these events. Our AAAs would easily drive to the ANP station and teach 3-5 hours of basic civics, anti-corruption, constitutional rights, how and why we should read people their rights upon arrest, and answer general questions they might have. Students were attentive and welcomed the classes.

Tribal Elder Legal Awareness – Outside the major cities, the tribal elders run the show. It’s a fact of life that these men will be deciding legal issues in their communities. Through coordination with the District Sub-Governor (Waliswal), he would pick important tribal elders from his community and arrange for them to come to the district center for a meeting (Shura). We would arrange for a prominent/respected judge or the province’s chief of huqoq to speak with the elders, teach them about the constitution, teach about some important aspects of the law (human rights/women’s rights), what areas they should and should not make decisions in, how to write a peace-letter and register it at the court, and to answer general questions. Tribal elders would ask hard questions and genuinely appreciated the trainings. One set of elders from a district felt empowered enough to get their Sub-Governor removed for his incompetency and corruption.

Open Trials – It took a long time for us to see open trials, but just before our BCT left, they began. Initially, when we would broach the subject with judges in Nangarhar about open trials, they would tell you that the trials were open, however, they would not publicize the trials in advance and would hold them in the judge’s chambers where there was limited room. They would also not publicize their decisions. Residents of Jalalabad would walk by their courthouse every day, but have little to no knowledge of what went on inside the compound’s walls. About halfway through our deployment, one province received a new chief prosecutor who was proactive and took a strong stance against crime and corruption. He helped break a few big cases including a corruption case and a murder committed by provincial level officials. Out of the blue, the judges and prosecutors in this province wanted to hold public trials. The DoS RoL Advisor took this desire and ran with it, doing everything he could to keep this momentum going. In the end, Kunar held the province’s first public trials, three of them, over a two week period. The final trial had over 570 people in attendance, with people literally hanging out of windows in hopes to hear what was happening in the trial. We took these events and pressured the other provinces for open trials as well, encouraging a friendly rivalry between the provinces on whose legal system was more advanced. At the beginning of trials, we hope to have the judge or another official give a short civics class and explain the legal process to those in attendance. We also planned projects to have judicial gowns made.

## **2. Rule of Law and Information Operations**

One of the goals our unit had for the RoL program was to increase the public’s understanding of and faith in their legal system, something few had. Most people view the formal system as being ineffective, slow, and corrupt. The lack of faith was a combination of not understanding the legal system and the fact that the legal system didn’t publicize anything they did. We wanted to find any opportunity we could to publicize good things the legal system was doing and make what they were doing more transparent.

One of the ways we looked to do this was to take advantage of the BCT’s information operations assets. One of the main ways our unit pushed out their IO products was through the “radio in a box” (RIAB). Most of the FOBs have RIABs and play news and music. Our office recorded short two to three minute skits, with

the aid of our AAAs, which described basic constitutional rights, what defense attorneys are, and other legal issues. We would also take information from our reports on trials at the courthouse and other significant legal events and have them included in the Eastern Zone News, a short news report that was broadcast all over the region. By the end of our deployment, our Brigade had two Afghan attorneys that did nothing but liaison with the appellate court, watch all of their trials, and provide us full reports.

Our AAAs would also record interviews of local officials and citizens who attended provincial level trainings and conferences and would have these interviews broadcast as well. Any time there was a provincial level legal conference (and there were a number of conferences we helped coordinate through the Justice Sector Support Program), we would coordinate with our Public Affairs Office to ensure local media were there. Your connections to the legal system and RoL initiatives can play an important role in your unit's COIN fight and should be presented to your command that way, increasing your ability to gain the access to assets you need to accomplish your mission.

### **3. Setting Your Replacements Up For Success**

In the end, your time will fly by, and to ensure all your efforts are not thrown by the wayside, you must set your replacements up for success. Much of that will be to simply document what you have done, provide them with up to date information on the legal community, and set up a game plan for them for their first couple of months.

Around the seven-month mark, I was sitting in a judge's office, waiting to watch some trials. Prior to the trials, the judge was meeting with a representative from another U.S. agency that was working in the RoL arena. The representative was new and knew nothing about the court. Rather than talk business, she asked questions like "How many judges are here?", "How many cases do you hear a week?", and "What types of cases do you hear?" It was then I realized I did the exact same thing! The judge has had to put up with untold numbers of people coming to his office and asking the same questions over and over. Collect the information and give it to your replacements so that they can get right to business.

You should also plan events and projects during the RIP/TOA so your replacements can see how a legal conference looks, how you planned it, and how you paid for it (help them to become CERP project purchasing officers and pay agents). By the time our replacements fully took over, they had seen a continuing legal education conference, had a nice stock of freshly published constitutions, had four comprehensive legal libraries to push out to the provincial courthouses and to the local law school, and had the groundwork laid for 42 civics classes throughout our AO. This allowed the new BCT RoL team to hit the ground running and make an impact immediately, while still allowing them time to feel their way and get used to the mission.

There is next to no guidance, if any, from your higher command or from the Department of State on what to do. Rule of Law doesn't really lend itself to a regimented formula, since what works in one valley of a district might not work in the next. The lack of guidance, while frustrating at first, gives you a lot of freedom to choose what will best work in your AO. In the end, your RoL program and operations are only going to be limited by the creativity and dedication of the people on the team.

## II. Iraq

### A. A Female Perspective on the Central Criminal Court of Iraq: Between the Idea and the Reality

*Editor's Note: The following submission provides a detailed look at the Iraqi criminal justice system as seen from a female Air Force Judge Advocate.*<sup>41</sup>

In November 2009, I deployed to Iraq to serve with the Combined Joint Special Operations Task Force, Arabian Peninsula (CJSOTF-AP).<sup>42</sup> When I arrived, I was tasked to be the Central Criminal Court of Iraq (CCCI) Liaison Officer (LNO) in Baghdad, Iraq. As the CJSOTF-AP LNO, my work involved extensive interaction with the local Iraqi population. Prior to my arrival, I was warned that Iraqi men did not view women as equals and that, due to my gender, I would face many uphill battles in my new job.

#### 1. Introduction

CJSOTF is a joint task force that contains special operations units from more than one country as well as more than one United States Military Department.<sup>43</sup> While in theater, CJSOTF-AP is subordinate to the Special Operations Command Central (SOCCENT).<sup>44</sup>

As the CJSOTF-AP LNO, I worked with CJSOTF-AP assets located throughout the entire Iraq theater of operations. CJSOTF-AP includes three regional Special Operation Task Forces (SOTFs) in Iraq: SOTF-West (SOTF-W), SOTF-Central (SOTF-C), and SOTF-North (SOTF-N). SOTF-W consists of Navy SEALs and is further divided into Task Units (TUs). The TUs are composed of smaller units called Detachments (DETs). SOTF-C and SOTF-N consist of Army Green Berets and are further divided into Advanced Operating Bases (AOBs). The AOBs are made of smaller units called Operation Detachment Alphas (ODAs). Each unit works with a Foreign Internal Defense (FID) partner (e.g., Iraqi Special Operations Forces) in an effort to assist Iraq's internal defense and development.<sup>45</sup>

My job as the CCCI-LNO was to help the CJSOTF-AP teams, and their FID partners, obtain Iraqi arrest warrants for CJSOTF-AP targets and to further prosecute cases through the Iraqi judicial system once the warranted insurgents were captured. To complete this mission, I was co-located with Task Force 134 in

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<sup>41</sup> See Eliot, T. S., *The Hollow Men*, Poetry X. (Jul. 13, 2003), available at <http://poetry.poetryx.com/poems/784/> (last visited Apr. 27, 2010).

<sup>42</sup> Captain Elizabeth Cameron Hernandez, USAF served as CJSOTF-AP LNO from November 2009 through May 2010.

<sup>43</sup> See Sean Naylor, *SF Presence May Grow in Combat Areas*, Army Times (Feb. 24, 2009), available at [http://www.armytimes.com/news/2008/02/army\\_specialforces\\_080225w/](http://www.armytimes.com/news/2008/02/army_specialforces_080225w/) (last visited July 26, 2010). There are five active duty Special Forces groups that are each focused on a particular region of the world. Currently, 5<sup>th</sup> Group is the permanent headquarters for the Iraq mission, although 10<sup>th</sup> Group Battalions may serve as Special Operations Task Forces (SOTFs). See also Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, 12 Apr 01, as amended through 31 Oct 09, available at [http://www.dtic.mil/doctrine/dod\\_dictionary/](http://www.dtic.mil/doctrine/dod_dictionary/) (last visited July 26, 2010).

<sup>44</sup> See Special Operations Command Central (SOCCENT), available at <http://www.globalsecurity.org/military/agency/dod/soccent.htm> (last visited Apr. 29, 2010).

<sup>45</sup> See Joint Publication 3-07.1, Joint Tactics, Techniques, and Procedures for Foreign Internal Defense (FID), 30 Apr 2004, available at [http://www.fas.org/irp/doddir/dod/jp3\\_07\\_1.pdf](http://www.fas.org/irp/doddir/dod/jp3_07_1.pdf) (last visited July 26, 2010). FID is defined as: The participation by civilian and military agencies of Government in any of the action programs taken by another government or other designated organization, to free and protect its society from subversion, lawlessness, and insurgency. *Id.*



Baghdad.<sup>46</sup> While Task Force 134 was the main prosecution arm for “legacy” detainees, my work focused almost exclusively on “new captures.”<sup>47</sup>

Because CJSOTF-AP works with new captures, CJSOTF-AP operations are conducted in accordance with the Security Agreement, which took effect on 1 January 2009.<sup>48</sup> The Security Agreement requires that all combat operations “be conducted with the agreement of the Government of Iraq.”<sup>49</sup> The Security Agreement further requires that combat operations “be fully coordinated with Iraqi authorities.”<sup>50</sup> Additionally, CJSOTF-AP assets partner with their FID forces to fulfill the Security Agreement’s purpose of supporting Iraq’s efforts to maintain security and stability.<sup>51</sup>

## 2. The Iraqi Judicial Process and the LNO

The Coalition Provisional Authority (CPA) established the CCCI in 2003.<sup>52</sup> CCCI is a court with national jurisdiction and focuses on cases involving terrorism.<sup>53</sup> The court is divided into two branches: the investigative court and the trial court.<sup>54</sup> Iraq uses an inquisitorial judicial system, where judges investigate and control the case.<sup>55</sup> Throughout the process, the judge wields tremendous power.<sup>56</sup>

There are several judges assigned to the investigative court, though only one investigative judge (IJ) is assigned to any one case. An IJ has several judicial investigators assigned to him. A judicial investigator is a lot like an American law clerk. The judicial investigator is primarily responsible for transcribing witness and detainee testimony as dictated by the judge.

The IJ is responsible for conducting arrest warrant hearings when requested. Iraqi law generally requires two eyewitnesses to a crime, along with any other evidence that might exist, before an arrest warrant will be issued.<sup>57</sup> Although the IJs place the most emphasis on eyewitness testimony, he may also consider other

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<sup>46</sup> Task Force 134 is the main organization responsible for detainee operations in Iraq. See W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants--A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, 2007 Army Lawyer 72, 75 (Jul. 2007).

<sup>47</sup> A “legacy” detainee is any detainee captured prior to 1 January 2009; a “new capture” is any detainee captured after 1 January 2009. 1 January 2009 is the date the Security Agreement took effect. See Security Agreement, *infra* note 7.

<sup>48</sup> 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, Art. 30 (Nov. 17, 2008) [hereinafter Security Agreement], available at <http://www.globalsecurity.org/military/library/policy/dod/iraq-sofa.htm> (last visited July 27, 2010).

<sup>49</sup> See Security Agreement, *supra* note 48 at Art. 4, para. 2.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See Coalition Provisional Authority, Order No. 13 (Revised) (Amended), The Central Criminal Court of Iraq (22 Apr. 2004), available at [http://www.iraqcoalition.org/regulations/20040422\\_CPAORD\\_13\\_Revised\\_Amended.pdf](http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf) (last visited July 27, 2010).

<sup>53</sup> See *id.* Section 18 sets forth the jurisdiction of the CCCI. In addition to terrorism, the CCCI may also hear cases on “organized crime, governmental corruption, acts intended to destabilize democratic institutions or processes, violence based on race, nationality, ethnicity or religion; and instances in which a criminal defendant may not be able to obtain a fair trial in a local court.” *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> See U.S. Department of State, 2004 Country Report on Human Rights Practices: Iraq § 1, para. (e), available at <http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm> (last visited Apr. 23, 2010) (“Judges, not lawyers, direct the progress of a case.”).

<sup>56</sup> For example, an Investigative Judge (IJ) has total control over a case, including what witnesses he will listen to, what evidence he will accept, and whether he will refer a case to the trial panel or dismiss the charges.

<sup>57</sup> *But see* Matthew Greig, *Detention Operations in a Counterinsurgency: Pitfalls and the Inevitable Transition*, 2009 Army Lawyer 25, 31 (Dec. 2009). Capt Greig writes, “[Iraqi] law...does not define the burden of proof setting a minimum evidentiary standard for warrant applications. The standard is flexible and specific to each judge...The most stringent judges require the testimony of two Iraqi witnesses before issuing a warrant. This ‘two-witness’ standard

forms of evidence such as fingerprint analysis or DNA evidence, provided it is coupled with eyewitness testimony. Evidence such as written confessions or hearsay will have no effect in court. Once an IJ hears the witness testimony and examines the evidence, he will issue an arrest warrant if he determines that sufficient evidence exists to support the warrant.

Once a warrant is obtained, the CJSOTF-AP ODA or DET, along with their Iraqi counterpart unit, captures the warranted target. Once the individual has been captured, Coalition Forces (CF) are required to turn over the detainee to a “Competent Iraqi Authority” (CIZA) within 24 hours.<sup>58</sup> The CIZA then signs a memo authorizing CF to hold the detainee for up to 14 days.<sup>59</sup> The detainee is then held in the CJSOTF-AP Temporary Holding Facility (THF) for interrogation and intelligence and the preparation of the criminal case against the insurgent. By the conclusion of the 14 days, the CCCI-LNO attempts to secure an Iraqi Detention Order (DO) in order to transfer the detainee to the Theater Internment Facility (TIF), where the detainee is held until final trial. If the CCCI-LNO is unable to secure a DO, the detainee is returned to the CIZA.

In order to secure a DO, the CCCI-LNO presents witness testimony and evidence to the IJ. This is called an “Investigative Hearing” (IH). IHs are fact-finding hearings where the IJ takes witness and detainee testimony and reviews evidence. Generally, the detainee is assigned a court-appointed defense counsel at the first IH.<sup>60</sup> The IH phase continues for as long as the judge requests further evidence. For example, after the initial DO is obtained, if the judge wants to hear more witness testimony, there will be an additional IH. Once all available evidence has been presented, the IJ decides whether to dismiss the charges against the detainee or to refer a case to trial.<sup>61</sup>

The second branch of the Iraqi judicial system is the trial court. While the CCCI-LNO was heavily involved in the investigative court process, the CCCI-LNO has minimal involvement in the trial court process. If the IJ refers a case to trial, it will go to one of two trial courts. Each trial court consists of a panel of three trial judges. The trial judges examine the IJ’s report and listens to the detainee’s testimony. The Iraqi prosecutor and the Iraqi defense counsel also provide argument. The trial panel then renders a decision. If the detainee is convicted, he may appeal his case to the Court of Cassation.<sup>62</sup>

### 3. Gender Irrelevance in an Efficient Work Environment

Prior to my deployment, I was warned repeatedly that I would have a difficult time working with the Iraqis because I was a woman. Military service members informed me that the Iraqis’ view of women is not as progressive as in westernized societies. Most of these individuals outranked me and I believed them when they told me that the Iraqis have a patriarchal and misogynistic culture that would make it difficult for a female JAG to work effectively. As I began my work, I was happy to discover that, in my particular role, none of the warnings were valid.

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becomes important at the trial stage, where a minimum of two witnesses is needed to convict a defendant in the absence of a confession.” *Id.* See also Law on Criminal Proceedings with Amendments, No. 23, Feb. 14, 1971 (Iraq), available at [http://law.case.edu/saddamtrial/documents/Iraqi\\_Criminal\\_Procedure\\_Code.pdf](http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf) (last visited April 22, 2010). During my tenure at the CCCI, the judges I worked with generally required two eyewitnesses in order to issue an arrest warrant.

<sup>58</sup> See Security Agreement, *supra* note 48. Article 4 states, “In the event the United States Forces detain or arrest persons as authorized...such persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest.” *Id.*

<sup>59</sup> If the CIZA signs a memo authorizing CF to hold the detainee, CF are doing so only on behalf of the Government of Iraq (GOI). GOI retains legal custody of the detainee while CF only have physical custody of the detainee.

<sup>60</sup> Although I was told that detainees could also retain their own lawyers, all the detainees I worked with accepted the court-appointed defense counsel.

<sup>61</sup> When a judge decides there is not enough evidence to refer a case to the trial panel, he issues a “Release Memo.”

<sup>62</sup> See W. James Annestad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, *supra* note 46 at 75.

Because of what I had been told prior to arriving, I expected an environment where only Iraqi males worked, while the females stayed home. Much to my surprise, when I walked into the court, I saw Iraqi females everywhere. There were female judicial investigators, female prosecutors, female defense attorneys and female administrators. Additionally, although the judges that I personally worked with were male, there were two female judges assigned to the court.<sup>63</sup>

Realizing that my preconceived notions about women in the court were incorrect, I embraced my role as CCCI-LNO. As the CCCI-LNO, I interacted frequently with the Iraqis. For example, in order to obtain an arrest warrant, I was required to present witness testimony from local citizens to the judge. Witness testimony would occur either in person or via Video Teleconference (VTC). If I presented witness testimony via VTC, I was required to go to the court, pick up the judge and his judicial investigator, bring them to a VTC location, and take them back to court after the hearing had concluded. Despite being informed by U.S. service members that the judges adamantly refused to travel with women, I successfully travelled with at least three different judges and their judicial investigators, each time without incident.<sup>64</sup>

I also interacted with the judges and judicial investigators during IHs at court. The Iraqi work week is Sunday-Thursday, and I would schedule IHs every day. At each IH, I interacted with one of four different IJs and one of ten different judicial investigators. Occasionally, I would have business to conduct with the Chief Judge; again, I did so without incident.

The interactions with IJs and their staff were constant. At no time did I feel inhibited, oppressed, or unable to accomplish the mission. The judges and judicial investigators that I worked with were nothing but professional in all their interactions with me. At no time did it appear that any of the judges were offended to be working with me. In fact, despite my initial pre-deployment fears, I never thought about being a female in Iraq. It just didn't come up—until my job shifted.

#### **4. A New Focus and New Perspective**

The role of U.S. Forces in Iraq continues to change. By 1 September 2010, the United States expects to cut the U.S. presence in Iraq by nearly half, from 95,000 U.S. troops to 50,000 U.S. troops.<sup>65</sup> During their remaining tenure in Iraq, U.S. service members have been charged with continuing to assist Iraqi security forces and helping the Iraqis build a stronger Iraq. As such, my role shifted slightly. Rather than unilaterally processing cases through CCCI, I became directly partnered with Iraqi Special Operations Forces and helped them secure arrest warrants for insurgents, with the expectation that they would then process their own cases through the judicial system.

In order to effectively complete my new mission, I was required to move locations. My new location put me closer to the Iraqis I needed to work with, but also put me in the middle of a male-dominated U.S. Army unit rampant with inaccurate Iraqi stereotypes. The first day I arrived at my new location, I was told a familiar story: it could be challenging for me to succeed as an attorney working with the Iraqis because I was female.

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<sup>63</sup> Interview with anonymous female Iraqi investigators at the (April 19, 2010).

<sup>64</sup> Previous CCCI-LNOs also conducted arrest warrant hearings en masse by flying an IJ to a remote location to hear witness testimony. There was speculation that an IJ would not travel in that capacity with a female. During my tenure; however, I was unable to find out as there was a moratorium placed on all “judge runs.” Anecdotally, however, I believe at least one judge would have gone on “judge runs” with my (female) paralegal and me as he offered to take us shopping to a town near Iran, which would have involved more extensive travel than a VTC. For security reasons, we declined the trip.

<sup>65</sup> See Jim Garmone, *Iraqi Security Forces Keep U.S. Drawdown on Track*, American Forces Press Service (April 19, 2010), available at <http://www.defense.gov/news/newsarticle.aspx?id=58798> (last visited July 27, 2010) (“American forces are transitioning to stability operations, and the last U.S. combat outfit will leave the country by the end of August [2010].”).

The warnings continued. Approximately three times per week, I heard various comments such as, “Don’t be surprised if you can’t accomplish anything; Iraqis don’t like women” and “Don’t be offended, but you may not have much luck with the Iraqis because you’re female.” Importantly, however, the warnings were specific to my interactions with Iraqis, and did not consist of generalized skepticism in my ability to perform my duties otherwise.

As I listened to the misguided counsel, I was saddened that the comments continued to come from U.S. service members who believed that all Iraqis held sexist views of women. Luckily, my boss wouldn’t allow any of the negative comments to interfere with my mission. He constantly encouraged me to ignore the comments and continue my work.

Like my previous job, my new job required me to work closely with an Iraqi judge and his Iraqi staff. At no time have the Iraqis ever made me feel that I couldn’t perform my duties. Instead, the Iraqis I worked with all went out of their way to make me feel welcomed. The Iraqis allowed me to successfully present cases to them and they provided assistance whenever they could. When I worked with the Iraqis, I felt the same way that I did in America: that I was there to do a job and do it well. The Iraqis I worked with never made me believe I couldn’t accomplish anything. In fact, any barrier I faced regarding my job resulted from the U.S. service members stereotypes of the Iraqi’s culture and views towards women.

I believe the U.S. service members truly believed that I could not operate effectively in my assigned position because of their firmly-held stereotype that Iraqi men did not like working with women. I do not believe the service members were trying to be mean or discouraging and I think there may be some possible explanations for their views.

Most of the service members at my new location interact frequently with the local population. While most of my work is with the judicial system (e.g., judges and investigators), other service members may be interacting mostly with the local citizenry. The local citizenry may not be as educated or as progressive as the judicial personnel and, as such, may not have very progressive views toward women. Additionally, much of the judicial personnel have interacted with Americans for several years and some have even been trained in American schools. Both of these situations would expose these Iraqis to more westernized views of women, and it is possible that the Iraqis have developed more open-minded views of gender roles from these experiences.

Although there may be an explanation for the service members’ views, it is important that we don’t continue to perpetuate a meritless stereotype. The constant warnings about the Iraqis only reveal our own misconceptions of the Iraqis. Female service members are fully capable of achieving success in Iraqi courts and to say otherwise disseminates inaccurate information and doesn’t give the Iraqis the credit they deserve.

Although my experiences show that a female can accomplish the mission in Iraq, there are some service members who believe that only a male should serve in this position. I strongly disagree with that proposition. I firmly believe that either a man or a woman could successfully accomplish the CJSOTF-AP mission.

## **B. Developing Rule of Law and Maintaining Stability in a Fluid Environment**

*Editor’s Note: The following article describes the successes of a Special Forces Battalion Judge Advocate in Northern Iraq from July 2009 through January 2010.<sup>66</sup>*

### **1. Introduction**

This article is a brief historical account of events that transpired during a Special Forces Battalion’s deployment<sup>67</sup> and provides insight into issues faced by a Special Forces (SF) Battalion Judge Advocate.

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<sup>66</sup> CPT Michael G. Botelho was the legal advisor for SOTF-N from July 2009 through January 2010.

Specifically, this article discusses the novel use of video teleconference (VTC) capability within the Iraqi judiciary to conduct probable cause hearings and how expanded VTC use lead to unprecedented cooperation between Iraqi and American Forces with National-level implications in support of the security and stability of Iraq. The article also discusses United States Special Forces (USSF) decentralized operational structure<sup>68</sup> and the Operational Adaptability<sup>69</sup> concept and how that concept is applied in a fluid combat environment. Success in this fluid environment was made possible by the assignment of a Judge Advocate at the battalion level, which is a fairly new concept implemented about 2006. Due to its unique force structure and the decentralized manner in which SF operates across the entire battlefield, the primary Army units really requiring a Judge Advocate at the battalion level are the various SF groups. Lastly, the article will touch upon some changes, both procedurally and substantively, that occurred at the Central Criminal Court of Iraq-Karkh (CCCI-K)<sup>70</sup> located in Baghdad and how those changes impacted operations in a SF Battalion. The CCCI-K is a creation of the Coalition Provisional Authority (CPA); however, the CPA was dissolved in 2004. The CPA promoted “the development of a judicial system in Iraq that warrants the trust, respect, and continued confidence in Iraqi people.”<sup>71</sup> The Iraqi judicial system is historically based upon a local and provincial construct, but the CCCI-K uniquely has nationwide jurisdiction to investigate and try crimes committed in Iraq. The primary focus of the CCC-I is terrorism.<sup>72</sup>

The U.S. and Iraq Security Agreement (SA) was implemented on January 1, 2009, and with the execution of its “out of cities” provision occurring later the same year on June 30, SF Battalion Judge Advocates found themselves dealing directly with the full spectrum of the Iraqi criminal system—from the SF team level to the national court level. However, notwithstanding the provisions of SA<sup>73</sup> that provide structure to operations, the operational environment in Iraq remains extremely fluid. A unit’s success and relevancy within this ever-changing environment depends on its ability to operationally adapt. The decentralized manner in which USSF operate was one of the keys to a SF Battalion’s successful execution of the Operational Adaptability concept as it directly relates to the warranted-target process to capture insurgents with full respect for Iraqi law. Since the rule of law (RoL)<sup>74</sup> model is still developing in Iraq, and as a general doctrinal concept, inconsistency within the judiciary will present significant RoL challenges for all U.S. Forces for the foreseeable future. This judicial inconsistency—which directly impacts combat operations—requires units to craft flexible solutions and be aware that Tactics Techniques and Procedures (TTPs) accepted as standard practice one month may not be an option the next.<sup>75</sup>

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<sup>67</sup> Members of 1st Battalion, 5th Special Forces Group (Airborne), which is known as Special Operations Task Force – North (SOTF-N) when deployed, was a subordinate unit of Combined Joint Special Operations Task Force – Arabian Peninsula or CJSOTF-AP. 1<sup>st</sup> Battalion deployed in July 2009 for Operation Iraqi Freedom and was responsible for a large area of operation in Northern Iraq.

<sup>68</sup> An SF battalion can cover an entire 3<sup>rd</sup> of the Iraq Area of Operation, but they don’t “own” any battle space; therefore, in order to conduct operations, they have to coordinate with the various Operational Environment Owners.

<sup>69</sup> Operational Adaptability: The ability to shape conditions and respond effectively to changing threats and situations with appropriate, flexible, and timely actions: TRADOC Pamphlet (Pam) 525-3-0, *The Army Capstone Concept, Operational Adaptability—Operating Under Conditions of Uncertainty and Complexity in an Era of Persistent Conflict*, Dec. 21, 2009.

<sup>70</sup> Coalition Provisional Authority, Order No. 13 (Revised) (Amended), The Central Criminal Court of Iraq (22 Apr. 2004).

<sup>71</sup> *Notes from the Field: Detention Operations in a Counterinsurgency: Pitfalls and the Inevitable Transition*, Captain Matthew Greig, Dec. 2009, at 33.

<sup>72</sup> *Id.*

<sup>73</sup> Security Agreement, *supra* note 48.

<sup>74</sup> *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.”).

<sup>75</sup> Application of flexible TTPs to solve ROL issues were required due to inconsistency within the judiciary based on legal interpretations and requirements varying between judges.

## 2. Operational Adaptability

Upon deployment, Special Operations Task Force – North (SOTF-N) personnel immediately faced RoL challenges resulting from the implementation of the “out of cities” provision of the SA just one month prior to their arrival. One of the major challenges was inconsistent application of the SA in the provinces throughout SOTF-N’s area of operation. Specifically, some local/provincial Iraqi authorities interpreted the SA “out of cities” provision to prohibit all U.S. Forces from entering cities entirely and, more importantly, engaging in any way whatsoever with the judiciary at the local/provincial level. In Mosul, for example, because of their association with U.S. Forces, USSF’s Foreign Internal Defense (FID)<sup>76</sup> partner had extremely limited or no access to the provincial judiciary and were thus forced to rely upon the national CCCI-K for their warrants. With no ability for local Iraqis to use the provincial court system for prosecution of cases, national-level CCCI-K warrants allowed them to overcome the lack of judicial access at the provincial level and also offered complaining witnesses an added level of protection.<sup>77</sup> The use of CCCI-K warrants also permitted prosecution of cases in a neutral and detached forum. Additionally, case prosecution at the CCCI-K offered protection for provincial judges fearing reprisal.<sup>78</sup> In the past, a mobile judicial team or “judge run” was used to acquire CCCI-K warrants. A judge would travel to the various provinces to hear witness testimony and issue a warrant for ultimate prosecution at the CCCI-K.<sup>79</sup>

As was the TTP at the time, SOTF-N personnel began coordination for a CCCI-K judge to travel to Mosul and Baqubah, which are areas with intermittent judicial access.<sup>80</sup> The last successful judge run, however, was completed in April of 2009 and resulted in the issuance of 129 total CCCI-K warrants for Mosul and Baqubah. Knowing this, members of SOTF-N legal team, consisting of a Battalion Judge Advocate and a Paralegal Noncommissioned Officer<sup>81</sup>, immediately contacted the CJSOTF-AP Liaison Officer to CCCI-K or CCCI-K LNO/Prosecutor<sup>82</sup> in order to schedule a “judge run” at the earliest possible opportunity. By early September, a judge run had yet to be accomplished based upon uncontrollable circumstances at the CCCI-K and the inability to acquire warrants locally. The failure to secure warrants was having a direct impact on the ability of three SF Operational Detachment-Alpha (ODA)<sup>83</sup> teams to conduct combined, offensive, warrant-

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<sup>76</sup> “Foreign Internal Defense: Participation by civilian and military agencies of a government in any of the action programs taken by another government or other designated organization to free and protect its society from subversion, lawlessness, and insurgency.” Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 12 April 2001.

<sup>77</sup> Witnesses who lived a substantial distance from Baghdad were reluctant to travel due to security concerns in certain areas of the country.

<sup>78</sup> Although corruption was an issue in some jurisdictions, fear of reprisal was a motivating factor in judges’ reluctance to hear cases at the provincial level.

<sup>79</sup> Integrating the Rule of Law with FID in Iraq; by Lieutenant Colonel Daniel A. Tanabe and Major Joseph N. Orenstein, *Special Warfare* November-December 2009.

<sup>80</sup> Notwithstanding exceptions to the rule, warrants were required for most operations, which is why access to the courts was critical.

<sup>81</sup> The Paralegal Non-commissioned Officer assigned to SOTF-N at the time was SSG Matthew A. Wilkerson, whose 8 and a half years of Special Operations experience as a paralegal provided a wealth of knowledge and continuity which allowed the Judge Advocate to make informed decisions and provide insightful advice to those he advised. SSG Wilkerson has deployed 6 times during his 5 years service with 1<sup>st</sup> Battalion 5<sup>th</sup> Special Forces Group and his 3 and a half years with 1<sup>st</sup> Battalion 75<sup>th</sup> Ranger Regiment.

<sup>82</sup> U.S. Air Force Captain Kurt Gerlach was assigned as the CJSOTF-AP Liaison Officer to CCCI-K at the time of the VTC implementation.

<sup>83</sup> The 12-man ODA (Operational Detachment Alpha) or “A-team,” is largely made up of NCOs. Each man has a specific function, ranging from operations and intelligence, to weapons, engineering, medical and communications. The advanced training for each specialty can take six months or longer and includes small-unit tactics; languages; and survival, evasion, resistance and escape. The ODA itself may specialize in an infiltration skill or a particular mission-set, such as military freefall, combat diving, mountain warfare, maritime operations or urban operations. USASOC. “Special Forces – Shooters and Thinkers.” <http://www.army.mil/-news/2009/10/26/29315-special-forces---shooters->

based operations with their Iraqi FID force. Specifically, two ODAs located in Baqubah and one in Mosul lacked the ability to execute combined offensive operations<sup>84</sup> due to an inability to acquire warrants at the local level.

Additionally, the CCCI-K judges were reluctant to travel due to security concerns and their observation of Ramadan during the month of September. In late September 2009, the SOTF-N legal team suggested using a VTC for the issuance of warrants. VTCs had been previously used for other aspects of the process in Iraq; however, the fluidity of the environment and the constant change in personnel required procedures to be re-invented and re-implemented. The possibility to extend VTCs for use in warrant hearings was unfamiliar to any members of SOTF-N, CCCI-K, CJSOTF-AP or Multi National Division-North (MND-N)<sup>85</sup> at the time of its recommended implementation, and no one could tell if the Iraqi judiciary would support VTC use in this manner. SOTF-N legal suggested that the VTC would allay security concerns of both the judges and witnesses as well as present an alternative to the judges' reluctance to travel during their holy holiday. Additionally, since travel to the courthouse was no longer necessary, the VTC decreased the time it took to acquire warrants.

The immediate implementation of VTC testimony was not possible for two primary reasons: (1) judges expressed a general aversion to the use of technology in courtroom proceedings, so there were varying opinions on the use of the VTC; and (2) the CCCI-K judges' opined that the Iraqi criminal code and the Iraqi Law on Criminal Proceedings of 1971<sup>86</sup> require witnesses to appear in person. The Iraqi code does contain a requirement for witnesses to appear in front of a judge, but there was no mention of the *medium* of the testimony. SOTF-N legal's interpretation of the Code was that it does not prevent witnesses from appearing in front of a judge in real time—testimony was live—albeit on video. This reasoning was supported by other sections of the Iraqi Code which allowed judges wide latitude in deciding *how* testimony was to be heard or accepted. Even though the idea and argument for the VTC originated with the SOTF-N legal team, the CCCI-K LNO/Prosecutor was instrumental in successfully presenting the idea to the CCCI-K chief judge and convincing him that the use of VTCs satisfied legal requirements and was prudent for many reasons. The judge initially agreed to conduct VTCs as a temporary fix to their inability to travel during Ramadan. The VTC was a solution to the problem of acquiring *warrants*<sup>87</sup>; however, oftentimes witnesses would still be required by the Iraqi judge to provide in-person testimony at later stages of the Iraqi criminal process<sup>88</sup> even where they had previously testified.

Once the VTC was approved as a valid means of conducting a probable cause hearing to issue warrants, scheduling for the VTC began in October 2009 and required extensive coordination between ODAs and the legal teams at SOTF-N and CCCI-K LNO's office. Instead of judges travelling to the remote locations, teams were now responsible for facilitating witness testimony and adhering to the judge's procedural requirements including, but not limited to: (1) presentation of witness testimony; (2) protecting witnesses identity from other testifying witnesses; (3) overall professional appearance of the witnesses; (4) valid forms

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and-thinkers/ (last visited July 27, 2010). Special thanks to the members of the ODA teams who assumed great risk on a daily basis and were responsible for the mission success and ROL advancement.

<sup>84</sup> Unilateral operations conducted by coalition forces are no longer allowed because the Security Agreement recognizes the sovereignty of Iraq and requires all operations within the Country be done in accordance with the agreement of the Government of Iraq.

<sup>85</sup> Currently United States Division-North.

<sup>86</sup> Law on Criminal Proceedings with Amendments, No. 23, Feb. 14, 1971 (Iraq).

<sup>87</sup> The VTC was a success because it offered a solution to a problem; however, because of the ever-changing environment, it was incumbent upon SOTF-N legal not to oversell it and to keep the command's expectations realistic with regard to its potentially temporary nature.

<sup>88</sup> The Iraqi criminal-justice system is an inquisitorial system similarly based upon the French and German civil-code, which results in the judge playing a more active role and strong emphasis is placed on witness testimony; Integrating the Rule of Law with FID in Iraq; by Lieutenant Colonel Daniel A. Tanabe and Major Joseph N. Orenstein, Special Warfare November-December 2009.

of identification; (5) copy of the *Quran* in order to swear witnesses to an oath; (6) proper witness preparation as to how the VTC was going to be conducted; and (7) what type of questions may be asked by the judge. Ultimately, it was incumbent upon the SOTF-N legal team to act as liaison between the ODA and CCCI-K LNO/Prosecutor in order to ensure the judge was getting all that he required. Proactive involvement by the legal team at battalion level also kept the chain of command informed of changes and developments throughout the process as well as allowed the SOTF-N legal team to better serve Iraq's advancement of RoL and also support operations. At the conclusion of SOTF-N's first warrant VTC, over 30 national warrants were issued for the lawful arrest of insurgents by the Iraqi FID partners with USSF combat advisors in Mosul and Baqubah.

In late October, 2009 due to a change in personnel within the judiciary and a change in the CSJOTF-AP LNO/Prosecutor, the VTC's utility appeared to be in jeopardy. The change in personnel required the SOTFs to re-address the validity of the VTC with the members of the judiciary as well as the newly arrived CCCI-K LNO/Prosecutor.<sup>89</sup> Once again, the CCCI-K LNO/Prosecutor was instrumental in advocating for the SOTFs which resulted in the VTCs continued use; although, the VTC was supposed to be a temporary fix during the holy month due to the judges' reluctance to travel. However, due to the strong rapport between the judiciary and the CJSOTF-AP CCCI-K legal team, the VTC warrant hearing option was extended beyond Ramadan and these hearings ultimately were conducted on a monthly basis. Additionally, while coordinating for their first VTC, SOTF-N and the CCCI-K LNO/Prosecutor kept the legal teams of SOTF-West and SOTF-Central apprised of the new developments. Over time, the VTC testimony capability was extended to, and considered by, each of the SOTFs depending on their respective provincial operating environments. Ultimately, each SOTF was offered opportunity to conduct warrant VTCs to facilitate for warrant-based operations. By January 2010, SOTF-N legal had also coordinated for and extended the VTC for use by a conventional force Brigade Combat Team (BCT) based in Kirkuk. The VTC's success underscored the requirement for Judge Advocates at all levels to assess the political and legal environment in their respective areas of operation. The successful and novel use of the VTC also illustrated the need for SOTF lawyers to immediately begin coordination and networking with all units in their commander's battlespace in order to assess potential issues or conflicts at the earliest opportunity. In this instance, Operational Adaptability required multi-level cross-coordination<sup>90</sup> between Iraqi and U.S. units and the national level courts, which lent itself to the VTC's implementation. The VTC's utility ultimately contributed to the success of the combined offensive operational capability of numerous ODAs' partnered Iraqi units and, more importantly, mitigated provincial level RoL corruption issues.

### **3. Battling Corruption**

In late November 2009, SOTF-N again used multi-level cross-coordination as a tool to enable their FID partner to overcome a significant RoL challenge when the 20/5 Iraqi Army Special Forces Platoon (20/5) Iraqi Army (IA), combat advised by USSF, detained a suspected terrorist pursuant to a locally-issued warrant. This individual was well known and targeted not only by USSF Iraqi counterparts, but also the ODA and a Brigade Combat Team (BCT) for a number of years. Following the Iraqi's detention of the suspected terrorist and one of his associates, both individuals were transferred to the 20<sup>th</sup> IA detention facility in Diyala province. Shortly following their detention, the 20/5 IA began receiving significant pressure from various Iraqi authorities and others to release this detainee due to his political connections in the province. As the political pressure increased, it became clear to our Iraqi FID partners and USSF that the suspected terrorist was not going to receive a fair and impartial trial at the provincial level and, in fact, may never make it to trial if released. At USSF and FID partner urging, the Iraqi government requested assistance in transferring the detainee to the CCCI-K court in Baghdad. Following the request for assistance, members of

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<sup>89</sup> CJSOTF-AP Liaison Officer to CCCI-K who replaced Kurt Gerlach was Air Force Captain Elizabeth Hernandez.

<sup>90</sup> Coordination at all echelons of command between both U.S. Forces and their counterparts.



an ODA, Advance Operations Base (AOB)<sup>91</sup>, SOTF-N, CJSOTF-AP, a BCT, and MND-North immediately began significant coordination in order to have 20/5 IA transfer the detainees to the Iraqi Counter Terrorism Service (CTS) forces using the Iraqi 8th Regional Commando Battalion. The Iraqi units escorted both detainees to Baghdad with the ultimate goal of prosecution at the CCCI-K in Baghdad.<sup>92</sup>

Additionally, reports indicated that the local judge was reluctant to hear the case and intended to nullify his provincial-level warrant. To avoid the devastating local politics, fear, and corruption, Iraqi Special Operation Forces (ISOF) personnel worked to acquire a new warrant from the CTS in Baghdad. After coordination, the CTS was prepared to secure both of the suspected individuals upon receipt of the warrant, but ISOF personnel anticipated the warrant process would take up to three days through the CTS. To prevent delay, the USSF AOB commander assisted ISOF, which is a subordinate unit to the CTS, to coordinate with USD-N to secure a national-level warrant issued via CTS. At the same time, SOTF-N and CJSOTF-AP JAs simultaneously pursued a national warrant<sup>93</sup> through the CCCI-K Court in Baghdad. In a truly combined effort, the Iraqi 8th RCB coordinated with members of the Iraqi Army to ensure both terror suspects were transferred to 8th RCB custody once the Baghdad warrant had been obtained. Again, USSF adjusted to the systemic ebb-and-flow in the Iraqi criminal system coupled with multi-unit coordination from the ground level to the national level, to ensure a criminal insurgent was not running free. There was no model for how this could be accomplished and numerous avenues were pursued to achieve the goal of long-term detention by means of proper prosecution in the Iraqi criminal system.

On November 24, 2009, CTS was successful in getting a national warrant, and the AOB and MND-N personnel were able to effect the transfer with their FID partners. Additionally, once custody by the 8th RCB was achieved, the Diyala Operation Center (DOC) commander signed a "CIZA"<sup>94</sup> requesting USSF assistance to temporarily transfer the detainee to USSF custody. The ODA, AOB, and Judge Advocates from SOTF-N, CCCI-K, and CJSOTF-AP immediately began coordination to bring witnesses to Baghdad to provide testimony to ensure the suspects' continued detention. In early December 2009, the ODA again assisted the Iraqis and transported 6 witnesses to the CCCI-K, whose testimony secured a detention order for the long-term detention of the suspects as they awaited trial. This entire effort was unprecedented and involved the collaboration of numerous organizations and units and is at the core of what a Special Operations Force does. In the end, successful execution of multi-level cross coordination enabled the Iraqis to employ flexible solutions which ultimately improved the overall Security and Stability of Iraq in accordance with Iraqi laws and procedures.

In mid-December 2009, a similar incident occurred, but had different results. A suspected terrorist was arrested pursuant to a locally-issued warrant in the Salah ad Din province. Compared to other provinces, Salah ad Din had a much more developed RoL system, and their judiciary did not face as many corruption issues compared to other Northern provinces. Having seen similar issues and having developed the process noted above, USSF and its partnered force were poised to assist with relocating the detainee from the local detention facility in Salah ad Din to Baghdad to await a detention order hearing and eventual trial at the CCCI-K. Accordingly, coordination began in much the same way as in the case above. In this case, however, the provincial judge strongly objected based on his perception that the potential movement of the

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<sup>91</sup> In special operations, a small temporary base established near or within a joint special operations area to command, control, and/or support training or tactical operations: Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms*, 12 April 2001.

<sup>92</sup> This incident was also significant because the Iraqis, advised by USSF, were working together to take ownership of a sensitive situation which resulted in the successful transfer of a well connected criminal in and among Iraqi units.

<sup>93</sup> National-level warrant: Warrant issued from an entity located in Baghdad, resulting in case prosecution at the CCCI-K, which offers a neutral and detached forum for some provinces facing corruption/fear of reprisal within their judiciary.

<sup>94</sup> CIZA: Competent Iraqi (IZ) Authority; a document issued by an Iraqi official which requests US Forces take physical custody of an Iraqi detainee for prosecution at the CCCI-K. Legal custody remains with the Government of Iraq.

case to CCC-I-K was an encroachment upon the sovereignty of the local province by the Iraq federal government. Once the objection to move the detainee was made, it was immediately clear to SOTF-N legal and the command that this matter had become an issue of provincial-versus-federal sovereignty which required a shift in the USSF role from actively enabling its partnered force to a more passive role of offering advice when needed. In this instance, USSF adjusted their level of involvement to allow the situation to develop and support the Iraqi criminal process provincially. Ultimately, members of Iraq's provincial and federal judiciary were left to define the limits of federal power according to their constitution.

The cooperation among U.S. Forces and Iraqis in both the first incident above and the incident in Salah ad Din were positive steps forward for RoL because the models for success SF demonstrated to their Iraqi counterparts were designed to adapt to the fluid and evolving nature of the issues presented. More importantly, the willingness to cooperate and work through issues speaks volumes of Iraq's desire to ensure their own success, stay the course in fighting corruption, and shape their own RoL model. Throughout the deployment, the key to solving the vast majority of the RoL issues was the Operational Adaptability of the organization and USSF's decentralized operations concept. The Special Forces decentralized operations concept allows all echelons of command and operations from the CJSOTF-AP, SOTFs, and AOBs, down to the ODAs to frame the problem and seek solutions at the lowest level first, while at the same time coordinate actions up to very high levels ensuring maximum Operational Adaptability in order to maintain stability in a fluid environment.

### **C. Two Missions: Rule of Law at the Division Level**

*Editor's Note: The following article describes the rule of law mission in Iraq as seen through the eyes of a Judge Advocate at the division level.<sup>95</sup>*

#### **1. Introduction**

Rule of law may be the least understood and most complex mission undertaken by military attorneys. But it is also one of the most important—especially in a counterinsurgency—because you cannot have security without a properly functioning criminal justice system.

While it will never be easy, rule of law works best when you realize that you have two missions, not one. First, you will have to help your unit capture and convict the enemy, who are generally insurgents without combatant immunity. Second, you will need to promote a healthy and effective justice system in the host nation. While these two missions complement each other, they are not the same—each will require a different approach and each will emphasize the talents of a different group of people. In this article, I will provide a suggested approach for each mission, as well as some examples drawn from the experience of 1<sup>st</sup> Cavalry Division's Operational Law team.

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<sup>95</sup> CPT Richard Slesman, 1<sup>st</sup> Cavalry Division Operational Law Attorney. The ideas in this article are not mine alone—they belong to the entire Operational Law team at MND-B and the 1<sup>st</sup> Cavalry Division: CPT Scott Bacalja, CPT Kate Buzicky, Lt. Robyn Stober, CPT Brett Robinson, CPT Elizabeth Crane, CPT Ian McCrea, Lt. Bryan Blackmore, and CPT Jay Jackson. They also belong to the outstanding Rule of Law team in our G-9 section, MAJ Alan Dollison and CPT Andres Gil. Finally, thanks to CPT Keith Schellack from the 4<sup>th</sup> Infantry Division for developing the concept for the biweekly Rule of Law meeting, and thanks to CPT Keirsten Kennedy from 8<sup>th</sup> Military Police Brigade for the idea of conferences between the Iraqi Police and the Judiciary. Finally, many of the targeting techniques mentioned in this article were developed by CPT Buzicky, CPT Crane, and CPT Robinson as they set up our framework for trying detainees captured prior to the Security Agreement.

## **2. The First Rule of Law Mission: Operations and Targeting**

Your unit's operational leaders already know how to find and capture the enemy, and they will have developed the systems necessary to do so. But unless you can ensure that the enemy is tried and convicted by the host nation, you will simply be creating a catch and release cycle. The good news is that the information you already use to determine the enemy's role, significance and location is often the same evidence you can use in court. Your task will be to help your unit adapt its targeting cycle so that it collects useable evidence and effectively presents that evidence to the host nation's justice system.

To properly adapt your targeting cycle, you will need to create a framework that links it to the host nation's justice system. To create this framework, you will need to go through the following steps: First, determine your points of access to the host nation's justice system. Second, develop an engagement plan for working with these points of access. Third, create a structure to manage information flow. Fourth, consider legal effects when making targeting decisions. Fifth, identify and use any special rule of law enabling assets you have available. Finally, understand how to combat corruption.

### **a. Determine your points of access to the host nation's justice system**

In your unit's operating environment, there will be many points of access to the host nation's justice system. Before detailing how to find them, it's wise to spend a moment considering what a point of access is. A point of access, as I use the term, is a point in the local justice system where you can build relationships, present or gather evidence, or just get things done. Usually, they will be a court or police station.

In your operating environment, there are likely to be many potential points of access. By considering a few key factors, you'll be able to find the ones that will help you accomplish your mission.

First, determine what your mission will require. In a counterinsurgency, this probably means that you will be trying to encourage the host nation to try terrorists—either those who have attacked U.S. Forces or those who pose a grave risk to the host nation's government. You will also be looking to gather information on what happens in each terrorist's case. That case information will help you determine whether your targeting efforts are achieving the desired effect.

Second, get to know the local justice system. How are cases prosecuted? What are the roles of the local judges? How do judges relate to law enforcement? What law enforcement agencies are available? If you don't understand how the justice system works, you will spend months or even years talking to the wrong people. Pay extra attention to the parts of the local justice system that are relevant to your mission. For example, if you need to see terrorism cases tried, you will need to figure out which courts and law enforcement agencies prosecute them. You will also need to find the host nation detention facilities where terrorists may be detained after capture. The goal here is to make sure you identify the courts, police stations, detention facilities and other criminal justice institutions you will need to work with to maintain the right amount of visibility and access.

Third, consider security. You will probably be visiting critical points of access frequently. Your presence at the court or police station is always going to make things more dangerous for its host nation staff, and you must minimize this. Consider whether your host nation partners can defend themselves from any increased risk—are there guards, blast walls, and proper standoff distances? If not, what can you do to improve things? For example, in Baghdad in 2009, there were two key points of access to the criminal justice system—the Central Criminal Court of Iraq (in Karkh) and the Rusafa Palace of Justice. Both these courts were relatively well protected, and could process cases with a reasonable amount of security. This relatively high level of security allowed us quite a bit of access, and minimized disruption to the legal system when we worked to assist with particular cases.

Fourth, consider local custom. When getting to know the justice system, you learned about its formal rules, but knowing only formal rules is not enough. You may be frustrated, for example, by host nation courts that

clearly have jurisdiction over your cases, but refuse to hear them. Consider carefully whether it is worth trying to change this informal practice. Making changes is extremely difficult, requiring you to convince many people that your idea will work, and requiring them to develop a new routine. Also, informal practices often develop for valid reasons, such as security, that may not be immediately apparent to you. You could spend much of your credibility and time trying to make a change only to see little improvement. In Baghdad in 2009, for example, there were no formal rules that prevented local judges from hearing terrorism cases, but by custom and tradition they were always referred to either the CCC-I or the Rusafa Palace of Justice. Since those courts provided the safest and most effective forum, we rarely tried to see cases heard elsewhere.

Finally, consider relationships and other intangibles. If you have a good relationship with the people at a particular point of access, work with them. However, you will need to be careful. Good personal relationships do not always mean you have selected the right point of access—sometimes the judges or investigators most willing to work with U.S. Forces have little influence or credibility among their peers.

**b. Develop an engagement plan for working with these points of access**

Once your unit has selected the right points of access, you must develop a plan for engaging these points of access. There are a few key steps that are necessary. First, decide who will have responsibility for the engagement. Second, determine how often you will need to engage. Finally, plan for life support and security.

**(1) Who will have responsibility for the engagement?**

At each point of access, you must determine who “owns” the relationship between U.S. Forces and the people at that point of access. Deciding this is absolutely critical—you must avoid an approach where local officials are presented with conflicting agendas, poorly coordinated ideas, and repetitive requests for information or action.

This does not mean that other units are prohibited from talking with these local officials, but it does mean that all contact should be coordinated through one group of people.

**(2) How often will you be working at the point of access?**

Next, determine how much work you will be doing at the point of access. This could range from occasional visits to around-the-clock cooperation with local officials. For some key courthouses, it will be essential to coordinate daily with the responsible judges and investigators. You may end up working right alongside them to ensure that important cases are prosecuted. This level of commitment will pay off—you will gain tremendous knowledge about the host nation’s justice system and the status of the cases you care about. Other institutions—remote police stations, for example—may only require monthly visits.

A good example is the Law and Order Task Force (LAOTF). This organization partnered with several Iraqi investigative committees, each of which worked on terrorism cases. Since the cases being handled by these committees were crucial to our interests, LAOTF lived and worked adjacent to the courthouse used by these committees. While resource intensive, co-location was necessary due to the importance of the cases.

**(3) How much life support and security will you need?**

Once you know how often you need to visit a particular point of access, you can create a plan for getting (or staying) there. If constant interaction is needed, you may need to adjust your basing plan so that U.S. Forces are living at or near the point of access. Otherwise, you will have to allocate transportation assets to get the right people there at the right time.

These decisions, of course, involve careful consideration of tactical or operational concerns, and will need to be made by your commander. In making your recommendation, you should pay careful attention to the importance of the mission, the likelihood of success, and the risks to your personnel.

**c. Information Flow**

You must also set up a system for gathering and disseminating the information you gain while working with the justice system. This could be information that you possess that you need to give to the host nation's justice system—evidence or the location of a witness, for example. This could also be information that you gather from the host nation's justice system and need to give to your own people—an update on a case's progress or the fact that a witness or a piece of evidence is needed, for example.

Your approach has to be systematic because battlefields are complex places, and it is unlikely that you know all the people who need the information you have or have the information you need. Since you are working with cases, however, things are often easier. For example, you could create spreadsheets that show all of your targets on the docket of a particular court. By electronically sharing these spreadsheets, you can provide instant updates to all of the communities—targeting, intelligence, etc.—that might know where a witness or evidence is located, or care that a particular target is being prosecuted.

Whether you post spreadsheets to an internet portal or host a regular meeting, the method you use must reach all the different affected communities. Military intelligence, targeting, operations, and civil capacity will all need the information you generate, whether it is results of trials or hearings, the fact that local law enforcement needs certain information, or the fact that local law enforcement is struggling with a particular problem.

Often, you will not be the unit tasked with engaging a point of access, even if that point is critical to your mission. Information flow then becomes the most important issue—how do you ensure you present the right information to higher headquarters, and how do you ensure they provide you with the right information in return?

In this situation, you'll need to consider the same factors you looked at when you were designing an information flow for a point of access you controlled. Instead of deciding how often to engage the host nation, you'll have to decide how many resources you're willing to commit to working with higher headquarters. This could range from a tracking spreadsheet posted on a portal to a group of liaison officers from several staff sections (targeting, intelligence, operations, legal, etc.). The importance of the point of access will govern this decision.

**d. Begin to consider legal effects when making targeting decisions**

Once you have set up a framework for working with the host nation's justice system, you must decide how and when to use your system. In other words, you need to consider legal effects when making targeting decisions.

According to Joint Publication 3-60, "targeting is concerned with the creation of specific desired effects through target engagement," and "seeks to create effects through target engagement in a systematic manner." Since your unit already has systems in place for both lethal and nonlethal targeting (and designing those systems is well outside the scope of this article), your task will be to outline what legal effects can be expected and encourage your unit to consider those effects when it makes targeting decisions.

Since you already know the host nation's legal system, you must explain its possible effects to your unit. Explain arrest warrants, searches, pre-trial detention, conviction, and long-term imprisonment to your unit,

and outline what is required to achieve each effect. The goal is to have engagement with the legal system be another tool that can be utilized as part of the targeting process.<sup>96</sup>

In each case, your unit will have to be realistic about the legal effect it can achieve. For example, if a conviction cannot be obtained, are there other outcomes that might achieve the desired effect? Often (especially in time-sensitive situations), disruption through arrests or searches is sufficient.<sup>97</sup>

**e. Identify and use any special Rule of Law enablers**

Other U.S. Government agencies, such as the Department of Justice and the Department of State, have the lead on the rule of law mission, and are working on a host of initiatives to improve the local justice system. In many cases, awareness of these interagency efforts will be useful as you seek to target criminals. For example, the U.S. Embassy will often partner with the host nation's anticorruption agencies, and will be assisting them with anticorruption investigations and prosecutions. That partnership may provide you with additional options when your targeting efforts uncover corrupt local officials who are aiding the enemy.

In a targeting context, the best way to use these partnerships is to think of them as additional enablers, provided by higher headquarters that you can use in your targeting operations.

To do this, you must first familiarize yourself with each enabler's capabilities and limitations. How quickly do they work? What are the chances for success? Is the partnered host nation agency independent or is it used as a political tool? You must understand all this in order to consider whether to refer a case or provide information. However, do not simply write off enablers that you think are weak—integrate them into your targeting process, and make sure that decision-makers are aware of their strengths and weaknesses.

Next, you must find out how to coordinate with them. Since most other agencies work at the national level, you must likely coordinate with higher headquarters in order to refer a case to them or provide them information. With a robust technical chain and primary responsibility for the rule of law mission, Judge Advocates are well positioned to coordinate easily with these interagency partners.

Finally, ensure that everyone involved in your targeting operations is aware of all enablers—you want to ensure that everyone knows that they have options to deal with particularly difficult cases.

**f. Corruption**

You are likely to lose many of the cases you choose to work with. It is tempting to chalk every loss up to corruption. Resist this. Use the resources you have available, especially the people you have engaging at your critical points of access, to determine the reason for the loss. Was your information unreliable? Did you misunderstand local law? Was there a language or cultural breakdown? Were you unable to obtain sufficient evidence? Was the evidence presented correctly? Knowing the answers to these questions will help you isolate and respond to the problem.

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<sup>96</sup> Of course, you will have to remind everyone that since this is another country's legal system, legal effects cannot simply be ordered into existence. Ensure your unit is aware that all you can do is gather evidence, find witnesses, provide information, and encourage and monitor performance. However, a clear legal effect should certainly be set as a goal for all this effort.

<sup>97</sup> Obviously, attorneys will need to consider ethical principles when encouraging criminal cases to be brought. However, moving forward on a case with the intent to "disrupt," rather than "convict" rarely poses the types of ethical problems it might in the United States, since it will likely be factors other than the amount of evidence that make conviction in host nation courts unlikely. Also, decisions made in your targeting process generally have more to do with how much effort U.S. Forces will expend assisting on a particular case than with the underlying merits of that case.

### **3. The Second Rule of Law Mission: Civil Capacity**

Your second rule of law mission is to help the host nation set up a healthy and effective justice system. This is by far the most important and difficult of your two missions—only when the host nation is empowered to deal with criminals on its own will you have succeeded in your counterinsurgency mission.

A complete overview of the civil capacity mission is well outside the scope of this article, and is thoroughly covered by the rest of this *Handbook*. However, there are a few things you must do to succeed in rule of law at the Division level: communicate, know the host nation's legal system, and provide the right help to the host nation.

#### **a. Communicate**

Rule of law is a complex mission—not only does it involve many different government agencies, it also involves subordinate units, higher headquarters, and many of your unit's own staff sections. In order to succeed, you must ensure that there is effective communication between all of these rule of law actors.

There are several things you can do to improve coordination within your own staff. Start by ensuring that you have a strong relationship with your unit's Civil Affairs officers, who are usually located in the G-9 section. While attorneys usually have a strong understanding of various legal systems, Civil Affairs officers have the development and operational expertise necessary to plan and conduct civil military operations (including tactical missions, development projects, etc.). It is the unit's Civil Affairs officers who can translate plans and theory into action. Once you have built a strong relationship with your G-9 section, integrate other staff sections, such as information operations, human terrain teams, and the provost marshal's office into your rule of law planning.

In addition to your unit's staff, you must communicate with your subordinate units, the most important of which are landowning BCTs. Your subordinate units are the ones doing the work, which generates a huge amount of knowledge and expertise, but they do not always talk amongst each other. Creating a forum where they can share knowledge and discuss ideas is very valuable. However, take care to ensure that the forum is safe enough to allow frank discussion and is efficient enough that it does not get in the way of their mission.

Also, you must coordinate with your interagency partners. In Multi-National Division-Baghdad (MND-B), we were partnered with Baghdad Provincial Reconstruction Team (PRT), and our subordinate units were each partnered with an embedded PRT (ePRT). We needed a way to promote collaboration not only between our PRT, but also amongst all the ePRTs and Brigade Combat Teams (BCTs).

We solved this problem by hosting a biweekly rule of law meeting, which used a computer program that allowed us to display slides while hosting a multi-party voice chat. This meeting brought together the rule of law advisors at Baghdad PRT, the rule of law advisors at each ePRT, the Brigade Judge Advocates from each BCT, as well as each staff section's rule of law representative. Each representative was roughly a peer, so the forum allowed for open discussion and a frank exchange of ideas. Also, many of the participants would not have talked regularly otherwise. For example, many division staff members would not ordinarily have interacted with ePRT rule of law advisors, and would have lost the opportunity to consider their expertise and perspective. Of course, rule of law advisors also benefited by working with military officers. By bringing these people together, we were able to maintain focus, share ideas, and ensure that we had (relatively) coordinated efforts.

#### **b. Know the system**

Just as you had to learn the host nation's legal system in order to conduct operations and targeting, you must also learn it to properly provide civil capacity support. In addition to the steps you took already, make sure to hire a local attorney and find the intangible problems with the legal system.

**(1) Hire a local attorney**

There is almost no way that you will know the language and culture—especially the legal language and culture—well enough to be effective in your rule of law mission. For this, you must hire a local attorney. An interpreter isn't enough—you need someone who can interact with local judges as a peer. In MND-B, we arrived to find that prior units had already hired an Iraqi attorney. He proved invaluable for us—adept at everything from hosting major conferences in Arabic, negotiating projects with local judges, training Iraqi Army units on criminal procedure, and helping us understand Iraqi law. Similar expertise will be required at every division, and the money you spend on salary will be quickly forgotten compared to the wasteful projects you will avoid.

**(2) Find intangible problems**

In MND-B, we benefitted from the hard work of our predecessors. They had developed a tremendous knowledge of Baghdad's legal system, and had been able to identify the biggest threat to the Rule of Law in the province—the poor relationship between investigative judges and the police. In Iraq, investigative judges (not law enforcement) investigate crimes. Their investigation is the only one that “counts,” because they can decide to accept or reject any investigation done by the police.

We discovered (as did many PRTs and military units), that this system had broken down. The police often did not know what their local judges wanted to see in an investigation. They also did not know how or when to coordinate with the judge. In our efforts, we did not try to change this system, but we did try to improve the relationship between investigative judges and law enforcement. Our goal was for law enforcement to involve the judges and know what the judges expected from them. We also wanted the judges to communicate with law enforcement, being clear about what type of involvement the judges wanted to have.

This problem was not very tangible, and could not be fixed by building or buying anything. It required us to build relationships between the right people over the long term.

**c. Provide the right help**

Your civil capacity efforts will be most successful if you respect the systems the host nation already has in place, and focus on resources that you can provide quickly and as simply as possible. Avoid disrupting what works. Often, your best resources will be training, your connections, your credibility, and money or equipment.

**(1) Training**

U.S. Forces are often well-positioned to provide training to judges and law enforcement. In MND-B, we knew that we could provide quite a bit of effective training on forensic evidence and criminal investigation. We had access to quite a few forensic facilities, such as the Joint Expeditionary Forensic Facility (JEFF) located on Camp Victory. These facilities had U.S. and Iraqi forensic experts, and generally had enough translators to host comprehensive tours and training sessions. Also, Iraqi judges and investigators responded well to the training, which was fairly sensitive to Iraqi custom and the Iraqi legal system. Because we had this great resource, we helped our subordinate Brigade Combat Teams train their local judges whenever possible.

When providing training, you must train the right people. We found that training investigative judges, and then allowing them to train law enforcement, was quite effective. According to the Iraqi criminal procedure code, the investigative judge was to control the investigation. However, they had largely been overlooked by U.S. training efforts, which had a tendency to focus solely on law enforcement. By training them on the latest forensic techniques, we were targeting the very people who had to accept forensic evidence (in Iraq, as mentioned earlier, law enforcement investigations are of no value unless conducted under the supervision of,



and accepted by, an investigative judge). Also, judges were less likely to accept forensic evidence when pressured to do so by the law enforcement officers they were supposed to be supervising.

One of the best training efforts we conducted was the Rusafa Area Command (RAC) Rule of Law Conference, hosted by 3rd Brigade, 82nd Airborne Division. That conference brought together the top investigative judges from Rusafa (the eastern portion of Baghdad) with key leaders from the Iraqi Army, the Federal Police, and Iraqi Police leadership. 3rd Brigade hosted a training session for the key law enforcement leaders and the judges, provided a forum for a criminal procedure lecture by the chief investigative judge, and hosted a panel discussion between all three entities. Completely in Arabic and facilitated by MND-B's Iraqi Attorney/Advisor, the conference was successful because it kept judges in the lead, developed relationships, and allowed each group to educate others about its role within the legal system.

## **(2) Connections and Credibility**

U.S. Forces are also able to use their connections and credibility within the host nation government and legal system. Just like any bureaucracy (including our own), different host nation agencies will be working on the same problem, or will be unable to work together. If you are careful and persistent, you will be able to improve cooperation within the host nation's government. In MND-B and at Baghdad PRT, we realized early on that each of us had a strong connection to different actors in the criminal justice system. In MND-B, we had many Police Training Teams (or PTTs), while Baghdad PRT had a strong connection with Iraqi judges. By working together on the U.S. side, we were able to use our strong connections to help both the police and judges work together more closely.

## **(3) Money and Equipment**

Finally, you will have plenty of opportunities to provide money or equipment to the host nation's justice system. When you do this, realize that the culture within the host nation's legal system is what's most important. For example, if the workers at the court you're trying to help cannot maintain basic equipment, providing them with a state-of-the-art computer system and network will not solve their problems. When spending money, look for areas where your help will not create long-term maintenance costs, or look for places where the host nation has a system in place and just needs help with start-up costs.

In a developing country, it is often true that the more a project costs, the worse it is. A good example from Baghdad in 2009 was the Taji IP Academy. Located in an abandoned detention facility, this project was run by an ePRT Rule of Law Advisor, two State Department International Narcotics and Law Enforcement (INL) advisors, and an Air Force Police Transition Team (PTT). It had almost no funding, and operated on whatever resources the PTT could scrape together. What it did have was serious commitment from Iraqi Police (IP) leadership. The INL representatives and the ePRT Rule of Law Advisor had spent years meeting all the right people, and they had a great relationship with the IP officers in charge of training. These IP leaders had worked the academy into their permanent training plan—police officers in need of training were officially rotated through the classes at the academy, and all classes were taught by official Ministry of the Interior instructors. No Iraqi was there unofficially—it was their place of duty while they were in attendance. It was this level of commitment by the Iraqi Police, and not the amount of funding that made the academy successful. In fact, the *low* level of funding means that it will be much easier for the Government of Iraq to run in the future. Projects like this should be your goal.

## **4. Conclusion**

You now understand the two rule of law missions. The art of rule of law is to balance each, ensuring that your targeting is not so short-sighted that it overwhelms the host nation's legal institutions, and ensuring that your civil capacity efforts remain relevant and realistic.

## **D. Rule of Law in Northern Iraq - Bridging the Gap Between the Kurdish and Arab Judiciary**

*Editor's Note: The following article describes the experience of a rule of law attorney in Northern Iraq who sought ways to bridge the gap between the Kurdish and Arab judiciaries.<sup>98</sup>*

Task Force Lightning deployed to Northern Iraq (Tikrit) and assumed responsibility over Diyala, Salah ad Din, Kirkuk and Ninewah Provinces, as well as the Kurdish Regional Government region (KRG) in October 2008. During this time, U.S. Forces were beginning to transition to operations under the "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 Security Agreement). After 1 January when the transition became official, the practice of rule of law in Iraq changed drastically. One way in which Task Force Lightning attempted to remain relevant and involved in rule of law was to provide the Iraqi judicial system with training, reach-back, and relationship building events.

U.S. Forces no longer had the authority nor the funds to begin projects that were previously "business as usual." The Provincial Reconstruction Teams (PRT) became the lead organization for rule of law; however, PRTs did not have the movement assets nor the personnel to engage in a comprehensive rule of law mission. The Brigade Judge Advocates and their team partnered closely with the PRT in order to complete the rule of law mission in their respective provinces that would not only meet the State Department's objectives, but would also meet the Brigade Commander's intent. At the division level, Task Force Lightning coordinated the rule of law across all four Northern provinces and the KRG.

A theme common across Northern Iraq was the lack of professional "reach back" among the legal community and the judiciary. Many times judges in each province had never met the other judges in that same province, much less judges from neighboring provinces. The courts did not communicate among one another if issues arose. In Northern Iraq one of the problems Task Force Lightning dealt with were the relationships between the Arabs and the Kurds, which were strained at times. Judges who had no professional relationships with other judges in the same province definitely did not have professional relationships with judges from the KRG. One judge from Diyala province stated that there was a Kurdish man in his prison who had been in prison for five years because the documents concerning his arrest were in Kurdish, and the judge was unable to have the documents translated.

One of the ways Task Force Lightning began to assist in these issues was to hold a conference in a secure location that was not connected with U.S. Forces. The concept was to give the judges a place to build relationships among the judiciary and legal community and to begin to establish some "reach back" capability. When we began planning the conference, we encountered several hurdles. The first hurdle involved the location for the conference. Even though security in Iraq was improving, there were no appropriately secure venues to hold the conference in any of the four provinces in Task Force Lightning's Operational Environment. The only viable option was to hold the conference in the KRG. Security was not an issue, and it provided a relaxing atmosphere in which the judges could engage in dialogue and debate.

With the location chosen, the next task was to determine how to fund the conference. Funding was no longer readily available to provide training to the Iraqi Judiciary. Working closely with the Salah ad Din PRT and the Brigade Judge Advocate, Task Force Lightning was able to fund the conference using a mixture of Department of State Quick Reaction Funds (QRF) and U.S. Army O&M funds. O&M funds were used to cover the cost of the U.S. military attendees; while QRF funds were used to pay for the cost of the Iraqi attendees.

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<sup>98</sup> CPT Gretchen Davenport was Task Force Lightning's Rule of Law attorney from November 2008 through November 2009.

After the initial planning stages, approval for the conference from the President of the Iraqi Higher Juridical Council (HJC) was obtained. In Iraq, the President of the HJC acts as the approval authority for all judicial training and equipping. Invitations were sent to the Provincial Chief Judges of Salah ad Din, Diyala, Kirkuk, Mosul and the Chief Judge for the KRG inviting the Chief Judge along with several judges of his choosing from the province/region to attend. The BJAs in each province along with the Regional Reconstruction Team in Irbil worked closely with their Chief Judges to obtain “buy-in.” In the end at least five (5) judges from each province and twenty (20) judges from the KRG attended the conference.

Task Force Lightning assessed the conference as a major success. The President of the KRG Higher Juridical Council attended the opening dinner and welcomed the judges from the provinces to Irbil. Discussions among the judges during the conference were lively and thoughtful. At the end of the first day, the Chief Judge of Diyala province, aided by the other judges, wrote a list of nine (9) issues that the judges thought needed to be solved by the judicial leadership in Baghdad.

Day two (2) of the conference included a presentation by the Joint Expeditionary Forensics Facility (JEFF) Lab Officer in Charge. The presentation gave the judges an overview of ballistic and fingerprint evidence. The judges were very interested in learning about forensic evidence. Most cases in Iraqi courts only use eye witness and confession testimony. There is little basis for the use of forensic evidence in Iraqi courts in the Iraqi Criminal Code and Criminal Procedure Code. The judges, however, recognized the benefits of scientific evidence and asked many, many questions.

After the conference, the judges from Salah ad Din requested Task Force Lightning assist them with accepting an offer from the KRG judges to return to Irbil to tour the Irbil Crime Lab. The Irbil Crime Lab is a state of the art facility with the ability to process everything from finger prints to DNA to ballistics. Again, funding for the training event was difficult to obtain. Department of State QRF funding rules had changed, and O&M cannot be used to pay for Iraqi judicial training. In the end, a small pot of Iraqi Security Force Funds were still available. Judges from Salah ad Din and Kirkuk attended the follow on forensic training in Irbil. The Director of the Crime Lab met the judges and conducted part of the tour through the lab. The judges were impressed by the capabilities of the lab, and the door was opened to further strengthen judicial/law enforcement relationships by the use of the Irbil crime lab by neighboring provinces.

By working closely with Higher Headquarters, the Brigade Judge Advocates on the ground, and the PRTs, Task Force Lightning was able to discern concerns from the Iraqi judiciary and address these issues in a way that furthered U.S. goals, provided training to the judges, strengthened Kurd/Arab judicial relationships, and strengthened the rule of law in Northern Iraq.

## **E. Synergistic Effects in a Rule of Law Ends-Based Approach**

*Editor’s Note: The following article describes the experiences of a rule of law attorney in southern Iraq, specifically the city of Basrah.*<sup>99</sup>

Throughout most of my team’s year<sup>100</sup> in Basrah, Iraq, we tried to think about rule of law (RoL) as much like building a wheel. With U.S. Forces and Iraqi Security Forces (ISF) establishing a rim of security for the Basrawis, we could focus on shaping or building the six Joint Campaign Plan Conditions<sup>101</sup> (focus areas) or

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<sup>99</sup> This narrative is a portion of an article by CPT Jeremy S. Scholtes entitled *Smart Power in Action – A Rule of Law Judge Advocate’s Reflections from Basrah, Iraq* to be published in the Creighton Law Review during the 2010-2011 academic year.

<sup>100</sup> 17<sup>th</sup> Fires Brigade Rule of Law (RoL) team from Fort Lewis, Washington included: CPT Jeremy Scholtes, SGT Jacqueline McElfresh, SPC Keagan Geer, and Mr. Samir Mufarreh (interpreter). Our Brigade Judge Advocate was MAJ Kenneth Tyndal.

<sup>101</sup> 2009 Joint Campaign Plan [hereinafter JCP] (on file with the author) (providing detailed guidance for all Department of Defense and Department of State personnel in Iraq, to include a very specific section, Annex C, for RoL practitioners). The six Conditions are – 1) Increasingly transparent, independent, efficient, and secure judiciary, 2)

spokes that must merge together at the hub in order to build strong, sustainable RoL capacity. The hub is local national acknowledgement of, belief and faith in, respect of, and conformity with the RoL. Our Basrah interagency team decided the best way to build that RoL wheel was through a holistic ends-based approach, using projects and training that yielded synergistic effects. The American Heritage Dictionary defines synergy as “the interaction of two or more agents or forces so that their combined effect is greater than the sum of their individual effects.”<sup>102</sup> Synergy is one of those words that sounds complex or academic, but the definition as you just read tells you it is really quite easy and very practical. So if it is so easy and practical, why doesn’t everyone do it? The answer is that it takes time, and time is a precious resource. For our purposes in the RoL building context I define synergy as simultaneous efforts in multiple Conditions that may be transpiring separately, but in fact complement each other to build an integrated and interdependent RoL environment.

In 2009 we assessed that we needed to work on more basic or fundamental skill sets before moving to more advanced training, or develop individual partnerships before we had the *wasta*<sup>103</sup> to bring our partners together to establish and influence their partnerships, our efforts appeared more like parallel columns rather than spokes of a wheel. Later in 2009 and then in 2010 we progressed to a point where we were able to take a more synergistic and holistic approach where we would attempt to satisfy as many Conditions as we could, simultaneously, with a single engagement, project, or set of projects. The trick was to know the right time to develop that collaborative environment because starting too early could quickly lead to failure and even setbacks, but starting too late could result in lost opportunity. Transition points from one stage of RoL efforts to the next more advanced stage, based on meeting certain criteria or progressing to a certain point in having shaped the desired conditions, help with this process.<sup>104</sup>

The following illustration exhibits the complexity of, but the absolute necessity for, using the simultaneous effects and holistic approach. One of our priority objectives throughout my year in Basrah was to encourage a transition in the courts from a predominantly eye-witness and confession based prosecution system to one where the judges would also use scientific and technical evidence to help prove up a case or exonerate the accused. This objective crossed both our judiciary and law enforcement capacity building focus areas, and required efforts from several interagency partners because multiple Iraqi directorates were involved in the process. First, the Iraqi Police (IP), part of the Ministry of Interior (MoI), and the Iraqi Army (IA), part of the Ministry of Defense (MoD), were generally the first responders to the crime scene so they needed training on crime scene preservation. Second, the Criminal Investigative Directorate (CID), also part of the MoI, provided the crime scene technicians (CSTs) to actually collect the evidence at the crime scene, properly handle and store it, and then deliver the evidence to the criminal evidence laboratory for processing. Third, the Basrah Criminal Evidence Laboratory,<sup>105</sup> also part of the MoI, needed additional training and

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Enhanced professionalism and effectiveness in law enforcement, 3) Continued improvements in detention and corrections practices and capacities, 4) Improved civil justice system that protects commercial and property rights, 5) Improved corruption detection and enforcement practices, and 6) Increased awareness of rights and equal access to justice through enhanced professionalism in the legal community.

<sup>102</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (Houghton Mifflin Company 4th ed. 2009).

<sup>103</sup> *Wasta* is the Iraqi term for “influence” or “pull.” It generally refers to the connections and strength an individual has in his or her community or organization.

<sup>104</sup> U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 4-14 (Oct. 2008) [hereinafter FM 3-07].

<sup>105</sup> There are four criminal evidence laboratories in Iraq: Irbil, Baghdad, al-Hilah, and Basrah. The Baghdad lab is the largest and most comprehensive lab although it suffered significant damage and loss of capacity when it was bombed by a vehicle-borne improvised explosive device (VBIED) on January 26, 2010. Adam Schreck, Baghdad Police Lab Bombed; 21 Dead, The Washington Times on-line (January 26, 2010), available at <http://www.washingtontimes.com/news/2010/jan/26/baghdad-police-crime-lab-bombed-21-dead/> (last visited July 27, 2010). The Irbil laboratory is not as large but is capable of conducting multiple investigative and technical assessments, tests, and comparisons. Justin Naylor, Iraqi Lawyers, Judges See How Police Investigators Solve Crimes, Official Homepage of the United States Army Front Page News (Oct. 30, 2009), available at <http://www.army.mil/news/2009/10/30/29614-iraqi-lawyers-judges-see-how-police-investigators-solve-crimes/> (last visited July 27, 2010).

resources to properly test, analyze, compare, and exploit the evidence and then document for future use in prosecutions or other investigations. Fourth, the investigative officers (IO), either from CID or one of the twelve IP District Headquarters across the province, all part of MoI, or from the National Information and Investigative Directorate/Agency (NIIA), the federal level intelligence and investigative organization akin to our Federal Bureau of Investigation (FBI), needed training on crime scene exploitation and development of investigative leads. Finally, the provincial investigative judges (IJ), subordinate to the federal-level Higher Juridical Counsel (HJC), needed training to understand the value of scientific evidence and how to use it in court as circumstantial evidence. Then, combined with all of the technical training, resourcing, and general capacity building, we needed to foster partnerships between the IPs (and where appropriate, IAs), CSTs, laboratory technicians, IOs, and IJs.

For such a gargantuan undertaking we needed more resources and unity of effort in more sections than just RoL. What we decided to start with was to coordinate an IP/IJ conference to bring all of the relevant stakeholders together in one place and establish a baseline for Basrah Province.<sup>106</sup> The conference in fact covered a variety of subjects in an effort to clearly identify where friction points in the relationships existed, shortcomings in training, overwhelming problems that needed our attention, and notable strengths on which we could continue to build. The topics of discussion spanned all of the six Conditions except for Condition 4 (commercial and property rights) and definitely provided the opportunity for the RoL team to meet all of the key players in Basrah, hear what the Iraqis thought, and learn how they envisioned they might remedy some of their problems.<sup>107</sup> The amazing thing for me was that coordinating this event took us two months of going between stakeholders because many of them did not speak on a regular basis unless required to or ordered to, which seemed bizarre and dysfunctional—which it was!

This point of failed or non-existent working relationships between directorates, while generally a problem across all of Iraq, was even further exacerbated in Basrah because of the Charge of the Knights (CoK) Campaign in March – May 2008.<sup>108</sup> Unlike many other parts of Iraq where Sunni and Shia conflicts serve as a wedge to divide the populace and where the constant reminder of Sunni dominated and Saddam Hussein led Baathist Party oppression of the Shia population lives on, Basrah is said to have a 80+% Shia population and therefore does not suffer from the Sunni-Shia conflicts as much as other regions of Iraq. However, the CoK campaign in 2008 where nearly 30,000 ISF<sup>109</sup> troops and policemen were sent in to root out and destroy the Special Groups and Shia militia, in particular al-Sadr's JAM, significantly affected the province. While the CoK operation was largely successful in killing, capturing, or driving out hundreds or by some counts, thousands, of militia and terrorists, some of the second and third order effects marred relations in Basrah for at least the last two years and likely years to come.

The 14<sup>th</sup> IA Division did not leave Basrah and in fact continued to man hundreds of checkpoints across Basrah even through my departure in July 2010. They operate with an air of superiority, which is partly merited because they are generally more technically and tactically proficient than the IPs, but which

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<sup>106</sup> Maurice Galloway, *Open Talk Leads to Better Legal System*, 17<sup>th</sup> Fires Brigade Website, Nov. 17, 2009, available at <http://17fib.armylive.dodlive.mil/index.php/2009/11/open-talk-leads-to-better-legal-system/> (last visited June 17, 2010).

<sup>107</sup> Key Topics of Discussion: 1) IO and IJ duties and responsibilities; 2) evidence and case development deficiencies: IJs and IOs need to create better working relationships; IOs need better training and need to focus only investigations; many participants raised the importance of (but apparent lack of) working knowledge of the penal code, procedure code, criminal psychology, evidence collection, and communication; 3) overpopulated prisons; shortage of facility personnel; lack of training for guards and management; 4) shortage of defense attorneys; extremely high number of detainees held over six months without representation and in some cases, without charges; 5) corruption amongst IPs, CID, NIIA, and IJs; 6) witness fear of retaliation, particularly in terrorism cases and so they will not testify, even as secret witnesses; 7) lack of technology to facilitate warrant tracking and case processing; and 8) criminal evidence laboratory advancements.

<sup>108</sup> MARISA COCHRANE, *THE BATTLE FOR BASRA*, IRAQ REPORT 9, INSTITUTE FOR THE STUDY OF WAR 15 (JUNE 2008), available at <http://www.understandingwar.org/report/battle-basra> (last visited June 17, 2010); Institute for the Study of War, Iraq Project, Regional, Southern Iraq webpage, <http://www.understandingwar.org/region/southern-iraq> (last visited June 17, 2010).

<sup>109</sup> *Id.*

unfortunately undermines the necessary partnership for the IA and IP to maintain long-term security in Basrah and precludes the IPs from taking over in earnest all of the law enforcement functions in the city. During the weeks of clearing Basrah, many IPs were arrested and either prosecuted or still languish in jails today. Many, but not all of them, were corrupt players through pure ideology, others through coercion, and others because they received bribes in the militia dominated environment in 2006-2008. The IJs played their part in either frustrating the IA by releasing detainees (sometimes in a summary and suspect manner; and sometimes quite legitimately based on lack of evidence) or angering many of the IPs for holding police who were supposedly “innocent.” The IJs were then targeted by JAM and other Special Groups because they investigated and prosecuted the terrorists. Of course, the truth in all of the chaos lies somewhere in between all of the stories, but the result was fractured or non-existent relationships across the province.

To add even more frustration to our attempt at coordinating the conference, we were attempting to incorporate the NIIA (akin to FBI), the Ministry of Justice (MoJ) prisons and MoI holding facility representatives,<sup>110</sup> and local Iraqi Bar Association and Iraqi Jurist Union representatives. In Basrah the NIIA compound is actually inside of the city-block sized Provincial Joint Coordination Center (PJCC) where the Provincial Director of Police (PDoP) and his deputies and staff, the Basrah Criminal Evidence Laboratory, another small and extremely overcrowded pre-trial holding facility, and a few other IP related entities are based. Despite the fact that the Director of the Basrah NIIA, Brigadier General (BG) Amer, had an office not 100 meters away from the Basrah PDoP, Major General (MG) Adel, the two men would not coordinate between themselves. My team had to physically walk between their offices and facilitate for them. The corrections personnel always felt left out of coordination sessions regarding fixing the overcrowded and poor conditions—meetings that should include them—but then felt solely blamed by human rights assessors for all of the overcrowding, alleged abuse, and substandard conditions at the facilities. The entire coordination process for bringing all of the stakeholders together was our first glimpse of the utter lack of coordination and the strained relationships that existed in and amongst the legal institutions across the province.

The new chief judge (CJ) in Basrah as of August 2009, CJ Khaz’al Dhabol Qasem,<sup>111</sup> an apparently well respected, very experienced, and highly motivated new head of the judiciary for Basrah, offered to host the conference at the Palace of Justice (PoJ), the newest and largest of the ten courthouses in Basrah. The PoJ, a U.S. funded \$10.9 million courthouse, built by the local Basrawi contractor Al Dayer United Construction with planning assistance and oversight from the United States Army Corps of Engineers Gulf Region South, had just opened February 28, 2009.<sup>112</sup> The court housed approximately 50 of the 92 civil law and investigative (criminal law) judges and 30 of the 60 prosecutors in Basrah Province, the Basrah Appellate Court (chaired by CJ Khaz’al), and several hundred support staff, administrators, and guards. The automatic response from the IP leadership was a litany of questions about why the conference was going to be at the courthouse when it *could* be somewhere else. Now we appeared to have a turf war on the horizon simply because the event was not at a neutral location. My Provincial Reconstruction Team (PRT) partners and RoL leads, Mr. Thomas Doherty, Mr. Daniel Connell, and Mr. Kamil al-Hasani and I considered other locations such as the few hotels in the area that could support a conference with reasonable security measures in place, the Basrah International Airport, and the Southern Oil Cultural Center, but ultimately we decided to support the CJ in having a conference that focused primarily on the investigative and judicial process at the PoJ. The CJ was adamant that court business should be conducted at the provinces’ court so as to demonstrate

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<sup>110</sup> The Ministry of Justice (MoJ) facility, al-Maqil Prison, was the only post-trial facility (prison) we had in Basrah. Scheduled to open in November 2009, then pushed back to April or May 2010, and then delayed yet again until after I left, the 1200-bed Basrah Central Prison paid for by US tax dollars, was scheduled to take the al-Maqil population and as much of the rest of the post-trial population held in pre-trial facilities. The Ministry of Interior (MoI) facilities comprised most of the rest of the holding facilities in Basrah, including al-Minah, twelve District Headquarter jails, and the seventy or eighty local police station short-term holding cells.

<sup>111</sup> Chief Judge (CJ) Khaz’al Dhabol Qasem, former Basrah deputy CJ and one-time former Basrah chief prosecutor, replaced CJ Laith Abdul Sammad.

<sup>112</sup> Press Release, Multi-National Forces – Iraq, Basra’s New Courthouse Bolsters Iraq’s Rule of Law (Feb. 28, 2009), available at <http://www.grd.usace.army.mil/news/releases/NR09-02-28-02.pdf> (last visited June 17, 2010).

legitimate and transparent processes with the Iraqis in the lead! That would seal for me for the rest of the year what a committed, passionate, and cerebral partner we had in CJ Khaz'al. Whether it was because we held the conference at the PoJ or for some other more legitimate reason, MG Adel the PDoP, decided he needed to send his deputy, BG Eedan instead. My concern was that we were not even started yet and the IP leadership had with a single bold move already slighted the CJ and would set back the conference. At the end of the day, however, the conference was a great success and simultaneously served as a reference-point for our RoL team for planning purposes. So, off we started on our ends-based, synergistic effects focused year.

Returning to our five groups of stakeholders involved in the prosecution process from securing the crime scene to final banging of the gavel at acquittal or guilty verdict and sentencing, we start with the beat-cop IPs. Our RoL team partnered with a Military Police battalion attached to my Brigade that was charged with the Police Training Team (PTT) mission. Those great National Guard Soldiers from Alabama, Georgia, Florida, Missouri, New York, and a handful from a few other states, along with some outstanding civilian police trainers called International Police Assistance (IPA) trainers,<sup>113</sup> all under the capable leadership of Lieutenant (LTC) Charles Buxton, worked with MG Adel's police in every conceivable area of policing that they could resource. They worked at the police stations, at the provincial Police College and Police Academy,<sup>114</sup> and on the COB, mentoring IP district headquarter station commanders, training beat-cops on physical fitness, marksmanship, patrolling and community policing, administrative concerns, and myriad of other fundamental law enforcement tasks and skills. Of note, they conducted some very critical crime scene preservation classes that taught the first responders how to secure the scene keeping on-lookers out and evidence in, and generally ensuring safety for the public and maintaining the integrity of the crime scene until the CSTs and IOs arrived.

In the months following training on the fundamentals the PTTs started a centralized block of training at the COB in addition to their station visits.<sup>115</sup> One of these blocks of instruction was called Criminal Evidence Collection training. The MPs and IPAs trained groups of 15-20 CSTs for their first two or three iterations of the nine-day training session (three days a week for three weeks) as the CSTs are the tasked IP personnel who actually collect the fingerprints, swab for DNA sampling, take photographs, and conduct all other evidence collection activities. It is important to remember that we are not talking about individuals who received months or years of training and are held strictly accountable for chains of custody, marking procedures, and on-site exploitation. This is not CSI-Miami, New York, or anywhere else in the U.S. Most of the CSTs were not well trained, are young and lack experience, but were motivated to learn and hone their skills.

After the MPs and IPAs trained the bulk of the CSTs, in an effort to take the training a step further and bring the CSTs together with their IO colleagues who work the other portion of the crime scene, I approached LTC Buxton about expanding the training to include IOs. We agreed that the first or second class including the IOs would include mostly IOs from the al-Maqil district (one of the twelve districts) so that we could also partner the IJs from the al-Maqil district to come to some portion of the training to provide their insights and direction, see exactly what their IOs were learning, and perhaps learn something themselves. This required separate coordination for the IJs from the al-Maqil district courts to attend, all formally requested through the CJ who would then order the IJs to attend.

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<sup>113</sup> See US DoS International Narcotics and Law Enforcement Affairs (INL) Office of Civilian Police and Rule of Law, Civilian Police Fact Sheet, at <http://www.state.gov/p/inl/rls/fs/113190.htm> (last visited July 27, 2010) (discussing a brief history of the INL mission and ongoing training in Iraq and other post-conflict states).

<sup>114</sup> The Police College trained Iraqi policemen, and the Police Academy trained the officers. Both facilities are co-located Shaibah Training Facility about 10 miles west of Basrah proper.

<sup>115</sup> Maurice Galloway, CSI-Iraq: Evidence Collection Course Helps IPs Close Cases, *available at* [http://www.dvidshub.net/?script=news/news\\_show.php&id=48911](http://www.dvidshub.net/?script=news/news_show.php&id=48911) (last visited June 17, 2010).

Part of the problem our RoL team identified early in our tour was that while the Criminal Procedure Code detailed some of the duties and responsibilities of the IJs (magistrates) and IOs, it did not make mention of the CSTs, lab technicians, rules of evidence or any other set guidance for using criminal evidence in court or how any of these players worked together to facilitate case development. The IOs, CSTs, and IPs were all sure to point out, however, that they each had their own narrow lane and that they did not do anything else. Each having their own set of responsibilities made sense, but the problem was (and probably will continue for the foreseeable future) that they did not communicate with each other.

Not all DHQ IO training was successful. As several IOs told Mr. Edgar Lacy, my law enforcement professional (LEP) one day during some on-sight training he assisted me with conducting in al-Zubayr district, they did not need training on criminal evidence because the CSTs do that. Can you imagine an investigator or detective in the U.S. who says he does not need to learn about physical evidence? Perhaps the IO does not need to know the intricacies of how precisely to collect every type of evidence, or about exploiting it at the laboratory, but he cannot possibly build cases without understanding what evidence was found, the context and circumstances, the results of the exploitation and how to use those results to search for suspects and witnesses. The other problem is that in a city of 1.5 million people and a cadre of only about 200 CSTs, the system needs as many trained and team-oriented professionals as possible working the hundreds of alleged crimes a day in Basrah.

The communication and partnering between each of these players is key in order to fully process the crime scene for not only physical evidence but also witnesses, develop additional leads, and then effectively process the evidence and then exploit the results to further build the investigation and potentially support companion cases or other unsolved cases. Additionally, the IJs need to understand how to direct the IOs to use some of the evidence to further develop the case and then use it themselves in investigative hearings and trials.

While we did not complete coordination before I left theater, the new PTT leader LTC Moore, the IPA leadership under Mr. Al Stewart, and I discussed developing two additional course models to get all of the CSTs, IOs, and IJs together for training and partnering. First, we discussed another centralized course that was shorter in duration and that was strictly for IOs (with IJ participation) to further develop the IO skills in witness interviews, suspect interrogations, lead development, and case management. The intent in this training was to address the deficiencies pointed out by the IJs that many of their IOs did little beyond following up on exactly what they were instructed to investigate and often did not produce organized case files. IJs would provide some instruction and would be on hand to provide necessary procedural context. The second model, and definitely more desirable but more difficult and time consuming to arrange, was coordinating for one or two IJs who had the most experience in working with crime scenes and scientific and technical evidence to teach a course. The crime lab trainers we incorporated into the centralized training, as well as one or two experienced IOs from the DHQs, were also key trainers for the combined training blocks. While the details were worked out to support these two models, we continued with the training at the DHQs, focusing primarily on another particularly motivated district north of Basrah called al-Qurnah.

That brings us to the criminal evidence laboratory technicians who processed the evidence. I previously mentioned that there are four criminal evidence laboratories across Iraq, and that one of those labs is in Basrah. When I arrived in July 2009, the laboratory was in rough condition. The British Consulate had a very small, but very effective contracted contingent of physical and forensic evidence specialists who were on point for facilitating training for the technicians, tracking the renovation of the existing lab at the PJCC, and outfitting the lab with the instruments and devices necessary to conduct handwriting, ballistics, fingerprint, and DNA analysis. Mr. Robert Lamburne and his successor Mr. John Ayres were the subject matter experts who provided much of the vision for developing capacity at the lab and expertise to make it happen. The U.S. for the most part contributed funding to renovate the fourth and fifth floors along with several hundred thousand dollars of equipment, while the British paid for renovations on the first three floors, most laboratory devices on those floors, and coordinating training for the technicians in Baghdad and Europe, and the Australians provided a travel opportunity to participate in criminal evidence laboratory



training in Australia. The first round of renovations that cost approximately \$263,000, was planned out in 2007 and 2008, and completed in February 2009.<sup>116</sup> This was the first major step forward in transitioning the incredibly dirty and broken-down storage and office building into a semi-sanitary work environment for technicians and sensitive equipment. When I left in July 2010, the major renovation of the top floor was still underway with a grand opening of the entire laboratory scheduled as part of a regional RoL conference to be held in Basrah in August or September 2010.

As the technicians developed more and more skills with their new and improved equipment, the RoL team decided in December 2008 to encourage the chief of the crime lab, BG Kareem, and his technicians to display their capabilities in a five-day training session and demonstration for Basrah Province IJs.<sup>117</sup> We also attempted to incorporate some additional familiarization with USF capabilities that most of the judges and technicians had not yet seen in action, but from which most of them had seen products or reports. PRT and I coordinated for representatives from Air Force Document Media Exploitation (DOMEX),<sup>118</sup> Combined Explosives Exploitation Cell (CEXC)<sup>119</sup> or a local Explosive Ordinance Disposal (EOD) team, and IPAs. These representatives were supposed to explain and demonstrate how they are able to conduct types of exploitation, improvised explosive device (IED) analysis, and upload biometric data into the Handheld Interagency Identity Detection Equipment (HIIDE) system,<sup>120</sup> respectively. As the planning proceeded for the training, the Iraqi lab technicians took more and more initiative until they had coordinated their own set of training which they would personally present. Still without complete fidelity as to whether the Iraqis intended to do the training themselves, we arrived at the crime lab with our trainers prepared to share.

While 17th Fires Brigade and our PRT RoL team encouraged this training event, expanded it from a basic lab walk through to a multi-day instructional opportunity, and initially coordinated for subject matter experts to present the material, the Iraqis ultimately took control and boy did they shine. In the end USF only taught one or two classes and our Iraqi partners took the lead in all other instruction. While the opportunity was lost to demonstrate capabilities which we have and the reports from which we share, the more important aspect of the training was that the Iraqi crime lab technicians took point. By any measure of effectiveness, this training session was a smashing success. The judges were engaged and asking questions and the technicians were clearly quite proud to show-off their contribution to the fight against crime and terrorism. Seventeen judges attended the first iteration, returning all five days, and the remaining IJs attended in subsequent weeks. This is simply another exhibit of the international and interagency synergy, in combination with Iraqi partners who seized the initiative that played out in the RoL forum everyday in Basrah.

Finally, we return to the judiciary which is where we started. While there are military police, civilian trainers, and a plethora of interagency and coalition partners to conduct the actual training for IPs and other Iraqi stakeholders referenced above, the only entity to work specifically with the judges was our RoL team. Helping to shape the future of the independent judiciary by creating a receptive and informed body of investigative judges for the technical and scientific criminal evidence just discussed was a huge part of my

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<sup>116</sup> Press Release, Multi-National Forces – Iraq, Basrah Forensic Lab Gets CSI Upgrade (Feb. 27, 2009), *available at* [http://www.usf-iraq.com/?option=com\\_content&task=view&id=25585&Itemid=128](http://www.usf-iraq.com/?option=com_content&task=view&id=25585&Itemid=128) (last visited June 17, 2010).

<sup>117</sup> Maurice Galloway, CSI-Iraq: The Judiciary Process Develops in Basra, *available at* <http://17fib.armylive.dodlive.mil/index.php/2010/01/c-s-i-iraq-the-judiciary-process-develops-in-basra/> (last visited June 17, 2010).

<sup>118</sup> Alyssa Miles, *Tactical Team Dominates Exploitation Efforts*, Operation Iraqi Freedom Official Website of Multi-National Forces – Iraq, Aug. 21, 2009, *available at* [http://www.usf-iraq.com/?option=com\\_content&task=view&id=27656&Itemid=128](http://www.usf-iraq.com/?option=com_content&task=view&id=27656&Itemid=128) (last visited July 27, 2010).

<sup>119</sup> Stephen Phillips, The Birth of the Combined Explosives Exploitation Cell (CEXC), *Small Wars Journal*, *available at* <http://smallwarsjournal.com/blog/journal/docs-temp/52-phillips.pdf> (last visited July 17, 2010).

<sup>120</sup> Steve Goodman, *Biometrics Are Driving Terrorists Bats*, 8 *Sotech* (2010) (discussing use of the Biometric Automated Tool Set (BAT), Handheld Interagency Identity Detection Equipment (HIIDE), and Automated Biometric Identification System (ABIS) in Iraq and Afghanistan), *available at* <http://www.special-operations-technology.com/sotech-archives/233-sotech-2010-volume-8-issue-2-march/2670-biometrics-are-driving-terrorists-bats.pdf> (last visited July 27, 2010).

year. It was often hard to tell exactly why we had as much of the progress we did have through the year, but when it comes to criminal evidence and the crime lab I am confident one of the long poles in the tent was HJC Chief Judge Medhat al-Mahmoud's clear interest in supporting the paradigm shift in the courts. His HJC Five-Year Strategic Plan (2009-2013)<sup>121</sup> never specifically addresses scientific and technical criminal evidence, but the objectives of the plan paint the picture of a forward leaning, technology and continuing legal education hungry, and evolving judiciary. The Chief Judge's commitment to scientific and technical evidence is explicit, however, in his hosting of the national criminal evidence conference in Baghdad on December 24, 2009, at the new Judicial Development Institute in Karkh<sup>122</sup> and continued discussion of progress in the field during the Fifth Annual Rule of Law Conference at the U.S. Embassy in Baghdad where CJ Medhat was the keynote speaker.<sup>123</sup>

In addition to incorporating the IJs into the training just described, I also used my weekly engagements with them to discuss ongoing case files. As most all of our activities and projects went, these engagements also served several purposes and hence, produced simultaneous effects. First, because many of the acts of terror involved USFs, we had a vested interest in tracking the cases through the system and helping to support prosecutions. Second and closely related, as USF continued to support IA and IP missions to capture terrorists in Basrah Province, our intelligence personnel and the many analysts and subject matter experts who exploited the cell phones, computers, written documents, and other evidence found during sensitive site exploitations produced reports that the IJs needed. The problem was that these reports, without explanation and a "connecting of the dots," were basically worthless. I spent hours preparing for and working with the IJs so that they could understand what the information means on a CELLEX report, how to synthesize fingerprints taken from the inside of an IED referred to in a CEXC report and positive matches for those fingerprints in a BAT-HIIDE report, and dozens of other situations.

The brigade intelligence officers and I formed a close relationship and open, fluid lines of communication so that we were always synchronized. MAJ Greg Holden, Captain (CPT) Janet Sapatu-Ellis, Lieutenant (LT) Cameron Graham and their team were not only the responsible section for intelligence collection and targeting development, but they were instrumental in collating all of the reports that came back from the various agencies, ensuring they were in releasable form and translated, and then getting them to me for prosecution. Before I would meet with the IJs regarding the evidence, the intelligence team delivered copies of the reports to their partners in the Basrah intelligence network who would use the reports for future planning but who also delivered the reports to the appropriate investigators at CID or NIIA. Those IOs should have been including those reports in their case files for discussion with the IJ, lead development, and eventually prosecution, but what we discovered was that for a variety of reasons that often did not happen. Thus, my third function or intended effect was serving as a check on the system to ensure it was functional. Sometimes that meant we discovered broken systems, other times simply failed communications, and yet other times suspected corruption.

In close, the combined ends-based, synergistic effects efforts by all members of our RoL team greatly facilitated our capacity building mission in as many RoL Conditions as we could every time we conducted an engagement or started a project. We hope that our efforts ultimately yield a substantial contribution to building the RoL wheel in Basrah, Iraq.

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<sup>121</sup> Iraqi Judicial Development Strategy Five-Year Plan 2009-2013 (on file with the author).

<sup>122</sup> See Higher Judicial Council Hosts Criminal Evidence Conference, Global Justice Project: Iraq website, available at <http://www.gjpi.org/2010/01/18/higher-judicial-council-hosts-criminal-evidence-conference/> (last visited June 17, 2010) (discussing the purpose of and participants in the first ever conference of the sort, and citing to an Arabic version of the HJC's press release, available at <http://www.iraqja.org/news/nadwaa.htm>, last visited July 27, 2010).

<sup>123</sup> February 3-4, 2010.



## ABBREVIATIONS AND ACRONYMS

AAA	Afghan Attorney Advisor
AAE	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Asia, Africa and Europe Programs
AAR	After Action Report
ACC	U.S. Army Capstone Concept
ACO	North Atlantic Treaty Organization, Allied Command Operations
ACT	U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization, Advanced Civilian Teams
ADCC	Afghan Detention and Corrections Cell
ADR	Alternative Dispute Resolution
AFOSI	Air Force Office of Special Investigations
AFR	Africa
AGA	Agricultural Advisor (U.S. Embassy)
ATF	U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives
ANA	Afghan National Army
ANDF	Afghan National Detention Facility
ANDS	Afghan National Development Strategy
ANE	Asia and the Near East
ANP	Afghan National Police
ANSF	Afghan National Security Forces
AOB	Advanced Operating Base
AP	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Asia, Africa and Multilateral Programs
art.	Article
ARTF	Afghanistan Reconstruction Trust Fund
ASD SO/LIC	Assistant Secretary for Defense for Special Operations and Low Intensity Conflicts
ASFF	Afghan Security Forces Fund
ASOP	Afghanistan Social Outreach Program
AUP	Afghan Uniformed Police
AWG	Asymmetric Warfare Group, U.S. Army
BBA	Bilingual Bicultural Adviser
BCT	Brigade Combat Team
BIAP	Baghdad International Airport
BTIF	Bagram Theater Internment Facility
CA	Civil Affairs
CAAT	Counterinsurgency Advisory and Assistance Team
CAOCL	U.S. Marine Corps, Center for Irregular Warfare / Center for Advanced Operational Culture Learning
CAST	The Fund for Peace Conflict Assessment System Tool
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment <b>or</b> Civil Affairs Team
CCCI	Central Criminal Court of Iraq
CCCI-K	Central Criminal Court of Iraq-Karkh
CCIR	Commander's Critical Information Requirements

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CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CENTCOM	U.S. Central Command
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CEXC	Combined Explosives Exploitation Cell
CJCS	Chairman of the Joint Chiefs of Staff
CICA	Competition in Contracting Act
CID	Criminal Investigation Division (U.S. Army) and/or Criminal Investigative Directorate (Iraq)
CIDA	Canadian International Development Agency
CIL	Customary international law
CIV	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Civilian Police and Rule of Law Programs
CIV-MIL	civilian-military
CIVPOL	UN Civilian Police
CIZA	Competent Iraqi Authority (IZ is an acronym used to indicate “Iraq”)
CJ	Chief Judge (Iraq)
CJIATF	Combined Joint Interagency Task Force
CJSOTF-AP	Combined Joint Special Operations Task Force – Arabian Peninsula
CJTF	Criminal Justice Task Force (Afghanistan) and/or Counter-Narcotics Justice Task Force (Afghanistan)
CLAMO	Center for Law and Military Operations, The Judge Advocate General’s Legal Center and School
CMO	Civil-Military Operations
CMOC	Civil-Military Operations Center
CNJC	Counter Narcotics Justice Center (Afghanistan)
CNP-A	Counternarcotics Police - Afghanistan
CNT	Central Narcotics Tribunal (Afghanistan)
CoK	Charge of the Knights (Iraq)
COTR	Contracting Officer’s Technical Representative
CPA	Coalition Provisional Authority (Iraq)
CPATT	U.S. Central Command, Civilian Police Assistance Training Teams (Iraq)
CRC	U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization, Civilian Response Corps
CRSG	Coordination of Reconstruction and Stabilization Group / Interagency Management System
CRPD	Convention on the Rights of Persons with Disabilities
CSDP	European Union, Common Security and Defense Policy
CSTs	Crime Scene Technicians
CSOs	Civil society organizations
CSTC-A	Combined Security Transition Command - Afghanistan
DATT	U.S. Embassy, Defense Attaché
DCHA	U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs
DCM	U.S. Embassy, Deputy Chief of Mission
DDR	Disarmament Demobilization and Reintegration
DEA	U.S. Department of Justice, Drug Enforcement Administration
DETs	Detachments
DHS	U.S. Department of Homeland Security
DFIP	Detention Facility in Parwan

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DG	Democracy and Governance
DIILS	Defense Institute of International Legal Studies
DLI	Iraq, Defense Language Institute
DO	Development Officer (USAID representative at U.S. Embassy) and/or Detention Order (Iraq)
DOD	U.S. Department of Defense
DODAA	U.S. Department of Defense Appropriations Act
DODD	U.S. Department of Defense Directive
DOJ	U.S. Department of Justice
DOMEX	Document Media Exploitation
DOS	U.S. Department of State
DPG	World Bank, Development Policy Grant
DRB	Detainee Review Board
DRL	U.S. Department of State, Bureau of Democracy, Human Rights and Labor
DSCA	Defense Security Cooperation Agency
DSSI	Iraq, Defense and Strategic Studies Institute
DTL	Deputy Team Leader
E	U.S. Department of State, Under Secretary for Economic, Business and Agricultural Affairs
ECA	U.S. Department of State, Bureau of Education and Cultural Affairs
ECF	International Monetary Fund, Extended Credit Facility
ECP	Entry Control Point
ed.	edition, editor(s)
E&E	Europe and Eurasia
EEB	U.S. Department of State, Bureau of Economic, Energy and business Affairs
e.g.	for example
EGAT	U.S. Agency for International Development, Bureau for Economic Growth, Agriculture and Trade
ENG	Engineer
EOD	Explosive Ordnance Disposal
ePRT	embedded Provincial Reconstruction Team
ESF	Economic Support Fund
EU	European Union
EUJUST LEX	European Union Integrated Rule of Law Mission for Iraq
EUPOL Afghanistan	European Union Police Mission - Afghanistan
F	U.S. Department of State, Director of U.S. Foreign Assistance and USAID Administrator
FAA	The Foreign Assistance Act of 1961
FACT	U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization, Field Advance Civilian Teams
FAST	Drug Enforcement Administration, Foreign-deployed Advisory Support Team
FBI	U.S. Department of Justice, Federal Bureau of Investigation
FCD	Future Concepts Directorate, The Judge Advocate General's Legal Center and School
FDD	Focused District Development
FID	Foreign Internal Defense
FM	Field Manual

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FOB	Forward Operating Base
FOAA	Foreign Operations Appropriations Act
FSN	Foreign Service Nationals
FTF	Focused Targeting Force
FUSMO	Funding U.S. Military Operations
FY	financial year
G	U.S. Department of State, Under Secretary for Democracy and Global Affairs
GAO	U.S. Government Accountability Office
GH	U.S. Agency for International Development, Bureau for Global Health
GIRoA	Government of the Islamic Republic of Afghanistan
G/IWI	U.S. Department of State, Bureau of International Women's Issues
G/TIP	U.S. Department of State, Office to Monitor and Combat Trafficking in Persons
HACC	Humanitarian Assistance Coordination Center
HCT	Human Intelligence Collection Team
HIIDE	Handheld Interagency Identity Detection Equipment
HIPC	Heavily Indebted Poor Countries
HJC	High Judicial Counsel (Iraq)
HN	Host Nation
HOC	Humanitarian Operations Center
HQ	Headquarters
HTT	Human Terrain Team
I	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Iraq Programs
IA	Interagency Acquisition
IAF	Iraqi Armed Forces
<i>Id.</i>	<i>ibidem</i> (latin), in the same place
IBRD	World Bank, International Bank for Reconstruction and Development
ICAF	Interagency Conflict Assessment Framework
ICCPR	International Covenant of Civil and Political Rights
I-CERP	Iraq Commander's Emergency Response Fund
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICITAP	U.S. Department of Justice, Criminal Division, International Criminal Investigative Training Assistance Program
ICRC	International Committee of the Red Cross
ICS	Iraqi Corrections System
IDA	World Bank, International Development Association
IDLG	Independent Directorate of Local Governance (Afghanistan)
IED	Improvised Explosive Device
IGFC	Iraqi Ground Forces Command
IGOs	Intergovernmental Organizations
IH	Investigative Hearing
IHT	Iraqi High Tribunal
IIP	U.S. Department of State, Bureau of International Information Programs
IJ	Investigative Judge
IJPO	Italian Justice Project Office (for Afghanistan)

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ILF-A	International Legal Foundation-Afghanistan
IMAR	Iraqi Military Academy, Ar Rustamiyah
IMF	International Monetary Fund
IMS	Interagency Management System
INCLE	International Narcotics, Crime and Law Enforcement
INL	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs
INL/CIV	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Civilian Police and Rule of Law Programs
INPROL	United States Institute of Peace, International Network to Promote the Rule of Law
INR	U.S. Department of State, Bureau of Intelligence and Research
IP	Iraqi Police
IPA	International Police Assistance
IPAO	Iraq Provincial Action Officer (U.S. Embassy)
IPB	Intelligence Preparation of the Battlefield
IPC	Interagency Policy Committee / National Security Council Integration Interagency Planning Cell / Interagency Management System
IPOG	National Security Council, Deputies Committee, Iraq Policy Operations Group
IR	Iraq Reconstruction
IRoCC	Interagency Rule of Law Coordination Center
ISAF	International Security Assistance Force (Afghanistan)
ISOF	Iraqi Special Operations Forces
ISB	Intermediate Staging Base
ISF	Iraqi Security Forces
ISFF	Iraqi Security Forces Fund
ISN	U.S. Department of State, Bureau of International Security and Nonproliferation
I-SRC	Iraqi Supreme Reconstruction Council
ITDC	Iraqi training and Doctrine Command
IQC	Indefinite Quantity Contract
IVLP	U.S. Department of State, International Visitor Leadership Program
IZ	International Zone
JA	Judge Advocate
JCP	Joint Campaign Plan
JCS	U.S. Department of Defense, Joint Chiefs of Staff
JEFF	Joint Expeditionary Forensic Facility
JIIM	Joint, Interagency, Intergovernmental and Multi-National
JOPPs	Joint Operation Planning Process
JSU	Judicial Security Unit (Afghanistan)
KRG	Kurdish Regional Government (Iraq)
L	U.S. Department of State, Office of the Legal Adviser / U.S. Embassy, Legal Adviser
LAC	Latin America and the Caribbean
LAOTF	Law and Order Task Force (Iraq)
LEP	law enforcement professional
LL	Lessons Learned



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LNO	Liaison Officer
LOFTA	Law and Order Trust Fund for Afghanistan
LP	U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Americas Program
LWA	Leader with Associate
M	U.S. Department of State, Under Secretary for Management
MAAWS	Money As A Weapon System
MAMT	NATO Training Mission – Iraq, Mobile Advising and Mentoring Team
MCP	Marine Corps Planning Process
MCR	Marine Corps Regiments
MCTF	Major Crimes Task Force (Iraq)
MCWP	Marine Corps Warfighting Publication
MDMP	Military Decision Making Process
MIPR	Military Interdepartmental Purchase Request
MiTT	Military Training Team
MNC-I	Multi-National Corps – Iraq
MND-B	Multi-National Division-Baghdad (Iraq)
MND-C	Multi-National Division- Center (Iraq)
MND-N	Multi-National Division-North (Iraq)
MNF-I	Multi-National Force – Iraq
MoI	Ministry of Interior (Iraq)
MoJ	Ministry of Justice (Iraq)
MoD	Ministry of Defense (Iraq)
MOU	Memorandum of understanding
MP	Military Police
MPICE	U.S. Institute of Peace Measuring Progress in Conflict Environments
NAS	Narcotics Affairs Section (INL Office at Embassies)
NATO	North Atlantic Treaty Organization
NAC	North Atlantic Treaty Organization, North Atlantic Council
NCC	Iraq, National Command Center
NCIS	Naval Criminal Investigative Service
NCO	Non-commissioned Officer
NDS	National Directorate of Security (Afghanistan)
NDSPD	National Directorate of Security Prosecution Department (Afghanistan)
NDU	Iraq, National Defense University
NEA/I	U.S. Department of State, Bureau of Near Eastern Affairs / Iraq
NECC	U.S. Navy, Naval Expeditionary Combat command
NGOs	Non-governmental Organizations
NIIA	National Information and Investigative Directorate/Agency (Iraq)
NJP	National Justice Program (Afghanistan)
NJSS	National Justice Sector Strategy (Afghanistan)
no.	Number
NSC	National Security Council
NSC/DC	National Security Council, Deputies Committee
NSC/IPC	National Security Council, Interagency Policy Committee
NSC/PC	National Security Council, Principals Committee
NSC/PCC	National Security Council, Policy Coordinating Committee

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NSPD	National Security Presidential Directives
NTM-A	NATO Training Mission – Afghanistan
NTM-I	NATO Training Mission – Iraq
OAG	Office of the Attorney General (Afghanistan)
ODA	Operational Detachment-Alpha
OE	Operating Environment
OET	Iraq, Officer Education and Training
OES	U.S. Department of State, Bureau of Oceans and International Environment and Scientific Affairs
OFDA	U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs, Office of Foreign Disaster Assistance
OIF	Operation Iraqi Freedom
OEF	Operation Enduring Freedom
OLC	U.S. Department of Justice, Deputy Attorney General, Office of Legal Counsel
OLP	U.S. Department of Justice, Office of Legal Policy
O&M	Operations and Maintenance Funds
OMB	Executive Office of the President, Office of Management and Budget
OMLT	NATO Training Mission – Afghanistan, Operational Mentor and Liaison Team
OPA	U.S. Embassy, Office of Provincial Affairs
OPDAT	U.S. Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training
OSCE	Organization for Security and Cooperation in Europe
OTI	U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs, Office of Transition Initiatives
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PA	Public Affairs
PAO	Public Affairs Officer or Provincial Action Officer
para.	Paragraph
PCC	National Security Council, Policy Coordinating Committee
PDO	Public Diplomacy Officer (U.S. Embassy)
PDOP	Provincial Director of Police
PERMREP	U.S. Permanent Representative to the United Nations
PIOs	Public International Organizations
PJCC	Provincial Joint Coordination Center
PJCM	Provincial Justice Coordination Mechanism
PKSOI	U.S. Army, Peacekeeping and Stability Operations Institute
P.L.	Public Law
PM	U.S. Department of State, Bureau of Political-Military Affairs
PM NOC	Iraq, Prime Minister’s National Operations Center
PMT	Police Mentor Teams
POC	Point of Contact
PoJ	Palace of Justice (Iraq)
POL OFF	U.S. Embassy, Political Officer
POMLT	NATO Training Mission – Afghanistan, Police Operational Mentor and Liaison Team
PRM	U.S. Department of State, Bureau of Population, Refugees and Migration
PRT	Provincial Reconstruction Team

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PRT/PRDC	Provincial Reconstruction Team/Provincial Reconstruction Development Council Projects Program
PRT/QRF	Provincial Reconstruction Team/Quick Response Fund
PSCs	Private Security Companies
PTT	Police Transition Teams
PVOs	Private Voluntary Organizations
R	U.S. Department of State, Under Secretary for Political Affairs
RAC	Rusafa Area Command (Iraq)
RC-E	Regional Command-East
RCLO	U.S. Department of Justice, Regime Crimes Liaison Office (Iraq)
REO	Regional Embassy Office
RFP	Request for Proposals
RIAB	Radio in a Box
RIPC	Rule of Law International Policy Committee (Iraq)
RLA	Resident Legal Adviser
ROI	Report of Investigation
RoLC	Rule of Law coordinator (U.S. Embassy)
R&S	Reconstruction and stabilization
RSO	U.S. Embassy, Regional Security Officer
SA	Security Agreement between the U.S. and Iraq
SAA	South Asian Affairs
SBA	Stand-By Agreements
SCA/A	U.S. Department of State, Bureau of South and Central Asian Affairs / Afghanistan
S/CRS	U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization
S/CT	U.S. Department of State, Office for the Coordinator for Counterterrorism
SF	Special Forces (U.S. Army)
S/GAC	U.S. Department of State, Office of the U.S. Global AIDS Coordinator
SHAPE	North Atlantic Treaty Organization, Supreme Headquarters Allied Powers, Europe
SJA	Staff Judge Advocate
SME	Subject Matter Expert
SOs	Strategic Objectives
SOAgS	Strategic Objective Agreements
SOFA	Status of Forces Agreement
SOG	U.S. Marshals Service, Special Operations Group
SOTF	Special Operations Task Force
SOW	Scope of Work
S/P	U.S. Department of State, Policy Planning Staff
SSR	Security Sector Reform
SSTR	Stability, Security, Transition, and Reconstruction
STT	NATO Training Mission – Iraq, Specialist Training Team
S/WCI	U.S. Department of State, Office of War Crimes Issues
T	U.S. Department of State, Under Secretary for Arms Control and International Security Affairs

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TCAPF	Tactical Conflict Assessment and Planning Framework
TDP	Targeted Development Program (DOS)
TESC	NATO Training Mission – Iraq, Training and Equipment Synchronization
THF	Temporary Holding Facility
TL	Team Leader
TO	Task Orders
TTPs	Tactics, Techniques and Procedures
TU	Task Units
TWG	Technical Working Groups
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Program
UNDPKO	United Nations Department of Peacekeeping Operations
UNICEF	United Nations Children Fund
UNITA	National Union for the Total Independence of Angola
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNSCR	United Nations Security Council Resolution
U.S.	United States
USACE GRD	U.S. Army Corps of Engineers, Gulf Region Division
USACIDC	U.S. Army Criminal Investigation Command
USAID	U.S. Agency for International Development
U.S.C.	U.S. Code
USDA	U.S. Department of Agriculture
USDH	U.S. Direct Hires
USD(P)	U.S. Under Secretary of Defense for Policy
USF-I	U.S. Forces - Iraq
USG	U.S. Government
USIP	United States Institute of Peace
USMS	U.S. Department of Justice, U.S. Marshals Service
USPSCs	U.S. Personal Services Contractors
USSF	United States Special Forces
VBC	Victory Base Complex, Iraq
VCI	U.S. Department of State, Bureau of Verification, Compliance and Implementation
VTC	Video Teleconference
WHT	Witness Handling Teams