

# 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



2015





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**2015**

**The Judge Advocate General's Legal Center and School, US Army**

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The 2015 *Rule of Law Handbook* is dedicated to all those who promote the rule of law especially the members of the US military as well as our interagency and coalition partners.



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

### **2015**

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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 is the sixth 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). Since the last edition in 2011, the operational environment has changed significantly requiring reconsideration of what Rule of Law (RoL) practice means to judge advocates (JAs).

Eight years ago when the first edition was published, US forces were heavily involved in both Iraq and Afghanistan where military intervention had merged with capacity building and development, and the RoL missions were evolving in the context of ongoing counter-insurgency and stability operations. From the early stages of Operation Enduring Freedom<sup>2</sup> and Operation Iraqi Freedom<sup>3</sup> the need for legal development and support became clear. In the absence of doctrinal guidance, commanders turned to their legal experts to provide support to the embryonic democratic governments of Iraq and Afghanistan and to plan and effect RoL related projects in support of security and stability. Skilled and resourceful JAs sought to respond to these demands, largely unsupported by doctrine or any other comprehensive resource. Against this backdrop, the *Rule of Law Handbook* evolved with a view to providing practical guidance to JAs seeking to advance a somewhat vague and undeveloped RoL mission in challenging circumstances.

The four-year gap since publication of the last edition of this *Handbook* is indicative of the changing operational picture and shifting strategic priorities which now demand reassessment of what 'RoL' entails to the DoD and to JAs, and how this is likely to develop in the 'post Iraq and Afghanistan' era. There are few JAs who have deployed in the last decade whose professional experience and development has not touched RoL in the context of Iraq and Afghanistan. To many, RoL as a mission is defined by such experiences. However, the benefits of RoL promotion are not limited to situations of military intervention. A more extensive role is rooted in US National Security Strategy (NSS)<sup>4</sup> which recognizes the threat posed by fragile states and instability; and emphasizes the need to help create legitimate, well governed, States by way of conflict prevention and post conflict stabilization as well as military intervention. Accordingly, increasing importance is attached to engagement aimed at strengthening relationships and building foreign partner capacity with a view to preventing or deterring conflict. In this context, the NSS contains prolific reference to the importance of human rights and RoL.

On 5 April 2013, the President signed Presidential Policy Directive 23 (PPD 23)<sup>5</sup> aimed at improving how the US government (USG) provides Security Sector Assistance (SSA) around the world with a view to helping allies and partner nations build their own security capacity, consistent with the principles of good governance and RoL. The PPD announces a new approach to SSA, stating that the US will strengthen its own capacity to plan, synchronize, and implement SSA through a deliberate and inclusive whole-of-government process that ensures alignment of activities and resources with national security priorities. It reaffirms the Department of State (DoS) as the lead agency responsible for the policy, supervision and general management of USG SSA, while also emphasizing the importance of interagency collaboration and providing an interagency framework to plan, synchronize and implement SSA.

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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 27 Jul 2011).

<sup>2</sup> See Congressional Research Service *US Periods of War and Dates of Current Conflicts* (28 Dec 2012). Operations Enduring Freedom began with the deployment of US military forces on 7 Oct 2001.

<sup>3</sup> *Id.* Operation Iraqi Freedom began on 19 Mar 2003.

<sup>4</sup> The White House, *National Security Strategy*, May 2010.

<sup>5</sup> PRESIDENTIAL POLICY DIRECTIVE 23, SECURITY SECTOR ASSISTANCE (5 Apr 2013) [hereinafter PPD 23] See Fact Sheet: US Security Sector Assistance Policy at <https://fas.org/irp/offdocs/ppd/ssa.pdf>.

The involvement of JAs in this type of RoL development is not new. One of the most elucidating elements of this *Handbook* is the historical analysis at Appendix A. It now includes reference, not only to RoL activity conducted by JAs in the context of conventional and irregular warfare, but also to the shorter but still significant history of legal engagement in the course of steady-state foreign development.

## **The 2015 Edition**

Significant changes have been made to the 2015 edition, and while recent experiences in Iraq and Afghanistan are still drawn upon to inform the approach to RoL within contingency operations, there is less specific focus on those theaters. Instead this edition addresses efforts to pursue RoL development globally with a view to informing JA RoL practice in the full range of environments from conflict to peacetime.

Regardless of the environment, the constituent elements of RoL remain constant and the practitioner must assess what contributes to those elements. On this basis, Chapter 1 provides foundational thought for practitioners in all environments encouraging JAs to think broadly about RoL. This supported by an overview of relevant international law at Chapter 2 and a comparative law consideration of judicial and religious systems at Chapter 3. In essence, these three chapters provide the situational background.

Chapter 4 provides important context and orientation for JAs operating in a complex environment. As with previous editions, many members of the RoL community have devoted time and effort to the development of this chapter. For this edition they have focused, not only on ensuring that the section addressing their work is current, but also on rebalancing input to reflect the wide geographic focus of RoL activity. As ever, CLAMO is deeply in their debt for those contributions. This Chapter has been somewhat re-structured with extra detail separated into Appendix C. Chapter 5 has been reshaped to reflect considerations relevant to permissive and non-permissive environments while retaining an emphasis on the importance of integrating RoL planning. The part of this chapter addressing the Military Decision Making Process has been moved to its own Appendix D alongside sample metrics at Appendix E. Chapter 6 continues to address fiscal considerations and has been updated to reflect changing annual fiscal authorities. Chapter 7 outlines in theater resources that may be available to support JAs in their RoL efforts. In many ways Chapter 4-7 form the core of this *Handbook*.

Afghanistan has served as a testing ground for the development of the USG approach to operational RoL. Chapter 8, while significantly reduced has been retained in order to record and, to a limited degree, assess, the procedures and mechanisms most recently created and developed as part of that process. It is complemented by the narratives in Chapter 9, which while keeping a foothold in Afghanistan, reflect the move towards a more expansive view of RoL activities.

## **What? Still No Template Solution?**

The *Handbook* is not intended to serve as US policy or military doctrine for RoL operations. Written primarily for JAs, its scope and purpose are to provide military attorneys assistance in accomplishing their various RoL missions. That said, it is hoped that others involved in RoL will find the *Handbook* helpful.

The *Handbook* does not serve as a complete solution, but rather as a starting place and a supplement for other materials and, crucially, individual thought. Indeed, the last decade has seen such a proliferation of relevant guidance and doctrine that the difficulty may well be in knowing *what* to read, rather than in finding *something* to read. In terms of doctrine, RoL features highly in the most recent Field Manual 3-07, *Stability*<sup>6</sup> which builds upon Army Doctrine Publication 3-07<sup>7</sup> and Army Doctrine Reference

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<sup>6</sup> US DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY (2 Jun 2014).

<sup>7</sup> US DEP'T OF ARMY DOCTRINE PUBLICATION 3-07 (31 Aug 2012).

Publication 3-07<sup>8</sup> and guides stability operations in all environments. Judge Advocates deploying in support of contingency operations should also be familiar with the recently revised Field Manual 3-24, *Counterinsurgency*<sup>9</sup>. The USMC *Small Wars Manual*,<sup>10</sup> and the US Joint Forces Command *Handbook for Military Support to Rule of Law and Security Sector Reform*,<sup>11</sup> remain useful, alongside more judge advocate centric, publications such as the *Operational Law Handbook*,<sup>12</sup> and Field Manual 1-04, *Legal Support to the Operational Army*<sup>13</sup>. In addition, within the Army, it is important to remember Civil Affairs units have often performed RoL activities, and their doctrine discusses them in detail. As such, Field Manual 3-57, *Civil Affairs Operations*<sup>14</sup> and Joint Publication 3-57, *Civil-Military Operations*<sup>15</sup> are also recommended reading.

Judge Advocates involved in regional RoL projects by way of security assistance should be aware of Field Manual 3-22 *Army Support to Security Cooperation*<sup>16</sup>, which provides doctrinal guidance and direction for the Army's role by way of security cooperation, and Army Regulation 11-31, the *Army Security Cooperation Policy*, which is supported by the Department of the Army Pamphlet (DA PAM) 11-31, *Army Security and Cooperation Handbook*. While there is currently no doctrine specific to Security Force Assistance or permissive environment RoL activity, PPD 23 is significant and the Joint Doctrine Note 1-13, *Security Force Assistance* (SFA) is useful in so far as it paves the way for joint doctrine and reflects current guidance regarding SFA. The reader can gain a wider perspective on RoL through review of books, articles, and documents published by various other agencies and organizations involved in RoL, many of which are listed within Chapter 8.

Notwithstanding this wealth of reference material, no course, handbook, manual or "think tank" publication can provide JAs with a template solution for how to support the development of the RoL in any one particular environment. Any reader who discovers such a template is invited to contact CLAMO so that it can be given pride of place in future editions of the *Handbook*. While this *Handbook*, hopefully, provides food for thought and points to some resources, it is no substitute for agile innovation, intelligence, and resourcefulness.

The intent is that the *Handbook* serves as an educational, introductory, resource for JAs whose work allows scope for promoting RoL. If readers believe that the *Handbook* fails in meeting that intent, or that they can in any way contribute to its efficacy, they should not hesitate to contact CLAMO with their suggestions for improvement.

This edition of the *Handbook* was completed shortly after a change in UK exchange officers at CLAMO. Misappropriating Moltke's aphorism somewhat: no plan survives contact with a handover. In this light, the current incumbent acknowledges all the sterling efforts made by his predecessor and takes full responsibility for any errors.

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<sup>8</sup> US DEP'T OF ARMY DOCTRINE REFERENCE PUBLICATION 3-07 (31 Aug 2012).

<sup>9</sup> US DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (22 Nov 2013).

<sup>10</sup> US MARINE CORPS, SMALL WARS MANUAL (1940).

<sup>11</sup> US JOINT FORCES COMMAND, UNIFIED ACTION HANDBOOK SERIES BOOK FIVE, MILITARY SUPPORT TO RULE OF LAW AND SECURITY SECTOR REFORM (13 Jun 2011).

<sup>12</sup> INT'L AND OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 2014 OPERATIONAL LAW HANDBOOK (2014).

<sup>13</sup> US DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar 2013).

<sup>14</sup> US DEP'T OF ARMY, FIELD MANUAL 3-57, CIVIL AFFAIRS OPERATIONS (31 Oct 2011).

<sup>15</sup> CHAIRMAN, US JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-57, CIVIL MILITARY OPERATIONS (11 Sep 2013).

<sup>16</sup> US DEP'T OF ARMY, FIELD MANUAL 3-22, ARMY SUPPORT TO SECURITY COOPERATION (22 Jan 2013).



## CHAPTER 1

# THE RULE OF LAW: INTRODUCTION AND OVERVIEW

For the purpose of opening this *Handbook*, the Rule of Law (RoL) exists when a society administers (or aspires to administer) itself through a set of transparent, ostensibly fair rules applied by impartial adjudicators. This is a broad framework and Judge Advocates (JAs) undertake a similarly broad range of tasks when deploying in a RoL capacity. Some JAs have helped to build courthouses and train judges, others have advised their commanders on host nation search and seizure law applicable to US forces conducting security operations. Many JAs have been involved in evidence-based operations (EvBO) against insurgents aimed at subjecting them to RoL in a host nation. In more permissive environments, JAs have helped promote disciplined military operations subject to the rule of law by improving good order and discipline, respect for civilian authority and control, human rights and the civilian population. Good order and discipline is the cornerstone of all capable and professional militaries and JAs have improved the transparency of military justice processes and worked with partner nation militaries to facilitate the consideration of legal issues and the legal education of military commanders.

In recent years, JAs have been heavily involved in RoL operations in the context of counterinsurgency (COIN) campaigns, such as in Iraq and Afghanistan. Rule of Law operations are central to COIN,<sup>1</sup> but the principles underlying RoL are equally relevant regardless of the operational environment. Accordingly RoL promotion takes place in a variety of operational environments, from active combat to stable peace and everything in between.<sup>2</sup> In future, JAs should expect to become even more involved in security cooperation (SC) missions that promote military adherence to RoL in developing and partner nations. In 2011 the Army Chief of Staff put forth his new Army strategy highlighting three roles for the Army.<sup>3</sup> First, the prevention of conflict through the projection of a credible force whose capacity and readiness cannot be successfully challenged. Second, the requirement to “shape the international environment so that our friends are enabled and enemies contained” through engagement, fostering mutual understanding and aiding partners to build capacity to defend themselves. Finally, when necessary, the Army must be ready to win decisively in a complex environment. As a consequence, the Army’s Regionally Aligned Force Concept is being designed to ensure that Combatant Commanders (COCOMs) have tailored and responsive Army Forces to support operational missions, military exercises, and theater SC activities. As specialists in good order and discipline, JAs bring unique skills that make them ideally suited for these types of capacity building missions aimed at professionalizing partner nation militaries.

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<sup>1</sup> See US DEP’T OF ARMY, FIELD MANUAL 3-24, INSURGENCIES AND COUNTERING INSURGENCIES at 13-13 (May 2014) [hereinafter FM 3-24] (“Establishing the rule of law is a key goal and end state in counterinsurgency.”). See also US 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>2</sup> This *Handbook* makes a general distinction between RoL activities that JAs may find themselves engaged in within a “non-permissive” environment (i.e. in a conflict/intervention context) and within a “permissive” environment (i.e. with the express consent of a host nation in a more benign environment).

<sup>3</sup> Prevent, Shape, Win. (16 Dec 16 2011) available at [Http://www.army.mil/article/71030/](http://www.army.mil/article/71030/) (last visited 18 Dec 2014).

## I. Quantifying the Rule of Law

### A. Reason for the Rule of Law

A first step in quantifying RoL is to ask what is the *purpose* of the RoL. Although there is some philosophical disagreement about why we have law, there is widespread acceptance that RoL has essentially three purposes, as described by Professor 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>4</sup>

Put somewhat more simply, the purpose of RoL is to provide the people with a government of security, predictability, and reason. Consequently the purpose of law has five components:

- Capacity of legal rules, standards, or principles to guide people in the conduct of their affairs
- Efficacy of law to actually guide people, at least for the most part
- Stability of law to facilitate planning and coordinated action over time
- Supremacy of legal authority to rule officials, including judges, as well as ordinary citizens
- Impartial justice - courts should be available to enforce the law and should employ fair procedures.<sup>5</sup>

While Professor Fallon was concerned with constitutional interpretation rather than military intervention and security assistance, countless other individuals and agencies have offered their own definitions of RoL reflecting their own institutional goals.<sup>6</sup> However, there is an increasing recognition that a practitioner approach to RoL in any given country should be context-specific.<sup>7</sup> Therefore, JAs should consider which aspects of RoL are most pertinent to their particular operational environment. For example, in the immediate wake of high intensity conflict the physical security of judiciary may be the main effort before transiting to a meaningful reform of the criminal justice system. In contrast, in a permissive context JAs' RoL development efforts will usually take the form of military-to-military (mil-to-mil) engagement designed to address legal issues according to the needs of the host military.

### B. Rule of Law Effects

Recent US Army doctrine has fully embraced the importance of RoL across the full spectrum of military operations within its 3-07 series.<sup>8</sup> In particular, FM 3-07 addresses the characteristics and effects of RoL and identifies broad categories of RoL activities relevant to stability tasks in permissive and non-permissive environments. As to the substance of RoL, FM 3-07 offers the following guidance:

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<sup>4</sup> Richard H. Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7-8 (1997).

<sup>5</sup> *Id.* at 8-9.

<sup>6</sup> See World Justice Project, [www.worldjusticeproject.org/what-rule-law](http://www.worldjusticeproject.org/what-rule-law) (last visited 27 Aug 2014). See also DfID Policy Approach to Rule of Law, UK Department for International Development (DfID), (12 Jul 2013). <http://issat.dcaf.ch/content/download/29431/413334/file/Policy%20approach%20to%20rule%20of%20law.pdf> (last visited 27 Aug 2014).

<sup>7</sup> *Id.* DfID Policy Approach to Rule of Law at 17, (advocating a context specific approach to RoL that accepts conditions influencing reform vary, based on country specific considerations including the level of stability).

<sup>8</sup> US DEP'T OF ARMY, FIELD MANUAL 3-07, (Jun 2014) [hereinafter FM 3-07].. See also US DEP'T OF ARMY, DOCTRINE PUB. 3-07, STABILITY (31 Aug 2012 as amended 15 Feb 2013) [hereinafter ADP 3-07] and US DEP'T OF ARMY, DOCTRINE REFERENCE PUB 3-07, STABILITY (31 Aug 2012 amended 15 Feb 2013) [hereinafter ADRP 3-07]. For a joint perspective see JOINT CHIEFS OF STAFF , JOINT PUBLICATION 3-07 STABILITY OPERATIONS (29 Sep 2011) [hereinafter JP-307].

The rule of law means that all persons, institutions and entities - public and private, including the state itself - are accountable to laws that are publicly promulgated, equally enforced, independently adjudicated, and consistent with international human rights principles.<sup>9</sup>

The rule of law is more than a safe and secure environment. It requires the security of individuals and institutions and accountability for crimes.<sup>10</sup>

These definitions align with the US Government (USG) interagency definition of the RoL.<sup>11</sup>

Moving on from a static definition, military doctrine further breaks down the RoL principle 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 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 existing legal institutions and the law during their daily lives.<sup>12</sup>

As the complete realization of these seven effects represents an ideal, JAs should view the success of RoL operations in terms of the host nation's movement toward the RoL effects rather than a full achievement of these same effects as categorizing completion is likely to be highly subjective. Moreover, societies can abide by RoL to different degrees according to geography (RoL may be stronger in some places than others), subject matter (RoL may apply more completely with regard to some laws than others), institutions (some may be more efficient or corrupt than others), and subjects (some individuals may have greater access to RoL than others).

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

A country in which the use of violence is out of the state's control is out of control in the worst possible way. That is not to say that only national instruments can wield violence as an instrument of state policy, as 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.

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<sup>9</sup> *Id* FM 3-07 at 1-12 (in relation to the primary stability task "Establish Civil Control") This guidance is based in part on the definition contained in the *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict And Post-Conflict Societies*, U.N. Doc. S/2004/616, at 4 (2004):

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

The Multi-National Corps Commander adopted this definition in Iraq as early as 2006. See Appendix 2 to Annex G to MNC-I Operation Order 06-03.

<sup>10</sup> *Id.* at 3-101. See also JP 3-07 *supra* note 6 at III-41.

<sup>11</sup> See RoL US AGENCY FOR INTERNATIONAL DEVELOPMENT, US DEPT. OF STATE, US DEPT. OF DEFENSE, SECURITY SECTOR REFORM 4 (Feb 2009) available at [www.state.gov/documents/organization/115810.pdf](http://www.state.gov/documents/organization/115810.pdf) ("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>12</sup> See FM 3-07 *supra* note 8 at 3-100 and JP 3-07 *supra* note 8 at III -41

Local security forces such as police, private security firms, and even militias, can have a role in a recovering state's security structure. The state must however 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.

In many states, corruption, lack of service delivery and a lack of legitimacy have allowed non-state actors to gain community acceptance – legitimacy – at the expense of the state. These areas become “ungoverned spaces” because the state does not control the use of force in them. Examples include gang-controlled neighborhoods in Honduras, insurgent areas in Afghanistan, or warlord controlled areas in Somalia. Rather than view them as “ungoverned”, it is more accurate to look at these areas as places where the claim to govern is contested. While local people may not like criminal groups, gangs, and insurgents, these groups may have established themselves as more legitimate, less corrupt, or more able to provide jobs and services than the state. Re-asserting state control requires not just ridding an area of these violent non-state actors, but regaining social legitimacy for the state by improving its desire and ability to serve all its citizens.<sup>13</sup>

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

In many ways, providing security is the ultimate purpose of any state. For a JA serving in a deployed force, providing security is the first element in any RoL plan<sup>14</sup> and depending on the status of operations, it may be the only real contribution that US forces can make to implement RoL. It is an important contribution nevertheless; and, from an operational standpoint, RoL itself is an unaffordable luxury without basic security. The basic needs of the people have to be provided, including, not only physical security, but also basic civil services and utilities, before any long-term attempt to improve RoL. In some societies such as totalitarian dictatorships, the primary protection to be offered by RoL may be protection from the state.

Brutally enforced security, however, can often lead back to conflict. Populations whose rights are infringed upon may choose to organize and fight the state, leading the country back into warfare or insurgency. Ironically, when a country balances security measures against human rights, overall security is strengthened as it is less likely to face violent social movements.

The interconnected nature of RoL projects requires tying security efforts to other reconstruction efforts to provide the kind of livable society in which RoL can flourish. In the immediate aftermath of major combat there is a window of time 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 that needs to be planned for and anticipated *before* the start of combat operations. The provision of security will likely fall entirely to intervening forces during the initial phase of subsequent stability operations, but the longer term objective will be to transition civil security responsibilities effectively to the host nation. Accordingly security force assistance at every stage is important to professionalize a host nation's security forces and build their capacity to legitimately fulfill the security function.

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<sup>13</sup> FM 3-24 *supra* note 1 at Chapter 4. See also David Kilcullen, *Out of the Mountains* (Oxford: Oxford University Press, 2013), 116–68; Vanda Felbab-Brown, *Aspiration and Ambivalence* (Washington, D.C.: Brookings Institution, 2012); Rachel Kleinfeld and Harry Bader, “*Extreme Violence and the Rule of Law*,” *Lessons from Eastern Afghanistan*, Carnegie Paper Apr 2014.

<sup>14</sup> JP3-07, *supra* note 8 at vii (“...the primary military contribution to stabilization is to protect and defend the population facilitating the personal security of the people and thus creating a platform for political, economic and human security...”).

<sup>15</sup> See JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTION* (2006) at 145-47.

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

The conduct of state actors must be bound by established rules although it does no good if the rules themselves can be changed arbitrarily or if they bear no relation to reason. The need for reasoned decision-making applies across executive, judicial, and legislative actors. In particular the executive must be prevented from acting with complete autonomy to achieve its chosen end lest order is obtained through terror or intimidation. 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 a state into an entity ruled, not by laws, but by the imposition of illegitimate restrictions or exceptions manipulated through the payment of bribes. Corruption, or “the abuse of public power for private gain,”<sup>16</sup> is a prototypical example of the subversion of RoL that can also lead to insecurity as corruption in appointments and pay to the security sector can lead to a military or police force unable to do their jobs correctly and the leakage of state weaponry. Additionally corruption writ large can cause popular anger leading to social unrest and allowing exploitation by insurgents.<sup>17</sup>

Judges, too, must be bound by law in their decision-making 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. Dedication to reason also suggests that judges should not base their decisions on *other* considerations, including bribes (corruption) or the social status of a particular litigant. RoL thus forms an important element of the state’s protection of human rights and fundamental freedoms against certain forms of discrimination.

The RoL must also bind legislatures. Legislatures must follow established procedures when making law, and most societies include substantive limitations on the power of legislatures through written or unwritten constitutions. Identifying and establishing the substantive limits of legislative authority is likely to be one of the most difficult problems any RoL project faces. Although major RoL programs frequently start with written constitutions that impose substantive limitations on legislatures, the value of such limits to truly constrain the actions of legislatures is a matter of dispute and a written constitution is likely to have little impact if drafted in isolation of other RoL activities.<sup>18</sup>

Considerations of this nature may also be relevant to the legal establishment and conduct of a military. As with legislatures above, the RoL must also bind the military and other security sector forces. In developing nations, armed forces are often the most powerful organization in the country. If left undisciplined or unrestrained by law, they have the potential to be the greatest destabilizing threat to a fragile government. JAs working to develop a host nation military in any environment will be mindful of the importance of military subordination to civilian authority and the benefits of an effective military justice system based upon domestic law and reflecting internationally accepted human rights standards. Armed forces must be bound to civilian authority and control constitutionally and by other laws as appropriate under the host nation’s legal systems and customs. Impunity and corruption within the militaries of fragile or developing nations are often systemic and undermine the internal and external legitimacy of both the military itself and the state that it serves.

Both internal and external mechanisms to ensure accountability should be considered with a view to ending a military’s ability to act with impunity, combating corruption and increasing transparency and accountability. There are many ways to ensure militaries are bound by law to include an effective

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<sup>16</sup> WORLD BANK, WORLD DEVELOPMENT REPORT 1997, at 102 (1997).

<sup>17</sup> See FM 3-24, *supra* note 1 at 4-4 (para 4-21) (“Corruption of the host-nation government can be a root cause. If institutional corruption is systematic, ongoing and considered unfair, insurgents can use that as an effective narrative. For example corruption in government development programs can cause resentment by the aggrieved group. Corruption can lead to loss of host-nation legitimacy and can undermine government control of an area.”).

<sup>18</sup> See generally A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383 (1968).

military justice system. For example an independent Inspector General or prosecutor may serve to prevent military corruption. Additionally the military's legal framework and policy can include conflict and ethics rules, mechanisms, and safeguards designed to combat and prevent corruption.<sup>19</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>20</sup> Any society that has advanced beyond anarchy is likely to have such an agreement. In countries that are the subject of foreign military intervention, it may be in the form of a newly authored constitution. Of course, in many countries, there will already be established legislatures and courts and it will be important for anyone undertaking RoL projects to quickly determine whether existing institutions have the necessary political legitimacy to continue. Conversely 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. Far more important than the physical infrastructure of such institutions is their legitimacy. In many countries, chiefs and local elders may constitute the 'court' and have legitimacy that does not accrue to formal state institutions.

Laws must be reasonably accessible so that citizens are able to understand and rely upon them.<sup>21</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.

In places where laws appear outdated, it may be tempting to import new legal codes. However "transplantation of laws" fails in nearly every case. As legislation must be understood by the population, new laws are most likely to be followed if they are worked out together with leaders in the local legal community. Cutting and pasting from other countries may appear to be a time-saver, but will rarely work. Of course, foreign partners' militaries may benefit from the experiences of the US military when embarking upon creation or reform of their military justice system.

#### **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. In order to have a working legal system, judicial and enforcement institutions must exist and the people must have practical access to those institutions. In many environments in which deployed JAs find themselves such institutions may be completely absent. Even when such institutions do exist, their efficacy may be completely compromised by corruption, discrimination or simple inefficiency. Corruption or systematic inefficiency in the police force or the judiciary can prevent just laws from having any real effect on society and, in order, for the state to be bound to its own laws, the judiciary must be able to exercise judgment independently of influence from the other branches.

The need for working legal institutions extends not only to police and courts, but also to the correctional system. In developing and reconstructing nations, prisons may fail RoL in two opposite ways: either there is no effective correctional system and convicts are routinely released or prisoners are treated in

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<sup>19</sup> *Rule of Law Development at the US Africa Command*, The Public Lawyer, Volume 21, No 2, (Summer 2013).

<sup>20</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>21</sup> See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (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).

ways inconsistent with human rights protections. A society cannot be said to be governed by RoL if criminals are not adequately punished or if the state fails to treat those subject to its complete control in a humane, rational manner.

When enforcement institutions do not exist in a “modern” fashion, a common mistake in RoL programming is to simply create institutions that look like those in the West. Such institutions rarely have the power that they need to enforce the laws. Enforcement institutions must have the support of the state and of local power brokers to function; otherwise courts, police, prisons and other institutions will be used as a tool of elites to punish enemies and consolidate power. Instead, institutions should be seen as by-products of power relationships.

Analysis of RoL reform efforts in recent years has led to criticism of an over-emphasis on *institutional* development (particularly the judiciary and law enforcement agencies). It is not that the development of such institutions is not regarded as relevant to the desired end state, but that insufficient regard has not been paid to the broader political, economic and social system in which institutions are embedded.<sup>22</sup> There is an increasing acknowledgement that the roots of effective RoL are deeper than the institutional level and that greater consideration should be given to societal, cultural and political factors and the relationship between the state and society as opposed to a collection of institutions.<sup>23</sup>

As with all the other effects, the principle is applicable to RoL development in the military context. A military that has a properly implemented military justice code which applies military justice fairly and without corruption will benefit from a more effective and legally-compliant command and control. Due to their specialist training, JAs are uniquely capable of assisting developing nation armed forces in establishing and implementing an effective, just and impartial military justice system.

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

It is difficult 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 that such a society would be operating outside the rule of law if the procedures applied were merely the fiat of a dictator acting wholly without regard to human rights and fundamental freedoms.

The standards for the minimum protection of a country’s inhabitants are embodied in the Universal Declaration of Human Rights (UDHR)<sup>24</sup> and the treaties to which the country is a party, 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 RoL. While some experts define the most important obligation as one of equal treatment regardless of gender or economic, racial, or religious status,<sup>26</sup> many disagree on exactly what forms of equality are necessary to RoL. In many societies, unequal treatment is a cultural fact supported by popular consent. 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

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<sup>22</sup> DfID Policy Approach to Rule of Law *supra* note 6.

<sup>23</sup> RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD NEXT GENERATION REFORM*, (2012). See also Adam Bushey review, *Second Generation Rule of Law and Anti-Corruption Programming Abroad: Comparing Existing US Government and International Best Practices to Rachel Kleinfeld’s book – Advancing the Rule of Law Abroad: Next Generation Reform* (at Ch. 9 of this *Handbook*).

<sup>24</sup> UDHR, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (12 Dec 1948).

<sup>25</sup> Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (last visited 28 Aug 2014).

<sup>26</sup> UDHR Art. 7; Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 31, 35 (Thomas Corothers ed., 2006) at 38.

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

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

doing so is unlikely to avoid disputes over which rights are essential to establishing RoL. Judge Advocates need look no further than our own, ongoing, debates over fundamental constitutional rights to see how lengthy and divisive social debates can be.

Nevertheless, JAs who work on RoL projects need to keep in mind that the protection of human rights and fundamental freedoms is an important component of RoL and different participants in RoL promotion are likely to have very different understandings of the content of those rights and their relative importance. It is important for JAs to research the human rights treaty obligations of the host nation along with any reservations made by it<sup>29</sup> and the likely USG views of any such obligations or reservations, as certain human rights abuses by host or partner nations may trigger restrictions on US funding.<sup>30</sup> If the country has not become party to the ICCPR, the UDHR should serve as the guiding document for JAs and regional human rights treaties should also be considered.

It is also useful to understand the values and culture of coalition partners who may be bound by regional human rights treaties such as the European Convention on Human Rights (ECHR).<sup>31</sup> Systematic mistreatment of citizens and prisoners may lead to substantial international resistance from NGOs, international organizations, and coalition partners in any RoL project.

Human rights considerations are central to RoL development in the military context.<sup>32</sup> The military is in the position to exercise force on behalf of the state and must do so legitimately and in accordance with the law. Many emerging nation's militaries have their own uniformed advocates and many others are seeking outside assistance in development of structures patterned after the US Army Judge Advocate General's Corps (JAGC) model. Many of our counterparts in developing countries only provide military justice advice to their commanders. Judge advocates engaged in mil-to-mil contacts are often asked to assist in development of operational law capacity in partner nations. Engagements that help JA counterparts with development of internal capabilities to provide advice on international law issues, the Law of Armed Conflict, human rights, detention, targeting, and other areas of practice that fall within our International and Operational Law discipline can go a long way in ensuring militaries are respecting and protecting human rights and fundamental freedoms.

In addition to institutional capacity building in this area, training and engagement focused on use of force (including in the context of detention, treatment of detainees and interrogation) can mitigate the risk of human rights abuses and increase the legitimacy of the military and the state for which it acts. Support to the development of military justice codes and systems can also promote reporting of abuses and subsequent investigation and prosecution. Gender equality within the military may also be the subject of mil-to-mil engagement.

## **7. Individuals Rely on Existing Legal Institutions and the Law**

Although one can arguably achieve order through threat alone, law is not compliance achieved through threat.<sup>33</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 compel

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<sup>29</sup> A full list of human rights treaties with links to details of ratification, declarations, reservations and objections by other states, is at <https://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en> (last visited 28 Aug 2014).

<sup>30</sup> See, e.g., Leahy Amendment, Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

<sup>31</sup> The European Court of Human Rights has, for example, increasingly expanded the scope of ECHR to bind signatory states both extra-territorially and into areas of law previously regarded as the *lex specialis* of International Humanitarian Law. For recent case law see the recent cases brought against the UK of Serdar Mohammed v Ministry of Defence [2014] EWHC 1369 (QB) and Hassan v UK [2014] (applic no. 29750/09).

<sup>32</sup> See FM 3-24, *supra* note 1, at 13-14 (para 13-61) (Citing the UDHR and the ICCPR as “guide[s] for applicable human rights.”) “[r]espect for the full panoply of human rights should be the goal of a host nation” as part of counterinsurgency operations.)

<sup>33</sup> HART, *supra* note 18, at 22-24.

compliance through force.<sup>34</sup> A state can only be truly said to be governed by RoL if it and its law are viewed as legitimate by the populace.<sup>35</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 the state having to rely on its coercive power to resolve more legal disputes than it has the capacity to handle.

Citizens must largely choose to follow the laws, and use courts to resolve disputes when they are broken. A government that lacks legitimacy such that its people ignore its laws must rely instead on force to impose its policies.<sup>36</sup> When a society does not accept a legal system, this may be signaled by vigilantism or alternative systems of dispute resolution (that could be offered by warlords or insurgents).

It is not necessary for the people to agree with 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. In such a case the source of the law, not its content provides its justification.<sup>37</sup>

Internal legitimacy is critical for resolving the vast majority 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 as a guide for conducting their own affairs. While a functioning court system is one level of success for a RoL project, a society that truly lives under RoL is one in which individuals themselves resolve disputes in ways *consistent* with the law even without invoking the judicial system.<sup>39</sup>

The internal legitimacy of a nation's legal system is, in many ways the ultimate expression of RoL, and is likely to take many years, if not decades, to develop. Again, JAs need look no further than America's own constitutional experience. The constitutional order that we now take for granted remained fragile for decades after the Constitution's adoption and arguably only cemented itself after the Civil War and Reconstruction. Judge Advocates are 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 RoL. Judge advocates should conduct RoL projects with this end in mind.

Armed forces that lack discipline frequently destabilize their country and the daily lives of its citizens. A professional military that is subordinate to civilian authority and operates within the law (including legitimate use of force), demands greater respect and can better contribute to the relationship between society and the state. It will also contribute heavily to the security of its citizens thus providing predictability and a foundation for economic growth and prosperity.

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

Identifying the necessary conditions for RoL does not tell one much about the content of a society's laws, and there is widespread disagreement over exactly what that content must be. Two views of RoL reflect these concerns: a *formalist* one, which emphasizes the procedures for making and enforcing law and the

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<sup>34</sup> *Id.* at 54-58.

<sup>35</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 13, at 75-76.

<sup>36</sup> See FM 3-24, *supra* note 1, at 1-9 (para 1-29).

<sup>37</sup> See HART, *supra* note 18, at 57-58.

<sup>38</sup> STROMSETH, WIPPMAN & BROOKS, *supra* note 13 at 78.

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

structure of the nation's legal system and a *substantive* one, in which certain rights are protected.<sup>40</sup> Using the list of RoL effects 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. Indeed, it is difficult to find someone with a strong substantive approach to RoL who would not also insist that the state in question follow certain procedures in making and enforcing law. The distinction, properly then, is a matter of emphasis and priority rather than a choice between approaches. The degree to which any RoL project's goal is either formalist or substantive will vastly affect how the project is carried out (and by whom) and will determine what strategies will be necessary to ensure the successful completion of the project. As JAs consider RoL projects, the formalist/substantive distinction needs to remain at the forefront of their thinking.

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 criteria.<sup>41</sup> Formalist projects are also much less likely to upset established political power relationships, who may otherwise find themselves at the mercy of their former rivals for alleged wrongs committed previously.<sup>42</sup> Similarly, formalist projects are frequently less likely to threaten the cultural identity of the host nation and its population than substantive projects.<sup>43</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 will receive the kind of broad international support they require, if they completely ignore substantive rights.<sup>44</sup> For instance, the US values the protection of human rights and by law places explicit restrictions on assistance to 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. Scope of Rule of Law Operations

The most complete articulation of RoL within military doctrine is contained at FM 3-07 which refers to military RoL activities as, "broad categories of actions designed to support host-nation institutional capacity, functional effectiveness and popular acceptance of a legal system and related government areas." These areas include:

- The criminal justice system
- Law enforcement
- Judicial systems and procedures
- Corrections
- The civil judicial system
- Anticorruption
- Elections
- Detention

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

<sup>42</sup> Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, *supra* note 24 at 31, 35.

<sup>43</sup> *Id.* at 38 (citing the example of gender equality as a threat to some conceptions of Islamic culture).

<sup>44</sup> The resources available to a project may also depend on its character as either formalist or substantive as many more international and NGOs are dedicated to bringing about substantive change in the world than are devoted to the change of legal formalities or structure. So projects with substantive goals are also likely to trigger broad involvement from the international and non-governmental community.

- Transitional military authority
- Transitional Justice
- Coordination with host-nation leaders, police forces, and legal personnel
- Coordination with host-nation ministry of defense and security force legal personnel.<sup>45</sup>

These activities fit squarely within current military stability doctrine as tasks subordinate to the five primary Army stability tasks.<sup>46</sup> The relevance of stability across the range of military operations forms part of the concept of “unified land operations,”<sup>47</sup> which calls for “simultaneous combinations of offensive, defensive and stability tasks” in proportions that vary according to the nature of the mission.<sup>48</sup> Stability operations have been specifically defined as “a core US military mission that the Department of Defense (DoD) shall be prepared to conduct with proficiency equivalent to combat operations...throughout all phases of the conflict and across the range of military operations including in combat and non-combat environments.”<sup>49</sup> Accordingly RoL activities as a subset of stability operations are relevant across the range of military operations including mil-to-mil engagement, security cooperation and deterrence, crisis response and limited contingency operations all the way through to major combat operations and campaigns.

The success of wider stability (and thus RoL) operations depends upon integrated civilian and military efforts. Military responsibility for RoL development varies according to the operational environment. During peacetime it will be limited to mil-to-mil engagement aimed at helping partner nation militaries develop and strengthen in accordance with RoL. In the course of intervention however, the military may be required to conduct a wider range of RoL activities. As the conflicts in Iraq and Afghanistan have demonstrated, the dynamic nature of military intervention is such that stability and RoL requirements may arise before civilian access is feasible, demanding a lead role by the military. As the environment becomes more permissive, civilian actors will assume greater responsibility, and the requirement for logistical and security support from the military will also gradually decrease.

Regardless of the operational environment, RoL development should always be conducted in concert with the host nation authorities. Local buy-in and ownership is critical to long-term success and all efforts to establish and support the RoL must account for the customs, culture and ethnicity of the host nation.

## **A. Rule of Law Development in a Non-Permissive Environment**

Operations in Afghanistan and Iraq have dominated RoL training and practice in recent years. Although by no means the first examples of US military intervention resulting in nation building,<sup>50</sup> USG

<sup>45</sup> FM 3-07, *supra* note 6, at 3-106.

<sup>46</sup> *Id.* at 1-6. (The 5 primary Army stability tasks are establish civil security, establish civil control, restore essential services, support to governance and support economic and infrastructure development. These 5 tasks in turn flow into 5 stability sectors which equate to the 5 Department of State (DoS) security sectors.)

<sup>47</sup> US DEP’T OF DEF, DOCTRINE REF. PUB. 3-0 UNIFIED LAND OPERATIONS at 1-1 (16 May 2012) [hereinafter ADRP 3-0] (“Unified land operations describe how the Army seizes, retains and exploits the initiative to gain and maintain a position of relative advantage in sustained land operations through simultaneous offensive, defensive and stability operations in order to prevent or deter conflict, prevail in war, and create the conditions for favorable conflict resolution.”)

<sup>48</sup> ADRP 3-07, *supra* note 6 at 2-1

<sup>49</sup> DEP’T OF DEF INSTR. 3000.05, STABILITY OPERATIONS, at 2 (para 4), (16 Sep 2009) [hereinafter DoDI 3000.05]. (This directive is currently under review and is due for renewal in 2015).

<sup>50</sup> See America’s Role in Nation Building From Germany to Iraq, [http://www.rand.org/pubs/monograph\\_reports/MR1753.html](http://www.rand.org/pubs/monograph_reports/MR1753.html) (last visited 28 Aug 2014). See also Minxin Pei and Sara Kasper Lessons from the Past: The American Record on Nation Building, Policy Brief Carnegie Endowment for International Peace.

experiences in those theaters demonstrated a requirement to shift rapidly from combat to development and to establish the conditions for long-term stability. Stability policy and doctrine during the last decade reflects the lesson learned, that “military force alone cannot secure sustainable peace”<sup>51</sup> and establishes a role for the military within a stability framework based on unity of effort amongst stability partners both internal and external to the USG.

### 1. Military Intervention - Rule of Law Framework and coordination

In its role as the USG lead for stabilization and reconstruction, DoS developed the Post-Conflict Reconstruction Essential Tasks Matrix which serves as a planning tool for stability operations and is addressed in further detail at Chapter 5 of this *Handbook*. It provides a framework based on five stability sectors that may be relevant in the context of an intervention, namely: security, justice and reconciliation, humanitarian assistance and well-being, governance and participation, and economic stabilization and infrastructure. The stability framework<sup>52</sup> refers to the range of failed, failing and recovering states, and governs civil-military efforts aimed at reducing the level of violence and helping the state transition toward normalization. Five (interrelated) end-state conditions mark success: a safe and secure environment, established rule of law, social well-being, stable governance, and sustainable economy.<sup>53</sup> The military contributes to long-term stability through the performance of stability tasks described as: “tasks conducted as part of operations outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment and provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.”<sup>54</sup>

While recognizing the need to support stability operations by DoS and other USG agencies, DoDI 3000.5 also provides for DoD to lead stability operations activities when civilian efforts cannot take the lead.<sup>55</sup> Typically then the military may have a more extensive role in RoL development as part of stability operations during the early stages of intervention when the prevailing security conditions limit civilian access and the military dominates in terms of access, capacity and resources.<sup>56</sup> As the operation progresses, the military may retain the lead in less secure areas while civilian primacy is established in others. Transitions of responsibility are fundamental to the success of RoL operations: as and when it becomes feasible, civilian agencies should assume lead responsibility and then, ultimately, the host nation. Thus, RoL practitioners must include transition planning in any RoL line of effort.<sup>57</sup>

At every stage of the intervention, RoL efforts must 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 (CA) forces have a particular expertise in many aspects of stability operations, and

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<sup>51</sup> FM 3-07, *supra* note 6 at iv.

<sup>52</sup> ADRP 3-07, *supra* note 6 at 1-12.

<sup>53</sup> ADRP 3-07 *supra* note 9 at 1-13 (emphasis is added).

<sup>54</sup> JP 3-07 *supra* note 3 at vii *See also* DoDI 3000.05, *supra* note 57, at 1.

<sup>55</sup> DoDI 3000.05, *supra* note 47, at 2 (para 4c). “...to establish civil security and civil control, restore essential services, repair and protect critical infrastructure, and deliver humanitarian assistance until such time as it is feasible to transition lead responsibility...”

<sup>56</sup> Thomas B. Nachbar, *The US Military’s Role in Rule of Law Development: From Intervention to Security Cooperation*, in PROMOTING THE RULE OF LAW: THE PRACTITIONERS’ GUIDE TO KEY ISSUES AND DEVELOPMENTS (ABA Publishing 2013)

<sup>57</sup> FM 3-07 *supra* note 6, Chapter 2.

<sup>58</sup> *See* STROMSETH, WIPPMAN & BROOKS, *supra* note 18, at 9; JP 3-0 *supra* note 45 at V-35 (“To achieve the desired military end state and conclude the operations successfully, Joint Force Commands must integrate and synchronize stability operations with other operations (offense and defense) within each major operation or campaign phase.”).

JAs should seek out CA personnel (who are frequently attached to both Army and Marine Corps units) when tasked to conduct RoL operations as part of stability operations.<sup>59</sup>

Of the various areas in which RoL activities are prominent, criminal justice system reform is of particular concern to military commanders, owing to its relationship to security. As experiences in Afghanistan and Iraq have taught, military detention of insurgents is a short-term and imperfect security solution. This adds to the imperative to help reestablish the host nation's criminal legal system. Use of host nation systems not only increases the legitimacy of the operational forces but facilitates greater support to host nation capacity building and sets the foundations for transition of authority.

## **2. Planning for Intervention**

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 through a counterinsurgency to stability.<sup>60</sup> While potential RoL activities within intervention operations are wide and varied, JAs should anticipate requirements and prepare accordingly before deployment. The potential requirements will depend upon the phase of the intervention and the status of the host nation. For example, early in an intervention JAs may find themselves dealing with the establishment of transitional authorities, the assessment of existing codes, laws, legal traditions and procedures and they may also need to act as legal advisors for transitional courts. Additionally commanders will rely on their JAs to provide initial advice on the legality, legitimacy, and effectiveness of the host nation legal system and on international, US, and host nation law relevant to building the host nation's capacity to maintain the rule of law.<sup>61</sup>

Consideration should be given to the preparation of flexible RoL templates and plans, particularly where transitional arrangements may be required. It is also vital that JAs receive a good handover from their predecessors about the host nation legal system, existing and anticipated RoL programs and any RoL lessons learned.

## **3. Operational Impact**

An important consideration for JAs during military intervention is the role played by our own operational forces in promoting and contributing to RoL. Any act that the populace considers to be illegitimate, ranging from the serious, such as the mistreatment of detainees, to the seemingly insignificant, such as a failure to obey traffic laws is likely to discourage the populace from viewing laws as binding. A command's ability to establish RoL within its area of control is dependent in large part on its own compliance with laws restricting soldiers' (and the command's own) discretion and protecting the population from the seemingly arbitrary use of force.

US forces may need to alter their tactical stance in order to convey to the population that they are operating according to law rather than merely exercising control through the threat of force. As major combat operations end, combat forces may need to adopt different and more engaging tactics as they transition into their role as a stabilizing force. When conducting stability operations generally, and RoL

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<sup>59</sup> See JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS (11 Sep 2013); US DEP'T OF ARMY, FIELD MANUAL 3-57, CIVIL AFFAIRS OPERATIONS (31 Oct 2011).

<sup>60</sup> See FM 3-24, *supra* note 6, at 7-11 (para 7-43) ("Success in counter-insurgency operations requires small-unit leaders agile enough to transition among many types of missions and able to adapt to change.")

<sup>61</sup> See FM 3-07 *supra* note 2 at 1-18.

operations in particular, the relationship between commanders and the local population (and other RoL participants) must be one of cooperation and persuasion rather than commanding and directing.<sup>62</sup>

It is critical for JAs to establish up front that efforts to inculcate RoL through deed rather than word are likely to have a very real operational cost in the form of both reduced mission capability and potentially even in the form of casualties.<sup>63</sup> The criminals who go free every day in the US because of illegal searches—and the police officers who are killed because they are limited in their power to search—are all the reminder that anyone needs of the human cost of a state that is itself bound by legal rules. Similarly, US commanders will need to be prepared to respect—and have their power constrained by—host nation legal rules as host nation legal institutions assert their authority.<sup>64</sup>

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

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

## **B. Rule of Law Rule Development in a Permissive Environment**

The US military contributes to RoL development in a non-intervention environment through the broad rubric of SC. DoD Directive 5132.03 defines SC as:

Activities undertaken by DoD to encourage and enable international partners to work with the United States to achieve strategic objectives. It includes all DoD interactions with foreign defense and security establishments including all DoD administered security assistance programs, that:

- Build defense and security relationships that promote specific US security interests, including all international armaments cooperation activities and security assistance activities
- Develop allied and friendly capabilities for self-defense and multinational operations, and
- Promote US forces with peacetime and contingency access with host nations.<sup>65</sup>

It is important to view DoD SC activities within the broader construct of the President's 2013 directive on Security Sector Assistance (SSA) "aimed at strengthening the ability of the United States to help allies

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<sup>62</sup> LCDR Vasilios Tasikas, *Developing the Rule of Law in Afghanistan, The Need for a New Strategic Paradigm*, ARMY LAW. 45 (Jul 2007).

<sup>63</sup> See JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at V-60 (11 Aug 2011) [hereinafter JP 3-0] at A-4 ("Security actions must be balanced with legitimacy concerns.").

<sup>64</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>65</sup> US DEP'T OF DEF, DIR. 5132.03, DOD POLICIES AND RESPONSIBILITIES RELATING TO SECURITY COOPERATION (24 Oct 2008) at 11.

and partner nations build their own security capacity, consistent with the principles of good governance and rule of law.”<sup>66</sup> The directive further defines SSA as activities the US uses to:

- Engage with foreign partners and help shape their policies and actions in the security sector
- Help foreign partners build and sustain the capacity and effectiveness of legitimate institutions to provide security, safety and justice for their people
- Enable foreign partners to contribute to efforts that address common security challenges.<sup>67</sup>

Although the precise boundaries between SC and SSA may be blurred, there is a recognition that RoL considerations are paramount, indeed the PPD 23 considers RoL as a universal value and goal of SSA.<sup>68</sup>

The concept of legal support to SC is not new. For example, USSOUTHCOM developed a legal engagement strategy in 1998 in support of the Commander’s *Strategy of Cooperative Regional Peacetime Engagement*. At the time many Latin American countries were new democracies and the Commander viewed military acceptance of RoL as key to the future of those nascent democratic systems. The legal engagement strategy sought to “promote the concept of professional law based militaries that operate in accordance with the rule of law, respect internationally recognized human rights and are subordinate to and controlled by democratically elected civilian governments.”<sup>69</sup> USSOUTHCOM’s legal engagement plan in the annex to the current Theater Campaign Plan includes tasks to strengthen partner nation legal capability in rule of law, ensure compliance with domestic and international laws, and improve professional development of security sector legal personnel.

While USSOUTHCOM may have led the way by pursuing legal issues and RoL development in support of SC objectives, there is now increasing recognition within DoD that RoL development is relevant to theater SC objectives, steady-state military engagements and relevant deterrent objectives. The relationship between RoL, stability and SC is reflected within the broader stability doctrine (which establishes the importance of RoL to stability and the relevance of security force assistance to the stability tasks<sup>70</sup>) and the Army’s concept of unified land operations construct.<sup>71</sup> Judge Advocates at each of the Combatant Commands (COCOMs) and Army Service Component Commands and potentially Regionally Aligned Forces are likely to be increasingly involved in RoL promotion in support of the regional Theater Campaign Plan.

The stability framework informs military engagement during peacetime and is relevant both to conflict prevention and to helping rebuild a nation torn by conflict or disaster. Current efforts at USCENTCOM reflect this framework and as Iraq and Afghanistan transition to a more traditional SC relationship, the USCENTCOM legal office (CCJA) has identified the need to rejuvenate efforts in steady-state/permissive RoL, not only in those two nations, but across the entire area of operations. Accordingly, CCJA is developing a RoL engagement strategy based on the following proposed end state: “Partner nation security forces and their individual members operate in accordance with the law, respect fundamental

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<sup>66</sup> *Presidential Policy Directive – 23*, (05 Apr. 2013) (PPD-23).

<sup>67</sup> *Id* at 3.

<sup>68</sup> *Id* at 3 includes within the goals for SSA: “Promote Universal values, such as good governance, civilian oversight of security forces, rule of law, accountability, delivery of fair and effective justice, and respect for human rights”

<sup>69</sup> See Jeffrey F. Addicott and Guy B. Roberts, *Building Democracies with Southern Command’s Legal Engagement Strategy*, Parameters Spring vol 2001 (2001).

<sup>70</sup> FM 3-07 *supra* note 6 at 1-22 (“security force assistance may prove important to the primary stability task of establishing civil security *either as part of peacetime activities* or as assigned missions along the stability framework after conflict”).

<sup>71</sup> See ADRP 3-0, *supra* note 45.

human rights, and manifest an organizational culture of justice and accountability.”<sup>72</sup> The three areas of focus are international law, treaties and international agreements, and military justice legal systems.

The Office of Legal Counsel, USAFRICOM<sup>73</sup> recently developed its legal engagements program to advance RoL development through five primary focus areas identifying characteristics deemed to contribute to RoL, assesses militaries based on those characteristics and seeks (through legal engagement and partner activity) to address areas that require improvement in the following areas:

- Military subordination to civilian authority
- The existence of an appropriate military justice system
- Military adherence to international humanitarian law
- Compliance with human rights standards and fundamental freedoms
- The prevention of military corruption.

This can serve both to assess the status of a foreign military’s adherence to RoL criteria, and as a planning tool for planning legal input to the development of foreign militaries as seen in further detail in Chapter 5.

### III. Concluding Remarks

The current National Defense strategy recognizes the need to protect "the rights and responsibilities of nations and people...especially the fundamental rights of every human being."<sup>74</sup> This need is inherently supported by the 2014 Quadrennial Defense Review which lists the conduct of “military engagement and security cooperation” as one of the 12 enduring armed forces missions.<sup>75</sup> That there is a role for JAs in this strategy was clearly defined in a recent memorandum<sup>76</sup> from the Army Judge Advocate General (TJAG) which confirms that the JAGC supports Army SC strategy by conducting legal engagements along three LoEs: LOAC, mil-to-mil engagement and enhanced interoperability. Critically the aim of all legal engagement is to "promote disciplined mil operations subject to the rule of law."<sup>77</sup>

It is likely then that JA involvement in permissive RoL engagement with partner nation militaries will increase as a means of promoting US security through the building of effective partnerships. When doing so, any approach to actually implementing RoL must take into account so many variables—cultural, economic, institutional, and operational that deployed JAs need to be flexible, not only in their understanding of what RoL is, but also in their approach to bringing it about. This is particularly so in light of the complexities likely to surround all future military deployment.<sup>78</sup>

Although adequate resources, security, and thoughtful planning and execution may be *necessary* for RoL projects, they are not necessarily *sufficient* for establishing RoL. Ultimately, establishing the RoL requires a recognition among the governed that compliance with and participation in a legal system is valuable. Judge Advocates should seek to assist based upon an understanding of host nation desires and remain constantly aware of the ever-changing and collaborative nature of RoL projects.

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<sup>72</sup> USCENTCOM Office of the Staff Judge Advocate Rule of Law Engagement Strategy (2014).

<sup>73</sup> The Office of Legal Counsel includes a legal engagement branch dealing with theater security cooperation, rule of law, small unit exchanges, human rights, strategic communication, African economic and security organizations, and mil-to-mil contacts.

<sup>74</sup> Sustaining US leadership: Priorities for 21<sup>st</sup> Century Defense (Jan 2012), preface.

<sup>75</sup> Quadrennial Defense Review (Mar 2014), 61.

<sup>76</sup> Memorandum for Judge Advocate Legal Services Personnel, *Legal Engagements in Support of the Army Security Cooperation Strategy*, (signed by LTG Flora D. Darpino, TJAG, 13 Apr 2014).

<sup>77</sup> *Id* para 1.

<sup>78</sup> See for example the preface to The US Army Operating Concept (TRADOC Pamphlet 535-3-1) (Oct 2014): “The environment the Army will operate in is unknown. The enemy is unknown, the location is unknown, and the coalitions are unknown”.

## CHAPTER 2

# THE INTERNATIONAL LEGAL FRAMEWORK FOR RULE OF LAW OPERATIONS

Deployed JAs working on RoL operations must be mindful of which international legal frameworks apply to their particular circumstances as no single legal discipline purports to operate as the *lex specialis* of RoL missions. Instead, JAs involved in RoL lines of operation are required to draw from a broad spectrum of legal disciplines. Moreover, JAs must be mindful that US policy and practice may require adherence to more stringent international norms than otherwise applicable under US law. Considering the challenges associated with establishing legitimate and sustainable RoL in a conflict or post-conflict nation, it is also important that the conduct of US forces in such environments comport with not only our own notions of law, policy and practice, but those of the international community as well.

The first section of this chapter reviews the various legal mandates which could apply to a particular operation while the second section is a brief overview of the substantive requirements of those frameworks. Regardless of the setting or the particular applicable regime, RoL operations call for adherence to the requirements of international law not only as a matter of legal compliance, but as a matter of US policy and good practice.

### I. Rule of Law Mandates

The aim of this section is to outline some of the various mandates that may govern military deployments overseas and the impact these have on RoL operations. From a legal perspective the mandate defines the nature, scope and limits of any military deployment, the *raison d'être*. The mandate may expand and evolve as the operation progresses or, by contrast, may become more limited as an operation matures.

#### A. United Nations Mandates

##### 1. United Nations Security Council Resolutions

The Security Council is the body with primary responsibility for maintaining international peace and security<sup>1</sup> and Chapter VII of the United Nations (UN) Charter enumerates the Council's compulsory powers to do so. Most UN Security Council Resolutions (UNSCR) 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.

##### 2. The Use of Force under the UN Charter

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

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<sup>1</sup> UN Charter art. 24(1).

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

<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." UN Charter art. 2(4).

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

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 provides for the peaceful settlement of disputes with the consent of the host nation, while the latter permits action with respect to threats to the peace, breaches of the peace, and acts of aggression even without the consent of the host nation.

Judge Advocates can expect to support UNSCR-mandated operations which often include a RoL mission. In addition to advancing efforts to restore peace, such resolutions may include developmental mandates: particularly in missions undertaken in under-developed states, JAs should expect UNSCRs to explicitly address perceived RoL deficiencies as well as economic, financial, health, and human rights issues. UN Security Council Resolutions 1483 (2003) for the reconstruction of Iraq is representative.<sup>6</sup> Frequently, the Security Council and Secretary General have relied on Special Rapporteurs and/or Special Representatives to provide detailed guidance on the implementation of such resolutions and to report to the Council on progress in their execution.<sup>7</sup>

UN Security Council resolutions, mandates, and directives may be in apparent conflict with pre-existing or concurrent international legal norms. If so, Article 103 of the Charter 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 peaceful 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 that might lead to international friction or give rise to a dispute, recommend appropriate procedures or methods of adjustment. The key to resolutions passed under Chapter VI is that they only permit the presence of military forces with the consent of the host government and do not sanction the use of force other than that which is necessary for self-defense.

Due to the permissive nature of Chapter VI missions, JAs should expect host nation legal norms to govern most operations. Relations between the sending and receiving state will, in all likelihood, be governed by a Status of Forces Agreement (SOFA). Chapter VI missions that include a RoL aspect may call on supporting JAs to assist the host nation in implementing its international legal obligations.

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<sup>5</sup> UN 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, UN Doc. S/RES/1483 (2003). As well as a directive to comply with the law of occupation, UNSCR 1483 instructed the coalition to work toward a number of developmental and humanitarian goals including repairing infrastructure and meeting the “humanitarian needs of the Iraqi people.” 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*, UN Doc. S/2003/715 (2003). The report frequently exhorted the coalition to speed reconstruction and development efforts, often through transformative means.

<sup>7</sup> *See Report of the Panel on United Nations Peace Operations (The Brahimi Report)*, A/55/305 - S/2000/809 (2000), available at [www.rol.org/doc.aspx?n=brahimi+report+peacekeeping.pdf](http://www.rol.org/doc.aspx?n=brahimi+report+peacekeeping.pdf) (last visited 1 Nov 2013).

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

## b. Resolutions Passed Under Chapter VII

Chapter VII of the UN Charter provides an important caveat to the prohibition on the use of force contained within Article 2(4). Along with Article 51, it constitutes the modern *jus ad bellum*. The prohibition on UN intervention in domestic affairs of a nation is specifically excluded in relation to actions which are predicated on threats to the peace, breaches of the peace, or acts of aggression.<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> Depending on the language used in the resolution, the Security Council’s imposition of economic sanctions against a state pursuant to Article 41 may be either recommended or mandatory in nature.

Article 42 empowers the Security Council to authorize 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> When this provision was drafted, it had been envisioned that Article 42 actions would be taken by countries under a unified UN command. That type of action has been rare. Instead, a practice has developed whereby the Security Council authorizes states to take all necessary measures, in which case, there is no unified UN command. Member states are not mandated to participate in a Chapter VII military operation, but they cannot work counter to the UN effort.

The legal effect of passing a resolution under Chapter VII that authorizes the use of all necessary means is significant. It offers the military commander enormous freedom to prosecute any campaign. Resolutions passed under Chapter VII have been aimed at both state and non-state actors. Examples of the latter include resolutions passed against the National Union for the Total Independence of Angola (UNITA) following their breach of terms of cease-fire in Angola<sup>13</sup> and the Taliban and Al Qaeda<sup>14</sup> after 9/11.

Judge Advocates may find familiar legal territory when supporting missions executed pursuant to Chapter VII authority. Such missions are typically coercive, thus obviating, at least during early phases, detailed consideration of host nation legal frameworks – although any preparatory understanding of these frameworks will assist JAs enormously post-intervention. The nature and international scope of Chapter VII missions, particularly those carried out under Article 42, will likely trigger application of the full body of the law of war; but the completion of decisive operations will typically transition to stability or post-conflict missions, which will often be accompanied by increased legal complexity. Judge Advocates should pay particular attention to extension and modification of legal mandates through subsequent

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<sup>9</sup> *Id.*, art. 2(7).

<sup>10</sup> *Id.*, art. 39.

<sup>11</sup> *Id.*, art. 41.

<sup>12</sup> *Id.*, art 42.

<sup>13</sup> UNSCR 1295. UN Doc. S/Res/1295 (18 April 2000). established a monitoring mechanism to supervise implementation of previous Security Council resolutions issued against UNITA and invoked the Council’s powers under Chapter VII and called on States to consider action under article 41 of the UN Charter.

<sup>14</sup> *See* S.C. Res 1373 (2001). The Taliban were not generally recognized by the International Community to be the legitimate Government of Afghanistan and as such were “non State actors.”

Security Council resolutions. Mandates subsequent to successful decisive operations may include broader developmental and transformative goals.<sup>15</sup>

## **B. Mandates Pursuant to Bilateral and Multilateral Agreements**

Due to political considerations and structural obstacles the UN system has rarely operated as envisioned. Though nearly all states have delegated responsibility for maintenance of international peace and security to the UN, bilateral security agreements form an integral part of the international security framework. States have frequently resorted to operations outside the context of the UN Security Council to restore peace and security. In addition to bilateral agreements on security cooperation, states have utilized multilateral, often of a regional nature, security arrangements to supplement both the United Nations system as well as their indigenous capacity for self-defense.

States also conclude 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 COCOM. Interagency coordination is also essential to appreciating the implementation strategy of bilateral development or security agreements.

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

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

Judge Advocates should anticipate national legislation, both standing and ad hoc, regulating armed forces' activities during RoL operations. Fiscal law restrictions will undoubtedly impact mission planning and execution.<sup>16</sup> Judge Advocates should also anticipate other reporting and operating requirements, such as vetting under the Leahy Amendment<sup>17</sup> for past human rights violations.

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

Currently, no single body of law regulates the conduct of RoL operations. Rather, RoL operations tend to demand highly context-specific legal frameworks that account for geographic, conflict, and cultural settings. This section considers the potential application of three major legal disciplines relevant to many RoL operations: the law of war, its subset of occupation law, and human rights law.

## **A. The Law of Armed Conflict**

Rule of Law operations typically occur within the broader context of stability operations. Department of Defense doctrine emphasizes that stability operations occur both along and beyond the conflict

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<sup>15</sup> See S.C. Res. 1483 (2003) *supra* note 6.

<sup>16</sup> See ch. 6 of this *Handbook*.

<sup>17</sup> Pub. L. No. 104-208, 110 Stat. 3009-133 (1996).

spectrum.<sup>18</sup> Doctrine notwithstanding, major combat operations present significant obstacles to effective RoL operations. Commanders must tailor mission sets, personnel, and resources to accommodate the realities and demands of the battlefield. Similarly, the law of armed conflict (LOAC) governs RoL operations occurring during armed conflict.

In some instances, the LOAC may operate as an enabler, facilitating the imposition of law and order. For example, applying Geneva Convention “Prisoner of War” or “Civilian Internee” standards to detention demonstrates a principled application of the RoL and may facilitate an orderly transition to civilian detention regimes in a post-conflict phase of operations. These standards, which apply in international armed conflict as a matter of law, may also serve as a guide in developing procedures for treatment of detainees in non-international armed conflict.<sup>19</sup>

## 1. Treaty Law

Much of the contemporary corpus of the law of war is contained in treaty law. Some commentators have found utility in dividing the positive law of war into obligations concerned with treatment of victims of conflict (the Geneva tradition) and obligations to be observed in the conduct of hostilities (the Hague tradition). While this academic division may no longer accurately reflect the respective treaty sources of these norms, the functional separation of rules remains useful.

The four 1949 Geneva Conventions form the backbone of the law relevant to treatment of victims of war. All UN member states, including the United States, are parties to the Geneva Conventions. Despite their impressive size, 419 articles in all, the majority of the Conventions regulate a narrow class of armed conflict—so-called international armed conflict. In fact, application of all but one article (Common Article 3) of the four Conventions is conditioned on existence of international armed conflict between opposing state parties to the Conventions. All other armed conflicts, namely those between state parties and non-state actors, such as civil wars and insurgencies, are governed only by Common Article 3.

Though conflict classification is usually determined at the highest levels of national government, JAs in RoL operations must remain attuned to evolutions in the character of conflict. Recent operations have featured complex conflict classifications; for example, some armed conflicts among diverse groups within the same state territory have been considered single conflicts while others involving multiple parties in a single state have been parsed into separate conflicts for legal purposes.

In addition to a restrictive conflict classification regime, each of the Conventions reserves the majority of its protective provisions to classes of “protected persons.” Only persons or groups satisfying these 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 and RoL operations, especially police, detention, and court functions will regularly implicate provisions of the Conventions.

In contrast, the Hague tradition exemplified in the 1907 Hague IV regulations specifically lists prohibited means of warfare, such as the use of poison or the declaration of no quarter (Article 23) and permitted means such as ruses of war (Article 24).

## 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.<sup>20</sup> Many treaty provisions, including the Hague

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<sup>18</sup> See US DEP’T OF DEFENSE, INSTR. 3000.05, STABILITY OPERATIONS, para. 4.a.

<sup>19</sup> See the *The Copenhagen Process: Principles and Guidelines*, available at <http://um.dk/en/~-/media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>. (last visited 12 Dec 14) (a guide for best detention practices in multinational ops in non-international armed conflicts).

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

Regulations of 1907, the Geneva Conventions of 1949 and portions of the 1977 Additional Protocols to the Geneva Conventions are considered CIL independent of their treaty law status and thus can be binding upon non-signatories. Provisions of the latter treaties have proven particularly troublesome for JAs because the US is not a party to either Additional Protocol, albeit the majority of Protocol I provisions relate to targeting operations and are not of primary concern to RoL operations. The US has not expressed explicit support for most of the Protocol I supplements to treatment of war victims, reducing the legal significance of these provisions during exclusively US operations.<sup>21</sup> Judge Advocates should bear in mind, however, that many US allies and potential RoL host nations have ratified or acceded to the Protocols or may view their provisions as reflective of CIL.

It is important to remember that legal norms mature with their triggering mechanisms. That a norm develops, through state practice and *opinio juris*, into CIL does not of necessity expand its scope of 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

Policy directs US 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>22</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.

## 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>23</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 RoL operations.

### 1. Treaty Law

Most norms of occupation law are found in international treaties. The Hague Regulations and the Fourth Geneva Convention (GC IV) 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 providing food and medical supplies, hygiene and public health.

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<sup>21</sup> *But see* for a more nuanced understanding of the US approach to the Additional Protocols and in particular Article 75 of Additional Protocol I: The White House Office of the Press Secretary “*Fact Sheet: New Actions on Guantanamo and Detainee Policy*” (07 Mar 2011), [hereinafter FACT SHEET] available at <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy> (last visited 15 Sep 2014); and Statement Before the House Armed Services Committee Hearing on Detainees, delivered by Deputy Secretary of Defense William J. Lynn, III, House of Representatives, 17 Mar 2011, available at <http://www.defense.gov/speeches/speech.aspx?speechid=1548> (last visited 15 Sep 2014).

<sup>22</sup> US DEP’T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM, para. 4.1 (9 May 2006) [hereinafter DOD LAW OF WAR PROGRAM].

<sup>23</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).

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

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

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

Occupation law is intended to preserve the *status quo ante*; it is conservationist in nature. Both Article 43 of The Hague Regulations and GC IV Article 64 direct occupants to preserve and adopt existing systems of government. When applicable, these provisions may present obstacles to RoL projects that modify existing legal regimes and institutions. Exceptions are primarily related to establishing and maintaining security and observance of fundamental humanitarian norms. The occupation phase of Operation Iraqi Freedom presented JAs with just such a challenge as 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 UNSCRs to justify legal innovations that would otherwise have run contrary to occupation law's rules of preservation. Specifically, the CPA relied on articles 25 and 103 of the United Nations Charter to justify observance of the Security Council's development mandate in Resolution 1483, notwithstanding apparent friction with occupation law's direction to preserve the status quo. During occupation, JAs should validate RoL projects that alter existing governmental structures either through legitimate security concerns or under a superseding international mandate for development.

## 2. Customary International Law

As occupation law is found in such well-established treaties, many argue that its norms constitute CIL. While probably true, JAs should remember the applicability of norms attaining customary status remains conditions-based. That is, when a treaty provision matures into custom, the primary effect is to bind non-parties. Customary status does not mandate application beyond the scope of conditions originally attendant to the relevant norm. For example, while Article 49 of GC IV 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 GC IV. Thus, Article 49 only operates as customary law in "cases of partial or total occupation of the territory of a High Contracting Party,"<sup>24</sup> and with respect to "[p]ersons . . . in the hands of [an] . . . Occupying Power of which they are not nationals."<sup>25</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. A recent study of CIL is similarly silent on occupation law.<sup>26</sup> The United States has not clearly expressed its views in this regard, although the application of the law of international armed conflict to all other military operations may provide a policy solution to this CIL conundrum.

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<sup>24</sup> GC IV, art. 2.

<sup>25</sup> *Id.*, at art. 4.

<sup>26</sup> See Henckaerts & Doswald-Beck, *supra*, note 20. See also ICRC, Occupation and Other Forms of Administration of Foreign Territory (2012), available at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf> (last visited 12 Sep 2014).

### 3. Policy

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

### C. Human Rights Law

Where international law generally governs relationships between states, human rights law regulates relationships between states and individuals. Human rights law can be applicable to RoL operations in either through the application of customary international human rights law to their activities, or through the application of the host nation's human rights (treaty-based) obligations. If engaged in combat operations, the US regards the law of war as an exclusive legal regime, or a *lex specialis*. Under this view, the law of war, as the more specific law pertaining to military operations, displaces the more general framework of human rights law.<sup>28</sup> Moreover, the US considers its obligations under the International Covenant on Civil and Political Rights (ICCPR)<sup>29</sup> to be territorial in scope, because the treaty applies in a State's "territory *and* jurisdiction" (emphasis added). This position is not necessarily shared by other nations due to domestic obligations and the wording of regional human rights treaties, such as the European Convention on Human Rights (ECHR); which apply in situations where a government has jurisdiction *or* control and authority over persons (such as in detention operations) rather than merely territorially. For this reason, Council of Europe states party to the ECHR may be bound by extra-territorial ECHR obligations when operating outside their domestic territories.<sup>30</sup>

Irrespective of the specific legal context, RoL operations, integrated with host nation governance, should be guided and informed by human rights law purely as a matter of efficacy. US forces should demonstrate model behavior and encourage actions that will encourage a host nation government to adopt and practice strong human rights norms. For example, while detention operations by US forces during the combat stage may legally be conducted in accordance with law of war requirements, the detention procedures adopted by US forces during the *post*-conflict phase may serve as a model for the administrative or criminal detention procedures that the host nation later adopts for domestic use. Judge

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<sup>27</sup> US DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE 352(b) (18 July 1956). *See also* DOD LAW OF WAR PROGRAM, *supra*, note 22.

<sup>28</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:

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>29</sup> Dec. 16, 1966, 999 UNT.S. 171, available at <http://www.ohchr.org/EN/ProfessionalInterests/Pages/CCPR.aspx> (last visited 1 Nov 2013).

<sup>30</sup> *See, e.g.*, Al Skeini and Others v the United Kingdom [GC] no. 55721/07 Eur. Ct. H.R. (2011) [hereinafter Al Skeini v. U.K.], Al-Jedda v the United Kingdom [GC] no. 27021/08 Eur. Ct. H.R. (2011) [hereinafter Al-Jedda v. U.K.] and Serdar Mohammed v Ministry of Defence and others [2014] EWHC 1369 (QB) [hereinafter Serdar Mohammed]

Advocates should assist host nation institutions in building capacity that complies with human rights standards that are consistent with the host nation's legal regime.

## 1. Treaty Law

There are many international human rights treaties to which the host nation may be party<sup>31</sup> including the Genocide Convention, the ICCPR,<sup>32</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>33</sup> the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>34</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>35</sup> the Convention on the Elimination of All Forms of Racial Discrimination (CERD);<sup>36</sup> the Convention on the Rights of the Child (CRC)<sup>37</sup> and its two optional protocols, the Convention on the Rights of Persons with Disabilities (CRPD)<sup>38</sup> and the International Convention for the Protection of All Persons from Enforced Disappearances.<sup>39</sup> Regionally, treaties include the ECHR,<sup>40</sup> the American Convention on Human Rights (ACHR),<sup>41</sup> and the African Charter on Human and Peoples' Rights.<sup>42</sup>

The United States is party to the ICCPR, the CAT, the CERD, and the two optional protocols to the CRC. However, the US does not consider the majority of its human rights treaty obligations to apply extraterritorially, nor during periods of armed conflict.<sup>43</sup> Notwithstanding this, JAs need to be aware that the US position is not universally accepted and that they may be called upon to respond to human rights complaints submitted to the United Nations. The treaty bodies interpreting the treaties to which the US is party typically expect the US to account for its actions wherever they take place.

Moreover, there are some 40 UN special procedures<sup>44</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. These bodies review complaints from any purported victim of a human rights violation, including in Iraq and Afghanistan. Although the US position is that the laws of war are the relevant *lex specialis* for military operations and that the human rights treaty bodies and the special mechanisms do not have jurisdiction over the laws of war, as a matter of policy and transparency, the US responds to these inquiries.

Although the US 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 US activities with international law by reference to the ACHR. It has issued precautionary measures

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<sup>31</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 12 Sep 2014).

<sup>32</sup> See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (last visited 1 Nov 2013).

<sup>33</sup> See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (last visited 1 Sep 2014).

<sup>34</sup> See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx> (last visited 12 Sep 2014).

<sup>35</sup> See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (last visited 1 Nov 2013).

<sup>36</sup> See <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CERD.aspx> (last visited 1 Nov 2013).

<sup>37</sup> See <http://www.ohchr.org/EN/ProfessionalInterests/crc.pdf> (last visited 1 Nov 2013).

<sup>38</sup> See [http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersons With Disabilities.aspx](http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersons%20With%20Disabilities.aspx) (last visited 1 Nov 2013).

<sup>39</sup> See [http://www.ohchr.org/EN/Professional Interest/Pages/IntConventionEnforcedDisappearance.aspx](http://www.ohchr.org/EN/Professional%20Interest/Pages/IntConventionEnforcedDisappearance.aspx) (last visited 1 Nov 2013).

<sup>40</sup> See [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf) (last visited 1 Nov 2013).

<sup>41</sup> See [www.oas.org/juridico/english/treaties/b-32.html](http://www.oas.org/juridico/english/treaties/b-32.html) (last visited 25 Sep 2014).

<sup>42</sup> See <http://www1.umn.edu/humanrts/instree/z1afchar.htm> (last visited 25 Sep 2014).

<sup>43</sup> *Supra*, note 29.

<sup>44</sup> See <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx> (last visited 1 Nov 2013) for all procedures.

pertaining to detainees at Guantanamo Bay and opined on the consistency of certain aspects of US military actions in Grenada with the American Declaration on Human Rights.

The US interpretation of the applicability of human rights treaties allows the US military comparatively greater freedom of action than many coalition partners when conducting operations overseas. As previously discussed, the seemingly increasing extraterritorial application of the ECHR may substantially impact on certain military operations conducted by European coalition partners.<sup>45</sup>

Human rights treaties may also apply to the host nation within which the US military is operating. At the outset of RoL operations or legal engagement, JAs should review the human rights law instruments to which the host state is a party, as well as their reservations and declarations.<sup>46</sup> Rule of Law missions may call upon JAs to develop plans to assist in the implementation of host nation human rights treaty obligations. Judge Advocates should appreciate and account for the complexities of implementing such obligations consistent with host nation legal and cultural traditions, but at the same time bear in mind US views of the host nation's obligations. For instance, although many Muslim states have ratified the CEDAW, most included significant reservations to account for Sharia which would be counter to US views on the rights of women.

## 2. Customary International Law

To the extent that human rights norms have attained a CIL status, they will be part of the applicable legal framework. However, there is much disagreement as to which human rights have matured into customary law. The Universal Declaration of Human Rights (UDHR) serves as a baseline guide,<sup>47</sup> but is an aspirational document that is not legally binding on states. The US practitioner, therefore, must look to other sources of law: the US accepts the position that certain fundamental human rights fall within the category of customary international law, and it violates international law when a state practices, encourages, or condones the following practices:

- Genocide
- Slavery or the slave trade
- Murder or causing the disappearance of individuals
- Torture or other cruel, inhuman, or degrading treatment or punishment
- Prolonged arbitrary detention
- Systematic racial discrimination
- A consistent pattern of gross violations of internationally recognized human rights.<sup>48</sup>

The President's recent statement on Article 75 of Additional Protocol I and the administration's intent to seek ratification of Additional Protocol II (particularly with respect to Articles 4-6) further indicates the current US view of human rights norms applicable in international and non-international armed conflict, respectively.<sup>49</sup>

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<sup>45</sup> See, e.g., *Al-Jedda v. U.K., Al Skeini v. U.K and Serdar Mohammed*, *supra* note 31.

<sup>46</sup> A full list of human rights treaties including reservations, declarations, and objections, available at <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&Lang=en> (last visited November 1, 2013).

<sup>47</sup> See US DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY D-8 (15 Dec. 2006). (citing the UDHR and the ICCPR as guide[s] for the applicable human rights.'').

<sup>48</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, §702 (1987).

<sup>49</sup> See FACT SHEET, *supra* note 22.

## CHAPTER 3

# THE INSTITUTIONAL AND SOCIAL CONTEXT FOR THE RULE OF LAW

One of the greatest challenges for RoL practitioners is the requirement to understand the contextual basis of the RoL environment within which they are operating.<sup>1</sup> Too often, past efforts to establish RoL in post-conflict environments ignored the local practices that allow access to justice and the “morality of society.”<sup>2</sup> Operations in Iraq, for instance, demonstrated that US officials involved in the reform of specific laws often lacked background information about Iraqi culture and their complex legal system.<sup>3</sup> Understanding the cultural and legal background of the host or partner nation is a vital prerequisite to any effort to assist with RoL development, regardless of whether that effort comprises a comprehensive program to reform the criminal justice system or mil-to-mil engagement with a view to developing the military justice system.

Section I of this chapter looks at the fundamental component parts of legal institutions in general. Sections II – IV is a comparative law look at legal systems unfamiliar to most common law practitioners, including civil law, religious legal systems, customary and combined systems. Sections V – VII broaden the context by considering gender, civil society and non-state security providers.

## I. Legal Institutions

### A. Legislatures

A legislature is a representative body that has the responsibility and power to make laws in accordance with a specified process. Typically, the detail of legislation is the responsibility of civil servants or government employees. However, in failed states or those states requiring overseas military support, individuals with relevant experience or ability may not be available.

Until recently, few deployed JAs had any contact with the legislative side of RoL operations. However, recent experiences have changed that and US and other coalition JAs found themselves being called upon to advise on the legislative procedures of the host country or, even, becoming personally involved in the creation of legislation, especially where that legislation related to the host nation’s armed forces.<sup>4</sup> Regardless of the nature of deployment, JAs should be aware that they initially encounter significant difficulties in establishing exactly what the legislative process of a host nation entails, or in finding authoritative guides to the same and prepare accordingly.

The process of enacting legislation is almost universally cumbersome, fraught with bureaucracy and time-consuming. Given this, it is frequently tempting to bypass the legislative system and attempt to effect reform by resort to executive action. Even if this is constitutionally permissible, resort to executive decree should be considered a last resort. In some circumstances, policy making via unilateral executive action rather than legislative process may, in itself, undermine the legitimacy of not only the policy, but

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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> For example 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 Army Legal Services officers were involved in drafting legislation pertaining to the host state armed forces.

also the host nation government. The legislative process 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>5</sup> Where military advisers are trying to promote the RoL, the use of a system that bypasses the legislative process does little to promote adherence to the concept.

Experience has shown that attempts to overhaul the host nation legal system to match the US model will lead to difficulties and is often not the best solution. Although less familiar to the JA, the local legal system may be as refined and developed as that in the United States, but more importantly, it will benefit from a degree of legitimacy that a newly imposed system will lack. If tasked with such responsibilities, JAs should be wary of relying too heavily on the familiar US models.<sup>6</sup> That does not mean that US sources should be disregarded, and several organizations, including the American Law Institute and the American Bar Association<sup>7</sup> produce model acts for legislatures. Even if the legislative process of the host nation is superficially similar to the US model, there are likely to be significant substantive differences. If the host nation's legal system is founded on a constitution, the process may, at least in theory, be derived from the constitution itself.<sup>8</sup> In other nations the process may be defined by statute.<sup>9</sup>

## B. Courts

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>10</sup> Although structural arrangements have changed over the years in most civil law countries to enhance judicial independence, they often still differ in fundamental respects from those found in common law countries. In most cases, countries considering structural reforms will look to other countries with a similar legal tradition for models:<sup>11</sup> so a former French colony is likely to look to the French legal system as a model for progress, as opposed to relying upon the common law tradition.

During intervention, JAs may be called upon to assist in both restructuring and reconstructing aspects of domestic legal systems. Judge Advocate involvement in the judicial aspects of RoL operations typically takes two general forms: actually operating a court system in the absence of civil authority 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>12</sup> The latter mission is a reconstruction mission that requires a broader understanding of the domestic legal system and will involve a variety of participants, including DoD, coalition partners, other US agencies, the host nation, IOs, and NGOs.

During steady-state security mil-to-mil engagement, JAs may help foreign nation militaries develop their military discipline and court-martial system, and adopt methods for complying with domestic and international laws.

If supporting any missions involving court systems, JAs may be required to advise on, or be knowledgeable about, court structures, practices and procedures, as well as assess and analyze the

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<sup>5</sup> See, e.g., European Commission Regular Reports on Romania 2000-2002 (noting with alarm the widespread use of presidential decree by Romania).

<sup>6</sup> 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>7</sup> See [www.ali.org](http://www.ali.org) (last visited 18 Dec 2013) and [www.americanbar.org](http://www.americanbar.org) (last visited 18 Dec 2013).

<sup>8</sup> See, e.g., US CONST. art. I, sec. 7.

<sup>9</sup> See, e.g., Parliament Act 1949, 12, 13 & 14 Geo. 6. c. 103 (Eng.).

<sup>10</sup> The Latin American civil law tradition features a strong investigative judge and a weak prosecutor; by contrast, under communist civil law systems, the prosecutor completely dominated procedures.

<sup>11</sup> USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 12 (2008).

<sup>12</sup> See US DEP'T OF ARMY, PAM 27-9-2, MILITARY JUDGES' BENCHBOOK FOR PROVOST COURTS (4 Oct 2004).

ongoing performance of such systems. In conducting such missions, JAs need to be mindful of the domestic expectations and generally recognized international standards for the operation of civilian (and military) courts. In resource-challenged environments, it may not be possible to operate domestic court systems in accordance with international standards, but that should not rule out using those standards as long-term goals in relevant RoL lines of operation.

Given that military deployments are most often necessitated by instability and security needs, in the past, the tendency in most, if not all, RoL missions was to focus on domestic criminal justice issues (vs. civil legal), in order to reestablish or maintain law and order by bringing those responsible to account for their wrong doing. Unless the criminal justice system is seen to be a demonstrable success, public support is likely to be limited and the RoL mission will be severely handicapped.

## 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 ensures public confidence in the court system and 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>13</sup> The defendant has the right to be tried in person<sup>14</sup> and through legal assistance of one’s choosing to examine and call witnesses and, if convicted, the right of appeal.

In 1990, the UN adopted guidelines on the role of prosecutors<sup>15</sup> and the International Association of Prosecutors followed in 1995.<sup>16</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 JA 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, the availability of defense lawyers may be limited or non-existent. Rule of Law missions (which frequently concentrate on ensuring that the judges and prosecutors are of an acceptable standard) may need to focus more heavily on training and deploying a competent corps of defense lawyers than prosecutors. Judge Advocates should be mindful that the role of defense lawyers may be much less central to the judicial process in some non-adversarial systems.

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<sup>13</sup> Equality of arms is central to any adversarial justice system. See Nicholas Cowdery, The Rule of Law and a Director of Public Prosecution, <http://www.odpp.nsw.gov.au/docs/default-source/speeches-by-nicholas-cowdery/the-rule-of-law-and-a-director-of-public-prosecutions.pdf?sfvrsn=2> (last visited 18 Dec 2013), (a perspective from the former Director of Public Prosecutions in NSW, Australia.) 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>14</sup> International human rights standards do not generally recognize trial in absentia. The US position was discussed by the Supreme Court in *Crosby v United States*, 506 US 255 (1993), concluding that the right is not absolute and can be voluntarily waived by the defendant.

<sup>15</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://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx> (last visited 18 Dec 2013).

<sup>16</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.iap-association.org> (last visited 18 Dec 2013).

## 2. Judicial Independence, Impartiality, and Training

No set of procedural protections will provide a court with legitimacy if it is not independent 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. The roles and responsibilities of judges adopted by the UN in 1985<sup>17</sup> and the *Bangalore Principles of Judicial Conduct*<sup>18</sup> provide an excellent template for those holding judicial office.

There are two aspects to independence: first, the tribunal must be subjectively free of personal prejudice or bias; second, the tribunal must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.<sup>19</sup> To establish whether a tribunal can be considered “independent,” regard must be had how appointments are made, terms of office, the existence of guarantees against outside pressures and whether a court appears 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>20</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.

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

### **Judicial Education in Afghanistan.**

As judges from many of the provinces of Afghanistan in 2003 had received less than a high school education,<sup>21</sup> creating a widespread program of judicial training was a high priority.<sup>22</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 while they received a basic level of instruction.

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<sup>17</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 29 Nov 1985 and 40/146 of 13 Dec 1985.

<sup>18</sup> BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2002), available at [https://www.ajs.org/files/8713/6485/1665/Bangalore\\_principles.pdf](https://www.ajs.org/files/8713/6485/1665/Bangalore_principles.pdf) (last visited 18 Dec 2013). The *Bangalore Principles* arose from a UN initiative with the participation of Dato Param Kumaraswamy, UN Special Rapporteur on the Independence of Judges and Lawyers. A draft code was discussed at several conferences attended by judges from both the common law and civil codes and was endorsed by the 59th session of the UN Human Rights Commission at Geneva in 2003.

<sup>19</sup> See *R. v. Dundon* EWCA 621 (2004), *Grievs v. United Kingdom*, 39 Eur. H.R. Rep. 2 ¶ 69 (2004).

<sup>20</sup> A system of proportional representation may be useful in providing representation proportionate to the ethnic distribution of a state.

<sup>21</sup> USAID, GENERAL ACTIVITY REPORT FOR 8 – 28 DECEMBER 2005.

<sup>22</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.

Other solutions to the lack of trained local judiciary include importing international judges to fill the vacancies. This has the distinct advantage of establishing a fully-trained and highly-educated judiciary in a very short time frame. Such an approach can, however, hinder legitimacy and develop reliance on outside support and should be done in conjunction with the development of local assets and resources.<sup>23</sup>

### **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 run the court. 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.

Engineers may take the lead on physical reconstruction projects like court buildings, but they will require advice from JAs. Wise JAs will attempt to consult with, and actively involve, the local judiciary in the process. As with any development mission, the projects should, as far as possible, be tailored according to the local requirements. Factors such as accessibility for the population, reliability of power supplies, ability to hold prisoners on remand, and security needs, all blend into the equation when deciding the location of court buildings.

#### **Computers in Iraqi Courthouses**

The provision of computers and other IT assets to many of Iraq’s courthouses was of little benefit; computers were rendered ineffective by the lack of electricity or inability of any of the court staff to use or maintain them. Iraqi judges stated that they would have preferred a generator and air conditioning to abate the 120 degree summer temperatures.

### **4. Security**

Providing human and property security to the court system is essential to building RoL. Courts need sufficient and sustainable security procedures, personnel and architectural features to protect the people, property, and integrity of the judicial process.<sup>25</sup> Without an adequate level of security, court personnel will not come to work, crime victims and witnesses will not access the courts, dangerous prisoners will escape or commit violent acts, coercion and corruption of court personnel will subvert justice; and evidence, equipment, police reports and case files will disappear. Because security plans must be locally sustainable, host-nation law enforcement officials must be involved in the planning process.

### **5. Adequate Administrative Infrastructure**

Along with reconstructing the physical infrastructure of a legal system, deployed JAs are likely to be involved in reconstructing the administrative aspects of a judicial system. It is easy to overlook the importance of court reporters, case tracking systems, and office equipment. Judge Advocates and others

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<sup>23</sup> Michael E Hartmann, *International Judges and Prosecutors in Kosovo: A New Model for Post Conflict Peace* (US Inst. for Peace Spec. Rep. No. 112 Oct 2003).

<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.

<sup>25</sup> Court Security Resource Guide, National Center for State Courts, available at: <http://www.ncsc.org/topics/courthouse-facilities/court-security/resource-guide.aspx> (last visited 18 Aug 2014).

involved in these assessments should closely scrutinize the “system of systems” that the courts use to conduct their work. How do they interface with the police after an arrest is made? How is the docket prepared? How are cases tracked from arrest–to trial–to incarceration–to release? During the entire process, focus should be placed on whether the process is transparent and whether there are nodes in the system that permit an individual to dispose of cases (or people) outside of the legitimate process and with little likelihood of detection. If weaknesses are identified, JAs should work through their command to seek the assistance of professionals with experience developing appropriate 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 initial investments in both money and training, as well as secondary systems support to provide technical maintenance and property security. They will then operate at the mercy of the power grid, which itself is unlikely to be reliable in a post-conflict environment—a lesson learned by many recently deployed JAs. Furthermore, the labor-intensive nature of a manual system is frequently a positive feature in environments where job creation itself can contribute to the restoration of civil authority.<sup>26</sup>

When it comes to administrative infrastructure, the clear lesson is that simplicity is key.

## **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, US forces are likely to participate in the re-establishment of civilian police functions.

### **1. Conducting Police Operations**

The history of coalition military deployments in the late 20th and early 21st Century is littered with examples of the military performing policing functions.<sup>27</sup> In Kosovo, for instance, military forces performed investigative, detention, arrest, and peacekeeping functions. Commanders need to understand that the use of force used in policing is very different from that used in major combat operations and JAs will be critical advisors during the change of force models. Assuring that military forces receive adequate training and that appropriate ROE are promulgated and understood by coalition military forces, is critical to successful policing in the aftermath of high intensity conflict and both developing the good will of the populace and establishing the legitimacy of the legal rules that are being enforced.

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

As well as actually providing the security that police provide, US forces often work to re-establish a civilian police capability.

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

The importance of recruiting and training an indigenous police force is paramount in all situations where security is compromised. The process of identifying, recruiting, and training police is often time-

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<sup>26</sup> See US DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 5-17 (15 Dec 2006).

<sup>27</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/en/ga/search/view\\_doc.asp?symbol=A/55/305](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/55/305) (last visited 19 Dec 2013).

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 combat units to police duties. But, as with many aspects of RoL operations, a 60% solution achieved by the local population is likely to be far more effective than attempting to impose a 100% solution by overseas forces. Indeed, the UN has tended to shift focus from importing their own international police force to focus primarily on the reform and restructuring of local police forces.

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; but, as British forces experienced in Iraq, if certain police units were complicit 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 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.<sup>30</sup>

As with other areas in RoL operations, flexibility and sensitivity to local culture cannot be overstated. Given the variety of policing arrangements in different countries, it may be necessary to have a local legal expert, or an entire advisory legal staff, if necessary, to help manage the formation of a new police force or the reform of an old one.<sup>31</sup> 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 in non-permissive environments.

## **b. Training**

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

- Self-defense and control/arrest tactics
- Use of graduated force
- Proper treatment of detained individuals
- Interviewing and interrogating suspects
- Conducting investigations and effective documentation/collection of evidence
- Weapons use, maintenance, and marksmanship
- Physical fitness
- Operation of police equipment including vehicles, communication, and computer systems
- Effective oral and written communications
- Defensive driving
- Participating in the judicial process with other members of the criminal justice system.

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

<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 OFFICE OF 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 18 Dec 2013).

<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, Shari'a, etc.

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

## D. Detention and Corrections

All systems of justice must be able to confine and protect prisoners. A state with no pre-trial detention capability cannot hold sufficient trials; likewise, a state lacking long-term confinement facilities cannot properly punish criminals. Separately, a state that systematically mistreats the incarcerated or fails to provide for their subsistence has no greater claim to the RoL than one with no prisons at all. In post-conflict societies, it is likely that there will have been a recent history of poor conditions in detention facilities, as a matter of either intentional mistreatment 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>33</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 stable conditions, however, there are a number of characteristics to which many prison facilities should either adhere or aspire to, including:<sup>34</sup>

- Walls or other security enclosures that prevent both escape and infiltration<sup>35</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<sup>36</sup> area, used to separate unruly, dangerous, or vulnerable prisoners from the general prison population.
- A library or book distribution program
- Visiting areas where detainees can meet with family, friends, clergy, or attorneys.

### 2. Humane Treatment

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

- Housing that adequately protects detainees from the elements
- Adequate food and water (the provision of which should accommodate to the extent possible the detainee's religious dietary practices)
- Care for detainees with dental and medical conditions (including pregnancy)

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<sup>33</sup> LTC Craig Trebilcock, *Legal Assessment of Southern Iraq*, 358<sup>th</sup> Civil Affairs Brigade (2003).

<sup>34</sup> As always, the facilities listed below 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>35</sup> These 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>36</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.

- Care for detainees with potential mental health conditions
- Handling juvenile and female detention and other segregation requirements
- Detainee escape, recapture, and misconduct
- Access to detainees by family, local medical personnel, and local court personnel
- Religious accommodation
- Restrictions upon detainee labor
- Appropriate 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>37</sup>

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

## E. Military Justice

One of the many tasks given to the military conducting deployed RoL operations includes the restructuring and training of the host nation's armed forces. Recent examples of this practice include Afghanistan, Iraq, Sierra Leone, and East Timor. This is also an area in which JAs may be involved by way of RoL development in a permissive environment at the request of partner nations.<sup>38</sup>

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. Moreover, overreaching by an undisciplined military force is a prime example of the kind of arbitrary state action that effective RoL works to prevent. In order to become disciplined, military forces have traditionally been subject to (and adhered to) their own internal military codes.<sup>39</sup> If the civilian court

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<sup>37</sup> Humane treatment is the standard under numerous authorities including international law and domestic law (in the majority of countries including the US and most allied nations). *See generally*, Common Article 3 to the Geneva Conventions 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 ICCPR. For US forces, the Detainee Treatment Act of 2005 prohibits inhumane treatment regardless of the status or location of the detainee. *See* 42 USC. 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>38</sup> *See Appendix A – The Rule of Law and Judge Advocates: A Short History*. (In view of national interests in replacing traditional inquisitorial criminal legal systems with adversarial oral systems, the Peruvian and Chilean TJAGs contacted their US equivalent to seek assistance in relation to the development of "a common model of military justice for the Americas – a code anchored in the new adversarial system").

<sup>39</sup> Although a justice system involving military courts may in some circumstances be overly burdensome to a nascent system of military discipline. Such was the conclusion of those responsible for drafting a military discipline

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. In Europe for instance, the European Court of Human Rights has held that the central role of a civilian judge is an important factor in ensuring the impartiality of proceedings whereas a uniformed judge (as per the US system) offers no such guarantees.<sup>40</sup>

Similarly, although representation by military defense lawyers is taken as a given in the US system, the use of military defense lawyers is not universal. In the UK courts-martial system, for instance, the ability of the military lawyers to represent the defendant has been curtailed by human rights judgment which means that the defendant must be represented by civilian counsel.<sup>41</sup>

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

Given the unique nature of military service, a number of military specific offenses<sup>42</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>43</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>44</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>45</sup>

## II. Civil Law Systems

The civil law system is predominant in most of the world, in particular in continental Europe, South America, parts of Asia and the Middle East and Africa.<sup>46</sup> In very broad terms civil codes can be divided into two groupings: French and German which then inform the particular jurisdictions of individual

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system for the newly established East Timorese Defense Force (ETDF). Interview with Lt Col J. Johnston, British Army (ALS) (Oct 2006) [hereinafter Johnston Interview].

<sup>40</sup> See *Grieves v. United Kingdom*, *supra* note 19; *Cooper v. United Kingdom*, 39 Eur. H.R. Rep. 8 ¶ 104 (2004).

<sup>41</sup> *Findlay v United Kingdom* 3 C.L. 342, 24 Eur. H.R. Rep 221 (1997).

<sup>42</sup> Such offenses have no equivalent in domestic criminal law. *E.g.*, absence without leave may be deemed a matter between employer and employee resulting in termination of service but would not lead to criminal censure potentially leading to deprivation of liberty.

<sup>43</sup> See Creation of a Code of Military Discipline for the New Iraqi Army - CPA Order No 23.

[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 19 Dec 2013). 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.

<http://www.un.org/en/peacekeeping/missions/past/etimor/untaetR/2001-12.pdf> (last visited 19 Dec 2013).

<sup>44</sup> Johnston Interview, *supra* note 40.

<sup>45</sup> See Watts & Martin, *supra* note 6.

<sup>46</sup> See JOHN MERRYMAN AND REGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 2 (3<sup>rd</sup> ed. 2007) [hereinafter “MERRYMAN”].

states.<sup>47</sup> The common law system, on the other hand, is found in the US (except Louisiana), the UK, Canada (except Quebec) and other former colonies of the British Empire.

Understanding comparative legal traditions is not just of theoretical value to practitioners. There are very real and practical benefits to understanding comparative legal systems, and potentially, very negative consequences to not understanding them.

## A. Key Characteristics of the Civil Law Tradition

A key characteristic of the civil law system is its emphasis on separation of powers, with all lawmaking power assigned to a representative legislature. Although common law systems also incorporate the principle of separation of powers, their approach and philosophy in doing so differs from that in civil law countries: in both the US and the UK, the judiciary serves as a progressive force on the side of the individual against abuse of power by the state.<sup>48</sup> Historically, in countries subject to civil law, judges often served as the extended arm of repressive governments due to the primacy of the legislative power over the judicial power. 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 RoL.<sup>49</sup> Notwithstanding the aversion for judge-made law, civil law jurisprudence does shape the existing laws by interpreting the law, and especially defining the meaning of abstract terms used in the respective codes.

A second important distinction of the civil law tradition is that civil law is inquisitorial rather than adversarial. The judge is central to the process, in some cases, directing the investigation, gathering evidence, questioning the witnesses, compiling the dossier (official court file), determining the correct verdict and, if guilt is found imposing the penalty. Because the judge is charged with determining the correct decision, the judge has a duty to consider and weigh all the evidence, whether inculpatory or exculpatory. There are few if any rules of evidence because the judge is assumed to have the skill and experience necessary to properly consider and weigh the evidence. Trials can occur over a longer period of time because the evidence is preserved in the court dossier. The judge is required to present his or her reasoning and application of the law in a formal verdict. If there is error, either side can appeal and the appellate court will conduct a trial *de novo* in order to insure the correct verdict was delivered.

## B. Specific Aspects of Civil Law

### 1. Sources of Law

The reliance on codes and laws is a central characteristic of the civil law. Parliamentary legislation is the principal source of law in civil law countries. This legislation includes codes, separate statutes, and ancillary legislation. Within civil law countries, there is a hierarchy of laws.<sup>50</sup> At the top of the hierarchy is the Constitution, followed by codes and other legislation, then executive decrees, then regulations, followed by local ordinances. Custom, as a rare source of law, sits at the bottom of the pyramid and would rarely be relied upon in court. International treaties and conventions are also a source of primary law in civil countries.<sup>51</sup> Many civil law countries are monist, meaning when the country ratifies the treaty

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<sup>47</sup> Most former continental colonies (i.e. countries previously belonging to the Belgium, Dutch, French, Portuguese, Spanish and Scandinavian empires), China and Russia are essentially civil law jurisdictions.

<sup>48</sup> *See id* at 17.

<sup>49</sup> *See* TAMANAHA, *supra* note 1, at 124–25.

<sup>50</sup> O'Connor, Vivienne, Practitioner's Guide: Common Law and Civil Law Traditions, INPRoL, Mar 2012, pg. 11; available at: [http://inprol.org/sites/default/files/publications/2012/common\\_law\\_civil\\_law\\_pg\\_final.pdf](http://inprol.org/sites/default/files/publications/2012/common_law_civil_law_pg_final.pdf), (last visited 18 Aug 2014).

<sup>51</sup> *Id.* at 11.

it automatically becomes part of the domestic law, and thus law that can be relied upon in court. In some countries judges are allowed to disregard statutes in favor of more recently adopted treaties.

Scholarly commentary is very influential in civil law countries. “Doctrine” of particular laws is created by prominent scholars and judges turn to this doctrine when considering their cases. It is not uncommon for civil judges to request scholarly opinion on an existing case and to integrate that opinion into their decision.<sup>52</sup> While academics play a larger role in the civil law system than they do in the common law system, case-law plays a diminished role. Within the civil law system, each case is considered unique deserving of independent analysis. While case law is not binding in the civil law tradition, it does serve a persuasive function when there is a line of considered authority behind the reasoning of a settled case.<sup>53</sup>

## 2. The Court System

In the civil law system there is a distinction between public law and private law. Accordingly, in civil law countries there are multiple sets of courts and each has its own jurisdiction, hierarchy, judiciary and procedure.<sup>54</sup> A case falling within the jurisdiction of one court generally is immune from jurisdiction in all others.

In the civil law system the courts are specialized and divided into “ordinary” courts (which include civil, criminal, and usually commercial courts), administrative courts, and a constitutional court. As a general matter, a system of “ordinary” courts, staffed by “ordinary” judges, adjudicates the vast majority of civil and criminal cases.

The German model<sup>55</sup> relies on several independent court systems, each with its own supreme court. In addition to the hierarchy of the ordinary (civil and criminal) courts, there are separate systems of labor courts, tax courts, and social security courts. The lower courts generally sit in panels of three professional judges, although commercial matters are heard by a panel of two lay judges and one professional judge. Lay involvement in labor matters also extends to the appellate level, where the judge acts in consultation with labor and management representatives. Final review from all of the German court systems is available in the Federal Constitutional Court, which exercises the power of judicial review.

Following the French model, the lowest court conducts trials. The first level of French ordinary courts consists of general civil and criminal trial courts and several specialized courts. Cases arising under the commercial code, for example, are first heard in a commercial court in which the panels of part-time judges are businessmen elected by their colleagues. If there is an appeal, the secondary court conducts a trial *de novo*. Appeals from the trial-level courts proceed to a court of appeal within the territorial jurisdiction of the lower court. In the French system, the apex of the ordinary court structure is the *Cour de Cassation* (Supreme Court of Cassation). The court reviews only questions of statutory interpretation. The Court of Cassation is composed of about 100 judges who sit in six rotating specialized panels and, in certain situations, in combined panels or plenary session. The highest level of the ordinary courts does not reconsider the facts of the case, but only reviews the legal determinations of lower courts.<sup>56</sup> The highest court will not usually decide a case but 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.

Apart from the ordinary courts, typical civil law court systems also include a set of administrative courts that exercise independent jurisdiction. The creation of administrative courts grew out of the strong

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<sup>52</sup> Id. at 22.

<sup>53</sup> Id. at 12.

<sup>54</sup> See MERRYMAN, *supra* note 46, at 86.

<sup>55</sup> The editors of this *Handbook* are particularly indebted to Angelika Mähr, Coalition Operations Attorney-Advisor who provided much of the content on European civil law structures and procedures based on her own professional experience in Germany while assigned to CLAMO during 2013-2014.

<sup>56</sup> MERRYMAN, *supra* note 46, at 87.

separation of powers. Within that tradition, the judiciary was not viewed as competent to render decisions on the legality of administrative action. In France the need for a review procedure was eventually met through the Council of State, a body that began as advisers to the King and gradually became the central point for review of government conduct. Today, the Council of State is the principal source of French administrative law. Other countries, including Belgium and Italy, have followed the French model and have allocated similar administrative jurisdiction to their own councils of state. In Germany and countries that follows its model, special administrative courts have been created.

In theory, ordinary court and administrative court jurisdiction is separate and exclusive, but disputes arise. In France, a special Tribunal of Conflicts decides which is the proper court for a disputed case. In Germany, the court in which the case is filed decides whether it has jurisdiction and may transfer cases over which it declines jurisdiction. A decision refusing jurisdiction is binding in the transferee court. In other countries, such as Italy, the Court of Cassation is the final authority on conflicts of jurisdiction.

As is typical in common law systems, most civil law systems include separate codes for criminal and civil procedure as they have separate civil and criminal courts. A typical civil proceeding in civil law countries is divided into three stages: a brief preliminary stage, in which the pleadings are submitted and the judge is appointed, an evidence-taking stage, in which the judges take evidence, and a decision-making stage in which the judges hear the arguments and render decisions.<sup>57</sup>

### **3. The Criminal Process**

#### **a. Investigation**

Once a crime has been discovered or reported, the police are required to promptly report the crime to the prosecutor. The prosecutor will then direct the initial investigation. In certain exigent situations the police have broader powers of investigation to preserve evidence that might otherwise be lost.

In countries where there is an investigating judge, the prosecutor will define the scope of the crimes being investigated and refer the case to the investigating judge for further development of evidence. Investigating judges have wide powers during the investigation. They can visit the scene of a crime, carry out reconstructions of the crime, hear witnesses, search and seize property, and arrest and remand suspects. If the prosecution or defense wishes to investigate any matter, they must file a request that the desired investigation be carried out by the investigating judge. It should be noted that defense counsel has access to the case file during the judicial investigation phase. At the conclusion of the investigation, the investigating judge determines whether to refer the case for trial or not. If the case is referred to trial, the case file is transferred to different sitting judges who will hear the case.

In civil law countries where there is no investigating magistrate, such as Germany, the prosecutor will lead and supervise the entire investigation.<sup>58</sup> In some countries, the prosecutor will direct the police to take action to gather evidence. In other countries, the prosecutor will personally gather the evidence. For coercive actions that would impinge upon the rights of the suspect or other persons (e.g., searches, seizures, and covert surveillance), the prosecutor must seek a warrant from a judge.

#### **b. Indictment**

Upon completion of the investigation an investigating judge will either close the investigation or refer the case to the trial judge. Where there is a prosecutor only, an indictment will need to be drafted and a court will determine if there is enough evidence to proceed to trial. At the conclusion of the investigation, the

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<sup>57</sup> *Id.* at 114.

<sup>58</sup> In the French system the prosecutor has a discretion to lead the entire investigation into minor offences without reference to an investigating magistrate.

prosecutor must present written charges (or an indictment) to the court. Usually, the indictment will describe the acts committed by the suspect, and outline the applicable law and the evidence upon which the accusation rests.<sup>59</sup> If the court confirms the indictment, the case proceeds to trial.

### **c. Trial**

The prosecutor opens the trial by presenting the indictment. Then the judge, acting as an inquisitor, questions the witnesses, examines the evidence, and (if the defendant chooses to speak) hears from the accused in order to find the facts and the truth. Neither the prosecutor nor the defense counsel takes center-stage in the trial, as one would see in a common law trial. Other significant differences between a common law trial and a civil law trial are that in the latter:

- Given the judge will have read the case file in advance of the trial, the trial itself will be much shorter than in common law countries
- The notions of “entering a plea” and “plea-bargaining” generally do not exist
- Witnesses are not central to the trial because the investigating judge will have already interviewed them and made detailed notes in the case file that the trial judge can follow, rather than re-interviewing the witness. More recently, however, civil law trials are increasingly using live witness, although the prosecutor and defense counsel can request that the judge ask particular questions. Cross-examination is being introduced into the laws of some countries (e.g., Germany); however, it is not being employed on a regular basis<sup>60</sup>
- The accused is permitted to make an unsworn statement, and may testify as a sworn witness.
- Expert witnesses, if called, “belong” to the court.

### **d. Verdict and Sentencing Hearing**

At the conclusion of the trial, the judge delivers the verdict, at which point the accused person will either be released or convicted. Upon a conviction a sentencing hearing follows the trial to determine the type and duration of penalties to be imposed.

### **e. Appeal**

The convicted person and prosecution can appeal on one of three bases: (a) an error in law, (b) an error in fact, or (c) the penalty imposed. With regard to (a), as well as arguing that the law was incorrectly applied, the appeal can be based on “a substantial violation of procedural law.” For example, the convicted person may argue that he or she did not have an interpreter during an interview, if required under the law, or that the judgment was based on evidence that should have been excluded. If a substantial violation is found, the court must order a retrial.

In civil law systems the appeals court always hears the trial *de novo*. In fact, in some civil law countries, the parties are permitted to request the addition of new evidence and witnesses for the consideration of the appeals court.

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<sup>59</sup> See “The Role of the Public Prosecutor in Court” *available at* [http://www.euro-justice.com/member\\_states/germany/country\\_report/2789/](http://www.euro-justice.com/member_states/germany/country_report/2789/) (last visited 21 April 2014).

<sup>60</sup> See “The Role of the Public Prosecutor in Court” *available at* [http://www.euro-justice.com/member\\_states/germany/country\\_report/2789/](http://www.euro-justice.com/member_states/germany/country_report/2789/) (last visited 21 April 2014).

### III. Religious Legal Systems

#### A. Islamic Law and *Shari'a*

From the Western perspective, questions of constitutionalism, human rights and equality are central to legal thought. From the Islamic perspective, it is the recognition of God's word that drives the legal system. These two approaches can often be difficult to reconcile in a single legal system. Consequently, Western countries conducting RoL operations in Islamic countries must be particularly conscious of problems of imposing a Western legal point of view. 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.

In common parlance, Islamic law is often called *Shari'a*. But within the Islamic legal tradition the term *Shari'a* has a more precise meaning. Taken literally, *Shari'a* means "a path to a source of water." Within Islamic law, *Shari'a* means God's law. It is known by God, and is made available to humankind through the specific commands attributed to God as laid out within the *Qur'an* and the body of prophetic precedents known as the *Sunnah*. Human interpretation of the *Qur'an* and the *Sunnah* by Islamic scholars is called *fiqh*. Islamic law is both the *Shari'a*, which is divine, and unchanging; and *fiqh*, which is a human endeavor to know God's law, and possibly subject to misunderstanding and error.

##### 1. Sources of Law

Islamic Law is derived from two primary sources, the *Qur'an* and the *Sunnah*. The *Qur'an* ("The Recital") is regarded by Muslims to be the very word of God and therefore, considered the primary source of law. God revealed the *Qur'an* to the Prophet Muhammad over the course of twenty-three years. The *Qur'an* actually contains little in the way of law. One third of its contents is devoted to an elaboration of the nature of God and another third to various narratives concerning biblical prophets. Around 300 verses are dedicated to various ritual matters (prayer, fasting etc.) specific to Muslims (*ibadat*). Only around 140 verses of the over 6,200 contained within the *Qur'an* concern matters that are legalistic in nature.

The *Sunnah*, generally defined as the actions and sayings of the Prophet Muhammad, serves as the second source of Islamic law. Guided by verses from the *Qur'an* that instruct believers to follow the Prophet's example, the *Sunnah* is regarded as the *Qur'an's* most authoritative exposition. In other words, the *Sunnah* illustrates the *Qur'an's* rules as articulated and lived by the Prophet Muhammad. The *Sunnah* is comprised of various narratives (*hadith*) collected during and after the death of the Prophet Muhammad. In order to establish validity, each *hadith* is accompanied by a chain of transmitters (*isnad*) which traces the narrative to the Prophet or to those closest to him. For nearly 300 years, Islamic scholars dedicated their work to determining the authenticity of the many reported *hadith*. Eventually, Muslims settled on various canons of *hadith* and depending on their affiliation (e.g. Sunni, Twelver Shi'I, Ismaili) accepted certain collections of *hadith* as authoritative. The two most popular are the "sound" *hadiths* compiled by Imams Bukhari and Muslim.<sup>61</sup>

##### 2. The Application of Islamic Law

Under classical Islamic law, disputes were brought before a *qadi* or judge. The parties to a particular dispute typically presented their case before the *qadi* and were seen as partners in the law-seeking process. This gave the procedure a rough similarity to contemporary mediation. Consequently, oral testimony was far more prevalent than written evidence, and each case was seen as different and

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<sup>61</sup> The most authentic collections are considered to be those of Muhammad ibn Ismail al-Bukhari and Imam Muslim ibn al-Hajjaj. Other categories of hadiths are the "tolerably sound" (*hajan*); the "weak" (*da'iyf*) and the "fabricated or forged" (*mawduw*).

particular. For Sunni Muslims the law was subsequently made even more accessible by the position of the *mufti*.

A *mufti* was a private specialist of Islamic law and based upon his scholarship, was typically regarded as the supreme legal authority within Islamic law. A *mufti's* defining duty was to issue a *fatwa* or an Islamic legal answer to a question he was asked to address. Consulting a *mufti* was generally free of charge and therefore accessible to members of the community. Questions addressed to the *mufti* were either brought to him by members of the community or even by judges themselves who found some cases brought before them too difficult to decide. Although technically non-binding, a *mufti's* fatwa nonetheless resolved disputes in part because if a disputant failed to receive a *fatwa* in their favor they generally did not pursue the matter any further. A *mufti's* fatwa was usually only disregarded, if another *fatwa* had been issued by another *mufti* and was more convincing and better reasoned. A *fatwa* in the classical tradition was considered the product of legal expertise and advanced legal knowledge. Decisions of a *qadi* were neither kept nor published, because the *fatwas* contained the central decision and reasoning of the case. *Fatwas* were the legal products collected and published within Islamic legal treatises.

The *muftis* were once both independent from the politics of the State and independently financed through religious endowments. Over time, colonization, the codification of Islamic law among Muslim-majority states, and the emerging trend to place the *muftis* on the payroll of the State served to undermine the *muftis'* long-held legitimacy. Today many Sunni Muslim countries have "official" *muftis* appointed by government authorities but, many *muftis* both within and outside official channels continue to exercise independent authority and influence among much of the population. Judge Advocates performing RoL operations in the Muslim world would be wise to know the importance of these *muftis*.

In the modern Muslim world, Islamic courts and law may exist side-by-side with secular ones (such as Indonesia), they may be relegated to certain areas of the law such as family law courts (as in Egypt), they may be eliminated almost entirely from the public sphere (as in Turkey), or in some cases (such as Saudi Arabia) they may be integrated into the whole of the system and retain substantial jurisdiction over legal disputes.

### 3. The Substantive Islamic Law

Unlike the common and civil law traditions, the benefits and burdens of adhering to Islamic law are not confined to the present world. Islamic law focuses on how a Muslim's day-to-day conduct affects his or her fate in the afterlife. To harmonize the relationship between God and humanity, Islamic law seeks to promote and protect five primary values: religion, life, offspring (family), property (wealth), and rationality (intellect).<sup>62</sup> All actions relating to these five values are classified as forbidden (*haram*), discouraged, neutral, recommended, or obligatory (*fard*) although only the first and the last of these categories of action are legally enforceable.

Based on the five values noted above, much of the *Shari'a* 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 Islamic law is profoundly marked by the Arabic *chthonic*<sup>63</sup> law which Muhammad encountered, and by his reaction to it. While it is the prevailing opinion that the Islamic law improved the status of women compared with the traditions of pre-Islamic law, the principle of equality of men and women as understood in Western law systems is not reflected in Islamic law. The *Qur'an* contains some verses that have been used to suggest that men and

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<sup>62</sup> See BERNARD G. WEISS, *THE SPIRIT OF ISLAMIC LAW* 146 (1998).

<sup>63</sup> Essentially law based upon principles elucidated from the cosmos.

women are not equal.<sup>64</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>65</sup>

At first sight, this discussion of rights without equality may appear somewhat contradictory. However, it is a useful reminder that Western concepts of “equality” are not analogous *per se* to “rights.” Judge Advocates should be wary about rushing to judgment on the basis of limited reading, knowledge, and understanding of Islamic law. When engaged in RoL work, a JA, particularly in a country where observance of *Shari’a* is a constitutionally mandated requirement, would be well advised to remember the importance of RoL program design that is culturally compliant rather than Western reliant.

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>66</sup>

Islamic criminal law and procedure includes a variety of principles such as the principle of legality, favoring doubt over conviction, and a preference for direct evidence over circumstantial evidence. Islamic law also categorizes crimes as:

- *hudud*—limits set by God with requirements for specific high levels of proof and severe punishments
- *qisas*—homicides and batteries that allow for retribution at the wish of the victims
- *diya*—forgiveness by the victim with the payment of restitution in lieu of punishment
- *tazir*—chastisement with discretionary punishments by the court.

*Hudud* crimes are identified in the *Qur’an* and *Sunnah*, and include: theft, highway robbery, fornication, false accusations of fornication, and, in some schools of thought, drinking alcohol and apostasy.

#### 4. International Law and Jihad

International law, especially the law of war, plays an important role in Islamic law. Here the central concept is *jihad*, which encompasses both *jus ad bellum* and *jus in bello*. Like the law of war in the West, but beginning much earlier and in comparatively more sophisticated forms, *jihad* as interpreted and developed by the jurists transformed over time and in response to particular historical developments. Historical influences include the preservation of the original *umma* (nation or community) 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 in the nineteenth century. Throughout the concept of *jihad* has always been subject to a diversity of views within the ranks of the scholars and among Muslims in general. This diversity and intensity of debate has become especially pronounced in the modern era.

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<sup>64</sup> *E.g.*, THE QUR’AN 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>65</sup> See JUDITH E. TUCKER, *WOMEN, FAMILY, AND GENDER IN ISLAMIC LAW* (2008).

<sup>66</sup> See MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE* (2006).

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 Islamic law, and only secondarily does it refer to the (only) legitimate reason for engaging in armed conflict. 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>67</sup> Although it is possible to extract phrases and passages from the *Qur'an* and the *Sunnah* 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 *Shari'a* 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.

## 5. 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>68</sup> it is helpful for RoL practitioners to understand the basic distinction, especially as it applies to law.

After the Prophet Muhammad's death, the issue arose of succession to the leadership of the community of *umma*. The majority (Sunni) 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') believe that Muhammad designated his cousin and son-in-law Ali as his rightful successor, and that only Ali's descendants (five, seven or twelve Imams depending on the branch of shiism) had the legitimacy to become the leader of the Muslim community. The majority of Shiites believe that the twelve Imam was secreted away in the ninth century to protect him from the illegitimate Sunni caliph and will return in the future as the *Mahdi* to usher in an era of peace and justice.

This dispute has had a direct impact on Sunni and Shiite legal and political thought resulting in different Sunni and Shiite *hadith* collections. For Sunni only the *hadiths* of the Prophet Muhammad are a valid source of law (the *Sunnah*). Shiites, however, rely primarily on the *hadiths* of the Imams (*Akhbars*) who although not prophets were deemed to have special insight and knowledge of *Shari'a*.

Another important distinction 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 *Qur'an* and the *Sunnah* to form new opinions, apart from fairly limited reasoning by analogy, are unacceptable. Moreover, Sunni *muftis* rely on the prior doctrinal teachings of earlier scholars within one of the four existing Sunni schools of jurisprudence (Shafii, Hanafi, Maliki or Hanbaki). 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* interprets the *Qur'an* and

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<sup>67</sup> See MICHAEL BONNER, *JIHAD IN ISLAMIC HISTORY: PRINCIPLES AND PRACTICES* (2006); See also RUDOLPH PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM* (2005).

<sup>68</sup> For a fuller explanation of this topic, see VALI NASR, *THE SHIA REVIVAL: HOW CONFLICTS WITHIN ISLAM WILL SHAPE THE FUTURE* (2006).

the *Akhbars* 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 the 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.

## **B. Hindu Law**

### **1. Hinduism and Dharma**

Traditionally Hindu law has been infused with the concept of *Dharma*. This is a concept with different meanings within the religions of Hinduism and Buddhism (as well as Sikhism and Jainism) and is often equated directly with law. In the Hindu tradition, *Dharma* can be defined as “an all-encompassing ideology which embraces both ritual and moral behavior.”<sup>69</sup> There are three primary sources of *Dharma*: *Śhruti*, *ācāra*, and *Smṛti*. *Śhruti*, literally translated as “what is heard,” is considered to have a divine origin and sits atop the hierarchy of Hindu law. *Acāra*, which translates as “practice” is a term used to refer to Hindu customary law. *Smṛiti*, (“what is remembered”) is a collection of reflections by Hindu scholars and experts on *ācāra* and thus can be described as a codification of Hindu customary law.<sup>70</sup>

### **2. Modern Application of Hindu Law**

Today Hindu law manifests both as customary law practiced in an informal, supplementary manner within pluralistic legal systems, as well as a formal legal system of personal laws that govern those of the Hindu faith in India. Additionally, the influence of Hindu law can still be seen in countries such as Thailand, Bangladesh, Indonesia and Malaysia.<sup>71</sup>

When the British first colonized India they created a system of law that was a blending of their own common law system with the Hindu laws contained within the *Dharmaśāstra* texts. Case law developed under this system (known as Anglo-Hindu law) and eventually legislation was passed in an attempt to create a more uniform system. Following India’s independence in 1947, the legislature passed a series of pieces of legislation known as Code Bills between 1955 and 1956. These included Hindu Marriage Act (1955), Hindu Succession Act (1956), Hindu Minority and Guardianship Act (1956), and Hindu Adoptions and Maintenance Act (1956) and are still currently in force in India today. In conjunction with these codes governing personal life came a reformed secular justice system (based primarily on the British common law system) that applies to criminal and civil issues. Thus, while the modern Indian justice system is considered secular, the majority of the population (approximately eighty percent Hindu) is still governed in part by laws sourced from *Dharmaśāstra* texts.

Codified Hindu personal law also exists outside of India in countries where Hindus are religious minorities. For example, in Kenya, the Hindu Marriage and Divorce Act now governs Hindu marriage

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<sup>69</sup> Isaac J. Colunga, An Argument for the Reformation of Traditional Hindu Law, 13 *Touro Int'l L. Rev.* 104 (2010).

<sup>70</sup> “Developments in Hindu law”, *Religion Compass* 7/7 (2013): 252–262, 10.1111/rec3.12052).

<sup>71</sup> [http://www.nyulawglobal.org/globalex/religious\\_legal\\_systems.htm#Religious\\_legal\\_systems](http://www.nyulawglobal.org/globalex/religious_legal_systems.htm#Religious_legal_systems) (last visited 25 Sep 2014).

law. However, outside of India, Hinduism often has a more informal influence on justice systems via customary or traditional law. Prior to 2008 this was the case in Kenya, where Hindu marriage and inheritance law was often practiced in a customary form, yet still recognized as binding law by the state. Hindu customary law is often found in states that at some point were governed primarily by Hindu law. For example, in Malaysia between the eighth and fourteenth centuries the *Dharmaśāstra* heavily influenced the justice system.

## IV. Other Systems

### A. Customary, Traditional, or Informal Justice<sup>72</sup>

Those who crave justice will tend to seek it out in the most accessible, affordable, time-efficient forum available to them, which is often not the formal justice system, but local, community-based non-state forums. The Taliban's ability to provide timely enforceable justice, albeit not in the sense that many readers of this *Handbook* will recognize, is often credited as being one of the major reasons for their historic, and ongoing support from communities in Afghanistan.

Dispute resolution by way of customary justice systems has a long history of use in many societies. Notwithstanding that fact, it is a resource which has historically been overlooked in many international RoL assistance sponsored attempts to reconstruct effective and efficient judicial systems in former conflict zones.<sup>73</sup> That is, perhaps, understandable if RoL efforts are simply seen as being part of a state-focused institution building exercise. However, in many conflict affected countries, the population views customary justice systems as the most legitimate and most widely accessible dispute resolution mechanism. Recent developments in RoL thinking and practice now emphasize the crucial importance, and utility, of these justice mechanisms.

While they are unlikely to deliver RoL writ large, customary justice systems have an important role to play in restoring or strengthening the RoL. Judge Advocates would be wise to consider whether, and how, such methods should be incorporated into their RoL programs, not forgetting that, by doing so, it is likely to bring its own challenges. Despite the fact that they are often viewed as “local level” issues, the JA RoL practitioner must understand that incorporating customary justice systems in the RoL line of operation will require a “high level” acceptance from the JA's own chain of command and also the host nation within which they are working. One thing is clear, customary justice systems must be approached with a very strong awareness of the social and cultural context in which they operate if RoL programs which engage with them are not to fall foul of the law of unintended consequences. That awareness will take time, and resources – things that JAs will rarely have an abundance of in a deployed environment – and it is for that reason, as well as those mentioned above, that engagement in this area must be properly planned, drawing on appropriate local level expertise, for in the wider RoL mission.

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<sup>72</sup> For reasons of expediency this *Handbook* uses the term “Customary Justice”. For a comprehensive introduction to this subject, including seven specific case studies of conflict-affected societies, see CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR TORN SOCIETIES (Deborah Isser ed.) (USIP Press, 2011). See also John Dempsey & Noah Coburn, *Traditional Dispute Resolution and Stability in Afghanistan*, USIP PeaceBrief 10 (16 Feb 2010).

<sup>73</sup> In East Timor, criticism was made of the UN Transitional Administration in East Timor's (UNTAET) failure to promote and develop customary legal structures following an East Timorese suggestion to incorporate such traditional methods into the new judicial structure was not acted upon.

### Traditional Remedies in Sierra Leone

Traditional remedies are often characterized as local forms of dispute resolution headed by a village chief or tribal leader. For example 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 which serve as a customary court. These courts cover 80% of the cases in the provinces and provide an effective, efficient, and perhaps most importantly, local method of dispute resolution, dealing largely with minor land, family, petty trade issues and lesser crimes of violence. Appeal from the decisions of the customary courts goes to the Magistrate's court. While such systems do not offer a panacea to all problems, they are often well supported and trusted by the local population.

## B. Combined Systems

In addition to civil law, common law, religious law and customary systems, there are also mixed legal systems in much of the world. The family of mixed law systems consists mainly of three different mixtures of legal systems: civil and common law systems, civil law and religious legal systems, and one or more of these systems mixed with customary law.

Systems representing a mixture of civil and common law systems include Botswana, Lesotho, Namibia, the Philippines, Puerto Rico, Scotland, South Africa, Sri Lanka, Swaziland, Zimbabwe and Louisiana.<sup>74</sup>

Civil/religious mixed systems frequently involve Islamic law, including Algeria, Egypt, Indonesia, Iraq, Afghanistan, and Syria. Iran claims to have an exclusively *Shari'a*-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>75</sup>

Particularly relevant for the RoL practitioner is that some mixed systems are generally not organically developed legal systems. Many mixed legal systems were created when one culture imposes its legal system on another culture, usually by conquest. Thus, the presence of a mixed system can be an indication of some tension between the populace's underlying norms and the legal system they live under. Frequently, 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.

Legal pluralism, when more than one legal system is operating within a single political unit, is frequently found in countries with well-developed customary law practices. Legal pluralism is especially prevalent in post-colonial states where "formal" justice systems, developed by the colonizing state, exist side-by-side with indigenous legal systems practiced by the native population with deep historical roots in those communities. It also exists in countries where Islamic law governs some people, while secular law governs others. The US has a form of legal pluralism where treaty rights govern divisions of legal jurisdiction between native tribes and the US government.

In some cases multiple legal systems within a single state can work in conjunction with each other harmoniously. However, issues can arise within a legally pluralistic state when two or more systems have concurrent jurisdiction. This is most often seen in post-colonial states where customary justice systems conflict with more formal state systems. Tension between coexisting systems can create problems of inconsistency and a lack of predictability and parallel legal systems can incentivize forum shopping for opportunistic individuals or organizations.<sup>76</sup> On the other hand, legal pluralism can increase access to

<sup>74</sup> See William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 679 (2000).

<sup>75</sup> See ASHGAR SCHIRAZI, *THE CONSTITUTION OF IRAN* (1997).

<sup>76</sup> *Id.* at 385.

justice by providing recourse for those unable to participate in a country's primary formal justice system due to financial or logistical constraints. Customary justice systems within legally pluralistic states also may have the advantage of public confidence, a key component in establishing RoL.<sup>77</sup>

Perhaps the largest issue with legal systems that combine customary and formal law is the danger of human rights abuses. Some post-colonial African states, in an attempt to preserve customary justice systems, have exempted these informal systems from their constitution's anti-discrimination provisions.<sup>78</sup> While one of the strengths of preserving customary justice systems is a respect for indigenous culture, this must be balanced against the potential for human rights abuse. Thus, ideally, legally pluralistic systems should look to integrate formal and customary law so as to operate in a complementary manner that upholds and protects the rights of all, as opposed to simply preserving the two as segregated systems.

#### **Potential pitfalls of RoL development in Legally Pluralistic States**

Prior to and during a decade long civil war, Liberia utilized a dual justice system comprised of a formal, western-style system and a customary system. The customary system traditionally included trial by ordeal in which the accused was presumed guilty and only by enduring a physical ordeal, such as drinking poison and surviving; or being touched with a hot machete and not being burned, could they establish their innocence.

Concerned that the customary system was outlawed by the Supreme Court and that it breached international human rights standards, the Liberia government with international partners, worked to strengthen the formal side of their legal system while eliminating certain rituals involved in traditional practices.

Outside of major urban centers, these reforms did little to improve the legal system for the average Liberian. Further, the majority of Liberians saw the formal system's adversarial nature as contrary to the high value that Liberian culture places on reconciliation. The limited capacity of the formal system, seemingly arbitrary punishments led most Liberians to remain reliant on the customary system for dispute resolution with only approximately three percent of civil cases and two percent of criminal cases resolved in formal courts.<sup>79</sup> More recently, in recognition of these issues, a number of groups in Liberia have been working with traditional leaders to better understand the cultural issues of Liberia's customary justice practices. Instead of trying to regulate or eliminate these systems this new approach has looked at ways to integrate the two systems, including giving tribal leaders authority within the formal system and writing down customary law so it may be applied in formal courts. This new approach has led to Liberians viewing the government as a partner, as opposed to an adversary, in dispute resolution and thus shows great potential for strengthening RoL in the country.<sup>80</sup>

### **C. 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 previous governmental abuses as part of the restoration of the RoL. The concepts underlying the process of TRCs are by no means new. Society has regularly adopted such practices and

<sup>77</sup> David Pimentel, *Legal Pluralism in Post-Colonial Africa: Linking Statutory and Customary Adjudication in Mozambique*, 14 *Yale Hum. Rts. & Dev. L.J.* 59, 64-65 (2011).

<sup>78</sup> *Id.* at 66-67.

<sup>79</sup> Jonathan Compton, *The Peril of Imposing the Rule of Law: Lessons from Liberia*, 23 *Minn. J. Int'l L.* 47, 49-50 (2014) at 64.

<sup>80</sup> *Id.* at 74-76.

procedures in an attempt to come to terms with dark chapters of its history. After the de-nazification of Germany, *Vergangenheitsbewältigung* (process of dealing with the past) allowed for individuals to admit the horrors of the former regime, attempting to remedy as far as possible the wrongs while attempting to move on from the past.

Since the mid-1970s, an unprecedented number of states have attempted the transition to democracy. One of the everpresent issues 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 1970.<sup>81</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 had 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>82</sup> In an attempt to promote political stability, investigations into allegation of previous offenses were limited.

TRCs are far from a panacea for the post-conflict society. It can take TRCs many years to hear evidence from a wide number of witnesses before typically producing written reports. Some feel that the publication of such reports, many years after events, can re-open, rather than heal, wounds.

### **D. Property Claims Commissions**

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 in Iraq.<sup>83</sup> 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 RoL values.

<sup>81</sup> Twenty-seven nations have adopted such an approach since 1970. On TRCs generally, see the USIP web site, <http://www.usip.org/publications> (last visited 19 Dec 2013).

<sup>82</sup> United Nations Special Representative of the Secretary General, Jean Arnault.

<sup>83</sup> See Coalition Provisional Authority Regulation 8, as amended by Regulation 12. See [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 19 Dec 2013).

## V. Gender

Gender issues can play an important role in RoL operations. First, measures to provide for the protection of basic human rights and fundamental freedoms will likely include some provisions to eliminate discrimination against women. Many societies discriminate against women or marginalize them and some degree of reform is required to bring relevant national laws into line with basic international human rights norms. Such substantive rights are a matter of considerable cultural sensitivity which can be eased by the inclusion of women within RoL project planning, design and implementation.

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. 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>84</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>85</sup> 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.

### **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>86</sup>

In 2000, UNSCR 1325 put women onto the international agenda for peacemaking, peace-keeping, and peace-building for the first time.<sup>87</sup> It called for attention to be given to two separate concepts: gender

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<sup>84</sup> See Robert Orr, *Governing When Chaos Rules: Enhancing Governance and Participation*, 25 WASH. Q. 139 (2002); According to Winie Byanyima, director of the UN 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, 16 May 2008, at A01.

<sup>85</sup> *Id.* (citing examples from Rwanda, Bangladesh, India, and Brazil).

<sup>86</sup> *Id.*

<sup>87</sup> "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." UNSCR 1325 was initiated by Namibia.

balance in negotiation processes for societal reconstruction<sup>88</sup> and gender mainstreaming<sup>89</sup> in the terms of the agreements reached and their implementation. The US policy on gender and women's issues is encapsulated within several documents.<sup>90</sup> The National Action Plan (NAP)<sup>91</sup> implemented in 2011 describes commitments made by the US government with a view to advancing women's participation in peace processes, governance and protection from violence.

To permit practical involvement by women in RoL and other development programs, proactive steps may be needed at the outset to compensate for entrenched gender disparities in rights, education, and resources.<sup>92</sup> Activities should aim at leveling the playing field to redress gross inequities.<sup>93</sup>

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 encouraging the participation of women could include: the creation of gender focal points in key ministries, capacity building for women candidates, judges and other professionals, activities addressing the specific societal or cultural obstacles hindering the full participation and empowerment of women,<sup>94</sup>(such as their equal right to own property or to receive an inheritance) and programs addressing violence against women by state security forces.<sup>95</sup>

Even if a country's legal system prohibits violence against women, the legal system may inadvertently discourage women or girls from reporting such violence. Activities could include gender-sensitive training for law enforcement agencies, special units staffed by women trained to deal with such crimes, increasing the number of female law enforcement officers, providing temporary shelter, or creating victim-friendly counseling and courts.

In societies where the armed forces have a history of engaging in sexual violence against women and children or recruitment of child Soldiers, additional programs should be considered to combat impunity and tolerance of such crimes. Activities to address such issues could focus on promoting changes to the organizational culture wherein security forces commanders: prevent, identify, halt, and punish sexual and other exploitation, develop selection guidelines in order to prevent the worst offenders from staying or integrating into the new armed forces, or provide explicit guidelines on what is and what is not permitted behavior.<sup>96</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.

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<sup>88</sup> Gender balance is the inclusion of both women and men at all stages and in all roles within such processes. See Christine Chinkin, *Gender, Human Rights, and Peace Agreements*, 18 OHIO ST. J. ON DISP. RESOL. 867 (2003).

<sup>89</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.

<sup>90</sup> For example, Executive Order 13595 *Instituting a National Action Plan on Women, Peace and Security* (19 Dec. 2011); The DoS Policy guidance *Promoting Gender Equality to Achieve our National Security and Foreign Policy Objectives* (2012); *The US Strategy to Prevent and Respond to Gender Based Violence Globally* (2012).

<sup>91</sup> See [http://www.whitehouse.gov/sites/default/files/email-files/US\\_National\\_Action\\_Plan\\_on\\_Women\\_Peace\\_and\\_Security.pdf](http://www.whitehouse.gov/sites/default/files/email-files/US_National_Action_Plan_on_Women_Peace_and_Security.pdf)

<sup>92</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.genderraction.org/images/ez-mg%20oxfam%20g%26d%20gender-pcr.pdf> (last visited 19 Dec 2013).

<sup>93</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/Series-Collections/Gender-Tools-and-Resources> (last visited 19 Dec 2013).

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

<sup>95</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 19 Dec 2013).

<sup>96</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.

### **Enhancing Economic Development through Female Empowerment: Rwanda**

In the 20 years since the genocide, when 800,000 people died during three months of violence, Rwanda has become perhaps the world's leading example of how empowering women can fundamentally transform post-conflict economies and fight the cycle of poverty. Reports indicate that women showed more willingness than men to embrace new farming techniques aimed at improving quality and profit. Moreover, while women make up the majority of borrowers, only one out of five defaulters is a woman. What does this have to do with the RoL? The answer is that these advances would not have happened had reforms not been passed in Rwanda after the genocide enhancing the legal status of women, which, for example, finally enabled women to inherit property. Today, 41 percent of Rwandan businesses are owned by women.

### **Gender-Based Crime- Responsive Policing Initiatives**

In Nicaragua 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 for women police officers from Central America and the Caribbean. This approach was so well-received it was adopted by the Commission of Central American and Caribbean Police Chiefs to integrate gender equality into their institutional reform efforts in the region.

The INL launched the *INL Guide to Gender in the Criminal Justice System*<sup>97</sup> in February 2014. This is a practical and valuable resource, containing information regarding the assessment of gender issues and integration of gender considerations within project design and implementation.

## **VI. Civil Society**

Civil society occupies a public space between citizen and government and has been defined as “the collective entity composed of NGOs, social movements, and professional and voluntary associations that functions independent of the state. It creates a network of pressure groups able to resist the holders of state power, if necessary.”<sup>98</sup> Civil society organizations (CivSOs) include organized NGOs, community-based organizations, faith groups, professional and trade unions, the media, private business, bar associations, human rights groups, and universities. In many societies, especially those emerging from dictatorship or authoritarian rule, traditional groups that brought people together around social, cultural or religious activities may look very different to the Western concept of a CivSO. In addition, association laws may have been highly restrictive, limiting the ability of CivSOs to lawfully form, operate, and implement activities seen as threatening to the authorities (such as promoting humans rights).

The involvement of civil society in RoL programs is crucial for wider and more inclusive local involvement in RoL operations and, ultimately, their sustainability and success. CivSOs 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 responsive to popular security and justice needs, and to actually perform the work of reconstruction and social support that leads to increased stability and recognition of the RoL.

<sup>97</sup> Available at: [www.state.gov/documents/organization/222034.pdf](http://www.state.gov/documents/organization/222034.pdf).

<sup>98</sup> CENTER FOR CONFLICT OPERATIONS, *COMPLEX OPERATIONS LEXICON* 35 (R. Scott Moore et al. eds., 4th ed. 2011).

Too often, RoL programs focus primarily on government actors and institutions 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. Judge Advocates need to be aware of ongoing efforts and partnering opportunities and to ensure that related military initiatives are compatible with credible CivSO efforts in their sector. Political legitimacy of the RoL can only come with the broad social involvement that civil society represents.

## **A. Potential Areas of Judge Advocate Engagement with Civil Society**

### **1. Human rights and access to justice**

CivSOs play an important role in advocating for human rights and increasing access to justice. 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.

### **2. Delivering justice services and Public education programs**

In many countries, CivSOs deliver essential justice services that the state fails to provide and have a significant impact in advancing justice by addressing grassroots needs. For example, CivSOs may include lawyers, community paralegals, legal aid centers, and victims' support groups. It is also often the case that CivSOs are best placed to deliver education programs focusing on specialist areas of the RoL with which they are most involved.

#### **Providing Legal Aid in Kirkuk**

While developing a plan to improve public access to the legal system, the PRT RoL team in Kirkuk learned of an organization of Iraqi attorneys in the area with similar goals: the Kirkuk Jurist Union (KJU). The KJU, which is an organization of Iraqi lawyers and other legal professionals, 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 USAID 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 provided face-to-face legal consultations, but also funded informational workshops for both laymen and legal professionals to increase their awareness of the legal system.

### **3. Oversight of the Police and Security Systems**

CivSOs can play a valuable role in working to minimize distrust between communities and the police,<sup>99</sup> while also helping to inform, influence and assess the performance of formal civilian oversight bodies and security system institutions.

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<sup>99</sup> See <http://www.usip.org/publications/justice-and-security-dialogue-new-tool-peacebuilders> (last visited 30 Jul 2014) as an example of community policing.

## **B. Common Challenges and Lessons Learned regarding CivSOs**

Building the capacity of CivSOs requires a long-term perspective in program planning, particularly when civil society is weak or under-developed. Judge Advocates need to coordinate their dealings with other agencies to avoid duplication and ensure that all dealings with CivSOs are totally transparent. In harnessing the power of CivSOs, JAs need to be aware of a number of key issues.

### **1. Institutional funding and sustainability**

In countries with emerging CivSOs acting in the security and justice arena it is important to ensure provision for core institutional funding. Organizations must develop balanced sources of funding to sustain their independence and avoid both donor fatigue and the appearance of dependence on a particular interest group (including foreign nations and the host government). This can be done, for example, through harnessing the support of the private sector.

### **2. Media awareness**

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. CivSOs can help to develop these skills. Developing the capacity of CivSOs to effectively engage with the media is crucial.

### **3. Support research institutions**

Developing the capacity of academic and research institutes can help generate a better understanding of the context, situation, relevant actors and challenges faced in a given country. Law schools, for instance, are a critical element of the civil society infrastructure supporting the RoL.

### **4. Lack of domestic legitimacy**

Supporting CivSOs without broad domestic legitimacy may jeopardize reforms with the government and alienate wider civil society. Some CivSOs connect more closely to national elites and external partners than to local communities. If CivSOs move from playing a watchdog role and start to participate in actually helping to implement the RoL, their domestic audience may perceive them as no longer being neutral.<sup>100</sup>

### **5. Security of NGO and CivSO 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.

## **VII. 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. While private security forces can and do

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<sup>100</sup> 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.

provide critical and legitimate security functions, unlike traditional police, they do not serve the general public. In attempting to bring them within the RoL, the role of private actors in providing security services has to be recognized and addressed. For instance, they provide the following 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. Private Security Companies**

Private security companies are generally defined as those commercial companies directly providing military or security-related services 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, US, UK, Israel and Germany. The private security sector is rarely addressed in any systematic way in RoL programming or assessment. As a result, there is a considerable lack of practical experience for practitioners to draw on.

It is tempting to ignore non-state security actors or treat them as a host nation problem. However, if the sector is neglected in broader RoL programming, it may come to represent an essentially parallel and largely unaccountable sector in competition with state justice and security provision. Without effective regulation and oversight, the PSCs are often narrowly accountable to clients and shareholders, rather than democratically accountable to public law, and over-reliance on PSCs can reinforce exclusion of vulnerable populations and unequal access to security. Unaccountable non-state security actors can facilitate human rights abuses or inappropriate links between the private security sector and political parties, state agencies, paramilitary organizations and organized crime.

## **B. Assessing the Role of Private Security Companies**

A professional, accountable and well-regulated private security industry can complement, rather than undermine, the state's ability to provide security allowing scarce public resources to be usefully redirected for other purposes. Within this context, key issues to be addressed are as follows:

- Roles of the PSC sector and its relationship with public security agencies
- Legal status of PSCs
- Statutory regulation and government oversight
- Professionalism and voluntary regulation
- Training for staff in human rights and humanitarian law, use of force and firearms, first aid.

In general, 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.

### **Blackwater**

The role of PSCs in areas of combat operations received significant public attention, largely in part to a number of high-profile incidents in Iraq, including the September 2007 incident in Nisour Square, Baghdad in which 17 Iraqis were killed. Subsequently one contractor pled guilty to manslaughter and four others faced charges for the shootings in federal court. The incident highlighted several critical issues, including the nature of the Iraqi licensing regime, US contractor immunity under Iraqi law, US jurisdictional limitations, and appropriate rules for the use of force for PSCs in a war zone.

## **C. Alignment of Non-State Security Providers**

Where possible, non-state security providers should be aligned with community safety initiatives. Typically, this will involve CivSOs who will need to encourage dialogue between communities and all security providers to ensure communities are aware of the roles and practices of the different actors in maintaining local security, law, and order. In addition, the host government will need to educate the public about the role and authorities of PSCs to align expectations and reduce miscommunications.

## CHAPTER 4

# KEY PLAYERS IN RULE OF LAW

Coordination of RoL activities is a complicated business as the USG has “at least 7 Cabinet-level departments and 28 agency bureaus and offices involved in RoL reform...”<sup>1</sup> and most of these agencies have multiple lines of effort (LOEs). Moreover USG activities take place amidst a myriad of international participants.

Within USG, DoS is the lead agency in foreign policy and the lead in efforts to develop RoL abroad. The DoD, however, is a vital partner in this effort, and plays an essential supporting role in RoL development worldwide. The level and nature of DoD involvement in RoL development varies according to the local security environment, broad US national interests, and particular US country policy goals but DoD will rarely act alone in a RoL mission. Accordingly, a military RoL practitioner working with host nationals, coalition partners, International Organizations (IOs),<sup>2</sup> intergovernmental organizations (IGOs),<sup>3</sup> Non Governmental Organizations (NGOs), academic institutions, and professional societies will need to identify the key players, understand shared responsibilities between players, be sensitive to the constraints and values of partner organizations, and maximize communication and cooperation in order to accomplish common goals.<sup>4</sup>

Progress in the RoL arena derives from the pursuit of a common strategic plan. A common strategy sets the rules and framework, establishes roles and missions, identifies the authorities and hierarchy of command, creates common commitment, helps manage expectations, and holds those involved to account.

### I. US Interagency Approach to Reconstruction and Stabilization

At the highest policy level, the National Security Council Interagency Policy Committees (NSC/IPC)s<sup>5</sup> manage the development and implementation of national security policies. These committees address specific issues or crises and are the main day-to-day forums for interagency coordination of national security policy. For example, the Reconstruction and Stabilization IPC is the day-to-day forum for interagency coordination of national policy on reconstruction and stabilization. National Security Staff provides overall policy leadership and interagency coordination in responding to major crises.<sup>6</sup>

Planning and executing interagency operations involving many federal departments and agencies is a complicated and difficult undertaking in any environment. This is, in part, due to the manner in which USG organizes agencies to manage specific, and often narrow, instruments of national power. These separate agencies tend to operate in legislatively-created policy stovepipes and funding streams and can

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<sup>1</sup> RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD, NEXT GENERATION REFORM*, (2012).

<sup>2</sup> IOs are public international organizations in which the United States participates pursuant to any treaty or under an Act of Congress.

<sup>3</sup> IGOs are organizations composed primarily of sovereign states, the organizational structure of which may or may not be governed by international treaties or other international agreements, and therefore may or may not be considered IOs under US law.

<sup>4</sup> See MELANNE A. CIVIC, *Interagency Operations: Coordination for Reconstruction and Stabilization* in *CENTER FOR ARMY LESSONS LEARNED (CALL) NEWLETTER* 10-46 (Jun 2010) available at [http://www.globalsecurity.org/military/library/report/call/call\\_10-46\\_ch02.htm](http://www.globalsecurity.org/military/library/report/call/call_10-46_ch02.htm) (analysis of lessons learned through policy and operations reveal friction between civilian diplomatic, development, and domestic organizations) (last visited 24 Sep 2014).

<sup>5</sup> IPCs have also been referred to as Policy Coordinating Committees under previous administrations.

<sup>6</sup> Currently, Presidential Policy Directive-1 (PPD-1) regulates USG interagency coordination. PPD-1 describes the NSC structure, and establishes the general framework for interagency coordination.

be constrained (by the same laws) from performing functions that fall outside of their core missions and funding authorities. In turn, this has led them to develop their own agency-specific goals, priorities, terminology, and bureaucratic cultures that reflect and support those missions, and, where appropriate, to work through and in cooperation with those agencies with international authorities, e.g., DoS, DoD, and US Agency for International Development (USAID).<sup>7</sup>

Joint Publication 3-08 sets out military doctrine for Inter-Organizational Coordination during Joint Operations. It defines “Interagency Coordination” as the “coordination that occurs between elements of DoD and engaged USG agencies for the purpose of achieving an objective. Interagency coordination forges the vital link between the US military and the other instruments of national power.”<sup>8</sup>

To operate successfully in the interagency environment it is crucial to accept the civil-military relationship as collaborative rather than competitive and be aware of broader organizational sociological trends to enhance this collaborative spirit: while the military normally focuses on reaching clearly defined and measurable objectives within given timelines under a command and control structure, civilian organizations are often more concerned with fulfilling changeable political, economic, social, and humanitarian interests using dialogue, bargaining, and consensus building.

Due to the inherent complexity of interagency, coordination has become increasingly important and USG agencies have moved from a largely informal framework to a more formalized interagency structure. Following the challenges of interagency planning and conduct of stabilization operations in Somalia, Haiti, Balkans, Iraq, and Afghanistan, DoS created the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) in August 2004 to enhance institutional capacity to respond to crises involving failing, failed and post conflict states and emergency situations. In November 2012, DoS subsumed S/CRS into the newly created Bureau of Conflict and Stabilization Operations (CSO), focusing on conflict prevention, crisis response, and stabilization activities. As USG agencies other than DoD usually have the lead on RoL programs, appreciating the utility of an effective interagency framework, and understanding the national policy aims within which it works, can only enhance a JAs role in implementing a RoL program.

In an attempt to synchronize reconstruction efforts, National Security Presidential Directive 44 (NSPD-44) made the Secretary of State (SecState) responsible for coordinating and leading USG reconstruction and stabilization (R&S) activities.<sup>9</sup> Congress authorized elements of NSPD-44 through Title XVI of the 2009 NDAA<sup>10</sup> to include the development of a standing civilian mechanism<sup>11</sup> comprised of USG personnel to provide a R&S surge capacity and to coordinate and facilitate interagency efforts. In December 2010, the first Quadrennial Diplomacy and Development Review (QDDR) established policy that DoS and USAID share a lead agency approach during crisis situations: “under the guidance of the National Security Staff, DoS will lead for operations responding to political and security crises, while

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<sup>7</sup> Other agencies, including the Departments of Treasury, Homeland Security, Agriculture and Commerce, have limited international authorities.

<sup>8</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-08, INTERORGANIZATIONAL COORDINATION DURING JOINT OPERATIONS (24 Jun 2011) at 1-2.

<sup>9</sup> National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstruction and Stabilization, 7 Dec 2005 [hereinafter NSPD-44], *available at* <http://www.fas.org/irp/offdocs/nspd/nspd-44.html> (last visited 29 May 2014).

<sup>10</sup> Duncan Hunter National Defense Authorization Act (NDAA) for FY 2009, Public Law. 110-417 110<sup>th</sup> Cong, Title XVI (14 Oct 2008).

<sup>11</sup> Called the Civilian Response Corps (CRC). While the CRC<sup>11</sup> reached its peak of interagency personnel in during 2010-2011 before downsizing completely by 2014, Congressional authority remains to reconstitute it. The central purpose of the CRC is to advise and mentor countries to develop resiliency and implement their own solutions with international community support. At its height as many as 157 active and more than 1500 standby personnel participated from multiple participating agencies – USAID, DoS, Justice, Homeland Security, Commerce, Agriculture, Health and Human Services. Approximately half were RoL experts.

USAID will lead for operations in response to humanitarian crises resulting from large-scale natural or industrial disasters, famines, disease outbreaks, and other natural phenomena.”<sup>12</sup> Specifically the QDDR mandated the development of a process to coordinate stability and transition operations known as the International Operational Response Framework and sought to elevate and improve strategic planning within DoS via the CSO.<sup>13</sup>

In the field, subject to a few exceptions such as those personnel under the command of a US Combatant Commander, the Embassy Chief of Mission will have full responsibility for the direction, coordination, and supervision of all in-country USG executive branch employees. In Washington, DoS and USAID will work closely with the National Security Staff and other federal agency partners to ensure unified interagency guidance, planning, and execution. In situations that call for a joint civil-military approach, DoS and USAID will coordinate with DoD.<sup>14</sup>

## II. US Government Agencies Involved in Rule of Law

Congress funds RoL programs and related activities primarily through appropriations for DoS and USAID. A brief description of these organizations along with others involved in RoL that JAs are likely to work alongside is set out below and at Annex C.

### A. Department of State

The Department of State is responsible for planning and implementing US foreign policy. It has the mandate to prepare for, plan, coordinate, and implement R&S operations in a wide range of contingencies, including disaster relief emergencies, failing and failed states, and post-war areas. Thus, 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 RoL. Where the US military is involved, DoS coordinates with DoD to synchronize military and civilian activities. The Secretary of State has overall responsibility to lead both steady-state and contingency planning in operations and coordinate federal agencies’ respective response capabilities with specific responsibilities including:

- Informing US decision makers of viable options for stabilization activities
- Coordinating USG 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 training and operations
- Coordinating and harmonizing military and civilian participation
- Resolving relevant policy, program or funding disputes among US agencies and departments
- Implementing foreign assistance programs around the world, in coordination with USAID and DoD, and in partnership with other US agencies and departments.

Many of the principal bureaus and offices working in RoL report to the Under Secretary of Civilian Security, Democracy, and Human Rights (J): J’s RoL Coordinator oversees RoL activities across J and with interagency partners. The main bureaus are described below:

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<sup>12</sup> *The 2010 Quadrennial Diplomacy and Development Review* at xiii (available at <http://www.state.gov/s.dmr/qddr/> (last visited 30 Aug 2014) [hereinafter QDDR]. As at the time of going to print the 2014 QDDR had not been published

<sup>13</sup> QDDR, *supra* note 12 at 135.

<sup>14</sup> *Id.* at 134.

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

The Bureau of International Narcotics and Law Enforcement (INL) is the lead bureau responsible for developing, coordinating, and managing criminal justice programs to combat international narcotics and transnational crime. All of INL's work is closely coordinated with the relevant regional bureau which has responsibility for coordinating all activities within a given geographical area.

The INL develops policies and programs on narcotics and law enforcement issues and has a global presence in overseas criminal justice sector reform. The INL's criminal justice reform programs cover a diverse range of initiatives, including work with law enforcement officers, correction officials, prosecutors, defense attorneys, civil society, legal educators, court employees, and judges. The INL employs approximately 7,000 people (including civil servants, foreign service officers, contractors, and local hires) on programs in more than 80 countries.

While criminal justice systems vary by country, professional, ethical and management assistance is generally provided to the following components:

- Legal Foundation – general criminal code and procedural reform, specific transnational crime legislation (counter-terrorism, trafficking in persons)
- Police – compliance with international human rights for all aspects of police conduct, including detention; expertise in gender-based and child-related crimes
- Prosecutors – case preparation, continuing legal education, public accountability and trust
- Defense Bar – access to justice, ethics, and organizational management
- Judiciary and Courts – compliance with international human rights standards, accountable court administration, judicial selection and independence, court and witness security, judicial education and coordination with informal dispute resolution mechanisms
- Corrections – compliance with international human rights standards in the treatment of prisoners and living conditions
- Civil Society – promoting citizen knowledge about the law and ensuring access to justice for citizens.

Further details about INL are at Annex C.

## **2. Bureau for Conflict and Stabilization Operations (CSO)**

The CSO was created under the policy guidance of the 2010 QDDR and built upon NSPD-44 to focus on conflict analysis, strategic planning and operations aimed at conflict prevention and crisis response. The CSO's mission is to break cycles of violent conflict and mitigate crises in priority countries during the first twelve months of transition from conflict. Priorities are based on an analysis of the importance of a country or region to US national security interests, an opportunity of interest and capacity for transition in that country, and the likelihood of making a difference within twelve months. The CSO's operational focus is on conflict prevention and crisis response, and toward that end has conducted analysis and deployed experts in Security Sector Reform (SSR) and human security, supported local anti-corruption efforts and Disarmament, Demobilization, and Reintegration programs to:

- Improve local justice administration
- Advance reconciliation
- Mitigate violence surrounding elections and transitions
- Improve early warning mechanisms and atrocities prevention tools.

The CSO works with local governments, civil society, and key actors in Central America, the Near East and Southeast Asia regions, and throughout Africa. The Bureau launches start-up projects and provides grants to local or international implementers.

The CSO has developed a Civilian Response Network (CRN) for conflict prevention and stability operations deployments and program implementation. Under the CRN framework, CSO deploys responders as needed by reaching out to private sector, multilateral, intergovernmental and host-country organizations, and developing networks of specialists beyond the USG. The Bureau hires or otherwise engages such talent only in response to actual demand. The CRN encompasses four main pools of talent:

- Individuals working within the CSO bureau who have the necessary skills and experience, and are committed to deploy
- Individuals who can be detailed from within the State Department and other USG agencies
- Individuals who can be hired intermittently through third party contracts, personal service contracts and the retired foreign service officers “While Actually Employed” mechanism, and
- Implementing organizations funded by government contracts and grants.

### **3. Office of Global Criminal Justice (GCJ)**

The Office of Global Criminal Justice, formerly the Office of War Crimes Issues, is headed by an Ambassador-at-Large and advises SecState and other elements of the USG on the prevention of, responses to, and accountability for atrocity crimes, including genocide, crimes against humanity, war crimes, and other grave human rights abuses. The GCJ also supports US diplomats operating in high-risk, conflict, and post-conflict scenarios and provides subject matter expertise to change agents and others seeking justice and accountability—broadly defined—for past atrocity crimes. The GCJ takes as its operating principle the precept of the 2010 National Security Strategy of the United States: “From Nuremberg to Yugoslavia to Liberia, the United States has seen that the end of impunity and the promotion of justice are not just moral imperatives; they are stabilizing forces in international affairs.”<sup>15</sup>

The GCJ helps shape US policy on regional and multilateral efforts to assist or establish transitional justice mechanisms, and works to coordinate various forms of USG assistance for national and international efforts, which include, but are not limited to:

- The establishment of domestic, hybrid, or international criminal tribunals
- The design and implementation of material and symbolic reparations to victims
- The establishment of truth seeking mechanisms, such as truth commissions and commissions of inquiry to investigate and document mass atrocities, as well as truth telling initiatives including remembrance ceremonies, museums and memorials
- The promotion of institutional reform to eliminate structures that allowed and facilitated past abuses, rebuild trust in public institutions, enhance governance and deter future abuses.

### **4. Office to Monitor and Combat Trafficking in Persons**

The Office to Monitor and Combat Trafficking in Persons (J/TIP) was created by the Trafficking Victims Protection Act of 2000 and is responsible for diplomacy, targeted foreign assistance, and public engagement on trafficking in persons. The Office upholds the “3P” paradigm of protecting victims, preventing trafficking, and prosecuting traffickers.

The Office currently manages 106 anti-trafficking projects worth over \$61,890,000 in 52 countries in every region of the world. Funds are awarded by J/TIP to international and nongovernmental organizations and focused on progressing the 3P paradigm including law enforcement training, comprehensive victim services, and raising public awareness. Projects typically last two to three years. Foreign support is also provided through targeted, short-term training and technical assistance. This

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<sup>15</sup> Published May 2010 at page 48.

assistance might take the form of law enforcement training and/or assistance with drafting or enhancing anti-trafficking legislation.

## **5. Bureau of Democracy, Human Rights, and Labor**

The Bureau of Democracy, Human Rights and Labor (DRL) is the principal DoS bureau responsible for advancing US policies that promote democracy, protect human rights, preserve international religious freedom, and advance labor rights globally. The Bureau also leads USG efforts to hold governments accountable to their obligations and commitments under universal human rights norms and international human rights instruments.

Primarily based in Washington, D.C., DRL leverages a broad network of human rights organizations, a variety of multilateral and international sources and US Embassy reporting to collect and analyze human rights related information from around the globe. The Bureau works with the interagency to develop a range of options to integrate critical human rights considerations into US policies and strategies and provides a human rights context for planners by leading USG efforts to collect and assess human rights-related facts and developments globally. This collection effort has multiple purposes including informing DRL's annual report to Congress on global human rights conditions in 190 countries.

Of particular note to JAs involved in permissive RoL activities, DRL works to ensure that USG policies, plans, and programs related to security sector and justice assistance give strong consideration to human rights protections and accountability for violations. The Bureau assists the interagency by providing country-specific human rights information and context, and assisting with designing program assessments and subsequent assistance programs, especially those intended to enhance accountability and oversight of security forces.

The Bureau is also mandated to ensure interagency compliance with laws governing human rights and security assistance, including the "Leahy Law"<sup>16</sup> prohibiting the provision of security assistance to units or individuals when there are credible allegations of gross human rights violations, and where effective steps to bring the perpetrators to justice have not been taken, and conducts vetting on over 160,000 individual recipients of US assistance annually.

## **6. US Embassy and its Country Team**

The Ambassador and the Deputy Chief of Mission (DCM) at each US embassy heads the team of USG personnel collectively known as the "country team." The country team system provides the foundation for interagency consultation, coordination, and action on recommendations from the field and effective execution of US missions, programs, and policies. The country team concept encourages agencies to coordinate their plans and operations and keep one another and the Ambassador informed of their activities. Although the US area military commander (the COCOM or a subordinate) is not a member of the embassy, the commander may participate personally or through a representative, in meetings and coordination conducted by the country team.

Assuming there is a US Embassy in the relevant nation, JAs conducting RoL operations should coordinate with the pertinent members of the country team through the relevant Army Service Component Command (ASCC) and COCOM Staff Judge Advocate (SJA) offices. While the composition of country teams may vary from one embassy to the next, for RoL operations the key players at the US embassy are typically:

- The US Ambassador/Chief of Mission
- The Deputy Chief of Mission
- The Office of Security Cooperation (OSC)

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<sup>16</sup> Section 620M of the Foreign Assistance Act of 1961, as amended.

- The Political Officer
- The Regional Security Officer
- Department of Justice Senior Legal Advisor
- The FBI Legal Attaché
- The DoS Legal Adviser
- The Defense Attaché
- USAID Mission Director
- USAID Democracy and Governance Officer.

While it is important for JAs to be aware of the central role of the country team regardless of the environment in which they are pursuing RoL activities, JAs should also be cognizant of the fact that each member of the country team has a different portfolio and is bound by their parent agency’s authorities, policies, and resources. In any event, the ASCC and the COCOM SJA offices can assist JAs in working with the Defense Attaché or command liaison to the US Embassy who is a likely entry point for approaching and dealing with the country team.

## **B. US Agency for International Development**

### **1. Overview**

The US Agency for International Development is an independent and autonomous federal agency headed by an Administrator that receives overall foreign policy guidance from SecState. As stated in the 2010 National Security Strategy, development is a “strategic, economic, and moral imperative.”<sup>17</sup> Accordingly USAID supports long-term and equitable economic growth and advances US national security through its assistance programs in global health, food security, democracy, human rights and governance, economic growth, education, environment and climate change, humanitarian assistance and disaster risk reduction, conflict, crisis, and instability, gender equality and women's empowerment, and science, technology, and innovation. The Agency is the principal USG provider of global development and humanitarian assistance and provides assistance in over 100 countries working in close partnership with NGOs, IGOs, universities, American businesses, other governments, trade and professional associations, faith-based organizations, and USG agencies. USAID has working relationships through cooperative agreements, contracts, and grant agreements with more than 3,500 companies and over 300 US-based NGOs.

A detailed description of the history and core values of USAID is at Appendix C.

### **2. Organizational Structure - Regional & Functional Bureaus**

Headed by an assistant administrator, USAID has six geographic bureaus which coordinate the activities in the countries where USAID operates its programs. The geographic bureaus are supported by four functional bureaus that provide technical expertise in USAID’s development and humanitarian mission:

- Global Health - is the focal point for child and maternal health and nutrition, HIV/AIDS, infectious disease and family planning. The bureau leads USAID efforts to develop technical advances and operations research that can be disseminated and replicated throughout the world.
- Economic Growth, Education, and Environment - provides technical leadership, research, and field support in economic growth and trade, infrastructure, education, environment, water, and gender equality.

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<sup>17</sup> At page 15. See also Presidential Policy 6 (22 Sep 2010) which recognizes the same.

- Bureau for Food Security - strengthens food security by investing in cutting-edge scientific and technological agricultural research. The bureau also helps develop agricultural markets and expand trade so farmers can sell what they grow at a profit.
- Democracy, Conflict and Humanitarian Assistance - focuses on crisis prevention, response, recovery, and transition efforts. It is home to several hundred experts managing a \$2 - \$3 billion annual assistance programs within eight separate offices, one of which, the Center of Excellence on Democracy, Human Rights, and Governance (DRG Center), is of particular note to JAs. The DRG Center, in line with USAID's 2013 Strategy on Democracy, Human Rights and Governance integrates democracy, human rights, and governance goals across all of USAID's development. The DRG Center also leads USAID efforts to implement USG policies on SSA. The Center provides staff to serve as consultants to missions and provide technical assistance to the field to ensure that USAID investments are coordinated with US diplomatic and defense efforts.<sup>18</sup> The USAID strategy recognizes that long-term, sustainable development is closely linked to sound democratic governance and the protection of human rights which all must advance together.

Overseas USAID operating units are called field missions and range in size from 3-4 US direct-hires (small mission) to 9-15 US direct-hires (full mission) depending upon the number of USAID strategic objectives in the relevant country. Missions operate under decentralized program authorities allowing missions to independently design and implement programs and negotiate and execute agreements. As a key member of the country team, the USAID mission director is often called upon to stand in for the Ambassador or the DCM during their absences. Field missions are supported by regional support missions (typically 12–16 US direct-hires) which house a team of legal advisors, contracting and project design officers, and financial services managers. In countries without integrated strategies, but where aid is still necessary, regional missions work with the host nation and NGOs to implement assistance programs. Regional missions may also design and manage their own programs.

### **3. Rule of law at USAID**

The USAID definition of RoL identifies five key components to the RoL - Order and Security, Legitimacy, Checks and Balances, Fairness and Effective Application. These components are integrated into all USAID RoL Planning and are considered further at Annex C.

#### **C. Department of Justice**

The Department of Justice (DoJ) provides legal advice to the President, represents the Executive Branch in court, investigates federal crimes, enforces federal laws, operates federal prisons, and provides law enforcement assistance to states and local communities. The Attorney General heads the DoJ, supervises US attorneys, marshals, clerks and other officers of federal courts, represents the US in legal matters and makes recommendations to the President on federal judicial appointments. While focusing on domestic legal activities, the DoJ also has a significant international role conducting operations and providing assistance to justice systems in partner nations throughout the world as crimes committed in the United States often have ties to organizations in other countries. To address these threads, the DoJ has an extensive network of international partnerships dedicated to enhancing collaboration, helping to establish RoL through international treaties and training and assistance; and using international working groups to foster communication and improve investigations, intelligence sharing, and threat awareness.

In cooperation with the interagency actors DoJ is engaged in RoL in more than 100 countries and works with foreign governments to develop professional and accountable law enforcement institutions that

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<sup>18</sup> Many technical publications and how to guides published the DRG Center can be found at <http://www.usaid.gov/node/33416> (last visited 23 Jul 2014).

protect human rights, combat corruption, and reduce transnational crime and terrorism. It does this through the overseas work of its law enforcement agencies such as the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the US Marshals Service (USMS), the Bureau of Alcohol, Tobacco, Firearms and Explosives, and the Bureau of Prisons and its specialist capacity building components the International Criminal Investigative Training Assistance Program (ICITAP) and Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) offices detailed at Annex C.

## **D. Department of Defense**

The DoD conducts RoL activities and engagements when necessary to support US national security objectives recognizing that the development and sustainment of law-abiding defense institutions that respect human rights is necessary to foster long-term stability and security in partner nations. The Assistant Secretary of Defense for Special Operations and Low Intensity Conflict (ASD SO/LIC) is the lead for RoL activities and stability operations across DoD. The Office of Stability and Humanitarian Affairs (SHA) provides policy guidance, support and oversight, identifies best practices and lessons learned in order to strengthen and guide current and future operations, and integrates stability and RoL policies into doctrine, planning, and strategy.

### **1. Defense Stability Training Establishments**

All of the services have responded to formal direction<sup>19</sup> to integrate training, education, exercises, material, leadership, personnel and facilities for stability operations. Within the Army, initiatives have included expanding the Peacekeeping and Stability Operations Institute (PKSOI) at Carlisle Barracks, establishing a Culture Center within the Army's Training and Doctrine Command (TRADOC) and creating additional Military Information Support Operations and CA billets. In February 2012 the Secretary of the Air Force designated a Deputy Chief of Staff for Operations, Plans and Requirements whose responsibility it is to fulfill the mandate of 3000.05.<sup>20</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 (SSTR) Operations and established the Naval Expeditionary Combat Command (NECC).<sup>21</sup> Finally, the Marine Corps maintains a Stability Operations Branch within the Small Wars Center and Irregular Warfare Integration Division that is responsible for the combat development and integration of stability functions.

All the services have also incorporated individual<sup>22</sup> and collective training on SSTR with training centers placing 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.

### **2. Defense Security Cooperation Agency**

The Defense Security Cooperation Agency (DSCA) is the central DoD agency that synchronizes global SC programs, funding and efforts across the Office of the Secretary of Defense (OSD), Joint Staff, DoS, COCOMs, and US industry. While much of DSCA's work is not directly related to RoL capacity

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<sup>19</sup> DEP'T OF DEF INSTR. 3000.05, STABILITY OPERATIONS, para 4d, (16 Sep 2009) [hereinafter DoDI 3000.05].

<sup>20</sup> HEADQUARTERS AIR FORCE MISSION DIRECTIVE 1054, DEPUTY CHIEF OF STAFF, OPERATIONS, PLAN AND REQUIREMENTS, 9 Feb 2012.

<sup>21</sup> For more information *see* [www.public.navy.mil/necc/hq/Pages/default.aspx](http://www.public.navy.mil/necc/hq/Pages/default.aspx)

<sup>22</sup> Training opportunities include: 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. See also Table 1 of Appendix B for RoL-specific training programs and short courses available for USG civilians and JAs.

building, it is responsible for the Defense Institute for International Legal Studies (DIILS) and the DoD Regional Centers, both of which warrant further mention:

**a. Defense Institute of International Legal Studies**

In 1992 the International Training Detachment of the US Naval Justice School was set up to implement a Congressional program to develop legal concepts in international military education and training. In 1997 the organization became the Defense Institute of International Legal Studies (DIILS) and is now staffed by Army, Navy, Air Force, Marine and Coast Guard JAs as well as experienced civil attorneys.

The Institute supports SC objectives by implementing programs designed to build partner legal capacity and promote transparent security sectors, democratic civilian control of the military and compliance with international standards of law. On average DIILS conducts over 130 events annually in over 60 countries and works closely with US Embassies. It also coordinates with the Office of the Under Secretary of Defense for Policy (USD(P)) and the COCOMs to ensure that programs align with US strategic objectives and priorities. Judge Advocates seeking DIILS assistance in implementing theater SC programs should coordinate directly with DIILS Regional Program Directors. The Institute carries out its mission through a blend of resident courses, mobile programs and observership programs.<sup>23</sup>

**b. DoD Regional Centers for Security Assistance Studies (Regional Centers)**

The DSCA's five Regional Centers provide international venues for bilateral/multinational study, communication and exchange of ideas. The training and education that they offer is primarily aimed at strategic level foreign civilian and military civilian leaders with a view to helping participants understand and address regional security issues. The DSCA is the executive agent for the Regional Centers which are also subject to the policy oversight of USD(P) and direction of the relevant COCOM.<sup>24</sup>

Owing to their regional focus, each of the centers has different priorities but common objectives include the promotion of peaceful security cooperation, enhancement of security partnerships, discourse regarding regional and global security issues and promotion of civil-military relations. The five Centers and the COCOM with which they are connected are as follows:

- George C. Marshall European Center for Security Studies, Germany (USEUCOM)<sup>25</sup>
- Asia-Pacific Center for Security Studies,<sup>26</sup> Honolulu, Hawaii (USPACOM)

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<sup>23</sup>**Resident Courses.** 131 countries have sent participants to resident courses. Further details are available on the DIILS website at Appendix B, table 2. Of particular note, a 3 week Law of Armed Conflict and Human Rights course was introduced in 2011 in response to increasing global interest in transparency and human rights. **Mobile Programs** are seminars or workshops addressing significant legal issues. Requests for mobile programs must be initiated by or coordinated with the OSC in the relevant US embassy with topics determined according to US objectives and host country needs. Current topics include LOAC and human rights, the legal aspects of combating corruption, operational law, rules of engagement, use of force, military justice and trial advocacy with recent hosts including Slovakia, Senegal, Macedonia, AUS/NZ, Kiribati, Cambodia, Czech Republic, Bosnia and Senegal. In several African nations DIILS programs have focused on establishing a professional military justice system, the protection of civilians and the prevention of mass atrocities and DIILS is funded by DoS to train military magistrates, prosecutors, and investigators to build capacity in the military justice community. Since 2012, DIILS has also engaged with Yemen's Ministry of Defense and the Myanmar military as part of bilateral efforts to promote human rights awareness within the defense sector. **Observership Programs** are designed to enable professionally qualified partner nation personnel to observe the US military judicial system.

<sup>24</sup> See DEP'T OF DEF. DIR. 5200.41, DOD CENTERS FOR REGIONAL SECURITY STUDIES (30 Jul 2004).

<sup>25</sup> See <http://www.marshallcenter.org/mcpublicweb/en/nav-main-wwd-mission-vision-en.html> (last visited 29 Aug 14).

<sup>26</sup> See <http://www.apcss.org/about-2/> (last visited 20 Jun 2014).

- William J. Perry Center for Hemisphere Defense Studies,<sup>27</sup> National Defense University Washington D.C. (USSOUTHCOM)
- Africa Center for Strategic Studies,<sup>28</sup> Fort McNair, Washington D.C. (USAFRICOM), (Regional Offices in Dakar, Senegal and Addis Ababa, Ethiopia)
- Near East-South Asia Center for Strategic Studies,<sup>29</sup> Washington D.C. (USCENTCOM).

### 3. National Guard State Partnership Program

The National Guard State Partnership Program (SPP) represents a comprehensive effort to build capacity in partner nations by and through the development of enduring relationships through persistent engagement. The program was initiated in 1993 to assist the three newly-independent Baltic countries after the break-up of the Soviet Union. Since then, it has grown to 68 current partnerships with 74 countries<sup>30</sup> in every Geographic COCOM.

The SPP pairs individual state National Guard units with a designated partner nation force. The SPP partners then conduct a wide-range of security cooperation activities designed to build capacity and to develop mutual understanding that enhances interoperability. A significant by-product of conducting training for these partner forces is that it augments the readiness of the participating US forces.

The range of SC activities conducted under the SPP includes programs focused on homeland defense/security, humanitarian assistance and disaster response/mitigation, consequence/crisis management, interagency cooperation and planning, border/port/aviation security, and combat medical operations. As the units work together, they develop mutual understanding of capabilities and needs which can be incorporated into future engagements, training and exercises.

Given its significant and relatively routine access to partner nation militaries and the highly diverse range of programs available, the SPP provides an ideal mechanism for strategic legal engagement. Sharing best practices and conducting training and education directly contributes to force professionalization and respect for civilian oversight of the military. The combination of a National Guard JA's status as a special command advisor with an attorney's experience in discussing sensitive matters in a variety of setting provides a significant platform to develop relationships and to influence the overall security cooperation plan.

### 4. Operational Forces

Judge Advocates should never forget that all operational forces can further RoL effects. For example, recent operations in Iraq are replete with examples of Second Lieutenants giving classes on human rights<sup>31</sup> or infantry companies partnering with police to maintain security in their communities.<sup>32</sup> Failing to include mainstream personnel in RoL will not only miss out on a tremendously powerful resource but will run the risk of RoL being viewed as a marginal activity. More widely, developing partner nation forces generally respect and greatly admire U.S. Servicemembers at all levels. In pre-deployment

<sup>27</sup> See <http://chds.dodlive.mil/about/> (last visited 21 Jul 2014).

<sup>28</sup> See [http://africacenter.org/wp-content/uploads/2011/11/ACSS\\_brochure\\_web.pdf](http://africacenter.org/wp-content/uploads/2011/11/ACSS_brochure_web.pdf) (last visited 21 Jul 2014).

<sup>29</sup> See <http://nesa-center.org> (last visited 29 Aug 14).

<sup>30</sup> See The National Guard State Partnership Program Annual Report Fiscal Year 2013, National Guard Bureau Division of International Affairs, J53 (Jan 2014). Further expansion is intended FY2015 and beyond. Available at <http://www.nationalguard.mil/Leadership/JointStaff/J5/InternationalAffairsDivision/StatePartnershipProgram.aspx>

<sup>31</sup> See Michael J. Totten, *Final Mission Part III*, MIDDLE EAST JOURNAL, (12 Feb 2008), <http://www.michaeltotten.com/archives/2008/02/the-final-missi-2.php> (last visited 6 Nov 2013).

<sup>32</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 6 Nov 2013).

preparations and briefs, JAs should remind soldiers in their units that their military bearing, conduct, and professionalism is being observed at all times.

## **E. Army**

### **1. Civil Affairs**

The mission of CA forces is to “support commanders by engaging the civil component of the operational environment to achieve civil military operations or other stated US objectives and ensure the sustained legitimacy of the mission and the transparency and credibility of the military force before, during or after other military operations.”<sup>33</sup> Civil Affairs operations are important to the execution of stability tasks and CA units can play a key role in building host nation legal capabilities.

Rule of Law is one of the CA functional specialty areas which also include economic stability, governance, public health, infrastructure, public education and information.<sup>34</sup> Civil Affairs doctrine provides that CA functional specialists may be required to fulfill planning, operational or liaison roles of USG civilian experts when such expertise is not available in the context of military intervention.<sup>35</sup>

In 2013 the Institute for Military Support for Governance (IMSG) was established at the direction of US Army Special Operations Command. Its mission is to manage the provision of civil sector expertise across the range of military operations in order to support USG obligations under international law and promote stability. Currently IMSG is developing specialist capability amongst reservists in their private capacities, to be applied to active duty to complement the existing 38A generalist CA capability. The specialist 38G RoL component is planned to encompass the following specialties: judicial, law enforcement, corrections, defense, prosecutorial, advisory, professionalization of justice systems, administrative and regulatory systems, comparative legal systems, legislative and constitutional frameworks, accountability, transitional justice, anti-corruption and human rights law.

Civil Affairs doctrine indicates that a RoL section should be able to:

- Determine the capabilities and effectiveness of the host nation legal systems and the impact of those on joint force civil military strategy
- Evaluate the host nation legal system to include reviewing legislation, procedures and legal traditions and to develop transitional codes, procedures and long-term legal reform
- Evaluate the personnel, judicial infrastructure and equipment of the host nation court system to determine requirements for training, repair, construction and acquisition
- Provide support to transitional justice, to include acting as judges, magistrates, prosecutors, defense counsels, legal advisors and court administrators when required
- Coordinate RoL efforts with US and coalition military, US agencies, IGOs, NGOs and host nation government
- Assist JAs in educating and training US personnel in the host legal system
- Advise and assist JAs in international and host nation legal issues as required
- Assist JAs with status-of-force agreement and status-of-mission agreement issues
- Advise and assist in public safety systems to support penal systems administration.<sup>36</sup>

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<sup>33</sup> US DEP’T OF ARMY, FIELD MANUAL 3-57, CIVIL AFFAIRS OPERATIONS (31 Oct 2011) at 1-1 [hereinafter FM 3-57].

<sup>34</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 3-57, CIVIL-MILITARY OPERATIONS (11 Sep 2013) at I-16. CA functional specialists advise and assist the commander and can assist or direct subordinate civilian counterparts.

<sup>35</sup> FM 3-57, *supra* note 33 at 1-28.

<sup>36</sup> *Id* at 2-20, para 2-66.

## 2. Judge Advocates

In 2013 The Army Judge Advocate General (TJAG) approved a memorandum<sup>37</sup> listing which RoL activities would be the primary responsibility of JAs, as opposed to personnel from other branches such as CA and Military Police. In accordance with this memorandum, Army JAs will be trained and prepared to lead on the following RoL activities:

- Assistance provided to host nation civilian legal personnel, such as judges, prosecutors, defense counsel, and court personnel (in permissive and non-permissive environments)
- Assistance provided to host nation legal personnel at the country's Ministry of Defense (or its equivalent) and Security Forces on concepts such as civilian control of the military, LOAC and rules for the use of force (in permissive and non-permissive environments)
- Performing host nation legal functions until legitimate civil authority is prepared to conduct such tasks (in non-permissive environments).<sup>38</sup>

Other activities that potentially are part of any RoL effort during military intervention and for which judge advocates will be prepared to play a supporting role, include:

- Detention operations
- Corrections
- Anti-corruption laws and efforts
- Elections
- Assistance to host nation police forces
- Assistance to host nation government leaders
- Synchronization of US and coalition RoL activities.

Note that the above delineation still only describes general categories of responsibility. A JA's specific duties can vary tremendously and will depend on US strategic goals as well as command priorities and resources. Typical duties in the context of military intervention will include acting as an adviser to commanders and their staff on legal reform initiatives, as an instructor to host and partner nation attorneys on military justice, as a mentor to judges and governmental officials, as a drafter and interpreter of host-nation laws and presidential decrees, and as a facilitator at RoL conferences.

## 3. Military Police

Military Police units and investigators<sup>39</sup> deploy in support of RoL missions to train host-nation military personnel in the full spectrum of police tasks. Increasingly MPs carry out these roles through involvement in strategic law enforcement operations and training as carried out by Police Transition/Mentor Teams (PTT/PMT) to train host nation police in apprehension, in-processing, investigation, adjudication, and incarceration.

Typically in a Brigade Combat Team, there is a Provost Marshal cell and a military police platoon within the Brigade Special Troops Battalion. As operations shift from active combat to law-enforcement, MPs can train US troops conducting security operations, both on how to conduct police-oriented population engagements effectively and on important matters such as evidence collection and preservation. These

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<sup>37</sup> Judge Advocate General' Legal Center and School memorandum entitled "Recommendation of Way ahead for Rule of Law Operations" dated 8 May 2013, approved by TJAG On 10 July 2013.

<sup>38</sup> *Id*

<sup>39</sup> As well as regular MP units, the US military also possesses criminal investigation units, such as the Air Force Office of Special Investigations, Naval Criminal Investigative Service and Army Criminal Investigation Command. These units provide a full range of investigative capabilities comparable to a civilian law enforcement agency including forensic laboratories, ballistics experts, narcotics experts, computer crimes specialists, and polygraphists.

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 RoL.

In the area of detention operations, MPs are shifting focus from a law of armed conflict model of detain and release to a RoL model based on indictments and convictions. While all detention operations emphasize proper care and custody of detainees, the RoL model builds extends to include population engagement - a four step process involving detention, assessment, reconciliation, and transition.

## **F. United States Institute of Peace**

The United States Institute of Peace (USIP) is federally chartered and headquartered in Washington, D.C. The institute advances US strategic interests while helping to protect the vulnerable from conflicts that devastate lives and livelihoods. The Institute achieves its mission through teaching and training, research and analysis, global grant making and active engagements in the world's conflict zones.

### **1. Courses and Tools**

The Institute operates in the world's most challenging conflict zones including Afghanistan, Iraq, Pakistan, the Sudans, Libya and Burma. On a daily basis USIP mediates among parties in conflict, builds local conflict-management skills in fragile states, supports the development of RoL in post-conflict environments and strengthens civil society. USIP's Academy for International Conflict Management and Peace-building conducts training on-site at the Institute's Washington, D.C. headquarters, in the field, and on-line in several languages.<sup>40</sup>

Another useful tool for JAs is USIP's International Network to Promote the Rule of Law (INPRoL).<sup>41</sup> This is a global, online practice community of 1,600 RoL practitioners from 128 countries and 300 organizations with members including police officers, judges, lawyers, corrections officials, and judicial administrators. Participation in the network is membership-based and individuals may apply online.

The Institute also produces a range of practical tools and resources for practitioners and policymakers including publications on a range of RoL topics such as criminal law reform,<sup>42</sup> organized crime and other destabilizing crime in post-conflict societies<sup>43</sup> and constitution making in the contexts of state building and governance reform.<sup>44</sup>

The Institute's premise is that adherence to RoL entails far more than the mechanical application of static legal technicalities and instead requires an evolutionary search for institutions and processes that will best bring about stability through justice. In other words, RoL is not only about codes, courts, and policy, but it also includes the relationship between citizens and the law taking into account a country's recent history and current political, social, and economic environment. In this regard, USIP also focuses on informal or community-based and religious-based legal systems and their relationship to formal legal systems.<sup>45</sup>

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<sup>40</sup> For example the five-day *Rule of Law Practitioners Course*. see Annex B for more details

<sup>41</sup> [www.inprol.org](http://www.inprol.org). More information is included at chapter 7 of this *handbook*.

<sup>42</sup> See *THE MODEL CODES FOR POST-CONFLICT CRIMINAL JUSTICE* (Vivienne O'Connor and Colette Rausch, eds., 2007-08, US Institute of Peace Press).

<sup>43</sup> See *COMBATING SERIOUS CRIMES IN POST-CONFLICT SOCIETIES* (Colette Rausch, ed., 2006, USIP Press).

<sup>44</sup> See *FRAMING THE STATE IN TIMES OF TRANSITION* (Laurel E. Miller, ed., 2010, USIP Press).

<sup>45</sup> See *CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR-TORN SOCIETIES* (Deborah Isser ed., 2011, USIP Press), also the *PRACTITIONERS GUIDE: ISLAMIC LAW* (Hamid Khan, 2013, INPRoL - International Network to Promote the Rule of Law) at: <http://inprol.org/publications/islamic-law-guide>.

## 2. USIP Activities in Permissive Environments

The Institute has worked in Nepal since 2006 on justice and security issues, including supporting a series of dialogues between the Nepalese Police, the justice sector, the general public, and local government. The Institute has conducted numerous initiatives including establishing a school liaison program with the police, developing a radio program on legal frameworks and police procedures, distributing over 1 million pamphlets on justice-related topics and conducting a nationwide survey on justice, security, and RoL.

USIP has been working in Burma since the democratic transition began in 2011. By investing in the cultivation of meaningful sustained relationships with key government and civil society leaders, USIP has built mechanisms to address shared problems related to justice, peace, and security.

## III. International Actors

The nature and scale of international involvement largely depends on the purpose and scope of the mission. Even a unilateral intervention or foreign assistance by the US is likely to involve some level of coordination with coalition countries, the United Nations (UN), IGOs and/or NGOs.

### A. United Nations

The UN has a widely accepted legitimacy and its actions, by definition, are based on approval and funding by its member states. Peace operations and post-conflict operations can undertake a broad range of tasks, as mandated by the UN Security Council, to support the implementation of an agreed peace process. These include:

- Helping parties maintain stability and order
- Helping a state re-establish its authority and secure its monopoly over the legitimate use of force
- Supporting the emergence of legitimate institutions
- Supporting effective police, judicial and corrections structures to uphold RoL
- Providing, on an exceptional basis, interim public security functions until host capacities suffice.

Under the ultimate authority and direction of the UN Secretary-General, responsibility for the overall coordination and coherence of RoL within the UN rests with the RoL Coordination and Resource Group, chaired by the Deputy Secretary-General. In September 2012 the Secretary-General provided new guidance for RoL collective efforts within the UN system<sup>46</sup> directing a more strategic approach to policy and external relations and a flexible approach to coordination of UN programs in over 150 member nations.<sup>47</sup> Additionally at the Headquarters level, the Secretary-General designated the UN Department of Peacekeeping Operations (UNDPKO) and the UN Development Program (UNDP) as the joint global point for the police, justice and corrections areas in RoL in post-conflict and other crisis situations. In this capacity, the UNDPKO and UNDP will support field leaders in carrying out their new responsibilities.

At the field level, the power of UN leadership has been enhanced with field leaders now responsible and accountable for guiding and overseeing UN RoL strategies, resolving political obstacles and coordinating UN country support on RoL, although in-country responsibility for program implementation remains with the multitude of different UN entities. Due to the large number of UN entities potentially working in a country, one of the first tasks for a JA conducting RoL operations should be to become familiar with the various components of the UN mission in country in order to understand the types of activities already underway or likely to be undertaken.

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<sup>46</sup> See Report of the UN Secretary General to UN Security Council s/2013/341 (11 Jun 2013) at para 13 *et seq.*

<sup>47</sup> In at least 70 countries a minimum of 3 UN entities carry out RoL activities. Five or more UN entities currently work on RoL in over 35 countries. See [www.unrol.org](http://www.unrol.org) for specific examples of UN RoL activities.

The UN also funds programs for educating both RoL practitioners and for the host nation. The UN Department of Peacekeeping Operations offers the Rule of Law Training Program for judicial affairs officers in various parts of the world twice a year for six days and the Global Program on Strengthening Rule of Law in Conflict and Post-Conflict Nations provides operational, technical and financial support to over 37 crisis affected countries and situations.<sup>48</sup>

## B. World Bank

The World Bank's mission has evolved from a facilitator of post-war reconstruction and development to its present day mandate of worldwide poverty alleviation and greater shared prosperity. During this evolution the World Bank has expanded from a single institution to an associated group of coordinated development institutions.<sup>49</sup> Despite its name, the World Bank is not a bank in the common sense. Rather, it consists of five development institutions which play different supportive roles in their mission of global poverty reduction and the improvement of living standards:

- International Bank for Reconstruction and Development (IBRD): loans, credit, governance (including RoL) focusing on middle and low income and creditworthy poor countries
- International Development Association (IDA): loans, credit, governance (including RoL) focusing on the poorest countries in the world, largely those in Africa
- International Finance Corporation: governance in collaboration with private investors for development projects, including such efforts as enhancing the effectiveness of commercial courts or introducing alternative dispute resolution
- Multilateral Investment Guarantee Agency: insurance against political risk to investors depending on analysis of country conditions
- International Centre for Settlement of Investment Disputes: provides international facilities for conciliation and arbitration of investment disputes.

### 1. Rule of Law and Development

The World Bank's overarching mission is to reduce poverty.<sup>50</sup> Over the past two decades the World Bank has promoted adherence to RoL as a fundamental element of economic development and poverty reduction as the absence of well-functioning law and justice institutions and the presence of corruption are constraints to economic growth and to the sustainability of development.<sup>51</sup> The importance of a sound justice sector to development is illustrated in cross-country data such as the World Bank's country performance and institutional assessment indicators<sup>52</sup> and the governance indicators which are also used by other donor agencies but are managed by the World Bank.<sup>53</sup>

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<sup>48</sup> See Table 1 of Appendix B.

<sup>49</sup> The World Bank has been in partnership with the UN since the founding of the two organizations in 1944 and 1945 respectively. The formal relationship was defined in a 1947 agreement that "recognizes the bank as an independent specialized agency of the UN as well as a member and observer in many UN bodies." See [www.unelections.org/?q/node/72](http://www.unelections.org/?q/node/72) (last visited 30 Aug 2014).

<sup>50</sup> See The World Bank Group, [www.worldbank.org](http://www.worldbank.org) (last visited 30 Aug 2014).

<sup>51</sup> See WORLD BANK LEGAL VICE PRESIDENCY, INITIATIVES IN JUSTICE REFORM (2009), at p. 1-6, at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JRInitiativestext2009.pdf> (last visited 3 Dec 2013). 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 3 Dec 2013).

<sup>52</sup> The World Bank, *IDA Resource Allocation Index (IRAI) – 2011* [hereinafter World Bank IRAI], available at <http://www.worldbank.org/ida/IRAI-2011.html> (last visited 3 Dec 2013).

<sup>53</sup> The World Bank, *Governance and Anti-corruption*, available at <http://wbi.worldbank.org/wbi/topic/governance> (last visited 3 Dec 2013).

## 2. Justice Reform Projects

The World Bank's various institutions, and in particular IBRD and IDA, provide significant financial and technical assistance for justice reform to developing countries through loans and grants. The World Bank is also increasingly offering reimbursable advisory services to middle-income countries interested in specific technical assistance in the justice sector (and other development areas) which is paid for by governments directly to the World Bank.

Rule of Law and justice reform began at the World Bank in the late 1980s as part of its legal technical assistance to Eastern European countries in transition. Initially, the World Bank focused on working with client countries to improve court services as greater privatization required firms to use the courts to resolve commercial disputes. In subsequent years, at the request of client countries, the World Bank has started to work with countries to build institutional capacity within the criminal justice system.

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

### C. International Monetary Fund

The International Monetary Fund (IMF) is an independent international organization of 188 member countries conceived in July 1944 to create a framework for international economic cooperation.<sup>54</sup> The purposes of the IMF include promoting international monetary cooperation and exchange rate stability, facilitating the expansion and balanced growth of international trade and assisting with balance of payments problems.<sup>55</sup> The IMF pursues these objectives through financial assistance to members, surveillance over members' economic and financial policies, and the provision of technical assistance.

While the IMF has emphasized the promotion of good governance among its membership, its role, 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>56</sup>

### D. The North Atlantic Treaty Organization

The North Atlantic Treaty Organization (NATO) is an international organization<sup>57</sup> chartered by the North Atlantic Treaty signed on 4 April 1949 and consisting of 28 member states<sup>58</sup> who have agreed to a system of collective defense in response to an attack by any external party under Article 5 of the NATO Treaty.<sup>59</sup>

Apart from situations of collective self-defense and from the controversial exception of *Operation Allied Force* in Kosovo 1999, NATO conducts UN peacekeeping and peace-enforcement acts on the basis of UN Security Council resolutions. Although NATO has historically tended not to engage directly in RoL endeavors, its recent contribution to RoL has been significant and included its training mission support in

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<sup>54</sup> <http://www.imf.org/external/about/histcoop.htm> (last visited 10 Jun 14).

<sup>55</sup> Article 1, Articles of Agreement of the International Monetary Fund (purposes of the IMF).

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

<sup>57</sup> NATO is a consensus based international organization, with decision making powers reserved to the North Atlantic Council a representative body of the Member States.

<sup>58</sup> Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Luxemburg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and the USA.

<sup>59</sup> NATO has only invoked Article 5 once, on 4 October 2001 in response to the terrorist attacks of 11 Sep 2001

Iraq (NTM-I) and Afghanistan (NTM-A), its counter-piracy operations off the Horn of Africa and its NATO Rule of Law Field Support Mission (NRoLFSM) in Afghanistan.<sup>60</sup>

### E. Non-Governmental Organizations

Non-governmental organizations play an increasingly important role in the international arena.<sup>61</sup> Working alone, alongside the US military, with other US agencies, or with coalition partners, NGOs are assisting in all the world's trouble spots where there is a need for humanitarian or other assistance. They 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. They cover a diverse range of activities and an increasing number now focus on RoL.

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. While some organizations will seek the protection afforded by armed forces or the use of military transport to move relief supplies to, or sometimes within, the operational area, others may avoid a close affiliation with military forces, preferring autonomous, impartial operations. This is particularly the case if those forces are conducting combat operations in the operational area.

Many NGOs consider their perceived impartiality as their greatest security asset and any form of collaboration, however tangential, that will impact upon this impartiality will be avoided. Some may also avoid cooperation with the military forces out of suspicion that the military intends to take control of, influence, or even prevent their operations. Commanders and their staffs should recognize these concerns, whether valid or not, and where necessary, consult these organizations, along with the competent national or international authorities, to identify local conditions that may impact effective military-NGO cooperation.<sup>62</sup>

Extensive grassroots involvement, local contacts and experience gained in various nations make NGOs valuable sources of information, that they are sometimes willing to share, about local and regional affairs and civilian attitudes. Virtually all NGO operations interact with military operations in some way: they use the same lines of communications, draw on the same sources for local interpreters and translators and compete for buildings and storage space. Establishing mechanisms by which NGOs and the military can work effectively, in harmony, within any given operational area is an essential element of successful RoL operations, and one that is likely to make the overall RoL product more effective.

The creation of a framework for structured civil-military interaction, which is one of the primary functions of CA,<sup>63</sup> allows the military and NGOs to meet and work together in advancing common goals in RoL missions. Accordingly, a climate of cooperation between NGOs and military forces should be the

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<sup>60</sup> For more on NRoLFSM, see [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_06/20110609-Background-Rule\\_of\\_Law-en.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_06/20110609-Background-Rule_of_Law-en.pdf) (last visited 20 Dec 2013). In Afghanistan, in addition to NTM-A and NRoLFSM there have been numerous examples of NATO component led RoL initiatives. *E.g.* the Australian Defence Force's Special Operations Task Group training of Afghan police, prosecutors and judges in southern Afghanistan.

<sup>61</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 20 Dec 2013).

<sup>62</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/sites/default/files/guidelines\\_handout.pdf](http://www.usip.org/sites/default/files/guidelines_handout.pdf) (last visited 29 Aug 2014).

<sup>63</sup> FM 3-57, *supra* note 33, at 1-24 ("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").

goal. It is important to remember, though, that commanders are restricted in what types of support they can provide non-federal entities such as NGOs and, as such, JAs should ensure that any support to NGOs complies with statutory and regulatory restrictions.<sup>64</sup>

Relationships between the military and civilian organizations such as NGOs and IGOs are coordinated at three different levels:

- 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 USAID’s Office of US Foreign Disaster Assistance (OFDA). Because the HOC operates at the national level, it typically consists of senior representatives from the affected country, the US embassy, joint forces, OFDA, NGOs, IGOs, and other major humanitarian organizations.
- Humanitarian Assistance Coordination Center (HACC) – Created by the COCOM’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.

## F. Coalition Partners

Given the increased importance of coalition operations,<sup>65</sup> it is essential for JAs to understand the varied philosophies, goals and structures of coalition forces, including their national approaches to military operations and their national responsibilities for RoL related activities, and in particular nation building activities.<sup>66</sup>

Some coalition partners view RoL programs in a different light to other civilian reconstruction and economic support.<sup>67</sup> For example, the German approach to RoL operations in post-conflict areas focuses on technical and logistics support,<sup>68</sup> although support can be provided to concerning judicial administration systems.<sup>69</sup>

France sees its contribution to the achievement of RoL through the provision of three kinds of assistance: training of police officers and judges, support in the field of legislation reform and making available

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<sup>64</sup> See e.g. US DEP’T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REGULATION (17 Nov 2011).

<sup>65</sup> See the Quadrennial Defense Review 2014.

<sup>66</sup> See CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 312 (2006).

<sup>67</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>68</sup> See German Action Plan, *Civilian Crisis Prevention, Conflict Resolution and Post-Conflict Peacebuilding* 10 (2004), at <http://www.auswaertiges-amt.de/cae/servlet/contentblob/384232/publicationFile/4346/Aktionsplan-EN.pdf> (last visited 16 Sep 2013).

<sup>69</sup> From 2009 German police mentoring teams helped develop the Afghan National Police in Northern Afghanistan through the Focused District Development program.

documentation of a legal or technical nature.<sup>70</sup> A practical example of this contribution was its framework-nation role for the institution of the Afghan Parliament.

The UK's recent *Building Stability Overseas Strategy* outlines the UK approach to helping to stop serious conflict from taking hold in unstable countries. Of particular note is the emphasis on investing in "upstream prevention" helping to build strong, legitimate institutions and robust societies in fragile, often pre-conflict, countries that are capable of managing tensions and shocks so there is a lower likelihood of instability and conflict.<sup>71</sup> More recently, DfID published a policy paper,<sup>72</sup> which examines how DFID can adopt a more "coherent and ambitious" approach to RoL as an element of its development work.

Coalition partners will be bound, as is the US, to comply with their own legal and policy obligations. These may create a marked disparity among the partners as to what they can or cannot do. Judge Advocates therefore need to have an appreciation of the laws and legal traditions of coalition partners and the extent of the applicability of treaties to which coalition partners are party. These differences should not, necessarily, be viewed negatively. They provide opportunities for coalition partners to advance RoL in different, but hopefully complementary, manners in operations throughout the world. An understanding of who does what in the coalition partner's structure will facilitate enhanced efficacy.

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<sup>70</sup> *Id.* at French Ministry of Foreign Affairs, Direction Générale de la Coopération Internationale et du Développement (French International Cooperation) 31 (2005), 32-33.

<sup>71</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/67475/Building-stability-overseas-strategy.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/67475/Building-stability-overseas-strategy.pdf) (last visited 29 Aug 2014).

<sup>72</sup> Policy Approach to Rule of Law, Department for International Development (12 Jul 2013, published 25 Apr 2014) available at <https://www.gov.uk/government/publications/dfid-policy-approach-to-rule-of-law> (last visited 29 Aug 2014).

## CHAPTER 5

# PLANNING FOR RULE OF LAW OPERATIONS

Parts I and II of this chapter look at the strategic and operational frameworks for non-permissive and permissive RoL operations. While Parts III-V look at tactical planning considerations for JAs embarking on a RoL deployment and are of direct applicability to non-permissive RoL operations, JAs engaged in permissive RoL activities should be able to draw lessons from the content. Linked to this chapter at Appendix D is a RoL-tailored guide to the Military Decision-Making Process.

### I. Strategic Planning Framework

#### A. Non-Permissive Rule of Law – Using the Essential Tasks Matrix within the Reconstruction & Stabilization Framework

Current USG reconstruction and stabilization (R&S) policy is aimed at assisting countries or regions “at risk of, in, or in transition from conflict...toward peaceful society.”<sup>1</sup> To this end, DoS has responsibility for coordinating and leading USG R&S activities directed through the CSO. While not the lead agency, DoD nevertheless retains considerable responsibility for engaging in interagency R&S activities (typically in non-permissive or semi-permissive environments) on the basis that “US forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.”<sup>2</sup>

Interagency efforts are channeled through the Interagency Management System (IMS). Approved by the National Security Council (NSC) in March 2007, IMS is designed to systematize and operationalize interagency unity of action. The System was developed in consultation with USAID, DoD and other government departments to perform planning operations, mobilize resources, harmonize efforts with the military, integrate plans and activities, and to coordinate efficiently in conflict prevention and post-conflict reconstruction situations.

Activation of IMS is at the discretion of the SecState, the SecDef and/or the appropriate NSC director. Once activated, IMS formalizes the respective roles and coordination across policymakers, Chiefs of Mission and military commanders to manage R&S engagements at the strategic, operational, and tactical/field levels. The System is comprised of three levels of response:

- A Country Reconstruction & Stabilization Group at the strategic/policy level with a dedicated support staff or Secretariat located principally in Washington D.C.
- An Integration Planning Cell to support the COCOMs
- An Advance Civilian Team to support whole-of-government structures and processes at embassies, under Chief of Mission Authority, augmented by Field Advance Civilian Teams at the tactical level if necessary.

Military participation within IMS depends largely upon the nature and scale of the operation, as dictated by policy and strategic objectives.

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<sup>1</sup> National Security Presidential Directive 44 (NSPD -44) 7 Dec 2005 at 1. *Available at* <http://www.fas.org/irp/offdocs/nspd/nspd-44.html> (last visited 29 May 2014).

<sup>2</sup> DEP'T OF DEF INSTR. 3000.05, STABILITY OPERATIONS, at 2 (para 4c), (16 Sep 2009) [hereinafter DoDI 3000.05], para. 4.3. Note that this preparedness may lead to circumstances where commanders expect tactical-level JAs to provide briefings on host nation commercial, banking, or private property ownership laws. Prior to deployment, great effort is needed to gather all available translations of local laws and regulations to facilitate this analysis as required.

In 2005-2006 DoS developed the Post-Conflict Reconstruction Essential Tasks Matrix (ETM)<sup>3</sup>. The Matrix provides a planning checklist for all participating organizations and is a comprehensive task list which captures and embodies lessons and best practices of R&S operations. It is structured on five broad “stability sectors” and uses a three-phased approach to R&S efforts:

- Initial response (immediate actions of R&S personnel)
- Transformation (short term development)
- Fostering sustainability (long-term development).

The three-phase approach is not necessarily sequential as situations may warrant the implementation of certain tasks drawn from a later phase. Personnel may plan and coordinate monetary policy programs in the early stages of the stabilization effort, even before the country enters the post-conflict phase.

The five stability sectors defined by the ETM are:

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

Sources of instability can affect more than one stability sector. For example, illicit drug trafficking threatens individual and community security, challenges the law enforcement community, and destabilizes the legitimate economy of the country. It is important, therefore, to understand the linkages between each DoS sector and anticipate where JA activities are likely to feed into wider R&S programs.

### **1. Security**

Security must be established before other USG partners can engage in R&S activities. Efforts within the security sector focus on establishing both national security and human security while advancing human rights and developing legitimate institutions and security infrastructure. Transitional security sector reform generally include disarmament, demobilization and reintegration elements which also ties into reconciliation efforts.<sup>4</sup> As indicated throughout the handbook, military involvement is likely to be greater where the host nation suffers from a lack of basic security.

### **2. Justice and Reconciliation**

This sector centers on justice reform and the RoL through support to the host nation’s judiciary, police forces, investigative services, and penal systems. It also includes helping the host nation reform or develop an appropriate body of laws to advance justice and human rights. In post-conflict environments, R&S personnel may also advise the host nation on developing mechanisms for addressing past grievances and working toward reconciliation and remediation.

### **3. Humanitarian Assistance and Social Well-being**

This sector focuses on basic needs such as food distribution, refugees and displaced persons, and sanitation. Such relief contributes to the perception of the host nation government’s legitimacy by

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<sup>3</sup> The ETM is at: <http://2001-2009.state.gov/s/crs/rls/52959.htm> (last visited 29 May 2014). Although this framework is entitled an “Essential Task Matrix,” its title should not be construed to mean that every task on the matrix must be completed to achieve stability: every situation is different, requiring effective mission analysis and course of action development.

<sup>4</sup> See Melanne Civic and Michael Miklaucic, eds., *Monopoly of Force: The Nexus of DDR and SSR* (National Defense University Press, 2011).

providing basic welfare to its citizens. Long-term social development programs such as education and public health further sustain stability and minimize the potential drivers of conflict.

#### **4. Governance and Participation**

Governance is a state's ability to serve its people to include the processes by which interests are articulated, resources managed, and powers exercised. Participation includes methods that actively involve the local populace in forming their government which, in turn, encourages public debate and the exchange of new ideas. Both governance and participation require effective, legitimate political and administrative institution and R&S personnel assist the host nation in determining the most effective governance structure and establishing the foundations for or restoring and advancing citizen participation.

#### **5. Economic Stabilization and Infrastructure**

Economic stabilization and infrastructure involves a state's programs and facilities which generate revenue. Planning, coordinating, and implementing economic growth programs across the interagency requires both short and long-term planning and strong coordination among the interagency partners and the host nation public and private sectors. Within this sector, RoL advisors will typically help develop regulatory and administrative mechanisms within the trade and banking sectors.

### **B. Permissive RoL Operations within the SSA Framework**

Rule of law events in a permissive environment require a willing foreign military partner supported by the government. There must be a genuine dialogue between the foreign military coordinated through the relevant embassy to determine whether a military is genuinely interested in assessing RoL within its institutions. This process can be visualized as a pull process with the foreign nation requesting or pulling information from the DoD rather than a push process with the DoD pushing the event. It is not enough that a foreign military request RoL assistance; it must have the will of the civilian government behind it.

As outlined in Chapters 1 and 4 and as is the case with R&S activities, presidential policy mandates DoS is the lead agency "responsible for the policy, supervision, and general management" of SSA activities<sup>5</sup> which encompasses military SC programs. On a country-by-country basis the vehicle for expressing SSA activities is the relevant embassy's Integrated Country Strategy (ICS).<sup>6</sup> Any RoL plans anticipated as part of a COCOM's regional SC plan will require embassy input and JAs must know where their RoL plans fit into the relevant embassy's ICS as well as the COCOM plan. Therefore, RoL development in a permissive environment requires coordination between the COCOM, the embassy and both military and civilian SSA planners.<sup>7</sup>

The 2010 QDDR instructed DoS and USAID to develop a new multi-layer strategic planning process, covering agency, regional, functional and country-level strategies. In meeting this instruction, each ICS serves as a "...single, multi-year, overarching strategy that encapsulate U.S. government policy priorities, objectives, and the means by which diplomatic engagement, foreign assistance, and other tools will be used to achieve them."<sup>8</sup> The ICS sets mission goals and mission objectives through a coordinated and collaborative planning effort among DoS, DoD, USAID, and other USG agencies operating overseas under Chief of Mission authority. The primary audiences for the ICS are the embassy country team,

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<sup>5</sup> PPD-23 at 9.

<sup>6</sup> White House Fact Sheet: Presidential Policy Directive on Security Sector Assistance, *available at* <http://www.whitehouse.gov/the-press-office/2013/04/05/fact-sheet-us-security-sector-assistance-policy>. (Last checked 4 Mar 2014).

<sup>7</sup> Such coordination usually encompasses the Defense Attaché, OSC and Political Section within the embassy who will liaise with the foreign military to gauge their interest in RoL and memorialize any interaction in the appropriate database (the current database is Global Theater Security Cooperation Management Information System (TSCMIS)).

<sup>8</sup> QDDR 2010 at 191.

bureaus, DoS resource and policy analysts, and senior USG leaders. This three-year strategy directly informs DoS's and USAID's annual budget requests.

In 2013, PPD-23 further directed US departments and agencies to utilize the ICS as “the core organizing document for United States Government SSA activities, promoting unity of effort and a more proactive, strategic, and efficient approach to meet SSA objectives.”<sup>9</sup> Specifically for SSA, the ICS:

- Provides prioritized USG SSA-related objectives
- Determines annual resource requirements and budgetary justifications
- Enables SSA implementation decisions to be made at lower levels when priorities compete
- Provides a framework to coordinate activities throughout the mission
- Links mission goals and objectives to higher level strategies
- Coordinates USG actions to address challenges and opportunities in a country.

In most cases in a permissive environment, a whole-of-government ICS will be in force, guiding all USG assistance and diplomatic outreach. For example in the USAFRICOM Area of Operations (AO), embassies in sub-Saharan Africa completed ICSs in late 2013 to cover the period FY15-17, and for the four countries of the Maghreb, embassies will develop their ICSs in the fall of 2014 to cover the period of FY16-18.

### **1. Human Rights/DoD Leahy Amendment Requirements**

The DoD has, as a matter of policy, performed human rights vetting when using foreign assistance type authority to train foreign militaries. This is to remain consistent with the Leahy amendment requirements for all DoS provided foreign assistance.

In section 8057 of the 2014 NDAA, Congress passed legislation which requires human rights vetting when the DoD uses any of its funds to train, equip or provide other assistance to a foreign military. The law prohibits training, equipment, or the provision of any assistance to members of a unit of a foreign security force if SecDef has credible information that the unit has committed a gross violation of human rights. Thus credible information about one member of a unit, based upon a plain language reading of the law, could result, in the entire unit being barred from receiving training, equipment or other assistance.<sup>10</sup>

There is a remediation provision which the DoD has not yet implemented. If SecDef determines after consultation with SecState that the foreign country has taken all necessary corrective steps to address the gross violation of human rights, the unit will be considered remediated and DoD funded training, equipment or other assistance can be provided. There is also SecDef level waiver provision if the assistance or equipment is needed to assist in disaster relief operations. Given the iterative nature of the law, JAs should always keep up to date with latest Leahy provisions to advise military planners.

### **2. The Scope of Security Cooperation Activities**

Most RoL events in a permissive environment will not have any specialized Congressional authority attached. So, absent fiscal law exceptions (discussed in more detail below and in chapter 6), events must be structured to not cross into unauthorized foreign assistance or security sector reform. When a RoL event is structured to engage in further dialogue, assessment, and information exchange with a foreign military partner regarding their defense institution, the military event could properly be categorized as a mil-to-mil engagement which requires no additional specialized authority. By contrast, an event with the

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<sup>9</sup> See White House Fact Sheet, *supra* note 6.

<sup>10</sup> SecDef Guidance on implementation of 2014 DoD Leahy Law is available on the International and Operational Law Division milsuite page at [https://www.milsuite.mil/book/groups/international-and-operational-law/content?filterID=contentstatus\[published\]~category\[human-rights\]](https://www.milsuite.mil/book/groups/international-and-operational-law/content?filterID=contentstatus[published]~category[human-rights]).

goal of restructuring a foreign defense institution will fall under foreign assistance support requiring specialized legal authority for DoD to proceed or DoS funds and authority.

**a. COCOM Mil-to-Mil Engagements Focused on Rule of Law**

Most mil-to-mil engagements take part in the context of traditional COCOM activities in support of strategic theater security objectives. These exchanges are accomplished through traveling contact teams, and engagement events exchanging basic information regarding tactics, techniques, and procedures. The goals are to exchange information, to ensure interoperability (in the event of combined exercises or future military operations performed together), to inform foreign partner militaries about US military processes, and to learn about foreign military processes. Most of these would not be direct foreign capacity building events, nor should they be structured as foreign assistance training since they will not take place under any specialized legislative authority granting the DoD the authority to conduct foreign training. The structure of these events must also be consistent with the relevant COCOM's theater SC objectives and LOEs. Examples of mil-to-mil engagements that JAs may be involved include:

- The State Partnership Program (SPP) - organized through the individual state's National Guard to promote enhanced bilateral relationships, using the same generalized legal authority available for mil-to-mil engagements.<sup>11</sup>
- The Air Maritime Sector Development program - developed for USAFRICOM using the same generalized legal authority for mil-to-mil engagements but funded as a program of record. Activities include use of the Africa Partnership Station, Africa Partnership Flight and Africa Maritime Law Enforcement Partnership as mil-to-mil engagement tools.

**b. DoD specialized authorities**

These authorities are usually coordinated through the respective COCOM to the Joint Staff and could be used to support RoL events. For example, SecDef is authorized to enter into both reciprocal and non-reciprocal exchange agreements to assign US military personnel to foreign forces and ministries of defense and to receive foreign personnel into the DoD.<sup>12</sup>

The counter terrorism fellowship program (CTFP) authorized at 10 USC 2249c, permits the DoD to pay any costs associated with the education and training of foreign military officers, defense officials, or security officials at military or civilian educational institutions, regional centers, conferences, seminars, or other training programs conducted under the Regional Defense Combating Terrorism Fellowship Program. This authority therefore permits direct training of foreign military.

Section 1203 of the NDAA of FY14 contains a new authority permitting general purpose forces<sup>13</sup> of the US military to train with friendly foreign forces and fund incremental expenses when certain criteria have been met and with SecDef concurrence, but is not an authority to directly train foreign forces.

The Combatant Commanders Initiative Fund (CCIF) is structured to facilitate Combatant Commanders' requests through the Joint Staff, funds and authority for seven categories of projects, which includes the training and education of foreign military.<sup>14</sup> The Chairman of the Joint Chiefs of Staff manages these

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<sup>11</sup> For example USAFRICOM current has eight State Partners: (New York: South Africa, Utah: Morocco, North Dakota: Ghana; Wyoming: Tunisia, California: Nigeria, Vermont: Senegal, North Carolina: Botswana, Michigan: Liberia) and was establishing further partnerships in 2014.

<sup>12</sup> 10 USC 168(c)4.

<sup>13</sup> Expressed in similar terms to 10 USC 2011 which already permits US Special Operations forces to train with foreign special operations forces.

<sup>14</sup> 10 USC 166a.

highly discretionary funds and issues policy regarding their use. Policy is to use CCIF for one-off projects and not for sustained activities.<sup>15</sup>

### **c. Special Legal Authorities (Dual Key Authorities)**

Congress occasionally provides specific authority to the DoD to engage in direct foreign capacity building, training and other types of security assistance support that is similar to foreign assistance. Those funds require coordination through the appropriate COCOM with staffing through the Joint Staff. They often include the need for approvals through the OSD or the DCSA<sup>16</sup> with DoS concurrence. For this reason, they are sometimes referred to as dual key authorities. The most important of these which could be used to authorize RoL events in a permissive environment when the event is more than a mil-to-mil engagement activity is the Global Security Contingency Fund which authorizes the DoD to transfer funds to the DoS for assistance to national military and security forces and for the justice sector (including law enforcement and prisons), RoL programs, and stabilization efforts in a country.

### **d. Department of State Funds and Authority**

Equipment and training is provided to foreign governments through the DoS Foreign Military Sales/Foreign Military Financing programs. This authority could also be used to fund a variety of RoL projects in direct support of capacity building. The primary legislative program addressing military justice reform is the International Military Education and Training (IMET) and the Expanded IMET (E-IMET) program. In addition, each COCOM may have specific programs such as the newly created Peace Keeping Operations (PKO)<sup>17</sup> funded program and the African Military Education Program designed to strengthen African military educational institutions which could fund RoL initiatives.

The DoS has the authority to transfer its funds and authority to DoD to execute foreign assistance cases using a special transfer authority found in Section 632b of the Foreign Assistance Act (FAA), as amended. These agreements are signed by DoS and either the DSCA, OSD, or the relevant combatant commands. Rule of Law events using DoS funds will then be executed by DoD within the parameters of the 632b Agreement.

For the RoL planner, the takeaway lesson is that identifying a special DoD or DoS authority permitting training or capacity building is not in itself legal authority to actually conduct such an event as formal coordination, staffing and approvals which must take place before money is spent and plans finalized.

## **3. TJAG Strategic Guidance**

The 2014 TJAG strategic guidance for legal engagements conducted in furtherance of the Army's security cooperation strategy<sup>18</sup> highlighted the important role that JAs have in developing and executing missions in support of both the Army's strategy and the respective GCC theater SC plans which have been tailored to reflect the foundations and challenges inherent in regional and local operational environments. Underlying SC missions represent a highly diverse set of operations including stability missions, support to governance and rule of law.

The guidance replaces a previously issued "Strategic Engagements Plan" in that it represented an

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<sup>15</sup> Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 7401.01E.

<sup>16</sup> See Chapter 4 for a further discussion of DCSA. It is worth remembering that DCSA is responsible for DIILS which receives funding for some of its activities from the Global Security Contingency Fund and the Global Train and Equip Fund.

<sup>17</sup> IMET and PKO are further examples of funding streams used by DIILS.

<sup>18</sup> Memorandum for Judge Advocate Legal Services Personnel, *Legal Engagements in Support of the Army Security Cooperation Strategy*, (Signed by LTG Flora D. Darpino, TJAG, 13 Apr 2014).

evolution of thought on the importance of legal engagements as recent experience has shown that SC relies on a long-term, thoughtful and deliberate process to build friendships and relationships to make the group stronger overall.

Furthermore, the strategic guidance encourages JAs to look beyond the traditionally perceived roles of lawyers in SC missions and to highlight the most effective ways to handle that mission. The strategic guidance discusses legal engagements in terms of specific authorities to act, the strategic end states the Army is pursuing, and the LOEs for conducting the mission to get there. The LOEs include law of armed conflict, military-to-military (often referred to as mil-to-mil) engagement, and relationships and enhanced interoperability. The guidance is not designed to provide a checklist of tasks that, if accomplished, equated to mission success. Instead it focuses attention on the evolving mission that the Army will be tasked with, so that the JAGC can continue to provide the most effective legal support to operations possible.

## **II. Operational Planning**

Before deploying, a RoL JA will need to be familiar with their commander's inherent desire for immediate and tangible success. Every mission has numerous LOEs that compete for military support and resources and by utilizing the military planning process, JAs can integrate RoL as a Line of Operation (LoO) into the commander's overall plan. Without this integration into the military planning process, JAs may face the perception that their RoL mission is not essential, thus losing priority or access to necessary resources.

When planning RoL LOEs, a JA should attempt to plan in conjunction with (if not in the company of) the RoL counterparts in their superior and subordinate units. For example, division level RoL planners should invite the BCT JAs to join them during pre-deployment planning.<sup>19</sup> At every level, JAs should be prepared for a consuming planning effort. Understanding planning procedures will allow a JA's efforts to integrate with those of the staff, and it will help to ensure the JA's plan is feasible, properly resourced, acceptable to the command, and capable of producing results. Notwithstanding its formulaic process, planning is an art considered further at Appendix D where the MDMP process, as adapted to a RoL context, is considered at length.

### **A. FM 3-07 and Stability Assessment Frameworks**

Recent revisions to FM 3-07<sup>20</sup> provide doctrinal guidance on assessment frameworks, adopting USAID's District Stability Framework and DoS's Interagency Conflict Assessment Framework (ICAF)<sup>21</sup> as model tools for supporting activities of the operations process and enhancing unity of effort. To this end Chapter 4 of FM 3-07 is required reading for any military RoL practitioner.

Although Civil Affairs has the doctrinal lead for RoL, SJAs preparing for an upcoming deployment should anticipate that commanders and staffs will expect the OSJA (hopefully in conjunction with CA and MP representatives) to take on operational responsibilities for RoL activities. Understanding where those activities sit within the military's primary stability tasks is an important foundation in building a

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<sup>19</sup> 25th Infantry Div., Staff Judge Advocate (SJA) Iraq After Action Report (AAR), Multi-National Division – North, Contingency Operating Base Speicher, Iraq, Nov 2008 – Nov 2009, (11 Mar 2010) [hereinafter 25ID IZ AAR, Nov08 – Nov 09]; on file with CLAMO.

<sup>20</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY (2 Jun 2014) [hereinafter FM 3-07].

<sup>21</sup> ICAF (upgraded to ICAF "2002" in June 2004) allows agencies to share a country's conflict dynamics and consensus on potential entry points.

robust and defensible RoL program. The military's five primary stability tasks<sup>22</sup> closely mirror the DoS's ETM stability sectors to ensure coherence with the wider strategic effort:

- Establish civil security
- Establish civil control
- Restore essential services
- Support to governance
- Support economic and infrastructure development.

As with the ETM all the sectors are intertwined and JAs should remain aware of linkages throughout.

### **1. Establish Civil Security**

Civil security involves protecting the population from external and internal threats. Ideally US forces will defeat external threats posed by enemy forces while simultaneously assisting host nation police and security elements to maintain internal security against terrorists, criminals and small, hostile groups. In some situations, no adequate host nation capability for civil security exists and US forces must provide most civil security while developing host capabilities. As soon the host nation security forces can safely perform this task, US forces transition civil security responsibilities to them. Civil security is required as an enabler for all the other stability tasks to be effective. Civil security LOEs include:

- Establishing public order and safety
- Protecting indigenous individuals, institutions, and infrastructure
- Protecting reconstruction and stabilization personnel.

### **2. Establish Civil Control**

This primary stability task is of key importance to JAs as the prevalent strand underpinning it is the promotion of RoL.<sup>23</sup> Doctrinally military RoL activities are CA operations conducted by JAs, international and comparative law specialists, human rights advocates, law enforcement and public safety practitioners, and related specialists to include:

- Establishing public order and safety
- Establishing an interim criminal justice system and supporting justice system reform
- Supporting law enforcement and police reform
- Supporting judicial reform
- Supporting corrections reform
- Supporting war crimes courts and tribunals.<sup>24</sup>

Further details of specific tasks for JAs likely to fall out of these LOEs are listed at FM 3-07 paragraph 1-99 and Chapter 3 of Army Techniques Publication 3-07.5 (Aug 2012).

### **3. Restore Essential Services**

Military involvement in restoring essential services usually occurs in the initial stage of stability operations until a civil agency can provide the services.

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<sup>22</sup> FM 3-07 *supra* note 19, 1-6 and U.S. ARMY DOCTRINE PUBLICATION 3-07: STABILITY (August 2012) at paragraph 45.

<sup>23</sup> FM 3-07 *supra* note 19, 1-12 – 1-13 (“Civil control fosters the rule of law...civil control is based on a society ensuring individuals and groups adhere to the rule of law.”)

<sup>24</sup> Further details of specific tasks for JAs likely to fall out of these LOEs are listed at FM 3-07 *id* paragraph 1-99 and Chapter 3 of Army Techniques Publication 3-07.5 (Aug 2012).

#### 4. Support to Governance

Depending upon the stage of the operation, military support to governance can include:

- Supporting transitional administrations and the development of local governance
- Supporting anti-corruption initiatives
- Supporting elections.

#### 5. Support to Economic and Infrastructure Development

Military forces can significantly improve the economic viability of a local population either by injecting money directly into the economy through construction and service contracts, or by improving the infrastructure that supports the economic base.

### B. Permissive Environment

As the US military attempts to move away from Iraq and Afghanistan to engagement in more permissive environs, JA involvement in RoL activities will follow. Given the important institutional role of the military within any society the provision of broad support to the development of foreign nations' armed forces is of key importance.<sup>25</sup> A 2013 JAGC memorandum makes clear the scope of proposed JA involvement in permissive RoL:

“JAGC will take the lead on the following RoL areas in a permissive environment: working with host nation legal personnel and working with host nation ministry of defense and security forces legal personnel.”<sup>26</sup>

Equally importantly the memorandum states that while staying involved in areas such as detention, anti-corruption and working with host nation police force, JAGC will not take the lead in this area.<sup>27</sup>

Combining this guidance with the various COCOM engagement strategies which focus heavily upon the education of host nation security forces it is clear the main effort for permissive RoL activities is mil-to-mil interaction with host nation legal interlocutors. While often smaller in scale, planning for RoL events in a permissive environment must be a thoughtful, systematic and continuous process. The involvement of JAs in permissive RoL events must take place within COCOM theater security cooperation objectives and could involve working alongside a variety of different missions including Regionally Aligned Forces.

When structuring events in a permissive environment, a RoL JA will need to determine how these events fit into the relevant ICS and should also be aware that information gleaned in their assessments and work in country can support the embassy's next ICS development phase, particularly if carried out within the final 12 to 18 months of execution of the strategy. The embassy must of course concur with any engagement and JAs should never attempt to reach out directly to a foreign military without prior embassy authority.

It is imperative to assess the status of a foreign military's adherence to RoL criteria before planning for RoL events. A nation which desires to govern by and embrace RoL must have a military that abides by RoL or aspires to abide by RoL. For fragile nations to develop their military must possess certain

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<sup>25</sup> See Thomas B. Nachbar, *The US Military's Role in Rule of Law Development: From Intervention to Security Cooperation*, in PROMOTING THE RULE OF LAW: THE PRACTITIONERS' GUIDE TO KEY ISSUES AND DEVELOPMENTS (ABA Publishing 2013) (“A country with a strong, civilian-led ministry of defense is more likely to have a military that is subordinate to civilian authority; a defense establishment that has robust personnel and accounting rules, is less likely to suffer from corruption.”).

<sup>26</sup>The Judge Advocate General's Legal Center Memorandum dated 8 May 2013, approved by TJAG, LTG Chipman 10 Jul 2013, paragraph 2a(1).

<sup>27</sup> *Id* paragraph 4c.

baseline RoL characteristics. Put another way, a struggling democracy whose military does not support and abide by the RoL is at great risk of either falling back into conflict or being subject to the threat of a military coup. Such a failure can destabilize not only the nation in question but an entire region leaving ungoverned spaces and neighboring democracies at risk. Such instability can directly or indirectly affect US national security interests.

As doctrine emerges in the field of permissive RoL engagement, there is currently no set planning template for JAs preparing for this type of activity. However, JAs may find it of assistance to consider the assessment framework currently used by USAFRICOM when assessing permissive RoL activities. This assessment is based upon the grouping of the host nation military under 5 separate categories known as the “5 pillars.”<sup>28</sup> As with any assessment framework, this model must be adapted to specific circumstances but JAs should find the broad issues raised of use at the mission preparation stages.

### **1. The promotion of military subordination to civilian authority**

Judge Advocates should be aware of how the foreign country’s government is structured. If the foreign government is structured so that the military is constitutionally subordinate to civilian authority, JAs should review whether there are indications that the country is being governed consistent with such a structure as, perhaps not surprisingly, there is the possibility the paper version of a government’s structure does not match the reality.

The first place to research the USG position should be through DoS’s annual Human Rights Report available online.<sup>29</sup> This report usually addresses instances of military or security forces operating outside the parameters of civilian authority. A review of any relevant UN reports should also be conducted.

### **2. Supporting development of a culturally appropriate military justice system**

A military which abides by RoL must have a military justice system which possesses basic RoL characteristics. A key difference between a group of armed people and a military force which abides by RoL is discipline underpinned by a functioning and fair military justice system. Initially, JAs should review whether the foreign military has a written military justice code system and a legal framework including codified procedures, processes, rules and standards to administer that military justice system and ensure good order and discipline.

Judge Advocates should address whether leaders apply military justice universally in a system generally perceived as fair and non-corrupt. They should also review whether the military has an effective command and control system and whether there is adequate access to justice. There should be key components of a military justice system which adheres to recognized RoL norms such as guaranteeing legal representation, establishing an independent judiciary, and establishing procedures for judicial review of decisions. A final question is whether there is an adequate penal system capable of effectively and humanely executing lawful punishments.

### **3. Military adherence to Law of Armed Conflict**

Judge Advocates should assess the foreign partner’s military historical adherence to the law of armed conflict (LOAC). Assessments should again start with the DoS Human Rights Report, any relevant United Nations reports and any credible NGO reports such as Human Rights Watch and the International Crisis Group. Additional areas of inquiry should include dialogues with the foreign partner nation on whether they have formal LOAC training programs and exercises within their military.

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<sup>28</sup> *Rule of Law Development at the US Africa Command*, The Public Lawyer, American Bar Association, Vol. 21, No. 2, Summer 2013.

<sup>29</sup> The latest, 2013, Report, published Feb 2014 is available at <http://www.cfr.org/human-rights/departments-state-country-reports-human-rights-practices/p10115> (last checked 14 Oct 14).

#### **4. Observation, respect for, and protection of human rights by the military**

It should also be assessed whether there are indications that the foreign military has historically adhered to human rights responsibilities. As well as the DoS Human Rights Report, UN reports and NGO reports, dialogue should take place with the foreign partner nation about formal training programs within their military addressing human rights responsibilities.

#### **5. A formal system designed to prevent corruption**

Judge Advocates should review whether the foreign military partner has a formal Inspector General (IG) program, or other similar program, to combat corruption and enhance accountability.

### **III. Tactical Rule of Law Planning**

#### **A. The Initial Assessment - Establishing the Baseline**

A detailed initial assessment pre-deployment sets parameters for success and enables the abstract to become more tangible. Essential questions to ask when beginning an assessment are: what are the needs; and what is the desired outcome? However, once deployed, a JA cannot rest on their laurels and must constantly re-evaluate the RoL mission, their contemporaneous operational situation, and planning requirements.

Once a JA identifies a likely RoL end state,<sup>30</sup> a baseline assessment should be compiled to formulate a starting point from which to work towards that end state. Early on a typical judicial-based RoL assessment may consider the number of courthouses, location of judges, education of prosecutors, drivers of corruption, strength or weakness of defense attorneys and competence of administrators in a specific region.<sup>31</sup> To inform this assessment, JAs should, wherever possible, consult as many different sources of data, such as intelligence, interagency colleagues, coalition partners, surveys and polling statistics.<sup>32</sup> The actual process of gathering information from other agencies, NGOs, and IOs is often a good way to meet the other RoL practitioners in the area and plant the seeds for an integrated and synchronized RoL effort,<sup>33</sup> but these other parties may be consumed with their immediate priorities, so it is not worth sacrificing valuable planning and execution time waiting for others unable to respond. At minimum, a JA should know exactly how to find and communicate with key personnel from other stakeholder groups. Most importantly, and if at all possible, local people who are affected most by the RoL, or lack of it, should be asked for their views and recommendations. A starting point for the sort of questions that JAs should ask themselves when conducting a baseline assessment is included at the first half of Appendix E.

The RoL team should focus on learning what is known and, perhaps more importantly, what is not known about the RoL environment in their area of concern. As well as reporting the ground truth, analysis must be undertaken to determine which information explains the difference between the desired RoL condition and the current conditions. In identifying problem areas, the RoL JA should seek to identify the root

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<sup>30</sup> See Appendix D for a detailed description of MDMP but on receipt of his commander's mission (step 1) a JA will need to conduct mission analysis (step 2) which will be informed by their baseline assessment.

<sup>31</sup> Time is inevitably a factor and a JA with little of this precious commodity would do well to be reminded of Dr David Kilcullen's snapshot of the health of the RoL at a given point of time outlined in *Measuring Progress in Afghanistan* in COUNTERINSURGENCY (Oxford University Press 2010) as being measurable in the answers to two questions: where do the judges sleep? And, if your bicycle was stolen to whom would you report it?

<sup>32</sup> U.S. JOINT FORCES COMMAND, UNIFIED ACTION HANDBOOK SERIES BOOK FIVE, HANDBOOK FOR MILITARY SUPPORT TO RULE OF LAW AND SECURITY SECTOR REFORM, ch. VII at 3-4 (13 Jun 2011).

<sup>33</sup> Given the plethora of individual RoL actors, drawing upon the findings of other governments, donors and stakeholders is an economic manner in which to collect data and addresses the most often criticized aspect of RoL assistance—the piecemeal, uncoordinated, and donor-driven approach to justice (and security) institutions. See 2011 United Nations New Voices: *National Perspectives on Rule of Law Assistance* (2011).

cause of the problem, not merely the symptoms. From this RoL centers of gravity can be extrapolated.<sup>34</sup> Obstacles will need to be eliminated and beneficial effects protected. For example, a problem with RoL operations in Afghanistan was that local advocates for change were supported and encouraged, but not always protected. As soon as reform gained traction or had positive effects, individuals benefitting from the absence of law would kill or otherwise silence such advocates through coercion.

### **Assessment Fatigue and Coordination**

Many redeploying JAs have identified “assessment fatigue”—repeated assessments from different agencies or multiple levels of headquarters — as a major problem in conducting RoL operations. When different USG agencies ask for duplicative or similar information, it demonstrates to their host nation counterparts that there is no single plan or coordinated RoL effort which can quick erode professional respect and personal trust for the RoL operative on the ground. It is critical to coordinate assessments with all levels and agencies operating in the RoL arena and, to the extent possible, rely on information already gathered. In particular, a JA deploying to a theater with an ongoing RoL program should be familiar with existing assessments before creating new ones.

Analysis can follow from a review of the physical environment, infrastructure and local resources through to an understanding of less quantifiable cultures and practices. For example, are the criminal courts trying insurgent cases, and if not, why not? If the clerks were given computers, would they know how to use them? Could they maintain them? Is the population choosing to use the government’s court systems to resolve its disputes, and if not, why not? Do the police have the confidence of the population, and if not, why not? Systems analysis can be used to understand the tangled network of systems that compose the RoL environment.<sup>35</sup> The sheer number of considerations can be overwhelming. Unless time and resources are limitless, adopting an 80% solution that produces a plan vice a 100% solution that never leaves the drawing board, will be the practitioner’s best bet – remembering, of course, that the drawing board does not need to start with a blank piece of paper.

An important byproduct of the assessment process is identifying information that is not known but is critical to decision-making. Often, information gained from assessments – critical to decision-making – may ultimately become part of a Commander’s Critical Information Requirement (CCIR). Partnership with the host nation in the assessment phase encourages domestic “ownership” of RoL development, in turn furthering the twin goals of sustaining and legitimatizing reform. This approach is in keeping with the “Sector Wide Approach” (SWAp) to international RoL development programs, and indeed to international aid programs generally.<sup>36</sup>

## **B. Maintaining the Rule of Law**

There is a temptation to sit back after the RoL assessment stage as been completed having identified measurable issues and proposed seemingly logical and “workable” solutions. Often these solutions will

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<sup>34</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATIONS PLANNING (11 Aug 2011) at IV-8. 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.

<sup>35</sup> *Id.* at III-16 – III-19 (on the “systems perspective” and its place assessing the environment).

<sup>36</sup> SWAp – an approach that aims to bring stakeholders together under one umbrella and characterized by a set of operating principles rather than a specific package of policies or activities. Other benefits attributed to this approach are the production of a single (vice public and private) sector policy, and common, realistic and agreed procedures for funding, expenditure, and monitoring.

soon become unworkable if JAs do not maintain personal relationships with host nation actors and do not continue researching local structures and systems.

### **1. Identify Who the Players Are**

Constantly verify who is in place. The most ambitious plans for reform can be undermined by the simple fact that there are not enough host nation personnel needed to perform the tasks. Early visits in particular should focus on identifying and meeting key personnel and conducting a visual assessment of physical structures. When meeting with local judicial officials try to understand the organizational structure of the court, the hierarchy of judges, the appellate process, and the administrative processes such as the scheduling of cases and the management of court records and dockets.

### **2. Understanding the Roles of All Players and Political Will**

As well as the leadership, junior and mid-level justice sector officials can be important actors. These individuals can sometimes have disproportionate influence in relation to their formal appointment and as a group can either support a reform program or sabotage it.<sup>37</sup> Understand positive and negative influences, such as:

- Where do loyalties/obligations lie (tribal, ethnic, religious, bureaucratic, financial)?
- What influences opposed to the RoL exist (corruption, poverty, foreign influences, crime, fear, insurgency, lack of education)?

Do not assume away a conflict of interest. Regardless of how polite and accommodating an official is in your presence, their ability to undermine RoL efforts in your absence should not be underestimated. During pre-deployment, the ability to gather detailed information about important, but lower level players within a foreign nation's bureaucracy may be limited; but, as a theater becomes more mature this information becomes easier to obtain.

Major players also exist outside the government. These include tribal and religious leaders, academics (take particular note of local law schools), businesses (which, when legitimate, generally see greater profit in secure environments), unions or bar associations, the media, NGOs and neighboring foreign officials with an interest in their neighbor's RoL progress. It is virtually inevitable that the quality of specific information available to the RoL JA will increase after arrival in the AO.

### **3. Capabilities and Needs on the Ground?**

While an initial assessment should have revealed capabilities and tools available within the host nation to conduct justice sector operations and reform, JAs should remember that the mere existence of equipment without a plan for how to use it effectively in support of RoL operation is not necessarily a positive contribution to the RoL mission. Donor nations and organizations often want to contribute what they *have*, rather than what the host country actually *needs*.

It is important to keep updated as to the number and physical capacity of courts, law enforcement and detention facilities and the amount of supplies and equipment within them, but it is more important to monitor how buildings and supplies are being used: a tree with shade is more use than a bespoke building with no electricity to power air-conditioning. Similarly, if a JA sees a pile of costly but dusty computers stacked in a corner then the chances are that the current RoL program can be tweaked somewhat.

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<sup>37</sup> For instance, one common RoL obstacle is endemic low-level corruption surrounding basic government services such as bribes for driver's licenses which can stultify wider reform.

#### **4. Funding**

All formal, and some informal, RoL systems require funding to pay wages, to maintain infrastructure and equipment, to provide education and training or to deliver public awareness and information programs. Additionally the ongoing assessment and evaluation aspect of RoLs programs bear a cost. The RoL JA must anticipate and become familiar with the host nation and external funding systems and constraints<sup>38</sup> to ensure that current and future requirements are identified and planned for.

#### **5. Assess the Status of Trial (criminal, civil judgments), Property, and Vital (marriage, divorce, births, and citizenship) Records**

In the aftermath of conflict or sectarian violence 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. Thereafter bringing simple organization principles to record keeping and helping to maintain such a system 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 which is a relatively common method of changing the outcome of cases in a dysfunctional system.

#### **6. History and Traditions of the Legal System**

A customary justice system may exist beyond, or, more likely, in parallel with the formal judicial system. If so, the RoL JA should evaluate the extent to which the formal and customary judicial systems interact and how they are perceived. The formal system may be viewed as slow, uncertain, expensive and corrupt but the informal system – which historically may have delivered a significant part of the society’s dispute resolution functions – may also suffer from its own inherent problems such as a lack of respect for universal human rights. The challenge is more likely to be in understanding the ongoing interaction between parallel systems and, having done so, designing meaningful, and operationally significant, measurements to record effect and performance over time.<sup>39</sup>

It critical throughout that any personal views that JAs may have as to the intrinsic validity of customary justice systems are tailored to the current circumstances of the host nation.

### **IV. Metrics**

Metrics measure performance. They are essential in informing course of action (COA) development during step 3 of the MDMP process and no enduring LOEs exist thereafter without some method of assessing performance. Once deployed into the host nation the RoL JA will need to review existing metrics or initiate new metrics. Metrics answer two questions which need to be constantly reviewed:

- Have we selected the correct objectives (or “are we doing the right things)?
- Are we pursuing those objectives effectively (or “are we doing things right”)?

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<sup>38</sup> An example of a prevalent internal constraint in Afghanistan was the practice among police chiefs to pad payroll with the names of officers to boost head-counts used by coalition forces to collect artificially enhanced payroll checks. Such leadership often gained further income by taking a percentage of each genuine officer’s salary.

<sup>39</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. It has now been incorporated into CUSTOMARY JUSTICE AND THE RULE OF LAW IN WAR TORN SOCIETIES, (Deborah Isser ed., United States Institute of Peace, 2011). The latter study offers an analytical framework for assessing customary justice systems applicable to any country.

The second half of Appendix E contains a collection of metric frameworks used in Iraq and Afghanistan which should provide a useful starting point for JAs seeking to devise new metrics.

It is important to recognize that applying metrics to a RoL mission is an attempt to place numbers upon an intangible—the level of trust and reliance the population has in its legal institutions. Metrics are important for conveying a subjective and intangible concept to higher headquarters and civilian policy makers, but they have limitations and should never be a complete replacement for the insight, common sense, and intuition of a JA as to whether the population has confidence that the RoL is growing or diminishing in their society. Attorneys perform these missions, not accountant or engineers, because of their legal training and judgment which enables them to discern patterns and trends out of otherwise seemingly chaotic circumstances.

## **A. Correct Metrics**

Performance is particularly hard to demonstrate in RoL programs where an ultimate end state may require generational change. Given the long-term nature of RoL, effective RoL measurement systems should track the advancement of RoL rather than its achievement of definitive set criteria and each measurement systems should include assessment, monitoring, and evaluation phases. Consistent monitoring of metrics allows for an appraisal of progress against the baseline goals set at the assessment stage and is enhanced by a more detailed, periodical evaluation of progress and the assumptions behind the metrics themselves.

The importance of choosing the correct metrics cannot be overstated. Once put in place, the RoL program will “work to the metric,” so an incorrect metric will derail progress toward the intended effect. Metrics should be carefully designed to serve the longer-term outcomes—not to demonstrate short-term success, despite pressure from commanders. Interpretation of indicators is critically important and requires informed expert judgment: it is not enough merely to count incidents or conduct quantitative analysis as interpretation should be a qualitative activity based on familiarity with the environment and conducted by experienced personnel able to properly detect trends.<sup>40</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.

### **Interpreting Metrics**

In Marjah in southern Afghanistan in 2010 a hasty mapping of detainee-handling revealed disturbing trends: the conviction rate for Coalition-captured detainees was 30-40% while the conviction rate for Afghan-captured detainees was 3-4%. The largest “leak” in the system was due to 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 patrons. While this problem was not easily solved, effective metrics helped determine that the issue was not driven primarily by resources or training, and the coalition was able to bring influence to bear where it most mattered.

## **B. Developing Metrics**

Judge Advocates should use various data sources to develop metric including wherever possible public surveys, expert surveys and administrative data, etc, as doing so allows for RoL initiatives to be measured

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<sup>40</sup> Kilcullen, *supra* note 30, 5.

from diverse perspectives.<sup>41</sup> The Vera Institute for Justice offers a number of different indicators that are traditionally used in developing metrics:

- Proportions and Rates (e.g., changes in the rate of homicides per month)
- Ranks (e.g., asking residents of a town to rank the biggest problems in their community)
- Dichotomous indicators (non-numerical indicators identifying whether an institution, policy, function, or law exists; e.g., recognition of domestic violence as a crime)
- Indices (multiple indicators combined into single measures, where each measure is assigned an individual weight based on the weight of its association to the concept the index represents).<sup>42</sup>

To prevent skewed results, indicators can be grouped into “baskets” which in turn generate a more nuanced assessment of progress.<sup>43</sup> Baskets makes it more likely that biases will be cancelled out and will compensate for limitations in any one source of data. For instance, crime rates often rise when police become more effective and legitimate, as people begin to report crimes that previously went unreported.

Deep social and political change is generally non-linear and non-incremental. Changes to the RoL may jump ahead during windows of opportunity and then may seem to stagnate when political will is not present. Therefore, an important factor to consider when developing metrics is whether they can accurately reflect changes throughout short periods of time of up to a year.<sup>44</sup> It is also necessary to track outcomes that may not necessarily be linear but are important such as changes in attitude towards courts, police legitimacy and public views on domestic violence and corruption.

Another concern is that results will only reflect the experience and viewpoint of the dominant group. Disaggregating the data into groups, for example by income, gender, age or region, provides the ability to see the discrepancies in progress, if any, that exist across different groups.<sup>45</sup>

### **Does Your Metric Really Measure Progress?**

“Money spent” is NOT a measurement of progress and JAs should resist pressure to spend funds on projects not linked to RoL objectives or overly-expensive.<sup>46</sup> Likewise, “items purchased” is an inadequate metric when it does not ask qualitative questions. Giving computers to a courthouse may indicate success in terms of performance, but it fails to measure effectiveness. A qualitative assessment would identify whether local officials were able to use and sustain the computers (computers are always useless to the illiterate and useless to everyone if broken).<sup>47</sup>

## **C. Gathering the Data**

Despite the critical role of assessment, few units will be willing to dedicate resources to a significant collection effort unless ordered to do so. Wherever possible JAs should seek out non-military partners

<sup>41</sup> *Id.* at 14-15; *see also* U.N. Dep’t of Peacekeeping Operations and Office of the U.N. High Comm’r for Human Rights, *The United Nations Rule of Law Indicators Implementation Guide and Project Tools*, at 1 (2011).

<sup>42</sup> *Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (Vera Inst. of Justice), Nov 2003, at 11 [hereinafter *Measuring Progress toward Safety and Justice*].

<sup>43</sup> *Measuring Progress toward Safety and Justice*, *supra* note 26 at 15.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> *See* 1st Cavalry Division, SJA Iraq AAR, Multi-National Division – Baghdad/Multi-National Division – Center, Camp Liberty, Iraq, Jan 2009 – Jan 2010, (1 Apr 2010); on file with CLAMO.

<sup>47</sup> *See* 2d Heavy Brigade Combat Team, 1st Infantry Division, Brigade Judge Advocate (BJA) Iraq AAR, Camp Liberty, Iraq, Oct 2008 – Sep 2009, (24 Nov 2009) on file with CLAMO.

who may already possess the required information.<sup>48</sup> If using military personnel, JAs should ensure units understand the intent of the metrics and the role they play in adapting the RoL plan.<sup>49</sup> If requested information does not survive a cost-benefit analysis in terms of the other operational requirements that will have to be dropped to ensure collection and the risk imposed in gathering the information, then the collection requirement must be reframed.<sup>50</sup> When two separate sets of metrics (i.e. for detention operations and for the judiciary) ask for the same information, then at least one set of metrics is improperly off-point and a waste of manpower resources.<sup>51</sup>

The point that bears most repeating is that any measurement system must be tailored to suit the situation at hand. There is no cookie-cutter approach to measuring success for every RoL program and adjusting the plan to the specific needs of the JA's area of responsibility will encourage success. Coordination with all parties involved is essential to this endeavor as it is rare for a single authority to have visibility, let alone control, of the dozens of RoL initiatives in country. With few people on the ground for more than twelve months poor programmatic continuity easily leads to stove-piped gaps and overlaps with projects frequently unconnected to any strategic framework. What coordination does exist is usually personality-driven and not institutional so JAs should endeavor to set their replacements up for success by readily transferring knowledge and experience to ensure consistency.

#### **D. The Importance of the Long-Term**

Historically, states build RoL over long periods of time. Understanding the theory by which change will come about—and then picking metrics based on that theory of change—can be important to capturing long-term changes even when effects are unlikely to happen in short time periods. For instance, if priority is accorded to educating a new generation of merit-based judges who believe in the independence of the judiciary, then it may take fifteen years for them to improve the overall operation of the court system. Merely measuring outputs – such as how many judges have been trained – does not say much about whether the training is effective. However conducting attitude surveys of judges before training, and then a year after training, could inform meaningful assessment on judicial independence.

The preference in all operations is to set goals based on tangible, measurable criteria. In RoL projects, temptation to set measurable goals pushes RoL projects toward either improving physical infrastructure, such as courthouses or jails, or implementing programs whose completion can be easily monitored, such as establishing training programs and measuring the number of graduates of the program. Such institutional improvements can be valuable, but RoL projects should ultimately focus on bringing about particular *effects*<sup>52</sup> along the path towards a specific end-state.<sup>53</sup> Thus, it is critical to keep in mind what values RoL represent, so those values drive reform rather than more intermediate, institutionally focused objectives.<sup>54</sup> A nation with beautifully constructed courthouses may nevertheless fail to achieve RoL if

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<sup>48</sup> XVIII Airborne Corps, Office of the Staff Judge Advocate (OSJA) Iraq AAR, Multi-National Corps – Iraq, Baghdad, Iraq, Feb 2008 – Apr 2009, (9-11 Jun 2009) [hereinafter XVIII ABC IZ AAR, Feb 08 – Apr 09] on file with CLAMO. In Iraq the High Judicial Council received reports from many of the lower courts that contained useful statistics.

<sup>49</sup> 41st Fires Brigade, BJA Iraq AAR, Forward Operating Base Delta, Iraq, Feb 2008 – Jul 2009, (7 Jul 2009) [hereinafter 41st Fires BDE IZ AAR, Feb 08 – Jul 09] on file with CLAMO.

<sup>50</sup> 4th Cavalry Combat Team, 1st Cavalry Division, BJA Iraq AAR, Tallil Airbase, Iraq, Jun 2008 – Jun 2009, (14 Aug 2009) on file with CLAMO.

<sup>51</sup> 41st Fires BDE IZ AAR, Feb 08 – Jul 09 *supra* note 48.

<sup>52</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATIONS PLANNING at III-20 (11 Aug 2011) (“[a]n effect is a physical and/or behavioral state of a system that results from an action, a set of actions, or another effect,” describing the relative role of objectives, effects, and end states in military planning).

<sup>53</sup> *Id.* at xxi (“Military end state is the set of required conditions that defines achievement of all military objectives.”)

<sup>54</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).

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.

Long-term progress is furthered by designing metrics in coordination with host nation counterparts. This gives them understanding and ownership of the process, which can provide near-term enthusiasm (or at least tolerance) for the RoL goals and in the long-term will allow them to continue programs with the same focus. While there is a danger that officials will doctor data to match the metrics, this is true regardless of the scope of the metric and a danger that only be alleviated if JAs feel able to work in a trust-based partnership.

## V. Deployment Planning

This section of the *Handbook* discusses generic planning for a deployment and is intended as a practical aid to getting on the plane and functioning in theater properly prepared as distinct from the more conceptual issues raised earlier. Issues raised in section are in three timeframes:<sup>55</sup>

- Pre-deployment (approximately -180 to -30 days prior to deployment)
- Initial deployment (approximately -30 to +90 days of arrival in the area of operations)
- Sustained deployment (approximately +91 days to indefinite).

### A. Pre-deployment Planning (D minus 180 to 30)

#### 1. Staffing Considerations

If at all possible the assigned RoL JA should be a separate member of the staff, not the commander's legal advisor. This will help to ensure RoL operations are conducted efficiently and minimize confusion between assigned JA roles as staff advisors and RoL advisors. The RoL JA will need to be a proficient briefer and be able to use PowerPoint effectively.<sup>56</sup> The division and brigade staffs should have at least one NCO in support to ensure information flow while the attorney(s) are circulating in the AO.<sup>57</sup>

At the brigade level and in Special Operations Task Forces JAs may have to perform the RoL mission in addition to traditional legal work, nonetheless, Brigade JAs have found that the combined workload generally requires more than two attorneys<sup>58</sup> and where possible one attorney should be specifically tasked and trained for the RoL role.<sup>59</sup> The staff might also be occasionally augmented by a detention operations JA who has been cross-trained for the purpose of mitigating the RoL workload.<sup>60</sup> Staffing

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<sup>55</sup> The timelines are indicative and will vary depending upon the nature of the conflict, the manner of entry into theater, the nature of the mission and whether this is an initial entry or a follow-on rotation.

<sup>56</sup> 34th Infantry Division, Minnesota Army National Guard, SJA Iraq AAR, Multi-National Division – South, Basra, Iraq, Apr 2009 – Feb 2010, (23 Feb 2010) on file with CLAMO. *But see* Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint*, N.Y. TIMES, 27 Apr 2010, at A1 (available at <http://www.nytimes.com/2010/04/27/world/27powerpoint.html>).

<sup>57</sup> *Id.*

<sup>58</sup> 2d Battalion, 10th Special Forces Group (Airborne), Special Operations Task Force Legal Advisor Iraq AAR, Victory Base Complex, Baghdad, Iraq, Jul 2009 – Mar 2010, (15 Jun 2010) on file with CLAMO.

<sup>59</sup> 1st Brigade Combat Team, 4th Infantry Division, Brigade Judge Advocate Iraq After Action Report, Mar 2008 – Mar 2009, (28 April 2009) on file with CLAMO; 1st Armored Div., OSJA Iraq AAR, Multi-National Division – North, Contingency Operating Base Speicher, Iraq, Sep 2007 – Dec 2008, (19 Feb 2009) [hereinafter 1AD IZ AAR, Sep 07 – Dec 08] on file with CLAMO.

<sup>60</sup> 10th Mountain Division (Light Infantry), OSJA Iraq AAR, Multi-National Division – Center/Multi-National Division – South, Camp Victory/Basra, Iraq, May 2008 – May 2009, (25 June 2009) on file with CLAMO.

requirements will shift as the operational environment develops. Judge Advocates in leadership roles should be prepared to plus up or reduce RoL manning as the situation dictates.<sup>61</sup>

Knowing whether JAs will be working in a centralized headquarters environment with other JAs or by him/herself with a tactical unit or other agencies is important as this will impact upon planning for:

- The numbers of sets of legal resources (manuals/CDs, computers)
- Communications capabilities (phones, email, and technical reporting channels)
- Chain of command and reporting issues.

## 2. Understand the Host Nation Legal Environment

Influencing the RoL will inevitably require an understanding of the local legal system and the societal context within which it operates and a failure to prepare in advance will make the mission significantly harder. For example, many units that ultimately became responsible for restoring the Iraqi legal system went into the mission with very little understanding of civil law systems in general, let alone knowledge or copies of host laws.<sup>62</sup> Even outside the RoL LOEs commanders often require JA advice on issues related to host nation commercial and land law to further other LOEs. The pre-deployment phase can be used to fill this knowledge gap and gain a general understanding of the host nation legal system, thereby allowing a more immediate and effective engagement of that system upon arrival in theater.

Aside from supporting the commander and staff, JAs have often served as mentors to local judges and prosecutors. They enter this role frequently at a disadvantage because of their youth relative to those they advise. This initial lack of credibility is compounded if a JA fails to understand basic host nation law<sup>63</sup> and JAs should not burden those who they are “mentoring” with basic questions that could have been answered in their own time, or attempt to indiscriminately foist US procedure or law upon them.

A suggested approach to understanding a host nation legal system in the pre-deployment phase is:

- Step 1. Understand the legal traditions and the political and historical context.
- Step 2. Understand the roles and interests of major players with particular attention to those who might potentially support reform as well as those who benefit from the *status quo*
- Step 3. Examine program options across the spectrum of RoL - do not be confined to formal justice sector initiatives.
- Step 4. Assess the justice sector. Assess the legal framework as well as justice institutions.

## 3. Pre-Deployment Resources

Judge Advocates should develop a library of theater-specific legal materials during the pre-deployment stage. This library will continue to grow following deployment. Core materials should include (in English and the local language) a host nation’s:

- Constitution
- Criminal code and criminal procedure code
- Civil code and civil procedure code
- Administrative law
- Citizenship law
- Property law
- Laws on organization of the police and prisons.

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<sup>61</sup> 4th Infantry Div., OSJA, Iraq AAR, Multi-National Division – Baghdad, Camp Liberty, Iraq, Nov 2007 – Feb 2009, (30 Apr 2009) on file with CLAMO; XVIII ABC IZ AAR, FEB 08 – APR 09, *supra* note 46.

<sup>62</sup> LTC Craig Trebilcock, Legal Assessment of Southern Iraq, 358th Civil Affairs Brigade (2003).

<sup>63</sup> 25ID IZ AAR, Nov 2008 – Nov 2009, *supra* note 18.

Much of this information can be obtained through consultation with DoS, including relevant country teams. However, if the necessary materials cannot be obtained through regular channels, these resources may often be found in English translation through:

- Library of Congress
- OTJAG
- Law school libraries (domestic and foreign)
- Large civilian law firms.<sup>64</sup>

Of course, operational security requirements may influence the manner in which information is solicited, but in addition to obtaining relevant host nation black letter law, the JA RoL practitioner should draw upon the extensive post-conflict RoL experience of the other organizations listed in Chapter 4 such as DoS, USAID and the UN.

#### **4. Plan for Coordination with other Rule of Law Participants**

Coordination with other agencies and organizations yields the most effective and lasting results even if the initial stage of a mission into a non-permissive environment is anticipated to be an entirely military task. Being aware during the pre-deployment stage of the number and nature of other USG RoL professionals with an anticipated involvement will permit meaningful planning for future stages of operations.

During initial entry, the RoL JA may often be alone among other military operators such as MP and CA personnel so it is important that their voice is not drowned out in the clamor to rebuild infrastructure and set up other more attention-grabbing stabilization LOEs. Setting up a RoL working group at the division level early in the planning will help to ensure that RoL remains visible and integrated within wider stabilization priorities.

#### **5. Anticipate and Plan for Linguist Assets**

The RoL JA should prioritize the need for translators and interpreters and should always be aware of cultural/sectarian divisions within the AO that might impact upon effectiveness. 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. It is also important to remember that a linguist with a lay background offers different capabilities to one with a legal background or training.

#### **6. Tactical Considerations**

Those engaged in RoL missions must be mobile, have effective communication systems and be able to provide their own security, as a RoL team that deploys to a non-permissive environment without the ability to defend itself in a convoy will be largely ineffective and place other lives at risk. In recent years many JAs and paralegals have performed security tasks such as “Guardian Angel” duties at shuras and shifts on perimeter security and it is incumbent on all JAs to maintain tactical proficiency when deployed.<sup>65</sup>

Deployed JAs have historically been hampered by a lack of organic transportation capability in conducting their RoL role. CA units, in contrast, often deploy with their own transportation capability. If possible, JAs should find out which CA assets will be operating in the AO and make preliminary contact.

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<sup>64</sup> Firms engaged in international business will have treaties/civil codes or practice notes for foreign nations. Many such firms also have JA reservists or former JAs employed who are often willing to be of assistance.

<sup>65</sup> The term “Guardian Angel” is used to describe the role of close quarter armed overwatch to deter insider attacks from host nation security forces.

## **7. Rule of Law Pre-Deployment Briefings for Commanders**

Judge Advocates need to educate commanders, operations officers, and staff planners prior to deployment upon how importantly RoL issues can impact upon mission accomplishment. It should not be assumed that warfighting battalion and brigade commanders will readily appreciate how something as intangible as the local populace's attitude toward their legal institutions can have a direct impact upon security and stability. To this end, JAs must be able to explain how RoL nests within the wider constructs of stability operations or COIN.

### **B. Initial Deployment Planning (D minus 30 to plus 90)**

Immediately before deployment JAs will likely be occupied with pre-deployment processing, preparing equipment for shipment, and personal issues. Accordingly, the D-30 RoL plan will most probably be that which exists upon arrival in theater. Following deployment, RoL teams may spend several weeks at intermediate staging bases (ISBs).<sup>66</sup> If so, they should make contact with the ISB's S-2 section in order to determine what local information it has that is of relevance to RoL.

The planning cycle will go into high gear upon arrival in theater. Frequently the nature of the expected mission or individual assignment changes, and command and reporting relationships are altered to meet the reality on the ground. Significantly the RoL team will come into contact for the first time with the infrastructure and personnel with whom they will be directly conducting the RoL operation and will be awash with new information as they begin to update their assessment of host nation RoL. During this initial deployment phase the RoL JA will need to identify short-term goals, activities and strategies that will demonstrate early success and generate political support in a post-conflict setting where conditions are evolving rapidly. They will also need to assign responsibilities, designate timelines and provide performance benchmarks for both the initial deployment phase and the longer term sustained deployment phase.

#### **1. Provide for Demonstrable Early Success**

The conclusion of armed conflict or the immediate aftermath of a natural disaster provide a limited time within which to secure the confidence and support of the local population. Despite the inherent long-term nature of meaningful RoL reform, the most intelligent, ambitious and strategically-oriented plan to restore the RoL may rapidly become irrelevant unless some simple "quick wins" are front-loaded into the plan to create an atmosphere of progress and a return to normalcy. Judge Advocates should be prepared to use these kinds of projects in order to maintain momentum and continually reinforce positive perceptions.

When short-term measures are used, they should, if possible, be performed under a mantle of authority consistent with the preexisting criminal code. It will be easier to succeed in long-term reform if the emergency measures initially relied upon are grounded in the host nation law, as adherence to an existing legal code at each step strengthens, rather than undermines, its legitimacy in the eyes of the population.

As security is established, legislative and executive (to include policing) functions can be restored and judges can begin working. When necessary, these officials can work from temporary facilities until new structures are built in the secure environment. However, constructing infrastructure such as government buildings, courts, police stations and prisons is counterproductive if it is then destroyed or left vacant.

#### **2. Create Mechanisms for Locals to Interface Positively with their Legal System**

Judge Advocates should strive to increase the opportunities for the populace to access RoL institutions. They should work to make local RoL institutions transparent and trustworthy by planning mechanisms for

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<sup>66</sup> *E.g.*, Hungary for Joint Endeavor; Saudi Arabia for Desert Storm; Kuwait for OIF.

positive interaction. Encouraging a local law school to sponsor conferences on the constitution and human rights involving government officials and the public but with no overt US presence proved to be a great success in one instance in Iraq.<sup>67</sup> On another occasion the Iraqi constitution was explained to citizens through the medium of a stage production. A local law professor introducing the show and DVDs of the show were produced and subsequently distributed.<sup>68</sup> At all times JAs should ensure they classify their materials appropriately and build unclassified information packets for local nationals in conjunction with their unit's foreign disclosure officer, so that useful material is not needlessly withheld from those who would benefit from it.<sup>69</sup> Radio can be a highly useful mechanism for populations with high illiteracy: "Street law" radio programs that explain legal rights and procedures (often in the context of entertaining cases such as the "Judge Judy" television) can be effective in building a connection between citizens and their justice institutions.

The problem of government corruption is exacerbated by public tolerance and a general feeling of helplessness. Programs that educate the public about their rights and inform them about reporting mechanisms can place pressure on officials to perform their roles in a less predatory manner. As seen, public education can be accomplished through a number of different mediums such as classes, radio programs, billboards, or printed literature (to include books, newspapers and comics etc.).<sup>70</sup> Creating accountability mechanisms is as important as transparency: societies that learn about corruption but are helpless to attack it display lower levels of trust in government and this can harm rebuilding efforts.

Public education programs can be pursued even in poor security environments where other substantive RoL projects would be premature. For instance, US forces in Khowst Province built a program where the local law school provided interns to *jirgas* to advise the elders on legal issues and aspects of the Afghan Constitution that applied to cases it was hearing, as well as to record the outcomes of the hearing. The project was Afghan owned, with local national attorneys liaising between the *jirgas* and the law school.<sup>71</sup>

### 3. Monitor and Mentor Local Officials and Professionals

Oversight, mentoring, and instruction are absolutely necessary to achieve change and a RoL JA must make frequent contact with local justice officials to ensure RoL progress. Building relationships with appointed officials and legal professionals takes time and it is never too early to begin developing these relationships<sup>72</sup> and the absence of a safe and secure environment should not prevent training and networking of government officials and RoL facilitators. Subsequently, if the security situation allows consideration should be given to establishing appropriate embed programs.

Relationship building by Commanders and JAs requires more than an occasional visit. Regular and frequent visits should be conducted where social matters, and not just work, are discussed.<sup>73</sup> However, JAs should be aware that impromptu visits can be disruptive or can even endanger host nationals. If so, JAs should consider maintaining contacts via less intrusive means such as telephone calls.<sup>74</sup>

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<sup>67</sup> 41st Fires BDE IZ AAR, Feb 08 – Jul 09 *supra* note 24.

<sup>68</sup> *Id.*

<sup>69</sup> Individual Augmentee, Combined Joint Task Force – 82, Rule of Law Section Afghanistan AAR, Bagram Airfield, Afghanistan, Oct2009 – Jan 2010, (18 Feb 2010) on file with CLAMO.

<sup>70</sup> 4th Brigade Combat Team (Airborne), 25th Infantry Division, BJA Afghanistan AAR, Forward Operating Base Salerno, Afghanistan, Feb 2009 – Feb 2010, (27 Mar 2010) on file with CLAMO.

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

<sup>72</sup> 3d Brigade Combat Team, 4th Infantry Division, BJA Iraq AAR, Forward Operating Base War Eagle, Iraq, Dec 2007 – Feb 2009, (6 May 2009) on file with CLAMO.

<sup>73</sup> Asymmetric Warfare Group, Group JA, Iraq AAR, Nov 2008 – Apr 2009, (17 Apr 2009) on file with CLAMO.

<sup>74</sup> 2d Brigade Combat Team, 1st Armored Division, BJA Iraq AAR, Camp Stryker, Iraq, Jul 2008 – Jun 2009, (25 Sep 2009) on file with CLAMO.

Before engaging local lawyers, judges, ministers or community leaders, JAs should work with cultural advisors to gain an understanding of local social customs and protocols,<sup>75</sup> particularly in societies where the local population has historically been suspicious of outsiders.<sup>76</sup> Finally it is important to remember that local recipients are more likely to embrace RoL initiatives if they think the idea is their own.<sup>77</sup>

### **The Resilience of Old Practices in Iraq**

During the initial stages of Operation Iraqi Freedom some Iraqi judges appeared to enthusiastically accept all of the guidance or instructions given by Coalition JAs. However, as soon as JAs departed the courthouse facilities the judges returned to doing business in the way that was familiar to them, including permitting judges dismissed by the Coalition to re-enter the courthouse and occupy their former offices. It required a continuous physical JA presence in the courthouse to make change take root. If this sort of behavior is noted JAs should ask themselves why. While resistance to change could be due to an inherent conservatism, proposed changes could be misunderstood or actively opposed due to personal loyalties or some other reason.

Key Leader Engagements must be thoroughly planned. The intent of the engagement (deliver a message, build rapport, gather information) must be determined in advance, with questions and follow up action planned. As well as being counterproductive to the RoL, poorly planned and consistently unproductive engagements needlessly expose personnel to the risk of harm<sup>78</sup> and JAs should prepare for any KLE meticulously. They should share talking points with all other coalition participants to ensure a single, unmixed message and prevent RoL “fratricide” through conflicting or duplicitous goals. Even when no other parties are involved, “shooting from the hip” can result in confusion, loss of credibility, and failure to achieve aims.<sup>79</sup> Credibility is particularly at risk if JAs over-promise and then under-deliver regardless of the reason for the disconnect between words and action.<sup>80</sup>

For a justice system to function efficiently its constituent parts must be able to work together. Assessments must consider not only the internal functioning of institutions, but the manner in which they interact with one another.<sup>81</sup> Solutions for dysfunctional systems may be non-traditional: in Wasit Province, Iraq, a dysfunctional relationship between the police and the courts was alleviated by encouraging the chief judge to organize investigative training for the local police. This not only educated the police on the requirements for successful case disposition, it built relationships and networks. The initial success led to the training expanding into a number of regularly held sessions. When these were complete, the judiciary then designed, of their own volition, an advanced course for graduates.<sup>82</sup>

<sup>75</sup> JUDY BARSALOU, *TRAUMA AND TRANSITIONAL JUSTICE IN DIVIDED SOCIETIES* 8 (USIP 2005).

<sup>76</sup> See LAUREL MILLER & ROBERT PERITO, *SPECIAL REPORT: ESTABLISHING THE RULE OF LAW IN AFGHANISTAN* 6 (USIP 2004).

<sup>77</sup> 1st Battalion, 9th Marines, Battalion JA Iraq AAR, Mar 2008 – Oct 2008, (9 Jan 2009) on file with CLAMO.

<sup>78</sup> 25ID IZ AAR, Nov 08 – Nov 09, *supra* note 18.

<sup>79</sup> Director, Interagency Rule of Law Coordinating Center Iraq After Action Report, U.S. Embassy, Baghdad, Iraq, June 2008 – June 2009, (29 June 2009) on file with CLAMO. 25ID IZ AAR, Nov 08 – Nov 09, *supra* note 18.

<sup>80</sup> For example, over-promising could occur through a JA having too zealous a desire to please, not understanding local dynamics or being pressured into making an unconsidered commitment.

<sup>81</sup> See CENTER FOR LAW AND MILITARY OPERATIONS, *LEGAL LESSONS LEARNED FROM HAITI* (1995) at 102-05.

<sup>82</sup> 41st Fires BDE IZ AAR, Feb 08 – Jul 09, *supra* note 48.

#### 4. Plan Security for Justice Sector Personnel

Unsurprisingly, judges will not readily embrace RoL initiatives if it means their death at the hands of those who have a vested interest in seeing judicial reform fail. If the success of a RoL mission depends upon judicial personnel being secure, they should be protected in the same manner as any other mission essential asset. While the point may seem obvious, protection of judges is frequently a low or nonexistent RoL priority in the aftermath of major combat operations. An interim solution may be the use of traveling judges with no ties to the area where the trial will be held. These judges can also be used as a comparative assessment tool.

##### **Protection of Judges in Early Rule of Law Efforts in Iraq**

Lack of funding and personnel were most often cited by the Coalition Provisional Authority as the reason for leaving those Iraqi judges who were cooperating with the coalition to protect themselves from anti-coalition elements. As a consequence the subsequent murder of many pro-coalition Iraqi judges and their family members, including the Chief Judge of Najaf, by criminal and insurgent forces had a chilling effect on other Iraqi judges and attempts at RoL reform.<sup>83</sup>

#### 5. External Coordination

Judge Advocates should coordinate with other agencies in the AO to prevent duplication of effort and resources, to maximize effects and to prevent confusion which could result in a loss of credibility.<sup>84</sup> However, the need to coordinate does not relieve US forces of the requirement to execute RoL operations unilaterally when necessary.<sup>85</sup> While other USG agencies are tasked with responsibility for developing comprehensive RoL programs and strategies, a variety of strategic, operational or tactical issues may constrain them at a crucial time. In particular any plan for the initial deployment period should be realistically premised upon military capability *without* outside organization assistance.

Because they are plentiful and their capabilities frequently unknown, it is tempting to become overly reliant during planning upon expected support from IOs and NGOs. Such organizations are often either unable or unwilling to maintain a presence in post-conflict AOs or assist directly with the military.

#### **C. Sustained Deployment Planning (D plus 91)**

As a deployment progresses, a JA's focus should shift almost exclusively to building the conditions for lasting, long-term RoL—those goals that make a system of law legitimate, relevant, and trustworthy in the eyes of the local population. As seen above, “condition building” should not be confused with constructing buildings. The number of operating courthouses, etc. is a metric of negligible value in assessing stability operation success if the citizenry does not seek to use the government-sponsored system to resolve grievances, but instead relies upon violence or non-governmental bodies.<sup>86</sup>

The concept of the RoL within a society is an intangible that the infrastructure metrics, which may be important during the initial deployment phase, do not capture subsequently. Accordingly, the wise RoL planner must recognize when it is time for the mission to evolve from the infrastructure-focused initial

<sup>83</sup> LTC Craig Trebilcock, *Justice Under Fire*, ARMY LAW. (Nov 2006).

<sup>84</sup> 2d Stryker Combat Regiment Iraq AAR, Aug 2007 – May 2008 (17 Feb 2009) on file with CLAMO; 1AD IZ AAR, Sep 07 – Dec 08, *supra* note 40; XVIII ABC IZ AAR, Feb 08 – Apr 09, *supra* note 46.

<sup>85</sup> DOD DIR 3000.05, *supra* note 2.

<sup>86</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).

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. It is important to recognize that the nature of planning will necessarily become more sophisticated and complex from a social and political viewpoint during the sustained deployment phase, even as the emergency conditions that dominated the initial deployment phase (such as the rebuilding of destroyed infrastructure) improve.

Specific RoL activities that JAs may be involved in (often in a supporting role) might include:

- Law school curriculum reform
- Creating community-based legal clinics sponsored by local bar associations or law schools
- Creating or strengthening professional associations for attorneys and judges
- Educating judges and leaders in the legal system on international norms of justice
- Linking host nation government legal organizations with law-related NGOs<sup>87</sup>
- Developing meaningful oversight mechanisms such as ombudsman offices or judicial/police inspection offices, to check corruption or misuse of government resources for private gain<sup>88</sup>
- Assisting civilian policing programs to reorient the police away from focusing on state security (protecting a regime) to personal security (protecting the average citizen)
- Educating police and prosecutors on evidentiary requirements for a successful prosecution
- Building oversight and citizen awareness of court programs, including judicial outreach and education programs that familiarize citizens with the law and courts.

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<sup>87</sup> For example, the American Bar Association conducts RoL programs in many developing countries, including several former Soviet republics. For more information see Table 2 at Appendix B.

<sup>88</sup> Particular care needs to be exercised in setting up oversight organizations as they can themselves become corrupt and improperly use their oversight positions.



## CHAPTER 6

# FISCAL CONSIDERATIONS FOR RULE OF LAW ACTIVITIES

As fiscal considerations are likely to be important to most RoL related activity, a failure to understand the nuances of fiscal law may lead to the improper obligation and disbursement of appropriated funds<sup>1</sup> resulting in negative administrative and/or criminal sanctions against those responsible for violations of fiscal law. Fiscal law can change rapidly in response to both the operating environment and the will of the US public, manifested in congressional appropriations and authorizations<sup>2</sup> and there is no overarching RoL funding source. This means that JAs must follow developments in both DoD and partner agency appropriations and authorizations to best advise commanders on the permissibility of funding RoL activities.

Section I of this chapter describes when it is fiscally permissible for DoD to conduct RoL activities and addresses the basic fiscal controls of purpose, time, and amount which Congress imposes on executive agencies. Section II identifies the funding authorities available to DoD to conduct RoL activities and considers non-permissive and permissive environments separately, while acknowledging the potential for overlap. Finally, because DoS is the primary agency responsible for foreign assistance efforts (including RoL activities), section III of this chapter briefly examines the appropriations and authorizations available to DoS to conduct RoL activities, which DoD may access via interagency agreements.

## I. Fiscal Law Analysis for Rule of Law Activities

The US Constitution grants Congress the “power of the purse,”<sup>3</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>4</sup> permeate all federal activity, both at home and overseas which means that there are no “deployment” exceptions to the fiscal principles when US troops are overseas, including the funding of RoL operations. In a permissive environment, DoD will most likely utilize mil-to-mil engagements to achieve RoL objectives that support COCOM security cooperation objectives; whereas in a non-permissive environment, DoD must fund RoL objectives as a sub-part of the overall contingency mission. The primary difference from a fiscal perspective is that DoD will generally use traditional authority and funding sources for RoL in a permissive environment and will not require specialized authority from Congress. In contrast, Congress is more likely to provide specific authorities that permit DoD to conduct

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<sup>1</sup> An obligation arises when the government incurs a legal liability to pay for its requirements, *e.g.*, supplies, 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 US agencies or a host nation. Although both obligations and disbursements are important fiscal events, the moment of obligation is generally the critical point of focus for the fiscal advisor. *See Contract & Fiscal Law*. Department TJAGLCS, US Army, Fiscal Law Deskbook, chs. 3 and 5 (2014) [Hereinafter “the TJAGLCS Fiscal Deskbook”], available at [http://www.loc.gov/rr/frd/Military\\_Law/Contract-Fiscal-Law-Department.html](http://www.loc.gov/rr/frd/Military_Law/Contract-Fiscal-Law-Department.html) (last visited 15 Jan 2014).

<sup>2</sup> *See, e.g.*, Congressional Research Service RL33837, *Congressional Authority to Limit U.S. Military Operations in Iraq* (27 Feb 2008).

<sup>3</sup> *See* US CONSTITUTION. art. I, § 9, cl. 7 (“No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.”).

<sup>4</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 FEDERAL APPROPRIATIONS LAW, Ch. 1, 1-2, GAO-04-261SP (US Gov’t Accountability Office, Office of the General Counsel) (3d ed. vol. I 2004).

non-permissive RoL during major contingency operations which are similar to foreign assistance. That said, the general fiscal analysis used by JAs to ensure commanders have authority to conduct RoL missions is the same whether the RoL activity is conducted in a permissive or non-permissive environment. In analyzing the funding of RoL activities in both permissive and non-permissive environments, JAs must consider several questions. First, JAs must determine whether the particular activity constitutes foreign assistance. If so, then JAs must ascertain whether Congress has authorized DoD (as opposed to DoS) to participate in that particular mission. If Congress has authorized DoD participation, then JAs must examine whether one of two general statutory prohibitions on the provision of assistance to foreign governments applies. Once JAs determine DoD can conduct a particular RoL mission, they must still ensure that the RoL activity is not limited by the basic fiscal controls of purpose, time and amount. Finally, JAs must always be mindful of the general prohibition on retaining miscellaneous receipts and augmenting appropriations. These issues are discussed in further detail below.

### **A. Limitations on DoD Participation in Foreign Assistance**

As stated above, JAs should begin their fiscal analysis by determining whether the particular RoL activity constitutes foreign assistance. Foreign assistance includes:

- security assistance to a foreign military, police force, or other security-related government agency
- development assistance for infrastructure projects, and
- humanitarian assistance directed to a foreign population

Given that RoL activities in a contingency environment generally have the primary purpose of improving the legal systems of foreign government agencies, foreign government institutions, and foreign civil institutions, they are often classified as foreign assistance. Once the practitioner determines that the RoL activity is considered foreign assistance, he or she must then determine whether Congress authorized DoD to participate in that particular foreign assistance mission. The general rule in fiscal law is that DoS funds foreign assistance. Therein, owing to the fact that RoL activities are often classed as a category of foreign assistance, they are generally funded, as per this rule by DoS.<sup>5</sup>

There are two exceptions to the general rule that DoS funds foreign assistance. The first is the narrow “interoperability, safety, and familiarization training” exception, colloquially referred to as the “little t” training exception which allows DoD to fund the training (as opposed to the acquisition of goods or services) of foreign militaries with its operations and maintenance funds (O&M) when the purpose of the training is to enhance the interoperability, familiarization, and safety of the foreign military with US military units, and when the training does not rise to the level of security assistance training.<sup>6</sup> This exception applies only to training of foreign militaries, *not police forces, or other foreign government agencies*.

The second exception is that DoD may engage in foreign assistance operations if Congress has provided a specific authorization and appropriated funds to execute the contemplated mission. Most of those authorities are managed by OSD, which means that a request to use such funds and authority would be sent through the appropriate combatant command for staffing to the OSD as examined in Section II.

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<sup>5</sup> The 1961 Foreign Assistance Act (FAA) created the authority for the executive branch to conduct foreign assistance on behalf of the United States. *See* Pub. L. No. 87-195, 75 Stat. 424 (codified as amended at 22 U.S.C. § 2151 (2000)); *see also* Exec. Order No. 10973, 26 C.F.R. 639 (1961) (delegating the authority to conduct foreign assistance created by Congress in the Foreign Assistance Act to DoS).

<sup>6</sup> *See The Honorable Bill Alexander, House of Representatives*, B-213137, 30 Jan 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* the TJAGLCS Fiscal Deskbook, ch. 10: Operational Funding (provides the legal requirements to apply the “little t” training exception, along with examples of what constitutes “little t” training versus Security Assistance Training.).

## B. General Statutory Prohibitions on Providing Assistance to Foreign Governments

Overhanging all military RoL activities are two general statutory prohibitions on the provision of assistance to foreign governments. The first prohibition is a general statutory prohibition on funding foreign law enforcement with FAA<sup>7</sup> funds. Specifically, section 660 of the FAA prohibits the provision of “training or advice, or . . . any financial support, for police, prisons, or other law enforcement forces for any foreign government.”<sup>8</sup>

There are a number of exceptions to this restriction, including one enacted in 1996 to fund law enforcement and RoL activities, specifically allowing:

assistance provided to reconstitute civilian police authority and capability in the post-conflict restoration of host nation infrastructure for the purposes of supporting a nation emerging from instability, and the provision of professional public safety training, to include training in internationally recognized standards of human rights, the rule of law, anti-corruption, and the promotion of civilian police roles that support democracy.<sup>9</sup>

Additionally, funds provided under the DoS International Narcotics Control and Law Enforcement Account are not subject to Section 660 restrictions. The result is that, despite the general prohibition, most RoL operations, properly funded by DoS, will fit into the exception authorizing the provision of the law enforcement and RoL aid, provided that such operations are funded in accordance 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 to the 1997 Foreign Operations Appropriation Act<sup>10</sup> and is now codified in the FAA.<sup>11</sup> It prohibits the provision of assistance under the FAA or the Arms Export Control Act to foreign security forces if DoS has credible evidence that such forces have committed gross violations of human rights, unless SecState determines and reports that the government of the country is taking effective measures to bring the responsible members of the security forces unit to justice. Similar language has also been found in annual DoD Appropriations Acts, prohibiting DoD from funding any training program involving a unit of the security forces of a foreign country if DoS has credible information that the unit has committed a gross violation of human rights and in particular the NDAA 2014 amended the DoD Leahy Laws and made this prohibition more encompassing<sup>12</sup>. Human rights vetting is now required when DoD funds training, or provides any equipment or other assistance to members of a unit of a foreign security force. No training, equipment or assistance may be provided if the SecDef has credible information that the unit has committed a gross violation of human rights unless all necessary corrective steps have been taken or the SecDef, in consultation with the SecState, decides to waive the prohibition due to extraordinary circumstances.<sup>13</sup>

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<sup>7</sup> 22 U.S.C. § 2347 *et seq.*

<sup>8</sup> 22 U.S.C. § 2420(a).

<sup>9</sup> 22 U.S.C. § 2420(b)(6).

<sup>10</sup> The Foreign Operations Appropriation Act is DoS’s annual appropriations act, most recently enacted as Division K of the Consolidated Appropriations Act, 2014.

<sup>11</sup> 22 U.S.C. § 2378d.

<sup>12</sup> 2014 NDAA, *PL 113-76, Div C, § 8057.*

<sup>13</sup> *See, e.g., Consolidated Appropriations Act, 2014, § 8057, Pub. L. No. 113-76 (2014).* *See also* SecDef Guidance on implementation of 2014 DoD Leahy Law is available on the International and Operational Law Division milsuite page at [https://www.milsuite.mil/book/groups/international-and-operational-law/content?filterID=contentstatus\[published\]~category\[human-rights\]](https://www.milsuite.mil/book/groups/international-and-operational-law/content?filterID=contentstatus[published]~category[human-rights]).

## C. Fiscal Controls on the Use of Appropriated Funds for RoL Activities

Once RoL practitioners determine that DoD can conduct a particular RoL activity, notwithstanding the limitations on DoD participation in foreign assistance, they must then apply the basic fiscal rules to any expenditures of appropriated funds. Congress imposes legislative fiscal controls in three ways, each implemented through one or more statutes.

The three basic fiscal controls are:

- Obligations and expenditures must be for a proper purpose<sup>14</sup>
- Obligations must occur within the time limits (or “period of availability”) applicable to the appropriation (e.g. O&M funds are available for obligation for one fiscal year)<sup>15</sup>
- Obligations must not exceed the amounts authorized by Congress, and must not violate the Antideficiency Act (ADA).<sup>16</sup>

These controls are enforced, in part, by the “congressional watchdog,” the Comptroller General of the United States, who heads the independent, nonpartisan US Government Accountability Office (GAO). GAO audits executive agency operations regularly to determine whether federal funds are spent efficiently, effectively, and in compliance with law and regulation. Congress likewise requires significant reporting on agency programs and activities. For example, section 1203 of the NDAA 2014, in authorizing the new training authority for US Forces, also requires annual reporting regarding program implementation and a description of all projects carried out under the authority.<sup>17</sup>

The “purpose” control is typically the controlling factor when examining RoL fiscal issues. 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>18</sup> Thus, expenditures must be authorized by law<sup>19</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:

- 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;
- The expenditure is not prohibited by law; and
- The expenditure is not provided for otherwise, *i.e.*, it does not fall within the scope of another, more specific appropriation.<sup>20</sup>

## D. General Prohibition on Retaining Miscellaneous Receipts and Augmenting Appropriations

Absent a statutory exception, a federal agency that receives any funds other than the funds appropriated by Congress for that agency must deposit those funds into the US Treasury.<sup>21</sup> If an agency retains funds

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<sup>14</sup> 31 U.S.C. § 1301(a).

<sup>15</sup> 31 U.S.C. § 1552.

<sup>16</sup> See 31 U.S.C. §§ 1341 & 1342. For more information on the basic fiscal legislative controls of purpose, time, and amount (Antideficiency Act), see the TJAGLCS Fiscal Deskbook, chs. 2-5.

<sup>17</sup> 2014 NDAA, Pub. L. No. 113-66, § 1203(e).

<sup>18</sup> 31 U.S.C. § 1301(a).

<sup>19</sup> For DoD, this includes permanent legislation (Title 10) and annual appropriations/authorizations acts. For DoS, this includes permanent legislation (Title 22) and annual appropriations/authorization acts.

<sup>20</sup> For detailed analysis of the Necessary Expense Doctrine, see the TJAGLCS Fiscal Deskbook, ch. 2: Purpose.

from a source outside the normal appropriated fund process, the agency violates the Miscellaneous Receipts Statute.<sup>22</sup> If an agency expends funds that were not specifically appropriated for that agency, it may be violating the constitutional requirement that agencies only expend funds appropriated by Congress.<sup>23</sup>

A corollary to the prohibition on retaining miscellaneous receipts is the prohibition against augmentation.<sup>24</sup> Absent a statutory exception, an agency augments its funds when it expends non-appropriated funds<sup>25</sup> or expends funds that were appropriated to a different federal agency. Generally, appropriated funds designated for one agency may not be used by a different agency.<sup>26</sup> If two funds are equally available for a given purpose, an agency may elect to use either fund, but once the election is made, the agency must continue to charge the same fund.<sup>27</sup> The election is binding, even after the chosen appropriation is exhausted.<sup>28</sup>

Congress has, however, enacted limited statutory exceptions to the miscellaneous receipts and augmentation prohibitions. The two 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 to describe the procedure by which an agency (the requesting agency) obtains supplies or services through another federal government agency (the servicing agency). The IA authorities allow agencies, under certain circumstances, to retain funds from other agencies and augment their appropriations with appropriations from other agencies.<sup>29</sup> The Economy Act is an example of a statutory authority that permits a federal agency to order supplies or services from another agency. The Economy Act is a general transfer authority that DoD may use; however if there is a more specific authority available then DoD must use that more specific authority before resorting to the Economy Act. For these transactions, the requesting agency must reimburse the servicing agency fully for the direct and indirect costs of providing the supplies or services.<sup>30</sup> Interagency acquisitions may become prominent during RoL activities when DoD executes DoS-funded missions, and vice-versa.

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<sup>21</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>22</sup> See *id.*; see also, *U.S. Securities and Exchange Commission—Postjudgment Interest and the Miscellaneous Receipts Statute*, B-322531, 2012 WL 1073230 (Comp. Gen. 2012).

<sup>23</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); and, *Bureau of Alcohol, Tobacco, and Firearms—Augmentation of Appropriations—Replacement of Autos by Negligent Third Parties*, B-226004, 67 Comp. Gen. 510 (1988).

<sup>24</sup> An augmentation is an action by an agency that increases the effective amount of funds available in that 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, or the Antideficiency Act. See the TJAGLCS Fiscal Deskbook, ch. 2: Purpose.

<sup>25</sup> Nonappropriated funds are monies not appropriated by Congress. U.S. DEP’T OF DEF., REG.7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 13, ch. 1, para. 010213 (Jan 2014).

<sup>26</sup> See *Secretary of the Navy*, B-13468, 20 Comp. Gen. 272 (1940); *Bureau of Land Management—Disposition of Water Reerve. Council Appropriations Advanced Pursuant to the Economy Act*, B-250411, 72 Comp. Gen. 120 (1 Mar 1993).

<sup>27</sup> See *Funding for Army Repair Projects*, B-272191, 1997 WL 702260 (Comp. Gen. 1997).

<sup>28</sup> *Honorable Clarence Cannon*, B-139510, 13 May 1959 (unpub.) (Rivers and Harbors Appropriation exhausted; Shipbuilding and Conversion, Navy, unavailable to dredge channel to shipyard); see also, *Funding for Army Repair Projects*, B-272191, 1997 WL 702260 (Comp. Gen. 1997) (citing 59 Comp. Gen. 528 (1980)).

<sup>29</sup> See, e.g., Economy Act, 31 U.S.C. § 1535; FAA, 22 U.S.C. § 2344, 2360, 2392 (permitting foreign assistance accounts to be transferred and merged); Emergency Presidential Drawdown Authority, 22 U.S.C. § 2318.

<sup>30</sup> See *Washington Naional Airport; Federal Aviation Admiinstration*, B-136318, 57 Comp. Gen. 674 (1978) (depreciation and interest); *Fed. Mediation and Conciliation Serv. – Propriety of Financial Management Service*.

Individual agency regulations must be consulted for IA procedural and approval requirements.<sup>31</sup> When DoS transfers foreign assistance funds to DoD, it relies upon section 632 of the FAA,<sup>32</sup> which authorizes the transfer of foreign assistance funds to other agencies for foreign assistance purposes. Although 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 de-obligate unused funds at the end of the fiscal year, as is required with Economy Act transactions.<sup>33</sup>

Transfer authority is a second major exception to the miscellaneous receipts and augmentation prohibitions. 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>34</sup> In other words, statutory transfer authority<sup>35</sup> allows an agency to “shift funds” between different appropriations without violating the miscellaneous receipts prohibitions, the augmentation prohibitions or the ADA.<sup>36</sup> Unless provided for within the statutory transfer authority, the transferred funds retain the same purpose, time, and amount restrictions.<sup>37</sup>

## II. DoD Appropriations for Rule of Law Activities

As stated above, DoS has the principal responsibility for conducting USG foreign assistance, although in the past Congress has given DoD direct authority to fund RoL missions during contingency operations. The DoD can also structure and finance its mil-to-mil activities as a SC mission in a permissive environment. Rule of Law JAs should be aware of the fluid nature and the significant difference between RoL funding authorities. If there is an authority gap between a mission outcome and the existing authorities it is also possible for DoD to specifically request additional Congressional authority.<sup>38</sup>

### A. Non-Permissive RoL Authorities

During recent contingency operations, where DoD has served as the lead agency, Congress has recognized the need to provide DoD with the authority to conduct a variety of RoL missions in a non-

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*Charges Under The Economy Act*, B-257823, 1998 WL 23074 (Comp. Gen. 1998); *see also* DoD Financial Management Regulation (FMR), 7000.14-R, vol. 11A, ch. 1, para. 010203.J (Apr 2013) (waiving overhead for transactions within DoD).

<sup>31</sup> *See* Federal Acquisition Regulation Subpart 17.5; Defense Federal Acquisition Regulation Subpart 217.5; DoD Financial Management Regulation, 7000.14-R, vol. 11A, ch. 3 (Mar 2012); *see also*, Army Federal Acquisition Regulation Supplement Subpart 17.5.

<sup>32</sup> 22 U.S.C. § 2392 (2012).

<sup>33</sup> *But see Expired Funds and Interagency Agreements between GovWorks and the Dep’t of Defense*, B-308944, 17 Jul 2007 (finding that DoD improperly extended the availability of funds by “parking” them in a franchise fund).

<sup>34</sup> DoD FMR, *supra* note 31, vol. 2A, ch. 1, para. 010107.B.58 and note 24 vol. 3, ch. 3, para. 030202. (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>35</sup> 31 U.S.C. § 1532.

<sup>36</sup> An unauthorized transfer also violates the Purpose Statute because it constitutes an unauthorized augmentation of the receiving appropriation. For detailed legal analysis of transfer authorities, *see* the Fiscal Law Deskbook, ch. 12: Reprogramming and Transfer Authority.

<sup>37</sup> PRINCIPLES OF FED. APPROPRIATIONS LAW, ch. 2, 2-24-28, GAO-04-261SP (U.S. GAO, Office of the General Counsel (OGC)) (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 are transferred into a five-year appropriation, the transferred funds would be available only for one year.

<sup>38</sup> *See* U.S. DEPARTMENT OF DEFENSE DIRECTIVE 5500.01, PREPARING, PROCESSING, AND COORDINATING LEGISLATION, EXECUTIVE ORDERS, PROCLAMATIONS, VIEWS LETTERS, AND TESTIMONY (15 Jun 2007)

permissive environment. While the broader security cooperation authorities appear to be available to DoD during contingency operations, Congress has typically provided DoD more specific funding and recent RoL operations in Iraq and Afghanistan have been funded through three specific appropriations: 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 played a key role in funding RoL activities in Iraq. Each of these funding mechanisms is discussed in greater detail below to illustrate the type of funding that maybe available for RoL in the future.

## 1. Afghanistan Security Forces Fund/Iraq Security Forces Fund

On 11 May 2005 Congress created the ASFF and the ISFF appropriations to enable DoD to “train and equip” the security forces of Afghanistan and Iraq respectively.<sup>39</sup> Congress initially appropriated \$1.285 billion for the ASFF and \$5.7 billion for the ISFF, to remain available for new obligations until 30 Sep 2006.<sup>40</sup> Since FY 2005 Congress has generally appropriated ISFF/ASFF funds on a yearly basis with a period of availability of two years. Though ISFF no longer exists, Congress most recently appropriated \$4.7 billion for the ASFF, available for obligation until September 2015.<sup>41</sup> The ASFF is available to the SecDef “for the purpose of allowing the Commander, Combined Security Transition Command-Afghanistan, or the Secretary's designee, to provide assistance, with the concurrence of SecState, to the security forces of Afghanistan, including the provision of equipment, supplies, services, training, facility and infrastructure repair, renovation, and construction, and funding.”<sup>42</sup> The purpose language accompanying the ISFF was very similar, although the applicable command authority for ISFF was the Commander, United States Forces-Iraq, and “construction” and “funding” were not among its specifically delineated purposes.<sup>43</sup>

For the RoL practitioner, minor distinctions between the ASFF and ISFF, such as the one described above, are important, and demonstrate the need to be aware of statutory changes. For instance, the original purpose of both the ASFF and ISFF included facility repair and construction, but in the 2009 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>44</sup> As noted in the Senate committee report, “the committee believes the Iraqi Government is well able to afford to finance its own infrastructure needs at this point.”<sup>45</sup> This illustrates the precept that, because operational funding is often dependent upon the political, economic, and security situation in a given environment, RoL practitioners must remain apprised of current fiscal law rules.

The ASFF appropriation does not specifically define what forces are considered to be the “security forces” of Afghanistan. DoD has typically defined the term “security forces” to include, however, both military and police forces under the direct control of the Afghan government.<sup>46</sup> This determination is

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<sup>39</sup> Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub. L. 109-13, 119 Stat. 231, 235-237 (2005). Prior to the creation of the ASFF and ISFF, Congress authorized the training and equipping of forces in Afghanistan and Iraq from O&M appropriations. At the outset, only the ANA and the New Iraqi Army could receive support. Later authorizations expanded the statutory language to include “security forces.” *Compare* Pub. L. No. 108-106 to Pub. L. No. 109-13.

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

<sup>41</sup> Consolidated Appropriations Act for Fiscal Year 2014, Pub. L. No. 113-76(2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Pub. L. No. 110-417, §1508 (2008); *see also*, Pub. L. No. 111-383, § 1533 (2011).

<sup>45</sup> S. Rep. No. 110-335, at 428 (12 May 2008).

<sup>46</sup> Security forces Ministry of Defense (Army and Air Force) and Ministry of Interior (National and Local Police are considered to be under the Afghan governments direct control and may, therefore, be funded with ASFF.

based on DoD budget request submissions to Congress that identify both the military and police forces that will be trained and equipped using ASFF.<sup>47</sup> Generally, however, the ASFF may not be used to fund police forces not under the Afghan Government's direct control.

## 2. Commander's Emergency Response Program (CERP)

The third example of an authorization that allows DoD to fund many RoL activities is the CERP. This is a statutory authorization to obligate funds from DoD's O&M appropriations<sup>48</sup> for the primary purpose of authorizing US military commanders "to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements within their areas of responsibility"<sup>49</sup> The 2014 NDAA allocated \$30 million for CERP in FY 2014.<sup>50</sup>

In addition to the broad purpose of CERP, Congress has also authorized SecDef 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>51</sup> The SecDef and his Deputy have routinely waived various statutes that would limit the execution of CERP, including the Competition in Contracting Act (CICA) and the Foreign Claims Act (FCA).<sup>52</sup> The combination of the broad statutory purpose of CERP, the low-level approval authority to authorize the use of CERP,<sup>53</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 DoS foreign assistance funding channels and restrictions.<sup>54</sup>

Commanders cannot use CERP to fund the military and police forces under the direct control of a foreign government.<sup>55</sup> As a result, CERP funds have been restricted to RoL activities that target the "urgent humanitarian needs" or "urgent reconstruction requirements" of the Iraqi and Afghan populations, and,

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<sup>47</sup> DoD budget request documentation typically breaks down funding into separate budget activities for "defense" forces (*e.g.*, the Army), "interior" forces (*e.g.*, the police), and other activities. *See, e.g.*, Office of the Secretary of Defense, *Department of Defense Budget Fiscal 2012, Justification for FY 2012 Overseas Contingency Operations Afghanistan Security Forces Fund (ASFF)*, (Feb 2011) available at <http://asafm.army.mil/Documents/OfficeDocuments/Budget/BudgetMaterials/FY12/OCO//asff.pdf> (last visited 13 Jan 2014).

<sup>48</sup> The actual funds available for CERP are from the Operations and Maintenance, Army appropriation. *See* Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10 (2011).

<sup>49</sup> Consolidated Appropriations Act, 2014, § 9005, Pub. L. No. 113-76 (2014).

<sup>50</sup> *Id.*

<sup>51</sup> *See, e.g.*, 2005 NDAA, Pub. L. 108-375, § 1202 (28 Oct 2004), as amended by 2008 NDAA, Pub. L. No. 110-181, § 1205, 2009 NDAA, Pub. L. No. 110-41, § 1214, 2010 NDAA, Pub. L. No. 111-84, § 1222, and 2011 NDAA, Pub. L. No. 111-383, § 1212 (emphasis added).

<sup>52</sup> *See, e.g.*, Memorandum from the Honorable William J. Lynn, Deputy Secretary of Defense, to the Secretaries of the Military Departments, *et. al.*, subject: Waiver of Limiting Legislation for Commander's Emergency Response Program (CERP) for FY 2010 (24 May 2010), available at <http://www.oaa.army.mil/FetchFile.ashx?DocID=350> (last visited 14 Jan 2014).

<sup>53</sup> 2005 NDAA, Pub. L. 108-375, §1201 (28 Oct 2004). The CERP authorization allows "military commanders" d down to company commanders, *i.e.*, generally the rank of a U.S. Army Captain to authorize the obligation of CERP funds. Although this statutory approval authority has generally been limited by DoD policy to higher ranks.

<sup>54</sup> For example, as a result of the waiver of CICA for CERP, CERP-funded projects need not adhere to the competition requirements of the Federal Acquisition Regulation. 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>55</sup> *See, e.g.* 2006 NDAA, § 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").

generally were not used for any RoL security operations with forces under the direct control of the Governments of Iraq or Afghanistan.<sup>56</sup> Before advising on the legality of using CERP funds to execute any RoL activity, JAs should scrutinize the most recent DoD Comptroller’s CERP policy guidance in the FMR.<sup>57</sup>

A recent development affecting CERP-funded RoL 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 RoL facilities “from the ground up” in Afghanistan. (This was not an issue in Iraq because of the prevalence of existing structures.) The most current version of the FMR no longer includes the concept of “build” and instead focuses on “reconstruction” and “restore.”<sup>58</sup> This focus on reconstruction does not limit efforts to restore “preexisting elements of Afghan society, such as RoL, if the projects are otherwise in accordance with CERP guidance,”<sup>59</sup> but JAs should ensure that they have the most current guidance on RoL facility construction relevant to their theater. Moving forward Congress has not provided DoD with worldwide CERP authority; therefore, JAs advising commanders should look to other authorities to conduct RoL activities during permissive future contingency operations.

### 3. Iraqi-Funded Commander’s Emergency Response Program

Another historical example of an authority DoD has used to support RoL missions is I-CERP. In April 2008, the Multi-National Force – Iraq (MNF-I) and the Iraqi Supreme Reconstruction Council (I-SRC) signed a MOU that authorized MNF-I units to execute an Iraqi-funded reconstruction program modeled after the US funded CERP.<sup>60</sup> Initial Funds of \$270 million for I-CERP came from the Iraqi Government of Iraq, with an additional \$30 million subject to transfer to I-CERP upon the approval of the I-SRC.<sup>61</sup> The initial intent of I-CERP was, therefore, for the Iraqis to match the reconstruction funding of CERP in Iraq to allow coalition commanders to execute urgent reconstruction projects for Iraqi people in the fifteen non-Kurdish provinces of Iraq.<sup>62</sup> Under the same monetary approval authorities as CERP, commanders in Iraq could authorize the use of I-CERP to repair or reconstruct infrastructure projects and non-reconstruction projects that promoted small business development.<sup>63</sup> I-CERP became increasingly important as Congress decreased fiscal authorities and appropriations in Iraq as US forces drew down and departed Iraq.<sup>64</sup>

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

<sup>57</sup> DoD FMR, *supra* note 31, vol. 12, ch. 27 (Jan 2009); *see also* TJAGLCS OPERATIONAL LAW HANDBOOK, ch. 14: Fiscal Law 238-2139 (2013) *available at* [http://www.loc.gov/rr/frd/Military\\_Law/operational-law-handbooks.html](http://www.loc.gov/rr/frd/Military_Law/operational-law-handbooks.html) (last visited 19 Feb 2014).

<sup>58</sup> *Id.* DoD FMR, vol. 12, ch. 27, para. 270103D.

<sup>59</sup> Commander, United States Central Command, Memorandum to Undersecretary of Defense, subject: Commander’s Emergency Response Program Waiver Guidance Request (11 Jun 2009). In the current context of winding down operations in Afghanistan, Congress is further limiting CERP authority for that theater *See* 2014 NDAA, Pub. L. No. 113-66 (2014)

<sup>60</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 [hereinafter I-CERP MOU], agreed to and signed by MNF-I on 25 Mar 2008 and by I-SRC on 3 Apr 2008.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> MAAWS, Multi-National Corps – Iraq, Combined Joint Staff Resource Management Standard Operating Procedure (MNC-I CJ8 SOP) (26 Jan 2009), Appendix C: I-CERP.

<sup>63</sup> *Id.*

<sup>64</sup> 2009 Duncan Hunter NDAA, Pub. L. No. 110-417, § 1214(e), 122 Stat. 4356, 4630-4632 (2008) (“It is the sense of Congress that the Government of Iraq should assume increasing responsibility for funding and carrying out projects currently funded by the United States through the Commanders’ Emergency Response Program.”).

## **B. RoL Authorities Available to DoD in Permissive Environments**

As the authority to conduct mil-to-mil engagements arises from Title 10 of the US Code, DoD forces do not require any special or additional authority from Congress and, in most cases, DoD forces will utilize O&M funds to support these types of RoL activities. Thus, a mil-to-mil engagement activity which does not include funding foreign military travel does not require additional statutory authority to execute.<sup>65</sup> There is a point at which, however, commander's RoL objectives and planned activities could move away from mere orientation and information exchanges and become akin to foreign assistance: activities that constitute security assistance training exceed the Congressional grant of authority for mil-to-mil engagements in Title 10, and therefore require a separate grant of authority from Congress.

In light of the drawdown of forces in Afghanistan and the change in US military strategy from sustained combat in a counterinsurgency to focusing on regional alignments and engagements in preparation for the next contingency, commanders will inevitably seek to maximize opportunities to conduct security assistance. In this permissive environment, JAs must identify the appropriate authority to support their commanders' RoL objectives if they move from mil-to-mil engagements to security assistance. Below are two examples of the type of authorities Congress provides DoD to support RoL objectives in a permissive environment. As the authorities available to DoD change with each passage of a NDAA, it is incumbent upon JAs to validate the existence of these authorities and verify there are no new authorities available before deciding on a specific course of action.

### **1. The Global Security Contingency Fund**

In the 2012 NDAA Congress created an authority intended to permit DoD to provide security assistance for the purpose of enhancing the capabilities of foreign security forces, as well as the justice sector, RoL programs, and stabilization efforts in a foreign country.<sup>66</sup> This authority called the Global Security Contingency Fund (GSCF)<sup>67</sup> provides DoD with the authority to conduct RoL missions through the provision of equipment, supplies and training. This authority is currently the broadest authority that supports DoD RoL activities and, as a dual key authority, DoD is required to coordinate and seek approval from DoS for these funds before executing any justice sector or stabilization operations.<sup>68</sup> As such, JAs will have to work with their respective COCOM to request use of those funds, ensuring compliance with any specific COCOM procedures for requesting funds. The request for funds will then be coordinated with OSD for final approval before DoD can utilize the GSCF.

### **2. The General Purpose Forces Training Authority**

The second authority that currently permits DoD to perform RoL activities through security cooperation is the General Purpose Forces Training Authority. In section 1203 of the 2014 NDAA, Congress authorized general purpose forces, *i.e.*, forces that do not qualify for the special authorities available to special operations forces, to train with the military forces or other security forces of friendly foreign countries.<sup>69</sup>

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<sup>65</sup> Funding the transportation and subsistence costs of foreign military requires a specific statutory authority *see* Joint Federal Travel Regulations, paragraph U1225. These authorities may include 10 U.S.C. §§1051, 1050, and 1050a.

<sup>66</sup> 2012 Duncan Hunter NDAA, Pub. L. 112-81, § 1207 (31 Dec 2011).

<sup>67</sup> *See Global Security Contingency Fund: Summary and Issue Overview*, Nina M. Serafino, Specialist in International Security Affairs, Congressional Research Service (4 Apr 2014)

<sup>68</sup> *Id.*

<sup>69</sup> NDAA 2014 Pub. L. No. 113-66 (2014).

Unlike the GSCF, this authority does not have a specific RoL provision or authority. The language, however, contained in the 2014 NDAA is broad enough to include training for foreign allied law enforcement forces.<sup>70</sup> In particular, section 1203 states,

Under regulations prescribed under subsection (f), general purpose forces of the United States Armed Forces may train with the military forces or other security forces of a friendly foreign country if the Secretary of Defense determines that it is in the national security interests of the United States to do so.<sup>71</sup>

This grant of authority comes with the following limitations and threshold requirements:

- DoD must first promulgate regulations governing training under section 1203 of the NDAA
- prior to employing this authority DoD is required to obtain DoS concurrence
- DoD must notify Congress 15 days prior to beginning any training using section 1203 authority.

Judge Advocates should expect further DoD guidance on implementing this new authority before advising commanders who wish to use this authority in support of RoL activities

### **III. Department of State Appropriations for Rule of Law Activities**

The two DoD authorities above are both temporary and structured in a way to limit DoD's overall role in foreign assistance activities. As such, in permissive environments, RoL practitioners seeking to fund any RoL activities outside of the congressionally provided authorities, should always look to DoS as the primary authority in this area.<sup>72</sup> This section considers the key authorities, transfers and restrictions and also DoS funding of civil-military organizations (CMO) using the Provincial Reconstruction Team (PRT) construct as an historical example.

#### **A. Relevant State RoL Appropriations**

The two most significant DoS appropriations are the Economic Support Fund (ESF) (primarily administered by USAID) and funds provided under the heading of International Narcotics and Law Enforcement (INCLE). Both were used in Iraq and Afghanistan to fund RoL activities conducted by PRTs. Below is an outline of the ESF, INCLE and other DoS funds potentially available for foreign assistance.

##### **1. The Economic Support Fund**

The ESF provides economic assistance to allies and countries in transition to democracy. It is a prominent DoS funding source for RoL operations and the most relevant authority for RoL projects related to the administration of justice and rebuilding of post-conflict criminal justice systems. The FAA authorizes ESF assistance to promote the economic or political stability of foreign countries.<sup>73</sup> It is implemented by USAID, with overall foreign policy guidance from DoS. The ESF funds programs all

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> See Section 622(a) of the FAA which provides that, "the Secretary of State, shall be responsible for the continuous supervision and general direction of economic assistance, military assistance, and military education and training programs, including but not limited to determining whether there shall be a military assistance (including civic action) or a military education and training program for a country".

<sup>73</sup> See 22 U.S.C. § 2346.

over the world but may not be used for military or paramilitary purposes.<sup>74</sup> Generally, the ESF has a two-year period of availability, with funds appropriated annually in the Department of State Foreign Operation Authorization Act (SFOAA) - the DoS equivalent of the annual DoD appropriations act. Funds are sometimes earmarked for certain countries or efforts in a particular region. An example of this is the “matching fund” requirement imposed by the 2009 Supplemental Appropriations Act which required the Government of Iraq to also contribute financially to certain programs.<sup>75</sup> The ESF was a significant funding source for RoL activity in Iraq and Afghanistan.

## **2. The Bureau of International Narcotics and Law Enforcement Affairs**

The State Department has statutory authority “notwithstanding any other provision of law” 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>76</sup> Congress appropriates funds for these purposes on an annual basis in the SFOAA. Funding from INCLE supports multiple countries in anti-narcotic and anti-crime efforts and was a significant source for Iraq and Afghanistan in relation to which Congress provided additional funds through supplemental appropriations.

Congress has also authorized the use of INCLE funds “for other anticrime purposes.”<sup>77</sup> This broad purpose mandate allows INCLE to be used for the majority of RoL activities in Afghanistan intended to decrease crime generally. Funding from INCLE also supported capacity building for the Ministry of Justice, Attorney General’s Office, Supreme Court, and Ministry of Women’s Affairs. Programs have also included training courses for police investigators, prosecutors, judges, defense attorneys, and corrections officers.

In the 2014 SFOAA Congress directed that “the provision of assistance by any other United States Government department or agency which is comparable to assistance made available under [the INCLE] heading but which is provided under any other provision of law, shall be administered in accordance with the provisions of section 481(b) and 622(c) of the FAA.”<sup>78</sup> Section 481(b) establishes the responsibility of the SecState to coordinate all assistance provided by USG to support international efforts to combat illicit narcotics production or trafficking. The 2014 proviso makes it clear this coordinating responsibility applies to all anticrime as well as counternarcotics assistance. Any RoL programs, whether or not funded with DoS funds, are to be coordinated with the relevant DoS bureaus, including INL and the respective regional bureau.

## **3. Other Relevant DoS funds and authorities**

Provided that the parameters of an FAA section 632b agreement are agreed with, there are other potential DoS funds that DoS may be able to use for permissive RoL activities.

Equipment and training is provided to foreign governments through DoS Foreign Military Sales/Foreign Military Financing (FMS/FMF) programs. This authority could also be used to fund a variety of RoL projects in direct support of capacity building. The primary legislative program addressing military justice reform is the International Military Education and Training (IMET) and the Expanded IMET

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<sup>74</sup> See 22 U.S.C. § 2346 (“Amounts appropriated to carry out this part shall be available for economic programs only and may not be used for military or paramilitary purposes.”).

<sup>75</sup> Pub. L. No. 111-32, 123 Stat. 1859 (Section 1106(b) includes a “matching requirement,” implemented by DoS’s 9 Apr 2009, “Guidelines for Government of Iraq Financial Participation in United States Government-Funded Civilian Assistance Programs and Projects.”).

<sup>76</sup> 22 U.S.C. § 2291 (4) (emphasis added).

<sup>77</sup> *Id.*; see also, Pub. L. No. 104-164, 110 Stat. 1429 (1996) (amending the FAA to broaden International Narcotics Control Assistance).

<sup>78</sup> 2014 Department of State, Foreign Operations and Related Programs Appropriations Act (p.l. 113-76) (2014).

(E\_IMET) program. Peace Keeping Operation (PKO) funds may also be available to in relation to RoL initiatives connected with building capabilities in countries seeking to participate in International Peace Support missions.

Additional DoS funded programs that could support RoL efforts include the Global Peace Operations Initiative program, which funds cases for peace support operations training and equipment for UN and African Union missions; and the DoS Africa Bureau's Africa Contingency Operations Training Assistance program. The DoS Partnership for Regional East African Counter Terrorism funds cases to selected nations in the Horn of Africa and surrounding territories. The purpose is to provide military training and equipment to combat current and emerging terrorist threats.

## **B. Funding Restrictions**

Judge Advocates should be aware of the existence of funding restrictions. Restrictions are statutorily imposed and may apply to an entire country. Examples of circumstances when restrictions may be imposed include:

- Narcotics Certification,<sup>79</sup> if the President determines that a country has “failed demonstrably” within the last 12 months to adhere to international counter-narcotics obligations or measures required by US law
- Seizure of US property,<sup>80</sup> in specified circumstances when a government has seized property at least 50% beneficially owned by US citizens
- Specific countries,<sup>81</sup> as imposed by statute for example Cuba, Iran, North Korea and Syria
- Loan default,<sup>82</sup> if a country is in payment default to the US for more than six months
- Diplomatic relations with US,<sup>83</sup> where the country has severed diplomatic relations with the US
- International Terrorism,<sup>84</sup> if a country has repeatedly provided support for international terrorism
- Export of lethal military equipment, by states designated by SecState as a sponsor of terrorism<sup>85</sup>
- Nuclear Technology<sup>86</sup>
- Military coup d’etat or decree,<sup>87</sup> if the elected government has been deposed by military coup d’etat unless the President notifies Congress that a democratically elected government has since taken office
- Human Rights violations,<sup>88</sup> if a government is determined to have engaged in a consistent pattern of gross violations of internationally recognized human rights
- Trafficking in persons (TIP),<sup>89</sup> if a country is listed in Tier 3 of the annual TIP Report
- Transparency and accountability,<sup>90</sup> if the central government of a country fails to meet the SecState’s minimum standards of fiscal transparency
- Enforcement of non proliferation treaties.<sup>91</sup>

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<sup>79</sup> Foreign Relations Authorization Act FY 2003 §706(1) (P/L. 107-228).

<sup>80</sup> Foreign Relations Authorization Act FY 1994 and 1995 §527 (P.L. 103-236).

<sup>81</sup> FAA §620(a) and 620(f) and FY 2012 Act §2007 *See also* 22 USC §2370 and 22 USC §2370(f).

<sup>82</sup> FAA §620(q) *See also* 22 USC §2370(q).

<sup>83</sup> FAA §620(t).

<sup>84</sup> FAA §620A and 620G and FY 2012 §7021(b) *See also* 22 USC §2371.

<sup>85</sup> FAA §620H and FY 2012 Act §7021(a) *See also* 22 USC §2378.

<sup>86</sup> Arms Export Control Act §101 and 102. *See also* 22 USC §2799aa and 2799a-1.

<sup>87</sup> FY 2012 Act §7008.

<sup>88</sup> FAA §116 and 502B.

<sup>89</sup> 22 USC §7107.

<sup>90</sup> FY 2012 Act §7031(b).

<sup>91</sup> Foreign Relations Authorization Act Years 1994 and 1995§530(b) (P.L. 103-236).

## C. Funding Rule of Law through Provincial Reconstruction Teams

Department of State funding supported stability and RoL operations through the activities of PRTs in Iraq and Afghanistan. While PRTs are no longer in existence they may well provide a model for future civil-military contingency operations.<sup>92</sup> They are CMOs that are staffed by USG civilian and military personnel to assist foreign provincial governments with their reconstruction efforts, security and RoL efforts, and political and economic development and were first deployed in Afghanistan in 2002 and in Iraq in 2005.

Embedded PRTs (ePRT) were a second type of PRT formed in Iraq as part of the “surge” in early 2007. They were directly assigned to Army Brigade Combat Teams or Marine Corps Regiments which provided the ePRTs’ force protection. Both PRTs and ePRTs in Iraq were led by DoS Foreign Service Officers assigned to the PRT/ePRT, but they tended to fund operations differently due to their structural differences. PRTs tended to have greater access to DoS appropriations like the ESF, the INCLE, and INL but could also access DoD appropriations and authorizations like CERP as a supplement to the DoS funds that they received.<sup>93</sup> The ePRTs reversed the funding model of PRTs by funding the majority of their operations with DoD appropriations like CERP and accessing DoS appropriations as a supplement.<sup>94</sup>

Due to the dramatically increased pace of operational RoL activities, the PRT, ePRT or successor construct is likely to require the appropriate funds faster than DoS is able to provide them. As a result, the unit should coordinate with the deployed DoS Political Advisor located at the Combined Joint Task Force, or division level, as early as possible in the planning stages. The unit may also coordinate with DoS Foreign Officers located at the PRT or CMO.

In advising their units, JAs should be aware of the cultural, structural, and procedural differences between the DoD and DoS.<sup>95</sup> DoD has the cultural and structural capability to plan for operations far in advance via the Military Decision Making Process. The DoS, on the other hand, generally has neither the structural capability nor the organizational culture to allow it to plan for operations as far in advance or with as detailed specificity as the DoD. These differences between the DoD and the DoS may affect the speed with which the DoS can access and provide its appropriated funds for RoL activities.

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<sup>92</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 USG’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>93</sup> *Id.* at 47.

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

<sup>95</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 7

# IN THEATER RULE OF LAW RESOURCES AND ENABLERS

As evident from other sections of this *Handbook*, JA RoL practitioners comprise only a small element of any given USG RoL effort. Furthermore, potential RoL activities are diverse and often overlap or converge with other operational LoE. JAs cannot and should not work in isolation, regardless of the environment in which they are operating. Rather, JAs should be mindful of the community in which they operate to seek out and use available resources to assist in their RoL efforts. Within the RoL JA's portfolio, there are overlapping efforts, each of which must also be coordinated and synchronized with other USG entities, international actors, NGOs and private contractors. A diverse network and effective use of the range of available enablers and assets can facilitate a RoL JA's success in an environment where progress is painfully incremental and difficult to measure.

It cannot be overstated that success in RoL is heavily dependent on initiative and creativity. The initiative of the RoL officer can determine whether RoL is stagnant or progressive, enhancing operational effectiveness. An active networking mindset is important for RoL attorneys, and face-to-face liaison and synchronization of efforts is far better than VTC, phone, or email. This chapter provides a brief overview of tactical RoL resources and enablers that JAs may encounter and should attempt to use on arriving in theatre. The Chapter is divided into 3 Sections: host national enablers, US enablers and written resources and should be read in conjunction with the strategic overview of RoL participants outlined in Chapter 4.

## I. Host National Enablers

### A. Local National Attorneys

Local national attorneys are an invaluable resource for JAs conducting RoL activity during military intervention. In this context, the effectiveness of the local criminal justice system will be of concern to commanders who will want to know that detained insurgents are being properly processed through the host national criminal process. Units that hired local attorneys in the Iraq and Afghanistan campaigns enjoyed unprecedented access to local courts and legal officials and earned greater respect and credibility by virtue of having someone on their staff that was knowledgeable about host nation law, local legal practices (both formal and informal), local justice actors, and customary law and practice.

Initially there may also be a need to obtain warrants through the local system to enable detention operations. Thereafter developing the effectiveness of the host nation's legal systems will be critical to an effective transition of responsibility back to the host nation. To achieve these ends a JA will need to engage local judges, prosecutors, attorneys, and other legal personnel in a variety of settings in furtherance of their RoL missions and will be enormously assisted in their task if they are accompanied by a knowledgeable and reputable local attorney.

Operational security may prohibit units from direct employment of local legal advisors. In such circumstances, there may be other ways in which JA RoL practitioners can benefit from local legal expertise. For example, NGOs and USG agencies often employ local lawyers that JA RoL practitioners can consult. Additionally, where U.S. forces are partnering and advising host nation units, legal expertise within or attached to such host nation units may be a good resource. While they may not have the language skills of contracted attorneys, the advantage of working with lawyers properly employed within the host nation system is those individuals have more permanence and will likely continue to have influence beyond the period of US military presence.

Nevertheless, it is highly beneficial to have an English-speaking local attorney in support of the RoL staff. Other non-legally qualified interpreters, even highly proficient ones, may find it more difficult to interpret

legal terminology resulting in imprecise translation and consequent confusion. Local attorneys with language skills can fulfill a dual function.

As well as facilitating engagement and assisting with legal processes (for example, securing warrants for search or arrest), local attorneys serve as an excellent source of information regarding the local laws and practices. There may be few libraries holding host nation law, and the available English translations found on-line are frequently inaccurate.<sup>1</sup> Furthermore, access to local legal advisers may be essential to understanding how local laws are applied in practice, regardless of what books say.

To find a suitable local national attorney during the early stages of an intervention, JAs may need to take the initiative and reach out to relevant members of the local national justice sector. Before doing so, it is wise to explore whether relationships have already been established through ongoing KLE or the RoL efforts of other USG or international actors. Regardless of the starting point of the relationship, the advice and assistance of a locally trained and experienced attorney, or better still, having such an individual on the RoL team, pays dividends in terms of facilitating engagements, informing discussions and building constructive relationships.

In the peacetime security cooperation realm, JAs are less likely to engage with civilian local national attorneys because their efforts will generally be limited to mil-to-mil engagements. In this context, JAs will likely work with foreign partner military legal personnel with a view to exchanging best practice and institutionalizing RoL within the host country military. Other USG agencies may conduct RoL programs within the permissive environment aimed at training civilian sector judges, attorneys and law enforcement personnel. JA involvement in such programs could be mutually beneficial, bringing SME to the program and providing the JA with insight regarding legal practice within the relevant country.

Regardless of the operational environment JAs should push hard for local national assistance and be prepared to argue their case vigorously especially if funding for an attorney is scarce.

## **B. Interpreters with Legal Language Skills**

As discussed above in relation to local national attorneys, the optimal asset for any RoL team is a local attorney who can speak good English and also fulfill the function of interpreter. However security considerations or lack of resources may prevent the employment of such a local attorney. Not every qualified interpreter will be capable of dealing with legal terminology and discussions of host nation law. Specialized language interpreters should therefore be included on the list of critical resources for any RoL mission, permissive or non-permissive, and JAs should conduct quality control of their interpreters to determine whether they have the skills to interpret in the highly specialized area of RoL.

## **II. US Tactical Enablers**

### **A. Human Terrain Teams<sup>2</sup>**

Human Terrain Teams (HTTs) are socio-cultural teams that can help improve commanders and staffs to understand the local population in their areas of operations. Historically HTTs provided an anthropological response to commanders' demands for a better understanding of the local populace in Iraq and Afghanistan through tactical-level support to brigades and regiments.<sup>3</sup> A HTT conducts field

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<sup>1</sup> Individual Augmentee, Multi-National Force-Iraq, Office of the Staff Judge Advocate(OSJA) (Rule of Law Section) Iraq After Action Report (AAR), Oct 2008 – Dec 2008, (9 Feb 2009); on file with CLAMO.

<sup>2</sup> For further details regarding the origins and development of HTTs see *THE RULE OF LAW HANDBOOK, A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, CENTER FOR LAW AND MILITARY OPERATIONS* (2011) Ch. 9.

<sup>3</sup> <http://humanterrainsystem.army.mil/htt.html> (last visited 1 Oct 2014).

research of the local population to determine the “human terrain” in order to help the commander assess how actions will be perceived by the local populace. A HTT typically consists of a team leader, one or two social scientists, and one research manager. When possible, a HTT deploys with at least one woman to facilitate access to females within the local population.

The importance of understanding the institutional and social context in which RoL operations are being conducted cannot be underestimated and is addressed in greater detail at Chapter 3 of this *Handbook*.

## **B. Operational Staff**

It is important for the RoL team to build and maintain strong relationships with the S-3 or operations section. RoL must be couched in operational terms and sold as an operational enhancer. Understanding the unit's mission and developing strong relationships with the S-3 section will allow the RoL JA to develop RoL LOE that fit within the mission and reflect command priorities. Ultimately RoL development should be integrated within the campaign plan. Such an approach emphasizes the operational impact of RoL activities and generates greater command support and allocation of resources. The S-3 shop is a strong enabler of RoL, or rather the RoL team should sell themselves as strong enablers of the S-3 shop.<sup>4</sup>

## **C. Intelligence Assets**

Judge Advocates should seek to leverage intelligence assets within the battle space to develop their RoL intelligence picture. The unit S-2 is a good starting point and, in an operational setting, will often have additional attached assets that JAs may not otherwise know. Judge Advocates must understand the various intelligence collection methods and be familiar with intelligence terminology such as HUMINT (Human Intelligence) and SIGINT (Signal Intelligence). An understanding of intelligence capabilities will enable JAs to use those S-2 assets as appropriate, to help gain a better understanding of the undercurrents that may be affecting RoL efforts. Other important intelligence resources include contracted intelligence analysts, weapons intelligence teams, explosive ordnance disposal units and analysts, and other intelligence agencies that operate in the battle space.

## **D. Specials Operations Forces (SOF)**

Special Operations Forces can be valuable assets for RoL efforts if capitalized through the initiative of the legal office, particularly when the legal team includes personnel dedicated to RoL. Additionally JAs assigned to conventional units should not disregard SOF as a RoL asset and are well advised to establish relationships with JAs working with SOF units to deconflict activity and maximize opportunities to benefit from this additional resource. Initiation of or involvement in RoL coordination meetings or working groups may facilitate such relationships.

SOF frequently engage with RoL actors or other individuals with influence in that arena. Effective relationships with SOF will not only ensure synchronization of effort, it will also allow contacts and influence to be leveraged. SOF may be able to provide information that enables JAs to complete a RoL intelligence picture of the battle space. Such information may help JAs to identify relevant contacts or provide valuable insight regarding existing contacts, enabling JAs to proceed on an informed basis and refine their approach to relevant individuals.

RoL practitioners should attend any battle space intelligence fusion meetings that involve participation and cross-talk of intelligence and SOF assets in their battle space and should encourage the convening of such meetings if they are not already occurring. Battle space coordination with SOF, as with any

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<sup>4</sup> This is dealt with in detail at Ch. 5, in the context of planning RoL operations.

concurrent RoL effort, will help prevent RoL ‘fratricide,’ or the friction caused and relationships damaged by unsynchronized or inconsistent approaches to local legal officials.

### **Practical Examples from Afghanistan NATO Special Operations Component Command-Afghanistan/ Special Operations Joint Task Force-Afghanistan**

#### **1. Use of SOF engagement to address corruption concerns**

A regional command JA sought SOF assistance to remove an Afghan provincial prosecutor who was refusing to prosecute cases and was suspected of being corrupt and/or an insurgent sympathizer. SOF leaders raised this issue at a KLE in Kabul with senior individuals who were influential in the assignment of the provincial prosecutor. As a result of the KLE, the Afghans immediately confronted the prosecutor about his prosecution decisions and told him he would be watched closely. In due course the Afghans removed him from his post and assigned him to Kabul pending an investigation.

#### **2. Afghan Prosecutor Shortages**

Afghan SOF had a shortage of Saranwals (Afghan prosecutors) to provide support at the tactical level. Saranwals are essential to ensuring that operations are conducted in accordance with Afghan law and can also improve the operational tempo and positively impact prosecution outcomes. Operationally they contribute to the lawful removal of insurgents from the battlefield and safeguard against unlawful conduct by Afghan SOF partners which not only exposes them to investigation or disciplinary proceedings but reflects poorly on US mentors. SOF units observed the shortage of Saranwals at the tactical level, and elevated the issue through coalition SOF channels as a KLE topic at the national level. SOJTF-A leveraged relationships at the US Embassy and engaged senior Afghan political and legal figures to secure better legal support to tactical units.

#### **3. Engagement with the Provincial-level Justice Sector**

The SOF RoL team observed a need for greater SOF engagement with the provincial-level justice sector. Most detainees went into the provincial systems but were not tracked beyond that point. The RoL team anticipated that the Afghan justice sector had information of interest to SOF and vice versa and that they would share common goals. The team was also mindful of the role that could be played by embedded CA teams. The Legal team drafted a FRAGO in which the Special Operations Joint Task Force-Afghanistan (SOJTF-A) commander ordered personnel with placement and access in the provinces, to facilitate relationships between provincially-aligned Afghan law enforcement personnel and key leaders in the Afghan provincial justice sector.

This resulted in a KLE in Wardak Province between the Wardak SOF element, a conventional battalion S-2, and the Wardak National Security Crimes Prosecutor. This meeting fostered information sharing between the prosecutor, tactical-level SOF unit, SOJTF-A RoL JAs, and battalion intel. A number of positive impacts resulted: (1) operations were facilitated by the relaying of actionable (warranted) targets to the SOF unit's Afghan partnered unit; (2) there appeared to be a higher likelihood of successful prosecution and lengthy conviction as a result of the collaboration and; (3) The SOF tactical units saw the benefit of engaging with the justice sector.

## E. Contracted Law Enforcement Personnel

During the Iraq and Afghanistan campaigns, multiple organizations provided assistance for training and capacity growth of the Iraq and Afghanistan Police. These included Police Transition Teams, International Police Advisors and Law Enforcement Professionals (LEPs) alongside other US private and governmental assistance teams and international initiatives. For a JA supporting a commander's security LOE, these resources are vital assets that should be leveraged when possible. In the "cops, courts, and corrections" context, RoL JAs should have these assets in their inner circle for any police training and advising matters.

Law enforcement professionals were recruited on the basis of significant experience in a federal law enforcement agency or major police force and often had extensive experience working undercover. In Afghanistan LEPs advised on integration of Afghan prosecutors into ANSF operations. This served to ensure that operations were supported by warrants as necessary and fully authorized by Afghan law. Law enforcement professionals also provided training in evidence-based operations to aid apprehension and subsequent prosecution of insurgents. Given their experience and capabilities, LEPs were often key players in the Prosecution Task Forces and other working groups led by a battle space owner's JA and convened to pool all resources relevant to the effort to ensure that captured insurgents were appropriately processed through the local criminal justice system<sup>5</sup>.

## F. Reserve Component Rule of Law Specialists

The US Army Reserve Legal Command reorganized its JA population to create Legal Operational Teams with unique specialties (called 'LOT-S'). One such variety of LOT-S is the International Law 'Rule of Law' Teams, charged with focusing their training time on RoL educational opportunities. The concept of the RoL teams is to have an 'off-the-shelf' RoL trained asset available for any operational or partnership effort that requires RoL augmentation. JAs looking for RoL personnel support should consult the Reserve Legal Command who can advise in relation to available LOT-S RoL teams.<sup>6</sup>

## III. Written Resources

Since the commencement of operations in Iraq and Afghanistan when RoL resources were scarce, there has been a proliferation of guidance and resources relevant to RoL practice. Many of those resources are referenced throughout this *Handbook* but some of the key sources and publications of wider application are listed below.

### A. Inspector General for Iraq

- Stuart Bowen, Learning from Iraq: Final Report from Special Inspector General for Iraq Reconstruction (Mar 2013).

### B. Department of State

#### 1. Bureau of International Narcotics and Law Enforcement Affairs (INL)<sup>7</sup>

- INL Guide to Justice Sector Assistance (2014)<sup>8</sup>
- INL Guide to Gender in the Criminal Justice System (2014)<sup>9</sup>

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<sup>5</sup> Office of the Staff Judge Advocate, 101st Airborne Division (AASLT), Afghanistan AAR, Feb 13 – Feb 14 (16-17 Apr 2014); on file with CLAMO.

<sup>6</sup> See DEP'T OF DEF. FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY (18 Mar 2013).

<sup>7</sup> More information regarding the role of INL is contained within Ch. 2.

<sup>8</sup> Available at <http://www.state.gov/documents/organization/222048.pdf> (last visited 28 Aug 2014).

- The Rule of Law in Afghanistan: A Primer for Practitioners (2014)<sup>10</sup>
- Three additional guides, addressing corrections assistance, police assistance, and anti-corruption assistance are forthcoming.

## **2. Office of the Coordinator for Reconstruction and Stabilization (S/CRS) (subsumed into the Bureau of Conflict and Stabilization Operations (CSO))**

- Post Conflict Reconstruction Essentials Tasks Matrix
- Lessons-Learned: Disarmament, Demobilization and Reintegration (DDR) in Reconstruction and Stabilization Operations: A GUIDE FOR UNITED STATES GOVERNMENT PLANNERS (2006), S/CRS, US Department of State in coordination with the Joint Policy Council's Security and Regional Stability Working Group/Sub-Group on DDR and the U.S Agency for International Development.
- Interagency Management System for Reconstruction and Stabilization (2007).<sup>11</sup>

## **C. The United States Agency for International Development (USAID)<sup>12</sup>**

- Reducing Corruption in the Judiciary (2009)<sup>13</sup>
- Field guide for USAID Democracy and Governance Officers: Assistance to Civilian Law Enforcement in Developing Countries (2011)<sup>14</sup>
- Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework (2010)<sup>15</sup>
- USAID Strategy on Democracy Human Rights and Governance (2013).<sup>16</sup>
- Anticorruption Assessment Handbook (2009)<sup>17</sup>
- Interagency Security Sector Assessment Framework Guidance for the US Government (2010)<sup>18</sup>
- Women's Access to Justice in Afghanistan (2014).<sup>19</sup>

## **D. Department of Defense, National Defense University Press**

- Melanne Civic and Michael Miklaucic, *Monopoly of Force: the Nexus of DDR and SSR*, NDU Press (2011)
- Jon Gundersen and Melanne Civic, *Unity of Mission*, Air University Press (2014).

## **E. United States Institute of Peace**

- Robert Perito, Michael Dziedzic, and Beth DeGrasse, *Building Civilian Capacity for US Stability Operations: The Rule of Law Component*, USIP Special Report No. 118 (Apr 2004).

## **F. The International Network to Promote the Rule of Law**

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<sup>9</sup> Available at <http://www.state.gov/documents/organization/222034.pdf> (last visited 28 Aug 2014).

<sup>10</sup> Available at <https://sites.google.com/site/touchpointidg/training-and-educational-services/afghanistan>.

<sup>11</sup> [https://dde.carlisle.army.mil/documents/courses\\_10/readings/2208\\_ims.pdf](https://dde.carlisle.army.mil/documents/courses_10/readings/2208_ims.pdf) (last visited 1 Oct 2014).

<sup>12</sup> The work of USAID is addressed at Ch. 2 (last visited 28 Aug 2014).

<sup>13</sup> Available at [http://pdf.usaid.gov/pdf\\_docs/PNADQ106.pdf](http://pdf.usaid.gov/pdf_docs/PNADQ106.pdf) (last visited 28 Aug 2014).

<sup>14</sup> Available at [http://pdf.usaid.gov/pdf\\_docs/PNADU808.pdf](http://pdf.usaid.gov/pdf_docs/PNADU808.pdf) (last visited 28 Aug 2014).

<sup>15</sup> Available at [http://pdf.usaid.gov/pdf\\_docs/PNADT593.pdf](http://pdf.usaid.gov/pdf_docs/PNADT593.pdf) (last visited 28 Aug 2014).

<sup>16</sup> Available at [http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG\\_%20final%20final%206-24%203%20%281%29.pdf](http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG_%20final%20final%206-24%203%20%281%29.pdf) (last visited 28 Aug 2014).

<sup>17</sup> [http://pdf.usaid.gov/pdf\\_docs/PNADP270.pdf](http://pdf.usaid.gov/pdf_docs/PNADP270.pdf) (last visited 28 Aug 2014).

<sup>18</sup> Available at [https://www.afcea.org/events/nps/11/documents/ISSAFFinal\\_000.pdf](https://www.afcea.org/events/nps/11/documents/ISSAFFinal_000.pdf) (last visited 28 Aug 2014).

<sup>19</sup> Available at [http://www.usip.org/sites/default/files/PW98\\_Women%27s-Access-to-Justice-in-Afghanistan.pdf](http://www.usip.org/sites/default/files/PW98_Women%27s-Access-to-Justice-in-Afghanistan.pdf) (last visited 28 Aug 2014).

As referred to in Chapter 4, INPRoL is a global online community of practice initiated by USIP. It was created in partnership with INL, the Organization for Security and Cooperation in Europe, the Strategic Police Matters Unit, The Center of Excellence for Stability Police Units, William & Mary School of Law, and the International Institute for Law and Human Rights.

INPRoL assumes a knowledge management role for the RoL community by maintaining an extensive library of high quality rule of law resources from leading rule of law organizations and authors, providing links to the original source.

In addition, INPRoL publishes research memoranda and practitioners' guides. INPRoL publications are generally available, but membership is required to gain access to the library and discussion forums.

- INPRoL Islamic Law Guide (2013)<sup>20</sup>
- Interim Justice and Security Arrangements in States Transitioning from Authoritarian to Democratic Rule (2012)<sup>21</sup>
- Best Practices for Building Investigative Capacity in Developing or Post-Conflict Countries (2012)<sup>22</sup>
- Common Law and Civil Law Traditions (2012).<sup>23</sup>

## **G. Center for Security, Development and the Rule of Law (DCAF)**

- Eden Cole, Kerstin Eppert and Katrin Kinzelbach, *Public Oversight of the Security Sector*, (2008)
- Vincenza Scherrer, *Measuring the Impact of Peacebuilding Interventions on Rule of Law and Security Institutions* (2012)
- Christoph Bleiker and Marc Krupanski, *The Rule of Law and Security Sector Reform: Conceptualising a Complex Relationship* (2012)
- Cornelius Friesendorf, *International Intervention and the Use of Force: Military and Police Roles* (2012)
- Majda Halilović, Heather Huhtanen, *Gender and the Judiciary: Selected findings and recommendations on the implications of gender within the judiciary of Bosnia and Herzegovina* (2014).

## **H. Carnegie Endowment for International Peace**

The Carnegie Endowment for International Peace is a global network of policy research centers in Russia, China, Europe, the Middle East and the United States. Its mission is to 'advance the cause of peace through analysis and development of fresh policy ideas and direct engagement and collaboration with decision makers in government, business and civil society.'<sup>24</sup>

- Rachel Kleinfeld and Harry Bader, *Extreme Violence and the Rule of Law, Lessons from Eastern Afghanistan* (2014)<sup>25</sup>
- Rachel Kleinfeld, *How to Advance the Rule of Law Abroad* (2013)<sup>26</sup>

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<sup>20</sup> Available at [http://inprol.org/sites/default/files/publications/2013/islamic\\_law\\_guide-july\\_2013\\_final\\_0.pdf](http://inprol.org/sites/default/files/publications/2013/islamic_law_guide-july_2013_final_0.pdf) (last visited 28 Aug 2014).

<sup>21</sup> Available at [http://inprol.org/sites/default/files/publications/2012/rm\\_shaw2.pdf](http://inprol.org/sites/default/files/publications/2012/rm_shaw2.pdf) (last visited 28 Aug 2014).

<sup>22</sup> Available at [http://inprol.org/sites/default/files/publications/2012/rm\\_criminal\\_investigations\\_final.pdf](http://inprol.org/sites/default/files/publications/2012/rm_criminal_investigations_final.pdf) (last visited 28 Aug 2014).

<sup>23</sup> Available at [http://inprol.org/sites/default/files/publications/2012/common\\_law\\_civil\\_law\\_pg\\_final.pdf](http://inprol.org/sites/default/files/publications/2012/common_law_civil_law_pg_final.pdf) (last visited 28 Aug 2014).

<sup>24</sup> See <http://carnegieendowment.org/about/?lang=en> (last visited 28 Aug 2014).

<sup>25</sup> Available at [http://carnegieendowment.org/files/violence\\_rule\\_of\\_law.pdf](http://carnegieendowment.org/files/violence_rule_of_law.pdf) (last visited 28 Aug 2014).

<sup>26</sup> Available at <http://carnegieendowment.org/files/Kleinfeld-PO-web.pdf> (last visited 28 Aug 2014).

- Corruption: The Unrecognized Threat to International Security – Working Group on Corruption and Security (2014)<sup>27</sup>
- Thomas Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006).

## I. American Bar Association

The ABA Rule of Law Initiative (ABA ROLI), established in 2007, is an international development program that promotes the RoL by working with in-country partners to build sustainable institutions and societies that deliver justice, foster economic opportunity and ensure respect for human dignity.<sup>28</sup>

- ABA Rule of Law Initiative (ROLI) Program Book 2014.<sup>29</sup>

## J. Other

- Jane Stromseth, David Wippman & Rosa Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (New York: Cambridge University Press, 2006)
- David Marshall, *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (2014)
- Handbook for Military Support to Rule of Law and Security Sector Reform, US Joint Forces Command (2011)
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<sup>27</sup>Available at [http://carnegieendowment.org/files/corruption\\_and\\_security.pdf](http://carnegieendowment.org/files/corruption_and_security.pdf) (last visited 28 Aug 2014).

<sup>28</sup> See [http://www.americanbar.org/advocacy/rule\\_of\\_law/about/origin\\_principles.html](http://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html).

<sup>29</sup> Available at (last visited 4 Sep 2014).

[http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba\\_rol\\_i\\_2014\\_program\\_book\\_web\\_email.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_rol_i_2014_program_book_web_email.authcheckdam.pdf) (last visited 5 Sep 2014).

## CHAPTER 8

# RULE OF LAW: RECENT OPERATIONAL EXPERIENCES IN AFGHANISTAN

Previous editions of this chapter attempted to prepare JAs for specific RoL missions in Iraq and Afghanistan, a requirement that no longer exists in Iraq and exists only minimally in Afghanistan. However, while US forces are unlikely to return on the same scale to Iraq or Afghanistan, recent military history suggests that at some stage in the foreseeable future, somewhere in the world the US military will be involved a large-scale intervention followed by R&S activities thereafter. If so, experiences in Afghanistan will provide valuable lessons in what to do and what not to do.

Afghanistan does not present a solution but represent the current baseline for operations of this nature. While there is a danger of always looking backwards, it is important to capture some of the flavor of the most recent RoL efforts particularly as USG as a whole still remains committed to supporting RoL in Afghanistan through the provision of personnel and resources. Thus, this chapter, while significantly reduced<sup>1</sup>, provides a brief overview of how RoL efforts have evolved in Afghanistan, especially since the last edition of the *Handbook*. This is primarily a historical rather than an analytical review and it will up to individual JAs to draw their own conclusions. As an historic review, though, JAs should be able to discern the prevailing themes of the necessity of host nation buy-in, the complexity of the interagency effort and the need for JAs to identify the broader strategic plan (if there is one) and situate their individual mission within it. Part I looks at US civil-military engagement within the context of national and international RoL plans. Part II is a brief look at some of the other more recent interagency and international RoL missions operating within Afghanistan.

As will be seen, strategies for the development of the RoL have evolved, a bewildering array of acronyms have been borne and numerous programs have been implemented in pursuit of RoL goals seen as imperative to a successful transition to Afghan control of overall security and stability. If and only if, Afghanistan manages to transition into a stable and safe state, then pervasive corruption and a lack of human capital will remain among the biggest obstacles to progress.

## I. Afghanistan Overview

### A. The Afghan Plan for Rule of Law

Following US intervention in 2001 and the overthrow of the Taliban regime there was no functional government in Afghanistan as the Taliban had repressed human rights and neglected social services and basic state functions. Under the December 2001 Bonn Agreement, Afghans formed a transitional government, began work on a new Constitution and committed to democratic principles and human rights obligations. Later that year, the country's first elections since 1969 saw Hamid Karzai embark on the first of two terms as the President of Afghanistan.

Developed in concert with the international community, Afghans owned the core plans for RoL. A series of overlapping and evolving strategic frameworks laid out the key objectives for RoL and the justice sector<sup>2</sup>. The first plan was the National Justice Sector Strategy (NJSS), passed during the Rome Conference on Rule of Law in 2007, which also established the National Justice Program (NJP). The NJP

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<sup>1</sup> For example the 2011 edition contains a detailed consideration of the Afghan and Iraqi legal systems. More detailed histories and lessons learned, on Iraq and Afghanistan RoL efforts, may be found in the CLAMO repository

<sup>2</sup> Congressional Research Service - Afghanistan: US Rule of Law and Justice Sector Assistance.

attempted to describe the effects required to establish RoL in this environment and the document itself represented a herculean effort to gain consensus between Afghanistan and the international community stakeholders.

The NJP aimed to be a comprehensive statement of the requirements for the RoL in Afghanistan. It established an end state, defined performance indicators, and outlined methods for monitoring and evaluation.<sup>3</sup> The NJP had six justice components:

- Effectively organized and professionally staffed, transparent, and accountable justice institutions
- Sufficient infrastructure, transportation, equipment and supplies to support the effective delivery of justice services
- Justice professionals adequately educated and trained 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.

As at publication, some international organizations such as the World Bank continue to use the NJSS/NJP to form the basis for their programs and support to the justice sector in Afghanistan.

Following the NJP was the 2008 Afghan National Development Strategy (ANDS)<sup>4</sup> which initially intended to cover a five year period (2008-2013) and contained a vision for Afghanistan in 2020 through a variety of plans for different “sectors” (such as agriculture, education, health, water, etc.). President Karzai approved the ANDS on 21 April 2008<sup>5</sup> calling it “an Afghan-owned blueprint for the development of Afghanistan in all spheres of human endeavor.” In 2010, as part of the Kabul Process,<sup>6</sup> the international community and Afghan government modified the ANDS by adopting the “ANDS Priority and Implementation Plan 2010-2013 (PIP).”<sup>7</sup> The PIP established new Strategic Objectives for security, governance and development reform divided into “national programs”.

Within governance, National Program 5 (NPP5): Law and Justice for All, rewritten in January 2013, targeted the legal system and RoL including legal aid, revising laws, simplifying the operations of state courts and facilitating linkages between informal and formal justice systems. As of the date of this writing, most international organizations provide support to the justice sector under NPP5.

## **B. The International Framework**

The Tokyo Conference on Afghanistan in July 2012 reaffirmed international community support for Afghan development, the focus being from transition to transformation with a view to Afghan self-

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<sup>3</sup> The responsibility for oversight is shared between the Program Oversight Committee (POC) and the Board of Donors (BoD). The first joint meeting between the POC and the BoD was held on 14 May 2009. Coordinating work on the NJP is unusually complicated because it involves so many different groups. These include: US, UK, Italy, Germany, Canada, NGOs, the World Bank (the Afghanistan Reconstruction Trust Fund), IDLO, ISISC, UNDP, UNODC, UNICEF, and UNIFEM.

<sup>4</sup> Afghan National Development Strategy, *available at* [http://www.embassyofafghanistan.org/sites/default/files/publications/Afghanistan\\_National\\_Development\\_Strategy\\_eng.pdf](http://www.embassyofafghanistan.org/sites/default/files/publications/Afghanistan_National_Development_Strategy_eng.pdf) (last visited 1 Oct 2014).

<sup>5</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>6</sup> See <http://www.thekabulprocess.gov.af/> (last visited 1 Oct 2014).

<sup>7</sup> <http://www.cfr.org/content/publications/attachments/ANDS%20PIP%20Vol%201%20final%2015July.pdf> (last viewed 1 Oct 2014).

reliance. This is the theme of the Afghan government's latest strategic vision, outlined in "Towards Self Reliance"<sup>8</sup> which sets security and development goals for Afghanistan through the year 2030. The document sets out aspiration for infrastructure, private sector, agriculture, and rural development. It considers "good governance" the key to successful implementation of the strategy. Most significantly, the Tokyo Conference endorsed the Tokyo Mutual Accountability Framework, which attempted to place indicators and metrics for progress to reduce corruption and provide more transparency and internal controls in the Afghan government as conditions for continued international funding.

Working with the Afghan government on RoL issues was complicated by the fact that there are six main ministries and executive agencies involved in providing RoL<sup>9</sup>: Outside the Afghan government, a large number of stakeholders remain interested in RoL. These include IOs, various USG agencies, other foreign national agencies, and NGOs. Experiences in Afghanistan confirmed that the military RoL practitioner must have an understanding of who the stakeholders are and how (and if) they fit together. Of these, the United Nations Assistance Mission in Afghanistan (UNAMA) is the most important IO to have developed RoL in Afghanistan. Originally established at the Afghan government's request in 2002, UNAMA's current mandate<sup>10</sup> calls for it to continue leading and coordinating international civilian efforts to assist Afghanistan's transition process to include 'the full assumption of Afghan leadership and ownership in governance and development.' With more than 20 UN agencies, funds and programs operating in Afghanistan, pursuit of greater coherence and coordination is a significant (and difficult) objective. UNAMA has regional offices at the provincial level which were of assistance to JAs in gaining situational awareness and coordinating RoL development efforts with other actors.

The European Union (EU) also engaged in RoL efforts in Afghanistan. The staff of the EU's Special Representative to Afghanistan were highly influential among international donors, although they had a limited field presence.<sup>11</sup> The EU's strategy for Afghanistan post-2014 includes support for state building and long term development and promotion of regional cooperation. The need for wider judicial reform to address issues of human rights and gender inequality was acknowledged. The EU Police mission (EUPOL) has a RoL component which focused on police-justice cooperation, anticorruption and human rights and gender. It is currently anticipated that the EUPOL RoL law mandate will expire in December 2015, although EUPOL's mission will last through 2016.

### C. US Strategy

Before 2010 different USG agencies approached their RoL development tasks with different goals, methodologies, and timelines, and were often unaware of each other's efforts.<sup>12</sup> In July 2010 this led to the US Ambassador to Afghanistan and the Commander of ISAF and UFOR-A to agree that a new approach to RoL coordination was required. As a result DoS established a new ambassadorial rank

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<sup>8</sup> Islamic Republic of Afghanistan Towards Self Reliance, Strategic Vision for the Transformation Decade 8 Jul. 2012 Tokyo Conference on Afghanistan, *available at* <http://mof.gov.af/Content/Media/Documents/Towards-Self-Reliance-27-6-2012167201210282583553325325.pdf> (last visited 1 Oct 2014).

<sup>9</sup> The Ministry of Justice, the Supreme Court, the Attorney General's Office, the National Directorate of Security, the Ministry of the Interior and, to a lesser extent, the Independent Directorate for Local Governance.

<sup>10</sup> Under UNSCR 2145 (2014).

<sup>11</sup> Factsheet on EU Engagement in Afghanistan, 14 Nov 2011 *available at* [http://eeas.europa.eu/policies/eu-special-representatives/vygaudas-usackas/docs/20120413\\_eu\\_engagement\\_afghanistan\\_en.pdf](http://eeas.europa.eu/policies/eu-special-representatives/vygaudas-usackas/docs/20120413_eu_engagement_afghanistan_en.pdf) (last visited 1 Oct 2014).

<sup>12</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 11 Apr 2014) "[T]he inspection team found that since 2002 the different civilian and military agencies engaged in aspects of RoL development have approached their tasks with different goals, methodologies, and timelines, and have often been unaware of each other's efforts." *Id.* At 7. Moreover, "[a]t the embassy in Kabul, . . . by late 2005, internal US coordination meetings on RoL were best characterized as shouting matches between representatives of different agencies." *Id.* at 8.

position to serve as the Coordinating Director for Rule of Law and Law Enforcement heading up a directorate of the same name some nine years after the US's initial entry into Afghanistan.

In November 2010 the US Embassy adopted the US Government Rule of Law Strategy, a plan acceptable to all stakeholders on the Kabul country team and approved by the interagency experts and policy makers in Washington. The USG developed this national strategy to support the Afghans' ANDS, NJSS and NJP. In particular, the strategy focused US RoL assistance in Afghanistan on constructive programs that offered Afghans meaningful access to fair, efficient, and transparent justice based on Afghan law while helping to eliminate the reach and influence of Taliban "justice." It also intended to increase the legitimacy of the Afghan government by promoting a culture with respect for the RoL. Key to the strategy was tackling corruption, and providing security and space for traditional justice systems to re-emerge organically in areas cleared of the Taliban. Critically, the strategy recognized that the US had no goal to replace traditional justice systems or to impose a western style justice system upon Afghanistan.

The US Embassy and COMUSFOR-A revised the USG Integrated Civilian-Military Campaign Plan for Support to Afghanistan in February 2011.<sup>13</sup> This plan attempted to replicate similar planning conducted previously in Iraq and sought to provide clear guidance on how the military, diplomatic, and development assets in Afghanistan should work cooperatively in the effort to secure and stabilize the country. This campaign plan was in turn superseded by a new Civil Military Strategic Framework in March 2012. This framework in turn was revised in August 2013<sup>14</sup> to include a standalone section on transition. The revision outlined US priorities throughout the transformation decade (2015-2024) reflecting policy changes and focusing on transition addressing the shift from provision to assistance. The framework provides for USG support to GIRoA's efforts to enhance legitimacy, exercise sovereignty and instill confidence in Government institutions through the transition period with a view to shifting from international to Afghan-led security by 2015. The priorities for RoL being constant with previous iterations; namely to:

- Build capacity of the GIRoA justice and legal systems
- Combat corruption within Afghan government agencies and institutions
- Increase access and understanding of the formal justice legal systems in order to empower civil society and protect women's rights in accordance with Afghan law and international obligations
- Strengthen linkages between the formal and customary justice sectors.

The framework acknowledges that the challenges of security, governance, RoL and socio-economic development will continue through the transformation decade and USG has committed to supporting GIRoA as a partnership 'focusing on supporting governance and development and seeking to preserve the hard fought gains of the past decade.' The USG has also committed to Afghan national goals articulated in the Afghan "Towards Self Reliance" construct referred to above in a shift towards traditional diplomacy and development presence led by the US Chief of Mission.

## **D. US Government Civil-Military Efforts**

While the civilian international and interagency community took the lead in RoL development, US and coalition military commands issued plans to support RoL efforts within their areas of responsibility. Rule of Law annexes to command plans focused on components of the NJP that the military was best placed to advance. Field presence in less secure areas was exploited in efforts to advance RoL in the provinces.

This section contains a brief synopsis of the civil-military efforts as they developed after 2010. The restructuring referred to above includes the establishment of Combined Joint Interagency Task Force-435

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<sup>13</sup> See [http://thesimonscenter.org/wp-content/uploads/2011/02/ICMCP\\_Feb\\_2011final.pdf](http://thesimonscenter.org/wp-content/uploads/2011/02/ICMCP_Feb_2011final.pdf) (last visited 1 Oct 2014).

<sup>14</sup> See GAO report on updated framework (2014) available at <http://www.gao.gov/products/GAO-14-438R> (last visited 1 Oct 2014).

(CJIATF-435) which grew from a military organization focused on detentions operations to a broader interagency RoL mission focused on building Afghan criminal justice capacity. A significant initiative of CJIATF 435 was the creation of the Rule of Law Field Force - Afghanistan (RoLFF-A) which led to the establishment of the NATO Rule of Law Field Support Mission (NRoLFSM).<sup>15</sup>

### **1. Joint Task Force 435 (2009 – 2014)**

In September 2009 SecDef established Joint Task Force 435 (JTF 435) to assume command, control, oversight and responsibility for all US detainee operations in Afghanistan, taking over from Combined Joint Task Force-82. This included the care and custody of detainees at the Detention Facility in Parwan (DFIP), oversight of detainee review processes, programs for the peaceful reintegration of detainees into society and coordination with other agencies for the promotion of the RoL in Afghanistan. JTF 435 focused its efforts on:

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

### **2. Combined Joint Interagency Task Force- (2010-2014)**

As part of the restructuring described above, CJIATF 435 was established in September 2010 with an expanded mission that included development of Afghan investigative, prosecutorial and judicial capabilities. It established RoLFF-A under a one-star commander who later became dual-hatted, assuming responsibility for RoLFSM-A under direct command of ISAF. A critical component of CJIATF-435's RoL strand was the Joint Legal Center (JLC) in Bagram which built evidentiary case files for Afghan detainees transferred to the DFIP which was subsequently renamed the Afghan Nation Detention Facility. A significant number of JAs working for the JLC mentored Afghan judges and lawyers working in the specialist Afghan security court at the Justice Center in Parwan. CJIATF-435 was drawing down as this edition of the *Handbook* was going to print.

### **3. Rule of Law Field Force-Afghanistan and NATO Rule of Law Field Support Mission – Afghanistan**

#### **a. RoLFF-A (2010 onwards)**

The RoLFF-A, was created as a subordinate command to USFOR-A and CJIATF-435 to offer RoL field support to civ-mil RoL teams, its mission was to 'provide essential field capabilities, liaison, and security to partnered Afghan and Coalition civil-military RoL project teams to build Afghan criminal justice capacity, increase access to dispute resolution services, fight corruption, and promote the legitimacy of the Afghan government.' A small command element of RoLFF-A currently remains in Afghanistan.

#### **b. NRoLFSM (2011-2013)**

In June 2011, ISAF created NRoLFSM as a command directly subordinate to COMISAF. Its mission statement coincided with that of RoLFF-A: 'to provide essential field capabilities, liaison and security to

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<sup>15</sup> For more detail as to how RoL efforts evolved during that period, a complete history of NRoLFSM and RoLFF-A, 2010-2014 is available in the CLAMO document library: *A History of NATO Rule of Law Field Support Mission and Rule of Law Field Force – Afghanistan NRoLFSM/RoLFF-A 2010-2014* (13 Mar 2014).

Afghan and International civilian providers of technical assistance supportive of building the Afghan criminal justice capacity, increasing access to dispute resolution, thereby helping to improve the efficacy of the Afghan government.”

The NRoLFSM focused on five primary tasks:

- Security – for civilian RoL experts
- Coordination – to facilitate movement of the experts and provide a liaison and outreach function
- Movement Support – such as secure convoys
- Engineering Support – for possible infrastructure upgrades at designated RoL facilities
- Oversight of contractual process – especially in connection with engineering support. and in accordance with ISAF practices.

By July 2013, the commander’s vision for both organizations was “to build Afghanistan’s resistance and resiliency against insurgent and terror-related threats through use of EvBO, forensic evidence, and enhanced cooperation across the Afghan Justice Sector.” ISAF revised the mission statement to synchronize with the ISAF campaign plan. The revised mission was to “train, advise, and assist the Afghan Justice Sector to develop and sustain effective evidence-based investigations and prosecutions in order to protect the people of Afghanistan, enhance security and strengthen the legitimacy of the Government of the Islamic Republic of Afghanistan (GIROA) through the Rule of Law.”<sup>16</sup>

### **c. Lessons Learned from NRoLFSM/RoLFF-A**

In March 2014, NRoLFSM/RoLFF-A published a final AAR of their operations in Afghanistan. The paragraphs below are excerpts from the summary memorandum of this AAR.<sup>17</sup> Main achievements were listed as:

- Completing a large number of justice infrastructure projects
- Establishment of training and mentoring initiatives; interaction with a broad variety of Afghan and international RoL actors
- Court operations at the Justice Center in Parwan.
- The increase of EvBO by the coalition forces and the Afghan Justice sector.

Some of the main challenges raised were:

- Termination of the forensic training and premature closure of the Afghan Criminal Techniques Academy
- The lack of organic security details preventing NRoLFSM/RoLFF-A from offering consistent field support to civilian agencies
- A lack of appreciation of the importance of EvBO and RoL development among the international military partners
- A geographic approach rather than a focus on strengthening the RoL pillars of investigation, prosecution and incarceration to criminalize the insurgency.

NRoLFSM/RoLFF-A made the following strategic policy recommendations:

- Establishing a single coordinating authority for RoL to synchronize military efforts with the US Embassy, other national embassies, and NGOs

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<sup>16</sup> Rule of Law Field Support Officer Deskbook: Guidelines and Lessons Learned for Military Support to Justice Sector Development in Afghanistan (Jun 2012).

<sup>17</sup> The complete ROLFF-A AAR is located in the CLAMO repository.

- Focusing the RoL mission on improving the investigation and prosecution of insurgent-related crimes in key areas or in a central court
- Transitioning to EvBO as early as possible
- If detainees held in administrative detention under LOAC are transferred to a criminal justice system for prosecution, extreme care should be taken to use host-nation institutions and procedures to the greatest extent possible to avoid engrafting an administrative procedure with the potential to undermine or politicize the regular justice institutions.

Primary mission-specific recommendations were:

- To establish an overall baseline for the RoL situation prior to mission
- To maintain a system of consistent, relevant metrics
- To define an end-state for the military RoL mission
- To focus on a specific mission-set to criminalize the insurgency through use of the host nation criminal justice sector supporting the use of intelligence-based targeting to conduct EvBO.

#### **NRoLFSM/RoLFF-A's Conclusion**

“In any future conflict in which a nation is rebuilt, especially one that has been in a period of protracted conflict, the military must be able to provide for initial RoL development conducted in a non-permissive to semi-permissive environment. As part of an effective RoL program, the military must begin enabling civil authority by transitioning to EvBO and supporting justice sector development even while conducting early phases of combat operations. Building the criminal justice sector will allow the host nation to more effectively investigate, prosecute and incarcerate criminals for insurgent-related crimes and protect coalition forces even if coalition LOAC detention authority is subsequently limited by the host nation. A strong host nation criminal justice system will also help to create a more permissive environment to allow other development programs to flourish. The extent and timing of RoL development programs by all entities (military, civilian government, international organizations and NGOs) need to be sequenced, coordinated and synchronized in order to build a stable government, garner support of the people for the government, and maximize RoL development while minimizing cost.”

#### **4. NATO Training Mission–Afghanistan (NTM-A)<sup>18</sup>/Combined Security Transition Command–Afghanistan (CSTC-A)**

From April 2009 through the fall of 2013, NATO Training Mission–Afghanistan (NTM-A) and its US companion command, Combined Security Transition Command–Afghanistan (CSTC-A) were a combined command operating from Camp Eggers in downtown Kabul. During this period, JAs and DoD civilian attorneys providing training, advice, and assistance to the Afghan legal personnel within the Afghan Ministry of Defense (MoD) and Ministry of Interior (MoI). The focus of the RoL effort was to enable the Afghan legal personnel to develop fully functioning legal offices capable of providing proactive legal advice to their respective leaders at the Ministerial level and within the various subordinate organizations, to include the Afghan National Army (ANA) General Staff. Critical to this

<sup>18</sup> The decision to establish NTM-A was made by heads of state at the Strasbourg Kehl Summit in Apr 2009. NTM-A was formally activated on 21 Nov 09.

effort was the development of a effective military justice system to include trial courts at the ANA Corps, including an appellate court located in Kabul and the development of an Operational Law capability to assist the Chief of General Staff (the ANA equivalent of the US Army's Chief of Staff, Army) to understand Afghan obligations stemming from the Geneva Conventions and other international treaties.

During the fall of 2013 NTM-A and CSTC-A disaggregated such that they became separate commands. With the closure of Camp Eggers in February 2014 the two commands physically separated with NTM-A moving to New Kabul Complex and CSTC-A moving to ISAF HQ. Even with reduced personnel after this transition was complete, both the MoI and MoD continued to receive legal training. By effectively training the ANA legal personnel and establishing a functioning military justice program, the US legal personnel assigned to NTM-A/CSTC-A working with the ANA and ANP personnel were able assist in the development of Afghan RoL.

Development of an Operational Law capacity, needed to ensure that command emphasis was placed on compliance with LoAC is still a work in progress. Leaders within the MoD and the ANA General Staff recognized the need to dedicate more legal personnel to the Operational Law, but due to the force caps in place of 195,000 soldiers and the desire not to increase headquarters at the expense of the operational units, adding personnel for this function was not a priority.

## 5. Provincial Reconstruction Teams

Provincial Reconstruction Teams evolved out of OEF “coalition humanitarian liaison cells” in early 2002<sup>19</sup>. The PRT concept matured from a single US-led pilot project in Gardez<sup>20</sup> in November 2002 to an international effort involving 25 teams in Afghanistan's 34 provinces.<sup>21</sup> The PRTs fell under the broad authority of ISAF and received general guidance through the ANDS process described above. The PRTs generally consisted of 50 to 100 military and civilian personnel and focused on force protection and small quick impact reconstruction and assistance operations. The civilian component of advisors included staff from DoS, USAID, and the Agriculture Department. The PRT's military commander, usually an Air Force or Navy O-5, did not have command authority over the non-DOD civilians.<sup>22</sup>

The PRT role in ISAF development and reconstruction grew such that by 2007 they were “the principal vehicle to leverage the international community and Afghan government reconstruction and development programs.”<sup>23</sup> The PRTs operated under tactical control of their battlespace task force, which was usually a BCT. Civilian practitioners generally led RoL efforts in their geographical area with support of military judge advocates, civilian affairs RoL practitioners and RoLFF-A in some locations.

The PRT handbook provides the following examples of PRT activities in support of RoL:

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<sup>19</sup> Afghanistan PRT Handbook, Army Center for Lessons Learned, No. 11-16 (Feb 2011) at 3 (“A dozen Army civil affairs units staffed these small outposts, dubbed “Chiclets” with the task to assess humanitarian needs, implement small-scale reconstruction projects and establish relations with the U.N. Assistance Mission in Afghanistan and non-governmental organizations still in the field,” *citing* US Institute of Peace Special Report 152, Oct 2005 page 2) [hereinafter PRT Handbook].

<sup>20</sup> The PRT location in Gardez closed on 3 Apr 2013. During its 10-year history, the PRT invested over \$282 million on approximately 527 projects.

<sup>21</sup> Donna Miles, *PRTs Showing Progress in Afghanistan, Iraq; Civilian Reserve Needed*, US DEP'T OF DEF. (Oct 5, 2007), <http://www.defense.gov/news/newsarticle.aspx?id=47700> (last visited 1 Oct 2014).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* General Wilkes also told the Subcommittee, “The activities of the PRTs are setting the conditions that bring more local support to the central government, further separating the local population from the insurgency, and continuing to transform the lives of the Afghan people . . . . The PRT is an entity to facilitate progress and ensure both the counterinsurgency and national development efforts are complementary and ultimately successful.”

- Support development of bar associations. law school curricula and standards and continuing legal education initiatives
- Facilitate police training in investigative techniques, evidence collection, constitutional law and forensics
- Develop appropriate relationships between police and investigative judges
- Monitor trials and detentions for signs of legal corruption, intimidation, or favoritism
- Maintain close relationships with judges Conduct public awareness campaigns in support of the RoL<sup>24</sup>

With the drawdown of military personnel in Afghanistan starting in late 2012, PRTs deactivated throughout the spring and summer of 2013. Duties fulfilled by DoS and USAID became the responsibility of the US Embassy and military RoL missions either became the responsibility of the respective Regional Command, Brigade Legal Section, or ended all together.

PRTs have been the subject of much analysis, and many reports<sup>25</sup> have highlighted their achievements and potential. PRTs are viewed most favorably for their focus on local security as opposed to reconstruction,<sup>26</sup> but they have also received criticism, not least by President Karzai, who came to see them as an obstruction to governmental authority. Some of the more critical observations are as follows:

- They varied in terms of capabilities and resources owing to varied national ownership and politics
- There was often a lack of coordination with other aid agencies and even internally between civilian and military components
- Much of the work initiated by PRT projects was not sustainable or well thought, often through due to national pressure to be seen as doing something.<sup>27</sup>

## II. Other Recent Interagency and International Missions in Afghanistan

As discussed at the beginning of the chapter a brief snapshot of *some* of the major agencies and international organizations involved in RoL projections at or near the time of transition in Afghanistan is included below. While every operational theater is specific and a number of the activities described below will not endure into 2015, the projects described are intended to be illustrative as to the type of activities that may perpetuate after military involvement in a host nation RoL has ceased.

### A. US Interagency Missions

#### 1. State Department Activities

The INL is still conducting missions in Afghanistan and has been the largest single provider of RoL assistance in Afghanistan through numerous programs such as the Justice Sector Support, the Corrections System Support Program (CSSP) and the Justice Training Transition Program focusing on institutional capacity building as well as training and mentoring in Kabul and in key provinces. These programs have employed hundreds of local and international attorneys and advisors and together JSSP and JTTP have trained nearly 3,000 Afghan investigators, prosecutors, judges, and defense attorneys - 40% of justice

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<sup>24</sup> PRT Handbook at 51.

<sup>25</sup> ROUGE, Estelle A., *The Effectiveness of Provincial Reconstruction Teams in Afghanistan*, available at <http://www.natowatch.org/node/683> (last visited 1 Oct 2014).

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

<sup>27</sup> Tim Foxley, *Provincial Reconstruction Teams: useful concept, flawed execution?* (12 Mar 2014); available at <http://www.oxuspost.com/2014/03/12/provincial-reconstruction-teams-useful-concept-flawed-execution/>

officials nationwide - while INL maintained a central RoL Training Center in Kabul. The CSSP has trained over 8,000 corrections personnel nationwide and also provides infrastructure assistance.

As well as formal justice sector development, INL has run gender-focused programs, expanded legal aid services throughout Afghanistan, increased public awareness of legal rights and supported numerous academic initiatives.

## **2. DoJ Activities**

As of October 2014 DoJ had maintained a presence in Afghanistan consisting of the DEA, the FBI, the USMS a counter-narcotic criminal investigator trainer/mentor, and experienced DoJ attorneys. The attorneys train and assist Afghan investigators, prosecutors and judges at the Afghan Criminal Justice Task Force (CJTF)<sup>28</sup> and the Central Narcotics Tribunal (CNT). A detailed description of the CNT and how JAs may be able to use it was contained in Chapter 11 of the 2010 Handbook.<sup>29</sup>

Led by a Senior Executive Service Justice Attaché at CNT, DoJ attorneys helped the Afghans craft a comprehensive counternarcotics law that created a specialized investigative/prosecutorial task force and a specialized court with exclusive nationwide jurisdiction for drug trafficking (and related corruption) cases in Afghanistan. The CNT successfully heard thousands of cases. The DEA stationed Special Agents and Intelligence Analysts to provide counternarcotics training to Afghan security forces. The FBI established a Major Crimes Task Force which focused on Afghan-led investigations of corruption, kidnapping, and other serious criminal acts before transferring this capability to DoD in 2013. Finally, rotating teams of Deputies from the Special Operations Group of the USMS established a Judicial Security Unit (JSU) in partnership with the Afghans to protectin courts and judges throughout Afghanistan.

## **3. United States Institute of Peace Activities**

The Institute has been heavily involved in RoL reform in Afghanistan since 2002 and is still actively engaged within the country. One of the key areas of engagement for USIP since 2002 has been to explore traditional dispute resolution mechanisms as a form of conflict resolution and justice provision. 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 national policies on the relationship between the two sectors. The Institute has onducted significant research, dialogue and programming on the role of Islamic law and religious leaders in conflict resolution and justice provision, including research and projects exploring the inter-relationship between religious leaders, community elders, and rights opponents.

The Institute has also supported research on constitutional analysis and interpretation in Afghanistan, bringing experts from a variety of constitutional systems to Afghanistan to provide comparative examples of constitutional implementation. This research led to a series of consultations with Afghan justice officials on criminal law reform and combating serious crimes in Afghanistan. The Institute also supports a project for Afghan scholars to engage in constitutional analysis, discussion, and public debate. The Institute 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, D.C. on Afghanistan policy.

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<sup>28</sup> Under Afghan law, the CJTF has exclusive nationwide jurisdiction over threshold drug cases and drug-related corruption.

<sup>29</sup> See *Rule of Law Handbook A Practitioner's Guide for Judge Advocates* 2010, Chapter 11, Rule of Law Narratives, Section I, D *Counter Narcotics Justice Task Force (CJTF): An Afghan Success Story*

## B. International RoL Efforts

### 1. International Monetary Fund

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. In November 2014<sup>30</sup> an IMF staff team met with GIRoA to discuss a program moving into 2015 and beyond following the expiration of an earlier 3 year program signed in November 2011 worth \$133.6 million<sup>31</sup>.

According to an IMF statement, the 2011 program's key objectives are "to make significant progress toward a stable and sustainable macroeconomic position while managing the challenges of the withdrawal of the international presence in Afghanistan; strengthening the banking system and addressing the governance and accountability; and improving the transparency and efficiency of public spending and services to protect the poor."<sup>32</sup> 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.

### 2. The World Bank

In January 2010 the World Bank and the IMF agreed to support US\$ 1.6 billion in debt relief for Afghanistan, as Afghanistan reached the completion point under the Heavily Indebted Poor Country (HIPC) Initiative.<sup>33</sup> Debt relief granted under the HIPC Initiative is conditioned, in part, on satisfactory performance under, and a track record of reform and sound policies through, IMF-supported programs.<sup>34</sup> The World Bank also supports development in Afghanistan through the Afghanistan Reconstruction Trust Fund (ARTF) which it manages as a fiduciary agent. The ARTF was established in 2012 and is supported by 33 donors. It has delivered important results within key sectors including governance. Of particular significance to RoL development was the "Judicial Sector Reform Project". The project's objective was to enhance the capacity of the justice sector institutions to deliver legal services. It comprised three components:

- enhancement of the capacity of legal institutions
- empowerment of the people
- strengthening of implementation capacity.

The first component included 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 aimed to improve legal awareness, as well as the capacity to provide legal aid throughout the country. The third component provided support to Afghan justice sector institutions to implement the NJSS.

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<sup>30</sup> IMF Press Release No. 14/548 dated 2 Dec 2014.

<sup>31</sup> IMF, Program Note "Islamic Republic of Afghanistan" November 15, 2011, *available at* <http://www.imf.org/external/np/sec/pr/2011/pr11412.htm> (last visited 10 Jun 2014).

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

<sup>33</sup> See <http://www.imf.org/external/np/sec/pr/2010/pr1015.htm> (last visited 10 Jun 2014).

<sup>34</sup> See <http://www.imf.org/external/np/exr/facts/hipc.htm> (last visited 10 Jun 2014).



## CHAPTER 9

# RULE OF LAW VIGNETTES

*Every JA who has deployed has their own vignettes, often relating to recent experiences in Iraq and Afghanistan. Previous editions of this Handbook included many of these, so, with the exception of Captain Adam Bushey's first article, they have not been repeated. This edition's collection of vignettes focuses on the reoccurring topics of interagency, flexibility, and the move towards permissive RoL engagements. The chapter finishes where it started, with a contribution by Captain Bushey, this time in the form of a book review of Rachel Kleinfeld's leading book – Advancing the Rule of Law Abroad: Next Generation Reform. None of the contributions in this Chapter should be taken to represent any official position of the units, organizations or countries the authors work for or are affiliated with.*

### **I. Finding Help in the Right Places for a Counterinsurgency Strategy<sup>1</sup>**

*The author of this narrative (a USAID Country officer who conducted Rule of Law operations in Afghanistan while deployed there in his capacity as an Army National Guard officer) singlehandedly demonstrates the benefits that flow from and understanding of, and empathy for, interagency cooperation.*

Winning the hearts and minds is a challenging endeavor, particularly in a nation as impoverished as Afghanistan.<sup>2</sup> I believe the only way to effectively implement a COIN strategy is to employ and receive guidance from the best and brightest locals within the area in which we work.

#### **A. Local National Attorneys**

To assist and support our TF with the RoL and governance mission within our four-province AO, we hired ten Afghan attorneys and one Afghan engineer, forming Teeme Mushawereen-e Hoqoqi (Legal Advisor Team), to interface with local government leaders.<sup>3</sup> To be consistent with our Afghan-Lead-Afghan-Owned strategy, we emphasized capacity building of the legal advisor team by focusing on their training and largely entrusting our governance mission to them, while simultaneously decreasing brigade RoL mission travel.<sup>4</sup>

The benefits of the decision to make Teeme Mushawereen-e Hoqoqi (TMH) the face of our governance mission were both vast and deep. These local experts had invaluable insight into the local area, people, and customs. They effectively represented the RoL Mission on our behalf, and as respected members of the community, they were able to contact almost any local leader at any time. Moreover, empowering local staff gave the mission credibility amongst the Afghan leaders, thereby strengthening our partnerships and improving implementation.

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<sup>1</sup> CPT Adam Bushey is in the NYS Army National Guard. With a significant focus on anti-corruption measures, his team helped train and develop the justice sector skills of over 2,000 Afghan attorneys, judges, prosecutors, police, and local leaders during his 2010 tour. His full-time job is with USAID.

<sup>2</sup> After ten years of US occupation in Afghanistan, the UNDP's 2010 Human Development Report ranks Afghanistan as the 155 of 169 least developed country in the world (it was second to last in 2009). Afghanistan has one of the lowest life expectancy and adult literacy rates, and it is in the top ten for women's inequality in the world. About 15% of the population has electricity.

<sup>3</sup> I was often asked if I could trust our legal advisors. First, we made sure to hire the best and brightest. Second, we became a true team, interdependent on one another to succeed. We created a culture of hard work, honesty, and collaboration. The legal advisors cared deeply about the team and the mission.

<sup>4</sup> Coincidentally, decreasing brigade travel provided us more time at HQ to formulate and shepherd programs through the chain of command approval process.

## 1. Sustainability

The success of our mission was sustainable on two fronts. First, our programs were properly tailored to their respective beneficiaries, thereby providing trainings and resources in critically needed areas. This is largely in part because as we created, contracted, implemented, monitored, and evaluated our more than 20 separate governance programs, the legal advisors regularly proposed programs or alterations to programs based on beneficiaries assessed needs, culture, and capabilities. For example, a vast majority of the programs outlined in our TF Governance Campaign Plan were designed strategically for our sub-national area by our legal advisor team.<sup>5</sup>

Second, hiring local experts allows institutional knowledge to continue following the transfers of authority (TOA). Repetitive assessments are often performed by replacement brigades as previously detailed assessments die on an unknown share drive.<sup>6</sup> Not only does this loss of knowledge slow down project implementation, but it appears suspicious and disorganized to our Afghan counterparts. Hiring Afghan attorneys remedies this negative cycle that inevitably occurs during TOAs.

## 2. The Proper Spotlight

Every program was designed and evaluated based on how well the program increased the authority and capacity of the government in the eyes of the populace. As such, it was critical that local media and participant reports center on the Afghan government's ability to govern and function, not on what the Americans provided. By having TMH monitor and evaluate our trainings, resource distributions, and other RoL programs, we effectively focused the attention of the program's success on the Afghan government by keeping coalition participation absent and in the background.<sup>7</sup>

## 3. Hiring Mechanism

Local staff are hired through O&M, not CERP funding. The O&M hiring process is a simple six step process:

- Step 1. Assemble a Joint Acquisition Review Board (JARB) packet, which typically requires a detailed Statement of Work (SOW), a Letter of Justification (LOJ), a Purchase Request & Commitment (PR&C) form, and a photocopy of your nomination letter and certificates designating you as a Contracting Officer Representative;
- Step 2. Submit the packet to the S-8 (or whoever is collecting them at the Brigade level);
- Step 3. S-8 sends it to the JARB for approval;
- Step 4. The approved packet is forwarded to the financing office who certifies the funds and forwards the packet to the contracting office;
- Step 5. The Contracting Officer publishes request for proposals/bids;
- Step 6. You select the strongest bid.

A JARB packet can be completed in about a day if you use an existing SOW as a model intended for hiring local nationals.

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<sup>5</sup> The TF Governance Campaign Plan focused on the Afghan justice sector holistically, including police, prosecutors, defense counsel, judges, law schools, the corrections system, civil society, and traditional and formal judicial mechanisms. It was written in strict adherence of: 1) USG strategy; 2) Afghan government priorities; 3) division guidance; and 4) the Commander's priorities.

<sup>6</sup> A civil affairs officer in our operational environment was not permitted to participate in meetings by Afghan officials for this very reason.

<sup>7</sup> However, coalition attendance at ribbon-cutting events (e.g. opening of a new courthouse or legal library) is both expected and encouraged.

One must pay careful attention to the cost section of the SOW. For example, fair payment for an Afghan attorney is approximately \$2,000 USD/month.<sup>8</sup> Fair pay is essential for a trustworthy team with high morale. Although a specific salary amount cannot be indicated in a SOW, you should explicitly state that the contractor must provide a sufficient salary, comparable to other organizations, to recruit and retain candidates with adequate experience. Attention to salary at the outset will decrease the likelihood of losing strong staff to higher paying jobs.<sup>9</sup>

## **B. Reinventing the Wheel**

Given the turnover rate and distinct chains of command, there is an astounding amount of knowledge lost amongst RoL JAs. There were a dozen other JAs doing the same job in other parts of the country and some of us were creating and implementing similar projects from scratch every time. Do not let this happen; work with your higher command to get names of high-performing JAs so you can learn from their experiences and attain their project templates to use in your operational environment.

For example, I implemented a district leader training program with district-governors, other local officials, and a local Sharia science organization to train Mullahs, Maliks, and Shura leaders on: 1) the importance of registering Shura decisions with the formal government, 2) anti-corruption laws and how to report corruption; 3) the Afghan Constitution and its strong relationship to Islam; and 4) basic civil and human rights afforded by the law, including women's rights.<sup>10</sup> I was then able to forward already approved project materials like the SOW, LOJ, and slide deck to other JAs. All they needed to do was work with their local officials, conform the documents to their particular AO, and the paperwork was already done. Similarly, I also shared the aforementioned documents needed for the JARB packet to hire local nationals; there was no need to reinvent the wheel.

## **C. Conclusion**

My mission would not have been successful without the guidance I received from the top-performing JAs who came before me, and, more importantly the advice and counsel of Teeme Mushawereen-e Hoqqi. By working with Afghan civic society organizations and Afghan government leadership, our legal advisors offered Afghans meaningful access to fair, efficient, and transparent justice based on the specific needs of our battle space through an Afghan-Led, Afghan-Owned COIN strategy. Only with the assistance of TMH were we able to increase the government's legitimacy and public standing by promoting a culture that values governance.

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<sup>8</sup> The bidding contractor will have to take his cut and pay his employment tax, so the contractor would need to receive more than \$2,000USD/month per attorney.

<sup>9</sup> The decision on which contractor to hire should be based in part on the bidder's cost estimates and not simply on who made the lowest bid. I found that contract bidders would low ball a bid proposal to win the contract, but then be unable to retain the most competent attorneys because the pay offered was not comparable to similar positions offered by the international community.

<sup>10</sup> Additional governance projects completed by members of my team included: 1) providing resources (e.g. legal books, police investigative tool kits) and training to the police to improve their professionalism, understanding of the law, and ability to perform their duties; 2) collaboration with the Afghan government to build nine legal libraries to expand citizen knowledge of their rights; 3) the establishment of a partnership to create a legal defense clinic that protected the rights of prisoners; and 4) working with a local NGOs to train citizens on women's rights.

## II. Rule of Law by Stealth—UK Detention Oversight Team 2013-2014

*The following narrative is intended to demonstrate the need for flexibility and how even the most narrowly focused JA mission can turn out to have RoL implications.*

The UK set up a Detention Oversight Team (DOT)<sup>11</sup> in late 2009 to monitor the conditions of detainees transferred by the UK into Afghan custody. The DOT's role was to visit every single former UK detainee and then report back to the UK Secretary of State for Defence (Defence Secretary). In spring 2012, allegations emerged that some transferred detainees had subsequently been physically mistreated by the Afghan National Directorate of Security (NDS). Mindful of the UK's international Human Rights obligations and that the UK's policy of transferring detainees in general was already subject to legal scrutiny,<sup>12</sup> the Defence Secretary directed that all detainees remained in UK detention at Camp Bastion, Helmand rather than transfer to the Afghan Government. In July 2013 the UK resumed the transfer of detainees to the Afghan National Detention Facility—Parwan (ANDF-P),<sup>13</sup> next to Bagram Airfield.

ANDF-P held individuals pre-trial alleged to have been involved in insurgent-related crimes who had either been transferred from within the Afghan judicial system or from ISAF nations. Detainees were held in ANDF-P until the conclusion of their criminal cases and were either released or prosecuted in the adjacent Justice Center in Parwan (JCIP). The JCIP was mentored by DoS and CJATF-435 and consisted of specialist Afghan primary and appeal Courts with Afghan civilian judges and lawyers. The key point was that on transfer, all ANDF-P detainees were Afghan detainees subject to Afghan law.

### A. Detainee Perspective

On paper the DOT mission sounded very clear-cut: visit detainees, ask them specific questions about their treatment, and report on the risk of future mistreatment.<sup>14</sup> The DOT was not responsible for detainee welfare, nor did it have any ANA mentoring responsibilities. However, when I explained to the first detainee I interviewed the UK no longer had any responsibility for him, and his treatment was the sole responsibility of the Afghan government, he laughed. He said that the fact that his daily food was brought by an ANA soldier was irrelevant as the soldier was only doing it because the ANA were controlled by the UK. Later on, he said, the Afghan judge who would decide his case would merely be a puppet of the UK. To prove his point the detainee pointed at two US guards providing satellite overwatch in the corridor and said, "look, you British are everywhere."

This very first encounter demonstrated the need to empathize with the host nation participant (however willing or unwilling) as early as possible—something which is often forgotten in RoL activities. Here was a young, uneducated, Pashtun who may not have travelled further than from his village to his nearest market town ever before in his life. Yet now, regardless of the merits of his case—which will be discussed later—foreigners had arrested him, taken him to Camp Bastion and then moved him hundreds of miles by air to near Kabul where another foreigner was now telling him that the Afghans were in charge of him. Moreover, the DOT conducted the interview with an interpreter and the fact that the detainee failed to

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<sup>11</sup> The DOT was a small military team comprising a JA Lt Col, a MP MAJ, an interpreter and a force protection NCO. This article is written by Lt Col Tim Child who deployed December 2013 through July 2014.

<sup>12</sup> Resulting from Maya Evans Judicial Review [2010] EWHC 1445 (Admin).

<sup>13</sup> ANDF-P had been built with US funds and was manned by soldiers from the Afghan National Army (ANA) MP Bde housed in a separate Afghan base next to ANDF-P. A US MP Brigade under the command of CJATF 435 mentored and trained the ANA although this US presence was steadily reducing once the US handed day-to-day operational control over to the ANA in 2013.

<sup>14</sup> Once individuals had been transferred to the Afghan government, the UK's legal responsibility passed in relation to these individuals. However, a duty of care still remained for those who might be transferred to the Afghan government in the future.

distinguish between US and UK troops was not that significant: our uniforms and physical appearance were similar and we were still all foreigners to him.

## **B. RoL Mission Creep?**

The UK transferred over detainee case files to further any subsequent Afghan investigation. The DOT never saw these case files as our role was to assess custodial conditions rather than decide guilt or innocence. However, it was soon apparent that the detainees' major concern was about the progression of their cases and that they expected DOT to fill in the gaps for them. Incarceration in any form is an unfamiliar concept to most Pashtun and a number of detainees were melodramatic in their utterances along the lines of, "I don't care if I am convicted, or set free. I just want to know what will happen to me. Not knowing is worse than death."

It was also apparent that since arriving in ANDF-P detainees had received no, or very little, information about their cases from the Afghan authorities. Occasionally officials had appeared at communal cells and asked detainees to sign documents or confirm their name, but that appeared to be it. The DOT had no oversight as to detainees' case progression and complaints about a lack of a case update did not amount to serious mistreatment or torture under the DOT mandate. However, as a lawyer I felt the right to be kept informed was a fundamental right regardless of the circumstances of arrest. In this sense, very early on, an ostensibly discrete national mission turned into a wider hybrid RoL mission.

We spoke to our day-to-day ANA contacts in the ANDF-P Ops room who referred us to ANA Bde Legal who referred us to the local NDS investigation office who referred us to the ANA prosecutor at JCIP who referred us back to ANA Bde legal; who no doubt would have referred us back to the ANDF-P Ops room where we had started. Those who have deployed to Afghanistan will be familiar with this circularity of responsibility – suffice to say a good deal of patience was required. Eventually we obtained copies of signed Pashto documents listing the dates that ANA Legal had received detainees' case files. Although this may not sound very much it did allow DOT to return to detainees the next month and show them their name and number on an Afghan document and confirm with them that they were being officially processed within the Afghan legal system.

As the months passed, we pieced more and more information together. While never enough for some detainees, the majority appeared to appreciate our efforts on their behalf which engendered a certain degree of openness among some of the more hostile detainees. This in turn lent more objective credibility to DOT reports that detainees were not being seriously mistreated or tortured.

This time-consuming role of "broker" became DOT's SOP for many other day-to-day issues raised by detainees such as those relating to routine medical treatment, air-conditioning, library books, visiting rights, length of exercise periods, pens and paper, and clothing. Some matters simply were not important and DOT had to remain impartial throughout: not automatically believing every complaint, not being viewed as stooges of the ANA. Rather than ignore every low-level complaint as a time-consuming gripe, DOT viewed every issue raised as an opportunity to engage with our Afghan hosts. These daily gripes opened up humdrum issues which illuminated the very fabric of the ANDF-P and the ANA who manned it. For example, a detainee complaining that Tajik guards allowed his cell five minutes less exercise than Pashtun guards created an opportunity to talk to a guard NCO and explain that a detainee had raised an issue, assess the NCO's attitude and discuss his perspective.

Aside from case progression, the issue of greatest significance to detainees was religion. ANDF-P had a single religious officer who did not appear actively engaged in the process of providing religious education or even seem aware of which cells contained mullahs. This frustrated certain detainees who wanted to receive religious education but were unable to do so because they lacked a mullah in their cell. These detainees were often very aggressive when they informed DOT of their desire to move cells.

DOT informed the religious officer of these requests and the cell location of mullahs. When nothing happened DOT approached the ANA Ops room direct and re-explained the issue, again being very careful to merely present the issue rather than providing a solution.

Such moves improved individual and overall cell harmony. In particular the perceived role that DOT had in the process allowed greater access to the “senior” mullah, Mufti S<sup>15</sup>, who as a detainee of great influence had previously been extremely hostile and incited other detainees with anti-ISAF rhetoric. Sensing a softening in his stance once other detainees had been transferred to his cell to study, DOT persevered with extra, extremely long interviews with him. On the day before his release in April 2014, Mufti S requested an extra interview in which he thanked DOT for their understanding the importance of religion to detainees. He added that he would tell his village on his return that he had been well-treated by ISAF, when he was a detainee. While ultimately any improvements for detainees had been made by ANA, the perception that he took home to his village was a positive one far removed from his earlier destabilizing rhetoric.

### **C. Cultural Awareness**

Talking to an enlisted soldier from Wardak or Kunduz province about why UK soldiers appeared every morning at his cell may not have result in a tangible, recordable metric, but it might have been the first time that such a soldier had ever spoken directly to a lawyer of any nationality. At the other end of the rank spectrum, DOT’s mere presence on a daily basis was a constant reminder to senior officers that they were being monitored. While we initially encountered considerable suspicion from the ANA hierarchy, by the end of the tour senior officers encouraged us to raise issues with them.<sup>16</sup> Whether this was due to a detailed understanding of the DOT mission or, more likely, due to ANDF-P’s increased political profile is a moot point; yet the end result was unrestricted access for detainee monitoring purposes: a clear RoL win.

In dealing successfully with issues it was important to approach the right person at the right time with the right issue: if someone too junior was approached then nothing would happen and if someone too senior was approached about a trivial matter, then there was the possibility that uninformed, kneejerk disciplinary action might ensue. It was important not to be blinded by rank: the three most important ANA individuals that DOT dealt with were a sergeant (the Librarian), a Warrant Officer (the main Ops Warrant officer) and a Colonel (Deputy Brigade Commander). While the majority of issues were discussed with these three individuals, it was important to understand their precise roles, spheres of influence and to whom they reported. In order to do so, DOT learnt to speak very basic Dari, wrote down and memorized the names of scores and scores of ANA personnel, learnt where they came from, where they lived, shared their aspirations, discussed soccer teams (invariably Manchester United and Barcelona), played sport together and ate and drank with them. Captain Michael Martin, a UK officer who became fluent in Pashto and spent 15 months in Helmand Province estimated that he only understood 1% of his hosts’ culture;<sup>17</sup> so we clearly only scratched at the surface but critically we realized progress would only result from a genuine attempt to understand.

Day-to-day involvement in ANDF-P also meant coming into contact with DoS, TF 435, US MPs and Dyncorp professionals to name but a few at various stages of the Afghan legal system. Add in the ICRC and other NGOs and there was a significant array of interested parties. To avoid interfering it was

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<sup>15</sup> A mufti is a scholar with a formal religious education as opposed to a mullah who requires no formal education.

<sup>16</sup> By way of example, one morning DOT was informed that the “head lawyer” wanted a meeting. The “head lawyer” turned out to be an ANA divisional SJA who had come down from Kabul. He was responsible for briefing the Law of Armed Conflict throughout ANA and had heard of DOT.

<sup>17</sup> Dr Michael Martin, AN INTIMATE WAR: AN ORAL HISTORY OF THE HELMAND CONFLICT 1978- 2012 (2014).

absolutely critical to engage in dialogue with as many different agencies as possible, as often as possible. JAs should not be afraid to explain their presence and stand their ground if necessary: too often individual teams become insular and it is easy to miss opportunities and efficiencies.

## **D. Conclusion**

As a lawyer involved in matters pertaining to individual liberty my role had an inherent but unstated RoL component to it. In seven months of monitoring the facility, DOT encountered no incidents of serious mistreatment or torture to detainees and was able to comply with its monitoring requirements in pursuance of UK policy. There was very little “black letter” law involved but my role often required using my status as lawyer to influence common-sense decisions. Improving the RoL is not always about drafting new statutes or building courtrooms, most often it is about being recognized as a lawyer and being seen to be engaged in open-minded discussion with the host nation. Often your mission will move you in directions that you had not anticipated at the pre-deployment stage and the chances are that the unexpected will include an element of the RoL.

## **III. Human Rights Training in a Permissive Environment**

*The following vignette should serve as a useful guide to the issues you may encounter when providing training in another country. Again the need for interagency and joint coordination is key and JAs should remember that they are acting as diplomats for their nation. The successful mission will cater for a range of expertise among students and remember that teaching is a two-way process, with issues faced by other nations often bringing out learning points for the US.*

In September 2014, a US Army Pacific (USARPAC) legal engagement team conducted a Subject Matter Expert Exchange with military lawyers from the Indonesian National Armed Forces (*Tentara Nasional Indonesia* or TNI). The Legal Engagement Team consisted of two Army JAs from USARPAC, an Air Force JA from Pacific Air Force (PACAF) and a Marine JA from CLAMO.<sup>18</sup> A civilian from the Office of Defense Cooperation, US Embassy, Jakarta, served as the principle liaison between USARPAC and TNI and was indispensable for the planning and execution of the engagement.

### **A. Mission**

The main theme throughout the engagement was the military lawyer’s role in teaching and preserving RoL in both the military justice system and during the conduct of military operations. The legal engagement team arrived in Indonesia with multiple objectives, including to:

- Familiarize the TNI with the US JA’s mission and organization within the different service JAG Corps;
- Instruct TNI on US JA support to military operations
- Develop a better understanding of TNI attorney training and functions
- Develop a better understanding of how legal services are provided within the TNI
- Encourage future legal engagements with the TNI.

### **B. TNI Law School, Jakarta**

The first two days of the engagement took place at the TNI Law School in Jakarta. About 40 Indonesian military members attended, representing the TNI Army, Air Force, and Navy (Navy lawyers cover the

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<sup>18</sup> This article was written by Capt James Burkart, USMC JA assigned to CLAMO.

TNI Marine Corps) with a mix of senior officers (colonels) down to law students (second lieutenants). American personnel presented classes on:

- The organization of the US Army/Air Force/Marine Corps/Navy JAG Communities
- Army JA Training and Education
- Legal Issues in Operational Environments
- Evolution of the UCMJ and Current UCMJ Challenges
- Role of Legal Advisor in Investigations and the Military Justice Process.

While the TNI members were very attentive and respectful during the classes, it appeared that some of the instruction was lost in translation. TNI comprehension was further hindered by their unfamiliarity with the US system. Although TNI had specifically requested classes on the evolution of the UCMJ and current military justice challenges, the USARPAC personnel soon realized that foundational courses were needed on the basics of American government (executive, legislative, and judicial branches), the military justice system, and the relationship between the military and civilian authorities. It is recommended that future legal engagement teams prepare a presentation of a basic military justice scenario that walks through the entire judicial process from crime until final disposition, with basic flowcharts, pictures and vocabulary.

The TNI law school trains military lawyers, military prosecutors, and military judges. This school is four years long and covers military law, but graduation from this law school does not qualify military lawyers to practice as civilian lawyers. Students come from the military academy, a civilian university military officer program, or laterally move from another branch (like infantry or field artillery). After learning the theory at the military law school in Jakarta, the students then attend the TNI Legal Education Center in Bandung for practical training in staff integration and the implementation of the law into military operations. USARPAC brought hard copy publications and DVDs to donate to their law offices and libraries, including the Operational Law Handbook, the LOAC Document Supplement, the LOAC Deskbook, the RoL Handbook, the USMC MAGTF Handbook, the Domestic Operations Handbook, Joint Publication 1-04 (Legal Support to Military Operations), and Army Field Manual 1-04 (Legal Support to the Operational Army), among others.

The Indonesia Military Justice System is based on their Military Law Code passed by the Indonesian Parliament (Indonesia is a civil law country based strictly on codes rather than a common law system with judicial precedent). The four basic steps of the military justice process are investigation, prosecution, trial, and disposition. Civilian courts have no jurisdiction over military personnel and thus any potential crime committed by military personnel will be investigated by military police, prosecuted by military prosecutors, and tried before a panel of military judges (there are no juries). Both government and defense can appeal to a High Military Court and ultimately the civilian Supreme Court. The main purpose of the criminal justice system is the rehabilitation of the service member, while also providing an appropriate punishment. The criminal system of military courts operate parallel to an administrative discipline system (like Article 15 non-judicial punishment) conducted by commanders that can impose administrative punishments such as reduction in rank or discharge from the military.

Human rights groups have criticized this system because “[p]ast experience has shown that military courts lack transparency, independence and impartiality, and have failed to adequately investigate and prosecute alleged serious human rights abuses by members of the military.”<sup>19</sup> Accordingly, the TNI lawyers had many questions about the concurrent jurisdiction that federal, state, and military courts have over US service members and the idea of a service member being tried in civilian court. They were also interested in the relationship between the commander and the military police, military prosecutors, and military judges and how the criminal system can maintain independence from unlawful command influence.

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<sup>19</sup> Human Rights Watch Letter to Chairman Stamboel of April 22, 2010.

A TNI Navy officer taught on the Law of the Sea and highlighted the challenges Indonesia faces as an archipelagic nation bordering the South China Sea. Indonesia is a party to the UN Convention on the Law of the Sea and claims status as an archipelagic state with three designated north-south archipelagic sea lanes (ASL) and with sovereign rights of exploration, exploitation and some law enforcement over an exclusive economic zone extending 200 nautical miles and a continental shelf extending 350 nautical miles. They specifically indicated issues with US claims of an east-west ASL that Indonesia does not recognize, jurisdictional control over the Strait of Malacca and the Australian Maritime Identification Zone. Although the TNI were greatly interested in hearing US interpretations regarding territorial waters and the South China Sea situation, USARPAC personnel declined to present on this politically sensitive subject.

TNI personnel also presented formal lectures on the TNI Law School and the Indonesian Military Justice System.

### **C. TNI Legal Engagement Centre, Bandung**

The next two days of the engagement took place at the TNI Legal Education Center (*Pusdiklum*) in Bandung. The TNI audience was approximately 30 personnel. The presentations again touched on the military justice system but also covered more operational issues. The Marine JA taught on the Role of the Military Lawyer in Targeting and the Collateral Damage Estimation Process and a TNI Army officer covered the Role of the TNI Legal Officer in Military Operations.

The Indonesian military conducts operations for two main objectives: internal unity and external security. Within these full spectrum military operations the legal officer provides both legal assistance and legal support during predeployment preparation and the actual deployment. TNI has legal officers at the Chief of Army Headquarters (Director of TNI Legal Services), the Divisions (Chief of Legal Office), and even at Brigades (a major as legal officer); there are approximately 1,000 to 2,000 TNI lawyers for a TNI military that is approximately 500,000 service members.

As a member of the commander's special staff, the legal officer provides advice directly to the commander on the overall legality of operations and on any specific legal aspects of the operations. As a member of the coordinating staff, the legal officer provides advice to other members of the staff. The legal officer helps their G-1 (Intel) with the vetting of targets in distinguishing between combatants and non-combatants and between military objectives and civilian objects. They advise their G-2 (Operations) on International Humanitarian Law, International Human Rights Law, and Rules of Engagement. They assist their G-3 (Personnel) with detention and medical casualty issues and their G-4 (Logistics) with transportation that avoids civilian areas and contract support from civilians. Furthermore, legal officers work with their G-5 (Civilian-Military Territorial Staff) that transports civilians away from areas of hostilities and handles internally displaced persons.

While more formal lessons were initially planned, the second day was spent in an interactive question and answer session open to any topic. American personnel learned that Indonesian Religious Courts have *Shari'a* jurisdiction only over Muslims and generally handle family law (marriage, divorce, and child custody), Islamic financial law, and inheritance issues. A US service member violating Indonesian law would be tried in a general civilian court (unless at time of war when a military commission might be applicable); TNI could provide assistance but could not otherwise interfere in the civilian judicial system. The informal conversations that took place during coffee breaks were also very productive in exchanging information and developing relationships.

Finally, TNI lawyers indicated that their biggest challenges are:

- Gaining the trust of the public in military courts which are viewed as overly protective of soldiers

- Providing legal assistance in civilian courts to military members and their immediate family which includes spouse, children and parents
- Returning military property and assets to civilian control as the TNI previously had extensive business interests and land holdings.

The engagement culminated with the observation of a field exercise at a Special Forces compound (*Pusdikpassus*) in Bandung. The ICRC had been instructing TNI Special Forces soldiers (non-legal branches) regarding international humanitarian law for the previous two days, and TNI invited the USARPAC legal engagement team to observe their course-ending live-action scenario training. TNI units simulated counter-insurgent tactical situations that raised issues regarding the law of armed conflict. Facilitators then led the students through a review of the scenario and a discussion of the issues. The scenarios were thoughtfully designed to raise practical considerations that generated a great deal of discussion and differences of opinion among the students.

The Indonesian officers were very eager to show that their forces comply with international humanitarian law and international human rights law in their military operations and indicated a desire for more legal engagements and training opportunities in the future, including TNI military lawyers attending courses at The Judge Advocate General's Legal Center and School. Overall, the engagement successfully educated both sides regarding the others' legal community organization, military justice systems, and provision of legal support to military operations.

#### **IV. Comparing Existing US Government and International Best Practices to Rachel Kleinfeld's book -- *Advancing the Rule of Law Abroad: Next Generation Reform*<sup>20</sup>**

*This article has been included as an analysis of Dr Kleinfeld's leading work on RoL which looks in depth at the nature of RoL and addresses the need to address underlying cultural norms before attempting RoL reform. By including this review at the very end the Handbook has come full circle to the wider issues raised in the opening chapters.*

“We don't have to be stupid or ineffective to fail – just misguided in our approach.”<sup>21</sup>  
General Stanley McChrystal

Rachel Kleinfeld authored *Advancing the Rule of Law Abroad: Next Generation Reform* (2012), which was selected as one of the best foreign policy books of 2012 by Foreign Affairs Magazine. Dr. Kleinfeld has an impressive background and experience in Rule of Law (RoL). She is the co-founder of the Truman National Security Project, a Senior Associate at the Carnegie Endowment for International Peace, and she has consulted for the World Bank, the EU, OECD, and multiple government agencies and private organizations on building the rule of law in weak states.

#### Breaking Rule of Law Down to its Core:

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<sup>20</sup> CPT Adam Bushey is a JAG Officer in the NYS Army National Guard. He started at the U.S. Agency for International Development (USAID) in 2007 and now holds a position in their Center of Excellence for Democracy, Human Rights and Governance. The article is the opinion of the Author's alone and should not be considered statements of policy by the U.S. Government. He can be reached at [adam.bushey@us.army.mil](mailto:adam.bushey@us.army.mil). Fatima Younus, a USAID Governance and Rule of Law unpaid Legal Intern, contributed towards this work. A special thank you to Caitlin Buck, 1LT Adam Zarazinski (USAF), and Sara Werth for their thoughtful edits and support. This article is due to published in the Houston Journal of International Law, Vol 37, (2014).

<sup>21</sup> General Stanley McChrystal, *ISAF Commander's Counterinsurgency Guidance*, 3 (2009) [http://www.nato.int/isaf/docu/official\\_texts/counterinsurgency\\_guidance.pdf](http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf).

Rachel Kleinfeld explains that Rule of Law (RoL) programming, generally, supports legal, judicial, and law enforcement reform efforts.<sup>22</sup> However, what makes Dr. Kleinfeld’s book so informative is not how she defines RoL, but her understanding and articulation of the core elements of RoL. Dr. Kleinfeld explains that RoL is primarily about power and the existence (and ability) of **structures to check and balance that power**. Additionally, and perhaps secondarily, it is about **cultural norms and habits**.

Therefore, according to Dr. Kleinfeld, RoL programming should fundamentally be about constraining power in a society – both the power of the government and the power of individuals. Her definition of a society that follows the RoL is one in which:

- the government is bound by, and governs through, pre-existing laws
- citizens are treated equally before the law
- human rights are respected
- law and order prevails
- citizens have access to efficient means to settle disputes<sup>23</sup>

It is important to note that there is not widespread consensus on the definition of RoL. This is partially due to the fact that development agencies<sup>24</sup> often approach RoL programming with different objectives (e.g. economic, political, human rights, human security, or democracy). Dr. Kleinfeld’s definition is in line with both the USAID and UN definition of RoL. USAID identifies five areas of RoL programming (Order and Security; Legitimacy; Checks and Balances; Fairness; and Effective Application),<sup>25</sup> which was developed in 2010 after completing case studies in multiple countries over a period of several years. According to the United Nations, RoL is a principle of governance in which “all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>26</sup>

### Why RoL Projects Fail and Challenges to RoL Reform

According to Dr. Kleinfeld, all RoL programming is conducted in four focus areas: **laws, institutions, power structures, and cultural and social norms**. Dr. Kleinfeld explains that, historically, laws and institutions have been the main targets of RoL reforms. However, programs focused on laws and institutions often do not address the fundamental popular and professional norms that must be altered to affect meaningful change.

Instead, RoL reform efforts need to focus on the role of power structures and culture. RoL programs can do this by: 1) creating horizontal and vertical checks and balances on power; and 2) using researched techniques, based on country-context, that change cultural behaviors, whether in the society as a whole or within rule of law professions (e.g. judges, law enforcement, lawyers).

The goal of RoL reform is to help restore the relationship between the state and society. Dr. Kleinfeld believes that when RoL projects fail, it is because the RoL practitioner set shortsighted, narrow goals. Instead of focusing on the reform needs and constraints as seen by locals (e.g. an anti-corruption

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<sup>22</sup> Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (2012).

<sup>23</sup> Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform*, Chapter 8, (2012).

<sup>24</sup> Examples include: UK Department for International Development (DFID), Australian Agency for International Development (AusAID), Swiss Agency for Development (SWD), and the United Nations (UN) to name a few.

<sup>25</sup> United States Agency for International Development, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, 2 (2010), available at: [http://pdf.usaid.gov/pdf\\_docs/PNADT593.pdf](http://pdf.usaid.gov/pdf_docs/PNADT593.pdf).

<sup>26</sup> From the UN website homepage (<http://www.un.org/en/ruleoflaw/>), which quotes the *United Nations Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616)*.

initiative), outside RoL practitioners tend to focus on building RoL institutions (e.g. court houses, case management tracking systems) that mirror those in the West.

A changed institution should not necessarily be a goal in and of itself. Such programming often does not address the root causes of challenge within the RoL system, such as distrust, systemic corruption, or a lack of capacity—root causes that are all associated with power and culture.

While mirroring Western constructs in programming is an issue, Dr. Kleinfeld may overstate its existence. U.S. Government (USG) programs in the past often emulated Western systems with little in-country context. However, in recent years, the USG development principles have pushed programs to be more focused on hiring local experts and finding best-fit programs instead of using one-size fits all approaches. Country context programming is evident through USG’s recent work with the Informal Justice Sector, although more country context programming could be done both in this sector and in other areas of areas of RoL generally.<sup>27</sup>

Liberia provides a strong example of how USAID studied a state’s cultural norms and country context to link the informal (non-state) and formal justice systems. According to a 2008 Oxford University survey, rural citizens use the formal court system in Liberia less than 5% of the time for both criminal and civil matters. Liberia is trying to build citizen trust in its formal justice system while at the same time remedying some non-state approaches that run counter to basic human rights, gender rights, and Liberia national law. However, most Liberians prefer the non-state system because it is seen as:

- having lower fees
- less arbitrary
- more transparent
- less susceptible to bribery<sup>28</sup>

Through RoL programming, the Ministry of Internal Affairs and the Ministry of Justice (MOJ) have signed several Resolutions/MOUs with informal justice sector leaders. The Carter Center RoL program, supported by USAID, is developing trust and a linkage between the two systems. They are hosting consensus building participatory meetings that, while time consuming, are effectively building community buy-in for a dual court system with checks and balances. The Carter Center also created community plays, community forums, radio commercials, and music that focused on: 1) how to use the formal system; and 2) important new laws that the non-state system was required to adhere to (e.g. inheritance rights, sexual assault protections, land dispute laws). In Liberia, the MOJ and Carter Center’s focus on specifically educating rural people about their rights was an important component to the overall non-state RoL program. While the program had challenges,<sup>29</sup> it has proved successful.

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<sup>27</sup> Several examples can be found in the unpublished Traditional Justice Programming: Best Practices Guide: A Practitioner’s Guide to Non-State Justice Sector Programming, such as: USAID, *Fostering Justice in Timor-Leste: Rule of Law Program Evaluation*, January (2009), [http://pdf.usaid.gov/pdf\\_docs/PDACM677.pdf](http://pdf.usaid.gov/pdf_docs/PDACM677.pdf); USAID, *Gender Assessment USAID/Panama*, (2010), [http://pdf.usaid.gov/pdf\\_docs/pdacr977.pdf](http://pdf.usaid.gov/pdf_docs/pdacr977.pdf); Rawls, Amanda. *Policy Proposals for Justice Reform in Liberia: Opportunities Under the Current Legal Framework to Expand Access to Justice*, <http://www.idlo.int/Publications/WP2rawls.pdf>, (2011) and USAID, *Evaluation of RoL Programs in Liberia*, (2009) [http://pdf.usaid.gov/pdf\\_docs/pdaco233.pdf](http://pdf.usaid.gov/pdf_docs/pdaco233.pdf); and USAID, *Kenya Land Tenure Project* <http://usaiddlandtenure.net/projects/kenya>.

<sup>28</sup> Isser, Deborah. Looking for Justice: Liberian Experience with and perceptions of Local Justice Options [http://www.usip.org/files/resources/liberian\\_justice\\_pw63.pdf](http://www.usip.org/files/resources/liberian_justice_pw63.pdf) p31 2009.

<sup>29</sup> Ibid. For example, limiting local elders’ ability to handle serious crimes has caused some to see a reduction in justice because the formal courts are still not seen as a credible and viable alternative. Moreover, efforts to harmonize the two systems at times have appeared to be an attack on a “culture rather than on harmful practices.” To remedy this, USIP has suggested that the government: “adopt a more nuanced approach to defining jurisdictional limitations—for example, by introducing criteria to determine when crimes may—and may not—be adjudicated by customary authorities. Such criteria might include whether or not the parties prefer customary

Similar to Dr. Kleinfeld’s approach, the USAID Guide to RoL Country Analysis also suggests caution before using cookie-cutter RoL programs as avenues to pursue. Specifically, it states that “obvious flaws in the legal system (such as lack of judicial independence, severe administrative failings, or case backlogs) are only symptoms. The underlying malady is the power of entrenched political and economic elites who benefit from a compliant legal system or ethnic or regional domination.”<sup>30</sup>

RoL practitioners face great substantive challenges, which include:

- getting political actors to give up power to allow for more accountability and internal controls
- changing cultural norms
- battling institutional and societal corruption
- unanticipated consequences of resource allocation
- strengthening civil society to advocate for change

To succeed despite these and other challenges, RoL programs must incentivize political actors to give-up power and change cultural norms, whether by offering motives (e.g. financial rewards, nonfinancial rewards, media oversight, punishments) or by helping civil society actors on the ground push for change. By giving up some power and control,<sup>31</sup> leaders can create needed checks and balances that limit subjectivity in governments.

Dr. Kleinfeld’s assessment on the need to change power structures and increase checks and balances is supported by the recent systematic review of existing impact evaluations conducted in the anti-corruption arena by the United Kingdom Department for International Development (DFID). In The Effectiveness of Anti-corruption Policy, an incredible focus is put on the need for incentivizing political actors to give up control and allow for a change in cultural norms. Popular and professional norms that impede the growth of rule of law in countries where there is a substantive deficit can range from graft and kickbacks, to gender and human rights violations.

The word ‘incentive’ is used more than 200 times in the 115-page review. The review makes it clear that impact evaluation research on anti-corruption programs has proven that simply creating a monitoring system is ineffective without a simultaneous incentive (and/or consequence) program<sup>32</sup> (note incentive programs can also be “ineffective if the incentive [and/or consequence] is not large enough”).<sup>33</sup> In other words, checks and balances are not effective in curtailing anti-corruption without corresponding punishments, financial rewards, nonfinancial rewards, or media oversight. Many of these incentives (and/or consequences) can be done without additional funding.<sup>34</sup>

### Goal of RoL Reform

*RoL reform must establish a respected and fair relationship between the state and society through balanced powers, proper oversight, checks and balances, and a culture norm that supports RoL. This is*

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adjudication, whether or not a third party is affected, whether or not there is a political or ethnic dimension to the crime, etc. Among the benefits of such an approach would be a reduced caseload in the few existing formal courts.” Ibid. Page 5 and 93. See also *Evaluation of RoL Programs in Liberia, (2009)*

[http://pdf.usaid.gov/pdf\\_docs/pdaco233.pdf](http://pdf.usaid.gov/pdf_docs/pdaco233.pdf).

<sup>30</sup> United States Agency for International Development, *Guide to Rule of Law Country Analysis: The rule of Law Strategic Framework*, 11 (2010), available at: [http://pdf.usaid.gov/pdf\\_docs/PNADT593.pdf](http://pdf.usaid.gov/pdf_docs/PNADT593.pdf).

<sup>31</sup> Dr. Kleinfeld’s E.g. include independent judiciary, internal accountability mechanisms, media or civil society oversight.

<sup>32</sup> Incentive examples include: reducing budgets if corruption exists, media publicity, merit pay, audits with strong punishments to name a few.

<sup>33</sup> Rema Hanna et al., *The Effectiveness of Anti-Corruption Policy*, 9 see also page 14 (2011), available at: [http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti\\_corruption\\_2011Hanna.pdf](http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti_corruption_2011Hanna.pdf).

<sup>34</sup> Example: See the federally implemented program in Brazil that reduces federal funding transfers to local municipalities if audits find the Mayor to be corrupt. Ibid. program explained on page 32.

particularly challenging in societies centered around family, but do not have broader connections to other citizens within the country. It is found that as loyalty to one's country decreases and loyalty to one's family/clan increases, the more difficult it is to create country-wide functional RoL systems.<sup>35</sup>

#### Four approaches to reform

According to Kleinfeld, there are four approaches to reform for changing the four focus areas of RoL mentioned earlier (**laws, institutions, power structures, and cultural and social norms**). The four approaches for reform are top down, bottom up, diplomacy, and enmeshment. Circumstances will determine which approach is most suitable. The best approach may be a combination of more than one approach.<sup>36</sup>

A **top down** approach is the most straightforward, which funds institutions and existing leaders to resolve a technical issue (e.g. changed law, better rules, more efficient case system, and infrastructure). While a top down approach can be useful for technical reforms, technical issues are rarely the problem. Top-down reform is not particularly effective in changing behavior, culture, or needed legal reforms that lack political will. Further, simply codifying better rules does not mean that those rules will be implemented or enforced. To be fully effective, these programs should include technical assistance, training, and socialization of the changes. Program goals should include transparency as well as responsiveness.

Dr. Kleinfeld's point that changing legal text by itself is not enough, that enforcement and incentives must also change, is supported by USAID's 2007 Legal Empowerment of the Poor Guide, which states that enforcement, done through creating appeal processes, audits, and changing the rules to limit discretion, must also be strengthened.<sup>37</sup> For example, replacing potentially corrupt workers with automated technology can be a very effective anti-corruption strategy that can ensure that new laws are enforced.<sup>38</sup>

The second approach, **bottom up**, works through civil society, businesses, bar associations, ethics committees, and religious groups to build vertical checks on the power of the government or other powerful actors, such as organized crime. By building community support through coalitions, bottom up strategies create long-term checks on power and can change popular and professional culture. Bottom up approaches can be some of the most effective strategies in our toolkit. For law reform, in particular, the bottom up approach works best because it can create cultural acceptance of the laws and government

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<sup>35</sup> Kleinfeld, 74. See also, Licht Amir N., Chanan Goldschmidt, and Shalom H. Schwartz, *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, (2002) <http://dev3.cepr.org/meets/wkcn/7/756/papers/licht.pdf>, which explains that societies whose culture emphasize individual uniqueness and view individual people as equals are less likely to be corrupt than countries whose culture is of the embeddedness structure (i.e. honoring elders and tradition, obedience, looking for guidance in areas other than through the law, putting individual family or clan above country). The author states that having law and order is associated with distinct culture values like autonomy and collectivism, the opposite of embeddedness. The authors conclude by questioning whether practitioners correctly identify culture as something that should always be factored into development programs. Similar to Dr. Kleinfeld, the authors suggest that some aspects of certain embeddedness cultures are simply antagonistic to RoL and good governance, and should not necessarily be reinforced but instead be changed.

<sup>36</sup> Kleinfeld explains each types through program examples conducted all over the world, including Indonesia, Albania, Nepal, Kyrgyzstan, Romania, and Colombia to name a few.

<sup>37</sup> "Legal empowerment of the poor occurs when the poor, their supporters, or governments, employing legal or other means, create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization." United States Agency for International Development, *Legal Empowerment of the Poor: From Concepts to Assessments*, (2007), available at: [http://pdf.usaid.gov/pdf\\_docs/PNADM500.pdf](http://pdf.usaid.gov/pdf_docs/PNADM500.pdf).

<sup>38</sup> Rema Hanna et al., *The Effectiveness of Anti-Corruption Policy*, 9 (2011), available at: [http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti corruption 2011Hanna.pdf](http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti%20corruption%202011Hanna.pdf).

accountability to the people. Breakdowns will often continue until the politically powerful are observant of, and held accountable to, the laws instead of ignoring them.<sup>39</sup>

However, there are disadvantages to the bottom up approach as well. For example, bottom up approaches often support non-governmental organizations, thereby doing little to help build the government's actual capacity. Further, picking the wrong partners, such as those without credibility or true expertise, can have negative consequences. Bottom up work is often tied to corresponding top down programming.

The third approach is **diplomacy**, which uses political pressure to instigate RoL reforms. Since the 1960's, when the USG began engaging in RoL development, USG motives have expanded to include more than U.S. security interests.<sup>40</sup> Foreign policy goals now add the promotion of democracy, human rights, and economic development to the base motive of U.S. security.<sup>41</sup>

The underlying assumption, or development theory, of the diplomacy approach is that if political actors change, reform will follow. Methods available in diplomacy include sanctions, embargoes, conditional aid, and domestic legislation with international scope and reach. Dr. Kleinfeld writes that diplomacy can be a strong tool when a specific reform is identified. However, she believes it is ill-suited for general cultural reforms. With many competing diplomatic priorities, Dr. Kleinfeld suggests that the diplomacy approach is limited due to security and other priorities that overshadow rule of law reform goals.

Finally, the **enmeshment** approach requires a country to meet certain preconditions to be eligible for membership in an international organization that supports the rule of law (such as NATO or the European Union). A softer form of the enmeshment approach socializes elites and professionals through exchange programs. The goal of enmeshment is to socialize people into a rule of law culture, thereby changing their popular and/or professional norms. Strong enmeshment, tying a country into international institutions, can be an effective approach. Soft enmeshment can rarely change a culture unless enough people from the same institution are brought into an enmeshment program together. For example, short two-week cultural exchanges of single individuals within large bureaucracies cannot change a bureaucratic culture easily. Enmeshment requires that enough individuals with power and influence are reached to create a ripple effect, which is often difficult to achieve with limited resources.

The concept of strong enmeshment, tying one to an international organization, is supported by the new USAID Strategy on Democracy, Human Rights, and Governance,<sup>42</sup> but questioned by the U4 Anti-Corruption Resource Center.<sup>43</sup>

### Reform Strategy

The first generation of RoL reforms were primarily top down and designed to change laws and institutions without changing the relationship between the state and society. The second generation

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<sup>39</sup> Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (2012), 213.

<sup>40</sup> DOS/USAID, *Leading Through Civilian Power: The First Quadrennial Diplomacy and Development Review*, 6 (2010), "As President Obama has said, America's security depends on diplomacy and development."

<sup>41</sup> DOS/USAID, *Leading Through Civilian Power: The First Quadrennial Diplomacy and Development Review*, 10 (2010) "Since our economy is interconnected with the local economy, we are using the tools of diplomacy and development to help achieve balanced and sustainable growth through an open, rule-based international economic system ..."

<sup>42</sup> United States Agency for International Development, *USAID Strategy on Democracy Human Rights and Governance*, (2013), available at:

[http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG\\_%20final%20final%206-24%203%20\(1\).pdf](http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG_%20final%20final%206-24%203%20(1).pdf).

<sup>43</sup> Jesper Johnson et al., *Mapping Evidence Gaps in Anti-Corruption: Assessing the State of the Operationally Relevant Evidence on Donors' Actions and Approaches to Reducing Corruption*, (2012), available at:

<http://www.u4.no/publications/mapping-evidence-gaps-in-anti-corruption-assessing-the-state-of-the-operationally-relevant-evidence-on-donors-actions-and-approaches-to-reducing-corruption/>.

reforms advocated by Dr. Kleinfeld start by looking at the problems as identified by the citizens of a country (and not just the well-connected elites in leadership positions) rather than the problems identified by foreigners. Second generation RoL programming restores the relationship between a state and society through a comprehensive strategy that attempts to build accountability mechanisms by changing power structures and cultures to support the RoL. The measure of success is not an increased output of a technical program (number of police trained, or courthouses built) but rather a measurable decline in the problem identified (i.e. improved law and order, reduced human rights abuses – with the understanding that better reporting when a problem is being fixed can affect measurement).

For example, the USAID Democracy, Human Rights and Governance (DRG) Strategy identifies Public Financial Management (PFM) as a program intervention that can contribute to promoting a culture of lawfulness across multiple sectors. PFM programs increase auditing and transparency in accounting, recording, and reporting. If done in multiple government agencies, this can help achieve their budget targets with less corruption. According to a recent evidence-based study on impact evaluations by the U4 Anti-Corruption Resource Center, PFM programs have a strong impact on reducing corruption and fraud by changing incentives and cultures.<sup>44</sup>

Dr. Kleinfeld's second generation RoL programming focuses on a problem identified by the local society, and not simply reforms outsiders think are needed. Her step by step approach, while expressed in a new way, is it not necessarily new itself. What is truly enlightening, however, is her unique and accurate focus on **check and balances of power, cultural and social norms**. She also makes it clear who should be designing these programs. While it is often lawyers who implement RoL programs, it is anthropologists, sociologists, and political scientists who have a true understanding of power and culture. These individuals should be involved with the design process.<sup>45</sup> Examples of Dr. Kleinfeld's second generation programs include: independent judicial schools that promote ethics for judges; bar associations that build ethical codes and professionalism; police academies that include culture of lawfulness as part a doctrine or core curriculum; law schools that build RoL and human rights into their curriculum; and programs that enlist the power of religious groups to fight corruption and change cultural attitudes to condemn corruption publically.

In the 2009 USAID Reducing Corruption in the Judiciary Program Brief, similar types of programs were listed as suggested programs. USAID expressed that it was important to create a culture of lawfulness, particularly in the judiciary, because “adherence to high standards of judicial independence and impartiality, integrity, accountability, and transparency not only diminish corruption. Respect for these values also makes the judiciary accessible, credible, efficient, and effective in protecting rights, guarding against predation, and helping to assure an environment in which participatory democratic societies can flourish.”<sup>46</sup>

However, speaking to the citizenry and utilizing meaningful measurements are not new concepts. It is USAID policy that RoL programs should reflect the values and norms of that society, and if applicable, borrow from regional models while introducing innovations when necessary. USAID's RoL Country Analysis involves four crucial steps: 1) political and historical context; 2) political economy analysis; 3) identification of RoL champions and spoilers; and 4) measurement and evaluation. USAID's first step in

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<sup>44</sup> Jesper Johnson et al., *Mapping Evidence Gaps in Anti-Corruption: Assessing the State of the Operationally Relevant Evidence on Donors' Actions and Approaches to Reducing Corruption*, (2012), available at: <http://www.u4.no/publications/mapping-evidence-gaps-in-anti-corruption-assessing-the-state-of-the-operationally-relevant-evidence-on-donors-actions-and-approaches-to-reducing-corruption/>.

<sup>45</sup> Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (2012), 185.

<sup>46</sup> USAID, *Reducing Corruption in the Judiciary Program Brief*, 19 (2009), [http://pdf.usaid.gov/pdf\\_docs/PNADQ106.pdf](http://pdf.usaid.gov/pdf_docs/PNADQ106.pdf).

analyzing a country's RoL system is to take into account the political and historical context and legal traditions.<sup>47</sup>

For its part, the new 2013 USAID DRG strategy mentioned above will help USAID move away from programs that focus on creating systems (e.g. case management systems), and focus more on culture and relationships as outlined by Dr. Kleinfeld. For example, The Strategy states that "USAID will support accountability to shift the **incentives** of the ruling elite so they will support meaningful reforms and more inclusive and accountable modes of political and economic governance" (emphasis added).<sup>48</sup> In other words, the Strategy emphasizes incentivizing leaders to create a culture of lawfulness through checks and balances on power and through social norms.

Again, in the vast majority of cases, USAID hires local experts during initial Democracy and Governance Assessments to measure problems identified by the citizenry.<sup>49</sup> For instance, an outsider might see outdated commercial laws as the reason for lack of business development, when in reality the real reason might be institutional corruption. After working with the local citizenry, Step 2 of USAID's RoL Country Analysis is to divide the problem into its institutional, political, and cultural components through a Political Economy Analysis.<sup>50</sup> Third, practitioners should locate both champions and spoilers of the potential RoL program(s) as early as possible in order to make the most informed choices.

In USAID's fourth and final step of program design, evaluation targets and measurement goals, which determine whether the problem is getting better or worse, are created before the project is implemented. True measurements will measure actual program impact. According to USAID's 2011 Evaluation Policy, impact evaluations "measure the change in a development outcome that is attributable to a defined intervention. They are based on models of cause and effect and require a credible and rigorously defined counterfactual to control for factors other than the intervention that might account for the observed change (ex. treatment and control group)." In contrast, performance evaluations are more output oriented, which include "what a particular project or program has achieved (either at an intermediate point in execution or at the conclusion of an implementation period); how it is being implemented; how it is perceived and valued; whether expected results are occurring; and other questions that are pertinent to program design, management and operational decision making."<sup>51</sup> Performance evaluations can provide strong before and after results, however they rarely include rigorous regression analysis or Randomized Control Trials (RCT), which use comparison groups to explain if there is a before and after difference by looking at the counterfactuals.<sup>52</sup>

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<sup>47</sup> United States Agency for International Development, *Guide to Rule of Law Country Analysis: The rule of Law Strategic Framework*, 6 (2010), available at: [http://pdf.usaid.gov/pdf\\_docs/PNADT593.pdf](http://pdf.usaid.gov/pdf_docs/PNADT593.pdf).

<sup>48</sup> United States Agency for International Development, *USAID Strategy on Democracy Human Rights and Governance*, See Development Objective 2: More Accountable Institutions and Leaders, 7, 19, 20 (2013), available at: [http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG\\_%20final%20final%206-24%203%20\(1\).pdf](http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG_%20final%20final%206-24%203%20(1).pdf).

<sup>49</sup> This is done per USAID's internal *Democracy and Governance Assessment Framework for Strategy Development*.

<sup>50</sup> A Political Economy Analysis (PEA) examines the actors and institutions that support or oppose reform so the USG can prioritize its efforts by identifying the political feasibility of achieving its reform goals outlined in the assessment. The PEA would identify the interests, resources, and strategies of key actors to ascertain whether a critical mass of reformists and resources exist, or could be organized to exist, to champion reform.

<sup>51</sup> United States Agency for International Development, *USAID Evaluation Policy* (2011), 2 <http://www.usaid.gov/sites/default/files/documents/1868/USAIDEvaluationPolicy.pdf>.

<sup>52</sup> <http://www.usaid.gov/evaluation>, and USAID Technical Note: Impact evaluations September 2013, p2 [http://www.usaid.gov/sites/default/files/documents/1870/IE\\_Technical\\_Note\\_2013\\_0903\\_Final.pdf](http://www.usaid.gov/sites/default/files/documents/1870/IE_Technical_Note_2013_0903_Final.pdf).

Further, in recent years, the use of a basket of two to nine indicators has become a trend to measure success in an area of development.<sup>53</sup> By aggregating the results of related indicators, practitioners can better measure success in multifaceted areas, such as transparency and accountability. For example, when measuring the integrity, transparency and accountability of the police, the existence and accessibility of a complaint system is an important accountability indicator. However, as stated by the UN, “it may be irrelevant if there are no effective procedures for alleged incidents of police misconduct or corruption to be investigated.” A basket (or index indicator) can draw on “experts’ perceptions of the effectiveness of complaint mechanisms with an indicator drawing on public perception of police behaviour provides a more complete and nuanced view of accountability than any one individual indicator.”<sup>54</sup> Many of USAID’s standard indicators are now basket indicators.

Dr. Kleinfeld concludes with some powerful points—points that USAID have prioritized over the last several years albeit their complications. First, Dr. Kleinfeld believes that practitioners should design a reform program bearing in mind the difference between “best fit” (what is best for the country in its unique circumstances) versus “best practice” (often a model based on Western ideals that does not account for existing power structures and cultural context). Second, programs need to be designed to be flexible. Programs must be able to be changed quickly to seize windows of opportunity (e.g. transparency of a major scandal, Arab Spring, or pro-democracy uprisings) to support the political and cultural reform movements. For it is during these windows of opportunity – when the political will for change exists – that the greatest reforms can be achieved.<sup>55</sup> Third, implementers should program with more local businesses, religious groups, NGOs, and other expert groups in-country instead of international organizations or US companies. For its part, USAID set an Agency goal to direct 30 percent of its annual grants and contracts to local partners by FY 2015, in effect tripling USAID’s local procurement efforts from only 9.7 percent in FY 2010.<sup>56</sup>

Dr. Kleinfeld’s book indicated that there is a need for more impact evaluations, but her book is sparse on actual results from impact evaluations as well. There could have been more emphasis on anti-corruption initiatives, for RoL cannot thrive when corruption is rampant. With that said, there are many more studies focusing solely on anti-corruption programming. For example, the DFID review by Hanna, mentioned above, found that anti-corruption programs with the greatest chance of long-term success are those that ‘change the rules’ of the game. These policy interventions aim to change how the government operates to create fewer opportunities or reasons to engage in corruption.<sup>57</sup> There are far fewer studies on how to think about RoL programming as done by Dr. Kleinfeld.<sup>58</sup>

Dr. Kleinfeld’s book was interesting and compelling because it helps RoL focus on the core RoL objectives (**check and balances on power, cultural and social norms**) that allows democracy to flourish.

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<sup>53</sup> E.g. UN Vera House Indicators, World Governance Indicator, Failed State Index, World Justice Project RoL Indicators, Media Sustainability Index, Transparency International’s Corruption Perception Index.

<sup>54</sup> United Nations, *Rule of Law Indicators: Implementation Guide and Project Tools* 3, (2001) [http://www.un.org/en/events/peacekeepersday/2011/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf).

<sup>55</sup> Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (2012), 216.

<sup>56</sup> *USAID Forward Progress Report 2013*, 14 (2013), <http://www.usaid.gov/sites/default/files/documents/1868/2013-usaid-forward-report.pdf>. By FY 2012, the percent to local partners had reached 14.3%. This is a noticeable improvement since the local organizations often need significant capacity development and training before they can be allocated contract or grant money.

<sup>57</sup> Rema Hanna et al., *The Effectiveness of Anti-Corruption Policy*, 31 (2011), available at: [http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti\\_corruption\\_2011Hanna.pdf](http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti_corruption_2011Hanna.pdf).

<sup>58</sup> See *Selected Readings on Law, Justice and Development* for a up to date list of RoL literature. <http://pubdocs.worldbank.org/pubdocs/genericServlet?action=viewContent&guid=250721385389666498>

## APPENDIX A

# RULE OF LAW AND JUDGE ADVOCATES: A SHORT HISTORY<sup>1</sup>

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 RoL. This has meant that lawyers serving as Army JAs with expeditionary US forces, sharing this deep belief in the importance of RoL in American society, have looked for ways to enhance RoL elsewhere. Starting in the Philippines at the end of the 19th century, JAs began promoting RoL as a valuable component in a larger strategy to defeat an enemy and strengthen a friendly government. These RoL efforts continued in Germany and Japan in the aftermath of World War II and in Vietnam in the 1960s and 1970s. More recently, Army lawyers deployed in Afghanistan and Iraq helped to run robust RoL operations as part of overall counterinsurgency operations.

This history essay begins by examining what is meant by the term “rule of law,” why it is the foundation of the United States, and why Army JAs have been receptive to it. It next looks at how Army lawyers serving in the Philippine Islands in the aftermath of the Spanish-American War of 1898 first attempted to implement American legal principles, including RoL, 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 RoL permanently onto German and Japanese institutions. Twenty years later, as this essay will show, Army lawyers in South Vietnam used RoL to enhance mission success in the larger fight against communist Viet Cong guerillas and their North Vietnamese allies. Finally, in relation to RoL development in the context of military intervention this essay looks at projects in Afghanistan and Iraq, that were 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 RoL, since citizens who believe that their leaders adhere to the law will be loyal to them. At the same time, these RoL projects sought to prove to the average Afghan and Iraqi citizen that RoL will safeguard their rights and property—while collaborating with insurgent forces will not.

Judge advocates also have a history of pursuing RoL development during peacetime. The final section of this essay considers the very different nature of RoL activities in that environment and cites examples of work undertaken by US Southern Command (USSOUTHCOM) and US Africa Command (USAFRICOM).

A final introductory note: While Army JAs have been involved in RoL programs for over one hundred years, this is not to say that there has been an official, codified, written RoL program in The Judge Advocate General’s Corps for this entire period. On the contrary, institutional recognition that RoL 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 RoL onto the social organizations of other nations, and this is almost certain to continue.

## I. RoL as the Foundation of the United States

What is the “rule of law”? While there are many definitions, including those identified in this *Handbook*, the US Government (USG) defines the idea in the following manner: Everyone must follow the law,

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<sup>1</sup> Written by Mr. Fred L. Borch, the Regimental Historian & Archivist of The Judge Advocate General’s Corps.

leaders must obey the law; the Government must obey the law; and no one is above the law.<sup>2</sup> Regardless of how the three-word phrase is defined, however, there is no question that RoL is the foundation of the United States. A quick look at why this is true provides a context for explaining why JAs have conducted RoL operations for more than a century.

As the American Revolution got underway, lawyers in the colonies were among the most radical thinkers. Believing that the tyranny of the Parliament in London was just as bad as the tyranny of George III, “many American colonists put their faith in fundamental law enshrined in a constitution—as John Adams famously put it, ‘a government of laws and not men.’”<sup>3</sup> But Thomas Paine’s statement about the law in his pamphlet *Common Sense* best captures why RoL 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>4</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 US citizens consistently look to courts—and RoL—as the best way to safeguard their rights and freedoms.<sup>5</sup>

Whether the law is a “civil religion”<sup>6</sup> in secular America is an open question. But there is no doubt that Army officers serving in the late 19th century shared the view of their fellow Americans that RoL was at the root of America’s democratic tradition. This explains why historian Andrew Birtle writes in his authoritative *US 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>7</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>8</sup> this explains why the Army serving overseas—and its JAs—wanted to export American RoL ideas and attitudes.

## II. RoL Efforts in the Philippines and Cuba (1898-1902)

The first JA involvement in establishing RoL occurred at the end of the 19th century, when the United States successfully invaded—and then occupied—Cuba, Puerto Rico, and the Philippine Islands during the Spanish-American War. After Spain sold the Philippines to the United States for \$20 million, relinquished control of Cuba and Puerto Rico, and also ceded Guam to the United States, the American government suddenly discovered that it was responsible for governing more than ten million Cubans, Puerto Ricans, Filipinos, and Guamanians.<sup>9</sup>

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<sup>2</sup> US Citizenship and Immigration Serv., Civics (History and Government) Questions for the Naturalization Test, available at <http://www.uscis.gov/USCIS/Office%20of%20Citizenship/Citizenship%20Resource%20Center%20Site/Publication%20s/100q.pdf> (last visited 2 Oct 2014).

<sup>3</sup> James Grant, *Juristocracy*, WILSON Q. (Spring 2010), at 16, 18.

<sup>4</sup> Thomas Paine, COMMON SENSE (1776), 50.

<sup>5</sup> Grant, *supra* note 3, at 19.

<sup>6</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>7</sup> ANDREW J. BIRTLE, US ARMY COUNTERINSURGENCY AND CONTINGENCY OPERATIONS DOCTRINE 1860-1941, at 101 (1998).

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

<sup>9</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

The Army initially established military governments in all of these former Spanish colonies, although it was expected that Congress and the President would replace Army governors with civilian officials as soon as possible. In Puerto Rico, Soldiers served as administrators until 1900, and Army officers governed the Philippine Islands until 1902. Military government remained in place in Cuba until 1902 but, even after that time, Army officers were involved in establishing—and running—new government institutions in Cuba for many years.

From 1899 to 1902, virtually every officer in the Army served in either Cuba, Puerto Rico, or the Philippines,<sup>10</sup> and JAs 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, JAs 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>11</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>12</sup>

But the Army also looked for ways to impress upon Filipinos that Americans believed in RoL. 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 horses, 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 RoL and were committed to fair and equitable treatment.

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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).

<sup>10</sup> BIRTLE, *supra* note 6, at 100.

<sup>11</sup> DAVID A. LOCKMILLER, *ENOCH H. CROWDER: SOLDIER, LAWYER AND STATESMAN* 77 (1955).

<sup>12</sup> *Id.* at 76.

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>13</sup> and Crowder continued his good work 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>14</sup>

While JA RoL 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 US Army—and JAs—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. RoL Efforts in Germany and Japan (1945-1950)

The next Army JA involvement in RoL 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 US Constitution, and set antimilitarist ideals at the very center of the national charter.”<sup>15</sup> More than anything else, however, the new Japanese constitution enshrined American ideas about RoL as the basis for a democratic form of government.

While no JAs 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 RoL 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>16</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>17</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

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<sup>13</sup> *Id.* at 75.

<sup>14</sup> JUDGE ADVOCATE GENERAL’S CORPS, US ARMY. *THE ARMY LAWYER 1775-1975*, at 105 (1975).

<sup>15</sup> JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II*, at 244 (1999).

<sup>16</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>17</sup> Military Government—Germany, Supreme Commander’s Area of Control, Proclamation No. 1, Military Government Regulation 23-200 (1945).

ranging from murder, theft, possession of a deadly weapon to false statements, curfew violations, and failure to have a valid identification card.<sup>18</sup>

These occupation courts existed to do justice, but JAs recognized at the time that these courts furthered the development of RoL 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 US Military Government Courts in Germany. Nobleman noted that, while the Military Government Courts had delivered justice, they also had "... gone a long way to toward teaching the democracy and the democratic system to the German people. All of the democratic safeguards mean absolutely nothing in the absence of impartial courts to protect fundamental rights. It has been correctly stated that the true administration of justice is the firmest foundation of good government."<sup>19</sup>

#### **IV. RoL Efforts in Southeast Asia (1964-1973)**

The next JA involvement in RoL 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>20</sup> JAs 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>21</sup>

In any event, until he returned to the US 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 US 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>22</sup>

Second, Prugh formally established an "advisory" program and tasked the Army, Navy, Air Force, and Marine Corps JAs 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, JAs 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

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<sup>18</sup> Eli E. Nobleman, *Military Government Courts: Law and Justice in the American Zone of Germany*, 33 A. B. A. 777, 778 (1947).

<sup>19</sup> Eli E. Nobleman, *Civilian Military Government Courts in Germany*, JUDGE ADVOCATE J. (June 1949), 37.

<sup>20</sup> GEORGE S. PRUGH, LAW AT WAR 13 (1975).

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

<sup>22</sup> JUDGE ADVOCATE GEN'S CORPS, *supra* note 13, at 222.

School (TJAGSA).<sup>23</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>24</sup>

In the end, MACV JAs not only cultivated valuable friendships, but also assisted ARVN JAs in using laws and regulations to promote efficiency in the ARVN and deter the subversive activities of the Viet Cong. Perhaps most importantly, RoL 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 RoL, this would generate confidence and trust in the actions of the Government of South Vietnam.

While the withdrawal of US forces in 1973 and the collapse of the South Vietnamese government in 1975 means that nothing remains of these JA RoL 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. RoL Operations in Afghanistan and Iraq (2001 to present)

After the deployment of US military personnel to Afghanistan in 2001 and Iraq in 2003, Army JAs 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>25</sup> Consequently, JAs understood that RoL 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 RoL missions “followed no set format or guidelines ... these pioneering Judge Advocates literally made it up as they went forward.”<sup>26</sup> In April 2003, for example, then LTC Craig Trebilcock was in southern Iraq and serving as the International Law Officer in the 358th Civil Affairs Brigade. As US forces transitioned from combat operations to occupation and reconstruction, Trebilcock convinced his commander that RoL was “an integral component of reestablishing security in an occupied territory.”<sup>27</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>28</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 US Attorney, served as RoL officer in the 1st Infantry Division from May 2004 to February 2005. Pagel and his fellow JAs built on RoL efforts

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<sup>23</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 GENERAL’S CORPS, US DEP’T OF ARMY, ANNUAL REPORT, TJAGSA app. VIII, at 83 (1970-1971).

<sup>24</sup> THE JUDGE ADVOCATE GENERAL’S CORPS, US DEP’T OF ARMY, COMMANDANT’S ANNUAL REPORT, TJAGSA 20 (1967-68).

<sup>25</sup> Bart Schuurman, *Clausewitz and the “New Wars” Scholars*, PARAMETERS (Spring 2010), at 98.

<sup>26</sup> CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL’S LEGAL CTR. & SCH., US ARMY, ROL HANDBOOK 163 (2007) [hereinafter ROL HANDBOOK].

<sup>27</sup> *Id.* at 164.

<sup>28</sup> *Id.* at 171, n. 24.

started by the 4th Infantry Division, which had previously operated in their geographic area. Their principal goal “was to clearly identify the most persistent obstacles to restoring rule of law and improving judicial output.”<sup>29</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 RoL projects. As Appendix D, “Legal Considerations,” put it, “establishing rule of law is a key goal and end state in COIN.”<sup>30</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 US Government agencies,” Appendix D also stresses that “support from US forces in some cases” also is required.<sup>31</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* RoL 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 Vasilius Tasikas and Army Reserve Captain Thomas Nachbar. Their guide, published in July 2007 as the *RoL Handbook*, recognized that JAs 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>32</sup> It follows that the intent of the *Handbook* was to provide Army lawyers conducting RoL 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.

After the initial publication of the *Handbook* in 2007, RoL projects continued in Afghanistan and Iraq. At the strategic level, senior Army JAs were appointed as RoL Coordinators at the US Embassies in both countries.<sup>33</sup> Additionally, while *ad hoc* RoL missions continued at the Brigade Combat Team (BCT) level, separate major commands were also established to oversee RoL missions, generally in the area of establishing security forces and prison operations.

In Iraq, for example, the Multi-National Security Transition Command-Iraq (MNSTC-I) was created to oversee the establishment and training of Iraqi Security Forces, including both Army and police forces.<sup>34</sup> A similar organization was established in Afghanistan, the Combined Security Transition Command-Afghanistan (CSTC-A). Each organization had a commander and a senior Army SJA for the command.

The commitment of commanders to on-going RoL operations is best illustrated by the activities of the Law and Order Task Force (LAOTF) created to work with Iraqi judges at the Central Criminal Court Iraq located in the Rusafa district on the east side of Baghdad (CCCI-Rusafa).<sup>35</sup> While LAOTF had been established in 2006, a major innovation in its operations occurred in November 2008, when Army and Air Force JAs at LAOTF and the Iraqi judges at CCCI-Rusafa created the Joint Investigative Committee (JIC). The intent of the JIC was to work through the issues that both US and Iraqi lawyers realized would

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<sup>29</sup> *Id.* at 189.

<sup>30</sup> US DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY, at D-8 (15 Dec. 2006).

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

<sup>32</sup> ROL HANDBOOK, *supra* note 26, at i.

<sup>33</sup> In Afghanistan, for example, LTC Dean Vlahopoulos served as the RoL Coordinator from 2008-2009; COL Fred Taylor from 2009-2010.

<sup>34</sup> MNSTC-I is now closed and its functions fall under USF-I.

<sup>35</sup> CCCI-R was different from CCCI-Karkh, which was located on the west side of the Tigris River in the Green Zone. Judges at CCCI-Karkh tried cases of detainees housed in the coalition operated Cropper detention facility.

result from the implementation of the U.S-Iraq Security Agreement (effective 1 January 2009). Since this agreement, in recognition of Iraqi sovereignty, prohibited coalition forces from detaining anyone without a warrant issued from an Iraqi judge, it was critical to put in place procedure that would comply with this new legal regime. In its third year of operation, the JIC consisted of American JAs, Iraqi investigators and Iraqi investigative judges. All worked in concert to obtain warrants for coalition targets, issue detention orders, and move the cases through the Iraqi criminal justice process. The JIC was a major RoL success because it focused on strengthening the Iraqi criminal justice process by, with, and through Iraqi personnel.<sup>36</sup>

Another good example of the commitment of commanders to RoL operations was the RoL Field Force-Afghanistan (ROLFF-A), which was established in 2010 and was commanded by a Judge Advocate brigadier general. The ROLFF-A focused exclusively on establishing, securing, and assisting the Afghans in implementing their own criminal justice system. The ROLFF-A, which is referred to in more detail in Chapter 8, is a combined, joint, interagency task force that established Justice Centers around Afghanistan.<sup>37</sup>

At CJTF-82, four JAs at the Office of the Staff Judge Advocate worked with their Afghan counterparts in the prosecution of “security criminals.” The “RoL 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>38</sup> Judge advocates also “partnered” 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>39</sup>

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

## **VI. RoL Operations in Central and South America (2000 to present)**

RoL activities in Central and South America (and in Africa, as discussed in Section VII, below) are very different from RoL operations in a contingency operational context. This is because engagements are at the *invitation* of the host nation, and this “permissive” aspect means that RoL activities must be structured to satisfy the desires (and interests) of the partner country. This is markedly different from RoL operations in Afghanistan and Iraq, where US efforts focused on introducing the concepts of due process and respect for the law as the foundation of a new government that will respect and protect its citizens.

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<sup>36</sup> The first Officer in Charge (OIC) for the JIC was LTC Jeff Bovarnick (2008-2009). He was followed by MAJ Sean Mangan (2009-2010) and MAJ Philip Staten (2010-2011).

<sup>37</sup> BG Mark S. Martins, the ROLFF-A commander, had previously been the Deputy Commander of Joint Force (JTF) 435 (later Combined Joint Interagency Task Force (CJIATF 435). This unit, created by Secretary of Defense Robert Gates in September 2009, had the mission, in part, “to ensure [that] US detainee operations in Afghanistan [were] aligned effectively with Afghan criminal justice efforts to support the overall strategy of defeating the Taliban insurgents.” Given BG Martins work with CJIATF 435, it was logical for him to take command of ROLFF-A when it was created in 2010. Jeff A. Bovarnick, “Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy,” *ARMY LAWYER* (June 2010), 9, 25-26.

<sup>38</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>39</sup> *Id.* at 8.

The earliest permissive RoL efforts in Central and South America took place in February 2000, when then Lieutenant Colonel Manuel E. F. Supervielle, then serving as the Staff Judge Advocate for US Southern Command (USSOUTHCOM) in Miami, Florida, began working with the Colombian Army to establish a separate, independent legal Corps. Although there were military lawyers in the Colombian Army, these men and women worked as part of a commander's staff and were answerable solely to that commander. As a result, there was no uniformity of legal advice in the Colombian Army, much less an overarching legal organization that could formulate uniform legal policy or procedures.

Lieutenant Colonel Supervielle, who was fluent in Spanish (having been born in Cuba), persuaded his Colombian counterparts that establishing a separate legal Corps (modeled to some extent on the Army JAG Corps) and building a JAG School would ensure an independent organization of well-trained lawyers in the Colombian Army and, with a TJAG-equivalent at the top of the organization, would ensure that legal policy (and advice) was uniform throughout the Colombian Army. Perhaps more importantly, creating a Colombian Army JAG Corps would show critics of the Colombian Army (then engaged in routine combat with guerillas intent on overthrowing the government) that the military was committed to respect for law and human rights. Supervielle's efforts, initially funded under the US aid initiative called "Plan Colombia," eventually bore fruit and the Colombian Army today has an independent JAG Corps with a Judge Advocate General, and a JAG School at the Ministry of Defense level.

Over the last few years, RoL efforts in the USSOUTHCOM Area of Operations have been spearheaded by US Army South (ARSOUTH), with a focus on helping willing and interested countries to improve the transparency of their military justice processes and operational law operations. This has been especially important for countries in Central and South America given the fierce criticism of military justice they face from the Inter-American Court of Human Rights (IACHR). That supra-national court has been especially critical of due process in military criminal legal systems.<sup>40</sup>

In July 2013, then LTC Luis Rodriguez accompanied Lieutenant General (LTG) Flora D. Darpino to Peru to discuss with the Peruvian and Chilean TJAGs, Admiral Julio Pacheco and General Waldo Martinez, respectively, how to improve each nation's code of military justice, increase transparency of military justice procedures, and improve interoperability between the Peruvian, Chilean and American armed forces. The event occurred because the Peruvians and Chileans---like many countries in Central and South America---are interested in replacing their traditional inquisitorial criminal legal systems (inherited from Spain and Portugal) with adversarial, oral trial systems like those familiar to Anglo-American lawyers. The Peruvian and Chilean TJAGs had contacted their US counterparts to see if the United States would join in their effort to develop a "common model of military justice for the Americas---a code anchored in the new adversarial system."<sup>41</sup> After the July conference, which began developing a model code using the UCMJ as a template, LTG Darpino, LTC Rodriguez and other JAs returned to Lima, Peru to continue these efforts, joined by senior military lawyers from Brazil, Canada, Bolivia, El Salvador and Uruguay.

Rule of law efforts in Central and South America continue, with representatives from Peru, Chile, and Colombia working with JAs from ARSOUTH to organize an Inter-American Summit on Military Justice and Operational Law in August 2014. Brazil, Canada and Uruguay also are expected to participate.

## **VII. RoL Operations in Africa (2007 to present)**

With the creation of US Africa Command (USAFRICOM) in 2007, JAs assigned to this new combatant command began exploring ways to use the law to help Africa and Africans. This potentially was a huge

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<sup>40</sup> Juan A. Lozada Leoni, "The Need for Transnational Cooperation among Military Attorneys, Towards the Development of More Credible Military Justice Systems," unpublished monograph, 2014.

<sup>41</sup> Email, COL Luis Rodriguez to Fred Borch, subject: Your trip with TJAG to Peru, 22 May 2014, author's files.

undertaking, since USAFRICOM has responsibility for all military activities in Africa---and RoL efforts necessarily would touch 53 of 54 countries on the African continent.<sup>42</sup>

Almost from the outset, the Office of Legal Counsel at USAFRICOM recognized that establishing the RoL in some African countries would be challenging, since “some African militaries still function under the ‘rule of personality,’ wherein leaders use the military to concentrate wealth and power in themselves, interfere in civil governance, or simply grab power to overthrow a civilian-elected government.”<sup>43</sup> Yet, because the armed forces are one of the strongest government institutions in many African countries, this makes them “an ideal entry point for promoting RoL.”<sup>44</sup>

Over the past few years, USAFRICOM’s lawyers have sought out willing, reliable, reputable and capable African partners who are interested in implementing RoL programs. A major “goal is to eradicate the need for the International Criminal Court” by removing any basis for the ICC or any international tribunal (like the International Criminal Tribunal for Rwanda (ICTR)) to be established in response to atrocities on the African continent. For JAs at USAFRICOM, this has meant educating military commanders “on the proper application of international humanitarian law” and including “a rule of law dimension into every USAFRICOM engagement, exercise, and training opportunity.”

The cornerstone of USAFRICOM’s RoL efforts are five “RoL Pillars.” These were developed by the JAs serving at the command from 2011-2012, with Army COL Jane Ellen Bagwell, who served as USAFRICOM’s Chief of Legal Engagements, playing a prominent leadership role during this foundational effort. The five pillars are intended to “capture what RoL means in a military context” and are at the core of USAFRICOM’s “role in advancing RoL in a *permissive* environment.” (emphasis added) The five pillars are:

- Military is subordinate to civilian authority
- Military has appropriate military justice system
- Military adheres to International Humanitarian Law
- Military and security forces observe, respect, and protect human rights
- Preventing military corruption<sup>45</sup>

In Liberia, USAFRICOM lawyers have established a “Legal Mentorship Program.” Liberia now has a military justice framework closely modeled on the Uniform Code of Military Justice and USAFRICOM JAs deploy on a routine basis to advise the Liberian military personnel administering the new system.

US Africa Command also has partnered with the Defense Institute of International Legal Studies, Newport, Rhode Island, to present military justice workshops in the Ivory Coast (Cote d’Ivoire), Kenya, Uganda, Guinea, Mauritania, and Burkina Faso.

In March 2014, USAFRICOM lawyers sponsored the inaugural meeting of the Africa Military Law Forum in Lilongwe, Malawi. A group of senior-level African JAs---16 attorneys from 15 countries---met to discuss and analyze critical legal issues and exchange ideas on RoL. There were presentations by military lawyers from Malawi, Nigeria, Ivory Coast, and Tunisia. This unique professional association of

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<sup>42</sup> Since Egypt remains a part of US Central Command’s Area of Responsibility, this explains why USAFRICOM is engaged with 53 of 54 African nations.

<sup>43</sup> James Dapper, Benes Aldana and Jeremy Greenwood, “Moving from the Rule of Personality to the RoL,” PUBLIC LAWYER (Summer 2013), 3.

<sup>44</sup> Id.

<sup>45</sup> USAFRICOM’s five pillars were peer-reviewed at the 2013 World Justice Forum; Chief Judge Baker (USCAAF) reviewed them, as did US Supreme Court Justice Anthony Kennedy, who were both in attendance. Both agreed that the pillars capture the core of what is needed to ensure a military operates in accord with RoL.

military attorneys in Africa developed ‘position papers’ on ‘best practices’ in Law of Armed Conflict training and began working on a similar paper on ‘best practices’ of legal corps structure.<sup>46</sup>

RoL efforts in USAFRICOM will continue to unfold, with an Africa Accountability Colloquium (organized in conjunction with the International Humanitarian Institute, San Remo, Italy), being the latest initiative. The colloquium, which held its first meeting in 2013, addresses “accountability” in military justice systems, regional cooperation in relation to Peace Support Operations, and international criminal justice.

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<sup>46</sup> USAFRICOM After-Action Report, Africa Military Law Forum, 10-12 March 2014.



## APPENDIX B

# RULE OF LAW TRAINING

This appendix provides information about RoL training courses and programs. Table 1 contains a list of short courses for RoL practitioners, including military personnel or civilians who practice in the area of RoL. Table 2 contains a list of RoL outreach programs that provide training for legal personnel and foreign officials from host nations within which RoL operations are being delivered. It is not a comprehensive list of all the training opportunities and programs available, but is intended to provide insight into the diversity of educational opportunities and training providers that exist. These program providers are not sponsored or endorsed by the Editor or Authors of this *Handbook*, nor is every program offered by these institutions listed.

For further information about any program, follow the URL to obtain detailed information including program availability and cost.

**Table 1: Courses suitable for USG [and coalition] RoL Practitioners**

| Agency/Organization   | Course Title   | URL for More Information  | Course Location                                  | Frequency/Length                               |
|---|--|---|--|--|
| Dep't of State Foreign Service Institute  | Various  | <a href="http://fsitraining.state.gov">http://fsitraining.state.gov</a>   | Washington, DC                                   | Depends on course/varies from 1 day to 2 weeks |
| United Nations Dep't for Peacekeeping Operations (UNDPKO)   | Rule of Law Training Programme for Judicial Affairs Officers | <a href="http://unrol.org/article.aspx?article_id=135">http://unrol.org/article.aspx?article_id=135</a>   | Various locations around world                   | 2x a year/6 days                               |
| United States Institute of Peace <sup>1</sup> Academy for International Conflict Management and Peacebuilding | Rule of Law Practitioners Course                             | <a href="http://www.usip.org/events/rule-law-practitioners-course">http://www.usip.org/events/rule-law-practitioners-course</a>   | Washington, DC                                   | Several times a year/5 days                    |
| Center for Security Sector Management at Cranfield Univ.  | Managing Public Security and the Rule of Law                 | <a href="http://www.cranfield.ac.uk/cds/shortcourses/managingpublicsecurityandtheruleoflaw.html">http://www.cranfield.ac.uk/cds/shortcourses/managingpublicsecurityandtheruleoflaw.html</a>   | Shrivenham, Swindon, UK                          | Annual/ 4 days                                 |
| International Law Institute   | Various  | <a href="http://www.ili.org/training.html">http://www.ili.org/training.html</a>   | Washington, DC                                   | Depends on course/varies from 4 to 18 days     |
| Center for International Peace Operations (ZIF)   | Rule of Law  | <a href="http://www.zif-berlin.org/en/zif-training-courses/specialization-courses/ruleoflaw.html">http://www.zif-berlin.org/en/zif-training-courses/specialization-courses/ruleoflaw.html</a> | Djurónäset, Stockholm, Sweden or Berlin, Germany | Annual/7 days                                  |

<sup>1</sup> For more information on USIP, see *supra* Chapter 2, Section II, Subsection E

| Agency/Organization                                     | Course Title  | URL for More Information  | Course Location                                  | Frequency/Length           |
|---|---|---|--|----------------------------|
| Folke Bernadotte Academy                                | Rule of Law Toolbox for Crisis Management and Peace Operations  | <a href="http://www.folkebernadotteacademy.se/en/Training/Specialised-courses/Rule-of-Law/">http://www.folkebernadotteacademy.se/en/Training/Specialised-courses/Rule-of-Law/</a>   | Djurönäset, Stockholm, Sweden or Berlin, Germany | Annual/7 days              |
| International Human Rights Network                      | Justice Sector Reform: Applying Human Rights Approaches   | <a href="http://www.ihrnetwork.org/justice-sector-reform_202.htm">http://www.ihrnetwork.org/justice-sector-reform_202.htm</a>   | Maynooth, Ireland                                | Annual/5 days              |
| NATO School   | Various (note: NATO School does not have any RoL-specific classes but offers a number of legal and planning courses that may be relevant) | <a href="https://www.natoschool.nato.int/courses.htm">https://www.natoschool.nato.int/courses.htm</a>   | Oberammergau, Germany                            | Depends on course/4-7 days |
| George C. Marshall European Center for Security Studies | Program in Security Sector Capacity Building (SSCB) <sup>2</sup>  | <a href="http://www.marshallcenter.org/mepublicweb/en/n-av-main-wwd-res-courses-sscb-en.html?highlight=WvJzc2Ni10">http://www.marshallcenter.org/mepublicweb/en/n-av-main-wwd-res-courses-sscb-en.html?highlight=WvJzc2Ni10</a> | Garmisch-Partenkirchen, Germany                  | 3 weeks                    |
| Univ. of Birmingham                                     | HMG Security and Justice Training Course  | <a href="http://www.idd.bham.ac.uk/events/security-justice.shtml">http://www.idd.bham.ac.uk/events/security-justice.shtml</a>   | Birmingham, UK                                   | 4x a year/3.5 days         |

**Table 2: Outreach programs providing Training and Development opportunities for Host Nations**

| Agency  | Program Title   | URL for more information  | Overview  |
|---|---|---|---|
| Defense Institute of International Legal Studies <sup>3</sup> | Rule of Law and Disciplined Military Operations Course  | <a href="http://www.diils.org/rule-of-law-and-disciplined-military-operations-course-offered-at-various-u-s-military-schools">http://www.diils.org/rule-of-law-and-disciplined-military-operations-course-offered-at-various-u-s-military-schools</a> | A one-week course available at various U.S. Military Schools. DIILS provides legal education, training, and rule of law programs for international military and related civilians.  |
| Dep't of State (INL)  | Afghanistan Justice Sector Support Program <sup>4</sup> | <a href="http://www.jssp-afghanistan.com">http://www.jssp-afghanistan.com</a>   | Through capacity building, technical advice, and direct assistance, JSSP helps justice institutions and justice professionals perform their roles in delivering fair and effective justice services to the citizens of Afghanistan. |

<sup>2</sup> The SSCB was introduced in Sep 13, replacing the previously offered Program for Security, Stability, Transition and Reconstruction (SSTaR)

<sup>3</sup> For more information on DIILS, see *supra* Chapter 2, Section II, Subsection D, Part 4.

<sup>4</sup> See *supra* Chapter 2, Section II, Subsection A, Part 1 for a discussion on the programs and operations of INL.

| Agency  | Program Title  | URL for more information  | Overview   |
|---|--|---|--|
| Dep't of State (INL)                                | Iraq Justice Development Program   | <a href="http://www.state.gov/p/inl/rls/fs/150854.htm">http://www.state.gov/p/inl/rls/fs/150854.htm</a>   | In partnership with other USG agencies including U.S. Marshals service and the DOJ, INL funds and oversees a wide range of RoL programs within seven functional areas: judicial security, justice integration, judicial professional development, public integrity/anti-corruption, judicial capacity development, legislative assistance and judicial outreach. |
| Dep't of Justice                                    | Overseas Prosecutorial Development Assistance and Training <sup>5</sup>                    | <a href="http://www.justice.gov/criminal/opdat/">http://www.justice.gov/criminal/opdat/</a>   | Mission is to help prosecutors and judicial personnel in other countries develop and sustain effective criminal justice institutions.  |
| United Nations <sup>6</sup>                         | Global Programme on Strengthening the Rule of Law in Conflict and Post-Conflict Situations | <a href="http://www.undp.org/cpr/documents/UNDP%20Rule%20of%20Law_web_FINAL_PRI_NT.pdf">http://www.undp.org/cpr/documents/UNDP%20Rule%20of%20Law_web_FINAL_PRI_NT.pdf</a>   | Offers comprehensive operational, technical and financial support to host countries to build capacities to implement comprehensive rule of law, justice and security programs.   |
| European Union/United Nations Development Programme | Iraq – Support to the Rule of Law and Justice  | <a href="http://www.unrol.org/article.aspx?article_id=155">http://www.unrol.org/article.aspx?article_id=155</a>   | A program in collaboration with the Iraqi government to improve the efficiency of the Iraqi justice system and strengthen the capacity of government RoL institutions.   |
| United Nations                                      | Programme on Governance in the Arab Region   | <a href="http://www.undp-pogar.org/governance/ruleoflaw.aspx">http://www.undp-pogar.org/governance/ruleoflaw.aspx</a>   | Assists governments in achieving a sufficient level of human development through good governance and protection of human rights.   |
| United Nations Office for Project Services          | Justice and Security Sector Reform   | <a href="http://www.unops.org/english/whatwedo/focus-areas/public-order-security/Pages/public-order-security.aspx">http://www.unops.org/english/whatwedo/focus-areas/public-order-security/Pages/public-order-security.aspx</a> | Provides support services in administration and project management in post-conflict areas to reduce risk and improve speed, quality or cost-effectiveness to allow partners to focus on their policy objectives.   |

<sup>5</sup> For more information on DOJ OPDAT, see Chapter 2, Section II, Subsection C, Part 3.

<sup>6</sup> The UN has over 40 entities engaged in RoL activities all around the world. The programs listed on this table are merely examples of the many UN RoL programs. For more information on UN RoL activities, visit the website: <http://www.unrol.org/> (last visited July 27, 2011). In addition, see Second Annual Report on strengthening and coordinating United Nations rule of law activities: Report of the Secretary-General, A/65/318, at <http://www.unrol.org/doc.aspx?id=2994> (last visited July 27, 2011).

| Agency   | Program Title   | URL for more information  | Overview   |
|--|---|---|--|
| USAID  | Rule of Law Stabilization – Formal Program <sup>7</sup> | <a href="http://afghanistan.usaid.gov/en/USAID/Activity/182/Rule_of_Law_Stabilization_Program_Formal_Component">http://afghanistan.usaid.gov/en/USAID/Activity/182/Rule_of_Law_Stabilization_Program_Formal_Component</a>   | This program develops the human and institutional capacity of the justice sector, increases access to justice (particularly for women), and increases public demand for RoL.   |
| USAID  | Rule of Law Stabilization Program – Informal Component  | <a href="http://afghanistan.usaid.gov/en/USAID/Activity/163/Rule_of_Law_Stabilization_Program_Informal_Component">http://afghanistan.usaid.gov/en/USAID/Activity/163/Rule_of_Law_Stabilization_Program_Informal_Component</a>   | This program helps re-establish traditional dispute-resolution councils (shuras) in areas recently stabilized while familiarizing them with Afghan national law.   |
| Univ. of South Carolina Walker Institute of International and Area Studies | Rule of Law Collaborative                               | <a href="http://www.cas.sc.edu/lis/RoLC/RoLCHome1.html">http://www.cas.sc.edu/lis/RoLC/RoLCHome1.html</a>   | Provides programs, research and training to develop Rule of Law as a discipline, intended especially for Foreign Area Officers (but can provide for anyone working in a RoL related field). Short courses, conferences, and lectures are offered periodically, typically within the U.S. |
| American Bar Association   | Rule of Law Initiative / Legal Profession Reform        | <a href="http://apps.americanbar.org/rol/programs/legal-profession.html">http://apps.americanbar.org/rol/programs/legal-profession.html</a>   | By providing technical assistance with trial advocacy skills, law practice management and substantive areas of law, ABA RoLI enhances the professionalism and expertise of lawyers in host countries.  |
| The World Justice Project  | Opportunity Fund  | <a href="http://www.worldjusticeproject.org/opportunity-fund">http://www.worldjusticeproject.org/opportunity-fund</a>   | This program provides seed grants to establish further multidisciplinary RoL initiatives around the world.   |
| The World Bank <sup>8</sup>  | State and Peace-Building Fund                           | <a href="http://web.worldbank.org/WBSITE/EXTERNAL/STRATEGIES/EXTLICUS/0,,contentMDK:21836102~pagePK:6417531~piPK:64171507~theSitePK:511778,00.html">http://web.worldbank.org/WBSITE/EXTERNAL/STRATEGIES/EXTLICUS/0,,contentMDK:21836102~pagePK:6417531~piPK:64171507~theSitePK:511778,00.html</a> | Establishes programs that address the needs of state and local governance in fragile, conflict-prone and conflict-affected situations, including RoL programs.   |
| The Arab Center for the Development of the Rule of Law and Integrity       | Various ongoing projects                                | <a href="http://www.arabruleoflaw.org">http://www.arabruleoflaw.org</a>   | As a non-governmental, non-profit organization with headquarters located in Beirut, ACRLI works with other regional and international organizations to develop and reinforce RoL, integrity and good governance in the Arab countries.   |
| George C. Marshall European Center for Security                            | Various   | <a href="http://www.marshallcenter.org/mcpublicweb/en/nav-college/nav-academics-resident-courses/nav-col-ssstar.html">www.marshallcenter.org/mcpublicweb/en/nav-college/nav-academics-resident-courses/nav-col-ssstar.html</a>  |  |

<sup>7</sup> USAID is heavily involved in many programs in addition to RoL in many countries. Listed here are just two RoL-specific programs in Afghanistan. For an in-depth discussion of USAID and its global mission, see *supra* Chapter 2, Section II, Subsection B.

<sup>8</sup> For more information on World Bank involvement, see *supra* Chapter 2, Section III, Subsection C.

| Agency  | Program Title   | URL for more information  | Overview |
|---|---|---|----------|
| Studies   |   |   |          |
| Asia Pacific Center for Security Studies                | Various   | <a href="http://www.apcss.org/college/">http://www.apcss.org/college/</a>   |          |
| William J. Perry Center for Hemispheric Defense Studies | Strategic Implications of Human Rights and Rule of Law (HR/RoL)                   | <a href="http://chds.dodlive.mil/education/courses/specialized-courses/hr-rol/">http://chds.dodlive.mil/education/courses/specialized-courses/hr-rol/</a> |          |
| Africa Center for Strategic Studies                     | Various   | <a href="http://africa.center.org/programs">http://africa.center.org/programs</a>   |          |
| Near East-South Asia Center for Strategic Studies       | Various programs addressing regional and global security and security cooperation | <a href="http://nesa-center.org/foundation-seminars">http://nesa-center.org/foundation-seminars</a>   |          |



## APPENDIX C

### FURTHER INFORMATION ON INTERAGENCY PARTNERS

Following on from Chapter 4, this appendix contains further information on the offices within DoS's International Narcotics and Law Enforcement Affairs (INL), the US Agency for International Development (USAID), and the DoJ's International Criminal Investigative Training Assistance Program (ICITAP) and Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT). At the back of this appendix is a comprehensive list of US agencies and bureaus involved in RoL.

#### I. Department of State

##### A. Bureau for International Narcotics and Law Enforcement Affairs

The Bureau implements its programs through:

- Funding to federal, state and local agencies. For example, at the federal level, INL provides funds to the OPDAT, ICITAP, direct to DoJ component agencies (US Marshals, FBI etc.), and the Department of Homeland Security. At the state and local level, INL has relationships with police, judicial and corrections agencies and associations
- Contracts with individuals and private firms chosen through a competitive process
- Contracts with host country subject matter experts
- Grants to nonprofits and universities chosen through a competitive process
- Contributions and attachments to multilateral organizations, such as the UN and European Union.

The Bureau is organized into regional and functional offices in Washington, D.C. with varied field presence throughout the world.

##### 1. Regional Offices

###### a. Office of Europe and Asia

The INL Office of Europe and Asia (INL/EA) is responsible for broad law enforcement, RoL and counternarcotics policies and program management throughout Europe and Asia (excluding Afghanistan and Pakistan). The office manages programs in 30 countries, including 15 countries in Europe, 5 countries in Central Asia, 4 countries in South Asia and 6 countries in East Asia and the Pacific.

The largest country programs in East Asia are in Indonesia and the Philippines, focusing on law enforcement development and justice sector reform. In Indonesia, INL/EA's Justice Sector Reform Program has supported the creation of an Anti-Terrorism and Transnational Crime Task Force, an Anti-Corruption Task Force, and a Natural Resource Crimes Task Force within the Attorney General's Office, as well as supporting broader criminal justice reform efforts. In the Philippines, INL/EA supports a Resident Legal Advisor at Embassy Manila focusing on strengthening police-prosecutor cooperation, improving prosecutorial training and skills development, promoting legislative and regulatory reforms designed to improve the operation of the criminal justice system, and developing and supporting better use of existing criminal procedure tools, such as plea bargaining.

Programs in Europe focus largely on strengthening the Balkan governments' capacity to combat organized crime and corruption through criminal justice sector reform. Programs in Eurasia have traditionally focused on law enforcement reform through training and technical assistance to police academies, border guards, forensic laboratories, and probation departments. They also focus on justice sector reform by assisting governments with drafting and enacting new Criminal Procedure Codes, effectively addressing trafficking in persons, and ensuring more equitable justice. The Central Asia

Counternarcotics Initiative addresses the illegal opiates traffic from Afghanistan through Central Asia by building the capacity of Central Asian countries to combat narcotics trafficking.

**b. Office of Western Hemisphere Programming (INL/WHP)**

The INL Office of Western Hemisphere Programming (INL/WHP) works to increase citizen security in partnership with nations in the Western Hemisphere. The offices' objectives are to reduce transnational and organized crime, including illicit trafficking, violence against citizens, and strengthening institutions by implementing strong RoL programs.

The Merida Initiative is partnership between the US and Mexico to fight organized crime and associated violence by building criminal justice sector capacity through assistance to federal, state, and local law enforcement and justice sector officials.

The office supports efforts to promote justice sector reform and development in the Caribbean, including through the Caribbean Basin Security Initiative. One key component of these efforts is strengthening the relationship between police and prosecutors in places such as Haiti and St. Kitts through training and technical assistance so that cases, including money laundering cases, can be successfully prosecuted in a modernized court system.

In Central America INL/WHP supports several governments in building judicial and prosecutorial capacity, including through the Central America Regional Security Initiative. For example, INL/WHP funds the Costa Rican Attorney General's Office with new administrative tools. In Honduras, INL/WHP embedded a Resident Legal Advisor in the Honduran Attorney General's office to mentor and train prosecutors working on trafficking in persons cases tied to transnational organized crime. INL/WHP is also assisting the Panamanian government in transitioning from an inquisitorial criminal procedural code to an adversarial code.

The office also works in a number of countries in South America, with particularly large programs in Colombia and Peru where the focus is on developing and expanding the capacity of criminal justice systems to strengthen law enforcement, prosecutorial, and judicial effectiveness; facilitating implementation of new criminal procedures codes under accusatory systems; and advancing greater respect for human rights. This is accomplished through the provision of training and technical expertise to justice sector actors such as police, prosecutors, public defenders, judges, and bar members.

**c. Office of Africa and Middle East (INL/AME)**

The INL Office of Africa and Middle East Programs (INL/AME) develops and executes foreign assistance programming to promote civilian security and criminal justice sector reform in support of US policy objectives in Africa and the Middle East. INL programs improve access to justice, promote stability and democratic reform, professionalize law enforcement entities, support local justice sector officials and strengthen correction systems.

In Sub-Saharan Africa INL/AME programming supports partner governments' efforts to respond effectively to the growing demand for peace and security by assisting governments to combat transnational organized crime, drug trafficking, and terrorism, and their effects. This is achieved through post-conflict stabilization operations and security sector reform aimed at strengthening criminal justice systems to be publically accountable and to respect human rights. The Africa programs include a comprehensive range of bilateral and regional initiatives including the West Africa Cooperative Security Initiative, the Trans-Sahara Counterterrorism Partnership and the Partnership for Regional East Africa Counterterrorism.

In the Middle East and North Africa INL/AME establishes and implements foreign assistance programming to promote civilian security and criminal justice sector reform in support of US policy objectives to develop strong, professional, and self-sustaining criminal justice and related institutions in

the region that can address existing and emerging security threats in a humane, transparent, and equitable manner. The West Bank, Iraq and Lebanon are INL/AME's largest programs in the region and the office is establishing new or expanding existing programs in Arab countries undergoing transition.

## **2. Functional Offices**

### **a. Office of Anticrime Programs**

The mission of the Office of Anticrime Programs (INL/C) is to counter crimes with a transnational impact and minimize crime's adverse effects on US citizens. To accomplish this mission INL/C houses eight expert teams whose functions are described below.

#### **(1) International Law Enforcement Academy**

This Team oversees the operations of the Department's five International Law Enforcement Academies (Bangkok, Budapest, Gaborone, San Salvador and Roswell) and two related regional training centers (Lima and Accra) and builds regional linkages between law enforcement services.

#### **(2) Demand Reduction**

The Demand Reduction Team counters notable international drug use trends, such as child addiction and crack cocaine, builds regional and national expertise and cooperation in drug treatment and builds strong community coalitions against drugs.

#### **(3) Anti-corruption**

The Anti-corruption Team represents the US in multilateral processes by developing international anticorruption commitments and assessing country implementation, manages USG's visa denial program for foreign corrupt actors and develops new approaches for promoting cooperation in asset recovery and corruption prevention.

#### **(4) Transnational Organized Crime (TOC)**

The Transnational Organized Crime Team supports innovative approaches to targeting transnational criminal organizations, such as mapping illicit flows and markets, manages the USG's TOC Rewards Program; and implements Executive Order 13581 which places sanctions against criminal organizations and individuals.

#### **(5) Cybercrime and Intellectual Property Rights (IPR)**

The Cybercrime and IPR Team develops regional and bilateral training and technical assistance programs to enhance law enforcement capacity and cooperation and provides policy guidance to interagency processes.

#### **(6) Anti-Money Laundering/Counter Terrorist Financing**

The Anti-Money Laundering/Counter Terrorist Financing team represents the US in multilateral processes that develop and implement international standards, including the Financial Action Task Force; develops and implements programs to build capacity and address current threats such as maritime piracy, bulk cash smuggling and co-leads the Terrorist Financing Working Group.

#### **(7) Border Security/Alien Smuggling**

The Border Security/Alien Smuggling Team works with international partners to build border, aviation, and maritime security, and address migrant smuggling.

**(8) Environmental Crime/Wildlife Trafficking**

The Environmental Crime/Wildlife Trafficking Team builds global law enforcement training and technical assistance programs to combat wildlife trafficking and develops DoS policy on environment crimes consistent with the President’s National Strategy to Combat Wildlife Trafficking.

**b. Office of Criminal Justice Assistance Partnership (INL/CAP)**

The mission of the Office of Criminal Justice Assistance and Partnerships (INL/CAP) is to provide technical assistance and guidance to the INL Bureau and other entities within DoS to develop or enhance the criminal justice systems of partner nations. The Office employs experts in policing, justice, corrections, and gender who regularly advise other INL offices, conduct program assessments and reviews, assist with program development and coordinate with the interagency community. The Office has partnerships with US federal, state, county and municipal criminal justice organizations to provide active serving professionals for short and medium term assignments in INL funded programs. Additionally, INL/CAP plays an important training role within DoS by managing the pre-deployment training that all contracted advisors receive before being deployed overseas.

The Office also manages INL’s International Police Peacekeeping Operations Support program to bolster the capacity of countries to deploy well-trained and appropriately-equipped police in UN operations

Lastly, CAP develops programmatic guides as resources for INL officers when designing, managing, and evaluating their programs. The INL Guide to Justice Sector Assistance<sup>1</sup> and the INL Guide to Gender in the Criminal Justice System<sup>2</sup> were released in early 2014. Three additional programmatic guides – guides to corrections assistance, police assistance, and anticorruption assistance – are forthcoming.

**c. INL Contacts and Further Information**

| <b>Subject Matter Expertise</b> | <b>Contact</b>  |
|---------------------------------|---|
| Police                          | INLCAPJOBS@state.gov  |
| Rule of Law                     | INLCAPJustice@state.gov   |
| Corrections                     | INLCorrectionsJobs@state.gov  |
| <b>INL Program Offices</b>      |   |
| INL/AP Justice                  | Inl-ap-rol-dl@state.gov   |
| INL/AME                         | INL-AME-AFRICA-DL@state.gov<br>INL-AME-MiddleEast@state.gov         |
| INL/WHP                         | Inl-whp-rol-dl@state.gov  |
| INL/EA                          | INL-EA-DL@state.gov   |
| <b>General Information</b>      | <a href="http://www.state.gov/p/inl">http://www.state.gov/p/inl</a> |

**II. US Agency for International Development (USAID)**

The US Agency for International Development contributes to national security by helping build more prosperous and just societies that are less likely to resort to violence to settle differences and more likely to be effective partners in tackling transnational threats, from organized crime to pandemics. In fragile and conflict-affected countries, in particular, USAID efforts help prevent, mitigate and resolve conflict and put communities on the path toward reconstruction and stability.

<sup>1</sup> Available at: [www.state.gov/documents/organization/222048.pdf](http://www.state.gov/documents/organization/222048.pdf) (last visited 29 Aug 2014).

<sup>2</sup> Available at: [www.state.gov/documents/organization/222034.pdf](http://www.state.gov/documents/organization/222034.pdf) (last visited 29 Aug 2014).

## A. History of Development and USAID Mission

For more than two hundred years the US has engaged in relief and development activities abroad. The first recorded act of US Foreign Assistance was in May of 1812, when the USG sent five ships loaded with flour to Venezuela following a devastating earthquake. Modern foreign assistance was institutionalized in the aftermath of WWII with the Marshall Plan,<sup>3</sup> which rebuilt the infrastructure of Europe, and President Truman's Point Four Program, which urged America to "embark on a bold new program for making the benefits of our scientific advances and industrial progress available for the improvement and growth of underdeveloped areas."<sup>4</sup> In 1961, these entities were reorganized under the Foreign Assistance Act, and USAID was established as the lead agency for US development assistance.

At the core of the USAID mission is a deep commitment to work as partners in fostering sustainable development. In 2014, USAID announced a new mission statement:

[To] partner to end extreme poverty and to promote resilient, democratic societies while advancing our security and prosperity.

## B. Budget

USAID operated in over 80 countries and administered development programming in nearly 100 countries during 2013. The number of countries fluctuates every year depending on, amongst other things funding constraints and whether any countries have "graduated," thereby no longer needing USAID assistance. For FY14, the USAID budget was roughly \$20 billion.

|  |            |                         |            |
|--|------------|-------------------------|------------|
| Peace and Security                     | \$537.1M   | Economic Development    | \$3,092.9M |
| Democracy, Human Rights and Governance | \$1,185.6M | Environment             | \$428.9M   |
| Health                                 | \$6,347.6M | Humanitarian Assistance | \$2,646.4M |
| Education and Social Services          | \$1,183.2M | Program Management      | \$2,350.0M |

## C. Employee Demographics

USAID workforce is made up of direct-hire and contract employees based in the US and at field missions around the world with over 9,400 employees worldwide.<sup>5</sup> The USAID Missions are part of the US embassies and the USAID Mission Director is part of the embassy Country Team. The majority of USAID staff overseas are locally-employed from the host nation. American Foreign Service Officers normally deploy to a country for tours of two to four years and generally serve consecutive tours overseas in several countries before returning to the US for a Washington-based tour.

## D. Core Development Objectives

The discipline of development requires critical thinking, deep understanding of the environment, continuous learning and adaptation and sometimes it even means reframing the problem. Knowing when to get in and how to get out (an "exit" strategy) can be complex and requires analysis and planning. Sustainability and the importance of local systems, country ownership, and political will are fundamental

<sup>3</sup> See Marshall's speech at Harvard in 1947 at

<http://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm> (last visited 29 Aug 2014).

<sup>4</sup> See Truman's inaugural address at <http://www.bartleby.com/124/pres53.html> (last visited 29 Aug 2014).

<sup>5</sup> March 2014 staffing pattern. Seventy percent of the USAID workforce is in overseas missions.

guiding principles of development. Although more work needs to be done, USAID has achieved major accomplishments in its eight core development objectives:

- Increase Food Security – Through the President’s “Feed the Future” initiative, USAID assists vulnerable women and family members to escape hunger and poverty by significantly increasing their purchasing power. The Agency also prevents stunting and child mortality through nutrition interventions and applies the latest research and technology to boost global agricultural production.
- Promote Global Health and Strong Health Systems – USAID works to reduce child and maternal mortality, halve the burden of malaria, prevent and treat HIV infections, treat tuberculosis cases and strengthens health system capacities against pandemic threats.
- Reduce Climate Change Impacts and Promote Low Emissions Growth – USAID helps strengthen developing country capabilities to complete national forest greenhouse gas emissions inventories and supports Low Emissions Development Strategies.
- Promote Sustainable, Broad-Based Economic Growth – USAID helps developing countries increase exports, reduce private sector business costs, improve literacy and workforce skills.
- Expand and Sustain the Ranks of Stable, Prosperous, and Democratic States – USAID helps strengthen local institutions to lead an effective and transparent development agenda by supporting democratic actors, electoral processes, freedom of association and human rights. The Agency also promotes transparent and effective governance systems by forging new compacts between government, civil society and the private sector.
- Provide Humanitarian Assistance and Support Disaster Mitigation – USAID leads the interagency response to disasters and crises deriving from complex emergencies and natural disasters. In particular, USAID responds to complex emergencies with its interagency partners by applying sustainable, measurable approaches to address security and development challenges.
- Prevent and Respond to Crisis, Conflict, and Instability – USAID responds to complex emergencies with its interagency partners by applying sustainable, measurable approaches to address security and development challenges in key national security countries.
- Improve Lives through Education – people who can read enjoy better health, make more money, create safer and more stable democracies, and serve their communities more effectively, USAID supports this process.

## **E. Operational Principles.**

USAID applies a set of operational principles designed to help development practitioners focus on achieving and measuring results. These principles are fully consistent with those articulated in the Presidential Policy Directive on Global Development (PPD-6), the 2010 QDDR and the USG Strategy for Meeting the Millennium Development Goals. While these principles are not new, under USAID’s policy framework they are being applied more systematically and with greater discipline and analytical rigor across USAID.

- Promote gender equality and female empowerment
- Apply science, technology, and innovation strategically
- Apply selectivity and focus
- Measure and evaluate impact
- Build in sustainability from the start
- Apply integrated approaches to development

- Leverage “solution holders” and partner strategically.

## **F. Bureau for Democracy, Conflict, and Humanitarian Assistance**

While the work of many USAID bureaus work overlaps with DoD activities, none do to the extent that the Bureau for Democracy, Conflict, and Humanitarian Assistance (DCHA) does. This Bureau is home to several hundred experts managing \$2-3 billion in development and humanitarian assistance programs annually and is comprised of eight separate offices, of which 5 are listed below.

### **1. Office of Civilian Military Cooperation**

The Office of Civilian Military Cooperation works to align defense and development policies, plans, and programs to achieve US foreign policy goals and development goals. In particular, the Office coordinates joint planning, training, conferences, exercises, and communications and staffs all COCOMS with senior advisors and Liaison Officers.

### **2. Office of US Foreign Disaster Assistance (OFDA)**

The Office of US Foreign Disaster Assistance runs the lead agency role in coordinating the USG response to declared disasters and emergencies worldwide. This ensures that the needs of disaster victims are met by providing all forms of relief and rehabilitation. In particular, OFDA formulates US foreign disaster assistance in disaster prevention, mitigation, preparedness, response and rehabilitation. The Office funds and procures relief supplies and administrative support for short and long-term disaster situations and provides humanitarian relief, rehabilitation, and reconstruction assistance to foreign disaster victims.

In 2013 OFDA responded to 52 crises in 40 countries, providing life-saving assistance to tens of millions of people (e.g. super typhoon in the Philippines, drought in the Republic of the Marshall Islands, food insecurity in the African Sahel and the Horn of Africa, floods in Mexico, complex emergencies in Yemen, the Democratic Republic of Congo (DRC), Burma, South Sudan, and the Central African Republic). While OFDA and DoD do work collaboratively, DoD is involved in fewer than 10% of the international emergencies and disasters to which OFDA responds.

### **3. Office of Transition Initiatives (OTI)**

The Office of Transition Initiatives supports US foreign policy objectives by helping local partners advance peace and democracy in priority countries in crisis or enduring intense political change. Programs are short-term, typically a few years in duration, until enough stability allows OTI to make an effective hand-off to other offices within USAID conducting longer-term development programs.

### **4. Office of Conflict Management and Mitigation (CMM)**

The Office of Conflict Management and Mitigation is a small office based in Washington which leads USAID’s efforts to identify and analyze sources of fragility and conflict, supports early responses to address the causes and consequences of fragility and conflict, and seeks to integrate conflict sensitivity and peace-building approaches into USAID’s analyses, strategies, and programs. This is achieved through the dissemination of rigorous, field-relevant research, training, analysis and guidance to better identify, assess, and engage conflict dynamics based on a comprehensive knowledge management system.

Utilizing the Conflict Assessment Framework 2.0 (CAF 2.0), CMM staff formulates analysis on the drivers, mitigators and actors in a country context. The Office also tracks conflict trends in at-risk countries and compile the annual alert lists of fragility and instability which provides missions and regional bureaus with nuanced early warning information.

## 5. Office of Civilian Response (OCR)

The Office of Civilian Response deploys personnel around the globe to USAID missions and embassies on crisis response teams in times of crisis prevention, response, recovery and transition. The office was established in 2009 to oversee training, equipping, and deploying mission-ready civilian experts for crisis response, stabilization and reconstruction, and conflict transition operations worldwide. Since then, OCR has provided over 20,000 days of mission support in deployments to countries such as Libya, Tunisia, Kyrgyzstan, Sri Lanka, Burma, Honduras, Yemen, Kenya, South Sudan, DRC.

## 6. Center of Excellence on Democracy, Human Rights, and Governance

As described in Chapter 4, the DRG Center advances democracy, human rights, and governance in support of political freedom overseas by integrating these concepts across all of USAID's development sectors. Staff provide technical assistance to the field in assessments, strategy development and program design as well as representatives in the interagency arenas, ensuring that USAID investment programs are coordinated with US diplomatic and defense efforts.<sup>6</sup>

## G. USAID's Program Cycle:

### 1. General

The Agency plans development programs based upon long term strategic goals, supported by plausible theories of change. Just as the Army uses the MDMP seven-step process for military decision-making, USAID uses its Program Cycle to define its own systematic approach and funding decisions.



This wheel illustrates the four key steps USAID takes as it programs US development assistance.

- Reinforcing agency-level policies, priorities, and strategies
- Clear and comprehensive strategic planning that includes country-specific analyses and stakeholder input
- Designed and implemented with rigor and a commitment to evidence-based programming

<sup>6</sup> Many technical publications and how to guides published the DRG Center can be found at <http://www.usaid.gov/node/33416> (last visited 23 Jul 2014).

- Tied to strong monitoring and quality evaluation.

## **2. Country Development Cooperation Strategy (CDCS)**

The Country Development Cooperation Strategy is the principal strategic planning exercise carried out at the USAID mission-level in country, providing strategic organizing principles and resource allocation guidance to allow missions to focus on integrating efforts across technical offices and sectors to explore opportunities that leverage resources that maximize development impact. The CDCS is integrated into the relevant embassy ICS. The CDCS incorporates a number of country-specific analyses and assessments including gender analysis, conflict assessment and political stakeholder assessment and prioritizes areas in which USAID will deploy its resources, which can help DoD personnel quickly identify where DoD activities may complement and fit with existing USAID activities.<sup>7</sup>

## **3. Program Design and Implementation**

Authorizing and appropriation 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.

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. USAID uses dozens of financial mechanisms to implement its assistance programs. The most common mechanisms are:

- Contracts specified by a scope of work (SOW)
- 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.

The Agency 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.

Most often, USAID implements its programs through partner organizations. In countries where USAID has a field office, staff engage in policy dialogue, writing analytical documents, and monitoring project implementation.

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<sup>7</sup> Country CDCS's can be found at <http://www.usaid.gov/results-and-data/planning/country-strategies-cdcs> (last visited 27 Jul 2014).

#### 4. Evaluation and Monitoring

In 2011, the USAID Administrator announced USAID's new evaluation policy.<sup>8</sup> This indicated a renewed emphasis on evaluation, measuring and documenting program performance and generating data to drive decision-making. The policy also explains the difference between standard performance evaluations and more rigorous impact evaluations. Impact evaluations are based on cause and effect models and require a credible and rigorously defined counterfactual to control for factors other than the intervention. In contrast, performance evaluations describe the empirical history of a particular program. Performance evaluations are less costly and useful than impact evaluations because, while they compare before and after, they rarely include a rigorous counterfactual. Highlights of the USAID evaluation policy include:

- Establishment of best practices and lessons learned for both performance and impact evaluations
- Calls for programs to integrate evaluation at the design stage
- Dedication of sufficient evaluation resources - approximately three percent of total program dollars.

#### H. Rule of Law at USAID

As seen in chapter 4, USAID programming for RoL is diverse and covers five areas (Order and Security, Legitimacy, Checks and Balances, Fairness, and Effective Application)<sup>9</sup> consistent with the UN definition of RoL.<sup>10</sup> Within this planning framework each of the below five elements of RoL must be present for RoL to prevail.

- **Order and security**—RoL cannot flourish in crime-ridden environments or where public order breaks down and citizens fear for their safety. The executive branch has immediate responsibility for order and security, but the judiciary has an important role as well in protecting rights and providing for the peaceful resolution of disputes. In addition, informal methods of resolving disputes, such as mediation or truth and reconciliation commissions, can promote order and security. USAID programs in this sector help to support order and security.
- **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.
- **Checks and balances**—RoL depends on a separation of governmental powers among both branches and levels of government. An independent judiciary is seen as an important “check.” At the same time, checks and balances make the judiciary accountable to other branches of government. Like all branches, the judiciary is also accountable to the public. An independent and strong bar association can also help support the judiciary and serve as a check against abuse of judicial power.
- **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.

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<sup>8</sup> Available at <http://www.usaid.gov/sites/default/files/documents/2151/USAIDEvaluationPolicy.pdf> (last visited 27 Jul 2014)

<sup>9</sup> United States Agency for International Development, *Guide to Rule of Law Country Analysis: The rule of Law Strategic Framework*, 2 (2010), available at: [http://pdf.usaid.gov/pdf\\_docs/PNADT593.pdf](http://pdf.usaid.gov/pdf_docs/PNADT593.pdf). (last visited 29 Aug 2014)

<sup>10</sup> (S/2004/616) Report of the *Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, see <http://www.un.org/en/ruleoflaw/>. See Chapter 1 footnote 10 for full definition.

These sub-elements are keys to empowering the poor and disadvantaged, including women. The justice sector bears primary responsibility for implementing these sub-elements.

- **Effective application**—Without consistent enforcement and application of the law for all citizens and other inhabitants, there can be no RoL. The judiciary is an important element of the enforcement process.

There is additional reading for JAs wishing to learn more about USAID RoL activities.<sup>11</sup>

### **III. Department of Justice**

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

The Office of the Deputy Attorney General issues policy guidance and direction to DoJ components involved in RoL activities. This Office also directly oversees the activities of senior DoJ officials deployed to operationally and is the principal agent for coordination of all overseas RoL programs.

#### **B. Criminal Division’s International Criminal Investigative Training Assistance Program**

Created in 1986, ICITAP works with foreign governments to develop professional and transparent law enforcement institutions that protect human rights, combat corruption, and reduce the threat of transnational crime and terrorism. ICITAP is situated in the Department of Justice’s Criminal Division, with programs primarily funded by the DoS, DoD, and USAID.

In designing and executing security sector assistance programs, ICITAP often partners with DoJ’s law enforcement organizations (FBI, DEA, USMS, ATF, and BOP), as well as with the interagency. ICITAP’s areas of expertise include:

- criminal investigations
- marine and border security
- corrections
- forensics and biometric data
- academy and instructor development
- terrorism and transnational crime
- anticorruption
- community policing and basic police services
- criminal justice coordination.

Over the last three decades, ICITAP has provided assistance and training to law enforcement agencies in nearly 100 countries. These activities encompass three principal types of assistance projects:

- Enhancing the capabilities of existing law enforcement institutions in emerging democracies and developing countries (e.g. Balkans, Eurasia, Sub-Saharan Africa)
- Assisting key allies in combating terrorism (e.g. Pakistan, Indonesia, Philippines)
- Developing law enforcement institutions in the context of post-conflict reconstruction or international peacekeeping operations.<sup>12</sup>

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<sup>11</sup> Reducing Corruption in the Judiciary (2009) available at [http://pdf.usaid.gov/pdf\\_docs/PNADO106.pdf](http://pdf.usaid.gov/pdf_docs/PNADO106.pdf) (last visited 29 Aug 14). Field Guide for USAID DG Officers: Assistance to Civilian Law Enforcement in Developing Countries (2011) available at [http://pdf.usaid.gov/pdf\\_docs/PNADU808.pdf](http://pdf.usaid.gov/pdf_docs/PNADU808.pdf) (last visited 29 Aug 14). Strategy on Democracy, Human Rights, and Governance (2013) available at [http://www.usaid.gov/sites/default/files/documents/2496/DRG%20Strategy%20%20paper\\_7-25-13.pdf](http://www.usaid.gov/sites/default/files/documents/2496/DRG%20Strategy%20%20paper_7-25-13.pdf) (last visited 29 Aug 14).

## **C. ICITAP – Regional Bureaus**

The Program works closely with DoD, and has worked with and under military command—including Iraq and Afghanistan. Ongoing collaborations include:

- Maritime security in the Philippines, Indonesia, and Malaysia and Bangladesh with USPACOM
- Transnational organized crime and border security issues in the Balkans with USEUCOM
- Counternarcotics (CN) program in Afghanistan with USCENTCOM and OSD
- CN training across Africa with USAFRICOM.

The Program also has a full-time liaison officer embedded with USEUCOM, and seeks to expand this collaborative model to the other COCOMs. Further, ICITAP maintains a close, habitual relationship with Special Operations Command (USSOCOM), evidenced by the USSOCOM SOST (Special Operations Support Teams) to DoJ's Criminal Division residing at ICITAP HQ.

All ICITAP field offices are managed by full-time federal employees, who serve as Senior Law Enforcement Advisors (SLEAs) with diplomatic status who are generally attached to US Embassies. Hundreds of technical advisors, law enforcement instructors, and support personnel serve ICITAP's programs worldwide.

### **1. Africa and the Middle East**

In 1994 ICITAP deployed to Somalia during the unrest. Since then, ICITAP has delivered a wide range of technical assistance and specialized training programs in nearly 30 countries throughout the region. Today, ICITAP's programs in the region focus on countering extremism and transnational crime, democratic policing principles, and forensic capacity development.

As of 31 March 2014, ICITAP has two field offices in the region – Algeria and South Sudan (currently evacuated); and seven additional funded programs – Bahrain, Benin, Kenya, Libya, Malawi, South Africa, and Tanzania.

### **2. Asia and the Pacific**

In 2000 ICIATAP spearheaded the Police Assistance Program for the Indonesian National Police after its separation from the Indonesian Armed Forces. Today, the major focuses of ICITAP's programs in the region support efforts to combat terrorism and transnational organized crime by building capacity to conduct complex criminal investigations, for example through participation in the DoD-funded, interagency Southeast Asia Tri-Border Initiative to deter terrorist recruitment and deny terrorists sanctuary in Indonesia, Malaysia, and the Philippines.

ICITAP has also developed a robust maritime security program in close collaboration with DoD in both Indonesia and the Philippines – establishing, fully equipping, and training and mentoring Special Boat Units. ICITAP's maritime development programs are improving security and cooperation in the strategic waterways between the Philippines, Indonesia, and Malaysia.

As of 31 March 2014, ICITAP has six field offices in the region – Afghanistan, Bangladesh, Indonesia, Nepal, Pakistan, and Philippines; and two additional funded programs – Sri Lanka and Vietnam.

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<sup>12</sup> Since its first post-conflict law enforcement mission in Panama, ICITAP has participated in the majority of US and international peacekeeping and post-conflict reconstruction missions, including those in Panama, El Salvador, Somalia, Haiti, Bosnia-Herzegovina, Guatemala, Kosovo, East Timor, Macedonia, Afghanistan, Iraq, Libya, Egypt, and Syria.

### **3. Europe/Eurasia**

In 1996 ICITAP deployed into Bosnia immediately after the signing of the Dayton Peace Accords where it was tasked with supporting United Nations efforts to stand up a new police force. Three years later, ICITAP was again called on to take the lead in Kosovo after the NATO intervention. Eighteen years later, ICITAP is still in Bosnia and Kosovo.

Currently ICITAP is focusing assistance efforts on building capacity to combat transnational organized crime by strengthening border security, developing complex criminal investigative skills, helping to establish specialized task forces, and improving regional law enforcement cooperation.

As of 31 March 2014, ICITAP has six field offices in the region – Albania, Bosnia, Kosovo, Kyrgyzstan, Macedonia, and Serbia; and four additional funded programs – Croatia, Montenegro, Ukraine, and Uzbekistan.

### **4. Latin America and the Caribbean (LAC)**

In 1986, DoS funded ICITAP to build capacity to prosecute key human rights cases in El Salvador and to enhance the criminal investigative capacity of police forces in Latin America. Since then, ICITAP has delivered training in every country in Central America, more than half of the countries in South America, and nearly all of the Caribbean.

Today, ICITAP's programs focus on criminal justice reform, anticorruption, forensic science, human rights, transnational crime, and advanced investigative skills. ICITAP is a key partner in major US assistance efforts in the region – Plan Colombia, the Merida Initiative in Mexico, and the Partnership for Growth Program in El Salvador.

As of 31 March 2014, ICITAP has four field offices in the region – Colombia, Barbados (Caribbean Basin), El Salvador, and Mexico; and two additional funded programs: Brazil and Dominican Republic.

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

This Office works with partner countries to develop and strengthen fair, just, and accountable justice sector institutions, to build strong international partners to combat transnational criminal activities, and to enhance and foster the administration of justice and RoL consistent with international norms and standards. All OPDAT programs are funded by US partner agencies, principally DoS, USAID, or DoD.

This Office places Resident Legal Advisors in countries to provide full-time advice and technical assistance to host governments in establishing fair and transparent justice sector institutions and practices. RLAs serve in a specific country for at least one year and provide a variety of functions.

The Office has a DoD-funded Legal Advisor stationed with USEUCOM in Stuttgart, Germany to act as a liaison to EUCOM, to assess transnational organized crime and counternarcotics issues and to provide appropriate technical assistance. The Legal Advisor also helps identify and facilitate DoD funding for OPDAT programs that address counternarcotics, counter-threat financing, and other transnational threats. Additionally, OPDAT works closely with USAFRICOM and USSOCOM to help build partner capacity in Africa, the Pacific, and other theaters.

## **IV. List of US Agencies Influencing Stability Operations**

There are an extensive number of individuals and US governmental offices that influence stability operations policy. There follows an overview of some of the relevant directives, offices or positions at the NSC and at USG agencies.

**Table 1: National Security Council (NSC) System**

| <b>Agency/Organization</b>  | <b>URL for More Information</b>   |
|---|---|
| National Security Council   | <a href="http://www.whitehouse.gov/administration/eop/nsc/">http://www.whitehouse.gov/administration/eop/nsc/</a> |
| NSC Principals Committee (PC) (DC)  |   |
| NSC Interagency Policy Committee (IPC)<br>(organized on a regional and/or functional basis) |   |

**Table 2: Department of State (DoS)**

| <b>Agency/Organization</b>   | <b>URL for more information</b>   |
|--|---|
| <b>Secretary of State (S)</b>  |   |
| Deputy Secretary (D)   | <a href="http://www.state.gov/s/d/">http://www.state.gov/s/d/</a>   |
| Deputy Secretary for Management and Resources (DMR)                  | <a href="http://www.state.gov/s/dmr/">http://www.state.gov/s/dmr/</a>   |
| Director of US Foreign Assistance (F)                                | <a href="http://www.state.gov/f/">http://www.state.gov/f/</a>   |
| Counselor of the Department (C)                                      | <a href="http://www.state.gov/s/c/">http://www.state.gov/s/c/</a>   |
|  |   |
| <b>Under Secretaries for:</b>  |   |
| Arms Control and International Security (T)                          | <a href="http://www.state.gov/t/">http://www.state.gov/t/</a>   |
| Economic Growth, Energy, and the Environment (E)                     | <a href="http://www.state.gov/e/">http://www.state.gov/e/</a>   |
| Civilian Security, Democracy and Human Rights (J)                    | <a href="http://www.state.gov/j/">http://www.state.gov/j/</a>   |
| Management (M)   | <a href="http://www.state.gov/m/">http://www.state.gov/m/</a>   |
| Political Affairs (P)  | <a href="http://www.state.gov/p/">http://www.state.gov/p/</a>   |
| Public Democracy and Public Affairs (R)                              | <a href="http://www.state.gov/r/">http://www.state.gov/r/</a>   |
|  |   |
| <b>Special Envoys and Special Representatives</b>                    |   |
| Coordinator, Threat Reduction Programs                               | <a href="http://www.state.gov/t/isn/c34463.htm">http://www.state.gov/t/isn/c34463.htm</a>   |
| Special Adviser for Nonproliferation and Arms Control                | <a href="http://www.state.gov/s/c38573.htm">http://www.state.gov/s/c38573.htm</a>   |
| Special Envoy for Climate Change                                     | <a href="http://www.state.gov/s/climate/">http://www.state.gov/s/climate/</a>   |
| Special Envoy for Conventional Armed Forces in Europe                | <a href="http://www.state.gov/r/pa/prs/ps/2010/02/136402.htm">http://www.state.gov/r/pa/prs/ps/2010/02/136402.htm</a>   |
| Special Envoy for Eurasian Energy                                    | <a href="http://www.state.gov/r/pa/prs/ps/2009/04/121930.htm">http://www.state.gov/r/pa/prs/ps/2009/04/121930.htm</a>   |
| Special Envoy for Holocaust Issues                                   | <a href="http://www.state.gov/p/eur/rt/hlcst/">http://www.state.gov/p/eur/rt/hlcst/</a>   |
| Special Envoy for Israeli-Palestinian Negotiations                   | <a href="http://www.state.gov/s/middleeastpeace/">http://www.state.gov/s/middleeastpeace/</a>   |
| Special Envoy for North Korean Human Rights Issues                   | <a href="http://www.state.gov/s/senk/">http://www.state.gov/s/senk/</a>   |
| Special Envoy for the Six-Party Talks                                | <a href="http://www.state.gov/r/pa/ei/biog/title/as/214018.htm">http://www.state.gov/r/pa/ei/biog/title/as/214018.htm</a>   |
| Special Envoy to Monitor and Combat Anti-Semitism                    | <a href="http://www.state.gov/j/drl/seas/">http://www.state.gov/j/drl/seas/</a>   |
| Special Envoy to Sudan and South Sudan                               | <a href="http://www.state.gov/s/sudan/">http://www.state.gov/s/sudan/</a>   |
| Special Representative for Global Partnerships                       | <a href="http://www.state.gov/s/partnerships/">http://www.state.gov/s/partnerships/</a>   |
| Special Representative of the President for Nuclear Nonproliferation | <a href="http://www.state.gov/r/pa/ei/biog/125818.htm">http://www.state.gov/r/pa/ei/biog/125818.htm</a>   |
| Special Representative to Afghanistan and Pakistan                   | <a href="http://www.state.gov/s/special_rep_afghanistan_pakistan/">http://www.state.gov/s/special_rep_afghanistan_pakistan/</a>   |
| Special Representative to Muslim Communities                         | <a href="http://www.state.gov/s/srmc/">http://www.state.gov/s/srmc/</a>   |
|  |   |
| <b>Bureaus and Offices</b>   |   |
| Administration (A)   | <a href="http://www.state.gov/m/a/">http://www.state.gov/m/a/</a>   |
| African Affairs (AF)   | <a href="http://www.state.gov/p/af/">http://www.state.gov/p/af/</a>   |
| Allowances (A/OPR/ALS)   | <a href="http://aoprals.state.gov/">http://aoprals.state.gov/</a>   |
| Arms Control, Verification and Compliance (AVC)                      | <a href="http://www.state.gov/t/avc/">http://www.state.gov/t/avc/</a>   |
| Authentication Division (A/OPR/GSM/AUTH)                             | <a href="http://travel.state.gov/content/travel/english/legal-considerations/judicial/authentication-of-documents/office-of-authentications.html">http://travel.state.gov/content/travel/english/legal-considerations/judicial/authentication-of-documents/office-of-authentications.html</a> |

| <b>Agency/Organization</b>  | <b>URL for more information</b>   |
|---|---|
| Budget and Planning (BP)  | <a href="http://www.state.gov/s/d/rm/">http://www.state.gov/s/d/rm/</a>                                 |
| Coordinator for Counterterrorism (S/CT)   | <a href="http://www.state.gov/j/ct/">http://www.state.gov/j/ct/</a>                                     |
| Coordinator for Conflict and Stabilization Operations (S/CSO)                   | <a href="http://www.state.gov/j/cso/">http://www.state.gov/j/cso/</a>                                   |
| Chief Information Officer (CIO)   | <a href="http://www.state.gov/r/pa/ei/biog/195884.htm">http://www.state.gov/r/pa/ei/biog/195884.htm</a> |
| Chief of Staff (S)  | <a href="http://www.state.gov/r/pa/ei/biog/210993.htm">http://www.state.gov/r/pa/ei/biog/210993.htm</a> |
| Civil Rights, Office of Consular Affairs (CA)                                   |   |
| Democracy, Human Rights, and Labor (DRL)  | <a href="http://www.state.gov/j/drl/">http://www.state.gov/j/drl/</a>                                   |
| Diplomatic Security (DS)  | <a href="http://www.state.gov/m/ds/">http://www.state.gov/m/ds/</a>                                     |
| Director General of the Foreign Service and Director of Human Resources (DGHR)  | <a href="http://www.state.gov/m/dghr/">http://www.state.gov/m/dghr/</a>                                 |
| East Asian and Pacific Affairs (EAP)  | <a href="http://www.state.gov/p/eap/">http://www.state.gov/p/eap/</a>                                   |
| Economic and Business Affairs (EB)  | <a href="http://www.state.gov/e/eb/">http://www.state.gov/e/eb/</a>                                     |
| Educational and Cultural Affairs (ECA)  | <a href="http://eca.state.gov/about-bureau">http://eca.state.gov/about-bureau</a>                       |
| European and Eurasian Affairs (EUR)   | <a href="http://www.state.gov/p/eur/">http://www.state.gov/p/eur/</a>                                   |
| Executive Secretariat (S/ES)  | <a href="http://www.state.gov/s/es/">http://www.state.gov/s/es/</a>                                     |
| Foreign Service Institute (FSI)   | <a href="http://www.state.gov/m/fsi/">http://www.state.gov/m/fsi/</a>                                   |
| Foreign Missions (OFM)  | <a href="http://www.state.gov/ofm/">http://www.state.gov/ofm/</a>                                       |
| Office of Global AIDS Coordinator (S/GAC)                                       | <a href="http://www.state.gov/s/gac/">http://www.state.gov/s/gac/</a>                                   |
| Office of Global Criminal Justice (G/GCJ)                                       | <a href="http://www.state.gov/j/gcj/">http://www.state.gov/j/gcj/</a>                                   |
| Office of Global Health Diplomacy (S/GHD)                                       | <a href="http://www.state.gov/s/ghd/">http://www.state.gov/s/ghd/</a>                                   |
| Global Women's Issues (S/GWI)   | <a href="http://www.state.gov/s/gw">http://www.state.gov/s/gw</a>                                       |
| Information Resource Management (IRM)   | <a href="http://www.state.gov/m/irm/">http://www.state.gov/m/irm/</a>                                   |
| Inspector General (OIG)   | <a href="http://oig.state.gov/">http://oig.state.gov/</a>   |
| Intelligence and Research (INR)   | <a href="http://www.state.gov/s/inr/">http://www.state.gov/s/inr/</a>                                   |
| International Information Programs (IIP)  | <a href="http://www.state.gov/r/iip/">http://www.state.gov/r/iip/</a>                                   |
| International Narcotics and Law Enforcement Affairs (INL)                       | <a href="http://www.state.gov/j/inl/">http://www.state.gov/j/inl/</a>                                   |
| International Organization Affairs (IO)   | <a href="http://www.state.gov/p/io/">http://www.state.gov/p/io/</a>                                     |
| International Security and Nonproliferation (ISN)                               | <a href="http://www.state.gov/t/isn/">http://www.state.gov/t/isn/</a>                                   |
| Legal Adviser (L)   | <a href="http://www.state.gov/s/l/">http://www.state.gov/s/l/</a>                                       |
| Legislative Affairs (H)   | <a href="http://www.state.gov/s/h/">http://www.state.gov/s/h/</a>                                       |
| Management Policy, Rightsizing and Innovation (M/PRI)                           | <a href="http://www.state.gov/m/pri/">http://www.state.gov/m/pri/</a>                                   |
| Medical Services (M/MED)  | <a href="http://www.state.gov/m/med/">http://www.state.gov/m/med/</a>                                   |
| Near Eastern Affairs (NEA)  | <a href="http://www.state.gov/p/nea/">http://www.state.gov/p/nea/</a>                                   |
| Oceans and International Environmental and Scientific Affairs (OES)             | <a href="http://www.state.gov/e/oes/">http://www.state.gov/e/oes/</a>                                   |
| Overseas Buildings Operations (OBO)   | <a href="http://overseasbuildings.state.gov/">http://overseasbuildings.state.gov/</a>                   |
| Policy, Planning, and Resources for Public Diplomacy and Public Affairs (R/PPR) | <a href="http://www.state.gov/r/ppr/">http://www.state.gov/r/ppr/</a>                                   |
| Policy Planning Staff (S/P)   | <a href="http://www.state.gov/s/p/">http://www.state.gov/s/p/</a>                                       |
| Political-Military Affairs (PM)   | <a href="http://www.state.gov/t/pm/">http://www.state.gov/t/pm/</a>                                     |
| Population, Refugees, and Migration (PRM)                                       | <a href="http://www.state.gov/j/prm/">http://www.state.gov/j/prm/</a>                                   |
| Protocol (S/CPR)  | <a href="http://www.state.gov/s/cpr/">http://www.state.gov/s/cpr/</a>                                   |
| Public Affairs (PA)   | <a href="http://www.state.gov/r/pa/">http://www.state.gov/r/pa/</a>                                     |
| Rightsizing the US Government's Overseas Presence (M/R)                         |   |
| Science & Technology Adviser (G/STAS)   | <a href="http://www.state.gov/e/stas/">http://www.state.gov/e/stas/</a>                                 |
| South and Central Asian Affairs (G/SCA)   | <a href="http://www.state.gov/p/sca/">http://www.state.gov/p/sca/</a>                                   |
| Trafficking in Persons (G/TIP)  | <a href="http://www.state.gov/j/tip/">http://www.state.gov/j/tip/</a>                                   |
| Western Hemisphere Affairs (WHA)  | <a href="http://www.state.gov/p/wha/">http://www.state.gov/p/wha/</a>                                   |

**Table 3: US Agency for International Development (USAID)**

| <b>Agency/Organization</b> | <b>URL for More Information</b>   |
|----------------------------|---|
| Administrator of USAID     | <a href="http://www.usaid.gov/who-we-are/organization/leadership">http://www.usaid.gov/who-we-are/organization/leadership</a>                       |
| <b>Bureaus</b>             |   |
| Bureau for Africa (AFR)    | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-africa">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-africa</a> |

| <b>Agency/Organization</b>                                 | <b>URL for More Information</b>   |
|--|---|
| Bureau for Asia  | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-asia">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-asia</a>   |
| Bureau for Europe and Eurasia (EE)                         | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-europe-and-eurasia">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-europe-and-eurasia</a>   |
| Bureau for Latin America and the Caribbean                 | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-latin-america-and-caribbean">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-latin-america-and-caribbean</a>                                       |
| Bureau for the Middle East                                 | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-middle-east">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-middle-east</a>   |
| Bureau for Democracy, Conflict and Humanitarian Assistance | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance</a> |
| Bureau for Economic Growth, Education and Environment      | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-economic-growth-education-and-environment">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-economic-growth-education-and-environment</a>           |
| Bureau for Food Security                                   | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-food-security">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-food-security</a>   |
| Bureau for Global Health                                   | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-global-health">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-global-health</a>   |
| US Global Development Lab                                  | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/us-global-development-lab">http://www.usaid.gov/who-we-are/organization/bureaus/us-global-development-lab</a>   |
| Bureau for Foreign Assistance                              | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/foreign-assistance">http://www.usaid.gov/who-we-are/organization/bureaus/foreign-assistance</a>   |
| Bureau for Legislative and Public Affairs                  | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-legislative-and-public-affairs">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-legislative-and-public-affairs</a>                                 |
| Bureau for Management                                      | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-management">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-management</a>   |
| Bureau for Policy, Planning and Learning                   | <a href="http://www.usaid.gov/who-we-are/organization/bureaus/bureau-policy-planning-and-learning">http://www.usaid.gov/who-we-are/organization/bureaus/bureau-policy-planning-and-learning</a>                                     |

**Table 4: Department of Justice (DoJ)**

| <b>Agency/Organization</b>   | <b>URL for More Information</b>   |
|--|---|
| Attorney General   | <a href="http://www.justice.gov/ag/">http://www.justice.gov/ag/</a>                           |
| Deputy Attorney General  | <a href="http://www.justice.gov/dag/">http://www.justice.gov/dag/</a>                         |
| Assistant Attorney General, Criminal Division                                  | <a href="http://www.justice.gov/criminal/">http://www.justice.gov/criminal/</a>               |
| International Criminal Investigation Training Assistance Program (ICITAP)      | <a href="http://www.justice.gov/criminal/icitap/">http://www.justice.gov/criminal/icitap/</a> |
| Office of Overseas Prosecutorial Development, Assistance, and Training (OPDAT) | <a href="http://www.justice.gov/criminal/opdat/">http://www.justice.gov/criminal/opdat/</a>   |
| Director, Federal Bureau of Investigations (FBI)                               | <a href="http://www.fbi.gov">http://www.fbi.gov</a>   |
| Director, US Marshals Service (USMS)   | <a href="http://www.usmarshals.gov">http://www.usmarshals.gov</a>                             |
| Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)            | <a href="http://www.atf.gov">http://www.atf.gov</a>   |
| Administrator, Drug Enforcement Administration (DEA)                           | <a href="http://www.justice.gov/dea/index.shtml">http://www.justice.gov/dea/index.shtml</a>   |
| Director, Federal Bureau of Prisons  | <a href="http://www.bop.gov">http://www.bop.gov</a>   |
| Office of Legal Policy (OLP)   | <a href="http://www.justice.gov/olp">http://www.justice.gov/olp</a>                           |
| Office of Legislative Affairs (OLA)  | <a href="http://www.justice.gov/ola/">http://www.justice.gov/ola/</a>                         |
| Office of Legal Counsel (OLC)  | <a href="http://www.justice.gov/olc">http://www.justice.gov/olc</a>                           |

**Table 5: Department of Defense (DoD)**

| <b>Agency/Organization</b>  | <b>URL for More Information</b>   |
|---|---|
| Secretary of Defense  | <a href="http://www.defense.gov/bios/secdef/">http://www.defense.gov/bios/secdef/</a>   |
| Deputy Secretary of Defense   | <a href="http://www.defense.gov/bios/depsecdef/">http://www.defense.gov/bios/depsecdef/</a>   |
| Secretary of the US Army  | <a href="http://www.defense.gov/bios/biographydetail.aspx?biographyid=228">http://www.defense.gov/bios/biographydetail.aspx?biographyid=228</a>   |
|   |   |
| <b>Joint Chiefs of Staff (JCS)</b>  |   |
| Chairman of JCS   | <a href="http://www.defense.gov/bios/biographydetail.aspx?biographyid=325">http://www.defense.gov/bios/biographydetail.aspx?biographyid=325</a>   |
| Joint Chiefs  | <a href="http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5432">http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=5432</a>   |
| Directorate of Management   | <a href="http://www.jcs.mil/Directorates/DirectoratesofManagement.aspx">http://www.jcs.mil/Directorates/DirectoratesofManagement.aspx</a>   |
| Joint Staff: J-1 – J-8  | <a href="http://www.jcs.mil/Leadership.aspx">http://www.jcs.mil/Leadership.aspx</a>   |
|   |   |
| Under Secretary of Defense for Policy   | <a href="http://www.policy.defense.gov">http://www.policy.defense.gov</a>   |
| Assistant Secretary of Defense for Legislative Affairs (OSD(LA))                        | <a href="http://www.la.defense.gov">http://www.la.defense.gov</a>   |
| Assistant Secretary of Defense for Special Operations/Low-Intensity Conflict            | <a href="http://www.policy.defense.gov/OSDPOffices/ASDforSpecialOperationsLowIntensityConflict.aspx">http://www.policy.defense.gov/OSDPOffices/ASDforSpecialOperationsLowIntensityConflict.aspx</a>   |
| Deputy Assistant Secretary of Defense for Partnership Strategy and Stability Operations | <a href="http://www.policy.defense.gov/OSDPOffices/ASDforSpecialOperationsLowIntensityConflict/PartnershipStrategyandStabilityOperations.aspx">http://www.policy.defense.gov/OSDPOffices/ASDforSpecialOperationsLowIntensityConflict/PartnershipStrategyandStabilityOperations.aspx</a> |
| Office of General Counsel   | <a href="http://www.dod.mil/dodgc/about.html">http://www.dod.mil/dodgc/about.html</a>   |

**Table 6: US Department of Agriculture (USDA)**

| <b>Agency/Organization</b>             | <b>URL for More Information</b>   |
|--|---|
| Secretary of Agriculture               | <a href="http://www.usda.gov/wps/portal/usda/usdahome?navid=SECRETARY_PAGE">http://www.usda.gov/wps/portal/usda/usdahome?navid=SECRETARY_PAGE</a> |
| Office of the Chief Scientist (OCS)    | <a href="http://www.usda.gov/wps/portal/usda/usdahome?navid=OCS">http://www.usda.gov/wps/portal/usda/usdahome?navid=OCS</a>                       |
| The Foreign Agricultural Service (FAS) | <a href="http://www.fas.usda.gov/about-fas">http://www.fas.usda.gov/about-fas</a>   |

**Table 7: Department of Commerce**

| <b>Agency/Organization</b>                           | <b>URL for More Information</b>   |
|--|---|
| Secretary of Commerce                                | <a href="http://www.commerce.gov">http://www.commerce.gov</a>                     |
| Afghanistan Investment and Reconstruction Task Force | <a href="http://www.trade.gov/Afghanistan/">http://www.trade.gov/Afghanistan/</a> |
| Iraq Investment and Reconstruction Task Force        | <a href="http://www.trade.gov/iraq/">http://www.trade.gov/iraq/</a>               |

**Table 8: Department of the Treasury**

| <b>Agency/Organization</b>                            | <b>URL for More Information</b>   |
|---|---|
| Secretary of the Treasury                             | <a href="http://www.treasury.gov/about/Pages/Secretary.aspx">http://www.treasury.gov/about/Pages/Secretary.aspx</a>   |
| Under Secretary for International Affairs             | <a href="http://www.treasury.gov/about/offices/Pages/Office-Of-International-Affairs.aspx">http://www.treasury.gov/about/offices/Pages/Office-Of-International-Affairs.aspx</a>   |
| <b>Assistant Secretary for International Affairs</b>  | <a href="http://www.treasury.gov/about/offices/Pages/Office-Of-International-Affairs.aspx">http://www.treasury.gov/about/offices/Pages/Office-Of-International-Affairs.aspx</a>   |
| Office of African Nations                             | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/--Africa.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/--Africa.aspx</a>   |
| Office of Development Policy and Debt                 | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/Development-Policy-and-Debt.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/Development-Policy-and-Debt.aspx</a>                                     |
| Office of East Asia                                   | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/East-Asia.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/East-Asia.aspx</a>   |
| Office of Environment and Energy                      | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/Environment-and-Energy.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/Environment-and-Energy.aspx</a>   |
| Office of Europe and Eurasia                          | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/--Europe-and-Eurasia.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/--Europe-and-Eurasia.aspx</a>   |
| Office of International Monetary and Financial Policy | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/--International-Monetary-and-Financial-Policy.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/--International-Monetary-and-Financial-Policy.aspx</a> |
| Office of Investment Security                         | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/-Investment-Security.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/-Investment-Security.aspx</a>   |
| Office of the Middle East and North Africa            | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/--Middle-East-and-North-Africa.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/--Middle-East-and-North-Africa.aspx</a>                               |
| Office of South and Southeast Asia                    | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/South-and-Southeast-Asia.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/South-and-Southeast-Asia.aspx</a>   |
| Office of Trade and Investment Policy                 | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/-Trade-and-Investment-Policy.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/-Trade-and-Investment-Policy.aspx</a>                                   |
| Office of the Western Hemisphere                      | <a href="http://www.treasury.gov/about/organizational-structure/offices/Pages/-Western-Hemisphere.aspx">http://www.treasury.gov/about/organizational-structure/offices/Pages/-Western-Hemisphere.aspx</a>   |

**Table 9: Executive Office of the President, Office of Management and Budget (OMB)**

| <b>Agency/Organization</b> | <b>URL for More Information</b>   |
|----------------------------|---|
| Director of the OMB        | <a href="http://www.whitehouse.gov/omb/organization_office/">http://www.whitehouse.gov/omb/organization_office/</a> |



## APPENDIX D

# RULE OF LAW AND THE MILITARY PLANNING PROCESS

### I. The Military Decision Making Process

The Military Decision Making Process (MDMP)<sup>1</sup> is an iterative planning methodology integrating 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. In brief outline the 7-step MDMP is:

| Key Inputs  | Step   | Key Outputs  |
|---|--|--|
| <ul style="list-style-type: none"> <li>Higher headquarters' (HHQ) plan or order or a new mission anticipated by the commander</li> </ul>  | Step 1:<br><b>Receipt of Mission</b>                 | <ul style="list-style-type: none"> <li>Commander's initial guidance</li> <li>Initial allocation of time</li> </ul>   |
| <ul style="list-style-type: none"> <li>HHQ plan or order</li> <li>HHQ knowledge and intelligence products</li> <li>Knowledge products from other organizations</li> <li>Design concept (if developed)</li> </ul>    | Step 2:<br><b>Mission Analysis</b>                   | <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> |
| <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> | Step 3:<br><b>Course of Action (COA) Development</b> | <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>                                    | Step 4:<br><b>COA Analysis (War Game)</b>            | <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>                                | Step 5:<br><b>COA Comparison</b>                     | <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>   | Step 6:<br><b>COA Approval</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>   |
| <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>                                    | Step 7:<br><b>Orders Production</b>                  | <ul style="list-style-type: none"> <li>Approved operation plan or order</li> </ul>   |
| CCIR    commander's critical information requirement<br>COA     course of action  |  | EEFI    essential element of friendly information<br>IPB     intelligence preparation of the battlefield   |

<sup>1</sup> MDMP is described fully in US DEP'T OF ARMY, FIELD MANUAL 6-0 COMMANDER AND STAFF ORGANIZATION AND OPERATIONS (MAY 2014), chapter 9. As the Marine Corps Planning Process (MCP) and the Joint Operation Planning Process (JOPPS) are analogous to MDMP this chapter will serve JAs planning under either of these systems. An online MDMP training program is available to Army JAs at JAG University <https://jagu.army.mil/> (last visited 19 Dec 2013) via the JATSOC Elective. MDMP is the fifth module in the course.

## Step 1: Receipt of Mission

The popular maxim “begin with the end in mind” should guide all RoL planning and all actions taken under the plan must be focused on the end state. In planning parlance the “end” is the commander’s objective and the “end state” is a set of required conditions that defines the achievement of this objective.

While it could be tempting to adopt an ambitious RoL end state such as one in which “all individuals and institutions, public and private, and the state itself are accountable to the law”<sup>2</sup> in all likelihood such a utopian end state will require adaptation to situation-specific requirements and limitations on resources and security to meet the commander’s objective. In each operation, the desired RoL end state will need to be finessed to accurately reflect the specific objective framed within the appropriate stability sector.<sup>3</sup>

Rule of Law planners at higher echelons are responsible for providing lower echelons with clear RoL objectives and, ideally, any intended RoL Line of Operation (LoO) will be accompanied by a vision of the requisite end state<sup>4</sup> along with any specific objectives and how those objectives nest with higher headquarters objectives. However, in many situations (as happened in Iraq and Afghanistan) the complexity of the issue will prevent this and individuals as low as battalion level may be left to define their local RoL end state. If so, the RoL JA must be a proactive planner despite the absence of clear direction. As planning is continuous, the JA can adapt the plan to integrate subsequent guidance.

Given the long-term, inherently developmental, nature of RoL objectives, the RoL JA will often need to articulate the ineffectiveness of short-term objectives. A collateral consideration is that for RoL operations to have a lasting effect, they must be designed to survive the end-of-deployment relief in place.<sup>5</sup> Long-term objectives generally focus on creating or enhancing governance capability rather than, providing items like computers and furniture.<sup>6</sup> Unfortunately time is rarely an abundant planning commodity and the longer that RoL planning is delayed the more costly, in terms of dollars, resources and lives, will be the bill. If the requisite information is not immediately available to develop RoL objectives, the JA’s default response must be to press on while remaining prepared to adapt and integrate new information as it becomes available.

The overall mission is unlikely to have RoL as its sole focus. Instead, RoL is likely to be one of a number of LoOs or it may form an integral part of a wider LoO aimed at establishing civil control. Regardless of the precise location of RoL within the planning structure, breaking the RoL mission down into separate RoL LoEs will assist in synchronizing priorities and ensuring that all actions are oriented on the end state.

A RoL LoO might be broken down into, for example, five LoEs:

- Resources & References
- Human Capacity & Training
- Use of the Law (to ensure that after officials are trained, they are actually performing correctly)
- Infrastructure (noting the importance of maintainence)
- Connecting Government to the People (provided it won’t victimize the people through corruption).<sup>7</sup>

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<sup>2</sup> US DEP’T OF ARMY, DOCTRINE PUB. 3-07, STABILITY (31 Aug 2012) [hereinafter ADP 3-07], para. 1-40.

<sup>3</sup> See Chapter 5 of this handbook and US DEP’T OF ARMY, FIELD MANUAL 3-07, (Jun 2014) [hereinafter FM 3-07].

<sup>4</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATIONS PLANNING III-21 (11 Aug 2011) [hereinafter JP 5-0].

<sup>5</sup> 82d Airborne Div., Staff Judge Advocate Afghanistan After Action Report, Regional Command – East, Bagram Airfield, Afghanistan, Jun 2009 – Jun 2010, (23 Jun 2010); on file with CLAMO.

<sup>6</sup> 1st Armored Div., OSJA Iraq AAR, Multi-National Division – North, Contingency Operating Base Speicher, Iraq, Sep 2007 – Dec 2008, (19 Feb 2009); on file with CLAMO.

<sup>7</sup> 1st Combat Support Brigade (Maneuver Enhancement), Task Force Warrior, BJA Afghanistan AAR, Bagram Airfield, Afghanistan, Jun 2008 – Sep 2009 After Action Report, (20 Oct 2009).; on file with CLAMO.

Step 1 will also, typically, encompass conducting a baseline assessment of the current situation as discussed in Chapter 5 of this *Handbook*.

The World Justice Project’s Rule of Law Index is a concise tool that may be of help in developing specific RoL end states and objectives

### The World Justice Project Rule of Law Index<sup>8</sup>

| Limited Government Powers   | Absence of Corruption   | Order and Security  | Fundamental Rights Guaranteed   | Open Government  |
|---|---|---|---|--|
| <ul style="list-style-type: none"> <li>Government powers are defined in the fundamental law</li> <li>Government powers are effectively limited by the legislature</li> <li>Government powers are effectively limited by the judiciary</li> <li>Government powers are effectively limited by independent auditing and review</li> <li>Government officials are sanctioned for misconduct</li> <li>Government powers are subject to non-governmental checks</li> <li>Transition of power is subject to the law</li> </ul> | <ul style="list-style-type: none"> <li>Government officials in the executive branch do not use public office for private gain</li> <li>Government officials in the judicial branch do not use public office for private gain</li> <li>Government officials in the police and military do not use public office for private gain</li> <li>Government officials in the legislature do not use public office for private gain</li> </ul> | <ul style="list-style-type: none"> <li>Crime is effectively controlled</li> <li>Civil conflict is effectively limited</li> <li>People do not resort to violence to redress personal grievances</li> </ul> | <ul style="list-style-type: none"> <li>Equal treatment and absence of discrimination</li> <li>The right to life and security of the person is effectively guaranteed</li> <li>Due process of law and rights of the accused</li> <li>Freedom of opinion and expression is effectively guaranteed</li> <li>Freedom of belief and religion is effectively guaranteed</li> <li>Freedom from arbitrary interference with privacy is effectively guaranteed</li> <li>Fundamental labor rights are effectively guaranteed</li> </ul> | <ul style="list-style-type: none"> <li>The laws are publicized and accessible</li> <li>The laws are stable</li> <li>Right to petition the government and public participation</li> <li>Official information is available on request</li> </ul> |

| Effective Regulatory Enforcement  | Access to Civil Justice  | Effective Criminal Justice  | Informal Justice  |
|---|--|---|---|
| <ul style="list-style-type: none"> <li>Government regulations are effectively enforced</li> <li>Government regulations are applied and enforced without improper influence</li> <li>Administrative proceedings are conducted without unreasonable delay</li> <li>Due process is respected in administrative proceedings</li> <li>The Government does not expropriate without adequate compensation</li> </ul> | <ul style="list-style-type: none"> <li>People can access and afford civil justice</li> <li>Civil justice is free of discrimination</li> <li>Civil justice is free of corruption</li> <li>Civil justice is free of improper government influence</li> <li>Civil justice is not subject to unreasonable delays</li> <li>Civil justice is effectively enforced</li> <li>ADR systems are accessible, impartial, and effective</li> </ul> | <ul style="list-style-type: none"> <li>Criminal investigation system is effective</li> <li>Criminal adjudication system is timely and effective</li> <li>Correctional system is effective in reducing criminal behavior</li> <li>Criminal system is impartial</li> <li>Criminal system is free of corruption</li> <li>Criminal system is free of improper government influence</li> <li>Due process of law and rights of the accused</li> </ul> | <ul style="list-style-type: none"> <li>Informal justice is timely and effective</li> <li>Informal justice is impartial and free of improper influence</li> <li>Informal justice respects and protects fundamental rights</li> </ul> |

<sup>8</sup> *The World Justice Project Rule of Law Index 2012-2013*, available at [http://worldjusticeproject.org/sites/default/files/WJP\\_Index\\_Report\\_2012.pdf](http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf) (last visited 19 Dec 2013).

## Step 2: Mission Analysis

Mission analysis contrasts the understanding of the situation gained following mission receipt with the desired end state or objectives. Of course, if no end state was received, the JA will need to gain buy-in from other staff sections and approval from the commander to formulate their own end state.

In this stage, objectives will be defined, with more refinement to come in the future as events unfold. The goal is to understand the problem in the context of the situation, and identify *what* tasks the command must undertake to achieve the end state, and *when* and *where* it must be done. Results must be self-sustaining so the situation does not deteriorate upon the withdrawal of coalition forces. The focus must be on root cause impediments to the desired end state or the achievement will not have any lasting value. Absent a careful analysis of root causes, commanders and staff are likely to default to strictly institutional projects such as building courthouses or training judges, which may not have any impact on enhancing the RoL. Because building RoL depends on understanding the root causes of its absence, the success of mission analysis is dependent in large part on the quality of the initial/baseline assessment (see Chapter 5 above).

A critical component of the mission analysis is understanding the purpose of the mission. The JA, in particular, must understand and articulate to the staff and commander the function of the RoL within the context of the overall mission. In COIN, host-nation forces and their partners operate to defeat armed resistance, reduce passive opposition and establish/reestablish the host-nation government's legitimacy.<sup>9</sup> Similarly, in stability operations the goal is to create a condition so the local populace regards the situation as legitimate, acceptable, and predictable.<sup>10</sup> In both contexts there is a clear RoL LoO predicated around host nation government legitimacy which can be measured against an end state specific to the operation.

Thereafter, LoEs lay out visually how individual actions relate to each other to achieve the end state. Because all action must be oriented on the end state and any action that does not directly or indirectly further the end state is waste, the LoE should focus on a clearly defined end state. This could be understood as the minimum set of criteria that, if accomplished, would complete the mission if RoL was the lead LoO in a post-intervention stability operation. Alternatively in a COIN context, the end state for the RoL could be about achieving a shift from 'build' to 'sustain' while the other COIN LoE were being achieved. All of the criteria should build toward the objectives of higher headquarters—up to two echelons above the planner. The ideal LoE creates unified action and shared understanding and purpose that allows Army leaders to integrate their actions within the larger national effort and synchronize their own operations.<sup>11</sup>

### Example: Rule of Law Mission Analysis

The division commander's mission is to improve the RoL in his AO. Intelligence and the JA's communication with the host nation and interagency RoL partners indicate a popular perception that the police and courts are sectarian in their administration of justice. This perception is fueled by insurgent propaganda and a growth in popular militias to provide "protection" from the police.

<sup>9</sup> ADRP 3-07, *supra* note 3, para. 3-101. *See also* FM 3-24, *supra* note 3.

<sup>10</sup> ADP 3-07, *supra* note 2, para. 1.

<sup>11</sup> U.S. ARMY ADP 3-0: UNIFIED LAND OPERATIONS (October 2011) at para. 11-13 [hereinafter ADP 3-0].

It is assessed that the end state of improved RoL is achieved by defeating the popular perception that the judges are motivated by sectarian influences instead of following the law (the enemy center of gravity). A CCIR is developed to determine whether there is a factual basis for the popular perception. If there is no factual basis, then the commander and RoL team are faced with a public information challenge. If there is a factual basis for the popular perception, then the problem is more challenging.

The staff and commander decide to assess their progress with measures of effectiveness that will include the number of crimes reported to the police by the minority sect, and measures of effectiveness including periodic interviews with community and tribal leaders concerning the legitimacy of the police and courts, and periodic informal surveys of opinion leaders in the community.

This example shows how the commander and staff sought to understand the underlying problems concerning the RoL operational environment, identified a center of gravity, identified critical information needed for further decision making and developed some measures indicating progress in achieving the desired RoL end state.

### **Step 3: Course of Action Development**

As the result of the first two steps, the commander and staff will understand the desired end state in the context of the RoL situation, as informed by the baseline assessment. Using the commander's guidance to develop various methods to move from the current situation to the desired end state is known as COA development. When developing COAs, staff will normally determine the doctrinal requirements for each type of operation being considered, including doctrinal tasks for subordinate units.<sup>12</sup>

The RoL JA will be invaluable in this process as, unlike for kinetic operations, there is no well-established doctrine that informs the conduct of RoL operations. They should be well-read in stability operations and COIN doctrine and past RoL programs as well as being creative in devising new programs to accomplish the desired effects in the operational environment. Armed with the comprehensive situational understanding and sound grasp of the desired end state derived from the mission analysis, the innovative RoL practitioner can help the staff in developing alternative ways to accomplish the desired effects. Collaboration with host nation resources and interagency partners is essential in brainstorming possible courses of action.

A good COA positions the force for follow-on action and provides flexibility to meet unforeseen events. The staff should remain unbiased and open-minded in evaluating proposed COAs. Other staff members must be engaged with to identify COAs that are not feasible due to factors in their functional areas. They can then decide if a COA can be modified to accomplish the objective or should be eliminated from consideration.<sup>13</sup> All COAs must meet the following screening criteria:

- Feasible—the unit can accomplish the mission within the available time, space, and resources
- Acceptable—the advantage gained by executing a 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 and must not lose sight of the desired end state. For instance, if an end state is a legal

<sup>12</sup> U.S. ARMY ATTP 5-0.1: COMMANDER AND STAFF OFFICER GUIDE, at para. 4-90. (September 2011) [hereinafter ATTP 5-0.1].

<sup>13</sup> See ATTP 5-0.1, *supra* note 15, p. 4-16, Figure 4-3 (COA development).

system that is perceived by the population to be legitimate, it will be important not to overlook potential public education and information operations components of the COA

- Distinguishable—each COA must differ significantly from the others
- 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.<sup>14</sup>

Judge Advocates should avoid suggesting a COA simply because it is the accepted way of doing things and should seek novel approaches and avoid preconceived opinions, without gratuitously re-inventing the wheel. Proceed with a rational basis and sufficient knowledge.

Step 3 also requires consideration of metrics. These are all too often developed as an afterthought in the planning and conduct of RoL operations (and indeed in planning more generally). They are essential in determining whether actions are having a positive, negative or nugatory effect on the RoL.

After developing COAs, the staff briefs them to the commander who issues further guidance. If one or more of the COAs are accepted, COA analysis commences.

#### **Step 4: Course of Action Analysis (Wargaming)**

Wargaming is a critical step in the MDMP and should be allocated more time than any other step. COA analysis allows the staff to identify the COA that best accomplishes the mission. Wargaming helps to:

- Determine how to maximize the effects of combat power
- Further develop a visualization of the operation
- Anticipate operational events
- Determine conditions and resources required for success
- Determine when and where to apply force capabilities
- Identify coordination needed to produce synchronized results
- Determine the most flexible COA.<sup>15</sup>

For each COA, wargamers need to:

- Remain objective—discounting personality or a sense of “what the commander wants”
- Avoid defending a COA just because they personally developed it
- Record advantages and disadvantages of each COA accurately as they emerge
- Continually assess feasibility, acceptability, and suitability of each COA. If a COA fails any of these tests, reject it
- Avoid drawing premature conclusions and gathering facts to support such conclusions
- Avoid comparing one COA with another during the war game—this occurs during COA comparison.<sup>16</sup>

Judge Advocates can play an important role in the COA analysis by ensuring that the staff avoids “groupthink.”<sup>17</sup> JAs have professional training that aids them in approaching problems in innovative ways and in expressing divergent opinions – they should not be afraid to do so.

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<sup>14</sup> *Id.*, *supra* note 15, at para. 4-81.

<sup>15</sup> *See id.*, *supra* note 15, at para. 4-116.

<sup>16</sup> *See id.*, *supra* note 15, at para. 4-118.

<sup>17</sup> Groupthink is a common failing of people or groups who work together to make decisions or solve problems: The group makes a collective decision and feels good about it because all members favor the same decision and in the interest of unity and harmony, there is no debate or challenge to the selected solution. Groupthink is a barrier to creativity that combines habit (reluctance to change from accepted ways of doing things), fear (being uneasy or

### **Step 5: Course of Action Comparison**

The COA comparison is intended to identify the COA with the highest probability of success against the most likely enemy COA and the most dangerous enemy COA. The selected COA should also:

- Pose the minimum risk to the force and mission accomplishment
- Place the force in the best posture for future operations
- Provide maximum latitude for initiative by subordinates
- Provide the most flexibility to meet unexpected threats and opportunities
- Provide the most secure and stable environment for civilians in the AO
- Best facilitate information themes and messages.<sup>18</sup>

The RoL JA provides an important function in this step of the MDMP by ensuring that the courses of action are evaluated critically with regard to the desired RoL effects and by remaining vigilant that the staff remains focused on the end state and does not stray into “bricks and mortar” or other overly simplistic capacity building projects that are readily quantifiable and subject to logical, sequential planning but that do not decisively address the underlying legitimacy challenges in the RoL environment.

### **Step 6: Course of Action Approval**

In this step, the staff recommends a COA, usually in a decision briefing. The commander decides which COA to approve and then issues the final planning guidance and CCIRs.<sup>19</sup> The decision briefing includes an explanation of: the assumptions used, a summary of the wargame for each COA to include critical events, modifications to any COA, wargame results, and the advantages and disadvantages (including risk) of each COA.

### **Step 7: Orders Production**

The staff prepares the order or plan by turning the selected COA into a clear, concise concept of operations with required supporting information.

## **II. Military Planning and Rule of Law Operations: Some Final Thoughts**

By utilizing MDMP, the commander, staff, and RoL practitioner analyze the complex RoL environment in a systematic way that is familiar to the commander and staff. This planning tool establishes procedures for:

- analyzing a mission
- developing, analyzing, and comparing courses of action against criteria of success and each other
- selecting the optimum course of action, and
- producing a plan or order.

Through the MDMP, the RoL practitioner can take a mission as complex and ill-defined as “improve the rule of law in this region” and convert that mission into a concept of operations that represents the best way to achieve the desired rule of law effects.

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apprehensive about discarding the old and/or reluctance of being thought a fool for recommending the new) and prejudice (opinion formed irrationally or based upon insufficient knowledge). The risk of prejudice due to a lack of knowledge is a particular danger in military RoL planning.

<sup>18</sup> See *id.*, *supra* note 15, at para. 4-177.

<sup>19</sup> See *id.*, *supra* note 15, at para.4-180-81.



## **APPENDIX E**

### **ASSESSMENTS AND METRICS**

This Appendix comprises a collection of questions from a number of sources<sup>1</sup> intended as a creative spur for JAs creating a baseline assessment or deciding upon appropriate metrics. It is in no way comprehensive but should point JAs in the right direction. The classification of a question in either section should not be viewed too rigidly, as questions used at the assessment stage will often continue to be used as metrics to inform subsequent evaluation. While the majority of questions are specifically designed to identify areas of importance during the immediate aftermath of military intervention, they address issues of continuing importance for ongoing deployments in both permissive and non-permissive environments. The metrics section is dominated by a USIP framework which demonstrates metric methodology and can be adapted accordingly to a specific mission.

#### **I. ASSESSMENTS**

##### **A. Mandate**

- What is the authority for US military presence in the host nation?
- Are there any applicable UNSCRs?
- Are there any international agreements (e.g., SOFAs)?
- Is a cease-fire or peace accord working?
- Is society under martial law or other exceptional law?
- Are the constitution or other basic laws in effect?

##### **B. Plans**

- What is the host nation plan?
  1. Are there significant planned events in the coming year?
  2. Are there significant host nation events that are not part of the plan (e.g., elections)?
- What is the USG plan?
- What is the higher headquarters plan?
  1. Is there a Rule of Law Annex?
  2. Are there any specific FRAGOs that address or modify the base order or plan?
- Is there a current RoL assessment?
- What RoL projects have units attempted or completed, ongoing in the future?

##### **C. Security and Armed Forces**

- Are there armed groups that harm and intimidate citizens?
- Are judges, lawyers, police, or prison officials being targeted or intimidated?
- What is the role of the host nation military in internal security?
- What are the rules and procedures of triggering a military response to internal security crisis?
- Are security sector employees getting paid a wage adequate to live on?
- Are the different security sector agencies interoperable?
- Is there a separate military justice system?

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<sup>1</sup> Including the Fourth Annual Samuel Dash Conference of Human Rights: Rule of law in the Context of Military Interventions, March 19-20 2009, the TJGLCS 2009 Rule of Law Short Course, The World Governance Assessment Matrix and The UN Rule of Law Indicators guide.

- Does the host nation have a uniformed JAG Corps?
  1. What laws and regulations govern PSCs?
  2. Which agencies or ministries are involved in the control and regulation of PSCs?

## **D. Legal Framework**

- Does the host nation have a civil or a common law framework?
  1. What is its history?
  2. What groups in society wrote the laws?
- What is the place of customary or religious law?
  1. Is it recognized as part of the country's laws, or is its status unclear?
  2. Does it conflict with laws that are part of the formally adopted legal system?

## **E. Legitimacy**

- How are the laws viewed today by different social groups?
  1. Are any laws resisted?
  2. Is law respected by elites? Do elites suffer if they break the law?
  3. Where do poor people go to obtain justice?
- Which institutions command respect, disrespect, or fear?
- Do citizens understand their legal rights and the role of the legal system in protecting them?

## **F. Host Nation Criminal Justice**

- What is the capacity of the host nation criminal justice system?
- What host nation agencies are essential to the justice system and what is the best method to ensure coordination and synchronization?
- Does the constitution provide that the judiciary is an independent branch of government?
- Does civil society scrutinize the justice system? Does the media?
- What is the role of the criminal bar?
- Is there a separate juvenile justice system?
- Which CivSOs work on security and justice issues and how credible are they in the eyes of the community, the state, and other international actors?
- Do women use the justice system, and what are the results?

## **G. Police**

- Is there an effective police force?
- What is the structure of the police force?
- Are the missions or mandates of the police forces codified or mandated in statutory law?
- Do police act within the law?
- Do police routinely violate human rights with relative impunity?
- Are there statutory penalties or punishments for discriminatory or abusive police conduct?
- Are there victim and witness support units within police stations?

## **H. Investigation and Charging**

- Do police and prosecutors have sufficient legal authority to investigate and prosecute crime?
- Is there a modern criminal code that conforms to international standards and provides a sufficient basis for dealing with most types of crime?
- Are charges brought only when there is adequate evidence of the commission of a crime?
- Do suspects have confidential and immediate access to defense lawyers?
- Are arrest warrants legally issued and executed?

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

## **I. Courts**

- Are there, courts, prosecutors, defense lawyers, judges?
- Do prosecutors prosecute (or not prosecute) for political, social, corrupt, or other illegitimate reasons (or are they perceived as acting in this way)?
- Are there codes of conduct in effect for judges, prosecutors, and lawyers? Do they understand how the courts work and how to access them effectively?
- Do lawyers have the knowledge and skills necessary to represent parties competently?
- Is there judicial and prosecutorial independence, impartiality, and accountability?
- Do courts routinely accept and consider illegally obtained evidence?
- Do judges respect the procedural rights of all parties and sanction those who violate the rules?
- Are judges' decisions well-reasoned and consistent with applicable law?
- Do the people understand how the courts work and how to access them effectively?

## **J. Criminal Code**

- Is there a criminal code?
  1. Does it conform to international standards?
  2. Does it provide a sufficient basis for dealing with most types of crime?
- Is it followed?
- Does it have a *habeas corpus* concept?
- Does it provide for a right to impartial, and open trial?
  1. Impartial judge?
  2. Right to review the prosecution's evidence and present own evidence?
  3. Right to legal representation?
  4. Presumption of innocence?
  5. Right against self-incrimination?
- Is there a right to appeal?

## **K. Civil Code**

- Is there a civil code?
- Is it followed?
- In practice, are civil judgments enforced in an effective and timely manner?
  - Can courts issue injunctions against executive/legislative actions?

## **L. Detention**

- Who is operating detention facilities, US or host nation forces (or others)?
- Are there jails? Do they need to be expanded?
- Under what authority are detentions being conducted? How can a copy be obtained?
- Who is responsible for apprehending and detaining host nation nationals?
- Are prisoners regularly subjected to inhuman conditions or abuse?
- Are prisoners regularly released because prisons are incapable of housing them?
- Are prisons operating?

## **M. RoL Structure**

- What is the RoL coordination structure?
- What is the relationship – horizontally – between military and civilian RoL practitioners?

- How does information flow along these channels?
- Is there a briefing responsibility for the JA? If so, what is the format for the briefing responsibility?
- Who, practically, is calling the shots in RoL and how does that flow work?
- What information is regularly requested and collected from you and by whom?
- What other USG agencies are currently in your sector doing RoL?
- What other countries are in place, what is their mission?
- What NGOs/IOs are in place?
- What foreign government agencies are in place?

## II. Metrics

### A. Initial Metrics

Metrics in the initial deployment stage frequently focus upon facilities and personnel. As stated in Chapter 5, they are usually of limited utility in the long term.

#### 1. Courts and Judiciary

- Number of courthouses that are structurally capable of operation?
- Number of trained, available judicial and law enforcement personnel?
- Availability of utilities necessary to operate facilities?
- The amount of funding needed for labor and materials to repair buildings?

#### 2. Police and Jails

- Number and geographic distribution of confinement facilities?
- 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?

### B. Long-term Metrics

#### 1. Effects-Oriented Metrics

Metrics related to long-term effects become more complex than those for initial short-term goals. The metrics during sustained operations seek in many instances to capture intangibles, such as the attitudes of the population toward their government, as well as the *efficacy* and *legitimacy* of the system.

Again, because the specific metrics to be used will be situation and mission specific, this list of metrics is focused on the justice system and meant only to prompt thought.

- Conviction/acquittal rates.
- The number of civil legal actions being filed each month.
- Case processing times for the civil court docket.
- Case processing statistics for criminal cases.
- Case statistics (both civil/criminal) should be compared from different portions of the country.
- Serious crime statistics.
  1. Numbers reported
  2. Percentage reported
- Formal or informal surveys pertaining to level of public trust in the police and the judiciary.
- The number of personnel assigned to police internal affairs offices.
- The existence of judicial/legal training centers Public information/outreach.

## 2. Measuring and Describing Change

After information has been collected over at least two consecutive time periods, change can begin to be assessed.<sup>2</sup> The UN Rule of Law Indicators guide<sup>3</sup> suggests three different ways to measure and describe change:

- **Dynamic ratings:** comparisons between the current and immediately preceding set of data collection, which indicate *positive, negative, or no* change over time.
- **Narrative descriptions:** puts ratings into context, along with information not included elsewhere.
- **Trend data:** summarizes the results of all the different sets of data, to show recent change as well as long-term changes.

When metrics are grouped together in baskets, you can monitor a basket's "collective trend" whether it be positive, negative, mixed, or constant (no change over time).<sup>4</sup>

## III. Measuring Progress in Conflict Environments Metrics Framework

One of the single most useful frameworks for rule of law metrics is the USIP's "Measuring Progress in Conflict Environments (MPICE) framework."<sup>5</sup> The process uses 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):** Involves surveying media publications using Boolean phrases that represent the indicators to track the salience of issues, identify perceptions and determine trends.
- **Expert Knowledge (EK):** Panels of 5 independent subject matter experts are used to provide their judgment on issues of interest, typically using a scale (e.g., from strong agreement to strong disagreement). Specifying evaluation criteria allow panel findings to be replicated over time.
- **Quantitative Data (QD):** Assessing Statistical data.
- **Survey/Polling Data (S/PD):** Conducting public opinion surveys to directly assess public attitudes and perceptions.

*Is the legal system used as an instrument of repression?*

- Percentage of citizens who fear law enforcement agencies as instruments of repression or that they will be treated unfairly if arrested. (by province and identity group). (S/PD)
- Detainees/prisoners are subjected to torture, cruel or inhumane treatment, beatings or psychological pressures (by identity group). (EK, S/PD, QD)
- Percentage of known prison population detained beyond the period specified in the law who have not had their case reviewed by an appropriate authority (by identity group). (QD)

*Is there discrimination in the treatment of disempowered or opposition groups throughout the legal process (by identity group)?*

- Percentage of prison population (by identity group) relative to their proportion of the overall population. (QD)

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<sup>2</sup> Office of the U.N. High Comm'r for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems* (2006), available at <http://www.ohchr.org/Documents/Publications/RuleoflawMonitoringgen.pdf> (last visited December 19, 2013).

<sup>3</sup> *Id.* at 33.

<sup>4</sup> *Id.* at 35.

<sup>5</sup> John Agoglia, Michael Dziedzic, and Barbara Sotirin, and eds., *Measuring Progress in Conflict Environments (MPICE): A Metrics Framework*, USIP (2010).

*Are traditional/non-state justice systems an instrument of repression or discrimination?*

- Traditional or other non-state justice systems give preference to specific identity groups. (EK)
- Traditional or other non-state justice systems have been co-opted or distorted resulting in discriminatory treatment of specific identity groups. (EK)

*Can political elites be held accountable for crimes they commit?*

- Ability or willingness of the legal system to investigate, prosecute, and convict perpetrators of politically destabilizing crimes (e.g., inter-group murder, use of political violence against rivals, and terrorism) when political leaders/elites are suspected of involvement in these crimes. (EK)
- Perceptions of law enforcement officials and victims of the potentially destabilizing crimes that suspects involved are untouchable and that cases are abandoned for this reason. (S/PD) (CA)
- Ratio of incidence of politically destabilizing crimes to investigations, prosecutions, and convictions for these crimes. (QD)

*Is justice obstructed in cases of crimes conducted by political elite?*

- Percentage of legal cases where witnesses recant testimony. (QD)
- Number of witnesses, police, judges, prosecutors, defense attorneys and their family members who suffer assaults or assassination. (QD)
- Percentage of judges with personal security details, or who have taken other security precautions (e.g., sleeping in offices or sending their family members to safer locations). (S/PD, EK, QD)

*Do parallel or informal governing structures sustained by illicit revenue exist within formal government institutions?*

- Political leaders/ruling elites are involved in or linked to criminal looting of natural resources, drug trade, human trafficking, money laundering, smuggling of arms or contraband. (EK)
- Public perception that organized crime has a substantial influence on the development of national policies, operation of ministries, and allocation of resources. (S/PD)
- Known criminals or individuals linked to crime syndicates occupy key government posts. (EK)
- Extent to which government expenditures are unaccounted for or are hidden. (EK)
- Militias/paramilitary groups allied with the government operate with government issue equipment and/or funding. (EK)

*Do national and local law enforcement agencies enforce the law and maintain public order (by province or equivalent locality)?*

- Percent of population who have been the victims of violent crime in the past month/year. (S/PD)
- Safe and sustainable return of displaced persons and refugees to former neighborhoods. (QD, S/PD)
- Use of public/private institutions, e.g schools, banks, etc. for their intended purposes. (QD, EK)
- Level of market activity. (QD, EK)
- Amount spent by businesses on private security. (QD, S/PD)

*Are law enforcement agencies held accountable for serious misconduct?*

- Percentage of complaints of serious misconduct such as excessive use of force by law enforcement agencies that are properly investigated and prosecuted. (EK/QD)
- Percentage of public complaints that are investigated and sanctions that are imposed by an independent agency with subpoena power. (QD, EK)

- Codes of conduct emphasizing adherence to law and to international standards of human rights are enforced by the courts and by supervisors in law enforcement agencies. (EK) (CA)

*Does the public have confidence in law enforcement agencies?*

- “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)
- “Have you been the victim of a crime?” (S/PD)
- “Did you report the crime to the police?”
- “Were you satisfied with the response?”
- “Do you teach your children to contact the police if they are in danger and need help?” (S/PD)

*Does the legal system (formal and informal) provide a nonviolent mechanism for the resolution of disputes (by identity group)?*

- Percentage of citizens who say that they have access to and are willing to use court systems to resolve criminal disputes (by identity group). (S/PD)
- Percentage of citizens who say they have access to and are willing to use traditional, customary, or informal systems of justice to resolve criminal disputes (by identity group). (S/PD)
- Percentage of population who perceive they have been treated fairly by the formal court system in the past and/or expect to be treated fairly in the future (by province and identity group). (S/PD)
- Percentage of population who perceive they have been treated fairly by the traditional, customary, or informal court system in the past and/or expect to be treated fairly in the future (by province and identity group). (S/PD)
- Extent to which citizens use the formal legal system to settle inter-group conflicts. (QD, S/PD)
- Extent to which citizens resort to the use of traditional, customary or informal legal systems to settle intergroup conflicts. (QD, S/PD)

*Does the criminal justice system perform essential functions effectively?*

- Do criminal laws and criminal procedures address criminal activity and provide effective means of law enforcement for combating terrorist financing, trafficking, transnational and organized crime (e.g., extradition, mutual legal assistance, cyber crime, etc.). (EK)
- Average times after detention until formal charges are brought. (QD)
- Percentage of those arrested, detained, or charged with a crime who have access to legal representation. (QD, S/PD)
- Percentage of pre-trial detention facilities complying with international human rights. (EK)
- Average time from entry into system on serious crimes charges until seeing a lawyer. (QD)
- Number of convictions for serious crimes as a percentage of indictments for serious crimes per province. (QD)
- Average time between filing of formal charges and trial. (QD)
- Percentage of those accused of serious crimes not represented at trial. (QD)
- Sentences in criminal cases comply with international standards for proportionality. (EK)
- Prison terms and fines are enforced. (EK)
- Penal system can enforce sentences on political elites and most dangerous criminals. (EK)
- Percent of prison population beyond stated capacity of prison system. (QD)
- Number of prisoners who escape per year. (QD)
- There is a fair and authentic appeals process (cost, time required, and access). (QD, EK)

*Does the civil justice system (where there is a separate civil justice system) perform essential functions effectively?*

- Civil laws and procedures address contemporary civil needs for adjudication, enforcement and recordkeeping. (EK)
- Percentage of those involved in a civil case who have access to legal representation. (S/PD)
- Percentage of citizens who say have access to court systems to resolve civil disputes. (S/PD)
- Percentage of citizens aware of forms of recourse available to them to resolve a dispute. (S/PD)
- Average time between filing of claim and adjudication. (QD)
- Percent of claims that remain un-adjudicated. (QD)
- Percentage of judgments enforced relative to the number awarded. (QD)
- There is a fair and authentic appeals process. (EK, S/PD)
- Percentage of property dispute claims adjudicated relative to claims registered (by identity group and province). (QD)
- Percentage of property dispute claims resolved relative to claims registered (by identity group). (QD)
- Perception of parties involved with property disputes that the process was fair and the case resolved satisfactorily (by identity group and province). (S/PD)
- Property settlements and contracts are enforced. (QD)

*How complementary are formal and traditional/non-state justice systems?*

- Extent of inconsistencies in substance or process between traditional/non-state justice systems and the formal legal system that lead to tension and confusion. (EK)
- Extent of inconsistencies traditional/non-state justice systems and international human rights standards (Negative indicator). (EK)
- Boundaries between formal and informal dispute resolution mechanisms are clear and uncontested. (EK, CA)
- Restoration of traditional/non-state justice systems that contributed to the peaceful resolution of dispute (if deliberately weakened or eliminated during the conflict). (EK)

*Are judges, prosecutors, lawyers, and penal system employees held accountable?*

- Public perceptions of integrity - judges, prosecutors, lawyers and penal system employees. (S/PD)
- Percentage of complaints against judges, prosecutors, lawyers, and penal system employees that result in disciplinary action. (QD)
- Percentage of those involved in legal proceedings who report paying bribes to judges. (S/PD)

*Is the judiciary independent?*

- The selection and promotion of judges is based on objective, merit-based criteria or elections as opposed to identity group membership, political affiliation, or patronage. (EK)
- Removal of judges is limited to specified conditions such as gross misconduct. (EK)
- Judicial expenditures are not controlled by the executive. (EK)

*Are governing authorities held accountable?*

- Government officials have been tried and convicted of abuse of authority. (EK)
- If state is one of the litigants, outcomes are not automatically in the state's favor. (QD/EK)

*Do civilian government authorities respect human rights?*

- Number of political prisoners. (EK, QD)
- Percentage of prisons and detention centers operating in compliance with international human rights standards. (EK)
- Frequency lawyers suffer retribution on account of representing controversial clients. (EK)

*Are human rights codified by the government?*

- Laws conform to international human rights standards. (EK)
- Human rights (e.g., freedom of religion, assembly, press, speech, association and movement, and other civil rights) are effectively protected under the law. (EK, CA)

*Are measures to protect human rights (e.g., human rights commission, human rights courts, or ombudsman) effective?*

- Percentage of people who feel they could file a human rights complaint without fear of reprisal (by identity group). (S/PD)
- Percentage of people who have confidence in obtaining a fair hearing (by identity group). (S/PD)
- Percentage of people who perceive the government is committed to pursuing human rights cases (by identity group). (S/PD)
- Percentage of human rights cases that result in remedies (by identity group). (QD)

*Is the law applied equally?*

- Percentage of victims who reported crimes to law enforcement authorities and percent who were satisfied with the response (by identity group). (S/PD)
- Perception of the population that the judicial system and law enforcement agencies apply the law equally to all identity groups. (S/PD)
- Assessments of the fairness of the judicial system. (EK)
- The staffing of the judiciary, law enforcement agencies, and penal system is reflective of the demographic composition of the broader society. (QD, S/PD)

*Is there access to justice?*

- Right to legal counsel is recognized by law. (EK)
- Laws, codes or other normative acts set forth a standard timeframe by which persons detained shall be given access to a lawyer. (EK)
- Individuals are regularly informed of their right to counsel at the time of arrest or detention. (EK)
- Extent of availability of legal aid or public defense. (EK)
- Percentage of population less than one half-day from nearest court house or police post. (QD)
- Number of interpreters per 100,000 minority language population. (QD)
- Percentage of court cases dropped due to inability of victim to pay. (QD, S/PD)
- Public perception that corruption has lessened, increased or stayed the same. (S/PD)

*Are social attitudes and norms supportive of peaceful resolution of disputes (by identity group)?*

- Extent of voluntary compliance with the law. (S/PD)
- Perception of the population who would consult with a formal legal advisor and use the formal court system if they have a dispute. (S/PD)
- Efforts to arrest identity group leaders who commit serious crimes are violently resisted by their identity group. (EK)

*How professional is the legal profession?*

- Process of accreditation to enter the legal profession and for sanctioning misconduct. (EK)
- Laws and normative acts establish the independence of the profession and set forth professional standards and ethics that are binding. (EK)
- Cases have been successfully brought to court over claims that the independence of lawyers has been violated through interference or intimidation by state authorities or non-state actors. (EK)
- Number of practicing lawyers and other legal advisors (e.g notaries) per capita (by identity group). (QD)
- Continuing legal education programs and practical training/apprenticeships are available to the legal profession (by identity group). (QD)
- Presence and strength of professional associations for members of the legal profession. (EK)

## APPENDIX F

### ACRONYMS

|            |  |
|------------|--|
| AAA        | Afghan Attorney Advisor  |
| AAR        | After Action Report  |
| ACC        | U.S. Army Capstone Concept   |
| ACO        | North Atlantic Treaty Organization, Allied Command Operations  |
| ADA        | Anti-Deficiency Act  |
| ADCC       | Afghan Detention and Corrections Cell  |
| ADR        | Alternative Dispute Resolution   |
| AFOSI      | Air Force Office of Special Investigations   |
| AFR        | Africa   |
| AGA        | Agricultural Advisor (U.S. Embassy)  |
| A&T        | Advising and Training  |
| ANA        | Afghan National Army   |
| ANDF       | Afghan National Detention Facility   |
| ANDS       | Afghan National Development Strategy   |
| ANE        | Asia and the Near East   |
| ANP        | Afghan National Police   |
| ANSF       | Afghan National Security Forces  |
| AO         | Area of Operations   |
| AOB        | Advanced Operating Base  |
| ARTF       | Afghanistan Reconstruction Trust Fund  |
| ASD SO/LIC | Assistant Secretary for Defense for Special Operations and Low Intensity Conflicts                             |
| ASCC       | Army Service Component Command   |
| ASFF       | Afghan Security Forces Fund  |
| ASOP       | Afghanistan Social Outreach Program  |
| ATF        | U.S. Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives                                |
| AUP        | Afghan Uniformed Police  |
| AWG        | Asymmetric Warfare Group, U.S. Army  |
|            |  |
| BBA        | Bilingual Bicultural Adviser   |
| BCT        | Brigade Combat Team  |
| BIAP       | Baghdad International Airport  |
| BJA        | Brigade Judge Advocate   |
| BTIF       | Bagram Theater Internment Facility   |
|            |  |
| CA         | Civil Affairs  |
| CAAT       | Counterinsurgency Advisory and Assistance Team   |
| CAST       | The Fund for Peace Conflict Assessment System Tool   |
| CAOCL      | U.S. Marine Corps, Center for Irregular Warfare / Center for Advanced Operational Culture Learning             |
| CAT        | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment or Civil Affairs Team |
| CCCI       | Central Criminal Court of Iraq   |

|           |   |
|-----------|---|
| CCCI-K    | Central Criminal Court of Iraq-Karkh  |
| CCIR      | Commander's Critical Information Requirements   |
| CEDAW     | Convention on the Elimination of All Forms of Discrimination Against Women  |
| CENTCOM   | U.S. Central Command  |
| CERD      | Convention on the Elimination of All Forms of Racial Discrimination   |
| CEXC      | Combined Explosives Exploitation Cell   |
| CJCS      | Chairman of the Joint Chiefs of Staff   |
| CICA      | Competition in Contracting Act  |
| CID       | Criminal Investigation Division (U.S. Army) and/or Criminal Investigative Directorate (Iraq)                      |
| CIDA      | Canadian International Development Agency   |
| CIL       | Customary international law   |
| CIV-MIL   | civilian-military   |
| CIVPOL    | UN Civilian Police  |
| CIZA      | Competent Iraqi Authority (IZ is an acronym used to indicate "Iraq")  |
| CJ        | Chief Judge (Iraq)  |
| CJIATF    | Combined Joint Interagency Task Force   |
| CJSOTF-AP | Combined Joint Special Operations Task Force – Arabian Peninsula  |
| CJTF      | Criminal Justice Task Force (Afghanistan) and/or Counter-Narcotics Justice Task Force (Afghanistan)               |
| CLAMO     | Center for Law and Military Operations, The Judge Advocate General's Legal Center and School                      |
| CMO       | Civil-Military Operations   |
| CMOC      | Civil-Military Operations Center  |
| CNJC      | Counter Narcotics Justice Center (Afghanistan)  |
| CNP-A     | Counternarcotics Police - Afghanistan   |
| CNT       | Central Narcotics Tribunal (Afghanistan)  |
| COIN      | Counterinsurgency   |
| CoK       | Charge of the Knights (Iraq)  |
| COTR      | Contracting Officer's Technical Representative  |
| CPA       | Coalition Provisional Authority (Iraq)  |
| CPATT     | U.S. Central Command, Civilian Police Assistance Training Teams (Iraq)  |
| CRC       | U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization, Civilian Response Corps |
| CRPD      | Convention on the Rights of Persons with Disabilities   |
| CSDP      | European Union, Common Security and Defense Policy  |
| CSTs      | Crime Scene Technicians   |
| CSOs      | Civil society organizations / U.S. Department of State Bureau for Conflict and Stabilization Operations           |
| CSTC-A    | Combined Security Transition Command - Afghanistan  |
|           |   |
| DATT      | U.S. Embassy, Defense Attaché   |
| DCHA      | U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs                |
| DCM       | U.S. Embassy, Deputy Chief of Mission   |
| DDR       | Disarmament Demobilization and Reintegration  |
| DEA       | U.S. Department of Justice, Drug Enforcement Administration   |
| DETs      | Detachments   |
| DFID      | U.K. Department for International Development   |
| DFIP      | Detention Facility in Parwan  |

|                   |  |
|-------------------|--|
| DG                | Democracy and Governance   |
| DHS               | U.S. Department of Homeland Security   |
| DIILS             | Defense Institute of International Legal Studies   |
| DLI               | Iraq, Defense Language Institute   |
| DO                | Development Officer (USAID representative at U.S. Embassy) and/or Detention Order (Iraq)                               |
| DOD               | U.S. Department of Defense   |
| DODAA             | U.S. Department of Defense Appropriations Act  |
| DODD              | U.S. Department of Defense Directive   |
| DODI              | U.S. Department of Defense Instruction   |
| DOJ               | U.S. Department of Justice   |
| DOMEX             | Document Media Exploitation  |
| DOS <sup>1</sup>  | U.S. Department of State   |
| DPG               | World Bank, Development Policy Grant   |
| DRB               | Detainee Review Board  |
| DRL               | U.S. Department of State, Bureau of Democracy, Human Rights and Labor  |
| DSCA              | Defense Security Cooperation Agency  |
| DSSI              | Iraq, Defense and Strategic Studies Institute  |
| DTL               | Deputy Team Leader   |
|                   |  |
| E                 | U.S. Department of State, Under Secretary for Economic, Business Energy and Agricultural Affairs                       |
| ECA               | U.S. Department of State, Bureau of Education and Cultural Affairs   |
| ECF               | International Monetary Fund, Extended Credit Facility  |
| ECP               | Entry Control Point  |
| ECHR              | European Convention on Human Rights  |
| ECtHr             | European Court of Human Rights   |
| E&E               | Europe and Eurasia   |
| EEB               | U.S. Department of State, Bureau of Economic, Energy and business Business Affairs                                     |
| EGAT              | U.S. Agency for International Development, Bureau for Economic Growth, Agriculture and Trade                           |
| ENG               | Engineer   |
| EOD               | Explosive Ordnance Disposal  |
| ePRT              | embedded Provincial Reconstruction Team  |
| ESF               | Economic Support Fund  |
| ETDF              | East Timorese Defense Force  |
| EU                | European Union   |
| EUJUST LEX        | European Union Integrated Rule of Law Mission for Iraq   |
| EUPOL Afghanistan | European Union Police Mission - Afghanistan  |
|                   |  |
| F                 | U.S. Department of State, Office of the Director of U.S. Foreign Assistance  |
| FAA               | The Foreign Assistance Act of 1961   |
| FACT              | U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization, Field Advance Civilian Teams |
| FAST              | Drug Enforcement Administration, Foreign-deployed Advisory Support Team  |
| FBI               | U.S. Department of Justice, Federal Bureau of Investigation  |

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<sup>1</sup> *But see supra* ch. 2 note 26

|         |   |
|---------|---|
| FCD     | Future Concepts Directorate, The Judge Advocate General's Legal Center and School                               |
| FDS     | Field Detention Site  |
| FDD     | Focused District Development  |
| FID     | Foreign Internal Defense  |
| FM      | Field Manual  |
| FMS     | Foreign Military Sales  |
| FOB     | Forward Operating Base  |
| FOAA    | Foreign Operations Appropriations Act   |
| FSN     | Foreign Service Nationals   |
| FSO     | Foreign Service Officer   |
| FTF     | Focused Targeting Force   |
| FUSMO   | Funding U.S. Military Operations  |
| FY      | financial year  |
|         |   |
| G       | U.S. Department of State, Under Secretary for Democracy and Global Affairs                                      |
| GAO     | U.S. Government Accountability Office   |
| GH      | U.S. Agency for International Development, Bureau for Global Health   |
| GIRoA   | Government of the Islamic Republic of Afghanistan   |
| G/S/GWI | U.S. Department of State, Bureau of Office of Global Women's Issues   |
| G/TIP   | U.S. Department of State, Office to Monitor and Combat Trafficking in Persons                                   |
|         |   |
| HACC    | Humanitarian Assistance Coordination Center   |
| HCT     | Human Intelligence Collection Team  |
| HIIDE   | Handheld Interagency Identity Detection Equipment   |
| HIPC    | Heavily Indebted Poor Countries   |
| HJC     | High Judicial Counsel (Iraq)  |
| HN      | Host Nation   |
| HOC     | Humanitarian Operations Center  |
| HQ      | Headquarters  |
| HTT     | Human Terrain Team  |
|         |   |
| IA      | Interagency Acquisition   |
| IAF     | Iraqi Armed Forces  |
| IBRD    | World Bank, International Bank for Reconstruction and Development   |
| ICAF    | Interagency Conflict Assessment Framework   |
| ICCPR   | International Covenant of Civil and Political Rights  |
| I-CERP  | Iraq Commander's Emergency Response Fund  |
| ICESCR  | International Covenant on Economic, Social and Cultural Rights  |
| ICITAP  | U.S. Department of Justice, Criminal Division, International Criminal Investigative Training Assistance Program |
| ICRC    | International Committee of the Red Cross  |
| ICS     | Iraqi Corrections System  |
| IDA     | World Bank, International Development Association   |
| IDLG    | Independent Directorate of Local Governance (Afghanistan)   |
| IED     | Improvised Explosive Device   |
| IGFC    | Iraqi Ground Forces Command   |
| IGOs    | Intergovernmental Organizations   |

|         |  |
|---------|--|
| IH      | Investigative Hearing  |
| IHT     | Iraqi High Tribunal  |
| IIP     | U.S. Department of State, Bureau of International Information Programs   |
| IJ      | Investigative Judge  |
| IJPO    | Italian Justice Project Office (for Afghanistan)   |
| ILF-A   | International Legal Foundation-Afghanistan   |
| IMAR    | Iraqi Military Academy, Ar Rustamiyah  |
| IMF     | International Monetary Fund  |
| IMS     | Interagency Management System  |
| INCLE   | International Narcotics, Crime Control and Law Enforcement   |
| INL     | U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs   |
| INL/AAE | U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Asia, Africa and Europe Programs         |
| INL/AP  | U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Asia, Africa and Multilateral Programs   |
| INL/CIV | U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Civilian Police and Rule of Law Programs |
| INL/I   | U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Iraq Programs                            |
| INL/LP  | U.S. Department of State, Bureau for International Narcotics and Law Enforcement Affairs, Office of Americas Program                         |
| INLTC   | Independent National Legal Training Center   |
| INPROL  | United States Institute of Peace, International Network to Promote the Rule of Law   |
| INR     | U.S. Department of State, Bureau of Intelligence and Research  |
| IO      | International Organizations  |
| IOC     | Initial Operations Capability  |
| IORF    | International Operational Response Framework   |
| IP      | Iraqi Police   |
| IPA     | International Police Assistance  |
| IPAO    | Iraq Provincial Action Officer (U.S. Embassy)  |
| IPB     | Intelligence Preparation of the Battlefield  |
| IPC     | Interagency Policy Committee / National Security Council Integration<br>Interagency Planning Cell / Interagency Management System            |
| IPOG    | National Security Council, Deputies Committee, Iraq Policy Operations Group  |
| IQC     | Indefinite Quantity Contract   |
| IR      | Iraq Reconstruction  |
| IRoCC   | Interagency Rule of Law Coordination Center  |
| ISAF    | International Security Assistance Force (Afghanistan)  |
| ISOF    | Iraqi Special Operations Forces  |
| ISB     | Intermediate Staging Base  |
| ISF     | Iraqi Security Forces  |
| ISFF    | Iraqi Security Forces Fund   |
| ISN     | U.S. Department of State, Bureau of International Security and Nonproliferation  |
| I-SRC   | Iraqi Supreme Reconstruction Council   |
| ITDC    | Iraqi training and Doctrine Command  |
| IVLP    | U.S. Department of State, International Visitor Leadership Program   |
| IZ      | International Zone or Iraq   |

|       |   |
|-------|---|
| JA    | Judge Advocate  |
| JAGC  | The Judge Advocate General's Corps, U.S. Army                                       |
| JCP   | Joint Campaign Plan   |
| JCS   | U.S. Department of Defense, Joint Chiefs of Staff                                   |
| JEFF  | Joint Expeditionary Forensic Facility   |
| JIIM  | Joint, Interagency, Intergovernmental and Multi-National                            |
| JOPPs | Joint Operation Planning Process  |
| JSU   | Judicial Security Unit (Afghanistan)  |
|       |   |
| KJU   | Kirkuk Jurist Union   |
| KRG   | Kurdish Regional Government (Iraq)  |
|       |   |
| L     | U.S. Department of State, Office of the Legal Adviser / U.S. Embassy, Legal Adviser |
| LAC   | Latin America and the Caribbean   |
| LAOTF | Law and Order Task Force (Iraq)   |
| LDTT  | Legal Development Training Team   |
| LEP   | law enforcement professional  |
| LL    | Lessons Learned   |
| LNO   | Liaison Officer   |
| LOFTA | Law and Order Trust Fund for Afghanistan  |
| LWA   | Leader with Associate   |
|       |   |
| M     | U.S. Department of State, Under Secretary for Management                            |
| MAAWS | Money As A Weapon System  |
| MACV  | Military Assistance Command, Vietnam  |
| MAMT  | NATO Training Mission – Iraq, Mobile Advising and Mentoring Team                    |
| MCPP  | Marine Corps Planning Process   |
| MCR   | Marine Corps Regiments  |
| MCTF  | Major Crimes Task Force (Iraq)  |
| MCWP  | Marine Corps Warfighting Publication  |
| MDMP  | Military Decision Making Process  |
| MIPR  | Military Interdepartmental Purchase Request   |
| MiTT  | Military Training Team  |
| MNC-I | Multi-National Corps – Iraq   |
| MND-B | Multi-National Division-Baghdad (Iraq)  |
| MND-C | Multi-National Division- Center (Iraq)  |
| MND-N | Multi-National Division-North (Iraq)  |
| MNF-I | Multi-National Force – Iraq   |
| MoI   | Ministry of Interior (Iraq)   |
| MoJ   | Ministry of Justice (Iraq)  |
| MoD   | Ministry of Defense (Iraq)  |
| MOU   | Memorandum of understanding   |
| MP    | Military Police   |
| MPICE | U.S. Institute of Peace Measuring Progress in Conflict Environments                 |
|       |   |
| NAC   | North Atlantic Treaty Organization, North Atlantic Council                          |

|           |   |
|-----------|---|
| NAS       | Narcotics Affairs Section (INL Office at Embassies)   |
| NATO      | North Atlantic Treaty Organization  |
| NCC       | Iraq, National Command Center   |
| NCIS      | Naval Criminal Investigative Service  |
| NCO       | Non-commissioned Officer  |
| NDAA      | National Defense Authorization Act  |
| NDS       | National Directorate of Security (Afghanistan)  |
| NDSPD     | National Directorate of Security Prosecution Department (Afghanistan)   |
| NDU       | Iraq, National Defense University   |
| NEA/I     | U.S. Department of State, Bureau of Near Eastern Affairs / Iraq   |
| NECC      | U.S. Navy, Naval Expeditionary Combat command   |
| NGOs      | Non-governmental Organizations  |
| NIIA      | National Information and Investigative Directorate/Agency (Iraq)  |
| NJP       | National Justice Program (Afghanistan)  |
| NJSS      | National Justice Sector Strategy (Afghanistan)  |
| NROLFSM-A | NATO Rol of Law Field Support Mission-Afghanistan   |
| NSC       | National Security Council   |
| NSPD      | National Security Presidential Directives   |
| NTM-A     | NATO Training Mission – Afghanistan   |
| NTM-I     | NATO Training Mission – Iraq  |
|           |   |
| OAG       | Office of the Attorney General (Afghanistan)  |
| ODA       | Operational Detachment-Alpha  |
| OE        | Operating Environment   |
| OEF       | Operation Enduring Freedom  |
| OET       | Iraq, Officer Education and Training  |
| OES       | U.S. Department of State, Bureau of Oceans and International Environmental and Scientific Affairs   |
| OFDA      | U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs, Office of Foreign Disaster Assistance |
| OIF       | Operation Iraqi Freedom   |
| OLC       | U.S. Department of Justice, Deputy Attorney General, Office of Legal Counsel  |
| OLP       | U.S. Department of Justice, Office of Legal Policy  |
| O&M       | Operations and Maintenance Funds  |
| OMB       | Executive Office of the President, Office of Management and Budget  |
| OMLT      | NATO Training Mission – Afghanistan, Operational Mentor and Liaison Team  |
| OPA       | U.S. Embassy, Office of Provincial Affairs  |
| OPDAT     | U.S. Department of Justice, Office of Overseas Prosecutorial Development, Assistance and Training   |
| OPTEMPO   | Operational Tempo   |
| OSCE      | Organization for Security and Cooperation in Europe   |
| OTI       | U.S. Agency for International Development, Bureau for Democracy, Conflict and Humanitarian Affairs, Office of Transition Initiatives      |
|           |   |
| PA        | Public Affairs  |
| PAO       | Public Affairs Officer or Provincial Action Officer   |
| PCC       | National Security Council, Policy Coordinating Committee  |
| PDO       | Public Diplomacy Officer (U.S. Embassy)   |
| PDoP      | Provincial Director of Police   |

|          |   |
|----------|---|
| PDP      | Pre-Deployment Preparation  |
| PERMREP  | U.S. Permanent Representative to the United Nations   |
| PIOs     | Public International Organizations  |
| PJCC     | Provincial Joint Coordination Center  |
| PJCM     | Provincial Justice Coordination Mechanism   |
| PKSOI    | U.S. Army, Peacekeeping and Stability Operations Institute                                    |
| PL       | Public Law  |
| PM       | U.S. Department of State, Bureau of Political-Military Affairs                                |
| PM NOC   | Iraq, Prime Minister's National Operations Center   |
| PMT      | Police Mentor Teams   |
| POC      | Point of Contact  |
| PoJ      | Palace of Justice (Iraq)  |
| POL OFF  | U.S. Embassy, Political Officer   |
| POMLT    | NATO Training Mission – Afghanistan, Police Operational Mentor and Liaison Team               |
| PPD      | Presidential Policy Directive   |
| PRM      | U.S. Department of State, Bureau of Population, Refugees and Migration                        |
| PRT      | Provincial Reconstruction Team  |
| PRT/PRDC | Provincial Reconstruction Team/Provincial Reconstruction Development Council Projects Program |
| PRT/QRF  | Provincial Reconstruction Team/Quick Response Fund  |
| PSCs     | Private Security Companies  |
| PTT      | Police Transition Teams   |
| PVOs     | Private Voluntary Organizations   |
| R        | U.S. Department of State, Under Secretary for Political Affairs                               |
| RAC      | Rusafa Area Command (Iraq)  |
| RC-E     | Regional Command-East   |
| RCLO     | U.S. Department of Justice, Regime Crimes Liaison Office (Iraq)                               |
| REO      | Regional Embassy Office   |
| RFP      | Request for Proposals   |
| RHP      | Office of the Special Coordinator for Rule of Law and International Humanitarian Policy       |
| RIAB     | Radio in a Box  |
| RIPC     | Rule of Law International Policy Committee (Iraq)   |
| RLA      | Resident Legal Adviser  |
| ROI      | Report of Investigation   |
| RoL      | Rule of Law   |
| RoLC     | Rule of Law coordinator (U.S. Embassy)  |
| RoLFF-A  | Rule of Law Field Force - Afghanistan   |
| R&S      | Reconstruction and stabilization  |
| RSO      | U.S. Embassy, Regional Security Officer   |
| SA       | Security Agreement between the U.S. and Iraq  |
| SAA      | South Asian Affairs   |
| SBA      | Stand-By Agreements   |
| SCA/A    | U.S. Department of State, Bureau of South and Central Asian Affairs / Afghanistan             |

|         |   |
|---------|---|
| S/CRS   | U.S. Department of State, Office of the Coordinator for Reconstruction and Stabilization      |
| SCROL   | The Special Committee on the Rule of Law  |
| S/CT    | U.S. Department of State, Office for of the Coordinator for Counterterrorism                  |
| SF      | Special Forces (U.S. Army)  |
| S/GAC   | U.S. Department of State, Office of the U.S. Global AIDS Coordinator                          |
| SHAPE   | North Atlantic Treaty Organization, Supreme Headquarters Allied Powers, Europe                |
| SJA     | Staff Judge Advocate  |
| SJSR    | Security and Justice Sector Reform  |
| SME     | Subject Matter Expert   |
| SOs     | Strategic Objectives  |
| SOAgs   | Strategic Objective Agreements  |
| SOFA    | Status of Forces Agreement  |
| SOG     | U.S. Marshals Service, Special Operations Group   |
| SOTF    | Special Operations Task Force   |
| SOW     | Scope of Work   |
| S/P     | U.S. Department of State, Policy Planning Staff   |
| SRSG    | Special Representative to the Secretary General   |
| SSA     | Security Sector Assistance  |
| SSR     | Security Sector Reform  |
| SSTR    | Stability, Security, Transition, and Reconstruction   |
| STT     | NATO Training Mission – Iraq, Specialist Training Team  |
| SU      | U.K. Stabilisation Unit   |
| S/WCI   | U.S. Department of State, Office of War Crimes Issues   |
|         |   |
| T       | U.S. Department of State, Under Secretary for Arms Control and International Security Affairs |
| TCAPF   | Tactical Conflict Assessment and Planning Framework   |
| TDP     | Targeted Development Program  |
| TESC    | NATO Training Mission – Iraq, Training and Equipment Synchronization                          |
| THF     | Temporary Holding Facility  |
| TJAGLCS | The Judge Advocate General’s Legal Center and School  |
| TL      | Team Leader   |
| TO      | Task Orders   |
| TRC     | Truth and Reconciliation Commissions  |
| TSE     | Tactical Site Exploitation  |
| TTPs    | Tactics, Techniques and Procedures  |
| TU      | Task Units  |
| TWG     | Technical Working Groups  |
|         |   |
| UDHR    | Universal Declaration of Human Rights   |
| UK      | United Kingdom  |
| UN      | United Nations  |
| UNAMA   | United Nations Assistance Mission in Afghanistan  |
| UNDP    | United Nations Development Program  |
| UNDPKO  | United Nations Department of Peacekeeping Operations  |
| UNICEF  | United Nations Children Fund  |
| UNITA   | National Union for the Total Independence of Angola   |

|           |   |
|-----------|---|
| UNOCHA    | United Nations Office for the Coordination of Humanitarian Affairs              |
| UNSCR     | United Nations Security Council Resolution                                      |
| U.S.      | United States   |
| USACE GRD | U.S. Army Corps of Engineers, Gulf Region Division                              |
| USACIDC   | U.S. Army Criminal Investigation Command  |
| USAID     | U.S. Agency for International Development                                       |
| U.S.C.    | U.S. Code   |
| USDA      | U.S. Department of Agriculture  |
| USDH      | U.S. Direct Hires   |
| USD(P)    | U.S. Under Secretary of Defense for Policy                                      |
| USF-I     | U.S. Forces - Iraq  |
| USG       | U.S. Government   |
| USIP      | United States Institute of Peace  |
| USMS      | U.S. Department of Justice, U.S. Marshals Service                               |
| USPSCs    | U.S. Personal Services Contractors  |
| USSF      | United States Special Forces  |
| <br>      |   |
| VBC       | Victory Base Complex, Iraq  |
| VCI       | U.S. Department of State, Bureau of Verification, Compliance and Implementation |
| VTC       | Video Teleconference  |
| <br>      |   |
| WG        | Working Group   |
| WHT       | Witness Handling Teams  |





