

Vanquishing Paper Tigers: Applying Comparative Law Methodology to Enhance Rule of Law Development

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I. Introduction

The conflicts in Iraq and Afghanistan have had a transformative impact on military doctrine and strategy.¹ By focusing attention on irregular threats and highlighting the dangers of unconventional, asymmetric methods of warfare,² both conflicts have changed the way military assets are evaluated and employed. In 2005, for example, the United States recognized the importance of stability operations³ to achieving long-term, national strategic objectives⁴ by elevating stability operations to a priority comparable with combat operations.⁵ This re-conceptualization of the military's core mission, however, has raised a number of practical questions. The U.S. Army Capstone Concept, a doctrinal guide describing the Army's vision for future force development, poses the following questions: "How should the U.S. Army use available and anticipated resources, to educate its leaders and organize, equip, and train units to

fight and win wars . . . ?"⁶ Other than combat, how can the Army "engage in security force assistance," "support state building efforts," and "persuade and influence relevant populations in pursuit of national policy goals?"⁷ One solution would involve more robust Army participation in rule of law operations.

Rule of law operations, however, cannot succeed without a thorough understanding of local laws and judicial traditions, subjects the Army has largely overlooked in the education of its leaders. Current rule of law instruction normally focuses on principals and overarching theories to the exclusion of more substantive topics, including foreign domestic law and foreign administrative bureaucracies. The growing emphasis on counterinsurgency and stability operations in transitioning and post-conflict environments warrants a reconsideration of this educational model, particularly as it relates to rule of law. More specifically, professional military education (PME) should include greater instruction on foreign and comparative law to enable commanders to pursue rule of law with greater cultural awareness and situational understanding.⁸ Legal PME should further emphasize substantive criminal law and procedure, rather than civil law, because of the outside role criminal justice plays in the early stages of stability operations, when reliance on military professionals is often

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¹ See U.S. DEP'T OF DEF., DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS para. 4.1 (28 Nov. 2005) [hereinafter DoDD 3000.05]; U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS (27 Feb. 2008) [hereinafter FM 3-0]. In his foreword to FM 3-0, General William S. Wallace states, "The operational environment in which . . . persistent conflict will be waged will be complex, multidimensional, and increasingly fought 'among the people.' . . . This edition of FM 3-0 . . . is a revolutionary departure from past doctrine. It describes an operational concept where commanders employ offensive, defensive, and stability or civil support operations simultaneously as part of an interdependent joint force . . ." *Id.* at foreword (emphasis omitted).

² See, e.g., FM 3-0, *supra* note 1, para. 1-15 ("Irregular threats are those posed by an opponent employing unconventional, asymmetric methods and means to counter traditional U.S. advantages. . . Irregular warfare includes such means as terrorism, insurgency, and guerilla warfare.")

³ Stability operations include "various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief." JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS, at GL-26 (13 Feb. 2008) (C2, 22 Mar. 2010) [hereinafter JOINT PUB. 3-0]

⁴ See FM 3-0, *supra* note 1, at vii ("Winning battles and engagements is important but alone is not sufficient. Shaping the civil situation is just as important to success.")

⁵ DoDD 3000.05, *supra* note 1, para. 4.1 ("Stability operations are a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations . . ."); see also FM 3-0, *supra* note 1, at vii ("Within the context of current operations worldwide, stability operations are as important—or more important than—offensive and defensive operations."); see also JOINT PUB. 3-0, *supra* note 3, at 1-9 (explaining that stability operations may be necessary to achieve national strategic objectives or protect national interests).

⁶ See U.S. ARMY TRAINING AND DOCTRINE COMMAND, PAM. 525-3-0, THE ARMY CAPSTONE CONCEPT—OPERATIONAL ADAPTABILITY: OPERATING UNDER CONDITIONS OF UNCERTAINTY AND COMPLEXITY IN AN ERA OF PERSISTENT CONFLICT, 2016–2028, para. 3-2 (21 Dec. 2009) [hereinafter TRADOC PAM. 525-3-0].

⁷ *Id.*

⁸ The curriculum at The Judge Advocate General's School (JAG School), U.S. Army, in Charlottesville, Virginia, currently features a number of courses on rule of law. Students of both the Judge Advocate Officer Basic Course and the Judge Advocate Graduate Course receive an introductory block of instruction on rule of law. Interested students in the Judge Advocate Graduate Course may also enroll in an advanced elective on rule of law for credit toward their master of laws (LL.M.) degree in military law. Rule of law instruction is also provided during the Operational Law Course, Senior Officer Legal Orientation, Congressional Staff Legal Orientation, and Reserve Component off-sites. Additionally, since 2008, the JAG School has hosted a week-long Rule of Law Course taught by members of the International & Operational Law Department and leading figures of the interagency rule of law effort. These courses have traditionally dwelt on more expansive subjects—e.g., "Counterinsurgency Doctrine," "Overview of the Department of Justice Role"—to the exclusion of more focused instruction on foreign law. The curriculum is currently being revised to incorporate more foreign and comparative law instruction. Other institutions also offer rule of law courses for practitioners. The U.S. Institute of Peace's Rule of Law Practitioners Course is particularly well-regarded. For a brief examination of rule of law instruction at civilian law schools, see Robert Stein, *Teaching the Rule of Law*, 18 MINN. J. INT'L L. 403 (2009), which notes that only seventeen ABA-accredited law schools offered rule of law courses in 2009 and which provides an overview of the rule of law curriculum at the University of Minnesota Law School.

most acute. Ultimately, future rule of law missions will require some background in foreign law and foreign legal traditions. The Army should prepare for those missions now by developing expertise through PME.

II. Background

The anti-coalition resistance that emerged following the U.S. invasion of Iraq in 2003 gained traction gradually before erupting into full blown insurgency.⁹ Initially, much of the post-invasion violence was ascribed to remnants of the old regime, including the Ba'ath Party and the Fedayeen Saddam, which continued to fight following Saddam Hussein's ouster.¹⁰ As fighting persisted and instability spread, however, it became increasingly clear that the insurgency had become something more serious and pervasive than first anticipated.¹¹ Moreover, a new strategy was needed to combat the escalating threat.

The release of Field Manual 3-24,¹² the Army and Marine Corps *Counterinsurgency* manual, in December 2006 did much to reframe debate on the war in Iraq.¹³

⁹ See generally THOMAS E. RICKS, *FIASCO* (2006).

¹⁰ See, e.g., Eric Schmitt, *2 U.S. Officials Liked Guerrillas to Renegade Postwar Nazi Units*, N.Y. TIMES, Aug. 26, 2003, at A10 (summarizing two senior officials' opinion that "Baathist and Fedayeen remnants" were responsible for the violence in Iraq); Eric Schmitt & David E. Sanger, *Guerrillas Posing More Danger, Says U.S. Commander for Iraq*, N.Y. TIMES, Nov. 13, 2003, at A1 (describing enemy fighters as "the shadowy armed opposition" and citing General John P. Abizaid as saying "loyalists to Saddam Hussein," not foreign terrorists, "pose the greatest danger to American troops and to stability in Iraq").

¹¹ See JAMES R. SCHLESINGER ET AL., FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DOD DETENTION OPERATIONS 11 (2004). The panel found,

In Iraq, there was not only a failure to plan for major insurgency, but also to quickly and adequately adapt to the insurgency that followed after major combat operations. . . . Major combat operations were accomplished more swiftly than anticipated. Then began a period of occupation and an active and growing insurgency. Although the removal of Saddam Hussein was initially welcomed by the bulk of the population, the occupation became increasingly resented.

Id. Ricks suggests the United States squandered its early military successes by failing to plan adequately for the postwar aftermath. See RICKS, *supra* note 9, at 136–138, 146–148. Ricks notes that as looting broke out across Iraq, "the U.S. military was perceptibly losing its recent gains; it gave the sense that it really didn't know what to do next and was waiting to pass the mission to someone else." *Id.* at 136. He further observes, "When top Pentagon officials refused to acknowledge the realities of Iraq, the opportunity to take hold of the situation slipped between the fingers of the Americans. In military terms, in April and May [2003], the U.S. military lost the initiative. . . ."

¹² U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (15 Dec. 2006) [hereinafter COUNTERINSURGENCY MANUAL].

¹³ See, e.g., Michael R. Gordon, *Military Hones a New Strategy on Insurgency*, N.Y. TIMES, Oct. 5, 2006, at A1 (quoting Jack Keane, who explains, "The Army will use [the counterinsurgency] manual to change its

Counterinsurgency, or COIN, soon became the mantra in both Iraq and Afghanistan, though the authors of the manual were careful not to overstate its message. "Insurgency and its tactics are as old as warfare itself,"¹⁴ the manual asserts, noting that "[t]hroughout its history, the U.S. military has had to relearn the principles of counterinsurgency (COIN) while conducting operations against adaptive insurgent enemies."¹⁵

The manual itself was intended to provide "principles and guidelines for counterinsurgency operations,"¹⁶ though only in general terms.¹⁷ Nearly five years after publication of the *Counterinsurgency* manual, some of the particulars—the tactics, techniques, and procedures—of counterinsurgency warfare have been more fully circumscribed as a result of its release. Rule of law is one subject that has benefited from the attention.¹⁸

The Army's *Rule of Law Handbook* and similar publications deserve credit for helping to demystify this elusive area of practice. Still, rule of law continues to confound and frustrate even the most seasoned rule of law practitioners, in part because every rule of law campaign, like every insurgency, is "contextual and presents its own set of challenges."¹⁹ Part of that challenge lies in preparation: What can and should the rule of law practitioner do to prepare for the rule of law mission? What background

entire culture as it transitions to irregular warfare"); Thomas E. Ricks, *General May See Early Success in Iraq; But Sharp Rise in Insurgent Violence Could Soon Follow, Officials Say*, WASH. POST, Jan. 23, 2007, at A01 ("[Troops'] top priority will be protecting the Iraqi population, following counterinsurgency doctrine laid out in a new Army manual . . . that says 'the people are the prize.'"); Sarah Sewall, *He Wrote the Book. Can He Follow It?*, WASH. POST, Feb. 25, 2007, at B03 ("The new [counterinsurgency] manual challenges the Army to think differently about how it conducts war.").

¹⁴ COUNTERINSURGENCY MANUAL, *supra* note 12, at 1.

¹⁵ *Id.* at ix. The foreword to the manual states that the manual was "designed to fill a doctrinal gap." *Id.* at foreword. The foreword continues, "It has been 20 years since the Army published a field manual devoted exclusively to counterinsurgency operations. For the Marine Corps it has been 25 years." *Id.* Meanwhile, counterinsurgency operations were generally "neglected in broader American military doctrine and national security policies since the end of the Vietnam War over 30 years ago," and publication of the *Counterinsurgency* manual was "designed to reverse that trend." *Id.* at vii.

¹⁶ *Id.* at foreword.

¹⁷ *Id.* ("This manual takes a general approach to counterinsurgency operations.").

¹⁸ *Id.* ("As this publication explains, performing the many nonmilitary tasks in COIN requires knowledge of many diverse, complex subjects. These include governance, economic development, public administration, and the rule of law.").

¹⁹ *Id.* ("The Army and Marine Corps recognize that every insurgency is contextual and presents its own set of challenges."). In their foreword, General David H. Petraeus and General James F. Amos further observe, "You cannot fight former Saddamists and Islamic extremists the same way you would have fought the Viet Cong, Moros, or Tupamaros; the application of principles and fundamentals to deal with each varies considerably." *Id.* The same holds true for rule of law operations.

knowledge should commanders and policymakers have before pursuing rule of law initiatives in counterinsurgency or post-conflict environments? If counterinsurgency is the “graduate level of war,”²⁰ the syllabus must include instruction in foreign and comparative law.

III. Defining “Rule of Law”

The shift from traditional combat operations to a counterinsurgency strategy in Iraq and Afghanistan stimulated intense interest in rule of law and its importance to the success of post-conflict stability. Although definitions of rule of law differ,²¹ the conceptual framework for rule of law and the universality of rule of law as a principle have been widely acknowledged. The *Rule of Law Handbook* observes, “There is no widespread agreement on what exactly constitutes the rule of law, just as there is no widespread agreement on what exactly it means to have a ‘just society.’ But there is common ground regarding some of the basic features of the rule of law”²² Meanwhile, this “common ground” rests on ideas so fundamental and basic no nation, legal system, or cultural tradition can lay sole claim to them. As the U.N. Secretary General noted in a 2004 report on rule of law, the norms and standards that undergird the United Nation’s rule of law efforts “have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of Member States As such, these norms and standards bring a legitimacy that cannot be said to attach to exported national models”²³ The U.S. Agency for International Development (USAID) has similarly observed, “The rule of law is not Western, European or American. It is available to all societies.”²⁴ As a practical matter, this has “important implications for practitioners. If the rule of law is a universal principle, then supporting the rule of law is not necessarily imposing foreign ideas on a society.”²⁵

²⁰ *Id.* at 1-1 (“Counterinsurgency is not just thinking man’s warfare—it is the graduate level of war.”), quoting a Special Forces Officer in Iraq in 2005. But see Colonel David S. Maxwell, *Is Counterinsurgency the Graduate Level of War?*, SMALL WARS J. (July 20, 2008, 1:44 AM), <http://smallwarsjournal.com/blog/2008/07/is-counterinsurgency-the-gradu/> (arguing that the graduate level of war “has to be full spectrum” and is “any form of war because war is as complex in major combat operations as it is in stability operations”).

²¹ See, e.g., THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES* 10 (2010) [hereinafter *RULE OF LAW HANDBOOK* (2010)].

²² *Id.* at 10.

²³ U.N. Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 10, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Rep. of the Secretary-General*].

²⁴ U.S. AGENCY FOR INT’L DEV., *GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK* 5 (2008) [hereinafter *USAID GUIDE*], available at http://pdf.usaid.gov/pdf_docs/PNADM700.pdf.

²⁵ *Id.*

Universal principles make excellent polestars, but they lack immediate direction. Unfortunately, even today, much of the discourse on rule of law remains theoretical and exasperatingly obscure to the practitioner in the field. As David Galula noted in his classic 1964 book *Counterinsurgency: Theory and Practice*, there is often a dearth of guidance when it comes to “suggesting concrete courses of action for the counterrevolutionary.”²⁶ Galula suggests, “Very little is offered beyond formulas—which are sound enough as far as they go—such as, ‘Intelligence is the key to the problem,’ or ‘The support of the population must be won.’”²⁷ Still, “[h]ow to turn the key, how to win the support, this is where frustrations usually begin.”²⁸

Importantly, a number of publications, including the U.S. Army’s *Rule of Law Handbook*, USAID’s *Guide to Rule of Law Country Analysis*, and the U.S. Institute of Peace’s (USIP) *Guiding Principles for Stabilization and Reconstruction* have begun to provide just such direction for rule of law practitioners in transitioning and post-conflict societies. Consequently, there is no reason to restate their recommendations in total again here. Instead, this article will focus on one discreet and often overlooked area of rule of law operations of particular relevance to judge advocate practitioners: the study of foreign law and, more specifically, host nation criminal law and procedure. This article, however, is not a primer on Iraqi law, Afghan law, or the law of any individual nation. Rather, it is a reminder to all practitioners that understanding and defining the applicable laws lies at the center of rule of law development. No rule of law judge advocate should deploy to theater without some familiarity of the applicable law, whether it is wholly foreign law, an interim international code, or a hybrid of the two. Without knowledge of the relevant law, the principle of rule of law may remain the ideal, but resentment of the rule of law mission may become the reality.

IV. Rule of Law Lines of Effort—Courts, Cops, and Corrections

Army doctrine defines rule of law as “a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that

²⁶ DAVID GALULA, *COUNTERINSURGENCY: THEORY AND PRACTICE*, at xii (1964). Galula uses the term “revolutionary war” to describe what in today’s vernacular might be called “counterinsurgency.” Galula explains, “Since insurgency and counterinsurgency are two different aspects of the same conflict, an expression is needed to cover the whole; ‘revolutionary war’ will serve this purpose.” *Id.* at xiv.

²⁷ *Id.* at xii.

²⁸ *Id.* See also DAVID KILCULLEN, *COUNTERINSURGENCY* 18 (2010). Kilcullen captures the frustration many junior officers felt after the *Counterinsurgency* manual’s release with a quote by a Marine Corps company commander: “The Field Manual tells us what to achieve, but not what to do. It lays out the theory, but we need practical advice at the company level.” *Id.*

are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law.”²⁹ The establishment of rule of law, moreover, is crucial to both counterinsurgency and stability operations.³⁰ The *Counterinsurgency* manual states, “Establishing the rule of law is a key goal and end state in COIN.”³¹ Ensuring confidence in, and access to, judicial institutions that operate transparently, equitably, and independently is also an imperative of stability operations.³² Ultimately, rule of law is a necessary end state in counterinsurgency and stability operations, because “[w]ithout rule of law, criminal and politically motivated violence will perpetuate the threat that warring parties posed during violent conflict.”³³ Such violence is antithetical to a stable society.

Rule of law operations in Iraq and Afghanistan have focused broadly on improving three aspects of the criminal justice system: judicial institutions, law enforcement, and the prison system³⁴—known informally as “courts, cops, and corrections.”³⁵ Rule of law efforts to strengthen these institutions have involved joint, interagency, intergovernmental, and multinational (JIIM) participation,³⁶ with the U.S. Department of State serving as the putative lead agency for rule of law activities.³⁷ In practice, however,

²⁹ U.S. AGENCY FOR INT’L DEV., U.S. DEP’T OF DEF. & U.S. DEP’T OF STATE, SECURITY SECTOR REFORM 4 (Feb. 2009); see also RULE OF LAW HANDBOOK (2010), *supra* note 21, at 11.

³⁰ See generally COUNTERINSURGENCY MANUAL, *supra* note 12; U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (6 Oct. 2008) [hereinafter STABILITY OPERATIONS MANUAL].

³¹ COUNTERINSURGENCY MANUAL, *supra* note 12, para. D-38.

³² STABILITY OPERATIONS MANUAL, *supra* note 30, para. 1-40. The *Stability Operations* manual also states that “[a]dherence to the rule of law is essential to legitimate and effective governance. Rule of Law enhances the legitimacy of the host-nation government by establishing principles that limit the power of the state and by setting rules and procedures that prohibit accumulating autocratic and oligarchic power.” *Id.* para. 1-42.

³³ U.S. INST. OF PEACE, GUIDING PRINCIPLES FOR STABILIZATION AND RECONSTRUCTION 7-64 (2009) [hereinafter USIP GUIDING PRINCIPLES].

³⁴ See generally RULE OF LAW HANDBOOK (2010), *supra* note 21, at 94–102; STABILITY OPERATIONS MANUAL, *supra* note 30, paras. 6-90 to 6-99 (describing “justice reform” with respect to “courts,” “law enforcement,” and “corrections”).

³⁵ See, e.g., RULE OF LAW HANDBOOK (2010), *supra* note 21, at 231.

³⁶ *Id.* at 23. “Joint” is defined as “activities, operations, organizations, etc., in which elements of two or more Military Departments participate.” JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 283 (as amended through 30 May 2008).

³⁷ See NAT’L SECURITY PRESIDENTIAL DIR./NSPD-44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTING AND STABILIZATION (Dec. 7, 2005) (“The Secretary of State shall coordinate and lead integrated United States Government efforts, involving all U.S. Departments and Agencies with relevant capabilities, to prepare, plan for, and conduct stabilization and reconstruction activities.”); see also RULE OF LAW HANDBOOK (2010), *supra* note 21, at 9 (“As a matter of U.S. policy, the Department of State (DOS) is the lead agency in conducting most stability and reconstruction activities . . .”).

U.S. military forces have frequently served as the lead for rule of law operations—and other stability operations—in Iraq and Afghanistan.³⁸ This reliance on military management of rule of law operations is not surprising. Rule of law activities take place throughout the continuum of full spectrum operations³⁹ and, as a consequence, often occur in security environments that may preclude significant civilian agency involvement. Joint Publication 3-0, *Operations*, explains, “The military’s predominant presence and its ability to command and control forces and logistics under extreme conditions may give it the de facto lead in stability operations normally governed by other agencies that lack such capacities.”⁴⁰ The development of rule of law institutions, therefore, will frequently devolve to the military, even during stability operations.

V. Determining the Applicable Law

Determining the applicable law in theater is critical to the rule of law mission because rule of law cannot develop in a vacuum of legal certainty. The absence of publicly promulgated laws, at best, breeds confusion; at worst, it invites the type of disorder and violence that too often result in grave abuses of human rights.⁴¹ Defining the applicable law at the outset of stability operations, therefore, should be a priority, and military personnel—judge advocates and military police in particular—should be prepared to intelligently apply and enforce the applicable law in support of the legal regime.

Determining which laws to apply and enforce, however, can be a singular challenge. Sometimes, existing legal codes may suffice as the applicable law, either in their entirety or *mutatis mutandis*; other times, entirely new laws may be necessary to replace unacceptable or illegitimate laws.⁴² In East Timor, for example, the U.N. peacekeeping mission

³⁸ Joint Publication 3-0 anticipates the possibility that military forces may be forced to serve as the lead agency for stability operations. The publication states U.S. military forces should be prepared to lead stability operations activities “when indigenous civil, USG [U.S. Government], multinational or international capacity does not exist or is incapable of assuming responsibility.” JOINT PUB. 3-0, *supra* note 3, at V-25.

³⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, at 3-1 (27 Feb. 2008) [hereinafter OPERATIONS]; see also RULE OF LAW HANDBOOK (2010), *supra* note 21, at 19–22.

⁴⁰ JOINT PUB. 3-0, *supra* note 3, at V-25; see also JAMES DOBBINS ET AL., RAND CORPORATION, THE BEGINNER’S GUIDE TO NATION-BUILDING, at xxiv (2009) (“Soldiers . . . are often called upon initially to perform many functions that would be better fulfilled by civilian experts, were such experts available in sufficient numbers.”).

⁴¹ See, e.g., DOBBINS ET AL., *supra* note 40, at 124 (“There is often little or no functioning justice system in the immediate post-conflict phase. Uncertainty about applicable law causes great confusion.”).

⁴² *Id.* at 125; USAID GUIDE, *supra* note 24, at 13 (“Post-conflict interventions may include adopting previous codes or introducing internationally accepted codes as interim measures while longer-term reforms are developed.”).

adopted existing Indonesian law as the applicable law, with the exception of laws governing capital punishment and subversion.⁴³ In contrast, enmity and resentment provoked by years of interethnic violence in Kosovo essentially delegitimized the existing legal regime, precluding it as a viable foundation for post-conflict law.⁴⁴ In general, when existing laws are unsuitable for post-conflict application—because they are unjust, are unacceptable to the population, or violate human rights or other international standards—new laws should be implemented as quickly as possible, even if temporarily, to provide some framework for the development of rule of law institutions. Unpopular law, to borrow a phrase from Ralph Waldo Emerson, can be a “rope of sand” that “perishes in the twisting.”⁴⁵

In post-conflict scenarios, the daunting task of defining the applicable law has traditionally fallen to international lawyers, academics, and practitioners trained in comparative law, human rights law, and judicial reform.⁴⁶ The process typically begins with a comprehensive assessment of the legal codes, statutes, regulations, and procedures that comprise the existing legal framework.⁴⁷ Existing laws are examined in light of international civil, political, economic, social, and human rights standards,⁴⁸ and short-term legal

⁴³ These exceptions included the abrogation of various anti-subversion laws and the elimination of capital punishment.

⁴⁴ On 25 July 1999, the U.N. Interim Administration Mission in Kosovo (UNMIK) promulgated UNMIK Regulation 1999/1, which decreed that the “laws applicable in the territory of Kosovo prior to 24 March 1999,” the start of the NATO air campaign, would continue to apply insofar as they did not conflict with international standards of human rights or U.N. Security Council Resolution 1244 (1999). Local judges would not apply the law, however, because they refused to apply “Serbian” law in Kosovo. Simon Chesterman, *UNaccountable?: The United Nations, Emergency Powers, and the Rule of Law*, 42 VANDERBILT J. TRANSNAT’L L. 1509, 1522 (2009). Instead, they “insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in March 1989, asserting that Belgrade had illegally revoked them.” *Id.* (quoting SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 166 (2004)) (internal quotation marks omitted). Eventually, less than five months later, UNMIK revoked Regulation 1999/1 and instead established the applicable law as the law in effect on 22 March 1989. *Id.* at 1522–23; UNMIK Reg. 1999/24, § 1.1, U.N. Doc. UNMIK/REG/1999/24 (Dec. 12, 1999).

⁴⁵ RALPH WALDO EMERSON, ESSAYS AND ENGLISH TRAITS (Charles W. Eliot ed., P.F. Collier & Son 1909–1914) (1844).

⁴⁶ See DOBBINS ET AL., *supra* note 40, at 78–82.

⁴⁷ USIP GUIDING PRINCIPLES, *supra* note 33, at 7-68; see also DOBBINS ET AL., *supra* note 40, at 79 (“Obtaining all the legislation that constitutes the applicable body of law and translating it so that international experts can assist their colleagues are also major challenges.”).

⁴⁸ These standards are codified in a variety of international agreements, including the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the Convention Relating to the Status of Refugees.

reform is instituted if necessary.⁴⁹ The *Guiding Principles for Stabilization and Reconstruction* recommends that short-term reforms “involve discreet changes to existing laws rather than a long-term overhaul”⁵⁰ and that they address “urgent problems such as laws that grossly undermine human rights or inadequate laws for pretrial detention.”⁵¹ Longer-term legal reform may involve more sweeping changes and should aspire to legitimacy through “societal consensus.”⁵² Ensuring the reform process is “transparent and participatory” is crucial to achieving such consensus.⁵³ As USIP notes, “Participation makes the population more invested in new laws, bringing the laws increased acceptability and public legitimacy.”⁵⁴ International standards should, nevertheless, serve as a guide for these reforms.⁵⁵

Legal reform is often essential to the establishment of rule of law, but even after culling unjust and illegitimate provisions from the law, elements of the pre-existing legal code are likely to endure. As already noted, international law can provide a normative framework for reform,⁵⁶ but unless a state’s laws are completely discarded and new laws prescribed, significant portions of the preexisting law will survive intact, as was the case in East Timor and Iraq. More often than not, therefore, those responsible for conducting rule of law operations must understand both foreign law—that is, nation-specific domestic law—and international law in order to competently prosecute the rule of law mission.⁵⁷

⁴⁹ USIP GUIDING PRINCIPLES, *supra* note 33, at 7-69; DOBBINS ET AL., *supra* note 40, at 79 (“International lawyers may be required to engage in interpreting the penal code or the criminal code through the lens of international human rights. This means applying provisions that meet international standards while eliminating those that do not.”); see also USAID GUIDE, *supra* note 24, at 9 (“Rule of law exists . . . only if the national legal system both recognizes essential human rights and respects those rights in practice.”).

⁵⁰ USIP GUIDING PRINCIPLES, *supra* note 33, at 7-69, 7-72.

⁵¹ *Id.*

⁵² An assessment process itself can take one to two years. *Id.* at 7-68.

⁵³ *Id.* at 7-70.

⁵⁴ *Id.*

⁵⁵ See, e.g., *Rep. of the Secretary-General*, *supra* note 23.

⁵⁶ See, e.g., *id.* ¶ 9. (“The normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. . . . These represent universally applicable standards adopted under the auspices of the United Nations and must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law.”) (footnote omitted).

⁵⁷ The USIP *Guiding Principles for Stabilization and Reconstruction* further recommends that rather than “attempting to fix everything at once, the international community and host nation counterparts should adopt a human rights-based approach to rule of law; pay special attention to marginalized groups, and focus on urgent problems including major crimes, human rights violations, and politically motivated violence.” USIP GUIDING PRINCIPLES, *supra* note 33, at 7-66.

VI. The Need for PME in Foreign Law

Knowledge of nation-specific domestic law would seemingly fall within the professional bailiwick of foreign-law-trained State Department attorney-advisors, yet State Department personnel and other civilian legal experts rarely have access to “courts, cops, and corrections” during ongoing combat operations—and certainly not in sufficient numbers to have a meaningful impact.⁵⁸ As Janine Davidson notes in *Lifting the Fog of Peace*, the “State Department has no expeditionary capacity of its own.”⁵⁹ Consequently, military personnel, including civil affairs officers, judge advocates, and the military police, must grapple with issues of substantive law and legal procedure specific to their areas of responsibility as a corollary to the performance of rule of law operations.⁶⁰

Unable to rely on readily and consistently available civilian expertise during counterinsurgency and stability operations, military leaders must cultivate a base of knowledge in the foreign law of their areas of responsibility. While the basic architecture of rule of law operations, with its broad emphasis on developing transparency, equity, and independence within an indigenous legal system, may be universally applicable, implementing plans and executing projects at the local level requires a comprehensive

⁵⁸ See, e.g., JANINE DAVIDSON, *LIFTING THE FOG OF PEACE: HOW AMERICANS LEARNED TO FIGHT MODERN WAR 166–73* (2010). Davidson observes that military personnel commonly and mistakenly believe “the State Department, the U.S. Agency for International Development (USAID), the Treasury, the Justice and Commerce departments, and even the Department of Agriculture” have deployable experts “who are available and can conduct the myriad stabilization and reconstruction tasks needed to ensure political success in the aftermath of an invasion.” *Id.* at 166. According to Davidson, however, the “capability and capacity of the so-called interagency . . . is simply dwarfed by that of the U.S. military,” and “unrealistic expectations about the capacity and capability of nonmilitary agencies and partners undermined success in Iraq from planning to execution and beyond.” *Id.* Secretary of Defense Robert M. Gates wryly observed during a speech to the Marine Memorial Association, “If you took every Foreign Service Officer in the world and added them up, the number would not be enough to crew one aircraft carrier. There are about 6,000 FSOs. Condi Rice used to say we have more people in military bands than they have in the Foreign Service. She was not far wrong.” Robert M. Gates, U.S. Sec’y of Def., Remarks to the Marine Memorial Association, San Francisco, Cal. (Aug. 12, 2010), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4672>. Meanwhile, Philip Lynch, a former Rule of Law Coordinator with the U.S. Embassy in Baghdad, has stated flatly, “You can’t promote the rule of law while sitting inside the American embassy.” Rebecca Agule, *Iraq, Afghanistan Struggle to Secure Rule of Law*, HARV. L. REC., Apr. 16, 2009, available at <http://www.hlrecord.org/2.4463/iraq-afghanistan-struggle-to-secure-rule-of-law-1.577076>.

⁵⁹ DAVIDSON, *supra* note 58, at 169.

⁶⁰ Rule of law activities that involve the practice of law, however, are limited to judge advocates. See U.S. DEP’T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 4-3 (30 Sept. 1996); see also U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. D-10 (15 Apr. 2009) (“Judge Advocates who fall under the statutory technical supervision of The Judge Advocate General are the only persons authorized to provide legal advice regarding rule of law planning and activities. Judge advocates also perform or supervise all rule of law activities that involve the practice of law.”).

knowledge of local laws and judicial practices. A successful rule of law plan will acknowledge local circumstances and societal idiosyncrasies, including peculiarities in the law or judicial practice. Ultimately, an honest appreciation of indigenous laws can mean the difference between designing a locally viable rule of law plan or promulgating an academically sound, theoretically satisfying plan that has no practical value on the ground. Given the realities of full spectrum operations, military officials must increasingly possess the requisite comparative legal expertise and knowledge of the applicable law to plan and execute rule of law operations with minimal input from civilian agencies.

VII. Prioritizing the Development of Criminal Law

The U.S. Army must apply its finite resources wisely to achieve strategic goals and policy aims in noncombat operations. Because security is essential to rule of law and counterinsurgency, military rule of law efforts should prioritize the enforcement of laws that promote security—namely, domestic criminal law—and leave the development of civil law to other groups involved in the interagency, intergovernmental effort.⁶¹ Prioritizing the Army’s emphasis on bolstering the criminal justice system—rather than civil justice mechanisms—is prudent for several reasons.

First, security is essential to the development of rule of law. The *Counterinsurgency* manual describes security as the “cornerstone” of any COIN effort⁶² and states, “Without a secure environment, no permanent reforms can be implemented and disorder spreads.”⁶³ The USAID *Guide to Rule of Law Country Analysis* similarly places a high priority on “order and security,” explaining, “Rule of law cannot flourish in crime-ridden environments or where public order breaks down and citizens fear for their safety.”⁶⁴

⁶¹ The development of the civil law aspects of rule of law seems ideally suited to civilian organizations. *Department of Defense Directive 3000.05* states, “Many stability operations tasks are best performed by indigenous, foreign, or US civilian professionals.” DODD, *supra* note 1, para. 4.3; see also RULE OF LAW HANDBOOK (2010), *supra* note 21, at 20. Meanwhile, ignoring the development of civil courts and dispute resolution mechanisms can seriously undermine the establishment of governmental legitimacy. As David Kilcullen relates in *The Accidental Guerilla*, the Taliban operated thirteen guerilla courts in southern Afghanistan by mid-2008. DAVID KILCULLEN, *THE ACCIDENTAL GUERRILLA* 47 (2009). The courts represented a “shadow judiciary that expanded Taliban influence” in the absence of a strong government presence. *Id.* Although the Taliban were widely acknowledged as cruel, they were also seen as fair, particularly when compared to local judges, prosecutors, and police who dispensed “phony ‘justice’” to the highest bidders. *Id.*

⁶² COUNTERINSURGENCY MANUAL, *supra* note 12, para. 1-131.

⁶³ *Id.*

⁶⁴ USAID GUIDE, *supra* note 24, at 1. The U.S. Agency for International Development identifies five elements that comprise the rule of law: (1) order and security, (2) legitimacy, (3) checks and balances, (4) fairness, and (5) effective application. Moreover, “[a]lthough country circumstances will vary, . . . there are inherent priorities among the five essential elements.”

The USIP *Guiding Principles for Stabilization and Reconstruction* states, “Without public order, people will never build confidence in the public security system and will seek security from other entities like militias and warlords.”⁶⁵ Security, therefore, is a necessary condition to the establishment of rule of law, especially in the immediate aftermath of conflict.⁶⁶ In this twilight between war and peace, conflict and stability, the most valuable contribution military forces can make to rule of law is the establishment of public order and the revivification of the criminal justice system.

Second, military forces usually have a small window of opportunity to contribute to rule of law development, and that time should be spent addressing the most pressing and elemental issues, including security and the establishment of governmental legitimacy. As noted earlier, the military is not the designated lead for rule of law but will frequently serve as the de facto lead during stability operations. Military involvement in the rule of law enterprise will typically last only as long as military forces maintain a presence in the host nation; once military forces withdraw, military involvement in rule of law development ceases.⁶⁷ Given the military’s finite and relatively short participation in any given rule of law campaign, military forces should focus on projects that not only set conditions for success but that also use the military’s limited resources to best advantage. Frequently, prioritizing the criminal justice system will yield the greatest results because improvements in criminal justice can enhance overall security and help promote the overarching objective of governmental legitimacy.

Order and security, and legitimacy, “comprise the highest priority” *Id.* at 1–3.

⁶⁵ USIP GUIDING PRINCIPLES, *supra* note 33, at 7-74 (citing U.S. INST. OF PEACE, COMBATING SERIOUS CRIMES IN POST-CONFLICT SOCIETIES: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS (Colette Rausch, ed. 2006)).

⁶⁶ See, e.g., DOBBINS ET AL., *supra* note 40, at xxiii (“The first order priorities for any nation-building mission are public security and humanitarian assistance. If the most basic human needs for safety, food, and shelter are not being met, any money spent on political or economic development is likely to be wasted.”).

⁶⁷ As the *Rule of Law Handbook* explains, “The military role in rule of law capacity-building will end with the redeployment of U.S. forces, but the effort will likely continue with civilian agencies assuming an increasingly central role.” RULE OF LAW HANDBOOK (2010), *supra* note 21, at 9. The end of Operation Iraqi Freedom and the expected withdrawal of U.S. military forces from Iraq by October 2011 are likely to set the pattern for future transitions to civilian control, most obviously for Afghanistan. Meanwhile, the undertaking promises to be a daunting one. James F. Dobbins, a former ambassador and envoy, has opined, “I don’t think State has ever operated on its own, independent of the U.S. military, in an environment that is quite as threatening on such a large scale. . . . It is unprecedented in scale.” Michael R. Gordon, *Civilians to Take U.S. Lead After Military Leaves Iraq*, N.Y. TIMES, Aug. 19, 2010, at A1.

Third, effective policing is critical to the maintenance of public order and security.⁶⁸ As Galula observes, the responsibility for maintaining order is a “heavy liability” and one that belongs to the counterinsurgent.⁶⁹ Police, meanwhile, are the “eye and the arm of the government in all matters pertaining to internal order” and are “obviously a key factor in the early stages of an insurgency.”⁷⁰ Many post-conflict societies, however, lack the police forces necessary to conduct law enforcement and impose public order. In these situations, law enforcement functions “may fall directly on the intervening authorities, and in particular on its police and military forces.”⁷¹ United States military involvement in law enforcement will typically take the form of active participation in police operations or activities that promote the re-establishment of civilian police capability.⁷² In executing both types of missions, knowledge of criminal law is essential. For example, the *Counterinsurgency* manual stresses, “U.S. forces conducting COIN should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation.”⁷³ The manual further states that counterinsurgents should “carefully preserve weapons, witness statements, photographs, and other evidence collected at the scene,” because evidence is necessary “to process the insurgents into the legal system and thus hold them accountable for their crimes while still promoting the rule of law.”⁷⁴

International involvement in post-conflict law enforcement is not new. Recognizing the practical importance of policing to the establishment of rule of law, the United Nations has historically incorporated law

⁶⁸ E.g., DOBBINS ET AL., *supra* note 40, at 50 (“The prime responsibility of any police force is to enforce the law and provide for public security.”); USAID GUIDE, *supra* note 24, at 14 (“Police are an integral part of a system of rule of law for the preservation of security and the enforcement of law.”).

⁶⁹ GALULA, *supra* note 26, at 7.

⁷⁰ *Id.* at 31.

⁷¹ DOBBINS ET AL., *supra* note 40, at 50; see also USIP GUIDING PRINCIPLES, *supra* note 33, at 7-75 (“Law enforcement . . . is vital for security and cannot be postponed for months. Because local forces will likely be weak, discredited, or a party to the conflict, assistance from international actors may be necessary to ensure that urgent law enforcement functions are performed . . .”).

⁷² RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98–100.

⁷³ COUNTERINSURGENCY MANUAL, *supra* note 12, at D-4. Galula suggests that “the extraordinary conditions of an insurgency” will often make “[p]rompt adaptation” of the judicial system necessary to the establishment of internal order. GALULA, *supra* note 26, at 31. He states, “If insurgents, though identified and arrested by the police, take advantage of the many normal safeguards built into the judicial system and are released, the police can do little.” *Id.*

⁷⁴ *Id.* The *Counterinsurgency* manual briefly addresses the status of insurgents under international law. Citing Common Article 3, the manual avers that “insurgents have no special status under international law” and “are not, when captured, prisoners of war.” *Id.* Instead, “[i]nsurgents may be prosecuted legally as criminals for bearing arms against the government and for other offenses, so long as they are accorded the minimum protections described in Common Article 3.” *Id.*

enforcement into the structure of peacekeeping operations. Indeed, “[o]ver the past 15 years, international police have become a standard element of stability missions, representing some 10 percent of the personnel of most current UN-led operations.”⁷⁵ Where the indigenous security apparatus has collapsed, “international police [may] perform direct law enforcement roles until reliable local police units can be assembled and trained.”⁷⁶ Alternatively, military forces may perform law enforcement functions when international police units are unavailable. In Kosovo and East Timor, for example, armed interventions “led to the withdrawal, in their entirety, of the political and administrative cadres that had previously governed the territories, including the security and law enforcement apparatus.”⁷⁷ Consequently, the Kosovo Force (KFOR) in Kosovo and the International Force for East Timor (INTERFET) in East Timor assumed immediate responsibility for security and law enforcement in their respective territories.⁷⁸ In Kosovo, U.N. Security Council Resolution 1244 directed KFOR to ensure “public safety and order until the international civil presence can take responsibility for this task.”⁷⁹ Similarly, in East Timor, U.N. Security Council Resolution 1272 authorized the U.N. Transitional Administration in East Timor (UNTAET), which succeeded the INTERFET, to “provide security and maintain law and order through the territory of East Timor.”⁸⁰ In addition to participating in active law enforcement, international police forces have also helped train local police forces because “[i]n virtually all major post-conflict stability operations since World War II, internal security bodies—especially the police—have been partially or wholly rebuilt,” and that rebuilding has always required some form of training.⁸¹

United States rule of law operations have likewise centered on both active law enforcement and police training. The *Rule of Law Handbook* states that “as the Dominate phase evolves into the Stabilize phase, combat forces previously engaged in high intensity conflict will shift over

⁷⁵ DOBBINS ET AL., *supra* note 40, at 47.

⁷⁶ *Id.*; see also *id.* at 54 (“International police may need to assume law enforcement responsibilities, especially when indigenous police have disintegrated during the conflict or have been discredited because of their abusive behavior.”).

⁷⁷ Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 A.J.I.L. 46, 47 (2001); see also USIP GUIDING PRINCIPLES, *supra* note 33, at 7-75 (“Certain public order functions are critical whether performed by international or host nation actors.”).

⁷⁸ Strohmeyer, *supra* note 77, at 46–52.

⁷⁹ S.C. Res. 1244 ¶ 9(d), U.N. Doc. S/RES/1244 (June 10, 1999). “In response to the rising security concerns and pursuant to its mandate, KFOR started to carry out large-scale arrests to restore public peace and order to the territory.” Strohmeyer, *supra* note 77, at 49.

⁸⁰ S.C. Res. 1272 ¶ 2(a), U.N. Doc. S/RES/1272 (Oct. 25, 1999).

⁸¹ DOBBINS ET AL., *supra* note 40, at 51.

to a police role.”⁸² Additionally, “as the theater matures into one in which full-scale stability operations are underway, US forces are likely to participate in the reestablishment of civilian police functions.”⁸³ However, although the United States has organized and deployed civilian police in past conflicts,⁸⁴ the United States currently has no standing civilian police component and no reliable mechanism for recruiting civilian police, from federal law enforcement agencies or state and local forces, to carry out the police element of rule of law operations.⁸⁵ Consequently, “the United States has developed little capacity to deploy civil police officers in formed, cohesive units; is unable to recruit individual police officers in sufficient numbers; and must rely on other nations or its own military to perform functions such as SWAT, riot control, counterterrorism, and counternarcotics where such capabilities are needed.”⁸⁶ In contrast, organizations like the United Nations and the European Union have regularly deployed international police to conduct police missions abroad.⁸⁷ Some states, such as Italy, France, and Spain, further maintain gendarmerie forces that can act as civil police in times of peace and as military police in times of war.⁸⁸ These forces, which may have “close or formal ties to the military,” can be deployed as cohesive units in support of stability and rule of law missions.⁸⁹

For the United States, the shortage of civilian police officers available for assignment to overseas contingency

⁸² RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98.

⁸³ *Id.* In Rajiv Chandrasekaran’s stunning book, *Imperial Life in the Emerald City*, Chandrasekaran recounts the early years of the U.S. occupation in Iraq. RAJIV CHANDRASEKARAN, *IMPERIAL LIFE IN THE EMERALD CITY: INSIDE IRAQ’S GREEN ZONE 84–90* (2006). Among other initiatives and missed opportunities, Chandrasekaran highlights the failure to train the Iraqi police in the formative period following the U.S. invasion. Chandrasekaran notes,

The first months after liberation were a critical period for Iraq’s police. Officers needed to be called back to work and screened for any Baath Party connections. They’d have to learn about due process, how to interrogate without torture, how to simply walk the beat. . . . Tens of thousands more officers would have to be hired to put the genie of anarchy back in the bottle.

Id. at 87. Unfortunately, funding for “desperately needed police advisor” was never secured, and “[w]ith no help on the way, the task of organizing and training Iraqi officers fell to American military-police soldiers, many of who had no experience in civilian law enforcement.” *Id.*

⁸⁴ For example, the “U.S. Department of State funded and managed the U.S. police deployments to Haiti, Bosnia, and Kosovo, employing a contractor, DynCorp, to recruit and pay the individual U.S. police officers.” DOBBINS ET AL., *supra* note 40, at 64.

⁸⁵ *Id.* at 64.

⁸⁶ *Id.*

⁸⁷ *Id.* at 63.

⁸⁸ *Id.* at 48.

⁸⁹ RULE OF LAW HANDBOOK (2010), *supra* note 21, at 99.

operations, unless seriously addressed at the policy level, will continue to saddle the military with responsibility for law enforcement and host nation police training, as it has in both Iraq and Afghanistan.⁹⁰ Meanwhile, the burden of these duties will, not surprisingly, fall primarily on the military police, who are better equipped, by virtue of training and experience, to engage in active law enforcement than are other units of the Armed Forces.⁹¹ However, given the magnitude and nature of the policing mission, particularly as sustained combat operations subside and the stabilization phase of operations begins, other military units, including infantry units, will invariably participate in law enforcement alongside military police.⁹²

Educating all forces involved in police operations on the applicable law in the area of responsibility (AOR) is crucial to the success of stabilization and the development of respect for rule of law.⁹³ The *Rule of Law Handbook* notes, “Commanders need to understand that the application of force in a police context is very different than in major combat operations, and they will need to recognize . . . the point at which they need to change force models.”⁹⁴ The handbook continues, “Assuring that military forces receive adequate training, and that appropriate are promulgated and understood by coalition military forces, is critical to successfully policing in the aftermath of high intensity conflict, and will be critical to . . . establishing the legitimacy of the legal rules that are being enforced.”⁹⁵ As discussed earlier, identifying the applicable law is a necessary first step in this process. Once defined, however, commanders and servicemembers should be trained on the relevant law, particularly the criminal laws and procedures they must apply to conduct law enforcement operations. Unfortunately, proper training on the applicable law is often

overlooked until the eleventh hour or later. In Iraq, for example, comprehensive training on Iraqi criminal law and procedure did not begin in earnest until the eve of the U.S.-Iraq Security Agreement,⁹⁶ which mandated respect for Iraqi law, despite the anticipated transition from law of war-based detentions to criminal law-based arrests under Iraqi domestic law.⁹⁷

VIII. The Judiciary⁹⁸

In addition to training law enforcement forces, military forces may be required to train judicial officials during counterinsurgency and stability operations. Because the final adjudication of crimes, like effective policing, can promote order and security, the reasons for emphasizing criminal law instruction discussed earlier equally apply. A functioning court system, however, can shape another crucial goal of rule of law operations: the establishment of governmental legitimacy. Considered an essential element of rule of law, the establishment of governmental legitimacy is often considered an early priority—along with order and security—in counterinsurgency or post-conflict environments.⁹⁹

A strong criminal justice system can foster governmental legitimacy by establishing the government’s bona fides to redress crime and hold perpetrators accountable for their actions in a principled and authoritative manner. Criminal trials can be particularly influential in transitional contexts by inspiring “public confidence in the State’s ability and willingness to enforce the law,”¹⁰⁰ and during a counterinsurgency, a host nation’s willingness to

⁹⁰ See, e.g., DOBBINS ET AL., *supra* note 40, at 64–65.

⁹¹ RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98 (“MPs will take the lead in the police elements of rule of law missions.”).

⁹² JOINT OPERATIONS, *supra* note 3, at V-24 (observing that operations in the Stabilization phase “typically begin with significant military involvement to include some combat, then move increasingly toward enabling civil authority as the threat wanes and civil infrastructures are reestablished”).

⁹³ See, e.g., Michael Moss, *Iraq’s Legal System Staggers Beneath the Weight of War*, N.Y. TIMES, Dec. 17, 2006, available at <http://www.nytimes.com/2006/12/17/world/middleeast/17justice.html> (quoting an Air Force officer as stating, “The most fundamental thing that we need to do in Iraq is establish the rule of law. . . . It’s the cornerstone of a civilization. Without it you have anarchy.”). Moss’s article further reports that “despite many victories for the military in court, about half of the 3,000 American-held detainees who have gone to trial [in the Iraqi central court] have walked free.” *Id.* One Iraqi judicial official attributed the high incidence of acquittals to poor evidence collection and inattentiveness to Iraqi judicial requirements. See *id.* (citing the manager of legal affairs of the Iraqi Higher Judicial Council, who “blames the Americans for bringing cases without the kind of evidence that Iraqi law requires”).

⁹⁴ RULE OF LAW HANDBOOK (2010), *supra* note 21, at 98–99.

⁹⁵ *Id.*

⁹⁶ Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraqi, U.S.-Iraq, Nov. 17, 2008, available at http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf.

⁹⁷ See, e.g., JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 323 (2006); Captain Ronald T. P. Alcala & Captain John Haberland, *Prosecution Task Forces and Warrant Applications in Multinational Division—Center*, in THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES 291, 291–93 (2009) [hereinafter RULE OF LAW HANDBOOK (2009)].

⁹⁸ The term “judiciary” as used here refers to the courts, which include judges, administrative staffs (including court clerks), and prosecutors. This definition is substantially similar to the definition of “judiciary” provided in the USAID *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*. See USAID GUIDE, *supra* note 24, at 13 n.11.

⁹⁹ See, e.g., USAID GUIDE, *supra* note 24, at 1, 23; COUNTERINSURGENCY MANUAL, *supra* note 12, at 1-21 to 1-22; STABILITY OPERATIONS MANUAL, *supra* note 30, paras. 1-28 to 1-34.

¹⁰⁰ *Rep. of the Secretary-General*, *supra* note 23, ¶ 39. The *Report of the Secretary General* further suggests that trials “can provide a direct form of accountability for perpetrators and ensure a measure of justice for victims by giving them the chance to see their former tormentors made to answer for their crimes.” *Id.*

deal openly with insurgents as criminals in the legal system, particularly a legal system “established in line with local culture and practices,” can signal respect for rule of law and garner public support for civil authority.¹⁰¹ In contrast, “[e]fforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law.”¹⁰² Recognizing the significance, both real and symbolic, of public trials, military leaders can promote legitimate civil authority by facilitating the shift from law of war-based detentions to criminal law-based arrests, and by ensuring criminal laws and judicial procedures are vigorously observed.

Before trials can be held, however, the judiciary must be capable of processing criminal cases. Restoring judicial capacity will often entail rebuilding physical infrastructure,¹⁰³ ensuring adequate administrative support to the courts,¹⁰⁴ and training judges on domestic law and respect for the rule of law.¹⁰⁵ Although rule of law operations are likely to undertake all three missions in theater, this article focuses on judicial training and the role of military practitioners can make in that effort.

Judicial training may be especially important when domestic laws are modified or new laws are instituted. As discussed above, changes to the legal regime are not uncommon during or after conflict.¹⁰⁶ When the law changes, however, the courts must be willing to accept the changes or the new laws will languish, ignored and unenforced by a skeptical judiciary. Sometimes, judges’ resistance to new laws may be justifiable and further modifications may be appropriate. This may occur when the new legal regime is considered particularly odious by the society. In Kosovo, for example, judges bluntly refused to apply the U.N. Interim Administration Mission in Kosovo’s (UNMIK) choice of law—that is, the law in force before NATO air operations began in Kosovo on 24 March 1999—because of its association with Serbian rule.¹⁰⁷ Instead, Kosovar judges “insisted on applying the Kosovo Criminal Code and other provincial laws that had been in effect in

March 1989, asserting that Belgrade had illegally revoked them.”¹⁰⁸ Confronted with ardent local opposition, the U.N. mission eventually rescinded its decision and reinstated the laws in force on 22 March 1989 as the applicable law.¹⁰⁹

On the other hand, some changes to the applicable law must be enforced, regardless of resistance from local actors, to ensure the growth of a legal system in harmony with international standards. As the USIP *Guide* notes, “In most war-torn states, the legal framework frequently . . . contains elements of discrimination and seldom meets the requirements of international human rights and criminal law standards.”¹¹⁰ Because new laws are “paper tigers if they do not result in changes in patterns and behavior,”¹¹¹ all rule of law practitioners must ensure international norms are adopted and internalized by the host nation judiciary.¹¹² Adherence to rule of law must transcend mere observance of the positive law—whatever law that may be—and embrace “substantive values of justice” even in societies disinclined to conform to global norms.¹¹³ When judicial officials fail to accept changes reflective of international standards, rule of law practitioners must work to instill acceptance through training, education, and collaboration.¹¹⁴

The relationships rule of law practitioners form with judicial and law enforcement officials, coupled with their specialized knowledge of host nation laws and local practices, make them uniquely qualified to serve another valuable role during counterinsurgency and stability operations: that of honest broker. Although developing judicial competence and creating institutional capacity are

¹⁰¹ COUNTERINSURGENCY MANUAL, *supra* note 12, at 1-24.

¹⁰² *Id.*

¹⁰³ See, e.g., RULE OF LAW HANDBOOK (2010), *supra* note 21, at 97 (suggesting that “[i]n some theaters, the need to provide for physical venues initially outstrips the need to provide for judges and prosecutors”).

¹⁰⁴ See, e.g., *id.* at 98.

¹⁰⁵ See, e.g., *id.* at 95–97.

¹⁰⁶ E.g. *supra* part V.

¹⁰⁷ Chesterman, *supra* note 44, at 1522. Chesterman states, “The largely Albanian judiciary that was put in place by UNMIK rejected [UNMIK’s choice of applicable law] with some judges reportedly stating that they would not apply ‘Serbian’ law in Kosovo.” *Id.* (quoting Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan*, INT’L PEACE ACAD. REP., Sept. 2002, at 5) (internal quotation marks omitted).

¹⁰⁸ *Id.* (quoting Simon Chesterman, *Justice Under International Administration: Kosovo, East Timor and Afghanistan*, INT’L PEACE ACAD. REP., Sept. 2002, at 5) (internal quotation marks omitted).

¹⁰⁹ *Id.* at 1522–23.

¹¹⁰ USIP GUIDING PRINCIPLES, *supra* note 33, at 7-68.

¹¹¹ *Id.* at 7-69.

¹¹² The USIP *Guiding Principles* cites treaties on organized crime, conventions on drug trafficking, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, among others, as possible sources of reference for international standards on human rights law, criminal law, civil law, and commercial law. *Id.* at 33.

¹¹³ See STEVEN WHEATLEY, THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW 196 (2010) (suggesting that the United Nations’s “expansive definition” of rule of law “relies on an idea of the rule of law that promotes substantive values of justice, and not one that simply demands the exercise of power in accordance with posited law norms”).

¹¹⁴ The 2009 edition of the *Rule of Law Handbook* declared,

Although it is critical to respect local institutions and norms, in order to obtain the stability and security sought by the rule of law mission, it will often be necessary to encourage or require the rejection of certain foreign nation laws that promote violence, discrimination, or other social divisiveness in the concern country.”

RULE OF LAW HANDBOOK (2009), *supra* note 97, at 222.

important rule of law objectives, the legal system must ultimately be capable of managing and adjudicating criminal cases effectively to sustain public confidence.¹¹⁵ When issues arise that threaten the system's effectiveness, rule of law practitioners must be prepared to identify and resolve them to protect the long-term viability of the system.

Obstacles to the timely adjudication of cases will vary but can include misunderstandings of the law, systemic or bureaucratic impediments (such as poor communication or animosity between law enforcement and judicial officials), or a lack of adequate physical infrastructure (including courthouses and jail facilities). When poor communication, bureaucratic barriers, or even open hostility between institutional actors lie at the root of the problem, rule of law practitioners may serve as intermediaries that bridge the divide between competing parties and their interests.¹¹⁶ For example, following the implementation of the U.S.-Iraq Security Agreement and the shift to a domestic law enforcement paradigm in Iraq, judge advocates and civilian rule of law advisors worked closely with judges and law enforcement to ensure criminal cases were properly adjudicated in the courts.¹¹⁷ Drawing on relationships they had established working on other rule of law projects, these individuals met regularly with judges and the police to build mutual understanding of each other's role and expectations.¹¹⁸ Without active practitioner involvement in the process, progress toward their common goal might have stalled, potentially delaying the growth of rule of law indefinitely.

¹¹⁵ Measuring the "effectiveness" of a system can be maddeningly speculative. A number of sources offer guidance on how to measure effectiveness. See generally RULE OF LAW HANDBOOK (2010), *supra* note 21, ch. 9 (describing methods of "measuring rule of law"). In the end, effectiveness, at least initially, may be best understood in relative terms.

¹¹⁶ See, e.g., Lieutenant Colonel Jeff Bovarnick, *Linking Up Investigative Judges with Investigators*, in RULE OF LAW HANDBOOK (2009), *supra* note 97, at 293, 293-96 (explaining how judge advocates served as a "conduit to build relationships between Iraqi [Investigative Judges] and . . . Iraqi investigators" and how the "link-up between the IJs and their investigators was absolutely essential to progressing a case through the Iraqi criminal justice system and therefore essential to the overall advancement of the rule of law in Iraq"); Timothy Kosis, *Finding an Iraqi Solution to Overcrowded Prisons in Basrah*, in RULE OF LAW HANDBOOK (2009), *supra* note 97, at 302, 302-04 (noting that a "deep distrust between the judiciary and police . . . contributed to the breakdown of the criminal justice process" but "Coalition members were able to play an important role by bringing judges and [Iraqi Security Forces] commanders together, advising on possible solutions to the problem, and provid[ing] targeted resources to build capacity in the justice system").

¹¹⁷ See, e.g., Alcalá & Haberland, *supra* note 97.

¹¹⁸ *Id.* at 93 (describing how judge advocates and civilian rule of law attorneys resolved a growing rift between judges and the police over the sufficiency of evidence necessary to support a judicial warrant by helping to "clarify what evidence the judges required . . . to approve warrant applications").

IX. General Training in Comparative Law

In addition to specialized training in foreign law and international human rights law, general preparation for rule of law operations should include instruction in comparative law—the comparative study of foreign legal systems and traditions.¹¹⁹ Broader and more general in scope than the study of nation-specific law, the study of comparative law should serve as a foundational requirement for leaders and practitioners engaged in stability operations. If, as the *Rule of Law Handbook* notes, "[a] frequent problem encountered by US Judge Advocates in rule of law operations is a lack of experience with non-US legal traditions,"¹²⁰ even a basic familiarization of the world's legal traditions could help narrow the knowledge gap.

Familiarity with the world's legal traditions—as well as sensitivity to informal or tribal law—can reduce misunderstandings and help temper cultural biases in the application of foreign law during operations.¹²¹ The RAND report suggests that "[b]efore deployment, civilian police personnel should be made familiar with international standards that apply to a broad range of public security and human rights functions. They should have some understanding of the general differences among legal systems based on the Napoleonic code, English common law, and sharia, as they may relate to the mission at hand."¹²² These recommendations are equally relevant to military police personnel, who must similarly conduct police operations in theater, and to judge advocates, who are the military's legal subject matter experts.¹²³ In essence, the RAND report advocates the study of comparative law.

Still, the study of comparative law is frequently neglected in favor of foreign law and human rights law training. Certainly, when the applicable law in theater incorporates pre-existing foreign law, in whole or in part, ignorance of that law is tantamount to professional malpractice; knowledge of the applicable law is an obvious prerequisite to engagement with the indigenous legal system during rule of law operations.¹²⁴ Similarly, familiarity with

¹¹⁹ See generally e.g., JOHN HENRY MERRYMAN ET AL., *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 1 (1994).

¹²⁰ RULE OF LAW HANDBOOK (2010), *supra* note 21, at 93.

¹²¹ RULE OF LAW HANDBOOK (2009), *supra* note 97, at 222-23 ("Crucial to establishing rule of law is understanding what is culturally acceptable for the developing nation. Legal reforms will only take hold if they are sensitive to the cultural and legal tradition of the host country.").

¹²² DOBBINS ET AL., *supra* note 40, at 65.

¹²³ See AR 27-1, *supra* note 60.

¹²⁴ See, e.g., RULE OF LAW HANDBOOK (2010), *supra* note 21, at 145. The *Rule of Law Handbook* notes that while it may seem obvious that those responsible for rebuilding a legal system should first understand the legal system, "many units . . . responsible for restoring the legal system in Iraq went into the mission with very little understanding of the Iraqi civil law system and no copies of the Iraqi laws whatsoever." *Id.*; see also STROMSETH ET AL., *supra* note 97, at 323.

international human rights norms is fundamental, particularly when the target society lacks a tradition of respect for human rights. In comparison, knowledge of comparative law may not have as conspicuous or as immediate an impact on operations, and that is probably why it has been largely overlooked as a matter of PME. Nevertheless, training in comparative law can be an effective way to introduce practitioners to the diversity of legal systems they may encounter throughout their careers.¹²⁵

The *Rule of Law Handbook* warns against perpetuating a “West is Best” mentality, and the study of comparative legal systems can help guard against intellectual insularity.¹²⁶ Cultivating even a rudimentary understanding of foreign legal traditions can begin the process of shedding cultural prejudices while serving as a prelude to more targeted training in nation-specific foreign law. As John C. Reitz suggests, the “[c]omparative study of law can be undertaken simply to inform the reader about foreign law, perhaps for the practical purpose of facilitating an international transaction or resolving a conflict of laws problem,” although “[t]here is no reason why comparative studies should be limited to any particular set of purposes. The comparative method is just a tool.”¹²⁷ For judge advocates and others working in the field of rule of law, the “comparative method” may provide an education in itself.

John H. Merryman proposes that the study of foreign and comparative law can “deprovincialize students, broaden their perspectives, and show them that other people can do things differently and yet survive and prosper.”¹²⁸ Because context and cultural sensitivity are so important to rule of law operations, PME should incorporate the study of

comparative legal systems and traditions into leadership training. Ultimately, personnel deploying to Iraq should be educated on Iraqi law, and personnel deploying to Afghanistan should be educated on Afghan law; but all leaders can and should be educated in comparative law.

X. Conclusion

Stability operations in Iraq and Afghanistan have underscored the critical role military personnel play in promoting rule of law in societies in conflict. Although other organizations may bear primary responsibility for the rule of law mission, military forces’ operational capabilities often require they take the lead in areas of ongoing conflict or instability. Despite this foreseeable result, preparation for rule of law activities within the military has frequently overlooked an essential piece of the rule of law puzzle: the study of the applicable law in the theater of operations.

Military forces cannot and should not execute the rule of law mission without a firm grasp of the applicable law because law itself is central to the rule of law construct and should inform the development process. When the applicable law can be determined, military personnel engaged in rule of law operations should be educated on it. Meanwhile, legal instruction should emphasize the domestic criminal law, and operations in theater should likewise focus on strengthening criminal justice institutions to bolster security and promote governmental legitimacy. As a more general matter, PME should educate leaders and practitioners on comparative law to broaden their perspectives and prepare them to engage in a world of diverse and varied cultures.

For better or worse, military involvement in civil society building is likely to remain a mainstay of future conflicts. The success of these missions, as with all missions, will depend largely on training and preparation. For military forces engaged in rule of law operations, preparation must include the study of foreign law.

¹²⁵ John H. Merryman suggests that “a cultivated American lawyer should be familiar with the principal features of other major legal systems and have some idea of how lawyers in other major nations think, and why they think that way.” MERRYMAN ET AL., *supra* note 119, at 1.

¹²⁶ See RULE OF LAW HANDBOOK (2010), *supra* note 21, at 93. Previous editions of the *Rule of Law Handbook*, however, were even more explicit on this point. In a section titled “Cultural Blindness or a ‘West Is Best’ Mentality,” earlier editions of the handbook dealt squarely with the dangers of cultural chauvinism. See, e.g., RULE OF LAW HANDBOOK (2009), *supra* note 97, at 222–23. The 2009 edition of the *Rule of Law Handbook* stated,

The inability of host nation legal institutions to operate in a post-conflict environment will present the temptation for those with the physical capabilities—frequently coalition forces—to simply take over legal functions, imposing a US-oriented system in the process. Rule of law planners should not view their mission as writing upon a blank slate, seeking to transplant a US style, common law system in the place of the host nation’s preexisting system. . . . After all, it is the host nation, not coalition forces, that both defines and lives under the rule of law.

Id. The section on cultural blindness was eliminated from the 2010 edition of the handbook.

¹²⁷ John C. Reitz, *How To Do Comparative Law*, 46 AM. J. COMP. L. 617, 624 (1998).

¹²⁸ MERRYMAN ET AL., *supra* note 119, at 1.