

Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm

*Lieutenant Commander Vasilios Tasikas**

I. Introduction

*Today, the greatest challenges that we face emerge more from within states than between them – from states that are either unable or unwilling to apply the rule of law within their borders.*¹

During a three-month deployment to Afghanistan, I was assigned to the Office of the Staff Judge Advocate (SJA) at Combined Forces Command in Kabul (CFC-A). There, I had an opportunity to work with the Chief of International Law² on a whole host of operational law issues traditional encountered by judge advocates in a war zone, namely the law of armed conflict and detention operations. However, my assignment provided me an opportunity not only to practice international law, but an opportunity to put my legal skills to use in “rule of law” operations directed at helping a fledgling democratic government. Moreover, after interviewing numerous judge advocates, I quickly concluded that many of the military attorneys assigned to Kabul were not practicing law in the traditional sense of the word, such as advising commands or prosecuting courts-martial cases, but were devoting the majority of their time to rule of law missions.³

This boots-on-the ground reality for judge advocates comes from the recognition that the conflict in Afghanistan is going to take more than killing or detaining the enemy to achieve victory. In truth, the U.S. military leadership in Afghanistan, then commanded by Lieutenant General Karl Eikenberry, directed United States judge advocates, in cooperation with civilian leadership, coalition forces, and host country officials, to devise and implement programs to assist in transforming a nascent democratic country to govern and be bound by the rule of law.

This article relates some of the undertakings from the rule of law operations that U.S. forces took to the Afghanistan theatre as it existed in the summer of 2006. While this article draws on my own experience and the experiences of other judge advocates in country in an effort to illuminate the many issues military lawyers confront today in post-conflict operations, this article has a greater purpose than just elucidating personal experiences. Rather, the piece signals the broader implications for judge advocates in future military operations and proposes a method to ensure a ready response for future military rule of law missions.

This article is premised on a political context that foresees the U.S. military as having a greater role in nation-building operations within post-conflict environments. However, the U.S. military has spent the last two decades trying to ignore or curtail the reality of lengthy and costly post-conflict operations. This neglect stems from a long-standing, but inaccurate, perception of the proper role of the military as an instrument of national power. This notion yields a strong bias to fund and operate mighty armies and navies to fight and win major wars against major foes. The truth is that the United States has always engaged in protracted military endeavors short of full-scale wars. The reality is that these types of operations will likely become more prevalent, not less, in the future.

Given this assumption, military interventions short of full-scale war will be a given fact for decades to come. Some have argued that this new reality will require increasing collaboration between the military and civilian development agencies,⁴ while others call for a bifurcation of the military into two separate governmental agencies (one purely for war-fighting; the

* U.S. Coast Guard. Written while assigned as the Advanced Operational Law Studies Fellow at the Center for Law and Military Operations (CLAMO), The Judge Advocate General’s School and Legal Center, Charlottesville, Virginia. Lieutenant Tasikas was on special three-month assignment to Combined Forces Command-Afghanistan (CFC-A), Office of the Staff Judge Advocate, International Law Division in the summer of 2006. I am sincerely grateful to Lieutenant Colonel Paul (LTC) Kantwill for his mentorship and good humor, while assigned to CFC-A. I also want to personally thank the two Staff Judge Advocates I served under while at CFC-A, Colonel (COL) Manuel Supervielle and COL David Diner for their leadership and support during my Afghanistan deployment. My appreciation also goes to Professor David P. Fidler, Professor Thomas Nachbar, COL Bruce Pagel, LTC Paul Kantwill, LTC Craig Trebilcock, LTC Laura Klein, LTC Corey Bradley, and Major (MAJ) Carlos Santiago for their encouragement and helpful comments on early drafts.

¹ Secretary Condoleezza Rice, Remarks at the American Bar Association’s Rule of Law Symposium, Capital Hilton, Wash. D.C., Nov. 9, 2005. <http://www.state.gov/secretary/rm/2005/56708.htm>.

² The Chief of International Law at Combined Forces Command-Afghanistan at the time was LTC Paul Kantwill, Judge Advocate, U.S. Army.

³ My mission mandate included conducting interviews with various judge advocates on “lessons learned” and first-person insights on combat operations and on reconstruction and development in Afghanistan. I participated in interviews with over forty judge advocates detailed to Combined Forces Command – Afghanistan (CFC-A), The Combined Security Transition Command-Afghanistan (CSTC-A), Combined Joint Task Force-76, and other subordinate task forces, as well as meetings with lawyers from the Afghanistan Government and International Security Assistance Force (ISAF). From these interviews I was able to extract core issues confronting judge advocates in Afghanistan. What follows is a synthesis of information garnered from those interviews and my own observations and conclusions regarding rule of law operations.

⁴ See Andrew S. Natsios, *The Nine Principles of Reconstruction and Development*, 35 PARAMETERS 4 (Autumn 2005).

other for post-conflict and disaster response operations).⁵ Either way, judge advocates will have to gain additional proficiency in conducting rule of law missions in post-conflict operations.

This increasing synthesis between kinetic operations and nation-building will require that judge advocates gain a broad understanding of how reconstruction and development operate in a post-conflict theatre in order to effectively conduct rule of law operations. If the U.S. military is going to be tasked with post-conflict missions, which by inference includes rule of law line of operations, the critical questions then posed are what organizational force structure should be created and what skills sets should be developed? To support that effort, the judge advocate community must question how best to strengthen its capability and what competencies are required to conduct rule of law in a post-conflict environment.

While judge advocates will continue to focus on the law of armed conflict and military justice, they will also have to gain new and comprehensive skills to confront the likely threat scenarios of the future. This article suggests that the lessons drawn from the development and reconstruction mission in Afghanistan signal that the judge advocate community must augment its training for young military attorneys and tailor its organizational force structure to facilitate and strengthen rule of law efforts in post-conflict operations now and into the future.

II. The Traditional American Military Ethos

American military strategy has traditionally endorsed the notion that the primary role of the armed forces in society is to achieve the political objectives of the State through war. In essence, the military's ethos affirms that "the ultimate objective of all military operations is the destruction of the enemy's armed forces."⁶ There remains a lingering notional legacy that the U.S. military should be limited to operations exclusively dealing with fighting and winning the nation's wars.⁷ Juxtaposed to this strategic belief, military strategists have never earnestly incorporated non-kinetic missions, such as peacekeeping, post-stability operations, or nation-building, into mainstream military doctrine.⁸ Quite simply the idea of these "peace" missions has been antithetical to the military philosophy, doctrine, and culture.⁹

The foundation of American military thinking stems back to Carl von Clausewitz, probably the most celebrated military strategist.¹⁰ Carl von Clausewitz defined war as "an act of force to compel our enemy to do our will."¹¹ "In war," Clausewitz wrote, "the destruction of the enemy is admittedly the purpose of all engagements."¹² From this, one infers that "force" is the means and "the compulsory submission of the enemy to our will it is the ultimate object."¹³

Traditional American military doctrine views war as an engagement between sovereign States with professional armies, modern navies, and sophisticated weapons. "War was clean, independent of politics, and fought with big battalions."¹⁴ This ideal notion was carried on throughout U.S. military thinking.

General Douglas MacArthur, one of the most renowned American generals, regarded the purpose of war in this pure absolute form. According to MacArthur, the goal of war was to "[destroy] the enemy's military power and [bring] the conflict to a decisive close in the minimum of time and with a minimum of loss."¹⁵ MacArthur also believed the overriding principle of war was to crush the enemy. Anything less he viewed as "appeasement."¹⁶

⁵ See THOMAS P.M. BARNETT, *THE BLUEPRINT FOR ACTION: A FUTURE WORTH CREATING* (2005) [hereinafter BARNETT 2005].

⁶ U.S. DEP'T OF ARMY, *FIELD SERVICE REGULATION 77* (1923).

⁷ See THOMAS P.M. BARNETT, *THE PENTAGON'S NEW MAP: WAR AND PEACE IN THE TWENTY-FIRST CENTURY* 107 (2004) [hereinafter BARNETT 2004].

⁸ See Lecture by James Jay Carafono, *Post-Conflict Operations from Europe to Iraq*, delivered July 13, 2004; published by the Heritage Lectures, July 13, 2007, available at <http://www.heritage.org/Research/NationalSecurity/hl844.cfm>.

⁹ See BARNETT 2004, *supra* note 7, at 79-88.

¹⁰ Homepage, Carl von Clausewitz (1780-1831) (Aug. 8, 2007), <http://www.clausewitz.com/CWZHOME/CWZBASE.htm>.

¹¹ CARL VON CLAUSEWITZ, *ON WAR* 606 (1976).

¹² *Id.* at 76.

¹³ *Id.* at 2.

¹⁴ John Fishel, *Little Wars, Small Wars, LIC, OOTW, the Gap, and Things that Go Bump in the Night*, 4(3) *LOW INTENSITY CONFLICT & LAW ENFORCEMENT* 377 (1995).

¹⁵ Allen Gottman, ed., *Testimony of General Douglass MacArthur and of Secretary of Defense George Marshall, in KOREA AND THE THEORY OF LIMITED WAR* 20 (1967) [hereinafter *Testimony*].

¹⁶ *Id.* at 26.

Extrapolated from these notions of war, U.S. military doctrine emerged embracing an idea that the primary focus of the military was to fight major wars where vital national interests are at stake.¹⁷ In addition, U.S. military doctrine embraced the idea that there are two distinct and autonomous instruments of national power, one “military” and the other “political.”¹⁸ Motivated by this ideal conception of war, U.S. military leaders promoted a complete and rigid separation of military affairs and political influence during wartime. Evidence of this fact is General MacArthur’s testimony before the Senate Armed Services and Foreign Relations Committees, where he stated:

The general definition which for many decades has been accepted was that war was the ultimate process of politics; that when all other political means failed, you then go to force; and when you do that, the balance of control, the balance of concept, the main interest involved, the minute you reach the killing stage, is the control of the military.¹⁹

MacArthur added, “There should be no artifice under the nave of politics, which should handicap your own men, decrease their chances for winning, and increase their losses”²⁰

Despite U.S. military history to the contrary, U.S. military thinking has reflected the conceptions espoused by MacArthur. From the Revolutionary War to the Iraq War, traditional military doctrine called for the military only to fight and win wars.²¹

This entrenched doctrine was further solidified after the ill-fated adventurism in Vietnam, which was later compounded by the Beirut tragedy of 1983. The lingering impact from Vietnam was that the United States should avoid limited wars and nation-building ventures.²² The aftermath of the 241 Marines that lost their lives by a suicide bomber in Beirut engendered a belief that the U.S. should eschew peacekeeping operations with ambiguous and ill-defined objectives.²³

Modern U.S. strategists offered narrow conditions for military use overseas. Former Secretary of Defense Caspar Weinberger, a year after the Lebanon bombings, offered a restrictive criterion on the appropriate use of military intervention. In essence, Weinberger expressed readiness to fight whenever vital national interests are at stake and the objective is to win.²⁴ In addition, Weinberger argued that military action should be initiated as a last resort and with “reasonable assurance” of public and Congressional support.²⁵

Colin Powell, former Chairman of the Joint Chiefs, carried this cautious interventionist doctrine forward during and after the Gulf War. In that, he argued that the United States should only intervene with overwhelming force and with an enunciated exit strategy.²⁶ The U.S. military events in Somalia and Haiti further stigmatized nation-building missions for many policymakers and citizenry alike as an inappropriate use of military assets.²⁷

This sentiment is also found in academia. Major General Charles Dunlap, an esteemed author and judge advocate, argued that the “armed forces [should] focus exclusively on indisputably military duties” and “not diffuse [its] energies away from our fundamental responsibilities for war-fighting.”²⁸ Other well-regarded academics have also noted the tendency of

¹⁷ Fishel, *supra* note 14, at 375-77.

¹⁸ See THOMAS K. ADAMS, *MILITARY DOCTRINE AND THE ORGANIZATION CULTURE OF THE UNITED STATES ARMY* 661 (1990).

¹⁹ Testimony, *supra* note 15, at 26.

²⁰ *Id.*

²¹ See Roy K. Flint, *The Truman-MacArthur Conflict: Dilemmas of Civil-Military Relations in the Nuclear Age*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1789*, at 261 (1991).

²² See George C. Herring, *America and Vietnam: The Unending War*, *FOREIGN AFF.* 104 (1991).

²³ See Alvin H. Bernstein, *The Truth About Peacekeeping*, *WKLY. STANDARD* 24 (Sept. 22, 1997).

²⁴ Casper W. Weinberger, *The Uses of Military Power*, Speech at the National Press Club, Washington, D.C. (Nov., 28, 1984), available at http://www.afa.org/magazine/jan2004/military_power.pdf.

²⁵ *Id.*

²⁶ Michael Barone, *War Is Too Important to Be Left to the Generals*, *WKLY. STANDARD* 31 (June 10, 2002).

²⁷ Nina M. Serafino, Foreign Affairs, Defense, and Trade Division, *Peacekeeping and Related Stability Operations: Issues of U.S. Military Involvement*, Congressional Research Service Report for Congress 4 (July 13, 2006), available at http://www.history.navy.mil/library/online/peacekeep_stab%20ops.htm.

²⁸ Charles J. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, 22 *PARAMETERS* 2 (Winter 1992-93). Currently, Major General and Deputy Judge Advocate of the United States Air Force.

post-conflict and nation-building operations to challenge the values of the warrior ethos and possibly undercut combat effectiveness during wartime.²⁹

The Supreme Court has also recognized this line of thinking in their seminal case, *Parker v. Levy*, where the Court stated that “[t]he differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or be ready to fight wars’”³⁰ Even George W. Bush, when a presidential candidate, reaffirmed this idea in the 2000 campaign when he declared: “I don’t think our troops ought to be used for what’s called nation-building. I think our troops ought to be used to fight and win war.”³¹

III. The Reality of Modern Military Intervention

The sentiments expressed in the previous section, however, are not in accord with the realities of military intervention throughout U.S. military history. From its inception, the U.S. military has been involved in small wars, insurgency operations, constabulary missions, and nation-building endeavors. The U.S. military has raided the Barbary Coast;³² pacified the Western Frontier;³³ fought rebels in the Philippines;³⁴ conducted constabulary missions in Cuba, Panama, and Nicaragua;³⁵ occupied Haiti and the Dominican Republic;³⁶ conducted peacekeeping operations in China;³⁷ and rebuilt Germany and Japan.³⁸

Despite the fact that military leaders and policy makers have promoted the mythos that the armed forces only exist to fight and win major wars of vital national interest, American history has been dominated by the military engaged in operations short of full-scale Clausewitzian war. These countless military skirmishes comprised no frontlines and encompassed no decisive battles. There was no strategy to annihilate the enemy; instead these events were better characterized on how military tactical force was always subordinate to broader political and diplomatic considerations. Nevertheless, this military reality has never caught up with the American military ethos. As one commentary reveals: “Despite the existence of significant experience and doctrine within the Marine Corps, an even greater amount of experience in the Army, and important foreign sources of relevant doctrine, there is little interest in and less acceptance of the role of the American military in small wars.”³⁹

Thus, while avoiding the notion, military planners could not ignore the certainty that the U.S. military would intervene in operations other than war.⁴⁰ This is no truer than in post-Cold War era. Despite the past-decade long rhetoric that the United

²⁹ See, e.g., MORRIS JANOWITZ, *THE PROFESSIONAL SOLDIER* 418 (1960); SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 61 (1985).

³⁰ *Parker v. Levy*, 417 U.S. 733, 743 (1974) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

³¹ Presidential Debate between Vice President Al Gore and Governor George W. Bush (Oct. 11, 2000) (transcript available at Commission on Presidential Debates, <http://www.debates.org/pages/trans2000b.html>).

³² RICHARD ZACKS, *THE PIRATE COAST: THOMAS JEFFERSON, THE FIRST MARINES, AND THE SECRET MISSION OF 1805* (2005); FRANKLIN T. LAMBERT, *THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC* (2005); JOSEPH WHEELEN, *JEFFERSON’S WAR: AMERICA’S FIRST WAR ON TERROR 1801-1805* (2003).

³³ TONY R. MULLIS, *PEACEKEEPING ON THE PLAIN: ARMY OPERATIONS IN BLEEDING KANSAS* (2004); DURWOOD BALL, *ARMY REGULARS ON THE WESTERN FRONTIER, 1848-1861* (2001).

³⁴ BRIAN MCALLISTER LINN, *THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR 1899-1902* (2000).

³⁵ LESTER D. LANGELY, *THE UNITED STATES AND THE CARIBBEAN IN THE TWENTIETH CENTURY* (4th ed. 1989); LESTER D. LANGLEY, *THE BANANA WARS: AN INNER HISTORY OF AMERICAN EMPIRE 1900-1934* (1983); IVAN MUSICANT, *THE BANANA WARS: A HISTORY OF THE UNITED STATES MILITARY INTERVENTION IN LATIN AMERICA FROM THE SPANISH-AMERICAN WAR TO THE INTERVENTION OF PANAMA* (1990).

³⁶ HANS SCHMIDT, *THE UNITED STATES OCCUPATION OF HAITI: 1915-1934* (1995). BRUCE J. CALDER, *IMPACT OF INTERVENTION: THE DOMINICAN REPUBLIC DURING THE U.S. OCCUPATION OF 1916-1924* (2006).

³⁷ JOHN KING FAIRBANKS, *THE UNITED STATES AND CHINA* (4th ed. 1979).

³⁸ JAMES DOBBINS, ET. AL., *AMERICA’S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ* (2003).

³⁹ John Fishel, *supra* note 14, at 379.

⁴⁰ Until recently the Department of Defense described these operations as Military Operations Other Than War (MOOTW). As defined in the now discontinued *Joint Chiefs of Staff, Joint Publication 3-07, Joint Doctrine for Military Operations Other Than War (2001)*, MOOTW encompasses:

A broad range of military operations and support a variety of purposes, including: supporting national objectives, deterring war, returning to a state of peace, promoting peace, keeping day-to-day tensions between nations below the threshold of armed conflict, maintaining U.S. influence in foreign lands, and supporting U.S. civil authorities consistent with applicable law.

JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR II-1 (2001).

States will not commit troops unless vital national interest are at stake and only with overwhelming force,⁴¹ the United States has shown a greater willingness over the last fifteen years to intervene in multifaceted military operations that were anything but total war. Since the early 1990's, the United States has been involved in seven post-conflict stability operations—roughly one nation-building mission every two years.

The United States deployed military troops to Panama (1989), Somalia (1993), Haiti (1994), Bosnia (1996), and Kosovo (1999) with a strategy short of the traditional military “fight and win” objective. Currently, the United States sees its armed forces conducting a full array of post-conflict operations in Afghanistan and Iraq.

The reason for these interventions in a post-9/11 world has become clear. Failed or weak states matter.⁴² They matter not only for humanitarian concerns, but also for national security reasons.⁴³ The 2002 National Security Strategy (NSS) focuses on the potential menace caused by failed states. “America is not threatened less by conquering states than we are by failing ones.”⁴⁴ In his introductory letter to the NSS, President Bush underscores this reality: “The events of September 11, 2001, taught us that weak states, like Afghanistan, can pose as great a danger to our national interests as strong states.”⁴⁵

The 2006 National Security Strategy carries over this notion that the prevailing threat to the United States for the last decade and half comes from nonstate actors located inside failed states.⁴⁶ This emphasis on failed states educes the hard reality that the United States military will intervene in stability and reconstruction operations for years to come. These missions will require a rule of law component.⁴⁷

Based on this new reality of military intervention and post-conflict operations, the military establishment is reformulating its doctrine - encompassing what is now known as “stability operations” on equal footing with major combat operations. The Pentagon is slowly coming around to the notion that high-tech weapons and massive firepower are not always beneficial or constructive in modern day military undertakings.⁴⁸ Acknowledging today's strategic realities, the military establishment is incorporating “soft” tactics in missions where the goal is not to annihilate the enemy's armed forces but to achieve a political end-state.⁴⁹ Thus, after years of trying to limit U.S. involvement in the “lesser included” operations, policy makers and military strategists are launching a momentous endeavor to improve the capability of the military to conduct stability operations. As articulated below, one of the principal lines of operations in stability operations includes rule of law.

IV. The Emergence of the Doctrine of Stability Operations

Since the attacks on America on September 11, 2001, the U.S. military has now come to fully appreciate the importance of stability operations. With America's modern Leviathan force and war-fighting capability, modern U.S. wars have proven to be quick and nearly painless.⁵⁰ However, following a cessation of major military operations, the post-conflict environment has proven to be more problematic.⁵¹

⁴¹ See Condoleezza Rice, *Campaign 2000: Promoting the National Interest*, FOREIGN AFF. (Jan./Feb. 2000), available at <http://www.foreignaffairs.org/2000/0101faessay5/condoleezza-rice/campaign-2000-promoting-the-national-interest.html>.

⁴² See 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 361-67 (2004).

⁴³ See John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25:4 WASH. Q., 85, 85 (Autumn 2002); Douglas H. Dearth, *Failed States: An International Conundrum*, 5-2 DEFENSE INTELLIGENCE J. 119, 122-23 (1996).

⁴⁴ THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Sept. 2002, at 1 [hereinafter NATIONAL SECURITY STRATEGY 2002], available at <http://www.whitehouse.gov/nsc/nss/html>.

⁴⁵ THE NATIONAL SECURITY STRATEGY 2002, Cover Letter, *supra* note 44.

⁴⁶ NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA, Mar. 2006, at 15, available at <http://www.whitehouse.gov/nsc/nss/2006/sectionIV.html>.

⁴⁷ *Id.* at 16.

⁴⁸ See, e.g., U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-27 (Dec. 2006) [hereinafter FM 3-24]. (“Sometimes doing nothing is the best reaction;” “Some of the best weapons for counterinsurgents do not shoot.”); Milan Vego, *The Network-Centric Warfare Illusion*, ARMED FORCES J., Jan. 2007, at 17 (“Technology is considered not an aid to war fighters but the very heart of warfare. Everything else is subordinated to the ‘system.’”).

⁴⁹ FM 3-24, *supra* note 48, at foreword. “Soldiers and Marines are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law.” *Id.* See generally also JOSEPH S. NYE, *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (1994).

⁵⁰ See Jeffrey Record, *Why the Strong Lose*, PARAMETERS 16, 25-27 (Winter 2005-06).

⁵¹ *Id.*

While this fact is obvious in Iraq, it is also true in Afghanistan. In the region, there has been a resurgence of the Taliban. Insurgency attacks were up 400% from 2005 to 2006.⁵² In fact, 2006 has proven to be the bloodiest year since the beginning of U.S. military intervention in 2001.⁵³ Provincial warlords continue to be the *de facto* rulers outside of Kabul. Opium production is at an all-time high. Crime is on the rise. The lack of essential public services, such as water and electricity, continue to be a major setback. Most ominous, Al Qaeda has regrouped.⁵⁴

The recent post-conflict experiences in Afghanistan (and Iraq) have impelled policy makers within the U.S. government to improve both the planning and execution of stability operations.⁵⁵ The Bush Administration, which came into power opposed to the notion of using U.S. military forces to engage in nation-building, has shifted direction by acknowledging that the United States “must also improve the responsiveness of our government to help nations emerging from tyranny and war . . . and that means our government must be able to move quickly to provide needed assistance.”⁵⁶ In turn, President Bush issued National Security Presidential Directive (NSPD) 44 for the purpose of improving “coordination, planning, and implementation for reconstruction and stabilization assistance for foreign states and regions at risk of, in, or in transition from conflict or civil strife.”⁵⁷ The Department of State created the Office of the Coordinator for Reconstruction and Stabilization (S/CRS) in order “to enhance our nation's institutional capacity to respond to crises involving failing, failed, and post-conflict states and complex emergencies.”⁵⁸

This impetus has also drawn the Department of Defense into an arena that before September 11 it wished to minimize, if not ignore completely. In November 2005, the Deputy Secretary of Defense issued Directive 3000.05, entitled “Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operation.”⁵⁹ The directive is an unprecedented initiative to declare stability operations as a “core U.S. military mission that the [military] shall be prepared to conduct and support.”⁶⁰ Moreover, the publication directs stability operations “shall be given priority comparable to combat operations and be explicitly addressed and integrated across all Department of Defense (DOD) activities.”⁶¹

The doctrine of stability operations is a new peculiarity in military literature typically described in a fashion that at first blush appears to be miscellaneous to the traditional function of the military. The term, in and of itself, connotes military operations which are “not war” and missions seemingly best left to civilian agencies to execute.

The 2006 Joint Publication 3-0, *Doctrine for Joint Operations*, defines stability operations in this fashion by stating that stability operations “seek to maintain or reestablish a safe and secure environment and provide essential governmental services, emergency infrastructure reconstruction, or humanitarian relief.”⁶² Directive 3000.05 echoes the Joint Publication 3-0 by delineating the focus of Stability Operations.

Stability Operations are conducted to help establish order that advances U.S. interest and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet

⁵² Walter Pincus, *U.S. Sees New Al-Qaeda Threat*, WASH. POST, Feb. 28, 2007, at A4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Phil Kearley, *Stability Operations Concepts and Capabilities Emerging from JFCOM/Joint Experimentation*, U.S. Joint Forces Command, Joint Experimentation Directorate (J-9), at 2 (Nov. 2004). However, the recognition that the U.S. military was not prepared for post-conflict operations goes back to lessons learned from the 1989 U.S. invasion of Panama. See RICHARD H. SHULTZ, JR. IN THE AFTERMATH OF WAR: U.S. SUPPORT FOR RECONSTRUCTION AND NATION-BUILDING IN PANAMA FOLLOWING JUST CAUSE (1993).

⁵⁶ President George W. Bush, Speech at the International Republican Institute Dinner, Renaissance Hotel, Washington D.C. (May 18, 2005), available at <http://www.whitehouse.gov/news/releases/2005/05/20050518-2.html>.

⁵⁷ NATIONAL SECURITY PRESIDENTIAL DIRECTIVE/NSPD-44, MANAGEMENT OF INTERAGENCY EFFORTS CONCERNING RECONSTRUCTING AND STABILIZATION, 1 (Dec. 7, 2005).

⁵⁸ See Department of State, Office of the Coordinator for Reconstruction and Stabilization website, available at <http://www.state.gov/s/crs/> (last visited Feb. 2, 2007).

⁵⁹ U.S. DEP'T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005) [hereinafter DOD DIR. 3000.05].

⁶⁰ *Id.* at 2.

⁶¹ *Id.*; see also REPORT OF THE DEFENSE SCIENCE BOARD TASK FORCE ON INSTITUTIONALIZING STABILITY OPERATIONS WITHIN DOD (Sept. 2005) (urging the Pentagon to accelerate its capabilities to conduct post-conflict stability operations).

⁶² JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, DOCTRINE FOR JOINT OPERATIONS V-I (Sept. 2006) [hereinafter JOINT PUB. 3-0].

humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society.⁶³

The objectives of stability operations are, thus, aimed at deterring continued armed conflict, resolving disputes, providing essential services, and supporting civil authorities. To this end, DOD Directive 3000.05 includes three general tasks involved in stability operations, which include: rebuilding indigenous institutions (e.g. security forces, correctional facilities, and judicial systems); reviving and rebuilding the private sector; and developing representative government institutions.⁶⁴

The characteristics of stability operations are seemingly the antithesis to traditional war fighting ethos. Operational commanders must apply operating principles that differ from traditional principles of war.⁶⁵ Andrew Natsios, the former head of U.S. Agency for International Development (USAID), delineates nine principles to be applied in post-conflict stability operations, which include: ownership, capacity building, sustainability, selectivity, assessment, results, partnership, flexibility, and accountability.⁶⁶ However, these principles, although easy to define, are often difficult to implement during stability operations. At its basic essence, it means that military strategists must cease viewing the military within the context of conflict and violence and start viewing the military in the context of peace and security. Or as one analyst succinctly put it, strategists must view “war within the context of everything else.”⁶⁷ A focus on winning wars is only a partial paradigm.

During stability operations, the military must adjust from its “fight to win” doctrine and use of overwhelming force and, instead, employ restrictive, and sometimes complex, rules of engagement. Success must be measured politically and not militarily. Furthermore, the military must work in close coordination with international organizations, non-governmental organizations, other U.S. governmental actors, and host-nation civil authorities; and commanders must accomplish their objective by cooperating and persuading rather than commanding and directing. Lastly, while conducting stability operations, individual tactical decisions can have dramatic and immediate strategic implications. Therefore, senior commanders and junior personnel alike must be strongly familiar not only with the operational factors of time, space, and force, but also with a nation’s history, economy, and culture.

These features place unique demands on an operational commander during stability operations. Joint Publication 3-0 notes that while many stability operations will involve other civilian agencies, the “U.S. military forces should be prepared to lead the activities necessary to accomplish these tasks when indigenous civil, [U.S. Government], multinational or international capacity does not exist or is incapable of assuming responsibility.”⁶⁸ Moreover, the publication adds that “[t]he 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.”⁶⁹ These assertions recognize the reality that military forces in some, if not all, post-conflict stability operations, will be the only governmental entity able of accomplishing the mission.

V. Rule of Law – The Fifth Pillar of Stability Operations

The Office of the Coordinator for Reconstruction and Stabilization has identified five pillars that are germane in stability operations.⁷⁰ These essential tasks include: security; governance and participation; humanitarian assistance and social well-being; economic stabilization and infrastructure; and justice and reconciliation.⁷¹

⁶³ DOD DIR. 3000.05, *supra* note 59, at 2.

⁶⁴ *Id.*

⁶⁵ U.S. DEP’T OF ARMY, ARMY FIELD MANUAL 100-5, OPERATIONS, at 2-4 to 2-6 (June 1993). The nine principles of war as outlined in FM 100-5 are: objective, offensive, mass, economy of force, maneuver, unity of command, security, surprise, and simplicity. *Id.*

⁶⁶ Natsios, *supra* note 4, at 4-20.

⁶⁷ BARNETT 2004, *supra* note 7, at 7.

⁶⁸ JOINT PUB. 3-0, *supra* note 62, at V-24.

⁶⁹ *Id.*

⁷⁰ See Department of State, *Post-Conflict Reconstruction Essential Tasks*, Apr. 2005, available at www.state.gov/documents/organization/53464.pdf; see also ROBERT C. ORR, ed., WINNING THE PEACE: AN AMERICAN STRATEGY FOR POST-CONFLICT RECONSTRUCTION (2004) (identifying only four pillars of post-conflict reconstruction: security, governance and participation, social and economic well-being, and justice and reconciliation).

⁷¹ *Id.*

The justice and reconciliation or rule of law pillar involves building and maintaining a legal system that is characterized by “well-functioning, respected courts, fair and adequate legal codes, well-trained police, and respect for civil and political rights.”⁷² These elements are in an effort to bring about a larger and broader end-state that is: establishing a government bound by the law, guaranteeing equality before the law, providing law and order, ensuring an efficient and predictable judicial system, and promoting human rights.⁷³ However, the goal of rule of law is not ultimately realized except through norm-creation and cultural conversion.⁷⁴ “Without a widely shared cultural commitment to the idea of the rule of law, courts are just buildings, judges are just bureaucrats, and constitutions are just pieces of paper.”⁷⁵

VI. Rule of Law Operations in Afghanistan – The Role of Judge Advocates

The consequences of the Pentagon embracing stability operations on the Judge Advocate General (JAG) community cannot be completely realized at this point. However, one thing has become apparent as a constant in this discussion—that is the idea that rule of law has emerged as a crucial and indispensable element to success in post-conflict environments. And JAs are at the “front lines” of the rule of law campaign in post-conflict Afghanistan.

The challenges to rule of law in post-war Afghanistan are formidable. In the past thirty years, the country has endured a decade long occupation and authoritarian rule by the Soviets, years of internal fighting and civil unrest, followed by despotism and oppression by the Taliban.⁷⁶ This long and tragic history has left Afghanistan one of the poorest countries in the world.⁷⁷ In turn, this has produced a country with a weak central government and an economy largely dependent on foreign aid.⁷⁸

After nearly three decades of war, chaos, and repression, much of the physical infrastructure has been destroyed and social services have been seriously disrupted.⁷⁹ Compounding the problem, Afghanistan suffers from low educational levels, scarcity in safe drinking water, poor health conditions, inadequate medical care, and shortages of safe housing and electricity.⁸⁰ Less than fifteen percent of the land is arable,⁸¹ and there is a heavy reliance on poppy cultivation and opium trade accounting of almost sixty percent of Afghanistan’s GDP and supplying over eighty percent of the world’s heroin consumption.⁸² To boot, the countryside is plagued with land mines and unexploded ordnance and less than twenty percent of the roads are paved.⁸³

As would be self-evident under these conditions, the Afghanistan rule of law apparatus also suffers from serious systemic deficiencies. Warlords continue to operate with impunity.⁸⁴ Corruption is rampant.⁸⁵ Salaries for judges and prosecutors are extremely low.⁸⁶ The judges and prosecutors that are employed tend to lack formal legal education.⁸⁷ There

⁷² JANE STROMSETH, ET AL., CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 69 (2006).

⁷³ See Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD 15-28 (Thomas Carothers ed. 2006).

⁷⁴ See John Norton Moore, *Toward a New Paradigm: Enhanced Effectiveness in United Nations Peacekeeping, Collective Security, and War Avoidance*, 37 VA. J. INT’L L. 811, 860 (1997). See also STROMSETH, *supra* note 72, at 75.

⁷⁵ STROMSETH, *supra* note 72, at 76.

⁷⁶ MICHAEL SCHEUER, IMPERIAL HUBRIS 30-37 (2004).

⁷⁷ U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK (2007) [hereinafter CIA FACT BOOK].

⁷⁸ *Id.*

⁷⁹ Dennis A. Rondinelli, *International Goals and Strategies for Afghanistan’s Development: Reconstruction and Beyond*, in BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSON FROM DEVELOPMENT EXPERIENCE 14 (John D. Montgomery & Dennis A. Rondinelli eds., 2004).

⁸⁰ CIA FACT BOOK, *supra* note 77; Larry P. Goodson, *The Lessons of Nation-Building in Afghanistan*, in NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ 154-55 (Francis Fukuyama ed. 2005); Rondinelli, *supra* note 79, at 13-14.

⁸¹ Rondinelli, *supra* note 79, at 13-14.

⁸² Goodson, *supra* note 83, in NATION-BUILDING: BEYOND AFGHANISTAN AND IRAQ 155; see also CIA FACT BOOK, *supra* note 80. For a comprehensive analysis of Afghanistan’s opium economy see *The Opium Economy in Afghanistan: An International Problem*, United Nations, Office of Drug and Crime (2003).

⁸³ Rondinelli, *supra* note 82, at 13-14.

⁸⁴ Barnett R. Rubin, *Saving Afghanistan*, FOREIGN AFF. (Jan./Feb. 2007), available at <http://www.foreignaffairs.org/20070101faessay86105/barnett-r-rubin/saving-afghanistan.html>.

⁸⁵ *Id.*; see also Paul Watson, *In Afghanistan, Money Tips the Scales of Justice*, L. A. TIMES, Dec. 18, 2006, at A1.

⁸⁶ Interview with COL Richard E. Fay, Rule of Law Officer, Combined Forces Command in Kabul, Afghanistan (Sept. 6, 2006) (noting that an Afghan civil judge makes about half the salary of a private in the Afghan National Army) [hereinafter Fay Interview].

are only a handful of licensed lawyers in Afghanistan for a population of thirty-one million.⁸⁸ Most police are illiterate.⁸⁹ The physical infrastructure, especially prisons, in the hinterlands is in disrepair and substandard.⁹⁰

The Afghan legal system also presents unique challenges. In Afghanistan, legal sources emanate from three separate legal traditions: Sharia law stemming from the Qur'an and Sunna; Secular law modeled after the French Napoleonic system, and Phushtunwali deriving from a centuries old honor-based tribal law.⁹¹ While all three have co-existed for hundreds of years, they have never been fully reconciled.

The mandate for rule of law operations in Afghanistan occurred shortly after the U.S. invasion in October 2001. On 5 December 2001, the international community concluded a Security Council agreement endorsing The Agreement on Provisional Arrangement in Afghanistan Pending the Re-establishment of Permanent Government Institutions (Bonn Agreement).⁹² Among other things, the parties stipulated that achieving the rule of law was a fundamental and central goal among reconstruction efforts in Afghanistan.⁹³ The Bonn Agreement set a desired end state in Afghanistan with a "domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions."⁹⁴

The Bonn Agreement was the foundational document that outlined the international community's effort to rebuild Afghanistan based on a "lead nation" model. In essence this approach put different country teams in the lead for developing the various post-conflict pillars. Germane to the rule of law field, Italy was charged with reforming the Afghan judicial system.⁹⁵ Germany was charged with developing the Afghan National Police.⁹⁶ The United States was given the mandate to reform the Afghan National Army, including military law reform.⁹⁷

At the theatre command level, the central objective of the rule of law mission in Afghanistan is to build self-confidence in an embryonic government emerging from a quarter of a century of war, anarchy, and tyranny.⁹⁸ Put another way, U.S. teams sought to bolster the ability of the new government to govern by the rule of law and inculcate Afghan society with the belief in the rule of law.⁹⁹

Along with these conditions, Combined Forces Command's operational lines made rule of law a high priority.¹⁰⁰ The CFC-A's guidance was threefold. First, it directed military personnel to seek out realistic, affordable, and practical justice sector improvements.¹⁰¹ Second, capacity building would require a holistic approach by linking key elements of rule of law, including courts, prisons, police, and lawyers.¹⁰² Lastly, it recognized a commitment to indoctrinate both Afghan government officials and the population with the firm belief in the rule of law.¹⁰³

⁸⁷ *Id.*

⁸⁸ See Amnesty International, *Afghanistan: Re-establishing the Rule of Law* 31-33 (Aug. 14, 2003), available at <http://www.web.amnesty.org/library/index/engasa110212003>.

⁸⁹ Fay Interview, *supra* note 86.

⁹⁰ *Id.*

⁹¹ See Frank E. Vogel, *An Introduction to Law of the Islamic World*, 31 INT'L. J. LEGAL INFO. 355 (2003); see also Special Report, *Honor Among Them: Thieves, Murderers, Rapists; and How the Pushtuns' Ancient Trial Code Is Fighting for Survival Against Radical Islam*, ECONOMIST, Dec. 19, 2006, at 36.

⁹² Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, U.N. Doc. S/2001/1154 (Dec. 5, 2001) [hereinafter Bonn Agreement].

⁹³ See Charles H. Norchi, *The Rule of Law as a Goal in Afghanistan*, in BEYOND RECONSTRUCTION IN AFGHANISTAN: LESSONS FROM DEVELOPMENT EXPERIENCE 118 (John D. Montgomery & Dennis A. Rondinelli eds., 2004).

⁹⁴ Bonn Agreement, *supra* note 92, art. II.2.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Interview with COL Manuel Supervielle, Staff Judge Advocate, Combined Forces Command, in Kabul, Afghanistan (July 19, 2006) [hereinafter Supervielle Interview].

⁹⁹ *Id.*

¹⁰⁰ Fay Interview, *supra* note 86.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

Combined Security Transition Command-Afghanistan (CTSC-A),¹⁰⁴ a subordinate command to both CFC-A and the U.S. Embassy in Afghanistan, also had operations that promoted the rule of law. The CSTC-A's mission statement states that it "in partnership with the Government of the Islamic Republic of Afghanistan and the international community, is to plan, program and implement . . . reforms of the Afghan National Security Forces in order to develop a stable Afghanistan, strengthen the rule of law, and deter and defeat terrorism within its borders."¹⁰⁵

The CSTC-A's Strategic Reform Division (SRD) was charged with reforming the Afghan National Army (ANA), while the Police Reform Division (PRD) was responsible for reforming the Afghan National Police (ANP) force.¹⁰⁶ Within each division there were U.S. legal mentors to advise and train the ANA and ANP legal personnel. For example, the SRD legal team role was to assist the Head of the Legal Department for the General Staff of the Afghan National Army, in essence the Judge Advocate General of the ANP. Their legal mentor counterparts at PRD had a similar task advising the Legal Advisor to the Minister of Interior and Chief of Legal Affairs for the ANP.

Recognizing that legal judicial reform was a precondition for a secure, democratic, and economically viable Afghanistan, rule of law practitioners took on a whole host of initiatives to maximize legal reform in a fledgling government. Judge advocates' involvement in rule of law took on one of several roles, including as advisers to commanders and their staff on legal reform initiatives, as instructors to Afghan National Army attorneys on military justice, as mentors to judges and governmental officials, as drafters of Afghan laws and presidential decrees, and as facilitators at provincial rule of law conferences.

During the summer of 2006, one of the feature accomplishments by the CFC-A rule of law team was to draft a U.S. strategic plan for the implementation of the rule of law program. Surprisingly, five years after the U.S. invasion of Afghanistan there was no overarching design on how the United States would support rule of law efforts in country. On behalf of the Office of the Director for Rule of Law at the U.S. Embassy in Kabul, judge advocates crafted a five-year plan on rule of law initiatives. The master document listed a vision, key participants, opportunities and threats, and key detailed initiatives required to succeed in Afghanistan. More importantly, it described the desired end state and the resources necessary to reform the Afghan justice system.¹⁰⁷

Rule of law practitioners were active in drafting necessary laws and regulations believed to be vital to the government's effectiveness, creating a secure setting, and fostering economic viability. For example, the SRD team was instrumental in developing ANA's Military Criminal Procedure Code and military punitive articles.¹⁰⁸ The PRD counterparts worked on drafting and implementing internal police disciplinary policy and regulations. The international and operational law team at CFC-A drafted decrees, laws, and regulations regarding border control and criminal procedure.

Rule of law practitioners were the first to recognize that creating a functional legal system requires more than the enactment of necessary laws, but requires a well-functioning judicial system and an ethical law enforcement apparatus to ensure uniform and fair application of those laws. To this end judge advocates were instrumental in mentoring various Afghan officials that ranged from high ranking ministerial officials to court-martial defense attorneys on the full gambit of legal issues including military justice, international law of armed conflict, human rights law, environmental law, ethics, fiscal law, and personnel law. However, efforts also included management issues such as organizational staffing, case management, anti-corruption reform, investigatory actions, and police tactics.¹⁰⁹

On a regular basis, judge advocates met with governors and provisional justice sector officials to assess their concerns and priorities in rule of law reform. Military teams routinely coordinated their efforts and information with U.S. Embassy officials and Provincial Reconstruction Teams to identify targets of opportunity. In an effort to extend the central government's authority, judge advocates in close coordination with Department of State, Department of Justice, USAID, and non-governmental agencies, facilitated in launching provincial justice programs, such as in Wardak Province located twenty miles southwest of the capital city. The success in the Wardak model has led to U.S. Embassy sponsored initiatives in four other provinces with the hope of expanding the process to other provinces.¹¹⁰

¹⁰⁴ CSTC-A, *Fact Sheet* (Apr. 12, 2006), available at http://oneteam.centcom.mil/fact_sheets/CSTC-A%20Fact%20Sheet%20-%202012%20April%202006.pdf.

¹⁰⁵ CSTC-A, *Mission Statement*, available at <http://oneteam.centcom.mil/default.aspx> (last visited Sept. 25, 2007).

¹⁰⁶ CSTC-A, *Fact Sheet*, *supra* note 104.

¹⁰⁷ Fay Interview, *supra* note 89.

¹⁰⁸ Interview with Lieutenant Commander Scott E. Johnson, Legal Mentor, Strategic Reform Division, CSTC-A, in Kabul, Afghanistan (Aug. 11, 2006). See also Major Sean M. Watts & Captain Christopher E. Martin, *Nation-Building in Afghanistan: Lessons Identified in Military Justice Reform*, ARMY LAW., May 2006, at 1.

¹⁰⁹ *Id.*

¹¹⁰ Fay Interview, *supra* note 86.

Judge advocates were also active members of Provincial Justice Conferences. In an effort to construct a coordinated and holistic approach to rule of law, judge advocates under the auspices of the U.S. Embassy and working with other coalition and international partners, would meet once a month with local governmental officials including judges, police, prosecutors, prison wardens, and public defenders. The aim was to assess the current state of the legal system and provide a comprehensive and integrated way forward.¹¹¹

This assessment included tangible issues like the condition of the physical infrastructure and needed equipment. It included collecting demographics and criminal data in the province, such as the population size, number of police, number of arrests, ongoing criminal cases, and prison population breakdown. But these assessments also included subjective assessments such as the condition of defendants while in confinement, access to defense clients at various states of the criminal process, and public perception of the secular legal system. Once a full and comprehensive assessment was done with input from all players, rule of law practitioners would move forward on an integrated strategic plan and coordinate efforts with the local government.

Lastly, judge advocates facilitated and supported efforts to rehabilitate the infrastructure and apparatus of the Afghan justice system utilizing Commander's Emergency Response Program (CERP) funds.¹¹² These rule of law endeavors included constructing modern courthouses and prisons, providing vehicles for a justice motor-pool, funding defense counsel services, and launching public awareness campaigns. In addition, they secured funding to equip facilities with office equipment, furniture, vehicles, and supplies essential for a functioning justice system.

VIII. The Missing Link – The Seventh Core Competency and Rule of Law Joint Command

Added to the cavalcade of internal challenges confronting Afghanistan, there is one major factor that greatly impedes rule of law progress in Afghanistan. The simple fact is that there are few rule of law operators in Afghanistan, a country the size of Texas; and the ones who were there tended to have no training in judicial reform or foreign development experience. Thus, rule of law endeavors were proving much more problematic to implement not only because of the conditions in Afghanistan, but also because of the dearth of rule of law operators and paucity of rule of law training.

This problem is compounded by the fact that there is limited information to judge advocates preparing to deploy to Afghanistan. As one judge advocate put it, "Anecdotally, we understand that the judicial system in Afghanistan needs great work at the provincial and local levels. Without accompanying data, however, it is difficult to determine where best to begin our efforts."¹¹³

Although the United States often referred to the rule of law as one of its highest priorities for Afghanistan post-conflict goals, the necessary manpower fell well short of effectively reaching the desired end state. The joint manning document (JMD) only called for one O-4 (Army major) "rule of law" judge advocate officer (Army major) in the CFC-A SJA's office. The CSTC-A was slated only for one O-5 (Navy commander), one O-4 (Navy lieutenant commander) judge advocate, and one contract civilian. On the Strategic Reform Division, the JMD only called for one civilian contractor to work with the entire Ministry of Interior and the ANP.

While the JMD required only a few judge advocates's to conduct the rule of law mission, the reality on the ground revealed something quite different. In CFC-A, the SJA's office enlarged the rule of law team by repositioning an O-6 judge advocate (Army colonel) at the helm and adding one other O-6 (Navy captain). In addition, the CFC-A Civil-Affairs directorate staffed an O-5 judge advocate (Army lieutenant colonel), whose focus was on rule of law.

At the CSTC-A command, restructuring was also required to handle the demand of the rule of law goal. The SRD team was augmented by an O-3 judge advocate from the Defense Institute of International Legal Studies. And the SJA at CSTA-A also devoted much of his time to assisting the one civilian contractor at SRD toward reforming legal issues affecting the Afghan police force.

One striking fact about the breadth and weight of rule of law missions among U.S. judge advocates in Kabul arose during interviews. Out of the eighteen judge advocates assigned to CFC-A and CSTC-A during the summer of 2006, fifteen of them

¹¹¹ *Id.*

¹¹² National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1202(a), 119 Stat. 3136, 3455-56. For a general overview and brief history and purpose of CERP, see INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, OPERATIONAL LAW HANDBOOK 273-74 (2006); see also LTC Mark Martins, *No Small Change of Soldering: The Commander's Emergency Response Program (CERP) in Iraq and Afghanistan*, ARMY LAW., Feb. 2004, at 1.

¹¹³ Memorandum, LTC Paul S. Wilson, Staff Judge Advocate, 82nd Airborne Division, to Director, Center for Law and Military Operations, subject: Afghanistan Rule of Law Initiatives (30 Nov. 2006) (on file with CLAMO).

were conducting rule of law operations in one form or another at least fifty percent of the time. That is, over eighty percent of judge advocates stationed at Kabul were fully engaged in rule of law. Thus, although military attorneys may have deployed expecting to practice operational law¹¹⁴ or one of the six core legal competencies of JAG community,¹¹⁵ once on the ground they were performing tasks to bring about the legal reform in a foreign country. The logical conclusion from this factor is that the legal teams in Afghanistan were not staffed for one of the emerging core competencies, namely rule of law reform.

Moreover, judge advocates were not trained for rule of law operations. As articulated by current military doctrine, the mission of the judge advocate is “to provide professional *legal support* at all echelons of command throughout the range of military operations.”¹¹⁶ As such, military attorneys are trained to provide legal advice and services to assist military operations; but not to act as planners or operators performing military operations. However, the experience in Afghanistan is proving that this model is outdated and causing a capability gap. The need to recognize rule of law as a core competency is driven by on-the-ground imperatives.

During my three-month deployment, I interviewed numerous judge advocates from each service, coalition military attorneys from Canada and United Kingdom, and held discussions with Afghan government lawyers. While those I met provided some practical or tactical lessons learned, most were eager to discuss systematic transformation measures that would impact on the strategic rule of law mission in country. In other words, the major theme running through all my discussions was the complexity of rule of law operations and the great necessity of understanding the broader context of development, reconstruction, and reform in post-conflict societies.

If there was one generally agreed-upon lesson from rule of law operators in Afghanistan, it is this: judge advocates will have to gain additional competencies and expertise in rule of law operations in order to effectively execute the broader U.S. post-conflict mission. Put another way, the real lesson drawn from operations in Afghanistan signal that the judge advocates should develop new skill sets in rule of law and possibly restructure itself to strengthen future U.S. engagements in post-conflict stabilization and nation-building efforts. The current model of on-the-job training was insufficient and learning on the fly at times was counterproductive to the intricacies and complexities of rule of law missions in post-conflict Afghanistan.

These suggested measures ranged from requiring judge advocates to acquire cross-cultural training and language skills to recognizing rule of law as a core competency within the JAG community. The common thread is that extensive training and schooling must be designed and implemented to prepare the next generation of judge advocates participating in international development and reconstruction. Judge advocates must be schooled in a multidisciplinary program that has more emphasis on reconstruction policy and international aid than with the practice of military law. Simply put, to effectuate nation-building strategies expected by politicians and demanded by theater commanders will require expertise in broader issues of political reform, development, and reconstruction.

The challenges associated with identifying the scope and applicability of rule of law in relation to post-conflict operations are facets at every level of command – from the provincial reconstruction team to the strategic headquarters. There is no doubt that assiduous judge advocates have made a tremendous contribution to the rule of law operations in Afghanistan. There is, however, a need for greater scrutiny directed to strategy, policies, doctrine and training in order to maximize efforts.

Truth be told, most judge advocates were not adequately prepared for such missions conceptually or organizationally, and often had difficulty assigning the abstract concept of “rule of law” an operational meaning inside a non-western state with alien norms and institutions.¹¹⁷ The only genuine solution is that military attorneys must develop a real foundation in nation-building programs and genuine expertise in rule of law.

Given the role of the State Department as the lead agency in post-conflict operations and the non-kinetic nature of rule of law, some may argue that rule of law operations are entirely within the remit of civilian governmental agencies. This position is misguided. This view fails to consider that the military may at times be the only governmental entity that can conduct post-conflict operations.¹¹⁸ As one source candidly described most post-conflict operations:

¹¹⁴ Operational Law is that “body of domestic, foreign, and international law that directly affects the conduct of operations.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS 3-2 (1 Mar. 2000).

¹¹⁵ Judge advocates’ competencies: military justice, international law, administrative law, civil law, claims, and legal assistance. *Id.* at 3-1 through 3-16.

¹¹⁶ *Id.* at 1-1 (emphasis added).

¹¹⁷ See Glenn Kessler & Thomas E. Ricks, *The Realists’ Repudiation of Policies for a War, Region*, WASH. POST, Dec. 7, 2006, at A1. “Indeed, among the lessons brought home by U.S. trainers over the past three years are that many were unprepared for the task and that the mission is extremely difficult. It requires knowledge not only of U.S. combat operations but also of foreign weaponry and, most of all, of Iraqi culture.” *Id.*

¹¹⁸ See FORGED IN THE FIRE: LEGAL LESSONS LEARNED DURING MILITARY OPERATIONS 1994 – 2006 (2006).

[T]he military on the ground represents the only capability to manage the impact of a leadership vacuum and head off a rapid spiral into lawlessness and human tragedy. However experienced or talented civilians may be, the military will have the main responsibility for establishing and maintaining public order, security, and emergency services in an immediate post-combat setting.¹¹⁹

Others may assert that this is a purely civil affairs unit responsibility. However, the reality on the ground is that it is a JAG operation. While civil affairs units can assist in logistics and reconstruction, it will be lawyers who draft laws, lawyers who train fellow lawyers, and lawyers who mentor governmental officials. There will be a need for military attorneys, along with law enforcement officials, to adequately train police on issues of basic criminal law, search and seizure, and human rights. Judge advocates will be used to train foreign military personnel on the law of armed conflict and detention operations.

While judge advocates will inevitably rely on their legal education and experience, rule of law operations will require broader skill sets. Incorporating rule of law as a subset of any existing core competency (such as operational or international law) is an incongruous mixture of professional disciplines. Rule of law is not about practicing law, but more akin to managing a political campaign or leading a community activists group; only in today's reality judge advocates are compelled to do so in countries that they know little about and in a language they do not understand.

If the JAG community envisions conducting rule of law operations and supporting other development projects now and in the future, policy makers must be prepared to train the next generation of military attorneys in international development encompassing a multidisciplinary paradigm model that combines economic conceptions, cultural and linguistic understandings, and comparative political and legal systems. This proposal is the result of several underlying principles.

First, a cursory understanding of religious, cultural, or legal aspects of a society is not sufficient to conduct successful rule of law operations.¹²⁰ Laws do not exist in isolation, but are shaped by political, cultural, and economic characteristics of the society to which they apply.¹²¹ Lesson learned from those on the ground and from Afghan commentary is that lack of cultural awareness by westerners was a major impediment to mission attainment. Rule of law operators must become intimately knowledgeable of the societal nuisances of a country and local conditions to implement sustainable and legitimate rule of law programs.¹²²

Second, western rule of law operations tend to focus on western speaking elites and technocrats without fully integrating a country's other legitimate power players or all-together ignoring grass-root political elements. This flawed approach is analogous to public health aid workers who concentrate their efforts on urban centers, hospitals, and doctors, overlooking rural populations, indigenous health systems, and nurses.¹²³ This top-down approach is particularly apparent in Afghanistan. Operators must, at minimum, recognize the non-state, but legitimate, power brokers of a region and how they effect the role of the state institution.

Third, rule of law operators must fully understand the basic political framework of post-conflict operations (e.g. the Bonn Agreement in Afghanistan) and understand the U.S. team leader's strategic objectives and the theatre commander's intent. In addition, rule of law operators must be able to readily identify partners and forge cooperative alliances with the interagency and international rule of law players.

Fourth, rule of law operations require fluent speakers in the indigenous language or very capable and legally trained interpreters.¹²⁴ While the Pentagon has launched programs to bolster foreign language proficiency of military personnel,

It should be noted that as it relates to capacity to conduct Rule of Law operations, no agency appears to have such an organic capability. At best, such capacity can be cobbled together from skill sets from among the various agencies. In environments where active combat operations are on-going, the military may be the only agency that can provide the force protection necessary to maintain freedom of movement on the ground.

Id. at 126.

¹¹⁹ See REPORT OF AN INDEPENDENT TASK FORCE SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS, IN THE WAKE OF WAR: IMPROVING U.S. POST-CONFLICT CAPABILITIES 13 (2005).

¹²⁰ See Manuel E. F. Supervielle, *The Geneva Conventions and the Rules of War in the Post-9/11 and Iraq World: Islam, the Law of War, and the U.S. Soldier*, 21 AM. U. INT'L L. REV. 192, 200 (2005).

¹²¹ Frank Upham, *Mythmaking in the Rule-of-Orthodoxy*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 75 (Thomas Carothers 2006).

¹²² Even with contextual insight and knowledge directly influencing legal reform is extremely difficult. See John. V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT'L L. & COM. REG. 71, 81 (1998).

¹²³ Stephen Galub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 106 (Thomas Carothers ed. 2006).

¹²⁴ Tom Bowman, *Pentagon to Bolster Language Skills*, BOSTON GLOBE, Jan. 2, 2006. "The U.S.-led missions in Iraq and Afghanistan have exposed the inability of most military personnel to converse in Arabic or the primary languages of Afghanistan, Dari Persian, and Pashtu. Such a dearth in knowledge

there is no endeavor to incorporate such programs in the rule of law arena. Concepts in law are highly complex and nuanced and are not often directly translatable. In addition, not everyone has the same concept of what a specific legal term means or ought to mean. Even the basic term “law” does not translate effectively in some Islamic languages.¹²⁵

Fifth, rule of law is not a technical problem, but a social and political process.¹²⁶ Rule of law operations have more in common with an election than they do with the practice of law, in that they attempt to convince officials and citizenry alike on the benefits of a particular legal system. A generic template approach is an approach for failure. Successful rule of law methods and implemented programs in one country may not, and likely will not, travel. Although conceptual notions will undoubtedly link these situations, rule of law practitioners must fully understand the context to which they enter to effectively tailor and personalize each operation to the specific culture of a country in order to be perceived as legitimate and functional.

What do these underlying principles mean in terms of force structure? Despite the recognition that rule of law is an important subset of post-conflict operations, the U.S. military does not have the right structural capability to conduct rule of law operations. The mandate is scattered, roles tend to overlap, and authority is unclear. The result is an ad hoc response to rule of law operations during post-conflict missions. As one expert stated:

Each time we have sent out new people to face old problems, and seen them make old mistakes. Each time we have dissipated accumulated expertise after an operation has been concluded, failing to study the lessons and integrate the results in our doctrine, training and future planning, or retain and make use of the experienced personnel in ways that ensure the availability for the next mission when it arrives.¹²⁷

An ad hoc response to a “core U.S. military mission” is no longer good enough. A proposed solution, would be for the military to stand up a joint command with its own budgetary authority and personnel resources that is ready to respond to rule of law missions. This “Rule of Law Joint Command” would be comprised of a robust staff, commanded by a general or flag officer, with a mandate to manage resources and planning regarding military rule of law operations. It would maintain its own major operational budgetary authority that would allow rapid financial dispersal to host country entities for development and reconstruction projects. The Joint Command would be able to develop permanent contacts with the interagency, coordinate and plan with international partners, and fashion relationships with nongovernmental agencies. In addition, it would be able to coordinate deployment efforts of rule of law experts and interpreters and provide reach back capability for rule of law operators out in the field.

The Rule of Law Joint Command would develop best practices, procedures, and techniques tailored to specific regions and legal systems in the world; and would maintain a database of rule of law reports and studies that would aid policy makers and military planners. Personnel would garner regional and linguistic expertise aligned with the current Combatant Command structure. The Joint Command would develop training and planning capabilities on permanent bases. Moreover, it would coordinate deployment of trained and competent military attorneys in rule of law overseas assignments.

The Joint Command would also manage and facilitate continuity and unity of effort.¹²⁸ Legal transformation and institutional judicial reform take a considerable amount of time and effort. In order for U.S. personnel to be catalysts for change, it will require development of profound relationships and rapport with influential host-country individuals. This, in turn, requires that continuity of effort be established for the duration of operations. However, this was not the case in Afghanistan. Continuity and coherence in implementing rule of law initiatives have been undercut by the rapid turnover among judge advocates.

In a Muslim country where personal relationships and trust are prized for deal making, the relatively rapid turnover of judge advocates disrupted their influence and impeded their ability to steer groups toward consensus.¹²⁹ While the effectiveness of rule of law operations will obviously depend on the skills and abilities of individual practitioners, it will also greatly depend on the ability of those practitioners to regularly meet with host-nation officials and attend consecutive grass-roots meetings with a harmonized position, unified effort, and consistent approach. An institutional body dedicated to the

comes at a particularly sensitive time, when the Americans must work closely with the local populations, training soldiers and police, and helping create government institutions.” *Id.*

¹²⁵ Vogel, *supra* note 91, at 356-57.

¹²⁶ Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar./Apr. 1998, at 95. Upham, *supra* note 121, at 75.

¹²⁷ *Next Steps in Iraq and Beyond: Before the S. Comm. on Foreign Relations*, 107 Cong. (2003) [hereinafter Dobbins Statement] (statement of James Dobbins, Director of RAND International Security and Defense Policy Center).

¹²⁸ Interview with Captain Christopher E. Martin, Defense Institute of International Legal Studies, in Kabul, Afghanistan (July 18, 2006).

¹²⁹ Supervielle Interview, *supra* note 98.

rule of law mission would greatly off-set any of these shortcomings by accounting for the predictable long-term duration of post-conflict missions.

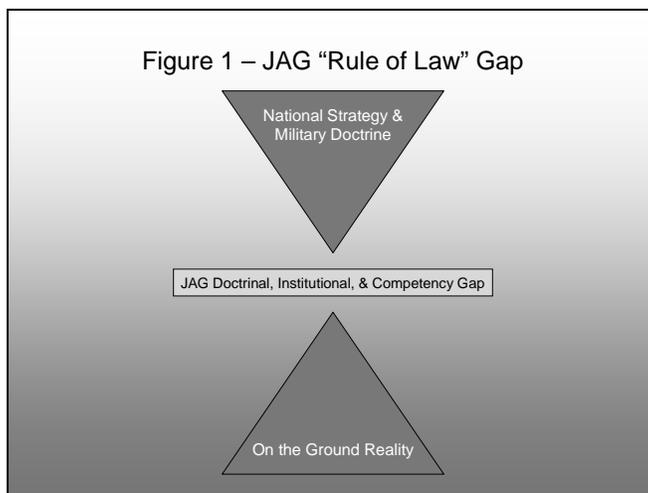
IX. Conclusion

One of the central national lessons gained from the U.S. experience in Afghanistan is that failed states directly affect U.S. security.¹³⁰ Following the withdrawal of the Soviet Union, Afghanistan had become a sanctuary for global terrorists. While America chose to ignore these states in the 1990's, September 11 taught us to do so was plainly myopic and simply fatuous.

Our current primary enemy is global terrorists. What policy and military strategists must come to realize is that the central gravity of terrorism is extremism. At its basic essence, extremism is a state of mind; and a state of mind cannot be beaten by military raids. Extremism may only be defeated by helping establish security, political, economic, and social structures to allow a society to alleviate the causes of extremisms – namely poverty, social isolation, illiteracy, and hopelessness. While combating terrorism will require military force along with law enforcement, extremism will only be eliminated through the time consuming process of development, reconstruction, and reform.

Forcefully removing degenerate regimes and killing or capturing terrorists is now recognized as a necessary, but incomplete strategy. Kinetic operations can only provide time and space. It can not be the solution in and of itself. Military war fighting may only provide the environmental conditions for political by-in. In other words, force is necessary, but never sufficient; and a political process is needed for total victory. This means that all groups must be able to draw away from terror or armed resistance and choose legal mechanisms to solve their disputes. Ultimately, this can only be done using soft tactics, such as rule of law programs, and not by using heavy handed weaponry.

In the past, the military has “treated each new [nation-building] mission as if it were the first, and more importantly, as if it were the last.”¹³¹ The implications of the last fifteen years regarding stability operations, however, is that institutionalized capacity and competency is now required.¹³² A continued absence of a functional institutional construct “reflects an outdated and wishful attitude that stabilization and reconstruction operations are extraordinary rather than routine.”¹³³ An institutional rule of law framework is now required due to U.S. defined national security interests and the Pentagon’s new doctrinal paradigm regarding post-conflict operations. More importantly, it is also required because judge advocates are in-fact conducting rule of law operations in theatre. However, as Figure 1 illustrates, what currently exists is a doctrinal, institutional, and competency gap within the JAG community regarding rule of law operations.



¹³⁰ John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, 25 (4) WASH. Q. 85–96 (Autumn 2002).

¹³¹ Dobbins Statement, *supra* note 127.

¹³² *Id.*

¹³³ REPORT OF AN INDEPENDENT TASK FORCE, CO-CHAIRS SAMUEL R. BERGER AND BRENT SCOWCROFT, SPONSORED BY THE COUNCIL ON FOREIGN RELATIONS, IN THE WAKE OF WAR: IMPROVING U.S. POST-CONFLICT CAPABILITIES (2005).

Although judge advocates are conducting rule of law operations in Afghanistan (and Iraq), it will not be the last time. As much as the JAG community would like to focus on the core legal competencies, rule of law operations cannot be disregarded or minimized. As the experience in Afghanistan has clearly confirmed, military lawyers are acting operators crafting and implementing rule of law initiatives. The ad hoc and haphazard practice, however, is not enough for such an important strategic component in post-conflict operations. Rather, Afghanistan underscores the critical importance of a new strategic paradigm.