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Keene, Shima D. Dr., "Exit Strategy: Rule of Law and the U.S. Army" (2018). *Monographs, Books, and Publications*. 393.

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EXIT STRATEGY: RULE OF LAW AND THE U.S. ARMY

Shima D. Keene



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and
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AND THE U.S. ARMY**

Shima D. Keene

September 2018

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This manuscript was funded by the U.S. Army War College External Research Associates Program. Information on this program is available on our website, <http://ssi.armywarcollege.edu/>, at the Opportunities tab.

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ISBN 1-58487-789-8

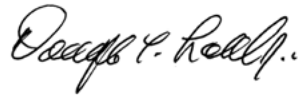
FOREWORD

The nature of warfare has changed. The U.S. Army has to operate in an environment that is uncertain and complex, where states, transnational organizations, and nonstate actors work collaboratively to serve their own self-interests. Consequently, warfare is no longer simply about winning the firefight. This is particularly the case when operating in fragile or failed states where governance is poor or lacking. In these situations, the United States and its allies must engage in peacekeeping and post-conflict state rebuilding to ensure that long-term stability is achieved. A key part of achieving that stability is to ensure that rule of law is established and maintained.

As British academic and practitioner Dr. Shima Keene articulates in this monograph, ensuring the establishment of effective and sustainable rule of law institutions plays an important role in stability operations, which should form a key part of the U.S. Army's strategy for disengagement once those operations are complete. Critically, Dr. Keene underscores that it should also form an integrated part of post-conflict planning before intervention is even considered.

Dr. Keene is a subject matter expert in asymmetric warfare and counterterrorism, and through her work for the United Kingdom Government's Stabilisation Group, she has worked with the military as well as nongovernmental organizations (NGO) and government departments which has enabled her to develop deep insights into the subject. Drawing from lessons identified in theaters such as Afghanistan and Iraq, she warns of the second and third order effects of military interventions that have inadvertently damaged rule of law institutions in the medium and long term, which must be avoided in future military engagements.

The Strategic Studies Institute (SSI) considers that this monograph provides a useful assessment of the key issues relating to the role that the U.S. Army should play in its contribution to establishing rule of law in post-conflict states, and is a valuable addition to the debate on how to plan and shape future U.S. peace-keeping and state-building missions.

A handwritten signature in black ink, reading "Douglas C. Lovelace, Jr." in a cursive script.

DOUGLAS C. LOVELACE, JR.
Director
Strategic Studies Institute and
U.S. Army War College Press

ABOUT THE AUTHOR

SHIMA D. KEENE is a British academic and practitioner specializing in defense and security. She is a director of the Conflict Studies Research Centre, Oxford, and a senior fellow at the Institute for Statecraft, London. Dr. Keene is also a deployable civilian expert for the United Kingdom (UK) Government's Stabilisation Group specializing in security and justice. She is a former senior research fellow and adviser at the Advanced Research and Assessment Group, Defence Academy of the United Kingdom, and special adviser to the UK Ministry of Defence (MoD).

Dr. Keene advises and works closely with a number of UK Government departments and law enforcement agencies to include the MoD, Foreign and Commonwealth Office, the Home Office, Department for International Development, Her Majesty's Treasury, and the National Crime Agency (NCA), as well as a number of regional law enforcement agencies. Outside the United Kingdom, she works with international organizations to include the North Atlantic Treaty Organization, the Organization for Security and Co-operation in Europe and the Council of Europe, as well as U.S. Government departments, the military, and law enforcement agencies. Dr. Keene has 27 years of practitioner experience obtained through investment banking, defense intelligence, and academia, and is a former British Army Reservist soldier with 7 years military service, most of which was spent with 4th Battalion, the Parachute Regiment.

Dr. Keene has published numerous internal and external government and corporate reports, as well as award winning academic journal articles, and is the author of *Threat Finance: Disconnecting the Lifeline of*

Organized Crime and Terrorism and a book chapter in the *Research Handbook on International Financial Crime*. She is a visiting lecturer at the BPP Law School, London, and the Centre for Development Studies, Cambridge University. Dr. Keene holds a Ph.D. in international criminal law, an M.Phil. in defence and security studies, and graduated with honors in business studies.

SUMMARY

Establishing the rule of law is a key goal and end state in counterinsurgency (COIN) operations and is a critical aspect of securing peace and preventing future conflict. To that aim, the development of rule of law institutions, such as an effective police force and a judicial system capable of protecting human rights and promoting justice, is essential. As such, ensuring the establishment of effective and sustainable rule of law institutions plays an important role in stability operations, and should form a key part of strategy for disengagement once those operations are complete. Critically, it should also form an integrated part of post-conflict planning before intervention is even considered. The lessons of not considering this aspect of drawdown and withdrawal are clear from Afghanistan and Iraq.

This is important and relevant to the U.S. Army, as well as to U.S. security and foreign policy interests more broadly, for two reasons. The first relates to homeland security. If the country in question is unable to maintain its own security, this volatility is likely to become a breeding ground for international terrorism and transnational crime, which in turn will pose a security threat to U.S. citizens both at home and abroad. The second relates to demand on U.S. Army resources. Further instability in a country with a U.S. presence invariably leads to a demand for greater Army resources to be allocated. As the U.S. Army is already under pressure to regenerate capacity for stability operations, it is in its interest not to have to redeploy to any given country. However, recent experience in theaters such as Afghanistan has shown that establishing effective rule of law institutions and practices is not a

straightforward task. Consequently, considerations as to how and when rule of law institutions can start to be developed and integrated into the stability transition process must not only be planned in advance, but also form part of the U.S. Army's strategy from the very start of any military intervention.

One of the biggest challenges for countries emerging from conflict is the transition from military to civilian rule, requiring a shift in capability, skills, and mindset. This is especially true for institutions such as the police who will be required to change from serving a combat function to performing a more traditional policing role. Consequently, the U.S. Army, along with its international partners deployed to provide assistance and mentoring to those organizations, must not only recognize the challenges but also take active steps to ensure that their approach and actions address rather than exacerbate these problems. An inability to take effective action will lead to unintended consequences. However, any action taken will require an in-depth understanding of the challenges that exist in the rule of law landscape, both in terms of a contextual understanding of the fragile state in question, and with respect to the response being provided by the international community.

This monograph identifies a number of issues in relation to the challenges in establishing rule of law institutions and practices in post-conflict countries, as well as how and when rule of law mechanisms could be integrated into U.S. Army stabilization operations, based on lessons identified from recent stabilization missions and deployments. These include the ability to identify the key challenges which prevent the establishment of effective and sustainable rule of law institutions, as well as to understand the unintended

consequences of U.S. Army interventions in training local police forces, and how these can be mitigated or avoided. In addition, an appreciation of the conflict or confusion between COIN and state-building missions and how this conflict can undermine both operations is necessary. Furthermore, in the context of achieving medium to long-term objectives, consideration must be given to the sustainability of rule of law interventions after withdrawal of troops as well as the impact of short-term mission objectives.

To that end, U.S. Army commanders must determine what role the U.S. Army should play in facilitating a transition from military to civilian rule of law. This may include giving consideration to how the U.S. Army could better utilize its Reserve forces to provide capacity and specialist skills to facilitate civilian transition, and determining when and how rule of law mechanisms and advisors should be integrated into stability operations. Finally, the importance of effective engagement with partner agencies and institutions is highlighted. Collectively, the analysis will assist the U.S. Army, and more broadly the Departments of Defense and State, in better facilitating a seamless rebalancing from military to police functions in post-conflict environments, to ensure that sustainable and effective rule of law interventions are delivered as part of an exit strategy from COIN campaigns.

EXIT STRATEGY: RULE OF LAW AND THE U.S. ARMY

INTRODUCTION

Establishing the rule of law is a key goal and end state in counterinsurgency (COIN) operations and is a critical aspect of securing peace and preventing future conflict in a fragile state. To that end, the development of rule of law institutions, such as an effective police force and a judicial system capable of protecting human rights and promoting justice, is essential.¹ As such, the establishment of effective and sustainable rule of law institutions and practices as part of overall rule of law interventions is critical to stability operations, and should form a key part of military exit strategies for countries operating in post-conflict states. The lessons of not considering this aspect of drawdown and withdrawal adequately are clear from recent theaters of conflict such as Afghanistan and Iraq. This is important and relevant to the U.S. Army, as well as to U.S. security and foreign policy interests more broadly, for two reasons. The first relates to homeland security. If the country in question is unable to maintain its own security, one likely consequence is that it will become a breeding ground for international terrorism and transnational crime. This in turn will pose a further security threat to U.S. citizens, both at home and abroad. The second relates to demand on U.S. Army resources. As the U.S. Army is already under pressure to regenerate capacity for stability operations globally, it is in its interest not to have to redeploy to any given country.

The importance of establishing rule of law is recognized by the U.S. Army, especially in the context of COIN operations. The term “rule of law” is mentioned

39 times in the U.S. Army COIN field manual, including a section on how to establish rule of law in host countries.² U.S. Army doctrine as well as literature relating to stability and peacebuilding accepts that the creation of a state which is stable and secure, and capable as well as willing to counter terrorism and other direct threats to the United States and its allies, is in the interest of U.S. homeland security and international security more broadly. Furthermore, as part of the promotion of stability and security in post-conflict states, the establishment of effective and sustainable civilian security and rule of law institutions has been recognized as being of paramount importance.

At the same time, a need to improve the approach to building rule of law in post-conflict fragile states has also been acknowledged.³ There is evidence to suggest that many interventions, no matter how well intentioned, result in unintended consequences, which can be damaging at many levels. Therefore, it is important for the U.S. Army and its partners to understand why and how these unintended consequences are occurring, as well as how they can be prevented in the future. Part of the answer lies in the challenge of operating in fragile environments in the process of transitioning from conflict to stability. The extent of the challenges brought about by a prolonged period of conflict and its impact on state infrastructures and cultural attitudes are often not fully taken into consideration. This becomes problematic when policies and practices designed and developed for stable environments are attempted to be replicated in post-conflict states.

For example, one of the biggest challenges for countries emerging from conflict is the transition from military to civilian rule, requiring a shift in capability,

skills, and mindset. This is particularly true for institutions such as the police who will be required to change from serving a combat function to performing a more traditional policing role. Consequently, the U.S. Army, along with its international partners deployed to provide assistance and mentoring to those organizations, must not only recognize the challenges but also take active steps to ensure that their approach and actions do not exacerbate these problems. To that aim, they must be able to understand as well as anticipate and mitigate the unintended consequences of their actions.

For the U.S. Army, establishing rule of law is a key component of stability missions, which in turn forms an important strand of its overall COIN campaigns. However, COIN campaigns are challenging in that they involve a mix of offensive, defensive, and stability missions conducted along multiple lines of operations. Soldiers are expected to not only perform the role of warriors but also that of nation builders, the latter requiring military personnel to perform tasks requiring skill sets more commonly associated with non-military agencies. A further challenge is that establishing effective and sustainable rule of law institutions and practices is a far from straightforward task and takes considerable time to achieve. Consequently, considerations as to how and when rule of law institutions can start to be developed and integrated into the stability transition process must not only be planned in advance, but also form part of the U.S. Army's strategy from the very start of any military intervention. Critically, it should also form an integrated part of post-conflict planning before intervention is even considered.

A further consideration is that the U.S. Army is not operating in this space alone. This can be seen as both an advantage and a disadvantage. It is advantageous in

that the responsibility of providing assistance in developing rule of law institutions does not, and should not, fall on the shoulders solely of the U.S. Army. It has partners that can share this burden, in terms of resources—financial, intellectual, and physical. The downside is that in any multi-stakeholder situation, implementation both at a strategic and tactical level can be made more complex and cumbersome. This is even more apparent when working with partners who have a non-military outlook due to differences in organizational culture and perspective—for example, with differing views on how strategic objectives should be accomplished and the ways in which success is measured. In addition, the more challenging the circumstances become in terms of differing organizational perspectives and goals, the greater the tendency to work in silos. This situation can often be further exacerbated by security conditions on the ground, which may restrict the ability for physical movement, making the ability to meet with partners in person more difficult. This further increases the temptation for stakeholders to focus on the delivery of their own organizational missions and agendas without adequate consideration to the bigger picture.

Another downside of this silo approach is the unintended consequences that can arise where steps taken by one partner, military or civilian, can impact the success of other projects and missions, directly influencing the effectiveness of interventions. As such, deconfliction measures must be in place to ensure that stakeholders are communicating with one another effectively, and can agree as much as possible about the role each should play in providing assistance to the host nation. In addition, clear objectives and goals must be decided in terms of how effective rule of law

can be established in a way that is sustainable in the medium to long term. This can only be achieved if the host country is actively involved, becomes part of the process, and takes ownership of the challenges.

Although each post-conflict setting is arguably unique, many of the challenges witnessed reappear repeatedly in different theaters. Lessons are often identified only to be forgotten, the result of which is that organizational knowledge is lost and the wheel is reinvented with each new mission. This wastes time, money, and lives, as well as damages reputations. It is therefore of paramount importance that the universal lessons are not only identified, but also absorbed and applied to future campaigns, in order to avoid likely pitfalls. This will in turn ensure future missions are more successful not only in the short term, but also in the medium and long term. There is evidence to suggest that lessons identified from one theater of conflict are relevant and applicable to another if the analysis can be adapted and applied intelligently with a degree of flexibility.⁴

One notable lesson, which repeatedly emerges from multiple theaters, is inadequate consideration as to how the international community (including the U.S. Army) can extricate itself once it has intervened in the affairs of a particular country. The term “exit strategy” is frequently used, but is rarely clearly articulated in terms of what that strategy is and how it is to be achieved. Furthermore, to enable the U.S. Army to exit the intervention, clarification is needed in terms of identifying the conditions required before implementation of the strategy can begin.

EXIT STRATEGY

In recent years, the U.S. Government and its Armed Forces have come under criticism for allowing itself to become engaged in interventions on foreign soil, with little consideration as to how to end those engagements.⁵ Afghanistan and Iraq both serve as good examples of interventions that appear never-ending, which is problematic militarily and politically. Therefore, irrespective of whether military action takes the form of force, peacekeeping, development, or all three, a key challenge facing U.S. military commanders and policy makers is to decide when and how to stop and get out. Such decisions can only be made if an exit strategy exists in advance.

The term “exit strategy” was popularized by the Clinton administration in the 1990s as a policy option that exercised boundaries in terms of the time and effort the United States as a nation was willing to expend on a military intervention.⁶ Despite extensive use of the term in government literature and military doctrine, an exact meaning has never been defined.⁷ This has often led to some confusion as to what is actually meant in practical terms, especially when the phrase is used interchangeably with the term “end state.” This can be problematic because desired end states differ according to perspective. In other words, military end states are likely to differ from government end states, which will be politically based with wider diplomatic and strategic implications of which the military is one of several components.

One challenge for the U.S. Army is that military objectives are based on concrete deliverables, articulated through clearly definable achievements accompanied by precise measures to plan and achieve the

required end state. Although military end states are flexible to reflect the dynamic situation on the ground, they are nevertheless clearer compared to policy or diplomatic end states. However, where military forces are operating in a capacity other than warfighting, the end state is commonly expressed in political terms. This can be challenging in that fluid concepts are a poor fit with military culture. Furthermore, such objectives cannot be achieved by the military alone as they lie beyond its competence. Another challenge is that an exit from post-conflict non-combat intervention is a transitional process as opposed to an event.

In this context, the role of the military is to facilitate the political process.⁸ This is highly relevant in establishing rule of law, which encompasses definable concrete deliverables in terms of how security institutions can be set up and developed to enable rule of law to take hold. At the same time, it is also a highly political process. Politics at the local and international levels play an enormous role in determining the pace of an exit strategy and the continued involvement of an intervening actor in state building. The case of Iraq illustrated that U.S. Armed Forces lacked adequate knowledge of the local actors at the time they invaded and began the process of state building which led to a bloody sectarian war and a long, drawn-out battle with insurgents.

For the desired end state of rule of law to be established, military leaders must be mindful that it is this transition process that is central to achieving the required end states, both military and political, and that this process necessitates awareness of wider issues if it is to have any chance of success.

WHAT IS MEANT BY THE RULE OF LAW?

The “rule of law” is an inherently vague term, which has no universally agreed definition.⁹ This is relevant to the U.S. Army in that it highlights the challenge of rule of law interventions at a fundamental level. In other words, if there is no collective agreement as to what is meant by the rule of law, how can rule of law interventions be expected to be developed, yet alone delivered successfully? The challenge in agreeing to a definition stems partly from the fact that rule of law is often expressed in terms of general principles, of which there are several. For example, according to legal theorist Lord Bingham,¹⁰ the core principle of the rule of law is:

that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts.¹¹

In his book “The Rule of Law,” Lord Bingham outlines the eight principles which he saw as being the key ingredients necessary to support that aim:

1. The law must be accessible, intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.
3. Laws should apply equally to all.
4. Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.
5. The law must afford adequate protection of fundamental Human Rights.

6. The state must provide a way of resolving disputes which the parties cannot themselves resolve.
7. The adjudicative procedures provided by the state should be fair.
8. The rule of law requires compliance by the state with its obligations in international as well as national laws.¹²

Similar principles are expressed by the United Nations (UN) which defines the “rule of law” as:

a concept at the very heart of the [UN] mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹³

This definition, which has been widely accepted by practitioners and policymakers in the rule of law community, describes an ideal end state to work toward, one that features a system of government that is transparent and accountable and embodies other checks and balances.¹⁴ Elsewhere, other organizations have developed their own definitions. That of the World Justice Project is based on four universal principles that were derived from internationally accepted standards:¹⁵

1. Accountability. The government [and its officials and agents] as well as [individuals and] private actors are accountable under the law.
2. Just Laws. The laws are clear, publicized, stable, and just; are applied evenly; and protect fundamental rights,

including the security of persons and property and certain core human rights.

3. Open Government. The process by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.

4. Accessible & Impartial Dispute Resolution. Justice is delivered timely [sic] by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.¹⁶

Undoubtedly, these slight differences in principles outlined, as well as their interpretation can make matters challenging. This is especially true in the context of post-conflict states that often have complex legal landscapes. However, it could also be argued that the lack of a concrete definition can be advantageous in that the guiding principles can be used as a platform to negotiate and agree to a definition for each post-conflict state. This flexibility must be seen as a positive given that every situation is not only different, but is also constantly evolving. It would be dangerous and inappropriate to use the same definitions, even if one were to exist, and apply it to every post-conflict state. Instead, this ambiguity forces a case-by-case definition to be created and adopted in a way that is fit for purpose, which is more appropriate for a dynamic fragile environment.

Nevertheless, a point of reference is necessary. One interpretation is that rule of law is where everyone is governed by and equal before the law and constitution established by the legitimate government of the country in which they live, and that they have access to human rights and justice which is open and accountable to independent oversight. A key differential in fragile states is the promotion of the rule of law as opposed to rule by law. To elaborate, "rule of law"

implies fairness and predictable application, whereas “rule by law” describes a situation where the law is used to repress the population. One example of the latter circumstance is Nazi Germany. In 1935, Adolf Hitler announced the Nuremberg laws which institutionalized many of the racial theories prevalent in Nazi ideology at the time. These laws excluded German Jews from Reich citizenship and prohibited them from marrying or having sexual relations with persons of “German or related blood,” as well as denying Jews most political rights.¹⁷ Although predictably and consistently applied, such laws clearly cannot be described as fairness or equality of application.

“Rule of law institutions” refers to organizations that enable rule of law. They can be described as state governance institutions responsible for a number of necessary components for the establishment of the rule of law. These include the creation of comprehensive laws, a functioning judicial system, effective law enforcement agencies capable of enforcing those laws, and government departments responsible for the administrative aspects that ensure those institutions operate effectively.

ESTABLISHING THE RULE OF LAW IN POST-CONFLICT STATES

Establishing the rule of law in post-conflict states has become a priority for the international community in recent years. This has resulted in numerous international and regional organizations, as well as bilateral donors and nongovernmental organizations (NGOs) becoming engaged in a variety of activities aimed at rebuilding or developing criminal justice systems with the aim of establishing rule of law. To add to that busy

environment, the justice landscape in a post-conflict state is likely to be complex as a result of a prolonged absence of rule of law during conflict. Even where some form of a state justice system exists, it is likely to be largely dysfunctional, resulting in the emergence of parallel systems of justice. Consequently the post-conflict rule of law landscape may consist of different systems and subsystems of justice, some operated by the state and others not. This presents further challenges as rule of law institutions need to be linked and coordinated to be effective. As such, interventions should not only be about focusing on building the capacity and capability of each component of the justice system, but must also be about ensuring that they work well together; it is also about building functional relationships between the institutions. For example, there is little point in establishing legislation if there is no effective law enforcement mechanism. Similarly, even if the police are able to make an arrest, if the courts are riddled with corruption that results in the offender being released, it makes the work of the police meaningless. Again, even where the offender is convicted in court, if the penal system fails to retain him, then the justice system as a whole has failed, allowing the offender to reoffend.

Bearing in mind the importance of interconnectivity, the U.S. Army must ensure it has a broad understanding of the overall rule of law landscape in the country where they are operating. It must also develop an appreciation of the parallel rule of law intervention landscape consisting of various elements of the international community, all attempting to deliver assistance to rule of law institutions in that fragile and dynamic environment. As a part of that landscape, the U.S. Army must develop strong situational awareness

as to who the other players are, as well as the activities with which they are involved. The damage that can be caused by one partner undermining the other should not be underestimated. Although the end goal may be the same, the ways and means to reach those goals are likely to differ—some may be complementary, others may not. This is likely to result in conflicting advice given to the rule of law institutions resulting in confusion and ultimately failure. As such, the U.S. Army must be prepared to work with a wide variety of institutions and actors to avoid this situation. There needs to be more of a focus on results, as opposed to evidence of delivery of interventions alone.

Although the U.S. Army has become increasingly involved with peacekeeping operations, this is not its traditional role, and it is unlikely that all of the knowledge and skill sets required to deliver rule of law interventions will exist within the military. U.S. Army commanders will be required to determine when, where, and how to rely on or employ relevant external personnel to fill this vacuum. Numerous advisers exist for this purpose. There are men and women who are sent abroad by governments, intergovernmental organizations, and NGOs to advise and consult with local counterparts on how to develop and improve local criminal justice systems as well as to deliver in-country stabilization more generally. These advisors are drawn from a variety of professional backgrounds to include: the legal profession, the judiciary, the police, and academia, as well as NGOs and civil society. Individually and collectively, they have the ability to bring with them a broad range of expertise and experience to assist the U.S. Army at every level of intervention as required.

However, in order for the U.S. Army to be able to work effectively overall, coordination is key. This requires a broad understanding of the elements involved in the criminal justice system as a whole, as well as the overarching challenges that the U.S. Army will face in its attempts to assist in the implementation of rule of law in post-conflict states.¹⁸ As such, it may be prudent for U.S. Army commanders to appoint one generalist senior adviser who oversees, coordinates, and liaises internally as well as externally. This will ensure that the relevant elements of its interventions are managed properly and integrated with the work of colleagues operating in the same space. Furthermore, he or she must be capable of translating the rule of law landscape into a series of executable assistance programs that reach achievable benchmarks, demonstrating incremental progress toward the required end state.

In order to describe how this could be achieved, this monograph will focus on three areas of interest: legislation, law enforcement and police, and the judiciary.

LEGISLATION AND LAW REFORM

For rule of law to prevail, laws must be comprehensive, transparent, and fit for purpose. Equally important is the communication of those laws to citizens, so that they know what the laws are, as well as the potential consequences of breaking those laws. As obvious as this may seem from a Western perspective, or the perspective of any developed nation, the first and fundamental challenge confronting U.S. Army personnel who are new to such environments is the absence of these norms.

Post-conflict states are usually characterized by grossly inadequate laws and a general lack of clarity of the legal landscape. This may have been caused by an accumulation of neglect where the existing laws have become outdated or where new legislation is introduced without repealing the old, causing duplication. Also during prolonged periods of conflict, as already mentioned in the previous section, it is likely that alternative nonstate justice systems have developed to fill the vacuum in areas where a state justice system was lacking, resulting in dual or multiple legal systems to emerge. A case in point is the legal landscape in Afghanistan which is occupied by three competing sources of law operating simultaneously, namely: the formal state legal system reflected in various codes and legislation and enforced through a system of state courts; the informal customary system based on tribal mediation; and the Taliban legal system, based on its own interpretation of Sharia law.¹⁹ This complex system has emerged as a result of hundreds of years of informal traditions, Islamic Sharia law, and former Soviet judicial practices during the 1980s, as well as various Western influences since the fall of the Taliban in 2001.

Further confusion of the legal landscape in post-conflict states may have been caused by the existence of customary legal systems as well as religion-based legal systems as in the case of Afghanistan. In such situations, legal reinstatement may be necessary to identify the applicable law, although this is a notoriously challenging process that can be deeply political. Nevertheless, a starting point for establishing rule of law may be to reform existing laws in such a way that they become compliant with the principles of the rule of law and international human rights norms and standards. In some cases, a requirement for law reform may have

been included in a peace agreement, as was the case of Burundi and Afghanistan, which is therefore binding on the parties to the agreement.²⁰

However, to date, the international community's interventions concerning law reform in post-conflict states have suffered a poor track record. What is of even more concern is that mistakes made in one post-conflict locale are often repeated in others. As an influential actor in the international community, it is of vital importance that the U.S. Army is aware of past mistakes and successes, to be able to reflect and learn from them to ensure that future interventions are more successful. This cannot be achieved without an appreciation of the broader challenges that face post-conflict states in promoting legislation.

The first challenge is that the ability to legislate by definition assumes the preexistence of a state. In other words, for a state to be able to legislate and apply those laws, it must have authority. In order to obtain authority, it must be seen as legitimate by its people.²¹ If a state lacks adequate governance structures and is seen as fundamentally corrupt, its legitimacy is undermined.²² This in many ways is the proverbial "chicken and egg" scenario in that it is not always obvious whether the laws need to be established first, or whether a state needs to have authority first in order to be able to legislate. The argument for the latter is that unless the state is seen as legitimate in the eyes of its people, the laws that are created by that government will not be enforceable. On the other hand, it can also be argued that by establishing the laws first, governance structures will begin to fall into place, which in turn will provide the credibility and authority needed by the state to establish its authority in order to be able to enforce those laws. The reality is that the two are

symbiotic and should develop simultaneously. However, the tension caused by questionable authority and legitimacy must be noted.

From the viewpoint of those providing assistance, a further issue is that many rule of law development projects are based on the flawed assumption that there is a legitimate government in the host country seeking to improve governance and suppress violence.²³ Unfortunately, there is evidence from multiple theaters to suggest that government officials responsible for rule of law may put themselves above the law in order to gain wealth through corruption, theft of state assets, smuggling rackets, or collusion with criminal forces.²⁴ As Kleinfeld and Bader note:

Often, individuals and agencies within the government are themselves involved in violent activity, from selling police or military armaments to gangs or insurgents to extrajudicial killings to moonlighting as members of the organizations they officially work to eradicate.²⁵

These factors combined will not only have an impact on the legitimacy of that state and the authority it needs to be able to create laws that are recognized and adhered to, but they will also have an impact on those delivering assistance to that state, both in terms of the likely success of the interventions they are attempting to deliver, as well as their own reputation and safety.²⁶ For example, if the U.S. Army is seen to be assisting a regime that is overtly corrupt and engaged in criminal activity through willful blindness to those activities, there is a danger that this could be misconceived as endorsement of those acts. There is then a further risk that the anger of the populations that suffer those injustices may be redirected toward the U.S. Army.

Also in providing assistance, extreme caution must be exercised to ensure that the West is not imposing its own principles and laws on the host country without giving adequate consideration to local traditions and cultures during the legislative process. This is important, as there are several unintended consequences that can emerge as a result of creating laws based on Western models. The first is that the newly created state laws may be viewed by populations as imported Western laws. This can be particularly problematic in Muslim countries where compliance with Sharia law is a basic necessity for laws to be adopted.

Another challenge in reforming laws to comply with international ethical standards is the local society's perception of what constitutes moral or immoral behavior. This is relevant as morality is closely linked to the question of legality. Laws are intended to shape behavior linked to what are considered to be the fundamental moral codes of behavior.²⁷ A problem emerges when behavior that is considered to be immoral in one culture is seen as acceptable in another. Matters relating to human rights provide a prime example. U.S. Army COIN doctrine recognizes that:

Respect for the full panoply of human rights should be the goal of the host nation; [and that] derogation and violation of these rights by host-nation security forces, in particular, often provides an excuse for insurgent activities.²⁸

As such, the human rights agenda supported by the UN Declaration on Human Rights and the International Convention for Civil and Political Rights plays a key part in U.S. Army rule of law interventions, as well as interventions by the international community more broadly. However, how effective can these new

laws incorporating human rights agendas be if there is no tradition or concept of human rights in the host country? Human rights violations carried out by the government or its armies and/or police forces are the norm in many parts of the world, especially—but not restricted to—fragile states. Even where the state institutions may not be the direct perpetrators, willful blindness is common.

For example, Human Rights Watch reported that Egypt's epidemic of violence and sexual abuse in 2013 resulted in more than 600 deaths and 91 women assaulted in 4 days of riots at Tahrir Square.²⁹ These attacks, where some of the victims required extensive medical surgery after being subjected to brutal gang rapes and sexual assault, occurred while government leaders and police stood by and failed to intervene.³⁰ Elsewhere in countries such as Syria, Sudan, Democratic Republic of the Congo, Pakistan, Somalia, Afghanistan, Iraq, Myanmar, Yemen, and Nigeria, human rights abuses are widespread.³¹ In these countries, women and children are often considered to be disposable assets as opposed to citizens worthy of respect and protection.

Consider the practice of lapidation for the offense of adultery. Lapidation, more commonly known as stoning, is a method of capital punishment whereby stones are thrown at a person until they are dead. Stoning is currently legal in 15 jurisdictions, although in some of these countries such as Qatar and Mauritania it is rarely invoked.³² In other countries, however, stoning may not technically be legal, but it is widely practiced, for example, Iraq, Iran, Afghanistan, and Mali.³³ Although both men and women, in theory, can be convicted of adultery, which is punishable by lapidation, there is strong evidence of discrimination

against women in those countries. For example, if a man is unhappy in his marriage, he is legally able to divorce or take other wives dependent on the country in which he lives. He is also more likely to have the means to employ defense lawyers and enjoy greater physical freedom that may allow him to remove himself from the marriage. A woman on the other hand often does not have those options, and convictions are often made under duress or based on gut feeling as opposed to evidence.³⁴ A further injustice is that even where a woman has been raped, this may be considered an admission to the crime of *zina* (sex outside marriage) under some interpretations of Sharia law.³⁵ An example from Somalia in 2008 occurred after Aisha Ibrahim Duhulow, a 13-year-old Somali girl, was raped by three men. When she reported the rape, this was interpreted as adultery, the consequence of which was that she was buried up to her neck, and stoned in front of 1,000 people by 50 men at a stadium in southern Somalia.³⁶

A further illustration of human rights violation and gender discrimination relates to how the punishment is delivered. In Iran, for example, men are usually buried up to the waist and if they are able to escape, they are spared. Women or girls are buried up to their chests or neck, making any prospect of escape impossible. Stoning contravenes a host of UN treaties including the International Covenant on Civil and Political Rights which states that no one should be subjected to torture or cruel or inhumane punishment. The treaty, which Iran and Pakistan have signed, allows countries to execute people only for the most serious crimes. Nevertheless, there are reports that since signing the treaty women have been executed through lapidation

for offenses to include being in possession of a mobile phone.³⁷

Humanitarian abuse is not restricted to the female gender. According to a 2009 Human Terrain Team study on Pashtun sexuality, the practice of Pashtun social norms dictate that raping a boy is not seen as un-Islamic or homosexual provided that the man performing the act does not love the boy, in which case the sexual act is considered not reprehensible, and far more ethical than defiling a woman.³⁸ In Afghanistan, the practice of *bacha bāzī*, a colloquial term meaning “boy play” refers to a variety of activities that involve child sexual abuse, to include sexual slavery and child prostitution in which prepubescent and adolescent boys are sold to wealthy or powerful men for entertainment and sexual activities.³⁹ From 1994-2001, under Taliban rule, *bacha bāzī* was an offense that carried the death penalty.⁴⁰ Since the fall of the Taliban, although the practice continues to be illegal under Afghan law, the laws have seldom been enforced, especially against powerful offenders and police who have been complicit in the crimes. Consequently, the practice of *bacha bāzī* has become widespread throughout Afghanistan in recent years.⁴¹ Furthermore, as many of these human right abuses are seen as cultural norms, U.S. Soldiers and Marines as well as the international community have been instructed not to intervene even when their Afghan allies have abused boys on military bases.⁴² Those who had taken action against the offenders have faced disciplinary action and career ruin for disobeying the order to dismiss and ignore the abuse of the young boys as traditional cultural practice.⁴³

Despite the fact that the prevention of child abuse may have appeared to be a low priority in comparison to fighting the Taliban, the U.S. COIN Field Manual

reminds us of the importance of rule of law and the protection of human rights.⁴⁴ Consequently, the U.S. Army must not be seen to be endorsing human rights abuses by turning a blind eye to such atrocities, especially when the crimes committed are recognized as such under local law. It must always be remembered that the fundamental purpose of the security forces (both military and police) of the host country, alongside which the U.S. Army is fighting and training, is to protect its citizens. It is not only about fighting enemies such as insurgent groups and criminality in general. As such, it is the duty of the U.S. Army to ensure that the population, especially the most vulnerable elements of society, is not abused by those who are there supposedly to protect them.

In countries where such abuses have become accepted as the norm, all personnel (from both U.S. and host institutions) should be briefed to ensure that they understand what actions constitute human rights abuses, and that these human rights abuses are crimes for which they will be punished. At the same time, a graduated disciplinary system could be introduced so that the offenders are given an initial warning and provided with the relevant remedial training. This provides offenders with the opportunity to understand that what they perceived as normal behavior is in fact a criminal act and if they reoffend, that there would be consequences from that action. It is essential that the U.S. Army enforce this discipline fairly and firmly. From a COIN perspective, if the Taliban is considered by local populations as being able to deliver better human rights protection (with respect to *bacha bāzī*) by swiftly delivering “justice” in its least corrupt

form, this makes a mockery of any rule of law intervention that the international community is promising to deliver.

Furthermore, the U.S. Army must do more to ensure that this zero-tolerance policy applies not only to offending allies who they may be training in the host country, but also to its own personnel, critically to include third party contractors. For example, the use of *bacha bāzī* by U.S. private military contractors Dyn Corp contracted to provide training to the Afghan police has been well documented.⁴⁵ This is hugely embarrassing for the United States and calls for better supervision by the U.S. Army to ensure that such incidents cannot reoccur in the future.⁴⁶ As guests of the host nation, Soldiers and contractors alike must ensure that they behave in a way that is morally acceptable by their own national standards as well as the standards of the host nation.

The key lesson is that these challenges cannot simply be cast aside as cultural differences. Such behavior requires a change in mindset, something that cannot be changed overnight. The mission to do so becomes one of not only simple legislative change, but also of influencing the hearts and minds of people who must first accept that practices are immoral in order to understand the reason for them being illegal. Only then will such laws become effective.

THE JUSTICE SYSTEM

Legislation is only as effective as the justice system that enforces it. It does not matter how good laws are if the justice system fails to implement those laws. The justice system can be defined as the system of law enforcement that is directly involved in apprehending,

prosecuting, defending, sentencing, and punishing those who are suspected or convicted of criminal offenses.⁴⁷ For the justice system to function properly, it must have criminal justice institutions that abide by the law, and are capable of implementing the law and working efficiently together especially in areas of overlap. For example, police officers must have the skills to be able to investigate a crime properly so that evidence can be collected and presented in court. Judges, prosecutors, and defense lawyers must have the relevant knowledge of the law and the skills necessary to be able to present their case effectively. They must also be able to go to court without fear of intimidation to carry out their work, which will require courthouses to be built in the right locations with appropriate levels of security. However, post-conflict criminal justice institutions are typically characterized as being under-resourced, having low capacity and capability, and lacking basic infrastructure. Many qualified personnel might have fled or been killed during the conflict. Those who remain may be guilty of human rights violations or corruption and therefore are generally unsuitable for service in the criminal justice system. Nevertheless, due to the lack of qualified staff, it is often not possible to find replacement personnel, resulting in the U.S. Army having to work with such individuals. Consequently, reeducation and reform must play an important role alongside technical training requirements.

The justice system encompasses a wide number of actors responsible for a broad range of activities, involving both the formal justice system and civil society. This section will focus on two main institutions within the formal justice system, namely the police and the judiciary, as this is where the U.S. Army is likely to have the closest contact and influence.

POLICE

The police as an organization should serve as the gateway to justice and security for the population. In most countries, a police force is the chief front line law enforcement agency, responsible for preventing crime, conducting initial investigations of any crime committed, and upholding public order.⁴⁸ However, during times of conflict, police forces in conflict-prone states can also be utilized as a combat function in support of the army, as is currently the situation with the Iraqi police who are being used to secure cities that have been retaken from the Islamic State.⁴⁹ In post-conflict scenarios, the police face numerous challenges. The first is the requirement to transition from serving a combat function to performing a more traditional policing role. This requires a shift in capability, skills, and mindset. In addition, during the transition period, the police are likely to be required to perform both roles, as the security situation remains volatile. This is likely to cause problems in terms of resources as well as further confusion as to their identity and function.

The need to be multi-skilled and have the ability to multi-task is not unique to the police in post-conflict states. This is also a requirement and a challenge for the U.S. Army operating in COIN campaigns, in that they are also required to fulfill multiple roles as the security situation dictates, alternating between combat and state-building activities. As such, the U.S. Army is well placed to empathize with the challenge the police forces face, and potentially act as role models as to how this could be accomplished. However, this can only be achieved if the U.S. Army is able to tailor relevant skill sets to police requirements.

This is not an unrealistic requirement. According to former British soldiers who have left the army to join the police, soldiering skills are transferable and can be highly relevant to traditional policing.⁵⁰ However, for the U.S. Army to succeed in training police officers, it needs to be mindful at all times that the role of the Army is to train police officers, not soldiers. As such, they must be respectful of the fact that these are two different roles requiring different skill sets, and that one is not superior or inferior to the other.

In Afghanistan for example, the military has come under harsh criticism for its treatment of the Afghan National Police (ANP) as a lightly armed element of the Afghan National Security Forces rather than as a separate and distinct civilian institution of law enforcement professionals.⁵¹ As such, U.S. Army commanders need to ensure that their Soldiers respect the difference in skill sets required, and remind them of the importance of the role of non-military organizations in bringing sustainable stability to post-conflict states. The military may take the lead during conflict, but once in the post-conflict scenario, it is the civilian institutions that need to take the lead to maintain peace. In the case of Afghanistan, it is generally acknowledged by the international community that law and order should eventually be enforced by civilian police, as opposed to by the Afghan National Army. This further emphasizes the need to nurture the police as police in terms of skill sets and mindsets, as opposed to an organization that exists to support the military.

This is relevant as organizational culture and self-perception is often an issue with the police in post-conflict states. Police officers who have served in conflict zones for long periods of time consider themselves combatants, not police officers. Many serving

officers may have only experienced conflict environments and are likely to have never witnessed traditional policing. In other words, they have no idea what policing should look like, and they have had no police role models to aspire to become. This will often result in confusion as to the role of the police, amongst not only serving police officers but also the general populations of that country. For example, in the words of one Afghan who commented that his father had served as a policeman, when asked what his father's role was in the police, he answered that he had served as a tank driver.⁵²

One consequence of the police's self-perception as a military as opposed to a civilian entity is that unless this perception can be changed, it will struggle to transition into the traditional policing role necessary to deliver sustainable law and order in the medium to long term. Despite the need to succeed as a civilian organization, it is worth observing that almost all police development interventions by the international community, including the establishment of operational policy, force structure, and standardized training and professionalization, have been modeled on military as opposed to civilian police institutions.⁵³ Furthermore, experience in theater has shown that training provided by military personnel to police personnel often exacerbates the preexisting military culture, where students aspire to become better soldiers, not police officers. This becomes problematic when the training function is passed on to police agencies where the students often have difficulty in identifying with traditional police culture and practices. Consequently, the U.S. Army should be mindful of this issue and bring in police advisers at the earliest possible opportunity to

ensure that the transition between military and police roles can take place more smoothly.

If there is concern that a civilian police adviser may struggle to fit into a military environment, one solution is to deploy army reservists who serve as police officers in their main civilian profession. In addition, there are also ex-military advisers with policing knowledge who could equally serve as a bridge between military and civilian cultures. Therefore, when recruiting advisors, U.S. Army commanders could specify that the civilian adviser he or she intends to recruit should possess policing experience or knowledge, ideally with a military background, or has experience working with and within the military. Furthermore, these individuals should be brought in at the earliest opportunity to ensure that any training provided by the U.S. Army is context specific and fit for purpose.

If training is to be provided by military trainers without policing knowledge, they too must be trained so that the trainers fully understand the role they are playing in preparing their students for what will ultimately be a civilian policing function. They must also be able to convey to their students that its combat function is an interim means to an end, and to introduce the concept of traditional policing. It should also be communicated at the outset that policing is ultimately about safeguarding, which requires a number of specific skills. Safeguarding requires the ability to collect and develop intelligence, carry out successful investigations, and collect evidence and present it in such a way that will bring about a successful prosecution in court. All of these specific skills are necessary to sustain rule of law in the medium to long term. Furthermore, it is absolutely correct that the military should endorse and deliver this message to initiate the change

in mindset that is so urgently required. What is important is that this forms part of the military training curriculum. There is also no reason why combat training cannot take place alongside or integrated with cultural education programs to encourage a gradual change in mindset of the police officers being trained by the U.S. Army. This will help prepare police officers for traditional police training to be conducted at a later stage by ensuring that expectations are managed when they are handed over to police trainers.

Another important aspect of traditional policing is the ability for the police to engage with the community. However, during periods of conflict, the police often become separated from the populations they are meant to serve and protect. Instead, they are likely to have become accustomed to operating more like an occupying army than public security officers. Again, similarities can be drawn between the U.S. Army in its requirement to perform hearts and minds operations where interaction with the local community is necessary. At the same time, extreme caution must be exercised, as there are fundamental differences that must be understood between hearts and minds influence operations in the context of COIN missions and community policing. Hearts and minds operations are in effect an exercise of soft military power aimed at removing the support of the local populations from insurgents.⁵⁴ They typically involve so-called consent-winning and gratitude-seeking elements to attempt to gain the support of local populations so that the military's own objectives can be achieved.⁵⁵ In community policing, the aim is to prevent or reduce crime by developing partnerships with the community to make neighborhoods safer. Community policing is generally described as a philosophy, as opposed to a tactic, designed to

tackle issues surrounding crime proactively based on a problem solving approach achieved through building relationships with community members.⁵⁶

The term “hearts and minds” is also used in the context of community policing, and both practices contain an element of intelligence gathering and require similar skill sets such as the ability to communicate with the local population. However, the objectives are fundamentally different, and time scales also differ in that military objectives tend to be more short term, whereas community policing requires a medium to long-term approach. This is relevant as attempting to reach long-term objectives in a short-term timescale commonly leads to failure. Consequently, training delivered to the police needs to reflect these differences which can again be achieved through the use of specialist advisers who are capable of translating military skills into police applications.

A further challenge facing the U.S. Army involved with training police in post-conflict states is that it is highly likely the police may have perpetrated serious human rights violations, which, in turn, may well have fueled conflicts. In other words, instead of being the solution to a problem, they are often the cause of the problem. Transforming such police forces into rights-respecting police services that simultaneously provide protection and fight crime is undoubtedly challenging.⁵⁷ However, that does not mean that these problems cannot be overcome. The U.S. Army again has a potentially vital role to play in communicating what is acceptable behavior and what is not—as well as why it is not. In many ways, the military is an ideal environment to establish, enforce, and project codes of behavior due to the high level of discipline that is at

the core of the military's distinct way of life and values, which in turn generate a culture of respect for the law.

With each post-conflict environment having its own distinctive features, there is no one model of police reform and training that will yield the desired results. Even if a model worked well in one post-conflict country, it should not be directly applied to another without considerable thought, as each scenario presents its own unique circumstances and challenges specific to that country and time period.⁵⁸ However, there are lessons from recent theaters as to what to avoid, as well as good practices that have worked which could be adapted and adopted in future campaigns. Recent research into reform of the ANP serves as a useful example. Despite considerable interventions by the international community, the ANP remains a highly corrupt and uncoordinated force, and has made only limited advances since 2001. Part of the problem lies in the fact that the ANP regards itself as a military organization, whose primary task is to fight the insurgency, a view exacerbated by law enforcement training provided by international military forces to include the U.S. Army. There is little shared sense that the police force's primary duty is to protect the civilian population. Human rights and gender equality are not issues that are considered as relevant to the police at the grassroots level, and customs such as *bacha bāzī*, which are in serious violation of International Human Rights Law, continue to be practiced by police on a regular basis. Although gender awareness has started to be incorporated into capacity building programs, as well as strategy and policy development, genuine buy-in has not been accomplished to date. Attempts to introduce female police officers too quickly have been

criticized, as they often resulted in the physical abuse of those officers by senior male police commanders.⁵⁹

Several reasons for the lack of success have been identified. These include the tendency to adopt a “tick-box” mentality where the potential unintended consequences of certain actions or policies are not fully thought through. These were exacerbated by the need to deliver results quickly, as well as an over focus on quantity over quality. For example, success for police training was often measured on the basis of the number of police officers who attended basic training as opposed to what they learned. In many cases, there were no tests or measures in place to assess whether the necessary basic standards were reached. In addition, the content of the courses was often reported as being a simple transmission of the instructor’s own experiences, which not only varied from instructor to instructor but also had little relevance in the local context. As with any form of education or training, the moment students feel that what they are being taught is not relevant to their role, there will be no incentive for those students to learn. Consequently, attendance at training sessions is only motivated by being linked to receiving pay, as opposed to developing knowledge and skills necessary to carry out their role effectively.

In addition, uncoordinated interventions have resulted in students receiving conflicting advice and instruction, causing further confusion. Shortages in translators also added to the general chaos because students were unable to understand what the instructors were saying.⁶⁰ The pressure for positive reporting is understandable given the considerable investment made to reform not only the police, but also rule of law interventions more generally. In the case of Afghanistan, there was considerable pressure on those involved in reforming the police to demonstrate success. These

pressures have also resulted in a short-term approach in solving issues that required a medium to long-term solution. In short, expectations were unrealistic.

At the same time, there have been reports of successful training practices. These were, on the whole, delivered by trainers who had the relevant skill set and, more importantly, the ability to adapt their training to be relevant and context specific. In most cases, having the right aptitude and credibility in the eyes of the students was considered to be far more relevant than a deep knowledge of the subject matter. In all cases, success depended on the ability of the trainer to have a flexible mindset and adapt the course as required.

Other areas of ANP achievement unrelated to training included tackling corruption relating to the payment of police salaries. Payment of police salaries is key in ensuring that police officers do not leave to join the insurgency on the grounds of pay.⁶¹ In recognition of the importance of paying police officers' salaries, the international community raised the necessary funds managed by the Law and Order Trust Fund Afghanistan, which manages international funds used to pay the salaries of more than 140,000 police officers.⁶² The concern was that payments made directly to the Ministry of Interior (MoI) or the ANP would not reach their intended recipients partly due to the lack of administrative infrastructures exacerbated by corruption which was epidemic not only within the Ministry, but also more generally. For example, officials responsible for police pay would provide names of fictional police officers to receive payment that would then be divided amongst corrupt officials.

In response to these concerns, governments (to include the United Kingdom) have taken the stance that aid must be delivered directly in the form of technical assistance, such as helping the MoI establish an

accounts system, as well as providing training and supervision to staff in performing police vetting functions. These include the identification of police officers, and arranging physical payment to the police officers directly and bypassing their superiors, to ensure that the funds were not lost or misdirected. This in turn ensured that police officers do not leave the police and join the insurgency on the basis of economic necessity, and receive the necessary training to become a more professional police force. If citizens are able to see positive change and develop trust in their police force, trust in the state as a whole is also likely to improve.⁶³

Significant and sustainable improvements in policing also depend on changing the capacity of the courts, and their ability to deliver justice.

THE JUDICIARY AND THE COURTS

The judiciary is the branch of government that is endowed with the authority to interpret and apply the law, adjudicate legal disputes, and otherwise administer justice.⁶⁴ However, as with the police, the judicial branch of the justice system in countries emerging from conflict usually lacks capacity in terms of physical buildings to house the courts, administrative structures that enable courts to take on and handle cases, and qualified personnel such as judges, prosecutors, and defense lawyers, all of which are essential to the ability to deliver justice.⁶⁵ In order to increase the necessary capacity of the judicial system, the U.S. Army has, alongside its international partners, contributed to numerous interventions to enhance the delivery of justice in a range of countries. Examples range from construction of court buildings and prisons that may have been damaged or destroyed during conflict, to

the provision of security, which enables the courts to operate.

Construction is an area that is typically outsourced to third party contractors, and it has received much criticism in recent years in theaters including Iraq and Afghanistan. For example, according to inspections and investigations carried out by the Special Inspector General for Afghanistan Reconstruction (SIGAR), a significant amount of construction projects suffered deficiencies, illustrated numerous instances of contract non-compliance, or were abandoned half completed. Examples include the failure to complete the \$10 million construction of the Justice Centre in Parwan and the \$20.2 million renovation project of Pol-i-Charkhi prison.⁶⁶ In the case of this prison, Afghanistan's largest correctional facility that was originally built in 1973 to house approximately 5,000 prisoners, \$18.5 million was paid despite the fact that the contractor only completed approximately 50 percent of the required work. Furthermore, with both projects, the work that had been carried out was reported as mainly defective. This is an area where the U.S. Army, in particular the U.S. Army Corps of Engineers, has the potential to play a bigger supervisory and management role to ensure that construction projects are completed to specification, on time, on budget, and to the required standards.

This is worthy of attention especially as inadequate oversight is believed to fuel corruption in such projects. In a report entitled "Corruption in Conflict" published in September 2016, SIGAR highlighted the damaging impact of corruption, not only in terms of its impact on construction projects as part of broader rule of law interventions, but also to the U.S. COIN campaign as a whole. According to former U.S. Ambassador to

Afghanistan Ryan Crocker, "The ultimate failure of our efforts . . . wasn't an insurgency. It was the weight of endemic corruption."⁶⁷

The report identifies five main findings with respect to the impact of corruption on the U.S. Afghan campaign from which lessons and recommendations for improvement can be drawn for future interventions. First, corruption undermined the U.S. mission in Afghanistan by fueling grievances and channeling support to the insurgency. Second, the United States contributed to the growth of corruption. Third, the United States was slow to recognize the magnitude of the problem. Fourth, U.S. security and political goals consistently overrode strong anticorruption actions; and finally, anticorruption efforts lacked sustained political commitment and saw limited success.⁶⁸ These criticisms apply equally to rule of law interventions.

In relation specifically to the justice system in Afghanistan, corruption is an epidemic within the judiciary, directly impacting their ability to deliver justice. A 2010 UN survey found that more than half the adults who had come into contact with prosecutors, judges, or the police had paid a bribe. According to Gulab Khan, a senior police investigator in Oruzgan Province, out of approximately 150 people detained for murder and other heinous crimes each year, half are released through means of corruption.⁶⁹ The conviction of opium trafficker Haji Lal Jan Ishaqzai is a case in point. Ishaqzai, a U.S. Treasury-designated "kingpin," was convicted by the Afghan Counter-Narcotics Justice Center (CNJC), for offenses relating to drug trafficking and was sentenced to 15 years in 2013.⁷⁰ Not long after he was sent to prison, Ishaqzai is reported to have paid in the region of \$14 million to a cross-section of people in the criminal justice system to

secure his release.⁷¹ As disheartening as this case may be, it illustrates the ubiquitous nature of corruption in every aspect of Afghanistan society from which two primary lessons can be drawn which equally apply to numerous post-conflict states suffering from epidemic corruption. The first is the importance of tackling corruption which has been recognized as a key characteristic that undermines efforts made in rule of law and other interventions aimed at bringing stability. This is particularly true with respect to law enforcement and the judiciary. In Afghanistan, with the exception of the Narcotics Courts, justice is rarely served as payments of money can be, and frequently are, made to overturn convictions. Until this situation changes, corruption will continue to impact the effectiveness of rule of law and general stabilization interventions carried out by the United States and its partners. The second is to look at the successes achieved by the CNJC to see whether this model can be utilized elsewhere, not only in Afghanistan but also in other post-conflict states.

The CNJC was set up to bring to justice those involved with narcotics.⁷² It achieves its aim by collocating close by the Supreme Court, the Office of the Attorney General, the MoI, and the Ministry of Justice in one secure location and is mentored by police officers from the British National Crime Agency (NCA). Counternarcotics is one area where there is general consensus that the joint efforts of the United States and Great Britain have had a positive impact. To date, there have been 621 convictions, including 35 Afghan officials, indicating the CNJC's ability and willingness to target not only the low hanging fruit but also more senior corrupt figures previously considered to be out of reach. Furthermore, the CNJC has not only pursued the arrest and prosecution of alleged drug dealers, but

has also focused on ensuring that the rights of suspects are fully respected and that they are given a fair and open trial. Within Afghanistan, this is the only court considered “corruption free,” where clan affiliations have no influence and convictions cannot be overturned through the payment of money.

The success of the CNJC to date has been attributed to several factors. First is the adoption of vetted, merit-based appointments where judges and prosecutors are appointed based on merit and qualifications as opposed to political or clan affiliation. Second, top-up payments have ensured that salaries paid to judges and prosecutors are sufficient to ensure that they are less tempted by bribery money. Third, all activities of the courts are closely supervised by the NCA, providing little opportunity for wrongdoing. Finally, discipline during training and education played an important role in professionalizing staff at all levels. Unlike many courses offered through other international partners, courses offered through the NCA were mandatory and strict discipline was exercised by NCA staff at all times. In addition, the courses were not “attendance only,” and instead performance of the attendees was assessed.⁷³ One further factor is the court’s ability to serve justice quickly, unlike other formal justice systems where speed of convictions as well as access to the court is an ongoing problem.

Inability to serve justice in a timely manner has been a key issue resulting in continued reliance on the informal justice system in many post-conflict countries. This is one of the reasons why in Afghanistan, the Taliban system of justice continues to be the preferred system for many, in addition to the fact that many Afghans believe it to be less corrupt compared to the state system. The punishments passed by the Taliban

justice system, such as stoning an adulterer to death, may have conflicted with commitments to human rights under both the Constitution and international law; nevertheless, the ability to deliver justice quickly provided the Taliban with authority. As such, the U.S. Army needs to consider how the lack of an effective state justice system impacts the broader security picture. The ability for the government to provide an effective state system of justice as a viable alternative to existing informal systems of justice, whilst ensuring that it is accessible to people irrespective of where they live, will directly change the balance of power which will impact COIN campaigns as a whole.

In post-conflict states that have been plagued by decades of conflict, access to fair, efficient, and transparent justice is often limited. Formal courts are often difficult to access especially for people in the provinces. A further issue relates to inadequate numbers of qualified legal personnel. The capacity of the justice sector can only grow if there is adequate legal education provided to judges, prosecutors, and criminal defense attorneys to support a well-balanced criminal justice system.⁷⁴ Although there have been initiatives to provide legal education, many have been unsuccessful. Due to the lack of adequate educational facilities in those countries, scholarships have been provided to promising candidates to send them to the United States and elsewhere to receive legal education and to obtain the necessary legal qualifications to enable them to practice law. However, many have ended up staying in those countries instead of returning to their country of origin to practice.⁷⁵ This clearly defeats the object of the investment.

As a possible solution to this problem, one could look to how legal firms, accountancy firms, and investment banks retain post-qualification interns. Prior to qualification, the intern is required to sign a contract with the firm which includes a clause stating that the individual is committed to working for the firm for a set period of time post qualification. This ensures that the individual does not jump ship immediately upon qualification so that the investment made by the firm is not lost. Startlingly, no scheme of this sort appears to have been applied in post-conflict countries to ensure that the newly qualified judges and lawyers practice law in the country intended.

The alternative is to provide education in country, but this presents many challenges. The first is the lack of educational facilities. The second is security, in that it requires teachers and lecturers who are willing to travel to and able to survive in a hostile environment. In addition, students may be attacked on the way to college, especially if they are female. There are numerous cases of female students having been attacked with acid in countries like Iraq, Pakistan, and Afghanistan, where many elements of the population hold traditional views that women and girls should not receive education of any description nor pursue a career.⁷⁶ As such, university and other training facilities need to be secure. All of this requires considerable funding. A further consideration is that, unlike delivering basic training to police forces, legal qualifications take considerably more time, and lecturers and tutors need to be able to stay for longer periods in order to nurture the students. A week or two of lectures provided by a Western law professor is insufficient.⁷⁷ In the case of Afghanistan, most of the practicing lawyers who were educated during the Soviet occupation are

now reaching retiring age. There is real concern that given a few years, there will be even fewer qualified judges, prosecutors, and attorneys due to the fact that no investment has been made to create a new generation of lawyers to replace those about to retire.

Legal educational programs are also necessary for the wider population. For example, in the Democratic Republic of Congo, the UN funded radio station, Radio Okapi, has been used to make the law accessible to the people. The radio station has developed theater pieces on aspects of the justice system that have proved to be very popular with listeners, as well as a series of programs linking international human rights law to customary law in order to demonstrate the universality of human rights standards. The station also sends theater troupes into the countryside to educate people on matters relating to justice.⁷⁸

However, such programs are fairly unique and more needs to be done to inform the public at large and to engage them in the justice process. Rule of law experts are not media experts, therefore the latter need to be recruited to assist in developing a media strategy tailored to the national or local context.⁷⁹ This could be achieved with the help of U.S. Army intelligence personnel with human terrain analysis expertise. It is unfortunate that the U.S. Army Human Terrain System program ended in 2014, as it was deemed to be no longer a requirement in theater.⁸⁰ In contrast, within the British Army human terrain analysis continues to be recognized as a key aspect of intelligence and information activities.⁸¹ Consequently, the U.S. Army is likely to have to source specialist expertise in this field if it wishes to strengthen the role of the population and civil society as part of its public education

and awareness campaigns through the delivery of rule of law public education programs.

As in the case of Radio Okapi in the Congo, such interventions are of vital importance if the existing justice system in a post-conflict state is to function. It is with the aid of multiple coordinated interventions that dysfunctional dual or multiple systems of justice may eventually become part of an effective unified justice system. However, for that to happen, the existence of informal systems of justice must be respected. In other words, the newly introduced formal justice system cannot simply replace the informal one, but instead systems must converge and merge. For centuries, in the case of Afghanistan, informal justice systems such as the *jirga/maraca* for the Pashtuns, and the *shura* for non-Pashtuns operated as a mechanism for dispute settlement. These dispute-resolution institutions incorporate prevalent local customary law, and institutionalize rituals such as *nanawate*, administered by a body of village elders with an established social status and reputation for piety and fairness. However, they frequently do not provide outcomes that meet international human rights standards, due partly to an emphasis on communal over individual rights. But since such systems are deeply embedded in Afghan culture, it would be a mistake to even attempt to eradicate them. Instead, interventions to attempt to increase awareness of human rights standards need to continue to try to achieve buy-in to such concepts from village elders and the populations more widely.

This will take time. The desired results can only be achieved through long-term sustained support and active inclusion of the population and civil society. It is with this in mind that careful consideration must be given by U.S. Army commanders at the earliest

opportunity to wider issues surrounding the establishment of the rule of law as part of an eventual exit strategy.

CONCLUSION

The importance of establishing rule of law in post-conflict states has been recognized as key in delivering stability in fragile states in the short, medium, and long term. This is in the interest of the U.S. Army and its partners not only from a COIN perspective, but also to protect U.S. security interests both at home and abroad. To that aim, assistance is required to ensure that in post-conflict environments, the management and maintenance of security is successfully transferred to civilian organizations such as the police and the justice system more generally. It is only when this successful transition occurs and sustainable rule of law has been established that military commitments can cease. As such, it is essential that the end state to a successful civilian handover form part of a plan for disengagement after an intervention.

However, one key challenge for organizations (such as the police) emerging from conflict is the requisite to transition from a combat function to a more traditional policing function. This is difficult due not only to a lack of the necessary skill sets, but also because of the need for a fundamental change in mindset about the purpose of policing. The U.S. Army can play an important role in facilitating the establishment of effective rule of law institutions and practices in post-conflict states in many ways. Additionally, a lack of appreciation of the importance of civilian institutions and their role in establishing rule of law will lead to an exacerbation of the problem.

Delivering rule of law interventions is a complex task involving multiple stakeholders. Numerous challenges exist, each of which can prevent the establishment of effective and sustainable rule of law institutions. This in turn is likely to lead to a requirement for further military support from the U.S. Army resulting in even longer term deployments in what can become an unending conflict. In order to avoid unintended consequences which will have the impact of undermining rule of law interventions carried out by the U.S. Army and its partners more broadly, the following recommendations should be considered in shaping future U.S. Army interventions relating to establishing rule of law as part of its future COIN and state building missions.

RECOMMENDATIONS

Recommendation 1: Contextual Understanding

Develop a broad understanding of the rule of law landscape in the post-conflict state in question, and identify key challenges which may deter the establishment of effective and sustainable rule of law institutions.

Recommendation 2: Unintended Consequences

Consider the potential unintended consequences of U.S. Army interventions in training local police forces and other rule of law interventions, and determine how can these be mitigated or avoided.

Recommendation 3: Strategic Objectives

Reevaluate objectives to ensure that expectations are realistic in terms of what is to be achieved and the timescale in which to achieve them. Consider the impact of short-term mission objectives in attempting to achieve medium to long-term objectives.

Recommendation 4: Sustainability

Ensure that rule of law interventions are sustainable after withdrawal of troops and form part of U.S. Army exit strategies. Ensure that these are integrated into post-conflict planning before intervention is considered.

Recommendation 5: COIN versus State Building

Address the existing confusion between the combat element of COIN operations and state building missions, and understand how this conflict can undermine both operations.

Recommendation 6: Police Training

Determine the role that the U.S. Army should play in facilitating a transition from military to civilian rule of law, and exercise particular attention to challenges relating to corporate culture.

Recommendation 7: Skills Shortages

Determine when and how rule of law mechanisms and advisors should be integrated into stability operations and consider how the U.S. Army could better

utilize its Reserve Forces to provide capacity and specialist skills to facilitate civilian transition.

Recommendation 8: Corruption and Human Rights Abuses

Adopt a zero-tolerance policy toward corruption and human rights abuses and provide remedial education where such practices may have become institutionalized.

Recommendation 9: Management and Oversight

Provide management and oversight of third party contractors through deployment of the U.S. Army Corps of Engineers to ensure that construction projects relating to rule of law interventions are completed to the required specifications.

Recommendation 10: International Liaison

Highlight other partner institutions the U.S. Army could or should be engaging with to ensure a coordinated approach to the establishment of effective rule of law institutions and practices in the host country.

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79. *Ibid.*

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81. Ministry of Defence (MoD), "Culture and Human Terrain," Joint Doctrine Note 4/13, Shrivenham, UK: Developments, Concepts and Doctrine Centre, September 2013.

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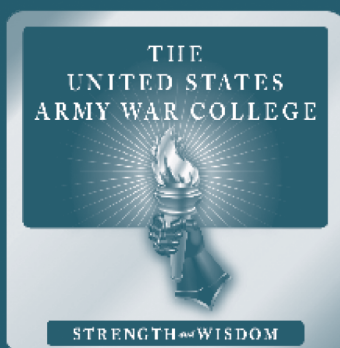
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