

President Obama talks with Russian President Vladimir Putin about situation in Ukraine, March 1, 2014 (White House/Pete Souza)



The Military's Role in Rule of Law Development

By Patrick J. Reinert and John F. Hussey

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

—PRESIDENT BARACK OBAMA¹

Brigadier General Patrick J. Reinert, USAR, is a career Assistant United States Attorney in the Northern District of Iowa. Colonel John F. Hussey, USA, is Deputy Commander of Combined Joint Interagency Task Force 435 in Afghanistan.

As Operation *Enduring Freedom* in Afghanistan transitions to the Resolute Support Mission, many believe that military engagements abroad involving the United States will decrease and that the Nation

will become a disengaged actor on the world stage. Given the complexity and volatility of relationships among nations, however, as well as the continual rise of hostile transnational groups, it appears the United States will remain

substantially engaged on the international stage for the foreseeable future. As part of its future engagement strategy, the United States must consider and plan for conducting operations in states at risk of failure, in failed states where the central government is so weakened that the people have virtually returned to the natural state described by Thomas Hobbes in the *Leviathan*, in states emerging from long periods of conflict such as Afghanistan, and in states in peaceful postconflict rebuilding periods.²

The world remains a volatile, uncertain, and dangerous place with states, transnational organizations, and nonstate actors all working in their own self-interests—which may or may not be aligned with the national interest of the United States. There is little choice for the United States but to maintain an active role to counter, impede, and dissuade hostile states, nonstate actors, and transnational criminal organizations. The United States, working in concert with other nations, international organizations, and nongovernmental organizations (NGOs), must work to mitigate threats through the use of all elements of national power and focus on rule of law development as a means to provide international stability.

If combat operations are required to wrest control of a nation or a large geographic area from a hostile force or if a nation becomes a failed state requiring international intervention, each participating nation must plan for and be prepared to implement programs to provide security and stability. Using as much of the indigenous criminal justice system as soon as possible should protect the people from harm and help them begin developing a sense of “nation” to form the nucleus of the nation that will rise from the ashes of the conflict. Rule of law development requires a whole-of-government approach in which synchronization and coordination among the military, Embassy teams, international organizations, and NGOs are critical. In an operation with a kinetic component, or where the security situation may be unstable, the military must take the

lead in developing the security umbrella using the criminal justice system for counterinsurgency and providing general security for the people. Other rule of law programs, focusing on more generalized development efforts, have a longer time horizon and can more effectively flourish after the security situation is more stable.

David Kilcullen, former counterinsurgency advisor to General David Petraeus in Iraq, stated the United States is likely to remain engaged in major stabilization or counterinsurgency operations such as Iraq or Afghanistan.³ In a world of uncertainty and instability, Kilcullen predicted the United States will engage in smaller operations, such as those in Bosnia or Kosovo, every 5 to 10 years for the foreseeable future.⁴ These conflicts will likely occur in conflict-ridden littoral areas and in underdeveloped regions of the Middle East, Africa, Latin America, and Asia.⁵ Operational planners must anticipate that coalition military forces and international organizations will confront failed, broken, or simply nonexistent justice systems that lack sufficient capability or capacity to conduct law enforcement operations, effectively resolve civil or criminal disputes, or appropriately conduct detention operations to support Law of Armed Conflict (LOAC) or criminal detentions in accordance with international humanitarian standards.⁶

What Is Rule of Law?

The rule of law has been described in varying terms, but a comprehensive definition, such as the one used by the United Nations, is useful in this context. The United Nations defines *rule of law* as:

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.*⁷

Many nations use secular constitutions, statutes, and mechanisms (law enforcement, courts, and institutions to correct individual criminal behavior) to implement rule of law. Other nations use differing implementation methods. In the Middle East, for example, the structure of the legal system is derived from a combination of systems, including religion and tribal practice, to form formal and informal legal mechanisms. In Latin America, citizens believe that they do not have a voice or the ability to obtain justice from a system permeated by corruption, judicial failures, repressive police tactics, and the legal marginalization of the majority of the population.⁸ Citizens in Central Asia, most notably the Caucasus states, assume that they are governed by institutions that are inept, corrupt, and rife with nepotism.⁹ In some parts of the world, rule of law appears under the guise of a strong authoritarian ruler exercising great influence over the “independence” of the judiciary. Often rulers with a strong “law and order mentality” impede social change that may threaten their holds on power. In states with a strong Islamic influence, personal issues, such as divorce and marriage, are resolved in sharia courts. The judges in criminal courts may be educated to approach criminal matters differently than judges trained in sharia law.¹⁰

For those who have deployed to or are familiar with war-torn areas or failed states, it is clear that military force alone will not be able to establish or implement rule of law. Legal systems and institutions take years to develop based on a variety of factors, including host nation culture, religion, and tolerated levels of corruption, and whether coalition members bring with them an ethnocentric bias that could complicate the establishment of rule of law. In at-risk, failed, emerging, and postconflict states, the military can set the conditions for rule of law development and stability by focusing on the state’s criminal justice system.



Afghan National Army soldiers stand in formation outside Bagram Air Field as part of ceremony giving Afghan government control of local prison (U.S. Army/Andrew Claire Baker)

Rule of Law in Afghanistan

After the Taliban government fell in Afghanistan, extremist organizations and insurgents continued to wage asymmetric warfare. The United Nations Security Council through the North Atlantic Treaty Organization (NATO) established the International Security Assistance Force (ISAF) to oversee security in the country. Under ISAF, a new sovereign national structure developed in Afghanistan in 2004. This new government faced significant challenges in establishing rule of law in a country that had been a battleground for years and was still a kinetic environment.

In much of Afghanistan, the legal system struggled to provide stability for the nation due to overly bureaucratic institutions focusing on central control; a traditional preference for local, informal dispute resolution; and a security environment challenging justice actors to

maintain a regular presence in some areas, resulting in a virtually nonexistent formal criminal justice system. This allowed the Taliban to fill the void with shadow courts using a rough variant of sharia law. Continued instability and the lack of significant economic growth have caused Afghanistan to struggle with sustaining required infrastructure and trained personnel to maintain rule of law institutions in the short term.

As noted in a recent RAND study, military planners and policymakers repeatedly treated detention operations as an afterthought. Detention operations have had strategic consequences for the United States internationally since 2001.¹¹ Planning and resourcing detention operations and rule of law development in the earliest phases of the campaign create additional challenges in conducting counterinsurgency operations. Although the international

community was quick to offer solutions to address Afghan institutional shortcomings, real reform of the justice system required an Afghan system to ensure protection of civil liberties, equal treatment, and stability. To conduct effective counterinsurgency operations, Afghans needed a trusted criminal justice system void of corruption and abuse of power. In 2009, the U.S. Embassy in Kabul and ISAF commander recognized the need for coordination of military and civilian rule of law efforts.

A Response to the Dilemma

In addition to a struggling judicial system, Afghanistan had a prison system that focused on the provincial rather than national level, resulting in detainees being removed from the battlefield and taken to a court in the same war-torn province. This process placed the provincial legal system at higher risk of

attack and illegal influence. The LOAC detention system used by the coalition was not part of the civilian system, and Afghanistan preferred using criminal procedure rather than administrative detention. Major General Douglas Stone, former Task Force 134 commander in Iraq, came to Afghanistan to review the Afghan prison system. His report was critical of coalition detention operations and found that approximately two-thirds of the detainees were not hardened radicals. Some were not involved with the insurgency, and others worked for the insurgency out of economic necessity.¹² General Stone felt detention centers and prisons should be rehabilitative in nature, which required separating insurgents from common criminals. This seminal report led to change.

On July 9, 2009, ISAF Commander General Stanley McChrystal requested approval to establish Joint Task Force (JTF) 435 to centralize detention operations, interrogation, and rule of law functions in Afghanistan while reducing strategic vulnerabilities posed by detention operations. On September 18, 2009, the Secretary of Defense established JTF 435 to assume command, control, oversight, and responsibility for all U.S. detainee operations in Afghanistan. JTF 435 assumed responsibility from Combined Joint Task Force 82 for the detainees held at the Detention Facility in Parwan (DFIP), oversight of detainee review processes, programs for the peaceful reintegration of detainees into Afghan society, and coordination with other agencies and partners for the promotion of the rule of law and biometrics in Afghanistan. JTF 435 achieved initial operations capability on January 7, 2010.

JTF 435 coordinated with a variety of military and civilian organizations, including Afghan organizations. In addition to the Kabul headquarters element, the JTF had seven subordinate elements:

- Military Police brigade maintaining humane custody, care, and control of detainees, limiting insurgent activity within the facility, and facilitating family visitation

- Theater Intelligence Group (TIG) to collect actionable intelligence
- Biometrics Task Force to confirm identities, track offenders, and build a biometric database
- Afghan Detentions and Corrections Advisory Team (later called the Security Forces Assistance Team) to coordinate with Afghan detention authorities and share best practices
- strategic communications and outreach cell to advance rule of law
- reintegration cell to facilitate deradicalization and reentry programs for Afghan prisoners
- Legal Operations Directorate to conduct periodic Detainee Review Boards and facilitate transfer of detainees to the Afghan criminal courts.¹³

With the addition of Afghan and interagency partners, JTF 435 became Combined Joint Interagency Task Force (CJIATF) 435 on September 1, 2010. The command also assumed new missions and responsibilities to support rule of law efforts as it partnered with the U.S. Ambassador to Afghanistan for Rule of Law and Law Enforcement. To effectively execute rule of law missions, CJIATF 435 created the Rule of Law Field Force–Afghanistan (ROLFF-A) to execute projects to increase rule of law capacity in Afghanistan.¹⁴ The concept required the Embassy and ROLFF-A to concur on programs to build short-term, mid-term, and long-term Afghan governance and justice systems. ROLFF-A then coordinated with battlespace owners to build capacity of local legal systems to allow them to operate effectively across the legal spectrum. ROLFF-A, in conjunction with U.S. law enforcement agencies, provided subject matter experts on evidence-processing to assist Afghan prosecutors and investigators.

On June 9, 2011, the defense ministers from the 48 nations of ISAF created the NATO Rule of Law Field Support Mission (NROLFSM) as a command directly subordinate to the ISAF commander. The commander of ROLFF-A was also the NROLFSM commander. NROLFSM provided essential field

capabilities for Afghan and international civilian providers to build Afghan criminal justice capacity, increase access to dispute resolution services, fight corruption, and promote the legitimacy of the Afghan government by providing security, coordination, movement support, engineering support, and contract oversight.

Under the ROLFF-A/NROLFSM mandate, U.S. Rule of Law Field Support Officers, predominantly lawyers and law enforcement officials, mentored justice sector officials.¹⁵ Neither ROLFF-A nor NROLFSM were to participate in U.S. LOAC detention operations.¹⁶ To be successful in a geographically dispersed rule of law mission, a unit such as ROLFF-A/NROLFSM needs to be well resourced and able to operate for an extended period of time. For future military forays into rule of law, a more focused effort is warranted.

In today's complex battlefield, military leaders have come to realize that achieving national goals to transition from combat to stability operations and ultimately transfer to host nation civil authority requires rule of law planning and shaping efforts well before combat operations. To facilitate the eventual transition to the host nation, rule of law planning must include incorporation of significant aspects of the host nation's legal system. The military rule of law plan must create the security umbrella and focus on criminal justice basics, specifically detentions, investigations, and adjudications. The military's use of these universal components of a criminal justice system must be as close as possible to the host nation's legal system to enable effective transition to host nation sovereignty. Military rule of law planning must focus on the basic security institutions to create a permissive environment for the interagency community, NGOs, and coalition partners to operate.

One of the primary goals of CJIATF 435 was to assist its Afghan partners in establishing a detention operations regimen, a detainee interview process to enable them to continue to gather information for prosecution and network targeting, and a court to adjudicate charges of criminal activity by members

of the insurgency. The commander's vision was "to build Afghanistan's resistance and resiliency against insurgent and terror-related threats through use of evidence-based operations, forensic evidence, and enhanced cooperation across the Afghan Justice Sector."¹⁷ In an effort to build the Afghan legal system and transition this facet of the operation to the Afghans, CJIATF 435 focused its mission on training the Afghan partners in detentions, interview techniques to perfect criminal cases, and court operations to resolve criminal cases related to the insurgency.

Investigations

To dismantle any criminal network, investigators must gather information to understand the network, methods of operation, identity of participants, and their roles. One of the important methods to gain insight into a criminal network is the interview of a suspect. In conducting operations against a networked adversary such as an insurgent group, an interview can result in information to conduct future operations to disrupt or dismantle the network on the battlefield while simultaneously obtaining evidence to use against the individual in the host nation court system. In Iraq, the model used to conduct detainee interviews was the Joint Intelligence and Debriefing Center.¹⁸ In Afghanistan, the Theater Intelligence Group and its Afghan partner, the National Directorate of Security, Department 40 (NDS-40), filled this role.

The TIG was created on January 6, 2010 and was assigned to CJIATF 435 to conduct interviews and debriefings to fill tactical, operational, and strategic intelligence requirements. Eventually, the TIG had more than 300 Servicemembers, civilians, contractors, and linguists assigned and forged working relationships with more than 20 interagency partners and organizations.¹⁹ The TIG conducted more than 35,000 interviews and debriefings and produced over 6,800 reports supporting all echelons of intelligence consumers.²⁰ In 2013, the TIG began partnered operations with law

enforcement investigators from NDS-40, which investigates individuals suspected of committing crimes in support of the insurgency. In this partnership, NDS-40 investigators were able to hone their skills at using forensic evidence, map tracking, and other interview techniques taught by the U.S. mentors in the TIG.

Court Operations

The evidence gathered through this joint effort enabled the Afghan legal system to remove insurgents from the battlefield. CJIATF 435 worked with the U.S. Department of State, international partners, and Afghan officials to develop the Justice Center in Parwan (JCIP) in 2010.²¹ The concept was for Afghans to have an effective, centralized criminal court to resolve national security-related cases applying Afghan law. The JCIP was to be a long-term facility led by Afghan judges, prosecutors, and defense counsel and was collocated with the Afghan National Detention Facility in Parwan (ANDF-P) within the National Security Justice Center (NSJC).²² At the JCIP, every detainee had a dedicated defense counsel, and justice advisors from other countries assisted counsel in honing their advocacy skills and effectively presenting cases before the court.

From May 2010 through September 2014, the JCIP provided due process to over 3,000 detainees through an Afghan criminal court operated by Afghan judges applying Afghan law. The JCIP successfully conducted over 7,000 primary and appellate trials of insurgents removed from the battlefield.²³ The legal advisors reviewed and reported the results of the majority of JCIP trials to help improve the process and capture lessons learned. The court maintained an overall conviction rate of over 75 percent and a conviction rate of 98 percent if there was DNA or a fingerprint match to an improvised explosive device.²⁴ The court's application of Afghan criminal law, specifically the Internal/External Security Crimes Act, effectively protected the coalition and the Afghan people. The JCIP provided a sustainable foundation for Afghanistan to effectively implement

Afghan law to criminalize the insurgency and build the people's confidence in the national government and legal system. The effective prosecution at JCIP creates a beacon of hope for the rest of the criminal justice system in the eyes of the Afghan people. Furthermore, an effective National Security Justice Center also counters the narrative that Afghanistan is the source of regional instability.

Detentions

As with Iraq and Guantanamo Bay, detention operations in Afghanistan had a variety of challenges. The original detention facility in Afghanistan, the Bagram Collection Point, later called the Bagram Theater Internment Facility, was challenged by a variety of issues, including the facility design. In 2009, the Detention Facility in Parwan was constructed with a view to transition detention operations to Afghan authority.²⁵ By the end of 2010, 561 Afghan guards had been trained to work at DFIP. Also, CJIATF 435 trained and mentored Afghan leaders to prepare them to assume responsibility for legal processing, case management, and administrative/logistical operations of the detention facility. CJIATF 435 facilitated the creation of the Afghan Military Police Brigade, a 5,294-man unit specially trained to conduct detention operations in accordance with international humanitarian standards.²⁶

CJIATF 435 transferred DFIP and the Afghan detainees to the control of the Afghan government on March 9, 2012, and the facility was renamed the Afghan National Detention Facility in Parwan.²⁷ The Afghan Military Police Brigade, subsequently designated the Detention Operations Command, remained part of the Afghan National Army and maintains control over the ANDF-P. The ANDF-P, JCIP, and support bases collectively constitute the NSJC. CJIATF 435 continues its partnership with the Afghan National Army, NDS-40, the court, prosecutors, and defense counsel to support the justice sector in combating the insurgency and creating a more stable Afghanistan.

Governing Ungoverned Territory

In the near term, the challenge for the United States is remaining globally engaged with limited resources. After nearly 13 years of continuous conflict in Iraq and Afghanistan, the United States and its coalition partners are war-weary. The duration of the conflicts, coupled with economic issues at home, makes domestic issues a focal point for politicians eager to avoid military engagements. To support global stability and prevent ungoverned territory from becoming a safe haven for extremist groups, the United States and its allies must carefully select the means to achieve the strategic goal of preventing nations from becoming failed states while avoiding long-term military engagements. This entails providing assistance to nations that are confronting destabilizing nonstate actors and transnational criminal organizations.

To achieve this objective, the United States and like-minded allies must concentrate on rule of law–focused engagement through routine military and interagency activities in an effort to dissuade or deter potential adversaries while solidifying relationships with friends and allies. These engagements will influence and strengthen the leadership of a nation and its populace. This engagement strategy requires a coordinated effort among the Defense Department, State Department, and other governmental agencies to formulate a holistic plan to help a nation or region avoid slipping into disunion and to enhance the ability of the nation to govern its territory. In many instances, this will require individuals on the ground to help build the legal institutions necessary for stability. The military is well suited to provide training in a less permissive environment to build security, stability, and a host nation's forces to enhance rule of law and reduce the risk of instability. Reinforcing or reforming a nation's security, prosecutorial, and judicial institutions helps create the fabric of a safe society functioning under the rule of law, while creating a more permissive environment for nonuniformed personnel to establish more long-term development programs.



California National Guard Special Forces Soldier trains with Nigerian soldier in Nigeria to assist local military to counter Boko Haram (DOD/Jason Sweeney)

While it may be more efficient to conduct training in detention operations, investigations, and legal operations in an academic environment in the United States, this method should be limited to key leaders identified during training occurring in the host nation. The bulk of training events must occur in the host nation. This allows trainers to gain a better understanding of the host nation's legal system and culture while identifying key current and future leaders for additional training outside the host nation. Training like that conducted by the

Defense Institute of International Legal Studies is an excellent example of rule of law development training conducted in the host nation.²⁸

All training must be tailored, focused, and incorporate the local legal system. Attempting to impose a new Western system or to make drastic changes to the existing legal framework will meet with resistance and undermine training efforts, which should focus on compliance with international humanitarian standards. This focus improves the professionalism of the force and mitigates the risk



KC-10 Extender refuels F-22 Raptor over undisclosed location before targeted airstrikes in Syria to protect U.S. personnel from Islamic State in Iraq and Levant (DOD/Russ Sclaf)

posed by an abusive authority figure to the rule of law. Abusive, predatory, or corrupt public officials undermine the legitimacy of the government in the eyes of the people. Police forces must enforce the law fairly and equally without regard for status, tribal/ethnic affiliation, or personal gain. In a nation emerging from conflict or striving to maintain legitimacy, the training must initially focus on the

three necessary components for a functioning rule of law system: investigation, adjudication, and detention.

Investigations training must focus on basic investigative skills and human rights training to ensure international humanitarian standards are met. In some nations, the police will be responsible for the interview of alleged criminals/insurgents. Trainers must ensure any interview

techniques comport with international humanitarian law. Any indigenous interview methods in the host nation that could result in a coerced statement must be specifically discouraged and the negative ramifications of such illegal activity discussed during the training.

The area of detentions is critical to establishing or preserving the rule of law. As noted by the classic Russian writer Fyodor Dostoevsky, “Humane treatment may raise up one in whom the divine image has long been obscured. It is with the ‘unfortunate,’ above all, that humane conduct is necessary.”²⁹ Without enlightened detention policy and rehabilitative programs, a detention center or prison can easily become a breeding ground for insurgents or other criminals. A poorly trained, corrupt, or abusive guard force will result in detainee abuse, causing the detainee to leave the facility a worse criminal than he entered. Detention and prison officials must understand their role is simply ensuring the safe and humane care of detainees in their custody. If a detainee or prisoner is humanely treated and given constructive rehabilitative training opportunities, the detention center can help create positive change in his behavior.

A free, impartial, and independent legal system, which ensures equal protection under the law and provides due process, is critical to the stability of a nation. The host nation may have a tradition of informal dispute resolution, such as allowing a village elder to resolve disputes, or a more formal legal structure. Informal methods are best suited for resolving individual, civil disputes, such as a land boundary dispute between neighbors. The formal mechanisms are best suited for resolution of criminal matters where the state is taking action to ensure the people are protected from criminal elements. To maximize the ability of the host nation to maintain security, initial training and development efforts should focus on the formal legal mechanisms, specifically the courts and counsel. The three rule of law building blocks of investigation, adjudication, and detention form the security foundation for the nation.

A failed, emerging, or postconflict nation is challenged to provide basic services such as garbage collection and water distribution; performing even basic government services is dependent upon first establishing security. Effective legal institutions are critical to establish and maintain rule of law by creating an environment for the rest of society to flourish. It is in the interest of the United States and the community of nations to ensure the stability of nations, minimize the number of failed states, and help emerging states become stable members of the international community. Using military rule of law development and training teams focused on investigation, formal adjudication, and detention should promote stability, reduce the risk of a failed state, and create the umbrella of security needed for other societal development. This military doctrinal focus should result in a narrow rule of law mission for the military to conduct in a kinetic environment, a clear line of demarcation from civilian development programs, and enhanced synchronization of rule of law development efforts. JFQ

Notes

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¹⁴ See Rule of Law Field Force–Afghanistan, "Rule of Law Support Mission History and After Action Review," approved by Brigadier General Patrick J. Reinert, on file at The Judge Advocate General's Legal Center and School, Center for Army Lessons Learned, and the Army Center for Military History.

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¹⁸ Thomas R. Mockaitis, *The Iraq War: A Documentary and Reference Guide* (Westport, CT: Greenwood, 2012), 222.

¹⁹ Modinger and Bartlett, 43–44.

²⁰ *Ibid.*, 44.

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bill/113th-congress/senate-resolution/355/text>. The Justice Center in Parwan has a conviction rate of roughly 80 percent. See David Pendall and Cal Sieg, "Biometric-Enabled Intelligence in Regional Command–East," *Joint Force Quarterly* 72 (1st Quarter, January 2014), available at <<http://ndupress.ndu.edu/Media/News/NewsArticleView/tabid/7849/Article/8327/jfq-72-biometric-enabled-intelligence-in-regional-command-east.aspx>>; and *Progress Toward Security and Stability in Afghanistan* (Washington, DC: Department of Defense, April 2014), available at <www.defense.gov/pubs/April_1230_Report_Final.pdf>.

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