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Table of Contents

The Rule of Law and Civil Affairs in the Battle for Legitimacy

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Abstract

Military legitimacy is about might and right. In the history of warfare, might has most often made right; but in operations other than war such as stability operations and counterinsurgency operations (COIN), might must be right to achieve mission success. That is because mission objectives in COIN are more political than military, and legitimacy is the center of gravity in achieving those political objectives.

The US invasions of Afghanistan in 2001 and Iraq in 2003 were both characterized by the shock and awe of overwhelming combat force; but subsequent military operations have been characterized as COIN, and excessive military force has proven to be counterproductive to legitimacy and mission success.

In COIN, the primary strategic objective is to promote the legitimacy of the supported government against insurgent threats, and that legitimacy is measured by public support in both the US and the area of operations. In the violent, ambiguous and unforgiving environments of Iraq and Afghanistan, tribal traditions and religious values have produced conflicting concepts of legitimacy that threaten mission success.

US strategic objectives in COIN are to promote democracy, human rights and the rule of law. Security is the first requirement of legitimacy, but a government must also provide its people with human rights

and a modicum of democracy to be considered fully legitimate. Experience in Iraq and Afghanistan has shown that democratic elections and security are achievable objectives, but that protecting fundamental human rights through the rule of law is difficult at best due to oppressive religious and cultural traditions.

This paper explores the battle for legitimacy and the interrelated roles of the rule of law and civil affairs in stability operations and COIN. It examines how religion and cultural traditions produce the moral and legal standards of legitimacy upon which public perceptions are based. And it considers those strategic and operational concepts unique to stability operations and COIN, and the military capabilities, missions and roles needed to carry them out in the challenging environments of contemporary conflict.

Introduction

Establishing the rule of law and legitimate governance is the strategic political objective of US counterinsurgency operations (COIN) in Afghanistan and Iraq, and civil affairs is the primary military means to achieve that strategic end. COIN is the violent competition between insurgents and an incumbent government for political power, and victory goes to the side that wins the public support needed for the legitimacy to govern. That makes public support a primary strategic objective in the battle for legitimacy.

If the US is to achieve mission success in the ambiguous and unforgiving environments of COIN, policy-makers and military leaders must better understand how military legitimacy, the rule of law and civil affairs relate to strategic political objectives, and how the misuse of military power can compromise mission success.

The last time the US effectively used its military power to achieve its strategic objectives was in the first Gulf War in 1991. It was a 100-hour war in which a US-led coalition liberated Kuwait from occupying Iraqi forces through the shock and awe of overwhelming combat power. The second Gulf War of 2003 was a different story; while it began with shock and awe and an apparent military victory over the Iraqi army, it soon morphed from conventional combat into more protracted COIN operations.

COIN includes a broad range of military-political operations and activities ranging from offensive combat operations to stability operations and nation-building. In military doctrine COIN is considered irregular warfare and shares many of the attributes of foreign internal defense, or FID. Both are stability operations that emphasize political objectives over conventional military objectives. While doctrinal terms overlap, political and military leaders have referred to operations in both Iraq and Afghanistan as COIN, and current doctrine for COIN emphasizes legitimacy, the rule of law and civil affairs.[1]

The transition in Iraq from conventional combat to COIN did not become clear until after the testimony of General David Petraeus before Congress in September 2007. Only then did President Bush begin to speak of achieving political objectives rather than military victory in Iraq. Real progress was made with the surge strategy of General Petraeus; yet even with violence down and status of forces agreement between Iraq and the US, there is still doubt whether the strategic objectives of the US will be achieved in Iraq, or whether the objectives of democracy, human rights and the rule of law will turn out to be ephemeral hopes of democratic idealism that dissipate when US forces depart.

Military Legitimacy and Public Support in Counterinsurgency

Military legitimacy is about *might and right,* and as a derivative of political legitimacy it depends upon public perceptions of what is right.[2] In wartime *might makes right* since victory depends upon the defeat of the enemy by overwhelming force. In COIN *might must be right* since mission success is not defined by military victory but by winning the battle for the public support needed for effective governance. In COIN, defending a government against an insurgent threat involves strategic objectives that are more political than military, and the collateral damage caused by excessive military force can undermine the public support needed to achieve strategic political objectives.

Legitimacy is what gives a government its moral authority, and the standards for that legitimacy are grounded in the law. But the law is only the beginning; public perceptions of legitimacy are also shaped by moral standards and values that are derived from secular and religious traditions.[3] These standards of legitimacy reflect cultural values and define public perceptions of what is right and proper for a government and its military forces, including limits on the use of coercive force. Such public perceptions are both a standard and measure of political and military legitimacy in a democracy.

This creates a double standard of legitimacy for US COIN operations: they must have public support in both the US and in the area of operations. Given the vast cultural differences between the US and both Iraq and Afghanistan, meeting this double standard is a daunting task.[4] Experience has shown that both culture clash and public reaction to collateral damage caused by excessive force can undermine the legitimacy needed for mission success in COIN.[5]

In the battle for legitimacy the objective of insurgents is to undermine the public support needed for legitimacy and political control. The Islamists of al Qaeda have used a campaign of terror to exploit tribal and sectarian conflicts and undermine US supported governments in Afghanistan and Iraq, and to promote a fundamentalist theocratic empire, or caliphate. While no insurgent group can gain political power without first gaining the public support needed to establish its legitimacy, terrorist activities can undermine the legitimacy of US supported governments by creating conditions approaching anarchy.

Because the legitimacy of US COIN operations is dependent upon public perceptions of legitimacy in both the US and in the area of operations, a loss of public support in either venue for the supported governments or in public confidence that they can provide legitimate and effective governance would likely result in Congressional action to terminate funding for continued US operations. This means that the success or failure of US operations in Iraq and Afghanistan depends upon political considerations and public support that are beyond the control of the US and its military forces.

The Rule of Law and Civil Affairs in Counterinsurgency

In US COIN operations in Afghanistan and Iraq the rule of law has become synonymous with US political objectives such as security (the first requirement of the rule of law), democracy and human rights. The rule of law has acquired this expansive meaning since it has never been more narrowly defined by the Department of Defense or the Department of State.[6] *Operational law* is a more limited term that defines those laws applicable to US military operations and provides a critical standard of military legitimacy,[7] but in current military doctrine the *rule of law* refers to US political objectives, to wit: *a key goal and end state in COIN* includes *a government that derives its powers from the governed*

as well as *sustainable security institutions* and *fundamental human rights*.[8]

If the rule of law is the political *objective* of COIN, then civil affairs is the primary *means* to achieve it. Civil affairs is the interface of the military with a civilian population, and in its broadest sense describes all civil-military activities and operations in COIN, not just the specialized military forces that carry them out. In COIN, civil affairs operations take precedence over conventional combat operations since strategic political objectives that require public support take precedence over conventional military objectives that are achieved through overwhelming military force. [9]

The Rule of Law, Democracy and Human Rights

Promoting the rule of law, democracy and human rights have long been an integral part of US national security strategy, and they are primary US political objectives in Iraq and Afghanistan. The US national values of democracy and human rights incorporated in the rule of law have shaped US perspectives of legitimacy, but those values are not shared in Iraq and Afghanistan. All would agree, however, that the legitimacy of any government must begin with the provision of law and order; and in Iraq and Afghanistan that prerequisite for legitimacy is elusive. Long-standing ethnic, tribal and sectarian conflict challenge the concept of centralized power, so that US forces must tolerate cultural norms and values that conflict with US laws and policy objectives-even with fundamental principles of democracy and human rights.[10]

 The mandates of the Shari'a Code (Islamic law) illustrate this conundrum: the comprehensive rules of Shari'a conflict with the secular norms of Western law and culture, and have no provision for democracy or human rights. Shari'a is the rule of law in Muslim theocracies such as Iran and Saudi Arabia, and provides cultural values in Afghanistan and Iraq that clash with Western norms. This conflict of law, religion and culture can jeopardize the legitimacy of US military operations in Muslim countries.

 Achieving mission success in Iraq and Afghanistan requires understanding this conflict of law and values. It is a conflict that underscores the importance of civil affairs, since one of its primary missions is to ensure that commanders comply with their legal and moral obligations to the local population.[11]

In order to gain the public support needed for mission success, US standards of law and morality (including democracy and human rights) that are not compatible with cultural values in the area of operations must be subordinated to those local values until the supported governments gain enough legitimacy to govern effectively.[12] In such hostile cultural environments US forces have difficulty winning hearts and minds for Western ideals, but they can still find sufficient consensus with local leaders to define common political objectives and the limits of legitimacy.[13] Since all can agree that law and order is the first requirement of legitimate governance, that mission priority dictates that the primary mission of US forces in both Iraq and Afghanistan is in a constabulary or law enforcement role, providing security for civilians until government security forces can assume that responsibility.

In a constabulary role US combat forces must restrict the use of coercive force much as do police officers; and as with law enforcement agencies, the use of excessive military force can undermine the legitimacy of the government they represent. The constabulary role of US combat forces underscores their primary mission to promote the rule of law and the importance of civil affairs to mission

success.[14]

Once law and order is achieved, then the next priority of US policy is to promote democracy and human rights. Even if they are not a priority of the local populace they are a universal measure of the legitimacy of any supported government. Law and order, human rights and democracy are all interrelated components of legitimate governance under the rule of law. Law and order standing alone can be oppressive, just as democracy (majority rule) can produce a tyranny of the majority without human rights to protect minorities.[15] Even with impressive US military victories over oppressive regimes and the establishment of stable regimes to replace them, the US cannot claim mission success in either Afghanistan or Iraq unless and until the supported governments leaven law and order with democracy and human rights.[16]

Lessons Learned in Legitimacy: Precedents and Principles

The US learned a painful lesson in legitimacy in Vietnam on the limits of military power in COIN. It is illustrated by an oft-quoted conversation between a US and a Vietnamese colonel following the war: "You know you never defeated us on the battlefield," said the American colonel. The North Vietnamese colonel pondered this remark a moment. "That may be so," he replied, "but it is also irrelevant."[17]

Superior military power can be irrelevant and even counterproductive in COIN, and that is as true today in Iraq and Afghanistan as it was in Vietnam. The battle for legitimacy is characterized by asymmetric warfare in which military victory can be lost in political defeat. Just as in Vietnam, every time a US air strike kills women and children in Afghanistan or Iraq in misguided efforts to defeat an evasive enemy, the US loses another battle in legitimacy, and reaffirms its vulnerability to asymmetric warfare.[18]

The vulnerability to collateral damage coupled with the tendency of US military commanders to rely on overwhelming combat force to achieve mission objectives proved fatal in Vietnam. The US learned-or should have learned-the painful lesson that superior military force is never a substitute for legitimacy. The ultimate failure of US COIN operations in Vietnam can be attributed to a corrupt and ineffective South Vietnamese government and its military, a failure exacerbated by collateral damage caused by US combat operations. There are similarities in Iraq and Afghanistan, where the governments are corrupt and rely on US forces to maintain security, and where US combat operations continue to cause collateral damage that undermines public support. Even so, there are dissenting voices that advocate keeping large numbers of US combat forces in Iraq and Afghanistan, and argue that the US failure in Vietnam was due to having too few US combat forces to achieve US strategic objectives.[19]

Maintaining a large presence of combat forces in Vietnam for more than a decade cost the US hundreds of billions of dollars and more than 50,000 lives, and was unable to save a corrupt and unpopular South Vietnamese government from defeat. It remains to be seen whether the Iraqi and Afghan governments can stand against the forces arrayed against them, both internal and external, when US forces withdraw.

The painful lessons of legitimacy learned in Vietnam should have been remembered by US policy-makers as they planned the invasions of Afghanistan and Iraq after 9/11, but the intoxicating power of *shock and awe* experienced during the first Gulf War seems to have blurred their memory. Little

thought was given to the need for extended stability and COIN operations; and while the surge strategy of General Petraeus gave the al-Maliki government an opportunity to prove its legitimacy, the Karzai government does not seem capable of standing on its own at the time of this writing.

The problem was never the lack of military doctrine on COIN; it was with civilian leadership thinking it unnecessary. The *Counterinsurgency Manual* (FM 3-24, December 2006) developed and used by General Petraeus[20] cites principles of COIN that were first developed as imperatives of *low intensity conflict* (LIC) and later as principles of military *operations other than war* (OOTW). Both COIN and civil affairs were included in OOTW, and after the 1986 Goldwater-Nichols Act created the United States Special Operations Command (USSOCOM), they were both considered special operations activities to be conducted by Special Operations Forces (SOF). [21]

The Preface to FM 3-24 notes: "COIN operations generally have been neglected in broader military doctrine and national security policies since the end of the Vietnam War over 30 years ago." That may have been true of conventional military doctrine, but not of SOF doctrine; and conventional strategists turned to COIN doctrine after conventional doctrine and tactics failed to achieve mission objectives in Iraq and Afghanistan. The similarity of the principles of COIN in FM 3-24 to those of LIC and OOTW can be seen below:

LIC Imperatives[22]	**Principles of OOTW**[23]	**Principles of COIN**[24]
1. legitimacy	1. legitimacy	1. legitimacy is the main objective
2. primacy of the politcal instrument	2. objective	2. unity of effort
3. unity of effort	3. unity of effort	3. political factors are primary
4. restricted use of force	4. restraint	4. understand the environment
5. perseverance	5. perseverance	5. Intelligence drives operations
6. adaptability	6. security	6. security under the rule of law
		7. long term commitment

In its list of principles for COIN, FM 3-24 adds *intelligence driving operations* to the historical principles of LIC and OOTW, but otherwise they remain the same. [25]

The primacy of legitimacy in COIN is confirmed in FM 3-24 as in earlier doctrine. As the dominant principle in COIN, legitimacy subsumes all others: The *primacy of political objectives over military objectives*, the need for US military personnel to work closely with other military and civilian personnel engaged in nation-building (*unity of effort*), the need to provide *security* while *restraining the use of force* to prevent collateral damage, and *perseverance* for a long-term commitment are all essential elements in building the public support needed for legitimacy and mission success in COIN.[26] They are all tried and tested, their validity proven the hard way in Vietnam.

Legitimacy and the Just War Tradition

The above operational principles of COIN apply down to tactical levels, but they have strategic consequences. There are other overarching strategic principles that determine the legitimacy of military interventions and combat operations which are derived from the Just War Tradition, and they can be categorized as those of *jus ad bellum* (the justice of going to war) and *jus in bello* (the justice of warfighting).

For an invasion to meet the moral criteria of just war (*jus ad bellum*), it must have a just cause, be authorized by competent authority, have the right intention, have limited objectives, be a last resort, and have a reasonable hope of success. For warfighting to meet the moral criteria of just war (*jus in bello*), military forces must continually exercise *discrimination* in choosing legitimate targets, and *proportionality* in limiting lethal force to that required to achieve legitimate objectives. The principles of discrimination and proportionality are more than moral guidelines for legitimacy; they are also principles of customary international law that have been incorporated into the Law of War. [27]

The legitimacy of an invasion influences the legitimacy of any government supported by the invading force. The 2001 US invasion of Afghanistan met the requirements of international law and the moral requirements of Just War. It was widely seen as a legitimate response to the Taliban and al Qaeda after the 9/11 attack on the US. That was not the case for the US invasion of Iraq in 2003, and the questionable legitimacy of that invasion initially tainted the legitimacy of the al-Maliki government. Ironically, the Karzai government has forfeited the benefits of its initial legitimacy through corruption and inaction against a growing Taliban insurgency, while the al-Maliki government has overcome its initial lack of legitimacy by taking aggressive action against both Sunni and Shia militias and by

asserting its sovereignty in negotiations with the US over a status of forces agreement.[28]

The invasion of Iraq did not meet the legal standards of the United Nations Charter or the moral standards of the Just War Tradition, and numerous polls indicate that it was widely perceived to have lacked legitimacy. The Bush rationale of preemptive self defense based upon Saddam Hussein's regime having weapons of mass destruction and supporting al Qaeda failed the test of credibility in the US and around the world. [29]

The success of the surge strategy of General Petraeus has compensated for earlier US strategic failures, but it cannot legitimize an illegal and immoral invasion. That continues to haunt US military operations not only in Iraq but also in Afghanistan where a resurgence of the Taliban is threatening to turn an initial US victory into political defeat. The US cannot expect to hold the moral highground and promote the rule of law when it fails to live by the same standards it promotes for others.

The Reversal of Military Priorities in COIN

There is a symbiotic relationship between the rule of law and civil affairs. In COIN political objectives that require public support are primary mission objectives, so that civil affairs is an operational priority and conventional combat forces assume the subordinate mission of providing civilian security. This is a reversal of traditional military priorities and requires the unique leadership traits of a diplomat-warrior.[30]

The priority of political over military objectives in COIN changes the very nature of military legitimacy. In warfighting the legitimacy of military operations depends upon the destruction of the enemy with overwhelming force, and public support in the area of operations is of minimal importance; combat forces have priority, with civil affairs in a supporting role. In COIN the priority between civil affairs and combat forces is reversed: the need for public support for political objectives gives civil affairs a priority mission and relegates combat forces to a supporting role providing security.[31]

This reversal of traditional military priorities is reflected in current COIN strategy and operational doctrine. Priority is given to public support which is gained through effective security operations and compliance with legal and moral standards. As in past military doctrine, the emphasis on public support makes the rule of law and civil affairs operational priorities for achieving and maintaining military legitimacy in COIN.[32]

The US surge strategy led by General David Petraeus in Iraq has emphasized securing the civilian population as the first priority in COIN, even if that priority came four years late-a delay that allowed al Qaeda to exploit sectarian violence into nascent civil war. Conventional combat forces can provide security for civilians following combat operations, but the primary military capability to assist governments provide essential services is civil affairs, and security is an essential function of government.

In hostile cultural environments like Iraq, the presence of large numbers of heavily armed US combat forces providing security can detract more than it contributes to legitimacy. The dilemma for US constabulary forces is that they must balance the need to provide adequate civilian security with restraint in the use of deadly force in order to minimize the collateral damage that can undermine legitimacy-this while insurgents are constantly exploiting situations to tempt combat soldiers to do what they are trained to do: to strike back with overwhelming military force. That response invariably causes collateral damage that can compromise mission success.[33]

The competing requirements of providing security and restraint in the use of lethal force in COIN call for a delicate balancing act, one that risks the loss of military legitimacy in embarrassing incidents that are inevitable whenever large numbers of conventional combat forces act as a constabulary force in a hostile cultural environment.[34] It is the same dilemma faced by domestic law enforcement officers when they use excessive force. It undermines their legitimacy and renders them ineffective.

It is ironic that in an earlier assignment in Iraq then Major General Petraeus emphasized the strategic priority of US forces to train and equip Iraqi forces to provide their own security. Later General Petraeus returned to Iraq to lead a surge of US constabulary forces to provide that security for Iraqis. The surge was an operational success but it was also evidence of earlier US strategic failures. It remains unclear whether the Iraqi government can provide adequate security against those internal and external threats that will challenge it whenever US combat forces are withdrawn. Only then will we know whether US operations were a success or a failure.

Matching Military Roles and Missions with Capabilities: Special Operations Forces and COIN

There have been recommendations coming out of the Pentagon for a hybrid "advisory corps" to conduct COIN,[35] but the US already has that capability in the Special Operations Forces (SOF) of USSOCOM. Unlike combat forces, SOF have specialized military training combined with cultural and linguistic skills that make them diplomat-warriors. They are quiet professionals who blend in with the local population and keep a low profile while training and advising indigenous forces. The Army's SOF include Special Forces, Civil Affairs and Psychological Operations, and their operational doctrine emphasizes the priority of civil affairs and the rule of law in the battle for legitimacy.[36]

The skills needed for COIN take years to acquire, and there is no way to make conventional combat forces into diplomat-warriors quickly-nor is it necessary to do so. The need is to acknowledge the limitations of conventional combat forces in COIN and utilize them in quick reaction combat support roles, assigning the primary role in COIN to those SOF who are better trained and equipped to perform it. The US strategic goal in COIN should be to reduce the presence of large numbers of combat forces and rely on the low-profile indirect support of SOF personnel who have the capability to perform the unconventional (irregular warfare) missions of COIN. Mission success depends upon the military forces of the supported government, not the US, defeating insurgents.

Military capabilities need to be matched with military roles and missions. Conventional combat forces should be used when mission success depends upon destroying an enemy with overwhelming power, while SOF should be used whenever strategic objectives are more political than military, and when language capability and cultural orientation are critical to achieving legitimacy and mission success. In hostile cultural environments like Iraq and Afghanistan where extended US combat operations are impractical, the diplomat-warriors of SOF are needed to win the battle for legitimacy.

The complex legal standards governing the use of force in COIN also favor SOF over conventional forces. The Law of War is an adequate standard of military legitimacy in conventional warfare, but because it applies only to international conflicts and requires a distinction be made between combatants and non-combatants, it has little applicability in COIN. The standards for the use of lethal force are far more restricted in COIN than in conventional warfighting. Military legitimacy in COIN depends upon providing security to the civilian population while restraining lethal force, and SOF are best able to do that in hostile and unforgiving cultural environments like those faced by US forces in Iraq and Afghanistan.

The primary lesson of Vietnam is that no amount of US military force can compensate for the lack of legitimacy of a supported government, and that legitimacy can be undermined by the collateral damage of excessive military force. Only the supported government can win the battle for legitimacy, and that depends upon winning the hearts and minds of those it must govern. The objective of US COIN operations is to support and defend the legitimacy of the host government. In the hostile cultural environments of Afghanistan and Iraq the smaller footprint and indirect operations of SOF coupled with their cultural and language training make them the ideal US military capability for COIN.

The Evolution of Civil Affairs in Stability Operations and COIN

As mentioned above, civil affairs was designated a Special Operations Activity in the 1986 Goldwater-Nichols Act, but civil affairs was born as an operational concept at the end of World War II when it was known as military government and provided stability and nation-building operations in areas devastated by the war. There was no insurgency to complicate these operations, so the rule of law was restored by conventional military personnel who had legal and public administration skills. Commanders were quick to see the value of civil affairs personnel as force multipliers who could relieve their combat troops for more conventional duties.[37]

General Dwight D. Eisenhower initially requested 960 civil affairs officers, and that request was later increased to thousands of personnel. Of these, approximately 200 were lawyers, most of whom were assigned to military government duties. In some instances staff judge advocates provided legal support to US military governments.[38]

The current emphasis on lawyers in military government reflects the priority of the law in civil affairs. This priority is evident in the civil affairs doctrinal imperative to assist commanders comply with their legal and moral obligations to civilians, and also evident in the provision for a Rule of Law Section "… to create security and stability for the civilian population by restoring and enhancing the effective and fair administration and enforcement of justice."[39]

The Philippines

The politics of post-war Philippines were more complicated and contentious than those of Europe or Japan and produced an insurgency. After the US granted the Philippines their national independence in 1946, Louis Taruc, a popular communist leader who had been denied a seat in the Philippine Lower House, left Manila to lead his Hukbalahap guerrillas (Huks) in an insurgency that would last for decades. Taruc was aided in his efforts by a corrupt government that had only a facade of democracy to cover "a wave of get-rich venality involving both Filipinos and Americans."[40]

Following the classic model of insurgency, the Huks fed on public hatred and distrust of the government. Had it not been for Taruc's own excesses of violence against the people, his Huks may have overthrown the government before 1950, when President Quirino appointed Ramon Magsaysay as his Minister of Defense. As Defense Minister and later as President, Magsaysay fashioned a combination of political reforms and COIN operations in the 1950s that are as relevant today as they were then. First, he set his own house in order, ensuring that the Defense Department was supportive of his plans and competent to carry them out. Second, he bolstered the legitimacy of his government with programs that responded to public needs, such as legal assistance for the poor and limited land reform. Third, he infiltrated the Huks, and using all the instruments of political warfare won over many guerrillas. Finally, he used limited but effective military force to neutralize the last hard-core Huks.[41]

Magsaysay had limited but able US assistance in the person of Air Force Lieutenant Colonel Edward

G. Lansdale. Lansdale coined the phrase "civic action" in the Philippines and became the prototype for the socially conscious Colonel Edward Hillandale in *The Ugly American*.[42] Lansdale understood the interrelationship between public support and legitimacy in COIN, and the need to limit the use of lethal force to prevent collateral damage that undermined legitimacy.

Vietnam

After the French left Vietnam (Indochina) following the 1954 debacle at Dienbienphu, the US quietly filled the vacuum and began supporting COIN operations against the Vietminh similar to those against the Huks in the Philippines.[43] Colonel Lansdale went to Vietnam to advise President Diem, but the result was different; Diem was not as effective as had been Magsaysay and the South Vietnamese government never overcame endemic corruption to gain the legitimacy it needed to defeat insurgent forces. And despite Lansdale's efforts to limit the US military commitment in Vietnam it was to escalate from advice and assistance to direct combat in 1965, when President Lyndon Johnson vowed that America would not lose its first war on his watch and sent in the US Marines, soon to be followed by Army combat divisions. With those massive combat deployments, the Vietnam conflict became America's war to win or lose.

Civil affairs units were effectively utilized in Vietnam, but it was too little too late. The Marines were first with their Combined Action Platoon Program in 1965, followed by Army civil affairs units in 1967. The effectiveness of civil affairs, however, was largely neutralized by a combination of collateral damage caused by large-scale US combat operations and government corruption. By the time Robert W. Komer was able to coordinate all military and civilian agencies engaged in civil affairs COIN activities under the Civil Operations and Revolutionary Development Support Program (CORDS) in 1967, the battle for legitimacy had already been lost.[44]

The American defeat in Vietnam resulted from misplaced reliance upon superior US military forces to win a military victory in COIN. Had Johnson understood the primacy of legitimacy in COIN he would not have committed US combat forces in a direct role and become focused on a military victory that was destined to be lost in political defeat. It is ironic that 38 years later another US President from Texas would make a similar strategic error and invade Iraq, relying on *shock and awe* to provide a quick and conclusive military victory-one that could still be lost in political defeat.

Post-Vietnam

Five years after the ignominious evacuation of US personnel from the roof of its Saigon embassy in 1975, the election of President Reagan marked the beginning of a new era of US military assertiveness. The 1980s were the height of the Cold War, with the USSR supporting communist insurgencies in Latin America. In this surrogate warfare between the US and the USSR, civil affairs played a vital role in COIN operations, including military civic action projects that were led "by highly trained civil affairs personnel, who [were able to] interface effectively with tactical planners, local civilian leaders and mid and high level officials of government ministries."[45]

Military legitimacy was tested in three major interventions from 1983 through 1991: Operation *Urgent Fury* in Grenada (1983), Operation *Just Cause* in Panama (1989) and Operation *Desert Shield/Storm* in Kuwait/Iraq (1991). Both Grenada and Panama were surprise invasions with combat forces quickly withdrawn after military objectives were achieved. This prevented public opposition and congressional interference with the President's power as commander-in-chief, while meeting the requirements of the War Powers Resolution.[46] The liberation of Kuwait in *Desert Storm* came quickly after an impressive display of shock and awe, but it differed from earlier US interventions in that both Congress and the

UN approved the invasion in advance, and a broad coalition of other nations participated in it.

These "quick and dirty" interventions allowed the US to claim military victory and quickly withdraw its combat forces, thereby avoiding troublesome issues of legitimacy associated with an extended military occupation. Civil affairs operations were primarily post-conflict stability operations that briefly provided civilian security until local governments could take over and then assisted with repairs and reparations. Fortunately there were no insurgencies to complicate matters, and civil affairs lived up to its motto: it *sealed the victory*.

Grenada

In operation *Urgent Fury* in Grenada, civil affairs helped mitigate the effects of collateral damage caused by overzealous troopers with the 82d Airborne Division who had commandeered privately owned vehicles and modified them into armored vehicles by cutting off their tops and mounting machine guns in them. Claims and solatia compensated Grenadians for such property damage. Following the brief hostilities, projects were initiated to assist the Grenadian government; and in one project, civil affairs personnel worked with the United States Agency for International Development (USAID) to train Grenadians in construction skills while improving school facilities.[47]

Panama

In operation *Just Cause* in Panama, civil affairs personnel arrived in the airborne assault to prevent civilian interference with combat operations and to protect civilians in the aftermath. But deficient planning allowed a breakdown in law and order during the combat phase, something that proper civil affairs planning could have probably averted.[48] Civil affairs remained in Panama to provide a variety of civil administration functions, such as assisting the new government in rebuilding its law enforcement and judiciary systems after ousting General Noriega's cronies.[49]

Kuwait

In *Desert Shield/Storm*, the primary civil affairs mission was civil administration, with the focus on Kuwait rather than Iraq. The Kuwaiti Task Force (KTF) was made up of senior civil affairs officers, several of them lawyers, who worked with the US State Department and the Kuwaiti government in exile to prepare for its return to power. The KTF advisors had a good relationship with Kuwaiti political leaders and helped smooth the transition from war to peace. Kuwait was unique in that it had a government in waiting with the economic capability to rebuild its own infrastructure, so that less US support was needed than in Grenada and Panama.

Northern Iraq

Following *Desert Storm*, Operation *Provide Comfort* provided humanitarian and security assistance to the Kurds in Northern Iraq.[50] It began with disaster relief and refugee control, and evolved into longer term humanitarian and security assistance. Had there been a Kurdistan, *Provide Comfort* would have been described as stability operations or nation assistance; but by whatever name, it illustrated the value of civil affairs in achieving military legitimacy:

"In this case, the military commanders conceived and planned the operation as a fundamentally civil-humanitarian operation carried out by both military forces and civilian agencies (both U.S. and international). While the need to ensure security for the Kurds was a major consideration, military issues were never at the forefront. The primary focus was on humanitarian assistance activities to feed, house, and care for Kurds displaced from their homes by Saddam's campaigns. One major reason this operation was carried out more smoothly than its larger counterpart in Kuwait and southern Iraq was

the availability to the European-based commanders of expert civil affairs advice from trusted members of the team."[51]

Somalia

Operation *Restore Hope* in Somalia was unique: it began as a UN humanitarian assistance mission (UNISOM I) in December 1992 and was unopposed since there was no Somali government to resist entry. Tribal warfare and anarchy had created a humanitarian crisis, and the UN mission was to provide security for those relief organizations providing humanitarian aid in Somalia. UNISOM I was successfully concluded in May 1993, but the next phase of *Restore Hope*, UNISOM II, did not fare as well. Poor strategic guidance and mission creep resulted in an abortive US raid against General Aideed, a Somali warlord in Mogadishu. There were televised images of Somalis dragging the bodies of US soldiers through the streets, after which President Clinton ordered the withdrawal of US forces from Somalia.[52] The Mogadishu debacle was later dramatized in the movie *Blackhawk Down*, and Somalia remains a failed state.

Haiti

The purpose of operation *Uphold Democracy* in Haiti in 1994 was to restore President Jean-Bertrand Aristide to power after he had been deposed by General Raoul Cedras. As in Somalia, the intervention was pursuant to a UN Resolution and met no real resistance; and also like Somalia, the biggest obstacle in Haiti was the lack of any effective government. The rule of law was the mission objective and civil affairs the primary means of achieving it. There was endemic lawlessness in Haiti, but there were no tribal warlords to oppose US efforts to restore security as there had been in Somalia.

The major issue of legitimacy in Haiti was creating order out of chaos–providing civilian security while restraining the use of lethal force. Civil affairs worked closely with other SOF personnel to provide security to over 600 rural villages. As one US official put it, they "skillfully established the law west of the Pecos putting local thugs out of business."[53] At the ministerial level civil affairs lawyers and judges addressed longer term measures "…to establish an effective judiciary in Haiti, one that will live by the rule of law rather than live in the shadow of corruption and fear."[54] Unfortunately, fourteen years later, Haiti still lacks effective governance.

The Balkans

Ethnic and sectarian violence in the Balkans has a long history. It is a region where cultural and religious fault lines converge and produce culture clash. Following the disintegration of Yugoslavia, ethnic and sectarian differences nurtured by idealistic notions of self-determination exploded into violence, creating lawlessness and anarchy. Bosnian Serbs, led by Slobodan Milosovic, were the worst offenders; but all groups exploited the weaknesses of their adversaries, resorting to rape, torture and murder to promote their ethnic and sectarian interests.

During the 1990s NATO peacemaking and peacekeeping missions in the Balkans included US forces, but there were few ground forces involved in combat operations. NATO relied primarily on air power as a means of coercing the warring parties to comply with its directives and to avoid NATO casualties. The lack of NATO ground forces and reliance on bombing to achieve political objectives, especially the bombing of Belgrade, created practical problems and significant moral, if not legal, issues of legitimacy.[55] After years of NATO air strikes, creating separate regimes and war crimes trials, there remains but a fragile peace in the region.[56]

The above highlights of US interventions since World War II illustrate the importance of civil affairs to

seal the victory of combat operations. Whenever there are strategic political objectives to be achieved, civil affairs has been a strategic requirement in every US combat operation within memory. General Wayne A. Downing, a former Commander of the United States Special Operations Command (USSOCOM), emphasized the importance of civil affairs in post-conflict stability operations:

"[A]ny operation we undertake in the future will have to include civil affairs. While we have always recognized the moral and legal obligations of the commander to the civilian population, the impact of this role has grown in recent years. Such challenges as dealing with refugees and cementing military victory with a plan to create stable nations in the aftermath of war highlight the importance of civil affairs to the commander. We must not only win the war, we must win the peace. Civil affairs is a key part of this post-conflict mission."[57]

It is ironic that the Bush administration came into office opposing the idea that military forces should be involved in extended stability operations and nation-building, yet since 9/11 it has initiated military commitments that have required more of these military capabilities than any since Vietnam. Administration policy-makers argued that US combat forces should not be distracted by humanitarian concerns and extended stability operations. They believed that US strategic objectives in Afghanistan and Iraq could be quickly achieved by the *shock and awe* of overwhelming combat power, and that the State Department could take care of everything else. Obviously, they were wrong.

Not since Vietnam has the operational priority of civil affairs been validated as it has in Afghanistan and Iraq. Current military doctrine on COIN and stability operations refutes the rationale that overwhelming military force can achieve victory in COIN, and affirms those lessons learned in Vietnam.[58] Among those lessons is the need for unity of effort among the many military and civilian components in COIN.

Unity of Effort in COIN: Civil Affairs and Provincial Reconstruction Teams

An entire chapter of the *Counterinsurgency Manual* is devoted to the need for unity of effort between military and civilian components, and it begins by noting the importance of public support to the legitimacy contested in COIN.[59] In military doctrine, unity of effort is synonymous with the mission of civil affairs. To be successful, civil affairs stability operations must integrate the many and diverse military and civilian components in COIN. Where the US military presence is limited, a civil-military operations center (CMOC) may be adequate to provide that unity of effort; but in large scale operations such as those in Afghanistan and Iraq, there is the need for hybrid units known as provincial reconstruction teams (PRTs) to provide the required integration of interagency activities.[60]

One of the lessons of Vietnam was the failure-at least until 1967-to provide adequate unity of effort among the many agencies participating in that conflict. As noted above, the effective integration of civil affairs activities came too late in Vietnam. Even coupled with successful pacification efforts, they were not enough to provide legitimacy to a corrupt and ineffective regime.[61]

In both Afghanistan and Iraq, PRTs have been able to bridge the formidable gaps between doctrine and operational practices and procedures of military units and civilian components. While there has been criticism of the lack of an overarching strategy and methodology for the hybrid PRTs, their interim and highly diverse nature makes standardization of doctrine, structure and evaluation difficult, if not impractical. Given their daunting task of coordinating military, diplomatic and civilian agencies in hostile, ambiguous and unforgiving environments, most PRTs seem to have performed reasonably well. There is a need for improvement, but we need to remember the lessons of history, especially those of Vietnam: not even the most efficient PRTs can provide legitimacy to a government that has

none.[62]

Religion and Cultural Values as Sources of Legitimacy

The primary dilemma for US forces in Iraq and Afghanistan is not a disconnect between military strategies and capabilities, or a lack of unity of effort between those military and civilian components engaged in COIN. It is a problem of conflicting cultures and values that have been centuries in the making; and because they are interwoven with matters of faith and religion they produce standards of legitimacy that are often contentious and are slow to change.

After all, most of the world's people believe that God is the source of all truth and defines good and evil. Moral values and laws become sacrosanct when a people believe that they come from God; and when they conflict with other values and norms, fear, hatred and violence often the result. That has been the case in the Middle East for millennia between Jews, Christians and Muslims, and it is increasingly prevalent in Africa between Christians and Muslims. Even Europe has had its share of religious wars between Christians and Muslims and Protestants and Catholics.

America has been something of an exception. Between its unique and multifaceted religions and its liberal pluralistic political culture, there has been much friction and smoke, but little fire. There have been raucous relationships between Christians and Jews and Protestants and Catholics in America, but there has not been the intractable religious violence found in other parts of the world.

Most Americans are religious, but their diverse religious beliefs have evolved in such a way as to conform with the secular requirements of democracy, human rights and the rule of law-national values that have been shaped more by the Enlightenment than by religion. Clearly religious and secular traditions influence each other in America, and it is difficult to determine which one has the greater influence on the other.[63]

The capacity for religious reconciliation has made America an example for the rest of the world. The evolution of pluralistic religions in America illustrates trends that can apply outside the US-this as formerly segregated religions and cultures experience forced integration and multiculturalism through the inexorable forces of globalization.

All of the world's religions are in a continuous state of reformation driven by advances in knowledge, technology and cultural preferences. The evolution of Christianity is no exception, with the Protestant Reformation of the 16th century only a dramatic stage in a continuing process of change. Scientific discovery and the printing press had as much to do with the original Reformation as did Martin Luther and John Calvin, and scientific discoveries and information technology continued to transform Christianity. And we can expect the dynamics of globalism and multiculturalism to continue to transform Christianity-and Islam as well-into forms shaped by their cultural and political environments. The question is not whether the world's religions will change, but in what direction that change will take them-whether toward reconciliation and peace or toward polarization and violence.

Religious fundamentalism is a current trend in both Christianity and Islam that has led to polarization and violence. Fundamentalism arose in the 19th century in response to modernism-those dynamic forces of knowledge and cultural preferences that threaten the inflexible doctrines of traditional religion.[64] Countering this trend to religious fundamentalism is a trend among religious moderates to question exclusivist doctrines and move toward more inclusive or pluralistic religious beliefs.[65] For example, a group of distinguished Muslim leaders has invited Jews and Christians to share a common

word of faith based on the greatest commandment of the Gospels.[66]

These divergent trends in American religion have been evident since the Revolution. Thomas Jefferson is perhaps the most respected figure of that era; as the author of the Declaration of Independence, one of the founding fathers of the US Constitution, the author of the First Amendment, and the third President of the US, Jefferson authored a small book which has come to be known as *The Jefferson Bible*. It was a powerful critique of the Christian religion of the early 19th century, emphasizing the moral teachings of Jesus as "the sublimest moral code ever devised by man" while ignoring the mystical doctrines of the church and criticizing its leaders. [67]

At about the same time as Jefferson was completing his *Bible*, America was experiencing its Second Great Awakening, with lively camp meetings taking religion to the fringes of the frontier. Known for their carnival atmosphere and unrestrained emotional excesses, it has been said that more souls were made than saved at these gatherings. Camp meetings were characterized by fiery sermons and ecstatic behavior, such as dancing, barking, the shakes, and passing out (being "slain by the spirit") as a result of the emotional fervor.[68]

Jefferson's *Bible* represented a theological trend among the intellectual elite of his day away from the traditional church, and at the same time camp meetings represented a social trend of the masses away from the church-but the two went in different cultural directions. Jefferson's radical theology would have to wait more than 100 years before being acknowledged by biblical scholars-and then it was by those liberal scholars who participated in the controversial Jesus Seminar.[69]

While Jefferson was taking liberties in picking and choosing divine passages from the Bible, most church leaders of his day were emphasizing the entire Bible as the inerrant and infallible Word of God, often to the exclusion of reason and common sense. For these biblical fundamentalists, if it wasn't in the Bible, then it wasn't true or morally right. Prior to the War Between the States, most clergy in the North as well as the South held this view and were reluctant to condemn slavery as immoral since it was often mentioned in the Bible but never condemned.[70]

During the War, Confederate generals like "Stonewall" Jackson were more likely than Northern generals to believe the war was ordained by God (Northern General William Sherman famously attributed the war to Satan by saying "War is Hell"), but religion was a sustaining force on both sides of the conflict. Following the War, there was a shift from a focus on the Bible to more popular forms of evangelicalism. The Methodist and Baptist churches were among the most competitive denominations in seeking new members. Bishop Matthew Simpson, who was close to President Abraham Lincoln and conducted his funeral, was typical of those who sought to make the Methodist church the most popular church in America. By the end of the century he had achieved his goal, albeit at the expense of a massive bureaucracy and numerous defections of those disenchanted with the emphasis on popularity at the expense of traditional Christian doctrine and holiness. [71]

From the latter half of the 19th century until the present, diversity more than any one trend has characterized the Christian religion. In the early 20th century when liberal theologians were using scholarly criticism to question the Bible as the inerrant word of God and to discover the historical Jesus, Biblical fundamentalists were reaching their zenith with the publication of the Schofield Bible and their defense of the inerrant truth of the Bible against the heresy of science at the 1925 Scopes trial-it was a contest between the literal truth of the creation story in the Bible versus the theory of evolution.

The middle of the 20th century saw a new trend that shifted emphasis from the Bible to Jesus as the

sacred focal point of the Christian faith. The so-called Jesus movement began in the 1960s with young people who rejected traditional religion and societal norms in favor of more "hip" forms of faith and social action, including communes. The movement matured into nondenominational churches in the 1980s, many of which have become megachurches and displaced mainline denominations as the most popular institutional form of Christianity today. These modern evangelicals have both liberal and fundamentalist variations, with styles of preaching and worship that are more charismatic, informal and emotional than traditional denominations, and which put little emphasis on doctrine, rules and rituals.[72]

A recent poll by The Pew Forum has revealed another recent trend prevalent in US religions. A majority of people who identify themselves as Christians and Muslims in the US now believe that salvation is possible for those of other faiths.[73] This is a major shift in the traditional exclusivist belief systems of Christianity and Islam, both of which claim to be the one true faith; and because religious exclusivity has been the underlying cause of the hostility of Christians and Muslims toward each other and toward those of other faiths, this trend toward religious tolerance and inclusivity represents real hope for the future.

It is but a small step from believing orthodox religious doctrine that God condemns those of other beliefs to personally condemning those of other beliefs. We see it in the news every day. The trend noted by the Pew Forum reflects how an inclusivist culture can reshape exclusivist religions, and there are indications that even in less tolerant cultures like Saudi Arabia a more moderate Islam can now be promoted. These trends are hopeful, especially with President Obama's pledge: "To the Muslim world, we seek a new way forward, based on mutual interest and mutual respect."[74]

Not all trends in culture and religion are so hopeful. In the Middle East and Africa radical Islamist fundamentalism seems as popular as ever,[75] and since 9/11 in the US Christian fundamentalists have exploited a pervasive fear of Muslim terrorism to widen the gap between Christians and Muslims. Unfortunately, there has been little activism by Christian religious leaders to defuse religious polarization and promote better interfaith relations.

Whether the terrorism of radical Islam leads to greater conflict depends to a large degree on whether more moderate Muslims are able to undermine the appeal of radical Muslim zealots to young people in what is a continuing reformation of Islam. It is important that Jewish, Christian and Hindu leaders assist moderate Muslims in their reform efforts through better interfaith relations. If Muslim moderates are isolated by radical Muslims and hostile believers in other faiths, prospects for peace are bleak.

Religion, War and the Rule of Law

Many wars have been fought over conflicting perceptions of good and evil which are defined by prevailing religions; and contrary to recent predictions, religion is not dying-not even in the West. To be sure religions are changing, but they remain alive and well, and are unfortunately as belligerent as ever. *A shining city on a hill, the axis of evil, the evil empire* and *the great Satan* are but a few examples of contemporary political labels derived from religion used to define regimes as good or evil. And once wars begin for whatever cause, religions have encouraged combatants (including the US) to demonize their enemies. Religions remain the main cause of the world's violence, but they must also be considered part of the solution for there to be any lasting peace. [76]

Aside from defining good and evil, religions are also the source of those moral standards from which laws are derived. This has made the rule of law historically the handmaiden of religion and war. The

Shari'a code of Islam is a contemporary example: it makes no provision for democracy, human rights, or a secular rule of law which are at the foundation of Western jurisprudence. Shari'a has also been interpreted to mandate Jihad and condone suicide bombing as a form of martyrdom.

The Western Judeo-Christian tradition of law goes back to the ancient Hebrew law of war (circa 1400 BCE) which is found in chapter 20 of the Book of Deuteronomy. It acknowledged pillage, plunder and the enslavement of foes as legitimate acts of war and provided no protection for civilians in the Holy Land. One's faith or ethnic identity was the only meaningful distinction made between friend and foe. The notorious *ban* mandated ethnic cleansing in the Holy Land, and Joshua, the successor to Moses, was a holy warrior who executed that terrible rule of law with alacrity at Jericho. *The ban* has remained a holy precedent for unholy war and ethnic cleansing, one employed in the Christian Crusades and more recently by the Serbian leader Slobodan Milosovic in the Balkans-not to mention Islamic sectarian violence in the Middle East.[77]

More than a millennia after Joshua, his Hebrew namesake, Jesus of Nazareth, appeared in the Holy Land and brought a new standard of legitimacy to the Hebrew people. Jesus preached a message of reconciliation and peace even as he acknowledged the depravity of humankind and the ugly inevitability of war. He prophesied, "Nation will rise against nation and kingdom against kingdom" until the end of the age.[78]

The ideals of democracy, human rights and the rule of law that now characterize Western standards of legitimacy are an amalgam of the altruistic moral teachings of Jesus and the lofty secular ideals of the Enlightenment. They are reflected in those national values found at the heart of the Declaration of Independence and the US Constitution.[79] But these lofty ideals have an uneasy relationship with the militant exceptionalism of US foreign policy which often takes on the form of a crusade for the forces of good over evil.

The seventh century brought Muhammad to the Arabian desert. He was a holy warrior like Joshua, and after he subdued opposing tribes he left the Arab world a new religion and a holy book, the Qur'an, which has since been cited by Muslim proponents of both war and peace.[80] The Shari'a code, mentioned earlier, is derived from the Qur'an and provides the legal and moral standards of legitimacy for Muslims. It bears a remarkable resemblance to Mosaic law set forth in the Hebrew Bible, reflecting the common Semitic heritage of Jews and Muslims.

The Just War Tradition, mentioned earlier, was initiated by St. Augustine during the fall of the Roman Empire, and evolved through the centuries to provide a Christian rationale for war.[81] But church leaders often chose holy war over just war in their violent quest for worldly power. The most egregious example was in 1095 when Pope Urban II initiated the first Crusade to liberate Jerusalem, which had been captured by Muslims 300 years earlier. The Crusaders liberated Jerusalem in 1099, but it was retaken by the Muslim leader Saladin in 1187.[82]

In Europe the Crusades fueled warfare for another 300 years. It would produce a code of chivalry among holy warriors but no justice for the civilian victims of war, who continued to suffer rape and pillage as legitimate spoils of war.[83] Even after the Protestant Reformation, religion continued to provide the primary rationale for war, until the Peace of Westphalia ended the Thirty Years War in 1648. Then with the Enlightenment and the emergence of international law to govern relations between sovereign nation-states, religion declined as a rationale for war-at least for a time.[84]

Cromwell's English revolution in the 17th century and the American and French revolutions at the end

of the 18th century marked the victory of popular sovereignty over the divine right of kings. But it was not until the outset of the US War Between the States that civilians were given legal protection against the ravages of war. It came with the Lieber Code of 1860, but its protections were ignored by Union General W. T. Sherman as his bummers burned and pillaged their way through Georgia and South Carolina in a brutal demonstration of total war and collective responsibility. Sherman's wrath was felt in Columbia, South Carolina, in 1865 when he destroyed the city by fire.[85]

In the later days of World War II, the US once again resorted to total war and collective responsibility. In his 2007 documentary film, *The War*, Ken Burns exploded the myth that World War II was "the good war" with revelations of US forces killing prisoners of war on the ground and bombing civilian targets from the air with the firebombing of Dresden and Tokyo and nuclear holocausts at Hiroshima and Nagasaki.[86] It was a total war in which *might made right* for the Allies. In the war crime trials that followed there were no prosecutions of anyone on the winning side.

In the aftermath of 9/11, religion has once again gained center stage in world conflict. Atavistic Islamists have declared holy war, or Jihad, on Israel and the dominant religions of the West: Christianity and Judaism. The strategic objective of these Jihadists is a new caliphate, their targets are the hearts and minds of the masses, and their tactics are terrorism and a politics of fear and hatred designed to polarize people of faith. Al Qaeda, Hamas, Hezbollah and Islamic Jihad are the best known of those terrorist organizations now pursuing this unholy war; and Hamas and Hezbollah have already parleyed their terrorism into political power in Gaza and Lebanon.

The resurgence of religion as a motivating factor in contemporary conflict has been recognized by US policy makers and incorporated in US strategy and operational art.[87] Religion has become part of the human terrain in COIN, where the mission objective is achieved in the hearts and minds of the local populace, not on the battlefield. In the global war on terror, the real battle is within Islam-between Muslim moderates and extremist Islamists. Christians and Jews can assist in this battle by working to improve interfaith relations and avoid the religious polarization sought by the Islamists; and indications are that they will be aided by the moderating forces of globalization. This is evidence of how culture shapes religion just as religion shapes culture-in this case modern secular culture moderates religious extremism as it shapes the public support so essential to legitimacy. [88]

Back to the Future: God, Gold and Manifest Destiny

History reveals how religion and culture have shaped standards of legitimacy and influenced its many wars. In the Western world concepts of legitimacy were shaped by a Judeo-Christian religious ethic that was reconciled with the secular libertarian values of the Enlightenment; and that amalgam of religious and secular values was then modified by the utilitarian principles of capitalism, which have remained a driving force behind the modernization of Western culture.

Religion remains a relevant factor in Western values, but for most modernists the bottom line of capitalism in this world trumps whatever happens in the next. For capitalists, the golden rule is that whoever has the gold makes the rules, and the golden gospel of prosperity is preached in some of America's most popular churches. It is a gospel that bears little resemblance to the one taught by Jesus Christ, yet it reflects American culture and its standards of legitimacy.

By way of contrast, in much of the developing world capitalism is seen as an instrument of Satan. In Islamic cultures God reigns supreme over the rule of law and subverts individual freedom through an

unyielding Shari'a Code.

The Islamic faith predominates in the Middle East, and much of Africa and Asia where the values of the Enlightenment and capitalism have not yet penetrated. Concepts of democracy, human rights and the rule of law have little real meaning in these regions where concepts of legitimacy are based on tribal traditions that have been incorporated into the unyielding discipline of a fundamentalist Muslim faith-one that makes no distinction between religion and politics or between law and morality. The result is a cultural environment that stifles the individual freedom and ambition needed to foster modernism.

Most Muslim countries are theocracies rather than democracies, but Turkey, Pakistan and Indonesia are evidence that once Muslims get a taste of the forbidden fruits of capitalism they tend to favor democracy over theocracy. With a taste of freedom and affluence authoritarian religious values give way to more permissive secular values that allow capitalism to flourish and provide the powers and pleasures that come with modernity. Saudi Arabia and Iran remain notable exceptions to the rule as theocratic sponsors of competing fundamentalist Muslim sects: Saudi Arabia, a US ally but not a democracy, sponsors Wahhabi Sunnis (al Qaeda has Wahhabi roots); and Iran, with a decidedly theocratic form of democracy, sponsors Shia militant groups like Hezbollah.

Most Western democracies are more secular than religious, but America is the exception; and it mixes its religious zeal with politics, even as it proclaims a separation of church and state. The Puritan work ethic reflects how American religion has assimilated the secular values of individual freedom and capitalism. While Western cultures reflect the priorities of individual freedom and economic development over authoritative religious rules, the reverse is true in many Eastern cultures. It is this conflicting priority-one between god and gold-that underlies conflicting standards of legitimacy in the West and East.

This is not to glorify Godless cultures or demean religious ones in the name of progress; it is only to illustrate the contrasting frames of reference for legitimacy in the West and East. These differences must be reconciled for the ideals of democracy, human rights and the rule of law to be accepted in theocratic Muslim cultures. Such a reconciliation is especially relevant to US success or failure in Iraq and Afghanistan.

The ideals of democracy, human rights and the rule of law have often been promoted by the US with a religious fervor-even as crusades against evil empires. Walter Russell Mead has argued that America is the heir to a British legacy of empire built on the mastery of capitalism and sea power (not to mention British colonialism), with US hegemony guided by the invisible hand of manifest destiny.[89] This theory may well be undermined by the spreading economic crisis that originated in the US. If it is as deep and lengthy as many have predicted, it may well signal the end of US hegemony and capitalism as a universal ideal, much as the dissolution of the USSR in 1989 discredited Russia and the communism it sponsored.

Reza Aslan provides a contrasting view of history and manifest destiny to that of Mead. He argues that the hostility of Muslims in the Middle East, Asia and Africa to Britain and its presumptive heir, America, is based on the evolution of the Muslim faith coupled with the exploitation of British colonialism. According to Aslan, the US invasion and occupation of Iraq opened old wounds of colonial rule for Muslims.[90]

Vali Nasr gives a more nuanced view of a Muslim world in which there are deep and violent divisions between Sunnis and Shias (most Muslims are Sunnis, but in Iraq and Iran the majority are Shia). He

describes an Islamic Reformation initiated by a Shia revival that seems analogous to the Protestant Reformation, which produced sectarian conflict in Christian cultures that extended into the 21st century. Despite the prospect for continued Islamic sectarian conflict, Nasr is optimistic that the Shia revival in Iraq and Iran will move Islam toward both moderation and modernation.[91]

Sunni and Shia sectarian conflict confirms that there is not a monolithic Islamic threat to the Western world, despite the claims of militant Islamists. Islamic terrorist groups like al Qaeda, Hezbollah and Hamas are engaged in a holy civil war, and unless Western powers intrude and are perceived to be a common enemy, their sectarian conflict will keep them too preoccupied with their differences to promote a pan-Islamic caliphate.

The US should not be surprised at the hostility encountered when it tries to force-feed Western political values into Muslim cultures. Public perceptions of what is right are shaped by religion and secular traditions such as tribalism, and are slow to change. Cultural values opposed to modernization will ultimately yield to the inexorable forces of globalization, however, if Western powers do not pervert the process. Even authoritarian theocratic rulers cannot hide the benefits of political and economic freedom from their people in a world now on the internet.

Progress and culture shape religion, just as religion shapes culture. And just as Galileo's discoveries could not be suppressed by the Church, neither can the benefits of democracy, human rights and the rule of law be suppressed by Muslim theocrats. The inevitable evolution to modernism can be seen in polls of Muslims living in the US compared with those Muslims living in the Middle East and Asia. There is little of the militant religious extremism among Muslims in the US that is so prevalent in the Middle East, and more acceptance by US Muslims of the political and economic freedom required for national progress and modernization, and for the democracy, human rights and the rule of law that makes such progress possible.[92]

The relationship between religion and progress will always be problematic, even in the US. Progress and the liberating forces of democracy, human rights, the rule of law and capitalism have not diminished the power of religion in the US, although they have reshaped it. God and gold have made a tentative peace. Today moderate Jews, Christians and Muslims are seeking common ground, promoting the libertarian values that underlie Western concepts of democracy, human rights and the rule of law, while rejecting excesses of greed and ambition that are so prevalent in progressive cultures.[93]

The US and its Western allies must be careful, however, not to use their military power in misguided efforts for regime change that unite Islamists against the West and the forces of modernization. Lessons learned in legitimacy indicate that if there is an invisible hand guiding the forces of history and determining the manifest destiny of the world, it is not the heavy hand of overwhelming military force, but instead the inexorable and transforming power of progress that leaves the end of history very much in doubt.

Morality and Legitimacy: Doing the Right Thing for the Right Reasons

The reliance upon military force to achieve strategic political objectives can create its own kind of morality. Carl Von Clausewitz once famously described war as an extension of politics by other means, and he emphasized a militant morality that emphasized victory with overwhelming military force. For Clausewitz public support in the area of operations was not a determining factor.[94]

Victory remains the supreme virtue in conventional war, but in COIN there is no identifiable enemy to defeat and strategic objectives are more political than military. The battle for legitimacy is ultimately one for public support. It is a contest between the supported government and insurgents for the moral authority to govern. Might does not make right in COIN; *might must be right*. But conflicting concepts of what is right in a world of cultural plurality creates moral ambiguity that can undermine the legitimacy of US military operations.

Religion is most often the source of what is right, but secular traditions also shape standards of legitimacy. In the Western world the Just War Tradition and the libertarian values of democracy, human rights and the rule of law determine what is right and proper. In Islamic cultures the standards of legitimacy are often based on religious laws which incorporate ethnic and tribal traditions that brutalize women and children. The result is an oppressive and unyielding rule of law used by Islamists to stifle individual freedom, oppress religious opponents and legitimize violence against unbelievers.

The challenge for American policy-makers in such hostile cultural environments is to develop strategies that balance the practical realism of *realpolitik* with the moral idealism of Just War, democracy, human rights and the rule of law, and ensure that such strategies do not unduly conflict with local standards of legitimacy. That is a daunting challenge for policy-makers and often requires that the ideals of democracy and human rights be deferred until supported governments can provide security for their people against Islamist insurgents. This has been the case in both Iraq and Afghanistan.

One international ethicist, Mark Amstutz, has argued for a universal standard of legitimacy based on Western ethical standards and rejected cultural plurality as an ethical norm, even as legal and moral diversity remains an uncomfortable reality in US foreign policy. Amstutz has even proposed that his idealistic ethical standards should prevail when in conflict with the law, and used this rationale to justify the US invasion of Iraq.[95]

The law is the foundation of legitimacy and must take precedence over moral and ethical standards if the rule of law is to have real meaning. Promoting the supremacy of international law is a daunting challenge in a world of cultural plurality, but it is essential to the goal of providing equal justice under the law. Promoting the rule of law begins with the conduct of US forces, and it is axiomatic that

egregious violations of law undermine their legitimacy. That has already happened in both Iraq and Afghanistan.

A report of the Senate Armed Services Committee concluded that the highly publicized abuses of Iraqi detainees at Abu Ghraib were not the isolated incidents of "a few bad apples" acting on their own, but the result of policies developed at the highest levels of US government. The report cited evidence "… that the first and second identifiable causes of US combat deaths in Iraq-as judged by their effectiveness in recruiting insurgent fighters into combat-are, respectively the symbols of Abu Ghraib and Guantanamo." The report went on to identify and condemn senior civilian and military officials who approved and administered the illegitimate interrogation policies.[96]

The humane treatment of detainees is principle of international law that must be honored if the US expects to promote human rights and the rule of law in the battle for legitimacy. But in addition to US violations, there are other obstacles to promoting human rights overseas. One is disagreement over what constitutes universal human rights, and another is the concept of sovereignty-a principle of international law that has traditionally prohibited the intervention of one nation in the affairs of

another. Disagreement over the definition of human rights remains, but the principle of non-intervention may be changing with new theories that allow humanitarian intervention if a nation fails to protect the human rights of its own people.[97]

There is little reason to expect those cultural values and standards that conflict with human rights in the Middle East and Africa to change any time soon, but for any military intervention for regime change to be considered successful by the US public it must produce a government that not only provides security for its people, but one that also promotes democracy and human rights as integral parts of the rule of law.

The US commitment to Iraq is winding down with a status of forces agreement that requires the withdrawal of all US forces by the end of 2011; but hard choices remain as to Afghanistan-whether to expend more US blood and billions of dollars to support a government that does not share US core values and which lacks legitimacy with its own people.[98]

While America cannot impose its cultural, religious and political values on the people of Iraq or Afghanistan, it can and should promote democracy, human rights and the rule of law in COIN whenever possible. Unfortunately, even if elections can be held and law and order established in these nations, it does not appear that human rights and the rule of law will follow anytime soon-especially in Afghanistan, where a culture of political corruption and the oppression of women has so far frustrated reform efforts.[99]

Looking Ahead: Iraq and Afghanistan

With the drawdown of forces in Iraq and the buildup of forces in Afghanistan, the US should reconsider its strategic objectives and reconstitute and redeploy its forces to better match missions with capabilities in the region.[100] Since the US strategic objective in COIN is to assist a supported government defend its legitimacy, if and when a government loses the legitimacy needed to govern effectively there is no justification for continued US COIN operations. That is the lesson of Vietnam, and it has become an issue in Afghanistan where the legitimacy of the Karzai government is in doubt.

There is an irony here. In Iraq, the legitimacy of the al-Maliki government was initially contaminated by a US invasion that was widely seen as an illegitimate exercise of power, but the US surge strategy allowed the al-Maliki government an opportunity to consolidate its power and enhance its legitimacy.[101] In Afghanistan, the Karzai government initially benefited from a US invasion widely seen as a legitimate exercise of power; but NATO operations are now unable to stop the rising tide of the Taliban, and the Karzai government is widely seen as corrupt, with its power eroded by powerful tribal warlords and their militias. There is evidence that the Karzai government as well as the Taliban are profiting from the opium trade, and turmoil in Pakistani politics has given the Taliban and al Qaeda sanctuaries just across the border. Given the loss of legitimacy of the Karzai government and the growing strength of the Taliban, there is reason to question whether COIN remains a suitable US/NATO strategy in Afghanistan.[102]

Similar issues of legitimacy prevail throughout the region.[103] Wherever the US is engaged in the battle for legitimacy, the rule of law should be the primary strategic objective and civil affairs the primary means to that end. That requires a mix of both soft and hard US power for the extended, ambiguous and often unpopular operations of COIN, but it is problematic whether the US public will support such irregular operations. That public support will require a cultural change in America's national will as

well as in the political and military institutions that implement it.

Finally, even if the US is successful in helping establish capable and legitimate governments in Iraq and Afghanistan, that will not eliminate the threat of terrorism to the US. That threat remains, and it is not one that can be fought and defeated by US military forces overseas. Since 9/11 civilian law enforcement and intelligence agencies rather than military forces have countered the terrorist threat of radical Islam outside Afghanistan and Iraq.[104] To win the global war on terror, the US must focus on cooperative efforts with law enforcement and intelligence agencies around the world, and when it chooses to use its military power in hostile cultural environments, it must temper its exceptionalism with a healthy dose of realism; at the same time the US must never sacrifice its ideals of democracy, human rights and the rule of law.

New Strategies, Roles and Missions and the Capabilities to Implement Them

In his inaugural address, President Barack H. Obama as the new US Commander-in-Chief, acknowledged that "Our nation is at war, against a far-reaching network of violence and hatred." Later he added: "We will not apologize for our way of life, nor will we waiver in its defense, and for those who seek to advance their aims by inducing terror and slaughtering innocents, we say to you now that our spirit is stronger and cannot be broken; you cannot outlast us, and we will defeat you."

To Islamist terrorists who represent *the power of hate and the patience to wait* in the battle for legitimacy, President Obama pledged to confront and defeat them with the power of US ideals-those of human rights and the rule of law-and the patience to see them through: "As for our common defense, we reject as false the choice between our safety and our ideals. Our founding fathers, faced with perils we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expediency's sake."[105]

Just how those lofty ideals are translated into strategies, roles and missions, and the military capabilities to carry them out is yet to be seen, but Robert M. Gates, the US Secretary of Defense, has already given a preview of how that will happen with *a balanced strategy* in three general areas: "[1] between trying to prevail in current conflicts and preparing for other contingencies, [2] between institutionalizing capabilities such as counterinsurgency and foreign military assistance and maintaining the United States' existing conventional and technological edge against other military forces, and [3] between retaining those cultural traits that have made the US armed forces successful and shedding those that hamper their ability to do what needs to be done."

Secretary Gates went on to explain the need for *unconventional thinking* in future military strategies: "What is dubbed as the war on terror, is, in grim reality, a prolonged, worldwide irregular campaign-a struggle between the forces of violent extremism and those of moderation. Direct military forces will continue to play a role in the long-term effort against terrorists and other extremists. But over the long term, the US cannot kill or capture its way to victory. Where possible, what the military calls kinetic operations should be subordinated to measures aimed at promoting better governance, economic programs that spur development, and efforts to address the grievances among the discontented, from whom terrorists recruit. It will take the patient accumulation of quiet successes over a long time to discredit and defeat extremist movements and their ideologies."

Secretary Gates observed: "To truly achieve victory as Clausewitz defined it-to attain a political objective-the US needs a military whose ability to kick down the door is matched by its ability to clean

up the mess and even rebuild the house afterward." He went on to note that Special operations have received increased funding and support in recent years and that counterinsurgency and Army operations manuals now provide doctrine for irregular operations alongside more conventional military doctrine; "And various initiatives are under way that will better integrate and coordinate US military efforts with civilian agencies as well as engage the expertise of the civilian sector, including nongovernmental organizations and academia."

Expanding on the third point of his balanced strategy, Secretary Gates addressed the need to change the bureaucratic culture of the Pentagon to support unconventional military capabilities, roles and missions: "One of the enduring issues the military struggles with is whether personnel and promotion systems designed to reward the command of American troops will be able to reflect the importance of advising, training, and equipping foreign troops-something still not considered a career-enhancing path for the best and brightest officers. Another is whether formations and units organized, trained and equipped to destroy enemies can be adapted well enough and fast enough to dissuade or co-opt them- or, more significant, to build the capacity of local security forces to do the dissuading and destroying."

Finally, the Secretary of Defense left no doubt where he stood on these contentious issues: "As secretary of defense I have repeatedly made the argument in favor of institutionalizing counterinsurgency skills and the ability to conduct stability and support operations. …Apart from the Special Forces community and some dissident colonels, however, for decades there has been no strong, deeply rooted constituency inside the Pentagon or elsewhere for institutionalizing the capabilities to wage asymmetric or irregular warfare-and to quickly meet the ever-changing needs of forces engaged in these conflicts."[106]

Colonel H. R. McMaster is one of those dissident colonels mentioned by Secretary Gates who understands and has promoted the need for those unique military capabilities, roles and missions required to win the battle for legitimacy in future conflicts. Colonel McMaster cited painful lessons learned in legitimacy from Vietnam to support a focus on the human element and a flexible capability in military operations rather than technological superiority and overwhelming force in those ambiguous and unforgiving conflict environments like Iraq and Afghanistan where the US must be prepared to defend its national security interests.

COL McMaster has argued the points made by Secretary Gates against proponents of the so-called *Revolution in Military Affairs* who favor future strategies and capabilities based on technological superiority and overwhelming military force, or *shock and awe*, to achieve US strategic objectives. He cited the failure of such strategies in both Vietnam and Iraq for having "slighted the human and psychological dimensions of war," and observed that no easy solution presents itself in Afghanistan and Iraq, just as in Vietnam where success required "…defeating enemy insurgent and conventional forces, countering enemy political initiatives, and helping the South Vietnamese government and military develop the effectiveness and legitimacy necessary to secure the population, address people's basic needs, and turn people against the Communists."

After comparing Secretary of Defense McNamara and his "whiz kids" with Secretary Rumsfeld and his neocon equivalents-who managed to duplicate the strategic errors of their predecessors-COL McMaster condemned US policies and strategies that "…invited Americans to indulge in the conceit that decisive victory would henceforth be achieved by small numbers of US forces backed with superior technology," which is an underlying assumption of the strategic priorities of the Revolution of Military Affairs.

After describing the unconventional nature of COIN and how it defies the kind of calibration required

to effectively utilize conventional military responses, COL McMaster has advocated more flexible strategies and military capabilities: "Enemy countermeasures such as dispersion, concealment, deception and intermingling with the civilian population limit the reach of surveillance and precision strike capabilities. Other factors, such as cultural, tribal and political identities enhance complexity and influence the course of events. Emphasis in planning and directing operations, therefore, ought to be on effectiveness rather than efficiency."[107]

It seems clear that the US Commander-in-Chief and his Secretary of Defense support strategies that require a capability to conduct COIN and stability operations, and that there is support for such flexible strategies in the officer corps. That begs the question: How does the US provide the needed capabilities and define the roles and missions needed to win the battle for legitimacy in COIN and stability operations? There are three areas in which changes should be made:

1. *Integrated interagency structures and operational units including Department of Defense (DOD) and Department of State (DOS) personnel and other critical civilians should be provided for the roles and missions in COIN and stability operations.*

The primacy of political objectives in COIN and stability operations make unity of effort essential to mission success. While PRTs have functioned reasonably well as interagency operational units in COIN and stability operations, there have been failures that can only be remedied by more effective integration of mission essential personnel from both DOD and DOS, and their conflicting policies and practices.

There has always been a vast gulf between the limits of diplomacy and military operations, and that gulf is evident in the clash of DOS and DOD operational cultures. Bridges must be built to overcome the bureaucratic inertia and operational friction that impede unity of effort in COIN and stability operations. Secretary of Defense Gates has acknowledged this issue, and it is assumed that Secretary of State Hillary Clinton will do the same, even as President Obama has indicated a shift of emphasis from DOD to DOS.

Achieving true unity of effort between DOD and DOS personnel will require hybrid organizational structures that effectively integrate interagency personnel, operational policies, practices and procedures and provide clear lines of authority and accountability. Given the inevitable culture clash, military officers and those in the diplomatic corps should share cross-training and operational assignments to gain a better understanding of the culture differences between their two bureaucracies.[108]

2. *Civil Affairs doctrine, units and force structures should be modified to provide an interagency capability for the roles and missions of COIN and stability operations.*

Civil Affairs assets represent the most suitable capability in either DOD or DOS to conduct the interagency activities and operations of COIN and stability operations, but operational doctrine and force structures must be modified to achieve that purpose. Most civil affairs units are in the United States Army Reserve (USAR) and are assigned to the United States Army Civil Affairs and Psychological Operations Command (USACAPOC) at Ft. Bragg, NC, which is under the United States Special Operations Command (USSOCOM) in Tampa, FL. Civil affairs is a special operations activity under the Goldwater-Nichols Act, so that all civil affairs personnel, activities and operations can be incorporated into USSOCOM, including those from DOS, the Agency for International Development (USAID) and the Civilian Response Corps (CRC).

CRC is a civilian capability with a rule of law mission in stabilization and reconstruction activities

overseas. It includes civilian judges, lawyers and policemen who should be organizationally integrated with civil affairs in order to achieve unity of effort in COIN and stability operations. So far CRC remains a separate DOS capability, compounding the interagency friction already noted with PRTs. A hybrid civil affairs capability in USSOOM that includes CRC could remedy the problem.[109]

Another way to improve the civil affairs capability would be to utilize existing civilian expertise in government services found in the Army National Guard (ARNG). Each state ARNG has the mission to provide essential services in natural and man-made disasters and has a state area command (STARC) that includes capabilities that parallel those functional specialties in civil affairs. The STARC could double as a civil affairs capability, but currently there are no civil affairs units in the ARNG.[110]

3. *There should be a new paradigm of military leadership in the battle for legitimacy: the diplomat-warrior.*

The need for a unique model of leadership for civil-military operations such as COIN and stability operations should be self-evident. The traditional model of the combat leader and his command style of leadership so well suited for combat is ill-suited for the civil-military and interagency priorities of COIN and stability operations.

The diplomat-warrior is a leader who understands the importance of diplomacy, negotiation and the power of persuasion in the battle for legitimacy; and the training and career path of this leader should run through both DOD and DOS. This applies to all special operations personnel with civil-military and interagency missions. As noted by Secretary Gates, providing a career path for the diplomat-warrior will require a major change in the bureaucratic culture of DOD, but it is a change that must occur if the US is to have the capability to promote the rule of law in the battle for legitimacy.[111]

Proposals have been made for new bureaucratic structures to provide the capabilities for the roles and missions in COIN and stability operations, but new layers of bureaucracy are not needed. The US already has the capabilities and structures needed to provide diplomat-warriors to train foreign forces, promote the rule of law and conduct the interagency operations needed in the battle for legitimacy. What has been lacking is leadership within DOD and DOS to challenge traditional bureaucratic inertia and culture and reshape existing capabilities for new roles and missions. The recommendations of Secretary Gates to transform the world's largest bureaucracy could make that happen.[112]

Conclusion

The military is the ultimate extension of a nation's foreign policy, and the US must have a capability to conduct military operations other than war such as stability operations and COIN in order to protect its national security interests. COIN is a battle for legitimacy rather than for military victory, and unlike conventional combat operations political objectives take precedence over military objectives. Public support for an embattled government is more important to mission success in COIN than overwhelming combat power. The battle for legitimacy cannot be won by military power, and excessive military force can be counterproductive when it causes collateral damage.

US interventions in Afghanistan and Iraq precipitated extended COIN operations that have yet to be resolved, but two results are certain: Iran has become the major power in the Middle East and a serious threat to US security interests, and Osama bin Laden remains at large with other al Qaeda and Taliban forces in sanctuaries in neighboring Pakistan, a country either unable or unwilling to purge itself of Islamists.

In Iraq the surge strategy made the best of a bad situation, but corruption and unresolved sectarian and ethnic conflict make the future uncertain. In Afghanistan the Karzai government has lost its initial legitimacy due to corruption and ineffectiveness. In both countries there remains pervasive hostility to the US based on endemic religious and cultural differences. There is good reason to question whether US strategic interests in the region have been well served by military strategies and operations to date.

Religion has once again infected the politics of the Middle East, and with an atavistic vengeance. Radical Islam feeds the intractable violence, and it is not only a threat in the Middle East, but also throughout Africa and Asia. Islamist terrorists have effectively utilized asymmetric strategies to counter superior force. They represent *the power of hate and the patience to wait*.

For the US to counter the threat of Islamist violence and promote democracy, human rights and the rule of law in hostile cultural environments like Afghanistan and Iraq, its policy makers and military leaders must better understand the central role of legitimacy in contemporary conflict, and how religion and culture produce conflicting standards of legitimacy and fragmented political structures. They must also understand the strategic relationship between the rule of law and civil affairs in the battle for legitimacy, and the need for public support in both the US and the area of operations to achieve the political objectives of COIN.

With a looming economic crisis overshadowing its military commitments, the US is at a crossroads that resonates with echoes from Vietnam. If the US chooses to continue stability operations and COIN in hostile cultural environments, it must make significant adjustments to its military strategies based on lessons learned in legitimacy. The US must reshape its military capabilities into new roles and missions and develop a new paradigm of leadership in order to win the battle for legitimacy-or be prepared to accept painful consequences that have been writ large in history.

END NOTES

1. General David Petraeus is one of the authors of Counterinsurgency, FM 3-24 and MCWP 3-33.5, December 2006, Headquarters, Department of the Army (hereinafter cited as FM 3-24 or *Counterinsurgency*), and he made it clear that the operational doctrine in that manual governed operations in Iraq. Legitimacy is described as the main objective in COIN in the first of the historic principles for COIN set forth in paras 1-113 through 1-136, and there is special emphasis on the rule of law in chapter 7 and Appendix D, and on civil affairs in chapter 2 on *Unity of Effort: Integrating Civilian and Military Activities* (the broad concept of civil affairs is synonymous with *unity of effort*). COIN is similar to Foreign Internal Defense (FID), and both are categorized as irregular warfare which is defined as "A violent struggle among state and non-state actors for legitimacy and influence over the relevant populations." (see Glossary, Quadrennial Roles and Missions Review Report, Department of Defense, January 2009; see also FM 3-0, *Operations*, Headquarters, Department of the Army, February 2008, chapter 2) On the distinction between COIN and FID, which seems a distinction without a difference, see Hasler, *Defining War*, Special Warfare, Mar/Apr 2007, p 23; also Mulbury, *ARSOF, General Purpose Forces and FID*, Special Operations, Jan/Feb 2008.

2. The concept of military legitimacy and its relationship to public support is defined and explained in Barnes, Military Legitimacy: Might and Right in the New Millennium, Frank Cass, 1996, in chapters 2 and 3 (hereinafter cited as *Military Legitimacy*); see also Barnes, *Military Legitimacy in OOTW: Civilians as Mission Priorities*, Special Warfare, Fall 1999 (hereinafter cited as *Military Legitimacy in OOTW*), and FM 3-24 at paras 1.3, 1.4 (p 1-1), 1-7 (p 1-2), 1.40 (p 1-8), 1.43 (p 1-9), 1-108 (p 1-120),

1-112-119 (pp 1-21,22), and box at p 7-9. See also FM 3-0 at pp 3-12 thru 3-14, Appendix A, p 4 (A-4).

3. For the role of culture and religious values in shaping concepts of legitimacy, see *Military Legitimacy* at pp 53-58 and *Military Legitimacy in OOTW*; generally see FM 3-24 at paras 1-75-83 (pp 1-14,15), 1-84 (p 1-16), 1-124,125 (pp 1-22,23); on Iraq, see Craig Trebilcock, *The Modern Seven Pillars of Iraq*, Army, Feb. 2007, p 25; as to Afghanistan, see Edward Croot, *Digging Deeper*, Special Warfare, Mar-Apr 2007, p 26.

4. On the need for public support for military legitimacy and the role of the media in shaping it, see Barnes, *Military Legitimacy in OOTW: Civilians as Mission Priorities*, Special Warfare, Fall 1999, pp 35-37; also *Military Legitimacy*, pp 58-60. The cultural pluralism that creates the double standard of legitimacy is discussed later (see note 95, *infra*).

5. On the need to restrain the use of lethal force and apply the principles of discrimination and proportionality to minimize collateral damage, see FM 3-24, paras 1-141-143 (p 1-25), 148-154 (pp 1-126-127) and 7-30-37 (pp 7-6,7).

6. This expansive meaning is described by David Scott Gordon in his paper, *Promoting the Rule of Law in Stability Operations: Myths, Methods and the Military*, 2007, see www.citadel.edu/smll; see also Kevin Govern, *"Reichstaat" Aspirations Versus Accomplishments: Rethinking the Rule of Law Efforts in Iraq*, paper presented to the Barnes Symposium at the University of South Carolina Law School, February 2007 (see at www.citadel.edu/smll). Tonya Jankunis has argued that the UN definition of the rule of law be adopted by all US agencies. It is a broad "substantive" definition that includes human rights and the implication of democracy (participation in decision-making). See Jankunis, *Military Strategists Are From Mars, Rule of Law Theorists Are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, Military Law Review, Fall, 2008, pp 16, 53. For the rule of law as defined in FM 3-24, see note 8, *infra*.

7. Operational law is a term of art used by military lawyers to describe the laws applicable to military operations, and compliance with the law is the first requirement of legitimacy. The Judge Advocate General's Legal Center and School in Charlottesville, VA publishes an *Operational Law Handbook* annually. As to the relationship between the law and legitimacy in COIN, see Barnes, *Military Legitimacy in OOTW: Civilians as Mission Priorities*, Special Warfare, Fall 1999, pp 33-34, and *Military Legitmacy* at p 57.

8. FM 3-24 (*Counterinsurgency*) states: "Establishing the rule of law is a key goal and end state in COIN… Some key aspects of the rule of law include: 1. A government that derives its powers from the governed… 2. Sustainable security institutions… [and]   3. Fundamental human rights…" (see Appendix D, para D-38; the rule of law is also considered an essential element of legitimacy in para 1-119 and of security in para 1-131) Elsewhere the range of meanings for the rule of law are from an expansive meaning that is synonymous with US strategic political objectives (see note 6, *supra*) to more narrow meanings such as that proposed by Dan Stigall in *The Rule of Law: A Primer and A Proposal*, Military Law Review, Fall 2006, p 92. In keeping with FM 3-24, Vasitios Tasikas has advocated a strategic paradigm emphasizing the importance of the rule of law to mission success in Afghanistan, with military lawyers playing a central role. See Tasikas, *Developing the Rule of Law in Afghanistan: the Need for a New Strategic Paradigm*, The Army Lawyer, July 2007, pp 45 et seq.; see

also note 6, *supra*.

9. On civil affairs generally, see *Military Legitimacy* at pp 36-48, 70, 149-155; see also, Barnes, *Civil Affairs: Diplomat-Warriors in Contemporary Conflict*, Special Warfare, Winter 1991, p 4. Civil affairs doctrine makes a distinction between civil-military operations and civil affairs operations (see FM 3-05.40, September 2006 at p 1-2), but in this context there is no meaningful distinction between the two. Civil affairs is integral to the unity of effort between military and civilian agencies and activities in COIN (see FM 3-24 at pp 1-22, 2-5, 2-13. Civil affairs activities and personnel are also an integral part of stability operations (see FM 3-0 at p 3-12); see also, Bruce Bingham, Daniel Rubini and Michael Cleary, *U.S. Army Civil Affairs: The Army's "Ounce of Prevention"*, The Land Warfare Papers, No. 41, March 2003; also notes 11 and 39, *infra*.

10. See references in note 3, *supra,* on the need to respect local culture and religious norms; but also notes 15 and 16, *infra*, on the potential pitfalls of promoting security at the expense of the political reforms needed to protect fundamental human rights.

11. See *Military Legitimacy* at p 39 and note 13; see also, Barnes, *Civil Affairs: Diplomat-Warriors in Contemporary Conflict*, Special Warfare, Winter 1991, at p 6 and note 12; also *Military Legitimacy in OOTW* at pp 40, 41, notes 36 and 37. Current civil affairs doctrine states that "CA significantly helps ensure the legitimacy and credibility of the mission by advising on how best to meet the moral and legal obligations to the people affected military operations" and provides for a Rule of Law Section to help create security and stability for the civilian population by restoring and enhancing a system of justice (see FM 3-05.40, pp 1-1 and 2-8 thru 2-10). See also note 39, *infra*.

12. See articles by Trebilcock and Croot cited in note 3, *supra*; on the conflict between providing security and legitimacy, see the article by Chamberlain cited in note 15, *infra*.

13. Michael Eisenstadt, *Tribal Engagement Lessons Learned*, Military Review, Sept-Oct 2007, pp 16, 25.

14. On the constabulary or police role of military forces in COIN, see FM 3-24 at paras 1-131 thru 1-133 and paras 7-26 thru 7-29. Morris Janowitz pioneered the concept of the military in a constabulary role. See Janowitz, *The Future of the Military Profession*, in Wakin, War, Morality and the Military Profession, Westview Press, 1987, at p 57. On the danger of promoting an oppressive constabulary force, see note 15, *infra*.

15. On the interdependence of democracy, human rights and the rule of law, see *Military Legitimacy* at p 80. IN COIN, legitimacy is not served by supporting an oppressive rule of law. Robert Chamberlain has compared US COIN in El Salvador in the 1980s with Iraq to illustrate that US support of security forces that suppress political opposition only feeds an insurgency. Robert M. Chamberlain, *With Friends Like These: Grievance, Governance, and Capacity-Building in COIN*, Parameters, Summer 2008, pp 79, 89, 90. On human rights, sovereignty and the UN, see notes 16 and 97, *infra*.

16. *Idem*; see also *Military Legitimacy*, chapter 4. In his inaugural address President Obama made it clear that human rights and the rule of law are US foreign policy objectives, so that no regime sponsored by the US that denies its people fundamental human rights can be considered a foreign policy success. The priority of human rights to mission success (at least prior to 9/11) is discussed in Barnes, *Human Rights and Legitimacy in the Foreign Training Mission*, Special Warfare, Spring 2001,

p 2. US forces in foreign training missions are required to report any gross violation of human rights, and funding is prohibited to those countries that have a record of human rights violations (see pp 4-6). See *Military Legitimacy* at p 139 and note 10. The notorious violations of human rights at Abu Ghraib and continuing issues of detainee abuse at Guantanimo (see note 96, *infra*) indicate that human rights must be restored as a mission priority of US forces. On human rights, sovereignty and the UN, see note 97, *infra*.

17. Harry G. Summers, Jr., On Strategy: The Vietnam War in Context, Strategic Studies Institute, The Army War College, Carlisle Barracks, PA, 1989, p 1.

18. Overwhelming military force can be turned against the US and the government it supports by asymmetric strategies of insurgents. See FM 3-24, chapter 1, paras 1-112-123, 1-131-133, 1-141-143 and 1-148-157. But that is only one of the asymmetrics of COIN; even democracy can be asymmetric, promoting rather than limiting terrorism, as it has in Gaza under the democratically elected Hamas government. (see generally, Cindy R. Jebb, P. H. Liotta and Ruth Margolies Beitler, The Fight for Legitimacy: Democracy vs. Terrorism, Praeger Security International, 2006, p 6 *et seq*. (hereinafter *The Fight for Legitimacy;* see also note 99, infra). Measures to counter the asymmetric tactics of insurgents are discussed in Dungan, *Fighting Lawfare at the Special Operations Task Force Level*, Special Warfare, March 2008).

19. Nadia Shadlow has argued that General Petraeus and the large number of US forces under his command should remain in Iraq indefinitely on the assumption that they "…can forge close relationships with Iraqi soldiers and police demonstrating to the population a commitment to achieving enduring security." Shadlow, *From the Jaws of Victory*, New York Times, February 7, 2008. The status of forces agreement between Iraq and the US will govern how many US forces remain in Iraq; all troops are to leave by the end of 2011. As to the debate on how many more NATO forces should be deployed in Afghanistan, see notes 102 and 104, *infra*.

20. See note 1, *supra*.

21. See *Military Legitimacy* at pages 37-48 and 60-71.

22. *Ibid* at p 61.

23. *Idem*.

24. See FM 3-24 at pp 1-20 through 1-24.

25. *Ibid* at pp 1-20 through 1-28. *The historic principles of COIN* listed in FM 3-24 omit *the restricted use of force* and *restraint* under LIC and OOTW, and *adaptability* under LIC; but these principles and precedents are found later under *contemporary imperatives of COIN* where they are listed as *use the appropriate level of force* and *learn and adapt.* The similarity of the modern principles of COIN with those of Low Intensity Conflict in the 1980s can be seen in a 1988 article by the author: *The Politics of Low Intensity Conflict*, Military Review, February 1988, p 1. FM 3-0, *Operations*, supplements the nine traditional principles of war with three principles of joint operations: perseverance, legitimacy and restraint. (see FM 3-0, Appendix A)

26. For a list and description of the LIC imperatives and principles of OOTW, see *Military Legitimacy*

at pp 60-71; for the principles of COIN see FM 3-24 at pp 1-20 through 1-28. For current doctrine on the full spectrum of operations, see note 1, *supra*. Daniel Roper has affirmed the primacy of legitimacy in COIN, and suggested that for strategic clarity the global war on terror should be called a global hiarabahist insurgency. See Roper, *Global Counterinsurgency: Strategic Clarity for the Long War*, <u>Parameters</u>, Autumn 2008, pp 93, 98, 99.

27. A concise theory of Just War with a listing of the six principles of *jus ad bellum* and the principles of *jus in bello* (discrimination and proportionality) can be found in Mark Amstutz , <u>International Ethics</u>, Rowman & Littlefield, 2008, at pp 113-116; a more comprehensive look at Just War and its application to Iraq is provided by Richard DiMeglio in *The Evolution of the Just War Tradition: Defining Jus Post Bellum*, <u>Military Law Review</u>, Winter 2005, p 116. The importance of the principles of discrimination and proportionality are emphasized in FM 3-24 at pp 7-6 and 7-7. See also *Military Legitimacy* at pp 8, 54, 55, 66-68, 85-90. The Israeli offensive into Gaza generated heated debate on whether Israeli actions were disproportionate or a proportionate response to the asymmetric tactics of Hamas. See Steven Erlanger, *Weighing Crimes and Ethics in Urban Warfare*, <u>The New York Times</u>, January 17, 2009.

28. A Status of Forces Agreement (SOFA) is a treaty that governs the status of US forces in a foreign country, and the al-Maliki government has used negotiations with the US over the Iraq SOFA to push for a "time horizon" for the withdrawal of US troops. See William J. Fallon, *Surge Protector*, <u>NYTimes</u>, July 20, 2008. On the US-Iraq SOFA, see Kevin Govern, *Sharing a SOFA With Iraq: Towards a Status of Forces Agreement*, Op-Ed in <u>Jurist Forum</u>, University of Pittsburgh Law School, July 2, 2008. On the terms of the SOFA approved by Iraq, see Sudarsan Raghavan, *Security Accord Approved in Iraq*, <u>The Washington Post</u>, November 28, 2008.

29. Commentators and scholars have argued whether the US invasion of Iraq met the requirements of international law set forth in Articles 2(4) and 51 of the UN Charter, which limit armed intervention to self-defense or collective self-defense, unless authorized under chapter VII of the UN Charter, and whether the invasion met the moral requirements of the Just War Tradition (see David K. Linnan, *Redefining Legitimacy: Legal Issues*, chapter 13, <u>Enemy Combatants, Terrorism and Armed Conflict Law</u>, edited by David K. Linnan, Praeger Security International, 2008; also Mark Amstutz , <u>International Ethics</u>, *ibid*). Most agree that preemptive self-defense and regime change do not satisfy the legal and moral requirements for the invasion. John Judis has argued that George W. Bush ignored the lessons of history (and legitimacy), beginning with the US occupation of the Philippines in the early 20th century, and that the US invasion of Iraq has undermined long-standing US efforts to promote democracy, human rights and the rule of law. See Judis, <u>The Folly of Empire: What George Bush Could Learn from Theodore Roosevelt and Woodrow Wilson</u>, Scribner, 2004. Most national polls taken since the beginning of 2007 indicate that the majority of Americans do not support the US war in Iraq and want the US out as soon as possible. See Lowndes F. Stephens, *The Press, the Presidency, and Public Opinion Since 9/11: Shaping US Foreign Policy and Military Strategy*, <u>Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues</u>, edited by David K. Linnan, Praeger Security International, 2008, at p 7.

30. For a description of the leadership qualities needed in COIN and ways to produce leaders with them, see Brian Polley, *Leadership Education and Training for the Interagency*, <u>The Interagency and Counterinsurgency Warfare: Stability, Security, Transition and Reconstruction</u>, edited by Joseph R. Cerami and Jay W. Boggs, Strategic Studies Institute, December 2007, at p. 425. See also *Military*

Legitimacy at pp 105-117; and Barnes, *Civil Affairs: Diplomat-Warriors in Contemporary Conflict*, Special Warfare, Winter 1991, p 4.

31. *Idem*; see also reference to reversal of military priorities in *Parodoxes of Counterinsurgency Operations* in *Counterinsurgency* at paras 1-148-161 and Table 1-1, reference to diplomat-warriors at para 2-36 (p 2-8), and leadership requirements in chapter 7.

32. Current doctrine in FM 3-24 (December 2006) is little changed from the doctrine for LIC and OOTW that preceded it. See note 25, *supra*. The emphasis on civil affairs is found in chapter 2, *Unity of Effort*.

33. See the discussion of the conflicting principles of *restraint* and *security,* two of the six principles of OOTW that apply to COIN. The other four principles are *legitimacy, objective, unity of effort* and *perseverance* as discussed in *Military Legitimacy* at pp 60-70, and 133-144. See also FM 3-24 at paras 1-112 through 1-161 and Table 1-1 at pp 1-20 through 1-29, and FM 3-0 at Appendix A; see also *Military Legitimacy in OOTW*.

34. Numerous examples of collateral damage have resulting from the excessive, inappropriate or illegal use of force in both Iraq (e.g. Abu Ghraib, the incident at Haditha, the Blackwater incident, and numerous air strikes that killed women and children) and Afghanistan, where air strikes targeting al Qaeda have often killed women and children.

35. See John A. Nagle, *A Battalion's Worth of Good Ideas*, NY Times, April 2, 2008; also Peter Spiegel and Julian E. Barnes, *Rethinking the U.S. Army*, Los Angeles Times, October 10, 2007. The United States Institute of Peace has promoted a Rule of Law Reserves in a Civilian Response Corps (CRC) and a federal Office for Rule of Law Operations, see *Building Civilian Capacity for US Stability Operations: The Rule of Law Component*, April 2004. In 2008 Congress funded $55 million (PL 110-252) to deploy 600 members of the CRC as a US capability for reconstruction and stabilization (see Carlson & Dziedzic, *Recruitment of Rule of Law Specialists for the Civilian Response Corps*, United States Institute of Peace, January , 2009, cited at note 109, *infra*); a special panel of the US House of Representatives Committee on Armed Services issued its first report (*Initial Perspectives*) in January 2008 which included articles on CRC (pp 42-44), a Department of Nation-Building (pp 45-47), and Provincial Reconstruction Teams (PRTs) that are currently in service under the State Department in both Afghanistan and Iraq (pp 68,69). The DOD Quadrennial Roles and Missions Review Report (January 2009) emphasized the need for innovative interagency initiatives like civil affairs and CRC to address COIN and stability operations (see pp 5-13; 31-36); and the head of the US Agency for International Development (USAID) has called for a robust interagency relationship between USAID, the Department of Defense and the Department of State in COIN (see Henrietta Holsman Fore, *Aligning "Soft" Power with "Hard" Power*, Parameters, Summer, 2008, p 14. See also notes 60-62, 100, 106, 108, and 109, *infra*.

36. See *Military Legitimacy* at pp 36-48; see also FM 3-24 at para 2-18 (p 2-5) and *Military Legitimacy and OOTW*. See Mark Grdovic, *The Advisory Challenge*, Special Warfare, Jan/Feb 2008; John Mulbury describes the capabilities of the Army's SOF and argues that its foreign internal defense (FID) mission is uniquely different from the COIN mission now being performed by conventional or general purpose forces, but it seems a distinction without a real difference. See Mulbury, *ARSOF General Purpose Forces and FID*, Special Warfare, Jan/Feb 2008, p 17. Ross Lightsey describes how Civil

Affairs forces support general purpose forces in *Civil Affairs Support to the Surge*, <u>Special Warfare</u>, Mar/Apr 2008.

37. See Ralph R. Young, *Snapshots of Civil Affairs: A Historical Perspective and Views*, unpublished paper presented at the 39th Annual Conference of the Civil Affairs Association at San Antonio Texas, June 1986, p 4. Also Alexander M. Walczak, *Conflict Termination–Transitioning From Warrior to Constable: A Primer*, unpublished paper prepared as part of USAWC Military Studies Program, U.S. Army War College, Carlisle Barracks, Pennsylvania, 1992. Walczak emphasizes the responsibility of commanders for the welfare of civilians in their areas, and their role as constables in establishing and maintaining law and order and providing essential services until CA forces arrive. See also FM 3-0 at p 3-12 thru 3-14.

38. See Ted B. Borek, *Legal Services During War*, <u>120 Military Law Review</u>, 1988, pp 35-40.

39. See note 11, *supra*. See also U.S. Army Field Manual (FM) 41-10, <u>Civil Affairs Operations</u>, December, 1985, p 1-1; cited in Barnes, *Legitimacy and the Lawyer in LIC: Civil Affairs Legal Support*, <u>The Army Lawyer</u>, October 1988, p 5.

40. See Harry F. Walterhouse, <u>A Time to Build</u> , The R. L. Bryan Company, University of South Carolina Press, Columbia, S.C., 1964, p 84. For an account of the US intervention in the Philippines in the early 20th century, see John Judis, <u>The Folly of Empire: What George Bush Could Learn from Theodore Roosevelt and Woodrow Wilson</u>, Scribner, 2004.

41. *Ibid* at pp 84-90

42. Reference is made to William Lederer and Eugene Burdick's <u>The Ugly American</u>, New York: W.W. North & Co., 1958.

43. Graham Greene's classic, <u>The Quiet American</u>, Penguin Books, 1955, 1973, gives an insight into the early days of US involvement in South Vietnam.

44. William R. Berkman, *Civil Affairs in Vietnam*, unpublished paper written for U.S. Army War College, Carlisle Barracks, PA, December 1973; see also the highlighted box in FM 3-24 (*CORDS and Accelerated Pacification of Vietnam*) at p 2-12,13.

45. John T. Fischel and Edmund S. Cowan, *Civil-Military Operations and the War for Moral Legitimacy in Latin America*, <u>Military Review</u>, January 1988, p 40, 43. The authors use the term civil-military operations, which has essentially the same meaning as civil affairs in this context. For other examples of military civic action in Latin America and elsewhere, see Gabriel Marcella, *The Latin American Military, Low Intensity Conflict, and Democracy, Winning the Peace: The Strategic Implications of Military Civic Action*, edited by John W. DePauw and George A. Luz, Strategic Studies Institute, U.S. Army War College, Carlisle, PA, chapter 4.

46. The Grenada and Panama incursions reflected both a preference for overwhelming military force and impatience with extended combat operations, producing "quick and dirty" combat operations that not only satisfied public preferences but also the 60-day limit on combat operations, after which the War Powers Resolution allows Congress to become involved. See *Military Legitimacy* at pp 65-66, 137-138; see also *Counterinsurgency*, Appendix D (*Legal Considerations*), p D-2.

47. See Delbert L. Spurlock, *Grenada Provides Classic Case*, <u>The Officer</u>, August 1984, p 17; see also, Barnes, *Grenada Revisited: Civil Affairs Operates in Paradise*, <u>The Officer</u>, July 1985, p 14.

48. Carnes Lord, Project Director, *Civil Affairs: Perspectives and Prospects* (draft, February 1993), Institute for National Strategic Studies, National Defense University, pp 7, 8.

49. See *Civil Affairs in Just Cause*, <u>Special Warfare</u>, Winter 1991, p 28.

50. See John R. Randt, *Working in a Place Called Zacho: Stories from the Storm*, <u>Army Reserve Magazine</u>, third issue of 1991, p 10.

51. See *Civil Affairs: Perspectives and Prospects* cited in note 62, *supra*, at pp p 9-12.

52. See *Military Legitimacy* at pp 19-20, 135-138.

53. See *Civil Affairs Journal and Newsletter*, Civil Affairs Association, Kensington, MD, January/February 1995, p 3.

54. See Bill Maddox, *Haiti Recovers*, <u>Army Reserve Magazine</u>, Spring 1995, p 20.

55. See Mark Amstutz , <u>International Ethics</u>, Rowman & Littlefield, 2005, at pp 20-26 (case study of the 1999 NATO war against Serbia in which Amstutz questions the morality of NATO bombing campaign).

56. *Idem*. The decentralized political system produced by the Dayton Peace Accord "…has entrenched rather than healed ethnic divisions" so that "the political situation is difficult, violent and unstable…." See Dan Bilefsky, *Fears of New Ethnic Conflict in Bosnia*, <u>The New York Times</u>, December 14, 2008.

57. Wayne A. Downing, *Civil Affairs Wins the Peace*, letter to the editor, <u>Military Review</u>, February 1994, pp 3, 64. See also, FM 3-0, p 3-12 thru 3-14.

58. FM 3-24 (see note 1, *supra*) and Department of Defense (DoD) Directive 3000.05 (November 2005) which support the primacy of legitimacy, the rule of law and civil affairs in stability operations. See Michael R. Gordon, *New Weight in Army Manual on Stabilization*, <u>New York Times</u>, February 8, 2008; see FM 3-0 at p 3-12 thru 3-15 and Appendix A. In the Forward to the DOD <u>Quadrennial Roles and Missions Review Report</u> (January 2009), Secretary of Defense Robert Gates confirmed that "… military success does not equate to victory." See also notes 35 *supra* and 100 and 106, *infra*.

59. See <u>FM 3-24</u>, n. 1, *supra*, at chapter 2 (*Unity of Effort*), para 2-1; also FM 3-12 thru 3-15. See also references in note 58, *supra*.

60. For a description of a CMOC, see <u>FM 3-24</u>, *ibid*, at pp 2-11, 2-13 and 2-14; PRTs are described in <u>FM 3-24</u> at p 2-12 and in <u>The PRT Playbook: Tactics, Techniques, and Procedures</u>, Center for Army Lessons Learned (CALL), http://call.army.mil, Sept 07, at p 1. The relationship between PRTs and legitimacy is noted on pp 1, 2; see also, Nina Abbaszadeh, et al., <u>Provincial Reconstruction Teams: Lessons and Recommendations</u>, Woodrow Wilson School of International Affairs, Princeton University, January, 2008, at pp 5, 7-13. On PRTs and interagency cooperation in COIN, see *Status of the Provincial Reconstruction Team Program Expansion in Iraq*, Office of the Special Inspector

General for Iraq Reconstruction, SIGR-07-014, July 25, 2007; *PRT Handbook: Tactics, Techniques and Procedures*, Center for Army Lessons Learned, September 2007. For a survey of organizational possibilities and issues relating to an advisory corps that might bridge the gap between the Department of State and Department of Defense in nation-building, stability operations and COIN, see H. Allen Irish, "*A Peace Corps With Guns": Can the Military Be a Tool of Development?*, The Interagency and Counterinsurgency Warfare: Stability, Security, Transition, and Reconstruction Roles, December 2007, Strategic Studies Institute, edited by Joseph R. Cerami and Jay W. Boggs.

61. See n. 44, *supra*.

62. On PRTs, see Provincial Reconstruction Teams: Lessons and Recommendations at note 60, *supra*, at pp 15-18. On the need for unity of effort, or a *whole-of-government* approach to COIN, see DOD Quadrennial Roles and Missions Review Report (January 2009) at pp 31-36 and the *Colloquium Brief* of Ralph Wipfli and Steven Metz, *COIN of the Realm: US COIN Strategy*, SSI Colloquium, Oct. 22, 2007. One panel of the colloquium acknowledged that "When engaged in COIN, the US focuses on restoring or augmenting the capacity of a partner state." The panel then noted that "A COIN strategy that ignores subnational groups and seeks only to strengthen the national government may be doomed to failure." (p 2) The panel affirmed the need for a *whole-of-government* approach in COIN, and then noted that "There is no framework for a whole of government approach (although efforts are under way)." (p 3) A second panel focused on balancing COIN with other needs: "COIN operations, in particular, demand capabilities which are in short supply including SOF, translators, cultural experts, military police and engineers. These low-density high-demand capabilities still need to be expanded." The second panel agreed with the first panel on the need for "…an overarching strategy and operating principles for COIN. It requires a whole-of-government approach which does not yet exist." The panel also noted, "History suggests that outsiders [e.g. US] are most effective at providing COIN support to local partners rather than controlling the operation themselves. Local forces are better rooted in society, enjoy more legitimacy, and are more knowledgeable in local customs and geography." (p 4) See also, notes 35 and 60, *supra,* and notes 100 and 106, *infra*.

63. The dynamic relationship between religion and American culture was first noted by Alexis de Tocqueville, who toured America in 1831. The following are among his observations taken from Democracy in America, published by The Co-operative Publication Society in 1900: "Christianity, which has declared that all men are equal in the sight of God, will not refuse to acknowledge that all citizens are equal in the eye of the law. But by a singular concourse of events, religion is entangled in those institutions which democracy assails, and it is not unfrequently [sic] brought to reject the equality it loves, and to curse that cause of liberty as a foe which it might hallow by its alliance." Referring to "partisans of liberty" such as Thomas Jefferson who were critical of organized religion, de Tocqueville says: "…they must know that liberty cannot be established without morality, nor morality without faith; but they have seen religion in the ranks of their adversaries, and they inquire no further; some of them attack it openly, and the remainder are afraid to defend it." (p 12) De Tocqueville describes Christianity in America "a democratic and republican religion…an alliance which has never been dissolved." (p 305) Noting the many diverse Christian sects, de Tocqueville marveled that "… Christian morality is everywhere the same" and that the American clergy, "…are all in favor of civil freedom, but they do not support any particular political system." (p 308) He goes on to observe that "…while the law permits Americans to do what they please, religion prevents them from conceiving, and forbids them to commit, what is rash or unjust." (p 310) In American Gospel (Random House, 2006), Jon Meacham says "In Tocqueville's analysis, religion in America nurtures the moral life, which

in turn creates basically virtuous citizens who are able to maintain a republic that is itself basically virtuous" and Meacham then cites de Tocqueville advocating the virtues of separation of church and state. (pp 79, 80) Seymour Lipset cites de Tocqueville extensively on the role of religion in shaping American cultural values and how they shaped America's role in world affairs in American Exceptionalism: A Double-Edged Sword, Norton, 1996, at pp 17-19, 60-63, 80, 154, 276, 277, 280. Since the time of de Tocqueville, the secular values of democracy, human rights and the rule of law have shaped all religions in Western cultures, including Islam in the US and Europe. (see notes 65 and 73, *infra*).

64. Karen Armstrong has traced fundamentalist movements in Judaism, Christianity and Islam that were in response to modernism during the 19th and 20th centuries-to wit, discoveries in knowledge and technology that threatened traditional doctrines of orthodox religion. Karen Armstrong, The Battle for God: A History of Fundamentalism, Ballentine Books, New York, 2001.

65. See Charles M. Blow, *Heaven for the Godless?*, New York Times, December 27, 2008, citing a Pew Forum Report of December 23, 2008: *Many Americans Say Other Faiths Can Lead to Eternal Life*, at http://pewforum.org/docs/. See also notes 63, *supra*, and notes 73 and 92, *infra*.

66. The distinguished group of 38 Islamic authorities and scholars is seeking to find common ground with Christians and Jews by inviting dialogue on the greatest commandments found in the Hebrew and Christian Bibles which call for love of God and love of neighbor. Their open letter to Christians and Jews (September 2007) can be found at www.acommonword.com. Alan Wolfe has argued that globalization has moderated religions in the West will do the same in radical Islamic cultures. (see note 73, *infra*)

67. Thomas Jefferson embraced the teachings of Jesus while rejecting organized Christian religion. In a letter written by Jefferson to Henry Fry on June 17, 1804, Jefferson left no doubt as to his love for the teachings of Jesus and his contempt for the distortion and misuse made of those teachings by preachers and politicians: "I consider the doctrines of Jesus as delivered by himself to contain the outlines of the sublimest morality that has ever been taught; but I hold in the utmost profound detestation and execration the corruptions of it which have been invested by priestcraft and kingcraft, constituting a conspiracy of church and state against the civil and religious liberties of man." Thomas Jefferson, The Jefferson Bible (Clarkson H. Potter, Inc., New York, 1964), p 378. Jon Meacham frequently cites Jefferson as a founding father of the American Gospel as it relates to American politics. See Meacham, American Gospel: God, The Founding Fathers, and the Making of a Nation, Random House, New York, 2006, pp 3-10, 25-31, 34, 57, 60, 62, 73-75, 103-105. Stephen Prothero describes Jefferson's Jesus as the first icon of America's Christian culture. See Prothero, American Jesus: How the Son of God Became a National Icon, Farrar, Straus and Giroux, New York, 2003, pp 21-32.

68. Harold Bloom, The American Religion: The Emergence of the Post-Christian Nation, Simon & Schuster, New York, 1992, pp 59-65.

69. See Robert W. Funk, et al., The Five Gospels: The Search for the Authentic Words of Jesus, MacMillan Publishing Company, New York, 1993. The book was dedicated to Galileo, Jefferson and David Frederich Strauss (1694-1768), with a reference to Jefferson at p. 2. See also, Meacham and Prothero at note 67, *supra*.

70. See Mark A. Noll, <u>America's God: From Jonathan Edwards to Abraham Lincoln</u>, Oxford University Press, New York, 2002, at chapter 19, pp 386-401.

71. See Frederick A Norwood, <u>The Story of American Methodism</u>, Abingdon Press, Nashville, 1974, pp 242, 243, 258; see also, Mark Noll, <u>America's God</u>, *ibid* at pp 165-169.

72. For a discussion of the Jesus movement and the rise of the megachurch, see Stephen Prothero, <u>American Jesus</u>, *supra* note 67, at chapter 4.

73. The more tolerant attitude of Christian and Muslim believers in the US to those of other faiths can be attributed to the influence of libertarian values in the US, which have moderated more radical and militant forms of Islam. (see Alan Cooperman, *Survey: US Muslims Assimilated, Opposed to Extremism*, <u>Washington Post.com</u>, May 23, 2007, based on a Pew Poll of American Muslims compared to Muslims elsewhere. Alan Wolfe has argued that the so-called secular American culture is actually religious, with a commitment to secular law which trumps those Shari'a religious laws that conflict with democracy and human rights. As a result Wolfe sees a moderation of radical Islam coming from Muslims living in the West. See Alan Wolfe, *And the Winner Is…*, <u>The Atlantic</u>, March 2008, p 56). See also note 92, *infra*.

74. See Robert F. Worth, *Preaching Moderate Islam and Becoming a TV Star for Youths*, <u>New York Times</u>, January 3, 2009

75. See Michael Slackman, *Jordanian Students Rebel, Embracing Conservative Islam*, <u>New York Times</u>, December 24, 2008.

76. See *Military Legitimacy* at pp 20-23; on US culture, religion and war, see Seymour Lipset, <u>American Exceptionalism</u>, cited at note 63, *supra*, at pp 63-67; also Kevin Phillips, <u>American Theocracy</u>, Viking, 2006, pp 250-262.

77. On *the ban* and its progeny, see *Military Legitimacy* at pp 6-7, 92-94; for a case study on the NATO war against Serbia which included ethnic cleansing in the name of God, see Mark Amstutz , <u>International Ethics</u>, cited *supra* at note 27, at pp 20-26.

78. See *Matthew 24:7*.

79. Thomas Jefferson drafted the language of the Declaration of Independence that included the inalienable rights of life, liberty and the pursuit of happiness; and later drafted the First Amendment to the US Constitution that provided for the freedoms of religion and expression. Jefferson also understood the sensitive relationship between religion and politics, having praised the teachings of Jesus as a sublime moral code while criticizing the church. See *Military Legitimacy* at pp 21-22, and note 67, *supra*.

80. For a sympathetic account of the life of Muhammad in war and peace, see Karen Armstrong, <u>Muhammad: A Biography of the Prophet</u>, Harper San Francisco, 1993, chapters 8 and 9.

81. See note 27, *supra*.

82. See Justo L. Gonzales, <u>The Story of Christianity, Vol. 1, The Early Church and the Dawn of the</u>

Reformation, Harper San Francisco, 1984, chapter 30, *The Offensive Against Islam,* pp 292-300.

83. See *Military Legitimacy* at pp 7-9, citing Barbara Tuchman, <u>A Distant Mirror</u>, Ballentine Books, NY, 1978.

84. The era of Cardinal Richelieu represented the zenith of religion and politics in the West (or nadir, depended on perspective), and as a proponent of realpolitik he clashed with Hugo Grotius, whose classic work, *On the Law of War and Peace* (1625) put him at odds with Richelieu and other power brokers of the day who wore a religious mantel. Grotius laid the foundation for modern international law to replace "God's will" as justification for national acts of aggression. See *Military Legitimacy*, p 86.

85. The doctrine of collective responsibility denies civilians in enemy territory the protection of the Law of War. See *Military Legitimacy* at pp 9-13, citing *inter alia* John G. Barrett, <u>Sherman's March Through the Carolinas</u>, University of North Carolina Press, 1956.

86. *Ibid* (*Military Legitimacy*) at pp 11-14.

87. For a discussion of Islam and how it affects US foreign policy, see Madeleine Albright, <u>The Mighty and the Almighty</u>, Harper, 2007; for a discussion of the origins and evolution of religious fundamentalism in Judaism, Christianity and Islam as a reaction to modernity, see Karen Armstrong, <u>The Battle for God</u>, Ballentime Books, 2001; for a discussion of how radical Islam impacts US military strategies, see Raymond Bingham, *Bridging the Religious Divide*, <u>Parameters</u>, Autumn 2006, p 6; and for a discussion of the operational dimension of religion, see Timothy K. Bedsole, *Religion: The Missing Dimension in Mission Planning*, <u>Special Warfare</u>, Nov-Dec 2006, p 8.

88. See notes 66 and 73, *supra*.

89. The <u>Encyclopedia Britannica</u> (1968) defines manifest destiny as "a persistent and cherished tradition of US history which, in its broadest conception, declared that Americans are a chosen people, blessed with free institutions and ordained by God to create a model society in the wilderness." The term *American Exceptionalism* extends the ideals of manifest destiny to contemporary US domestic and foreign policy, as elaborated by Seymour Martin Lipset in <u>American Exceptionalism: A Double-Edged Sword</u>, Norton, 1995. Walter Russell Mead discovers the roots of manifest destiny and predicts its future, postulating that America's exceptionalism is an inheritance from England, which demonstrated the means to national power through a combination of capitalism and sea power. He argues that America's manifest destiny will be achieved through a capitalistic secular humanism that is the natural successor to Abrahamic faith, and which will lead inexorably to heaven on earth, or the end of history. See Mead, <u>God and Gold: Britain, America and the Making of the Modern World</u>, Knopf, 2007.

90. Reza Aslan takes issue with Mead's premise that colonialism was evidence of English superiority inherited by America (see Mead, *ibid*). Aslan condemns the exploitations of English colonialism, asserting that the legacy of colonialism continues to contaminate Western interventions in Muslim countries like Iraq and Afghanistan . He cites a dispatch from a British Deputy Commissioner of Amritsar in India to the Foreign Office in London reporting the summary execution (read massacre) of over 200 rebellious Indian Sepoys (Muslims) in 1857. After a graphic description of the efficiency in which the British shot the unsuspecting "Mohammedans" and dumped their bodies into a well, the Commissioner waxed eloquent to his home office: "To those of you fond of reading signs, we would

point to the solitary golden cross still gleaming aloft on the summit of the Christian church at Delhi, whole and untouched; though the ball on which it rests is riddled with shots deliberately fired by the mutinous infidels of the town. The cross symbolically triumphant over a shattered globe! How the wisdom and heroism of our English soldiers seem like mere dross before the manifest and wondrous interposition of Almighty God in the cause of Christianity!" See Aslan, <u>No god but God: The Origins, Evolution and Future of Islam</u>, Random House, 2005, p 222.

91. See Vali Nasr, <u>The Shia Revival: How Conflicts Within Islam Will Shape the Future</u>, Norton, 2007.

92. Alan Wolfe has used a poll on wealth and religiosity to demonstrate that where religions have become secularized by surrounding culture-that is, where religions have made peace with capitalism and secular laws that protect individual freedom and human rights-there is little religious extremism, although people remain religious. That helps explain why Muslims in America are more moderate than those in the Middle East. See note 73, *supra*. A survey of Muslims by the Pew Research Center in May 2007 indicated that Muslims in the US are "highly assimilated, close to parity with other Americans in income and overwhelmingly opposed to Islamic extremism." See Alan Cooperman, *Survey: US Muslims Assimilated, Opposed to Extremism*, <u>washingtonpost.com</u>, May 23, 2007. See also note 65, *supra*.

93. See note 88, *supra*.

94. Carl Von Clausewitz, <u>On War</u>, Edited by Michael Howard and Peter Paret, Princeton University Press, 1984. For examples of Clausewitzean theory that relate to and often conflict with COIN, see Book One, chapter one: pp 75 (section 3: The Maximum Use of Force); p 77 (section 5: *The Maximum Exertion of Strength*); p 87 (section 24: *War Is Merely the Continuation of Policy by Other Means*; section 25: *The Diverse Nature of War*); p 89 (section 28: *The Consequences for Theory*); Book Three, chap 3, p 184 (*Moral Factors*); chap 7, p 193 (*Perseverance*); Book Eight,. chap 6, p 603 (*The Effect of the Political Aim on the Military Objective*); p 605 (*War Is an Instrument of Policy*).

95. Mark Amstutz notes that cultural pluralism is "a fact of global society" and then goes on to ask: "If moral religious and political values differ from society to society, and if human rights conceptions will necessarily reflect the cultural environment in which they are defined and applied…whose culture is normative?" Amstutz then asserts that "cultural relativism must remain a descriptive fact, not a normative proposition," and asserts the supremacy of Western norms of democracy, human rights and the rule of law as international ethical standards. See Amstutz, *supra* n. 27 at pp 92, 93, see also pp 14,15. In arguing for the ethics of regime change to supercede the law and justify the US invasion of Iraq, Amstutz acknowledges that the unilateral use of force is normally contrary to international law. "But while unilateral force on behalf of world order may be inconsistent with international law, such action may nevertheless be morally justified. Indeed, when legal duties confront moral obligations, the cause of justice demands that its moral claims take precedence over structural or legal responsibilities." (Amstutz, p 128). Army military doctrine makes it clear that when legal and moral standards conflict, the law prevails (see FM 3-0, Appendix A, p A-4). Likewise, FM 3-24 emphasizes compliance with the law in all COIN operations (see Appendix D to FM 3-24), and the *2007 Operational Law Handbook* provides the Legal Basis for the Use of Force in chapter 1, refuting any ethical basis for an otherwise unlawful invasion.

96. Executive Summary, <u>Senate Armed Services Committee Inquiry into the Treatment of Detainees in US Custody</u>, released December 11, 2008. See Toby Warrick and Karen DeYoung, *Report on Detainee Abuse Blames Top Bush Officials*, <u>Washington Post</u>, December 12, 2008; for calls to prosecute, see *The Torture Report*, <u>Washington Post</u>, December 18, 2008. At his confirmation hearing to be Attorney General, Eric H. Holder, Jr. said, "Waterboarding is torture," and that "we will follow the evidence, the facts, the law and let that take us where it should." But he added, quoting Mr. Obama, "that we don't want to criminalize policy differences" and finally pleaded for more time to study the matter. See Scott Shane, *Remarks on Torture Could Lead to Legal Changes*, <u>New York Times</u>, January 17, 2009. FM 3-24 provides military doctrine on detention and interrogation (see FM 3-24, note 1, *supra*, at pp 7-7, 7-8). See also note 16, *supra*.

97. Conflicting views of universal human rights reflect fundamental cultural differences in the East and the West, with Western standards emphasizing individual liberty while Eastern standards emphasize socioeconomic rights (see Mark Amstutz, <u>International Ethics, 3rd Edition</u>, cited in note 27, *supra*, at pp 95-98). The doctrine of sovereignty prohibits intervention absent action under the UN Charter (see generally *Military Legitimacy* at pp 86-91 and *Amstutz* at pp 98-102); but in 2006 the UN Security Council affirmed key principles of a report of the International Commission on Intervention and State Sovereignty entitled *The Responsibility to Protect* (R2P) which provides that whenever there is genocide, war crimes, ethnic cleansing or crimes against humanity "the principle of non-intervention [sovereignty] yields to the international responsibility to protect." (see *Amstutz*, p 102, note 45) Unfortunately Libya, Cuba, Iran and Egypt have controlled the agenda of the UN Human Rights Council, frustrating UN promotion of human rights. See Joel Brinkley, *"Durban II": Let the hate flow*, McClatchy-Tribune News Service, <u>The State</u>, August 8, 2008. Another rationale for intervention was suggested by Robert Kagan: If Pakistan does not eliminate al Qaeda and other Islamist terrorists who have found sanctuary in its Northwest provinces, those areas should be pacified and placed in international receivership. See Robert Kagan, *The Soveriegnty Dodge*, <u>Washington Post</u>, December 2, 2008. See also note 16, *supra*.

98. The business culture of the Middle East has long sanctioned corruption considered unethical and/or illegal in Western cultures, and reports of corruption and a US cover-up in Iraq has threatened the legitimacy of its government. See *Former State Department Officials Allege US Cover Up of Iraqi Government Corruption*, <u>FoxNews.com</u>, May 12, 2008. There are also continuing reports of tribal "honor" killings and the abuse of women in Iraq. Sudarsan Raghavan, *Iraqi Women, Fighting for a Voice*, <u>Washington Post</u>, December 7, 2008. In Afghanistan things are even worse; corruption and the abuse of women are even more pervasive in a tribal culture dependent on heroin production, and both the Taliban and the Karzai government are on the take. This has resulted in many Afghans loosing confidence in the Karzai government. Sarah Chayes, *The Other Front*, <u>Washington Post</u>, December 14, 2008. Even the Secretary General of NATO has acknowledged that the basic problem in Afghanistan is not too much Taliban but too little good governance. He said that we have paid enough in blood and treasure to demand that the Afghan government take more concrete and vigorous action to root out corruption and increase efficiency, even where it means difficult political choices. Jaap de hoop Scheffer, *Afghanistan: We Can Do Better*, <u>The Washington Post</u>, January 18, 2009. There have been reports of the Taliban attacking schools and female students, reminiscent of the Taliban's ban on educating girls, "one of the group's signature and most shameful repressions during the years it ran Afghanistan." A <u>New York Times</u> editorial has urged President Obama to "move quickly to come up with a sound military and development strategy for halting Afghanistan's downward spiral." See *They Want Us to Be Stupid Things*, <u>New York Times</u>, January 17, 2009. Now that al Qaeda has found

sanctuary in neighboring Pakistan, there is a real question whether the US should continue COIN operations that support a corrupt and ineffective regime that is not willing or able to enforce human rights in Afghanistan. Joe Klein has characterized COIN in Afghanistan as "an aimless absurdity", citing rampant corruption, narco-terrorism, and safe havens for al Qaeda and the Taliban in Pakistan. See Klein, *The Aimless War: Why Are We in Afghanistan?*, Time, December 22, 2008. See also, notes 99 and 102, *infra*.

99. On problems with human rights and the rule of law in Afghanistan, see notes 98, *supra* and 102, *infra*. On problems with promoting democratic elections, President Obama and his Secretary of State, Hillary Clinton, have both acknowledged that "elections aren't [the equivalent of] democracy," which reflects the fact that democratic elections have increased the power of Hamas in Gaza and Hezbollah in Lebanon. See *Elections Aren't Democracy* and Hiatt, *The Power of the Ballot*, both in The Washington Post, January 19, 2009. On the difficulties of promoting democracy while fighting terrorism, see Cindy R. Jebb, P. H. Liotta, Thomas Sherlock, and Ruth Margolies Butler address the anomalies of combating terrorism and promoting democracy in The Fight for Legitimacy: Democracy vs. Terrorism cited *supra*, note 18. "A core assumption of this study is that combating terrorism and promoting democracy are not mutually exclusive goals, even in unstable transitional polities, but can and must be pursued simultaneously." (p1) But "…For democratization to be successful the state must support the rule of law. [And]…The ultimate determinant of the struggle between nascent democracy and violent extremism is how successful either is in generating political legitimacy, or power transformed into authority." (p 2) It is noted that "…most studies have found that democracy actually encourages terrorism." (p 6, n 21) And authorities are cited that "…democratization proposed by the Bush administration will actually prolong and deepen the disease of terrorism." (p 9) Weak states are risky candidates for democratization since they have "…a shallow civil society, divided elites, a poor economy, and a tenuous rule of law." (p 10) "By producing anarchic conditions [in a weak state], a derailed democratic transition may itself create a supportive environment for terrorist activities, thereby mocking Washington's justification for advocating democracy." (p 11) This rationale raises serious doubts whether continued US/NATO COIN operations in Afghanistan can produce meaningful democracy, human rights and the rule of law through legitimate governance.

100. An unpublished Rand Study (November 2005) that faulted President Bush, Secretary of Defense Rumsfeld and CENTCOM Commander General Tommy Franks for deficiencies in planning the Iraq invasion and its aftermath was promptly buried in the Pentagon to avoid controversy. The Study suggested "…a need to change the military's mind-set which has long treated preparations to fight a major war as a top priority…and cast the mission of stabilizing war-torn nations as equal in importance to winning a conventional war." (see Michael R. Gordon, *Army Buried Study Faulting Iraq Planning*, New York Times, February 11, 2008). *Accord*, see Joseph L. Galloway, *Inconvenient Truths Locked Away*, The State, February 26, 2008. The newest of the US unified commands, AFRICOM, will require new roles and missions to confront the continuing crises in Africa. See *Report of Panel on Roles and Missions*, US House of Representatives Committee on Armed Services, January 2008, cited at note 35, *supra*, at pp 51,52,59,60. The Pentagon recently elevated irregular warfare to an equal footing with traditional combat operations. See Ann Scott Tyson, *US to Raise "Irregular War" Capabilities*, Washington Post, December 4, 2008. The need for new roles and missions is at the heart of the DOD Quadrennial Roles and Missions Review Report (January 2009), and Secretary of Defense Robert Gates has elaborated on this mix of irregular and conventional capabilities by incorporating them in a balanced strategy. See Gates, *A Balanced Strategy*, cited in note 106, *infra*. See also notes 35 and 62, *supra*.

101. In his April 2008 Report to Congress on the Situation in Iraq, General Petraeus emphasized the primacy of political objectives and the need for Iraqi public support to achieve them. He reported that "…the military surge has achieved progress, but that progress is reversible," and that the real threat to the al-Maliki government is not from al Qaeda in Iraq (AQI) but from Iran, which is funding, training and arming Shiite Special Groups in Iraq. Vali Nasr is more skeptical, seeing the US invasion and subsequent operations in Iraq as helping make the case for radical Islam and fueling the fires of sectarian conflict: "The reality that will shape the future of the Middle East is not the debates over democracy or globalization that the Iraq war was supposed to have jump-started but the conflicts between Shias and Sunnis that it precipitated. In time we will come to see this as a central legacy of the war." (p 250). Nasr goes on to predict that a second explosion of Islamic extremism will come out of the Iraqi insurgency, whose force and tenacity will be entwined with the Shia-Sunni power balance across the Middle East, and which will seek to use sectarian conflicts to expand the scope of its jihad across the region." (p 252) See Nasr, <u>The Shia Revival</u> at note 91, *supra*. While Nasr sent his book to press before the surge, US officials recognize the potential for renewed Sunni-Shia violence, and that future success depends upon the al-Maliki government bringing those Sunnis made US allies by the "Awakening" into the Shia dominated government.   On the issue of partition, see Mitchell M. Zais, *Iraq: The Way Ahead*, <u>Military Review</u>, January-February 2008, p 112

102. Ambassador Thomas Schweich drafted a narcotics eradication plan for Afghanistan in 2005 which was subsequently resisted by the Pentagon and rejected by the Karzai government. Schweich explained: "Karzai was playing us like a fiddle: the US would spend billions of dollars on infrastructure improvement; the US and its allies would fight the Taliban; Karzai's friends could get rich off the drug trade; he could blame the West for his problems; and in 2009 he would be elected to a new term." See Scweich, *Is Afghanistan a Narco-State?*, <u>NYTimes</u>, July 27, 2008. The British Commander in Afghanistan, Brigadier Mark Carlton-Smith, said simply that the war against the Taliban cannot be won. Reuters, *British commander says war in Afghanistan cannot be won*, <u>Yahoo News</u>, October 5, 2008. A host of others have said as much: "Every aspect of sound counterinsurgency strategy revolves around bolstering the government's legitimacy…" and there is "…growing despair among average Afghans that their government is fundamentally illegitimate." Nathaniel C. Fick and Vikram J. Singh, *Winning the Battle, Losing the Faith*, <u>NY Times</u>, October 5, 2008. Adding to the erosion of legitimacy are civilian casualties caused by NATO air strikes. See Nader Nadery and Haseeb Humayoon, *Peace Under Friendly Fire*, <u>NY Times</u>, October 5, 2008. Rory Stewart claims we have accomplished our objectives in Afghanistan, and that Pakistan and Saudi Arabia are more lethal threats to the US. He says a sudden surge of troops and cash in Afghanistan would be unhelpful and unsustainable. See Stewart, *The "Good War" Isn't Worth Fighting*, <u>NY Times</u>, November 23, 2008. Bartle Brease Bull has written that a "surge" in Afghanistan is not the best way to achieve US security objectives, citing General [Dan] McNeil's estimate that three times as many troops as were sent to Iraq at the height of the surge would be needed. "If Americans believe…that Afghanistan is the right war and a place appropriate for Iraq-style nation-building, then they must understand both the cost involved and the remote likelihood of success." Bull, *The Wrong Force for the "Right" War*, <u>NYTimes</u>, August 14, 2008. Even Generals Petraeus and David D. McKiernan have acknowledged that Afghanistan is more of a challenge for COIN than Iraq. See Michael Gordon, *Afghan Strategy Poses Stiff Challenges for Obama*, <u>NY Times</u>, December 2, 2008. Ralph Peters has noted similarities between Afghanistan today and South Vietnam in 1965 when LBJ committed US Marines. See Peters, *Afghan-'Nam Blues*, <u>New York Post</u>, Jan. 27, 2009. Like LBJ, Obama is "putting more emphasis on waging war than on development" and "working with provincial leaders as an alternative to the central government [of Karzai]." Helene Cooper & Thom Shanker, *Aides Say Obama's Afghan Aims Elevate War*, <u>New York</u>

Times, Jan. 28, 2009. In testimony before Congress Secretary Gates expressed his own doubts about increasing US forces in Afghanistan, "warning that he would be 'deeply skeptical' of any further US troop increases, saying that Afghan soldiers and policy must take the lead in part so that the Afghan public does not turn against US forces as it has against foreign troops throughout history." Noting that "civilian casualties resulting from US combat airstrikes have been particularly harmful to progress in Afghanistan and must be avoided, Gates stressed, "My worry is that the Afghans come to see us as part of their problem rather than part of their solution, and then we are lost." Ann Scott Tyson, *Gates Predicts "Slog" in Afghanistan*, Washington Post, Jan. 28, 2009. Given the above circumstances, it seems that the battle for legitimacy in Afghanistan may have been lost, and COIN rendered an obsolete strategy. See also notes 98 and 99, *supra*.

103. Thomas L. Friedman has summed up the US strategic dilemma in the Middle East: "The truth is that Iraq, Afghanistan, Saudi Arabia, Lebanon and Pakistan are just different fronts in the same war. For far too long, this region has been dominated by authoritarian politics, massive youth unemployment, outdated education systems, a religious establishment resisting reform and now a death cult that glorifies young people committing suicide, often against other Muslims." Friedman cites Ambassador Schweik's assessment of Karzai (see note 102, *supra*), and questions Afghanistan as being the "good war." Friedman, *Drilling in Afghanistan*, NYTimes, July 30, 2008.

104. A recent Rand research effort has affirmed that terrorist groups like al Qaeda are more effectively countered by police and intelligence agencies than by military forces: "The evidence since 1968 indicates that terrorist groups rarely cease to exist as a result of winning or losing a military campaign. Rather, most groups end because of operations carried out by local police or intelligence agencies or because they join the political process. This suggests that the US should pursue a counterterrorism strategy against al Qaeda that emphasizes policing and intelligence gathering rather than a "war on terrorism" approach that relies heavily on military force." *How Terrorist Groups End*, Research Brief of the Rand Corporation, July 28, 2008.

105. Inaugural address of President Barack H. Obama, January 20, 2009. As it relates to Afghanistan, see note 102, *supra*.

106. Robert M. Gates, *A Balanced Strategy: Reprogramming the Pentagon for a New Age*, Foreign Affairs, January/February, 2009. This article elaborates on the DOD Quadrennial Roles and Missions Review Report (January 2009). See notes 35, 62 and 100, *supra*.

107. H. R. McMaster, *The Human Element: When Gadgetry Becomes Strategy*, World Affairs, Winter, 2009.

108. Unity of effort is a principle of COIN as it was a principle of LIC and OOTW in older Army doctrine (See chapter 2 of FM 3-24, cited at note 1, *supra*; see also notes 22, 23 and 24, *supra*). On interagency initiatives for COIN and stability operations, see references in notes 35, 60-62, and 106, *supra*, and notes 109 and 112, *infra*.

109. A pre-publication draft on the future of civil affairs prepared by the Center for Strategic and International Studies recommends an expanded role for civil affairs that would "embed civil affairs expertise in key strategic organizations throughout the department [DOD] and across the US government." and keep civil affairs units within USSOCOM; it also recommends that civil affairs personnel be competent in their functional specialties (for a suggestion on how to improve such

competency, see note 110, infra) On civil affairs generally and how it relates to unity of effort in COIN and stability operations, see notes 9, 11, 31, 32, 37, 39 and 60, supra. For similar recommendations made before 9/11, see Military Legitimacy, cited at note 2, supra, at pp 165-170. A preliminary report entitled *Civilian Surge: Key to Complex Operations* prepared for the National Defense University and edited by Hans Binnendijk and Patrick M. Cronin (December 2008) recommends the creation of a new civilian capability (the Civilian Response Corps, or CRC) managed by USAID to conduct stability and reconstruction operations in irregular warfare operations such as COIN. The report, however, does not adequately address the issues of integration of military and civilian personnel and command and control (unity of effort) that have plagued interagency operations in COIN. A United States Institute of Peace Briefing states that the if the CRC is fully developed as a cadre of rule of law specialists (police, judges, prosecutors, court personnel, corrections officials and other rule of law specialists) "it will provide policymakers with a foreign policy instrument that is just as vital to waging peace as a professional armed force is for waging war." See Scott Carlson and Michael Dziedzic, *Recruitment of Rule of Law Specialists for the Civilian Response Corps*, United States Institute of Peace, Jan. 09, p1; see also, notes 35 and 108, *supra*.

110. The ARNG state mission is more compatible with civil affairs than with the combat units that currently dominate in the ARNG, and it would be easier to recruit personnel in the ARNG who have the functional specialties needed in civil affairs than in the USAR; and civil affairs personnel with identified functional specialties should be competent in them. (See note 109, *supra*) A shift of civil affairs units from the USAR to the ARNG and of reserve combat units from the ARNG to the USAR would not only enhance the civil affairs capability but would also improve the training and deployment of reserve combat units since they would not have a state mission to complicate training and deployment with their active component counterparts. See *Military Legitimacy* at pp 170, 171.

111. See note 30, *supra*.

112. See notes 35 and 106, *supra*. Major changes in the vast bureaucracies of DOD and DOS will likely be slow in coming and will require the concerted efforts of both the President and Congress. Representative Ike Skelton (D-MO), Chairman of the House Armed Services Committee, applauded the DOD Quadrennial Roles and Missions Review Report (January 2009), saying it "represents an advance by organizing in one place a host of ideas about new or newly emphasized missions for the department" and "raises significant issues about the appropriate role of the department in these areas that will be heavily debated in the national security community in the coming years." But Skelton cautioned: "The report makes only a small contribution to the difficult task of challenging the allocation of treasured turf and changing deeply held cultures within the department, which will be required to actually fulfill such a far-reaching mission-set."

ABBREVIATIONS:

ARNG - Army National Guard

CA - civil affairs

CMOC - civil-military operations center

COIN - counterinsurgency operations

CRC - Civilian Response Corps

DOD - Department of Defense

DOS - Department of State

FID - Foreign internal defense

LIC - low-intensity conflict

NATO - North Atlantic Treaty Organization

OOTW - operations other than war

PRTs - provincial reconstruction teams

PSYOP - psychological operations

SF - Special Forces

SOF - Special Operations Forces

STARC - state area command (Army National Guard)

UN - United Nations

US - United States

USACAPOC - United States Army Civil Affairs and Psychological Operations Command

USAID - United States Agency for International Development

USAR - United States Army Reserve

USSOCOM - United States Special Operations Command

Justice in Waiting: Developing Rule of Law in Iraq

Written by: Daniel L Rubini

About the Author

Colonel Daniel L. Rubini served as a Judge Advocate officer and a Civil Affairs officer in the US Army Reserves for 32 years. He served as assistant chief of staff of the Government Team and Special Functions Team and as brigade Staff Judge Advocate (SJA) at the 358th Civil Affairs (CA) Brigade in Norristown, PA. He retired from the Army Reserve in February 2000. COL Rubini earned his bachelor's degree in Political Science at Virginia Polytechnic Institute, Chartered Financial Consultant from American College, and Juris Doctor from Temple University. He served as SJA to the 304th CA Brigade. He served as SJA to the 157th Separate Infantry Brigade (Mechanized), 1175th U.S. Army Outport, and as Trial/Defense Counsel to the 153rd Judge Advocate General Detachment. He served in Desert Shield/Storm as advisor to the Kuwait Ministry of Justice. He served in Haiti (Operation Uphold Democracy) in 1994 as Ministry of Justice Advisor and on later MAT missions from 1995 to 1997. He served in Central America as Chief of Civil Affairs U.S. Southern Command's Forward Command Element for Hurricane Mitch reconstruction. Colonel Daniel L. Rubini returned to Active Duty and served as Senior Advisor, Coalition Provisional Authority, Ministry of Justice from September 2003 to February 2004. COL Rubini practiced law for 22 years and is now a U.S. Administrative Law Judge in Philadelphia, PA. for fifteen years.

This paper includes both the author's comments and lengthy excerpts from other articles to introduce the reader to building Rule of Law in Iraq and to introduce the branch of the US Armed Forces dedicated to rebuilding foreign government services: the US Army Civil Affairs branch.

Part I- Civil Affairs (CA) is one of the most complex and sensitive operations in which the U.S. Army can engage, involving the interface between our soldiers and the civilians in the area of operations. It is also one of the most misunderstood Army missions and-to some who see it as "unwarriorlike"-the most criticized. History, however, shows that successful Army CA operations during and after more conventional military stability and reconstruction operations are key to moving from battlefield success to final victory. In wartime, CA prevents civilian interference with military operations and conducts humanitarian assistance. In postwar and peace operations, CA provides specialized assistance directly to foreign governments to establish essential government services and stabilize functions. Finally recognized during World War II as an inherent command responsibility, CA was initially designated as "Military Government" in the occupation of Germany, Italy, Korea and Japan. CA soldiers have since deployed to every significant operation since Vietnam-Grenada, Panama, Saudi Arabia/Kuwait (Desert Shield/Storm), Somalia, Haiti, Rwanda, Bosnia, Kosovo and Afghanistan and Iraq. In this paper

veterans of CA operations describe the proper role of the military in postwar/post disaster and peace operations. CA soldiers can bridge the dangerous gap between the end of war and the establishment of a stable foreign government capable of providing essential services.

Part II- Iraq is not a third-world legal system. Iraq's law and courts are well developed and secular. The roots of its criminal and civil law courts are from European Civil Codes. At the time of the US intervention in Iraq in 2003, the courts were based on 1960's-era law with an overlay of Saddam's special courts for torture, summary execution and his rule by decree. The formerly independent judiciary had been placed under the control of the Minister of Justice, a political appointee. After decades of living under such centralized control, the judges had become political functionaries. In April 2003, Ba'athist rule was replaced by anarchy. Insurgency, corruption, and organized crime remain as serious challenges in bringing justice to the Iraqi people.

The legitimacy of a justice system depends upon police, courts and prisons working together Each must be perceived as fair, just, transparent, and a protector of human rights. **Progress toward the rule of law in Iraq depends upon its leaders e**stablishing an independent judiciary, relinquishing control of the judicial budget to the judiciary, providing mechanisms to enforce Court decisions, and enacting laws against corruption, organized crime, and political interference in law enforcement. The great difficulty in establishing a system of justice in Iraq was the lack of a working relationship between police, courts and prisons. There was no history of them ever working together. The Iraqi civilian population is still cautious about placing confidence in the revamped Iraqi judiciary.

Judges still endure significant risk to their personal safety in order to accomplish the ideal of an independent judiciary. From the beginning, Iraq's judges wanted US advisors to mentor them on the modern techniques and technology of evidence gathering, investigation, and case management. The mentors engaged in building relationships, understanding the Iraqi system and working with Iraqis within their system. It may not be the American way (the adversarial system), but it does work. Given security from violence, independence from politics, and elimination of corrupt judges and officials, and given continued mentoring, Iraqis will find their way to the rule of law. The pieces are there, but it is still very much a work-in-progress. For now, justice is still in waiting.

Foreword- In Iraq, for every step of the way in all of our progress toward the Rule of Law, someone died to get us there. In these pages, we honor the sacrifice and suffering of our (U.S.) soldiers, our coalition allies, the civilian lawyers and law enforcement personnel, and the incredible dedication, bravery and sacrifice of our Iraqi partners in building a better way of life in Iraq.

The U.S. government has intervened in crises around the world to protect its national interests, resulting in the need to build or rebuild the essential services of a devastated or failed state. By definition, this includes the need to build a "Rule of Law" in place of lawlessness, rule by dictator's decree, and human rights atrocities. The eternal debate in US foreign policy between just or unjust interventions, isolationism, "realpolitik" versus idealism, humanitarian interventions and preemptive interventions is beyond the scope of this chapter. I have written and edited these comments to introduce the reader to building Rule of Law in Iraq and to introduce the branch of the U.S. Armed Forces dedicated to these missions of rebuilding government services: the U.S. Army Civil Affairs branch.

The publication of The U.S. Army & Marine Corps *Counterinsurgency Field Manual* in December 2006 presents a more complete context of U.S. military operations, such as Iraq. This doctrine also raises fundamental questions about the legitimacy, purposes, and limits of U.S. power in confronting low-tech insurgents who corrode the American way of war by exploiting traditional legal and ethical

constraints on the use of force. How can America align its ethical principles with its strategic requirements?

"Interveners may be tempted to cut and run after the initial military phase of an intervention ends, getting out with as little loss of life and money as possible. Yet both moral and pragmatic considerations suggest that taking a longer-term view is better in the end… military interventions that do not ultimately rebuild the rule of law in post-conflict societies are doomed to undermine their own goals. Unless the rule of law can be created in post-intervention societies, military interventions will not fully eradicate the dysfunctional conditions that necessitated intervention in the first place. Without the rule of law, human rights abuses and violence will recur and continue unchecked, posing ongoing threats not only to residents of post-conflict societies but also to global peace and security and perhaps necessitating another intervention a few years down the road."[1]

 "Haiti is a case in point: ten years after sending in U.S. and U.N. troops to restore a democratically elected leader to power, the U.S. recently found itself, ironically, complicit in removing the same leader and forced to send troops to ensure a peaceful transition to a new government. Had the U.S. and the international community made a more sustained investment in rebuilding the rule of law in Haiti and maintained the pressure for reform, many abuses might have been prevented, and there might have been no need to send in the Marines a second time around. As of this writing, there is little reason to believe that the United States has yet learned this lesson from the first U.S.-led intervention in Haiti: once again, U.S. troops were quickly withdrawn, and U.S. promises of meaningful reconstruction assistance have amounted to little."[2] But in fairness to the U.S., the Haitian politicians were not interested in reform. Only Haitians could save themselves and they freely elected a government that was interested only in returning to business-as-usual and having the donor nations subsidize them.

PART I The Army's Bridge to Stability–Civil Affairs

Introduction- In the American classic "A Bell for Adano", John Hersey wrote "America is on its way to Europe. You can be as isolationist as you want to be, but that is a fact. . . . Until there is a seeming stability in Europe, our armies and our after-armies will have to stay in Europe…Neither the eloquence of Churchill nor the humaneness of Roosevelt, no Charter, no four freedoms, no dreamer's diagram . . . no treaty-none of these things can guarantee anything. Only men can guarantee, only the behavior of men under pressure, only our [soldiers]".[3] Published in 1944, A Bell for Adano is a fictionalized story based on the real-life struggles of then Major Frank E. Toscani (subsequently Colonel Toscani), a US Army Civil Affairs (CA) Officer in occupied Sicily during World War II. It won the 1945 Pulitzer Prize. Sixty-five years later, Hersey's words remain true, not only for military peacekeeping operations but for counter-insurgency wars like Afghanistan, Iraq and wherever we fight wars where we must win support of a nation's people rather than just take and hold real estate. In counter-insurgency (COIN), we not only "clear and hold", we also "build". Combat operations are destructive. CA operations are constructive.

Civil Affairs is one of the most complex and sensitive operations in which the U.S. Army can engage, involving the interface between our soldiers and the civilians in the area of operations. It is also one of the most misunderstood Army missions and-to some who see it as "unwarriorlike"-the most criticized. History, however, shows that successful Army CA operations during and after more conventional military stability and reconstruction operations are key to moving from battlefield success to final victory. The new *Counterinsurgency Field Manual* incorporates all the missions of CA since its first days as Military Government in World War II. In wartime, CA prevents civilian interference with

military operations and conducts humanitarian assistance. It mobilizes foreign civilian resources for combat support. In postwar and peace operations, CA provides specialized assistance directly to foreign governments to establish services and stabilize functions.

The roots of U.S. Army Civil Affairs can be traced back to the Revolution, when Montreal and other parts of Canada were under Continental Army control. Later, Army officers were appointed as Indian Agents to negotiate Indian treaties and settle disputes in the new territories. In the war with Mexico in the 1840's, young officers were sent to replace Spanish authorities in the Louisiana Territory; and later, senior Army leaders served as governors of Mexican cities. Finally recognized during World War II as an inherent command responsibility, CA was initially designated as "Military Government" in the occupation of Germany, Italy, Korea and Japan. In recent postwar/peace operations, CA soldiers have deployed to every significant operation since Vietnam-Grenada, Panama, Saudi Arabia/Kuwait (Desert Shield/Storm), Somalia, Haiti, Rwanda, Bosnia, Kosovo and Afghanistan. Civil Affairs played a significant part in the stabilization of Iraq.

In this paper veterans of CA operations have described the proper role of the military in postwar/post disaster and peace operations. Civil Affairs is a vital part of our Army, and its soldiers bridge the dangerous gap between the end of war and the establishment of a stable foreign government capable of providing essential services. If we are to win the peace as decisively as we win the war, CA must be a player in the planning and execution of Army operations from beginning to end.

In COIN, legitimacy is the primary objective, and building that legitimacy against insurgents requires public support. As the interface between the US military and the civilian population the mission of CA is to build the public support needed for legitimacy by helping to establish essential services and promoting democracy, human rights and the rule of law through the supported government. There was no support in the Bush administration for "nation-building" in Afghanistan or Iraq, but necessity dictated otherwise. In 1989, after the Russians were ousted the US walked away from its Afghan allies and gave them no significant help to build a government. The Afghans saw it as betrayal and abandonment. In 1991, after Operation Desert Storm, the US, while establishing "no-fly" zones, did not support Iraqi and Kurdish factions rebelling against the Saddam Hussein regime.

Jay Tolson wrote in U.S. News & World Report that America recoils from the concept of "empire."[4] United States foreign policy is conflicted between isolation and humanitarian intervention. The nation has agonized over not being principled enough while engaged in "realpolitik", a strategy whose objective is to maintain stability by endorsing the status quo regardless of how despotic and repressive the regimes we support. We have the state of mind of a country that has not decided what it wants to be on the world stage. The U.S. military intensely dislikes its involvement in nation-building. As disagreeable to some who regard American imperialism as the root of all evil as it is to others who believe that the world beyond U.S. shores is not the nation's business, there is a basic truth-Many people owe their freedom to the exercise of American military power.

1. Glad to See Them Come and Sorry to See Them Go- The Role of the U.S. Military in Nation-building[5]- "The military has a uniquely demanding job today. Instead of preparing for territorial defense, U.S. troops must safeguard vaguely defined American and global 'interests' in an increasing number of far flung places."[6] The U.S. military has engaged in these nontraditional operations throughout its history, far more than it has waged conventional warfare. After the Mexican War in the 1840's, General Winfield Scott's occupation was such a model of excellence that one of his junior officers, Ulysses S. Grant remarked that the Mexicans regretted Scott's departure almost as much as

they hated to see his arrival.

The CA branch of the Army originated as Military Government during World War II to meet requirements for military specialists to administer areas liberated from German and Japanese occupation and to govern areas in Germany and Japan occupied by the U.S. Army during and after the war. Military personnel with appropriate civilian skills and education were formed into military government units to assure law and order and provide essential services to the populations of territories administered by the U.S. Army. After World War II, these units were renamed "Civil Affairs." In its postwar mission of military government in Germany, Japan and Italy, U.S. Army CA became the world's model for maintaining stability, restarting democratic civilian governments and preventing future wars. Unfortunately, CA in Korea remained a hit-or-miss, come-as-you-are operation until the last few months of the war. Few, if any, of the lessons of World War II had been learned. "The Army desired to put Korea behind it and go back to its preferred strategy, the defense of Europe against the Soviet hordes."[7]

By the early 1960s, almost all (97 percent) of the U.S. Army's CA capability was in the Army Reserve, where it remains today. This was (and remains) appropriate because the professional competence of CA personnel is derived principally from their civilian careers. In Vietnam, the concept of COIN was characterized as "winning the hearts and minds of the people." That slogan was exemplified by U.S .Army Special Forces and military advisors engaged in COIN. After America's failed nation-building efforts in Vietnam, the Army swore "never again" and prepared to "win" conventional wars, not to "contain" or even fight counterinsurgencies. Certain important experiences of fighting COIN were forgotten again. Lessons learned about "winning hearts and minds" (i.e., civilian support and stability operations) faded to black. Enlightenment focused on achieving victory in conventional war. Securing the victory was taken for granted and fighting a COIN war was out of the question. There was no thought given to what must be done after the shooting stopped. Civil Affairs slid into the backwaters of the Army's priorities-that is, until Panama in 1989.

Then Chairman, Joint Chiefs of Staff General Colin Powell said this of the Panama intervention (*Just Cause*): "We are going to eliminate Noriega and the PDF [Panamanian Defense Forces]. If that succeeds, we will be running the country until we can establish a civilian government and a new security force." The Panamanians were totally unprepared to govern, let alone make democracy work. Despite these handicaps, one Panamanian businessman remarked, "You [the United States] got the police working; not too well, but working, and you got the government ministries working'." But General Powell concluded, "We did not plan well enough for reintroducing civil government."[8]

Then in 1991, came Operations *Desert Shield* and *Desert Storm*. President George H. W. Bush mandated large-scale involvement of CA: "The legitimate [Government of Kuwait, or GOK] will be restored to its rightful place and Kuwait will once again be free."[9] CA advisors worked with the Kuwaiti ministries to "jump-start" GOK functions and to prevent human rights abuses. CA was instrumental in transition from military control to civilian control by GOK after war's end.

In Haiti in 1994, Operation *Uphold Democracy* once again placed demands on CA for specialized talent to work with heads of a foreign government at the ministerial level. Short term objectives were met, but the Haitian government did not embrace the long term goals of democracy, economic reform, human rights and the rule of law that were bequeathed to them by U.S. CA advisors. It soon returned to business-as-usual and expected the donor nations to subsidize their status quo.

About Bosnia, Richard Newman wrote in U.S. News & World Report, "As the multinational force [Implementation Force, or IFOR] . . . was waiting to enter Bosnia in 1995 . . . Army CA soldiers [drank

very bad whiskey with local chieftains] . . . listening to their concerns that IFOR might disrupt their communities. . . . Ten years ago, integrating these unorthodox warriors into a major mission from the start would have been unthinkable. But today Special Operations Forces (SOF), which includes CA . . . are becoming the military's most sought after troops. . . . The unique capabilities and accomplishments of SOF appeal to ambassadors and [military commanders] alike. As a result, SOF missions had nearly tripled since 1991."[10]

Unlike Desert Storm, Haiti and Bosnia, CA in Afghanistan in 2001 was originally limited to logistical aspects of humanitarian aid. But necessity demanded that the mission expand, and newly formed Provincial Reconstruction Teams (PRTs) were recommending and coordinating projects that have impact at the national level to bolster the Karzai government.

We face threats which have no conventional military forces or clear national centers of gravity, as illustrated by Somalia, Rwanda and Haiti, and now Iraq, Afghanistan, the Philippines, and elsewhere in Africa. Here threats are sub-national groups, disintegrating social structures, disease and environmental degradation. The conventional forces that fight aggressor nations are usually not appropriate to address these unconventional threats. But Bernard Trainor, writing for The Wall Street Journal, was more critical. He said the military has trouble coming to terms with this post-Cold War phenomenon of peacekeeping in places like Somalia, Haiti, Bosnia and Kosovo. It is easy to understand the military's unease. U.S. soldiers are trained to close on the enemy and destroy him with the utmost violence. COIN and postwar stability and peace operations, on the other hand, require a complex balance between carefully targeted violence against hardcore insurgents and restraint to avoid collateral damage to a population whose support is essential to mission success. It is difficult to expect young American soldiers to be warriors, policemen and diplomats as well.[11]

Once again, there was heated debate on the extent of U.S. military involvement in postwar reconstruction in Afghanistan. Many civilian and military leaders believed that war-fighting was the only appropriate role of the military and, beyond exerting control, reconstruction must be done by civilians. They believed that military involvement in nation-building was wrong and that peace operations were a misuse of soldiers and resources. No matter how constricted the military mission at the outset, Afghanistan, Iraq and all of the failed-state peace operations have forced an expanded military role to engage in rebuilding efforts. Necessity has so dictated, and every sizable military operation since World War II has repeatedly demonstrated that necessity, not doctrine, dictates policy.

U.S. Army CA is the most qualified and competent military capability to initiate and manage reconstruction efforts that involve the civilian population. The U.N., nongovernmental organizations (NGOs) and private volunteer organizations (PVOs) and the international donor community play a key role in distributing humanitarian assistance in high-risk areas in collapsed states. These civilian aid organizations play a huge role in nation-building when the military has control or where a functioning state exists. But in a conflict environment in which the U.S. is an occupying power, or at the end of hostilities when a government is unable to provide essential services, or in COIN operations-whenever political objectives that require civilian support are more important than conventional military objectives-then CA should take a priority role in coordinating military and civilian activities. In violent environments like COIN, there is no other U.S. military or civilian capability that can manage and coordinate civil-military operations.

2. The U.S. Army Civil Affairs Mission- Civil Affairs is inherently a responsibility of command. There are four mission areas for Army CA, each having significant operational law guidelines:

1. Support for conventional operations. This includes support for combat operations by minimizing

civilian interference and mobilizing human and natural resources for combat support. It also includes humanitarian and life-sustaining operations and assessments to determine the status of the foreign nation (FN) infrastructure.

2. Support for special operations, including irregular warfare and counterinsurgency (COIN).

3. Support for civil administration. This includes nation-assistance, which usually involves specialized advice and assistance to foreign nation officials based on CA expertise in those CA functional specialties listed below.

4. Military assistance to domestic civil authorities and support in domestic emergencies such as natural disaster and civil disturbances.

The work of CA is divided into 15 functional specialties which are not the equivalent of active component career specialties, but instead relate to essential services provided by a government to its people**: Rule of Law**, Public Administration, Public Education, Public Safety, Public Health, Economic Development, Food and Agriculture, Public Communications, Transportation, Public Works and Utilities, Cultural Relations, Civil Information, Dislocated Civilians, Emergency Services, and Environmental Management.

Civil Affairs elements in the U.S. Marine Corps operate in support of conventional USMC amphibious-based combat operations. In the USMC, military lawyers are cross-trained to function as a CA staff officer until CA units arrive. USMC CA units remain in the Reserve and they have fully engaged in COIN in Iraq. With most of the CA capability in the U.S. Army, other branches of the U.S. armed services have only recently-since the Iraq war-created a CA capability. The Air Force is creating a CA capability in civil aviation support. The US Navy has recently established CA units to engage in civil maritime development.

What does CA offer that is not found in the rest of the armed forces? It is the soldier capable of being a warrior-diplomat and possessing technical skills needed to build or manage a country's infrastructure-sanitation, public transport, rule of law, health care systems and other public services. This can be done only by soldiers with unique and appropriate civilian backgrounds. Highly skilled personnel from the reserve component have performed such jobs in Panama, the Persian Gulf, Haiti, Bosnia, Kosovo and Afghanistan, and Iraq, and they offer expertise that exists only in Reserve CA units.

The challenge to the Army is determining what CA operations and activities the world will need in the future. The trend for deploying CA soldiers will probably continue as has been the case in Iraq and Afghanistan. When the mission calls for an investment banker with fifteen years of Wall Street experience or someone who runs schools or a health care system, or an engineer who has built national road systems, the mission planner cannot go to the active component and say, "Give me one of these people." By their very nature, these positions require civilian skills and must come from the reserve components because the Defense establishment cannot maintain them in the active component. CA's true value is its ability to access the necessary civilian-acquired skills, put those soldiers in uniform and deploy them to perform specific technical missions. The National Guard and the Reserve have been particularly effective in relating to the civilian-oriented needs in post-conflict and peace operations because they bring to the table all of the wealth of experience gained in their civilian roles which is enhanced by their Guard and Reserve training.

3. Bridging the Gap- There is often a dangerous gap between the end of war (or intervention in peace operations) and the establishment of a stable foreign government capable of providing essential services. In Iraq and Afghanistan, reconstruction continues amid instability as insurgents make war on

Iraqi and Afghani efforts to establish a better way of life. The gap is "instability" in which victory on the battlefield can be lost to upheaval, violence and disintegrating social structures. Military operations must continue to prevent anarchy and support both short-term and long-term recovery. After victory is achieved, the end-state now becomes "stability." Even after Department of State (DOS) and the U.S. Agency for International Development (USAID) resume their responsibilities as lead agencies, the military is still needed to bridge the gap between military victory and political stability. With increasing frequency, host nations request help from CA. Afghanistan and Iraq have required it, and CA has filled the gap.

In the long-term plan for recovery, there are three tiers to the CA mission that move the operation across the "Bridge to Stability":

1. **Civil-Military Operations (CMO) and Humanitarian Assistance** - CA generalists prevent civilian interference with military operations (e.g., assembling refugees out of the combat zone), mobilize civilian resources to support military operations (e.g., foreign nation labor, materials to be used by the military), and conduct emergency operations to sustain life (e.g., distribution of food and water).

2. **Functional Team Assessments** - CA specialists determine the status of the local infrastructure, develop short-term and long-term project and recovery plans, set project priorities based on reports of foreign nation water sources and food production, recommend projects to enhance production of food and potable water, and analyze necessity and "benefits versus risk" for the Civil Administration mission to achieve stability.

3. **Civil Administration** - CA specialists work directly with the foreign nation ministries and the Inter-Agency Task Force to develop plans, develop human resources to assist the government, jump-start government services, implement reforms, and determine relations among the ministries (e.g., agriculture, veterinary and water experts consult with ministers of agriculture and public facilities to develop comprehensive plans for water treatment plants and farming systems).

At the strategic level of the Ministerial Advisory Team (MAT) mission, CA is a tool of the commander and/or the ambassador to maintain stability, assist in accomplishing U.S. foreign policy objectives at the national level, and to fulfill the commander's legal and moral obligations. This mission develops human resources in the foreign nation, mentors reformers and establishes an ethic of governing for the benefit of the governed. Civil Affairs teams assist the host nation (HN) to secure a safe environment in which the rule of law can survive, whether performing CMO, conducting functional team assessments or advising HN ministries through Ministerial Advisory Teams. The HN must demonstrate its legitimacy by responding to the needs of the very people the insurgency is trying to influence. Civil Affairs has proven its value as a force multiplier in US military operations since World War II, but this is often forgotten, as it was again during the invasion of Iraq in 2003. To achieve the political objectives of COIN and stability operations, CA must be part of operational plans and deployed across the spectrum of US conflict, from civil-military operations to civil administration.

4. An Exit Strategy- Civil Affairs units provide the most qualified, skilled and capable personnel in the inventory of the US government to go into troubled areas during and immediately following hostilities to guide a nascent democracy in the recovery and reconstruction process. With that said, CA does not contemplate seeing that recovery and reconstruction through to conclusion. CA establishes the process, sets short-term, mid-term and long-term goals and objectives, and plans for the transfer of the assistance mission to mid and long-term aid providers such as the UN, USAID, NGO/PVO community and the host nation itself. In other words, CA works its way out of a job once stability is achieved.

To develop an exit strategy, one must first determine the conditions of those ministries of the HN that are responsible for the rule of law, providing essential services and establishing a viable economy. Using the somewhat different models of Kuwait, Haiti and Bosnia, and now Iraq and Afghanistan, we know that even after the most basic humanitarian assistance mission (e.g., food and water distribution), CA cannot simply depart the Area of Operations (AO). CA soldiers must devise a transition plan and exit only upon achievement of the transition criteria.

The end-state of a CA mission is stability, and CA soldiers are the gap-fillers to achieve it and initiate the hand-off. Military planners should relate their exit strategies to the end state of stability. Stability operations are qualitative, not finite. Such operations require that the military work with a foreign population, often to break with the past. That defies setting an absolute end-date. Haitians said, "How soon you want the troops to leave depends on how soon you want them back."[12]

5. A Never-Ending Debate- But why is this a job for the U.S. military? Isn't it a responsibility of the Department of State (DOS)? Interventions in Haiti and Bosnia proved once again that the need for ministry advisers in Panama in 1989 and Kuwait in 1991 was no fluke. Ever since Franklin D. Roosevelt considered the first military government missions during World War II, this has been a never-ending debate. At first President Roosevelt wanted civilian agencies to exercise control over conquered and liberated areas. After all, wasn't this DOS business? But political preferences could not long resist the course of the war. Adverse experience in the North African campaign showed there was an immediate need for experts with critical civilian skills, and that DOS personnel could not function in such environments. These experts had to be soldiers because only soldiers could operate under such dangerous conditions. These specialized civilian-soldiers had to collaborate with local civilian authorities and their DOS counterparts to fulfill their civil-military mission. And contrary to opinions held by many conventional military thinkers, the mission was much greater in scope and complexity than mere "control" or low-level sustainment of foreign civilians. The Army had the capability to perform the mission while civilian agencies did not. Necessity, not doctrine, dictated the policies that deployed military government units and gave birth to modern CA.

Until December, 2006, the debate on the role of the military in Iraq as well as postwar and peace operations continued unchanged and unabated. With war casualties and costs mounting and no stability achieved, it was as divisive as any debate over U.S. involvement in rebuilding other nations. The long-held conventional sentiment was that the exclusive mission of the military is to kill people and destroy things. Over-simplistic to be sure, but conventional military thinking was that the employment of combat forces in COIN, peacekeeping and postwar was a misuse of its soldiers and resources.

While that sentiment is widespread, necessity has overruled it again and again. The debate over the scope and extent of the CA mission has repeated itself for every major deployment, and in Iraq and Afghanistan, necessity has again trumped doctrine and driven policy. Army leadership assumed that every war could be fought like *Desert Storm*, which was the last battle between conventional armies and determined by overwhelming force. Our enemies were not so considerate. They chose and will always choose to fight us where we are the weakest. All elements of military and civilian assistance must have security to function. The CA capability is one that can function and coordinate with civilian agencies in the violent and unforgiving environments of COIN and post-war stability operations.

6. The Debate Is Resolved…at least for now[13] - Although there were lonely voices arguing that the Army needed to focus on COIN in the wake of the Cold War, the sad fact is that when an insurgency began in Iraq in the late summer of 2003, the Army was unprepared to fight it. The U.S. Army was designed, organized, trained and equipped to defeat another conventional army. It was not

prepared for an enemy that knew it could not hope to defeat the U.S. Army on a conventional battlefield, and therefore chose to wage asymmetric warfare from the shadows. The U.S. was slow to adapt, but adapt it did. It went from confronting terrorists with conventional tactics to COIN. The surge strategy of General Petraeus, one of the authors of the *Counterinsurgency Manual*, was to use an influx of US forces as a constabulary force in Iraqi neighborhoods to protect civilians and win popular support for the Iraqi government. That, in combination with the "Anbar Awakening", the change of alliances negotiated by the Army with the Sunni fighters in Anbar Province, turned defeat into a gradual and tenuous victory for the U.S. military. That resulted in more cease-fires throughout Iraq. [14]

Secretary of Defense Robert M. Gates has fully recognized these problems and stated that the Pentagon has to do more than modernize its conventional forces; it must also focus on today's unconventional conflicts, as well as tomorrow's. The defining principle of the Pentagon's new National Defense Strategy is balance. The U.S. cannot expect to eliminate national security risks through higher defense budgets that buy everything to do everything. **The strategy strives for balance in three areas:**

-between trying to prevail in current conflicts and preparing for other contingencies,

-between institutionalizing capabilities for COIN and foreign military assistance and maintaining the US conventional and strategic technological edge against other military forces; and

-between retaining those cultural traits that have made the U.S. armed forces successful and shedding those that hamper their ability to do what needs to be done. The U.S. ability to deal with future threats will depend on its performance in current conflicts. **To fail-or to be seen to fail-in either Iraq or Afghanistan would be a disastrous blow to U.S. credibility, both among friends and allies and especially among potential adversaries.**[15]

The Judge Advocate General's Legal Center and School, U.S. Army Center for Law and Military Operations has published The Rule Of Law Handbook- A Practitioner's Guide For Judge Advocates 2008 which states: "It is highly likely the Global War on Terror (GWOT) will require the US military to engage in operations that include rule of law operations as an essential part of the overall mission. The term was mentioned nine times in the 2002 National Security Strategy, and sixteen times in the 2006 National Security Strategy (NSS). As the 2002 NSS explains: America must stand firmly for the nonnegotiable demands of human dignity: *the rule of law*; limits on the absolute power of the state; free speech; freedom of worship; equal justice; respect for women; religious and ethnic tolerance; and respect for private property.

But, still feeling whipsawed in the "never-ending debate," the authors expressed frustration while recognizing necessity. "While there is little debate over the need for such a practitioner's guide, there is little else in the rule of law arena upon which there is widespread agreement. There are divergent, and often conflicting, views among academics, various US government agencies, US allies and even within the Department of Defense (DOD), as to whether or not to conduct rule of law operations, what constitutes a rule of law operation, how to conduct a rule of law operation, or even what is meant by the term "rule of law." As in the case of any emerging area of legal practice or military specialty, doctrine is non-existent, official guidance is incomplete, and educational opportunities are limited. While acknowledging the above challenges, the Judge Advocate General's Corps leadership still recognizes the inevitability that Judge Advocates on the ground under extraordinarily difficult conditions will be

called upon to support, and even directly participate in and lead rule of law operations.

What is agreed upon by almost every individual who has worked in this area is that *joint, inter-agency and multinational coordination is the basic foundation upon which all rule of law efforts must be built.* In the past, military services, U.S. government agencies, and coalition partners have often conducted the rule of law mission in isolation. History has shown, however, that such an approach often results in much energy expended in a wasted effort. To maximize rule of law reform efforts, we must achieve synchronization and integration across the spectrum of rule of law. Indeed if the reader takes nothing else from this *Handbook*, they should recognize this one central concept. Without coordination with other participants in the rule of law arena, the efforts of a single contributor in isolation are at best less than optimal and at worst counterproductive to the overall rule of law reform objectives being pursued. Quite simply, "coordination and synchronization" is to the rule of law effort what "fire and maneuver" is to the high intensity conflict.[16] While everyone agrees to the need for this interagency coordination, there is little agreement on what that doctrine should be.

In Iraq and Afghanistan U.S. policy makers suffered from a lack of focus in choosing development initiatives and rotating personnel. Bureaucratic turf battles and demands for "credit" plagued efforts to establish legitimacy and an effective rule of law. Mission success required seeking the common good rather than promoting narrow agency and personal agendas. These problems were evident in civilian-based Provincial Reconstruction Teams (PRTs) which are dedicated to rebuilding critical infrastructure in Iraq and Afghanistan such as schools and utilities. The PRTs were plagued by low funding, not enough staff and poor leadership. PRTs are mostly ad-hoc outfits, commonly described as a "pickup game." Because government workers lack many of the skills needed for post-conflict reconstruction, private contractors **(many with military backgrounds)** are hired. Lacking institutional precedents, PRTs are largely personality dependant for their success or failure, and there are no clear lines of authority because the leaders often answer to multiple agency commands both in country and back in Washington.

A significant challenge is finding people with the needed skills who are also willing to serve in combat zones. The Defense Department provides the majority of PRT members, but there are not enough CA staffers to fill all the teams' open slots. Several sources told committee investigators that they feared that serving with a PRT would be a "career disruption, not career enhancing," because officer promotion boards might not place the same value on this service as they would for service in conventional combat units. Neither the military nor civilian agencies offer a career track for personnel performing what the government calls "stability and reconstruction operations."[17]

From "*Evaluating Iraq's Provincial Reconstruction Teams While Drawdown Looms*"[18] - Since their 2005 inception in Iraq, PRTs have struggled to fully define their mission, overcome structural problems, learn to work alongside their military counterparts and assist Iraqis down the path to self-governance and stability so that US forces can withdraw. PRTs in Iraq are largely civilian-led and resemble mini development task forces, harnessing civilian expertise sourced from the US and augmented by CA officers. The experience thus far has been bumpy. The State Department and its Baghdad-based PRT coordinator, the Office of Provincial Affairs (OPA), have encountered enormous challenges in locating and deploying qualified professionals to staff the PRTs long enough to make impact and justify the huge expense of providing for their accommodation, protection and transport. Once deployed to a PRT, typically co-located with a military brigade on a forward operating base (FOB), team members must learn to operate in a combat or post-combat environment for which most have scant preparation.

PRTs play a critical role in facilitating the expenditure of Iraqi funds on Iraqi reconstruction and development. This change comes as part of a broader policy shift toward the U.S spending less money in Iraq and "helping Iraqis spend their own money." Washington is substantially reducing the primary U.S. funding. Building the capacity of Iraqi government institutions to provide essential services and rebuild Iraq's infrastructure has become the PRTs' central goal. PRTs in their earlier days were devoted in large part to the "reconstruction" of infrastructure projects, typically large scale. Now the PRTs are out of the "brick and mortar" business and have taken on more of a consulting, advisory role in which Iraqis increasingly take the lead. The PRTs are the pressure point where the U.S. helps Iraqis push as much of their own money as possible into infrastructure, essential services, and economic development. Due in significant measure to PRT efforts, execution of Iraqi budgets has improved dramatically over the past 18-24 months. PRT members also monitor security flashpoints and scout for the military. In full COIN mode, PRTs tend to play a supporting, advisory role for the military, providing them with civilian expertise they would not otherwise have and offering suggestions on how to shape operations.

For the PRT to be effective, it must acknowledge its subordinate status in COIN. As stability is established and there is less need to win "hearts and minds," the military's heavy focus on non-kinetics should end and the PRT should gradually assume greater responsibility for reconstruction and development. When there is a sound relationship between the PRT and the military, the military defers to the PRT; when the relationship has soured, the two entities develop parallel relationships with their Iraqi counterparts, resulting in duplicity, miscommunication and inefficiency. "We also encountered cases in COIN settings in which the relationship between the military and the PRT was dysfunctional and mistrusting. In these cases, the PRT is sidelined while the military drives the non-kinetic effort."[19]

The DOS Office of Provincial Assistance (OPA) appears to have made substantial progress in appointing strong team leaders for PRTs. DOS does not traditionally develop leaders as does the military, and thus encountered numerous difficulties early on with weak team leaders, a problem that it is now attempting to correct. OPA has also been credited for improving strategic guidance, something DOS has lacked due to its long-term culture of planning which is not suited to strategic planning in the fluctuating, complex and difficult environment of COIN. On a more positive note, CA soldiers brought on to "plus up" PRTs are in most cases highly valued by team leaders, even if they do not bring specific expertise. As an institution, DOS lacks the expertise the PRTs need to staff most of their positions. Moreover, the PRTs' work is so unusual that such expertise is hard to find on the open market. Military interviewees marveled at what they saw as the inability of DOS to perform simple management functions and the incompetent civilians (in their judgment) who were brought in to work in PRTs.

The PRT program depends on a range of factors, but the most important is the continued U.S. military presence required to support, move and protect PRTs . Withdrawal of U.S. forces would determine the end-state of their PRTs. If the PRTs leave on their own terms and military withdrawal does not force their hand, an end-state will be determined by a province's level of self-sustainability.

7. Conclusion- U.S. Army Civil Affair is the Army's Bridge to Stability- The strategic lessons experienced but not learned from U.S. military history, especially since Vietnam, should have taught that COIN is not an obsolete concept, and that military operations other than war-by whatever name-are essential to protect US interests postwar and in peacetime. Painful lessons have taught that traditional combat capabilities are unsuited for these non-combat operations. Dr. Stanley Sandler, a historian, said the fact that conventional US military officers find themselves adrift in such operations is not without irony, in that these undertakings are nothing new. Rather, the U.S. military has engaged in

nontraditional peace and stability operations more than conventional warfare throughout its history.[20]

In wartime, CA supports combat forces; but in COIN there is a complex balance to be achieved between "wining hearts and minds" and killing or capturing those who can never be persuaded. In postwar and peacetime, priorities are most often reversed: combat forces end up supporting CA missions. In a seamless Total Force, CA civilian soldiers are not just Reservists, but are full partners with their active-component counterparts as an extension of both the U.S. military and the diplomatic corps. Much of the opposition to military operations other than war has to do with their unconventional nature, which requires the unique leadership found in CA that combines the characteristics of both the warrior and the diplomat. Post-Cold War strategy requires military capabilities that are as constructive during peacetime as they are destructive during wartime.

Yet the Active Component continues to diminish the role of CA, especially in the Civil Administration support role where the Reserve Component is the prime source for the mission. They continue to view Reservists as second-class soldiers. Recently in Iraq one military deputy PRT leader recommended that the deputies should not come from the military's CA brigades, as is common, because these deputies tend to be *reservists viewed as civilians by the combat brigade leadership*. Instead, he argued, the deputies should be active duty combat arms officers. In the eyes of the brigade leadership, they have more credibility in explaining PRT capabilities to higher ranks and are thus better positioned to get the PRTs needed support.[21]

PART II   Iraq and the Rule of Law

Introduction- Impatience and instant gratification are part of U.S culture, so there is little understanding that the development of the Rule of Raw is not only qualitative (like stability), but also generational. Building the Rule of Law in Iraq or any other hostile cultural environment demands leadership, persistence, patience, bravery, competence and belief in a cause bigger than one's self-not to mention millions of dollars and even more precious blood. On military and national security issues, making the Rule of Law a mission priority requires a change in the status quo of the political and military mindsets. The objective must be the national interest and not the interest of any group or bureaucracy. In the U.S. and in Iraq, such changes come glacially with much resistance from vested interests; but in the U.S., good sense finally prevailed in 2007 with the adoption of COIN doctrine and the appointment of military leaders who were capable of conducting COIN.

For the Iraqis, establishing the Rule of Law has demanded more and more blood. The world has ignored the stories of Iraqis who cast their lot with the U.S. and were killed, injured or forced to flee because they believed in a better way of life and risked working with the U.S. to achieve it. For Iraqis, the great untold story is their bravery in establishing the Rule of Law in the face of murder and anarchy which were the accepted norms of insurgents, criminals, and corrupt officials. The stories of honest Iraqi judges, lawyers, translators, police, soldiers, civil servants and even private Iraqi contractors are buried beneath more sensational stories of violence, incompetence and corruption, and have rarely been seen in mainstream media.

The Coalition Provisional Authority (CPA) Ministry of Justice (MOJ) employed about fifty Iraqi lawyer/translators. More than translators, the Iraqis were our legal, political, and cultural guides and advisors. We could have done nothing without them. Every day they risked their lives and the lives of their families to work with the MOJ. They did not stay safely inside the "Green Zone" but worked outside in Iraqi courts as court and prison liaisons, presenting anti-corruption lectures, and doing a multitude of tasks with coalition lawyers that made them high profile targets. Their bravery in working for a better life in Iraq often brought death and destruction to them and their families. Many were

forced to flee Iraq as they were hunted by insurgents, criminals, and corrupt officials-anyone seeking to preserve the old ways.

1. "Justice" before Saddam[22]- Iraq is not a third-world legal system. Iraq's law and courts are well developed and secular-much more than Iran, Saudi Arabia or other Arab states. Iraq's law is not a merger of mosque (church) and state. The civil law roots of the Iraqi legal system come from sources that follow the pattern of European Civil Codes with a mix of German, Turkish, other European laws and the Egyptian legal system. During the period of the British mandate in Iraq, the judiciary became independent and changes were made to the substantive law, but the procedural legislation remained based on civil law.

The Iraq criminal court system is also modeled after European courts in that there is no jury or adversary system. The case is developed by an Investigating Judge. The role of the public prosecutor (Department of Public Prosecutions) is very much an advisory or observational role, with the focus on whether there is an offense made out in law and providing opinions to the investigating judge on guilt or innocence. Most national legal systems based on civil law apply the inquisitorial system, while in common law countries the adversarial model is used. The two systems are not a rigid dichotomy and neither model is found in its pure form in any country. Over time the legal systems of every country have adopted aspects of each model to reflect national traditions, customs and historical demands.

Prior to Iraq's takeover by Saddam Hussein, the courts had conducted business with acceptable levels of bureaucracy, inefficiency, and corruption. Iraq has well developed law schools and a judicial training academy. The Bar Association is powerful and acts as a quasi-governmental agency regulating admission to practice of law and lawyer discipline. All lawyers must hold membership and pay dues.

Article 11 of the Organization of the Judiciary Act provides for the following courts, from the highest to the lowest:

1. The Court of Cassation (Mahkamat al-Tamyeez) is the highest judicial body in the country and exercises judicial supervision over all other courts. As yet, there is still no case-law precedent set by appellate cases.

2. Courts Of Appeal. There are 12 regional Courts of Appeal in Iraq located in Baghdad, Basra, Mosul, Hilla, Kirkuk, Irbil, Najaf and Nasiriyyah. They serve geographically based appellate areas consisting of one or more governates.

3. Civil Courts (Mahkamat al-Bidaya).

4. Criminal Courts. Within each court building throughout Iraq there is a Misdemeanor Court and a Criminal Court. A Misdemeanor Court consists of a single judge and has jurisdiction over misdemeanors and minor felonies.   A Criminal Court hears felony cases.

5. Courts of Specific Jurisdiction. Juvenile Courts are located within each governate and have jurisdiction over offences where the offender was over 7 but under 18 years of age

6. Personal Status Courts are located within each governate. These are presided over by a single (Muslim) judge and deal with domestic matters such as marriage and divorce.

Tribal mediation is not a formal part of the judicial structure, but it has over five thousand years of tradition and acceptance. Tribes pre-date Islam and are still the power centers in Iraq. Their 'mediators' settle disputes based on blood relationships more than legal principles-"You lose because your uncle is a dishonorable man." People are reluctant to resort to the civil courts because that is seen as an act of disloyalty to their tribe. The courts are not likely to see the day when tribal mediation

disappears so they would do well to find compatibility, and that can best be achieved by reaching out and teaching concepts of relevancy and law. Tribal mediation is not to be confused with so-called "religious courts". They are not courts but the tool of militias to inflict radical standards of Islam and their own punishments outside of the law. They are illegal and defy the government.

2. "Justice" under Saddam[23]- At the time of the U.S. intervention in Iraq in 2003, there was a judicial bureaucracy as described above based on 1960's-era law, with an overlay of Saddam's special courts and his rule by decree. Initial assessments of the Iraqi courts revealed that the courts of general jurisdiction within each of Iraq's eighteen provinces were widely subject to political control and influence. The formerly independent judiciary had been placed under the control of the Minister of Justice, a political appointee.

The Ministry of Justice in Baghdad had appointed judges based on party loyalty and their willingness to support Ba'ath party policies through their rulings. These judges appeared to possess strong professional credentials, as they were trained in one of three quality law schools in Iraq and possessed at least ten year's experience as practicing attorneys. Although the judges in Iraq possessed strong professional credentials, they had lived for thirty-five years in a system which made self-preservation the primary objective. Those who demonstrated too much initiative or independence ran the risk of being viewed as potential threats to the regime. Operating under a tight hierarchal structure, the chief judge in each province was expected to demonstrate unwavering obedience to Ba'athist policies and orders from Baghdad. After decades of living under such centralized control, the senior members of the Iraqi bench had become political functionaries who knew that their primary goal was obeying the regime, with their secondary duty was administering justice to the Iraqi people. By placing the needs of the people in second place, the regime unwittingly planted the seeds for corruption and bias as judges increasingly placed self-interest above other issues. During Coalition interviews with sitting Iraqi judges throughout southern Iraq in June and July 2003, virtually all judges acknowledged that widespread corruption characterized their system. The judges also acknowledged that a litigant's tribal and political connections were prime considerations in the outcome of both criminal and civil trials. The Iraqi criminal justice system under Saddam was characterized by a process that relied more on coerced confessions than extrinsic evidence to determine guilt. The judiciary regularly relied upon confessions obtained through torture. Indeed, the criminal procedure code in practice sanctioned torture.

The independence of the judiciary was destroyed by the transfer of the Judiciary to the control of the Minister of Justice and all judges were required to join the Ba'ath Party. After that, Saddam did not change the court system, but simply bypassed it. The Iraqi judicial system was marginalized by several actions undertaken by Saddam Hussein's rule. First, the regime created a variety of special security courts (Law Enforcement Court, Revolutionary Court and Specialty Courts) that heard cases involving state security. These were courts in name only, being tools of the regime to dispense summary executions or torture; and they were immediately abolished by the coalition. There were some judges who resisted Ba'ath party control and were imprisoned. However, the majority of the judiciary was corrupted by the system of Ba'ath party "telephone justice" and endemic bribery.

The former Iraqi government encouraged the use of tribal courts to garner support for the regime from the tribal leaders. This had the effect of diverting cases from the judicial system to tribal courts. Although tribal courts existed prior to the Hussein era, their influence and power were greatly increased by Saddam for his own political ends, and as mentioned above, tribal courts still play a significant role in adjudicating disputes. Saddam ruled by decree and rewarded loyalty, not religion or sect-although the Sunnis were prominent in the government, while Shiites and Kurds were prominent in being

excluded and persecuted.

Saddam was an equal-opportunity butcher. When meeting with Saddam, Iraqi officials never knew if they would be rewarded with a Mercedes or a bullet in the head. Saddam instituted a culture of corruption far beyond the previous norms-the only rule was that one could not steal from Saddam. In essence, he kept for himself the salaries of government workers, paying them nearly nothing. Civil servants could only survive "on the take". The court system was also plagued by excessive filing fees that impaired accessibility.

The totalitarian regime left a festering legacy of real estate title disputes that continue to pose a threat to overall stability in Iraq. These disputes resulted from Saddam's regime evicting Kurds from their property in northern Iraq and replacing them with persons of Arab ancestry. Many of the Arab property owners then sold the property to other persons who did not have had knowledge of the ouster of Kurdish property owners. This has created conflicting claims to Iraqi real estate, with multiple claimants apparently having good title. In the south, an area with a majority Shiite population, the Ba'ath party followed a similar tactic, taking real estate belonging to Shiites and giving it to Ba'ath party members. Some then sold their property to others who were not aware of the originally tainted transaction, so that there are conflicting claims to the title of real estate throughout Iraq.

Saddam did not modernize any of his government's infrastructure. This was most obvious in Iraq's oil industry, but it was also evident in electrical and water utilities and the court system. Court facilities were deteriorated, had no computers and functioned only through the efforts of their managers and local judges. Continuing legal education for judges stagnated, and judges and lawyers were not permitted to travel outside the country. Finally, there was a strict culture of centralized planning in which no one would make a decision. The fear of reprisal was pervasive and stifled progress; if one did nothing, then one could not be criticized for doing something wrong.[24]

3. The fall of Saddam in April 2003[25]- In April 2003, Ba'athist rule was replaced by anarchy and most of the court buildings throughout the country were looted and severely damaged. Judges and employees stayed away. At the beginning of the Coalition occupation the legal and physical foundations of the Iraqi legal system were in disarray. Up to 100,000 criminals were released from jail, given weapons and officially pardoned. These pardons required recognition under international law, which prohibited re-arresting those pardoned to complete their original sentence. They were free to loot and riot, and street crime spun out of control.

The CA units first on the scene assessed the dismal state of the Iraqi legal system in order to restart and reform it. CA lawyers, Judge Advocate lawyers and civilian lawyer teams operated in 120+ degree temperatures for 16 hours a day, 7 days per week. These efforts were plagued with communication, bureaucratic and administrative problems that made it impossible for the central coalition authorities and commanders in the field to adequately communicate with each other. Additionally, disagreements among the coalition partners resulted in the failure of the coalition authorities to issue a definitive statement of applicable law. The problems were not the fault of the central justice ministry officials or the commanders in the field, but rather the result of a lack of communication and the failure to develop needed legislation by U.S. policymakers.

Coalition military attorneys who were responsible for restoring the judicial system encountered a culture in which many Iraqi judges had no sense of professional pride in the positions they held. Years of service under an oppressive regime had made personal and political survival the prime goal. Rather, the main goal of many Iraqi judges was to use their position for personal gain. As Coalition lawyers sought to restore court operations, senior Iraqi judges demanded personal cell phones, sport utility

vehicles, and air conditioning prerequisites for their positions. As jails overflowed with looters and other criminals released by Saddam Hussein, many courts remained closed as judges sought to maximize personal privileges.

The new Iraqi judges serving in the post-Saddam era faced pressure from Iraq's powerful tribal structure to perpetuate a court system based traditions of tribal favoritism. Conscientious judges faced threats from those unhappy with their verdicts, as well as from pro-Ba'athist elements who sought to intimidate any Iraqi officials cooperating with the Coalition. In facing these dangers and continuing to take the bench, these judges demonstrated the strength of character and dedication to the law which had been absent under the old regime. This is not a change that will occur in one or two years, as the roots of thirty-five years of corruption run deep.

4. The Rule of Law in Iraq from 2003: Building a System of Justice- Any government that derives its powers from the governed must achieve its legitimacy-that is, its moral authority to act-based on public support and confidence, and that is based on its effectiveness in serving the basic needs of the people. The effectiveness of the Rule of Law requires competency and security along with political, social, and economic development. This legitimacy is based upon an ethic of "governing for the benefit of the governed." Legitimacy for the Rule of Law is then based upon principles of fundamental fairness and due process. Legitimacy is achieved as the "governed" see and believes that no person is above the law and that they will be treated fairly in the system.

Nation-building requires the creation of legitimate governance beginning with security, and this cannot be done without a justice system to effectuate the Rule of Law. Courts are just part of a system of justice that begins with the police and ends with prisons. The legitimacy of the justice system depends upon these three security institutions working together; each must be perceived as fair, just, transparent, and a protector of human rights.

The police are where "the rubber meets the road" for the Rule of Law. Police maintain order, control and ultimately support the status quo. While this is a necessary first step and the one that receives most media attention, maintaining order to sustain the political and economic status quo by itself is not a legitimate objective of government. That is because maintaining order is not always the same as providing justice. The justice system must determine the guilt or innocence of those accused of crime, decide civil disputes and interpret laws in a just and equitable manner so that no person is above the law. The courts are dependant upon police for security, investigation, and enforcement, and to process arrests, detain criminals, execute warrants and conduct investigations by professional corps of investigators. The three dimensions of security for courts are personal protection for judges and staff, security for courthouse operations (courtroom bailiffs and crowd control), and hardening facilities along their perimeters and at ingress points.

The great difficulty in establishing a system of justice between police, courts and prisons was the lack of a working relationship between Iraqi police, courts, and prisons. There was no history of them ever working together. A functioning system of justice is a new challenge for Iraqi reformers, and they need education and mentoring to make it work.

5. The American Rule of Law bureaucracy in Iraq [26]**-** The American Rule of Law bureaucracy in Iraq is a tough ball of yarn to untangle, but is made up of three major groups totaling about 400 lawyers in all. First are military lawyers with CA and Judge Advocate General's Corps lawyers from several countries (US, UK, Australia, Poland, etc.) whose priority is detainees: where to keep them, how to prosecute them, and recently, how to move as many as possible to Iraqi custody. There are about 350 military lawyers in this first group.

The second group consists of the policy-makers at the U.S. Embassy in Baghdad. These U.S. Department of Justice and State Department attorneys act as advisers to the Iraqi government, work with the Iraqi High Tribunal (roughly analogous to the U.S. Supreme Court) and work on big projects like those in the Central Criminal Court of Iraq, where coalition-held detainees are tried by Iraqi judges.

The third group of American lawyers in Iraq work for Iraqi PRTs. The first Iraqi PRTs were in Mosul, Kirkuk and Hillah in November 2005. There are now seven American-led permanent PRTs in Iraq, along with about 18 "embedded" PRTs that travel with military units. The number of PRTs is expected to decline as surge troops leave Iraq. There are also three coalition-led PRTs. The number of team members varies depending on the province. The Baghdad group, which is the largest, has 111.

6. Rule of Law Initiatives Starting April 2003- U.S. Army CA teams, Judge Advocate teams, and a Department of Justice team working for the CPA MOJ conducted country-wide reviews of Iraq's courts and judiciary. The teams were either local or traveled to courthouses throughout the country. The Senior Advisor of the CPA MOJ traveled widely to reassemble Iraqi employees. Bar Association leaders were asked their advice on judicial and Ministry leadership. Based on these consultations, the CPA selected the new chief judge and Minister of Justice and recommended the following:

1. Salaries of the Judiciary and civil servants be raised to a living standard with the expectation that they would continue in employment with no further expectation of bribes or gratuities from citizens.

2. The judiciary be restored to independence from the other governmental entities.

3. The prosecutorial function was recommended to be made independent from the judiciary and empowered to direct criminal investigations and prosecutions. This has yet to be done.

4. The entire relationship between law enforcement and prosecutorial agencies was to be examined and reconsidered to eliminate duplicate efforts and provide more effective investigations of criminal acts. This is still very much of a work in progress in a dysfunctional environment.

The following long-term initiatives were commenced and continue through 2009:

Independent Judiciary- Re-establishment of a Judiciary as the third branch of government was requested by Iraq's newly appointed Chief Judge and Minister of Justice. The concept of judicial independence was preserved in the Transitional Law and the Constitution.

Judicial Review Commission- Unlike the Iraq Army and police, the CPA MOJ did not disband the judiciary. For the short term, all judges were taken back; the good, the bad, and the ugly. For the longer term, the CPA MOJ established a committee of three coalition lawyers together with three Iraqi judges selected by the newly appointed Chief Judge. The committee took six months to gather evidence regarding Ba'ath Party affiliations and corruption issues for about 850 Judges, and decisions were completed by February 2004. About 175 judges were removed, and Iraqi lawyers supported their removal. The Committee would have been justified to remove certain other judges, but took a conservative approach to retain judges if there was a substantial question of the evidence against them. The committee said that Iraq did not yet have the political will to take such action itself.

Central Criminal Court of Iraq- Major felony "big fish" cases overwhelmed the ordinary courts. They were unprepared to handle the threats, the management of major cases, and the volume of cases. Based upon the British model, the CPA established the Central Criminal Court of Iraq. The Iraqi judges lived and worked in a protected environment to handle the major felony cases of organized crime, corruption and crimes against Coalition Forces.

Energize Ordinary Courts- A court Liaison program was established to closely monitor and motivate the movement of routine cases in the ordinary courts. The courts were now open but investigating judges were overwhelmed with the many street criminals arrested by Iraqi police—including repeat offenders among the 100,000 criminals released <u>and pardoned</u> by Saddam. By 2004, few trials were held, with defendants still in queue after investigation. Too many judges sat in fear of assassination, or were still part of the culture of corruption, and inertia. Some did not want to be seen as supporting the Coalition. At the same time, they were afraid that the Coalition would abandon Iraq, although they would not say so in public. By December 2003, the CPA MOJ had set up court liaisons utilizing Iraqi lawyers in a grand effort to eliminate bureaucratic corruption and motivate the trial court judges to move cases. The result was that ordinary courts were now frying small fish but could not fry the big fish in corruption cases involving government officials and police and organized crime cases.

Mentor on technique and technology of modern investigation and evidence gathering, and case management- Iraq's Justice System had been accustomed to closing cases by coerced confession. Now they resolve cases by evidence aided by long-term education in forensics and investigation techniques.

Public defender system- Problems quickly arose for the funding of training and lawyer pay, and with Bar Association favoritism. The Iraqi government had not followed through with this effort.

Legal Education- U.S. Agency for International Development (USAID) and International Legal Assistance Consortium sponsored education for Iraqi judges and lawyers. Iraq's Judicial Training Institute and Iraq's Law Schools received assessments by outside contractors for the revision of courses under the CPA Ministry of Higher Education.

Criminal laws were revised to roll back "Rule by Decree" of Saddam. The law was returned to pre-Saddam status of 1960s. The Iraqis were quite satisfied with the substantive law of that era.

Rehabilitation of facilities- Engineering plans were developed for judicial centers throughout Iraq.

Over the summer of 2003, Iraqi judges and their staffs returned to work, along with some police. Street crime was reduced, but not nearly enough. With courts reopening, cases started to move, but attacks on judges and civil servants rose as insurgents, organized crime, street criminals and corrupt government officials all wreaked havoc on reform efforts. By the summer of 2003, conventional war had transitioned into insurgency. Sectarian and tribal militias (street gangs on steroids) proliferated and created anarchy. Organized crime, common criminals, corrupt police and government officials contributed to the violence, partnering with insurgents to accomplish espionage, assassinations, bombings and kidnapping. These anti-government organizations consisted of more than fighters; they had networks of supporters for money and resources and sympathizers to gather intelligence.

Since April 2003, significant financial and human resources were placed at the disposal of the Iraqis for use in restoring their court system. The US military, the DOS, the Justice Department, the American Bar Association, and many private entities contributed millions of dollars in reconstruction aid and thousands of professional work hours toward building a system of justice. Even Kuwait, a former victim of Iraqi aggression, provided support: books and training, and hosting the first visit of Iraqi jurists to Kuwait in March 2004 to promote cooperation between the two ministries of justice. These actions provided the Iraqis with the tangible tools needed to restore the Rule of Law.[27]

The Iraqi judiciary struggled to reinvent itself from being the political tool of a despot to conducting a fair and impartial system of justice while being subject to an insurgent destabilization campaign. Iraqi judges who were not seen as loyal to a particular insurgent faction or militia were targeted for killing.

In fairness, one cannot expect judges to rule against people who are quite willing to kill them.

By purely quantitative measures a strong case can be made for progress in the restoration of the Iraqi legal system. In terms of courthouses rebuilt and cases adjudicated, the numbers indicated real progress; but these statistics were misleading indicators of justice in Iraq, just as the body count was a misleading indicator of victory in Vietnam. Justice cannot be measured by bricks and mortar or case processing statistics; true measurements of justice in Iraq are intangible and exist in the hearts and minds of the Iraqi people. Justice, like legitimacy, can only be measured by public perceptions of whether it will be provided by their government through fair and impartial processes.

Michael O'Hanlon says US benchmarks are reasonable - that is, if not taken too literally, and not viewed as the be-all and end-all in Iraq. What really matters is that Iraqis view themselves as a single people working together to build a new nation and a justice system that will treat them fairly. Legitimacy of the Rule of Law is only achieved when this happens. The benchmarks are important, but only as indicators of progress in creating this new attitude of democratic governance which is difficult to measure or demonstrate.[28]

Another challenge to evaluating judicial reform in Iraq is that circumstances vary greatly depending upon one's geographic location. The closer a court is to Baghdad, the greater the semblance of an independent judiciary. The overwhelming presence of US forces in Baghdad helps reinforce the stability of the central government, and provides a positive atmosphere for judicial reform. Even in Baghdad, however, judges live with the specter of violence hanging over them. "Judges throughout Iraq start their daily trek to the court house, not knowing if they will see their families again. Though threats are routine, so is the way judges accept the fact that intimidation is just part of their job."[29] The greater the distance from Baghdad, the greater the negative impact of militias and insurgents on the judiciary. The stability of the Iraqi courts is an uneven patchwork quilt. No one generalization can accurately describe the wide divergence of justice provided within the eighteen provinces. [30]

Until 2007, Anbar province was the most volatile province in the Sunni Triangle. There were no functioning criminal courts due to instability, although there was a full complement of judges on hand. In 2007 the Sunni leadership changed alliances and has since fought with the US against Al-Qaeda in Iraq. Now security in Anbar Province is achieved. The US military turned over control to the Iraqis and departed in victory at the end of 2008. The example of the Sunni security force ("Sons of Iraq") enabled cease-fire agreements throughout the country. In Babil province in the Shiite south, progress was made toward the rule of law despite concerns by judges for their personal security. In Hillel, the Judicial Council established the first terrorist court outside of Baghdad in 2005.

Why this difference? The ultimate success or failure in restoring the rule of law is inextricably linked to security, which is the first requirement of the Rule of Law. Much progress has been made in Iraq in renovating the physical infrastructure of the courts and providing the judiciary with the tools it needs to build an independent judiciary, but growth and development of a system of justice will not happen until intimidation and undue influence of the judiciary are eliminated. It would be unrealistic to expect law enforcement officials and judges who survived under Saddam by being compliant to embrace legal reform when to do so place their lives at risk.

As stated by a Judge Advocate responsible for judicial reconstruction in the [formerly] volatile Anbar province: "In the final analysis, the only measurable [way] progress will be made is through a genuine commitment to improvement from the Iraqi citizens working with [the judiciary, pretrial detention facilities, and the Iraqi police]. This commitment will take tremendous courage and risk on their part because individuals cooperating with the coalition forces are considered traitors by those who terrorize

this region each day. There are countless examples of Iraqis being attacked or murdered for cooperating or even giving the appearance of cooperating with the coalition forces."[31]

The relationship between security and the establishment of the Rule of Law in Iraq is a symbiotic one. The rule of law cannot be established in a nation where doing justice means death; and yet the people of Iraq will not resist insurgent violence and support the judiciary (as well as other Iraqi government institutions) unless they believe the judiciary is committed to the rule of law and justice.

The Iraqi civilian population is still cautious about placing confidence in the revamped Iraqi judiciary. The initial euphoria over Saddam's fall in the Shiite south has been replaced with wariness. One source of concern is that, "most of the corrupt judges who had been dismissed by the Judicial Review Committee established in 2003 were reinstated by the Chief Justice of the Judicial Council. They are very well known by the people."[32] **After the Judicial Review Committee (Coalition and Iraq) removed certain judges, the judiciary was forced to take them back under intense political pressure. This was likely a redrawing of the line of acceptability to accommodate this political reconciliation process. But most of these judges had been fired because of corruption. It was a disappointment that political reconciliation could not be satisfied with the induction of new judges.**

There is doubt within judicial ranks as well as to whether the rule of law will take root in the new Iraq. Some judges who have opposed corruption in the Iraqi government have been assassinated; others claim to have been demoted or removed for being too "effective" in their positions. These allegations erode public confidence in the judicial process and legitimacy in the government among an already wary populace that feels the insurgency has "affected the judges badly."[33] **"This unwillingness …to remove former Ba'athist elements from the bench leads many Iraqis to wonder if the courts can be trusted." O'Hanlon gives Iraq's court system a B- at the end of 2007,[34] and this has not changed in 2008. However, m**any judges deserve credit for enduring significant risk to their personal safety in order to accomplish the ideal of an independent judiciary. "Iraqis are literally dying for the chance to achieve an efficient and effective court system in a democracy of their own choosing."[35]

7. Corruption and establishment of the Commission or Public Integrity (CPI) - Essentially, Saddam took corruption to new heights. He kept the government's money and told ministers to raise their own budgets. That forced all civil servants to be "on the take." **In 2003 Iraq's Commission for Public Integrity (CPI) was formed to fight corruption in government and compiled an astounding record of indictments and investigations. The courageous Commissioner was essentially Iraq's "Elliot Ness," and a frequent target of assassination attempts. Several of the CPI staff were killed, and many more suffered killings of family members and threats that forced them to flee.**

The CPI concept covered the following:

a. Legislation- The CPI was drafted into the Transitional law and the Constitution to be virtually the fourth branch of government, but politicians triumphed in defeating these terms so that CPI investigations are stymied at the Ministerial level and its budget can be held hostage by the Ministry of Finance. Even so, aggressive investigation and prosecution have resulted in significant indictments at the Ministerial level.

b. Enforcement- The Coalition has assigned anti-corruption experts to staff the advisory office to CPI and Coalition mentors train Iraqi CPI personnel.

c. Education- An entire culture of corruption must be changed through public education, and that will

not be easy. For government, it means establishing a culture of "Governing for the Benefit of the Governed." This is a monumental challenge, and so far Iraq's political parties have not felt any accountability to the voters once in office. While traveling to the Iraqi Ministry in October 2003, my translator saw a political party campaign poster and told me it read "It's our turn at the trough."

Iraqi lawyers have acknowledged that corruption among judges and lawyers is rampant. Corruption involves payments made to judges (with either defense attorneys or prosecutors as intermediaries) to affect the outcome, scheduling or dismissal of cases. Certain judges under the Saddam regime were honest and attempted to decide cases on the merits. Corruption was aided and abetted by those within the legal system who had low compensation; court employees and police officers only made a few dollars a month. The following were typical ways of buying favors:

-judges accepting money for favorable treatment of a case;

-court employees accepting gifts from litigants to assure timely attention to their cases;

-police accepting payments from criminals at the investigation stage to "lose" evidence or be dissuaded from torturing people;

-police and criminals colluding to fabricate allegations against an individual and then extorting money from him or his family to "drop the charges";

-lawyers bribing police in order to have access to their client's files;

-lawyers paying kickbacks to police for referring cases to them;

-lawyers taking money on the pretext of paying someone off, then pocketing the money.

Clearly, corruption in the Iraqi justice system is limited only by the imagination of those participating in it. The highly factionalized political competition-in which every group sought its own narrow advantage-further undermines institution building. PRT members frequently complain that their Iraqi counterparts are motivated more by graft and the division of spoils than by any expressed interest in long-term development. This is compounded by their relative inexperience. The war created an entirely new political class with little experience in governing. Many of them are appointees who owe their posts to political patronage, and have little idea what they should be doing.[36]

An Epic Fight [37] Judge Radhi Hamza al-Radhi al-Kenany, Iraq's former corruptions investigator is a soft-spoken man whose calm demeanor belies the intensity of his experiences. Jailed twice during Saddam Hussein's regime, he said he supported the initial invasion but questions what has happened since, saying "there is so much corruption now." Judge Radhi would agree that money is being lost, but believes the mission is far from being futile.

In the summer of 2004, Judge Radhi was selected from many applicants by Ambassador Bremer to head Iraq's new independent agency to investigate corruption and hold Iraqi officials accountable. Under Judge Rahdi, the Commission for Public Integrity (CPI) expanded to include 1030 employees. "This represented a first in Iraq and perhaps even a first in the Middle East," said Judge Radhi. In a country where corruption is so widespread that it has forestalled much reconstruction, CPI investigated almost 3,000 corruption cases totaling $18 billion in fraud. Although only 241 cases resulted in guilty verdicts, that was a considerable feat in the face of organized government corruption-Mafia-like in its fraud and threats against law enforcers such as those in CPI.

As his investigations continued, Radhi began to notice disturbing connections between public fraud and

the insurgency. In the elections, voters were often coerced into voting for the radical Islamic parties. "The Islamic religious groups in power; they have no experience in administration of government. They are all political. How can they control the country?" said Radhi. These corrupt political groups are the very ones that are receiving money from the US to help reconstruct the country. Instead of building it up, they take the money for themselves, or even worse, redirect it to insurgent groups. He said, "In western countries, they steal maybe ten percent but build 90 percent. In Iraq, they steal 80 percent and only build 20 percent."

Rahdi also cited open borders as a significant contributor to the influx of terrorism. When US forces came in, they dissolved the Ministry of the Interior and the Civilian Police. This had disastrous consequences, since it allowed terrorists to travel in and out of unprotected borders. The flooding of Iraq with criminals robbed much of the reconstruction money, discouraging foreign investors. The much-discussed oil revenue, which was supposed to finance the country's reconstruction, is controlled by sectarian groups that smuggle the oil to fund terrorist groups.

In the Ministry of Defense, Radhi and his investigators gathered evidence of massive war contract fraud. The government had just purchased $1 billion worth of new weapons from the US, but when the militia needed the weapons in a battle in Basra, they received old and outdated models. The money had just disappeared, and it took Judge Radhi's team to uncover the web of connections involved in incidents like these. As they dug deeper, it became clear that a majority of the officials in government were connected to some form of corruption. Thirty cases involved high-level officials, and the corruption had infiltrated "almost every ministry of the current government."

This put Rahdi in an awkward position with the United States. President al-Maliki had been handpicked by the US, so that Rahdi's investigations were calling into question appointments by the US government. The investigations put CPI officials in even more of a quandary with their own government. CPI had earned the anger of a wide network of corrupt Iraqi officials and their cronies. As investigations probed into corruption, the number of deaths in the organization increased to 35, and the judge reported horrific cases of torture. "They could not catch one man, but they did get his father. They drilled his body. He was 70 years old," he said.

President Nouri al-Maliki repeatedly tried to curb CPI's efforts. When a case began to be gathered against Salam al-Maliki, the President's cousin, the President dismissed the case. Other investigations were similarly cut off, but the biggest blow came with a new provision in the Iraqi constitution that required all cases be approved by the president before prosecution, effectively ending CPI's independence.

Although there had always been threats to Judge Radhi's life, the violence escalated after this announcement. Two missiles were fired at his house at different times and although both missed, the message was clear: it was no longer safe for Radhi to remain in Iraq. In late 2007, Radhi was granted political asylum in the US, and here with his family he has been living as a refugee. Now is a peaceful moment for a man whose work as head of post-war Iraq's anti-corruption efforts resulted in death threats, missile attacks that destroyed his Iraqi home, and resistance from Iraqi and US officials. Rahdi continues to assert that CPI reform efforts are essential to US success in Iraq, and its independence should be a crucial part of the US agenda.

The Iraq legislature has continued to block investigations by prohibiting them if they were not authorized by the Ministry being investigated. Rahdi has been replaced with a person who has essentially shut down anti-corruption work. It is truly three steps back, with the fox now guarding the hen-house. At first the US refused to deal with the new CPI Commissioner, but

political expediency prevailed, and we reversed course. If we end up supporting him, we are becoming enablers of corruption. The Iraqi people deserve better than Mr. Maliki and his predecessors. Their bravery in voting in the face of death threats has not been matched by those political parties looking for "their turn at the trough."

8. What's Next for Iraq Rule of Law?- In January, 2008 Michael O'Hanlon[38] examined whether Iraq's politicians had made any progress toward a rule of law that achieves the following objectives:

-Supports an independent Judiciary

-Relinquishes control of the judicial budget to the judiciary

-Provides mechanisms to enforce court decisions

-Enacts laws against corruption, organized crime, political interference of law enforcement

Attempts to provide the rule of law fail when we try to "Americanize" the system. We somehow think that if trials are not conducted in the adversarial tradition of U.S. courts, the truth will not come out; but that is not so. Recall that Iraq's courts are modeled on the European system. From the beginning, Iraq's judges wanted us to mentor them on the modern techniques and technology of evidence gathering, investigation, and case management. They wanted to get away from the age-old practice of managing cases by way of coerced confessions. So the mentors engaged in relation-building, and working with the Iraqis within their system. Judges in the Central Criminal Court of Iraq (CCCI) have learned to work with forensic evidence. Convictions are now commonly made by fingerprint identification rather by confession. The truth does come out-but it is in their way and not by coerced confession. It may not be the American way (the adversarial system), but it does work.

O'Hanlon says of the courts that while hardly exemplary, Iraq's legal system now has more than 1,200 trained judges who are better protected against violence than before, and many prisoners have now been released after initial review of their cases. In 2007 we saw the "surge" of forces and the disillusionment of Iraqis with Al Qaeda, when coupled with the sheiks' self interest started the Anbar miracle. In much greater numbers, Iraqis identify insurgents to US forces and then *testify* against them. Certain judges (CCCI) and police are protected in Judicial Centers in Baghdad and Hills. With security, the rule of law took root and judges could work without fear. All provinces want secure judicial centers. Sentences in CCCI have increased from 300 in 2004 to 3000 in 2007 and death sentences rose from 15 from 2003 to 2006 up to 113 in 2007, according to LTC Charles Grinnell, JA. There is true deterrent in the death penalty; but even with better security there have not been sufficient cases closed in these centers to justify their tremendous cost. There are only pockets of security, and most judges still have no protection, forcing some to flee. Outside of the secured courts, justice still flounders.

There are other forces working to defeat the Rule of Law besides security. Reconciliation from a heritage of sectarian hatred and violence remains elusive. But there seems a real desire of Iraq's major sectarian groups to use the reconciliation law to help smooth over tensions between them.

T**he independence of the judiciary is compromised as its budget is still controlled by the Ministry of Finance and there is no other source of money. This pressure point is an effective method of coercion to achieve political ends. B**election of capable ministers- technocrats rather than political "hacks"- is a critical sign of willingness to develop capacity and govern for the benefit of the governed. **Corruption in government, street gangs and organized crime remains rampant and erodes the legitimacy of government. The propensity of criminals and corrupt officials to exercise control through violence and mafia-style politics was only rivaled by the insurgency and**

is now becoming the paramount problem. Until 2007, the Executive branch lacked the political will to defeat these threats. Some judges are still controlled by "telephone justice," with the killing of judges and reformers by non-insurgent forces; and with police and prisons, it is still possible to buy one's way out of jail.

From "Wilson Myer's War"[39]-   Natural tension exists between the US lawyer groups working in Iraq over priorities in the Iraqi Justice system. Issues copmpeting for priority are security, attacks on Coalition and Iraqi forces and civilian targets, government corruption, organized crime, street crime and then civil rights, and the civil law (contracts, property etc). The five-year US-led justice reform program had as its first priority capturing, holding, and prosecuting suspected insurgents. Understandably, security and stability had to be achieved first and prosecution of corruption and organized crime followed closely. Nearly 50 judges have been assassinated in the past five years, along with an unaccounted number of lawyers.

Policy-makers at the US Embassy in Baghdad, who control the purse strings of an estimated $120 million annual justice system budget (excluding police funding) for Iraq, are still committed to a strategy that is primarily focused on the detention and prosecution of the 21,000 Iraqi prisoners in coalition custody. "The top priority of the American military is always going to be criminal prosecutions; …if you have someone shooting at soldiers, you want to have them prosecuted quickly and efficiently." Other lawyers believe a justice system should also include more vigorous criminal defense standards; and any modern state needs effective civil contract and property rights enforcement to achieve simple justice for its people, and to promote conditions for economic growth and foreign investment.

The nastiest turf battles were between Justice and the State Department. An October 2005 Office of Inspector General for Iraq Reconstruction audit of Rule of Law in Iraq describes a combative work environment." Jockeying between agencies and the field, chiefly [the Justice Department] and [the Bureau of International Narcotics and Law Enforcement Affairs at the State Department], divert motivated, talented employees from the tasks at hand which arise from genuine policy differences and replay disputes that originate in Washington," the audit says. "At root is [Justice's] perception that it has the requisite judicial expertise and should be able to operate on its own." The political infighting, coupled with tremendous political pressure to transform Iraq into a law-abiding democracy overnight, has resulted in millions of dollars of misspent money. There is clear suspicion of those far-reaching, expensive justice reform projects.

Five years later, U.S. and Iraqi lawyers say that things are getting better here, "It would impress anyone to see the dedication of people at the courthouses — the clerks, the judges, the lawyers." Courthouses are packed with Iraqi civilians. Yet they still describe a justice system in dire need of reform. Most police aren't trained to preserve and collect evidence. Instead, they still rely on confessions, which are often obtained through torture. Prisons, including juvenile facilities, are overcrowded and unsanitary. Civil courts are open, but painfully slow, and petitioners have little confidence that rulings will be enforced. An attorney's influence usually depends on his relationship with the judge. US lawyers say that the Iraqi lawyers have a thirst for knowledge, but that it will take a generation to make up for 35 years of legal neglect in Iraq.[40]

How long will it take before the Iraqi justice system operates at a level that the Western world deems acceptable? "As Americans we tend to be impatient … 'Why can't you see the merit of doing it the right way?' we wonder. We shouldn't condone complacency, but we also have to look at what we're doing here in the context of history. Iraq won't change overnight. This is evolution, not

revolution."[41]

9.   What's Next For Iraq? - "The United States is now clearly in the end game in Iraq …The security situation is clearly still subject to sudden outrage at any moment by Al Qaeda in Iraq (AQI) or to degradation because of provocative behavior by the Maliki government. However, the bottom line is a dramatic and growing momentum for economic and security stability which is unlikely to be reversible."[42] The lawless disintegration of the state at province and municipal level has now largely abated as the Iraqi National Police have regained control of conflict areas.

The Iraqi Army has gained enormous numbers and has new leadership prepared to fight and die to keep Iraq together. The Maliki government remains largely dysfunctional in its ability to deliver services to the population, and the struggle for power has increasingly moved to political warfare from the battlefield of the streets. The officer corps of the Iraqi military is much improved over a year ago-but the bench is thin. Young officers at company and battalion level show great promise and courage, while the legacy of the Saddam nightmare weighs heavily on the culture of the more senior officers. Finally, the confidence of the Iraqi combat force is still dependant on US mentoring and backup. Their officers are very explicit on this point—THE IRAQI SECURITY FORCES DO NOT WANT THE US COMBAT UNITS TO LEAVE—YET. [General McCaffrey's emphasis]. The leadership and courage of US military forces in Iraq (and increasingly the Iraqi Security Forces) has kept the country together. [43]

From "How to Leave a Stable Iraq"[44] The Iraq war has become one of the most polarizing issues in American politics. Years of bad news from the front polarized differences on the war along partisan lines and embittered many on both sides; but p**ositive developments in the past year and a status of forces agreement that resolves the issue of when US forces will leave Iraq have moderated contentious issues, so that US combat forces should be able Iraq in 2011 in relative stability. The** prognosis is now much more promising than it has been in years. With a degree of patience, the US can build on a pattern of positive change in Iraq that offers will allow it to withdraw its combat troops without giving up hope for sustained stability.

Most Americans have a mental image of Iraq that is defined by the chaos of 2006. But Iraq today is a very different place than it was then. Overall violence is down at least 80 percent since the surge began, and ethno-sectarian violence is down by over 90 percent. This remarkable change in Iraq's security situation results from the interaction of Al Qaeda-in-Iraq's errors, the surge in US troop levels, the growing capacities of Iraqi Security Forces (ISF), and the downstream consequences of all of this for the Shiite militias. The surge, and especially its new emphasis on the provision of direct population security by US forces, enabled the Sunnis to survive aligning itself with the U.S. and AQI's inevitable counterattacks. In Anbar, U.S. firepower, combined with a persistent troop presence and Sunni knowledge of whom and where to strike, essentially expelled AQI from the province. News of this "Anbar model" spread rapidly among disaffected Sunnis elsewhere. In just a few months, the result was a large-scale stand-down of the Sunni insurgency and the decimation of AQI throughout western and central Iraq.

As the violence declined, two big changes in the Iraqi state took place — one military, one political. On the military side, the ISF have grown much more capable than they were in 2006. The size and competence of these Iraqi forces have allowed US commanders to maintain population security even as US troop strength has declined significantly since the surge. **At the same time, the US has greatly expanded its advisory effort.** Sectarian, corrupt, incompetent, and turncoat officers have been removed. Aggressive recruitment and new amnesty and de-Baathification ordinances have led to

increases in both the number of Sunnis, especially in the officer corps, and the number of people with prior military experience in the forces. There are still problematic elements in the ISF, and a renewal of ethno-sectarian violence would severely test allegiances. But declining violence enables sectarianism to be policed more quickly, consistently, and harshly than in the past. The result has been important progress, which has been reflected in improved public perception of the ISF.

The Iraqi National Police provide another critical example of this progress. As recently as the fall of 2006, the national police force was a disaster. It was infested with Shiite militias as well as every variety of coward and criminal, and police units often acted as anti-Sunni hit squads. But a new commander has turned the force around. Police units are now capable of supporting army units in combat zones, and popular trust in the police is growing. The ISF have improved to where they have become a partner to US forces in Iraq, but they will require outside support for some time to come.

Iraqi politics are changing as well. Tensions, mistrust, and competitive pressures remain severe. But thanks to reduced violence, diminished sectarian warfare, weakened militias, and the prospect of upcoming elections, the old patterns of Iraqi political life are giving way to new ones. This moment of change brings risk and uncertainty, but those old patterns were so clearly dysfunctional that this transition offers an important opportunity.

Over the past 18 months, militias have been significantly weakened. **Now that the Iraqi people are rejecting the militias, the political parties that had long served as facades for them are scrambling to be seen as helping to improve the government's capacity to deliver security and essential services, in the hope that voters will forget how badly the parties hindered that process before 2007.** For now, there is still more potential than realization. Legislative progress on reconciliation continues to be slow, factional and sectarian differences remain divisive, and there is still no new political alignment or movement with the power to bridge these divides. Some argue that the US must withdraw. Threatening withdrawal might speed this progress, but today it seems more likely to derail it instead. Iraqis, out of fear for their own safety, might well respond to a threatened US withdrawal by preparing for renewed warfare. Withdrawal is the biggest threat that Washington can issue, but it is also a blunt instrument with great potential to damage both parties' interests. In an environment of increasing stability, the US can now hope to succeed with subtler methods.

New Problems, not no problems- **If the US and its coalition partners are to keep Iraq moving toward stability, they must still overcome a range of new challenges. These problems promise to be less daunting than those faced at the beginning of 2007, but they could still plunge Iraq back into civil war.** Achieving this will require tackling a number of second-order issues, which are growing in visibility as the first-order problems of rampant sectarian and insurgent violence abate.

First, there is the challenge of integrating the Sons of Iraq into the ISF and the Iraqi government. The stand-down of the Sunni insurgency under the Sons of Iraq program has been a critical element in the reduction in violence. Most Sons of Iraq groups want to be integrated into the government security forces-a move they see as the best guarantee that a Shiite regime will not use the ISF to tyrannize them. But Maliki's government has been dragging its feet out of fear of empowering Sunni rivals. Until the Sunnis fully trust the ISF, the peacekeeping role will largely fall to the US military-and in fact, many US brigades already spend much of their time involved in peacekeeping duties to enforce the terms of Sons of Iraq contracts.

Returning refugees and internally displaced people are another important second-order problem. The first-order problem of the civil war created about four million refugees and internally displaced people. Some of them are now starting to return home, and many more can be expected to follow if security

continues to improve. The returnees often have neither jobs nor homes to return to.

The Iraqi central government's administrative capacity and the country's economic progress still lag far behind the gains in security, and there is still much to be done before Iraq has a mature political system and a productive economy capable of meeting the Iraqi people's basic needs. Credible public administration is important for sustaining improved security. As part of the surge strategy, the US increased its support to Iraq's provincial governments, which are better able than the central government to develop the capacity to deliver essential services. US civilian and military personnel, most deployed in new PRTs, have fanned out into the countryside to help Iraqi officials build local and provincial governance structures and utilities.

A final second-order problem worth noting is the thorny issue of Kirkuk. The city and its environs, once heavily Kurdish, were "Arabized" by Saddam in an effort to weaken the Kurdish hold on Iraq's northern oil-producing region. Many Kurds were displaced by the influx of Arabs, and now in much of the city two different families claim every house. The good news is that the Kurdish leadership recognizes the difficulties and has so far supported the UN process established to handle it.

Whither the US Presence?- For now, US troops are playing an important role in sustaining the fragile hope and security in Iraq. Current troop levels must be reduced pursuant to provisions of the status of forces agreement (out of Iraqi cities by 2009 and out of Iraq by 2011), but there is still some question about drawdowns within the timetable provided by the agreement. One possible model if current trends continue is provided by the recent developments in Anbar Province, which has famously gone from being the worst area of the country in 2006 to nearly its best today**. The US will also have to continue to provide key "combat enablers"-aerial surveillance and air, artillery, and armor support-to Iraqi forces in battle.** But the ISF are now providing most of the infantry and policing manpower, and the continued presence of US military forces after 2011 will have to be agreed to by the Iraqi government.

10. Conclusion - Establishing the Rule of Law is the ultimate test of legitimacy of a government facing an insurgency, and that Rule of Law must stand up during nation-building. When viability is achieved, Rrule of Law is transparent, effective, efficient, and is the absolute expression of nation building. There are brave dedicated people in Iraq's judiciary, but they do not yet have security or independence from political pressure, and the government still encroaches on judicial independence. Colonel Craig Trebilcock's articles[45] in The Army Lawyer are still controlling. Even with improved security, he wrote in early 2006: "Any 'chicken and egg' analysis, asking which must come first-security or reform-misses the mark. Both must trudge forward in tandem, occasionally making progress and occasionally enduring setbacks, without losing sight of the objective. The Rule of Law will not succeed in Iraq without a more stable security environment, just as a more stable security environment will not endure without the Rule of Law. Progress has been made, but five years after the U.S. invasion, it is fair only to claim that the opportunity for the Rule of Law still exists-not that the goal has been achieved. The will for continuing self-sacrifice from Iraqi jurists, the Iraqi people, and security forces is necessary for success. The Rule of Law will be established only when Iraqi judges apply the Rule of Law to a given case without self-interest or fear for their survival. Until that day, however, the end state for the Iraqi judicial system is still up for grabs."

Great optimism remains for the Rule of Law because the essential pieces are in place. Iraqis have a system (European style courts and a mix of European and Arabic laws), and are not looking to be remade into the American image. They want the mentoring in the modern technique and technology of investigation, evidence gathering, and case management. We succeed by working with them within

their system. Do people support US rule of law policies in Iraq? They want to, but see the limits.

The Rule of Law has not yet been achieved. The chill from over fifty assassinations of judges has left the judiciary keeping a low profile. Political interference is a reality and is conducted through Ministry of Finance budget control and legislation limiting anti-corruption operations and pressure from local officials. Measures at reconciliation forced the Chief Judge to redraw the line of acceptability, taking back judges fired by the Judicial Review Committee for corruption. Too many judges are still corrupt and do not maintain an acceptable caseload.

Aside from political and insurgent violence, organized crime and corruption remain the biggest elephants in the room, outgunning the police and intimidating the courts. Presently, anti-corruption efforts are stalled by policy and legislation of the Iraqi government. Al-Maliki and the legislature have, in effect, created a class of privileged persons above the law with freedom to steal public money.   So while security is improved, the judges remain intimidated by 50 assassinations and countless threats.

If security is not a threat, then corruption, organized crime and a legislative/ executive policy remain a barrier between the current status of rule of law and the dreams of Iraqi people. Given security from violence, independence from politics, and elimination of corrupt judges and officials, and given continued mentoring, Iraqis may well find their way to the Rule of Law. The pieces are there, but it is still very much a work-in-progress. For now, in Iraq *justice is still in waiting*.

"*Don't leave us…Finish your Holy task…Don't leave us like you did in 1991"*

Iraqi lawyer addressing Coalition Provisional Authority lawyers, Baghdad, January, 2004

"*How soon you want the troops to leave depends on how soon you want them back.*" Haitian citizen on U.S. troops in Haiti in 1994 [46]

"*The Choice is not between war and peace. The choice is between war and something much worse.*" Senator John McCain   2004

"*The Iraqi Army and police are getting into the fight…The 'bad guys' days are numbered"*

Chief Judge Medhat Mahmood   2005

"*In Iraq, things are better…not great… but better.*" Comments by an Iraq lawyer, 2008

Part III- US Security Agreements and Iraq[47]

Historically, the status of forces agreement is a legal framework that defines how foreign militaries operate in a host country. There is no uniform or standard format for the document, which can vary in length and specificity. Two major agreements, a status of forces agreement and a broader strategic framework agreement, have been approved by Iraq's parliament and the US ambassaor to the US. They cover Criminal and Civil Jurisdiction, Military Operations, Withdrawal Timeline, and Committees necessary to implement and monitor the terms and conditions of the agreements.

The first, a status of forces agreement, or SOFA, codifies legal protections for US military personnel and property in Iraq. The final version contains agreement to a total withdrawal of US troops from Iraq by the end of 2011, calls for restrictions on how troops conduct missions, and requires a pullout from Iraqi urban areas by July 2009.

The strategic framework agreement was broadly aimed at addressing issues not covered by the SOFA. Among these issues are the US role in defending Iraq from internal and external threats, US support of political reconciliation and US efforts to confront terrorist groups. The final version of the strategic framework focuses primarily on shaping future cooperation on cultural, energy, economic,

environmental, and other issues of mutual interest.

SOFA Legal Framework- Status of forces agreements are used to define the rights and obligations of militaries operating on foreign soil, detailing everything from how soldiers wear their uniforms and carry weapons to how their mail is delivered. But the most common issue addressed is the legal jurisdiction over foreign forces. Such jurisdiction is of particular importance to the US military. According to a November 2003 Department of Defense directive spelling out the Pentagon's SOFA policy, the United States enters SOFAs to protect "personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons." The granting of immunity to US military personnel has become a source of friction for host countries where SOFAs are enforced. The US enters SOFAs to protect "personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons." (2003 Pentagon policy memorandum)

Currently, multinational forces, international consultants, and US personnel are immune from Iraqi legal jurisdiction. In November 2007, President Bush and Maliki signed an agreement spelling out the political, economic, and security issues to frame relations between the countries. Left out of the new security agreements are legal protections for nonmilitary personnel, an ommission that could lead some US contractors to conclude that doing business in Iraq is too risky. The agreement allows for nonmilitary contractors to be subject to Iraqi law, a change contractors fear will open civilians up to unfair prosecution.

"The SOFA is a misnomer here; it's a SOFA-plus. The linchpin of the debate over the SOFA was a "right-to-fight" clause which provided the legal authority to conduct military missions after the UN mandate expired. Some experts have said the provision requiring US troops to leave Iraqi cities by the summer of 2009 could render them powerless in containing future violence. Among the most debated changes outlined by the security deal-in addition to withdrawal from cities by mid-2009 and total withdrawal by the end of 2011-are requirements that US combat troops coordinate missions with the Iraqi government; hand over prisoners to Iraqi authorities; relinquish control of the Green Zone; and give Iraqi authorities the lead in monitoring Iraqi airspace. The agreements will not allow permanent US bases in Iraq, nor do they specify the number of American forces stationed there.

Strategic Framework Agreement- In addition to the SOFA, a strategic framework agreement was negotiated with Baghdad, defining relations on economy, culture, science, technology, health trade and broadly address issues outlined in the November 2007 agreement. Political and economic items make up the bulk of the strategic framework, Among the most contentious issues was whether its principles would be binding, or if it would indefinitely commit Washington to defending Iraqi sovereignty.

Most of the Iraqi committees created to guide the transition from US to Iraqi control of security in the country have yet to appoint members, let alone convene; but progress is being made in key areas of the transition, such as control of Iraqi airspace and the Green Zone safety area that houses Iraqi government offices and foreign embassies.[48]

Former Navy JAG lawyer Tara Lee[49] said that the SOFA with Iraq abdicates the jurisdictional reach of the US over contractors (not just security contractors) who are US citizens acting on its behalf, which is too high a price to pay for recognizing Iraq's sovereignty. She referred to a UN report that was highly critical of the absence of due process in Iraq's criminal justice system. The US government is offering its contractors no due process guarantees, no indemnification, and worst of all, no answers. According to Ms. Lee, the plan seems to be to have no plan. "We're just going to wait and see how the Iraqi courts handle each case as it comes up. Critics state that recognizing the sovereignty of Iraq is

important, to be sure, but abdicating the jurisdictional reach of the United States over the citizens acting on its behalf is too high a price to pay for that recognition."

Conclusion- As of mid-January 2009, it is too early to assess the real impact of these agreements. They will test the Iraqi government as to its policy toward continued US presence in Iraq and the competence of its government, especially its judiciary, in fulfilling requirements in a just, timely and secure manner. The Iraqi government could use these agreements to make US military and contractor missions impossible. There is also the potential for mission failure by reason of political influence, delay or corruption by some judges. Only time will tell if the Iraqi government can maintain and enhance the fragile legitimacy it gained during the surge and become a model of democracy, human rights and the rule of law as envisioned by the US.

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Promoting the Rule of Law in Stability Operations: Myths, Methods and the Military

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About the Author

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The 9/11 attacks and subsequent US military actions have made it clear that warfare is no longer a matter of large force against large force. Instead of the US being threatened by a peer or near-peer such as the Soviet Union, the threat has became one of small, secretive groups using information and terror to wage asymmetrical war against a Leviathan they cannot not hope to challenge on equal terms with conventional forces. The US has discovered that the nations which pose the greatest security threats to the US are fragile, failed and rogue states or ungoverned areas in which terrorist groups can find havens. The US has also learned that military force, by itself, cannot bring a resolution to the conflict; in many instances, the conditions necessary to ensure our national security can only be created by stabilizing and reconstructing these states and areas.

The US military has been ill-prepared to engage in such asymmetrical conflict. After Viet Nam, all the military departments focused on the effective and efficient use of massive force to defend against the Warsaw Pact and similar threats. They did very little to prepare to deal with insurgencies or the societal problems that bring about the weakening or collapse of a state. Even the peacekeeping operations in the Balkans did little to change the mindset-those actions were considered by many to be annoying distractions from the true work of our forces, not a core function of the military.

However, the realities of the conflicts in which we have found ourselves have made our military rethink what it must be able to do on behalf of the American people. In November, 2005, the Department of Defense issued DoD Directive 3000.05, "Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations."[i] This Directive made the startling change of declaring that "stability operations are a core US military mission that the Department of Defense shall be prepared to conduct and support." The Directive also states that the military shall give stability operations "priority comparable to combat operations."

In the Directive, stability operations are defined as "military and civilian activities conducted across the spectrum from peace to conflict to[1] establish or maintain order in states and regions."[ii] One of the stated long-term goals of stability operations is to help develop indigenous capacity for securing the "rule of law."[iii] However, "rule of law" is carefully left undefined in the Directive. This lack of definition for the military is not surprising, given that the various US civilian agencies and international agencies who have been engaged in promoting rule of law have had little success in developing a comprehensive definition of what it is they are attempting to do.

While the Directive is a recent development, the military missions it describes are not. Since World War II, the US military has maintained Civil Affairs units to perform many of the tasks required in stability operations, including what are now called rule of law operations.[iv] The Civil Affairs force is composed primarily of Army units, with some Marine Corps units and a nascent Navy capability, and is designed to provide humanitarian assistance, perform reconstruction and nationbuilding, and, when required, perform all the functions of government in foreign areas under US military control. [v]

Army Civil Affairs organizations include military lawyers, public safety specialists, and others needed to carry out rule of law operations. As might be expected, the field experience gained since 2001 has resulted in considerable development of Civil Affairs doctrine and training, including that applicable to rule of law. Joint and Army doctrine on Civil Affairs currently recognizes six functional specialty areas, which are Rule of Law, Governance, Infrastructure, Public Health and Welfare, Economic Stability, and Public Education and Information. None of the functional areas are properly susceptible to operations independent of actions in the other areas, nor can they be done effectively without being part of an overall plan of reconstruction and development.[vi]

This paper examines some of the definitional conundrums and myths of what is termed by Carothers and others as the "rule of law orthodoxy."[vii] It will examine some methods that can be used by US military lawyers, Civil Affairs personnel and civilians to establish essential elements of a basic rule of law system. Finally, the paper will examine the roles of the military and civilian agencies in promoting rule of law during stability operations.

What is the "Rule of Law?"

Lord Paddy Ashdown gave us an idea of the importance of rule of law in post-conflict and other stability operations in his editorial, *What I Learned in Bosnia*:

> We thought that democracy was the highest priority and we measured it by the number of elections we could organize. In hindsight, we should have put the establishment of Rule of Law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, and public confidence in police and courts.[viii]

But what then is this "rule of law" that has such high importance? The rule of law is a mythological animal. It changes its shape and color, depending on where and how you look at it. It has magical properties. It is widely sought after, but elusive. For some, holds out the solution to all problems. For others, it is like the Cheshire Cat, and annoyingly fades away just when you think you have it. And, like griffins, phoenixes and the like, many people simply don't believe in it at all.

"Rule of law" is often cited as being a very important strategic goal of the United States. The term "rule of law" is found numerous times in major official strategy documents, including the National Security

Strategy 2006,[ix] National Security Presidential Directive (NSPD)-44,[x] and DoD Directive 3000.05. However, there is no definition given in any of these documents for "rule of law." The phrase, "rule of law," is grand rhetoric; it conjures up a connotational genie of that which is self-evidently good, right, unopposable and inevitable, the high road to the Promised Land.   In part, the appeal of the concept lies in its very ambiguity and multiplicity of meaning; those with widely divergent and even contradictory positions can nonetheless applaud the ideal of promoting the rule of law. Indeed, many academic writers happily and profitably devote considerable time and words to examining the nuances of the phrase.

But the question "What is meant by 'the rule of law'?" is one that needs to be asked. It is easy to talk at cross purposes about rule of law when one party to the conversation views rule of law as pertaining to the legitimacy of a military intervention and the conduct of the intervener's forces,[xi] while another is concerned with "fundamental" human rights, a third regards it as a tool to promote investment, and a fourth looks upon it as a principle of governance pertaining to having a functioning and effective system of police, courts, and corrections. Numerous definitions have been proposed, and each sheds some light on the concept. Some relevant examples follow.

A relatively simple, and deliberately nebulous, definition is given in Army Civil Affairs doctrine: *"Rule of law* pertains to the fair, competent, and efficient application and fair and effective enforcement of the civil and criminal laws of a society through impartial legal institutions and competent police and corrections systems."[xii]

A frequently referenced and adopted definition is one articulated by the UN, which states that rule of law:

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

This definition has been incorporated, with minor modifications, into the US Army's new FM 3-07, *Stability Operations* (October 2008):

> *Rule of law* is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, and legal certainty. Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency.[xiv]

As will be discussed below, there are difficulties with this definition, especially when the attempt is made to apply it to stability operations. A more pragmatic definition is proposed by Stromseth, Wippman and Brooks:

> The "rule of law" describes a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules, and in a manner that respect fundamental human rights norms (such as prohibitions on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions, and extrajudicial killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying those institutions and codes. [xv]

A fourth definition describing the systems involved in rule of law is given by MG(Ret) Tim Ford in a rule of law conference held by the US Army Peacekeeping and Stability Operations Institute in 2004, in which "rule of law" is described as

> . . . the establishment of those systems and organizations that provided social order and stability. These organizations included law enforcement agencies; judicial systems; a law system; human rights; and functioning government structure at local and national levels that were representative of the people. [xvi]

It is apparent that while the various definitions share common elements, the nuances between the definitions may vary considerably, and frequently the terms used in the definitions may themselves be ambiguous, highly connotational, and fraught with unconsciously absolutized cultural norms of a particular time and place. These definitions, if taken together cautiously, may serve as a starting point for discussion, but are by no means dispositive of the question.

Myths

Rachel Kleinfeld has made a perceptive analysis of competing definitions of the rule of law in a paper for the Carnegie Endowment.[xvii] She identifies five basic end states which define the rule of law:

Government bound by law

- Equality before the law
- Law and order
- Predictable, efficient justice

● Lack of State violation of human rights.

Kleinfeld goes on to say that these definitions are not mutually exclusive, but identify ends sought by rule of law interventions. All five ends are likely to be applicable to a given intervention; indeed, these ends are "complementary but often in tension," with changes in one producing changes in the others. [xviii]

It is of note that most of these definitions discussed by Kleinfeld have a very strong ideological flavor clearly harking back to the *Rechtsstaat* thought of Kant and other Western philosophers.[xix] Notably, law and order is not one of one of the key elements of what constitutes the ideal rule of law state; indeed, much of Western thought on rule of law has focused on reducing and controlling the otherwise unbridled power of the state, rather than making the state more effective and efficient in controlling the activities of its populace. The fundamental creed of the rule of law orthodoxy is to make the state "ruled by law, rather than by men," as it is often phrased.

In much rule of law thought, it is assumed that it is better to have the government bound by law (whatever that means) than not, that equality before the law is in and of itself desirable, that predicable and efficient justice is a good in and of itself, and that a state that does not often violate human rights is better than one that does. While arguments are frequently advanced to couch these Western ideals in terms of pragmatic effect-equal treatment leads to less discontent, therefore the society will be more stable; or, a predictable, efficient justice system will attract more foreign investment, thereby producing economic growth-it has been pointed out that there is very little empirical evidence to support claims that programs to spread these good, true, and beautiful ideas actually produce any noticeable effect.[xx]

The plethora of potential definitions arises from the deep, and often unconscious, assumptions about the rule of law held by those who speak and write about it. These assumptions form the foundation of the rule of law mythology. The words "myth" and "mythology" as used here do not refer to falsehoods, but to ideas that are compelling and cherished, even though they may not reflect anything empirically verifiable. The problem that we practically inevitably will encounter is that our rule of law mythology may not at all resonate with the deeply cherished myths held by non-Westerners about the same subjects.

The biggest conceptual barrier to conducting effective rule of law operations is the inability of Western interveners to understand that what they subconsciously believe to be universal principles are in reality the products of their own culture. At best, this barrier will make it difficult, if not impossible, for the interveners to understand what will actually work to modify conditions in the culture they are attempting to influence. At worst, their efforts to impose foreign ideas on an unwilling populace may create a new driver of conflict.

The UN definition and its Army variant quoted above is a case in point. While it is quite satisfying emotionally to Western lawyers and others who have internalized Western social ideologies, there are severe difficulties with this definition, at least when it comes to planning and executing rule of law operations as part of a stability operation. It is one full of high sentence, but a bit obtuse. Like many UN pronouncements, it is vague enough so that disparate groups who hold diametrical views can accept it because they can interpret it as being in consonance with their beliefs. It tacitly assumes universal acceptance of Europhilic political and human rights principles which significant population groups outside North America and Western Europe dispute as being contrary to their fundamental cultural beliefs about religion, politics, and society. It is aspirational, almost evangelical in its tone, and utopian in its outlook. From the position of those planning and executing an intervention, it is largely useless because it is utterly open-ended; there is simply no point at which any program, military or

civilian, can conclude that it has achieved its goals because the perfection required by this definition is inherently unachievable. In reality, it is no definition at all; it is a credal affirmation of certain culturally-bound philosophical principles about what constitutes proper governance, rather than a description of an achievable set of conditions within a society.

Anyone who has seriously acquainted with the political and legal systems of the US, the United Kingdom, the members of the European Union, Japan or other developed nations would have to say that the high standard stated in the UN definition has not even been remotely achieved in any of the Western-style democracies.[xxi] It is overly optimistic to adopt such a lofty and difficult standard to guide stabilization and reconstruction of a state that is dysfunctional to the extent that an international military intervention is necessary. A less exalted, more pragmatic statement of what we mean by rule of law should be used to guide our efforts to stabilize a society that is entering, embroiled in, or emerging from violent conflict.

This is not to say that we should not conduct or support programs which advance these lofty principles; however, one of the lessons repeatedly observed in the Balkans and the current conflicts in Afghanistan and Iraq is that in fragile, failed and formerly rogue states, the first and most critical task is not to restrain the government, but to restore a modicum of social order.

We may be able to develop more effective programs to achieve some functioning law and order if we do not try to accomplish massive changes in a culture too early in the intervention. We might first want to accomplish the more humble goal of creating the conditions whereby the average person can earn a living, raise a family, and walk down the street without risking life, limb and property, and which allows most people to settle their disputes without resorting to private violence. These conditions can be the foundation for deeper, more significant reforms which may be implemented eventually. Moreover, we should always keep in mind that, as foreign interveners, our purpose is to stabilize conditions in the host nation society, not restructure that society according to our own notions. One part of our own Western mythology we sometimes forget is the right of the people of the host nation to self-determination: by our own standards, they are entitled "to freely pursue their economic, social and cultural development,"[xxii] even if that is not exactly to our liking.

The Orthodoxy

In addition to its mythology, rule of law also has an orthodox methodology for achieving its perceived ends, which Golub[xxiii] identifies as consisting of the following points:

- State institutions are key
- The judiciary is central to rule of law development
- Judicial reform is a valuable end in itself
- Institutional changes have society-wide impacts
- Institutional reform is sustainable-civil society reforms are not
- Support to state legal institutions will lead to self-sustaining reforms and enduring improvements.[xxiv]

What this approach normally translates into in terms of programs are:

- Rebuild and repair court houses and prosecutors' offices
- Give the courts computers, equipment, furniture and supplies
- Train judges and prosecutors, usually by bringing in foreign experts
- Train administrative personnel in efficient (Western) ways of tracking and processing cases

- Revise legal codes to make them more rational (e.g., Westernized)
- Have international exchange programs to take host nation legal personnel to the US or Europe to see how we do things
- Set up bar associations.

However, this orthodoxy does not adequately address a number of aspects critical to establishing or restoring a functioning rule of law system. Orthodox rule of law programs are frequently done by lawyers, and are usually focused on what lawyers understand and do. Lawyers tend to think in terms of formal structures-law codes, civil and criminal procedure, and court organizations–and have little interest or tolerance for the informal procedures that frequently supplement or supplant formal systems. However, an effective rule of law system has many more elements than simply the formal court systems. Alternative methods of resolving disputes, such as traditional justice, should be considered as part of the overall system. Effective and legitimate policing and corrections are also critical. And public awareness, acceptance, and support of the overall system are essential to creating lasting change.

A persistent problem identified by Kleinfeld[xxv] and many other authors is that most rule of law practitioners simply focus on building the capacity of indigenous institutions, rather than seeking to determine the desired ends and seeking to find ways to reach those ends. Such a simple approach is perfectly natural-it is much easier to identify that a court house does not have electricity, or that judges are not educated, and set up readily measurable programs to correct those problems. It is very easy to report to the world, or at least to higher headquarters, that "we installed generators for ten courthouses in Wardak province," "we trained 200 judges in Kandahar," or "we built multi-million dollar court complexes in Iraq."

However, such reports fail to address the more difficult to measure, but much more significant questions of what ends were actually furthered by these projects. It does very little good to install generators in court houses if there is no provision for fueling the generators over time, or if few people in the district regard the courthouse as a place to resolve disputes. It may be counterproductive to train judges if the contractors hired to do so ignore the national codes, and instead teach a rather strict Wahabi interpretation of Islamic *Shari 'a* which actively opposes ideas of gender equality, religious toleration or other human rights principles dear to Western interveners. And a courthouse facility may facilitate, but is not essential for effective justice; wise and just decisions may be rendered by a competent judge sitting under a tree.

Beyond Myth and Orthodoxy: Developing a Pragmatic Definition

What is needed is a pragmatic statement of what we mean by "rule of law" which can be the basis of determining the ends, ways, and means for creating stability in a fragile, failed, or formerly rogue state. Such a statement could perhaps be based on the Civil Affairs definition cited above, although that statement is preliminary and intentionally nebulous. A more complete statement would incorporate the elements addressing the systems of social order and stability referred to in the definition given by MG(Ret) Ford above. It should also incorporate the characteristics of the rule of law state of affairs described by Stromseth, Wippman and Brooks above. Additionally, a more complete statement should include concepts which would guide the planner and operator in determining what the goals of a program should be.

Generally, the overall objective of such programs should be to establish a set of rule of law systems that are effective, efficient, locally legitimate, internationally acceptable, and which reduce the drivers of conflict.

Effective: the systems must be able to resolve criminal charges and other disputes in a final manner, and must be able to enforce those decisions, whether that requires punishment of someone who has been convicted of a crime or enforcement of a judgment on a property or contract issue. They should also be a deterrent to criminal and other conduct which violates the system of rules.

Efficient: the systems must be able carry out their essential tasks satisfactorily, while operating within the constraints of the resources of time, money, and people that the society is able to make available for them, without having to rely on extensive international aid.

Locally legitimate: the central element in stabilization is establishing both a set of societal rules as well as methods of adjudicating and enforcing those rules that are viewed as legitimate by the people of the host nation. In order to have a set of rules which are viewed by the populace as legitimate, they must be perceived by most of the people as being validly imposed, in consonance with their moral views, and as being obligatory. Further, there must be recognized and accepted methods of interpreting and applying those rules (courts, arbitrations, councils of elders, etc.), and recognized methods of enforcing them (police, corrections systems, social sanctions, etc.).

Other characteristics of local legitimacy are that the rules are perceived by the populace as being applied fairly (e.g., crimes are adjudicated and punished more or less the same for all groups; disputes between members of different groups will be adjudicated and the determinations enforced on the basis of the established rules, rather than group affiliation) and are administered effectively (e.g., the enforcement mechanisms work most of the time, even against the powerful and well-connected). The ultimate test of legitimacy is that the majority of the populace generally choose to make use of the established rules and adjudication and enforcement mechanisms as opposed to turning to self-help or violence to solve problems.

Internationally acceptable: military interventions and civilian development programs are always tied to the policy considerations of the donor nations. The US and other donor nations have certain results they want to accomplish in the host nation, and their willingness to commit funds and people is contingent upon their perception of the likelihood of achieving those results. The US and many other donor nations have strong commitments to promote democracy, human rights, economic growth, and other ideals. In many cases, there will be tension between what the international community wants and what the host nation populace sees as legitimate. In effect, there will generally be an ongoing negotiation between local legitimacy and international acceptability; while some donor objectives may be undesirable or even offensive to local standards, the local populace (or at least the elites) may accept donor requirements in order to get donor aid. Conversely, donor nations may have to accept less than perfect outcomes in order to respect the principle of self-determination and to accomplish their stabilization objectives.

Reduce the drivers of conflict: An intervention is intended to produce stability, not Utopia. Fragile, failed, or formerly rogue states have conditions which create instability and which push competing groups toward violent conflict. These "drivers of conflict" are usually based on core grievances, which can include tribal or ethnic conflicts, economic and resource issues, competing territorial claims, greed, religious conflicts, or desire for power. One of the most critical steps in stabilization is to properly identify the drivers of the conflict. Stabilization operations can then be planned and executed to address the drivers of conflict and mitigate their effect. [xxvi]

Rule of law systems can create (or exacerbate) drivers of conflict when abuses in such systems create grievances, such as when the police or courts discriminate against tribal or ethnic groups, are otherwise used repressively, or when such systems are corrupt to the point where the populace does not trust

them. Rule of law operations should be intentionally focused on reducing those drivers of conflict, rather than haphazardly attempting to promote uncoordinated improvements in the rule of law systems.

The US Institute of Peace, the US Army Corps of Engineers, and The US Army Peacekeeping and Stability Operations Institute have developed a metrics framework for conflict situations which identifies a number of potential drivers of conflict, including those applicable to rule of law systems, and establishes metrics for measuring the effects of programs to reduce the effects of the drivers of conflict. This framework can be very useful in identifying the rule of law-related drivers of conflict and developing programs to effectively reduce those drivers.[xxvii]

Methods

Turning from the question of "what is rule of law?" to the question of how to do rule of law operations, there are some very pragmatic principles relevant to fostering an effective rule of law system in a fragile, failed, or formerly rogue state in which stability operations have been initiated. Some are so obvious that they are often missed entirely, but they are essential to clarifying the ends sought and the means by which to reach them.

1. Understand what it is you are trying to do.

 Clausewitz, in his seminal *On War*, set forth the simple but essential proposition that the "most far-reaching act of judgment that the statesman and commander have to make is to establish . . . the kind of war on which they are embarking;" war is an instrument of policy, and how it is conducted must be determined by the policy goals it is intended to implement.[xxviii] This principle is applicable to rule of law operations undertaken in support of a stability operation.

This point is obvious, but neglected. Quite often, there is no clear policy guidance as to what is to be accomplished in rule of law operations. Given the ambiguity of the term "rule of law," policy guidance must be more than a platitude to "promote the rule of law." In most interventions in which the military is involved, the immediate goal is not to create the perfect republic, but to try to provide for the security of the population by reducing the causes of the conflict. In formulating policy, it is therefore very important to identify the factors that drive the conflict so that efforts may be focused on the essential rather than the peripheral. [xxix]

2. Proper analysis of the situation is critical.

The initial question is very simple-what can we do with the legal/dispute resolution and enforcement systems that will reduce violence and create pubic order?-but determining the answer to that question is extremely difficult.

The practitioner must understand the formal legal system of the country, but that is not enough. It is imperative to understand the cultural underpinnings of what the indigenous people consider normative, to include religion, custom, family and clan ties, and informal dispute resolution systems. It is also imperative to understand political factors, such as interest groups, informal power structures, and the interests of individuals who control such groups and structures. Rule of law practitioners tend to shy away from political and social group analysis, but it is essential to understand who has power, how power is gained and lost in the society, and how people will react to changes in the power structure.

3. Ensure that what you do affects the results you are trying to achieve.

It is important to develop and implement methods to determine what the conditions on the ground actually are, then apply appropriate tools to determine what, if any, effect the intervention has had, or will have, on those conditions. Metrics must measure what is important, rather than what is countable.

In many cases, measuring effectiveness will require developing and executing sophisticated attitudinal surveys, rather than simply counting courthouses, policemen, or persons put through training programs. Important results do not lend themselves to showing daily, weekly or even monthly progress, and both those carrying out the operations and those evaluating the results need to bear in mind that a metric that can be calculated easily and frequently is usually a misleading one.

4. Have reasonable expectations as to what you can achieve.

In past interventions, the US has gone in with the assumption that a system that suffered from corruption, factional exploitation and neglect for decades could be turned into something Americans would recognize as a working legal system within a few months with minimal commitment of resources. Such assumptions have uniformly proved to be utterly fallacious. Significant change takes time and resources effectively applied to the problem.

5. The immediate goal is law and order.

Stability and safety for the local populace is the first step to achieving any lasting positive change. It is essential to secure the streets, critical infrastructure, and public documentary depositories as soon as possible, even if it is necessary to use military troops to do so. Plans must include provisions for providing effective policing over time, and not assume that the host nation or the international community will be able credibly to assume responsibility for such services before a considerable time has elapsed. Moreover, these security functions must ensure that concepts of justice and humane treatment are observed from the beginning.

6. While dealing with the immediate, lay the ground work for long-range change.

It is essential that we recognize that most of the high-sounding end states described by Kleinfeld are not things that can be created by a wave of the magic wand of the West. There is no place on earth where there is not already a heavily entrenched constellation of cultural norms that forms the substratum of the people's perception of what is right and wrong. We will find no *tabula rasa* upon which we can inscribe our notions of what is the ideal *Rechtsstaat*. This is not to say that we cannot achieve eventual and lasting change, for cultures and laws do change over time, and in many cases do so because of outside influences; however, we must be prepared to invest intensive effort over a considerable period of time-not weeks and months, but years and generations.

7. Take care not to entrench interests that may stifle long-term ends.

Few development interventions are zero-sum events. Even if the intervention is simply drilling a new well, there are usually those who gain power from that well and those whose power is lessened. Rule of law interventions are even more significant, because the mechanisms for rule of law-courts, police, lawyers, the laws-are usually the most potent mechanisms for wielding power in a society. If, for instance, you try to make judges more independent, you may create a class of people who have their own agendas, biases, and allegiances, but who have no checks on their behavior. If you train the police to be more effective at tracking and apprehending criminals, you may merely make them more efficient oppressors. [xxx]

As one person who had considerable experience in development once said, "Do not think you are managing your local contacts. They are managing you. They know what they want to achieve, whether it is power for themselves or for their group, and they will use you to get to where they want to be." While local partners may be quick to learn the buzz words like "transparency," "equality before the law," and "judicial independence," the Western intervener needs to be very cautious, and recognize that merely using the terminology does not mean that the underlying values have been adopted. The words

may be interpreted quite differently, or they may be used simply to garner the support and resources of Western representatives to further their own agendas.

Your local contact may be sincerely trying to "promote rule of law," or he may be trying to exploit you and the financial and other resources you control to reach a goal you may find reprehensible. It is important to gain as much information about your local contacts as possible to determine what their agendas truly are. This can be a very difficult process, since all those who may give you information are very likely carrying out their own agendas.

8. Rule of law is not limited to the formal legal system (lawyers, judges, courts, laws).

While lawyers can, will and must contribute to rule of law projects, merely being an experienced lawyer or judge does not make one expert in doing rule of law operations in a different culture. Many lawyers have attempted to reform the legal systems of Afghanistan and Iraq without any understanding of how the legal systems were supposed to work in the first place. For instance, one of the proposals made to promote rule of law in Iraq was to introduce the jury system. While the proponents were competent American lawyers, they did not understand that the Iraqi system is based on the civil law tradition, where there are no jurors. Unless we are prepared to say that most European civil law countries have unfair legal systems because they do not use the jury system, we can hardly conclude that the Iraqi system is inherently unfair because it does not have juries.

A rule of law system is not limited merely to a formal courts system. Alternative methods of resolving disputes, such as councils of elders and other forms of traditional justice, should be considered as part of the overall system. We must also ensure that there is a strong and readily understandable connection between the laws and the police that enforce them. It does little good to train judges and prosecutors if the police do not understand the laws they are trying to enforce and obey the laws that govern their conduct. The police and the courts must be supported by a corrections system that provides both effective, safe and secure prison facilities and treatment of those incarcerated that complies with international standards.

9. Significant change is a long-term, labor-intensive process.

Rule of law efforts frequently suffer from inadequate personnel resources. There is frequently but one advisor who is charged with implementing the program. He or she may visit the various local participants occasionally, but such contacts are frequently superficial because the practitioner has little time to spend with each of the host nation contacts.

A lesson learned from Civil Affairs efforts is that the best way to begin to influence a village or town is to have frequent contact between the Civil Affairs team and the local officials. Teams visit the leaders of the community frequently and spend considerable periods of time with them eating, drinking tea, and talking. While in America we have a cultural bias about being objective and to the point, most of the world finds our businesslike manners abrupt, discourteous, and untrustworthy. In most countries where we may intervene, establishing friendship and trust are essential to any dealings, whether it involves business, military support, humanitarian assistance, or changing the concept of what is right and what is not right in a legal system.

Rule of law operations should be no different. Instead of one individual making occasional and superficial calls on judges, court administrators, chiefs of police, lawyers, and corrections officials, a much more effective method would be to have teams of four, six, or more people frequently call on the local participants, spend time with them, become friends with them, and learn what their issues are. These efforts must take place over time; there is no way to make the process instant.

10. Efforts should go to what needs to be done, rather than doing those things you know how to do.

Rule of law operators must identify what elements are critical to immediate goals, and gear their actions accordingly. Resist the temptation to focus on what you find easiest to do, and put your efforts on what will actually get to the goals. Suppose one of your operators is a communications law expert, and the host nation has a communications law that is forty years out of date. The temptation would be for the expert to focus on what he knows best, but if communications law is not a cause of conflict, it may be better to find out from his host nation counterparts what they perceive to be the reasons for the conflict, and how they perceive the ways their legal system could work to deal with those underlying causes.

11. Effective Rule of Law Operations require more listening than talking, more learning than teaching.

Many times we approach rule of law as if we (Westerners) have all the answers, even if we have failed to ask any of the questions. We may not understand the host nation system, but we are quick to propose remedies, which generally work to make the host nation system conform to the system to which we are accustomed. At best, we will be discounted or ignored; we well may make significant enemies.

Usually, we cannot change the host nation system directly. What we have to do is change the way significant host nation actors think and act so that *they* change how their system works. One very effective way of influencing host nation actors is to ask them questions about their system, rather than attempting to give solutions. This allows us to learn how the host nation system works and what the issues are, and frequently causes the host nation actors to develop solutions of their own.

Another method is to couch rule of law activities in a mutual learning framework-we offer to share with the host nation actors how our system works, and they share how their system works, so we can learn from each other. Such methods work because they show respect to your host nation partners both as individuals and as representatives of a legal culture. The changes which result are not grafted on from outside the host nation system, but grow from within.

Merely building courthouses, equipping and training police, or attempting to import foreign legal concepts into the host nation system will have little long-term effect on achieving the ends of a rule of law intervention. Success requires assisting host nation participants to change their attitudes, and sometimes their values, so as to favor a set of norms that Westerners consider essential to rule of law.

Rule of Law and the Military

An important issue is determining the proper roles of various US and other agencies in rule of law operations. Many scholars and policy makers have viewed rule of law activities as being a civilian function, and therefore primarily the responsibility of civilian agencies, such as the Department of State, Department of Justice, or the US Agency for International Development (USAID).[xxxi] The Report of the Iraq Study Group reinforces this position.[xxxii]

The great difficulty the civilian agencies have is that they are not designed to be expeditionary. They do not have large numbers of people who are prepared to deploy to a troubled part of the world on short notice and operate there for extended periods of time. The civilian agencies have essentially two resources: in-house personnel and contractors. Frequently, agencies such as the Department of Justice will detail their employees to perform overseas missions, but the employees normally have to volunteer for such duties, and their home organizations have to do without their services in their normal positions

while they are deployed. Few, if any, government civilian agencies have the redundant assets to deploy personnel without having their ability to perform their normal activities seriously degraded.

Another alternative is for a civilian agency to bring in contractor personnel to perform rule of law operations. This option is frequently used effectively by USAID and other agencies.[xxxiii] However, there are limitations to using contractors; they have to work within the scope of their contract, so their activities are not normally subject to the direction and control of US government officials. They are not officials of the US government, so they may not be able to effectively speak to host nation personnel on behalf of the US government. Finally, their legal status is normally that of a private firm or individual, meaning that they have no immunity from host nation criminal, tax, regulatory or other laws as would a civilian or military representative of the US government.

A third alternative is to develop a deployable US government civilian force which would consist of lawyers, judges, court administrators, police and other rule of law specialists, as well as specialists in other disciplines. The members of this corps would be deployable to provide civilian support to stability operations.[xxxiv] On July16, 2008, the Bush Administration initiated the Civilian Response Corps (CRC) as part of the Department of State's Office of the Coordinator for Reconstruction and Stabilization (S/CRS). The CRC consists of three parts: The *Active Response Corps*, who are full-time Government employees whose specific job is to train for, prepare, and staff reconstruction, stabilization and conflict prevention efforts. They are able to deploy within 48 hours and focus on critical initial interagency functions such as assessment, planning, management, administrative, logistical, and resource mobilization; The *Standby Component*, who are full-time employees of various governmental departments who have specialized expertise useful in reconstruction and stabilization operations and are available to deploy within 30 days in the event of a reconstruction and/or stabilization operation; and the *Reserve Component*, who are US citizens not employed by the Federal Government who have committed to be available within 45-60 days of call-up to serve as US Government temporary employees in support of overseas reconstruction and stabilization operations. Reserve officers are critical to efforts to bring "normalcy" to countries by filling capabilities career US Government employees cannot match in expertise or in number. To date, the Congress has not funded the Reserve Component.[xxxv]

The Obama administration has expressed its intent to create a national Civilian Assistance Corps (CAC) of 25,000 personnel: "This corps of civilian volunteers with special skill sets (doctors, lawyers, engineers, city planners, agriculture specialists, police, etc.) would be organized to provide each federal agency with a pool of volunteer experts willing to deploy in times of need at home and abroad."[xxxvi] This appears to be an expansion of the existing CRC. However, it should be noted that the concept of a civilian corps was proposed at least as early as 2004, and took over four years to develop as a concept and get initial funding from the Congress. The CRC is at this point minimally functional, and the reserve component still has not been funded. The progress of the CRC into a viable force to carry out rule of law and other stabilization and reconstruction missions will be dependent on the willingness of the various federal agencies to adjust to supporting such a force, as well as willingness of the Congress to adequately fund it.

Security is major concern with all civilian personnel attempting to work in non-permissive locations. Whether US government civilians, contractor personnel or civilian reserve corps personnel, they must be protected against violence committed by insurgents, warlords, and criminals. This protection must be supplied by US, host nation, or other military forces, the police, or private security firms.

That brings us back to the military, and how military assets can work in partnership with other agencies

to achieve rule of law objectives. The military is designed to be expeditionary, with large numbers of personnel trained and deployable. The military has a robust system of transportation and logistical support, and can place and maintain significant resources anywhere in the world. The military has access to considerable human intelligence resources which can enhance rule of law operations if properly used. Importantly, the military consists of people trained and equipped to survive and protect themselves in a hostile environment; they can provide their own security.

The military can bring considerable capabilities to conduct rule of law operations, especially in non-permissive environments. As an example, Army Civil Affairs units have over fifty lawyers assigned to them for rule of law operations.   These lawyer-soldiers are part of the reserve component, so they each have considerable experience in civilian legal practice. They can also be augmented by a pool of over 3,000 reserve component military lawyers, as well as military lawyers from other services.   In addition to lawyers, Civil Affairs units also have public safety specialists with considerable experience in law enforcement and corrections.

Conclusion

Returning to DOD Directive 3000.05, the military normally supports other agencies in rule of law and other stability operations, but the military must be prepared to execute such operations until civilian elements arrive, and then continue to support the overall US government effort. In evaluating the respective roles of personnel conducting rule of law operations, the important issue is not whether an individual has military or civilian status, but rather whether or not that individual has the skills necessary to analyze the problems, determine an attainable end state, and apply appropriate resources and techniques to influence events to move in the direction of the desired end state. These skills arise out of the individual's experience and training. If an individual's experience and training give him or her the requisite skills to work with reforming a host nation rule of law system, then it should be of little significance whether or not that person is wearing a uniform or comes from a particular agency.

The most important point is that both US military and civilian agency personnel must collaborate effectively on rule of law operations so as to achieve the objectives of the US government. While such cooperation frequently develops in the field as individuals develop *ad hoc*, personal working relationships with other representatives of the US government doing related tasks, the various US organizations, civilian and military, need to develop more formalized and doctrinal relationships and patterns of cooperation long before they attempt to promote rule of law in post-conflict situations. In particular, the development of the Civilian Response Corps and military Civil Affairs should be closely coordinated, given that they have overlapping functions and will likely be supporting one another when deployed. Only by planning, training, and organizing together in advance will the disparate participants be able to function together to arrest and reverse the chaos that inevitably exists in a stability operation.

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[i] The Directive is available at http://www.dtic.mil/whs/directives/corres/pdf/300005p.pdf.
[ii] Directive, Para. 3.1.

[iii] Directive, Para. 4.2.

[iv] DOD Dir. 2000.13, *Civil Affairs* (1994).

[v] Joint Publication 3-57, *Civil-Military Operations* (8 July 2008), which replaced *Joint Doctrine for Civil-Military Operations* (2001) and Joint Publication 3-57.1, *Joint Doctrine for Civil Affairs* (2003).

[vi]Army Field Manual 3-05.40, *Civil Affairs Operations* (September, 2006). Doctrine concerning rule

of law operations is found in paragraphs 2-6 and 2-16 through 2-23.

[vii] See generally, Thomas Carothers, ed., *Promoting Rule of Law Abroad: In Search of Knowledge* (Washington: Carnegie Endowment, 2006). This volume collects a number of essays previously published by the Carnegie Endowment.

[viii] Lord Paddy Ashdown, "What I Learned in Bosnia," *New York Times*, October 28, 2002.

[ix] The National Security Strategy (NSS) is a document prepared by the executive branch pursuant to the Goldwater -Nichols Act in which the administration describes the major national security concerns and how the administration plans to deal with them. The last NSS was published by the Bush Administration in 2006. The Obama Administration has not yet published an NSS.

[x] National Security Presidential Directive (NSPD) 44, Subject: Management of Interagency Efforts Concerning Reconstruction and Stabilization, December 7, 2005. This Directive places the responsibility for coordinating the reconstruction and stabilization efforts of all US agencies, including DOD, under the Secretary of State. The Office of the Coordinator for Reconstruction and Stabilization is organized to carry out that function on behalf of the Secretary.

[xi] Rudolph C. Barnes, Jr., *Military Legitimacy: Might and Right in the New Millennium* (Portland, OR: Frank Cass, 1996), 57.

[xii] Para. 2-6, FM 3-05.40, *Civil Affairs Operations* (September 2006).

[xiii] Report of the Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (United Nations Security Council, 2004), Para 6, http://daccessdds.un.org/doc/

UNDOC/GEN/N04/395/29/PDF/N0439529.pdf

[xiv] Para. 1-40, FM 3-07, *Stability Operations* (October 2008).

[xv] Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (New York: Cambridge University Press, 2006), 78.

[xvi]MG(RET) Tim Ford, Australian Army, *Peacekeeping and Stability Operations Institute Rule of Law Conference Report*, 6-9 July 2004, at 8.

[xvii] Rachel Kleinfeld, "Competing Definitions of the Rule of Law," in Carothers, Promoting *the Rule of Law Abroad*, 31-73. An earlier version of the paper was published at Carnegie Endowment for International Peace, Rule of Law Series, Democracy and Rule of Law Project, Number 55, January 2005. http://www. carnegieendowment.org/files/CP55.Belton.FINAL.pdf.

[xviii] Id., 62.

[xix] Brian Z. Tamantha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 92, 108, 113.

[xx] Thomas Carothers, "The Problem of Knowledge," in Carothers, *Promoting the Rule of Law Abroad*, 15-28, at 17-19.

[xxi] Illustrative of the literature on this point is Frank Upham's "Mythmaking in the Rule of Law Orthodoxy," Carothers, *Promoting the Rule of Law Abroad*,75-104, especially 83-98, where he shows how the US and Japan in particular deviate from the rule of law orthodoxy.

[xxii] "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." UN

International Covenant on Civil and Political Rights, Article 1, Paragraph 1. http://www.hrweb.org/legal/cpr.html. The US has signed, but not ratified, this Covenant.

[xxiii] Stephen Golub, "A House Without a Foundation," in Carothers, *Promoting the Rule of Law Abroad*, 105-136. Adapted from Golub's "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative," Carnegie Endowment for International Peace, Rule of Law Series, Democracy and Rule of Law Project, Number 41, October 2003. http://www.carnegieendowment.org/files/wp41.pdf.

[xxiv] Golub, in Carothers, *Promoting the Rule of Law Abroad,* 109-126.

[xxv] Kleinfeld, in Carothers, *Promoting the Rule of Law Abroad,* 33-34.

[xxvi] See FM 3-07, *Stability Operations* (October 2008), Paras 1-10, D-25 through D-27.

[xxvii] "Measuring Progress in Conflict Environments (MPICE): a Metrics Framework for Assessing Conflict Transformation and Stabilization," Version 1.0 (August 2008). The document is available at http://www.usip.org. The section dealing with rule of law-related drivers of conflict is at pp. 30-38.

[xxviii] Carl Von Clausewitz, *On War*, ed. and trans. by Michael Howard and Peter Paret (Princeton: Princeton University Press, 1989), 88.

[xxix] See the US Department of State, Office of the Coordinator for Reconstruction and Stabilization, *Post-Conflict Reconstruction Essential Tasks* (April 2005).

[xxx] See Halvor L. Hartz and Laura Mercean, with Clint Williamson, "Safeguarding a Viable Peace: Institutionalizing the Rule of Law," in Jock Covey, Michael J. Dziedic, and Leonard R. Hawley, *The Quest for Viable Peace* (Washington: US Institute for Peace, 2005), 157-204.

[xxxi] Kimberly C. Field and Robert M. Perito, "Creating a Force for Peace Operations: Ensuring Stability with Justice," *Parameters*, Winter 2002-2003, 77-87; Robert M. Perito, *Where is the Lone Ranger When We Need Him?* (Washington: US Institute for Peace, 2004).

[xxxii] *The Iraq Study Group Report* (New York: Vintage Books, 2006), 81.

[xxxiii] See US Agency for International Development, USAID *Primer: What We Do and How We Do It*, 22-25.

[xxxiv]US Institute of Peace, "Building Civilian Capacity for US Stability Operations," Special Report 118 (April 2004).

[xxxv] Department of State, Office of the Coordinator for Reconstruction and Stabilization, http://www.crs.state.gov/index.cfm?fuseaction=public.display&shortcut=4QRB (accessed 20 Jan 2009).

[xxxvi]The White House (Obama Administration): The Agenda: Defense, http://www.whitehouse.gov/agenda/defense/ (accessed 20 January 2009).

AFRICOM as the New "New Thing:"Mixed Metaphor or New Paradigm for the Developing World? ©

Written by: Kevin. H. Govern [1]

> **About the Author**
>
> Professor Govern began his legal career as an Army Judge Advocate, serving 20 years at every echelon during peacetime and war in worldwide assignments involving every legal discipline. He is an Assistant Professor of Law at Ave Maria School of Law, is a Law and Legal Studies Instructor for California University of Pennsylvania, and has also served as an Assistant Professor of Law at the United States Military Academy. He has published widely and spoken frequently on international and comparative law, national security and homeland security law, military operations, and professional ethics. He received a Bachelor of Arts and a Juris Doctor from Marquette University, a Master of Laws with International and Operational Law Specialization from the Judge Advocate General's School, and a Master of Laws in International and Comparative Law from the University of Notre Dame.

On the first of October, 2007, U.S. Africa Command, or AFRICOM, officially "stood up" or reached "initial operating capability" (IOC) to start its function as the U.S. Department of Defense's current regional combatant command.[2] Adapting and altering a "Cold War' paradigm of regional military command orientations to crises and combat operations, AFRICOM was conceived to work closely with the African Union (AU), with regional African institutions, and with individual nations, curiously not to take a leadership role but in the words of its first commander, General William E. "Kip" Ward, to "provide unique 'value-added' capabilities to enhance already existing U.S. and international programs."[3] This symposium paper will survey the significant challenges which lie ahead for AFRICOM in providing those "value added" capabilities in advancing U.S. and African economic, security and development policies, and suggest possible ways ahead in these critical efforts.

"Pax Americana" and Africa in the "Arc of Uncertainty?"

In his 10 June 1963 Commencement Address at American University, President John F. Kennedy coined the term *Pax Americana*,[4] a variation on the so-called *Pax Romana* of the Roman Empire, and *Pax Britannica* of the British Empire. For President Kennedy, it was a negative exemplar – what would <u>not</u> be advanced by American foreign and defense policy in the post World War II world:

I have, therefore, chosen this time and place to discuss a topic on which ignorance too often abounds and the truth too rarely perceived. And that is the most important topic on earth: peace. What kind of peace do I mean and what kind of a peace do we seek? Not a Pax Americana enforced on the world by American weapons of war. Not the peace of the grave or the security of the slave. I am talking about genuine peace, the kind of peace that makes life on earth worth living, and the kind that enables men and nations to grow, and to hope, and build a better life for their children — not merely peace for Americans but peace for all   men and women, not merely peace in our time but peace in all time.[5]

The latter portion of the 20th, and indeed 21st Century, has been anything but a peaceful era – there have been over 200 wars and internal armed conflicts from 1899-2001 alone, with each "flame" on the Nobel Foundation map depicted below representing an interstate war, colonial war, civil war, or world war:

Nobelprize.org Conflict Map 1899 – 2001[6]

In the 21st Century, the most current (2005) U.S. National Defense Strategy identifies America as a "nation at war [facing] a diverse set of security challenges … yet … in an era of advantage and opportunity."[7] Africa is identified in the current (2004) U.S. National Military Strategy as lying in:

An "arc of instability" stretching from the Western Hemisphere, through Africa and the Middle East and extending to Asia. There are areas in this arc that serve as breeding grounds for threats to [U.S.] interests.[8]

Indicative of that regional instability, the U.S. had become increasingly involved in Africa since the end of the Cold War, with over 20 U.S. military operations in Africa between 1990 and 2000 and another 10 since 2000.[9] Theresa Whelan, Deputy Assistant Secretary of Defense for African Affairs testified in the Fall of 2007 that the U.S. currently spends approximately $9 billion a year in Africa, "funding programs in such areas as health, development, trade promotion, and good governance. In contrast, security-related programs receive only about $250 million a year."[10]
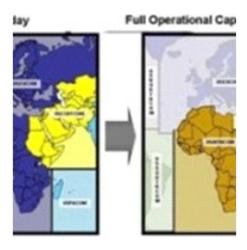
U.S. Assistant Secretary of State Jendayi Frazer believes that "we are living in an historic window of opportunity" in Africa given her observations that in the last five years "[w]e have seen belligerence

yield to negotiation in six contentious settings: Angola, Burundi, Democratic Republic of Congo, Liberia, Sierra Leone and the North-South element of the Sudan Crisis." [11] Noting this historical shift, Secretary Frazer believes that African leaders will face three key challenges: consolidating democratic gains, expanding economic growth, and stemming the spread of HIV/AIDS.[12]

Centralized Authority in a Divided World: From Goldwater-Nichols to AFRICOM

The World With Commanders' Areas of Responsibility 2002-2007[13]

Evolution of AFRICOM Commander's Area of Responsibility 1 October 2008 Onward[14]

The National Security Act of 1947 first mentioned so-called "unified Combatant Commands" and "specified combatant commands, with basic legislation outlining their responsibility being found at Title 10, U.S. Code section 161 et seq.[15] The Goldwater-Nichols Department of Defense Reorganization Act of 1986,[16] sponsored by Senator Barry Goldwater and Representative Bill Nichols, was the most significant defense reorganization after the National Security Act of 1947. Of particular significance to defense strategy and policy, this Act centralized the Chairman of the Joint Chiefs of Staff (CJCS) operational authority, made the CJCS principal military advisor to the president, National Security Council and secretary of defense, and streamlined the operational chain of command

from the President to the Secretary of Defense to the unified combatant commanders (UCCs).[17]

Prior to 1 October 2007, the U.S. Department of Defense (DoD) under its Unified Command Plan (UCP) divided responsibility for African defense and security issues among three so-called "UCCs:" the U.S. Central Command (CENTCOM), Pacific Command (PACOM) and European Command (EUCOM).[18] CENTCOM had responsibility for Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Somalia, and Sudan. PACOM had responsibility for the Comoros, Madagascar, Mauritius, and the Seychelles. EUCOM had responsibility for the rest of the continent.[19] In the Summer of 2006, former U.S. Defense Secretary Rumsfeld tasked the DoD to "analyze and make broad recommendations regarding possible adjustments in the UCP to better align with national interests and security requirements."[20] The creation of AFRICOM was to "[realign] the region" under one U.S. organization to pursue a "three-pronged defense, diplomatic and economic effort designed to enable U.S. government elements to work in concert with African partners without the 'bureaucratic divisions' created by a shared command structure."[21]

In the August 2, 2007 estimation of the then-Acting Assistant Secretary, Bureau of Political-Military Affairs Stephen Mull, where it would be employing a "whole of government approach," AFRICOM is an "unprecedented step forward in inter-agency cooperation and a new vehicle for addressing security issues in Africa."[22]

This three-pronged, interagency approach from AFRICOM came none too soon in the estimation of the current U.S. EUCOM Commander, General Bantz Craddock, who, in written testimony to Congress has noted that: "Africa is becoming a continent of increasing strategic importance to the U.S. and our allies… The DoD, in collaboration with other U.S. agencies, is seeking more effective ways to mitigate or respond to humanitarian crises, sustain African unity and stability, and improve cooperation on such transnational issues as terrorism and HIV/AIDS."[23] In Craddock's estimation, "[t]here is little doubt that Africa will occupy an increasingly larger amount of our national attention in the years ahead."[24]

In his 27 September 2007 written responses to Senate Armed Services Committee questions, current AFRICOM Commander GEN Ward wrote that: "[j]ust as EUCOM focused on security cooperation activities with African nations, so too will AFRICOM continue developing capabilities of African nations to help solidify our relations, achieve our mutual goals, and provide a bright future full of promise and opportunity for Africans everywhere" [25] AFRICOM's exercises, training, and humanitarian assistance efforts across the continent must occur, according to Ward, "in ways that demonstrate value-added through its existence."[26]

Rear Admiral Moeller, the Executive Director of the 60-person AFRICOM Transition Team, has said that AFRICOM will "better enable the Department of Defense and other elements of the U.S. Government to work in concert and with partners to achieve a more stable environment in which political and economic growth can take place" as AFRICOM "consolidate[s] the efforts of three commands into one focused solely on Africa and help coordinate US Government contributions on the continent."[27]

The U.S. Department of State (DoS) ambitiously predicts that the U.S. military's newest command center for Africa, Africa Command (AFRICOM) will '[p]lay a supportive role as Africans continue to build democratic institutions and establish good governance across the continent;" AFRICOM's "foremost mission is to help Africans achieve their own security, and to support African leadership

efforts."[28]

Resources to Requirements: What AFRICOM Has and What It Must Do

Robert G. Berschinski of the Strategic Studies Institute commented in November 21, 2007 that because AFRICOM incorporated security, development, and humanitarian functions into one organization, it "may be particularly susceptible to strategic failure if it uncritically incorporates the operational concepts that have guided its predecessors."[29]

General Ward pledged at AFRICOM's inception that it would have "no designs on creating vast, permanent concentrations of forces on the continent: "Bases? Garrisons? It's not about that … We are trying to prevent conflict, as opposed to having to react to a conflict."[30] In a Fall 2008 interview with the BBC, General Ward candidly commented that AFRICOM had "no hidden agenda" and would work to operate "in partnership with our African friends," so that "trainers or other forms of military support and assistance [remain]… only so long as is required to conduct the specific training that we've been asked to do or to conduct the specific activities."[31]

As of the time of this paper's writing, the only permanent base the United States now has in Africa is Camp Lemonier in Djibouti, where 1,800 US troops are stationed.[32] The composition and size of U.S. Africa Command's headquarters staff at Kelley Barracks, Stuttgart, Germany (co-located with EUCOM), was evolving in a manner "tailored to accomplish the command's mission."[33]

While the average UCC's staff ranges from 500 to more than 1,000 personnel (not including civilian contractors and supporting intelligence architecture), AFRICOM's initially projected size was between 650 and 760, increasing to 1200-1800, factoring in intelligence and other support requirements.[34] Service component command personnel strength, supporting AFRICOM in regional operations as well as headquarters staff would range, by the Congressional Research Service, between 100 to 350 personnel.[35] In GEN Craddock's estimation, the kinds of forces deployed to Africa by AFRICOM will be "[l]argely based on the capabilities needed to counter the challenges Africa faces." [36] Craddock recognizes those challenges as "humanitarian assistance, disaster relief, security sector reform, and counterterrorism," such that AFRICOM forces will "work with host nations to build up African militaries, as well as reinforce the importance of civilian control over the military."[37]

In an interesting set of end-of-year developments in AFRICOM force structure, the 173rd Airborne Brigade Combat Team, along with a 250-person headquarters from the Southern European Task Force (SETAF) in Vicenza, Italy, was transformed on December 9, 2008 into U.S. Army Africa – the Army Component Command to AFRICOM.[38] This new organization's mission is that "SETAF, in concert with national and international partners, conducts sustained security engagement with African land forces to promote peace, stability, and security in Africa. As directed, deploy as a contingency headquarters in support of crisis response."[39]

In Naples, Italy, Naval Forces Europe was also redesignated in December 2008 and expanded to

become NAVEUR NAVAF (Naval Forces Europe Naval Forces Africa).[40] Navy officials anticipated NAVAF's staff of 500 to "increase over the next few years by about 140."[41]

To compliment this conventional force capability, and rounding out AFRICOM's October 1, 2008 "full operating capability" status, AFRICOM "stood up" a "theater Special Operations command for Africa," or SOCAFRICA. SOCAFRICA will support USAFRICOM's Theater Security Cooperation Program, deliberate plans, and real world contingencies and will "eventually take over from Special Operations Command-Europe. [42] Also, the 17th Air Force at Ramstein Air Base, Germany, has been designated to support AFRICOM and reached initial operating capability in October 2008.[43]

The so-called "standing up" of AFRICOM was to cost an estimated USD$50 million in Fiscal Year (FY) 2007.[44] This should be placed in the context of USD authorized appropriations totaling USD$509 billion for fiscal year 2007 for the military functions of the DoD, for activities of the Department of Energy (DOE), and for other purposes. That total includes USD $50 billion for military operations in Iraq and Afghanistan, and over USD$68 billion in supplemental appropriations for 2006! [45] The Congressional Research Service (CRS) estimated that the "nascent command's budget for Fiscal 2008 (October 1, 2007, to September 30, 2008) [was] estimated at USD$75.5 million," and that "AFRICOM's budgetary needs will increase substantially when the command begins its move to the continent, given the construction and/or acquisition of physical infrastructure and other start-up costs."[46]

In contrast, under the FY 2008 National Defense Authorization Act, some USD$641 billion were authorized for the military functions of the DoD, for activities of the DOE, and for other purposes, and USD$142 billion for military operations in Iraq and Afghanistan![47]

Ironically, in a move *curtailing* projected AFRICOM operations, the FY 2009 appropriations bill *trimmed USD$123 million* from the *USD$389 million* requested in military personnel and operation and maintenance accounts for AFRICOM, for a resultant budget of *USD$266 million*![48] That was an improvement nonetheless over what the House Appropriations Subcommittee on defense recommended providing AFRICOM: only *USD$80.6 million* in funding for FY 2009. [49] That would have been 80 percent less than was requested, according to Matthew Mazonkey, communications director for Rep. John Murtha, D-Pa., the subcommittee chairman.[50]

The Government Accountability Office (GAO) has expressed concerns that some members of Congress, civilian government agencies, non-governmental organizations, and African nations have criticized the command as a "militarization" of U.S. foreign policy in the region.[51] As for AFRICOM's stated requirements, its present "mission statement" sets forth that:

> *US Africa Command promotes US National Security objectives by working with African states and regional organizations to help strengthen stability and security in the AOR. US Africa Command leads the in-theater DoD response to support other USG agencies in implementing USG security policies and strategies. In concert with other U.S. government and international partners, US Africa Command conducts theater security cooperation activities to assist in building security capacity and improve accountable governance. As directed, US Africa Command conducts military operations to deter aggression and respond to crises.[52]*

Journalist Paul Salopek notes that "over the past five years, 21 African countries have hosted military instructors in the biggest-ever U.S. training effort on the continent."[53] Ongoing training and operational missions that AFRICOM assumed – or will assume - from USEUCOM and other combatant commands include *but are not limited to* the following:

Location	Ongoing Unclassified Missions Since 2006
Kenya, Ethiopia and Djibouti	Combined Joint Task Force Horn of Africa (CJTF-HOA) is currently helping to build host-nation capacity.[54]
Liberia	Joint Task Force Liberia with Economic Community of West African States (ECOWAS) to provide aid to victims of civil war and to restore order and prevent a full-blown humanitarian crisis.[55]
Northern Africa	Trans-Sahara Counter-Terrorism Initiative (TSCTI), the U.S. Government's long-term interagency plan to combat terrorism in Northern Africa.[56]
Northern and Western Africa	Countering emerging terrorist extremist threats[57]
Pan-Africa	Security Assistance (SA) missions to increase the capacity of international organizations to contribute more effectively to the improvement of governance and the expansion of civil society (specifically support to the African Union's (AU's) development of a humanitarian crisis intervention capability), to include: -Operation Enduring Freedom: Trans Sahara (OEF-TS)/Trans Sahara Counter-Terrorism Partnership (TSCTP); -International Military Education and Training (IMET); -The African Contingency Operations Training and Assistance Program (ACOTA)/ Global Peace Operations Initiative (GPOI).[58], and; -Communications exercises with the AU.[59]

AFRICOM's focus will be to build the capacity of its African partners to reduce conflict, improve security, defeat terrorists, and support crisis response.[60] For instance, just one of the above-mentioned, ongoing missions is the Trans-Sahara Counter-Terrorism Partnership (TSCTP). The TSCTP involves combined teams of U.S. Special Forces, and soldiers of Chad, Mali, Mauritania and Niger, working with the armies of Algeria, Morocco, Nigeria, Senegal and Tunisia, to control "undergoverned" spaces of the Sahara under rebellion in the past and believed to be under radical Islamist and/or terrorist group control at present.[61]

Another substantial threat to regional and global security involves narco-trafficking: for example, the total value of illegal drugs trafficked through the West African sub-region has risen to more than $2 billion in 2009.[62] Ambassador Yates' March 2009 trip to Ghana highlighted Ghanaian-U.S. counter-narcotics co-operation, through capacity building of the Ghana Navy and the police, funding drug screening equipment, and upgrading airport customs facilities at the airport.[63] In related combined and interagency counter-narcotics efforts, AFRICOM and the U.S Treasury Department and regional governments are cooperating on programs "to address money laundering and provide legal security of assets owned by known drug-trafficking leaders."[64]

As part of its pan-Africa security assistance (SA) and counterterrorism missions, the U.S. has been

training Ugandan troops in counterterrorism for several years.[65] In early February 2009, it was reported that a team of 17 advisers and analysts from AFRICOM provided satellite phones, intelligence, and $1 million in fuel to Ugandan forces, and worked closely with Ugandan officers so Ugandan troops could conduct cross-border attacks into Congo to crush the Lord's Resistance Army rebel group.[66]

Focusing more on economic and political development, AFRICOM can and should focus to support such strategic initiatives as the New Partnership for Africa's Development (NEPAD). [67] The Organisation of African Unity (OAU) (replaced by the AU in 2002) gave a mandate to the five initiating NEPAD Heads of State (Algeria, Egypt, Nigeria, Senegal, South Africa) to "develop an integrated socio-economic development framework for Africa."[68] NEPAD's stated goals are to " address the current challenges facing the African continent … [such as] escalating poverty levels, underdevelopment and the continued marginalisation of Africa needed a new radical intervention, spearheaded by African leaders, to develop a new Vision that would guarantee Africa's Renewal."[69]

As the command develops, more responsibilities will transition from other UCCs to AFRICOM. In its "way ahead," AFRICOM's staff recognizes it "must, continue on-going activities without interruption, increase [AFRICOM] personnel and resources, [and eventually] establish USAFRICOM HQ on the continent … Many details of U.S. Africa Command remain to be developed."[70]

Implications of AFRICOM on Future Humanitarian Efforts in the Region

Africa has had a long and troubled history in terms of humanitarian disasters and conflict that AFRICOM must understand and will have to confront as its future operations unfold. As Ibrahim J. Wani noted, man-made and natural disasters are relatively commonplace, and "cause significant property destruction and loss of lives, and disrupt social relations."[71] Wani further remarked, "Emerging disasters such as AIDS and other health epidemics, industrial accidents, arms trafficking and terrorism are likely to stress national resources even further and, therefore, increase the vulnerability of communities and individuals."[72]

The African Crisis Response Initiative (ACRI), which evolved into the African Contingency Operations Training and Assistance Program (ACOTA) in 1997, has been a U.S. Department of State (DoS), Africa Bureau (AF) program, designed in the words of the Naval Postgraduate School "to enhance the capacity of African partner nations to effectively participate in multinational peace support operations (PSO)," or in other words, to improve the training and effectiveness of African military forces.[73] The goal of these programs has been "to increase the capabilities of these militaries in areas such as human rights, interaction with civil society, international law, military staff skills, and small unit operations."[74]

AFRICOM has embraced this ACOTA strategy, as is evidenced by General Ward's testimony to Congress in March of 2008 as a "Global Peace Operations Initiative."[75] That testimony did not escape the attention of the UN Office for the Coordination of Humanitarian Affairs. That UN office's IRIN News website correctly pointed out that Ward focused his comments mainly on "military training, security and counter-terrorism," and gave very little time to AFRICOM's involvement in humanitarian efforts.[76] IRIN News further reported that despite these remarks, many in the NGO and development

community have grave concerns regarding AFRICOM's focus on humanitarian aid and efforts.[77] These concerns may be partially allayed by the fact that AFRICOM currently "has more diplomats and aid experts than other headquarters."[78]

This tension has somewhat stifled AFRICOM's progress in terms of incorporating experts from USAID and State Department development experts into AFRICOM's ranks.[79] Despite the seemingly competing interests, the two groups have met in order to share concerns and plot a course for the future that appeals to both sides. Much progress remains to be accomplished on this front however. The US government maintains "conducting humanitarian operations with military precision will only help to make American aid to Africa more effective and will ultimately save and improve many more lives."[80] Alternatively, NGOs claim that "the best image of the U.S. overseas, in development and humanitarian work, should be that of a civilian" and that military presence will without a doubt complicate matters and add to confusion.[81]

Nevertheless, AFRICOM's proponents stress that its focus is to strengthen and develop the militaries that comprise the AU force so "they're able to handle their own problems."[82] Towards this end, on January 5, 2009, former President Bush authorized an airlift of 240 containers of heavy equipment into Darfur, Sudan to facilitate peacekeeping missions there.[83] AFRICOM's work will edify the military forces of African nations, which in turn will not only strengthen the integrity of those nations but will also simultaneously provide security for ongoing humanitarian and development efforts.

While concerns are likely to persist into the future regarding conflicts between the military and NGOs, it is clear that AFRICOM will be of great strategic importance in providing wherewithal that is unique to the military and unavailable to NGOs and other organizations. US military resources have proven beneficial in the past, as evinced by efforts not only in support of relief following the 2004 Indian Ocean tsunami but also US Navy medical care provided off the coast of Ghana.[84] As AFRICOM Deputy Commander for Civil-Military Affairs Ambassador Mary Yates observed, "The proof will be in the fact that we will be supporting – whether it's humanitarian assistance or whether it's a crisis or a natural disaster – that's where I think we will have some assets and some value added."[85]

What Will African and Non-African Nations Do About, With or Against AFRICOM?

The Economist Magazine sanguinely predicted in 14 June 2007 that in Africa, the U.S.' "struggle for hearts and minds may be easier than in the Middle East." Economist commentary on the subject continued with the observation that:

Africans still think of America as a foe of colonialism … On top of this, Africans know that the superpower's military investment will bring money and jobs. The budget of the Trans-Sahara Counter-Terrorism Partnership for 2007 is about $115m, while non-military assistance increased by about 60% last year as well. Unimaginable in many parts of the world, there is keen competition among African countries to host AFRICOM's new headquarters.[86]

A Summer 2008 article by Karen DeYoung in the Washington Post, however, indicates that such predictions may have been erroneous as AFRICOM's presence in the region is causing controversy among African nations.[87] One issue in particular is the questioning of US motives for the established

military presence. "The trouble was, no one consulted the Africans … Worry swept the continent that the United States planned major new military installations in Africa."[88] Some nations with a great deal of political clout immediately refused to allow US military bases to be established in their countries, and others followed suit. Yet despite this perceived setback, Theresa Whelan has noted that eight countries have offered to host AFRICOM facilities, although seven of those countries made those offers privately.[89] In the meantime, the decision has been made to maintain the command's current headquarters in Stuttgart, Germany.[90] General Ward rejected criticisms that Africa Command would result in a militarization of foreign policy, and he said it was "specifically structured for cooperative efforts across the agencies of the United States government."[91]

In a post-colonial Africa, how could or should AFRICOM operate to build harmony and foster cooperation rather than raise anxiety and divisiveness? I would suggest a strong measure of what business executive Karen Benjack Glatzer calls "cultural astuteness. To paraphrase Glatzer, that is "the ability to get out of your … comfort zone and navigate smoothly through the cultural nuances of your specific area of responsibility.[92] Organizational consultant Kevin Hummel asserts a critical component of "cultural astuteness" as being able to " move your goals forward in a way that is not seen as self-serving through a combination of direct communication, influence, and asking other people to be your advocate or champion.*"**[93]**

A critical component to this "culturally astute" mission focus must be an understanding of African post-colonial identity. Observations alluding to the state of such identity, as recently as October 7, 2008 on SW Radio Africa Zimbabwe, have included the notion that post-colonial construction of an African identity should be treated as a "social, political and historical fact through which public discourses should be formed and shaped." Africa, as a nation of imagined community "requires an assumed collectivity and mutuality beyond an individual's circumstances and political communities are only real when they are collectively imagined."[94]

On the abiding legacy of postcolonial disharmony, Forbes' Tunku Varadarajan on October 27, 2008 mused that "[w]Whether we like it or not, vast swaths of Africa, Asia and the Middle East still   live in varying degrees of post-colonial confrontation with the West, and with whiteness."[95] Mindful of that construct, Varadarajan believes it is "difficult (often impossible) for the West to get the non-West to embrace its better ideas." [96]

In a speech at the U.K. Royal United Services Institute (RUSI), GEN Ward alluded and "cultural astuteness" and embracing ideas when he recalled advice given to him in previous assignments about the "human dimension" of operations:

*'Ward, you need to have someone to help you understand the human dimension. You need some human terrain analysis.' I said, 'what? Get out of here.' But it's important, and where do those skills, talents reside – academia, places like RUSI.***[97]

AFRICOM will likely develop this and other capabilities through the employment of so-called "private military firms" or "PMFs:" "corporate bodies that specialize in the provision of military skills, including combat operations …operat[ing] globally, often with strategic impact on both the process and

outcome of conflicts."[98]

Towards the end of establishing civilian contractor-based "human terrain analysis" capability, AFRICOM is emulating the U.S. Army's "Human Terrain System" program,[99] managed by defense contractor BAE Systems. AFRICOM retained research and risk management firm Archimedes Global, Inc.[100] to hire personnel who will develop and employ capabilities as a new "socio-cultural cell" and a "Social Scientist Research Center (SSRC)" within AFRICOM.[101]

AFRICOM and outsourcing to PMFs was the primary focus of the International Peace Operations Association (IPOA) Annual Summit held between October 26-28 in Washington, D.C.[102] That Summit included "experts, representatives from international organizations, NGOs, governments and IPOA's 50+ member companies, representing the full capabilities of the private sector," meeting under the auspices of "Engaging AFRICOM: The AU, UN and the Future of the Continent."[103] AFRICOM's outreach and partnership director, Paul Saxton, was reported to have told a packed audience at the conference that the "command plans to enlist the help of the private sector. 'We're reaching out.'"[104]

Speculation and skepticism abounds about the motivation for outreach. One past "proto-PMF / mercenary" leader, Eeben Barlow, recently opined on African skepticism towards American policies and PMF actions in Africa. Barlow said: "Looking at…US administrations' record in Africa, it is one long script of betrayal, destabilisation, political blackmail and even worse." African nations, Barlow noted, "remain extremely reluctant and wary to allow the wolf to guard their sheep."[105]

Dr. Bello Oboko, leader of the Federated Niger Delta Ijaw Communities (FNDIC) in Nigeria, warned on October 28, 2008 that "an America's slide to economic meltdown was caused by wasteful spending to display strength in Iraq," and that "Nigeria's subscription to Africom, a US/Africa Security pact could spell similar disaster for Nigeria."[106]

Journalist Karen DeYoung's assessment is that "despite the promise of new development and security partnerships, many Africans concluded that AFRICOM was primarily an extension of U.S. counterterrorism policy, intended to keep an eye on Africa's large Muslim population."[107] This reaction partly comes from the deeply rooted antipathy many Africans have toward foreign nations as a result of a long and bloody history with colonial powers during the 19th and 20th centuries, and also from the perception that terrorism and Islam have become coterminous in the eyes of American policymakers, a prevalent religion in some African countries.[108]

The renowned South African artist and author Breyten Breytenbach expressed his skepticism in late Fall of 2008 about AFRICOM, saying:

[Y]ou're not concerned about developing society. You're not concerned about democracy. You're not concerned about women's rights. You're not really particularly concerned about the health problems either, although some work has been done in that field. So, AFRICOM, I think, should be seen within

*that context. I know I've read that and I'll say that they would be as interested in developing democracy and health services, etc., as they would be in maintaining security or assuring American security interest. But I don't think that's going to be the case.***[109]**

DeYoung also reported that in mid-2008, President Bush encountered African leaders who were adamantly opposed to the possibility of US bases being built in their countries. The President purportedly responded that the notion of bases being built in the countries was false.[110] A Summer 2008 interview with Vice Admiral Moeller indicated that current US plans are to locate AFRICOM stations in preexisting US installations, such as military offices within US embassies. Moeller reiterated, "[w]e're not going to go anywhere we're not invited."[111] It is clear that AFRICOM planners are proceeding with a great deal of concern for the African populace.

Moreover, the U.S. is not the only nation with aspirations for ongoing and future military and interagency cooperation in Africa. Helmut Heitman, the South Africa Correspondent of Jane's Defence Weekly aptly points out a subtle fact of foreign influence in Africa: "the U.S. is not the only foreign power trying to secure its grip on the region; the difference is others are more covert in the way they're going about it."[112] Heitman believes "China, India and to a lesser extent Brazil will try to expand their interests in Africa," but in contrast to past and ongoing U.S. initiatives, those nations "won't do things as obviously … I think they will only be indirectly involved militarily, by supporting their favoured government, opposition group or warlord."[113]

In the Council on Foreign Relations' 2006 report, "More than Humanitarianism," foreign affairs experts assessed that "all across Africa today, China is acquiring control of natural resource assets, outbidding Western contractors on major infrastructure projects, and providing soft loans and other incentives to bolster its competitive advantage."[114] Mid-2008 statements by Deputy Assistant Secretaries of State Thomas Christensen and James Swan suggested the US has a more positive outlook on the role of China and other countries in terms of their efforts in the region. Despite the less than transparent nature of aid that China gives to African nations, the officials noted "it is the Africans themselves who will shape the relationship with China."[115] The officials further noted that the US has "encouraged China to reconsider its close military relationships with repressive military regimes in Africa," adding "there also may be some additional opportunities for cooperation in non-security sectors in Africa, such as health and agriculture."[116]

Jennifer Cooke, an expert at the Centre for Strategic and International Studies, predicts that AFRICOM will offer " [m]ore direct engagement, particularly with African organisations such as the AU, with a separate command, than when you have people rolling through from Europe from time to time," providing a "much more nuanced understanding of the problems Africa faces."*[117]*

Such direct engagement will become even more important as post-colonial strides towards African unity progress towards fruition. The OAU existed for 39 years, from May 25, 1963 onward as "an expression of the will to act collectively on issues of common interest," yet it acted in "compromise between supporters of a full political integration and those preferring a loose cooperation organization."[118] The OAU grew from a 35 nation initial membership, but aspirations and goals evolved such that the AU replaced the OAU in 2002.[119]

In 2006, the AU contemplated a deliberative, "gradual incrementalism and multi-layered approach to

implement a United States of Africa by 2015.[120] In accordance with the AU's 2006 "Tentative Roadmap of the Union Government, the union was to evolve in three-year phases: Phase 1 - Establishment of the Union Government establishment of the Union Government (i.e. steps and processes that are necessary for the immediate operationalization of the Union Government); Phase 2 – Making the Union Government fully operational in all its components and to laying the constitutional ground for the United States of Africa, and; Phase 3 – Facilitation of all required structures of the United States of Africa at the levels of the states, the regions and the continent.[121]

Direct engagement with an evolving AU and emergent United States of Africa may well take an interesting turn in the near future, well before 2015. On February 2, 2009, the "Leader of the Revolution of the Great Socialist People's Libyan Arab Jamahiriya" (a/k/a President of Libya), President Muammar el-Qaddafi, became Chairperson of the African Union (AU).[122] Reports indicate that Qaddafi's intends at the AU's next summit in July 2009 to bring up for vote the immediate unity of African nations into a United States of Africa, the establishment of a single currency, army and passport for the entire continent![123]

United or not, African governments will have to overcome some past and ongoing internal and external problems. One such notable problem has been the ongoing crisis in the Darfur region of Sudan, where more than two million people have fled their homes over the last six years.[124] The AU has appointed former South African President Thabo Mbeki to chair a committee to investigate human rights violations in Darfur. [125]   This comes about as a reaction to the International Criminal Court's (ICC) March 5, 2009 arrest warrant for Sudan's President Omar al-Bashir, including five counts of war crimes and two of war crimes involving atrocities committed in Darfur.[126] At the time of the events, the British Broadcasting Service (BBC) reported Bashir's "scoffing" at his arrest warrant,[127] and rejecting the charges as "colonialism."[128] In turn, the AU reportedly requested a one-year delay in ICC charges for a year, "warning that attempts to arrest Mr Bashir could further destabilise the situation in Darfur."[129]

The U.S' position regarding this matter is awkward. The U.S. is not a party to the Rome Statute that set up the ICC, yet a senior State Department official has said "the United States wants to see those responsible for Darfur atrocities held accountable and will not stand in the way of the possible prosecution of Sudanese President Omar al-Bashir by the International Criminal Court."[130]

Retired Foreign Service Officer Robert E. Gribben warned of intensifying politico-military "turf issues" in Africa, since"[i]ncreasingly throughout Africa, U.S. military resources and projects are crossing ministerial lines." [131] Gribben points to the theoretical "key local client for AFRICOM" as being the host Ministry of Defense, yet the additional realities are that "U.S. military personnel and/or money already goes to projects in ministries of water development, women's affairs, health, interior, aviation and so forth." [132] Gribben's counsel is that "Washington policy makers as well as ambassadors in the field need to decide how much militarization of non-military assistance is wise and to ensure that such undertakings are properly vetted. Such discussions will become increasingly important when (not if) AFRICOM gets more resources to play with."[133]

Singly or together as one nation, there will be no substitute for "African solutions to Africa's problems, "as asserted by Professor James J.F. Forest, Director of Terrorism Studies at the Combating Terrorism Center at West Point.[134] Forest has noted that the AU – a key partner to AFRICOM – at present faces a crisis of legitimacy, such that "[t]he AU is being judged on whether it can and will respond effectively

to situations of armed conflict [under the provisions of the AU Constitutive Act]."[135] In Forest's estimation, the AU is "also being judged on whether the presence of AU or regional peacekeeping forces can resolve complex peace support or enforcement operations." [136]

According to Forest, if the AU aspires to become the leading enabler of peace and security on the continent, it must be seen as capable of responding to all kinds of humanitarian crises, find common ground on how to respond to threats, enhance their individual and collective ability to communicate across borders, share information, and develop the ability and the will to conduct joint exercises.[137]

Of no small additional import, Forest believes the AU member nations could and should develop regional early warning centers, logistical depots & transportation/force projection capabilities, professional militaries and police forces, accountability among decision-makers, and a perception of AU power and capability.[138] Inadequate response to a crisis in Africa can undermine the future of the AU, so for Forest, great advantage will accrue if the U.S. and the international community does everything possible to "enable the success of the [AU]" and "[make] AFRICOM … a reflection of the continent's strategic importance to the U.S."[139]

In December of 2007, the CRS identified numerous potential problem areas and shortcomings regarding U.S. strategic interests and the role of the U.S. military in Africa under AFRICOM. Those areas in which CRS recommended Congressional oversight of AFRICOM's composition, resourcing, and missions included:

AFRICOM's necessity, desirability, and mission definition;

- *How U.S. strategic interests influencing the size and scope of the U.S. military footprint on the continent, and what effect will the creation of a new AFRICOM have on future U.S. military operations in Africa?*
- *How Africans and other foreign countries perceive AFRICOM and U.S. military efforts in Africa;*
- *The role of contractors in AFRICOM's operations;*
- *Development of AFRICOM's interagency process and, in particular, co-ordination with the State Department and DOD on plans for the command and on military efforts in Africa in general, and enhanced integration of non-DOD USG agency personnel into the command necessitate statutory changes;*
- *AFRICOM's requirements for the intelligence community to realign resources directed toward the continent;*
- *Administration efforts to ensure that U.S. military efforts in Africa do not overshadow or contradict U.S. diplomatic and development objectives;*
- *Authorities granted to U.S. Chiefs of Mission regarding combatant command activities in the countries to which they are posted, and are these authorities sufficient;*
- *Counter-terrorism operations and programs relative to the peacekeeping training and support components in AFRICOM's mandate*
- *The sufficiency of legal authorities guiding DOD's implementation of security cooperation reform programs, and;*
- *Efforts to ensure that the training and equipment provided to African security forces is not used to suppress internal dissent or to threaten other nations.[140].*

CONCLUSION

This paper has been a very early look at a nascent organization less than a year old to ambitiously adapt U.S. "Cold War" defense and security strategy, using limited assets, supporting but not assuming leadership, yet "adding value" to advance U.S. and African economic, security and development policies. In closing this paper, let me offer hopes that President Obama's ambitious, aspirational comments about AFRICOM become self-fulfilling prophecies, such that AFRICOM coordinates and synchronizes our military activities with our other strategic objectives in Africa:

Working under the foreign policy leadership of the State Department, this command should help to integrate military (especially non-lethal capabilities) with all the other elements of US power and diplomacy ... Increased security depends on better governance and plans for long-term stability that foster a believable hope among Africans that tomorrow will be better. This means cleaner water, adequate food, better schools, available and affordable healthcare, improved infrastructure and communications, more employment opportunities, human rights, and total gender equality.[141]

ENDNOTES

[1]The author is an Assistant Professor of Law at Ave Maria School of Law, Ann Arbor, MI, a Law and Public Policy Instructor for the California University of Pennsylvania, and a former Assistant Professor of Law at the U.S. Military Academy, West Point, NY. Unless otherwise attributed in notes to this paper or in comments made during the presentation of this paper, the conclusions and opinions expressed are solely those of the author cultivated in the freedom of expression and academic environment of the Ave Maria School of Law and the California University of Pennsylvania.
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[4] President John F. Kennedy, Commencement Address at American University, June 10, 1963, transcript available at http://www.americanrhetoric.com/ speeches/jfkamericanuniversityaddress.html.

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[13] U.S. Department of Defense Unified Command Plan (UCP) Website, January 21, 2008, available at http://www.defenselink.mil/specials/ unifiedcommand/.

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See also Jewish Institute for National Security Affairs (JINSA) Website, AFRICOM is the Newest U.S. Combatant Command, embedded image, January 21, 2008, available at http://www.jinsa.org/articles/view.html?documentid=3886. The command's Area of Responsibility (AOR) "will eventually encompass the continent of Africa, the Islands of Cape Verde, Equatorial Guinea and Sao Tome and Principe, and the Indian Ocean islands of Comoros, Madagascar, Mauritius, and Seychelles. Central Command will still maintain its traditional relationship with Egypt, but AFRICOM will coordinate with Egypt on issues relating to Africa security." *See* U.S. Africa Command (AFRICOM) Transition Team Website Frequently Asked Questions (FAQs), http://www.eucom.mil/ africom/africomFAQs.asp (last viewed Jan. 21, 2008).

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[17] *Id.*

[18] *Id.* Note: The Department of Defense Dictionary of Military and Associated Terms defines UCP as " The document, approved by the President, that sets forth basic guidance to all unified combatant commanders; establishes their missions, responsibilities, and force structure; delineates the general geographical area of responsibility for geographic combatant commanders; and specifies functional responsibilities for functional combatant commanders." *See* U.S. Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms, 12 April 2001, as amended through 17 October 2007, at 565,, available at http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf

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[50] *Id.*

[51] Government Accountability Office, *Preliminary Observations on the Progress and Challenges*, pp. 16–17, available at http://www.gao.gov/new.items/d08947t.pdf .

[52] US Africa Command (AFRICOM) Command Briefing, at 7 (2007), *available at* http://www.defenselink.mil/dodcmsshare/ briefingslide/295/070207-D-6570C-001.pdf. General Ward's 2008 assessments of threats faced include the following: "African demographic trends are troubling. Rapid population growth, particularly a disproportionate "youth bulge", will exceed governments' ability to provide basic goods, services, and jobs. This trend has already led to a large pool of undereducated and unemployed youth who present a potential source of social and political instability. Vast coastal areas provide havens for smuggling, human and drug trafficking, illegal immigration, piracy, oil bunkering, and poaching of fisheries. Piracy and theft are major concerns along the Gulf of Guinea coast–an area that stretches for nearly 2,000 nautical miles. Large-scale oil theft in the Niger Delta is a significant problem. Shipping ports, transit areas, harbors, oil production, and transshipment areas are largely unobserved, uncontrolled, and vulnerable to attacks by terrorist groups, criminal gangs, or separatist militias. Corruption and complicity at all levels of government only serve to exacerbate this problem." *See* Fact Sheet: AFRICOM Posture Statement: Ward Updates Congress on U.S. Africa Command, U.S. Africa Public Affairs Office, March 13, 2008, available at http://www.africom.mil/printStory.asp?art=1799

[53] Salopek, Paul, African armies receive U.S. expertise, ammo, Chicago Tribune, November 18, 2008, available at http://www.chicagotribune.com/news/chi-africa_terror_sidebarnov18,0,4213072.story

[54] U.S. Dep't of Def., 2006 Quadrennial Defense Review Report, at 12 (2006), *available at* http://www.defenselink.mil/ qdr/report/Report20060203.pdf. Section 118 of Title X of the *United States Code*, *available at* http://www4.law.cornell.edu/ uscode/html/uscode10/usc_sec_10_00000118 —-000-notes.html, specifies: "The Secretary of Defense shall every four years, during a year following a year evenly divisible by four, conduct a comprehensive examination (to be known as a "quadrennial defense review") of the national defense strategy, force structure, force modernization plans, infrastructure, budget plan, and other elements of the defense program and policies of the United States with a view toward determining and expressing the defense strategy of the United States and establishing a defense program for the next 20 years. Each such quadrennial defense review shall be

conducted in consultation with the Chairman of the Joint Chiefs of Staff."

[55] *Id.* at 13-14.

[56] *Id.* at 23.

[57] *Id.* at 12.

[58] *Id.* at 90. *See also* CRS Report, *supra* note 15, at 21-22.

[59] Thomson, Alistair, U.S. helps Africa's armies talk to each other, Reuters, January 13, 2009, available at http://www.reuters.com/ article/latestCrisis/idUSLD341580. Thomson noted that "21Communications experts from around 25 African armies and the U.S. Africa Command (Africom) are meeting in Senegal this week to plan a continental exercise in Gabon in July, the third of its kind and intended to pave the way for a common communications platform."

[60] AFRICOM Command Briefing, *supra* note 47, at 3.

[61] *Policing the Undergoverned Spaces*, The Economist, June 16, 2007, available at

http://www.economist.com/world/africa/ displaystory. cfm?story_id=9340544

[62] Ampah, Samuel, Eight per cent of Europe's drugs pass through Ghana, The Ghanaian Journal, March 3, 2009, available at http://www.theghanaianjournal.com/2009/03/03/eight-per-cent-of-europes-drugs-pass-through-ghana/ Deputy USAFRICOM Commander, Ambassador Mary Carlin Yates related that the total value of Ghanaian drug trafficking was higher than Ghana's annual gold export, with eight per cent of the total drug seizures in the whole of Europe passed through Ghana, adding that there was the need for seriousness in clamping down on the drug trade to save the country.

[63] Id.

[64] Id.

[65] See, e.g., Pizzey, Allen, U.S. Reaches Out In Africa Al Qaeda Fight, CBS News Broadcast, May 1, 2008, transcript and video available at

 http://www.cbsnews.com/stories/2008/05/01/eveningnews/main4063821.shtml

[66] Gettleman, Jeffrey and Schmitt, Eric, U.S. Aided a Failed Plan to Rout Ugandan Rebels, New York Times, World-Africa Section, February 6, 2009, available at

http://www.nytimes.com/2009/02/07/world/africa/07congo.html?emc=eta1. Gettleman and Schmitt reported that '[t]he American military helped plan and pay for a recent attack on a notorious Ugandan rebel group, but the offensive went awry, scattering fighters who carried out a wave of massacres as they fled, killing as many as 900 civilians."

[67] New Partnership for Africa's Development (NEPAD) Website, January 14, 2009, available at http://www.nepad.org/2005/ files/inbrief.php.

[68] *Id.*

[69] *Id.*

[70] AFRICOM Command Briefing, *supra* note 52, at 8.

[71] Wani, Ibrahim J., *African Humanitarian Assistance and Disaster Relief Operations – A Case Study of Multilateral Cooperation* (2001), *available at* http://www.ndu.edu/inss/symposia/pacific2001/wanipaper.htm.

[72] *Id.*

[73] Naval Postgraduate School, AFRICAN CONTINGENCY OPERATIONS TRAINING AND ASSISTANCE (ACOTA) PROGRAM Fact Sheet, Updated February 2006, available at

http://www.nps.edu/services/usmc/ Docs/ACOTA_FactSheet Feb06.pdf? OpenDocument (last visited June 7, 2008).

[74] Africa Crisis Response Initiative (ACRI) / African Contingency Operations Training and Assistance, available at http://www.globalsecurity.org/military/agency/dod/acri.htm (last visited June 7,

2008).

[75] Fact Sheet, *supra* note 47.

[76] UN Office for the Coordination of Humanitarian Affairs, *AFRICA: AFRICOM to focus on military, not humanitarian role*, IRIN, Mar. 14, 2008, available at http://www.irinnews.org/Report.aspx?ReportId=77283. Note: The IRIN News Website is maintained by the UN Office for the Coordination of Humanitarian Affairs. GEN Ward's comments on humanitarian roles amounted to four lines in the Strategic Approach and six lines in Theater Security Cooperation of a fifteen page document.

[77] *Id.*

[78] *Id.*

[79] Taylor, Darren, *Aid Workers Anxious about US Military Involvement in African Development – PART 5 of 5*, May 26, 2008, available at http://www.voanews.com/english/Africa/Aid-Workers-Anxious-about-US-Military-Involvement-in-African-Development-PART-5-of-5.cfm (quoting Theresa Whelan).

[80] *Id.*

[81] *Id.* (quoting Sam Worthington).

[82] Taylor, Darren, *AFRICOM to Stay in Germany for Several Years – PART 2 of 5*, Voice of America News, May 26, 2008, available at http://www.voanews.com/english/Africa/AFRICOM-to-Stay-in-Germany-for-Several-Years-PART-2-of-5.cfm (quoting Vice Admiral Moeller).

[83] Wolfson, Paula, Bush Orders Airlift of Supplies for Darfur Mission, NewsVOA.com Website, January 5, 2009, available at http://coanews.com/english/2009-01-05-voa25.cfm?renderforprint=1.

[84] UN Office for the Coordination of Humanitarian Affairs, *supra* note 66.

[85] Taylor, *supra* note 79 (quoting Mary Yates).

[86] *Policing the Undergoverned Spaces*, *supra* note 61.

[87] DeYoung, Karen, *U.S. Africa Command Trims Its Aspirations*, Washington Post, June 1, 2008, at A18.

[88] *Id.*

[89] Pessin, Al, *Pentagon says AFRICOM Will Be Ready for Full Operations October 1*, Voice of America News, May 30, 2008, Available At Http://Www.Voanews.Com/English/2008-05-30-Voa62.Cfm (Quoting Teresa Whelan). Under questioning before the Senate Africa Subcommittee on 1 August 2007, Assistant Secretary Whelan said that Liberia, Botswana, Senegal, and Djibouti were among the countries that had expressed support For AFRICOM—although only Liberia has publicly expressed a willingness to play host to AFRICOM personnel. Testimony Of Whelan, Theresa, Deputy Assistant Secretary for African Affairs, Exploring The U.S. Africa Command And A New Strategic Relationship With Africa, Hearing Before The Subcommittee On African Affairs Of The Committee On Foreign Relations, United States Senate, One Hundred Tenth Congress, First Session, August 1, 2007, available at http://www.fas.org/irp/congress/2007_hr/africom.html .

[90] *Id.*

[91] Shanker, supra note 30.

[92] Adapted from Glaser, Connie, Doing a good job isn't enough — 'cultural astuteness' is needed to succeed, Business First – Louisville, Jul. 20, 2007, available at http://louisville.bizjournals.com/louisville/stories/2007/07/23/editorial5.html. Glazer' quotes Karen Benjack Glatzer, founder and CEO of GH Consulting, an Atlanta executive and leadership coaching firm, whose concept of "cultural astuteness for the business realm is ""the ability to get out of your

office and your comfort zone and navigate smoothly through the cultural nuances of your specific company."

[93]*Id.*

[94] Africa 2008: A conversation on nation, nation state and nationalism in post-colonial Africa, SW Radio Africa, Zimbabwe – Oct. 7, 2008, available at http://news.google.com/news/url?sa=t&ct=us/3-0&fp=49068a1e7d105fbd&ei= YIsGSeG4C47Y MqbE2LED &url=http %3A//www.swradioafrica.com/pages/nation071008.htm&cid=0&usg=AFQjCNHZNQwoupmHBJIzH KVYxqlVrBE4hg

[95]Varadarajan, Tunku, Black Power, Forbes.com, Oct. 27, 2008, available online at http://www.forbes.com/opinions/2008/10/26/obama-black-power-oped-cx_tv_1027varadarajan.html

[96]I*d.*

[97] TRANSCRIPT: General Ward Outlines Vision for U.S. Africa Command, Royal United Services Institute, February 18, 2008, available at http://www.africom.mil/getArticle.asp?art=1659.

[98] Singer, P. W., Corporate Warriors: The Rise of the Privatized Military Industry 8 (2003), *cited with authority in* Govern, Kevin H. & Bales, Eric C., TAKING SHOTS AT PRIVATE MILITARY FIRMS: INTERNATIONAL LAW MISSES ITS MARK (AGAIN), Fordham International Law Journal, Vol. 32, No. 1, December 2008, at 56 et. seq.

[99] Human Terrain System (HTS) Website, undated, available at http://humanterrainsystem.army.mil/. The HTS website describes HTS as "a new proof-of-concept program, run by the U.S. Army Training and Doctrine Command (TRADOC), and serving the joint community. The near-term focus of the HTS program is to improve the military's ability to understand the highly complex local socio-cultural environment in the areas where they are deployed; however, in the long-term, HTS hopes to assist the US government in understanding foreign countries and regions prior to an engagement within that region."

[100] Archimedes Global Website, undated, available at http://www.archimedesglobal.com/

[101] Hodge, Nathan, Help Wanted: 'Human Terrain' Teams for Africa, Wired Blog Network, January 12, 2009, available at http://blog.wired.com/defense/2009/01/help-wanted-hum.html.

[102] See, e.g., International Peace Operations Association (IPOA Website, available at http://ipoaworld.org/eng/.

[103] AFRICOM and African Peacekeeping Operations to Be Focus of IPOA Annual Summit, Reuters Website, August 14, 2008, available at http://www.reuters.com/article/pressRelease/idUS207446+14-Aug-2008+PRN20080814 . Reuters reported that the keynote speaker was retired four-star Marine General and former Commander in Chief of U.S. Central Command (CENTCOM) Anthony Zinni (formerly including parts of USAFRICOM's current AOR). Also speaking was Maj. Gen. Patrick Cammaert, formerly the United Nations Force Commander for the Eastern Democratic Republic of the Congo, and Jane Holl Lute, recently
named the United Nations Assistant Secretary-General for Mission Support in the Department of Peacekeeping Operations.

[104] Falconer, Bruce and Schulman, Daniel, Blackwater's New Frontier: Their Own Private Africa, Mother Jones, March/April 2009, available at http://www.motherjones.com/politics/2009/03/blackwaters-new-frontier-their-own-private-africa. Note: Since publication of this Mother Jones article, Blackwater Worldwide, a "Private Military Firm," has changed its name to Xe™ and its founding President and CEO has stepped down as the chief executive officer. See Price, Jay, Xe, formerly Blackwater, names new leadership, The News & Observer, March 3, 2009, available at http://www.newsobserver.com/917/story/1425276.html . The News & Observer article goes on to recount that "Five Xe guards have pleaded not guilty to charges brought by federal prosecutors for their roles in a shooting at a Baghdad traffic circle in Sept. 2007 in

which 17 Iraqi civilians were killed. A sixth guard pleaded guilty and is working with prosecutors."
[105] Falconer, at Id. By way of background, the former South African soldier Eeben Barlow founded the mercenary/PMF firm Executive Outcomes. Executive Outcomes was hired by the Angolan government in 1994 to prevent its overthrow by the rebel National Union for the Total Independence of Angola ("UNITA").70 Executive Outcomes decimated UNITA, allowing Angola's government to remain in control and consolidate its power. In 1995, Executive Outcomes did much the same for Sierra Leone when it dislodged the Revolutionary United Front from the diamond fields and forced them to negotiate a peace settlement with the government. Govern, supra note 90, at 63.
[106]Africom, threat to Nigeria's sovereignty —Oboko, Vanguard, Oct. 28, 2008, available at http://www.vanguardngr.com/ content/view/20329/44/

  [107] DeYoung, *supra* note 87.

  [108] Africom, *supra* note 103.

[109] An Hour with the Renowned South African Poet, Writer, Painter and Anti-Apartheid Activist

Breyten Breytenbach, Democracy Now Website, December 26, 2008, available at

http://i2.democracynow.org/2008/12/26/an_hour_with_the_renowned_south

  [110] DeYoung, *supra* note 87.
[111] Skinner, Danielle, U.S. Africa Command Public Affairs, *Deputy Moeller Speaks on Future of AFRICOM*, (June 5, 2008), *available at* http://www.africom.mil/getArticle.asp?art=1779.
[112] Gordon, Daniel, *The controversy over Africom*, BBC World Service, Oct. 3, 2007, available at http://news.bbc.co.uk/ 1/hi/world/africa/7026197.stm.
[113] *Id.*
[114] More than Humanitarianism: A Strategic U.S. Approach Toward Africa, Council on Foreign Affairs INDEPENDENT TASK FORCE REPORT No. 56, January 2006, at 40, available at http://www.cfr.org/publication/9302/ more_ than_humanitarianism.html
[115] Corey, Charles, *A Better Africa for Africans is Goal of U.S. Policy*, America.gov, June 5, 2008, *available at* http://www.america.gov/st/peacesec-english/2008/June/20080605153632WCyeroC0.2556116.html&distid=ucs.
  [116] *Id.*
[117] Lobe, Jim, *POLITICS: Africa to Get Its Own U.S. Military Command*, IPS News, 31 January 2007, http://www.ipsnews.net/news.asp?idnews=36396
  [118] *Id.*, at 3.
  [119] *Id.*, at 3.
[120] Study on an African Union Government Towards the United States of Africa, African Union, June 2006, at 32, available at http://www.africa-union.org/Doc/study_on_AUGovernment_june2006.pdf .
[121] *Id*., at 32.
[122] Press Release, LEADER MUAMMAR GADDAFI VISIT'S AU HEADQUARTERS: "The time has come for Africa's voice to be heard" Addis Ababa 5 February 2009, African Union (AU) Website, February 5, 2009, available at Http://www.africa-union.org/root/au/Conferences/2009/january/summit/assembly/press/12th%20summit%20-%20LEADER%20GADDAFI%20-%2005-02-09%20-%20ENGLISH.doc.
[123] Polgreen, Lydia, Qaddafi, as New African Union Head, Will Seek Single State, New York Times, World-Africa, February 2, 2009, available at http://www.nytimes.com/2009/02/03/world/africa/03africa.html?_r=1&emc=eta1
[124] Q&A: Sudan's Darfur conflict, BBC News Online, Friday March 5, 2009, available at http://news.bbc.co.uk/2/hi/africa/3496731.stm

[125] Mbeki named to heal Bashir rift, BBC News Online, Friday, March 6, 2009, available at http://news.bbc.co.uk/2/hi/africa/7927706.stm

[126] Id.

[127] Martell, Peter, Dancing Bashir scoffs at Darfur warrant, BBC News Online, Thursday, March 5, 2009, available at http://news.bbc.co.uk/2/hi/africa/7926813.stm

[128] Mbeki, supra note 121.

[129] Id.

[130] Gollust, David, US Signals Support for ICC Prosecution of Sudan's Bashir, Voice of America Websirte, February 12, 2009, available at http://www.voanews.com/english/2009-02-12-voa56.cfm. **As a "m**ultimedia international broadcasting service funded by the U.S. Government,:" the VOA oversimplified why the U.S. is not a party to the ICC, asserting that it was "owing to concerns of the former Bush administration that the court is unaccountable to anyone and might prosecute U.S. troops or diplomats."

[131] Gribbin, Robert E., *Implementing AFRICOM: Tread Carefully*, Foreign Service Journal, May 2008, at 25.

[132] *Id.,* at 25

[133] *Id.,* at 25

[134] Forest, James J.F., Legitimacy and Peace: Linking U.S. Strategic Objectives with the African Union and Darfur 6 (2007), *available at* http://www.teachingterror.net/lectures/Forest_IDC2007.ppt. Presented at 13th Annual International Development Conference.

[135]*Id.* at 8, quoting with authority Article 4(h), of the AU Constitutive Act, *available at* http://www.africa-union.org/root/au/AboutAu/Constitutive_Act_en.htm: "The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity." Initiatives to build legitimacy, as outlined by Forest at Slide 10, included the following: Global Peace Operations Initiative; Anti-Terrorism Assistance Program; Trans-Sahara Counter Terrorism Partnership; East Africa Counterterrorism Initiative; African Coastal Security Program; Foreign Military Financing; African Union Standby Force; Kofi Annan International Peacekeeping Training Center; African Contingency Operations Training & Assistance; International Military Education Training; Military Personnel Exchange Program; Regional Defense CT Fellowship Program, and National Guard Bureau State Partnership Program.

[136]*Id.* at 8.

[137] *Id.* at 6.

[138] *Id.* at 6.

[139] *Id.* at 11.

[140] Preliminary Observations , *supra* note 37, at 11.

[141] Obama, *supra* note 3.

The Two Faces of Military Legitimacy: America's Illusive Search for "Legitimate"Partners in an Illegitimate World

Written by: Jack Porter

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Abstract

In its original version, military legitimacy addresses the subject of US military operations and their faithfulness to American values, such as the rule of law, democratic principles and human rights. Increasingly however, military legitimacy necessitates greater attention to not only the behavior of American personnel but also the actions of our allies. Of significance, this requirement is not necessarily new nor solely the product of recent events. Instead, it represents the culmination of decades of US international involvement and profound changes at both the global and domestic levels. Over the past four decades, there has been a marked shift in the belief that America must associate itself with the right type of partners if its national interests are to be effectively advanced in an acceptable manner. If appropriate actors are not available, then they must be constructed, with outside assistance if necessary. By the 21st century, America's interests, power, and moral standing demand more than ever that leaders understand this link between the legitimacy of its behavior and that of others'.

Introduction

At the most basic level, the question of "military legitimacy" necessitates a thorough and reflective analysis of U.S. military policies and their faithfulness to the country's widely held values and principles. Unlike many other states, particularly those with unaccountable authoritarian governments, the United States of America has found it difficult to engage in international politics in an amoral (or

realist) fashion. Even in those circumstances requiring the cold calculations associated with realism, U.S. leaders frequently justify actions and objectives in moral and principled terms. This is not to suggest that all American leaders are disingenuous all of the time. Certainly, America's involvement in the international system has a proud tradition often characterized by altruistic motives, ethical policies, and legal behavior. Also, the above claim does not discount the possibility that the United States must at times direct its actions based on hard considerations of power and national self-interest. Nevertheless, one of the defining features of American foreign and security policy from its inception has been the degree to which its leaders and citizens demand that policies not undermine the ambitious principles of liberty, equality, honor, and compassion. At a minimum, the country is expected to behave in a manner that upholds some of its most fundamental of values - accountability, the rule of law and respect for human dignity. If developing policies and assets in line with these principles were not complicated enough, one of the mounting challenges of America's 21st century foreign policy is the added necessity of pursuing them with the assistance and cooperation of partners regarded as equally "legitimate." This turns out to be one of the Bush Administration's most subtle and unspoken legacies. With few exceptions, the United States must increasingly pursue its core interests in association with legitimate actors or create them if they are to be regarded as successful.

With the above observations in mind, the focus of this paper will be less on how consistently American forces act (or not) in accordance with the mandates of military legitimacy and instead on how American policies increasingly demand that our allies and partners do so. The analysis will be organized along the following lines. First, I will provide a overview of the concept of military legitimacy paying particular attention to its growing significance in the context of 21st century American foreign policy. The widespread impact of an increasingly interconnected and observant international community further accentuates its importance and complicates its implementation. Second, I will take a step back and briefly look at America's foreign and security policies during the later part of the Cold War in order to illustrate the importance (or lack there of) of seemingly "legitimate" partners and allies. As will be seen, despite rhetoric and complex definitions (for example, Jeane Kirkpatrick's distinction between totalitarian and authoritarian governments) much of America's actual behavior relied on cooperation with and assistance from non-legitimate actors (at least from the perspective of American values). Third, the implications of the end of the Cold War and 9/11 on the renewed importance of military legitimacy will be discussed. Fourth, I will analyze current policies that place a premium on "legitimate" actors in Afghanistan and Iraq and the complications associated with legitimacy at two levels (domestic and international). In this regard, the primary focus will be on counterinsurgency operations and reconstruction efforts; both of which require indigenous actors who are perceived as legitimate to not only the local community but also to their coalition colleagues as well as the American public at large. Finally, a conclusion will outline some of the unanswered questions and explore the possibility that success may be elusive or at least distant without a frank and honest dialogue on the limits of legitimacy.

Currently, the American public and the much of the world community await the commencement of the Barack Obama presidency, some with excitement and optimism others with fear and skepticism. Throughout the presidential campaign, then candidate Obama went to considerable lengths to distance himself from just about all of President George W. Bush's domestic and international policies. Whether on issues related to detainees and "enhanced" interrogation techniques or the wars in Afghanistan and Iraq, the future president promised a full and thorough reorientation in American strategy and conduct. Yet, it will take time for the full details of this redirection to emerge; not to mention the potential for unexpected events to sidetrack even the best of his intentions (one need only to look back at the

tremendous impact that the events of 9/11 had on George W. Bush's initial foreign policy agenda based on restraint, limited state and nation building, and a renewed focus on great power politics). Beyond campaign rhetoric, some general promises to "surge" diplomacy, and the cabinet appointments of Hillary Clinton as Secretary of State, retired Marine General James Jones as National Security Advisor, and the retention of Robert Gates as Secretary of Defense, President Obama's future foreign and security policy remains a work in progress. What is more apparent are the complex and unresolved dilemmas left over from the Bush administration. In addition to this practical legacy, President Obama must also deal with the more intangible, idealistic legacy of the Bush Doctrine.

First outlined in the US National Security Strategy of 2002 and updated in 2006, the so-called Bush Doctrine attempted to combine the realist ideas of unilateral action, preemption, and the efficacy of military power with the more idealistic tenets of liberty, free markets, human dignity and respect for the rule of law. Interestingly, all of these elements resonate with American values, even if they make for an uncomfortable mix.[1] George W. Bush was not the first president to realize the difficulty in reconciling these approaches, nor will he be the last. For President Obama, however, the Bush Doctrine pushed these ideas and their potential contradictions squarely to the forefront of the conscience of the American body politic. The country is now aware of the brutal and quasi-legal practices associated with enhanced interrogation practices. The reckless, illegal and damaging behavior of loosely controlled and for the most part unaccountable private contractors are still working their way through the criminal justice system. Finally, the images of *Abu Ghraib* echo not just in the United States but also throughout the wider international community. All of these tragic cases have one thing in common - they indicate just how difficult it is to balance realist conceptions of security and the use of force with idealist principles of rule of law and respect for human dignity. Like George W. Bush and presidents before him, President Obama is also confronted with the awesome responsibility of somehow reconciling "might and right."

Before looking back at earlier attempts to solve this puzzle, it is vital that we identify a few contemporary factors that further complicate future American policy and efforts to secure national interests in an acceptable and legitimate manner. Readers will certainly be familiar with these changes since most are associated with what is commonly know as globalization. The changes and innovations in information technology that have done so much to interconnect the many communities across the globe have introduced a new level of accountability when it comes to military legitimacy. Not only must American citizens and select indigenous actors regard the country's policies and actions as legitimate, now due to satellites, round the clock news programming and the Internet a regional and potentially global audience has the capability of evaluating and judging the outcomes. The earlier examples are illustrative; the increasingly widespread viewing audience either directly or indirectly exacerbated each situation. Of course, at its core legitimate behavior rests on the individuals and their own actions. Nonetheless, the more people that become disenchanted with and disgusted by American actions, the more difficult it becomes to accomplish its national goals and retain its moral status.

Political leaders and scholars have long understood the critical importance of acting in accord with legal rules and established codes of conduct when it came to combat and interstate violence. For instrumental and/or normative reasons, states increasingly sought to clarify acceptable treatment of both combatants and non-combatants in legally binding treaties such as the Geneva Conventions of 1949. Despite their profound and far-reaching significance, however, the Conventions and other international agreements were less than comprehensive and left much of their enforcement to individual states. Principled behavior and lawful conduct were often at the discretion of state leaders. Balancing might and right remained an illusive and subjective goal. Even for the most sincere and law-

abiding of countries, the pressures and temptations to sidestep this obligation particularly in the face of perceived strategic necessity were in many cases too much to resist. Nonetheless, the short-term expedience and benefits of ignoring legal and ethical restraints could have devastating consequences.

In his insightful and prescient book, *Military Legitimacy: Might and Right in the New Millennium*, Rudolph C. Barnes, Jr. wisely reminded Americans of this vital connection between military power and ethics.[2] Written shortly after breakup of the Soviet Union, Barnes referred to this type of conduct as "military legitimacy." He was primarily concerned with America's post-Cold War projection of power in an increasingly complex strategic environment. With few state adversaries, military activities would instead involve a vast array of "operations other than war." While not discounting the significance of military legitimacy during interstate conflict, it was now absolutely necessary if the United States hoped to accomplish its national security objectives. Whether in peacekeeping operations or humanitarian relief, soldiers and officers must ensure that their actions reflected democratic values. Success depended as much on perception as tangible results. Of significance, Barnes's focus was on the tactical and strategic level and primarily concerned with the behavior of Americans. In presenting the challenges that lay ahead, the author notes "new strategies and capabilities must be built on the principles of legitimacy, and while the core principles of democracy, human rights and the rule of law have not changed, the new strategic environment is creating new priorities for military legitimacy in the coming millennium."[3]

Military Legitimacy during the Cold War

Any effort to understand today's complex choices between "might and right" must include an analysis of American foreign policy during the Cold War. It was during this period that the United States assumed its position as leader of the "free world" - both in terms of material power and global commitments. For many, the bipolar structure bequeathed by the outcome of World War II was more than simply a confrontation between two emerging superpowers. It was a struggle between good and evil, freedom and tyranny, darkness and light. Justifying the tremendous sacrifices required of the United States, President Harry S. Truman underscored the stakes involved in NSC 68,

The assault on free institutions is world-wide now, and in the context of the present polarization of power a defeat of free institutions anywhere is a defeat everywhere…Thus unwillingly our free society finds itself mortally challenged by the Soviet system. No other value system is so wholly irreconcilable with ours, so implacable in its purpose to destroy ours, so capable of turning to its own uses the most dangerous and divisive trends in our own society, no other so skillfully and powerfully evokes the elements of irrationality in human nature everywhere, and no other has the support of a great and growing center of military power.[4]

Thus, for the first time in its history, the United States committed itself to an explicitly internationalist posture. The conditions for such a monumentous choice appear in retrospect to have been overwhelming; two superpowers driven by mutually hostile ideologies, incompatible political and economic systems, and conflicting national security interests. Furthermore, the seemingly clear-cut logic of the international system suggested equally simple strategic choices. Overtime, however, the tremendous complexity behind this bipolar configuration and what it meant for American foreign and security policy would become clear and present increasingly vexing challenges to Washington, DC. Furthermore, although defining the conflict in such stark terms suggested an equally straightforward choice in allies, American decision makers soon found themselves struggling with a profound contradiction - allying with non-democratic societies in the name of freedom. And their conduct reflected back on the United States.

The Vietnam War provided the first vivid example of this contradiction to most Americans. Certainly, America's involvement in Southeast Asia during the first two decades of the Cold War eschews easy descriptions and quaint narratives. For the purpose of this discussion of military legitimacy, however, I will limit my comments to somewhat general observations on the illusive search for "legitimate" allies in the struggle against an ever-expanding communist adversary. As will become evident, with a few noteworthy exceptions, American decision makers were ultimately unable to find or create legitimate partners in this region. The increasing illegitimacy of operations, combined with the mounting financial and human costs, would contribute significantly to the decision of the United States to abandon the effort after 1972. Here one sees the multifaceted interaction of different levels of legitimacy. At the most basic level, the conduct of American soldiers and our allies was becoming the focus of an increasingly attentive and ultimately disapproving American public. This situation evolved into an even more intricate relationship when it came to counterinsurgency operations. In this area, success hinged not only on the perceptions and support of America, but first and foremost on the approval of the local population. Put more simplistically, victory was only possible by "winning the hearts and minds" of the Vietnamese.

Efforts to defeat the communist infrastructure in South Vietnam date back to the early 1960's. Both the South Vietnamese government and U.S. military advisors sought to identify and eliminate communist political and military personnel operating in the countryside. The efforts failed as the result of a number of bureaucratic and strategic flaws. Subsequently, in February 1966 President Lyndon B. Johnson convened a high level conference in Honolulu, Hawaii to sort out the problems and design a new approach to the insurgency in South Vietnam. The first priority was to establish unity of effort by combining military and civilian operation under one chain of command. This was accomplished by the creation of a single program, Civil Operations and Rural Development Support (CORDS), in charge of pacification and lead by former NSC staffer Robert Komer. Significantly, Komer and the CORDS program were situated within the Military Assistance Command Vietnam (MACV) under the command of General William Westmoreland. Second, a more effective balance between force and civilian development needed to be established and maintained. This objective required two overlapping projects: efficient and restrained "neutralization" of the most ardent adversaries (the Phoenix Program) as well as the provision of a host of social, economic, and political projects (CORDS Program). Crucial to this were attempts to identify and employ local partners capable of acting in a relatively honest and lawful fashion. Ironically, many experts argue that in the limited context of counterinsurgency operations, these endeavors were deemed successful. In fact, by some accounts the insurgency had been all but eliminated by 1972.[5] Unfortunately, victory in Vietnam remained illusive in part due to the inability to develop a legitimate government at the national level. Corruption, inefficiency and brutal authoritarian rule were chronic characteristics of the Saigon regime and no amount of American military power could overcome this weakness in the long run.

In certain respects, this experience initiated an objective now called "capacity building." President Nixon's plan to "Vietnamize" the struggle called for drawing down U.S. military involvement while simultaneously encouraging South Vietnam's indigenous capability to prosecute the conflict. This strategy hinged on the development of two related proficiencies: military proficiency and political legitimacy. On the first, early evidence suggests that by 1972 the Army of the Republic of Vietnam was successful in acquiring the capacity to operate somewhat independently of direct American support. Unfortunately regarding the second, South Vietnam and its American advisors were unable to eliminate the corruption and incompetence of the Vietnamese government. Combined with Congress's post 1972 decision to terminate military and economic assistance, this profound lack of legitimacy of America's ally would prove fatal.

Without going into too much detail, this painful experience with illegitimate third world allies contributed to the bitter psychological and physical trauma referred to as the "Vietnam Syndrome." Combined with the growing global attention to human rights (highlighted by the Helsinki Accords in 1975) and thawing relations with the Soviet Union associated with Détente, America embraced a new desire to place respect for liberal values, such as political and religious freedoms, at the forefront of President Jimmy Carter's foreign policy agenda. Although economic woes, an increasingly belligerent Soviet Union, and an Islamic revolution in Iran ultimately doomed the Carter Presidency, his emphasis on human rights and political freedoms as criteria for America's allies represented a significant shift in the terms of the Cold War. Not only would the United States defend freedom and liberal values, it now expected its partners to adhere to them as well. This stance clarified some of the frustration of the Vietnam chapter only to see other complications emerge.

President Ronald Reagan was perhaps the most forceful of Cold War presidents to stress the vital necessity of combining the utility of military power and faith in liberal values in the pursuit of American foreign policy. When it came to supporting allies and vice versa, UN Ambassador Jeane J. Kirkpatrick provided the most cogent argument for assisting "friendly" authoritarian states at the expense of more revolutionary, "populist" movements and socialist/Marxist regimes. Her self-proclaimed realist position naturally emphasized the primacy of American national interests as the first test in whom to support. In this regard, authoritarian states were based on traditional social and political relationships and tended to support the status quo. In contrast to the revolutionary regimes promising profound upheavals in all aspects of life, these authoritarian governments were often natural allies of the US. Naturally, many of the revolutionary actors regarded the Soviet Union (its ideology as well as material support) as patron and sponsor. For Kirkpatrick and other conservatives, in purely strategic terms it was obvious with whom the United States should ally.

Yet Kirkpatrick's defense of alliances with authoritarian "strongmen" as opposed to totalitarian actors went beyond merely realist strategic logic. It also included a passionate assertion that in the long run, authoritarian regimes were much more likely to transition into legitimate democratic political systems than were communist countries. In her seminal essay, *Dictatorships & Double Standards*, Kirkpatrick rebukes President Carter and other liberals for their mistaken support, or at least acquiescence, of anything claiming to operate as a "peoples' movement." The Left's intellectual blinders allowed them to refuse assistance unless accompanied by sincere reform to staunch allies like General Anastasio Somoza Debayle in Nicaragua and the Apartheid government in South Africa while making allowances for Marxist rebel activities throughout South and Central America and sub-Saharan Africa. Pointing to the fallacy and tragic consequences of this perspective, Kirkpatrick wrote "…the American efforts to impose liberalization and democratization on a government confronted with violent internal opposition not only failed, but actually assisted the coming to power of new regimes in which ordinary people enjoyed fewer freedoms and less personal security than under the previous autocracy - regimes, moreover, hostile to American interests and policies."[6]

What was ultimately at stake for Kirkpatrick (and President Reagan) were both America's power and values. In distinguishing between good authoritarian and bad totalitarian states, America can pursue both its national interests in the short term and advance American values in the long term. In an interest juxtaposition of ideas, realist calculations can advance idealistic objectives. American assistance and encouragement to illegitimate authoritarian allies can provide the avenues to democracy and legitimacy. When confronted by rebellion and people's movements, US leaders must stand firm behind these autocratic friends and assist their counterinsurgency efforts. Furthermore, refusal to support such regimes produced the counterproductive outcomes for both the people and the United

States. Conversely, a policy of abandoning them in their hour of need and turning a blind eye to the likelihood of socialist tyranny promised strategic failures and disappointments in democratization. Summing up her argument case, Kirkpatrick asserts,

The foreign policy of the Carter administration fails not for lack of good intentions but for lack of realism about the nature of traditional versus revolutionary autocracies and the relation of each to American national interest. Only intellectual fashion and the tyranny of Right/Left thinking prevent intelligent men of good will from perceiving the facts that traditional authoritarian governments are less repressive than revolutionary autocracies, that they are more susceptible of liberalization, and that they are more compatible with U.S. interests. The evidence on all these points is clear.[7]

While time and events would disprove some of Kirkpatrick's claims (Communist China's economic liberalization, the relatively peaceful collapse of the Soviet bloc and its transition to democracy and free markets, etc.), her concern with balancing America's strategic interests with fidelity to its liberal values reflected not only the complexities of the time but anticipated an increasingly formidable force in American politics. As will be demonstrated in the remainder of this essay, future presidents would find their foreign and security policies evaluated increasingly through the twin lenses of strategic interests and liberal values. For President Reagan and Ambassador Kirkpatrick, the logic of the Cold War and the objective of defeating the Soviet Union still provided enough room for illegitimate allies and partners. With the collapse of the Soviet Union and the concomitant delegitimization of operational communism, the global stage was potentially set for an American policy based on a neat consistency between "might and right."

Military Legitimacy during the 1990s

The end of the Cold War was meet with considerable optimism. Not only did the defeat of communism usher in an "end of history," the goal of promoting democracy seemed to take on a momentum of its own.[8] The United States was now free from the rigid realist constraints of the bipolar international system and thus able to reorient its national security strategy in new directions. Prosperity became the primary objective as the world entered a new era of cooperation based on mutual understandings and common interests. Not only America but also the rest of the globe were to enjoy the new peace dividend and other fruits of an increasingly liberal democratic community.[9] Of importance to the discussion on military legitimacy, the decreasing need for military means to advance America's national objectives was one practical consequence.[10] Promoting or defending democracy through violent means such as proxy wars and (counter) insurgency was replaced by a host of interconnected diplomatic, economic, and social strategies. Furthermore, as pointed out, many argued that globalization gave rise to autonomous trends and pressures that made increased liberalization almost inevitable. For America, choosing legitimate allies became less convoluted; instead, the emphasis now shifted towards assisting them in strengthening and consolidating the transition to democratic political institutions.

With reference to the construction of legitimate partners, much of America's energy was directed at multilateral mechanisms. The North Atlantic Alliance became the cornerstone in the West's goal of integrating the former communist states in East and Central Europe as well as the new republics of the Former Soviet Union. Initially through the Partnership for Peace Program, these states were brought into the West's expanding collective security arrangement. Promises of full NATO membership and all the associated benefits awaited them at the end of their journey. Adoption and consolidation of liberal democratic political, economic, and social institutions is all that stood in the way. In addition to numerous military adjustments such as weapons interoperability and an overhaul of civil military

relations, potential NATO members were required to adopt democratic constitutions, protect human rights and respect the rule of law. While not without opponents and critics, this strategy sought to not only push the frontier with Russia further eastward but also offer tangible rewards to pro-Western politicians in these countries. In essence, having defeated the totalitarian menace, the objective was to now transform them into legitimate partners.

Certainly, the world was not without violence and conflict. Even before the collapse of the Soviet Union, Saddam Hussein's Iraq invaded Kuwait in August 1990. Communal violence persisted in other parts of the globe, with the Rwandan genocide in 1994 perhaps representing humanity's worst. Even Europe was not spared as war and ethnic cleansing spread throughout the Balkans. These devastating traumas notwithstanding, the 1990's remained a decade of hope and optimism in the capability of multilateral institutions, such as the United Nations, the European Union, and the North Atlantic Alliance, as mechanisms for liberalism, prosperity, and security. Furthermore, military legitimacy was conveyed and guaranteed almost by definition through membership in these organizations.

Military Legitimacy in the 21st Century

Impact of 9/11 and the Bush National Security Strategy

Upon taking office in early 2001, President George W. Bush initially had planned to scale back America's global presence and overseas commitments. Critical of Clinton's overextension of forces engaged in peacekeeping and other non-combat activities, (derisively referred to during the 2000 presidential race as "international social work") Bush had hoped to refocus attention on great power politics more reminiscent of the Cold War. For example, departing from Clinton's approach to China as a "strategic partner," Bush promised a harder line and instead referred to the increasingly economic and militarily powerful country as a "strategic competitor." His selection of Condolezza Rice as National Security Advisor, Colin Powell as Secretary of State and other so-called Cold Warriors to critical foreign and defense posts further confirmed this intention. Tragically, nine months into his first term, the terrorist attacks of September 11, 2001 would compel the President to reevaluate this original strategy.

It is beyond the scope of this analysis to outline the many complex, and sometimes unintended, effects that the events of 9/11 had on American foreign and defense policy. While they may not have "changed everything," the attacks shocked a relatively complacent superpower and brought to the forefront a new national impulse to revenge the wrongs and restructure the international system so that they would not be repeated. In general terms, the new approach was officially outlined in the Bush Administration's National Security Strategy first articulated by the President as a commencement address to the 2002 graduating class of the United States Military Academy at West Point. The more specific details would take shape over the ensuing seven years.

The National Security Strategy (2002 & 2006) outlines in extraordinary and ambitious terms a policy designed to link two of America's most formidable assets - liberal democratic values and military power. In theoretical parlance, the Strategy attempts to bridge the tenets of realism with those of idealism. Promoting freedom, liberty, and human dignity are not just normatively worthy goals, they are better understood a strategic necessities. "To protect our Nation and honor our values, the United States seeks to extend freedom across the globe by leading an international effort to end tyranny and to promote democracy."[11] The advancement of liberal values has become not just a goal but the cornerstone of U.S. strategy. Undeterred by outspoken realist critics, the Bush administration coupled American security and global stability to the idealistic advancement of political legitimacy based on American democratic principles. Might and right were finally combined into one policy. Success or

128

failure now hinged on America's ability to construct free nations and thus also rested in the hands of its new allies.

As defined by the Strategy, "effective democracies" exhibited four common traits. As will be discussed later, these characteristics also relate to political legitimacy. First, they must respect human rights such as political and religious freedom as well as the rights of association and free media. Second, their governments must be responsive to citizens especially when it comes to elections. Third, in practical terms, they have to be able to exercise their sovereignty by controlling borders and punishing unlawful behavior through an independent judiciary. The rule of law is paramount to this concern. Finally, there should be limited government interference in the private sphere by acknowledging civil society, voluntary associations, private property and a market economy. *Of significance to this discussion, in order for these new "effective democracies" to remain effective, secure, and true to U.S. interests, their security forces must also act consistently with the dictates of military legitimacy.*

Efforts underway in Iraq and Afghanistan provide two vivid examples of the importance to which the United States has attached its national security interests to the promotion of "effective democratic" allies. Committed to the belief that American interests rest increasingly in the hands of legitimate allies, tremendous human and economic resources are currently being directed at democratic state building in these formerly authoritarian countries. The political projects are multifaceted, combining ambitious institution building with civic organization and education. Economically, private enterprise is being promoted while massive infrastructure and developmental ventures are being constructed. But both political and economic endeavors ultimately depend on the ability of these fledgling democracies, in conjunction with their American allies, to provide the necessary security and regional stability. This seemingly straightforward objective presents the true test of America's commitment - can security be advanced in these countries with U.S. and allied military personnel (as well as other affiliated actors such as contractors) remaining loyal to the very values they are swore to advance? Or will strategic considerations and more immediate practical concerns trump democratic values and tempt these new security forces to act in ways contrary to the dictates of military legitimacy?

Building Legitimacy in Iraq

As is well know by now, considerable time, energy, and resources have been devoted to the (re)creation of the Iraqi armed forces. Of note, this represents only part of the larger effort to develop what are collectively referred to as the Iraqi Security Forces (ISF). Although the ISF are made up of forces from the Ministry of Defense (MoD), Ministry of the Interior (MoI), and Counter-Terrorism Bureau (CTB), there is a certain degree of overlap in terms of training and projected mission. At a minimum, it is expected that these units be capable of cooperation and joint operations. While this analysis will be limited to the development, training, and operations of those forces under the control of the MoD, issues of legitimacy obviously relate to all members of the ISF. Of particular concern are the measures that at being taking to ensure that these new military units act in ways that enhance their military legitimacy in the eyes of the Iraqis (as well as the U.S. and the rest of the world community) and thus directly impact perceptions of American legitimacy as well.

As required by law, the US Department of Defense furnishes regular updates to Congress on security and stability in Iraq. These semi-annual reports cover a broad range of topics related to the overall situation including the progress of returning stabilization responsibilities back to Iraqi control. As of December 2008, 13 of Iraq's 18 provinces have been transferred to Provincial Iraqi Control (PIC).[12] The status of the ISF in general and the armed forces in particular are central to this process and vital to its ultimate success. According to the report, as of October 31, 2008, Iraqi Security Forces had an

authorized total of approximately 630,000 of which 566,000 were classified as trained. Although the number of trained MoD personnel is reported as 263,000, only 223,500 are officially assigned to duty. The excess number of trained soldiers includes those trained to date but currently inactive due to injury, absent without leave, normal separation, etc.[13] Numbers are important but only tell part of the story. In fact, levels of competence, proficiency and retention rates are also essential metrics in terms of assessment.

The U.S. evaluation of Iraqi MoD capabilities centers overwhelmingly on operational and logistical criteria with *readiness, capability and effectiveness* the primary objective. (One example of the tremendous emphasis placed on operational capacity is found in the Multi-National Security Transition Command - Iraq definition of success, "Success is - If they can recruit themselves, train themselves, equip themselves, pay themselves, trust each other and acquire their future force requirements, then they are truly mission ready.")[14] In addition to combat and material proficiency, the report also analyzes progress made in the development of ministerial skills, personnel, acquisition and budget competence and training centers and curricula. Expertise in these fields is absolutely essential to the development of combat effective Iraqi armed forces. Also discussed, but in much less detail are efforts geared toward promoting a deeper understanding of democratic civil-military relations and military legitimacy. This is not to suggest the US military is unaware of the importance of these concerns or has in any way purposefully neglected these subjects. Instead, the overwhelming immediacy of security needs and counterinsurgency operations demand that combat skills and tactical operations take priority over training in other areas.

Although not receiving the same level of attention as combat skills, efforts to develop a democratic and accountable Iraqi military are underway. For example, of the 11 areas of expertise offered by Iraq's MoD Ministerial Training and Development Center - Academy (MTDC-A) two deal directly with the subject of military legitimacy: General Counsel and Inspector General/Human Rights. Also, in order to educate a new generation of NCO's (a noteworthy weakness) and officers the MoD has created the Iraqi Center for Military Values, Principles, and Leadership Development which "is charged with developing a professional force that is ethically based, competently led, loyal to the principles of the constitution, and accountable to the civilian leadership and people of Iraq."[15] The Center also trains instructors so that they can teach ethics during basic combat and leader training programs.

It is difficult to assess just how successful these programs have been to date. The DoD report does offer some rudimentary numbers regarding the status of human rights and military disciple. In both areas, problems and backlogs persist. In terms of human rights there is a significant overcapacity in detainees awaiting trial and legal review. Also, concerns have been raised about the detention centers and access to health care, poor quality food and water as well as inadequate hygiene facilities. In general terms, military justice is also still a work in progress although a number of legal and structural adjustments point to an improvement in the overall system.[16] However, despite this relatively sanguine assessment by the US military, outside observers have portrayed a much more problematic picture. For example, Rand analyst Olga Oliker testified before Congress in 2007 that, among other concerns, senior officers in the Iraqi Armed Forces are trying to solidify Shi'a control over the security forces including the MoD, that the vetting efforts to eliminate inappropriate loyalties have long be ineffective and that despite Coalition monitoring, security forces are seen "as part of the growing sectarian conflict."[17] The situation is even more problematic with those forces that are more loosely monitored by coalition advisors such as diplomatic protection personnel and the Facility Protection Services (FPS).

Building Legitimacy in Afghanistan

Contrary to the considerable progress recently exhibited in Iraq, efforts to develop the Afghan National Army (ANA) remain problematic. In terms of overall troop strength, the end goal is approximately 80,000 by 2010. By mid-2008, the ANA had about 69,000 troops of which 52,000 were actively engaged in major operations in conjunction with ISAF forces.[18] Although the eventual plan is to have the ANA assume responsibility for both internal and external security, their primary duties currently center on counterinsurgency and counter-terrorism. Foreign advisory and monitoring remains essential to these activities. For example, each ANA unit is assigned either a U.S. Embedded Training Team (ETT) or NATO ISAF Operational Mentor and Liaison Team (OMLT). Multinational in make-up, these teams act as trainers, assessors, and links between the ANA and NATO ISAF. Unfortunately, and despite numerous pledges from the United States and other NATO members, understaffing and personnel shortfalls plague this otherwise promising effort. Finally, there is little or no overall defense policy or strategic guidance beyond the more tactical concerns related to counterinsurgency.

Beyond developing operational and organizational skills, there are few programs designed to promote the more intangible proficiencies associated with ethics and democratic values. The ongoing need to combat the mounting insurrection led by a resurgent Taliban is one explanation for this insufficiency. Low retention rates, high levels of illiteracy, and the ANA's multiethnic composition are further obstacles. This is clearly an area of concern and one that needs to be addressed if the new ANA is to fulfill one of its primary functions - to act, in time, as a symbol of national unity and purpose.[19]

On a more positive note, there does seem to be the early development of a professional officer class conscious of its obligations and loyalty to the national government. They are also increasingly proficient at using the "military decision-making process and to provide information and decision briefs to their superiors. The chain of command works well when exercised, and there is strict adherence to direction from higher ranks."[20] Finally, the first class of the National Military Academy of Afghanistan graduated in January 2009. The four-year university is designed to prepare the new professional officer class and includes coursework in engineering, computer science, sciences or legal studies. According to President Hamid Karzai, the graduates were to become "the heartbeat of the entire nation."[21]

The above overview underscores the extreme difficulties that confront US and NATO efforts to develop a combat capable and militarily legitimate Afghan military. Tactical skills and operational proficiency have become the top priority due to the more immediate needs to defeat the Taliban insurgency as well as capture Osama bin Laden and dismantle the al Qaeda terror network. Structuring professional armed forces based on the tenets of military legitimacy and accountable to the Afghan nation has assumed secondary importance. Although understandable, this decision has produced unintended and unfortunate consequences. One example is worth quoting at length:

> On August 22, 2008, U.S. and Afghan forces engaged insurgents in Azizabad village in Herat province, ordering air strikes that caused significant casualties. U.S. officials at first denied the existence - and then the scale - of the civilian casualties and insisted that the attack was justified, enraging Afghan citizens and turning them away from their government and international forces. Afghan and international forces have too often used overwhelming force in pursuing militants, prioritized the protection of soldiers over civilians in their operations, conducted indiscriminate and unwarranted searches of peaceful villages without consideration of local customs, detained Afghanis with no known connection to militant groups, and picked discredited allies with whom to fight terrorism. **These actions have provoked indignant protests and popular resentment across the country and have hindered critical stabilization and state-building efforts (emphasis added)**.[22]

Barnes's recognition of the importance of military legitimacy for American operations is equally valid for the activities and behavior of its allies in today's strategic environment.

Conclusion

The objective of this essay was to analyze the increasingly important connection between American military legitimacy and the military legitimacy of its allies. While certainly not new, the search for partners capable and willing to act in a manner consistent with American principles and values has become a vital necessity for the successful promotion of U.S. national interests in the 21st century. Absent the apparently simple logic of the Cold War and its concomitant strategic necessities, the United States seems to have more latitude in its choice of allies. It is now able to be more demanding in terms of values and institutions. President George W. Bush made this particularly clear in his National Security Strategy. Yet the emergence of fundamentalism and international terrorism threatens this approach and has instead introduced a new global enemy that may once again tempt U.S. decision-makers to shortchange these policies. Furthermore, as efforts in Iraq and Afghanistan demonstrate, strategic and security demands are even now pushing concerns for military legitimacy to the back burner. This is not only unfortunate; as Rudolph C. Barnes cautioned in 1996, these short-term decisions often produce long-term consequences that are potentially detrimental to American national interests and moral standing.

Endnotes

[1] Walter Russell Mead, *Special Providence: American Foreign Policy and How it Changed the World*, New York: Routledge, 2002.

[2] Rudolph C. Barnes, Jr., *Military Legitimacy: Might and Right in the New Millennium*, London: Frank Cass, 1996.

[3] *Ibid*, p. 1.

[4] NSC 68, http://www.fas.org/irp/offdocs/nsc-hst/nsc-68.htm

[5] For a forceful and well-researched discussion of the Phoenix program that also argues that the program was ultimately successful, see Mark Moyar, *Phoenix and the Birds of Pray: Counterinsurgency and Counter-terrorism in Vietnam*, Nebraska: Bison Books, 2007.

[6] Jeane J. Kirkpatrick, "Dictatorships & Double Standards," reprinted in *World Affairs*, Vol. 170 No. 2, Fall 2007, p. 62.

[7] *Ibid*, p. 72.

[8] Francis Fukuyama, *The End of History and the Last Man*, New York: Perennial, 2002.

[9] Some skeptics remained, such as John Mearsheimer, "Why We Will Soon Miss the Cold War," *The Atlantic*, 266, No. 2, August 1990. Also James M. Goldgeier and Michael McFaul suggested that this

cooperation and attention to welfare was limited to the core while the periphery would remain locked in a realist competition for power and security, see "A Tale of Two Worlds: Core and Periphery in the Post Cold War Era," *International Organization*, Vol. 46 No. 2, Spring 1992, pp. 467-491.

[10] The massive use of American military assets in the 1991 Gulf War does not negate this suggestion since the war's primary objective was the removal of Iraq from Kuwait and not the imposition of liberal democracy.

[11] National Security Strategy 2006, p. 3

[12] *Measuring Stability and Security in Iraq*, Report to Congress, December 2008, p. 29.

[13] *Ibid*, p. 31.

[14] *The Report of the Independent Commission on the Security Forces of Iraq*, Center for Strategic & International Studies, September 6, 2007, p. 49.

[15] *Measuring Stability and Security in Iraq*, Report to Congress, December 2008, p. 49.

[16] *Ibid*, p. 46.

[17] *Iraqi Security Forces: Defining Challenges and Assessing Progress, Testimony*, Santa Monica: Rand Corporation, March 2007, p. 5.

[18] *Report of Progress Toward Security and Stability in Afghanistan*, Department of Defense, June 2008, p. 13.

[19] *Armed Forces, Afghanistan*, Janes Information Group, 13 August 2008, p.2.

[20] *Report of Progress Toward Security and Stability in Afghanistan*, Department of Defense, June 2008, p. 21.

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[22] Ali A. Jalali, "The Future of Security Institutions," in J. Alexander Theirs, ed. *The Future of Afghanistan*, Washington, DC: U.S. Institute of Peace, 2009, pp. 25-26.