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Setting the Conditions for the Rule of Law During Military Interventions

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Maritime Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Abstract

Establishing the rule of law is a critical component of the national strategic end state for any U.S. military intervention in a foreign nation. Although U.S. policy recognizes that civilian organizations, and the State Department in particular, are best suited to develop the rule of law in post-conflict societies, the military Joint Force Commander wields the most influence over the eventual direction and pacing of post-conflict rule of law development by virtue of his position, authority and capability at the moment of intervention and the instability immediately thereafter. Lacking the sophisticated capabilities and insights of the civilian organizations, the Joint Force Commander must nevertheless plan and conduct his initial intervention to dominate the operational environment with due regard for the requirements of the follow-on civilian rule of law development program to set the conditions for that program's success. He can best accomplish this by incorporating interagency counterparts, host-nation experts and relevant NGO and private legal actors within his planning process, ensuring the maintenance of civil order immediately upon arrival in the operational area, and preparing his forces to act in a supporting role for the rule of law force by assessing and securing key infrastructure and personnel.

I. INTRODUCTION.

The national strategic end-state for any U.S. military intervention in a foreign country will include a post-hostilities return of that nation to the rule of law.ⁱ Although the National Security Strategy, Presidential directives and Department of Defense policy recognize that post-hostilities rule-of-law development will be best accomplished by national or international civilian institutions, the Joint Force Commander (JFC) wields the greatest influence due to his ability to shape the operational environment at the decisive moment – the initial intervention of a military force into a foreign land.ⁱⁱ By virtue of the joint force’s domination of the battlespace to the exclusion of other authorities, the JFC has a rare window of opportunity during his execution of major combat or other initial intervention¹ operations in which his forces may set the conditions for transition to eventual rule of law.ⁱⁱⁱ

In so doing, the operational commander is faced with a paradoxical dilemma: he must at once both dominate the operational environment and prepare it for a peaceful return to local control. This requires him to straddle his traditional warfighting role with the national strategy of reconstruction and governance, reflective of his position at the nexus of the tactical and strategic levels of war.^{iv} Whether the eventual transition is made directly to an incoming host-nation government, or achieved by a United Nations transitional administration, U.S. Government interagency rule of law development organization, or other instrument is beyond the purview of the joint force commander. International politics and battlefield contingencies may dictate and derail the best plans and assumptions. Nonetheless, the operational commander is the best

¹ This paper uses the term “intervention” to encompass not only military invasions pursuant to major combat operations as in Operation Iraqi Freedom (Iraq) and Operation Just Cause (Panama), but also the initial entry of joint forces into an environment pursuant to a leveraged invitation by a reluctant sovereign. The model for this type of operation is the entry of forces into Kosovo under Operation Joint Guard, in which the Serbs officially agreed to permit the introduction of a NATO force pursuant to the Military Technical Agreement, but did not truly want NATO forces present, resulting in an uncertain security environment. See William G. O’Neill, *Kosovo: An Unfinished Peace*, (London, England: Lynne Reiner Pub., 2002).

positioned to set the course for this transition by virtue of his position as the sole authority able to exercise area-wide control throughout the initial period of instability.

This paper will examine the Joint Force Commander's opportunities to shape the environment during his conduct of major combat or other initial intervention operations with an eye toward a transition to effective rule of law development programs. By using the term "intervention," the paper assumes that U.S. entry into the host nation follows some sort of combat operation – either a forced or merely semi-permissive entry – resulting in a security environment that, at least initially, precludes the deployment of a civilian rule of law development program. The paper will begin with an overview of "Rule of Law" as scholars, statesmen and military officers have struggled to define it. This section will include the relationship of rule of law to the current National Security Strategy. The third section of the paper will explore factors affecting rule of law development commonly faced by operational commanders.

Based upon these factors, section IV will develop a framework for the Joint Force Commander to incorporate rule of law development into his operational planning and execution. The paper concludes that the JFC exercises the most influence upon the affected area's eventual return to the rule of law by virtue of his *de facto* authority on the ground and significant capability relative to other forces at the moment of intervention. The force's actions in the immediate aftermath of the intervention will set the trajectory for a return to civil society and strategic success. In light of this opportunity, the JFC should conform his domination of the operational environment with conditions-setting actions to support ensuing rule of law efforts.

II. THE RULE OF LAW – ARRIVING AT A DEFINITION

Since the Global War on Terror and Operation Iraqi Freedom, the term “Rule of Law” has emerged as a defining characteristic of a successful stability operation. Indeed, decay in the rule of law is often cited as the dominant characteristic of failing or failed states, and the precursor to U.S. military intervention in the first instance.^v According to the President’s 2006 National Security Strategy, the rule of law is one of two vital characteristics of the desired end state of any military operation:

Military involvement may be necessary to stop a bloody conflict, but peace and stability will last only if follow-on efforts to restore order and rebuild are successful. The world has found through bitter experience that success often depends on the early establishment of strong local institutions such as effective police forces and a functioning justice and penal system. This governance capacity is critical to establishing the *rule of law* and a free market economy, *which provide long-term stability and prosperity*.^{vi}

Thus, the clear guidance to military planners is that military interventions overseas will naturally transition to stability operations aimed at establishing the rule of law. Moreover, the seeds for such rule of law efforts must be planted as early as possible.

Despite this exalted status, the U.S. government has yet to define “Rule of Law” in a manner applicable to U.S. policy. The academic debate over the definition ranges from desirable attributes (e.g. comprehensive laws, competent courts, etc.) to desirable policy end states (e.g. upholding law and order, making predictable judgments regarding conduct, etc.).^{vii} The State Department website states that the “rule of law is a fundamental component of democratic society and is defined broadly as the principle that all members of society -- both citizens and rulers -- are bound by a set of clearly defined and universally accepted laws,” but then provides the concrete characteristics in terms of the American view of democracy: an independent judiciary, a free press, a system of checks and balances on freely elected leaders and a separation

of power between the branches of government.^{viii} While a glowing description of America, this is a fairly narrow prism by which to view foreign nations and cultures, particularly coming from the one federal agency responsible for *foreign* policy.

To the operational commander, a more concrete distillation of the principles inherent in the National Security documents deduces that a nation subject to the rule of law is one in which:

- The state monopolizes the use of force in the resolution of disputes;
- Individuals are secure in their persons and property;
- The state itself is bound by law and does not act arbitrarily;
- The law can be readily determined and is stable enough for individuals to rely upon in planning their affairs;
- Individuals have meaningful access to a fair and impartial legal system;
- Basic human rights are protected by the state; and
- Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.^{ix}

Put simply, a state under the rule of law is marked by stability, generality, predictability and clarity.^x These characteristics apply to both the content of the law and the various institutions and structures that implement it.

III. FACTORS AFFECTING RULE OF LAW DEVELOPMENT

What goes in to establishing the rule of law in a given society hinges upon several variables, including the nature of the existing legal regime, ethnic tensions, culture, history, etc. Although the factors developed in this section and accompanying analysis are by no means exhaustive, they are common to many of our nation's recent military interventions. The first and foremost

consideration will be the impact of the very introduction of foreign forces upon the people and government of the affected nation.

A. Rule of Law at the Moment of Intervention.

When U.S. forces intervene in a foreign land, the rule of law will have broken down.^{xi} Often, the deterioration of courts, police and respect for law and human rights led to the intervention in the first place, as in Kosovo, Bosnia, Somalia and Haiti. In cases such as Panama and Iraq, the rule of law had been weakened by tyrants, but society had not yet dissolved into civil disorder. However, a military's entry into and assertion of authority over host nation territory necessarily collapses the rule of law because the predictable authority of the state is forcibly displaced by a foreign military commander. An intervening U.S. military force, for example, will not consent to the host nation government's monopoly on the use of force, nor will an operational commander ever likely subject his operations and forces to the host nation's laws. Rather, consistent with "Dominating" under the six-phase operational planning model, he will seek to control the operational environment – i.e. placing his forces in the position of control and authority over the operational area to the exclusion (or at least subordination) of all other authorities.^{xii} A breakdown in the rule of law at the national level, then, is the assumed condition at the moment of a force's entry into the operational area. This assumption is both validated by history and anticipated by international law.

In recent history, the U.S. invasions of Iraq (Operation IRAQI FREEDOM) and Panama (Operation JUST CAUSE) both illustrate the breakdown in the rule of law upon the appearance of the invasion force. Although both nations fell short of the model definition of the rule of law offered in Section II above, they were both marked by relative stability and civil order prior to

U.S. intervention as a result of strong central government able to exercise control through national security forces.

On 20 December 1989, U.S. ground forces invaded Panama under Operation JUST CAUSE to remove the dictator Manuel Noriega, protect U.S. nationals and U.S. interests under the Panama Canal Treaty, and to restore the duly elected President of Panama, Guillermo Endara, to power.^{xiii} That same day, widespread rioting and looting began throughout Panama City, lasting four days and costing more than a billion dollars in damage before U.S. forces were able to bring it under control.^{xiv} Notably, this collapse of law and order occurred despite the near-simultaneous installation of Panama's elected leader because the existing security forces were all loyal to the ousted dictator.

In Iraq, the April 2003 capture of Baghdad resulted in a near-simultaneous breakdown in law and order. Within one day of the 3d Infantry Division's sweep through downtown Baghdad, platoon leaders on the ground observed widespread looting.^{xv} According to the 3d Infantry Division After-Action Report, the transition from combat to civil lawlessness occurred automatically "while the division was still fighting Republican Guard, paramilitary and terrorist cells."^{xvi} As with Panama, the failure of civil order occurred concurrently with the ousted dictator's loss of control over the internal security apparatus.

Curiously, these two historical examples merely highlight a principle which statesmen had recognized as early as 1907: that the ouster of a sovereign by a foreign military would inevitably lead to chaos and disorder. Accordingly, nearly all civilized nations agreed in the Hague Convention Respecting the Laws and Customs of War on Land (IV) and attached Regulations that an invading military force must properly administer captured territory.^{xvii} The Regulations recognized military occupation of foreign land as a likely by-product of war.^{xviii} They describe

not only how a territory becomes occupied, but also the legal relationship between the occupant and the ousted sovereign, the occupant's general responsibilities to administer the conquered land and the duty to respect the allegiance of the population to the ousted sovereign.^{xix}

Following WWII, the focus of the Law of War shifted from the conduct of the army and the nature of governance towards the protection of conflict victims.^{xx} The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 [Geneva IV] supplemented Occupation Law by linking the occupying power's authority and duty of maintaining civil order to the protection of civilians.^{xxi}

B. Filling the Vacuum: Exploiting the Golden Hour

A second lesson of history is that the invading force has a very short window in which to re-establish security and the rule of law before the native population's initial reaction to the invasion hardens into resentment, conflict and chaos. Ambassador James Dobbins refers to this phenomenon as the "Golden Hour" – an initial period during which the shock and uncertainty of the intervention and relief at the end of combat can help secure a high degree of cooperation from the population.^{xxii}

In the wake of the initial 2003 invasion of Iraq, the failure of U.S. forces to maintain civil security "after we displaced the regime created a power vacuum, which others immediately tried to fill."^{xxiii} These "others" included not only individual criminal actors, but also organized criminal elements and ethnic forces such as the Kurdish Peshmerga, opening a potentially explosive (and unanticipated) ethnic conflict.^{xxiv} While Coalition Forces were able to restrain organizations such as the Peshmerga through quick action, their inability to secure Baghdad or the rest of Iraq from mere criminals and anti-U.S. opportunists (i.e. the nascent insurgency) left the Coalition with a growing security problem and an increasingly hostile population. To make

the operational picture worse, the looters not only stole merchandise, but destroyed infrastructure. The pillaging extended to police stations, electrical facilities, hospitals and water/sewage plants.^{xxv} As a result, the Coalition Forces Land Component Commander, LTG McKiernan, could neither communicate with the Iraqi people by television or radio, nor could he have staffed police stations, courthouses and prisons even had the forces been willing and able to return to work.^{xxvi} In a remarkably candid assessment, the 3d Infantry Division After-Action Review highlighted the need for a comprehensive and immediate post-invasion security plan:

Resolution of this is not in division control. State, Defense, and other relevant agencies must do a better and timelier job planning occupation governance and standing up a new Iraqi government. If this is not possible, the best alternative would have been to let the military plan and execute the mission for a month or more, then turn it over to the civilian overseer. This would have avoided the power/authority vacuum created by our failure to immediately replace key government institutions.^{xxvii}

Iraq is hardly an isolated example of this phenomenon. Robert Perito, peacekeeping expert at the U.S. Institute of Peace, cautioned the U.S. Defense Policy Board in a pre-OIF briefing that “experience in the Balkans, East Timor and Afghanistan shows that Coalition forces will have to deal with high levels of violence for the first two years of the mission.”^{xxviii} In Kosovo, for example, the NATO Kosovo Force (KFOR) learned that those units which clamped down on lawlessness early saw a much easier time maintaining order. Elsewhere, the power vacuum was filled by the guerilla Kosovo Liberation Army, resulting in long-term setbacks in establishing security and rule of law.^{xxix} For their part, the Australians noted this phenomenon as well following the Canadian failures to implement law and order programs in Somalia during the United Nations’ UNITAF and UNOSOM missions. This resulted in tremendous friction and lack of cooperation by the Somali population with the follow-on Australian military forces in their attempts to restore order.^{xxx}

The implications of this phenomenon for the operational commander cannot be overstated: the success or failure of any follow-on rule of law development organization hinges on actions during the initial phases of any stability operation, which are usually simultaneous with major combat operations.^{xxx} Scholars, policy proponents and statesmen have spilled oceans of ink about the need to develop a deployable civilian rule of law development capability, be it a U.N. task forces, Department of State program, regional *ad hoc* effort such as the Organization for Security and Cooperation in Europe (OSCE), or other structure.^{xxxii} Yet any such organization will require a minimum level of security to operate, whereas the joint force provides its own security. Thus, despite the natural tendency for the military to gladly relinquish responsibility for post-conflict reconstruction pursuant to NSPD-44, the Defense Department insightfully instructed the military to “be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.”^{xxxiii} Until security is established, the military will be the only act in town. More to the point, it will likely be the only act in town at the most critical moment – the “golden hour.”

C. The Pre-Existing Host-Nation Legal Regime

Although there may not be a functioning justice system in the immediate post-conflict phase, it is entirely likely that, at some point prior to the conflict and U.S. intervention, the residents of the operational area policed themselves under some sort of legal regime governing their conduct. However, it is highly unlikely that the regime mirrored a western conception of the rule of law similar to that on the state department website.^{xxxiv} Former British colonies, including the United States, may hold a conception of law characterized by precedential court decisions and an adversarial criminal justice system. In contrast, civil law systems present throughout much of the world are based upon the Napoleonic code and employ an inquisitorial mode of criminal

justice.^{xxxv} These formal structures are generally built upon some form of the “justice triad,” in which separate state entities police, judge and impose the penalties (i.e. corrections) of the prescribed laws.^{xxxvi}

In a less formal but no less sophisticated manner, some regions subscribe to religious bodies of law, such as Shari’a, a comprehensive body of law regulating all aspects of Muslim life.^{xxxvii} Many cultures eschew any type of formal legal structures in favor of traditional, or customary, law unique to each ethnic group. Referred to as “indigenous” or “tribal” law, these systems vary greatly in content, organization and refinement, but often form the most deeply held rules of conduct and stability in many third-world cultures.^{xxxviii} Finally, such systems rarely exist in isolation outside the western world. For example, the systems may mix, such as in Egypt where Shari’a forms the content of the law but it is applied within a mixed civil and common-law structure.^{xxxix} Or they may coexist side by side, such as in Nigeria where a common law tradition rules the state but both Shari’a and indigenous systems provide the de facto codes of conduct and penalty in each tribal region.^{xl}

The structure and content of the existing legal system matter to the JFC because they provide a template for population control in a manner which increases the joint force’s legitimacy with the affected people, thus leading indirectly towards a more desirable conflict termination.^{xli} Put simply, inhabitants will be more likely to accept rule consistent with life as they already know it if the JFC is able to leverage an existing legal regime to maintain civil order. Use of the native criminal justice structure also comports with international law, which strives to protect the affected population from unnecessary radical political changes.^{xlii}

However, two countervailing considerations bear mention. First, a Joint Force Commander will seldom possess the resources and inherent expertise in the native legal system to operate its

levers to his advantage, particularly in a post-conflict environment where the native institutions have crumbled.^{xliii} Second, despite the general desirability of using the native legal system as a basis to enforce the rule of law, one must first ensure that the existing laws comply with internationally-recognized standards of fairness and human rights.^{xliv} Even the U.S. Constitution at one time was structured so as to discriminate along both racial and regional lines.^{xlv} Existing legal systems, though they have broken down, may contain similar or more insidious structural discrimination. This leads to another reason why the joint force commander should act with thoughtful deliberation.

D. Ethnic Strife and Other Existing Conflicts

Ethnic or other existing internal conflict itself is often a major contributing factor leading to U.S. military intervention in the first place. As the U.S. and United Nations learned in Kosovo, nation-building is far more complex when the respective warring factions are still jockeying for position even after the fighting has died down. The U.N. Mission in Kosovo (UNMIK) was tasked with post-conflict justice sector reconstruction in 1999. Although UNMIK recognized and planned for the policing challenge, it was unprepared for the judicial vacuum.^{xlvi} Without judges (and, in the end, prisons), police are ineffective. Accordingly, UNMIK identified 55 local judges to meet the demand on short notice.^{xlvii}

The hastily-developed plan was a disaster because ethnic Serb judges felt intimidated and fled, damaging the credibility of the system. The remaining ethnic Albanian judges had been out of office for the past ten years, and were therefore professionally undeveloped. Moreover, they refused to apply the existing law, opting instead for the criminal code in effect in 1989 before the Serbian Republic stripped Kosovo of its autonomy.^{xlviii} Finally, the courts were not equipped with even the most basic supplies, rendering even routine administrative work impossible.^{xlix}

Not only did this operation violate the principle: “first, do no harm,” but it also risked UNMIK’s appearance of impartiality by ceding to the ethnic Albanians’ demands.ⁱ

The Australians and the United Nations applied the lessons of Kosovo during the 2000 crisis in East Timor. In addition to establishing a monitored police force, the U.N. moved swiftly to identify East Timorese judges who had been cast aside during the Indonesian occupation. Upon constructing the interim court system, the U.N. combined East Timorese judges with international experts to ensure fairness in the application of criminal laws to all ethnic groups.^{li} Moreover, the U.N. rapidly established a comprehensive system that ensured review of decisions, expedited process for petty offences, and provided for defense representation.^{lii}

E. The National Strategic Vision

Of course, a final compelling factor for the joint force commander will be the strategic guidance on the nature of the transition force and the desired end state insofar as it encompasses the rule of law. One of the principal criticisms of Operation Iraqi Freedom has been the failure of the national leadership to adequately plan for the post-war conflict. However, much of this failure is attributable not only to faulty assumptions, but to shifts in strategic guidance.^{liii} In the summer of 2002, GEN Franks, CENTCOM commander, believed that the Pentagon would handle the postwar, with a CENTCOM JTF HQ in support.^{liv} By January 2003, the postwar “lead” was the newly formed Office of Reconstruction and Humanitarian Assistance (ORHA) headed by LTG (ret.) Jay Garner. However, ORHA and CENTCOM did not integrate their plans. The deputy chief of plans at CENTCOM illustrated the general friction between the two organizations: “[ORHA] didn’t listen to anyone, because they were a bunch of friggin’ know-it-alls.”^{lv} This friction would yield profound operational effects when ORHA would later be unprepared to move into Iraq upon CENTCOM’s perceived completion of major combat

operations.^{lvi} Just as the ORHA mission was to begin in earnest upon the transition to stability and reconstruction, the President converted the lead agency to a unique and undefined organization known as the Coalition Provisional Authority (CPA) under Ambassador L. Paul Bremer. Though no one knows exactly what kind of organization the CPA was or to what department or country it belonged, it was placed squarely in charge of the reconstruction of Iraq by the U.N. Security Council.^{lvii} As with ORHA, the relationship between the CPA and the new theater-wide military command, Combined Joint Task Force 7, was ill-defined and characterized by pronounced friction and lack of coordination.^{lviii} As a result, at no point during the conflict did the military have the slightest clue what the national vision was for postconflict rule of law development. Even had the operational commander been informed, the plan changed three times within a year. Is it then any wonder that the tactical formations facing the looters were left without guidance, thereby sacrificing the “golden hour?”

This is particularly disturbing in light of the U.S. experience in Panama less than fourteen years earlier. There, too, different teams developed plans for the invasion and postconflict restoration of law and order.^{lix} The postconflict plan to promote rule of law (originally BLIND LOGIC, then re-named PROMOTE LIBERTY) was never integrated with the invasion plan (JUST CAUSE). More critical, BLIND LOGIC was never adequately developed in its own right because it was not seen as a part of the broader political-military strategy.^{lx}

IV. Conclusion - Toward a Framework for the Operational Commander.

Thus, it is apparent that a rule of law development effort must be fully integrated into the initial combat operations plan, both to seize the civil-military initiative from forces which would fill the power vacuum following invasion and to set the trajectory for the strategic end state of a stable society under the rule of law.^{lxi} Recognizing that each conflict will differ according to

many factors, including those discussed above, a few general principles may prove useful to the joint force commander charged with a non-permissive military intervention into a foreign nation.

A. Planning considerations

Notwithstanding strategic guidance that developing rule of law components will fall to expert civilian organizations, the operational commander should be prepared to engage in this mission in accordance with DoDD 3000.05. At most, this will consist of a branch plan to conduct a temporary military occupation. Not only is this doctrinally prudent, particularly considering the experience of the coalition force in Iraq, but it is also required under international law for the protection of the civilian population.^{lxii} While the U.S. (and other nations) studiously avoids the label “occupation,” compliance with the law not only legitimizes the effort, but authorizes population control measures otherwise in violation of international humanitarian law. The full measure of occupation authorities and requirements are beyond the scope of this paper, but may be found in the U.S. Army’s Field Manual 27-10, Law of Land Warfare.

As a less extreme planning measure, the joint force commander should structure his organization to support the follow-on civilian rule of law development organization. For purposes of discussion, this section will assume the transition program to be modeled after Mr. Perito’s suggested State Department Office of Rule of Law Operations (ORLO), though such a program could easily be a U.N. entity or other regional organization such as OSCE, NATO, etc.^{lxiii} Key to this effort will be integrating members of ORLO into the JFC’s planning team for major combat operations, both so that the joint staff and commander may tailor operations to the intended end state and so that the representative may keep ORLO apprised of changes to the operational environment and the validity of its planning assumptions.

However, the rule of law problem is far more complex. Rather than serve as a mere liaison between phase-lead organizations, the ORLO representative may best be located in a rule of law planning cell within the JFC's J-5 directorate, comprised of representatives from the principal staff sections, relevant special staff (Staff Judge Advocate, Provost Marshal, Medical, etc.) and significant U.S. Government partners. By organizing as a planning cell, the section will also be better positioned to incorporate other key subject matter experts and capabilities that may not appropriately have access to the full spectrum of operational plans. Critical experts in this regard might include contracted host-nation (or similar legal system) attorneys, police, and jurists with valuable insights on the existing legal structures of the nation and critical personnel and infrastructure. Other cell participants should include relevant international and non-governmental organizations and contractors who might perform much of the heavy lifting in the follow-on reconstruction and training effort. This will enable the JFC to leverage the expertise of all the major civilian participants to ensure that the combat plan dovetails with the conditions needed for the follow-on effort to be successful.

B. Execution Tasks

Although potential execution tasks to set conditions for ORLO and its partners to succeed are much more situation-dependent, a few tasks are likely, given the factors identified in Section III.

First and foremost, the lessons of Panama, Kosovo and Iraq highlight the absolute primacy of maintaining law and order immediately upon moving into an area through disciplined but fair control. Ceding the "golden hour" to criminal elements is tantamount to creating an insurgency. Not only does looting destroy critical infrastructure and create a culture of lawlessness, but the observations of the investigative task force into the looting of the antiquities at the Iraqi National Museum heralds a far more damaging trend. Simply, organized criminal elements and enemy

terrorist organizations may patiently wait and seek to exploit the natural chaos in the wake of a military intervention. As the British elements in KFOR and the Australian INTERFET force in East Timor discovered, an immediate transition to a stability mindset preventing crime and imposing order pending the arrival of a policing force can quell nascent lawlessness. To implement this, the JFC will need to request (and train for) supplemental rules of engagement and other capabilities. Depending on the situation, he may require PSYOP elements with approved products, military police units, riot control means, or other specialized resources.

Consistent with the counterinsurgency principle of “first, do no harm” the force must avoid any actions which might ignite (or re-ignite) ethnic or other pre-existing conflict among native groups. Absent direction to the contrary, the joint force must act within the limits of its operational mandate without extending its reach into matters which properly lie in the realm of national or theater strategy. In particular, the joint force must maintain strict impartiality and credibility in the eyes of the affected population as a tough but fair security force, consistent with peace operations doctrine.^{lxiv} An impartial security force will pave the way for the introduction of the expert civilian rule of law programs to follow and develop the police, judicial and penal systems necessary to maintain order over the long term.

Having accomplished the two key prerequisites for temporary security within the operational area, other execution tasks in support of the follow-on ORLO mission will vary. Some routine tasks may involve identifying and securing qualified law enforcement, judicial and corrections personnel; securing rule of law infrastructure such as police stations, courts and prisons; and possibly even rudimentary reconstruction and oversight tasks pursuant to DoDD 3000.05. In particular situations, the joint force might need to operate temporary military commissions to administer justice. On the other hand, they may need to supervise existing indigenous criminal

justice processes which survived regime collapse. In any case, the aforementioned rule of law cell becomes more critical to continually assess and guide military actions and maintain the trajectory toward an eventual stable nation governed in accordance with the rule of law.

What will not change is the recognition that the military's initial domination of the operational environment must serve to advance rule of law development as a component of stability, enabling the eventual return of the operational area to host-nation civilian control. Although tactical military forces may chafe at responsibilities such as maintaining law and order, assessing courthouses, protecting judges or policing neighborhoods, the Joint Force Commander must empower and guide them in the fleeting transition once major combat or initial intervention is complete. The JFC's ability to incorporate this type of planning and task execution during the golden hour enables him to seize the initiative and stabilize the operational area in pursuit of the rule of law end state.

V. Recommendations.

- The Joint Force Commander should organize a rule of law planning cell within his J-5 directorate. This cell should be staffed with key staff representatives, as well as representatives of the follow-on civilian rule of law program (U.S. and/or IGO), adjunct advisors fluent in the host-nation legal regime(s), and significant private and non-governmental organizations with interests and capabilities in the eventual resulting legal structure. The cell will advise on the rule of law impacts of the JFC's plans and the transition to the civilian rule of law development program or host-nation control.
- The Joint Force Commander should prepare and empower his forces to transition to law and order activities immediately upon entry into the operational area, to maintain security in preparation for a rapid transition to support the follow-on civilian rule of law

development program. He should be prepared to execute a branch plan to employ occupation authorities as needed to protect the civilian population, with an eye toward relinquishing control to civilian authority as soon as practicable.

- The Joint Force Commander should be prepared to transition his forces to support rule of law tasks as a subset of SSTR operations, to include infrastructure and key personnel protection, rule of law assessments, and policing functions.
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NOTES

- i U.S. President, *The National Security Strategy of the United States of America*, (Washington, DC: White House, 2006), 4.
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- iv Milan N. Vego, *Joint Operational Warfare: Theory and Practice* (Newport, RI: Naval War College, 2008), XI-4.
- v “Failed States Index, 2007,” *Foreign Policy*, July/August 2007, 56.
- vi U.S. President, *National Security Strategy of the United States*, (Washington, DC: White House, 2006).
- vii Celestine Nyamu-Musembi, “Ruling Out Gender Equality? The Post-Cold War Rule of Law Agenda in Sub-Saharan Africa,” *Third World Quarterly* 27, no. 7 (2006): 1196; Rachel Kleinfeld Belton, “Competing Definitions of the Rule of Law: Implications for Practitioners,” *Carnegie Endowment for Int’l Peace, Rule of Law Series* paper, No. 55 (Jan. 2005): 3.
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- xii Chairman, U.S. Joint Chiefs of Staff, *Joint Operations*, Joint Publication (JP) 3-0 (Washington, DC: CJCS, 13 February 2008), IV-28.
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- xv Thomas Ricks, *Fiasco: The American Military Adventure in Iraq*, (New York, NY: Penguin Press 2006), 149-152.
- xvi U.S. Army, Third Infantry Division (Mechanized), *After Action Report, Operation IRAQI FREEDOM* (2003), 12 [hereinafter 3ID AAR].
- xvii “Regulations Respecting the Laws and Customs of War on Land, Annexed to the Fourth Hague Convention Respecting the Laws and Customs of War on Land,” Section III, October 8, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter “Hague Regulations”].
- xviii Eyal Benvenisti, *The International Law of Occupation* (Princeton, N.J.: Princeton University Press, 1993), 3.
- xix Hague Regulations, arts. 42, 43.
- xx Jean Pictet, *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, Switzerland: International Committee of the Red Cross, 1958), 614 (“the Hague Regulations codify the laws and customs of war and are intended above all to serve as a guide to the armed forces, whereas [Geneva IV] aims principally at the protection of civilians”). See also Benvenisti, *International Law of Occupation*, 98-106.
- xxi “Geneva Convention Relative to the Protection of Civilian Persons in Time of War,” Aug. 12, 1949, Section III, U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva IV].

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- xxiii 3ID AAR, 289.
- xxiv Robert Perito, *Where is the Lone Ranger When We Need Him? America's Search for a Postconflict Stability Force*, (Washington D.C: U.S. Institute of Peace Press, 2004) 312 (attributing the looting of the irreplaceable historical collections at the National Museum of Antiquities to professional criminal organizations); Michael Gordon & LTG Bernard Trainor (ret.), *Cobra II: The Inside Story of the Invasion and Occupation of Iraq*, (New York, NY: Pantheon Books, 2006), 448.
- xxv Gordon & Trainor, *Cobra II*, 467-68; Perito, *Where is the Lone Ranger When We Need Him?*, 311-312; 3ID AAR, 156-57.
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- xxix William G. O'Neill, *Kosovo: An Unfinished Peace*, (London, England: Lynne Reiner Pub., 2002), 76.
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- xxxii See, e.g. Robert Perito, *Building Civilian Capacity for U.S. Stability Operations*, United States Institute for Peace Special Report 118 (April 2004) (advocating creation of a deployable Office for Rule of Law Operations (ORLO) consisting of police, prosecutors, judges and corrections personnel within the U.S. Dep't of State).
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- xxxv For a brief comparison of common and civil law systems, see Tasikas et. al., *Rule of Law Handbook*, 86-87.
- xxxvi Perito, *Where is the Lone Ranger When We Need Him?*, 333.
- xxxvii Mir Zohair Husain, *Global Studies: Islam and the Muslim World* (Dubuque, IA: McGraw-Hill, 2006), 15.
- xxxviii Maxwell O. Chibundu, "Law in Development: On Tapping, Gourding and Serving Palm-Wine," *Case Western Reserve University Journal of International Law* 29 (Spring, 1997): 169.
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- xli CJCS, *JP 3-0, Joint Operations*, IV-7.
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- xliv Louis Henkin, et. al., rptrs., *Restatement (Third) of the Foreign Relations Law of the United States*, (St. Paul, MN: American Law Institute, 1987), § 701.
- xlvi U.S. Constitution, Art. I, § 2, ¶3, prior to the adoption of the 14th Amendment (ratified 9 Jul 1868), read: "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, *three fifths of all other Persons.*" (emphasis added).
- xlvi O'Neill, 77.
- xlvi Ibid.
- xlvi Ibid., 79-80.
- xlvi Ibid., 77.
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- li Dobbins et. al., 83-84.

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- lii United Nations Special Representative of the Secretary-General, United Nations Transitional Administration in East Timor Regulation No. 2000/11, *On the Organization of the Courts in East Timor* (East Timor: UNTAET, 6 March 2000).
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- lvii Elaine Halchin, *The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* (Washington, DC: Congressional Research Service, 2005) (concluding that “No explicit, unambiguous and authoritative statement has been provided that declares how the CPA was established, under what authority, and by whom, and that clarifies the seeming inconsistencies among alternative explanations for how CPA was created”); S.C. Res. 1483, U.N. SCOR, 57th Sess., 4761st mtg., U.N. Doc. S/RES/1483 (2003).
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- lix Schultz, 16.
- lx Ibid., 17.
- lxi SSTR JOC, 30.
- lxii Kelly, 407; Hague Regulations; Geneva Convention IV, sec. III.
- lxiii Perito, *Building Civilian Capacity for U.S. Stability Operations*, 1.
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