



**STRATEGY
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**BACK TO THE FUTURE: THE ROLE OF THE MILITARY
IN ENFORCING THE RULE OF LAW**

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ABSTRACT

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During the post-Cold War era, there has been a marked increase in the number of peacekeeping operations in which the United States military has participated. During the same period US national interests evolved to include supporting democratization and administration of justice, and adherence to the rule of law. With the increase in failed states and the collapse of all semblance of order, the US military, with its unique capabilities, have increasingly been entrusted with promoting the rule of law during the post-conflict stage. This SRP will examine what, if any, is the role of the military in enforcing the rule of law. This includes examining 20th century examples of US troops deploying to enforce or promote the rule of law as well as the current US National Security Strategy and Presidential Decision Directives 25, 56, and 71. In addition, a definition will be articulated on what is involved with rule of law operations in answering the question should the military be involved in this type of peace operation in the 21st century.

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BACK TO THE FUTURE: THE ROLE OF THE MILITARY IN ENFORCING THE RULE OF LAW

It is a dangerous hubris to believe we can build other nations. But where our own interests are engaged, we can help nations build themselves – and give them time to make a start at it.

— Anthony Lake, 6 March 1996

The Cold War for all intents and purposes ended in late 1989 and the United States is now considered the sole world superpower, the world “hegemon.” With this status come new responsibilities and duties as it and the United Nations deal with emerging problems around the world. Throughout the 1990’s the US was faced with a multitude of challenges of when, where, and how to act when there was a threat to US interests. Traditional enduring US interests include defense of the US, protection of our democratic government, promotion of democracy, and economic prosperity. Meanwhile the US found itself engaged in a variety of peacekeeping operations because of the growing belief that it could and must deal with intrastate conflict.¹ It is in this area that US interests are being redefined. As the world leader, we cannot remain morally neutral and politically paralyzed in the face of massive humanitarian crisis involving famine, internal civil conflict, or ethnic cleansing. The instability caused by intrastate conflict resulting a humanitarian crisis can quickly threaten US regional interests. We are seeing the Westphalian model of inter-state conflict die off, giving way to intrastate conflicts, whose common characteristic is that it involves a failed state.²

The US military, specifically the Army, saw its operational tempo increase as it was thrust into peacekeeping missions in failed states to “promote democracy and respect for human rights and the rule of law,”³ all under the rubric of US national interests. However there is a cost. The US military is undergoing a “Revolution in Military Affairs” as it continues to support the US National Security Strategy. *Joint Vision 2020* states that to build an effective force the military must be fully joint in five areas: intellectually, operationally, organizationally, doctrinally, and technically.⁴ Specifically, the joint force must support civilian authorities to accomplish the objectives specified by the National Command Authority (NCA).⁵ *Army Vision 2000* is consistent in that as it experiences the transformation to a lighter, more mobile deployable, lethal force, its focus is to provide the NCA with a broad range of options for peacetime operations, deterrence, and warfighting.⁶ Critical to all this is the ability of the Army to perform multiple missions. Throughout the whole spectrum of military operations, from full combat to humanitarian assistance, one aspect requiring close scrutiny is the area of peacekeeping involving peace building. This normally involves a failed state and occurs during the post-conflict stage. Characteristics

of a failed state include extreme nationalism, religious fanaticism, and ethnic purity. This raises the question of what is the role of the military in enforcing the rule of law during peacekeeping operations in a failed state? In defining the military's role in enforcing the rule of law in the 21st century, this paper will determine what is meant by the rule of law by reviewing the current National Security Strategy as well as Presidential Decision Directives 25, 56, and 71, and analyzing 20th century military missions. It will conclude with a recommendation on how to use military in such missions.

PEACE OPERATIONS

The initial task in determining the role of the Army in peace operations is to define peacekeeping, peace enforcement, and peace building. This is critical to understanding the Army's role in supporting such missions, especially ones mandated by the UN. Despite the fact there are no universally accepted definitions, the following most appropriately define the different types of missions.

Peacekeeping is the deployment of unarmed or lightly armed forces in a peaceful environment to monitor and facilitate implementation of an existing truce agreement. Peacekeeping is conducted in a largely consensual framework pursuant to Chapter VI, UN Charter, wherein the peacekeepers are impartial.⁷ An example of this type of mission was the US Task Force Able Sentry as part of UNPREDEP in Macedonia from 1995-1999.

Peace enforcement occurs when troops deploy under the authority of Chapter VII, UN Charter. There the application of military force or its threat of use to compel compliance with accepted resolutions or sanctions is permissible.⁸ The purpose is to enforce provisions of a mandate designed to maintain or restore peace and support diplomatic efforts. Because it's authorized under Chapter VII, it may include combat actions.

Peace building, also known as "nation-building", involves dealing with failed states after resistance is overcome. Occurring in the post conflict stage of a failed state, it seeks to rebuild basic civil infrastructure, governmental institutions, and procedures different from those that existed prior to the conflict/strife.⁹ It is during this type of operation that additional duties are generated and thrust upon the military. These include disarming the former combatants, training security personnel, monitoring elections and reforming or strengthening governmental institutions.¹⁰ Examples of both peace enforcement and peace building are the on going missions in Bosnia-Herzegovina known as SFOR and in Kosovo known as KFOR.

US POLICY

US policy has undergone a dramatic makeover since 1989. Beginning with the fall of the Berlin Wall and subsequent end of the Cold War, coinciding with the transition from the Bush administration in 1992 to the Clinton administration, US national security interests have evolved to include humanitarian consequences of failed states.¹¹ This is initially articulated in the 1993 "National Security Strategy of the United States (Jan 93)."¹² The effect of the change is seen in the increasing number as well as diversity of missions the military has participated in throughout the 1990's.

NATIONAL SECURITY STRATEGY (NSS)

The current NSS states that the opportunities and challenges facing the US in the 21st century include the growing number of nations embracing the respect for the rule of law.¹³ In responding to demands for US action, the US national interests must be clear. Specifically, in the area of humanitarian and other interests, US action may include supporting democratization and adherence to the rule of law. Threats to regional security and US interests include failed states that are unable to provide basic governance, safety, and security for the population, potentially generating international conflict and mass killings.¹⁴

The decision to use the military to support US humanitarian efforts and other interests, although not easily made, is based on the military's unique capabilities and resources.¹⁵ The NSS directs consideration of several critical questions before committing troops. These questions include: were non-military means that offer a reasonable chance of achieving our goals explored or exhausted; is there a clearly defined, achievable mission; what are the opportunity costs in terms of maintaining our capability to respond to higher-priority contingencies? Do we have milestones and a desired end state to guide the decision on terminating the mission?¹⁶ While arguably vague, one can see that it gives the National Command Authority latitude to decide whether to become engaged in certain conflicts. This vagueness is seen in earlier guidelines stated by John M. Shalikashvili, former Chairman of the Joint Chiefs of Staff, Warren Christopher, former Secretary of State, and Anthony Lake, former National Security Advisor.¹⁷ Irrespective of the argument of vagueness, if the military is deployed, they must have a clear mission and means to achieve the objectives.¹⁸

PRESIDENTIAL DECISION DIRECTIVES (PDDS)

Recent PDDs were designed to improve US capability to manage or resolve inter and intra-state conflict while promoting US interests. Their purpose is to assist in achieving US objectives in protecting US national interests. In determining whether to employ the military to serve US national interests in peace operations, President Clinton's policy is defined in PDD 25 "*The Clinton Administration's Policy on Reforming Multilateral Peace Operations (May 1994)*."¹⁹ While reiterating that multilateral peace operations is part of the US NSS, PDD 25 provides the guidelines on arriving at the initial decision to participate in peace operations.²⁰ Subsequently, PDD 56 requires an interagency process to conduct political-military planning and to coordinate management of specific peace operations.²¹

PDD 71 is the third in the series involving peace operations and other complex contingencies. While directing the military to maintain a constabulary capability, the specific intent is "...that the Executive Branch of the US Government improve its capabilities to participate in rebuilding effective foreign criminal justice systems."²² PDD 71 amplifies PDD 25 guidance concerning police and judicial dimensions of peace operations by stating that "...US military forces shall maintain the capability to support constabulary functions abroad and if necessary carry out constabulary functions under limited conditions for a limited period of time."²³ Constabulary activities include regulating movement that is necessary for safety, intervention to stop civil violence, stopping or deterring widespread or organized looting, vandalism, riots, or mob-like actions, and dispersing unruly or violent public demonstrations and civil disturbances."²⁴

Woven throughout PDD 71 is the expectation that it applies to the processes of dealing with peace operations as defined in both PDD 25 and 56.²⁵ Critical to peace operations, PDD 71 is supposed to enhance US capabilities to better promote US interests in managing or resolving conflicts by rebuilding effective criminal justice systems. Essential to this is the requirement for the military to maintain a constabulary function. However, prior to deciding whether or not the military should participate in a peace building operation in accordance with the current US National Security Strategy and policy, it behooves us to review earlier missions, to see if we are repeating ourselves.

HISTORICAL REVIEW

The US administration and its military have been involved in what is termed "peace building" and promoting democracy in one form or another for over 150 years. Initially after the Civil War, this included enforcement of martial law, then later the pacification of Native-Americans on

the western frontier.²⁶ However the political reaction to reconstruction was so negative that it led to the *Posse Comitatus Act*, which places limitations on the use of the military for law enforcement purposes within the US.²⁷ Within this historical review, only those US military actions that involve democratization or peace building are considered. Democratization is the promotion or support of democracy and while peace building has many interpretations, common to all is it is the external effort to construct a government. Democratization, which is part of the larger peace building campaign, includes programs that strengthen the rule of law, enhance respect for human rights, expand civilian control of the military and improve the judicial system, the police, legislatures and political parties.²⁸ Looking towards the future requires us to reflect upon the past. The following summaries of US military operations all involve either external peace building or internal democratization efforts. Their commonalities are the military's role in performing constabulary functions; even when they were unsuccessful. Constabulary functions are necessary to create order in an unstable situation while assisting and encouraging the civilian population's development ensuring long-term stability.²⁹

PRE-WORLD WAR II

PHILIPPINES (1898-1946)

In 1898 the US Army deployed to the Philippines to help maintain order as a result of the Treaty of Paris ceding the Philippines to the US.³⁰ Companies were organized into constabulary units to "preserve the peace, keep order and enforce the law."³¹ Over time, the capabilities of the constabulary expanded. It eventually included duties such as tax collection, postmaster duties, transfer of prisoners, assisting in developing educational system, establishing health clinics, and constructing work projects. Beginning in 1912 Filipino officers were incorporated into the constabulary even though the US continued to face obstacles such as abuses, negative attitude of the population, and resentment of the extension of constabulary authority into civil matters. As the numbers of Filipino officers in the constabulary grew, Filipinos were given more authority in the government. As the population became more receptive to the constabulary efforts to maintain order, they were more willing to seek independence through peaceful means after a period of US tutelage.³² The long-term commitment of US troops, over 40 years, permitted the mission to be successful in supporting the peace building and democratization of the Philippines.

AMERICAN SAMOA (1900-1951)

A treaty to aid Samoans survive as a culture resulted in the US Navy being deployed to establish a government to preserve the rights of the Samoan people and to provide security for a coaling station. At the time there was no legitimate, organized government on the Island of Samoa and a need for peace existed. The purpose of the Navy constabulary was to maintain law and order, end the feuds among the Samoans, and organize the US administration of Samoa.³³ The constabulary efforts included developing local agriculture, setting up agriculture schools, and unifying the education system. The military policy of moderation, tolerance, and respect for local customs enabled them to develop an indigenous quasi-constabulary to assist, which remained intact and effective until the military withdrew in 1951 at the end of a successful mission.³⁴

HAITI (1915-1934)

In 1915 the US military entered Haiti to protect US political and financial interests as well as shield against foreign intervention, in essence to preserve order.³⁵ The constabulary forces were to stabilize the Haitian system, reshape the Haitian Army, restore the public administration, re-establish economic stability and encourage social stability favoring the mulatto elite.³⁶ Faced with hatred of the military and white intervention, as well as distrust by Haitian officials, the government had to be administered by the constabulary forces (called "Gendarmerie") led by a US Marine Major General.³⁷ Due to the resentment toward the military and failure of the military to take into account local customs, culture, language, institutions, and authorities, the mission failed. The departure of the US military in 1934 was hailed as Haiti's second emancipation.³⁸ Subsequent history, however, showed the failure to stabilize the political system by improving public administration resulted in the US military returning 60 years later.

NICARAGUA (1927-1933)

In 1927, Nicaraguan President Diaz requested the US military restore peace and order due to internal discord and a revolutionary uprising that was creating an unstable government.³⁹ The US military's mission was to preserve the peace, ensure security of individual rights, control arms, ammunition and all government property and train Nicaraguan officers. Obstacles included lack of a responsible local government, serious class divisions, high illiteracy due to a poor educational system, and resentment toward the US.⁴⁰ The short-lived constabulary mission failed, in part, due to the lack of a unified plan. There was no synchronized effort to combat

the insurgency and at the same time restore the economic and political stability. Other factors include lack of a training program, failure to understand the language and culture, and friction between the civilians and the US military.⁴¹

POST-WORLD WAR II

At the conclusion of World War II (WWII), the Allies established constabulary forces to provide the basic rule of law, to support civil administration and conduct peace building activities in Germany and Japan.⁴² A significant fact is that WWII was a "total war" in every sense of the word. It involved the total defeat and unconditional surrender of vanquished states often seen in inter-state Westphalian conflicts which are unlikely to re-occur because most future conflicts and disputes will involve failed states or intra-state conflict. Three factors facilitated the process in Germany and Japan. First, the unconditional surrender by the losers gave the victors total authority to do as they wish. Second, the level of development and education (two highly literate, industrialized countries) favored and facilitated change. Third, the public commitment by the Allies to create democratic states was self-evident.⁴³

GERMANY (1946-1952)

The US military objectives as articulated by General Lucius D. Clay in 1946 were clear and unequivocal: destroy the war potential, re-educate the Germans to a liberal philosophy of life and government, re-establish self-government under democratic procedures, and facilitate eventual acceptance of Germany into the UN.⁴⁴ These objectives necessarily included establishing an independent judiciary, a de-centralized government, economic unity and democratic elections.⁴⁵ Because of the total perversion of moral values and destruction of the rule of law by the Nazi regime, the military government organizations (US, France, UK and Russia) were tasked with administration of the country.⁴⁶ While each zone of occupation was administered differently by the respective Allied power,⁴⁷ complete co-ownership of the democratization process was impossible; therefore General Clay, the US Military Governor, led the entire program.⁴⁸ Despite the US lead, democratization worked best when and where it allowed the Germans to govern themselves. This started at the grass roots level and worked its way up.⁴⁹

US constabulary forces left Germany in 1952. While the democratization of Germany was not without its problems, without a doubt Germany is today considered a democratic country. This would not have occurred without the US military controlled, democratic reforms that are seen throughout German society.

JAPAN (1946-1952)

General Douglas MacArthur, the US Military Governor of Japan, was totally immersed in the nation (peace) building and democratization of Japan. His tightly autocratic, highly controlled method of leadership was instrumental in “establishment of a peaceful and responsible government” of a democratic nature.⁵⁰ While the overall intent was to change the political and economic institutions as in Germany, General MacArthur did not overhaul them, as did General Clay. The focus was an extensive re-education program. This program included individual freedoms, democratic and representative organizations as well as land reforms.⁵¹ The end result was the same as in Germany. A democracy enhanced by public will, with respect for education, literacy and industrialization. All the result of military-led programs.

POST-COLD WAR

Since the fall of the Berlin Wall in 1989, the number of US military missions involving peace building and democratization efforts has dramatically increased. So much so that there have been over 40 UN sanctioned peace operations during this time with the US participating in a majority of them.

PANAMA (1989-1992)

In 1989, the US invaded Panama for several reasons: to protect American lives, to ensure implementation of Panama Canal treaties, to apprehend General Noriega, and to restore democracy; all despite the US being a signatory to several international treaties that proscribed intervention on the pretext that a dictator breached the rule of law.⁵² Irrespective of the condemnation from the UN (75 to 20) and the Organization of American States (20 to 1),⁵³ US troops acted as a constabulary force in apprehending President Noriega, who was tried and convicted in US court as a drug criminal. Subsequently US troops continued to perform constabulary activities while awaiting creation of a newly trained police force due to the absence of civilian law enforcement elements resulting in looting, chaos, and destruction.⁵⁴ An important lesson learned is that US troops are neither adequately prepared nor overly interested in “nation-building”, which includes constabulary activities,⁵⁵ irrespective of the “success” in apprehending President Noriega. In a post conflict situation where the US is not one of the belligerents, but part of the multilateral effort to resolve the conflict, the US needs a coherent strategy.⁵⁶ This was not addressed until 1994 in PDD 25. A final lesson learned was that political reconstruction was not a military mission.

SOMALIA (1992-1994)

In 1992, the US and the international community irresponsibly ventured into uncharted territory in an attempt to rebuild the collapsed state of Somalia with no clear idea of how to accomplish the task.⁵⁷ Initial US involvement was the Operation *Provide Relief* (UNISOM I) humanitarian mission⁵⁸, followed by Operation *Restore Hope* (UNITAF) a combined humanitarian assistance and limited military action operation⁵⁹, and finally the ill-fated UNISOM II, peace enforcement mission involving combat and nation-building.⁶⁰ United Nations Security Council (UNSC) Resolution 814 directed assistance to restore and maintain peace, stability, and law and order. The well-documented decision to pursue General Aideed leading to the Mogadishu incident is a classic constabulary function. Insurmountable internal problems aggravated an already ambiguous reading of the mission especially when it was US officials that drafted UNSC Resolution 837 reaffirming UNSC Resolution 814 calling for all necessary action to arrest and detain for prosecution, trial and punishment all individuals responsible for armed attacks.⁶¹

It is unrealistic to send the US military on a humanitarian mission in the middle of a civil war if the objective is stability and rehabilitation of a country.⁶² This is all the more true when there is nothing of geopolitical interest to the US but rather strictly for humanitarian assistance. The conflicting UN purposes, the lack of Somali government consent because a government did not exist, the existence of a collapsed state, and the promise of the UN and US to "rebuild the state" were part of the recipe for disaster. A primary objective of any peace operations should be to integrate the diplomatic, military and humanitarian actions.⁶³ When ignored this fatal shortcoming illustrated that there are certain limits the military should not exceed, most notably doing peace building.⁶⁴

HAITI (1994-1996)

US military involvement in Haiti in 1994 drew on Somalia lessons learned. Specifically, the military primarily concentrated on security to prepare for the humanitarian operation. This included neutralizing the armed opposition and creating a secure environment for restoration for the legitimate government, preserving or restoring civil order, and pass responsibility for the military operations to the UN Mission in Haiti.⁶⁵ The military did not become involved in peace building activities such as constabulary functions to the same degree as in Panama and Somalia.⁶⁶ This was President Clinton's first test of his foreign policy with promotion of democracy one of the three main objectives. Even though international peace and security was not threatened, the Administration stated that regional security was at risk because Haiti was in the US

western sphere of influence, democracy was being denied, and the refugee problem was threatening to overwhelm the US. As a consequence, the US military was the Administration's choice to accomplish these national objectives for a variety of reasons, one being President Aristide's request.⁶⁷ After six months, the mission changed from a UN Chapter VII peace enforcement mandate to a UN Chapter VI peacekeeping mission during which the US military provided a secure environment for the civilian peace building tasks. These civilian tasks included reforms in the police, military and judiciary, strengthening of democratic institutions and economic development.⁶⁸ The limitations placed on the military and the delineation of achievable peace building aims by the civilians provided a template for later peace building operations.

BOSNIA-HERZEGOVINA (1995-PRESENT)

In November 1995, the Dayton Peace Accords were signed and UNSC Resolution 1031 provided the mandate for the Implementation Forces (IFOR).⁶⁹ The IFOR mandate, stated in the General Framework Agreement for Peace (GFAP), is part of the Dayton Peace Accords. The GFAP contains 12 annexes with Appendices that details the military and civilian tasks. Annex 1A provides the key military tasks and key supporting tasks. Of vital importance to the military was the duty of the Parties to the agreement to provide a safe and secure environment for all persons by maintaining civilian law enforcement agencies.⁷⁰ The separation of constabulary/law enforcement functions from military functions allows the US military to concentrate on its military mission. This separation continues in today's ongoing SFOR mission. Indispensable is that this separation of duties forces the civilian organizations and citizens of Bosnia-Herzegovina to take ownership for rebuilding their country instead of relying on the military.

KOSOVO (1999-PRESENT)

In 1999, the UN authorized a military security presence in the Yugoslavian province of Kosovo.⁷¹ Under the UNSC Resolution, KFOR, the NATO lead troops, is authorized to establish a secure environment and ensure public safety and order until the international civilian presence assumes control.⁷² The military duties in the Military Technical Agreement do not include constabulary tasks. However, over time, because of the lack of civil order, US troops started performing constabulary missions.⁷³ Subsequently US troops began arresting individuals suspected of serious crimes under Yugoslavian law and detaining them in a multi-national detention facility. Even though the United Nations Mission in Kosovo (UNMIK) appointed locals to act as judges, prosecutors and defense counsel on the Judicial Advisory Council (JAC), the military continued to perform constabulary tasks.⁷⁴ The consequences of these constabulary missions

are seen in the recently released investigation into reports of misconduct by US troops in Kosovo that concluded the US troops were not trained to conduct peacekeeping duties, and in fact the mission was better suited for military police.⁷⁵

RULE OF LAW AND PEACE BUILDING

The rule of law is a fundamental building block to a democratic state. It is not simply the vehicle the government wields to assert its power; it is the principle that constrains the power of government obliging it to act pursuant to public rules and procedures. It protects the rights of all members of society, holding all parties accountable and prohibiting autocratic or oligarchic power.⁷⁶ A state collapses when public institutions, legitimate authority, law and political order including police and judiciary disintegrate.⁷⁷ In other words the rule of law is key to democracy and its absence is common to the type of intra-state conflicts the future will bring.

Immediately following hostilities there is a period when the rule of law is vague if non-existent. It is commonly acknowledged that the military is the most effective organization capable of ending conflict; however in the 21st century is the military the most effective means for enforcing the rule of law and performing constabulary tasks?

It must be determined what is involved with rule of law in peace building operations. In "The Rule of Law in the Post Conflict Phase" Neil J. Kritz contends that under emerging international standards there are ten institutional and procedural elements of the rule of law. His major structural and procedural elements are an independent judiciary, and functioning law enforcement and criminal justice system that provide the citizens with a sense of security.⁷⁸ Meanwhile Jan-Philipp Goertz suggests that there are four principles of rule of law.⁷⁹ His main factors are predictability of law making, law enforcement and law interpretation. This predictability provides transparency and effectiveness, fueling public trust in and respect for the law. A third view is Karin von Hippel's that a collapsed state requires consideration of three elements: re-establishing security, empowering civil society and strengthening democratic institutions, and coordinating international efforts.⁸⁰

A failed state occurs when it loses its ability to perform the basic functions of self-governance, thereby losing its legitimacy.⁸¹ Fundamental to this is law enforcement, an independent judiciary and law-making. Therefore it is safe to conclude that because of the nature of a collapsed state, the post-conflict phase of enforcing the rule of law involves at a minimum re-establishment of the police, the judicial system (including judges, prosecutors and defense counsel), and an accountable representative government.

Once the US decides to commit the military to a peace operation, what is its role during the post conflict stage involving enforcing the rule of law? It must be understood that peace building is an ambitious project involving a long-term commitment. It will involve performance of what one can only describe as constabulary duties under this umbrella to include maintenance of order, combating instability, restoration of rule of law, and administration of justice.⁸² In other words the missions described in PDD 71. Because of this long-term commitment, there are costs to the military, especially the Army. These costs affect the military, especially the Army, in at least five ways.

First is in terms of personnel. There is a fundamental difference between combat and non-combat operations. Assuming an increase in "rule of law" (constabulary) objectives in peace building missions, this will aggravate an already strained military readiness and retention problem. One approach would be utilizing dedicated troops specially trained for these missions. However current force levels, including the Army, are barely adequate to meet existing requirements. In fact the General Accounting Office in a February 2001 report found that the current Army force structure lacks units needed for extended contingency operations.⁸³ To set aside designated troops for peace building missions would exacerbate this shortage and limit US foreign military policy.⁸⁴ In addition, budget plays a critical role. According to the Congressional Budget Office (CBO), the current military is 25 percent bigger than its budget. At the current spending levels, the CBO argues that DoD needs to cut the force by a quarter to meet fiscal reality.⁸⁵ In view of fiscal reality and the potential for force reductions, now is not the time for the military to assume additional missions.

Second is the affect of military transformation. Although the end result on the military as a whole is unknown, the Army, for one, will be smaller, more mobile, focused on technological and information innovation. Military planners do not envision an increase in the force structure no provision of special forces for these missions. Because of the need to maintain the capability of full spectrum dominance, fighting skills atrophy in peace building missions.

Third, placing US troops in peace building operations where they perform constabulary missions to enforce the rule of law puts them in a dilemma – whose law do they apply? Most peace operations involve failed states. By that very definition, there is an absence of legitimate law. US soldiers are put in a position of enforcing standards that may not be fair and impartial to the populace they are there to assist. This recently occurred in Kosovo. Disputes arose over which laws to apply – Kosovar or Serbian? After initially applying Serbian law, UNMiK changed course and applied the Kosovar law that was in effect prior to March 1989 when Kosovar autonomy was revoked.⁸⁶ The reason was the failure of Albanian Kosovar judges and prosecutors to

enforce Serbian law. They argued that the Serbian law was discriminatory and the Serb instrument for oppression. Such ambiguity puts the US military at greater risk because by imposing a set of laws different than in effect prior to the conflict, constabulary forces will be looked upon as violating the sovereignty of the state. Under international law, if a dispute arises as to the applicability of a law, absent consent, it is the states' law that is applicable.⁸⁷ This dilemma puts the military in the middle: enforce the laws of an oppressive government that initiated the conflict and be accused of partiality, or enforce laws without the consent of the state and be accused of violating the country's sovereignty.

Fourth is the potential for being bogged down in an occupation mission. When there is lack of faith in public institutions, care must be given to avoid application of the law of occupation as a means of restoring an efficacious regime of public security. Occupation occurs when territory is placed under the authority of foreign armed forces that have the ability to invalidate the government's exercise of public authority.⁸⁸ Under the Hague Convention of 1907, an occupied territory is administered by a military government who bears the responsibility of restoring and maintaining public order and safety while respecting the laws of the occupied nation.⁸⁹ Because of the all-encompassing application of the Hague Convention, the political, economic and legal ramifications of taking over the functions of sovereignty and administration of another state are enormous. The likely future scenario is not post-WW II Germany and Japan, but a Bosnia or Kosovo. The law of occupation can limit the options of a commander and force him, to be responsible for schools, sanitation, food, medical care and a new civil government.⁹⁰ If we are to maintain a bright line in peace building wherein the military does not enforce the rule of law, absent a vital or important national interest, being an occupying power and performing occupation duties is beyond what the US military should do.

Lastly, are lessons learned from previous peace operations. The military should not exceed certain limits in peace operations, especially in the peace-building phase. US forces should not be primarily responsible for this mission.⁹¹ The time has passed for the US to be a Colonial power by imposing its will as we did in Haiti, Nicaragua, American Samoa and the Philippines. Further it is doubtful that the long-term commitment of the presence of US forces will be tolerated in the 21st century. Nor is something on the scale and scope of post-WWII in Germany and Japan plausible considering the amount of money, time and troop presence required. Our national weakness is not cowardice, but impatience.⁹²

There are three opposite views worth review on the role of the military in performing constabulary duties to enforce the rule of law. First is Ralph Peters, who states that constabulary functions are a part of America's military tradition.⁹³ He posits that the American service mem-

ber is a splendid peacekeeper and because of the reality of global US involvement, we need to return to our "lithe expeditionary and constabulary traditions" to effectively cope with this global engagement.⁹⁴ What he fails to consider are the effects of the military transformation, especially the Army's, limited budgets, and more importantly, that increased missions will aggravate an already strained operational tempo.

A second view is presented by the US Army Peace Keeping Institute in their "SFOR Lessons Learned in Creating a Secure Environment with Respect for the Rule of Law." It specifically calls for the military to be more active and aggressive in disempowering criminal institutions and power structures during the post conflict stage of a peace operation.⁹⁵ The unstated effect is use of all the coercive battlefield operating systems to shape and establish the rule of law environment. This means using military forces as the ultimate enforcement mechanism, leading down the road of no return toward peace building and long-term presence.

A third view is one that addresses the gaps in public security. Michael Dziejic writes that the future usage of the military in peace operations will be in the realm where the essence of the mission is rehabilitation, not annihilation.⁹⁶ Because there are gaps in the deployment, enforcement, and institutional phases of a peace operation between termination of hostilities and a functioning government with legitimate law enforcement and justice, the military needs to be trained to perform constabulary functions as well as provide constabulary forces.⁹⁷ The next step is to extend the mission to provide an interim police force. However, because such an approach takes longer than the US is prepared to leave forces deployed, to extend the role of the military in a peace building operation such as suggested harkens back to early 20th century military operations. As stated earlier, this is not in the best interests of the US.

CONCLUSION

It is appropriate that the debate over the military's role in peace operations continues, especially in regard to implementing peace agreements.⁹⁸ Most peace operations involve creation of an environment wherein legitimacy is implicit in the peace settlement irrespective of how forced is the consent.⁹⁹ The very reason there is a failed state is that authority broke down. However military doctrine and thinking should limit the role of the military to creation of an environment in which other organizations do the peace building. The military should avoid the civilian aspects of peace building,¹⁰⁰ such as performing constabulary activities to enforce the rule of law.

With the current military transformation set against the backdrop of social and political expectations in 2010, reality is the military will continue to participate in peace operations which

will involve ungovernable or failed states. Because of ambiguity and lawlessness, there exists a security vacuum in a failed state society but that is not a military problem. The military can provide a short-term solution while civilian long-term engagement lays the groundwork and then promotes growth of institutions and patterns of legitimate government.¹⁰¹

It is obvious that the US needs a coherent strategy on developing legitimate governments. That is "governance that derives its just powers from the governed and generates a viable political competence that can and will manage, coordinate, and sustain security, political, economic, and social development."¹⁰² It is not the military's role during a transitional period of a peace operation, from termination of conflict to new order, to fill the rule of law void left by lack of a law enforcement mechanism.¹⁰³ The key military task should be to maintain a safe and secure environment, not perform constabulary activities, recognizing that this boundary will shift from mission to mission. The best option is one we call the "GFAP" template. This sets a bright line between key military tasks and supporting tasks, specifically stating that civilian law enforcement is the responsibility of the civilian parties to the peace settlement.¹⁰⁴ Along with this is the responsibility of the civilian organizations to rebuild the judiciary and law making institutions. This approach forces the military and civilian aspects of a peace operation to synchronize and coordinate with each other, something directed by PDD 56.¹⁰⁵ Most future peace operations will not be a US unilateral mission, but will be a multi-national one with UN blessing. Therefore, the International Community, including the UN, is the appropriate organization to fill the void with Civilian Police (CIVPOL).

Finally, providing military constabulary capability is not consistent with our National Security Strategy and the decision to employ military forces to support our humanitarian and other interests.¹⁰⁶ Specifically, such a capability is the wrong answer to some critical questions that must be answered concerning commitment of military forces: Have we explored or exhausted non-military means? Is there a clear mission and means to achieve the objectives decisively?¹⁰⁷ The very nature and purpose of a constabulary mission and force in enforcing the rule of law leads to but one answer to both questions: NO. Otherwise the US military in the 21st century will go "Back to the Future" of 20th century missions.

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- ¹¹ Robert H. Dorf, "The Future of Peace Support Operations," in Toward Responsibility in the New World Disorder: Challenges and Lessons of Peace Operations, ed. Max G. Manwaring and John T. Fishel (Portland, OR: Frank Cass Publishers, 1998), p. 168.
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³⁶ *Ibid.*, 111.

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- ³⁹ Ibid., 110.
- ⁴⁰ Ibid., 111.
- ⁴¹ Ibid., 79.
- ⁴² von Hippel, 11-18.
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- ⁴⁴ John Gimbel, The American Occupation of Germany, Politics and the Military, 1945-1949 (Stanford, California: Stanford University Press, 1968), 76.
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- ⁴⁹ Ibid., 15.
- ⁵⁰ Ibid., 16.
- ⁵¹ Ibid., 17.
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