

Rule of Law: It's Not Just for Judge Advocates Anymore

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"I wasn't in the Taliban but I am now," stated Payanda Muhammed, a prisoner in Afghanistan, to a journalist.¹ Muhammed was imprisoned for allegedly bombing a sugar factory, which killed 72 civilians. Muhammed is one of several prisoners interviewed, who claims his innocence, but who has turned away from the corrupt justice system to the Taliban—a likely result when rule of law fails in a post-conflict society.

The rule of law (ROL), is at the foundation of recovery and stabilization efforts. Its existence, or lack thereof, in those countries subject to strife, at risk for strife, or where the United States (US) has ceased combat operations, can dictate the military's deployment or its extension. The successful achievement of ROL can dictate the military's departure. ROL is such an integral component of current stability operations (SO), that the United States Marine Corps (USMC) must adequately train and educate its members, of various military occupational specialties (MOS), in order to successfully accomplish ROL.

¹ Kim Barker, "Prison refrain: I wasn't Taliban, but I am now," http://www.chicagotribune.com/news/chi-afghan-letter_barker_12nov12,0,4348656.story.html>(12 November 2008)

ROL as part of a professional military education (PME) curricula is important for three reasons. First, ROL is inherent to stability operations and as such is part of the current mission as dictated by Department of Defense (DoD) Directive 3000.05 (DoDD), *Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations*. Second, a successful ROL effort is one that is an interagency one and therefore one which is integrated into the planning process. Third, the DoDD requires PME in Stability operations, and as ROL is a subset of SO, it should also be required PME.

Background

Army Judge Advocate doctrine defines the ROL as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.²

In other words, an accessible, predictable, just, and reliable, legal system exists.

² (U.S. DEPT OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY D-1 (draft July 2008), quoted in The Judge Advocate General's Legal Center & School, U.S. Army Center for Law and Military Operations, *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates*, (Charlottesville, VA 2008), 5. This draft is the latest revision and this definition is based on the Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U. N. Doc S/2004/616, at 4 (2004) which continues: 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.

The current operating environment consists of ROL operations in Iraq and Afghanistan. However, the U.S. military has conducted ROL throughout its history when required. At the end of the Spanish-American war, the United States was responsible for governing 10 million people in Guam, the Philippines, Cuba and Puerto Rico, due to invasions, occupations, and the ceding of territory.³ The Army established military governments initially, until civilian governors were emplaced. Judge advocates wrote criminal codes, and established new judicial frameworks and legal institutions.

Between 1899 and 1902, almost every Army officer had served in either Cuba, the Philippines or Puerto Rico. The U.S. military also exercised extensive ROL activities after World War II, in both Germany and Japan and more recently in Bosnia and Kosovo.⁴

Stability Operations and COIN

DoD Mission

In December 2005, the President issued National Security Presidential Directive 44 (NSPD-44) establishing national policy regarding stabilization and reconstruction

³ Stromseth, (Rule of Law Handbook) ix.

⁴ Stromseth, x. Judge advocates conducted over 350,000 military courts in Germany, and drafted a new constitution for Japan.

assistance to foreign states. It further directed the Secretary of State to lead and coordinate with the DoD.⁵

In November 2005, DoD Directive (DoDD) established the DoD policy for SSTR operations.⁶ The DoDD designates SSTR operations as a core military mission, equating their priority to those of combat operations. It assigns responsibilities within the DoD for planning, conducting, and training for these missions. The DoDD also recognizes that although civilians are the best suited to conduct stability operations, it directs the military to conduct them when civilians can not.

Most ROL activities are part of a counterinsurgency (COIN) campaign, but also may occur throughout all operations. The goal of ROL as well as the goal of COIN is to establish the legitimacy of a government.⁷ Legitimacy and therefore successful ROL operations contribute to the local population's trust and confidence in the host nation government. According to COIN doctrine, "victory is achieved when the populace consents to the government's legitimacy and stops actively and passively supporting the

⁵ National Presidential Security Directive/NSPD-44, *Management of Interagency Efforts Concerning Stabilization and Reconstruction*, December 7, 2005.

⁶ Department of Defense Directive 3000.05 Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations, November 28, 2005.

⁷ Stromseth, 18.

insurgency”⁸ Throughout the course of COIN operations, “counterinsurgents aim to enable a country or regime to provide the security and rule of law that allow the establishment of social services and growth of economic activity.”⁹

The military’s ability to cease combat operations quickly and decisively, does not necessarily create a stable post-conflict environment. However, this ability requires that the military be able to begin stability and reconstruction efforts at the end of major combat and this may only be accomplished by adequate concurrent planning and by coordination with the civilians who are best suited to this end. Stability operations will occur during the initial combat phase, and even though they are often more prevalent at the end of the campaign, they will need to be planned for as part of the overall campaign.¹⁰

Planning

Traditionally (prior to the last fifteen years), U.S. military operations began with extensive planning and force build-up. Offensive operations were followed by stability and reconstruction and ended with nation building.

Conflicts typically lasted from several months to several

⁸ United States Marine Corps, *Marine Corps Warfighting Publication 3-33.5: COUNTERINSURGENCY*. (Quantico VA: MCCDC Dec 2006), quoted in Rule of Law Handbook, 18-19.

⁹ Rule of Law Handbook, 19.

¹⁰ Binnedijk, 54.

years and ended with a sizable US presence in theater. The long duration and large footprint eliminated most enemy resistance and allowed more time to plan for and to begin stability operations.¹¹

Since the end of the Cold War, the US has conducted a stability and reconstruction operation every 18 to 24 months, lasting from five to eight years.¹² However, in the last 15 years, the military has operated with a rapid buildup of a reduced amount of forces, within a shorter offensive period, resulting in fewer forces available for follow on stability and reconstruction operations.¹³

The ROL architecture is not just limited to courts, cops, and corrections as it is often referred to in the judge advocate community. In addition to The Law of War, Occupation Law, Human Rights Law, and various legal institutions and systems of law, the rule of law also includes arbitration, mediation, and alternative forms of dispute resolution and other projects which rebuild the post-conflict society.

¹¹ Binnedijk, Hans, and Stuart E. Johnson, ed., *Transforming for Stabilization and Reconstruction Operations*, (Washington, D.C.: National Defense University Press, 2004).

¹² United States Government Accountability Office (GAO), Testimony Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives, *STABILIZATION AND RECONSTRUCTION Actions Needed to Improve Governmentwide Planning and Capabilities for Future Operations*, Statement of Joseph A. Christoff, Director International Affairs and Trade and Janet A. St. Laurent, Director Defense Capabilities and Management, October 30, 1977.

¹³ Binnedijk

Therefore ROL must be part of the Marine Corps Planning Process (MCP) and the Military Decision Making Process (MDCP) and the USMC must also expose its troops to ROL. Since judge advocates and military police are not issued capes and do not operate in a vacuum, they cannot possibly perform all functions required of ROL; therefore, ROL cannot be strictly limited to certain military occupational specialties.

PME

In addition to the DoDD directing that SSTR operations be a core military capability, it also directs that "stability operation skills" should be "developed and incorporated into Professional Military Education at all levels." Judge advocates at a minimum should receive mandatory PME on ROL, but other MOSs should receive ROL training and/or PME in order to ensure successful ROL operations.

In 2007, The Judge Advocate General's Legal Center and School (TJAGLCS), U.S. Army Center for Law and Military Operations first published The Rule of Law Handbook: A Practitioner's Guide For Judge Advocates, and subsequently published the second edition in July 2008. However, TJAGLCS only offers limited instruction on ROL. ROL is offered as a one week short course, and has only been

offered once, in July 2008. Additionally, it is offered as an elective to its Graduate Course. Judge advocates can attend both courses and can additionally complete an on-line ROL course.¹⁴

USMC judge advocates receive legal instruction in accordance with MOS requirements from the Naval Justice School (NJS). NJS does not offer instruction on ROL, at this time. Despite the DoD mandating in its directive in 2005, that "stability operations skills," such as understanding and being able to conduct ROL operations, be "developed and incorporated into PME at all levels" it has yet to be achieved for judge advocates in the USMC.¹⁵

Not only is PME dictated by DoDD, but PME is imperative to ensure Marines succeed in their mission. ROL includes not only nation building or rebuilding nation activities, but also ensuring that forces (U.S., host nation and coalition), conduct themselves in a way which respects the rule of law during offensive, defensive and stability operations.¹⁶ Successful ROL operations during military involvement depends upon, "A Command's ability to establish the rule of law within its area of control" is necessary and "is dependant in large part on its own

¹⁴ Rule of Law Handbook, ii.

¹⁵ DoDD 3000.05,

¹⁶ Rule of Law Handbook, 18.

compliance with legal rules restricting soldiers' (and the command's own) discretion and protecting the population from the seemingly arbitrary use of force."¹⁷

Field Manual (FM) 3-0 explains:

...individual and small unit actions can have consequences disproportionate to the level of command or amount of force involved. In some cases, tactical operations and individual actions can have strategic effects. Recognizing and avoiding potential problems requires trained, disciplined, and knowledgeable leaders and soldiers at every level. Every soldier must understand the operational and strategic context of the mission and the potential military, political and legal consequences of their actions or inaction.¹⁸

Therefore, without truly understanding the mission of ROL, Marines will not understand fully how to operate successfully in the area of operation. In order to be successful in SO, it is imperative that the military achieve success by developing Professional Military Education (PME) for all MOSs in order to conduct and support stability operations and ROL.

Counterargument

Misconceptions exist in the military that ROL is new, that it is only for judge advocates, and that it is inherently understood by the military as citizens of the

¹⁷ Rule of Law Handbook, 18.

¹⁸ Department of the Army, Field Manual 3-0, Operations. (Washington, DC: Headquarters, Department of the Army June 2001), 9-15.

United States. Although certain military occupational specialties, such as judge advocates, military police and civil affairs, traditionally focus on ROL operations, and although ROL has been recently recognized institutionally as part of judge advocate doctrine, it is neither new nor exclusively for judge advocates.¹⁹ ROL is not inherently understood by military members of other occupational specialties who may come in contact with its applicability, or even by all judge advocates.

Additionally, almost all ROL activities will involve international, governmental and non-governmental organizations and even though the military's part in a ROL operation may end with the departure of the forces, the effort will continue as these other agencies have a more central role. The military therefore needs to use its personnel efficiently. This can be done sooner and with better coordination with the civilian talent. It will be time well spent and is something which is not necessarily taught to the military masses.

¹⁹ Rule of Law Handbook, pg x, MG GEORGE S. PRUGH, LAW AT WAR: VIETNAM 1964-1973 13 (1975) In 1964, then Colonel George S. Prugh, the Staff Judge Advocate for Military Assistance Command, Vietnam (MACV), noted "there cannot be a successful counterinsurgency program until there is established a respect for law and order."

Conclusion

A major campaign will not cease until local civil authorities are in a position to govern the host nation. Stability operations are critical to mission success, and ultimately to the redeployment of military forces. (Fn a2 and a3) Almost all ROL activities will involve international, governmental and non-governmental organizations. Even though the military's part in a ROL operation may end with the departure of forces, the ROL effort will continue as these other agencies develop and increase their role.

If a Marine does not understand the importance of ROL in a post-conflict country, he may contribute to its failure. The failure of ROL will continue strife, disorder and corruption, requiring extended and multiple deployments.

Muhammad, who still denies any role in bombing the sugar plant, stated '...if I'm released... I will be one of the strongest opponents of the government.' ²⁰

²⁰ Kim Barker

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