



Seizing the Initiative by Establishing the Rule of Law During Combat Operations

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“And let me say also we will not be judged on how we do the combat part, but it is how we leave it in the eyes of the world—and that’s that nation-building part that is so essential . . . the forces will have to transition to peacekeeping and stability, because you can’t afford a lull.”

— General Carl W. Stiner

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PHOTO: Iraqi civilians rush to kick the torn-down statue of Iraqi President Saddam Hussein, Baghdad, 9 April 2003. (AP Photo/Laurent Rebours)

IF YOU BREAK IT YOU OWN IT,” Colin Powell told President George W. Bush as the president considered the invasion of Iraq.¹ Powell’s statement should resonate in the minds of operational planners as they prepare contingency plans for future U.S. military operations. In any future military operation, U.S. commanders will be expected to plan for stability operations and integrate non-DOD agencies into military contingency plans. As part of that responsibility, the U.S. government is accountable to the rule of law. Preparation of forces for rule of law operations is critical for success of the strategic end state; the failure to consider and plan for those factors may have strategic consequences that can undermine national objectives.

FM 3-07, *Stability Operations*, defines the rule of law as—

*A principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.*²

Rule of law in a war-torn nation is a critical, paramount requirement in achieving stability operation objectives “to maintain or reestablish a safe and secure environment; provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief” and allowing for essential service to be restored.³ Military commanders must plan, train, and resource an adequate number of military personnel to implement order, protect property, and maintain security to prevent lawlessness. Lawfulness is the foundation of stability. Operational planners must anticipate U.S. military forces will likely encounter a failed, broken, destroyed, or simply nonexistent justice apparatus (i.e., policing courts and corrections institutions). The situation

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will likely require immediate attention to protect the indigenous people of the area, their property, and their economic livelihood. Successful planning and execution of a rule of law plan by troops on the ground (United States, allied, coalition, or UN forces) will enable the U.S. military to achieve or ensure stability. In turn, creating the conditions necessary for U.S. forces to transition from combat operations to stability, security, transition, and reconstruction (SSTR) operations will eventually enable the United States to achieve its strategic end-state goals.

Uncontrolled Lawlessness

In April 1992, America watched as lawlessness broke out in Los Angeles. Riots erupted on 29 April 1992 after a jury acquitted four LA police officers accused in the beating of an African American motorist. The verdicts were announced around three thirty in the afternoon. Within 45 minutes, an unruly crowd had formed at the intersection of Florence and Normandie Avenues. The mob assaulted pedestrians, pelted vehicles with bricks and rocks, and smashed shop windows. Police officers called to the scene immediately tried to arrest the boldest troublemakers, but failed, and rather than call for emergency backup, they retreated from the area.

The mob rapidly grew, and without a police presence, its actions became increasingly violent. In an act of brutality that shocked the nation, an incensed mob attacked a helpless victim who had driven into the gauntlet of their fury. Several men dragged the victim from the cab of his truck, knocked him to the ground, and kicked him. He was then struck in the head with a fire extinguisher, pounded several times with a hammer, and hit with a brick. The following day the *Los Angeles Times* posed the question, “Where were the police?” The *Times* said the riots might have been averted had police responded with a massive effort to quell the initial unrest.⁴

The events during the riots in Los Angeles were destined to be repeated. While it is impossible to predict what challenges military forces will encounter, operational planners must glimpse into the future and plan accordingly. During the planning for the U.S. invasion of Iraq, one of the most contentious issues was troop strength. Secretary of Defense Donald Rumsfeld believed, after a successful operation with limited conventional forces in Afghanistan, that the



A Los Angeles police officer holds a shotgun on two looting suspects as a California state police officer puts handcuffs on them near Martin Luther King Boulevard and Vermont Avenue in South Central Los Angeles, 1 May 1992. (AP Photo/John Gaps, III)

United States could invade Iraq with a relatively small footprint. During testimony before the Senate Armed Service Committee, then-Army Chief of Staff General Shinseki stated that something “on the order of several hundred thousand soldiers” in addition to troops already committed would be necessary for the invasion force and post-war stabilization.⁵

Nonetheless, the United States invaded Iraq with a force of only 130,000 troops by the end of 2003. After Baghdad fell, widespread looting broke out in the streets of that capital. U.S. forces soon reported that they were overwhelmed and did not have the capacity (or plan) to quell the disturbances.⁶

A 2003 Rand study concluded that “successful nation-building” required a minimum of 20 soldiers per 1,000 residents (or about 1 soldier per 40 inhabitants).⁷ At about the same time, only 25,000 U.S. personnel enforced the rule of law in Baghdad, a city of approximately 6 million. The ratio was one U.S. soldier for each 250 citizens. Lieutenant General David McKiernan, the U.S. Joint Forces Land Component commander, noted, “That’s not enough to control a city of 6 million people.”⁸ The widespread and uncontrolled looting in Baghdad not only cost the Iraqi society billions of dollars, but

also set conditions that favored and fueled Iraq's initial insurgency.⁹

The pervasive sense of lawlessness conveyed a widespread, lingering message to the citizens of Baghdad, the American public, and the international community: No one is in charge. To those intent on doing harm, it also signaled an opportunity to expand the chaos and havoc for political purposes. In addition, the inability of the American and Iraqi forces to secure munitions allowed looters to pillage the vast munitions supply of the former military regime. Stockpiles of arms, ammunition, and artillery shells fell into the hands of anticoalition forces who immediately used them against the coalition.

Lastly, the looting of government offices and damage to infrastructure directly affected the restoration of essential services. Dick Mayer, a former police officer and deputy director for the Department of Justice's International Criminal Investigative Training Assistance Program, noted that as Iraq descended into lawlessness, the ability of the United States to create a stable government in Iraq was also diminished.¹⁰ Together, the detrimental effects of the looting directly undermined U.S. strategic goals.

Comparing the riots in LA to the looting in Baghdad highlights the culminating point. In both situations, the inability of security forces to maintain decisive control from the onset of the disturbances created a situation that quickly grew out of control and exacerbated an already complex situation. Just as the world watched in horror as truck driver Reginald Denny was dragged from a truck and beaten in LA, the world also witnessed U.S. forces reduced to sideline spectators as looters overwhelmed U.S. forces in Baghdad and destroyed key infrastructure essential for SSTR efforts. In both instances, the security forces were not prepared to deal with the situation and quickly became overwhelmed. Regardless of the circumstances, in Iraq the U.S. government did not perform one of its core functions: providing security to the populace. It, therefore, was viewed as inept. When crowds become unruly, potential to cause violence or destruction arises; then commanders and forces need to recognize this decisive point and move quickly to establish order.

One of the key findings of the recent Rand research on establishing internal security in nationbuilding is

that establishing security during the "golden hour" after combat operations conclude is critical to preventing additional unrest. The "golden hour" is the short time of several weeks to several months after combat operations when external intervention may enjoy both popular support and legitimacy and the opposition has not had the time to organize.

To take maximum advantage of the "golden hour," planners must anticipate and ensure the right mix of forces and proper rule of law training. The "golden hour" is a critical time to gain security during stability operations because it can prevent unrest from quickly spiraling out of control as during the LA riots or the lawlessness in Baghdad.

In Afghanistan, coalition forces missed the opportunity to seize the initiative immediately following the overthrow of the Taliban regime. Future efforts should be particularly mindful of the period following major combat operations. The inability to react and take advantage of the "golden hour" risks losing the initiative and jeopardizes long term stability and transition to civil authority.¹¹

A New Paradigm

In 1994, Colonel Thomas X. Hammes coined the term "fourth generation warfare" as a new type of warfare between a nation-state's military and an irregular, nonstate actor. In fourth generation warfare, insurgents seek to incorporate different elements of warfare, including conventional capabilities, irregular tactics and formations, and terrorist acts to demonstrate a willingness to fight "across the political, economic, social, and military spectrums" and achieve the strategic goal of "changing the minds of the enemy's policymakers."¹²

Many accuse U.S. military leaders of fighting the nation's last war. This means strategic leaders often use their experiences gained on the battlefield and in academia to plan contingency operations based on the paradigm of old. This creates a situation best expressed by General Wallace during the U.S. invasion of Iraq, when he noted that this was not the enemy we war-gamed.¹³ As U.S. forces face the long-term prospect of fighting fourth generation conflicts, operational planners must adjust their planning and prepare to fight what the former commandant of the U.S. Marine Corps, General

Charles Krulak, dubbed “the three block war.” Krulak believed that the three main categories of military operations are combat, stabilization, and humanitarian support performed simultaneously and tactically within a confined geographical space. To be successful in fourth generation warfare, U.S. commanders must provide security to populations of large cities and rural areas.¹⁴

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Field Manual 3-07 established the rule of law as an essential element in transitioning from SSTR operations to enabling civil control. The difficulty with this concept is that rule of law is often discussed as a strategic policy and at the operational level is planned by those with a background in international law. Too often, the planning is long term in nature and focused on top-down host nation government institutional level. As noted by the senior counterinsurgency adviser to General David Petraeus in Iraq, David Kilcullen, the rule of law is one of the critical foundations of societal order and fundamental to a functioning society.

The coalition in Afghanistan continues to struggle with rule of law operations, mainly because they are trying to create national-level institutions, while rule of law functions are usually at the local level and community based. The Taliban are focused at the local level and thus are having more success with rule of law and often displace the coalition.¹⁵ One only need look at the initial failings of the Coalition Provisional Authority experiences in Iraq to understand the difficulty. A focus on long-term institution building does not meet the immediate need to resolve a corrupt, incompetent, nonfunctioning judicial system. Taking years to build credible national institutions ignores the immediate need to provide a system that can resolve both criminal and civil cases and undermines stability efforts. Local militias formed in Iraq to fill a judicial vacuum and the Taliban exploited such vacuums in Afghanistan on two occasions.

In an unstable environment, people need security and such security depends on some local form of law and order. While long-term goals that led to a successful exit strategy are important, what does the lack of a functioning justice system mean for the U.S. soldier or marine on the ground fighting the three-block war at the tactical level? Units from the brigade level all the way down to the team level must deal with irregular forces creating the chaos and fueling the insurgency. How does a team of soldiers led by a 23-year-old sergeant establish security against a nonstate actor who seeks to combine guerrilla tactics with a willingness to fight “across the political, economic, social, and military spectrums”? What does a squad leader do with a petty criminal or someone accused of a more serious crime such as rape or kidnapping? How does the team deal with minor civil issues such as land disputes that exacerbate tribal tensions and lead to violence? Have operational planners provided the necessary guidance, resources, and training for this situation?

Existing U.S. policy and UN resolutions obligate military commanders and forces to plan and conduct rule of law operations. To help the United States or allied nations reform the rule of law in post-conflict combat environments, planners must consider an interim criminal and civil code adopted by the international community to enforce the rule of law and settle civil issues. Internationally accepted laws are pivotal to establishing the rule of law during post conflict operations. For a military force to enforce laws, the laws must have international legitimacy, be accepted by the population, and conform to basic international human rights. A code of interim transitional laws will enable military forces to enforce the rule of law and thus ensure public safety and security.

Throughout previous conflicts, the international community recognized the inability of military forces to enforce the rule of law. In the latter part of the 1990s and in early 2000, the subject of the rule of law was widely debated. The UN issued the Report of the Panel on UN Operations, also known as the Brahimi Report. Within a year of the report’s release, the U.S. Institute of Peace and the Irish Centre for Human Rights launched the Model Codes Project. The project included over 300 international experts who developed a set of codes



(DOD)

David Kilcullen (left) asks a question of LTC Michael Infanti, commander of the 4th Battalion, 31st Infantry Regiment, 2nd Brigade Combat Team, 10th Mountain Division (Light Infantry), before visiting the Yusufiyah, Iraq, Joint Security Station, 3 June 2007.

for post-conflict reconstruction based on extensive research and best practice principles—the Model Criminal Code, the Model Code of Criminal Procedure, the Model Detention Act, and the Model Police Powers Act. Although the international community has not implemented the model codes, they offer a valuable alternative and starting point for criminal justice reform in post-conflict.¹⁶

When considering stabilization and reconstruction (SSTR) operations and logical lines of operations (LLO), planners should consider Maslow's hierarchy of needs model. The model can help envision SSTR and the development of LLOs via the basics that any population will require in a war-ravaged environment. Such needs consist of basic human requirements to survive: food, water, and safety. In most situations, people who do not feel safe will move their families to seek safety and rely on the goodness of others by way of an international or nongovernmental organization. This is why there are so many internally displaced civilians during a time of war. For civilians to return to an area they vacated,

they must feel a sense of security and a sense of justice. This is a basic concept that military planners must recognize during any deliberate or crisis action planning. Without security, the conditions necessary to fulfill the other hierarchy of needs in Maslow's pyramid will never be met.

Under this model, the population does not focus on elections, construction, and economic development until the basic rule of law is established. The situation that occurred in the streets of Egypt and various locations throughout the Middle East in early 2011 are prime examples. Egypt, a place war had not ravished, provided the population a sense of security through the Egyptian military and police. The rule of law in Egypt enabled the Egyptian protesters to demonstrate for legal and political reform. Their main concerns were state-of-emergency laws, free elections, freedom of speech, corruption, and economic issues, including high unemployment. If the rule of law had been absent, the protesters would not have had an opportunity to focus on secondary and tertiary issues on Maslow's pyramid.

At the operational level, this focus may require a planner to consider the police, the judiciary, and corrections to resolve current criminal justice and civil law requirements and develop a more stable justice system under the control of the population. The U.S. public and indigenous population has to understand that this is a long-term concept that may take years to implement in war-torn nations or failed states. Planners must consider what personnel and resources are necessary at the tactical level of war to achieve the goals and move stability and reconstruction forward along the various LLOs.

As U.S. forces continue to fight an elusive enemy in fourth generation warfare, establishing security will be paramount to counterinsurgency operations. To transition from phase III thru phase IV, commanders must implement and enforce the rule of law via a justice system acceptable to the population they serve. This is especially true if phase III operations destroy or cripple preexisting order. In many instances, military forces are unfamiliar with the concepts of the rule of law and do not have the expertise to administer justice in a nonfunctioning justice system, and those forces may not understand or appreciate the cultural sensitivity of the law in relation to the country or region to which they deploy. For example, deployed forces often bring with them an ethnocentric bias that could complicate nation building or counterinsurgency. Often the deployed force will enforce criminal justice or civil justice principles based upon "what they know" as opposed to what may be important to the culture in which they serve. This might entail using a tribal chief to resolve disputes at the local levels. Some may argue that this might not be the long-term goal, and it negates the purpose of a regional or federal legal system. However, it may be necessary in the early stages of SSTR. As LLO are developed, the establishment of a regional or national justice system may be contemplated; however, this may take decades to implement. For the U.S. forces fighting the three-block war, the crucial time is the present.

Soldiers at the tactical level must have the tools to establish the rule of law. These tools include not only an internationally recognized code of law, but also training, rules for use of force, and the right to bear arms. Unfortunately, the U.S. military often discovers too late that it has failed to provide the

requisite tools for soldiers on the ground to deal with insurgents or common criminals. We must train soldiers in apprehension and detention and in basic police techniques to include that they emphasize human rights.

Many in the military are familiar with the saying "if all you have is a hammer, everything looks like a nail." Providing U.S. forces with weapons such as F16s, MK19s, and M249s when they are dealing with a civilian population is fraught with danger. If the only resource U.S. forces have is weapons that inflict serious injury or death, then everything starts to look like the proverbial nail, and they will use their hammers. A lethal weapon will bring about a resolution. If the United States only provides soldiers with combat weapons and does not invest in culturally appropriate training, then an overuse of force is likely to occur, exacerbating relations with the local population and sowing the seeds of an insurgency.

As noted in the command guidance to the International Security Assistance Force (ISAF), this creates animosity and may be detrimental to the

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overall mission. More important, deployed forces must convey that they are operating under the host nation's rule of law rather than governing by the use of force or the threat of the use of force. The excess use of force will result in ill feelings and mistrust between the military and the population the U.S. military is trying to protect and gain the trust of.

During Operation Iraqi Freedom, U.S. military leaders learned that cordon searches and the mass arrests of locals were alienating Iraqis and rendering the operations counterproductive. Lieutenant General Ricardo Sanchez noted multiple indicators that the U.S. iron-fisted approach was beginning to alienate Iraqis. Indeed, some named the mass incarceration of Iraqis in prisons such as Abu

Ghraib as a contributing factor leading to some of the abuses that occurred within the facility. To avoid these types of mistakes, planners must recognize and ensure that deployed forces are trained, equipped, and resourced to conduct the rule-of-law operations of policing, corrections, and establishing a judiciary during operations that occur between phase III and phase IV.

In fourth generation warfare, the operational commander and the forces at the tactical level must demonstrate restraint. This is especially true when provoked by insurgents mixed within the civilian population. Soldiers must be agile and capable of moving from the use of deadly force against enemy combatants to using less lethal weapons in counterinsurgency operations to incapacitate people and equipment while preventing the loss of life and damage to property.

In Afghanistan, General Stanley McChrystal had previously issued orders aimed at minimizing civilian casualties to the point of restricting airstrikes. He noted that while his policy may create risks to coalition forces, alienating the Afghan population was a far greater *strategic* risk and actually created greater risk to the troops at the tactical level in the long term.¹⁷ While the ISAF commander, General David Petraeus stated that “forces must secure and serve the population”—a phrase reminiscent of a common American police force motto “to protect and serve,”

... the decisive terrain is the human terrain. The people are the center of gravity. Only by providing them security and earning their trust can the Afghan government and ISAF prevail.¹⁸

Corrections and the Judiciary

The concept of arresting large numbers of military-aged males using cordons and searches and incarcerating them for extended periods without due process is unacceptable and may lead to a greater insurgency. Major General Douglas Stone, the former commander of Task Force 134 Detention Operations in Iraq, estimated that over 160,000 detainees processed through the detention operations process. Additionally, each detainee U.S. forces incarcerated potentially had a network extending beyond the wires of the camps and linked into the overall strategic goals of the United

States.¹⁹ The perception of torture and human rights violations in Guantanamo Bay and throughout the U.S. detention system has increased recruiting and funding for Al-Qaeda and has damaged the U.S. reputation internationally.

American forces must be careful to differentiate between a common petty thief and a hardcore insurgent. We should never incarcerate these two types of individuals together because of the possible consequence of detention camps becoming a recruiting ground and training institution for the insurgency. We should house hardcore insurgents in a separate facility so as not to allow common criminals to become insurgent groups. We must manage detention camps using a policy of engagement rather than incarceration. Similarly, soldiers conducting detention operations must minimize their ethnocentric bias and understand the culture in which they are operating. This does not mean that soldiers have to coddle detainees, but they should understand a detainee’s culture to avoid errors in judgment that may affect the overall strategic mission of the United States.

Long-term judicial reconstruction projects will require international assistance and aid. It could take several years for the public to regain confidence in a judiciary that in many instances has a reputation for bias and corruption. However, a system must be in place that can hear grievances and issue rulings on the incarceration of people detained by military forces as well as resolve civil issues. To ensure due process, there must be a functioning court system that fairly, impartially, and expeditiously determines the innocence or guilt of detainees based on rules of evidence. The civilian population will quickly see a judiciary that is not free from corruption, bias, and human rights violations as inept, undermining the policing and correctional aspects of the rule of law. Failure to implement a functioning court system could also increase the violence through organized crime and extrajudicial killings, as in Iraq during sectarian violence.

Planners must consider implementing a functioning judiciary as part of the planning process to ensure due process for persons apprehended by U.S. forces and to resolve civil issues in accordance with local laws or custom or religious practices. There are several different methods, including working with the host nation and staff judge advocates to

combine cultural and religious sensitivities with the rule of law. The following incident that occurred in the Balkans further illustrates the importance of creating an independent judiciary. In Kosovo, the Albanian judiciary failed to apply the law equally between the ethnic Albanians and Serbs. Due to obvious discrimination, the Special Representative of the UN Secretary-General attempted to improve the judicial system by permitting internationals to serve on the judiciary. After the conflict in Kosovo, the UN Mission in Kosovo established an independent judiciary by appointing international judges and prosecutors. It was the first time this had been done, and it resulted from discrimination within the courts and a lack of trained judges and prosecutors. The after action conclusion of the program was that the international participation in establishing the judiciary should have been immediate rather than incremental and crisis-driven.²⁰

The Critical Juncture

Operational planners focused on fourth generation warfare or counterinsurgency must place more emphasis on the immediate concerns of military forces entering operational areas without a functioning justice system. They must anticipate and accept the fact that military forces in conjunction with international organizations will be necessary, and they will play a significant role in providing security and stability via rule of law operations.

Planners must consider rule of law operations throughout all phases of the operation. Effective planning must address how the joint force and international organizations, host nation forces, and rule of law personnel will resource, train, and implement rule of law functions to sustain the force until achieving the end state.

The military has the obligation and ability to create the conditions necessary to provide a stable and secure environment by properly planning for rule of law operations throughout each phase of an operation. Often, planners are more concerned with rule of law operations during stabilization and enabling civil authority; however, preventing lawlessness during combat operations, or as the operations wind down, is necessary to reduce lawlessness and achieve stability. An effective, accountable justice system supported by trained and resourced security personnel at the tactical level of war is essential to establishing the rule of law at a critical juncture of combat operations. Preparation and resourcing of forces for rule of law operations should be part of the initial operational plan.

A functioning justice system with the ability to resolve both criminal and civil cases is critical for success of the strategic end state. The inability to plan, train, and resource U.S. military forces in police operations, detention operations, and the judiciary will have strategic consequences that will be detrimental to national objectives. **MR**

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