

WHY SETTLE FOR A “WILLY-NILLY UNEQUAL, HAPHAZARD RULE OF LAW EFFORT”? ; AN ARGUMENT FOR A STANDARDIZED FRAMEWORK FOR THE DEVELOPMENT OF THE RULE OF LAW

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The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General’s School, the United States Army, the Department of Defense, or any other governmental agency.

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Thesis Abstract

Rule of law (ROL) operations are complex and require a team effort by United States Government (USG) agencies and employees. They cover a broad scope of disciplines and activities and require the coordination between multiple USG agencies. And if conducting ROL missions is a team effort, there should be a playbook that every member uses. Unfortunately, that is not the case. Many current ROL operations are conducted ad hoc, with little coordination, and too focused on criminal justice systems; this approach is simply inadequate. A standardized framework referred to as the Standing Framework for Rule of Law Operations (SFROLO) used by all USG ROL practitioners would facilitate coherent and effective unity of effort during ROL operations.

This thesis goes a step beyond arguing that the rule of law (ROL) operations are not being done correctly. It proposes a solution to some of the coordination problems and ad hoc nature of ROL operations conducted by the United States Government (USG). The solution is the creation of a standardized framework for all USG ROL practitioners to use in the field. This framework would act as a starting point for operations and would assist communication and coordination by providing a playbook that all can work from.

Examples from post-conflict states, such as Sierra Leone, Sudan, and Afghanistan, illustrate that many post-conflict states possess the same challenges in developing the ROL and the SFROLO proposes an approach that would be effective in a variety of post-conflict countries. Practitioners need a standardized interdisciplinary method to execute operations that establish effective penal systems, support economic development, and create good governance. The proposed framework meets these needs by providing a common analytical framework, reporting requirement and task matrix which integrate this interdisciplinary approach into a standard model for operations. The SFROLO draws knowledge from many USG agencies and would be used by all USG ROL practitioners for the development of laws and legitimate legal systems in a post-conflict state. The proposed framework will enhance interagency cooperation and provide a more effective interdisciplinary approach to ROL operations. The SFROLO proposed in this thesis encourages the following: greater cooperation amongst practitioners; standardization of USG ROL doctrine; and a greater level of success in the execution of ROL missions.

¹ CENTER FOR ARMY LESSONS LEARNED, V CORPS AS MULTI-NATIONAL CORPS – IRAQ, JANUARY 2006 –JANUARY 2007: INITIAL IMPRESSIONS REPORT 105 (June 2007) *quoted in* THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 136 (2008) (describing rule of law efforts in Iraq during 2006).

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“Doing the rule of law’ is a team rather than an individual effort”²

I. Introduction

If conducting rule of law missions is a team effort, there should be a playbook that every member uses. Unfortunately, that is not the case. For example, a military judge advocate is told she will be deploying to a country where major combat operations have just ceased. She will be deploying as the lead rule of law attorney and though she had a couple hours of instruction in her graduate course on rule of law, she is not sure what that really means. The deployment is still a month away, so she decides to find out all she can about rule of law operations. As she does her research, she becomes increasingly frustrated. Her problem is not a shortage of information and publications, but instead too many that all seem to say something slightly different. So she prepares the best she can.

Months later, while deployed she is attempting to coordinate her rule of law projects with other military units and the newly arrived Department of State agencies. Again, she is frustrated. Each of the groups seems to have a different vocabulary and all are receiving different guidance even though they are all working on rule of law missions. She cannot understand how they could be working on the same team, and yet not be able to have some sort of unified effort on the ground. The problem is that there is no common playbook used by each member of the United States Government team.

This fictional judge advocate’s experience is not unfamiliar to several military ROL

² THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER ACTION REPORTS from July 2008-August 2009 (2009) (AAR comment from IBCT, 101st ABN DIV (AASLT) 2009 OIF).

practitioners. *Forged in the Fire*, a Center for Law and Military Operations publication, is full of after action review (AAR) comments of judge advocates expressing similar and more extensive frustrations.³ Many scholars have also published articles lamenting the lack of a comprehensive approach to the development of the rule of law.⁴ Yet with all these calls for action and change, it is likely that if a judge advocate deploys tomorrow to a new post-conflict state, she would be writing similar AAR comments as those found in *Forged in the Fire*.

This thesis is going a step beyond arguing that the rule of law (ROL) operations are not being done correctly. It proposes a solution to some of the coordination problems and ad hoc nature of ROL operations conducted by the United States Government (USG). The solution is the creation of a standardized framework for all USG ROL practitioners to use in the field. This framework would act as a starting point for operations and would assist communication and coordination by providing a playbook that all can work from. This standardized document is the Standing Framework for Rule of Law Operations (SFROLO) and it is designed to enhance unity of effort through standardizing processes and procedures for conducting ROL operations.

First, this thesis will explain why such a framework is needed. Section II will discuss the multiple definitions and approaches for ROL operations and explain how the diversity

³ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 136 (2008) (describing rule of law efforts in Iraq during 2006). *See also* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER ACTION REPORTS from July 2008-August 2009 (2009).

⁴ The author conducted a search in the WestLaw law review and periodical base using the terms "rule of law" & "post conflict" and received 1262 results. Presumably not all of these articles offer a critique of current rule of law efforts, but the sheer number of published articles demonstrates the interest in the topic.

detracts rather than enhances the understanding of how to develop the ROL in post-conflict countries. It outlines how ROL operations are made unnecessarily more complex and difficult as a result of interagency issues. And that many of those issues stem from a lack of a standard model or application of ROL doctrine throughout the USG.

Section III then describes what it will take to have more effective ROL operations. This thesis argues there must be interagency coordination, better training, and an interdisciplinary approach. Next, in Section IV, this thesis proposes to accomplish these requirements through the SFROLO. Section IV also discusses what kind of model and approach should be created. And it answers the questions, once that model is created, who will implement it and will anyone actually want to use it.

In Section V, the SFROLO is thoroughly introduced. The details of the approach, methodology, and application of the proposed new standard process for ROL operations are described. It is in Section V, the reader will learn how the SFROLO will work in a very practical way to address many of the issues identified in Section II.

Finally, Section VI is dedicated to showing how the SFROLO would apply to a variety of situations when developing the ROL in post-conflict countries. The format and contents of the SFROLO were chosen to provide the ROL practitioner a playbook for future ROL operations. Section VI provides examples to how various pieces of the SFROLO address common ROL needs. Therefore, the SFROLO not only could provide a common process for all USG ROL practitioners to use, it will provide a process that will advance success in ROL operations.

The SFROLO is designed to be a document that would assist the ROL practitioner regardless of skill level. The fictional judge advocate should have a framework, like the SFROLO, given to her when she is given the assignment to conduct ROL operations. And the ROL practitioner who is part of one the DoS agencies arriving later in theater should be working off the same framework. Then, when they talk, they will have a common frame of reference and coordinate their activities using the standardized processes provided by the SFROLO.

II. “Willy-Nilly Unequal, Haphazard Rule of Law Effort”⁵

A. Defining “Rule of Law”

Rule of Law is a concept many in the international community view as essential for peace and stability.⁶ It is a standard prerequisite for effective justice systems, economic development, and international relations.⁷ Yet, as important as ROL is to economic development and political stability, there is not an agreed upon definition by scholars, international agencies, or even within the United States Government (USG).⁸ Some definitions focus on institutions and others are more substance focused.⁹ Other definitions

⁵ See *supra* note 2.

⁶ Amichai Magen, *The Rule of Law and its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. OF INT’L L. 51, 51 (2009).

⁷ Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, WM. & MARY L. REV. 1443 (2008).

⁸ RACHEL KLEINFELD BELTON, *COMPETING DEFINITIONS OF THE RULE OF LAW IMPLICATIONS FOR PRACTITIONERS* (2005) (analyzing the challenge of effectively defining the ROL through an examination of different definitions and the implications of each for ROL development efforts).

⁹ Major Tonya L. Jankunis, *Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of The Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV.

are ends-based in nature.¹⁰ This section will highlight some of the key definitions which influence USG practitioners of ROL operations. It will also explain how the variety of definitions presents challenges to ROL practitioners.

1. Variety of Definitions

The United Nations (UN) 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.”¹¹ Despite the authority and respect commanded by the UN, many nations and organizations involved in international ROL efforts do not all ascribe to the same definition.¹²

The World Bank has a slightly different take on the definition of the ROL. It states the ROL is “the extent to which agents have confidence in and abide by the rules of society, including the quality of contract enforcement and property rights, the police, and the courts, as well as the likelihood of crime and violence.”¹³ This definition specifically mentions laws

16, 29-30 (2008) (summarizing rule of law theorists who have a formal view of the ROL focused on the structures of legal systems and those who have a substantive view that is focused on the contents of laws).

¹⁰ RACHEL KLEINFELD BELTON, *COMPETING DEFINITIONS OF THE RULE OF LAW IMPLICATIONS FOR PRACTITIONERS* (2005).

¹¹ U.N. Secretary-General *The rule of law and transitional justice in conflict and post-conflict societies: Rep. of the Secretary-General*, S/2004/616* 4 (23 August 2004) (discussing UN efforts toward transitional justice and the rule of law in conflict and post-conflict societies).

¹² David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 31 (2006) (discussing what is meant by the term rule of law and how it can be developed in post-conflict societies).

¹³ WORLD BANK, *GOVERNANCE MATTERS 2008 1* (2008) (defining its six factors of good governance).

that effect commercial transactions instead of laws in general.

Within the United States Government (USG) there is not a common definition of the ROL. The U.S. State Department (DoS) defines¹⁴ the ROL, but not all of its sub-agencies exclusively use that definition. For example, United States Agency for International Development (USAID) has created a handbook for ROL practitioners in its organization.¹⁵ It discusses how there are various definitions and highlights both the UN and DoS definitions. Yet, after the reference to those definitions, it neither adopts the DoS or UN definition. Nor does it provide a concrete definition of its own for practitioners. It merely states that ROL is “a state in which citizens, corporations, and the state itself obey the law, and the laws are derived from a democratic consensus.”¹⁶ By citing an international organization’s definition with a USG agency definition, it provides its employees options to define the ROL. On the other hand, it does not include a discussion of the ROL definitions that other USG agencies provide, nor does it clarify which definition is U.S. policy.

The DoD also does not assign a common definition of ROL. There are a total of seven field manuals that currently provide a patchwork of guidance for ROL tasks (primarily Army publications).¹⁷ However, they do not consistently apply a single definition.¹⁸

¹⁴ “The U.S. State Department’s website similarly describes rule of law as protecting ‘fundamental political, social, and economic rights’ and distinguishes between rule *of* law versus rule *by* law in more authoritarian societies.” USAID GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK (January 2010) (providing a “conceptual framework for analyzing challenges to the rule of law, as well as guidelines for conducting a justice sector assessment and for designing and prioritizing program interventions” for USAID democracy and governance (DG) officers and other staff members) (quoted material cited to U.S. Department of State, <http://usinfo.state.gov/products/pubs/principles/law.htm>).

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ See U.S. DEP’T OF ARMY, FIELD MANUAL 3-0 OPERATIONS para. 2-14, 3-73 (Feb. 2008) (stating generally that developing the rule of law is part of Stability Operations); U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.40

2. Challenges from Multiple Definitions

Even with the variety of definitions, ROL is seen as a central aspect of the modern state and is understood to be essential to democracy, to international order, and to the promotion of peace, ending wars and reducing crime.¹⁹ Rule of law is viewed not only as a requirement to bring about stability, but also the lack of ROL is seen as an indicator of a state failing.²⁰ Both military stability operations²¹ and foreign assistance²² efforts encourage the ROL as a result of the perceived connection between economic and political development

CIVIL AFFAIRS OPERATIONS para. 2-6, 2-16-2-23 (Sep. 2006) (listing ROL as one of the six functional areas of Civil Affairs and providing a basic task list that requires coordination with judge advocates for ROL missions); U.S. DEP'T OF ARMY, FIELD MANUAL 3-05.401 CIVIL AFFAIRS TACTICS, TECHNIQUES, AND PROCEDURES para. 4-26 (Jul. 2007) (providing a generalized list of tasks for ROL civil affairs Soldiers though many of the tasks explicitly must be conducted with judge advocates IAW FM 3-05-40); U.S. DEP'T OF ARMY, FIELD MANUAL 3-07.31 PEACE OPS: MULTI-SERVICE TACTICS, TECHNIQUES, AND PROCEDURES FOR CONDUCTING PEACE OPERATIONS at VI-8 (Apr. 2009) (stating, in contradiction with other doctrine, that “[r]ule of law includes the three related fields: police, judicial, and penal” and that law and order is primarily the function of civil authorities and will only be conducted by military personnel in rare circumstances. This FM is a joint manual.); U.S. DEP'T OF ARMY, FIELD MANUAL 3-24 COUNTERINSURGENCY OPERATIONS para. 1-4 & D-38 (Dec. 2006) (stating part of long-term success in COIN operations is dependent on the establishment of ROL, defining the end-state of the establishment of the ROL, and though acknowledging that ROL includes civil services focuses primarily on the penal aspects of ROL). See also U.S. DEP'T OF DEF. JOINT PUBLICATION 3-0 DOCTRINE FOR JOINT OPERATIONS (10 Sept. 2001).

¹⁸ A comparison of the definitions of FM 3-07 and FM 3-05.40 shows there are inconsistency between regulations. FM3-05.40 defines ROL as that which “pertains to the fair, competent, and efficient application and fair and effective enforcement of the civil and criminal laws of a society through impartial legal institutions and competent police and corrections systems”. FM 3-07 defines 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 principles.”

¹⁹ Amichai Magen, *The Rule of Law and its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. OF INT'L L. 51, 53 (2009).

²⁰ MARLA C. HAIMS ET AL, *BREAKING THE FAILED-STATE CYCLE 1* (RAND Corp., 2008).

²¹ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 11 (Oct. 2008) [hereinafter FM 3-07].

²² David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 31 (2006) (discussing what is meant by the term rule of law and how it can be developed in post-conflict societies). See generally Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, MINN. J. INTL. L. 415 (2009) (discussing ROL efforts in post-conflict countries and arguing for more than the creation of legal structures, but also for instilling confidence in the local population in those structures).

and the establishment of the ROL. However, a lack of consensus on a definition of ROL has created challenges toward the implementation of ROL efforts.²³ The definitions are so broad and varied that it can be difficult to evaluate what is or is not a ROL function.²⁴ The lack of a clear definition of the ROL creates confusion regarding the proper execution of ROL missions and the appropriate roles of ROL practitioners.²⁵

If ROL is vital to peace and stability, then it is vital that ROL practitioners can plan from a common frame of reference of the ROL. The lack of a common definition has hindered efforts toward peace and stability in post-conflict states.²⁶ Without a common definition, ROL practitioners do not have common strategies or goals. Without knowing what an agency is working toward, it is difficult to create a cohesive strategy.²⁷ The lack of consensus is aggravated when multiple agencies are involved.²⁸ Not having a single, government-wide definition or policy regarding ROL results in piecemeal guidance for ROL

²³ Magan supra note 19, at 89 (arguing that when creating “theory of legal-institutional development” in ROL mission, you must have defined benchmarks to evaluate the rule of law in a country). It is very difficult if not impossible to create benchmarks to evaluate progress without a clear goal. Without a common definition used by USG agencies, it will be difficult for USG practitioners to evaluate their progress toward ROL.

²⁴ Major Tonya L. Jankunis, *Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule Of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 23-29 (2008) (analyzing various definitions and descriptions of the rule of law). A similar criticism is made about the lack of sufficient definition and assessment criteria for stability operations and building partner capacity in those operations. JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 21 (RAND Corp., 2010).

²⁵ Major Tonya L. Jankunis, *Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 30 (2008).

²⁶ Amichai Magen, *The Rule of Law and its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. OF INT’L L. 51, 55 (2009).

²⁷ *Id.*

²⁸ Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, MINN. J. INTL. L. 415, 419 (2009) (asserting one reason for the failure of post-conflict ROL efforts have been caused by a lack of attempts to look at the interrelationships between different reform efforts being conducted by different people).

practitioners.

3. Proposed Common Definition

An important first-step to coordinating and improving ROL efforts is to select a common definition. Absent a uniform starting point, subsequent coordination of various agency efforts becomes even harder. This thesis proposes the definition from Army Field Manual (FM) 3-07, *Stability Operations* as that starting point: “Rule of law is 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 principles.”²⁹ The DoS agency charged with providing unity in stability operations, the Coordinator for Reconstruction and Stabilization (S/CRS)³⁰ lists FM 3-07 as a key resource and the manual contains the most thorough description the role ROL in stability operations of the military manuals. The definition is also virtually the same as the UN definition which creates some consistency with other international organizations.³¹ Thus, the FM 3-07

²⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 1-9 (Oct. 2008). This definition is selected because the DoD is frequently the first USG agency in country conducting ROL operations in a post-conflict state and because it is very close to the UN definition. It could provide continuity between the first ROL operations and later efforts by international organizations. It thus is a reasonable choice to provide standardization within the USG while being consistent with other international organizations. FM 3-07 is also listed on the S/CRS resources website as a tool for the reconstruction, stabilization, and conflict prevention community and thus is an established authority beyond the DoD. Dep’t of State, Resource Library <http://www.state.gov/s/crs/c38150.htm> (last visited Mar. 30, 2011). See generally THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK; A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES (2010) [hereinafter *The Handbook*] (discussing the origins of the definition and providing further explanation).

³⁰ The Coordinator for Reconstruction and Stabilization (S/CRS) was created in 2004 to improve inter-agency cooperation during stability operations. See *infra* Part II.B1.

³¹ Major Tonya Jankunis proposes that the USG uniformly adopt the former United Nations (UN) Secretary General’s definition of ROL as it would eliminate the multiple definitions used within the USG and provide

definition of ROL is a promising candidate for common use during USG ROL missions.

The FM not only provides a definition that is good for common USG agency use, it also gives context for these operations. It explains that military stability operations are part of larger USG efforts in reconstruction and stabilization efforts in the world. It then classifies ROL as an aspect of stability operations.³² This context is helpful for the practitioner by providing limits to the definition and preventing it from becoming overly expansive. Knowing that ROL is a condition in which peace and stability are encouraged and that it is *not* synonymous with stability operations prevents it from being haphazardly applied to any effort that encourages peace and stability. Correspondingly, this thesis limits the term to efforts that directly work to establish, promulgate, and enforce fair and effective legal systems.³³

greater legitimacy in international circles during operations. Major Tonya L. Jankunis, *Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 23-29 (2008). Her proposal has merit, but since it is not current reality, FM 3-07 definition is preferable. Compare with Major Christopher E. Martin, *Sovereignty, Meet Globalization: Using Public-private Partnerships to Promote the Rule of Law*, 202 MIL. L. REV. 91, 108-109 (2009) (acknowledging the positive aspects of the UN definition of ROL but advocating for the World Bank's definition of ROL; "the extent to which agents have confidence in and abide by the rules of society, including the quality of contract enforcement and property rights, the police, and the courts, as well as the likelihood of crime and violence.").

³² FM 3-07 *supra* note 21, at vi & vii. The Army Field Manual is helpful for placing ROL operations in context and providing a workable definition. However, as discussed in section II.B., the manual has significant weaknesses as it does not provide extensive descriptions of ROL operations and does not provide a framework for analysis and execution of ROL missions.

³³ It is the experience of the author that many judge advocates define ROL missions broadly, including all training of security forces or any operation completed with host nation forces within the definition. Certainly, the culture of rule of law can be transferred during such training operations or during any personal interactions between U.S. troops and host-nation citizens. However, the furtherance of the ROL is an indirect result of those interactions. Only those operations that set up laws and legal systems and encourage the equal application of laws and legal systems directly fit the definition used in this thesis. Similar lack of focus and understanding of a definition for ROL came up in AARs from Afghanistan. THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER ACTION REPORTS from July 2008-August 2009 (2009) ("Depending on what RoL definition one preferred, the entire [Combined Security Transition Command – Afghanistan] CSTC-A mission could be considered RoL development.").

Rule of law has many challenges beyond the lack of a common definition. There are many USG agencies involved in ROL missions. Each of these agencies has their own culture and they do not have a common standard method of evaluation or application of ROL techniques or goals.

B. The Institutional Challenges of Establishing Rule of Law

1. *Interagency Issues*

The U.S. Government uses multiple agencies to perform ROL missions.³⁴ These agencies provide specialized expertise but the involvement of multiple agencies necessitates interagency cooperation and coordination. The need for interagency cooperation is heightened by the difference in each agency's involvement in the development of ROL. In order to have a consistent application of U.S. policy, these agencies must communicate and coordinate their efforts.³⁵ The need for coordination is obvious but faces challenges such as ill-defined agency roles and until recently, the lack of a central hierarchy.³⁶ The differing missions and resources available (in terms of funding and personnel) can also pose

³⁴ Various executive agencies have employees working in ROL operations providing their expertise to these complex operations. These agencies range from the Department of State to the Department of Treasury. *See infra* Part II.B.1e. (discussing different USG ROL actors)

³⁵ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER ACTION REPORTS from July 2008-August 2009 110 (2009) (containing several AAR comments about the importance of inter- and intra- agency coordination).

³⁶ Email from MAJ Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 5, 2011, 14:06 EST) (on file with author) (stating while working with other agencies, to include DoS, there did not seem to be a clear leader and projects would be completed, or not, based on consensus).

challenges to coordination and execution of ROL missions.³⁷

The two agencies with the most extensive involvement are the DoS and DoD but they have not been given the same authority or resource pools for the conduct of ROL operations. Congress gives each of these executive agencies guidance for their mission. Perhaps, more importantly, they receive funding for these missions from separate appropriations. Congress has thus created domestic legal constraints both on mission and funding for the USG agencies involved in ROL missions.

Normally, the DoS is the lead agency that develops, plans, and expends resources on foreign development operations as outlined in the Foreign Assistance Act, 22 U.S.C. §32 subchapter I.³⁸ As explained below, Congress, through the Foreign Assistance Act and other laws, gives the DoS much more authority for ROL missions. However, Congress also gives the DoD specific, narrowly-tailored authorizations while providing extensive funding for current ROL operations.³⁹

a. Congressional Guidance for the Department of State

The Department of State is the lead government agency for foreign development

³⁷ *Id.* (Lower task forces (TF) were not responsive to the CJTF ROL office because they were not in the chain of command. This created situations where a TF would pick and choose the projects they would complete or conduct major unrequested projects because they had the resources that CJTF did not.)

³⁸ 22 U.S.C. §2151b (2006) (stating “under the policy guidance of the Secretary of State, the agency is primarily responsible for administering subchapter I of this chapter should have the responsibility for coordinating all United States development-related activities”).

³⁹ *See infra* Part II.B.a & c.

activities.⁴⁰ Foreign development entails the executing of U.S. policy through providing resources to developing countries “to build and maintain the social and economic institutions necessary to achieve self-sustaining growth and to provide opportunities to improve the quality of life for their people.”⁴¹ The principle objective of foreign development is to encourage and support people of developing countries to “acquire the knowledge and resources essential to development and to build the economic, political, and social institutions,” to improve lives.⁴² The statutory purpose of providing assistance to developing countries and the resulting goals are the same foundational aspirations of ROL operations.⁴³ Though the definition of ROL does not have the altruistic goal of improving lives, it does have the goal of improving institutions and creating peace and stability which then benefits economic, political, and social institutions. The law further requires these goals to be “fully reflected”⁴⁴ in U.S. foreign policy coordinated under the guidance of the Secretary of State.

⁴⁰ 22 U.S.C. § 2151b (2006) (stating the DoS is the USG agency primarily responsible for development assistance).

⁴¹ 22 U.S.C. § 2151-1a (2006) (stating the purpose for U.S. development assistance).

⁴² 22 U.S.C. § 2151a (2006) (stating the policy goals for U.S. foreign policy as it relates to development assistance. There are five principle goals in accomplishing the stated policy; alleviate the worst physical manifestations of poverty, promote conditions of self-sustaining economic growth, encourage respect of individual civil and economic rights, the integration into an equitable international economic system, and promotion of good governance).

⁴³ Several laws support the use of ROL operations in USG foreign relations and development assistance. For example, Pub.L. 110-53, Title XX, §2021, Aug. 3, 2007, of 22 U.S.C. § 2151(2006), contains an allowance of grants, technical assistance, training and other programs to countries in the Middle East to promote, among other things, “policies that promote economic opportunities for citizens” and “the rule of law.” Though this does not mandate that ROL always is contained in U.S. foreign policy in developing countries, it is instructive that development of economic systems and rule of law are primary goals of foreign assistance. Further, in the declared policy of the International Development chapter of the act, funds will be made available for technical and capital assistance for the development and use of cooperatives in less developed countries. Priority of such operations will be given to agriculture, financial systems, infrastructure, and housing and community services. 22 U.S.C. § 2151i. (2006).

⁴⁴ 22 U.S.C.A. § 2151a (2010).

These statutes provide the DoS with the legal authority to conduct and lead foreign assistance missions.⁴⁵

b. Reality of Department of State Involvement

Correspondingly to its leadership role in foreign assistance, it is the lead agency for ROL operations.⁴⁶ Nevertheless, DoS resources and manpower are not in theater during the initial stages of stability operations.⁴⁷ In the aftermath of a conflict, DoS personnel are not yet deployed in large number due to the security environment and the lack of a large corps of deployable employees.⁴⁸ Consequently, neither the staff nor the funding to carry out extensive ROL operations in post-conflict states is available through the DoS.⁴⁹ The DoD

⁴⁵ In other parts of the Foreign Assistance Act, Congress gives the Secretary of State authority to distribute the duties and responsibilities of particular projects amongst other government agencies. One recent example is the Iraq Relief and Reconstruction fund. 22 U.S.C.A. § 2207 (2010). *See also* 22 U.S.C. § 2152(c)(b) (2006) (Programs to encourage good governance).

⁴⁶ National Security Presidential Directive (NSPD) -44, Dec. 7, 2005; Dep't of State, Office of the Coordinator for Reconstruction and Stabilization (S/CRS), <http://www.state.gov/s/crs/>; U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 2-20 & app. A (Oct. 2008). *See also*, JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS (RAND Corp., 2010).

⁴⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para.1-58 (Oct. 2008). *See also* JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 12, 50 (2010) (stating stability operations and building partner capacity for cooperation in stability operations has only recently “migrated” to the top of the U.S. agenda and asserting that despite the DoS’s lead on stability operations, it lacks the capacity to manage large-scale activities while the DoD lacks much of the capability.).

⁴⁸ JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 12 (RAND Corp., 2010) (“DOS and other civilian departments currently lack the *capacity*—personnel, funding, security forces, and operational know-how—to manage large-scale capacity-building activities in a conflict environment.”).

⁴⁹ The DoS is attempting to address this shortfall by the creation of the Civilian Response Corps which falls under the authority of the Coordinator for Reconstruction and Stabilization (S/CRS). This organization is comprised of diplomats, development specialists, public health officials, law enforcement and corrections officers, engineers, economists, and lawyers who are willing to deploy with short notice in order to assist with the restoration of stability and rule of law. CIVILIAN RESPONSE CORPS, WHO WE ARE <http://www.civilianresponsecorps.gov/who/index.htm> (last visited Mar. 31, 2011).

however is typically operating in the post-conflict state and, by default, must begin the ROL mission despite its limited resources as discussed below. As the USG agency initially developing the ROL efforts, the DoD sets the tone for future ROL operations in country.⁵⁰ As a result, DoS is inadvertently subordinated to the DoD to a degree that prevents it from achieving Congressional directives to lead foreign assistance efforts.⁵¹ If the DoS supplied a framework for all USG ROL practitioners to follow, then regardless of whether there were any DoS resources in country, those practitioners could follow the DoS's lead. The DoS has the expertise and capability of executing ROL development.⁵² That capability can be communicated to DoD actors who have the capacity to act through a strategic framework.

In acknowledgement of the shortfalls of the DoS's ability to assert its leadership, the President has formed additional departments and offices to improve The DoS's capacity to act in stability operations.⁵³ The National Security Presidential Directive (NSPD) -44, Dec. 7, 2005 created the Coordinator for Reconstruction and Stabilization (S/CRS).⁵⁴ This sub-

⁵⁰ The military will conduct ROL operations as part of its stability operations. By being the primary USG agency in the country, it will be primarily DoD employees working to establish ROL. What the DoD employees do, right and wrong, will be the foundation for future operations that involve other USG agencies. Thus, the DoD takes a de facto lead in establishing US policy for ROL during stability operations.

⁵¹ 22 U.S.C.A. § 2151a (2008).

⁵² The DoS has the Office of the Director of Foreign Assistance and USAID, both which have highly trained individuals working to use foreign assistance resources to advance human rights, promote democracy, and reduce poverty and general suffering.

⁵³ NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD) -44, Dec. 7, 2005; JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 8 (RAND Corp., 2010).

⁵⁴ NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD) -44, Dec. 7, 2005. *Accord* U.S. DEP'T OF STATE AND THE BROADCASTING BOARD OF GOVERNORS OFFICE OF INSPECTOR GENERAL, REPORT OF INSPECTION, OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION Report Number ISP-I-07-26 (May 2007) (The S/CRS was created in 2004 but codified in 2005 with NSPD-44); DEP'T OF STATE, OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION (S/CRS), <http://www.state.gov/s/crs>.

agency falls under the DoS, but is comprised of staff from the DoD,⁵⁵ Department of Justice (DoJ), Department of Treasury, as well as other relevant agencies. The multi-USG office has the mission to develop, approve, plan, and coordinate U.S.-led stability operations across the globe.⁵⁶

In addition to having multiple USG executive agencies involved in ROL operations, there are multiple sub-agencies within the DoS with their own ROL missions. Two additional agencies were created and fall under the S/CRS: the Interagency Management System (IMS) and the Civilian Response Corps (CRC). Another DoS entity involved in ROL operations is the United States Agency for International Development (USAID)⁵⁷

⁵⁵ The DoD has been a vocal supporter of the S/CRS and has transferred significant funding to the organization to further its development. DEP'T OF STATE AND THE BROADCASTING BOARD OF GOVERNORS OFFICE OF INSPECTOR GENERAL, REPORT OF INSPECTION, OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION Report Number ISP-I-07-26, 10 (May 2007).

⁵⁶ National Security Presidential Directive (NSPD)-44, Dec. 7, 2005. *See also* JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 26 (RAND Corp., 2010) (explaining of the role and essential tasks of the S/CRS). The NSPD explicitly mandates coordination between the DoD and DoS on stability operations but the S/CRS itself has not yet taken a fully functioning leadership role and has given little guidance to current military ROL operations. JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS (RAND Corp., 2010). *See also*, U.S. DEP'T OF STATE AND THE BROADCASTING BOARD OF GOVERNORS OFFICE OF INSPECTOR GENERAL, REPORT OF INSPECTION, OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION Report Number ISP-I-07-26, 1, 21 (May 2007) (stating the S/CRS has not yet taken a leadership role and needs to restructure its organization so it actually reflects its responsibilities, but it has developed doctrine, managed exercises, and after a period of personnel delays, has excellent leadership), U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS app. B (Oct. 2008) (describing the role and importance of S/CRS); Major Tonya L. Jankunis, *Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 73 & 75 (2008) (stating the NSPD has proven itself to be inadequate to direct interagency cooperation). *See generally* Major Christopher E. Martin, *Sovereignty, Meet Globalization: Using Public-private Partnerships to Promote the Rule of Law*, 202 MIL. L. REV. 91, 100 (2009) (stating the S/CRS is inadequate for a synchronized approach to rule of law operations and arguing that integration of multi-national corporations into rule of law operations will be much more effective than government and NGO led efforts alone). *But see* Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 Human Rights Quarterly 687, 701 (2004) (showing cooperation with powerful industry groups presents a danger of dilution the goals of an activist campaign).

⁵⁷ USAID carries out economic sustainment and assistance programs for the USG. *See generally* JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 23 (RAND Corp., 2010).

which believes that long-term, sustainable economic and social development requires the ROL. Its ROL program promotes the following five essential elements: order and security, legitimacy, checks and balances in the form of an independent judiciary, fairness, and the effective application of laws.⁵⁸ These agencies provide personnel and expertise to the DoS but their sheer number and diversity creates challenges for coordination.

c. Congressional Guidance for Department of Defense

The primary purpose for the DoD is to “provide the military forces needed to deter war and to protect the security of our country.”⁵⁹ Usually, this mission is focused on providing military forces to conduct combat operations. Additionally, Congress has given guidance to the DoD on its role in foreign assistance. However, this role is primarily military assistance. Subchapter II of the Foreign Assistance Act, gives authority to the Department of Defense to provide limited foreign assistance through military assistance and sales.⁶⁰ The purpose of this assistance is to promote the “peace of the world and the foreign policy, security, and general welfare of the United States” by strengthening “friendly countries.”⁶¹ The authorization is narrowly tailored to assisting the development of military forces and is

⁵⁸ USAID, DEMOCRACY AND RULE OF LAW, Nov. 12, 2009, http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/; USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 10 (2008).

⁵⁹ Department of Defense, *About the Department of Defense*, <http://www.defense.gov/about/#mission> (last visited Apr. 13, 2011).

⁶⁰ 22 U.S.C. § 2301(2006) (gives policy to “authorize measures in the common defense against internal and external aggression, including the furnishing of military assistance, upon request, to friendly countries and international organizations”).

⁶¹ 22 U.S.C § 2301 (2006).

not generally an authorization for humanitarian assistance.⁶² This law lacks the broad policy agenda that was given to the DoS to alleviate poverty, enhance economic and social rights, other nation-building type activities that exists in §2151. Correspondingly, it does not provide much authorization for ROL operations.

However, through Title 10, chapter 20, of the United States Code, Congress gives limited authority to the DoD to engage in Humanitarian Assistance.⁶³ A military department may conduct humanitarian and civic assistance if it is in conjunction with a military operation and certain conditions (enhancing servicemember skills and promoting U.S. interests) are met.⁶⁴ Section §402 provides additional authorization by stating that the DoD may transport, without charge, humanitarian goods supplied by a nongovernmental source on a strictly space available basis.⁶⁵ However, these laws⁶⁶ clearly do not give unlimited authority to the DoD to engage in ROL operations, which encompass building key

⁶² 22 U.S.C § 2302 (2000) (“It is the sense of the Congress that such foreign military forces should not be maintained or established solely for civic action activities and that such civic action activities not significantly detract from the capability of the military forces to perform their military missions . . .”).

⁶³ 10 U.S.C. §§ 401-409 (2006).

⁶⁴ 10 U.S.C. § 401(2006) (requiring the promotion of the interest of the U.S. and the host country and the enhancement of the specific operational readiness skills of the member of the Armed Forces who are participating in the assistance and further limiting action to specific activities that encompass rudimentary health, infrastructure, and sanitation assistance). The statute is implemented by U.S. DEP’T OF DEF., INST. 2205.02, HUMANITARIAN AND CIVIC ASSISTANCE (HCA) ACTIVITIES (2 Dec. 2008) [hereinafter DoDI 2205.02, 2008].

⁶⁵ Similar to the limitations imposed in §401, there are additional limitations to the providing of transportation of humanitarian goods such as the supplies are in usable condition, there is a legitimate humanitarian need, the will be used for humanitarian purposes, and adequate arrangements have been made for the distribution of the supplies. The additional provisions allow for specific humanitarian aid such as demining assistance and for the “provision of humanitarian assistance, disaster relief, or support of law enforcement” when the operation has not been provided for in advance. 10 U.S.C. § 407 (2006), 10 U.S.C.A. § 127a (2011). The DoS has similar permission to conduct limited humanitarian and development operations during unplanned contingencies. 22 U.S.C.A. § 2261 (2010).

⁶⁶ See 10 U.S.C. §§ 401-410 (2006).

infrastructure for government and economic activities, training government officials (from elected leaders to local police), and educating the populous on the concept and benefits of the ROL.⁶⁷ These typical ROL activities fit much better with the guidelines for DoS actions. Again, DoS's role as the leader in development assistance and DoD's subordinate position is established in these laws.

Despite these limitations, Congress has acknowledged the need for such operations⁶⁸ and the reality that, at times, DoD is the only USG agency able to conduct them. Therefore it has given the DoD specific authority to conduct the tasks involved in ROL operations on a case-by-case basis.⁶⁹ Examples of specific exceptions to meet particular needs include the Commanders Emergency Response Program⁷⁰ in its various forms, Afghanistan Infrastructure Fund (AIF),⁷¹ Humanitarian Assistance⁷² and Foreign Excess Personal Property (FEPP).⁷³

⁶⁷ *See supra* section II. A.

⁶⁸ For example, the 2011 National Defense Authorization Act allows for the DoD to expend funds to develop infrastructure projects in Afghanistan using a program established by the Secretary of Defense and the Secretary of State. These projects are not limited to military-to-military assistance projects but instead extend to water, power, and transportation infrastructure. National Defense Authorization Act for Fiscal Year 2011, P.L. 111-383, § 1217.

⁶⁹ For example, Congress extended the Commander's Emergency Response Program (CERP) program for an additional year and has authorized funds for programs which authorizes United States military commanders to carry out small-scale projects designed to meet urgent humanitarian relief requirements or urgent reconstruction requirements and provide an "immediate and direct benefit to the people of Iraq or Afghanistan." National Defense Authorization Act for Fiscal Year 2011, P.L. 111-383, §1212.

⁷⁰ *Id.*

⁷¹ National Defense Authorization Act for Fiscal Year 2011, P.L. 111-383, § 1217.

⁷² 10 U.S.C. § 2561 (2006).

⁷³ 40 U.S.C. § 701(b)(2)(B) (2006).

Thus to accommodate DoD as the primary USG actor in country, Congress created authorities for DoD to access DoS funds to accomplish missions normally associated with the DoS.⁷⁴ Though Congress does not generally authorize DoD as an agent for foreign assistance beyond military training, collectively these laws give specific legal authority for the DoD to be involved in the reconstruction of specific post-conflict states. Considering the operational realities of ROL missions and the requirements during a military occupation created by international law,⁷⁵ there is authority for the execution of the military doctrine described in section II.B.3. Authorizations such as these have provided a basis for DoD executed ROL missions. However, they do not resolve the current reality of capacity and capability distribution shortfalls. These laws are more consistently applied when the DoS leads by creating policy, and the DoD implements the policy in a post-conflict state.

e. Reality of Department of Defense Involvement

⁷⁴ *E.g.* 22 U.S.C. § 2346 (2006) (allowing funds for economic support to countries under the policy of the DoS but prohibiting the use of the funds for military or paramilitary purposes); National Defense Authorization Act for Fiscal Year 2011, P.L. 111-383, §1212 (updated authorization for the Commander’s Emergency Response Program (CERP) to allow for small-scale humanitarian projects).

⁷⁵ International law creates obligations of certain actors to enforce laws in a post-conflict state. These laws create legal constraints on the conduct of ROL operations by the U.S. military during various engagements. For example, a military force has specific requirements upon occupation. A territory is considered occupied when it is “placed under the authority of the hostile army.” Hague Convention Respecting the Laws and Customs of War On Land And Its Annex: Regulation Concerning The Laws And Customs Of War On Land, art 42 [hereinafter HR]. The occupying force is required to take measures necessary for the maintenance of law and order and proper administration of the territory. Army doctrine recognizes this obligation and has addressed it in FM 3-07 para. 2-39 & chapt. 5. U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (Oct. 2008).

In so doing, the occupying military force is required to use the local laws unless otherwise limited. Use of local laws is limited when they are contrary to international law or military necessity. HR IV, art 43, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art 64, 12 August 1949, [hereinafter GC]. *See generally* Jeh Charles Johnson, *Remarks to the 2009 Samuel Dash Conference on Human Rights Rule of Law in the Context of Military Interventions*, Army Law., May 2009, at 2, 4. Furthermore, the occupier has the authority to suspend, repeal, or alter existing laws for the maintenance of order or for the welfare of the population. HR, art 43, GC IV, art 64(3).

The reality of the DoD’s role in ROL operations is not as simple one may perceive after reading the Foreign Assistance Act. Domestic laws place the greater responsibility for policy development of foreign assistance on the DoS and international law requires the occupying force, the military, to establish law and order.⁷⁶ The Department of Defense is often the first—and only—agency capable of promoting the ROL in a post-conflict state, even though the military is neither the lead actor in ROL operations, nor the subject matter expert.⁷⁷ The inadvertent result of overlooking the reality of the situation has been inadequate staffing and training for DoD ROL operations in post-conflict states. This situation remains even though the DoD has a vested interest in promoting ROL because it sets the conditions for mission success. In reality, the DoS has individuals well trained in nation-building who are not in theater, and the DoD relies on personnel who lack training to execute the ROL operation.⁷⁸

Therefore, despite the DoS’s “lead” role in foreign policy and development assistance, the DoD has done the “heavy lifting” in developing ROL in post-conflict countries.⁷⁹ The DoD retains the undertaking almost exclusively at the initial cessation of

⁷⁶ Convention (IV) Respecting the Laws and Customs of War on Land, art 42 & art 43, October 18, 1907, 36 Stat. 2277, U.S.T.S. 539. [hereinafter HR]. See generally, Jeh Charles Johnson, *Remarks to the 2009 Samuel Dash Conference on Human Rights Rule of Law in the Context of Military Interventions*, ARMY LAW., May 2009, at 2, 4.

⁷⁷ Major Tonya L. Jankunis, *Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 27 (2008). See also *supra* Part II (In a post-conflict state, the result often is the military conducting stability operations, to include ROL missions, without initial involvement of DoS experts in country. Thus, the DoD execution of ROL often creates an unbalanced application of resources and authority).

⁷⁸ Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW. 53 (July, 2007).

⁷⁹ As late as 2009, practitioners in Iraq were experiencing this reality. THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER

hostilities and releases the mission as other agencies are able to send resources to advance the development operations.⁸⁰ To that end, effective operations depend on the quality of pre-existing coordination in conducting ROL operations.⁸¹ Effective coordination between DoS and DoD can leverage the military's strengths because its unique capabilities.⁸²

Beyond DoS and DoD cooperation, successful ROL operations cannot occur without input from other USG agencies such as the Department of Treasury, and Department of Justice.⁸³ The DoJ is involved in ROL operations albeit in a more limited role. For example, the International Narcotics and Law Enforcement Affairs Bureau (INL), an office of the DoS, funds the DoJ Senior Federal Prosecutors Program in Afghanistan.⁸⁴ As of 2010,

ACTION REPORTS from July 2008-August 2009 214 (2009) ("The Office of Provisional Affairs was the RoL coordinating entity for the DoS at the operational level. In reality, they had very few personnel. The corps headquarters did try to develop a Unified Common Plan with OPA to place everyone on the same sheet of music.").

⁸⁰ *See, e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS, para. 5-3 (Oct. 2008) ("Sometimes, however, sufficient civilian expertise is not present or conditions of the operational environment do not support introducing such civilian expertise. Military forces may then be required to lead this effort until they stabilize the security situation and can safely transition responsibility for governance to civil authority and control."). *See also* JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 50 (RAND Corp., 2010).

⁸¹ JAMES DOBBINS, ET AL, THE BEGINNER'S GUIDE TO NATION-BUILDING (RAND Corp., 2007) (explaining that fragmented efforts among USG agencies and international organizations have prevented real progress of stabilizing failed states).

⁸² U.S. DEP'T OF DEF., DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS (28 Nov. 2005) [hereinafter DoDD 3000.05, 2005]. *See also* U.S. DEP'T OF DEF., INSTR. 3000.05, STABILITY OPERATIONS (16 Sep. 2009).

⁸³ U.S. DEP'T OF DEF., DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND RECONSTRUCTION (SSTR) OPERATIONS ch. 3 (28 Nov. 2005)

⁸⁴ SEC'Y OF STATE, ET ALL, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN REPORT TO CONGRESS IN ACCORDANCE WITH THE 2008 NATIONAL DEFENSE AUTHORIZATION ACT 35 (June 2008).

there were no DoJ attorneys permanently stationed in the provinces of Afghanistan.⁸⁵

However, the DoJ has sent employees on temporary duty assignments (most ranging from three to six months) to Iraq and Afghanistan. The DoJ has also sent hundreds of contractors to Iraq, and a “smaller number” to Afghanistan.⁸⁶ Currently, there are approximately fourteen DoJ attorneys in Afghanistan and many other personnel from various DoJ offices.⁸⁷ Beyond working to eliminate narcotics production, military ROL personnel have worked with DoJ ROL personnel to improve Afghan prisons when the need was identified.⁸⁸ With the varied definitions and multiple actors, there is an inconsistent application of ROL doctrine and practices.

2. Inconsistent Application

As stated earlier, seven military field manuals provide a patchwork of inconsistent or incomplete guidance for ROL tasks.⁸⁹ The most descriptive sources of information are FM 3-07, FM 3-05.40, and FM 1-04. FM 3-07, *Stability Operations*, presents “overarching

⁸⁵ The Judge Advocate General’s Legal Center & School, US Army, Center for Law and Military Operations, *RULE OF LAW HANDBOOK; A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES 57* (2010) [hereinafter *THE HANDBOOK*].

⁸⁶ Statement of Bruce C. Swartz, Deputy Assistant Attorney General Criminal Div. US DOJ before the House Committee on Armed Services, U.S. House of Representatives concerning Dept of Justice Personnel Deployed to Afghanistan and Iraq, October 16, 2007. 3 & 4 (The largest presence in Afghanistan is from the DEA with a combination of law enforcement personnel and prosecutors. Only four prosecutors were working as mentors during the time of this statement but they do typically serve in one year tours.).

⁸⁷ Email from LTC Paula Schasberger, Military Liaison/Advisor to US Embassy ROL Section, to author (Apr. 17, 2011, 09:39 EST) (on file with author) (The U.S. Marshals Service, Federal Bureau of Investigation, Drug Enforcement Agency, and DOJ all have personnel in Afghanistan).

⁸⁸ MAJ Wright organized a meeting between DoJ, DPS, USAID, and the TF attorneys to gather data and discuss prison security. She did not see it as an ROL attorney job but saw the need and the MPs did not believe Afghan prisons as part of their mission. Email from MAJ Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 5, 2011, 14:06 EST) (on file with author).

⁸⁹ *See supra* note 10.

doctrinal guidance and direction for conducting stability operations, setting the foundation for developing other fundamentals and tactics, techniques, and procedures detailed in subordinate field manuals.”⁹⁰ It asserts throughout that security, law and order, and economic development are intertwined and all must be addressed in order to accomplish stability in a post-conflict state.⁹¹ The FM’s treatment of ROL however is inconsistent in that it purports to call for economic development, but almost exclusively focuses on penal systems and virtually ignores commercial laws.

FM 3-05.40 provides more detail of particular ROL missions by listing various types of operations. It also lists the capabilities of a civil affairs ROL team.⁹² Both FM 3-05.40 and FM 1-04 list activities which involve the practice of law and therefore must be conducted by a judge advocate. All three FMs make broad statements such as the ROL practitioner will evaluate complex legal systems.⁹³ However, none of the three regulations provide practical methods to develop or evaluate a legal system. They also do not contain a detailed ROL specific task list. This haphazard approach requires the DoD practitioners to look elsewhere (such as DoS or international organization publications) for guidance.⁹⁴ The remainder of

⁹⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS, at iv, 6 (Oct. 2008).

⁹¹ *Id.* at para. 3-55.

⁹² U.S. DEP’T OF ARMY, FIELD MANUAL 3-05.40 CIVIL AFFAIRS OPERATIONS para 2-17 & 2-20 (Sep. 2006).

⁹³ For example, a civil affairs ROL team is to be capable of conducting the task: “Evaluate the HN legal system, to include reviewing statutes, codes, decrees, regulations, procedures, and legal traditions for compliance with international standards, and advising and assisting the HN and other rule of law participants in the process of developing transitional codes and procedures and long-term legal reform. FM 3-05.40 *supra* note 18, at para. 2-20.

⁹⁴ FM 1-04 specifically states “Generic rule of law assessment and metrics frameworks, which are tailored to specific circumstances, are available from the Department of State.” U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, para. D-16 (Apr. 2009). Accordingly, the individual practitioner is left to look for these documents on her own. Forged in the Fire, a CLAMO publication also expects ROL practitioners to search various web sites to “aggressively pursue the development of an

the field manuals are not consistent nor do they provide comprehensive guidance.

This lack of clear guidance has effected ROL operations in current engagements. In Afghanistan, some ROL practitioners have felt that they have not received a clear mission and have had to improvise to the best of their ability. For example, a Combined Joint Task Force (CJTF) ROL attorney in 2008⁹⁵ was deployed without any training in ROL and while there, she did not feel she was given a clear definition of ROL or goals.⁹⁶ When she was working for the International Security Assistance Force (ISAF) Regional Command–East (RC-East), the subordinate task forces were not responsive to her office’s requests because they were not in the same chain of command. Accordingly, they pursued their own ROL projects.⁹⁷ The lack of a clear framework or methodology thus leads to inconsistent application of the ROL.

The inconsistent doctrine across DoD and DoS agencies leads to inconsistent

interagency working group to synchronize efforts and resources even if it is *ad hoc* in nature.” THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, FORGED IN THE FIRE 127(2008). Further, not only must a deployed judge advocate locate these non-DoD instructions, she must then attempt to choose the best one for the particular circumstances. It is not sensible to expect each individual team or practitioner to engage in this time consuming research and guessing process.

⁹⁵ Email from Maj. Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 5, 2011, 14:06 EST) (on file with author). Maj. Wright is not alone in this opinion. Several AAR comments from OIF and OEF reflect similar dissatisfaction with the lack of a unified plan or strategy. THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER ACTION REPORTS from July 2008-August 2009 112 &155(2009).

⁹⁶ Maj. Wright received an OPORD but the language was vague and unhelpful for specific missions and the remainder of her guidance was oral. Maj. Write *supra* note 36. The situation improved in 2009 when the U.S. Embassy ROL team was able to publish a ROL strategy for Afghanistan. But it took one year for that strategy to be approved. Telephone interview with LTC Paula Schasberger, Military Liaison/Advisor to US Embassy ROL Section (Apr. 16, 2011).

⁹⁷ Maj. Wright was heavily involved in legal education, hiring of attorneys and establishing relationships. Other taskforces conducted major projects such as establishing a justice center without any coordination with CJTF. She also reports that there were disagreements within the ROL community as to whose responsibility it was to promote ROL in the Afghan corrections system. Maj. Write *supra* note 3636. LTC Schasberger stated there currently is better coordination of projects but the problems of the past are still being felt. For example, there is a courthouse a TF built in RC-East that has not been used during its three years of existence. Telephone interview with LTC Paula Schasberger, Military Liaison/Advisor to US Embassy ROL Section (Apr. 16, 2011).

application of ROL in post-conflict countries. All USG agencies should be using one definition for ROL operations. Then, they should apply the same evaluation methods and goals to ROL operations in order to create a unity of effort regardless of what USG agency is in country.

3. Insufficient Standards

The inconsistent application of the ROL in USG doctrine and practice is an outgrowth of a lack of standards. Though there are many policies, documents, and reports concerning reconstruction generally, and ROL specifically, there is not a single ROL framework for all USG practitioners to reference or use. Diverse post-conflict states have major challenges in common and a standard framework with an interdisciplinary approach could assist with ROL development. Standardization is helpful so that all practitioners are working toward the same goal and can implement USG policy consistently.⁹⁸ There should be a standard evaluation criteria, common reporting mechanisms, and basic tasks for all USG ROL practitioners.

Even though the President has created new departments to force interagency communication and unity of effort under DoS leadership at the practical level, these efforts have not yet succeeded in replacing the initiative of military practitioners.⁹⁹ Military

⁹⁸ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, *TIP OF THE SPEAR: AFTER ACTION REPORTS* from July 2008-August 2009 112 (2009) (containing AAR comments calling for a clear strategy or conceptual framework. "You must establish a common plan so everyone knows the means and ends of all the players in the fight.").

⁹⁹ For example, in 2006, judge advocates were creating the U.S. ROL strategy for Afghanistan. Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law In Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW. 53 (July, 2007) ("During the summer of 2006, one of the feature accomplishments by the CFC-A rule of law team was to draft a U.S. strategic plan for the implementation of the rule of law program. Surprisingly, five years after the U.S. invasion of Afghanistan there was no overarching design on how the United States would support rule of law efforts in country.") The situation had not changed enough when four years after the creation of the S/CRS, Maj. Wright and her co-workers were identifying needs for ROL

doctrine identifies there are DoS products to assist with ROL missions, but does not mandate the use of such resources. Also, there is no standardized training given to ROL practitioners.¹⁰⁰ The DoD recognizes the importance the S/CRS but the S/CRS has not yet taken a fully functioning leadership role and has given little guidance to current military ROL operations.¹⁰¹ As a result, the responsibility often falls on the military judge advocate or other Soldier to coordinate ROL operations. In some cases, they must implement legal policy with little guidance.¹⁰²

5. Inadequate Training for Rule of Law Practitioners

The ROL practitioner, whether a Soldier, a DoS employee, or an operator from another agency, must be able to quickly gain an understanding of the post-conflict state's legal system.¹⁰³ He must learn to maximize unity of effort between USG agencies in order to draw on other's knowledge and expertise. The development of the ROL requires extensive

development and coordination with other USG agencies without any formal system or priority established from a higher authority. *See supra* note 86 & Part II.B.2.

¹⁰⁰ Compare the discussion of DoD doctrine in Part II.B.2 and to the DoS guides and task matrixes.

¹⁰¹ U.S. Dep't of State and the Broadcasting Board of Governors Office of Inspector General, Report of Inspection, Office of the Coordinator for Reconstruction and Stabilization Report Number ISP-I-07-26, 1,21 (May 2007).

¹⁰² *See* Email from MAJ Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 5, 2011, 14:06 EST) (on file with author).

¹⁰³ Often those conducting rule of law missions must work with the existing informal legal system in order to provide some law and order or system of governance until the local government is established and functional. This use of local dispute resolution mechanisms is necessary for two important reasons. First, in most post-conflict states the state of the local judiciary is in disarray and has been for some time due to the violence of the conflict and corruption existing in the previous government. The local populous is used to relying on local methods of dispute resolution. As security is being established, these local dispute resolution processes may be the only vehicle for justice and therefore, the rule of law practitioner must first work within this system in order to encourage justice. Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, WM. & MARY L. REV. 1443 (2008). *See generally* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK; A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES (2010).

involvement in the development of legal systems, training of host-nation citizens, and providing the necessary infrastructure to support the effective promulgation and enforcement of laws. These tasks are challenging and require extensive breadth of knowledge. Many DoD ROL practitioners have to accomplish these missions without much training in ROL.¹⁰⁴

Unfortunately, many practitioners lack experience with non-U.S. legal traditions though many post-conflict states have diverse legal traditions.¹⁰⁵ The long-term viability of new legal institutions is dependent on whether the cultural traditions and accepted legitimate legal practices remain in place, or are incorporated into new forms. A major challenge for a ROL practitioner is to assist in developing legal systems which will be accepted by the population.¹⁰⁶ To develop institutions that conform to the local culture, the practitioner must first understand the culture in which he is operating.¹⁰⁷

Judge advocates are not alone in their need for this knowledge. Other ROL practitioners suffer from a similar deficit, unable to implement ROL in post-conflict countries in a way that successfully integrates the host nation's culture and existing legal

¹⁰⁴ Email from MAJ Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 5, 2011, 14:06 EST) (on file with author). *Contra* Email from LTC Mark Visger, Chief, Rule of Law, Multi-National Corps-Iraq February 2009- February 2010, to author (Apr. 8, 2011, 17:07 EST) (on file with author) (reporting he was given six months for self-study in preparation for his deployment).

¹⁰⁵ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK; A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 93 (2010).

¹⁰⁶ Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, MINN. J. INTL. L. 418, 419 (2009) (asserting a failure in ROL efforts have been creating new institutions that may not be the most responsive to the particular needs of the population and that ROL programs must be felt as coming from the people themselves).

¹⁰⁷ THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER ACTION REPORTS from July 2008-August 2009 108 (2009) (multiple AAR comments stressed the importance of understanding the local legal system).

system. In Rwanda, for example:

. . . the international community focused on a number of training programmes for the few remaining legal professionals in the fledging justice sector. Most of the international experts, however, came from common law backgrounds with little or no understanding of Rwanda's legal tradition, which is a mix of French and Belgian civil law which effectively hindered much of the rule of law reforms carried out.¹⁰⁸

The Rule of Law Handbook, published by the Center for Law and Military Operations, gives judge advocates a quick primer on the differences between common law and civil law systems so that they can complete their missions with a modicum of understanding.¹⁰⁹ However, it is unable to mandate action, and is not adequate for providing a judge advocate with the knowledge needed to develop the ROL in an immature theater without further guidance.

The Judge Advocate General Legal Center and School (TJAGLCS) dedicates a full day (7 hours) in the Operational and Law of War Course to ROL.¹¹⁰ The instruction includes a two hour block on "Rule of Law and Stability Ops," a one hour seminar on the same, two hours of comparative law instruction, an hour on international human rights law and a one hour block on multinational operations.¹¹¹ During a week long course, this is a significant

¹⁰⁸ Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12, *Journal of Conflict & Security Law* 65, 74 (2007) (argues ROL practitioners have hindered their own efforts when they modeled their ROL goals based on their own "national experiences and tried to mimic the conditions" of their native country).

¹⁰⁹ THE HANDBOOK, *supra* note 85, at 103-110.

¹¹⁰ Email from Maj Jeremy Marsh, Professor, International and Operational Law, TJAGLCS, to author (Mar. 31, 2011, 15:02 EST) (on file with author).

¹¹¹ *Id.*

amount of time but it only begins to identify issues. Seven hours is not enough to provide expertise in the variety of disciplines with which a ROL practitioner must work. TJAGLCS also offers a week long course exclusively on the ROL.¹¹² The Air Force Judge Advocate General's School has two Operational Law courses during the year, but, it does not have a course entirely focused on ROL.¹¹³ Further, many judge advocates do not even receive a chance attend these limited classes.¹¹⁴

The high expectations of DoD ROL practitioners can be seen in Afghanistan. There, judge advocates took on many roles, such as “advisers to commanders and their staff on legal reform initiatives, as instructors to Afghan National Army attorneys on military justice, as mentors to judges and governmental officials, as drafters of Afghan laws and presidential decrees, and as facilitators at provincial rule of law conferences.”¹¹⁵ Rule of law practitioners were also active in drafting laws to improve the Afghan government's effectiveness, create security, and foster economic viability.¹¹⁶ These ROL missions would be challenging for the most experienced ROL practitioner. For the untrained, they are momentous challenges.

¹¹² THE JUDGE ADVOCATE GENERAL'S SCHOOL, FY 11 FINAL ACADEMIC CALENDAR, 12 AUG 2010.

¹¹³ Email from W. Darrell Phillips Associate Chief, Operations and International Law Division, The Judge Advocate General's School, to author (Apr. 6, 2011, 14:49 EST) (stating they do not teach RoL as a specific topic in their operations law courses but do teach the various topics that could fall within subject matter of ROL). The Navy does not have a rule of law course scheduled for fiscal year 2011. Naval Justice School, *Fiscal Year 2011 Course Schedule*, <http://www.jag.navy.mil/documents/RainbowSchedule.pdf>.

¹¹⁴ Email from MAJ Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 5, 2011, 14:06 EST) (on file with author) (Maj. Wright stated that she received no training prior to arriving in Afghanistan for her ROL position and did not know the Rule of Law Handbook existed until she started working in the job.).

¹¹⁵ Lieutenant Commander Vasilios Tasikas, *Developing The Rule Of Law In Afghanistan: The Need For a New Strategic Paradigm*, ARMY LAW., July, 2007, at 54.

¹¹⁶ *Id.*

6. Innumerable Resources Available

Regardless of past experience or training, there are many resources available to ROL practitioners.¹¹⁷ However, many resources are from various proponents (USG and international) and are not mandated for use. To access these documents and handbooks, the practitioner must conduct research on their own and choose which resource to use. Different USG practitioners may access different documents even though they are working in the same region and may be using different standards or methods to promote the ROL. Without standard access to key resources, it can be nearly impossible to have unity of effort throughout all USG agencies.

Extensive research using government databases and mainstream internet searches can produce wide-ranging reports, matrixes, and guidebooks published by USG agencies, private research institutions, and international organizations. Many DoS agencies have produced reports on development and reconstruction of post-conflict states.¹¹⁸ These reports may be accessed through the DoS website and can be very valuable. Private research institutions have also created books and reports on the best practices for ROL operations. These organizations produce studies on which methods have been most effective for reconstruction and development of various nations. Some of these reports were paid for by USG agencies and can be drawn upon by the USG ROL practitioner. As far as international agencies, the IMF, World Bank (WB), and NGOs are great assets for DoD ROL practitioners to access.

¹¹⁷ See *infra* Part II.B.6. *Contra* THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, TIP OF THE SPEAR: AFTER ACTION REPORTS from July 2008-August 2009 108 (2009) (containing the AAR comment, "[t]here were not many useful resources available to educate oneself on the RoL.").

¹¹⁸ See generally Dep't of State, <http://www.state.gov/>.

Good coordination and knowledge sharing with these agencies can be incredible force multipliers for the ROL effort as they have a separate set of resources to augment ROL operations with little involvement of DoD actors.¹¹⁹ Accessing the expertise of non-USG agencies could be done through communicating with an organization in country or accessing published reports and other documents.

Yet, gathering all the resources from the above agencies and conducting hours of self-study is not an efficient course of action for the typical ROL practitioner. It also does not bode well for the consistent application of a cohesive USG foreign policy. In order for there to be a unity of effort across all USG agencies in the conduct of ROL, there needs to be a model that encourages interagency coordination, training, and an interdisciplinary approach.

III. Rule of Law Operations Need:

Developing the ROL in post-conflict societies is a challenging endeavor. Many challenges are caused by the dysfunction and underdevelopment of the country itself. Adding to the difficulty is the requirement for extensive interagency cooperation during operations. Yet, Rule of law is made unnecessarily difficult when efforts are not coordinated, practitioners are under-trained, and the approach is ad hoc. Coordination and training are hindered by the lack of a common approach with a standardized definition and means and methods of USG ROL operations. To achieve greater effectiveness of ROL operations, the USG should take steps to address these unnecessary hindrances. As members

¹¹⁹ For example, the IMF produces documents to assist in creating a simple tax system for developing countries. The individual practitioner may not have extensive experience in tax law but there are many resources that he may draw on to implement the necessary laws. The IMF has created the IMF Code of Good Practices on Fiscal Transparency and Plain English Tax Law Drafting which are available through the IMF web site. IMF CODE OF GOOD PRACTICES ON FISCAL TRANSPARENCY (2007); IMF PLAIN ENGLISH TAX LAW DRAFTING (Feb. 25, 2008).

of the same team, despite their diversity, USG agencies should coordinate their effort to maximize their impact in ROL development. The next section will tackle how coordination is needed for success.

A. Interagency Coordination

Rule of law consists of cultural norms, commercial and criminal codes, and government administration.¹²⁰ Because ROL encompasses so many disciplines, a wide range of actors are necessary to work toward its establishment.¹²¹ Each USG agency involved in ROL has its own skill-set to apply to the post-conflict country and often work independently from each other. Yet, if individual USG agencies work in a vacuum, they cannot effectively assist the host-nation develop.¹²² For example, in Afghanistan, a lack of interagency cooperation has limited success of individual agency efforts. If all USG agencies involved in opium reduction focused and coordinated their efforts, they could better assess what actions are necessary for success.¹²³ DoS, DoD, and DoJ are each working to reduce opium

¹²⁰ Jane Stromseth, *Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, WM. & MARY L. REV. 1444 (2008) (“The idea of the rule of law is often used as a handy shorthand way to describe the extremely complex bundle of cultural commitments and institutional structures that support peace, human rights, democracy, and prosperity . . . involves courts, legislatures, statutes, executive agencies, elections, a strong educational system, a free press, and independent non-governmental organizations (NGOs) . . . On the cultural level, the rule of law requires human beings who are willing to give their labor and their loyalty to these institutions . . .”).

¹²¹ *See supra* Part II.B.1.

¹²² Jane Stromseth, *Strengthening Demand for the Rule of Law in Post-Conflict Societies*, MINN. J. INTL. L. 418, 419 (2009) (asserting a shortcoming of current ROL efforts is that agencies work apart from each other and do not adequately look at the interrelationship between their actions).

¹²³ CHRISTOPHER WARD & WILLIAM BYRD, AFGHANISTAN’S OPIUM DRUG ECONOMY 13&14 (World Bank, SASPR Working Paper Series, December 2004) [hereinafter WARD & BYRD, DRUG ECONOMY] (arguing the sequencing of alternative livelihoods initiatives with law enforcement actions is vital for the effectiveness of the reduction of opium production. “[W]ithout alternative livelihoods already in place, premature eradication can alienate the affected population and damage the environment for rural development.”).

production in Afghanistan but their efforts have not reached their potential because of a lack of adequate coordination. Currently, poppy farming and opium production is a huge problem.¹²⁴ In 2004, the revenue from opium totaled one-third of Afghanistan's gross domestic product.¹²⁵ Opium is "undermining both the economy and the polity in a vicious circle of drugs and arms, supporting fragmented warlordism and undermining efforts to build an effective, accountable nation state" and complicating the situation.¹²⁶ Thus, the drug economy feeds the Afghans and at the same time, fuels the insurgency.¹²⁷

To combat the growth of opium production, the DoJ, is extensively involved in assisting the Afghan government in the apprehension and prosecution of those involved in

¹²⁴ As a result of the growth in local production Afghanistan currently is the supplier for 93% of the global opiate market. Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons 10 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses). See also BARNETT R. RUBIN, THE POLITICAL ECONOMY OF WAR AND PEACE IN AFGHANISTAN (June 21, 1999), http://www.institute-for-afghan-studies.org/ECONOMY/political_economy_of_war_peace.htm ("The production of opium was related to one of the major macro-economic changes induced by the war: a rapid increase in the supply of money, which, combined with the destruction of the much of the subsistence economy, induced an apparently large, if as yet unmeasured, monetization of economic and social relations, as well as hyper-inflation."). The removal of the Taliban further increased opium production and currently has reached near record levels. WARD & BYRD, DRUG ECONOMY, *supra* note 123, at 16. Accord STEPHANE GUIMBERT, STRUCTURE AND PERFORMANCE OF THE AFGHAN ECONOMY 8 (World Bank ed., 2004).

¹²⁵ WILLIAM BYRD & CHRISTOPHER WARD, DRUGS AND DEVELOPMENT IN AFGHANISTAN, Conflict Prevention & Reconstruction, Paper No. 18 (World Bank, December 2004) (giving six reasons for its rapid rise, to include lack of law enforcement and market development. The market developments in favor of opium production are a shift in supply to the world market and growing demand (other countries succeeded in eradicating the crop), the collapse of governance, prevalence of drugs and arms, rural pauperization, and comparative advantage.).

¹²⁶ WARD & BYRD, DRUG ECONOMY, *supra* note 123, at 10, 11.

¹²⁷ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons 2 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses). See also STEPHANE GUIMBERT, STRUCTURE AND PERFORMANCE OF THE AFGHAN ECONOMY 8 (World Bank ed., 2004) ("The war economy mainly includes opium and poppy culture, which has been growing since the 1980s.").

the opium industry.¹²⁸ Under a separate initiative DoS is leading efforts to develop alternative livelihoods for poppy farmers so that they have another way to make a living.¹²⁹ And a joint DoD and DoS inspector team assesses the effectiveness of the opium eradication and the turn to alternative livelihoods. Despite these efforts, there is little evidence supporting the notion that poppy cultivation has decreased.¹³⁰ An explanation for the lack of progress is that the local populations do not yet see alternative livelihoods to be a long term solution to their economic struggles.¹³¹ More importantly, these various initiatives were uncoordinated, independent acts of various USG agencies. The eradication and development efforts would prove more effective if they were centrally coordinated. However, if they do not work together, then poppy farmers who have no other way to feed their families are unlikely to cease growing poppies, even in the face of increased risk of prosecution.

While extensive interagency coordination would lead to better results, executing interagency cooperation is extraordinarily challenging. It would be made easier if there was a common formulation of doctrine, as well as extensive communication, between all relevant agencies. The doctrine for ROL operations should be easily accessible to practitioners and

¹²⁸ SEC'Y OF STATE, ET AL, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN REPORT TO CONGRESS IN ACCORDANCE WITH THE 2008 NATIONAL DEFENSE AUTHORIZATION ACT 64 (June 2008).

¹²⁹ SEC'Y OF STATE, ET AL, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN REPORT TO CONGRESS IN ACCORDANCE WITH THE 2008 NATIONAL DEFENSE AUTHORIZATION ACT 47 (June 2008) (“To accelerate sustainable economic development in regions most affected by poppy production, USAID provides access to materials, technology, and expertise necessary to produce and market high-value licit crops such as fruits, vegetables, and tree crops.”).

¹³⁰ Zarif, *supra* note 127, at 54-55.

¹³¹ Zarif, *supra* note 127, at 55, 58. *See also* WILLIAM BYRD & CHRISTOPHER WARD, DRUGS AND DEVELOPMENT IN AFGHANISTAN, Conflict Prevention & Reconstruction, Paper No. 18, 13 (World Bank, December 2004) (“eradication of illicit narcotics in the fields alone will not work and is likely to be counterproductive, resulting in perverse incentives for farmers to grow more drugs . . . [W]ithout alternative livelihoods already in place, premature eradication can alienate the affected population”).

should follow the same model, regardless of agency. For example, the SFROLO has a standard format for analysis, standard reporting requirements, and standard task matrix broken down into phases of the operation. Using such a format, all practitioners would report through the same channels and operate according to the established phases of the operation. Thus, the structure of the common doctrinal model would encourage coordination by requiring adherence to specific benchmarks. The combination of a common frame of reference and common reporting should enhance communication.¹³² In a situation where timing of efforts is vital, like the reduction of opium production, a standard model can steer multiple agencies through phases of the operation together thus maximizing the effectiveness of all their labors.

Such a framework based on a common doctrine must be promulgated across all USG agencies so that all ROL practitioners have a common understanding and will work toward U.S. policy goals with unity. It should be developed, distributed, and integrated into routine training long before entry into a post-conflict state. Agencies would be better able to coordinate actions when the established doctrine is implemented through a common framework during all phases of the operation.

A standard doctrine is even more vital because of the reality of how the USG becomes involved in post-conflict ROL operations. Because they result from a military conflict, the DoD is often the primary agency available for ROL missions. Other agencies that have more skills in developing the ROL are often unable to operate until a minimum

¹³² Having the same frame of reference is very helpful when communicating but it is up to individuals to actually ensure they are talking to one another and coordinating their efforts. A standard framework can streamline communication but it does not substitute for relationships.

level of security is established.¹³³ Yet the DoD cannot afford to wait for other agencies to arrive before starting to develop the ROL. If it did so, the USG is likely to lose a window of opportunity to effectuate change.¹³⁴

However, if the DoD begins operations using a common framework, non-DoD ROL practitioners arriving in theater would be able to enhance ROL efforts falling-in on the same framework. Those ROL practitioners would be able to use their expertise to build upon the actions of military practitioners. Rule of law operations are not—nor should they be—conducted solely by one type of DoD or DoS practitioner.¹³⁵ But these differences should not result in the use of varied analytical frameworks or distinct schemes used to report results. Regardless of the organization, all USG ROL practitioners should follow the same standard methods and models for analyzing, reporting, and conducting their operations.

B. Training

Training for ROL operations is limited for DoD practitioners.¹³⁶ Other agencies have employees who specialize in nation-building and development and thus are well suited for

¹³³ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS, para. 5-3 (Oct. 2008) (“Sometimes, however, sufficient civilian expertise is not present or conditions of the operational environment do not support introducing such civilian expertise. Military forces may then be required to lead this effort until they stabilize the security situation and can safely transition responsibility for governance to civil authority and control.”).

¹³⁴ Furthermore, simply ignoring the ROL would be contrary to the law of occupation. *See supra* note 70.

¹³⁵ DoD ROL operations are most appropriately conducted with teams consisting of civil affairs Soldiers, judge advocates, and unit commanders. There are also specific teams created expressly for ROL operations such as Provincial Reconstruction Teams (PRT) which have a special role in stability operations.

¹³⁶ *See supra* Part II.B.5.

ROL operations.¹³⁷ A standard framework for ROL operations that is common across agencies must also address the training shortfall for DoD practitioners. The standard framework could assist in two ways:

First, a common framework, vetted by other USG agencies based on their specialty, would provide DoD actors a reliable source for decisions and action. Even if the DoD actor is not adept in particular skills, they would at least have a road map to guide their actions. Because USG experts in particular fields created the framework, DoD practitioners would be able to rely on it as a source of approved U.S. policy. Second, a common framework directed for use is much easier to teach than a loose collection of vague, complex information. What is needed is a framework that is exclusively focused on ROL operations. The ROL framework then could be a foundation for future training as opposed to drawing on a host of publications that dedicate a paragraph or two to ROL. A narrowly tailored framework, used by all agencies, would provide the DoD a more clearly defined training objective for its practitioners. It could also facilitate and encourage interagency training because training programs would all flow from the same doctrine.

A standardized model that enhances coordination and training opportunities would assist ROL practitioners but it is also imperative that the model itself be effective at developing the ROL. The proposed standard framework provides a model of how to

¹³⁷ See Civilian Response Corps, *Eligibility* <http://www.civilianresponsecorps.gov/join/eligibility/index.htm> (last visited Apr. 10, 2011) (In addition to its traditional employees, the DoS has begun recruiting highly qualified people to deploy to foreign countries for stability operations. To be an active member a person must “possess stabilization, conflict prevention, interagency planning, or similar expertise” and be: a U.S. citizen eligible to receive a Secret security clearance, available to train for, prepare, and staff stabilization and conflict prevention efforts; willing and physically able to work in austere and potentially dangerous hardship environments; and able to deploy upon 48-hours notice.).

approach ROL operations. To be effective, this standard approach must be applicable to an interagency operation and be interdisciplinary.

C. Interdisciplinary Approach

Rule of law operations require a broad, interdisciplinary approach grounded in international law, domestic law, and host nation law that includes the administration of government services, penal systems, and commercial codes. This requires ROL practitioners, regardless of agency, to have a grasp of an extensive amount of scholarly disciplines when analyzing and addressing the particular ROL needs in a country.

During DoD ROL missions, commanders will look to their legal advisor, judge advocate or Civil Affairs officer (if available) to conduct this analysis.¹³⁸ In order to be an asset to the command in advising on ROL operations, “lawyers must overcome three main ‘problems of scope’ that presently afflict the rule of law literature and policy enterprise.”¹³⁹ They must acknowledge ROL is not “self-contained” but a “sub-branch of a larger process.”¹⁴⁰

This requires legal scholars and practitioners interested in the rule of law and its promotion abroad to expand the intellectual scope of the existing rule of law literature, drawing insights from a number of disciplines, including international legal scholarship, comparative politics, international relations theory, development economics, and regional integration studies. . . . a task which lawyers have traditionally shunned and are generally ill equipped to

¹³⁸ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 3-23 (Oct. 2008).

¹³⁹ Amichai Magen, *The Rule of Law and its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. OF INT’L L. 51, 45 (2009).

¹⁴⁰ *Id.*

approach.¹⁴¹

Put another way, “to be relevant . . . lawyers must depart from a primarily jurisprudential view of the rule of law,” and be able to address the environment, methods, and limitations of the development of ROL specifically, and reconstruction of post-conflict states generally.¹⁴²

The need for an interdisciplinary approach is demonstrated by the challenges faced in reducing illicit activity surrounding opium production in Afghanistan. Even though DoD ROL practitioners have made efforts to increase the capacity of the penal system and law enforcement capabilities, since the overthrow of the Taliban, the illicit economy of opium trade and production has grown.¹⁴³ The growth of the poppy industry undermines the criminal justice efforts because it creates a vested interest in a significant segment of the population and government officials to maintain the status quo instead of pursuing ROL.¹⁴⁴ The criminal justice-focused efforts by DoD ROL practitioners have not effectively addressed the other disciplines of the ROL. This singular focus has caused a lack of continuity with other USG agencies, ultimately resulting in an incomplete application of the ROL.¹⁴⁵ Unfortunately, the development of the economic aspects of ROL has been left

¹⁴¹ *Id.* at 54.

¹⁴² Magen *supra* note 139, at 114.

¹⁴³ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons 63 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

¹⁴⁴ WILLIAM BYRD & CHRISTOPHER WARD, DRUGS AND DEVELOPMENT IN AFGHANISTAN 1 (World Bank, Paper No. 18, 2004).

¹⁴⁵ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

exclusively to other government agencies and NGOs. Therefore, focusing exclusively on the penal system has undermined those very efforts to reduce criminal activity. A more balanced approach, which sought to also develop commercial codes and administrative law, could have been a more effective at addressing the opium problem.

Instead of focusing too heavily on criminal justice, greater cooperation with other USG ROL efforts to provide incentives for non-criminal behavior could be more effective at establishing the ROL. For example, this dynamic could be improved by greater cooperation in the granting of micro loans to those compelled to farm opium.¹⁴⁶ Through micro loans, DoS ROL practitioners have experienced some success in developing small businesses and increased coordination with different agencies involved in opium eradication efforts.¹⁴⁷ Additional problems may be more effectively addressed through a unified system that the SFROLO proposes. These challenges to the conduct of ROL operations can be mitigated through the creation of a standard model for all USG agencies.

IV. The SFROLO Can Establish a Standard Model and Effective Approach

To establish ROL, it will take interagency coordination, additional training, and an interdisciplinary approach. A standard framework for ROL operations that is used by all USG ROL practitioners will enhance interagency coordination and aid in training

¹⁴⁶ *Id.* (arguing that the institutionalization of a central banking system serves as the cornerstone of future economic progress).

¹⁴⁷ *Id.* See also U.S. Dep't of State Bureau of South and Central Asian Affairs, Country Profile: Afghanistan (March 26, 2010), <http://www.state.gov/r/pa/ei/bgn/5380.htm> (explaining most of the micro loans go to small businesses and currently have a repayment rate of 94%. Out of these loans, 49% of the borrowers are women. These programs are seen as a way to not only stabilize the economy but also to provide much needed social stability and safety for women. The international loans and their success rates have encouraged commercial banks to increase their involvement with agribusiness in Afghanistan.).

practitioners by implementing a more focused doctrine. The need for an interdisciplinary approach can be addressed by creating a framework that is interdisciplinary in nature. It will be interdisciplinary because it would address ROL issues using criminal, commercial, and administrative laws and related systems.

This thesis proposes an interagency doctrinal change by implementing a Standing Framework for ROL Operations (SFROLO). Since the military has most frequently, and ironically, most effectively, been an agent of ROL operations, it is time that the individual DoD practitioners are provided better access to the vast amount of expertise that exists in the USG. This can be done through the development of an effective doctrinal framework for all ROL operations.¹⁴⁸ A common framework could condense and synthesize existing knowledge so that the ROL practitioner may apply best practices in an interdisciplinary approach to future operations. Given the involvement of diverse organizations with entirely different areas of expertise, it is surprising that there is not an established interagency doctrine for ROL operations, beyond the recognition that it is essential to stability operations.¹⁴⁹ The discussion below argues for a standard framework that will leverage DoD strengths in a post-conflict country when conducting ROL operations while ensuring a standard approach across USG agencies.

¹⁴⁸ See *supra* note 94 and accompanying text.

¹⁴⁹ This remains despite that since the end of the Cold War, U.S. military interventions increased to a rate of about one every two years and UN peacekeeping missions increased to a pace of a new mission nearly every six months. The duration of the stability-type missions have also lengthened to an average of five to ten years and international military interventions have remained the best means of preventing post-conflict states from slipping back into conflict. DOBBINS ET AL., *supra* note 81, at xvii. See also Lieutenant Commander Vasilios Tasikas, *Developing The Rule Of Law In Afghanistan: The Need For a New Strategic Paradigm*, ARMY LAW. July, 2007 at 48 (arguing that conflicts less than general war, to include nation-building, have occurred throughout U.S. history under a more accurate understanding of the role of the military, the military must be prepared to conduct stability operations as part of its main mission).

A. Proposing a Standard Model

Currently, there is no common model for ROL across USG agencies. Instead there are multiple definitions and various handbooks, reports, and other documents used by each USG agency. Despite the President assigning the S/CRS the role of coordinating all USG stability operations, that agency has not developed a standard framework for the development of ROL operations.

A standard model for ROL should consist of a common definition and framework. The common definition would clarify the U.S. perspective on ROL for all USG practitioners. A standard framework would enhance clarity of the purpose and goals of ROL operations across USG agencies. It would also create operating procedures common to all practitioners. A standard framework would eliminate agencies creating their own strategy for development of the ROL and working off a variety of documents. What is needed is a single framework consolidating the key aspects of from each agency's model.

A standard framework for ROL operations that is used by all USG ROL practitioners will enhance interagency coordination by providing a common vocabulary and construct for operations. The commonality can increase understanding of various practitioners' actions. As a byproduct of implementing a more focused doctrine, the standard model would aid training opportunities of practitioners.¹⁵⁰ A formal structure for operations which can be distributed to practitioners to study prior to deployment enables an increase in familiarity of

¹⁵⁰ For example, if all agencies had the same doctrine, one agency could become the central point for maintaining training materials and or events. This option would eliminate some duplication of efforts. Alternatively, the standardized training could be distributed to all ROL practitioners through their own agency. One of the responsibilities outlined in NSPD-44 for USG agencies is to designate points of contact for training. NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD) -44, Dec. 7, 2005. This could be a jumping off point for coordinated training efforts and the integration of a standard model to ROL.

the mission requirements. It also could encourage inter-agency training opportunities as the doctrine is the same. A standard model would allow all ROL practitioners the capacity to draw on the experiences of experts and apply a tool regardless of which USG agency employs them.

The SFROLO¹⁵¹ proposes a model framework to meet the need for a consolidated doctrinal framework. Part V will use case studies to demonstrate how the SFROLO would be a mechanism for coordination and unity of effort. The SFROLO would provide standard model would eliminate the existing hodgepodge of reconstruction task lists through which the ROL practitioner must sift. The next section discusses the need for a standard approach to developing the ROL.

B. Proposing a Standard Approach

Many post-conflict countries have unique challenges but also have overarching struggles in common. For example, post-conflict countries frequently have an infrastructure that has been destroyed or was under-developed because of extensive violence, natural resources that have been used to destroy the country rather than to promote prosperity, and delayed or perverted justice that favors the few.¹⁵² A model used by all USG agencies would support a standard approach. The approach would address the overarching challenges faced by ROL practitioners in post-conflict states would assist those faced with these

¹⁵¹ See *infra* app.

¹⁵² For example, many countries rich in natural resources suffer from economic incentives which encourage illicit and exploitive behavior instead of economic development. See generally, AMBER LINEA MOREEN, OVERCOMING THE “RESOURCE CURSE” PRIORITIZING POLICY INTERVENTIONS IN COUNTRIES WITH LARGE EXTRACTIVE INDUSTRIES (RAND Corp., 2006); Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 HUMAN RIGHTS QUARTERLY 687, 696 (2004).

significant challenges.

The standard model should be ROL focused. In order to provide clear direction to practitioners, the single USG model should be focused on ROL operations and not be a document discussing stability operations in general. Current doctrine mentions ROL in the context of stability operations but there are few resources which exclusively concentrate on ROL operations.¹⁵³ The new approach should not require practitioners to sift through reconstruction and other stability responsibilities in order to determine what is necessary to accomplish the ROL. To remain focused, the approach should entail tasks which directly influence laws—creation, promulgation, and enforcement.

Beyond being focused, it needs to be effective. Rule of law can be accomplished by using interdisciplinary means. In order to create an effective and adaptive approach to ROL, the agencies concerned must “tak[e] an initial step in identifying a potentially broad research and policy agenda; an agenda which, if seriously considered, would entail detailed, interdisciplinary work by lawyers, economists, and political scientists.”¹⁵⁴ The approach should address penal, economic, and administrative law development in the ROL context. The interdisciplinary approach creates a holistic treatment of ROL development. That also makes the model relevant to all USG practitioners.

The proposed SFROLO has an approach that meets these needs of being applicable to

¹⁵³ See *supra* Part II.B.2. However there are exceptions. *E.g.*, THE JUDGE ADVOCATE GENERAL’S LEGAL CENTER & SCHOOL, US ARMY, CENTER FOR LAW AND MILITARY OPERATIONS, RULE OF LAW HANDBOOK; A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES (2010); USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 10 (2008).

¹⁵⁴ Amichai Magen, *The Rule of Law and its Promotion Abroad: Three Problems of Scope*, 45 STAN. J. OF INT’L L. 51, 54 (2009).

post-conflict states, focused on ROL, and interdisciplinary. The SFROLO offers a framework that is consistent with this policy agenda by applying the lessons learned and strategic plans from an interdisciplinary group of USG agencies, international organizations, scholars, and sources of law. The SFROLO creates a model for a focused and interdisciplinary approach by merging existing operating procedures while focusing them to include only relevant ROL tasks.¹⁵⁵

C. A Standard for All

For the model to be truly standard, it must apply to all USG ROL practitioners. As a doctrinal framework, it would be a starting point for all ROL operations. It provides continuity across agencies by ensuring that regardless of the timeframe of involvement or the agency involved, practitioners can plug into the operation. The follow-on practitioner would already be familiar with the reporting mechanisms and task list. Therefore, they would be able to ask those in country what is the status of those particular tasks. Actual communication and information sharing between individuals and agencies is still required, but they would be communicating with a common frame of reference. Thus the standardized framework would enhance the transmission of information.

The proposed SFROLO assists all USG agencies, but it is especially helpful to DoD ROL practitioners. As stated above, DoD practitioners are often inexperienced but must

¹⁵⁵ DEP'T OF STATE, POST-CONFLICT RECONSTRUCTION ESSENTIAL TASKS (April 2005). The SFROLO adopts several tasks from this list. However, only those tasks which are ROL related and common to post-conflict states were chosen to be a part of the SFROLO. For example, infrastructure, transportation systems, and general education are necessary to stability operations and indirectly support ROL operations but are not directly related to the creation or fair application of legal systems. Therefore, those tasks are generally not included in the SFROLO. However, some infrastructure tasks are contained in the SFROLO when they directly affect a legal function (for example, the construction of a courthouse).

work to develop the ROL before other agencies are able to operate in a country.¹⁵⁶ A standard model provides a roadmap for the DoD practitioner to implement regardless of experience level. It also provides continuity for other USG practitioners; as they arrive, they will know the basis for operations already underway and simply require a status report. Thus, the SFROLO would also enhance the ability of the DoD to set the right conditions for future action by other agencies.¹⁵⁷ Furthermore, as a common starting point, it would allow for further tailored efforts toward development or specialization by USG agencies.

D. Department of State Exercising Leadership Through Establishing Standards

The proponent for a USG framework for ROL operations should be the DoS through the S/CRS.¹⁵⁸ The S/CRS is the ideal agency because it was created to enhance interagency cooperation in stability operations.¹⁵⁹ Since ROL development is a sub-set of stability

¹⁵⁶ See *supra* Part II.B.5.

¹⁵⁷ Knowing that other agencies will arrive in country after the DoD has begun ROL efforts, it is important that those agencies are able to synchronize their efforts with those already started. See *generally* U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 1-14 (Oct. 2008).

Where military operations typically demand unity of command, the challenge for military and civilian leaders is to forge unity of effort among the diverse array of actors involved in a stability operation. This is the essence of *unified action*: the synchronization, coordination, and/or integration of the activities of governmental and nongovernmental entities with military operations to achieve unity of effort (JP 1).

¹⁵⁸ See *supra* Part II.B. (discussing the role of various USG agencies in ROL operations and elaborating of the S/CRS).

¹⁵⁹ The S/CRS has come under significant criticism for not being able to promote inter-agency cooperation and take the lead on stability operations as it was mandated to do. However, it has a well-managed Office of Best Practices which compiles lessons learned and an Office of Planning which works with the inter-agency community. Thus, it has the structure that may make it best suited to this endeavor. U.S. Dep't of State and the Broadcasting Board of Governors Office of Inspector General, Report of Inspection, Office of the Coordinator for Reconstruction and Stabilization Report Number ISP-I-07-26, 1, 15, 21 (May 2007) [hereinafter IG Report] (stating the S/CRS has not yet taken a leadership role and needs to restructure its organization so it actually reflects its responsibilities and reporting that other rule of law players in the USG do not yet see the value in the role of the S/CRS, but it has developed doctrine, managed exercises, and after a period of personnel delays, has excellent leadership).

operations, it is logical that this agency would provide standardized guidance to all other agencies on how to conduct ROL operations. The S/CRS is the agency that is best equipped to take the lead in this process because it falls under the leadership of the DoS and contains members of other agencies with expertise in different ROL subject matter.¹⁶⁰ It can use that interagency staff to conduct strategic planning and vet the framework to ensure it is interdisciplinary and has the appropriate contents.

Furthermore, SFROLO must be mandated by leaders working at the strategic policy level as a document to be used by the DoD as it is the “first responder.” The contents and future application of the SFROLO would ultimately provide the DoD a framework for executing the creation or modification of laws and institutions to already-established USG methods and international legal norms. Below, sections IV.E. and IV.F. will demonstrate how a streamlined interagency approach can improve current operations and why it should be adopted.

E. Why the SFROLO?

The S/CRS should adopt the SFROLO as a common framework because it simplifies an already very complicated but important mission, it unifies the USG into one team and will support greater cooperation, and it provides a foundation that will enhance the performance of experienced and inexperienced practitioners.

Rule of law operations are by their nature, complicated and difficult. There will

¹⁶⁰ Dep’t of State, Office of the Coordinator for Reconstruction & Stabilization, *About Us*, <http://www.state.gov/s/crs/about/index.htm#whole> (last visited Apr. 10, 2011). See also FM 3-07 *supra* note 168, at app. B (describing the role and importance of S/CRS).

never be a complete one-size-fits-all or quick solution to the development of the ROL in post-conflict countries. However, a standard model could provide simplicity. It can simplify operations by articulating clear priorities and structure which can enhance interagency coordination. By insisting that all ROL practitioners to follow the same standard framework for analyzing, reporting, and conducting their operations there no longer will be a variety of divergent and sometimes conflicting doctrines.

The proposed framework would be a standing document ready to be used in any post-conflict state. As an existing document, it would enable the practitioner to immediately execute the mission without unnecessary research into multiple approaches. For example, the practitioner would not be faced with the chore of choosing between a penal system-focused approach, the USAID approach, or their own approach created with a hodge-podge of ROL tasks. The task list could be especially valuable for the ROL practitioner because it is focused in its contents; it does not include all the tasks involved in stability operations. Instead, it is narrowly tailored for ROL operations. The SFROLO adheres with the FM 3-07 guideline that, “[s]implicity is central to reduce complexity in planning,” and establishes clear priorities for analyzing and implementing an interdisciplinary approach to ROL operations.¹⁶¹

The proposed model would also simplify, to the extent possible, analyzing the operating environment by providing a distinct substantive outline for data collection.¹⁶² This

¹⁶¹ This objective complies with U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 4-5 (Oct. 2008).

¹⁶² The Data Collection and Assessment part of the SFROLO lists particular types of data to be collected and categorizes them into three categories; penal legal systems, economic legal systems and governance systems. The list is in an outline form so that the data is classified into distinct levels and types. *See infra* app. para. 3.a.

provides simplicity by directing analytical efforts. For example, a ROL practitioner beginning a ROL operation may feel overwhelmed at the amount of data they must gather to assess the situation. A standard model which outlines the data to be collected can aid the practitioner. When beginning a difficult and complicated task, it is easy to become overwhelmed. But, when that task is sectioned out and has a step-by-step format, a person can focus on each individual step as they execute the task. A step-by-step method does not eliminate the complexity, but does structure it into less overwhelming actions. The proposed framework provides a structured outline which identifies the data necessary to be collected.

The proposed framework contains standardized reporting requirements. If all USG practitioners are using the same model, then all reports should be in the same format and those reports should be easily consolidated and then assessed. During 2009, the Multi-National Corp–Iraq (MNC-I) ROL office developed a series of metrics in conjunction with assessments to report their progress.¹⁶³ However, as the mission became more focused on the Provincial Reconstruction Teams, MNC-I adopted their Maturity Model Assessment.¹⁶⁴ If there was a standard model across USG agencies, a change in reporting format and analysis model would have been unnecessary.

The SFROLO condenses and synthesizes existing knowledge so that the ROL practitioner may apply best practices in an interdisciplinary approach to future operations.

¹⁶³ Email from LTC Mark Visger, Chief, Rule of Law, Multi-National Corps-Iraq February 2009- February 2010, to author (Apr. 8, 2011, 17:07 EST) (on file with author).

¹⁶⁴ The Maturity Model Assessment is the mechanism the PRTs use to report progress in their ROL missions and it is designed to “systematically assess and describe the evolution and maturation of provincial government and private sector leadership behavior.” U.S. Dep’t of State and the Broadcasting Board of Governors Office of Inspector General, Report of Inspection, Interim Report on Role, Staffing, and Effectiveness of the Regional Embassy Office in Hillah, Iraq Report Number MERO-IQO-09-04, 11 (Apr. 2009).

The standard model provides an extensive, but distinct task list for use by all ROL practitioners. The standardized task list would only contain ROL tasks so the practitioner would not have to sift through a collection of reconstruction or stability tasks to identify which ones apply to his mission.¹⁶⁵

A standard interdisciplinary model, the proposed SFROLO, provides procedures to assist ROL practitioners to make timely and appropriate ROL decisions. It aids the determination of the right set of commercial, administrative, and penal laws to stabilize a post-conflict nation by providing a comprehensive structure for data gathering and analysis. The standardization facilitates wise execution by creating a holistic approach. The SFROLO accomplishes all this by providing a systematic framework acting like a floor plan to a building. The floor plan shows the basic structure of the building; the size and location of the rooms. Every construction worker who looks at the floor plan will see that they are building a three bedroom, two and half bath house. Though the construction worker will need more tools to build the house, with the floor plan, there will be a common understanding of what needs to be done. The three rooms in the SFROLO are the disciplines of penal, economic and administrative laws. The commercial, administrative, and penal challenges which are a part of ROL operations will present themselves in any stability operation. Thus, a standard model can synthesize the framework for complex operating environment and establish a needed standing operating procedure (SOP) to create a comprehensive and cohesive unified

¹⁶⁵ Email from MAJ Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 5, 2011, 14:06 EST) (on file with author) (“Of course, defining what is a ROL task is the challenge.”).

effort.¹⁶⁶

A standard model and approach would unify the USG into one team and will support greater cooperation. A main goal of the military in stability operations is the use of military assets to set the conditions for further development by other agencies.¹⁶⁷ By extension, the role of the DoD in ROL operations, as a sub-set of stability operations, is to establish a foundation for future ROL missions conducted by other USG agencies. The military is uniquely able to set this climate, not only because it is in country, but also because taking the initiative traditionally has embodied the offensive spirit of the military force¹⁶⁸ and its driving need to accomplish the mission, regardless of the lack of available resources. However, complex operations requiring extensive planning and knowledge can hinder the quick and effective use of initiative.¹⁶⁹ Complex operations can also cause commanders to make quick, but ill advised, decisions which have negative consequences. A standard ROL framework could maximize the utilization of DoD resources and personnel skill-sets and optimize the results of ROL during the initial phase of stability operations.¹⁷⁰ Task lists and

¹⁶⁶ JAMES DOBBINS, ET AL, *THE BEGINNER'S GUIDE TO NATION-BUILDING* 80 (RAND Corp., 2007).

¹⁶⁷ U.S. DEP'T OF ARMY, *FIELD MANUAL 3-07, STABILITY OPERATIONS*, para. 2-6 (Oct. 2008). See U.S. DEP'T OF ARMY, *FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY*, para. D-13 (Apr. 2009) (describing the role of judge advocate when no other civilian legal expertise is available).

¹⁶⁸ U.S. DEP'T OF ARMY, *FIELD MANUAL 3-07, STABILITY OPERATIONS* para. 2-9 (Oct. 2008).

¹⁶⁹ Major Tonya L. Jankunis, *Military Strategists are From Mars, Rule of Law Theorists are From Venus: Why Imposition of the Rule of Law Requires a Goldwater-Nichols Modeled Interagency Reform*, 197 MIL. L. REV. 16, 50 (2008) (citing the limited time for gains in ROL operations with an air of legitimacy and effectiveness and arguing ROL operations must be thoroughly planned and not executed in a piecemeal fashion).

¹⁷⁰ The military uses standard reports and drills frequently in order to enable leaders to execute without detailed instruction. Examples include the use of 5-paragraph orders and analysis memory aids. Such standardized tools have many benefits to include: creating standard skills based on specific performance measures required to support proficiency, building from simple to complex tasks, and linking the concepts of "how-to-train" and "how-to-fight" at the small unit level. U.S. DEP'T OF ARMY, *FIELD MANUAL 3-21.75, WARRIOR ETHOS AND SOLDIER COMBAT SKILLS*, para. 1-7 (Jan. 2008) ("A battle drill: Is a collective action . . . without the application

other framework-type documents can be helpful by creating a to-do list that can guide a person through unfamiliar territory. It not only shows where to go, but it provides limits by eliminating options. In Afghanistan, the ROL office at the Kabul Embassy produced a checklist to guide the conduct of traditional dispute resolution (TDR).¹⁷¹ They found it helpful to produce the list in order to establish boundaries for inexperienced practitioners. In the same way, the SFROLO's task lists can provide boundaries for ROL practitioners on how to accomplish the ROL through an interdisciplinary approach.¹⁷²

A standard model and approach provides a foundation that will enhance the performance of experienced and inexperienced practitioners. A framework like the proposed SFROLO eases access to the vast amount of expertise that exists in the USG and develops an effective interagency doctrinal framework for ROL operations.¹⁷³ By providing a systematic process for data analysis and a task list, the SFROLO could assist judge advocates and other ROL practitioners to analyze the vast information and to advise on complex decisions. The required interdisciplinary education and expertise is a massive amount of knowledge for the judge advocate or other DoD ROL practitioner to gather and provide a commander.¹⁷⁴ The

of a deliberate decision-making process. . . . is initiated on a cue . . . and is a trained response to the stimulus. It requires minimum leader orders to accomplish, and is standard"). *Id.*

¹⁷¹ Telephone interview with LTC Paula Schasberger, Military Liaison/Advisor to US Embassy ROL Section (Apr. 16, 2011).

¹⁷² See *infra* app. Part Task Matrix.

¹⁷³ See *infra* note 300.

¹⁷⁴ See *supra* note 175 for a laundry list of rule of law tasks. For military lawyer's personal experience validating the author's statement, see Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW. 53 (July, 2007) ("The simple fact is that there are few rule of law operators in Afghanistan, a country the size of Texas; and the ones who were there tended to have no training in judicial reform or foreign development experience.").

FM 1-04's ROL task list would tax the abilities of even the most experienced attorney. The proposed framework would fill the gap in doctrine between the extensive list of possible activities for ROL operations and lack of priority or guidance for analysis.¹⁷⁵

Given the present delta, it is very difficult for the ROL practitioner with limited experience in developing legal systems to be able to successfully set the conditions for a robust ROL mission. A pre-existing framework for all ROL practitioners, such as the one proposed, would fill the void in doctrine by giving a floor plan, to continue the construction analogy, to practitioners. The distribution of the common plan ensures ROL practitioners address ROL operations in a holistic and systematic manner regardless of experience level.

ROL operations are often the most difficult and complex transition conducted in a stability operation. A single framework would address the reality of the inherent interdisciplinary requirements and vast amount of interagency actors. All the while,

¹⁷⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, para. D-11 (Apr. 2009). Instead of giving means or methods to conduct the ROL or give a framework creating priorities for different ROL tasks, the FM simply provides the following list for judge advocates:

- Determining which HN offices, ministries, or departments can legally evaluate, reform, and implement the law and execute its mandates.
- Evaluating and assisting in developing transitional decrees, codes, ordinances, courts, and other measures intended to bring immediate order to areas in which the HN legal system is impaired or nonfunctioning.
- Evaluating HN law, legal traditions, and administrative procedures in light of international legal obligations and human rights standards and, when necessary, providing appropriate assistance to their reform.
- Evaluating training given in light of international legal obligations and human rights standards and providing assistance to improve training. This training is given to HN judges, prosecutors, defense counsel, legal advisors, court administrators, and police and corrections officials.
- When necessary, serving as legal advisors for transitional courts.
- Advising commanders and others on the application of international, U.S. domestic, and HN law that is considered in restoring and enhancing rule of law in the host nation.
- Advising commanders and U.S., international, and HN authorities on the legality, legitimacy, and effectiveness of the HN legal system including its government's compliance with international legal obligations and domestic law.
- Support the training of U.S. personnel in the HN legal system and traditions.

“[f]ailure to ensure continuity of rule of law through this transition threatens the safety and security of the local populace, erodes the legitimacy of the host nation, and serves as an obstacle to long-term development and achieving the desired end state.”¹⁷⁶ The consequences of failing at developing ROL in a timely and effective manner are why the USG should adopt the SFROLO or similar framework.

F. Good Idea, but Will Anyone Adopt the SFROLO?

The USG will adopt this framework for several practical and basic reasons. The first and foremost reason is because the current ad hoc method is not gaining the desired results. Second, the DoS is statutorily the lead agency in foreign assistance and thus has the authority to dictate a common methodology, and the DoD supports this DoS leadership role.¹⁷⁷ Finally, the S/CRS was created to provide continuity and though it has struggled to fill its role, this would be a key step to providing coordination between all agencies.

The SFROLO provides the necessary standardized analytical requirements, reporting requirements, and task list required for successful ROL operations. The result of the absence of any framework, like the SFROLO, is deeply felt in Afghanistan. Up until 2009, a comprehensive USG ROL strategy had evaded development in Afghanistan.¹⁷⁸ When the

¹⁷⁶ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 1-83 (Oct. 2008).

¹⁷⁷ JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 1 (RAND Corp., 2010) (quoting Secretary Gates’ article in *Foreign Affairs*, January/February 2009 calling for increasing the authority of the DoS so they can take the lead in exercising soft power around the globe).

¹⁷⁸ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, 1 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses). The Bonn Agreement placed different coalition nations in charge of different aspects of building a justice system. For example, one country was to reform the judiciary and another reform and train a police force. See also Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New*

Transitional Government was established, there were significant disconnects in a comprehensive ROL effort and the disconnect remained for several years and still affects current operations.¹⁷⁹ Different Coalition governments were not working with a unified strategy,¹⁸⁰ the Karzi government is unable to exercise control over much of the territory, local corruption undermines the local and national government, and there is not a concerted effort to develop a full-fledged Afghan counter-narcotic agency.¹⁸¹ This situation demonstrates how ineffective coordination of a multiple agency effort will affect the outcome of ROL development.

A primary challenge of ROL operations is that development-centered agencies (such as USAID) are not in theater until a level of security is established. Upon arrival, they may or may not be aware of specific DoD ROL efforts. Cross-agency institutional knowledge of the DoD ROL operations can be especially useful as other agencies play a more active role in the development of the post-conflict state. Having standard priorities and task lists facilitate coordination and transitions as other USG agencies begin to operate. The result of SFROLO

Strategic Paradigm, ARMY LAW., July, 2007 at 53 (“[s]urprisingly, five years after the U.S. invasion of Afghanistan there was no overarching design on how the United States would support rule of law efforts in country.”).

¹⁷⁹ The current USG ROL strategy for Afghanistan was not approved until late in 2009. See *supra* note 91. LTC Schasberger informally described her job as ensuring the ROL objectives and projects are doing are in line with the ROL Strategy and assist the practitioners issues needing to be resolved by the Embassy. Email from LTC Paula Schasberger, Military Liaison/Advisor to US Embassy ROL Section, to author (Apr. 13, 2011, 02:44 EST) (on file with author).

¹⁸⁰ SEC’Y OF STATE, ET AL, *supra* note 84, at 5, 6 (June 2008) (“Generally, police development has been hindered by a lack of reform, corruption, insufficient U.S. military trainers and advisor, and a lack of unity of effort within the international community.”).

¹⁸¹ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, 11-16 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

implementation would be a new level of coordination and cooperation between USG agencies in ROL operations, limiting redundancies and conflicting procedures.

As discussed in section II.B.1.a., the DoS is statutorily the lead agency in foreign assistance. As the lead agency, it has the authority to dictate a common methodology for assistance operations to include ROL operations. As the primary agency involved in stability and development, it also has a vested interest in ensuring that the DoD and other agencies conduct ROL operations in an effective manner.¹⁸² During the past few years, some good DoS projects were not being completed because of ineffective coordination.¹⁸³ These missed opportunities that could have been reduced by having clear leadership and direction from the DoS.¹⁸⁴ The DoD's official position is that it supports the DoS's leadership role.¹⁸⁵ Because circumstances often force the DoD to act on its own in ROL operations until support from other agencies become available,¹⁸⁶ the DoD has recently promoted interagency cooperation

¹⁸² NSPD-44 has actually dictated that the DoS "shall coordinate and lead integrated United States Government efforts, involving all U.S. Departments and Agencies with relevant capabilities, to prepare, plan for, and conduct stabilization and reconstruction activities." NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD) - 44, Dec. 7, 2005.

¹⁸³ One example from Afghanistan in 2008 is that a task force would fund a courthouse project. It would be agreed that the DoJ would provide the computers and books, USAID would provide training for employees, and a NGO offered to donate furniture. However, the project was never completed as a result of lack of buy-in by the Task Force commander and lack of funds by the agencies. There was no central authority stating that the project would be completed. Each actor was able to veto the project by simply withdrawing their participation. Email from MAJ Melissa Wright, CJTF ROL Attorney 2008, to author (Apr. 6, 2011, 7:55 EST) (on file with author).

¹⁸⁴ In fact, improvements have been recently made in Afghanistan and almost all the big projects are managed and centrally coordinated. What has changed is that the projects and funds are managed by the DoS and coordinated at the Embassy. Telephone interview with LTC Paula Schasberger, Military Liaison/Advisor to US Embassy ROL Section (Apr. 16, 2011).

¹⁸⁵ JEFFERSON P. MARQUIS ET AL, DEVELOPING AN ARMY STRATEGY FOR BUILDING PARTNER CAPACITY FOR STABILITY OPERATIONS 21 (RAND CORP., 2010).

¹⁸⁶ *Id.*

and advocated for the preservation of the DoS's role as lead agency on ROL operations though it is a subset of stability operations.¹⁸⁷

Implementing a standard framework for ROL operations is a way for the S/CRS to assert its authority in a meaningful way. The S/CRS was created to establish a focal point for coordination in planning of reconstruction and stabilization assistance and related activities (ROL is listed as one of those activities) and to harmonize such efforts with U.S. military operations.¹⁸⁸ Though it is has struggled to fill its role; providing a standard framework for ROL would be a key step to providing coordination between all agencies and harmonizing DoD and DoS involvement during stability operations.

Therefore, a common framework for ROL operations should be adopted by the DoS and implemented throughout the USG because as the lead agency, the DoS should establish doctrine for all ROL operations. As demonstrated in Part II.A, Congress intended for the DoS to have the lead role in foreign assistance operations such as ROL. And, through the NSPD-44, the Executive intended for the DoS to coordinate all stability operations, to include ROL, amongst all USG agencies. Thus, the SFROLO could be used to satisfy both Congressional and Executive intent for U.S. policy and agency roles in implementing ROL policy. More importantly, an interdisciplinary model for ROL should be adopted because it could be a more effective way of doing business. The development of the ROL has come to be an important part of military and other USG foreign policy operations and is too vital to

¹⁸⁷ *Id.* at 24. (asserting the DoD is the only agency that has developed formal guidance for developing partners in stability operations unlike the DoS and USAID, though it is still not specific enough to be fully effective). The study also concludes that there is no overarching inter-agency strategy and thus the DoD must be prepared to work with others and on its own. *Id.* at 50.

¹⁸⁸ NATIONAL SECURITY PRESIDENTIAL DIRECTIVE (NSPD) -44, Dec. 7, 2005.

be conducted in an ad hoc manner.

V. How the SFROLO Works

A. Approach

The SFROLO is an interdisciplinary framework which draws from the expertise of several USG and international agencies.¹⁸⁹ The SFROLO provides a much needed distillation of ROL tasks and doctrine.¹⁹⁰ It is not singularly focused on criminal justice reforms but instead provides a holistic framework addressing ROL development in multiple areas of the law. The USG doctrines which the SFROLO draws upon, address reforms in several sectors of the legal system in order to promote the ROL. Thus, the SFROLO provides an interdisciplinary framework for all USG agency ROL practitioners to use.

The SFROLO divides those areas of the law into three categories. They are Penal Legal Systems, Economic Legal Systems, and Governance Systems. Each of these categories addresses key ROL issues in a post-conflict state.

a. Penal Legal Systems

The creation and enhancement of penal systems is closely related to the establishment

¹⁸⁹ The SFROLO draws upon source documents which were created for post-conflict state reconstruction operations. Most of the documents are labeled as task lists for reconstruction of post-conflict countries and address many details beyond the ROL. Each document focuses on tasks involved in its own agency mission. The SFROLO integrates and filters existing knowledge and policy goals into a functional, standardized framework specifically for ROL operations. More detailed lists and tasks are available through FM 3-07 and S/CRS's Mission Essential Tasks for Post-conflict Reconstruction. United States Agency for International Development's documents were integral in creating the proposed SFROLO, as they are the subject matter experts and ought to be taking over the ROL operations as the theater matures and security is established.

¹⁹⁰ Specifically, the initial analysis requirements of the SFROLO were heavily drawn from the USAID GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK (January 2010).

of security in a post-conflict state. Actors in the penal system are law enforcement officers, prosecutors, judges, and corrections officers. These actors, along with the infrastructure that supports them, work to eliminate crime and to punish those who commit crimes in a manner that is procedurally and substantively fair.¹⁹¹ Such systems work well only if all participants believe that the law must be equally applied and executed in a manner that does not violate human rights norms. The process and application of penal law is an essential part of ROL development. There must be a system that applies criminal statutes fairly throughout the population. There are different challenges and solutions to create and enhance the ROL through functioning justice.¹⁹² In a post-conflict state, the challenges to an effective and fair criminal justice system can range from a lack of infrastructure, a lack of qualified personnel, or a lack of appropriate laws. The SFROLO provides a framework to guide the practitioner as he addresses each of these challenges.

Current DoD ROL operations heavily focus on penal legal systems and many current ROL practitioners are familiar with its development. The SFROLO goes beyond this penal system focus and includes commercial law reform that is frequently necessary for ROL development.¹⁹³

b. Economic Legal Systems

After initial gains in security, ROL practitioners must address the economic concerns

¹⁹¹ See generally U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶¶6-8 & 12, U.N. Doc. S/2004/616* (Aug. 23, 2004).

¹⁹² *Id.*

¹⁹³ See *infra* Part VI.

of the populous. Current doctrine recognizes the urgency and necessity to address the post-conflict nation's economy in a sustainable way.¹⁹⁴ In accordance with this need, the local population must be able to carry on its daily livelihood and provide for families as soon as it is safe to do so.¹⁹⁵ Economic opportunity provides incentives for the locals to embrace peace so that they can provide for their families without reliance upon insurgent factions and shadow government systems.¹⁹⁶ The importance of economic laws is of special concern in post-conflict states which have incentives that encourage criminal behavior. Addressing those incentives through legal reform reduces the threat of crime as people have legal alternatives to provide for basic needs.¹⁹⁷ Predictable and enforceable commercial laws can encourage the ROL and reinforce other justice efforts.¹⁹⁸ Therefore, economic legal systems must quickly accompany penal system reforms as they play mutually supportive roles.¹⁹⁹

The SFROLO assists by addressing key economic institutions and matters that provide basic

¹⁹⁴ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para.s 1-90-1-93 & para.s 2-20, 2-22 (Oct. 2008) (noting how the economy "must be addressed immediately" as part of DoS's essential tasks integrated in Army doctrine).

¹⁹⁵ RACHEL KLEINFELD BELTON, COMPETING DEFINITIONS OF THE RULE OF LAW IMPLICATIONS FOR PRACTITIONERS (2005) ("A predictable, efficient legal system allows businesses to plan, enables law-abiding citizens and businesses to stay on the correct side of the law, and provides some level of deterrence against criminal acts.").

¹⁹⁶ WILLIAM BYRD & CHRISTOPHER WARD, DRUGS AND DEVELOPMENT IN AFGHANISTAN 8 & 10 (World Bank, Social Development Papers, Conflict Prevention & Reconstruction, Paper No. 18, December 2004) ("the opium economy is a decidedly mixed blessing for many of the poor . . . [they] are disproportionately vulnerable to the adverse effects of the volatility of the opium economy . . . and are very much affected by the general lawlessness and insecurity associated with the drug industry . . .").

¹⁹⁷ The examples of illicit diamond mining and opium production are particularly relevant to the need for functional economic development and legal systems. *See infra* Part VI.

¹⁹⁸ RACHEL KLEINFELD BELTON, COMPETING DEFINITIONS OF THE RULE OF LAW IMPLICATIONS FOR PRACTITIONERS (2005) ("explaining how predictability in laws applies to commercial laws as well as criminal laws").

¹⁹⁹ Regardless of whether the DoD is suited for complex financial development missions, it's ROL operations must address these concerns because financial laws and systems are integral to stability operations.

economic stability.

As reflected in FM 3-07, “[s]ound economic policies promote equitable, sustainable growth. It is the key to remedying underlying tensions in society.”²⁰⁰ Along these lines, the SFROLO addresses economic issues, in even the most basic ways, and works in tandem with the establishment of security which is foundational to ROL and other stability operations.

In a post-conflict state, the local government (either national or provincial) is largely non-existent. In many cases, the government operated in a manner that contributed to the primary cause of the conflict. Thus, those flawed governments are unable to conduct normal government actions such as establishing law and order and providing fair commercial codes. The same weaknesses are often true for many administrative law functions. Consequently, proper establishment of governance and administration mechanisms are essential topics for an effective SFROLO.

c. Governance Systems (Administrative law)

For a government to enforce and comply with the ROL, it is important that it has the capacity to govern well. The definition of good governance may seem intuitive but, FM 3-07’s defines it as: “Governance is the state’s ability to serve the citizens through the rules, processes, and behavior by which interests are articulated, resources are managed, and power is exercised in a society, including the representative participatory decision making processes

²⁰⁰ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 3-55-3-58, 3-62 (Oct. 2008) (providing the essential tasks for supporting economic development).

typically guaranteed under inclusive, constitutional authority.”²⁰¹ Governance capacity-building, which fosters the host nation’s ability to address the post-conflict issues independent of outside influence, is an essential part of stability operations and ROL operations.²⁰² Capacity-building takes place as security is first established through the turnover of authority. “Capacity-building activities develop and strengthen skills, systems, abilities, processes, and resources. Host-nation institutions and individuals need to adapt these activities to dynamic political and societal conditions within the operational environment.”²⁰³

An interdisciplinary approach should include ROL efforts focused on restoring public administration, resuming public services, and fostering long-term initiatives to establish a functional system of political governance. These efforts develop the ROL by working to ensure the government is accountable to the law and to encourage trust in government institutions by the local nationals.²⁰⁴ Government capacity-building ROL efforts are especially important if the military is in the role of “occupier.” When these efforts succeed, DoD assets are freed from the task of governing the post-conflict state while also creating

²⁰¹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS para. 2-57 (Oct. 2008). A good addition to this definition is government who officials work for the good of those people they represent, the population of the country, and not for individual gain. CHRISTINE MARY PAGEN, INTERNATIONAL AID AS INFORMAL EDUCATOR: EXPLORING POLITICAL ATTITUDES AND ENGAGEMENT IN SOUTHERN SUDAN 6 (2010).

²⁰² FM 3-07, *supra* note 168, at para.s 2-28, 2-38, & 2-39.

²⁰³ *Id.* at para. 1-35-1-39. Most capacity building focuses on long-term technical assistance programs, which may include 1) Human resource development, 2) Organizational development, or 3) Institutional and legal framework development. This is purposely consistent with Department of State publication, Post-Conflict Reconstruction Essential Tasks. *Id.*

²⁰⁴ *Id.* at para. 2-57. Also included in para 3-53 are essential tasks for limiting corruption which can undermine stability through undermining legitimate economic forces and remove legitimacy from the USG efforts as well as the new host-nation government. *Id.* at para 3-53.

legitimacy. The SFROLO provides a framework that includes proposed essential tasks to enhance the capacity of broken institutions—both national and local—to accomplish basic government administration and the development of good governance.

The interdisciplinary approach proposed by the SFROLO addresses the key needs for ROL development in a post-conflict state. The SFROLO combines and distills multiple USG publications into a framework that contains key legal aspects focused on penal, economic, and administrative systems. The following section explains the method for applying this proposed interdisciplinary approach.

B. Methodology

The SFROLO is a three part document meant to meet the need for a common USG approach to ROL operations. Each of the parts is meant to create standardization for ROL practitioners and to establish a starting point for all USG ROL operations. It is designed to be a foundational document. Like the foundation of a house, it can be built upon as the operation develops. Yet, like the foundation of the house, it remains throughout the life of the house to provide support and continuity throughout the entire operation.

1. A Phased Operation

Both the DoS and DoD use phases to delineate transition points in their operations.²⁰⁵

The SFROLO also uses phases in order to provide decision points or delineate transitions of a ROL operation. The SFROLO adopts the structure of Initial Response, Transformation,

²⁰⁵ U.S. DEP'T OF ARMY, FIELD MANUAL 3-0 OPERATIONS Figure 3-5 (Feb. 2008); OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION, DEP'T OF STATE, Post-Conflict Reconstruction Essential Tasks (Apr. 2005).

and Fostering Stability phases established in the FM 3-07 and the DoS essential tasks lists.²⁰⁶

Using familiar DoD and DoS doctrinal terms provides guidance and flexibility to commanders and all USG practitioners for implementation of the SFROLO.²⁰⁷ These phases are used to provide context to the tasks contained in the SFROLO.

2. Three Parts to Make a Whole

The SFROLO is a model with three parts: analysis requirements, reporting requirements, and an essential task matrix. The analytical section is entitled Data Collection and Assessment.²⁰⁸ It directs SFROLO practitioners to evaluate the ROL environment through data retrieval using the interdisciplinary categories discussed above.²⁰⁹ Each category contains several basic questions to guide the practitioner in their assessment of the current state of the ROL in a particular operating environment. The practitioner would not be limited by the questions, but instead, the questions should provide minimum criterion for information gathering. The ROL practitioner would use available assets and resources to collect data, to include local intelligence, while supplementing with their own traditional

²⁰⁶ FM 3-07 *supra* note 168, at para. 2-67- 2-69 (The initial response phase generally reflects tasks executed to stabilize the operational environment in a crisis state. . . The transformation phase represents the broad range of post-conflict reconstruction, stabilization, and capacity-building tasks. . . Fostering sustainability phase encompasses long-term efforts that capitalize on capacity-building and reconstruction activities to establish conditions that enable sustainable development.); OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION, DEP'T OF STATE, Post-Conflict Reconstruction Essential Tasks (Apr. 2005).

²⁰⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS v (Oct. 2008) (stating intended users of the regulation are other USG employees involved in stability operations).

²⁰⁸ *See app.* at para. 3.a.

²⁰⁹ USAID GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK (January 2010) (providing analysis criteria for ROL practitioners).

research.²¹⁰

The points of information that the practitioner must gather on the local penal system address several items to assess the health of the criminal justice system.²¹¹ Information must be collected concerning the physical infrastructure constraints (such as the existence of buildings, technology, or supplies), the nature of the existing laws and legal system, case load information, human resource strengths and challenges, public perception of the justice system, and existing NGO involvement. The economic legal system analysis contains virtually the same categories of information, but focuses on the civil court system and commercial codes.²¹²

Finally, to assess the local governance system, the practitioner must identify the physical infrastructure constraints, the existing local government structure, the relationship between local government and the central government, the effectiveness of the existing civil service corps, the public perception of governing bodies, and key NGO involvement. All the data the practitioner gathers is reported in accordance with specific reporting requirements laid out in the next section of the SFROLO.²¹³

After the Data Collection and Assessment paragraphs in the SFROLO is the section entitled Reporting Requirements. The first reports should be generated upon the initial

²¹⁰ The SFROLO provides an outline of what data will be necessary to gather in order to understand the operating environment. It does not substitute for the practitioner gaining expertise through their own self-study or through institutional training.

²¹¹ See app. at para. 3.a.i.

²¹² See app. at para. 3.a.ii.

²¹³ See app. at para. 3.b.

implementation of ROL operations. They would provide the strategic level leadership a clear understanding of the status of the ROL in the post-conflict state. USG agency strategic planners would then use the data to modify specific ROL missions to meet the needs of a specific geographical area and stability operation. Thus, the analytical and reporting mechanisms of the SFROLO are able to provide a common starting point for all ROL practitioners in country. With this foundation, planners and practitioners would be able to develop an effective strategy that is tailored to the particular post-conflict country.

The SROLO would continue to provide a framework for gathering data and can be used to assist in measuring progress in ROL development. The SFROLO directs that subsequent reports will be submitted monthly and quarterly. The monthly report's primary purpose is to report on progress toward particular tasks. The quarterly report would include any developments or concerns in relation to the Data Collection and Assessment. They would contain applicable data with appropriate analysis and a status report of actions taken using the task matrix. The practitioner will submit each report through the chain of command or relevant authority. It is imperative that these reports do not become onerous and impede the requirements of ROL establishment. The SFROLO is specifically vague about the format to lend flexibility to the operating environment but to facilitate ease of use; all reports in a country will follow the same format. The exact format will be dictated by the commander of the operation (whether that is an ambassador, task force commander, or a geographic combatant commander). The strict adherence to one format will encourage practitioners to focus their efforts on the data and ROL execution, and not the generation of unnecessarily complex or changing reports.

The final part of the SFROLO is an essential task list in the form of a matrix. It contains several essential tasks for the development of the ROL.²¹⁴ The list is not exhaustive and is not designed to limit practitioners from addressing ROL needs in a country. What it does is identify common issues for ROL development in post-conflict countries. Many, if not all, of the tasks are very challenging. Merely providing a list does not create an instant solution. The list does not substitute for the expertise and hard work of practitioners. It does however, provide standardization of initial and subsequent efforts. It could assist the practitioner in identifying what tasks are minimally necessary to develop the ROL.

Structurally, the matrix has three spreadsheets; each correspond to the three interdisciplinary categories (penal, economic, and governance). Each spreadsheet has three columns, one for each phase of a stability operation.²¹⁵ The SFROLO's structural division does not purport to create a firm division between the tasks. An interdisciplinary approach means that all aspects of the law are addressed during ROL operations. However, for ease of use, these divisions are used to structure the matrix. Finally, categories of work are used to identify types of tasks. These are identified in the matrix using a color coded system.

3. Categories of Work

The overarching tasks of the SFROLO matrix contain three categories of work: development of legal systems, facility construction, and education/training programs. All of

²¹⁴ OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION, DEP'T OF STATE, Post-Conflict Reconstruction Essential Tasks (Apr. 2005); POST-CONFLICT RECONSTRUCTION: A JOINT PROJECT OF THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS) AND THE ASSOCIATION OF THE UNITED STATES ARMY (AUSA), TASK FRAMEWORK (May 2002); THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT, AFRICAN POST-CONFLICT RECONSTRUCTION POLICY FRAMEWORK (June 2005).

²¹⁵ See *supra* Part V.B.1.

these categories of work are subtasks included in the broader interdisciplinary topics of penal legal systems, economic legal systems, and governance. Knowing the category of work for a particular task is helpful in order to identify what skill sets are needed to accomplish the task. It also can provide another mechanism to evaluate a particular ROL operation. Awareness of the category of work provides the additional benefit of allowing practitioners to identify the different agencies and individuals from multiple disciplines who are better-capable to assist on a particular issue.

a. Development of Legal Systems

When assisting the host-nation develop their legal systems, the practitioner must identify the type of system and determine what, if any, modifications are necessary. The legal systems should be consistent with international norms. And the modification to the criminal codes, criminal procedure, or commercial law must have the capacity for integration into local laws.²¹⁶ The proposed task list in the SFROLO instructs the practitioner to determine what host-nation laws must be adjusted or substituted, to ensure compliance with not only ROL principles, but international law.²¹⁷ The task list provides action points during the three phases of stability operations in order to facilitate the successful establishment or enforcement of legal systems.

²¹⁶ See generally INT'L MONETARY FUND, CODE OF GOOD PRACTICES IN FISCAL TRANSPARENCY (2007); IMF PLAIN ENGLISH TAX LAW DRAFTING (Feb. 25, 2008); World Bank, <http://www-wds.worldbank.org> (searching World Bank Documents and Reports, Law and Development).

²¹⁷ Aspects of legal systems may need to address the privatization of resource industry, corruption-free taxes/tariffs, and transparency in government regulation. See Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 Hum. Rts. Q. 687, 704(2004).

b. Facility Construction

Facility construction tasks prompt the ROL practitioner to identify the minimum requirements for building and supplying the physical infrastructure to support a ROL mission. The SFROLO calls on the practitioner to gather and analyze data in order to specify numbers of court houses, confinement facilities, local government offices, or transportation mechanisms needed for minimum implementation of legal actions. Then, the ROL practitioner must work with the appropriate groups for the actual physical infrastructure development. The facility requirements would be determined based on population density or geographic environment²¹⁸ and then acted upon.

c. Education/Training Programs

For the ROL to be established, the law must be widely promulgated and thus civic education programs are necessary. Also, it is imperative that those working in the legal system have adequate knowledge of those very systems. The SFROLO's category of work labeled "education/training" include tasks which range from training local judicial officials, to police forces, to the local population on the law and its administration to encourage acceptance and compliance.²¹⁹ This category also includes tasks that use a mechanism for feedback from local leaders and populous.²²⁰ Thus, the ROL practitioner also becomes

²¹⁸ For example, the terrain may dictate the construction of more courthouses because many populations are geographically isolated.

²¹⁹ See e.g. Christine Mary Pagen, INTERNATIONAL AID AS INFORMAL EDUCATOR: EXPLORING POLITICAL ATTITUDES AND ENGAGEMENT IN SOUTHERN SUDAN, 8 & 12 (2010) (arguing that the people in southern Sudan learn about democracy and human rights from their interactions with aid organizations and such organizations should see themselves as an "educative force or tool in the process of post-conflict political development").

²²⁰ In this way, the ROL practitioner is also being educated on the needs of the populous and aids in the way laws are implemented so that they suit the local culture and needs (and are strictly not a U.S. product) and enhance legitimacy.

educated on the view points of the local population.

C. Application

The SFROLO is a framework created to provide standardization for USG ROL operations. It is a product meant to address the issues discussed in Part II. Lack of a common definition or approach has hindered interagency coordination and individual practitioners' understanding of their mission. As discussed in Part IV, to accomplish ROL, an inherently difficult enterprise, USG agencies would be best equipped if they used a common interdisciplinary approach. This approach should have a standard model which applies to all USG ROL practitioners; it should be directed for use by the S/CRS.²²¹ This thesis argues that USG leaders should and would accept such an approach because the current ad hoc method is not gaining the desired results. Furthermore, as the lead agency, the DoS has the authority to dictate a common methodology and the DoD has shown support DoS leadership. Finally, the S/CRS was created for such a time as this. Therefore, if the S/CRS does exert its supervisory role and adopts the SFROLO, or something like it, in order to provide unity of effort for ROL operations, how would it work?

The SFROLO is not an instruction manual to provide knowledge about laws or the administration or enforcement of laws. Practitioners would still be required to gain proficiency through institutional training or self-study. However, it does provide the ROL practitioners with a model from which to identify training needs and to use while working in conjunction with other agencies.

²²¹ See *supra* Part V.

Rule of Law practitioners would apply this framework using a cyclical analysis process and a linear process for tasks. A cyclical analysis process requires the practitioner to conduct the initial analysis and then relay the findings. The strategic planners would then gather all the data from the reports, receive a full picture of the operating environment, and develop appropriate ROL strategies. As these strategies are implemented, the quarterly reporting requirements of the SFROLO require the data collection and assessment task to be revisited. Thus, the analysis process goes through a continuous cycle of data collection, analysis, and application.

The linear process approach to the tasks means that the practitioner will address each task during the corresponding phase of the operation. The ROL practitioner would then embark on the difficult mission of completing the tasks. Many of these tasks are ongoing projects and many may be outside the comfort zone of the practitioner.²²² The three task lists which comprise the SFROLO task matrix are designed to be executed simultaneously in order to create an interdisciplinary approach. The practitioner would compare their analysis of their operating environment against the tasks in each of the three categories. During the comparison, the practitioner will realize that not every task will be applicable to every situation. If during the analysis or the strategic planning, ROL practitioners identify that a particular task is unnecessary, it obviously will not be conducted.

For example, there may already be a functioning tax code and collection mechanism in the post-conflict country. Once that has been identified, the remaining tax related tasks

²²² This state is not new as ROL operations are long-term endeavors and are challenging under the best circumstances.

can be disregarded. Other reasons may necessitate a decision to disregard a task. Resources may be scarce and thus strategic planners may chose to focus ROL efforts on the critical situations in the country, thus making a conscious decision to overlook some tasks.

As alluded to, the reporting requirements are also cyclical. The reason for frequent periodic reporting is not simply to measure progress; it is also meant to identify necessary changes to the chosen strategy. If the environment changes, the ROL practitioner, and other strategic planners, should be able to identify whether different tasks need renewed focus. Regardless of a decision to disregard particular tasks, the SFROLO will have its optimal benefit when it is used to conduct ROL operations in a holistic, interdisciplinary manner.

The proposed standardized format for analysis, reporting, and task list could be applicable in different post-conflict states because of its flexibility and because post-conflict states have many issues in common. Throughout this thesis, there are examples of ROL challenges in Afghanistan, Sierra Leone, and Sudan. These countries have some unique problems, but many of the examples demonstrate that they have common challenges which the ROL practitioner would need to address. Since post-conflict states have shared requirements, a standardized framework for ROL operations would provide the USG an efficient method to address these requirements during its ROL operations.²²³

One of the commonalities of post-conflict states is the need for an interdisciplinary

²²³ JAMES DOBBINS, ET AL, *THE BEGINNER'S GUIDE TO NATION-BUILDING* 186-188 (RAND Corp., 2007) (The governing body must establish financial controls such as national funds, certification of goods, and contract transparency for the public dealings.). *See also* U.S. DEP'T OF ARMY, *FIELD MANUAL 3-07, STABILITY OPERATIONS* para. 3-62 (Oct. 2008). For the essential tasks, the Army has outlined to support institutions for the development of local businesses and the World Bank has a procurement manual that can be useful for these projects and Army doctrine does provide some guidance. *Id.*

approach to ROL development. Despite major institutions' recognition that ROL has an economic aspect, "it is rather surprising that the majority of rule of law programmes and projects implemented in post-war societies ha[ve] a tendency to focus almost exclusively on criminal justice, while neglecting the broader role played by law in a reconstruction process."²²⁴ Despite these calls to action, economic development in a legal context has curiously remained absent from the standard "rule of law menu."²²⁵ The SFROLO expands the ROL "menu" and addresses many of these issues. The standardized approach requires the analysis of the capacity and laws in the economic legal sector and administrative law sector as well as the penal sector. The proper role for a holistic approach to the ROL begins during the initial response phase of stability operations, as there will never be enough courts, cops, or corrections to solve the issues of most post-conflict states.²²⁶ The SFROLO shifts practitioners from an ad hoc approach and requires them to make a holistic analysis of the ROL in a country and then address the needs in a comprehensive way.

Therefore, the proposed SFROLO offers more than mere lists to identify necessary

²²⁴ Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12, J. OF CONFLICT & SECURITY L. 65, 73 (2007).

²²⁵ *Id.* at 70 (arguing that in the "broader realm of statebuilding" practitioners have acknowledged and addressed the role of economic failures in creating conflicts. However, ROL practitioners do not seem to have addressed this vital area in their processes and plans; "[i]ssues concerning the protection of social and economic rights and control of the executive power are generally left out of the statebuilding and rule of law equation."). *See also* Major Christopher E. Martin, *Sovereignty, Meet Globalization: Using Public-private Partnerships to Promote the Rule of Law*, 202 MIL. L. REV. 91, 112 (2009). Major Martin states rule of law is good for business. *Id.* His statement makes sense in the respect that an essential element of ROL is that the population can plan their future actions based on a reliance on consistent, promulgated laws. This is true for commercial laws as well as penal laws.

²²⁶ FM 3-07, *supra* note 168, para. 2-42 (Economic activity and stability are directly tied to good governance, which are both a prerequisite and a decisive factor in ROL operations and in completing a stability operation.).

tasks.²²⁷ It provides a framework that addresses different categories of tasks that practitioners may inadvertently ignore or unwisely delay. This interdisciplinary approach also ensures that the SFROLO is not only applicable to DoD ROL practitioners who usually are focused on penal system reforms,²²⁸ but also applicable to the non-DoD actors in ROL operations which address the other categories in their work.²²⁹

A notable example to support the simultaneous application of all three task lists is the result of the regulation of the diamond trade in Sierra Leone.²³⁰ The major reforms to regulate the diamond industry occurred before there was peace and stability and actually contributed to the end of the civil war. Regulations removed an income source from belligerents and insulated income of legitimate businessmen.²³¹ This provides an excellent example of how economic legal issues must be addressed by ROL operations with a sense of urgency. Using an interdisciplinary approach, like the proposed SFROLO, would help practitioners to recognize similar opportunities to promote the ROL with a variety of legal reforms.

VI. Applying Past Lessons for Future Success

²²⁷ DOBBINS ET AL., *supra* note 223, at 74-78 (Then, there must be a plan for recruiting and training judges and lawyers, building the infrastructure, providing civil and criminal courts, improving the corrections system, establishing a ROL culture, and supporting transitional justice.).

²²⁸ Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a new Strategic Paradigm*, 45 Army Law. 45 (2007).

²²⁹ E.g. USAID.

²³⁰ *See infra* Part VI.

²³¹ Like opium production in Afghanistan, the illicit diamond trade has funded all sides of the conflict. However, oil profits have been exclusively used by the government of Sudan to fund the civil war.

The SFROLO, or a similar document, will succeed in assisting ROL practitioners in accomplishing their missions because it has a basic format but at the same time directs the practitioner to address the difficult challenges in developing the ROL. It does not shy away from important legal reforms that must occur in a post-conflict state. It requires extensive analysis and the development of legal structures which will improve accountability, access to legal process, and trust in the law. Below are several examples of the types of tasks directed by the SFROLO and examples of how these tasks could be applied in different post-conflict states. The examples will demonstrate that a holistic approach has the potential to greatly further the development of the ROL.

A. Building a Home for Law

Post conflict countries often have massive destruction of their infrastructure as a result of the war. The damage is not limited to military targets, but pervades civil society. For example, in Afghanistan, the Soviet tactics destroyed villages and farmland.²³² The agricultural industry, on which much of the population relied, was crippled as a result of the destruction of transportation routes, irrigation systems, and arable farmland.²³³ In order for the ROL to be developed in a post-conflict country, the buildings and other infrastructure must be repaired or constructed. Otherwise, there will not be any courtrooms for trials, police stations for law enforcement, or government buildings to administrate from.

²³² See ALI AHMAD JALALI & LESTER W. GRAU, *THE OTHER SIDE OF THE MOUNTAIN: MUJAHIDEEN TACTICS IN THE SOVIET-AFGHAN WAR* (Foreign Military Studies Office, 1995). Accord ANTHONY ARNOLD, *THE FATEFUL PEBBLE* 89 (1993) (Soviets used anti-personnel mines indiscriminately; farms, villages, and roads were littered with active mines.).

²³³ Maseh Zarif, *Counter-narcotic strategy in Afghanistan: Internal implications and external lessons* 6 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

The proposed SFROLO responds to these needs in the analysis and task list sections.²³⁴ During the initial analysis conducted by the ROL practitioner, the SFROLO requires the practitioner to assess the facilities available for the criminal justice system, the civil courts, and government facilities. After these assessments are conducted, planners can use that information to determine priorities of work and identify the group to assist with particular projects.

This information is vital as it would allow decision-makers to understand if they had challenges like those faced by the post-conflict states, Sierra Leone and Southern Sudan. A major issue facing Sierra Leone's development of a functioning criminal justice system is that the court system is almost exclusively confined to major cities. As a result, the justice sector only serves the urban elite.²³⁵ In addition, Sierra Leone's infrastructure problems are not limited to the penal system and have affected government administration.²³⁶

Southern Sudan has had extreme challenges in creating courts, prisons, and police stations.²³⁷ The new country lacks adequate roads which makes travel very difficult and

²³⁴ See *infra* app. at para.s 3.a.i.1, 3.a.ii.1, & 3.a.iii.1.

²³⁵ Richard Sannerholm, *Legal, Judicial and Administrative Reforms In Post-Conflict Societies: Beyond The Rule Of Law Template*, 12, JOURNAL OF CONFLICT & SECURITY LAW 72 (2007) (explaining that due to a lack of physical infrastructure and staffing shortcomings, the rural population often must go to the cities in order to have an issue resolved in a formal court. Otherwise, they rely on the traditional methods of justice conducted by tribal leaders, as opposed to the federal government. As a result, only those living in the cities are able to have access to the court system.).

²³⁶ WORLD BANK, JOINT COUNTRY ASSISTANCE STRATEGY FOR THE REPUBLIC OF SIERRA LEONE FOR FY10-FY12 at 6 (2010) (March 23, 1991–approximately 18 January 2002) (Current efforts of the World Bank, IMF, and other international organizations exist to assist Sierra Leone's government in improving its civil service and administration.); WORLD BANK INTERNATIONAL DEVELOPMENT ASSOCIATION, SIERRA LEONE: FROM CONFLICT TO DEMOCRATIC RULE 1 (2009); IMF, *Sierra Leone: Ex Post Assessment of Longer-Term Program Engagement*, IMF Country Report No. 10/371. (December 2010).

²³⁷ Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2006).

facilities with consistent power, much less computers are very rare.²³⁸ These infrastructure needs remain significant challenges to the development of ROL in Southern Sudan.²³⁹ It is likely the USG will conduct ROL operations in countries with situations like Southern Sudan and Sierra Leone. It is important that the infrastructure shortcomings be identified quickly so they can be addressed.

The SFROLO task matrix follows through on the analysis by requiring the practitioner to address the infrastructure shortfalls. Each category of the interdisciplinary task list contains tasks to “[r]ehabilitate or construct necessary facilities.” The SFROLO contains additional infrastructure tasks to include “[a]ssure resources for personnel, supplies, and equipment to deliver essential local services” and “[r]estore essential local public services.”²⁴⁰ Beyond ensuring there are structures for personnel to work in, the building must be supplied with the necessary materials to accomplish its mission. These supplies can range from paper and pens to computers and communications equipment. The above examples of Sierra Leone and Southern Sudan support the inclusion of these tasks in the SFROLO.

B. Codes, Codes, and More Codes

One of the major challenges in implementing the ROL in a post-conflict state is that

²³⁸ Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2006). *See also* THE WORLD BANK, SUDAN THE ROAD TOWARD SUSTAINABLE AND BROAD-BASED GROWTH, 5 (2009) (“Sudan’s capital city consumes nearly a third of the total electricity produced in the country, while less than 7 percent of households in the country have access to the national grid. There are eight bridges over the Nile around the Khartoum city, while the remaining 1,500 kilometer stretch of the river has only eight such bridges, and only one in Southern Sudan.”).

²³⁹ Christina Murray & Catherine Maywald, *Subnational Constitution-Making in Southern Sudan*, 37 RUTGERS L.J. 1203 (2006).

²⁴⁰ *See infra* app. at Governance Tasks.

the local laws may be very different than what the practitioner knows or have wide variance in the country itself. When this occurs, it is imperative that the practitioner conducts an analysis and identifies the local sources of laws and works with the local population to create a legal system that is culturally acceptable and complies with international law. These sorts of ROL environments are extremely challenging and the SFROLO framework would help guide the ROL practitioner through these difficult tasks by providing structure to the process.

For example, the laws of Afghanistan come from three distinct sources: secular law: modeled after the Napoleonic system, Pashtunwali tribal law, and Shari'a. A single comprehensive code or system integrating these sources was never developed.²⁴¹ Justice for peasants and those in the rural areas has fallen on traditional tribal leaders using traditional dispute resolution systems.²⁴² This situation of multiple legal systems is not unique to Afghanistan. Southern Sudan has an even more complicated legal environment. The current legal system in Southern Sudan is based on multiple sources of authority; there are over sixty tribal systems of justice in the country.²⁴³

In the analysis part of the SFROLO, the ROL practitioner is called on to conduct an extensive assessment of the promulgated law of the country. With this information, several courses of action can be determined. Those courses of action could be a decision to abolish individual laws or complete codes, to a decision that only slight modification of particular

²⁴¹ *Id.*

²⁴² Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12, *Journal of Conflict & Security Law* 65, 65, 66 (2007).

²⁴³ United States Institute of Peace, *Customary Law and Criminal Justice in South Sudan*, <http://www.usip.org/programs/projects/customary-law-and-criminal-justice-south-sudan>.

procedures will be necessary. If faced with a case like Southern Sudan, for example, a practitioner would have reported that there are sixty different tribal justice systems enabling ROL strategic planners to work on a plan to integrate these systems to provide a coherent and legitimate national penal legal system. As the strategic planning occurs, the practitioner will begin working from the ROL essential task list to execute their assigned mission.

Beyond the initial analysis, the reviewing process is also a task in the Initial Response phase of the matrix for both the Penal Legal System tasks and the Economic Legal Systems tasks.²⁴⁴ The SFROLO matrix includes many tasks that require the ROL practitioner to develop the ROL by identifying areas of the local law that need to be modified or abolished. An example of a post-conflict state with laws that had to be modified to develop the ROL is Afghanistan. In order to comply with international legal norms, much of the U.S. military's ROL effort in Afghanistan has concentrated on the criminal justice system and the required modifications.²⁴⁵

The SFROLO also directs the practitioner to facilitate the creation of penal, commercial, and administrative codes, as necessary.²⁴⁶ Writing new laws is difficult, and it would not be done immediately. The SFROLO responds to this reality by dividing tasks

²⁴⁴ See *infra* app. at Penal Legal Systems Tasks & Economic Legal Systems Tasks (e.g. “Review current laws and resolve questions of applicability,” “Evaluate civil legal system procedure”).

²⁴⁵ Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, ARMY LAW. 53 (July, 2007) (stating the Combined Forces “directed military personnel to seek out realistic, affordable, and practical justice sector improvements” focus on capacity building “linking key elements of rule of law, including courts, prisons, police, and lawyers”, and indoctrinating “both Afghan government officials and the population with the firm belief in the rule of law”).

²⁴⁶ See *infra* app. at Penal Legal Systems Tasks & Economic Legal Systems Tasks (e.g. “Enact interim legal codes and procedures permitted by international law,” “Abolish provisions incompatible with international standards of human rights,” and “Reform administrative law”).

among the phases and does not require the ROL practitioner to create the new codes on their own. The task “[f]acilitate discussions leading to new codes” underscores this point.

Another example is the tasks affiliated with the development of property laws. The table below is an excerpt from the matrix and it shows that the tasks build on each other during different phases of the operation.

Initial Response	Transformation	Fostering Sustainability
Evaluate existing laws pertaining to land rights, registration of the property, and collateralization of movable and immovable property	Draft laws and codes to establish or strengthen property rights including customary or traditional concepts where appropriate	

The SFROLO task matrix contains tasks that are far beyond the creation of courts, cops, and corrections; especially in the Economic Legal Systems task list. These tasks, like the rest of ROL, can be extremely challenging. And if the ROL practitioner is not trained in the area of law being addressed, the challenge is heightened.²⁴⁷ But, the standardization of the framework and the tasks being broken down into categories and phases should assist the practitioner in identifying the local need and reforming accordingly. A prime example, shown in the below excerpt, would be the tasks associated with taxation and fiscal powers of the host-nation’s government.²⁴⁸

²⁴⁷ The ROL practitioner is expected to do what doctrine and common sense would require, study the law and consult with experts to accomplish the mission.

²⁴⁸ The individual practitioner may not have extensive experience in tax law but there are many resources that he may draw on to implement the necessary laws. The IMF has created the IMF Code of Good Practices on Fiscal Transparency and Plain English Tax Law Drafting which are available through the IMF web site. IMF CODE OF GOOD PRACTICES ON FISCAL TRANSPARENCY (2007); IMF PLAIN ENGLISH TAX LAW DRAFTING (Feb.

Initial Response	Transformation	Fostering Sustainability
Assess the existing taxation laws and fiscal powers/procedures and evaluate the legal framework	Propose fiscal and taxation laws subject to public debate	Laws concerning taxes accessible, clear, and understandable

The SFROLO addresses taxation, fiscal powers, and government relationships with financial institutions because they can be vital for developing good governance and promoting ROL in all aspects of society. Using Southern Sudan’s example again; the lack of a coordinated fiscal policy among various government entities can stifle legal private enterprise and create incentives for criminal behavior, undermining other ROL efforts.²⁴⁹ On a smaller scale, many international actors, along with the United States, are attempting to assist Afghan farmers in accessing much needed credit in order to reduce their reliance on poppy crops.²⁵⁰ The proposed SFROLO specifically directs the ROL practitioner to address such issues during the initial response and transformation phases. These tasks are prudent because they could provide incentives for the local population to move away from illicit activities—poppy farming—to legitimate economic activities.

25, 2008). Practitioners can easily access documents such as these to carry out the required tasks. The requirement to address tax issues should also provide an impetus for high level ROL planners to give theater-wide guidance to subordinates on how the tax laws shall be implemented.

²⁴⁹ A 2008 study showed that private sector productivity remains alarmingly low due to “high transaction costs, poor market institutions, a lack of infrastructure, and high administrative barriers and transaction costs”. THE WORLD BANK, SUDAN THE ROAD TOWARD SUSTAINABLE AND BROAD-BASED GROWTH, 54 (2009) (Without major reform in the government’s approach to the private sector and fiscal policy, there is not a lot of hope for development and accompanying stability in Sudan.).

²⁵⁰ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

C. A Time for Healing and Resolution

Often when attempting to establish a legitimate penal system, the ROL practitioner must address the crimes which occurred during the conflict as well as current criminal behavior. In Sierra Leone, for example, there are ongoing efforts to address past criminal conduct and to bring enduring justice.²⁵¹ The government of Sierra Leone has been faced with many challenges since 11 August 2007, when elections were held for the first time in the absence of UN peacekeepers. Foremost; it has attempted to heal old wounds, administer justice with a very limited judicial presence outside the capital.²⁵²

Separate efforts include the prosecution of past crimes, reintegration of displaced and injured people, and human rights education of the public.²⁵³ United Nations agencies, in cooperation with the government, launched a nationwide consultation campaign in 2004 in order to create national legislation for the implementation of the Convention on the Elimination of All forms of Discrimination Against Women.²⁵⁴ Additionally, a Human Rights Commission was established in 2004.²⁵⁵ The Commission was formed to address the

²⁵¹ Chairman Peacebuilding Commission, *Outcome of the Peacebuilding Commission High-level Special Session on Sierra Leone*, ¶ 4, U.N Doc. PBC/3/SLE/6 (June 10, 2009).

²⁵² *Building the roads to the future*, The Telegraph Group Limited, London, October 19, 2010.

²⁵³ NATALIE MANN & BERT THEUERMANN, CHILDREN AND THE TRUTH AND RECONCILIATION COMMISSION FOR SIERRA LEONE, (UNICEF, 2001) (The Truth and Reconciliation Committee (TRC) has worked to prosecute those who abused vulnerable persons during the war and to mitigate the punishment of children who were forced to commit atrocities.).

²⁵⁴ Richard Sannerholm, *Legal, Judicial and Administrative Reforms In Post-Conflict Societies: Beyond The Rule Of Law Template*, 12, JOURNAL OF CONFLICT & SECURITY LAW 85 (2007).

²⁵⁵ THE HUMAN RIGHTS COMMISSION OF SIERRA LEONE ACT, 2004 (Sierra Leone) (The Commission follows the general functions of other established commissions, and has retained a rather wide set of powers, including the right to enforce the attendance of witnesses and examine them on oath, compel the production of documents, issue orders to enforce decisions, and refer to the High Court for contempt an individual who refuses to comply with a decision.). See also Richard Sannerholm, *Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template*, 12, Journal of Conflict & Security Law 65, 84 (2007).

recognition and prosecution of many human rights violations which occurred during the civil war and to encourage the collective healing process.²⁵⁶ It has been acknowledged that this Commission, as well as other efforts of administering justice, has been an important step in creating a formalized national capacity to address human rights issues.²⁵⁷ Many see such human rights initiatives and the internalization of human rights by the population to be the heart of ROL operations.²⁵⁸

The SFROLO is structured in a way that enables the ROL practitioner to facilitate the prosecution of past crimes as well as build effective institutions for the future. It mandates the preservation of evidence of past crimes and at the same time implements procedures to prosecute both contemporary and past behavior. Specific tasks which facilitate future prosecution of past crimes issues include: “[l]ocate and safeguard key witnesses, documents and other evidence related to key ongoing or potential U.S. investigations and prosecutions;” “[i]dentify, secure and preserve evidence of war crimes, crimes against humanity, corruption, and transnational crimes including terrorism, organized crime, financial crimes, trafficking in humans and narcotics;” and “[i]dentify and detain perpetrators of these offences.”²⁵⁹

D. Commercial Codes are Laws Too

To follow an interdisciplinary approach, ROL efforts must address the laws that

²⁵⁶ Stacy Elmer, *Health Disparities and Historical Injustice In Sierra Leone: A Case For Reparations?*, 57 U. KAN. L. REV. 971, 974 (2009).

²⁵⁷ Sannerholm, *supra* note 224, at 85.

²⁵⁸ *Id.* at 84.

²⁵⁹ *See infra* app. at Penal Legal Systems Tasks.

affect the local economy and work to promote growth of legal enterprises. The SFROLO requires an analysis and development of commercial and financial codes that can assist the ROL practitioner in setting the conditions for success in post-conflict states. Afghanistan's struggle with poppy production provides a case study on how lack of access to credit can undermine the ROL.

Approximately 85% of Afghans are dependent on agriculture or agribusiness for their livelihoods.²⁶⁰ The destruction of essential transportation systems, agricultural assets, and public finance structures has thus created a crisis in the agribusiness of Afghanistan.²⁶¹ A severe dearth of opportunity for the re-establishment of traditional agricultural methods exacerbated problems encountered by an illiterate population with limited access to public services and resources.²⁶² In this situation of anarchy and poverty, "the cultivation of opium in Afghanistan spread very rapidly over the last ten years and now occurs in all 34 provinces."²⁶³ As a result of the growth in local production, Afghanistan currently is the supplier for 93% of the global opiate market,²⁶⁴ an outgrowth of its increase during the wars

²⁶⁰ U.S. Department of State Bureau of South and Central Asian Affairs, Country Profile: Afghanistan (March 26, 2010), <http://www.state.gov/r/pa/ei/bgn/5380.htm>.

²⁶¹ CHRISTOPHER WARD & WILLIAM BYRD, AFGHANISTAN'S OPIUM DRUG ECONOMY (World Bank, SASPR Working Paper Series, December 2004); BARNETT R. RUBIN, THE POLITICAL ECONOMY OF WAR AND PEACE IN AFGHANISTAN (June 21, 1999), http://www.institute-for-afghan-studies.org/ECONOMY/political_economy_of_war_peace.htm. An earlier version of this paper was presented at the meeting of the Afghanistan Support Group, Stockholm, Sweden, 21 June 1999.

²⁶² Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons 10 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

²⁶³ CHRISTOPHER WARD & WILLIAM BYRD, AFGHANISTAN'S OPIUM DRUG ECONOMY 1 (World Bank, SASPR Working Paper Series, December 2004).

²⁶⁴ Zarif, *supra* note 233, at 10.

and violence.²⁶⁵ Eradicating poppy production is not simply a matter of compelling the farmers to stop farming poppies through criminal sanctions. There are many economic factors, virtually forcing farmers to participate in the opium industry, and it has become deeply imbedded in some areas of Afghanistan.²⁶⁶ Seventy-five percent of the poppy trade profits do not go to the farming community.²⁶⁷ The traffickers are the primary beneficiaries of the opium trade²⁶⁸ and they create an insurgent network which leverages loosely guarded borders and corrupt government officials to perpetuate the business.²⁶⁹ In short, the economics of the poppy industry directly undermine ROL efforts in Afghanistan.

The SFROLO specifically addresses the need for economic law development through its interdisciplinary data analysis and task matrix. The tasks associated the Economic Legal System are designed to meet the ROL development needs of post-conflict states that have economic incentives for criminal behavior, like Afghanistan. Examples of these tasks include: “Evaluate regulatory framework of banking system;” “Provide immediate credit including access to micro and small and medium enterprises (SME)

²⁶⁵ BARNETT R. RUBIN, THE POLITICAL ECONOMY OF WAR AND PEACE IN AFGHANISTAN (June 21, 1999), http://www.institute-for-afghan-studies.org/ECONOMY/political_economy_of_war_peace.htm (“The production of opium was related to one of the major macro-economic changes induced by the war: a rapid increase in the supply of money, which, combined with the destruction of the much of the subsistence economy, induced an apparently large, if as yet unmeasured, monetization of economic and social relations, as well as hyper-inflation.”).

²⁶⁶ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, 7 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

²⁶⁷ *Id.* at 26 (The annual farm-gate value of poppies in Afghanistan is \$1 billion but that compares to a total \$4 billion export value of opiates to neighboring countries.).

²⁶⁸ BARNETT R. RUBIN, THE POLITICAL ECONOMY OF WAR AND PEACE IN AFGHANISTAN (June 21, 1999), http://www.institute-for-afghan-studies.org/ECONOMY/political_economy_of_war_peace.htm.

²⁶⁹ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, 29-32 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

lending;” and “Develop on-going credit programs including access to micro and SME lending.”²⁷⁰ The SFROLO also contains tasks to address licenses, contract enforcement, and other economic laws that can encourage development of legal industries in post-conflict states.

Afghanistan is not alone among post-conflict states for its need for commercial legal reform in order to develop the ROL. The example of the diamond industry in Sierra Leone demonstrates the application of the economic reforms, like the ones contained in the SFROLO, can actually enhance the stability of a post-conflict state regardless of the strength of the penal system. International and non-government groups fanned the flames of global public outrage regarding atrocities occurring in Sierra Leone during the civil war being funded by the illicit diamond trade.²⁷¹ Many activists placed pressure on international organizations and the diamond industry to create mechanisms to prevent the purchase of diamonds funding violence.²⁷² In order to distinguish “blood” diamonds from legitimate diamonds, international activists identified the need for a certification system which became

²⁷⁰ See *infra* app. at Economic Legal Systems Tasks.

²⁷¹ ISMAEL JAMES MUVINGI, ACTUALIZING HUMAN RIGHTS NORMS IN DISTANCED SPACES 5-6 (2007) (“While laborers toiled, sometimes at gunpoint in the riverbeds of Sierra Leone and Angola, the diamonds they extracted found their way onto global markets through an intricate web that included rebels, warlords, generals, international corporations, and jewelers ...”). See also Alfred Zack-Williams, *Sierra Leone: The Political Economy of Civil War, 1991-98*, 20 *Third World Q.* 143, 162 (1999); UN, *Conflict Diamonds* (March 21, 2001) <http://www.un.org/peace/africa/Diamond.html>; World Bank, *On the Road to Recovery: Sierra Leone Seeks to Rebrand itself as it Welcomes World Bank President* (January 29, 2010) <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SIERRALEONEEXTN/0,,contentMDK:22455330~menuPK:367842~pagePK:2865066~piPK:2865079~theSitePK:367809,00.html>.

²⁷² Anna Frangipani Campino, *Conflict Diamonds: Sanctions and War*, UNITED NATIONS (March 21, 2001), <http://www.un.org/peace/africa/Diamond.html>. Accord Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 *HUMAN RIGHTS QUARTERLY* 687, 689 (2004); ISMAEL JAMES MUVINGI, ACTUALIZING HUMAN RIGHTS NORMS IN DISTANCED SPACES 1 (2007) (“At its height, the conflict diamonds campaign comprised of a coalition of more than 150 human rights, humanitarian, and faith organization shoes immediate goal was to stop the use of diamonds as a key funding source for violent conflict in African countries.”).

known as the Kimberly Process.²⁷³

The Kimberly Process²⁷⁴ and other initiatives that have created a legitimate market for Sierra Leonean resources serve as an example of how economic regulation can promote the ROL.²⁷⁵ Since the cease fire agreement in 2000, the Government of Sierra Leone has also begun to create economic incentives for legal diamond trade.²⁷⁶ More mainstream efforts toward enhancing the ROL to create economic development have also been made by

²⁷³ ISMAEL JAMES MUVINGI, ACTUALIZING HUMAN RIGHTS NORMS IN DISTANCED SPACES 40 (2007).

²⁷⁴ KIMBERLY PROCESS, FROM CONFLICT DIAMONDS TO PROSPERITY DIAMONDS, <http://www.kimberleyprocess.com> (last visited Mar. 1, 2011) (The Kimberly Process is the product of a series of international negotiations between governments, the diamond industry and NGOs. “It is an international regulatory system of the trade of diamonds developed to eliminate the illicit trade of conflict diamonds... It was launched 2000 and works by imposing extensive requirements on its members to enable them to certify shipments of rough diamonds as ‘conflict-free’.” It has significantly reduced the illicit trade in conflict diamonds and accomplished a significant drop even while the civil war was ongoing.). See also Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 HUMAN RIGHTS QUARTERLY 687, 691 (2004); ISMAEL JAMES MUVINGI, ACTUALIZING HUMAN RIGHTS NORMS IN DISTANCED SPACES 40 (2007).

²⁷⁵ WORLD BANK, JOINT COUNTRY ASSISTANCE STRATEGY FOR THE REPUBLIC OF SIERRA LEONE FOR FY10-FY12 at 2 (2010) (“Sierra Leone is still a country of very high poverty, with an absolute poverty headcount in 2007 of more than 60 percent. Even this figure represents a significant fall of between 6 and 8 percent since the end of the conflict. Given the current global crisis, there are risks that poverty rates may start rising again.”). See also *Building the roads to the future*, The Telegraph Group Limited, London, October 19, 2010 (explaining that “...65 per cent of the population is still engaged in agriculture and the allocation in the national budget for agriculture has risen from two per cent to nearly 10 per cent in three years, while the number of tractors has risen tenfold. As a result of the steps that have been taken, farming is moving from subsistence levels to commercialization.”). Countries with valuable resources like oil and diamonds are often plagued with war and corruption instead of prosperity. These valuable commodities are frequently the cause, or at least sustain, bloody civil wars and abusive governments. Citing a study by World Bank economist Paul Collier, Tamm asserts countries “earning at least a quarter of their GDP from unprocessed commodities” have a higher likelihood of civil war. She supports a new movement that would force governments to provide information about how they manage and distribute the revenues of unprocessed resources. The increased transparency would hopefully result in less embezzlement and corruption and put pressure on leaders of both exporters and importers to self regulate their trade in commodities. Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 HUMAN RIGHTS QUARTERLY 687, 688 (2004). See generally Alberto Dalmazzo & Guido de Blasio, *Resources and Incentives to Reform*, 50 IMF Staff Papers (Palgrave Macmillan Journals, 2003) (asserting resources can hold a country back by creating incentives for leaders/powerful to use the resources for personal benefit and not to develop the country).

²⁷⁶ U.S. Dep’t of State Bureau of African Affairs, Country Profile; Sierra Leone (August 17, 2010), <http://www.state.gov/r/pa/ei/bgn/5475.htm> (explaining that in 2001, the government created a mining community development fund which returns a portion of diamond export taxes to the mining community in order to create incentives for the local population to participate in the legal diamond trade).

various international organizations. Sierra Leone needed a commercial code which permitted free enterprise and equality under the law for economic endeavors, particularly as it related to the diamond industry.

The pattern continues with the example of Sudan. The tragic history of Sudan demonstrates that unregulated economies can create incentives for extreme violence.²⁷⁷ Like diamonds in Sierra Leone, resources can motivate legal or criminal behavior but it is how that industry is regulated through commercial codes that make the difference. These examples demonstrate why the SFROLO, or any other ROL framework, should address commercial laws and regulations.

E. The Separation of Sectors

In addition to containing many essential tasks to assess and promote economic laws that encourage commercial development, the SFROLO contains tasks to develop private sector accountability and development. The tasks direct the ROL practitioner to assist in the separation of private industry from public administration. These tasks are included to encourage the development of private enterprise and to prevent corrupt and abusive governments.²⁷⁸ The need for such tasks can be seen through examples of post-conflict countries such as Sudan. The Sudanese government controlled the country through

²⁷⁷ ISMAEL JAMES MUVINGI, *ACTUALIZING HUMAN RIGHTS NORMS IN DISTANCED SPACES* 194 (2007). Sudan's oil exploration and extraction was conducted through a campaign (with the implicit or direct cooperation of corporations) of displacement of the population residing in the oil rich regions. Villagers would be brutally forcefully cleared from the area using proxy militias and Sudanese military assets. *Id.*

²⁷⁸ See *infra app.* at Economic Legal System Tasks (Examples of tasks that seek to encourage the separation of the public and private sector are: "Assess government relationships with private entities develop transparent relations IAW promulgated rules;" "Identify obstacles to private sector development;" and "Prevent capture of proceeds from natural resources and commodities by factions.").

cronyism, and the result was a history rife with human rights abuses²⁷⁹ which was sustained by a single commodity; oil.²⁸⁰ As with diamonds in Sierra Leone, the discovery and exploitation of oil has been a double-edged sword for Sudan.²⁸¹ Sudan's heavy dependence on oil revenue and its abuse of people was caused by individual decisions of government leaders and by the system which regulates the economy. The oil sector is almost entirely owned and operated by the government.²⁸² This huge public sector has both motivated and enabled widespread abuse and corruption.²⁸³ The related aspects of the SFROLO is meant to create an interdisciplinary approach that is able to assist practitioners develop the ROL by

²⁷⁹ UN Office for the Coordination of Humanitarian Affairs, *Sudan: Feature – Ecological aspects of the conflict*, March 17, 2003, www.globalsecurity.org/military/library/news/2003/mil-030317-irin06.htm (“The discovery of oil has assumed critical importance in the Sudanese conflict, adding a new dynamic that had even more severe humanitarian consequences, with civilians forcefully removed from their homes to pave the way for oil exploration.”).

²⁸⁰ Ingrid J. Tamm, *Dangerous Appetites: Human Rights Activism and Conflict Commodities*, 26 HUMAN RIGHTS QUARTERLY 687, 696 (2004) (“In 1999, the government of Sudan completed a 900-mile pipeline bringing petroleum north to Port Sudan. Today, oil is a central source of revenue, allowing Khartoum to nearly double its defense spending.”). Conversely, the existence of oil does not automatically make Sudan destined to be a rogue state. It harbored Osama Bin Laden and conducted many human rights abuses before it started exporting oil. KEITH CRANE ET AL, IMPORTED OIL AND U.S. NATIONAL SECURITY 43 (RAND 2009). *See also* ISMAEL JAMES MUVINGI, ACTUALIZING HUMAN RIGHTS NORMS IN DISTANCED SPACES 268-270 (2007).

²⁸¹ As well as being a motivator for increased violence, Sudan has fallen into a familiar pattern associated with the discovery and exploitation of commodities. There has been a shrinking on non-oil tradable goods sector within Sudan which has severely weakened its long-term growth possibilities. However, this is not an inevitable scenario, with sound institutions, resource rich countries have been able to transform their economies into diverse and sustainable systems. Unfortunately for Sudan, it has a long history of violence and corruption to overcome. THE WORLD BANK, SUDAN THE ROAD TOWARD SUSTAINABLE AND BROAD-BASED GROWTH, 29 (2009).

²⁸² World Bank, Sudan *supra* note 281, at 57 (observing that the oil sector currently accounts for 60 percent of total government revenues).

²⁸³ *Id.* at 4 (asserting that in the last ten years of oil exporting, the public sector's share in the GDP has increased from 6 to 40 percent). That is not to say that private companies have not invested in oil extraction in Sudan. Many western companies were integral in the exploration and development of Sudan's oil fields. Then, when pressured to leave due to implications in human rights abuses, Chinese, Malaysian, and Indian companies have heavily invested in Sudan's oil extraction. AMBER LINEA MOREEN, OVERCOMING THE “RESOURCE CURSE” PRIORITIZING POLICY INTERVENTIONS IN COUNTRIES WITH LARGE EXTRACTIVE INDUSTRIES 144 (RAND Corp., 2006) (explaining western countries withdrew because of pressure to not conduct business with the Sudanese due to human rights concerns, whereas other countries have been prepared to look the other way and place little pressure on the government of Sudan).

triggering analysis and action that address the economic incentives for abusive governments.

F. Addressing Corruption

Besides exploiting natural resources for personal gain or abusing the populous using the profits from those resources, there are other ways a government can hinder the development of the ROL. A primary concern for practitioners is making the government accountable to the law by addressing corruption. Effective governing institutions free of corruption are essential to ROL operations. The SFROLO essential tasks require the practitioner to clearly specify the role of government and to assist in the creation of new systems, when necessary.

For example, during the initial response phase, the SFROLO requires an assessment and development of a plan for the appropriate size of a civil service corps and the vetting of potential government employees.²⁸⁴ Once that task is accomplished and the operation has moved on to the transforming phase, the ROL practitioner would embark on the next set of related tasks. Those tasks are training the indigenous civil service employees and developing mechanisms for transparency and accountability.²⁸⁵

Government corruption further compounds the challenges of developing the ROL. Like the economic aspect of ROL operations, tasks involving government administration

²⁸⁴ See *infra* app. at Governance Systems Tasks (e.g. “Determine structure and affordable size of civil service to meet ongoing and future needs” and “Develop transparent process to vet officials and employees of state owned enterprises”).

²⁸⁵ See *infra* app. at Governance Systems Tasks (e.g. “Select and train indigenous civil servants,” “Review skills of government officials,” & “Develop laws and administrative procedures promoting accountability and transparency across government institutions and in the private sector”).

must be started in the initial response phase of a stability operation because they encourage both the general population and government officials to refrain from criminal behavior.

This reality has been born out in Afghanistan where corruption is rampant at the national and local levels. The establishment of the Transitional Government without controls in place to combat corruption resulted in an increase in cronyism and corrupt governing.²⁸⁶ Rule of law efforts have been hindered by the lack of effective systems in place to create transparency of the government officials' actions and the lack of political will to prevent individuals from working for their own interests.²⁸⁷ The warlords, opium dealers, and insurgents have all benefited from this environment.²⁸⁸

Corruption specifically undermines the ROL goal that government actors are equally accountable under the law as citizens, and it prevents the development of predictable and efficient administration (or regulation) of commercial entities. Because corruption has such a significant impact on the development of the ROL, operations should address laws and regulations that effect governance simultaneously with penal and economic legal systems.

The primary cause of the violence in Sierra Leone during the 1990s was the

²⁸⁶ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, 17 (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

²⁸⁷ The DoS is addressing the need to encourage the political will to end corruption in the Afghan government through its ROL strategy being used by the U.S. Embassy in Afghanistan. U.S. GOVERNMENT RULE OF LAW STRATEGY FOR AFGHANISTAN (on file with author) (“Attempts to build faith in Afghan executive and justice sector officials by helping the state justice system to combat corruption that undermines the state, and other serious crimes;” “Leverage diplomatic, intelligence and other assistance tools to develop the political will (within the Afghan government, the U.S. government and the international community) to prosecute and/or lawfully remove high-profile corrupt justice sector officials from office”).

²⁸⁸ Maseh Zarif, Counter-narcotic strategy in Afghanistan: Internal implications and external lessons, (2008) (unpublished M.A.L.S. dissertation, Georgetown University) (on file with Proquest Dissertations and Theses).

destruction of civil society under corrupt rule.²⁸⁹ During that time, government actors introduced a network of client-patron relationships and developed an economy based on personal gain to individuals working in the government institutions, rather than for the good of the nation.²⁹⁰ By developing an economy based on party loyalties, entrepreneurship was practically non-existent. The client-economy was enforced by an oppressive state apparatus which “destroyed the enterprise of the people and their will to be governed.”²⁹¹ The Stevens administration did next to nothing to strengthen Sierra Leone as a nation. Instead, he used his power to enrich himself and those who supported him.

Not unlike Sierra Leone’s experience, the use of the petroleum-based resources by government officials for personal gain instead of for the nation of Sudan became common.²⁹² This graft resulted in stealing of revenue (or land) and sabotaging activities of disenfranchised groups.²⁹³

The corruption of a government supported by the United States has been an ongoing challenge for ROL efforts in Afghanistan. Members of many USG agencies, to include the

²⁸⁹ Alfred B. Zack-Williams, *Sierra Leone: The Political Economy of Civil War, 1991-98*, THIRD WORLD QUARTERLY, Vol. 20, No. 1 Complex Political Emergencies 143 (Feb, 1999).

²⁹⁰ Alfred B. Zack-Williams, *Sierra Leone: The Political Economy of Civil War, 1991-98*, THIRD WORLD QUARTERLY, Vol. 20, No. 1 Complex Political Emergencies 144 (Feb, 1999).

²⁹¹ *Id.*

²⁹² THE WORLD BANK, *SUDAN THE ROAD TOWARD SUSTAINABLE AND BROAD-BASED GROWTH 4* (2009). As is a common tendency when there are high commodities revenues, individuals appropriate the wealth generated by the resources. There is evidence of this in Sudan from the oil revenues themselves but also in civil construction and public infrastructure projects indirectly related to oil production. *Id.*

²⁹³ *Id.*

U.S. military, have sought to stem the corruption through training and political pressure.²⁹⁴

Through concerted and unified efforts during the initial establishment of transitional governments, some of these ROL challenges may be avoided in future operations. The SFROLO is merely a model that lists tasks for ROL practitioners to accomplish and does not provide an immediate solution to these sorts of challenges. However, it could unify the effort of all USG agencies to mitigate the challenges of corruption in a developing government by focusing efforts on key ROL tasks during the initial stages of the operation.

G. A Good Bureaucracy?

In addition to preventing corruption, it is important the government be competent to function and gain the trust of the population. The establishment of a working civil service corps is necessary to a functioning administrative law, or governing system. The need for competent civil servants for effective governance is akin to the need for trained law enforcement for penal systems. Again, example countries bear out the fact that a weak civil service can undermine ROL efforts. The government of Afghanistan suffers from systemic problems of fragmented administrative structures and difficulty in attracting and retaining skilled professionals with management and administrative experience.²⁹⁵

Similar to the shortage of criminal courts, there is a shortage of trained regional

²⁹⁴ SEC'Y OF STATE, ET AL, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN REPORT TO CONGRESS IN ACCORDANCE WITH THE 2008 NATIONAL DEFENSE AUTHORIZATION ACT 38, 39 (June 2008).

²⁹⁵ SEC'Y OF STATE, ET AL, REPORT ON PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN REPORT TO CONGRESS IN ACCORDANCE WITH THE 2008 NATIONAL DEFENSE AUTHORIZATION ACT 34 (June 2008).

administrators and other public officials in certain parts of Sierra Leone.²⁹⁶ This shortage resulted in UN personnel acting as *de facto* administrators in providing basic services, even though these services did not really fall within the mandate of the peace operation.²⁹⁷

The SFROLO contains tasks which direct the ROL practitioner to meet this need. The tasks of “[d]etermine structure and affordable size of civil service to meet ongoing and future needs” and “[d]evelop transparent process to vet civil service employees and local government officials and ensure employment procedures and conditions clear and publicized”²⁹⁸ are to be conducted during the initial response phase of the ROL operation. The practitioner would carry out these tasks while the government is being re-established. Then, in the transformation phase, tasks such as “[s]elect and train indigenous civil servants” and “[r]eview skills of government officials”²⁹⁹ would be executed.

Afghanistan, Sierra Leone, and Sudan demonstrate that post-conflict countries have ROL challenges that span beyond one discipline of law. To address those challenges, any interdisciplinary strategy or framework must be implemented during the initial stages of the operation. Economics, governance, and penal systems are not mutually exclusive systems in a state but instead, they support each other. For example, if the government official has been

²⁹⁶ Richard Sannerholm, *Legal, Judicial and Administrative Reforms In Post-Conflict Societies: Beyond The Rule Of Law Template*, 12, JOURNAL OF CONFLICT & SECURITY LAW 82 (2007) (citing various UN missions, to include Sierra Leone, where the UN peacekeepers were not explicitly given authority to administer or act as an executive, but did so, without authority, when the assistance mission required such actions).

²⁹⁷ *Id.* at 82.

²⁹⁸ *See infra* app. at Governance Tasks.

²⁹⁹ *See infra* app. at Governance Tasks.

properly trained, he can issue a business license and regulate the credit industry. Then, a local man will have the ability to re-establish his livelihood. He will engage in commercial activity to feed family and no longer will be compelled into a life of crime. He will work *with* the newly trained law enforcement and not over burden the new courthouse. This is the happy ending all ROL practitioners hope their efforts will facilitate.

VII. Conclusion

This thesis proposes the Standing Framework of Rule of Law Operations as a new model to be used in all USG ROL operations in post-conflict states. A new model is needed to provide a standard definition, evaluation method, and application of ROL doctrine. The lack of standards has created confusion and disunity within USG agencies, even when these agencies are working in the same country for the same goal; establishment of the ROL. This deficit has hindered USG personnel from acting as one team.

This thesis began by offering that there is a world-wide belief that the rule of law is a condition that benefits economies, democracy, and people. Thus, many organizations from the World Bank to the U.S. Government send out ROL practitioners to assist in ROL development around the world. Unfortunately, there is not a universal consensus on a definition of the ROL. Even more disturbing is that USG agencies do not use a common definition and their efforts are not adequately coordinated.

Rule of law operations are extremely difficult in they must affect many aspects of culture and governing. The operation becomes even more burdensome and challenging when there is a lack of a standard model or coordination by those purporting to work together

toward the same goal. In part III, the thesis demonstrated that ROL operations are made especially difficult because of the lack of standards and interagency cooperation. Various USG agencies have a role in ROL operations but the DoS has the Congressional and Presidential directive to exert leadership. However, the DoS has not promulgated a standard doctrine for all USG agencies to follow. Even within the DoD, there is not a cohesive or comprehensive doctrine to address ROL operations. The publications which are available give piecemeal, and at times conflicting, direction.

As a result, the ROL practitioner must gather information and instruction in an ad hoc manner and attempt to apply it in complex operations. The fictional judge advocate from the introduction is left to deploy with whatever information her research yielded. What is needed is a standard framework to provide continuity for all USG practitioners and that all ROL operations can be built upon. This foundational document would provide a playbook so that all members of the USG team would have a standard analytical framework, reporting requirements, and interdisciplinary approach.

Thus the S/CRS should adopt and promulgate the SFROLO. The President created it to coordinate all stability operation planning across USG agencies and it has the authority to prescribe the new model. The S/CRS also has the staff that can assist in molding the new framework and ensuring that the most important details are analyzed and executed.

The proposed Standing Framework for Rule of Law Operations is a starting point for a new model and approach. It is basic in form, but thorough in substance. It creates a standard model for analyzing and reporting important data to inform strategic planning of ROL operations. It also contains a three part task matrix which provides the practitioner an

outline to accomplish essential tasks during different phases of the operation. The task matrix includes lists to address the development of the ROL through enhancing penal legal systems, economic legal systems, and governance capabilities. By including all three, it adheres to an interdisciplinary approach.

The interdisciplinary approach of the SFROLO is an improvement over the current approach because the laws that effect and govern people's daily lives and effect behavior are not limited to one area of the law. People depend on fair and efficient enforcement of commercial codes and property law as much they do the enforcement of criminal law. Courts are needed to adjudicate and hold government, corporations, and individuals accountable to a whole host of laws and the legal systems. Any new standardized model should be ready to address all of these needs.

To establish ROL, there must be unity of effort. ROL practitioners need to work from the same playbook: They must have a common definition and framework to guide their efforts. This common starting point could enhance communication and training opportunities and thus maximize all efforts. The proposed model, the SFROLO, provides the much needed standardized framework to enhance unity of effort throughout USG ROL operations.

Appendix A. Standing Framework for Rule of Law Operations³⁰⁰

When a unit or team has been tasked with a rule of law mission or task, it shall follow the below guidelines on data collection and analysis, reporting, and task lists.

1. Purpose. To provide guidance on the conduct of rule of law (ROL) operations and to establish standing mechanisms for reporting of data and ROL essential task lists during all phases of Stability Operations.
2. Applicability. The SFROLO applies to all USG ROL operations in post-conflict states.
3. Responsibilities. The SFROLO is a State Department document generated and maintained by the S/CRS which establishes fundamental policies and procedures governing the actions to be taken by all USG agencies and their personnel while conducting ROL operations.
 - a. Data Collection and Assessments: All agencies conducting ROL operations will report the following data upon the initiation of ROL operations. The data comprises an analysis of the current operating environment in regards to penal legal systems, economic legal systems, and governance systems. Each commander will report the assessment for their particular area of operation.
 - i. Penal Legal System
 1. Physical infrastructure:
 - a. Number, condition, and location of courts, prosecution offices, and police stations
 - b. Transportation or other infrastructure challenges for these locations
 2. Promulgated law:
 - a. Is there an informal justice sector?
 - b. What are the sources of law: Customary, Religious, Civil Code, Common Law
 - c. Whether current laws comply with international human rights norms:
 - i. Follow international human rights standards
 - ii. Identify discrepancies
 - d. Is there a written or oral legal tradition (or both)?

³⁰⁰ OFFICE OF THE COORDINATOR FOR RECONSTRUCTION AND STABILIZATION, DEP'T OF STATE, Post-Conflict Reconstruction Essential Tasks (Apr. 2005); POST-CONFLICT RECONSTRUCTION: A JOINT PROJECT OF THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES (CSIS) AND THE ASSOCIATION OF THE UNITED STATES ARMY (AUSA), TASK FRAMEWORK (May 2002); THE NEW PARTNERSHIP FOR AFRICA'S DEVELOPMENT, AFRICAN POST-CONFLICT RECONSTRUCTION POLICY FRAMEWORK (June 2005). USAID GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK (January 2010).

3. Caseload information: (filings, clearance rate, types of cases)
 - a. Number of cases investigated by police
 - b. Number that went forward to prosecutors
 - c. Number that were tried in court
 - d. Prison population
 4. Human Resources:
 - a. Number of judges, prosecutors, attorneys, and police
 - b. Average salary of judges, prosecutors, attorneys, and police
 - c. Existence and effectiveness of training facilities for judges, prosecutors, attorneys, and police
 5. Public Perception:
 - a. Conduct citizen surveys of impression of judges, prosecutors, attorneys, and police
 - b. Extent of public notice and information of results
 6. Report on key NGO involvement and activities.
- ii. Economic Legal system
1. Physical infrastructure:
 - a. Number, condition, and location of courts
 - b. Transportation or other infrastructure challenges for these locations
 2. Promulgated of law:
 - a. Is there an informal justice sector?
 - b. What are the sources of law: Customary, Religious, Civil Code, Common Law
 - c. Whether current laws comply with international human rights norms:
 - i. Follow international human rights standards
 - ii. Identify discrepancies
 - d. Is there a written or oral legal tradition (or both)?
 3. Caseload information (filings, clearance rate, types of cases)
 4. Human Resources:
 - a. Number of judges and attorneys
 - b. Average salary of judges and attorneys
 - c. Existence and effectiveness of training facilities for judges and attorneys
 5. Public Perception:
 - a. Extent of public notice and information of results
 - b. Citizen surveys of impression of judges and attorneys (dispute resolution process)
 6. Report on key NGO involvement and activities.

- iii. Governance Systems
 - 1. Physical infrastructure:
 - a. Number, condition, and location of administrative offices
 - b. Transportation or other infrastructure challenges for these locations
 - 2. Current local government structure.
 - 3. Relationship of local government with central government.
 - 4. Civil Service:
 - a. Process for vetting government employees
 - b. Qualifications of government employees
 - c. Removal process for government employees (misconduct, vote, other methods)
 - 5. Public Perception:
 - a. Perception of the efficiency or capabilities
 - b. Public/cultural understanding of the responsibilities of the government
 - 6. Report on key NGO involvement and activities.
- b. Reporting Requirements: Unit or teams conducting ROL operations will report data complying with the below requirements. Authority to create the format for all reports is established in the Geographic Combatant Commander or similar USG Agency authority but it shall be standardized throughout the theater. (Changes to the frequency or format of the report are not authorized unless authorized by the GCC or equivalent authority.)
 - i. ROL practitioners report through the chain of command or similar authority.
 - 1. Content: The report shall contain paragraph 3.a. information or progress reports from the essential task list. The initial report shall contain all the information in 3.a. and subsequent reports shall contain applicable information for the operation.
 - 2. Timing:
 - a. Initial report. The initial report shall be generated at the soonest possible moment in order to provide the GCC with vital information for planning ROL operations. It will consist of all the data located in paragraph 3.a.
 - b. Monthly. The monthly report shall consist of progress reports on each task on the task list.
 - c. Quarterly. The quarterly report shall consist of updated analysis of data in paragraph 3.a.
- c. ROL Essential Task List: (spreadsheet provided for detailed list)

- i. The task list is broken down into three phases which correspond to Stability Operations.
 1. Initial Response
 - a. Penal Legal Systems
 - b. Economic Legal Systems
 - c. Governance Systems
 2. Transformation
 - a. Penal Legal Systems
 - b. Economic Legal Systems
 - c. Governance Systems
 3. Fostering Sustainability
 - a. Penal Legal Systems
 - b. Economic Legal Systems
 - c. Governance Systems

Color Key:

Legal
Category
of Work

Facility
Construction
Category of
Work

Education/Training
Category of Work

Initial Response	Transformation	Fostering Sustainability
Penal Legal System Tasks		
<p>Review current laws and resolve questions of applicability</p> <p>Locate and safeguard key witnesses, documents and other evidence related to key ongoing or potential U.S. investigations and prosecutions</p> <p>Identify, secure and preserve evidence of war crimes, crimes against humanity, corruption, and transnational crimes including terrorism, organized crime, financial crimes, trafficking in humans and narcotics</p> <p>Identify and detain perpetrators of these offences</p> <p>Enact interim legal codes and procedures permitted by international law</p>	<p>Facilitate discussions leading to new codes</p>	

<p>Abolish provisions incompatible with international standards of human rights</p>	<p>Maintain positive relations with the public</p>
<p>Perform civilian policing functions</p>	
<p>Supervise incarceration processes</p>	
<p>Develop strategy to rebuild criminal justice system</p>	
<p>Inventory courts, law schools, legal libraries, and bar associations</p>	<p>Rehabilitate or construct necessary facilities</p>
<p>Reforming and implementing procedural codes</p>	<p>Establishing or strengthening independent judicial bodies (foster and develop ethical and independent behavior)</p> <p>Stimulating citizen support for judicial independence</p>

<p>Assess indigenous capacity to combat organized crime</p> <p>Establish multidisciplinary approach to address organized crime involving international intelligence, law enforcement, and criminal justice personnel</p>	<p>Identify and dismantle organized crime networks</p> <p>Strengthen the capacity of indigenous criminal justice institutions and personnel to combat organized crime</p> <p>Strengthen the capacity of indigenous criminal justice institutions and personnel to handle the investigation, prosecution and adjudication of complex criminal cases</p>	<p>Enforce anti-corruption laws, including removal and prosecution of violators</p>
<p>Vet and reconfigure existing police forces</p>	<p>Establish transparent entry, promotion, and retirement systems for national police</p>	<p>Mentor indigenous police forces</p>
<p>Train existing indigenous police in international policing standards</p>	<p>Establish police academies</p>	
<p>Inventory police stations, mobility capabilities, communications systems, data management systems and headquarters</p>	<p>Rehabilitate or reconstruct necessary facilities</p>	
<p>Assess requirements to eradicate corruption in law enforcement community</p>	<p>Establish office of Inspector General to investigate police corruption and abuse</p>	

Inventory indigenous legal professionals	Vet existing judicial system personnel, including judges, prosecutors, defense attorneys, and court personnel	Establish professional code for judicial system
	Promote laws fostering judicial independence and transparency	
	Review role of judge and prosecutor	
Educate criminal justice personnel on interim legal codes	Develop training plan closely linked to institutional reform; identify and train local professionals who can train their colleagues	Establish mentoring programs
Establish liaison mechanism between civilians and judicial authorities on legal matters	Inform indigenous population on accessing the judicial system	
Conduct media campaigns to make citizens aware of rights, responsibilities and interim procedures and codes	Carry out public consultations on justice reform (surveys, meet with diverse groups)	Improving transparent and efficient administration of justice system components

Initial Response	Transformation	Fostering Sustainability
Economic Legal System Tasks		
Assess the existing taxation laws and fiscal powers/procedures and evaluate the legal framework	Proposed fiscal and taxation laws subject to public debate	Laws concerning taxes accessible, clear, and understandable
	Collection, commitment and use of public funds governed by law and transparent	Fiscal powers of Federal government are clear and promulgated
	Timely publication of fiscal information mandated by law	Government liability of asset management, including the granting of rights to use or exploit public assets have an explicit legal basis
Begin dialogue with policy makers to identify priorities and assess capacity to undertake basic fiscal policy		
Assess immediate fiscal balance and financing gap		
Develop budget		
Rationalize revenues and expenditures and establish priorities	Develop and implement a budgetary process, including input from line ministries	
design an efficient tax structure with a clear collection policy	Evaluate collection rates of tax authorities	Implement strategy for improved tax audit, collection, and enforcement
Determine the efficacy of alternative short-term tax policies (i.e. tax holiday)	Rationalize tax policy to provide tax revenue and redraft necessary tax laws to increase efficiency in revenue collection	

<p>Survey economic situation including assessment of absorptive capacity of economic and social sector, financial imbalances, and real sector distortions</p> <p>Formulate assistance strategy in close cooperation with national government/indigenous actors and international community</p>		
<p>Evaluate regulatory framework of banking system</p> <p>Provide immediate credit including access to micro and small and medium enterprise (SME) lending</p>	<p>Develop on-going credit programs including access to micro and SME lending</p>	
<p>Assess government relationships with private entities develop transparent relations IAW promulgated rules</p>	<p>Clarify relationship between government and public corporations</p>	
<p>Assess the depth of the private sector including weakness of the goods and service sector and its distribution channels</p> <p>Identify obstacles to private sector development</p> <p>Take immediate steps to remove or counter obstacles to private sector development where possible</p>	<p>Strengthen private sector through contracting/outsourcing</p> <p>Prevent capture of proceeds from natural resources and commodities by factions Establish mechanism to ensure transparency in extractive industries and stop illicit trade in natural resources and develop governance mechanisms and incentives to bring trade into market</p> <p>Ensure contractual arrangements between private entities are clear and publicly accessible</p>	

Evaluate civil legal system procedure	Reform and implement procedural codes as necessary	Expand access to legal services
Ensure a transparent and efficient administration of civil system components	Adopt appropriate laws, regulations and codes	
Determine relevance of enforcement mechanisms	Enforce judgments	
Initiate process for addressing and resolving ownership and access issues to valuable natural resources	Design laws and regulations to provide incentives for economic growth and development	
Evaluate existing laws pertaining to land rights, registration of the property, and collateralization of movable and immovable property	Draft laws and codes to establish or strengthen property rights including customary or traditional concepts where appropriate	
Take immediate steps where needed to establish process to resolve property rights issues	Establish process to reconcile and address claims of expropriations	
Review civil and commercial codes	Draft and promulgate revisions	
Evaluate restrictions on trade, commerce, and open market operations	Streamline businesses' administrative requirements for entry	
Evaluate existing laws pertaining to commercial and business operations	Develop codes to foster economic growth and development	
	Design laws that are conducive to and open market trade regime and a responsible tariff structure	

Implement mechanisms to prevent unauthorized seizures of land/property	Establish flexible but structured mechanism for resolving property disputes	
Publicize property seizure dispute resolution options/alternatives to violence	Publicize procedures	
Ensure coordination with law enforcement components to enforce property dispute judgments to deter violence	Develop roster of contested property	Implement mechanism for adjudicating property disputes

Initial Response	Transformation	Fostering Sustainability
Governance Tasks		
Establish basic facilities	Improve physical infrastructure	
Clearly specify the responsibilities and relationship between levels of government		Federal government's structure and functions are clear
Determine need for international transitional administration Establish transitional political authority; and interim civil administration, placing advisors into key Ministries and local governments	Consult with indigenous leaders in designing future governance systems Devolve certain functions to indigenous authorities, building indigenous capacities	
Deliver administrative support systems		

<p>Establish rules and realistic timetable for interim national government</p> <p>Work with indigenous leaders to recruit individuals to serve on and advise the national government</p> <p>Vet indigenous officials and reconstitute leadership at multiple levels of government</p> <p>Establish process for passing and amending interim laws and regulations</p>	<p>Prepare for transition to permanent national government</p> <p>Implement plans for revenue generation</p>	
<p>Determine structure and affordable size of civil service to meet ongoing and future needs</p> <p>Develop transparent process to vet officials and employees of state owned enterprises</p>	<p>Select and train indigenous civil servants</p> <p>Review skills of government officials</p>	
<p>Ethical standards of behavior for civil service employees clear and publicized</p> <p>Develop transparent process to vet civil service employees and local government officials and ensure employment procedures and conditions clear and publicized</p>		
	<p>Audit mechanism established</p>	
<p>Assure resources for personnel, supplies, and equipment to deliver essential local services</p>		

Identify legal, institutional, and political obstacles affecting citizens' input to legislative process	Determine whether decentralization is appropriate, and if so, its scale and form	
Restore essential local public services		Continue to use government resources to promote public needs
Establish mechanisms for local level participation, taking into account history and culture	Avoid unnecessary conflict with traditional structures	
Reforming administrative law	Strengthening the implementation of administrative law and procedure	
Provide legal advisors and consultants	Develop laws and administrative procedures promoting accountability and transparency across government institutions and in the private sector	
Design and implement anti-corruption campaign, including education		
Mainstream anti-corruption efforts into other programs	Identify and dismantle organized crime networks	
Identify incentives to reduce corruption	Design and implement anti-corruption campaign, including education and codes of conduct	
Identify drivers of corruption	Enforce anti-corruption laws, including removal of corrupt officials	
	Develop and implement enforcement mechanisms	

Combat corruption among police,
border, customs, and tax collection
forces/units

Empower legal and civil society
mechanisms to monitor
governmental behavior