



DEFINING THE RULE OF LAW PROBLEM

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– *The Editors*

THERE HAS BEEN CONSIDERABLE MENTION of the “rule of law” – and the pressing need to establish it – in the course of the continuing U.S. military interventions in Iraq and Afghanistan. But “rule of law” is an inherently vague term meaning different things to different people. That inherent indeterminacy has not deterred many who have attempted to define what the rule of law is in the course of academic debate, the development of military doctrine, and practical application.

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What unites most of these efforts (even those by scholars) is that they seek a definition of the rule of law not as an abstract exercise but to further some concrete effort, be it military, diplomatic, political, or developmental. From an operational standpoint, any approach to actually implementing the rule of law must take into account so many variables – cultural, economic, institutional, and operational – that it may seem futile to seek a single definition for the rule of law or a single way to achieve it. The temptation – especially in the heated context of any military intervention – is simply to choose a definition and “move out” on a mission to realize the defined end state, complete with plans, resources, and prescribed metrics to tell us when we’ve arrived at the rule of law. But efforts to bring about the rule of law are different than other development projects such as those to reconstruct a nation’s electrical or transportation infrastructure. When dealing with an operational imperative as deeply rooted in morality as “law,” it is impossible to separate the how of rule of law from the what of rule of law.

DESCRIBING THE RULE OF LAW

There is no widespread agreement on what exactly constitutes the rule of law, just as there is no widespread agreement on what exactly it means to have a “just society.” But there is common ground regarding some of the basic features of the rule of law.

The first step to defining the rule of law is to ask what the *purpose* of law is. Although there is some philosophical disagreement about why we have law, there is widespread acceptance that the rule of law has essentially three purposes, as described by Richard Fallon:

First the Rule of Law should protect against anarchy and the Hobbesian war of all against all. Second, the Rule of Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions. Third, the Rule of Law should guarantee against at least some types of official arbitrariness.¹

¹ Richard H. Fallon, *The Rule of Law as a Concept in International Discourse*, 97 COLUM. L. REV. 1, 7-8 (1997) (footnotes omitted).

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Put somewhat more simply, the purpose of law is to provide a government of security, predictability, and reason.

In applying these principles, though, context is critical. For example, the paper in which Professor Fallon provided his definition was one on constitutional interpretation, not military operations. Consequently, he emphasized some points (such as stability over time) that may be less important to rule of law efforts within military intervention than others he did not emphasize (such as providing physical security).

When dealing with a term used in as many different contexts as “the rule of law,” it is important not only to identify the purpose of *law*, it is important to identify the purpose of the *definition*. The U.S. military’s purpose in defining “rule of law” is to inform its conduct of military campaigns, with a current emphasis on counterinsurgency² and stability operations.³

Even that limited description of purpose is somewhat oversimplified. Almost any rule of law effort in which the U.S. military participates will be an interagency one. As a matter of U.S. policy, the Department of State is the lead agency in conducting most stability and reconstruction activities unless otherwise specified,⁴ and virtually all stability operations will involve international and non-governmental organizations as participants. While military rule of law practitioners must be able to accommodate participation by other agencies in development efforts, they cannot rely on it. This

² “Counterinsurgency is military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency.” U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 1-1 (2006).

³ Stability operations are “various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.” JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS GL-28 – GL-29 (2006). *See also* U.S. DEP’T OF DEFENSE, DIR. 3000.05, MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION AND RECONSTRUCTION (SSTR) OPERATIONS, para. 4.2 (Nov. 28, 2005).

⁴ National Security Presidential Directive/NSPD-44, Management of Interagency Efforts Concerning Reconstructing and Stabilization (Dec. 7, 2005).

point is made in military doctrine,⁵ and has been borne out in practice in Iraq and Afghanistan during earlier phases of those campaigns when many civilian agencies were precluded from operating because of security concerns. Ideally, the U.S. military will have a minor role in establishing the rule of law in a foreign nation. As recent events have made clear, though, adopting a definition of the rule of law for use in ideal circumstances is unhelpful, since it is only in the worst cases – when indigenous institutions are the most dysfunctional and the environment is at its most hostile and unstable – that the U.S. military will be asked to take the lead in establishing the rule of law.

According to U.S. Army doctrine:

Rule of law is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles. It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decisionmaking, and legal certainty. Such measures also help to avoid arbitrariness as well as promote procedural and legal transparency.⁶

That principle can be broken down into seven effects:

- The state monopolizes the use of force in the resolution of disputes.
- Individuals are secure in their persons and property.
- The state is itself bound by law and does not act arbitrarily.

⁵ See JOINT PUB. 3-0, *supra* note 3, at V-24 (explaining that, while other agencies may have the lead, U.S. military forces must be prepared to carry out all aspects of stability operations).

⁶ U.S. DEP'T OF ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS 1-9 (2008). This definition is based in part on that contained in the *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict And Post-Conflict Societies*, U.N. Doc. S/2004/616, at 4 (2004). This definition was also adopted by the Multinational Corps-Iraq Commander as early as 2006. See Appendix 2 to Annex G to MNC-I Operation Order 06-03.

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- The law can be readily determined and is stable enough to allow individuals to plan their affairs.
- Individuals have meaningful access to an effective and impartial legal system.
- The state protects basic human rights and fundamental freedoms.
- Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.⁷

The complete realization of these effects represents an ideal; the seven effects exist to greater or lesser degrees in different legal systems and are not intended as a checklist for a society that abides by the rule of law.⁸ Moreover, what one person thinks satisfies one effect another person may not. Societies can abide by the rule of law to different degrees according to geography (the rule of law may be stronger in some places than others), subject matter (the rule of law may apply more completely with regard to some laws than others), institutions (some may be more efficient or corrupt than others), and populations (some individuals may have greater access to the rule of law than others). Because any meaningful definition of the rule of law represents an ideal, military planners should view the success of rule of law projects as a matter of the host nation's movement toward the rule of law, not the full satisfaction of anyone's definition of it.

Given the subservient role that the military will ideally play in any development operation, the deployed Soldier or Marine working to establish the rule of law should be part of an operation that already has a definition of the rule of law – one that has been adopted by policymakers. Nevertheless, the seven effects – or at

⁷ FM 3-07, *supra* note 6, at 1-9. Of the many definitions of the rule of law in common use, this one most closely hews to that suggested in JANE STROMSETH, DAVID WIPPMAN & ROSA BROOKS, *CAN MIGHT MAKE RIGHTS?: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS* 78 (2006).

⁸ See STROMSETH, WIPPMAN & BROOKS, *supra* note 7, at 79; Fallon, *supra* note 1, at 9. Indeed, given the value-laden character of the seven effects, there is not even widespread agreement over how to measure deviation from them. *Id.*

least the values they represent – are likely to be present in any definition one is likely to encounter in a rule of law operation. In this way, the seven effects can not only supply a definition of the rule of law, but also complement definitions expressed in other terms, providing more specific guidance about the effects U.S. forces should be working to help bring about in establishing the rule of law. What follows is a discussion of each effect.

*The state monopolizes the use of force
in the resolution of disputes.*

It is impossible to say that a society is governed by the rule of law if compulsion is not the sole province of the state. A country in which the use of violence is out of the state's control is out of control in the worst possible way. The alternative to state control over force is warlordism, which is a legally illegitimate form of security.

That is not to say that only state instruments can wield violence as an instrument of state policy. It is possible for the state to delegate the use of force to subsidiary bodies such as state and local governments or even non-state security providers, who may or may not be accountable to local interests. Local security forces such as police, private security firms, and even less professional arrangements such as militias, can have a role in recovering a state's security structure. But the state must retain ultimate control over the use of force. Any local entity's power must be effectively regulated by the state in order for it to be considered a legitimate exercise in state power.

*Individuals are secure in their
persons and property.*

In many ways, providing security is the ultimate purpose of any state. For any deployed military force, providing security is going to be the first element in any rule of law plan and, depending on the status of operations, it may be the only real contribution that U.S. forces can make to implementing the rule of law. But it is an important contribution nonetheless. From an operational standpoint, without basic security, the rule of law itself is an unaffordable luxury. The basic needs of the people, including not only physical se-

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curity but also basic civil services and utilities, have to be provided before one can undertake any long-term attempt to improve the rule of law. Thus, the interconnected nature of rule of law projects also requires that rule of law efforts be tied to other reconstruction efforts in order to provide the kind of livable society in which the rule of law can flourish.⁹ Time, however, is of the essence in establishing security. In addition to the problem of security in the immediate aftermath of major combat (such as the prevention of looting), there is a window following the conclusion of major combat during which destabilizing elements are themselves likely to be too overwhelmed to put up major opposition.¹⁰ It is critical during that period to establish security, but the task of reconfiguring military forces and adjusting rules of engagement from combat to a security mission is a substantial one – it needs to be anticipated and planned for *before* the start of combat operations.¹¹

*The state is itself bound by law and
does not act arbitrarily.*

The conduct of state actors must be bound by established rules. Of course, it does no good for the state to be bound by rules if the rules themselves can be changed by fiat or if they bear no relation to reason.

*The law can be readily determined and is stable enough
to allow individuals to plan their affairs.*

A basic premise of a society governed by law is that there is widespread agreement on what the law is: a rule for recognizing what is law and what is not.¹² Any society that has advanced beyond anarchy is likely to have such an agreement, which, in coun-

⁹ See STROMSETH, WIPPMAN & BROOKS, *supra* note 7, at 135.

¹⁰ *Id.* at 145-47.

¹¹ See FM 3-24, *supra* note 2, at 7-5 (“There is a clear difference between warfighting and policing. [Counterinsurgency] operations require that every unit be adept at both and capable of moving rapidly between one and the other.”).

¹² H.L.A. HART, *THE CONCEPT OF LAW* 94-95 (2d ed. 1994) (describing the “rule of recognition” that societies use to identify law).

tries that are the subject of U.S. military intervention, may be in the form of a newly authored constitution. Of course, in many countries there will already be established legislatures and courts, and it will be important for anyone undertaking rule of law projects in such countries to quickly determine whether existing institutions have the necessary political legitimacy to continue. The converse is that, when setting up new legal institutions, the most important thing will be to go through a process that produces the necessary agreement in order to have that institution's decisions recognized by the society as law.

Individuals have meaningful access to an effective and impartial legal system.

It means little to have laws on the books if there is no mechanism for the enforcement of those laws to redress criminal and civil wrongs. Thus, in order to have a working legal system, judicial and enforcement institutions must exist, and the people must have practical access to those institutions. In many environments in which deployed military forces find themselves, such institutions may be completely absent. Even when those institutions do exist, their efficacy may be compromised by corruption; racial, ethnic, religious, or gender bias; or simple inefficiency. Corruption, other illegitimate motives, or systematic inefficiency in the police force or the judiciary can prevent just laws from having any real effect on society. And in order for the state to be bound to its own laws, the judiciary must be able to exercise judgment independently of influence from the other branches.

The need for working legal institutions extends not only to police and courts, but also to the correctional system. In developing and reconstructing nations, prisons may fail the rule of law in two opposite ways: either there is no effective correctional system and convicts are routinely released, or prisoners are treated in ways inconsistent with human rights protections. A society cannot be said to be governed by the rule of law if criminals are not adequately dealt with or if the state fails to treat those subject to its complete control in a humane, rational manner.

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*The state protects basic human rights and
fundamental freedoms.*

It is not possible to completely separate the form of a legal system from its content. Most would agree, for instance, that a legal system in which judges applied the law as given to them and police arrested and incarcerated offenders without corruption or bias would nevertheless fail to qualify as applying the rule of law if the law applied was merely the fiat of a dictator or of a ruling majority acting without regard to human rights and fundamental freedoms. In the twenty-first century, it would be hard to find anyone who would acknowledge the meaningful existence of the rule of a law in a society in which people were considered personal property, to be openly bought and sold at market. It is meaningless to say that the law protects individuals without at least some minimal concept of the rights the law must protect.

Although standards for the minimum protection of a country's inhabitants are embodied in the Universal Declaration of Human Rights (UDHR)¹³ and the treaties to which a country is a party,¹⁴ such as the International Covenant on Civil and Political Rights (ICCPR),¹⁵ there is disagreement on exactly what rights a society's laws must protect for it to be considered a society governed by the rule of law. Some, especially those active in the rule of law community, define the most important obligation as one of equal treatment regardless of gender or economic, racial, or religious status.¹⁶ While most would agree that equality is an important value, many disagree on exactly what forms of equality are necessary to the rule of law. In many societies, unequal treatment is a cultural fact that

¹³ Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).

¹⁴ See FM 3-07, *supra* note 6, at 1-7.

¹⁵ Dec. 16, 1966, 999 U.N.T.S. 171, available at www2.ohchr.org/English/law/ccpr.htm.

¹⁶ UDHR art. 7; Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* 31, 38 (Thomas Corothers ed., 2006).

there is no popular will to change. Others define the necessary rights substantively – for instance, the right to security in one’s person¹⁷ or the right to free speech¹⁸ – but doing so is unlikely to avoid disputes over which rights are essential to establishing the rule of law. We need look no further than our own, ongoing debates over constitutional rights for an example of how lengthy and divisive social debates over fundamental rights, both egalitarian and substantive, can be.

Nevertheless, U.S. military forces engaged in rule of law projects needs to keep in mind that protection of human rights and fundamental freedoms is an important component of the rule of law and that different participants in the rule of law enterprise are likely to have very different understandings of the content of those rights and their relative importance.

Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.

Although one can arguably achieve order through threat alone, law is not compliance achieved through threat.¹⁹ In order for a rule to be said to be a *legal* rule, sanction for the rule’s violation must be justifiable by reference to the rule itself, not merely by the ability of the government to impose a sanction or compel compliance through force.²⁰ A state can only truly be said to be governed by the rule of law if the state, and its law, is viewed as legitimate by the populace – if the law is internalized by the people.²¹ From a moral perspective, it is problematic for a state to impose a legal system that does not reflect its society’s values. From a practical perspective, the failure of a legal system to become internalized can devastate the official legal infrastructure either because of constant

¹⁷ U.S. CONST. amends. V, XIV, sec. 1; UDHR art. 3.

¹⁸ U.S. CONST. amend. I; UDHR art. 19.

¹⁹ HART, *supra* note 12, at 22-24.

²⁰ *Id.* at 54-58.

²¹ See US AGENCY FOR INTERNATIONAL DEVELOPMENT, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 7-8 (2007 draft); STROMSETH, WIPPMAN & BROOKS, *supra* note 7, at 75-76.

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resistance (through political or more violent means) or by requiring the state to rely on its coercive power to resolve more legal disputes than it has the capacity to handle. That legitimacy can take multiple forms:

First, citizens must choose to rely on the legal system. A court system cannot function without judges, but it also needs litigants. A government whose laws are ignored by the people must rely instead on force to impose its policies, which in turn is likely to increase resistance²² (and fuel insurgency).²³ Again, there are strong connections between this element and others, specifically the state's willingness to bind *itself* to the rule of law. It would be unreasonable, for instance, to expect a populace to accept the decisions of the judiciary or the legislature if the executive ignores them.

Second, legitimacy is critical for resolving the 99% of legal disputes that never see a courtroom. Most dispute resolution in any society occurs "in the shadow of the law,"²⁴ which requires that members of the society have internalized the society's legal rules and are comfortable using them to conduct their affairs. While a functioning court system, for instance, is one level of success for a rule of law project, a society that truly lives under the rule of law is one in which individuals themselves resolve disputes in ways *consistent* with the law even without invoking the judicial system.²⁵

The legitimacy of a nation's legal system is in many ways the ultimate expression of the rule of law, and is likely to take many years, if not decades, to develop. Again, we need look no further than America's own constitutional experience. The constitutional order that we now take for granted remained fragile for decades after the Constitution's adoption, and many would argue became cemented only after the Civil War and Reconstruction. A deployed

²² See JOINT PUB. 3-0, *supra* note 3, at V-26.

²³ See FM 3-24, *supra* note 2, at 1-27.

²⁴ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979). See also STROMSETH, WIPPMAN & BROOKS, *supra* note 7, at 78 (on the application of this principle to building the rule of law in the context of military intervention).

²⁵ STROMSETH, WIPPMAN & BROOKS, *supra* note 7, at 78-79.

U.S. military force is unlikely to witness the full social acceptance of a legal system in a post-conflict country, but even local acceptance of a single court, police force, or town council is a major step on the road to achieving the rule of law. U.S. military forces should conduct rule of law projects with this end in mind.

RULE OF LAW OPERATIONS

Rule of Law Activities Within the Context of Full Spectrum Operations

Joint Publication 3-0, *Joint Operations*, breaks operations into three categories: offensive operations, defensive operations, and stability operations. Any major campaign will require a combination of all three types of operations, to be carried out in different, appropriate balances during the different phases of the campaign.²⁶ Army doctrine refers to the mix of offensive, defensive, and stability operations as “full spectrum operations.”²⁷

Although stability operations are emphasized during the later phases of the campaign, they will take place even during the initial combat phase,²⁸ and they must be planned for as part of the overall campaign. The termination of a major campaign cannot take place until local civil authorities are in a position to administer the host nation,²⁹ and stability operations are critical to the final phases of the campaign, leading to its termination and the redeployment of U.S. forces.³⁰ Stability operations are also a critical component of counterinsurgency.³¹

²⁶ JOINT PUB. 3-0, *supra* note 3, at V-1, V-2.

²⁷ U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 3-1 (27 Feb. 2008). In addition, full spectrum operations include “civil support operations,” which is the domestic counterpart to stability operations, which are performed overseas.

²⁸ JOINT PUB. 3-0, *supra* note 3, at V-15.

²⁹ *Id.* at IV-29.

³⁰ *See id.* at V-2, figure V-1. *See also id.* at IV-7; *id.* at xii.

³¹ FM 3-24, *supra* note 2, at 2-5 (15 Dec. 2006) (“Most valuable to long-term success in winning the support of the populace are the contributions land forces make by conducting stability operations.”).

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It is Department of Defense policy that “[m]any stability operations tasks are best performed by indigenous, foreign, or U.S. civilian professionals. Nonetheless, U.S. military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.”³² Thus, servicemembers can expect a particularly close working relationship not only with a multitude of U.S. civilians, but also with coalition, non-governmental, and indigenous participants in rule of law projects.

But rule of law activities have a place across the full spectrum of operations, not just within stability operations. The objective of any campaign is to leave in place a “*legitimate* civil authority”³³ within the host nation. “Legitimacy is frequently a decisive element,” in joint operations.³⁴ Similarly, in counterinsurgency, “victory is achieved when the populace consents to the government’s legitimacy and stops actively and passively supporting the insurgency.”³⁵ In this sense, for U.S. forces engaged in counterinsurgency, the most important of the seven effects described above is the last one – that individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives. That legitimacy is the desired end state for any campaign, but it is the only real objective in a counterinsurgency.

Because of the special relationship between the rule of law and the legitimate exercise of force, rule of law activities not only include formal projects to rebuild host nation capacity, but also actions to assure that U.S., coalition, and host nation security forces themselves operate in ways that encourage respect for the rule of law while engaged in the full spectrum of operations, including offensive and defensive operations.

Efforts to build a legitimate government though illegitimate actions are self-defeating, even against insurgents who con-

³² DOD DIR. 3000.05, *supra* note 3, para. 4.3. See also JOINT PUB. 3-0, *supra* note 3, at V-24.

³³ JOINT PUB. 3-0, *supra* note 3, at IV-29 (emphasis added).

³⁴ *Id.*, at A-4 (“Committed forces must sustain the legitimacy of the operation and of the host government, where applicable.”).

³⁵ FM 3-24, *supra* note 2, at 1-3.

ceal themselves amid noncombatants and flout the law. Moreover, participation in [counterinsurgency (COIN)] operations by U.S. forces must follow United States law, including domestic laws, treaties to which the United States is party, and certain [host nation] laws. Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.³⁶

Legitimacy is the watchword of counterinsurgency, which means that every operation undertaken during a counterinsurgency – offensive, defensive, or stability – has a rule of law component. Any act that the populace considers to be illegitimate (such as the mistreatment of detainees or other criminal acts by soldiers acting in either their individual or official capacity, even as seemingly insignificant as the failure to obey traffic laws) is likely to discourage the populace from viewing legal rules as binding. A command's ability to establish the rule of law within its area of control is dependent in large part on its *own* compliance with legal rules restricting soldiers' (and the command's own) discretion and protecting the population from the seemingly arbitrary use of force.

Any definition of the rule of law adopted for use by the U.S. military must consequently not only provide guidance for stability operations, it must motivate the conduct of the full spectrum of operations. Judge advocates have an important stake in that chosen definition, because they both help to plan and execute formal projects to build indigenous capacity to establish and maintain the rule of law and serve as advisors to commanders in the conduct of operations generally.

Operational Impact

Although ensuring that operations are carried out with legitimacy in mind has long-term benefits, there is no denying that there may be short-term costs. Commanders must understand that any rule of law effort will require the dedication of resources in

³⁶ *Id.* at 1-24.

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order to be successful. In addition to drawing away resources that might otherwise be devoted to combat operations or other stability operations, rule of law operations may impact traditional operations in other ways as well.

Because rule of law operations are inherently cooperative enterprises, rule of law practitioners must be flexible not only as to possible end states, but also as to the means they undertake to reach those end states. Moreover, because the governed have the final say over the nature of the law that rules them, whatever means are used for advancing the rule of law must be ones that the local population views as legitimate. That requirement applies both to both formal projects undertaken as part of stability operations (for example, it would be illegitimate for a commander to unilaterally appoint host nation judges) and to the conduct of offensive and defensive operations by coalition and host nation forces (for example, the use of warrantless “cordon and search” methods). Injecting legitimacy into operations is likely to substantially limit commanders’ operational flexibility.

Efforts to inculcate the rule of law through deed rather than word are likely to have a very real operational cost, in the form of reduced mission capability and potentially even in the form of casualties.³⁷ The criminals who go free every day in the United States because of illegal searches – and the police officers who are killed because they are limited in their power to search – are all the reminder anyone needs of the human cost of a state that is itself bound by legal rules. Similarly, U.S. commanders will need to be prepared to respect – and have their power constrained by – host nation legal rules as host nation legal institutions assert their authority.³⁸ Moreover, the operational costs of both operating according to pre-established and well-known rules and of taking a protective rather

³⁷ See JOINT PUB. 3-0, *supra* note 3, at A-4 (“Security actions must be balanced with legitimacy concerns.”).

³⁸ For instance, commanders may have to confront not only the delay and effort of having to obtain search warrants from host nation judges prior to conducting searches but also the possibility that they will be *denied* those search warrants, restricting their operational capacity significantly.

than combative operational stance are likely to be incurred in the short term, while the benefits of those efforts are likely to be realized only over the very long term. It may be particularly hard for commanders to accept those short-term and certain costs in exchange for long-term and uncertain benefits. Commanders need to know these operations, like any other, may cost Soldiers' lives and that, while loss of life is always tragic, it is no more or less acceptable as part of rule of law operations than it is as part of a high-intensity conflict.

Rule of law operations are long-term ones, and the rule of law is not free, either financially or operationally. The worst thing commanders can do for the rule of law is to commit themselves to an approach that they are not prepared to maintain and eventually wind up reversing, an act that is likely to be viewed by the populace as an arbitrary (and consequently lawless) one.

CONCLUSION

The military plays a special role in U.S. efforts to establish the rule of law in foreign nations. The military is the U.S. government's development agency of last resort, likely leading rule of law development programs only when indigenous capacity is so diminished that U.S. forces are providing not only development assistance but security itself. In those situations, the definition of the rule of law that drives the development effort may not be as important as the one that defines the approach that U.S. forces take to their own operations. Successfully establishing the rule of law has less to do with one's definition of the rule of law than it has to do with one's commitment to the rule of law.

