

Rule of Law Makes Sense

A way to Improve your Mission



CCOE

Civil-Military Co-operation
Centre of Excellence



Rule of Law Makes Sense

A Way to Improve Your Mission

First Edition

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This publication represents the views and opinions of the CCOE, as an independent organization and a subject matter expert in its domain. Drafts of this publication have been peer-reviewed by military and civilian experts from different organizations, governments and universities worldwide.

The author would like to thank the peer-group for their valuable contributions. A special thanks goes out to Eliot Glover and Allard-Jan ten Berge for their excellent work reviewing this publication.

On the cover: NAWA DISTRICT CENTER, Helmand province, Afghanistan - Coordinating Director of Rule of Law and Law Enforcement United States Ambassador Hans G. Klemm cuts the ribbon during a grand opening of the new justice center. He was there to help celebrate the center which took nearly a year to finish.

*"[...] the end of the law is, not to abolish or restrain, but to preserve and enlarge freedom. For in all the states of created beings capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others; which cannot be where there is no law: and is not, as we are told, a liberty for every man to do what he lists. (For who could be free when every other man's humour might domineer over him?). But a liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be the subject of the arbitrary will of another, but freely follow his own."*¹

JOHN LOCKE
1632-1704

¹ John Locke, *The Second Treatise of Government*, C.B. McPherson ed. (Cambridge 1980) chapter 6, paragraph 57.

Abstract

Most failed or fragile states in (post) conflict situations face difficulties in upholding the Rule of Law. When it is decided to intervene in such states, militarily or otherwise, strengthening the Rule of Law is increasingly becoming of high interest for military and political missions. When working on Rule of Law during these missions, Civil-Military Cooperation (CIMIC) can play an important role. The aim of this publication is therefore to demonstrate how CIMIC as a military capability can contribute to military and political missions concerned with Rule of Law objectives.

To answer the aforementioned overarching question the publication firstly sets out what exactly Rule of Law is and provides an insight into the legal framework relevant to the Rule of Law (**objective one**). After that, an explanation follows on how Rule of Law can contribute to sustainable mission success (**objective two**). Both questions are important to provide an answer to the **third objective**: how CIMIC at the operational and tactical level can contribute to Rule of Law.

The approach of this publication is to answer the three leading questions by first providing a theoretical overview of Rule of Law followed by a practical part consisting of case studies and examples from the field, demonstrating how CIMIC can contribute to Rule of Law objectives in all phases of a military mission whilst looking at all levels of responsibility (from the political/strategic level to the tactical level).

With regard to the first leading question, this publication acknowledges that Rule of Law cannot be easily defined as it is a very broad term, encompassing the entire spectrum of law-related activities in a country. Nevertheless, two main functions of Rule of Law can be distinguished. The first one protects citizens from their government and the second one protects citizens from each other. Furthermore, there are two concepts of Rule of Law; a 'thin' concept focusing on formal rules and procedures and a 'thick' concept focusing on the content of the law itself.

The abovementioned theoretical background information is needed to provide an answer to the second leading question; how Rule of Law can contribute to sustainable mission success. In short, this publication describes that Rule of Law is the basis for a stable society, because it influences all segments of society, as described in the Advanced Cultural Competence model in the preface of this publication. Sustainable peace will require that the state sanctioned justice system is perceived to be functional and just, and therefore the most attractive alternative to violence for resolving disputes. This sense of justice is an important Rule of Law challenge. Furthermore, it is demonstrated that for a state to function properly, economic and political recovery is necessary. Rule of Law can have a positive contribution to this. When the forces from a military or political mission

have withdrawn, the host-nation will hopefully be able and self-sufficient to uphold these aspects of Rule of Law and provide for a stable society.

CIMIC as a military capability is an important facilitator during the process of strengthening the Rule of Law (if this is part of a mission's objective). It is demonstrated that CIMIC at the operational and tactical level can contribute to Rule of Law (as part of activities and military planning) by facilitating contacts between host-nation actors and the military and providing assessments to the military commander or head of the mission. How this is being done is demonstrated by three case studies focusing on mission experiences from the UN, NATO and EU, followed by a separate chapter on Rule of Law at the operational and tactical level. In the pre-deployment phase CIMIC can contribute to the planning process of a mission, for instance by providing a Theatre Civil Assessment, which is outlined in annex B of the publication. During the deployment phase CIMIC can help strengthen local ownership of the process of improving Rule of Law by putting local actors in the lead to achieve the desired results. In the transition phase then, CIMIC can support the successful development of Rule of Law. It is demonstrated that this can be achieved by providing local actors with assistance or knowledge, through training or education, or in limited cases by directly helping them with Rule of Law projects. However, the publication stresses that the most important task of CIMIC is to contribute to the military commander's objective of leaving behind a secure and stable country after the military has left.

Consequently, the conclusion is drawn that Rule of Law should be(come) an integral part of the host nation's state, upheld by self-sufficient local actors who are capable of delivering a strong, accountable and independent judicial system, long after the military mission has ended. CIMIC can be a very useful capability to support this process and build the foundation for long-term and sustainable success of a military or political mission by providing a facilitating (not a leading) capability when working in the field of Rule of Law.

Preface

The support of states in their movement from conflict to peace is a very demanding and complex challenge. As civil entities might have a head-start when compared to military entities, it is nevertheless absolutely necessary that military forces are able, willing and keen to participate.

These transitioning states demand a different type of focus than the average situation analysis of military personnel. This normal military situation analysis is not considering all the factors which need to be part of the equation. To facilitate a holistic view for the military the CCOE designed the Advanced Cultural Competence (ACC) Model². It incorporates all relevant sectors of any society, as well as all influence factors to this society, which the military forces need to understand and include in their planning to lend the support needed. ACC structures societies into five segments. These are the:

1. **Physical dimension:** Here one has to think of land, mountains, potable water, rivers, the environment but also the mineral resources.
2. **Economic dimension:** produce, trade, ways of dealing with scarcity, but also aspects as entrepreneurial confidence and black market.
3. **Social dimension:** the way any society defines and organizes its relationships: young vs. old; have vs. have-nots; male vs. female.
4. **Political dimension** how a society has divided its power and organized its leadership.
5. **Identity dimension** with joint beliefs and history that helped to shape the identity of a culture/society.

Each single one of these dimensions plays a vital part in the interaction of any society (and thus of any state), sets its' fundamental axioms and depicts borders or development opportunities. Any frictions in these areas will create unrest ranging from irritation to aggression.

² CCOE/J. Sennef, *Advanced Cultural Competence – the gate to CCOE's “... makes sense” publication series* (Enschede 2011).

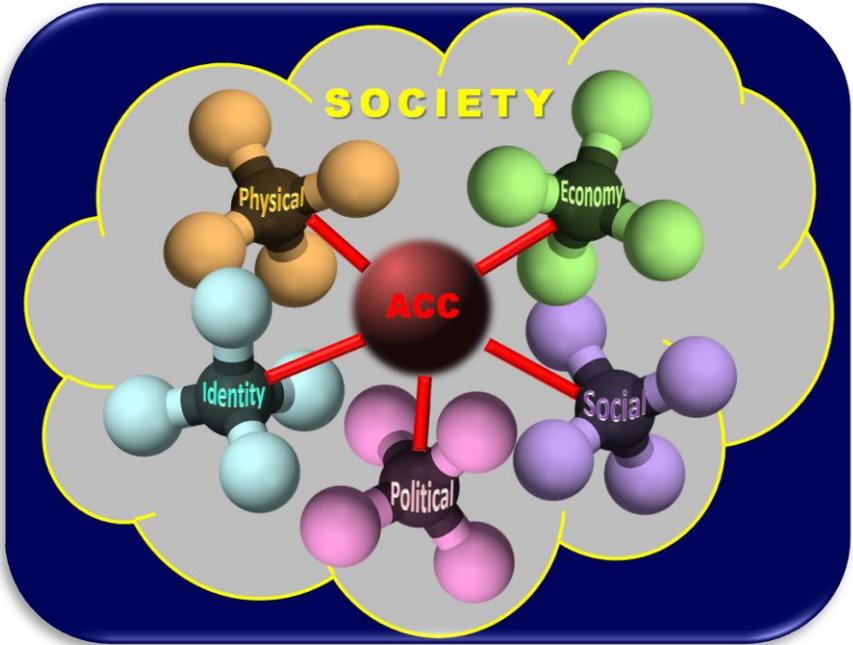


Figure 1 : the Advanced Cultural Competence (ACC) Model

The CCOE aims to produce a model that is transparent as well as understood. In support of this the CCOE publishes a tactical guidance series for the aforementioned elements, if not covered in other publications or doctrines. The start has been made with a “Gender makes sense”, “Ecosystems assessment makes sense” and a “Good Governance makes sense” publication, covering parts of all five dimensions mentioned above. The publication you hold in your hands now explains the influence of one more aspect on all parts of societies rounding up the picture. In future, the ACC-model will be further enhanced with publications on other issues.

Fostering and promoting understanding and comprehension of the ACC-model will, among other things, be assured by making understood the importance of most prominent influence-issues in each segment.

1. Ecosystems influence in the physical dimension
2. Entrepreneurial influence in the economical dimension
3. Gender influence in the social dimension
4. Good governance and Rule of Law influence in the political dimension
5. Cultural heritage Protection influence in the identity dimension.

Taking a close look at these crucial topics will enable military personnel to decipher the problems at hand. This is the prerequisite for holistic analysis of the situation in the area of operations. Starting from here, Alliance Forces will be able to decide on the most efficient measures for solving problems. It is also the key to identifying areas of common interest with civil partners in order to achieve cohesive solutions of an enduring character.

The ACC-model is the gateway to these conditions, thus, enabling military forces to reach the desired end-state, in close partnership with civil entities also committed to the efforts in the area of operation.

This publication will centre on the influence that Rule of Law has on all dimensions of society. The tools and examples outlined in this booklet will support concerted action by the military, civil actors, and the host nation's society, focusing on the improvement of Rule of Law. This publication is therefore based on a comprehensive perspective on Rule of Law. Indeed, the military involvement in strengthening and promoting Rule of Law can only succeed if there is a harmonized and coordinated approach in all five dimension of the ACC-model. In the end, the operational relevance of this publication therefore lies in the understanding that Rule of Law influences all relevant sectors of any society, as outlined above.

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Foreword

21 October 2012

It is with great pleasure that I introduce and recommend you this *Rule of Law Makes Sense* publication.



Assisting States in strengthening their Rule of Law is a complex but highly important and rewarding endeavour. Rule of Law directly affects quality of Government, belief in the judicial organs of a State and therefore the institutional well being of a population. It is a key element in achieving mission success.

Therefore, in present times, nearly all missions reflect an *integrated* or *comprehensive* approach, in recognition of the fact that an end-state of security and stability requires much more than just the disarmament of conflicting parties. It definitely also involves addressing the broad spectrum of Rule of Law:

"... 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. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."³

Based on my personal experiences in Afghanistan and in NATO's Allied Command Operations I would submit that coordination between and cooperation with international and local partners, military *and* civilian, is an essential prerequisite in the process of implementing and strengthening Rule of Law. CIMIC is the key military capability to facilitate this interaction process. It has proven to be a vital tool for military commanders.

³ United Nations, Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, ([S/2004/616](#))

I am convinced this publication will contribute to a better understanding of the important principles of Rule of Law. It provides a theoretical background and a practical approach with experiences from different missions. I strongly believe it will enable military and civilian counterparts to apply these crucial principles in current and future missions and operations.

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke at the bottom.

Brigadier General Jan Peter Spijk LL.M. MA
Head of the Military Legal Services of the Netherlands' Armed Forces
President of the International Society for Military Law and the Law of War

List of Abbreviations

AOO	Area of Operations
AOI	Area of Interest
AOR	Area of Responsibility
ACC	Advanced Cultural Competence
CCOE	Civil-Military Cooperation Centre of Excellence
CIMIC	Civil-Military Cooperation
CMI	Civil-Military Interaction
CSDP	Common Security and Defence Policy
CSO	Civil Society Organisation
DDR	Disarmament, Demobilisation and Reintegration
DPKO	Department of Peacekeeping Operations
EU	European Union
EUCAP	European Union Maritime Capacity Building Mission [in the Horn of Africa]
EUJUST LEX-Iraq	EU Integrated Rule of Law Mission for Iraq
EULEX	European Rule of Law Mission Kosovo
EUPOL	European Union Police
HOTO	Hand-over take-over
IC	International Community
IO	International Organisation
ISAF	International Security Assistance Force
KFOR	[NATO] Kosovo Force
LOAC	Law of Armed Conflict
MINUSTAH	United Nations Stabilization Mission in Haiti
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
NROLFSM	NATO Rule of Law Field Support Mission [Afghanistan]
OPLAN	Operation Plan
PRT	Provincial Reconstruction Team
ROL	Rule of Law
ROLFF-A	Rule of Law Field Force-Afghanistan
S&R	Stability & Reconstruction
TCA	Theatre Civil Assessment
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Programme
UNODC	United Nations Office on Drugs and Crime
UNSCR	United Nations Security Council Resolution

1 Introduction

1.1 What is the Importance of Rule of Law?

The concept of Rule of Law is something to achieve for all states, not just for fragile or failed ones.⁴ However, one of the main characteristics of failed and fragile state is a weak or non-existent Rule of Law. When a state is fragile or failed because of conflict, building the Rule of Law poses many challenges. Domestic state institutions in these states often suffer from the demolition of physical infrastructure. This usually results in a lack of educated law professionals and a rapid spread of crime and corruption, facilitated by insecurity and low law enforcement capacities. Next to that, government staffs are threatened by conflicting parties, and there can be difficulties in identifying and implementing adequate responses to human rights violations that have occurred in the course of a conflict.

When a country needs to be rebuilt and sustainable peace needs to be reached, Rule of Law can be seen as an important facilitator in this process. With a poorly functioning justice system, crimes and violence (which can be criminal as well as politically motivated) flourish with impunity. Rule of Law on the other hand seeks to ensure safety and freedom of movement in order to access public services such as education and health care as well as boost personal and community confidence. Moreover, Rule of Law is a necessary foundation for economic and political recovery and prosperity.⁵

International military forces and international and non-governmental organisations (IO/NGO) face these issues when they try to support a host-nation's state institutions in stabilizing the country and establishing the Rule of Law. However, there is a tendency among different actors, with diverging mandates and capacities, to implement their own Rule of Law strategies with little or no coordination between each other. Therefore, there is a real need for cooperation with the host nations' institutions as well as between the different actors (both military and civil) that operate in a certain Area of Operations (AOO).

It is the aim of this publication to demonstrate that CIMIC as military capability can play an important role in facilitating and coordinating this cooperative process and can help strengthen and promote the aspects the Rule of Law. More importantly, the overarching goal is to explain why Rule of Law is so important for long lasting mission success and how CIMIC can contribute to reach this desired goal. Nonetheless, this publication acknowledges that it has to be stressed that the military should first and foremost deliver a

⁴ A fragile state can be defined as a state that is particularly vulnerable to internal and external shocks and domestic and international conflicts. A failed state can be defined as a condition of state collapse (it can no longer perform its basic functions and has no effective control over its territory and borders).

⁵ United States Institute of Peace, *Guiding Principles for Stabilization and Reconstruction* (Washington 2009) pp. 7-64 and 7-65.

safe and secure environment (its core business). After that, being part of a broader political dimension, the military would be well advised to concentrate on the different cross-cutting aspects of Rule of Law, within a comprehensive approach.

1.2 Methodology

This publication will demonstrate how CIMIC as a military capability can contribute to military or political missions concerned with Rule of Law objectives. A first step is to demonstrate the importance of Rule of Law and in what way this concept is related to current and future military missions. As Rule of Law is increasingly becoming of high interest and value of military operations the overarching aim of this publication is to demonstrate how CIMIC can contribute to Rule of Law activities⁶ during military missions. This process however needs the cooperation of both the military and civil actors. Therefore it is the intention of this publication to:

- Create a thorough understanding of Rule of Law for all different military levels of responsibility, in order to create a long lasting and sustainable success of military missions;
- Stimulate military stakeholders to become more knowledgeable on Rule of Law;
- Provide both military and civilians with awareness regarding the military approach towards Rule of Law.

In short, CIMIC can play an important role in facilitating and supporting this comprehensive approach toward Rule of Law. To demonstrate why this is the case, this publication will answer the following three questions:

1. What is Rule of Law?

2. How can Rule of Law contribute to sustainable mission success?

3. How can CIMIC at the operational and tactical level contribute to Rule of Law?

As a first step to answer these three leading questions it is important to create a broad overview of what exactly Rule of Law is. Chapter two therefore goes into the definition(s) of Rule of Law, the activities that are carried out under the umbrella of 'Rule of Law' and puts the concept in its proper legal framework. After that, chapter three will provide an insight into the legal framework relevant to Rule of Law. The next chapter then will

⁶ In this publication the term *Rule of Law activities* is being used to describe all *activities* in the field of Rule of Law. This specifically means that Rule of Law activities do not only encompass the execution of *projects*. Activities in this case might as well mean interaction between military and civil actors, or contributing to military planning by providing assessments of the Rule of Law situation (one of the core *activities* of CIMIC).

elaborate how a comprehensive approach can contribute to strengthening Rule of Law and what exactly the mission relevance of this topic is. The second part of this publication will put the theory into practice. Chapter five will deal with the Rule of Law activities of three major international organisations: UN, NATO and EU. As this publication is aimed for operator handling at the operational and tactical level, chapter five will also focus on several examples and testimonies from the field to illustrate how CIMIC can support the local effort to strengthen the Rule of Law. Lastly, chapter six sets out important aspects of Rule of Law activities during three stages: pre-deployment, deployment and transition. During all these phases CIMIC can be an important tool to assess the aspects of the Rule of Law in the Area of Operations, incorporate these findings in military planning and eventually contribute to the overall Rule of Law objective(s) of the military mission. As a result, the leading questions will be answered in the conclusion, followed by a chapter with recommendations.

Textbox 1 USAID: Why the Rule of Law is Critical for Democracy

“The rule of law is the cornerstone for all other elements of democracy. A free and fair political system, protection of human rights, a vibrant civil society, public confidence in the police and the courts, and economic development all depend upon accountable governments, fair and accessible application of the law, and respect for international human rights standards. In post-conflict settings, reestablishing the rule of law is the first step in the rebuilding process. Establishing peace and security and rebuilding justice institutions can help to develop the necessary climate for reconciliation, public confidence, and subsequent economic growth.”

http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/

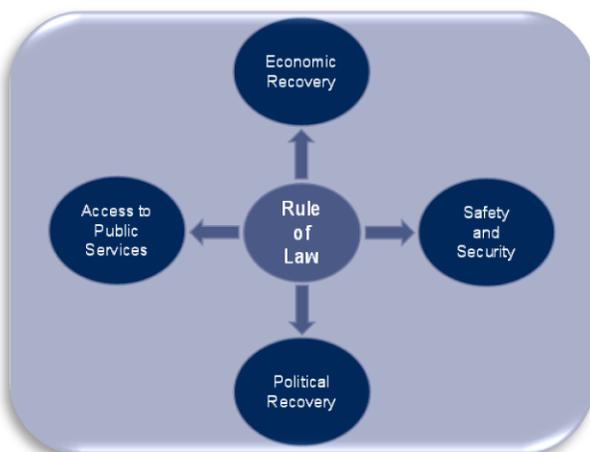


Figure 2. Lines of Influence

2 What is Rule of Law?

Beyond Aristotle's basic concept of "a government of laws, not of men", variations on the understanding of Rule of Law abound in contemporary culture and literature.⁷ Many IOs, NGOs, governments, lawyers and judges associations, policy think-tanks and private foundations are engaged in promoting the Rule of Law and naturally they often view Rule of Law differently. One clear distinction however that can be seen in these various views is between a 'thin' (narrow or formal) and a 'thick' (broad and substantive) concept of the Rule of Law.

1. *Thin concept of Rule of Law*

The 'thin' concept focuses on formal rules and procedures. It emphasizes the procedures for making and enforcing law and the structure of a nation's legal system.

2. *Thick concept of Rule of Law*

The 'thick' concept focuses more on the content of the law itself. In this concept one would for example make sure that the law is consistent with international human rights and standards. These include due process, equality before the law, judicial checks on executive power, freedom of expression and conscience.

Textbox 2

The military would in most cases use the thin concept of Rule of Law. That is what the military is best equipped for. This includes for example helping existing court systems to function properly. This can be done by making sure there is enough judicial personnel in a region, by creating a safer or more secure situation (for example by building a wall around a courthouse or by providing safe housing for judges) etc. Another example is training the police force. They have to be trained according to their own laws (for example in evidence gathering or making arrests).

The thick concept, which deals with the content of the law itself, goes much deeper into a country's legal system and demands much more legal expertise. This concept entails for example the writing and changing of laws. In the thick concept, the factor time plays a very important role, as writing laws and creating a formal judicial system can take years to develop. 'Military' projects aimed at the thick concept would therefore be long-term rather than short-term. It should not come to a surprise that the appetite in the military for these sorts of projects is normally quite low.

⁷ Friedrich Hayek, *The Constitution of Liberty* (Chicago 1960) pp. 162-175.

The distinction between the two types of Rule of Law is a matter of emphasis and priority rather than a choice between one approach and the other.⁸ However, the degree to which a Rule of Law activity is thin or thick will affect how the project is carried out, by whom and with which strategies.⁹



Picture 1 Mosaic representing both the judicial and legislative aspects of law. The woman on the throne holds a sword to chastise the guilty and a palm branch to reward the meritorious

Even though there are many different definitions, there is common ground and there are two main functions of Rule of Law that virtually everyone agrees on:

1. To curb arbitrary and inequitable use of state power. Rule of Law acts as an umbrella concept for a number of legal and institutional instruments to protect citizens against the power of a state; and

2. To protect citizens' lives and property from infringements or assaults by fellow citizens.¹⁰

⁸ The Judge Advocate General's Legal Centre & School, U.S. Army, Centre for Law and Military Operations, *Rule of Law Handbook; A Practitioner's Guide for Judge Advocates* (2010) p. 17.

⁹ The World Justice Project. *Rule of Law Index 2011*, p. 9.
http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf (accessed 12 July 2012).

¹⁰ Adriaan Bedner, 'An Elementary Approach to the Rule of Law', *Hague Journal on the Rule of Law*, Nr. 2, 1 (2010), pp. 48-74.

In short, the first function of Rule of Law deals with the relationship between the government and its citizens and the second function deals with the relationship between citizens.

The United Nations for instance is actively involved in Rule of Law. They see promoting the Rule of Law at the national and international level as being at the heart of their missions. The UN's definition of Rule of Law is as follows:

The rule of law refers to 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 and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹¹

While this broad definition has infused other definitions of many other Rule of Law actors, it too contains the two main functions of Rule of Law as described earlier. Therefore, as this definition represents many countries within the international community, it offers a useful starting point.

Lastly, to complete the definition of Rule of Law, it is important to set out that three pillars form the foundation of justice: personnel (there needs to be qualified and reliable personnel), infrastructure (there needs to be sufficient and safe infrastructure) and law-abidingness (there needs to be consciousness of the law and right and wrong, in order to build confidence in the legal justice system with the very people who will be affected by it). As with a stool, all three legs need to be well developed and balanced to prevent it from falling.¹²

¹¹ United Nations, *United Nations and the Rule of Law*, <http://www.un.org/en/ruleoflaw/index.shtml> n.d. (accessed 7 July 2012).

¹² Gijs Scholtens, *Taskforce Uruzgan, op zoek naar het recht* (Soesterberg 2007), p. 26.

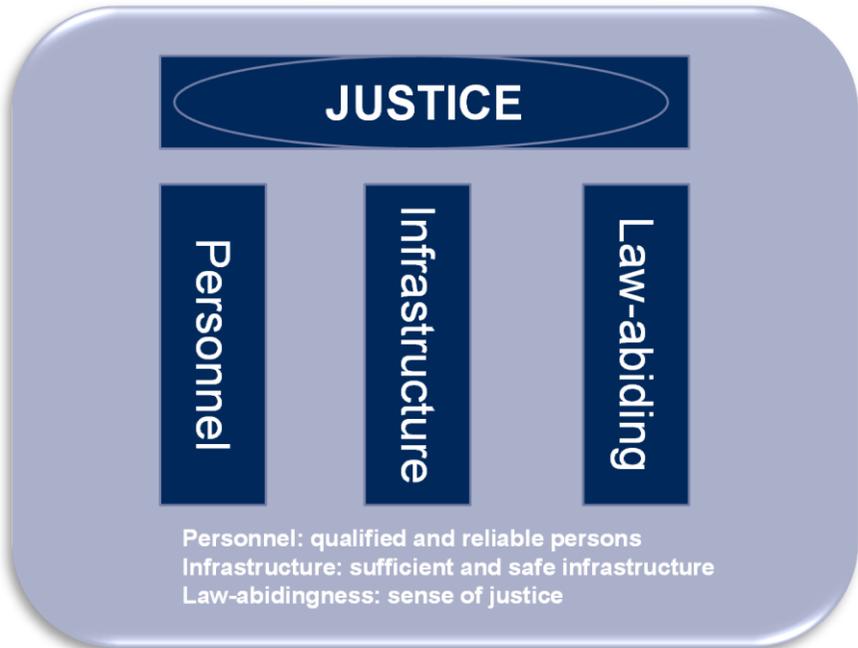


Figure 3. The three pillars of justice (source: G. Scholtens, 2007)

Textbox 3

The Netherlands-led Provincial Reconstruction Team (PRT) Uruzgan (as part of Taskforce Uruzgan) dealt for example with the following issues in Uruzgan province, Afghanistan, in the period between 2006 and 2010:

Personnel:

- Training of the police force;
- Negotiations to get judges appointed to the region and to get the appointed judges to actually come to the region;
- Initiating training for judges and prosecutors.

Infrastructure:

- Building and renovating the courthouse, prison and housing for judges.

Law-abidingness:

- Broadcasting radio messages and spreading flyers about the law.

When deployed, CIMIC personnel reading this publication will hopefully be part of an operation that already has a solid definition of the Rule of Law, albeit one that has been adopted by policymakers. With that in mind, the definitions presented above are ones that are likely to be present in any Rule of Law definition one is likely to encounter. 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 (see the ACC model presented in the preface) - that it may seem futile to seek a single definition for the Rule of Law or how it is to be achieved. Therefore, CIMIC personnel need to be flexible in not only their understanding of what the Rule of Law is, but also in their approach to bringing it about in a particular context.¹³

¹³ The Judge Advocate General's Legal Centre & School, *Handbook*, p. 1.

3 Legal Framework

3.1 Basic Legal Framework

Generally speaking, there are three major legal disciplines relevant to Rule of Law activities during missions: the law of armed conflict (LOAC), international human rights law and the national and local laws of the host nation. This paragraph will demonstrate what each of these disciplines are, and how they influence military missions.

3.1.1 Law of Armed Conflict

During missions, LOAC will most likely apply along with all relevant treaty law (the Hague Conventions on the means and methods of warfare, the Geneva Conventions on the protection of victims of war and the Additional Protocols to the Geneva Conventions), customary international law or national policy decisions to comply with LOAC in military operations regardless of their characterization.¹⁴

Occupation law is a subset of LOAC and it needs to be considered when a piece of territory is actually placed under the authority of an occupying force and it extends only to the territory where such authority has been established and can be exercised.¹⁵ Treaty law can mainly be found in the 1907 Hague IV Regulations (rule of governance and handling of property) and the Fourth Geneva Convention (norms applicable to the treatment of persons). The norms of these treaties can also be considered to constitute customary international law. An obstacle to Rule of Law activities could be article 43 of the Hague Regulations and article 64 of the Fourth Geneva Convention. These articles direct occupants to preserve and adopt existing systems of government. So, modifying existing legal regimes and institutions is not allowed under occupation law. However, there are two exceptions possible. Firstly, if the alteration is grounded in legitimate security concerns and secondly, if it falls under a superseding international mandate for development (such as United Nations (UN) Security Council Resolutions together with article 25 and 103 of the UN Charter).

¹⁴ There is a great deal of discussion about the relevance of LOAC with regard to conflicts called non-international armed conflict.

¹⁵ Hague Convention IV 1907, Article 42.



Picture 2 Modern laws of war, such as the 1949 Geneva Conventions, also include prohibitions on attacking doctors, ambulances or hospital ships displaying a Red Cross or a Red Crescent.

3.1.2 International Human Rights Law

Human rights obligations can be taken into a mission area by a state and they can already exist in a host nation. This can be the case because of treaty obligations and because of customary international law. Some treaties are territorial in scope and are thus not applicable outside that territory. However, the International Covenant on Civil and Political Rights and the European Convention on Human Rights are also applicable when the state parties have jurisdiction. This would for example mean that these treaties have to be applied with regard to detainees (the United States do not share this opinion). On the other hand, regardless of the (applicable) human rights treaties, Rule of Law activities are well served with behaviour that reflects human rights law. This will help and encourage the host nation to adopt and practice strong human rights norms.¹⁶

3.1.3 Host Nation Law

A third obvious, but nonetheless very relevant, legal system is host nation law. This is of course the foundation of working with Rule of Law once most kinetic activities have subsided. For example, when police officers are being trained in evidence gathering, it is essential that this happens in accordance with their national law. A government sanctioned court system is also something that is laid down in accordance with national

¹⁶ The Judge Advocate General's Legal Centre & School, *Rule*, pp. 85-91.

laws and when law reform needs to happen, laws need to be changed or new laws need to be built according to the right procedures.

3.2 Detailed Guidelines

As can be seen in the UN Charter, the three pillars of the UN's mission are to maintain international peace and security, achieve economic and social progress and development, and to encourage respect for human rights and fundamental freedoms. The promotion of Rule of Law is fundamental to this mission.¹⁷ In the Outcome Document of the 2005 World Summit the UN Member States recognized “[...] the need for universal adherence to and implementation of the rule of law at both the national and international levels” and reaffirmed their “commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States.”¹⁸

Furthermore, the UN General Assembly adopted several resolutions on Rule of Law at the national and international levels. These resolutions have been adopted on a yearly basis starting in 2006.¹⁹ In these resolutions, the UN General Assembly (among other things) states (and stresses) the importance of Rule of Law, supports coordination of Rule of Law activities and requests reports on Rule of Law.

The UN seeks to apply Rule of Law principles that are based upon commonly agreed values. Drawn from existing commitments in the UN Charter, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, the 2005 World Summit Outcome Document and multilateral treaties, such as the Vienna Convention on the Law of Treaties, these core values include:

(a) Respect for the Charter of the United Nations and international law, which are indispensable foundations for a more peaceful, prosperous and just world;

(b) Recognition that peace and security, development, human rights, the rule of law and democracy are interlinked and mutually reinforcing, and that they form part of the universal and indivisible core values and principles of the United Nations;

(c) Recognition that an effective multilateral system in accordance with international law is essential to address the multifaceted and interconnected challenges and threats confronting our world, and that to achieve progress in the areas of peace and security,

¹⁷ United Nations, *Guidance Note of the Secretary-General, UN Approach to Rule of Law Assistance*, April 2008.

¹⁸ United Nations, *General Assembly Resolution 60/1*, par. 134. October 2005, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>. (accessed 6 May 2012).

¹⁹ UN General Assembly Resolutions 61/39, 62/70, 63/128, 64/116, 65/32 (status 2011).

development and human rights requires a strong and effective United Nations playing a central role through the implementation of its decisions and resolutions;

(d) Respect for the sovereign equality of States and the need to promote the non-use or threat of use of force against the territorial integrity or political independence of any State in any manner inconsistent with the Charter of the United Nations;

(e) The need to resolve disputes by peaceful means in conformity with the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, and the principles of justice and international law;

(f) Respect for and protection of human rights and fundamental freedoms, the right of peoples to self-determination, and the equal rights of all, without distinction as to race, sex, language or religion;

(g) Recognition that protection from genocide, crimes against humanity, ethnic cleansing and war crimes is not only a responsibility owed by a State to its population, but also a responsibility of the international community.²⁰

During specific missions, the applicable UN Security Council Resolutions (UNSCR) will specify the mandate for those missions. The scope for military involvement with regard to Rule of Law will have to be found here.



Picture 3 Timorese National Police (PNTL) officers complete a three-week training course facilitated by the United Nations Police (UNPOL) component of the United Nations Integrated Mission in Timor-Leste (UNMIT)

²⁰ United Nations, *Rule of Law at the International Level*, 15 June 2009, Concept Note.

4 Rule of Law during Missions

4.1 Mission Relevance

Violent conflict disrupts the very fabric of society. Besides the restoration of basic commodities and services such as food, water, medical care and shelter, one of the first priorities will be the establishment of security. A functioning, credible and visible police force for instance will go a long way in ensuring public safety and enhancing the trust and confidence of the local population. If powerbrokers and criminal fraternities can be brought to justice – prosecuted, sentenced and where necessary imprisoned – the threat to security and the local population will be manageable within the system itself. Sustainable peace will require that the state sanctioned justice system is perceived to be functional and just, and therefore the most attractive alternative to violence for resolving disputes. This sense of justice is an important Rule of Law challenge.

Furthermore, for a state to function properly, economic and political recovery is necessary. Though human security may be established through physical security and humanitarian assistance, and economic recovery may be initiated, long-term stability requires the establishment of the Rule of Law.²¹ In short, the conclusion can be drawn that improving Rule of Law can fall within the ‘normal’ primary task of the military of maintaining security, but it can go (much) further than that. In any case, improving Rule of Law will be very beneficial for a state’s stability, which therefore can also be an important task for the military. Indeed, it is often the establishment of the Rule of Law, and a security sector that can enforce it, that will permit the redeployment of any joint force when supporting Stability & Reconstruction (S&R) in a failed or failing state.²²

It is important to understand that Rule of Law involves a country’s entire legal framework and influences all dimensions of society, as described in the ACC-model. Within a legal framework all fields of law should be addressed; criminal law, private law, administrative law etc. (with subcategories such as property rights, family law, anti-corruption etc.). A field of law that can be particularly suitable for the military to deal with during missions is criminal law (law and order). Among other things, improving criminal law directly influences the safety situation in a country and the military (including military police) is capable of employing activities which will benefit this field of law (for example training the police force and building the necessary infrastructure such as courts and prisons).

²¹ USIP, *Guiding*, pp. 64-65.

²² NATO, *Allied Joint Publication for Support to Stabilization and Reconstruction 3.4.5 SD1* (2012) Ch. 4. p. 9.



Picture 4 Patrol to an ANP (Afghan National Police) post just outside of Deh Rawod where the Netherlands-led PRT (Provincial Reconstruction Team) Uruzgan teaches weapon maintenance and first aid to ANP members.

As a law and order construct, Rule of Law involves 'three C's': Cops, Courts and Corrections. This is perhaps the most functional and 'operational' way to address Rule of Law as it pertains to post-conflict areas and issues, reflecting the entire chain or 'life cycle' of justice delivery essential for a framework capable of sustaining Rule of Law. The following illustrates this 'chain' of strengthening the Rule of Law:

1. There has to be a credible police force to report a crime to (and who can investigate it);
2. There has to be an independent court where a criminal can be tried fairly and;
3. There has to be a prison, which guarantees certain basic humane standards, where criminals can be sent to.²³

However, each situation should be judged by its own facts. In some failed states there may exist a local or traditional form of justice (as is the case in rural Afghanistan for instance). This should not be ignored or treated as secondary to the more formal justice that the western world is typically used to. We should take into account that in some

²³ Southern Region Partners Coordination Board, *A Common and Operational Approach to Rule of Law for Southern Afghanistan* (Kandahar 2009).

cases it is the 'winning of hearts and minds' in the more traditional justice field that constitutes the true battleground.

In the end, as described earlier, Rule of Law influences all segments of society (physical, economic, social, political and identity). Although Rule of Law obviously strongly influences the political dimension, it also has an important impact on other relevant aspects of society. In fact, culture is one of the most fundamental aspects when looking at the question how Rule of Law influences military operations. As demonstrated in the CCOE's ACC-model, cultural awareness improves the quality of the relationship between the military and the local population by deepening the understanding of each other's motives in relation to Rule of Law. Consequently, advanced cultural competence will result in the situation that local judicial rules and procedures that might initially be considered alien, unwelcome and even hostile to the operational requirements can take its rightful place in the operation and actually contribute to the mission's success. For instance, in Afghanistan it is common practice that ISAF troops join and make use of *shura* meetings (a local consultation mechanism). Using a 'host nation' perspective can therefore improve mission success to a large extent.



Picture 5 When working on Rule of Law cultural awareness is essential

4.2 Strengthening the Rule of Law

Reaching stability in a crisis area involves addressing several topics that are all in some way linked to each other. The theory behind this is called *comprehensive approach*. A comprehensive approach reflects the synergy amongst all actors and actions of the International Community through the coordination and de-confliction of its political, development and security capabilities to face today's challenges including complex emergencies. This can include coordination between and with local and international partners, but it can also include organising or facilitating contacts among local partners.

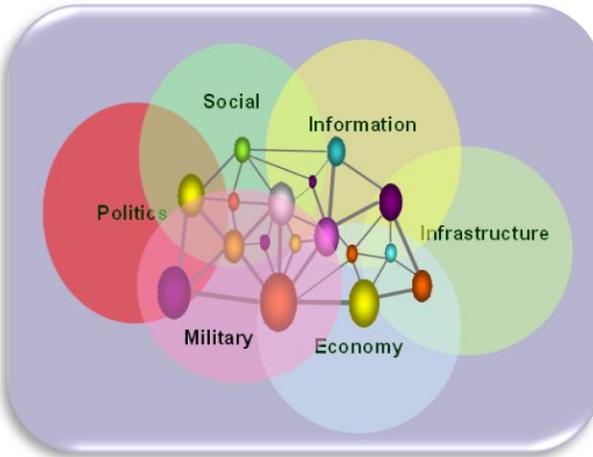


Figure 4. Instruments of power (Political, Military, Economical, Social, Information and Infrastructure-PMESII, see chapter 6.1)

It is very likely that multiple IOs and NGOs will already be operating within the conflict area, and their priorities will probably be with broad stabilisation efforts including the return of 'basic services'. It is also likely that the security situation on the ground during the early stages of an operation will limit the activities of IOs and NGOs, through restricted movement. The military most probably has more freedom of movement to engage in Rule of Law activities. In this case, the first step for CIMIC personnel would be to make a Rule of Law assessment. In other words, it is important to assess the situation through talking to the local population, government officials, IOs, NGOs and relevant professionals to ascertain where help is most needed and where the military is best equipped to support Rule of Law projects. This could be a task for functional specialists or members of a CIMIC team. The bottom line, however, is that when relevant IOs or NGOs are present, it is vital that Rule of Law activities are harmonised in order to prevent duplication of effort preserve resources and reduce friction between the respective organisations, thus optimising the Rule of Law activities in a country.²⁴

²⁴ The coordination and liaison role of CIMIC is obviously very important in this case.

Textbox 4

A Rule of Law assessment, at least at the start of a mission or when Rule of Law starts being addressed during a mission, is crucial because it will give a clear picture of the situation and it will uncover the topics that need to be addressed. Furthermore, it helps prevent duplication of efforts, because the assessment will give an insight into already existing projects and activities. This needs to be well-documented so successors can easily take over and do not have to go through the entire assessment process again (keeping the existing assessment up-to-date with for example new contacts and projects would be enough). If every new rotation would start with a full assessment there would hardly be time to continue or start actual projects and the goodwill and cooperation of the relevant civilian partners would soon be lost.

It is important to bear in mind that CIMIC activities should always be undertaken in support of the mission. As a result, Rule of Law activities must also fall within the boundaries of that specific mission. This means that it is important to understand the mission's objectives and to be aware of the so called 'feel good trap'. Rule of Law activities should be executed according to mandates and they should be part of a mission objective. It is not wise to undertake Rule of Law activities 'just because it feels good and we should do something'. The important documents where CIMIC activities should be based on are: the UNSCR, or any other mandate, and the military plan that eventually follows from that (on NATO level, the OPLAN which – among other things – contains the commander's intent).

In short, there is a great variety of activities that are carried out under the umbrella of Rule of Law, such as:

- Recruitment and training of legal personnel (judges, lawyers, prosecutors etc.).
- Recruitment and training of the police force.
- Building of prisons, courthouses etc.
- Securing the safety of judicial personnel (for example by building safe housing or by building walls around courthouses).
- Establishing management and administration systems for judiciaries.
- Establishing or strengthening bar associations and law schools.
- Attracting enough legal personnel to certain regions.
- Drafting of new laws, regulations and codes of criminal or civil procedure.

It should however be clear that the aforementioned activities should not be directly translated into CIMIC. All of the activities are in one way or another projects, and none of them are directly carried out by CIMIC personnel. However, civil-military cooperation can strongly contribute to these activities, not by executing them but by being a facilitator. For instance, through the capacities and capabilities of CIMIC an assessment of the Rule of Law situation in the Area of Operations can be made. This assessment can then be incorporated into the military planning in all phases of the mission (pre-deployment, deployment or transition). If one of the objectives is to strengthen Rule of Law (for instance when stipulated in the mandate), the military would be well advised to address the issues which have been incorporated in the military plans. CIMIC can then facilitate contacts between local civil actors and the military in order to perform certain Rule of Law activities. In the past, CIMIC activities have extensively contributed to Rule of Law objectives, as shall be further elaborated in the next chapter.



Picture 6 Sarpoza prison staff receive training on proper techniques for searching visitors at the PRT training centre in Kandahar City.

Textbox 5

Even though military Rule of Law projects may aim at short term effects (and these projects can be very useful, in support of the mission and show progress in a short period of time), it is important not to forget long(er)-term Rule of Law development. When a project only has temporary benefits, this should be taken into consideration when deciding to spend time and money on a project. Long term projects can outlast our stay, but they can be very beneficial for the Rule of Law in a country and when setting up a long term project the possibility of - in a later stage - handing it over to locals or IOs/NGOs can be looked into. It then is vital to look forward to a date when the project can realistically be handed over in order to avoid mission creep and dependence.



Picture 7 Afghan local officials and several other guests sit for lunch during a celebration marking the grand opening of the justice center in Nawa. The new centre comes with a community court room, consultation room, and several office spaces for the district's rule of law figures like the senior judge, prosecutors, and the *huquq*, or civil dispute mediator.

5 Rule of Law and UN, NATO and EU

This chapter provides an overview of Rule of Law activities (not projects per se), looking at three different organisations: UN, NATO and EU. There are of course more organisations and multinational entities working on Rule of Law. However, this publication focuses on these three organizations because of their relevance to the military environment. Moreover, CIMIC plays an important role in all of these organizations when working in the field of Rule of Law. Although CIMIC is well known within UN, NATO and EU, all three entities have a (fairly) different view on this concept. Consequently, when working towards a comprehensive approach it is useful to describe the different ways of working and the activities undertaken by these organizations in relation to Rule of Law. This chapter therefore describes the different approaches to Rule of Law, illustrated with recent examples of how CIMIC contributed to each of these approaches.

5.1 UN and Rule of Law

As described in chapter 2 and 3.2, Rule of Law is a well developed concept within the UN. In the 2006 report *'Uniting our strengths: Enhancing United Nations support for the rule of law'* UN Secretary-General Kofi Annan decided to create a Rule of Law Coordination and Resource Group as well as a Rule of Law Unit. Since that time responsibility for the overall coordination and coherence of Rule of Law within the United Nations system rests with this Rule of Law Coordination and Resource Group. The Group's role is to ensure coherence and minimize fragmentation across all thematic Rule of Law areas, including justice, security, prison and penal reform, legal reform, constitution-making, gender issues and transitional justice. The mission of its members is to work together and in support of one another, in the spirit of shared values and principles, to ensure effective and coherent UN Rule of Law efforts that are aligned with the aspirations of partners at the national and international levels.²⁵

²⁵ United Nations Rule of Law, *United Nations Rule of Law Coordination Group* http://www.unrol.org/article.aspx?article_id=6, n.d. (accessed 12 July 2012).

Textbox 6

The Rule of Law Coordination and Resource Group

“Members of the Group are the principals of the Department of Political Affairs (DPA), the Department of Peacekeeping Operations (DPKO), Office of the High Commissioner for Human Rights (OHCHR), the Office of Legal Affairs (OLA), United Nations Development Programme (UNDP), the Office of the United Nations High Commissioner for Refugees (UNHCR), the United Nations Children’s Fund (UNICEF), the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) and the United Nations Office on Drugs and Crime (UNODC). The Group serves an important coordination function, while the operational role remains squarely with the individual UN entities.”

http://www.unrol.org/article.aspx?article_id=6

The UN Rule of Law Unit has three main tasks:

- Ensuring coordination and coherence among the many UN entities engaged in Rule of Law activities;
- Developing system-wide strategies, policy direction and guidance for the organization’s activities in promoting Rule of Law; and
- Enhancing partnerships between the UN and other Rule of Law actors.

Furthermore, the Rule of Law Unit supports the Rule of Law Coordination and Resource Group in its task of acting as a repository for the UN’s Rule of Law materials and best practices, and in establishing and managing web resources.²⁶

Over 150 Member States of the UN in every region of the world are involved in Rule of Law activities. In at least 70 countries, a minimum of three UN entities carry out Rule of Law activities. These include “normal” peacetime projects, but these activities are also carried out during UN peace operations (i.e. in peacemaking, peacekeeping and peacebuilding missions).

All of the activities to strengthen Rule of Law support the codification, development, promotion and implementation of international norms and standards in most fields of international law. At the national level, they involve strengthening the constitution, laws, institutions of justice, governance, security and human rights, transitional justice, and

²⁶ United Nations Rule of Law, *Rule of Law Unit*, http://www.unrol.org/article.aspx?article_id=7, n.d. (accessed 12 July 2012).

public and civil society engagement. Lastly, the UN includes judicial mechanisms, such as the International Court of Justice, and the ad hoc criminal tribunals and hybrid tribunals, established by the Security Council or through an agreement with the host country.²⁷

Textbox 7

A few examples of UN Rule of Law activities:

- **Afghanistan:** The *DPKO*-led mission *UNAMA* supported the establishment (in 2008) of the Afghan Independent Bar Association and a new Legal Aid Department within the Ministry of Justice. *UNAMA* also facilitated the finalization of the National Justice Sector Strategy to ensure effective coordination of the establishment of the justice system and the National Justice Programme to implement the strategy. The *UNAMA* Police Advisory Unit advised and assisted the Ministry of Interior on key technical issues, and supported the Commander of Kabul police and other provinces on strategic and operational planning in co-operation with the International Security Assistance Force. *UN WOMEN* has been promoting gender-responsive security sector reform and supporting women political leaders in an effort to increase women's influence in peacebuilding and improve their access to justice. *UNDP* has a well-established rule of law programme which is composed of three projects, notably Strengthening the Justice System of Afghanistan, Access to Justice at the District Level, and the Provincial Justice Coordination Mechanism with *UNAMA*. *UNODC* is supporting a multi-disciplinary programme to promote criminal justice capacity-building.

- **Rwanda:** *UNDP* is conducting a training programme for community policing committees, increased involvement of the community in the maintenance of peace of security, dissemination of human rights principles and strengthened awareness on gender-based violence. *The International Criminal Tribunal for Rwanda*, an ad hoc international criminal tribunal, established by the Security Council in 1994 as a subsidiary organ of the UN, has finished more than 20 trials.

- **Mozambique:** *UNDP* supports the reform of the criminal justice system through decentralization of the criminal justice system and in favor of alternatives to imprisonment.

- **Sierra Leone:** *The Special Court for Sierra Leone* was set up jointly by the Government of Sierra Leone and the UN Secretariat and has completed two cases. *UNIFEM* is focusing its efforts on making use of specific indicators to measure implementation of resolution 1325 and to ensure women's inclusion in the reconstruction of the country.

²⁷ United Nations Rule of Law, *Homepage*, <http://www.unrol.org/default.aspx>, July 12, 2012 (accessed 12 July 2012).

Textbox 7 continuation

- **Haiti:** With the assistance of the *DPKO*-led mission, *MINUSTAH*, the host country established a legal aid clinic, community-based legal assistance clinic for dispute resolution and to house resource materials, and a magistrate's school. *MINUSTAH* supported the Haiti National Police (*HNP*) to restore security resulting in a significant decrease in the reported number of kidnappings. It also supported the coast guard and assisted the Government in reforming and restructuring the *HNP*. Formed Police Units assist the *HNP* in maintaining safety and security and in support of the crime prevention strategy. *UNICEF* is supporting the provision of legal support to children placed in pre-trial detention and detention and building the capacity of the police on child protection in cooperation with *MINUSTAH*.

<http://www.unrol.org/>



Picture 8 Restoring the Rule of Law is an important part of UN's *MINUSTAH* mission in Haiti

5.1.1 CIMIC and the Rule of Law: the MONUSCO experience

Since 1996, the challenging environment of the Democratic Republic of Congo (DRC) has posed relentless threats from active foreign and local armed groups to the Congolese state, particularly in the Eastern part of the DRC, with persistent land and ethnic conflicts and inter-communal tensions intensified by the movement of populations. In response to this crisis, MONUC was established through Security Council Resolution (SCR) 1279 on 30 November 1999.

Since the Mission's inception UN CIMIC²⁸ has played a critical role in implementing solutions ranging from opening humanitarian access to increasing humanitarian assistance, protecting those most vulnerable to violence and poverty, preventing and solving local conflicts, extending the reach of the Congolese state and promoting dialogue amongst civil society organizations (CSOs), national and provincial governments.

As the situation in DRC has become more stable, MONUC transformed into the UN Stabilization Mission in the DRC (MONUSCO) through SCR 1925 on 1 July 2010. On 28 June 2011, the current mandate was passed under Resolution 1991 to advance peace and security through protection of civilians, stabilizing conflict affected areas, improving human rights, including support to justice and the security sector, as well as strengthening democratic institutions and support to peace consolidation.²⁹

With regard to Rule of Law, one of the most challenging activities of the UN Mission is to build the capacity of judicial institutions in Sud Kivu. Such activities include providing training for various actors of the provincial judicial and executive power, including the public prosecutor, judges, lawyers, inspectors, and criminal investigation officers. In the framework of the Government's Stabilization and Reconstruction Program (STAREC) for war-affected areas in eastern DR Congo, CIMIC has contributed to the construction of peace courts in the territories of Walungu, Shabunda and Fizi. Moreover, CIMIC is

²⁸According to the UN policy on CIMIC (see: United Nations, *Civil-Military Coordination in UN Integrated Peacekeeping Missions (UN-CIMIC)* (2010) p. 2), "UN CIMIC encompasses activities undertaken and/or facilitated by military components of UN integrated missions across the full spectrum of UN peacekeeping operations, particularly as part of integrated planning. In a UN peacekeeping context, this coordination is called 'UN-CIMIC' which is a military staff function that facilitates the interface between the military and civilian components of an integrated mission, as well as with the humanitarian and development actors in the mission area, in order to support UN mission objectives. While UN Civil-Military Coordination¹ (UN-CMCoord) refers to the humanitarian civil-military coordination function that provides the necessary interface between humanitarian and military actors to protect and promote the humanitarian principles and achieve the humanitarian objectives in complex emergencies and natural disaster situations." Thus, in essence NATO CIMIC does not differ a lot from UN CIMIC. Both concepts are aimed at being facilitators in the process of civil-military interaction.

²⁹ United Nations, *MONUSCO's Civil Affairs: From resolving conflict to restoring state authority, Civil Affairs understands the reality on the ground* (2010) p. 2.

facilitating technical, logistical and other support to judicial authorities as they help organize mobile court hearings, or conduct inspections of jurisdictions, lower-level prosecution offices, and detention centres.

The assessments made during the abovementioned inspections result in well founded advice for the commanders of the MONUSCO mission. If necessary it can be decided that as a part of MONUSCO's mandate specific flaws in the Rule of Law situation can be addressed by CIMIC, in order to provide support to the local actors dealing with these topics. In the end, CIMIC personnel therefore contribute to the Rule of Law objectives of the MONUSCO missions by providing advice to the military commander on the aspects of Rule of Law which have to be strengthened. Consequently, if necessary, CIMIC personnel can facilitate cooperation between local civil actors, NGOs/IOs and the military to work on these Rule of Law objectives. It is obvious that CIMIC should not lead this process, but is mostly a facilitator as opposed to the actor. However, this position can highly increase a positive military contribution to Rule of Law activities and result in long lasting mission success, by letting the local population take the lead.



Picture 9 Officers and support personnel of the Armed Forces of the Democratic Republic of the Congo (FARDC) upon completion of a week of military legal education in the DRC

5.2 NATO and Rule of Law

According to NATO, restoring the Rule of Law is fundamental to establishing peace and stability. Any enduring solution to a crisis requires a safe and secure environment maintained by a civilian law enforcement system. The possible contribution of the military component in this delicate area could consist of providing a safe and secure environment where such functions could be effectively conducted by the appropriate bodies, either from the host-nation or from other multinational structures. Police, and military supporting police can restore public order in the short term but building viable law enforcement agencies is critical for long term stability. Civilian actors and international police / gendarmerie forces in concert with the host-nation are primarily responsible for civil law and order, but the military might need to provide initial support if they are the only organization that can ensure credible public security.³⁰

NATO Rule of Law activities constitute a wide range of stabilization and reconstruction efforts, which includes police, judicial, legislative and security reforms, supported by lead nations, IOs/NGOs and CIMIC units that contribute to the improvement or development of respect for and adherence to the Rule of Law. Such operations seek to restore and enhance the effective and fair administration and the enforcement of justice. As a result, this will assist the creation of secure and stable “white spaces” for the civilian population to live, work and exercise their legal rights. NATO policy stresses the need for synchronization and synergy between the efforts to restore, reform and assist the judicial system and on the other hand assist the public safety system, as they are powerless and illegitimate without each other.³¹

One of the most predominant countries where NATO is involved in Rule of Law (besides Afghanistan, see chapter 5.2.1 and 5.2.2) is Kosovo. UNSCR 1244 serves as the basis for the NATO-led Kosovo Force (KFOR). Throughout Kosovo, KFOR works with the authorities and, bearing in mind its operational mandate, cooperates with and assists the UN, the EU and other international actors, as appropriate, to support the development of a stable, democratic, multi-ethnic and peaceful Kosovo. An example of cooperation between EULEX and KFOR is the joint operation to re-establish freedom of movement in northern Kosovo which started on 20 October 2011. Paragraph 5.3.2 will go further into this example.³²

³⁰ NATO, *Allied Joint Publication for Support to Civil Authorities 3.4.3 FD 2* (February 2012).

³¹ NATO, *Legal Deskbook. Second Edition* (2010), p. 160. See also The ISAF Report on Rule of Law, 12 December 2011.

³² NATO, *NATO's Role in Kosovo*, http://www.nato.int/cps/en/natolive/topics_48818.htm, May 10, 2012 (accessed 12 July 2012), EULEX, *EULEX-KFOR operation to re-establish freedom of movement*, <http://www.eulex-kosovo.eu/en/pressreleases/0200.php>, October 20, 2011 (accessed on 12 July 2012).

5.2.1 NATO Rule of Law Field Support Mission³³

NATO's Rule of Law activities are mainly 'mission focused'. In other words, Rule of Law activities are not undertaken in splendid isolation, but are part of a broader political mandate. For example, in 2007 at the Rome Conference on the Rule of Law in Afghanistan the NATO Secretary General stated that further strengthening of the Rule of Law "pillar", under a UN mandate, would certainly be one of the major contributors to long-term success in Afghanistan.³⁴ As a result, on 4 July 2011 the NATO Rule of Law Field Support Mission (NROLFSM) was officially launched. NROLFSM supports the building of Afghanistan's justice capacity and the links between customary and formal justice systems with a focus on 48 districts supporting seven provincial centres as endorsed by the Afghan-led Rule of Law Working Group under the Independent Directorate of Local Government. The five primary tasks of the NROLFSM are security, coordination, movement support, engineering support and oversight of the contractual process. Twelve key tasks further detail these, underlining that NROLFSM will neither deliver justice services nor participate in detention operations.



Picture 10 Ambassador for Coordinating Director of Rule of Law and Law Enforcement Hans G. Klemm, U.S. Navy Rear Admiral James Crawford, Commander, NATO Rule of Law Field Support Mission-Afghanistan (NROLFSM) and Rule of Law Mission Field Force-Afghanistan (ROLFF-A), Administrative Officer for Justice Department Dr. Abdul Malik Kamawi, Member of Supreme Court of

³³ The following description of the NATO Rule of Law Field Support Mission is provided by NATO/ISAF staff officers who are actively involved in the NROLFSM.

³⁴ NATO, *Address by NATO Secretary General, Jaap de Hoop Scheffer at the Rome conference on the rule of law in Afghanistan* http://www.nato.int/cps/en/SID-69FA8357-9A37250D/natolive/opinions_8179.htm, August 25, 2008 (accessed 12 July 2012).

Afghanistan Mohammad Omar Babrakzai, and Lt. General Jamil Junbish inaugurate the new facility in Parwan, Afghanistan on November 29, 2011.

Textbox 8

The NATO Rule of Law Field Support Mission (NROLFSM) has the following mission:

To provide essential field capabilities, liaison and security to Afghan and international civilian providers of technical assistance supportive of building the Afghan criminal justice capacity, increasing access to dispute resolution, thereby helping to improve efficacy of the Afghan Government.

<http://www.isaf.nato.int/images/media/PDFs/110930rolbackground.pdf>

In the year 2011, eleven districts in Afghanistan held their first public trials in recent memory. These events highlight seemingly modest, yet significant progress that Afghanistan has made improving justice sector capacity. While improvements in the Afghan legal system are often overshadowed by political and security issues that dominate public discussion, they remain vitally important to the military campaign to secure Afghanistan. This importance stems from the Taliban's comparative advantage in criminal and civil dispute resolution, which threatens the legitimacy of the Afghan government. Taliban leadership originally rose to power in the mid-1990s by displacing a weak government where localities could be dominated by warlords. The population preferred the swift, albeit often brutal, dispute resolution provided by the Taliban over what they believed was the un-Islamic decisions by corrupt politicians. Today, Taliban justice is still a marketable commodity in areas where the Afghan state cannot provide effective, fair and expedient justice to local citizens. Sustaining the legitimacy of the Afghan government depends in part upon promoting a justice system capable of demonstrating that not even high-ranking politicians are above the law so as to compete with Taliban enforced justice at the sub-national level.

In 2011 there have been tangible signs of improvement in the justice system. In provinces such as Nangarhar, Kandahar and Helmand, Afghan district judges have begun holding public trials. In just one example of a transformation in progress, Arghandab district in Kandahar province has transitioned from a local government lacking a single judge or prosecutor to one with a robust Tashkiel (cadre of justice officials) holding public trials. Public trials have the potential to improve the quality of the Afghan court system, as open courtrooms enable transparency which makes individual acts of incompetence or corruption more difficult to hide.

There are additional positive developments in overall judicial capacity. The Afghan

Supreme Court has championed an initiative to deploy 54 Afghan judges to previously unstaffed districts in 2012 and an additional 140 new judges graduated from an official training course known as the *Stage* in May 2011. These initiatives represent a significant step towards filling critical justice sector gaps and improving the professionalism of those working as judges, prosecutors or defence attorneys. Improvements to the human capital of the Afghan justice sector are mirrored by improvements in infrastructure, not the least of which are the courtrooms, prisons and judicial offices that have been built or renovated across Afghanistan.

An equally important component in the competition with the Taliban shadow system is to enable the Afghan courts to fairly adjudicate national security cases involving insurgent actors. This process can be substantially improved by the use of forensic evidence, which allows Afghan judges to render more objective verdicts. On 29 November 2011, the Supreme Court and Ministry of Interior hosted the opening of the Afghan Criminal Techniques Academy in Parwan province, which began providing forensic training courses to Afghan National Police officers the following month. The graduates of this program will be stationed in regional laboratories across the country to collect, process and analyze criminal forensic evidence.

Overall, the NATO Rule of Law Field Support Mission has been a key facilitator for all of the abovementioned developments, both directly and through its support to the many U.S. and international community civilian organizations assisting with Rule of Law. Formally established on July 4th, 2011 and in conjunction with its U.S. counterpart, the Rule of Law Field Force—Afghanistan (ROLFF-A), NROLFSM provides essential field capabilities, liaison and security to Afghan and international civilian providers of technical assistance supporting the building of Afghan criminal justice capacity, increasing access to dispute resolution services, thereby helping to improve the efficacy of the Afghan government.

Although the results achieved thus far are not conclusive with respect to a fully functional, transparent and fair justice delivery system, the Afghan judicial sector is on a path to greater sustainability. Afghanistan still faces a host of challenges, not the least of which is its systemic corruption and inadequate linkages between formal and customary justice systems. Yet, perhaps the most encouraging development is that Afghan institutions are assuming leadership in, and ownership of, all aspects of justice sector development. Continued international support is critical to foster permanent changes in public perceptions of the legitimacy of Afghan justice institutions and to turning independent success stories into irreversible trends. To that end, Afghanistan requires focused, coordinated and – even as security forces move toward transition – increased resourcing to justice sector initiatives in order to ensure that a critical mission is not relegated to an ancillary effort.

5.2.2 CIMIC and Rule of Law: the NROLFSM experience

There are significant NATO efforts underway in Afghanistan to build capacity and institutions in the Rule of Law sector. However, NATO forces will not engage in Rule of Law itself, rather it will support and enable Afghan officials and international actors with the mandate to do so. The concept assumes the United Nations Assistance Mission to Afghanistan (UNAMA) will lead all international efforts to support and strengthen governance and Rule of Law, guided by the principle of Afghan ownership and leadership, as per UNSCR 1917 of 2 March 2011 and UNSCR 1974 of 22 March 2011.

It is one of the aims of NATO CIMIC to work within an interagency approach, because Rule of Law comprises a large number of state institutions, as well as various non-state actors. CIMIC facilitates the process of working across institutions (horizontally) in an effort to strengthen the natural linkages between them. Strengthening any one institution's institutional capacity in isolation will not provide overall Rule of Law improvements.

Therefore, CIMIC in Afghanistan can only be achieved through effective interaction, cooperation, mutual support, joint planning and constant exchange of information at all levels between military forces and civilian organizations. There cannot be a solely military solution to instability, and civilian and military resources need to be committed in a way that achieves greatest impact. In order to improve Rule of Law efforts and programming, this requires a commitment to setting priorities, sequencing activities to maximize the effect of limited resources, and identifying specific approaches to meet the different needs and challenges in Afghanistan's 365 districts in 34 provinces.³⁵

It should be noted that NATO agrees that Rule of Law in host-nations should normally be based on the existing legal framework.³⁶ However, in some areas in Afghanistan where formal justice systems still have a nominal existence (particularly in southern and eastern parts of the country) Afghans rely on traditional justice systems, which are composed of customary and tribal institutions set up for decision-making and dispute resolution and are based on customary law, institutionalized rituals and remediation. Traditional justice can be an effective way of managing disputes, redressing local grievances and maintaining peace and stability within communities. The Government of Afghanistan recognizes that it must engage members of traditional justice bodies (village elders, religious and influential leaders) both to encourage and promote their strengths in maintaining social order but also to address their limitations and bad practices that may isolate human rights and / or limit the role of women and children.^{37 38}

³⁵ The Hague Rule of Law Network, Final Report: Civil-Military Cooperation in Building the Rule of Law (2009) annex 4.

³⁶ NATO, *AJP 3.4.5 SD1*, chapter 4, page 30.

³⁷ NATO, *Media Backgrounder: NATO Rule of Law Field Support Mission (NROLFSM)* (2012).

³⁸ For a complete overview of these 'gender' related issues see: CCOE, *Gender Makes Sense: A Way to Improve Your Mission* (Enschede 2008 or the upcoming 2012 edition).

For CIMIC it is important to take into account the abovementioned aspects of the judicial system in Afghanistan. NATO CIMIC in Afghanistan is therefore aimed at a comprehensive approach which is sensitive to the local particularities of the state, culture and population, and the likely multi-dimensional character of the conflict. Understanding local socio-political context is essential, and accordingly, there is good reason for the need to always take into account the local (legal) culture.

5.3 EU and Rule of Law

Human rights, democracy and the Rule of Law are core values of the European Union (EU). One of the policy areas of the EU is human rights. The EU actively promotes and defends them within its borders and in its relations with external states. To promote human rights around the world, the EU funds the European Initiative for Democracy and Human Rights. This Initiative focuses on four areas:

- Strengthening democracy, good governance and the Rule of Law (support for political pluralism, a free media and a sound justice system);
- Abolishing the death penalty in countries which still retain it;
- Combating torture through preventive measures (like police training and education) and repressive measures (creating international tribunals and criminal courts);
- Fighting racism and discrimination by ensuring respect for political and civil rights.³⁹

As described in paragraph 5.2, the EU has a Rule of Law Mission in Kosovo, named EULEX. This is the largest civilian mission ever launched under the Common Security and Defence Policy (CSDP). The central aim of EULEX is to assist and support the Kosovo authorities in the Rule of Law area, specifically in the police, judiciary and customs areas. EULEX works under the general framework of United Nations Security Council Resolution (UNSCR) 1244 and has a unified chain of command to Brussels.⁴⁰

³⁹ European Union, *Human Rights*, http://europa.eu/pol/rights/index_en.htm, n.d. (accessed 12 July 2012).

⁴⁰ EULEX, *What is EULEX*, <http://www.eulex-kosovo.eu/en/info/whatisEulex.php>, n.d. (accessed 12 July 2012).

Other EU Rule of Law missions are the EU Integrated Rule of Law Mission for Iraq (EUJUST LEX-Iraq)⁴¹ which was established to strengthen the Rule of Law and promote a culture of respect for human rights in Iraq and the different EU Police (EUPOL) missions in Afghanistan, Congo and the Palestinian Territories.⁴² Rule of Law aspects can also be found in the EU partnership for peace, security and development in the Horn of Africa. This is a Comprehensive Approach to conflict prevention in the Horn of Africa.⁴³ Contributing to sustainable and long-term solutions with regard to piracy is one of its objectives. There is also a focus on social and economic development in Somalia, concentrating on three sectors of cooperation: governance, education and the productive sectors. Furthermore, the EU civilian EUCAP Nestor mission was set up to develop a civilian coastal policing capacity in Somalia and the EU runs a wide range of programmes related to the prosecution, trial and detention of piracy suspects. Lastly, the EU is cooperating to end impunity and therefore is assisting the UNDP and the UNODC in their work to establish sufficient conditions to allow fair and efficient piracy trials in Somalia.⁴⁴



Picture 11 EUJUST LEX-Iraq workshop on Rule of Law

⁴¹ European Union, *EUJUST LEX-Iraq*, <http://www.consilium.europa.eu/eeas/security-defence/eu-operations/eujust-lex?lang=en>, n.d. (accessed 12 July 2012).

⁴² European Union, *EU Operations*, <http://www.consilium.europa.eu/eeas/security-defence/eu-operations?lang=en>, n.d. (accessed 12 July 2012).

⁴³ EUROPA, *European Commission proposes an EU strategy for peace, security and development in the Horn of Africa*, <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1441>, October 20, 2006 (accessed 12 July 2012).

⁴⁴ EU NAVFOR Somalia, *Objectives*, <http://www.eunavfor.eu/about-us/mission/> n.d. (accessed 12 July 2012).

Textbox 9

“Selective justice is no justice, and does not do any good to the development of a post-conflict society. Bringing all perpetrators to justice, whoever and wherever they are, is not only a moral imperative, but also the best way to lay down the foundation for a stable and prosperous society, truly committed to seeking the truth and rejecting impunity.

In this regard, it may be said that just as an armed conflict deeply affects the whole society, and not only the direct victims, war crimes trials are not only beneficial to the victims, but also to the society as a whole. This is because war crimes trials are not only capable of meeting the victims’ quest for justice, but are also instrumental in letting everybody know the whole truth about darkest pages of a societies’ history.”

By Silvio Bonfigli, Head of the EULEX Justice Component

01 April, 2011

<http://www.eulex-kosovo.eu/en/column/00004.php>

5.3.1 CIMIC and the Rule of Law: the EULEX experience

The EU has been conducting the European Union Rule of Law Mission in Kosovo (EULEX) since 2007. The goal of EULEX is assisting Kosovo’s institutions, judicial organs and law-enforcement agencies in the pursuit of sustainability and accountability, and in the further development and strengthening of an independent multinational justice system, a multinational police force and customs services. A second part of the mission’s objective is to ensure that these institutions are independent from political interference and that they adhere to internationally recognized standards and European best practice. Moreover, the EU in Kosovo has set itself several specific goals, next to the more general ones. The goals in short are:

- “to ensure that war crimes, cases of terrorism and organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious criminal offences are adequately investigated, prosecuted, adjudicated and enforced in accordance with the applicable law;
- to strengthen and promote co-operation and adjustment during the course of judicial process, in particular in the area of organized crime;
- to contribute to the fight against corruption, fraud and financial crime.”⁴⁵

⁴⁵ Marjan Malesic, *Crisis Management in the EU: International Coordination and Civil-Military Cooperation* (Ljubljana 2011) pp. 20-21.

The EULEX mission implements its mandate through monitoring, mentoring and counseling, in cooperation with the European Commission Assistance Programme. Certain executive powers however are maintained by EULEX. Next to that, a safe environment for the functioning of these international institutions, along with a host of non-governmental organizations is provided by NATO via its KFOR forces which are responsible for providing a secure environment and the freedom of movement for all citizens, regardless of their national origin.⁴⁶

In Kosovo it became clear that it is of great importance that EU CIMIC⁴⁷ personnel is qualified to observe, mentor and advise, local officials rather than simply assuming the role of local authorities. Local authorities must accept their own share of responsibility otherwise the task cannot be accomplished. One of the biggest challenges of working in the field of Rule of Law appeared to be the dependency of the host nation government on EULEX capacities. After several years of post-conflict reconstruction the government of Kosovo became dependent on the EU and other organizations for providing the basic aspects of Rule of Law, such as having a strong judicial system and law-enforcement agencies.

It is the task for CIMIC to assess the abovementioned challenges and address these to the head of the mission. If deemed necessary he or she can allocate resources to tackle these problems. Next to that, CIMIC can be an important instrument in facilitating contact and cooperation between elements of KFOR and civil actors working in the field of Rule of Law. Through CIMIC, EULEX personnel can proactively engage NATO's military assets in order to cooperate in Rule of Law activities. As a result, this cooperation between EULEX, NATO forces and civil actors improves the possibility of working on Rule of Law in Kosovo. CIMIC is therefore a capability not only for a military commander to be used, but is also a process of interaction and coordination between different actors working in a specific area of interest.

⁴⁶ Ibidem.

⁴⁷ In 2002, the EU adopted the CIMIC Concept for EU-led Crisis Management Operations, defined as: co-ordination and cooperation between military components and civilian actors, including national populations and local authorities, as well as international, national and non-governmental organizations and agencies, in support of the mission. The EU's definition of CIMIC partly reflects NATO's concept, although the EU's definition is broader and implies a possible use of various instruments, military and civilian, in crisis management. For a complete overview of the EU concept of CIMIC see: Council of the European Union, *EU Concept for Civil-Military Co-operation (CIMIC) for EU-led Military Operations*, Doc. 11716/1/08 (Brussels 2009).



Picture 12 EU civilian representative talking to EULEX personnel from different nationalities

6 Rule of Law at the Tactical and Operational Level

This chapter focuses on the steps that have to be taken, and important issues that have to be considered, at the tactical and operational level with regard to Rule of Law. The chapter is divided into three stages or phases: the pre-deployment, deployment and transition phase. In all these different stages CIMIC personnel can contribute to the overall process of assessing the Rule of Law situation, and can help facilitate certain Rule of Law activities, keeping in mind that these have to be relevant to the objectives of the mission. As will be demonstrated in this chapter, local ownership of the whole process of strengthening and promoting Rule of Law in mission areas is crucial in achieving long lasting success of the military or political mission. Consequently, the overarching goal of CIMIC in relation to Rule of Law is not only to support the military operation, but moreover the achievements will hopefully lead to self-sustainment of the Rule of Law in the host-nation. In the end, it is the aim that all aspects of Rule of Law can be upheld by the population of the host-nation itself. Only this can guarantee long lasting mission success.

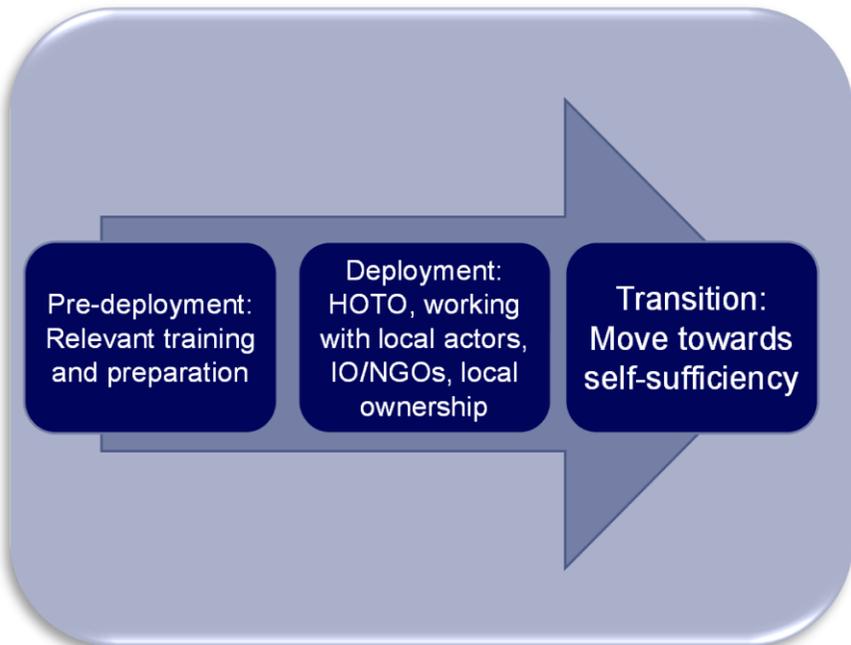


Figure 5. From pre-deployment to transition

6.1 Pre-deployment

Relevant training, preparation and planning are essential elements in the pre-deployment stage, because they will most likely provide a head-start during the actual deployment. Usually, pre-deployment takes quite some time, so the earlier CIMIC personnel are appointed to a mission, the sooner training and preparing can start. In fact, well-prepared CIMIC personnel will prove to be very beneficial for the execution of the mission.

6.1.1 Preparation and Training

When CIMIC personnel are appointed to work in the field of Rule of Law during a mission, they would want to know what the mandate of the mission is and what the mission exactly will entail. More specifically of interest will be which Rule of Law activities are to be carried out and which goals need to be achieved. Mapping the duties, responsibilities and goals makes it easier to obtain a clear focus when deploying. Furthermore, in order to be able to work on Rule of Law issues in a specific country or region, one needs to have an understanding of the local legal system, culture and customs. An assessment for this can be made via the ACC-model. Moreover, it is important not to let one's own customs and norms lead the way, but to adapt to the situation at hand. Pre-deployment training will help CIMIC personnel to get an understanding of the local culture and customs. Raising awareness in this field can also help during deployment to recognize when a cultural or political advisor should be consulted.

Textbox 10

Studying a country's entire legal system will be unrealistic, but it is important to know how the local legal system is built and organised and which aspects are accepted by the local population (and which are not). In order to get more in-depth knowledge, hiring a local lawyer to work for the military is highly recommended, as they enjoy local legal and political connections, understand their own laws and know how they are implemented in practice and can offer advice on where Rule of Law resources are best employed.



Picture 13 Joint pre-deployment planning is essential when working on Rule of Law

6.1.2 The Planning Phase

A second, but even so important part of the pre-deployment stage is the planning phase of an operation. During cooperative operations planning it is imperative that Rule of Law aspects are taken into account. CIMIC personnel can contribute to this phase by providing necessary guidance and assessments, which makes it easier for the military commander to execute his vision. Moreover, with regard to Rule of Law, the coordination and combined planning will obviously take place within an inter-agency or 'whole-of-government' context, thus between the military, civil actors and host nation governments. Consequently, when Rule of Law is incorporated into a political mandate, it needs to be an integral part of strategic military planning, but military involvement should be put clearly into its proper perspective.

In relation to CIMIC, the operations planning process of NATO missions begins at SHAPE (Supreme Headquarters Allied Powers Europe), well in advance of a response to a crisis, in accordance with the CIMIC Functional Planning Guide (FPG). It primarily includes the development of information and knowledge requirements about the area of operations. During this initial planning phase, CIMIC will conduct and provide a Theatre Civil Assessment (TCA). This assessment examines all civil conditions in the respective Area of Interest (AOI) as they might affect a military engagement. Annex B of this publication provides a (partial) format for a TCA, aimed at all relevant aspects of governance.⁴⁸ Furthermore, Rule of Law efforts can generally be categorized as structural, strategic, or functional. Examples of structural, strategic, and functional activities are listed in Annex C.

⁴⁸ A complete format can be found in NATO, *BI-SC Civil-Military Co-operation Functional Planning Guide* (8 June 2012) annex A.

Information forming the basis of this assessment should come from the widest range of sources. The analysis is structured into the following domains: Political, Military, Economical, Social, Information and Infrastructure (PMESII).⁴⁹ CIMIC personnel involved in this process have to apply analytical logic to determine what the factors they have found mean for a possible engagement. The TCA is the base document for all subsequent phases of the CIMIC planning process. It will also determine the critical CIMIC issues for inclusion in the next phase of the planning process.⁵⁰

6.2 Deployment

On arrival in the mission area it is very important to have a good hand-over take-over (HOTO) with a predecessor (if present), so enough time should be scheduled for this process. A good documentation of the work that has already been done is also indispensable to make most out of the deployment. When the HOTO process is performed effectively, and the work already done is well-documented, much time can be saved and a successor can go further where the predecessor left off. This can also prevent losing *good-will* with local authorities and IOs/NGOs, because it avoids that every new CIMIC operator in the field of Rule of Law will ask the same questions every few months to assess the situation.

When there is no (good) CIMIC assessment of the situation on the ground, for example because the mission has just started, doing an assessment is of course indispensable. New developments should also be taken into account. This means that new assessments should take place when the situation asks for it in order to stay up-to-date.

Textbox 11

Local structures and numbers of judges, prosecutors and lawyers present (and working) in the area are examples of topics to assess. Furthermore, one would want to know which other entities are engaged in Rule of Law in the area. A good source for this is the International Rule of Law Directory: <http://www.roldirectory.org/>. This is an online database of entities engaged in Rule of Law work throughout the world.

⁴⁹ PMESII (Political, Military, Economic, Social, Infrastructure and Information systems) is a key concept in Irregular Warfare and Effects-Based Operations simulations. PMESII describes the foundation and features of an enemy (or ally) state and can help determine the state's strengths and weaknesses, as well as help estimate the effects various actions will have on states across these areas.

⁵⁰ NATO, *BI-SC Civil-Military Co-operation Functional Planning Guide* (8 June 2012) p. 5.

The TCA, as described in paragraph 6.1, is a 'living document' which needs to be updated continuously during the mission. CIMIC personnel tasked with Rule of Law obtain a lot of (specific) knowledge during deployment which might be very useful for the TCA. Therefore, contributing to this assessment is highly recommended.

With regard to contact with local actors, communicating as partners is preferred over patronage. This also means that consultative mechanisms must be coordinated with and linked to decision making processes to ensure that they do not become talking shops but make a genuine contribution to the formulation of policy. In order to be perceived as genuine, the outcome (i.e. reform programs) must reflect at least some of the preferences that emerge during the consultation process. Consultations are dependent on a permissive environment that allows participants to express their views, perceptions and concerns openly and safely. It is a challenge to consult widely enough in order to ensure satisfactory local representation while keeping the process within manageable and practicable limits. Wherever possible, local actors should be encouraged to participate in or perhaps even lead Rule of Law activities and projects. This encourages a greater 'buy in' from the community and reduces the chances of dependency upon the international community. Ultimately, local actors will be responsible for the projects once the international community completes the mission and departs. Where local actors struggle to lead the consultation process, CIMIC personnel can take on a facilitating and guiding role. Consultative mechanisms at the technical level must avoid becoming politicized and thereby impotent. Objective mentoring through CIMIC can help to maintain a focus on professional issues.⁵¹



Picture 14 Consultations should make clear that host-nation actors are in the lead of improving Rule of Law

⁵¹ Annika S. Hansen & Sharon Wiharta (eds.) *Transition to a Just Order – Establishing Local Ownership after Conflict: A Practitioners' Guide* (Stockholm 2007) pp. 12-13.

For CIMIC personnel it is critical to monitor the activities of interim governments in order to prevent misuse of power or attempts to oust political opposition. Shared authority is not a fixed state but the beginning of a process by which responsibility should be transferred progressively, and which should be coupled with capacity building.

Lastly, the AOO will most probably also have IOs/NGOs working on Rule of Law (see textbox 11 for information about a worldwide online database). After these IOs/NGOs and their activities are mapped by CIMIC personnel, it is imperative to try to get into contact with them. This way they know about the military working on Rule of Law issues and we know what they are working on. As a result, some kind of co-operation can be established, which can be very beneficial for all parties and the Rule of Law activities themselves. This is of course an important part of CIMIC and can tremendously support the overall military mission. For instance, at least having knowledge of other Rule of Law activities in the area will prevent doing the same thing twice (or even more times). Furthermore, it should be kept in mind that Rule of Law is not a purely military activity and that certain IOs/NGOs are much better equipped to work on Rule of Law. They will also probably still be working in the area (long) after the military has left.



Picture 15 An Afghan police officer is being introduced to Afghan locals.

6.2.1 Towards Local Ownership

Calls for local ownership are widespread in all missions, as they aim to put in place the minimum conditions necessary to enable formal local authorities, local staff in justice and security institutions and the wider public to sustain the Rule of Law. It is important to note that this is a gradual process. The precise shape and pace of transition in each mission will depend on a range of factors and will vary in different areas of the justice and security sector.⁵²

Nonetheless, one way for CIMIC to approach implementing the principle of local ownership is to view the reform effort as consisting of a series of stages:

- a) civil assessment
- b) setting objectives, priorities and strategies;
- c) programme design;
- d) programme implementation; and
- e) evaluation.

Ownership is critical in any reform process regardless of whether it takes place in a post-conflict situation. CIMIC efforts to build local ownership would do well to keep in mind that any reform or change process introduces temporary instability into that organisation. People in most societies are generally reluctant to – or even scared of – change. Host nation civil servants and members of the military for instance may fear for their jobs or continued control over areas of influence and it is therefore not very likely that they are motivated and willing to cooperate with reformers (i.e. the military). In order to increase support for a process of change, it is imperative that goals and processes are communicated clearly through CIMIC. Lessons from institutional reform processes also suggest that civil actors in the field of Rule of Law should be consulted and heard in order to engender enthusiasm for the new organisation.

Some of the preconditions for successful change management regarding Rule of Law include clear political signals that outline the goals of reform and the authorities' commitment to those goals; that the process is as predictable and cohesive as possible; and that there is a balance between the level of ambition of the reform process and the resources available to support the organisation in the future. These challenges of reform and ownership are increased in a post-conflict society, where local stakeholders may not trust the international reformers to understand their concerns and to act in their best interests. This underlines the need for CIMIC to win over and maintain the trust of the local stakeholders from the very beginning and thereafter for there to be iterative consultation, communication and transparency in all dealings. For CIMIC, in part, this is a question of attitude and the need to treat local counterparts with respect. Although not exactly a CIMIC task, it also calls for mechanisms to hold international actors accountable

⁵² Hansen & Wiharta (eds.) *Transition*, p.5.

– especially if they have executive powers – in order to prevent decisions being made that do not take local interests into account, prevent international abuses, and avoid inconsistencies between the words and the deeds of international actors. Independent bodies that can monitor the transition to a just order, that can handle complaints and take disciplinary action against international actors are a central component of local ownership and can also enhance popular trust in international actors.⁵³



Picture 16 When working on Rule of Law, ‘winning hearts and minds’ can seriously improve CIMIC.

Textbox 12

Examples of these independent bodies are:

- The High Judicial and Prosecutorial Council of Bosnia and Herzegovina

http://www.rai-see.org/bosnia-and-herzegovina/index.php?option=com_docman&task=doc_download&gid=19&Itemid=62

- Independent Selection and Review Boards which can manage the process of selection of people to certain key positions (for example in the Federation of Bosnia and Herzegovina: the Director of Administrative Services in the Federation Ministry of Interior and the Director of Police in the Federation Ministry of Interior)

http://www.ohr.int/decisions/mo-hncantdec/default.asp?content_id=28094

⁵³ Hansen & Wiharta (eds.) *Transition*, p.6-7.

In many post-conflict settings several reform processes are likely to be taking place simultaneously, across the range of public institutions. This will increase the challenge of achieving a cohesive end-product. It should therefore be clear that reforming institutions, or the individuals that drive them, will vie for international attention and funds. This puts additional strain on the available resources and increases the need to create a set of institutions, skills and understandings that is sustainable in the long-run by local sources of funding. Next to that, capacity building and time are important factors for the creation of this set of institutions, skills and understandings. Capacity building should be both structural and normative. Structural measures aim to put in place an institutional structure, the skills to run these institutions effectively and the understanding of the legal framework (laws that define the role of the institutions as well as internal regulations and procedures). In sum, the normative element stresses the values of transparency and respect for human rights in both the individuals' and the institutional culture. The time aspect reflects the long term nature of this process. Furthermore, there is actually no end state as creating a set of institutions, skills and understandings is a dynamically evolving process.⁵⁴

Textbox 13

"It's better to let themselves do it imperfectly than to do it yourself perfectly. It's their country, their way and our time is short."

T.E. Lawrence (of Arabia) 1918

Essential for establishing Rule of Law is local ownership. The mission will at some point end and then the system needs to keep running. If the local population, local leaders and government officials do not believe in the system the international community (IC) has (helped) set up, they will not keep it going after the IC has left. This also means that one has to be aware of the local needs, values, customs etc.

Instead of providing a Western view, the international community can try to strengthen the system the host national already has. If the host nation for example has a good functioning informal legal system, the international community should not immediately try to get rid of it, but maybe even try to improve it. An informal legal system (for example for land and family issues) can be very beneficial, for it can give people easy access to dispute settlement in a country where it is otherwise very difficult to get their day in court (because there are no courts in their region, there are no or not enough judges etc.). In Western terms, this would be a type of mediation.

⁵⁴ Hansen & Wiharta (eds.) *Transition*, p.7 and p. 43.

6.3 Transition

Eventually, the mission will end and the military will leave the area of operations. At that point transition will need to have taken place. Authority and responsibility need to be handed over to host nation authorities (or – if this is not possible yet – to the UN, other international organizations or a follow-on force). This stage needs to be kept in mind from the start. Hence, transition is the overarching objective of any Rule of Law activity.

Strengthening or establishing Rule of Law, including the necessary institutions, skills and sense of justice, is a long and demanding process that will most likely outlast any military mission. In order to ensure that the mission's best efforts have not been in vain it is necessary to facilitate a transition to local authorities. Ultimately, the running, staffing and future development of Rule of Law institutions will fall to local authorities. In addition, the local population is the end-user of justice and security and must have confidence in the Rule of Law in order for it to work effectively and equitably. It therefore makes sense to begin building the capacity and willingness of local actors as early in the mission as possible in order to let, over time, Rule of Law become the basic organising principle of society and the foundation for continued security.



Picture 17 Zharey District leader makes opening remarks at the official launch of the Zharey JDCC (Joint District Coordination Centre).

Conclusion

The Importance of Rule of Law

Building and strengthening the Rule of Law in (post) conflict areas is closely tied to international security and military operations. The reason for this is that fragile and failed states hampered by conflict or gradually returning to peace will most probably struggle with a weak or non-existent Rule of Law. When these states are being rebuilt and try to reach sustainable peace and stability, Rule of Law can be seen as an important facilitator, because Rule of Law seeks to ensure safety and security, serves as a foundation for economic and political recovery and it creates access to public services. Consequently, the conclusion can be drawn that improving Rule of Law will be very beneficial for a state's stability.

In order to provide an answer to the first leading question of this publication (what exactly Rule of Law is), it is clear that the term Rule of Law cannot be easily defined as it is a very broad concept, encompassing the entire spectrum of law-related activities in a country. Nevertheless, it has been demonstrated that two main functions of Rule of Law can be distinguished. The first one protects citizens from their government, and the second one protects citizens from each other. Furthermore, there are two concepts of Rule of Law: a 'thin' concept focusing on formal rules and procedures and a 'thick' concept focusing on the content of the law itself.

Rule of Law in the sense of law and order (the three C's: Cops, Courts, Corrections) has proven to be the most functional and operational way to address Rule of Law. This is what the military in most cases will focus on if they choose to work on Rule of Law issues.

A Way to Improve Your Mission

The second and third leading question of this publication (how can Rule of Law contribute to sustainable mission success, and how can CIMIC at the operational and tactical level contribute to Rule of Law) describe what happens if the military decides to focus on Rule of Law. Although Rule of Law influences a state's stability and its security situation, it has been demonstrated that this is not solely, or better said primarily, a concern for the military. Non-military actors working in the field of Rule of Law, such as IOs and NGOs, are often better situated to work in this topic, not because of their equipment and personnel, but because of their training, focus and the sustainability of their efforts to offer the best policy and overall strategies for Rule of Law in conflict and post-conflict areas.

However, when the security situation in a country is not conducive to civilian intervention, but Rule of Law promotion is necessary nonetheless, military Rule of Law actors are often the only ones present and able to address these aspects. This is where CIMIC comes into play. The different NATO, EU and UN experiences described in this publication have illustrated that it is essential to focus on a comprehensive approach when working on Rule

of Law. CIMIC personnel responsible for Rule of Law activities would be well advised to thoroughly assess all aspects of the host nation's judicial situation and if necessary and possible address these to the military commander. These assessments are in fact one of the most important tools of CIMIC to contribute to the overall military mission. Through CIMIC, contacts can be made and activities can be facilitated in order to strengthen Rule of Law. In the end, a military commander or head of a mission can decide to use the information gained from CIMIC and CMI, provided by CIMIC personnel, and put this into his military planning. Furthermore, as demonstrated in chapter six, the assessments made by CIMIC personnel can also highly improve military planning before the mission actually takes place (the pre-deployment phase), for instance via a Theatre Civil Assessment.

When all planning and preparation has been completed, the actual mission can commence. Looking at the operational and tactical level, CIMIC has proven to be an important military capability to address Rule of Law aspects and CIMIC can possibly even be used to set up Rule of Law projects. Leading the efforts of strengthening Rule of Law should however not be the aim. In fact, once (security) conditions become more favourable, civilian organisations and host nation actors working on Rule of Law ought to be engaged immediately and integrated into the activities of the military until they are capable of taking the lead. Furthermore, local authorities need to be able to uphold the Rule of Law themselves in the end. That means that transition to these local authorities should be the focus of all CIMIC activities related to Rule of Law. Thus, in short, it has become clear that from the start and during the process of providing support to Rule of Law, attaining local ownership is essential. In the end, all efforts exerted through CIMIC should bear fruit and lead to long lasting mission success. In other words, Rule of Law should become an integral part of the host nation's state, upheld by self-sufficient local actors who are capable of delivering a strong, accountable and independent judicial system, long after the military mission has ended. In sum, CIMIC can be a very useful capability to support this process and build the foundation for long-term and sustainable success of a military or political mission.



Picture 18 A lack of Rule of Law will probably remain a fertile breeding ground for unrest, tensions and even violent conflict, as was demonstrated recently during the Arab Spring.

Recommendations

- When working on Rule of Law, always act in support of the mission. In other words: know the objectives of your mission, be aware of the 'feel good trap' and avoid 'mission creep' at all cost.
- Knowledge of the local legal system is a must. Studying a country's entire legal system will be unrealistic, but it is important to know how the local legal system is built and organised and which aspects are accepted by the local population (and which are not). Contact with local legal professionals is also extremely useful.
- Working in the field of Rule of Law involves making contact with relevant local key players. Rule of Law projects for instance can be short projects with a quick impact, but they can also be bigger projects which need (much) more time. With ongoing military rotations, this can mean that projects have to be handed over to successors. This hand-over take-over process is crucial for the success of the project. If the successor has to start all over again with identifying the problems and asking the same questions, your credibility will be hampered and the project will be severely delayed.
- A good assessment of the situation is crucial for conducting successful Rule of Law activities. Successors can also benefit from a good assessment that is well documented.
- It is of utmost importance that during the pre-deployment phase training and education on Rule of Law is an integral part of the preparation of a Rule of Law mission.
- Rule of Law issues are incorporated in mandates, directives and all phases of military planning and implementation. It is therefore significant that military personnel at all levels are aware of the importance of Rule of Law.
- Work towards transition from the beginning of your mission. Eventually, the military will leave and the host nation authorities will have to provide for Rule of Law themselves.
- Make sure there is local ownership of the process of strengthening the Rule of Law. This is also part of the process towards transition. The transition to Rule of Law will probably not succeed if there is no local ownership. As a result, the efforts made during the mission will be in vain.

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Annex A: Checklist for CIMIC personnel

When working on Rule of Law issues during missions, certain steps should be followed and certain questions should be answered.

It all starts with the commander's intent:

- What does your commander want?
- What is the goal that must be achieved?
- Is what you are doing still supporting the mission?

This is followed by an assessment of Rule of Law aspects: what are the needs, views and ideas of the local judges (or other legal professionals), government officials and other relevant people? Is there a link between the commander's intent and the Rule of Law efforts of other players in the area of operations?

If a predecessor has already made a good assessment which is still valid, a new assessment will not be necessary. However, a good hand-over take-over and a good documentation of the work done is essential.

When questionnaires or checklists are used, one should be aware of local culture and customs (certainly in culturally sensitive environments) and adapt the questionnaires or checklists accordingly. In meetings with the local population, a friendly conversation is preferred over a formal interview.

QUESTIONS WHICH CAN BE USEFUL DURING MISSIONS

- Does the Rule of Law plan/project both support the mission and cater for the need of the population?
- Are there any other Rule of Law activities happening or scheduled in the area? If so, by whom? Is there coordination, cooperation?
- Have other Rule of Law activities been endeavoured earlier in the area? If so, what was the result?
- Who are the key players?
- Has the role of local actors (local authorities, assemblies) been investigated?
- Were hidden power structures vs. official power structures charted?
- Is there possible resentment and/or resistance (spoilers) both currently and later on in the process?
- How is the current division of powers (Judicial / Legislative / Executive)? Or are all three politicised and/or corrupted? Are they functioning on any level at all?
- Have the interests of vulnerable groups (women, ethnic minorities) been taken care of?

- Have local and international roles been defined to prevent gaps, overlaps and / or patronage?
- What are unresolved, still painful issues in the area?
- Is there a communication plan towards local authorities and local population?
- Is there a prioritization of the several Rule of Law projects?
- Has mutual reinforcement of the several Rule of Law projects throughout the chain been catered for?
- Are the financial aspects well-covered, also after the transition?
- What is your budget or where do you have to go to get money for a project?
- What are the prospects of capacity building of all partners in the Rule of Law chain?
- Are there affordable, sustainable and adequate training facilities?
- Can all levels be trained: technical, management and political level?
- Is there a capacity building training curriculum both for structural and normative dimensions?
- Is there coordination of the training of all partners in the Rule of Law chain?
- Are monitoring, mentoring, oversight and advising mechanisms in place?
- Are there any civil society bodies in place that can be involved?
- Can local media be involved to strengthen the link between society and Rule of Law?
- Is the project SMART? (Specific, Measurable, Attainable, Relevant and Timely)

Annex B: Bi-SC CIMIC Functional Planning Guide - Format of a Theatre Civil Assessment (TCA) Section 3: POLITICAL⁵⁵

Section 3: POLITICAL

Section 3 of the Theatre Civil Assessment format example describes the first letter of PMESII, which is the Political dimension. *Political* means any grouping of primarily civil actors, organizations and institutions, both formal and informal, that exercises authority or rule within a specific geographic boundary or organization through the application of various forms of political power and influence. It includes the political system, parties and main actors. It must be representative of the cultural, historical, demographic and sometimes religious factors that form the identity of a society.

In the conduct of CIMIC planning, the aspects under sub-section 3.1 of the TCA will most likely play an important role when looking at Rule of Law. The most obvious ones are described under section 3.1.2 and 3.1.6.

Sub-section 3.1: GOVERNANCE

3.1.2 Legal Systems

3.1.2.1 System of Laws

3.1.2.2 The Administration of Justice

3.1.6 Public Safety

3.1.6.1 General Conditions and Problems

3.1.6.2 Police System

3.1.6.3 Penal Institutions

3.1.6.4 Fire Protection

3.1.6.5 Civil Emergency Planning

3.1.6.6 Civil Defense

⁵⁵ NATO, *Bi-SC Civil-Military Co-operation Functional Planning Guide / ANNEX A TO ENCLOSURE 1 TO SHAPE/OPI CIM /11/12-TT282641 5000 TSC FCO 0120/TT 8183 SER: NU0022* (8 June 2012).

Annex C: Example Rule of Law Lines of Effort⁵⁶

STRUCTURAL LINES OF EFFORT

- Host Nation Legal Framework
- Host Nation Justice Architecture
- Host Nation Security Architecture
- Law Enforcement
- Corrections
- Civil Governance
- Integrated Border Management
- Infrastructure and Sustainability

STRATEGIC LINES OF EFFORT

- Legitimacy
- Sovereignty
- Human Rights
- Strategic Communications and Perception Management

FUNCTIONAL LINES OF EFFORT

- Countering Transnational Crime
- Accountability, Oversight and Anti-Corruption
- Public Information and Public Records Management
- Conflict Resolution and Peace Implementation
- Reconciliation and Re-integration
- Security Sector Reform (SSR)
- Demobilization, Disarmament and Reintegration (DDR)
- Intelligence and Information Sharing
- Use and Integration of Government Contractors

(1) **Structural.** Structural activities in Rule of Law articulate the components of national and local institutional structures and institutions, and the public knowledge and participation in them that are essential to enabling the Rule of Law.

⁵⁶ Source: NATO, *Allied Joint Publication for Support to Stabilization and Reconstruction 3.4.5 SD1* (2012) Ch. 4. p. 31.

(2) **Strategic.** Strategic Rule of Law activities deal primarily with the substantive political goals and strategic context required to enable or sustain the Rule of Law. Operations to strengthen Rule of Law and SSR should be aligned with this larger context if they are to be successful and sustainable. All four are closely intertwined. Sovereignty must be based on legitimacy and respect for human rights. Strategic communication is essential in promoting the values expressed by the other three activities.

(3) **Functional.** Functional areas of interest focus on specific types of short- and long-term Rule of Law tasks and missions.



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