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Thomas J. Bogar

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# RULE OF LAW OPERATIONS IN THE COMBAT ENVIRONMENT: A JUDGE ADVOCATE'S PERSPECTIVE AS A LEGAL MENTOR IN AFGHANISTAN

*SHOHNA BA SHOHNA*

*By Thomas J. Bogar\**

## INTRODUCTION

Before U.S. and coalition forces can withdraw from Afghanistan and declare the military mission a success, the Afghan National Security Forces (“ANSF”)<sup>1</sup> must first be able to self-sustain and defend its country from the insurgency that has plagued Afghanistan for the last ten years. Getting the ANSF to that level, however, will require significant training, partnering, and mentoring. As a consequence, training the ANSF has now become a key component of U.S. foreign policy for Afghanistan and of the eventual withdrawal of U.S. forces from the region.<sup>2</sup> The responsibility for training the ANSF falls to the greatest degree upon the United States and its coalition partners through NATO’s principal command, the International Security Assistance Forces (“ISAF”).<sup>3</sup>

Until February 2010, the Combined Security Transition Command–Afghanistan (“CSTC–A”), led by the United States,

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\* B.S., May 1985, Dickinson College, J.D., May 1992, Seattle University School of Law, LL.M., December 1993, Villanova University School of Law, LL.M., January 2008, The George Washington University School of Law. The author served on active duty April to October 2011 as a Lieutenant Colonel, Judge Advocate, U.S. Army, assigned as a legal mentor to the 207th Corps for the Afghan National Army, Herat, Afghanistan. The opinions expressed are those of the author, and not those of the Department of Defense or any U.S. Agency or Department. I want to express my special thanks to LTC Ramon Torres who helped me finalize this Essay.

1. The ANSF is made of two parts: the Afghan National Army (“ANA”) and the Afghan National Police (“ANP”). KENNETH KATZMAN, CONG. RESEARCH SERV., RL 30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 23 (Apr. 15, 2011).

2. *Id.*

3. *See id.* at 23–24.

coordinated the training of the ANSF.<sup>4</sup> The CSTC–A was later combined with the NATO Training Mission–Afghanistan (“NTM–A”), a command primarily focused on building the institutional capacity of the ANSF and training its recruits.<sup>5</sup>

Key to training the ANSF are partnering, or mentoring, teams, comprising mentors provided by NATO who pair with their Afghan counterparts in positions of all ranks—from as high as the Ministry of Defense, to the Afghan National Army (“ANA”) Corps, down to the Brigades and Companies.<sup>6</sup> Each ANA Corps, for example, has a Judiciary and Staff Judge Advocate (the “Corps SJA” or “SJA”), who serves as the principal legal advisor to the Corps Commander.<sup>7</sup> As part of NATO’s mentoring team, a legal mentor, who is usually a field-grade U.S. Judge Advocate, partners with the Corps SJA and is principally responsible for training him and his staff, together forming the Office of the Staff Judge Advocate (“OSJA”).<sup>8</sup> I served as an ANA legal mentor for the 207th ANA Corps in Herat for six months in 2011.

Although others have written about mentoring SJAs, very little has been said since 2007.<sup>9</sup> Much has changed in Afghanistan since then, not just from an operational standpoint, but also from a policy perspective, including the significance of the

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4. *See id.* at 23.

5. *See id.* at 23–24.

6. There are currently seven established Corps throughout Afghanistan: the 201st, 203rd, 205th, 207th, 209th, 215th, and the 111th Division. JOINT CTR. FOR INT’L SEC. FORCE ASSISTANCE, AFGHAN NATIONAL ARMY (ANA) MENTOR GUIDE 2–21 (2011) [hereinafter ANA GUIDE] (on file with author). The 201st is located in Kabul; the 203rd in Gardez; the 205th in Kandahar; the 207th in Herat; the 209th in Mazar-e-Sharif; the 215th in Lashkar Gah; and the 111th Division in the Capital. *Afghan National Army (ANA)—Order of Battle*, GLOBALSECURITY.ORG, <http://www.globalsecurity.org/military/world/afghanistan/ana-orbat.htm> (last visited Oct. 27, 2012).

7. *See* ANA GUIDE, *supra* note 6, at 2–20.

8. *See* Daniel J. Hill & Kevin Jones, *Mentoring Afghan National Army Judge Advocates: An Operational Law Mission in Afghanistan and Beyond*, ARMY LAW., Mar. 2007, at 12, 13 n.18. When I left Afghanistan in October 2011, there was one Canadian Army Major serving as a legal mentor, two U.S. Navy Commanders, one U.S. Air Force Colonel, and three U.S. Army Lieutenant Colonels.

9. *See* Hill & Jones, *supra* note 8; Sean M. Watts & Christopher E. Martin, *Nation-Building in Afghanistan: Lessons Identified in Military Justice Reform*, ARMY LAW., May 2006.

mentor mission. For these reasons, I consider it important to revisit the topic and include my experience and lessons learned to benefit future Judge Advocates deploying as ANA legal mentors.

Before deploying as ANA legal mentors, Judge Advocates should understand some basic concepts needed for a successful mission. Because legal mentors will interact frequently with the ANA (not just with the SJA, his staff, and the judges, but also with many non-legal ANA officers, including the Corps Commander), they should have a good understanding of Afghan history and culture, the ANA military and civilian legal systems, and some basic Dari.<sup>10</sup> A cursory understanding of these topics will not be enough for mission success, because laws do not exist in isolation. They are shaped by the political, cultural, and economic characteristics of the society to which they apply. Previous mentors have learned that a lack of cultural awareness can be a major obstacle to mission success. Consequently, legal mentors must gain insight into Afghan social norms and nuances for rule of law programs to succeed.

Part I of this Essay provides some basic background information for deploying Judge Advocates; Part II addresses significant challenges that ANA legal mentors face; Part III suggests solutions or approaches to those challenges; and finally, a Conclusion offers some closing remarks.

## I. BACKGROUND

As previously mentioned, NATO's top command in Afghanistan is ISAF, currently commanded by U.S. Army General

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10. This Essay is not intended to provide the requisite level of understanding on these topics for prospective ANA legal mentors. Rather, it is intended to provide a brief overview so Judge Advocates can continue their course of self-study before deploying. To learn more about the topics, see generally THOMAS BARFIELD, *AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY* (2010); EHSAN M. ENTEZAR, *AFGHANISTAN 101: UNDERSTANDING AFGHAN CULTURE* (2007); MARTIN EWANS, *AFGHANISTAN: A SHORT HISTORY OF ITS PEOPLE AND POLITICS* (2002); SETH G. JONES, *IN THE GRAVEYARD OF EMPIRES: AMERICA'S WAR IN AFGHANISTAN* (2009) (discussing the rise of the insurgency in Afghanistan from a historical and structural perspective); BARNETT R. RUBIN, *THE FRAGMENTATION OF AFGHANISTAN: STATE FORMATION AND COLLAPSE IN THE INTERNATIONAL SYSTEM* (2d ed. 2002); STEPHEN TANNER, *AFGHANISTAN: A MILITARY HISTORY FROM ALEXANDER THE GREAT TO THE FALL OF THE TALIBAN* (2002).

John Allen.<sup>11</sup> The task of training the ANA falls squarely on ISAF.<sup>12</sup>

According to its mission statement, ISAF “conducts operations in Afghanistan to reduce the capability and will of the insurgency, support the growth in capacity and capability of the Afghan National Security Forces (ANSF), and facilitate improvements in governance and socio-economic development in order to provide a secure environment for sustainable stability that is observable to the population.”<sup>13</sup> Subordinate to ISAF are two commands, each led by a U.S. Lieutenant General: NTM–A and ISAF Joint Command (“IJC”).<sup>14</sup>

On the one hand, NTM–A “oversees [the] training and equipping of Afghan [security] forces throughout Afghanistan.”<sup>15</sup> It also develops military doctrine for the ANA and provides high-level training, via defense colleges and academic institutions, for ANA senior officials.<sup>16</sup>

At the operational level, Operational Mentor and Liaison Teams (“OMLTs”) mentor ANA troops by focusing on building the capability and scope of the ANA.<sup>17</sup> OMLTs are essentially multi-disciplinary ISAF military forces that fall under the purview of IJC. By “co-ordinating the planning of operations and ensuring that the ANA units receive necessary enabling support,” OMLTs provide training, mentoring, and liaison services between ANA and ISAF forces.<sup>18</sup> In October 2010, 150 OMLTs

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11. See *About ISAF: Leadership*, INT'L SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/leadership.html> (last visited Oct. 28, 2012).

12. See *About ISAF: Mission*, INT'L SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/mission.html> (last visited Oct. 28, 2012).

13. *Id.*

14. *Subordinate Commands*, INT'L SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/news/5.html> (last visited Oct. 28, 2012). The NTM–A was formerly known as the Combined Security Transition Command (CSTC–A). See *supra* text accompanying notes 4–5.

15. *NATO Training Mission–Afghanistan*, INT'L SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/subordinate-commands/nato-training-mission-afghanistan/index.php> (last visited Oct. 28, 2012).

16. RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES 71 (Ctr. for Law & Military Operations, The Judge Advocate General's Legal Ctr. & Sch., U.S. Army ed., 4th ed. 2010), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/rule-of-law\\_2010.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2010.pdf).

17. *Id.*

18. Public Diplomacy Div., *Fact Sheet: NATO's Operational Mentor and Liaison Teams (OMLTs)*, N. ATL. TREATY ORG. (June 2010), <http://www.nato.int/isaf/topics/factsheets/omlt-factsheet.pdf> [hereinafter Pub-

were operating within Afghanistan, seventy-six of which were from the United States.<sup>19</sup>

On the other hand, the IJC “conducts population-centric comprehensive operations to neutralize the insurgency in specified areas, and supports improved governance and development in order to protect the Afghan people and provide a secure environment for sustainable peace.”<sup>20</sup>

Thus, while NTM–A and OMLTs are ISAF’s training and equipping arm, the IJC is ISAF’s operational arm.<sup>21</sup> As a comparison, Judge Advocates deploying as ANA legal mentors are detailed to IJC as part of ISAF’s operational arm in much the same way the ANA Corps SJA is part of the ANA operational arm.

#### A. *A Brief History of Afghanistan*

Afghanistan has on more than one occasion been referred to as the “graveyard to empires.”<sup>22</sup> History explains how it has earned this moniker.

Since the time of Alexander the Great, Afghanistan has been the battleground for several empires and the crossroads for many conquerors.<sup>23</sup> The nineteenth century and the beginning of the twentieth century saw Afghanistan as a critical strategic piece to the “Great Game” played between Russia and Britain.<sup>24</sup> It was then that Afghanistan engaged in three Anglo-

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lic Diplomacy Div., *Fact Sheet*]. Each OMLT team is staffed with eleven to twenty-eight personnel from one to several countries. *Id.*

19. KATZMAN, *supra* note 1, at 24. For the ANP, the partnership teams are called the Police Operational Mentoring and Liaison Teams (“POMLTs”) and are staffed with fifteen to twenty personnel each. *Id.* In October 2010, 317 POMLTs were operating in Afghanistan; 279 were from the United States. *Id.*

20. *ISAF Joint Command*, INTERNATIONAL SECURITY ASSISTANCE FORCE, <http://www.isaf.nato.int/subordinate-commands/isaf-joint-command/index.php> (last visited Sept. 21, 2012).

21. *Id.* OMLTs also serve as liaisons between coalition forces and ANA forces during operations. Public Diplomacy Div., *Fact Sheet*, *supra* note 18. Perhaps it is because the OMLTs serve as liaisons for operations that they are part of IJC.

22. KATZMAN, *supra* note 1, at 1.

23. JONES, *supra* note 10, at xxv–xxviii; KATZMAN, *supra* note 1, at 1.

24. JONES, *supra* note 10, at xxvi; KATZMAN, *supra* note 1, at 177–82.

Afghan wars, which eventually led to Afghan independence from Britain on August 8, 1919.<sup>25</sup>

During the middle of the twentieth century (1933–1973), Afghanistan was ruled by King Mohammad Zahir Shah.<sup>26</sup> Under his rule, Afghanistan adopted a constitution, formed a national legislature, and afforded women unprecedented freedoms.<sup>27</sup> It was also during this period of relative peace when King Zahir allied Afghanistan with the Soviet Union.<sup>28</sup> Through its political and arms-purchase relationship with Afghanistan, the Soviet Union built large infrastructure projects throughout Afghanistan, *inter alia*, the north-south Salang Pass/Tunnel and Bagram airfield, many of which remain today.<sup>29</sup>

Following a bloodless coup in 1973,<sup>30</sup> the country succumbed to instability “when diametrically opposed Communist Party and Islamic movements grew in strength.”<sup>31</sup> The instability mounted until December 27, 1979, when the Soviet Union sent troops into Afghanistan to prevent Islamic militias, or *mujahedin*, from seizing power.<sup>32</sup> For the next twenty years, Afghanistan remained in an almost continuous state of armed conflict.<sup>33</sup>

In the years following the Soviet defeat in 1989, civil war among formerly allied mujahedin leaders caused the destruction of most of the country’s infrastructure.<sup>34</sup> The constant state of war and lawlessness created an ideal situation for the Taliban to seize power by promising to restore order in exchange for rule (1996–2001).<sup>35</sup>

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25. KATZMAN *supra* note 1, at 1; *see also* BARFIELD, *supra* note 10, at 115–46, 181–82; JONES, *supra* note 10, at 6–8; RUBIN, *supra* note 10, at 19, 47–54.

26. KATZMAN, *supra* note 1, at 1.

27. *Id.*

28. *See id.*

29. *See id.*; *see also* BARFIELD, *supra* note 10, at 209–10; JONES, *supra* note 10, at 9; RUBIN, *supra* note 10, at 65–66; TANNER, *supra* note 10, 225–27.

30. TANNER, *supra* note 10, at 229.

31. KATZMAN, *supra* note 1, at 2.

32. *Id.*; *see also* BARFIELD, *supra* note 10, at 211, 234; JONES, *supra* note 10, at 11–19; TANNER, *supra* note 10, at 229–35.

33. *See* JONES, *supra* note 10, at xii–xiii; TANNER, *supra* note 10, at 243–287.

34. *See* BARFIELD, *supra* note 10, at 6; JONES, *supra* note 10, at 41–43, 49–51; TANNER, *supra* note 10, at 269–83.

35. *See* BARFIELD, *supra* note 10, at 6–7; KATZMAN, *supra* note 1, at 5; TANNER, *supra* note 10, at 279–87.

The presence of Al Qaeda in Afghanistan and the Taliban's refusal to extradite bin Laden for his complicity in the 9/11 attacks led to the eventual U.S. invasion and removal of the Taliban from power. More than ten years later, the United States and its NATO allies remain locked in Afghanistan.<sup>36</sup>

These last thirty years of war in Afghanistan are well documented and have left the country with a weak central government and an economy that ranks as one of the worst in the world.<sup>37</sup> Afghanistan today remains largely dependent on foreign aid,<sup>38</sup> with little to no infrastructure, scant potable water, scarce electricity, and a citizenry plagued with meager health conditions and little or poor medical care.<sup>39</sup> In all, 40% of the country is unemployed, 72% is illiterate,<sup>40</sup> and less than 15% of the land is arable, all leading to a significant reliance on an opium trade that supplies 80% of the world's opium and accounts for 60% of Afghanistan's GDP.<sup>41</sup>

### *B. The Culture: A Basic Foundation*

It has often been said that a people's culture develops from its history and that culture, in turn, defines a people. Just as it is important to know its history, understanding Afghanistan's culture may help mentors understand why Afghans act a certain way or even anticipate how they may act.<sup>42</sup>

Attempting to define Afghans as one homogeneous culture would be an oversimplification of a very complicated reality; there are just too many variations of ethnicity, tribes, sub-tribes, and villages.<sup>43</sup> Thus, rather than learn cultural nuances, the study of which could take years of training, legal mentors should instead try to grasp and understand cultural commonal-

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36. BARFIELD, *supra* note 10, at 318–20, 333–36.

37. Cent. Intelligence Agency [CIA], *Afghanistan*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited Oct. 29, 2012).

38. *Id.*

39. Lieutenant Commander Vasilios Tasikas, *Developing the Rule of Law in Afghanistan: The Need for a New Strategic Paradigm*, 7 ARMY LAW. 45, 52 (2007).

40. CIA, *supra* note 37.

41. Tasikas, *supra* note 39 at 52.

42. *Afghan Culture: Observations, Insights, and Lessons*, AFG. CULTURE NEWSLETTER (Ctr. for Army Lessons Learned, Fort Leavenworth, Kan.), Sept. 2010, at 67, available at <http://usacac.army.mil/cac2/call/docs/10-64/10-64.pdf>.

43. *See id.*



ities particular to the region to which they are assigned.<sup>44</sup> The location of the ANA Corps to which a mentor is assigned will be indicative of the prevalent ethnicities, tribes, and villages present in the Corps.

For instance, in Afghanistan these commonalities include the following:

- [1] [t]ribal and Islamic cultures are traditional and conservative[;]
- [2] [t]ribal codes (honor, revenge, and hospitality) are social controls[;]
- [3] [t]ribal identity and loyalty . . . take precedence over individual identity and private loyalty)[;]
- [4] [s]elf-interest and personal gain outweigh the fear of retribution or legal/punitive action and hypocrisy or loss of respect[;]
- [5] [a *Jirgah* or a *Shura* often make decisions, depending upon the circumstance;]
- [6] [t]he most important duty of an Afghan man is to defend and control his assets: women, gold and land[;]
- [7] [h]ospitality is an essential aspect of Afghan culture.<sup>45</sup>

By studying and understanding these cultural commonalities, mentors will be better prepared to successfully carry out their mission.

Ultimately, when trying to understand Afghan conduct, mentors should keep in mind that God, family, village, and tribe all take priority before country or nation.<sup>46</sup> Understanding this crucial concept will go a long way, particularly when encountering widespread government corruption, which is discussed later.

### C. The Law

Judge Advocates deploying as legal mentors should also be well versed in relevant military and civil Afghan law. Afghanistan's history of war and occupation has left an indelible impression upon its people, particularly in their failure to apply

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44. *See id.*

45. *Id.* at 67–68.

46. *See ANA GUIDE, supra* note 6, at 1-4; ENTEZAR, *supra* note 10, at 75–77.

the rule of law. This is especially evident with the people's almost cavalier acceptance of high-level government and military corruption.<sup>47</sup> But by knowing Afghanistan's history and understanding its culture, mentors will soon realize how law has now become more relevant and why it is as intertwined with Afghanistan's culture as it is with its history.

There are five sources of law in Afghanistan: (1) Islamic law; (2) the 2004 Constitution; (3) codes, decrees, and legislation; (4) international treaties and covenants; and (5) various regulations and orders.<sup>48</sup> Above all other laws, however, Islamic law takes precedence.<sup>49</sup> In fact, the Afghan Constitution specifically provides that "no law can be contrary to the sacred religion of Islam."<sup>50</sup>

The law applicable to the ANA is found in several codes of military justice.<sup>51</sup> Although initially based upon the United States Uniform Code of Military Justice ("UCMJ"), the ANA codes have since been revised to instill Afghan culture and standards.<sup>52</sup> The codes, or laws of military justice, were written to reinforce the significance of the rule of law within the ANA and emphasize a well-disciplined and combat-ready army.<sup>53</sup>

Echoing article 3 of the Afghan Constitution, nothing within the ANA codes can be contrary to Islam or Shari'a; in fact, the codes specifically permit Shari'a, as well as the Afghan Civil

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47. See Kevin T. Carroll, *Afghan Corruption—The Greatest Obstacle to Victory in Operation Enduring Freedom*, 43 GEO. J. INT'L L. 873, 876–83.

48. See *Muslim Law Systems and Mixed Systems With A Muslim Law Tradition*, JURIGLOBE, <http://www.juriglobe.ca/eng/sys-juri/class-poli/droit-musulman.php> (last visited Oct. 29, 2012); THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF AFGHANISTAN [AFGHAN CONSTITUTION], Jan. 26, 2004, available at <http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf>.

49. AFGHAN CONSTITUTION art. 3.

50. *Id.*

51. See Hill & Jones, *supra* note 8, at 14 & n.24. The Afghan Constitution removes the military courts from the Afghan civil judicial system. AFGHAN CONSTITUTION art. 122.

52. See Hill & Jones, *supra* note 8, at 14. Unlike the UCMJ, the ANA military justice codes are not consolidated in one document. Rather, the ANA military justice code is comprised of several codes, which incorporate by reference the Afghan Civil Code and Shari'a law. Those ANA codes are: (1) Afghan National Army Law of Military Courts ("LMC"); (2) Military Criminal Procedure Code ("MCPC"); and (3) Military Crimes Code ("MCC").

53. See Hill & Jones, *supra* note 8, at 16.

Penal Code, to supplement the ANA codes when offenses are not specified.<sup>54</sup>

Three separate provisions make up the ANA military justice codes, each of which will be discussed in turn:

1. the Law of Military Courts Code ("LMC"), which contains eighteen articles within seven chapters and determines the authority and jurisdiction of the military courts;<sup>55</sup>
2. the Military Criminal Procedure Code ("MCPC"), which contains sixty-one articles within seven chapters and regulates the criminal investigation process in the military;<sup>56</sup> and
3. the Military Crimes Code ("MCC"), which contains forty-eight articles within three chapters and establishes military crimes and punishment within the military.<sup>57</sup>

The LMC establishes the ANA military court system.<sup>58</sup> It defines the roles of prosecutors, military judges, and defense counsel.<sup>59</sup> It also designates primary military trial courts and a military court of appeals,<sup>60</sup> with "exclusive jurisdiction of purely military offenses committed by members of the [ANA]." <sup>61</sup> Appeal from the ANA military court of appeals is made to the Supreme Court of Afghanistan.<sup>62</sup>

The MCPC is authorized pursuant to article 8(B) of the LMC.<sup>63</sup> Within its sixty-one articles, the MCPC regulates the

54. AFGHAN NATIONAL ARMY MILITARY CRIMINAL PROCEDURE CODE [MCPC] art. 47 (on file with author); *see also* Hill & Jones, *supra* note 8, at 14.

55. AFGHAN NATIONAL ARMY LAW OF MILITARY COURTS [LMC] (on file with author). The Afghan Ministry of Justice has not yet published or officially distributed the Law of Military Courts in its Official Gazette.

56. MCPC.

57. AFGHAN NATIONAL ARMY MILITARY CRIMES CODE [MCC] (on file with author).

58. LMC art. 1.

59. *Id.* art. 8.

60. *Id.* art. 7.

61. *Id.* art. 9(A). However, there may be instances when the military courts have concurrent jurisdiction with the civilian courts when "persons subject to [the LMC] commit acts which are offenses under both military and civilian law," or over persons not otherwise members of the ANA. *See* LMC arts. 2, 9.

62. *Id.* art. 15.

63. Although article 1 of the MCPC recites articles 122 and 134 of the Afghan Constitution as its authority, article 8(B) of the LMC empowers the Minister of Defense with the authority to "establish written procedures and

“procedures relating to discovery, investigation and trial of duty related crimes” allegedly committed by ANA soldiers,<sup>64</sup> much like the due process articles found in the UCMJ.<sup>65</sup>

The MCC is more or less a revision of a former Soviet-era military justice code.<sup>66</sup> The MCC outlines the elements of various military crimes, as well as their associated confinement terms.<sup>67</sup> In addition to crimes typical of a military crimes code—such as desertion, mutiny, and absent-without-leave (“AWOL”)—the MCC contains crimes specific to Afghanistan, *to wit*, corruption and violations pertaining to the operation of vehicles<sup>68</sup> and selling or losing combat equipment.<sup>69</sup> Furthermore, the MCC incorporates all crimes punishable under the Afghan Civil Penal Code and Islamic law.<sup>70</sup> In such instances, jurisdiction may lie with either a military or civilian court.<sup>71</sup> For these reasons, legal mentors need to have some understanding of the ANA codes, the Afghan Civil Penal Code, and basic Islamic law.

## II. CHALLENGES WHEN ADVISING THE ANA

### A. *Advising the ANA—What is Mentoring?*

Before discussing the kinds of challenges Judge Advocates should expect to encounter when mentoring the ANA, it is probably best to first cover, in greater detail, what it means to “mentor.”

In Afghanistan, legal mentors provide training guidance, administrative advice, as well as advice to the SJA and his staff on routine and non-routine legal matters. Legal mentors also serve as experts for or advisors to the SJA, OSJA, and Corps judiciary when cases are complex or potentially involve political interference, or when help from a third party is need-

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rules of military courts in accordance with the constitution and the laws of Afghanistan.” *Id.* art. 8(B); *see also* Watts & Martin, *supra* note 9, at 6.

64. MCPC art. 1.

65. Watts & Martin, *supra* note 9, at 7. For a good overview of the MCPC, *see id.* at 7–9.

66. *See id.* at 9.

67. MCC arts. 9, 12–47.

68. *Id.* art. 30.

69. *Id.* arts. 35, 36.

70. *See id.* art. 47.

71. *Id.*

ed. Keeping in mind U.S. policy for Afghanistan, the mentor mission is consistent with the principal objective of developing each Corps OSJA into a self-sufficient legal office, with the capacity to conduct thorough and impartial internal investigations.<sup>72</sup> That, in turn, will lead to good order and discipline within the Corps' ranks and eventually to the Corps' assuming responsibility for security in its respective region.

The most critical kind of mentoring that legal mentors provide is legal training to the OSJA so that they can then provide legal training to the ANA soldiers. Some of the topics covered during training sessions taught by ANA Judge Advocates include the rules of engagement, the law of armed conflict, non-judicial punishment, and ethics. These issues seem to be the ones that resonate most frequently through the ANA. Ensuring each Corps understands and complies with the laws of armed conflict will better prepare Afghanistan for the day when the ANA accepts responsibility for the security of all Afghanistan.

Legal mentors also provide administrative guidance. More specifically, they advise on tasks required for running a legal office. These tasks may include completing supply requisitions (a form called a MOD 14 in the ANA system), non-commissioned officer evaluation reports, counseling statements, investigation reports, or statements for non-judicial punishment.<sup>73</sup> Administrative training and advice may also entail showing the ANA how to track and catalogue regulations and orders or how to organize case management files.

In addition to administrative advice, legal mentors may advise on a number of other matters as well. These matters may be legal (e.g., strategy for a particular case), political (e.g., dealing with a particular commander who is reluctant to submit to a criminal investigation), logistical (e.g., difficulty obtaining supplies through the MOD 14 process),<sup>74</sup> or operation-

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72. See Hill & Jones, *supra* note 8, at 17–19.

73. Training the OSJA on these topics is important because they will be required to complete many of the same forms for their own soldiers or be asked by other commanders on how best to complete the forms.

74. There have been multiple instances when requisition of simple supplies through proper ANA channels are delayed for months because of the ANA's own bureaucratic inadequacies. See ANA GUIDE, *supra* note 6, at 2-46 to 2-47. The ANA must learn how to resolve their own issues and requisition their own supplies through their own chain of command and requisitioning system. See *id.* Only when a situation warrants intervention and after efforts

al/intelligence-related (e.g., issues related to the Taliban, suspected threats, or foreign agents acting in theater). In these instances, legal mentors should be prepared to provide *ad hoc* advice, whether it is to the SJA, prosecutors, defense counsel, or commanders. It is imperative, however, that legal mentors *never* tell their principals what to do; advice should be given as a suggestion, or even as a question, so the Afghans can claim ownership of and responsibility for the final decision.<sup>75</sup>

As each OSJA develops, the SJA's relevance to his respective Corps Commander will increase so that eventually each OSJA will be responsible for not only military justice matters, but also for rendering legal advice on administrative, fiscal, and operational matters.<sup>76</sup>

But mentoring is more than simply providing advice. It is also about developing relationships with the ANA. The job, in a sense, is oftentimes more diplomatic than legal. This is part of the reason mentors who aim to better engage their principals must understand Afghan history and culture. When mentors engage their principals, everyone in the OSJA feels empowered knowing that they have their mentor's support.<sup>77</sup> Over time, a sense of trust will develop between the mentor and his principals, which is crucial to the success of the mentor's mission. Trust, however, must be earned, not purchased by furnishing material goods (an error committed in the past, for example, with office furniture, wide-screen TVs, and vehicles) or making shallow promises. The trust I refer to is only attained through the development of an honest, professional relationship. Nevertheless, mentors must master the delicate balance between developing a trustworthy, professional relationship with their ANA colleagues and fulfilling their primary duty of service to their country.

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have been exhausted through the normal ANA chain of commands should mentors step in with assistance. *See id.*

75. In many instances, particularly with corruption cases, commanders or ANA judge advocates will tell defendants that they do not want to prosecute or investigate, but are being forced to do so by American advisors. Any perception of American influence on case disposition places the mentor into a precarious position. It is better to make it known that decisions are made by the Afghans and that mentors are there to provide suggestions and advise.

76. When I left the 207th in October 2011, the SJA was just starting to review operational plans for legal sufficiency.

77. *See* RULE OF LAW HANDBOOK, *supra* note 16, at 276.

*B. Challenges when Mentoring the ANA*

Evidently, mentoring has its particular challenges. Helping to establish a functional, stand-alone, and credible military and OSJA in the midst of an insurgency accompanied by terrorism, criminal activity, and routine government corruption is one of the greatest challenges any attorney could ever face. However, knowing and understanding the challenges beforehand will help Judge Advocates to adjust accordingly and succeed in this challenging mission.

## 1. Ethnicity

Ethnicity presents an important type of cultural challenge.<sup>78</sup> Ethnic issues are prevalent throughout Afghanistan and are mirrored within the ANA. Working within an ethnically diverse ANA presents a unique and difficult challenge for legal mentors because of the prejudices that exist among the various ethnic groups.<sup>79</sup>

Afghans are historically a multiethnic people and devoutly loyal to their tribal or ethnic affiliations.<sup>80</sup> Consequently, ethnic discrimination plagues all ranks of the ANA.<sup>81</sup> Commanders, and even those higher in the chain of command, often manipulate subordinates of differing ethnicity, while subordinates, particularly the largest group—Pashtuns—likewise manipulate commanders of minority ethnicity, such as Hazara.<sup>82</sup>

In the military justice context, ethnic discrimination appears rampant. There have been examples of commanders issuing non-judicial punishment (“NJP”)<sup>83</sup> inequitably based on ethnic-

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78. “An ethnic group is a large group of people with a common racial, national, tribal, linguistic, religious, or cultural origin or background.” *Afghan Culture*, *supra* note 42, at 68. “Afghanistan’s major ethnic groups are defined by language and origin, whereas sub-ethnic groups may be defined by religion, geography, history, politics, and/or tribes.” *Id.* at 69.

79. ANA GUIDE, *supra* note 6, at 3-4 to 3-5.

80. *Id.* at 1-2 to 1-3, 3-4 to 3-5. In Afghanistan, 42% of the population are Pashtun; 27% are Tajik; 9% are Hazara; 4% are Aimak; 3% are Turkmen; 2% are Baloch; and 4% are other. 80% of the population is Sunni Muslim and 19% is Shia Muslim. Central Intelligence Agency, *supra* note 19. These groups are often referred to as tribes, although there are also subgroups within each of these groups. *Afghan Culture*, *supra* note 42, at 69.

81. ANA GUIDE, *supra* note 6, at 3-5.

82. *See id.*

83. A form of punishment given administratively by commanders for minor military infractions.

ity. In criminal justice matters more serious than NJP, commanders and even prosecutors have protected or obstructed investigations of soldiers because of ethnic allegiances. Ethnic prejudice is also apparent when cases are detailed to prosecutors or when judgments or sentences are handed down by judges. Although most ANA leaders and soldiers will deny this discrimination exists, tribal or ethnic authority pervades the ANA.

When cultural or ethnic discrimination is suspected, mentors should try to instill national values and support for the rule of law as paramount to ethnicity.<sup>84</sup>

## 2. Intimidation

Influence through intimidation has become an accepted practice in the ANA and presents another challenge for legal mentors.<sup>85</sup> Those seeking to influence a particular individual might intimidate that person directly or indirectly through threats to his or her family.<sup>86</sup> Although commanders, soldiers, or witnesses may want to do what is legally right, they are often constrained in their ability to do so because of fear for their or their family's safety.<sup>87</sup>

More often than not, intimidation is the reason many corruption cases or high-profile military justice cases are dismissed or not pursued to their end. It is also usually why witnesses refuse to cooperate in investigations or testify at trials, critical evidence is lost, or defendants are suddenly reassigned or disappear. This regrettable situation often leaves prosecutors with no choice but to dismiss the case. Accordingly, mentors should remain flexible and understand that intimidation may be the primary reason some high-level matters are never pursued.<sup>88</sup>

## 3. Confessions

ANA prosecutors rely heavily on confessions to prove their cases.<sup>89</sup> This reliance, in large part, is historically and culturally based on Islamic law teachings whereby confessions made in

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84. ANA GUIDE, *supra* note 6, at 3-5.

85. *Id.* at 3-7.

86. *Id.*

87. *Id.*

88. *See id.*

89. *Id.* at 3-6.



an open court before God are rarely challenged.<sup>90</sup> With this in mind, better-informed defendants, usually senior-ranking officials in high-profile corruption cases, will simply refuse to speak, knowing that, as a result of this refusal, the prosecutors or investigators will most likely abandon their case.

Fortunately, ANA prosecutors today are starting to trend away from this past accepted practice, particularly as they develop their advocacy and case-development skills. Legal mentors can work with prosecutors on developing cases that do not need confessions to succeed in court.

#### 4. Illiteracy

Illiteracy presents yet another interesting challenge for legal mentors, especially when training ANA soldiers on rules of engagement, laws of armed conflict, NJP, and ethics. On a larger scale, illiteracy within the ANA negatively impacts the overall U.S. mission in Afghanistan, albeit indirectly.

Although efforts are underway to increase the literacy rate,<sup>91</sup> illiteracy and an aversion to writing among those who are literate has left the ANA with inadequate to almost-nonexistent record keeping.<sup>92</sup> As a result, many form-driven processes, such as counseling statements, promotions, NJPs, and payroll records, which a U.S.-military trained Judge Advocate might take for granted, have suffered. When routine paperwork is not completed, soldiers might miss pay or promotions, or they might be wrongly punished (or so they believe), leaving them feeling disconnected and discouraged. These discouraged, unpaid soldiers might react by going AWOL, deserting, or joining the insurgency. This, in turn, leaves the ANA undermanned, poorly motivated, and generally unable to defend its country against the insurgency, ultimately preventing it from effectively taking responsibility for the security of Afghanistan. Thus, poor record keeping causes an unintentional domino effect within the ANA, with the effect worsening as it moves down the chain.

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90. See Rashid Ahmad, *Admission/Confession: A Comparative Study of Islamic and Pakistani Laws of Evidence*, THE CLUTE INST., 164–65 (Jan. 2011),

<http://conferences.cluteonline.com/index.php/IAC/2011HI/paper/viewFile/65/64>.

91. ANA GUIDE, *supra* note 6, at 2-41.

92. See *id.* at 2-45.

While legal mentors cannot directly combat illiteracy within the ANA, they can provide the OSJA with PowerPoint presentations and training that cover critical legal subjects and are geared toward the illiterate ANA soldier.<sup>93</sup>

### 5. Leadership

Lack of experienced leaders possessing any formal military training is another challenge to mentoring the ANA.

Prior to the recent efforts to build a new Afghan National Army, there had essentially been no Afghan Army since the Soviets left Afghanistan in 1989, leaving many former mujahedeen fighters, warlords, and militia to serve as officers and non-commissioned officers (“NCOs”).<sup>94</sup> Many ANA commanders and even SJAs got their positions through patronage, intimidation, bribery, or some other means of influence.<sup>95</sup> This has resulted in many senior leaders with little to no formal education or military training.<sup>96</sup> For example, when I arrived at the Corps to which I had been assigned, the SJA was not a lawyer or even trained in the law. He was a former mujahedeen artillery battalion commander suspected by many throughout the Corps as being corrupt. Fortunately, before the end of my term, the ANA Judge Advocate General replaced him with a well-respected former judge and law professor.

“This lack of training, combined with a promotion system that favors influence peddling and patronage, remains an impediment to ANA leadership development.”<sup>97</sup> Lack of experienced leaders poses a unique challenge for legal mentors trying to instill discipline and respect for the rule of law within the ANA.

### 6. The Soviet Model

The senior leaders in the ANA who have previous military experience or training received it during the days of the Soviet occupation, leaving a leadership model built largely on Soviet

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93. *See id.* at 2-30.

94. *Id.* at 3-2.

95. *Id.* at 2-29, 3-8. It is not uncommon for senior officers to buy their position to eventually personally profit through extortion, bribery, and corruption. *Id.* at 2-29.

96. *See id.* at 2-30, 3-8. Many leaders also consider training a waste of time and instead rely on their militia experience. *Id.* at 3-8.

97. *Id.* at 3-8.

military tradition.<sup>98</sup> Under this system, NCOs have very little authority or decision-making ability, if any.<sup>99</sup> Because leaders do not have authority and are not expected to make decisions, they are not held accountable for the actions of their subordinates.<sup>100</sup> This way, they remain in charge until something is amiss, when they can then shift the blame to those beneath them.<sup>101</sup> Hence, leaders are reluctant to make recommended changes, because enacting change means they take on the risk of failure, whereas remaining with the status quo means they can simply blame the underlying problem on someone else.<sup>102</sup> In other words, under the Soviet model, leaders prefer to do nothing, which poses a challenge for legal mentors looking to effect change.<sup>103</sup>

### 7. Working with Coalition Partners

Legal mentors will often work with coalition partners, either when serving as part of an OMLT, or when working alongside coalition teams. Working with coalition members who have their own priorities and cultural idiosyncrasies offers a new set of challenges.

In Afghanistan, the country is divided into Regional Commands ("RCs"), with each RC commanded by a different NATO commander.<sup>104</sup> The coalition commander of the RC also usually heads the OMLT assigned to the region. In addition, depending on where the Corps is located, the battle-space commander, in other words, the commander in charge of the particular RC or portion thereof, may be a coalition commander.<sup>105</sup> Thus, coalition members work in a number of settings in Afghanistan.

Afghans have definite perceptions of coalition members, some positive, but many negative. Some perceptions may be historically based (as is the case with the British or Russians), while others may be culturally or linguistically based. These perceptions may affect how Afghans interact with the legal mentor or

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98. *See id.* at 3-9.

99. *Id.*

100. *See id.* at 3-10.

101. *Id.*

102. *Id.*

103. *See id.* at 2-29.

104. *See* KATZMAN, *supra* note 1, at 30.

105. ANA GUIDE, *supra* note 6, at 3-10.

how the mentor addresses them, which could impact the entire mission.

At other times, the mentor will need support from a coalition or OMLT partner, but for one reason or another, it does not come. Hence, legal mentors should remember that diplomacy is just as important when working with coalition partners as it is when dealing with Afghans.

#### 8. Other Rule of Law Operators in the Battle-Space

In addition to the ANA legal mentor, there are other organizations conducting similar rule of law mentoring in the battle-space.<sup>106</sup> Unlike ANA mentors, these operators work within the civilian rule of law arena and may include the following: Brigade Combat Teams (“BCTs”), NATO Rule of Law Field Support Mission (“NROLFSM”), the Department of State—Bureau of International Narcotics and Law Enforcement Affairs (“DOS/INL”), U.S. Agency for International Development (“USAID”), the Department of Justice (“DOJ”), Provisional Reconstruction Teams (“PRTs”), and the United Nations Assistance Mission Afghanistan (“UNAMA”).<sup>107</sup> Since there may be times when the legal mentors’ interests intersect with those of the civilian operators’, or when information gained from these operators located at the regional and provincial levels is helpful to the legal mentors, getting to know them could prove beneficial.<sup>108</sup>

BCTs and NROLFSM are military-led and provide civilian rule of law support. BCTs are co-located at the brigade-level with their own rule of law personnel and routinely engage with local civilian provincial and appellate judges.<sup>109</sup> NROLFSM, on the other hand, does not engage in rule of law advising, mentoring, or training.<sup>110</sup> Instead, it coordinates civilian and military rule of law efforts with DOS counterparts focusing on five main areas:

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106. RULE OF LAW HANDBOOK, *supra* note 16, at 200.

107. *See id.* at 199–204; Public Diplomacy Div., N. Atlantic Treaty Org., *NATO Rule of Law Field Support Mission*, NORTH ATLANTIC TREATY ORG., [http://www.nato.int/nato\\_static/assets/pdf/pdf\\_2011\\_06/20110609-Background-Rule\\_of\\_Law-en.pdf](http://www.nato.int/nato_static/assets/pdf/pdf_2011_06/20110609-Background-Rule_of_Law-en.pdf) (last visited Oct. 7, 2012).

108. *See* RULE OF LAW HANDBOOK, *supra* note 16, at 200.

109. *NATO Rule of Law Field Support Mission*, *supra* note 107 at 26.

110. *See NATO Rule of Law Field Support Mission*, *supra* note 107.

[1] Security—for civilian rule of law experts; [2] Coordination—to facilitate movements of the experts in conjunction with other actors also working in the area in Afghanistan, and to provide a liaison and outreach function; [3] Movement support—such as secure convoys; [4] Engineering support—for possible infrastructure upgrades at designated Rule of Law facilities; and [5] Oversight of the contractual process—in connection with the engineering support and in accordance with current ISAF practices.<sup>111</sup>

The U.S. civilian agencies providing civilian rule of law support are DOS/INL, USAID, and DOJ. DOS/INL works and operates through two programs: (1) the Justice Sector Support Program (“JSSP”), which provides regional training programs and supports the Afghan Attorney General’s Office and the Ministry of Justice, and (2) the Corrections Systems Support Program (“CSSP”) which “supports the prison system, develops corrections infrastructure, and provides training.”<sup>112</sup> In addition, USAID supports the Supreme Court of Afghanistan, assists in reforming the law, and helps the Afghans draft legislation.<sup>113</sup> Finally, “DOJ has the lead with the Criminal Justice Task Force (the specialist counternarcotics task force), the Anti-Corruption Unit in the Attorney General’s Office, and the U.S. Marshals Service protection efforts.”<sup>114</sup>

To a lesser extent, PRTs are also involved in rule of law efforts.<sup>115</sup> PRTs “are civil-military organizations (CMOs) that are staffed by U.S. government (USG) civilian and military personnel to assist foreign provincial governments with their reconstruction efforts; their security and rule of law efforts; and their political and economic development.”<sup>116</sup> While a PRT might not have a coordinator dedicated to civilian rule of law efforts (although this may change), “PRTs can contribute to justice reform in Afghanistan [by b]uilding judicial infrastructure, [f]acilitating information-sharing (PRTs are popular with

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111. *Id.*

112. RULE OF LAW HANDBOOK, *supra* note 16, at 201.

113. *Id.*

114. *Id.*

115. *See id.* at 201–04. PRTs are the “principal vehicle to leverage the international community and Afghan government reconstruction and development programs.” *Id.* at 202. Currently there are twenty-five teams scattered throughout most of the thirty-four provinces in Afghanistan; twelve are led by the United States. *Id.* at 201.

116. *See id.* at 193.

Afghan nationals, giving them good situational awareness), [a]dvising on the best use of donor funds, [and h]elping to coordinate reconstruction efforts with the UNAMA.”<sup>117</sup>

Finally, of the various non-governmental organizations (“NGOs”) conducting rule of law operations, UNAMA is most prevalent,<sup>118</sup> having its own mandate “to lead the international civilian efforts . . . [and] to support and strengthen efforts to improve governance and the rule of law.”<sup>119</sup> Their usefulness may depend upon the RC to which they are assigned.

Because there are so many organizations conducting rule of law operations in the battle-space, coordination and unity of effort is sometimes required. For instance, in Afghanistan, ANA soldiers convicted to confinement may spend their term in civilian prisons.<sup>120</sup> As a result, there may be times when coordination between the mentor and the civilian rule of law counterparts (NROLFSM, CSSP, or JSSP) will be needed if a visit to or information about a prison is requested. At other times, coordination among the mentor and the agencies may be needed because the ANA and civilian authorities have concurrent jurisdiction (e.g., when an ANA soldier commits a civilian offense off-post and off-duty, or if an ANA picks up and detains a Taliban or al-Qaeda suspect, subject to the jurisdiction of the National Directorate of Security).<sup>121</sup>

### 9. Working with Interpreters

An interpreter (or linguist) can be a mentor’s greatest asset.<sup>122</sup> In fact, without an effective interpreter, the legal mentor could find himself in trouble. Poor interpreters have led to mentors being dismissed or discounted by their principals simply because of poor translation or poor protocol. Advising through an interpreter is a skill that must be developed.<sup>123</sup> A linguist with a lay background offers different capabilities than one with a legal background. An “uneducated or otherwise un-

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117. *Id.* at 204.

118. *Id.* at 200.

119. S.C. Res. 1868, ¶ 4, U.N. Doc. S/RES/1868 (Mar. 23, 2009), available at <http://www.unhcr.org/refworld/docid/49c9f9992.html>.

120. MCPC art. 45; Hill & Jones, *supra* note 8, at 19.

121. See Hill & Jones, *supra* note 8, at 14; Watts & Martin, *supra* note 9, at 6.

122. ANA GUIDE, *supra* note 6, at 3-4.

123. *Id.*

sophisticated interpreter” can complicate a relationship and potentially sabotage the mission.<sup>124</sup>

There are many legal terms that lawyers use as common-speak that do not have equivalents in Dari or Pashto, the main languages of Afghanistan.<sup>125</sup> For instance, there are no Dari words for defendant or plaintiff; nor are there words for misdemeanor or felony. Instead, the legal community in Afghanistan uses Arabic words just as we use Latin words in the English legal system. Other words do not have literal translations: the Supreme Court is the “clean court”; when “charges” are referred, there is an “accusation”; an attorney does not dismiss a case, he “exits” it. In one instance, an attorney intended to speak of keeping a client’s confidentiality; however, the interpreter (who happened to have no legal background) translated the idea as “keeping secrets from your client.” In this particular example, one translation is an ethical duty, and the other is ethical grounds for sanctions.

It is also important to use the same interpreter, especially if he routinely delivers quality services.<sup>126</sup> In most instances, the ANA principals with whom mentors work will have already developed a concurrent relationship with the interpreter from prior mentors.<sup>127</sup> This prior relationship can serve as a bridge for introductions and may even help curry favor.<sup>128</sup>

The SJA, his key staff, the judges, and key personnel in the Corps (particularly senior leadership) should keep the interpreter’s cell phone number available, and vice-versa, in the event someone needs to contact the mentor or the mentor needs to schedule a meeting. A good Rolodex and contacts with key ANA personnel is an essential element for success.<sup>129</sup>

There are several tips legal mentors should keep in mind when using an interpreter. Mentors should speak to the person addressed, not to the interpreter.<sup>130</sup> Look at the addressee when speaking. Make sure the interpreter only translates what is said and nothing more. Keep sentences short to avoid over-

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124. RULE OF LAW HANDBOOK, *supra* note 16, at 227.

125. CIA, *supra* note 37.

126. RULE OF LAW HANDBOOK, *supra* note 16, at 227.

127. *See id.*

128. *See id.*

129. *See id.* at 227–228.

130. ANA GUIDE, *supra* note 6, at 3-4.

whelming the interpreter.<sup>131</sup> Do not allow for adjustments, unless it is culturally necessary or something said is inappropriate. Also be careful as to word choice and using sayings which are often not translated well or misunderstood. A good interpreter can help overcome these obstacles. The interpreter should always advise if he hears or believes there may be a dangerous situation. Do not curse or use profanity. Many Afghans understand some English, and if they hear profanity, they may believe they are being insulted. Similarly, do not allow the interpreter to hold private discussions with the principals and do not hold private conversations with the interpreter because it is considered impolite or even offensive unless the discussion is translated.<sup>132</sup> Finally, always speak clearly and simply.

#### 10. Conflicts of Interest

While gaining trust is paramount for success as a legal mentor, trust does not create a fiduciary relationship between the legal mentor and his principal. In fact, legal mentors do not have fiduciary relationships with any members of the ANA. As such, no privileges flow from this relationship, and there should be no conflicts of interest.

During the course of the deployment, legal mentors may encounter instances where information gained through the ANA relationship must be compromised to Coalition Forces. If ever in doubt, it is always best to consult with the IJC chain of command, starting with the IJC SJA.

#### 11. Corruption

Cultural challenges become especially frustrating considering the epidemic high-level government corruption that may at times seem a culturally-accepted means for conducting business.<sup>133</sup> Corruption is one of the greatest concerns for gaining stability in Afghanistan.<sup>134</sup> Corruption permeates every level of the ANA and Ministry of Defense.<sup>135</sup> It is often rationalized be-

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131. *Id.*

132. *See id.*

133. *Id.* at 3-6.

134. RULE OF LAW HANDBOOK, *supra* note 16, at 201.

135. ANA GUIDE, *supra* note 6, at 3-6.



cause of the high risks and low pay for ANA soldiers.<sup>136</sup> Many in the ANA do not see it as a problem per se but rather as a means of survival.<sup>137</sup> Legal mentors who encounter corruption should encourage commanders to conduct investigations.<sup>138</sup>

Discovering corruption is often harder than simply conducting an investigation, however, and investigations often present their own challenges, including obstruction by commanders. One method for discovering corruption is through observing relationships and the seemingly casual discussions that may flow from them. Thus, it is important for legal mentors to develop close, professional relationships with the SJA, the Criminal Investigation Division ("CID") chief, the Inspector General ("IG") mentor, the hospital mentors, the Military Police ("MP") chief (and his mentor, if applicable), the finance mentor, the Garrison Commander, the G2 Chief (and his mentor), the G3 Chief (and his mentor), the Brigade Commanders, and the Corps Commander. Depending on the Corps, there may be other liaisons that may be of help as well.

To combat corruption, mentors should incorporate ethics into discussions whenever possible, using analogies to illustrate key points.<sup>139</sup> Lecturing should generally be avoided.<sup>140</sup> One legal advisor was particularly effective by equating corruption with support for the insurgency, pointing out that every dollar taken through corruption feeds the insurgency ten-fold, thus diminishing ANA efforts.

Finally, the SJA should refer cases where senior commanders are implicated to his higher chain of command, in particular to the ANA Judge Advocate General, for guidance or referral of charges. This way the SJA can avoid investigating the same commander with whom he has, and may continue to have, a professional relationship.

## 12. Logistics

In most instances, the ANA OSJAs lack adequate resources, supplies, technology, and even paper.<sup>141</sup> In fact, until recently,

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136. *Id.*

137. *See id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *See id.* at 3-7.

most did not even have copies of the military codes, laws, or regulations that one would expect to find in an SJA office.

Besides lacking equipment and supplies, most SJA offices are not fully or well staffed either. Each OSJA has a manning requirement (or *tashkil*)<sup>142</sup> that was designed for a much smaller Corps. Cases frequently cannot be investigated or tried for lack of investigators or investigator kits, defense counsel, or judges. These logistical difficulties often affect investigations. For example, investigators might not be able to secure a crime scene or preserve evidence because they do not have vehicles and thus cannot get there fast enough. Unreasonable delays between the time an accused is incarcerated and the time he is charged are also common because of these logistical challenges.

Logistical restrictions can also affect the legal mentor's mission, particularly when needing to travel outside the perimeter (e.g., visiting the civilian jail or meeting with ANP, civilian judges, or politicians) because security concerns limit obtaining vehicles and a security detail.

### 13. Insurgency

Finally, the greatest challenge for the mentor in the battlespace will be the insurgency. Meeting and addressing all of the aforementioned challenges, and then some, while fighting an insurgency is incredibly difficult.<sup>143</sup>

In addition to fighting an insurgency, there is the ever-present threat of infiltration of the ANA base.<sup>144</sup> There have been instances when units have been comprised of soldiers who were former Taliban fighters, from pro-Taliban villages, or compromised by intimidation, bribery, or corruption.<sup>145</sup>

Every day I mentored there was a continuous threat of an attack, whether from my principal, someone in his office, or someone that had infiltrated the ANA compound. In fact, just as I was arriving in theater, a mentor and several other coalition members were shot and killed by their ANA principal. I do not know the specifics of the attack (a large part of the details remain classified), but I do know that subsequent to those kill-

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142. *See id.* at 2-19.

143. *See id.* at 2-15 to 2-16.

144. *Id.* at 3-7.

145. *Id.*

ings, mentors remained on a heightened state of preparedness when working with the ANA.

### III. SOLUTIONS

#### A. *Successful Practices*

a. "Strive to understand the culture and the law, both in theory and in practice."<sup>146</sup> For Afghans, God, family, village, and tribe all take priority before country. Learn the civilian civil code and basic Shari'a law since both are relevant sources of the ANA military justice code. Failing to know or understand the history, culture, or law will be considered an exploitable weakness. Learn how cases develop and how they are investigated; how the SJA reviews investigations and assigns cases for prosecution; how prosecutors work their cases and draft and submit a charge sheet; how the Court intakes cases and the effect of the Court's review; how defense counsel investigate, prepare, and work cases; and finally, learn and understand the prosecutor's, defense counsel's, and court's roles at trial.

b. Learn the pressure points of the ANA military justice system. These include the effect of ethnic relationships among the victim, suspect, chain of command, SJA, and judiciary; the potential an accused, a witness, or a victim may be influenced by one of his superiors; the level of corruption within the ANA military; the potential for intimidation by senior officials of prosecutors, military judges, CID investigators, and witnesses; and the potential level of incompetence, particularly in the investigation phase.

c. "Establish and maintain strong, open, and trusting relationships," not just with the ANA but also with the inter-agency, coalition, and NGO partners as well.<sup>147</sup> Make a point to meet with the other rule of law actors. By getting out and attending rule of law working groups outside the base, you will gain valuable insight into how other actors operate in the rule of law environment, in addition to gaining leverage for coordinating future rule of law efforts. There is no local rule of law problem in a country with a national government developing as quickly as Afghanistan's. Any project that ignores the necessary relationships among foreign and host nation stakeholders

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146. RULE OF LAW HANDBOOK, *supra* note 16, at 210.

147. *Id.*

is bound to fail in the long run, if for no other reason than there will be no national support to sustain it.

d. Similarly, get to know the key mentors and their principles, in particular the Corps Commander, Garrison Commander, Garrison tenant Commanders, G2, G3, Corps finance Chief, IG, and MP Chief. The mentors can provide valuable insight into ANA issues that are particularly relevant to the legal advisor and OSJA. At the same time, encourage the SJA to forge his own relationships with the ANA principals and their mentors.

e. When giving advice or opinions, be clear and respectful, providing rationale for your thoughts. Avoid giving rash advice based on naiveté (which is part of the motivation for understanding the culture and history). When a dissenting opinion is based on sound, rational reasoning, legal advisors will gain the trust and respect of their principals.

f. Understand that an advisor's "power" derives from the ability to pass along information and spot issues for senior-ranking officials at both ISAF and the Ministry of Defense. This ability should be used prudently. Do not threaten its use lightly. Seek this avenue only when convinced higher echelons (at least on the coalition side) will agree that the issue is sufficiently important to merit their intervention.

g. Keep matters simple.<sup>148</sup> Pursue simple and practical systems for training and mentoring.<sup>149</sup> Be honest and succinct and try to keep meetings short. Rather than lecturing, mentors should use analogies and discussion points to illustrate important points. Although "infrastructure and process are important," the primary focus should be on the people through "educating, developing, mentoring, and empowering" the ANA.<sup>150</sup>

h. Words and word choice matter. Be careful what is said in English. Be professional. Use appropriate language. Many Afghans understand English and words taken out of context may be misconstrued.

i. Provide incentives for producing. Objectives should be offered to the ANA as a personal incentive. Remember where the Afghan priorities lie (God, family, tribe). Consider how Af-

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148. *Id.*

149. *Id.*

150. *Id.*

ghans' actions may be influenced by other factors, such as loyalties (e.g., "tribal, ethnic, religious, bureaucratic, financial"); personal obligations (e.g., financial, or to their tribe, ethnicity, or religion); and third-party influences inimical to the rule of law (e.g., "corruption, poverty, foreign influences, crime, fear, insurgency, lack of education").<sup>151</sup>

j. Instill in commanders the necessity for following the rule of law. Remind commanders to utilize the SJAs as the principal rule of law advisors and also remind SJAs how they can minimize their own personal exposure for violations.

k. Remember the objective is not for the ANA to look like the U.S. Army, but rather for the ANA to be a professional and competent military organization in a form appropriate for Afghanistan.<sup>152</sup>

l. Utilize your own strengths to your advantage. Everyone will approach the position and address issues from different angles as defined by their prism of personal experience. Use that past experience as leverage for accomplishing tasks. Do not expect too much. Set realistic goals. The levels of bureaucracy in Afghanistan create an incredibly slow process, so patience is a pre-requisite for success.

### *B. Unsuccessful practices*

a. Do not think you know everything. Remain flexible and open minded. This is not Iraq and even if you have been to Afghanistan before, the landscape changes almost daily. Do not try to go it alone by disregarding the expertise and experience of others. Know, understand, and use, when applicable, all available resources to your advantage. The mission is not new and many of the issues you encounter have been previously addressed by others. Do your research before embarking on a new quest. Besides the civilian rule of law operators, the Afghans can provide a valuable resource. They have been here the longest and many, including your interpreter, have the institutional memory on how things have been done for your RC.

b. Failing to adhere to cultural prerequisites or etiquette or disregarding cultural advice (e.g., from the linguist) can prove devastating and has, at times, doomed legal advisors.

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151. *Id.* at 160.

152. See ANA GUIDE, *supra* note 6, at 3-3.

c. Do not tell the principal what he “has” to do. Instead guide them by asking questions, for example, have they done *X* or thought of *Y*? This way they think of the issues and solutions themselves and can take responsibility for the plan.

d. Do not promise things that may not, or cannot, happen. By failing to deliver, credibility is lost and may not be recovered. Rather, say that you will “look into it.” There is a perception among Afghans that Americans promise but do not deliver. Similarly, failing to follow-up on tasks or promises is another means to lose credibility and trust.

e. Keep a professional attitude and do not let things get personal. Many suggestions will be ignored or disregarded. Understand why a suggestion was disregarded. Knowing the culture and how things operate in Afghanistan and how tasks are accomplished may give better insight into how suggestions should be made next time.

f. Do not undermine the SJA or anyone of authority in front of subordinates.

g. You are not a fiduciary to the SJA or the judiciary. Despite what some may think, you represent the United States and as such your duty of loyalty and confidences run to it, *not* to the ANA.

## CONCLUSION

Key to U.S. policy for Afghanistan is training, partnering with, and mentoring the ANA so it can self-sustain and be capable of defending its country from the insurgency that has beset Afghanistan for the last ten years. Developing the ANA Corps OSJA into a self-sufficient legal office is a critical component of this policy. An OSJA capable of providing accurate and timely advice for a well-disciplined Corps, and that respects the rule of law and complies with the laws of armed conflict and rules of engagement, will eventually be able to take responsibility for the security of its respective region, which will lead to the eventual withdrawal of U.S. and coalition forces from the region.

Judge Advocates deploying as ANA legal mentors will encounter many challenges unique to Afghanistan while fighting an ongoing insurgency. Before deploying, Judge Advocates should spend a significant amount of time learning and understanding the history, culture, law, and basic political framework of post-conflict operations and be ready to develop alli-

ances with other legal rule of law operators in the region. It is my hope that with this information, Judge Advocates deploying as ANA legal mentors will be well equipped and prepared to handle any of the challenges expected in theater.