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Stability Operations: A Guiding Framework for “Small Wars” and Other Conflicts of the Twenty-First Century?

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[I]f international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.¹

Introduction

The ongoing armed conflict in Afghanistan provides a stark example of the challenging and complex operating environment in which the international community is seeking to establish and maintain the rule of law. Professor Hersch Lauterpacht’s entreaty in the aftermath of World War II for lawyers to address the myriad of law of war issues not covered by the Geneva Conventions with a feeling of humility is no less applicable today regarding attempts to regulate contemporary conflict.² Twenty-first-century conflict rarely meets the traditional legal criteria of an international armed conflict. Instead, operational lawyers have to apply a normative framework primarily designed to regulate State-on-State conflict to increasingly complex security situations involving warfare both within States and across international borders. Such operations range from relatively benign

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humanitarian relief operations to significant combat operations, such as those in Afghanistan involving the multinational forces assisting the Afghan government.

Lawyers should not feel isolated in this endeavor, as the challenge of categorizing conflict and operating in complex security situations is not a uniquely legal one. Military commanders are also seeking to have doctrine adapted, and where necessary developed, to address such conflicts. The doctrinal goal of attempting to categorize operations that do not fit within the classic notions of offensive or defensive operations between State armed forces has led to the development of the concept of "stability operations." This article explores the relationship between the law of armed conflict and what is largely a US-led initiative to place a myriad of military missions, often occurring at the lower end of the conflict spectrum, under one overarching doctrinal umbrella.³ The analysis includes an outline of the limits of the contemporary normative legal framework in governing operations designed to bring stability to failed or failing States.

Stability operations will be assessed in four parts, commencing with an outline of the definition, scope and purpose of those operations. A key question is the degree to which such operations are actually new or whether the concept is in reality a catch-all term for a variety of missions that have always challenged both doctrine writers and lawyers alike. Secondly, the law governing operations at the lower end of the conflict spectrum will be explored. Emphasis will be placed on looking at whether international law has adapted to account for such conflict, or if it has, like military doctrine, focused on State-on-State conflict. Thirdly, the applicability of the term "stability operations" in a coalition environment will be explored. Given the prevalence of such operations, the adoption, or lack thereof, of this doctrinal approach by potential allies provides an important indicator of the maturity and potential viability of the concept.

Finally, potential limitations on this forward-thinking American doctrinal approach to addressing the contemporary "war amongst the people"⁴ will be considered. While there is a possibility for failure, the significant potential this new categorization of conflict presents in seeking to articulate a realistic regime in which to conduct operations in the existing complex security environment will be explored.

Stability Operations

The Doctrine

The analysis will now turn to outlining the stability operations doctrine, exploring its scope and relationship with doctrine governing combat operations, and situating stability operations in a historical context regarding previous efforts to

categorize such conflict. “Stability operations” is a relatively recent doctrine developed by the prolific US military doctrine production process. In its simplest form, such operations are defined as “[m]ilitary and civilian activities conducted across the spectrum from peace to conflict to establish or maintain order in States and regions.”⁵ This definition, found in Department of Defense (DoD) Directive 3000.05, elevates such operations to “a core U.S. military mission that the Department of Defense shall be prepared to conduct and support. They shall be given priority comparable to combat operations and be explicitly addressed and integrated across all DoD activities”⁶ The goal of these operations is ambitious:

The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society.⁷

Among the activities envisaged are rebuilding indigenous security forces, correctional facilities and judicial systems necessary to secure and stabilize the environment; reviving or building the private sector; and developing representative governmental institutions.⁸ The partners for US military forces include “U.S. Departments and Agencies, foreign governments and security forces, global and regional international organizations . . . U.S. and foreign nongovernmental organizations . . . and private sector individuals and for-profit companies”⁹ While the directive clearly anticipates that many stability operations are best performed by indigenous, foreign or US civilian professionals it clearly, and perhaps for many military planners ominously, states: “[n]onetheless, U.S. military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot do so.”¹⁰

The fulfillment of the “stability operations” mission presents a significant challenge. Indeed some might think it at best aspirational if it were not for the fact such operations comprise the types of missions presently being conducted, not just by the US military, but also by the wider international community. This is evident not only in Iraq, which is often cited as the most glaring example of what can go wrong when mission planning has not fully contemplated or provided for the maintenance of order and the re-establishment of governance institutions when traditional fighting has concluded, but also in Afghanistan. In Afghanistan, NATO, the United Nations, international organizations and nongovernmental organizations are all faced with the tremendous security, governance and organizational challenges of trying to rebuild or, perhaps more accurately, build a State. Both the Afghanistan and Iraq missions provide clear examples of the activities stability

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operations can encompass, as well as the policy and legal challenges they pose. Given the post-2001 emergence of the doctrine they appear to have been primary catalysts for its development.

However, there is a significant danger in looking at stability operations through the narrow lens of Iraq or Afghanistan. The activities captured under the stability operations doctrine are much broader than those two major conflicts. This idea is reflected in the foreword to the 2008 US Army Field Manual on “Stability Operations,” where Lieutenant General William Caldwell notes, “America’s future abroad is unlikely to resemble Afghanistan or Iraq.”¹¹ It is the very breadth of the stability operations doctrine that highlights not only the complex nature of the existing security challenge, but also the deficiencies in the underlying legal framework within which contemporary security operations take place.

The “Catch-All” of Conflict

The complexity of stability operations results from a number of factors, including the wide scope of activities that fall within its definition. To fully understand that scope it is necessary to look at recent US Army doctrine. That doctrine has undergone a significant revision with the 2008 Army manual replacing an earlier version produced just in 2003.¹² The speed with which this doctrine has undergone that revision appears to reflect not only the dynamic environment within which such operations are conducted, but also the impact of “lessons learned” information being incorporated into military doctrine.

While not as specific as its predecessor in terms of identifying types of operations, the new doctrine indicates that stability operations occur across a spectrum of conflict from peace to general war and can include

a wide range of stability tasks performed under the umbrella of various operational environments—

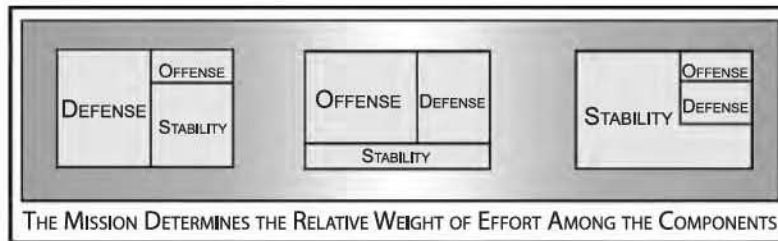
- To support a partner nation during peacetime military engagement.
- After a natural or man-made disaster as part of a humanitarian-based limited intervention.
- During peace operations to enforce international peace agreements.
- To support a legitimate host-nation government during irregular warfare.
- During major combat operations to establish conditions that facilitate post-conflict activities.

- In a post-conflict environment following the general cessation of organized hostilities.¹³

Consistent with the 2003 version, the doctrine found in the 2008 manual envisages stability operations to be carried out during humanitarian disaster relief, peacetime support to other nations, peacekeeping and peace enforcement, counterinsurgency (COIN) operations and post-conflict occupation. Given the general wording provided in the new doctrine there is no reason to believe it would not also include operations identified in the earlier manual, such as support to counterdrug operations, combating terrorism and noncombatant evacuation operations.¹⁴

Significantly, in respect to terrorism, the 2008 doctrine notes that the greatest threat to American national security “comes not in the form of terrorism or ambitious powers, but from fragile states.”¹⁵ While terrorism remains a threat which must be addressed in the context of such operations, avoiding the impression of engagement in a “Global War on Terror” will undoubtedly remove a potential irritant with many coalition partners. The reference to humanitarian operations also highlights the degree to which dealing with humanitarian disaster is increasingly being seen in the same light as insurgency and other challenges to governance by State authorities.¹⁶ Both humanitarian and many other types of stability operations, which are located well down on the conflict spectrum, often involve military forces in issues related to governance, including law enforcement. What remains to be seen is the degree to which military forces can or must adapt their operations to participate in a law enforcement role.

Significantly, the stability operations doctrine takes a bold step in addressing the primary security challenge of the twenty-first century by elevating such operations in DoD Directive 3000.05 to an equal footing with combat operations. In many ways this doctrine is revolutionary, visionary and long overdue. The Army manual seeks to reinforce this doctrinal advance by indicating the full spectrum of operations includes “continuous, simultaneous combinations of offensive, defensive, and stability tasks.”¹⁷ That relationship is depicted as follows:¹⁸



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The question remains, however, whether the attempt to elevate stability operations to the level of combat operations will win out over the significant historical resistance to changing the focus on traditional "inter-State" armed conflict. To do so, such a change in status will have to address the significant effort that will be required in terms of training and education. The challenges that arise from focusing on armed conflict between States not only has plagued doctrine writers, but has also impacted on attempts to clearly outline the legal framework governing operations at the lower end of the conflict spectrum.

A Doctrinal Morass

The strength of military doctrine is that it provides an overall conceptual framework within which operations are conducted. One of the potential obstacles to gaining acceptance for the new doctrinal term "stability operations" is that it could appear to a cynical observer to simply be an attempt to provide a new name to an old problem. For well over a century efforts have been made to categorize small-scale and lower-intensity conflict. Such terms have included small wars,¹⁹ imperial policing,²⁰ police action,²¹ insurgency, low intensity conflict,²² military operations other than war,²³ peacekeeping,²⁴ peace enforcement,²⁵ three block wars,²⁶ revolutionary war, irregular warfare, war amongst the people and, more recently, mosaic war.²⁷

These categorizations can often be used to encompass one or more of the other doctrinal terms associated with conflict at the lower end of the conflict spectrum. For example, the 2007 US Army and Marine Corps counterinsurgency manual notes that "insurgency and COIN are two sides of a phenomenon that has been called revolutionary war or internal war."²⁸ Further, they are "included within a broad category of conflict known as irregular warfare."²⁹

The development and use of the term "mosaic war" in the counterinsurgency manual³⁰ itself highlights the challenge of seeking just one term to categorize contemporary complex security operations. "Mosaic war" was introduced to highlight that contemporary COIN operations are more complicated than the 1990s concept of "three block war" on the basis that such warfare "is difficult for counter-insurgents to envision as a coherent whole."³¹ The manual recognizes the term "stability operations" and identifies it as an essential component of COIN operations, along with offensive and defensive operations.³² It is within this shifting doctrinal framework that stability operations will have to be interpreted.

The counterinsurgency manual also highlights a further complexity of contemporary conflict. In that manual "insurgency" is defined as "an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, *occupying power*, or other political authority while

increasing insurgent control.”³³ Counterinsurgency operations and as a result stability operations occur not only during internal armed conflicts, but also during periods of occupation.

Part of the challenge in applying the doctrinal term “stability operations” is that the underlying security situations which motivated its creation are not only not new, but have been and are the dominant form of warfare. As has been identified by Doctor Lawrence Yates for the Combat Studies Institute Press, “[i]f America’s armed forces have fought fewer than a dozen major conventional wars in over two centuries, they have, during that same period, engaged in several hundred military undertakings that would today be characterized as stability operations.”³⁴ It has been noted that in 2006 no State-sponsored opposing armies were engaged in armed conflict, while the number of civil wars increased.³⁵

Although the potential for armed conflict between States continues, as was evidenced by the 2008 armed conflict between the armed forces of Russia and Georgia, there is increasing recognition within the US Department of Defense that “the main threat faced by the U.S. military overseas will be a complex hybrid of conventional and unconventional conflicts, waged by ‘militias, insurgent groups, other non-State actors and Third World militaries.’”³⁶ It is within this complex security environment that the applicable law must be identified and applied in order to ensure that military operations, including stability operations, are conducted pursuant to the “rule of law.”

The Law

Unfortunately, it appears that international law has been no more successful than military doctrine in definitively addressing the challenges associated with irregular warfare. Like military doctrine, the law of armed conflict has been more readily developed and applied to regulate conflict at the inter-State level. The lack of a comprehensive set of legal rules governing conflict outside the context of traditional inter-State warfare has been influenced by a number of interrelated factors: the post-World War II emphasis on prescribing the recourse to war between States, difficulty in categorizing conflict at the lower end of the conflict spectrum and a general reluctance to introduce international law of armed conflict rules to what are often viewed as internal security matters. This in turn results in considerable debate regarding what legal regime governs such conflict: the law of armed conflict or human rights law. The analysis will now turn to discussing this challenge.

Emphasis on Inter-State Conflict

While the immediate post–World War II period saw the almost concurrent development of the 1949 Geneva Conventions,³⁷ governing aspects of the conduct of warfare, particular legal emphasis was placed on stopping or limiting future inter-State wars. This was perhaps best evidenced by the increasing use of the terms *jus ad bellum* and *jus in bello*, which were designed to separate the legal analysis regarding conflict into two distinct analytical spheres.³⁸ The *jus ad bellum* branch focused on the replacement of the balance of power approach to inter-State relations with resurgence of the concept of *bellum justum*.³⁹ This is reflected in the UN Charter, which significantly prescribed the recourse to war.⁴⁰

The extent to which war between States was to be limited is reflected in the fact that the very use of the term “war” has become problematic. While “war” continues as part of the everyday lexicon, including in the newly issued stability operations doctrine manual,⁴¹ in a legal sense it has often been viewed since World War II as being “outlawed.”⁴² This sensitivity toward describing conflict as “war” is frequently reflected in legal articles where that term is often prefaced with the qualifier that it is being used in a *de facto* rather than a *de jure* sense.⁴³

Even the new term “armed conflict,” introduced in the 1949 Geneva Conventions to describe a broad range of conflicts between States,⁴⁴ came with limitations that reflected the inter-State bias of the drafters of those Conventions. The scope of “armed conflict” is effectively qualified in Common Article 3 of the Conventions with reference to “armed conflict not of an international character,” mirroring the historic approach of distinguishing between public and private war. States were more willing to deal with international armed conflict than comprehensively identify rules to govern its non-international counterpart. In effect, there was significant armed conflict in terms of scope, frequency and levels of violence to which the rules governing conflict between States were not clearly stated to be applicable. This emphasis by the international community on inter-State conflict is understandable given the horrific human and material cost of the total wars of the twentieth century. However, the bias toward inter-State conflict has resulted in intra-State conflict not being provided as clear or rigorous a governing legal framework.

It is evident there has been an extreme reluctance on the part of States to codify the law governing armed conflict as it applies to warfare within a State. Certainly, the expansion of Additional Protocol I⁴⁵ to deal with “national liberation movements” and what otherwise would be an internal armed conflict has met with significant resistance. Efforts commenced by the International Committee of the Red Cross (ICRC) as early as 1912 to introduce law of armed conflict norms to internal conflict continued through the immediate post–World War II period to the present day with what realistically can only be described as having had limited success.

Common Article 3 of the Geneva Conventions, while representing a significant milestone in the twentieth-century efforts to codify the rules governing internal conflict, in reality represents the best that could be attained in a broader effort to have all of the Conventions apply to conflicts “not of an international character.”⁴⁶ A quarter century later the success in negotiating Additional Protocol II⁴⁷ is tempered by both the lack of universal acceptance by States⁴⁸ and the relatively high threshold for its application that leaves significant internal conflict outside its scope.⁴⁹ Notwithstanding a trend in having law of armed conflict treaties address both international and non-international armed conflict⁵⁰ it undoubtedly was the long-standing reluctance by States to outline in codified form the rules to be applied to internal armed conflict which has resulted in efforts by the International Criminal Tribunal for the former Yugoslavia (ICTY)⁵¹ and the ICRC to articulate what customary international law rules should apply to govern internal warfare.⁵² These initial efforts are long overdue. However, there remains a lack of agreement regarding the scope and content of the customary law of armed conflict as it applies to non-international armed conflicts.

One example of the degree to which international law often focuses on inter-State conflict is reflected in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁵³ where the International Court of Justice ruled the invocation of Article 51 of the UN Charter required attacks that were imputable to a foreign State and a threat originating outside of occupied territory.⁵⁴ Even where there is a clash between State armed forces the *jus ad bellum* focus on limiting conflict has left considerable room for disagreement and, as a result, confusion as to when such clashes engage the law of armed conflict. This is evident in the assessment of the threshold of what constitutes an “armed attack.”⁵⁵ The reference in *Military and Paramilitary Activities in and against Nicaragua*⁵⁶ to “frontier incidents” as a less grave use of force not constituting such an attack raises the question as to whether such incidents could constitute “armed conflict” where the law of armed conflict would apply.

The ICTY has stated armed conflict “exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁵⁷ In that assessment, particular attention is paid to the intensity of the fighting and the organization of the armed groups.⁵⁸ However, the requirement for “protracted” armed violence between opposing armed forces still results in situations where armed forces may be engaged in fighting where it is not clear there is consensus that “armed conflict” exists such that the law of armed conflict would apply. If that is the case, it is not necessarily evident how the alternative legal framework of international human rights law is equipped to regulate such violence. The criteria

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established by the ICTY can be contrasted with that followed in *Abella v. Argentina*, where an isolated act of armed violence between State armed forces and a rebel armed group during a two-day period resulted in the application of the law of armed conflict.⁵⁹

While the *Nicaragua* judgment has garnered considerable criticism, it highlights that in the context of the inter-State use of force and in respect to military action between State and non-State actors there is a wide range of activity that does not neatly fall within the parameters of traditional armed conflict. Such contemporary operations can include peacekeeping, noncombatant evacuations, hostage rescue, humanitarian intervention and attacks against terrorist groups. These types of operations fall within the scope of stability operations. Yet this is an area which has not garnered sufficient attention in terms of clearly identifying the law which applies to the conduct of those operations.

Identification of the applicable law can be further clouded by references to “policing” language when describing the types of operations. For example, referring to UN military operations as “police actions” or counterterrorist operations as “extra-territorial law enforcement”⁶⁰ does not mean such military activity is governed by a law enforcement legal framework. Those military operations would, to the extent they involve combat, be governed by the law of armed conflict regardless of whether such fighting is called a “war.”⁶¹

Providing Clarity: Which Norms Apply?

The degree of uncertainty regarding what law applies to the wide range of international military operations falling within the scope of stability operations should raise significant concern. Whether perceived as a “gap” that must be filled, or simply a grey zone that must be clarified, the reality is that there is no clear international consensus as to what law applies to a wide range of international operations involving the use, or potential use, of armed force by State armed forces.

It is a problem often addressed by reference to the “spirit and principles” of the law of armed conflict⁶² or to applying that law to all military operations as a matter of direction from national authorities.⁶³ While strong policy statements or national direction provides an important indication that the law of armed conflict should apply to operations outside the scope of traditional armed conflict, there is considerable room for confusion and debate, particularly in light of the continued application of human rights during armed conflict.⁶⁴

The confusion results, in part, because of the complexity of such operations. Further, the requirement to interface with the civilian population during the conduct of many stability operations can significantly impact on the freedom to use force. For example, in terms of controlling the use of force the question will

inevitably arise as to whether military forces are using force in a combat or law enforcement role. At some point the law of armed conflict as a *lex specialis* must be reconciled with the application of the norms associated with a human rights-based law enforcement framework. It is not completely clear how such reconciliation can occur if the law of armed conflict is only accepted as applying as a matter of policy or national direction.

The breadth of the potential tasks assigned to military forces under the stability operations doctrine also introduces other significant challenges. The rule of law tasks inherent in stability operations require an understanding of legal norms and standards well beyond a simple familiarity with the law of armed conflict. There has been significant debate regarding the impact of human rights norms during periods of occupation⁶⁵ and even a lack of consensus of what constitutes an occupation at law.⁶⁶ This can result in a potential broadening of situations in which the interface between occupation law and human rights may have to be considered.

To the extent the stability operations doctrine encompasses periods of occupation, that debate will continue to have relevance. However, the law of armed conflict and human rights interface might be seen to be less relevant to stability operations outside the context of occupation, although questions will continue to arise as to the impact of Common Article 3, Additional Protocol II or customary international law on human rights law during internal armed conflicts.⁶⁷ The ability to interpret and apply international human rights and host-nation laws will raise significant challenges for military commanders and their legal advisers, who likely will be more comfortable applying the law applicable to armed conflict.

Is it War or Policing?

A particular challenge for military forces is that stability operations are usually conducted among the people.⁶⁸ This interface often places those forces in the difficult situation of policing the local population in addition to fighting organized armed groups. This occurs regardless of whether those forces are operating under the legal framework of occupation during an international armed conflict or in respect to a multinational coalition effort engaged in combating the counterinsurgency in Afghanistan.

Perhaps the most graphic evidence of the unwillingness or inability of the international community to deal directly with this challenge is that neither the responsibility for, nor the conduct of, a policing function is directly addressed in the black-letter law governing occupation.⁶⁹ Perhaps the closest reference can be found in Article 43 of the 1907 Hague Regulations,⁷⁰ which provides that the occupying power “shall take all the measures in his power to restore, and ensure, as far as

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possible, public order and safety [civil life], while respecting, unless absolutely prevented, the laws in force in the country.”⁷¹

The reality is that where a military force controls territory and comes in contact with the local population it may, particularly where the failing State is unable to do so, be required to perform a policing role. This occurs regardless of whether the force is operating on behalf of an occupying power, as part of a multinational coalition or at the invitation of a failing State. Reference to this policing task is found in FM 3-07 (2008), where it is noted that “[n]ormally the responsibility for establishing civil security tasks belongs to the military from the outset of operations through transition, when host-nation security and police forces assume this role.”⁷² This policing task can be problematic for two reasons. First, military forces may be neither trained nor equipped to perform a policing function. Secondly, performance of a policing function concurrently with ongoing operations against insurgent forces can create a complex and, at times, unclear interface between the law of armed conflict and the human rights–based norms governing policing.⁷³

At this stage the international community is just coming to terms with how force should be regulated at the lower end of the conflict spectrum. One approach adopted by the Israeli High Court of Justice in the *Targeted Killing* decision⁷⁴ is a blended one based, in part, on Israeli “internal law” being applied in a law-of-armed-conflict targeting analysis which has a preference for “[a]rrest, investigation, and trial.”⁷⁵ Here the domestic law requirements reflect the law enforcement norms of international human rights law in favoring capture over killing. An alternative approach is a “situation based” one which looks at the type of threat and then applies the appropriate legal regime to control the use of force by security forces. This means the law of armed conflict is applied to incidents of violence related to the armed conflict, while human rights–based law enforcement standards are applicable to policing scenarios.⁷⁶

Whichever approach is applied, there are significant doctrine, training and operational deployment challenges for military forces. The question is not necessarily one of “targeting” or deciding when someone is taking a direct part in hostilities. For soldiers manning checkpoints or defending convoys against suicide bombers or improvised explosive devices their reaction will often be governed by self-defense rules. The inevitable restriction on the use of force in counterinsurgency operations points to an application of graduated minimum force not normally associated with armed conflict. The challenge of reacting to such threats is not helped by the present lack of clarity in the law, particularly in light of the decisions being asked of young coalition and International Security Assistance Force soldiers operating in complex security situations such as Afghanistan.

The United States and Coalition Partners: On the Leading Edge or Alone?

Having outlined a number of the doctrinal and legal challenges associated with the stability operations doctrine, there is also the question of how this US doctrine will resonate in a coalition environment. Given the likelihood that the United States will continue to conduct operations as the dominant member of international coalitions, it is evident that a common understanding among coalition partners of what stability operations are will be helpful in ensuring interoperability. Further, the military doctrine of the United States, as the major State on the international stage regarding military capability, is a significant factor in terms of developing customary international law.

In considering the approach of allied countries toward stability operations, it appears that the United States has a much more robust, well-developed and ambitious vision for such operations. For example, the Canadian Forces (CF) have no separate stability operations doctrine, although there is doctrine for CF operations generally, as well as peace support operations, humanitarian operations, disaster relief operations and noncombatant evacuation operations, that would fall under the US stability operations doctrine umbrella.⁷⁷

As often occurs in situations where military forces are confronted with new operational challenges, Canadian doctrine appears to be driven by experiences gained at the tactical level in Afghanistan. The Canadian Army has developed two manuals that refer to stability operations.⁷⁸ The new doctrine focuses on counter-insurgency, with stability operations being addressed at the tactical level. Tactical activities comprise four parts: offensive, defensive, stability and enabling operations, thereby setting out “full-spectrum operations.”⁷⁹ Stability operations are defined as “a tactical activity conducted by military and security forces, often in conjunction with other agencies to maintain, restore or establish a climate of order.”⁸⁰ To the extent these manuals reflect the focus of Canadian Forces operations, it is clear this approach is not as comprehensive as that adopted by the United States.

At this stage NATO does not appear to have embraced stability operations as a separate strategic- or operational-level concept. It is perhaps telling that the 2006 *NATO Handbook* refers to the Afghanistan mission as an international peacekeeping effort.⁸¹ One of the factors that may impact on a wider allied adoption of the term “stability operations” is found in the indication that part of the rationale for the US development of a separate stability operations doctrine may be the negative connotation attached to “peace operations.” As is noted in a 2006 Congressional Research Service Issue Brief for Congress, “[p]eacekeeping has been the traditional generic term More recently, in an attempt to capture their ambiguity and

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complexity, and perhaps to avoid the stigma of failure attached to peacekeeping, they have become known as ‘stabilization and reconstruction’ operations, or more simply ‘stability’ operations.”⁸²

As a result, there may be a number of factors that may impact on the degree to which coalition partners embrace the US concept of stability operations. First, peacekeeping and other peace support operations do not necessarily have the same negative connotation outside the United States. Therefore, it may not necessarily be evident to other States why a new term is required. Second, the very “ambiguity and complexity” of such operations may cause other military forces to embrace more narrowly focused mission-specific doctrine. Third, other nations may neither be involved, nor plan to get involved, in as wide a variety of stability operations as the US doctrine appears to cover. Accordingly, potential coalition partners may continue to use separate doctrinal terms such as peace support operations or humanitarian operations. Finally, the traditional approach of State militaries in focusing on State-versus-State conflict may still be prevalent among the potential allies of the United States. This in turn may limit any acceptance that stability operations have an equal status with traditional combat operations. None of these factors will necessarily preclude the conduct of coalition operations within the wider stability operations doctrine. However, it may mean that the US military will have to be prepared to interface with coalition partners on a different level (e.g., tactical) and with terms that reflect only a partial acceptance by other States of subcomponents of the overarching stability operations doctrine.

The Future

The question remains as to whether this new doctrine is simply the latest attempt in a long history of short-lived efforts to definitively categorize unconventional conflict. While it is likely an answer to that question will only be provided with the passage of time, it is clear the US military has taken a significant step in creating the stability operations doctrine. It is an approach which seeks to break the historical reluctance to address warfare outside of State-versus-State conflict. Combined with other publications such as the counterinsurgency manual and the *Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates*,⁸³ there is evidence significant effort continues to be placed on developing doctrine and guidance that specifically addresses unique aspects of counterinsurgency operations, the dominant form of warfare in the twenty-first century.

Unfortunately, it does not appear the doctrine can point to a comprehensive, clearly articulated legal framework for such operations. Perhaps this is understandable given the inability of the international community to definitively come to

grips with this challenge. This is graphically evidenced by the continued reliance on a “spirit and principles” or national-direction approach to applying the law of armed conflict to operations conducted at the lower end of the conflict spectrum. However, until clear direction on the legal framework can be provided, there is a danger such operations will be conducted at the “vanishing point” of the law of armed conflict. In this respect it could be the complexity and ambiguity inherent in the scope of stability operations doctrine that sows the seeds of its downfall.

Yet such an outcome can be avoided. The doctrine itself is visionary in that it shines a spotlight on the very type of operations that dominate the international scene today. Given the number, scope and complexity of such operations and the fact that international intervention, either under a UN mandate or otherwise, is a common occurrence, it may be time for a clear statement by States as to what law of armed conflict applies beyond general reference to Common Article 3 of the Geneva Conventions, Additional Protocol II (if it applies) or the suggested rules of the ICRC customary law study. It may very well be that the credibility of the doctrine of “stability operations,” which is based upon establishing legitimacy and the rule of law, will itself be dependent on such a definitive articulation of customary norms.

As is noted in FM 3-07 (2008), intervening forces “carry with them an innate perception of legitimacy that is further strengthened by consistent performance conforming to the standards of national and international law.”⁸⁴ However, unless this new doctrine is matched by an effort by individual States, and by the international community generally, to comprehensively outline the law of armed conflict that applies to conflict outside the context of inter-State warfare, and articulate how that law interfaces with the human rights norms, the ability of armed forces to conform with such legal standards may be at risk.

Notes

1. Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRITISH YEAR BOOK OF INTERNATIONAL LAW 360, 382 (1952).

2. *Id.* at 381–82.

3. Joint Doctrine Division, J-7, Joint Staff, Joint Publication 1-02, DOD Dictionary of Military and Associated Terms (as amended through 26 August 2008), available at <http://www.dtic.mil/doctrine/jel/doddict/> (doctrine is defined as “[f]undamental principles by which the military forces or elements thereof guide their actions in support of national objectives. It is authoritative but requires judgment in application”).

4. RUPERT SMITH, *THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD* 3–4 (2007).

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5. Department of Defense, DoD Directive 3000.05, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations (2005), at 2, para. 3, *available at* <http://www.dtic.mil/whs/directives/corres/pdf/300005p.pdf>.
6. *Id.* at 2, para. 4.1.
7. *Id.* at 2, para. 4.2.
8. *Id.* at 2, paras. 4.3.1–4.3.3.
9. *Id.* at 3, para. 4.4.
10. *Id.* at 2, para. 4.3.
11. Headquarters, Department of the Army, FM 3-07, Stability Operations (2008), *available at* http://downloads.army.mil/docs/fm_3-07.pdf [hereinafter FM 3-07 (2008)].
12. Headquarters, Department of the Army, FM 3-07 (FM 100-20), Stability Operations and Support Operations (2003), *available at* <http://cgsc.cdmhost.com/cgi-bin/showfile.exe?CISOROOT=/p4013coll6&CISOPTR=69&filename=70.pdf#search=%22Stability%20Operations%20and%20Support%20Operations%22> [hereinafter FM 3-07 (2003)].
13. FM 3-07 (2008), *supra* note 11, at 13, para. 1-11.
14. FM 3-07 (2003), *supra* note 12, at 1-4 (in that manual stability operations are defined also to include peace operations, foreign internal defense (e.g., counterinsurgency), security assistance, humanitarian and civic assistance, support to insurgencies and show of force).
15. *See* FM 3-07 (2008), *supra* note 11, Foreword.
16. *See* PHILIP BOBBITT, TERROR AND CONSENT: WARS FOR THE TWENTY-FIRST CENTURY 3 (2008) (In referring to the risks posed to civilians by nuclear or biological terrorism, it is noted that “these risks are in several important dimensions indistinguishable from those imposed by the terror that is the consequence of genocide and ethnic cleansing and also of metropolitan earthquakes, pandemics, tidal waves, and hurricanes”).
17. FM 3-07 (2008), *supra* note 11, at 2-1, para. 2-1.
18. *Id.*
19. *See* C.E. CALDWELL, SMALL WARS: THEIR PRINCIPLES AND PRACTICE 21 (University of Nebraska Press, 3rd ed. 1996) (1906); *see also* US Marine Corps, Small Wars Manual: United States Marine Corps 1 (1940) and MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER xiv (2002).
20. *See* CHARLES W. GWYNN, IMPERIAL POLICING 3–4 (1934). (The author identifies three types of “police duties” performed by UK military forces: small wars, acting in aid of the civil power and “imperial policing.” The latter type of operation occurs “when normal civil control does not exist, or has broken down to such an extent that the Army becomes the main agent for the maintenance of or for the restoration of order.”).
21. *See* Josef Kunz, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 AMERICAN JOURNAL OF INTERNATIONAL LAW 37, 54 n.41 (1951) (relying on a quote from P.C. JESSUP, A MODERN LAW OF NATIONS 188–89 (1948), where he also says, “It is a mistake to assume that the acceptance of the concept of an international police force . . . with its subsequent abolition of the concept of ‘war’ in a legal sense, eliminates the necessity for the legal regulation of the rights and duties of those who are active participants in the struggle”).
22. *See* Headquarters Department of the Army and Air Force, FM 100-20/AFP 3-20, Military Operations in Low Intensity Conflict, at ch. 1 (1990) (superseded by FM 3-07 (2003), which in turn was replaced in 2008), *available at* <http://www.globalsecurity.org/military/library/policy/army/fm/100-20/10020ch1.htm> (“Low intensity conflict is a political-military confrontation between contending states or groups below conventional war and above the routine, peaceful competition among states. It frequently involves protracted struggles of competing principles and ideologies. Low intensity conflict ranges from subversion to the use of armed force. It is waged by

a combination of means, employing political, economic, informational, and military instruments. Low intensity conflicts are often localized, generally in the Third World, but contain regional and global security implications”).

23. See FM 3-07 (2003), *supra* note 12, at 1-1 (where the relationship between stability operations and military operations other than war is noted as follows: “[t]he army conducts full spectrum operations to accomplish missions in both war and military operations other than war (MOOTW). Full spectrum operations include offensive, defensive, stability, and support operations Offensive and defensive operations normally dominate military operations in war, as well as some smaller scale contingencies. On the other hand, stability operations and support operations predominate in MOOTW that may include certain smaller scale contingencies and peacetime military engagements”).

24. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 307–08 (4th ed. 2005).

25. *Id.* at 310–15 (for an explanation of non–Article 42 enforcement actions).

26. Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES MAGAZINE, Jan. 1999, at 3, available at http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm (“Modern crisis responses are exceedingly complex endeavors. In Bosnia, Haiti and Somalia the unique challenges of military operations other than war (MOOTW) were combined with the disparate challenges of mid-intensity conflict. The Corps has described such conflicts as the three block war, contingencies in which Marines may be confronted with the entire spectrum of tactical challenges in the span of a few hours within the space of three adjacent city blocks”).

27. See Headquarters, Department of the Army & Headquarters, Marine Corps Combat Development Command, FM 3-24/MCWP 3-33.5, Counterinsurgency (2006), at 1-8, para. 1-37, available at <http://www.usgcoin.org/library/doctrine/COIN-FM3-24.pdf>.

28. *Id.* at 1-1, para. 1-2.

29. *Id.*

30. *Id.* at 1-8, para. 1-37.

31. *Id.*

32. *Id.* at 2-5, para. 2-18 (“COIN draws heavily on a broad range of the joint force’s capabilities and requires a different mix of offensive, defensive, and stability operations from that expected in major combat operations”).

33. *Id.* at 1-1, para. 1-2 (emphasis added).

34. LAWRENCE A. YATES, THE US MILITARY’S EXPERIENCE IN STABILITY OPERATIONS, 1789–2005 (2006), available at <http://www-cgsc.army.mil/carl/download/csipubs/yates.pdf>.

35. See Daniel Smith, *World at War* (The Defense Monitor, Center for Defense Information, Washington, D.C.), Jan./Feb. 2007, http://www.cdi.org/PDFs/DM_JanFeb07.pdf.

36. Ann Scott Tyson, *Gates Criticizes Conventional Focus At Start of Iraq War*, WASHINGTON POST, Sept. 30, 2008, at A04.

37. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 218 [hereinafter Fourth Geneva Convention]; all reprinted in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.

38. See Robert Kolb, *Origin of the Twin Terms Jus Ad Bellum/Jus in Bello*, INTERNATIONAL REVIEW OF THE RED CROSS 553, 560–62 (1997). (The terms *jus ad bellum* and *jus in bello* appear

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to have first come into usage in the 1930s. Widespread use appears to have only started after World War II.).

39. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 3 (1963) (in “which every sovereign entity may decide on the occasion for war”).

40. CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 5 (2d ed. 2004).

41. See FM 3-07 (2008), *supra* note 11, at 1-1, para. 1-1. See also OXFORD ENGLISH DICTIONARY 950 (Catherine Soanes ed., 2002) (“war n. 1 a state of armed conflict between different nations, states, or armed groups. 2 a sustained contest between rivals or campaign against something undesirable: a war on drugs. . . .” (emphasis added)).

42. Quincy Wright, *The Outlawry of War and the Law of War*, 47 AMERICAN JOURNAL OF INTERNATIONAL LAW 365 (1953).

43. See Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 283, 283 (1987).

44. See COMMENTARY I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Jean S. Pictet ed., 1960) [hereinafter ICRC COMMENTARY]. A similar commentary was published for each of the four Geneva Conventions. Because Articles 2 and 3 are identical—or common—to each Convention, however, the commentary for these articles is also identical in each of the four commentaries. (“Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.”).

45. See also Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3(b), June 8, 1977, 1125 U.N.T.S. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 37, at 422.

46. See ICRC COMMENTARY, *supra* note 44, at 38–48 (for an outline of the efforts to have the provisions of the Geneva Conventions apply to internal armed conflict). See also LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 23–29 (2002).

47. See Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(2), June 8, 1977, 1125 U.N.T.S. 609, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 37, at 483.

48. See International Humanitarian Law—Treaties & Documents, <http://www.icrc.org/ihl.nsf/INTRO?OpenView> (last visited Feb. 4, 2009) (where 164 countries are identified to be States party to Additional Protocol II).

49. See MOIR, *supra* note 46, at 101–03.

50. See, e.g., the Chemical Weapons Convention; the Amended Protocol II to the Convention on Certain Conventional Weapons; the 1997 Convention on the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction; the 1998 Rome Statute; and the 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property.

51. See Prosecutor v. Tadic, Case No. IT-94-1-AR72, Appeal on Jurisdiction, para. 94 (Oct. 2, 1995), *reprinted in* 35 INTERNATIONAL LEGAL MATERIALS 32 (1996), available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

52. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* (2005) (2 volumes).

53. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), *reprinted in* 43 INTERNATIONAL LEGAL MATERIALS

1009, 1050 (2004), available at <http://www.icj-cij.org/docket/fil/131/1671.pdf> [hereinafter Wall].

54. *Id.* (The court distinguished the terrorist threat by Palestinian groups as different than Al Qaeda attacks on the United States on the basis that Israel exercises “control” over the Occupied Territories.).

55. See GRAY, *supra* note 40, at 145–49 and DINSTEIN, *supra* note 24, at 195–96 for a discussion of the *Nicaragua* case and the issues raised by the concept of “frontier incidents.”

56. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

57. See Tadic, *supra* note 51, para. 70.

58. See Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgement, para. 176 (July 10, 2008), available at http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf.

59. Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271 (1997), reprinted in 13 INTER-AMERICAN YEARBOOK ON HUMAN RIGHTS 602 (Inter-American Commission on Human Rights ed., 1999). This approach has been the subject of critical comment because it does not take into account the duration of the confrontation. See LIESBETH ZEGVELD, THE ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 137–38 (2002).

60. DINSTEIN, *supra* note 24, at 247 (where the term “extra-territorial law enforcement” is used to describe a form of self-defense where recourse is made to cross-border counterforce against terrorists and armed bands).

61. See Kunz, *supra* note 21, at 54 n.41 (“It is a mistake to assume that the acceptance of the concept of an international police force . . . with its subsequent abolition of the concept of ‘war’ in a legal sense, eliminates the necessity for the legal regulation of the rights and duties of those who are active participants in the struggle”).

62. See Office of the Judge Advocate General, Canadian Forces Doctrine Manual: The Law of Armed Conflict at the Operational and Tactical Level, B-GJ-005-104/FP-021 17-1, para. 1702 (2001), available at <http://www.cfd-cdf.forces.gc.ca/sites/page-eng.asp?page=3481> (follow Law of Armed Conflict hyperlink) (“[t]oday a significant number of armed conflicts in which the CF may be involved are non-international in nature. As stated, the law applicable to such conflicts is limited. It is CF policy, however, that the CF will, as a minimum, apply the spirit and principles of the LOAC during all operations other than domestic operations”) and the United Nations UN Secretary-General, Bulletin on the Observance by United Nations forces of international humanitarian law, U.N. Doc. ST/SGB/1999/13, reprinted in 38 INTERNATIONAL LEGAL MATERIALS 1656 (1999) (see section 1 where it is indicated the “fundamental principles and rules of international humanitarian law” are applicable in situations of armed conflict, which include “enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence”). For background to the introduction of the “spirit and principles” approach to applying humanitarian law during United Nations operations, see MOIR, *supra* note 46, at 76–77.

63. Department of Defense, Directive 2311.01E, DoD Law of War Program, para. 4.1 (2006) (“Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations”).

64. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, para. 26 (July 8); and Wall, *supra* note 53, para. 106.

65. See Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 AMERICAN JOURNAL OF INTERNATIONAL LAW 97–102 (1990).

66. See Adam Roberts, *What Is a Military Occupation?*, 55 BRITISH YEAR BOOK OF INTERNATIONAL LAW 249, 250 (1984) (“[o]ne might hazard as a fair rule of thumb that every time the

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armed forces of a country are in control of foreign territory, and find themselves face to face with the inhabitants, some or all of the provisions of the law on occupations are applicable”).

67. See MOIR, *supra* note 46, at 193–231 (for a discussion of the interface between law of armed conflict (Common Article 3 and Additional Protocol II) and human rights law).

68. See SMITH, *supra* note 4, at 3–4; and FM 3-07 (2008), *supra* note 11, at 1-2, para. 1-8 (for reference to war among the people).

69. The Fourth Geneva Convention does recognize the continuance in force of the laws of the occupied territory and the maintenance of the status of public officials or judges.

70. Convention No. IV Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 37, at 69.

71. Annex, *supra* note 70, art. 43. The reference here to “civil life” comes from the French version, which some have suggested was incorrectly phrased as “safety” in the first English translation. See EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 7 n.1 (2004) (relying on E.H. Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 *YALE LAW JOURNAL* 393 (1945)).

72. See FM 3-07 (2008), *supra* note 11, at 2-10 to 2-11, para. 2-46.

73. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 1, 24–30 (2004).

74. See Public Committee Against Torture in Israel et al. v. Government of Israel et al., HCJ 769/02, Judgement (Dec. 13, 2006), *available at* http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf.

75. *Id.*, para. 40.

76. Kenneth Watkin, *Maintaining Law and Order during Occupation: Breaking the Normative Chains*, 41 *ISRAEL LAW REVIEW* 175, 192–95 (2008).

77. See CF Doctrine Hierarchy, *available at* <http://www.cfd-cdf.forces.gc.ca/websites/Resources/dgfd/Joint%20Doctrine%20Hierarchy/doctrineHierarchy.gif>.

78. Land Operations, B-GL-300-001/FP-000 (Jan. 1, 2008) [hereinafter Land Operations Manual]; and Counter-Insurgency Operations, B-GL-323-004/FP-003 (Dec. 13, 2008).

79. Land Operations Manual, *supra* note 78, at 3-18 to 3-20.

80. *Id.* at 3-18.

81. PUBLIC DIPLOMACY DIVISION, NATO HANDBOOK 155 (2006).

82. Nina M. Serafino, Congressional Research Service, *Peacekeeping and Related Stability Operations: Issues of U.S. Military Involvement*, No. IB94040 (2006), *available at* <http://www.fas.org/sgp/crs/natsec/IB94040.pdf>.

83. Center for Law and Military Operations, The Judge Advocate General’s Legal Center School & Joint Force Judge Advocate, United States Joint Forces Command, *Rule of Law Handbook: Practitioner’s Guide for Judge Advocates i–ii* (July 2007) (see *id.* at ii where it is stressed the Handbook “is not intended to serve as US policy or military doctrine for rule of law operations. [Center for Law and Military Operations] has neither the resources, nor more importantly the mission, to propose or institute doctrine on a topic upon which no consensus has been achieved.” However, it is also noted, *id.* at i, that military lawyers have been engaged in rule of law projects since the invasion of Afghanistan in 2001 and “have been on the cutting edge of the effort to bring stability and rule of law support to the embryonic and fragile democratic governments in both Afghanistan and Iraq. . .”).

84. FM 3-07 (2008), *supra* note 11, at 1-7, para. 1-32.