Kauffman Foundation Research Series:
Expeditionary Economics

Closing the Transition Gap: The Rule of Law Imperative in Stabilization Environments

August 2011, 4th in the Series

Brock Dahl
The George Washington University Law School

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Introduction

Expeditionary Economics addresses means for properly enabling private sector led growth in transitional environments.[1] In order to invest and grow, the private sector requires some modicum of stability and institutional reliability. Transitional environments, however, are often typified by a political economy within which powerful non-state actors develop inappropriate alliances with state officials and run illicit enterprises that violate the rights of their fellow citizens and suffocate licit entrepreneurial growth. Where essential stabilization steps required to fight these alliances are neglected, a "transition gap" arises, and the state, increasingly viewed by its citizens as corrupt and ineffective, loses legitimacy. This paper argues that stabilizing forces have strategic, moral, and legal obligations to immediately establish effective rule of law institutions in the wake of interventions. More specifically, stabilizing forces must establish (or support) institutions that are capable of preventing, investigating, and punishing corruption and criminality. To date, these obligations have not been adequately recognized or resourced.

The first section of this paper addresses the strategic and moral aspects of closing the transition gap. It argues that immediate action on rule of law is required to establish the institutional foundations that are necessary for stabilization and economic growth. As noted above, where state institutions do not adequately enforce the law, criminal networks that subvert essential state functions and violate the rights of citizens will develop. This criminalization undermines counterinsurgency efforts by depriving stabilizing forces of the ability to responsibly hand over power to host institutions and retarding the development of a robust, licit economy. It also deprives the local citizens of the dignity and security that any stabilizing force must seek to establish and protect. The first section also will suggest specific actions that can strengthen rule of law in the early stages of stabilization.

The second section reviews aspects of the international jurisprudence applicable in occupation environments. It offers a novel argument that in situations of occupation, a combined reading of international humanitarian and international human rights law implies a legal obligation to close the transition gap. While there is some overlap between international humanitarian law (specifically here we will be dealing with laws of occupation) and human rights law (a body of various treaties recognizing fundamental human rights), they often are dealt with in legal literature as two entirely separate bodies that have little bearing on one another. The second section asserts, however, that the responsibility to respect and ensure public order and civil life, contained in international humanitarian law, incorporates human rights obligations to protect life, privacy, property, and personal integrity. This combined set of obligations requires that stabilizing forces establish adequate rule of law institutions. In making this assertion, the section examines the linkages between corruption and human rights violations, and explores detailed legal norms that, in addition to strategic and moral grounds, provide a basis for immediate action against corruption and organized criminality in transitional environments.

This paper also recognizes that international authorities often do not acknowledge that an occupation exists, or even clearly describe the situation and the authorities that do exist.[2] The third section of this paper, therefore, argues that international negotiators must be very clear about the authorities that exist in stabilization situations and provide adequate law enforcement authorities even where occupation law is not accepted. Furthermore, international forces should work with host-society actors to develop means of fighting corruption and organized crime, even where their authority to directly counter such activities are constrained. The section uses Afghanistan as a specific case study, proposing ways that international actors can enable local citizens to enforce their own legal rights against corrupt

1. I use "transitional environments" here to express the range of situations in which international forces have intervened to stabilize a situation.

2. An occupation was never admitted to exist, for example, in Afghanistan.

government officials or powerful nongovernmental actors in the absence of direct legal authority to prevent, investigate, and punish.

Ultimately, the suggestions expressed herein provide guidance on how to adequately close the transition gap. Stabilizing authorities must establish or support local institutions that are capable of preventing, investigating, and punishing a host of wrongs that are prevalent in post-conflict countries. Admittedly, this reading of strategic, moral, and legal obligations puts added burdens on stabilizing forces. This essay, therefore, implores decision makers to carefully consider the full responsibilities they have in initiating interventions, and to properly authorize and resource stabilization forces to satisfy those responsibilities.

Part I. Establishing Rule of Law

One immediate imperative to stabilizing post-conflict environments is ensuring that the criminal economy, like a host of weeds in a garden, does not suffocate the growth of licit commercial and social activities. Urgent action is needed to kill such "weeds" before they even begin to grow. This action requires the establishment or support of law enforcement and judicial bodies that can prevent, investigate, and punish corruption and criminality.

Military commanders may rightly contend that in the early stages of an intervention, they have too many challenges to deal with, and that policing operations focused on illicit power structures would divert resources from other vital security functions. The U.S. experience in Iraq and Afghanistan has shown, however, that such rule of law functions are inseparable from the goals associated with stabilization operations. This paper does not dispute military security priorities or resourcing decisions, but merely posits that future planning should recognize the full scope of post-conflict needs, discussed below, and properly plan to include a substantial law enforcement component in stabilization operations.

Foremost, stabilizing forces must lay out a clear rule of law strategy with measurable timelines and goals. In Afghanistan, part of the rule of law problem has involved the lack of a coherent strategy, and consequently, a coherent means of measuring success. Commenting on rule of law programs in 2008, the State Department's Office of the Inspector General noted that " … it is often not clear how, or even if, [Rule of Law] efforts are being measured for success."[3] The assessment goes on to observe that "after almost five years of donor activities in Afghanistan, the baseline knowledge about the formal justice sector outside of Kabul

Table 1: USAID Obligations for Afghanistan FY02–FY07
(millions US$)

Sector	2002-2007	%
Agriculture	304	5%
Alternative Development	544	9%
Roads	1,438	24%
Power	626	11%
Water	53	1%
Economic Growth	321	5%
PRTs	298	5%
ARTF	365	6%
NSP	50	1%
GiROA Support	19	0%
Democracy/Governance	375	6%
Elections	52	1%
Rule of Law	64	1%
Education	343	6%
Health	422	7%
Program Support	83	1%
IDPs	141	2%
Food Assistance	376	6%
Total	**$5,874**	

Source: *http://afghanistan.usaid.gov/en/about/budget (corrected sum)*

3. U.S. Department of State, Office of the Inspector General, "Rule of Law Programs in Afghanistan," Report Number ISP-I-08-09 (2008), 5,http://oig.state.gov/documents/organization/106946.pdf.

remains fairly rudimentary."[4] Moreover, as can be seen in Table I, for roughly the first five years of U.S. engagement in Afghanistan, only 1 percent of the USAID budget was obligated to Rule of Law programming. The picture that emerges is one of ad hoc development of programs focused on immediately accessible institutions, with potentially limited impact on the majority of the country's population. The lesson: it is essential that stabilizing forces enter a country with a clear strategy to stand up critical rule of law institutions from the outset.

The following section first will dispel the myth that corruption is an inevitable cultural characteristic of developing countries. It then will describe how post-conflict environments develop a political economy that is uniquely susceptible to corruption and organized criminality. Given that susceptibility, this section then will address the need to fight corruption with adequate law enforcement programs from the onset of stabilization operations. It will close by addressing means of deconstructing corrupt institutions once they already are established.

Corruption is Not Inevitable

One of the classic red herrings in stabilization discussions is the idea that corruption is an engrained, unavoidable cultural attribute that cannot be changed. However, one needs only a handful of conversations with the victims of corruption throughout the developing world to understand the deep frustration they feel toward corrupt officials. Consider, for example, a darkly ironic story from Afghanistan: A U.S. aid contractor organized a kite festival which was intended to help educate Afghan children about rule of law issues.[5] As children rushed to booths to pick up the free kites, Afghan police beat them away and, in some instances, actually stole the kites for their own personal use.[6] When confronted, a senior Afghan officer excused the behavior of a policeman who was loading kites into his own truck saying it was permissible since the man was more than a policeman, but was also his personal bodyguard.[7] An article published the next day in *The New York Times* discussed the story of an American shipment of computers intended for Iraqi schoolchildren that had vanished from the Iraqi port of Umm Qasr.[8] The problem here is not with inimitable cultures of corruption, but with the impunity that allows certain people to act "above the law."

Table 2: Integrity Watch Afghanistan: National Corruption Survey 2010

What is the Biggest Problem the Government Needs to Address?

Insecurity	32%
Unemployment	23%
Corruption	22%
Illegal Drugs	6%
Access to Justice	3%
Armed Groups	3%
Education Access	2%
Lack of Development	2%
Water/Electricity	2%
Access to Health	1%
Lack of Political Freedoms	0%
Other	4%

Is there sufficient government performance in addressing corruption?

Yes	23%
No	66%
Don't Know	11%

Source: *Integrity Watch Afghanistan, "Afghan Perceptions and Experience of Corruption: A National Survey 2010" available at: http://www.iwaweb.org/corruptionsurvey2010/Main_findings_files/IWA%20National%20Corruption%20Survey%202010.pdf*

4. Ibid.

5. Rod Nordland, "Afghan Equality and Law, but With Strings Attached," *The New York Times,* September 24, 2010, http://www.nytimes.com/2010/09/25/world/asia/25kite.html?_r=3&hpw.

6. Ibid.

7. Ibid.

8. Steven Lee Myers, "U.S. Gift for Iraqi Students Offers a Primer on Corruption," *The New York Times,* September 25, 2010, http://www.nytimes.com/2010/09/26/world/middleeast/26iraq.html?_r=1&hp.

To be more specific, it is quite easy for these children to understand that they have been wronged. They are not subject to overarching cultural norms which tell them that such corruption is proper and acceptable. They see, quite clearly, that these actions constitute gross violations. As the survey responses in Table 2 demonstrate, it is no more difficult for their parents, after being forced to pay bribes to judges, or having family members beaten or suffer worse indignities at the hands of government officials, to recognize that something is seriously amiss. Any random conversation in a Kabul café or Baghdad office can elicit such stories, usually followed by pleas for justice. Likewise, it is no more difficult for hopeful entrepreneurs, facing the threat of kidnapping or other extortion, and without legal recompense, to recognize that such an environment is no place to invest resources.

So why, then, does comprehensive corruption surface? Such environments do not simply emerge overnight. The first step to enabling licit economic activity is for stabilizing forces to understand how such criminal ecosystems emerge.

Closing the Transition Gap: The Necessity of Immediate Action

Violent conflict often leads to the breakdown of state institutions. As armed groups battle within a certain territory, governing institutions may be unable to provide services in the midst of violence, or may be totally destroyed.[9] Thus, a "transition gap" is created wherein government institutions fail to take adequate responsibility for enforcing the law. This gap creates opportunities for the malevolent to develop sophisticated networks with which they can pursue illicit activity.

While some actors may operate simply to provide for the fundamental needs of society, others pursue profit through a number of illicit endeavors that the transition gap enables.[10] As early as April 2003, one month after the United States invaded Iraq, for example, reports showed that criminal organizations had begun to develop around the main population centers of Basra, Baghdad, and Mosul.[11] By July, many of these organizations already had developed sophisticated means for arms and drug smuggling in and out of the country.[12] These organizations inevitably will develop ties with local governing institutions, allowing them protection, access to resources, and additional opportunities for illicit profit.[13] Such trends are not unique to Iraq.

Indeed, evidence of the commonality of conflict economies' criminalization is overwhelming. One Bosnia expert described how the smuggling networks that were critical to various wartime activities transitioned seamlessly into profit centers during the peace, pursuing a number of illicit functions.[14] Similar evidence abounds of conflict inequities throughout Asia and Africa.[15]

One of the most serious mistakes stabilizing forces can make is discounting the likelihood of the organized criminalization of post-conflict economies. Ignoring such developments sets a path for subsequent institutional and social trends that lead to profound corruption and, potentially, the inability of a state to sustain governing institutions that can reliably provide for its citizens' needs. Iraq and Afghanistan reveal the dangers of ignoring the transition gap.

9. Brock Dahl, "The Business of War: How Criminal Organizations Perpetuate Conflict and What To Do About It," *Colloquium 2,* no. 1 (March 2009): 3, https://coin.harmonieweb.org/Knowledge%20Center/Colloquium/Dahl.pdf.

10. Brock Dahl, "The Quiet Enemy: Defeating Corruption and Organized Crime," *Military Review* (March-April 2010): 78.

11. Phil Williams, "Organized Crime and Corruption in Iraq," *International Peacekeeping* 16, no. 1 (2009):119.

12. Mark Fritz, "Arms and Drug Smuggling Rise as Crime Gets Organized in the New Iraq," *Associated Press,* July 5, 2003, 1, quoted in Robert E. Looney, "Reconstruction and Peacebuilding Under Extreme Adversity: The Problem of Pervasive Corruption in Iraq," 15 *International Peacekeeping* 15, no. 3 (2008): 31.

13. Peter Andreas, "The Clandestine Political Economy of War and Peace in Bosnia," *International Studies Quarterly* 48 (2004): 44.

14. Ibid.

15. Susan Rose-Ackerman, "Corruption in the Wake of Domestic National Conflict," in *Corruption, Global Security, and World Order,* ed. Robert I. Rotberg (Washington, DC: Brookings Institution Press, 2009), 66–95.

Despite its authority and control, the Coalition Provisional Authority (CPA), the U.S. government organization established in 2003 to guide Iraq from conflict to stability, seemed unconcerned with any comprehensive policing strategy, and saw crime merely as an Iraqi responsibility.[16] Indeed, a U.S. Central Command official proclaimed in 2003 that the military would not "be a police force," and around the same time a British military commander responded to questions about looting by asking, "Do I look like a policeman?"[17] Rather than going in with any plan to fill the policing vacuum, the U.S. approach in 2003 was contingent upon a "temporary reconstitution" of the then-existing police force.[18] The exploding criminality that followed the invasion, described above, demonstrates this plan's ineffectiveness.[19] Indeed, it was not until 2006, three years after the initial invasion in Iraq, that any prominent U.S. official called for a more intense focus on corruption and criminality.[20]

Table 3: Transparency International, Rank in Corruption Perceptions Index Out of World Countries

	2007	2008	2009	2010
Afghanistan	172	176	179	176
Iraq	178	178	176	175

Source: *http://www.transparency.org/policy_research/surveys_indices/cpi*

Surveys vary in sample size, but there are generally around 180 countries.

Similar mistakes were made in Afghanistan, where the United States relied on a small group of military and intelligence operators to support the Northern Alliance, a loosely confederated band of Afghan militias.[21] In the years that followed the toppling of the Taliban, the warlords who led the alliance were allowed to divvy up the country into their own spheres of influence.[22] Many of those same warlords now run roughshod over the Afghan people and control various aspects of the licit and illicit Afghan economy.[23]

Lamentably, as indicated in Table 3, despite years of significant international presence in both countries, Afghanistan and Iraq continue to rank amongst the most corrupt countries in the world. Stabilizing forces, therefore, must recognize that law enforcement functions are integral to stabilization operations, and the development community as a whole (including the military) must immediately stand up rule of law institutions and then gradually transition such institutions over to local authority.[24] The military must, consequently, develop groups that are capable of both adjudicating and enforcing law in these early stages of stabilization. Such law enforcement requirements force policymakers to acknowledge that intervention is a resource intensive process and cannot be done on the cheap.

Specific Institutions

Though the requirements of such a policing force are beyond the scope of this paper, the RAND Corporation has produced an excellent study on the

16. Williams, 116.

17. R. Jeffrey Smith, "Law and Order: The Military Doesn't Do Police Work. Who Will?", *Washington Post,* April 13, 2003, sec. B-.

18. Ibid.

19. See Dahl, "The Business of War," 3; Dahl, "The Quiet Enemy," 78.

20. Mark Gregory, "The Failure of Iraq's Reconstruction," *BBC News,* November 10, 2006, accessed March 14, 2011, http://news.bbc.co.uk/2/hi/middle_east/6132688.stm.

21. Gary Schroen. *First In: An Insider's Account of How the CIA Spearheaded the War on Terror in Afghanistan* (New York: Presidio Press, 2005).

22. For a telling example, see Doug Feith's recounting of a story about a provincial warlord named Pacha Khan, whom the United States allowed to challenge the authority of the nascent Afghan government. Doug Feith, *War and Decision* (New York: HarperCollins Publishers, 2009), 140–45; see also Brock Dahl, "Corruption in Afghanistan," *National Review Online,* November 16, 2009, http://www.nationalreview.com/articles/228612/corruption-afghanistan/brock-dahl.

23. Aryn Baker, "The Warlords of Afghanistan," *Time,* February 12, 2009, accessed February 14, 2011, http://www.time.com/time/magazine/article/0,9171,1879167,00.html.

24. Where reliable institutions already exist, stabilizing forces must provide adequate support to ensure operational effectiveness.

need to create a "Stability Police Force."[25] Suffice it to say, however, that such a body must be capable of policing the full spectrum of criminal activities. Organized crime groups are dependent on more sophisticated public corruption and illicit financing schemes to survive and grow. A stability police force, therefore, must work across agency lines with the U.S. military and civilian law enforcement communities to be able to stem illegal activities and train host country agencies to do the same.

The intervening forces also must be prepared to set up courts and prisons in order to complete the entire law enforcement cycle. This may not require creating entirely new institutions, but rather reinforcing with experts and resources those local institutions weakened by conflict. Care should be taken to fully account for local dynamics in structuring such support. Political pressures, for example, currently reign over the Afghan justice system, with judges openly admitting that they receive demands from officials in the Afghan government to decide cases in favor of well-connected parties.[26] The assistance must be structured to forestall such interference and create a protected zone, perhaps both physically and politically, within which these institutions can operate.

For example, the intervention community may consider bringing in international experts on the model that was used in Kosovo: following the conflict there, the United Nations inserted international judges and prosecutors to work with the local judiciary to administer the justice system.[27] It also could facilitate centralized judges travelling to provinces to hear cases, as has been done in Iraq.[28] Though such initiatives would not be without controversy, efforts must be made to stress to the local population the need to grow local institutions to the point of independence.

Moreover, another imperative lies in protecting and sufficiently funding judicial bodies to reduce their susceptibility to bribery and safeguard them from threats. Such threats are common where powerful, violent organizations are active. In Colombia, for example, roughly 700 judges received threats in a four-year period.[29] A UK-U.S. effort to facilitate a special drug court in Afghanistan, where judicial officials are protected and operate in a secure courthouse, provides one model for establishing a stronger judiciary.[30]

Corruption Deconstruction

Of course, in Iraq and Afghanistan, the invasions now are long past and the window of opportunity for impacting the early trajectory of the political economy has closed. Nonetheless, it is never too late to work to roll back negative trends.[31]

In order to deconstruct widespread criminal enterprises after the transition gap has closed, high-level intervening actors must be willing to use leverage to force host country officials to crack

25. See Terrence K. Kelly et al., *A Stability Police Force for the United States: Justifications and Options for Creating U.S. Capabilities* (Santa Monica, CA: RAND Corporation, 2009), http://www.rand.org/pubs/monographs/2009/RAND_MG819.pdf.

26. Ben Arnoldy, "Tearful Karzai warns of youth exodus from Afghanistan. Here's why," *Christian Science Monitor,* September 29, 2010, http://www.csmonitor.com/World/Asia-South-Central/2010/0929/Tearful-Karzai-warns-of-youth-exodus-from-Afghanistan.-Here-s-why.

27. Tom Perriello and Marieka Wierda, "Lessons from the Deployment of International Judges and Prosecutors in Kosovo," *International Center for Transitional Justice* (March 2006), 13.

28. U.S. Department of Defense, "Measuring Stability and Security in Iraq: June 2009 Report to Congress in Accordance with the Department of Defense Supplemental Appropriates Act of 2008," June 2009, 9, accessed March 14, 2011, http://www.defense.gov/pubs/pdfs/9010_Report_to_CongressJul09.pdf.

29. "Reportan 700 jueces amenazados en cuatro anos," *Caracol Radio,* June 29, 2010, accessed March 14, 2011, http://www.caracol.com.co/nota.aspx?id=1319841.

30. Senate Committee on Foreign Relations, *Afghanistan's Narco War: Breaking the Link Between Drug Traffickers and Insurgents,* 111th Congress, 1st sess., 2009, Committee Print, 11, http://www.humansecuritygateway.com/documents/USGOV_AfghanistansNarcoWar_BreakingLink_DrugTraffickersInsurgents.pdf.

31. I have suggested in *Military Review* a range of options for dealing with well-entrenched corruption. That advice, intended largely for military commanders in the field, recommended that they focus on reducing opportunities for corruption, increasing the risks of illicit activities, and minimizing the potential rewards for such behavior. That article, however, did not address in great detail the higher-level political capital that must be expended to truly weed out endemic corruption. See Dahl, "The Quiet Enemy."

down on corruption, and potentially lay out a plan to attack such corruption themselves. The fact that such corruption is so well entrenched likely means that political instability will result from aggressive efforts to purify the ranks of government and harmful power brokers. Yet, as mentioned previously, much of this instability can be avoided if attempts are made to provide access to resources through formal, impartial institutions. By first eroding the support base of the power brokers, it then is possible to remove them from positions of power.

In some instances, such resource redirection may take too long. The policymaker, therefore, is faced with a tradeoff between potential instability at a time when foreign support is still present and restabilization is possible, and the facade of stability in the present followed by potential collapse once foreign support diminishes. The decision, therefore, comes down essentially to the investment that policymakers are willing to make in reestablishing normal institutional processes. Where stabilizing forces insist on planning and resourcing only one year in advance, it will be difficult to develop and sufficiently resource the type of strategy necessary to deconstruct illicit power structures. Likewise, if stabilizing forces plan on a near-term withdrawal, the prospects for achieving durable change—and creating institutions strong enough to sustain their own power—are low. To put it in crude terms, with the prospect of near-term withdrawal from a compromised host state, the sustainability of the status quo is largely dependent upon endogenous resourcing factors and local political realities. If the host government has difficulty producing sufficient revenue to function and is factionalized, collapse is highly likely.

Some nations, such as Iraq, have sufficient rent-producing income to prop up a modicum of institutions. If the relevant political parties are able to come to adequate power- and resource-sharing arrangements, the country may survive withdrawal. Yet in countries such as Afghanistan, there is quite simply not enough revenue to provide basic state services and still permit kleptocrats to take their share. In such states, conflict over the limited spoils likely will follow withdrawal. Moreover, due to inadequate resourcing and crippling infighting, the power players propped up by intervening forces likely will be too weak to resist the type of organized threat—such as that posed by the Taliban—that can then use the territory as a base to protect foreign terrorists or directly pose greater threats to its neighbors and the world. This was the case when the Russians left Afghanistan in the 1980s and the Taliban took power in the 1990s. It continues to be the case in Afghanistan today.

Moreover, in assessing efforts to attack corruption, it is critical that success is measured by outcomes rather than mere inputs. The USAID Rule of Law program in Afghanistan is a case in point. A USAID website boasts that the organization trained more than 50 percent of the Afghan judiciary.[32] A survey released in the summer of 2010 in Afghanistan, however, indicates that 50 percent of Afghans perceive the courts and the Ministry of Justice as the most corrupt institutions in the country.[33] It is not sufficient to train judicial members if, for a variety of reasons, they are not justly applying the country's laws. Therefore, different measures must be developed to more accurately gauge results.

In short, the only way to truly root out corruption, once deeply established, may be to pursue a medium-term strategy that involves substantial resource investment, aggressive leveraging with the local elites, and coherent and properly focused attempts to stand up essential institutions.

The argument for early stage law enforcement efforts, thus far, has been largely strategic and moral in nature. Immediate action in critical rule of law investigation and enforcement capacity is essential to sound counterinsurgency strategy and responsible transitional leadership. Yet these considerations only imply that such activities are sound policy, not that binding obligations exist to execute them. There increasingly are reasons

32. Accessed October 16, 2010, http://www.usaid.gov/locations/asia/countries/afghanistan/index.html.

33. Integrity Watch Afghanistan, "Afghan Perceptions and Experiences of Corruption: A National Survey 2010," 74, accessed October 16, 2010, http://www.iwaweb.org/corruptionsurvey2010/Main_findings_files/IWA%20National%20Corruption%20Survey%202010.pdf.

to believe, however, that such actions also are necessary under international law, thereby creating binding obligations for parties to whom the law applies.

Part II. Legal Aspects of the Debate

Potential Sources of Law Governing Military Activities

There are a host of potential sources of applicable legal norms in occupation situations. These sources include *debellatio,* UN Security Council Resolutions, international humanitarian law (IHL, or more specifically the Law of Occupation), and international human rights law (HRL), all of which will be reviewed herein. The focus of this section will be on occupation situations, a unique legal category in which specific treaties, particularly IHL, govern the conduct of occupying forces (stabilizing forces). Thus, while the strategic and moral necessity of closing the transition gap would be necessary in any situation, the legal necessity according to the argument that follows only arises in relevant occupation situations.

This section will conclude that the infrequency of fully recognized occupations (though they may exist practically, the occupants do not acknowledge them as such) has hampered the development of a clear set of laws guiding occupation, leaving a maze of norms from which occupiers can draw to guide their actions. However, it also will lay the groundwork for the argument that IHL and HRL are entirely consistent and interdependent when it comes to fighting corruption and crime, and that they must be read together to impose an obligation on occupying powers to combat illicit behavior. Finally, even where IHL may not technically be applicable, the types of activities it arguably requires should provide guideposts for any stabilizing forces.

We turn now to the potential sources of governing law that dictate the proper actions for stabilizing forces.

Debellatio

The oldest source of law potentially impacting occupation situations is called *debellatio.* This concept, the legal analogue to absolute war, essentially sees the defeated government as totally annihilated and allows for an occupying authority to make sweeping changes to host institutions.[34] Melissa Patterson, writing in the *Harvard International Law Journal,* argued that *debellatio* consists of a tripartite framework: (1) the invaded state ceases to exist by virtue of the disintegration of its national institutions; (2) the occupying victor acquires title to the territory formerly controlled by the toppled state; and, (3) the new titleholder has plenary powers over the territory where the state previously existed.[35]

While some commentators have argued that a modernized version of such a concept would be most applicable to the situation in Iraq,[36] it also is arguable that modern concepts of statehood and international relations make *debellatio* obsolete. Modern notions of sovereignty and self-determination[37] would directly conflict with a concept that essentially provides carte blanche authority to an occupying power. Moreover, the customary notion in international law that the state continues to exist despite government failure seems to directly rebut the aged concept of total annihilation. Because *debellatio* holds little sway today, we next examine occupation situations under

34. Brett H. McGurk, "A Lawyer in Baghdad," *Green Bag* 8, no. 2 (2004): 51, FN1. Though *debellatio* would not even countenance the terms of occupier, occupation, and the like, they are used here to maintain consistency in describing the presence of foreign forces in a given territory not under the authority of those forces' sovereign at the onset of military operations.

35. Melissa Patterson, *Who's Got the Title? or, The Remnants of Debellatio in Post-Invasion Iraq,* Harvard International Law Journal 47 (2006): 467, 481–82, 480–81.

36. Ibid., 468.

37. Benvenisti discusses, in detail, the applicability of such notions to modern occupations. See Eyal Benvenisti, *The International Law of Occupation* (Princeton, NJ: Princeton University Press, 2004), 3–31,.

Security Council Authority, IHL (embodied, for our purposes, in the Hague Regulations of 1907 and the Geneva Convention of 1949), and HRL.[38]

UNSC Resolutions

To examine the significance of United Nations Security Council Resolutions (UNSCR), we look at their applicability in the occupation of Iraq. In Iraq, the CPA was compelled to act under UNSCRs 1483 and 1511.[39] UNSCR 1483 called upon the CPA "to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future."[40] The CPA argued that through the UNSCRs the United Nations commanded the CPA to play an "active and vigorous role in the administration and reconstruction of Iraqi society."[41]

Resolution 1511 emphasized "the importance of establishing effective Iraqi police and security forces in maintaining law, order, and security,"[42] Paragraph 13 of the same "… authorizes a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq …"[43]

It seems, then, that whatever else the UNSCRs may have implied, there clearly was an emphasis placed on restoring policing and providing security as an imperative function of the CPA. Yet UNSCRs provide little detail about what such obligations actually may entail. Moreover, they may not be promulgated in every situation in which occupations occur, and even where they are, applicable IHL and HRL still apply.

Law of Occupation (IHL)

This paper assumes a traditional understanding of the Law of Occupation, a subset of International Humanitarian Law (IHL), which is primarily based upon the Hague Convention (IV) respecting the Laws and Customs of War on Land, and its annex: Regulations concerning the Laws and Customs of War on Land.[44] Much modern scholarship has conflated separate bodies of human rights law, such as the International Covenant on Civil and Political Rights (ICCPR), under the heading of IHL.[45] Unlike the Law of Occupation, however, international human rights norms were not expressly written with conflict situations in mind. They will, therefore, be dealt with separately in a subsequent section. The consanguinity of these two bodies of law as they pertain to military occupations, however, will be established later in this paper.

i. Hague Article 43

The fulcrum of IHL is Article 43 of the 1907 Hague Convention, which reads,

> *"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the county."*[46]

38. McGurk openly acknowledges the coalition as occupiers in Iraq, and the consequent applicability of occupation law. McGurk, 51–55.

39. UN Security Council (UNSC), *Resolution 1483,* S/RES/1483, May 22, 2003, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/368/53/PDF/N0336853.pdf?OpenElement; UN Security Council, Resolution 1511, US/RES/1511, October 16, 2003, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/563/91/PDF/N0356391.pdf?OpenElement.

40. UNSC, *Resolution1483,* par. 4, Ch. 7 provisions.

41. McGurk, 53–54.

42. UNSC, *Resolution 1511,* par. 16.

43. Ibid. (original emphasis)

44. International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land,* article 43, October 18 1907, 2 U.S.T. 2269 [hereinafter Hague IV].

45. International Covenant on Civil and Political Rights [hereinafter ICCPR], Article 2, par. 1, December 16, 1966, 999 U.N.T.S. 171.

46. Hague IV, Article 43.

It is necessary to mention from the outset that the English translation of the original, authoritative French regulation has been criticized and corrected in scholarship.[47] The French "l'ordre et la vie publics," was translated into English as "public order and safety," though "public order and *civil life*" seems a more accurate translation.[48] The concept of civil life, according to the legislative history of the document, can be described as "social functions, ordinary transactions which constitute daily life."[49] Thus, the international mandate would encompass wider obligations than basic military security operations alone.

One of the most authoritative experts on occupation law, Yoram Dinstein, read Hague Article 43 to create "two distinct obligations": "(i) to restore and ensure as far as possible, public order and life in the occupied territory; and, (ii) to respect the laws in force in the occupied territory unless an absolute impediment exists."[50] Another commentator refers to the latter obligation to respect the laws in force in the occupied territory as the "conservationist principle."[51] According to this principle, the occupier enjoys no sweeping authority to make permanent changes to "legal and political structures" in the territory. One former CPA attorney acknowledges that Article 43 constitutes a general prohibition against "transformative" change.[52] More importantly, another scholar extends the conservationist claim even further by arguing that there is no obligation to create institutions that monitor rights compliance, investigate allegations of wrongdoing, and prosecute violators.[53] The analysis below will directly refute this latter contention as inconsistent with a holistic reading of IHL and HRL.

An alternative interpretation of IHL holds that Article 43 creates an affirmative obligation to "protect the civil population from a meaningful decline in orderly life."[54] In this broader view, the distinction between "life" and "safety" is essential, because an occupying power may frequently "… show callous indifference to any hardships (unrelated to safety and security) that befall [the population]."[55]

Arguably, moreover, this is an obligation of means and not results.[56] According to some analysts, the affirmative obligations imposed by Article 43 may not be as intensive as those that would be required to fulfill human rights obligations.[57] Again, however, a modernized reading of both IHL and HRL make such a distinction between the two bodies difficult to defend.[58] Even within the narrower, exclusivist readings of the different bodies of law, however, one thing is clear: criminal prosecution constitutes "[t]he most traditional way of restoring public order,"[59] and such activity thus would arguably be required by Article 43.

Eyal Benvenisti, however, sees a much more limited relevance for Article 43 in modern occupation law.[60] He feels that the phrase is

47. See, for example, Marco Sassoli, "Legislation and Maintenance of Public Order and Civil Life by Occupying Powers," *European Journal of International Law* (2005): 663–64 Benvenisti, 7; and Yoram Dinstein, The International Law of Belligerent Occupation (Cambridge: Cambridge University Press, 2009), 90.

48. Sassoli, 663–64; Benvenisti, 7; Dinstein, 90.

49. Sassoli, 663–64.

50. Dinstein, 90.

51. Gregory H. Fox, "The Occupation of Iraq," *Georgetown Journal of International Law* 36 (2005): 199.

52. McGurk, 52.

53. Fox, 271.

54. Dinstein, 90.

55. Ibid.

56. Sassoli, 664–65.

57. Ibid.

58. See Analysis section below.

59. Sassoli, 664–65.

60. Benvenisti, 30–31.

vulnerable to changing conceptions regarding the proper role of a government, and notes that when the Hague Regulations were written, *laissez-faire* governance was the dominant ideal of the day.[61] Yet, while Benvenisti is probably right in saying Article 43 has "at best become an incomplete instruction to the occupant,"[62] even *laissez-faire* governments would have acknowledged law enforcement functions such as policing and prosecution to be ineluctable elements of governance. Moreover, despite Benvenisti's incredulity as to the efficacy of the regulation, traditional IHL was invoked by the UN Security Council when it asked occupying powers to observe their obligations under IHL with respect to Iraq.[63]

Ultimately, the precise applicability of Article 43 is left open for debate, a dangerous precedent when people's lives and well-being are on the line. As will be discussed below, HRL provides added flesh to the skeletal structure the IHL conventions established, and which narrow readers of Article 43 overlook.[64]

Human Rights Law (HRL)

Questions about the potential applicability of HRL[65] to occupation settings have given rise to much academic speculation.[66] There is a growing trend, not without its critics, to incorporate human rights laws into the obligations assumed to inhere in occupying authorities.[67]

i. Applicability of Human Rights Law during Occupation

John Cerone cites the International Court of Justice's (ICJ) "Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons," the agreement of the Inter-American Commission on Human Rights and the United Nations Human Rights Committee (UNHRC) to the effect that the International Covenant of Civil and Political Rights (ICCPR), one of the leading human rights accords, is applicable in times of war.[68]

Some disagree. Arguing for the predominance of the conservationist principle, Gregory Fox points out that the principle would cease to exist where applicable human rights law imposed obligations to legislate outside of "conservationist" boundaries.[69] Yet this claim does not prove that the basic security functions of effective governance must be ignored. Indeed, the potential applicability of human rights laws arguably would create an affirmative obligation for the occupying authority to take certain measures to "ensure" the rights of the population in ways that would not necessarily break the conservationist principle regarding local legislation.

ii. Affirmative Obligation through Human Rights

The *Velasquez-Rodriguez* case, a watershed in modern human rights law, provides a window on the connectivity of IHL and HRL.[70] In *Velasquez,* the Inter-American Court of Human Rights read the term "ensure" in the preambular paragraph of the American Convention on Human Rights to create affirmative obligations on the state to "organize the governmental apparatus and, in general, all the

61. Ibid., 9, 209–10.

62. Ibid., 30.

63. See UN Security Council, *Resolution 1483,* par. 5.

64. See Analysis section below.

65. HRL as referred to here includes a range of various treaties and covenants signed by states in mutual recognition of the rights of humanity.

66. See, for example, John Cerone, "Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations," Vanderbilt Journal of Transnational Law 39 (2006): 1447; see also Naomi Roht-Arriaza, State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law, California Law Review 78 (1990): 451.

67. Cerone, 1453–54.

68. Ibid.

69. Fox, 274–75.

70. Velasquez-Rodriguez v. Honduras, 1988 Inter-American Court of Human Rights, (ser. C), no. 4 (July 29, 1988), http://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

structures through which public power is exercised, so that [state parties] are capable of juridically ensuring the free and full enjoyment of human rights."[71] Moreover, according to the Inter-American Court, the state must "*prevent, investigate and punish* [emphasis added] any violation of the rights recognized by the Convention."[72] Additionally, even a private act could lead to state responsibility if there was a "… lack of due diligence to prevent the violation or to respond to it as required by the Convention."[73] Finally, the state's duty is, specifically, "… to take reasonable steps to prevent human rights violations …"[74]

The same obligation, to "*take whatever measures are necessary* [emphasis added] to enable individuals to enjoy or exercise the rights guaranteed by the Covenant" also arguably exists in the ICCPR, which is valid in Iraq, Afghanistan, and some 165 other countries.[75] The presence of such obligations in the ICCPR is evident through both the decisions and general comments of the UN Human Rights Committee (UNHRC), the body responsible for adjudicating rights claims under the ICCPR. In *Atachahua v. Peru,* for example, the UNHRC held that Peru had violated multiple provisions of the ICCPR by failing to prevent and punish rights violations including arbitrary detention and murder by state agents.[76] In General Comment No. 6, moreover, the UNHRC noted that "State parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces."[77] The UNHRC also has commanded that the state must take all legislative and "other measures" necessary to protect citizens from cruel treatment and punishment, whether such punishment occurred at the hands of government or private actors.[78] It has made similar findings in other areas as well.[79]

Moreover, the European Court of Human Rights also has recognized such affirmative obligations of the state. Most recently, in *Silih v. Slovenia,* the European Court made clear that it is insufficient for states merely to have laws protecting human rights on the books; they must enforce those laws in practice.[80]

These decisions demonstrate an emerging norm that imposes upon states some measure of responsibility for both public and private actions in their territories.[81] According to Justice Thomas Buergenthal, formerly a judge on the ICJ, the obligations tied to the usage of "ensure" includes an obligation to "improve the administration of criminal justice."[82] Administration would seem to be a broad enough term to include legislation and enforcement, and Cerone argues that the due diligence requirement involves a legislative prohibition of violative behavior as well as enforcement.[83] Dinah Shelton adds that due diligence requires "reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances."[84]

71. Velasquez, par. 166.

72. Ibid.

73. Ibid., par. 172.

74. Ibid., par. 174.

75. Thomas Buergenthal, "To Respect and Ensure: State Obligations and Permissible Derogations," in *The International Bill of Rights: The Covenant on Civil and Political Rights,* ed. Louis Henkin, (New York: Columbia University Press, 1981), 77.

76. *Atachahua v. Peru,* CCPR/C/56/D/540/1993, UN Human Rights Commission (UNHRC) (April 16, 1996).

77. UNHRC, *General Comment no. 6,* April 30, 1982.

78. UNHRC, *General Comment no. 20,* March 10, 1992.

79. UNHRC, *General Comment no. 16,* April 8, 1988.

80. *Silih v. Slovenia,* application no. 71463/01, European Court of Human Rights (April 9, 2009).

81. Cerone, 1466.

82. Buergenthal, 77.

83. Cerone, 1467.

84. Dinah Shelton, "Private Violence, Public Wrongs, and the Responsibilities of States," 13 *Fordham International Law Journal* 13 no. 1 (1989): 22–23.

iii. Extraterritorial Application of Human Rights Conventions

As these human rights conventions purport to affect state's behavior within their own territory, an added wrinkle to the applicability question involves whether they create obligations in an extraterritorial setting such as would exist during occupation. As is the case with respect to many other legal issues affecting occupations, opinions differ.

The United States Supreme Court, in *Sale v. Haitian Centers Council, Inc.,* found that "… a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than general humanitarian intent …"[85] The growing international norm may be in conflict with the Court's rendering, however.

Cerone points out that the UNHRC frequently has held that the ICCPR can have extraterritorial application.[86] The European Commission on Human Rights also has acknowledged the extraterritorial obligations of the state.[87]

Moreover, Justice Buergenthal has written, prior to his ICJ judgeship, that the state is obligated to ensure the rights of all those *within its jurisdiction.*[88] The question of jurisdiction seems to rest on factual arguments about whether the occupying authority exercises powers of government on the ground, regardless of whether those powers are exercised outside its official territory.[89] On this point, it is important to remember that the Hague Convention acknowledges the adoption of authority by occupying powers in Article 43, which reads, "The authority of the legitimate power having in fact passed into the hands of the occupant …"[90]

Finally, the UN Office of the High Commissioner for Human Rights (OHCHR) has made clear that the "rights enshrined in the Covenant belong to the people living in the territory of the State party".[91] If, indeed, rights rest with the people, their rights should be protected regardless of the identity of the governing authority. Under such an interpretation, the extraterritoriality debate is a red herring, because the citizens of a state arguably can enforce against an occupying force any treaties that are in place against the former government.

The foregoing section highlights the uncertainties surrounding the potential legal authorities that govern occupation, and the proper meaning and scope of those authorities even where they are found applicable. In an age when many occupiers refuse to be so named, or subjected to the laws of occupation, there has been limited opportunity to further develop and understand occupation law.[92] Within already existing law and scholarship in the human rights field, however, there is a clear tendency toward imposing affirmative obligations on governing authorities to investigate and prosecute rights violations. Consequently, here is a strong argument for applying the same obligations to occupying authorities.

Legal Confusion

Brett McGurk, a former CPA attorney, noted in looking back on the CPA's activities that the multitude of legal authorities to which they were potentially subject created "internal inconsistencies that were often hard to reconcile."[93] By his reading, it could be impossible in certain circumstances to

85. *Sale v. Haitian Centers Council, Inc.,* 509 U.S. 155, 183 (1993). See Theodor Meron, "Extraterritoriality of Human Rights Treaties," *American Journal of International Law* 89 (1995): 78, 81-82.

86. Cerone, 1471–72.

87. *Cyprus v. Turkey,* application no. 25781/94, European Court of Human Rights (1994); Buergenthal, 76.

88. Buergenthal, 74.

89. Fox, 273.

90. Hague IV, Article 43.

91. UNHRC, *General Comment no. 26,* December 8, 1997.

92. Fox, 231.

93. McGurk, 51.

simultaneously comply with both UNSC Resolutions and IHL.[94] The coalition, he admits, voluntarily declared itself an occupying power but IHL seemed difficult to apply in situations of long-term occupation where the UNSC contemplated sweeping changes to various institutions.[95]

Nonetheless, the legal ambiguity surrounding the degree of legislation an occupier can or must promote, identified by McGurk and debated by academics, is no barrier to a resolution of the more limited question about the occupier's obligations and capabilities with respect to the administration of law enforcement. As the next section will show, a proper, comprehensive reading of various legal authorities indicates that the occupying power has a duty to effectively police the territory for which it is responsible. Consequently, though traditional occupation law is ill developed, related law and precedent arguably indicate that stabilizing forces assume governing authority and the human rights obligations that such authority contains. We now turn to exploring this claim in greater detail.

Refined Analysis of Occupation Obligations

Both IHL and HRL require that a governing authority "ensure" basic norms of order. Read together, the agreements within the international community to ensure basic levels of order (whether found in the Hague Convention, the ICCPR, or elsewhere) imply an affirmative obligation that a governing authority must provide at least a baseline social stability function. Because of the coterminous elements of both IHL and HRL, it is clear that these affirmative obligations exist regardless of whether a state is in conflict or at peace. The analysis below demonstrates this simultaneous identity of obligations imposed by IHL and HRL. In so doing, it maintains that a reading of the law that denies an occupier's obligations to attack illicit behavior rejects the importance of the most fundamental needs of human life and society, and the most rudimentary functions that a state must serve in ensuring those needs are met.

The analysis below addresses areas where corruption and organized criminality violate the basic rights that international law has acknowledged governing authorities must protect. It discusses areas where international precedents clearly have ordained that a governing authority is obliged to act to ensure and respect the rights of its citizens, and argues that international law must be understood to create obligations during occupations that force governing authorities to attack corruption and organized criminal activities that violate the rights enshrined in the ICCPR and materially similar conventions.[96]

The article concludes by asserting that stabilizing forces are not immune from affirmative obligations. Just like governments functioning in normal times, stabilizing forces have an obligation under international law to respect and ensure the rights of those in the territory they occupy. Such an obligation requires that they prevent, investigate, and punish violations caused by corruption and organized criminality. Thus, policymakers who choose to initiate occupation activities must be prepared to properly resource and equip their armed forces to carry them out.

To Respect and Ensure

It is difficult to imagine any other interpretation of the term "ensure" than one which imposes upon the subject an obligation to do something to achieve the object of the sentence in which "ensure" is found. Whatever the goal of the action may be, if that object is to be ensured, the subject must in some way affirmatively see to it that the object is achieved. Both IHL and HRL use the term "ensure" with respect to defined subjects and objects. The subject of IHL is an occupying power;[97] of HRL, a

94. Ibid., 55.

95. Ibid., 52–53.

96. The ICCPR is chosen because its provisions provide focal points that are the most relevant to the types of violations seen in conflict economies. Other treaties, however, also describe rights which stabilizing forces may be obligated to protect.

97. Hague IV, Article 43, "The authority of the legitimate power having passed into the hands of the occupant …"

state government.[98] The object of each is textually different, but both should be read as imposing the same affirmative obligations on occupying powers and state governments.

As mentioned above, IHL requires that an occupant "… restore, and ensure, as far as possible, public order and [civil life] …"[99] Though HRL varies by covenant, the ICCPR demands that a state party "undertake[s] to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant …"[100] Because so few opportunities to further explicate occupation law have occurred,[101] the concept of public order and safety (or civil life, depending on the preferred translation) has not been fleshed out in the legal arena. The development of HRL constitutes the acknowledgment by a similarly broad group of states of the basic rights that any social order must enshrine, and indirectly then gives color to the concept of public order and civil life. The case law addressing key provisions of HRL, therefore, arguably provide guidance on what the Article 43 concept of ensuring public order and civil life includes.

Even using the more limited translation of public order and safety, Article 43 must be read to incorporate the most fundamental rights to life, privacy, property, and personal integrity that illicit behavior violates. What is order and safety if not a citizen's basic right to live, to have his or her privacy protected, and to maintain his or her own possessions and bodily integrity? These aspects of life are so fundamental to the well-being of the human person that, without them, a person could not fully participate in society, and society itself would cease to function. Without them there would, in fact, be no order or safety. The very objectives IHL seeks to achieve, therefore, would be undermined. Indeed, the societies would resemble pre-surge Iraq and today's Afghanistan.

Consequently, affirmative obligations of the governing authority derive directly from the "ensure" language of the conventions. In both IHL and HRL, the subject must ensure the objects of the law—which at least include life, privacy, property, and bodily integrity.

Scholars on occupation law also recognize this overlap. Fox has noted that "substantive rights and implementing responsibilities" should "inform our understanding" of IHL.[102] McCarthy has argued for an even broader reading, and claimed that it is not permissible for the occupying power to allow for "… economic, social, political, and infrastructural retardation."[103] Dinstein has argued that a key litmus test for judging the propriety of occupation actions should be asking whether the occupying power is protecting rights in a similar fashion as it would in its own state.[104]

An additional argument for these obligations exists, however, in the notion of adoption of the legitimate authority's powers by the occupying power. If, as HRL establishes, legitimate authorities have the obligation to respect and ensure life, property, privacy, and bodily integrity, then any view of occupation that contemplates an occupier adopting the full responsibilities of the legitimate authority also would necessitate the adoption of responsibilities to respect and ensure the adumbrated rights. Indeed, IHL takes such an "adoptive" view of occupation in Article 43.

Article 43 of the Hague Convention notes, "The authority of the legitimate power having in fact passed into the hands of the occupant …," and then obliges the occupant to ensure public order and safety.[105] Because the Hague Convention

98. ICCPR, Article 2, par. 1, December 16, 1966, 999 U.N.T.S. 171, "Each State Party to the present Covenant undertakes …"

99. Hague IV, Article 43.

100. ICCPR, Article 2, par. 1. See also, American Convention on Human Rights [hereinafter ACHR], Chapter 1, Article 1, par. 1, July 18, 1978, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, "… to respect the rights and freedoms recognized herein and to ensure all persons subject to their jurisdiction the free and full exercise of those rights and freedoms …"

101. Fox, 231.

102. Fox, 296.

103. McCarthy, 62.

104. Dinstein, 121–22.

105. Hague IV, Article 43.

is addressed to, and specifically describes, the responsibilities and obligations of the occupier, and Article 43 itself couples authority with obligations, it is inconceivable that the Hague Convention would intend for authority to pass to the occupier without the responsibilities that authority necessitates also passing.

Given the dearth of recognized occupation situations, the fact that the international understanding of order and safety has undergone more specific, if indirect, articulation over the past century through HRL should be no surprise. But such latter, more specific articulations of state obligations should enhance rather than limit our understanding of what order and safety can now be said to include. Order and safety clearly were thought by the world community in the Hague Convention to be the most fundamental aspects of human society. As evidenced by their universal appearance in various human rights covenants, life, privacy, property, and bodily integrity also are thought by the world community today to be equally fundamental to human society. The fact that the latter fundamentals were expressed through a different legal medium should not prohibit us from recognizing their contribution to better understanding a governing authority's obligations during occupation.

The UNHRC, the body responsible for overseeing the implementation of the ICCPR, agrees. Speaking of the obligation to respect and ensure the rights listed in the ICCPR, the UNHRC commented, "This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation."[106]

While the UNHRC's language may be interpreted as limited to UN peacekeeping situations given its contemplation of an assignment for such responsibilities, the principles of international law arguably also would apply to occupants who had initiated operations on their own.

A comparison of the fundamental objectives underlying IHL and HRL law, thus, makes clear that the more specific obligations of the state to ensure the rights of its citizens must be read into the obligation to maintain order and safety established by IHL. The next section will describe in more detail, however, the practical actions (prevention, investigation, and punishment of violations) such obligations require. The final section will drill down to an additional level of detail in addressing specific types of violations that the occupying authority is obliged to prevent, investigate, and punish in order to fulfill its obligations under international law.

Affirmative Obligations: Prevent, Investigate, and Punish[107]

The governing authority must fulfill its obligation to maintain order and safety by ensuring the fulfillment of the traditional functions of the state, such as policing, investigations, and the prosecution of crimes. In short, it must ensure the preservation of the rights universally recognized by various human rights treaties as elements of order and safety. The overlap of objectives between IHL and HRL means that neat distinctions between basic policing and separate military occupation no longer hold true. One commentator characterized the traditional boundaries in this way: "Public order is restored through police operations, which are governed by domestic law and international human rights law, and not through military operations governed by IHL on the conduct of hostilities."[108] This article asserts, however, that military occupants must plan for and be prepared to execute basic policing and administrative functions as part of their occupation. Developments in international law mean that the traditional distinctions drawn between IHL and HRL no longer are viable in stabilization environments. In short, it

106. UNHRC, General Comment no. 31, par. 10, May 26, 2004.

107. Recognizing that international forces never acknowledged occupation law to exist in Afghanistan (though the point of whether it should have is highly debatable), this section uses Afghanistan and Iraq as paradigmatic examples of the types of post-conflict environments where these new legal principles could be effectively applied were an occupation approach taken to similar conflicts in the future.

108. Sassoli, 665.

is not enough to plan the war; a stabilization force also must plan the peace.

The obligations articulated in *Velasquez* most succinctly describe the policing obligations for which a stabilization force must plan: any administrative functions that are required to prevent, investigate, and punish violations of the rights recognized by [relevant conventions].[109] The key theme of *Velasquez,* and its progeny in the Inter-American, European, and UN human rights systems, is that governing authorities must take the measures necessary to end the impunity of criminals, whether such criminals act in an official or private capacity.[110] It is precisely the impunity of corrupt and organized criminals which leads to wholesale violations of the rights of local inhabitants, undermines stability operations insofar as it compromises trust in governing authorities, and minimizes the chances for the establishment of strong governing institutions and sustainable peace. Therefore, through the protection, investigation, and punishment of rights violations, stabilizing forces not only fulfill their international legal obligations, but also execute more effective counterinsurgency and stabilization programs.

Effective Measures to Preserve Life, Privacy, Property, and Personal Integrity

A failure to fulfill the tripartite obligation to prevent, investigate, and punish obliges the governing authority to provide effective remedies to those whose rights have been violated. As is clear from the data in Table 4, effective law enforcement is amongst the most visible ways of government demonstrating its legitimacy to households. The investigation and punishment of wrongs provides the most tangible remedy. Yet such governmental functions also perform a preventive purpose insofar as they deter future wrongdoing—specifically attacking the impunity that reigns in the absence of any such deterrence.

The right to an effective remedy is a fundamental aspect of HRL. Article 13 of the European Convention on Human Rights and Fundamental Freedoms establishes this right for European residents, for example. Moreover, Article 2 of the ICCPR makes it necessary "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."[111] The OHCHR, in addition, has reinforced the *Velasquez* obligations (prevent, investigate, punish) by making clear that "administrative requirements are particularly required to give effect to the general obligations to investigate allegations of violations …"[112]

It is crucial, then, to have effective means of preventing, investigating, and prosecuting rights violations. It is insufficient to simply have laws

Table 4: Integrity Watch Afghanistan: National Corruption Survey 2010

In which state services has the existence of corruption had a negative impact on your household?

Security by Police	58
Justice by Courts	33
Electricity	14
Payment of Duties/Taxes	12
Hospitals/Health Services	11
Primary/Secondary	10
Higher Education	8
Land/Property Registry, Sale, Purchase	6
Transport Services/Licensing	5
Employment/Disability	5
ID Cards/Passports	3
NSP	2
Hajj Services	2
Other	14

Source: *Integrity Watch Afghanistan, "Afghan Perceptions and Experience of Corruption: A National Survey 2010" available at: http://www.iwaweb.org/corruptionsurvey2010/Main_findings_files/IWA%20National%20Corruption%20Survey%202010.pdf*

109. Velasquez, par. 166.

110. *Paniagua-Morales v. Guatemala,* Inter-American Court of Human Rights (ser. C), no. 37, par. 173 (March 8, 1998).

111. ICCPR, Article 2, par. 3(a).

112. UNHRC, *General Comment no. 31,* par. 15, May 26, 2004.

or administrative procedures on the books that address such measures; the governing authority actually must execute the laws in order to satisfy their international obligations.[113] The following four sections address specific instances in which corruption and organized criminal activities lead to violations of fundamental rights, and where occupying authorities must take effective measures to prevent, investigate, and prosecute such activities. The four key areas (preservation of life, privacy, property, and the bodily integrity of local inhabitants) are almost universally present in various human rights conventions, and therefore present sound cornerstones for the development of a policing strategy for stabilizing forces.

i. Life

Article 6 of the ICCPR echoes the universal recognition in other human rights documents that every human being has a right to life that shall be ensured by the state. Article 2 of the European Convention on Human Rights expresses the same, and the obligation under Article 2 was tested in *Silih v. Slovenia,* a case that rose to the Grand Chamber in the European Court.[114]

Silih involved a family whose son had died due to negligent hospital action, but whose complaints essentially went unrecognized by the local authorities.[115] The ECHR found that the state has an obligation to provide an effective, independent judicial system to adjudicate matters such as wrongful death, and that the state has an obligation to promptly and effectively respond to complaints about wrongful deaths.[116] Slovenia's failure to provide these resulted in liability to the complainants.[117] The ECHR discussed similar obligations in *Opuz v. Turkey,* where it made clear that the state must back up criminal laws with effective law enforcement machinery for the "prevention, suppression, and punishment" of violations of the criminal law.[118]

Occupying authorities, though potentially numbed to the violence wrought by the phases of conflict directly preceding the termination of formal hostilities, have an obligation to similarly prevent, investigate, and punish violent crimes that result in wrongful deaths during stabilization activities. As discussed above, criminal organizations often will compete violently for control of various areas or commodities. It is just as essential to properly investigate and penalize the deaths that result from such activities as those that result from insurgent or terrorist violence, or even negligence such as existed in *Silih.*[119]

ii. Privacy

The right to privacy also is recognized in various international human rights conventions. Article 17 of the ICCPR protects individuals from being subjected to arbitrary or unlawful interference with their privacy and family.[120] The American Convention on Human Rights (ACHR) similarly states, "No one may be the object of arbitrary or abusive interference with his private life, his family, his home."[121] The European nations similarly have agreed that "Everyone has the right to respect for his private and family life, his home and his correspondence."[122]

One need only consider the appalling situation in Afghanistan of "loan brides" to find an obvious example of gross violations of this most sanctified sphere of family privacy. In some rural Afghan provinces, it is not uncommon to hear of

113. *Silih v. Slovenia,* application no. 71463/01, European Court of Human Rights (April 9, 2009), par. 195 (noting that "State's obligation … will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice …").

114. See generally *Silih*.

115. *Silih*, par. 10–85.

116. Ibid., par. 192, 195.

117. Ibid., par. 211.

118. *Opuz v. Turkey,* application no. 33401/02 , European Court of Human Rights, par. 128 (June 9, 2009).

119. *Silih,* par. 10–85.

120. ICCPR, Article 17.

121. ACHR, Article 11, par. 2.

122. European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter CHRFF], Article 8, par. 1, November 4, 1950, E.T.S. no. 5, 214 U.N.T.S. 221.

farmers who are forced to give their daughters as repayment of loans given by local drug traffickers whom they are unable to repay with cash crop when their poppy harvest is destroyed by eradication efforts.[123] The economic pressures created by such local trafficking syndicates, and in many situations permitted or aided by local police forces, destroy human dignity and warp local family relations. Such inhuman conduct cannot be allowed to go unpunished.[124]

iii. Property

International courts also have recognized the importance of property rights as a fundamental condition of the individual in society. While some conventions have not specifically mentioned rights to property, the bodies interpreting those conventions have been willing to defend property rights as a function of prohibitions on inhuman and degrading treatment. The ECHR's decision in *Ilhan v. Turkey* exemplifies such a reading.[125]

In *Ilhan,* Turkish security forces stormed the complainant's home, burning it to the ground and destroying its contents as well as his vineyards, orchards, and oak trees.[126] The ECHR found that the destruction constituted a violation of Article 3 of the European convention, which says, "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[127] The ECHR decided that such destruction and subsequent anguish caused to the family by the actions of the state qualified as inhuman treatment insofar as it left the family without shelter and support and obliged them to leave their place of residence.[128]

Moreover, illegally forced evictions, a substantial problem in post-conflict settings, are arguably the functional equivalent of destruction since they also deprive the family of shelter and support, obliging them to leave their place of residence. Such evictions and destruction have been prominent in postwar Iraq and Afghanistan. Powerful forces formed land mafias in postwar Afghanistan and deprived Afghan citizens of their land, evicting the residents and putting the property to use for their own purposes.[129] Similarly, in Iraq, reporting indicates thousands of forced evictions by non-state actors.[130] This reporting specifically calls on host country authorities and international forces to "shoulder responsibilities placed on them under international law" to ensure protection, security, and services for the most vulnerable of Iraqis.[131] The same could be said of all vulnerable citizens in post-conflict settings.

Moreover, much like the ECHR, the ICCPR provides that "no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[132] Stabilizing forces, therefore, are under an obligation to prevent, investigate, and punish actions, such as the destruction and deprivation of property, that constitute inhuman and degrading treatment of host national occupants.

iv. Personal Integrity

ICCPR's Article 9 reads, "Everyone has the right to liberty and security of person."[133] The American convention echoes that sentiment, ensuring that "every person has the right to security and personal liberty."[134] The ECHR states substantially

123. Sami Yousafzai and Ron Moreau, "The Opium Brides of Afghanistan," *Newsweek,* April 7, 2008, http://www.newsweek.com/id/129577.

124. The complexities created by eradication efforts, while acknowledged, are beyond the scope of this paper.

125. *Ilhan v. Turkey,* application no. 22494/93, European Court of Human Rights (2004).

126. Ibid., par. 12–20.

127. Ibid., par. 104–9.

128. Ibid., par. 107–9.

129. Stephanie Irvine, "Powerful 'grab Afghanistan land," *BBC News,* September 6, 2007, http://news.bbc.co.uk/2/hi/south_asia/6981035.stm.

130. See generally, Refugee Studies Centre, *Iraq's displacement crisis: the search for solutions, Forced Migration Review* (June 2007), http://www.fmreview.org/FMRpdfs/Iraq/full.pdf.

131. Ibid., 20.

132. ICCPR, Article 7.

133. Ibid., Article 9, par. 1.

134. ACHR, Article 7, par. 1.

the same as both the ICCPR and the ACHR.[135] The right enunciated in each of these clauses strikes at one of the most sensitive and prevalent crimes seen in post-conflict situations: disappearances.

Disappearances prompted the *Velasquez* watershed, which first articulated the affirmative obligations placed upon governments discussed in this essay.[136] The European Court, in addition, agreed in *Kurt v. Turkey* that the state must investigate disappearances, and that not doing so constitutes a violation of the right to liberty and security of the person.[137] The UNHRC has agreed, finding in *Atachahua v. Peru* that the violent removal by state agents and subsequent failure to investigate the whereabouts of Laureano Atachahua constituted a violation of the right to liberty and security of the person.[138]

While the *Kurt* and *Atachahua* decisions both focused specifically on a disappearance involving state actors, there is no reason why the right to liberty and security of the person should be limited only to situations where state officials were involved.[139] *Velasquez,* poignantly, makes clear that a state's obligation to investigate applies regardless of whether the state or a private actor is the potential wrongdoer.[140] The UN and the ECHR agree.[141]

Thus, disappearances offer yet another example of a crime against human rights that an occupying power is obligated to prevent, investigate, and punish in accordance with international law. Inaction in the early days of occupation ultimately shrouds nascent illicit actors in a veil of impunity. In Iraq, the widespread disappearances that began in 2003 and only escalated after the transition provide an unsettling example of such a problem.[142] Numerous examples of such impunity also are evident in the everyday life of Afghans.

U.S. Objections

Military officials may argue that this understanding of IHL and HRL obligations expands the mission beyond reasonable bounds and places too many responsibilities on limited forces. Indeed, the responsibility lies with policymakers to recognize the full weight and obligations created by international law (as well as sound strategic and moral decision making), and to provide the military sufficient resources to perform the functions it must perform to adhere to international norms.

The U.S. military also has maintained that it is not subject to the obligations imposed by the ICCPR in extraterritorial settings.[143] It maintains that IHL is *lex specialis* that operates to the exclusion of HRL.[144] For several reasons, however, that logic hardly seems to offer sufficient response to the obligations to maintain public order and safety as outlined above.

Indeed, as the foregoing discussion has made clear, Article 43 offers only a vague impression of government obligations that HRL can animate in greater detail. The U.S. Army's *Operational Law Handbook,* moreover, recognizes that those aspects of human rights law that rise to the level of customary international law are considered obligatory, but does not outline what qualifies as customary international law.[145] Moreover,

135. ECHR, Article 5, par. 1.

136. See generally *Velasquez.*

137. *Kurt v. Turkey,* 1998-III European Court of Human Rights, par. 128–29 (May 25, 1998).

138. *Atachahua,* par. 8.6.

139. *Kurt,* par. 128–29.

140. *Velasquez,* par. 177 (stating, "Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.")

141. See UNHRC, *General Comment no. 16;* compare, Cerone, 1466.

142. Peter Beaumont, "Frontline police of new Iraq are waging secret war of vengeance," *Guardian,* November 20, 2005, http://www.guardian.co.uk/world/2005/nov/20/iraq.theobserver.

143. Cerone, 209.

144. The Judge Advocate General's Legal Center and School, Center for Law and Military Operations, *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations, 2008), 79–80.

145. The Judge Advocate General's Legal Center and School, International and Operational Law Department, *Operational Law Handbook* (Charlottesville, VA: International and Operational Law Department, 2009), 41.

the general rejection of obligations in addition to IHL during occupation is out of step with the statements and decisions of international bodies such as the UNHRC and the ICJ, which support potential extraterritorial validation.[146] In addition, respected experts such as Justice Thomas Buergenthal have made clear that ICCPR obligations apply to any territory within a state's jurisdiction (or authority).[147] Finally, it is quite simply untenable to maintain that a state should recognize ICCPR rights within its own borders, but not within the borders of another state where it exercises governing authority. To do so would be to relegate the rights of other nationalities to an imagined substratum that the very *raison d'être* of an international covenant—and the impulse for occupation and displacement of rogue governments—denies.

Most importantly, however, because the occupying authority inherits the authorities and obligations of the legitimate government under Article 43, an occupying power such as the United States cannot escape its international obligations through an extraterritoriality exception argument. Through occupation, the occupier is responsible to uphold essential rights through the updated reading of IHL espoused in this article, but also due to its inheritance of the Conventional obligations of the previous authorities of the occupied territory. In that respect, it is interesting to note that both Iraq and Afghanistan have ratified or acceded to the ICCPR in 1971 and 1983, respectively.[148] As was stated previously, 165 other countries—including Libya, Syria, Somalia, and Zimbabwe (to name a few randomly selected nations)—also are parties to the ICCPR.

The Question of Remedies

To be sure, the U.S. position on extraterritorial obligations likely is rooted in concerns about exposure to legal liability. Where the cases brought actually address the failure of a government to adequately prevent, investigate, and punish rights violations, the relevant conventions make remedies available to claimants. The United States and other stabilizing forces are, therefore, justifiably concerned about the potential liability to which they could be exposed through stability operations.

A range of remedies can be awarded to claimants. In some cases, authorities are ordered to pay damages to those who suffered wrongs that were not adequately addressed.[149] In other cases, authorities are ordered to properly investigate the claims.[150] Importantly, however, the case law discussed above does not place a burden of perfection upon governing authorities. Rather, it essentially requires good faith efforts by authorities to establish adequate law enforcement institutions and procedures and ensure their effective functioning. Consequently, as argued in the first part of this essay, this legal obligation would not place any greater burden on stabilizing forces than would already exist were they to follow a sound rule of law strategy during the transition gap period.

From a technical legal perspective, it also is highly unlikely that any liability could emerge from recent activities in Iraq or Afghanistan. While they are all signatories to the ICCPR recognizing the human rights obligations of signatory states, the United States, Iraq, and Afghanistan are not signatories to the Optional Protocol, which actually gives citizens the ability to bring actions before the UNHRC. Moreover, if actions were brought in the United States, the Supreme Court already has made clear in *Sale* that it does not recognize extraterritorial obligations that were not contemplated when the government signed a particular treaty.[151] Thus, while the legal points are debatable, the risk of liability arising from these current stabilization actions is probably minimal, and should not scare officials away from seriously entertaining the various legal, strategic, and moral facets of the suggestions made in this essay.

Finally, coming to terms with these obligations may provide an opportunity to address the

146. See UNHRC, *General Comment no. 6;* UNHRC, *General Comment no. 20.*

147. Buergenthal, 73–74.

148. UN Database, Status of Treaties, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

149. See the holdings of *Velasquez* (note 71), *Opuz* (note 120), *Ilhan* (note 127), *Kurt* (note 139), and *Silih* (note 81) for examples.

150. See the holdings of *Atachahua* (note 77), *Paniagua-Morales* (note 112) for examples.

151. *Sale,* 509 U.S. 155; Cerone, 1471-72.

serious problem of corrupt and uncooperative officials in host countries to which stability forces provide assistance. Acknowledging international legal obligations to prevent, investigate, and punish violations could help to compel host country officials to perform the basic functions that corruption and criminality undermine. However, occupation law applies in only a narrow set of circumstances, and even where it may arguably apply, occupying forces often are reluctant to acknowledge its applicability. What alternatives exist for fighting corruption and organized crime in environments where occupation is not acknowledged or sovereignty of the host institutions has been fully established so that occupying forces no longer have the legal authorities that occupation law would grant? The next section explores this topic using Afghanistan as an example.[152]

Part III: Beyond Occupation

As discussed, the United States never has accepted the label of occupation force in Afghanistan, nor did it send adequate forces early in the conflict to execute the broad law enforcement obligations discussed above. Moreover, there are plausible arguments to be made that the international community would be unwilling to accept the occupation label, or send in occupying forces, in many future interventions. The following section discusses situations in which the international community has rejected occupation law or sovereignty already has been established, first addressing the need to adequately authorize and resource stabilization efforts even where occupation is rejected, and then making specific recommendations for using local laws to enable citizens to assert their rights where international forces are limited because of sovereignty and other concerns.

Enabling International Actors

The foregoing sections captured the powerful potential that occupation law has to require more of stabilizing forces while simultaneously enabling more effective stabilization efforts. It shows that decision makers must think very carefully about the types of interventions they desire and the legal authorities that are necessary in executing sound strategy and fulfilling our moral obligations to host country citizens. Even where interventions fall short of activating full-scale occupation law, the international community must authorize its forces to fully attack organized crime and corruption, and must be clearer about the language it uses and the types of authorizations it is granting.

The UN Security Council Resolution addressing the intervention in Iraq does recognize that the stabilizing forces were occupying powers, noting the "… obligations under applicable international law of these states as occupying powers under unified command."[153] By contrast, the resolutions addressing the initial stages of the intervention in Afghanistan contain no language recognizing occupying law.[154] Nonetheless, both resolutions contain similar-sounding injunctions on supporting local institutions, safety, and security. The Iraq resolution called for the stabilizing authority to "… promote the welfare of the Iraqi people through the effective administration of the territory," as well as "… to assist the people of Iraq in their efforts to reform their institutions and rebuild their country."[155] The Afghanistan Resolution recognized obligations for UN Member States to provide "… support for such [transitional] administration and government, including through the implementation of quick-impact projects."[156] Additionally, both resolutions enjoin member states to take measures

152. Through the generosity of a 2010 Arthur C. Helton Fellowship from the American Society of International Law , I was able to perform work in Kabul further developing this concept. For more information on this project, please see http://www.asil.org/reflection_dahl.cfm; and on the Fellowship generally, see http://www.asil.org/helton-fellowship.cfm. The section on proposals for Afghanistan (Beyond Occupation) addresses issues that I examined during the Fellowship.

153. UNSC, *Resolution 1483.*

154. UNSC, *Resolution 1378.*

155. UNSC, *Resolution 1483,* par. 4, Chapter 7 provisions.

156. UNSC, *Resolution 1378,* par. 4.

ensuring the safety and security of the local populations. Despite such language, however, the security presence and posture in both countries involved little focus on actual law enforcement activities.

It is critical for international diplomats and intervention strategists to clarify the meaning of language espousing such safety and security measures, which in practice seems to have little import. In an era of failing states and the rise of substate actors, when various types of international support or interventions may be necessary, developing a clearer understanding of intervening obligations has become all the more urgent.[157] The credibility of international agreements and interventions, in fact, rests upon the significance that attaches to the authorizations they create. If the UN Security Council commands international forces to provide for local safety and security, and yet crime and corruption are permitted to overtake local institutions, what kind of credibility can such authorizations have?

To be certain, much of the challenge with overly explicit authorizations lies in the international tendency to recognize local sovereignty and avoid any actions that may seem to infringe on such sovereignty. It is unclear, for example, what the Security Council meant when it recognized its "strong commitment to the sovereignty" of Afghanistan in the very first resolution of the Afghan conflict, when no discernible Afghan government existed.[158] Similar questions surround the council's reaffirmation of the "sovereignty and territorial integrity of Iraq" in Resolution 1483, which simultaneously recognized the authorities and obligations of the occupying powers that had just toppled the Hussein regime.[159]

The concept of sovereignty, therefore, is a dangerously ambiguous term when used in conjunction with stabilization authorizations. The term often is used as a conceptual argument against more robust authorization or resourcing of stabilizing forces. Arguably, it does more harm to recognize the full sovereignty of a state in which the host state institutions are incapable of performing many of the functions of government. This was precisely the case during the transition gap period in places like Iraq and Afghanistan, when a reticence to execute robust law enforcement functions merely left space for criminal organizations and activities to proliferate.

Therefore, international negotiators must be clear about the types of authorities that exist, and consider the full institutional needs of weakened host countries rather than gravitating toward ambiguous but restrictive concepts of state sovereignty. In short, when authorizing future interventions, the UN must make clear that forces are responsible and authorized to take measures necessary to attack organized crime and criminality.

Yet even where an ambiguously restrictive sovereignty has been established and adequate legal authorities for stabilizing forces do not exist, there still should be ways for using local laws to empower host country citizens against illicit actors. Afghanistan provides an excellent case study of where such opportunities exist even today.

Enabling Local Actors

In Afghanistan, stabilizing forces can use local law to empower citizens to file actions for human rights violations against government and other powerful actors. There are two primary legal systems for punishing human rights violations: criminal and civil. The working of the criminal system requires that the Attorney General or relevant prosecutor file criminal charges against the offender, and that the judge move forward with the case. Where warlords are too powerful, there is much evidence to indicate that one or both of these steps do not happen.

Victims of rights abuses, however, also can directly file civil claims demanding compensation from abusers for the offenses they have committed. For both cultural and informational reasons,

157. One such sphere, beyond the scope of this paper, is the nascent "Responsibility to Protect," which is a foundation for UN authorizations where atrocities or other types of violence must be stopped. Much like occupation law, however, the nuances of what exactly this authorizes are far from clear.

158. UNSC, *Resolution 1378*.

159. UNSC, *Resolution 1483*.

Afghans often are not aware of such options, and this opportunity is rarely utilized.

Because the criminal system often fails to prosecute, and there is not a culture of civil lawsuits, warlords face virtually no legal or financial consequences for their negative actions. International actors and Afghan civil society can impose consequences on warlords for their inappropriate actions by supporting civil lawsuits by victims of human rights abuses. Several grounds exist for filing civil suits against human rights violators.

i. Civil Action Initiatives

The legal basis for filing civil suits against government officials—or possibly those connected to the government in some way—exists in Article 51 of the Afghan constitution. Article 51 reads, "Any person suffering undue harm by government action is entitled to compensation, which he can claim by appealing to court."

Moreover, even if the violator cannot be linked to the government, there is a substantial basis in both Afghanistan's civil code, and in Islamic *Sharia* law—on which most of the Afghan civil code is based—for filing civil lawsuits against those who have injured citizens in some way. Additionally, even where the specific law does not exist, new and creative legal arguments about rights violations can be made by appealing to *ijtihad,* an Islamic concept similar to analogical reasoning that permits judges to reach new conclusions of law based on older examples. In short, skilled legal counsel can be incredibly effective in helping to create consequences for offenders and achieve remedies for victims.

While the Afghan constitution and laws give the right to sue the government, there is little indication that Afghan citizens are currently utilizing this right. There seem to be several reasons for inaction. In my prior work in Afghanistan, many citizens indicated that they did not trust the system or believe doing anything would help. Others simply were unaware that they had any legal options. Many, however, indicated that they would be willing to file a civil suit if they had some form of assistance.[160]

This willingness demonstrates the value of supporting some sort of legal aid for civil suits against human rights offenders. International actors and Afghan civil society can consider providing a forum for bringing together various legal aid providers and enabling them to support legal actions by victims. Where legal aid resources are limited, the international actors may consider providing financial support to enable legal aid providers to hire attorneys. The international community and Afghan civil society also can assist legal aid providers in selecting high-profile cases for which strong evidence exists. The filing and success of such lawsuits can send strong messages to the public about their ability to recover for damages, and to violators about the costs that will be imposed for improprieties.

Moreover, one of the key challenges for those wishing to file civil suits is their inability to compel the provision of evidence by government officials or other powerful actors. The limited resources for discovering and collecting such evidence also appears problematic. The international community and Afghan civil society should consider options for assisting in the evidence collection process for civil suits. Support could be provided, for example, to the Afghanistan Independent Human Rights Commission (AIHRC) in pursuing such efforts. Article 24 of the AIHRC law empowers the AIHRC to collect evidence about human rights violations. While Article 25 of the AIHRC law prohibits any other agencies from coercing the AIHRC into disclosing evidence, there does not seem to be a restriction on voluntary disclosure of such evidence.[161] The AIHRC, consequently, could assist victims by providing evidence that will be necessary to succeed in civil suits against human rights violators.

Finally, many Afghans are concerned that even if the willingness and ability to file civil suits exist, the court system still is so corrupt that filing such suits is a hopeless cause. International actors and Afghan civil society can pursue a range of oversight and transparency initiatives to publicize the activities of the judiciary. Civil actions alone may face significant challenges because of problems in

160. These rough indicators come from informal surveys performed during my Fellowship in Afghanistan with the assistance of the AIHRC.

161. The AIHRC should, however, review any restrictions on the provision of legal aid and ensure that such evidentiary support would not violate such restrictions.

the judiciary, but if properly combined with other publicity and information initiatives, progress may be possible.

ii. Enabling an International Forum

In the course of my work in Afghanistan, I also learned that many Afghans would be willing to take a claim to the UN, or some other independent body, if Afghan institutions failed to provide justice. Problematically, while Afghanistan is party to many treaties for which such independent adjudicatory bodies exist, it has not signed the necessary protocols to allow Afghan citizens to bring claims in such bodies. International actors and Afghan civil society should recommend that Afghanistan sign additional protocols, or make necessary declarations, to enable Afghan citizens to bring claims before the UN. A list of recommended actions relating to treaties to which Afghanistan already has acceded includes:

- Sign the First Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR)
- Sign the Optional Protocol to the Convention on the Elimination of Discrimination Against Women (CEDAW)
- Make the necessary declaration under Article 22 of the Convention Against Torture (CAT)
- Make the necessary declaration under Article 14 of the Convention Against Racial Discrimination (CERD)

Conclusion

This article has argued that nations have strategic, moral, and legal obligations to create rule of law structures in post-conflict states. Such structures are necessary for securing the local population, building strong local government, and enabling the entrepreneurial growth that is essential to economic expansion.

With respect to the strategic and moral obligations, this paper has argued that a transition gap occurs where rule of law is not enforced, and this gap allows for illicit power structures to erode host government institutions in a way that is contrary to the overall objectives of counterinsurgency. From a legal perspective, it has sought to establish that stabilizing forces have an obligation to ensure and respect the rights to life, privacy, property, and bodily integrity of host country citizens. This obligation must be embraced in occupation settings as part of a comprehensive reading of IHL and HRL. Finally, this paper has argued that international diplomats must clearly authorize law enforcement activities during interventions, and intervening forces should use local laws to empower host country citizens to hold their governments accountable.

Ultimately, while these increased obligations do put added burdens on stabilizing forces, this paper has sought to place the burden of clear thought and sufficient resourcing on the policymakers who choose to intervene. To date, the West does not have an acceptable track record of properly addressing post-conflict corruption and criminality. Unfortunately, in a world of weak states and powerful non-state forces, there are bound to be more opportunities on the horizon that will provide further tests of our ability to learn from these mistakes. We owe it to our own forces, and to the people of destabilized societies, to properly plan for the peace.

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