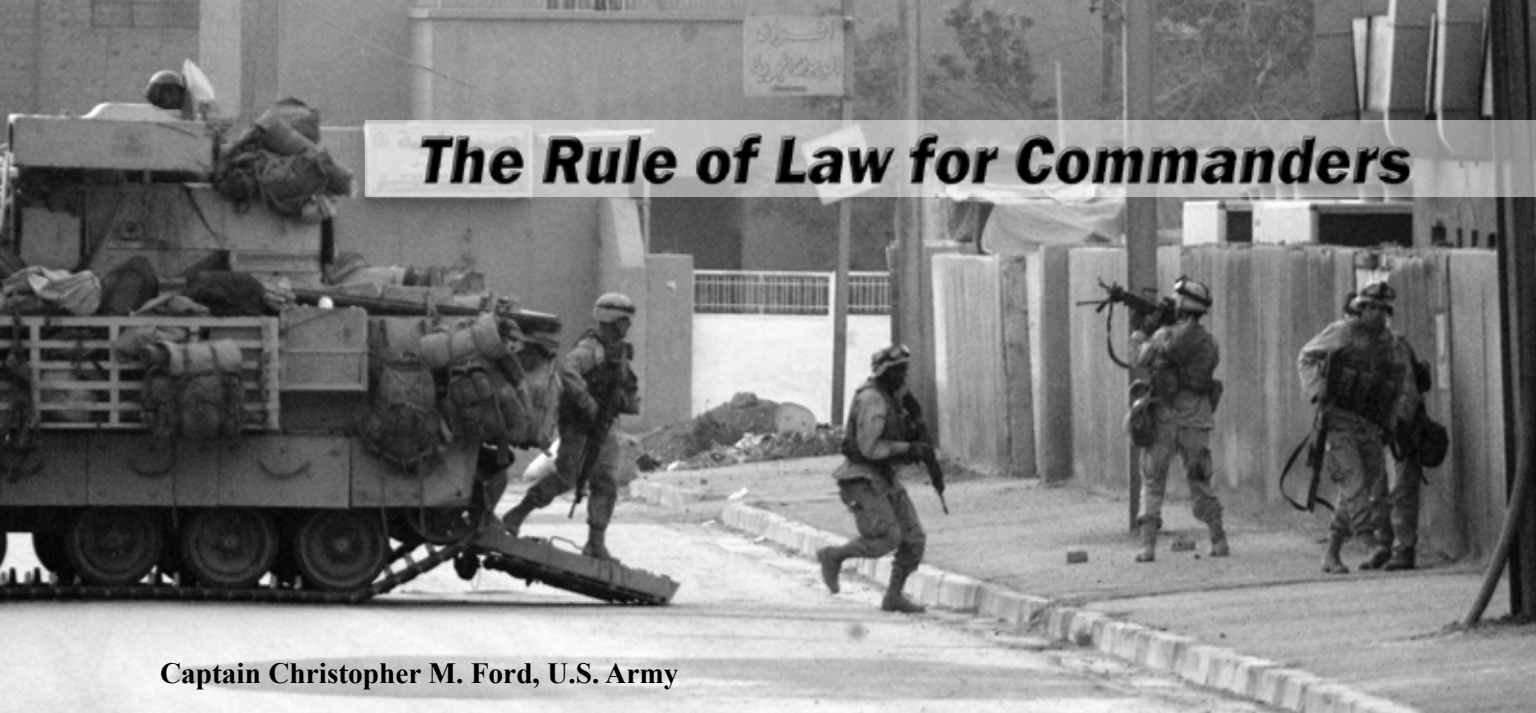


The Rule of Law for Commanders



Captain Christopher M. Ford, U.S. Army

Long-term security does not come from the end of a gun.

—LTG Peter Chiarelli,
Commander MNC-I

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PHOTO: U.S. Army Soldiers assigned to the 3d Infantry Division dismount from an M2A2 Bradley Infantry Fighting Vehicle to begin a reconnaissance security patrol and to assess damage done by looters to the Yarmuk Hospital, located in Baghdad, Iraq, 14 April 2003. (USAF, SSGT Jeremy T. Lock)

A POPULAR SAYING holds that the purpose of the Army is to “kill people and break things.” While this is cute and crisp, it runs counter to the Army’s stated mission and current practices.¹ Today, the complexities of combat extend well beyond the lethal emphasis of the past. The current missions in Iraq and Afghanistan require a sophisticated mix of lethal and nonlethal operations that range from conducting combat operations to constructing health clinics and schools. Former commandant of the Marine Corps General Charles Krulak famously referred to this kind of war as a “three-block war,” one in which troops simultaneously “[provide] support to the indigenous population, [help] restore or maintain stability, and [fight] an armed foe in force-on-force combat.”²

It is perhaps intuitive for Army officers to consider Krulak’s “three block war” as being comprised of at least two distinct, separate parts: combat operations, executed by combat units to defeat armed insurgents; and stability operations, performed by civil affairs units and civilian agencies like the State Department and the United States Agency for International Development (USAID) to support, stabilize, and reconstruct fragmented societies.³ Such thinking flows naturally from the Army’s past experience, doctrine, and organizational structure. Operations in Iraq and Afghanistan, however, have rendered the distinction between fighting and fixing obsolete. Today, all Army units constantly engage in a full spectrum of operations, from stability to high-intensity combat. What binds these seemingly disparate missions is the Army’s overall objective: to instill rule of law.

Having overthrown indigenous regimes in Iraq and Afghanistan, the U.S. is responsible for establishing post-conflict stability in both countries. This has been hard to do. In such tenuous situations, chaos incites the greatest threats to stability. It invites crime and provokes fragmentation by disenfranchising certain groups. Chaos represents the societal antithesis of rule of law. In a stable environment, the rule of law functions as the adhesive that brings order. Clearly articulated and enforced codes apply equally to all and thus govern society. Absent the rule of law, chaos prevails: police are openly defied; citizens are arbitrarily punished; corruption runs rampant; business grinds to a halt; and

the government is stripped of power and respect. In congressional testimony, the inspector general for the State Department asserted that “effective rule-of-law strategies are essential for the functioning of a democracy and are central to protecting the rights and liberties of individuals. Specifically for Iraq, effective rule of law will serve to promote democratic reform and enhance stability.”⁷⁴

Even if we recognize the importance of the rule of law, we are still left with some very fundamental questions: How do you define “rule of law”? What is the Army’s role in developing it in the post-conflict phase of operations? What is the combat commander’s role in promoting it in the midst of chaos? This article attempts to answer these three questions.

Rule of Law Defined

Defining “rule of law” is a thorny exercise in jurisprudence and philosophy. As one legal commentator noted (in a 26,000 word discourse), “The meaning of the phrase ‘rule of law’ . . . has always been contested.”⁷⁵ Nevertheless, when we examine how different organizations have defined the phrase and then identify common elements that might serve as the basis for an operational definition commanders can use, we find there is enough commonality to draw some useful conclusions.

The definitions discussed below are either formalistic or substantive. Formalistic definitions focus on the procedural aspects of the rule of law, such as the organizational structure that supports it (independent courts, for instance). Substantive definitions, on the other hand, “incorporate certain substantive requirements such as human rights or democratic principles.”⁷⁶

The State Department has traditionally taken the lead in promoting rule of law; in fact, doing so is part of its mission statement. The department offers two brief formulations:

- “Rule of law includes the entire legal complex of a modern state, from a constitution and a legislature to courts, judges, police, prisons, due process procedures, a commercial code, and anti-corruption mechanisms.”⁷⁷

- “Rule of law means that no individual or private citizen stands above the law.”⁷⁸

The department uses a third definition that combines the first two and adds substantive aspects (italicized for emphasis):

- “Rule of law is a principle under which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law. *It also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.*”⁷⁹

USAID has concocted a similar definition comprised of both formalistic and substantive elements. For the agency, rule of law encompasses “the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights.” At the same time, it “ensures that individuals are subject to, and treated equally according to the law, and that no one is subject to arbitrary treatment by the state”⁸⁰

The Army, too, has weighed in. Field Manual (FM) 3-24, *Counterinsurgency*, identifies several “key aspects” necessary for the rule of law to function: the state’s government “derives its powers from the governed,” the state’s security institutions are sustainable, citizens enjoy fundamental human rights, etc.⁸¹ The Center for Strategic Leadership at the U.S. Army War College provides a lengthy definition of the rule of law as it applies to peacekeepers. Its definition includes “application of the Charter of the United Nations, international humanitarian law, human rights law, military law, criminal law and procedure, and constitutional law.”⁸² The Army Judge Advocate General’s Corps *Rule of Law Handbook* acknowledges that “there are divergent, and often conflicting, views among academics, various USG [U.S. Government] agencies, U.S. allies and even within the Department of Defense (DOD), on what is meant by the ‘rule of law.’”⁸³ The handbook does not provide a single definition, but instead lists criteria that must be met for the rule of law to exist.

Oddly, the Army’s FM 3-07, *Support Operations and Stability Operations*, neither defines nor describes the rule of law at all.⁸⁴

For commanders, an operationally useful definition ought to meet two criteria: it must be easy to understand and explain and it must be quantifiable.

Ease of understanding is important because, to engage the rule of law effectively, all Soldiers in a unit need to understand the basic concept. It should be quantifiable because commanders have to apply objective metrics to gauge the success or failure of their efforts. A definition that fails to meet these criteria is of no practical use to the Army, however academically accurate it may be.

Given the above, we might best define the rule of law as a situation marked by *a transparent judicial system in which all persons and organizations are equally accountable to publicly promulgated laws.*

The Army, Iraq, and the Rule of Law

As noted above, the State Department has traditionally had the lead for establishing and fostering the rule of law in foreign countries. In practice, however, the Army has always played a major part, although largely unofficially. Now, it's official: rule-of-law operations in a post-conflict environment are a subset of broader reconstruction and stability operations, and DOD has incorporated stability operations into the U.S. military mission.

Department of Defense Directive 3000.05, dated November 2005, declares that "stability operations are a core U.S. military mission."¹⁵ According to the directive, "Stability operations are conducted to help establish order that advances U.S. interests and values. The immediate goal often is to provide the local populace with security, restore essential services, and meet humanitarian needs. The long-term goal is to help develop indigenous capacity for securing essential services, a viable market economy, rule of law, democratic institutions, and a robust civil society."¹⁶

By designating security an immediate goal and rule of law a long-term goal, the directive implies that the two goals should be temporally separated—

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first we get security, then we pursue rule of law. However, as current operations in Iraq suggest, the two goals are too closely connected, both logically and empirically, to be separated. In fact, any temporal separation between them could be dangerous.

"National Security Presidential Directive (NSPD) 44," published in 2005, validates the State Department as the lead coordinating agency for stabilization and reconstruction, but also mandates that the secretaries of state and defense "integrate stabilization and reconstruction contingency plans with military contingency plans when relevant and appropriate."¹⁷ Thus, "NSPD 44" acknowledges the reality of most post-combat environments: that a security "gap" exists after open hostilities end. That gap opens the door to low-grade violence in a setting of immature domestic security apparatuses and weak governmental organizations. Such conditions make it exceedingly difficult, if not impossible, for nonmilitary organizations such as the State Department and USAID to operate effectively. Ironically, it is also during this time that the rule of law is of the utmost importance.

A Bad First Step: No Security

On 9 April 2003, when Baghdad fell and a wave of looting and anarchy spread across Iraq, the direct connection between security and rule of law became obvious. Anarchy reigns in the absence of any functioning rule of law (e.g., enforceable laws, police, judicial institutions, jails). Looting is anarchy's natural companion. In response to a question about looting in Iraq, Secretary of Defense Donald Rumsfeld said, "Stuff happens . . . Freedom's untidy, and free people are free to make mistakes and commit crimes and do bad things."¹⁸ Rumsfeld's flippant remark soon proved to be grossly mistaken.

Noah Feldman, a law professor and the Coalition Provisional Authority's senior advisor on constitutional law in Iraq, noted, "The key to it all was the looting. That was when it was clear that there was no order. There's an Arab proverb: 'Better forty years of dictatorship than one day of anarchy.'¹⁹ Professor Feldman's and others' concerns have since been confirmed by a number of studies linking security and rule of law. A RAND Corporation report on the reconstruction of health infrastructure in post-conflict environments has concluded that "protection of power generation and transmission

systems from bombing and, even more important, looting, should be one of the highest priorities.”²⁰ Kenneth M. Pollack, director of research at The Brookings Institution’s Saban Center for Middle East Policy, found that “as no orders were issued to the troops to prevent looting and other criminal activity—since it was mistakenly assumed that there would not be such problems—no one [did anything]. The result was an outbreak of lawlessness throughout the country that resulted in massive physical destruction coupled with a stunning psychological blow to Iraqi confidence in the United States, from neither of which has the country recovered.”²¹ Clearly, freedom, as applied to a flourishing society, has a correlation with the rule of law that is not in any sense untidy.

According to another RAND study, “The breakdown of law and order enabled [insurgents] to travel freely, and to train with the foreign fighters who were flowing in across unprotected borders.”²² In *Jane’s Intelligence Review*, Gordan Corera concluded that “the first week after 9 April was dominated by looting and a breakdown in security in the Iraqi capital, a problem that had serious consequences for the way in which the Iraqi people perceived the new administration. The failure to plan and execute sufficiently well in the security field has probably been the coalition’s greatest failing.”²³ Not only was there a spiral of violence stemming from the breakdown of order, but there was also a related loss of confidence propelling the situation still further into chaos.

A UN study has similarly found that “rebuilding governance institutions, promoting respect for human rights and the rule of law, and fostering participatory dialogue are critical in driving forward peace-building and nation-building processes.”²⁴ In a separate report to the secretary general, the UN Security Council warned that “restoring the capacity and legitimacy of national institutions is a long-term undertaking. However, urgent action to



U.S. Air Force, SSGT Jeremy T. Lock

A U.S. Army Soldier from the 3d Infantry Division patrols the battle-scarred perimeter around Yarmuk Hospital before members of the 96th Civil Affairs Battalion and Joint Task Force Four conduct a survey and assess damage from looting at Yarmuk Hospital in Baghdad, 14 April 2003.

restore human security, human rights, and the rule of law cannot be deferred.”²⁵ It “cannot be deferred” because it is the essence of civilization, and bringing freedom and democracy means nothing good if it does not bring order.

Plainly, quickly establishing and enforcing the rule of law in a post-conflict environment is critical. Equally obvious is the direct correlation between the rule of law and security: the two objectives must be pursued concurrently, not sequentially.

Commander’s Role in Fostering Rule of Law

Establishing the rule of law in Iraq is requiring enormous effort across the full spectrum of operations. In 2003, 19 organizations involved in various rule-of-law programs spent over \$400 million in Iraq.²⁶ In a 2005 report to Congress, the State Department reported well over a billion dollars spent for myriad programs at all levels, from UN-organized national elections to Soldiers on the ground talking to citizens about voting and democracy.²⁷

Without a doubt, tactical commanders in Iraq must be involved in fostering the rule of law. They can do this primarily by interacting with their Soldiers and the population in their area of operations. Such fostering will happen when they protect and encourage local institutions and people who support the rule of law. Their involvement will perhaps be most

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obvious when they are neutralizing organizations and individuals who seek to undermine the law.

The manner in which commanders have their troops conduct missions can also influence the local population's acceptance of the rule of law. In a post-conflict environment, occupying forces have tremendous powers. Commanders or their civilian counterparts can promulgate laws, set up checkpoints, outlaw weapons possession, declare martial law, designate certain geographic areas off-limits, set curfews, cordon and search at will, and detain freely. These measures might be legitimate and vitally important to stabilizing the environment, but how Soldiers implement them can have significant consequences. Senior commanders in Iraq have repeatedly noted that ultimate success depends on co-opting the small percentage of

“fence-sitters” who have not cast their lot with any side in the conflict.²⁸ Winning over the undecided is made all the more difficult when units apply heavy-handed force, violate the law of war, or disrespect indigenous culture. Such actions run counter to or undermine the basic principles of the rule of law.

Where troops understand the consequences of their actions, they can better articulate the importance of the rule of law to the people they see on the streets every day. Soldiers who have seen military justice administered fairly in their own units and have learned to respect the rule of law understand the concept's importance. When they see discipline bring order to a military organization, they realize that some form of discipline has to operate in any society. Moreover, if Soldiers receive basic training on the tenets of indigenous rule-of-law mechanisms and procedures, as well as human rights, democracy, and related concepts, they will be more likely to respect a country's inhabitants and will better understand their own missions. Regardless of how archaic the indigenous system may seem, Soldiers who show respect and abide by the Law of Armed Conflict are less apt to violate local laws and more apt to enforce the rule of law. They will set a strong example for the people they need to influence.

It may even be helpful to purposefully engage the people at certain times, such as prior to a local election. Commanders could encourage Soldiers to talk with the local population, explaining the election process and answering questions, to constructively demonstrate respect for both the people and the rule of law.

Commanders and Soldiers who understand the importance of the rule of law will also understand the strategic consequences of looting and take measures designed to mitigate or stop the problem. If, for example, a Soldier watches a local national grab a pair of shoes from a store, he may not regard this as anything more than a simple act



U.S. Army, SSG Charles B. Johnson

Legitimate pursuit of security or heavy-handed operation? A paratrooper from the 82d Airborne Division searches two local Iraqis at a checkpoint as part of Operation Streetfighter, Al Fallujah, Iraq, 23 December 2003.

of petty theft. But if he understands the importance of the rule of law and how such acts can create a strategic ripple of chaos, he will take action. Similarly, a commander observing criminal behavior across an area of operations might be wary of enforcing another nation's laws, but if he is aware of the long-term strategic ramifications of not taking action, he will likely intervene. The Army is not a police force, does not train all of its Soldiers in law enforcement techniques, and does not expect them to understand the intricacies of local criminal laws; nevertheless, commanders can adjust unit and resource priorities when there is a clear connection between acts of lawlessness and security.

The last two ways in which commanders can play a significant role in establishing the rule of law are by supporting those who uphold the rule of law and by neutralizing those who undermine it. While this sounds commonsensical, in practice, units frequently pursue strategies at odds with these goals. In Iraq, for instance, commanders often seek out local power brokers such as sheiks and imams rather than deal with official representative bodies.²⁹ They do this because the power brokers, thanks to custom and tradition, are important personages with actual power and influence.

Iraq, however, has functioning government institutions, although commanders are often unwilling to deal with them because they believe them to be powerless, incompetent, corrupt, or obstructionist. The latter might sometimes be true, but the unofficial power brokers are equally suspect. While there may be a cultural precedent for working with sheiks, there is also a cultural precedent for working with government agencies that have existed for decades. When commanders seek to address local issues by going outside the official framework, they should understand the long-term, strategic consequences of their decisions. Every substantive interaction

outside the official framework undermines the overall effort to establish a stable society.

Take, for instance, a routine reconstruction project in Iraq: building a health clinic. When a unit announces such a project, it is inundated by bids from local contractors. One bid will very possibly be from a construction firm associated with a powerful sheik who has made it known that he will support the coalition and encourage his people to do the same if he gets the contract. Regardless of the merits of the bid, awarding the contract to the sheik leaves the population with the impression that what transpired was business as usual. We may build the clinic, but we may also degrade respect for the rule of law.

We can find an analogous example in the practice of arming various groups and deputizing them to act as pseudo law-enforcement officers operating checkpoints, providing intelligence, and capturing insurgents. We can call this strategy “gray-market” security—something that is neither “white market” (official), nor black market (illegal)—but it countenances perhaps the boldest subversion of the rule of law: it gives non-governmental actors the one power the state traditionally reserves to itself—the legal use of violence. This practice simultaneously undermines Iraqi security forces and encourages vigilante justice. While some units have had success with the practice in Al Anbar province, the long-term effects of such gray-market security are unclear. One day we will have to un-deputize these officers and persuade them to abide by the system we previously encouraged them to undermine. Doing so may prove difficult.

Conclusion

Writing off the rule of law as an abstraction more suited to academic philosophy than warfighting or nation building is understandable, given the term's complexities and its relative absence from mainstream Army doctrine. However, recent operations clearly demonstrate that the rule of law is inextricably tied to security and therefore to enduring stability. These objectives are related, and commanders have to work toward them concurrently. Rule of law means a functioning system of justice, which in turn produces long-term stability. Gray-market fixes may lead to short-term successes, but they inevitably end in failure. **MR**

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NOTES

Epigraph is drawn from an article by Peter W. Chiarelli and Patrick R. Michaelis, "Winning the Peace: The Requirement for Full-Spectrum Operations," published in the July-August 2005 *Military Review*.

1. See, for example, Department of Defense Directive 3000.05, Para 4.1 (28 November 2005). This directive notes that "stability operations are a core U.S. Military mission."

2. Russell W. Gleen, Christopher Paul, et al., *People Make the City, Executive Summary: Joint Urban Operations Observations and Insights from Afghanistan and Iraq* (Santa Monica, CA: RAND Corporation, 2007), xii.

3. See also, for example, U.S. Department of Defense, Joint Publication (JP) 3-0, *Joint Operations* (Washington, DC: U.S. Government Printing Office [GPO], 17 September 2006). This publication divides operations into three categories: offensive operations, defensive operations, and stability operations.

4. Testimony of Howard J. Krongard, Inspector General, U.S. Department of State and Broadcasting Board of Governors, 18 October 2005, <<http://oig.state.gov/documents/organization/55371.pdf>>.

5. Richard H. Fallon Jr., "The Rule of Law As a Concept in Constitutional Discourse," *The Columbia Law Review* (January 1997).

6. Dan E. Stigall, "The Rule of Law: A Primer and a Proposal," *Military Law Review* 189 (Fall 2006). This article provides a very extensive discussion of the definitions of rule of law.

7. United States Department of State and the Broadcasting Board of Governors, Office of Inspector General, "Report of Inspection: Inspection of Rule-of-Law Programs, Embassy Baghdad," Report Number ISP-IQO-06-01, October 2005, 5.

8. United States Department of State, "Principles of Democracy: The Rule of Law," <<http://usinfo.state.gov/products/pubs/principles/lawrule.pdf>>.

9. United States Department of State, Office of the Director of U.S. Foreign Assistance, "Annex C: Foreign Assistance Standardized Program Structure and Definitions," 27 October 2006.

10. United States Agency for International Development, Center for Democracy and Governance, "Handbook of Democracy and Governance Program Indicators," August 1998, 19.

11. U.S. Army Field Manual (FM) 3-24, *Counterinsurgency* (Washington, DC: GPO, December 2006), D-8.

12. U.S. Army War College, "Rule of Law Conference Report July 6-9 2004" (Carlisle Barracks, PA: U.S. Army Peacekeeping and Stability Operations Institute, The Center for Strategic Leadership, July 2007).

13. *Rule of Law Handbook: A Practitioner's Guide For Judge Advocates* (Center for Law and Military Operations, Joint Forces Judge Advocate, July 2007), 4.

14. FM 3-07, *Stability Operations and Support Operations*, (Washington, DC: GPO, February 2003).

15. Department of Defense Directive 3000.05, *Military Support for Stability, Security, Transition, and Reconstruction Operations*, 28 November 2005, 2.

16. *Ibid.*

17. "National Security Presidential Directive 44," 7 December 2005.

18. Thomas E. Ricks, *Fiasco: The American Military Adventure in Iraq* (New York: The Penguin Press, 2006), 136.

19. George Packer, *The Assassin's Gate: America in Iraq* (New York: Farrar, Straus and Giroux, 2005), 138.

20. Seth G. Jones, et al., *Securing Health: Lessons from Nation-Building Missions* (RAND Corporation: 2006), 267.

21. Kenneth M. Pollack, "The Seven Deadly Sins of Failure in Iraq: A Retrospective Analysis of the Reconstruction," *The Middle East Review of International Affairs* (December 2006).

22. Nora Bensahel, "Preventing Insurgencies After Major Combat Operations," *Defence Studies* 6, no. 3 (September 2006): 281-82.

23. Gordan Corera, "Iraq Provides Lessons in Nation Building," *Jane's Intelligence Review*, 1 January 2004.

24. United Nations Development Program (UNDP), "UNDP Background Paper for Working Group Discussions: Governance in Post-Conflict Situations," 5-7 May 2004, 4.

25. Report to the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, 27.

26. Krongard, 2.

27. Kenneth Katzman, CRS Report for Congress: Iraq: Post-Saddam Governance and Security, 10 May 2007, 22.

28. Peter W. Chiarelli and Patrick R. Michaelis, "Winning the Peace: The Requirement for Full-Spectrum Operations," *Military Review* (July-August 2005): 17.

29. See Hannah Allam, "Iraqi Insurgents Taking Cut of U.S. Rebuilding Money," *McClatchy Newspapers*, 27 August 2007.

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