

# OPERATION SHUMBA

## Final Report of the Legal Team: Preliminary Legal Planning Document for Counterinsurgency Operations in Zimbabwe

December 14, 2007

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### *Members of the Legal Team*

Corey Buckner	Jeremy Johnson	Kellen Myers
CPT Susan A. Castorina U.S. Army	CPT Ashley A. Jolissaint U.S. Army	CPT Mark Pitzak U.S. Army
CPT John W. Caulwell U.S. Army	Ben Lawson	CPT Marcia Reyes Lohnes U.S. Army
Matt Ciesielski	CPT Aaron Lykling U.S. Army	Kisa Ruiz
Peter De Sanctis	2LT Peter McNeilly U.S. Marine Corps	Adam Shoemaker
CPT Jonathan E. Fields U.S. Army	James Moskowitz	Zach Szilagyi

Legal Team Coordinator:

David P. Fidler  
James Louis Calamaras Professor of Law  
Director, Center on American and Global Security  
Indiana University

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## Table of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
AFRICOM	Africa Command
AUMF	Authorization to Use Military Force
CENTCOM	Central Command
CERP	Commander's Emergency Response Program
COIN	Counterinsurgency
<i>CoinFM</i>	<i>Counterinsurgency Field Manual</i>
CWC	Chemical Weapons Convention
DoD	Department of Defense
DoJ	Department of Justice
DoS	Department of State
DTA	Detainee Treatment Act
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EURCOM	European Command
FAA	Foreign Assistance Act
FCA	Foreign Claims Act
FCM	Fourth Chimurenga Movement
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
HN	Host nation
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICITAP	International Criminal Investigative Training Assistance Program

IGOs	Intergovernmental organizations
JOC	Joint Operations Command
LOAC	Law of armed conflict
LLO	Logical line of operation
MCA	Military Commissions Act
MDC	Movement for Democratic Change
MEJA	Military Extraterritorial Jurisdiction Act
NATO	North Atlantic Treaty Organization
NGOs	Non-governmental organizations
NSC	National Security Council
POSA	Public Order and Security Act
PSC	Private security contractor
RCA	Riot control agent
ROE	Rules of engagement
<i>ROLH</i>	<i>Rule of Law Handbook</i>
SAO	Security Assistance Office (U.S. Embassy)
SOFA	Status of Forces Agreement
SADC	Southern African Development Community
SROE	Standing Rules of Engagement
UCMJ	Uniform Code of Military Justice
UN	United Nations
UN Charter	Charter of the United Nations
UNSC	United Nations Security Council

UNTS	United Nations Treaty Series
U.S.C.	United States Code
WPR	War Powers Resolution of 1973
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZNA	Zimbabwe National Army
ZRP	Zimbabwe Republic Police

## Executive Summary

### *Introduction*

1. This Report contains preliminary legal analysis for the National Security Council (NSC) focused on potential U.S. intervention in the Republic of Zimbabwe. The NSC organized this Legal Team to examine legal issues that might arise if the United States engaged in counterinsurgency (COIN) efforts in Zimbabwe. The NSC plans to use this Report as it prepares to advise the President on possible U.S. responses to the crisis in Zimbabwe.

***2. The Report concludes that rule of law considerations would be critical features of designing, planning, and executing a COIN campaign in Zimbabwe. Without sufficient attention to the rule of law aspects of a COIN mission, the desired end state for Zimbabwe—a secure, economically viable, rights-respecting, and self-sustaining democracy—cannot be achieved.***

3. The Legal Team has provided an overview of legal issues that the United States would face in engaging in a COIN campaign in Zimbabwe. The overview examines key legal considerations that would arise in each aspect of full spectrum operations. This overview would be useful to those tasked with designing, planning, and executing any COIN operations by the United States in Zimbabwe. Aspects of the Report, particularly Chapter 5 on stability operations, may also be valuable should insurgent violence dissipate and post-conflict nation building begin.

4. As a preliminary analysis, this Report does not contain the detailed analysis required for military forces and civilian personnel deployed in COIN operations. Such specific preparations would be premature absent a decision to intervene in Zimbabwe. In the event the President decides to intervene, the Report provides a starting point for designing and planning rule of law operations as part of the COIN mission in Zimbabwe, and civilian and military leaders would need to gather more information, engage in more analysis, and translate their findings into operational guidance for those being deployed.

### *Counterinsurgency, Rule of Law Operations, and Legitimacy*

5. Interest in “rule of law operations” as part of COIN has arisen from the U.S. government’s experiences in Afghanistan and Iraq. Rule of law operations are coordinated civilian and military operations designed to ensure that COIN activities conform to the substantive content and procedural principles of the rule of law. This new concept communicates the importance of integrating the rule of law into the doctrine, policies, and training informing COIN campaigns. Without this integration, counterinsurgent efforts to achieve the target end state for a host nation (HN) will be crippled. This conclusion holds for COIN operations in Zimbabwe because of the magnitude of the political, economic, and legal challenges counterinsurgents would face.

6. The rule of law is a philosophy of governance that stresses the need to empower and limit political authority through substantive and procedural legal means. Although lawyers are necessary to make this governance philosophy function, the rule of law is far more than technical legal work. The rule of law structures the exercise of political power by directing a polity towards specific substantive ends (e.g., democracy) and requiring the pursuit of substantive ends to follow procedural rules (e.g., due process of law). Through the rule of law, societies identify legitimate political ends to pursue and legitimate means for obtaining those ends.

7. The new joint COIN doctrine from the U.S. Army and Marine Corps emphasizes that COIN is primarily a political struggle for legitimacy between counterinsurgents and insurgents. Winning the battle for legitimacy requires counterinsurgents to establish legitimate objectives and achieve those objectives through legitimate means. The rule of law helps counterinsurgents determine *what* ends should be sought and *how* those ends should be fulfilled. The importance of legitimate ends and means makes the rule of law critical for COIN strategy and tactics.

8. The close relationship between legitimacy and the rule of law explains why the rule of law, directly and indirectly, features prominently in the new joint COIN doctrine. The rule of law informs the desired end state of a COIN campaign, guides planning and execution of civilian and military missions to achieve that end state, and requires assessment of the progress made. As a result, COIN efforts must include rule of law operations.

*Full Spectrum Operations, the Rule of Law, and Post-Mugabe Zimbabwe*

9. The Report identifies preliminary legal planning issues that the United States and other counterinsurgent forces would confront in undertaking full spectrum operations in a COIN effort in Zimbabwe. In keeping with the COIN doctrine's emphasis on each aspect of full spectrum operations, the Report devotes a chapter each to legal considerations potentially arising from offensive, defensive, and stability operations conducted by the United States and other counterinsurgents in Zimbabwe.

10. These chapters demonstrate that rule of law operations in COIN involve diverse and complicated challenges that are, like full spectrum operations, interdependent. These challenges force counterinsurgents to handle issues under their own national law, international law, and the HN's law simultaneously and in a synchronized manner across an expanse of legal needs, which include the authorization to use military force, the provision of essential services in the HN, and matters of transitional justice.

11. The Report highlights how the political, economic, and legal situation in Zimbabwe factors into the need for rule of law operations in any potential COIN campaign. Mugabe died with Zimbabwe in a perilous condition. His government systematically abused human rights and thus violated the Zimbabwe Constitution and international law.

12. In the process, Mugabe politicized and degraded Zimbabwe's security forces, legislature, and judiciary, creating distrust among the populace towards all elements of national government. The Mugabe legacy also includes a shattered economy burdened with hyper-inflation, massive unemployment, an exodus of skilled workers, disease epidemics, an inability to provide essential services, and an agricultural system destroyed by land reform policies that pitted black and white citizens violently against each other. The legal requirements created by undertaking full spectrum operations, combined with the condition in which Mugabe left Zimbabwe, underscore how critical rule of law operations would be to a successful COIN campaign in Zimbabwe.

*Conclusion*

13. Rule of law considerations would not ultimately determine whether the United States should intervene in Zimbabwe. Nor do planning and executing robust rule of law operations guarantee success in COIN. However, given the substance of the new COIN doctrine and likely political conditions in potential HNs, such as Zimbabwe, counterinsurgents must accord rule of law operations strategic attention in designing, planning, and executing COIN campaigns. The COIN doctrine asserts the rule of law "is a powerful potential tool for counterinsurgents" (*CoinFM 2007*: 39). In terms of Operation Shumba, this Report begins the process needed to ensure that the United States and other counterinsurgents make full use of this powerful instrument in waging what is perhaps the most complex form of warfare.

## CHAPTER 1

### THE LEGAL TEAM'S MANDATE: PRELIMINARY LEGAL ANALYSIS FOR COUNTERINSURGENCY OPERATIONS IN ZIMBABWE

#### I. INTRODUCTION

1. The government of the United States of America is analyzing whether it should intervene with civilian and military assets in the Republic of Zimbabwe. The intervention would support the response of the interim government of this country to a growing insurgency that threatens to plunge Zimbabwe into civil war. A decision to intervene would mean that the United States would commit itself to support efforts by the interim government, other countries, international organizations, and non-governmental organizations (NGOs) to reach the desired end state in Zimbabwe—a secure, economically viable, rights-respecting, and self-sustaining democracy.

2. The National Security Council (NSC) asked the Legal Team to produce a preliminary legal analysis and planning document that would assist the NSC in formulating advice for the President on what actions the United States should take concerning the crisis in Zimbabwe. As lessons learned from counterinsurgency (COIN) operations in Afghanistan and Iraq demonstrate, organizing, executing, and sustaining an effective COIN campaign is difficult. The NSC's request in advance of a decision to intervene in Zimbabwe reflects awareness of the importance of including rule of law operations in COIN strategies.

3. This chapter describes the crisis in Zimbabwe, discusses the emergence of new doctrine in the United States on COIN, and examines the place of rule of law operations in the new thinking on COIN. The chapter also provides a roadmap for the Report and concludes with thoughts the reader should keep in mind when examining the Report.

#### II. THE CRISIS IN ZIMBABWE

##### **A. Mugabe's Death, an Insurgency, and Zimbabwe on the Brink of Civil War**

4. The current crisis in Zimbabwe flowed from political consequences triggered by the death of Zimbabwe's long-standing president, Robert Mugabe. As indicated in the Memorandum to the Legal Team from White House Legal Counsel on Preliminary Legal Planning Document for Operation Shumba, dated October 26, 2007 (White House Memorandum), Mugabe died while on a state visit to Senegal. (The White House Memorandum appears as Appendix 1 to this Report for reference purposes.)

5. The White House Memorandum describes a cascade of events in Zimbabwe in the aftermath of Mugabe's death, including (1) the formation of an interim government by one faction of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) party, led by Solomon Mujuru, and the Movement for Democratic Change (MDC), and (2) the

emergence of the Fourth Chimurenga Movement (FCM), a violent insurgency supported by another ZANU-PF faction, led by former ZANU-PF official Emmerson Mnangagwa.

6. Mugabe's rule was devastating for the political, economic, and social future of Zimbabwe's citizens. Despite domestic and international pressure for Mugabe to step down, he clung to power and engaged in actions that exacerbated an already deteriorating situation. Unfortunately, his death has unleashed events that put Zimbabwe on the brink of civil war between the interim government and the FCM.

7. Zimbabwe and the international community face hard choices that will determine whether the path for Zimbabwe's future leads to violence and division or a democratic and economically prosperous nation. The United States and other potential partners confront an important policy decision regarding how they respond to the crisis in Zimbabwe, a crisis that threatens not only the citizens of that country but also the entire southern Africa region.

### **B. U.S. Interests Concerning the Crisis in Zimbabwe**

8. The decision whether the United States, in cooperation with other countries, should engage in COIN action in Zimbabwe will not be made on the basis of legal considerations alone. Preliminary analysis of rule of law concerns in a possible COIN campaign needs to be informed by the political and strategic context of the crisis. Mugabe's death, and subsequent events, has altered the environment for U.S. policy toward Zimbabwe. Simultaneously, the crisis reinforces trends in U.S. policy about Africa's significance, especially southern Africa. Other nations with interests in Zimbabwe's future (e.g., China) also confront this changed environment and will be re-evaluating their next steps.

#### *1. From Sanctions to Counterinsurgency*

9. Prior to Mugabe's death, the United States (Executive Order 13391 2005; U.S. Department of the Treasury 2005) and the European Union (European Union 2004, 2006, and 2007) applied economic sanctions to punish political leaders in Zimbabwe for their participation in policies that violated fundamental human rights and degraded prospects for democracy. These sanctions applied to the leading figures of the immediate post-Mugabe era (Solomon and Joyce Mujuru and Emmerson Mnangagwa). The United States, other governments, and NGOs wanted Mugabe and his ZANU-PF supporters to depart the political scene to create opportunities for a stable, economically prosperous, and rights-respecting democracy to emerge in Zimbabwe.

10. Mugabe's death, and the conflict between the Mujuru and Mnangagwa factions of ZANU-PF, transformed the context in which the United States imposed sanctions. Currently, the United States is contemplating mounting a COIN campaign, potentially with other nations, to support an interim government that includes individuals previously the target of sanctions. The Report later highlights rule of law concerns that arise from this transformation in the Zimbabwean political situation, a change that has upset the

previous approach based on sanctions against members of ZANU-PF.

11. A COIN campaign in Zimbabwe by the United States would mark a 180-degree change in U.S. policy because the ultimate purpose of the campaign would be to support the interim government's claim to be the legitimate government for the next period of Zimbabwe's political history. Rather than using sanctions to punish individuals, such as Mujuru and Mnangagwa, the United States is now considering shedding blood and spending treasure to support Mujuru's fight against Mnangagwa. Politicians, policy experts, voters, potential coalition partners, international organizations, and affected NGOs would want explanations for this shift in U.S. policy towards Zimbabwe.

12. The Legal Team's mandate is not to provide these explanations, but these explanations would affect how rule of law activities would play out in any COIN operations in Zimbabwe. Thus, a brief examination the emerging strategic framework affecting U.S. policy thinking on Africa is important for the purposes of this Report.

*2. The Strategic Framework for U.S. Involvement in Counterinsurgency Operations in Zimbabwe*

13. U.S. policy approaches to Africa have passed through three phases in recent decades. The Cold War witnessed the United States focus on Africa as part of the struggle with the Soviet Union. In the post-Cold War period, Africa declined in importance in U.S. policy because the Soviet threat to U.S. interests on the continent had vanished. The third phase emerged in the post-9/11 world where the United States increasingly views threats to its national security as intertwined with complex political, economic, cultural, and social forces in vulnerable states in Africa and elsewhere.

14. Awareness of Africa's new strategic importance is reflected in U.S. concerns about China's growing activities in Africa. In recent years, China has increased its diplomatic activities, political influence, and access to economic resources and markets in Africa (Council on Foreign Relations 2006; Konings 2007). Before his death, Mugabe had embraced increased relations with China (White House Memorandum 2007: ¶16). Chinese interest in Africa contributes to the new U.S. focus on the continent's future.

15. The establishment and unique military-civilian structure of the U.S. military's new Africa Command (AFRICOM) provide signs that U.S. thinking about Africa continues to undergo a sea change (Ploch 2007). The crisis in Zimbabwe arises as this sea change in U.S. policy unfolds. This crisis perhaps represents an early test of U.S. willingness to engage in complex military and civilian operations and possibly prevent another African country from slipping into the nightmare of civil war. The stability of the southern African region, and the interests of the United States and other countries in this region, is linked to what happens in Zimbabwe. The United States can anticipate what fate awaits a Zimbabwe torn apart by civil war. The outcome of U.S. participation in COIN operations in Zimbabwe is less foreseeable.

16. The end state that counterinsurgent forces would seek in Zimbabwe creates opportunities and dangers that recall the challenges the United States and other countries have experienced with COIN and post-conflict nation building in the past. Zimbabwe has political, economic, and legal features that, if properly protected, organized, and empowered, could contribute to the establishment of a sustainable democracy in Zimbabwe. Hanging over this potential is the legacy of Mugabe's regime, which degraded many aspects of Zimbabwe's political system, economic assets, and legal capabilities. The United States, the interim government, and other like-minded countries have to chart a course between the promise and the peril in Zimbabwe such that the end state is achievable and contributes to U.S. interests in fostering peace, stability, and development in that country, region, and continent.

17. This increased U.S. interest in Africa, and AFRICOM's establishment, could help COIN efforts by the United States and other counterinsurgent forces. One of the great challenges for effective COIN operations is coordination and synchronization of U.S. civilian and military efforts and of U.S. and coalition partners' activities. AFRICOM, with its unique command structure, may prove efficient and effective at facilitating the collaboration challenge of COIN operations in Zimbabwe.

### III. ZIMBABWE'S CRISIS AND THE NEW THINKING ON COUNTERINSURGENCY AND RULE OF LAW OPERATIONS

18. Approaching the strategic and humanitarian aspects of possible intervention in Zimbabwe occurs in a context in which thinking on COIN has undergone something of a revolution in the United States. We describe this change, why the change is important for thinking about intervening in Zimbabwe, and how the change makes rule of law operations central to COIN campaigns.

#### **A. Re-Learning to Eat Soup with a Better Knife: New Joint Doctrine on Counterinsurgency**

19. Reflecting on his experiences leading the Arab Revolt against the Ottoman Empire during World War I, T. E. Lawrence (1935) observed that waging "war upon rebellion was messy and slow, like eating soup with a knife." Although the U.S. military has long experience with low-intensity warfare, it had to learn to eat soup with a knife again during Vietnam (Nagl 2005). The lessons learned were subsequently marginalized in U.S. military doctrine and training. In Afghanistan and Iraq, the United States has painfully had to learn the lessons of COIN again. The failures to wage effective COIN campaigns against insurgencies in Afghanistan and Iraq prompted the U.S. military to challenge its traditional marginalization of COIN as a war-fighting skill and capability.

20. Forward-thinking officers in the U.S. Army and Marine Corps led the development of a new joint doctrine on COIN, which is contained in the *Counterinsurgency Field Manual* (FM 3-24) (*CoinFM*), made publicly available in December 2006 and published by a university press in 2007. Described as "paradigm shattering" (Sewall 2007: xxxv), the *CoinFM* attempts to integrate the best thinking from

classical COIN literature—from T. E. Lawrence (1917) to David Galula (1964)—with lessons learned from COIN campaigns in the first decade of the 21st century.

21. Although the new COIN doctrine is not without skeptics or controversy (Heuser 2006; Kahl 2007b), its impact is clear, whether the challenge is capitalizing on the military impact of the “surge” of troops in Iraq, the training and deployment of provincial reconstruction teams in Afghanistan, or the reorganization of U.S. government agencies and departments to coordinate effectively in COIN’s joint, interagency, intergovernmental, and multinational environment. The *CoinFM* emphasizes that the new doctrine does not make waging effective COIN campaigns easier. In fact, it stresses how difficult, unpredictable, contingent, lengthy, and costly COIN operations can be. The objective of the doctrine is, however, to guide U.S. involvement in COIN campaigns in ways that improve the prospects of military and civilian assets achieving lasting success.

### **B. The New Counterinsurgency Doctrine and Zimbabwe’s Crisis**

22. The violent intentions of the FCM demonstrate that U.S. intervention would involve COIN operations. The Zimbabwean crisis provides a potentially stern test of the potential and limitations of a new doctrine borne of difficult experiences in Afghanistan and Iraq. The doctrine is designed to influence *how* the United States conducts COIN campaigns, but commentators have opined that the new doctrine may affect *whether* the United States should intervene in other countries (Sewall 2007; Kahl 2007b). Thus, understanding the *CoinFM*, and analyzing its tenets correctly, is important for the United States with respect to weighing responses to the crisis in Zimbabwe. The COIN doctrine has a double edge in the situations the United States confronts with Zimbabwe.

23. On the one hand, the *CoinFM* constructs a strategy tailored to achieving lasting success in the form of legitimate governments capable of producing security, economic welfare, and individual freedoms. These end results resonate with the normative goals of U.S. national security, foreign policy, and humanitarian activities. Achieving a legitimate government in Zimbabwe promises to be a task of great magnitude. On the other hand, the *CoinFM* is a warning because it forces the U.S. government to understand the magnitude and difficulty of the COIN challenge. Both the promise and the peril in the new COIN doctrine will affect how the United States considers options for responding to Zimbabwe’s crisis.

### **C. Re-Learning to Eat Soup with a Legitimate Knife: Rule of Law Operations in Counterinsurgency**

24. The mandate of the Legal Team is to shed light on the legal issues that would arise in COIN operations in Zimbabwe. The mandate responds to a bipartisan theme in post-Cold War U.S. foreign policy, international governance strategies, and activities of NGOs—promoting the rule of law. The COIN doctrine is sensitive to the role of law because it acknowledges the need to achieve objectives, such as security and governance, within the rule of law. In the *CoinFM*, the rule of law simultaneously represents an end itself and the means to all other COIN ends.

25. This double role for the rule of law taps into the counterinsurgents' need to build, maintain, and sustain legitimacy within the host nation (HN), the populations of intervening countries, and the international community. The new COIN doctrine cannot merely be a better knife with which to eat soup; it must also be a legitimate knife. This requirement produces the need for "rule of law operations" within COIN campaigns, the need informing the NSC's request for its preliminary legal analysis.

26. Military lawyers, who have borne the burden of rule of law operations in COIN efforts in Afghanistan and Iraq, have marked the emergence of this new mission by developing guidance for Judge Advocate General (JAG) officers. This guidance appears in the *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates (ROLH)*, published in July 2007. Although the *ROLH* is not specific to COIN, its substance was forged in the fires of COIN successes and failures in Afghanistan and Iraq. This Report takes advantage of the *ROLH* because it, like the *CoinFM*, helps frame analysis of the challenges the crisis in Zimbabwe presents for the United States.

#### IV. OVERVIEW OF THE PRELIMINARY LEGAL ANALYSIS FOR OPERATION SHUMBA

27. Informed by the new thinking on COIN and rule of law operations, the Legal Team structured this Report to facilitate the integration of COIN doctrine and rule of law principles. In this part, we provide a brief roadmap of the Report to provide the reader with some sense of its scope, substance, and structure.

##### **A. Scope of the Report**

28. COIN doctrine mandates that preliminary legal analysis approach its task with a broad, comprehensive scope. For example, the *CoinFM* argues that effective COIN campaigns involve military and civilian personnel in activities ranging from use of force against insurgents, rebuilding HN security forces, and delivering essential humanitarian services. The COIN doctrine's mantra that COIN is fundamentally a political rather than a military undertaking communicates the scope of COIN efforts. Even the most traditional military activities in COIN proceed within a complex political milieu that makes every soldier a statesman. The Legal Team has not, therefore, limited its analysis to "cops, courts, and corrections," often seen as the corpus of rule of law activities.

29. In addition, the nature of the crisis in Zimbabwe reinforced the Legal Team's conclusion that it needed a comprehensive approach to the legal challenges COIN operations in Zimbabwe would face. The crisis in Zimbabwe is profound in its breadth and depth. Mugabe's reign left Zimbabwe crippled politically, economically, socially, and legally. The reality of post-Mugabe Zimbabwe would overwhelm any approach based on a cramped vision and half-measures, even without factoring in the existence of a dangerous insurgency movement. The FCM will draw strength from timid ambition and a parsimonious approach to reform in Zimbabwe.

## B. Structure of the Report

30. The Report is organized to reflect guidance provided by the new COIN doctrine. This approach allowed the Legal Team to get closer to COIN-specific challenges for rule of law operations and to address the full spectrum of rule of law challenges potentially facing COIN forces in Zimbabwe. The interdependency of offensive, defensive, and stability operations in COIN (*CoinFM* 2007: 34-35) communicated the need for rule of law operations to be comprehensive and systemic. Making rule of law operations effective in full spectrum operations highlights coordination and synchronization challenges in COIN, and this challenge confronts potential interventions in Zimbabwe.

31. Chapter 2 examines rule of law operations in the context of COIN. As the *ROLH* acknowledges, the emergence of the rule of law mission has not escaped complex, controversial, and often confusing philosophical and political matters associated with the "rule of law." A legal planning document, even a preliminary one, needs to address these issues because of the role that rule of law operations play in COIN. This role is central to the battle for legitimacy between insurgents and counterinsurgents. Chapter 2 grounds the often abstract debates about the rule of law in the concrete reality of post-Mugabe Zimbabwe, a grounding that helps the reader appreciate the need for, and complexities of, potential rule of law operations in Zimbabwe.

32. The next three chapters address rule of law considerations in each element of full spectrum operations: offensive operations (Chapter 3), defensive operations (Chapter 4), and stability operations (Chapter 5). Although presented sequentially in the Report, COIN doctrine stresses that each operation can and should occur simultaneously in COIN campaigns. The priority given to one kind of operation over another can vary temporally and geographically, even within a single province of a HN. As a result, COIN forces have to be competent to undertake the tasks in each context concurrently.

33. Each COIN operational environment raises distinct legal questions that preliminary legal planning needs to analyze. For example, offensive operations implicate legal questions concerning the authority the U.S. military has to engage in armed conflict with insurgents. The conduct of defensive operations faces legal questions about the use of private security contractors in COIN environments. Stability operations force counterinsurgents to address legal challenges ranging from delivering essential services to revising the HN's constitutional order.

34. The Report's final chapter offers concluding thoughts on conducting rule of law operations during COIN efforts in Zimbabwe. The chapter reinforces the importance of strategically and tactically using rule of law operations in COIN campaigns. It also identifies issues that any subsequent legal planning endeavors should address, including going beyond this Report's limited analysis of the politics, law, and culture in Zimbabwe. The chapter ends with cautionary words about the relationship between COIN and rule of law operations in order to remind the reader of the hard realities of this relationship.

V. CONCLUSION: BEYOND PRELIMINARY LEGAL CONSIDERATIONS FOR  
COUNTERINSURGENCY OPERATIONS IN ZIMBABWE

35. The Legal Team recalls the NSC's mandate for *preliminary* legal analysis for possible COIN operations in Zimbabwe. Completion of this Report leaves no member of the Legal Team with illusions about how much work remains to be done for effective legal planning to support potential COIN efforts in Zimbabwe. Counterinsurgents seek to foster the development of effective governance by a legitimate government (*CoinFM* 2007: 37). The end state counterinsurgents would seek is a secure, economically viable, rights-respecting, and self-sustaining democracy in Zimbabwe. This objective is not satisfied by preliminary legal analysis. However, achieving this end state requires focusing on how COIN forces address the complex dimensions of the rule of law.

## CHAPTER 2

### RULE OF LAW OPERATIONS IN COUNTERINSURGENCY: AN OVERVIEW

#### I. INTRODUCTION

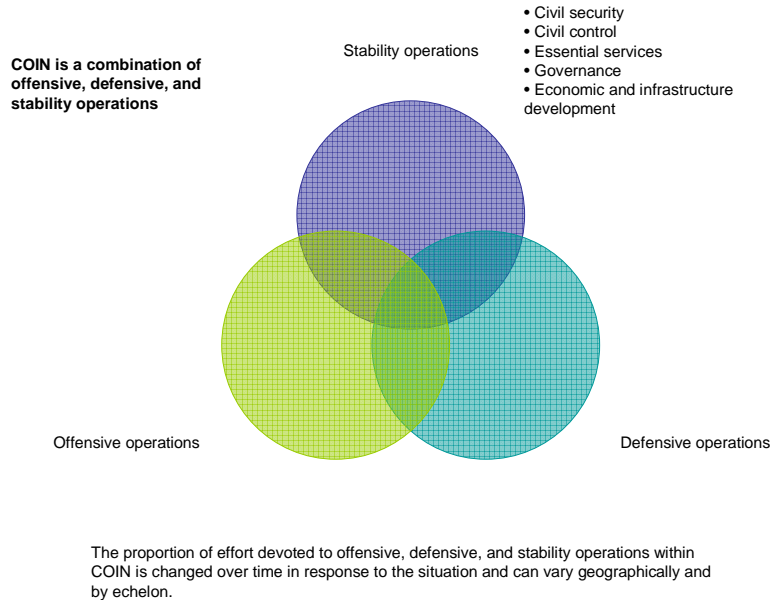
1. The Legal Team's establishment by the National Security Council (NSC) to engage in preliminary legal analysis recognizes the importance of the "rule of law" in bringing security, prosperity, and individual rights to the people of Zimbabwe. This recognition is a step in the right direction for two reasons. First, it indicates that problems experienced with rule of law operations in Afghanistan and Iraq may be mitigated by legal preparation for intervention in Zimbabwe. As the *ROLH* emphasized, military lawyers deployed to Afghanistan and Iraq engaged in rule of law operations with little or no preparation, training, resources, or guidance from commanders.

2. Second, the NSC's recognition of the importance of rule of law issues captures the emphasis U.S. leaders give to the rule of law in future U.S. policy endeavors (National Security Strategy 2002 and 2006). The rule of law has been a feature of U.S. policy in many post-conflict operations, but many of these operations did not involve on-going insurgent violence that made reconstruction and stability efforts more difficult. As the crisis in Zimbabwe illustrates, future rule of law operations will unfold in contexts where security is fragile, which complicates the task of helping to build the rule of law.

3. This chapter provides an overview of the challenge of attempting rule of law operations in COIN contexts. Such an overview is necessary because, to date, materials on conducting rule of law operations in COIN have not been developed. The *ROLH* was not crafted specifically to provide practical guidance for civilian and military personnel engaging in rule of law efforts as part of a COIN campaign. For example, the *ROLH* (2007: 3) states that "rule of law operations constitute the legal aspect of stability operations." This approach makes the *ROLH* relevant to any campaign that involves stability operations, from COIN to peacekeeping.

4. COIN operations involve, however, full spectrum operations—offensive, defensive, and stability operations (*CoinFM* 2007: 34-35). Counterinsurgent forces may conduct each operation simultaneously in a context in which the emphasis on any one varies over time and as between specific areas of operations within a larger theater. See Figure 1. Within and across offensive, defensive, and stability operations, counterinsurgents have to pursue strategies—what the COIN doctrine calls "logical lines of operation" (LLOs) (*CoinFM* 2007: 154-173)—in order to defeat insurgents and create a foundation for a legitimate host-nation (HN) government. LLOs, including (but not limited to) combat operations, training HN security forces, providing essential services, improving HN governance, and engaging in economic development, all generate legal issues that COIN forces must anticipate and address.

**Figure 1. Full Spectrum Operations in Counterinsurgency**



*Source:* Adapted from *CoinFM 2007*: 35

5. Thus, COIN campaigns raise more rule of law issues and challenges than stability operations alone, as illustrated by the legal considerations highlighted in the COIN doctrine (*CoinFM 2007*: Appendix D). An overview of the challenge of rule of law operations in COIN helps lay the groundwork for the chapters that focus on legal issues in offensive, defensive, and stability operations (Chapters 3-5).

6. This chapter’s overview is also useful because it highlights conceptual and practical challenges that confront rule of law operations in COIN. For example, this chapter looks at how controversy about the meaning of the rule of law affects planning for rule of law operations. In COIN, these conceptual disagreements have practical implications, particularly in thinking through what the rule of law means for the end state COIN forces attempt to achieve. Rule of law operations in COIN also raise other challenges, including the difficult task of harmonizing rule of law interests and values between COIN forces and the HN’s culture and traditions with governance and law.

## II. THE EMERGENCE OF “RULE OF LAW OPERATIONS” AS A CHALLENGE IN U.S. COUNTERINSURGENCY POLICY

7. The Legal Team would like to stress how new the mixture of issues and tasks explored in this Report actually are. The United States has engaged in COIN in the past (e.g., Philippines (1899-1902) and Vietnam (1963-1973)) and has been promoting the rule of law in its foreign policy for decades. Never before, however, have COIN practices

and rule of law concerns been so tightly intertwined and emphasized as they have become in U.S. policy through the development of the new COIN doctrine and the recognition of the importance of rule of law operations in COIN campaigns. Understanding this development is important for U.S. policy on COIN.

### **A. The Post-Cold War Emphasis on Rule of Law in Transitional Societies and Nation-Building**

8. The objective of the rule of law has long been part of U.S. foreign policy. Geopolitical conditions during the Cold War limited, however, opportunities for the United States to pursue rule of law reforms with other countries. With the end of the Cold War came an expansion in U.S. activities in this realm, as well as global recognition that the rule of law constitutes an important objective for states, intergovernmental institutions, and non-governmental organizations (NGOs).

9. The expanded significance of the rule of law can be seen in initiatives in the 1990s to assist countries' transition from socialism to democratic, free-market nations and to engage in peacekeeping and nation-building. By and large, these rule-of-law endeavors took place in contexts not involving large-scale violence (e.g., transition of East European countries to democracy) or in situations where military operations and wide-spread violence had ended (e.g., peacekeeping in Haiti, Bosnia, and Kosovo).

10. Thus, the rise of the rule of law as a strategic objective for the United States and the international community occurred in environments that predominantly required reform and reconstruction in post-communist or post-conflict settings. Involvement in these environments did not involve COIN operations. Large-scale military actions by the United States during the immediate post-Cold War period also did not involve COIN, as illustrated by the conventional military operations against Iraq in 1991. Other U.S. military operations involving combat, such as the mission in Somalia, did not lead to effective follow-on peacekeeping or nation-building.

### **B. Afghanistan, Iraq, and the Return of Counterinsurgency in U.S. National Security and Foreign Policy**

11. The convergence of COIN and rule of law occurs in the wake of the insurgencies that developed in Afghanistan and Iraq after the conclusion of conventional military operations. As the *CoinFM* and *ROLH* acknowledge, the United States was unprepared to respond effectively to these insurgencies. The United States had not updated its military doctrine on COIN for approximately twenty years, reflecting the continuation of a post-Vietnam marginalization of COIN and other forms of unconventional warfighting. Similarly, little to no guidance existed for civilian and military lawyers tasked with rule of law missions as part of COIN campaigns, which have radically different dynamics from rule of law activities in relatively peaceful and stable post-conflict settings.

12. The development of new COIN doctrine for U.S. military forces became an urgent national security priority, and the process that crafted the *CoinFM* produced

doctrine widely regarded as radical in both substance and implications. Importantly, the doctrine itself integrates the rule of law as an important feature for all counterinsurgent forces: “All counterinsurgent actions must be those of agents of a legitimate and law-abiding HN government” (*CoinFM* 2007: 276). In keeping with the COIN doctrine, these actions include offensive, defensive, and stability operations—giving the rule of law task in COIN enormous doctrinal breadth and depth. Although classical COIN thinking contained echoes of the new doctrine’s emphasis on the rule of law, the return of COIN in U.S. policy has taken the rule of law component to new levels of significance.

### **C. Rule of Law Challenges and Failures in Past and Present Counterinsurgency Campaigns**

13. The importance given to rule of law operations in the new COIN doctrine requires some understanding of how rule of law challenges and issues arose in past and present COIN campaigns. To our knowledge, no analysis exists that systematically examines rule of law concerns in COIN efforts over time, but general observations can be made. Post-World War II thinking on COIN developed to counter revolutionary warfare (Shy and Collier 1986). In the framework of revolutionary war, COIN forces faced insurgents inspired by ideologies that challenged the “rule of law” concepts and arguments of the HN and COIN forces and presented radically different alternatives for structuring governments and societies. In these COIN situations, the rule of law became subsumed in the larger ideological conflict between insurgents and counterinsurgents, and this conflict gave the “rule of law” ideal less traction as an instrument of COIN effectiveness.

14. This reality helps explain why one rarely sees much emphasis on the rule of law in COIN literature from the Cold War period. In addition, the target of much revolutionary warfare was colonial, neo-imperial, puppet, or corrupt governments, the legitimacy of which was suspect under rule of law principles. Mounting COIN efforts to support such governments might have made geopolitical sense but hardly qualified as examples of the promotion of the rule of law.

15. As COIN campaigns in Afghanistan and Iraq indicate, present and future COIN operation involving the United States have a different “rule of law” flavor from Cold War COIN efforts. Commentators have pointed out that, unlike during the Cold War, today’s and tomorrow’s COIN forces are the agents of change rather than the defenders of the status quo against revolutionary forces. As Stromseth, Wippman, and Brooks (2006: 4) argued, “[s]ince today’s interventionists generally intervene in the name of global order and ‘the rule of law,’ they must consequently strive to build the rule of law in the societies in which they intervene, at the risk of losing their own global credibility.” Although accurate, this perspective is not without controversy because, to some, such rationale for intervention is vulnerable to accusations of neo-imperialism.

16. At any rate, the new context of intervention and rule of law makes the failures to prepare adequately for rule of law operations in Afghanistan and Iraq all the more troubling and underscores the importance of not repeating those mistakes in future interventions.

### III. RULE OF LAW OPERATIONS AND COUNTERINSURGENCY

17. The center of gravity between COIN and the rule of law in today's and tomorrow's global environment is legitimacy in the exercise of political and military power by COIN forces. Identifying legitimacy as the main objective requires, from a rule of law perspective, understanding what we mean by "legitimacy." This task connects to debates about what the "rule of law" means. The challenge of conceptualizing legitimacy in terms of the rule of law leads into the responsibilities of assessment, design, planning, measurement, and coordination. Fulfilling these tasks is critical for operationalizing the rule of law in COIN campaigns. This part of the chapter analyzes these considerations and includes, at relevant points, references to the situation in Zimbabwe in order to make concrete the issues that must be addressed in any COIN activities in Zimbabwe.

#### **A. Counterinsurgency, Legitimacy, and the Rule of Law**

##### *1. Counterinsurgency and Legitimacy*

18. The new COIN doctrine declares that "[t]he primary objective of any COIN operation is to foster development of effective governance by a legitimate government" (*CoinFM* 2007: 37). Legitimacy is the prize over which insurgents and counterinsurgents fight: "The primary struggle in an internal war is to mobilize people in a struggle for political control and legitimacy" (*CoinFM* 2007: 15). The *CoinFM* breaks down the component parts of this struggle in order to guide counterinsurgents in their pursuit of creating legitimacy through all aspects of COIN operations.

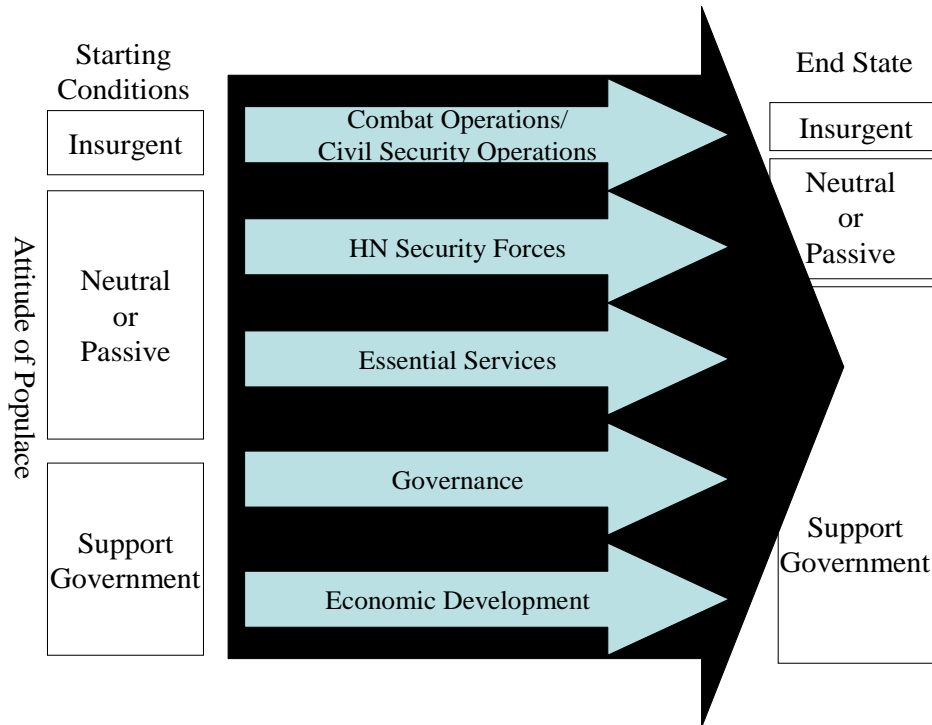
19. Civilian and military actors must keep their eyes constantly on the objective of legitimacy. Every action taken in full spectrum operations flows into the larger COIN effort to prevail in the competition for legitimacy. The doctrine's LLOs identify key COIN tasks needed to move all COIN forces towards a legitimate end state for the HN. See Figure 2 (next page). Not only does each LLO connect to legitimacy, but each LLO also contains legitimacy considerations that COIN forces have to manage.

20. The COIN doctrine conceives of legitimacy for the HN in a specific way, which reflects the interest and values of the United States in undertaking COIN campaigns: "Governments described as 'legitimate' rule primarily with the consent of the governed; those described as 'illegitimate' tend to rely mainly or entirely on coercion" (*CoinFM* 2007: 37). Obtaining the consent of the governed requires the ability of HN governance to deliver security, essential services, and economic development and the ability of the people to choose their leaders through democratic means.

21. The legitimacy objective encompasses not only *what* counterinsurgents produce but also *how* they achieve the end state of legitimate HN governance. Counterinsurgents cannot produce legitimate HN governance through means considered illegitimate by the HN population, the home populations of COIN participants, and the international community. Sewall (2007: xxii) captured this aspect of COIN in arguing that the COIN "doctrine's most important insight is that even—perhaps especially—in

counterinsurgency, America must align its ethical principles with the nation’s strategic requirements.” Legitimacy in this dual sense—outcome and process—means, to paraphrase a not-so-ancient Chinese saying, that every action by counterinsurgents is a fish that swims in the sea of legitimacy.

**Figure 2. Logical Lines of Operation in Counterinsurgency Campaigns**



Source: *CoinFM 2007*: 155

2. *The Rule of Law and Legitimacy*

22. The COIN doctrine also declares:

The presence of the rule of law is a major factor in assuring voluntary acceptance of a government’s authority and therefore its legitimacy. A government’s respect for preexisting and impersonal legal rules can provide the key to gaining widespread, enduring societal support. Such government respect for rules—ideally ones recorded in a constitution and in laws adopted through a credible, democratic process—is the essence of the rule of law. (*CoinFM 2007*: 39)

23. This statement highlights the importance of the rule of law to the pursuit of legitimacy in COIN. The rule of law characterizes the end state of COIN activities—a HN government functioning under the rule of law. Achieving and sustaining a rule-of-law government gives COIN forces a powerful advantage over insurgents who cannot offer a similar vision of good governance. One feature of the post-Cold War context of

interventions and rule of law activities is the absence of credible alternatives to the vision of democratic societies exercising sovereignty in accordance with the rule of law.

24. Insurgency movements, as in Afghanistan and Iraq, still may reject this vision, but they do not typically offer an alternative blueprint for legitimacy that enjoys widespread support among the affected populations, other countries, intergovernmental organizations, and NGOs. A similar situation prevails in Zimbabwe, where Emmerson Mnangagwa's Fourth Chimurenga Movement (FCM) has developed, to date, no specific agenda other than opposing "racism" and "imperialism" and perhaps elevating Mnangagwa to a position of supreme power, in the Mugabe model.

25. The FCM narrative retains power and appeal in Zimbabwe. COIN doctrine emphasizes the importance of understanding insurgents' narrative, which expresses their ideology and their appeals to the populace's concerns (*CoinFM* 2007: 25). Based on current information, the FCM narrative does not define legitimacy through the integration of the rule of law into all aspects of political life in that troubled country. The narrative appears instead to tap into latent and deep fears about the return of racist, imperialist practices imposed by Western countries on the people of Zimbabwe.

26. Ironically, continuing debates about what the "rule of law" means dilute the clarity of the objective of achieving legitimacy in COIN through the rule of law. The *ROLH* (2007: i) noted the "divergent, and often conflicting, views among academics, various USG agencies, US allies and even within the Department of Defense . . . , on what is meant by the 'rule of law.'" In short, how we conceptualize legitimacy in COIN depends significantly on what meaning we give the rule of law.

## **B. Conceptualizing Legitimacy: The Meanings of the Rule of Law in Counterinsurgency**

### *1. The Great (and Never Ending) Debate About the "Rule of Law"*

27. For an idea at the heart of the philosophy of governance that guides the United States and other countries, the amount of disagreement about what the rule of law means might seem surprising. The lack of consensus has not prevented the rule of law from becoming one of the great policy objectives of post-Cold War global policy (see Table 1), nor has it prevented the rule of law from being important in the new COIN doctrine. In the context of COIN, however, uncertainty about the rule of law has a sharper edge because counterinsurgents are not legal philosophers—they have to implement rule of law activities. In the world of practice, the "we know it when we see it" (Stromseth, Wippman, Brooks 2007: 56) attitude toward the rule of law is not sufficient for COIN.

**Table 1. United Nations' Definition of the Rule of Law**

“The ‘rule of law’ is a concept at the very heart of the [UN]’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

*Source:* Report of the Secretary-General 2004: ¶6

28. This Report is not the place to engage in detailed analysis of different conceptions of the rule of law. We only mention the main approaches to defining this concept and reflect on how COIN doctrine informs how to conceptualize the rule of law. According to numerous commentators, the two main frameworks for thinking about the rule of law are the substantive framework and the formalist framework. The substantive framework defines the rule of law to include commitments to particular outcomes, typically democracy, protection of individual rights, and provision of basic material welfare. The formalist approach focuses on institutional and procedural elements of the rule of law, such as the idea that a government can only punish a citizen for violating a pre-existing legal rule, or the concept that laws must be transparent and accessible in people’s lives.

29. The substantive perspective on the rule of law is conceptually denser than the formalist outlook because the substantive position combines the formalist emphasis on structures and procedures with an embrace of particular outcomes to be achieved through legal rules and institutions. The COIN doctrine’s approach to legitimacy leans toward the substantive end on the conceptual spectrum because it envisions the end state for the HN as including democracy, protection of human rights, and the creation of sustainable economic opportunities through free-market mechanisms.

30. Warnings exist, however, about substantive tendencies in rule of law thinking. Lawyers possessing practical experience with rule of law operations sometimes favor a more formalist approach (Stigall 2006). Experts who include substantive goals sometimes seek to constrain their approach by supporting a minimalist agenda that embraces only “those norms that are usually understood to have gained near universal acceptance” (Stromseth, Wippman, and Brooks 2006: 79).

31. Concern about rule of law operations becoming overly ambitious on substantive goals arises for a number of reasons. First, conducting rule of law operations is difficult without including substantive objectives. Second, problems arise with trying to import Western rule-of-law concepts into non-Western societies with different traditions of law’s role in culture and governance. Rule of law operations then have to handle a potential clash of substantive preferences concerning the rule of law.

*2. Full Spectrum Rule of Law: Integrating Substantive and Formalist Understandings of the Rule of Law into an Appropriate End State for the Host Nation*

32. The Legal Team did not attempt a synthesis of the debate between substantive and formalist conceptions. Rather, we took our cues from the COIN doctrine, which in effect requires COIN forces to engage in “full spectrum” rule of law. This idea stands for the proposition that counterinsurgents must undertake rule of law operations that involve formalist *and* substantive tasks, particularly activities that require re-building (or building from scratch) legal and governance institutions in the HN.

33. The receptiveness of the various actors involved in COIN to rule of law operations will affect formalist as well as substantive activities. Counterinsurgents must be aware at all times how the HN’s culture and traditions of governance affect any rule of law action. COIN forces need to determine and monitor the elasticity of the HN’s population with respect to formalist and substantive proposals. Societies with highly inelastic attitudes towards rule of law objectives typically found in Western interventions will pose difficulties for the rule of law component of COIN campaigns.

34. Full spectrum rule of law also means that counterinsurgents need to be vigilant about their behavior. Hypocrisy by COIN forces concerning formalist and substantive aspects of the rule of law will undermine the strategy of advancing the HN towards legitimate government and governance. In short, we must practice what we preach and propose in the rule of law arena.

*3. Zimbabwe Under Mugabe: Applying Rule of Law Definitions*

35. Applying the idea of full spectrum rule of law to Zimbabwe reveals the pragmatism in this approach. Substantive and formalist challenges exist in Zimbabwe, particularly with respect to reforming political and legal institutions damaged by Mugabe’s rule. The reality in Zimbabwe requires a full spectrum rule of law strategy.

36. We can illustrate this point by applying the *ROLH*’s definition of the rule of law to Zimbabwe under Mugabe. The *ROLH* (2007: 6) defines the rule of law as existing when:

- The state monopolizes the use of force in the resolution of disputes;
- Individuals are secure in their persons and property;
- The state is itself bound by law and does not act arbitrarily;
- The law can be readily determined and is stable enough to allow individuals to plan their affairs;

- Individuals have meaningful access to an effective and impartial legal system;
- Basic human rights are protected by the state; and
- Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.

37. During Mugabe's rule, the state monopolized the use of force. Zimbabwe did not experience wide-spread violence perpetrated by political factions or militias beyond the control of the state. Satisfaction of this formalist element did not, however, mean that Mugabe's monopoly on the use of force contributed to the existence of the rule of law. Mugabe used the state's monopoly on force to oppress opposition and enact his policies. The manner in which Mugabe's government used the monopoly on force was a telling characteristic that Zimbabwe did not enjoy the rule of law.

38. In the last decade of Mugabe's rule, individuals in Zimbabwe were not secure in their persons or property. Mugabe's government implemented policies, such as the violent seizure of white-owned farms, the "clean up the filth" campaign (Operation Murambatsvina) that produced thousands of homeless people, forced price-control policies, and violence against members of the Movement for Democratic Change (MDC), that demonstrate that neither person nor property were secure in Mugabe's Zimbabwe.

39. The behavior of Mugabe's government appeared animated by a single principle: remain in power at all costs. This principle meant that the government did not think it was bound by the rule of law and led to arbitrary acts by the regime. When constrained by the Constitution, Mugabe rigged its amendment. When thwarted by the courts, Mugabe changed the judges. Rights accorded by the Constitution and by statute were ignored. Elections were corrupt, pre-determined affairs.

40. In this environment, citizens of Zimbabwe did not experience the benefits of being able to determine what the law was or how it would be applied, precluding individuals and businesses from planning their affairs with reasonable certainty about future governmental behavior. The near total collapse of the economy caused by Mugabe's policies provides evidence of the instability into which individuals, private enterprise, and NGOs in Zimbabwe fell.

41. As the often-violent oppression of the MDC by Mugabe's regime suggests, individuals did not have meaningful redress against the government's abuses, either at the ballot box or before the nation's courts. Electoral fairness and effective judicial independence were not features of Mugabe's Zimbabwe. In combination with the economic disaster Mugabe inflicted on the country, the corruption of these mechanisms contributed to the exodus of millions of Zimbabwean nationals from the country into neighboring states (Refugees International 2007a).

42. Human rights report after human rights report, whether issued by foreign governments or NGOs, recorded and analyzed the extensive violations of basic human

rights in Mugabe's Zimbabwe (Zimbabwe: Human Rights in Crisis 2007). None of the individual rights guaranteed by Zimbabwe's Constitution and its ratification of human rights treaties were protected. Torture was a common practice of Mugabe's security forces; property rights meant nothing to Mugabe's government; freedom of expression and movement were restricted to serve the government's interests; and welfare services, such as food and health care, depended on foreign humanitarian assistance.

43. This litany of abuse underscores why, in Zimbabwe, individuals could not and did not rely on legal institutions and the law to conduct their lives. The situation in Zimbabwe illustrates not only the utility of the *ROLH*'s definition of the rule of law but also why rule of law operations in Zimbabwe will have to address substantive challenges, formalist issues, and institutional reform and reconstruction. In other words, little is gained by wringing hands over whether a substantive or formalist definition of the rule of law is the right way to proceed in Zimbabwe. Full spectrum rule of law is required.

*4. Zimbabwe After Mugabe: The Rule of Law, Legitimacy, and the Participation of ZANU-PF in the Interim Government*

44. With legitimacy through the rule of law the key objective of COIN operations, the United States faces a potential HN government with serious legitimacy problems, even accounting for its inclusion of members of the MDC and its promise of democratic elections. Chapter 5 returns to this problem as a rule of law concern arising in stability operations, but a few observations on this challenge are warranted here.

45. Rule of law operations as part of COIN in Zimbabwe face difficulties not experienced in the Afghanistan and Iraq, where the United States and coalition forces toppled existing governments and established new governments. In Zimbabwe, the United States was involved in neither Mugabe's death nor the formation of the interim government. Of most concern with respect to the linkage between legitimacy and the rule of law is the participation in the interim government of the Mujuru faction of ZANU-PF.

46. This faction, including Solomon Mujuru and his wife, Joyce, were prominent members of ZANU-PF during Mugabe's rule. Much of the parade of rule-of-law horrors described above occurred when these people were officials in the ruling party and government. The application of economic sanctions against the Mujurus and others demonstrates that the United States and the European Union attributed culpability to these individuals for Zimbabwe's descent into disaster. Calls by NGOs for members of ZANU-PF to be tried for crimes against humanity (White House Memorandum 2007: ¶18) also reveal the extent to which many believe Mugabe's compatriots (including leaders in the interim government) are guilty of illegal acts on a grand scale.

**C. Leveraging Legitimacy Through Rule of Law Operations: Assessing, Designing, Planning, Measuring, and Coordinating**

47. Literature on COIN and rule of law operations stresses the importance of counterinsurgents engaging in certain activities that help them leverage their efforts and

resources at producing legitimacy in the HN and in their own behavior. These activities are assessment, design, planning, measuring, and coordinating.

48. Assessment provides the factual basis necessary for designing COIN campaigns, planning the specific component parts of such campaigns (including rule of law operations), and sustaining such lengthy and costly endeavors. In COIN doctrine, design involves examination of “the nature of a problem to conceive a framework for solving that problem,” while planning “applies established procedures to solve a largely understood problem within an accepted framework” (*CoinFM* 2007: 139). Counterinsurgents must also monitor their efforts and, consequently, need systems to measure quantitative and qualitative data. Finally, coordination of COIN forces is critical to success, which includes coordination of assessment, design, planning, and measurement activities.

49. As a preliminary analysis, this Report engages in some assessment of situation in Zimbabwe and makes some initial planning recommendations. This preliminary analysis should not be mistaken for the more substantial and detailed assessment, design, planning, measuring, and coordinating required if the United States intervenes in Zimbabwe. These tasks represent the heavy lifting required for giving COIN and rule of law operations decent prospects for gaining traction in the HN and beyond.

#### **D. Operationalizing Legitimacy: Challenges for Rule of Law Operations in Counterinsurgency in Zimbabwe**

50. Conceptualizing the substantive and formalist rule of law challenges facing potential COIN operations in Zimbabwe is only the first step. Legitimacy in theory must be transformed into legitimacy in reality. The *CoinFM* (2007: 42) states that “security under the rule of law is essential.” The *ROLH* (2007: 151) warns that “[i]t is difficult to overstate the challenges facing any rule of law operation . . . [because] rule of law operations are complex, arduous, and painstaking.” Some sense of the difficulty of operationalizing legitimacy through rule of law operations can be grasped by considering everything multiple LLOs require to be undertaken simultaneously and in a coordinated manner in COIN campaigns.

51. Rule of law operations in Zimbabwe would face key challenges should the United States engage in a COIN campaign there. Understanding these challenges would inform the critical tasks of designing and planning for both COIN and rule of law operations because the challenges focus strategy on practical targets of COIN endeavors.

##### *1. Conflict Mitigation*

52. Every source on COIN consulted by the Legal Team stressed how critical security is to every element of COIN operations. COIN, by definition, involves an environment where security is threatened. The security challenge cannot be escaped as long as insurgents are able to engage in violence against the HN government, HN population,

NGOs, and COIN forces. The FCM has already demonstrated a potential for large-scale violence in urban and rural areas of Zimbabwe.

53. The FCM's potential for violence will place a premium on how well counterinsurgents conduct offensive and defensive operations. Based on the information provided in the White House Memorandum (2007: ¶¶4, 9), the split in ZANU-PF that occurred after Mugabe's death fragmented the police and the Zimbabwe National Army because members of these institutions joined the Mujuru or Mnangagwa factions. In circumstances involving the break-up of the HN's security forces, provision of security would probably fall heavily on military forces from intervening countries.

54. Effective rule of law operations would require, and ultimately depend upon, intervening foreign governments committing sufficient military forces to control conflict in Zimbabwe. The presence of military personnel participating in full spectrum operations would also highlight the adherence of troops to the rule of law. Legal planning for rule of law operations in COIN must address legal issues potentially raised by the activities of military forces, including those in offensive operations (e.g., laws of war) and defensive operations (e.g., detention and interrogation of suspected insurgents).

## 2. Coordination

55. In addition to the need for security, analyses reviewed for this Report emphasized how critical coordination is to effective COIN campaigns and rule of law operations. The *CoinFM* (2007: 39) asserted that "unity of effort" must be present at every level of COIN activities, and unity of effort involves all elements of the U.S. government, the HN government, foreign nations, and NGOs. Coordination has to occur within and across offensive, defensive, and stability operations and within and across LLOs.

56. Literature on the rule of law also raises the coordination theme. For example, the *ROLH* (2007: ii) observed that virtually every person who had worked on rule of law issues agrees "that **joint inter-agency and multinational coordination is the basic foundation upon which all rule of law efforts must be built**" (emphasis in original). The number of actors just within the U.S. government that rule of law operations would need to coordinate is daunting (*ROLH* 2007: 24-27), let alone adding the coordination challenges created by working with intergovernmental institutions, foreign countries (both helpful and potential spoilers), the HN government, and NGOs.

57. The White House Memorandum signaled that coordination would be critical for COIN and rule of law operations in Zimbabwe. The United States, United Kingdom, and South Africa have been identified as key actors in the fate of post-Mugabe Zimbabwe. Pro-democracy and human rights groups within and outside Zimbabwe are likewise poised to be involved in Zimbabwe's future. Previous efforts at moving Zimbabwe towards democracy and the rule of law suggest that the Southern African Development Community (SADC), Africa Union (AU), the African members of the Commonwealth, the World Bank, and the United Nations (UN) would all have roles to play in transitioning Zimbabwe from its current crisis towards stability and peace.

58. The number and kind of actors likely to become involved in the affairs of Zimbabwe ensure that the definition of the rule of law used in COIN and rule of law operations would include both substantive and formalist aspects. The pro-democracy and human rights groups would be keen to make sure that counterinsurgents are committed to the substantive objectives of democracy and human rights in Zimbabwe. Coordination would make determining the scope of rule of law operations a joint, interagency, intergovernmental, and multinational endeavor. This reality reinforces the need to conceive of the task as undertaking full spectrum rule of law.

59. The great frustration with the emphasis on coordination in literature on COIN and rule of law operations is the lack of practical suggestions about how to coordinate effectively in these inter-related activities. Proven mechanisms and strategies for creating coordination in COIN and rule of law endeavors appear few and far between. Some potential mechanisms, such as the new Africa Command (AFRICOM) and SADC, have never been utilized for COIN and rule of law operations in any country.

60. In addition, the depths to which Zimbabwe has plunged politically and economically under Mugabe would require so much effort that the necessity for involving and coordinating many actors is heightened. Thus, *how* to coordinate effectively remains a constant challenge to COIN and rule of law operations, and this challenge confronts planning for any potential COIN campaign in Zimbabwe with serious problems.

### 3. Culture

61. Although not novel to thinking about low-intensity conflict, one feature of the new COIN doctrine that has garnered significant attention is its emphasis on cultural awareness by counterinsurgents. The *CoinFM* (2007: 40) argues that “effective COIN operations require a greater emphasis on certain skills, such as language and cultural understanding, than does conventional warfare. The interconnected politico-military nature of insurgency and COIN requires immersion in the people and their lives to achieve victory.” The same message appears in the rule of law literature. For example, the *ROLH* (2007: 69) identified the lack of familiarity by military lawyers with the Iraqi legal system, Islamic law, and civil law systems generally as a problem that hindered the quest of counterinsurgents for legitimacy.

62. Although prevalent in contemporary COIN literature, emphasis on understanding the culture, language, and traditions of the HN creates challenges for rule of law operations. These challenges flow from the problem of how counterinsurgents determine what to reform and what to keep in the HN’s political, legal, and governance systems.

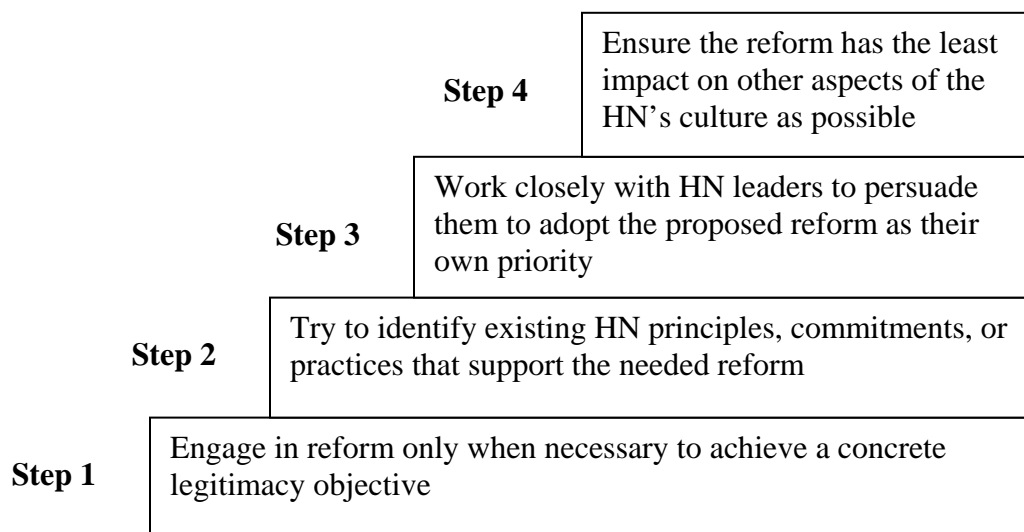
63. Generally, the advice is to achieve balance between the HN’s culture and COIN objectives: “U.S. forces must make clear that they do not intend to undermine or change the local religion or traditions. However, Soldiers and Marines have a mission to reduce the effects of dysfunctional social practices that affect the ability to conduct effective security operations” (*CoinFM* 2007: 219). Similarly, the *ROLH* (2007: 158) opines that

“[a]lthough it is critical to respect local institutions and norms, in order to obtain the stability and security sought by the rule of law mission, it will often be necessary to encourage or require the rejection of certain foreign nation laws that promote violence, discrimination, or other social divisiveness in the concerned country.”

64. The experience of counterinsurgents in Afghanistan and Iraq illustrate how difficult balancing respect for HN culture and commitment to rule-of-law reform in the HN can be. The extent to which this challenge would manifest itself in COIN and rule of law operations in Zimbabwe is not clear at this preliminary stage of analysis. The actions that have dragged Zimbabwe to the edge of the abyss do not seem to have much to do with cultural matters. Zimbabwe does not appear to contain significant fundamentalist religious factions, such as the Taliban or Sunni and Shi’a extremists, which could exacerbate the insurgency. Nor does it appear that tribal or ethnic tensions (as opposed to racial problems) have played much, if any role, in Mugabe’s rule or the problems Zimbabwe faces. Finally, with English as the official language of Zimbabwe (Central Intelligence Agency 2007a), U.S. personnel would confront fewer communication and translation problems.

65. Counterinsurgents should, however, plan and prepare for the balancing task COIN and rule of law writings identify. To ensure consistency in how this balancing task is approached, rule of law operators could establish a framework for analyzing when and how to strike the balance between respect for local ways and the need to reform the HN practices. The Legal Team suggests a four-step framework. *See* Figure 3.

**Figure 3. Four Step Approach to Balancing Respect for Local Culture and the Need for Rule-of-Law Reforms**



66. First, in keeping with the advice in the *CoinFM* and the *ROLH*, counterinsurgents should move to reform HN traditions and practices only when reform is necessary to achieve concrete, specific legitimacy objectives. This step places the burden on the foreign counterinsurgents to demonstrate that they have a compelling legitimacy interest in reforming the HN's traditional approach to the issue in question.

67. Second, foreign counterinsurgents should strive to find principles, commitments, or practices that already exist in the HN that support the reform. In other words, effort should be made to ground the change in concepts, ideas, laws, or accepted approaches present in the HN's political, legal, or governance systems. Such local grounding could be found, for example, in the HN's constitution, statutes, or treaty commitments. Treaties, especially human rights conventions, may be a helpful way to convince the HN that reforms conform to commitments the HN has already accepted by ratifying treaties.

68. Third, foreign counterinsurgents should work closely with HN leaders and lawyers to persuade them to adopt the proposed reform as their own priority. This step harkens back to the advice of T. E. Lawrence (1917), who counseled the need to persuade an Arab leader to adopt the foreign military expert's advice and to promulgate it as the leader's own ideas. In this way, Lawrence believed change could be effected more productively within the leader's tribe than a mandate from the foreign advisor.

69. Fourth, foreign counterinsurgents should work to ensure that the reform has the least impact on the HN's traditional political, legal, governance, and cultural systems as possible. In other words, if another reform that is reasonably available to the HN could achieve the legitimacy objective sought but with less impact on the HN's traditional practices, then this reform must be promoted. This step requires that foreign counterinsurgents work with experts in the HN to explore different options for achieving the legitimacy objective rather than simply adopting the "West is best" option.

#### *4. Compromise*

70. Counterinsurgents need to be prepared to make compromises in connection with trying to achieve the rule of law. Typically, the tasks COIN forces undertake, including full spectrum operations and multiple LLOs in a different cultural context, require setting priorities and allocating resources accordingly. In this sense, soaring rhetoric about the rule of law meets the sordid reality of engaging in domestic and international politics in the real world with limited time and resources. In terms of Zimbabwe, the United States has to think about potential rule of law compromises, including compromises related to:

- The participation of ZANU-PF leaders, such as Solomon Mujuru, in the interim and permanent governments of Zimbabwe;
- Not pursuing criminal forms of transitional justice against ZANU-PF leaders who serve in the interim and permanent governments; and
- The consequences of Mugabe's harmful efforts at land reform.

71. COIN forces would not be able to right all wrongs done during the colonial period or Mugabe's reign, and they would have to work with individuals who held positions of authority during this reign. An inescapable feature of COIN operations involves managing the impact of the politics of the HN, especially the political will of the HN leaders cooperating with counterinsurgents. Such compromises may not find favor with human rights groups, which are already pressing for members of the Mugabe regime to be held accountable for crimes they are alleged to have committed. Compromises may, therefore, create complications for coordination of COIN activities.

#### 5. *Commitment*

72. The COIN doctrine's emphasis on the importance of the rule of law does not necessarily translate into adequate time, personnel, and financial support for rule of law operations. The *ROLH* (2007: 159) noted that "[a] common issue within the rule of law community is that time and money afforded to the process of reform is insufficient. . . . Most military units are understaffed and underfunded for stability operations, including the rule of law." The military's use of frequent rotations has, in Afghanistan and Iraq, adversely affected the continuity of rule of law operations, thus putting at risk the contribution such operations make to the primary COIN objective of legitimacy. Complaints about inadequate capabilities in civilian agencies for COIN efforts, including rule of law missions, compound the problem of lack of sufficient commitment for effective rule of law operations.

73. The commitment challenge could be enormous with respect to COIN and rule of law operations in Zimbabwe. Mugabe's rule left Zimbabwe in a profound and deteriorating crisis, which the insurgency is only worsening. Significant COIN human and economic resources over many years would be required to get Zimbabwe on the path towards democracy and the rule of law. Rule of law missions, whether in post-conflict societies or COIN campaigns, are not cheap and cannot be completed quickly. Any expectation that these conclusions, drawn from past harsh experience, do not apply to Zimbabwe should be discarded before any COIN operations begin in that country.

#### **E. Rule of Law Operations and Other Strategic Elements of Counterinsurgency Doctrine**

74. In addition to being critical to achieving legitimacy in COIN, rule of law operations can also contribute to other strategic elements of COIN doctrine and strategies. Indeed, the manner and frequency with which the COIN doctrine identified the rule of law as important made the Legal Team consider whether rule of law operations should have the same doctrinal status as information operations—that is, as something that also helps strengthen execution of all LLOs (*CoinFM* 2007: 157). Rule of law operations also apply to information operations in that the latter have to occur within the framework of the rule of law. The Legal Team also discussed whether rule of law operations should be recognized as a LLO in COIN campaigns.

75. The Report did not pursue these ideas, but the Legal Team wishes to emphasize the strategic importance of rule of law operations in COIN campaigns. In short, the rule of law is a stratagem in this most complex form of warfare, and rule of law operations should be considered a form of “lawfare” essential to successful COIN campaigns.

*1. Waging Strategic Lawfare in Counterinsurgency*

76. Commentators have used lawfare mainly as a pejorative idea to criticize the use of law to constrain U.S. power and influence. COIN doctrine does not denigrate law and legal procedures in this manner because the doctrine utilizes the rule of law to inform both *what* COIN seeks to achieve and *how* counterinsurgents should act. In today’s COIN context, the rule of law is part of the DNA of interventions by liberal democracies and informs the narrative counterinsurgents tell to oppose the tale the insurgency spreads.

77. Tactically and strategically, the rule of law can be a force multiplier or an Achilles Heel for counterinsurgents. Strengthening the performance of cops, courts, and corrections can, for example, support the COIN narrative of moving the HN toward the desired end state. A narrative empowered by the rule of law helps counterinsurgents undertake their responsibilities from a position of credibility and strength. Likewise, the failure of counterinsurgents to deliver security under the rule of law erodes the willingness of the population to believe the COIN campaign will produce a better future.

78. Further, just as with military tactical success against insurgents, patchwork tactical progress in rule of law operations does not amount to strategic accomplishment against an insurgency. “Tactical success,” COIN doctrine warns, “guarantees nothing” (*CoinFM* 2007: 50). The extent to which rule of law assumptions and practices penetrate, almost subconsciously, our thinking means that U.S. civilian and military assets may have trouble externalizing the rule of law mantra and transforming it into a learning and constantly adapting weapon of COIN warfare.

79. The *CoinFM* (2007: 39) informs us that the rule of law is a powerful tool for counterinsurgents. The following paragraphs describe how critical rule of law operations are for key elements of the COIN doctrine. These descriptions suggest that rule of law operations hold a strategic importance not reflected enough in COIN thinking. These considerations must be kept in mind with respect to any COIN operations in Zimbabwe.

*2. Rule of Law Operations and Unity of Effort in Counterinsurgency*

80. The strategic importance of rule of law operations can be illustrated by highlighting their potential contributions to key aspects of COIN doctrine. Take, for example, the COIN principle that “unity of effort is essential” (*CoinFM* 2007: 39). The goal of joint, interagency, intergovernmental, and multinational coordination is to ensure that “objectives are shared and actions and messages are synchronized” (*CoinFM* 2007: 39). The challenge of unity of effort in COIN requires shared commitments on *what* counterinsurgents seek to achieve and *how* they seek to achieve it—precisely the tasks rule of law operations are designed to articulate, advance, and accomplish. Planned and

executed properly, rule of law operations should constitute critical parts of the architecture that unity of effort, as a foundational principle of COIN, needs.

### *3. Rule of Law Operations and Intelligence in Counterinsurgency*

81. Intelligence drives the operations of counterinsurgents (*CoinFM* 2007: 41). The doctrine acknowledges that COIN intelligence has to be different from intelligence for conventional military operations. In COIN, “[c]ommanders and planners require insight into cultures, perceptions, values, beliefs, interests and decision-making processes of individuals and groups” (*CoinFM* 2007: 80). These insights are exactly the kinds of information that rule of law operations in the HN can produce.

82. In addition, rule of law operations support the COIN doctrine’s emphasis on culturally informed intelligence. A society’s traditions concerning social structure, language, power, authority, and interests leave marks in its laws, legal institutions, and governance systems. The rule of law typically only appears in COIN discussion of intelligence through emphasis on the need to comply with U.S. and international law in detention and interrogation activities (*CoinFM* 2007: 121). This perspective fails to grasp how rule of law operations can serve broader, population-centric intelligence needs of COIN through the wide-ranging and continuous assessment rule of law operators must make of the HN and its legal history, institutions, culture, practices, and values.

### *4. Rule of Law Operations and Designing Counterinsurgency Campaigns*

83. The COIN doctrine asserts that “[c]ampaign design may very well be the most important aspect of countering an insurgency” (*CoinFM* 2007: 150). Factors that influence design are the campaign’s end state, operational logic, and vision of resolution, typically expressed in the selection of relevant LLOs. Given the importance of the rule of law to the desired end state, the manner in which a COIN campaign is visualized and structured is an exercise in applied legitimacy. In the pursuit of selected LLOs thick in legal purpose and content (e.g., governance, economic development), rule of law operations have a more powerful presence in COIN campaign design than is perhaps articulated in the doctrine. Thus, designing COIN efforts needs to acknowledge how strategic the conduct of full spectrum rule of law is to COIN campaign design.

### *5. Rule of Law Operations and Logical Lines of Operation*

84. In its chapter on executing COIN operations, *CoinFM* (2007:154 *et seq.*) utilizes the concept of LLOs. In COIN, each LLO constitutes “a conceptual category along which the HN and COIN force commander intend to attack the insurgent strategy and establish HN government legitimacy” (*CoinFM* 2007: 154). The LLOs selected for a COIN campaign are independently important, but they are also interdependent—COIN forces must pursue them in a coordinated and synchronized manner. In presenting LLOs, the COIN doctrine argues that information operations “support and enhance [COIN] operations by highlighting the successes along each one” (*CoinFM* 2007: 158).

85. From the rule of law perspective, each LLO contributes to the rule-of-law end state sought by counterinsurgents, and each LLO depends on rule of law operations in its implementation. While information operations validate, *post hoc*, the achievements in each LLO, rule of law operations contribute to the planning and execution of the tasks undertaken in LLOs. Thus, rule of law operations constitute, like information operations, an overarching strategy that weaves LLOs together into a legitimacy-fostering campaign.

#### IV. CONCLUSION

86. The new COIN doctrine highlights the link between the rule of law and COIN operations and the importance of the rule of law as an end and as a means for counterinsurgents' pursuit of legitimacy. The relationship between COIN and rule of law operations is new and relatively uncharted, which raises conceptual issues applicable to any COIN campaign and operational considerations specific to a particular HN. The scope, substance, structure, and complexity of rule of law operations in COIN is further revealed by problems and challenges such operations would face in a potential COIN campaign in post-Mugabe Zimbabwe. The next three chapters identify the specific legal issues rule of law operations in COIN in Zimbabwe would confront, and these chapters form a detailed preliminary planning template for such operations.

## CHAPTER 3

### OFFENSIVE OPERATIONS AND THE RULE OF LAW IN COUNTERINSURGENCY

#### I. INTRODUCTION

1. Legal issues that arise in offensive combat operations are familiar to military lawyers, who receive training on the law of armed conflict. Conducting offensive operations in counterinsurgency (COIN) presents challenges. Through a variety of kinetic and non-kinetic means, insurgents seek political change contrary to the goals of COIN forces and detrimental to the long-term health of the host nation (HN). Thus, insurgency forces pose a complicated target for offensive military operations. COIN doctrine explains that “[f]ew insurgencies fall neatly into any rigid classification. In fact, counterinsurgent commanders may face a confusing and shifting coalition of many kinds of opponents” (*CoinFM 2007*: 9). Therefore, when preparing for offensive operations, counterinsurgents have many legal issues to identify and assess in planning to undertake COIN operations within the rule of law.

2. This chapter focuses on legal considerations the United States would have to address if it engaged in offensive operations in Zimbabwe. Many, if not all, of these legal considerations connect directly to the overarching objective of legitimacy. The legitimacy concerns are complex because they encompass not only the conduct of military operations in the HN but also perceptions of legitimacy regarding the use of force in the United States and the international community. Thus, critical to rule of law operations in Zimbabwe would be:

- Authorization for the use of military force within U.S. and international law;
- Application of the laws of war to offensive operations;
- Management of alleged violations of the laws of war by counterinsurgent forces; and
- Payments of claims and solatia to help shore up legitimacy in the aftermath of offensive operations.

#### II. OFFENSIVE OPERATIONS IN COUNTERINSURGENCY CAMPAIGNS

##### A. Counterinsurgency Doctrine on Offensive Operations

3. The COIN doctrine asserts that “political factors have primacy in COIN” (*CoinFM 2007*: 40) at every stage of a campaign. The primacy of politics includes recognition that counterinsurgents have to use military force against insurgents. In COIN doctrine, offensive, and defensive operations focus “on defeating enemy forces” (*CoinFM 2007*: 166). Specifically “[m]easured combat operations are always required to

address insurgents who cannot be co-opted into operating inside the rule of law” (*CoinFM* 2007: 167). Counterinsurgents often have to fight hard-core insurgents through offensive operations. The *CoinFM* makes clear, however, that COIN is not conventional warfare but a more complicated kind of armed conflict that requires restrained and calibrated uses of force, even in offensive operations.

4. To this end, smaller units typically take the lead in offensive operations (*CoinFM* 2007: 167). Small units can operate quickly and responsively against insurgent forces. Such units can get closer to the population to gain trust, goodwill, and intelligence. For this reason, battalion sized-units and smaller are the workhorses of COIN offensive operations, and these units should be trained to operate in the COIN environment.

5. The *CoinFM* (2007: 174) uses the “clear-hold-build” paradigm to describe the challenges facing COIN forces. Offensive operations clear an area of insurgents, which allows counterinsurgents to engage in defensive (hold) and stability (build) operations. COIN forces then continue to use offensive operations to eliminate resistance, taking care to minimize the impact on the populace (*CoinFM* 2007: 176).

6. If appropriate, offensive operations can integrate HN forces in combined action units, particularly to hold areas cleared of insurgents and to begin stability operations. The COIN doctrine states that “[c]ommanders use this [combined action] approach to hold and build while providing a persistent counterinsurgent presence among the populace” (*CoinFM* 2007: 184). Such use of HN units can boost the population’s cooperation and support, which increases the COIN effort’s legitimacy. Offensive operations can also be the responsibility of HN forces, with limited support by foreign military personnel. Under this model, “HN security forces are expected to conduct combat operations, including any clearing and holding missions” (*CoinFM* 2007: 187).

7. Whatever approach counterinsurgents take to offensive operations, they can easily destroy the advantages offensive operations produce by conducting these operations in ways that alienate the HN’s population and thus strengthen the hand of the insurgency. This danger underscores the need to ensure that offensive operations have legitimacy, and conducting such operations under the rule of law can contribute to such legitimacy.

### **B. Offensive Operations in Zimbabwe**

8. Given that the Fourth Chimurenga Movement (FCM) has attacked the interim government and threatened to attack any white foreigners who interfere in Zimbabwe’s politics, offensive operations would be required to combat the FCM. As COIN doctrine emphasizes, security from insurgent attack is critical for counterinsurgents to engage in effective stability operations. This reality does not mean that offensive operations always sequentially precede stability operations, and thus deserve the lion’s share of COIN resources. The concept of full spectrum operations means that COIN forces will be simultaneously engaging in offensive, defensive, and stability operations in the HN. Therefore, the attention the COIN campaign pays to offensive operations in Zimbabwe

should keep this strategy in mind in order to avoid failing to hold and build an area of the HN that has already been cleared of insurgent fighters.

9. The military forces of the United States and other coalition countries would probably bear the greatest burden in offensive operations in Zimbabwe in both urban and rural contexts because of the degraded condition of the Zimbabwe National Army (ZNA). As the White House Memorandum (2007: ¶¶4, 6) indicated, support from members of the ZNA is split between the interim government and the FCM. The politicization of the ZNA under Mugabe would require foreign military forces to engage in significant re-training of ZNA troops supporting the interim government before these troops can contribute to offensive COIN operations.

### III. OFFENSIVE OPERATIONS BY U.S. MILITARY FORCES IN ZIMBABWE: LEGAL CONSIDERATIONS

#### A. Authorization to Use Military Force in Zimbabwe

##### *1. Legitimacy and the Authorization to Use Military Force*

10. The legal basis for an intervention is crucial to the success of a COIN campaign. The legality of an intervention contributes to establishing and maintaining legitimacy in the domestic population of COIN coalition members, the international community, and in the HN. Lack of legitimacy in this area can degrade support for the COIN effort, support that will be needed for a long period of time.

11. COIN doctrine stresses that most COIN campaigns involve multiple countries and other actors (*CoinFM* 2007: 62). Thus, international legitimacy is important to establish and sustain. It allows states, intergovernmental organizations (IGOs), and non-governmental organizations (NGOs) to commit themselves to achieve the desired end state, particularly activities needed for stability and reconstruction efforts (Stromseth, Wippman, and Brooks 2006: 18).

12. Obtaining legal legitimacy for interventions may not always be feasible, particularly at the international level, where state interests may clash on the propriety of an intervention. In such cases, legitimacy can still be obtained when a substantial majority of states regard an intervention as justifiable, as arguably happened with the intervention by the North Atlantic Treaty Organization (NATO) in Kosovo (Stromseth, Wippman, Brooks 2006: 19). An unauthorized intervention may obtain legitimacy through suppressing violence, providing essential services, and rebuilding economic capabilities. As Stromseth, Wippman, and Brooks (2006: 19) suggest, “[t]o a degree, success creates its own legitimacy.”

13. Designing and planning for a COIN campaign in Zimbabwe should not bank on the campaign’s future success as its strategy to achieve legitimacy. To ensure the greatest potential to attract the support of a coalition of actors at home, abroad, and in the HN, a COIN campaign should have strong legal bases for the intervention. Legal planning for

COIN in Zimbabwe must, therefore, analyze U.S. and international law as they relate to potential military and civilian involvement in that country.

2. *U.S. Law and the Authorization to Use Military Force*

14. Offensive military operations by U.S. armed forces in Zimbabwe would require authorization under U.S. law. This authorization would be important for sustaining U.S. popular and political support for a sustained deployment of U.S. military forces. As the war in Iraq has shown, authorization of an intervention by the appropriate U.S. constitutional processes does not ensure the action's international legitimacy, so the legitimacy limits of authorization within U.S. law must be kept in mind. Nevertheless, for the sake of legitimacy and support in the United States, authorization for the use of military force must be obtained.

a. Congressional Authorization of the Use of Military Force

15. Direct Authorization to Use Military Force. Congressional authorization is the best legal basis for combat operations by U.S. military forces. Congress can authorize the use of military force either through a declaration of war or, more commonly, through a resolution authorizing the use of military force (AUMF). An AUMF resolution would define the "nature, scope and limits of any military deployment" (*ROLH* 2007: 57). Such congressional authorization would satisfy the War Powers Resolution (WPR) of 1973, which permits the president to introduce U.S. military forces into hostilities pursuant to specific statutory authorization (50 U.S.C. §1541(c)).

16. Indirect Authorization through Statutory Law on Appropriations. Federal courts have held that appropriations statutes passed by Congress specifically intended to fund military combat operations overseas provide constitutionally valid authorization for such operations. These statutes typically arise after the president has introduced U.S. military forces into hostilities abroad without congressional authorization, as occurred in the U.S. military intervention in Kosovo.

b. Presidential Authority to Use Military Force

17. Residual Statutory Authority. The WPR appears to allow the president to introduce U.S. military forces into hostilities without a prior declaration of war, statutory authorization, or attack upon the United States because it requires the president to withdraw troops 60 days after their deployment, unless Congress has declared war or specifically authorized the military action (50 U.S.C. §1544 (b)). This provision means that the President has some residual statutory authority that Congress can terminate after 60 days unless Congress specifically authorizes the action's continuation. This time limit would preclude effective military operations in a COIN campaign in Zimbabwe.

18. Inherent Presidential Authority. Article II of the U.S. Constitution confers upon the president the authority to act as Commander-in-Chief of the armed forces. Arguably, this provision gives the president some constitutional power to commit military forces to

combat operations overseas without the prior, express approval of Congress. Although every president has claimed this authority, the practicalities of prolonged military engagements overseas require the participation of both Congress and the president.

c. Joint Participation of the Political Branches Required

19. The nature of military operations in COIN contexts means, as a practical matter, that both political branches of the federal government will have to support and sustain such operations. However much the President believes he has independent constitutional authority to commit troops to combat, the President cannot appropriate money to support them in the field. As the COIN doctrine states, “[c]ongressional support is needed for any prolonged involvement of U.S. forces in actual operations overseas” (*CoinFM* 2007: 349). The need to engage in full spectrum operations in COIN campaigns also means that congressional support is critical, over a potentially long period of time, to fund offensive, defensive, and stability operations. Without congressional support for each type of operation, efforts will falter because of the interdependencies among these operations.

*3. U.S. Law on Authorization to Use Force and Counterinsurgency in Zimbabwe*

20. The need for congressional authorization and appropriations for COIN operations in Zimbabwe means that the executive branch should gauge potential support and opposition of members of Congress to U.S. military and civilian involvement in Zimbabwe’s crisis. The design and planning aspects of a potential COIN campaign must include a strategy for dealing with the interests Congress possesses vis-à-vis U.S. capabilities to contribute to the desired end state in Zimbabwe. Given Congress’ power to define the nature, scope, and limits of U.S. military deployments, efforts need to be made to ensure that Congress supports an intervention sufficiently robust to handle the full panoply of challenges COIN entails.

*4. International Law and the Authorization to Use Military Force*

21. The struggle for legitimacy in COIN can be affected by whether the counterinsurgents’ use of military force is authorized under international law. The “absence of agreed legal authority can undermine the chances of building and sustaining a committed coalition” (Stromseth, Wippman, and Brooks 2006: 18-19). Thus, the conduct of offensive operations by U.S. and other national military forces in Zimbabwe should have a basis in international law. A number of potential international legal bases for military action by counterinsurgents should be considered.

a. Invitation by the Interim Government of Zimbabwe

22. Military assistance by invitation of the government of a sovereign state is well established in international law and provides a legal basis for involvement of foreign military forces in domestic crises. Nevertheless, controversy exists with such invitations

because states have sometimes used this justification to disguise military aggression against another country.

23. This problem is not what might trouble the United States in the context of Zimbabwe. Rather, the United States would need to be concerned about the potential political responses of other countries and the population of Zimbabwe to the interim government's request for foreign military assistance. The legitimacy of the interim government is in question, which weakens the authority it has to invite foreign militaries to fight the FCM. Any such invitation may weaken the interim government's legitimacy. Formal diplomatic recognition of the interim government by the United States, other countries (e.g., South Africa), the UN, and regional organizations (e.g., Southern African Development Community (SADC)) would strengthen the interim government's position and increase the legitimacy of its request for foreign military help.

b. Authorization by the United Nations Security Council

24. Chapter VII of the Charter of the United Nations (UN Charter) permits the Security Council to authorize UN members to use military force in order to restore international peace and security. Authorization by the Security Council typically provides an initial strong foundation of legitimacy for the use of force. This Chapter VII authority is a broad power. In exercising this authority, the Security Council is not limited to responding to acts of aggression or breaches of the peace, but it can act preemptively and authorize the use of force to prevent the emergence of threats to international peace and security (Stromseth, Wippman, and Brooks 2006: 23). The Security Council has established precedent in authorizing collective interventions in response to threats to the peace that have involved internal conflicts and violations of human rights norms (Stromseth, Wippman, and Brooks 2006: 27).

25. The potential ramifications of civil war in Zimbabwe include matters that the Security Council could determine to constitute threats to international peace and security. The crisis in Zimbabwe has implications for peace and security in southern Africa, and thus does not merely involve an internal dispute. In addition, the Security Council's has been willing in the post-Cold War period to define "threats to the peace" broadly "to include humanitarian emergencies, the overthrow of democratically elected leaders, extreme repression of civilian populations and cross-border refugee flows threatening regional security, and failure to hold perpetrators of major atrocities accountable" (Stromseth, Wippman, and Brooks 2006: 32). Many of these conditions are present in Zimbabwe, which connects the crisis to Security Council powers under Chapter VII.

26. The obstacle to Security Council authorization for U.S. military involvement in Zimbabwe is, however, the attitude of other permanent members of the Security Council. China and Russia have already stated their wish to "avoid foreign interference with the affairs of the people of Zimbabwe" (White House Memorandum 2007: ¶15). China and Russia have played the non-interference card before, only to agree to permit the Security Council to act in limited ways under Chapter VII, as happened with the authorization of a peacekeeping force for the Darfur region of the Sudan. If China and Russia remain firm

on the non-interference position, Security Council authorization for foreign military involvement in Zimbabwe may not be possible, raising the potential need for intervention through a regional organization or even unilateral intervention (see below). Diplomatic activity is required to determine the level of Chinese and Russian opposition to Security Council authorization for foreign military intervention in Zimbabwe's crisis.

c. Intervention by a Regional Organization

27. The UN Charter provides that "no enforcement action shall be taken . . . by regional agencies without the authorization of the Security Council" (Article 53). Despite this provision, regional security organizations have succeeded in gaining international legitimacy for interventions in the absence of Security Council authorization (Stromseth, Wippman, and Brooks 2006: 33). Indeed, some evidence suggests that regional organizations are becoming more prepared to act when the Security Council is unable to respond (Stromseth, Wippman, and Brooks 2006: 34). Thus, the United States and other like-minded states could explore basing the legality of a military intervention in Zimbabwe on the actions of a regional security organization.

28. However, unlike the Economic Community of West African States that intervened in Liberia and Sierra Leone, the SADC and the African Union (AU) seem less willing or able to confront the FCM. NATO acted without Security Council authorization in its intervention in Kosovo, and the interim government is considering formally inviting NATO intervention (White House Memorandum 2007: ¶14). Whether NATO would intervene in Zimbabwe in the manner it did in Kosovo is unlikely. A combined SADC, AU, and NATO intervention might be worth exploring because it would combine NATO's military capabilities with SADC's and the AU's regional expertise and legitimacy.

d. Unilateral Intervention by the United States

29. Intervention by the United States without the support of multilateral or regional organizations or significant assistance from other countries would make COIN operations in Zimbabwe difficult. U.S. experience in Iraq attests to such difficulty. Given the massive political and economic reconstruction that Zimbabwe needs to establish itself as a peaceful, stable and democratic state, the United States alone does not possess all the necessary resources required for such an undertaking. U.S. policymakers must also consider current military operations in Iraq and Afghanistan and the supplies and resources those operations will continue to utilize for the foreseeable future.

**B. Use of Force Against Insurgent Forces in Zimbabwe**

*1. Application of the Laws of War in the Context of Counterinsurgency*

30. The application of the laws of war is complex in COIN. No single, standard body of law exists that governs all armed conflicts (ROLH 2007: 61). Additionally, the HN government may not be a party to treaties on the laws of war. The complexity confronting

the application of the laws of war creates problems for COIN campaigns, but the need to handle this complexity is important to obtaining legitimacy. Thus, lawyers must draw upon a broad legal spectrum, including the law of war, occupation law, and human rights law, to craft an appropriate legal framework (*ROLH* 2007: 67).

31. The main treaties (e.g., Hague Regulations of 1907, the four Geneva Conventions of 1949, and Additional Protocol I of 1977 to the Geneva Conventions) and rules of customary international law governing the conduct of armed conflict—collectively known as the law of armed conflict (LOAC)—were developed to regulate inter-state warfare rather than internal armed conflicts. The United States and Zimbabwe are parties to the Geneva Conventions, but only Zimbabwe is a state party to Additional Protocol I. In addition, as a matter of U.S. law, all U.S. forces operate under the auspices of the Hague Regulations and Geneva Conventions during all international armed conflicts (*CoinFM* 2007: 351). However, COIN operations in Zimbabwe would not constitute international armed conflict within the meaning of the LOAC. Technically, the international legal rules on international armed conflict (e.g., the law of occupation in Geneva Convention IV) would not apply to COIN in Zimbabwe.

32. The international legal rules on non-international armed conflict are found in Common Article 3 of the Geneva Conventions and Additional Protocol II of 1977 to the Geneva Conventions. While Common Article 3 binds both countries, Zimbabwe (but not the United States) is a party to Additional Protocol II. Thus, Zimbabwean forces and U.S. forces have different obligations with respect to engaging in armed conflict with insurgent forces. The differences may multiply as the international legal obligations of other potential counterinsurgent allies are analyzed.

33. Similarly, Zimbabwe's treaty obligations under human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR), apply to the interim government's actions. The United States generally holds that the human rights treaties it has ratified, including the ICCPR, do not apply to U.S. forces engaged in operations outside the United States (*ROLH* 2007: 65). By contrast, the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR) "on military operations conducted by European coalition partners . . . may substantially curtail their freedom of action as compared to the United States" (*ROLH* 2007: 66). Thus, U.S. military involvement in COIN operations in Zimbabwe would have to be sensitive to human rights concerns of other counterinsurgents, not to mention the support the COIN effort would require from human rights-oriented IGOs and NGOs.

34. The first legal planning observation to make about this patchwork of international legal obligations is that legitimacy will suffer if the counterinsurgents do not accomplish two objectives. First, each counterinsurgent must determine in advance what approach it will take toward its international legal obligations in a COIN context in Zimbabwe. In the United States, how armed conflicts are classified is "usually determined at the highest levels of government" (*ROLH* 2007: 62). Civilian and military personnel need clear guidance from policy makers on the applicable standards for COIN operations. Confusion

on what LOAC standards apply can result in unfortunate actions that jeopardize legitimacy in COIN contexts, as the United States has discovered in Afghanistan and Iraq.

35. Second, counterinsurgents must coordinate how they approach the application of international law in the COIN campaign. Counterinsurgents do not have to make their policies completely uniform, but the approaches must be consistent enough to prevent divergent standards of behavior through which legitimacy could be lost. The FCM could exploit differences in the behavior of the interim government's forces, U.S. troops, and other counterinsurgent military personnel in the conduct of offensive combat operations or detention and interrogation practices.

36. In addition to Common Article 3 of the Geneva Conventions, the United States applies, as a matter of policy, the law of war created for international armed conflicts to *all* conflicts in which U.S. forces participate (*ROLH* 2007: 63). This consistency of application, regardless of international or internal armed conflict, establishes a LOAC standard for all U.S. military personnel (*ROLH* 2007: 63). Differences might appear between the U.S. position and the standards the interim government and other counterinsurgent forces apply pursuant to their obligations under Additional Protocol II and applicable human rights treaties.

37. These differences have potential practical consequences that legal planning must address. First, from the U.S. perspective, the differences raise the important issue of clarifying jurisdiction over the acts of U.S. military personnel (see Part III.C below). Second, given the need for U.S. and other foreign counterinsurgent forces to train Zimbabwean forces, Zimbabwe's international legal obligations (e.g., Additional Protocol II and Zimbabwe's human rights treaties) should be addressed in planning.

38. Third, the rules for international armed conflict apply awkwardly to aspects of COIN campaigns. For example, U.S. military intervention into Zimbabwe would likely represent neither invasion nor occupation in an international legal sense because the interim government would welcome it. However, given the condition of the military and security capabilities of the interim government, U.S. forces would find themselves in quasi-occupation roles. The international law of occupation is conservative because it requires occupying forces to apply, as much as possible, the laws of the occupied country (*CoinFM* 2007: 352). COIN in Zimbabwe would require, however, that counterinsurgents engage in efforts with the interim government to change Zimbabwean law and, for legitimacy purposes, avoid applying some laws adopted during Mugabe's reign, specifically laws that enhanced his power and suppressed his opponents. The laws of war designed for international armed conflict do not provide sufficient guidance on how U.S. forces should sort through what Zimbabwean laws to apply, ignore, or change.

39. Fourth, whether differences in policy and legal standards could affect the conduct of offensive operations needs to be determined. General principles applied by U.S. troops in the use of force should resonate with the international legal standards the interim government and other counterinsurgent forces use. These principles include the principles

of proportionality and discrimination, which “require combatants not only to minimize harm to noncombatants but also to make positive commitments to—[p]reserve noncombatant lives by limiting the damage they do[; and a]ssume additional risk to minimize potential harm” (*CoinFM* 2007: 247).

40. How COIN forces apply the principles of proportionality and discrimination in offensive operations is critical. COIN contexts present counterinsurgents with very difficult challenges for the application of these principles. Distinguishing between combatants and noncombatants in offensive operations is difficult because insurgents use noncombatant populations and infrastructure to shield themselves from attack and to provide cover for counterattacks. Counterinsurgents need to coordinate how they will individually and collectively calculate proportionality in offensive operations and determine the best strategies to ensure proper discrimination in the use of offensive force.

41. COIN doctrine can inform these tasks. Generally, the doctrine encourages counterinsurgents to use minimal force, even in offensive operations. The reason connects to the politics of gaining and retaining legitimacy within the HN’s population and the international community. Uses of military force “that cause unnecessary harm or death to noncombatants may create more resistance and increase the insurgency’s appeal—especially if the populace perceives a lack of discrimination in their use” (*CoinFM* 2007: 249). This incentive to minimize the use of force may help counterinsurgents, which have different obligations under the laws of war and human rights law, to converge on effective ways to conduct offensive operations without sacrificing the COIN campaign’s legitimacy.

## *2. Rules of Engagement in Counterinsurgency Operations*

### *a. Rules of Engagement for U.S. Military Forces in a Counterinsurgency Context*

42. The U.S. and other militaries formulate rules of engagement (ROE) for their forces as part of the effort to comply with the applicable LOAC. ROE are “directives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered” (*CoinFM* 2007: 350). Absent operation-specific ROE, U.S. forces implement the Standing Rules of Engagement (SROE) promulgated by the Chairman of the Joint Chiefs of Staff (*CoinFM* 2007: 350). However, almost every order for a military operation includes specific ROE, and deployment of U.S. military forces to Zimbabwe would, in all likelihood, follow this pattern.

43. The SROE and operation-specific ROE communicate to U.S. troops the principles that should guide their use of force. These principles “state the circumstances under which Soldiers and Marines may open fire[—]when they positively identify a member of a hostile force or they have clear indications of hostile intent” (*CoinFM* 2007: 350). ROE also always recognize the right of self-defense, the commander’s right and obligation to

protect assigned personnel, and the right to defend U.S. forces, allies, and coalition participants against armed attack.

44. Military commanders typically issue one set of ROE for a military operation, which provide guidelines applicable to all types of missions. In COIN, the soldier's mission continually changes. An offensive mission can become a defensive or stability mission within minutes and revert back to offensive (*CoinFM* 2007: 242). ROE must combine consistency and flexibility. ROE have to communicate the core principles on the use of force applicable to any mission. At the same time, effective ROE are flexible because they permit subordinate commanders to respond to the mission and react when confronted with unforeseen circumstances (U.S. Department of the Army 2001: ¶6-7).

45. ROE do not require or direct specific actions. They provide guidance for military personnel to operate effectively within the specific environment. Ideally, ROE provide a balance between initiative and restraint (U.S. Department of the Army 2001: ¶6-8). Lack of consistency and flexibility in ROE will only confuse the soldier who must apply the ROE on a daily basis. Such confusion could produce actions inconsistent with ROE that harm the legitimacy of counterinsurgents.

46. COIN contexts do not necessarily require substantive changes to the principles embedded in ROE, but these contexts severely challenge the application of ROE. The use of the civilian population by insurgents, and the need to achieve and maintain legitimacy, heightens the political significance of each use of force by counterinsurgents. Escalation from non-lethal to lethal force can occur without complete information about the threat or the possible consequences of resorting to lethal force.

47. The political incentive to minimize the use of force in COIN operations resonates with use-of-force principles in ROE, but this compatibility does not make the choices of commanders and military personnel in dangerous situations any less difficult. Proper and repeated training with ROE is critical to their effective application. The U.S. Army's motto of "Train as you fight!" captures this need (U.S. Department of the Army 2007: 3).

48. Training should begin at the home station for counterinsurgent forces. Training with the prescribed ROE will ensure their dissemination and understanding down to the lowest levels. It will also detect shortcomings with the ROE and allow time for their revision. As soldiers train in the application of ROE, they will internalize the principles, thereby ensuring correct application and the strengthening troops' ability to contribute to the success of the overall mission.

49. As then-Lieutenant General Petraeus (2006: 9) observed, COIN operations have "to remember the strategic corporals and strategic lieutenants, the relatively junior commissioned or noncommissioned officers who often have to make huge decisions, sometimes with life-or-death as well as strategic consequences, in the blink of an eye" (emphasis in original). The concept of "strategic corporals and strategic lieutenants" reinforces the importance of training in applying ROE in COIN settings.

50. Importantly for COIN operations, ROE are not static. Commanders must assess ROE contemporaneously within the cyclic planning of full spectrum operations (U.S. Department of the Army 2001: ¶5-19). Therefore, ROE can be adapted according to an operation's phases pursuant to assessment of the battle staff with respect to the current situation (*CoinFM* 2007: 188). The means to act decisively to prevent escalation and to apply force selectively and discriminately change with the situation on ground. A surge in insurgent violence can warrant relaxing the limitations on the use of force, and a failure to relax the ROE appropriately could place U.S. forces in greater danger. Conversely, a failure to tighten the ROE as the operating environment improves could damage the progress counterinsurgent forces have made against an insurgency. The application of ROE by U.S. forces is an art dictated by experience, detailed intelligence analysis, and extensive training.

51. ROE must also change according to the learning cycle of the insurgent, who learns and adapts to the tactics of COIN forces in order to develop new approaches (*CoinFM* 2007: 196). As the insurgent learns the counterinsurgents' ROE, he will change tactics to gain an advantage, potentially placing U.S. forces at greater risk. Commanders must be cognizant of the insurgent's ability to learn and adapt and be ready to revise the ROE to prevent the exploitation of COIN adherence to standardized operating principles (U.S. Department of the Army 2001: ¶4-32).

52. Counterinsurgents must also consider cultural norms when establishing operation-specific ROE. COIN doctrine stresses the importance for military leaders, including small-unit leaders, to have cultural awareness within their areas of operation (*CoinFM* 2007: 242). ROE that advise searches of women and children to be undertaken, where possible, by female counterinsurgents can demonstrate cultural sensitivity to the civilian population. Identifying such cultural norms in the planning process and enhancing the ROE to respect them, as appropriate, prevents the insurgent from exploiting and misrepresenting the acts and intentions of COIN forces. In this way, carefully constructed ROE enhance the legitimacy of the COIN campaign.

53. Finally, U.S. military forces engaged in COIN operations must apply ROE consistently. Typically, U.S. military operations are divided among multiple commands and branches (e.g., Army and Marines). Lack of consistency in ROE for branches of the U.S. military can cause problems for counterinsurgents. The civilian population of the HN will not distinguish between separate U.S. entities, nor should commanders when designing and issuing ROE in a COIN context. Consistency in ROE reflects the larger strategic need for integration of activities into unity of effort (*CoinFM* 2007: 53).

b. Coordination on Rules of Engagement with Zimbabwe and Other Counterinsurgency Forces

54. Unity of effort with respect to ROE is also important to achieve between U.S. forces, HN troops, and military contingents from other countries. In the case of Zimbabwe, counterinsurgents would most likely not have the same ROE, if they have them at all. The different international legal obligations and different levels of training of

some foreign counterinsurgent forces might produce more restrictive ROE for those forces than ROE acceptable to U.S. military commanders. ROE coordination will, therefore, be necessary.

55. In addition, foreign counterinsurgent forces would have to ensure that military and security forces of the interim government of Zimbabwe operate under acceptable ROE. The fragmentation of the ZNA may undermine whatever processes the ZNA had in place, if any, for issuing ROE. Training of the interim government's forces by foreign counterinsurgents should include the use of ROE in COIN. Counterinsurgent forces also have to be aware that the split in the ZNA provides an opportunity for the FCM to infiltrate the interim government's forces and pass intelligence back to the FCM leadership, including intelligence on ROE.

56. The U.S. Embassy's Security Assistance Office (SAO) should handle the task of ROE coordination with the interim government (U.S. Department of the Army 2003: ¶A-6). The SAO would have direct liaison with the interim government's forces and would have the lead on any ROE directives from the interim government.

57. Africa Command (AFRICOM) will eventually command all U.S. military actions within Africa. Thus, under the formal military chain of command, AFRICOM would have responsibility for coordinating ROE among U.S. military services operating in Zimbabwe. In addition, AFRICOM could play a key role in coordinating ROE with other foreign military forces participating in COIN operations in Zimbabwe.

### *3. Detention and Interrogation of Suspected Insurgents During Offensive Operations*

58. Military forces engaged in offensive operations may capture suspected insurgents and proceed to detain and interrogate them. All detention and interrogation actions undertaken by U.S. forces during any type of operation must conform to U.S. law and applicable international law. Chapter 4 analyzes the legal issues that detention and interrogation of suspected insurgents raise for U.S. forces and all other components of a COIN campaign.

## **C. Addressing Alleged Violations of the Laws of War by Counterinsurgency Forces**

### *1. Jurisdiction and Immunity Agreements between the United States and Zimbabwe concerning U.S. Military Personnel*

59. Even with training and supervision, some U.S. military personnel would violate the LOAC and, potentially, Zimbabwe's criminal law during COIN operations. For various reasons, including assuaging anger in the population over such acts, Zimbabwe's interim government may seek to exercise jurisdiction over such cases. Subjecting U.S. military personnel to the criminal jurisdiction of an interim government in the midst of an

insurgency raises legal and political concerns. Accordingly, “sovereignty issues should be addressed before executing operations” (*CoinFM* 2007: 66).

60. Status of Forces Agreements (SOFAs) are the primary legal mechanism for clarifying jurisdiction and immunity arrangements between the United States and nations hosting U.S. military personnel. The United States does not have a SOFA with Zimbabwe. Thus, before any deployment of U.S. military forces to Zimbabwe, military lawyers should work with the Department of State (DoS) to negotiate a SOFA with the interim government that immunizes U.S. forces from prosecution in the courts of Zimbabwe and preserves exclusive U.S. jurisdiction. A SOFA with Zimbabwe requires DoS involvement because, under U.S. law, the Secretary of State or her designee must approve “a proposed international agreement to be concluded in the name of the U.S. Government” (22 C.F.R. § 181.4(c)).

61. A SOFA with Zimbabwe would also be advisable even if the UN Security Council authorized the intervention under Chapter VII of the UN Charter. Military actions taken under Chapter VII authority “are typically coercive, thus obviating, at least during early phases, detailed consideration of host national legal frameworks” (ROLH 2007: 60). COIN doctrine emphasizes, however, that counterinsurgents will engage in full spectrum operations right from the start, so organizing how the HN’s legal system applies to foreign counterinsurgent forces is critical to planning for COIN operations.

62. An additional incentive to negotiate a SOFA or similar agreement with the interim government comes from Congress, which has exercised its appropriations power to ensure that U.S. military personnel serving outside the United States are not subject to the jurisdiction of host nations. For example, in the Department of Defense Appropriations Act of 2007, Congress prohibited the Department of Defense (DoD) from entering any agreement with Iraq that would “subject U.S. military members to the jurisdiction of Iraq criminal courts or punishment under Iraq law” (Public Law 109-289, §9017).

63. The United States has entered into agreements with countries that are parties to the Statute of the International Criminal Court (ICC) in order to ensure that those countries do not subject U.S. military personnel within their territories to ICC jurisdiction. Zimbabwe is not a party to the ICC, thus relieving the United States of the need to address the implications of the ICC on U.S. military participation in COIN in Zimbabwe. Should Zimbabwe join the ICC, as many human rights and other NGOs will encourage it to do, the United States would have to re-visit this issue.

64. Although U.S. military personnel would have immunity from Zimbabwean law in any COIN campaign under a SOFA or equivalent agreement, this immunity does not mean that U.S. troops can disregard such law without serious consequences for COIN efforts. As discussed more below, if the HN population perceives that counterinsurgents engage in illegal acts with impunity, the legitimacy of the interim government and the COIN campaign suffers while the FCM’s neo-imperialist narrative gains strength.

65. An important aspect of preliminary legal planning for COIN in Zimbabwe is to understand applicable Zimbabwean law and to determine ways to ensure U.S. forces respect it to the fullest extent possible. One aspect of this exercise would be to delineate whether Zimbabwe's acceptance of international legal obligations under Additional Protocol II or human rights treaties (e.g., ICCPR, ACHPR) create categories of crimes the United States does not recognize in applying the LOAC for international armed conflict to U.S. military participation in non-international armed conflicts.

*2. U.S. Enforcement of the Laws of War Against U.S. Military Personnel*

66. U.S. soldiers who allegedly violate the LOAC during COIN operations in Zimbabwe (e.g., killing noncombatants, destruction or theft of personal property, destruction of cultural sites) must be held accountable under the Uniform Code of Military Justice (UCMJ). The UCMJ's procedures are rigorous and are in accord with the tenets of the rule of law, and military lawyers are skilled in the UCMJ's application. Enforcement is critical to deter misconduct and to preserve the COIN campaign's legitimacy in the eyes of Zimbabwe's population, the international community, and the United States.

67. The FCM would exploit every instance in which a U.S. service member allegedly breaks the law and goes unpunished (or receives lenient punishment), even when insurgents themselves are not constrained by the laws of war (*CoinFM* 2007: 52). To mitigate the damaging effect of these accusations, commanders and judge advocates need to address promptly alleged violations and "ensure that investigation, trial, and punishment are prompt, fair, and public" (Stromseth, Wippman, and Brooks 2006: 326). Efforts should also be made to make clear to the people of Zimbabwe, the international community, and the U.S. citizenry that the United States is holding its troops accountable for violations of the laws of war.

68. In the same way, U.S. military commanders should be held criminally responsible if they issue unlawful orders or turn a blind eye to their subordinates' misconduct. As the COIN doctrine notes, "accountability for the overall behavior and performance of a command cannot be delegated" (*CoinFM* 2007: 253). Failure to hold senior leaders accountable creates the impression that the highest echelons of the U.S. government do not respect the rule of law, which is more problematic than blowback resulting from the actions of lower-ranking "bad apples."

69. Prosecutions of violations of the laws of war under the UCMJ have occurred with respect to U.S. military personnel serving in Afghanistan and Iraq. These prosecutions have not, however, regained the legitimacy the United States lost because of the criminal acts committed. Perceptions linger, particularly with atrocities committed at Abu Ghraib, that higher-ranking military officers and civilian officials escaped punishment for their responsibilities in these acts. Similarly, during Mugabe's regime, impunity for senior civilian, intelligence, and military officials was the norm, which heightens the importance of making sure impunity is not the norm for any counterinsurgents. This unfortunate reality reminds potential COIN campaigns of the critical necessity to train soldiers and

help commanders in ways that prevent violations of the laws of war as much as possible (*CoinFM* 2007: 238; Kahl 2007a).

*3. Alleged Violations of the Laws of War by Military Forces of Zimbabwe and Other Counterinsurgents*

a. Military Forces of Zimbabwe

70. Zimbabwe's security forces have a legacy of brutality and oppression. Some of the most brutal elements of the Mugabe-era military currently belong to the FCM, including those that carried out Operations Tsuru and Murambatsvina (White House Memorandum 2007: ¶8). The ranks of the interim government's security forces undoubtedly contain perpetrators of human rights violations as well. Indeed, two of the interim government's leaders—Solomon and Joyce Mujuru—are on the list of individuals targeted by U.S. and European Union sanctions for complicity in human rights abuses. The United States would have to confront this problem in planning for assistance to the security forces of the interim government (see Chapter 4).

71. In light of this history, the security forces of Zimbabwe might be predisposed to engage in offensive operations against the FCM in ways that violate the laws of war. Moreover, the interim government itself may not attach much significance to enforcing compliance with the laws of war because part of its leadership is accustomed to ruling without political accountability. Unless "the state is itself bound by law" (*ROLH* 2007: 6), counterinsurgents would have difficulty achieving lasting rule of law reforms in Zimbabwe. Therefore, some of the most pressing legal issues in offensive operations revolve around the need to instill and enforce discipline in Zimbabwe's security forces.

72. Counterinsurgents should consider ways to prevent HN violations of the laws of war and to address violations that occur. For example, one possible means to prevent misconduct is to embed U.S. advisors within Zimbabwean units. An alternative measure is to limit Zimbabwean forces' participation in offensive operations—at least until they demonstrate the ability to operate in compliance with international legal norms. These options (and others) require clarification of the legal relationship between the military forces of the United States and Zimbabwe—a relationship defined not only by the legal mandate for the use of force but also by coordination on law of war issues with the interim government.

73. Unfortunately, even the most stringent oversight cannot prevent all violations of the laws of war by the HN. When misconduct occurs, the alleged perpetrator(s) must be held accountable. As the *ROLH* (2007: 81) notes, "[A]n armed force without effective discipline is easily turned into a disruptive force, and overreaching by military forces is a prime example of the kinds of arbitrary state actions whose eradication is a primary component of the rule of law." Counterinsurgents should make efforts to ensure that the population of Zimbabwe perceives that the interim government is holding its forces accountable for abuses.

74. Legal planning for COIN must, therefore, identify the applicable legal framework for adjudicating alleged violations of the laws of war by the security forces of the interim government. This framework involves the applicable law and the adjudicating institutions. For the applicable law, possibilities include Zimbabwe's existing criminal law, the military justice code in Zimbabwe, a transitional justice code, and international criminal law. In terms of institutions, the interim government will likely retain jurisdiction over its personnel and may wish to prosecute violations itself. Massive corruption characterized the military and judiciary during the Mugabe era, so counterinsurgents would have to monitor the performance of the interim government in connection with alleged violations of the laws of war.

75. Legal planners cannot rule out the possibility that private militias would form in Zimbabwe to secure the populace from insurgent violence. Counterinsurgents occasionally permit groups unaffiliated with the HN government to conduct offensive operations (e.g., arming Sunni tribesmen in Iraq's Anbar province). However, a danger exists that such groups "may come to represent an essentially parallel and largely unaccountable sector in competition with state justice and security provision" (*ROLH* 2007: 103). If foreign counterinsurgents and the interim government allow paramilitary groups to conduct offensive operations against the FCM, lawyers need to insist that the interim government bring such groups within its jurisdictional authority.

#### b. Other Counterinsurgents

76. Coalition partners are responsible for addressing violations of the laws of war by their own military personnel, but a failure to do so will undermine the legitimacy of all counterinsurgent forces and cripple the rule of law mission. Thus, a vital part of the coordination and synchronization inherent in COIN and rule of law operations is ensuring the disciplined conduct of all coalition military personnel. Lawyers should identify the states most likely to participate in COIN in Zimbabwe and analyze ways to ensure the highest level of compliance with the laws of war and that violators are held accountable.

#### c. Insurgents

77. Legal planning for potential COIN operations in Zimbabwe must also consider how counterinsurgents would hold legally accountable captured insurgents who allegedly violated the laws of war or the laws of Zimbabwe. Common Article 3 of the Geneva Conventions provides the minimum standard counterinsurgents in Zimbabwe would have to satisfy (*CoinFM* 2007: 353). Common Article 3 prohibits "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

78. What this standard in Common Article 3 means has been controversial in the United States. The Supreme Court struck down the Bush administration's procedures for trials of illegal enemy combatants by military commission because the procedures did not conform to Common Article 3 (*Hamdan v. Rumsfeld* 2006). Although Congress

legislated that the procedures contained in the Military Commissions Act of 2006 complied with Common Article 3, controversy lingers on this question. Counterinsurgents need to avoid these kinds of controversies because they call into question the legitimacy of the COIN campaign.

79. Counterinsurgents would also have to make sure that the interim government was capable of complying with, at a minimum, Common Article 3 in cases in which the interim government exercised criminal jurisdiction over captured insurgents. Foreign counterinsurgents “should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation” and thus “must carefully preserve weapons, witness statements, photographs, and other evidence collected at the scene” (*CoinFM 2007: 353*).

80. The importance to COIN legitimacy of how counterinsurgents handle criminal prosecutions of insurgents places this issue on the coordination agenda for all counterinsurgent forces. Squabbles among counterinsurgents about which coalition partner prosecutes insurgents or intra-coalition concerns about violations of Common Article 3 would provide the FCM with ammunition in the battle for legitimacy.

#### **D. Claims and Solatia Payments by the United States after Offensive Operations**

81. During offensive operations, unfortunate events occur, which are the result of accidents, poor planning, or unavoidable collateral damage. Although these events may happen at any stage of COIN operations, they are very likely to occur during offensive operations. Without appropriate responses, such events may degrade the legitimacy of the COIN effort and thus require strategies to mitigate this potential effect.

##### *1. The Foreign Claims Act and Counterinsurgency Operations*

82. Congress enacted the Foreign Claims Act (FCA) to promote and maintain positive relationships abroad (10 U.S.C. § 2734). The FCA provides the legal authority for the financial settlement of claims of damage made against the United States. Under the FCA, “claims by HN civilians for property losses, injury, or death caused by service members or the civilian component of the U.S. forces may be paid to promote and maintain friendly relations with the host nation” (*CoinFM 2007: 360*).

83. The FCA excludes, however, claims for damages resulting from direct or indirect combat actions, unless the damages are the result of an accident or malfunction of a U.S. military aircraft or airborne ordinance (10 U.S.C. § 2734(b)). The FCA does not allow for settlement of claims for damages resulting from the actions of the enemy. In short, the FCA does not provide foreign nationals much opportunity to file claims against the United States for property or personal damages caused by offensive operations by U.S. forces. Claims under the FCA may more likely arise with respect to defensive and stability operations. The inevitability of legal claims means that rule of law planning must address how the United States will handle such claims in Zimbabwe.

2. *Solatia Payments and Counterinsurgency Operations*

84. Solatia payments differ from legal claims under the FCA. Solatia payments are “payments in money or in kind to a victim or a victim’s family as an expression of sympathy or condolence” (*CoinFM* 2007: 360). In some countries, such payments are customary, and counterinsurgents can utilize solatia payments to show regard for accidental losses associated with offensive operations. These payments are generally nominal in amount and are “simply offered as an expression of remorse in accordance with local custom” (*CoinFM* 2007: 360). Handled effectively, solatia payments can be a “legitimacy multiplier” for counterinsurgents.

85. Although solatia payments can be useful, U.S. forces must engage in this practice in a disciplined and monitored way. To begin, counterinsurgents should determine whether solatia payments have any customary basis in Zimbabwe. Second, money must have been appropriated and allocated for use by U.S. forces as solatia payments. Third, U.S. troops should not make solatia payments “without prior coordination with the combatant command” (*CoinFM* 2007: 360). Fourth, the payment of solatia in any area of operations must be closely monitored to avoid unintended adverse consequences, such as encouraging false and frivolous claims of damage, disrupting local economic conditions through payment of solatia, or enticing insurgents to extort money from, or violently target, individuals who received solatia payments from U.S. forces.

3. *Beyond Solatia: Alternatives to Solatia Payments to Restore Legitimacy for Counterinsurgency Forces After Offensive Operations*

86. Potentially more powerful in legitimacy terms for COIN forces is the ability to coordinate offensive operations with effective defensive and stability operations. The more rapidly counterinsurgents can shift from clearing insurgents from an area to securing the area and delivering essential services, and stimulating economic development, the less likely resentment about damage caused by offensive operations will fester and threaten the long-term prospects of the COIN campaign. This observation merely reinforces the COIN doctrine’s emphasis on the need for counterinsurgents to engage competently in full spectrum operations at all times during COIN.

IV. CONCLUSION

87. COIN in Zimbabwe would require offensive combat operations against the FCM. For preliminary legal planning purposes, the United States would need to address:

- Authorization under U.S. law for the use of force in COIN operations in Zimbabwe;
- Authorization under international law for the United States and other countries to use military force in COIN operations in Zimbabwe;

- Application of the laws of war to the U.S. military, other foreign military forces, and Zimbabwe's military and security forces in the conduct of offensive operations in Zimbabwe;
- Development and implementation of appropriate ROE for all counterinsurgent forces conducting offensive COIN operations in Zimbabwe;
- Establishment of immunity from the jurisdiction of Zimbabwean law for U.S. military personnel engaging in COIN operations in Zimbabwe;
- Enforcement of the laws of war against U.S. military personnel alleged to have violated the UCMJ during offensive COIN operations in Zimbabwe; and
- Preparation for addressing legal claims or customary expectations of payments related to damage to persons or property related to the conduct of offensive COIN operations by U.S. military forces.

88. Offensive combat missions create serious challenges for ensuring that the rule of law informs COIN activities. Effectively handling these challenges means that offensive operations are also rule of law operations. Counterinsurgents require proper legal authorization to use military force in COIN, and they must respect limitations that law imposes on the conduct of combat operations. How counterinsurgent forces fare in handling these challenges directly affects how the strategic struggle for legitimacy with the insurgency will unfold.

## CHAPTER 4

### DEFENSIVE OPERATIONS AND THE RULE OF LAW IN COUNTERINSURGENCY

#### I. INTRODUCTION

1. In conjunction with offensive operations, defensive operations in counterinsurgency (COIN) focus on defeating insurgents (*CoinFM 2007*: 166). Counterinsurgents conduct defensive operations to protect their military and security forces, the civilian population of the host nation (HN), and critical institutions and infrastructure in the HN from insurgent attack (*CoinFM 2007*: 5). Defensive operations are critical to COIN campaigns because they help provide security and facilitate more effective offensive and stability operations.

2. This chapter focuses on rule of law challenges that defensive operations create. Compared to offensive operations, defensive operations are more diverse in nature, which creates a more complex web of considerations for legal planning. The chapter begins by looking at the role defensive operations play in COIN and at challenges such operations might face in the COIN context of Zimbabwe. Next, the Report summarizes rule of law issues explored in Chapter 3's analysis of offensive operations that also apply to defensive operations, including authorization of the use of force, compliance with and enforcement of the laws of war, application of ROE, and handling claims and solatia payments. The chapter also explores legal issues raised by the potential need for counterinsurgents to use non-lethal munitions, such as riot control agents (e.g., tear gas), in defensive operations.

3. The chapter then focuses on legal concerns that arise in training and equipping HN military and security forces and conducting detention and interrogation of suspected insurgents. These two areas are thick with legal issues arising from U.S. domestic law, international law, and the law of Zimbabwe. The chapter concludes with an analysis of the legal considerations connected with the use of private security contractors by counterinsurgents. The controversies over the U.S. government's use of private security contractors in Afghanistan and Iraq have involved serious rule of law issues that preliminary legal planning for COIN operations in Zimbabwe must address.

#### II. DEFENSIVE OPERATIONS IN COUNTERINSURGENCY CAMPAIGNS

##### A. Counterinsurgency Doctrine on Defensive Operations

4. COIN doctrine describes full spectrum operations by using a medical analogy to communicate the elements of COIN efforts: stopping the bleeding, facilitating inpatient care for recovery, and moving the outpatient toward self-sufficiency (*CoinFM 2007*: 153-154). Under this analogy, defensive operations support each of these tasks.

5. Defensive operations help “stop the bleeding” by allowing counterinsurgents to attain and maintain security for the HN government and civilian population, which strengthens the COIN campaign against the insurgency. Defensive operations also support COIN efforts to help the HN recover from the damage caused by the insurgency. Defensive operations feature in key logical lines of operation (LLOs) that attempt to restore HN capabilities in providing for civil security, such as training HN security forces to handle civil security (*CoinFM* 2007: 153). Defensive operations also contribute to the recovery and restoration of HN capabilities by gathering intelligence that facilitates more effective offensive and stability operations.

6. Finally, defensive operations help provide the foundation for the HN to conduct governance functions increasingly on its own, thus achieving self-sufficiency. Such operations aim to provide the HN with self-sufficient security forces that can conduct offensive operations and protect civilians and infrastructure from insurgent attacks. Such self-sufficiency creates a more fertile environment for counterinsurgents to re-double their efforts on stability operations (e.g., essential services and economic development).

7. The medical analogy used by COIN doctrine is useful only up to a point. The analogy is not intended to communicate that the three stages occur sequentially, as they would for a patient in the health care system. Defensive operations are not the linear transition phase between offensive operations and stability operations. The interdependency of full spectrum operations means that defensive operations are always intertwined with offensive and stability operations in a fluid relationship that challenges the capabilities of counterinsurgent forces to operate simultaneously in all three.

### **B. Defensive Operations in Counterinsurgency in Zimbabwe**

8. In light of COIN doctrine on defensive operations, counterinsurgents in Zimbabwe would face enormous challenges. The Fourth Chimurenga Movement (FCM) poses a dangerous threat to the interim government’s power and legitimacy, officials of the interim government, the safety and welfare of the population, civilian infrastructure, and the security of foreign forces that might intervene to help the interim government.

9. The difficulty of eliminating an insurgency through offensive operations places a premium on COIN forces’ ability to conduct defensive operations. Foreign counterinsurgents that might join the interim government’s struggle face the task of rebuilding, retraining, and re-equipping security forces in Zimbabwe. Neither the Zimbabwe National Army (ZNA) nor the Zimbabwe Republic Police (ZRP) is an effective force after their fragmentation following Mugabe’s death. In addition, foreign counterinsurgents must help the remnants of the ZNA and ZRP supporting the interim government overcome their legacy of human rights abuse developed during Mugabe’s reign, a legacy that may make civilians leery of cooperating with these security forces.

10. The FCM’s appeal to the anti-imperialist history of those leaders who liberated Zimbabwe from racist white rule also complicates the context for conducting defensive operations. The FCM has already threatened any foreign forces intervening in Zimbabwe with attack, and it would try to create distrust of foreign counterinsurgent forces among

the population. The FCM's actions and narratives would attempt to hang an imperialist mantle on foreign counterinsurgents, who would have to overcome this perception while building the foundation for achieving the desired end state for Zimbabwe.

11. The margin of error for counterinsurgents in terms of defensive operations in Zimbabwe would, therefore, be small. The nature and diversity of defensive operations mean that the potential for damaging COIN legitimacy is great, particularly with respect to the use of force. This reality highlights the importance of ensuring that COIN forces plan and implement defensive operations in ways that produce legitimacy and minimize the political risks and economic costs to counterinsurgents. This task requires counterinsurgents to embed such operations within the rule of law.

### III. DEFENSIVE OPERATIONS BY THE UNITED STATES IN ZIMBABWE

12. With COIN doctrine and the situation in Zimbabwe both making clear that U.S. involvement in COIN in Zimbabwe would involve defensive operations, preliminary legal analysis must pay attention to rule of law concerns associated with counterinsurgents' defensive efforts to maintain a secure environment for the populace of Zimbabwe and to erect a legitimate shield behind which stability operations can take hold (*CoinFM* 2007: 5, 157). Legal issues relating to the use of force overlap with legal concerns triggered by offensive operations, but rule of law operations face some distinct issues with defensive operations concerning training and equipping military and security forces in Zimbabwe, detention and interrogation of suspected insurgents, and use of private security contractors in defensive operations.

#### **A. Use of Force in Defensive Operations in Zimbabwe**

##### *1. Authorization to Use Force in Counterinsurgency in Zimbabwe*

13. As Chapter 3 discussed, U.S. military participation in COIN in Zimbabwe should not commence without authorization for the use of force under U.S. and international law. Such authorizations would, in all likelihood, empower the U.S. military to use force as part of defensive operations, and thus further discussion of the need for legal authorization is not required.

##### *2. Application and Enforcement of the Laws of War with Respect to Defensive Uses of Military Force*

14. The laws of war apply with equal force to offensive and defensive operations. Offensive and defensive operations in COIN occur at the same time, so requiring troops to oscillate between varying legal imperatives would be confusing and ineffective. This reality explains why U.S. military commanders issue one set of ROE that contain principles relevant to both offensive and defensive operations (see Chapter 3). Similarly, allegations of violations of the laws of war, including violations not related to the use of force (e.g., allegations of torture of detained persons), by U.S. military personnel would be handled as described in Chapter 3 (e.g., immunity from Zimbabwe's jurisdiction and investigation and prosecution under the Uniform Code of Military Justice).

15. Defensive operations tend to highlight, however, some aspects of the laws of war more than offensive operations. As Chapter 3 analyzed, the United States would apply, as a matter of policy, the laws of war relating to international armed conflict to guide U.S. military personnel engaged in COIN in Zimbabwe. Particularly relevant for defensive operations would be Common Article 3 of the Geneva Conventions of 1949, which applies to non-international armed conflicts, and Geneva Convention IV on occupation.

16. As discussed in Part III.C below, defensive operations in COIN in Zimbabwe would involve counterinsurgents in detaining and interrogating suspected insurgents. Common Article 3 of the Geneva Conventions informs the standard of treatment for persons detained in a non-international armed conflict.

17. Defensive operations would also involve foreign counterinsurgents in activities that resemble those undertaken by an occupying power in international armed conflict, making Geneva Convention IV relevant to the conduct of defensive operations by U.S. military forces. Foreign counterinsurgents providing assistance to the interim government would not technically constitute occupying forces because the conflict is not international in nature. However, the weakness of the interim government's security forces, and the perilous state of the economy, would require foreign counterinsurgents initially to play roles akin to those of an occupying power during an international armed conflict. These roles include providing public order and civil security (defensive operations) and delivering essential services to the population (stability operations).

18. Given the quasi-occupation status foreign counterinsurgents might have while engaging in COIN in Zimbabwe, the Department of Defense (DoD) and U.S. military commanders would need to make clear how U.S. forces should apply the international law on occupation in a COIN campaign in Zimbabwe. Failure to accomplish this task can lead to problems for COIN efforts, particularly with respect to legitimacy.

19. For example, U.S. forces were, under international law, an occupying force in Iraq, but policy decisions dictated that the United States present itself as a liberating rather than occupying force. These decisions led to unfortunate consequences when the United States occupied Iraq, including serious rule of law problems directly the result of a lack of planning for the application of the international law on occupation. For U.S. military involvement in COIN in Zimbabwe, the same mistake of lack of planning concerning the law of occupation must be avoided in order to achieve the goal of defensive operations—security under the rule of law.

*3. Defensive Operations and the Use of Riot Control Agents by U.S. Military Forces During Counterinsurgency in Zimbabwe*

20. The need for foreign counterinsurgents to help provide public order and civil security in Zimbabwe means that they would confront situations in which domestic law enforcement agencies could use non-lethal munitions, such as riot control agents (RCAs). The FCM may well try to foment riots as a way to provoke COIN forces to over-react and use lethal force. The extraterritorial use of RCAs by military forces has, however,

been controversial, especially between the United States and some potential coalition partners for COIN in Zimbabwe.

21. The underlying reason for the controversy stems from how the United States views RCAs under the Chemical Weapons Convention of 1992 (CWC), a perspective not in accord with how other CWC parties interpret the treaty. Preliminary legal planning should focus on how potential coalition governments would perceive the use of RCAs by the United States in a COIN context.

22. U.S. policy on military use of RCAs is set out in Executive Order 11850 of 1975, which was incorporated into the U.S. ratification of the CWC. The policy renounces the use of RCAs in armed conflict except in defensive operations to save lives, such as:

Controlling riots in areas under direct and distinct U.S. military control, to include rioting prisoners of war; dispersing civilians where the enemy uses them to mask or screen an attack; rescue missions for downed pilots/passengers and escaping [prisoners of war] in remotely isolated areas; and in our rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists, and paramilitary organizations. (*Operational Law Handbook 2007: 20*)

23. U.S. policy prohibits the use of RCAs in offensive operations and thus is in accord with the CWC's prohibition on the use of RCAs as a method of warfare (Article I.5). U.S. policy permits, however, use of RCAs in defensive operations that might arise during a COIN campaign, such as engaging in riot control in areas under U.S. military control and protecting U.S. military personnel and assets from civil disturbances.

24. The United States does not believe that the CWC regulates these uses of RCAs because RCAs are not "toxic chemicals" within the meaning of that term in the CWC (Article I.2). Some defensive uses are arguably legal under the CWC provision that recognizes use of toxic chemicals for law enforcement purposes (Article II.9(d)), but any RCA use by U.S. forces in military operations in another country would cause concern with coalition partners that are CWC parties and that do not agree with the U.S. stance on defensive military use of RCAs. Zimbabwe is also a CWC party, so assessing the interim government's views on RCA use by U.S. forces in the territory of Zimbabwe during defensive COIN operations is also important for planning. Assessments of other counterinsurgents' views should inform the decision the president must make concerning use of any RCA by U.S. forces (Executive Order 11850 1975).

#### *4. Claims and Solatia Payments by the United States After Defensive Operations*

25. Chapter 3's analysis of the Foreign Claims Act (FCA) and solatia payments in the offensive operations applies with equal force to damages caused by defensive operations. The potential for foreign claims under the FCA is perhaps more diverse for defensive than offensive operations because defensive operations involve a wider scope of military activities than combat. As experiences at road checkpoints in Iraq have demonstrated,

mistakes made when force is used for defensive purposes may trigger the need to make solatia payments to preserve goodwill with the population, assuming such payments are customary in the relevant area of operations.

## **B. Training and Equipping Military Forces in Zimbabwe**

### *1. The Need for Foreign Assistance to Reform the Zimbabwe National Army*

26. The security forces of Zimbabwe must participate in defensive operations in any COIN campaign. Effective HN security forces are essential to the achievement of the ultimate goals of COIN efforts (*CoinFM* 2007: 199), and foreign counterinsurgents often engage in training and equipping HN security forces. In Zimbabwe, the need for effective security forces requires improving the ZNA and the ZRP. This chapter addresses the need to strengthen the ZNA, and Chapter 5 handles the challenge of improving the ZRP. Both tasks are critical in COIN operations and both would require significant assistance from foreign counterinsurgents because Zimbabwe's security forces fragmented after Mugabe's death, with some elements joining the interim government and others the FCM. Thus, without foreign assistance, the interim government will not be in a position to provide civil security from insurgent violence.

27. The ZNA forces supporting the interim government may also not be well trained for conducting defensive operations in the complex context of COIN. Mugabe used the ZNA as a tool of repression, as detailed in reports from human rights organizations (e.g., Zimbabwe Human Rights NGO Forum 2007b). The ZNA's legacy of human rights abuses further highlights the need for foreign assistance to reform Zimbabwe's forces into an asset that supports the pursuit of legitimacy. The need for foreign assistance to improve the ZNA raises many legal issues that preliminary planning should consider.

### *2. U.S. Legal Framework for Assistance to Foreign Military Forces*

#### *a. Congressional Authorization and Appropriations Required*

28. Under U.S. law, Congress must authorize the training and equipping of foreign security forces and appropriate all expenditures for such activities (*CoinFM* 2007: 359). This necessity reinforces the need for Congress to support any COIN deployment to Zimbabwe. The president may authorize deployed U.S. military personnel to train or advise the military forces of Zimbabwe as a component of defensive COIN operations. Under such presidential authorization, congressional appropriations for DoD personnel, operations, and maintenance "provide an incidental benefit to those [foreign] security forces" (*CoinFM* 2007: 359). Beyond this incidental support, the Foreign Assistance Act (FAA) requires that Congress specifically appropriate funds for all other training and equipping services and materiel provided to foreign security forces (*CoinFM* 2007: 359).

29. Under the FAA, the Department of State (DoS) is the primary agency responsible for foreign assistance, and DoD involvement with training foreign security forces typically is limited to the amount of man-hours and materiel requested by DoS (*CoinFM*

2007: 359). The president can direct that DoD be responsible for coordinating U.S. efforts to train foreign security forces, but, otherwise, DoD “lacks authority to take the lead in assisting a host nation to train and equip its security forces” (*CoinFM* 2007: 359).

b. Human Rights Vetting Required

30. Under U.S. law, DoS and DoD would have to verify that units of Zimbabwean security forces to receive training and equipment from the United States have not committed gross violations of human rights (*CoinFM* 2007: 359). Mugabe’s use of the ZNA to commit human rights abuses makes this requirement important to handle properly. The scope of the ZNA’s involvement in massive human rights abuses is extensive, including the assault, torture, murder, rape, unlawful detention, death threats, and other abuses perpetrated during Mugabe’s seizure of white-owned farms (Zimbabwe Human Rights NGO Forum 2007a). The United States would, therefore, have to undertake a serious vetting process to ensure compliance with U.S. law on assistance to foreign security forces.

31. At least four considerations complicate the undertaking of the needed lustration of the ZNA forces supporting the interim government:

- First, leaders of the interim government, such as Solomon Mujuru, may be personally implicated in the massive human rights abuses in question because of their roles in the Mugabe regime.
- Second, the vetting process would delay the ability of the United States to begin training and equipping of the ZNA forces loyal to the interim government, which would set back the timetable for integrating ZNA units into offensive and defensive operations.
- Third, failure of the United States to engage in the vetting process would not only violate U.S. law but also anger human rights organizations interested in Zimbabwe, the assistance of which counterinsurgents would need for stability operations.
- Fourth, as the problematical de-Ba’athification process in Iraq demonstrated, the United States would need to ensure that lustration does not undermine efforts to achieve security, provide essential services, and stimulate economic development.

*3. Human Rights Standards Relevant to Training and Equipping Military Forces in Zimbabwe*

32. Any assistance the United States provides to improve Zimbabwe’s security services should be undertaken with the objective of instilling in such services respect for human rights. Again, human rights groups would watch this process of military assistance closely. For example, Amnesty International (2007) argued, “The America we believe in would ensure US security transfers do not contribute to human rights abuses, it would work to prevent the use of and help rehabilitate child soldiers globally, and it would

ensure stringent human rights criteria govern the US training and equipping of foreign forces.” The abusive legacy of the ZNA also makes training the interim government’s security forces to human rights standards important for convincing the civilian population that their human rights are not at risk from these forces.

33. The relevant human rights standards to which the interim government’s security forces should be trained should be taken from the protections found in Zimbabwean law (e.g., constitutional human rights protections) and in human rights and other applicable treaties to which Zimbabwe is party. The Zimbabwe Constitution contains an impressive list of protected rights, and Zimbabwe is party to important human rights treaties, such as the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples’ Rights. The commitments the interim government has under constitutional and international law provide a basis for identifying human rights standards to inform training of security forces loyal to the interim government.

### **C. Detention and Interrogation of Suspected Insurgents**

#### *1. The Ghosts of Abu Ghraib: Legitimacy, Rule of Law, and Standards for Detaining and Interrogating Suspected Insurgents*

34. COIN doctrine states that “[d]etentions and interrogations are critical components to any military operation” (*CoinFM* 2007: 249). Successful offensive and defensive operations will capture insurgents and insurgency sympathizers who may possess information regarding insurgent activities. Detention and interrogation of insurgents prevent them from perpetrating further violence and provide actionable intelligence for full spectrum operations (*CoinFM* 2007: 250).

35. Although detention and interrogation are vital components of defensive operations, they have also been a major source of controversy in COIN operations. Detainee abuse and questionable interrogation techniques have undermined the legitimacy of counterinsurgents in the international community, within the HN, and with the counterinsurgents’ own political institutions and populations. To advance the primary goal of building legitimacy, COIN operations in Zimbabwe would require standards for detention and interrogation that meet security imperatives in a manner that adheres to the rule of law and that would be viewed as legitimate in the HN and abroad. Such standards must be informed by international law, U.S. law, Zimbabwean law and culture, and the primary goal of seeking legitimacy.

36. One famous historical example of detention and interrogation policy harming a COIN campaign comes from the French experience in Algeria (*CoinFM* 2007: 252). In Algeria, the French Army used torture to gain intelligence. In the security context, the French strategy was successful as they were able to pacify the country (DiMarco 2006). However, the use of torture undermined France’s ability to gain or maintain legitimacy within Algeria, France, and the international community, and eventually France lost Algeria to the insurgents.

37. In the current example of Iraq, the United States suffered setbacks to its legitimacy because of abusive detention and interrogation policies, especially at the infamous Abu Ghraib prison. The use of dogs, sexual humiliation, religious degradation, and painful stress positions against detainees at Abu Ghraib damaged the legitimacy of U.S. intervention and the efforts to quell insurgency movements. The consequences of such abuse, and its dissemination through pictures on the Internet, continue to haunt U.S. credibility. The Abu Ghraib debacle means that any detention and interrogation activities the United States would undertake in Zimbabwe would be scrutinized by human rights groups, intergovernmental organizations, and the global media.

38. Legal planning for detention and interrogation operations in Zimbabwe must balance the security aims of defensive operations and the strategic goal of legitimacy. Difficulties in gaining human intelligence sources within the FCM may leave detainees as the key source for actionable intelligence. The need for actionable intelligence, combined with limited sources for such intelligence, may lead to questionable interrogation techniques in the absence of standards and leadership (*CoinFM* 2007: 251). These standards must be clear and unambiguous, conform to international and U.S. law, and be uniformly applied by all members of the COIN operation.

39. In addition to learning the lessons from past conflicts (Church 2004: 3), legal planning for detention and interrogation in COIN should also include assessment of potential problems that might arise from the culture and experience of the people of Zimbabwe. Some detention and interrogation techniques may offend cultural and religious practices, which could anger local populations and jeopardize the achievement of security and legitimacy. Planning for detention and interrogation in Zimbabwe should also take into consideration the abusive nature of the Mugabe regime, a legacy counterinsurgents would be loath to inherit through their own behavior.

40. Standards for detention and interrogation must be coordinated across all relevant COIN actors. Although each counterinsurgent force may have its own legal framework, coordination and unity of effort on interrogation and detention are needed in order to reach the balance between intelligence for security and legitimacy for achieving the desired end state (*CoinFM* 2007: 57). Coordination is also vital in training to ensure that HN security forces are proficient in the balancing task. Inconsistent policy, standards, and training contributed to the abuses at Abu Ghraib and elsewhere (Fay 2004: 8).

## *2. U.S. Legal Standards for Detention and Interrogation*

### *a. Common Article 3 of the Geneva Conventions*

41. COIN operations generally take place as part of internal armed conflicts under the laws of war (*CoinFM* 2007: 352). As a matter of policy, the United States requires its military forces to obey the laws of war applicable in international armed conflict in any armed conflict in which such forces participate (see Chapter 3). Typically, insurgents captured in COIN operations are not entitled to receive prisoner of war status. Such detainees are subject to the laws of war and the domestic law of the HN. From the U.S.

legal perspective, U.S. military forces and civilian agencies must, in detaining suspected insurgents, comply with Common Article 3 of the Geneva Conventions.

42. Common Article 3 prohibits:

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture;
- Taking of hostages;
- Outrages upon personal dignity, in particular humiliating and degrading treatment; and
- The passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees recognized as indispensable by civilized peoples.

43. Common Article 3 of the Geneva Conventions has caused controversy with respect to U.S. detention and interrogation policy in the global war on terrorism. The controversy culminated in the Supreme Court's ruling in *Hamdan v. Rumsfeld* (2006) that Common Article 3 applied to U.S. actions in the global war on terrorism. COIN operations in Zimbabwe might not create the same detainee classification disputes because the crisis is presently a non-international armed conflict in the classical sense. U.S. statutory law (e.g., Detainee Treatment Act of 2005 (DTA)) and DoD policy directives and doctrine (e.g., DoD Directive 2310.01E, DoD Directive 3115.09, and U.S. Army Field Manual on Intelligence Interrogation (FM 2-22.3)) support application of Common Article 3 to the kind of military operations that would take place in COIN efforts in Zimbabwe. Classification problems may arise again if the FCM begins to cooperate with terrorist groups hostile to the United States.

44. What exactly Common Article 3 prohibits counterinsurgents from doing with detainees has also been controversial in the global war on terrorism, particularly with regard to what interrogation practices constitute torture, cruel, inhuman, and degrading treatment or punishment. The United States has been accused of adopting definitions of torture inconsistent with Common Article 3 and international human rights law and of not applying the same standards for detention and interrogation to military (e.g. DoD) and civilian (e.g., Central Intelligence Agency) entities.

45. The international perception of U.S. detention and interrogation practices has been that they are not clear and are not consistently applied. After policy pronouncements and signing statements from the Bush administration, decisions by the Supreme Court, and statutes adopted by Congress (e.g., DTA and the Military Commissions Act of 2006), stating exactly what U.S. law and policy require of U.S. military and civilian agencies engaged in detention and interrogation is not necessarily easy.

46. Detention and interrogation operations carried out by U.S. agencies in Zimbabwe would need to avoid the reality and perception of ambiguously applied inconsistency. Given that Zimbabwe's crisis is not presently related to the global war on terrorism, perhaps the legitimacy troubles the United States has had in the realm of detention and interrogation law and policy would not adversely affect COIN operations in Zimbabwe. This situation could change. The existing circumstances do not temper, however, the legal planning imperative of setting out clear standards for detention and interrogation in any COIN campaign in Zimbabwe.

b. Grounding U.S. Legal Planning in the War Crimes Act, Detainee Treatment Act, and Military Policy Documents

47. Legal planning for detention, transfer of custody, and interrogation operations should be grounded in federal law and military policy that aims to prevent abuses and to punish violations when they occur. The War Crimes Act makes torture committed in the context of any armed conflict a federal crime (18 U.S.C. §2441). The DTA states that “[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment” (§1003(a)). The War Crimes Act and the DTA place no geographical limitation on the applicability of their prohibitions, so they would apply to U.S. detention and interrogation activities in Zimbabwe.

48. The War Crimes Act, as amended by the Military Commissions Act of 2006 (MCA), defines torture as “an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, correction, or any reason based on discrimination of any kind” (MCA §6(b)). The DTA defines cruel, inhuman, or degrading treatment or punishment as meaning the same as cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution (§1003(d)).

49. The War Crime Act's prohibition of torture and the DTA's prohibition of cruel, inhuman, or degrading treatment or punishment not only accord with U.S. obligations under Common Article 3 of the Geneva Conventions but also similar prohibitions found in treaties to which the United States is party, including the UN Convention against Torture and Other Forms of Cruel, Inhuman, and Degrading Treatment or Punishment of 1984 (UN Convention against Torture) and the ICCPR. The traditional U.S. view is that “the majority of human rights law obligations do not extend beyond the boundaries of the United States” (*ROLH* 2007: 65), but, at least in terms of the prohibitions against torture, cruel, inhuman, or degrading treatment or punishment, the War Crimes Act and DTA have given the prohibition extraterritorial effect for all U.S. government personnel.

50. The DTA also prohibits DoD personnel (but not personnel from non-DoD agencies) from using any interrogation technique not authorized by and listed in the United States Field Manual on Intelligence Interrogation (FM 2-22.3) (§1002(a)). FM 2-

22.3 lists all acceptable interrogation techniques that DoD personnel may use on any detainee in the custody of DoD personnel. The manual also requires that only trained interrogators question detainees. This requirement prevents abuses by non-trained DoD personnel, such as happened with military police at Abu Ghraib, and ensures DoD interrogators are proficient and knowledgeable in the relevant law. The DTA's requirement for interrogations to be conducted only by trained personnel also conforms to rules in human rights treaties to which the United States is party (e.g., UN Convention against Torture, Article 10).

51. DoD military policy supports these DTA requirements and rules of international law. DoD Directive 2310.01E outlines the military's policy on detention operations and includes the following elements:

- Common Article 3 must be applied to all detainees regardless of legal status;
- DoD personnel must maintain careful records and full accountability for all detainees;
- Reporting of possible, suspected, or alleged violations of relevant laws is mandatory;
- Inclusion of the International Committee of the Red Cross in any armed conflict of which the United States is a party;
- Requires the education and training of personnel to ensure they have the relevant knowledge and skills to perform detainee operations; and
- Requires that private contractors be trained in the law, regulations, and policies relevant to detainee operations.

52. In terms of alleged violations, Directive 2310.01E mandates that all possible, suspected, or alleged incidents be reported through the chain of command to the combatant commander. The reports then go to civilian officials and the Joint Chiefs of Staff. The report must either specify an investigation of the incident or explain why an investigation is impracticable. The investigations must be designed to identify underlying policy problems, training issues, contributing factors, and identify culpable personnel. U.S. military personnel alleged to have violated the law on detention and interrogation are also potentially subject to prosecution under the Uniform Code of Military Justice.

53. The Center for Law and Military Operations captured the requirements and guidance from the DTA and military policy documents in the "THINK" model for the legal conduct of detention and interrogation operations:

**T**reat all detainees with the same standard  
**H**umane treatment is the standard  
**I**nterrogators interrogate  
**N**eed to report abuses  
**K**now the approved techniques  
(*Operational Law Handbook 2007: 333*)

54. Despite the controversies that arose with detention and interrogation in the global war on terrorism, U.S. law and policy provides a solid foundation on which to prepare for conducting detention and interrogation policies in Zimbabwe in accordance with the rule of law. Those previous controversies would ensure that coalition, international governmental, and non-governmental scrutiny of any U.S. detention and interrogation activities in Zimbabwe would be intense, and legal planning for detention and interrogation operations should keep this inevitability in mind.

### *3. Coordination Challenges for Detention and Interrogation Operations*

55. The COIN principle of unity of effort applies to the conduct by counterinsurgents of detention and interrogation operations. The legitimacy of counterinsurgents would be undermined if the United States, other foreign counterinsurgent countries, and the interim government implemented different standards for conducting detention and interrogations. Such different standards would have an even more corrosive effect if members of the counterinsurgent coalition refused to transfer detainees to other members for fear that the detainees would be mistreated. Thus, legal planning for detention and interrogation operations must include the task of coordinating counterinsurgents in these operations.

#### a. Potential Coalition Countries and Detention and Interrogation Standards

56. Some critics of U.S. detention and interrogation standards and practices in the global war on terrorism have been European countries, some of which would be likely candidates to join a COIN effort in Zimbabwe. These countries are party to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR), a treaty to which neither the United States nor Zimbabwe is party. According to the *ROLH* (2007: 66), “[t]he impact of the ECHR on military operations conducted by European coalition partners . . . may substantially curtail their freedom of action as compared to the United States.” The ECHR may also make European countries reluctant to transfer detainees to U.S. custody because of a European perception that U.S. interrogation standards do not comply with the requirements of the ECHR. This issue has, in fact, arisen among NATO coalition partners in Afghanistan.

#### b. Zimbabwe and Detention and Interrogation Standards

57. Another coordination challenge in the detention and interrogation area concerns the standards and practices the interim government of Zimbabwe would apply. The Zimbabwe Constitution prohibits torture and other forms of cruel, inhuman, or degrading

treatment and punishment (§15(1)). Zimbabwe is also a party to human rights treaties—ICCPR and ACHPR—that absolutely prohibit the same acts. Although Zimbabwe is not party to the UN Convention against Torture, its constitutional and international legal obligations provide a foundation for ensuring that the interim government conducts detentions and interrogations consistently with the rule of law.

58. However, as numerous reports from governments, intergovernmental organizations, and human rights NGOs have documented, Zimbabwe under Mugabe systematically violated the government’s constitutional and international legal obligations with respect to detention and interrogation practices. Torture of persons detained by the ZNA or ZRP was frequent and rarely, if ever, investigated or punished. In fact, Mugabe condoned and encouraged harsh treatment of persons detained by the ZNA or ZRP on suspicion of opposing his rule. He stated at one March 2007 rally concerning the beating of MDC leader Morgan Tsvangirai: “Of course he was bashed. He deserved it. I told the police to beat him a lot” (Human Rights Watch 2007b).

59. In addition, under Mugabe, the conditions inside Zimbabwe’s jails and detention centers constituted serious human rights abuses. Prison and detention conditions were harsh, and were characterized by a lack of resources, gross overcrowding, poor sanitation, poor medical care, poor hygiene, and torture that combined to create a high mortality rate (U.S. Department of State 2006 and 2007). Singularly and combined, the conditions in Zimbabwe’s detention facilities represented cruel, inhuman, and degrading treatment.

60. The behavior of Mugabe’s regime in the detention and interrogation areas does not necessarily mean that the interim government would follow this abusive path with persons suspected of involvement with the FCM. However, some of the leadership of the interim government were high-ranking officials in Mugabe’s government and must have known about and at least tacitly condoned the human rights abuses in the detention and interrogation areas. Further, the split in Zimbabwe’s security forces between the interim government and the FCM weakens the capacity of the interim government to conduct detention and interrogation operations in accordance with the rule of law.

61. Thus, the United States and other foreign counterinsurgents must prepare to assist and monitor the interim government’s detention and interrogation standards and practices. Given the presence of the appropriate prohibitions of torture and other forms of cruel, inhuman, and degrading treatment or punishment in Zimbabwe’s constitutional law and international legal commitments, the critical element would be ensuring the interim government’s compliance with such prohibitions. Failure to include this challenge in legal planning for defensive operations could lead to the loss of legitimacy for the COIN campaign in Zimbabwe, no matter how sterling the detention and interrogation performance of foreign counterinsurgents might be.

62. Foreign counterinsurgents should not underestimate the scale of this task. As indicated above, the ZNR and ZRP engaged in detention and interrogation abuses on a massive scale with impunity. Training and education for members of the security forces loyal to the interim government would be required, which will take time. The physical

conditions of detention facilities are not up to international standards, which would require concerted effort by COIN forces to correct. The sorry state of detention and interrogation practices and conditions left over from Mugabe's reign is exacerbated by a dysfunctional justice sector in need of significant reform (see Chapter 5). Thus, improving Zimbabwe's performance on detention and interrogation requires whole scale justice sector reform and the creation of a rule of law culture within the security forces.

#### **D. Use of Private Security Contractors in Defensive Counterinsurgency Operations**

63. In Afghanistan and Iraq, the U.S. government has employed private security contractors (PSCs) to support military and civilian personnel in undertaking defensive and stability operations. For example, PSCs have engaged in defensive operations by providing security to DoD and DoS personnel in Iraq. The reasons for the expanded use of PSCs are beyond the scope of this Report. The need for PSCs to support military missions seems unlikely to diminish in the time frame under consideration with the crisis in Zimbabwe. As a result, legal planning for potential defensive operations in Zimbabwe must consider rule of law issues arising from the use of PSCs in COIN environments.

64. Given controversies involving PSCs (discussed below), a major rule of law problem that counterinsurgents must address is making sure that PSCs are subject to legal rules that regulate their behavior and that can be enforced if violated. The use of PSCs, which effectively are not subject to any rule of law, does little to bolster efforts to create legitimacy in the HN. PSCs may be in defensive roles that bring them close to the HN's population. The lack of rules may encourage PSCs to behave in ways contrary to COIN doctrine by, for example, not using minimal force in conducting defensive missions. To the fullest extent possible, counterinsurgents must ensure that all PSCs operate according to the principles of the COIN doctrine.

##### *1. The Black Eye from Blackwater: Legitimacy, the Rule of Law, and the Use of Private Security Contractors in Counterinsurgency Campaigns*

65. U.S. efforts to improve its COIN campaign in Iraq suffered a setback over the controversy that erupted concerning Blackwater, a major PSC for the U.S. government. The Blackwater controversy illustrates the potential problems for counterinsurgents in using PSCs in COIN efforts. The U.S. government primarily hired Blackwater to provide security in Iraq for officials and diplomats within the DoS. Unfortunately, Blackwater's use of force to protect DoS personnel during a skirmish with insurgents left many Iraqi civilians dead and caused an uproar in Iraq, the United States, and internationally. Iraqi calls for the Blackwater employees to be brought to justice were met with the response that they were immune from Iraqi criminal and civil jurisdiction, immunity granted to PSCs working for the U.S. government shortly after the invasion of Iraq in March 2003.

66. When proposals were made to bring the Blackwater employees to justice under U.S. law, the U.S. government had trouble deciding whether U.S. law applied to Blackwater's actions in Iraq. This embarrassing episode contradicted core tenets of COIN doctrine, such as "using force precisely and discriminately strengthens the rule of law"

(*CoinFM* 2007: 48), and harmed the “surge” strategy designed to improve COIN prospects in Iraq. The Iraqi population did not distinguish Blackwater employees from U.S. Marines—to Iraqis, they are all part of the same team. With Blackwater and other PSCs apparently a law unto themselves, at least in the eyes of the Iraqi population and many in the international community, unity of effort was degraded and the legitimacy of the COIN campaign suffered.

### *2. Counterinsurgency Operations in Zimbabwe and the Potential for Use of Private Security Contractors*

67. As happened in Afghanistan and Iraq, a COIN operation in Zimbabwe would be ripe for counterinsurgents to use PSCs for defensive operations related to the overall objective of providing security in the HN. Absent significant increases in the number of U.S. military personnel available for COIN operations in Zimbabwe, the U.S. government would again seek the assistance of PSCs to engage in defensive missions, from protecting U.S. civilians to helping train Zimbabwean security forces.

68. The fragmentation of the ZNA and ZRP heightens the need for counterinsurgents to shoulder more of the burden of defensive operations, particularly because “[t]he interim government has not yet shown a capability to reorganize police and security forces to respond effectively to the insurgency violence” (White House Memorandum 2007: ¶9). Without the security that defensive operations can create, stability operations would suffer because civilian workers and NGOs would not be secure. Thus, COIN operations in Zimbabwe would face an environment in which use of PSCs might be critical to the overall success of the campaign.

### *3. Legal Issues Concerning Use of Private Security Contractors by the United States in Defensive Counterinsurgency Operations*

69. The chief legal planning issues surrounding use of PSCs in a COIN setting involve identifying what laws apply to the PSCs operating within the HN. HN law may not apply if PSCs are exempt from such law by agreements between the HN and the foreign counterinsurgents employing PSCs. Additionally, given the location outside the United States, whether U.S. law applies to the actions of PSCs raises questions that demand, but still do not have, clear answers.

70. Blackwater’s presence in Iraq began after the invasion in March 2003 as civilian officials entered the country to begin reconstruction. Coalition Provisional Authority (CPA) Order 17 (2004a: §4(3)) provided that “Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.” CPA Order 100 (2004b), which dissolved the CPA in June 2004, and transferred governing authority to the Iraqi Interim Government, did not rescind the immunity granted by Order 17. Since the transfer of power, the Iraqi government has not revoked the immunity provided in Order 17.

71. Although Blackwater and other PSCs have been immune from Iraqi law, whether U.S. law applies to their actions has caused confusion. Employees of PSCs are private

citizens and are thus not generally subject to the Uniform Code of Military Justice (UCMJ). Legislation adopted by Congress in 2007 subjects military contractors to potential court-martial under the UCMJ (John Warner National Defense Authorization Act 2006: §552), but the constitutionality of this statutory provision is questionable (Congressional Research Service 2007: 20-21).

72. For U.S. law to apply to PSC activities outside the United States, Congress would have to adopt legislation that extended federal jurisdiction over such activities. Employees of PSCs could, for example, be subject to federal criminal jurisdiction for violating the War Crimes Act. This statute and other laws with extraterritorial reach do not encompass much of the activities PSCs undertake in contracts with government agencies. Without the application of some law, the objectives of preventing abuses and holding people accountable for violations cannot be achieved. Thus, counterinsurgents that retain PSCs to undertake defensive operations risk losing legitimacy and credibility as advocates of the rule of law.

73. The United States recognized this problem before the invasion of Iraq. In 2000, Congress passed the Military Extraterritorial Jurisdiction Act (MEJA) (18 U.S.C. §§ 3261-3267). MEJA extends federal jurisdiction over those “employed by or accompanying the Armed Forces outside the United States” for crimes that, if they had been committed within the United States, would be punishable by a year or more of imprisonment. MEJA specifically applies to DoD civilian employees, contractors, and subcontractors (18 U.S.C. § 3267(1) and (2)). DoD implemented MEJA through DoD Instruction 5525.11. Thus, PSCs retained by DoD are subject to U.S. law under MEJA.

74. Blackwater was not, however, a DoD contractor, and thus not expressly subject to MEJA. Blackwater was retained by DoS to provide security for its employees. Whether MEJA applies to DoS contractors depends on the mission DoS officials are undertaking. MEJA’s scope includes civilian employees, contractors, and employees of contractors of “any other Federal agency . . . to the extent that such employment relates to supporting the mission of the Department of Defense overseas” (18 U.S.C. §3267). According to the Congressional Research Service (2007: 19), MEJA “does not appear to cover civilian and contract employees of agencies engaged in their own operations overseas.”

75. Whether DoS officials participating in a COIN campaign are supporting a DoD mission within MEJA’s meaning is not clear. COIN doctrine holds that COIN is primarily a political, not a military, exercise, which might suggest that DoS is engaging in its own operations, or that DoD is supporting the political mission of DoS. However, under the concept of full spectrum operations, DoS activities in defensive and stability operations could be interpreted as supporting DoD’s mission in all operations.

76. The uncertainty about the application of MEJA to DoS contractors is one reason why DoS crafted, in the midst of the Blackwater controversy, new rules for PSCs operating in Iraq (Broder 2007), and why legislative proposals appeared in Congress. Legal planning for use of PSCs in defensive operations in any COIN campaign in Zimbabwe would have to assess the latest political and legislative developments in this

area to ensure that the United States does not, again, harm COIN efforts by failing to apply the rule of law to its use of PSCs.

*4. Legal Issues Concerning Use of Private Security Contractors by the Interim Government of Zimbabwe*

77. The interim government of Zimbabwe may also find retention of PSCs attractive as part of its contribution to defensive COIN operations. Unless the interim government grants such PSCs immunity from Zimbabwean law, the PSCs would be subject to domestic law in connection with their actions in Zimbabwe. Just as the interim government might worry about what law applies to U.S.-retained PSCs, the United States may have cause for concern if the interim government retained PSCs for defensive COIN operations without the ability to enforce Zimbabwean law effectively against such contractors.

78. The interim government's use of PSCs for defensive operations would also concern other counterinsurgents if such use delayed the staffing, equipping, and training of public security forces in Zimbabwe, which, under COIN doctrine, are critical assets for achieving security under the rule of law. The United States could not provide assistance to such PSCs as part of its effort to improve Zimbabwe's security forces, and the money spent on the PSCs by the interim government would not go to building the sustainable security force capacity the country would need to reach the desired end state.

IV. CONCLUSION

79. COIN in Zimbabwe would require defensive operations to protect the interim government's military and security forces, the civilian population, and critical institutions and infrastructure from insurgent attack. For preliminary planning purposes, the United States needs to address legal issues arising from:

- The use of force in defensive operations, including authorization for the use of force, application and enforcement of the laws of war, use of RCAs, and claims and solatia related to damage caused by defensive operations;
- Training and equipping military and security forces in Zimbabwe, including the need for
  - congressional authorization of and appropriations for such assistance,
  - human rights vetting of the Zimbabwean security forces, and
  - identifying human rights standards relevant to training security forces in Zimbabwe;
- Detention and interrogation of persons suspected to be involved with the FCM insurgency, including the

- lessons learned from the problems in this area experienced in COIN operations in Iraq and Afghanistan,
  - application of U.S. legal and policy standards on detention and interrogation (Common Article 3, War Crimes Act, DTA, and DoD policy directives), and
  - coordination of detention and interrogation policies and practices among counterinsurgent forces; and
- Use of private security contractors by counterinsurgents to undertake defensive operations.

80. Defensive operations create serious challenges for ensuring that the rule of law informs any COIN campaign in Zimbabwe. These diverse challenges add significantly to the scope and substance of the rule of law agenda counterinsurgents would have in such a campaign. The difficulties and failures experienced with the legal issues connected with defensive operations in past COIN contexts, including Afghanistan and Iraq, send a stern message to future counterinsurgents to prepare and plan in advance as much as possible.

## CHAPTER 5

### STABILITY OPERATIONS AND THE RULE OF LAW IN COUNTERINSURGENCY

#### I. INTRODUCTION

1. For counterinsurgency (COIN) and rule of law operations, stability operations consist of “various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or establish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief” (*CoinFM* 2007: 62; *ROLH* 2007: 3). This definition indicates that stability operations encompass many political, economic, and military activities that raise complex legal issues. The political, economic, and legal conditions prevailing in Zimbabwe heighten the risks counterinsurgents would face in undertaking stability operations.

2. This chapter focuses on rule of law challenges that critical stability operations in COIN would create for counterinsurgents aiming for the desired end state of a secure, economically viable, rights-respecting, and self-sustaining democracy in Zimbabwe. These challenges include:

- Reforms of the constitution, justice sector, and law-making processes;
- Questions of transitional justice;
- Creation of a rule of law culture;
- Provision of essential services; and
- Economic development.

#### II. STABILITY OPERATIONS IN COUNTERINSURGENCY CAMPAIGNS

##### A. Counterinsurgency Doctrine and Stability Operations

3. In COIN doctrine, stability operations form part of full spectrum operations, and the doctrine asserts that counterinsurgents need to be prepared to engage in stability operations simultaneously with offensive and defensive operations. Despite this doctrinal emphasis, a tendency exists to think of stability operations as the final phase of full spectrum operations, as the category of activities that follows offensive and defensive operations. The phrase “clear, hold, and build” captures this sequential framing. Although the trajectory for COIN activities should be towards less offensive and more stability operations, counterinsurgents cannot effectively engage in full spectrum operations by slotting stability operations into some distant final phase of the campaign.

4. The need for counterinsurgents to engage in stability operations concurrently with offensive and defensive operations appears in the use of the concept of logical lines of operation (LLOs). Three of the five LLOs the COIN doctrine highlights are associated with stability operations—essential services, governance, and economic development. The doctrine instructs counterinsurgents to advance these LLOs at the same time as conducting offensive and defensive operations.

### **B. Stability Operations and the Rule of Law**

5. Stability operations and the rule of law are closely connected. The *Rule of Law Handbook (ROLH 2007: 3)* states, for example, that “**rule of law operations constitute the legal aspect of stability operations**” (emphasis in original). This Report takes the position that rule of law operations constitute the legal aspect of full spectrum operations, not just stability operations. The *ROLH*'s identification of rule of law operations with stability operations is, however, indicative of the legal issues that stability operations force counterinsurgents to address.

6. From a rule of law perspective, stability operations are probably the most thickly populated with legal concerns of any type of COIN operation. This observation does not discount the importance of rule of law challenges in offensive and defensive operations; it merely reflects the reality that trying to address such matters as revision of constitutional law, reform of the justice sector, delivering essential services, and stimulating economic development represents a legal agenda of massive proportions.

7. In addition, the rule of law in stability operations functions in a more diverse context than in offensive and defensive operations. All counterinsurgents are subject to similar principles concerning the laws of war. These principles do not change because one counterinsurgent has a different cultural tradition concerning warfare. For example, the rule of law approach to offensive and defensive operations does not allow one counterinsurgent force to torture suspected insurgents because that force has customarily tortured suspected rebel fighters.

8. The same type of legal uniformity does not appear in stability operations. The areas in which counterinsurgents undertake these operations are more deeply embedded in the political, cultural, and religious assumptions, patterns, and practices of HNs. COIN doctrine, and guidance on rule of law operations, recognizes this fact by repeatedly stressing the need to understand the culture or cultures of the HN. Cultural reconnaissance is critical for rule of law operations. Stability operations create fertile cultural ground for counterinsurgents to differ on what the rule of law requires, and this context forces them into situations where compromises are necessary and critical to maintaining unity of effort. Counterinsurgents have to balance cultural awareness with the need to press for rule of law changes, and how these compromises get made will provide a window on the political dynamics of a COIN campaign.

### **C. Stability Operations in Zimbabwe**

9. Stability and rule of law operations in Zimbabwe face significant challenges. Using the LLOs relevant to stability operations, an overview of Mugabe's reign reveals systematic degradation of governance capabilities, the ability to deliver essential services, and the foundations for economic development. As foreign government, intergovernmental, and non-governmental reports on Zimbabwe's decline have documented, Mugabe and his inner circle distorted all governance institutions—the legislature, the courts, the police, and the armed forces—into instruments wielded to preserve Mugabe's grip on power. This government destroyed its ability to provide essential services to its people, as evidenced by the need for half the population to be reliant on imported food aid (Moss and Patrick 2005: 6). In addition, Mugabe's land reform and other economic policies have wrecked Zimbabwe's economy.

10. Stability operations in COIN in Zimbabwe have to address all these problems, and more, and must do so informed by the rule of law. Zimbabwe and its people have demonstrated the potential for moving in the direction counterinsurgents would want the country to move. Zimbabwe's courts have, at times, demonstrated a capacity for independence, which may have provoked Mugabe to interfere in the judicial system. In the past, Zimbabwe's economy was one of the most promising in southern Africa, rich in natural resources and able to export food to neighboring nations. Government social services in Zimbabwe were once among the best in Africa. The struggle mounted by the Movement for Democratic Change (MDC), and Mugabe's fear of its potential power, suggests that Zimbabwe can field active, globally connected civil society groups, which could work with counterinsurgents to create a better future for Zimbabwe.

## **III. STABILITY OPERATIONS AND LEGAL AND JUSTICE REFORMS IN ZIMBABWE**

### **A. Constitutional Reform**

11. An effective, well-designed constitution helps establish the rule of law. Ineffective constitutions create conditions for tyranny and social fragmentation. How a constitution allocates power, protects rights, and monitors responsibilities is the key question. Effective constitutions share two features. First, effective constitutions distribute power, rights, and responsibilities in such a way that no single individual or group can gain control of government and turn it to private purposes. Second, effective constitutions are created by and facilitate an inclusive, democratic political process. In short, effective constitutions set the legitimate ground rules for a well-ordered society.

#### *1. The Challenge of Constitutional Reform as Part of Stability Operations*

12. Constitutional reform is often critical to successful stability operations in COIN. The absence of effective constraints on governmental power can derail justice sector and legislative reform. Counterinsurgents might have to operate within a constitutional framework in a host nation (HN) that contains fundamental flaws, such as an inadequate

separation of powers between branches of government. Typically, and as seen in the case of Zimbabwe, the executive has aggregated power to itself at the expense of the judiciary and legislature through a pliant amendment process. The power grab may also involve disenfranchisement of segments of the population.

13. Counterinsurgents will, therefore, probably have to determine whether the existing HN's constitution has to be replaced or is amenable to piecemeal reform. If an existing constitution was adopted undemocratically, it may lack popular support. A constitution widely perceived as illegitimate may need to be replaced entirely. On the other hand, if the original adoption process was democratically inclusive, existing amendment procedures to modify the constitution may suffice.

14. Piecemeal reform in a COIN context may be favored for two reasons. First, adopting a new constitution is time consuming and expensive. In COIN operations, time and money are usually in limited supply. Second, modifying an existing constitution can be more efficient for realizing overall stability goals. For example, many legal aspects of stability operations, such as justice sector reform, cannot be accomplished without a proper constitutional foundation. Scrapping a constitution means that martial law or an interim constitution must provide the necessary legal foundation. Counterinsurgents must consider whether the costs of imposing martial law or working under an interim constitution will outweigh the benefits of adopting a new constitution.

15. Adopting a new constitution also presents internal and external challenges that relate to a single task: *how to achieve a legitimate but workable constitution*. Internal challenges reflect historical, cultural, religious, and ethnic conditions in the HN. In Iraq, for example, the Ba'athist constitution intensified rather than ameliorated ethnic divisions. Internal challenges—whether ethnic, sectarian, historical, or some combination thereof—threaten the solidarity essential for constitutional consensus. Without consensus, legitimacy is impossible. Only by ensuring widespread public participation can the constitutional process forge consensus. This fact suggests that a constitutional commission or similar body and a national referendum on the proposed constitutional reforms are critical. For countries transitioning from undemocratic to democratic governance, counterinsurgents should not underestimate the need to educate the HN's population about the logistics of democracy in undertaking a referendum on constitutional reform—all the rules, procedures, and institutional capabilities necessary to ensure that voting is fair, transparent, secure, and effective.

16. External challenges result from the nature of COIN campaigns. COIN doctrine emphasizes that COIN campaigns should be multilateral undertakings involving state and non-state actors (*CoinFM* 2007: 59), but the doctrine also calls for unity of effort (*CoinFM* 2007: 39). Accomplishing HN constitutional reform in a harmonized way may prove difficult because each COIN participant may seek to influence the constitutional process according to its own agenda.

17. Further, external interference may be seen within the HN to be illegitimate by stakeholders, thus posing a threat to the constitutional reform process. Even if all COIN participants speak with a single voice, their actions may still be seen as illegitimately influencing the process. For example, COIN forces may wish to exclude certain actors from the reform process in order to realize their own goals, but doing so may create backlash against COIN forces and the constitutional reform process (Hashim 2006).

18. COIN forces must resolve the tension between their goals and the aspirations of the HN's constitutional stakeholders. Otherwise, the new constitution may be viewed as an illegitimate proxy for foreign interests. Foreign counterinsurgents must resist the temptation to move too quickly on constitutional reform because of their political timetables. Although adopting a constitution democratically is often precarious and painful, it nonetheless provides the necessary legitimacy for establishing the rule of law.

### *2. Constitutional Questions for Post-Mugabe Zimbabwe*

19. The Constitution of Zimbabwe went into effect on April 18, 1980—the date Zimbabwe attained independence. By 2000, the Constitution had undergone 16 amendments, many of which strengthened the executive at the expense of the legislature and judiciary. In 2005, Mugabe pushed through more amendments, which included, among other things, changes necessary to implement the controversial land reform program. Legal planning for potential COIN in Zimbabwe has to assess whether the Constitution, as amended through 2005, provides the appropriate foundation for the end state envisioned for Zimbabwe. Such an assessment is likely to conclude that, at a minimum, Zimbabwe's Constitution must undergo some significant reforms.

20. For preliminary legal planning purposes, four basic constitutional issues are on the table:

- The interim government's legal mandate under the existing Constitution;
- The scope of executive power; and
- Human rights guarantees, including property rights and the land reform issue.

#### *a. Succession Issues after the Death of a President*

21. Zimbabwe's Constitution (2005: ¶31) authorizes a Vice President to succeed the President in case of death or incapacity. At the time of Mugabe's death, Zimbabwe had two vice presidents, Joseph Msika and Joyce Mujuru. Under the Constitution (2005: ¶31(1)(b)), when there are two vice presidents, the Vice President who assumes the functions of President is the Vice President (1) whom the President designated for such eventuality, or (2) the Vice President who last acted as President where neither vice president was designated for this eventuality.

22. One of Mugabe's vice presidents—Joyce Mujuru—leads the interim government. The Legal Team has no information on whether Mugabe designated Mujuru or Msika to assume the presidency under the Constitution. Mujuru has served as acting President in the past when Mugabe was absent from Zimbabwe, so her leadership of the interim government may give it constitutional legitimacy. The Constitution (2005: ¶28) requires, however, a presidential election within ninety days when the presidency is vacant due to death, resignation, or removal.

23. The interim government has postponed the elections scheduled for March 2008 because of the insecurity and violence caused by the FCM. It has suggested that, with improved security, it could hold elections by the end of 2008. Although the FCM is causing insecurity, legal planning for COIN in Zimbabwe would need to determine, whether the interim government has the constitutional power to postpone elections because of the security situation. Such power may flow from the authority vested in the President to declare public emergencies (Zimbabwe Constitution 2005: ¶31J).

#### b. Problems with the Scope of Executive Power

24. In terms of executive power, Zimbabwe's Constitution fails to balance the three branches of government sufficiently. In fact, the President's power is effectively unchecked because of his power of appointment. For example, the President has direct and indirect control over approximately 20% of Parliamentary seats (Guhr 2006). Similarly, the President's appointment power threatens the judiciary's independence (Zimbabwe Constitution 2005: ¶79B). The President has sole discretion in appointing the Chief Justice and other members of the Supreme Court and the High Court, subject only to a consultation with the Judicial Service Commission (Zimbabwe Constitution 2005: ¶84(1)). Additionally troubling is the President's power to remove judges from office through his power to appoint an investigative tribunal (Zimbabwe Constitution 2005: ¶87).

25. The President also controls the police, the military, and the prison service. The President has the power to appoint the Police Commissioner and the Police Service Commission (Zimbabwe Constitution 2005: ¶¶93, 94). The President has the same appointment powers with respect to the prison service (Zimbabwe Constitution 2005: ¶¶99, 100). Finally, besides acting as Commander-in-Chief, the President also has the power to appoint the commander of the Defense Forces as well as the commanders of each defense branch (Zimbabwe Constitution 2005: ¶97).

26. Legal planning for possible COIN in Zimbabwe must, therefore, address the President's appointment powers as part of potential constitutional reform. In particular, counterinsurgents should seek to reduce the power of the President over the judiciary and legislature, and make presidential appointments for executive branch offices subject to Parliament's approval.

c. Constitutional Protections for Human Rights

27. Zimbabwe's Constitution (2005: Chapter III (Declaration of Rights)) guarantees an impressive array of human rights, including the right to life, liberty, property, and to be free from slavery, forced labor, and inhuman treatment. This Report has already mentioned how the Mugabe government ignored these constitutional protections, so here the Legal Team focuses on troubling human rights aspects in the Constitution itself.

28. Unfortunately, the 2005 revision of the Constitution introduced two provisions inconsistent with these fundamental human rights. Section 22 on freedom of movement was amended so that the Government can restrict movement if it is "in the national interest, the public interest, or the economic interests of the State." This amendment also allows the Government to prevent individuals from leaving Zimbabwe on these grounds. Whether these new restrictions on free movement meet international human rights standards is doubtful (Guhr 2006: 4).

29. However, the interim government might find Section 22 attractive for controlling population movements in the struggle with the FCM. Population control is a COIN technique designed to isolate insurgents from the populace (*CoinFM* 2007: 51). Thus, counterinsurgents can expect tensions to arise between the human right of freedom of movement and the COIN need for population controls.

30. Another amendment causing human rights concern involves land reform (Zimbabwe Constitution 2005: ¶16B). The new land reform provision grants the Government authority to acquire land and limits compensation to only "improvements effected on the land before it was acquired." From a human rights perspective, the most egregious aspect of this provision is the denial of due process to owners whose land has been seized (Zimbabwe Constitution 2005: ¶16B(3)(a)). Mugabe forced this amendment through the constitutional process in order to give his strategy of seizing land from white farmers without any due process or compensation constitutional grounding.

31. The constitutional provision on land reform is inconsistent with established standards of international law on the protection of property and due process and has come under international criticism. Counterinsurgents would have to confront this constitutional provision as part of efforts to address the land reform conundrum (see more below), which involves the need not only to resuscitate the agricultural economy but also to confront volatile issues concerning land connected back to British colonialism and the racist policies of the Rhodesian government.

## **B. Justice Sector Reform**

### *1. Interdependency of Courts, Cops, and Corrections in Stability Operations*

32. The legitimacy that counterinsurgents seek will often require engaging in reform of the HN's justice system. A functioning justice system involves a number of institutions, and weakness in any one may render the system incapable of upholding the rule of law. The institutions and institutional players in the justice sector include courts, judges, prosecutors, defense attorneys, executive agencies tasked to enforce the law (e.g., police, border guards), prisons, and corrections officers. In COIN, the less the key parts of the HN's justice system work, the more foreign counterinsurgents have to be prepared to shoulder the burden of making the rule of law work (*CoinFM* 2007: 229).

33. Reform of the justice sector cannot be done piecemeal but must be done holistically. The need for such reform requires planning, prioritizing reforms, and creating reform synergies across the justice sector. As past experiences with justice sector reform have shown, "building and sustaining justice systems in the wake of military intervention is extraordinarily difficult" (Stromseth, Wippman, and Brooks 2006: 180).

34. The justice sector forms part of the HN's larger political framework. Reforms must empower not only the institutions of justice, but also accountability mechanisms to ensure that powers are not abused. Mugabe's use of the police for political oppression, failure to hold police accountable for violations of human rights, and stranglehold on judicial appointments compromised the justice system's ability to retain its independence, guarantee constitutional rights, and support the rule of law.

### *2. Courts in Zimbabwe*

35. The judiciary's principle role is to apply the law, independent of the political interests of the other branches of government. In order to perform this duty, court procedures must reflect standards consistent with the rule of law. Openness and public participation ensure transparency. Judicial independence prevents political interests from abusing the courts and is fundamental to protecting human rights. Due process of law ensures fairness of treatment when the government uses its powers against the individual.

36. Zimbabwe's court system consists of a Supreme Court, a High Court, and such subordinate courts as established by Parliament (Zimbabwe Constitution 2005: §79). The Supreme Court has ultimate appellate jurisdiction and original jurisdiction over claims where "any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person)" (Zimbabwe Constitution 2005: §24).

37. The President appoints the judges of the Supreme Court, High Court, and special courts. The President must consult with the Judicial Service Commission on

appointments, but is not obliged to follow the Commission's recommendations (Zimbabwe Constitution 2005: §84). The President appoints the members of the Commission, which is also responsible for investigation and removal of judges.

38. These constitutional provisions mean that the President has direct and indirect influence over the composition and behavior of the courts. Mugabe used this power to undermine the independence of Zimbabwe's judiciary and its capacity to counter executive actions inconsistent with the Constitution. Reform of the judicial selection process, likely requiring constitutional reform, would be critical to preventing future abuse of the judicial system and ensuring judicial independence. Without reform, rule of law efforts may have little more than a temporary impact during COIN operations before political forces again prey on the judiciary as part of the struggle for power.

39. Judicial independence in Zimbabwe was also compromised by the lack of adequate salaries and the failure to provide protection for members of the judiciary, which left judicial officers vulnerable to corruption and coercion. Establishing an independent judiciary in Zimbabwe during stability operations would require providing physical security for judges in dangerous areas and providing sufficient financial resources to prevent the bulk of judicial officers from turning to corruption and graft.

40. Reform of the courts in Zimbabwe should not neglect needs that may exist with respect to the administrative and physical infrastructure of the court system. To operate courts according to the rule of law, administrative capabilities are required, including court reporters and staff to handle dockets and case tracking (*ROLH 2007: 75*). Similarly, courts require adequate physical facilities that must meet specific needs, such as security, reliable electricity, temporary detention areas, and accessibility for the population (*ROLH 2007: 75*). Rule of law operations need to pay attention to these administrative and physical infrastructure requirements.

41. Rule of law operations should also try to ensure that individuals enjoy due process of law, including the right to public assistance for legal counsel. The Legal Aid Act of 1996 provides a legal aid fund and directorate that covers civil and criminal matters (Saki and Chiware 2007). Under this Act, any person can apply for legal aid. Eligibility is determined by three factors: insufficient means, reasonable grounds of success, and need of the services provided by the Act. The main form of legal aid is payment for a legal practitioner to represent the indigent person. The effectiveness of this Act under Mugabe's regime is not clear, but for justice sector reform in COIN, the Act provides a vehicle for rule of law operators to strengthen due process of law in Zimbabwe.

#### a. Criminal Justice

42. Preventing crime and punishing those who commit crimes are important aspects of the rule of law. These tasks mean that, "[u]nless the criminal justice system is seen to be a demonstrable success, public support is likely to be limited and the rule of law mission will be severely handicapped" (*ROLH 2007: 71*). The quality of a HN's criminal

justice system is of paramount concern for counterinsurgents. Unfortunately, in addition to the political abuses Mugabe inflicted through the justice system, Zimbabwe faces problems in its criminal justice system that counterinsurgents would need to address.

43. In Zimbabwe, magistrate courts are the courts of first instance in criminal cases, and magistrates decide issues of bail and remand. Magistrates in Zimbabwe are not, however, judicial officers but are employees of the Ministry of Justice and are vulnerable to political manipulation. Under Mugabe, magistrates were prone to grant remand of detained persons into the custody of potentially abusive police. As the gateway into the Zimbabwean criminal justice system, counterinsurgents would need to think about reforming the magistrate courts to eliminate political influence from their daily functions.

44. In terms of substantive law and procedure, prior to 2005, Zimbabwe's criminal law was based on Roman-Dutch common law (Zimbabwe Constitution 2005: §82). In 2005, the Zimbabwean legislature codified criminal law and procedure in the Criminal Law (Codification and Reform) Act. Whether this Act violates the constitutional provision basing Zimbabwean criminal law on Roman-Dutch common law is not clear.

45. The codification of criminal law has also been controversial because it contains key provisions taken from the notorious Public Order and Safety Act (POSA). Human rights groups have argued that POSA violates individual rights protected by the Zimbabwe Constitution and grants the police additional powers to enforce such unconstitutional provisions. These powers include the ability to detain suspects and witnesses of certain offenses for at least a month (Legal Resources Foundation 2004).

46. The uncertainty surrounding criminal law in Zimbabwe confronts counterinsurgents with the need to plan for reform in this area. What such reform should entail requires further analysis. One strategy would be to return to the criminal law applied before the 2005 codification. Another approach would involve applying the 2005 criminal code except for those provisions that raise serious human rights concerns. Counterinsurgents could also suggest use of an "interim criminal code," as suggested by the UN's Brahimi Report (2000: ¶83), which establishes basic substantive offenses and procedure until properly constituted democratic entities can adopt new criminal law and procedure (Stromseth, Wippman, and Brooks 2006: 193).

#### b. Civil Law

47. Although criminal law tends to gain the lion's share of attention in justice sector reform, counterinsurgents should not ignore the importance of civil law and civil courts to establishing the rule of law in a HN. In Zimbabwe, Roman-Dutch law, as applied at the Cape of Good Hope in June 1891, and as amended by statutes and judicial opinions, provides the foundation for civil law (Zimbabwe Constitution 2005: §89). English common law heavily influenced Roman-Dutch law in 1891, "hence the common law of Zimbabwe must be said to be Anglo-Roman-Dutch Law" (Saki and Chiware 2007).

48. Counterinsurgents from common law jurisdictions, such as the United States and the United Kingdom, would probably find Zimbabwean law more accessible and understandable than they found the civil law system in Iraq. Lessons learned from rule of law operations in Iraq repeatedly noted the difficulty U.S. military lawyers had working with Iraq's civil law system. In addition, law in Zimbabwe does not appear significantly influenced by any major religion but does incorporate some tribal customary law.

49. Counterinsurgents should be aware, however, that Zimbabwe has a number of different courts created by Parliament to address specific or local issues, such as the Labor Relations Tribunal, Administrative Court, Children's Court, Water Court, Electoral Court, Small Claims Court, and Local Courts on Customary Law. The procedures of these courts are less formal than the ordinary courts (e.g., Supreme Court, High Court, Magistrate's Court), which increases access to them without the need for legal counsel (Saki and Chiware 2007). Legal planning for COIN in Zimbabwe should identify these specialist courts in each potential area of operations and assess to what extent their functioning can help counterinsurgents restore stability and increase legitimacy for the interim government.

### c. Customary Law

50. The Zimbabwe Constitution (2005: §89) recognizes African customary law as part of the law of Zimbabwe (Saki and Chiware 2007). The scope of application of such customary law is limited (e.g., it does not apply in criminal matters or in some aspects of family law). Customary law claims and disputes can be adjudicated by local customary courts presided over by a headman, chief, or person appointed by the Ministry of Justice. This customary law system exists "to provide a justice system to ordinary people in rural areas which is consistent with African custom and values" (Saki and Chiware 2007).

51. Counterinsurgents should be aware that this customary law system has proved controversial, especially with respect to its impact on women and girls. For example, the Human Rights Committee of the International Covenant on Civil and Political Rights (ICCPR) has expressed concern "about continued practices, in violation of various provisions of the Covenant, . . . such as *kuzvarita* (pledging of girls for economic gain), *kuripa ngozi* (appeasement to the spirits of a murdered person), *lobola* (bride price), female genital mutilation, early marriage, the statutory difference in the minimum age of girls and boys for marriage" (Human Rights Committee 1998: ¶12). Whether and how to reform the customary law system would have to be assessed in more detail in the event of COIN operations in Zimbabwe.

### 3. *Cops in Zimbabwe*

52. Competent police forces serve critical roles in COIN, including supporting offensive operations, contributing to defensive operations, upholding the rule of law, and providing legitimacy for the HN government. COIN doctrine recognizes that the police rather than the military constitute the primary frontline security force (*CoinFM* 2007:

229). Establishing HN security forces, including police, is a key LLO in the execution of COIN campaigns (*CoinFM* 2007: 167-169). Recruiting and training an indigenous police force are critical actions needed to establish legitimacy in the HN (*ROLH* 2007: 77), and “law enforcement capacity is . . . essential to the rule of law” (Stromseth, Wippman, and Brooks 2006: 202).

53. The Zimbabwe Republic Police (ZRP) is responsible for maintaining law and order in Zimbabwe. However counterinsurgents would have to reform the ZRP before it could fulfill its roles in COIN and in the end state sought for Zimbabwe.

a. Problems and Issues with the Zimbabwe Republic Police

54. The most immediate problem for stability operations concerning the police is the fragmentation of Zimbabwe’s security forces between the interim government and the FCM. Zimbabwe, in essence, does not have a functioning police force. Foreign counterinsurgents would have to provide the interim government with assistance to reconstitute the ZRP into an effective force for security and stability operations.

55. Even with those members of the ZRP loyal to the interim government, rule of law problems would exist because of the legacy of abuse of the ZRP. Under Mugabe, the ZRP and the Zimbabwe National Army (ZNA) terrorized Zimbabwe’s citizens and committed large-scale human rights violations as part of Mugabe’s effort to suppress political opposition to his rule (Moss and Patrick 2005: 5). Mugabe used the ZRP to violate human rights found in the Zimbabwe Constitution and in human rights treaties to which Zimbabwe is party, including the right to be free from torture, the right to freedom of assembly, and the right to freedom of expression (Zimbabwe Human Rights NGO Forum 2007b; Human Rights Watch 2007b; U.S. State Department 2006 and 2007). This use of the ZRP was strategic, systematic, and involved the Joint Operation Command (JOC), which was comprised of leaders of the army, police, and intelligent services (International Crisis Group 2007: 2). Members of the ZRP who participated in these acts of political violence operated with general impunity.

56. ZRP participation in torture and other cruel, inhuman, and degrading treatment helps communicate how prevalent this human rights abuse was within Mugabe’s police forces. Human Rights Watch (2007a: 6) noted in August 2007 that torture and inhuman treatment was a systematic problem in the ZRP. The ZRP used punches, kicks, beating on the soles of the feet, and the shackling of detainees in painful positions to elicit confessions, and to punish opposition forces. The Zimbabwe Human Rights NGO Forum (2007c: 2) recorded 337 acts of torture in the first nine months of 2007.

57. Zimbabwean law provides for an ombudsman empowered to engage in independent oversight of the ZRP. Ideally, an ombudsman would receive complaints about alleged police misconduct, investigate the allegations, and act to resolve those issues (Lumina 2006: 101). During Mugabe’s reign, the ombudsman procedure was rendered powerless by Section 9 of the Ombudsman Act, which prohibits the ombudsman

from investigating actions taken by Mugabe or his staff (Lumina 2006: 101). Counterinsurgents could explore with the interim government a repeal of Section 9 and the re-authorization of the ombudsman's authority, or creation of an independent review board (*CoinFM* 2007: 231), as a means to bring the ZRP in conformity with the rule of law.

b. Repeal of Statutes Facilitating Police Abuse of Human Rights and Implementation of Human Rights Treaties

58. Counterinsurgents may also need to consider, as part of reforming the ZRP, encouraging the interim government to repeal certain laws that provided the basis for abusive police behavior during Mugabe's rule. The statutes most frequently mentioned in this regard have been the POSA, the Miscellaneous Offenses Act (MOA), the Criminal Law (Codification and Reform) Act, the Access to Information and Protection of Privacy Act (AIPPA), the Private Voluntary Organizations Act, and the Zimbabwe Police Act (Lumina 2006: 102).

59. Police reform should also be guided by human rights norms found in treaties Zimbabwe has joined, including the ICCPR and the African Charter on Human and Peoples' Rights (ACHPR). These treaties "provide for a number of rights which are not only affected by the lawful exercise of police powers (including the rights to liberty and fair trial, the prohibition of arbitrary arrest and detention), but also effectively place limitations on the exercise of police powers" (Lumina 2006: 97). The interim government could make these rights a more effective part of Zimbabwean law, which would help it gain supporters in domestic and international human rights communities.

c. Other Rule of Law Considerations in Police Reform in Zimbabwe

60. In addition to ridding the ZRP of its Mugabe-era legacy, counterinsurgents would need to consider other rule of law issues in reforming the ZRP. "Democratic policing" is often an objective of police reform following military interventions, the goal of which is to create a transparent police force that serves the needs of the public, is accountable to the law rather than regimes or leaders, and protects human rights (Stromseth, Wippman, Brooks 2007: 205). To produce a ZRP capable of democratic policing would require a number of rule-of-law reforms and the building of a rule of law culture in the ZRP.

61. First, counterinsurgents would have to make decisions relating to the composition of the police force (*ROLH* 2007: 77). Which members of the Mugabe-era ZRP could be retained and retrained and which ones would have to be removed from the force? Answering these questions would require counterinsurgents to engage in vetting to remove police officers linked to human rights and other abuses (e.g., corruption, extortion). Vetting may reduce the size of the available force, necessitating the (1) training of new recruits (who must also be vetted for participation in human rights abuses

and criminal activities), (2) temporary use of military forces in police roles, or (3) deployment of international police units organized, for example, by the UN.

62. Second, recruitment for the new ZRP should aim to secure participation from persons from all demographic regions, including minority populations (*CoinFM 2007: 214-215*). Ethnic, tribal, and religious tensions, which have plagued reform of security forces in Iraq, do not appear to be a problem in Zimbabwe. Racial tensions have, however, been a problem, as illustrated by Mugabe's use of the ZRP in forcibly evicting white land-owners from their farms.

63. Third, members of the police force must be carefully trained in important skills (listed at *ROLH 2007: 78*) to engage in effective police work within the context of the rule of law. Fourth, police forces must be adequately compensated (*CoinFM 2007: 215, 231*). The nature of their duties and contact with the local community make them vulnerable to corruption, and insurgent forces may take advantage of this vulnerability (*CoinFM 2007: 216*). COIN doctrine provides more details on pay considerations for security forces (*CoinFM 2007: 216*).

64. The U.S. Department of Justice (DoJ) has experience providing foreign countries with assistance on improving police capabilities in criminal justice, law enforcement, and security (*ROLH 2007: 31*). DoJ provides this training assistance within the context of reconstruction and stabilization operations. Within the DoJ, the International Criminal Investigative Training Assistance Program (ICITAP) can provide such assistance because its mission is "to serve as the source of support for foreign policy goals by assisting foreign governments in developing the capacity to provide professional law enforcement services based on democratic principles and respect for human rights" (*ROLH 2007: 31*).

#### d. U.S. Legal Framework for Providing Assistance to Foreign Police Forces

65. Reconstituting the ZRP as a police force capable of performing its duties within the rule of law would require technical and financial assistance from foreign counterinsurgents and international organizations. In terms of the United States, the legal framework for providing assistance to the interim government for training and equipping Zimbabwe's police forces is the same as the framework discussed in Chapter 4 concerning foreign military forces, and the reader should refer back to Chapter 4 to review the legal analysis provides there.

#### 4. *Corrections in Zimbabwe*

66. The third pillar of the justice sector is the system of correctional facilities. According to Stromseth, Wippman, and Brooks (2006: 218), "[p]risons generally get the short end of the stick in post-conflict legal reform." Failure to provide adequate conditions in correctional facilities can violate the laws of war, international human rights standards, as well as having serious adverse consequences for legitimacy in COIN, as

illustrated by the Abu Ghraib scandal in Iraq (Stromseth, Wippman, and Brooks 2006: 219). Stability operations in any COIN campaign in Zimbabwe would have to address rule of law problems that the country faces with its correctional system.

a. Problems and Issues with Zimbabwe's Corrections System

67. In addition to torture, prison conditions in Zimbabwe were harsh and life threatening under the Mugabe regime. The U.S. Department of State (2007) included the following observations in its latest report on human rights in Zimbabwe:

- “Zimbabwe’s 47 prisons were designed for a maximum capacity of 16,000 prisoners, but held nearly 25,000.”
- “Poor sanitary conditions aggravated outbreaks of cholera, diarrhea, measles, tuberculosis, and HIV/AIDS.”
- “Food, water, electricity, clothing, and soap were consistently deficient in adequate quantities.”

68. Zimbabwe’s prison system during Mugabe’s rule resembled correctional systems in post-conflict societies—“devastated and squalid, poorly equipped, and poorly run” (Stromseth, Wippman, and Brooks 2007: 218). The crisis that has gripped Zimbabwe since Mugabe’s death will only exacerbate the problem of poor prison conditions. This situation would produce a serious rule of law and justice reform burden for foreign counterinsurgents, assisted perhaps by international organizations (e.g., the UN Office on Drugs and Crimes).

b. Rule of Law Considerations for Reform of the Corrections System in Zimbabwe

69. Assessing HN detention facilities requires evaluating not only basic structural facility requirements, but also the way prisoners are treated with respect to human rights standards (*ROLH* 2007: 79-81). In terms of facilities, the *ROLH* (2007: 80) suggests basic requirements, including adequate walls and security enclosures, an exercise yard or gymnasium, a chapel, a healthcare facility, and a visiting area. The *ROLH* (2007: 135) also outlines a metrics scheme for prisons, which requires information on the number and distribution of confinement facilities, a breakdown of bed capacity in detention centers, the number and nature of detained persons, and the rate of growth versus capacity.

70. In terms of human rights and international standards for corrections facilities, rule of law operations in Zimbabwe might profit from cooperating with the interim government on applying the UN Standard Minimum Rules for Treatment of Prisoners (1955) or the “Model Detention Act” being developed by NGOs and UN agencies (Stromseth, Wippman, and Brooks 2006: 221). This approach would upgrade Zimbabwe’s approach to corrections and bring the country closer to complying with its

obligations under its Constitution and human rights treaties applicable to prison conditions and treatment of prisoners (e.g., ICCPR and ACHPR). Either of the model rules could serve as a placeholder until the interim government enacts new laws that improve prisons in Zimbabwe. Some aspects of Zimbabwean law on prisons rarely utilized by Mugabe's government, such as the provision allowing international human rights monitors access to prisons, could be preserved in a revised corrections law.

### **C. Reform of the Law-Making Process**

#### *1. The Importance of Reform of Law-Making Processes*

71. In rule of law efforts, those involved often focus more on reforming the substance of the HN's law than on improving how the HN makes law (Stromseth, Wippman, and Brooks 2006: 199). Similarly, the focus on cops, courts, and corrections in justice sector reform neglects the law-making process. COIN doctrine asserts that counterinsurgents should approach their tasks holistically and systematically (*CoinFM* 2007: 154-158), and, in keeping with this advice, legal planning for stability operations should consider whether reform of the HN's law-making processes might be necessary.

72. By adhering to and promoting basic principles regarding legal process (Stromseth, Wippman, and Brooks 2006: 199-202), counterinsurgents can enhance the legitimacy of justice sector reform during stability operations:

- First, the process of law-making should be transparent and accountable to the people.
- Second, reform of law-making processes should be a bottom-up rather than top-down process.
- Third, legislatures should be provided with training and technical assistance in order to strengthen domestic law-making capabilities.
- Fourth, COIN lawyers should promote NGO assistance and participation in the process of reforming law-making processes.
- Fifth, reforms should ensure that law-making processes are capable of meaningful dissemination of laws adopted.

#### *2. Law-Making Reform Challenges for Zimbabwe*

73. Counterinsurgents would face difficult challenges with respect to reform of law-making processes in Zimbabwe. Structural problems with the Constitution concerning the influence of the President over Parliament and the judiciary can warp how law is made in Zimbabwe. The law-making process under Mugabe's government was entirely top down, non-transparent, and devoid of democratic accountability. In addition, this reality may

have emaciated the domestic law-making capabilities of Parliament, necessitating foreign assistance to make Parliament a more robust actor in the making of law in Zimbabwe.

74. Similarly, the nature of some laws enacted by Mugabe's government affect the law-making process adversely, especially those laws (e.g., POSA, AIPPA) that allow the government to trample on freedom of association, assembly, and expression. To have law-making processes that reflect the rule of law, counterinsurgents would have to work with the interim government to reform or remove these statutes from Zimbabwean law. The context of violence and insecurity would not, however, be conducive to the interim government's willingness to relinquish these restrictive powers.

75. Reform of law-making processes in Zimbabwe during COIN would also confront the need to contain potentially explosive issues with respect to critical problems facing Zimbabwe. At the top of that list is the land reform challenge. Counterinsurgents have to help the interim government figure out not only what substantively to do about the land reform debacle created by Mugabe but also how to go about reform without undermining legitimacy. Any COIN campaign in Zimbabwe cannot avoid entering the minefield that the land reform issue has become, and this chapter returns to this issue below.

76. If foreign counterinsurgents are perceived, however, to be too active in foisting solutions on the interim government, the legitimacy of the COIN efforts may be jeopardized. The FCM has built into its narrative attempts to draw on anxieties about neo-imperialistic and racist foreign intervention returning Zimbabwe to land policies that favor whites (White House Memorandum 2007: ¶7). Conversely, the politics of land reform may be so divisive that only outside involvement can move Zimbabwe toward an acceptable solution. Counterinsurgents would have to approach the land reform challenge carefully, always keeping an eye on trying to make sure that both the end result and the process producing it conform to the rule of law.

#### **D. Transitional Justice Questions and Counterinsurgency Operations in Zimbabwe**

77. Transitional justice represents a challenge in any conflict or post-conflict environment. However difficult, questions of transitional justice remain persistent and stubborn—they will not go away. Transitional justice goals are holistic and include commitments to halt ongoing human rights crimes, investigate them, identify those responsible, impose sanctions on those responsible, provide reparations to victims, prevent future human rights crimes, reconstruct state-citizen relationships, preserve and enhance peace and democracy, and foster individual and national reconciliation (Zimbabwe Human Rights NGO Forum 2006: 6). These goals sound themes familiar to the rule of law mission in COIN.

78. However, in post-conflict and COIN contexts, pursuit of transitional justice is fraught with danger. Efforts to prosecute and punish individuals accused of committing atrocities could provoke them to respond disruptively and perhaps violently, thereby

endangering the transition of the society toward a better future. These dangers are particularly acute in the COIN situation in Zimbabwe, where calls have been made for prosecuting high-ranking members of both the interim government and the FCM, who have been accused of involvement in human rights atrocities during Mugabe's time in power (e.g., the Gukurahundi massacres of between 10,000 and 30,000 people in the 1980s; Operation Murambatsvina) and after his death (e.g., the FCM's commission of war crimes) (White House Memorandum 2007: ¶18). In addition, contributions of transitional justice mechanisms in some post-conflict societies have been less than what advocates had anticipated (Stromseth, Wippman, and Brooks 2006: 254), which also instills caution into how the stubborn matter of transitional justice should be addressed in Zimbabwe.

79. Joyce and Solomon Mujuru and Emmerson Mnangagwa were all high-ranking officials in the Zimbabwean government while Mugabe was president. The gross and systematic human rights abuses committed by Mugabe's government were the result of the collective decisions of the leadership of ZANU-PF. Thus, key political figures in post-Mugabe Zimbabwe all bear political responsibility for these abuses, as demonstrated by the U.S. and EU sanctions leveled against them for their culpability in human rights violations. This reality remains steady even when we learn that the rival Mujuru and Mnangagwa factions in the Mugabe government traded accusations over responsibility for some policies, such as Operation Murambatsvina (International Crisis Group 2005).

80. Counterinsurgents intervening in Zimbabwe would not be able to avoid these transitional justice questions, which are aimed at the interim government and the FCM. Counterinsurgents would have to grapple with whether and how to engage in transitional justice endeavors, and do so in a coordinated and synchronized way to avoid providing the insurgency with opportunities to harm the COIN campaign.

81. Legal planning for COIN in Zimbabwe should assess the strengths and weaknesses of the range of transitional justice options, which include:

- Criminal trials before domestic or international tribunals;
- Truth-seeking and fact-finding commissions;
- Reparation mechanisms (whether symbolic or restorative);
- Lustration and removal of abusers from positions of public authority and trust, perhaps including exile of those removed from office;
- Memorialization of the abuses to ensure permanent "collective memory" about the abuses (Zimbabwe Human Rights NGO Forum 2006: 6).

82. Critical to this legal planning assessment would be the attitudes of the MDC, human rights groups within and outside Zimbabwe, and other governments and IGOs

with commitments to transitional justice mechanisms. Counterinsurgents should remember that transitional justice is not simply a stark choice between criminal prosecution or amnesty. Transitional justice can be, and in the context of COIN must be, more nuanced with multiple paths being taken at different times and places.

83. Above all, legal planning for transitional justice as part of stability operations should remain committed to ensuring that, whatever transitional justice strategies are utilized, they contribute to the overall COIN objectives of producing a secure, economically viable, rights-respecting, and self-sustaining democracy. In particular, transitional justice mechanisms should strengthen domestic capacity for rule of law politics in Zimbabwe, which would contribute significantly to achieving legitimacy.

### **E. Creating a Rule of Law Culture in Zimbabwe**

84. Important to making the rule of law meaningful in COIN and post-conflict environments is the need to create or re-create a “rule of law culture” in societies weakened by tyranny or war. In the words of Stromseth, Wippman, and Brooks (2006: 310), “[t]he rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes. Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing.”

85. Legal planning should explore possibilities for rebuilding a rule of law culture in Zimbabwe. Mugabe’s reign over Zimbabwe damaged the population’s confidence in the “rule of law,” which effectively meant whatever Mugabe wanted it to mean. Government officials, members of the armed forces, and police officers committed gross and systematic abuses of human rights in Zimbabwe with impunity. The social trauma caused by this official political violence has produced “high levels of suspicion, low levels of trust, and a steep deterioration of social capital” (Moss and Patrick 2005: 5).

86. Mugabe’s rule also adversely affected the legal profession in Zimbabwe. For example, the Law Society of Zimbabwe (2007: 5) has detailed:

the persecution of lawyers in Zimbabwe since August 2006, which includes sustained media bashing, arbitrary arrests and detention, organized violence and torture, impeding access to clients, non-compliance with court orders, arbitrary searches of legal offices and seizures of documents including clients’ files, uncooperative disposition from police, threats, false prosecutions, surveillance and setting up of a possible hit squad involving military intelligence to abduct and eliminate certain lawyers.

87. Counterinsurgents should not discount how tyrants and war degrade the relationship between people and legal systems nor underestimate how much effort might be required to reconstitute that relationship as part of a functioning society. The problem such degradation creates for any plan to build a rule of law culture is painful but simple:

How do you build such a culture in a society where the people have been brutally taught to fear and distrust the government while watching it systematically destroy the country?

88. The departure of Mugabe creates a window of opportunity in which the groundwork can be laid for a rule of law renaissance in Zimbabwe, even amidst the threat of insurgency violence. Taking advantage of this opportunity would require counterinsurgents to undertake rule of law missions in not only the specific stability operations examined in this chapter but also in other areas identified by experts as important for creating rule of law cultures. Stromseth, Wippman, and Brooks (2006: 315) labeled these alternative strategies as “do no harm” and “doing some good.” Table 2 below contains ideas that these experts recommended for rule of law missions taking place in conjunction during or after military interventions. Many of these recommendations resonate with critical elements of COIN doctrine and further underscore how important rule of law operations are to overall COIN success.

**Table 2. Do No Harm and Do Some Good (Stromseth, Wippman, and Brooks 2006: 316-345)**

<i>Do No Harm</i>	<i>Do Some Good</i>
Acknowledge and address the paradoxes created by trying to pull the rule of law from the barrel of a gun	Invest in civil society Invest in legal education
Be committed to transparency and accountability in your own actions	Utilize traditional dispute settlement mechanisms
Develop linguistic and cultural know-how with regard to the countries where you will be working	Make use of paralegals and trained mediators
Plan carefully and avoid early errors	Reach down to the grassroots
Be willing to act collaboratively and multilaterally	Engage in innovative outreach programs, including to marginalized groups, and in creative media strategies

89. A critical component of building a rule of law culture in Zimbabwe would be improving education concerning the law in two senses. First, counterinsurgents would need to encourage improved education of legal professionals in Zimbabwe. The change from the Mugabe regime to the interim government may help de-politicize the legal profession, but counterinsurgents would need to do more to improve legal education and training. The Southern African Development Community (SADC) Lawyers Association (2007) has expressed concern that law societies and bar associations in SADC members

“have still not adequately developed a structured, systematic and accessible legal education, capacity building and training programme for continuous legal education of members of the legal profession in their jurisdictions.” Where needed, counterinsurgents could work with the Law Society of Zimbabwe and the University of Zimbabwe Faculty of Law to achieve the objectives set out the SADC Lawyers Association.

90. Second, counterinsurgents could work with the legal profession, non-profit groups, and human rights NGOs in Zimbabwe to improve the education of the people about law in Zimbabwe, particularly their rights under the Constitution. The challenge of legal literacy in Zimbabwe has been present since its independence in 1980. The Legal Resources Foundation (LRF) was established in 1984 “to meet the need to improve the accessibility of legal and information services to all sections of the population” (Manase 1992: 11). The LRF and other organizations have increased legal literacy, but efforts in Zimbabwe concerning human rights education have been criticized (d’Engelbronner-Kolff 1998). The LRF still operates, and it provides programs on legal services, legal education (including community outreach and paralegal training), publications, advocacy, research, training, and institutional development (Legal Resources Foundation 2006). The LRF is a potential partner for counterinsurgents’ efforts to engage in grassroots legal education in Zimbabwe.

#### IV. STABILITY OPERATIONS AND PROVIDING FOR THE MATERIAL NEEDS OF THE PEOPLE OF ZIMBABWE

##### **A. Provision of Essential Services**

###### *1. Importance of Providing Essential Services in Counterinsurgency Operations*

91. COIN doctrine identifies the provision of essential services as a key LLO in the execution of COIN campaigns (*CoinFM* 2007: 169-170). The scope of this LLO is daunting because it could include making food available, operating sewage and water treatment plants, collecting trash, providing electricity, running transportation systems, keeping schools and universities functioning, and delivering health services (*CoinFM* 2007: 156). Essential services are also intertwined with efforts to stimulate economic development. The provision or restoration of the HN’s ability to provide these and other services directly connects to achieving security and legitimacy (Stromseth, Wippman, and Brooks 2006: 135). Counterinsurgents need to recognize the urgent importance of providing essential services by engaging in thorough assessment, design, and planning for this vital LLO.

92. The provision of essential services is also critical for rule of law operations. To begin, how essential services get provided in COIN must conform to the rule of law. Thus, rule of law operators cannot conceive of the essential services LLO as outside of their domain. Second, effective provision of essential services can help build support for the COIN campaign and the HN government, thus increasing the legitimacy of the entire

effort. Growing trust and confidence in the HN government pays dividends for other rule of law operations that counterinsurgents may need to undertake.

### *2. Provision of Essential Services in Zimbabwe*

93. Counterinsurgents in Zimbabwe would face a massive responsibility to provide and restore essential services. Prior to the moves by Mugabe to strengthen his grip on power, Zimbabwe was not a comprehensive tragedy in terms of the provision of essential services. At the time of Mugabe's death, however, the reality concerning essential services in Zimbabwe ranged between dismal and dire. A few sobering facts are sufficient to communicate the potential burden the essential services LLO would impose on counterinsurgents in Zimbabwe:

- Zimbabwe ranked 151 out of 177 countries in the UN's Human Development Index for 2005, and 176 out of 177 countries in terms of life expectancy at birth (40.9 years) (UN Development Programme 2007). Other estimates put life expectancy for women at 34 years and 37 years for men (Tren, Ncube, Urbach, and Bate 2007: 7).
- Health experts argue "Zimbabwe's health care system has collapsed" (Tren, Ncube, Urbach, and Bate 2007: 2). Diseases such as HIV/AIDS, malaria, dysentery, tuberculosis, and cholera are a significant problem in the country (IRIN 2007). Zimbabwe has the fourth highest HIV/AIDS prevalence rate among adults in the world at 24.6% (Central Intelligence Agency 2007b). Cholera, dysentery, and diarrhoeal are growing as health threats because "[w]ith Zimbabwe's failing infrastructure, safe water supplies are becoming increasingly rare and residents of most towns and cities can no longer depend on the once potable water or the sewage treatment services" (Tren, Ncube, Urbach, and Bate 2007: 19).
- The educational system is suffering because of the economic conditions in Zimbabwe. Although Zimbabwe retains a high literacy rate, the deterioration in government funds for books, supplies, infrastructure, and teachers' salaries is taking a toll from elementary schools to the University of Zimbabwe (Kwenda 2007; Network for Education and Academic Rights 2007; Sifile 2007).
- Mugabe's land reform policies eviscerated agricultural production, forcing nearly half the population to rely on imported food aid (Moss and Patrick 2005). Food security deteriorated in 2007, with predictions of a worsening crisis through 2008 (Famine Early Warning System Network 2007). Estimates predict "that 2.1 million people will face serious food shortages during the third quarter of 2007. This figure is expected to rise during the first months of 2008 to 4.1 million, more than a third of the population" (Internal Displacement Monitoring Centre 2007). Food shortages are producing malnutrition, which makes Zimbabweans more vulnerable to disease (Tren, Ncube, Urbach, and Bate 2007: 19).

- Policies have displaced hundreds of thousands of people from their homes, helping produce a crisis in internally displaced people (Internal Displacement Monitoring Centre 2007). Operation Murambatsvina alone is estimated to have produced 570,000 displaced people (Tibaijuka Report 2005; Human Rights Watch 2005).
- The Zimbabwean economy has collapsed. Inflation is running “between 7,600 per cent (government figures) and 13,000 percent (independent estimates)” (International Crisis Group 2007: i). Unemployment in Zimbabwe is estimated to be 80% (Central Intelligence Agency 2007c). Four out of five Zimbabweans live below the poverty line (International Crisis Group 2007: i).
- According to Refugees International (2007b) “food shortages, a near total collapse of the domestic economy, and continued political repression are forcing large numbers of citizens to seek refuge and sustenance for their families in neighboring countries.” Skilled workers have also left Zimbabwe in large numbers (Chitapi 2007), reducing the human capital available in the country to repair the disaster Mugabe’s regime wrought.
- Many Zimbabweans who left the country have been forcibly repatriated by neighboring African countries, with more than 86,000 repatriated between January and May 2007 alone (Sokwanele Civic Action Support Group 2007), creating a reverse refugee crisis in Zimbabwe. The return of more Zimbabweans from other countries after Mugabe’s death may exacerbate this crisis, and the FCM has demonstrated interest in recruiting among these returning nationals (White House Memorandum 2007: ¶10).

94. The horrendous situation in Zimbabwe in the last years of Mugabe’s rule created a fairly significant international humanitarian effort to relieve the suffering of the people of Zimbabwe, and counterinsurgents would need to ensure that IGOs and NGOs with extensive activities in Zimbabwe (e.g., delivering food assistance, providing shelter, and running health services) remain active. This objective would necessitate providing security for humanitarian relief efforts and coordinating military and political activities with IGO and NGO endeavors (*ROLH* 2007: 43-44). The security and coordination tasks would be challenging in a COIN campaign in Zimbabwe because of the difficulty of achieving unity of effort among counterinsurgents. In prior COIN environments (e.g., Afghanistan and Iraq), these objectives proved difficult to achieve, even within the U.S. government. For example, analysis of the performance of Provincial Reconstruction Teams (PRTs) in Iraq identified coordination problems between PRT efforts and the use of Commander’s Emergency Response Program (CERP) funds by military commanders (Office of the Special Inspector General for Iraq Reconstruction 2007).

3. *Rule of Law Considerations for Provision of Essential Services*

a. U.S. Legal Considerations

95. As with assistance to foreign security forces, Congress must specifically appropriate funds for U.S. assistance for humanitarian relief and reconstruction in foreign countries (*CoinFM* 2007: 357). In past operations involving humanitarian and military activities, Congress appropriated funds for the exercise of DoS legal authorities (e.g., United States Agency for International Development) under Title 22 of the U.S. Code, and smaller amounts for use by military commanders pursuant to their legal authorities under Title 10 of the U.S. Code (*CoinFM* 2007: 357; *ROLH* 2007: 139). For Iraq and Afghanistan, Congress authorized the CERP, which gave military commanders the authority to disperse limited amounts of “funds for urgent humanitarian relief and reconstruction projects” (*CoinFM* 2007: 358).

96. The use of congressionally appropriated funds for essential services in COIN also raises numerous considerations, which legal planning has to address. The disbursement of humanitarian assistance requires entering into contracts for the provision of essential services, and the contracting process requires “sensitive and fair construction and execution so perceptions of exploitation and favoritism do not undermine overall COIN initiatives” (*CoinFM* 2007: 276). In large civilian-military operations, such as would happen with COIN in Zimbabwe, the contracting burden can be significant. Handling this burden requires advanced planning to ensure that, as has happened within expeditionary contracting in the U.S. Army (Commission on Army Acquisition and Program Management in Expeditionary Operations 2007), the COIN effort is not hampered by understaffed, under-trained, and under-funded contracting capabilities.

97. Counterinsurgents would also have to make sure that humanitarian relief and funds for essential services do not fall into the hands of the FCM. This need requires counterinsurgents to vet potential vendors and contractors for affiliations or ties to Mnangagwa and the FCM. This task may not be straightforward given how extensive Mnangagwa’s business interests were in Zimbabwe during Mugabe’s rule, interests Mnangagwa is using to fund the FCM (White House Memorandum 2007: ¶9).

b. Zimbabwe Legal Considerations

98. To strengthen commitment to the rule of law, counterinsurgents would need to provide and restore essential services in keeping with the applicable laws in Zimbabwe. The existing scale of humanitarian involvement in Zimbabwe suggests that conducting continued relief should not pose significant problems in Zimbabwean law. However, for legal planning purposes, potential problems and obstacles created by Zimbabwean law should be identified and assessed in order to create a strategy for handling them.

99. One Mugabe-era law that counterinsurgents could encourage the interim government to repeal is the law that requires humanitarian aid coming in foreign

currencies to be exchanged for Zimbabwe's currency at an official government rate, which was only a fraction of the market exchange rate. Under Mugabe, the Zimbabwe Reserve Bank was "able to sell the hard currency [from foreign aid agencies] at a large profit on the free market, which it use[d] to benefit the ZANU-PF establishment, while some 50-90 per cent of the money is lost for its intended humanitarian purposes" (International Crisis Group 2007: 9).

100. Counterinsurgents should also keep in mind that Zimbabwe is party to human rights treaties that include economic, social, and cultural rights, particularly the International Covenant on Economic, Social, and Cultural Rights (1966) and the ACHPR. Although the United States does not recognize economic, social, and cultural rights as human rights, Zimbabwe and other potential coalition partners take a different legal position. Provision of essential services in COIN would contribute towards respecting, protecting, and fulfilling economic, social, and cultural rights in Zimbabwe.

## **B. Economic Development**

### *1. Importance of Economic Development in Counterinsurgency Operations*

101. As a major LLO, economic development plays a key role in establishing an environment that diminishes insurgent influence while supporting reform and reconstruction in all interrelated aspects of civil society (*CoinFM* 2007: 157, 171). Failure to advance economic development in COIN can foster or deepen economic disparities, feeding a population's willingness to support an insurgency movement (*CoinFM* 2007: 96, 98, 172-173). Economic development activities are difficult in the midst of COIN because military and security operations can adversely affect the HN's economy through destruction of physical infrastructure, limitations on population movements, decreased trade and foreign investment possibilities, and emergence of black markets and criminal enterprises.

102. In keeping with COIN doctrine, economic development activities must be coordinated to achieve unity of effort. Achieving this unity of effort on economic development is not easy. In addition, counterinsurgents should be aware of the impact of their decisions on prospects for economic development. A policy move seemingly unrelated to economic development (e.g., disbanding a HN's military force, setting pay levels for security forces, disbursing CERP funds, soldiers giving small amounts of cash to children) can have adverse economic repercussions for individuals, families, communities, the HN, and the COIN campaign. Done properly, integrating HN economic development into the logistics of supporting counterinsurgency forces through, for example, contracts with HN suppliers can help stimulate the HN's economy in ways conducive to the goals of COIN.

103. Counterinsurgents must also keep in mind that the objective of economic development is to provide the HN with a self-sustaining economic foundation for a

secure, rights-respecting, and prosperous democracy. Economic development is not humanitarian relief. It entails reconstituting the HN's own economic capabilities to allow a nation to stand on its own feet. Wherever possible, counterinsurgents should allow the HN government to source its needs (e.g., for its security forces and other governmental institutions) from HN contractors and suppliers (*CoinFM* 2007: 270). Economic development in COIN should, therefore, be integrated and coordinated with HN governmental and private sector actors to provide the earliest possible traction for indigenous economic growth to take hold.

104. As with essential services, rule of law operators have a significant stake in HN economic development. Such economic development must occur within the rule of law and not replicate the quasi-kleptocracy Zimbabwe became under Mugabe's rule. As the International Crisis Group (2007: 9) observed, both "Mujuru and Mnangagwa are two of the richest establishment figures, with interests spreading across mining, tourism, real estate, farming and banking. They built their business empires . . . largely through opportunities and guarantees granted with the president's personal approval[.]" Counterinsurgents face the task of ensuring that economic development in post-Mugabe Zimbabwe takes a rule-of-law path.

## 2. *Economic Development Challenges in Zimbabwe*

105. Mugabe's rule destroyed the country's economy. Experts estimate "that from 1994 to 2004, Zimbabwe experienced the lowest economic growth of any country in the world, with -1.9 percent GDP growth per year" (Teslik 2007). Economic mismanagement and expensive military adventures in the Congo stressed the government's ability to respond to economic problems. The agriculture sector has been wrecked, turning Zimbabwe from a food exporter to a country on food life support from humanitarian agencies. The tourism industry has suffered from Zimbabwe's poor reputation and the loss of wildlife and its habitat. Outside of extraction of natural resources, the country does not attract significant foreign investment because of Mugabe's policies and the economy's collapse. Skilled workers have been leaving Zimbabwe to escape the nightmare. Economic sanctions imposed on the country and its leaders have exacerbated Zimbabwe's economic peril. In 2007, Mugabe's effort to fight inflation by forcing prices to be cut (i.e., Operation Dzikisa Mitengo) caused more suffering, as did his attempt to require foreign investments in Zimbabwe to be majority owned by Zimbabweans.

106. Many analyses of Zimbabwe's economic condition stress that, with better policies, Zimbabwe has the potential to be a vibrant economy in southern Africa. Zimbabwe is rich in natural resources, and its agricultural sector used to perform well and was a leading source of Zimbabwean exports. The gap between Zimbabwe's current level of economic development and its potential must be bridged for two reasons.

107. First, Zimbabwe faces a violent insurgency movement which threatens the basic security needed to make economic development gains for the population. Second, many of the economic problems affecting Zimbabwe are structural and deeply political,

perhaps none more so than the problem of land reform. Fixing structural problems typically proves more difficult than tweaking market inefficiencies. Structural economic problems are often embedded in legal and governance systems, which makes legal reform for economic development difficult but critical for establishment legitimacy. Economic development is, thus, a central rule of law operation.

### *3. U.S. Legal Considerations Concerning Economic Development for Zimbabwe*

108. The U.S. legal considerations analyzed with respect to provision of essential services (e.g., funding, contracting issues) apply in the area of economic development efforts and will not be repeated here. The United States can explore some legal strategies to help the interim government move towards economic development, such as:

- Providing Zimbabwean exports to the United States with preferential tariff treatment under the Africa Growth and Economic Opportunity Act and encouraging other major markets, such as the European Union, to do the same; and
- Entering into a bilateral investment agreement with the interim government to try to encourage foreign direct investment from the United States into Zimbabwe.

109. Such strategies would require, however, that the United States and the European Union end their economic sanctions on Zimbabwe, including against Solomon and Joyce Mujuru, who form part of the interim government's leadership.

### *4. Zimbabwe Legal Considerations: The Land Reform Conundrum*

110. Rule of law operations in connection with economic development in Zimbabwe would also need to analyze potential considerations raised by Zimbabwean law. This analysis would require a more thorough assessment of Mugabe-era laws that inhibit economic development in rural and urban areas. The overall legal structure in Zimbabwe would need to be re-oriented in such a way as to allow Zimbabwe's natural economic advantages to take hold and help jump-start the rest of the economy. Many possible strategies for advancing economic development in Zimbabwe would be still-born, however, without resolving the crisis over land reform.

111. Mugabe's government amended the Zimbabwe Constitution to permit seizure of white-owned farms without compensation in order to redistribute land to Mugabe's supporters. The results of these policies have been disastrous for Zimbabwean agriculture and the larger economy, but the disaster should not obscure the deeply politicized nature of land reform issues in Zimbabwe. The problem of access to and ownership of land dates back to the British colonial period, and the politics of land in Zimbabwe after independence continued to suffer from the problems caused by British imperialism and Rhodesia's racism. In short, counterinsurgents and the interim government would

confront a problem more deeply rooted in the emotions and ideology of Zimbabwe than any other issue.

112. General legal principles for resolving the land reform problem have been enunciated before, such as those found in the Abuja Agreement adopted by the Commonwealth in 2002 (see Table 3). Legal planning for potential COIN in Zimbabwe should, however, push beyond these general principles, which accord with COIN's emphasis on the rule of law, to understand possible options for the more detailed resolutions of the land problem that would be required.

**Table 3. The Commonwealth's Abuja Agreement, January 2002: Statement on Land Reform Controversy in Zimbabwe**

The meeting recognised that as a result of historical injustices, the current land ownership and distribution needed to be rectified in a transparent and equitable manner. It also agreed on the following:

- Land is at the core of the crisis in Zimbabwe and cannot be separated from other issues of concern to the Commonwealth such as the rule of law, respect for human rights, democracy and the economy. A programme of land reform is, therefore, crucial to the resolution of the problem
- Such a programme of land reform must be implemented in a fair, just and sustainable manner, in the interest of all the people of Zimbabwe, within the law and constitution of Zimbabwe
- The crisis in Zimbabwe also has political and rule of law implications which must be addressed holistically and concurrently. The situation in Zimbabwe poses a threat to the socio-economic stability of the entire sub-region and the continent at large . . .
- The orderly implementation of the land reform can only be meaningful and sustainable if carried out with due regard to human rights, rule of law, transparency and democratic principles. The commitment of the government of Zimbabwe is therefore crucial to this process.

113. In an exhaustive report, the International Crisis Group (2004: 120) argued that “[I]and issues cannot be tackled effectively until an inclusive transitional administration and a timeline for new elections are established in consultation with the MDC and civil society.” Mugabe’s death and the emergence of the interim government, which includes the MDC, comes close to meeting these political pre-conditions.

114. The International Crisis Group (2004: 123) also asserted that “[a]lmost all agree that the logical first step in moving the land process forward during a transition or post-transition period is to establish a Land Commission.” The proposed Land Commission

should be politically inclusive, informed by a strong technocratic base, strengthened by involvement of the UN, and supported by the World Bank and other major governments and IGOs with stakes in land reform in Zimbabwe (International Crisis Group 2004: 123). The International Crisis Group's proposed mandate for a Land Commission appears in Table 4 below.

**Table 4. International Crisis Group (2004:123-124) Proposal for Land Commission Mandate**

The Land Commission should have a clear mandate and timetable for achieving its goals. Its tasks should include:

- conducting a comprehensive inventory of land, built around a determination of who holds what, the status of redistribution, compensation paid for leases and to owners and where farms are being used productively;
- organising land tribunals to mediate claims on the ground as well as considerable field staff to assist in the process;
- incorporating broad public input;
- developing a compensation formula for farms that were seized, recognising that 100 per cent compensation will likely not be possible;
- developing new enterprises, making sure new farmers have access to needed expertise and establishing incentives for former farmers to return to their land (or small versions thereof); and
- establishing the parameters of a new law to govern land reform procedures.

115. The Legal Team is not advocating that the International Crisis Group's ideas should be the basis for legal planning for economic development during COIN in Zimbabwe. These ideas provide, however, the outlines of the legal considerations and the challenges that addressing the land ownership crisis in Zimbabwe would involve. Counterinsurgents and the interim government would have to create and sustain a significant legal and institutional initiative to address this crisis. Counterinsurgents should even consider making the land reform problem a specific LLO in a COIN campaign in Zimbabwe. Effectively resolving the land reform conundrum would not be easy, but, with results, the effort could gain the interim government and counterinsurgents significant legitimacy vis-à-vis the FCM.

V. CONCLUSION

116. COIN in Zimbabwe would require stability operations to maintain or establish a safe and secure environment, provide essential governmental services, infrastructure reconstruction, and humanitarian relief. For preliminary planning purposes, the United States should address rule of law concerns arising from the need to:

- Reform the Zimbabwe Constitution, particularly in terms of correcting the imbalance that permits the President to interfere in the legislative and judicial branches of government;
- Reform the justice sector in Zimbabwe, including the courts, police, and corrections facilities;
- Reform the process of making law in Zimbabwe, which, under Mugabe, lost the critical elements of democratic involvement, transparency, and accountability;
- Handle questions of transitional justice being asked about members of the leadership of the interim government and the FCM;
- Build a stronger rule of law culture in Zimbabwe to overcome the legacy of distrust Mugabe's rule created in the population and its hopes for the future;
- Provide essential services to the suffering population of Zimbabwe; and
- Engage in economic development in a context of economic meltdown, with particular emphasis needed on finding solutions to the long running and still festering problem of land ownership and use.

117. Counterinsurgents would face enormous tasks in undertaking stability operations in Zimbabwe. Rule of law operations alone would not produce stability in Zimbabwe during a COIN campaign. Counterinsurgents cannot out-lawyer the problems they would face in stability operations in Zimbabwe. At the same time, the rule of law is so intrinsic to the kind of stability counterinsurgents seek to promote that rule of law operations have to be part of the counterinsurgent's stability operations tool kit.

## CHAPTER 6

### CONCLUDING CONSIDERATIONS FOR RULE OF LAW OPERATIONS DURING COUNTERINSURGENCY IN ZIMBABWE

#### I. INTRODUCTION

1. This Report reveals the magnitude and complexity of potential rule of law operations in counterinsurgency (COIN) generally and in Zimbabwe specifically. The rule of law tasks generated by conducting full spectrum operations in COIN appear in every logical line of operation (LLO), affect every member of a COIN coalition, and touch every level of law, from the local to the international. In addition, rule of law missions within each operation and each LLO must be undertaken simultaneously and in a coordinated manner by military forces, civilian officials, non-governmental personnel, and citizens of the HN. The difficulty of these challenges may trigger two reactions.

2. First, decision makers might think that rule of law challenges are technical matters that legal experts will handle in due course. Second, the difficulty of rule of law operations may encourage policy makers to believe that these tasks can be left until after the insurgency has been defeated militarily and no longer poses a security threat. The “leave it to the lawyers” and “leave it until tomorrow” perspectives will, however, undermine the prospects for the rule of law to play a strategic role in a COIN campaign, a role COIN doctrine identifies as critical.

3. In this concluding chapter, the Legal Team highlights some final considerations the National Security Council (NSC) should keep in mind when incorporating this Report into its advice for the President. Grasping and acting upon the strategic importance of rule of law operations in COIN in Zimbabwe requires attention to at least three policy tasks the Legal Team has not been able to address adequately:

- A more detailed and robust understanding of post-Mugabe Zimbabwe;
- Delineating more precise mechanisms for coordinating and synchronizing rule of law and COIN operations in Zimbabwe; and
- Tackling gaps in staffing, training, and sustaining rule of law operations over the course of a long, difficult COIN campaign.

4. The chapter concludes with thoughts on how this Report’s analysis relates to the policy decision to be made about intervention in Zimbabwe. This decision will not, and should not be, driven primarily by rule of law concerns. The key is to understand how rule of law considerations inform the politics of deciding whether to intervene. This task mandates that policy makers comprehend, and are capable of handling, the good, the bad, and the ugly of rule of law operations in COIN in Zimbabwe.

## II. GETTING FROM THE “BEGIN STATE” TO THE “END STATE”

5. COIN literature speaks of achieving the “end state” in COIN campaigns. In reviewing the COIN doctrine and material on rule of law operations, the Legal Team noted the frequency with which the rule of law was identified as an important “end state” characteristic. The objective of rule of law operations is to ensure that the rule of law informs the end state achieved. This Report identified rule of law issues that a COIN effort in Zimbabwe would have to address, but the preliminary nature of the Report’s analysis means that the tasks of assessment, design, planning, and coordination for rule of law operations in Zimbabwe would require more work, particularly in three areas.

### A. Better and Deeper Understanding of the “Begin State” in Zimbabwe

6. The first challenge is the need for a better and deeper understanding of the political, economic, and legal situation of post-Mugabe Zimbabwe. The *CoinFM* and the *Rule of Law Handdbook (ROLH)* stress the importance of understanding the politics, economics, societies, languages, and cultures of the HN. Crafting this understanding would be critical for executing rule of law operations in Zimbabwe. This Report draws on diverse materials that describe and examine Zimbabwe under Mugabe, particularly with an eye to his unfortunate legacy. The limited time allotted for completing this Report precluded, however, the Legal Team from undertaking the more comprehensive assessment of the political, economic, and legal “begin state” in Zimbabwe that would be required to launch rule of law operations in the most effective way.

7. The Report’s identification of political, economic, and legal problems in Zimbabwe has not, for example, been broken down into individual regional, provincial, or municipal characteristics and idiosyncrasies. As COIN doctrine and the practical guidance on rule of law missions suggest, challenges in one locale may differ from neighboring areas, requiring knowledge of each area of COIN operations and the ability to learn and adapt within highly context specific environments. The involvement of the Movement for Democratic Change (MDC) in the interim government, and the MDC’s links with human rights and pro-democracy non-governmental organizations (NGOs) in Zimbabwe and beyond, gives foreign counterinsurgents potentially robust local sources of cooperation on completing a detailed assessment of conditions in Zimbabwe.

8. COIN doctrine has led to the creation of “human terrain teams,” which have been used in Afghanistan. These teams operationalize the COIN tenet of “[k]now every village, road, field, population group, tribal leader, and ancient grievance” (*CoinFM* 2007: 287-88). COIN in post-Mugabe Zimbabwe requires more sophisticated handling of the “rule of law terrain” than provided in this Report, and we caution the NSC and others using this Report to heed this warning and not assume that the rule of law aspect of potential COIN operations in Zimbabwe has already been comprehensively analyzed.

## **B. Mapping Pathways for Coordination and Synchronization in Rule of Law Operations in Zimbabwe**

9. The Report reflects the emphasis the COIN doctrine and the *ROLH* place on coordination and synchronization of COIN and rule of law operations. The Legal Team identified various U.S. government entities (e.g., Africa Command), countries (e.g., South Africa), international organizations (e.g., United Nations), regional groups (e.g., Southern African Development Community), and NGOs (e.g., human rights groups in Zimbabwe) the involvement of which would be important in any COIN campaign in Zimbabwe. Identifying the need for coordination and synchronization is necessary but not sufficient in designing and planning COIN operations in Zimbabwe.

10. The NSC should recognize that the next stage of preparing for COIN in Zimbabwe would have to include serious attempts to select or create coordination and synchronization mechanisms needed for COIN and rule of law operations. Given the present lack of information about what countries a COIN coalition in Zimbabwe might include, attempting to construct frameworks for coordination and synchronization would be premature speculation. The diversity of challenges that COIN and rule of law operations would face in Zimbabwe verge on the overwhelming, which places a premium on counterinsurgents mapping out how they collectively plan to overcome the insurgency threat. In short, the COIN and rule of law mantra of coordination and synchronization has to become more than a ritual chant—it must stimulate the development and operation of effective mechanisms for collaboration and partnership.

## **C. Adequately Staffing, Training, Funding, and Sustaining Rule of Law Operations**

11. The *ROLH* repeatedly indicated that military lawyers tasked with rule of law missions in Afghanistan and Iraq had inadequate training, insufficient personnel and funding, competing responsibilities, and no strategy for sustaining such missions over time and through repeated troop rotations. Civilian rule of law efforts in these countries did not fare much better and sometimes fared worse because of a failure to coordinate activities with the military. The outcomes demonstrate that the U.S. government did not make rule of law operations a strategic priority in handling the insurgencies in Afghanistan and Iraq. More broadly, analysis of rule of law endeavors in post-conflict settings reveals a sobering track record littered with as many or more failures than successes (Stromseth, Wippman, and Brooks 2006).

12. The mistakes made in Afghanistan and Iraq and in post-conflict situations should not be repeated in Zimbabwe. The *CoinFM* and *ROLH* provide future COIN campaigns with guidance distilled from lessons learned from recent COIN experiences, and counterinsurgents in Zimbabwe could draw on these lessons as they learn and adapt in their COIN context. COIN forces in Zimbabwe should develop their own “lessons learned” systems through continuous assessment and measurement efforts that influence the “design, learn, redesign” cycle of the overall COIN effort (*CoinFM* 2007: 144).

13. From past lessons, the U.S. government knows that sustaining effective rule of law operations during a COIN campaign, and then in a post-insurgency nation-building phase, requires adequate staffing, training, and funding. The crisis in Zimbabwe does not afford the United States the time to create specific rule of law training for Zimbabwe, and such country-specific training might not be possible given the unpredictability of where crises requiring U.S. intervention may occur. Proposals have, however, been made to improve the training and preparation of military lawyers for rule of law operations wherever they might be needed, such as the idea for creating a Rule of Law Joint Command (Tasikas 2007).

14. The strategic importance of rule of law operations to COIN means that training cannot focus only on military and civilian lawyers. Rule of law issues have to be mainstreamed into the overall design and planning processes for U.S. engagement in COIN or other types of complex operations. Integrating rule of law operations into strategic thinking will help civilian and military leaders avoid the “leave it to the lawyers” and “leave it until tomorrow” temptations described earlier.

15. The consequences of not thinking about the rule of law strategically in COIN are clear from recent experiences in Afghanistan and Iraq. The United States should not attempt to do rule of law operations on the fly and on the cheap again because this approach plays into the hands of the insurgency, particularly its ability, through violence and intimidation, to raise the blood-and-treasure cost of COIN activities and lengthen the time counterinsurgents need to achieve their end state.

### III. RULE OF LAW OPERATIONS AND THE DECISION TO INTERVENE IN THE CRISIS IN ZIMBABWE

#### **A. Counterinsurgency is Primarily a Political, Not a Legal, Exercise**

16. The strategic importance of rule of law operations in COIN materializes from doctrine developed not by lawyers but by leading military officers thinking comprehensively about how best to achieve success in COIN. *How* to wage effective COIN does not, however, tell us much about *whether* the United States should engage in COIN in specific places, such as Zimbabwe. COIN is, after all, primarily a concrete political task not an abstract legal exercise. Decisions to intervene will not be made on jurisprudential grounds.

17. The strategic potential of rule of law operations depends, however, on the nature of the political decision to engage in intervention. What insurgencies the United States decides to fight, what HNs we commit to help, and what allies the United States and the HNs would have, will significantly affect whether the United States can undertake rule of law operations successfully. Sewall (2007: xli) argued, for example, that “[I]ack of clarity about when and why the United States will conduct counterinsurgency operations undermines the likelihood that the U.S. will ever do it well.”

18. This observation applies with equal force to rule of law operations, which require leaders to generate political and strategic rationales for intervention robust enough to allow counterinsurgents to maintain political support at home and in the HN and, ultimately, to do the rule of law justice. This task is formidable, particularly because those intervening have to prepare for the political consequences “inherent in trying to pull the rule of law from the barrel of a gun” (Stromseth, Wippman, and Brooks 2006: 325). In short, the fate of rule of law operations ultimately rests on the quality of the political decisions that shape and sustain a COIN campaign.

### **B. The Good, the Bad, and the Ugly of Rule of Law Operations in Counterinsurgency**

19. Rule of law considerations that COIN campaigns confront can help inform political decisions on whether an intervention should occur in Zimbabwe. The *raison d'être* of rule of law operations closely corresponds to the primary objective of COIN—legitimacy. Counterinsurgents can draw tactically and strategically on the analytical approach and substance of rule of law thinking in charting a course that leads to legitimacy in what counterinsurgents seek and how they seek it.

20. The potential synergy is so strong that counterinsurgents may well take the rule of law path even in the absence of formal, binding obligations to apply legal rules. The *ROLH* (2007: 66) captured this feature of rule of law operations by arguing that, “[e]ven if one were to ignore legal obligations, . . . rule of law operations should be guided and informed by human rights law purely as a matter of efficacy.”

21. Rule of law thinking is not, however, all synergistic for COIN operations. Proclaiming the rule of law as an objective, and pursuing rule of law operations across the daunting range of activities counterinsurgents undertake, provides insurgents with opportunities for attrition against the counterinsurgents’ legitimacy narrative and political and military actions. Counter-terrorism experts often describe the difficulty of their responsibilities by observing that terrorists only have to succeed occasionally, while counter-terrorist forces have to succeed all the time. A similar dynamic confronts COIN and rule of law operations. The violence insurgents perpetrate erodes security and, thus, eats into the potential for effecting positive change in governance, economic development, essential services, human rights, and democracy. As Stromseth, Wippman, and Brooks (2006: 134) argued, “[a]bsent basic security, efforts to reform political institutions, adopt new laws, promote national reconciliation, and jump-start economic growth are destined to fail.”

22. As seen in Afghanistan and Iraq, continued insurgency violence closes the window of opportunity that counterinsurgents have to stake their claim as the holder of a society’s future. Within the space of a few months after conventional military operations ended, insurgencies in Afghanistan and Iraq were able to damage the claims of the intervening forces to be guardians of a better future. Serious levels of insurgency violence

do not free COIN forces to “take the gloves off” militarily. Heavier reliance on kinetic violence to defeat the insurgency runs counter to COIN doctrine and feeds the insurgents’ narrative about the brutality and illegitimacy of the corrupt HN government and its imperialist foreign allies. The length of time required to build or re-instate the rule of law in shattered countries, such as Zimbabwe, forces counterinsurgents to keep the window of opportunity open for many years.

23. T. E. Lawrence (1929) observed that low-intensity warfare tends to favor guerilla forces so strongly that, given the right circumstances (e.g., mobility, security, time, and doctrine), their victory is close to inevitable. COIN doctrine is designed to facilitate counterinsurgents’ ability to counter the advantages insurgents may have. Still, Lawrence’s analysis did not consider the now mandatory need for counterinsurgents to define and achieve legitimacy locally and globally, in process and in results, through the rule of law. In this sense, contemporary COIN campaigns are simultaneously intensely local and global, and achieving legitimacy in both realms is paramount. In the face of determined insurgents, the commitment to the rule of law risks becoming a perfection of spirit that struggles in vain against the advantages insurgencies have.

24. Beneath the synergy between legitimacy and the rule of law in COIN campaigns lurks wide-open opportunities for insurgencies to cut the synergy to shreds by the simple strategy of spreading fear and uncertainty throughout the HN’s population using calculated, ruthless violence. The ability of the Fourth Chimurenga Movement to engage in coordinated, nation-wide violence against the interim government in Zimbabwe suggests that Emmerson Mnangagwa understands how low the threshold is for insurgents to gain an advantage over their local and foreign enemies.

25. The promise and peril inherent in a rule of law strategy for COIN campaigns means that rule of law operations will inevitably be difficult, dangerous, and—for painfully long periods of time—indeterminate. Counterinsurgents will need to engage in compromises that balance political realities and rule of law principles. What issues may force COIN forces to compromise, and how counterinsurgents might compromise, cannot be predicted with confidence. This uncertainty limits the eventual impact of advanced rule of law planning, assessment, and campaign design. The beauty of rule of law rhetoric contrasts with the likely ugliness of turning such rhetoric into reality in COIN contexts.

26. The vulnerability of rule of law operations to insurgency tactics and strategies, and the inevitability of compromises and setbacks, means that counterinsurgents have to anchor the rule of law mission so deep in the ethos and practice of their interventions that they do not waver when the mission confronts the fear, hopelessness, and desperation insurgencies spread in the HN. Anchoring the rule of law requires more than repetition of rule of law rhetoric; it requires putting the rhetoric into practice, particularly through training. Otherwise, to paraphrase Yeats (1920), COIN will devolve into a tragedy where the best lack all conviction, while the worst are full of passionate intensity.

IV. CONCLUSION

27. Whether the United States engages in COIN and rule of law operations in Zimbabwe remains to be determined by the President as advised by his national security and foreign policy teams. This Report will feed into the decision-making process and hopefully contribute to the decision made. If the President decides to intervene with civilian personnel and military forces, then this Report should inform the pre-deployment assessment, design, planning, and coordination activities needed for robust rule of law operations. In each of these contexts, the Legal Team emphasizes the need to avoid privileging one aspect of COIN over another in order to ensure that counterinsurgents undertake full spectrum operations in the manner prescribed by the COIN doctrine.

28. Just as “the conduct of COIN is counterintuitive to the traditional U.S. view of war” (*CoinFM 2007: 47*), promoting the rule of law through politico-military means in an environment marked by the physical and psychological insecurity of a foreign population seems counterintuitive to the traditional U.S. perspective on the rule of law. For the sake of future COIN and rule of law operations, the United States must, perhaps paradoxically, make the counterintuitive the central mechanisms of its ability to adapt to the insurgency challenge and to learn to outwit and outlast an ancient but effective form of national and global political violence.

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## Appendix 1

### MEMORANDUM

To: Legal Team  
(Operation Shumba)

From: White House Legal Counsel

Re: *Preliminary Legal Planning Document for Operation Shumba*

Date: October 26, 2007

#### ***I. Introduction***

1. The National Security Council (NSC) is analyzing whether the United States should intervene with civilian and military assets in Zimbabwe to help the current government respond to an insurgency that threatens to plunge that nation into civil war. The code name for this evaluation exercise is "Operation Shumba," and the NSC has organized this Legal Team of civilian and military lawyers and experts to produce a preliminary legal planning document to assist the NSC in providing advice to the President on what course of action to take concerning potential assistance to Zimbabwe. This memorandum provides background information on the current situation in Zimbabwe and the scope of the Legal Team's mandate for the preliminary legal analysis.

#### ***II. Current Situation in Zimbabwe***

2. As widely reported in national and international media, Robert Mugabe, the long-standing President of Zimbabwe, died recently and unexpectedly while on a state visit to Senegal. The exact cause of death remains shrouded in secrecy and has, unfortunately, become the source of rumors that have fueled the development of an insurgency movement in Zimbabwe against the government that took power following Mugabe's death. The violence related to the insurgency, combined with the negative economic and political consequences of Mugabe's rule, make the current situation in Zimbabwe dangerous for its population and for the entire southern African region.

3. The sudden nature of Mugabe's death caught all political parties and their various factions in Zimbabwe off guard, but the Zimbabwe African National Union-Patriotic Front (ZANU-PF) faction led by Joyce Mujuru (Vice President) and Solomon Mujuru, leader of a strong ZANU-PF faction and rival of Mugabe's, quickly moved to consolidate power. The absence from Zimbabwe at the time of Mugabe's death of Emmerson Mnangagwa, the leader of another powerful ZANU-PF faction and long considered Mugabe's heir apparent, helped the Mujuru faction gain the initiative in seizing control of the government of Zimbabwe. Prior to Mugabe's death, the Mujuru faction was most vocal in wanting Mugabe to step down as President after the elections scheduled for

March 2008. The Mnangagwa faction had aligned itself with Mugabe's plans to continue in power past the March 2008 elections.

4. As part of its strategy to consolidate power quickly, the Mujuru faction reached out to Zimbabwe's opposition party, the Movement for Democratic Change (MDC), for support. The two competing factions within the MDC, led respectively by Morgan Tsvangirai and Arthur Mutambara, both responded favorably to the Mujuru overture to join in creating the first post-Mugabe government in Zimbabwe's history. The united support of the previously quarreling Tsvangirai and Mutambara factions of the MDC gave the Mujuru-led move to consolidate power some democratic credentials within and beyond Zimbabwe. For example, numerous non-governmental organizations (NGOs) praised the Mujuru incorporation of the MDC in the new government. The Mujuru faction within ZANU-PF also solidly backed this consolidation of power and the inclusion of the MDC. In addition, those factions of the army and the security forces that had wanted Mugabe to step down from power supported the Mujuru-led move to consolidate power, especially in Harare.

5. Although the interim government believes that holding elections as planned in March 2008 is not realistic in light of the threat of insurgency violence (see below), it promises to hold free and fair elections for all national political offices as soon as the security situation stabilizes to permit such elections. The interim government has expressed a desire to see elections occur by the end of 2008, if possible.

6. As the Mujuru-led ZANU-PF faction began to work with the MDC to form an interim government, Emmerson Mnangagwa returned to Zimbabwe and began arguing that the interim government was illegitimate and unconstitutional. Mnangagwa did not return to Harare for fear of being arrested, but he began to gather supporters in Mugabe's home province of Mashonaland West and Mnangagwa's home province of Midlands. Mnangagwa had success in drawing support from pro-Mugabe leaders in the army and the security forces, and these individuals became the vanguard of the insurgency movement Mnangagwa's faction began against the interim government.

7. Mnangagwa refused overtures from the interim government and declared the beginning of the "Fourth Chimurenga" (i.e., the fourth "period of struggle" in Zimbabwe's history). Mnangagwa asserted that the Mujuru/MDC "junta" was the illegitimate puppet of the United Kingdom (UK), which was again interfering with the sovereignty and will of the people of Zimbabwe for neo-imperialist reasons. Mnangagwa argued that the UK had never fulfilled its promises to an independent Zimbabwe, particularly with respect to the redistribution of massive amounts of land unfairly held for decades after independence by whites. "They [the interim government] will give all the land back to the whites," Mnangagwa has repeatedly asserted. Mnangagwa also argued that the UK orchestrated the "coup d'etat" to remove Mugabe and his legacy as obstacles to the UK's racist desire to manipulate Zimbabwe's future. Mnangagwa implied that Solomon Mujuru and the UK were behind Mugabe's death by repeatedly referring to "Mujuru the murderer" and the "assassins of Whitehall."

8. Apart from sporadic violence, mainly from opportunistic looting, Zimbabwe was calm in the immediate aftermath of Mugabe's death and the development of the Mujuru/MDC interim government and the formation of Mnangagwa's Fourth Chimurenga Movement (FCM). Serious violence began across Zimbabwe in conjunction with the purported funeral and burial of Mugabe in Mashonaland West orchestrated by the FCM. (Whether Mugabe was actually buried is not clear; what exactly happened to Mugabe's body after it left Senegal is not known.) Mnangagwa fought in the insurgency with Mugabe against the white-ruled government of Rhodesia in the 1970s, and rhetoric within the FCM attempts to rally people to its cause by appealing to the victory the earlier insurgency believed it won over racism and imperialism. Mnangagwa has argued repeatedly within the FCM that "we know how to win as insurgents, and traitors to Zimbabwe will suffer the same fate as the old, racist government."

9. The FCM clearly planned to use Mugabe's "funeral" to launch violent attacks on government institutions and people alleged to be Mujuru/MDC sympathizers. The attacks were sufficiently diverse (e.g., coordinated attacks in urban areas against government buildings and murders and beatings of individuals in rural areas) not to reveal a pattern in the FCM's future military strategy and tactics. These attacks revealed, however, the extent of the FCM's reach and demonstrated that Mnangagwa was having success recruiting supporters and fighters from the paramilitary and military forces Mugabe used to seize farms from white citizens and to implement by force other policies, such as Operation Murambatsvina. The interim government has not yet shown a capability to re-organize police and security forces to respond effectively to the insurgency violence, which is not surprising given how the split in ZANU-PF upon Mugabe's death fragmented these government institutions into the competing factions.

10. With Mugabe dead, many Zimbabweans who fled the country to find work in neighboring nations have started to return to Zimbabwe, even though the economy has not improved since Mugabe's death and now faces new difficulties because of the violence perpetrated by the FCM. The FCM is actively recruiting supporters from among the returning refugee populations, and Mnangagwa is using the extensive business interests and wealth he accumulated during Mugabe's reign to offer political and economic incentives for joining the FCM. Some reports from Zimbabwe indicate that Mnangagwa is being particularly successful in recruiting or coercing young males, including children, into the FCM's insurgent forces.

11. The FCM's infiltration of refugee resettlement efforts, and its use of violence to intimidate opponents, has scared off NGOs and staff from the interim government, leaving the returning refugee populations in rural and urban areas vulnerable and angry. The interim government and outside observers are concerned that the FCM may be able to exploit this deteriorating environment to strengthen its political and military power. These developments have transformed the initial sense of relief about Mugabe's death in Zimbabwe to one of growing fear about the potential emergence of civil war.

*III. Perspectives of the Interim Government, Key Countries, and NGOs*

12. To bolster its prospects, the interim government is making quiet diplomatic enquiries with other countries, including the UK, South Africa, and the United States, about its need for formal recognition and international political, economic, humanitarian, and military support in the struggle with the FCM. At present, each of these governments has called for calm, a cessation of violence, and national unity in moving Zimbabwe towards democracy, the rule of law, and economic prosperity. Given the FCM's virulent anti-British rhetoric, the UK is maintaining a low profile with respect to the interim government, promising humanitarian aid but nothing, so far, with respect to overt political, economic, or military support. The FCM has also threatened to attack any white foreigners who interfere in Zimbabwe's politics.

13. Although deeply worried by the situation in Zimbabwe, South Africa presently wants to avoid taking the situation to the UN Security Council (UNSC) in order to focus on an African-led solution to the crisis centered on potential initiatives from the African Union (AU) and the Southern African Development Community (SADC). South Africa is deeply worried by the turn of events in Zimbabwe and, presently, does not want to take sides in the standoff between the interim government and the FCM. NGOs have been very critical of the South African stance, particularly in light of the inclusion of the MDC in the interim government.

14. The interim government in Zimbabwe favors resort to the UNSC and has concerns about the ability of the AU and the SADC to confront effectively the violence and military capabilities of the FCM. The interim government perceives the AU has its hands full in peacekeeping terms with the crisis in the Darfur region of Sudan and has, generally, proven ill-equipped to deal with serious threats of violence from determined military or paramilitary forces. The interim government does not believe that SADC has the capability to provide military and security support as a regional organization. In the absence of UNSC authorization for peacekeeping forces, the interim government is contemplating formally inviting NATO countries to send military forces to provide security and assist with post-Mugabe stabilization and reconstruction of Zimbabwe.

15. Of the other permanent members of the UNSC, the French position, at present, resembles the UK's approach, and China and Russia have officially said very little beyond the need for the violence in Zimbabwe to stop and to avoid foreign interference with the affairs of the people of Zimbabwe. Intelligence reports indicate that both Russia and China have opened channels of communication with the interim government and with the FCM.

16. From the perspective of the U.S. government, the behavior of China is of significant concern. Under Mugabe, Zimbabwe and China were developing stronger political and especially economic ties, with Mugabe proclaiming a "Look East Policy" and blasting the West as a collection of neo-imperialist meddlers in Zimbabwe's sovereignty and domestic affairs. Mugabe's death poses some prickly problems for

China's foreign policy in Africa because the fragmentation of ZANU-PF denies it of a reliable government with which to deal.

17. The Mujuru/MDC alliance in the interim government makes matters more difficult for China because of MDC's desire to move strongly in the democratic direction. The MDC is likely to be more skeptical or even hostile to the interim government embracing China. At the same time, China does not want to be seen openly supporting the FCM. Some intelligent analysts believe China will talk to both sides but let the West bear the brunt of trying to resolve the current crisis, allowing China to move in to deal with whatever political power prevails.

18. NGOs within and outside Zimbabwe are calling for immediate UNSC action under Chapter VII of the UN Charter and, through that strategy, the deployment of a multinational peacekeeping force in Zimbabwe to end the violence and provide the country with the security necessary for a transition to a true democratic polity that protects fundamental human rights. A number of NGOs are calling for members of the FCM and ZANU-PF, including Mnangagwa, to be arrested and tried for war crimes, crimes against humanity, and other international crimes for activities undertaken before and after Mugabe's death, including the Gukurahundi massacres in the 1980s.

#### ***IV. Formulation of U.S. Policy Towards the Crisis in Zimbabwe and the Legal Team's Mandate***

19. The NSC has been monitoring the situation in Zimbabwe, and the Department of State has been in diplomatic contact with the interim government. The President has ordered the NSC to engage in a wide-ranging review of policy options available to the United States. This review is proceeding on the assumption that U.S. involvement in the situation in Zimbabwe would, in all likelihood, require civilian and military participation in a counterinsurgency (COIN) campaign to support Zimbabwe's transition to democracy, the rule of law, and economic prosperity. The review is also being guided by recent developments in COIN policy and doctrine, including the *Counterinsurgency Field Manual* produced by the U.S. Army and Marine Corps.

20. Given the strategic importance of establishing the rule of law in Zimbabwe, the NSC formed this Legal Team and now requests that it develop a preliminary analysis of the rule of law challenges facing the potential COIN operations in Zimbabwe. The Legal Team has discretion in terms of the style and substance of the preliminary analysis, but the Legal Team should produce a report that will be useful for the formulation of the NSC's advice to the President on what courses of action the United States should pursue with respect to the crisis in Zimbabwe. The NSC is aware of the short time frame in which the Legal Team must produce its analysis, and thus the NSC understands that the Legal Team will not be able to examine all issues at a similar level of detail.

21. The Legal Team should submit its final report to the NSC no later than **November 29, 2007**.