

**BANGLADESH RAPID ACTION BATTALION:
SATISFYING THE REQUIREMENTS OF THE LEAHY
AMENDMENT WITH A RULE OF LAW APPROACH**

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*Our words must be judged by our deeds; and in striving for
a lofty ideal we must use practical methods; and if we cannot
attain all at one leap, we must advance towards it step by
step, reasonably content so long as we do actually make
some progress in the right direction.¹*

I. Introduction

Security forces throughout the world are confronting asymmetrical threats unlike any in modern history.² Terrorist organizations are using

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¹ Theodore Roosevelt, Nobel Lecture, Nobel Peace Prize of 1906 (May 5, 1910), available at http://nobelprize.org/nobel_prizes/peace/laureates/1906/roosevelt-lecture.html (last visited Aug. 18, 2013).

² See BRUCE VAUGHN ET AL., CONG. RESEARCH SERV., RL 34194, TERRORISM IN SOUTHEAST ASIA (Oct. 16, 2009) (detailing the spread of terrorist organizations, such as Jemaah Islamiyah, Lashkar-e-Taiba and al Qaeda in Pakistan, Indonesia, and other Southeast Asian nations); BRUCE VAUGHN, CONG. RESEARCH SERV., RS 22591, ISLAMIST EXTREMISM IN BANGLADESH 10 (Jan. 31, 2007). See also Symposium, *Dealing with Today's Asymmetric Threat to U.S. and Global Security: The Need for an Integrated National Asymmetrical Threat Strategy*, SOURCE 2 (May 2008), stating,

technology, international financial and criminal networks, and the Internet to decentralize their command and control structure, increase their mobility, obscure their intentions, and increase their lethality.³ These organizations are constantly evolving their tactics, techniques and procedures, while seeking out safe havens in developing nations and border regions.⁴ Foreign security forces need to develop their capabilities to address these threats.

In developing nations, such as Bangladesh, Indonesia, and Malaysia, security forces are struggling to meet their internal security needs while also attempting to counter these terrorist groups.⁵ Some of these nations have experienced recent political upheaval, such as coups, military instability, and religious division.⁶ Typically, these security forces are inexperienced, underfunded, and undertrained compared to the threats that they face.⁷ Without adequate training, these security forces will be unable to maintain advantages against constantly evolving terrorist organizations.

This terrorist threat, grown on a foundation of instability and religious extremism, has capably and creatively leveraged technology, strategic communications, and divergent Western policies and priorities to enhance both its credibility and efficacy. As a result, the U.S. must rethink the policies, structures, and processes that have guided its national security strategy for the past 60 years.

³ See, e.g., UNITED STATES ARMY TRAINING AND DOCTRINE COMMAND, MILITARY GUIDE TO TERRORISM IN THE TWENTY-FIRST CENTURY, G2 HANDBOOK (2007) (detailing the evolving threat of terrorism); *The Use of the Internet by Islamic Extremists, Testimony before the House Permanent Select Committee on Intelligence*, 109th Cong. (2006) (statement of Bruce Hoffman), available at http://www.rand.org/pubs/testimonies/2006/RAND_CT262-1.pdf (last visited Feb. 10, 2011) (detailing use of technology by terrorist groups); and DR. MARTIN J. CETRON & OWEN DAVIES, 55 TRENDS NOW SHAPING THE FUTURE OF TERRORISM 39–42 (Feb. 2008), available at <http://www.carlisle.army.mil/protus/docs/55-terror.pdf> (last visited Feb. 1, 2011) (detailing evolving threat and trends in terror).

⁴ See OFFICE OF THE COORDINATOR FOR COUNTER-TERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM, 2009, at 208–12 (Aug. 2010) [hereinafter COUNTRY REPORTS], available at <http://www.state.gov/documents/organization/141114.pdf> (last visited Aug. 22, 2013) (providing annual congressional report on terrorism).

⁵ *Id.* at 212–14 (describing efforts to counter terrorist organizations). See also Taj Hashmi, *Bangladesh: The Next Taliban State?*, SIMON FRASER UNIV. (Vancouver, Can. (Feb. 9, 2005), available at http://www.muktomona.com/Articles/taj_hashmi/ (last visited Aug. 18, 2013); and VAUGHN ET AL., *supra* note 2 at 6.

⁶ See *infra* Parts II and III (discussing the challenges of security forces in South America, Asia and Africa).

⁷ See *infra* Part IV (describing deficiencies of Bangladesh security forces).

In Bangladesh, for example, a caretaker government was instituted in 2006 to stabilize the government, deal with corruption, run the general election, and provide internal security.⁸ In response to political instability and increasing criminality, the government granted a paramilitary security force, the Rapid Action Battalion (RAB) (barely three years old), extensive powers to curtail criminal and terrorist activities.⁹ This unit provided much-needed law enforcement and security as the nation stabilized, but, due to poor training and tactics, received numerous complaints of excessive use of force, misconduct, and human rights violations.¹⁰

Current U.S. law, known as the Leahy Amendment, prohibits U.S. forces from training a nation's security forces that have a history of human rights violations and have failed to take appropriate corrective actions to address these violations.¹¹ Problematically, these nations frequently experience significant internal and transnational threats, while attempting to implement democratic and legal reforms to improve their limited abilities to adequately address past violations. As a result, these nations cannot overcome the requirements of the Leahy Amendment, which has impeded the ability of U.S. forces to conduct military and security force training for host nation security forces, such as the RAB, without undergoing significant Rule of Law efforts.

⁸ RAPID ACTION BATTALION, http://www.rab.gov.bd/about_us.php?page=2 [hereinafter RAPID ACTION BATTALION] (last visited Aug. 23, 2013); *see also* Abu Sufian, *RAB Comes into Being in a Month*, NEWS FROM BANGLADESH, Feb. 19, 2004, available at <http://www.bangladesh-web.com/> (last visited Aug. 18, 2013). JOYEETA BHATTACHARJEE, *A YEAR OF CARETAKER GOVERNMENT IN BANGLADESH* (2008). The Bangladesh Constitution institutes a caretaker government, designed to maintain basic public services and law enforcement, during a time of transition to a democratic government, or when the Parliament is dissolved. *Id.*

⁹ HUM. RTS. SCHOOL, LESSON 1: BANGLADESH'S STATE OF EMERGENCY AND RELATED LEGISLATION (Feb. 2008), available at <http://www.hrschool.org/doc/mainfile.php/lesson52/193/> (last visited Aug. 18, 2013); *see also* Sufian, *supra* note 8.

¹⁰ *See generally* HUM. RTS. WATCH, JUDGE, JURY AND EXECUTIONER: TORTURE AND EXTRAJUDICIAL KILLINGS BY BANGLADESH'S ELITE SECURITY FORCE (Dec. 2006) [hereinafter JUDGE]; Shamim Ashraf, *Extra-judicial Killings Call for Unbiased Probe*, DAILY STAR, May 21, 2005, <http://www.thedailystar.net/2005/05/21/d5052101033.htm> (last visited Feb. 1, 2011).

¹¹ The Department of Defense and Full-Year Continuing Appropriations Act of 2011, § 524, states "None of the funds made available by this Act may be used to support any training program involving a unit of the security forces of a foreign country if the Secretary of Defense has credible evidence from the Secretary of State that a member of such unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken." Pub. L. No. 112-10, § 8058(c), 125 Stat. 38 (2011).

This article focuses on the current state of the law, offering model approaches for meeting the requirements of the Leahy Amendment, and recommending solutions to address human rights violations while allowing U.S. forces to train security forces to counter emerging threats. Part II provides a historical background for the enactment of the Leahy Amendment, its legislative history, current application, and its impact on current training opportunities. Part III analyzes the Rule of Law, its current use, previous Rule of Law efforts, and its applicability to Leahy-prohibited security forces. Part IV describes a novel, inter-agency engagement with the Bangladesh RAB that endeavored to help the unit develop a transparent system to investigate, report, and prosecute human rights violators. Part V provides a recommended Rule of Law methodology that could be applied to Security Force Assistance (SFA)¹² to enable host nations to address human rights violations while receiving training. Finally, Part VI discusses the need to strike the correct balance of national interests while ensuring an appropriate response to the continuing threat of international terrorism.

II. The Leahy Amendment

In 1997, Senator Patrick Leahy, a Democrat from Vermont, introduced legislation to limit funding for training nations with a history of human rights violations.¹³ Senator Leahy and other members of Congress were concerned that recipients of American funding and military training were using these resources in support of repressive regimes in South America.¹⁴ While admirable in its intent, the Leahy Amendment, as it became known, has limited the ability of U.S. forces to train security forces in developing nations in support of our national security interests.¹⁵

¹² See *infra* note 53. Security Force Assistance is a DOD program that allows DOD elements to train other nations' Security Forces in areas regarding Foreign Internal Defense, policing, law enforcement and other security-related matters to improve stability.

¹³ § 8058(c), 125 Stat. 38.

¹⁴ See *infra* Part II.A.

¹⁵ NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1–2 (2010) (detailing current threats).

A. The School of the Americas and the Development of the Leahy Amendment

In order to develop Partner Nation capability,¹⁶ the U.S. Army founded the School of the Americas (SOA) in 1946.¹⁷ The purpose of the SOA was to train select military officers and senior non-commissioned officers of South and Central American military and security forces.¹⁸ The Spanish-taught training included mission planning, infantry tactics, foreign internal defense, and international human rights standards.¹⁹ Through 2000, the SOA had trained over 60,000 students.²⁰

Following a reported massacre in El Salvador, human rights groups and members of Congress became concerned with U.S. training of foreign military forces.²¹ The “Massacre at El Mozote” involved

¹⁶ See U.S. DEP’T OF DEF., QDR EXECUTION ROADMAP: BUILDING PARTNERSHIP CAPABILITY 4 (May 22, 2006).

Partnership capacity includes, but is not limited to, the capability to: defeat terrorist networks, defend the US homeland in depth, shape the choices of countries at strategic crossroads, prevent hostile states and non-state actors from acquiring or using WMD, conduct irregular warfare (IW) and stabilization, security, transition and reconstruction (SSTR) operations, conduct “military diplomacy,” enable host countries to provide good governance, and enable the success of integrated foreign assistance.

See also Fred Kaplan, *Secretary Gates Declares War on the Army Brass, Unfortunately He Doesn’t Have Time to Fight the Battle*, SLATE MAG. 2 (Oct. 12, 2007). Secretary Gates asserts “the most important military component in the War on Terror is not the fighting we do ourselves, but how well we enable and empower our partners to defend and govern their own countries.”

¹⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/NSAID-96-178, SCHOOL OF THE AMERICAS 5-8 (Aug. 1996) [hereinafter SCHOOL OF THE AMERICAS] (providing history of the SOA). The School of the Americas was originally located in Panama. *Id.* In 1984, the school relocated to Fort Benning, Georgia. *Id.* In 2001, the School of the Americas changed its name to the Western Hemisphere Institute for Security Cooperation. *Id.* See also LESLEY GILL, THE SCHOOL OF THE AMERICAS: MILITARY TRAINING AND POLITICAL VIOLENCE IN THE AMERICAS 62-89 (2004) (detailing origins and history of SOA).

¹⁸ SCHOOL OF THE AMERICAS, *supra* note 17, at 10 (stating purpose of the SOA).

¹⁹ *Id.* at 10-12 (detailing the course curriculum).

²⁰ *Id.*

²¹ See JAMES HODGE & LINDA COOPER, DISTURBING THE PEACE: THE STORY OF FATHER ROY BOURGEOIS AND THE MOVEMENT TO CLOSE THE SCHOOL OF THE AMERICAS 1-4 & 148-67 (2004) (describing the events that led to the creation of SOA Watch).

members of the Salvadoran military who had received training at SOA.²² The massacre occurred when Salvadoran military opened fire in the village of El Mozote and killed hundreds of people, including women, children, and the elderly.²³ Reporters discovered that the Salvadoran military, along with other Central American militaries involved in atrocities, had received training from the U.S. military.²⁴

In 1982, Father Roy Bourgeois, a Colombian priest, formed SOA Watch.²⁵ The purpose of this organization is to bring attention to allegations of human rights abuses by SOA graduates.²⁶ SOA Watch members began collecting information on human rights abuses throughout Central America.²⁷ In particular, SOA Watch collected significant evidence of long-term, systematic human rights atrocities by the Colombian military throughout the 1980s and 1990s.²⁸ Subsequently, Non-Governmental Organizations (NGOs) and Human Rights Organizations (HROs) advocated for investigations into Colombia's human rights record.²⁹ They also began to lobby for congressional action

²² See MARK DANNER, *THE MASSACRE AT EL MOZOTE* 3–10 (1993); see also JACK NELSON–PALLMEYER, *SCHOOL OF ASSASSINS: GUNS, GREED, AND GLOBALIZATION* 1–13 & 21–32 (2003).

²³ HODGE & COOPER, *supra* note 21, at 91 (stating that Father Bourgeois frequently talked about “the massacre at El Mozote where U.S.-trained Salvadoran troops shot, hanged, and decapitated more than nine hundred peasants”).

²⁴ *Id.*

²⁵ *Id.*

²⁶ SCHOOL OF THE AMERICAS WATCH, <http://www.soaw.org> (last visited Aug. 18, 2013) (providing history of SOA Watch and reports related to atrocities).

²⁷ *Id.*

²⁸ *Id.*

²⁹ See LINDA CORAL ET AL., *REDUCING THE INCIDENCE OF MASSACRES IN COLOMBIA* 10–11 (2004) (quoting Interview with Paul Paz y Mino, Colombia Specialist, Amnesty Int'l (Feb. 18, 2004)) [hereinafter Paz Interview], available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/24/AR2008012402532.html> (last visited Sept. 3, 2013). The author also details an incident involving Colombian security forces.

In the cool hours before sunrise on January 17, 50 members of the United Self-Defense Forces of Colombia marched into this village of avocado farmers. Only the barking of dogs, unaccustomed to the blackness brought by a rare power outage, disturbed the mountain silence. For an hour, under the direction of a woman known as Comandante Beatriz, the paramilitary troops pulled men from their homes, starting with 37-year-old Jaime Merino and his three field workers. They assembled them into two groups above the main square and across from the rudimentary health center. Then, one by one, they killed the men by crushing their heads with heavy stones and a sledgehammer. When it was over, 24 men lay dead in pools of

to limit funding to the Salvadoran and Colombian militaries.³⁰ Senator Leahy answered the call of advocates by proposing legislation to tie human rights compliance to the receipt of military aid.³¹

Originally introduced in 1997 as an amendment to the Foreign Operations Appropriations Act of 1997, the Leahy Amendment sought to limit U.S. government foreign assistance to countries that did not comply with international human rights standards.³² As stated on Senator Leahy's website:

[T]he Leahy Law makes it clear that when credible evidence of human rights violations exists, U.S. aid must stop. But, it provides the necessary flexibility to allow the U.S. to advance its foreign policy objectives in these countries. The law gives the Secretary of State the authority to determine when the law applies. In addition, it gives foreign governments an incentive to correct the problem: U.S. aid can resume if they bring to justice people who commit such crimes.³³

The Amendment restricted foreign aid, including training and support, on the basis of a nation's human rights record.³⁴ Nations with a history of human rights violations, or with unresolved human rights allegations, are prohibited from receiving foreign aid.³⁵ Under the amendment, the Department of State (DoS) has primary responsibility for ensuring that the Leahy Amendment restrictions are properly applied.³⁶

blood. Two more were found later in shallow graves. As the troops left, they set fire to the village. (Chengue Massacre, 2001)

See also HODGE & COOPER, *supra* note 21, at 91; HUM. RTS. WATCH, COLOMBIA'S KILLER NETWORKS: THE MILITARY-PARAMILITARY PARTNERSHIP AND THE UNITED STATES 45 (1996), and HUM. RTS. WATCH, THE "SIXTH DIVISION": MILITARY-PARAMILITARY TIES AND U.S. POLICY IN COLOMBIA 10, 61 (2001).

³⁰ See CORAL ET AL., *supra* note 29, at 10-11 (quoting Paz Interview, *supra* note 29).

³¹ Senator Patrick Leahy, http://leahy.senate.gov/issues_and_legislation/issues/issue/ (last visited Sept. 9, 2013).

³² Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006).

³³ Senator Patrick Leahy, *supra* note 31.

³⁴ Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d.

³⁵ *Id.*

³⁶ *Id.*

B. Application of the Leahy Amendment

The Leahy Amendment requires that the Secretary of State (SECSTATE) certify that the foreign units to be trained do not have a history of human rights violations.³⁷ Upon request, the appropriate embassy will vet the units for any reports or allegations of human rights violations.³⁸ While the Leahy Amendment, and subsequent guidance from the DoS, have failed to provide an exact definition of “unit,” in practice, the smallest military unit or individual to be trained is submitted for vetting.³⁹

The vetting process involves a background check, records search, and certification of individuals or units before approving of any training plan or funding.⁴⁰ The requesting agent submits a list of the individuals to be trained, which is checked through local and DoS databases for any allegations.⁴¹ If the individual or unit is cleared, then training may commence. If not, training is prohibited. The requesting agent will notify the host nation with possible remedies, such as selecting a new unit, restricting training to individuals cleared in the vetting process, or withdrawing the request.⁴²

For those nations with human rights violations, they must demonstrate that “all necessary corrective steps” have been taken to address outstanding allegations.⁴³ Unfortunately, the definition of this statutory term remains unclear. The DoS has simply avoided seeking or promulgating a clear definition of this term.⁴⁴ For the most part, DoS officials have denied training and assistance if there is credible evidence

³⁷ *Id.*

³⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSAID-05-739, SOUTHEAST ASIA: BETTER HUMAN RIGHTS REVIEWS AND STRATEGIC PLANNING NEEDED FOR U.S. ASSISTANCE TO FOREIGN SECURITY FORCES 20 (July, 2005) [hereinafter SOUTHEAST ASIA] (describing the vetting process).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ U.S. GOV'T SEC'Y OF STATE, REVISED GUIDANCE REGARDING LEAHY AMENDMENTS AND U.S. FOREIGN ASSISTANCE (July 14, 2006).

⁴⁴ See AMNESTY INT'L, MILITARY ASSISTANCE AND HUMAN RIGHTS: COLOMBIA, U.S. ACCOUNTABILITY, AND GLOBAL IMPLICATIONS (Fellowship of Reconciliation, U.S. Office of Colombia) 7 (July 2010) [hereinafter MILITARY ASSISTANCE AND HUMAN RIGHTS: COLUMBIA] (arguing for a clearer definition of all necessary corrective steps, and a stronger Leahy Amendment to further restrict U.S. foreign assistance).

of violations without regard to any measures taken by the host nation.⁴⁵ On the other hand, the Department of Defense (DoD) has continued to provide training by tailoring training events only to individuals and units that have passed the vetting process.⁴⁶

C. Waivers of the Leahy Amendment

Included in the Leahy Amendment is a provision that allows for waiver of the training prohibition against a nation.⁴⁷ It states that “the Secretary of Defense (SECDEF), after consultation with the Secretary of State, may waive the prohibition in subsection (a) if he determines that such a waiver is required by extraordinary circumstances.”⁴⁸ After granting a waiver, the SECDEF must report to Congress within fifteen days, specifying the extraordinary circumstances, the details of the approved training, the military units involved, and the information regarding human rights violations that necessitated the waiver.⁴⁹

It is difficult to provide a detailed definition of when a situation constitutes “extraordinary circumstances.” The Leahy Amendment only requires a determination of the need for a waiver and the notification of Congress, without providing further information regarding the basis.⁵⁰

⁴⁵ SOUTHEAST ASIA, *supra* note 38, at 20.

⁴⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/NSAID-99-173, MILITARY TRAINING: MANAGEMENT AND OVERSIGHT OF JOINT COMBINED EXCHANGE TRAINING 11 (Aug. 1999) [hereinafter MILITARY TRAINING] (finding that training to vetted units and individuals has continued under the DOS-approved vetting process).

⁴⁷ See Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d (2006).

⁴⁸ See *id.*; MILITARY TRAINING, *supra* note 46, at 11 (providing overview of waiver process). See also Limitations on Assistance to Security Forces (The “Leahy Law”), available at <http://ciponline.org/facts/leahy.htm> (last visited Feb. 11, 2011) (detailing concerns with application of Leahy Amendment).

⁴⁹ See Limitation on Assistance to Security Forces, 22 U.S.C. § 2378d. (This Act requires that DOD provide the names and personnel of all military units, both U.S. and foreign, involved in the training.). *Id.*

⁵⁰ See National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance to Honduras, 64 Fed. Reg. 60 (Mar. 30, 1999); National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance to Ethiopia, 69 Fed. Reg. 199 (Oct. 15, 2004); National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance to Egypt, 73 Fed. Reg. 55 (Mar. 20, 2008); and National Interest Determination and Waiver of § 620(q) of the Foreign Assistance Act of 1961, as amended, Relating to Assistance for the Independent States of the Former Soviet Union, 73 Fed. Reg. 72 (Apr. 14, 2008). The actual notice states:

Administrations have thus granted limited waivers based on “extraordinary circumstances,” presumably based on the recommendations of the country team involved, emerging threat projections, intelligence, and the national security interests.⁵¹ This uncertainty makes it difficult to ascertain what constitutes “extraordinary circumstances” because it is dependent on the national security view of a particular administration. This has, in turn, led to inconsistency between administrations and resulted in a limited approach to planning and conducting security force training.⁵²

The current U.S. approach to granting waivers is insufficient. It requires forecasting threats well in advance of training to allow for adequate planning and training time with host nation forces. This type of combined training requires the building of relationships and trust at every level between U.S. and host nation forces.⁵³ In addition, training must be incremental, continuous, and long-term.⁵⁴ For example, training for an immediate threat, such as training with security forces immediately prior to a Mumbai-style attack,⁵⁵ would be inadequate; while long-term

Pursuant to the authority vested in me by section 620(q) of the Foreign Assistance Act of 1961, as amended (FAA), and by Executive Order 12,163, as amended, I hereby determine that assistance to COUNTRY is in the national interest of the United States and thereby waive, with respect to that country, the application of section 620(q) of the FAA. This determination shall be reported to Congress and published in the Federal Register.

No further information is provided. *Id.*

⁵¹ *Id.*

⁵² See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-860, COMBATING TERRORISM: ACTIONS NEEDED TO ENHANCE IMPLEMENTATION OF TRANS-SAHARA COUNTERTERRORISM PARTNERSHIP 20-28 (July 2008); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-962T, NATIONAL SECURITY: INTERAGENCY COLLABORATION PRACTICES AND CHALLENGES AT DOD'S SOUTHERN AND AFRICA COMMAND 10-21 (July 10, 2010) (finding interagency difficulties in planning). See also CONG. RESEARCH SERV., RL 34639, THE DEPARTMENT OF DEFENSE ROLE IN FOREIGN ASSISTANCE: BACKGROUND, MAJOR ISSUES, AND OPTIONS FOR CONGRESS 16-18 (Aug. 25, 2008) [hereinafter DOD ROLE].

⁵³ HEADQUARTERS, UNITED STATES ARMY, SECURITY FORCE ASSISTANCE, at v and 1-1 to 1-6 (May, 2009) [hereinafter SECURITY FORCE ASSISTANCE]. See also COMMANDER'S HANDBOOK FOR SECURITY FORCE ASSISTANCE, JOINT CENTER FOR INTERNATIONAL SECURITY FORCE ASSISTANCE 2-1 to 2-3 (July 14, 2008) [hereinafter COMMANDER'S HANDBOOK].

⁵⁴ SECURITY FORCE ASSISTANCE, *supra* note 53, at 2-1 to 2-3.

⁵⁵ K. ALAN KRONSTADT, CONG. RESEARCH SERV., RL40087, TERRORIST ATTACKS IN MUMBAI, INDIA, AND IMPLICATIONS FOR U.S. INTERESTS 1-6 (Dec. 19, 2008) (detailing Mumbai attacks). The nature of the attacks in India reflect long-term planning by the

perpetrators that may have been discovered with developed intelligence capabilities. The report summarizes the attack and response.

At approximately 9:30 p.m. local time on the evening of November 26, 2008, a number of well trained militants came ashore from the Arabian Sea on small boats and attacked numerous high profile targets in Mumbai, India, with automatic weapons and explosives. By the time the episode ended some 62 hours later, about 174 people, including nine terrorists, had been killed and hundreds more injured. Among the multiple sites attacked in the peninsular city known as India's business and entertainment capital were two luxury hotels—the Taj Mahal Palace and the Oberoi– Trident—along with the main railway terminal, a Jewish cultural center, a café frequented by foreigners, a cinema house, and two hospitals.¹ Six American citizens were among the 26 foreigners reported dead. Indian officials have concluded that the attackers numbered only ten, one of whom was captured. Some reports indicate that several other gunmen escaped.

According to reports, the militants arrived in Mumbai from sea on dinghies launched from a larger ship offshore, then fanned out in southern Mumbai in groups of two or three. Each was carrying an assault rifle with 10–12 extra magazines of ammunition, a pistol, several hand grenades, and about 18 pounds of military-grade explosives. They also employed sophisticated technology including global positioning system handsets, satellite phones, Voice over Internet Protocol (VoIP) phone service, and high-resolution satellite photos of the targets. The attackers were said to have demonstrated a keen familiarity with the Taj hotel's layout in particular, suggesting that careful advanced planning had been undertaken.

Home Minister Shivraj Patil (who resigned in the wake of the attacks) reportedly ordered India's elite National Security Guard commandos deployed 90 minutes after the attacks began, but the mobilized units did not arrive on the scene until the next morning, some ten hours after the initial shooting. The delay likely handed a tactical advantage to the militants. . . . [T]he militants made no demands and had killed most of their hostages before being engaged by commandos on the morning of November 27. Two full days passed between the time of that engagement and the episode's conclusion when the two hotels were declared cleared of the several remaining gunmen. Along with domestic political recriminations, the Mumbai attack has fueled already existing concerns about India's counterterrorism policies and capabilities.

Id. at 14.

Subsequent parliamentary investigations found serious weaknesses in the ability of Indian security forces to protect against such infiltration. Others worry that expanding anti-terrorism commando

training, such as with the Philippine National Police and the Armed Forces of the Philippines, is proving successful in combating threats from transnational terrorists, like the Abu Sayyaf Group.⁵⁶

forces will not resolve more fundamental problems within such forces, including what may be inadequate training and equipment.

Id.

Washington and New Delhi have since 2004 been pursuing a “strategic partnership” based on shared values such as democracy, pluralism, and rule of law. One facet of the emerging [United States and India] partnership is greatly increased counterterrorism cooperation. The U.S. State Department’s Country Reports on Terrorism 2007 identified India as being “among the world’s most terror afflicted countries” and counted more than 2,300 Indian deaths due to terrorism in 2007 alone. . . . Despite lingering problems, the scale of the threat posed by Islamist militants spurs observers to encourage more robust bilateral intelligence sharing and other official exchanges, including on maritime and cyber security, among many more potential issue–areas.

Id. at 17.

⁵⁶ Sumit Ganguly, *Lessons from Mumbai: Preventing Another Terrorist Attack*, NEWSWEEK, Oct. 29, 2009, available at <http://www.thedailybeast.com/newsweek/2009/10/28/lessons-from-mumbai.html>.

[I]nstitutional changes do not do enough to address the terrorist threats India faces nationwide. Local police forces remain woefully underequipped in terms of forensic and investigative capabilities, electronic surveillance, and even adequate firepower. During the initial phase of the Mumbai crisis, police constables arrived on the scene armed with bolt–action, single–shot, World War II–vintage rifles. Tackling the menace of terror will require India’s policymakers to fill these critical gaps on a war footing. The lethargic approach that the country has long taken to addressing critical issues of domestic security simply invites the possibility of yet another disaster.

Id. This type of attack requires long-term training to identify and respond to threats. *See also America’s Forgotten Frontline: The Philippines*, NBC NEWS (Oct. 1, 2010), available at <http://www.msnbc.msn.com/id/39444744/> (last visited Aug. 18, 2013) (detailing joint U.S.–Philippines counterterrorism training). In addition to training, U.S. forces are deployed to the Philippines under *Operation Enduring Freedom–Philippines (OEF–P)* to “advise and assist” the Armed Forces of the Philippines (AFP) and the Philippine National Police (PNP) in conducting ongoing counterterrorism missions. *Id.*

D. Impact on Military-to-Military Counter-Terrorism and Counter-Narcotics Training

The Leahy Amendment's restrictions have had a significant impact on military-to-military training. The DoD has continuously sought to train the security forces of nations that have been determined to be in the best interest of the national security of the United States.⁵⁷ The DoD routinely conducts SFA with host nation forces to enhance security force capabilities of designated nations.⁵⁸ Security Force Assistance consists of building partner capacity, supporting efforts to build partner legitimacy, and transitioning after conflict.⁵⁹ The term SFA is further defined as "the unified action to generate, employ, and sustain local host nation, or regional security forces in support of legitimate authority."⁶⁰ Under U.S. policy, security forces include military, police, border police, coast guard, paramilitary forces and other forces "that provide security

⁵⁷ DOD ROLE, *supra* note 52, at 11. *See also* Abraham M. Denmark with Rizal Sukma & Christine Parthemore, *Crafting a Strategic Vision: A New Era of U.S.-Indonesia Relations*, CTR. FOR NEW AM. SECURITY (June 2010), available at <http://www.cnas.org/files/documents/publications/> (last visited Aug. 18, 2013) (stating that "[A] robust military-to-military relationship is . . . in the interests of both sides [U.S. and Indonesia]. For Jakarta, normal military relations . . . bring access to advanced military technologies as well as world-class professional military education and training. For the United States, improving Indonesia's military capabilities would allow it to play a more substantial role in its efforts to combat terrorism. . .").

⁵⁸ *See generally* U.S. DEP'T OF DEF. AND DEP'T OF STATE, FOREIGN MILITARY TRAINING, FISCAL YEARS 2008 AND 2009, JOINT REPORT TO CONGRESS, VOL. 1 (2010) [hereinafter FOREIGN MILITARY TRAINING] (reporting detailed information on all U.S. Government training provided to foreign militaries).

⁵⁹ SECURITY FORCE ASSISTANCE, *supra* note 53, at v (defining elements of SFA). *See also* SHANNON D. BEEBE & MARY KALDOR, THE ULTIMATE WEAPON IS NO WEAPON: HUMAN SECURITY AND THE NEW RULES OF WAR AND PEACE 8-9 (2010) (arguing that security force assistance and reform is an essential part of human security). The authors define human security, which is significantly broader than physical security, as economic security, health security, environmental security, food security, personal security, community security, and political security. *Id.* at 8. The authors identify six principles of human security that should be part of security efforts. These principles are: the primacy of human rights, legitimate political authority, a bottom-up approach, effective multilateralism, regional focus, and clear civilian command. *Id.* at 9.

⁶⁰ SECURITY FORCE ASSISTANCE, *supra* note 53, at v (detailing purpose of SFA). The field manual states "the United States supports the internal defense and development of international partners, regardless of whether those partners are highly developed and stable or less developed and emerging." *Id.* *See also* Harsch, *infra* note 146 (quoting U.N. Secretary-General Ban Ki-moon as stating "Security forces that are untrained, ill equipped, mismanaged and irregularly paid are often part of the problem, and perpetrate serious violations of human rights.").

for a host nation and its relevant population.”⁶¹ Several other programs will often complement SFA, including security cooperation, foreign military sales, foreign military financing program, foreign internal defense, and international military education and training.⁶² All of these programs are subject to the restrictions of the Leahy Amendment.⁶³

Several nations, including Bangladesh and Indonesia, are combating Islamic militants and other transnational threats, but their primary counter-terrorism forces are Leahy-prohibited and therefore prohibited from receiving SFA.⁶⁴ Based on previous human rights allegations, sometimes decades-old, numerous countries have been prohibited from receiving valuable counter-narcotics and counter-terrorism training.⁶⁵ For example, in Indonesia, the Komando Pasukan Khusus (KOPASSUS), Indonesia’s elite security force, is restricted from receiving training.⁶⁶ Numerous members of the KOPASSUS were involved in human rights violations during operations in East Timor.⁶⁷ Currently, the Obama Administration is advancing requests for support to Indonesian security forces on the basis of a waiver due to the growing militant threat within Indonesia.⁶⁸

⁶¹ SECURITY FORCE ASSISTANCE, *supra* note 53, at v. *But see* BEEBE & KALDOR, *supra* note 59, at 181 (“The West should support a shift in training and manning philosophies away from creating defense forces aimed at armed threats to a . . . model oriented around combating the conditions of instability and hindrances to development.”).

⁶² *Id.* at 1–2 to 1–4.

⁶³ SECURITY FORCE ASSISTANCE, *supra* note 53, at B–3 to B–6.

⁶⁴ COUNTRY REPORTS, *supra* note 4, at 208–12 (providing annual congressional report on terrorism). *See also* Denmark, *supra* note 57, and VAUGHN ET AL., *supra* note 2, at 45.

⁶⁵ *See* ANGEL RABASA & JOHN HASEMAN, THE MILITARY AND DEMOCRACY IN INDONESIA: CHALLENGES, POLITICS AND POWER 139–141 (Dec. 2, 2002). *See generally* MARCUS MIETZNER, THE POLITICS OF MILITARY REFORM IN POST-SUHARTO INDONESIA: ELITE CONFLICT, NATIONALISM, AND INSTITUTIONAL RESISTANCE 45 (July 3, 2006); COUNTRY REPORTS, *supra* note 4, at 208–12; and Denmark, *supra* note 57.

⁶⁶ Denmark, *supra* note 57, at 14–15.

⁶⁷ *Id.* (stating that Indonesian special forces unit Komando Pasukan Khusus (KOPASSUS) was “a key force in the 1975 invasion of East Timor and participated in the surge of violence in 1999 as East Timor voted for independence”).

⁶⁸ *See, e.g.,* U.S. Resumes Military Relations with Indonesian Special Forces, WALL ST. J. (July 22, 2010) (stating that “U.S. officials said they are restoring relations with Indonesia’s military special forces after a decade-long freeze over alleged human-rights abuses, brushing aside a dispute that has poisoned relations between the two countries for years.”); U.S.–Indonesia Military Relations Uncertain Ahead of Obama Visit, REUTERS (Mar. 16, 2010) (The Obama administration “has been preparing the way to resume training an elite Indonesian military unit as part of growing counter-insurgency and intelligence cooperation with Jakarta.”); Denmark, *supra* note 57, at 17 (stating that the Obama administration “offered . . . support for [the] comprehensive partnership [between

Granting waivers is an important tool to provide flexibility to the President and the Secretaries of Defense and State to address critical national security needs.⁶⁹ However, the United States stands committed to addressing human rights violations with our training partners. As such, the U.S. Government rarely grants waivers, but focuses on providing non-lethal training and assistance to host nations to address outstanding allegations.⁷⁰ This assistance can involve human rights exchanges, advice, and support to host nation governments while they continue to address their human rights records.⁷¹

According to Senator Leahy, a nation must demonstrate that all “necessary steps” have been taken and that “offenders are brought to justice.”⁷² However, in many developing nations, this process can prove problematic. Frequently, the Rule of Law is a relatively new concept and there is a complete absence of true justice in any form in the host nation.⁷³ These societies may be complicit with the government’s use of power in the interest of security. Their justice systems may be corrupt, compromised, inadequate, or ineffective. They may lack the capability to investigate and prosecute incidents. Without the Rule of Law, as evidenced by an absence of a valid justice system, it would be difficult for a nation to satisfy the requirements of the Leahy Amendment.

III. The Modern Rule of Law Approach

The Rule of Law has been an effective means of ensuring democratic reforms, improving access to the judicial system, and protecting basic

the U.S. and Indonesia] based on environmental, economic, social and security issues”). *But see* Victoria Garcia & Rachel Stohl, *U.S. Foreign Military Training: A Shift in Focus* (Terrorism Project), CTR. FOR DEF. INFO. 10 (Apr. 8, 2002) (arguing that terrorism has existed prior to 9/11 and that military training can cause long-term strategic problems).

⁶⁹ See generally *supra* note 50 and accompanying text. For the previous decade, there have only been five waivers, for the Congo, Egypt, Ethiopia, former Soviet Union, and Honduras. In addition, there was also a waiver of country conditions placed on aid to Colombia. *Id.*

⁷⁰ See generally DOD ROLE, *supra* note 52 (detailing all types of DOD assistance, including humanitarian and disaster relief and assistance); FOREIGN MILITARY TRAINING, *supra* note 57.

⁷¹ *Id.*

⁷² Senator Patrick Leahy, *supra* note 31.

⁷³ WEIGHING, *infra* note 79.

human rights.⁷⁴ The Rule of Law concept focuses on ensuring that societies have fair, impartial, respected, and transparent systems for creating, implementing, and enforcing laws that have been duly enacted by a recognized authority.⁷⁵ Ultimately, the Rule of Law provides the basic foundation for democratic and economic reform.⁷⁶

The U.S. and coalition partners have made Rule of Law the primary focus of effort in Afghanistan and Iraq.⁷⁷ Significant effort has been made on the transition to democratic governance, including judicial reform, legislative assistance, training, and security sector reform.⁷⁸ Despite its “new” importance, Rule of Law efforts have existed outside of traditional post-conflict operations.⁷⁹ While much-needed in Iraq and Afghanistan, other nations have benefitted, or could benefit, from Rule of Law efforts.⁸⁰

⁷⁴ The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 5, U.N. Doc. S/2004/616, at 4 (Aug. 23, 2004).

⁷⁵ *Id.*

⁷⁶ *Id.* See also CONG. RESEARCH SERV., R 41484, AFGHANISTAN: U.S. RULE OF LAW AND JUSTICE SECTOR ASSISTANCE 3 (Nov. 9, 2010) [hereinafter AFGHANISTAN]

ROL is often understood to be a foundational element for the establishment and maintenance of democracy and economic growth, and the vehicle through which fundamental political, social, and economic rights are protected and enforced. The concept assumes the existence of effective and legitimate institutions, primarily a country’s national government, to administer the law as well as to guarantee personal security and public order.

Id.

⁷⁷ *Id.* at 4–5; U.S. DEPT’ OF STATE OFFICE OF THE INSPECTOR GENERAL, REPORT OF INSPECTION: RULE OF LAW PROGRAMS IN AFGHANISTAN, REPORT NUMBER ISP–I–08–09, at 1–2 (Jan. 2008); MEASURING STABILITY AND SECURITY IN IRAQ, REPORT TO CONGRESS 7–9 (Nov. 2006) [MEASURING STABILITY] (detailing progress and limitations in security and stability operations in Iraq); ESTABLISHING JUSTICE AND THE RULE OF LAW IN IRAQ: A BLUEPRINT FOR ACTION, U.S. INSTITUTE OF PEACE 1, 7–10 (May 21, 2003).

⁷⁸ U.S. DEP’T OF ARMY, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES 18 (2010) [hereinafter RULE OF LAW HANDBOOK].

⁷⁹ UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID) WEIGHING IN ON THE SCALES OF JUSTICE (Feb. 1994) [hereinafter WEIGHING] (detailing early Rule of Law efforts).

⁸⁰ *Id.* (detailing early Rule of Law efforts). See generally OFFICE OF DEMOCRACY AND GOVERNANCE, BUREAU FOR DEMOCRACY, CONFLICT, AND HUMANITARIAN ASSISTANCE, U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), ACHIEVEMENTS IN BUILDING AND MAINTAINING THE RULE OF LAW: MSI’S STUDIES IN LAC, E&E, AFR, AND ANE 47–50 (Nov. 2002) [hereinafter ACHIEVEMENTS]; see generally VAUGHN ET AL., *supra* note 3

A. The Rule of Law Defined

There are varying definitions of the Rule of Law. Nations, international agencies and organizations have adopted their own definitions.⁸¹ The concept of the Rule of Law continues to evolve. The most common view is that Rule of Law includes the following: properly enacted laws, fairness of legal process, transparency and stability of law, legal equality and access, predictability, and supremacy of law for the state and individuals in the disposition of legal disputes.⁸²

The United Nations (UN) defines Rule of Law as follows:

The Rule of Law . . . 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.⁸³

This definition is aspirational. It does not provide a means for ensuring Rule of Law compliance, or measures for its successful application. This definition also fails to provide any guidance on the types of laws to be enacted or the means for its promulgation. The United States has added a “means and measures” element to its Rule of Law definition in order to address some of these concerns.⁸⁴

In addition to the UN definition, the United States includes the following:

It [Rule of Law] also requires measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in applying the law, separation of powers, participation in decision making, and legal certainty. Such measures also

(detailing the spread of terrorist organizations, such as Jemaah Islamiyah, Lashkar-e-Taiba and Al Qaeda in Pakistan, Indonesia, and other Southeast Asian nations).

⁸¹ SAMUEL L. BUFFORD, *Defining the Rule of Law*, JUDGES' J., Fall 2007, at 9.

⁸² *Id.*

⁸³ The Secretary-General, *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 5, U.N. Doc. S/2004/616, at 4 (Aug. 23, 2004).

⁸⁴ RULE OF LAW HANDBOOK, *supra* note 78, at 11.

help to avoid arbitrariness as well as promote procedural and legal transparency.⁸⁵

The U.S. approach focuses on the advancement of human rights principles and justice in compliance with international standards. These principles are difficult to categorize. Some may simply require systemic or procedural changes, while others may require broader societal changes.⁸⁶ In addition, nations may have different definitions of the fundamental elements of a society based on the Rule of Law.⁸⁷ This is why Rule of Law efforts require sustained action to implement changes necessary to the furtherance of democratic ideals.

The Rule of Law is an “incremental endeavor.”⁸⁸ Success in the Rule of Law takes time and cannot be easily quantified.⁸⁹ Success is based on the advancement of the stated principles, not on the achievement of one at the expense of others. Nations will have varying degrees of success in satisfying these principles.⁹⁰ This can make the definition of the fundamental attributes of the Rule of Law, its attainment, and “successful” efforts difficult to articulate and measure.

In response to these issues, the United States uses an effects-based approach to measure progress of the Rule of Law.⁹¹ The effects are helpful for planning Rule of Law efforts, as well as for monitoring progress on societal reforms. The effects correlate to the principles contained in the U.S. Government view of the Rule of Law. The seven effects are:

1. The state monopolizes the use of force in the resolution of disputes
2. Individuals are secure in their persons and property

⁸⁵ U.S. DEP’T OF ARMY, FIELD MANUAL 3–07, STABILITY OPERATIONS 1–9 (6 Oct. 2008) [hereinafter STABILITY OPERATIONS].

⁸⁶ RULE OF LAW HANDBOOK, *supra* note 78, at 93–125 (detailing the systemic and societal structures that may be part of a Rule of Law effort).

⁸⁷ BUFFORD, *supra* note 81, at 10 (stating “it is important to recognize that the Rule of Law is not an international or apolitical matrix that can be imposed on a particular culture in a particular country”). *Id.*

⁸⁸ JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 309 (2007).

⁸⁹ STABILITY OPERATIONS, *supra* note 85, at 1–9.

⁹⁰ *Id.*

⁹¹ *Id.*

3. The state is itself bound by law and does not act arbitrarily
4. The law can be readily determined and is stable enough to allow individuals to plan their affairs
5. Individuals have meaningful access to an effective and impartial legal system
6. The state protects basic human rights and fundamental freedoms
7. Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.⁹²

These effects are difficult to define and equally difficult to attain.⁹³ Progress in the Rule of Law will take many shapes. Nations will make progress on these effects at different times and rates.⁹⁴ In addition, some nations will make progress along all of the elements; while others will make progress on some while having little or no progress on others.⁹⁵ The ultimate success of a Rule of Law program depends on forward progress toward the Rule of Law, while taking societal factors into consideration.⁹⁶

B. Rule of Law and Security Sector Reform

The Rule of Law takes many forms. There is no “cookie-cutter” Rule of Law program that can be applied in all cases.⁹⁷ A country’s unique societal attributes and limitations will factor into how the Rule of Law is developed and evolves to meet the changing needs of the populace.⁹⁸ The Rule of Law approach requires an analysis of the nation’s existing judicial and law enforcement elements, as well as the laws being instituted and enforced.⁹⁹ Despite the approach used in a particular

⁹² *Id.*

⁹³ RULE OF LAW HANDBOOK, *supra* note 78, at 11–12.

⁹⁴ *Id.* at 11–12.

⁹⁵ *Id.* at 12.

⁹⁶ See U.S. AGENCY FOR INT’L DEV. (USAID) GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK: A GUIDE FOR USAID DEMOCRACY AND GOVERNANCE OFFICERS 38 (Jan. 2010) [hereinafter COUNTRY ANALYSIS].

⁹⁷ See BUFFORD, *supra* note 81, at 10.

⁹⁸ *Id.*

⁹⁹ COUNTRY ANALYSIS, *supra* note 96, at 38; and WEIGHING, *supra* note 78 (detailing early Rule of Law efforts).

nation, the Rule of Law remains essential to ensuring basic human rights in all societies, whether at peace, conflict or post-conflict.

Similar to SFA, DoS undertakes Security Sector Reform (SSR) to address deficiencies in the Rule of Law in developing nations.¹⁰⁰ Security Sector Reform “is the set of policies, plans, programs, and activities that a government undertakes to improve the way it provides safety, security, and justice.”¹⁰¹ This involves efforts to establish or improve bureaucracies, organizations, and structures that support the maintenance of civil society.¹⁰² Security Sector Reform efforts can include drafting legislative and administrative policies, planning and supporting law enforcement and corrections, developing civilian oversight agencies, and reforming judicial systems.¹⁰³

Security Sector Reform complements DoD efforts in improving security force capabilities. Both programs aim to provide effective and legitimate governmental agencies that are “transparent, accountable to civil authority, and responsive to the needs of the public.”¹⁰⁴ However, DoS efforts are much broader than DoD efforts.¹⁰⁵ Department of State personnel can engage security elements, including military and paramilitary forces involved in the security sector.¹⁰⁶ The DoD is limited to recognized security forces.¹⁰⁷ But, as demonstrated below, a concerted effort—involving DoS *and* DoD is essential to establishing the Rule of Law while developing professional, accountable security forces.

¹⁰⁰ UNITED STATES AGENCY FOR INT’L DEV., UNITED STATES DEPARTMENT OF DEFENSE, AND UNITED STATES DEPARTMENT OF STATE, SECURITY SECTOR REFORM 1–6 to 1–8 (Feb. 2009) [hereinafter SECURITY SECTOR REFORM]; Sarah Meharg & Aleisha Arnusch, *Security Sector Reform: A Case Study to Transition and Capacity Building* (U.S. Army Strategic Stud. Inst.) (Jan. 2010).

¹⁰¹ *Id.* at 1–7.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ SECURITY FORCE ASSISTANCE, *supra* note 53, at 1–1 to 1–10; and SECURITY SECTOR REFORM, *supra* note 100, at 1–6.

¹⁰⁵ Compare SECURITY FORCE ASSISTANCE, *supra* note 53, at B–1 to B–6 & 2–1 to 2–12 (detailing the tasks and authorities of DOD to conduct assistance to military forces), with SECURITY SECTOR REFORM, *supra* note 100, at 1–1 to 1–6 (providing an inclusive list of DOS activities in Rule of Law and Security Sector and judicial reform).

¹⁰⁶ SECURITY FORCE ASSISTANCE, *supra* note 53, at B–1 to B–6 (detailing legal limitations on DOD operations, including fiscal restraints, such as the Leahy Amendment, and policy restraints on the use of DOD personnel for DOS functions).

¹⁰⁷ *Id.*

C. Current Approaches in Afghanistan and Iraq

The Rule of Law has been a critical element in stabilization efforts in Afghanistan and Iraq.¹⁰⁸ Current operations in those countries focus on developing the Rule of Law, establishing governmental structures, (such as the judiciary, the police, security forces, and the military), training, and working toward a stable government that can meet the needs of the populace while ensuring basic human rights.¹⁰⁹ These operations involve joint, interagency, and coalition partners with differing definitions of the Rule of Law and differing views of “successful” achievement of the Rule of Law.¹¹⁰

Despite the size and complexity of the Rule of Law effort, these operations highlight the need to incorporate societal norms, values, and judgment into Rule of Law efforts. The United States has specifically tailored its efforts to implement a Rule of Law that is societally-acceptable and sustainable by the host nation.¹¹¹ The ongoing effort has incorporated existing legal and quasi-legal systems into the effort.¹¹² For example, the tribal-focused Rule of Law effort in Afghanistan is unique to the culture and traditions of the Afghan people.¹¹³ By contrast, in Iraq, there was an established (although corrupt), legal system before to the 2003 invasion.¹¹⁴ The Iraqi people were familiar with the Iraqi legal

¹⁰⁸ AFGHANISTAN, *supra* note 76, at 4–5. *See also* MEASURING STABILITY, *supra* note 77, at 7–9 (detailing progress and limitations in security and stability operations in Iraq).

¹⁰⁹ RULE OF LAW HANDBOOK, *supra* note 78, at 93–125 (detailing elements of society that can be involved in a Rule of Law effort).

¹¹⁰ *Id.* at 25–78.

¹¹¹ *Id.* at 12.

Every society will satisfy the list of factors more or less completely, and what one person thinks satisfies one factor another person may not. Societies can abide by the rule of law to different degrees according to geography (the rule of law may be stronger in some places than others), subject matter (the rule of law may apply more completely with regard to some laws than others), institutions (some may be more efficient or corrupt than others), and subjects (some individuals may have greater access to the rule of law than others).

¹¹² *See* AFGHANISTAN, *supra* note 76, at 7–15. *See also* MEASURING STABILITY, *supra* note 77, at 7–9.

¹¹³ AFGHANISTAN, *supra* note 76, at 60.

¹¹⁴ *See* MEASURING STABILITY, *supra* note 77, at 7 (detailing limitations of Iraqi legal systems).

system and its shortcomings and were generally supportive of Rule of Law efforts designed to improve its fairness and transparency.¹¹⁵

It is important to note that Congress has specifically authorized the security forces of Iraq and Afghanistan to receive funding without Leahy Amendment restrictions.¹¹⁶ With input from the Bush Administration and the DoD, Congress determined that the necessity for trained security forces in these countries warranted an exemption from the requirements of the Leahy Amendment. These forces are considered “new” with new structure, personnel, and governance. With the establishment of new democratically elected governments, prior regime crimes, including previous human rights violations and atrocities, are being investigated and adjudicated. As such, these security forces do not have the “history” of other Leahy-prohibited forces, such as Colombia, Bangladesh, and Indonesia, regarding human rights.¹¹⁷

D. Prior Rule of Law Engagements

The Rule of Law is frequently deficient or absent in some developing nations, yet it is still essential for ensuring adherence to international human rights.¹¹⁸ The Rule of Law is also noticeably deficient in countries that are Leahy-prohibited, such as Indonesia or Bangladesh, or those that otherwise have histories of human rights violations or political repression.¹¹⁹ In Leahy-prohibited nations, there are common deficiencies in the legal systems, including limited investigatory capacity, lack of legal resources and funding, poor oversight, political stagnation, legislative deficiencies, and limited prosecutorial ability.¹²⁰ By making noticeable advancements in these areas through a sustained Rule of Law effort, these nations can make significant progress on the successful investigation and prosecution of human rights violations.

¹¹⁵ *Id.*

¹¹⁶ 2010 National Defense Authorization Act, Pub. L. No. 110–181, § 1501–12, 122 Stat. 368 (Afghanistan Security Forces Fund and Iraq Security Forces Fund).

¹¹⁷ *See generally* Parts III.D.1.–2, III.E., IV.

¹¹⁸ COMMANDER’S HANDBOOK, *supra* note 53, at 20. Many rule of law operations will take place as components of stability operations, helping to establish (or reestablish) the host nation’s capacity to maintain the rule of law.

¹¹⁹ ACHIEVEMENTS, *supra* note 80, at 47–50.

¹²⁰ *Id.* at 47.

Despite its new relevance, there is a long history of U.S. Rule of Law efforts in the past century-and-a-half.¹²¹ In places such as Colombia and El Salvador, Rule of Law efforts have shown positive results in improving basic human rights compliance and improved legal remedies for victims of government abuse.¹²² These efforts provide valuable insights on applying Rule of Law programs to Leahy-prohibited nations in contemporary times and will be explored in the subsections below.

1. Colombia

In the late twentieth century, Colombia struggled with drug and politically -motivated violence, corruption, and government inaction.¹²³ The Colombian government is battling left-wing insurgents and drug cartels. There are large parts of the nation that are practically ungoverned. Colombian security forces were under-trained, ill-equipped, and under constant threats from insurgents and cartels. In addition, individuals and groups have alleged numerous human rights violations, including coercion, kidnappings, and threats and intimidation of the Colombian people.¹²⁴

Recognizing that the Colombian legal system was inadequate to meet the needs of the Colombian people, the United States Agency for International Development (USAID) began Rule of Law efforts in 1986.¹²⁵ The primary focus was on justice reform, increasing judicial access, improving the public defender's office, and building relationships between the respective branches of government.¹²⁶ Initially, the Colombian government, with USAID help, made great strides toward judicial reform and the Rule of Law. However, efforts tended to stall in subsequent years.¹²⁷ With the passage of Plan Colombia, a U.S.-funded initiative to increase security and stability in Colombia, USAID efforts increased with visible improvements at the local and national levels.¹²⁸

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 51.

This has led to the international community recognizing that the Colombian government is working to address human rights concerns.¹²⁹

Under Plan Colombia, and the approved Country-Specific Conditions, DoS/DoD approved an “exceptional circumstances” waiver to allow training.¹³⁰ Since the implementation of Plan Colombia, the Colombian government addressed numerous allegations of human rights violations.¹³¹ The government began to properly investigate and prosecute human rights violations against its own military and police forces.¹³² The Colombian government implemented all necessary corrective measures and those suspected of violations were brought to justice.¹³³ These steps allowed the United States to resume training and funding Colombian security forces, without the need for a waiver.

2. *El Salvador*

In 1983, following a twelve-year civil war, El Salvador held elections and drafted a new constitution.¹³⁴ This constitution focused on ensuring basic human rights and judicial independence.¹³⁵ The following year, the U.S. Government began operations to assist the new El Salvadoran government in establishing the Rule of Law.¹³⁶ For the next decade, U.S. efforts focused on the following improvements: supporting legal reform, modernization, and enhancement of legal institutions; creating investigative capabilities; increasing judicial freedom and independence; improving judicial procedure and structure; demilitarizing the police; and conducting public education and outreach.¹³⁷

¹²⁹ *Id.* But see *supra* note 44, at 7 (arguing that Colombia still has outstanding human rights violations that need to be addressed).

¹³⁰ ACHIEVEMENTS, *supra* note 80, at 51.

¹³¹ *Id.* But see MILITARY ASSISTANCE & HUMAN RIGHTS: COLUMBIA, *supra* note 44, at 7 (finding that Colombia security forces continue to have human rights issues), and AMNESTY INT’L, ASSISTING UNITES THAT COMMIT EXTRAJUDICIAL KILLINGS: A CALL TO INVESTIGATE U.S. MILITARY POLICY TOWARD COLOMBIA 4–8 (Fellowship of Reconciliation, U.S. Office of Colombia) (Apr. 9, 2008).

¹³² ACHIEVEMENTS, *supra* note 80, at 51.

¹³³ *Id.*

¹³⁴ *Id.* at 65.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 65–68.

These efforts increased the credibility of the Salvadoran judicial system and the executive branch.¹³⁸ The government now held officials responsible, both politically and legally, for their actions. The government reformed its investigative procedures, disbanded a military-linked investigative commission, and increased police training and accountability.¹³⁹ The government implemented measures to ensure greater transparency involving investigations into police and military misconduct, which resulted in higher popular support for these entities.¹⁴⁰ The government routinely investigated and prosecuted allegations of misconduct, and U.S. training resumed.¹⁴¹

E. Areas in Need

Throughout the developing world, many nations are struggling to establish or maintain the Rule of Law while confronting histories of authoritative rule.¹⁴² Civil disruption, social disintegration, and lawlessness have destabilized these countries and undermined security and reform efforts.¹⁴³ As a result, nations have often initially empowered their security forces with broad authority to enforce laws and maintain order.¹⁴⁴ In many cases, this has been to the detriment of their citizens'

¹³⁸ *Id.* at 69.

¹³⁹ *Id.* at 51.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Getacchew Teklemariam, *Project Management in Africa: Failed States, Terrorism and Bad Governance, Regional Report—Ethiopia*, PM FORUM 1 (Feb. 2010) (finding that “most of the nations of the continent [Africa] are extremely poor, devastated by unjustifiable wars, ravaged by corruption and lack of good governance, failing to meet basic needs for their citizens, and governed by authoritarian dictators”).

¹⁴³ Zachary Devlin-Foltz, *Africa's Fragile States: Empowering Extremists, Exporting Terrorism, Africa Security Brief*, AFRICA CTR. FOR STRATEGIC STUD. 4 (Aug. 2010) (detailing nations, such as Nigeria and Somalia, with a “security vacuum” that has existed since the “complete collapse” of the Somali state, and arguing that a “multisectoral approach,” including, but not limited to security improvements could stabilize failed or failing states.); Teklemariam, *supra* note 142, at 4 (describing the “enormous” need for reform. The author states “the demand for economic and social infrastructures, which are essential for poverty reduction, economic growth, human capital development . . . and good governance, is enormous). *Id.* at 4; BEEBE & KALDOR, *supra* note 59, at 4 (stating that African security requires: “reform of the security sector, including law-and-order reform, police reform, judicial reform, penal-code and penal-system reform, and the transformation of standing military forces into a value-added instrument for social development”).

¹⁴⁴ Peter S. Moore, *Taming the Wounded Lion: Transforming Security Forces in West Africa*, INT'L DEV. RES. CENTRE 1 (Dec. 2010) (detailing interaction between new civilian

human rights.¹⁴⁵ In Africa, many countries, including Ethiopia, Nigeria, and the Democratic Republic of the Congo, are implementing democratic reforms while transitioning from more repressive regimes.¹⁴⁶ Their security forces have documented histories of human rights violations.¹⁴⁷ Similarly, in Asia, Bangladesh, and Cambodia, governments are emerging from decades of civil strife compounded by numerous allegations of repression and human rights violations.¹⁴⁸

Similar to Columbia and El Salvador in the 1990s, economic and other factors are forcing developing nations to devote limited resources to their security needs and “increasing [its] military capacity as opposed to implementing a progressive social policy.”¹⁴⁹ Paradoxically, they are making the choice between security and human rights, when a Rule of Law effort would demonstrate that they do not have to sacrifice the one to protect the other.¹⁵⁰ In fact, these nations will improve security, obtain much needed international training and support, and deny terrorists the chance to exploit the victimized populace by maintaining the Rule of Law and addressing human rights allegations.

While a Rule of Law assessment and engagement strategy can address a host nation’s shortcomings, implement societal Rule of Law improvements, and recommend courses of action for future efforts, many Leahy-prohibited nations lack the capability to make these changes by

democratic officials and military and security forces). However, the author recognizes that “civilians who have lived in repressive societies often fear the security forces.” *Id.*

¹⁴⁵ U.S. DEP’T OF STATE, SUPPORTING HUMAN RIGHTS AND DEMOCRACY, THE U.S. RECORD 2006, at 20–23, 28 & 47 (2006) [hereinafter U.S. RECORD] (detailing human rights records and histories of African nations).

¹⁴⁶ *Id.*; Ernest Harsch, *Reforming Africa’s Security Forces: For Armies and Police That Protect Citizens, Not Abuse Them*, AFRICA RENEWAL, vol. 23, at 6 (Apr. 2009) (The article highlights ongoing efforts to reform security forces. The author states, “From South Africa to Burundi and Cote d’Ivoire, a number of other countries in Africa are also seeking to restructure and professionalize their armies, police and intelligence services. The process is fraught with difficulties, but is increasingly seen as vital for the continent’s long-term peace and stability. . . . The momentum for such reform is growing as more countries seek to consolidate democracies or rebuild after debilitating wars.”).

¹⁴⁷ *Id.*

¹⁴⁸ U.S. RECORD, *supra* note 145.

¹⁴⁹ CTR. FOR STRATEGIC AND INT’L STUD., INTEGRATING 21ST CENTURY DEVELOPMENT AND SECURITY ASSISTANCE, FINAL REPORT OF THE TASK FORCE ON NONTRADITIONAL SECURITY ASSISTANCE 17 (Jan. 2008) [hereinafter INTEGRATING 21ST CENTURY DEVELOPMENT].

¹⁵⁰ *Id.* at 15.

themselves; they require assistance.¹⁵¹ As demonstrated below, a concerted Rule of Law effort can provide a valuable roadmap for the DoS and DoD and other agencies to provide this assistance, thereby advancing the Rule of Law, meeting the Leahy Amendment's "necessary corrective measures" requirements, and allowing host nations to satisfy international human rights standards.

IV. The Bangladesh Rapid Action Battalion Engagement

The National Security Strategy and the National Counter-Terrorism Strategy recognized the need to engage developing nations, such as Bangladesh, that were combating Islamic terrorists.¹⁵² In response, DoS and DoD developed an approach to implement a Rule of Law program to address human rights allegations.¹⁵³ The initial plan, endorsed by Senator Leahy, called for an engagement strategy that would identify a means of providing training to the Bangladesh RAB while supporting the Rule of Law and human rights.¹⁵⁴ This model approach can serve as a template for other efforts to advance human rights, improve the Rule of Law, meet U.S. interests, and satisfy the requirements of the Leahy Amendment.

A. The Rapid Action Battalion

Following a period of political upheaval and instability, the Bangladesh government enacted the Armed Police Battalions Act of 1979, as amended in 2003, and the Armed Police Ordinance, which established the RAB.¹⁵⁵ Pursuant to the Armed Police Ordinance, the RAB's primary duties include the following: provide internal security;

¹⁵¹ See generally ACHIEVEMENTS, *supra* note 80 (highlighting persistent shortfalls in the Rule of Law).

¹⁵² See generally NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002); NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006); NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2010); DENNIS BLAIR, ANNUAL THREAT ASSESSMENT OF THE INTELLIGENCE COMMUNITY FOR THE SENATE ARMED SERVICE COMMITTEE 3-8 (Mar. 10, 2009).

¹⁵³ See OFFICE OF THE COMMAND HISTORIAN, SOCPAC COMMAND HISTORY, FISCAL YEAR 2009, at 22 (2009) [hereinafter COMMAND HISTORY] (on file with SOCPAC Command Historian).

¹⁵⁴ *Id.*

¹⁵⁵ See Armed Police Battalions Ordinance 1979, art. 6 (Bangl.), available at http://www.askbd.org/RAB/Law_4.pdf (last visited Sept. 9, 2013).

conduct intelligence and investigations into criminal activity; recover illegal arms; arrest criminals and members of armed gangs; assist other law enforcement agencies; and investigate any offenses as ordered by the government.¹⁵⁶ In June 2004, the RAB began operations.¹⁵⁷

The RAB, clad in all black clothes, black sunglasses, and black bandanas, police Dhaka's crime-riddled neighborhoods and present an imposing symbol of the seriousness of the Bangladeshi government's "war on crime."¹⁵⁸ Empowered to address the growing threat of criminal organizations, the RAB initially thrived on the fear and intimidation that followed in their wake.¹⁵⁹ The immediate impact of the RAB is without dispute: crime rates fell dramatically; counter-smuggling and counter-terrorism efforts were well-received by the general populace; and there was public support for RAB activities.¹⁶⁰ But these successes did not come without concern. Several human rights groups filed allegations of human rights violations concerning the deaths and torture of criminals and civilians.¹⁶¹

1. Structure of the RAB

The name "Rapid Action Battalion" is a misnomer; there are actually twelve RABs throughout Bangladesh.¹⁶² Each battalion is divided into operational companies. At the department level, there is also a headquarters element. The RAB Headquarters is divided into four wings: operations, administration, legal and media, and intelligence.¹⁶³

¹⁵⁶ *Id.* (stating that the RAB is frequently tasked with investigating high profile cases).

¹⁵⁷ *Id.*

¹⁵⁸ See RAPID ACTION BATTALION, *supra* note 8; see also Sufian, *supra* note 8.

¹⁵⁹ Maher Sattar, *Dhaka's "Death Squad" Shoots for a Makeover*, GLOBAL POST.COM, available at <http://www.globalpost.com/dispatch/news/regions/asia-pacific/120128/bangladesh-dhaka-death-squad-RAB-rapid-action-battalion-FBI-terrorist> (last visited Aug. 23, 2013).

¹⁶⁰ JUDGE, *supra* note 10, at 19–20.

¹⁶¹ See AMNESTY INT'L, BANGLADESH: DEATH IN CUSTODY AND REPORTS OF TORTURE 1–4 (May 10, 2007). See also TORTURE IN BANGLADESH 1971–2004: MAKING INTERNATIONAL COMMITMENTS A REALITY AND PROVIDING JUSTICE AND REPARATIONS TO VICTIMS 16 (2004), available at http://www.univie.ac.at/bimtor/dateien/bangladesh_redress_2004_report_tortureinbangladesh.pdf (last visited Sept. 9, 2013); Roland Buerk, *Bangladesh's Feared Elite Police*, BBC NEWS, DHAKA (Dec. 13, 2005), available at http://news.bbc.co.uk/2/hi/south_asia/4522734.stm (last visited Jan. 20, 2011).

¹⁶² See RAPID ACTION BATTALION, *supra* note 8.

¹⁶³ *Id.* Of note, there is only one person with legal training within the Legal and Media Wing. The director has one semester of legal training. *Id.*

The operations wing focuses on conducting interdiction, apprehension and direct action against suspected criminal and terrorist elements.¹⁶⁴ The administrations wing focuses on finance, personnel, and training.¹⁶⁵ The legal and media wing deals with public affairs, media interaction, and news releases (favorable to the RAB), and limited legal issues.¹⁶⁶ The intelligence wing is tasked with investigating criminal activity, to include interrogation operations, human intelligence exploitation, and technological exploitation.¹⁶⁷

The RAB is comprised of personnel from the military branches and law enforcement.¹⁶⁸ The personnel remain under the administrative control of their parent organizations while they are assigned to the RAB.¹⁶⁹ The RAB maintains day-to-day control over all personnel assigned, including training, tasking, and routine discipline.¹⁷⁰ There is significant turnover within the RAB since the average length of assignment is two to three years.¹⁷¹

2. Allegations of Human Rights Violations

Since the founding of the RAB, there have been numerous allegations of human rights violations against its members, ranging from unlawful detention, coerced interrogation, physical abuse, to rape and murder.¹⁷² Rapid Action Battalion officials routinely describe deaths of criminals as being the result of law enforcement “encounters” or “crossfires.”¹⁷³ These reportedly occur when RAB personnel escort a detained person to recover weapons or to identify a criminal location and the detainee dies when a “shootout” or “encounter” occurs between RAB forces and the detainee’s fellow criminals.¹⁷⁴ This explanation is so commonplace that the term “crossfire” has become shorthand within Bangladeshi culture

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*. However, many of the intelligence functions and activities are frequently conducted by RAB team members on sight. This has led to misuse of force and abuse allegations. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ COMMAND HISTORY, *supra* note 153, at 23.

¹⁷¹ *Id.*

¹⁷² JUDGE, *supra* note 10, at 19–20.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

for death while in custody “helping” the RAB with their investigation.¹⁷⁵ By some accounts, there have been over 1200 crossfire deaths since 2004.¹⁷⁶

For example, in 2004, RAB forces in Dhaka arrested three men for criminal activity and took them to the RAB Headquarters. One of the men, named Pichchi Hannan, was wounded. After six weeks in custody, Hannan was reported to have died in “crossfire.” Rapid Action Battalion officials maintained that Hannan had provided information on a meeting of suspected criminals and had agreed to go with RAB forces to assist them in identifying the specific location. Upon arrival, the criminals began to “shoot away” and Hannan was killed. No RAB members were injured in the exchange.¹⁷⁷

In another example in 2005, Mahimuddin Mohim, a businessman and leader of the opposition party’s student wing was arrested on suspicion of criminal activity. Again, while in custody, Mohim provided information and was taken to an area to assist in searching for illegal weapons. While at the location, his “fellow criminals” attacked and killed him in “crossfire.” The RAB allowed his family to view the body they reported evidence of torture, including broken fingers, bruises, and a broken elbow.¹⁷⁸ In 2005, in response to these allegations, the DoS prohibited training under the Leahy Amendment.

Following a divisive election in 2008, the new government began a number of reforms aimed at improving human rights for all Bangladeshis. The new government focused on limiting police authority, providing legal and political access to all, and addressing allegations of human rights violations.¹⁷⁹ After a significant decrease in allegations, the

¹⁷⁵ See Buerk, *supra* note 161; see also HUMAN RTS. WATCH, BANGLADESH: BRING PARAMILITARY UNIT TORTURERS TO JUSTICE 15 (Oct. 23, 2009) [hereinafter HUMAN RTS. WATCH, BANGLADESH], available at <http://www.hrw.org/en/news/2009/10/23/bangladesh-bring-paramilitary-unit-torturers-justice> (last visited Sept. 9, 2013).

¹⁷⁶ See HUMAN RTS. WATCH, BANGLADESH, *supra* note 175.

¹⁷⁷ JUDGE, *supra* note 10, at 26–30.

¹⁷⁸ *Id.* at 26–30.

¹⁷⁹ See HUMAN RTS. WATCH, BANGLADESH, *supra* note 175. *But see* ACHIEVEMENTS, *supra* note 80, at 25 (“The presence or absence of political will influenced the course of ROL activities. . . . Without the requisite commitment for reform from appropriate government or court officials, USAID feared that working with formal justice system institutions risked failure . . .”). See also *id.* at 153 (“Without question, Bangladesh has far to go before its legal and other institutions are effective in meeting the overwhelming

DoS began to engage the Bangladesh government regarding the possibility of assisting the RAB in fulfilling its human rights obligations.¹⁸⁰ The DoS determined that an assessment of the current state of RAB compliance was needed in order to meet future DoS objectives.¹⁸¹

B. Assessment

In 2008, DoS requested DoD assistance to evaluate the current state of the RAB and its efforts to address allegations of human rights abuses.¹⁸² A team, comprised of legal and operational experts, was assembled and tasked with conducting an assessment of the military justice system of the RAB. Conducted in September 2008, the initial assessment, modeled after the DoS Rule of Law assessment procedure, focused on the sufficiency of the policies, procedures, and systems needed to properly receive and investigate allegations.¹⁸³ The team reviewed all available information to gain a better understanding of the workings of the RAB.¹⁸⁴

Focusing on the RAB's ability to "police its own," the assessment team collected statistical information on case disposition, monitoring efforts, and judicial capabilities.¹⁸⁵ The military justice assessment team

needs of its citizens . . . [any] pockets of progress have been described as "patches of green" in an otherwise desolate landscape.").

¹⁸⁰ See generally BUREAU OF DEMOCRACY, RTS. AND LABOR, DEP'T OF STATE, 2007 HUMAN RIGHTS REPORT: BANGLADESH (Mar. 11, 2008); see also BUREAU OF DEMOCRACY, RTS. AND LABOR, DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: BANGLADESH (Feb. 25, 2009).

¹⁸¹ COMMAND HISTORY, *supra* note 153, at 29.

¹⁸² *Id.* at 31.

¹⁸³ COUNTRY ANALYSIS, *supra* note 96, at 38. See also WEIGHING, *supra* note 79 (detailing early Rule of Law efforts). The information involved: the sufficiency of the military justice system, the policies and procedures for investigating complaints, the policies and procedures for receiving complaints, the application of recognized human rights to law enforcement, transparency of the justice system, level of training on human rights, the ability of civilians to submit complaints without fear of reprisal, statistical analysis of complaint/incident trends, and current and previous efforts and/or ROL and HR activities. *Id.*

¹⁸⁴ COMMAND HISTORY, *supra* note 153, at 31.

¹⁸⁵ OFFICE OF THE STAFF JUDGE ADVOCATE, BANGLADESH TRIP REPORT 4 (2009) [hereinafter TRIP REPORT] (on file with SOCPAC Command Legal Office). The information included: active and closed cases, availability of prosecutors, judges, and support staff, number of complaints versus number of cases referred to court, number of specific types of cases (human rights violations, crossfires, excessive use of force, etc.),

evaluated the information and applied a modified version of the USAID Rule of Law assessment.¹⁸⁶ Applying this method, the team focused on the primary elements to achieve human rights compliance and accountability for offenders.¹⁸⁷ The primary elements for human rights compliance are as follows: a credible investigation/prosecution mechanism; transparency in the process; and effective application of justice.¹⁸⁸

The first element, identified by the team, was to focus on the credibility of the investigative process.¹⁸⁹ The RAB did not have the legal authorities and policies to investigate and prosecute cases in a fair and appropriate manner.¹⁹⁰ Credibility requires both a subjective and objective determination of trustworthiness and validity.¹⁹¹ The people of Bangladesh, as well as the government and international community, must have faith that their officials are not “beyond the law” and are subject to the same legal process as the regular citizen.¹⁹²

Credibility in the process requires the following components: all allegations are taken seriously; all allegations are investigated; all investigations are forwarded to the appropriate authority; appropriate action is taken on the complaint; and the complainant and the public are kept informed of the results.¹⁹³ Credibility further requires the ability to hold offenders accountable for their actions.¹⁹⁴ In addition, all incidents of “crossfires” and human rights violations should be documented and reported to the local public.

The second primary element of transparency is necessary to achieve human rights because it allows visibility of the workings of government

NGOs that monitor RAB activities, ability of Bangladeshi locals to render complaints against the RAB, transparency of the process, current military justice system, disposition of cases (conviction rate, acquittal rate, etc.), investigation policies and procedures (internal affairs guidance), rules on the use of force, command policies, training (Human Rights, Ethics in Law Enforcement, and Tactical), and personnel and assignment policies and procedures. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ COUNTRY ANALYSIS, *supra* note 96, at 35.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 35.

and “guarantees rights and the democratic process.”¹⁹⁵ In assessing the RAB, this element focused on the “transparency” of the process. Transparency occurs when there are procedures that ensure visibility of the RAB’s operations and investigations.¹⁹⁶ The rights of all Bangladeshis are better protected when the activities of the RAB withstand independent scrutiny from outside entities and organizations, such as DoS and Human Rights Watch.

The third element posits that justice requires accountability, which translates to effective legal systems for handling criminal and civilian cases.¹⁹⁷ In all democracies, justice must be effectively applied to all sectors of society, including members of law enforcement and the military.¹⁹⁸ Law enforcement personnel cannot act with impunity.¹⁹⁹ In order for a democracy to survive, there must be a viable system of accountability for government abuses, to include misuse of authority, violations of citizens’ rights, and other offenses.²⁰⁰

The assessment team produced a RAB Engagement Plan, approved by the U.S. Embassy–Bangladesh, that focused on assisting the RAB in developing mechanisms to report accurate information and transparency regarding allegations of human rights violations.²⁰¹ The DoS, with concurrence of Senator Leahy, tentatively approved future engagements with the RAB if they could demonstrate positive steps toward a transparent reporting process; credible investigation process; and accountability for offenders.²⁰² The engagement plan focused on developing an internal capability to receive, investigate, and prosecute human rights violations.²⁰³ In particular, the plan included the creation of a human rights office, development of a process to receive complaints, and revisions to current RAB policy to investigate allegations in order to establish accountability.²⁰⁴

¹⁹⁵ *Id.* at 38.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 35.

²⁰⁰ *Id.*

²⁰¹ OFFICE OF THE STAFF JUDGE ADVOCATE, RAB ENGAGEMENT PLAN 3 (Nov. 15, 2008) [hereinafter ENGAGEMENT PLAN] (on file with SOCPAC Command Legal Office). *See also* COMMAND HISTORY, *supra* note 153, at 32.

²⁰² ENGAGEMENT PLAN, *supra* note 201, at 2.

²⁰³ *Id.*

²⁰⁴ *Id.*

C. Findings

The initial RAB assessment noticed areas, such as training and tactical exercises, which the RAB could improve upon to prevent violations and reinforce human rights-compliant behavior.²⁰⁵ However, the RAB is reliant on other agencies, particularly the Law and Justice Ministry and the Legislative Branch, to enforce human rights laws.²⁰⁶ The government seemed to lack the political will, motivation, and expertise required to make significant changes.²⁰⁷ All of the Bangladeshi agencies involved, including the military and the judiciary, have procedural and personnel deficiencies that undermine the effort to address human rights violations.²⁰⁸ In particular, the governmental agencies had deficiencies in the systems needed to receive, investigate, and prosecute RAB members suspected of committing human rights violations.²⁰⁹ A brief overview of these deficiencies follows.

1. Training

The RAB has a detailed human rights training program for all of its members.²¹⁰ New recruits receive over sixteen hours of classroom training on human rights.²¹¹ However, there is no annual or continuing training beyond the initial training requirement.²¹² Additionally, there is no mechanism to train RAB members in real-world situations.²¹³ According to most professional police forces, current training paradigms should incorporate “shoot/don’t shoot” tactical situations to train the individual to respond properly in stressful situations.²¹⁴

²⁰⁵ TRIP REPORT, *supra* note 185, at 3.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 7.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *See generally* LIEUTENANT COLONEL (RETIRED) DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY (2009); LIEUTENANT COLONEL (RETIRED) DAVE GROSSMAN & LOREN W. CHRISTENSON, ON COMBAT: THE PSYCHOLOGY AND PHYSIOLOGY OF DEADLY CONFLICT IN WAR AND PEACE (2008).

In addition to human rights training, the RAB is deficient in tactical planning and execution of missions. During the assessment, the RAB conducted a training simulation to demonstrate their tactics:

A man screams, “If you come in here, I am going to kill her!” out a second floor window. The window is in the middle of a large building, with approximately five rooms on each side of the hostage scene. The man is visible in the window holding a female hostage. He is clearly unstable and brandishing a weapon. Negotiators try to reason with the man. This only increases his agitation. As negotiations continue, the RAB arrive on scene. They begin to infiltrate the building using ropes to scale to the second floor. Once inside the building, members of the assault team begin to clear the building using “flash bangs.”²¹⁵ The RAB members begin at opposite ends of the building and move towards the room containing the hostage-taker. As they approach the room, the sounds of numerous “flash bang” explosions rip through the air. A total of ten or more explosions indicate the progress of the assault team. The hostage-taker surrenders as the RAB prepare the final assault on the room.²¹⁶

This simulation demonstrates that the tactics employed by the RAB would just as likely result in the death of the hostage. The means of clearing other rooms would only increase the stress on the hostage-taker and could cause him to kill the hostage and himself. There was no indication of other criminals on scene and the unnecessary clearing of the

²¹⁵ See <http://www.globalsecurity.org/military/systems/munitions/xm84.htm>. The flash bang grenade is a “Stun Grenade is a non-fragmentation, non-lethal “Flash And Bang” stun grenade that is intended to provide a reliable, effective non-lethal means of neutralizing & disorienting enemy personnel. The M84 non-lethal stun grenade is a non-lethal, low hazard, non-shrapnel producing explosive device intended to confuse, disorient or momentarily distract potential threat personnel. The device produces a temporary incapacitation to threat personnel or innocent bystanders. This device will be used by military personnel in hostage rescue situations and in the capture of criminals, terrorists or other adversaries. It provides commanders a non-lethal capability to increase the flexibility in the application of force during military operations.”

²¹⁶ TRIP REPORT, *supra* note 185, at 4 (explaining the tactical demonstration that the RAB considered “successful”). RAB officials spoke highly of the proficiency of their forces and their ability to handle hostage situations without using lethal force. RAB officials also used this demonstration for all visiting foreign officials.

other rooms put civilians at risk of death or serious injury. This simulation indicates that the RAB simply does not have appropriate training on tactical operations. Until this training deficiency is addressed, human rights violations will likely continue.

2. *Legal Deficiencies*

In most nations, “the military and civil judicial systems are meant to work together effectively to deter security members from committing abuses.”²¹⁷ However, in the case of the Bangladeshi government, these systems do not work together effectively. There are procedural and statutory limitations that negatively impact the effective administration of justice for RAB members.²¹⁸ In addition, all agencies within the Bangladesh government have limited resources, to include attorneys and support staff, to provide for the growing demands of a burgeoning democracy.²¹⁹

a. *Military Justice System*

Within the RAB, there are no assigned prosecutors.²²⁰ In units of similar size, American, British, and Australian militaries assigned at least one or two prosecutors and numerous support staff to handle disciplinary offenses.²²¹ When an incident occurs, the RAB involved refers the case to an administrative judge for action.²²² The RAB Headquarters have limited ability to conduct an internal investigation.²²³ Unlike Western law enforcement and military agencies, the RAB does not have an internal affairs-type unit or criminal investigation capability that is empowered to look into allegations against its members. Instead, the local RAB commander has the ability to independently determine whether an allegation warrants referral to an administrative judge. Numerous RAB commanders have used this ability to summarily dispose

²¹⁷ CORAL ET AL., *supra* note 29, at 23.

²¹⁸ TRIP REPORT, *supra* note 185, at 4.

²¹⁹ COUNTRY REPORTS, *supra* note 4.

²²⁰ TRIP REPORT, *supra* note 185, at 4.

²²¹ U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY, 3-1 to 3-4 (Apr. 15, 2009) (detailing assignment of judge advocates to operational units, like brigades).

²²² ENGAGEMENT PLAN, *supra* note 201, at 2.

²²³ *Id.*

of allegations before forwarding outside of the RAB, thereby maintaining the “blue wall” of impunity.²²⁴

In addition, because the RAB is comprised of all Bangladeshi military services and law enforcement personnel, issues commonly arise regarding jurisdiction over assigned personnel.²²⁵ The RAB Headquarters routinely transfers alleged violators to their assigned service, such as the Army or Air Force, for prosecution.²²⁶ Once this occurs, RAB officials treat it as out of their hands and the responsibility of that respective service.²²⁷ This process removes the incentive for the RAB to investigate and prosecute offenders.

b. Civilian Judiciary

In addition, there is a significant backlog in the handling of criminal and civil cases.²²⁸ Bangladesh suffers from a critically understaffed judiciary that has responsibility for all cases, a problem that has led to a significant delay in the disposition of cases.²²⁹ For example, the RAB investigated a murder that occurred at a dining facility on a RAB base.²³⁰ The alleged murderer was charged in 2005 and granted bail.²³¹ The case has yet to proceed to trial.²³² Rapid Action Battalion officials stated that this is not unusual in the Bangladeshi judicial system.²³³

Besides concerns for due process and timely justice, from a practical view, a flawed civilian judiciary results in no visible consequences for criminal behavior. The civilian judiciary does not take an active involvement in the disposition of human rights cases.²³⁴ According to

²²⁴ TRIP REPORT, *supra* note 185, at 4.

²²⁵ ENGAGEMENT PLAN, *supra* note 201, at 2.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ TRIP REPORT, *supra* note 185, at 4.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *See generally* BUREAU OF DEMOCRACY, RTS. AND LABOR, DEP'T OF STATE, 2007 HUMAN RIGHTS REPORT: BANGLADESH (Mar. 11, 2008); BUREAU OF DEMOCRACY, RHTS. AND LABOR, DEP'T OF STATE, 2008 HUMAN RIGHTS REPORT: BANGLADESH (Feb. 25, 2009).

some NGOs, there are political reasons for their lack of involvement.²³⁵ Many in Bangladesh remember the violence and instability of the last decade. Consequently, there is a tacit acceptance of the “strong arm” tactics of law enforcement, to include the RAB, in response to this violence, and a prevailing fear of its return.²³⁶ The judiciary is not immune to this fear. This is demonstrated in its reluctance to appear “anti-government” or “anti-law and order.”²³⁷

The results of this assessment remain unknown. Despite being forthcoming with information and recognizing their international obligations, Bangladeshi officials are hampered by political and fiscal limitations in their attempts to improve the Rule of Law within Bangladesh, and incidents of human rights violations continue to surface.²³⁸ These incidents continue to be a significant matter of concern to the U.S. government and international agencies.²³⁹ Since the RAB and the Bangladesh government have begun implementing changes to their procedures, there have been several allegations of “crossfires,” for example, several alleged criminals were killed while opposing RAB forces, in October of 2010.²⁴⁰ Clearly, it is too early to tell if this engagement will be successful.

However, the RAB assessment indicates that, without foreign assistance, the RAB will be unable to overcome its history of human rights violations and obtain valuable counterterrorism training.²⁴¹ It also demonstrates that developing nations will not be able to overcome

²³⁵ See HUM. RTS. WATCH, BANGLADESH, *supra* note 179. *But see* ACHIEVEMENTS, *supra* note 79, at 25 (“The presence or absence of political will influenced the course of ROL activities . . . Without the requisite commitment for reform from appropriate government or court officials, USAID feared that working with formal justice system institutions risked failure.” *Id.* at 153 (“Without question, Bangladesh has far to go before its legal and other institutions are effective in meeting the overwhelming needs of its citizens . . . [any] pockets of progress have been described as “patches of green” in an otherwise desolate landscape.”).

²³⁶ TRIP REPORT, *supra* note 185, at 7 (summarizing interviews with RAB personnel and local Bangladeshis).

²³⁷ *Id.*

²³⁸ See notes 238–41 and accompanying text.

²³⁹ BRUCE VAUGHN, CONG. RESEARCH SERV., R41194, BANGLADESH: POLITICAL AND STRATEGIC DEVELOPMENTS AND U.S. INTERESTS 15–16 (Apr. 1, 2010).

²⁴⁰ See *Two Killed in “Encounter” with RAB in Berguna* (Oct. 23, 2010), available at <http://www.bdnews24.com/pdetailes.php?id=176873> (last visited Feb. 1, 2011); *Alleged Mugger Killed in “Shoot Out” with RAB* (Feb. 10, 2011), available at <http://www.bdnews24.com/pdetailes.php?id=176698> (last visited Sept. 9, 2013).

²⁴¹ See *supra* Part IV.C.

obstacles in investigating and prosecuting human rights violators without a sustained Rule of Law effort.²⁴² This engagement provides a potential framework to foster human rights awareness and compliance while allowing host nations to improve their counterterrorism capability.

V. U.S. Rule of Law Challenges and Recommendations

The RAB Engagement demonstrates that an inter-agency approach can assist developing nations in addressing human rights while maintaining internal security. However, there are significant challenges that must be addressed. Currently, U.S. Rule of Law efforts are limited by a lack of unified purpose as well as by systemic limitations. In particular, several challenges need to be overcome to allow for meaningful Rule of Law efforts with our partners. They include a lack of strategic planning, inadequate funding and authorities among the various agencies, an imbalance of manpower and funding between DoS and DoD, and the pressing need to confront emerging threats.²⁴³

In order to address the compelling training needs of our partners, the following recommendations are helpful: redefine “necessary corrective actions” as a committed enrollment in a Rule of Law effort; increase authorities and funding for DoS and DoD to conduct Rule of Law efforts; and formulate a comprehensive strategic plan for Rule of Law efforts. This article details each of these recommendations.

A. Enrollment in a Rule of Law Effort, Which Includes Military and Security Forces, Should Be Considered “Necessary Corrective Action” Under the Leahy Amendment

A dedicated and committed Rule of Law effort should be considered as a factor in meeting the Leahy requirement for necessary corrective action. Together, the DoD and DoS should work with Congress to establish the criteria regarding “all necessary corrective actions” to include: (1) a commitment to a Rule of Law program; (2) removal of all suspected violators from positions of power or authority; (3) initiation of transparent investigations into all outstanding allegations, with

²⁴² See *supra* Parts II, III.

²⁴³ Gregory J. Dyekman, *Security Cooperation: A Key to the Challenges of the 21st Century* (U.S. Army Strategic Stud. Inst.) (Nov. 2007).

international assistance and oversight; (4) training to international standards of all training participants troops on human rights; and (5) submission to U.S. monitoring. These agreed-upon criteria should allow for counterterrorism training to commence conditioned on adherence to and progress in a Rule of Law effort.

As demonstrated in Bangladesh, developing nations frequently lack the resources and infrastructure to properly administer the Rule of Law.²⁴⁴ Deficiencies within the law enforcement and judicial structures prevent nations from properly investigating and prosecuting criminal activities, to include human rights violations.²⁴⁵ Without the capability to carry out these activities, these nations will never be able to demonstrate that they have responded to allegations and “brought those responsible to justice.”²⁴⁶

With a comprehensive plan and sustained effort, many uneligible countries will be able to overcome the restrictions of the Leahy Amendment.²⁴⁷ More importantly, victims of human rights violations will be able to obtain justice and see those responsible held accountable. However, without much needed tactical training, the abuses that occurred due to poor training will only reoccur, thereby creating new victims.²⁴⁸ By combining Rule of Law with appropriate training, professionalism and accountability of security forces will increase, as will the populace’s trust in its government. This human rights-focused effort, coupled with training, will increase security and stability, and deprive transnational terrorist groups of fertile ground to plant seeds of hatred and violence.

B. Lack of Strategic Planning

As is true of most bureaucracies, the U.S. Government faces challenges in formulating a long-term, comprehensive vision and plan.²⁴⁹

²⁴⁴ See *supra* Parts II, III.

²⁴⁵ *Id.*

²⁴⁶ *Senator Patrick Leahy, supra* note 31.

²⁴⁷ See Denmark, *supra* note 57 (stating that “enhancements of military and non-military cooperation between the United States and Indonesia in recent years coincided with a marked improvement in Indonesia’s human rights practices”).

²⁴⁸ *Id.*

²⁴⁹ SOUTHEAST ASIA, *supra* note 38, at 28 (stating that “U.S. government lacks an integrated national security assistance strategy covering all U.S. training and assistance provided to foreign security forces”). See also U.S. DEP’T OF DEF., DIR. 3000.05, DIRECTIVE ON MILITARY SUPPORT FOR STABILITY, SECURITY, TRANSITION, AND

Each individual department, whether it is DoD, DoS, or USAID, has its own internal mission statement, plan, authorities, and limitations.²⁵⁰ National Security Presidential Directive 44, signed by President George W. Bush on December 7, 2005, attempts to correct this deficiency by promoting “the security of the United States through improved coordination, planning, and implementation of reconstruction and stabilization assistance for foreign states and regions at risk of, in or in transition from conflict or civil strife.”²⁵¹ This directive focuses on integrated U.S. responses to nations at risk, and provided for an increased civilian response capability within DoS.²⁵²

In order to overcome these obstacles, the United States must develop a strategic plan, involving all agencies and all elements of national power, to address the national security needs of the nation. The government must “bring all instruments of statecraft to bear, in a calibrated fashion, through coordinated interagency strategy.”²⁵³ The DIMES (diplomatic, intelligence, military, economic, and social) approach seeks to use all elements of national power by employing the unique attributes and capabilities of the individual agencies to advance a common agenda.²⁵⁴ In particular, DoS provides diplomatic access, intelligence, and information on local conditions, and the ability to project economic power in the form of aid, programs, and grants, while DoD contributes primarily military and intelligence capabilities to the national effort.²⁵⁵

At the national level, U.S. agency efforts should be guided by the National Security Strategy, the strategic plans for developing areas, and the ongoing national security needs of the nation. At the host country and regional level, these efforts should be under the purview of the

RECONSTRUCTION (SSTR) OPERATIONS (Nov. 2005) [hereinafter DODD 3000.05]. *But see* DOD ROLE, *supra* note 52, at 25–29 (recommending “enhanced” civilian capabilities).

²⁵⁰ See generally U.S. DEP’T OF DEF., MISSION STATEMENT, available at <http://www.defense.gov/about/#mission> (last visited Nov. 12, 2011), U.S. DEP’T OF STATE, MISSION STATEMENT, available at <http://www.state.gov/s/d/rm/index.htm> (last visited Nov. 12, 2011), and U.S. AGENCY FOR INT’L DEV., MISSION STATEMENT, available at http://www.usaid.gov/about_usaid/primer.html (last visited Sept. 9, 2013).

²⁵¹ NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 44 (Dec. 7, 2005).

²⁵² *Id.*

²⁵³ INTEGRATING 21ST CENTURY DEVELOPMENT, *supra* note 149, at 5.

²⁵⁴ Anton K. Smith, *Turning on a Dime: Diplomacy’s Role in National Security*, STRATEGIC STUD. INST. 2–10 (Oct. 2007), available at <http://www.strategicstudiesinstitute.army.mil/> (last visited Sept. 9, 2013).

²⁵⁵ *Id.*

respective Embassy's country team and the Geographic Combatant Commander (GCC).²⁵⁶ Through close coordination between country teams and the GCC staff, emerging needs and trends will be identified and resources will be applied to address them, allowing for the adjustment of the larger strategic picture.²⁵⁷

By synchronizing efforts based on the National Security Strategy, all agencies will be focused on a single purpose. This may require the creation of new interagency task forces or working groups to synchronize efforts. In addition, there may need to be a new position at the department, agency, or cabinet level to oversee this effort. However, without interagency efforts based on a common goal at the national and regional level, there will continue to be difficulty in providing the means for "at risk" nations to overcome Leahy restrictions.

C. Inadequate Funding and Authorities among the Various Agencies

In security force assistance and security sector reform, there is a disparity between the assets and authorities of the agencies involved. The DoD has the funding and assets, but no authority; the DoS has authority, but extremely limited funding and assets.²⁵⁸ There is a common belief that the majority of engagements should be civilian-based, such as Rule of Law reform, and that DoD involvement should be limited to providing support.²⁵⁹ This belief has even been incorporated into policy.²⁶⁰ Despite such recognition, country teams often rely on the assets and funds of the Combatant Commands to meet Embassy needs.²⁶¹

²⁵⁶ *Id.*

²⁵⁷ U.S. DEP'T OF DEF., NATIONAL DEFENSE STRATEGY 17 (June 2008) ("[G]reater civilian participation is necessary both to make military operations successful and to relieve stress upon the men and women of the armed forces. Having permanent civilian capabilities available and using them early could also make it less likely that military forces will need to be deployed in the first place.").

²⁵⁸ DoDD 3000.05, *supra* note 249.

²⁵⁹ *Id.* *But see* DoD ROLE, *supra* note 52, at 5 (quoting Defense Secretary Gates as stating "until our government decides to plus up our civilian agencies . . . Army soldiers can expect to be tasked with reviving public services, rebuilding infrastructure, and promoting good governance. All these so-called 'nontraditional' capabilities have moved into the mainstream of military thinking, planning, and strategy"). *Id.*

²⁶⁰ DoDD 3000.05, *supra* note 249.

²⁶¹ SOUTHEAST ASIA, *supra* note 38, at 28 (stating that "U.S. government lacks an integrated national security assistance strategy covering all U.S. training and assistance provided to foreign security forces").

In addition, there is a conflict between the authorities needed, and the funding and manpower available, to conduct these operations. The DOS has the authority and mandate to conduct Rule of Law efforts, as well as to conduct numerous other types of training with host nations.²⁶² The respective embassies have significant discretion to develop civil operations, such as Acquired Immune Deficiency Syndrome (AIDS) awareness outreach, disaster construction, and other actions targeting the host nation populace.²⁶³ By contrast, with the exception of very specific civil military operations, the DoD is limited to military engagements and training.²⁶⁴ Under Section 1206 of the National Defense Authorization Act (NDAA), DoD is specifically authorized to train host nation military, but prevented from training security forces.²⁶⁵ Currently, funding and authorities, both at DoD and DoS, are insufficient to meet the growing non-conflict Rule of Law needs, both military and civilian, of developing nations.²⁶⁶

The funding authorized under Section 1206 of the National Defense Authorization Act, is considered “train and equip” funding.²⁶⁷ It allows the DoD to provide training and equipment to foreign military and maritime security forces.²⁶⁸ In 2006, Congress initially authorized Section 1206 funding for three years; however, it has been subsequently renewed in the 2010 NDAA.²⁶⁹ The DoD continues to advocate for Section 1206 as a valuable tool in the war on transnational terrorism.²⁷⁰ However, there are significant shortfalls with this funding, including that it: is extremely limited, and cannot be used to train non-military security forces, such as the RAB; limited activities to those authorized for DoS under the Foreign Assistance Act; and subject to poor coordination with DoS and a lack of larger strategic planning.²⁷¹

²⁶² See generally U.S. DEP’T OF STATE, MISSION STATEMENT, available at <http://www.state.gov/s/d/rm/index.htm> (last visited Nov. 12, 2011); U.S. AGENCY FOR INT’L DEV., MISSION STATEMENT, available at http://www.usaid.gov/about_usaid/primer.html (last visited Sept. 9, 2013).

²⁶³ *Id.*

²⁶⁴ National Defense Authorization Act of 2009, Pub. L. No. 109–163, § 1206, 119 Stat. 3136, 3456–58 (2009). However, the NDAA specifically authorized the training of Iraqi and Afghan security forces.

²⁶⁵ *Id.*

²⁶⁶ See *supra* Part V.C.

²⁶⁷ See *supra* note 266 and accompanying text.

²⁶⁸ *Id.*

²⁶⁹ § 1206, 119 Stat. 3136, 3456–58.

²⁷⁰ *Id.*

²⁷¹ DoD ROLE, *supra* note 52, at 73–77.

The Bush Administration recognized the shortcomings of these current funding sources and drafted the Building Global Partnership Act of 2007 (BGPA).²⁷² The BGPA's purpose is to provide the DoD with permanent 1206-like authority to train and equip military and security forces for counterterrorism and stability enhancing operations.²⁷³ This Act would allow for the GCCs to spend up to \$750 million annually, and to carry funds over fiscal years.²⁷⁴ In addition, it would allow the DoD to transfer funds to other agencies, such as DoS, to fund their participation in those specified activities.²⁷⁵ Numerous organizations have opposed this act, and the bill is currently languishing in Congress.²⁷⁶ Congress should enact the BGPA, thereby providing valuable authority and funding to the DoD to conduct Rule of Law activities on behalf of DoS.

However, there also needs to be a funding source that is available to DoS and DoD to allow for Rule of Law and other cross-agency national security activities. An authorized DoS/DoD fund, with appropriate Congressional oversight, should be created that will fund these types of engagements. This funding source should be available to all GCCs and country teams in coordination with SECDEF and SECSTATE. Included in this fund should be a provision that allows the Geographical Combatant Commands (GCCs), with the concurrence of DoS, to authorize and fund Rule of Law activities, or contract/fund them for Leahy-prohibited security forces.

D. The Roles of DoS and DoD with Foreign Security Forces

There is now additional concern regarding the growing role of the DoD in Rule of Law and traditional DoS/USAID activities.²⁷⁷ Due to the availability of personnel and assets, DoD has taken on greater DoS-type activities, such as Rule of Law efforts in Iraq and Afghanistan and humanitarian relief in Haiti.²⁷⁸ There is concern that these efforts have

²⁷² Building Global Partnership Act of 2007, available at <http://www.dod.mil/dodgc/olc/docs/BGPA.pdf> (last visited Sept. 9, 2013).

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ See LETTER OF OPPOSITION, FRIENDS COMMITTEE ON NATIONAL LEGISLATION, available at <http://www.etan.org/news/2007/05global.htm> (last visited Sept. 9, 2013) (detailing the groups and reasons for opposing the BGPA).

²⁷⁷ DOD ROLE, *supra* note 52, at 2–6.

²⁷⁸ *Id.*

undermined the traditional warfighting role of the DoD and usurped DoS mandated activities.²⁷⁹ To address these concerns, the U.S. Government must reconsider the appropriate roles of each agency in 21st century operations.

In particular, USAID has the lead for Security Sector Reform (SSR).²⁸⁰ Security Sector Reform focuses on all of the “institutions, processes and forces that provide security and promote the Rule of Law.”²⁸¹ This program focuses on the civilian side of law enforcement and internal security. The United States Agency for International Development’s policies recognize that “forces enhanced through traditional security assistance comprised of equipment and training can better carry out their responsibilities if the institutional and governance frameworks necessary to sustain them are equally developed.”²⁸² The U.S. Government efforts are made to improve or reform civilian institutions, such as the judiciary, improve budgeting and staffing, and to ensure coordination between security organizations and civilian entities.²⁸³

In regard to Leahy-prohibited nations, DoS and USAID have an interest in ensuring that the security forces are properly conducting their operations.²⁸⁴ However, this interest is based on the larger society impact of security sector reform efforts.²⁸⁵ In security sector reform, the concern is on the wider impact that inadequate security has on the greater population.²⁸⁶ In comparison, DoD has a different interest in security force training.²⁸⁷ The DoD recognizes that places with inadequate military and security forces are prone to be exploited by identified threats, such as al Qaeda.²⁸⁸ There is also an interest in forming “strategic alliances” at the operational level and interoperability in the event that the DoD and the host nation must confront a common enemy in a coalition setting.²⁸⁹

²⁷⁹ *Id.* at 6–12. See also INTEGRATING 21ST CENTURY DEVELOPMENT, *supra* note 149, at 3.

²⁸⁰ SECURITY SECTOR REFORM, *supra* note 100, at 1.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ SECURITY FORCE ASSISTANCE, *supra* note 53, paras. 1–1 to 1–6, at v.

²⁸⁸ See U.S. DEP’T OF DEF., NATIONAL DEFENSE STRATEGY 17 (June 2008).

²⁸⁹ SECURITY FORCE ASSISTANCE, *supra* note 53, paras. 1–1 to 1–6, at v.

These varied interests can result in vastly different approaches to dealing with security force issues. The DoS frequently views security engagements from the importance of human rights protection, and stability and responsiveness to democratic rule.²⁹⁰ The DoD, by contrast, views it from the need to build capability in response to national security threats.²⁹¹ These are ingrained cultural views that are perceived as mutually exclusive, but rather are complimentary.²⁹² Both views are focused on the stated U.S. national interests of stable governments with properly trained forces. However, the focus of efforts and the application of limited resources will vary.

As noted in the RAB engagement, the majority of issues regarding “holding those responsible accountable” under the Leahy Amendment are beyond the control of the RAB.²⁹³ These are issues that will only be addressed through security sector and judicial capability reform.²⁹⁴ The RAB leadership cannot hold offenders responsible under the current system.²⁹⁵ There are significant changes that need to be made to allow for successful investigations and prosecutions.²⁹⁶ This will require a long-term allocation of resources, under the USAID authority, to make these changes. Unfortunately, USAID has limited resources for countless missions and must prioritize efforts, with the majority of effort being in Iraq and Afghanistan.²⁹⁷

E. Compelling Need to Confront Emerging Threats

The National Threat Assessment recognizes the emerging threats from transnational terrorist organizations, like Jemaah Islamiyah, al Qaeda, and Lashkar-e-Taiba.²⁹⁸ These organizations are intentionally

²⁹⁰ SECURITY SECTOR REFORM, *supra* note 100, at 1.

²⁹¹ SECURITY FORCE ASSISTANCE, *supra* note 53, paras. 1–1 to 1–6, at v.

²⁹² *See supra* Parts II, III.

²⁹³ *See supra* Part IV.

²⁹⁴ *See supra* Part IV.

²⁹⁵ *See supra* Part IV.

²⁹⁶ *Id.*

²⁹⁷ *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-496, FOREIGN ASSISTANCE: USAID NEEDS TO IMPROVE ITS STRATEGIC PLANNING TO ADDRESS CURRENT AND FUTURE WORKFORCE NEEDS 7–28 (July 2010) (detailing USAID staff challenges involving Iraq and Afghanistan).

²⁹⁸ BLAIR, *supra* note 152, at 3–7.

targeting and exploiting developing nations and lawless areas.²⁹⁹ They operate where governments are unable or unwilling to exercise control and provide basic services for their citizens.³⁰⁰ They count on the absence of the Rule of Law, government atrocities, and marginalization of the civilian populace in order to bolster local support, create safe havens and solidify recruitment.³⁰¹

Rule of Law efforts require significant time and persistent engagement with host nations to solidify advances and bring about long term societal changes.³⁰² Rule of Law efforts take significant time to take root.³⁰³ Many of these nations are decades away from having a fully functional legal system.³⁰⁴ The United States' Rule of Law efforts, in places such as Colombia and El Salvador, have taken several years, or more, to produce demonstrated results.³⁰⁵ Meanwhile, security forces are in a "catch 22": they have no training to improve tactics and ensure human rights compliance, because they have unresolved human rights allegations due to poor tactics.

In Leahy-prohibited nations, the United States is withholding vital training on the condition that the nation addresses human rights violations. Thus, Leahy-prohibited nations' security forces are unable to receive training and must take necessary corrective actions prior to receiving training. This training could help counter the threat of transnational terrorists, increase professionalism of security forces, reduce misuse of force, and add to societal stability.³⁰⁶ Without a

²⁹⁹ *Id.* See also CHRISTOPHER G. PERNIN ET AL., UNFOLDING THE FUTURE OF THE LONG WAR: MOTIVATIONS, PROSPECTS, AND IMPLICATIONS FOR THE U.S. ARMY 129–132 & 145 (2008).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² See AFGHANISTAN, *supra* note 76. See also MEASURING STABILITY, *supra* note 77.

³⁰³ See *infra* Part II.

³⁰⁴ See generally ACHIEVEMENTS, *supra* note 80 (describing deficiencies in the Rule of Law).

³⁰⁵ See generally *id.* (detailing duration of Rule of Law efforts).

³⁰⁶ SETH G. JONES ET AL., SECURING TYRANTS OR FOSTERING REFORM: U.S. INTERNAL SECURITY ASSISTANCE TO REPRESSIVE AND TRANSITIONING REGIMES 161 (2006), available at http://www.rand.org/pubs/monographs/2006/RAND_MG550.pdf (last visited Sept. 9, 2013).

[I]nternal security forces should be judged by their ability to respond effectively terrorist organizations, insurgents, criminal groups, and other security threats that fall within their area of responsibility. In the interest of long-term sustainability, however, they must also be

balanced Rule of Law effort, coupled with additional counter-terrorism training, security forces will be forced to deal with new, evolving threats by relying on their often outdated training. This lack of current training may have contributed to human rights violations, or waiting to receive U.S. training. Unfortunately, the enemy is not waiting.

VI. Striking the Correct Balance (The Way Ahead)

Geopolitical changes and the evolving threat of Islamic terrorists compel our elected officials to constantly reevaluate the national security interests of this nation. As noted by the USAID, “the increasingly complex threats facing our partners and our own nation urgently require that we [the United States] address the linkages among security, governance, development, and conflict . . .”³⁰⁷ The Government cannot view these developments in isolation; it must consider these developments to strike a balance between our national ideals and international obligations to ensure human rights and the national security threats posed by transnational terrorist organizations.

Two seemingly juxtaposed strategic goals, security and democratic reforms and human rights, confront officials in developing national policy. The adherence to human rights norms requires stability; the law, and efforts to advance it, also requires stability. With proper planning and coordination, these strategic goals can both be met. Ultimately, stable, lawful nations, free from the threat of transnational terrorists, are in the national security interest of the United States. As noted in the U.S. National Security Strategy, the U.S. goal is “to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system.”³⁰⁸

As Senator Richard Lugar, a Republican from Indiana, stated, “The threats associated with terrorism and weapons of mass destruction necessitate American engagement and security cooperation, and provision of military assistance with countries that would otherwise be

judges by their accountability and human rights practices. The goals of effectiveness, accountability, and human rights are interlinked and mutually reinforcing.

³⁰⁷ SECURITY SECTOR REFORM, *supra* note 100.

³⁰⁸ See NAT'L SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 1–3 (2010) (detailing current threats).

subjected to a very different policy approach.”³⁰⁹ However, with a combined Rule of Law and counterterrorism training effort, the United States can improve the ability of host nations to fight terrorist organizations, as well as to prevent human rights abuses.

Security Force Assistance, in a time of global terrorism, will remain a challenge from both a tactical and strategic perspective until the U.S. Government can reach an appropriate balance between national security needs and legal and moral requirements. Ultimately, as noted by Judge James E. Baker, “Rule of Law is the West’s alternative to jihadist terrorism. Law, and respect for law, offers the structure of democracy, the opportunity for individual fulfillment . . . and a process for the impartial administration of justice. Sustained commitment to the Rule of Law in practice and perception will serve as a positive national security tool”³¹⁰

VII. Conclusion

The current restriction on counter-terrorism training, imposed by the Leahy Amendment, is impeding the Nation’s ability to work proactively with our partners to counter emerging threats. Throughout the world, developing nations are confronting threats that far exceed their capabilities. In responding to these threats, the potential for human rights violations will only increase absent some capacity building and counter-terrorism training. In order to meet our current threats and satisfy our national ideals, the U.S. Government should undertake an expanded inter-agency Rule of Law effort to help the security forces of developing nations complete their assigned duties while ensuring the right of their people to be safe. Ultimately, “[L]aw, like homeland security, is an incremental endeavor. It is dependent on sustained action, not rhetoric, and perceptions can be swept aside . . . Law, like this conflict [the war on terrorism], requires sustained sacrifice and sustained support.”³¹¹

³⁰⁹ INTEGRATING 21ST CENTURY DEVELOPMENT, *supra* note 149, at 3.

³¹⁰ BAKER, *supra* note 88, at 309.

³¹¹ *Id.* at 309.