

Judicial Assessment Models: An Ad Hoc Approach of Assessments in Fragile States

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INTRODUCTION

Over the past thirty years, the United States government's foreign policy objectives have increasingly focused on stability and reconstruction. Since September 11th 2001, the primary tools utilized by the U.S. government for this effort have expanded from the previously exclusive domain of civilian agencies into the current state of the military being the lead U.S. agency.¹ This is particularly true in Iraq and Afghanistan, resulting from the deteriorating security situation in those nations. As this paradigm shifted, friction points have arisen between the Department of Defense (DOD) agencies and other U.S. government civilian agencies on how to measure progress and success. The focus of this paper is to discuss some of the assessment models utilized by the military and the various civilian agencies in their assessments of the judicial sector. Illustrative emphasis will be placed on judicial development assessments and operations by these agencies within the Horn of Africa, Iraq, and Afghanistan.

The US government is not treading new ground in assessment frameworks and judicial reform. Ambitious efforts were spearheaded by the U.S. Agency for International Development (USAID), the Ford Foundation, and private donors to reform judicial systems in Africa, Asia, and Latin America were undertaken in the 1970s. At the time, the predominant belief by putative reformers was that the law was central to the development process, and lawyers and judges could serve as social engineers when properly educated about rule of law.² Critics of this movement pointed out, "the most significant reason for the failure of the law and development movement was the naïve belief that the American legal system...could be easily transplanted to developing countries."³ The program was declared a failure by the early 1980s.⁴ A lack of empirical data connecting development and reform, as well as the continued disagreement amongst reformers over priorities and strategy, has led some critics to conclude that the same mistakes seen in the law and development movement

¹ Department of Defense Directive 3000.05, November 28, 2005, Military Support for Stability, Security, Transition, and Reconstruction (SSTR) Operations.

² "Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement" John Merryman, 1977

³ <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf>

⁴ *Legal Imperialism: American Lawyers and Foreign Aid in Latin America.* Madison: University of Wisconsin Press James Gardner, 1980

may be repeated today.⁵ Further criticism included the detrimental pressure to produce measurable results quickly works directly against the slow pace of legal and social reform that is necessary to insure its eventual success.⁶ The echoes of those lessons sound in our current efforts today.

This paper examines judicial assessment tools developed by the World Bank, USAID, and the Bureau for International Narcotics and Law Enforcement Affairs (INL).⁷ When examining the variety of approaches taken by these agencies, the fundamental differences in their organizational philosophies generate striking differences between their various assessment models.

Generally, civilian agencies commonly rely on an academic approach, blending quantitative and qualitative information into individualized written reports, while the DOD's approach consists primarily of simple numbers and metrics. The size of the institution plays a role in this difference, in that small pieces of easily-analyzed data are simpler for use in large-scale operations that generate enormous amounts of data. Although a balanced approach that blends quantitative and qualitative measures is arguably preferable, it is simply not feasible for the DOD. DOD does not possess the available manpower required to perform a coherent analysis of the individualized, report-styled assessments of its civilian counterparts.

THE US DEPARTMENT OF DEFENSE

In 2005, DOD was tasked with providing military support to stability and reconstruction operations. In previous years the occasional task for providing stability operations fell to the special warfare and civil affairs personnel. DODD 3000.05 placed stability and reconstruction squarely within the purview of the entirety of the military - i.e., all branches. While acknowledging that stability operations are best performed by indigenous, foreign, or U.S. civilian professionals, this directive makes it clear that U.S. military forces shall be prepared to perform all tasks necessary to establish or maintain order when civilians cannot.⁸

Such a significant shift in military doctrine has led to a great deal of overlap and unsynchronized work, resulting in redundant and even counter-productive efforts being applied to stability and reconstruction efforts. Reports on the assessment data and analysis of the performance of judicial projects collected by the military is often classified, meaning that even non-tactical information is typically inaccessible to most of their civilian counterparts. This may be due to either the information's security classification, or a lack of experience or ability on the part of the U.S. government civilian agencies to access the appropriate section within the complex structure of the military. Traditionally Civil Affairs units have maintained the most interaction with civilian agencies, due to the nature of the civil affairs mission. However, the relationship and information sharing can generally be described as ad

⁵ "Law, Governance, and the Development of the Market: Practical Problems and Possible Solutions." Patrick McAuslan. In Faundez. 1997 and "Comment on McAuslan's "Law, Governance and the Development of the Market: Practical Problems and Possible Solutions.;" In Faundez. 1997.

⁶ <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf>

⁷ Examples of quantitative in this context include, for example, measuring the number of courthouses and judges. Qualitative data is more subjective and comes most frequently from interviews.

⁸ DODD 3000.05, page 2

hoc in most regions, given the turnover of military personnel, the variety of civilian agency actors, and the lack of a shared, mutually accessible database. Obviously, this leads to gaps, overlap, and potential conflict.

These shortcomings have been identified after many years of lost or wasted information, and several projects are underway to develop a system to capture information from assessments and to provide a standardized format through which regular assessments are conducted and maintained.⁹ However, a standard has not been agreed upon by the U.S. military, and a variety of databases are currently used. For purposes of simplicity, this paper analyzes the database which has been directed for use by U.S. Central Command (CENTCOM), due to their pivotal role in current stability operations. CENTCOM's areas of responsibility include Afghanistan, Iraq, and the Horn of Africa.¹⁰

A large amount of useful information in the field of assessments is collected primarily from Civil Affairs personnel CENTCOM-wide as well as the Provincial Reconstruction Teams in Iraq and Afghanistan. The Civil Affairs teams are composed of active component Army personnel, Army reserve component personnel, and joint personnel.¹¹ These different subdivisions of military units create unique internal cultures, even under the parent organization of the DOD. The active component of Army Civil Affairs falls under the umbrella of the U.S. Army Special Operations Command (USASOC), which has a culture of military elitism. Reservist personnel, who comprise the bulk of the Civil Affairs force, are relegated to the U.S. Army Reserve Command (USARC) and are considered conventional forces. As USARC and USASOC each fall under entirely separate commands, their longstanding cultural clash and natural conflict over proponenty exacerbates an already complicated situation.

This structure explains in part the lack of cohesion in data management. Soldiers and officers, whether from the active component Civil Affairs, the reserve, or even joint personnel from other branches of the military are sent as teams to support operations within CENTCOM. They are divided into a number of different Provincial Reconstruction Teams, and they disperse to conduct civil military operations throughout the theater of operations. There has never been consistency in their assessment formats. Different commands utilize entirely different databases, and annual troop rotations ensure that new units arrive to assume responsibility every year, each bringing their own assessment tools and formats along with them.¹² Subsequently, much information is lost, and the tracking of projects and the assessment of their impact is impossible.

Recently, the development phase has begun of an unclassified assessment database for use in Afghanistan and Iraq has begun. The intent is to provide a common, easy platform by which the military and U.S. government civilian agencies can fuse data. This database, known as the Combined Information Database Network Exchange (CIDNE), is at the heart of an effort known as Civil Information Management (CIM). CIDNE is a web-based tool, originally designed as an event tracking tool in Iraq. It has grown from that time to include input from a variety of sources to include intelligence, psychological operations, civil

⁹ Center for Army Lessons Learned, Handbook 07-34, September 2007, Appendix A.

¹⁰ The area of responsibility include Afghanistan, Bahrain, Djibouti, Egypt, Iran, Iraq, Pakistan, Qatar, Saudi Arabia, Seychelles, Syria, Tajikistan, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen.

¹¹ In this context, joint is meant to describe any combination of Army, Navy, Air Force and Marine personnel

¹² Assuming an assessment model existed. Currently, there is no mandated report format utilized for judicial assessments.

military operations, civil affairs operations, and more. The DOD's organizational philosophy shows through in the strictly quantitative nature of this database. As it stands, it has very limited rule of law assessment capability - however future plans exist to include assessments of judicial case throughput, security of judges, detainee abuses, and courthouse metrics.

An effort to facilitate communication between the military and the U.S. government civilian agencies, as well as within the various levels within the military, from the tactical to the strategic level is underway in the form of CIM. CIM is a new process for collecting, fusing, analyzing, and disseminating information. While the concept of CIM is accepted nearly universally, disagreements over shortcomings of the specific collection systems result in the continued loss or degradation of information with every annual rotation of the military. For example, CENTCOM directs that all information be placed into CIDNE, while other units such as the 95th Civil Affairs Brigade utilize a separate database they have named DCGS-A. Currently CIDNE and DCGS-A have no capacity for interfacing, and no overall effort to absorb the many various excel spreadsheets from the tactical level units is underway.

Therefore, the military must continue to rely upon ad hoc cooperation with U.S. government civilian agencies in the sharing information, and continues to pay a price in the loss of data. Once an unclassified database such as CIDNE or its equivalent is fully developed and functional, it will allow for greater synchronization of reconstruction and development projects by DOD and other U.S. civilian governmental agencies.

THE U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT

USAID frequently works in conjunction with the US military on stabilization and reconstruction efforts. It is an independent federal agency that receives its overall foreign policy guidance from the Secretary of State. USAID supports long-term objectives particularly in democracy, conflict prevention, and humanitarian assistance. Their guidance for rule of law country analysis¹³ was developed to provide a conceptual framework for analyzing rule of law, as well as a guideline for conducting the narrower scope of justice sector assessments. Guides specifically designed for justice sector assessments are currently under development and should be published soon.¹⁴ The following analysis below covers the published Guide to Rule of Law Analysis.

Naturally, the current guide is focused on promoting rule of law for democratic governance. The priorities of USAID in this sector are listed as establishing a democratic legal authority, guaranteeing rights and a democratic process, and the effective application of the justice sector in society. This guide also addresses transitional justice for post-conflict or post-authoritarian situations. Transitional justice is included as an important component of the long-term reestablishment of rule of law, and specifically addresses both truth and reconciliation commissions, and national and international tribunals. This is an important and often overlooked aspect of rule of law, and its inclusion is laudable.

¹³ Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework; A Guide for USAID Democracy and Governance Officers, September 2008.

¹⁴ USAID, Guide to Court Reform and the Role of Court Personnel; USAID, Improving Access to Justice Through Non-State Justice Institutions, Issues to Consider; USAID Enforcement of Judgments: a Toolkit for Assessment and Programming.

The USAID guide also defines five key elements of the rule of law: order and security, legitimacy, checks and balances, promoting fairness, and effective application.¹⁵ The guide makes clear that if the judiciary is not operating effectively, rule of law will be unlikely to prevail. However, it points out that even if the judicial system as a whole does not function, it is unlikely that the judiciary is the sole source of dysfunction. Therefore, assessments and programs should be designed for the broader picture.

The judicial portion of USAID's assessment tool consists of two steps. First is an analysis of a State's overall framework of laws, in order to determine the degree of commitment to the rule of law. Second is an analysis of the justice sector institutions and actors, both public and private. The assessment itself is completed in a written report style with an emphasis on program recommendations to the agency. A comprehensive and subjective look at the assessed judicial factors is conducted by experts in the judicial field. The reports are maintained within the agency, some of which are available on the USAID website.¹⁶ While there are obvious benefits to the publication of these reports publicly, they are difficult to locate on the website, frustrating their ready use. Another disadvantage of this approach is that the information cannot be quantified into a database for use by a larger organization such as DOD.

A positive benefit of this approach, however, is that long-term assessments of USAID projects and their effects are conducted over time within a specified section within the agency. Accountability of the agency's activities are readily obtained in both the organizational memory, and can prevent repetition and overlap. This approach is one that functions well for an agency specializing in this area of reconstruction and stabilization.

THE BUREAU FOR INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS

The INL is a bureau within the Department of State which advises the President and various agencies within the US government on the development of policies and programs designed to combat international narcotics and crime. This agency assists and promotes the modernization of foreign criminal justice systems.¹⁷

This organization has taken a uniquely hybrid approach to judicial assessments with the development of their Criminal Justice Sector Assessment Rating Tool (CJSART).¹⁸ The assessment tool provides an estimate of a nation's ability to become a peaceful, stable and prosperous state, based on the effectiveness of a State's criminal justice sector. CJSART was developed in early 2004 with input from members of the INL, Department of Justice, and the Department of Homeland Security. This tool naturally places a heavy emphasis on criminal justice, with one of five sections entirely devoted to judicial institutions.¹⁹ This portion of the assessment model provides a focus on judges, the public prosecution service, as well as the

¹⁵ Order and security, legitimacy, checks and balances, fairness, and effective application.

¹⁶ www.usaid.gov

¹⁷ <http://www.state.gov/p/inl/>

¹⁸ Criminal Justice Sector Assessment Rating Tool; A U.S. Government Interagency Framework to Assess the Capacity of International Criminal Justice Systems, January 2008.

¹⁹ The other sectors examined are the Criminal Codes, Law Enforcement, Border Security, Correction Systems, and International Cooperation.

public and private defense bar. The methodology calls for a team of functional experts to begin with a comprehensive desk study, focusing on the provided context questions included in each chapter.

The in-country assessment calls for interviews with locals and facility visits, anticipating interviews of over one hundred officials. Questions that have a fundamental U.S. governmental priority are weighted more heavily than others. Although it may appear to be strictly quantitative by its nature as yes/no questions are the basis of the model, the process by which information is obtained and then quantified is done with a fairly subjective analytical process. Subject matter experts conduct interviews, glean information from locals and other subject matter experts in a qualitative approach, later condensing the information into quantitative yes/no questions. The information collected is subsequently analyzed by subject matter experts outside of the assessed country in order to provide more objectivity to the analysis. These objective experts then assign an overall performance rating. The performance rating of a specific capability of the country's criminal justice system is assigned on a scale from one to five.²⁰ A "one" rating refers to a judicial system that is essentially nonfunctional, or else unverifiable in its claim of functionality. A "five" rating refers to an "enviable" level of achievement, based on compelling and convincing evidence.²¹

This model seeks to provide policy makers with the ability to design multi-faceted programs to address specifically identified weaknesses in a nation's rule of law framework. By maintaining a consistent system of assessments, the efficacy of the various projects may be analyzed over time. The drawback of this approach is the loss of some of the context of the data when it is quantified, but this potential flaw is mitigated by the overall subjective approach with which the data is obtained. Further, this model can be useful to larger organizations by providing a consistent template with which can be replicated and tracked. In an organization that may potentially have a consistent turnover of personnel, this model would be ideal for maintaining long-term consistency and provide greater ease in reading results over time. Although INL is a small organization, this model appears to be of use to larger organizations for these very reasons.

The INL is currently providing assistance in Sudan to help develop a secure environment for upcoming elections. This assistance includes the placement of a contingent of judicial officers within the UN Mission to Sudan, to facilitate development of the criminal justice sector.²² This fragile state will provide an ideal opportunity to determine the efficacy of this model of justice sector assessments over time.

THE WORLD BANK

Since 1994, the World Bank has engaged in judicial sector assessments in its effort to further its mission to provide a source of financial and technical assistance to developing nations. Its goal relevant to the topic of this paper is the promotion of good governance.²³

²⁰ If a country meets between 0% to 20% of a certain performance capability, it is ranked as a Level 1; 21%-40% is Level 2; 41%-60% is Level 3; 61%-80% is Level 4, and 81%-100% is Level 5.

²¹ CJSART pages 7-8

²² <http://merln.ndu.edu/archivepdf/afghanistan/State/98167.pdf>

²³ <http://web.worldbank.org>

The World Bank has developed a Justice Sector Assessment Handbook,²⁴ providing a pragmatic approach in an unofficial guidebook. This guidebook is a well-developed and comprehensive work in comparison to the other assessment models described above. It points out that the assessment of justice sectors is an emerging field and that methodologies are still in the developmental stage. This guide explains its subjective approach to judicial sector assessments as a response to the absence of a pre-existing checklist of rigorous standards developed for this purpose. It does not purport to provide a formal template for assessment, rather it is intended to serve merely as a model for the analysis of qualitative descriptions. It is not a guide which is mandated for use by the Bank.

Before examining the model more closely, it is important to note that although the Bank's operations are guided in response to its assessments based on the Bank's external standards, it would be well advised to be guided in areas identified as problematic by the citizens of a particular country. This is an important concept that is easily overlooked with donor pressure, a lack of cultural understanding, and time constraints.

Previously, the Bank conducted assessments on an ad hoc basis without any published standard assessment model. As the organization gained experience conducting assessments, it became clear that a framework for good practice was necessary in order to identify lessons learned and ease the burden on future assessors. The model developed by the Bank is blend of several different models with an eye towards how the judicial sector promotes or detracts from social stability and economic prosperity. An interesting aspect of this model is its focus on social research and it discusses openly the necessity of developing a methodology that is occasionally at cross-purposes. Clearly stated, “[t]he values commonly pursued in any justice reform program - access, efficiency, fair and high quality judgments - are themselves often in conflict and therefore unlikely to be advanced equally over the short to medium run. Over the longer run, perhaps all good things come together, but reform programs do not work in that timeframe.”²⁵

The methodology recommended by this handbook varies depending on the size and scope of the assessment. Both quantitative and qualitative sources are recommended for use as no single one will provide all the information needed, and in combination they may be used to corroborate one another. The author points out that an increasing emphasis is placed on quantitative data, as the less structured “soft” sources of information usually generate more varied information and insights. The collection and interpretation of quantitative data benefit from these insights. Flaws in the collection of quantitative data are discussed as well.

In conducting a survey, it is always better to collect considerable background from interviews and documents on system operations and what informants commonly identify as problems before designing the survey itself. Standardized questionnaires are useful for cross-national comparisons, but they are far less helpful in understanding what is occurring in the system under study. Hard data also require careful treatment to ensure validity—that they measure what they purport to measure—and reliability—that they are always measuring the same thing. Even when statistics are available from the courts or other sector agencies, it is important to determine how these

²⁴ Justice Sector Assessments, A Handbook. Dory Reiling, Linn Hammergren, & Adrian di Giovanni (undated).

²⁵ Reiling page 2.

data are generated, what the categories mean, and what kinds of checks are made on data entry.²⁶

A blend of qualitative sources can include documentary sources, legal documents, informant interviews, direct observation, and quantitative sources such as surveys, aggregate statistics, case file analysis may cover a good base of information. Evaluating the quality of judicial decisions is also analyzed is a highly qualitative source, but an important one. In order to determine the quality of the rationales behind decisions, the thoroughness of factual summaries and the accuracy and consistency of legal analysis are important elements to examine. There are some obvious pit-falls associated with the analysis of this part of the judicial sector, and the advice of this guidebook is to allow local counterparts to analyze the decisions according to what they determine to be important. This is an unusual but excellent recommendation, and is likely to give the host nation greater ownership in future judicial reform. Other good potential sources of information listed in the guide include focus and study groups, incentive analysis, workshops, conferences, and seminars (preliminary reporting feedback and collective interactions).

The handbook points out common weaknesses in assessments which should be avoided. A tendency to focus strictly on the state sector, i.e., the courts without looking at how traditional or informal non-state institutions complement or replace state-run courts is a frequent mistake. It is difficult to assess traditional justice, but it is essential in completing the picture of how societies resolve conflict.

In 2007, the Bank undertook an ambitious effort to assess the Kenya judiciary. The targeted areas were the judiciary, alternate dispute resolution mechanisms, and levels of corruption. The report was completed and submitted to the Kenyan government for review. However, the Kenyan government was not in agreement with the findings, and as a result the report was never published. This is a prime example of the price of diplomacy versus candid reporting, and the value of buy-in by the host nation. This isn't to say that tact and diplomacy are to be ignored, but assessors are in a position of balancing diplomacy and candid reporting. The Bank clearly has a duty to its stakeholders to provide complete and accurate assessments of the areas of interest. The refusal of a candid and honest assessment can be just as valuable as the information provided in the assessment. If an assessed State is unwilling to accept the findings, that State is highly unlikely to engage in the work necessary to effect change. The cost of an assessment which is shelved is minimal compared to the price of conducting an operation which is almost certainly doomed to failure. Buy-in on the part of the assessed nation is essential in order to have any hope for useful stability operations or humanitarian assistance. This seems obvious, but it is not a fact necessarily taken into account in the midst of an international rush to 'help.'

SUMMARY

Echoes of the US government's chaotic, ad hoc approach toward stability operations in the 1970s are evident again today. No mechanism currently exists to track the myriad of efforts undertaken by the US government, international governmental organizations, and private groups. The full effects of this approach have yet to be fully understood, and as complex as

²⁶ Reiling, pg 33.

the situations are, they may never be. While the debate about proponency and who has the responsibility of data management tools is outside of the scope of this paper, it is clear that a large-scale reform of the U.S. government's stability operation efforts is necessary to capture the lessons learned and to chart the progress or regression resulting from involvement in the judiciary.

It is unlikely that positive, stable progress within a fragile nation can occur without a long-term outlook towards judicial reform efforts, as well as some type of collective means to capture the lessons learned from judicial assessments. A "fast food" approach to judicial reform is doomed at best to temporarily disrupt an already fragile State. At worst it could contribute to further instability when donor fatigue inevitably results in dropping of projects over time, and the host nation is left holding the bag.

If the U.S. involves itself without invitation in the affairs of foreign nations, it incurs a responsibility to those States to follow through. If we bite off more than we can chew, it is negligent and reckless to cease our efforts without ensuring stability prior to our departure. Appropriate planning, assessment, host nation buy-in, and follow through on the part of the intervening agencies are imperative.

ACRONYMS

CIM	Civil Information Management
CIDNE	Combined Information Data Network Exchange
CJSART	Criminal Justice Sector Assessment Rating Tool
DOD	Department of Defense
DCGS-A	Distributed Common Ground System - Army
INL	The Bureau for International Narcotics and Law Enforcement Affairs
PRT	Provincial Reconstruction Team
USAID	United States Agency for International Development
USACAPOC	United States Army Civil Affairs and Psychological Operations Command
USARC	United States Army Reserve Command
USASOC	United States Army Special Operations Command
USCENTCOM	United States Central Command
USG	United States Government
USAJFKSWCS	U.S. Army John F. Kennedy Special Warfare Center & Schools