



Frontier Justice

A New Approach for
U.S. Rule of Law Assistance

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EXECUTIVE SUMMARY

In establishing the rule of law, the first five centuries are always the hardest.

--Gordon Brown

United States rule of law assistance is failing to help recipient governments provide good governance, security and justice. This is particularly true in three categories of states in crisis: (1) states that are experiencing extreme levels of organized criminal violence; (2) states where international Islamist terrorism is attempting to impose extreme versions of Shariah law; and (3) states where corrupt authoritarian governments have morphed into kleptocracies. Though conditions have changed in these countries, U.S. rule of law assistance continues to employ a fragmented and technocratic approach to improving foreign criminal justice systems. Dedicated officials, civil society leaders, and concerned citizens in these countries want to establish the rule of law. In many cases, our current assistance does not help them change the prevailing paradigm.

What new approaches for U.S. rule of law assistance are required to provide them with the support needed to change the system?

In countries threatened by criminal violence, terrorism, and corrupt authoritarian rule, the study found that those working to promote a democratic political process believed rule of law was the essential element in providing good governance, security, and justice. They pointed out that law enforcement authorities and the criminal justice system were primary targets for those seeking to impose despotic regimes. They looked to the United States as a natural ally sharing common values and providing a model of what they can achieve.

These individuals confirmed the critical importance of U.S. assistance in preventing further deterioration in the local conditions and to providing any hope that the situation might be improved. In all cases, these activists lamented the fact that U.S. rule of law assistance programs were often not strategically focused, culturally relevant, or adequately resourced. They made clear that more—not less—U.S. help is required to move forward. Indeed, they called for increased use of U.S. political and diplomatic leverage, closer consultations on program selection and development, and more intelligent targeting of financial resources.

Whether aimed at establishing justice, enabling economic development, or promoting foreign investment, U.S. rule of law assistance has been a tool of U.S. foreign and national security policy since the end of World War II. The Obama Administration, however, subordinated rule of law programming to assistance for promoting democracy, protecting human rights, and enabling good governance. There also was a sharp drop in the financial resources devoted to aiding the justice sector. Outside of large programs in Iraq and Afghanistan, funding for aid to courts and corrections fell from several billion dollars to \$1.9 billion in 2013 to less than \$500 million in 2016. At the same time, rule of law assistance became ‘securitized’ with assistance increasingly focused on convicting and incarcerating drug traffickers and terrorists.

The study identified other conditions and practices that undermined the effectiveness of U.S. rule of law programming. From the Washington perspective there is no readily knowable number for the total amount the United States spends annually on rule of law assistance, nor is there a common policy, doctrine, strategy, or coordinating mechanism for this aid. Funding is provided from a number of legislative funding sources, allocated to various government departments, and then spread among numerous implementing partners, primarily non-governmental organizations (NGOs) and commercial contractors. Assistance programs militarize civilian security forces and train prosecutors to charge terrorism suspects and jailors to prevent radicalization. Government agencies concerned with the rule of law programming utilize staff with legal and law enforcement backgrounds largely as advisors and rely upon generic program officers to handle program design, funding and program management. As a result, establishing the rule of law is less a tool than an end state that hopefully will result from programs to ensure free elections, fight drug trafficking, and counter violent extremism.

In the field, the study found the administration of U.S. rule of law assistance is neither strategically focused nor designed to produce sustainable change. U.S. programs fail to emphasize that state building efforts are political initiatives and not technical exercises. Program funding is not concentrated to achieve objectives and mobilize sufficient local support. In areas where criminals, jihadists, and insurgents operate without respect for national borders, U.S.

assistance does not have a regional perspective. Project implementation is also affected by a lack of U.S. government staff with legal and law enforcement backgrounds on the ground and by risk adverse State Department personnel policies that restrict the movement of U.S. officials making it difficult for them to meet with counterparts and visit project sites to access progress.

A New Policy Paradigm

To effectively promote the rule of law in crisis states, the United States requires a new paradigm that would implement the portion of the President’s 2017 National Security Strategy that deals with dismantling transnational organized crime. The Strategy notes that these organizations threaten U.S. national security by undermining democratic institutions in partner states, enabling terrorist organizations, and cooperating with corrupt authoritarian regimes. The new paradigm would highlight the critical role that the justice sector plays in countering all forms of organized criminal activity. It would highlight the fact that the justice sector is an integral part of the democratic process, essential for the protection of human rights and the basis for good governance. It would also acknowledge that the justice sector is among the primary targets of criminal organizations and thus, requires political, financial, and technical support.

The new paradigm would acknowledge that international organized crime, Islamist terrorism, and kleptocracy share common characteristics and cooperate to subvert governments and gain political power. They convert governing institutions into Mafia-like structures to divert public resources to benefit the ruling elite. They exploit illicit revenue streams from trafficking in narcotics, weapons, and migrants, the sale of artifacts, and the expropriation of national resources for their own purposes. They mask their activities with nationalist, populist, or religious rhetoric to recruit supporters and dissuade opponents. They transform the judicial system—police, courts, and prisons—into instruments of repression that protect and ensure continued control by the ruling elite.

The new paradigm for U.S. rule of law assistance would abandon last-century definitions for terms like organized crime, terrorism, corruption, and authoritarian rule, replacing them with understandings that fit the realities of the Twenty-First Century. International organized crime is no longer focused on racketeering in U.S. cities but on creating global trafficking networks that earn billions of dollars and provide revenue streams that support political corruption and terrorist groups. Islamist terrorism is not focused on taking over existing governments or establishing a more just society but on seizing territory and establishing a totalitarian theocracy based on extreme interpretations of Shariah law. Corruption is now understood as the operating system of authoritarian regimes, not the isolated work of “a few bad apples” or a “virus” attacking otherwise healthy institutions.

Under the new paradigm, establishing the rule of law would be viewed as a political process. It would involve a normative system of accepted principles and institutions under which the exercise of power is regulated and constrained, and conflicts are resolved by non-violent means.¹ It would focus on governance and the use of political and diplomatic power to reform and empower judicial sector institutions. It would enhance traditional justice mechanisms

¹ Pilar Domingo, “Rule of law, Politics and Development: the Politics of Rule of Law Reform,” Overseas Development Institute, London, March 2016, pp. 4-5, <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10420.pdf>.

in areas where they are the primary instruments for peaceful dispute resolution. It would establish political and programmatic priorities, and marshal resources to achieve defined goals.

The new paradigm would prioritize U.S. rule of law assistance as a means of dealing with threats posed to U.S. national security interests by organized crime, terrorism, and corrupt authoritarianism. This approach would utilize a comprehensive, whole-of-government, and whole-of-society approach to understanding challenges and developing solutions. It would acknowledge that all forms of development assistance require engagement in the realms of policy, power, and politics. It would emphasize promoting social and institutional reforms over providing equipment and training to judicial officials and security forces. The long-term goal would be to realign forces within society to create a culture of lawfulness.

Implementing the new approach would start with creating a common policy, doctrine, and strategy for rule of law assistance. It would also require establishing a high-level, central coordinating mechanism with sufficient authority to marshal all available resources and direct inter-agency program development. Implementing the new paradigm would necessitate empowering the relevant U.S. government agencies to develop new policy options and design programs. It would also involve recruiting a cadre of government personnel with appropriate expertise and experience. This would enable U.S. government agencies to effectively oversee—if not directly implement—rule of law assistance programs.

The new approach for implementing programs would take a problem solving approach and avoid imposing U.S. models or “international best practice.” Programs would focus on what works indigenously and include partner country input in program planning. Implementation would be viewed as a political rather than a technocratic process that would marshal support from political elites and influential groups. Increased attention would be given to supporting traditional justice and security mechanisms and determining ways that these entities could be linked to the formal justice system.

First Steps

Implementing the new rule of law policy paradigm would require the following steps:

- **A high-level rule of law assistance coordinating mechanism.** Implementing this approach would require a National Security Presidential Memorandum that would establish a National Security Council-directed rule of law assistance policy process. The process would be led by an NSC-chaired, Policy Coordinating Committee (PCC) responsible for policy formulation, program and project selection, and funding allocation. The PCC would emphasize the essentially civilian nature of rule of law institutions but recognize the importance of Defense Department and U.S. military involvement, especially in areas such as border control and coordination of cross-border security initiatives. The PCC would develop results-based systems to evaluate rule of law programs. It would formulate a strategy for engaging with Congress and soliciting its support for this initiative.
- **A comprehensive policy, doctrine, and strategy for U.S. rule of law assistance.** Following precepts outlined in the presidential directive, the PCC would prepare a U.S. rule of law assistance policy, doctrine, and strategy with defined goals and objectives.

The new policy would recognize the political nature of development assistance and focus on the importance of utilizing U.S. political and diplomatic leverage to advance the establishment of rule of law in countries receiving U.S. aid. The new policy would focus on institutional development and capacity building of supervising institutions and carry this focus over into training and equipping police, judicial, and corrections personnel where necessary. It would focus on governance and on reforming and empowering judicial sector institutions in countries that are vital to U.S. national security. It would include empowering traditional justice systems in countries where such systems are relied upon by local populations for non-violent dispute resolutions. The new policy would seek to build on locally-inspired, whole-of-society solutions to provide security and justice in recipient countries.

- **Recruitment of a cadre of experienced rule of law professionals to supervise and implement U.S. assistance programs.** Implementing the new paradigm would require recruiting a cadre of senior government personnel with an understanding of the overall political, economic, and social dynamics in target countries and how legal, law enforcement, and corrections expertise can be translated into successful rule of law programs. This would ensure that programs are conceived and managed in the context of a comprehensive overview of goals and objectives in a given country and supported by skills tailored to these proposed reforms. It would also reduce dependence upon NGOs and commercial contractors for program implementation and evaluation.
- **Exercise ambassadorial leadership.** U.S. ambassadors would use their considerable authority to ensure better program coordination in the rule of law area both within their missions and with like-minded donor countries that administer similar programs. Ambassadors would take the lead in foreign donor coordination to eliminate program duplication among the donor community and with international organizations like the World Bank, regional development banks, United Nations agencies, and the European Union. The outcome of such coordination would make programming more strategic in that it would focus resources on the host country's most critical rule of law needs.

PROJECT DESCRIPTION

The project was funded by a grant from the Smith Richardson Foundation whose mission is to address serious public policy challenges facing the United States. It focused on three categories of states in crisis that are both important to U.S. national security interests and recipients of U.S. rule of law assistance: the northern tier states of Central America—Guatemala, El Salvador, and Honduras—that are experiencing extreme levels of organized criminal violence; Pakistan, Tunisia, and Mali, where international Islamist terrorists are attempting to impose extreme versions of Shariah law; and Azerbaijan and Venezuela, where corrupt, authoritarian governments have morphed into kleptocracies. The project looked at these states from a Washington policy and funding perspective and, where possible, visited them to meet with government officials, political activists, researchers, civil society representatives, and U.S. Embassy officials.

The project was led by two veteran rule-of-law practitioners: Robert M. Perito, former Director of the Center of Innovation for Security Sector Governance at the United States Institute of Peace, and Donald J. Planty, former United States Ambassador to Guatemala. The project was assisted by a Senior Advisory Council of distinguished experts with broad experience in governance, national security, and promoting the rule of law. Members of the Senior Advisory Council included:

Paul R. Williams, Chairman, Rebecca Grazier Professor of Law and International Relations at the Washington College of Law at the American University and Co-Founder of the Public International Law and Policy Group;

Rosa Brooks, Associate Dean of Graduate Programs and Professor of Law, Georgetown University Law School;

James Dubik, Director of the Teaching Center for Security Studies, Georgetown University, Senior Fellow, Institute for the Study of War, and Lt. General U.S. Army (Retired);

Kimberly Field, Area Director for Countering Violent Extremism, Creative Associates and former Deputy Assistant Secretary of State, Bureau of Conflict and Stabilization Operations and Brigadier General, U.S. Army (Retired);

Michael Meese, Chief Operating Officer, American Armed Forces Mutual Aid Association and Brigadier General, U.S. Army (Retired);

Nicholas Rostow, Charles Evans Hughes Visiting Chair of Government and Jurisprudence at Colgate University;

Michael Shifter, President of the Inter-American Dialogue;

Michael Skol, Principal at Skol and Serna and former Deputy Assistant Secretary of State for Western Hemisphere Affairs and U.S. Ambassador to Venezuela; and,

Alexander Watson, Managing Director of Hills & Company and former Assistant Secretary of State for Western Hemisphere Affairs and U.S. Ambassador to Peru.

The study's findings and conclusions were vetted by an Experts Roundtable sponsored by the Public International Law and Policy Group on February 22, 2018. The meeting was attended by over 40 rule of law experts from U.S. government agencies, international organizations, law firms, think tanks and universities and took place in the conference facilities of Orrick, Herrington and Sutcliffe, LLP in Washington, DC.

A summary version of this document is also available on the Public International Law and Policy Group's website: <https://www.pilpg.org/frontier-justice-rule-of-law-summary-report>.

IMPORTANCE OF U.S. RULE OF LAW ASSISTANCE

Laws, law making, and law enforcement do not exist in a vacuum. Rule of law develops within a complex, interdependent system of security and justice. Absence of rule of law is not merely a legal problem; it is a problem of governance that perpetuates insecurity. To be effective, rule of law development must be embedded in a framework of democracy and open and effective governance. Otherwise, it fails to address fundamental problems of legitimacy and enforceability and risks being irrelevant and ultimately unsustainable. When rule of law is effective, the result is a free and fair democratic political process and effective governance providing basic services including security and justice.

The World Justice Project (WJP) offers a working definition of the rule of law based upon four universal principles: (1) accountability, where laws apply equally to government and private actors; (2) justice, where laws protect personal security, property, and human rights; (3) transparency, where laws are formulated and enforced through an open and commonly accepted process; and (4) accessibility, where impartial and competent authorities, reflecting the composition and values of the communities they serve, provide peaceful dispute resolution.²

The WJP definition has guided this study along with the understanding that implementing rule of law involves a democratic political process and good governance. Rule of law may be administered through a broad collection of institutions, ranging from formal government ministries, security forces, judicial institutions, and corrections facilities, to informal or other traditional mechanisms for peaceful dispute resolution and maintaining social stability.

Historically, the United States has viewed promoting rule of law abroad as a critical component of its foreign and national security policy. The critical nature of this component was confirmed on July 24, 2017, when the Center for Strategic and International Studies (CSIS) issued the report of a congressionally-led, bipartisan task force on “Reforming and Reorganizing U.S. Foreign Assistance: Increased Efficiency and Effectiveness.”³ The taskforce was led by Senators Jeanne Shaheen and Todd Young and was composed of representatives from government agencies, research institutions, and academia. The report acknowledged that U.S. foreign assistance needed reform, but that foreign assistance was vital in dealing with challenges that were beyond the capacity of developing countries and fragile states. The report stated that fragile and failing states remain a source of instability with the potential to export transnational threats to the United States. These countries require U.S. funding, training, and technical assistance to deal with political dysfunction, terrorism, transnational crime, and establishing the rule of law.

The importance of implementing the rule of law abroad was also noted in the President’s 2017 National Security Strategy that called for devoting increased resources to dismantling international criminal organizations and their subsidiary networks. The Strategy noted that these

² What is the Rule of Law? “Four Universal Principles,” World Justice Project, <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

³ Conor Savoy and Erol Yayboke, “Reforming and Reorganizing U.S. Foreign Assistance: Increased Efficiency and Effectiveness,” Center for Strategic and International Studies, Washington, D.C. July 2017. https://csis-prod.s3.amazonaws.com/s3fs-public/publication/170718_Runde_ReformReorgUSDevelopment_Web.pdf?qH7jDPtbfu2ts1IpJkevg.q18FpoNhXU.

organizations weaken our allies and partner states by corrupting democratic institutions. They also enable corrupt authoritarian regimes and other national security threats such as terrorist organizations. The first line of defense against the organized crime in all countries is the criminal justice system. Strengthening those systems in partner countries is vital to U.S. national security interests.⁴

In fragile and failing states that are threatened by criminal violence, terrorism, and corrupt authoritarian rule, the project team found dedicated officials and selfless activists working to promote democratic political change. These individuals argued that the rule of law was the essential element in providing good governance, security, and justice. They also pointed out that law enforcement authorities and the criminal justice system were primary targets for those seeking to impose despotic regimes. They looked to the United States as a natural ally that shared common values and could provide a model of what they could achieve.

In Guatemala, the head of a leading think tank emphasized that U.S. assistance was critical to making progress on rule of law reform but that U.S. programs were too limited in their reach and not strategic in scope. Interlocutors in Tunisia sounded a similar note, stating that the U.S. was overly concerned with security and insufficiently engaged in promoting and strengthening democracy. The United States was not using its considerable political leverage, and therefore, its programming did not have a strategic impact. The United States needed to increase political pressure on the Tunisian government to complete rule of law reforms. In Azerbaijan, political opposition leaders said the United States abandoned its efforts to improve the rule of law and had accepted the government's kleptocratic nature. The United States no longer urged the regime to return to democratic norms by permitting free elections and an independent judicial system. There can be no rule of law in Azerbaijan without the restoration of democratic freedoms.

Individuals interviewed in all three categories of states confirmed the critical importance of U.S. rule of law assistance in preventing further deterioration of local conditions and in providing hope that the situation might be improved. In all cases, these activists lamented the fact that U.S. rule of law assistance programs often were not strategically focused, culturally relevant, or adequately resourced. They made clear that more—not less—U.S. help is required to hold the current ground and to move forward. They called for increased use of U.S. political and diplomatic leverage, closer consultations on program selection and development, and more intelligent targeting of financial resources. These appeals from rule of law advocates indicate the continued need for U.S. rule of law assistance as the core of our overall support for democracy, good governance, and the respect for human rights. These practitioners believe that rule of law is the critical element in meeting the needs of their societies for security and justice.

⁴ Donald J. Trump, *National Security Strategy of the United States*, (Washington, D.C., The White House, December 18, 2017), p. 11. <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

A HISTORY OF U.S. RULE OF LAW ASSISTANCE

Rule of law has been a subject of U.S. foreign policy and development assistance since the end of World War II. In the aftermath of that conflict, there have been a series of distinct waves of effort to build viable judicial systems in countries considered vital to U.S. national security interests. The first of these waves, from 1945 to the mid-1960s, was built on Modernization Theory, the idea that economic development and creating a modern state required building centralized bureaucracies. At that time, support to judicial systems played a secondary role. In the mid-1960s, however, U.S. academics made the argument that legal education and judicial reform were the missing pieces in Modernization Theory and that true modernization required the rule of law to succeed. The subsequent “Law and Development” movement emphasized educating foreign lawyers and judges in U.S. universities and transplanting models of Western judiciaries into developing countries. The belief was that rule of law was a technocratic process that would proceed on its own once the benefits were made clear to recipient societies.⁵

This emphasis on transplanting U.S. legal institutions and legal education continued, with diminishing results, until a third wave began in the 1980s. Often called the “Administration of Justice” movement, this effort was precipitated by civil wars and human rights abuses in Latin America and involved a massive resurgence in rule of law assistance. Programs in this phase continued to focus on formal state institutions. Over time this effort lost momentum as emerging regimes in Latin America proved resistant to change.⁶ A decade later, in the aftermath of the Cold War, a fourth surge in rule of law assistance sought to support the transition of communist countries to democratic rule. Under the rubric of “Rule of Law Reform,” the size and scope of U.S. rule of law assistance grew dramatically as more government agencies and private voluntary organizations became involved. Assistance was motivated by the belief that the rule of law would facilitate transitions to market economies by increasing predictability and efficiency and by encouraging free elections and respect for political and civil rights. Given the magnitude of the effort, the results were less than satisfactory.⁷

The War on Terrorism’s Impact on Rule of Law Assistance

The terrorist attacks of September 11, 2001, and the subsequent U.S. interventions in Iraq and Afghanistan launched a fifth wave of U.S. rule of law assistance related to stability operations. This meant the securitization of rule of law support in conflict environments.⁸ After initially opposing nation building, the George W. Bush Administration threw its full support behind efforts to rebuild the police forces and justice sectors of Iraq and Afghanistan as part of a

⁵ David M. Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future, Univ. of Wisconsin, June 2003, <http://law.wisc.edu/gls/RuleofLawinDevelopmentAssistance.pdf><http://law.wisc.edu/gls/RuleofLawinDevelopmentAssistance.pdf>

⁶ Vivienne O’Connor, “Understanding the International Rule of Law Community, its History, and its Practice,” (August 17, 2015, U.S. Institute of Peace, International Network to Promote the Rule of Law, pp. 18-22. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665672.

⁷ Thomas Carothers, “Rule of Law Temptations,” *Fletcher Forum of World Affairs*, Vol. 33:1, Winter/Spring, 2009, p. 49, <http://www.fletcherforum.org/archives/2016/9/28/331-winterspring-2009>.

⁸ Pilar Domingo, “Rule of Law, Politics and Development: The Politics of Rule of Law Reform,” Overseas Development Institute, London, March 2016, p.7, https://www.researchgate.net/publication/312627044_Rule_of_law_politics_and_development.

counter-insurgency strategy. National Security Presidential Directive 44 entitled “Management of Interagency Efforts Concerning Reconstruction and Stabilization” stated that the United States should “promote peace, security, development, democratic practices, market economies and rule of law.”⁹ Department of Defense (DOD) Directive 3000.05 elevated stability operations to “a core military mission,” equivalent to war fighting and committed DOD to assist other agencies, foreign governments, and international organizations to “strengthen governance and the rule of law.”¹⁰

Implementing these directives in Iraq involved a massive surge of resources for rule of law assistance that was ostensibly designed and led by civilian agencies but largely delivered by the DOD and the U.S. military. This assistance spread over a number of years and resulted in: rebuilding interior and justice ministries; training and equipping civilian security forces (400,000 police in Iraq); constructing judicial infrastructure; training judges, prosecutors, and court administrators; and the development of a national prison system.¹¹

Not surprisingly, the institutions that emerged from this herculean effort were military rather than civilian in character. Uniformed personnel directed and staffed these ministries. Police forces received weapons, body armor, and basic military training. U.S. and European police advisors were involved, but their numbers were limited, as was their ability to influence the character of training. Civilian advisors argued that police should be trained in law enforcement and community relations. Their military counterparts agreed, but only after the police had helped to fight and win the war. Attracted by lucrative DOD contracts, U.S. private sector firms added rule of law programs to their portfolios which expanded the variety of civilian participants in the field. U.S. justice sector assistance focused on reforming state institutions based on U.S. models.¹²

In Afghanistan, rule of law programs were an integral part of U.S. counter insurgency strategy, with a declared policy of establishing fair dispute resolution mechanisms to eliminate a perceived justice vacuum that the Taliban had exploited. However, U.S. policy makers did not realize the complex mixture of justice mechanisms already in place in Afghanistan. The Taliban operated a parallel legal system to the official Afghan court system, acknowledged by Afghans to be fair and free of bribery. Taliban courts provided predictable, legitimate, and accessible dispute resolution in contrast to the formal legal system that was seen as distant, corrupt, and undependable. The official justice system and Taliban justice competed with a third alternative: traditional tribal justice systems that had been degraded but were still utilized in many parts of the country. U.S. rule of law programs in Afghanistan failed because they focused on filling a

⁹ The White House, National Security Presidential Directive -44, Management of Interagency Efforts Concerning Reconstruction and Stabilization,” December 7, 2005, p. 2, <https://fas.org/irp/offdocs/nspd/nspd-44.pdf>.

¹⁰ Department of Defense, “Instruction, Number 3000.05 Stability Operations,” September 16, 2009, p.3 <http://www.dtic.mil/whs/directives/corres/pdf/300005p.pdf>.

¹¹ Robert Perito, *The Iraq Federal Police: U.S. Police building under Fire*, Special Report no. 291, (Washington, DC: United States Institute of Peace, October 2011) <https://www.usip.org/publications/2011/10/iraq-federal-police>.

¹² Robert Perito, “Police in Armed Conflict,” in *The SAGE Handbook of Global Policing*,” Ben Bradford *et al* editors, London, SAGE Reference, 2016, pp. 443-462.

nonexistent justice vacuum and did not address the real problem which was competing dispute resolution systems.¹³

From 2004-2009, the United States Agency for International Development (USAID) carried out the \$44 million Afghanistan Rule of Law program that sought to strengthen local courts, educate legal personnel, improve access to justice, and engage the informal justice sector. Also in 2004, the State Department's Bureau of International Narcotics and Law Enforcement Affairs (State/INL) became the official coordinator of U.S. rule of law assistance and established the \$241 million Justice Sector Support Program focused on the formal justice system. The program sought to train justice officials, establish a case management system and build the administrative capacity of the Ministry of Justice. From 2010-2014 USAID funded the follow-on Rule of Law Stabilization Program with a formal and informal justice component. This \$47.5 million program was operated by Tetra Tech and sought to fill the justice vacuum in areas the U.S. military had cleared of Taliban courts. Simultaneously, the U.S. military engaged in providing rule of law assistance through the \$24 million Rule-of-Law Field Force-Afghanistan program that was integrated with the larger counterinsurgency effort and sought to establish "rule-of-law green zones" where U.S.-supported traditional authorities would provide justice.¹⁴

Despite a decade of effort and the expenditure of over \$350 million, the State and Defense Department Inspectors General and the Special Inspector General for Afghanistan determined that while U.S. assistance achieved tactical gains and built some judicial infrastructure it had failed to meaningfully advance the rule of law in Afghanistan. This was attributed to the Afghan government's disinterest in establishing the rule of law and its willingness to thwart U.S. programs. Despite the evident lack of progress over time, U.S. officials continued to implement programs already identified as ineffective. They also failed to confront the massive corruption in the Afghan government and the patronage networks it relied upon for support. U.S. programs emphasized the importance of the informal justice sector, but U.S. actions emphasized creating a Western-style judiciary. The United States did not seriously attempt to engage with the key elements of traditional Afghan judicial legitimacy: cultural affinity, Islam, and creating accessible forums for equitable dispute resolution.¹⁵

The Obama Administration Emphasized Democracy and Governance

Failure of the massive U.S. effort to reform the justice system in Afghanistan discredited rule of law assistance as a nation building tool.¹⁶ In 2010, the Obama Administration realigned priorities for rule of law assistance at USAID by creating the Center of Excellence for Democracy, Human Rights, and Governance (DRG).¹⁷ The Center emphasized free and fair elections, political party development, human rights, and labor and gender protection. The Rule of Law Office merged into a new Office of Governance and Rule of Law. This new office

¹³ Geoffrey Swenson, "Why U.S. Efforts to Promote the Rule of Law In Afghanistan Failed," *International Security*, Vol. 42, Issue 1, Summer 2017, pp. 114-151, http://www.mitpressjournals.org/doi/abs/10.1162/ISEC_a_00285.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Author's telephone interview with Thomas Carothers, Senior Vice President for Studies, Carnegie Endowment for International Peace, November 13, 2017, Washington, D.C.

¹⁷ "Democracy, Human Rights and Governance Strategy," U.S. Agency for International Development, Washington, DC, <https://www.usaid.gov/democracy-human-rights-and-governance-strategy>.

supported activities to improve the accountability, transparency, and responsiveness of governing institutions and to promote legal and regulatory frameworks aimed at improving security and law enforcement. In the bureaucratic reorganization, the rule of law was transformed from a tool to promote democracy, human rights, and good governance to an outcome that would be achieved by these programs. As a practical matter, USAID in Washington effectively ceded responsibility for rule of law programming to the Department of State.¹⁸

The motivation behind this change was in part ideological, but in larger part it reflected a major reduction in available resources. Presidential initiatives took much of what had been USAID's funding. President Bush's "President's Emergency Plan for HIV/AIDS Relief" was continued and followed by President Obama's own initiatives: the "Feed the Future" program that sought to increase global agricultural production, and the "Global Development Lab" that encouraged the use of science, technology, and innovation to promote development. The DRG budget declined from \$2.8 billion in 2009 to \$1.5 billion in 2015. In the field, larger USAID missions used discretionary funds to continue traditional rule of law programming. Smaller missions were forced to choose between rule of law programs, which tended to be expensive, and numerous smaller projects in other areas. The drop in funds limited staffing, often to a single program officer responsible for managing all of USAID's accounts.¹⁹

The State Department's Bureau of International Narcotics and Law Enforcement Affairs (State/INL) emerged as the U.S. government's most important institution for rule of law assistance to address narcotics trafficking and organized crime.²⁰ State/INL was not a law enforcement agency, but it operated in over 80 countries and had dedicated Bureau representatives in 42 U.S. missions abroad. INL was the primary U.S. entity for providing policy, coordination and funding for training and equipping foreign law enforcement, border control, court systems and corrections institutions. Its most unusual component was an air force of 100 helicopters and 30 fixed wing aircraft that conducted narcotics crop eradication and countered drug trafficking and narcoterrorism. Funding was provided by Congress under the Foreign Operations Appropriation Act and the International Narcotics and Law Enforcement Fund. INL funded rule of law programs were implemented by the Justice and Treasury Departments and federal law enforcement agencies under interagency agreements; through grants, cooperative agreements and contracts with commercial firms; through letters of agreements with the UN and other international organizations and under partnership arrangements with U.S. state and local law enforcement and justice agencies.²¹ Despite its broad mandate, INL primarily focused on assisting law enforcement and paid less attention to courts and prisons. Like Clinton, President Obama placed an interagency Rule of Law Coordinator at the State Department. This experiment

¹⁸ Author's interview with a Senior Advisor, Office of the Coordinator for Countering Violent Extremism, USAID, U.S. Agency for International Development, July 6, 2017.

¹⁹ Author's interview with advisors and staff members of the USAID Bureau of Democracy, Human Rights and Governance, U.S. Agency for International Development, Washington, D.C., February 1, 2017.

²⁰ Querine Hanlon and Richard Shultz, Jr. *Prioritizing Security Sector Reform: A New U.S. Approach*, (Washington, DC, United States Institute of Peace Press, 2016, p. 221.

²¹ U.S. Department of State Diplomacy in Action, "Bureau of International Narcotics and Law Enforcement Affairs, (Washington, DC, U.S. Department of State, 2016) <https://www.state.gov/j/inl/>

failed because the Coordinator was given limited authority and no project funding and staff and had little ability to influence the policy process.²²

During Obama's second term, the State Department's Counter Terrorism Bureau (State/CT) joined State/INL as an important provider of rule of law assistance funding. In FY 2015, the Bureau received \$250 million in "Nonproliferation, Anti-Terrorism, Demining and Related Programs (NADR)" funds for law enforcement programs. Of this amount, \$200 million was transferred to State's Diplomatic Security Bureau for U.S. embassy security and to support the Bureau's Anti-Terrorism Assistance (ATA) program that provided foreign training in terrorist incident investigation, countering improvised explosive devices, and forming civilian police rapid reaction squads. The remaining \$50 million was spent on a variety of terrorism-related programs in the justice sector. In FY 2016, State/CT hired its first rule of law program officer when it received \$155 million from a new source, the Counter Terrorism Partnership Fund. This money was used for: (1) Countering Safe Havens (\$75m) by creating civilian crisis response forces in Mali and Jordan, vetting a law enforcement unit in Bangladesh, and sending Justice Department rule of law advisors to improve counter terrorism investigations and prosecutions in eleven countries; (2) Countering Returned Foreign Terrorist Fighters (\$50m) in Bosnia, Albania, and Kosovo; and (3) Countering Terrorist Actions from Iran and Hezbollah (\$30m). State/CT also moved into training for corrections officials on such terrorism-related topics as preventing radicalization in prisons, special handling of imprisoned terrorists, and tracking and rehabilitating terrorist prisoners after their release from prison.²³

State/CT counterterrorism rule of law programs were informed by the Global Counter Terrorism Forum Lifecycle of Radicalization to Violence Initiative and its focus on utilizing the criminal justice system to counter terrorism by improving the capacity of partner countries to investigate, prosecute and incarcerate those guilty of domestic terrorism and returned Foreign Terrorist Fighters.²⁴ While the Initiative argues for a comprehensive approach to Countering Violent Extremism, its programs for the justice system focus on dealing with terrorist cases and not on taking a comprehensive approach to the development of police, courts and prisons. The result are programs that emphasized developing a single set of skills (arresting, convicting and incarcerating terrorists) as opposed to developing more effective police, prosecutors and judges and improving the criminal justice system overall.

U.S. Programs Were State-Centric and Top-Down

After World War II, the theories, priorities, objectives, and funding levels of U.S. rule of law assistance evolved over time, but the content of U.S. programs remained remarkably constant. According to Carnegie Fellow Rachel Kleinfeld, U.S. programs advocated top-down reforms of government judicial institutions. U.S. programs targeted legal professionals, training lawyers and jurists in technical skills and improving court administration. Parliamentary

²² Author's telephone interview with former State Department International Narcotics and Law Enforcement Affairs Bureau Rule of Law advisor, Washington, D.C. March 6, 2018.

²³ Author's telephone interview with State Department Counter Terrorism Bureau officer, Washington D.C., February 2, 2107.

²⁴ Global Counterterrorism Forum, "GCTF Toolkit to Address the Lifecycle of Radicalization to Violence," <https://toolkit.thegctf.org/sites/default/files/document-sets/source-document-uploads/2016-09/GCTF%20Lifecycle%20Initiative%20Annotated%20Guide.pdf>

assistance sought to improve legislative drafting skills and committee processes. Assistance for lawyers focused on strengthening law schools and bar associations, and on improving technical skills such as contract drafting, interviewing clients, and oral advocacy. Programs for judges covered plea bargaining, alternative sentencing, and international crimes such as money laundering, asset recovery, and financial corruption. As Kleinfeld points out, this approach to legal reform resulted in institutional modeling where local laws and judicial institutions were modified to more closely resemble those of the United States.²⁵

During the Obama Administration, however, USAID began to move away from technocratic and top-down rule of law programming.²⁶ Recognizing that understanding the political context was critical to the success of development efforts, USAID integrated Political Economy Analysis (PEA) into its rule of law programs. USAID/DRG developed its own PEA field guide²⁷ and required that a political analysis was undertaken at the beginning of every rule of law project and reflected in planning and program management. USAID expanded its bottom-up support of civil society that included citizen empowerment and programs to expand access to justice to include Crime and Violence Prevention Projects.²⁸ These programs created municipal councils composed of local authorities, community organizations, religious institutions and business leaders to identify local security. The councils developed prevention plans that included education and employment opportunities, women and youth activities and services and improved cooperation between citizens and law enforcement. To ensure a more comprehensive and integrated approach, USAID began including the rule of law in some of its five-year Country Development Cooperation Strategies. For Kosovo, the Strategy called for moving beyond providing courthouse infrastructure and equipment to focusing on commercial law to improve the investment climate and capacity building by supporting the Kosovo Judicial Institute.²⁹

State/INL compensated for the overall decline in the number of government rule of law experts by creating the Office of Criminal Justice and Assistance Partnerships staffed by former police, corrections officers and legal professionals that advised program officers in the Bureau. These advisors conducted in-country assessments, developed specific program recommendations and worked with program officers that were not rule of law experts, but had responsibility for designing, funding and managing programs. The advisors also developed policy guidance, created briefing documents and delivered in-house orientation and training sessions. Capacity building within State/INL benefited from the Justice Sector Training, Research and Coordination Program,³⁰ a partnership between the State Department and the University of South Carolina to

²⁵ Rachel Kleinfeld, *Advancing the Rule of Law: Next Generation Reform*, (Washington, D.C., Carnegie Endowment for International Peace, 2012) pp. 35-46.

²⁶ Author's telephone interview with Senior Rule of Law Advisor, U.S. Agency for International Development, March 2, 2018, Washington, D.C.

²⁷ Diana Cammack, "USAID Applied Political Economy Analysis Field Guide," United States Agency for International Development, Washington, D.C. February 1, 2016.

<https://www.usaid.gov/sites/default/files/documents/2496/Applied%20PEA%20Field%20Guide%20and%20Framework%20Working%20Document%20041516.pdf>.

²⁸ USAID Fact Sheet, "Crime and Violence Prevention Project/El Salvador,"

<https://www.usaid.gov/documents/1862/crime-and-violence-prevention-project>

²⁹ USAID, "Kosovo: 2014-2018 Country Development Cooperation Strategy," U.S. Agency for International Development, Washington D.C. November 1 2017 <https://www.usaid.gov/kosovo/cdcs>.

³⁰ Justice Sector Training, Research and Coordination Program, University of South Carolina, <http://justrac.org/>

strengthen U.S. justice sector programming through capacity building seminars for U.S. agencies and program implementers. To obtain the services of law enforcement professionals, State/INL created the State and Local Partnerships Program³¹ with U.S. state and local police, courts, and corrections agencies to enable serving officers and officials to conduct training and capacity building sessions abroad and to host educational visits for foreign counterparts. The Bureau paid increased attention to justice and corrections, taking a more holistic approach to rule of law programming that included institutional capacity building along with training personnel.³²

U.S. Assistance was Militarized and Failed to Acknowledge Traditional Justice Systems

Still the U.S. approach to rule of law assistance evinced shortcomings. Attempts to fine tune formal judicial systems failed to acknowledge the evolution in international organized crime and public corruption that made these scourges increasingly immune to such traditional methods as anti-crime campaigns, arrests, prosecutions, and institutional reforms. The Twentieth Century view of organized crime as an external virus attacking otherwise healthy state institutions no longer applied. Similarly, describing public corruption as the activity of a “few bad apples” in otherwise properly functioning institutions no longer fit contemporary reality. Instead, organized criminal enterprises replaced state administrations, expropriated revenues and development assistance, and engaged in drug trafficking and terrorist financing. Corruption became the standard operating procedure for officials, the judiciary, and police who utilized public office to maximize personal gain. Increased criminality within public administrations contributed to a rise in violence as government security forces acted with impunity, engaged in criminal activities, and suppressed manifestations of citizen disapproval with no state repercussions.³³

In post-Soviet Central and Eastern European states, U.S. top-down, regime-centric police assistance short-circuited bottom-up, civil society driven efforts to achieve democratic reforms. In a forthcoming book, Professor Erica Marat writes that in five post-Soviet states—Ukraine, Georgia, Kyrgyzstan, Kazakhstan, and Tajikistan—regime change and police reform occurred only after an incident of transformative police violence in which police brutality exceeded the level of citizen tolerance, provoking a massive popular backlash.³⁴ In these instances, political activists and civil society groups initially engaged with political elites and security officials to achieve meaningful reductions in police brutality and abusive practices throughout the criminal justice system. In several cases, however, police assistance from the United States and other international donors enabled newly installed governments to preempt the bottom-up reform process and institute top-down, unilateral and largely cosmetic changes involving new uniforms, modern equipment, and recruiting new personnel. In the process, these governments were able to retain the essential characteristics of police in post-Soviet countries: personal loyalty to individual leaders and a priority on protecting the state.

³¹ Department of State Diplomacy in Action, “U.S. State and Local Partnership Program, <https://www.state.gov/j/inl/focus/partnerships/c75770.htm>.

³² Author telephone interview with program officer, State Department Office of Criminal Justice and Assistance Partnerships, Washington, D.C., March 1, 2018.

³³ Ivan Briscoe and Pamela Kalkman, “The new Criminal Powers: The Spread of Illicit Links to Politics across the World and How it can be Tackled,” CRU Report, Clingendael, Netherlands, January 2016, http://www.clingendael.nl/pub/2016/the_new_criminal_powers.

³⁴ Erica Marat, *The Politics of Police Reform: Society against the State in Post-Soviet Countries*, (London, Oxford University Press, Forthcoming).

Overall U.S. assistance to law enforcement agencies was ‘securitized.’ Aid that militarized police and border guards improved partner-country security forces’ abilities to conduct counter narcotics and counter terrorism operations. For example, the U.S. Central American Regional Security Initiative (CARSI) provided \$642 million in weapons, equipment, and training to regional security forces to fight drug and arms trafficking, gangs, and organized crime.³⁵ Most of this assistance, however, did not address the underlying fragility of rule of law at the community level where gangs and traffickers thrived, or the culture of impunity that pervaded security and justice institutions. Throughout Africa, the United States prioritized training border guards and counterterrorism units, and providing assault rifles, body armor, and armored vehicles. Militarizing civilian security agencies reinforced an existing authoritarian ethos and undermined efforts to improve police-community relations. It also did little to improve police’s ability to investigate transnational organized crime.³⁶

Additionally, U.S. rule of law assistance failed to bridge the gap between formal legal institutions and the lives of people in rural areas and traditional societies. With its top-down orientation, U.S. rule of law assistance did not acknowledge the relevance of alternative justice systems based upon customary practice, religious principles, or tribal law that people turned to for personal safety and social justice. In rural villages people viewed formal legal systems as distant, corrupt, and irrelevant to their needs. Instead, they were more likely to seek dispute resolution through traditional authorities and customary legal traditions. These approaches to resolving disputes among people who must continue to live in close proximity avoided assigning guilt and innocence. Instead, they sought to achieve mutual accommodation that resolved problems and allowed life to go on. In countries where most economic activity is in the informal sector, traditional norms are more relevant than foreign inspired legal codes. By failing to link formal and informal systems, U.S. rule of law programs failed to take advantage of the contribution that customary justice could make to reducing pressure on the formal judicial system and providing alternatives to the resort to violence to resolve conflict.³⁷

NEW CHALLENGES FACING U.S. RULE OF LAW ASSISTANCE PROGRAMS

The shortcomings in current U.S. rule of law assistance programs are particularly evident in three categories of states that are important to U.S. national security interests and recipients of U.S. rule of law programming. These states are experiencing a particularly virulent mix of armed violence, terrorist tactics, and organized crime often linked with corrupt authoritarian rule. In some cases these phenomena occur together. The report focuses on the most pressing concern of the three in each country explored. Following is a description of the new challenges presented by these states and the status of current U.S. rule of law programs.

³⁵ U.S. Department of State, Diplomacy in Action, “Central American Regional Security Initiative, <http://www.state.gov/p/wha/rt/carsi/>.

³⁶ A. Booukhars, “Rethinking Security Across the Sahara and the Sahel,” Policy Brief 199, FRIDE April 2015. P. 5. <http://fride.org/publication/1257/rethinking-security-across-the-sahara-and-the-sahel>.

³⁷ Erwin van Veen, Diana Goff, Thibault Van Damme, “Beyond Dichotomy: Recognizing and Reconciling Legal Pluralism in Mali,” pp.5, 30.

Criminal States

Guatemala, Honduras and El Salvador

The northern tier states of Central America – Guatemala, El Salvador, and Honduras – occupy a strategic geographical space between North and South America. They form a physical funnel on the Central American isthmus channeling illicit drugs, migrants, and contraband through Mexico to the United States. A reverse flow of weapons, stolen cars, laundered cash, and deported migrants, some with criminal records, travels south. The movement of goods in both directions takes advantage of porous land borders, clandestine airstrips, unpatrolled rivers, and open sea lanes. This intense level of illegal activity generates extreme violence and billions of dollars in unlawful revenue that has overwhelmed law enforcement, created a climate of impunity and undermined democratic institutions.

The high level of poverty and the lack of economic, social, and political opportunity in all three countries exacerbate this situation. Socio-economic indicators compiled by the UN Economic Commission for Latin America and the Caribbean reveal that Guatemala has the lowest Human Development Index in the Western Hemisphere, one of the most unequal distribution of income ratios, and the highest levels of poverty in the region. Chronic child malnutrition in Guatemala is the highest in the Hemisphere and fourth highest in the world. Honduras and El Salvador fare little better on socio-economic indices. Honduras has a poverty rate of 63.9% in rural areas and 50.5% in urban centers.³⁸

The rule of law in Central America has been historically weak due to the absolutism of Spanish colonial rule and the caudillo tradition – the man on horseback as authoritarian ruler. While Central American countries established constitutional democracies based on the U.S. model after their independence from Spain, frequent constitutional change—including extra-constitutional seizures of power—has weakened democratic institutions and interfered with the development of the rule of law. The caudillo tradition has produced highly centralized systems of government that are corrupt, non-transparent, and unable to provide basic services to the population. Legislatures are weak and dysfunctional, judiciaries are corrupt and incompetent and security forces are exploitative and abusive. The sub-region continues to struggle against these historical and cultural forces. This was especially true in the 1980s when ideologically-based internal armed conflicts led to the demise of democratic governance and long periods of military rule. Rule of law institutions, in particular the police and the judiciary, were progressively degraded and eventually rendered ineffective.

During this project, Ambassador Planty made multiple visits to the region and met with government leaders, opposition political groups, civil society representatives, and academic experts. From this field research, Planty found that, despite the generally grim conditions, reformers—political leaders, businessmen, NGOs, and civil society representatives—still exist in all three countries but are not sufficiently organized or funded to mount a sustained challenge to the corrupt system. U.S. rule of law assistance does support these reform elements to some degree with financial and material resources, but reformers say that U.S. programs are neither sufficiently comprehensive nor durable enough to overcome corruption and strengthen

³⁸ United Nations Economic Commission for Latin America and the Caribbean, *Statistical Yearbook* (New York: 2017). <https://www.cepal.org/en>

institutions. In some cases, U.S. assistance has perpetuated the status quo by making it possible for corrupt regimes to use enough resources to avoid a total collapse while diverting much of the aid to corrupt enterprises. NGOs and academic experts stressed that U.S. rule of law programs were not “strategic,” since they did not make a major impact in an important sector at a critical time.³⁹

At U.S. Embassies, Planty found that diplomats readily admitted that U.S. programs were aimed more at enhancing security in general and, particularly, at improving community safety to stem the tide of emigration to the United States.⁴⁰ This approach is based on a misreading of the reasons for mass migration northward. Migrants are not fleeing narcotics traffickers and gang violence so much as a lack of opportunity and social services: unavailability of doctors or medications at health centers, absence of elementary schools and teachers, unemployment, no access to universities, and a general lack of economic opportunity.

In Guatemala, the government led by political neophyte Jimmy Morales is not overtly corrupt, but has been characterized by ineffective leadership. Guatemala’s Congress is dysfunctional and the courts are notoriously corrupt and inefficient. The country’s one rule of law bright spot is the United Nations International Commission Against Impunity in Guatemala (CICIG) which has pursued a series of high profile anti-corruption cases. On February 13, 2018 former President Alvaro Colom and nine of his cabinet ministers were arrested on corruption charges.⁴¹ CICIG has not, however, fulfilled its mandate to bolster Guatemalan democratic institutions and equip them to function as independent actors in a democratic state. Because of this failure, Guatemala’s rule of law institutions will remain ineffective after CICIG’s forthcoming departure from the country. CICIG’s inability to strengthen Guatemalan rule of law institutions may be a missed opportunity of historic proportions.

Some reform-minded Guatemalans, describe the CICIG experiment as a matter of lights and shadows. There have been three CICIG’s with three different directors and approaches, not one. Each CICIG Commissioner has had a different focus and therefore has created pro-CICIG and anti-CICIG followers. The original idea behind CICIG was that it should fight crime and end impunity in a way that Guatemalans could not and, in the process, strengthen Guatemala’s rule of law institutions so that they could function independently once CICIG’s mandate ended. In reality, CICIG has largely improvised, resulting in a shifting focus and little accomplished, especially on institutional reform. What the justice system needs is a comprehensive, long-term reform plan and the necessary funding to implement it.

Across the political spectrum, many say that CICIG has contributed to the overall climate of instability in Guatemala by pursuing selective justice. It is widely believed that former presidential candidate Sandra Torres and her National Unity of Hope Party were thoroughly corrupt but CICIG did not investigate the accusations against them. CICIG has ignored widespread abuse of political and judicial authority in Guatemala. In some cases, CICIG does not seem to feel any responsibility for fair and evenhanded operations.

³⁹ Author Interviews in Honduras, El Salvador and Guatemala, May 22-June 1, 2017.

⁴⁰ Author Interviews with U.S. Embassy Officers, Tegucigalpa, May 22, San Salvador May 25 and Guatemala City, May 31, 2017.

⁴¹ Elisabeth Malkin, “Guatemala Arrests Ex-President and His Finance Minister in Corruption Case,” *The New York Times*, February 13, 2018, <https://www.nytimes.com/2018/02/13/world/americas/guatemala-corruption-colom-oxfam.html>.

CICIG did support a package of constitutional reforms that would have modernized the Guatemalan judiciary. However, CICIG inserted itself directly into the political process, pressuring members of Congress to enact the measures. Instead of promoting public consensus in favor of the reforms and building support indirectly, CICIG's direct political action produced a backlash against what was seen as high-handed interference by an international organization in Guatemala's internal affairs. The sorely needed reforms did not pass Congress and an opportunity was missed.

Guatemala's overall socio-economic condition is the most critical in the sub-region due to its large and impoverished indigenous community. Some 60% of Guatemala's 16.4 million people are of Mayan descent with approximately 90% of the 60% living in abject poverty with almost no cash income, dependent on subsistence agriculture and deprived of access to basic education and health services. The vast majority of this population lives in rural areas where the Guatemalan government exercises little or no control and there is no police presence. Criminal elements operate with impunity in these locations and large areas of remote northern Guatemala are effectively governed by narcotics traffickers.

U.S. policy in Guatemala distinguishes between security support and support for the rule of law. U.S. funding is aimed at improving the overall security climate in the country but also supports programs to assist the judiciary, the police and the public prosecutor's office. In 2016, the United States provided \$7.0 million to support CICIG, \$10.5 million largely to fight narco-trafficking and \$10 million in economic assistance. The U.S. believes that vetted police and prosecutorial units are important and the FBI and DHS have contributed to this effort. The United States has also assisted with an ambitious prison reform program based on the successful prison reform experience in the Dominican Republic. During interviews, U.S. Embassy officers said they believe that Guatemala would be worse off without CICIG and U.S. assistance. They admitted, however, that there is room for improvement, especially in the area of program coordination both locally and with Washington agencies.

The Guatemalan private sector is the strongest and most important actor on the political, economic and social scene. The business community is very conservative and has been criticized for its failures to foster a more inclusive society. There are reform elements in the business community, however, that see greater adherence to the rule of law as the *sine qua non* for the future development of the country. This group has called for reinforcing Guatemala's democratic institutions, especially in the judicial sector, with a focus on recruiting qualified people for government service that can exercise responsible leadership. Business leaders have stressed that a lack of ethical leadership is a major problem and that political factions spend most of the time pushing ideological agendas and fighting among themselves instead of concentrating on addressing the country's needs. They also emphasize that the business community wants good government and reliable rules of the road so that they can promote the common good while pursuing their economic and financial objectives.

Most members of the business community want to see the country advance in the rule of law area and continue to invest in the local economy. They are often stymied, however, by the absence of a long-term government development and security plan. Many see good progress in areas such as construction but without any clear organization or sequence. Typical of the government's approach to the rule of law is the plan to reduce the size of the army from 45

thousand to 15 thousand troops and to fill the security gap with police. While there is general political support for this policy, there is no concrete plan for the police to assume this role.

Other private sector leaders underscored the need for a viable rule of law development model. They feel that some international NGOs seemed set on undermining Guatemalan institutions which makes progress all the more difficult.⁴² Moreover, U.S. assistance is not impactful. There are constant changes to USAID programs and these programs proceed without an overall development theme. The programs are clearly well-intentioned but are not well executed and do not reach people at the grassroots. Other programs, including the Millennium Challenge Corporation and INL police cooperation, are better conceived and more professionally executed. In this sense, they are important but insufficient. They have not reduced the crime level and are not strategic in scope. The US is not using its political power to effect change in the rule of law arena. As a result, both the credibility of the institutions and the US image have suffered. The situation in northern Guatemala is so bad that it is too dangerous to travel in the area and the national government has lost control of the territory to the narcotics traffickers.⁴³

The Guatemalan public sees the rampant impunity that prevails in the justice sector -- those who are guilty of crimes are not prosecuted -- and reinforces the message that rule of law institutions are not working. The Guatemalan justice system is so clogged with cases that it has nearly ceased to function. Despite this critical situation, the government has no overall vision of how to improve the functioning of the justice sector and therefore US programs can provide only patchwork or stopgap changes.⁴⁴

According to one informed observer, many Guatemalans did not realize until recently the severity of the country's corruption problems. The executive branch of government is addicted to graft and is disinterested in governing for the common good. There is no long-term plan to rid the country of its ills and citizens face strong, increasingly sophisticated underground criminal mafias that undermine institutions and are outside the reach of the law. Due to widespread corruption, resources are scarce and there is no domestic strategic dialogue or development model for attacking the underlying conditions that retard the country's progress.⁴⁵

One internationally renowned human rights activist commented that the rule of law situation in Guatemala has changed little in the twenty years since the signing of the 1996 Peace Accords. The most important change is a negative one -- the major players in Guatemala's political, economic and social life have been infiltrated thoroughly by global crime syndicates. These corrupt, criminal enterprises have captured the state and the same networks have penetrated the private sector. The result is a permanent grey zone in Guatemalan society where these groups operate freely. The infiltration is not pyramidal in nature but rather horizontal. It permeates institutions and thrives on ambiguity, spinning a web of illegality that gradually but surely undermines Guatemalan democracy.

⁴² Author Interview with Jose Miguel Torrebiarte, Board Member, Guatemalan Development Foundation, Guatemala City, Guatemala, May 29, 2017

⁴³ Ibid.

⁴⁴ Author Interview with Juan Carlos Zapata, Executive Director, Guatemalan Development Foundation, Guatemala City, Guatemala, May 29, 2017

⁴⁵ Author Interview with Danilo Siekavizza, Board Member, Guatemalan Development Foundation.

This same observer stated that Guatemala today is effectively a U.S. protectorate, but the traditional approach that the United States employs to exercise influence is not working. U.S. programs are functioning but they are not strategic--they do not make a difference on critical issues at key times. What Guatemala needs is U.S. political power behind a concerted effort to rid the country of criminal mafias and to strengthen rule of law institutions. The United States can make a difference and send strong political messages by supporting the right groups. Structural change in rule of law institutions is desperately needed. CICIG has revealed many of the shortcomings of the Guatemalan system but Guatemalans themselves need to take control of reforming the system. One way they could make a difference is by forming new political parties that represent a departure from business as usual.⁴⁶

Members of Guatemala's think tank community echoed these views. One prominent leader observed that Guatemala's problems, particularly in the rule of law area, are similar to those elsewhere in the world. When it comes to the rule of law, populations respond to their institutions and governments much the same way. The Central American governments are dealing with a highly complex set of issues that are fundamental to their well-being but difficult to resolve. The number one issue is corruption which has infected public and private systems alike and reached a level of sophistication heretofore not seen. Governments have close linkages to the private sector and the business community provides governments with goods and services. One need only observe the relationship between Petrobras and Odebrecht in Brazil. During the Berger government in Guatemala some years ago, the Supreme Court refused to reform itself, despite the administration's insistence. The Court proved to be the weakest part of the justice system as it blocked cases and in general trampled on the justice system.⁴⁷

The infamous *ley de amparo* or right to appeal any court decision that is enshrined in the 1985 Guatemalan constitution is another example of the rule of law gone awry (the 1985 constitution restored democracy in Guatemala after 31 years of military rule). This clause was inserted in the new constitution as a safeguard against abuses by future authoritarian governments. It is now routinely invoked to stop or impede any and all cases from proceeding through the court system and is used by defense lawyers to stall trials indefinitely. What was intended as a way to protect democratic values has become a perverse instrument of abuse by making every court decision subject to appeal. This is another institutional weakness derived from the many years of military government and the long internal war.

Under the Guatemalan constitution, it is the responsibility of Congress to pass laws providing for rule of law reform, especially to govern the courts. In Guatemala, however, anti-reform elements in the judiciary have conspired with anti-reform congressmen to block government-proposed constitutional reforms. Citizens do not identify with their congressional representatives and legislative corruption is rampant. This has created public hostility at a time when the public is looking for legitimate reforms that will benefit the people. On top of all this, there is little presidential leadership in Guatemala. President Morales does not have political

⁴⁶ Author Interview with Helen Mack, President, Myrna Mack Foundation, Guatemala City, Guatemala, May 30, 2017

⁴⁷ Author Interview with members of the Guatemalan Institute of Economic and Social Studies (ASIES), May 30, 2017

party support in Congress and the administration has had problems establishing priorities. Morales' political party itself is new and supported largely by former senior army officers.⁴⁸

Still others pointed out that there are three integrated economic power groups in Guatemala: organized crime, which includes narcotraffickers and members of the military, loosely organized corruption networks and the Guatemalan business community. Even honest businessmen are trapped because they must deal with organized crime and corrupt groups that wield political and economic power. A byproduct of this situation is the chaos that reigns in the countryside. There are widespread invasions of farms and factories taking place. Some 3,000 people have lost employment due to business closures as a result of this activity. Many of these people head directly to the United States. There is no police or army presence in these remote areas and, even where there is a police presence, the authorities are afraid to act because if injuries or deaths result, those involved will be jailed without due process.⁴⁹

Guatemala needs a new national dialogue to reach a place where the rule of law can prevail again. First, the country needs to adopt a sense of urgency about combating extreme poverty. Only 3% of the country's resources are dedicated to alleviating extreme poverty. Second, Guatemalans love politics but detest politicians. There is a need to form new political parties that can produce a generation of non-corrupt political leaders. Third, the media detests honest leaders and loves the bad guys. This also needs to change. Guatemalans have resources available to create more favorable conditions for the rule of law but they do not invest in reform. In Guatemala, there is no sense of national identity or spirit of solidarity among the citizenry making it extraordinarily difficult for the rule of law to prevail.⁵⁰

In Honduras, President Juan Orlando Hernandez controls all three branches of government. Hernandez was reelected on November 26, 2017 after judges he appointed to the Supreme Court lifted the constitutional ban on multiple presidential terms. International observers documented irregularities in the voting that was suspended when the opposition candidate appeared to be ahead. Notwithstanding these irregularities, the Honduran Electoral Commission declared Hernandez the victor on December 17, 2017 despite calls by the Organization of American States (OAS) for a new election. Other irregularities ensued in the wake of the election. On January 18, 2018, the Honduran Congress passed a law revoking the attorney general's authority to investigate cases involving the theft of public funds that involved high ranking government officials, including 60 current and former legislators.⁵¹ In response to these developments, the leader of the OAS Support Mission Against Impunity in Honduras

⁴⁸ Author Interview with Eduardo Stein, former Guatemalan Vice President and Foreign Minister, Guatemala City, Guatemala, May 29, 2017

⁴⁹ Author Interview with Ricardo Arenas, President, National Civic Movement (MCN), Guatemala City, Guatemala, May 29, 2017

⁵⁰ Author Interview with Richard Aitkenhead, President, International Development Consultants, former Guatemalan Minister of Finance, Guatemala City, Guatemala, May 31, 2017

⁵¹ Jeff Ernest and Elisabeth Malkin, "Amid Protests, Honduran President is Sworn in for 2nd Term," *The New York Times*, January 27, 2018, <https://www.nytimes.com/2018/01/27/world/americas/honduras-president-inauguration-protests-juan-orlando-hernandez.html>.

(MACCIH) resigned in protest, stating that the new law would make it impossible for him to continue his work.⁵²

Over the past three decades, the United States has attempted to improve the rule of law in Honduras, and to staunch the northward movement of people, with little success. U.S. policy has focused mostly on stopping narcotics smuggling and has only tangentially dealt with the underlying problems—weak government institutions, pervasive official corruption, and low levels of national investment in health, education, and welfare. While the totality of U.S. government programs appears impressive, they have had little impact on Honduran rule of law institutions. One reason is the absence of an overall strategic plan for implementing U.S. rule of law assistance in the Central American region. Without a holistic approach to reforming rule of law institutions that features integrated programming across U.S. agencies, real change is unlikely. A related challenge is that contractors implement all USAID and most State/INL programming and most of these programs are failing. A major USAID evaluation published in late 2017 concluded that its programming is producing limited results and several programs are having no impact at all.⁵³

Honduras largely avoided the bitter ideological wars of the 1980s that divided Guatemala and El Salvador, but fears that neighboring conflicts might spread to Honduras prompted killings and disappearances of leftist activists. Honduras also became indirectly involved in the sub-region's turmoil by serving as a base for the Contras, the paramilitary group partly organized and trained by the U.S. to overthrow the Sandinista regime in Nicaragua and as a training ground for thousands of Salvadoran and U.S. troops. Soto Cano army base became a key locale for U.S. operations in the area and the U.S. continues to maintain forces there today. The country remains one of the poorest in the Hemisphere and the internal security situation is abysmal. Hondurans, especially young people, are leaving the country for the United States because of the lack of economic and social opportunity and widespread insecurity linked to gang activity and narco-trafficking.

Many independent observers consider Honduras a failed state. Crime is rampant in the country and extortion is a major problem. Gangs are involved in narcotics trafficking, trafficking-in-persons, kidnappings and other violent behavior. Gang activity accounts for the high murder rate, especially among youths. Underlying much of this criminal activity is a broken social fabric stemming from the lack of education (no schools or no teachers in existing schools), a broken health care system (few health centers and/or no medications or doctors available at health centers in rural areas) and the lack of employment opportunities. Parents simply cannot provide for their children and families have no stake in communities that lack basic services. The police are absent or ineffective and families have no means to resist criminal activity, especially from the organized gangs that seek to recruit members from families under economic duress. The absence of social investment is directly related to official corruption and has resulted in extreme poverty and lack of opportunity for ordinary Hondurans. This situation has

⁵² Elisabeth Malin, "Citing Hostility, Leader of Anti-Corruption Panel in Honduras Resigns" Support Mission Against Impunity and Corruption in Honduras, *The New York Times*, February 16, 2018 <https://www.nytimes.com/2018/02/16/world/americas/honduras-corruption-panel.html>.

⁵³ USAID, "What Works in Reducing Community Violence: A Meta-Review and Field Study for the Northern Triangle, Washington, DC, February 2016 <https://www.usaid.gov/sites/default/files/USAID-2016-What-Works-in-Reducing-Community-Violence-Final-Report.pdf>.

worsened in recent years and is the most important cause of large-scale migration to the United States.

The court system in Honduras faces five main problems: First, slow procedures result in long judicial delays. A criminal case should be completed in 6-8 months but it takes two and one-half years on average. Similar delays affect other parts of the judicial system. Second, there is no transparent, merit-based system for the nomination of judges. This violates international standards. Honduras must end the process of naming judges “*de dedos*”, i.e., by some opaque, pre-determined, pre-selection process. Judges must be selected by a transparent process that assesses their qualifications. Third, the whole judicial process is very opaque; proceedings and decisions take place behind closed doors. Fourth, the Court’s departments and dependencies are historically weak. The public defender function and the inspector general’s office do not operate properly and there are no mechanisms for addressing irregularities and misconduct in the system. Fifth, the system must provide security for judges, especially for those that handle the most difficult, complicated and sensitive cases. Extortion is a vexing problem across Honduran society but narco-trafficking, corruption, fraud and contraband are other important crimes.⁵⁴

Notwithstanding these conditions, the U.S. Embassy in Tegucigalpa believes there is political will on the part of President Hernandez and his administration to pursue rule of law reforms. The government has stated that it wants effective institutional reform and the Embassy is working on rule of law issues across the spectrum. The police reform commission has purged 5,000 police out of 14,000 on the force; the goal is to create a force of 26,000 by 2033. The idea is to effect a cultural change in the police institution and purge corruption at the top, not just among the rank and file. The Embassy believes that the national police reform commission represents a commitment to real institutional change on the part of the Hernandez administration.⁵⁵

INL has partnered with USAID on the model police precinct program designed to engage communities in policing. INL provides targeted assistance to the police, including technical assistance, and has formed a partnership with Colombian mentors to the police. Some 20,000 youths have been trained in anti-gang programs, there are police trainers working in communities and local community commissions participate in this activity. Police coverage is provided around the clock and the Embassy believes that this initiative is bringing down crime. The objective is to train police to provide better coverage and to create a rural police force. INL training has expanded from 4 months to 10 months and INL also helps provide access to higher education for trainees.

USAID is re-entering the rule of law area due to the government’s perceived political will to tackle systemic corruption. USAID supports the National Anti-Corruption Council and works on linking communities with the police. The USAID Mission works closely with the Attorney General’s Office that has a plan for strengthening the agency’s operations. The Mission is providing training for prosecutors and making continuing education available. It also supports the investigative arm of the judiciary and its programming is designed to take a comprehensive

⁵⁴ Author Interview with Rolando Argueta, President, Supreme Court of Honduras, Tegucigalpa, Honduras, May 23, 2017.

⁵⁵ Author Interview with Heide Fulton, Deputy Chief of Mission, US Embassy Tegucigalpa, Honduras, May 22, 2017.

approach to reforming the investigative function. This includes capacity building for judges and dignitary protection. However, additional resources are needed in this area.

One US activity that seems directly aimed at improving the rule of law in Honduras is USAID's Project United for Justice. United for Justice Program managers explained that the project combines Central American Regional Security Initiative (CARSI) funds and USAID monies in an effort to integrate security, poverty reduction and justice sector reform for the first time in ten years. The project will disburse \$34 million over four and one-half years to reform justice and security systems in Honduras. This is a cross-sector, comprehensive and integrated project that stresses respect for human rights and the participation of civil society. The specific focus will be on (1) inclusion of civil society, (2) institution building and (3) community policing. The project will focus on police, prosecutors and judges/courts.⁵⁶

Independent analysts and NGOs, however, did not share the U.S. Embassy's optimism on the larger political picture or on rule of law progress. Several said that the U.S. Millennium Challenge Corporation's programming is the most successful example of how international aid can be channeled effectively and transparently; everyone recognizes the MCC as a success. INL programs are useful and fill in where the government does not work, for example in anti-drug operations. One problem is that INL's projects take a long time to develop and the security situation in Honduras changes quickly. By the time program funds reach Honduras, the security dynamic has changed. Moreover, INL projects often are not sustained over a multi-year period and obligating funds takes a long time. Much also depends on the individuals and organization implementing the projects.⁵⁷

Critics also noted that INL projects deal with the consequences of illicit activity in Honduras and not the causes. National institutions do not invest in rule of law programs even though Honduras needs more effective public institutions to support a very fragile government. Government agencies and departments are often financially strapped creating a situation of institutional weakness. Problems in public institutions are threefold: (1) lack of independence and political party/government interference; (2) incapacity, i.e., an inability to administer; (3) corruption. These factors make it difficult to find trustworthy partners/cooperators in government. Moreover, U.S. programs tend to be short term, rigidly defined and with limited budgets.⁵⁸

U.S. technical support is generally well regarded and considered more flexible than aid from the Europeans. Honduras is such a weak state that the U.S. needs to be more forceful in supporting local groups working to strengthen the rule of law. One example is last year's Supreme Court election. The government proposed to distribute 7-8 seats among political parties and the opposition. At least 6 of the candidates were directly linked to narco-traffickers. The U.S. needed to oppose such efforts in a robust and public way instead of engaging diplomatically behind the scenes.⁵⁹

⁵⁶ Author Interview with Javier Said, DAI Chief of Party, USAID Project United for Justice and Theodore Glenn, USAID Honduras, Tegucigalpa, Honduras, May 22, 2017.

⁵⁷ Author Interview with Carlos Herrera, Association for A More Just Society (ASJ), Tegucigalpa, Honduras, May 22, 2017.

⁵⁸ Ibid.

⁵⁹ Ibid.

On the subject of U.S. rule of law/justice sector programming, most civil society organizations are uninterested in partnership funding but concerned with how the U.S. will invest its money. Most will speak out when a project has no impact. Hondurans expect more from the United States because it is a friend and ally. Hondurans also believe that Americans do not have an objective view of their country. They are suspicious that political motivations are behind everything the United States does in Honduras and believe the U.S. fails to recognize important changes when they are taking place.⁶⁰

El Salvador's internal armed conflict between government forces and the leftist Farabundo Marti Liberation Front (FMLN) lasted from 1980-92 and resulted in 75,000 deaths. The war ended in 1992 with the signing of the Chapultepec Agreement in Mexico City that provided for a new civilian national police force to replace the National Guard and elections in 1994 which ended the military's dominant role in Salvadoran society. Extreme violence perpetrated by both sides during the war left the country with deep political divisions, a shattered economy and widespread social unrest. El Salvador has among the highest murder rates in the world and it is the epicenter of large scale gang activity. Experts estimate that 25,000 gang members are at large in El Salvador and 9,000 are in prison. The two most important gangs, Mara Salvatrucha (MS-13) and Barrio 18, originated in Los Angeles. Under the 1996 U.S. Illegal Immigration Reform and Immigration Responsibility Act, thousands of gang members were deported to El Salvador where they reorganized and engaged in drug trafficking.⁶¹

Salvadoran youth continue to join gangs today and participate in a range of criminal activity. The appeal of gangs is attributed to family neglect or abandonment, unemployment, poverty, lack of education and economic opportunity and a general sense of alienation from society. This situation has also contributed to the large-scale migration of unaccompanied children to the United States. Crime and insecurity negatively affect the legitimacy of government institutions and remain a major restraint on social and economic development. Fundamental institutional weaknesses within the justice sector inhibit an effective, sustainable response to criminality and perpetuate an unfair justice system. Limitations on the government's ability to control crime and a lack of public financial integrity have eroded public confidence. This overall lack of security and social upheaval has negatively affected El Salvador's democratic institutions and produced a "perfect storm" of instability.⁶²

El Salvador's President, Salvador Sanchez Ceren, is a former leftist guerrilla and a member of the Salvadoran National Liberation Front (FMLN) party. Sanchez Ceren has sought to establish political control across the organs of government and to use alliances with municipal leaders for corrupt purposes. Resources are withheld from the Attorney General's office and the judicial system that reduce their ability to press anti-corruption cases and respond to the high demand for criminal prosecutions. Weak rule of law institutions limit the progress against crime and result in impunity.

Several interlocutors charged that international donors are not sufficiently focused on support for rule of law institutions in El Salvador. Many international assistance programs suffer

⁶⁰ Ibid.

⁶¹ Renwick, Danielle, "Central America's Violent Northern Triangle", Council on Foreign Relations, New York, January 18, 2018 <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle>

⁶² USAID, "El Salvador-Overview," <https://www.usaid.gov/el-salvador/overview>

from excessive delay between program conception and delivery, resulting in programs that are ineffective or irrelevant due to fast changing conditions on the ground. Private organizations and independent observers note that the problems are so serious that it is difficult to see the impact of international rule of law assistance. Many worry about the capture of the state by criminal elements.

In contrast, the U.S. Embassy believes that its rule of law programming is prompting positive change. Primary Embassy objectives are to help El Salvador reduce insecurity, improve economic conditions and strengthen democratic institutions. The Embassy supports the government's Plan Secure Salvador to enhance security in the hardest hit communities. All of these activities are aligned with the Alliance for Prosperity, the regional development plan promoted by the three "Northern Triangle" governments. Embassy officials point to expulsion of narcotics traffickers from several departments in the country's interior, interdiction of off-shore "fast boats" transporting narcotics and lowering of the extortion and murder rates as examples of U.S. successes. U.S. programs are primarily aimed at deterring emigration of Salvadorans to the United States which follows U.S. policy in Central America. The Embassy uses a place-based strategy that focuses on the 50 hardest hit communities in the country.⁶³

One key project is USAID's Justice Sector Strengthening program. The project began in 2013 and is scheduled to end in 2018 with a possible extension to 2019. The project concentrates on capacity building while stressing anti-corruption and impunity. Initially the emphasis was on training and leadership, but subsequently the emphasis shifted when it became apparent that institutional change did not extend to the countryside. Project emphasis was altered to track with Plan Secure Salvador (PSS). There is now a focus on training in judicial management – how to manage a courtroom, handle the docket and other administrative tasks. The project is also working with the judiciary to develop a system to assign cases randomly to avoid judge "shopping." Vacancies on the bench are a major problem. The National Judicial Council (NJC) is lacking judges and the positions are filled with alternates. The Supreme Court has complained that it is not receiving good judicial candidates from the NJC. The NJC retorts that Supreme Court judges want to name their own people. This clash between judicial quality and political favors can bring the process to a standstill.⁶⁴

The Supreme Court is a major actor on rule of law issues and Court personnel work with USAID to improve its operations by employing technical assistance, training/capacity building and new equipment to improve judicial integrity. The Court increased the number of high-level corruption cases it handled from five in 2015 to fourteen in 2016 but lawyers need more training on how to present anti-corruption charges. Court representatives emphasized that the rule of law is critical to El Salvador's future and that the Supreme Court wishes to continue its close cooperation with the United States on judicial reform.⁶⁵

On the Salvadoran government side, the Attorney General's office (AG) is at the center of crime fighting and there is a high demand for the department's services. The AG's own analysis

⁶³ Author Interview with Mark Johnson, Deputy Chief of Mission, U.S. Embassy, San Salvador, May 25, 2017.

⁶⁴ Author Interview with USAID Contractor (Chechhi) Technical Team, San Salvador, El Salvador, May 26, 2017

⁶⁵ Author Interview with Dr. Jose Oscar Armando Pineda, President, Supreme Court of Justice, San Salvador, El Salvador, May 26, 2017

revealed the need for better focused local and international cooperation to battle corruption, narcotrafficking, human trafficking and related crimes and underscored the importance of U.S. rule of assistance. The AG's office emphasized that the successful prosecution of a former president and attorney general on corruption charges could not have been possible without U.S. aid. In the wake of that success, the AG established a "Group Against Impunity" to handle the toughest corruption cases and also created nine special units to handle prosecution of narcotraffickers and money launderers. The AG noted that U.S. assistance makes a difference, especially a U.S. provided wiretapping facility, but more resources are needed.⁶⁶ The AG believes that the key to continued progress is institutional strengthening. Officials come and go but the institutions remain; they need to be strong to continue the fight.⁶⁷

Financial investigators from the Attorney General's (AG) office expressed gratitude for U.S. assistance that provided financial intelligence and expertise in tracing money laundering. Investigators and prosecutors said that cooperation with the U.S. Embassy's INL representative was excellent and that aid covered not just operational areas but also strategic analysis. This assistance allowed the unit to tackle high-level corruption for the first time. The equipment and technology, especially the ability to intercept telephone conversations, were important tools. Investigators are committed to rooting out official corruption and other crimes. Morale is high and the unit is making good use of the resources provided. The AG's office has reduced the number of extortion cases and is making headway in solving homicides by penetrating the gangs. Convictions are higher than ever.⁶⁸

The Chief of the Salvadoran National Police said the police are in a good place because they have been able to focus on El Salvador's key problems. Part of the reason is that State/ INL and USAID have exhibited a new attitude and are more flexible in cooperating with the police. Now there is a coincidence of views and the police can move forward working with U.S. counterparts. INL and USAID have helped the police challenge the gangs and manage internal relations on the force. Tactical police units were formed and community policing precepts developed. The police force established a cooperative program with investigating attorneys. There are now three investigative prosecutors assigned to the police that are part of joint investigative teams. The number of cases successfully prosecuted has risen and there is greater access to justice for the population. Nevertheless, the police still are in dire need of assistance, especially with internal affairs. There is malfeasance in the force and a crisis of control and confidence. Technical investigative teams should be formed to root out corruption and deal with other integrity issues. There is a need for a state-of-the-art forensic laboratory. The force also needs to integrate more women. Implementing these goals will require additional resources.⁶⁹

El Salvador has a national Human Rights Ombudsman, an institution created by the civil war peace accords. The Human Rights Ombudsman said further U.S. assistance is vital to combat corruption, delinquency, sex crimes, and extra-judicial killings and to help the population receive justice. The current situation contributes to people fleeing the country. There is also a

⁶⁶ Author Interview with Attorney General Douglas Melendez's office, San Salvador, El Salvador, May 25, 2017.

⁶⁷ Ibid.

⁶⁸ Author Interview with Jorge Orlando Cortez, Chief, Financial Investigations Unit, Attorney General's Office, San Salvador, El Salvador, May 25, 2017.

⁶⁹ Author Interview with Howard Cotto, Chief, Salvadoran National Police, Police Headquarters, San Salvador, El Salvador, May 25, 2017.

crisis with the killing of police, 47 officers were murdered last year. The Ombudsman's office has taken the lead in this matter. There is also a requirement for restorative justice in El Salvador since there are still many outstanding issues from the civil war. The post-peace accords amnesty was ruled unconstitutional last year and there is no established transitional justice process. Congress must provide a framework and the Ombudsman's office is working on a draft law. Colombia is now naming judges to supervise its transitional justice process and El Salvador should do the same. El Salvador needs to close this chapter in its history.⁷⁰

The Salvadoran Foundation for Economic and Social Development (FUSADES) reflects the business community's views on the status of the rule of law and U.S. rule of law assistance programs. FUSADES representatives emphasized that the United States is El Salvador's strongest ally and that U.S. aid is critical. Historically, the United States provided a variety of rule of law projects, including training of judges, technology transfer and now anti-corruption programs. Unfortunately, it is very hard to see where any of these programs have had a lasting impact. One area that needs improvement is the reliance on contractors to implement programs. So much depends on how the contractor performs and no one knows how the implementers are selected or trained. This is an area where the government can influence program execution by inserting its own people into projects as contractors. The U.S. needs to do a better job vetting and following-up on contractor program implementation. The business community believes the Salvadoran government is not necessarily a friend of the United States but has no option other than to cooperate, where possible. The government has tried to remove some reform judges – they would like to control the judicial selection process – but it has to be careful because it does not want to risk the loss of U.S. aid.⁷¹

Officials at the United Nations Office on Drugs and Crime (UNODC) observed that El Salvador would be much worse off without U.S. assistance to boost the rule of law, especially in the area of narcotrafficking. They remarked that El Salvador is plagued by the fragility of its institutions and risks capture of the state by criminal elements. For now, a complete breakdown of institutions has been averted but the context for U.S. rule of law programs is a failed state. Notwithstanding this situation, some progress has been made. The arrest and successful prosecution of a former president and attorney general would have been unthinkable a short while ago. Legal reforms are still needed and the country needs to rebuild its institutions.⁷²

One important improvement that could be made is to rationalize the many international assistance programs that often overlap or conflict. UNODC has played a role in establishing a cooperation mechanism to rationalize some 90 different projects across the rule of law area. For example, both Japan and the U.S. are providing dogs for narcotics detection. Both the UN and the U.S. are donating computers. Missing is a comprehensive action plan for all foreign rule of law assistance from prevention to arrest, prosecution, the court system and prison. There is a particular need to strengthen investigative ability; scientific investigative tools are missing and more special investigative units are needed. There should be more judicial cooperation with the United States. Finally, the assistance process must be streamlined and made more agile. Too

⁷⁰ Author Interview with Raquel Caballero de Guevara, National Human Rights Ombudsman, San Salvador, El Salvador, May 25, 2017.

⁷¹ Author Interview with Javier Castro de Leon, Director, Department of Legal Studies, Salvadoran Foundation for Economic and Social Development (FUSADES), San Salvador, El Salvador

⁷² Author Interview with UNODC Chief Monica Mendoza, San Salvador, El Salvador, May 26, 2017.

much time elapses between program conception and program implementation. By the time program funds are disbursed to attack a problem, a more urgent problem has arisen.⁷³

Terrorist States

In an arc from Pakistan to Mauritania, the United States faces a region in turmoil as democratic transitions have stalled, chaos has spread, and violent extremists have gone on the offensive. In the aftermath of the Arab Spring, popular aspirations for democratic change have been replaced by the realization that regional governments are not coping with crime and terrorist violence. This growing awareness is based on: (1) revelations of government corruption and the use of terrorist threats to justify crackdowns on political opponents; (2) the inability of security forces to prevent the proliferation of Islamist terrorist groups and their ability to control territory and to strike high profile targets; and, (3) the failure to counter terrorists' appeals to radicalized youth to join their cause.⁷⁴

The most extreme example has been that of the Islamic State (IS) in Syria, Iraq, and Libya, where IS fighters ruled the city of Sirte until they were driven out by Misratan militias backed by U.S. Special Forces and air support. IS fighters are now attempting to regroup in Libya's southern desert where they threaten the Sahel along with al-Qaeda in Islamic Maghreb, Boko Haram, and Islamist tribal insurgencies.⁷⁵ In North African and Sahel's vast ungoverned spaces, terrorist groups have joined with organized criminal networks to turn historic caravan routes into trafficking corridors for narcotics, weapons, and migrants.⁷⁶ Smuggling networks have seized on regional instability, grinding poverty, and the lack of opportunity to become deeply entrenched in local economies, making them difficult to dislodge. Impaired by growing instability, regional states are increasingly unable to deliver basic government services. Endemic corruption has left government institutions bereft of legitimacy as alienated citizens are frustrated by declines in health care, educational opportunities, and living standards.⁷⁷

To evaluate U.S. rule of law assistance in this vast area, the project looked at three historic American allies that face serious challenges from Islamist terrorism. Pakistan partnered with the United States to evict the Soviet Union from Afghanistan and remains a frontline state in the battle against al Qaeda and the Taliban. Tunisia signed its first treaty of friendship with the United States during Thomas Jefferson's presidency. Today it remains North Africa's best hope

⁷³ Ibid.

⁷⁴ Yezid Sayigh, "Dilemmas of Reform: Policing in Arab Transitions," Carnegie Middle East Center, Beirut, March 31, 2016, pp. 1-4. <http://carnegie-mec.org/2016/03/30/dilemmas-of-reform-policing-in-arab-transitions/iw6o>.

⁷⁵ Kevin Casey and Stacey Pollard, "ISIS Moves Very Deliberately in Gaining from the Chaos in Libya," *Daily Star*, April 7, 2015, www.dailystar.com.lb/Opinion/Commentary/2015/Apr-07/293506-isis-moves-very-deliberately-in-gaining-from-the-chaos-in-libya.ashx. Eric Schmitt, "Warnings of a Power Keg in Libya as Isis Regroups," *New York Times*, March 21, 2017, <https://www.nytimes.com/2017/03/21/world/africa/libya-isis.html?smprod=nytcore-ipad&smid=nytcore-ipad-share>.

⁷⁶ Querine Hanlon and Matthew Herbert, "Border Security Challenges in the Grand Maghreb," United States Institute of Peace *PeaceWorks*, Number 109, 2016, pp. 6-7.

⁷⁷ United Nations Secretariat, "Report of the Secretary-General on the Situation in the Sahel Region," UN Doc. S/2013/354, June 14, 2013. https://unowas.unmissions.org/sites/default/files/s_2013_354_sahel_strategy_en.pdf.

to complete the transition to democracy despite a series of damaging terrorist attacks.⁷⁸ Prior to the 2012 coup, Mali was considered a model for democracy in Africa and a success story of U.S. development assistance. Today Mali is maintained by a United Nations peacekeeping mission and a French expeditionary force that are engaged against Islamist terrorist groups and tribal insurgents. The project team visited Pakistan and Tunisia and, due to a State Department travel advisory, worked with resident experts and U.S. officials to develop its findings on Mali.

Pakistan

Nuclear-armed and fighting an Islamist insurgency, Pakistan is now the fifth most populous country in the world with 207.7 million people.⁷⁹ Pakistan was created in 1947 from the violent partition of India into Moslem and Hindu entities following the end of British colonial rule. Since independence, Pakistan and India have fought four major wars and a proxy conflict over Kashmir. Hostility with India caused Pakistan to acquire nuclear weapons to counter India's acquisition of nuclear arms. On its western front, Pakistan played a major role in the wars in neighboring Afghanistan. During the Soviet intervention, Pakistan was a conduit of weapons to the mujahedeen and a refuge for millions of Afghans fleeing the conflict.

Since September 11, 2001, Pakistan has been a frontline state in the U.S.'s Global War on Terrorism, a sanctuary for al Qaeda and Afghan Taliban leaders, and the site of a growing domestic insurgency. Pakistan has received \$33.4 billion in U.S. military and counterterrorism aid since 2001 and Congress had initially proposed \$345 million in security assistance and economic aid for FY 2018. The Obama Administration mostly ignored Pakistan's duplicity in harboring Afghan terrorists for fear of losing its cooperation in the Afghan conflict. The United States needs Pakistan's approval to transport military supplies from Pakistani ports to Afghanistan.⁸⁰ In August 2017, National Security Advisor Lt. General H.R. McMaster publically charged that Pakistan was selectively fighting terrorist groups and stated that the United States wanted Islamabad to stop providing safe havens to the Afghan Taliban and the Haqqani Network.⁸¹ On January 4, 2018, the United States suspended nearly all of its \$1.3 billion in annual security assistance to Pakistan in response to Pakistan's failure to respond to U.S. concerns.⁸² On February 23, the Paris-based international Financial Action Task Force, at U.S.

⁷⁸ The White House, Office of the Press Secretary, "Fact Sheet: Enduring U.S.-Tunisian Relations, May 2015" Washington, May 21, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/05/21/fact-sheet-enduring-us-tunisian-relations>.

⁷⁹ Daniel Markey, "A New Drone Deal for Pakistan," *Foreign Affairs*, August 8, 2013 <https://www.foreignaffairs.com/articles/south-asia/2013-08-08/new-drone-deal-pakistan>. Pamela Constable, "Pakistan's Dangerous Population Surge," *The Washington Post*, September 10, 2017, <https://www.pressreader.com/usa/the-washington-post-sunday/20170910/281758449447451>

⁸⁰ Asfandyar Mir and Paul Staniland, "Will U.S. Threats to Pakistan help Crack Down on Terrorism? Not Really," *The Washington Post*, August 29, 2017, https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/29/will-u-s-threats-to-pakistan-help-crack-down-on-terrorism-not-really-for-these-5-reasons/?utm_term=.070d1ca3643b.

⁸¹ Ayaz Gul, "Pakistan Dismisses US Assertions Fighting Terrorism 'Selectively,'" *Voice of America News*, August 6, 2017, <https://www.voanews.com/a/pakistan-us-assertion-fighting-terrorism/3974351.html>.

⁸² Mark Landler and Gardiner Harris, "Trump, Citing Pakistan as a Safe Haven for Terrorists Freezes Aid," *New York Times*, January 4, 2018, <https://www.nytimes.com/2018/01/04/us/politics/trump-pakistan-aid.html>.

request, placed Pakistan on its state terrorism watch list, a step that could damage the country's economy.⁸³

The Police

In Pakistan, the police have first-line responsibility for providing security and justice. Advancing the rule of law in Pakistan must begin with police reform.⁸⁴ The 2016 World Justice Project survey on "The Rule of Law in Pakistan" found that 82% of those interviewed considered the police the most corrupt authorities and 83% wholly distrusted the police.⁸⁵ Pakistan's problems with police corruption and abuse relate directly to institutions left over from the country's colonial era. The underlying philosophy and legal framework for policing date to the Police Act of 1861, enacted under British rule. Under this law, police serve as the enforcement arm of the state, controlling the population through repression and fear. As in the colonial era, Pakistan's police have no jurisdiction in the Federally Administered Tribal Areas (FATA) along the Afghan border. Thus, the police are unable to operate in the area from which the major threats to the country's security originate.⁸⁶

The 1861 Police Act's authoritarian approach to policing is reflected in what is called *Thana culture*, a term used in Pakistan to describe a policing mind-set that accepts such common abuses as demanding bribes, illegal detention, and the use of torture to obtain confessions. Police have a reputation for treating the public in a crude, abusive, and high-handed manner. There are frequent reports of police engaging in extrajudicial killings of criminal suspects and those who challenge the political establishment and wealthy landowners. Politicians routinely use police to intimidate political opponents and pressure voters during elections. Police constables affect a military manner and answer to military-style discipline. Police are feared, but not respected. For the average citizen, seeking police assistance is viewed as potentially dangerous and done as a last resort.⁸⁷

In the core area of Pakistan, policing is the responsibility of the country's four provincial governments and in the capital, Islamabad, of the Federal government. The rank-and-file of the provincial police are locally recruited from the lower strata of society. Recruits must have completed high school, but many are functionally illiterate and their training is devoted to marching and instilling discipline with little attention paid to learning police skills. Salaries are low and uniforms, housing, medical care, and other benefits are either limited or not provided. In urban areas, police stations are heavily guarded, fortress-like structures that convey a sense of the state's authority. In rural areas, police stations often are in dilapidated buildings. Some sub-

⁸³ Salman Masood, "At U.S. Urging, Pakistan to be Placed on Terrorism-Financing List," *The New York Times*, February 23, 2018, <https://www.nytimes.com/2018/02/23/world/asia/pakistan-terror-finance-list.html>.

⁸⁴ Robert Perito and Tariq Parvez, "A Counterterrorism Role for Pakistan's Police Stations," Special Report number 351, (Washington, DC: The United States Institute of Peace, August 2014). <https://www.usip.org/sites/default/files/SR351-A-Counterterrorism-Role-for-Pakistan%E2%80%99s-Police-Stations.pdf>.

⁸⁵ The World Justice Project, "The Rule of Law in Pakistan, 2016 Survey" Washington D.C. 2016, pp.6-7, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/special-reports/rule-law-pakistan>.

⁸⁶ Robert Perito and Tariq Parvez, "Empowering the Pakistan Police," Special Report number 332, (Washington DC: The United States Institute of Peace, May 2013), <https://www.usip.org/sites/default/files/SR332-Empowering-the-Pakistan-Police.pdf>.

⁸⁷ "This Crooked System: Police Abuse and Reform in Pakistan," Human Rights Watch, September 25, 2016, <https://www.hrw.org/report/2016/09/25/crooked-system/police-abuse-and-reform-pakistan>.

stations are in makeshift structures or even tents. Police are expected to work long hours seven days a week and often go months, if not years, with no time off. Over the course of a career, constables have little prospect for promotion or better assignments. Under these conditions, it is not surprising that police abuse the public and are open to opportunities for petty corruption, recruitment by politicians or criminal elements, and use of their position for personal gain.⁸⁸

In contrast, the officer corps is provided by a national institution, the Police Service of Pakistan (PSP), which is among the most prestigious of the occupational groups comprising the government's Central Superior Services. PSP officers are recruited through the federal civil service examination system and undergo training with other civil servants at the National Civil Service Academy. PSP officers rotate through postings in all provinces, supervising local police in the manner of British police officers during the colonial period. While PSP officers are Federal employees, when serving in provincial police forces, they report to provincial chief ministers and are funded by provincial governments.⁸⁹ This creates a provincially based, decentralized system of policing with ineffective national oversight. It also creates a situation where provincial-level political interference with police administration and operations is rampant and beyond the ability of the police leadership to resist the external pressure.⁹⁰

Decisions on police officer's assignment are made by provincial officials who have the authority to direct police operations, including ordering arrests or releasing persons in custody. This arrangement serves the interests of the political elite, wealthy landowners, and influential members of society who can pay for or demand special treatment. Political control of the police opens the way for massive corruption and abuses within the force. Command-level officers are often chosen for their willingness to comply with illegal orders and harass political opponents. Senior police officers are required to pay bribes to their political superiors to obtain postings. Positions that provide opportunities for payoffs and kickbacks—from both the private sector and organized crime—are in high demand and require large bribes at every level as police officers must raise money from subordinates to recoup their own payments.⁹¹

The financial impact of police officers buying their positions is amplified by the fact that in practice there is no fixed length of police assignments or security of tenure. Police officers can be transferred at the whim of their political superiors, who do not have to provide justifications or advance warning. A survey conducted by a group of reform-minded PSP officers discovered that the average time in an assignment for a provincial police chief was eight months. Officers in charge of policing in provincial capitals and other major cities served only six months on

⁸⁸ Tariq Khosa, "Who Will Police the Police?" *Dawn*, July 15, 2013, <http://www.dawn.com/news/1023792/who-wil-police-the-police?>

⁸⁹ Hassan Abbas, "Reforming Pakistan's Police and Law Enforcement Infrastructure: Is It Too Flawed to Fix?," Report number 266, (Washington DC: The United Institute of Peace, February 2011) https://www.usip.org/sites/default/files/SR266-Reforming_Pakistan%E2%80%98s_Police_and_Law_Enforcement_Infrastructure.pdf.

⁹⁰ Afzai Ali Shigri, "Police Corruption and Accountability," in Hassan Abbas, ed., *Stabilizing Pakistan Through Police Reform*, Asia Society, Report of the Independent Commission on Pakistan Police Reform, July 2012, pp.25-28.

⁹¹ Robert Perito and Tariq Parvez, "Empowering the Pakistan Police," Special Report number 332, (Washington DC: The United States Institute of Peace, May 2013), <https://www.usip.org/sites/default/files/SR332-Empowering-the-Pakistan-Police.pdf>.

average. The head of police stations averaged only three months in their assignments.⁹² Frequent turnover of police leadership maximizes the illicit income from bribes for political officials, but it also means that police officers down the chain of command have to pay bribes to their superiors more frequently as well.⁹³

The financial burden of this system of public corruption is onerous, but it's most pernicious influence is on the effectiveness of police operations. Insecurity of tenure creates a situation where even well-intentioned and honest police officers are unable to effectively perform their duties. Countering terrorism and organized crime requires an in-depth understanding of local personalities and the environment. Frequent transfers mean senior police officers hardly learn the names of their subordinates before they are forced to move on. Police leaders justifiably point to the shortness and unpredictability of assignments as the reason for poor police performance. Knowing they may be removed at any time, police executives resort to quick fixes and reactive measures rather than engaging in strategic planning to improve police performance and local conditions.

Political interference with the police extends beyond bribery and arbitrary assignments to the rampant misuse of police by political officials to curry favor and satisfy requests from wealthy, influential patrons. In high threat areas, it is common for politicians to utilize police for personal protective details and to arrange such VIP protection for family members, colleagues, and prominent personalities. This is particularly true for elite counterterrorism units whose members are assigned to provide personal protection and, in teams, to conduct convoy operations or guard offices and residences. The Lahore-based newspaper *Dawn* reported that some 60% of the city's police were engaged in VIP protection or acting as escorts for politicians, judges, bureaucrats, religious leaders, and media personalities – with over 1,200 police assigned to protect the prime minister's family residence. In addition, nearly two-thirds of police motorcycles and vehicles were used to escort prominent persons with most of the remainder assigned for senior police officers' personal use. The newspaper noted that with the police otherwise occupied, crime in the city had increased by 17 percent.⁹⁴

Despite their dismal reputation, Pakistani police are routinely called upon to adjudicate noncriminal disputes. These disputes range from petty squabbles between neighbors over noise and trash, to major confrontations between extended families over land ownership. Mediating disputes is part of every police officer's work, though it technically lies outside their official duties. Resolving disputes is time consuming, normally done without compensation, and risks involving the police in those disputes or corrupt activities. Police officers defend the practice by noting that if conflicts are left to fester they can escalate into violence and revenge killings. Most police stations employ unpaid citizen committees to mediate disputes between residents. Police may participate in these committees or intervene if complainants cannot reach agreement.⁹⁵

Pakistan's police are the first responders to terrorist incidents and are often the targets of terrorist attacks. On June 23, 2017, seven policemen were killed in a suicide attack on a police

⁹² Tariq Parvez, "Brief Tenures of Police Leadership," *Dawn*, July 14, 2014, <https://www.dawn.com/news/1119220/brief-tenures-of-police-leadership/print>.

⁹³ Ibid.

⁹⁴ Muhammad Faisal Ali, "Protocol Duties Consume 60 Per Cent of Police Force," *Dawn*, January 2, 2012, <https://www.dawn.com/news/684973>.

⁹⁵ Perito and Parvez, "Empowering the Pakistan Police," p. 7.

checkpoint in Quetta, one of a series of attacks at the end of Ramadan.⁹⁶ Yet counterterrorism is not a formal responsibility of the police. For the Federal government, countering terrorism has been viewed as the responsibility of the Army which has conducted a series of military campaigns in the FATA to destroy Taliban base camps and drive militants across the border into Afghanistan. In response to the December 2014, Tehrik-i-Taliban attack on an Army Public School in Peshawar the government adopted a National Action Plan that ended Pakistan's moratorium on the death penalty and sanctioned special military courts for terrorist cases. More than 300 death row prisoners were executed, and military courts tried suspected terrorists in secret, including four men linked to the school attack, bypassing the glacially slow civilian court system.⁹⁷

Provincial governments followed suit by creating special armed anti-terrorist units that were often trained by the Army and composed of former military personnel. Provincial leaders have argued that the police are not trained or equipped to face armed terrorists groups and are already struggling to meet their responsibilities for maintaining public order and controlling ordinary crime. The police also resisted the expansion of their already overwhelming list of responsibilities to include counterterrorism. Police duties range from conducting foot patrols, manning traffic check points, and directing traffic to engaging in dispute resolution, escorting health workers, preventing theft of electricity, and stopping arguments over kite flying. In January 2014, the head of a police station in Sindh province was suspended for failing to follow orders after the terrorist-caused death of a motorcycle patrolman. Provincial authorities had decreed police were to be equipped with mobile phones, patrol in pairs, and wear body armor. The station house officer protested that his 70 personnel had only three mobile phones, one motorcycle, and six bulletproof jackets, and that he could follow the new security procedures only if his station was properly equipped.⁹⁸

Police are further dissuaded from taking an active role in countering terrorism by the distrust and lack of authority in their relationship with the Army and intelligence services. Police are aware of the ties between these organizations and certain militant groups and will privately admit to routinely receiving instructions from intelligence agencies to release suspects arrested in terrorist cases. This carries over to militant groups that enjoy protection of provincial governments and political parties. The political leadership and the security services in Punjab pointedly ignored four terrorist groups that were operating training camps in the southern part of the province.⁹⁹ Ironically, U.S. police assistance caught the attention of the Pakistan Army, which feared the United States would gain undue influence over their civilian counterparts. To counter possible U.S. gains, the Army sought to improve its own relations with the police and

⁹⁶ Salman Masood, "Bombings in Pakistan Kill Dozens, Putting Country on Edge," *The New York Times*, June 23, 2017, https://www.nytimes.com/2017/06/23/world/asia/bombings-pakistan-parachinar.html?_r=0.

⁹⁷ Jon Boone, "Peshawar School Attack: One Year on 'The Country has Changed Completely,'" *The Guardian*, December 15, 2015, <https://www.theguardian.com/world/2015/dec/16/peshawar-school-attack-one-year-on-the-country-is-changed-completely>.

⁹⁸ Farz Khan, "Enough Works, Give US Resources, Say Policemen," *The Express Tribune*, January 31, 2014, p. 5.

⁹⁹ Hassan Abbas, "Reforming Pakistan's Police and Law Enforcement Infrastructure: Is it too Flawed to Fix?" Special Report Number 266 (Washington, D.C., U.S. Institute of Peace, February 2011) https://www.usip.org/sites/default/files/SR266-Reforming_Pakistan%E2%80%98s_Police_and_Law_Enforcement_Infrastructure.pdf.

began providing limited amounts of financial assistance and training, particularly for rapid reaction and counterterrorism units.¹⁰⁰

In its January 2014 report on “Policing Urban Violence in Pakistan,” the International Crisis Group concluded that Pakistan’s police should be given primacy in controlling terrorist, sectarian, and insurgent violence, but that this would be impossible without fundamental police reform. The report noted that Pakistan’s megacities required sophisticated police personnel and technical resources to track violent offenders and urged that provincial governments make modernization the focus of law enforcement reforms. The report urged governments to insure police are not hampered by political interference, inadequate resources, and a lack of institutional and operational autonomy.¹⁰¹

The Judicial System

On July 28, 2017, Pakistan’s Supreme Court ordered the removal of Prime Minister Nawaz Sharif from office on charges of corruption stemming from the disclosures in the Panama Papers scandal. The documents showed that Sharif and his family owned expensive residences in London through a number of offshore companies. An ensuing investigation by the court determined that the Prime Minister had amassed millions of dollars in unaccounted for income and had evaded paying taxes. That the Prime Minister, who had dominated the country’s politics for decades, immediately agreed to step down indicated the strength of the judiciary at the most senior level and its support from the Army.¹⁰²

As a consequence of this and similar actions, 47% of Pakistanis view judges and magistrates as the least corrupt public officials. Nonetheless, Pakistanis generally avoid using the formal court system for dispute resolution. Most Pakistanis take their disputes to a traditional or customary authority. Of those using the formal judicial system, most seek assistance first from police, then the courts, and least often from a government office. Those using the traditional mechanisms were most satisfied with the speed and cost of the dispute resolution process.¹⁰³

The preference for customary justice is encouraged by the failures of the formal legal system, particularly the lower courts. Dockets are heavily backlogged due to antiquated court administration, and malpractice by judges, lawyers, and the police. There is widespread corruption and confusion between the civil and criminal tracks with the same judges hearing cases in both areas. Most civil cases are settled by agreements between the parties away from court. Most criminal cases end in acquittals after long periods of pre-trial detention because of lost files or the disappearances of witnesses.¹⁰⁴ Access to courts is restricted by the cost of hiring

¹⁰⁰ Author telephone interview Pakistan-American academic expert, Washington, DC, August 17, 2017.

¹⁰¹ International Crisis Group, “Policing Urban Violence in Pakistan,” Asia Report Number 255, January 23 2014, pp. 38-41. Available at <http://www.crisisgroup.org/~media/Files/asia/south-asia/pakistan/255-policing-urban-violence-in-pakistan.pdf>.

¹⁰² Slaman Masood, “Prime Minister Nawaz Sharif of Pakistan is Ordered Removed,” *The New York Times*, July 28, 2017, <https://www.nytimes.com/2017/07/28/world/asia/pakistan-prime-minister-nawaz-sharif-removed.html?smprod=nytcare-ipad&smid=nytcare-ipad-share>.

¹⁰³ World Justice Project, “The Rule of Law in Pakistan,” https://worldjusticeproject.org/sites/default/files/documents/Pakistan%20Thematic%20Infographics_0.pdf.

¹⁰⁴ Mohib Asad, “The Criminal Justice System,” in Hassan Abbas, ed., *Stabilizing Pakistan Through Police Reform*, Asia Society, Report by the Independent Commission on Pakistan Police Reform, July 2012, Pp. 19-23.

an attorney, the need to travel to urban centers where courts are located, and the need to pay bribes to obtain a verdict.

There is also a problem with legal awareness. With an illiteracy rate of 40%, Pakistanis have only a limited awareness of their civil and legal rights, particularly in agricultural areas where society retains a feudal character. The preference for traditional dispute resolution has been exploited by the Pakistan Taliban in the FATA. Taliban courts provide quick judgments, based upon Shariah law and local traditions, backed by the use of force against those who reject their verdicts. Participation in Taliban justice makes those receiving favorable judgments dependent upon the group remaining nearby to insure that the rulings are followed.

The structural limitations imposed by laws, bureaucracy, and customary practice on police are also evident in the country's judicial institutions—particularly those that focus on countering terrorism. The Anti-Terrorism Act (ATA) of 1997 is Pakistan's primary counterterrorism law and applies throughout the country except in the FATA. The Act created a special category of Anti-Terrorism Courts (ATCs), 54 of which now operate in parallel with the regular court system. The ATA and the courts it created are deeply flawed and foster a situation where there is a 7% conviction rate in terrorist cases and rampant finger-pointing between police, prosecutors, and judges. Despite repeated amendments, the ATA remains vaguely worded and lacks specific definitions of terrorism or terrorist acts. The law's overly broad scope allows police and prosecutors to bring any offense that might frighten or terrorize the public before the special courts. Prosecutors bring high profile criminal cases before the ATCs to show the public that they are doing something. For the same reason, the police register irrelevant cases that clog the ATCs. As a result, terrorism cases suffer long delays and are often either dismissed or end in acquittals because documents and witnesses have disappeared over time.¹⁰⁵

Despite their special status, procedures in ATC trials are essentially the same as those used in criminal trials. ATC judges rely almost exclusively on eyewitness testimony delivered in the courtroom and confessions. Forensic evidence is generally limited to serological reports related to a colonial-era requirement to prove that blood found at the scene of a crime was human and not animal. Use of DNA evidence is limited by the lack of forensic labs, failures to maintain a chain of custody, and social and religious attitudes. The country's only near state-of-the-art lab, the Punjab Forensic Science Authority (PSFA), is overburdened, slow to process samples, and victimized by police sending irrelevant material to be analyzed. Pakistan also lacks an updated, efficiently operated fingerprint database. The Pakistan Automated Fingerprints Identification System operated by the Federal Investigations Agency is difficult to access, poorly maintained, and slow to respond to requests from police agencies.¹⁰⁶ Police, prosecutors, and judges ignore the Fair Trial Act of 2013 that authorizes covert surveillance, wire-tapping, DNA and other types of forensic evidence. Criminal investigations conducted by untrained and overworked police investigators are often incomplete and poorly documented. Cases are often dismissed for lack of evidence and procedural errors.¹⁰⁷

¹⁰⁵ Zulfiqar Hameed, "Antiterrorism Law," in Hassan Abbas, ed., *Stabilizing Pakistan through Police Reform*, Asia Society, Report by the Independent Commission on Pakistan Police Reform, July 2012. Pp. 49–56.

¹⁰⁶ Manzar Zaidi, "Assessing Conditions for U.S. Rule of Law Interventions: Forensics," (Lahore, Unpublished report, 2017).

¹⁰⁷ Zulfiqar Hameed, "Antiterrorism Law," in Hassan Abbas, ed., *Stabilizing Pakistan through Police Reform*, Asia Society, Report by the Independent Commission on Pakistan Police Reform, July 2012. Pp. 49–56.

Judicial insistence on eye witness testimony in terrorist trials contributes to the lack of convictions. Judges ignore the fact that terrorists usually hide their identity and that witnesses inevitably offer contradictory stories. Witnesses, who are required to testify with the accused present, are routinely intimidated and frequently subjected to reprisals so people are reluctant to come forward and appear in court. Police react to the necessity of providing eyewitness accounts by hiring witnesses and fabricating their testimony. Police also pad the number of witnesses, especially for major trials, which results in inaccurate and contradictory statements that are seized on by defense attorneys. Judges have no authority to discipline defense lawyers who have achieved celebrity status in Pakistan for courtroom antics – including failing to appear, requesting frequent adjournments, and staging strikes and street protests to delay trials.¹⁰⁸ Ten years after the assassination of former Prime Minister Benazir Bhutto, on August 31, 2007, an ATC judge freed the five members of the Pakistan Taliban and al-Qaeda that had been charged with the crime for lack of evidence. Judges hearing the case had changed frequently and there was speculation that the judge issuing the ruling was afraid of reprisals.¹⁰⁹

In Punjab province, prior to the passage of the Prosecution Act of 2006, magisterial prosecutions were handled by police legal officers presenting the cases in court. Prosecution Services are relatively recent developments in other provinces. Newly-minted public prosecutors are burdened with heavy caseloads and in practice have little authority to pursue cases or, more importantly, to drop cases that are without merit. The inability of prosecutors to clear dockets and improve case flow contributes to the attendant problems of long pretrial detention, failure to provide timely justice, and lack of public confidence in the courts. Current practice is sustained, however, by the entrenched vested interests of patronage politics, rigid attitudes of the police who do not want to give up their historic prerogatives and a general unwillingness to grant prosecutors additional powers. This is a critical bottleneck, the removal of which would have a positive impact.

Corrections

Corrections is a provincial government responsibility in Pakistan. Each province has a central provincial prison, multiple district prisons, and numerous sub-district jails. There is only one staff training institution, the National Academy of Prison Administration in Lahore. Prisons are understaffed, warders are poorly trained and prison rules are antiquated. Prisons are overcrowded with an estimated 70% of inmates held in pre-trial detention. Prison administration still utilizes handwritten ledgers and, beyond noting dates of arrival and release, record keeping concerning prisoners is minimal. Foreign prison assistance, including from the United States, has principally focused on Punjab province and largely consisted of staff training – including repeated failed attempts to introduce computerized systems for records and personnel management. Among the reasons for the lack of progress has been the shortage of educated,

¹⁰⁸ Syed Manzar Abbas Zaidi, "Terrorism Prosecution in Pakistan, *Peaceworks*, (Washington, D.C, U.S. institute of Peace, 2016) p. 9. https://www.usip.org/sites/default/files/PW113_Terrorism_Prosecution_in_Pakistan.pdf.

¹⁰⁹ Salaman Masood, "Five Suspects in Bhutto Assassination are Cleared by Pakistan Court," *The New York Times*, August 31, 2017, https://www.nytimes.com/2017/08/31/world/asia/benazir-bhutto-assassination-court-ruling.html?mcubz=3&_r=0.

computer-literate staff and absence of government support to insure sustainability and necessary technology upgrades.¹¹⁰

Problems with Pakistan's jails and prisons begin with the misuse, by influential citizens and the police, of the First Incident Report (FIR) system. Once a FIR accusing someone of committing a crime is registered, the police must arrest and detain the accused while they conduct an investigation. Persons involved in disputes exploit this practice as a negotiating strategy to force the accused to agree to terms. It is also used by the police in criminal and terrorism cases to place suspects in pretrial detention and take them off the streets. In cases before the ATCs, this appears to be the preferred approach for dealing with suspects where extended pre-trial detention is the goal. Hundreds of suspects are rounded up after terrorist incidents and held for prolonged periods. Little effort is made to build cases against them but prisoners may be incarcerated for a longer period than if they were convicted of the crime. Prisons are holding facilities for suspected extremists and breeding grounds for radicalization.

U.S. Rule of Law Assistance to Pakistan

Despite the contradictions in practice, officially the United States and Pakistan maintain a strong security partnership and are working to dismantle terrorist networks. In FY 2016, Pakistan received \$255 million in U.S. Foreign Military Financing that was focused on strengthening the ability of Pakistan's military to conduct counterterrorism and counterinsurgency in areas bordering on Afghanistan.¹¹¹ In addition to military aid, Pakistan's police and civilian security forces received substantial U.S. security assistance through State/INL's law enforcement, countering violent extremism and counter narcotics programs.

Law enforcement assistance is implemented through the U.S. Justice Department's ICITAP program which uses contractors to deliver training on investigations, forensics, modern police practices and on improving police-community relations.¹¹² ICITAP has created model police stations in metropolitan areas and built demonstration public reception centers at police stations in Islamabad. These centers present a welcoming atmosphere to citizens seeking police assistance and are equipped with computers manned by specially trained personnel. Unfortunately, the computers are not networked between stations or to higher headquarters and the Pakistan police have been either unable or uninterested in replicating the model stations or reception centers more broadly.¹¹³

State/INL also funded programs on counterterrorism and counternarcotics. ICITAP and other U.S. agencies have addressed the threat to Pakistan's police from improvised explosive devices with training on recognition, post-blast investigation and terrorist attack-site management. State/INL's broad counternarcotics assistance portfolio includes programs to support law enforcement, crop control and demand reduction. State/INL has provided training and equipment to the Ministry of Narcotics Control Anti-Narcotics Force and the Frontier Corps

¹¹⁰ Manzar Zaidi, "Assessing Conditions for U.S. Rule of Law Interventions: Prisons" (Unpublished report, Lahore, Pakistan, August 2017).

¹¹¹ Office of the Special Representative for Afghanistan and Pakistan Fact Sheet, "U.S. Relations with Pakistan," Diplomacy in Action, U.S. Department of State, January 24, 2017, <https://www.state.gov/r/pa/ei/bgn/3453.htm>

¹¹² U.S. Department of Justice, "About ICITAP Asia and Pacific," February 2, 2017, <https://www.justice.gov/criminal-icitap/asia-and-pacific>

¹¹³ Briefing received during the author's visits to these facilities in 2016.

in border provinces. Funds have been provided to build 650 kilometers of access roads to enable police to reach growing areas; irrigation canals to create fertile farm land for alternative crop cultivation; and, hydro-electric, clean water supply and other civic improvement projects to encourage local buy-in for counter-drug programs. State/INL has supported Pakistan's Anti-Narcotics Force Academy and related training for more than a thousand Pakistani law enforcement officers. To assist demand reduction programs, State/INL developed a comprehensive drug user survey to inform police program development.¹¹⁴

State/INL also funded programs to improve police-community relations through the U.S. Institute of Peace (USIP). One project created a made-for-television movie about how much Pakistanis respect the police; a second paid mini-cab drivers to post pro-police slogans on the back of their vehicles rather than commercial advertisements.¹¹⁵ In FY 2015, USAID had a robust, \$72.9 million Democracy and Governance program in Pakistan aimed at strengthening government institutions and civil society and protecting individual rights. The rule of law portion of the budget, however, was only \$300,000.00 which was devoted to public awareness campaigns, judicial training and assisting civil society.¹¹⁶

In Pakistan, U.S. rule of law assistance programs often fail because of the lack of U.S. understanding of structural problems within the Pakistani government. A State Department program to introduce community policing to counter violent extremism is a case in point. The program was implemented by a Washington-based agency in partnership with the National Police Bureau (NPB) in Islamabad. On paper, the federal-level NPB is responsible for policy development and strategic planning, but has no actual authority over the country's provincial police forces. The project began with a Washington meeting where a small group of PSP officers and U.S. experts developed a "concept note" laying out a plan to introduce community policing in Pakistan. Following the meeting, the NPB director was replaced and the Washington agency delayed a visit to Islamabad. The new NPB director said the right things, but the project stalled. NPB then failed in three attempts to organize the follow-on meeting because provincial police forces would not participate and the foreign ministry refused to issue visas to the American experts. After two years of frustration, the State Department withdrew the remaining funding, terminating the program.¹¹⁷

Interviews with a cross-section of police officers, judicial officials, and civil society representatives showed that Pakistanis view U.S. rule of law assistance programs as well-intentioned but generally irrelevant. U.S. pilot programs that create model police stations, demonstrate the applications of computers or deliver forensic training are helpful but reach limited numbers and are not sustained by Pakistani government investment. Interviewees viewed U.S. programs that promote practices that violate Pakistani cultural norms as counterproductive. The current U.S. approach fails to identify, or simply ignores, the structural problems that are the source of police and judicial corruption and malpractice in Pakistan. Unless these impediments are addressed, U.S. programs will continue to have only superficial effects. Informed observers

¹¹⁴ U.S. Department of State, "INL Pakistan Counternarcotics Program," Diplomacy in Action, <https://www.state.gov/j/inl/narc/c48593.htm>

¹¹⁵ Author's interview with U.S. institute of Peace staff member, December 13, 2016.

¹¹⁶ USAID Dollars to Results, "Democracy and Governance in Pakistan, FY 2015," <https://results.usaid.gov/pakistan/democracy-and-governance#fy2015>

¹¹⁷ Author was a participant in this program.

argued that the United States should cease offering rule of law assistance programs designed to promote cosmetic changes that merely make Pakistani rule of law institutions look more like their American counterparts. Instead, the United States should use its political and diplomatic leverage to promote programs that demonstrate U.S. understanding of the political dynamics and power relationships that prevent reform.

The U.S. should focus on reducing political interference with the police by using diplomacy to convince elites their interests are better served by enabling the police to perform effectively. U.S. diplomats can point to successes in Khyber Pakhtunkhwa (KP) province on the Afghan and Kashmir border, where the provincial government has empowered competent police leadership and forbidden political interference with police operations and personnel management. In KP, the provincial police inspector general drafted a new basic police law that was adopted by the provincial assembly. The result has been significant progress in combating organized crime, narcotics trafficking, and countering terrorism within the province.¹¹⁸ Ensuring ‘security of tenure’ for senior police officials is another point of access for this approach. Senior PSP officers have proposed ending the current ‘revolving door’ system of assignments and allowing police commanders to serve the full, legislatively-defined three year term as a means of improving police performance and controlling corruption. The U.S. should use its influence with the federal and provincial governments to institute this reform.

Regarding the judiciary, the U.S. should address failures to effectively prosecute terrorist cases, even in the special terrorism courts, by encouraging Pakistani legislative and judicial authorities to: (1) amend the ATA to include a specific definition of terrorism and a list of terrorist acts; (2) implement the 2013 Fair Trial Act by recruiting educated criminal investigators and provide them with the capacity to utilize modern approaches; (3) develop standard operating procedures for terrorist case management, particularly for controlling evidence and the forensic processing of terrorist incident sites; and (4) require judges to abide by existing laws and admit DNA analysis and other types of modern forensic evidence in their courts. These approaches require the use of U.S. diplomatic and political pressure to inspire Pakistani political will to undertake meaningful reforms. These programs are virtually cost free, but should be supported by well-designed rule of law assistance programs once local reform efforts are underway.

Tunisia

On December 17, 2010, the Arab Spring began in the Tunisian town of Sidi Bouzid with an episode of police abuse that led to the self-immolation of a fruit peddler named Mohammed Bouazizi. His death sparked protests that spread quickly from the rural south to the capital where the country’s U.S. trained military refused a presidential order to fire on protestors. That same day, President Zine El Abidine Ben Ali fled to Saudi Arabia.¹¹⁹ Following his overthrow, Tunisia experienced an upsurge in Islamist terrorist violence. In 2012, Ansar al Sharia led a mob attack on the U.S. Embassy in Tunis. In 2013, insurgents established a base in the mountains near the Algerian border and began a campaign of political assassinations, ambushes of police

¹¹⁸ Author’s telephone interview with retired senior police official with personal knowledge of conditions in KP Province, August 29, 2017.

¹¹⁹ Querine Hanlon, “Security Sector Reform in Tunisia: A Year after the Jasmine Revolution,” United States Institute of Peace Special Report, Number 304, March 2012, pp-1-2, <https://www.usip.org/sites/default/files/SR304.pdf>.

and army units, and suicide bombings. Two prominent political leaders were killed in Tunis with the Islamic State (IS) claiming credit. In 2015, more than 70 foreign tourists were killed in IS attacks on the Bardo Museum in Tunis and the Marhaba Hotel in Port el Kantaoui. A dozen members of the presidential guard were killed in a suicide attack claimed by IS. In March 2016, Tunisian security forces thwarted an attempt by a group of 60 jihadists to occupy the city of Ben Geurdane near the Libyan border. Subsequently, Tunisia built a 125-mile earthen wall along its Libyan border to prevent infiltration.¹²⁰

Today, there is a sense amongst Tunisia's security forces and political class that the terrorism threat has abated over the last year. There has not been a mass casualty attack in 17 months. British tourists have returned to the Tunisian beach resort at Sousse two years after the terrorist attack that killed 38 people.¹²¹ Yet, two proto-insurgencies involving Al-Qaeda in the Islamic Maghreb (AQIM) and IS-affiliated groups continue in the western governorates along the Libyan border.¹²² On January 20, 2018, the National Guard ambushed and killed two leading members of AQIM who were on a mission to reorganize the group's Tunisian branch.¹²³ Returning Islamic State fighters also pose a threat. More Tunisians joined the IS than from any other country. As many as 6,000 Tunisians went to Syria and Libya, where hundreds died in battle while others moved on to commit terrorist acts in France and Germany. Tunisian officials' fear that thousands may return home, increasing the threat of terrorist violence at a time when the country is ill prepared to respond.¹²⁴

At the same time, on the seventh anniversary of the Arab Spring, Tunisia remains the region's best hope to complete the transition from authoritarian rule to democratic governance. Tunisians have adopted a new constitution and held free and fair parliamentary and presidential elections in 2014. The next year, Tunisia's parliament approved a unity government led by the secular Nidaa Tounes party that included the rival Islamic party. In July 2017, parliament passed landmark legislation outlawing domestic violence and economic discrimination against women.¹²⁵ However, the country faces growing challenges from economic stagnation and youth unemployment. On January 1, 2018, a new government budget that raised taxes on gasoline and food items brought protesters into the streets in ten cities resulting in over 800 arrests.¹²⁶ Political elites are stalling the democratic transition. Parliament has not appointed a constitutional court because of failure to agree on the judges. Local elections were postponed

¹²⁰ "Jihadist Violence in Tunisia: The Urgent Need for a National Strategy," International Crisis Group, Briefing Number 50, June 22, 2016, <https://www.crisisgroup.org/middle-east-north-africa/north-africa/tunisia/jihadist-violence-tunisia-urgent-need-national-strategy>.

¹²¹ Reuters, "Two Years after Sousse Attack, British Tourists Return to Tunisia," *Al-Monitor*, August 2, 2017, <http://www.al-monitor.com/pulse/originals/2017/08/tunisia-sousse-attack-britain-resume-flights-tourism.html>.

¹²² Author's Skype interview with resident Tufts University researcher, Tunis, Tunisia, October 24, 2017.

¹²³ Tarek Amara, "Tunisia Forces Kill the New Leader of Local Branch of al-Qaeda," *Reuters*, January 21, 2018, <https://af.reuters.com/article/africaTech/idAFKBN1FBONE-OZATP>.

¹²⁴ Carlotta Gall, "Tunisia Fears the Return of Thousands of Young Jihadists" *New York Times*, February 25, 2017, https://www.nytimes.com/2017/02/25/world/europe/isis-tunisia.html?_r=0.

¹²⁵ "Tunisia Passes Landmark Law to End all Violence against Women," *France 24*, July 28, 2017, <http://www.france24.com/en/20170727-tunisia-violence-against-women-landmark-law>.

¹²⁶ Lillia Blaise, "You Can't Survive Anymore: Tunisia Protests Rising Prices and Taxes," *The New York Times*, January 9, 2018 https://www.nytimes.com/2018/01/09/world/africa/tunisia-protests.html?_r=0.

four times and before taking place in May 2018. Major parties are already positioning themselves for national elections scheduled for 2019.¹²⁷

Donald Planty visited Tunisia in October 2017, to assess progress toward the rule of law in a country that overturned an authoritarian regime during the Arab Spring but is struggling to consolidate democratic rule. He met with the Tunisian Truth and Dignity Commission, legislators, legal advisors, NGOs, think tanks, and opposition political leaders.

Some interlocutors stated that Tunisia is moving forward with democratic reforms, albeit slowly, but most felt that the democratic process has stagnated. Several emphasized that the country has enacted too many new laws without the capacity to implement them or to follow-up on democratic policy initiatives. Others said that the country is still governed by old laws and the government prefers decrees to laws, which are easier to promulgate and do not come with checks and balances. There is selective application of the law. The Constitutional Court is not fully constituted and municipal elections, provided for in the Constitution, have not taken place. A planned new investment law has not emerged in five years and reform of the criminal code remains unfinished.

A super majority of those interviewed underscored that the lack of an independent judiciary as the biggest stumbling block to establishing the rule of law. The government has tried to co-opt the National Association of Tunisian Magistrates to prevent its acting as an independent arbiter for judges and the courts. Activists emphasized that pressures on the Association prove the government does not accept the concept of judicial independence. Judges' salaries average \$1,200 per month, an unrealistic figure and one that encourages corruption. Access to justice is also an issue. In 2017, the government reduced its budget for legal aid to the poor from 1.7 million Dinars to 700,000 Dinars. This situation is exacerbated by an IMF austerity program that requires the government to reduce spending. Police reform has not taken place. The Ministry of Interior has limited control over the police and more accountability and transparency is needed.

The International Center for Transnational Justice (ICTJ) was founded in 2001 as a non-profit organization dedicated to pursuing accountability for atrocities and human rights abuses through transitional justice mechanisms. Its director, Salwa El Gantri,¹²⁸ said that the rule of law is an important topic in Tunisia because the counter-revolution has had an impact (the International Center for Transitional Justice). The challenge that Tunisians face is to save what they have accomplished in the rule of law area over the past six years. Police reform has not taken place despite the history of police abuse in Tunisia. There is more police torture in Tunisia today than before the revolution. The US has provided assistance for police reform and modernization of the Ministry of Interior but there is no assessment of the impact of this programming. The Ministry itself acts transparently but the police are not under control. In essence, there is no equality before the law in Tunisia today. The outlook for the rule of law is

¹²⁷ "Democracy and its Discontents: Tunisians are Losing Faith in the Ballot Box," *The Economist*, January 20, 2018, <https://www.economist.com/news/middle-east-and-africa/21735051-widespread-protests-have-shown-depth-their-disgruntlement-tunisians-are>.

¹²⁸ Author interview with Salwa El Gantri, Head of Office, the International Center for Transitional Justice, Tunis, Tunisia, October 9, 2017

gloomy and many are asking if the government wants to control constitutional issues by not establishing the constitutional court.

Tunisians need to work very hard to keep their hopes alive and to find a political balance that will assure continued democratic reforms. Efforts must be directed toward achieving long term social justice and providing opportunities for the young and unemployed. People do not trust institutions and the government is not using the Tunisian General Labor Union (UGTT) to negotiate labor agreements but rather negotiating with workers directly. The UGTT played a leading role in Tunisia's democratic reform process, winning the 2015 Nobel Peace Prize as part of the group of civil society organizations credited with preserving Tunisia's democratic transition.

Overall, the democratic political process is not what it should be in the wake of the revolution. There are questions surrounding the government's transparency and accountability. The government was supposed to move forward with anti-corruption legislation last April but did not. There are also concerns with the work of the Truth and Dignity Commission (Reconciliation Commission). The public has no idea of what the Commission will do – there is no transparency or clarity in the Commission's work. There should be written depositions in specific cases and the outcome of investigations should be published in the official gazette. Moreover, the Commission's mandate does not meet the requirements of the reconciliation law. There is a need to combat terrorism but without engaging in human rights violations. The government has no strategy for moving ahead with the democratic process and there is imminent danger of backsliding. The forces of reform, change and the rule of law are struggling and Tunisia will be fortunate to have real rule of law in twenty years.

An interview with Amine Ghali, Director of the Kawakibi Democracy Transition Center, produced similar complaints about the rule of law in Tunisia.¹²⁹ Ghali stressed that there is no rule of law in Tunisia today because the country does not have a rule of law tradition. Tunisia is accustomed to laws produced by dictatorships and producing laws through democratic procedures is a new experience. There is still a huge resistance to democratic reform from the old forces representing a past era. Tunisia, in fact, is still governed by old laws and needs laws that emanate from the democratic process. The authorities find it easier to rule by decree, without checks and balances, and to be inaccessible to the public. When the laws are good, the government does not apply them; when they are bad, they are applied selectively – a double-edged sword. The seat belt law is a good example. Tunisians ignore the seat belt law and the police enforce the law only selectively when they want to detain an individual for undetermined reasons. The same is true of taxes. This selective implementation of the law is the norm and does not produce a rule of law based society.

Corruption remains a major problem. It begins with the country's leadership and then becomes the norm throughout society. The old system was riddled with corruption and the revolution has shaken this construct but not dismantled it; new forms of corruption have entered the scene. Tunisians who support the democratic reforms are in the middle of this fight. Civil society is trying to take the lead following the example of Lech Walesa in Poland.

¹²⁹ Author interview with Amine Ghali, Director, Kawakibi Democracy Transition Center, Tunis, Tunisia, October 9, 2017

The United States' role falls into three categories – political, security and economic. The early thinking post-revolution was that the political and economic spheres were the most important but security proved to be a major need during the transition. Many feel that Tunisia is still falling behind in the security sector. Ironically, security is most important for those who oppose reform since a focus on security helps them keep control. The U.S. falls into a trap in this area and is not using its leverage at the right level to support reforms – it does not take a strategic approach. All politicians talk about democracy but only the US has the political leverage to insist that the country make the proper changes. The U.S. must live up to its role as the world's leading democracy and use its power to promote reform.

Officials at the National Anti-Corruption Authority discussed the country's anti-corruption efforts, including work with the US Embassy and other international organizations.¹³⁰ One US Embassy project centers on enhancing transparency in public administration and how to implement anti-corruption reforms in government. The International Republican Institute's (IRI) Middle East project (POMED) is working on transparency in municipalities. A World Bank project concentrates on capacity building for financial investigations and the United Nations Development Program (UNDP) and the South Korean government are also implementing transparency projects. The United Nations Office on Drugs and Crime (ODC) works on protection of whistle blowers. Tunisia has an anti-corruption law, but the public prosecutor's office does not have a budget.

In a meeting with an opposition parliamentarian (MP) who is a member of the Parliamentary Commission on Rights, Liberties and External Relations, the MP emphasized that his party's policy is to make the democratic transition in Tunisia successful.¹³¹ Democracy also means that the country must be successful in the economic and social realm. Nearly seven years from the outbreak of the revolution in Tunisia, democracy still needs to be achieved. Political figures from the old administration have reappeared and are trying to rule again and to slow down democratic progress in the country. There are some new ministers of government in office who are from the Ben Ali era. The question we must ask is, can we achieve democratic development with these people in office or will they stem democratic progress?

Unfortunately, the MP noted, the opposition parties are politically weak and the political party system is unsound. This slows down democratic evolution. Both the United Arab Emirates (UAE) and the Turkish government are active in Tunisia supporting certain political factions. This is unhelpful because it promotes foreign interests and will not help create a balance among conflicting democratic forces. The United States, in addition to providing economic assistance, can pressure the ruling party to make the democratic process succeed. For example, the United States could point out that municipalities still do not have elected leaders after almost seven years.

The MP concluded that democracy is a culture that requires a clear road map for its establishment. He observed that the situation in the Mideast and North Africa (MENA) region is not positive and it seems that neither friendly countries such as the United States nor NGOs understand the need for a strategic perspective. There is no strong support for political parties

¹³⁰ Author interview with Fatma Ajroud, Chief International Cooperation Officer, National Anti-Corruption Authority, Tunis, Tunisia, October 9, 2017

¹³¹ Author interview with Ghazi Chouachi, Member of Parliament, Tunis, Tunisia, October 9, 2017

and the U.S. seems to cater to only the governing party. The Tunisian President is the product of the past. There needs to be more balance across the Tunisian political spectrum.

In a meeting with a member of the Parliamentary Commission on Rights, Liberties and External Relations and former Deputy Speaker of Parliament, the MP said that trying to establish the rule of law in Tunisia is the country's major objective.¹³² There have been some achievements, but there is still much to accomplish. For example, the Ben Ali regime used the police force and the National Guard abusively, especially in rural areas and on the country's borders. Both organizations have a bad image and need to be rehabilitated. There is a reform program for the security forces that would improve their working conditions by raising pay, providing health care, granting social security benefits and improving allowances but the police are currently working under appalling conditions and the result is widespread corruption. They must be better equipped and trained if they are to respect the new constitution. The government is working with the US, the EU and the Swiss government to assist with this effort; the EU and the Swiss government have also contributed resources. While some progress is evident, the reforms are an ongoing process.

In the past, the judiciary was part of the executive branch of government and there is considerable strife attached to ensuring judicial independence. The idea is to transform the judicial sector into a third pillar of democratic power. Tunisia has created a Supreme Judicial Council to help reach this objective but the government has not provided the Council with the funds, equipment and staff that it needs to work effectively. One of the Council's key functions is to supervise judicial nominations to ensure that qualified judges are named to the courts. The constitutional court has not yet been organized. The public prosecutor's office is part of the government and is free of corruption. The people also trust the administrative courts. However, Tunisia has had past problems with corrupt judges but fortunately powerful and respected judges and lawyers were in the forefront of the revolution in order to head off this problem in the new democratic government. All this is important for the establishment of the rule of law in Tunisia.

The United States has supported different sectors of Tunisian society, but seems to value internal political stability in Tunisia, no matter the price. The MP underscored that Tunisia needs to establish stability through democracy and cannot impose it with the army. The army needs to respect the constitution and support the rule of law in Tunisia. Tunisia needs the United States to be engaged in strengthening of democratic government. Tunisia is surrounded by unstable regimes, especially Libya, and the population has great expectations, including the ability to find work and live dignified lives. Everyone recognizes that democracy in Tunisia has not delivered on expectations and it is democracy that guarantees the rule of law.

A meeting with representatives of the Tunisian transparency watchdog IWatch highlighted the difference between laws on the books and the application of the law.¹³³ IWatch's assessment was that Tunisia was doing well overall, especially when compared to its North African neighbors. Tunisia has new laws, including the constitution, but they have been difficult to implement during a transitional period. For example, the National Constituent Assembly's (NCA) committees are barely functional. Of five committees, only two are working and the

¹³² Author interview with Mehrezia Laabidi, Member, Parliamentary Commission on Rights, Liberties and External Relations, Tunis, Tunisia, October 10, 2017

¹³³ Author interview with Mouheb Faroui, Co-Founder, IWatch, Tunis, Tunisia, October 10, 2017

other three lack an organizational framework. The political tension in the Assembly is higher than ever since the Assembly simply cannot handle the plethora of laws on its agenda.

The Supreme Judicial Council has no money and the administrative/financial court is the only ombudsman for monitoring public finance. Its mission is to audit the state budget and produce an annual report on government agencies. However, the Finance Minister determines the court's budget even though the constitution guarantees the court's independence from the executive. The public does not have access to the audit reports. While Tunisia has a rule of law system, big questions remain on how it functions. A good example is the case of a couple arrested for kissing in public. They spent four months in jail and were not allowed legal representation. Is this really the rule of law?

The state of the Tunisian judiciary was discussed further in a meeting with the Tunisian Judges Association (TJA) and the Judicial and Legal Studies Center.¹³⁴ TJA leaders are elected and the Association represents judges, legal and administrative workers in the judicial sector. TJA officials said the Association, which was founded in 1990, was the first of its kind in Tunisia and was formed to guarantee an independent judiciary. The TJA envisions the judiciary as a balancing element in the government and is dedicated to adhering to international norms and laws. It supports the right of judges to be consulted before they are moved to new assignments and to the autonomy of the prosecutor general. During its formation, the government tried to “own” the Association and the TJA responded by asking for a constitutional amendment to guarantee judicial independence. In previous governments, police would surround courtrooms during proceedings, blocking access by lawyers to the courts and even seized TJA headquarters. The TJA became more active after the revolution and was a principal player in drafting the constitution.

Despite EU assistance for judicial reform, there are few concrete results so far. Judicial buildings are in poor repair and are crumbling. There is no training for judges and the financial situation is precarious. The \$1,200 monthly salary for judges is inadequate and better salaries are a critical requirement, especially to inhibit corruption. United States support for rule of law programs would be very helpful. The judicial system accounts for 1.6% of the national government budget and 60% of that figure goes to the prison system. The International Monetary Fund (IMF) tells the government that it is overspending so the government uses this as a convenient excuse to block judicial independence by not providing funds.

Representatives of the National Authority for the Prevention of Torture (NPT) said that the NPT makes a major contribution to the rule of law in Tunisia through its work to end the practice of torture.¹³⁵ They noted that individuals arrested on terrorism charges are mistreated after their detention and mingled with other prisoners in jail. This can lead to radicalization of regular criminals. The government needs to better manage apprehended terrorists and to development programs to reintegrate them back into society. Prisons are very crowded, exacerbating the problem. The judicial system is still politicized and corrupt, reflecting the

¹³⁴ Author interview with Raoudha Karafi, President, Tunisian Judges Association and President of the Judicial and Legal Studies Center, Palais de Justice, Tunis, Tunisia, October 10, 2017

¹³⁵ Author interview with Alef Chaabane, President, Legislative Commission on the National Authority for the Prevention of Torture, Tunis, Tunisia, October 11, 2017

influence of the old regime. The NPT is also working on human trafficking issues, including training and capacity building in this area.

Kais Said, a distinguished international law professor, noted that Tunisia had the first written constitution in the Arab world.¹³⁶ The human rights provisions in the 1959 constitution, the first constitution after independence from France, were equal to those in the West. International law and UN precepts penetrated Tunisia so the problem was not the texts but the fact that the legal precepts were not effective in practice. Said asserted that the U.S. constitution endured because it was internalized by the people and their government. The Tunisian constitution was not respected by government leaders nor internalized by the Tunisian people. Said emphasized he made this distinction in connection with the new constitution. The revolution was a chance to create a lawful ethic but sadly Tunisia was missing another historic opportunity. Tunisia had lost the impetus for creating a society of laws. Said insisted that Tunisia needed a new political and administrative organization to ensure the rule of law.

As an example, the Constituent Assembly needed to be elected by secret ballot. Politicians only respond to their political parties and not to the people. Tunisia is still governed by the same old rules and has made the wrong rule of law choices from the start in 2011. The constitution was a negotiated document without popular support that only serves the people in power and the political parties. Civil society is a main actor in a modern democratic state and there is still a possibility that it could emerge in Tunisia. At the 2011 constituent assembly, the premise was that a national government could be assembled through national dialogue. During the 2013 crisis, it became clear that the system created did not reflect the political reality in Tunisia. There is still time to make corrections but no one is working on the adjustments. The political culture must change for the rule of law to become a reality.

The status of the rule of law in Tunisia was explored further with members of the International Legal Assistance Consortium (ILAC), including a former member of the constituent assembly and a senior official of the US National Center for State Courts.¹³⁷ This group's assessment is that the Tunisian revolution produced real social change, including more equality for workers. They identified the major current issues as 1) politics and the political system 2) terrorism and 3) economic and social challenges. They said the democratic transition has succeeded generally but is imperfect. The Islamic Party was defeated and accepted the results. Even though transitional justice was stillborn, there is optimism about the future.

There are economic problems but the situation is not as bad as before the revolution. The 2015 terrorist attacks hurt tourism but that sector has rebounded. There is a lack of currency in circulation and the investment code that was promised five years ago has not appeared. The country is working at roughly two-thirds of its potential. Tunisians say that out of every three persons employed, two are not working and the third does the work of the other two.

Consortium members disagreed with the prevailing view that reforms are not working, observing that the justice sector does not change quickly. People working in the court system want change. Citizens now have the right to a lawyer when in police custody. This is a positive

¹³⁶ Author interview with Kais Said, Constitutional Law Professor, Tunis, Tunisia, October 11, 2017

¹³⁷ Author interview with Selim Ben Abdesselam, Senior Legal Advisor, International Legal Assistance Consortium, Tunis, Tunisia, October 11, 2017

development. Tunisia has a paper-heavy bureaucracy. The conversion to electronic records is important. It is a question of how much change can be handled simultaneously. The Supreme Judicial Council, presently under-equipped and under-funded, will make the judiciary more independent. There are psychological factors in answering the question of how “independence” is defined. There is also the issue of accountability in the rule of law. Authority is slipping away from the executive branch and accruing to the judicial branch. The Minister of Justice is willing to move forward with the reforms. Progress on the rule of law in Tunisia is difficult to quantify.

The rule of law discussion continued with representatives from Lawyers Without Borders (LWB)¹³⁸ that is working on transitional justice issues with the Truth and Dignity Commission and with civil society on access to justice, human trafficking and decentralizing human resources management. There are problems with access to justice, especially for vulnerable women who generally come forward with civil cases. The state budget for legal aid to the poor has dropped from 1.7 million Dinars to 700,000 Dinars, an inadequate number. Lawyers do not want to work with legal aid clients and instead seek paying customers. They do not support the concept of legal aid and the law did not take *pro bono* work into account. The system is suffering from slow procedures and the idea of legal representation after an arrest is new to many lawyers. The government accepts the need for reforms but does not have the resources for implementation.

The government has assigned budget authority to new institutions but does not want to fund them for fear of losing control. The Anti-Corruption Authority had to fight for its budget and no one knows how long its funds will last. There are many anti-constitutional activities to rule on but the government delays or cites a lack of a quorum, a device for non-decisions. There are delays in torture cases and no transparency so justice is not done. The government has opened many corruption cases but so far impunity has prevailed. With seven governments in four years, continuity and follow-up has suffered. Trials take years and nothing has happened with reform of the criminal code. There is no legal framework for Shariah law and the government is trying to limit the formation of civil society associations.

Finally, we met with Sihem Bensedrine, President of the state’s Truth and Dignity Commission (IVD).¹³⁹ Bensedrine said that the law on transitional justice was designed to examine past human rights violations in Tunisia and to dismantle anti-democratic mafias and authoritarianism by investigating citizens’ complaints. The Commission would also determine the reforms that needed to be implemented to avoid a repetition of the past. The Commission has received 63,000 complaints, but only about 1,000 were corruption-related. The Commission’s mandate makes a link between human rights violations and corruption and includes crimes such as forced disappearance, sexual violence, coercion, violent settling of disputes and deprivation of basic human rights. To date, 43,000 cases have been processed through a recorded interview with the complainant. Public hearings have been held on 21 cases. Thirty-two types of violations have been identified and 18 events are under investigation, including the bread riots from the Bourgiba period and the trade union conflicts of the 1970s.

¹³⁸ Author interview with Elsa Papageorgiou, Research and Advocacy Coordinator and Azaiz Samoud, Advocacy Officer, Lawyers Without Borders, Tunis, Tunisia, October 11, 2017

¹³⁹ Author interview with Sihem Bensedrine, President, Truth and Dignity Commission, Tunis, Tunisia, October 12, 2017

The Commission's investigative units will look at events to identify the victims and perpetrators (there were 4,000 victims during the bread riots). Many cases involve torture and forced disappearance and some can be resolved by the Commission but others will be submitted to the special court on transitional justice. The transitional justice court has no limitations and can re-open old cases even if there are statutory limitations. Laws can be made retroactive and amnesty can be discarded. The Commission will deliver a set of recommendations to the Commission for Institutional Reform to ensure the rule of law in the future. Despite opposition from the President, the parliament and other institutions, Bensedrine is optimistic the Commission will complete its work before its mandate expires in May 2018. After the mandate expires, it will be the job of civil society to carry on the work the Truth and Dignity Commission has begun.

U.S. Rule of Law Assistance in Tunisia

To protect Tunisia's democratic gains and to assist in the fight against terrorism, the U.S. provided \$225 million in security assistance and \$700 million to strengthen civil society, empower women and youth, advance economic reforms, promote the rule of law and protect human rights between 2011 and 2015. In May 2015, the U.S. and Tunisia signed a Memorandum of Understanding reaffirming their close relationship that dates to a friendship treaty signed in 1800.¹⁴⁰ Tunisia was a founding member in 2014 of the State Department-led Security Governance Initiative which works to enhance the institutional capacity of partner countries to confront security challenges. The SGI program engages partner governments at a senior level to insure joint strategic planning and program coordination. SGI has no program funds. Its value added is promoting institutional reform rather than training and equipping operational forces.¹⁴¹

The SGI-Tunisia Joint Country Action Plan (JCAP) of September 2016 focuses on border management, police-community engagement and radicalization in the criminal justice system. SGI was something of a late comer to the crowded U.S. assistance effort in Tunisia. It has sought to play a coordinating role for a group of rule-of-law-related programs with the aim of promoting high-level attention and Tunisian inter-ministerial cooperation in their implementation: The program areas include:

- Police Policy, Procedure and Community Engagement. This is a State/INL funded program that seeks to improve police accountability and community engagement and to increase trust between the police and population. Following a January 9, 2017 SGI/Tunisia Steering Group meeting, the U.S. Embassy in Tunis is now reassessing whether the program's current projects remain relevant given changes in the security environment.
- Promoting Integrity and Addressing Radicalization in the Criminal Justice System. This is a joint project of the State Department Bureau of Democracy, Human Rights and Labor and the Bureau of Counterterrorism to improve court case management to reduce pre-trial

¹⁴⁰ The White House, Office of the Press Secretary, "Fact Sheet: Enduring U.S.-Tunisian Relations, May 2015" Washington, May 21, 2015, <https://obamawhitehouse.archives.gov/the-press-office/2015/05/21/fact-sheet-enduring-us-tunisian-relations>.

¹⁴¹ Department of State, "Security Governance Initiative: Promoting the Transparent, Accountable and Legitimate Management and Oversight of Security Policy and Practice, 2016, Review," p, 10, Washington, February 2017,

detention and to improve local media coverage of the criminal justice system to increase public confidence. Currently this project is delayed by required Leahy amendment vetting to insure that local participants are not guilty of human rights violations.

- Border Management. This is a joint Department of Homeland Security and DOD project that is also delayed following a Tunisian request for a pause while they conduct an internal reorganization.¹⁴²

Beyond the SGI effort to coordinate selected programs, U.S. rule of law assistance in Tunisia involves a number of programs funded by State/INL to improve the capabilities of the interior and justice ministries and the operational capacity of the Tunisia National Police and National Guard. Tunisia is participating in a regional State/INL funded program conducted by the U.S. Institute of Peace to establish “Justice and Security Dialogues” between police and civil society. USIP is also conducting a survey of police and National Guard training facilities and a review of current curriculum as a first step toward modernizing the national police training program. State/INL programs have trained 1,000 National Police officers and 200 commanders in crowd control techniques and helped create the first Tunisian women’s police association.¹⁴³

USAID established a presence in Tunisia only within the last year and is not engaged in traditional rule of law programming. Its small project team has sought to create a more permissive legal environment for civil-society groups by organizing support for passage of a new law for non-governmental organizations and has launched programs that promote community resilience and youth development.¹⁴⁴

Mali

After the Libyan revolution in 2011, ethnic Tuareg soldiers who had served as mercenaries in former Libyan President Muammar Gaddafi’s army returned home to northern Mali. Emboldened by their superior arms and ties to AQIM, they attacked Malian army bases, captured the major cities of Kidal, Gao, and Timbuktu, and declared the new, independent nation of Azawad, an action condemned by the international community. Their time in power was short-lived. A coalition of three Islamist terrorist organizations, AQIM, Ansar al Din, and the Movement for the Unity and Jihad in West Africa, routed the Tuaregs, took control of urban centers in the north, and imposed a radical version of Shariah law. Meanwhile, on March 22, 2012, the retreating Malian Army staged a coup, blaming lack of government support for their defeat in the North, removing the democratically elected president, and installing a military regime in Bamako.

As the chaos spread, the United Nations Security Council on October 12, 2012, authorized the deployment of an African Union-led peacekeeping force and French military intervention. In January 2013, Ansar al Din and other jihadist groups unexpectedly began to move south. French troops repelled their advance, recapturing the three major cities in the north and driving the insurgents into the mountains near the Algerian border. Finally on April 23, 2013, the U.N. Security Council authorized the deployment of the U.N. Multidimensional

¹⁴²Author telephone interview with a program officer of the Security Governance Initiative, Department of State, Bureau of African Affairs, Washington, D.C. February 15, 2017.

¹⁴³ Author telephone interviews with program participants and State Department program officers in March 2017.

¹⁴⁴ Author telephone interview with a Senior Democracy and Governance Advisor, USAID Middle East Division, March 10, 2017.

Integrated Stabilization Mission in Mali (MINUSMA) with 12,000 military and police personnel and a mission to reestablish democratic governance in Bamako, launch a national political dialogue, and return Malian administrative and military presence to the north.

Five years on, Mali has made some progress with U.N. and international community support. The presence of MINUSMA and French forces removed the threat of an extremist takeover, but there is still widespread terrorist violence. In 2013, U.N. supervised presidential and parliamentary elections were held returning Mali to democratic rule after the 2012 coup.¹⁴⁵ On June 20, 2015, the Malian government, the pro-government Platform militia group, and an alliance of Tuareg rebel groups called the Coordination of Movements of Azawad (CMA) signed an Algerian-brokered Bamako Peace Agreement that provided for greater autonomy and a role for CMA security forces in the north.¹⁴⁶ On June 29, 2017, the State Department warned Americans against travel to Mali due to ongoing terrorist attacks, kidnappings, and criminal violence. The warning followed a June 18, 2017, jihadist attack on a luxury hotel frequented by expatriates near Bamako, the fourth such attack in the capital in two years.¹⁴⁷ Northern Mali saw growing instability from renewed clashes between pro and anti-government armed groups and attacks by Nusrat al-Islam wal Muslimeen, a new jihadist alliance of al-Qaeda-linked factions.¹⁴⁸ On February 28, 2018, four U.N. peacekeepers were killed and others were wounded when their vehicle hit an explosive device. Mali remains the most deadly U.N. peacekeeping mission in history with over 150 peacekeepers killed since the mission was established.¹⁴⁹

The Bamako Agreement, which was supposed to usher in an era of peace and stability in northern Mali, failed for a number of reasons. The Agreement identifies the Malian state as primarily responsible for leading implementation, but the government was initially reluctant to move forward and its foot dragging created tensions with the armed groups in the north. At the same time, the armed factions fragmented creating new groups that wanted to join the Follow-Up Committee even though they did not sign the Agreement. Intensification of intergroup clashes enabled the government to shift blame for increased insecurity and justify failure to implement provisions related to justice and development. This further reduced northern support, while perceived concessions to northern armed groups weakened support for the Agreement in the south. Finally, the April 2017 Conference of National Understanding failed to address transnational terrorism and organized criminal trafficking in weapons and migrants that has exacerbated other problems.¹⁵⁰

¹⁴⁵ BBC Africa, "Mali President's Party Wins Parliamentary Elections," *BBC News*, December 31, 2013, <http://www.bbc.com/news/world-africa-25426141>.

¹⁴⁶ UN News, "Mali: Ban Welcomes Signing of Peace Agreement by Remaining Parties," UN News Center, June 20, 2015, <http://www.un.org/apps/news/story.asp?NewsID=51209#>.

¹⁴⁷ Bureau of Consular Affairs, U.S. Passports and International Travel, "Mali Travel Warning," Washington, DC, Department of State, June 29, 2017, <https://travel.state.gov/content/passports/en/alertswarnings/mali-travel-warning.html>.

¹⁴⁸ "Jihadist Alliance Claims Mali Attack that Killed 11 Soldiers," *News 24*, March 10, 2017, <http://www.news24.com/Africa/News/jihadist-alliance-claims-mali-attack-that-killed-11-soldiers-20170310>.

¹⁴⁹ Associated Press, "Four UN Peacekeepers Killed in Central Mali," *African News*, March 1, 2018, <http://www.africanews.com/2018/03/01/four-un-peacekeepers-killed-in-central-mali-mine-blast>.

¹⁵⁰ Arthur Boutellis and Marie Zahar, "A Process in Search of Peace: Lessons for the Inter-Malian Agreement" International Peace Institute, June 20, 2017, <https://www.ipinst.org/2017/06/lessons-from-inter-malian-peace-agreement>

Failure to move forward on peace implementation reflected the distrust that exists between the sparsely populated, Moslem north and the densely populated, largely Christian south. The Bamako Agreement was the fourth since independence between the government and armed groups in the north. These agreements committed the Malian government to recognize the special status of the north, decentralize administration, reduce the role of the armed forces, promote development, and integrate rebels into the Malian security forces and government. Failure to fully implement those agreements created an expectation that agreements will be broken and that the authorities will not fulfill their commitments.¹⁵¹

At the end of 2017, the U.N. Secretary General reported that the security situation in Mali had worsened and terrorist attacks against U.N. and Malian security forces had increased. Terrorist groups had improved their operational capacity and expanded their areas of operations. U.N. concern was increasingly focused on the central portion of the country, where more terrorist incidents occurred than in the five northern regions of the country combined. Malian security forces were heavily targeted and suffered increased casualties. Attacks on high ranking state and judicial officials also increased. Violent extremist and radical armed groups asserted control over increasingly large areas, enforcing extremist religious dogma, threatening civilians with violence if they cooperate with the Malian authorities, and engaging in violent reprisals when faced with resistance.¹⁵²

In central Mali, jihadist, insurgent and militia groups took advantage of the security vacuum created by the Malian Army's retreat from rural areas. Armed attacks resulted in 52 deaths since January 2017 and the displacement of large numbers of people in this previously peaceful area. Central Mali, which is dominated by the Inner Niger Delta, provides optimum terrain for radical groups. It is fertile land shared by farmers and herders who belong to different ethnic groups and have conflicting economic interests. Tensions have been fed by disputes over land use and water rights. Nomadic Fulani herders claim that agriculture is expanding at their expense while farmers accuse the herders of trampling their crops. With the influx of weapons into the region and loss of influence by traditional authorities, disputes are now settled by armed attacks. Government officials and security forces returned to the area in 2013 but often sided with farmers, creating a growing sense of ethnic victimization among the transient Fulani. Beginning in 2015, there were attacks on Malian security forces stationed in small towns and government officials and local authorities were threatened and killed. The government and the UN have failed to respond to the jihadist tactics. Malian security forces and government representative have pulled back into the cities; less than 30 percent of government officials are still present at their duty stations compared with 38 percent in January 2017.¹⁵³

¹⁵¹ Gregory Chauzal, "Fix the Unfixable: Dealing with Full-Blown Crisis and Instability: How to Bring Greater Stability to the Sahel?" Clingendael Policy Brief, Netherlands Institute of International Relations, December 2015. https://books.google.com/books/about/Fix_the_Unfixable.html?id=viqgjwEACAAJ

¹⁵² United Nations Security Council, "Report of the Secretary General on the Situation in Mali, S/2017/1105, December 26, 2017 <https://reliefweb.int/report/mali/report-secretary-general-situation-mali-s20171105>.

¹⁵³ International Crisis Group, "Central Mali: An Uprising in the Making," Africa Report Number 238, July 6, 2016, <https://d2071andvip0wj.cloudfront.net/central-mali-an-uprising-in-the-making.pdf>; "Mali: Spate of Killings by Armed Groups," Human Rights Watch, April 5, 2017, <https://www.hrw.org/news/2017/04/05/mali-spate-killings-armed-groups>

In the south, President Keita added to the national political discord by proposing a constitutional referendum on legislation adopted by the National Assembly that would strengthen his authority over the prime minister, parliament and the judiciary. After months of street protests, on August 21, 2017, the president announced the suspension of efforts to hold the referendum.¹⁵⁴ Political tensions continued to increase as Mali entered a new election cycle with district, regional, legislative and presidential elections scheduled over the next year. President Keita reorganized his cabinet and appeared intent on seeking reelection in July 2018.¹⁵⁵ Political maneuvering in the capital has distracted Mali's political elite from confronting the deteriorating security situation in the rest of the country. At the same time, Bamako's residents have been troubled by an increase in street crime and robberies and international trafficking in drugs, weapons and contraband.

The political and security situation in Mali has deteriorated despite an impressive international show of support. On June 29, 2017 the UN Security Council extended MINUSMA's mandate for another year, maintaining the 13,289 military and 1,920 police force levels and highlighting UN support for redeploying the Malian defense and security forces to the north.¹⁵⁶ On May 19 2017, French President Emmanuel Macron visited 1,600 of France's 4,000 troops stationed in the Sahel at their base in northern Mali, his first official visit outside of Europe. Macron met with Malian President Keita and pledged support for the Bamako Agreement and for assisting the government in its fight against terrorism. Macron pledged to encourage other European countries to aid Mali.¹⁵⁷ In line with Macron's comments, Germany increased its commitment to MINUSMA by deploying eight attack and transport helicopters and 350 additional soldiers to Mali.¹⁵⁸ On June 21, the UN Security Council endorsed the creation of the Group of Five Sahel--Mali, Chad, Niger, Burkina Faso and Mauritania--a joint force of 5,000 military and police to combat terrorism and transnational crime in the region with a special focus on Mali.¹⁵⁹

Despite continuing problems in the northern region, international concern increasingly has focused on the central portion of the country. As the International Crisis Group points out, extremist groups succeed in areas of civil strife where the government is represented by its security forces, particularly if they commit abuses. Radical groups step in to provide security, justice and moral standards. They clear state officials from the area and replace them their own

¹⁵⁴Reuters, Mali President Suspends Referendum on Constitutional Reform," *US News and World Report*, August 21, 2017, <https://www.usnews.com/news/world/articles/2017-08-19/mali-president-postpones-referendum-on-reforms>

¹⁵⁵ "Mali President Keita Names Loyalist Cabinet ahead of 2018 elections, Reuters, April 11, 2017, <http://af.reuters.com/article/commoditiesNews/idAFL8N1HJ5KO>

¹⁵⁶ United Nations Security Council Meetings Coverage, "Security Council Extends Mandate of Mission in Mali, Unanimously Adopting Resolution 2364 (2017), June 29, 2017, <https://www.un.org/press/en/2017/sc12895.doc.htm>

¹⁵⁷ "Emmanuel Macron Visits French Troops in Northern Mali," *Aljazeera*, May 19, 2017, <http://www.aljazeera.com/news/2017/05/emmanuel-macron-visits-french-troops-northern-mali-170519112433707.html>

¹⁵⁸ " German Military Helicopter Crashes in Mali, Two Peacekeepers Killed," *Reuters*, July 26, 2017, <https://www.reuters.com/article/us-mali-un-crash-idUSKBN1AB23N>

¹⁵⁹ United Nations Meetings Coverage, "Security Council Welcomes Deployment of Joint Force to Combat Terrorism Threat, Transnational Crime in Sahel, Unanimously Adopting Resolution 2359 (2017)," United Nations Security Council, June 21, 2017, <https://www.un.org/press/en/2017/sc12881.doc.htm>

people.¹⁶⁰ This is now happening in central Mali where the forces contesting for control of the country are increasingly engaged. The central region was largely peaceful in 2015 and its representatives did not help negotiate or sign the Bamako Accord. As a result, its provisions, which included government benefits, did not apply. Ethnic groups in the region felt excluded from the country's political dialogue and sought access to government recognition and resources. The government response was to deploy military forces that were guilty of serious human rights violations that made the situation worse. Jihadist groups from the north, bandits, and village and tribal militias have filled the security vacuum. Fighting has displaced over 55,000 people around Mopti, one of the regions two major cities. The country's future may be decided by whether the government is able to maintain control of this critical region.¹⁶¹

In developing a U.S. strategy for reversing the trend of events in central Mali several factors should be considered. The lack of political consensus within society coupled with the near absence of government presence and legitimacy in the area makes it difficult for externally sponsored initiatives to move forward. In Mali the central authorities deliberately marginalized remote regions creating decades of distrust. Historically, the government's failure to decentralize authority, chronic underinvestment in strategic sectors such as agriculture, and failure to deliver basic services resulted in a loss of control over sections of the population. Rampant corruption, the embezzlement of public funds and foreign assistance, exacerbated the problem. Armed groups have imposed themselves as providers of social services such as community health care and Islamic education and financial assistance for families. They have also preformed state functions such as providing police and justice services.¹⁶²

The International Crisis Group developed a three-point plan,¹⁶³ based upon restoring the rule of law, for a possible Malian government initiative to reverse the course of events in the central region. The initiative would begin with the government seeking the support of local elites by bringing them into a dialogue designed to reduce ethnic rivalries and achieve political consensus on the region's future. This effort would be supported by a government-sponsored, locally-staffed territorial police force that would provide security, replacing village militias and other informal armed groups. Finally, the government would provide an alternative to jihadist-led justice by supporting existing customary justice mechanisms already utilized by the majority of the population in resolving disputes over land, inheritance, theft, and marital issues. In Mali,

¹⁶⁰ International Crisis Group, "Central Mali: An Uprising in the Making?" Africa Report no. 238, July 6, 2016, <https://d2071andvip0wj.cloudfront.net/central-mali-an-uprising-in-the-making.pdf>

¹⁶¹ "The Sahel: Mali's Crumbling Peace Process and the Spreading Jihadist Threat," International Crisis Group Commentary/Africa, March 1, 2017, <https://www.crisisgroup.org/africa/west-africa/mali/sahel-malis-crumbling-peace-process-and-spreading-jihadist-threat>

¹⁶² Authors Skype interview with resident foreign security expert on Mali in Tunis, October 3, 2017.

¹⁶³ "The Sahel: Mali's Crumbling Peace Process and the Spreading Jihadist Threat," International Crisis Group Commentary/Africa, March 1, 2017, <https://www.crisisgroup.org/africa/west-africa/mali/sahel-malis-crumbling-peace-process-and-spreading-jihadist-threat>.

customary justice is trusted because of its ability to preserve social cohesion, where the formal judicial system is seen as complicating social relations and disrespecting cultural values.¹⁶⁴

There is much that a U.S.-led coalition of the United Nations and donor governments could do to assist the Malian government in implementing such a plan. Diplomatic pressure would be necessary to prevent Malian authorities from employing their traditional strategy of organizing pro-government tribal factions and pitting them against anti-government ethnic rivals. International support would be essential for outreach to regional elites and for organizing conferences on the region's future. Technical assistance with organizing a new territorial police force would be required, along with providing training and equipment. Deploying such a force would require assistance from MINUSMA and French military forces. Finally, U.S. funding, training, and political support would be required to energize traditional justice mechanisms and, in the long term, promote the return of the formal justice system to the region. This would require refocusing the current Bamako-centric, U.S. rule of law assistance program that is engaged in a number of initiatives without focusing on issues that are critical for Mali's national survival. Current U.S. rule of law assistance to Mali falls short of the level and type of assistance required to deal with the country's political and security challenges.

U.S. Rule of Law Assistance to Mali

The United States had close relations with Mali, which prior to the 2012 coup, was viewed as a model for democracy in Africa. Following the crisis in the north, the U.S. military airlifted UN, AU and French forces into Mali and provided them with critical intelligence supplied by drones flown from U.S. basis in neighboring Niger. In FY 2016, the U.S. provided over \$125 million in foreign assistance to support implementation of the 2015 Bamako Agreement, promote democracy and prevent terrorist and traffickers from exploiting ungoverned areas. U.S. assistance is administered by the State Department and USAID and implemented through a number of government agencies, non-governmental organizations and private contractors. USAID's total assistance for 2016-20 is projected at \$690 million with the primary focus on governance, humanitarian, health and agricultural programs. Rule of law-related projects will be spread among the agency programs.¹⁶⁵

As in Tunisia, the Strategic Governance Initiative is coordinating Malian interagency implementation of selected assistance programs under a 2015 Joint Country Action Plan. The three rule of law programs involved address:

- National Police Human Resource Development: This State/INL funded project is implemented by the Department of Justice ICITAP program which helps the Mali police

¹⁶⁴ Diana Goff, Madina Diallo and Anca-Elena Ursu, "Under the Microscope: Customary Justice Systems in Northern Mali," (The Hague, Clingendael, Netherlands Institute of International Relations, CRU Report, July 26, 2017) <https://www.clingendael.org/publication/under-microscope-customary-justice-systems-northern-mali>.

¹⁶⁵ U.S. Department of State Fact Sheet, "Diplomacy in Action: U.S. Relations with Mali" Washington, DC, December 22, 2016, <https://www.state.gov/r/pa/ei/bgn/2828.htm>

develop a personnel resources management manual on merit–base recruiting and career development as a first step toward recruiting 5,000 new officers. ICITAP is working on the recruitment application form and has gotten the Malians to remove a widely ignored requirement that all applicants are unmarried and remain so. SGI has brought in ICITAP’s EU counterpart which was conducting a parallel program so the two are now working together.

- Ministry of Justice (MOJ) Human Resources Management: This USAID funded program is implemented by a contractor. The project is working on MOJ resource management trying to set standards for the first hiring of legal professionals in years. Once new ministry personnel are in place, the program will move to improving MOJ capacity to manage the court system and provide better access to justice and judicial services.
- Inter-Ministerial Coordination: SGI is trying to convince the Malians to create a National Security Council and to coordinate among ministries on national security priorities and polices. This project is run by the Center for Civil-Military Relations at the Naval Post-Graduate School. Getting Malian ministry representative to attend meetings together is viewed as an achievement.¹⁶⁶

Beyond the SGI coordinated program to improve police personnel management, State/INL is administering other police and corrections projects funded by the Trans-Sahara Counterterrorism Partnership Program. These programs are focused on making the Malian police more professional, accountable and community oriented as a means of promoting stability and preventing alienation and radicalization of the population. Mali is participating in the regional USIP Justice and Security Dialogue project to improve police-community relations. State/INL has funded workshops that brought university students and police together to reduce campus violence. INL’s corrections program is focused on improving security in prisons by (1) improving prison academy curriculum to upgrade the professionalism of prison staff; (2) developing emergency response units to prevent further prisoner escapes; (3) classifying prisons and prisoners to avoid housing inmates in inappropriate facilities and mixing prison populations; and, (4) developing screening procedures for visitors and staff and improving the conduct of prison searches for contraband, drugs and weapons. State/CT is advising the Mali government on creating an interagency crisis response capability and has funded the State Department Anti-Terrorism Assistance Program to train and equip a police rapid reaction unit to respond to terrorist attacks on hotels.¹⁶⁷

USAID’s Mali Justice program is projected to spend \$22 million over the next four years in three program areas. USAID has engaged the Justice Department’s Office of Overseas Prosecutorial Development Assistance to host forums to identify training needs of judges and magistrates, leading to development of new curricula and continuing education programs. USAID’s program will increase access to justice by training and deploying paralegals throughout the country, especially to underserved rural communities. It will reduce roadside corruption

¹⁶⁶ Author telephone interview with a program officer of the Security Governance Initiative

¹⁶⁷ Author telephone interview with program officer, Bureau of International Narcotics and Law Enforcement Affairs, March 15, 2017

along internal trade corridors by providing legal support to citizens impacted by corruption and by developing a citizen reporting system.¹⁶⁸

Kleptocracies

Kleptocracies are states where governments have morphed into organized criminal enterprises that have seized control of banking, natural resources, and other economic assets, and systematically stolen public funds on a vast scale. Kleptocrats mask their looting of public wealth and accumulation of personal fortunes behind xenophobia and populist rhetoric backed by the strong-arm tactics of authoritarian rule. Misappropriation of government revenues and exploitation of national resources retards economic growth, allows infrastructure to crumble, and weakens national power and resolve. It also spawns popular opposition as citizens come to view the government as a criminal racket rather than a legitimate provider of goods and services.

Kleptocracies divide the population between those who benefit from the government's patronage system and those appalled by the spectacle of social elites flaunting their ill-gotten gains. They suppress civil society groups and the media, and pervert democratic norms. Kleptocracies co-opt the security services by providing access to illicit revenues in return for officer loyalty, enriching security officials in the process. Kleptocracies are enabled by captive judiciaries, weak or intimidated civil society, and bureaucracies based on criminal and political patronage rather than merit and skill.¹⁶⁹

Beyond their internal impact, Kleptocracies pose a threat beyond their borders. Vladimir Putin used Russian banks to fund authoritarian political parties and media outlets throughout Europe. Kleptocrats in Eastern Europe have used the international banking system to launder the proceeds from narcotics trafficking, which they have invested in multi-million dollar properties and businesses abroad. They have also used their positions as representatives of member states to protect against human rights violation investigations, undermining efforts by the Council of Europe and the United Nations.¹⁷⁰

Kleptocracies cover the political and geographic spectrum from populist regimes in South America to hard-right regimes in Eastern Europe and the former Soviet republics. On August 18, 2017, Venezuela's pro-regime Constituent Assembly formally assumed the powers of the opposition-dominated Congress, completing a power grab that placed all branches of the

¹⁶⁸ USAID, "USAID Mali Justice Program," November 2016, https://www.usaid.gov/sites/default/files/documents/1860/USAID%20PDG%20-%20Mali%20Justice%20Program%20Fact%20Sheet%20-%20Nov%20'16_FINAL.pdf

¹⁶⁹ Natalie Duffy and Nate Sibley, "Five Myths About Kleptocracy", *The Washington Post*, January 5, 2017, https://www.washingtonpost.com/opinions/five-myths-about-kleptocracy/2017/01/04/42b30d72-c78f-11e6-8bee-54e800ef2a63_story.html?utm_term=.f958144d98df.

¹⁷⁰ Carl Gershman, "Unholy Alliance: Kleptocratic Authoritarians and their Western Enablers," *World Affairs Online Features*, July 2016, <http://www.worldaffairsjournal.org/article/unholy-alliance-kleptocratic-authoritarians-and-their-western-enablers>.

government under the control of President Maduro.¹⁷¹ The move was followed by a spike in opposition protests, a rise in street crime, and the virtual collapse of the country's economy. On January 5, 2018, Maduro announced a government plan to replace Venezuela's worthless national currency with a new crypto currency, the "petro," backed by the country's oil and natural resources.¹⁷² Simultaneously, Nicaragua, under President Daniel Ortega, continues to move in an authoritarian direction. Ortega was elected to a third term in November 2016, running unopposed with his wife, Rosario Murillo, on the ballot as vice president. Ortega's party, the Sandinista Front, controls Congress, nearly all other state institutions and elected offices, and the Supreme Court and judiciary. All meaningful opposition parties are banned. The private sector has been co-opted via a tacit understanding that business leaders have free reign as long as they do not criticize the government.¹⁷³

In Eastern Europe and the former Soviet Republics, divisions in the North Atlantic Treaty Organization (NATO) alliance and the reduced appeal of European Union (EU) membership has moderated pressure on political leaders to govern according to democratic precepts, protect human rights, and fight corruption. This has created a trend toward corrupt authoritarian rulers that govern through patronage systems and repression.¹⁷⁴ In Poland and Hungary elected populist regimes have controlled the media, politicized the civil service, intimidated civil society, and compromised judicial independence, reversing the democratic revolution in Central Europe that followed the Soviet Union's collapse. Most recently, the Romanian parliament has followed suit by enacting a series of measures to curtail the powers of the country's anticorruption agency and significantly weaken the independence and authority of the justice sector. Parliament's majority party has called for changes in the criminal code that would shield corrupt politicians and limit the ability of police and prosecutors to investigate the country's endemic corruption. These actions have been challenged by a year of street protests, but the autocrats appear to have historical trends on their side.¹⁷⁵

To evaluate U.S. rule of law programs in kleptocracies, the project team visited Azerbaijan and made an extensive study of events in Venezuela where the State Department discouraged travel.

¹⁷¹ Rachele Krygler and Anthony Falola, "Venezuela's Pro-Government Assembly Moves to Take Over Power from Elected Congress," *The Washington Post*, August 18, 2017, https://www.washingtonpost.com/world/venezuelas-pro-government-assembly-moves-to-take-power-from-elected-congress/2017/08/18/9c6cd0a2-8416-11e7-9e7a-20fa8d7a0db6_story.html?utm_term=.f6bf7f588c9e.

¹⁷² Fabian Goamero and Girish Gupta, "Maduro Says Venezuela Will Issue \$5.9 Billion in Oil-Backed Cryptocurrency," *Reuters*, January 5, 2018, <https://www.reuters.com/article/us-venezuela-economy/maduro-says-venezuela-will-issue-5-9-billion-in-oil-backed-cryptocurrency-idUSKBN1EV02S>.

¹⁷³ Andres Oppenheimer, "Venezuela Needs Our Attention, but so do Dictatorships-in-waiting in Nicaragua and Bolivia," *The Miami Herald*, November 22, 2017, <http://www.miamiherald.com/news/local/news-columns-blogs/andres-oppenheimer/article186095083.html>.

¹⁷⁴ Matthew Brunwasser, "Serbia's Prime Minister Projected to Win Presidency, Consolidating Control," *The New York Times*, April 2, 2017, https://www.nytimes.com/2017/04/02/world/europe/serbia-aleksandar-vucic-president-elections.html?_r=0.

¹⁷⁵ Editorial Board, "Democracy Threatens to Backslide in Romania," *The Washington Post*, December 29, 2017, https://www.washingtonpost.com/opinions/global-opinions/democracy-threatens-to-backslide-in-romania/2017/12/29/71dc4308-eb37-11e7-9f92-10a2203f6c8d_story.html?utm_term=.2a3a2a7668bb Kit Gillet, "Romania Braces for President's Decision on Bills Seen as Weakening Judiciary," *New York Times*, December 30, 2017, <https://www.nytimes.com/2017/12/30/world/europe/romania-corruption-iohannis.html>.

Azerbaijan

The Azerbaijan Democratic Republic proclaimed its independence in 1918 and became the first democratic state in the Muslim-oriented world. The country was incorporated into the Soviet Union in 1920 as the Azerbaijan Soviet Socialist Republic. The modern Republic of Azerbaijan proclaimed its independence on August 30, 1991 prior to the official dissolution of the Soviet Union in December 1991. Azerbaijan officially is a unitary semi-presidential republic. The country is a member state of the Council of Europe, the OSCE and the NATO Partnership for Peace program. It is one of the founding members of the Commonwealth of Independent States and joined the United Nations in 1992. Azerbaijan is also a member of the Non-Aligned Movement and has observer status in the World Trade Organization. The government emphasizes its alliance with the United States and stresses the country's stability and the lack of radical Islamic movements. Azerbaijan has been accused of bribing foreign officials to promote its image abroad, a practice termed "caviar diplomacy."¹⁷⁶

In Azerbaijan, President Ilham Aliyev has held power since 2003 when he succeeded his father, Heydar Aliyev, a former Soviet KGB officer who had ruled the country with an iron fist since its independence from the Soviet Union. Recently, the president's wife was named First Vice President, apparently to ensure the family's continued hold on political power. The president does not have the right to dissolve the National Assembly, but he has the right to veto its decisions. The National Assembly is a unicameral legislature comprised of 125 members all of whom belong to the ruling party.¹⁷⁷ A resolution adopted by the European Parliament in September 2015 described Azerbaijan as "having suffered the greatest decline in democratic governance in all of Eurasia over the past ten years."¹⁷⁸

There is no rule of law in the Western democratic sense and the courts operate as an extension of the Executive. Judicial power is vested in the Constitutional Court, the Supreme Court, and the Economic Court. The president nominates the judges in these courts. Verdicts are dictated by the President and there is no judicial independence. There are 150 political prisoners in Azerbaijan. This number is increasing and there are reports of deaths from torture. Private attorneys have used their own resources to take their cases to the European Court of Human Rights. Court representatives do not visit Azerbaijan and the Court holds very few hearings on Azerbaijani cases. According to a human rights activist, one judge rejected 52 Azerbaijan cases in one day. Corruption is clearly present in these cases and there is no right of appeal. Previously there were elected municipal councils but the heads of the regions are now appointed by the government. The ruling party has been accused of authoritarianism and human rights abuses and Azerbaijan is classified as "not free" by Freedom House.

There are few media outlets and no media freedom. Television is controlled by the ruling family and the oligarchy and the last independent newspaper closed last year. A court decision has blocked access to several internet sites. Fortunately, the internet is still relatively free and social networks, especially Facebook, are important. Social media represents the only free exchange of views but accounts are monitored by the government and are not safe to use. Many

¹⁷⁶ Author Interview with Isa Gambar, Chairman, Center for National Strategic Thought, Baku, Azerbaijan, July 4, 2017

¹⁷⁷ Author Interview with Aril Hajili, Chairman, Musavat Party, Baku, Azerbaijan, July 4, 2017.

¹⁷⁸ Texts Adopted, European Parliament Resolution, September 10, 2015, europarl.europa.eu.

people have been arrested for “illegal entrepreneurship” such as writing in a foreign media outlet without permission from the Foreign Ministry, even though there is no prohibition in the legal code. The Ministry has ruled that one could work for a foreign media service, but could not be paid. Requests for accreditation are ignored.

In recent years, large numbers of Azerbaijani journalists, bloggers, lawyers, and human rights activists have been rounded up and jailed for their criticism of President Aliyev and government authorities. There is no academic freedom in Azerbaijan and a leading academic was recently fired from Baku University for protesting government policies. The population lives in fear and there is repression. The leader of one of the country’s main political parties is in prison despite an appeal to European Court of Human Rights. Unhappiness is widespread, even among people in government. Government employees have suffered a reduction in income because the government’s practice of providing “pocket money” generated by corruption has been discontinued.

The government controls all major economic activity. Oil and gas resources are the base of the country’s wealth. Contracts with foreign petroleum companies are approved by the government-controlled parliament. There is no transparency and no information available on the terms of the contracts. Outside of the energy sector, the government discriminates against foreign companies. No non-Azerbaijani banks are permitted to directly operate in the country. Many U.S. companies are present but only through franchise arrangements. The government controls the entire market and doesn’t want competition. Pasha Holdings, which belongs to the President’s wife, has 70% of the market in Azerbaijan and restricts competition. Car loan rates are 24-25% and the real estate interest rate is 60%.¹⁷⁹

The government makes everyone an accomplice to crime. For example, in the textile sector, the Customs Service will not clear fabric shipments to clothing factories without receiving a bribe. Once bribed, the Customs official releases the fabric to clothing producers but without creating a record of the transaction. After the clothing is manufactured and sold, the tax authorities step in and charge the producers with selling shirts made from illegally imported fabric since this fabric was never registered in Customs. The producers are then charged with bribery and the factory can be confiscated. The government controls the housing sector in a similar manner. There are 500,000 illegal houses in the country – houses without deeds. There are no ownership rights and no legal sale of real estate. This allows the government to step in and confiscate property at any time.

The Constitution of Azerbaijan does not declare an official religion and all major political forces in the country are secularist. The majority of the population is of Shiite Muslim background but most Azerbaijanis do not actively practice any religion. The country is considered one of the most irreligious countries in the Muslim world, with 53% of the population stating that religion has little to no importance in their lives, according to the Pew Research Center and Gallup Polls. The government uses the threat of religious uprisings to scare the West. Opposition activists believe the government actually faked a religious uprising to demonstrate that religious forces needed to be controlled. Religious leaders were arrested in this fiasco and were tortured but did not admit to the charges; six people were killed, including two policemen

¹⁷⁹ Author Interview with Natig Jafarli, Executive Secretary, Republican Alternative Movement, Baku, Azerbaijan, July 3, 2017.

Donald Planty traveled to Azerbaijan in July 2017 to assess local conditions and to determine the effect of past U.S. rule of law programs on the country. He met with opposition figures and political activists, academics, members of think tanks, legal personnel, non-governmental organizations and U.S. Embassy officials who helped organize his visit. Those interviewed agreed unanimously that the absence of the rule of law in Azerbaijan was directly linked to the demise of Azerbaijani democracy. The autocratic nature of the Aliyev regime made a mockery of the law, and U.S. rule of law programs had failed to acknowledge the broader ramifications of this reality.¹⁸⁰ U.S. officials publicly praised the deputy interior minister for his cooperation with U.S. anti-trafficking-in-persons programs. This same deputy minister was notorious for supporting torture and extra-judicial executions.

The National Democratic Institute (NDI) and the International Republican Institute (IRI) left the country because of the government's restrictions on working with opposition political parties.¹⁸¹ Numerous civil society leaders said that the international community had failed Azerbaijan. When the country joined the Council of Europe (COE), many believed that the government would be held to the COE's democratic standards but the rule of law situation deteriorated even further. Most believe that the West has closed its eyes to human rights violations and authoritarianism in Azerbaijan, clearing the way for further repressive measures.¹⁸²

Venezuela

In 2017, Venezuela was described by the Oslo Freedom Forum as “a geographic area terrorized by a criminal enterprise that pretends to govern, with a civil society made up of two sets of people: accomplices and victims.”¹⁸³ The Organized Crime and Corruption Reporting Project (OCCRP) gave Venezuelan President Nicolas Maduro its *Person of the Year Award* that “recognizes the individual who has done the most to advance organized criminal activity and corruption.”¹⁸⁴ OCCRP chose Maduro for the award because his oil-rich nation's population was literally starving while he stole millions to fund the patronage system that kept him in power. The plunder of Venezuela began under the administration of President Hugo Chavez in 2000, when the country's public sector succumbed to systematic bribery, graft, and looting. Government ministries were populated with “phantom employees” and phony government programs siphoned off millions of dollars from the treasury. The perpetrators raided Venezuela's gold reserves and profited from a bold currency-exchange scam. More than one trillion dollars in wealth was strip-mined by the country's ruling elite, some was wasted on ineffective social programs and a staggering amount deposited in foreign banks. Massive graft and corruption turned Venezuela into a wasteland with shortages of food and basic necessities; diseases once

¹⁸⁰ Author Interview with Isa Gambar, Chairman, Center for National Strategic Thought, Baku, Azerbaijan, July 4, 2017.

¹⁸¹ Author Interview with Arif Hajili, Chairman, Musavat Party, Baku, Azerbaijan, July 4, 2017.

¹⁸² Author Interview with Jamil Hasanli, Chairman, National Council of Democratic Forces, Baku, Azerbaijan, July 4, 2017.

¹⁸³ Halvorseen, Thor, “How Venezuela's Corrupt Socialists Are Looting the Country to Death”, *The New York Post*, January 10, 2017. <https://nypost.com/2017/01/10/how-venezuelas-corrupt-socialists-are-looting-the-country-to-death>.

¹⁸⁴ “Venezuelan President Wins OCCRP Person of the Year for 2016”, January 3, 2017. <https://www.occrp.org/personoftheyear/2016>.

eradicated returned with a vengeance and a crime wave gave Caracas the highest murder rate in the world.¹⁸⁵

In 2017, Maduro dismantled the last vestiges of Venezuela's democratic institutions and replaced them with bodies packed with regime-supporters. On July 30, 2017, Maduro orchestrated the election of a Constituent Assembly to draft a new constitution that would authorize autocratic rule. The Assembly, which was elected from a government-supplied list of candidates, quickly assumed full governing powers, replacing the democratically-elected, opposition-controlled Congress.¹⁸⁶ Public opposition to the Maduro government increased, marked by violent confrontations between protestors and police, and the detention of opposition leaders. In December 2017, Maduro laid out a plan to expand his control of the economy by creating a digital currency known as the Petro, similar to Bitcoin, backed by the nation's oil reserves.¹⁸⁷ Venezuela's military might be able to challenge the regime, but the generals have remained loyal because Maduro has allowed them to profit from drug trafficking.¹⁸⁸

Historically, USAID's Venezuela assistance program supported civil society, promoted human rights, and attempted to shore-up democratic governance by encouraging greater participation in public affairs by civil society and expanding dialogue among democratic groups. This programming stressed the rights of citizens to be informed by independent media. It provided judicial training, supported research on democratic norms, and sponsored exchanges with other Latin American countries. USAID also worked on building the capacity of the National Assembly to be a more viable democratic institution that represented all Venezuelans. These efforts were brushed aside as President Chavez led the country from representative democracy to authoritarian rule.

In 2010, the United States recalled its ambassador from Caracas and bilateral relations reached a nadir. The United States no longer has a rule of law program in Venezuela but monitors Venezuela closely for involvement in narcotics trafficking, money laundering, and other international criminal activities. U.S. rule of law assistance could return to Venezuela if President Maduro leaves office and is succeeded by a government that restores Venezuela's democratic institutions.

RULE OF LAW PROGRAM METHODOLOGY

In discussing U.S. rule of law assistance, it is important to consider how assistance programs should be implemented. Fortunately, there is rich literature on this subject; a body of principles and guidelines that confirm the importance of the rule of law and provide directives on implementing international assistance programs. In March 2005, the Organization for Economic

¹⁸⁵ Thor, "How Venezuela's Corrupt Socialists Are Looting the Country to Death."

¹⁸⁶ Tamara Broner, "Venezuela: the Constituent Assembly Sham" Human Rights Watch Dispatches, July 31, 2017, <https://www.hrw.org/news/2017/07/31/venezuela-constituent-assembly-sham>.

¹⁸⁷ Kirk Semple, "In a Venezuela Ravaged by Inflation, a Race for Survival," *The New York Times*, December 2, 2017, <https://www.nytimes.com/2017/12/02/world/americas/venezuela-nicholas-maduro-inflation-hyperinflation.html>.

¹⁸⁸ Karen De Young and Anthony Faiola, "US Hits 4 Senior Venezuelan Officials with Sanctions," *Washington Post*, Jan. 5, 2018, https://www.washingtonpost.com/world/national-security/trump-administration-hits-13-venezuelans-with-sanctions-in-advance-of-critical-vote/2017/07/26/d80a6ac0-721e-11e7-9eac-d56bd5568db8_story.html?utm_term=.fe74903e9438.

Cooperation and Development (OECD) convened a group of development ministers from donor and developing countries to consider methods for increasing the effectiveness of donor assistance through strengthening governance and improving recipient performance. Conference participants drafted the Paris Declaration on Aid Effectiveness that provided a detailed set of recommendations arguing for local ownership, donor and recipient alignment and harmonization, results-oriented management, and mutual accountability. OECD convened a similar group of government ministers in September 2008 in Accra Ghana to evaluate progress achieved in implementing the Paris Declaration. The meeting determined that progress had been made but more needed to be done. The resulting Accra Agenda for Action provided follow-on recommendations to accelerate progress in the areas covered in the Paris declaration.¹⁸⁹ In 2007 the OECD went a step further issuing a set of “Principles for Good International Engagement in Fragile States and Situations”¹⁹⁰ that applied specifically to conflict countries.

In 2004, the UN Security Council released a report of the Secretary General on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies.” The report cautioned against imposing foreign models and one-size-fits-all solutions in providing rule of law assistance. It noted that justice, security, and democracy were mutually reinforcing imperatives and argued for mobilizing support for domestic constituencies to build justice sector institutions.¹⁹¹ In 2008, the United Nations issued the “Guidance Note of the Secretary General on the UN Approach to Rule of Law,” which laid out eight principles to guide the organization’s work in this field.¹⁹² The Guidance reiterated the importance of ensuring national ownership, supporting national reformers, and utilizing a comprehensive and strategic approach. The 2012 “Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels” affirmed the importance of states supporting the rule of law for fulfilling all the UN’s responsibilities.¹⁹³

In April 2013, the Washington, D.C. “NEWDEAL for Building Peaceful States” conference of ministers from 30 countries as well as representatives of international institutions, NGOs, and the private sector pledged to align foreign assistance with the goals of recipient states.¹⁹⁴ In a March 2016 report on improving justice and security programming, the OECD concluded that it was “unrealistic to expect external programs to deliver fundamental change on

¹⁸⁹ OECD, “The Paris Declaration on Aid Effectiveness, 2005, and the Accra Agenda for Action, 2008, Accra Agenda for Action, 2008.

¹⁹⁰ Principles for Good International Engagement in Fragile States and Situations (Paris: Organization for Economic Cooperation and Development, 2007), <http://www.oecd.org/dac/incaf/38368714.pdf>.

¹⁹¹ United Nations Security Council, “Report of the Secretary General on “The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,” Un Doc. S/2004/616, August 24, 2004, http://www.un.org/ga/search/view_doc.asp?symbol=S/2004/616.

¹⁹² United Nations, Guidance Note of the Secretary-General; UN Approach to Rule of Law Assistance (2008), <http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm>.

¹⁹³ The General Assembly, Declaration of the High-Level Meeting of the General Assembly on Rule of Law at the National and International Level, A/RES/67/1, November 20, 2012m <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>.

¹⁹⁴ NEWDEAL Building Peaceful States, Third Global Meeting of the International Dialogue, April 19, 2013, Washington D.C. <https://www.newdeal4peace.org/news-and-events/third-international-global-meeting-of-the-international-dialogue-washington-dc-pm-19-april-2013/>.

sensitive issues like security and justice, but that they could create conditions where domestic champions could make real progress.”¹⁹⁵

Taken together these directives stress the importance of: (1) achieving local ownership and aligning international assistance efforts with national strategies and procedures; (2) developing local capacity through institutional development and personnel education and training; (3) working with civil society groups to mobilize support among reform-minded constituencies to support program objectives; and (4) ensuring donor coordination to avoid overlapping and conflicting activities. Yet knowing what should be done is not the same as knowing how to do it. Asserting the importance of local ownership still requires a follow-on set of instructions on how to identify and convince local leaders to help design and support rule of law programs. A second tranche of principles and guidelines, based upon studies of programmatic success and failure, is devoted to that effort. This body of work provides pragmatic, experience-based suggestions for improving the implementation of rule of law programming.

These approaches begin with taking the time to thoroughly understand the political context in which programs will be undertaken. Rule of law programs must have a political focus and consider the interests of local elites. Clingendael Senior Research Fellow Erwin van Veen notes that “where justice and security initiatives are perceived by elites to threaten their interest they are almost guaranteed to fail.”¹⁹⁶ Thus, rule of law development should focus on the political rather than judicial arena. Emphasis should be placed on strengthening executive authority to create stability, clarifying the rules for stabilizing the power competition among elites, and allowing the emergence of greater popular participation over time. To have an opportunity for success, rule of law programs must enable local elites to participate in planning and implementation and be seen publically as responsible for their success.

Rule of law programs should not be overly linear in design nor expect that implementation will occur in a prescribed order consistent with a predetermined timetable. They must have extended timelines, include change management, and allow for programmatic adjustments in response to opportunities or negative developments. Rachel Kleinfeld writes that “most evaluation systems are set to measure the equivalent of a train progressing down a track; a straight line with clear checkpoints along the route that should be hit at specified times. In contrast, social and political reforms look more like a sailboat tacking towards its destination.”¹⁹⁷ Rule of law assistance programs are most likely to experience spurts and setbacks and can change direction in the course of reaching their objectives.

¹⁹⁵ OECD Publishing, *Improving Security and Justice Programming in Fragile Situations: Better Political Engagement, More Change Management*,” OECD Development Policy Papers, Number 3, March 2016, p. 54, http://www.oecd-ilibrary.org/development/improving-security-and-justice-programming-in-fragile-situations_5jm0v3vd5jg0-en;jsessionid=28s89mbtijix9.x-oecd-live-02.

¹⁹⁶ Erwin van Veen and Maria Derks, “The Deaf, the Blind and the Politician: The Troubles of Justice and Security Interventions in Fragile States,” *The Hague Journal on the Rule of Law*, Number 4, (The Hague, Netherlands, Number 4, 2012)p. 85. <http://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/The-Deaf-the-Blind-and-the-Politician-The-Troubles-of-Justice-and-Security-Interventions-in-Fragile-States>. Erwin van Veen, “A Shotgun Marriage: Political Contestation and the Rule of Law in Fragile Societies, Clingendael, (The Hague, Netherlands, June 22, 2017), <https://www.clingendael.nl/publication/shotgun-marriage-rule-law-fragile-societies>.

¹⁹⁷ Rachel Kleinfeld, “Improving Development Aid Design and Evaluation: Plan for Sailboats not Trains,” Washington DC, Carnegie Endowment for International Peace, 2015.

Rule of law assistance programs should adopt a problem-solving approach rather than assuming that international best practice will work everywhere. Diana Ohlbaum, former deputy director of USAID's Office of Transition Initiatives, writes that the idea of transferring know-how should be replaced by discovering what has worked in the local context and then using external experience to support such efforts going forward.¹⁹⁸ Assistance programs must have sufficient financial resources, appropriately skilled staff, flexibility, and evident commitment to promote trust between implementers and host country recipients. Programs should start by focusing on short-term accomplishments that demonstrate effectiveness. Successful projects require building broad-based coalitions that engage large constituencies. This does not look like a single NGO in the capital, but rather marshalling forces to address issues of public concern.

Finally, rule of law is a core feature of good governance which provides security and justice. Rule of law assistance programs should utilize the host government bureaucracy as much as possible and operate programs in rural areas to reach members of populations most critically in need. This requires the development of accountable, host-government procurement agencies to handle contractual relations with foreign donors and ensure that international assistance is used for its intended purpose. Initially, that may require international oversight and the participation of foreign accounting firms in building local capacity before transitioning exclusive responsibility to local government counterparts.¹⁹⁹

U.S. rule of law assistance programs do not always reflect these guidelines for reasons that are systemic and beyond the control of the implementing agencies. Many problems arise from congressional restrictions that cause U.S. agencies to buy American, honor earmarks, and spend money rapidly. USAID-funded programs are authorized for 3-5 years, but Congress provides funding on an annual budget cycle with no guarantee that projects will be fully funded. This causes problems in project planning and in relations with local partners. Staff can be hired only one year at a time and projects cannot make long-term financial commitments.²⁰⁰ Single-year funding enables a 'flavor-of-the-month' approach where priorities can shift quickly in response to political considerations in Washington, even if ongoing projects are abandoned in the process.

The competitive bidding process among NGOs and private firms for rule of law assistance contracts discourages learning from local sources, experimentation, and problem solving. In response to requests for proposals from U.S. government departments, implementers base their bids on models that were successful elsewhere. Monitoring and evaluation protocols are premised on projects meeting predetermined benchmarks on a prearranged schedule. London School of Economics Fellow Geoffery Swenson writes that USAID demands control over the scope, content, and implementation of projects it supports. This level of micromanagement is a bad fit for dynamic situations that demand flexibility.²⁰¹ A project proposal that advocated investigating local conditions and supporting ongoing local initiatives would be rejected out of

¹⁹⁸ Diana Ohlbaum, "Knowing Our Limits," Devex Newswire, February 23, 2015, <https://www.devex.com/news/knowning-our-limits-85556>.

¹⁹⁹ Diana Ohlbaum, "Country Ownership 3.0," Devex Newswire, February 25, 2017, <https://www.devex.com/news/country-ownership-3-0-85566>.

²⁰⁰ Authors interview with former USAID Assistant Administrator, Center for Strategic International Studies, Washington DC, August 17, 2017.

²⁰¹ Geoffery Swenson, "Why U.S. Efforts to Promote the Rule of Law in Afghanistan Failed."

hand. Only government staff could follow the recommended route of examining the local context, identifying successful efforts, and supporting them. U.S. government departments, however, no longer have the personnel to directly undertake rule of law programs.

CONCLUSIONS

The study highlights two important problem sets that limit the effectiveness of U.S. rule of law assistance in crisis states. These shortcomings reflect a reduction in priority and resources that has occurred in recent years. They also reflect a failure to maximize the authorities, resources, and opportunities that are available both in Washington and in the field.

- **U.S. rule of law assistance lacks a strategic policy, organizing mechanism, and funding coordination.** From the Washington perspective, U.S. rule of law assistance lacks a common policy, doctrine, and strategy. There are no agreed upon goals and objectives. There is no central administrative coordinating mechanism. Instead, agencies offer a collection of projects that reflect the annual choices of Washington policy makers, embassy officers, and partner governments. There is no identifiable, confirmed number for the total amount of money the United States spends on rule of law assistance each year. Funding authority is spread among a collection of congressional committees and legislative funding sources. Money is allocated to the State and Defense Departments and USAID, which reallocate the money to implementing agencies. These agencies in turn reallocate the money to NGOs and commercial contractors. This multilayered process defeats accurate accounting and results in high administrative costs and delays program implementation. Finally, Washington agencies have a shortage of personnel with law enforcement and judicial experience and regional, cultural, and linguistic expertise.
- **U.S. rule of law assistance lacks priority, a strategic focus, concentrated funding, and effective personnel.** In the field, U.S. representatives do not strategically utilize rule of law programming. Embassies fail to provide leadership, build consensus, coordinate donor support, and use diplomatic leverage. They fail to recognize that state-building programs are primarily political not technical exercises. Assistance programs are not strategically focused and designed to produce sustainable change. Program funding is spread among programs ensuring that individual programs are under resourced and unable to effectively mobilize external support. In some cases, host governments utilize U.S. assistance to maintain base-level justice and security institutions while diverting local resources for personal gain. As in Washington, there is a lack of U.S. government rule of law experts in the field. Moreover, U.S. personnel are often constrained by risk-averse State Department personnel policies that restrict the travel of American officials to rural areas, prevent meetings with counterparts, and impede direct observation of projects in the field.

RECOMMENDATIONS

A New Policy Paradigm

To effectively promote the rule of law in crisis states, the United States requires a new paradigm that would implement the portion of the President's 2017 National Security Strategy

that deals with dismantling transnational organized crime. The Strategy notes that these organizations threaten U.S. national security by undermining democratic institutions in partner states, enabling terrorist organizations, and cooperating with corrupt authoritarian regimes. The new paradigm would highlight the critical role that the justice sector plays in countering all forms of organized criminal activity. It would highlight the fact that the justice sector is an integral part of the democratic process, essential for the protection of human rights and the basis for good governance. It would also acknowledge that the justice sector is among the primary targets of criminal organizations and thus, requires political, financial, and technical support.

The new paradigm would acknowledge that international organized crime, Islamist terrorism, and kleptocracy share common characteristics and cooperate to subvert governments and gain political power. They convert governing institutions into Mafia-like structures to divert public resources to benefit the ruling elite. They exploit illicit revenue streams from trafficking in narcotics, weapons, and migrants, the sale of artifacts, and the expropriation of national resources for their own purposes. They mask their activities with nationalist, populist, or religious rhetoric to recruit supporters and dissuade opponents. They transform the judicial system—police, courts, and prisons—into instruments of repression that protect and ensure continued control by the ruling elite.

The new paradigm for U.S. rule of law assistance would abandon last-century definitions for terms like organized crime, terrorism, corruption, and authoritarian rule, replacing them with understandings that fit the realities of the Twenty-First Century. International organized crime is no longer focused on racketeering in U.S. cities but on creating global trafficking networks that earn billions of dollars and provide revenue streams that support political corruption and terrorist groups. Islamist terrorism is not focused on taking over existing governments or establishing a more just society but on seizing territory and establishing a totalitarian theocracy based on extreme interpretations of Shariah law. Corruption is now understood as the operating system of authoritarian regimes, not the isolated work of “a few bad apples” or a “virus” attacking otherwise healthy institutions.

Under the new paradigm, establishing the rule of law would be viewed as a political process. It would involve a normative system of accepted principles and institutions under which the exercise of power is regulated and constrained, and conflicts are resolved by non-violent means.²⁰² It would focus on governance and the use of political and diplomatic power to reform and empower judicial sector institutions. It would enhance traditional justice mechanisms in areas where they are the primary instruments for peaceful dispute resolution. It would establish political and programmatic priorities, and marshal resources to achieve defined goals.

The new paradigm would prioritize U.S. rule of law assistance as a means of dealing with threats posed to U.S. national security interests by organized crime, terrorism, and corrupt authoritarianism. This approach would utilize a comprehensive, whole-of-government, and whole-of-society approach to understanding challenges and developing solutions. It would acknowledge that all forms of development assistance require engagement in the realms of policy, power, and politics. It would emphasize promoting social and institutional reforms over

²⁰² Pilar Domingo, “Rule of law, Politics and Development: the Politics of Rule of Law Reform,” Overseas Development Institute, London, March 2016, pp. 4-5, <https://www.odi.org/sites/odi.org.uk/files/resource-documents/10420.pdf>.

providing equipment and training to judicial officials and security forces. The long-term goal would be to realign forces within society to create a culture of lawfulness.

Implementing the new approach would start with creating a common policy, doctrine, and strategy for rule of law assistance. It would also require establishing a high-level, central coordinating mechanism with sufficient authority to marshal all available resources and direct inter-agency program development. Implementing the new paradigm would necessitate empowering the relevant U.S. government agencies to develop new policy options and design programs. It would also involve recruiting a cadre of government personnel with appropriate expertise and experience. This would enable U.S. government agencies to effectively oversee—if not directly implement—rule of law assistance programs.

The new approach for implementing programs would take a problem solving approach and avoid imposing U.S. models or “international best practice.” Programs would focus on what works indigenously and include partner country input in program planning. Implementation would be viewed as a political rather than a technocratic process that would marshal support from political elites and influential groups. Increased attention would be given to supporting traditional justice and security mechanisms and determining ways that these entities could be linked to the formal justice system.

First Steps

Implementing the new rule of law policy paradigm would require the following steps:

- **A high-level rule of law assistance coordinating mechanism.** Implementing this approach would require a National Security Presidential Memorandum that would establish a National Security Council-directed rule of law assistance policy process. The process would be led by an NSC-chaired, Policy Coordinating Committee (PCC) responsible for policy formulation, program and project selection, and funding allocation. The PCC would emphasize the essentially civilian nature of rule of law institutions but recognize the importance of Defense Department and U.S. military involvement, especially in areas such as border control and coordination of cross-border security initiatives. The PCC would develop results-based systems to evaluate rule of law programs. It would formulate a strategy for engaging with Congress and soliciting its support for this initiative.
- **A comprehensive policy, doctrine, and strategy for U.S. rule of law assistance.** Following precepts outlined in the presidential directive, the PCC would prepare a U.S. rule of law assistance policy, doctrine, and strategy with defined goals and objectives. The new policy would recognize the political nature of development assistance and focus on the importance of utilizing U.S. political and diplomatic leverage to advance the establishment of rule of law in countries receiving U.S. aid. The new policy would focus on institutional development and capacity building of supervising institutions and carry this focus over into training and equipping police, judicial, and corrections personnel where necessary. It would focus on governance and on reforming and empowering judicial sector institutions in countries that are vital to U.S. national security. It would include empowering traditional justice systems in countries where such systems are relied upon by local populations for non-violent dispute resolution. The new policy would seek

to build on locally-inspired, whole-of-society solutions to provide security and justice in recipient countries that reflect popular support.

- **Recruitment of a cadre of experienced rule of law professionals to supervise and implement U.S. assistance programs.** Implementing the new paradigm would require recruiting a cadre of senior government personnel with an understanding of the overall political, economic, and social dynamics in target countries and how legal, law enforcement, and corrections expertise can be translated into successful rule of law programs. This would ensure that programs are conceived and managed in the context of a comprehensive overview of goals and objectives in a given country and supported by skills tailored to these proposed reforms. It would also reduce dependence upon NGOs and commercial contractors for program implementation and evaluation.
- **Exercise ambassadorial leadership.** U.S. ambassadors would use their considerable authority to ensure better program coordination in the rule of law area both within their missions and with like-minded donor countries that administer similar programs. Ambassadors would take the lead in foreign donor coordination to eliminate program duplication among the donor community and with international organizations like the World Bank, regional development banks, United Nations agencies, and the European Union. The outcome of such coordination would make programming more strategic in that it would focus resources on the host country's most critical rule of law needs.

PROJECT TEAM BIOGRAPHIES

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