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I. Introduction

In December 2006, the Department of the Army released Field Manual 3-24 titled "Counterinsurgency," which is the first doctrinal work on the subject set forth by the Army in twenty years. At the time of the manual's release, the United States had been at war in Iraq for more than three years, at the cost of the lives of over 2,400 U.S. servicemembers,[1] and approximately 151,000 Iraqi civilians.[2] The effort to create the new manual was led by then Lieutenant General David H. Petraeus, who would have the opportunity to put theory into practice when he assumed command of all Coalition Forces in Iraq the month following the publication of the counterinsurgency manual.

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1. Department of Defense, Defense Manpower Data Center, Global War On Terrorism – Operation Iraqi Freedom, http://siadapp.dmdc.osd.mil/personnel/CASUALTY/OIF-Total-by-month.pdf (last visited Oct. 27, 2009).

2. Estimates of Iraqi casualties vary greatly from study to study. The number quoted here includes deaths resulting from violence between March 2003 and June 2006, and is taken from the Iraqi Family Health Survey conducted by the Iraqi Federal Ministry of Health in Baghdad, the Kurdistan Ministry of Planning, the Kurdistan Ministry of Health, the Central Organization for Statistics and Information Technology in Baghdad, and the World Health Organization. *See* Hannah Fischer, *Iraqi Civilian Death Estimates*, CONG. RES. SERVICE, Aug. 27, 2008, at 3-5.

Under General Petraeus' leadership, the war in Iraq took a dramatic turn, with military casualties falling from a high of 764 in 2007 to 221 in 2008.[3] Furthermore, General Petraeus testified to Congress that by September 2007, civilian deaths had declined by 45% and deaths due to ethno-sectarian violence had declined by 55%.[4] General Petraeus attributed these positive trends to a multitude of factors, including tribal rejection of Al Qaeda in Al Anbar province, and the growth of Iraqi Security Forces.[5] However, the primary focus of American military efforts were on the employment of "counterinsurgency practices that underscore the importance of units living among the people they are securing, and accordingly, our forces have established dozens of joint security stations and patrol bases manned by Coalition and Iraqi forces in Baghdad and in other areas across Iraq."[6] Such practices were straight out of the counterinsurgency manual, and to the extent that security gains may be attributed to them, they validate the efficacy of the new U.S. counterinsurgency doctrine.

Against the backdrop of security gains loomed the December 31, 2008, expiration of U.N. Security Council Resolution 1790, which provided the legal justification for the presence of American forces in Iraq.[7] Without the authority provided by the resolution, it was questionable whether U.S. forces would be able to continue military operations, including the detainment of Iraqi citizens, and whether U.S. forces would be liable under Iraqi law for actions taken in the line of duty.[8] In short, it appeared that the costly gains made over five years of fighting might evaporate on New Year's Day 2009 if no new international legal agreement was reached, which would result in the effective confinement of U.S. forces to their bases in Iraq.

Fortunately, a political consensus was eventually achieved within the Iraqi Parliament, and as of January 1, 2009, United States military forces in Iraq became subject to the provisions of the

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3. Global War on Terrorism — Operation Iraqi Freedom, *supra* note 1.

4. *Report to Congress on the Situation in Iraq*, Sept. 10-11, 2007, at 3 (testimony of Gen. David H. Petraeus to Congress), *available at* http://www.defenselink.mil/pubs/pdfs/Petraeus-Testimony20070910.pdf.

5. *Id.* at 4-5.

6. *Id.* at 2.

7. S.C. Res. 1790, ¶ 3, S/RES/1790 (December 18, 2007).

8. Alissa J. Rubin, *Iraq Inches Closer to Security Pact with U.S.*, N.Y. TIMES, Oct. 15, 2008, *available at* http://www.nytimes.com/2008/10/16/world/middleeast/16iraq.html?_r=1&scp=6&sq=Security%20Agreement%20Iraq&st=cse.

Bilateral Security Agreement (hereinafter, "BSA").[9] Article 4 of the BSA provides that all military operations "shall be conducted with full respect for the Iraqi Constitution and laws of Iraq," and proclaims that "[i]t is the duty of the United States Forces to respect the laws, customs, and traditions of Iraq and applicable international law."[10] Article 22 of the BSA outlines the process by which the United States may detain individuals in Iraq, stating that "[n]o detention or arrest may be carried out by the United States Forces . . . except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4."[11] Under Iraqi criminal procedure, "arrest or apprehension of a person is permitted only in accordance with a warrant issued by a judge or court or in other cases as stipulated by law."[12] Furthermore, the BSA requires that "[i]n the event the United States Forces detain or arrest persons as authorized by this Agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within twenty-four hours from the time of their detention or arrest."[13]

While the provisions of the BSA are (perhaps by design) vague, some general observations about the effect of the agreement on the conduct of military operations may be made, particularly with regards to the targeting of specific insurgent actors. First, the BSA requires that United States Forces obtain a warrant – or at least a lawful Iraqi decision – before seeking to arrest Iraqi civilians, meaning that military operations designed to target individuals cannot be conducted unilaterally.[14] Second, the BSA appears to

9. Campbell Robertson, *Pact, Approved in Iraq, Sets Time for U.S. Pullout*, N.Y. TIMES, Nov. 16, 2008, *available at* http://www.nytimes.com/2008/11/17/world/middleeast/17iraq.html.

10. Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq., Nov. 17, 2008, art. 4, § 3, [hereinafter Withdrawal Agreement], *available at* http://georgewbush-whitehouse.archives.gov/infocus/iraq/SE_SOFA.pdf.

11. *Id.* art. 22, § 1.

12. Law of Criminal Proceedings, § 2, ¶ 92 (1971) (Iraq), *available at* law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf.

13. Withdrawal Agreement, *supra* note 10, art. 22, § 2.

14. It should be noted that the Security Agreement does hint at some degree of flexibility on this issue. For example, Article 22, Section 5, requires that warrants be obtained before United States Forces search private property, "except in the case of actual combat operations conducted pursuant to Article 4." Correspondingly, Article 4 requires only that military operations be conducted "with the agreement of the Government of Iraq," *see* art. 4, § 2, and with "full respect for" – rather than

preclude long-term detention of Iraqis by the United States, except where requested by Iraqi authorities.[15] Taken together, these two provisions appear to lock the United States into the use of Iraqi criminal procedure for the apprehension and detention of individuals targeted by the military. Such is unfamiliar territory for military forces accustomed to operating under the relatively permissive procedural requirements of the Law of Armed Conflict[16] and the U.S. Rules of Engagement,[17] and as such, requires a paradigm shift. For many military officials, the new requirements represent a regrettable yet necessary restraint on U.S. operations. The BSA is regrettable because it limits military commanders' operational freedom, yet it is necessary if Iraq is to function as an independent, sovereign nation.

As this article will show, however, participation in indigenous legal institutions may provide new, albeit challenging, options for achieving U.S. military objectives, and diplomatic agreements such as the BSA should not necessarily be viewed as a hindrance. To demonstrate this point, Section II will define the international legal framework that governs the conduct of a counterinsurgency campaign, and will provide an example of how prosecution of indigenous criminal insurgent actors complicate operational planning. Section III will discuss the legal, strategic, and tactical benefits of a counterinsurgency force participating in indigenous legal institutions while Section IV will highlight several difficulties inherent in such a course of action, including challenges in the introduction of intelligence information as criminal evidence, and cultural influences on legal processes and counterinsurgency goals. Finally, Section V will examine the potential for the use of indigenous legal institutions in future counterinsurgency campaigns, and the impediments that may undermine the effectiveness of such efforts.

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in accordance with – Iraqi law. *See* art. 4, § 3. Thus, it seems that the Security Agreement envisions some military operations that may be conducted without strict adherence to Iraqi criminal procedure. In any case, such operations must be coordinated by the Joint Military Coordination Committee, and in the absence of agreement in that venue, through the Joint Ministerial Committee. *See* art. 4 §, 2.

15. Withdrawal Agreement, *supra* note 10, art. 22, §§ 1, 3.

16. *See generally* DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3rd ed. 2000) (1982).

17. *See* JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCH., OPERATIONAL LAW HANDBOOK 73-104 (Marie Anderson & Emily Zukauskas eds., 2008).

II. The Law at War

Before proceeding, a few definitions are necessary. First, although the counterinsurgency manual was written during the war in Iraq (and many references are made in the work to that conflict), it was intended as a general doctrine to be applied broadly for planning, training, and operating purposes for any current or future insurgency conflicts. Operating from that premise, this paper will also draw on examples from the Iraqi conflict,[18] and will assume correspondingly that the U.S. military will be the counterinsurgency force applying the principles herein proposed.[19] At the same time, it is intended that the problems and recommendations made in this paper be applicable to any conflict in which a military force applies concepts of counterinsurgency.

Second, counterinsurgency operations are not merely (nor mostly) about combat operations. Rather, a successful counterinsurgency effort will seek to both eliminate the insurgent threat, as well as the economic, political, and cultural conditions that allow the insurgency to flourish. Thus, essential to the successful defeat of an insurgency is the establishment of the rule of law.[20] Such is a broad concept, however, and incorporates many diverse goals, such as enforcing property rights, ensuring civil courts are available for the resolution of private disputes, encouraging equality before the law, and enhancing judicial and police professionalism.

With the two preceding premises in mind, this paper will be narrower in scope, with focus on the use of indigenous law as an instrument to achieve military targeting objectives within the context of a broader counterinsurgency effort. Counterinsurgency may be analogized to emergency medical treatment, with the first step being to "stop the bleeding," where the goal is to "protect the population, break the insurgents' initiative and momentum, and set the conditions for further engagement."[21] The second step is "inpatient care – recovery," where the goal is to "develop and

18. In particular, this paper is influenced by the author's own experiences working with Special Operations Task Force West in Al Anbar province from October 2008 to March 2009. The experiences of other units – particularly in other areas of the country – may vary.

19. Indeed, the terms "counterinsurgency force" and "military" generally refer to U.S. forces, unless otherwise indicated.

20. DEPARTMENT OF THE ARMY, COUNTERINSURGENCY MANUAL, 1-1 (2006).

21. *Id.* at 5-2.

build resident capability and capacity in the [host nation] government and security forces."[22] The final step is "outpatient care – movement to self-sufficiency," where counterinsurgency forces strive to transition responsibility for [counterinsurgency] operations to [host nation] leadership."[23]

While the targeting of specific individuals is likely to be more of a focus during the first step, the counterinsurgency force will need to maintain a residual ability to target and detain insurgents throughout the entire process, lest violence and intimidation undermine gains made in host nation self-sufficiency. Furthermore, as gains are made and host nation capabilities increase in the second and third steps of counterinsurgency, the foreign counterinsurgency force will need to tailor their operations to facilitate the seamless transition of insurgent targeting from the foreign military to the indigenous legal authorities. To this end, familiarity with and utilization of the substance and procedure of domestic criminal law is essential.

In practical application, criminal statutes and criminal procedure are likely to be the primary laws employed in targeting individuals. However, domestic, international and transnational civil law could be used in theory as well. There is a subtle distinction between the "law at war" and the "law of war." The law of war encompasses a variety of international legal regimes, including the Rules of Engagement and the Law of Armed Conflict and Humanitarian Law. In a counterinsurgency, the laws of war inform and shape the law at war, with international agreements setting the general parameters of liability applicable to counterinsurgency forces in the host nation's legal regimes.

Here, it bears noting that, depending on the form and circumstances of a particular counterinsurgency effort, different international laws may apply.[24] Insurgencies and

22. *Id.*

23. *Id.*

24. As an initial matter, it must be noted that regardless of whether the counterinsurgency is considered an international conflict, or a conflict of a non-international character, many of the core principles of the Geneva Conventions would be applicable, if only through Common Article 3. *See* INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION, 34 (1994); *see also* Hamdan v. Rumsfeld, 548 U.S. 557, 629-30 (2006) (ruling that Common Article 3 applies to the conflict between the United States and Al Qaeda). However, because Common Article 3 concerns itself primarily with the treatment of protected persons

counterinsurgencies vary greatly, from internal struggles to attempts by local insurgents to overthrow an occupying power. The counterinsurgency manual contemplates a more specific type of counterinsurgency: the active participation by U.S. forces in quelling insurgencies in foreign countries through long-term cooperation with host nation forces.[25] Any such long-term counterinsurgency campaign by the U.S. military – with the attendant efforts to transfer the power of effective government from the U.S. military to the host nation – may be characterized by successive stages, with the character of the effort varying widely from one period to the next. In the early stages of such counterinsurgency campaigns, the U.S. military, having achieved effective control of the territory in question, will be subject to the Hague[26] and Geneva Conventions[27] governing occupation. Indeed, on May 22, 2003, shortly following President Bush's declaration that "major combat operations in Iraq" against the Republican regime had ended,[28] the United Nations defined the United States and the United Kingdom as "occupying powers" in Iraq and called upon the two powers to "contribute to conditions of stability and security in Iraq."[29]

Of course, the term "occupying power" has a specific definition under the various international agreements that comprise the Law of Armed Conflict,[30] even if the definition is difficult to apply within the context of a counterinsurgency. For example, the Fourth Hague Convention states that "[t]erritory is considered occupied when it is

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rather than the criminality of acts prior to capture, reference must be made to whole text of the Geneva Conventions, as well other potentially applicable international regimes.

25. DEPARTMENT OF THE ARMY, *supra* note 20, at 1-134-1-136.

26. Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 42, 36 Stat. 2277, 1 Bevans 631 [hereinafter Convention Respecting the Laws and Customs of War on Land].

27. *See* Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

28. George Bush, President of the United States, Speech Aboard the USS Abraham Lincoln (May 1, 2003), *available at* http://www.washingtonpost.com/ac2/wp-dyn/A2627-2003May1.

29. S.C. Res. 1483, ¶ 1, U.N. Doc. S/RES/1483 (May 22, 2003).

30. The Law of Armed Conflict is comprised of, *inter alia*, the Hague Conventions of 1899 and 1907, in addition to the four Geneva Conventions of 1864, 1906, 1929, and 1949, as well as the Additional Protocols of 1977 and 2005. *See generally* DOCUMENTS ON THE LAWS OF WAR, *supra* note 16.

actually placed under the authority of the hostile army."[31] Furthermore, "occupation extends only to the territory where such authority has been established and can be exercised."[32] At various points during counterinsurgency, the degree of control that the foreign military force exercises over specific territory may ebb and flow, making such broad tests of occupational authority difficult to apply. Moreover, these criteria of occupation were historically linked with the concept of *debellatio*, which declared that territories pried from the control of a fallen regime become the sovereign property of the occupying power.[33] As Eyal Benvenisti notes, however, the modern concept of occupation, as exemplified by U.N. Security Council Resolution 1483, only contemplates a temporary term of authority by the foreign power over the occupied territories, with sovereignty remaining with the occupied population.[34] Thus, implicit in such a view of the law of occupation is that the rights and responsibilities of the foreign power will change once the indigenous government is able to resume the provision of public services.

It is unclear, however, what international legal regime would supplant the law of occupation in an ideal counterinsurgency campaign. Here, the example of Iraq may not offer much in the way of clarifying information. Security Council Resolution 1483 was superseded by Resolution 1546, which authorized the multinational force in Iraq to "take all necessary measures to contribute to the maintenance of security and stability in Iraq," albeit in accordance with the request for multinational forces made by the Prime Minister of the newly formed sovereign Iraqi government.[35] In endorsing the new government, Resolution 1546 explicitly stated that the multinational occupation of Iraq would end with the transfer of sovereignty on June 30, 2004.[36] Thus, following the transfer of sovereignty to Iraq, the United States and its allies found themselves operating in a confusing legal environment: authorized to conduct operations by both the international community and the

31. Convention Respecting the Laws and Customs of War on Land, *supra* note 26.

32. *Id.*

33. EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION *xi* (Princeton Univ. Press 2d ed., 2004) (1993).

34. *Id.*

35. S.C. Res. 1546, ¶ 10, S/RES/1546 (June 8, 2004).

36. *Id.* preamble.

host nation, yet not explicitly subject to the traditional law of occupation.

As the U.S. military transfers the role of governance to the host nation, the question of the applicable international legal regime becomes more complicated. On the one hand, the struggle may be analogous to an international armed conflict governed by International Humanitarian Law such as the Third[37] and Fourth Geneva Conventions[38] (as well as Protocol I.[39]) On the other hand, the conflict may be described as non-international in character, where Protocol II[40] and the Common Articles apply.[41] Finally, the conflict may possibly be characterized as a peacekeeping operation under United Nations Chapter VII authority.[42] Determination of the applicable law would likely hinge on the character of the combatant parties. For example, should the insurgent organization be the remaining elements of the supplanted regime, an argument could be made that the conflict remains one between two state parties, thus making the Third and Fourth Geneva Conventions applicable. Alternatively, where the insurgent group's claim of governmental authority is tenuous or nonexistent, reference to International Humanitarian Law (other than the Common Articles) would be inappropriate.

Reference to the Convention on the Safety of United Nations and Associated Personnel (hereinafter, "Safety Convention") offers little clarification of the matter.[43] That convention – addressing concerns about attacks on peacekeeping forces – applies to those

37. Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

38. Geneva Convention IV, *supra* note 27.

39. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

40. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 U.N.T.S. 609.

41. *See, e.g.*, Geneva Convention III, *supra* note 37, art. 3.

42. U.N. Charter art. 42.

43. Convention on the Safety of United Nations and Associated Personnel, Dec. 9, 1994, 2051 U.N.T.S. 363, *available at* http://www.un.org/law/cod/safety.htm [hereinafter Safety Convention]. The United States is a signatory, but has not ratified the Convention. *See* United Nations, *Treaty Series*, 2051, 363 (Dec. 1994), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-8&chapter=18&lang=en.

operations "established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control," where "the operation is for the purpose of maintaining or restoring international peace and security" or "where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation."[44] The Safety Convention does not define what constitutes "establishment" by the United Nations, nor does it explicitly state the meaning of United Nations "authority and control." The question therefore remains whether military operations initiated unilaterally or multilaterally under the Article 51 right to individual and collective defense,[45] yet is subsequently endorsed by an organ of the United Nations (e.g., the Security Council under Chapter VII authority "calling upon" the United States and the United Kingdom to restore "conditions of security and stability" in Iraq),[46] would meet the threshold requirement of "establishment" and U.N. control for application of the Safety Convention. Alternatively, the Safety Convention states that it,

> shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.[47]

Thus, for counterinsurgency operations that evolve out of traditional inter-State conflict (like the campaign in Iraq), application of the Safety Convention is problematic. To the extent that the insurgency retains any claims of representing a sovereign government, and maintains organizational structures sufficient to meet the requirements of the Geneva Conventions, the provisions of the Safety Convention are inapplicable.

If, however, a conflict initially within the purview of the laws of international armed conflict becomes subject to the Safety Convention, military commanders may gain an invaluable practical and political tool as attacks against the forces of the State party that

44. *See* Safety Convention, *supra* note 43, art. 1(c).

45. U.N. Charter art. 51.

46. *See* S.C. Res. 1483, *supra* note 29, preamble.

47. Safety Convention, *supra* note 43, art. 2(2).

has assumed peacekeeping functions become criminal[48] instead of potentially permissible as actions of lawful combatants.[49] The practical advantages of criminalization of insurgent acts will be discussed below.[50] On a strategic and political level, invocation of the Safety Convention could demark an important milestone in a counterinsurgency campaign. Such would be an international exhortation that the insurgent forces may no longer cloak their actions in the garb of statehood. Sovereignty would reside with the population, who, represented by a new regime, may rightfully prosecute violations of public order.

A changing international legal backdrop affects the rights and responsibilities of both insurgent and counterinsurgent forces at any given point of the conflict. Actions may be permissible in one period yet proscribed in the next. In such an environment, a counterinsurgency military commander may be tempted to maximize the advantages of legal authorities permitted him in one period before the advantages devolve. Yet, despite changes in applicable international regimes, military goals of security for the civilian population and transfer of military and police operations to host nations remain the same. Unlike the applicable international regime, the indigenous criminal law likely will not change. Thus, a consistency of policy as well as an unchanging local legal environment may dissuade the military commander from exploiting the differences in applicable international law over time, and indeed may recommend the adherence to more restrictive international regimes earlier in the counterinsurgency effort. As will be shown below, adaptation of military operations to criminal justice practices

48. *Id.* art. 9.

49. While the Third Geneva Convention states that prisoners of war may be prosecuted under the laws of the Detaining Power for acts committed prior to capture, *see* Geneva Convention III, *supra* note 37, art. 85, it is unlikely that most acts of warfare could be prosecuted, since the official commentaries of the International Committee of the Red Cross limits the categories of prior crimes to a) crimes against peace, b) war crimes, and c) crimes against humanity, *see* INT'L COMM. OF THE RED CROSS, *supra* note 24, at 419-22. *See also* Geneva Convention IV, *supra* note 27, art. 68 ("Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed.").

50. *See infra* Section III.

may be challenging enough without having to alter military operations to suit the then applicable international regime. Thus, while the laws of war will figure prominently in a military commander's decision-making process, this paper will focus on the more limited question of how to adapt military operations to indigenous criminal law.

A. The Law at War in Practice

In order to highlight the operational effects of moving to a prosecution model, an example may be helpful. Consider the information and planning challenges confronting a military commander seeking to locate and detain an individual or group of individuals suspected of insurgent activity. First, the commander must gain sufficient intelligence on the targeted individual. In a thesis written for the Naval Postgraduate School, Steven Marks, Thomas Meer, and Matthew Nilson propose a model for gathering information on who they term "persons of national interest" (hereinafter, "PONI").[51] In this model, intelligence analysts seek out information on the identity of a PONI, build a social profile of the individual in question, and identify the PONI's support network, in order to help narrow down the location of the wanted individual.[52]

Once intelligence analysts achieve a degree of confidence concerning the location of a wanted individual, the commander must conduct a second assessment, to "determine [the target's] military importance, priority of attack, scale of effort, and lethal or nonlethal capabilities required to attain a specified effect."[53] In other words, the military commander must determine whether he has the means to successfully attack the target, and whether the risk is worth the gain.[54]

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51. Steven Marks, Thomas Meer, and Matthew Nilson, Manhunting: A Methodology for Finding Persons of National Interest (June 2005) (unpublished M.A. thesis, Naval Postgraduate School), *available at* http://www.au.af.mil/au/awc/awcgate/nps/manhunting_marks_jun05.pdf.

52. *Id.* at 60. There are two additional steps in the process, namely assessing the abilities and limitations of the "hunter," and consideration of alternative hypotheses. *Id.* These two steps have been omitted here, since the first is captured in the CARVER process below, and the second may be viewed as an assessment of the results of a process parallel to the first three steps.

53. JOINT PUBLICATION 3-05.1, JOINT SPECIAL OPERATIONS, TASK FORCE OPERATIONS, app. F, ¶ 1 (April 2007), *available at* www.dtic.mil/doctrine/jel/new_pubs/jp3_05_1.pdf.

54. There are various assessment models for making such a determination.

Assuming that the operation is successful and that the target is taken into custody, the traditional model has been to deliver the captured target to detention. From there, the "manhunt" begins anew, with information gained from the capture of the PONI providing the intelligence leads for the next target.[55] Of course, throughout the entire process, secrecy is essential to the protection of the methods and means of intelligence gathering. Secrecy also provides the raiding forces the additional security of the element of surprise, and prevents the escape of the targeted individual.

Now consider how this model changes when the goal of prosecution is added. Again, the process begins with the collection and assessment of information on the target. However, in addition to the various criteria listed above, the commander must now consider not only whether the target presents an actual or potential threat to U.S. forces, but also whether the target has committed a crime, and whether the intelligence presents sufficient evidence admissible in a court of law to support a conviction. In addition to weighing the value of the target relative to the risk of attempting capture, the military commander must consider whether the politically disruptive effects of a foreign military detaining an individual will reduce the chances of that individual's prosecution in an indigenous court. Furthermore, many of the precursors to detention necessary in criminal justice systems – such as the arrest warrant requirement – risk exposing the details of a pending operation, thereby placing forces at risk, and alerting the target.

Once the detention operation has been conducted, the aim of prosecution requires intelligence analysts to remain engaged in the case of the captured individual. Instead of merely seeking information from the detainee in order to develop future targets, intelligence analysts must identify and fill evidentiary gaps. This must be done while avoiding procedural errors that might result in the dismissal of the criminal case, and protecting sources of intelligence.

This simple example demonstrates how the adoption of a goal

Joint Publication 3-05.1 prescribes the CARVER method, which evaluates the Criticality, Accessibility, Recuperability, Vulnerability, Effect, and Recognizability of an intended target. *Id.* at app. F, ¶ 3.

55. See *Saddam Capture Leads to Other Arrests*, ASSOCIATED PRESS, December 15, 2003, *available at* http://www.foxnews.com/story/0,2933,105755,00.html, for an example of how the capture of one PONI can provides intelligence of value in successive manhunts.

of criminal prosecution drastically increases the complexity of targeting persons of national interest. Furthermore, this change in the conduct of military operations is but one of the numerous challenges a military commander in a multifaceted counterinsurgency campaign must face, as concerns of economic development and cultural engagement likewise demand attention and resources. Considering the complexity and uncertainty of the effort as a whole, a lack of enthusiasm on the part of military commanders to alter familiar methods of conducting combat operations is understandable. Nonetheless, as the next section will show, the benefits of embracing the law enforcement model may significantly outweigh the costs of frustrations involved.

III. Why Use Law?

Despite the operational limitations and additional procedural requirements listed above, the use of a prosecution model may provide several benefits to the military commander. First and foremost, efforts made by a foreign military to use and improve the indigenous legal system may contribute to increased perceptions of indigenous governmental legitimacy, which in turn is a primary goal of counterinsurgency operations.[56] As the U.S. Army Counterinsurgency Field Manual states,

> The presence of the rule of law is a major factor in assuring voluntary acceptance of a government's authority and therefore its legitimacy. A government's respect for preexisting and impersonal legal rules can provide the key to gaining it widespread, enduring societal support. Such government respect for rules – ideally ones recorded in a constitution and in laws adopted through a credible, democratic process – is the essence of the rule of law. As such, it is a powerful potential tool for counterinsurgents.[57]

Thus, if the use of indigenous legal institutions by counterinsurgency forces can help to strengthen the competence, responsiveness, and integrity of those institutions in the eyes of the local populace, the result may be that claims of governmental ineffectiveness and corruption – the oft rallying cry of insurgent forces – may have less salience.[58]

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56. *See* DEPARMENT OF THE ARMY, *supra* note 20, at 1-21.

57. *See id.* at 1-22.

58. *See, e.g.*, Jeffrey Fagan, *Introduction to the Symposium on Legitimacy and*

Of course, the ability of a foreign military to positively affect local nationals' perceptions of the legitimacy of legal institutions is dependent on the local populace's perception of the foreign power. However, it is possible that the use of indigenous legal systems by a foreign military may have mutually beneficial results, in that if either party possesses a greater degree of credibility amongst the indigenous population, the interaction between the two parties may serve to transfer some of the credibility from one to the other. This in turn may create a "feedback loop" of legitimacy from the local legal institutions to the foreign military, and vice versa.[59] For example, implicit in the utilization of a country's legal institutions is a demonstration of respect for the sovereignty of those institutions. If those institutions reflect the values of the society they represent, a willingness by a foreign military to abide by the procedures and results of the indigenous legal system may be seen as a demonstration of respect for the indigenous society itself. Furthermore, where legal actions brought by the foreign military are successful, those actions may be said to have been vetted and deemed consistent with the values of the community. Thus, use of the indigenous court system may bolster the credibility of the foreign military, and continued work by the "credible" military with indigenous legal institutions may then help sustain or improve upon the legitimacy of those institutions.

The second benefit to the military commander in the use of host nation criminal law is that it expands the strategic and tactical tools available to the field commander. Throughout the history of warfare, military commanders have sought to use all of the methods available to them to shape the choices of their opponents as individuals, whether those individuals be the commanders of the army or individual soldiers. Traditionally, the methods available for shaping individuals' preferences have been the threat of violent action, economic ruin through the destruction of property, or the restriction of personal liberty. In modern warfare – that is to say

Criminal Justice, 6 OHIO ST. J. CRIM. L. 123 (2008). Although Professor Fagan's focus is on the U.S. criminal justice system, his central argument – that the perceived failure of legal institutions to be procedurally fair, distributively just, and effective may result in a lack of public compliance with the law – is certainly informative in the counterinsurgency context.

59. Of course, the opposite is equally possible, i.e., that a negative feedback loop is created, where the illegitimacy of one institution is transferred to the other. This possibility is addressed below.

warfare that has been conducted by state militaries adhering to the restrictions of the Laws of War – the loss of personal liberty is intended to be temporary.[60] Assuming a combatant merits the protections of the Geneva Conventions, the restriction of liberty of a Prisoner of War ends with the cessation of hostilities.[61] Thus, life sentences, or even detention longer than the period of military operations are prohibited. Such limits restrict the leverage a military commander may apply in attempting to dissuade an adversary from certain acts. Where permissible, the use of criminal procedure removes some of these constraints, and depending on the legal system in question, may provide additional leverage such as plea bargaining.[62]

A second method by which the use of indigenous law increases the options available to military commanders is the "force multiplier" effect, or the appropriation of the services of indigenous law enforcement agencies. If military objectives are congruent with law enforcement goals of local police, opportunities for cooperation and collaboration may exist. This provides numerous benefits. First, cooperation between occupation forces and local nationals increases available manpower. Second, cooperation with local law enforcement may increase the amount of intelligence available to a military commander, since indigenous police may possess cultural knowledge and connections that may permit them access to places and networks that were impenetrable by foreigners.

Finally, the foreign militaries may be required to enforce local laws under the laws of war. As noted above, depending on what stage a counterinsurgency effort is in, different international agreements may apply. If the counterinsurgency is in the "stop the bleeding" stage, where the U.S. military is engaged in direct action missions designed to allow the host nation government to assume effective control, international laws of occupation are likely applicable. As Article 43 of the Fourth Hague Convention states,

The authority of the legitimate power having in fact passed into

60. *See* Geneva Convention III, *supra* note 37, art. 118.

61. *Id.*

62. Generally speaking, plea bargaining does not appear to be possible in the Iraqi system. Although Art. 129 of the Law of Criminal Proceedings permits Iraqi Investigative Judges (with the permission of the trial level Criminal Court) to offer immunity in exchange for testimony, offers of reduced punishment in exchange for testimony do not appear possible, except in specific cases. *See* Law of Criminal Proceedings, *supra* note 12, § 2, ¶ 129.

> the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.[63]

The admonition that occupation forces respect indigenous laws was further expanded under the Fourth Geneva Convention, with Article 64 dictating that "[t]he penal laws of the occupied territory shall remain in force."[64] The Fourth Geneva Convention not only requires that occupying parties respect the substance of the law of the occupied territory, but indigenous legal procedure and institutions as well, as "the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws."[65]

To this end, the international law of occupation dovetails with the objectives of counterinsurgency – the military commander by international legal obligation and by strategic necessity must make use (or at the very least allow the continued operation) of indigenous legal systems during the "stop the bleeding" stage of the campaign. Ideally, the continued operation of the host nation legal system, while under the international receivership of the occupying power, will encourage the development of institutional competence, to the end that the domestic regime will be fully capable of assuming responsibility for law enforcement upon the transfer of sovereignty.

IV. Challenges to the Use of Law

Reference to international law highlights a threshold problem with the use of indigenous law to advance military objectives, namely that criminal prosecution is generally forbidden in cases where the Geneva Convention applies.[66] Further, as noted above, a successful counterinsurgency may be saddled by the curious problem that the applicable international laws of armed conflict at the beginning of the conflict may not be the same as those in latter stages. For example, the earliest stages of the war in Iraq were characterized by the military of the United States fighting the

63. Convention Respecting the Laws and Customs of War on Land, *supra* note 26, art. 43.

64. Geneva Convention IV, *supra* note 27, art. 64.

65. Geneva Convention IV, *supra* note 27, art. 64.

66. *See* note 49, *supra*.

military of Iraq, a situation squarely within the jurisdiction of the Third Geneva Convention as an armed conflict between two parties. Much later in the war, the conflict consisted primarily of political and religious groups attacking both American forces and the security forces of the fledgling Iraqi government – arguably the kind of conflict envisioned by the drafters of Protocol II. Between these two points, however, was an uncertain period where the United States' control of the country was tentative at best, where elements of the collapsing Iraqi Republican armed forces continued to resist through the use of unconventional warfare tactics. In that environment, the United States' legal status as an occupying power was uncertain (particularly after the issuance of U.N. Security Council Resolution 1546), as was the legal identity of the remaining elements of the Iraqi regime not integrated into the new Interim Iraqi Government.[67]

For the counterinsurgency commander, such a transition period between interstate and intrastate conflict presents a conundrum. Assuming, *arguendo*, that the Third Geneva Convention applies at the beginning of a particular counterinsurgency, those acts of violence by insurgents directed at the counterinsurgency force may be considered the legitimate actions of combatants, and therefore not prosecutable.[68] As the U.S. military gains effective control of the country, however, its role as an occupying power requires it to enforce local laws.[69] At that stage, actions directed towards the civilian population would be considered criminal, while certain actions directed towards the military may not. Once effective control has been turned over to the nascent host nation government, acts directed at the counterinsurgency force would be considered criminal acts, prosecutable in indigenous courts.

The problem is that the boundaries between these legal periods of time are not well defined, and certain types of crimes (such as

67. Although Security Council Resolution 1546 does not explicitly call on insurgents to lay down their arms, in the aggregate it may be said to reject the legitimacy of insurgent violence by, *inter alia*, endorsing the interim Government of Iraq (¶ 4a), calling on Iraqis to implement elections peacefully (¶ 6), and condemning acts of terrorism while calling on member states to prevent the transit of terrorists in and out of Iraq (¶ 17). S.C. Res. 1546, *supra* note 35. An official demand that individuals using violence to subvert the Iraqi Government lay down their arms only came in 2006, following the national elections of January 30, 2005. *See* S.C. Res. 1723 at 2, S/RES/1723 (Nov. 28, 2006).

68. *See* Geneva Convention III, *supra* note 37, art. 3.

69. *See* Geneva Convention IV, *supra* note 27, art. 64.

conspiracy) may span across multiple periods. Therefore, military commanders must conduct their counterinsurgency operations in a given period with an eye towards the future, taking the time to collect evidence in the hope that, at some future point, the indigenous government will be capable of prosecuting the crimes of the past. As noted below, a tension may exist between the immediate tactical and operational concerns of the military commander, and the long-term goals of the counterinsurgency. However, even if a counterinsurgency force makes efforts at evidence collection in order to improve the chance of prosecution, they do so against the risk that the applicable laws of war may bestow a kind of amnesty from future prosecution for the crimes begun early in the conflict that have continued into the later stages of the counterinsurgency effort.[70]

Beyond the restraints on the use of criminal law imposed by the Geneva Conventions, a more basic problem exists. Warfare is fundamentally proactive -- combatants strive to find and destroy their opponents before their opponents find and destroy them. In contrast, law enforcement is largely reactive (i.e., police seek to find and prosecute suspects after a crime has been committed). Thus, commanders who pursue an individual before the commission of a crime may increase their security in the immediate term at the expense of having no ability to convict the individual, thereby weakening security in the long term.

Further, the laws of armed conflict and criminal justice differ in the standards of proof that each requires.[71] In warfare, the standard of proof required before a combatant may lawfully engage an opponent is relatively low – generally speaking, the opponent must meet the Hague Convention definitions of a combatant,[72] and the

70. Furthermore, amnesty laws passed by the indigenous government may "wipe the slate clean" for crimes committed early in the counterinsurgency campaign. The full text of an amnesty law passed in Iraq in 2008 may be found at http://www.iraqslogger.com/index.php/post/5506/Full_Text_Iraqs_New_Amnesty_Law. The Amnesty Law (2008) (Iraq).

71. *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1082 (2008).

72. *See* Convention Respecting the Laws and Customs of War on Land, *supra* note 26, Annex, art. 1 ("The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: To be commanded by a person responsible for his subordinates; To have a fixed distinctive emblem recognizable at a distance; To carry arms openly; and To conduct their operations in accordance with the laws and customs of war.").

engaging soldier must abide by the Rules of Engagement (e.g., positive identification of the opponent and demonstration of hostile intent) that apply to him.[73] Thus, if a soldier of one party encounters an individual carrying a weapon and dressed like a member of the opposing party, the soldier may lawfully use the degree of force permitted under the Rules of Engagement to neutralize the threat.[74] Additionally, in warfare, the emphasis is on the collective (i.e., individuals are held personally responsible for actions of the group).[75] Therefore, an individual may be detained or killed because of her current and open participation as a member of the armed forces of a party to a conflict. Once the individual lays down her arms or the conflict ends, the opposing side may not lawfully bring charges[76] or kill the individual.[77]

By contrast, the standard of proof in law enforcement is comparatively high. The prosecuting authority must show evidence of specific acts that have been committed by the individual accused. It is likely not sufficient that a person is dressed like a criminal and carrying a weapon (assuming, *inter alia*, that no specific weapons laws apply). Instead, the prosecutor must prove that the defendant at some prior point used the weapon in a manner that violated a specific crime. Thus, the emphasis in a criminal justice system is on individual culpability, rather than association with a group.[78]

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73. *See* OPERATIONAL LAW HANDBOOK, *supra* note 17, at 98-104 (sample Rules of Engagement applicable to the U.S. military during various conflicts).

74. See, for example, the sample Rules of Engagement for Operation Desert Storm, which dictate, *inter alia*, that soldiers "1. FIGHT ONLY COMBATANTS; 2. ATTACK ONLY MILITARY TARGETS; 3. SPARE CIVILIAN PERSONS AND OBJECTS; 4. RESTRICT DESTRUCTION TO WHAT YOUR MISSION REQUIRES." *Id.* at 101.

75. *See* INT'L COMM. OF THE RED CROSS, *supra* note 24, at 128 ("War is a relationship between one State and another, or, one may also say, between one belligerent Power and another; it is not a relationship between individual persons.").

76. Detaining powers may prosecute prisoners of war, but only for crimes they commit as individuals, not for their participation in the conflict as lawful combatants. *See* Geneva Convention III, *supra* note 37, art. 87. A similar provision exists for protected persons: "[n]o protected person may be punished for an offence he or she has not personally committed. Collective penalties . . . are prohibited." *See* Geneva Convention IV, *supra* note 27, art. 33.

77. *See* Geneva Convention III, *supra* note 37, art. 13.

78. *See, e.g.*, Iraqi Constitution, Art. 19, §8, *available at* http://portal.unesco.org/ci/en/files/20704/11332732681iraqi_constitution_en.pdf/iraqi_constitution_en.pdf. Of course, an individual can be prosecuted for conspiracy, but such usually requires that the *individual* possess the intent to enter into an agreement to commit

Faced with these fundamental differences between warfare and law enforcement, the military commander may attempt to "square the circle" through increased reliance on intelligence to facilitate aggressive prosecution of inchoate crimes such as conspiracy, thereby initiating the criminal justice process before the suspect in question has an opportunity to attack military forces. Pursuing such a strategy, the military commander will likely confront the numerous challenges attendant to prosecuting inchoate crimes, such as proving *mens rea* when the overt acts of the accused could be variously interpreted as incriminating or innocuous, or facing judicial disapproval of invasive surveillance and monitoring of private citizens. Routine focus on such crimes is likely to lead to frustration of the counterinsurgency forces, and possible alienation of indigenous legal actors.

Reliance by foreign military commanders on local legal systems presents an additional tradeoff, namely the relative certainty of military operations versus the relative uncertainty of indigenous institutions. Although there is nothing certain about warfare, the modern American military commander may generally rely on the soldiers under his command to comply with his orders and work towards the fulfillment of the commander's intent.[79] Such cannot be said of the police, prosecutors, and judges of a sovereign legal system, all of whom are likely to have their own conceptions of what is in the best interest of their community. Indeed, many individuals in the judicial system may harbor resentment towards the presence of a foreign military in their country, and be sympathetic towards those who commit crimes aimed at harming the foreign power.[80]

Additionally, when dealing with failed states or developing nations, issues of political corruption, religious or tribal influence, poor financial infrastructure, and the lack of qualified personnel may impede or completely disrupt the operation of the criminal

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an offense with others. *See, e.g.*, Penal Code of 1969, ¶¶ 33, 55 (1969) (Iraq), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf.

79. Indeed, failure to obey an order is itself a crime. *See* Uniform Code of Military Justice, 10 U.S.C. § 894 (1956).

80. The Geneva Conventions recognize that people will desire to resist an occupying power. Article 68 of the Fourth Geneva Convention stipulates that actions taken against an occupying power, which do not harm individuals nor seriously damage property should be punished through simple imprisonment. *See* Geneva Convention IV, *supra* note 27, art. 68.

justice system. Military commanders may find their attempts to affect the security of a country frustrated by a legal system not yet mature enough to handle complex and politically sensitive cases, and thus may decide to pursue options other than criminal prosecution.

While abstention from using indigenous legal venues may thus be tempting, the truth is that there is no way to improve a country's legal system but to permit it to work through its problems with real cases in controversy. The law cannot be developed if it is not permitted to fail: The actors within the system should be held responsible for the consequences of their actions. Of course, in a developing state where all government institutions are weak, and the prejudices of the people may be easily reignited, the consequences of the failure of the criminal justice system may be great, leading to significant security concerns for both the indigenous population and the foreign military. Such are two of the classic dilemmas of counterinsurgency: (1) "[s]ometimes, the more you protect your force, the less secure you may be," and (2), "[t]he host nation doing something tolerably is normally better than us doing it well."[81]

Finally, the use of host nation legal institutions to advance counterinsurgency objectives raises questions of institutional competence for the military (i.e., whether it is appropriate for the average soldier to receive and in turn provide law enforcement training).[82] The current U.S. statutory regime – built primarily around the Foreign Assistance Act – generally prohibits foreign assistance funding for training law enforcement agencies,[83] and either presidential or congressional authorization is usually required to enable the military to provide training to foreign police departments.[84] With these constraints on the training of foreign police departments, reluctance by the U.S. military to invest time and money in preparing soldiers to perform law enforcement

81. DEPARTMENT OF THE ARMY, *supra* note 20, at 1-154.

82. *See id.* at 6-16.

83. 22 U.S.C. §2420 (1999).

84. *See* DEPARTMENT OF THE ARMY, *supra* note 20, at D-1, D-2. In Somalia, military forces were only permitted to train local police forces once a presidential directive was signed. However, in 1996, the Foreign Assistance Act was changed by Congress to allow military assistance in post-conflict police training. *See* Marc L. Warren, *Operational Law – A Concept Matures*, 152 MIL. L. REV. 33, 45 n.46 (1996).

"foreign internal defense" would be understandable.[85]

As noted above, however, in order for a counterinsurgency to be successful, U.S. military forces must be capable of targeting wanted individuals throughout all stages of the insurgency. Therefore, even if as the counterinsurgency manual states, "[p]olice are best trained by other police,"[86] it is essential military personnel possess the knowledge and skills necessary to cooperate and interact with their host nation law enforcement partners, especially as a counterinsurgency moves from focus on combat operations to law enforcement. In order to be effective as both participants and advocates of a host nation legal system, members of a counterinsurgency force would need to be trained in local criminal procedure, as well as other foundational police skills as witness questioning and basic crime scene investigation. While these skills are present in certain units within the military,[87] they are not broadly taught to military personnel. Success in future counterinsurgency operations requires that the military train specialists in indigenous legal systems, and that basic legal instruction be provided to ground troops likely to interact with host nation forces.

A. Evidentiary Problems

Procedurally, the convergence of military operations with criminal prosecution presents many problems, not least of which is the fact that military intelligence does not easily translate into criminal evidence. Warfare has always been a process of developing techniques and tools designed to provide one side with a distinct advantage over the other. In modern warfare, possessing an information edge over one's opponent is a significant advantage, and great lengths are taken to maintain secrecy so that one side may monopolize the strategic and tactical benefits such information provides. The fact that combatants would be required to reveal their methods and means to a neutral arbiter in order to fully realize the fruits of their efforts runs counter to the entire history of

85. *See generally* JOINT PUBLICATION 3-05.1 *supra* note 53 at I-2.

86. DEPARTMENT OF THE ARMY, *supra* note 20, at 6-16.

87. For example, commands such as the Army's Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations include active duty units trained in civilian law enforcement techniques and technical procedures.

warfare. Yet, this is precisely what is required to obtain a conviction; in order to assess the merits of a case, judges must probe not only the substance of the information they are presented with, but also the means by which it was obtained.

Thus, introducing intelligence in a host nation criminal proceeding is likely to give military commanders a moment of pause. Not only will a criminal proceeding cause methods and means to be revealed, but it would potentially provide third parties with a degree of control over the intelligence methods available to the commander. Consider a case where the military wishes to use some form of technical surveillance such as wiretapping similar to that used by domestic law enforcement in the United States. Under the Iraqi constitution, any form of electronic surveillance intended for prosecution requires judicial approval.[88] Therefore, if military commanders wish to tap a suspected insurgent's phone for potential use in future criminal proceedings, they must risk compromising the secrecy of their intelligence efforts by obtaining judicial permission. As a result, military commanders may decide to forgo pursuing the surveillance, or more likely, abstain from using the intelligence gained through surveillance in criminal proceedings, thereby weakening the case.

Even if military commanders feel that the benefit of releasing intelligence to judicial authorities is worth the operational and informational risks, a threshold administrative problem must be addressed. The system of classification used by the United States military and intelligence agencies is highly decentralized, in that the individual or organization that originates an intelligence report sets (within established guidelines) its classification level, and any other user of the intelligence must submit a request to the originator to lower the classification level or to declassify the report.[89] Assuming that no policy forbids the release of the information (e.g., that it does not reveal methods and means), the individual seeking the release must therefore not only work through bureaucratic channels to seek permission for release, but must also task the originator to perform the work of "sanitizing" the report for release.[90]

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88. Iraqi Constitution, art. 38.

89. *See* Exec. Order No. 12,958, 76 Fed. Reg. 19,825 § 4.2 (Apr. 17, 1995). *See also* Department of the Navy Information Security Program Regulation, SECNAVINST 5510.36. (2006).

90. *See* Exec. Order 12,958, § 3.1.

Considering this, the potential exists for agencies or organizations to differ on the priority of the release request, or to differ on the form and content of the sanitized report, either of which can frustrate the intent of the requesting organization to provide intelligence to a foreign government for prosecution purposes. The problem is compounded when one considers the number of military units and government intelligence agencies that may be gathering intelligence on groups and individuals within a given country.[91] Of course, the rule of declassification by the originator is supported by sound policy rationale, in that it would be unwise to permit individuals and organizations without subject matter expertise to determine whether or not to reveal that information to outside parties. Considering this, the establishment of uniform guidelines for the declassification of information to foreign governments for criminal prosecution may help to reduce – but not eliminate – the bureaucratic delay in sanitization of information across the intelligence community. The formation of such policies takes time, however, and would need to be tailored to the unique security environment of the country in question. Therefore, the coordination of intelligence release is likely to present itself anew as a problem for each country in which the United States wishes to utilize the criminal justice system for the accomplishment of military objectives.

Beyond these conceptual and administrative barriers, there exist numerous differences between intelligence operations and judicial proceedings on the question of the testing of the veracity, reliability, and relevance of information. These differences exist in part because the goals of the two procedures are not identical. Judicial proceedings seek to gather and weigh information in order to assign legal rights and duties. Intelligence operations seek and analyze information to, *inter alia,* assist commanders and policy-makers in their decision making.[92] In judicial proceedings, the cast

91. Consider, for example, that each of the sixteen intelligence agencies under the Office of the Director of National Intelligence may gather intelligence on Iraq, as do the intelligence departments of Central Command, Special Operations Command, and Transportation Command, as well as the intelligence departments of the multinational commands under Multinational Corps Iraq (Multinational Divisions Baghdad, Central, Southeast, Northeast, North, Multinational Force West, and Logistical Support Area Anaconda), and each of the major units under the Multinational Divisions (for example, II Marine Expeditionary Force under Multinational Force West).

92. Fred Manget, *Intelligence and the Criminal Law System*, 17 STAN. L. & POL'Y

of "characters," as well as the potential outcomes, are rather narrowly defined (i.e., there is one or more identified defendants, who face the possibility of a finding of guilt or innocence for committing a certain act, or acquittal due to procedural complications). Considering the limited purview of judicial action, it is understandable that courts would wish to narrow the range, subject, and type of information it considers, as well as the manner in which the court receives the information. In contrast, the strategic and tactical options available to a military commander are far less constrained. Targets may be captured or killed, engaged or ignored, co-opted or deterred. Furthermore, resources alone constrain the universe of "characters" on which a military commander may gather intelligence. Thus, considering these differences between intelligence operations and judicial proceedings, it is understandable why the use of information derived through one epistemological process to make judgments in another will likely be procedurally and idiomatically problematic.

Specifically, at least four procedural problems exist in the use of intelligence as evidence. First, the conversion of raw information into intelligence is strongly dependent on inference, or put differently, circumstantial evidence – the "existence of a fact, from which the existence or nonexistence of some fact in question may be inferred as a probable consequence."[93] For example, from specific seismic activity, an intelligence agency may deduce without visual or other sensory observation that a country hundreds of miles away has tested a nuclear weapon.[94] In many legal systems, however, circumstantial evidence is problematic[95] if not expressly forbidden.[96]

Second, intelligence officers do not necessarily place as much weight on chain of custody as criminal courts. Thus, procedures established for obtaining intelligence may place more emphasis on the speed of obtaining and the content of information, rather than the careful and open documentation of who possessed the

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REV. 415, 415-16 (2006).

93. William P. Richardson, THE LAW OF EVIDENCE, § 111, at 68 (3d ed. 1928).

94. *See, e.g.*, Bill Gertiz, *U.S. Doubts Korean Test Was Nuclear*, WASH. TIMES, Oct. 10, 2006.

95. In the United States, the pragmatic test of "whether the evidence makes any fact of consequence more or less probable than it would be without the evidence in question" generally determines admissibility. 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 39 (Tillers rev. 1983).

96. *See, e.g.*, Law of Criminal Proceedings, *supra* note 12, ¶ 169.

information at each stage, from the originator to the final recipient. Indeed, revealing information such as methods of collection, identity of sources, and military personnel in open court may present security risks in itself.[97]

Third, hearsay (or derivative information) is a vital and welcome part of human intelligence, whereas it is rejected — or at least carefully scrutinized — in many legal systems.[98] While intelligence gathering and military operations are continuing processes, most criminal trials are one-off affairs, which is to say that the victims, defendants and witnesses are unlikely to appear before the court on multiple occasions for other matters.[99] Thus, the criminal procedure ban on hearsay makes sense, since judges are deprived of many of the tools available to military intelligence professionals for evaluating the accuracy of the information. For example, in the courtroom, inadmissible hearsay evidence cannot be "rescued" by considering the integrity or character of the individual giving testimony. In the intelligence context, however, previous positive cooperation with an informant may give increased credibility to the information provided. Furthermore, the inadmissibility of hearsay testimony is not affected by the number of individuals who come forward with the same information. In contrast, an intelligence officer would be foolish to reject intelligence that is confirmed by multiple sources simply because none of the informants had direct access to the information.

The fourth rationale for the exclusion of derivative evidence in common law systems is the manner in which evidence is introduced at trial. At common law, two parties seek out and present evidence

97. Manget, *supra* note 92, at 416.

98. In common law systems, hearsay is either excluded or admitted under a number of limited circumstances. In civil law countries, the risk of improper influence of derivative information is mitigated either through the "principle of immediacy" (i.e., that there be a direct contact between the decision makers and their source of information), or the threat of reversal on subsequent review due to insufficient justification for a particular finding. *See* Mirjan Damaska, *Of Hearsay and its Analogues*, 76 MINN. L. REV. 425 (1992).

99. In another context, the contrast between episodic civil law proceedings and "one shot" common law proceedings is cited by Professor Mirjan Damaska as being one of the historical causes of the two systems' differing approaches to hearsary evidence. In civil law countries, fact finders presented with hearsay could suspend proceedings in order to locate and question the original declarant. In the English system, however, the logistical difficulties in reassembling a jury made such delays in court proceedings impractical, thus leading to a bias against derivative evidence. *Id.* at 428-30.

supportive of their respective arguments. Under this system, it is easy to imagine biased witnesses who give false testimony in order to advance the cause of one of the parties. Through the process of confrontation, the opposing party may seek to reveal a witness' contradictions, inconsistencies, and physical reactions that reveal the testimony to be false. As Professor Damaska points out, though, the task of testing the truthfulness of a statement is far more difficult where the witness can falsely ascribe a statement to a declarant who is unavailable for cross-examination.[100]

With respect to the manner in which information is collected for consideration by the decision maker, the process of intelligence gathering is closer to the civil law system of judicial inquisition than the common law adversarial process. That is to say that the intelligence professional seeks out all the information that he or she deems relevant to resolving the question at hand, rather than being constrained to the "bipolar" record presented by two biased parties. Therefore, some of the common law rationales for the exclusion of derivative information are not present in intelligence gathering. However, this is not to say that the question of bias is moot in intelligence collection – to the contrary, intelligence professionals must constantly evaluate their own preconceptions as well as the reliability of information given to them by persons whose motivations and allegiances may be suspect. This is accomplished through the consideration of consistent alternate reporting, or through the disregard of unverified hearsay information.

Even if the intelligence professional is satisfied that the derivative information in question is trustworthy, this does not eliminate the bias problem when a counterinsurgency force wishes to introduce hearsay evidence to an indigenous court. Advocacy of the use of specific evidence introduces the specter of adversarial partiality, even in a civil law court room, for the judge must not only consider the motivation of the witness, but also the counterinsurgent force that goes against the inquisitorial method by recommending evidence to the court. The trial judge may call the original declarant to testify in order to probe the trustworthiness of the statement. However, while the motivations of the counterinsurgency force in recommending the evidence might be self-evident, it would likely be distractive, impractical, and politically ill-advised for the judge to examine the

100. *Id.* at 431.

counterinsurgency force's role in recommending the testimony.

Finally, there is the question of the sufficiency of evidence. While it may be that only prudence dictates that military commanders seek multiple sources of information before choosing to act on a piece of intelligence, some legal systems explicitly dictate that certain forms of evidence – no matter how reliable – are insufficient for prosecution.[101] For example, imagine that a military commander receives information from a spy giving the current location of an individual the spy claims is responsible for numerous insurgent acts. The spy has a history of reliable reporting and the information on the individual's whereabouts is extremely time-sensitive, since it is likely that the wanted individual will flee before the commander can get a second source to confirm the spy's report. In such a case, the commander may be justified in acting based solely on the information given to him by the spy. However, even if the information resulted in the successful detainment of the individual, the testimony of the spy alone would be insufficient for prosecution in Iraqi courts, since under the Iraqi Law of Criminal Proceedings "[o]ne testimony is not sufficient for a ruling if it is not corroborated by other convincing evidence or a confession of the accused."[102]

B. Use of Technology and Forensics

Modern intelligence collection is very much dependent on technology and forensics, as the seismic evidence of nuclear activity example above demonstrates. However, the introduction of scientific and technical information into a criminal trial is fraught with difficulties to say the least, as esoteric information must be explained in order to demonstrate its relevance. This inherently requires that the technical process that produced the information be laid bare for consideration by the trier of fact – a prospect that is unappealing for those who wish to maintain the secrecy of a particular technique.

Besides the reluctance of military commanders to reveal the specific means by which they come to possess information, there exists the issue of whether judges would accept and give weight to any such information submitted to the court. Here, at least three

101. *See, e.g.*, Law on Criminal Proceedings, *supra* note 12, ¶ 213(B).

102. *Id.*

problems may exist. First, members of the local judiciary may not be familiar with the type of technical evidence presented to them. In every judicial system, courts adapt to ever-more complex forensic and technical evidence through self education, and reliance on experts.[103] However, cultural or nationalistic biases may come into play when such edifying information comes to a judge via foreign sources, causing the local judge to reject or view the evidence with skepticism.

Second, even if judges and other officials in the criminal justice system are familiar with the type of forensic evidence presented, they may nonetheless be reluctant to make controversial rulings based on evidence that is highly technical in nature, lest an uninformed public view the ruling as illegitimate.[104] This may be especially problematic in developing nations, where the average level of education may be comparatively low.[105] Therein lies a more

103. In the United States, Fed. R. Evid. 702 permits the testimony of experts in order to explain scientific evidence to the trier of fact. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the Supreme Court set forth a five-part test for U.S. judges to evaluate the credibility of scientific testimony: (1) whether the reasoning or methodology can be tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, (4) whether there is "general acceptance" of the theory or technique, and (5) the existence and maintenance of standards controlling its operation. *Id.* at 595-96. Here it is interesting to note that the *Daubert* test would be rather unhelpful in evaluating the soundness of secretive intelligence collection methods, due to the unlikelihood that such techniques would be available for peer review and "general acceptance."

104. The proposition that judges, due to their education and training, are more capable of understanding complex technical or scientific evidence than society writ large is debatable at best. An interesting study comparing the respective comprehension of scientific data by judges and juries found that each group understood certain information better than the other. However, the author proposes that such differences may be the result of the manner in which the evidence was presented, as well as the process of deliberation by juries that judges do not undertake. Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL'Y 19, 42-46 (2007). Nonetheless, greater differences in education levels in developing countries may make the comprehension differences between judges and the public more pronounced.

105. For example, school life expectancy in Iraq is 10 years, compared to fifteen in the United States. CIA World Factbook: Iraq, *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html (last visited Oct. 22, 2009). It is possible, however, that sources of technical knowledge other than formal education may inform the general populace's understanding of scientific evidence, representations of forensic evidence in popular media in particular. However, as Tom Tyler argues, there is little scientific evidence that the "'CSI' effect" actually exists, and if it does, it may equally result in greater likelihood of conviction rather than acquittal. Tom Tyler, *Viewing CSI And The Threshold Of Guilt*, 115 YALE L.J.

philosophical question of whether a conviction can be considered fair if the public does not understand the basis.

Third, the process of providing intelligence for admission as evidence in many cases would require possession by local police and courts of the technological facilities to access the information. However, in many developing countries, local law enforcement agencies lack basic technology such as computers and internet access. Indeed, the U.S. Government Accountability Office cites examples of Iraqi law enforcement agencies having insufficient fuel to travel to crime scenes, and military units being forced to barter with American forces for computer support services.[106] Thus, even if judges wished to accept technical evidence, the local police may not have the technical ability to present it to them, and the courts may not have the capacity to receive it.

C. Human Intelligence

Concerns over the use of intelligence as evidence is not confined to the world of technical information. The oldest form of intelligence, human espionage, is likewise ill-suited for use in the courtroom. The relationship between a foreign power and its confidential local informants is predicated on the promise that the foreign power will protect the identity of the individual. Asking an informant to testify in a domestic court violates this promise, and potentially places the informant in physical or legal jeopardy. While many judicial systems have procedures for confidential testimony,[107] the security of those procedures is only as reliable as the individuals charged with performing them. If a legal system is plagued by corruption or sectarian allegiances, confidential informants may be understandably reluctant to testify, lest their identity be leaked.

Further, the testimony of an individual who is secretly cooperating with a foreign power may be greeted with skepticism by local courts. It takes little imagination to attribute selfish motives

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1050 (2006). Anecdotally, many Iraqis told the author that they routinely watched "CSI," and one police colonel half-jokingly stated that he told his officers to watch the show as a training tool.

106. GOVERNMENT ACCOUNTABILITY OFFICE, OPERATION IRAQI FREEDOM: DOD ASSESSMENT OF IRAQI SECURITY FORCES' UNITS AS INDEPENDENT NOT CLEAR BECAUSE ISF SUPPORT CAPABILITIES ARE NOT FULLY DEVELOPED 13 (2007).

107. *See* Law of Criminal Proceedings, *supra* note 12, ¶ 47 (witnesses to a felony may make a report in person to an IJ, a Public Prosecutor, or at any Police Station); Law No. 119 of 1988 amended Article 47 to allow secret testimony.

(e.g., financial gain) to individuals assisting foreign powers in a manner that may be viewed as betrayal of one's culture, religion, or nationality. At worst, such cooperation may constitute treason against the local state.

Of course, the decision whether or not to testify against a wanted insurgent is entirely personal to the informant. It may be very likely that the same motivations that drive an individual to become an informant to U.S. forces (e.g., a desire to end violence in the host country) may lead the same individual to come forward to local authorities with criminal evidence, despite the dangers attendant in doing so. Against this backdrop, it would be wise for those members of the military and representatives of the United States government who meet with confidential informants to be forthright about both the need for and potential risks in providing criminal evidence. Where a particular informant is too valuable to the counterinsurgency force to merit the risk of exposing that individual to legal liability or physical harm, the military commander may need to pursue other methods of gaining information (such as sub-informants), or exercise "prosecutorial discretion" by forgoing prosecution of the case.

Another tradeoff between intelligence and evidence is the question of whether information gained by military personnel should be used to secure a conviction or used to find the next target. Often, these two goals are not in contention. However, rapid action on information gained from one individual may often be the best way to find associates of that individual within the same group. The proper investigation, documentation, and recordation of information for specific crimes for evidentiary purposes may create delays that give associates of the arrested suspect time to discover the detention, destroy other incriminating evidence, or flee the area. The temptation to move quickly on targets is likely to be particularly felt during the initial "stop the bleeding" stage of a counterinsurgency. However, insurgencies tend to be protracted affairs, where key actors may evade capture for years. Thus, even when military efforts are focused more on combat than law enforcement, efforts should be made to record information essential for conviction, so that the option of prosecution remains viable later.

D. Cultural Influence

As noted above, participation by the counterinsurgency force in the host nation legal system may, under certain circumstances, confer legitimacy on the indigenous legal institutions. Likewise, where host nation institutions possess legitimacy in the eyes of the local populace, they may provide credibility to the counterinsurgency force. Either way, participation by U.S. military forces in indigenous legal proceedings is likely to affect more than perceptions of the host nation legal system. A legal system is shaped by the individuals using it. A counterinsurgency military force that becomes an actor in the host nation legal system cannot help but affect the substance and procedure of that system. In doing so, a counterinsurgency power may inadvertently or consciously impose some of its values onto the indigenous system.

The counterinsurgency force may passively affect the system through the cases it chooses to pursue and forgo. By bringing cases for specific crimes, the military creates a hierarchy of priorities. If the counterinsurgency military is an actor of significance in the indigenous legal system, that hierarchy may be adopted by the local institutions. Further, the military may actively shape the legal system by encouraging or forcing local legal institutions to adopt certain procedures and practices. In either case, if the result of the military's interaction with the local legal institutions is that the priorities and values of the institutions do not match those of the indigenous population, the legitimacy of those institutions may suffer. In essence, the reverse of the positive legitimacy "feedback loop" may occur, undermining the legitimacy of both the host nation and the counterinsurgency force.

In order to avoid such a result, counterinsurgency commanders must choose their cases and targets with care. While there may be great temptation to pursue prosecution of those individuals who threaten the military force, such actions may create a rift between the counterinsurgency force and the host nation. The local populace is likely to view attacks against a foreign military as less important than crimes committed against their neighbors, friends, and family. Thus, military commanders with limited resources may do well to focus the balance of their efforts on prosecution of crimes of perceived importance to the local community, while giving prosecution of military targets secondary emphasis. Ultimately, it is the perception of safety by the local populace that determines the

success of a counterinsurgency effort, and not the safety of the counterinsurgency force.[108]

Just like an actor cannot help but shape the system he works in, so too does the system shape the actor. As the counterinsurgency manual suggests, use of an indigenous legal system is likely to be part of a larger effort at building the institutions of a state.[109] In such an environment, progress is unlikely to be uniform across all areas that the military wishes to affect. Military leaders are thus likely to encounter scenarios where goals in one area of the counterinsurgency are in conflict with goals in another, and strict adherence to the rule of law by the military may inhibit or impede economic, political, or security gains. This is especially likely in traditional societies, where legal disputes are often dealt with outside the formal judicial system, so as not to damage fragile community relationships. For example, insistence by military commanders that a member of a particular tribe be tried for certain alleged crimes may alienate the leaders of that tribe from the military, thereby sacrificing assistance the tribe could bring in helping to strengthen the economy and security of their area of influence. Thus, the military leader may be forced in the name of "the greater good" to allow the crime to be dealt with through tribal law, rather than the court system.

Of course, diplomacy has always been a process of negotiations and concessions, and "armed diplomacy" is no exception. However, when the concession to be made is adherence to the rule of law, a slippery slope is created: the law is the law, except where it is not. One group's tribal law is another group's vigilante justice. Thus, where concessions are to be made, two questions must be addressed. First, does the proposed concession violate U.S. or controlling international law? If the answer is yes, then the concession – no matter how well-intentioned – cannot be countenanced. Second, if the concession is of the spirit, rather than the letter of the law, what goal does the concession serve? Respect for local culture is essential for success in counterinsurgencies, but it may all too easily be used as justification for courses of action expedient to immediate security objectives. All else being equal, turning an individual over to tribal or religious courts may be permissible when done to honor local conceptions of fairness and

108. *See* DEPARTMENT OF THE ARMY, *supra* note 20, at 1-149.

109. *See id.* at 5-15.

justice, but it may not be done solely to circumvent courts unsympathetic to the counterinsurgency force.

V. The Future (Ready or Not)

The Bilateral Security Agreement dictates that United States Forces will withdraw from Iraq no later than December 31, 2011.[110] If the terms of that clause are honored, it will mark the end of one of the most expensive wars ever undertaken by the United States.[111] With the exception of counterinsurgency efforts underway in Afghanistan, it is unlikely that the United States will attempt nation building on a similar scale anytime in the foreseeable future.

It is equally unlikely, however, that the military's experiment of using indigenous legal systems for achieving foreign policy goals will be left behind in Iraq alongside broken vehicles and abandoned operating bases. Indeed, there are many reasons to believe that the use of foreign courts and cooperation with local law enforcement agencies will come to embody the rule, rather than the exception, of military operations in the future.

To understand why, two trends of contemporary society must be considered. First, the world is becoming smaller. The increasing connectivity of the global community through communication, travel, and trade has provided numerous positive economic, political, and cultural benefits. At the same time, however, it has enabled like-minded non-state actors to coordinate and collaborate across state lines and large geographic distances to achieve common goals.[112] Thus, terrorist organizations may have their political or ideological leaders in one country, their finance cell in a second country, and their target of operations in a third. Such decentralization makes the disruption of international terror organizations and crime syndicates through traditional military operations extremely difficult. The diplomatic efforts required to convince sovereign states to permit military action within their borders may be highly disproportionate to the size of the targeted cell, while covert and clandestine operations risk severe political

110. Withdrawal Agreement, *supra* note 10, art. 24, § 1.

111. *See* Stephen Daggett, *Cost of Major Wars*, CONG. RES. SERVICE, July 24, 2008, at 2. By 2008, the Iraq War was estimated to have cost $648 billion (in constant 2008 dollars), third in total cost behind the World War II ($4.1 trillion), and Vietnam ($686 billion). *Id.*

112. *See* DEPARTMENT OF THE ARMY, *supra* note 20, at 1-22.

repercussions should they be uncovered.

Second, advances in technology have expanded the capacity for violence at all levels – what may be termed weapons of mass destruction compared to the destructive weapons of the masses. State militaries are capable of drawing on large national budgets and the international arms industry to field extremely complex and destructive weapons systems, such as advanced cruise missiles and anti-air radar systems. At the same time, the globalization has put incredibly destructive weapons in the hands of individuals, be it knock-off Kalashnikov rifles made in China, or improvised explosive devices made in a residential basement from instructions found on the internet.

The results of these two trends are that individuals have the capacity to conduct acts of violence with regional or international consequences using low cost technology, against which the advanced weapons of nation states may be of limited effect.[113] Further, any attempt to use conventional military forces against small, decentralized opponents may appear heavy handed, meaning that military victory may come at the cost of losing the battle to win hearts and minds.

Against this backdrop, the use of indigenous law enforcement is extremely attractive as a policy option. First, use of indigenous law requires the military to partner with elements of the local government, thus potentially reducing diplomatic resistance to military operations within a sovereign state. As noted above, use of an indigenous legal system demonstrates respect for that institution, and may by extension show respect for the broader community and its values. Moreover, partnership with local law enforcement agencies creates incentives on the part of the host nation agency to increase and maintain that partnership – in other words, a local interest group likely to advocate U.S. interests domestically is created.

Second, the appropriation of indigenous law enforcement agencies for military objectives is both cost efficient (since they do not need the kind of logistical support that deployed military forces require), and less intrusive to the local community. The "force multiplier" effect of cooperation with and cooption of local law enforcement personnel may have the additional effect of reducing

113. *See, e.g.*, MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR (1991).

the "footprint" of U.S. forces necessary to accomplish a given military objective. This is not necessarily to say that the utilization of indigenous forces is intended to disguise the involvement of American personnel. As noted above, in some cases, the involvement of the U.S. military in a particular criminal case may be deleterious in the eyes of the local populace. In other cases, however, association with American forces may provide a degree of legitimacy. In these cases, the number of U.S. forces needed to provide assistance to local law enforcement are likely to be far less than that required to conduct operations unilaterally.

A. The Way Forward

If use of indigenous legal systems is to remain a viable option for the achievement of military objectives in the future, several practical considerations should be addressed. Currently, the Foreign Assistance Act only permits police training to countries which have emerged from periods of conflict.[114] While that is a broad category that may be liberally applied, the focus on post-conflict development may preclude the military from providing police training to countries in the midst of combating counter-democratic insurgencies. This creates a gap in military capabilities. Assuming proper Executive and Congressional authorization, the military may have the authority to assist local military forces in fighting insurgent forces during the active combat phase of an insurgency. Likewise, the Foreign Assistance Act permits the training of police once the conflict has come to a conclusion. However, as noted above, the distinction between these two phases of insurgencies is not always clear. By precluding the training of police forces during combat operations, the Foreign Assistance Act may lock the military into a strategy of cooperating with the indigenous military, rather than the approach of working by, with, and through the indigenous police forces during the nebulous period between open insurgent warfare and post-conflict reconstruction.

Furthermore, while Presidential and Congressional authorization may permit U.S. military forces to engage in the

114. 22 U.S.C. § 2420. The Foreign Assistance Act does include a provision allowing the President to expend funds and provide military assistance in emergency situations. *See* 22 U.S.C. § 2318 (2000). However, because this measure is by design reactive, it does not overcome criticisms of the Act discussed *infra*.

training of indigenous law enforcement personnel, such authorization is likely to be *ad hoc* and specific to the conflict in question. As a result, the military is unlikely to conduct advance training of specialized units dedicated to training and working with local police forces. In addition to the understanding of law enforcement techniques, the acquisition of cultural knowledge and linguistic skills necessary for successful engagement with local officials is likely to take years to develop. Failure by the military to prepare in advance for contingencies in potential "hot spots" may result in costly delays in acquiring those skills once hostilities have begun. Also, failure to adequately prepare a needed skill is likely to resonate across to other areas of the military. For example, the lack of military personnel trained to work with indigenous law enforcement prevents U.S. intelligence personnel and ground force commanders from adapting to the challenges of working within the local criminal justice system.

Beyond the planning and training stages, several other considerations are necessary once hostilities have begun. First, it is essential that counterinsurgency forces integrate host nation actors into all steps of the targeting process. Indeed, this is prescribed by the Counterinsurgency Manual,[115] with the intent of building local capacity. However, it is not sufficient for counterinsurgency forces to work with host nation personnel heavily in some areas of the targeting process, while pursuing only nominal cooperation in others. In the short term, the result of such an incomplete incorporation may be frustration of the targeting process, where host nation forces with little interest in a particular target may exert little to no effort in advancing the criminal case when the targeted individual is turned over to the judicial system for prosecution. In the long term, failure to fully train host nation forces in specific aspects of the targeting will likely result in critical failure when the host nation begins to operate unilaterally.

Naturally, concerns over operational security may create a strong desire to keep certain aspects of targeting operations "off limits" to non-U.S. personnel, particularly in areas where incorporation of host nationals would expose the methods and means of U.S. intelligence gathering, such as local informants working with the United States. Still, while the method by which information is gained may be withheld, it is essential that acquired

115. DEPARTMENT OF THE ARMY, *supra* note 20, at 2-1.

intelligence is shared with host nation forces throughout the development of the target. Doing so may enable host nation personnel to help identify and fill key intelligence gaps, and give the host nation a stake in the target. Additionally, sharing intelligence with host nation forces may provide the informational "seed" from which the host nation may grow indigenous methods and means of information gathering, such as informant networks of their own that are essential to law enforcement investigations.

As alluded to above, host nation personnel are as likely to bring information to the counterinsurgency force as they are to take from it. Such local knowledge is especially important with regards to indigenous law. Effective navigation of a host nation's legal system requires a degree of esoteric knowledge that is difficult for foreign-trained attorneys to acquire. Regardless of the capabilities and professionalism of the Judge Advocates advising counterinsurgency commanders, language barriers and differing legal traditions will present challenging roadblocks to American-trained attorneys seeking to operate in a host nation legal system. At best, the delay required for Judge Advocates to become educated in a host country's law and procedure will come at the cost of effective implementation of the military commander's intent. At worst, a lack of understanding of the nuances of a host nation's law could completely frustrate specific counterinsurgency efforts. Thus, having independent host nation counsel – separate from judicial and law enforcement officials with whom the military engages – could present a significant boon by assisting the military commander either through private consultation, or through active representation.

Finally, incorporating host nation personnel puts a "local face" on the targeting process, thereby potentially mitigating the effects of anti-U.S. sentiment on the part of actors in the indigenous legal system. Such incorporation may also confer "legitimacy by association" in the eyes of the local populace, creating the kind of positive feedback loop from which both the military and domestic institutions benefit. Of course, collaboration with indigenous actors is perhaps just as likely to create a negative reputation as it is to bestow credit. For this reason, careful and continuous vetting of indigenous partners is essential,[116] as public perceptions of corruption, or political, ethnic, or religious bias may quickly taint

116. DEPARTMENT OF THE ARMY, *supra* note 20, at 6-33.

the counterinsurgency force through guilt by association.

Finally, while incorporation of host nation personnel may slow or impede operations, it must be remembered that in counterinsurgency operations the process is almost as important as the result. The sacrifice of unilateral efficiency is often more than worth the benefit of increasing host nation capacity. This is especially true in the greater realm of establishing the rule of law, where initial efforts by the host nation are likely to be slow, frustrating, and ineffective, and where failure can undermine gains in other areas. However, while seeking to maintain overall security improvements, it is preferable to permit host nation failure in individual criminal cases, than to unilaterally ensure justice in every instance. In the famous words of T. E. Lawrence, "Do not try to do too much with your own hands. Better [they] do it tolerably than that you do it perfectly. It is their war, and you are to help them, not to win it for them."[117]

117. DEPARTMENT OF THE ARMY, *supra* note 20, at 1-154.