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The Law at War: Counterinsurgency Operations and the Use of Indigenous Legal Institutions.

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Abstract
Success in counterinsurgency campaigns requires the military to train, equip, and ultimately turn over responsibility for public safety to indigenous legal institutions. Nonetheless, the pursuit of military objectives through participation in indigenous legal systems presents many challenges, as pragmatic concerns of operational security and the use of intelligence as legal evidence must be reconciled with cultural differences and the weakness of indigenous legal institutions. This article argues, however, that such participation may be required under international law. Further, participation may help to legitimize counterinsurgency goals in the eyes of the local populace, and bring additional resources to military efforts. In order to realize such benefits, this article argues that military commanders must make a commitment to the use of indigenous criminal justice through all stages of a counterinsurgency campaign – during pre-deployment planning, active combat, and post-conflict rebuilding efforts.

I. Introduction

In December, 2006, the Department of the Army released Field Manual 3-24, “Counterinsurgency,” the first doctrinal work on that 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. service members, and approximately 151,000 Iraqi civilians. The effort to create the new manual was led by then Lieutenant General David H. Petraeus, who would have the

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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.

Under General Petraeus’ leadership, the war in Iraq made a dramatic turn, with military casualties falling from a high of 764 in 2007, to 221 in 2008. Furthermore, Gen. 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%. 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. 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.” Such practices were straight out of the counterinsurgency manual, and to the extent that the security gains may be attributed to them, they validate the efficacy of the new U.S. counterinsurgency doctrine.

Against the backdrop of the security gains was the looming expiration on December 31, 2008 of U.N. Security Council resolution 1790, which provided the legal justification for the presence of American forces in Iraq. Without the authority provided by the resolution, it was questionable whether U.S. forces would be able to continue military operations, including detaining Iraqi citizens, and whether U.S. forces would be

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liable under Iraqi law for actions taken in the line of duty. In short, it appeared that the costly gains made over five years of fighting might evaporate on New Year’s Day 2009, if a lack of an international legal agreement resulted 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 Bilateral Security Agreement. Article 4 of the Agreement provides that all military operations “shall be conducted with full respect for the Iraqi Constitution and laws of Iraq,” and continues to state that “[i]t is the duty of the United States Forces to respect the laws, customs, and traditions of Iraq and applicable international law.” Article 22 of the Security Agreement 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.” 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.” Furthermore, the Security Agreement 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 24 hours from the time of their detention or arrest.”

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8 Security Agreement, Art. 4 Section 3. Available at: http://www.mcclatchyci.com/iraq/story/56116.html
9 Security Agreement, Art. 22, Section 1.
While the provisions of the Security Agreement 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 Agreement 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. Second, the Security Agreement appears to preclude the long-term detention of Iraqis by the United States, except where requested by Iraqi authorities. 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, and U.S. rules of engagement, and as such, requires a paradigm shift.

For many military officials, the new requirements may represent a regrettable yet necessary restraint on U.S. operations; regrettable in that it limits military commanders’ operational freedom, yet necessary if Iraq is to function as an independent, sovereign nation. In reality, however, the use of an indigenous criminal justice system may offer the American military novel and beneficial options for the achievement of U.S.

11 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 Section 2, and with “full respect for” – rather than in accordance with – Iraqi law, see Art. 4 Section 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 Section 2.

12 Security Agreement, Art. 22, Sections 1, 3.
objectives. Either way, mandated recourse to indigenous criminal prosecution venues presents unique challenges in the planning and execution of military operations.

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 general doctrine to be applied broadly for planning, training, and operating purposes for any current or future insurgency conflict. So too, this paper draws on examples from the Iraqi conflict, and assumes that the U.S. military will be the counterinsurgency force applying the principles herein proposed. At the same time, it is intended that the problems and recommendations made in this paper may be applied to any conflict in which a military force wishes to apply the concepts of counterinsurgency.

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. Such is a broad concept, however, and incorporates many diverse goals, such as enforcing property rights, ensuring civil courts are available

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13 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.
14 Indeed, the terms “counterinsurgency force” and “military” generally refer to U.S. forces, unless otherwise indicated.
for the resolution of private disputes, encouraging equality before the law, and enhancing judicial and police professionalism.

This paper will be narrower in scope, however, by focusing 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.”\textsuperscript{16} The second stage is ‘inpatient care – recovery’, where the goal is to “develop and build resident capability and capacity in the [host nation] government and security forces.”\textsuperscript{17} The final stage is ‘outpatient care – movement to self-sufficiency’, where counterinsurgency forces strive to transition responsibility for [counterinsurgency] operations to [host nation] leadership.”\textsuperscript{18}

While the targeting of specific individuals is likely to be more of a focus during the first stage, 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 stages of the counterinsurgency effort, the foreign counterinsurgency force will need to tailor their operations to facilitate the seamless transition of insurgent targeting from the military to the indigenous legal authorities. To this end, familiarity with and utilization of the substance and procedure of domestic criminal law is essential.

\textsuperscript{16} Id. at 5-2.
\textsuperscript{17} Id.
\textsuperscript{18} Id. at 5-2.
In practical application, criminal statutes and criminal procedure are likely to be the primary laws employed in targeting individuals, but theoretically domestic, international and transnational civil law could be used as well. However, there is a subtle distinction between the “law at war”, and the “law of war;” the latter having come to encompass a variety of legal regimes, ranging from Rules of Engagement, to the Law of Armed Conflict and Humanitarian Law. Nonetheless, it must be conceded that the laws of war inform and shape the law at war in a counterinsurgency, in that international agreements will set the general parameters of liability that will apply to counterinsurgency forces as they pursue their objectives through host national legal regimes.

Here it bears noting that, depending on the form and specific circumstances of a particular counterinsurgency effort, different international laws may apply.19 Insurgencies and 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, i.e. active participation by U.S. forces in quelling insurgencies in foreign countries, through long-term cooperation with host nation forces.20 Any such long-term counterinsurgency campaigns 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

19 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 INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION, 34 (1994); see also Hamdan v. Rumsfeld, 548 U.S. 557, 629-630 (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 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.

20 Id. at 1-134 – 1-36.
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 and Geneva Conventions 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\(^{21}\) – the United Nations defined the United States and United Kingdom as “occupying powers” in Iraq, and called upon the two powers to “contribute to conditions of stability and security in Iraq.”\(^{22}\)

Of course, the term “occupying power” has a specific definition in the Law of Armed Conflict, even if the definition is difficult to apply within the context of a counterinsurgency. The Fourth Hague Convention states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army.”\(^{23}\) Furthermore, “occupation extends only to the territory where such authority has been established and can be exercised.”\(^{24}\) At various points in 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. Additionally, these criteria of occupation were historically linked with the concept of *debellatio*, which declared that territories pried from the control of a fallen regime became the sovereign property of the occupying power.\(^{25}\) As Eyal Benvenisti notes however, the modern concept of occupation – as exemplified by U.N. Security Council Resolution 1483 – only

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\(^{21}\) The full text of President Bush’s speech may be found at http://www.washingtonpost.com/ac2/wp-dyn/A2627-2003May1


\(^{23}\) Annex to the Fourth Hague Convention, art. 42. Oct. 18 1907,

\(^{24}\) Fourth Hague Convention, art. 42.

contemplates a temporary term of authority by the foreign power over the occupied territories, with sovereignty remaining with the occupied population. 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. 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. Thus, following the transfer of sovereignty to Iraq, the United States and its allies would find themselves operating in a confusing legal environment: authorized to conduct operations by both the international community and the 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 either an international armed conflict governed by International Humanitarian Law such as the Third and Fourth Geneva

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28 Id. at 1.
Conventions (as well as Protocol I); alternatively, the conflict may be described as being non-international character where Protocol II and the Common Articles apply, or a peacekeeping operation under the United Nations Chapter VII authority. Such a determination would likely be determined by 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 (the “Safety Convention”) offers little clarification of the matter.\(^{29}\) That convention – addressing concerns about attacks on peacekeeping forces – applies to those 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.”\(^{30}\) The 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.


\(^{30}\) See Safety Convention, Art. 1(c).
whether military operations initiated unilaterally or multilaterally under the Article 51 right to individual and collective defense, 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), would meet the threshold requirement of “establishment” and U.N. control for application of the Convention.

Alternatively, however, the 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.”

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 structure sufficient to meet the requirements of Geneva Conventions, then the provisions of the Convention are inapplicable.

If, however, a conflict initially within the purview of the laws of international armed conflict may become subject to the terms of the Safety Convention, military commanders may gain an invaluable practical and political tool: attacks against the forces of the State party that has assumed peacekeeping functions become criminal, rather than the potentially permissible actions of lawful combatants. The practical advantages of

\[\text{31} \text{ U.N. Charter, art. 51.} \]
\[\text{32} \text{ See Security Council Resolution 1483, at 2.} \]
\[\text{33} \text{ Id. at Art. 2(2).} \]
\[\text{34} \text{ Safety Convention, art. 9.} \]
\[\text{35} \text{ While the Third Geneva Convention states that Prisoners of War may be prosecuted under the laws of the Detaining Power for acts committed prior to capture, see Convention Relative to the Treatment of Prisoners of War art. 85, Aug. 12, 1949, it is unlikely that most acts of warfare could be prosecuted, since the official commentaries of the International Committee of the Red Cross limits the categories of prior crimes to a)}\]
criminalization of insurgent acts shall be discussed \textit{infra}. From the strategic political level, however, invocation of the Security Convention could demark an important milepost in the evolution of 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 resides with the population, who has come to be represented by a new regime, and that regime may rightfully prosecute violations of public order.

Thus, a changing international legal backdrop affects the rights and responsibilities of both insurgent and counterinsurgent forces at any given point of the conflict. Certain actions will be permissible in one period, yet proscribed in the next, and a counterinsurgency military commander may be tempted to maximize the advantage of legal authorities permitted him in one period before they become unavailable as the circumstances of the campaign evolve. Yet the change from one applicable international regime to another takes place against the unchanging military goals of securing the civilian population and the transfer military and police operations to host nations. Additionally, while the applicable international regime may change, it is likely that the indigenous criminal law will not. 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

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\item crimes against peace, b) war crimes, and c) crimes against humanity, \textit{see} \textsc{International Committee of the Red Cross, Commentary on the Third Geneva Convention}, 419-422 (1994). \textit{See also} Geneva Convention relative to the Protection of Civilian Persons in Time of War, art. 68, Oct. 21, 1950 (“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”).
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effort. As will be shown below, the adaptation of military operations to criminal justice practices may be challenging enough, without the added complication of altering military operations to suit the 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.

IIa. 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 informational 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 what they term “persons of national interest” (PONI). 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.

Once intelligence analysts achieve a degree of confidence concerning the location of a wanted individual, the commander must conduct a second assessment, to “determine

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37 Steven Marks, Thomas Meer, and Matthew Nilson, “Manhunting: A Methodology for Finding Persons of National Interest”. Masters Thesis, Naval Postgraduate School, 2005 at 60. There are two additional steps in the process, namely assessing the abilities and limitations of the ‘hunter’, and consideration of alternative hypotheses. 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.
[the target’s] military importance, priority of attack, scale of effort, and lethal or nonlethal capabilities required to attain a specified effect.” 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.

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. Of course, through the entire process secrecy is essential, so as to protect the methods and means of intelligence gathering, provide the raiding forces the additional security of the element of surprise, and to prevent 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 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, where 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 the primary goal of counterinsurgency operations.\textsuperscript{40} 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.”\textsuperscript{41}

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.\textsuperscript{42}

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. Such in turn may create a “feedback loop” of legitimacy from the local legal

\textsuperscript{40} See Counterinsurgency Manual at 1-21.
\textsuperscript{41} See Counterinsurgency Manual at 1-22.
\textsuperscript{42} See e.g. Jeffrey Fagan, Introduction to the Symposium on Legitimacy and 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.
institutions to the foreign military, and vice versa. 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 being by extension a demonstration of respect for the indigenous society itself. Furthermore, where legal actions brought by the foreign military are successful, they 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 if the ‘credible’ military continues to work with the indigenous legal institutions, such may sustain or increase the legitimacy of those institutions.

The second benefit to the military commander in the use of host nation criminal law is that such expands strategic and tactical tools available to the battlespace 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 the individual be the commanders of the army, or individual soldier. 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 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; assuming that a combatant merits the protections of the Geneva Conventions, the restriction of liberty of a Prisoner of War

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.
ends with the cessation of hostilities. Thus, life sentences, or even detention longer than the period of military operations are prohibited. Such limits the leverage that 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 methods of leverage, such as plea bargaining.

A second method by which the use of indigenous law increases the options available to military commanders is that such acts as a “force multiplier” by essentially appropriating the services of indigenous law enforcement agencies. If military objectives are congruent with the law enforcement goals of local police, opportunities for cooperation and collaboration may exist. Such provides numerous benefits. First, cooperation between occupation forces and local nationals increases available manpower. Furthermore, 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 are 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, i.e. the U.S. military is engaged in direct action missions designed to

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44 See Third Geneva Convention, Art. 118.
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 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.”

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.” The Fourth Geneva Convention not only requires that occupying Parties respect the substance of the law of the occupied territory, but that indigenous legal procedure and institutions be respected as well, stating that “the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws.”

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

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46 Hague Convention IV of 1907, Art. 43.
47 Geneva Convention IV, Art. 64.
48 Geneva Convention IV, Art. 64.
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 Geneva Convention applies. Furthermore, as noted above, a successful counterinsurgency may be characterized by the curious problem that the international laws of armed conflict applicable at the beginning of the conflict may not be the same as those applicable in latter stages. For example, the earliest stages of the war in Iraq were characterized by the military of the United States fighting the 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, and 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 Iraqi regime not integrated into the new Interim Iraqi Government.

For the counterinsurgency commander, such a transition period between interstate and intrastate conflict presents a conundrum. Assuming, *arguendo*, that the Third

50 Although Security Council Resolution 1456 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 (Paragraph 4a), calling on Iraqis to implement elections peacefully (Paragraph 6), and condemning acts of terrorism while calling on member states to prevent the transit of terrorists in and out of Iraq (Paragraph 17). 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 (November 28, 2006)
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.\textsuperscript{51} As the U.S. military gains effective control of the country, however, its role as an occupying power requires it to enforce local laws.\textsuperscript{52} At that stage, actions directed toward the civilian population would be considered criminal, while certain actions directed the military might not. Finally, 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 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.

\textsuperscript{51} See note 35, supra.
\textsuperscript{52} See Fourth Geneva Convention, Art. 64
from future prosecution for the crimes begin early in the conflict, and continue into the later stages of the counterinsurgency effort.\footnote{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 \url{http://www.iraqslogger.com/index.php/post/5506/Full_Text_Iraqs_New_Amnesty_Law}.}

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 opponent before their opponents finds and destroys 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.

Furthermore, the laws of armed conflict and criminal justice differ in the standards of proof that each requires.\footnote{See Robert Chesney & Jack Goldsmith, Terrorism and the Convergence of Criminal and Military Detention Models, 60 STAN. L. REV. 1079, 1082 (2008).} 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,\footnote{See Annex to the Fourth Hague Convention, 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.”} and the 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. 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 that degree of force permitted under the Rules of Engagement to neutralize the threat. Additionally, in warfare, the emphasis is
on the collective; i.e. individual is not held personally responsible for actions of group. 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\textsuperscript{56} or kill the individual.

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 dress like a criminal and carry a weapon (assuming, \textit{inter alia}, that no specific weapons law 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.\textsuperscript{57}

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 \textit{mens rea} when the overt acts of the accused could be variously

\textsuperscript{56} Detaining powers may prosecute prisoners of war, but only for crimes they commit as individuals, not for their participation in the conflict as a lawful combatant. \textit{See} Third Geneva Convention, 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.” \textit{See} Fourth Geneva Convention, Art. 33.

\textsuperscript{57} \textit{See e.g.} Iraqi Constitution, Art. 19 §8, available at \url{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 \textit{individual} possess the intent to enter into an agreement to commit an offense with others. \textit{See e.g.} Iraqi Penal Code of 1969 Para. 33, 55, available at \url{http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf}. 

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interpreted as incriminating or innocuous, or facing judicial disapproval of invasive
surveillance and monitoring of private citizens. Routinely focusing on such crimes is
thus likely to lead to frustration on the part of the counterinsurgency force, and perhaps
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. Of course, there is nothing certain about warfare –
indeed, as Barbara Tuchman stated, “war is the unfolding of miscalculations.”\(^\text{58}\)

Nonetheless, the modern American military commander may generally rely on the
soldiers under his command to comply with his orders, and work toward the fulfillment
of the commander’s intent.\(^\text{59}\) 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 within their country,
and be sympathetic towards those who commit crimes specific aimed at harming the
foreign power.\(^\text{60}\)

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 justice system. Military commanders may find their attempts to affect the

\(^{58}\) Barbara Tuchman, The Guns of August, ______.
\(^{59}\) Indeed, failure to obey an order is itself a crime. See Uniform Code of Military Justice, 10 U.S.C. § 894.
\(^{60}\) The Geneva Conventions recognize that people will desire to resist an occupying power. Art. 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 Fourth
Geneva Convention, art. 68.
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, if the actors within the system are not 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. However, such highlights two of the classic dilemmas of counterinsurgency; first “[s]ometimes, the more you protect your force, the less secure you may be”, and second, “[t]he host nation doing something tolerably is normally better than us doing it well.”  

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. The current U.S. statutory regime – built primarily around the Foreign Assistance Act – generally prohibits foreign assistance funding for training law enforcement agencies, and either presidential or congressional authorization is usually

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61 Counterinsurgency Manual at 1-27.
62 See Counterinsurgency Manual at 6-16.
required to enable the military to provide training to foreign police departments.  

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 “foreign internal defense” would be understandable.

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,” it is essential military personnel possess the knowledge and skills necessary to cooperate and interact with their host national law enforcement partners, especially as a counterinsurgency moves from a focus on combat operations to law enforcement actions. In order to be effective as 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, such as witness questioning and basic crime scene investigation. While these skills are present in certain units within the military, 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.

IV(a). Evidentiary Problems

64 See Counterinsurgency Manual 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).

65 Counterinsurgency Manual at 6-16

66 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.
Procedurally, the convergence of military operations with criminal prosecution presents many problems, not least 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 informational edge over one’s opponents 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. 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 warfare. Yet such 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.

Introducing intelligence in a host nation criminal proceeding is thus likely to give military commanders a moment of pause, not simply because it causes methods and means to be revealed, but also because it would potentially provide third parties with a degree of control over the intelligence methods available to the commander. Consider, for example, 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.\(^67\) 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

\(^{67}\) Iraqi Constitution, Art. 40.
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 its classification level (within established guidelines), and any other user of the intelligence must submit a request to the originator in order to lower the classification level or declassify the report.68 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.

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.69 Of course, the rule of declassification by the originator is supported by

69 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.
sound policy rationale, in that it would be unwise to permit individuals and organizations
without subject matter expertise to determine whether 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
how to test 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, whereas intelligence operations seek and analyze information to, *inter alia*, assist
commanders and policy-makers in their decision making. ⁷⁰ In judicial proceedings, the
cast 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

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Anaconda), and each of the major units under the Multinational Divisions (for example, II Marine
Expeditionary Force under Multinational Force West).
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 specific 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 probably consequence.” 71 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. 72 In many legal
systems, however, circumstantial evidence is problematic, 73 if not expressly forbidden. 74

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 the

73 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
74 See e.g. Law of Criminal Proceedings, Para. 169.
careful and open documentation of who possessed the information at each stage from the originator to the final recipient. Indeed, revealing such information in open court may present security risks in itself, such as methods of collection, and the identity of sources, and military personnel.\footnote{Manget, \textit{supra} note 69, at 416.}

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.\footnote{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. \textit{See} Mirjan Damaska, \textit{Of Hearsay and its Analogues}, 76 \textit{Minn. L. Rev.} 425 (1992).} 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.\footnote{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, factfinders 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. \textit{Mirjan Damaska, Of Hearsay and its Analogues}, 76 \textit{Minn. L. Rev.} 425 428-430 (1992).} 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 court room, 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
An additional rationale for the exclusion of derivative evidence in common law systems is the manner in which evidence is introduced at trial; the two parties seek out and present evidence that is supportive of their respective arguments. Under this system, it is easy to imagine that witnesses may be biased to 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’s contradictions, inconsistencies, and physical reactions that reveal the testimony to be false. As Professor Damaska points out, however, the task of testing the truthfulness of a statement is far more difficult where the witness falsely can ascribe the statement to a declarant who is unavailable for cross-examination.\footnote{Id. at 431.}

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 the 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 distractionary, impractical, and politically ill-advised for the judge to examine the counterinsurgency force to inquire into its 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. For example, imagine that a military commander receives information that 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.”

IV(b). Use of Technology & 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. Such 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 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

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79 Law of Criminal Proceedings, Para. 213 (B).
reliance on experts. However, when such edifying information comes to a judge via foreign sources, cultural or nationalistic biases may come into play, 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 present, 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. This may be especially problematic in developing nations, where the average level of education may be comparatively low.

Such raises the more philosophic question of whether a conviction is fair if the public doesn’t understand the basis.

Third, the process of providing intelligence for admission as evidence in many cases would require that local police and courts possess the technological facilities to

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80 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 595-596. 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”.

81 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, the greater differences in education levels in developing countries may make the comprehension differences between judges and the public more pronounced.

82 For example, the school life expectancy in Iraq is 10 years, compared to fifteen in the United States. CIA World Factbook, available at https://www.cia.gov/library/publications/the-world-factbook/geos/iz.html. It is possible, however, that sources of technical knowledge other than formal education may inform the general populace understanding of scientific evidence, in particular representations of forensic evidence in popular media. 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. 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.
access the information. However, in many developing countries, local law enforcement agencies lack basic technology, such as computers and internet access. Indeed, the GAO 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.\(^83\) 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.

**IV(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, i.e. spying by human beings, is likewise ill-suited to for use in the court room. 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,\(^84\) 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.


\(^84\) See Law of Criminal Proceedings, Article 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.
Furthermore, the testimony of an individual who is secretly cooperating with a foreign power may be greeted with some skepticism by local courts. It takes little imagination to attribute selfish motivations (e.g. financial gain) to individuals assisting foreign powers in a manner that may also be viewed as being a betrayal of cultural, religious, or nationalist allegiances. 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 so doing. 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 criminal evidence, and the potential risks in providing such. 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 trade-off between intelligence and evidence is the question of whether information gained by military personnel should be used to secure a conviction, or instead be used to help find the next target. Often, these two goals are not in contention. However, when targeting a group of individuals, acting rapidly on information gained from one target may be the best way to find associated individuals. Taking the time to
properly investigate, document and record information on specific crimes for evidentiary purposes may create delays, giving the associates of the arrested suspect time to discover the detention, and possibly destroy other incriminating evidence, or flee the area. The temptation to move quickly to follow 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 in the counterinsurgency effort.

IV(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. In either case, the 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 to 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.

For example, the counterinsurgency force may passively affect the system through the cases it chooses to pursue, and those it elects to forgo; by bringing cases for
certain crimes, and not others, the military demonstrates 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. Furthermore, the military may actively affect the 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. Thus, the reverse of the positive legitimacy “feedback loop” may occur, undermining both the host nation and the credibility of the counterinsurgency force.

In order to avoid such a result, counterinsurgency commanders must choose carefully the cases and targets they choose to undertake. While the temptation to primarily pursue prosecution of those individuals who threaten the military force is understandable, it may create a rift between the counterinsurgency force and host nation; attacks against a foreign military are likely to be viewed as less of a priority to the local populace than crimes that are committed against their neighbors, friends, and family. Thus, military commanders with limited resources may do well to focus the balance of their efforts on prosecuting crimes of perceived importance to the local community, while prosecution of targets of solely military importance receives secondary emphasis. Ultimately, it is the perception of safety to the local populace that determines the success of a counterinsurgency effort, not the safety of the counterinsurgency force.\footnote{See Counterinsurgency Manual at 1-149.}

Just like an actor cannot help but to 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.\textsuperscript{86} 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. Such 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 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 when 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, then the focus must be on the final goal that the concession serves; respect for local culture is essential for success in counterinsurgencies, but it may all too easily be used solely as a justification for courses

\textsuperscript{86} See Counterinsurgency Manual at 5-44.
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 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. 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. 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 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 the 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-

87 See Art. 24, Sec. 1.
88 See CONGRESSIONAL RESEARCH SERVICE, COST OF MAJOR WARS, July 4, 2008. 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).
minded non-state actors to coordinate and collaborate across state lines and large geographic distances to achieve common goals.\textsuperscript{89} 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 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 vs. destructive weapons of the masses. State militaries are capable of drawing on large national budgets and an 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.\textsuperscript{90} Furthermore, any attempt to use conventional military forces against small, decentralized

\textsuperscript{89} See, Counterinsurgency Manual at 1-22.
\textsuperscript{90} See e.g. MARTIN VAN CREVELD, THE TRANSFORMATION OF WAR (The Free Press, 1991).
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, because the use of such requires the military to partner with elements of the local government, diplomatic resistance to military operations within a sovereign state may be reduced. As noted above, use of an indigenous legal system demonstrates respect for that institution, and may by extension demonstrate respect for the broader community and its values. Additionally, however, partnership with local law enforcement agencies creates incentives on the part of the host nation agencies 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 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 and lend the good offices of the U.S. government are likely to be far less than that required to conduct operations unilaterally.
VI(a). The Way Forward

If the use of indigenous legal systems is to remain a viable option for the achievement of military objectives, several practical considerations should be addressed. Currently, the Foreign Assistance Act only permits police training to countries which have emerged from periods of conflict. While such 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. Such 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 training of indigenous law enforcement personnel, such is likely to be ad hoc authorization, specific to the conflict in question. Because of this, the military is unlikely to conduct the advance training of specialized units and personnel

91 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. However, because this measure is by design reactive, it does not overcome criticisms of the Act discussed infra.
dedicated to training and working with local police forces. In addition to an understanding of law enforcement techniques, the acquisition of cultural knowledge and lingual 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. Additionally, failure to adequately prepare one needed skill set resonates across other areas of the military; for example, a lack of military personnel trained in working with indigenous law enforcement personnel likewise prevents the collaboration of those personnel with intelligence personnel and ground force commanders, in order to help them adapt their specialties to the challenges of working within a 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 targeting process. Indeed, this is prescribed by the Counterinsurgency Manual,92 with the intent being to build 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. The end result of such an incomplete incorporation may be frustration of the targeting processes in the short term, where host nation forces with little interest in a particular target 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 a critical point of failure when the host nation begins to operate unilaterally.

92 Counterinsurgency Manual at 2-1.
Naturally, concerns over operational security may create a strong desire to keep certain aspects of targeting operations ‘off limits’ from non-U.S. personnel, particularly where incorporation of host nationals would expose methods and means of intelligence gathering, such as the networks of local informants working with the United States. Nonetheless, while the method by which the information was gained may be withheld, it is essential that acquired intelligence be shared with host nation forces throughout the development of the target. Doing such 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 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, lingual 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 time it takes for Judge Advocates to become educated in a host country’s law and procedure will come at the cost of delayed effective implementation of the military commander’s intent. At worst, a lack of understanding of the nuisances 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 also may 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 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, as public perceptions of corruption, or political, ethnic, or religious basis may quickly taint 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 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

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93 Counterinsurgency Manual at 6-33.
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.”

94 Counterinsurgency Manual at 1-154.