DOCTRINALLY ACCOUNTING FOR HOST NATION SOVEREIGNTY DURING U.S. COUNTERINSURGENCY SECURITY OPERATIONS

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In the aftermath of the wars in Iraq and Afghanistan, the United States will emphasize non-military means and military-to-military cooperation to address instability and reduce the demand for significant U.S. force commitments to stability operations. U.S. forces will nevertheless be ready to conduct limited counterinsurgency and other stability operations if required, operating alongside coalition forces whenever possible.[1]

A [counterinsurgency] effort cannot achieve lasting success without the [host nation] government achieving legitimacy.[2]

I. Introduction

Some authors considering the United States' campaigns in Iraq and Afghanistan have argued U.S. forces were unprepared for high intensity counterinsurgency due to a lack of viable doctrine.[3] Aggressive capture

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[1] SEC'Y OF DEF. LEON PANETTA, SUSTAINING U.S. GLOBAL LEADERSHIP: PRIORITIES FOR 21ST CENTURY DEFENSE 6 (2012).

[2] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY para. 1-120 (Dec. 2006) [hereinafter FM 3-24].

[3] *See* Andrew F. Krepinevich Jr., *How to Win in Iraq*, FOREIGN AFF., Sept.-Oct. 2005, at 87 (calling for the development of a population-centric counterinsurgency strategy to turn

and detention practices manifested this unpreparedness, causing U.S. forces to alienate the very populations they sought to secure.[4] As a result, these tactical and operational practices undermined the broader strategic objective of building the supported governments' legitimacy in the eyes of the Iraqi and Afghan populations.[5]

In 2006, the U.S. Army's new Field Manual (FM) 3-24 introduced a counterinsurgency strategy to resolve this and the many other challenges forces faced.[6] Noting that U.S. forces had erroneously applied conventional, large-scale operational doctrine in Iraq, the manual called for a population-centric strategy requiring forces to both secure the population and foster the growth of an effective, legitimate government.[7]

Nevertheless, the manual applies legally permissive methods applicable during conventional operations, preventing security operations from themselves being a tool to build the government's legitimacy.[8] United States legal and policy obligations indicate that prolonged counterinsurgency campaigns will evolve into non-international armed conflicts in which U.S. forces support a sovereign host nation government.[9] During such conflicts, the law of armed conflict affirms the

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the tide of the war in Iraq); THOMAS E. RICKS, THE GAMBLE 15–17, 24–25 (2009) (noting the U.S. military's unpreparedness for counterinsurgency operations in 2003). *See also* THOMAS E. RICKS, FIASCO 109–11 (2006) (noting an inadequate post-conflict operational plan based on false assumptions); Brigadier General Mark Martins, Mea Culpa*: The Military's Proper Role in Strengthening the Rule of Law During Armed Conflict*, LAWFARE, Sept. 7, 2011, 11:03 AM, http://www.lawfareblog.com/2011/09/mea-culpa-the-militarys-proper-role-in-strengthening-the-rule-of-law-during-armed-conflict/ (calling post-conflict planning "superficial").

[4] *See, e.g.*, Alissa J. Rubin, *For Afghan-U.S. Accord, Night Raids Are a Sticking Point*, N.Y. TIMES, Dec. 3, 2011, at A14 (noting Afghan popular frustration with U.S. military raids of Afghan homes to detain suspected insurgents); JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 323 (2006) (noting Iraqi popular outrage following the Abu Ghraib abuse scandal).

[5] Rubin, *supra* note 4 (noting that night raids into Afghan private homes alienate citizens, offend cultural sensitivities, and lack sufficient military value); STROMSETH ET AL., *supra* note 4, at 6, 51 (noting Iraqi mistrust of U.S. forces given their "heavy-handedness," undermining U.S. credibility in improving the rule of law).

[6] FM 3-24, *supra* note 2, at foreword.

[7] *Id.* at ix.

[8] *See infra* Part IV.

[9] *See infra* Part II.B. This article assumes a long-term foreign deployment of conventional U.S. ground forces to assist a host nation in defeating an insurgency, distinguishing such counterinsurgency operations from stability or foreign internal defense operations entailing a more limited employment of U.S. forces. *See* FM 3-24, *supra* note 2, paras. 1-107, 1-134 (distinguishing counterinsurgency operations from stability operations by the

primacy of the host nation's domestic criminal laws to sanction insurgent conduct,[10] creating operational limitations the new FM did not account for.[11] Thus, as in Iraq, host nation criminal laws, evidentiary standards, and criminal justice institutional norms can operationally limit U.S. forces' ability to detain individuals.[12] Yet despite these obligations, the manual applies legally permissive conventional targeting, intelligence, and tactical methods.[13] Consequently, it does not identify how targeting, capture, and detention operations can further the greater strategic goal to build the government's popular support by fostering governmental accountability and capacity.[14]

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use of offensive and defensive kinetic operations). Additionally, this article assumes that counterinsurgencies arising from U.S. invasions will become non-international armed conflicts between a U.S.-supported government and a domestic insurgency. *See* David E. Graham, *Counterinsurgency, the War on Terror, and the Laws of War: A Response*, 95 VA. L. REV. IN BRIEF 79, 86 (2009) (considering Iraq and Afghanistan "atypical" counterinsurgencies for having arisen from U.S. invasions). This article does not address global insurgencies, but focuses on traditional insurgencies primarily operating from within one state and focused on affecting its government. For a description of the global insurgency theory, see, e.g., Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1776 (2009).

[10] *See infra* Part II.A.

[11] *See infra* Part IV. Operational limitations include "other restrictions" such as legal and policy obligations, and thus are broader than constraints (higher command requirements dictating an action) or restraints (prohibiting an action). *See* JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 69, 252–53, 293 (15 Nov. 2011) [hereinafter JP 1-02].

> [O]perational limitation: An action required or prohibited by higher authority, such as a constraint or a restraint, and other restrictions that limit the commander's freedom of action, such as diplomatic agreements, rules of engagement, political and economic conditions in affected countries, and host nation issues.

Id. at 252–53.

[12] *See infra* Part II.D.1.

[13] *See infra* Part IV.

[14] *See* U.N. DEP'T OF PEACEKEEPING OPERATIONS, POLICY ON JUSTICE COMPONENTS IN UNITED NATIONS PEACE OPERATIONS 6 (2009), *available at* http://www.unrol.org/doc.aspx?d=2920; Teri Weaver, *A Lack of Convictions: U.S., Iraqis Look to Address Catch-and-Release Justice System*, STARS & STRIPES, Oct. 17, 2010, at 1; Diana Cahn, *A Legal Purgatory: Bagram Detention Center Reviews Suspects' Cases but Finds Neither Guilt nor Innocence in a War Zone*, STARS & STRIPES, Feb. 22, 2011, at 1; *infra* Part III.

This doctrinal gap is particularly significant in light of a recent shift in U.S. national security strategy. The Department of Defense's January 2012 statement of U.S. defense priorities clearly indicates the United States will remain prepared to combat non-state threats, but will be less likely to undertake prolonged, resource-intensive counterinsurgency campaigns to effect regime change or promote democracy.[15] Consequently, future U.S. counterinsurgency campaigns may be more limited and multilateral, and thus may not feature the sweeping legal authorities that applied to security operations in Iraq and Afghanistan.[16] While the U.S. may require certain minimum detention authorities to safeguard U.S. security interests before assisting a host nation government,[17] this strategic shift makes the legally permissive FM 3-24 particularly ill-suited as a doctrinal template. And, as this article will argue, even if U.S. forces enjoy broad authorities, U.S. legal and policy obligations eventually will require conforming security operations to host nation criminal justice laws and procedures to achieve strategic campaign objectives—a paradigm doctrine does not currently identify.[18]

This article proposes revisions to FM 3-24 to close this doctrinal gap by accounting for the operational limitations of host nation criminal laws and procedures on the targeting, capture, and prosecution of insurgents. Through analysis of U.S. practices and historical experience, the article will derive practical recommendations for the forthcoming revised FM 3-24.[19] A proper revision will ensure the manual achieves its doctrinal

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[15] PANETTA, *supra* note 1, at 1, 6.

[16] *See, e.g.*, Robert Chesney, Address at The Judge Advocate Gen.'s Legal Ctr. & Sch.: Collision Course: The Second Post-9/11 Decade and the Evolving Law of the Conflict with al Qaeda (Feb. 27, 2012) [hereinafter Chesney Address] (proposing that the continuing conflict against al Qaeda and its affiliate organizations will present new legal challenges different from those the United States has encountered since 9/11 due to changes in both U.S. and al Qaeda strategy) (notes on file with author).

[17] *See infra* Part II.B.2; Robert Chesney, *The Daqduq Mess: Apportion Blame Widely*, LAWFARE (Dec. 20, 2011, 12:20 P.M.), http://www.lawfareblog.com/2011/12/the-daqduq-mess-apportion-blame-widely/ (noting the significance of the United States' failure to ensure the continued detention of alleged Hezbollah operative Ali Musa Daqduq).

[18] *See infra* Parts II.B.2, IV.

[19] *See* COMBINED ARMS CTR. & FORT LEAVENWORTH, U.S. ARMY, PROGRAM DIRECTIVE (PD) FOR FIELD MANUAL 3-24/MARINE CORPS WARFIGHTING PUB. 3-33.5, COUNTERINSURGENCY (Oct. 26, 2011) [hereinafter PROGRAM DIRECTIVE] (on file with author). This article omits discussion of broader rule of law and other matters possibly necessitating revision, focusing instead on targeting, capture, and detention operations. Additionally, it focuses on the legal basis to detain insurgents, rather than the legal obligations regarding their treatment, and does not propose more detailed tactics,

purpose by identifying a range of challenges future leaders may face, and ensure that observing host nation legal primacy is not an afterthought, but rather a central feature of future campaigns.[20]

Part II of this article argues that host nation domestic law assumes primacy during all prolonged counterinsurgency campaigns and identifies several operational effects of this primacy. Part III demonstrates how observing host nation law can further overall counterinsurgency campaign objectives. Part IV recommends specific changes to FM 3-24 to account for host nation legal primacy. Finally, Appendix A organizes Part IV's recommendations in comment matrix format for use in the U.S. Army's doctrine revision process.[21]

II. Host Nation Domestic Law Becomes the Primary Legal Basis to Detain Insurgents During Prolonged U.S. Counterinsurgency Campaigns

In 2011, U.S. forces participated in at least four counterinsurgency campaigns in Iraq, Afghanistan, Colombia, and the Philippines.[22] Although these campaigns differ greatly in scope and origin, U.S. forces have in each sought to comply with host nation domestic laws to enable the continued detention of insurgents. As this section will argue, whether an insurgency seeks to expel a foreign occupier or displace an established government,[23] the host nation's domestic laws will increasingly operationally limit U.S. security operations as the environment improves due to U.S. legal and policy obligations.

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techniques, or procedures suitable for an Army Techniques Publication. *See* COMBINED ARMS CTR., U.S. ARMY, DOCTRINE 2015 INFORMATION BRIEFING 7 (Oct. 27, 2011) [hereinafter DOCTRINE 2015], *available at* usacac.army.mil/cac2/adp/Repository /Doctrine%202015%20Briefing%2027%20Oct%202011.pdf.

[20] FM 3-24, *supra* note 2, at vii, para. D-4. *See also* MUNGO MELVIN, MANSTEIN: HITLER'S GREATEST GENERAL 153 (2011) (noting Field Marshal von Manstein's frustration with the lack of a suitable, modern doctrine to prepare German forces for their Eastern Front campaign during World War Two).

[21] *See infra* app. B (providing an explanation of the Combined Arms Center's comment matrix format).

[22] *See infra* Part II.B.3.

[23] FM 3-24, *supra* note 2, para. 1-2 ("[A]n insurgency is an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control."). *But see* IAN F. W. BECKETT, MODERN INSURGENCIES AND COUNTER-INSURGENCIES: GUERILLAS AND THEIR OPPONENTS SINCE 1750, at 2–4 (2001) (describing partisan insurgent activities during the American Revolutionary War incident to the broader conventional conflict).

Fortunately, as Part III argues, observing host nation criminal justice laws and procedures can both build popular support for the host nation government and promote post-conflict stability.[24]

A. Host Nation Domestic Law Provides the Primary Basis to Detain Insurgents During Non-International Armed Conflicts

The 20th century development of the law of armed conflict represents an international willingness to abrogate national sovereignty in exchange for certain benefits under specific circumstances.[25] Reflecting this balance, the Geneva Conventions classify persons, places, and conflicts to limit the circumstances in which the Conventions apply, thereby preserving state sovereignty.[26]

In contrast to international armed conflict, the Conventions' triggering criteria preserve states' sovereign authority to maintain law and order during their domestic, or non-international, armed conflicts.[27] Both Common Article 3 to the Geneva Conventions and Additional Protocol II, regulating the conduct of non-international armed conflicts, note that insurgents are not immune from domestic criminal prosecution for their acts of aggression.[28] Additionally, the occurrence of the triggers specified in Common Article 3 and Additional Protocol II does not invoke the entire Conventions, but only certain limited detainee treatment and due process guarantees.[29] Thus, while prisoners of war

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[24] *See infra* Part III.

[25] *See generally* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF WAR DESKBOOK 23–24 (2011) [hereinafter LOW DESKBOOK].

[26] *Id.* at 24. *See also, e.g.*, Geneva Convention [IV] Relative to the Protection of Civilian Persons in Time of War arts. 2–4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter GCIV] (limiting the Convention's applicability based on the type of conflict, type of person, and the person's location).

[27] LOW DESKBOOK, *supra* note 25, at 26–28.

[28] GCIV, *supra* note 26, art. 3; Protocol Additional to the Geneva Conventions of Aug. 12, 2949, and Relating to the Protection of Victims of Non-International Armed Conflicts arts. 1, 3, Jun. 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII] (limiting the criteria triggering the Protocol's application and reiterating the principle of non-intervention). *See also* Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042, 1059–62 (discussing contemporary interpretations of the Geneva Conventions' non-international armed conflict triggering criteria).

[29] GCIV, *supra* note 26, art. 4; Bergal, *supra* note 28, at 1051–52. *But see* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY,

generally enjoy immunity from criminal prosecution during international armed conflict, states retain their sovereign authority to punish insurgents according to their domestic criminal laws.[30]

B. Long-Term U.S. Counterinsurgency Campaigns Will Become Subject to Host Nation Domestic Law by Operation of Law and Policy

Whether U.S. forces enter a country by force or by invitation, U.S. legal and policy obligations indicate that host nation domestic law will operationally limit long-term U.S. counterinsurgency campaigns. Both U.S. and international law contemplate and permit the detention of combatants during armed conflict.[31] Nevertheless, as this section argues, international law and the specific authorities governing a given contingency may operationally limit the authority to detain insurgents. Additionally, since U.S. policy does not include the forceful annexation of foreign territory, U.S. forces can expect host nation law to shape the eventual conduct of all long-term U.S. counterinsurgency campaigns.[32]

1. Prolonged U.S. Counterinsurgency Campaigns Beginning as International Armed Conflicts Will Become Non-International Armed Conflicts

While international law contemplates non-permissive armed interventions in foreign states, it does not authorize the forceful

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RULE OF LAW HANDBOOK 79 (2011) [hereinafter ROL HANDBOOK] (noting that international human rights law may bind coalition partners and host nations, constraining their detention practices).

[30] *See* LOW DESKBOOK, *supra* note 25, at 88 n.58 (discussing generally that while "[the Third Geneva Convention] does not specifically mention combatant immunity," it is customary international law and "can be inferred from the cumulative effects of protections within [the Convention]").

[31] The U.S. Supreme Court considers "detention to prevent a combatant's return to the battlefield [to be] a fundamental incident of waging war." Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004). Additionally, the Geneva Conventions and their Additional Protocols "plainly contemplate the detention of individuals during armed conflict." Major Christopher M. Ford, *From Nadir to Zenith: The Power to Detain in War*, 207 MIL. L. REV. 203, 208 (2011).

[32] PRESIDENT BARACK OBAMA, NATIONAL SECURITY STRATEGY 12–13, 22, 40–41 (2010) [hereinafter NATIONAL SECURITY STRATEGY], *available at* www.whitehouse.gov/sites/default/files/rss_viewer/security_strategy.pdf; U.N. Charter art. 2, para. 4.

annexation of foreign territory.[33] As the central foundation of international order, the United Nations (UN) Charter preserves state sovereignty and the principle of non-intervention in a state's territory or domestic affairs.[34] Nevertheless, the Charter recognizes the inevitability of armed conflict between states. Consequently, it establishes a framework to limit such conflicts, requiring a state to act either in self-defense or pursuant to a Security Council authorization under Chapter VII authority.[35] Even in the event of a lawful non-permissive armed intervention, though, international law presumes a temporary state of conflict and calls for the restoration of the *status quo ante*.[36]

During such a conflict, foreign occupying forces enjoy only temporary authorities. Occupation presumes a temporary state of control by foreign forces—distinguished from the exercise of sovereignty—with the occupying power eventually relinquishing its authority to a new or restored host nation government.[37] The Geneva Conventions' authorities for occupying forces only remain in effect until the termination of occupation, the restoration of sovereignty, or for a limited period of time after the conclusion of hostilities.[38]

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[33] While U.S. forces might enter a foreign state to topple the existing government and occupy the country in its entirety, U.S legal and policy obligations indicate forces either will leave the territory as soon as possible, or remain only at the invitation of a restored host nation government. Since FM 3-24 contemplates long-term campaigns, this article assumes the latter in the case of campaigns beginning as international armed conflicts. *See* FM 3-24, *supra* note 2, at x ("COIN campaigns are often long and difficult. . . . However, by focusing on efforts to secure the safety and support of the local populace, and through a concerted effort to truly function as learning organizations, the Army and Marine Corps can defeat their insurgent enemies.").

[34] U.N. Charter art. 2, para. 7. *See also* LOW DESKBOOK, *supra* note 25, at 32–34 (elaborating on the UN Charter's general prohibition against the threat or use of force against other states).

[35] U.N. Charter art. 51. *But see* Sean D. Murphy, *Protean* Jus Ad Bellum, 27 BERKELEY J. INT'L L. 22, 23 (2009) (arguing that emerging threats, state practices, and international legal norms undermine the *jus ad bellum* structure of the UN Charter and may merit its revision).

[36] GCIV, *supra* note 26, arts. 47, 64. *See also* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, TITLE para. 358 (July 1956) ("Occupation Does Not Transfer Sovereignty"); ROL HANDBOOK, *supra* note 29, at 77 (noting that occupying powers must "preserve and adopt existing systems of government").

[37] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION, at xi (2004).

[38] GCIV, *supra* note 26, art. 6; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3, Jun. 8, 1977, 1125 U.N.T.S. 3.

Policy obligations indicate that U.S. forces would transfer sovereignty as soon as possible to a credible host nation authority, regardless of whether or not forces invaded to either topple a government or occupy an ungoverned failed state.[39] As a signatory of the UN Charter, U.S. national security policy does not advocate the forceful annexation of foreign territory.[40] Consequently, U.S. occupation authority would expire by either operation of law or policy. Operations in Iraq and Afghanistan confirm this, with the United States supporting the rapid establishment and transfer of sovereignty to interim governments.[41]

The resumption of sovereign powers by the host nation government and its application of host nation domestic law will displace U.S. occupation authority to detain insurgents. While there may be an ambiguous transition between U.S.-dictated security operations and host nation-directed law enforcement operations, host nation sovereignty and security responsibility implies the eventual complete primacy of its laws in the conduct of counterinsurgency operations. For example, while exercising occupation authorities, U.S. forces could establish courts to adjudicate offenses committed against U.S. forces, but otherwise must maintain existing local laws and institutions.[42] Upon the transfer of sovereignty from foreign occupying forces to the state's government, an ongoing counterinsurgency campaign within the state becomes a non-international armed conflict between the host nation and the insurgent forces.[43] Consequently, the legal regime described above applicable to non-international armed conflicts will eventually apply to an ongoing counterinsurgency within the state and bind U.S. forces.[44]

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[39] Some authors argue the Iraq and Afghanistan campaigns, invasions that resulted in insurgencies, are exceptions to a norm of providing assistance to a standing government. *See, e.g.*, Graham, *supra* note 9, at 86.

[40] OBAMA, *supra* note 32, at 12–13, 22, 40–41 (reiterating the United States' long-term commitment to multilateral international dispute resolution and the preservation of international order in accordance with international law, while maintaining the United States' prerogative to act unilaterally if necessary).

[41] STROMSETH ET AL., *supra* note 4, at 119–20, 128; GEORGE W. BUSH, DECISION POINTS 359–60 (2010).

[42] GCIV, *supra* note 26, art. 64.

[43] *See*, *e.g.*, LOW DESKBOOK, *supra* note 25, at 80–81 (describing how the 2001 U.S. invasion of Afghanistan constituted an international armed conflict, but arguably shifted to a non-international armed conflict after the assumption of sovereignty by President Hamid Karzai's Afghan government).

[44] *See supra* Part II.A; U.S. DEPT. OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (21 Feb. 2011) (requiring the observation of the law of armed conflict during all U.S. military operations, and the application of Common Article 3 of the Geneva Conventions during all conflicts, however classified).

Even when U.S. forces enjoy broad authority to detain insurgents during a continuing Chapter VII campaign following the resumption of host nation sovereignty,[45] strategic goals and U.S. policy obligations may require limiting the exercise of that authority. U.S. forces might enjoy a broad UN authorization to use force allowing for the detention of suspected insurgents.[46] Nevertheless, as the host nation develops capacity and asserts it sovereignty, it might attempt to constrain that authorization by limiting aspects of U.S. security operations. As the United States has found in Afghanistan, this could require an unpleasant decision whether to continue exercising UN-derived detention authority at the risk of alienating the very government this authority seeks to support.[47]

2. Absent Agreement Otherwise, U.S. Forces Must Observe Host Nation Laws When Invited to Assist a Host Nation Government in a Counterinsurgency Campaign

Even when U.S. forces commence a counterinsurgency campaign at the invitation of a host nation government, this section will argue that

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[45] *See, e.g.*, S.C. Res. 2011, U.N. Doc. S/RES/2011, pmbl., ¶ 2 (Oct. 12, 2011) (authorizing the International Security Assistance Force (ISAF) and its participating Member States "to take all necessary measures to fulfill its mandate," while recognizing that the sovereign Afghan government has "responsibility for providing security law and order").

[46] *See, e.g.*, *id.*; S.C. Res. 1386, U.N. Doc. S/RES/1386, ¶ 3 (Dec. 20, 2001) (first authorizing "the Member States participating in [ISAF] to take all necessary measures to fulfill its mandate"). Authors have argued this "all necessary measures" language provides detention authority to ISAF members. *See* Ford, *supra* note 31, at 209 (citing Olga Marie Anderson & Katherine A. Krul, *Seven Detainee Operations Issues to Consider Prior to Your Deployment*, ARMY LAW., May 2009, at 7, 9–10 ("ISAF's detention authority appears to stem from the language in [Resolution 1386] that directs ISAF to 'take all necessary measures to fulfill its mandate.'")).

[47] *See* Rubin, *supra* note 4 (describing Afghan governmental calls to limit U.S. operations as part of a forthcoming security partnership agreement between the United States and Afghanistan). Nevertheless, U.S. forces also could find themselves arguing that a conflict is an international armed conflict, limiting the ability of both U.S. and host nation forces to criminally adjudicate insurgent offenses, while the host nation considers it a non-international armed conflict. *See* MAJOR GENERAL GEORGE S. PRUGH, LAW AT WAR: VIETNAM 63 (1975) (noting the South Vietnamese government's initial disagreement with the United States whether the 1964–1973 Vietnam war constituted an international armed conflict, complicating combined detention operations). Additionally, U.S. forces may be further constrained by U.S. domestic legal obligations despite having broader UN authority. CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES para. 6 (13 Jun. 2005) [hereinafter JCSI 3121.01B] (requiring that commanders' rules of engagement comply with applicable domestic law).

international law generally requires the application of the host nation's domestic laws during security operations. Additionally, even if the U.S. obtains broader, independent security authorities, host nation sovereign interests and the impracticality of operating indefinite detention facilities indicate the United States would find it necessary to transfer all detention-related responsibility to the host nation government and its criminal justice system prior to the conclusion of conflict.[48]

Operations by invitation theoretically enable the host nation government to tailor U.S. forces' authorities. Chapter VI of the UN Charter provides for international armed assistance during a state's internal conflicts, but only with the state's consent.[49] Alternatively, a state could invite U.S. forces to assist in counterinsurgency operations outside of UN mechanisms.[50] In either case, the host nation would have the ability to tailor U.S. forces' authorities prior to their introduction. For example, the lack of a functioning government might effectively enable U.S. forces to operate with broad authorities in Somalia.[51] In contrast, were Mexico to request large-scale U.S. conventional forces to aid in defeating the drug cartels, Mexico would have to amend or repeal its own laws preventing foreign military operations on Mexican soil, possibly requiring limitations seen in ongoing counterinsurgency operations in Colombia and the Philippines.[52] Thus, lacking occupation

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[48] *See, e.g.*, Alissa Rubin, *U.S. Backs Trial for Four Detainees in Afghanistan*, N.Y. TIMES, Jul. 18, 2010, at A6.

> Although military officials believe that the United States can legally continue to detain Afghans under the law of war, they have come to see long-term detention as creating problems, including increased resentment from the local population that the Americans are trying to win over. The goal by next summer is to have more Afghan trials than American military administrative hearings . . . .

Id.

[49] U.N. Charter arts. 33–36 (providing for Security Council recommendations to resolve disputes between states when those states request the Council's assistance).

[50] *See infra* Part II.D.2 (describing the Philippine government's request for U.S. counterinsurgency assistance).

[51] *See generally* David C. Ellis & James Sisco, *Implementing COIN Doctrine in the Absence of a Legitimate State*, SMALL WARS J. (Oct. 13, 2010), *available at* http://smallwarsjournal.com/jrnl/art/implementing-coin-doctrine-in-the-absence-of-a-legitimate-state.

[52] *See* Ginger Thompson, *U.S. Widens Role in Battle Against Mexican Drug Cartels*, N.Y. TIMES, Aug. 7, 2011, at A1 (describing an increased U.S. intelligence, planning, and training role in Mexico's conflict with the drug cartels, excluding the use of conventional U.S. forces due to Mexican legal prohibitions); *infra* Part II.D.2 (describing legal

or other Geneva Convention authorities applicable during international armed conflict,[53] U.S. forces would have to be prepared to observe Mexican limitations.[54]

Given its experience at the ultimate conclusion of the Iraq conflict in 2011, the United States may be unwilling to accept a host nation's terms of assistance that excessively constrain U.S. operational authorities. As a result of the failure to reach agreement with the Iraqi government regarding the continued presence of U.S. forces in Iraq, the United States withdrew its forces from Iraq at the end of 2011 and closed its last remaining detention facility for insurgents captured in Iraq.[55] The United States then had no legal alternative but to transfer Hezbollah operative Ali Musa Daqduq to Iraqi authorities despite his threat to U.S. national security, with no assurance Iraqi authorities would continue to detain him.[56] This bitter experience is unlikely to prevent the United States from assisting allies combating insurgencies, but it may lead the United States to demand detention authority sufficient to safeguard its security interests as a condition of significant support.[57]

Particularly where an insurgent group might pose a transnational threat to U.S. interests, the United States might demand specific authority beyond the host nation's domestic law to detain certain insurgents. The emergence of insurgency and terrorist movements posing

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limitations to ongoing U.S. counterinsurgency operations in Colombia and the Philippines).

[53] The introduction of foreign forces might be sufficient to consider the conflict a non-international armed conflict and thus trigger the application of Common Article 3. Bergal, *supra* note 28, at 1063, 1065 (discussing the International Criminal Court's interpretation that a state's use of regular armed forces to combat a domestic threat to law and order is a potential factual trigger for a Common Article 3 non-international armed conflict).

[54] *See, e.g.*, Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq arts. 22, 24, U.S.-Iraq., Nov. 17, 2008, *available at* www.usf-iraq.com/images/CGs_Messages/security_ agreement.pdf [hereinafter Security Agreement] (requiring U.S. forces to conduct operations in accordance with Iraqi law).

[55] Mark Lander, *U.S. Troops to Leave Iraq by Year's End, Obama Says*, N.Y. TIMES, Oct. 21, 2011, at A1.

[56] Charlie Savage, *U.S. Transfers Its Last Prisoner in Iraq to Iraqi Custody*, N.Y. TIMES, Dec. 16, 2011, at A11. *See also infra* Part II.D.1 (describing the United States' eventual need to request Daqduq's extradition from the Iraqi government).

[57] *See* Chesney, *supra* note 17 (noting the significance of the United States' failure to ensure the continued detention of alleged Hezbollah operative Ali Musa Daqduq).

transnational threats has led the United States to intervene across the globe not only to assist allies in fighting these movements, but also to safeguard the United States' domestic and foreign interests.[58] Thus, it is conceivable the United States might accept a Yemeni request for additional, conventional U.S. military assistance to help it defeat al Qaeda in the Arabian Peninsula (AQAP) insurgents.[59] Nevertheless, to safeguard U.S. interests, the U.S. government might demand specific authority to detain and possibly even remove from Yemen certain AQAP individuals who threaten U.S. interests. In such a situation, the United States might seek a dual-track detention arrangement akin to that in Afghanistan, where the United States exercises authority under both a UN Security Council Resolution and a U.S. legislative authorization to use force to combat al Qaeda.[60]

Even if the United States were to insist on broad detention authority as a condition of assistance, policy and practice indicate an eventual necessity to seek host nation criminal prosecutions for most detained insurgents. Several problems may arise should the United States continue to exercise broad authorities not derived from host nation criminal law. First, at some point the United States would have to determine what to do with any remaining detainees it holds under its independent authority:

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[58] *See, e.g.*, *infra* Part II.D (describing U.S. support to the Philippines to combat al Qaeda-linked Islamic insurgencies that might threaten U.S. interests beyond the Philippines, and increases in U.S. counterinsurgency support to Colombia after Colombian insurgent groups began posing a transnational threat); Sitaraman, *supra* note 9 (proposing a global insurgency theory). *See also* Chesney Address, *supra* note 16 (noting that while some insurgent groups trace their origins to al Qaeda and other transnational terrorist influences, others, such as Somalia's al Shabaab, have developed relationships with al Qaeda and its affiliate organizations to further their nationalist objectives, only then drawing the attention of the U.S. intelligence community).

[59] *See* Eric Schmitt, *U.S. Teaming with New Yemen Government on Strategy to Combat Al Qaeda*, N.Y. TIMES, Feb. 27, 2012, at A6 (describing limited U.S. special operations and Central Intelligence Agency operations to assist Yemeni counterinsurgency efforts and "work together to kill or capture about two dozen of Al Qaeda's most dangerous operatives, who are focused on attacking America and its interests"); Chesney Address, *supra* note 16 (arguing that while before 2001, few would have considered Yemeni insurgent groups to be linked to a global ideology and pose a global threat, the United States has come to better understand the groups' relationships with terrorist organizations and ideology, and the threat they pose beyond Yemen's borders).

[60] *See infra* Part II.D.3; Jeh Charles Johnson, Address at Yale L. Sch.: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012), *available at* http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school/ (stating that the Obama Administration considers the 2001 legislative authorization to use force against al Qaeda to continue to apply to al Qaeda affiliate organizations) (citing Authorization for Use of Military Force, Pub. L. No.107-40, 115 Stat. 224 (2001)).

whether exercising UN-granted or host nation-granted detention authorities, military authority to detain persons indefinitely without charge during armed conflict derives from limited particular sources and expires at the conclusion of the conflict.[61] At this point, U.S. forces might lack any other legal, feasible alternative other than transferring the vast majority of detainees to the host nation, as occurred with Daqduq, particularly given international criticism of the use of the Guantanamo Bay detention facility and the domestic political challenges of bringing detainees to the United States for criminal prosecution.[62] Second, continuing to exercise broad, aggressive authorities despite the existence of a functioning host nation government could alienate both indigenous and international support for that government, as the Soviets discovered in Afghanistan in the 1980s, and Sri Lanka discovered during its campaign against the Tamil Tigers insurgency.[63]

C. Host Nation Domestic Laws May Limit U.S. Forces' Ability to Use Force and Detain Individuals

The likelihood that a prolonged U.S. counterinsurgency campaign would evolve into a non-international armed conflict requires U.S. forces to be prepared for host nation laws to operationally limit U.S. operations. As shown above, to the degree the host nation exercises its sovereignty by requiring the application of host nation law, U.S. forces generally

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[61] *See generally* Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT'L L. 549 (2011); Ford, *supra* note 31.

[62] *See* Chesney, *supra* note 61, at 549; Chesney Address, *supra* note 16 (arguing that legal, political, and international relations challenges continue to hinder the U.S. Government's ability and willingness to remove detained insurgents and terrorists from the state in which they are captured and transfer them to the United States for criminal prosecution in U.S. Federal Courts or Military Commissions); Chesney, *supra* note 17.

[63] *See generally* Larry Goodson & Thomas H. Johnson, *Parallels with the Past—How the Soviets Lost in Afghanistan, How the Americans are Losing* (Apr. 2011), *available at* http://www.fpri.org/enotes/201104.goodson_johnson.afghanistan.pdf (arguing that an overly aggressive Soviet strategy alienated the Afghan people from the Soviet-supported government); Jon Lee Anderson, *Death of the Tiger: Sri Lanka's Brutal Victory over Its Tamil Insurgents*, NEW YORKER (Jan. 17, 2011), at 41 (arguing that Sri Lanka's aggressive tactics against the Tamil Tigers drew international criticism and isolated Sri Lanka, hindering Sri Lanka's efforts to obtain international assistance during the conflict).

must observe that law unless acting unilaterally.[64] This would therefore require U.S. forces to observe the host nation's penal and procedural codes, all of which may affect the United States' authority to capture and detain a particular insurgent.[65] A gradual transition, such as in Iraq and Afghanistan, may be the exception; constant host nation legal primacy, as in Colombia and the Philippines, may in fact be the norm for future U.S. counterinsurgency operations.[66] Consequently, U.S. forces must be prepared to operate wholly within the laws and structures of indigenous criminal justice institutions.

This section identifies three major categories of effects host nation laws can have on operations. First, targeting processes must account for host nation criminal procedural and evidentiary requirements. Second, forces must share intelligence with host nation authorities to obtain judicial detention authorizations. Finally, tactical procedures must facilitate the collection of evidence while capturing insurgents.

1. Criminal Evidentiary Requirements Affect Targeting Processes

During conventional Chapter VII campaigns, forces often enjoy broad authorities to target and detain enemy forces.[67] Commanders make decisions within the confines of the applicable rules of engagement and operations orders, which incorporate U.S. legal authorities to use force and detain individuals.[68] A commander's decision to detain an insurgent thus generally is based on the commander's knowledge and the effective detention authorities, not whether a foreign government approves of the particular detention.[69]

In contrast, host nation legal primacy may require U.S. forces to obtain host nation authorization to arrest or continue to detain suspected

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[64] *See supra* Part II.B.2. *But see* JCSI 3121.01B, *supra* note 47 (maintaining the prerogative of U.S. forces to act in self defense).
[65] *See infra* Part II.D.1 (discussing the effects of the Iraqi criminal procedure code on U.S. operations following implementation of the Security Agreement in Iraq).
[66] Graham, *supra* note 9, at 86.
[67] Ford, *supra* note 31, at 208.
[68] *See generally* JCSI 3121.01B, *supra* note 47, at 2.
[69] *See, e.g.*, S.C. Res. 2011, *supra* note 45, ¶ 2 (authorizing the International Security Assistance Force in Afghanistan "to take all necessary measures to fulfill its mandate," without requiring Afghan approval for those measures despite the existence of a sovereign Afghan government).

insurgents.[70] As described above, during non-international armed conflict, the host nation regulates law and order within its borders.[71] This may require forces to obtain host nation judicial authorizations to detain suspects,[72] effectively making this task a step in the targeting process and requiring units to consider the sufficiency of evidence against a suspected insurgent relative to criminal justice system requirements prior to commencing a capture operation.[73] Additionally, sufficient intelligence to warrant detention might not equate to sufficient evidence to support a lawful prolonged detention or criminal conviction. Factors not otherwise included in intelligence analyses thus assume increasing importance, including sufficiency of evidence, credibility of evidence, type of evidence, and the ability to share evidence with host nation authorities.[74] Finally, regardless of the care U.S. forces take in gathering evidence, forces must respect judicial acquittals, possibly requiring renewed efforts to target the same insurgents.[75]

2. Host Nation Criminal Prosecutions Require Sharing Intelligence with Host Nation Authorities

Since host nation criminal courts generally provide the primary venue to adjudicate insurgent offenses and authorize their continued detention, U.S. forces must be prepared to provide information to criminal justice authorities to support judicial proceedings.[76] Unfortunately, U.S. policy strictly limits the sharing of information with

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[70] *See* Steve D. Berlin, *Conviction Focused Targeting*, SMALL WARS J. (Aug. 24, 2010), http://smallwarsjournal.com/jrnl/art/conviction-focused-targeting (citing the Security Agreement and describing it required forces to work with and through the Iraqi criminal justice system). *See also supra* Part II.B.3; FM 3-24, *supra* note 2, para. D-15.

[71] *See supra* Part II.B.

[72] *See, e.g. infra* Part II.D.1 (discussing the Security Agreement).

[73] *See, e.g.*, Berlin, *supra* note 70 (describing how U.S. commanders in Iraq began requiring Iraqi warrants before detaining suspected insurgents).

[74] *See infra* Part IV.B.

[75] *See* LIEUTENANT COLONEL KEN TOVO, FROM THE ASHES OF THE PHOENIX: LESSONS FOR CONTEMPORARY COUNTERINSURGENCY OPERATIONS 14 (2005) (noting that American forces repeatedly targeted the same Vietcong insurgents due to low Vietnamese criminal court conviction rates); Savage, *supra* note 56 ("Many previous [U.S.-captured] detainees transferred to the Iraqi police have either been acquitted or released without charges.").

[76] *See* BECKETT, *supra* note 23, at 107 (considering intelligence coordination amongst counterinsurgent forces and authorities one of the six most critical aspects of a successful campaign).

foreign governments,[77] possibly complicating efforts to prosecute a U.S.-captured insurgent in host nation courts. Additionally, U.S. forces tend to over-classify factual information necessary to effect prosecution.[78] For example, information such as forensic blast analyses, recorded telephone conversations, and aerial video footage might not be eligible for disclosure to host nation judicial authorities due to U.S. foreign disclosure regulations, or it may be difficult to transfer because it is stored and transmitted on secure information systems.[79]

3. Criminal Prosecutions Require Tactical Evidence Gathering

The need to provide evidence to host nation judicial authorities can drive tactical actions while capturing an insurgent since information and materiel located with the insurgent might be critical to prove the insurgent's guilt in a subsequent prosecution. Host nation legal primacy may imply the need to convince a host nation judicial authority that a given insurgent merits arrest and prosecution under the host nation's criminal laws.[80] Even if U.S. forces can provide intelligence information, such as video imagery showing the insurgent emplacing an explosive device, host nation judicial authorities may nevertheless demand physical evidence and testimony more directly associated with the insurgent, such as items found at his or her home or the statements of witnesses to his or her actions.[81] These concerns may not be paramount during conventional capture operations,[82] but U.S. forces must prevent undermining an effective counterinsurgency capture operation by failing to provide evidence to a judicial authority.

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[77] U.S. DEPT. OF DEF., DIR. 5230.11, DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (16 June 1992) [hereinafter DoDD 5230.11].

[78] Berlin, *supra* note 70. *See also* Old Blue, *COIN Primer: Unity of Effort*, AFGHAN QUEST (Feb. 15, 2011, 1:15 PM), http://afghanquest.com/?p=527 (noting that U.S. forces' reliance on secure information systems effectively prevents the sharing of unclassified factual information with Afghan forces).

[79] *See, e.g.*, DoDD 5230.11, *supra* note 77; Old Blue, *supra* note 78.

[80] *See infra* Part II.A.

[81] *See infra* Part II.D.1 (describing U.S. challenges in satisfying Iraqi investigative judges by providing sufficient evidence to obtain warrants and detention orders).

[82] *See generally* CTR. FOR ARMY LESSONS LEARNED, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., DETAINEE OPERATIONS AT THE POINT OF CAPTURE (2006) (describing conventional U.S. doctrine, tactics, techniques, and procedures incident to capturing enemy combatants during combat operations).

D. Recent U.S. Counterinsurgency Campaigns Illustrate Varying Degrees of Host Nation Legal Primacy

A survey of recent prolonged U.S. counterinsurgency campaigns illustrates the operational limitations of host nation legal primacy in a variety of contexts. While forces in Afghanistan enjoy broad UN authority to detain insurgents, the Philippines and Colombia have explicitly limited U.S. operations in those countries. Additionally, well before the Iraq conflict concluded, the Security Agreement between Iraq and the United States required the observation of Iraqi law.[83] Regardless of the degree host nation laws have operationally limited U.S. security operations, host nation sovereignty has been, at a minimum, a major planning factor for U.S. forces during these campaigns.

1. Operation Iraqi Freedom Required the Observation of Iraqi Law by 2009

The U.S. campaign in Iraq from 2003 to 2011 provides an example of a gradual transition toward host nation legal primacy. U.S. forces entered Iraq with broad authorities to detain persons, subsequently transferred select detainees to Iraqi courts for criminal prosecution, and eventually required Iraqi authorization to detain persons.

The United States began the campaign with broad authorities to secure the environment. Upon entering Iraq in 2003, U.S. forces derived their authority to detain persons from a Congressional authorization for the use of military force which implied the authority to detain individuals.[84] Following the 2004 transfer of sovereignty to the Iraqi government, U.S. forces detained individuals pursuant to a UN Security Council Resolution granting the multi-national force "the authority to take all necessary measures to contribute to the maintenance of security

[83] Security Agreement, *supra* note 54.

[84] *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002) (authorizing "necessary and appropriate" U.S. military force "defend the national security of the United States against the continuing threat posed by Iraq"). While this authorization does not explicitly authorize detentions, the U.S. Supreme Court has found the similar 2001 Authorization for Use of Military Force to imply such authority in its "necessary and appropriate" clause. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (citing Authorization for Use of Military Force, Pub. L. No.107-40, 115 Stat. 224 (2001), and concluding that the authority to detain individuals during armed conflict is such a "fundamental and accepted incident to war" to be "necessary and appropriate" to combat the threat al Qaeda posed to the United States).

and stability in Iraq."[85] Nevertheless, U.S. forces provided a measure of due process and transferred selected detainees to Iraqi courts for prosecution.[86]

By 2007, U.S. forces realized the necessity to gather evidence not only to satisfy U.S. detainee review board procedures, but also to support Iraqi criminal prosecutions.[87] Units began collecting witness statements and completing site sketches at the point of capture, and carefully reviewing detainee files for completeness prior to forwarding the detainee to higher headquarters for continued detention.[88]

Beginning on January 1, 2009, the Security Agreement displaced these authorities, and Iraqi criminal law became the primary legal basis to detain insurgents.[89] Article 22 of the Agreement required U.S. forces to conform arrest and detention practices to Iraqi penal and criminal procedure laws.[90]

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[85] Matthew Greig, *Detention Operations in a Counterinsurgency: Pitfalls and the Inevitable Transition*, ARMY LAW., Dec. 2009, at 25, 26–28 (citing S.C. Res. 1546, ¶ 10, U.N . DOC. S/RES/1546 (Jun. 8, 2004)).

[86] While Iraq was a sovereign government by June 8, 2004, the Coalition continued to utilize UN-derived authority to detain insurgents. Coalition forces established a combined U.S.-Iraqi review and forwarding process pursuant to their authority under Resolution 1546, providing detainees some due process while determining whether to release them, detain them as a security internee, or forward their cases to the Central Criminal Court of Iraq for criminal prosecution in accordance with Iraqi law. For various reasons, Coalition and Iraqi authorities indefinitely detained "the vast majority" as security internees, rather than forwarding their cases to the Central Criminal Court of Iraq. Greig, *supra* note 85, at 26, 28 (citing Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, ARMY LAW., July 2007, at 76).

[87] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., FORGED IN THE FIRE: LESSONS LEARNED FROM MILITARY OPERATIONS 1994–2008 41 (2008) [hereinafter FORGED IN THE FIRE].

[88] *See id*. at 41–42, 49.

[89] Greig, *supra* note 85, at 28. The Security Agreement reflected both the United States' need to have clear authorities and protections for its forces stationed in Iraq following the expiration of Resolution 1546, and Iraq's increasing political maturity and assertion of its sovereignty. *See generally* Campbell Robertson & Stephen Farrell, *Pact, Approved in Iraq, Sets Time for U.S. Pullout*, N.Y. TIMES, Nov. 17, 2008, at A1; PETER BERGEN, THE LONGEST WAR 293 (2011).

[90] Greig, *supra* note 85, at 28 (citing Law on Criminal Proceedings with Amendments, No. 23, Feb. 14, 1971 (Iraq), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf)).

The Security Agreement required U.S. forces to immediately change targeting, capture, and interrogation procedures to obtain judicial approval for each arrest and detention.[91] In addition to gathering evidence on already-detained insurgents, U.S. forces modified intelligence gathering protocols to yield evidence for Iraqi criminal proceedings.[92] Commanders trained Soldiers in basic crime scene preservation techniques to ensure the collection and safeguarding of information and items for future Iraqi judicial proceedings.[93] Additionally, to prevent the release of existing detainees for want of judicial authorization, U.S. forces often presented local Iraqi police and community leaders with lists and photographs of detainees to try to transfer them to local authorities for prosecution.[94] Finally, U.S. forces found they faced a new operational risk of alienating local populations when arresting persons without Iraqi judicial authorization.[95]

Some units in Iraq recommended that target execution criteria include an assessment of whether the available intelligence would provide sufficient evidence to support Iraqi criminal prosecution.[96] As units found, securing an arrest warrant was not sufficient to ensure an insurgent's continued detention.[97] Consequently, it became necessary to perfect evidence against a detained insurgent to obtain judicial

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[91] CTR. FOR ARMY LESSONS LEARNED, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., *Forensics and Warrant-Based Targeting*, NEWSLETTER, Mar. 2010, at i.

[92] Greig, *supra* note 85, at 31, 32. This evidence could include "witness statements, photographs, fingerprints, ballistics, DNA, and other evidence." *Id*. at 31.

[93] *Id.* at n.47 (describing military police-led investigative training courses for other Soldiers such as infantrymen, who lacked specialized evidence gathering training).

[94] Alissa Rubin, *A Puzzle Over Prisoners As Iraqis Take Control*, N.Y. TIMES, Oct. 24, 2008, A1. The United States and Iraq agreed to gradually reduce the U.S. detainee population. Greig, *supra* note 85, at 29; Press Release, Multinational Force Iraq, Coalition Begins Releasing Detainees Under new Security Agreement (Feb. 3, 2009) [hereinafter Press Release, Multinational Force Iraq], *available at* http://www.defense.gov/news newsarticle.aspx?id=52930.

[95] *See, e.g.*, *U.S. Forces Apologize for Killing Iraqi Citizen By Mistake*, AK NEWS, Nov. 24, 2010 (on file with author) (reporting a public U.S. apology and possible compensation to the family of an Iraqi citizen killed during a raid to arrest the man's brother, and the interest of Iraq's Prime Minister in the matter).

[96] *See* FORGED IN THE FIRE, *supra* note 87, at 36, 43 ("The ideal situation would have been to obtain enough evidence for a complete prosecution packet prior to detention.") (internal citations omitted).

[97] Greig, *supra* note 85, at 31 ("Securing high numbers of arrest warrants may appear to be an easy win, and the numbers will look good to headquarters; however, high warrant numbers can reflect artificial success and can ultimately undermine long-term rule of law gains.").

authorization to continue to detain the suspect and promote their eventual Iraqi prosecution.[98]

Classification requirements also stymied efforts to transfer insurgents to Iraqi authorities and secure their eventual prosecution. U.S. forces tended to classify information not requiring classification, complicating the sharing of information with Iraqi authorities.[99] Iraqi investigative judges often would not accept the unclassified, written statements of U.S. personnel as evidence during a detention order hearing.[100] Since units often could not disclose the classified information used to identify the insurgent, detention might depend on the detainee's willingness to confess before the investigative judge.[101] Consequently, units developed methods to conform to local judges' evidentiary and procedural expectations to the maximum extent possible.[102] Nevertheless, cumbersome foreign disclosure processes required time and manpower, and still were subject to theater classification criteria.[103]

As previously discussed, the conclusion of the Iraq conflict saw the United States struggling to best safeguard U.S. interests and reach agreement with an assertive, sovereign Iraqi government.[104] After having no legal alternative but to transfer Hezbollah operative Ali Musa Daqduq to Iraqi authorities in December 2011, the United States eventually requested that Iraqi authorities return him to U.S. custody to face trial by

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[98] *See* CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR & SCH., TIP OF THE SPEAR: AFTER ACTION REPORTS FROM AUGUST 2009–AUGUST 2010, at 36 (2010) [hereinafter TIP OF THE SPEAR] ("[P]ractically, the [Brigade Combat Team (BCT)] needed to remove targets from the battlefield quickly, resulting in timely warrants with follow-through by the BCT Prosecution Task Force to complete the prosecution packet with the [Investigative Judge].") (internal citations omitted); JD, *Warrant Based Targeting: The Iraq Model*, AL SAHWA (Apr. 3, 2010, 10:29), http://al-sahwa.blogspot.com/2010/04/warrant-based-targeting-iraq-model.html ("[T]he warrant based targeting model forced us to slow down our targeting cycle. . . . The prior targeting model was simple, [sic.] once you have enough [intelligence] you launch your assault force. I think we are now more deliberate and wait to develop a more holistic network picture, with solid warrant packets.").

[99] TIP OF THE SPEAR, *supra* note 98, at 63 (arguing that the over-classification of factual information prevented the prosecution of detained insurgents in Iraqi courts).

[100] *Id.* at 36–37.

[101] *See id.* at 37 (noting a situation in which a U.S. military unit could not provide classified information to an Iraqi investigative judge and the judge refused to accept U.S. Soldiers' sworn statements into evidence, but the detainee confessed before the judge).

[102] *See id.* at 39 (describing one unit's best practice to obtain an Iraqi arrest warrant).

[103] Berlin, *supra* note 70, at 3.

[104] *See supra* Part II.B.2.

U.S. military commission and better ensure he cannot threaten U.S. interests again in the future.[105] The United States' ultimate lack of control over Daqduq's detention demonstrates the degree of authority it lost between 2003 and 2011 over the detention of insurgents, and also implies the United States might be less willing in the future to entertain an Iraq-like security agreement that relinquishes control of such matters.[106]

2. Operations in Colombia and the Philippines Have Required the Continuous Observation of Host Nation Law

Ongoing U.S. counterinsurgency campaigns in Colombia and the Philippines have required the constant observation of the host nation's domestic laws during security operations. While U.S. forces in the Philippines enjoy certain U.S. domestic counterterrorism authorities related to the September 11, 2001, attacks, both the Colombian and Philippine governments have restricted U.S. forces from detaining insurgents.

The United States' security assistance to Colombia has featured both counter-narcotic and counterinsurgent components. Since the 1960s, the Revolutionary Armed Forces of Colombia (FARC) and other insurgent groups fighting the Colombian government generally did not support or participate in Colombia's drug trade.[107] In 1999, the United States' "Plan Colombia" significantly expanded ongoing U.S. counter-narcotic support, committing $1.3 billion in military and developmental assistance, and providing as many as 800 U.S. military and civilian personnel to advise and assist the Colombian armed forces and perform coca eradication missions.[108] While Plan Colombia's purpose was

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[105] Charlie Savage, *Prisoner in Iraq Tied to Hezbollah Faces U.S. Military Charges*, N.Y. TIMES, Feb. 24, 2012, at A12.

[106] *See id.* (noting that the Security Agreement gave Iraq the authority to determine whether and how to detain and prosecute insurgents, and that the United States did not wish to "violate Iraqi sovereignty" by unilaterally removing Daqduq from Iraq over the objection of Iraqi Prime Minister Nuri Kamal al-Maliki).

[107] *See generally See* MAJOR JON-PAUL N. MADDALONI, AN ANALYSIS OF THE FARC IN COLOMBIA: BREAKING THE FRAME OF FM 3-24, at 9–24 (2009) (describing the history of the FARC).

[108] *See* DOUG STOKES, AMERICA'S OTHER WAR: TERRORIZING COLOMBIA 84–85 (2005) (noting that the recipients of the $1.3 billion also included Bolivia, Peru, and Ecuador); BECKETT, *supra* note 23, at 209 ("In 1999, therefore, the United States began training the Colombian army once more to meet the twin challenge of the remaining insurgents and the drugs cartels . . . .").

primarily counter-narcotic, the United States has since assumed a counterinsurgency mission because of the FARC's increasing involvement in the drug trade, its use of terrorist tactics, and the drug trade's role in global terrorism financing.[109] For example, a 2003 appropriation funded the training and equipping of Colombian forces protecting a FARC-targeted oil pipeline.[110] Additionally, the United States has supported Colombian criminal justice system reforms to facilitate the prosecution of captured cartel and insurgent leaders.[111]

Military assistance to Colombia has not included active combat operations, has focused on counter-narcotic efforts, and has required compliance with Colombian limitations, criminal laws, and extradition treaties. The United States' primary focus in Colombia has remained combating drug production and trafficking, with advisors training and equipping the Colombian armed forces and sharing intelligence to support arrests and drug seizures.[112] The United States has largely relied

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[109] While the U.S. Congress initially limited assistance to prevent U.S. involvement in Colombia's counterinsurgency, by 2002 the United States considered the FARC a terrorist threat and more openly supported Colombia's counterinsurgency efforts. *See* THOMAS MARKS, COLOMBIAN ARMY ADAPTATION TO FARC INSURGENCY 3–4, 8 (2002) (on file with author); *Colombia: Counter-Insurgency vs. Counter-Narcotics: Hearing Before the S. Caucus on Int'l Narcotics Control*, 106th Cong. 1–2 (1999) (statement of Sen. Richard Grassley, Chairman, S. Caucus on Int'l Narcotics Control) [hereinafter Caucus] ("It would appear that the present tendency in U.S. policy would have us more deeply involved in Colombia's insurgency."); Marc Grossman, Under Sec'y of State for Political Affairs, Remarks before the Georgetown Univ. Joining Efforts for Colombia Conference (June 24, 2002), *available at* http://web.archive.org/web/20050411014930/http://bogota.usembassy.gov/wwwsmg13.shtml#English ("The FARC is a narco-terrorist organization. . . . We put [the FARC] on the [Foreign Terrorist Organizations] list last September 10 . . . . These criminal organizations must understand that the international community will not tolerate their violations of human rights and terrorist acts."); Jo Becker, *U.S. Sues Business It Says Helped Hezbollah*, N.Y. TIMES, Dec. 15, 2011, at A8 (reporting on Hezbollah's laundering of Colombian drug trade profits for use in its activities throughout the Middle East).

[110] Grossman, *supra* note 109.

[111] David T. Johnson, Assistant Sec'y, Bureau of Int'l Narcotics & Law Enforcement Affairs, Statement Before the Senate Judiciary Subcommittee on Human Rights and the Law, May 18, 2010, *available at http://www.state.gov/p/inl/rls/rm/141952.htm*.

[112] Hon. Brian E. Sheridan, Department of Defense Coordinator for Drug Enforcement Policy and Support, Statement for the Record, Caucus, *supra* note 109, at 23–27 (describing U.S. involvement in Colombia as including advising, assisting, and equipping the Colombian armed forces, as well as providing counter-narcotics surveillance and intelligence assistance); Rand Beers, Assistant Sec'y, Bureau of Int'l Narcotics & Law Enforcement, Answer to Question for the Record, Caucus, *supra* note 109, at 115 (describing U.S. assistance to Colombia as "intended for counternarcotics activity only. . . . To the extent that the [insurgents] are involved in the narcotics industry, or that

on private contractors, rather than on members of the armed forces.[113] Additionally, Colombia limited the geographic scope of U.S. operations to prevent U.S. domestic political concerns from interfering with Colombian operations.[114] Finally, Colombia did not grant U.S. forces the authority to detain insurgents, requiring reliance on Colombian forces and extradition treaties to secure custody of wanted insurgents.[115]

Operation Enduring Freedom-Philippines (OEF-P) has also featured U.S. forces advising, assisting, and equipping the Armed Forces of the Philippines (AFP) in counterinsurgency operations.[116] For over four decades, Philippine forces have combated communist and Muslim insurgencies and criminal groups.[117] The United States' interest in these internal conflicts elevated after the August 2001 kidnapping of a U.S. citizen by the al-Qaeda-linked Abu Sayyaf Group.[118] Following the September 11, 2001, attacks, Philippine President Gloria Arroyo invoked the 1951 Mutual Defense Treaty between the U.S. and the Philippines,[119]

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they attempt to hinder counternarcotics operations, U.S. assistance may be used appropriately to oppose them."); STOKES, *supra* note 108, at 101.

[113] STOKES, *supra* note 108, at 99.

[114] MARKS, *supra* note 109, at 25–26 (citing the Colombian armed forces' efforts to compartmentalize U.S. involvement in the counterinsurgency and counternarcotics conflicts to prevent U.S. domestic political concerns such as human rights conditions from interfering with Colombian decision-making primacy).

[115] U.S. DEP'T OF STATE, THIRD REPORT ON INTERNATIONAL EXTRADITION SUBMITTED TO CONGRESS PURSUANT TO SECTION 3203 OF THE EMERGENCY SUPPLEMENTAL ACT, 2000, AS ENACTED IN PUBLIC LAW 106-246 (2002), *available at* http://www.state.gov/s/l/16164.htm; MARKS, *supra* note 109, at 32–33.

[116] Colonel David S. Maxwell, *Operation Enduring Freedom-Philippines: What Would Sun Tzu Say?*, MIL. REV., May–June 2004, at 20–21. *See also* Gary Thomas, *US Maintains Quiet Counterterrorism Effort in Philippines*, VOICE OF AMER., Jul. 28, 2001, http://www.voanews.com/english/news/asia/US-Maintains-Quiet-Counterterrorism-Effort-in-Philippines-126348218.html; Colonel Gregory Wilson, *Anatomy of a Successful COIN Operation: OEF-Philippines and the Indirect Approach*, MIL. REV., Nov.–Dec. 2006, at 6 (describing OEF-P lines of operation, including developing the AFP, civil-military operations such as humanitarian missions, and information operations).

[117] Joe Penney, *Clinton, Counter-Insurgency and Hegemony: 60 Years Ago, the Philippines Signed a Defence Treaty with the US, and Has Been Backing US Wars Ever Since*, AL JAZEERA, Nov. 15, 2011, http://www.aljazeera.com/indepth/opinion/2011/11/201111173127469575.html; Thomas D. Long, *The "Quiet" Side of Counter Terrorism Operations: Combating Islamic Extremism in Southeast Asia*, GLOBAL SECURITY STUD., Winter 2011, at 18, *available at* http://www.globalsecutiystudies.com/vol2isslwinter2011.htm (noting the objective of both Abu Sayyaf Group and the Moro Islamic Liberation Front to create Islamic states within the Philippines).

[118] Maxwell, *supra* note 116, at 20; *Abu Sayyaf an Enduring Threat in Philippines*; MANILA BULL. (Phil.), Apr. 13, 2010, http://www.mb.com.ph/node/252543/abu-.

[119] Mutual Defense Treaty, U.S.-Phil., Aug. 30, 1951, 3 U.S.T. 3947.

requesting U.S. military assistance in AFP counterinsurgency operations, and eventually providing Philippine troops to the multinational coalition in Iraq.[120]

Security operations in the Philippines explicitly exclude active U.S. combat operations and have required the continuous observation of Philippine domestic criminal law. The 1951 Mutual Defense Treaty is the primary basis for U.S. OEF-P operations, arguably enabling President Arroyo to overcome Philippine constitutional prohibitions on foreign military operations within the Philippines.[121] Even if the 2001 U.S. Authorization for the Use of Military Force against al Qaeda were to apply to Abu Sayyaf militants and enable U.S. detentions,[122] the U.S. and Philippine governments have prohibited U.S. forces from conducting combat operations to avoid Philippine constitutional violations.[123] These restrictions have left U.S. forces in a supporting role, advising the AFP and providing intelligence, with AFP forces and civil authorities engaged in the detention of insurgents.[124]

3. U.S. Forces Are Increasingly Promoting Afghan Criminal Prosecutions for Detained Insurgents to Further Overall Campaign Objectives

In Afghanistan, U.S. forces have begun promoting the prosecution of captured insurgents not out of necessity, but to legitimize and build the Afghan governmental capacity and facilitate post-conflict transition

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[120] Penney, *supra* note 117.

[121] The 1987 Philippine constitution bars foreign military bases and foreign combat operations within the Philippines absent a treaty otherwise. *Id.*; Craig Whitlock, *Philippines May Allow Greater U.S. Military Presence in Reaction to China's Rise*, WASH. POST, Jan. 27, 2011, http://www.washingtonpost.com/world/national-security/philippines-may-allow-greater-us-presence-in-latest-reaction-to-chinas-rise/2012/01/24/glQAhFIyQQ_story.html?hpid=z2; SALIGANG BATAS NG PHILIPINAS [CONSTITUTION] Feb. 11, 1987, art. 18 (Phil.). *But see* Maxwell, *supra* note 116, at 22 (arguing that the U.S. government misinterpreted the Philippine Constitution, unduly limiting U.S. tactical-level assistance and combat operations).

[122] *See* Pub. L. 107-40, 115 Stat. 224, Sept. 18, 2004.

[123] Maxwell, *supra* note 116, at 21–22.

[124] *See Abu Sayyaf an Enduring Threat in Philippines*, *supra* note 118 ("US intelligence and weaponry have helped Filipino soldiers capture or kill many of the Abu Sayyaf's main leader [sic]."); *Around the Nation: Transfer of Detention*, MANILA BULL., Jan. 25, 2011, http://mb.com.ph/articles/300610/transfer-detention (describing AFP detentions of captured insurgents).

stability.[125] U.S. forces in Afghanistan exercise at least two specifically-applicable authorities to use force and detain individuals without charge: the 2001 Authorization for Use of Military Force against al Qaeda, and the UN Security Council resolutions applicable to the International Security Assistance Force.[126] Although the United States has established thorough detainee review board procedures and provided other measures of due process, U.S. capture and detention practices have drawn criticism from Afghan citizens and governmental officials.[127] Consequently, U.S. forces established Combined Joint Interagency Task Force 435 and the Rule of Law Field Support Mission to promote increased Afghan criminal prosecutions for insurgents, improve popular perceptions, manage detainee populations, and build Afghan governmental capacity.[128] Simultaneously, international forces are seeking ways to create formal relationships between informal justice mechanisms such as local *shuras* and *jirgas* and the state justice system.[129] Nevertheless, limited intelligence-sharing continues to hamper U.S. efforts to transfer detainees and ensure their eventual Afghan criminal prosecution.[130] Also,

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[125] *See* Brigadier General Mark Martins, *Building the Rule of Law in Practice*, LAWFARE (Nov. 23, 2010, 12:01 AM), http://www.lawfareblog.com/2010/11/building-the-rule-of-law-in-practice/ ("Although U.S. forces in Afghanistan ultimately retain the option of detaining insurgents under Congress's 2001 Authorization to Use Military Force–as informed by longstanding law of armed conflict principles and as acknowledged by the Afghan government in various bilateral diplomatic exchanges–it is desirable in COIN to transition from combat operations to law enforcement as soon as that becomes feasible. The cause of quelling an insurgency, which ultimately must be defeated on a political level, is eventually better served by a government enforcing a country's own laws than through combat detentions by foreign forces."); TIP OF THE SPEAR, *supra* note 98, at 81 (noting that while forces can transfer detainees to U.S. facilities, transfers to Afghan authorities for criminal prosecution should occur by default).

[126] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); S.C. Res. 1386, *supra* note 46, ¶ 3. *See also* Brigadier General Mark Martins, DOD News Briefing with Army Brig. Gen. Mark Martins via Teleconference from Afghanistan, Feb. 10, 2011, http://www.defense.gov/transcripts/transcript.aspx?.

[127] *See* Cahn, *supra* note 14, at 20.

[128] United States Central Command, COMBINED JOINT INTERAGENCY TASK FORCE-435, http://www.centcom.mil/jtf435; North Atlantic Treaty Org., NATO RULE OF LAW FIELD SUPPORT MISSION (NROLFSM), *available at* http://www.isaf.nato.int/facts-and-figures.html; Brigadier General Mark Martins, *NATO Stands Up Rule of Law Field Support Mission in Afghanistan*, LAWFARE (Jul. 6, 2011, 2:07 PM), http://www.lawfare blog.com/2011/07/nato-stands-up-rule-of-law-field-support-mission-in-afghanistan/; Rubin, *supra* note 48.

[129] Amin Tarzi, Address at The Judge Advocate Gen.'s Legal Ctr. & Sch.: The Historical Relationship Between State Formation and Judicial System Reform in Afghanistan (Oct. 24, 2011) [hereinafter Tarzi Address] (notes on file with author).

[130] *See* Cahn, *supra* note 14, at 20 ("For Afghan prosecutors, who receive vague case files from U.S. officials at Bagram, there is skepticism that the right people are landing behind

as in Iraq, U.S. forces in Afghanistan are more carefully collecting evidence incident to capture operations for use in Afghan criminal court proceedings.[131]

III. Utilizing Host Nation Criminal Justice Institutions During Security Operations Furthers Strategic Counterinsurgency Objectives

While securing the population is a primary concern during a counterinsurgency campaign, ultimately even security operations must contribute to securing the host nation government's legitimacy.[132] Both the government and the insurgency seek to convince the population that they are the sole legitimate authority.[133] The insurgency relies not only on force, but also on the strength of its cause,[134] while the government must counter and eliminate the insurgency's causes to maintain popular

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bars because the detentions are based more on confidential intelligence than on releasable evidence."); Old Blue, *supra* note 78.

[131] *See* FORGED IN THE FIRE, *supra* note 87, at 49 ("As in Iraq, the prospect of criminal prosecutions required decreased reliance upon intelligence in favor of increased reliance upon physical evidence. . . . In order to increase the potential for successful prosecutions, the [82nd Airborne Division Office of the Staff Judge Advocate] recommended the collection of evidence at the time of capture or soon thereafter. . . . [A] decision to transfer [a detainee] several months after capture often meant that the capturing unit could no longer provide useful information or was, in fact, no longer in theater.") (citation omitted).

[132] ROBERT THOMPSON, DEFEATING COMMUNIST INSURGENCY: EXPERIENCES FROM MALAYA AND VIETNAM 54 (1978) (arguing counterinsurgent forces must act transparently and in accordance with established law, but acknowledging that "[s]ecurity must come first."); FM 3-24, *supra* note 2, paras. 1-3 (identifying the host nation government's popular legitimacy as a central objective of counterinsurgency operations), 1-113 ("The primary objective of any COIN operation is to foster development of effective governance by a legitimate government."). *See also* Thomas H. Johnson & M. Chris Mason, *Refighting the Last War: Afghanistan and the Vietnam Template*, MIL. REV., Nov.–Dec. 2009, at 2, 4 (noting that experts consider a successful counterinsurgency to require a government viewed as legitimate by at least 85% of the population). *But see, e.g.*, Major Edward C. Linneweber, *To Target, or Not to Target: Why 'Tis Nobler to Thwart the Afghan Narcotics Trade with Nonlethal Means*, 207 MIL. L. REV. 155, 196–97 (2011) ("Kinetic targeting also risks appearing excessive and unjust, which could undermine the [Afghanistan] counterinsurgency effort."); STROMSETH ET AL., *supra* note 4, at 173 (arguing that the UN Kosovo Force detention operations, including widespread arrests and prolonged detentions without charge, "undercut its own rule of law message").

[133] DAVID GALULA, COUNTERINSURGENCY WARFARE 9 (1965); FM 3-24, *supra* note 2, at 1-1; PRUGH, *supra* note 47, at 38.

[134] GALULA, *supra* note 133, at 18–25; FM 3-24, *supra* note 2, paras. 1-48 to 1-51.

consent to its authority.[135] Particularly if insurgent causes derive from the government's exercise of its police power, the host nation's targeting, capture, detention, and prosecution of insurgents can visibly demonstrate the government's worthiness and competency to maintain law and order.[136] Securing the population being essential to success, doing so in accordance with the law can simultaneously demonstrate governmental accountability and capacity, and promote post-conflict societal stability.

This section describes several benefits of conducting security operations and punishing insurgents according to host nation criminal justice laws and procedures. While other authors provide a more exhaustive discussion,[137] this section focuses on those benefits most relevant to U.S. doctrine.

A. Host Nation Criminal Prosecutions Demonstrate the Government's Accountability and Capacity to Enforce the Law

Criminal justice prosecutions enable the host nation government to demonstrate its own accountability and its capacity to enforce that law, both critical components of attaining popular legitimacy. The prosecution of insurgents in host nation criminal courts, including those insurgents U.S. forces capture, enables the government to achieve these intermediate steps in support of overall campaign objectives.

Transparent laws and open courts enable the public to judge whether the government is competent, accountable, and just. One way a government demonstrates its responsibility and accountability is by

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[135] FM 3-24, *supra* note 2, para. 1-3.

[136] *See* FM 3-24, *supra* note 2, para. 1-51; THOMPSON, *supra* note 132, at 68 (arguing that government adherence to the law shows the people that it is just and undermines the "insurgent conspiracy"); Sitaraman, *supra* note 9, at 1814–15 (arguing that providing security often requires a tradeoff between the populace's civil rights and military exigency). It is noteworthy that the Taliban exploited a lack of law and order following the departure of Soviet forces from Afghanistan, garnering support by promising to end lawlessness and disarming warring groups. Kawun Kakar, *An Introduction to the Taliban*, INST. FOR AFG. STUD. (Fall 2000), http://www.institute-for-afghan-studies.org/AFGHAN%20CONFLICT/TALIBAN/intro_kakar.htm.

[137] *See, e.g.*, Robert Chesney & Tom Nachbar, *Tom Nachbar on "Law as a Means to Counterinsurgency: Practical Considerations," in* LAWFARE (Jan. 9, 2011, 10:27 PM), http://www.lawfareblog.com/2011/01/tom-nachbar-on-law-as-a-means-to-counterinsurgency-practical-considerations/.

acting in accordance with published law.[138] By providing due process through open trials, the government need not justify its every action and provides citizens a forum to refute allegations against themselves.[139]

Acting transparently and in accordance with published laws does not necessarily undermine counterinsurgent forces' exigent need to secure the population. A counterinsurgent government can modify penal and procedural codes during a crisis to provide harsher emergency powers, provided it does so in a transparent matter that demonstrates fairness.[140] During the Malayan emergency, the government published and uniformly applied emergency legislation and kept civil courts open for public business.[141] Consequently, "the government itself functioned in accordance with the law and could be held responsible in the courts for its actions . . . [thus] the population could be required to fulfill its own obligation to obey the laws."[142] Similarly, Iraq's government provided

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[138] THOMPSON, *supra* note 132, at 54 (contending that the government's acting in accordance with the law makes each government official accountable to the people). *See also* MADDALONI, *supra* note 107, at 35–37 (arguing that Colombian success in combating the FARC since 2003 has in part been due to its "act[ing] in accordance with the law").

[139] *See* THOMPSON, *supra* note 132, at 54 ("Trials in camera, martial law, and military tribunals can never be satisfactorily justified. They are in themselves a tacit admission that government has broken down."); Cahn, *supra* note 14, at 20 ("[H]uman rights groups, along with the Bagram detainees themselves, say their inability to adequately refute the [American] claims against them breeds bitter contempt against the Americans."). *See also* MADDALONI, *supra* note 107, at 44–45 (noting Colombia's improvements to insurgent criminal prosecution procedures have both established the government's authority and improved the rule of law); DAVID KILCULLEN, COUNTERINSURGENCY 148 (2010) (noting the example of the Fifth Century B.C. King Deiokes, who recognized the possibility of gaining popular confidence by mediating the people's disputes openly and consistently).

[140] *See also* GALULA, *supra* note 133, at 31, 76 (arguing that the government should modify penal laws to suit emergency circumstances and more effectively combat an insurgency); THOMPSON, *supra* note 132, at 53 (using the Malayan Emergency as an example of a government's enacting and utilizing emergency legislation in an appropriate manner); KILCULLEN, *supra* note 139, at 152 ("Even if [laws] are harsh and oppressive, if people know they can be safe by following a certain set of rules, they will flock to the side that provides the most consistent and predictable set of rules. . . . [W]hat people most want is security, through order and predictability . . . ."). *But see* GALULA, *supra* note 133, at 65 (arguing that a government can defeat a nascent insurgency by immediately arresting its leaders and "impeaching them in the courts," but risks lending support to the insurgent cause if acting without popularly-perceived lawful justification).

[141] THOMPSON, *supra* note 132, at 52–53.

[142] *Id*. at 53.

broad, published, detention authorities to security forces.[143] Finally, while exercising martial authorities during the 1899–1902 Philippine Insurrection, the U.S. Army allowed local courts to continue to operate and established U.S.-managed provost courts for certain offenses.[144] These examples indicate that incidental tactical and operational compromises necessary to lawfully adjudicate insurgent offenses can yield greater strategic gains.

Additionally, utilizing host nation criminal justice systems to prosecute insurgents demonstrates the government's capacity to maintain law and order independent of foreign assistance. The government must demonstrate it is the sole provider of justice, and that insurgent institutions do not and cannot replace governmental institutions.[145] Similarly, U.S. forces must prevent an indigenous reliance on foreign troops, which otherwise "may supplant the need for the indigenous justice system."[146] U.S. forces likely cannot place the entire burden of adjudicating insurgent offenses on an unprepared host nation government, possibly requiring a gradual or partial transition of responsibility.[147] For example, following the enactment of the Security Agreement, the United States gradually transferred many of its remaining

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[143] *See, e.g.*, Anti-Terrorism Law, No. 13, Nov. 7, 2005 (Iraq), *available at* www.vertic.org/media/National%20Legislation/Iraq/IQ_Anti-Terrorism_Law.pdf (specifying acts of terrorism distinct from provisions of existing Iraqi penal codes and classifying these acts as egregious crimes eligible for heightened sentences); Prime Minister's Directive Under the State of Emergency Number 83/S, Feb. 7, 2007 (Iraq) (on file with author) (authorizing the Iraqi Security Forces, including the military, to perform law enforcement functions to carry out the Anti-Terrorism Law).

[144] Headquarters, U.S. Army Dep't of the Pac., Gen. Order No. 8 (22 Aug. 1898); Headquarters, U.S. Army Dep't of the Pac., Daily Order: To the People of the Philippines (14 Aug. 1898).

[145] Greig, *supra* note 85, at 25 ("A necessary condition for success in any counterinsurgency effort is the establishment of state institutions as the sole provider of key government functions."). *See also* MADDALONI, *supra* note 107, at 11 (arguing that the FARC gained support in rural, centrally-ungoverned areas by establishing "public order commissions" to adjudicate offenses against "unpopular criminals").

[146] Greig, *supra* note 85, at 25. *See also* STROMSETH ET AL., *supra* note 4, at 136 (calling for intervening foreign forces to incorporate host nation actors in security decisions to promote post-conflict transition).

[147] *See* FORGED IN THE FIRE, *supra* note 87, at 37; Robert Chesney, *Plan Ahead for End of Afghan Detention Operations*, LAWFARE (Jan. 6, 2012, 9:53 AM), http://www.lawfareblog.com/2012/01/plan-ahead-for-the-end-of-afghan-detention--operations/ (arguing that unlike in Iraq, which had a relatively well-established criminal justice system, the United States may find it much more difficult to ensure the Afghan criminal prosecution of captured insurgents as U.S. operations wind down).

15,000 detainees to the Iraqi criminal justice system.[148] In Afghanistan, the United States has endeavored to transfer detained insurgents to Afghan authorities not out of legal obligation, as in Iraq, but to ensure Afghan authorities are prepared to assume total responsibility for maintaining law and order following the departure of U.S. forces.[149]

B. Indigenous Criminal Justice Legitimizes the State's Claimed Monopoly on the Use of Force and the Dispensation of Justice

Modern political theorists consider the defining feature of a state to be its maintenance of a monopoly on the use of force.[150] Maintaining a stable society under the rule of a government requires continuous obedience, and the government itself must continuously exercise its authority to maintain its place.[151] Nevertheless, the government must rely on popular legitimacy rather than on fear to ensure its long-term survival.[152]

At the same time, maintaining this monopoly also requires demonstrating restraint and accountability.[153] Criminal prosecutions demonstrate the government's limited authority and its responsibility to

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[148] Press Release, Multinational Force Iraq, *supra* note 94.

[149] *See supra* Part II.D.3.

[150] MAX WEBER, POLITICS AS A VOCATION (1919), *available at* www.sscnet.ucla.edu/polisci/ethos/Weber-vocation.pdf ("[W]e have to say that a state is a human community that [successfully] claims the *monopoly of the legitimate use of physical force* within a given territory." (emphasis in original)); AYN RAND, *America's Persecuted Minority: Big Business*, *in* CAPITALISM: THE UNKNOWN IDEAL 42 (1986) ("The difference between political power and any other kind of social 'power,' between a government and any private organization, is the fact that a *government holds a legal monopoly on the use of physical force*." (emphasis in original)); THOMAS HOBBES, LEVIATHAN (1651), *available at* http://www.orgegonstate.edu/instruct/phl302/texts/hobbes/leviathan-c.html.

[151] KILCULLEN, *supra* note 139, at 151 ("In other words, support *follows* strength, not vice versa." (emphasis in original)).

[152] *See* MADDALONI, *supra* note 107, at 32; Johnson & Mason, *supra* note 132, at 4–5 (arguing that popularly elected Afghan President Hamid Karzai lacks culturally significant dynastic and religious sources of authority, and comparing this to the South Vietnamese government's similar lack of cultural legitimacy during the Vietnam War); WEBER, *supra* note 150 ("Organized domination, which calls for continuous administration, requires that human conduct be conditioned to obedience towards those masters who claim to be the bearers of legitimate power.").

[153] Ayn Rand, *The Nature of Government*, *in* THE VIRTUE OF SELFISHNESS 109 (1964) ("[The government's] actions have to be rigidly defined, delimited and circumscribed. . . . [I]f a society is to be free, its government has to be controlled.").

the people.[154] As an expression of society's disapproval, criminal prosecution also de-romanticizes the insurgent,[155] demonstrating the moral rightness of hating criminals[156] while differentiating the government from the insurgency by the former's use of lawful means to punish its enemies.[157] A just, effective criminal justice system in a counterinsurgency can cement the people's trust in the government's claim to the sole authority to use of force, and prevent the insurgent group from garnering lasting support as an alternative.[158]

C. Host Nation Criminal Justice Prosecutions Promote Post-Conflict Stability

The long-term stability of the host nation may depend in part on whether the criminal justice system furthers a stable relationship between the government and people grounded in popular consent. In theory, foreign forces will leave the country or cease from actively participating in security operations.[159] After this transition, the host nation government's long-term survival may depend on whether the population views it as legitimate and accepts its authority by coercion or consent.[160]

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[154] *See* Richard Warner, *Adjudication and Legal Reasoning*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (Martin P. Golding & William A. Edmundson, eds., 2005) (arguing that judicial action is legitimate "when appropriately constrained decision makers reach decisions based on authoritative legal materials and selected moral principles"); THOMPSON, *supra* note 132, at 52, 54.

[155] THOMPSON, *supra* note 132, at 54. *But see* MADDALONI, *supra* note 107, at 11–12 (arguing that Colombia's 1978 National Security Statute, giving the military extensive authority to detain insurgents and adjudicate their offenses, led to widespread human rights abuses that created public sympathy for the FARC insurgency).

[156] JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND (1883), *reprinted in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 104 (2001).

[157] THOMPSON, *supra* note 132, at 54 ("If the government does not adhere to the law, then it loses respect and fails to fulfill its contractual obligation to the people as a government. . . . [T]here [becomes] so little difference between the [insurgent and the government] that the people have no reason to support the government.").

[158] THOMPSON, *supra* note 132, at 54; JOHN A. NAGL, LEARNING TO EAT SOUP WITH A KNIFE: COUNTERINSURGENCY LESSONS FROM MALAYA AND VIETNAM 25 (2005) (arguing that the state must be a protector of the population to defeat an insurgency).

[159] *See supra* Part II.B.

[160] FM 3-24, *supra* note 2, paras. 1-113, 1-115 (arguing that an illegitimate government preserves unresolved social contradictions that may undermine governmental authority), 1-119 (noting the relationship between "[t]he presence of the rule of law" and "widespread, enduring societal support").

Three indirect benefits of a functioning criminal justice system contribute to societal stability. First, criminal punishment maintains social equilibrium.[161] Second, criminal punishment both deters undesirable behavior and stimulates habitual law-abiding behavior, furthering a cultural commitment to the law.[162] Third, criminal punishment encourages respect for the law and government institutions.[163] Finally, the government's use of lawful means to combat the insurgency furthers the existence of participating opposition political parties, undermining the insurgent's claim as the sole avenue to oppose the government.[164]

Host nation prosecutions also reduce the risk of popular discontent directed toward legally non-responsible foreign forces, discontent which ultimately can fall upon the inviting host nation government. Placing responsibility on the host nation's shoulders removes the U.S. from the population's resolution of its disputes and provides an appearance of governmental responsibility to the population.[165] For example, U.S.

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[161] HERBERT MORRIS, ON GUILT AND INNOCENCE (1976), *reprinted in* KADISH & SCHULHOFER, *supra* note 156, at 109.

[162] Johannes Andenaes, *General Prevention–Illusion or Reality?*, 43 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 176 (1952), *reprinted in* KADISH & SCHULHOFER, *supra* note 156, at 109; STROMSETH ET AL., *supra* note 4, at 310 ("The rule of law is as much a culture as a set of institutions. . . . Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing."). *See also* Martin Krygier, *Approaching the Rule of Law*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION 30 (Whit Mason, ed., 2011).

[163] ROYAL COMMISSION ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE, MEMORANDUM SUBMITTED BY THE RT. HON. LORD JUSTICE DENNING 207 (Dec. 1, 1949) (U.K.), *reprinted in* KADISH & SCHULHOFER, *supra* note 156, at 104.

[164] THOMPSON, *supra* note 132, at 67 (using Malaya and Indonesia as examples of how a stable, functioning parliament provides outlets for political opposition separate from the insurgency). *But see* GALULA, *supra* note 133, at 65–66 (arguing that insurgencies may attempt to usurp legitimate political opposition groups); Jack Healy & Michael S. Schmidt, *Iraqi Moves to Embrace Militia Open New Fault Lines*, N.Y. TIMES, Jan. 6, 2012, at A1 (noting that leaders of the Iraqi militia Asaib Ahl al-Haq promised to foreswear violence and enter Iraq's political process in 2009, only returning to violence after U.S. forces agreed to release them).

[165] During the Second Chechen War, the Russian military sought to "Chechenize" the campaign to put a Chechen face on security operations, arming pro-Russian Chechen groups and withdrawing Russian troops to "reduce Russian casualties and enable hostilities to be depicted as a war between Chechen factions that Russia was helping to stabilize." Svante E. Cornell, *Russia's Gridlock in Chechnya: 'Normalization' or Deterioration?*, *in* INSTITUTE FOR PEACE RESEARCH AND SECURITY, OSCE YEARBOOK 2004 267–76 (Ursel Schlichting, ed., 2005), *available at* http://www.silkroadstudies.org/new/docs/publications/0407OSCE_Chechnya.htm. *But see* EIDGENÖSSICHE TECHNISCHE HOCHSCHULE ZÜRICH [SWISS FED. INST. TECH. ZURICH], ASSESSING RUSSIAN

Detainee Review and Release Boards do not necessarily legitimize U.S. detainee operations or lend credibility to the host nation government: they are not conducted in accordance with host nation laws to which the population is subject;[166] and their purpose is not to determine guilt or innocence under local law, but to determine whether the person continues to pose a threat.[167] They do not resolve the concerns of the populace to have a hearing to fairly determine their guilt or innocence.[168] In contrast, a court sitting by authority of the host nation's laws, and accountable to its people, is more likely to satisfy popular concerns and appear accountable.

IV. Field Manual 3-24 Requires Modification to Account for Host Nation Legal Primacy

While acknowledging the importance of host nation legal institutions, FM 3-24 presumes a legally permissive environment absent the operational limitations arising from host nation legal primacy. The manual repeatedly notes the importance of host nation domestic law and calls on forces to "transition security activities from combat operations to law enforcement as quickly as feasible" to further the host nation government's legitimacy.[169] Nevertheless, as this section will argue, the manual recommends methods applicable during a conventional, legally permissive environment, not accounting for the operational limitations of a law enforcement environment grounded in the host nation's criminal laws, procedures, and institutional norms; and not identifying how security operations can themselves promote the supported government's legitimacy and public trust.

This section recommends specific changes to FM 3-24 to close the gap between the manual's acknowledgment of host nation legal primacy

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CHECHENIZATION (2008) (Switz.) (arguing that, despite its objectives to draw down the Chechen conflict, Chechenization led to the arming of armed groups not subject to the rule of law and actually increased violence and instability in Chechnya following the departure of Russian forces).

[166] *See* Cahn, *supra* note 14.

[167] *Id.*

[168] *Id.*; FORGED IN THE FIRE, *supra* note 87, at 44–45 (arguing that the United States' overreliance on broad detention authority alienated Iraqi citizens who otherwise might have been sympathetic to coalition forces). *See also* TIP OF THE SPEAR, *supra* note 98, at 81 (arguing that units should by default transfer detainees to Afghan authorities for criminal prosecution to effect their criminal prosecution in Afghan courts).

[169] *See, e.g.*, FM 3-24, *supra* note 2, paras. 1-131, D-15.

and its doctrinal templates for counterinsurgency operations. To complement these recommendations, this section also proposes modifying counterinsurgency military information support operations, and recommends possible measures of performance and effectiveness.[170] Appendix A arranges these recommendations in a comment matrix for use in the formal revision process.[171]

A. U.S. Forces Must Account for Host Nation Legal Primacy and its Related Operational Limitations

1. Field Manual 3-24 Must Clearly Identify Host Nation Legal Primacy and the Benefits of Observing this Primacy

While FM 3-24 exposes leaders to some benefits of observing host nation law, it does not make clear the relationship between U.S. security operations and host nation legitimacy, and how host nation law may operationally limit U.S. operations. The manual's "Legal Considerations" appendix notes that "U.S. forces conducting [counterinsurgency operations] should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation."[172] Similarly, the manual notes the importance of "[t]he presence

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[170] *See* BECKETT, *supra* note 23, at vii (counting "psychological" activities among the primary means by which governments counter insurgencies); KILCULLEN, *supra* note 139, at 76 (noting the importance of metrics and their interpretation to waging a successful counterinsurgency campaign).

[171] *See infra* apps. A, B.

[172] FM 3-24, *supra* note 2, para. D-15.

> The final sentence of Common Article 3 makes clear that insurgents have no special status under international law. They are not, when captured, prisoners of war. Insurgents may be prosecuted legally as criminals for bearing arms against the government and for other offenses, so long as they are accorded the minimum protections described in Common Article 3. U.S. forces conducting [counterinsurgency operations] should remember that the insurgents are, as a legal matter, criminal suspects within the legal system of the host nation. Counterinsurgents must carefully preserve weapons, witness statements, photographs, and other evidence collected at the scene. This evidence will be used to process the insurgents into the legal system and thus hold them accountable for their crimes while still promoting the rule of law.

of the rule of law . . . in assuring voluntary acceptance of a government's authority and therefore its legitimacy."[173] It notes several beneficial effects of the rule of law: first, criminalizing the insurgency erodes its public support; second, using the locally-based legal system to dispense criminal justice to insurgents builds the government's legitimacy; third, coercive actions, such as "unlawful detention . . . and punishment without trial" undermine the government's legitimacy.[174]

Nevertheless, to better identify the relationship between these objectives and U.S. operations, the manual must more clearly note that transparency is critical to both security and the rule of law.[175] It should more clearly state that not only host nation forces, but U.S. forces, should seek to transparently observe host nation laws to avoid undermining the government's legitimacy, even when not legally required to do so.[176] As previously discussed, host nation legal primacy presents tactical and operational challenges for U.S. forces.[177] Nevertheless, the previously discussed strategic benefits of observing this primacy are so critical to success that they outweigh these potential tactical and operational disadvantages at some point during a campaign.[178] To this end, the manual must emphasize how both strategic objectives and U.S. legal and policy obligations should call for observing host nation law when stability emerges during counterinsurgency campaigns.[179]

Id.

[173] *Id.* para. 1-119.

[174] *Id.* para. 1-132.

[175] *See* MADDALONI, *supra* note 107, at 44–45 (arguing that FM 3-24 does not sufficiently identify the importance of governmental transparency during counterinsurgency campaigns).

[176] *See* STROMSETH ET AL., *supra* note 4, at 324–25 (noting a paradox facing foreign efforts to restore host nation stability and governmental capacity, by which foreign forces' necessary exercise of military force to restore security can undermine broader efforts to promote the rule of law and build the host nation government); THOMPSON, *supra* note 132, at 54, 68; GALULA, *supra* note 133, at 89 (arguing that all military actions must support and be secondary to political goals). *See infra* app. A, items 1, 4.

[177] *See supra* Part II.C.

[178] *See supra* Part III.

[179] *See infra* app. A, items 2, 3.

2. U.S. Forces Must Be Prepared to Respect Host Nation Amnesty Laws, Informal Justice Institutions, and Post-Conflict Reconciliation Mechanisms

The manual also must identify the possible need to respect and promote the host nation's alternative justice mechanisms and promote post-conflict reconciliation.[180] A consensus is emerging among legal theorists that the law of war should not only account for actions before and during conflict, but also actions to promote post-conflict reconciliation and stability.[181] Additionally, Additional Protocol II to the Geneva Conventions calls for governing authorities to grant amnesty broadly at the end of an internal armed conflict.[182] To promote this stability, U.S. forces should be prepared to respect and aid in the implementation of host nation amnesty programs, truth commissions, or other peace initiatives.[183]

Counterinsurgent governments have effectively used amnesty both during and after a conflict to reduce insurgent populations, fracture insurgent movements, and promote post-conflict resolution.[184] In 2003, Colombian President Alvaro Uribe reached a peace and amnesty agreement with the Autodefensas Unidas de Colombia (AUC) insurgency, leading to the demobilization of 32,000 AUC insurgents.[185] This agreement effectively splintered the Colombian insurgency movements, enabling the government to focus on defeating the FARC.[186] Similarly, in 1994, Philippine President Fidel Ramos established a National Unification Commission to create an amnesty program for Mindanao National Liberation Front (MNLF) insurgents, leading to a

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[180] See *id.* item 22.
[181] Jaan K. Kleffner, *Introduction: From Here to There . . . And the Law in the Middle*, *in* JUS POST BELLUM: TOWARDS A LAW OF TRANSITION FROM CONFLICT TO PEACE (Jann K. Kleffner & Carsten Staan, eds., 2008) (noting the evolution of state practice since the adoption of the UN Charter to consider states responsible for restoring post-conflict stability following foreign interventions).
[182] APII, *supra* note 28, art. 6.
[183] *See infra* app. A, items 1, 2, 22, 21.
[184] THOMPSON, *supra* note 132, at 90 (arguing that amnesty procedures "create an image of government both to the insurgents and to the population which is both firm and efficient but at the same time just and generous"). *See also* GALULA, *supra* note 133, at 26 (arguing that "a policy of leniency" can both effectively undermine the insurgency and prevent overwhelming the criminal justice system).
[185] MADDALONI, *supra* note 107, at 22.
[186] *Id.*

peace agreement with the MNLF and enabling the government to combat the remaining insurgency movements.[187]

Additionally, U.S. forces also should be prepared to respect and work with the indigenous culture's informal methods of holding insurgents accountable for their actions.[188] Informal justice mechanisms, also called "traditional," "indigenous," "cultural," or "customary" systems, are particularly common in nascent and post-conflict societies with weak governments, providing an alternative means to resolve disputes outside of the formal, or state justice systems.[189] Host nation informal institutions may have deep cultural roots, complicating U.S. efforts to promote formal structures.[190] Acknowledging their significance, international forces in Afghanistan have begun promoting tribal justice mechanisms as an irreplaceable component of the Afghan justice system.[191] This shift also reflects an acknowledgment that the Taliban, like the FARC in Colombia, has used these institutions to its

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[187] *Id.*

[188] See *infra* app. A, items 1, 2, 8.

[189] U.N. RULE OF L., INFORMAL JUSTICE, http://www.unrol.org/article.aspx?article_id=30 (last visited Feb. 10, 2012); KRISTINA THORNE, RULE OF LAW THROUGH IMPERFECT BODIES? THE INFORMAL JUSTICE SYSTEMS OF BURUNDI AND SOMALIA 1–2 (2005), *available at* http://www.peace-justice-conference.info/documents.asp (describing informal justice systems in post-conflict Somalia, East Timor, Rwanda, and Burundi).

[190] William Manley, *The Rule of Law and the Weight of Politics: Challenges and Trajectories*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION, *supra* note 162, at 61, 69–70.

> A major challenge in the post-2001 era [in Afghanistan] has been to find ways of re-establishing *state-based* legal rules in the face of bodies of law with greater religious or traditional resonance. . . . A 2009 survey . . . showed that 79 per cent of respondents agreed that the local *jirga* or *shura* was accessible to them, while only 68 per cent said this of state courts; 69 per cent judged the local *jirga* or *shura* effective at delivering justice, while only 50 per cent said this of the state courts; 72 per cent labeled the local *jirga* or *shura* 'fair or trusted,' while only 50 per cent said this of the state courts; and 64 per cent stated that the local *jirga* or *shura* resolved cases 'timely and promptly', while only 40 per cent said this of the state courts.

(emphasis in original) (citations omitted)).

[191] Tarzi Address, *supra* note 129; Susanne Schmeidl, *Engaging Traditional Justice Mechanisms in Afghanistan: State-Building Opportunity or Dangerous Liaison?*, *in* THE RULE OF LAW IN AFGHANISTAN: MISSING IN INACTION, *supra* note 162, at 149–50 (arguing that the prevalence of informal, customary justice mechanisms in Afghanistan "has forced the international community to reconsider its stance against customary justice").

advantage to build political legitimacy.[192] By respecting and utilizing these institutions to the extent practicable and consistent with U.S. policy objectives, U.S. forces can align local tribal and governmental leaders, thereby alienating and displacing insurgent leaders.[193]

3. U.S. Forces Must Be Prepared to Face the Risks and Challenges of Working With Host Nation Criminal Justice Institutions

The manual also should more clearly identify risks and challenges leaders will face by observing host nation legal primacy. In addition to those risks the manual already identifies,[194] risks may include ceding authority to host nation institutions possibly lacking sufficient capacity. Not accounting for these risks and challenges can hinder otherwise effective operations: for example, in Vietnam, the South Vietnamese government's inability to quickly and firmly adjudicate Vietcong insurgents' offenses undermined the considerable security gains achieved through the Phoenix Program.[195]

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[192] KILCULLEN, *supra* note 139, at 60–61 (2010) (arguing that the Taliban's use of informal mechanisms is "translating local dispute resolution and mediation into local rule of law and thus into political power"); Schmeidl, *supra* note 191, at 150 (noting the Afghan insurgency's establishment of Shari'a courts to provide access to justice to rural populations). *See also* MADDALONI, *supra* note 107, at 10–11 (noting the FARC's use of "public order commissions" to establish law and order in effectively ungoverned areas, enabling "the guerillas to gain influence and control of small villages and towns to further expand their logistical base").

[193] STROMSETH ET AL., *supra* note 4, at 338 (recommending evaluative questions for intervening authorities to ask to determine whether and how to utilize host nation informal justice mechanisms).

[194] *See, e.g.*, FM 3-24, *supra* note 2, para. D-21 (noting possible conditions in which U.S. legal obligations may prevent the transfer of detainees to host nation authorities). *See also* U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1964, 1465 U.N.T.S. 85 (prohibiting parties from transferring a person to the custody of a state "where there are substantial grounds for believing that he would be in danger of being subjected to torture").

[195] TOVO, *supra* note 75, at 14 (citations omitted). *See also* PRUGH, *supra* note 47, at 24–25, 64 (noting the tendency of South Vietnamese authorities to release judicially-tried Vietcong insurgents within six months according to domestic law due to a lack of criminal justice system capacity to adjudicate all offenses, while holding captured North Vietnamese soldiers indefinitely as prisoners of war).

To account for this risk, the manual should first prepare commanders to cede a measure of the autonomy they normally enjoy during security operations. Commanders' priorities may diverge with judges' priorities; while the former may be most concerned with eliminating security threats, the latter may primarily seek just outcomes, complicating unity of effort.[196] Additionally, insurgent criminal prosecutions may fail, possibly requiring units to target the same individuals repeatedly or decline transferring them to host nation authorities provided they have sufficient authority to retain custody.[197] Nevertheless, the practical difficulty of removing large numbers of detainees to the United States for U.S. criminal prosecution, as well as U.S. domestic political and foreign policy considerations, may leave no choice but to rely on the host nation as a campaign nears its conclusion.[198]

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[196] FM 3-24, *supra* note 2, para. 2-13; Greig, *supra* note 85, at 25, 34.

> While acting under the guise of furthering the rule of law, units may be tempted to take advantage of corrupt judges or use their influence with local officials to circumvent the judicial process in order to achieve certain security goals. These quick wins may be operationally expedient but undermine the host nation's capacity-building process . . . . Eventually the hard decision to sacrifice operational expediency for long term gains must be made, even at the risk that an insurgent might go free due to lack of evidence or corruption in the system.

Id. See also infra app. A, item 5.

[197] *See* HIGH JUD. COUNCIL, VERDICTS OF ALL CRIMINAL COURTS FOR 2009 (2010) (Iraq) (on file with author) (reporting a 47% 2009 felony conviction rate, with individual provincial rates as low as 25%); TIP OF THE SPEAR, *supra* note 98, at 52, 60–61 (identifying difficulties tracking detainees after their transfer to Iraqi authorities). Criminal justice system acquittals and problems also can frustrate host nation authorities, possibly requiring U.S. forces partnering with local authorities to encourage patience and trust in the system. *See* Jane Arraf, *In Baghdad, Police Chief Explains Why It's Tough to Enforce the Rule of Law*, CHRISTIAN SCI. MONITOR, Sept. 3, 2010, http://www.csmonitor.com/World/Middle-East/2010/0903/In-Baghdad-police-chief-explains-why-it-s-tough-to-enforce-the-rule-of-law (citing a Baghdad police official's frustration with the high rate of Iraqi criminal justice system acquittals, which the United States reported at the time to occur in 75% of cases).

[198] *See supra* Part II.B.2; *infra* app. A, item 3.

Second, the manual should reinforce the need to understand the host nation's criminal justice system prior to commencing operations.[199] The lack of institutional capacity in a nascent state may prevent U.S. forces from fully utilizing the host nation criminal justice system,[200] and even a functioning one may not necessarily contribute to societal stability.[201] As in Iraq, U.S. forces may have unrealistic expectations of this system.[202] To mitigate these risks, FM 3-24 should recommend ascertaining the capacity of the local criminal justice system when describing the effects of the operational environment.[203] The manual identifies several civil considerations related to criminal justice system effectiveness, such as tribal structure, roles and statuses, social norms, and the distribution of power and authority within the host nation society.[204] It recommends staffs identify societal grievances and ascertain whether the government is addressing them.[205] To link these factors to the criminal justice system, the manual should recommend assessing the relationship between socio-cultural factors and the government's criminal justice capacity.[206] Additionally, forces should deploy with a plan to reach out to central and

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[199] *See* TIP OF THE SPEAR, *supra* note 98, at 66 (arguing that U.S. forces should sufficiently understand Iraqi criminal justice system requirements prior to deploying); PRUGH, *supra* note 47, at vii (At the outset of the Vietnam war, U.S. forces "knew very little about Vietnamese law and how it actually worked. . . . To learn these facts, then, became a first priority . . . ."); *infra* app. A, item 6.

[200] *See, e.g.*, Ellis & Sisco, *supra* note 51 (arguing that the absence of functioning governmental institutions in Somalia would complicate achieving unity of effort with the Somali government in a hypothetical U.S. counterinsurgency campaign applying FM 3-24 population centric doctrine).

[201] *See* Ernesto Londono, *Many Sunnis See Iraqi Justice System as Shiite Cudgel*, WASH. POST, Nov. 22, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/22/AR2010112206760.html (noting Sunni mistrust of the Iraqi criminal justice system given the government's predominantly Shiite composition).

[202] Greig, *supra* note 85, at 31–32 (noting that Iraqi judges often required the testimony of two witnesses in accordance with the Iraqi Code of Criminal Procedure and Iraqi judicial tradition, and were reluctant to consider forensic evidence despite significant Coalition investment in judicial training and forensic facilities).

[203] FM 3-24, *supra* note 2, para. 3-19 (The manual emphasizes the necessity of civil considerations, that is, "how the . . . civilian institutions, and attitudes and activities of the civilian leaders, populations, and organizations within an area of operations influence the conduct of military operations.").

[204] *See id.* paras. 3-23–3-51.

[205] *Id.* tbl.3-1.

[206] *See* PRUGH, *supra* note 47, at 15 (arguing that working with a host nation government requires understanding the legal system's cultural and historical foundations); *infra* app. A, item 7.

local criminal justice authorities to ascertain their capabilities, norms, and expectations.[207]

B. Field Manual 3-24 Must Identify and Account for the Operational Limitations on Targeting, Intelligence, and Capture Procedures Arising from Host Nation Legal Primacy

While the manual notes the importance of host nation laws and criminal justice institutions to a counterinsurgency campaign, it must account for the specific operational limitations host nation law may cause. As described above, host nation criminal justice procedural and evidentiary requirements may affect U.S. forces' ability to target and continue to detain insurgents.[208] These operational limitations primarily will arise in targeting, intelligence sharing, and capture operations.

1. Field Manual 3-24 Should Modify Existing Targeting Doctrine for Use in a Counterinsurgency-Specific Environment

The use of a counterinsurgency-tailored targeting methodology will better prepare U.S. forces to lawfully capture insurgents, ensure their continued detention, and promote their criminal prosecution. Field Manual 3-24 calls for the use of the conventional "decide, detect, deliver, and assess" (D3A) targeting methodology without adjusting for the effects of host nation law.[209] While an effective methodology for lethal and nonlethal targeting,[210] it requires modification for use during population-centric counterinsurgency operations in which detentions must appear legitimate and not undermine the host nation government.

As previously discussed, prosecution raises unique problems not within the scope of ordinary targeting concerns and which FM 3-24 does

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[207] Some units in Iraq prepared for the Security Agreement by meeting with local judicial officials "to understand their standards and establish procedures for the presentation of evidence and the expeditious issuance of arrest warrants." TIP OF THE SPEAR, *supra* note 98, at 35; Greig, *supra* note 85, at 31. *See also infra* app. A, item 23.

[208] *See supra* Part II.

[209] FM 3-24, *supra* note 2, para. 5-104 (applying the D3A methodology found in U.S. DEP'T OF ARMY FIELD MANUAL 3-60, THE TARGETING PROCESS (26 Nov. 2010)).

[210] Lieutenant Colonel David N. Propes, *Targeting 101: Emerging Targeting Doctrine*, FIRES, Mar.–Apr. 2009, at 16; KILCULLEN, *supra* note 139, at 4.

not address.[211] The need for sufficient evidence may require tactical patience prior to executing an otherwise ready target, and the use of unique information sharing and tactical procedures to ensure the collection of evidence. Nevertheless, the manual focuses on *sufficient evidence in combat*, rather than *sufficient evidence in court*, noting that, for example, "captured equipment and documents . . . [must be sufficient] to justify using operational resources to apprehend the individuals in question; however, it does not necessarily need to be enough to convict in a court of law."[212]

To appropriately modify and apply D3A methodology, the manual should account for the necessity of satisfying host nation legal requirements. Modified targeting decision criteria might require *sufficient evidence in court*.[213] Preparing for this constraint may require coordination with host nation judicial authorities to ascertain applicable requirements.[214] During the "decide" phase, the intelligence cell and targeting board should not only analyze intelligence to identify insurgents, but analyze whether the intelligence available would satisfy host nation legal requirements to detain the person.[215] During the "detect" phase, the staff must prepare an exploitation plan that ensures post-capture intelligence exploitation of the detainee yields both intelligence and judicially admissible evidence.[216] The commander should be prepared to decide whether to "deliver"; that is, detain the insurgent, based on whether or not sufficient evidence exists to support continued detention, or whether absent such evidence he or she has sufficient authority to detain the person.[217] Finally, during the "assess" phase, units should be cognizant of the value of information acquired

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[211] *See supra* Part II.C.

[212] FM 3-24, *supra* note 2, para. 3-152.

[213] *See infra* app. A, item 16.

[214] FORGED IN THE FIRE, *supra* note 87, at 37–39, 42–43 (recommending that units deploying to Iraq both study Iraqi criminal law and criminal procedure before deploying, and develop relationships with local judges to better understand local requirements and facilitate the obtaining of warrants in the future).

[215] *See* TIP OF THE SPEAR, *supra* note 98, at 71 (noting efforts to modify targeting procedures to better assemble evidence throughout the targeting process for use in prosecuting Afghan detainees); *infra* app. A, item 17.

[216] *See infra* app. A, item 18.

[217] Chesney, *supra* note 16. *See also* TIP OF THE SPEAR, *supra* note 98, at 36 ("The ideal situation would have been to obtain enough evidence for a complete prosecution packet prior to detention." (citations omitted)), 75 (identifying challenges in keeping insurgents detained past 72 hours due to the Afghan criminal procedural requirement for prosecutors to verify a prima facie case against a person within 72 hours of arrest); *infra* app. A, item 19.

during the operation to prosecute targeted insurgents in court or support the detention and prosecution of other insurgents.[218]

2. FM 3-24 Must Identify the Greater Need to Share Intelligence to Enable Host Nation Criminal Justice Proceedings

Since host nation criminal justice institutions may have a role in targeting processes, FM 3-24 should prepare forces for the need to share intelligence with these institutions. As with targeting, FM 3-24 need not apply new intelligence doctrine, but must better apply existing processes to account for the operational limitations of host nation legal primacy.[219] This section proposes modifications to better tailor general intelligence processes to the legal conditions specific to a counterinsurgency.

The counterinsurgency manual must identify the possible need to divulge more information to host nation authorities than might otherwise occur during conventional operations.[220] As the United Staes experienced in Vietnam, Iraq, and Afghanistan, an unwillingness to share information with host nation judicial authorities can lead to the release of known insurgents.[221] Units should be prepared to provide information on suspected insurgents to community leaders and law enforcement authorities to ensure an arrest and prosecution in accordance with host nation domestic law.[222] Additionally, units must guard against unnecessarily complicating the transfer of unclassified information by erroneously classifying the information, or by unnecessarily placing unclassified information on a secure information system.[223]

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[218] *See infra* app. A, item 20.
[219] *See* FM 3-24, *supra* note 2, at foreword to ch. 3 (noting that the intelligence section of FM 3-24 does not supersede existing generally-applicable U.S. intelligence doctrine).
[220] *See infra* app. A, item 12.
[221] BECKETT, *supra* note 23, at 202 (noting South Vietnamese aversion to sharing intelligence information with U.S. forces during the Vietnam War); TIP OF THE SPEAR, *supra* note 98, at 63 (noting the tendency to over-classify information, limiting the ability to prosecute detained insurgents in Iraqi courts); Cahn, *supra* note 14.
[222] *See* TIP OF THE SPEAR, *supra* note 98, at 44 (recommending the use of unclassified "baseball cards" containing basic incriminating information on suspected insurgents to pass to local community and law enforcement leaders), 62 (noting one unit's intelligence officer briefing judges on detainees' activities, enabling the judge to frame his questioning of the detainee without disclosing classified materials to the judge).
[223] *See* Old Blue, *supra* note 78; *infra* app. A, item 11.

Units should implement methods to facilitate information-sharing with host nation criminal justice authorities while satisfying U.S. classification regulations.[224] Units can achieve this through several means. First, a dedicated staff cell can compile intelligence information and items for use as evidence in host nation courts and transfer this information to host nation authorities, either in whole or redacted.[225] Joint or multinational task force commanders may modify classification criteria to broaden the scope of information eligible for transfer to host nation authorities.[226] Establishing procedures with host nation authorities to vet certain judges or judicial personnel can enable in-camera intelligence sharing.[227] Finally, procedures to vet and protect human intelligence sources might encourage them to testify in court, while also ensuring they are sufficiently credible.[228] Nevertheless, forces must anticipate that it may not be feasible or possible to convince some sources to testify.

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[224] *See* TIP OF THE SPEAR, *supra* note 98, at 43 (recommending deploying units have systems to translate intelligence into evidence for use in host nation courts).

[225] *See id.* (recommending the use of Brigade Prosecution Task Forces (PTFs) to synchronize efforts related to the gathering of information against a suspected insurgent and the provision of this information to host nation authorities), 44 (recommending the pre-deployment identification and training of dedicated PTF personnel). *See infra* app. A, item 11.

[226] *See, e.g.*, U.S. DEPT. OF DEF., DIR. 5200.01, DOD INFORMATION SECURITY PROGRAM AND PROTECTION OF SENSITIVE COMPARTMENTED INFORMATION (13 June 2011) (requiring the classification of certain types of information while prohibiting "prevent[ing] or delay[ing] the release of information that does not require protection"). For example, techniques such as signals intelligence and unmanned aerial vehicle video recordings are widely known to exist; their resulting media need not necessarily be classified in light of their possible value during judicial proceedings. *See, e.g.*, Robert Siegel & Tom Bowman, *Navy SEALs Rescue Kidnapping Victims in Somalia*, NAT'L PUB. RADIO, Jan. 25, 2012 (transcript available at http://www.npr.org/2012/01/25/145859961/navy-seals-rescue-kidnapping-victims) (describing U.S.-intercepted cell phone or radio communications providing critical information for a U.S. raid to rescue two hostages in Somalia).

[227] *See, e.g.*, Classified Information Procedures Act, Pub. L. No, 96-456, 94 Stat. 2025 (1980) (codified at 18 U.S.C. app. §§ 1–16 (Suppl. 2006)) (providing a mechanism for the introduction of classified evidence in U.S. Federal Courts); 10 U.S.C. § 949 (2006) (providing a mechanism for the introduction of classified evidence in U.S. military courts-martial). *See infra* app. A, item 13.

[228] *See infra* app. A, items 9, 10. *See also, e.g.*, Bergal, *supra* note 28, at 1078 (discussing the Mexican government's effort to develop witness protection measures to facilitate the prosecution of cartel figures).

3. Field Manual 3-24 Must Identify Unique Tactical Considerations During Capture Operations to Enable the Criminal Prosecution of Captured Insurgents

Field Manual 3-24 notes the general importance of safeguarding the "forensic trace" left by insurgents for use in a criminal justice proceeding.[229] Nevertheless, the manual omits sufficient discussion of how units can best accomplish this during pre-deployment preparations and during counterinsurgency operations. This section recommends general items for inclusion in doctrine, recognizing that these tactical level considerations may require additional detail in a techniques publication.[230]

Units must be prepared to modify capture operation tactical actions to identify, collect, and safeguard information and items for use in criminal justice proceedings.[231] As indicated above, the "assess" phase of targeting may require an assessment of information and items acquired during an operation for use in judicial proceedings against a captured insurgent.[232] Units can prepare for this with pre-deployment evidence collection training tailored to host nation's criminal evidentiary standards.[233] Additionally, standard operating procedures can include the collection of evidence during capture operations,[234] including sworn statements, photographs and sketches, and items and materiel.[235]

C. Military Information Support Operations Related to the Dispensation of Criminal Justice Can Foster the Host Nation Government's Popular Legitimacy

Achieving popular support being essential to success during counterinsurgency campaigns, forces must be prepared to disseminate information about host nation criminal justice processes as a component

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[229] FM 3-24, *supra* note 2, para. 1-133.
[230] *See* DOCTRINE 2015, *supra* note 19, at 7.
[231] *See infra* app. A, item 20.
[232] *See supra* Part IV.B.2.
[233] FORGED IN THE FIRE, *supra* note 87, at 41.
[234] *See id.* at 41, 49 (describing procedures U.S. forces employed in Iraq and Afghanistan).
[235] *Id.* at 49 (describing typical Afghanistan point of capture evidence categories).

of military information support operations.[236] Field Manual 3-24 notes the importance of the information environment in counterinsurgency, both to the insurgent and the counterinsurgent.[237] Military information support operations are critical "to rally the population to the side of the government and encourage positive support for the government in its campaign"—that is, to counter the insurgent's propaganda and undermine the insurgency's cause.[238] Nevertheless, FM 3-24 fails to note how criminal prosecution outcomes must be a component of counterinsurgent military information support operations to shape the people's perception of the government's evenhandedness.[239]

The manual should call for criminal justice-related military information support operations to demonstrate the government's viability, trustworthiness, and accountability. As discussed above, the dispensation of justice is central to long-term societal stability and the popular perception of the government.[240] The insurgency and government each seek to visibly establish law and order, particularly at the local level.[241] Consequently, FM 3-24 should call for public

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[236] *See* U.S. DEPT. OF DEF., DIR. 3600.01, INFORMATION OPERATIONS (IO) paras. 3.1, E2.1.19 (23 May 2011) (defining military information support operations, formerly known as psychological operations, as a core information operations capability).

> Military Information Support Operations (MISO). Planned operations to convey selected information and indicators to foreign audiences to influence their emotions, motives, objective reasoning, and ultimately the behavior of foreign government, organizations, groups, and individuals. The purpose of MISO is to induce or reinforce foreign attitudes and behavior favorable to the originator's objectives.

Id.

[237] FM 3-24, *supra* note 2, para. 5-19 ("The [information operations (IO) logical line of operations (LOO)] may often be the decisive LLO. . . . IO make significant contributions to setting conditions for the success of all other LOOs."). *See also* KILCULLEN, *supra* note 139, at 42 (noting the importance of the counterinsurgent's "alternative narrative" to the insurgent's propaganda).

[238] THOMPSON, *supra* note 132, at 90.

[239] *See* FM 3-24, *supra* note 2, tbl.5-1 (not addressing the need to include host nation criminal justice procedures or outcomes as a component of information operations); STROMSETH ET AL., *supra* note 4, at 243 n.236 (arguing that the publication of judicial decisions is "of crucial importance" and that such actions in East Timor helped improve judicial transparency) (citations omitted).

[240] *See supra* Part III.

[241] *See supra* Part II.C.

education campaigns and the publication of judicial outcomes to build public awareness of governmentally imposed law and order.[242]

D. Measures of Performance and Measures of Effectiveness Should Isolate Causes and Effects Related to the Host Nation Criminal Justice System

Since commanders must be prepared to rely on host nation criminal justice authorities to facilitate the capture and detention of insurgents, measures of effectiveness related to these authorities and institutions should enable them to correctly determine causes of success or failure. These metrics should measure trends to best track performance over time and provide meaningful gauges of performance to the public.[243] Appendix A includes example criminal justice-related measures of performance and effectiveness,[244] including metrics related to informal justice mechanisms and criminal justice system accountability.[245]

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[242] *See* GALULA, *supra* note 133, at 122 (Information operations targeting rural populations are "most effective when [their] substance deals with local events, . . . with which the population is directly concerned . . . ."); STROMSETH ET AL., *supra* note 4, at 243 (calling for the publication of judicial decisions), 329 (calling for media campaigns to increase public understanding of the law); *infra* app. A, item 14.

[243] KILCULLEN, *supra* note 139, at 52.

[244] FM 3-24, *supra* note 2, para. 5-94.

> A *measure of effectiveness* is a criterion used to assess changes in system behavior, capability, or operational environment that is tied to measuring the attainment of an end state, achievement of an objective, or creation of an effect (JP 1-02). MOEs focus on the results or consequences of actions. MOEs answer the question, Are we achieving results that move us towards the desired end state, or are additional or alternative actions required? A *measure of performance* is a criterion to assess friendly actions that is tied to measuring mission accomplishment (JP 1-02). MOPs answer the question, Was the task or action performed as the commander intended?

Id. (emphasis in origina) (citing JP 1-02, *supra* note 11, at 214). *See infra* app. A,item 15.

[245] *See* KILCULLEN, *supra* note 139, at 60 (arguing that, in Afghanistan, the public's preference to turn to Taliban courts to resolve disputes may provide a useful metric of popular confidence in the government; that the public's willingness to turn to insurgents for dispute resolution may indicate a lack of trust in the integrity of government officials; and that conviction rates are useful not as much as an indicator of the rate of prosecution, but of the honesty and professionalism of the security forces).

V. Conclusion

Although the Iraq campaign has ended and the campaign in Afghanistan is winding down, the historical frequency of unconventional conflict implies that the United States must remain prepared to combat insurgencies.[246] Its experience waging counterinsurgency—in the diverse environments of Colombia, the Philippines, Iraq, Afghanistan, and beyond—calls for a cognizance of the ultimate disposition of captured insurgents during future campaigns.[247] Professor Robert Chesney has noted,

> First, and most significantly, the American experience in Iraq teaches that the capacity to employ military detention without criminal charge as a practical matter will decay over time. Regardless of whether such detention is legally and factually warranted in the first instance, it ultimately must be abandoned.
>
> . . . Changing strategic circumstances—including the dictates of counterinsurgency doctrine, the inevitable assertion of sovereign prerogatives by the host nation, the political infeasibility of importing detainees into the United States or Guantánamo, and the political and diplomatic infeasibility of maintaining covert detention facilities abroad—ensure it will be so.[248]

While counterinsurgencies may change and the lessons of one campaign may not be entirely applicable to another,[249] sound doctrine will enable the Army's future leaders to best prepare for—and win—conflicts whose legal detention regime inevitably will constrict over time.[250] As forces learned in Iraq, furthering the government's popular legitimacy requires

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[246] MAX BOOT, THE SAVAGE WARS OF PEACE, at xx, 336–41 (2002); KILCULLEN, *supra* note 139, at ix; BECKETT, *supra* note 23, at vii.

[247] *See* Lieutenant Colonel Gian Gentile, *Eating Soup With a Spoon: Missing from the New COIN Manual's Pages Is the Imperative to Fight*, ARMED FORCES J., Sept. 2009, at 30 (arguing FM 3-24 improperly minimizes the need for kinetic operations during counterinsurgency).

[248] Chesney, *supra* note 61, at 553.

[249] *See* KILCULLEN, *supra* note 139, at 3.

[250] *See id.* at 20 (arguing that doctrine ensure armies can best analyze and adapt to a specific counterinsurgency environment by "inculcat[ing] habits of mind and action that change organizational culture and behavior").

more than simply building courthouses while conducting aggressive conventional operations.[251]

Revising FM 3-24 to account for the operational limitations of host nation legal primacy will ensure forces remain prepared to target and detain insurgents in a way that will best support the ultimate objective—fostering the development of a legitimate government.[252] The manual's focus on a legally permissive environment is understandable given the issues forces faced in Iraq at the time of its development.[253] Yet future campaigns might not feature such a permissive environment. The United States surely will act in its national interests, perhaps demanding broad detention authorities to safeguard U.S. security interests prior to commencing operations supporting a host nation's counterinsurgency.[254] As Professor Chesney argues, regardless of the authorities they may enjoy, U.S. forces will find it necessary to transition away from security detentions without charge.[255] To satisfy U.S. legal and policy obligations, the best course of action is to use host nation legal primacy as a strategic tool, fostering the government's legitimacy by conducting security operations in accordance with the host nation's criminal laws and procedures to the maximum extent feasible.[256] A revised FM 3-24 will provide a relevant tool for U.S. military leaders to remain prepared to do so, wherever and however extensive future U.S. counterinsurgency campaigns may be.

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[251] ROL HANDBOOK, *supra* note 29, at 128–29; Keith Govern, *Rethinking Rule of Law Efforts in Iraq*, U. PITT. JURIST, Feb. 26, 2007, http://jurist..law.pitt.ed/forumy/2007/02/rethinking-rule-of-law-efforts-in-iraq.php (noting that U.S. rule of law initiatives in Iraq before 2005 focused heavily on physical infrastructure). *See also* STROMSETH, ET AL., *supra* note 4, at 14, 311 (arguing that building the rule of law requires inculcating a cultural commitment to the rule of law).

[252] The January 2012 strategic shift away from prolonged counterinsurgencies may erode the U.S. military's present proficiency in counterinsurgency operations. Craig Whitlock & Greg Jaffe, *Obama Announces New, Leaner Military Approach*, WASH. POST, Jan. 5, 2012, http://www.washingtonpost.com/world/national-security/obama-announces-new-military-approach/2012/01/05/gIQAFWcmcP_story.html.

[253] *See* MADDALONI, *supra* note 107, at 38 ("FM 3-24's focus was clearly Iraq and not a comprehensive approach to counterinsurgency. . . . The Iraq problem was the primary concern and received the bulk of resources.").

[254] Chesney, *supra* note 17; *infra* Part II.B.2.

[255] *See* Chesney, *supra* note 61, at 553.

[256] *See supra* Part II.B. *See also* TOVO, *supra* note 75, at 14–15 ("In the long term, the United States must establish a process . . . which yields intelligence for future operations, prevents detainees from rejoining the insurgency, meets basic legal and ethical standards, and maintains U.S. legitimacy.").

Appendix A

Comment Matrix

Item #		Source	Type	Page	Para	Line	Comment	Rationale
	1	USA	M	1.22	1-119		Add before last sentence, "The government, and U.S. forces assisting the government, consequently must transparently demonstrate their adherence to the host nation's laws in the arrest, detention, and prosecution of all persons, or risk undermining the population's voluntary acceptance of the government's authority."	Emphasizes the potential for host nation and U.S capture and detention operations without lawful authority to lead to popular discontent with the government.
	2	USA	M	1.23	1-131		Add after fifth sentence, "Like host nation forces, partnering U.S. forces must also observe the host nation's laws as required under orders and policies to also contribute to the government's legitimacy."	Notes that host nation criminal justice laws and procedures may operationally limit both host nation and U.S. forces.
	3	USA	M	1.24	1-132		Add after fourth sentence, "U.S. forces should be prepared for host nation laws to begin limiting whether and for how long U.S. forces can detain suspected insurgents, particularly as the host nation assumes increasing security responsibility. Additionally, it may be impractical for the United States to detain and prosecute all captured	Emphasizes the possible U.S. legal obligation to observe host nation criminal justice laws while targeting and detaining insurgents.

							insurgents using U.S. domestic means, even if legally possible."	
	4	USA	M	1.24	1-133		Add at end of paragraph, "This "forensic trace" may be essential to obtain host nation judicial authorization when necessary to lawfully detain an insurgent."	Reiterates the potential need to observe host nation criminal justice evidentiary requirements to capture, detain, and prosecute insurgents.
	5	USA	M	2.3 – 2.4	2-14		Add new paragraph, "U.S. forces must be prepared to respect host nation institutions and interests, even when those appear to diverge with U.S. priorities. U.S. forces may demand the continued incarceration of an individual they deem a security threat, while host nation officials may face constituent pressure to release these individuals. Similarly, the host nation government might grant amnesty to an individual or group, appearing to undermine U.S. security efforts. Nevertheless, U.S. forces may have to accept these outcomes to respect host nation sovereignty and legal primacy and not alienate officials who may become unwilling to cooperate with U.S. forces."	Emphasizes host nation legal primacy and how U.S. forces' priorities may diverge from those of the host nation authorities.
	6	USA	M	2.8	2-36		Add new bullet example, "Judicial and other decisions regarding the prosecution of	Identifies how judicial independence may limit U.S. influence in

							insurgents."	host nation criminal proceedings.
	7	USA	M	3.3 – 3.4	3-19		Add after second sentence, "Assessing civil considerations includes assessing the relationship between socio-cultural factors and the government's capacity to perform its functions."	Encourages the consideration of whether government institutions will intentionally not perform their duties due to social and cultural pressures.
	8	USA	M	3.11	3-64		Add at end of paragraph, "Host nation societal institutions may feature a combination of all three types of authority. For example, a tribal leader may have authority to adjudicate civil and criminal disputes, reflecting both rational-legal authority grounded in the host nation's laws, and traditional authority reflected in the host nation's culture and societal structure."	Encourages leaders to consider different layers of authority in the host nation's society, and provides an example to illustrate the way these layers can intersect.
	9	USA	M	3.26	3-133		Add after last sentence, "Since HUMINT sources may provide information necessary to effect the criminal prosecution of an insurgent in host nation courts, units must have systems to sufficiently protect HUMINT sources that they are willing to testify."	Emphasizes need to protect sources to encourage their testimony in court against insurgents.
	10	USA	M	3.26	3-134		Add after last sentence, "Additionally, individual sources and their information must be	Ensures forces provide credible information to host nation courts for use

							sufficiently credible for use in host nation criminal justice proceedings against captured insurgents."	in criminal proceedings against insurgents.
	11	USA	MM	3.33	3-176		Add after last sentence, "Units must have systems to transfer intelligence information and items to host nation authorities in accordance with U.S. information security regulations to allow host nation criminal prosecution of targeted insurgents. Additionally, units must guard against unnecessarily classifying unclassified information or placing it on classified information systems which may complicate sharing the information with host nation authorities."	Established information sharing procedures and not over-classifying information will best facilitate timely support to host nation criminal justice authorities.
	12	USA	M	3.34	3-181		Add after second sentence, "Additionally, it may be necessary to share information with host nation criminal justice authorities to obtain the legal authorization to capture or continue to detain a suspected insurgent."	Emphasizes the need to share information to obtain the legal authorization to detain insurgents from host nation criminal justice authorities.
	13	USA	M	3.34 – 3.35	3-183		Replace last sentence with, "For example, procedures to vet host nation criminal justice personnel and allow for in-camera viewing of sensitive information may	Provides an example method to share information with host nation criminal justice authorities while

							enable the prosecution of insurgents while safeguarding intelligence information from compromise."	mitigating the risk of compromise.
	14	USA	M	5.8 – 5.9	Table 5-1		Add new bullet, "Criminal justice-related military information support operations may include general information to educate the public as to their rights under the law, and the publication of specific court case outcomes to demonstrate how the government is using its authority under the law to protect the population."	Encourages the inclusion of criminal justice outcomes and education as a component of operations to shape the information environment.
	15	USA	M	5.27	Table 5-7		Add new bullet and sub-bullets: • Effectiveness of Host Nation Criminal Justice Institutions. These indicators may over time enable commanders to evaluate the specific causes of success or failure in the prosecution of captured insurgents and the host nation's rule of law conditions generally. Proportion of targeted insurgents ultimately convicted due to U.S. restraints preventing the transfer of intelligence information or items for use in criminal justice proceedings. ▪ Degree of government coordination with	Recommends metrics for evaluating host nation criminal justice institutions and U.S. interaction with those institutions.

							informal justice mechanisms. ▪ Quantity of host nation actions to hold criminal justice officials accountable for failures or improper dealings. ▪ Conviction rate of host nation criminal courts. ▪ Percentage of criminal cases reaching various stages of completion (e.g. formal charges filed, indictment, or trial).	
	16	USA	M	5.29	5-105		Add new paragraph, "Effective intelligence that provides a sufficient basis for the commander to decide to target and detain an enemy combatant during conventional operations may be insufficient to detain an insurgent during a counterinsurgency. U.S. forces must anticipate host nation criminal justice laws limiting targeting processes by requiring forces to obtain host nation judicial authorization to detain insurgents. Commanders must be prepared to modify targeting methodology to amass evidence sufficient to satisfy host nation legal requirements."	Identifies the need to prepare for host nation criminal justice laws operationally limiting targeting processes.
	17	USA	M	5.29 – 5.30	5-106		Add after second sentence, "Due to host nation legal requirements, a target may not be	Notes the possibility of delaying target execution until sufficient

							sufficiently developed until the staff has amassed sufficient information that would be admissible as evidence in host nation legal proceedings to authorize detention."	evidence is available to support the target's criminal prosecution.
	18	USA	M	5.30	5-108		Add after last sentence, "The exploitation plan may also have to account for host nation criminal evidentiary requirements to ensure information acquired during exploitation is admissible in host nation judicial proceedings."	Notes the impact host nation criminal evidence laws may have on the exploitation of detainees.
	19	USA	M	5.30 – 5.31	5-110		Add at end of paragraph, "The commander may have to consider whether sufficient evidence exists to satisfy host nation legal requirements to arrest the person. If the commander lacks sufficient evidence to secure the person's continued detention, the commander may have to consider whether the person warrants what may be only a temporary detention."	Notes the possibility of exercising patience when executing a target in order to facilitate the target's criminal prosecution.
	20	USA	M	5.31	5-112		Add after second sentence, "Additionally, detainee statements, captured documents, and captured equipment may yield information usable as evidence during the host nation's criminal prosecution of the captured insurgent.	Reiterates the need to collect and safeguard all information and materials for use against the detainee in host nation criminal courts. Encourages efficient and effective collection of

							Units may have to specially train and task organize capture forces to ensure the identification, collection, and safeguarding of information and items at the point of capture for use in host nation criminal justice proceedings."	information and materiel for use against an insurgent in host nation criminal justice proceedings.
	21	USA	M	54.15	D-4		Add after last sentence, "U.S. forces also must remember that host nation authorities may disagree whether or how to hold insurgents criminally liable, but it may be legally necessary to respect the host nation's decisions on such matters."	Emphasizes host nation legal primacy and how U.S. forces' priorities may diverge from those of the host nation.
	22	USA	M	54.4	D-15		Add new paragraph, "Due to the possible primacy of host nation criminal laws, U.S. forces must be prepared to respect host nation decisions regarding whether and how to hold insurgents criminally responsible. U.S. forces must be prepared to respect and aid in the implementation of host nation programs granting amnesty to insurgents. Amnesty programs may appear inconsistent with U.S. objectives, but may further the host nation's societal reconciliation and political stability. Similarly, U.S. forces may find it	Emphasizes the possibility U.S. forces will have to respect host nation decisions and customs regarding whether and by which means to hold insurgents criminally accountable, including amnesty grants, informal mechanisms, and other means to promote post-conflict reconciliation and stability.

							necessary to respect and work with informal justice mechanisms, such as tribal courts, and other alternatives to formal criminal justice prosecution, such as truth and reconciliation commissions. Such mechanisms may be both legally and culturally necessary, and may best ensure long-term political stability following the departure of U.S. forces.")	
	23	USA	M	54.4	D-16		Add new paragraph, "U.S. forces should attempt to ascertain the structure and capacity of the host nation's criminal justice institutions prior to deploying to be able to work with these institutions. A pre-deployment study of the host nation's criminal laws, and the use of host nation legal experts, may enable commanders to conduct targeting and detention operations in accordance with host nation laws and in support of campaign objectives."	Encourages deploying units to prepare for conducting targeting operations within host nation criminal justice laws by developing an understanding of the host nation legal regime before deploying.

Appendix B

Combined Arms Center Standardized Comment Matrix

The comment matrix is a table to be used as a template for submitting comments on draft publications and draft program directives. Except as noted below, an entry is required in each of the columns.[1]

Column 1 – ITEM
Numeric order of comments. Accomplish when all comments from all sources are entered and sorted. To number the matrix rows, highlight this column only and then select the numbering ICON on the formatting tool bar.

Column 2 - #
Used to track comments by source. Manually enter numbers from the first comment to the last comment. These numbers will stay with the comment and will not change when consolidated with other comments.

Column 3 – SOURCE

J1 - J-1	JFCOM - US Joint Forces Command
J2 - J-2	NORTHCOM - US Northern Command
J3 - J-3	PACOM - US Pacific Command
J4 - J-4	SOCOM - US Special Operations Command
J5 - J-5	SOUTHCOM - US Southern Command
J6 - J-6	STRATCOM - US Strategic Command
J7 - J-7	TRANSCOM - US Transportation Command
J8 - J-8	DTRA – Defense Threat Reduction Agency

[1] This appendix includes relevant excerpts of the Combined Arms Center Standardized Comment Matrix Primer, available in enclosure 3 to the FM 3-24 revision Program Directive. PROGRAM DIRECTIVE, supra note 19.

USA – US Army
USN – US Navy
USAF – US Air Force
USMC – US Marine Corps
USCG – US Coast Guard
CENTCOM - US Central Command
EUCOM - US European Command
DIA – Defense Intelligence Agency
DLA – Defense Logistics Agency
MDO – Missile Defense Organization
NSA – National Security Agency
DISA – Defense Information Systems Agency
NGA – National Geospatial-Intelligence Agency
LC – Joint Staff Office of Legal Counsel

Column 4 – TYPE
C – Critical (Contentious issue that will cause non-concurrence with publication)
M – Major (Incorrect material that may cause non-concurrence with publication)
S – Substantive (Factually incorrect material)
A – Administrative (grammar, punctuation, style, etc.)

Column 5 – PAGE
Page numbers expressed in decimal form using the following convention:
(Page I-2 = 1.02, Page IV-56 = 4.56, etc.) This format enables proper sorting of consolidated comments.

0 – General Comments
0.xx - Preface, TOC, Executive Summary (Page i = 0.01, Page XI = 0.11)
1.xx – Chapter I
2.xx – Chapter II
3.xx – Chapter III
x.xx – Chapter x, etc.
51.xx – Appendix A
52.xx – Appendix B
52.01.xx - Annex A to Appendix B
53.xx – Appendix C, etc.
99.xx – Glossary

NOTE: For Program Directives enter the page number as a whole number, (1, 2, 3, etc.) PDs are normally sorted by paragraph and line number and the page number helps to find the paragraph.

Column 6 – PARA
Paragraph number that pertains to the comment expressed. (i.e. 4a, 6g, etc.)

NOTE: An entry in this column should be used when commenting on draft program directives.

Column 7 – LINE
Line number on the designated page that pertains to the comment, expressed in decimal form (i.e., line 1=1, line 4-5 = 4.5, line 45-67 = 45.67, etc.) For figures where there is no line number, use "F" with the figure number expressed in decimal form (i.e. figure II-2 as line number F2.02). For appendices, use the "F" and the appendix letter with the figure number (i.e appendix D, figure 13 as line number FD.13; appendix C, annex A, figure 7 as line number FCA.07)

Column 8 – COMMENT
Provide comments using line-in-line-out format according to JSM 5711.01A, Joint Staff Correspondence Preparation (Examples are provided in CJCSI 5120.02, Joint Doctrine Development System. To facilitate adjudication of comments, copy and insert complete sentences into the matrix. This makes it unnecessary to refer back to the publication to understand the rationale for the change. Do not use Tools, Track Changes mode to edit the comments in the matrix. Include deleted material in the comment in the strike through mode. Add material in the comment with underlining. Do not combine separate comments into one long comment in the matrix, (i.e. 5 comments rolled up into one).

Column 9 - RATIONALE
Provide concise, objective explanation of the rationale for the comment.

Column 10 - DECISION
A - Accept
R - Reject (Rationale required for rejection.)
M - Accept with modification (Rationale required for modification.)

NOTE: This column is for the LA and JSDS use only. No rationale required for accepted items. Rationale for rejection is placed in the

rationale comment box and highlighted for clarity. For modifications, the complete modified language will be placed (and annotated) as the bottom entry for that item in the "Comments" column and the rationale for the modification placed in the rationale comment box and highlighted for clarity.