

WARRANT-BASED TARGETING: PROSECUTION-ORIENTED CAPTURE AND DETENTION AS LEGAL AND MORAL ALTERNATIVES TO TARGETED KILLING

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I. INTRODUCTION

Targeted killing has had significant political and military repercussions around the world in recent years, especially in the wake of 2011 operations against Osama bin Laden and Anwar al-Aulaqi.¹ By contrast, adapting a time-tested, prosecution-oriented strategy to capture rather than to kill, warrant-based search and detention became the de jure required modality of dealing with insurgents and criminals alike in Iraq prior to coalition troop withdrawal. Use of search and detention, called “warrant-based targeting” since 2008, is also an emergent trend in combined² and interagency³ operations, not only in present-day Afghanistan, but also in the international arena as a military adaptation to the prosecution-support function.⁴ Despite popular misconceptions of an inherently bellicose

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1. See generally TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD (Claire Finkelstein et al. eds., 2012) [hereinafter TARGETED KILLINGS]. This article will not examine the “surveil, apprehend, or kill dilemma” regarding how “judicial approval is required when the United States decides to target a U.S. citizen overseas for electronic surveillance, but . . . judicial scrutiny is prohibited when the United States decides to target a U.S. citizen overseas for death.” *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 8 (D.D.C. 2010). For such an examination, see, for example, Anthony M. Shults, *The “Surveil or Kill” Dilemma: Separation of Powers and the FISA Amendments Act’s Warrant Requirement for Surveillance of U.S. Citizens Abroad*, 86 N.Y.U. L. REV. 1590 (2011). In *Al-Aulaqi*, Judge Bates ultimately held that the political question doctrine, among other reasons, precluded judicial scrutiny of President Obama’s alleged targeting of suspected terrorist, and U.S. citizen, Anwar Al-Aulaqi for death. 727 F. Supp. 2d at 52.

2. Definition of “combined”: “Between two or more forces or agencies of two or more allies. (When all allies or services are not involved, the participating nations and services shall be identified, e.g., combined navies.)” DEP’T OF DEF., JOINT PUBL’N 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS, 51 (Nov. 8, 2010, as amended through Dec. 15, 2012), http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf [hereinafter DICTIONARY OF MILITARY AND ASSOCIATED TERMS].

3. Definition of interagency: “United States Government agencies and departments, including the Department of Defense. See also interagency coordination. (JP 3-08).” *Id.* at 165.

4. See Robert Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 VA. J. INT’L L. 549 (2011) [hereinafter

connotation to the words *target* or *targeting*, the Department of Defense (DOD) defines target as: “An entity or object considered for possible engagement or other action,” and “[i]n intelligence usage, a country, area, installation, agency, or person against which intelligence operations are directed,” and defines targeting as: “The process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirements and capabilities.”⁵ Warrant-based targeting, then, considers persons for possible intelligence and law enforcement engagement as targets for possible arrest and prosecution, rather than persons to be fired upon or engaged with the use of force.

Compelled by strategic necessity, the U.S. military has quietly adapted its procedures to search at the point of capture, and to detain using conventional and Special Operations Forces (SOF) organizational structures in the field, in order to maximize the prospects for host-nation prosecutions—all contrary to conventional wisdom about the incompatibility of such efforts with the military’s mission of “template-able aim points for easy targeting and destruction.”⁶ Warrant-based targeting follows a guiding principle of military forces working alongside domestic and international security forces. Together, those forces assess threats, build credible bases for judicially-issued criminal arrest warrants, seek those warrants, apprehend suspects pursuant to those warrants while collecting evidence for prosecution, then hand off apprehended individuals along with evidence collected to competent civilian judicial and correctional authorities. As contrasted with proceedings pursuant to military tribunals,⁷ such an undertaking necessarily involves the effective use of information to seek a civilian judicial warrant for arrest, and works best in systems where transparent judicial processes militate against secrecy and promote public accountability.

This article examines warrant-based targeting and key lessons learned with respect to such operations, and proposes future locales where it might be effectively employed. Part II is an initial review of historical, warrant-based

Chesney, *Iraq and the Military Detention Debate*]; see also Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008) (describing the procedural and substantive convergence under the criminal and military models of detention).

5. DICTIONARY OF MILITARY AND ASSOCIATED TERMS, *supra* note 2, at 290, 291. Military targets need not be the object of death, disabling, or destruction, nor must targeting involve kinetic effects or use of force as means towards the military ends.

6. See, e.g., Frank G. Hoffman, *Striking a Balance: Posturing the Future Force for COIN and Conventional Warfare*, ARMED FORCES J., July 2009, at 14, available at <http://www.armedforcesjournal.com/2009/07/4099782/>.

7. For a brief history of military tribunals short of contemporary times, see Jack Goldsmith & Cass Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002). See also Abraham D. Sofaer & Paul R. Williams, *Doing Justice During Wartime: Why Military Tribunals Make Sense*, POL’Y. REV., Feb. 1, 2002, at 131, available at <http://ssrn.com/abstract=2032915>. For superb and practically-oriented scholarship on the creation of non-military, domestic tribunals to handle those detained during time of armed conflict, see Amos Guiora, *Creating a Domestic Terror Court*, 48 WASHBURN L.J. 617 (2008).

targeting examples that follows commentary on legal and operational matters making warrant-based targeting both necessary and proper in Iraq from 2009 onward. Part III discusses specific tactics, techniques, and procedures (TTP) involved in warrant-based targeting in Iraq, now carried over to operations in Afghanistan. From a broader perspective, and in order to apply warrant-based targeting beyond Iraq and Afghanistan, Part IV's key lessons regard military cooperation with domestic law enforcement and judicial authorities. These lessons include: the necessity for proper collection and processing of forensic evidence; the inherent dilemma of military forces performing law enforcement roles; and the necessity to overcome a mindset that the military reaches "mission accomplished" status merely when it obtains the requisite warrant, collects evidence, and then carries out an arrest. Part V establishes what, in a world of ever-changing circumstances, the rule of law has come to mean and why warrant-based targeting matters to advancing the rule of law. Concluding comments in Part VI consider why this methodology is a meaningful, albeit complicated, alternative to the expediency of targeted killing.

II. HISTORICAL BASES FOR WARRANT-BASED TARGETING

From a historical perspective, written directives to law enforcement or military officers to search, arrest, and even execute pursuant to a judicial, executive, or legislative order have long existed, at least at common law.⁸ The extent to which these written directives—or warrants—have been shrouded in secrecy or concealed from public scrutiny or knowledge has often been closely circumscribed, and the act of singling out an individual or group for punishment without a trial is proscribed under the U.S. Constitution, Article I, Section 9, paragraph 3, which provides: "No Bill of Attainder or ex post facto Law will be passed."⁹

One of the most famous—or infamous—instances of intended apprehension under warrant in time of war or insurrection came at the very inception of the U.S. Civil War. In late May or early June 1861, the "target" was not a "domestic enemy," Confederate separatist, or felon on the run, but instead one of the highest legal authorities of the land. Purportedly, President Lincoln secretly ordered an arrest warrant for Roger B. Taney, Chief Justice of the U.S. Supreme Court, but then abandoned the proposal upon consideration of counsel to the contrary.¹⁰

8. See, e.g., Francis H. Bohlen & Harry Shulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 485–86 (1926–1927).

9. U.S. CONST. art. I, § 9. Regarding the potential origins of the bill of attainder proscription and implications regarding targeted killing, see Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV., 1203, 1215–21 (2011).

10. See, e.g., Charles Adams, *Lincoln's Presidential Warrant to Arrest Chief Justice Roger B. Taney: "A Great Crime" or a Fabrication?*, LEWROCKWELL.COM (Jan. 5, 2004),

Warrants for arrest or apprehension have existed with both an interstate or domestic jurisdiction, as well as with those enforced within U.S. states and territories, and international warrants as well, for example the European Arrest Warrant (EAW),¹¹ valid throughout all member states of the European Union (EU), as well as those issued by international tribunals such as the International Criminal Court (ICC).¹² These warrants for arrest or apprehension ensue where states and entities pursue a law enforcement model involving public records, procedures, and accountability systems for legal, moral, and ethical efforts to bring about justice. The competing paradigm is pursuit of justice via an armed conflict or war modality in which unprivileged belligerents, terrorists, pirates, and others violating national and international laws may be targeted with force, under the law of armed conflict (LOAC) or, if captured, brought to justice in military courts or tribunals.¹³ These searches and apprehensions are also distinguishable from the process of warrant-based, enhanced interrogation, or so-called “torture warrants,” as proposed by Alan Dershowitz,¹⁴ or as previously practiced extrajudicially by the State of Israel.¹⁵

<http://www.lewrockwell.com/orig2/adams3.html>. The account, found in the private papers of Federal Marshal Ward Hill Laman, is reported by Frederick S. Calhoun in his *THE LAWMEN: UNITED STATES MARSHALS AND THEIR DEPUTIES, 1789–1989* (1989). *Id.* But see BRIAN MCGINTY, *LINCOLN AND THE COURT 77* (2008) (noting that, in fact, Taney was never “molested” or mistreated by any member of the Federal Government).

11. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States, 2002 O.J. (L 190/2) 1 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:190:0001:0018:EN:PDF>. Once issued, the EAW requires another member state to arrest and transfer a criminal suspect or sentenced person to the issuing state so that the person can be put on trial or complete a detention period. *Id.* “Since it was first implemented in 2004 the use of the EAW has steadily risen. Member state country evaluation reports suggest that the number of EAWs issued has increased from approximately 3,000 in 2004 to 13,500 in 2008.” *European Arrest Warrant*, WIKIPEDIA, http://en.wikipedia.org/wiki/European_Arrest_Warrant, (last visited Mar. 14, 2013).

12. *Situations and Cases*, INT’L CRIM. CT., http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Mar. 3, 2013).

13. See, e.g., CLAIRE FINKELSTEIN, *Preface*, in *TARGETED KILLINGS*, *supra* note 1, at v, et seq. Professor Finkelstein aptly points out that “the two models do not exhaust the approaches that might be taken to the issue, [with some suggesting] that both models are inadequate and some third way is needed.” *Id.*

14. See, e.g., Alan Dershowitz, *The Torture Warrant: A Response To Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2003).

15. *Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity*, Part One, 15, 18–20, excerpts translated in 23 ISR. L. REV. 146 (1989) (Also known as The Landau Report, its recommendations were considered irreconcilable with international law’s absolute ban on torture, even in cases of national emergency.) [hereinafter Landau Report]. For the decision of the Israeli Supreme Court regarding the Landau Report’s findings, see HJC 5100/94 Israel v. State of Israel 7 BHRC 31 [1999]. See also Sanford H. Kadish, *Torture, the State and the Individual*, 23 ISR.

The pressures of the War on Terror (termed since 2009 Overseas Contingency Operations),¹⁶ on national security decision-makers have caused major policy shifts and legal questions of national and international importance to become less transparent. United States and foreign acts of “expedited” justice, by means of secretive targeted killings and classified operation assassinations, have grown exponentially over the past several years.¹⁷ As the University of Pennsylvania Conference on the Ethics of Secrecy and the Rule of Law conferees discussed, this increase in secrecy is not without costs: there appears to be a tradeoff between the U.S. need for effective security and the value it places on transparency, as well as a U.S. policy trend towards unilateralism rather than multilateral solutions to discrete security problems.¹⁸

What are some recent, successful warrant-based arrests, then, and where have and where will these continue to be ongoing? Notwithstanding the much suspected reluctance of Nigerian President Obasanjo to relinquish the fugitive Charles Taylor, from an international perspective active investigation and pursuit of the former Liberian leader led to a combined military-civilian multinational effort arrest in 2006.¹⁹ Long in coming, and most recently, the Special Court of Sierra Leone—jointly managed by the West African country and the United Nations—convicted Taylor on April 26, 2012.²⁰ Taylor became the first head of state to be apprehended under warrant, then indicted, tried, and convicted by an international tribunal—a validation of judicially-issued warrants being used as the basis for capture and arrest, with the process of collecting evidence before and during arrest culminating in successful conviction.²¹

L. REV. 345, 349–50 (1989); Mordechai Kremnitzer, *The Landau Commission Report: Was the Security Service Subordinated to the Law, or the Law to the “Needs” of the Security Service?*, 23 ISR. L. REV. 216, 254 (1989); Jordana S. Rubel, *A Missed Opportunity: The Ramifications of the Committee Against Torture’s Failure to Adequately Address Israel’s Ill-Treatment of Palestinian Detainees*, 20 EMORY INT’L L. REV. 699, 714 (2006).

16. Scott Wilson & Al Kamen, “*Global War On Terror*” Is Given New Name, WASH. POST, Mar. 25, 2009, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

17. See, e.g., KEVIN GOVERN, *Operation Neptune Spear: Was Killing Bin Laden a Legitimate Military Objective?*, in TARGETED KILLINGS, *supra* note 1, at 366 et seq.; see also Kevin Govern, *Expedited Justice: Gaddafi’s Death and the Rise of Targeted Killings*, JURIST (Oct. 25, 2011), <http://jurist.org/forum/2011/10/kevin-govern-gaddafi-killing.php>.

18. Conference on The Ethics of Secrecy and the Rule of Law, May 18–19, 2012, Institute for Law and Philosophy, University of Pennsylvania Law School, <https://www.law.upenn.edu/institutes/cerl/conferences/ethicsofsecrecy/>.

19. See, e.g., Craig Timberg, *Liberia’s Taylor Found and Arrested*, WASH. POST, Mar. 30, 2006, at A16. Jordanian and Nepalese soldiers, part of the United Nations Observer Mission in Liberia (UNOMIL), provided security for Taylor while en route to Freetown for the War Crimes Court. *Id.*

20. Drew Hinshaw, *Court Convicts Liberian Ex-President*, WALL ST. J., Apr. 26, 2012, at A8.

21. *Id.*

On January 1, 2009, warrant-based targeting began in Iraq under Article Twenty-Two of the Agreement Between the United States of America and Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq (or Withdrawal Agreement).²² On March 4, 2009, Sudanese President Omar al-Bashir became the subject of the first ever international arrest warrant against a sitting head of state.²³ The issuing authority, the ICC in The Hague, Netherlands, has in its existence publicly indicted twenty-eight people, proceedings against twenty-three of whom are ongoing, issued arrest warrants for twenty individuals and summonses to nine others in what it refers to as sixteen “cases” in seven situations that have been brought before the ICC.²⁴

Two years later, on June 27, 2011, the ICC issued an arrest warrant for former Libyan leader Muammar Gaddafi, his son Saif Al-Islam Gaddafi, and former Libyan intelligence chief

22. Agreement between the United States of America and Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities During Their Temporary Presence in Iraq, art. 22, Nov. 17, 2008, *available at* http://graphics8.nytimes.com/packages/pdf/world/20081119_SOFA_FINAL_AGREED_TEXT.pdf [hereinafter *Withdrawal Agreement*]. Two historical agreements were negotiated between the U.S. and Iraqi governments. The Strategic Framework Agreement for a Relationship of Friendship and Cooperation (SFA) covers our overall political, economic, and security relationship with Iraq. A Security Agreement—otherwise known as the Status of Forces Agreement (SOFA)—implements our security relationship. The Withdrawal Agreement was negotiated as a supplementary agreement to the SOFA, and is incorporated by reference within it. *Id.*; Strategic Framework Agreement for a Relationship of Friendship and Cooperation Between the United States of America and the Republic of Iraq, U.S.–Iraq, Nov. 17, 2008, TIAS 09-101.1 (entered into force Jan. 1, 2009), *available at* http://www.acq.osd.mil/log/ps/p_vault/se_sfa.pdf [hereinafter *SFA*]. For a detailed description, see Kevin Govern, *Sharing a SOFA With Iraq: Towards a Status of Forces Agreement*, JURIST (July 2, 2008), <http://jurist.law.pitt.edu/forumy/2008/07/sharing-sofa-with-iraq-towards-status.php>.

23. Press Release, Int’l Crim. Ct, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan (Mar. 4, 2009), <http://iccnow.org/?mod=newsdetail&news=3258>. NOTE: This is to be distinguished from when Charles Taylor was captured under arrest warrant while no longer the leader of Liberia, and later convicted.

24. *Situations and Cases*, *supra* note 12. In addition to the seven ongoing “situation” investigations in Sudan, Uganda, the Democratic Republic of Congo, the Central African Republic, Kenya, Libya and Côte d’Ivoire, the ICC Prosecutor’s office is reportedly analyzing a number of other situations on different continents including Afghanistan, Chad, Colombia, Georgia, Guinea, Honduras, Nigeria, the Occupied Palestinian Territories, and the Republic of Korea. See *Cases and Situations*, COALITION FOR THE INT’L CRIM. CT., <http://www.iccnw.org/?mod=casesituations> (last visited Feb. 24, 2013). Of this action, the International Bar Association (IBA) described the warrant as “a major milestone in the fight against impunity in Darfur,” and that “the decision should be seen as targeting impunity, not Africa.” *Arrest Warrant Against President al-Bashir Targets Impunity, Not Africa Says IBA*, INT’L BAR ASS’N, <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=45B89B37-9C25-48B5-A45E-8DE59D652D64> (last visited Feb. 24, 2013).

Abdualla Al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya from February 15, 2011, until at least February 28, 2011, through the State apparatus and Security Forces.²⁵

Militating against an effective ICC-host nation-coalitional collaborative effort to use warrant-based targeting/apprehension, Libyan authorities detained an ICC lawyer and staff members for three weeks, claiming they would not be released until they explained their dealings with Seif al-Islam el-Qaddafi, whom they visited in Libya.²⁶

Most recently, on July 13, 2012, Luis Moreno-Ocampo, the chief prosecutor at the ICC, issued new warrants for the arrests of two rebel leaders in the Democratic Republic of Congo (DRC), Congolese rebel leader Bosco Ntaganda, and Sylvestre Mudacumura, the supreme commander of the Rwandan rebel group known as the Democratic Forces for the Liberation of Rwanda (FDLR).²⁷ Ocampo also asked the ICC judges to add three charges of crimes against humanity and four charges of war crimes to the arrest warrant for Ntaganda—first issued in 2006—for his alleged activities in Ituri (north-eastern DRC) in 2002 and 2003, but was unsuccessful in obtaining an arrest warrant for Mudacumura on May 31, 2012.²⁸

National or regionally-oriented, warrant-based targeting may rely on a variety of bases for jurisdiction to issue warrants and to try individuals for crimes, as will be explained below. The ICC's inherent limitations include the fact that its jurisdiction extends to war crimes, crimes against humanity, and genocide

25. Press Release, Int'l Crim. Ct., Pre-Trial Chamber I Issues Three Warrants of Arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdualla Al-Senussi (June 27, 2011), <http://iccnow.org/?mod=newsdetail&news=4640>. For commentary regarding the need to avoid impunity and in dealing with Libyan crimes against humanity, see Kevin Govern, *Avoiding Amnesty: Bringing Gaddafi to Justice*, JURIST (Aug. 25, 2011), <http://jurist.org/forum/2011/08/kevin-govern-gaddafi-icc.php>. For the consequences of failing to bring Libyan leaders to justice before the courts, see Govern, *supra* note 17.

26. Marlise Simons, *Libya Refuses To Release Hague Court Workers*, N.Y. TIMES, June 14, 2012, at A6. See also *Australian ICC Lawyer Held in Libya Says She Acted Consistent With Legal Obligations*, ASSOCIATED PRESS (July 6, 2012), <http://news.yahoo.com/australian-icc-lawyer-held-libya-says-she-acted-114624030.html> ("Speaking publicly for the first time since her release Monday [July 2, 2012], Australian lawyer Melinda Taylor denied any wrongdoing in Libya, where authorities accused her of endangering national security while meeting with her client, Seif al-Islam.")

27. RTT Staff Writer, *ICC Prosecutor Seeks Warrants For Arrest of Two Congolese Rebel Leaders*, RTT NEWS (May 15, 2012), <http://www.rttnews.com/1886258/icc-prosecutor-seeks-warrants-for-arrest-of-two-congolese-rebel-leaders.aspx>; see *ICC issues warrants for DR Congo warlords*, ALJAZEERA (July 14, 2012), <http://www.aljazeera.com/news/africa/2012/07/2012713225249467318.html>.

28. *Congo-Kinshasa: Kigali, Between Ntaganda and the ICC*, ALLAFRICA (June 7, 2012), <http://allafrica.com/stories/201206071269.html>.

committed after July 1, 2002, only if at least one of the following threshold conditions is met:

- The crimes occurred in the territory of a state that is a party to the Rome Statute (the treaty that established the ICC);
- The person accused of the crimes is a citizen of a country that is a party to the Rome Statute;
- A state that is not a party to the Rome Statute accepts the ICC's jurisdiction for the crime in question by making a declaration and lodging it with the ICC registrar; or
- The UN Security Council refers the situation to the ICC prosecutor.²⁹

Former and present leader-criminals are being targeted for apprehension and processing within a system of justice, becoming subjects of potential warrant-based targeting rather than the subjects of personality-based targeted killing. The successful carrying out of warrant-based targeting requires not only force necessary to subdue or to bring into custody the subject, but also perhaps even more importantly the deliberate efforts of applied, nonviolent law enforcement skills. These skills include the use of forensics prior to and during the apprehension; that is, the collection, preservation and analysis of evidence such as “chemistry (for the identification of explosives), engineering (for examination of structural design) or biology (for DNA identification or matching).”³⁰ In the event that warrant-based targeting is interagency in nature and scope,³¹ then both military and paramilitary forces must be mindful of collecting and preserving evidence, providing technical support to those who further investigate and prosecute the individuals involved, and for that matter training others to successfully collect, preserve, safeguard, and forward the required evidence.³²

Despite past military operations in which war crimes or other offenses were investigated after the fact,³³ the practical challenge of applying warrant-based targeting oriented “forensics” on the battlefield, especially with regards to building a case for prosecution, comes with the developing experience of military members outside of the military police and criminal investigative branches with regards to securing evidence.³⁴ This simple but difficult reality was relearned in

29. *Darfur: International Criminal Court's Decision on Bashir Arrest Warrant*, HUMAN RIGHTS WATCH (Feb. 3, 2010), <http://www.hrw.org/news/2009/03/04/q-international-criminal-court-s-decision-al-bashir-s-arrest-warrant>.

30. Arindam Datta, *Forensic Evidence: The Legal Scenario*, LEGAL SERVICE INDIA (Jan. 26, 2008), <http://www.legalserviceindia.com/article/1153-Forensic-Evidence.html>.

31. DICTIONARY OF MILITARY AND ASSOCIATED TERMS, *supra* note 2, at 165.

32. *See id.*

33. *See, e.g.*, Guiora, *supra* note 7, at 630 (regarding World War I and II detentions and tribunals).

34. Victor R. Morris, Professional Forum, *Battlefield Forensics: Dynamic Adaptation of the Company-Level Task Force*, INFANTRY 6, 6 (Nov.–Dec. 2010), *available at*

particular during Operation Iraqi Freedom, where the “esoteric history” of this scientific methodology met the reality of the streets of Baghdad, as soldiers moved “through villages, clearing homes in an attempt to glean the ‘who, what, where, why, and how’ from a group of people with whom we have little in common, we are being asked to recognize and secure what is essentially evidence—evidence that will be used to prosecute.”³⁵

III. TACTICS, TECHNIQUES, AND PROCEDURES: IRAQI FREEDOM OPERATIONS AS A MODEL

The national security expert Robert Chesney noted that the U.S. government, as compelled by strategic necessity, has directed its military to quietly adapt its procedures at the point of capture, and organizational structures in the field, in order to maximize the prospects for host-nation prosecutions—all contrary to conventional wisdom about the incompatibility of such efforts with the military’s mission, or short versus long term rule of law efforts and goals.³⁶ Chesney subsequently discerned this LOAC-driven military detention model in Iraq post-2003 as a paradigm shift that was progressively and “inevitably brought on by the combination of the host state’s increasing independence and capacity and contemporaneous decreases in the degree of commitment by the United States (i.e., the increasing U.S. desire to get out, and to facilitate this by transferring responsibility for detention to the host state).”³⁷ In the instance of Afghanistan,

<http://www.docstoc.com/docs/72579275/BATTLEFIELD-FORENSICS-Dynamic-Adaptation-of-the-Company-Level-Task-Force>.

35. Pamela M. Collins, *Forensics: From Its Esoteric History to the Streets of Baghdad*, MIL. POLICE, 10, 10 (Spring 2009), available at <http://www.wood.army.mil/mpbulletin/pdfs/Spring%2009/Collins.pdf>.

36. Chesney, *Iraq and the Military Detention Debate*, *supra* note 4, at 549; see also COLONEL ARTHUR D. SIMONS CENTER FOR THE STUDY OF INTERAGENCY COOPERATION, INTERAGENCY HANDBOOK FOR TRANSITIONS 11–13 (2011), available at <http://www.usip.org/files/resources/TransitionHandbook.pdf>.

A significant difference exists between policing requirements [of a military force] in the [short-term] aftermath of intervention and policing requirements over the long-term. Stability policing places a high priority on preventing violent crime with less regard for prosecution under the rule of law. Community-based [long-term] policing places a much higher priority on embedding the police force within the community, professionalizing the force, and adhering strictly to the rule of law.

A. Edward Major, *Law and Ethics in Command Decision Making*, MILITARY REV., May–June 2012, at 62.

37. Robert Chesney, *Moving to Warrant-Based Targeting and the Law Enforcement Model in Afghanistan?*, LAWFARE (Mar. 20, 2012, 10:22 AM),

Chesney, among others, finds room for skepticism whether “Afghanistan has at last embraced, however quietly, the propriety of using non-criminal detention for insurgents” and whether the “Karzai administration is going to begin releasing detainees from the facility for purely political purposes in the run-up to the next round of elections (scheduled in 2014).”³⁸

This paradigm shift is part of what are called effects-based operations (EBO): the planning and conduct of operations combining military and non-military methods to achieve a particular effect.³⁹ EBO in continual strategic, operational, and tactical planning bring the focus on defeating the enemy, or gaining specific objectives. Warrant-based targeting logically fits into a multifaceted EBO approach of declared objectives and goals, achieved as follows: “planning staffs build a picture of adversary strengths, weaknesses, dispositions and intentions; commanders, with their assigned forces’ own strengths, weaknesses, and dispositions craft their carefully sequenced response—their

<http://www.lawfareblog.com/2012/03/moving-to-warrant-based-targeting-and-the-law-enforcement-model-in-afghanistan/>.

38. Robert Chesney, *Detention in Afghanistan: How Much Control Does the US Still Have?*, LAWFARE (June 7, 2012, 11:54 AM), <http://www.lawfareblog.com/2012/06/detention-in-afghanistan-how-much-control-does-the-us-still-have/>. Regarding motivators for Afghanistan to reduce corruption and establishment of the rule of law, see Jane Perlez, *\$16 Billion in Civilian Aid Pledged To Afghanistan, With Conditions*, N.Y. TIMES, July 8, 2012, at A4 (“An international donor’s conference [today] pledged [under the Tokyo Framework of Mutual Accountability] \$16 billion for the economic development of Afghanistan in the next four years, but for the first time made it a condition that the Afghan government reduce corruption before receiving all of the money.”).

39. See generally James N. Mattis, *USJFCOM Commander’s Guidance for Effects-based Operations*, PARAMETERS, Autumn 2008, at 18–25, available at <http://www.carlisle.army.mil/USAWC/parameters/Articles/08autumn/mattis.pdf>. As the Combatant Commander of Joint Forces Command responsible for the joint (multiservice) doctrine of all the U.S. Department of Defense, General Mattis noted that:

Joint Publication (JP) 3–0, *Joint Operations*, and JP 5–0, *Joint Operation Planning*, provide the current official perspective of the US military’s use of effects and related concepts in joint operations. These publications contain very little of the original deterministic EBO concept, though they do have some room for improvement in better clarifying existing effects-related terminology and explanations. Additionally, the US Army distanced itself from EBO by concluding in 2007 that the concept has no place in Army doctrine. This position was reinforced by the recent release of Field Manual 3–0, *Operations* (February 2008), which rejects the more mechanistic aspects of EBO but recognizes the value of operational variables, such as the political, military, economic, social, information, infrastructure, physical, and time characteristics of the operating environment.

counter intentions—and an attrition contest commences.”⁴⁰ As a “reality check” on EBO, and tellingly concerning some of the very same challenges faced by military and civilian forces in warrant-based targeting, the U.S. Army, U.S. Marine Corps, and other observers have also concluded, perhaps erroneously, that EBO:

- Assumes a level of unachievable predictability,⁴¹ that is to say, ambition exceeds capability;
- cannot correctly anticipate reactions of complex systems (for example, leadership, societies, political systems, and so forth),⁴² putting EBO in the “too tough to handle box” even for well-trained forces and interagency efforts;
- calls for an unattainable level of knowledge of the enemy,⁴³ pointing out intelligence collection, analysis, and dissemination shortcomings;
- is too prescriptive and over-engineered,⁴⁴ implying that innovation and improvement are stymied by a regimented and routinized system;
- discounts the human dimensions of war (for example, passion, imagination, willpower, and unpredictability),⁴⁵ overlooking the dynamic of interagency skill-sets and capabilities;
- promotes centralization and leads to micromanagement from headquarters,⁴⁶ potentially overestimating the priority of such operations over others, or importance to commanders and leaders in war-fighting and stability operations and support operations;⁴⁷

40. Guy Duczynski, paper, Effects-Based Operations: A Guide for Practitioners, presented at 9th ICCRTS: Coalition Transformation: An Evolution of People, Processes, and Technology to Enhance Interoperability (Copenhagen, Sept. 14-16 2004), available at http://www.dodccrp.org/events/9th_ICCRTS/CD/papers/171.pdf.

41. Mattis, *supra* note 39, at 20 (citing U.S. Army Doctrine Update #1, Combined Arms Doctrine Directorate, U.S. Army Combined Arms Center (Fort Leavenworth, Kan.: Feb. 24, 2007); Effects Based Operations Conference, U.S. Marine Corps (Quantico, Va.: Sep. 7, 2005), slides 6–9).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. See Mattis, *supra* note 39, at 20.

47. See, e.g., U.S. ARMY, FIELD MANUAL 3-07, STABILITY OPERATIONS (2008), available at www.fas.org/irp/doddir/army/fm3-07.pdf (“[Stability operations encompass] various military missions, tasks, and activities conducted outside the United States in coordination with other instruments of national power to maintain or reestablish a safe and secure environment, provide essential governmental services, emergency infrastructure reconstruction, and humanitarian relief.”); see also *id.*, at vi.

- is staff, not command, led,⁴⁸ drawing perhaps an erroneous assumption that interagency operations somehow will lack command and control present in military operations;
- fails to deliver clear and timely direction to subordinates,⁴⁹ anticipating a worst-case scenario, regardless of reality, and;
- uses confusing terminology and is difficult to understand,⁵⁰ underestimating the intellectual capacity and agility of military members and civilians or ability to adapt military and civilian law enforcement doctrine to this sort of operation, and to comprehend the need for, plan, execute, and evaluate such operations,⁵¹

In Iraq, the U.S. Department of State had the lead on coordinating non-lethal issues such as health, public diplomacy, governance, economics, and rule of law, working closely with the interagency Provincial Reconstruction Teams (PRTs) in Iraq and their military partner Brigade Combat Teams under “Unified Common Plans,” based on “Joint Common Plans,” between the Ambassador and the Multinational Force-Iraq (MNF-I) Commander.⁵² Pertinent to Rule of Law Goals in Iraq from 2008 onward, and the realities of a changing operational environment and the desirability for increasing coordination and cooperation with Iraqi authorities, the “Joint Common Plan” directed these EBO-compatible goals: “[t]he public and private obligations of any person [must be] known or readily

48. Compare Mattis, *supra* note 39, at 20 with e.g., Joshua J. Potter, AMERICAN ADVISORS – SECURITY FORCE ASSISTANCE MODEL IN THE LONG WAR, at 17, 30, 48 (2011), available at <http://www.cgsc.edu/carl/download/csipubs/AmericanAdvisors.pdf>.

49. Mattis, *supra* note 39, at 20.

50. *Id.*

51. This list was originally prepared for the U.S. Department of Defense in J. N. Mattis, General, U.S. Marine Corps, Memorandum for U.S. Joint Forces Command, Subject: Assessment of Effects Based Operations (Aug. 14, 2008). Each bulleted entry appears here as written by General Mattis, with commentary by the author.

52. Michael F. Scotto & Jason S. Alexander, *The Role of PRTs on the Battlefield 2009*, SMALL WARS J. (Apr. 16, 2009), smallwarsjournal.com/mag/docs-temp/223-scotto.pdf. NOTE: PRTs, or Provincial Reconstruction Teams have been units introduced by the U.S. government consisting of military officers, diplomats, and reconstruction subject matter experts, to support reconstruction efforts in unstable states. The first PRTs were established in 2002 in Afghanistan, then came PRTs in Iraq. See, e.g., Robert Bebbler, *The Role of Provincial Reconstruction Teams (PRTs) in Counterinsurgency Operations: Khost Province, Afghanistan*, SMALL WARS J. (Nov. 10, 2008), smallwarsjournal.com/mag/docs-temp/131-bebber.pdf. For an update on the role of PRTs in Afghanistan, see *Provincial Reconstruction Teams*, USAID/Afghanistan (last updated Feb. 21, 2013), http://afghanistan.usaid.gov/en/partnerships/partners_provincial_reconstruction_teams.

determinable [and,] disputes regarding these obligations are resolved effectively and impartially, and only by the state or by a method sanctioned by the state.”⁵³

For those reasons and under those limitations, U.S. forces supporting the Iraqi criminal justice system, and using that system to deal with those coming into military custody, would need to ensure the following safeguards were present before relinquishing individuals over to the Iraqi criminal justice system:

- The state complies with the law and its procedures;
- Persons are secure in their person and property, are free from illegal harm or threatened harm, and violations of this security will be vindicated by the state;
- The state protects basic human rights; and
- All persons rely on the existence of legal institutions and the content of laws and regulations to conduct their daily lives and resolve disputes voluntarily.⁵⁴

For coalition forces, the necessity of conducting warrant-based targeting came when the Security Agreement (SOFA) and the concurrent Withdrawal Agreement were implemented on January 1, 2009,⁵⁵ notwithstanding earlier searches and arrests pursuant to Iraqi warrant in 2008.⁵⁶ The Withdrawal Agreement, Article 4, allowed U.S. Forces to assist the Government of Iraq (GOI) to combat Al Qaeda, terrorists, and outlaw groups; Article 22 required that all detainees captured be turned over to Iraqi authorities within 24 hours.⁵⁷ That short suspension for turning captured persons over to the GOI meant that collecting evidence for the GOI’s prosecution was more important than ever, and the likelihood of being able to stretch out pre-hearing incarceration or detention to collect more evidence was essentially impossible. For that matter, Article 22 also required that all detainees in U.S. custody be turned over to the GOI, so coalition forces were forced to review any evidence on detainees and relinquish that evidence, if any, to the GOI.⁵⁸

53. William Obring, Law in the Deployed Environment: Roles and Responsibilities of an Operational Law Attorney, slides from a presentation at Widener University School of Law, slide 30 (Apr 16, 2009), available at <http://www.slideshare.net/widenerlaw/will-obringer-office-of-judge-advocate-us-army-speaks-at-widener-law>.

54. *Id.* For a critique of warrant-based targeting techniques in particular, and the overall conduct of Operations Enduring Freedom and Iraqi Freedom, in general, see David G. Bolgiano & James M. Patterson, FIGHTING TODAY’S WARS: HOW AMERICA’S LEADERS HAVE FAILED OUR WARRIORS 29, 98 (2012).

55. Withdrawal Agreement, *supra* note 22.

56. Chesney, *Iraq and the Military Detention Debate*, *supra* note 4, at 555.

57. *Id.*

58. Withdrawal Agreement, *supra* note 22. Article Twenty-Two: Detention, provides the following:

1. No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the

Rather than having overlapping or concurrent jurisdiction between the GOI and coalition forces, Article Twenty-Four of the Withdrawal Agreement required that coalition forces withdraw from cities by mid-2009 and that there be a total withdrawal by the end of 2011.⁵⁹ Coalition forces engaged in missions capturing detainees needed to begin their operations with these ends in mind, and coordinate efforts. By many accounts, this was not successfully accomplished between 2008 and 2011.⁶⁰

United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4.

2. In the event the United States Forces detain or arrest persons as authorized by this Agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest.

3. The Iraqi authorities may request assistance from the United States Forces in detaining or arresting wanted individuals.

4. Upon entry into force of this Agreement, the United States Forces shall provide to the Government of Iraq available information on all detainees who are being held by them. Competent Iraqi authorities shall issue arrest warrants for persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this Agreement.

5. The United States Forces may not search houses or other real estate properties except by order of an Iraqi judicial warrant and in full coordination with the Government of Iraq, except in the case of actual combat operations conducted pursuant to Article 4.

Withdrawal Agreement, *supra* note 22, art. 22.

59. *Id.* Note: Section XI of the SOFA provided that it would remain in effect unless either party provided written notice to the other of its intent to terminate this agreement. In effect, the Withdrawal agreement acted as a concurrent notice of termination, inasmuch as the rights and obligations under the Article 30 of the Agreement noted that “[t]his Agreement shall be effective for a period of three years, unless terminated sooner by either Party pursuant to paragraph 3 of this Article.” *Id.* On October 15, 2011, absent the capacity or willingness of the GOI to renegotiate the SOFA and Withdrawal agreement before their expiration, the Obama Administration committed to withdraw American forces from Iraq because of concerns over troop and contractor immunity from Iraqi courts post SOFA and Withdrawal agreement expiration, despite American commanders’ concerns about the rise of Sadrist elements in the ensuing withdrawal period and the general state of Iraq’s readiness for transfer of power. Anne Gearan & Erica Werner, *U.S. Drops Plan to Keep Troops in Iraq*, USA TODAY (Oct. 15, 2011), <http://www.usatoday.com/news/military/story/2011-10-15/Iraq-withdrawal-war-troops/50786604/1>.

60. *See, e.g.*, Gearan & Werner, *supra* note 59.

The failure to create a unity of effort amongst differing military commands severely degraded the effectiveness of rule of law operations, visible in the warrant based targeting process, and in unsuccessful training efforts.⁶¹ Geoff Guska, a judge advocate serving in Iraq between 2008 and 2010 in various capacities regarding rule of law operations and specifically warrant-based targeting, observed that:

Successful execution of warrant-based operations requires significant coordination with both the U.S. and host nation organizations. Unfortunately, much of the coordination needed to build successful warrants was not seen within the province. Efforts to obtain warrants were stove-piped within a particular staff section, which invariably failed to capture information, know-how, and host nation contacts possessed by other Rule of Law practitioners, that was required to work within the Iraqi criminal justice process. This fundamental misunderstanding of the criminal justice process coupled with the lack of contacts within the system led to many abortive efforts to obtain warrants.⁶²

This trial and error process continued with good intentions but poor execution from 2008 onward and continued to evolve through ad hoc efforts, and then increasingly deliberate, coalitional efforts in Iraq—always involving a substantial aspirational aspect. Cooperation with civilian government agencies and even foreign military and paramilitary forces required a minimization of secrecy or compartmentalization. Information regarding the targeted individual had to be properly declassified, and then passed to judge advocates involved with warrant-based targeting, to consolidate the declassified information with witness statements and other evidence in order to build a criminal complaint; then the complaint could be filed in the appropriate courthouse or police station, thereby “injecting the case in to the host nation criminal justice system” for eventual issuance of warrant upon which U.S./coalitional and Iraqi forces could act to detain.⁶³ But Iraq then—as now—had far to go in improving the transparency and effectiveness of its judicial system,⁶⁴ and to obtain and employ technological

61. Geoff Guska, *The Rule of Law at Dawn: A Judge Advocate's Perspective on Rule of Law Operations in Operation Iraqi Freedom from 2008 to 2010*, SMALL WARS J. (Feb. 10, 2011), at 6, <http://smallwarsjournal.com/blog/journal/docs-temp/674-guska.pdf>.

62. *Id.* at 5 n.24.

63. *Id.* at 5 n.26 (“Proper declassification occurred through the authorized Foreign Disclosure Officer, which was coordinated through intelligence channels.”).

64. See, e.g., Michael Connarty, *Michael's Questions Put Spotlight on the Continuing Misery in Iraq*, CONNARTYMP.COM, <http://www.mconnartymp.com/human-rights-in-iraq-shocking-revelations.html> (last visited February 25, 2013); see also U.S. DEP'T OF DEF., MEASURING STABILITY AND SECURITY IN IRAQ: REPORT TO CONGRESS IN ACCORDANCE WITH THE DEPARTMENT OF DEFENSE SUPPLEMENTAL APPROPRIATIONS ACT 2008 3 (SECTION 9204,

innovations readily available to U.S./coalition forces but otherwise heretofore unavailable and unknown to Iraq.⁶⁵

Under the SOFA, as MNF-I coalitional forces began to cooperate more fully with GOI military, law enforcement, and judicial authorities as the supported clients, rather than lesser partners or even the insignificant or non-existent entities, criminals, terrorists, insurgents and others posing a threat to the GOI, its people or MNF-I forces were sometimes identified in advance of their capture.⁶⁶ Requesting a warrant for arrest and capture was only one aspect of the targeting plans; also included would be deliberate planning and execution of an evidence collection plan, culminating in a warrant packet being assembled, translated, and forwarded for action to a judge with jurisdiction over the case, then awaiting warrant issuance before capture or detention and further contributions to prosecutors' evidence.⁶⁷

PUBLIC LAW 110-252 (Jan. 9, 2009), available at http://www.defense.gov/pubs/pdfs/9010_Report_to_Congress_Dec_08.pdf ("In addition to a large number set free on bail, parole, or facing warrants, the total number of Iraqis granted amnesty includes over 23,000" [as of Feb. 26, 2008, when the Iraqi Presidency Council approved the Amnesty Law for Iraqis accused or convicted of certain crimes]).

65. Note: One such technology is electronic surveillance capabilities. See, e.g., Stuart Fox, *U.S. to Give Advanced Wiretap Tech to Iraqi Police*, INNOVATIONNEWSDAILY.COM, (July 22, 2012, 10:24 AM), <http://www.innovationnewsdaily.com/449-iraqi-police-wire-tapping.html>. This was acquired on behalf of the GOI as part of a competitively bid "Lawful Intercept" system. See Procurement listing, *Solicitation Number: W91GY0-11-R-0016-Lawful Intercept*, FEDBIZOPPS.GOV, https://www.fbo.gov/index?s=opportunity&mode=form&id=5cd11c03db7b6f8130f4951eab1f33a3&tab=core&_cview=1 (last modified July 22, 2011, 3:40 AM).

66. See Obringer, *supra* note 53, slides 39–40.

67. See Steve D. Berlin, *Conviction-Focused Targeting: Targeting Violent Extremists While Developing Rule of Law Capacity*, SMALL WARS J. (Aug. 24, 2010), smallwarsjournal.com/blog/journal/docs-temp/505-Berlin.pdf. See generally Obringer, *supra* note 53.

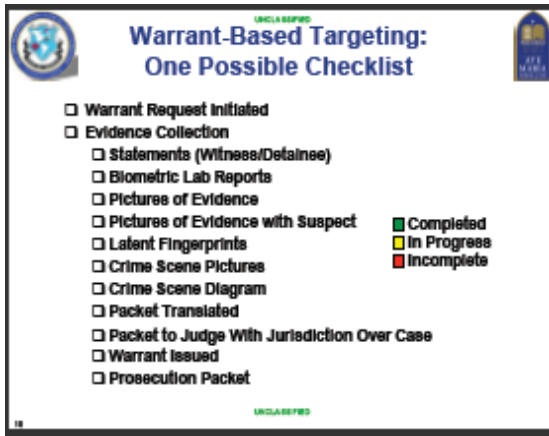


Figure 1 – Warrant-Based Targeting Checklist⁶⁸

The Task Quotient (TQ) assessment of evidence to target value was a modality by which MNF-I helped create a consistent, reliable, and repeatable decision-making process by identifying the best combination of evidence obtained to “target value” or relative significance to unit echelons or the GOI of the individual having a warrant issued and executed for their capture, arrest, and relinquishment to the GOI for judicial proceedings.⁶⁹ Depicted below is one such unclassified, notional TQ assessment:

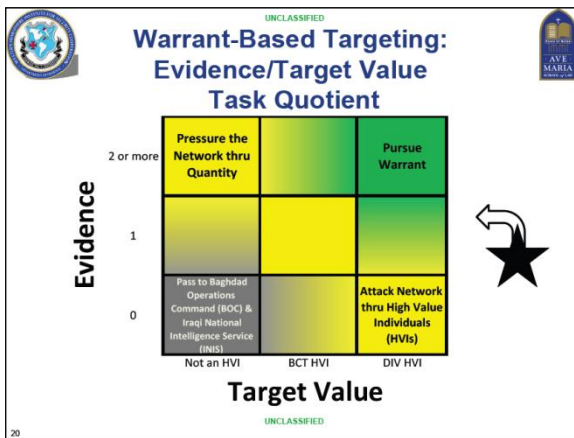


Figure 2 – Task Quotient (TQ) Assessment Chart⁷⁰

68. Kevin Govern, *Warrant-Based Targeting: Roles and Responsibilities Under Law and Policy*, WESTERN HEMISPHERE INSTITUTE FOR SECURITY COOPERATION (WHINSEC), July 3, 2012, at 19 (available upon request from author) (citing Obringer, *supra* note 53).

69. *Id.*

70. *Id.* at 20.

Along with the TQ assessment of evidence to target value, commanders and teams carrying out warrant-based targeting also found it useful to have so-called “quad charts”—literally with four quadrants conveying the same consistent categories of information—for individuals against whom a warrant-based targeting would be carried out.⁷¹ Depicted below is one such unclassified, notional “quad chart” including: a picture of the person of interest, their religious and operational affiliations in the upper right hand quadrant; the offenses or incidents making them persons of interest in the upper right hand quadrant including their aliases; the mission status of the warrant-based targeting checklist in the lower left quadrant; and finally, specific and additional comments on evidence to be collected on the person of interest as well as other pertinent information:⁷²

UNCLASSIFIED

UA 0807: Kevin Abu Yahya

Shia
 Sunni

Offense(s) / Incident(s)

Fill this block with 5 Ws:
Who: Abu Yahya
What: Instructor
Where: Aug 11 to Present
Where: WHINSEC, FBGA, Naples, FL
Why:

Evidence

-Physical Evidence: BATS/HIDE
-Statement: witness statements from Abu Aiyasa' and Abu Musa
-SIGINT: NIA
-Other: al-Qaeda in Iraq (AQI), Baghdad Kalanib Hezbollah (KHL), Assaf AH al-Haq (AAH), Biometric Automated Tool Set (BAT), Handheld Interagency Identity Detection Equipment (HIDE)

Target Value

Completed
In Progress
Incomplete

UNCLASSIFIED

Figure 3 – Notional Warrant-Based Targeting “Quad Chart”⁷³

By 2008, MNF-I developed unit policies that all detentions would require a warrant from GOI judicial authorities,⁷⁴ and thus a deliberative, multifaceted and multi-step advance effort prior to arrest or detention. The exception lay where MNF-I forces witnessed a crime involving an attack against Coalition Forces (CF) or Iraqi Security Forces (ISF), and it was reasonably certain that the act constituted a criminal act, or where MNF-I forces were acting in self-defense.⁷⁵ MNF-I would also direct its units to “mentor” GOI partner units on conducting

71. *Id.*

72. *Id.* at 34. To aid readers, this “quad chart” includes in one of its quadrants acronym definitions that would ordinarily not be necessary for “quad chart” users because of their familiarity with such terms of art.

73. Govern, *supra* note 68, at 34. Any similarity of “Kevin Abu Yahya” to the author is purely intentional, but merely illustrative, and not indicative of actually having been the subject of past or present warrant-based targeting. *See also* Obringer, *supra* note 53, slide 38.

74. Obringer, *supra* note 53, slide 34.

75. *Id.*

warrant based detentions, and to “support Iraqi law in all matters.”⁷⁶ Consistent with the aforementioned Article 22 requirements, MNF-I forces would, within 24 hours, turn over any detainees to “competent Iraqi authority,” with the 24-hour period starting at the time of detention, and completely avoid U.S. interrogations once detainees were relinquished and within GOI or ISF facilities.⁷⁷ By this methodology, MNF-I operated in partnership with the GOI rather than as a “law unto themselves,” abiding by the extant security agreements, and promoting the sovereignty and independence of the GOI judiciary and ISF.

This practice was a practical and significant effort to advance (if not fully accomplish or reestablish) the elusive rule of law in Iraq, or to promote Iraq’s rule of law aspirations as a *Rechtsstaat*—as it is sometimes called in the Western legal tradition.⁷⁸ The view attributed to von Gneist is that a “free legal profession would be the Archimedean lever for accomplishing the liberal project of personal rights and the rule of law.”⁷⁹ Mauro Zamboni found that even the “most ‘extreme’ legal cultures . . . namely those of the Nazis and Communists, have occasionally proclaimed their adherence to an idea of State based on the principles of *Rechtsstaat* . . . stat[ing] that their forms of government and their uses of the laws were in order to realise a ‘true’ *Rechtsstaat*.”⁸⁰

In the context of (then) ongoing operations in Iraq and Afghanistan, the U.S. Department of State (DoS) attempted to define for Congress what notions of rule of law the United States encourages and promotes, noting:

While there is no commonly agreed upon definition for the rule of law, we take it to mean a broad spectrum of activities including a constitution, legislation, a court system and courthouses, a judiciary, police, lawyers and legal assistance, due process procedures, prisons, a commercial code, and anticorruption activities. To successfully implement an emerging rule of law, these activities must proceed somewhat sequentially and not randomly.⁸¹

76. *Id.*

77. *Id.*

78. See generally RUDOLF VON GNEIST, *DER RECHTSSTAAT* (1872). The first to popularize this term, in the middle of the nineteenth century, apparently were Robert von Mohl and Rudolph Gneist. The German term *Rechtsstaat*, often translated “the rule of law,” comes from the root words *Recht* (law) and *Staat* (state). See also David Abraham, *From General Estate to Special Interest: German Lawyers 1878–1933*, 105 AM. HIST. REV. 4, 1411–12 (2000) (reviewing a book with the same name by Kenneth F. Ledford); Alexander N. Domrin, *Issues and Options in the Soviet Transition to the Rule of Law*, COEXISTENCE: REV. E.-W. & DEV. ISSUES, Mar. 1993, at 57–68.

79. RUDOLF VON GNEIST, *FREIE ADVOCATUR: DIE ERSTE FORDERUNG ALLER JUSTIZREFORM IN PREUBEN* 49 (1867) (author’s translation).

80. Mauro Zamboni, “*Rechtsstaat*”: *What Is It That Swedish Development Assistance Organisations “Export”?*, 2 NON-STATE ACTORS & INT’L L. 89, 91 (2002).

81. *Testimony on Iraq: Perceptions, Realities and the Cost to Complete: Hearing Before the House Subcommittee on National Security, Emerging Threats, and International*

Of a similarly contemporary timeframe, the departing U.N. Secretary-General Kofi Annan said that “the only way to achieve the key principles of international relations—collective responsibility, global solidarity, the rule of law, mutual accountability and multilateralism—is by ‘making the best possible use’ of the United Nations.”⁸² Another lesson Annan added is that “security and development ultimately depend on respect for human rights and the rule of law.”⁸³

IV. LESSONS RELEARNED ON CIVILIAN-MILITARY COOPERATION AND WARRANT-BASED TARGETING

In post-2003 Iraq, the United States established a guiding principle of working by, with, and through the domestic security forces, once the forces were vetted, trained, and operational, such that it would consistently work within the domestic rule of law and international law as well when dealing with insurgents and criminals who threaten their forces.⁸⁴ This “re-legitimization” of Iraqi governmental entity forces, and the negotiated security agreement legal prescriptions, required coalition and U.S. forces to shift their operational and legal focus away from “kinetic” (use of force) targeting, and “close-hold,” classified operations with “witting” participation only by allied/coalitional forces.⁸⁵ The shift from 2009 onward was towards a “smart” power employing “soft” power tools including diplomacy, economic assistance and communications to supplement or augment traditional “hard” power capabilities of the military to defend and advance U.S. interests in Iraq and around the world.⁸⁶ From a political perspective, warrant-based targeting is a natural fit for so-called “smart power” projection in which nations develop integrated strategies (civil-military), resource bases (economic, political, and military), and tool kits (military and diplomatic capabilities) to achieve national objectives.⁸⁷

Relations of the House Committee on Government Reform, 109th Cong. 2 (Oct. 18, 2005) (testimony of Howard J. Krongard, Inspector General, U.S. Dep’t of State and Broadcasting Board of Governors), available at <http://oig.state.gov/documents/organization/55371.pdf>.

82. Kofi A. Annan, U.N. Secretary-General, Address at the Truman Presidential Museum and Library (Dec. 11, 2006), available at <http://www.un.org/apps/sg/sgstats.asp?nid=2357>).

83. *Id.*

84. See, e.g., W. ANDREW TERRILL, LESSONS OF THE IRAQI DE-BA’ATHIFICATION PROGRAM FOR IRAQ’S FUTURE AND THE ARAB REVOLUTIONS (2012) available at www.strategicstudiesinstitute.army.mil/pubs/download.cfm?q=1106.

85. David Crane, “Smart Power” and the Rule of Law, JURIST (Jan. 20, 2009), <http://jurist.org/forum/2009/01/smart-power-and-rule-of-law.php>.

86. *Id.*

87. RICHARD L. ARMITAGE & JOSEPH NYE JR., *How America Can Become a Smarter Power*, Introduction to CSIS COMMISSION ON SMART POWER: A SMARTER, MORE SECURE AMERICA 5, 7 (2007), available at http://csis.org/files/media/csis/pubs/071106_csissmartpowerreport.pdf.

The following U.S. warrant-based targeting observations and lessons relearned may well have analogous applicability in other settings, nations, and regions involving combined and interagency warrant-based targeting:⁸⁸

- Judges are the law within the domestic court system; commanders must build relationships and trust with the judges.⁸⁹
- Commanders must also help educate judges on internationally accepted techniques used in building a case for prosecution, with a special focus on forensic evidence.⁹⁰
- Commanders and their legal advisors (staff judge advocates) must actively seek the help of Iraqi local officials; it is essential that they learn how local systems operate because every province and district is unique.⁹¹
- Soldiers and leaders must be trained in applicable local and international laws and procedures, especially but exclusively those related to the proper collection and processing of evidence, crime scene documentation, and identification and handling of witness statements.⁹²
- Leaders must understand the local warrant system, such that the first step in the court system should be to collect and present sufficient evidence or documentation to obtain a warrant issued by a judge.⁹³
- Towards the end of a successful arrest or apprehension, commanders and leaders that task-organize assets for evidence- or warrant-based targeting will be most successful, with particular utility proved where time and resources permit to creating and maintaining a dedicated, trained “prosecution task force.”⁹⁴
- Rather than “reinventing the wheel,” those involved in warrant-based targeting should seek advice and practical lessons learned from subject matter experts, who are people who have done these operations in the institutional base and forces operating in theater. There is no substitute for experience, but knowledge of someone else’s successes or failures can help avoid unwanted and unnecessary expense, effort, and casualties.⁹⁵

88. *Id.* at 4–6.

89. Chesney, *Iraq and the Military Detention Debate*, *supra* note 4, at 608.

90. *Id.* at 618–20.

91. *Id.* at 576, 619.

92. *Id.* at 606.

93. *Id.* at 606–07.

94. Chesney, *Iraq and the Military Detention Debate*, *supra* note 4, at 607–10.

95. Govern, *supra* note 68.

The U.S. Army's Center for Law and Military Operations (CLAMO) produced a treatise concerning how warrant-based targeting first worked in Iraq.⁹⁶ Collecting after-action reports and assessments from those experienced with these operations, CLAMO noted that:

[Under] Coalition Provisional Authority, Memorandum Number 3 (Revised), subject: Criminal Procedures (27 Jun. 2004) . . . the multinational forces (MNF) had the right to apprehend persons suspected of committing criminal acts, but were not considered security internees. These individuals had to be handed over to the Iraqi authorities as soon as reasonably practicable. The MNF could retain criminal detainees in their facilities at the request of appropriate Iraqi authorities based on security or capacity considerations. If the MNF held the criminal detainee, the following procedures were to apply.

(a) Upon the initial induction into the detention centre a criminal detainee shall be apprised of his rights to remain silent and to consult an attorney by the authority serving an arrest warrant.

(b) A criminal detainee suspected of a felony offence may consult an attorney 72 hours after induction into the detention centre.⁹⁷

From approximately October 2008 onward, U.S. and coalition forces worked through "combined security meetings, working with [national police counterparts] on warrant-based targeting . . . [t]o make sure they have someone lined up to go to court if needed."⁹⁸ In that timeframe, journalist Richard Tomkins of the *Washington Times* interviewed military members of the U.S. Fourth Infantry Division conducting some of the first warrant-based targeting in Iraq. He noted that year, "U.S. troops operating in Muqdadiya in Diyala province conducted [700] warrant-based search-and-detain operations along with Iraqi police. The police got the warrants for terrorist suspects from the local court."⁹⁹ Tomkins described the warrant process as inherently dangerous to complainants and witnesses, since they had to sign court affidavits and appear before Iraqi

96. CTR. FOR LAW AND MILITARY OPERATIONS (CLAMO), VOLUME I, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: MAJOR COMBAT OPERATIONS (11 SEPTEMBER 2001—1 MAY 2003) (2004), available at <https://www.fas.org/irp/doddir/army/clamo-v1.pdf>; CLAMO, VOLUME II, LEGAL LESSONS LEARNED FROM AFGHANISTAN AND IRAQ: FULL SPECTRUM OPERATIONS (2 MAY 2003—30 JUNE 2004) (2004), available at <http://www.fas.org/irp/doddir/army/clamo-v2.pdf>.

97. CLAMO, VOLUME II, *supra* note 96, at 77 n.442.

98. Nathan Hodge, *It's Now Law & Order: Baghdad for U.S. Troops*, WIRED (Dec. 12, 2008, 5:47 AM), <http://www.wired.com/dangerroom/2008/12/cops-and-robber/>.

99. Richard Tomkins, *U.S. to Begin Using Search Warrants in Iraq*, WASH. TIMES, Nov. 21, 2008, at A1.

judges, “thus identif[ying] themselves and risk[ing] retribution from terror suspects and their allies.”¹⁰⁰

By way of comparison and contrast elsewhere in Iraq, “[w]arrants in the Baghdad area could be obtained by Iraqi security forces from the Ministry of Interior,” but “[w]hether U.S. forces and their Iraqi counterparts could obtain standing warrants for ‘most wanted’ terror suspects [was] unclear.”¹⁰¹ Even though the Iraqi security forces were “supposed to have been operating under the warrant-based system since 2007,” the security forces have been unable to achieve the hoped-for, combined and coalitional interaction with law enforcement and judicial authorities.¹⁰²

In the early stages of warrant-based targeting in Iraq, “[m]any judges fear[ed] revenge-targeting by extremists and [did not] want to be seen with U.S. troops.”¹⁰³ United States and coalition forces found that “Iraqi security personnel often act as intermediaries, establishing contact” with judges and “gaining their cooperation.”¹⁰⁴ Initially, warrant-based targeting in Iraq was also hampered by differing standards of evidence among judges: “[s]ome judges require[d] just one detailed witness statement as part of an evidentiary packet, while others require[d] two or more. Some judges [would] accept fingerprints lifted from an unexploded bomb, for example; others [would] not.”¹⁰⁵

Tomkins was determined to discern if the difficult task of such operations might be easier elsewhere under the right conditions; he aptly concluded that there is no substitute for knowing how the process is supposed to work and who the key players are and should be in the process.¹⁰⁶ He concluded with a less-than-sanguine assessment that:

What isn’t clear, and what’s causing members of the 4th Infantry Division’s Prosecution Task Force (PTF) teams [that conducted warrant-based targeting] to burn the midnight oil are fundamental issues such as how to obtain the warrants, from whom and with what kind of evidence—basically divining the

100. *Id.*

101. *Id.*

102. Campbell Robertson, *Warrants Expected To Slow Arrests in Iraq*, N.Y. TIMES, Nov. 30, 2008, <http://www.nytimes.com/2008/12/30/world/africa/30iht-troops.4.19007661.html>; see also Campbell Robertson, *New Rules in Iraq Add Police Work to Troops’ Jobs*, N.Y. TIMES, Dec. 31, 2008, at A5, available at <http://www.nytimes.com/2008/12/31/world/middleeast/31iraq.html?pagewanted=all>.

103. Richard Tomkins, *U.S. Troops Maneuver Through Legal Maze As They Detain Terror Suspects*, RADIO FREE EUROPE RADIO LIBERTY ONLINE, Dec. 21, 2008, http://www.rferl.org/content/US_Troops_Maneuver_Through_Legal_Maze_As_They_Detain_Terror_Suspects/1362058.html.

104. *Id.*

105. *Id.*

106. Richard Tomkins, *Warranting Compliance; U.S. Forces Follow New Pact in Suspects’ Arrests*, WASH. TIMES, Dec. 18, 2008, at B1, available at <http://www.washingtontimes.com/news/2008/dec/18/warranting-compliance/?page=all>.

procedural nuts, bolts and mechanisms of implementation, which can vary from district to district and subdistrict to subdistrict in Baghdad.¹⁰⁷

Another challenge, which existed in Iraq in the 2008–2009 timeframe, was the sheer volume—8,000—of individuals who were already detained by U.S. and coalition forces; of that sizeable number, only 1,360 had been transferred to Iraqi authorities pursuant to a warrant, detention order, or conviction.¹⁰⁸

Military lawyers, or judge advocates, working directly with conventional and special operations forces discerned early on, regarding mandated warrant-based targeting, that prior planning prevents poor performance, and that attention to detail was absolutely indispensable:

Getting identities and personal information on the suspects isn't a haphazard affair. Soldiers working with PTFs [Prosecution Task Forces] spend hours checking and cross-checking photographs and other biometric details if available against U.S. and Iraqi files; they check and cross-check names, the spelling of names—a perpetual problem stemming from Arabic-English transliteration—and pseudonyms so that they have thoroughly accurate identification in warrant requests.¹⁰⁹

In short, given the lessons learned from three years of warrant-based targeting in Iraq and several years in Afghanistan, U.S. troops have come to appreciate that “counter-insurgency isn't simply killing or capturing bad guys,” but also involves “thinking about critical needs” for a population, including “police organizations in the country [where you are operating].”¹¹⁰ Judge advocates supporting warrant-based targeting specifically learned another lesson worth repeating: working within host nation legal parameters was not only possible, but also efficient, practical, and effective when coalition forces and host nation forces reliably rehearsed and practiced warrant-based targeting procedures,

107. *Id.*

108. Gina Chon, *U.S. to Hand Over Jails to Iraq*, WALL ST. J., Sep. 18, 2009, at A10, available at <http://online.wsj.com/article/SB125319775557819733.html>.

109. Tomkins, *supra* note 106, at B1.

110. Ned Valentine, *Clay Becomes Training Grounds for Cavalry Officers for Second Time*, THE CLAY CTR. DISPATCH (Apr. 26, 2012, 3:32 PM), http://m.ccenterdispatch.com/mobile/news/article_f6a923b8-8fde-11e1-a5c8-001a4bcf6878.html (quoting Lieutenant Colonel Matthew Cody, commander for the U.S. Army's Fourth Cavalry Regiment, First Squadron, stationed at Fort Riley, Kansas, regarding his unit: “He said the unit would be charged with developing ‘warrant based targeting’ for Afghan security forces so they go after individuals on orders from a judge, similar to the U.S. system ‘so they at least have some form of judicial system.’ ‘It ain't gonna be pretty. They aren't there yet,’ Cody said [of the capacities of his prospective Afghan partners]. ‘But they're gonna get there.’”).

thus shifting responsibility for security and accountability to host nation assets.¹¹¹ As they prepared for warrant-based targeting:

[P]lanners developed a process that would integrate the evidentiary standards of Iraqi criminal law into the [SOF] detention procedures. That would, in turn, remove the [High Value Individuals] from the “security detainee” classification and re-designate them as “criminal detainees” in pre-trial confinement, in accordance with Iraqi criminal-procedures law. The process would be effective and responsive only if it were nested within the targeting methodology being taught to the partnered Iraqi [Foreign Internal Defense] units, as well as in the group targeting cycle that supported the combined missions between U.S. SOF and their partnered Iraqi units. The process came to be referred to as the “rocket docket.”¹¹²

...

Through a functional approach, we integrated the rule of law into our [Foreign Internal Defense] mission without disrupting our operational tempo or mission accomplishment.¹¹³

Some forces also found that “a transition to warrant-based arrests now instead of later [gave] American officers time to train their local counterparts how the rule of law works instead of letting the Iraqis sink or swim on their own later.”¹¹⁴ In 2009, then Colonel John Hort, Commander, 3rd Brigade Combat Team, 4th Infantry Division, expressed concern about MNC-I capabilities regarding such operations:

I am concerned about the warrant-based targeting. We have to make sure we’re part of the Iraqi judicial system. That’s going to require some training. We are going to have to adjust some bases in the city and move them out to the perimeter. But I’m more optimistic than I am nervous or pessimistic. We see the Iraqi military in much better shape than they were a year ago.¹¹⁵

111. Berlin, *supra* note 67, at 7.

112. Daniel A. Tanabe & Joseph N. Orenstein, Integrating the Rule of Law With FID [Foreign Internal Defense] in Iraq, *SPECIAL WARFARE*, Nov.–Dec. 2009, 7, 7, available at <http://www.dvidshub.net/publication/issues/8260>.

113. *Id.* at 11.

114. Michael Totten, *The Future of Iraq, Part I*, MICHAEL J. TOTTON (MAY 12, 2009), <http://www.michaeltotten.com/archives/2009/05/the-future-of-i.php>.

115. *Id.* In validation of Hort’s successful command and observations as Commander, Third Brigade Combat Team, Fourth Infantry Division, he went on to be selected in 2011 for promotion to Brigadier General and assignment as Chief of Plans, G-3, U.S. Army Forces

Irrespective of timeframe, place of conduct, or name, warrant-based targeting is allied with the time-honored concept of “manhunting.”¹¹⁶ Manhunting is “the deliberate concentration of national power to find, influence, capture, or when necessary kill an individual to disrupt a human network,” and “has arguably become a primary area of emphasis in countering terrorist and insurgent opponents.”¹¹⁷ Scholars at the U.S. Department of Defense’s Joint Special Operations University (JSOU) at Hurlburt Field, Florida, have zeroed in on a potentially fatal flaw in U.S. and other nations’ efforts to conduct warrant-based targeting: the lack of dedicated organizations with a core competence, mission, and maintained capability to conduct sporadic and recurrent warrant-based targeting and other “manhunting” operations:

The fundamental question concerning manhunting is whether the United States Government (USG) is properly organized to conduct manhunts? Currently, the USG has no central organization that oversees manhunting. Apprehending fugitives has never been a core competency of either the DoD or any of the intelligence agencies.¹¹⁸

Determining just which agency or agencies should have lead authority, or even supporting responsibility or involvement, has been far from clear in the U.S. example. This may prove to be even less discernable in the regional, coalitional, and multinational situations that currently exist or may arise in the future:

Traditionally, apprehending individuals has been considered a law enforcement function. However, criminal cases are manpower intensive, so most criminal investigations focus on collecting evidence to issue arrest warrants. Furthermore, the suspects in most criminal cases are concerned not with running from justice, but with concealing their connection to the alleged crime. This dynamic has prevented the law enforcement community from developing a centralized organization responsible for all fugitive manhunts.¹¹⁹

Command, Fort McPherson. *See General Moves Announced*, ARMY TIMES (June 9, 2011), <http://www.armytimes.com/news/2011/06/army-general-moves-060911/>.

116. *See* GEORGE A. CRAWFORD, MANHUNTING: COUNTER-NETWORK ORGANIZATION FOR IRREGULAR WARFARE, 1 (2009), available at <http://www.scribd.com/doc/36926852/Man-Hunting>.

117. *Id.*

118. STEVEN MARKS, THOMAS MEER & MATTHEW NILSON, MANHUNTING: A METHODOLOGY FOR FINDING PERSONS OF NATIONAL INTEREST 75 (2005) (published master’s thesis), http://www.au.af.mil/au/awc/awcgate/nps/manhunting_marks_jun05.pdf.

119. *Id.*

William Shakespeare wrote, “What’s in a name? That which we call a rose by any other name would smell as sweet.”¹²⁰ So too, we might consider that “conviction-focused targeting” is synonymous with, and the moral equivalent of, warrant-based apprehension, commonly known as the “rose” named warrant-based targeting, and also known as prosecution-oriented targeting. The scholar Steve Berlin assesses these concepts as conjoined,¹²¹ with the following recommendations for successful warrant-based targeting focused on the goal of conviction within the court system:

- Create combined task force(s), resembling an organized crime or anti-gang task force, “in order to investigate complex criminal cases.”¹²²
- Number of task forces within a theater of operations will be dependent on the operating environment and should align with the host nation’s security leaders.¹²³
- “The task force(s) should focus on rendering Violent Extremist Networks unable to function.”¹²⁴

“To make this work,” Berlin further suggested, “senior leaders must create a ‘focused engagement strategy’ to ensure the appropriate level host nation leaders support the combined strategy.”¹²⁵ “Once created, the parties must find a method to “synchronize their efforts.”¹²⁶ “The forces must have a secure location where both” coalition forces “and host nation forces can interact freely without bringing excessive attention to their combined efforts.”¹²⁷ “This location should be collocated with a combined operations center,” increasing transparency and accountability between and among coalition and interagency military and paramilitary forces, government agencies, and to the public.¹²⁸ The location should “include briefing facilities,” yet coalitional forces “should have a secure facility within the complex to store and synthesize information and to help convert intelligence into actionable evidence.”¹²⁹ This means, in effect, having a place where some cards are still held close to the vest, and classified and compartmented information is not shared outside trusted circles.

120. WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 2, sc. 2, ll. 45–46.

121. Steve D. Berlin, *Conviction-Focused Targeting: Targeting Violent Extremists While Developing Rule of Law Capacity*, *SMALL WARS J.* (Aug. 24, 2010), at 6, smallwarsjournal.com/blog/journal/docs-temp/505-Berlin.pdf.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. Berlin, *supra* note 121, at 6.

127. *Id.*

128. *Id.*

129. *Id.*

This methodology of warrant-based targeting and criminal, as well as non-criminal, detention was transplanted to the Afghan theater of operations.¹³⁰ Berlin notes U.S. forces and Afghan “host nation prosecutors brought their first terrorism case to trial at Bagram Air Field on June 1, 2010.”¹³¹ As an analogous modality of operations, this model would, in Berlin’s estimation, likewise work in places with ongoing counter-narcotics operations, such that in a stability operation, commanders would “apply this prosecution task force to partner with host nation criminal justice systems to target the drug trafficking networks.”¹³² Consistent with earlier observations, though, the greatest impediments to successful warrant-based targeting and prosecution may be a lack of host nation transparency and effectiveness: Berlin states the obvious when he says that “the commander must adapt to environment,” not “terrain and obstacles,” but rather “host nation rule of law institutions.”¹³³ The scholar Philip Bobbitt believes that “law and strategic circumstance exist in a complex, dynamic relationship,” in which “changing circumstances inevitably find expression in the law, yet fidelity to the rule of law is a critical factor in preserving security.”¹³⁴ In examining Bobbitt, the scholar Robert Chesney found no internal paradox in this dynamic, “for fidelity to the rule of law does not require law to be static.”¹³⁵

Just because an appropriately obtained and executed warrant brings a wanted person into custody does not, however, mean he or she will remain in custody or face judicial proceedings. Chesney observed of such operations in Iraq that “[a]fter arrest,” for example, “an Iraqi judge had to grant a detention order allowing the accused to remain in custody,”¹³⁶ and, as noted above, “all of this

130. Robert Chesney, *Afghanistan Quietly Embraces Non-Criminal Detention*, LAWFARE (Apr. 9, 2012), <http://www.lawfareblog.com/2012/04/afghanistan-quietly-embraces-non-criminal-detention/>. Regarding detention operations in Afghanistan, the Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan, <http://www.lawfareblog.com/wp-content/uploads/2012/04/2012-03-09-Signed-MOU-on-Detentions-Transfer-2.pdf>, states, at paragraph 5, the following: “Afghanistan affirms that it has established an administrative detention regime under its domestic law which is: a) consistent with international humanitarian law, including the Additional Protocol II of 1977 to the Geneva Convention of 1949, and all of Afghanistan’s international obligations; b) in compliance with Afghanistan’s international obligations with respect to humane treatment and applicable due process; and c) based on sustainable arrangements, including housing.”

131. Berlin, *supra* note 121, at 11.

132. *Id.* at 11.

133. *Id.*

134. Chesney, *Iraq and the Military Detention Debate*, *supra* note 4, at 635 (citing PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY FIRST CENTURY* (2008); see PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE AND THE COURSE OF HISTORY* (2002)).

135. *Id.*

136. *Id.* at 603 (citing Regimental Judge Advocate, 2d Stryker Cavalry Regiment, *After Action Report, Operation Iraqi Freedom, August 2007–May 2008: Understanding the Iraqi*

was preliminary to the decision of the trial panel on the ultimate question of guilt.¹³⁷ For these, and numerous other reasons, the name of such operations really does matter, since it may shape expectations and set measures of effectiveness,¹³⁸ as well as the actual, expended level of effort to investigate, apprehend, detain, and relinquish to authorities. Chesney notes that:

[T]he phrase ‘warrant-based targeting’ is problematic. It implies that the military has done its job once it obtains the requisite warrant and then carries out the arrest. That much is useful for disruption purposes, no doubt, and possibly for purposes of short-term tactical intelligence gathering as well. But, if the goal is to incapacitate the individual for more than a brief period, then the mission is a failure should the person not actually remain in custody going forward, pending trial (which requires a detention order from the IJ [Investigative Judge]) and after (which requires a conviction, of course). Thus, some JAs [judge advocates] have advanced the more holistic phrase “prosecution-based targeting.”¹³⁹

Chesney concludes, with regard to warrant-based targeting operations and their applicability to future operations, that “[l]aw and strategic circumstance exist in a complex, dynamic relationship. In this model, changing circumstances inevitably find expression in the law, yet fidelity to the rule of law is a critical factor in preserving security.”¹⁴⁰

V. WHY WARRANT-BASED TARGETING MATTERS: WHERE AND AGAINST WHOM IT MAY BE USED IN THE NEAR FUTURE

These operations, primarily in Iraq, and to a limited extent in Afghanistan,¹⁴¹ offer some interesting opportunities, as well as challenges, for other nations’ efforts to bring persons accused of war crimes and crimes during

Legal System in Support of Prosecutions at CCCL, in CTR FOR LAW & MILITARY OPERATIONS, U.S. ARMY, TIP OF THE SPEAR 39 (2009)).

137. *Id.*

138. *See, e.g.*, Richard E. Darilek et al., MEASURES OF EFFECTIVENESS FOR THE INFORMATION-AGE ARMY iii (2001).

139. Chesney, *Iraq and the Military Detention Debate*, *supra* note 4, at 603.

140. *Id.* at 634.

141. For the tactics, techniques, and procedures for forensics on the battlefield and warrant-based targeting in Afghanistan, see *ISAF Evidence Collection Guide – Supporting the Prosecution of Insurgency Crimes* (July 2010), <http://info.publicintelligence.net/ISAF-EvidenceCollectionGuide.pdf> (citing CTR. FOR ARMY LESSONS LEARNED (CALL), FORENSICS AND WARRANT-BASED TARGETING NEWSLETTER (Apr. 10), <https://call2.army.mil/toc.aspx?document=5898>).

internal and international armed conflicts to justice. Such occasions may stimulate an even more deliberate and cooperative mode of operations between nations,¹⁴² especially in instances of extradition and rendition agreements.¹⁴³

Warrant-based targeting could be a means and methodology of simultaneously addressing the threat of terrorism, and avoiding what expert on targeted killings Claire Finkelstein calls “brutality in interrogations, indefinite detentions, and the moral and legal thicket of bringing conducting legal proceedings against terror suspects.”¹⁴⁴ Warrant-based targeting relies not upon the right to kill in armed conflict, but instead, a more generic framework of reserving the right to employ violence, such as is found in a law-enforcement context, but more specifically to employ the modalities of military organization and due process safeguards as could be employed by law enforcement organizations, to pursue a hybridized criminal law solution to national and international illegal activity.¹⁴⁵

Transitioning from unilateral operations to operations by, with, or through host nation or coalition forces requires an abrupt changing of mindset akin to transforming conventional U.S. forces into SOF-style soldiers “on-the-fly.” While traditional U.S. military operational objectives of “find, fix, finish, exploit, analyze, disseminate (F3EAD) remain valid,”¹⁴⁶ there is merit to a shift away from “kinetic” use of force and targeted killing.¹⁴⁷ This is true not just from a moral and ethical perspective, but also as being more appropriate or palatable

142. See JD, *Warrant Based Targeting: The Iraq Model*, AL SAHWA (Apr. 3, 2010, 10:29AM), <http://al-sahwa.blogspot.com/2010/04/warrant-based-targeting-iraq-model.html> [hereinafter *Warrant Based Targeting*]; see also BUREAU OF NEAR EASTERN AFFAIRS, U.S. DEP'T OF STATE, IRAQ STATUS REPORT APRIL 7, 2010, at 10 (2010), available at <http://www.state.gov/documents/organization/140125.pdf> (reporting successful joint U.S.-Iraqi operations against al-Qaeda).

143. See, e.g., RICHARD V. MEYER, *The Privilege of Belligerency and Formal Declarations of War*, in TARGETED KILLINGS, *supra* note 1, at 184; FERNANDO R. TESÓN, *Targeted Killing in War and Peace: A Philosophical Analysis*, in TARGETED KILLINGS, *supra* note 1, at 417. In the absence of extradition or rendition agreement, the permissive aspects of past warrant-based targeting operations become hybridized to a semi-permissive or hostile act of capture, and the accompanying concerns with respect to the thread of use of force, the actual use of force, and compromises to sovereignty.

144. CLAIRE FINKELSTEIN, *Targeted Killing as Preemptive Action*, in TARGETED KILLINGS, *supra* note 1, at 156–67. Finkelstein persuasively asserts these factors were significant in the Obama administration’s increased employment of targeted killing over the previous Bush administration.

145. *Id.* at 160.

146. See Center for Army Lessons Learned (CALL), Thesaurus Entry: F3EAD, <http://usacac.army.mil/cac2/call/thesaurus/toc.asp?id=34068> (last updated Sept. 17, 2008).

147. Fernando R. Tesón, *Targeted Killing in War and Peace: A Philosophical Analysis*, in TARGETED KILLINGS, *supra* note 1, at 403, 425 (“Killing a person, no matter how culpable, without giving him a chance to surrender is morally impermissible.”).

than causing death outside of judicially orchestrated processes.¹⁴⁸ Pragmatic realities from history and present indicators of future crises give us every indication that “irregular warfare and insurgencies will continue to be an enduring challenge,”¹⁴⁹ and that the use of force, especially force employed by U.S. forces, may be decreasingly palatable or suitable outside combat zones. From a moral and a practical perspective, then, warrant-based targeting presents a certain appeal.

A. Applying Warrant-Based Targeting in the “Arc of Instability” That Is Africa

Looking beyond ongoing operations in Afghanistan, where might warrant-based targeting take place, or against whom might it be directed? Unfortunately, there are a plethora of places, many on or near the continent of Africa,¹⁵⁰ where “[w]eakly governed spaces provide favorable operating environments for violent extremism, piracy, and trafficking of humans, weapons, and drugs.”¹⁵¹ Numerous other nations have duly constituted governments that

148. Fernando Tesón’s definition of targeted killing “excludes not only unforeseen deaths, but also foreseen yet unintended deaths.” *Id.* at 404. I would posit that warrant-based targeting further discerns and excludes unforeseen deaths as well as foreseen and unintended deaths, putting non-lethal means ahead of lethal ones, to bring individuals to justice. Tesón further explains the distinction between intended outcomes and unintended yet foreseen outcomes having a crucial role in the morality of war, and cites Joseph Boyle Jr., *Toward Understanding the Principle of Double Effect*, in *THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE* 12 (P.A. Woodward ed., 2001); R. G. Frey, *The Doctrine of Double Effect*, in *A COMPANION TO APPLIED ETHICS* (R.G. Frey & C. H. Wellman eds., 2003); M. WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 128 (4th ed., 2006). See generally Peter L. Jennings & Sean T. Hannah, *The Moralities of Obligation and Aspiration: Towards a Concept of Exemplary Military Ethics and Leadership*, 23 *MILITARY PSYCHOLOGY* 550–71 (2011); A.C. MACINTYRE, *AFTER VIRTUE* (2007), cited with approval in Major, *supra* note 36, at 66.

149. DEF. SCI. BD. TASK FORCE ON INTELLIGENCE DEF., OFFICE OF THE UNDER SEC’Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, COUNTERINSURGENCY (COIN) INTELLIGENCE, SURVEILLANCE, AND RECONNAISSANCE (ISR) OPERATIONS viii (2011), available at <http://www.acq.osd.mil/dsb/reports/ADA543575.pdf>.

150. On Africa as part of an “arc of instability,” see RICHARD B. MYERS, *THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA: A STRATEGY FOR TODAY; A VISION FOR TOMORROW* 5 (2004), available at <http://www.defense.gov/news/mar2005/d20050318nms.pdf>; see also Kevin Govern, *21st Century Africa as an Arc Of (In)Stability: U.S. and African Economic, Security, and Development Policies Advanced Through U.S. Africa Command Initiatives*, 26 *CONN. J. INT’L LAW* 281, 285 (2011).

151. General William E. Ward, Commander, United States Africa Command (AFRICOM), Posture Statement Before Congress (Mar. 9, 2010), available at <http://www.africom.mil/NEWSROOM/Article/7245/africom-posture-statement-ward-reports-annual-test>. In testimony before Congress on March 9, 2010, the commander of AFRICOM

employ cronyism and favoritism to manipulate the organs of law enforcement and judicial systems, or flaunt international efforts to advance and promote justice.

We need only look to the docket of the ICC, mentioned earlier in this paper, which has, to date opened investigations into seven “situations”: the Democratic Republic of the Congo, Uganda, the Central African Republic, Darfur, Sudan, the Republic of Kenya, the Libyan Arab Jamahiriya, and the Republic of Côte d’Ivoire.¹⁵² The ICC has publicly indicted twenty-eight people, proceedings against twenty-three of whom are ongoing.¹⁵³ The ICC has issued arrest warrants for nineteen individuals and summonses to nine others: five individuals are in custody; one of them has been found guilty (with an appeal possible), while four of them are being tried; nine individuals remain at large as fugitives (although one is reported to have died).¹⁵⁴ Additionally, two individuals have been arrested by national authorities, but have not yet been transferred to the Court.¹⁵⁵

This does not include national efforts to seek international extradition, the most recent of which at the time of this article’s writing was the International Court of Justice’s call to order Senegal to extradite former Chadian president Hissène Habré to Belgium to face prosecution for war crimes and crimes against humanity,¹⁵⁶ or the pending ICC arrest warrant against son of the deceased Libyan strongman, Saif al-Islam Gaddafi, and the former Libyan intelligence chief.¹⁵⁷ Not every nation or region will cooperate to bring criminals, insurgents, or pirates to justice, though, and even the United States may not necessarily support or cooperate in legally meritorious and operationally feasible missions if they involve ICC-issued warrants because of domestic political situations.¹⁵⁸

An egregious case in point is the ICC arrest warrant for Sudan’s President Omar al-Bashir on March 5, 2009, a warrant that included five counts of crimes against humanity and two counts of war crimes involving the atrocities

provided an overview of the strategic environment in Africa, explained AFRICOM’s strategic approach, and showed how security cooperation efforts promote stability in support of U.S. foreign policy and national security objectives. *Id.* It is noteworthy that these Annual Posture Statements seldom, if ever, include “metrics” related to “measures of success,” identifying instead, anecdotal instances of mission successes and efficacy.

152. Situations and Cases, *supra* note 12.

153. *Id.*

154. *Id.*

155. *Id.*

156. Chandra Sriram, *ICJ and Habre: A Possible End to a Long Road to Accountability*, JURIST (Mar. 12, 2012), <http://jurist.org/forum/2012/03/chandra-sriram-icj-habre.php>.

157. *ICC Issues Gaddafi Arrest Warrant*, ALJAZEERA (June 28, 2011), <http://english.aljazeera.net/news/africa/2011/06/20116278148166670.html>.

158. See Kevin Govern, *supra* note 150, at 324. In that article, I posited how the U.S. position regarding this matter is awkward, since the U.S. did not assist in the establishment of the ICC, yet the U.S. State Department’s official stance has been that “[t]he United States wants to see those responsible for Darfur atrocities held accountable and will not stand in the way of the possible prosecution of Sudanese President Omar al-Bashir by the International Criminal Court.” *Id.*

committed in Darfur.¹⁵⁹ The British Broadcasting Service reported that shortly after the warrant's issuance, al-Bashir "scoffed" at his arrest warrant,¹⁶⁰ and rejected the charges as "neo-colonialism."¹⁶¹ In turn, the African Union (AU) requested a one-year delay in ICC charges, "warning that attempts to arrest al-Bashir could further destabilize the situation in Darfur."¹⁶² At the time of this article's writing, not only did al-Bashir remain in power and at large, but he had: traveled to Tripoli (before it came under rebel siege) to attend fortieth anniversary celebrations of the coup that brought Moammar Al-Gaddafi to power on September 1, 2009; won a lopsided and questionable victory in April 11–15, 2010 national elections; benefited from the AU's summer 2010 request of yet another delay in ICC charges;¹⁶³ and he and his South Sudanese counterpart, Salva Kiir, traveled in late September 2012 to a summit in Addis Ababa,¹⁶⁴ co-chaired by chief negotiators of the two countries, Idriss Abdul Gadir (also indicted for war crimes)¹⁶⁵ and Pagan Amum.¹⁶⁶

Another equally troubling challenge to an accountable, open, multilateral effort to bring other indicted criminals to justice: Libya dismissed on May 1, 2012, ICC efforts to bring Al-Gaddafi's son, Saif al-Islam Gaddafi, and his intelligence chief Abdullah al-Senussi to justice outside Libya, rejecting the authority of the tribunal.¹⁶⁷ Just as with failed efforts to bring al-Bashir to justice, the AU has failed to bring the Libyan indictees to justice; negotiations were initiated by the AU in April 2011 and quickly failed—but not because of the ICC.¹⁶⁸ Haggling between the ICC and Libya's National Transitional Council (NTC) over the fate of Saif al-Islam Gaddafi and Abdullah al-Senussi continues.¹⁶⁹ Libya quietly, but controversially, passed a blanket amnesty for pro-

159. Mbeki Named to Heal Bashir Rift, BBC NEWS (Mar. 6, 2009), <http://news.bbc.co.uk/2/hi/africa/7927706.stm> [hereinafter Mbeki].

160. Peter Martell, *Dancing Bashir Scoffs at Darfur Warrant*, BBC NEWS (Mar. 5, 2009), <http://news.bbc.co.uk/2/hi/africa/7926813.stm>.

161. Mbeki, *supra* note 159.

162. *Id.*

163. Patrick Goodenough, *Little Western Support As Libya Marks 40 Years of Gaddafi*, CNS NEWS (Sept. 1, 2009), <https://cnsnews.com/news/article/little-western-support-libya-marks-40-years-gaddafi>; see also Edith M. Lederer, *Africans Ask UN to Delay al-Bashir Prosecution*, ASSOCIATED PRESS (Sep. 25, 2010) (the AU made such request ostensibly because a trial would "interfere with efforts to end the seven-year conflict in western Darfur"); Will Ross, *Sudan Holds Landmark Multi-Party Elections*, BBC NEWS (Apr. 11, 2010), <http://news.bbc.co.uk/2/hi/8613572.stm>.

164. Zuleikha Abdul Raziq, *Al Bashir, Kiir Summit Continues: Committee Set up to Report on Unresolved Issues*, SUDAN VISION (Sep. 24, 2012), <http://news.sudanvisiondaily.com/details.html?rsnpid=214473>.

165. Situations and Cases, *supra* note 12.

166. Raziq, *supra* note 164.

167. Owen Bowcott, *Let Libya Stage Trial of Gaddafi's Son, Lawyers Ask War Crimes Court*, GUARDIAN, May 1, 2012, at 18.

168. *Id.*

169. *Id.*

Revolution rebels, and formally asked the ICC to abandon its legal action against Saif al-Islam Gaddafi and the country's former intelligence chief so that both men can be tried in Tripoli where they could face the death penalty.¹⁷⁰ For that matter, Libya has negotiated with the government of Mauretania to return al-Senussi to Libya, but, postponed Saif al-Islam Gaddafi's trial until at least February 2013.¹⁷¹ Libyan leader Mohammed Magarief personally apologized to U.S. Secretary of State Hillary Clinton on September 24, 2012, for the September 11, 2012, attack on the consulate in Benghazi, which killed four Americans, and pledged his government would bring the perpetrators to justice; only time will tell whether the Libyan leader's "great readiness to cooperate with the U.S. government in order to cooperate in the investigation and bring those perpetrators to justice" will translate into investigation, warrant-based targeting, and prosecution of those killers.¹⁷²

B. Warrant-Based Targeting of Narcoterrorists and Criminals in the Americas

While not typically considered an internal or international armed conflict, the rapidly escalating narco-terrorism and narco-criminal threat of North and Central America point to plentiful, if complex, opportunities for employment of warrant-based targeting.¹⁷³ "Well-financed drug trafficking organizations (DTOs), along with transnational gangs and other organized criminal groups, threaten to overwhelm Central American governments."¹⁷⁴ Originally created in

170. *Id.*

171. *Id.*; see also *Saif al-Islam Gaddafi's War Crimes Trial Postponed*, FRANCE 24 (Sep. 10, 2012), <http://www.france24.com/en/20120910-libya-saif-al-islam-gaddafi-war-crimes-trial-postponed-libya-muammar-son-senussi-capture>.

172. Andrew Quinn, *Libyan Leader Delivers Personal Apology for Benghazi Attack*, REUTERS (Sep. 25, 2012), <http://in.reuters.com/article/2012/09/24/libya-usa-idINL1E8KOG7M20120924>.

173. PETER J. MEYER & CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R41731, CENTRAL AMERICA REGIONAL SECURITY INITIATIVE: BACKGROUND AND POLICY ISSUES FOR CONGRESS 1-2 (2012), available at <http://www.fas.org/sgp/crs/row/R41731.pdf>.

174. *Id.* at 2. The report explains:

As in neighboring Mexico, the countries of Central America—particularly the “northern triangle” countries of El Salvador, Guatemala, and Honduras—are dealing with escalating homicides and generalized crime committed by drug traffickers, gangs, and other criminal groups. While the drug trafficking-related violence in Mexico has captured U.S. policymakers’ attention, the even more dire security situation in many Central American countries has received considerably less focus or financial support from the United States.

Id. at 4 (internal citations omitted). Meyer and Seelke further note that “[i]n 2010, the homicide rate per 100,000 people in Mexico stood at roughly 18.1, a rate exceeded by that

Fiscal Year (FY) 2008 as part of the Mexico-focused counterdrug and anticrime assistance package known as the Mérida Initiative,¹⁷⁵ the recent developments in the U.S. State Department's Central American Regional Security Initiative (CARSI) take a broad approach to the issue of security, funding various activities designed to support U.S. and Central American security objectives.¹⁷⁶

The CARSI, as part of a greater Central American Integration System (SICA)¹⁷⁷ Security Strategy, has emphasized "vetted police units, community policing and increasing cooperation among police, judges and prosecutors," particularly creating and training anti-drug units, which currently exist in Guatemala, Honduras, El Salvador and Panama.¹⁷⁸ In FY 2008–2011, funding for CARSI totaled \$361 million, with an additional \$130 million pledged for FY 2012.¹⁷⁹ "During a difficult economic period that has prompted budget cuts in

of Belize (41.7), El Salvador (66), Guatemala (41.4), Honduras (82.1), and Panama (21.6)." *Id.* (citing U.N. OFFICE ON DRUGS & CRIME (UNODC), GLOBAL STUDY ON HOMICIDE: TRENDS, CONTEXTS, DATA 107 (2011).

175. BUREAU OF W. HEMISPHERE AFFAIRS, U.S. DEP'T OF STATE, THE MERIDA INITIATIVE: EXPANDING THE U.S./MEXICO PARTNERSHIP (2012) <http://www.state.gov/documents/organization/187329.pdf>.

176. *Id.*

177. See CENTRAL AMERICAN INTEGRATION SYSTEM, http://www.sica.int/sica/sica_breve_en.aspx?Idm=2&IdmStyle=2 (last visited Feb. 28, 2013) [hereinafter SICA].

[SICA] is the institutional framework of Regional Integration in Central America, created by the States of Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. Also involved are the Dominican Republic as an Associated State, the United Mexican States, the Argentina Republic, the Republic of Chile and the Federative Republic of Brazil as Regional Observer[s]; and the Kingdom of Spain, the Republic of China (Taiwan), the Federal Republic of Germany, Italian Republic and Japan as Extrarregional Observers. The headquarters of the General Secretariat of SICA is in the Republic of El Salvador. . . . [SICA] was designed taking into account past attempts for regional unification as well as lessons learned from a history of political crisis, belligerent conflict and dictatorial rule in Central America. These considerations, coupled to internal constitutional transformations and the existence of democratic regimes in the region, were contemplated in establishing the fundamental objective of realizing the integration of Central America in order to transform the area into a region of Peace, Liberty, Democracy and Development, based firmly on the respect, tutelage and promotion of human rights.

Id.

178. Allen Hines, *DEA-linked Deaths Show Faults in Central American Drug Plan*, UPSIDE DOWN WORLD (May 30, 2012), <http://upside-downworld.org/main/honduras-archives-46/3657-dea-linked-deaths-show-faults-in-central-american-drug-plan>.

179. Press Release, Office of the Vice President, Fact Sheet: The Central American Citizen Security Partnership (Mar. 6, 2012), <http://www.whitehouse.gov/the-press-office/2012/03/06/fact-sheet-central-american-citizen-security-partnership> [hereinafter

many regionally funded foreign assistance programs, the United States commitment to CARSI has remained stable.”¹⁸⁰ Fiscal year 2012’s commitment to CARSI is intended to “enable the United States to support a broad range of bilateral and regional programs to reduce levels of crime and violence,”¹⁸¹ specifically by increasing police capability to track and arrest drug traffickers.¹⁸²

Even if it is not a true combined, interagency effort towards warrant-based targeting, recent U.S. cooperation with Guatemala has included substantial technical support. Notably, a U.S. aviation program in Guatemala provides rapid mobility in response to intelligence and is being transferred to Guatemalan law enforcement as maritime interceptor vessels, law enforcement vehicles, and other specialized equipment, provided by millions of dollars in U.S. funding, further enhance the capabilities of national police forces, navies, and coast guards throughout the region.¹⁸³

With respect to Honduras, U.S. or regional military forces, working in conjunction with Honduran law enforcement and military, are anticipated to help overcome what has been identified as “a logistical problem, with communications, with detection.”¹⁸⁴ Unfortunately, Honduran law enforcement and judicial organs lack transparency and effectiveness in overcoming corruption, creating another fundamental problem where “the police are penetrated by organized crime.”¹⁸⁵ In response to the increasing drug problem, U.S. counternarcotic officials have utilized Honduran department and agency cooperation, which led to the interception of two drug smuggling flights in Honduras within a single week.¹⁸⁶ Through continued U.S.-Central American relations, local law enforcement agencies are improving in their professionalism and training for counternarcotic missions and intelligence sharing.¹⁸⁷ Despite the recent success in these efforts, there is some concern that CARSI’s “hybridization of the military and police” may result in unintended violence, as displayed in the recent killing of four

CACSPJ. At the Summit of the Americas in Cartagena, Colombia on April 14–16, 2012, President Obama announced that the United States will allocate an additional \$130 million in FY 2012 funding towards Central America through CARSI. See Press Release, Department of State, State Department Funds Exchange Program for Central American Law Enforcement Officials, (Apr. 16, 2012), <http://www.state.gov/r/pa/prs/ps/2012/04/187957.htm>.

180. CACSP, *supra* note 179.

181. *Id.*

182. Hines, *supra* note 178.

183. See Allen Hines, *DEA-Linked Deaths Show Faults in Central American Drug Plan*, UPSIDE DOWN WORLD (May 30, 2012, 3:00 PM), <http://upside-downworld.org/main/honduras-archives-46/3657-dea-linked-deaths-show-faults-in-central-american-drug-plan>.

184. Damien Cave, *Drug Trafficking and Raids Stir Danger on the Mosquito Coast*, N.Y. TIMES, May 24, 2012, at A1.

185. *Id.*

186. Damien Cave et al., *A New Front Line in the U.S. Drug War*, N.Y. TIMES, June 1, 2012, at A4.

187. *Id.*

Hondurans during an anti-drug mission.¹⁸⁸ Whether the program will result in a meaningful, long-term impact is yet to be determined.

The civilian-military, combined-interagency operation paradigm may be especially useful in combating and bringing to justice a paramilitary-like narcoterrorist/narcocriminal network in El Salvador. The Congressional Research Service's (CRS) recent research details how "illicit networks that smuggled arms and other supplies to both sides involved in the armed conflict in El Salvador have been converted into transnational criminal networks that smuggle drugs, people, illicit proceeds, weapons, and other stolen goods."¹⁸⁹ As with the case of Guatemala, the CRS has found that "some former combatants in El Salvador and Guatemala have put the skills they acquired during their countries' armed conflicts to use in the service of criminal groups, as the end of civil conflicts there coincided with the emergence of drug trafficking in the region."¹⁹⁰

In Panama, an ongoing combined and interagency cooperative venture could be easily adapted to a prescriptive, warrant-based targeting model. "U.S.-trained customs and immigration inspectors, often with U.S. funded technology, are screening thousands of vessels, vehicles, and aircraft, as well as cargo, crews, and passengers moving through ports of entry throughout [Panama] for illicit activity."¹⁹¹ United States Customs and Border Protection and U.S. Immigration and Customs Enforcement officials are also "partnered with Panamanian counterparts to establish the Joint Security Program at Tocumen International Airport to interdict high-risk passengers and contraband,"¹⁹² with suspects handed over to Panamanian law enforcement officials for eventual prosecution.

Unfortunately, widespread corruption hinders or prevents reliable intergovernmental cooperation.¹⁹³ As discussed above, the decreased likelihood of successful handoff to civilian law enforcement officials, prosecutors, and judges for prosecution in Central America make any legitimate and appropriately conducted warrant-based targeting difficult at best. According to Transparency International's 2011 Corruption Perception Index (CPI), citizens in every Central American country (with the possible exception of Belize, which is not included)

188. Hines, *supra* note 178. For an unclassified assessment of CARSI's future potential for success in Honduras, see DEP'T OF STATE, THE FUTURE OF CARSI IN HONDURAS (Mar. 12, 2012), http://photos.state.gov/libraries/honduras/23248/pol/carsifuthn_eng.pdf.

189. MEYER & SEELKE, *supra* note 173, at 6 (citing Douglas Farah, *Organized Crime in El Salvador: the Homegrown and Transnational Dimensions*, Woodrow Wilson Center for Scholars Latin America Program, Working Paper Series on Organized Crime in Central America (Feb. 2011), available at <http://wilsoncenter.net/sites/default/files/Farah.FIN1.pdf>).

190. *Id.* (citing HAL BRANDS, CRIME, VIOLENCE, AND THE CRISIS IN GUATEMALA: A CASE STUDY IN THE EROSION OF THE STATE, STRATEGIC STUDIES INSTITUTE (May 2010), <http://www.strategicstudiesinstitute.army.mil/pdf/files/PUB986.pdf>).

191. CACSP, *supra* note 179.

192. *Id.*

193. Alanna Byrne, *Despite Some Progress, Corruption Still a Widespread Concern in Latin America*, INSIDECOUNSEL (June 18, 2012), <http://www.insidecounsel.com/2012/06/18/despite-some-progress-corruption-still-a-widesprea>.

perceive high levels of public sector corruption. On a scale of 0–10 (highly corrupt–very clean), each country scored below 5: Nicaragua (2.5), Honduras (2.6), Guatemala (2.7), Panama (3.3), El Salvador (3.4), and Costa Rica (4.8).¹⁹⁴ Also, many Central American nations have a complicated history regarding civilian-military cooperation¹⁹⁵ and Costa Rica’s constitution has forbidden a standing military since 1949.¹⁹⁶

VI. CONCLUSION

To varying degrees along the continuum “between war and peace,” and conflict and conflict resolution, various degrees of economic, political, and military influences can lead to dispute de-escalation, political accommodations, and achievement of desired ends of unilateral or multilateral benefit.¹⁹⁷ This article is not a comprehensive, survey of operational observations and lessons learned about the hybrid military-judicial-law enforcement operations called warrant-based targeting or prosecution-oriented targeting. Warrant-based

194. *Corruption Perceptions Index 2011*, TRANSPARENCY INT’L (last visited Mar. 14, 2013), <http://www.transparency.org/cpi2011/results>. For recent examples of corruption, see country entries in BUREAU OF INT’L NARCOTICS & LAW ENFORCEMENT AFFAIRS, U.S. DEP’T OF STATE, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT (INCSR) (2011), available at <http://www.state.gov/g/inl/rls/nrcrpt/2011/index.htm>.

195. With regards to Nicaragua and El Salvador, for instance, the CIA World Factbook notes:

[V]iolent opposition to governmental manipulation and corruption spread to all classes by 1978 and resulted in a short-lived civil war that brought the Marxist Sandinista guerrillas to power in 1979. Nicaraguan aid to leftist rebels in El Salvador caused the US to sponsor anti-Sandinista contra guerrillas through much of the 1980s. After losing free and fair elections in 1990, 1996, and 2001, former Sandinista President Daniel Ortega Saavedra was elected president in 2006 and reelected in 2011 [under questionable conditions].

CENTRAL INTELLIGENCE AGENCY, THE CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook> (last visited Feb. 28, 2012). Regarding its neighbor, “[a]fter two and a half decades of mostly military rule, a freely elected civilian government came to power in 1982. During the 1980s, Honduras proved a haven for anti-Sandinista contras fighting the Marxist Nicaraguan Government and an ally to Salvadoran Government forces fighting leftist guerrillas.” *Id.* At the center of the isthmus, the CIA World Factbook notes that “[w]ith US help, dictator Manuel Noriega was deposed in 1989. The entire Panama Canal, the area supporting the Canal, and remaining US military bases were transferred to Panama by the end of 1999,” and various leaders have had mixed success in combatting corruption and criminality. *See id.*

196. EL ESPÍRITU DEL 48: ABOLICIÓN DEL EJÉRCITO, <http://www.elespiritudel48.org/docu/h013.htm> (last visited Jul. 18, 2012).

197. Kevin Govern, *The Legal Way Ahead Between War and Peace*, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES 287 (David Linnan ed. 2008).

targeting employs political and military influences by means and methodologies that can and have met peaceful, desired ends of multilateral benefit in furtherance of national and international standards of justice.

The United States, and other nations employing this measure, should not repeat the U.S.-coalition forces' failures to anticipate post-conflict operations in Iraq and Afghanistan "shifting from a military LOAC framework to a warrant-based law enforcement framework as host nation sovereignty increased."¹⁹⁸ As examined in Part IV and V above, and as validated by recent U.S. Joint and Coalition Operational Analysis findings, any failure to anticipate such a paradigm shift of operations may well lead as it did in Iraq and Afghanistan to "ad hoc approaches to address requirements for warrants and evidentiary support to satisfy the host nation and preserve freedom of action."¹⁹⁹ Warrant-based targeting should be individualized and tailored in its approach, and therefore is not applicable where assets are lacking that are capable of pursuing such warrant-base operations. Nor will this methodology work where corruption, a lack of capacity, or unbridled impunity put wrongdoers temporarily, if not permanently, beyond the reach of the law and interagency capacities to enforce it.

In its essence, and in summary, warrant-based targeting is but one tool in the domestic, regional, and national security toolbox to bring those who would push conditions from peace to war, or from lawfulness to criminality, to justice. In a world where "crime, terror, and non-state actors continue to increase,"²⁰⁰ and various corrupt state actors abuse human rights with relative impunity,²⁰¹ there are profoundly negative effects on national, regional, and international politics, economies, societies and cultures. Those engaged in warrant-based targeting operations must know and understand "the host country and its government's objectives, the U.S. national security objectives, and the individual mission's goal,"²⁰² and then be able to use necessary assets to accomplish those objectives

198. Chesney, *Iraq and the Military Detention Debate*, *supra* note 4; see also JOINT AND COALITION OPERATIONAL ANALYSIS, DEP'T DEFENSE, DECADE OF WAR, VOL. 1, ENDURING LESSONS FROM THE PAST DECADE OF OPERATIONS 16 (2012) [hereinafter JCOA].

199. JCOA, *supra* note 198, at 16.

200. *Id.* at 30.

201. See Govern, *supra* note 150, at 299.

202. Ann Castiglione-Cataldo, *The Judge Advocate's Dual Mission in a Low Intensity Conflict Environment: Case Study: Joint Task Force-Bravo, Where "Can I Shoot the Prisoners?" Is Never the Question* 41 (Apr. 1991) (thesis presented to the Judge Advocate General's School, United States Army); see also Celestino Perez, Jr., *The Army Ethic and the Indigenous Other: A Response to Colonel Matthew Moten's Proposal*, Fort Leavenworth Ethics Symposium: Exploring the Professional Military Ethic: Symposium Report 255-68 (Nov. 2010) (cited in Major, *supra* note 36, at 73 n.31). "The [Staff Judge Advocate's] (SJA's) advice must consider politics, yet be free of political bias." Major, *supra* note 36, at 73 n.31. See also Joint Publication (JP) 3-07, 8.02.3, *Drafting Considerations*; Eric Talbot Jensen and Geoffrey Corn, *The Political Balance of Power Over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 Hous. L. Rev., 553, 571-76 (2007), both cited in Major, *supra* note 36, at 73 n.31. "An understanding of jus cogens, the principles of international law so

and goals. Warrant-based targeting will work best in and among nations committed to the sovereignty, independence, territorial integrity and national unity of their partner and host nations, and where there is developing or developed commitment to social and economic development, security, institutions and regional cooperation, matched by commitments to strengthen accountability, transparency, oversight, and to protect and promote human rights.²⁰³ Where appropriately employed, warrant-based targeting will likely yield more transparent governmental practices, while advancing the domestic and international rule of law. In the calculated employment of right and might in this new millennium, military forces working alongside, or in lieu of civilian law enforcement assets, face a complex legitimacy challenge in promoting democracy, human rights, and the rule of law.²⁰⁴ Sometimes the wielded sword is mightier than the penned warrant, and use of force must remain the tool of necessity as well as appropriate legal functionality.



fundamental that no nation may ignore them, would be an esoteric but also required part of the SJA's analysis." Major, *supra* note 36, at 73 n.31.

203. For commentary regarding the complex interchange of influences in Afghanistan, see Kevin Govern, *The "Great Game" & the US-Afghan Strategic Partnership Agreement*, JURIST (May. 22, 2012), <http://jurist.org/forum/2012/05/kevin-govern-us-afghan-spa.php>.

204. RUDOLPH C. BARNES, JR., *MILITARY LEGITIMACY: MIGHT AND RIGHT IN THE NEW MILLENNIUM* 23 (1996).