

“Warrant-Based Targeting:”
Prosecution-Oriented Operations, Advancing The Rule of Law,
As A Legal and Moral Alternative To Targeted Killing[©]

by
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ABSTRACT

Targeted killing has had significant political and military repercussions around the world in recent years, but especially in the wake of 2011 operations against Osama bin Laden and Anwar al-Awlaki.¹ Adapting a time-tested, prosecution-oriented strategy to capture rather than to kill, warrant-based targeting became the *de jure* required modality of dealing with insurgents and criminals alike in Iraq prior to coalitional troop withdrawal. It is also part of an emergent trend of combined² and interagency³ operations, not only in present-day Afghanistan, but also in the international arena. 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 arrest warrants, seek those warrants, apprehend pursuant to those warrants while collecting evidence for prosecution, then hand off apprehended individuals along with evidence collected to competent judicial and correctional authorities. It necessarily involves the effective use of information to seek a judicial warrant for arrest, and it works best in systems where transparent judicial processes militate against secrecy and promote public accountability.

This paper examines warrant-based targeting, and key lessons learned with respect to such operations. After an initial review of historical warrant-based targeting examples, follows commentary on legal and operational matters making warrant-based targeting both necessary and proper in Iraq from 2009 onward. Next discussed are 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 for applying warrant-based targeting beyond Iraq, and Afghanistan, come key lessons (re)learned with respect to military cooperation with domestic law enforcement and judicial authorities. These 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. In conclusion, the paper establishes what, in a world of ever-changing circumstances, the rule of law has come to mean, and why warrant-based targeting advances the rule of law and exists as a meaningful albeit complicated moral alternative to the expediency of targeted killing.

¹ See, e.g., Claire Finkelstein, Jens Ohlin and Andrew Altman, Eds., *Targeting Killings Law and Morality in an Asymmetrical World* (2012).

² U.S. Joint Publication (JP) 1-02, Department of Defense (DoD) *Dictionary of Military and Associated Terms*, Nov. 8, 2010, as amended through Mar. 15, 2012, 64, http://www.dtic.mil/doctrine/jel/new_pubs/jp1_02.pdf for a 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.) See also joint.”

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

I. HISTORICAL BASES FOR WARRANT-BASED TARGETING

From an historical perspective, written directives to search, arrest, and even execute pursuant to a judicial, executive or legislative order by direction to a law enforcement or military officer has likely existed since the earliest known civilizations. 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, where it provides that: "No Bill of Attainder or ex post facto Law will be passed."⁴

Warrants for arrest or apprehension have existed with an intrastate or domestic jurisdiction, as with those enforced within U.S. states and territories, and intrastate or international warrants as well, in the instance of the European Arrest Warrant (EAW),⁵ 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).⁶ These warrants for arrest or apprehension ensue where states and entities pursue a law enforcement model involving public records, procedures, and accountable 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, or, if captured, brought to justice in military courts or tribunals.⁷ As the May 2012 University of Pennsylvania Conference on the Ethics of Secrecy and the Rule of Law discussions will explore, the pressures of the War on Terror, (termed since 2009 Overseas Contingency Operations)⁸ have caused major policies and legal questions of national and international importance to become less and less open to public view, and U.S. and foreign acts of "expedited"

⁴ U.S. Const, Art. I, sec. 9. Regarding the potential origins of the bill of attainder proscription and implications regarding targeted killing, see, e.g., Alford, Ryan Patrick, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens* (March 7, 2011). *Utah Law Review*, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1780584>

⁵ "EU Council Framework Decision of 13 June 2002 on the European Arrest Warrant (2002/584/JHA), Article 1(1)". European Union. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:EN:NOT>. Once issued, the European Arrest Warrant (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. 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.

⁶ Situations and Cases, International Criminal Court (ICC) Website, updated May 2012, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/>.

⁷ See, e.g., *Targeted Killings*, supra note 1, at 5 *et seq.* Professor Finkelstein aptly points out in that work 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.*

⁸ Scott Wilson and Al Kamen, 'Global War On Terror' Is Given New Name, *washingtonpost.com*, Mar. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/24/AR2009032402818.html>.

justice, by means of secretive targeted killings and classified operation assassinations, has grown almost exponentially over the past several years.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 a 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, the Chief Justice of the U.S. Supreme Court, but then was said to have abandoned the proposal, upon consideration of wise counsel to the contrary.¹⁰ From an international perspective, and in a much more contemporary time, the warrant-based targeting and combined military-civilian multinational effort arrest of Charles Taylor in 2006, and the April 26, 2012 verdict by the Special Court of Sierra Leone—jointly managed by the West African country and the United Nations—proved to be a major validation of the concept 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.¹¹ By this process, Mr. Taylor became the first head of state to be indicted, tried and convicted by an international tribunal.¹²

On January 1, 2009, warrant-based targeting began in Iraq under Article 22 of the Strategic Framework Agreement between the U.S. and Iraq.¹³ Some months later, 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.¹⁴ The issuing authority,

⁹ See, e.g., Targeted Killings, supra note 1, at 366 *et. seq.*, and see also Kevin Govern, Expedited Justice: Gaddafi's Death and the Rise of Targeted Killings, JURIST - Forum, Oct. 25, 2011, <http://jurist.org/forum/2011/10/expedited-justice-the-trend-to-kill-over-capture.php>.

¹⁰ See, e.g., Charles Adams, Lincoln's Presidential Warrant to Arrest Chief Justice Roger B. Taney A Great Crime' or a Fabrication?, Southernheritage411.com, last updated 2004, <http://southernheritage411.com/truehistory.php?th=076>. The account is found in the chapter entitled, "Arrest of Traitors and Suspension of Habeas Corpus." It was taken from the private papers of the Federal Marshall, Ward Hill Laman, at the Huntington Library in Pasadena. Id. Brian McGinty, Lincoln and the Court (2008), at 77, in contrast, notes that in fact, Taney was never “molested” or mistreated by any member of the Federal Government. *Id.*

¹¹ See, e.g., Craig Timberg, Liberia's Taylor Found and Arrested, Washington Post, March 30, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/29/AR2006032900879.html>.

¹² Drew Hinshaw, Court Convicts Liberian Ex-President, Wall Street Journal, Apr. 26, 2012, <http://online.wsj.com/article/SB10001424052702304811304577367270834086502.html>.

¹³ U.S.–Iraq Status of Forces Agreement (official name: "Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq"), http://www.google.com/url?sa=t&rct=j&q=Strategic+Framework+Agreement+Iraq&source=web&cd=3&ved=0CGAQFjAC&url=http%3A%2F%2Fhp.osd.mil%2Fintlhealth%2Fpdfs%2Fstrategic_framework_agreement.pdf&ei=x7SyT4LdKYjM9Qtkw7HuCA&usg=AFQjCNGs3pYaGxqyeKrdLTNOOQloSBquPw&cad=rja. Note: The U.S. and the government of Iraq have negotiated two historic agreements: a Strategic Framework Agreement (SFA) that covers our overall political, economic, and security relationship with Iraq, and a Security Agreement – otherwise known as the Status of Forces Agreement (SOFA) – that implements our security relationship. For a detailed description, see, e.g., Kevin Govern, *Sharing a SOFA With Iraq: Towards a Status of Forces Agreement*, JURIST - Forum, Jul. 2, 2008, <http://jurist.law.pitt.edu/forumy/2008/07/sharing-sofa-with-iraq-towards-status.php>.

¹⁴ ICC issues a warrant of arrest for Omar Al Bashir, President of Sudan, ICC Website, Mar. 3, 2009, [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20)

the International Criminal Court (ICC) in The Hague, Netherlands, has in its existence publicly indicted 28 people, proceedings against 23 of whom are ongoing. The ICC has issued arrest warrants for 19 individuals and summonses to nine others in what it refers to as 15 “cases” in 7 situations have been brought before the International Criminal Court.¹⁵ 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 Abdulla Al-Senussi for crimes against humanity (murder and persecution) allegedly committed across Libya from 15 February 2011 until at least 28 February 2011, through the State apparatus and Security Forces.¹⁶

Most recently, Luis Moreno-Ocampo, the chief prosecutor at the ICC, said on May 14, 2012 that he was seeking new warrants for the arrests of two rebel leaders in the Democratic Republic of Congo (DRC), Congolese rebel leader Bosco Ntaganda and a fresh arrest warrant for Sylvestre Mudacumura, the supreme commander of the Rwandan rebel group known as the Democratic Forces for the Liberation of Rwanda (FDLR).¹⁷

While national or regionally oriented warrant-based targeting may rely upon a variety of bases for jurisdiction to issue warrants and to try individuals for crimes, the ICC’s inherent limitations include the fact that its jurisdiction extends to war crimes, crimes against humanity, and genocide 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 person accused of the crimes is a citizen of a country that is a party to the Rome Statute;

20%282009%29/icc%20issues%20a%20warrant%20of%20arrest%20for%20omar%20al%20bashir_%20president%20of%20sudan. NOTE: This is to be distinguished from the instance of Charles Taylor who was no longer the leader of Liberia when captured under arrest warrant, and later convicted.

¹⁵ Situations and cases, *supra* note 6. 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 International Criminal Court, [iccnw.org](http://www.iccnw.org), <http://www.iccnw.org/?mod=casessituations>.

¹⁶ Press Release, Pre-Trial Chamber I issues three warrants of arrest for Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdulla Al-Senussi, International Criminal Court, Jun. 27, 2011, <http://www.icc-cpi.int/NR/exeres/D07229DE-4E3D-45BC-8CB1-F5DAF8370218.htm>. For commentary regarding the need to avoid impunity and in dealing with Libyan crimes against humanity, see, e.g., *Kevin Govern*, Avoiding Amnesty: Bringing Gaddafi to Justice, JURIST - Forum, Aug. 25, 2011, <http://jurist.org/forum/2011/08/kevin-govern-gaddafi-icc.php>, and for the consequences of failing to bring Libyan leaders to justice before the courts, see, e.g., Expedited Justice, *supra* note 9.

¹⁷ ICC Prosecutor Seeks Warrants For Arrest Of Two Congolese Rebel Leaders RTTnews.com, May 15, 2012, http://www.rttnews.com/1886258/icc-prosecutor-seeks-warrants-for-arrest-of-two-congolese-rebel-leaders.aspx?type=msg&utm_source=google&utm_campaign=sitemap.

- 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.¹⁸

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 will require not just the force necessary to subdue or to bring into custody the subject, but perhaps even more importantly the deliberate efforts 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).”¹⁹ In the event that warrant-based targeting is interagency in nature and scope,²⁰ then both (para)military and other forces must be mindful of collecting and preserving evidence, providing technical support to those who further investigate and prosecute the individual(s) involved, and for that matter training others to successfully collect, preserve, safeguard, and forward the required evidence.²¹

Despite countless past military operations in which war crimes or other offenses may have been investigated after the fact, 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 relative inexperience of military members outside of the military police and criminal investigative branches with regards to securing evidence. This simple but difficult reality was (re)learned in particular during Operation Enduring Freedom in Iraq, where the “esoteric history” of this scientific methodology met the reality of the streets of Baghdad:

But as we move 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 ...”²²

II. TACTICS, TECHNIQUES AND PROCEDURES (TTP) – IRAQI FREEDOM OPERATIONS AS A MODEL

¹⁸ Darfur: International Criminal Court’s Decision on Bashir Arrest Warrant [umanrightswatch.org](http://www.umanrightswatch.org), Feb. 3, 2010, <http://www.hrw.org/news/2009/03/04/q-international-criminal-court-s-decision-al-bashir-s-arrest-warrant>

¹⁹ See, e.g., Forensic Evidence: The Legal Scenario [Legalserviceindia.com](http://www.legalserviceindia.com), Jan. 26, 2008, <http://www.legalserviceindia.com/article/l153-Forensic-Evidence.html>

²⁰ DoD Dictionary, *supra* note 3.

²¹ *Id.*

²² Pamela M. Collins, Forensics: From Its Esoteric History To The Streets of Baghdad, Military Police, Spring 2009, <http://www.wood.army.mil/mpbulletin/pdfs/Spring%2009/Collins.pdf>

In Iraq, the U.S. Department of State had the lead on such non-lethal issues as health, public diplomacy, governance, economics, and rule of law. The interagency Provincial Reconstruction Teams (PRTs) in Iraq and their military partner Brigade Combat Teams had so-called “Unified Common Plans” based on “Joint Common Plans” between the Ambassador and the Multinational Force-Iraq (MNF-I) Commander.²³ Pertinent to Rule of Law Goals in Iraq from 2008 onward, the “Joint Common Plan” directed that:

- The public and private obligations of any person [must be] known or readily determinable [and,]
- Disputes regarding these obligations are resolved effectively and impartially, and only by the state or by a method sanctioned by the state.²⁴

For those reasons and under those limitations, US 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 hard or threatened harm, and violations of this security will be vindicated by the state.
- The state protects basic human rights.
- 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.²⁵

For coalitional forces, the necessity of conducting warrant-based targeting came when the Security Agreement or SOFA was implemented on January 1, 2009.²⁶ In that agreement, Article 4 allowed for US Forces to assist the Government of Iraq (GOI) to combat Al Qaeda, terrorists, and outlaw groups, and Article 22 required that all detainees captured be turned over to Iraqi authorities within 24 hours.²⁷ That short suspense for turning captured persons over to the GOI meant that collecting

²³ Michael F. Scotto and Jason S. Alexander, The Role of PRTs on the Battlefield 2009, Small Wars Journal, smallwarsjournal.com, <http://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 Journal, smallwarsjournal.com, 2008, <http://smallwarsjournal.com/blog/journal/docs-temp/131-bebber.pdf> [quoting Army/Marine Corps Counterinsurgency Field Manual FM 3-24, December 2006].

²⁴ See, e.g., William Obring, Law in the Deployed Environment, Widener Law School, Apr 16, 2009, available at <http://www.slideshare.net/widenerlaw/will-obringer-office-of-judge-advocate-us-army-speaks-at-widener-law>.

²⁵ *Id.*

²⁶ U.S.–Iraq Status of Forces Agreement, *supra* note 13.

²⁷ *Id.*

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 essentially impossible. For that matter, Article 22 also required that all detainees in US custody be turned over to the GOI,²⁸ so coalition forces were forced to review any evidence on detainees and relinquish that evidence if any to the GOI. Rather than having a lengthy and overlapping or concurrent jurisdiction between the GOI and coalition forces, the Security Agreement or SOFA made it clear and binding that coalition forces would withdraw from cities by mid-2009 and that there would be a total withdrawal by the end of 2011.²⁹ So coalition forces engaged in missions capturing detainees needed to begin their operations with these ends in mind. It became not just pragmatic or expedient to effectively use of information to seek a judicial warrant for arrest, but the requirement. Unfortunately, these actual requirements involved in 2008 – and continued to involve through coalitional presence in Iraq – a substantial aspirational aspect. Cooperation with civilian government agencies and even foreign (para)military forces requires a minimization of secrecy or compartmentation. But Iraq then – as now – has far to go in improving the transparency and effectiveness of its judicial system.³⁰

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-extant 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; 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:

²⁸ *Id.*

²⁹ *Id.*

³⁰ See, e.g., Alastair Burt, Michael's [UK Member of Parliament Connarty's] questions put spotlight on misery in Iraq, mconnartymp.com, March 2012, <http://www.mconnartymp.com/human-rights-in-iraq-shocking-revelations.html>, *citing with authority* House of Commons Hansard Written Answers for 27 Mar 2012, Mar. 27, 2012, <http://www.publications.parliament.uk/pa/cm201212/cmhansrd/cm120327/text/120327w0003.htm>.

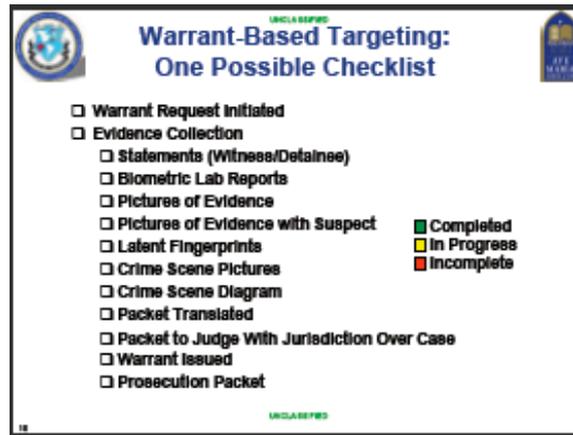


Figure 1 – Warrant-Based Targeting Checklist³¹

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. Depicted below is one such unclassified, notional TQ assessment:

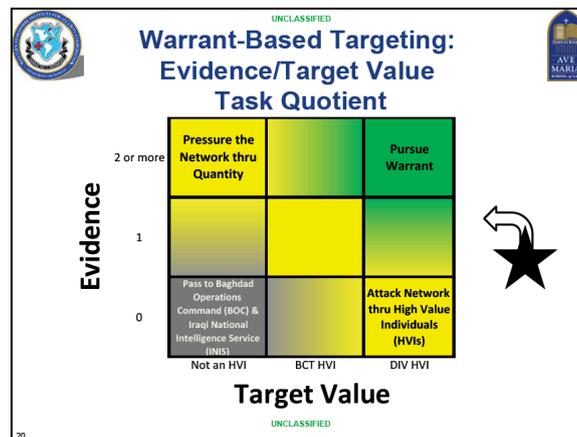


Figure 2 – Task Quotient (TQ) Assessment Chart³²

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. 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 accomplishment status of the

³¹ Kevin Govern, Warrant-Based Targeting: Roles and Responsibilities Under Law and Policy, Western Hemisphere Institute for Security Cooperation (WHINSEC), Ft. Benning, GA, Jul. 3, 2012, 19, (on file with author) *citing with authority* Obringer, *supra* note 24.

³² *Id.*, at 20.

warrant-based targeting checklist in the lower left quadrant, and finally; specific and additional comments on evidence collected to be collected on the person of interest as well as other pertinent information (which in this notional case included defining acronyms which ordinarily would have not been defined by compilers or necessary for end-users because of their familiarity with such terms of art):

The form is titled "UNCLASSIFIED UA 0807: Kevin Abu Yahya". It includes a photo of a man in a military uniform, a "Detained" checkbox, and a religion selection (Shia/Sunni). The "Offense(s) / Incident(s)" section contains a 5 Ws form (Who, What, When, Where, Why). The "Evidence" section is divided into a checklist of items (e.g., Warrant Request Initiated, Evidence Collection, Statements, etc.) and a central "Evidence" box with a star icon and "Target Value" field. The bottom right contains physical evidence details and a "SIGINT: N/A" note.

Figure 3 – Notional Warrant-Based Targeting “Quad Chart”³³

MNF-I developed unit policies by 2008 such that all detentions would require a warrant from GOI judicial authorities,³⁴ 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 where there was an attack against Coalition Force (CF) / Iraqi Security Force (ISF), and it was reasonably certain that act constituted a criminal act, or where MNF-I forces were acting in self-defense.³⁵ It would also direct that its units “mentor” GOI partner units on conducting warrant based detentions, and to “support Iraqi law in all matters.” Consistent with the aforementioned Article 22 requirements, MNF-I forces would, within 24 hours, turn over any detainees to “competent Iraqi authority,” with the e 24-hour time period starting at the time and point of detention, and to completely avoid US interrogations once detainees were relinquished and within GOI or ISF facilities.³⁶

Rather than operating as a “law unto themselves,” by abiding by the Security Agreement, and promoting the sovereignty and independence of the GOI judiciary and ISF, a very practical and significant effort was made in advancing (if not fully accomplishing or reestablishing) the elusive rule of law status in Iraq, or to promote Iraq’s aspirations as a “rechtstaat” as sometimes referenced within the Western legal tradition. The term “rechtstaat” in German, is often translated to “the rule of law” in English, yet coming from the root words “Recht” (the law) and “Staat” (the State). The first scholars to use this term, at the turn of the nineteenth century, apparently

³³ *Id.*, at 34.

³⁴ Obringer, *supra* note 24

³⁵ *Id.*

³⁶ *Id.*

were the Germans Robert von Mohl and Rudolph Gneist.³⁷ Professor Alexander Domrin observed that von Gneist firmly believed in 1867 that a “free legal profession would be the Archimedean lever for accomplishing the liberal project of personal rights and the rule of law.”³⁸ 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*.”³⁹

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

*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.*⁴⁰

Of a similarly contemporary timeframe, the departing 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.”⁴¹ Another lesson, Mr. Annan added, is that “security and development ultimately depend on respect for human rights and the rule of law.”⁴²

³⁷ Rudolf von Gneist, DER RECHTSSTAAT (1872) 484-33, *cited with authority in* Kevin Govern, “Rechtsstaat” Aspirations versus Accomplishments: Rethinking Recent Rule of Law Efforts in Iraq, ISIL Yearbook of International Humanitarian and Refugee Law Vol VI. (2006), 9, 50.

³⁸ Alexander N. Domrin, Issues and Options in the Soviet Transition to the Rule of Law, reviewing *COEXISTENCE. A REVIEW OF EAST-WEST AND DEVELOPMENT ISSUES*. Dordrecht, Boston, London: Martinus Nijhoff Publishers. Vol.30, No.1, March 1993. Pp.57-68, *available at* <http://www.uiowa.edu/~cyberlaw/domrin/andar01.html>, *cited with authority in* Rechtsstaat, *Id.*, at 51.

³⁹ Mauro Zamboni, Mauro, 'Rechtsstaat': What is it that Swedish Development Assistance Organisations 'export'? (2004), at 3, <http://ssrn.com/abstract=924888> or <http://dx.doi.org/10.2139/ssrn.924888>, *cited with authority in* Rechtsstaat, *Id.*, at 51.

⁴⁰ Howard J Krongard, Testimony before the House Committee On Government Reform Subcommittee On National Security, Emerging Threats, And International Relations, the Inspector General, U.S. Department Of State And Broadcasting Board Of Governors, October 18, 2005, at 2, *available at* <http://oig.state.gov/documents/organization/55349.pdf>.

⁴¹ Speech by former UN Secretary-General Kofi A. Annan, at the Truman Library, Dec. 11 2006, *available at* <http://www.un.org/apps/sg/sgstats.asp?nid=2357>

⁴² *Id.*

III. LESSONS (RE) LEARNED ON CIVIL-MILITARY COOPERATION AND WARRANT-BASED TARGETING

In Iraq, the U.S. established a guiding principle of working by, with, and through the domestic security forces, once they were vetted, trained, and operational, such that it would consistently work within the domestic rule of law when dealing with insurgents and criminals who threaten their forces. This “(re)legitimization” of Iraqi governmental entity forces, and the negotiated security agreement legal prescriptions, required coalitional 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. 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 US interests in Iraq and around the world.⁴³ As U.S. forces have conducted “warrant based targeting” in Iraq, they have concluded the following that may well have analogous applicability in other settings, nations, and regions involving combined and interagency warrant-based targeting:⁴⁴

- Judges are the law within the domestic court system; commanders must build relationships and trust with the judges.
- Commanders must also help educate judges on internationally accepted techniques used in building a case for prosecution, with a special focus on forensic evidence.
- 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.
- Soldiers and leaders must be trained in the proper collection and processing of evidence, crime scene documentation, and identification and handling of witness statements.
- 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.
- 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.”
- 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 promote unwanted or

⁴³ David Crane, *‘Smart Power’ and the Rule of Law*, JURIST - Forum, Jan. 20, 2009, <http://jurist.law.pitt.edu/forumy/2009/01/smart-power-and-rule-of-law.php>

⁴⁴ *Id.*, at 4-6.

avoidable results.⁴⁵

A brief literature review of relatively recent, unclassified (“open source”) writings on military operations proves highly useful in identifying which of these principles and lessons learned have been (re)validated, and what can and ought to be avoided regardless of operational scenarios which may lay ahead.

The U.S. Army’s Center for Law and Military Operations (CLAMO) created a Legal Lessons Learned From Afghanistan and Iraq Volume I & II Major Combat Operations (11 September 2001 – 1 May 2003) in 2004, writing about how warrant-based targeting first worked in Iraq. 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.⁴⁶

In the Fall of 2008, Journalist Richard Tomkins of the Washington Times interviewed military members of the U.S. 4th Infantry Division conducting warrant-based targeting; 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.⁴⁷ 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

⁴⁵ Govern, *supra* note 31. Note: Observations are based upon interviews, research, and debriefings, as well as the Obringer materials cited in note 24.

⁴⁶ U.S. Army Center for Law and Military Operations (CLAMO), Legal Lessons Learned From Afghanistan and Iraq Volume I & II Major Combat Operations (11 September 2001 – 1 May 2003), 2004, at 29, 74, <http://www.fas.org/irp/doddir/army/clamo-v2.pdf>.

⁴⁷ Richard Tomkins, Warrants present hurdle in Iraq, *washingtontimes.com*, Dec. 18, 2008, <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.”⁴⁸

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.”⁴⁹

Those judge advocates also learned a lesson worth repeating that accomplishing warrant-based targeting within host nation legal parameters was not only possible but also efficient and practical and effective, where coalition forces and host nation forces rehearsed and practiced what they rehearsed consistently and reliably, thus shifting responsibility for security and accountability to host nation assets:

Planners would integrate the evidentiary standards of Iraqi criminal law into the [Special Forces] 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. [Special Operations Forces] and their partnered Iraqi units. The process came to be referred to as the “rocket docket.” ... Through a functional approach, we integrated the rule of law into our [Foreign Internal Defense] mission without disrupting our operational tempo or mission accomplishment.”⁵⁰

Warrant-based targeting by any other name is allied with the time-honored concept of “manhunting.” 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

⁴⁸ Richard Tomkins, Warrants present hurdle in Iraq, [washingtontimes.com](http://www.washingtontimes.com/news/2008/dec/18/warranting-compliance/?page=all), Dec. 18, 2008, <http://www.washingtontimes.com/news/2008/dec/18/warranting-compliance/?page=all>.

⁴⁹ Daniel A. Tanabe and Joseph N. Orenstein, Integrating the Rule of Law With FID [Foreign Internal Defense] in Iraq, *Special Warfare*, November-December 2009, at 7 et seq., <http://www.scribd.com/doc/24500266/Special-Warfare-november-December-2009>.

⁵⁰ *Id.* at 7.

opponents.”⁵¹ Scholars at the U.S. Department of Defense’s Joint Special Operations University (JSOU) at Hurlburt Field, FL, 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.⁵²

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, and may prove to be even less discernable in the regional, coalitional, and multinational situations that may 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.⁵³

The bard William Shakespeare famously wrote “What’s in a name? That which we call a rose. ... By any other name would smell as sweet.”⁵⁴ So too, we might consider that “conviction-focused targeting” is the moral equivalent of the warrant-based targeting “rose.” The scholar Steve Berlin assesses the two as twinned,⁵⁵ with the following recommendations for successful warrant-based targeting focused on the goal of conviction within the court system:

- Create a combined task force in order to investigate complex criminal cases.
- Number of task forces within a theater of operations is dependent on the operating environment and should align with host nation security leaders.
- Focus on rendering Violent Extremist Networks unable to function.

⁵¹ George A. Crawford, *Manhunting: Counter-Network Organization for Irregular Warfare*, JSOU Report 09-7 (Hurlburt Field: The JSOU Press, 2009) 1, <http://www.scribd.com/doc/36926852/Man-Hunting>.

⁵² *Id.*, citing with authority Marks, Meer, and Nilson, *Manhunting: A Methodology* (2005), at 73, http://www.au.af.mil/au/awc/awcgate/nps/manhunting_marks_jun05.pdf.

⁵³ *Id.*

⁵⁴ William Shakespeare, *The Complete Works of William Shakespeare, The Tragedy of Romeo and Juliet*, (II, ii, 1-2), <http://www.gutenberg.org/ebooks/1112>.

⁵⁵ Steve Berlin, *Conviction-Focused Targeting: Targeting Violent Extremists While Developing Rule of Law Capacity*, *Small Wars Journal*, smallwarsjournal.com, August 24, 2010, at 6, <http://www.smallwarsjournal.com/blog/journal/docs-temp/505-Berlin.pdf>.

- Task force should resemble an organized crime or anti-gang task force.⁵⁶

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.⁵⁷ Once created, the parties must find a method to “synchronize their efforts.”⁵⁸ The forces must have a secure location where both coalitional and Forces and host nation forces can interact freely without bringing excessive attention to their combined efforts.⁵⁹ This location should be collocated with a “combined operations center,” increasing transparency and accountability between and among coalitional and interagency (para)military forces, government agencies, and to the public, and 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,⁶⁰ in effect, having a place where some cards are still held close to the vest and classified and compartmented information is not shared outside witting, trusted circles.

Berlin further notes that this methodology was transplanted to the Afghan theater of operations, and U.S. Forces and Afghan host nation prosecutors brought their first terrorism case to trial at Bagram Air Field on June 1, 2010.⁶¹ 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.”⁶² 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.”⁶³

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. The scholar Robert 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,”⁶⁴ and, as noted above, “all of this was

⁵⁶ *Id.*, at 6.

⁵⁷ *Id.*, at 6.

⁵⁸ *Id.*, at 6.

⁵⁹ *Id.*, at 6.

⁶⁰ *Id.*, at 6.

⁶¹ *Id.*, at 11.

⁶² *Id.*, at 11.

⁶³ *Id.*, at 11.

⁶⁴ Robert Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, V. J. Int’l Law, Vol 51, Issue 3, 549, *citing with authority* Regimental Judge Advocate, 2d Stryker Cavalry Regiment, After Action Report, Operation Iraqi Freedom, August 2007–May 2008: Understanding the Iraqi Legal System in Support of Prosecutions at CCCI (Feb. 17, 2009), in *Center FOR LAW & MILITARY OPERATIONS, U.S. ARMY, TIP OF THE SPEAR 57* (2009), at 39.

preliminary to the decision of the trial panel on the ultimate question of guilt.”⁶⁵ For these and numerous other reasons, the name of such operations really does matter, since it may shape expectations and measures of effectiveness.⁶⁶ Chesney notes that from this perspective:

[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.”⁶⁷

Chesney concludes of his research into reported 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.”⁶⁸ He found “no paradox in this,” given the notion that “fidelity to the rule of law does not require law to be static.”⁶⁹

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

These operations primarily in Iraq, and to a limited extent in Afghanistan, may offer some interesting opportunities as well as challenges for other nations’ efforts to bring persons accused of war crimes, and crimes during times of internal and international armed conflict, to justice, most notably an even more deliberate and cooperative mode of operations between and among nations.⁷⁰ Transitioning from unilateral operations to operations “by-with-through” host nation or coalitional forces requires “an abrupt changing of mindset akin to transforming conventional US forces into special forces-

⁶⁵ *Id.*, at 603

⁶⁶ See, e.g., Richard E. Darilek, et al., *Measures of Effectiveness for the Information-Age Army*, RAND CORP. (2001), at iii, http://www.rand.org/content/dam/rand/pubs/monograph_reports/MR1155/MR1155.pref.pdf.

⁶⁷ Chesney, *supra* note 60, at 603.

⁶⁸ *Id.*, at 634.

⁶⁹ *Id.*, at 635.

⁷⁰ Warrant Based Targeting: The Iraq Model, Al Sahwa Website, Apr. 3, 2010, <http://al-sahwa.blogspot.com/2010/04/warrant-based-targeting-iraq-model.html>, citing with authority Iraqi Security Forces disrupt AQI’s financial, extortion networks, Operation New Dawn Website, April 1, 2010 <http://www.usf-iraq.com/news/press-releases/iraqi-security-forces-disrupt-aqis-financial-extortion-networks>.

style ‘soldiers on-the-fly.’”⁷¹ while traditional military operational objectives of “find, fix, finish, exploit, analyze, disseminate (F3EAD) remain valid,⁷² there is present and future merit to a mindset shift from “kinetic” use of force and targeted killing.⁷³ This is not just from a moral and ethical perspective as being more appropriate or palatable or desirable than causing death outside of judicially orchestrated processes,⁷⁴ but because history and present indicators of future crises give us every indication that “irregular warfare / insurgencies will continue.”⁷⁵

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 (just on or near the continent of Africa alone) where “weakly governed spaces provide favorable operating environments for violent extremism, piracy, and trafficking of humans, weapons, and drugs.”⁷⁶ 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.⁷⁷ The ICC has publicly indicted 28 people, proceedings against 23 of whom are ongoing.⁷⁸ The ICC has issued arrest warrants for 19 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).⁷⁹ Additionally, two individuals have been arrested by national authorities, but have not yet been transferred to the Court.⁸⁰

This does not even include national efforts to seek international extradition, the most recent of which at the time of this paper’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,⁸¹ or the

⁷¹ *Id.*

⁷² Author’s Note: “F3EAD” means Find, Fix, Finish, Exploit, Analyze, and Disseminate. See F3EAD Definition/Scope, U.S. Army Combined Arms Center Thesaurus Online, Last Updated: Sept 17, 2008, <http://usacac.army.mil/cac2/call/thesaurus/toc.asp?id=34068>.

⁷³ Targeted Killings, *supra* note 1.

⁷⁴ *Id.*

⁷⁵ Warrant-Based Targeting, *supra* note 70.

⁷⁶ U.S. AFR. COMMAND, 2010 POSTURE STATEMENT (2010), cited with authority in 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, *Conn. J. Int’l L. Jour.* Vol. 26, 282. In testimony before Congress March 9, 2010, the commander of AFRICOM 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. 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.

⁷⁷ Situations and Cases, *supra* note 6.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Chandra Sriram, *ICJ and Habre: A Possible End to a Long Road to Accountability*, JURIST - Forum, Mar. 12, 2012, <http://jurist.org/forum/2012/03/chandra-sriram-icj-habre.php>.

pending ICC arrest warrant against son of the deceased Libyan strongman, Saif al-Islam Gaddafi, and the former Libyan intelligence chief.⁸² Not every nation or regional will cooperate to bring criminals, insurgents, or pirates to justice, though. 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 crime involving the atrocities committed in Darfur.⁸³ The British Broadcasting Service reported that shortly after the warrant’s issuance, al-Bashir “scoffed” at his arrest warrant,⁸⁴ and rejected the charges as “neo-colonialism.”⁸⁵ 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.”⁸⁶ At the time of this article’s writing, not only was al-Bashir still in power and at large, but he had even traveled to Tripoli (before it came under rebel siege) to attend the 40th anniversary celebrations of the deposed-by-death Gaddafi’s Libya coup, held September 1, 2009, won a lopsided and questionable victory in April 11-15, 2010 national elections, and became the beneficiary of the AU’s Summer of 2010 request of yet another delay in ICC charges.⁸⁷

Of 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 Gaddafi’s son, son Saif al-Islam Gaddafi, and his intelligence chief Abdullah al-Senussi to justice outside Libya, rejecting the authority of the tribunal.⁸⁸ 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 Court.⁸⁹ While haggling between the ICC and Libya’s National Transitional Council (NTC) over the fate of Saif al-Islam Gaddafi and Abdullah al-Senussi continues, Libya quietly, but controversially, passed a blanket amnesty for pro-Revolution rebels, and formally asked the ICC to abandon its legal action against Gaddafi and the country’s former intelligence chief so that both men can be tried in Tripoli where they could face the death penalty.⁹⁰ For that matter,

⁸²ICC issues Gaddafi arrest warrant, [aljazeera.net](http://english.aljazeera.net/news/africa/2011/06/20116278148166670.html), Jun. 28, 2011, <http://english.aljazeera.net/news/africa/2011/06/20116278148166670.html>.

⁸³ *Mbeki Named to Heal Bashir Rift*, BBC NEWS (Mar. 6, 2009), <http://news.bbc.co.uk/2/hi/africa/7927706.stm>. [hereinafter *Mbeki*], cited with authority in Kevin Govern, *supra* note 72, at 282.

⁸⁴ Peter Martell, *Dancing Bashir Scoffs at Darfur Warrant*, BBC NEWS (Mar. 5, 2009), <http://news.bbc.co.uk/2/hi/africa/7926813.stm>.

⁸⁵ Mbeki, *supra* note 83.

⁸⁶ *Id.*

⁸⁷ Patrick Goodenough, *Little Western Support As Libya Marks 40 Years of Gaddafi*, CNS NEWS (Sept. 1, 2009), <http://www.cnsnews.com/news/article/53329>. See also Edith M. Lederer, *Africans Ask UN to Delay al-Bashir Prosecution*, THE 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>, cited with authority in Govern, *supra* note 78.

⁸⁸ Owen Bowcott, *Saif Gaddafi should go on trial in Libya, war crimes tribunal told*, Guardian.co.uk, May 1, 2012, <http://www.guardian.co.uk/world/2012/may/01/saif-gaddafi-trial-libya-icc?newsfeed=true>

⁸⁹ *Id.*

⁹⁰ *Id.*

Libya has negotiated with the government of Mauretania to return al-Senussi to Libya, pending sufficient recovery from liver disease to travel.⁹¹

CONCLUSION

To varying degrees along the continuum “between war and peace,” conflict and conflict resolution, various degrees of economic, political, and military influences can lead to de-escalation from disputes, political accommodations, and achievement of desired end states of unilateral or multilateral benefit.⁹² This paper has been a far-from-exhaustive, non-comprehensive survey of operational observations and lessons (re)learned about the hybrid military-judicial-law enforcement operation variously called warrant-based targeting or prosecution-oriented targeting. In its essence, and in summary, it 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, and its application will likely cause less use of secrecy in governmental practices, while advancing domestic and international rule of law values.

⁹¹ *Id.*

⁹² Kevin Govern, Chapter 16, The Legal Way Ahead Between War and Peace, in *Enemy Combatants, Terrorism, and Armed Conflict Law: A. Guide to the Issues*, David Linnan ed. (2008), at 287