Rule of Law in War
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International Law and United States Counterinsurgency in Iraq and Afghanistan

Travers McLeod
For Gemma and Lyall, who made it all possible, and Julia, who I met along the way.
The book places international law at the centre of the transformation of United States (US) counterinsurgency (COIN) doctrine and practice that occurred during the Iraq and Afghanistan wars. It contradicts existing theoretical assumptions and claims international law matters much more than is often assumed and much more than scholars and practitioners have previously been able to claim. In particular, the book contends international law matters in a case that may be regarded as particularly tough for international law, that is, the development of a key military doctrine, the execution of that doctrine on the battlefield and the ultimate conduct of armed conflict. To do so, the book traces international law’s influence in the construction of modern US COIN doctrine and assesses how international law’s doctrinal influence has held up in Iraq and Afghanistan. My account of this doctrinal change is based on extensive access to the primary actors and materials.

I argue we can trace international law’s impact on counterinsurgency via three pathways. The first incorporates international law’s ‘ideational influence’, primarily through the way in which a deference to the rule of law implicates specific rules of international law directly or indirectly. The second looks at international law’s influence on legitimacy, by which I mean the way international law is used to articulate and also to demonstrate legitimacy. The final pathway examines what I term international law’s mandatory impact, seen largely through its interaction with domestic law and domestic institutions.

The book tells us something new about international law’s impact on the preponderant power in the international system, the US, in an area of state behaviour usually assumed to be inoculated from its influence. Nine years ago, in 2005, the US was accused of being a ‘lawless hegemon’, one that deliberately avoided rules of international law, especially those relating to the law of armed conflict (LOAC) and international human rights law. The counterinsurgency campaigns in Iraq and Afghanistan resulted in the opposite: the book uses the three pathways to explain the role of international law in this reversal. In doing so, it also illustrates the influence of international law in modern war. The book is the first to have access to the full drafting history of Field Manual 3-24, *Counterinsurgency* (FM 3-24), released by the US Army and Marine Corps in December 2006. I draw additionally on over sixty interviews.
with FM 3–24’s writing team and military officers of various ranks who served in Iraq and Afghanistan. These interviewees include US four-star military commanders (Generals Petraeus, McChrystal and Mattis), other Multi-National Force Iraq (MNF–I) and International Security Assistance Force (ISAF) commanders (Lieutenant General Sir Graeme Lamb, Major Generals Mart de Kruif and Jim Molan), judge advocates (including Brigadier General Mark Martins, Colonels Richard Hatch and Marc Warren), policymakers and advisers (William Lietzau, Drs John Nagl, Janine Davidson, David Kilcullen and Colin Kahl among them), and officers at US Central Command (CENTCOM) and Fort Carson, a US military base in Colorado.

Despite obvious crossover, the disciplines of International Relations (IR) and International Law (IL) still operate in relatively exclusive spheres. I believe a lack of detailed causal and empirical inquiry of their interaction has exacerbated this exclusion. The book attempts to remedy this and bring the disciplines closer together so far as they understand how international law impacts state action. Some of international law’s impact was correlated with operational and tactical thinking, but not all of it was consciously directed. The upshot: there is a more independent influence than is commonly appreciated.
Acknowledgements

This book bears my name but reflects the collective input of many wonderful people. It builds on postgraduate research completed at the University of Oxford 2007–12. During that time I was fortunate to have two excellent supervisors: Yuen Foong Khong and Dapo Akade. Yuen was part of this project from its conception, and his guidance nudged it in all the right directions; Dapo joined in 2009 and added vital expertise and counsel. Both have become trusted mentors and friends.

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Travers McLeod
Melbourne, Australia
September 2014
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Additional Protocols  Geneva Protocol I Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts (1977)
                  Geneva Protocol II Additional to the Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977)

ANA  Afghanistan National Army
ANP  Afghanistan National Police
AP 1  Geneva Protocol I Additional to the Geneva Conventions, and Relating to the Protection of Victims of International Armed Conflicts (1977)
AP 2  Geneva Protocol II Additional to the Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts (1977)

CADD  Combined Arms Doctrine Directorate, Fort Leavenworth
CAT  Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

CENTCOM  US Central Command
CIA  Central Intelligence Agency
CIDTP  Cruel, inhuman or degrading treatment or punishment
CJIATF 435  Combined Joint Interagency Task Force 435
COIN  Counterinsurgency

DCG-DO  Deputy Commanding General for Detention Operations
DoD  US Department of Defense
DoD Dir. 2311.01E  US Department of Defense, Directive 2311.01E, DoD Law of War Program

DPH  Direct participation in hostilities
EOC  Elements of Crimes
EOF  Escalation of Force
FM  Field Manual
## Abbreviations

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<td>GOI</td>
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<td>IBC</td>
<td>Iraq Body Count</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>IED</td>
<td>Improvised explosive device</td>
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<td>IG</td>
<td>Interpretive guidance</td>
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<td>IHL</td>
<td>International humanitarian law</td>
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<td>IL</td>
<td>International Law</td>
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<td>IO</td>
<td>Information operations</td>
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<td>IR</td>
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<td>International Security Assistance Force (Afghanistan)</td>
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<td>ISIL</td>
<td>Islamic State in Iraq and the Levant</td>
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<td>JSOC</td>
<td>US Joint Special Operations Command</td>
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<td>LOAC</td>
<td>Law of armed conflict</td>
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<td>LWD 3-0-1</td>
<td>Australian Command Staff College, Land Warfare Doctrine 3-0-1, Counterinsurgency (2008)</td>
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<td>Manual for Courts-Martial</td>
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<td>Multi-National Corps–Iraq</td>
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<td>Multi-National Force–Iraq</td>
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<td>MNFRC</td>
<td>Multi-National Force Review Committee</td>
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<td>OEF</td>
<td>Operation Enduring Freedom</td>
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<td>Office of the Staff Judge Advocate</td>
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<td>POW</td>
<td>Prisoner of war</td>
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<td>RoE</td>
<td>Rules of engagement</td>
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<td>ROLFF–A</td>
<td>Rule of Law Field Force–Afghanistan</td>
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<td>SCP</td>
<td>Strategic Communication Plan</td>
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<td>StratCom</td>
<td>Strategic Communications</td>
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<td>UCMJ</td>
<td>Uniform Code of Military Justice (US)</td>
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<td>UN</td>
<td>United Nations</td>
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<td>US</td>
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Introduction

In May 2014, as United States (US) combat forces prepared to leave Afghanistan, the US Army and Marine Corps released their revised blueprint for counter-insurgency operations. There was little fanfare. Sunni militants swept through Mosul and other parts of Iraq under the banner of the Islamic State in Iraq and the Levant (ISIL) barely a month after its release. Eight years earlier, in December 2006, copies of the previous (and first) edition, Field Manual 3-24, *Counter-insurgency* (FM 3-24), had been hand delivered to President George W. Bush and members of the Senate Armed Services Committee by the doctrine’s architect, Lieutenant General David Petraeus.¹ Some recipients requested a signed copy. FM 3-24 was downloaded more than 600,000 times within a day of its release, and over 1.5 million times in the ensuing month, by which point Petraeus had been promoted to four-star general rank and appointed Commander of the Multi-National Force in Iraq (MNF–Iraq). His forces became heavily enmeshed in the ‘surge’, a popular expression to describe the counter-insurgency campaign he had designed and been asked to implement. Its apparent success led to the adoption of a similar approach in Afghanistan, signalled by the appointment of General Stanley McChrystal as Commander of the International Security Assistance Force (ISAF) in June 2009. However, over a decade of fighting insurgencies in Iraq and Afghanistan and continuing instability in the Middle East has ensured the second iteration of FM 3-24, *Insurgencies and Countering Insurgencies*, is more reflective than prescriptive when compared to its predecessor. ‘No more Iraqs or Afghanistans’ could well be the second edition’s mantra, just as ‘No more Vietnams’ characterized US thinking after the Vietnam War. History suggests, however, that irregular wars will continue to be fought. For that reason, the story of FM 3-24’s first edition and the campaigns it informed merits close inspection.

¹ ‘FM 3-24’ is used throughout this book in reference to the first edition.
This book explores the power of international law. Robert Keohane argued the ‘causal issue’ is ‘central to the debate about the role of rules, even though causal inferences, especially in complex situations such as these, are always flawed’. Keohane and others have also lamented the lack of empirical examination of how such rules have their impact. This book takes up these causal and empirical challenges by asking how, if at all, international law manifests itself in the conduct of modern war, and how such manifestations affect prevailing theories on the function of international law in international politics. More specifically, it examines how international law impacted the development of US counter-insurgency doctrine and its prosecution downrange in Iraq and Afghanistan.

War has been chosen as the environment within which to examine international law’s influence for three reasons. First, ‘military force remains a depressingly constant feature of political life’. Second, international law, perhaps unexpectedly, has had a long association with war. Third, this association notwithstanding, the conduct of warfare is said to be ‘among the areas least likely to be affected by international law’. Much discussion about international law’s impact has been in the abstract, with discourse dominated by writers biased towards one realm of the relationship (law or politics) or lacking deep knowledge of both disciplines. Tellingly, the literature has assumed that certain areas of state behaviour—namely the prosecution of war and the maintenance of security—are largely immune from international law’s influence. Jack Goldsmith and Eric Posner famously declared international law’s limits, but did so with a nebulous definition of state interest and by sidelining what they described as ‘two of the most significant areas of international law’, namely environmental law and the law of armed conflict (LOAC). In their work on the life cycle of norms, Martha Finnemore and Kathryn Sikkink also suggested international law’s influence was least expected (and least evident) in the ‘traditional security field’.

By focusing on the US, this book seeks to say something new about international law’s impact on the preponderant power in the international system. I claim international law has been pivotal in an area of state behaviour usually assumed to be inoculated from its influence. In 2005, the US was accused of being a ‘lawless hegemon’, one that deliberately avoided rules of international law, especially those relating to war and international human rights, and

\[6\] Guzman (2002: 1885).
\[7\] Posner and Goldsmith (2005: 3).
\[9\] See Krisch (2005: 370).
exploited gaps and ambiguity within them to benefit its prosecution of the so-called ‘War on Terror’. The counterinsurgency story resulted in almost the opposite, a rule-abiding hegemon with greater respect for international law. This book strives to explain the function of international law in this reversal and, in doing so, illustrate the influence of international law in modern warfare. The book is the first to have access to the full drafting history of the first edition of FM 3-24, released by the US Army and Marine Corps in December 2006. Research draws on over sixty interviews with FM 3-24’s writing team and military officers of various ranks who served in Iraq and Afghanistan. These interviewees include US four-star military commanders (Generals Petraeus, McChrystal and Mattis), other Multi-National Force Iraq (MNI–I) and International Security Assistance Force (ISAF) commanders (Lieutenant General Sir Graeme Lamb, Major Generals Mart de Kruif and Jim Molan), judge advocates (including Brigadier General Mark Martins, Colonels Richard Hatch and Marc Warren), policymakers and advisers (William Lietzau, Drs John Nagl, Janine Davidson, David Kilcullen and Colin Kahl among them), and officers at US Central Command (CENTCOM) and Fort Carson, a US military base in Colorado.

By evaluating the changing approach to the conduct of counterinsurgency, I aim to examine the conditions under which international law matters in directing, changing, or refining certain outcomes on the battlefield. Despite the difficulties presented by assessing the impact of rules, I argue international law has played an important but underappreciated role in the design and execution of modern US COIN doctrine; that the US has approached legitimate warfare in increasingly legal terms. By important, I do not mean international law has done all the heavy lifting. Although Louis Henkin’s observation, that ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’, is attractive to writers and practitioners for its parsimony, its generality is misleading.

My core proposition is that one can unpack international law’s impact via three pathways. The first pathway investigates international law’s ‘ideational influence’, primarily through the way in which deference to the rule of law implicates rules of international law either directly or indirectly. The second pathway looks at international law’s influence in the process of legitimation, by which I mean the way international law is used to articulate and also to demonstrate the legitimacy of state actions. The final pathway examines what I term international law’s mandatory impact, where states have no choice but to follow the ‘rules’, seen largely through international law’s interaction with

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12 Henkin (1979: 47).
domestic law and domestic institutions. These pathways trace international law’s influence in the construction of modern US COIN doctrine and assess how that influence held up in Iraq and Afghanistan.

Politics versus Law?

Let lawyers and statesmen addle
Their pates over points of law:
If sound be our sword and saddle
And gun-gear, who cares one straw?

Poet Laureate (Alfred Austin), *The Times*, during the Jameson Raid, 1896

Damn the law, I want the Canal built.

President Theodore Roosevelt, during the Panama crisis, 1904

We did a whole lot of things that were right, but we tortured some folks.
We did some things that were contrary to our values.

President Barack Obama, August 2014.13

International law and power have had a vexed relationship. In 1939, E.H. Carr spoke of an inability to understand international law ‘independently of the political foundation on which it rests and the political interests it serves’.14 Labelling international law, like politics, a ‘meeting place for ethics and power’, Carr heralded ‘stability’ as ‘the peculiar quality of law which makes it a necessity in every political society’.15 Carr’s views may be contrasted with Hans Morgenthau’s, whose 1929 doctoral dissertation centred on the relationship between international relations and international law. Morgenthau was ‘pessimistic’ about international law’s function, asserting power and material forces would determine political and legal outcomes.16 He subsequently claimed, “‘law’ as understood in the domestic sense, had no place internationally. The only relevant laws were the ‘laws of politics’, and politics was “a struggle for power”’.17 By contrast, international lawyers have historically been disinterested in ‘non-legal power’. Many have simply assumed that ‘international law affects how states behave’ and that international legal rules ‘have a certain “power” of their own, which is necessary to constrain or facilitate state action’.18 Today, debate about international law’s relationship with power remains unresolved and neglected, despite their

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14 Carr (1939: 177).
15 Carr (1939: 230).
18 See Byers (1999: 15, 30–40).
symbiotic relationship, international law’s growing pervasiveness across the international system and the burgeoning relationship of international law with domestic law and municipal legal processes.  

A perpetual puzzle brings the disciplines of International Relations and International Law together: what happens when international law clashes with state power? Two decades ago, Anne-Marie Slaughter described the challenge posed by realists to international lawyers to establish international law’s relevance, while acknowledging the competing assumption of international law theorists that ‘international legal rules, however derived, [have] had some effect on state behaviour, that law and power [have] interacted in some way’. Since then, scholars with differing disciplinary and theoretical allegiances have grappled with the traditional claim that rules, principles and processes of international law are epiphenomenal of state power. They have sought to consider how, when and why international law matters. In doing so, the chasm dividing claims that international law shapes state behaviour from beliefs in international law’s manipulation by states has been replaced by a more careful and rigorous discussion. The focus of much of the contemporary discussion is causality. If consistency with international law ‘is ephemeral, or results purely from the exercise of power and coercion, the ability of international law and institutions to order world politics is greatly limited’.

An absence of empirical inquiry and the avoidance of ‘the difficult tasks of causal explanation and prediction’ have exacerbated confusion over international law’s true impact on state behaviour. Keohane has criticized this state of affairs, along with the ‘serious methodological issues not fully addressed’ by scholars, suggesting that:

Empirically, it is hard to validate causal arguments about the impact of norms or discourse … the normative optic presents us with intriguing observations that seem anomalous for the mainstream political science view. However, when we seek to establish causality, we are left with an incomplete argument and empirical ambiguity.

The empirical void persists. International politics may be ‘replete with the language of law’, but the divide between the disciplines has yet to be bridged,

27 See, further, Reus-Smit (2004: 2): ‘There has been much talk in recent years about the need to bridge the divide between the disciplines of International Relations and International Law. Yet there
Rule of Law in War

the impact of rules of international law is insufficiently understood. The orthodox view in International Relations is that rules of international law do not matter much and are endogenous of state power and interest. Jack Goldsmith and Eric Posner are the best-known proponents of this view, even if they did not consider LOAC in doing so. The legalization literature, criticized for its ‘formalistic rationalism’, has been focused on the nature of legalization, which has obscured understanding of the impact of legalization itself. By their own admission, constructivists have generally directed attention to ‘the politics of international law, not the “letter of the law”’, the contribution of Jutta Brunée and Stephen Toope being a notable exception. Disciples of International Law, meanwhile, generally assume rules of international law are increasingly independent, central to state decision-making and routinely followed. Confusion endures on the impact of international law and the international legal system on state actions. Insufficient attention has also been directed towards the interaction of international and domestic legal spheres, specifically towards the way in which domestic law may facilitate the operation of rules of international law more or less frequently.

Three projects provide renewed impetus for this book. Jutta Brunée and Stephen Toope’s 2010 interactional theory of international legal obligation is a legal theory, but one that nonetheless provides International Relations scholars with ‘concrete factors to consider as they examine whether and how law “matters” in international affairs’. Michael Scharf and Paul Williams has been a curious reluctance on the part of both international relations scholars and lawyers to rethink long-held assumptions about the nature of politics and law and their interrelation. Consider also Bull (1972: 583); Petersen (2009); Dickinson (2010: 28); Hafner-Burton, et al. (2012: 48): ‘Yet the two fields are still notable for their distance’. See, additionally, Koskenniemi (2012: 15–18).

30 For critiques of the rationalist literature, see Hafner-Burton, et al. (2012: 81–2); Finnemore and Toope (2001); Reus-Smit (2003: 592–4); Liste (2011: 592); Petersen (2009: 1258–62). See, for example, Reus-Smit (2004: 17–18, 20–3, 25), self-described as ‘a counterpoint to the “rationalist” approach’. Reus-Smit (2004: 36) argued principles emanating from the modern legislative norm of procedural justice ‘have had a profound and enduring effect on the institutional form of the modern international legal order’ and have helped constitute a system with four principal characteristics: a discourse of institutional autonomy; a multilateral form of legislation; a distinctive language and practice of justification; and a horizontal structure of obligation.
33 See Brunée and Toope (2010), which combines Lon Fuller’s work on legal theory and constructivism to posit an interactional theory of international legal obligation, which relies on social norms and shared understandings, a criterion of legality that motivates fidelity, and a continuing practice of legality. Theirs is not a book, however, about international relations; it is primarily about the distinctiveness of legal obligation in international law: see (2010: 9–15, 33, 42).
34 But see Slaughter (2004) and the depiction of the preferences of individuals and groups within states, and the cumulative effect of such preferences on foreign policy when mobilized through institutions.
responded around the same time to Goldsmith and Posner’s rationalist framework; they argued, based on interviews with ten former US State Department legal advisers, that international law exerts a ‘compliance pull’ of its own in national security crises,\(^\text{37}\) recounting numerous occasions where US policymakers determined not to use force or changed their policy preferences to comply with international law.\(^\text{38}\) Laura Dickinson also used interviews in a 2010 paper for the *American Journal of International Law* to examine the US military’s internalization of core values inscribed by international law. Dickinson’s analysis, however, suggested answers to the *how*, *when* and *why* questions about international law’s impact continue to elude us.\(^\text{39}\)

In recent years, international law scholarship has taken a more empirical turn. But this turn has been largely quantitative, relying on relatively blunt numerical measures that lack contextual richness or detailed analysis of the myriad possible causal factors that might explain compliance. What is missing, even after all these years of debate, is a sustained commitment to qualitative analysis of the actual mechanisms by which compliance occurs.

**Why COIN, and why the US?**

Counterinsurgency is an especially enticing case for analysing *how* international law impacts behaviour because it presents its own unique puzzle. The COIN catchphrase became ‘lose legitimacy, lose the war’, which ensured heightened focus on the rule of law, legitimate government, and the lawful conduct of warfare, in spite of the more conventional and enemy-centric approaches to counterinsurgency campaigns put forward at the same time. While much has been written on the modern ‘COIN Era’, the impact of international law has received less attention in International Relations and from lawyers outside the military.\(^\text{40}\) This project seeks to uncover how and why the new approach crystallized; whether the recalibration of military strategy to conform with legality was accidental, whether it was pursued to win this kind of war, or whether something else was going on. The precise function of international law in the revolution of counterinsurgency doctrine and practice will be the focus.\(^\text{41}\)

Modern COIN, which captures the post-Cold War era, is defined as the ‘military, paramilitary, political, economic, psychological, and civic actions

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\(^{39}\) Dickinson (2010: 2) (citations omitted).


\(^{41}\) See Hafner-Burton, et al. (2012) pp. 55–6, 97: ‘Most research is now focused on specific mechanisms that explain how law influences outcomes.’
taken by a government to defeat insurgency’. While countering insurgency is not new, rarely has counterinsurgency been labelled ‘the warfare of the age’ or been as central to national and international security and strategy as it was over the past decade. This does not mean conventional warfare between states is obsolescent, for there is clear evidence it is not, nor that counterinsurgency is the way of the future. Nevertheless, counterinsurgency is a rich case for examining international law’s influence.

It was in response to the Iraqi insurgency’s rise that the US Army and Marine Corps released FM 3-24 in December 2006. This was the first counterinsurgency manual produced by either institution in over two decades. Its compilation was the response to an urgent requirement for new doctrine to fight a particular type of war and a need to understand second- and third-order effects of such combat to prevent insurgencies from being strengthened. FM 3-24’s principles have been hailed for their role in the successful 2007 ‘surge’ in Iraq, and have spawned a raft of related US doctrinal and interagency manuals and handbooks. FM 3-24’s lead authors, General David Petraeus and General James Mattis, then both Lieutenant Generals, became senior commanders in the US military, heading up forces in Iraq, Afghanistan and CENTCOM. US allies, including the United Kingdom and Australia, developed new COIN doctrine mirroring FM 3-24; and General McChrystal convinced NATO members to adapt FM 3-24 to the Afghanistan campaign in mid-2009. In doing so, such states converged upon COIN’s importance and best practice.


\[45\] Note the January 2012 Defense Strategic Guidance released by the White House and the Pentagon <http://www.defense.gov/news/Defense_Strategic_Guidance.pdf> (a. 30 July 2014): ‘In the aftermath of the wars in Iraq and Afghanistan, the United States will emphasize non-military means and military-to-military cooperation to address instability and reduce the demand for significant US force commitments to stability operations. US forces will nevertheless be ready to conduct limited counterinsurgency and other stability operations if required, operating alongside coalition forces wherever possible. Accordingly, US forces will retain and continue to refine the lessons learned, expertise, and specialized capabilities that have been developed over the past ten years of counterinsurgency and stability operations in Iraq and Afghanistan. However, US forces will no longer be sized to conduct large-scale, prolonged stability operations.’ (Original emphasis.)

\[46\] Stephen Biddle and others have claimed the new approach was a necessary but not sufficient condition: Biddle, et al. (2012: 36–40).

\[47\] On 28 April 2011, President Obama nominated Petraeus to be the next Director of the US Central Intelligence Agency. Petraeus assumed this post in September 2011 and served until November 2012.

This book draws extensively upon FM 3-24 and, in this respect, breaks new ground: it is the first study that has had full access to FM 3-24’s complete drafting history. Interviews with the writing team, as well as military officers and legal advisors from various ranks who deployed to Iraq or Afghanistan before and after FM 3-24’s release, are a fundamental component of the book. These interviews have been used to investigate international law’s influence and to document the story of FM 3-24’s development and implementation. The accounts have generated a number of helpful, though not irrefutable, observations and unearthed several discernible implications. I have retained electronic recordings of the majority of the interviews and pinpoint time references for quotations used. Sources have seen a copy of direct quotes and citations from their interview (or interviews) and the context in which they appear. By consent, most interviewees are referenced by name, though in some cases I have used a pseudonym and referred to sources in general terms. Related field manuals, other documents from the field, testimony of public officials and media reports have also been accessed, and secondary sources have been used to supplement primary source material.

In situating examination of international law’s influence within the conduct of war, and by interviewing military officers, policymakers, lawyers, and especially non-lawyers, I have sought to minimize selection and confirmation bias. My interviewees have not spoken with one voice; they often differed in their accounts. I also interviewed several of FM 3-24’s best-known critics to guard against hagiography. The congruence procedure has been employed to establish the existence of a relationship between international law and the development and execution of FM 3-24, specifically in relation to the use of force and detention. Process tracing is then used to examine the causal significance of any congruity. The goal is to establish congruency between international law and important changes in doctrine and battlefield behaviour, before particularizing this ‘through the dynamic of events’ constituting the construction of FM 3-24 and its implementation.

49 Author’s interview with Conrad Crane, Carlisle, PA, 2 August 2010 (Crane II).
51 See, further, KKV (1994: 128); Bennett and Elman (2006: 460–1); George and Bennett (2005: 207).
52 George and Bennett (2005: 6, 176, 181–5).
53 George and Bennett (2005: 182–4).
54 George and Bennett (2005: 185–99. The use of interviews within this book is consistent with, and suited to, the congruence procedure and process tracing models: George and Bennett (2005:206; Tansey (2007: 766–8); see also Bennett and Elman (2006a).
55 George and Bennett (2005: 177). See also KKV (1994: 5).
Why the US? It is generally accepted ‘the most powerful way to test a theory is to determine if the propositions derived from it hold in circumstances in which they are highly unlikely to do so’.\textsuperscript{57} It has already been suggested that analysing international law’s influence in the conduct of modern war is a tough case in which to elicit such influence. What has not been explained is why a specific focus on the conduct of US forces in war is a logical spotlight for this study. Reasons may appear obvious: the US has been roundly criticized for its lack of receptiveness to international law constraints for much of its ‘War on Terror’,\textsuperscript{58} and remains formally outside several international legal frameworks concerning the laws of war, including the 1977 Additional Protocols to the 1949 Geneva Conventions and the Rome Statute of the International Criminal Court. Accordingly, the US appears a more unlikely case than others in which to uncover empirical evidence of international law’s impact. However, the scrupulousness with which the US avoids subscribing to certain international obligations might suggest a higher degree of conformity with those obligations it does subscribe to.

Regardless of whether the US is described as an easy or a hard case,\textsuperscript{59} it is doubtless a crucial case.\textsuperscript{60} Over the past decade, the US has been the largest prosecutor of counterinsurgency.\textsuperscript{61} There is an important story to be told about how the US military overhauled its approach to the conflicts in Iraq and Afghanistan in the midst of them, and how the new approach impacted events on the ground.\textsuperscript{62} Thus far, the function of law has not been subject to close examination; access to the drafts and the writing team provides an opportunity to remedy this. The doctrine’s scope is enormous: totalling over 150,000 words, it addresses not only strategic conceptions of insurgency and counterinsurgency, operational frameworks for designing and executing counterinsurgency operations and optimizing civil–military relations, but also prescribes lines of operation, leadership and ethics for counterinsurgency, procedures for training security forces and specific logistical tactics ranging from patrolling to cargo air drops. Importantly, the US, particularly its military, is not a monolithic actor.\textsuperscript{63} Focusing on the upper echelons of decision-making will not suffice in unpacking international law’s influence on US COIN.\textsuperscript{64} This is why I explore the implementation of the doctrine

\textsuperscript{57} Eckstein and Gurr (1975: 118–20).
\textsuperscript{58} cf. ‘New Words for War’,\textit{ Washington Post}, 4 April 2009.
\textsuperscript{59} See Eckstein and Gurr (1975: 118–20).
\textsuperscript{60} See George and Bennett (2005: 75); Eckstein and Gurr (1975: 127); Litfin (1994: 5–6); KKV (1994: 209–12); Gerring (2004); Walt (2005); Waltz (2008); Byers (2005); Bellinger (2007); cf. Allison and Zelikow (1999: 7).
\textsuperscript{62} See Bennett and Elman (2006: 463).
\textsuperscript{64} cf. Chayes (1974); Scharf and Williams (2010).
as well as its development, and home in on approaches to the use of force and detention.

The limits of studying just one state, albeit a crucial one, particularly the US, are conceded.65 Moreover, counterinsurgency represents but one form of warfare; indeed, it is one that may lend itself to conformity with international law more readily than other forms.66 Different states, particularly those ruled by oppressive governments, may counter insurgencies differently.67 Nevertheless, international law’s function in war, however prosecuted, remains a hard case, perhaps the toughest case in which to grapple with international law’s impact.68 One must be particularly wary, of course, of expecting the claims made here to hold across all aspects of warfare, and of extrapolating any findings to a wider theory asserting international law’s role in international politics.69 Even so, implications derived here may be used as a building block for further study of other states and other legal frameworks.70

Use of Force and Detention

This book is interested in the relationship between international law and the development and execution of US counterinsurgency doctrine generally. Nevertheless, for the purposes of argument, especially causal and empirical clarity, it will be helpful to dig deeper into the use of force and detention. Other aspects of counterinsurgency, such as criminal prosecutions, occupation, civilian compensation or information operations could have been chosen for specific examination of international law’s influence instead of the use of force and detention.71 This book concentrates on these two areas because they are the most recognized and contested arenas of international law as applied to armed conflict. Indeed, military operations involving the use of force or detention present considerably high stakes. The establishment or maintenance of security as a result of such operations is often a necessary

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70 See George and Bennett (2005: 75); McKeown (2004: 163); Eckstein and Gurr (1975: 104, 113–20). Consider also Bennett and Elman (2006: 458, 462): ‘One cannot ascertain the generalizability of a hypothesized causal mechanism…until one knows something about the mechanism itself and hence about its potential scope conditions. For example, Charles Darwin’s study of a few species on the Galapagos Islands resulted in a theory of evolution relevant to all species.’
condition for additional action.\textsuperscript{72} For example, although criminal prosecutions are significant in counterinsurgency given the importance placed on building independent institutions and regulating behaviour, they are often not possible without detention or the use of force.

\textit{Use of force:} Perhaps the ‘most fundamental question’ in armed conflict is who can be targeted.\textsuperscript{73} Historically, combatants are lawful targets and non-combatants are not, though that has not prevented civilian casualties in war. Nevertheless, it is an accepted principle of LOAC that civilians enjoy protection from direct attack unless, and for such time as, they take a direct part in hostilities.\textsuperscript{74} This principle of distinction is enshrined in international law but is notoriously difficult to apply, and comply with, in irregular wars. As Colin Kahl, former US Deputy Assistant Secretary of Defense for the Middle East, observed, ‘the belief that US forces regularly violate the norm of non-combatant immunity—the notion that civilians should not be targeted or disproportionately harmed during war—has been widely held since the outset of the Iraq conflict’, a perception confirmed by numerous studies and surveys.\textsuperscript{75}

Counterinsurgency is war among the people. It brings into focus not only issues relating to the principles of distinction, humanity, and military necessity, but also, given the difficulty of distinguishing between combatants and civilians, that of proportionality. Proportionality is an international law principle that operates in a range of different areas of armed conflict, including entry into war and conduct during war. So far as the conduct of hostilities is concerned, proportionality may refer to, among other things, belligerent reprisals, military objectives, the use of particular weapons, environmental damage, combatant suffering, or civilian harm and collateral damage.\textsuperscript{76} In the context of FM 3-24, the application of the concept of proportionality in war became particularly salient, requiring collateral damage to civilians and civilian property not to be excessive in relation to the expected military advantage. The language of proportionality became prominent in legal debates about the conflicts in Iraq and Afghanistan and in military debates about strategy and success. Understanding its function in counterinsurgency, therefore, will be a key aspect of this book.

\textit{Detention:} Much of the US approach to the Iraq and Afghanistan wars has been reflected by its attitude to detention. The capacity to detain individuals is of critical importance to states in armed conflict. Unsurprisingly, detention

\begin{flushleft}
\textsuperscript{72} Consider Scott and Withana (2004).
\textsuperscript{74} See also \textit{Public Committee Against Torture in Israel v. Government of Israel (Targeted Killings case)}, Supreme Court of Israel, HCJ 769/02 (13 December 2006), [30].
\textsuperscript{75} See Kahl (2007: 7–8); Sewall (2011: 11–16). Kahl nonetheless argued US forces did a better job than suspected, despite this perception persisting.
\textsuperscript{76} Dinstein (2004).
\end{flushleft}
policies have been central to US political and military strategy since 9/11 and figure prominently in FM 3-24.\textsuperscript{77} Focusing on approaches to detention in counterinsurgency, as distinct from the use of force, is useful for tracing international law’s influence in several respects. First, the rules of international law governing detention are more systematized in their interaction with domestic law. Detention, therefore, invites attention towards the way in which domestic law may facilitate or obstruct the operation of rules of international law. Second, detention issues require consideration of the extent to which it is the approach of particular lawyers, rather than international law itself, that influences particular actions or decisions. The same may be said of the use of force, but arguably in detention operations the level of legal specificity is higher. Third, individuals in armed conflict may be classified differently depending on whether the intent is to kill or capture; there is a distinction between the rules of international law that apply to each situation.\textsuperscript{78} Comparing approaches to the use of force and detention is useful because factors impacting compliance levels with the principle of distinction between civilians and combatants when using force may influence adherence to international law principles with respect to detention, and vice versa.\textsuperscript{79}

**Military Doctrine: Just Words?**

This book is about international law’s impact on the development and implementation of US counterinsurgency doctrine. There may appear to be some incongruity between looking at military doctrine, which ostensibly comprises words, when I want to unpack the *causal* influence of rules on state action. Given the imperfect dichotomy between words and action, something must be said about the relationship between military doctrine and discourse, and between military doctrine and battlefield action. My focus on doctrine assumes the words comprising it are central to the conduct of war—this section explains why.

There is a strong scholarly consensus on the value of studying words.\textsuperscript{80} Yet no ‘common understanding has emerged’ as to the best way to study discourse.\textsuperscript{81} Charlotte Epstein defines a discourse as ‘a cohesive ensemble of ideas, concepts and categorizations about a specific object that frame that object in a certain way and, therefore, delimit the possibilities for action in relation to it.’\textsuperscript{82} This book engages in an analysis of FM 3-24 and other documents, and to that extent undertakes a form of discourse analysis.

In doing so, the focus is international law’s impact, and not discursive practices in the US military or in military manuals.\(^{83}\)

Epstein defines a powerful discourse as ‘one that makes a difference’, adopting an approach to power relations that emphasizes particular modes of power exertion. Social relations are depicted as ‘both simultaneously the locus of power and the site for the production of meaning’.\(^{84}\) Epstein echoes and advances challenges to the positivist distinction between understanding and explanation, claiming:\(^{85}\)

It precludes apprehending ‘meaning’ as a cause of social action and as a factor of change and continuity, thereby undermining its explanatory purchase. The point here is not to salvage the language of causality in the study of meaning but rather to clear the grounds for establishing that the discursive approach I propose does away with the distinction between explaining and understanding.

Epstein argues discourses and material practices are mutually constitutive, a type of co-constitution which places greater spotlight on the arena where such meaning is produced, and where alternative constructs are ‘actively evacuated’. The development of military doctrine may be one such arena. For Epstein, the ‘fixing of an object’s meaning’ refers to ‘the evacuation of what it is not’ and ‘emerges out of a process of determination that excludes possible sets of articulations’.\(^{86}\) Epstein’s analysis is attractive in assisting to reconcile the distinction between doctrine as words and doctrine in action, the co-constitution, if you like, between doctrine and the battlefield. It also offers one explanation of the constitutive relationship between legality, including adherence to international law, and the conduct of war. Nevertheless, I believe Epstein’s construction is limited for two reasons, which is why I seek to retain a distinction between understanding and explaining.

The first limitation lies in Epstein’s definition of discourse, so far as it is assumed to relate to physical objects. Such an analysis may be possible with whales, the objects with which Epstein was concerned, but perhaps not so easily with a dynamic process such as war. The second concern is that Epstein appears to assume the process of exclusion is a zero-sum game, which it is not. Multiple articulations, for example, are capable of shaping approaches to doctrine and to the conduct of war. For centuries, international law has been enmeshed with the conduct of war. It is for that reason that alternative understandings or meanings can never be truly evacuated, even though notions such as overwhelming firepower may be sidelined. More precisely, it

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\(^{83}\) cf. Litfin (1994: 3).


\(^{86}\) Epstein (2008: 9).
is the nuance in distinction between approaches that is vital. This book does not deny that discourse, just like doctrine and international law, are inherently social, and that we must update our understanding of modern power to reflect this, but it insists the language of causality remains important. I suggest greater clarity may be found through three pathways, which will be introduced shortly.

Two questions routinely arise with respect to analysing discourse: falsification and the translation of discourse into action. Regarding falsification, there are several scenarios that would readily disprove my thesis: an emphasis on supreme firepower, or ignorance or circumvention of legal constraints, particularly in the areas of discrimination between civilians and combatants, proportionality and the selection and treatment of detainees, for example. There are persistent proponents of these approaches. The extent to which military doctrine remains simply words is also a genuine concern. There are notable examples of doctrine failing to endure; in the Vietnam War, for example, it is claimed ‘the differences between written doctrine and actual practice became glaringly apparent’. Accordingly, doctrine is not the sole focus of this book; indeed, there is a danger of selection bias in focusing only on written doctrine, given that current US counterinsurgency doctrine emerged largely in response to events on the ground in Iraq, including allegations of illegality. This book strives also to assess the prosecution of the new doctrine in Iraq and Afghanistan. ‘Prosecution’ is used deliberately here in a non-legal sense to convey the notion of pursuing a particular ‘action, scheme, or purpose with a view to its accomplishment or completion’.

But why do the words in military manuals matter? Doctrine, as Paul Herbert outlined, refers to ‘authoritative fundamental principles by which military forces guide their actions in support of national objectives’.

Doctrine is an approved, shared idea about the conduct of warfare that undergirds an army’s planning, organization, training, leadership, style, tactics, weapons and equipment. These activities in preparation for future war lie at the heart of the

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87 Constructivist theory challenged Realism’s monopoly on power discussion. Although they arguably accept ‘brute material forces’ define the parameters of ‘feasible activity’, constructivists assert ideas are instrumental in determining power’s content; that what ‘we want material forces for’ is critical. See Wendt (1999: 109–13, 308–9) (original emphasis); Kratochwil (1989); Reus-Smit (2004: 22); Hurrell (2007: 39); cf. Waltz (1979); Waltz (2008); Baldwin (1993); Dahl (1968); Dahl (1957).

90 See, for example, Gentile (2009); (2008); (2007); Peters (2007); Luttwak (2007). See also Kilcullen (2010: 5–6, 11).
91 Long (2008: 9); see also Fall (1998).
93 Herbert (1988: 3).
military profession in modern societies. When well-conceived and clearly articulated, doctrine can instil confidence throughout an army. An army’s doctrine, therefore, can have the most profound effect on its performance in a war.

Herbert’s definition is used here principally because the US military has endorsed it. There are other complementary studies of military doctrine, such as that produced by Barry Posen.\textsuperscript{94} The relationship between grand strategy and military doctrine, and its capacity to foster a greater or reduced role for international law, is one that should be continually borne in mind, although it is not the focus of this book.\textsuperscript{95} Notwithstanding, Herbert’s conceptualization arguably incorporates both realms.

Doctrine is the product of ‘heated’ ideational debate, involving intense competition, and sometimes grudging compromise.\textsuperscript{96} Its development is a discursive exercise, indubitably one with very real consequences, as Herbert warned:\textsuperscript{97}

To be in the throes of a major doctrinal change or, worse, doctrinally adrift or, worse yet, committed to a doctrine one’s enemy perceives as unworkable is to risk international crisis if not outright attack, or at least so it seems to officers responsible for the army’s readiness.

There could be no better description of the US situation in Iraq circa 2003–2006. This invites analysis of FM 3-24, doctrine designed to turn this situation around. As Stephen Biddle wrote following FM 3-24’s publication: ‘Official doctrinal manuals are a unique source of insight for the study of war, but too often are ignored by political scientists’.\textsuperscript{98}

Doctrine has not always had the capacity to shape wartime performance: ‘translation of ideas into published doctrine is a relatively modern phenomenon’.\textsuperscript{99} For doctrine to be truly significant, ‘more than mere words are required’.\textsuperscript{100} Nowadays, doctrine is very much a statement of policy and intention,\textsuperscript{101} the ‘transmission belt’ for the translation of new ideas into combat.\textsuperscript{102} FM 3-24’s drafters intended the doctrine to propel significant

\textsuperscript{94}See Posen (1984: 245 fn. 3): ‘In my view, once one begins to ask questions about how battles are fought, one has entered the realm of military doctrine. When one begins to ask which wars shall be fought, or if war should be fought, one has entered the realm of strategy.’

\textsuperscript{95}See, further, Luttwak (2001: 87–91); Sitaraman (2009: 1750–1752); Strachan (2010: 158–61, 175–9); Strachan, ‘It is far too early to claim the war in Afghanistan has failed’, \textit{Guardian}, 21 April 2011.

\textsuperscript{96}Herbert (1988: 3).

\textsuperscript{97}Herbert (1988: 4).

\textsuperscript{98}Biddle (2008: 347).

\textsuperscript{99}Herbert (1988: 3).

\textsuperscript{100}Long (2008: 29).

\textsuperscript{101}Kilcullen (2010: 20): ‘[F]ield manuals say less about how a given military force actually behaves than about how it wants to behave’. On the ability of the US military to learn and adapt, see Kilcullen (2010: 19); McMaster (2009: 16–17); Nagl (2005); Davidson (2010). See also Kaplan (2013: 243), referring to President Bush’s decision to order the surge in 2007: ‘COIN was now the official policy’.

changes within the US military, not just within the conduct of operations but also institutionally. What was unique about FM 3-24 was the immediate effort to implement the ideas on the battlefield. Indeed, in March 2006, FM 3-24’s writing team published an early version of the first chapter in Military Review to get ‘important concepts to the field as quickly as possible’. Important as developing doctrine was, what truly mattered was the ability of US forces to execute FM 3-24’s ideas downrange.

Although the battlefield is the ultimate forum in which doctrinal change is consolidated, difficulty in accessing the battlefield ensures doctrinal language is often the closest we can come to ‘meaning’ and intent. This is not a particularly novel conclusion; international courts are increasingly looking to military manuals to determine the content of customary international law. Accessing FM 3-24’s drafting history is thus a major component of this book. In doing so, it is understood ‘doctrine is only a precursor to change, not its guarantor’, and that new doctrine may not ‘earn the Army’s confidence’ and fail to transition to combat. As foreshadowed, this book spends some time looking at results on the ground in Iraq and Afghanistan to see whether this was the case. In order to ‘access the battlefield’, raw data from the field, command directives and interviews with military officers across various ranks who have deployed to Iraq and Afghanistan before and after FM 3-24’s release are considered to examine the traction of its ideas on the ground.

Tracing International Law’s Impact: Three Pathways

Law and power do interact. The goal of this book is to show empirically that in the law versus power debate questions of causality are complex but analysis remains possible. In order to do this, three pathways will be introduced. The aim in doing so is to identify alternative ways in which international

104 See <http://www.princeton.edu/~pr/alumnidaylectures/Petraeus_AlumniDay.pdf> (a. 10 September 2014).
105 See FM 3-24: xvi fn. 5; Cohen, et al. (2006: 53): ‘Our enemies are fighting us as insurgents because they think insurgency is their best chance for victory. We must prove them wrong’. According to FM 3-24’s forewords (the Chicago University Press edition), doctrine ‘drives decisions’, is ‘enormously important’ in providing ‘a common language and a common understanding of how Army forces conduct operations’, and ‘is a recipe for conducting the most complex and maddening type of war’: FM 3-24: xix (Nagl), xxi (Sewall).
106 See, further, Kaplan (2013: 164–5, 177–8).
109 See, for example, Prosecutor v Galać, Case No. IT-98-29-A, ICTY Appeals Chamber, 30 November 2006, [89]; Henckaerts and Doswald-Beck (2005); Carvin (2010: 362); Garraway (2004); Meron (2011).
110 FM 3-24: xxxiv.
111 Herbert (1988: 2).
law’s impact might occur and be tracked. The concern is not necessarily with compliance, important though that is.\textsuperscript{112} Compliance \textit{per se} ‘is agnostic about causality’.\textsuperscript{113} The more interesting but neglected question is how law helps, impedes or changes action: how international law matters, even in war. Consequently, this book suggests three primary pathways in which international law’s impact may be understood empirically. These include: international law’s ideational pull; international law’s capacity to demonstrate and articulate legitimacy; and international law’s role in mandating or modifying certain outcomes through the machinations of domestic law.

\textit{Law, Power and Norms:} Modern power is a nuanced and diffuse beast, evidenced across its multiple dimensions. ‘Strength for war’ is no longer the barometer of power, or the test of a Great Power.\textsuperscript{114} This is important. War-winning ability was ‘the unstated standard’ by which Kenneth Waltz, Morgenthau, and others ranked state power. This might be understood today as \textit{material} power. Today, such a standard is apt to mislead. Not only have ‘the sources of strength for war’ changed, so too have the sources of power.\textsuperscript{115} These days ‘power’ is very much a chameleon term: it might refer to weapons; it might refer to words; and it might refer to status. Quite often, we can differentiate between material and non-material sources of power. Above all, however, power refers to \textit{influence}.\textsuperscript{116} The notion of power as the capacity to coerce, induce, or force certain decisions\textsuperscript{117} all but guarantees a focus on causality.\textsuperscript{118}

This book accepts the social dimension of power, which has long been accepted\textsuperscript{119} but has been insufficiently examined.\textsuperscript{120} Michael Barnett and Raymond Duvall helpfully characterize power as ‘the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate’.\textsuperscript{121} Though they locate international law’s

\begin{itemize}
\item \textsuperscript{112} See Chayes and Chayes (1993: 186–7); Chayes (1995); Reus-Smit (2001: 538). This book accepts there is now a complete system of international law and for the most part, ‘wars and unarrested international villains’ aside, compliance with it often surpasses levels of adherence to domestic law: see Lowe (2000: 207–8, 212–14; 2007: 20).
\item \textsuperscript{113} Raustiala and Slaughter (2002: 539). See also Brunée and Toope (2010: 121); Liste (2011: 589).
\item \textsuperscript{114} Nye (2004: 2).
\item \textsuperscript{115} Baldwin (2002: 183).
\item \textsuperscript{116} Nye (2004: 2).
\item \textsuperscript{117} Baldwin (2002: 185–6); cf. Waltz (1979: 131). Consider also Baldwin (2002: 186): ‘The gross inventory of American elements of national power was not only of little help in predicting the outcome of the Vietnam War, it was quite misleading. The US may have been the greatest power in the history of the world, but it was ill-equipped to fight a guerrilla war in a faraway land with language, culture and history that it understood poorly.’
\item \textsuperscript{118} cf. Goh (2005: 261 fn. 12).
\item \textsuperscript{120} Hurrell (2007: 36–9).
\item \textsuperscript{121} Barnett and Duvall (2005: 42–3, 48).
\end{itemize}
influence largely within institutions, they accept the connections and necessary overlap between each of the types of power they identify.\textsuperscript{122}

How powerful, then, is international law? Keohane proposed no ‘coherent account of how rules relate to state action’ could be made without passing through three ‘nodes of causal pathways’: interests, reputations, and institutions. His characterization, however, casts international law, interests, reputations and institutions as largely mutually exclusive. International law and the rule of law are themselves institutions,\textsuperscript{123} perhaps fundamental ones.\textsuperscript{124} Power, interest and reputation depend on them to varying degrees.\textsuperscript{125} Keohane does not deny this; he accepted ‘interests are neither fixed nor firm’ and ‘reputations depend on institutions’, but does not offer a methodological solution.\textsuperscript{126} In order to determine how international law matters, in the sense that international law may be a necessary element of a given outcome and hence causally relevant,\textsuperscript{127} this book attempts to trace out causal pathways on which international law relies and ‘generate testable propositions’ from them.\textsuperscript{128} By tapping the tasks international law might perform, one can gauge how much or how little and perhaps why international law matters to modern US counterinsurgency, in conjunction with, and distinct from, other factors.\textsuperscript{129} The key here is to understand the context and form in which material and non-material power is advanced, together with the degree to which law guides, constitutes and even dictates that advancement.

Before turning to the pathways, it is necessary to say something about the relationship between law and norms. In 2000, Martha Finnemore offered a brief cautionary tale to those working on the influence of legal norms.\textsuperscript{130} One had to be clear, she argued, about what distinguishes legal norms from other non-legal norms. Next, one had to reveal whether or not ‘legal’ norms have distinctive effects. Finnemore was not convinced there were satisfactory answers on either matter within International Relations. Nowadays, there are some answers on the first query, notably Brunée and Toope’s contribution. Some point to legal norms being a compromise between utility and appropriateness, or as a variable constellation of interests, morality, and power. Others speak to legal norms as being part of the institutional ideal of the rule of law, which itself has autonomous normativity. However, insufficient work

\begin{itemize}
\item \textsuperscript{122} Barnett and Duvall (2005: 61–2).
\item \textsuperscript{123} See Barnett and Duvall (2005: 67).
\item \textsuperscript{124} See Reus-Smit (1997: 558–9).
\item \textsuperscript{126} Keohane (1997: 499–500).
\item \textsuperscript{128} Keohane (1997: 494). See also Bennett and Elman (2006: 459): ‘[I]n mainstream qualitative methods, within-case methods are largely aimed at the discovery and validation of causal mechanisms.’
\item \textsuperscript{129} Consider Bennett and Elman (2006: 465–8); cf. Allison and Zelikow (1999).
\item \textsuperscript{130} Finnemore (2000: 699–706).
\end{itemize}
has been done to remedy Finnemore’s second contention: the distinctive effects of legal norms on political behaviour have yet to be adequately established.

Tracing the distinctive effects of legal norms on state action is the core task of this book. Little ground has been made here, perhaps for two reasons. First, there has been insufficient qualitative analysis on how, when and why international law matters, particularly in areas that are traditionally assumed to be immune from its influence. Second, there is an open question as to whether International Relations scholars are conversant in the nitty-gritty of law; whether the discipline can be confident (including in its debates with international lawyers) in speaking about what the law is. ‘Law’ is used here to include domestic and international law: both sources of law speak to each other far more regularly than they used to. Much of the good recent work has appeared in law journals or been presented as a legal theory. A 2013 piece, by Ashley Deeks, deals with one aspect of alleged state manipulation of international law, specifically, the principles of international consent and the supremacy of international obligations over sturdier domestic rights requirements.\textsuperscript{131} Such worthy contributions to the debates are notable partly because lawyers and not International Relations scholars are making them. If the discipline is serious about unpacking the impact and function of international law in international politics, this needs to change. Three pathways to help it do just that are now introduced.

*International law’s ideational pull:* This pathway attempts to shed light on the interaction between the rule of law and international law. My sense is that an obsession with identifying compliance levels has meant many have lost sight of the central premise behind international law: the rule of law. Once one turns to the notion of the rule of law itself, not just legislative rules or judge-made law but precisely what we expect *law*, including international law, to provide, the concern is less about *compliance* and more about the rule of law *ideal* itself.\textsuperscript{132} This ideational pull of the rule of law arguably incorporates all facets of international law’s influence.\textsuperscript{133} Now, to isolate levels of distinctiveness one needs to parse particular rules of international law, which involves differentiating customary international law from treaty law and examining the interaction between international law and domestic law. However,

\textsuperscript{131} See Deeks (2013).
\textsuperscript{132} See, for example, Trimble (1990: 538): ‘Most international law implementation, however, depends less on the prospect or formal enforcement and sanctions and more on a belief by decision makers in the rule of law and on the sense that the law is legitimate.’ See also Koskenniemi (1990: 4); Brunée and Toope (2010: 31).
\textsuperscript{133} See, further, Brunée and Toope (2010: 6, 39–40, 42), which draws on the ‘logic of appropriateness’; Finnemore and Sikkink (1998); March and Olsen (1998).
I suggest one can begin to track the distinctiveness of rules of international law if one understands their connection to the rule of law ideal.

Beyond the conception of ‘government by law and not by men’ the rule of law is a more elusive concept. Gianluigi Palombella has recalled the vital semantic difference between rule of law and rule by law, the latter of which can merely be a conduit for the rule of men.\footnote{Palombella (2010: 6), quoting Arthur Goodhart’s contention that rule by law ‘can be the most efficient instrument in the enforcement of tyrannical rule’.} Upholding the rule of law, Palombella argues, involves the law ultimately exercising an ‘authority which does not coincide with its manageability’ as an ‘instrument’, most commonly but not necessarily as an instrument of the state. As we will see later, pursuit of the rule of law in Iraq and Afghanistan pursuant to US COIN doctrine is described by military and civilian officials as commitment to the rule of law continuum. This description appears to bear out Palombella’s striking and persuasive deconstruction of the rule of law as an institutional ideal. Combining Palombella’s work with other contributions by Christian Reus-Smit, Quentin Skinner and Jeremy Waldron generates two propositions relevant to this section. First, the rule of law ideal is a premise of international law, but is not itself dependent on international law. Second, international law is a nascent source of law on which the rule of law ideal continues to be built.\footnote{See Palombella (2010: 17).}

International law strengthens the ability of a rule of law system to designate a path that is not entirely reducible to the will of a given legislature or group of individuals.\footnote{Palombella (2010: 9).} The historical evolution and diffusion of rule of law systems are important in this context, particularly the way in which the legislative norms of procedural justice informed the constitutional structure of international society and modern international law.\footnote{See, further, Reus-Smit (1997: 576–585); Skinner (1998); Palombella (2010: 10–17); Koskenniemi (2012: 23–4).}

The core components of a rule of law system are generally accepted by scholars and practitioners.\footnote{See Fuller (1969: 46–91, 200); Raz (1979).} Jeremy Waldron has described how the idea of the rule of law comprises some or all of the following: (1) the exercise of power by those in authority within a rule-based framework; (2) prospective rules that facilitate ascertainment by ordinary citizens of their duties, the consequences of certain actions, and the legitimate expectations for official action; (3) independent courts observing procedural due process; and (4) legal equality, with no person or body above the law.\footnote{Waldron (2011: 316–17), incorporating works by numerous jurisprudential scholars. See also Fuller (1969: 39, 81–91); Waldron (2011: 316 fn. 3); cf. Brunée and Toope (2010: 26), who list the eight internal criteria of legality upon which they and Fuller rely; and Carr (1939: 229–30).} Waldron’s taxonomy is chosen here for three reasons.\footnote{A combination of (1), (2), and (3) from Waldron arguably incorporates what Brunée and Toope (2010: 24–9) infer by congruence, interaction and fidelity.} First, it captures the work of Lon Fuller and Joseph Raz,
among others, in attempting to determine what law is. Second, it explicitly links the strands comprising the concept of law, from which Palombella unpacks the ideal of the rule of law.\textsuperscript{141} Third, Waldron offers a convincing exposition of how the rule of law, which emerged in domestic settings vis-à-vis relations between a sovereign and citizens, applies internationally.

The rule of law was originally designed to constrain governments and provide certainty for citizens within a domestic system. Debates about its scope and content took place when international law was, at best, embryonic. The absence of an international ‘sovereign’ may necessitate substantial revision to domestic rule of law requirements if transposed to the international arena.\textsuperscript{142} However, as Waldron claims, ‘concern for the regularity and law-bound character of state action is undiminished when’ moving from domestic to international law; the ‘reasons for wanting nation-states to remain bound by law do not evaporate’ because states are operating internationally.\textsuperscript{143} Just as attentiveness to procedural rules led to state systems built upon such rules, which in turn informed the development of modern international law, so too should we expect rules of international law increasingly to inform procedural and perhaps even substantive aspects of a rule of law system. Palombella and Waldron would disagree on the extent to which substantive requirements are incorporated, but would likely agree on the central point.

‘The meaning of the rule of law depends on an enduring continuity with its own past’, Palombella tells us.\textsuperscript{144} Similar points have been made by Christian Reus-Smit, and Martti Koskenniemi.\textsuperscript{145} Such meaning is constantly evolving and, this book argues, expanding so far as it implicates rules of international law directly or indirectly. Palombella is not as explicit as Waldron on this front. Nevertheless, he does allude to the possibility of rules of international law and the related configuration of treaties, customary international law and international tribunals representing a key bulwark against arbitrariness and domination within the law.\textsuperscript{146} Palombella insists that fidelity and constancy are vital in determining how legal spheres are woven together, and cautions against the monopolization of sources comprising the law. This gradual

\textsuperscript{141} See Palombella (2010: 26 fn. 21).
\textsuperscript{142} See, further, Waldron (2006: 25–6): ‘Essentially, the rule of law in the international realm constrains the administration not in the way that domestic law constrains an individual, but in the way that domestic law constrains a lawmaker. Governments are bound in the international arena, as in any arena, to show themselves devoted to the principle of legality in all their dealings. They are not to think in terms of a sphere of executive discretion where they can act unconstrained and lawlessly’. See also Besson (2009: 360–63, 378–79); Lowe (2003: 871); cf. Beckett (2008).
\textsuperscript{143} Waldron (2011: 341 and 343): ‘a national sovereign sells its dignity short when it conceives of its sovereignty (or tries to get others to conceive of it) as just brute unregulated freedom of action, considered apart from the legal constraints and the general idea of law that make it, constitutively, what it is’. See, additionally, Fallon (1997: 7–8).
\textsuperscript{144} See Palombella (2010: 17, 32).
\textsuperscript{145} See Koskenniemi (2012).
\textsuperscript{146} Note Palombella (2010: 23–4, 33–4).
evolution is why the rule of law ‘remains an ideal, whose objectives are still to be achieved’.147

Incorporated within international law’s ideational influence is that body of law’s inertia, together with its interpreters. As Vaughan Lowe has put it: ‘We speak of states acting. States do not, of course, act: people act for them’.148 Accordingly, international law may be a necessary element in facilitating a given outcome simply because of its constant (and growing) presence, or as Lowe terms it: caution.149 The community of lawyers is widespread.150 Many marvelled ‘at the sheer number of lawyers’ US President Obama brought to the White House.151 Despite differences among individuals heading or advising government departments, often ‘international law is their lingua franca, the vehicle for their discussions, and the optic through which they view the world’.152 In almost any international dispute, one can get on the telephone to another international lawyer in another country and ‘speak the same language’.153 Nevertheless, agreeing there is an abundance of international law speakers does not resolve a debate about the independence of law, including international law, when it clashes with state power. This first pathway suggests the debate about law versus power can be accessed by examining the function of international law within the rule of law ideal, and whether certain rules of international law, directly or indirectly, acquire some ‘autonomous normativity’.154

As we will see, in FM 3-24 the concept of the rule of law, nebulous though it is,155 became central to US counterinsurgency doctrine. ‘Security under the rule of law’ was declared ‘essential’,156 whereby every action was declared to have ‘a rule of law component’.157 The enhanced cognisance of the rule of law’s importance to war in FM 3-24 has had an important impact on the

147 Palombella (2010: 34).
153 Dapo Akande has noted, for example, the increase in the number of international lawyers on the Times list of 100 top UK lawyers: <http://www.ejiltalk.org/top-international-lawyers-of-2008/> (a. 13 September 2014). In an intriguing coincidence, the 2011 compromis for the Phillip C. Jessup International Law Moot Court Competition focused in the main on extrajudicial and targeted killings in a hypothetical situation that bore a close resemblance to events in Afghanistan and Pakistan. The competition involved participants from over 500 law schools across more than 80 countries. Iraq fielded the seventh highest number of teams: <http://www.whitecase.com/press-01212011/> (a. 13 September 2014).
154 See Palombella (2010: 8–9).
156 FM 3-24: [1-119]. [1-131]–[1-133].
conduct of operations using force. Notably, LOAC principles of distinction and proportionality play an increasingly pivotal role in a way that deepens and arguably entrenches US commitment to such principles. The rule of law’s centrality in FM 3-24 is not straightforward; indeed, the use of the rule of law to strengthen the pillars of FM 3-24 was one of the most controversial features of the new doctrine. Accordingly, this pathway tracks how the rule of law ideal was deployed in the process that constructed the doctrine and the extent to which it has been internalized downrange in Iraq and Afghanistan. This book is interested primarily in how commitment to the idea of the rule of law impacted the conduct of kinetic operations; that is, operations involving force or detention.\textsuperscript{158}

International law’s use to demonstrate and to articulate legitimacy: The second pathway through which we might observe international law’s impact is through its capacity to demonstrate and to articulate legitimacy.\textsuperscript{159} This is achieved through the legality of the action \textit{per se} and in international law’s use to enhance the ‘narrative’ and so encourage favourable public perception.\textsuperscript{160} The pathway responds to the move to place legitimacy ‘back to centre stage’ in international relations.\textsuperscript{161} Note it has two elements: the need for \textit{demonstration} and \textit{articulation} requires international law to be much more than a persuasive device.\textsuperscript{162} In the modern information age, perceptions and reality are increasingly inseparable. International law’s impact in augmenting action stems in part from its symbiotic relationship with legitimacy, authority, and morality.\textsuperscript{163} Each of these are contested concepts; any given rule of international law may have all, some or none of these characteristics.\textsuperscript{164} It may be true that neither legitimacy nor morality is a ‘necessary condition of the existence of law’, but, to paraphrase H.L.A. Hart: ‘any form of legal order is at its healthiest when there is a generally diffused sense it is also legitimate


\textsuperscript{159} See Clark (2007: 29–30): ‘the practice of legitimacy describes the political negotiation amongst the members of international society as they seek out an accommodation between those seemingly absolute values [legality, morality, and constitutionality], and attempt to reconcile them with a working consensus to which all can feel bound’. Consider also Brunée and Toope (2010: 52), but note their interactionist theory invokes a particular conception (2010: 53–4) of ‘legal legitimacy’. Compare Besson (2009: 380); Reus-Smith (2007: 158–65).

\textsuperscript{160} As Scharf and Williams argued (2010: 215): ‘[T]he observations of the [US State Department] Legal Advisers...tell us much about how international law is actually used for legitimating political actions, for rallying support, for imposing restraints, and for persuading policymakers to choose a particular course consonant with international law to achieve their desired goals.’

\textsuperscript{161} See Lang (2012: 203), reviewing Brunée and Toope (2010); Clark (2007: 12): ‘[T]aking legitimacy seriously in international relations now enjoys much greater potential support: it is an idea whose time has come’. See, further, Franck (1990: 29).

\textsuperscript{162} Consider Hafner-Burton, et al. (2012: 92, 58–9); Deitelhoff (2009).

\textsuperscript{163} See, further, Kratochwil (1989: 102–4, 204–10); Franck (1990: 41); Cortell and Davis (1996: 457); Reus-Smit (2004: 40–1); Koskenniemi (2012: 12–13).

This book accepts morality, authority, and legitimacy are ultimately political phenomena, ‘a crystallization of judgment that may be influenced by but is unlikely to be wholly determined by legal norms’. However, an avenue prioritizing international legal obligation and accompanying legal reasoning often becomes the path of least resistance to demonstrating legitimacy.

The focus of this pathway, then, is the relationship between legality and legitimacy in FM 3-24, and how international law influences the establishment of legitimacy on the battlefield. Put another way, we are interested in how powerfully legality determines legitimacy. It will be shown that the determination of the writing team to establish counterinsurgency’s central objective as legitimacy, as well as their desire to build legitimacy for FM 3-24 itself, resulted in the ensuing notion of legitimacy taking on features more or less shaped by law, including aspects of international law. This was not without controversy, according to General Mark Martins, a former Chief of the International and Operational Law Division in the Office of the Judge Advocate General in the US Department of Defense. Martins assisted with legal aspects of FM 3-24, served in Iraq under General Petraeus during the surge, and subsequently deployed to Afghanistan as head of detainee operations and later rule of law operations. He recalled, ‘there was a lot of resistance amongst traditional army thinkers... with putting legitimacy at the core and to having these legal concepts define success’.

One key feature to emerge in this respect has been the vital role of international law in information operations (IO) to control the narrative and stabilize perceptions of illegality (and, in turn, illegitimacy) among different audiences.

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165 Hart (1994: 226). Consider also Brunée and Toope (2010: 33), who argue their interactionist account of international law, principally their reliance on Fuller’s criteria of legality and social practice, enables one to view international law as autonomous, ‘independent of stronger moral or political commitments. That, in turn, enables it to facilitate communication and protect diversity, one of its strengths in conceptualizing the role of law in international society’. See, further, Koskenniemi (2012: 12–13); Rodin (2011: 450–6).


169 Brigadier Martins is now Chief Prosecutor, US Military Commissions.

International law’s mandatory influence:171 The focus of the third and final pathway is how international law mandates a certain outcome through its interaction with domestic law.172 One example of this is Security Council Resolution 1373, adopted in September 2001, which effectively provided, by virtue of Article 25 of the UN Charter, a domestic legislative platform for international responses to terrorism following 9/11.173 A more particularized example of international law’s mandatory power lies in the US Supreme Court decision of *Hamdan v. Rumsfeld*.174 The Supreme Court’s interpretation of Article 1 of the US Constitution175 and Articles 21 and 36 of the Uniform Code of Military Justice (UCMJ)176 determined that compliance with the ‘law of war’177 is the condition under which jurisdiction to US military commissions is granted.178 The plurality held the rights protecting individuals contained in the Geneva Conventions were indisputably ‘part of the law of war’179 and that the phrase ‘not of an international character’ within Common Article 3 applied to the conflict between the US and al Qaeda.180

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171 In some respects, this pathway resembles the exercise of ‘compulsory power’ outlined by Barnett and Duvall (2005: 61), but particularizes the legal, as opposed to the normative, compulsion on specific state actions. This the pathway also encompasses structural and productive power as described by Barnett and Duvall (2005: 64) to highlight international law’s influence in the social constitution of actions rather than simply how certain states may attempt to use international law to influence others. An understanding of the monism and dualism debate and the growing synthesis between domestic and international law is also helpful background: see, further, Brierley (1935: 31); Holdsworth (1942: 141–52); Lauterpacht (1939: 537–69); Kennedy (1996: 402); Koskenniemi (2005: 542–512); Roberts and Gelfand (2000: 1).  
172 Through which Congress has power to ‘define and punish offences against the law of nations’.  
173 Article 21 grants jurisdiction to military commissions to try offences under the ‘law of war’; Article 36 empowers the President to prescribe rules and procedures to implement the UCMJ’s provisions.  
175 On this phrase, see Roberts and Guelff (2000: 1).  
177 Curiously, according to S/PV.4385 (the communiqué detailing the meeting to discuss Resolution 1373), there was no debate and the meeting, which adopted the Resolution unanimously, lasted only five minutes.  
178 See *Hamdan*, 562 per Stevens J (Kennedy, Souter, Ginsburg, Breyer JJ concurring).  
179 *Hamdan*. At least four of the Justices stated the phrase ‘regularly constituted court’ within Common Article 3 ‘must be understood to incorporate at least the barest of those trial procedures that have been recognized by customary international law’, including that sourced in the 1977 Additional Protocol I (AP I), an instrument the US has not ratified. In their view, ‘the US Government “regard[s] Article 75 of [AP I] as an articulation of the safeguards to which all persons in the hands of an enemy are entitled”’, and, further, the principles articulated in Article 75 are ‘indisputably part of customary international law’. See *Hamdan*, 633–4 per Stevens J, et al., stating US objections were not to Article 75 itself and quoting Taft (2003: 322).  
180 See *Hamdan*, 630–31 per Stevens J: ‘In context, then, the phrase “not of an international character” bears its literal meaning…. Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of “conflict not of an international character,” i.e., a civil war… the commentaries also make clear “that the scope of the Article must be as wide as
Accordingly, observance of the minimum rights prescribed by Common Article 3 was a condition precedent to the exercise of jurisdiction.

The limits of this pathway must be briefly acknowledged. The malleability of domestic law will dictate the degree to which international law can operate within it.\(^{181}\) To this extent it is somewhat aspirational and reliant upon favourable conditions. *Medellín v. Texas*\(^{182}\) aptly demonstrates these limitations, whereby the International Court of Justice’s *Avena*\(^{183}\) decision was declared by the US Supreme Court to be unenforceable because none of the relevant treaties had been implemented domestically.\(^{184}\) It is worth pointing out, however, the extraordinary attempts of the Bush administration to persuade the Governor of Texas to abide by the ICJ decision. As John Bellinger, who was principal legal adviser to former US Secretary of State Condoleezza Rice from 2005–2009, recalled:\(^{185}\)

I first persuaded the Secretary of State that we needed to comply with the decision … she then needed to persuade the President … even though we supported the death penalty, and even though this was a particularly heinous case, [as well as] very bad domestic politics for the President to dip into a state domestic criminal [matter] … nonetheless he needed to do it. … [E]ven after the Supreme Court said the way the President had done it did not comply with our Constitution [we] continued to try … we actually had the Secretary of State and the Attorney General write a letter to the Governor of Texas to say … ‘we are asking you essentially for the honour of the country … to comply with this obligation’.

One aspect of FM 3-24 especially susceptible to this pathway is detainee operations. *Hamdan* demonstrates the potential of international law, through its use in constitutional and statutory interpretation, to modify and even prevail over domestic laws and domestic policy. The US Supreme Court decision also illustrates the growing influence of non-traditional actors, namely the judiciary. Indeed, ‘one of the most striking things about post-9/11’ for Martins ‘is how [US] laws have been transformed through Supreme Court decisions.’\(^{186}\) As we will see, early drafts of FM 3-24, just like early operations in Iraq and Afghanistan, explicitly countenanced the use of torture, notably possible,” … In fact, limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion” was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.’

\(^{181}\) Raustiala and Slaughter (2002: 547). Brunée and Toope (2010: 48) argued international law’s ‘hard work’ is not done with the pronouncement of binding law in a treaty, but also conceded (2010: 61) that once a particular rule of international law is incorporated into domestic systems ‘it is likely to shape the government’s understanding of appropriate conduct in tangible ways’.

\(^{182}\) 552 US 491 (2008); Guzman (2008: 2–6).

\(^{183}\) [2004] ICJ 12.

\(^{184}\) See, further, 552 US 491, 591 (2008).

\(^{185}\) Author’s interview with John Bellinger, Washington, D.C., September 2008 (Bellinger).

\(^{186}\) Martins. See also Slaughter (2004).
through a ‘ticking time bomb’ scenario. Only through the interaction of international and domestic law, in combination with other factors, was this practice unequivocally cast aside in FM 3-24’s ultimate version. Through this pathway one also witnesses deepening regulation of the use of force in modern US COIN operations by LOAC and international human rights law, as manifested in rules of engagement (RoE) and command directives.

Structure

This book comprises a further five chapters. Chapter 2 situates counterinsurgency and the evolving character of war against the growing juridification of warfare, and introduces important concepts of LOAC and international human rights law. Chapter 3 marks the start of the empirical work, charting the evolution of FM 3-24 and providing an account of FM 3-24’s development and institutionalization, utilizing a mixture of oral accounts and FM 3-24’s drafting history. Chapter 4 builds upon this evidence, employing the three pathways to determine how, and to what effect, international law influenced FM 3-24’s development and ultimate composition. Chapter 5 uses a similar method, buttressed by evidence from the field, to illustrate how the doctrine and the pathways held up on the ground. Finally, Chapter 6 reflects on the utility of the pathways in understanding international law’s impact, and what they tell us about the function of international law in modern US counter-insurgency. Chapter 6 also evaluates the new edition of FM 3-24, released in May 2014.
Counterinsurgency and International Law

This chapter examines the nexus between counterinsurgency and international law. Its core task is to comprehend more clearly the intersection of legal principles with counterinsurgency operations. The first part of the chapter situates counterinsurgency theory and practice within modern warfare. Next, the chapter details the applicable law and relevant definitions of combatants, non-combatants and civilians. The final section explores legal principles relating to the use of force and detention within modern counterinsurgency operations. The emerging picture is one of gaps in legal and military doctrine. The synergy, as well as the tension, of international law with warfare is suggested to be most apparent in counterinsurgency. This chapter attempts to understand these issues against the backdrop of the recalibration of US national security focus from the War on Terror to counterinsurgency during the Iraq and Afghanistan wars.\(^1\)

One continuing feature of US counterinsurgency operations has been a lack of appreciation for their legal dimension. In 1963, US Army Major Joseph Kelly wrote an article in *Military Review* on ‘Legal Aspects of Military Operations in Counterinsurgency’. He began by noting that such discussion was ‘elemental to those conversant with international law’. Kelly insisted the discussion was valuable, not only because individuals ‘actually involved in counterinsurgency operations are not international lawyers’, but also because ‘it is with these basic principles that the real difficulties are encountered which prevent to a great extent the application of law to these revolutions’.\(^2\) Of course, in the US Civil War almost a century earlier, General Orders 100 was issued by President Abraham Lincoln to direct the conduct of his soldiers (on the advice of a lawyer, Dr Francis Lieber) but infrequently followed.\(^3\) Kelly’s article appeared prior to the passage of the 1977 Additional Protocols to the


\(^2\) Kelly (1963: 96).

\(^3\) Birtle (2004: 35): ‘Yet for all of its influence upon future generations of Army leaders, General Orders 100 had surprisingly little impact on the conduct of the Civil War itself.’
Geneva Conventions (AP I, AP II) and before warfare’s heightened juridification. Yet the same difficulties are evident and perhaps even more complex today, both in terms of the content of the relevant principles and the manner of their application.

The primary legal focus in this chapter is the law of armed conflict, otherwise known as jus in bello or international humanitarian law (IHL). These laws regulate the conduct of war, as distinct from jus ad bellum, which operate in respect of entry into war. LOAC applies equally to all parties to a conflict, without prejudice to the nature or origin of the armed conflict or the causes fought for by the participants. Apart from LOAC, elements of international human rights law, international criminal law and US domestic law are also relevant. The application of certain LOAC principles is contested in modern counterinsurgency. Problems of application are exacerbated by ignorance of particular LOAC principles. In this respect it is significant that the counterinsurgency focus in Iraq and Afghanistan received little attention in mainstream legal scholarship. Ganesh Sitaraman, a lawyer who spent time at the Counterinsurgency Training Centre in Afghanistan and has written on the interaction of counterinsurgency and LOAC, suggested ‘legal scholars [had] almost completely ignored’ counterinsurgency, despite its ‘ubiquity in military and policy circles’. This chapter attempts to remedy this somewhat by exploring the striking congruency between alleged COIN best practice and close adherence to LOAC.

Insurgency and Counterinsurgency

Andrew Birtle’s two volumes on US Army Counterinsurgency and Contingency Operations Doctrine detail the long history of US efforts to deal with insurgencies and irregular forces and conduct constabulary and contingency operations. Key episodes in the late nineteenth and early twentieth centuries included the US Civil War (1861–65) and certain constabulary operations, principally in the Philippines (1900–13) but also in the Moros, China, Cuba,
Panama, and Germany. In his first volume, Birtle argues the US military had institutionalized its knowledge of small wars relatively well by World War II:

By the eve of America’s entry into World War II, it had developed doctrinal materials for the conduct of small war and civil affairs operations that synthesized European and American experiences into a traditional carrot-and-stick doctrine—a doctrine that attempted to balance aggressive military action with non-military programs designed to appease the civilian population and, if possible, to address some of its needs.

Sustaining such expertise proved difficult with the onset of global conventional warfare in World War II, which threatened to relegate small wars doctrine to the sidelines. The subsequent escalation of Maoist revolutionary guerrilla warfare revealed a ‘more sophisticated species of insurgency’. This in turn prompted a rapid rise and fall of US interest in counterinsurgency in the Cold War period, as Birtle explains:

The role that counterinsurgency operations played in American strategic thought changed dramatically during the thirty-plus years that spanned the middle of the twentieth century. From relative obscurity in the 1940s, counterinsurgency quietly grew in stature until it erupted with much fanfare in the early 1960s as one of the central tenets of US national security policy. The rapidity with which counterinsurgency made its ascent onto the policy stage in the early 1960s was matched only by the speed of its fall, as a disillusioned nation hastened to return it to the backwaters of strategic thought in the 1970s.

Understanding the marginalization of counterinsurgency doctrine following the Vietnam War and other US military travails in South East Asia is important in comprehending the relative malaise with which US forces were reconfigured to conduct counterinsurgency operations in Iraq and Afghanistan from late 2004. Conrad Crane, Director of the US Army Military History Institute, based in Carlisle, Pennsylvania, who headed FM 3-24’s writing team, detailed how this occurred in a review of Birtle’s second volume, which dealt with US efforts to repel communist insurgencies. During this period, counterinsurgency became much maligned and entangled in definitional quagmire, with

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11 Birtle (2004: 260). A separate small wars doctrine was developed by the US Army and Marine Corps, along with a field manual on military government. These were developed separately, although there was some evidence of ‘cross-fertilisation’. See, further, US Marine Corps, NAVMC 2890, Small Wars Manual (1935, revised and republished in 1940); FM 27-5, Basic Field Manual, Military Government (1940); War Department, FM 100-5, Tentative Field Service Regulations, Operations, (Oct 1939, and May 1941); FM 27-10, Rules of Land Warfare, (1940); Birtle (2004: 239–61).
12 World War II itself involved several counterinsurgency operations, including the Nazi campaign in Yugoslavia, reportedly characterized by ‘few carrots and a lot of sticks’: Lieb (2008: 70).
the term itself falling out of favour.\textsuperscript{15} Nevertheless, the overarching mission for counterinsurgents, that of isolating internal and external support for insurgent forces and winning over the local population, has remained largely intact over time. The constant discord has concerned how this should be done. Indeed, the tension that has pervaded US counterinsurgency operations has been between security and the deployment of overwhelming force, on the one hand, and politics and the conquest of ‘hearts and minds’, on the other.

In his 2005 book, \textit{Learning to Eat Soup with a Knife: Counterinsurgency Lessons from Malaya and Vietnam},\textsuperscript{16} John Nagl, a retired US Army Lieutenant Colonel and one of the key thinkers behind FM 3-24, quoted a 1936 US Command and General Staff College Manual: ‘strategy begins where politics ends’.\textsuperscript{17} This could not be further from reality in counterinsurgency. As Major General Jim Molan, a retired Australian officer who served as Chief Operations Officer under US General George Casey in MNF–Iraq from 2004–5, observed: ‘war has never been just an extension of politics by other means; war also creates its own politics’.\textsuperscript{18} This is certainly a feature of counterinsurgency operations, which embrace ‘all of the political, economic, social, and military actions taken by a government for the suppression of insurgent, resistance, and revolutionary movements,’ thus emphasizing the whole of government (or ‘full spectrum’) nature of such operations.\textsuperscript{19}

David Galula is arguably the Clausewitz of counterinsurgency.\textsuperscript{20} He is a former French Army Lieutenant Colonel who served in North Africa, France and Germany during World War II, and who became familiar with tactics of insurgents and counterinsurgents during service in China, the Balkans and Algeria in the late 1940s and the 1950s. Galula’s seminal 1964 \textit{Counterinsurgency Warfare: Theory and Practice} remains a recommended counterinsurgency primer for US troops headed for the field.\textsuperscript{21} Galula was attuned to the dilemma inherent in counterinsurgency operations of maintaining the correct balance between security and political operations, and the merits of civilian-centric as opposed to enemy-centric (‘kill-capture’) approaches. Galula observed the traditional ‘ABCs’ of war do not hold in revolutionary wars fought between insurgents and counterinsurgents. The asymmetric arsenal of the opposing camps marks such wars, yet, unlike conventional war, the ‘overwhelming superiority in tangible assets in favour of the counterinsurgent’ is not necessarily conducive to victory.\textsuperscript{22} Galula contended politics is

\textsuperscript{15} Crane (2008: 176–7).
\textsuperscript{16} Nagl’s title is taken from Lawrence (1926): ‘Making war upon insurgents is messy and slow, like eating soup with a knife’.
\textsuperscript{17} Nagl (2005: 201).
\textsuperscript{18} Molan (2008: 349).
\textsuperscript{19} Birtle (2004: 3).
\textsuperscript{20} See Clausewitz, et al. (1976); Strachan (2007); Strachan and Herberg-Rothe (2007).
\textsuperscript{22} Galula (1964: 6–7).
intertwined with counterinsurgency operations, unlike conventional fighting where politics re-emerges ‘when the fighting ends’. Hence, Galula defined ‘the battle for the population’ as the ‘major characteristic’ of counterinsurgency warfare:

The population represents this new ground. If the insurgent manages to disassociate the population from the counterinsurgent, to control it physically, to get its active support, he will win the war because, in the final analysis, the exercise of political power depends on the tacit or explicit agreement of the population or, at its worst, on its submissiveness.

Galula argued military action is not ‘the principal instrument’ in counterinsurgency: ‘every military move has to be weighed with regard to its political effects, and vice versa’. Although conventional force may be required to support counterinsurgency objectives, modern armies, it was contended, must fight differently against insurgent forces predominantly located among civilian populations:

A soldier fired upon in conventional war who does not fire back with every available weapon would be guilty of a dereliction of his duty; the reverse would be the case in counterinsurgency warfare, where the rule is to apply the minimum of fire. ‘No politics’ is an ingrained reaction for the conventional soldier, whose job is solely to defeat the enemy; yet in counterinsurgency warfare, the soldier’s job is to help win the support of the population, and in so doing, he has to engage in practical politics.

Galula’s focus, then, was not the enemy but the civilian population. This meant increased awareness of the effects of the unrestrained use of force:

Since antagonizing the population will not help, it is imperative that hardships for it and rash actions on the part of the forces be kept to a minimum. The units participating in the operations should be thoroughly indoctrinated to that effect, the misdeeds punished severely and even publicly if this can serve to impress the population. Any damage done should be immediately compensated without red tape.

Debates over the virtues of political primacy, as opposed to greater orientation toward firepower, are directly relevant to legality. This argument continued throughout the drafting of FM 3-24 and remains vivid in its revised edition. Here, I have simply offered a brief insight into the development of counterinsurgency theory throughout the 20th century. Given the focus on Birtle's

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23 Galula (1964: 8–9).
24 Galula (1964: 7–8).
25 Galula (1964: 9).
27 Galula (1964: 95).
work in this section and the nature of the argument to follow, it is worth extracting his conclusions about US failure in South East Asia:  

In the case of Army doctrine, what had occurred in the 1960s was that the Army had placed a layer of ‘new’ counterinsurgency theory on top of older, established counterguerrilla tactics and techniques. The resulting doctrine was more comprehensive and robust, yet experience would demonstrate that the new theory also had some shortcomings. Among these were unrealistic expectations as to the power of sociopolitical reforms to defeat an implacable foe, an overly optimistic faith in the ability of foreign nation builders to transform an ailing society in the throes of war, and a lack of appreciation for the central role force plays in revolutionary warfare.

Modern Counterinsurgency

The preceding section illustrated counterinsurgency is not simply a modern invention. For General James Mattis, a former CENTCOM commander who led operations in Iraq and was the Marine Corps lead on FM 3-24, it is only new if ‘we don’t read our own history’. Even so, in the early 2000s, counterinsurgency would have been at best a distant memory for US officers.

For three decades the professional military education system all but ignored counterinsurgency operations. In the 1980s instructors from the Command and General Staff College trying to create a course on low-intensity conflict looked in vain for help from the Special Operations School at Fort Bragg, North Carolina, only to find ‘that the staff there had been ordered to throw away their counterinsurgency files in the 1970s.’ As a result of the lack of suitable doctrine, commanders in Iraq initially fell back on their experience and education as a guide to action. They were not all equal in this regard.

Clausewitz tells us war has always been shaped by the ‘spirit of the age’ and has adapted to the prevailing conditions of the era. He contended the French Revolution of 1789–99 represented the period when war ‘attained the absolute in violence’, but maintained this would not always be so: ‘it is no more likely that war will always be so monumental in character than that the ample scope it has come to enjoy will again be severely restricted’. The recent conflicts in Iraq and Afghanistan have made clear that war is not out of

30 Author’s interview with General Mattis, Norfolk, VA, November 2008 (Mattis).
date or in a state of disuse, but its prosecution is adhering to the Clausewitzian
tradition of being predominantly a product of the peculiarities of the age.\textsuperscript{34}

David Kilcullen, a former Australian military officer and leading thinker
and practitioner of contemporary counterinsurgency, came to the attention
of Lieutenant General Petraeus in 2005.\textsuperscript{35} Kilcullen has noted insurgency is
not irregular because it is uncommon, but rather because it is ‘against the
rules’, observing that 83 per cent of recorded conflicts between 1816–1997
were civil wars or insurgencies.\textsuperscript{36} While Kilcullen accepts Galula’s funda-
mentals remain relevant, he maintains their application against modern
insurgencies ‘often differs substantially’.\textsuperscript{37} Kilcullen illustrates trends that
have changed the conflict landscape and asserts the contemporary insurgent
is qualitatively and quantitatively different from his or her predecessors.
These include: globalization and its opponents; the rise of non-state actors
with capabilities similar to states and global ambitions; the Shi’a revival
prompting conflict within Islam; asymmetric US military supremacy forcing
opponents to adopt unconventional approaches; and a global information
environment. These factors, Kilcullen argues, require ‘accidental’ guerrillas
to be viewed as part of a global insurgency,\textsuperscript{38} which in turn ‘demands a rethink
of traditional counterinsurgency’.\textsuperscript{39}

Although the Iraq and Afghanistan conflicts began in spectacularly conven-
tional fashion, they eventually degenerated into struggles against insurgen-
cies. Peter Mansoor, who began his ‘postwar’ command of the 1st Brigade of
the US Army’s 1st Armored Division east of the Tigris River in Baghdad in late
June 2003, captured the experience of most when he observed: ‘At least it was
supposed to be postwar.’ Mansoor went on to describe that deployment as a
‘challenge for which’ his ‘military background and training had offered little
preparation’.\textsuperscript{40} His portrayal supplies an insight into counterinsurgency’s
modern character.\textsuperscript{41}

\textsuperscript{34} ‘The end of the Gulf War and the extraordinary conventional military superiority of the US
over any conceivable enemy has driven our adversaries to fight us unconventionally and
asymmetrically as insurgents and as terrorists’: Author’s interview with John Nagl, Washington,
D.C., September 2008 (Nagl).
\textsuperscript{35} See, further, Kilcullen (2006), (2006a); Ricks (2009: 27–9). Kilcullen served as an adviser to
Petraeus and the US State Department in Iraq and Afghanistan.
\textsuperscript{36} See Kilcullen (2010: ix–x) and <correlatesofwar.org> (a. 20 September 2014).
\textsuperscript{38} See Kilcullen (2009: 295–6).
\textsuperscript{39} Kilcullen (2010: 192) has termed this new approach ‘counterinsurgency redux’, which
eschews ‘the templated application of 1960s techniques’ in favour of an ‘integrated approach’
that draws on the disciplines of counterterrorism and counterinsurgency, ‘modifies them for
current conditions, and develops new methods applicable to globalized insurgency’.
\textsuperscript{40} Mansoor (2008: 20); cf. Sky ‘My Mesopotamian Getaway: Fishing with handguns and touring
ancient ruins in post-American Iraq’ \textit{Foreign Policy}, 13 January 2012.
\textsuperscript{41} Mansoor (2008: 346).
Since counterinsurgency warfare is fought among the people, it is ultimately won and lost through human interaction and perceptions. The actions of privates, specialists, sergeants, lieutenants, and captains matter a great deal. Indeed, in the age of the Internet and satellite communications, tactical actions often have strategic consequences—as the criminal actions of the night guard shift at Abu Ghraib prison demonstrated. Al Qaeda’s operations are planned around their media impact far more than on their effect on the military or economic capacity of the target. Insurgent organizations in Iraq contained ‘media cells’ whose sole function was to advertise insurgent successes on the Internet, via flyers, or through the production and distribution of videos and DVDs. . . . The Internet itself has become a battlefield in the competition for public support . . . Military operations in a counterinsurgency war, regardless of their actual kinetic impact on insurgent forces, must in the end revolve around the public perceptions of their legitimacy and effectiveness.

While it ultimately became clear that US forces were mired in a counterinsurgency fight in Iraq and Afghanistan, the distinctiveness of modern insurgencies and the extent to which the US could simply ‘dust off’ communist counterinsurgency practices to counter them remained unappreciated.42 Over time, US forces began to question and lament the orthodox and compartmentalized approach to military operations, as Major Generals Peter Chiarelli and Patrick Michaelis revealed:43

We witnessed in Baghdad that it was no longer adequate as a military force to accept classic military modes of thought. Our own mentality of a phased approach to operations boxed our potential into neat piles the insurgent and terrorist initially exploited. . . . [T]hose who viewed the attainment of security solely as a function of military action alone were mistaken.

**Juridification of War**

War has never been a humane activity. Although international law has had a long association with war,44 historically it has made little ‘more than an occasional and limited difference’ to what actually occurs within war.45 Nevertheless, earlier generations in Ancient Greece and Rome, for example, were concerned with the regulation of armed conflict. Restraint in the conduct of hostilities, particularly so far as women, villages, churches and hospitals were concerned, was also a feature of the 150 Articles of War decreed by King Gustavus Adolphus of Sweden in 1621.46 The present epoch of LOAC dates back to Albericus Gentilis’ 1598 *De Jure Belli*, which was relied on by Hugo

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42 Mattis. 43 Chiarelli and Michaelis (2005: 4).
44 As depicted in Shakespeare’s *Henry V* (III, iii, 9–13) and *King Lear* (V, iii, 143): see Meron (1993: 11, 76–7).
Grotius in his 1625 text, *De Jure Belli ac Pacis*. Travers Twiss explained that Gentilis’ pioneering work represented the first attempt to separate the jurisprudence of war from theology. The second of Gentilis’ three books comprising *De Jure Belli* concerned the conduct of war; he argued good faith was always to be observed, poison and assassination forbidden and truces strictly kept.

Grotius, like Gentilis, was not ignorant of the reality of war. Indeed, he suggested ‘a remedy must be found for those who believe that in war nothing is lawful, and for those for whom all things in war are lawful’. Although Grotius deemed moderation possible and optimal, his caveat vis-à-vis military necessity made it clear this was not easily achieved: ‘in war things which are necessary to attain the end in view are permissible’. Grotius’ landmark treatment of ‘non-combatants’ rested on assumptions all the more notable given their contemporary relevance, namely the capacity for warring parties to divorce ‘military from economic and political considerations’ and ‘that the persons to whom it is wished to distinguish as non-combatants do objectively appear to be such to sceptical enemy combatants and dispassionate third parties’.

Codification of current LOAC is commonly traced to the 1899 and 1907 Hague Peace Conferences, although there were important earlier developments, including the 1856 Paris Declaration Respecting Maritime Law, the 1863 Lieber Code, and the 1868 St Petersburg Declaration relating to the use of certain explosive projectiles in war. The Hague Conferences, and the instruments flowing from them, particularly the Annex to the 1907 Hague Convention IV (‘1907 Annex’), are described as the ‘lineal ancestors’ of the four 1949 Geneva Conventions, which alongside the 1977 Additional Protocols to these Conventions, represent the foundation of modern LOAC.

It is worth dwelling momentarily on the Lieber Code, acknowledged by many as the basis of the first laws of war, as it was developed in the midst of, and in response to, a growing insurgency. Uncertainty over the treatment of irregular forces led General Henry Halleck, Commanding General of the US Army from 1862–4, to request the advice of Dr Francis Lieber, who was a noted jurist and a legal adviser to the War Department and President Lincoln. Lieber’s response was later reissued as ‘General Orders Number 100’ and subsequently known as the Lieber Code. The forces in question were divided

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47 Twiss (1877–8: 143).
48 Note also Gentilis’ position on released soldiers: see Twiss (1877–8: 157).
50 See Best (1994: 29 and 26–7); Grotius: Book III, Ch IV, VI–XV; Ch XVII.
51 Respecting the Laws and Customs on Land.
53 ‘Whether the rebels could extend the cloak of legitimacy to the many less formally organized bushwhacker and guerrilla bands that operated in civilian dress’: Birtle (2004: 32).
into five categories: partisans (members of the Partisan Rangers); guerrillas (armed enemies not belonging to the hostile army); scouts (who were to be treated as spies); armed prowlers (described by Birtle as bushwhackers, individuals who shot sentinels); and war-rebels (civilians taking up arms against an occupying power in an occupied area).\textsuperscript{55} As Birtle explained:\textsuperscript{56}

Essentially, Lieber advocated treating irregulars according to their deeds. Those who abided by the rules of war deserved humane treatment, while those who did not were to be treated severely, regardless of whether they were regular soldiers, partisans, guerrillas, or civilians.

Lieber’s characterization underlined a core dilemma of modern LOAC: differentiating between combatants, non-combatants and civilians. Yet his criteria were no panacea to controlling the conduct of the armed forces:\textsuperscript{57}

Over the course of four years the balance between moderation and retaliation shifted decisively toward the more radical pole. Even Lincoln, who continuously strove to moderate the actions of his field commanders, accepted the necessity of using ‘hard’ policies in overcoming the insurrection. Although commanders felt uncomfortable with the extreme measures to which they were driven, they assuaged their consciences by holding the Southerners themselves responsible.

Tension between brutality and moderation toward irregular forces continued throughout early US efforts to quell insurgencies, particularly in occupied areas. In 1919, in an effort to collate best practice, US Secretary of War Newton Baker directed the US Army to produce an official military manual. The Army reportedly ‘baulked’, partly due to suspicion the League of Nations ‘might radically alter’ applicable international law.\textsuperscript{58} Though FM 27-5 was not published until 1940, it warned ‘harshness, injustice, or oppression’ bred resentment and future wars, while ‘just, considerate and mild treatment of the governed’ would win the ‘hearts of the people’ and ‘convert enemies into friends’.\textsuperscript{59}

Despite such exhortations, the tension between overwhelming force and winning over the population was to return in Vietnam. By this point the Geneva Conventions had banned certain coercive measures, yet ambiguity in application and strong temptations to act outside legal parameters remained.\textsuperscript{60} Robert Thompson, the leading British counterinsurgency expert, who served as Permanent Secretary of Defence for Malaya, referred to such

\textsuperscript{55} Lieber Code: [81]–[85]; Birtle (2004: 32–3).  
\textsuperscript{56} Birtle (2004: 33); Lieber Code: [81]–[82].  
\textsuperscript{57} Birtle (2004: 40).  
\textsuperscript{58} Birtle (2004: 250).  
temptations in 1965 when reflecting on his experiences in Malaya and South Vietnam. Thompson suggested these induced ‘government forces to act outside the law’ on the basis that legal processes were too ‘cumbersome’, not designed for insurgencies, and that terrorists and guerrillas deserved to be treated as outlaws regardless.61 (Thompson argued such measures only worked to the enemy’s advantage.) Another difficulty that emerged, according to US Major General George Prugh, was differentiating between international and non-international armed conflict and thus determining which sources of LOAC to apply.62

Much has been made of the changing character of war post-9/11 and the difficulty of applying LOAC in an increasingly civilianized environment.63 Many challenges resemble those that have presented themselves in earlier times. Certain aspects of modern counterinsurgency may be sui generis, as Mattis accepted, though they have clear antecedents. The same applies to LOAC: non-lawyers remain the principal prosecutors of counterinsurgency in the field, and debate over the basic legal principles and their application continues among lawyers.64 What is distinctive is that war is now an intensely legalized operation. There has been a logarithmic spike of lawyers in the battlefield. The military now ‘lives and breathes legal issues, and increasingly senior commanders conduct modern war with a lawyer by their side’.65

This centrality of law in war is a far cry from past practice. Robert O’Neill, an Australian captain in Vietnam, recalled how their legal advisers were based in Australia and not Vietnam during that conflict.66 By Desert Storm, as then Chairman of the US Joint Chiefs of Staff, General Colin Powell, observed: ‘Decisions were impacted by legal considerations at every level’.67 William Lietzau, former Deputy Assistant Secretary of Defense (Rule of Law and Detainee Policy), described Desert Storm as signalling LOAC’s growing importance as well as the sophistication of its role in the narrative:68

What I saw historically with respect to international law and its role in US military operations was that jus in bello had little impact. . . Then we had Desert Storm, and things changed. We saw discussions of war crimes on the news . . . the laws of war had become a discriminating factor to be considered and employed as a strategic component of victory in a larger sense. The issue wasn’t whether we were going to win the war—of course we were going to win in a traditional sense; the issue was how we would look as victors at the end of it. Regardless of how we conducted

61 Thompson (1966: 52).  
63 On the changing character of war, see Strachan and Scheipers (2011).  
64 Kelly (1963: 96).  
ourselves from a moral perspective—and I had no doubt we would do the right thing—if the focus of the international community was on our bombing of a baby milk factory rather than on our triumph over Saddam’s Republican Guard, then our strategic interests would not be furthered. That realization was a turning point for me fuelling my dormant interest in international law—not because I viewed it as a concrete body of law that could have coercive authority over our foreign policy or military implementation of that policy, but because of the comprehension that to be victorious in the truest sense of the word, we needed to reflect an understanding of, appreciation for, and commitment to the very international law that we had played such a significant role in developing.

John Bellinger, Legal Adviser to US Secretary of State Condoleezza Rice, observed in 2008 that ‘lawyers really do spend even more and more time’ on military strategy and tactics: ‘you probably spend more lawyer time on every single munition that is dropped from the sky as you do targeting time’.69 One reason for this is the reality that in the digital age legal issues are key to winning the ‘narrative’.70 During the second Fallujah operation in Iraq in November 2004, Molan, who is not a lawyer, was instructed ‘in no uncertain terms’ by General Casey to ensure a response to any media allegation of illegality within one hour.71 Molan described this as a ‘manifestation of the information war’.72 Law’s importance to this battle was clear:73

We were confident about winning the physical fight. The only question was at what cost. On the other hand, I was not so confident about winning the information war…. With documents, still pictures and video, we would record every transgression of international law.

Mattis accepted the rising vitality of the narrative in modern warfare, and the importance of the law within it, stating officers ‘have had to become more conversant’ in the laws of war.74 This is particularly so given the rise of ‘lawfare’, a term prominent since its use in Qiao Liang and Wang Xiangsui’s 1999 book, Chao Xian Zhan (Unrestricted Warfare), and in US Colonel Charles Dunlap’s subsequent publication on law and military interventions. Lawfare

69 Bellinger, who observed the then Congress had approved in excess of 80 treaties, ‘the largest number in American history in a two-year term of the Senate’. The US was ‘taking on more obligations in a short period of time than at any point in history’, many of them multilateral. A year earlier, Bellinger described he had a staff of almost two hundred lawyers working to ‘promote the development of international law as a fundamental element of [US] foreign policy’: <http://photos.state.gov/libraries/unesco/182433/pdfs/JBB_Speech_on_International_Law_6-5-07.pdf> (a. 20 September 2014).


74 Mattis.
refers to ‘the use of law as a weapon of war’, or ‘real, perceived, or even orchestrated incidents of law of war violations being employed as an unconventional means of confronting’ an opponent.75 As Mattis emphasized, given ‘the enemy sees the legal system as a way to work against’ the US, the legal narrative has become ‘a key part of the terrain that you have to fight to win’, particularly where civilian casualties are concerned.76 Similarly, Bellinger attributed the magnification of legal issues to ‘the growth of NGOs’ and the ‘phenomenon of lawfare’.77

Asked to give an example of law operating contrary to strategic military interest, Mattis cited the landmine ban contained in the 1997 Ottawa Convention.78 As with the Additional Protocols to the Geneva Conventions, the US is not a party to the Ottawa Convention. The US is also not party to the Rome Statute of the International Criminal Court (ICC).79 If there is another instrument that has prompted an ‘appreciable’ change in the operation of LOAC, Lietzau suggests the Rome Statute may be it.80 By virtue of the Rome Statute, the ICC has jurisdiction over genocide, crimes against humanity, war crimes, and the crime of aggression.81 Several states have not ratified the Rome Statute due to the extensive definitions of these crimes.82 Important, however, non-party states are unable to wholly escape jurisdiction.83 Subject to the principle of complementarity,84 nationals of non-party states will fall within jurisdiction if they commit a crime on the territory of a state party or are referred by the Security Council.85

The first Prosecutor of the ICC, Luis Moreno-Ocampo, who concluded his term in June 2012, has claimed the ICC has necessitated changes to the

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77 Bellinger.
78 Mattis.
79 As of September 2014, the ICC has 122 states parties.
80 This is in addition to other ad hoc international tribunals, such as the ICTY (1993) and ICTR (1994), the Special Court for Sierra Leone (2000), the Serious Crimes Panels in the District Court of Dili, East Timor (1999), ‘Regulations 64’ Panels in the Courts of Kosovo (1999), and, more recently, the Khmer Rouge Trials in Cambodia. See Fischer in Fleck (2008: §719); Nelson (2008: 16): ‘Since the end of the Cold War there has been a boom in the development, application, and enforcement of the laws of war.’
81 Article 5. In June 2010, states parties agreed to amend the Rome Statute to allow the ICC to exercise jurisdiction over the crime of aggression. Thirty states must ratify the amendments before the ICC may exercise jurisdiction, subject to a decision by the Assembly of States Parties. On the definition, see Akande (2010a: 5); (2010b: 23); <http://www.icc-cpi.int/en_menus/asp/crime%20of%20aggression/Pages/default.aspx> (a. 28 July 2014).
84 See Rome Statute, Article 17.
military tactics and strategies of all states. Lietzau, who was the Pentagon’s negotiator at the 1998 Rome conference and the chief US negotiator for the subsequent elements of crimes negotiations, did not find this claim ‘at all puzzling’. He attributes greater attentiveness to the specific content of LOAC to the Elements of Crimes (EOC), a subsidiary feature of the Rome Statute initially pushed by the US. Lietzau explained the US was not confident of securing agreement in Rome on the necessity for EOC to circumscribe the ICC’s subject-matter jurisdiction more precisely. When the Clinton administration elected not to sign the Rome Statute, the question became the extent to which the US would remain involved in the Preparatory Commission (PrepCom) that drafted the EOC. Lietzau recalled:

In the end [what] took us to the PrepCom was the recognition that we cared about how the laws of war developed, and, therefore, we cared about the definitions of the war crimes and the actual elements that established those definitions.

The decision to attend was made the weekend before the PrepCom. Lietzau was instructed to prepare a draft, which was submitted to the PrepCom and ‘was more or less … where [the EOC] ended up’. The EOC were ultimately adopted in September 2002. Although the US has never ratified AP I, the EOC reflect many of AP I’s concepts and much of its specific language. Comprising some 50 pages, the EOC proceeds through each of the crimes, specifying the acts and factual circumstances capable of constituting an offence. ‘One way the ICC changed things’, Lietzau told me, ‘was in providing some practical definition to the laws of war through the act of developing’ the EOC. Lietzau recalled many states objecting to the EOC idea ‘because the crimes had theoretically existed for many years—in some cases over 100 years’. Lietzau countered these impressions by conducting surveys around the negotiating room. His account is revealing:

‘What does treacherous wounding mean to you?’ Disparate answers came from across the spectrum of possibilities. The EOC allowed us to agree on answers to those questions before vesting ICC judges with authority to punish individuals for acts associated with such ambiguous concepts. Later, when we needed elements of crimes for the military tribunals in Guantánamo … we ended up turning to articulations that are about the same as those used by the ICC. What the ICC brought us in addition to a Court was definitions of war crimes that were more rigorous than

87 Lietzau.
89 Lietzau.
90 Lietzau.
91 Lietzau.
any before—definitions that had some granularity that could, in turn, give them teeth. Now one has the ability to parse with greater certainty the conduct that violates the law from the conduct that does not. Now the world has judges and indictments and the possibility of human beings going to jail. Now this law that was once little more than a focal point for political censure suddenly has become more purposeful.

Lietzau suggests that while certain military officers may not ‘really understand the ICC’, that does not mean it has no impact on the conduct of operations, even if the impact is not direct.\textsuperscript{92} Of course, extensive empirical work is needed to test this claim.\textsuperscript{93} Some scholars have argued international criminal law actually ‘has exacerbated’ old LOAC, and that international prosecutions may sometimes be counterproductive to ‘humanitarian interests’.\textsuperscript{94} Even so, the specificity of the Rome Statute, particularly the EOC, may be making an appreciable difference in the impact of LOAC. The definitions of crimes are far-reaching, in some instances (such as war crimes) moving beyond grave breaches of the Geneva Conventions to include ‘other serious violations of the laws and customs applicable in international armed conflict’.\textsuperscript{95} The ICC’s jurisdiction over crimes against humanity, defined as any of a number of specified acts committed as part of a widespread or systemic attack directed against any civilian population, including severe deprivations of liberty and torture, includes crimes committed during peacetime. Individual criminal responsibility for crimes extends to attempted crimes, as well as to those who assist in the commission or attempted commission of a crime.\textsuperscript{96}

The scope and explication of the crimes subject to the ICC’s jurisdiction ensure their relevance to the military practices of all states. Certain events in Iraq, such as those at Abu Ghraib and in Haditha, are discussed later in this book. Each highlights the potential for military actions of all states to traverse the boundaries of legality.\textsuperscript{97} In February 2006, Moreno-Ocampo confirmed the ICC’s mandate to examine conduct during the Iraq conflict, but concluded the Rome Statute’s requirements to seek authorization to initiate an

\textsuperscript{92} Lietzau.

\textsuperscript{93} Note General Rupert Smith (2005: 381): ‘The more we establish courts to deal with cases of the breach of international humanitarian law, the more we must be sure of the position of those we commit to operations.’

\textsuperscript{94} See Blum (2010); Clark (2010); cf. Waxman (2009); (2008).

\textsuperscript{95} The list of war crimes violations (Article 8) includes: intentionally directing attacks against civilian populations, individual civilians or civilian objects; intentionally launching attacks knowing they will cause excessive long-term and severe damage to the natural environment; or committing outrages upon personal dignity. These definitions extend to non-international armed conflict in certain instances, whereby the ICC retains jurisdiction.

\textsuperscript{96} Rome Statute, Article 25.

\textsuperscript{97} See Sewall (2011: 13 fn. 54).
investigation had not yet been satisfied. Preliminary examinations have also been conducted with respect to Afghanistan.\textsuperscript{98}

The degree to which the law of armed conflict (LOAC) remains permissive or restrictive is difficult to ascertain, particularly in relation to US forces. Nagl maintains it is not clear, at least in his mind, that LOAC have ‘changed appreciably’ since Desert Storm, but that the change resides in the ‘nature of the conflicts’.\textsuperscript{99} Lietzau’s contentions on the ICC run counter to this,\textsuperscript{100} as does a recent speech by William Hays Parks on the new US Department of Defense Law of War Manual, in which he referred to eight treaties negotiated or ratified by the US in recent decades.\textsuperscript{101} Two other factors may have also altered the nature of LOAC: increased recognition of customary international law principles, particularly so far as they pertain to non-international armed conflict, and the role of international human rights law. Lietzau and Nagl agree, however, that the changing nature of the conflicts the US is fighting ensures the application of LOAC poses a much greater challenge. As Nagl explained:\textsuperscript{102}

In Desert Storm it was easy, you shot the tanks that didn’t look like you. We fought on a battlefield essentially devoid of civilians. In Iraq, in Afghanistan, we’re fighting on battlefields filled with civilians and our enemies look like civilians and the civilians look more like enemies so the rules of engagement are far more difficult to implement … the question of what is a legitimate target becomes far harder.

Despite the rising numbers of lawyers downrange, the reality remains that it is non-lawyers, ranging from senior commanders to junior officers, who take decisive action on the battlefield. While LOAC training has been a feature since at least the Vietnam War, that training has assumed greater importance.\textsuperscript{103} The focus, however, as Nagl explained, is not exclusively on embedding intricate knowledge of the laws of war.\textsuperscript{104}

\textsuperscript{98} See further, Bosco (2014).
\textsuperscript{99} Author’s interview with John Nagl, Washington, D.C., September 2008 (\textit{Nagl}).
\textsuperscript{100} On the influence of human rights prosecutions and the ‘justice cascade’ generally, see Sikkink (2011).
\textsuperscript{101} Hays Parks (2011: 13–14). See also Waldron (2010: 16), citing GC III, Articles 3, 17; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (signed by the US in April 1988 and ratified in October 1994 with reservations) (CAT); and the International Convention on Civil and Political Rights, Art 7 (ratified by the US in 1992 with declarations stating Articles 1–27 were not self-executing) (ICCPR). US reservations to CAT are available here: \texttt{<http://www.state.gov/documents/organization/100296.pdf>} (a. 15 September 2014).
\textsuperscript{102} \textit{Nagl}.
\textsuperscript{103} Molan noted, for example, how the requirement to incorporate ‘formal instruction’ in LOAC for officers and soldiers, and the ‘availability of legal officers within the system’, were major changes for Australian forces: Author’s interview with Jim Molan, February 2009, by telephone (\textit{Molan}).
\textsuperscript{104} \textit{Nagl}.
What you ultimately want to get to is the point where the 18-year-old private first class has got to make the shoot / no shoot decision, he stands as well trained as he possibly can and he has very clear—the brightest lines he possibly can—to separate shoot from don’t shoot...we don’t expect the 18-year-old to know the laws of war, we expect him to understand the rules of engagement.

Modern armies are still grappling with how best to impart LOAC through effective rules of engagement (RoE). This dilemma is relatively new; it was only in 1979 that US commanders were directed to ensure RoE complied ‘with all international law pertaining to armed conflict’. In 1994, Mark Martins noted how changes in ‘doctrine, in national security strategy, and in the world at large have heightened attention to land force RoE because the changes mandate that modern land forces be highly flexible’. This requirement for flexibility is magnified in counterinsurgency. The population’s behaviour and mood ‘is the major factor’ but incredibly difficult to replicate in a training environment. Moreover, actions during counterinsurgency operations ‘seldom produce immediate effects’. Much of the training, therefore, has historically been ‘done on the job’.

Characterizing Armed Conflict

The relentless modernization of weaponry, the transformation of military strategy, and recent conflicts incorporating both these trends, especially in response to the War on Terror, have affected jus in bello in ways that legal practitioners are just beginning to discern four years into the twenty-first century.

David Jividen, Jus in Bello in the Twenty First Century, 2004

The next task of this chapter is to unpack some principles of LOAC. The best known sources of international law are outlined in Article 38(1) of the Statute of the International Court of Justice (ICJ) and include: international treaties, whether general or particular; international custom, as evidence of a general practice accepted as law; general principles of law recognized by civilized nations; and judicial decisions and the teachings of eminent publicists. It is important to distinguish between the two most common sources:

112 ‘Treaties’ includes conventions, declarations, and protocols: Roberts and Guelff (2000: 5). Judicial decisions and the views of esteemed publicists are generally recognized as weaker sources.
treaties and customary international law. Once ratified, treaty obligations become binding on states. Although signing a treaty does not create duties extending beyond the obligation of good faith,\textsuperscript{113} it may assist in the formation of customary international law or supply proof of the crystallization of a customary rule.\textsuperscript{114} Apart from those provisions otherwise binding as \textit{jus cogens} or as custom, treaties are generally prevented from adversely affecting the rights of, or creating obligations for, non-party states without their consent.\textsuperscript{115} For some countries, entering into a treaty may not automatically change domestic law; further legislation may be required to implement its terms.\textsuperscript{116}

Given that several key states are not party to some relevant treaties, customary international law is of much importance. For example, while the US, Iraq, and Afghanistan are parties to the Geneva Conventions they have not signed or ratified the first two Additional Protocols. This creates difficulties in combat, particularly in coalition operations, as explained by a \textit{Rule of Law Handbook} issued for US judge advocates in 2007:\textsuperscript{117}

Customary international law (CIL) is a second major source of law of war obligations. Given its largely uncodified form, CIL can be difficult to discern. Many treaty provisions, including the Hague Regulations of 1907, the Geneva Conventions of 1949, and portions of the 1977 Additional Protocols…are considered reflective of CIL. Provisions of the latter treaties have proven particularly troublesome for US Judge Advocates because the US is not a party to either Protocol. The majority of Protocol I provisions relate to targeting operations and are not of primary concern to rule of law operations. The US has not expressed explicit support for most of the Protocol I supplements to treatment of war victims, however, reducing the legal significance of these provisions during exclusively US operations. Judge Advocates should bear in mind, however, that many US allies and potential rule of law host nations have ratified or acceded to the Protocols or may view their provisions as more fully reflective of CIL.

\begin{footnotes}
\footnotetext{113} Vienna Convention on the Law of Treaties (VCLT), Articles 18, 26.
\footnotetext{115} VCLT, Article 34. Recall, however, the discussion on the ICC above.
\footnotetext{116} In the US, a treaty is defined as self-executing ‘if the Court may apply the treaty or a provision of the treaty without further legislation by Congress to implement its terms’: \textit{Foster v. Neilsen} 27 US 253 (1829).
\footnotetext{117} US Army, The Judge Advocate General’s Legal Center & School, Center for Law and Military Operations, and Joint Force Judge Advocate, US Joint Forces Command, \textit{Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates}, July 2007 (ROLH): 62–3. See also Kelly (2005: 164–8). Dinstein (2004: 255) argued the divergence should not be underestimated: ‘The result, after more than a quarter of a century, plagued by intransigent theoretical disagreements and divergent practice (even among nations otherwise like-minded), has been a veritable fault-line separating Contracting Parties of [AP I] from some key players in the international arena led by the United States…. It would be folly to underrate the significance of the profound division of opinion regarding topics such as conditions of lawful combatancy or the use of belligerent reprisals against civilians.’
\end{footnotes}
A rule becomes a norm of customary international law when there is widespread and representative state practice that is carried out in the belief the practice is required by law (*opinio juris*). As distinct from treaties, where terms and states parties are easily ascertainable, customary rules are often alleged to exist when *opinio juris* is contested. This latter requirement, the belief that the relevant customary rule is the *law*, is key. Often, states follow certain customs not because they believe in their legality, but because of the political benefits of adherence to them. Bellinger criticized the ‘sloppiness’ with which certain lawyers and policymakers treated custom. His argument, that ‘actually law is a lot less clear’ on a number of its more controversial subjects, including LOAC, is one often repeated. The International Committee of the Red Cross’ Customary International Humanitarian Law Project (ICRC Project), which purports to collate LOAC customary rules and practice, has attempted to remedy this. In this context, it has been suggested certain European and Commonwealth states tend to view customary international law ‘as providing clearer rules’ than does the US. Much depends on one’s approach to international law generally and how malleable its content is viewed.

Discussion of customary international law is particularly important for LOAC in two respects. First, existing treaty law expressly provides for its continuing role. The best-known provision in this respect is the Martens clause, which appeared in slightly different formulations in the instruments arising out of the 1899 and 1907 Hague Conferences. Notably, the clause was included as a compromise to resolve a dispute over the status of irregular forces. The role of customary international law is similarly preserved in the Geneva Conventions and within AP I. Second, despite the ICRC Project, there is a lack of consensus on the customary status of some rules, together with continued dispute as to the proper interpretation of the Martens clause. Nonetheless, custom remains a vital source of LOAC.

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119 Bellinger; Scharf and Williams (2010: 204): ‘Although there was a consensus among the [US State Department] Legal Advisers that international law is binding law, there was also broad agreement that international legal rules are often quite vague, and consequently there is ample room for the interplay between law and politics’. See, further, Abbott and Snidal (2000).
121 See ICRC (2005).
122 Author’s interview with Ashley Deeks, Washington, D.C., October 2008 (Deeks).
123 Author’s interview with Matthew Waxman, New York, November 2008 (Waxman); Akande (2010c); Brunée and Toope (2010: 46–8).
124 Named after Professor F.F. de Martens, the Russian delegate to the 1899 Hague Peace Conferences.
125 See, for example, the preamble to the 1907 Hague Convention IV; Ticehurst (1997).
127 See GC I-IV, Articles 63(4), 62(4), 142(4), and 158(4) respectively, and AP 1, Article 1(2).
128 See Fleck (2008: 33–5, 619–20). The ICJ has stated the clause is now part of customary international law: *Nuclear Weapons Advisory Opinion* [196] ICJ 226, 259 [84].
Alongside and in addition to treaty and customary rules, there exist particular general principles of international law. In the context of LOAC, proportionality has been referred to as one such rule ‘in the sense that it underlies and guides the application of the whole regime’, a view notably enunciated by President Barak in the Targeted Killings case in the Israel Supreme Court.129 Other general principles may include the principle of distinction and the principle of military necessity. Another important, though often overlooked, avenue through which to ascertain international law’s content is judicial decisions emanating from international courts and tribunals and from domestic courts.130 Aside from these sources, two particular areas of international law deserve special mention. International criminal law has already been discussed.131 The other, international human rights law, is also increasingly influential in war. While LOAC remains the lex specialis (the law governing armed conflict specifically), international human rights law was recently used by the ICRC to assist in interpreting the notion of direct participation in hostilities, particularly in respect of restraints on the use of force in direct attack.132 It has also been employed where gaps exist in areas of LOAC, such as in administrative detention.

The focus of this book is not the distinction between international and non-international armed conflict, yet something must be said about it in order to unpack applicable LOAC. Although the dichotomy between international and non-international armed conflict has been questioned, and arguably the deficiencies in treaty provisions for non-international armed conflict have been partially remedied by customary international law, it remains fundamental to LOAC.133 The Rome Statute reinforced the dichotomy to some extent.134 Moreover, the US famously invoked the ‘character of the conflict’ with respect to Al Qaeda and the Taliban in 2001–2 to justify certain actions.135 A strict reading of treaty law would point to ‘a range of very significant disparities

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130 Such decisions are referred to as a subsidiary source of international law in Article 38(1)(d), in the sense that they may supply proof of customary law or be used as subsidiary means of interpretation for customary norms or treaty provisions.

131 See also Dinstein (2004: 232–7).


133 See, for example, ICRC (2005); Prosecutor v. Tadic (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (Tadic), Case No. IT-94-1-AR72, ICTY Appeals Chamber, 2 October 1995, [119], [127].


between the two regimes’, including in areas relevant to this book.\textsuperscript{136} These differences will be expanded upon where relevant below.

For now, it suffices to accept that LOAC applies as soon as, and for as long as, there is an ‘armed conflict’.\textsuperscript{137} The Geneva Conventions and AP I govern international armed conflicts; non-international armed conflicts are regulated by Common Article 3 to the Geneva Conventions, AP II, or both. Customary international law supplements both regimes. So far as the Geneva Conventions are concerned, they apply primarily, by virtue of Common Article 2, ‘to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them’,\textsuperscript{138} as well as in cases of partial or total occupation of territory. AP I applies to armed conflicts falling within the scope of Common Article 2, and extends to ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination’. As most conflict involving counterinsurgents is of a non-international character, the starting point is Common Article 3,\textsuperscript{139} which applies to conflicts ‘not of an international character’ and prohibits certain acts being committed with respect to those ‘persons taking no active part in the hostilities’, including:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment; and
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

\textsuperscript{136} See, for example, Stewart (2003: 320); International Institute of Humanitarian Law (2006: 2–3).
\textsuperscript{137} Defined in Tadic, [70]: ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.’ See also Rome Statute, Article 8(2)(f).
\textsuperscript{138} See also Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Wall Opinion) [2004] ICJ 136, [95].
\textsuperscript{139} See, further, Alston (2010: 17–18). These conflicts require evidence of an identifiable non-state armed group, a minimum threshold of intensity and duration, and a nexus with the territory of a State. The test is slightly different under AP II, such that non-international armed conflicts may meet the criteria in Common Article 3 but not AP II.
Between 7 October 2001 and 5 December 2001, when the Bonn Agreement was signed and an Afghan Interim Authority established, the US-led conflict in Afghanistan, referred to as ‘Operation Enduring Freedom’ (OEF), was generally considered to be an international armed conflict. Thereafter, the armed conflict against the Taliban-led insurgency continued in two respects: first, through the International Security Assistance Force (ISAF) operation, authorized by the Bonn Agreement and subsequent Security Council Resolutions to assist the Government of Afghanistan;\textsuperscript{140} and, second, through the continuation of OEF by the US-led coalition against Taliban and Al Qaeda forces.\textsuperscript{141} While the ISAF mandate was relatively well defined,\textsuperscript{142} this was not the case for OEF. Disputes persisted within the US as to the status of the Taliban and Al Qaeda and the relevance, for Common Article 2, of Afghanistan’s characterization as a failed state. A more sustained debate also took place over the application of Common Article 3 and whether the conflict was \textit{sui generis} given it allegedly did not fit within either conflict category.\textsuperscript{143} That characterization was subject to intense criticism, both within the US and abroad, and was ultimately reversed following the US Supreme Court’s decision in \textit{Hamdan v. Rumsfeld}.\textsuperscript{144}

The US-led invasion of Iraq, beginning 20 March 2003, commenced an international armed conflict. The subsequent establishment of the Coalition Provisional Authority (CPA) raised questions about if and when the situation in Iraq constituted a military occupation. The transfer of formal authority on 28 June 2004 and assumption of full authority and responsibility for Iraq on 30 June 2004 by the Interim Government of Iraq led to debate as to whether the law of occupation had been replaced by laws governing non-international armed conflict, or whether some combination of the rules applied.\textsuperscript{145} Significantly, in early 2006 the US Department of Defense directed its armed forces ‘to comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations’.\textsuperscript{146}

\textsuperscript{140} See Resolution 1386 (2001); <http://www.isaf.nato.int/history.html> (a. 15 September 2014).
\textsuperscript{142} See <http://www.nato.int/cps/en/natohq/topics_8189.htm> (a. 28 September 2014).
\textsuperscript{144} 548 US 557 (2006), 562 per Stevens J (Kennedy, Souter, Ginsburg, Breyer JJ concurring).
\textsuperscript{145} See Roberts (2005).
international armed conflict across the conflict spectrum. Notwithstanding, the consequences of the classifications illustrated above will be discussed where relevant below.

**Combatants, Non-Combatants and Civilians**

Crucial for LOAC’s operation is the distinction between combatants and civilians. Combatants, unlike civilians, can legally take part in hostilities and benefit from prisoner of war (POW) status if captured. Combatants are legitimate targets, whereas civilians are not: attacks cannot be directed against civilians unless they take a direct part in hostilities, and weapons must be capable of distinguishing between civilian and military targets. Such principles emerged from the use of regular armies, and perhaps a concurrent shift in military strategy, but also have roots in legal and ethical just war traditions. The so-called ‘Basic Rule’, in Article 48 of AP I, which the US has accepted as ‘a codification of the customary practice of nations, and therefore binding on all’, also captures this principle of distinction:

>[The Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.]

Distinguishing between combatants and civilians is difficult, both in theory and practice. As Dr Lieber’s advice demonstrates, this is not a new problem, though the difficulty is more pronounced today. The process of distinguishing involves considering up to three related questions: whether the individual is a combatant; if so, whether the combatant is a lawful combatant protected by GC III, AP I, or both; or whether the individual, ostensibly a civilian, is nonetheless taking a direct part in hostilities.

The separation between who is a combatant and who is a non-combatant but not a civilian is not readily obvious. Indeed, it may depend on which army one is from. Article 43(2) of AP I effected a complete change in how combatants were defined, labelling all members of the armed forces of a Party to a conflict, except for medical personnel and chaplains, combatants. Here, definition derives from identity; so long as one has a ‘right to participate

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149 See, further, Nuclear Weapons Advisory Opinion, 257.
152 Roberts (1993: 150–1). See also AP I, Article 57(2)(a)(iii) and Rome Statute, Article 8(2)(b)(iv). The latter provision deems an intentional attack on civilians or civilian objects a war crime.
directly in hostilities’ one is a combatant.\footnote{155} This distinction is important: combatants may be targeted at all times, whether or not they are lawful combatants in the sense that they benefit from POW protections.\footnote{156} For states not party to the Additional Protocols, such as the US, the relevant combatant definition stems from the 1907 Annex, which characterizes combatants by virtue of their conduct, not their identity. Article 3 of the 1907 Annex accepts the armed forces of states ‘may consist of combatants and non-combatants’, the latter category generally referring to members of the armed forces who belong ‘to branches of the military administration’.\footnote{157} This was done in recognition that certain members of the armed forces fought, and that other members have functions, often prescribed by national legislation, that did not involve direct fighting. The 1907 Annex further singled out medical and religious personnel, a practice continued by the Geneva Conventions and Additional Protocols.

The legal significance of the label ‘non-combatant’, so far as it refers to members of the armed forces not fighting and not to civilians, is nominal. It derives from the separation of members of armed forces into combatants and non-combatants in the 1907 Annex. Since the 1907 Annex, non-combatants do not appear to have secured a unique status under international law that attracts particular rights or duties. There remain arguments about whether non-combatants in the historical sense (those members not directly involved in combat missions) may be targeted,\footnote{158} or whether national legislation should restrain their ability to partake in hostilities. But aside from medical and religious personnel, an adversary is not required to differentiate between combatants and non-combatants.\footnote{159} Perhaps the better view is that the distinction between combatants and non-combatants carries little meaning.\footnote{160} The relevant distinction, alongside the separation of combatants and civilians, is that between lawful and unlawful combatancy. As Yoram Dinstein has explained:\footnote{161}

\begin{itemize}
\item The distinction between lawful and unlawful combatants is a corollary of the fundamental distinction between combatants and civilians: the paramount purpose of the former is to preserve the latter. [LOAC] can effectively protect civilians from being objects of attack in war only if and when they can be identified from the enemy as non-combatants. Blurring the lines of distinction between combatants and civilians is bound to end in civilians suffering the consequences of being suspected as covert combatants. Hence, under customary international law, a
\end{itemize}

\footnote{155}{Certain states, such as Australia, have confined the definition of combatant to those individuals engaged in fighting in their Declarations to AP I: Kelly (2005: 167–8).}

\footnote{156}{Note Prosecutor v. Galic, Case No. IT98-29-T, Judgment, Trial Chamber, 5 December 2003, [36]–[61].}

\footnote{157}{Fleck (2008: 96).}

\footnote{158}{Note Article 41(2) of AP I.}

\footnote{159}{See Fleck (2008: 99–101).}

\footnote{160}{Fleck (2008: 96–99). It has been asserted that Article 43 of AP I represents custom: ICRC (2005: Rules 4, 16).}

\footnote{161}{Dinstein (2004: 29) (citations omitted).}
sanction (deprivation of the privileges of a prisoner of war) is imposed on any combatant masquerading as a civilian in order to mislead the enemy and avoid detection.

The question of lawful combatancy in international armed conflict turns primarily on interpretations of Article 4 of GC III and Articles 43 and 44 of AP I. Under GC III, combatants must fall within one of the categories outlined in Article 4(A) in order to be entitled to POW protections. Article 4A(1) deals with regular armed forces, while Article 4A(2) covers irregular forces, described by Dinstein as ‘the most problematic category, given the proliferation of such forces in modern warfare’. 162 These two provisions are as follows:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
   (a) that of being commanded by a person responsible for his subordinates;
   (b) that of having a fixed distinctive sign recognizable at a distance;
   (c) that of carrying arms openly;
   (d) that of conducting their operations in accordance with the laws and customs of war.

Article 4(A)(2), represented the first exposition of lawful combatancy of irregular forces since the 1907 Annex, which had followed on from the Lieber Code. As Dinstein explains, it repeats the 1907 Annex’s conditions, and adds three implied requirements, including (e) organization; (f) belong to a Party to the conflict; and (g) lack of duty of allegiance to the Detaining Power. 163 Importantly, Article 5 of GC III provides that where there is any ‘doubt’ as to whether persons satisfy the Article 4(A) conditions, ‘such persons shall enjoy [GC III] protections until such time as their status has been determined by a competent tribunal’.

AP I adopts a rather different approach to lawful and unlawful combatants. As highlighted above, under Article 43(2) of AP I, apart from an exception for medical personnel and chaplains, all members of armed forces are combatants. ‘Armed forces’ are defined in Article 43(1):

The armed forces of a Party consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its

162 Dinstein (2004: 36).
subordinates, even if that Party is represented by a government or authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Significantly, under Article 44(2) of AP I, LOAC violations do not deprive combatants of their right to be a combatant or to be a POW. In order for one’s combatancy to remain lawful, however, a combatant falling within Article 43(1) must comply with Article 44(3), which relevantly provides that to retain lawful combatant status, combatants shall ‘distinguish themselves from the civilian population’, and where this is impossible, carry arms openly at prescribed times.\(^{164}\) Even so, Article 44(4) provides that combatants failing to meet the requirements of Article 44(3), despite forfeiting their right to be a POW, ‘shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war’ by GC III and AP I. Thus, AP I reduces ‘the formal requirements for privileged combatants’,\(^ {165}\) arguably rendering the distinction between lawful and unlawful combatants obsolete.\(^ {166}\)

Richard Baxter’s oft-cited 1951 piece on ‘Unprivileged Belligerency’, which responded to the US Supreme Court decision *Ex parte Quirin*,\(^ {167}\) neatly explained the dilemma presented by the distinction between lawful and unlawful combatants. *Quirin* endorsed a category of participants in war not classified as combatants and thus not entitled to POW status, but still capable of being tried for LOAC violations. Baxter characterized what he termed ‘unprivileged belligerency’, which for all intents and purposes is the same as unlawful combatancy, in these terms:\(^ {168}\)

> The correct legal formulation is, it is submitted, that armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy. ‘Unlawful belligerency’ is actually ‘unprivileged belligerency’. International law deliberately neglects to protect unprivileged belligerents because of the danger their acts present to their opponent.

The category of unlawful combatants raises important questions as to how, once captured, such individuals are to be treated, and whether they are entitled to a baseline level of treatment such as that prescribed by Article 75 of AP I. We will return to these issues below.

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\(^ {164}\) For the duration of the battle and when visible to the enemy in the deployment phase before the battle: Dinstein (2004: 46).

\(^ {165}\) See Sitaraman (2009: 1832).

\(^ {166}\) Dinstein (2004: 47).

\(^ {167}\) 317 US 1 (1942).

\(^ {168}\) Baxter (1951: 343).
In non-international armed conflict there is no accepted definition of who constitutes a lawful combatant. Article 13 of AP II, however, does distinguish between civilians and those directly participating in hostilities. Thus, differentiating between ‘combatants’ and civilians in non-international armed conflict turns on the notion of direct participation in hostilities, which we will come to shortly.

Civilians are not combatants and, as illustrated earlier, may not be targeted. Civilians are defined in Article 50 of AP I as persons who are not combatants as defined in Article 43 of AP I or prisoners of war as defined in GC III, namely those defined in Articles 4(A)(1), (2), (3) and (6) of GC III. Pursuant to Article 50(1) of AP I, if there is any doubt over whether an individual is a civilian, that person is to be treated as a civilian. Prior treaty law, including the Geneva Conventions, does not define civilians expressly. Although GC IV deals with the ‘Protection of Civilian Persons in Time of War’, it principally concerns rules relating to humane treatment and internment during the course of armed conflict and during occupation. Falling within the scope of GC IV ‘does not necessarily mean that a person is not to be regarded as a combatant for the purposes of the conduct of hostilities’, as individuals ‘may be classified differently depending on the purposes for which classification is being made’.

Importantly, just because combatants lose their POW privileges under GC III or AP I by failing to comply with the conditions in Article 4A(2) of GC III or Article 43(1) or 44(3) of AP I, they do not become civilians. There may be legal consequences attached to the failure to fulfil one or more of these conditions, such as the withdrawal of POW privileges and classification as an unlawful combatant, but they do not become civilians. These conclusions operate in respect of regular and irregular armed forces. To argue otherwise would fatally undermine the principle of distinction and enable irregular forces that violate the conditions of lawful combatancy to benefit from the legal regime that protects civilians.

The difficulty with irregular armed forces, however, is discerning a relationship of control between the organized armed group and a Party to the conflict. The degree of control required has been the subject of much debate and remains unsettled. For now, it suffices to note the ICRC’s conclusion:

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\[170\] Thus, civilians are defined ‘negatively as all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse’: see ICRC (2009: 20); Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Chamber, 3 March 2000, [180]. This definition is reflective of custom: see ICRC (2005: Rule 5); cf. Kahl (2007: 9).

\[171\] See Akande (2010: 184).


where groups engaging in armed conflict do not belong to a Party in the conflict, they ‘cannot be regarded as members of the armed forces of a party to that conflict’, whether under AP I, the 1907 Annex or the Geneva Conventions, and are ‘thus civilians under those three instruments’. Although membership of regular state armed forces is often governed by domestic law and is easily ascertained, such that civilian protection is restored most often when ‘a member disengages from active duty and reintegrates into civilian life’, membership of irregular armed forces is far more difficult to determine. By definition, it is generally unregulated by domestic law. In such instances, it has been suggested membership be determined in the same way as for organized armed groups in the context of non-international armed conflict, that is, to include only those individuals ‘whose continuous function it is to take a direct part in hostilities’. Given that civilians also lose their protected status in international and non-international armed conflicts when they take a ‘direct part in hostilities’, that phrase is, more than ever, fundamental to the central question during war: ‘who can be targeted?’

Under existing LOAC, civilians benefit from the protections outlined ‘unless and for such time as they take a direct part in hostilities’. In 2009, on the basis of its own research and five years of consultations with experts, the ICRC published its interpretive guidance (IG) on ‘the notion of direct participation in hostilities’. In doing so, the ICRC sought to elucidate an uncontested but ambiguous LOAC principle, applicable in both international and non-international armed conflict. Although reaching consensus on the method to discern if, when, and for how long a civilian takes a direct part in hostilities is extraordinarily difficult, those questions are vital to modern warfare, especially counterinsurgency. War is now increasingly urbanized. Civilians and armed actors live and intermingle within the same environment at an unprecedented scale. The growing subcontracting of aspects of war to private military and security companies, along with the reluctance of many actors to distinguish themselves from the civilian population, further complicates the picture.


175 ICRC (2009: 23–5, 32–6); cf. Akande (2010: 186–7), who noted that despite the pragmatism inherent in such an approach, particularly in non-international armed conflict, it nonetheless creates inequality between state and non-state forces. Nevertheless, as Akande affirmed, those without a continuous combat role can still be targeted if they take a direct part in hostilities. Compare Gross (2010); O’Driscoll (2009).
178 AP I, Article 51(3); AP II, Article 13(3). See also Targeted Killings case, [30], which concluded ‘all of the parts’ of Article 51(3) express custom.
179 Akande (2010: 180).
180 See Tonkin (2011).
181 See ICRC (2009: 5).
The IG addressed three questions: (i) who is considered a civilian for the purposes of the principle of distinction; (ii) what conduct amounts to direct participation in hostilities (DPH); and (iii) what modalities govern the loss of protection against direct attack. The IG set out three constitutive elements of DPH: a threshold of harm; direct causation; and a belligerent nexus. Under this approach, for an individual to directly participate in hostilities and thus be liable to attack, he or she must commit an act, or participate in a military operation, likely to cause, and intended directly to cause, harm to the military of the adversary or to protected persons or objects, and thus benefit a party to the conflict. This characterization excludes conduct ‘that merely builds up or maintains the capacity of a party to harm its adversary, or which otherwise only indirectly causes harm’. The IG provides examples of excluded acts, such as: a regime of economic sanctions; the provision of supplies and services, including electricity, fuel, construction material, finances, financial services, scientific research, production and transport of weapons and equipment; and the recruitment and training of personnel. Such acts only amount to DPH if they are ‘an integral part of a specific military operation designed to directly cause the requirement threshold of harm’. Using recruitment and training as one example, the IG declared that ‘only where persons are specifically recruited and trained for the execution of a predetermined hostile act’ would that recruitment and training be regarded as an integral part of the hostile act and thus DPH.

Of equal importance in establishing DPH is determining when it ends: LOAC is clear civilians may be directly attacked only ‘for such time’ as they directly participate in hostilities. The IG rejected the notion of continuous DPH, declaring ‘the ‘revolving door’ of civilian protection’ to be ‘an integral part, not a malfunction,’ of LOAC. Instead, it endorsed the narrow view that civilians lose protection only for the duration of each specific act amounting to DPH. Duration is defined broadly to include ‘measures preparatory to the execution of a specific act’, along with ‘the deployment to and the return from the location of its execution’. According to Dapo Akande, this analysis does not have large practical consequences, as a civilian routinely partaking in hostile acts would probably be deemed a member of ‘an organized armed group’ liable to direct attack for the duration of such membership.

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187 Despite the contrary claims of the US and Israel: see Article 51(3) of AP I; Akande (2010: 188–9).
188 ICRC (2009: 70).
191 Akande (2010: 189–90), quoting also the Targeted Killings case, [39].
armed group belonging to a party in the conflict, he or she would be characterized as a civilian and subject to the DPH rule.\textsuperscript{192}

The IG produced was mired in controversy, as many of the experts involved refused to sanction its conclusions.\textsuperscript{193} The final document, authored by ICRC legal adviser Nils Melzer, expressed only the ICRC’s views. Akande has argued its key contribution is providing analytical tools to determine whether a civilian is directly participating in hostilities. To this end, the vital tool is ‘the requirement that harm that results (or is intended to result) from an act must be brought about within one causal step of the act (or the operation of which the act forms a part)’.\textsuperscript{194} Perhaps the most controversial aspect of the ICRC’s approach, and the key reason behind the final report losing expert backing, is its characterization of what is permissible once a civilian crosses the DPH threshold. ‘In addition to the restraints imposed by’ LOAC, the IG asserted that ‘the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances’.\textsuperscript{195}

Although not altogether remarkable, given prior support for a similar position in the \textit{Targeted Killings} case,\textsuperscript{196} the IG’s approach is significant given it appears to require a secondary decision, in addition to usual LOAC requirements, to determine ‘the kind and degree of force permissible in attacks against legitimate military targets’.\textsuperscript{197} This is to be done \textit{after} it has been concluded that an individual may be targeted. The IG advocated using the ‘least harmful means’, the insinuation being that ‘if a person can be captured rather than killed, there is an obligation to do so even in cases where the person is not a civilian or where he is a civilian taking a direct part in hostilities’.\textsuperscript{198} The supposed attempt by the ICRC to

\textsuperscript{192} See Akande (2010: 190–1); Garraway (2009: 506–10). \textit{Molan} recalled, for example, the process involved in recognizing the Mahdi militia in Iraq as a combatant force.

\textsuperscript{193} See Garraway (2009: 505–10); Melzer (2010).

\textsuperscript{194} Akande (2010: 188).\textsuperscript{195} ICRC (2009: 77).

\textsuperscript{196} At [40]. See also \textit{McCann v. United Kingdom} (1995) 21 EHRR 97.

\textsuperscript{197} See ICRC (2009: 78 fn. 212): ‘[This section] remained highly controversial. While one group of experts held that the use of lethal force against persons not entitled to protection against direct attack is permissible only where capture is not possible, another group of experts insisted that, under IHL, there is no legal obligation to capture rather than kill. Throughout the discussions, however, it was neither claimed that there was an obligation to assume increased risks in order to protect the life of an adversary not entitled to protection against direct attack, nor that such a person could be lawfully killed in a situation where there manifestly is no military necessity to do so.’

\textsuperscript{198} Akande (2010: 191). As Alston (2010: 23) noted, some critics have interpreted this aspect of the ICRC’s approach ‘as requiring the use of a law enforcement paradigm in the context of armed conflict’, citing Parks (2010). Alston suggested the ICRC’s approach articulated ‘only the uncontroversial IHL requirement that the kind and amount of force used in a military operation be limited to what is “actually necessary to accomplish a legitimate military purpose in the prevailing circumstances”’. 

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prohibit ‘unnecessary targeting’\textsuperscript{199} finds little backing in LOAC, as Akande outlines:\textsuperscript{200}

There is some support for this general view of military necessity in military manuals. However, there seems to be no practice of States in which it is contended that the targeting of individuals who are members of armed forces or civilians taking a direct part in hostilities are nevertheless unlawful because such targeting was not necessary in the particular case. . . . What is strange is that the general doctrine of military necessity has led to the development of a specific principle with regard to weaponry and suffering caused by weaponry but States have refrained from elucidating a specific principle about the act of targeting of combatants when such targeting is not necessary. It would seem that this silence is not accidental.

Akande and Charles Garraway also point to the difficulty of applying the IG’s approach on the battlefield, as soldiers on the ground may not know a threat can be averted by capturing and not killing, or whether that is possible.\textsuperscript{201} This is particularly so in counterinsurgency. Still, the IG maintained ‘it would defy basic notions of humanity to kill an adversary or to refrain from giving him or her an opportunity to surrender where there manifestly is no necessity for the use of lethal force’.\textsuperscript{202} Irrespective of the accuracy of this position, the kill-capture debate has risen to the forefront of LOAC debate, just as debates over the efficacy of firepower resurfaced in counterinsurgency.

\subsection*{Modern Counterinsurgency and International Law}

We live in the postmodern era of warfare, where small-scale, intra-state conflict is increasingly becoming the norm. While the modern era conceived of war and warfighting as a large-scale, inter-state conflict waged between massed professional armies, the postmodern era perceives conflict as ‘war among the people’ where technological advantage, massive firepower, and physical manoeuvre can count for little in the struggle for ascendancy. It turns out that such conflict can be as deadly and strategically significant as conventional warfare.

Dale Stephens, Captain, CSM, Royal Australian Navy, US Naval War College, June 2010\textsuperscript{203}

\textsuperscript{199} See Garraway (2009: 506–9).
\textsuperscript{202} ICRC (2009: 82).
Whether we live in a ‘modern’ or ‘postmodern’ era of warfare, counterinsurgency operations have entered an historic period over the past decade. Described as ‘the warfare of the age’ in 2009, counterinsurgency had ‘never before seemed so central to the future of warfare’. The problematic aspect is that modern LOAC seems undesigned for it. Although the Additional Protocols were prompted by the rise in guerrilla warfare, AP I was principally directed towards conventional warfare in international armed conflict. Disagreement persists on the applicability of legal principles to counterinsurgency, particularly those sourced in custom and international human rights law. Nagl emphasized, for example, the lack of international agreement on LOAC applicable to non-state actors. Although the military and defence establishments have sought to reposition doctrine and strategy, largely through the development of FM 3-24 and associated manuals, the legal community has been relatively unmoved. As Stephens argued:

Paradoxically, while military doctrine has managed a self-conscious leap in perspective regarding means and methods of warfare, there has been a correlative lack of innovation within established mainstream legal thinking, at least in the prevailing legal lecture. A formalist methodology of interpretation and a continued commitment to the attritional focus of the law of armed conflict (LOAC) remain the prevalent orthodoxy, notwithstanding that such binary thinking has proven to have had limited utility within counterinsurgency (COIN) and stabilization operations.

Sitaraman has similarly argued that legal scholarship missed the shift in US strategy from a War on Terror framework to a counterinsurgency framework, which inverted the War on Terror’s primary strategic mindset of killing and capturing for a ‘win-the-population strategy’ encompassing ‘security, political, legal, economic, and social operations’. This shift in the national security framework was encapsulated by the September 2008 statement by US Secretary of Defense Robert Gates: ‘over the long term, we cannot kill or capture our way to victory.’ Gates’ comments reinforced the 2008 National Defense Strategy, which confirmed greater proficiency in irregular warfare was the Defense Department’s ‘top priority’, and that the US faced a likely ‘extended series of campaigns to defeat violent extremist groups’.

‘Recognizing this shift,’ Sitaraman contended, ‘is necessary for thinking

204 Sitaraman (2009: 1746).
206 Nagl.
through the laws of war in the modern era.\footnote{211 See Sitaraman (2009: 1757–8, 1765).} He identified three conflicting legal approaches permeating the post-9/11 era. The first, articulated most notably by the Bush administration and most clearly expressing a kill-capture strategy, argued LOAC was inapt and too ‘quaint’ to deal with contemporary challenges.\footnote{212 Sitaraman (2009: 1759–60) quoting former US Attorney-General Alberto Gonzales.} The second approach resisted claims of LOAC’s inadequacy, without a consensus among proponents as to interpretations of applicable law. Adherents of this approach have mostly accepted the difficulties of placing terrorism within a ‘Geneva’ framework but have maintained the core task is to ‘clarify the threshold determination of which law applies’\footnote{213 Sitaraman (2009: 1761).}.

Finally, the third approach seeks to innovate, proposing a hybrid form of applicable law fusing LOAC and criminal law and privileging a kill-capture mindset to ‘increase security and defeat terrorism’\footnote{214 Sitaraman (2009: 1764).}.

Tellingly, although Galula used ‘law’ altogether differently to articulate the ‘ABCs’ of winning,\footnote{215 Galula (1964: x–xi).} he offered this warning:\footnote{216 Galula (1964: 14–15).} Since legal changes are slow, the counterinsurgent may be tempted to go a step further and act beyond the borders of legality. A succession of arbitrary restrictive measures will be started, the nation will soon find itself under constraint, opposition will increase, and the insurgent will thank his opponent for having played into his hands.

This chapter has shown LOAC’s historical development has been closely correlated with countering insurgencies.\footnote{217 See Ucko (2009).} Indeed, counterinsurgency reveals the difficulties of LOAC compliance and the risk of transgressions perhaps more than any other sphere of warfare. During the Algerian War of Independence (1954–62), French forces wrongly ‘placed an overwhelming emphasis on military power’, strengthening the insurgency by ‘repressive and heavy-handed measures, including torture, forced resettlement and collective punishment’. By contrast, the relative success of British-led forces in the Malayan Emergency (1948–60) was attributed to the conduct of ‘counterinsurgency operations in accordance with the rule of law’.\footnote{218 Both examples taken from LWD 3-0-1, [3.22]; cf. FM 3-24: xxxiv.} ‘The government’s inability to enforce ethical adherence to the rule of law by its officials and forces’ was said to be a crucial factor in Chiang Kai-shek’s defeat in the Chinese Civil War (1927–49).\footnote{219 FM 3-24: [5-16].} US success during the Philippine insurgency (1899–1913) has also been credited with the absence of ‘screaming jets accidentally bombing helpless villages, no B-52s, no napalm, no artillery barrages, no collateral damage’\footnote{220 Cassidy (2004: 80); cf. Kahl (2007: 44–5).}.
Martins underlined the ‘devilish problem’ presented by the unprivileged belligerent in counterinsurgency. In his view, the legal regime of Hague and Geneva law, ‘built up principally by reciprocating armies that found it useful’, including ‘powerful states that found it useful’, and supplemented by LOAC prompted by those ‘horrified by the suffering of war’, which sought to codify protections for certain civilians, then all civilians, ‘is just wracked by difficulty when you bring in the guerrilla’.\(^{221}\) For him, Common Article 3 merely delineates a consensus between states of ‘a baseline humane treatment for those who are no longer participating in hostilities’. It may be a starting point for treatment of unlawful or unprivileged combatants, but it does not resolve the problem.

The application of LOAC to counterinsurgency operations is clearly not without difficulty. Correct and defensible identification of adversary combatants and standards of detention and interrogation have proved to be major challenges. Baxter foresaw this dilemma, noting the tendency to extend POW status meant one could ‘envisage a day when the law will be so retailored as to place all belligerents, however garbled, in a protected status’.\(^{222}\) The distinction between civilians and unprivileged belligerents remains, to quote Martins, ‘the most protective one’.\(^{223}\) Yet this distinction is also the most difficult to establish, ‘blurred by the obsolescence of pitched battles and the role of supporters and sympathizers’.\(^{224}\) One might expect uncertainty in the application of LOAC to militate against adherence. However, as the prescriptions of counterinsurgency theorists suggest, closer adherence may often produce the optimal result. It is here that legal principles intersect with military doctrine.\(^{225}\)

Galula famously argued the balance of effort in counterinsurgency is ‘eighty per cent political, twenty per cent military’.\(^{226}\) Alex Alderson, a British colonel with recent tours to Iraq and Afghanistan, and the lead author of the British Army’s new counterinsurgency doctrine, believes Galula’s prescription still holds.\(^{227}\) Such conflicts, most states agree, are population-centric; certainly this is the operating principle for NATO members.\(^{228}\) Nevertheless, while rethinking existing legal regimes requires an intimate understanding of this mindset,\(^{229}\) it does not appear to be equally obvious that such a strategic shift requires drastic legal changes. Insurgencies and irregular forces

\(^{221}\) Martins. \(^{222}\) Baxter (1951: 343). \(^{223}\) Martins. 
\(^{227}\) See Alderson (2008: 5), quoting former British General Sir Frank Kitson (1977: 283): ‘there can be no such thing as a purely military solution because insurgency is not primarily a military activity’. 
\(^{229}\) Sitaraman (2009: 1747–8): ‘Counterinsurgency’s strategy is thus starkly different from the strategy that undergirds the laws of war and the debates on legal issues in the war on terror.’
have a history of informing adaptations to LOAC, even if substantial disagree-
ment persists on its utility in regulating such conflicts.\textsuperscript{230} That is not to say modern LOAC does not appear ‘disconnected’ from counterinsurgency in some respects, such as in the use of non-lethal weapons, the provision of civilian compensation, in privileging certain combatants, and in regulating humanitarian operations and legal occupations.\textsuperscript{231}

Sitaraman and Stephens are correct to point out the reluctance of conven-
tional legal literature to grapple with the transformation in military approaches and the recent focus on counterinsurgency. Although Sitaraman may overstate the case,\textsuperscript{232} legal debates have been ‘somewhat myopic and misplaced’ in attempting to deal with counterinsurgency through a War on Terror lens.\textsuperscript{233} But the stickiness or inertia of existing LOAC parameters may yet be a good thing,\textsuperscript{234} and help to resist more deleterious military efforts.\textsuperscript{235} While this book accepts the premise of Sitaraman’s thesis that LOAC has been built principally around kill-capture strategies,\textsuperscript{236} and that the ‘laws of war are a blueprint for the architecture of legitimate warfare’,\textsuperscript{237} there has been a concerted effort by some lawyers, particularly judge advocates, to grapple with the civilianization of warfare and the challenges of counterinsurgency.\textsuperscript{238} Awareness of shifting strategies need not translate to adapting LOAC provisions that enable or restrain certain actions: it seems overly parochial to suggest legal scholars should incorporate ‘the strategic foundations of counterinsurgency when considering’ revisions to existing legal regimes.\textsuperscript{239}

Although FM 3-24’s construction is addressed in later chapters, it should be noted that it does not ‘emphatically reject’ the kill-capture strategy. Far from it.

\textsuperscript{230} They also have a long history of influencing strategy: see Luttwak (2001).
\textsuperscript{231} cf. Sitaraman (2009: 1748): ‘Moreover, the laws of war are poorly tailored to the realities of counterinsurgency. In some cases, such as occupation law, the laws of war are unduly constraining to the point of preventing strategically necessary initiatives that would also improve humanitarian goals. In other cases, such as civilian compensation, the laws of war could perhaps place greater humanitarian duties on military forces.’
\textsuperscript{232} Sitaraman (2009: 1779–80, 1770–1).
\textsuperscript{234} US Colonel Marc Warren (retd) has argued (2010: 168) ‘Old law is good law; the Geneva Conventions and the law of armed conflict in general are grounded in practicality and have retained remarkable vitality and utility. They should be embraced, not dismissed, and followed, not avoided. They must be explained to the media and to the civilian population generally. Failure to take and hold the legal high ground makes taking and holding the high ground on the battlefield much more difficult’. See, additionally, Lowe (2005: 190–4, 196).
\textsuperscript{236} See Sitaraman (2009: 1757).
\textsuperscript{237} Sitaraman (2009: 1752–3).
\textsuperscript{238} I am grateful to Commodore Neil Brown for drawing the International Law Studies (Blue Book) Series to my attention <http://www.usnwc.edu/Publications/Studies-Series.aspx> (a. 20 September 2014). Volumes 84–7 are particularly instructive. Note also the contributions of feminist legal theory to this endeavour: see Khalili (2011); cf. Charlesworth, et al. (1991); Charlesworth and Chinkin (2000).
\textsuperscript{239} See also Nelson (2008: 4, 9–11); cf. Sitaraman (2009: 1836–7): ‘A correct understanding of strategy is therefore essential to shaping the substance of the laws of war.’
Serious attention is devoted in FM 3-24 to extremism, and the killing and detention of insurgents still feature heavily in such operations. The continued importance of kinetic operations, and the centrality of security to other political aspects of counterinsurgency should not be understated. Indeed, the story told here is not one that measures legal intractability or inadequacy and posits necessary changes, important though that is, but one that grapples with how international law functioned in the US strategic revolution and prosecution of counterinsurgency strategies on the ground.

What appears compelling is that strategic self-interest on the part of the US and coalition forces should theoretically prompt ‘counterinsurgents to operate in accordance with humanity as much as possible’. It is the last puzzle that informs this book. That is, the theoretical congruency between the lawful conduct of war and successful counterinsurgency operations, viewed against a very different reality on the ground. As Conrad Crane observed when interviewed, theory does not always marry with reality. Moreover, ‘the problem is the enemy is going to fight the way you are not prepared to fight. The enemy is always going to look for your weakness.’ This became the problem in Iraq and Afghanistan, as conflicts that commenced in conventional fashion quickly turned into irregular conflicts, an environment US forces were unprepared for. The resulting revolution of doctrine and practice, and the function of international law in this revolution, is the focus of this book.

Use of Force

The law relating to the use of force during armed conflict has been particularly susceptible to proposals for change. Sitaraman has argued, for example, that the phrase ‘active part in hostilities’ found in Common Article 3, should be prejudiced above ‘direct part in hostilities’ to allow individuals who assume an indirect but important role in hostilities to be targeted. (Such as the IED builder and those other individuals comprising the ‘clandestine infrastructure’ of insurgencies.) This book does not endorse proposals to loosen the

241 Sitaraman (2009: 1780, also 1748-9). Sitaraman argued the strategic necessity for exemplarism ‘enables a self-enforcing foundation for compliance with the laws of war’ and is a substitute for reciprocity (although it could be argued indirect reciprocity or a form of ‘legal entrapment’ are just as important). Nelson (2008: 273) also underlined the strategic value for compliance and the associated role of lawfare.
242 Author’s interview with Conrad Crane, Carlisle, Pennsylvania, 30 July 2010 (Crane).
243 See, for example, Schmitt (2009).
244 Sitaraman (2009: 1787-9, 1834).
principle of distinction; it is interested in how influential existing LOAC has been in practice. Even so, while distinguishing between civilians, combatants and civilians who are taking a direct part in hostilities is clearly difficult in counterinsurgency operations,246 this is not altogether a new dilemma.247 Such problems were evident in Kosovo,248 and date back to far earlier times. Debates over the ICRC’s IG reveal military officers are seeking to resolve and create toolkits for resolving discord and other problems of application.

Nowadays, civilians are certainly closer to the battle, and battlefields are often inextricable from civilian centres.249 Moreover, as Mansoor depicted, the vicissitudes of modern operations are qualitatively and quantitatively different.250 The utility of force in war fought amongst civilian populations has also been heavily questioned.251 Regardless, the lengthy history of a principle of distinction in combat indicates that differentiating between civilians and combatants has long persisted as a feature of warfare. If one must distinguish (or anticipate distinguishing), it strains reason to believe armies would fight in arenas devoid of civilians. Looser interpretations do not necessarily enhance clarity in application; indeed, they may exacerbate difficulty in operationalizing such concepts and increase the discretion exercised by junior officers.

Two other general principles must also be introduced. The first is military necessity, which ‘means different things depending on legal and strategic variables’.252 Defined by Krista Nelson as a principle that ‘limits military action to those measures which are indispensable for securing the ends of war, and which are lawful according to the laws of war’,253 military necessity and the principles of humanity,254 distinction, and proportionality are fundamental to the use of force. Military necessity best embodies the tension between law and war: inherent in the definition is the notion that ‘one must give up the whole mission if it involves violation of the law’ yet there is strategic ‘recognition that some measures are indispensable for securing the ends of war’.255 ‘Military necessity,’ stated Nelson, ‘is usually portrayed

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252 Nelson (2008: 5).
254 Which ‘captures the drive to reduce suffering’: see Nelson (2008: 9). Nelson (at 12) noted Article 29 of the Lieber Code: ‘The more vigorously wars are pursued, the better it is for humanity’.
255 See Nelson (2008: 11, 275); Shue (2011). Nelson considered the 1991 Gulf War, the 1997 Ottawa Convention, the 1999 NATO Kosovo Operation, along with counterinsurgency in Iraq from 2003–7 and concluded (2008: 283) the cases ‘showed relatively little tension between law and strategy. Military necessity did not demand costly strategic sacrifices in the face of legal limitations. Rather, it allowed for varied and even contradictory strategic actions and legal arguments. Military necessity allowed for the fulfilment of both law and strategy because strategy shaped the legal concept of military necessity, and the strategic contexts studied have benefited from adherence to the laws of war.’
as a lawful limitation and a fundamental influence on the law, while some analyses suggest it may also be an unlimited justification.\textsuperscript{256} Nelson’s investigation of US approaches to military necessity in the Gulf War and during early counterinsurgency operations in Iraq suggested the concept facilitated ‘a range of approaches to the use of force’.\textsuperscript{257} Given the counterintuitive nature of what successful counterinsurgency may look like, determining what may be militarily necessary is difficult,\textsuperscript{258} as Nelson explained.\textsuperscript{259}

In COIN operations, according to what is considered the best doctrine and policy, forces should use the minimum force necessary. This doctrinal and policy basis seems to reflect notions of military necessity, particularly indispensability. On the other hand, it is not clear what using minimum force means and what the source of that standard is. In addition, in COIN operations, political and other non-military factors increase in importance. Indeed, military factors revolve around political and other factors, blurring the lines between military and non-military realms. Lastly, COIN operations in Iraq have raised questions about whether military necessity is constrained by the law of war.

The nebulous nature of military necessity operates alongside the principle of proportionality,\textsuperscript{260} which this book argues is pivotal in counterinsurgency.\textsuperscript{261} Sitaraman also accepted proportionality plays a prominent role. Indeed, he defended his argument for ‘embracing the blurring line between civilians and combatants’ and giving ‘more discretion to counterinsurgents’ on the basis that ‘considerable protections’ are still offered ‘through a robust principle of proportionality, a principle that, in counterinsurgency, unifies humanity and strategic self-interest’.\textsuperscript{262}

Proportionality requires a delicate but appropriate balance to be struck between military necessity and collateral damage. In the fog of war, this is never a simple task. It is made more difficult given these rules are almost entirely self-administered. There are, quite simply, ‘not enough cops’, and states do not always comply with their obligations of transparency.\textsuperscript{263} The prosecution of counterinsurgency campaigns in new or ‘dirty’ wars

\textsuperscript{256} Nelson (2008: 22).
\textsuperscript{257} Nelson (2008: 277–8).
\textsuperscript{259} Nelson (2008: 25 and 274): ‘Counterinsurgency operations in Iraq featured diverse goals and strategies, and showed the flexibility of the concepts of necessity and military purposes. In addition, COIN required frequent and complex determinations about whether or not to apply the law of war paradigm, including the concept of military necessity, or apply the law enforcement paradigm; and indeed COIN operations challenge the distinction between the two.’
\textsuperscript{260} On the principle of proportionality and the ‘war against terrorism’ generally, see Greenwood (2002).
\textsuperscript{261} See Schmitt (2009); Stephens (2010: 313): ‘The recognition of the specifics of individual identity and anticipating the second- and third-order effects of a “proportionate attack’ are not matters that have occupied much legal time in any planning analysis, and yet, as we have seen in COIN, they can have enormous strategic policy significance’.
\textsuperscript{262} Sitaraman (2009: 1781).
\textsuperscript{263} See Waldron (2009a: 10); Alston (2010: 25–6).
complicates the application of proportionality, especially as standards used to strike a proportionate balance have changed. Mattis confirmed the historical tightening of the proportionality framework:

[W]hen you look at the number of French people that our air and naval bombardment killed in Normandy to get those landing forces ashore, we just took the French villages of St Marie Eglise and others, it was just the way of war. When you look at what we did to Dresden, we could never do something...like that in today’s world.

Undoubtedly, proportionality is a core tenet of modern LOAC. It ‘requires that losses resulting from a military action should not be excessive in relation to the expected military advantage’. The minimization of civilian casualties lies at the heart of proportionality, though it is important to remember this is not its only focus. Proportionality, of course, is also relevant in attacks against other armed forces, whether they be regularly or irregularly constituted, thus operating as a restraint on the amount of suffering and particular weapons that may be used against combatants to achieve the legitimate ends of war. It is also relevant in other contexts, including in relation to legitimate self-defence. These aspects of proportionality have a longer pedigree than the present rules relating to civilian casualties, and remain relevant.

Proportionality, as a legal doctrine, was not given greater formal content until the Additional Protocols. The Geneva Conventions actually say little about civilians vis-à-vis the conduct of war. As previously outlined, GC IV is ‘mainly confined to the treatment of civilians in the hands of the adversary’ and deals ‘less extensively with the protection of civilians from the effects of hostilities’. By contrast, Chapter II of AP I is directed towards ‘civilians and civilian populations’ and codifies the legal principle of proportionality in the realm of international armed conflict. It was not, then, until 1977 that the proportionality principle crystallized into ‘both a conventional and

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264 Martins.
265 Mattis.
266 Proportionality impacts _jus in bello_ and _jus ad bellum_. The commencement of hostilities by any state or states may be a disproportionate response to an act of aggression, thus exceeding the right to act in self-defence under Article 51 of the UN Charter. Such is an example of _ad bellum_ (dis) proportionality. _Ad bellum_ and _in bello_ proportionality are arguably related; at a certain point the conduct of hostilities may demand reflection on the ultimate war aims, blurring the usual divide. See Benvenisti (2009); Greenwood (1983).
268 See Gul (2005), on the sinking of ARA General Belgrano during the Falklands War.
269 See, for example, 1907 Annex, Article 22(e); Nuclear Weapons Advisory Opinion, 257: ‘[I]t is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.’
270 See Gul and Royal (2006: 52).
271 Gardam (2004: 3, 10): ‘It was a considerable period of time before the concrete manifestations of its requirements in IHL (and indeed _jus ad bellum_) were to materialize.’
customary principle of the law of armed conflict’. While AP I only applies to international armed conflict, its provisions on proportionality arguably represent customary international law.

So far as the minimization of civilian causalities are concerned, Articles 51 (4) and (5) of AP I prohibit indiscriminate attacks that ‘strike military objectives and civilian or civilian objects without distinction’, including attacks that ‘may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’. This wording is repeated in Articles 57(2)(a)(iii) and (b). By comparison to the principle of distinction, the codification of this legal principle of proportionality was a long time coming. Although certain individuals, particularly women and clergy, were often protected, there was little recorded in the way of broad civilian protections. Article 23 of the 1907 Annex, despite being limited to sieges and bombardments, is the first codified illustration of the principle, incorporating the central concepts of military necessity, humanity and chivalry. For example, Article 23(e) forbids the use of ‘arms, projectiles, or material calculated to cause unnecessary suffering’, whereas Article 23(g) prohibits destruction or seizure of property unless it is ‘imperatively demanded by the necessities of war’.

Proportionality does not require equality of force between the warring parties: it accepts civilian deaths are often a reality. Proportionality does not mean tit-for-tat, nor does it require comparison of relative losses. Yet proportionality does conceive of soldiers bearing additional risk as a means of minimizing collateral damage. Despite being formalized much later than the principle of distinction, proportionality has arguably supplanted it as the critical point of inquiry and perhaps even the linchpin of LOAC vis-à-vis targeting in irregular warfare, especially in counterinsurgency. As the pertinent separation is often between civilians and combatants, not necessarily between lawful and unlawful combatants, the protection of civilians is often achieved by adhering as closely as possible to the principle of proportionality given the difficulties inherent in distinguishing between civilians and combatants (or insurgents). Kahl underlined the close relationship between the two principles as follows:

Proportionality is not a wholly separate legal standard, but rather a secondary test that a planned attack must pass after meeting the principle of distinction. If both the distinction and proportionality principles are met, civilian casualties resulting from a strike on a military target, however tragic, are not considered violations of international law.

The relatively new, but evolving, codification of proportionality has been accompanied by a rise in the importance of the narrative, with law playing a pivotal role in conveying the message and managing perception.\footnote{277} These developments have been set against new wars fought predominantly in urban populations,\footnote{278} which ensure proportionality is foremost in the minds of military lawyers given the heightened consequences of getting the balance wrong. Ashley Deeks, of the US State Department, explained that collateral damage ‘manifested itself in Kosovo’, such that the US became ‘keenly aware of the problems that collateral damage causes politically’, but still ‘very conscious of wanting to preserve the political understanding that collateral damage is permissible in war’.\footnote{279}

The importance of proportionally, and the reduction of civilian casualties, became most stark as the Iraq and Afghanistan conflicts continued. Counterinsurgency, after all, is about the civilian: it is ‘war amongst the people’.\footnote{280} As the Iraq conflict deepened, Martins recalled, the ‘big statistic was civilian causalities; we were watching that like a hawk’.\footnote{281} This is confirmed in Sarah Sewall’s foreword to FM 3-24: ‘Counterinsurgency opens a window to greater awareness of civilian effects in conventional operations as well. The costs of killing non-combatants finally register on the ledger’.\footnote{282} Consequently, the principle of proportionality has become salient, perhaps the dominant paradigm of twenty-first century LOAC and the more powerful and apposite prism through which modern militaries engage.\footnote{283}

Although counterinsurgency theory suggests ‘kill-capture operations can cause backlash and fuel the insurgency, rather than stamp it out’,\footnote{284} and that counterinsurgents should counsel ‘greater restraint in targeting when confronting and targeting individuals’,\footnote{285} kill-capture tactics appeared the default in the beginning of the Iraq and Afghanistan wars. Precision-guided munitions represented 68 per cent of bombs dropped, as opposed to eight per cent during Operation Desert Storm in 1991. Improved targeting practices were acknowledged by groups such as Human Rights Watch, yet allegations of unnecessary and excessive civilian casualties and damage to civilian

\footnote{277}See Sitaraman (2009: 1789): ‘Particularly with the rise of instant communication and publicity, any kill-capture operation can easily be found to be unreasonable by domestic and international opinion, reducing the legitimacy of the counterinsurgent and its ability to win over the population.’
\footnote{278}LWD 3-0-1: [4.20(b)], noting the UN estimate that 60 per cent of the world’s population will be living in urban areas by 2025.
\footnote{279}Deeks.\footnote{280} Kilcullen (2009: 292).
\footnote{281}Martins. See also McChrystal (2013: 313).
\footnote{282}FM 3-24: xxv–xxvi (citation omitted). See also Sitaraman (2009: 1789–90).
\footnote{283}Note Gul and Royal (2006: 58–9): ‘In the war against terror—a cross-pollinated hybrid of military action and law enforcement—it appears that proportionality is the concept around which the law of armed conflict and international criminal law enforcement are coming to coalesce’, citing Slaughter (2002) and quoting O’Connell (2002: 908).
\footnote{284}Sitaraman (2009: 1789).
\footnote{285}Stephens (2010: 301).
infrastructure persisted.\textsuperscript{286} The use of drones\textsuperscript{287} to execute ‘targeted killings’ in Afghanistan and Iraq continues to complicate the application of LOAC,\textsuperscript{288} with evidence that the CIA ‘places no restrictions on the use of the force with these selected targets’, which have reportedly included drug traffickers.\textsuperscript{289} The theoretical congruence of legality and strategy as far as targeting operations are concerned,\textsuperscript{290} including requirements of transparency and accountability,\textsuperscript{291} does not appear to marry readily with the situation on the ground. The evolution of approaches to the use of force will thus be a key focus in examining FM 3-24’s construction and execution.

Detention

Putting aside the issue of whether the missile strike itself is a legal option, somehow, curiously, the predictable civilian deaths of the missile attack seem a tragic yet natural consequence of military force while the hypothetical detention of everyone present—a more humane, less injurious application of military force—would be widely regarded as illegitimate and lawless.

Matthew Waxman, former US Deputy Assistant Secretary of Defense for Detainee Affairs, 2008\textsuperscript{292}

The capacity to detain individuals is of critical importance to states involved in armed conflict.\textsuperscript{293} There are, roughly, three ways in which this may be done. The first, and most common, is to detain an individual as a POW falling

\textsuperscript{286} See, further, Dunlap (2010: 140–1, 142): ‘it is a mistake to conceive of the LOAC revolution strictly in terms of new technologies; it also involves fresh approaches to organizing, training and employing judge advocates’.

\textsuperscript{287} Over 40 countries now possess drone technology. On their ‘appeal’, see Alston (2010: 9).

\textsuperscript{288} As reported in May 2010 by Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions, the US has claimed their legal justification is based on its ‘asserted right to self defence, as well as on [LOAC], on the basis that the US is “in an armed conflict with Al Qaeda, as well as the Taliban and associated forces”’. Alston welcomed the statement, but noted ‘it does not address some of the most central legal issues including: the scope of the armed conflict in which the US asserts it is engaged, the criteria for individuals who may be targeted and killed, the existence of any substantive or procedural safeguards to ensure the legality and accuracy of killings, and the existence of accountability mechanisms.’ See Alston (2010: 8), citing Koh (2010).

\textsuperscript{289} See Alston (2010: 2 and 21), where it is suggested representatives should be convened under the auspices of the High Commissioner for Human Rights to discuss and potentially revise the ICRC’s IG.


\textsuperscript{292} See Waxman (2008: 1366), referring to an alleged January 2006 attempted CIA assassination of al Qaeda deputy Ayman Zawahiri in Pakistan, which allegedly killed twelve civilians.

\textsuperscript{293} See Deeks (2009: 403). Fischer in Fleck (2008: 371) noted the US detained in excess of 50,000 people between 2001–4 as a result of the Afghanistan, Iraq and other conflicts.
within GC III. This category applies only to international armed conflicts. Any individual falling within the power of the enemy and satisfying the categories listed in Article 4(A) of GC III is a POW and benefits from the provisions therein, including prohibitions on inhumane or dishonourable treatment, the right to complain about inadequate conditions of captivity, and the general duty on the part of the detaining power to release prisoners of war after the cessation of actual hostilities.\textsuperscript{294} The purpose of this detention is ‘to exclude enemy soldiers from further military operations’, and may extend to internment or prosecution for war crimes or other criminal offences, or both.\textsuperscript{295}

The most problematic GC III category concerns individuals from irregular forces, which are required to meet the cumulative conditions listed in Article 4(A)(2).\textsuperscript{296} These cumulative conditions are only relaxed in relation to a \textit{levé en masse}, which applies in the context of non-occupied territories.\textsuperscript{297} Article 4B(1) of GC III also provides for persons belonging, or having belonged, to the armed forces of the occupied territory to be treated as POWs while the occupying power considers it necessary to intern them. Recall that Article 5(2) of GC III requires that where there is any doubt as to whether persons belong to any of the categories listed in Article 4, such individuals shall be treated as such ‘until such time as their status has been determined by a competent tribunal’.\textsuperscript{298} As discussed earlier, Articles 43–5 of AP I supplement the GC III POW regime and cater especially for the detention and treatment of irregular forces. Not all of the AP I provisions, unlike those explicated by GC III, definitively represent customary international law.\textsuperscript{299}

Like other LOAC provisions, the application of GC III and AP I to ‘terrorists’ and unlawful combatants has been debated,\textsuperscript{300} resulting in greater numbers of detainees being placed into the next category. To this end, then, the second situation in which individuals may be detained exists where individuals act as belligerents but are not entitled to the protections afforded by POW status. These individuals may arguably be detained without charge until the end of the conflict. Although such detainees are argued to fall outside the \textit{lex specialis} for POWs, namely GC III and AP I,\textsuperscript{301} debate persists as to the applicability of

\textsuperscript{294} See GC III, Articles 13–14, 78(1)–(2).
\textsuperscript{295} Fleck (2008: 372, 396, 408); GC III, Articles 21(1), 82(1), 85, 118.
\textsuperscript{296} See Dinstein (2004: 36–42).
\textsuperscript{297} See, for example, GC III, Article 4(A)(6).
\textsuperscript{298} See also AP I, Articles 45(1) and (2). Note also the sequence of US Supreme Court cases, beginning with \textit{Hamdi v. Rumsfeld} (28 June 2004).
\textsuperscript{299} Consider Fischer (2008: 383): ‘If one party to the conflict is bound by AP I, members of its armed forces shall be treated as prisoners of war even if they only carry their weapons openly prior to an attack. For parties to a conflict only bound by GC III, the situation is different so that prisoner of war status cannot be claimed.’ Note, however, GC III, Art 5(2).
\textsuperscript{300} See Fischer (2008: 371); Waxman (2008).
\textsuperscript{301} Note also Section III of AP I, which provides for the treatment of persons in the power of a party to the conflict.
some or all of the detainee treatment provisions in international human rights law, such as those contained in Part III of the International Covenant on Civil and Politics Rights (ICCPR).\textsuperscript{302} Indeed, specific provisions, namely Article 75 of AP I, are said to represent customary international law and apply in respect of detention, internment in situations of violence and any administrative detention required for security (see the next situation). These provisions may also be enforced under certain international human rights instruments like the ICCPR.\textsuperscript{303} Some have suggested a criminal law and not a LOAC paradigm, is better suited to regulating the detention, treatment and potential prosecution of unprivileged belligerents detained during armed conflict.\textsuperscript{304}

The third situation concerns civilians, who may be detained indefinitely without charge pursuant to Article 5 of GC IV, which relevantly provides that where an individual in the territory of a Party to the conflict ‘is definitely suspected of or engaged in activities hostile to the security of the State’, that individual shall not be entitled to claim the rights and privileges afforded by GC IV where they would ‘be prejudicial to the security of such State’. GC IV sets out the standards governing administrative detention of this kind, as well as variations where detention takes place in the territory of a Party to the conflict,\textsuperscript{305} or where it takes place in occupied territory. Article 78 of GC IV governs this latter situation, and became particularly salient in Iraq and Afghanistan.\textsuperscript{306} As with the above situation, aspects of international human rights law may apply in respect of such internment. In non-international armed conflict, states may similarly ‘detain individuals engaged in hostile acts against it, such as armed rebels and individuals that the state deems a serious threat to security’.\textsuperscript{307} As Deeks has outlined, while the procedural safeguards under GC IV are ‘reasonably robust’,\textsuperscript{308} in non-international

\begin{itemize}
\item See, for example, Articles 7, 9, 14, 75.
\item See ICRC (2005: Rules 87–105); \textit{Hamdan v. Rumsfeld}, 633; Fischer (2008: 375). Article 75 relevantly provides that all such persons in the power of a party to the conflict who do not benefit from more favourable treatment under the Geneva Conventions or the rest of AP I, shall enjoy, as a minimum, certain protections. These include the prohibition of certain acts such as murder and torture; humiliating and degrading treatment and other outrages upon personal dignity; access to information detailing the circumstances justifying the arrest, detention, and/or internment; and for all penalties or sentences to be imposed by a regularly constituted court respecting recognized principles of regular judicial procedure set out therein.
\item cf. Lowe (2005: 196).
\item GC IV, Articles 42–3.
\item GC IV, Article 78: ‘If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.’ Note also ICRC and Pictet, et al. (1958).
\item Art 75 of AP I is said to supplement these provisions.
\end{itemize}
armed conflict detention ‘is governed almost exclusively by a state’s domestic law’, with a state’s international human rights obligations generally attaching to such detention to the extent that the obligations operate domestically.\(^{309}\)

Sitaraman and Waxman have argued that debate over detention policy post-9/11 ‘has been shaped by the “enemy combatant” approach made famous by the Bush administration’s War on Terror and use of Guantánamo Bay as a detention facility’.\(^{310}\) This initial ‘baseline status’, it is argued, ‘globalized’ the detention debate and affected the evolution of subsequent proposals, marked by procedural ‘add-ons’.\(^{311}\) The focus on Guantánamo and Abu Ghraib has overshadowed analysis of the conduct and operation of detention policy in Iraq and Afghanistan and the function, or functions, exercised by different forms of law, whether it be LOAC, international human rights law, or domestic law. The relationship of detention with strategy has also been largely overlooked.\(^{312}\)

As with targeting, initial detention practices in Iraq and Afghanistan contradicted the notion that ‘procedural safeguards should not be abandoned’ in counterinsurgency, and that counterinsurgents ‘must build legitimate legal institutions and not over-detain’ in order to win over the population.\(^{313}\) One would deduce, then, that decisions on who to detain, how to detain, and the procedures relevant to that detention were closely aligned with FM 3-24’s construction and execution. This will be investigated in Chapters 4 and 5.

**Conclusion**

[I]f one is operating amongst the people, and the object is to achieve and maintain a situation of order in which political and economic measures are to take hold, then by implication one is seeking to establish some form of rule of law. Indeed, this may be defined as a strategic objective—which means that to then operate tactically outside the law is to attack one’s own strategic objective.

British General Sir Rupert Smith, *The Utility of Force*, 2005\(^{314}\)

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\(^{309}\) Deeks (2009: 404–5, 405 fn. 6). See also Pejic (2005). Deeks argued ‘the core procedures contained in [GC IV] are battle-tested and serve as an excellent basis for administrative detention during all types of armed conflict.’

\(^{310}\) See, for example, Waxman (2009a); Sitaraman (2009).

\(^{311}\) See Sitaraman (2009: 1815–16, 1818–23), where he cited Kilcullen’s ‘disaggregation strategy’ with approval (which suggests detainees should be held and tried in the state in which they are captured) and acknowledged the need for diversity in domestic approaches. Note especially Sitaraman’s contention (2009: 1820), relying partly on Abram and Antonia Chayes’ ‘managerial model’, that this would strengthen, and ultimately streamline, national approaches consistently with the rule of law.

\(^{312}\) See Waxman (2008).

\(^{313}\) Sitaraman (2009: 1822).

The US was accused of ‘operating tactically outside the law’ in the early stages of the Iraq and Afghanistan wars, whether through disproportionate force or unlawful detention and inhumane treatment of prisoners.\textsuperscript{315} Counterinsurgency doctrine disappeared following the Vietnam War, and did not develop in step with the ensuing juridification of war following the end of the Cold War. If doctrine was non-existent, LOAC was also apparently unsuited. While many argue current LOAC is incompatible with the modern counterinsurgency era, debates about successful counterinsurgency and LOAC have converged around the weight to be afforded to killing and capturing.\textsuperscript{316} Effective counterinsurgents, it is said, operate within the confines of law,\textsuperscript{317} as Philip Bobbitt reinforced in 2010:\textsuperscript{318}

The war aim in a war against terror is not territory, or access to resources, or conversion to our way of political life. It is the protection of civilians within the rule of law. Not coincidentally, this is what General Petraeus realised was necessary in Iraq, and it is what General McChrystal has testified will be his goal in Afghanistan.

These realizations were, and remain, contested. If they existed at the outset of the Iraq and Afghanistan wars they were certainly sidelined. Jeremy Waldron has argued that post-9/11 the worldwide reputation of the US ‘took a nose-dive’, whereby it was ‘regarded as a “torture state”, a repeated violator of human rights and international humanitarian law’ and known for creating military bases ‘described by jurists elsewhere as “legal black holes”’. In short, the US was seen as ‘contemptuous in its actions and attitudes towards international law’\textsuperscript{319} This was not merely a view confined to academia or Guantánamo Bay. US Colonel Marc Warren (retired), who served as the Staff Judge Advocate for MNF–Iraq from 2003–4, also bemoaned the ‘fog of law’ that hampered US operations, which he defined as follows:\textsuperscript{320}

\textsuperscript{315} Smith (2005: 378) argued operating among the people creates a ‘complex reality’ that ‘reflects upon two aspects of law and conflict: establishing the rule of law amongst the people, and the relationship between the military and the law’. Smith went on to say (2005: 380): ‘The more the measures to impose order involve terrorizing the population the more the position of the opponent as their defender is enhanced—and the less likely you are to gain the strategic objective, the will of the people. It is difficult to apply military force to this objective, since by its nature it is lethal, massive and tends to be arbitrary. Its practitioners have in the main been trained for a war they are not fighting.’

\textsuperscript{316} Note also Kaplan (2013: 154–5), quoting Sarah Sewall.

\textsuperscript{317} See Sitaraman (2009: 1828–9, 1834).


\textsuperscript{319} Waldron (2010: 16).

\textsuperscript{320} Warren (2010: 167–8).
The ‘fog of law’ is the ambiguity caused in wartime by the failure to clearly identify and follow established legal principles. It can frustrate deliberate planning, create confusion and lead to bad decisions that imperil mission accomplishment. When coupled with poor and inadequate planning, its effect can be near catastrophic. …The lesson of [Iraq] is that legal ambiguity at the strategic level can imperil mission success. Conversely, legal clarity and compliance enhance military effectiveness, which in turn leads to more rapid mission success and reduced adverse impact on the civilian population in the combat zone.

The task of remaining chapters, then, is to dig deeper to uncover whether this changed, how it came about and why. Colin Kahl has underlined it was no certainty that US forces would turn away from harsh practices when it embraced population-centric counterinsurgency. Though there was an emerging consensus from late 2005 that ‘hearts and minds’ were important, there were certainly other ‘historically viable theories of victory’ out there, ‘including ones that were incompatible with non-combatant immunity’. For Kahl, this begged the question as to why the US military turned in a more restrained direction: ‘why they would take it for granted that the use of discriminate and proportional force was the only or best approach to counterinsurgency’, particularly when the ‘most successful COIN campaign’ of US forces in the Philippines suggested otherwise? Kahl argued it would be a mistake to characterize the COIN shift as ‘the mere by-product of rational adaptation to objective conditions’, stating that ‘organizational culture mattered too’.321

The primary concern of this book, however, is not to track the role of organizational culture, but of international law. This is a difficult task, as the complexities and nuances of LOAC and associated international and domestic legal frameworks reveal. It is a task that has been explored by few scholars of International Law and International Relations. A key proposition advanced by this book is that the pathways introduced in Chapter 1 will help us to understand international law’s impact. Notably, Sitaraman, one of the few scholars to explore the links between legality and counterinsurgency, also referred to pathways in this context:322

The underlying premise is that law and strategy are inextricably intertwined. Law does more than constrain actors; it provides pathways for action. Because law is at once enabling and constraining, it can shape strategy.

The pathways introduced in Chapter 1 should thus be borne in mind as we begin detailed analysis of modern US counterinsurgency doctrine.

Special attention was devoted in Chapter 1 to Paul Herbert’s definition of doctrine, that is, ‘authoritative fundamental principles by which military forces guide their actions in support of national objectives’. Recall Herbert’s warning: to be ‘in the throes of major doctrinal change’ or ‘doctrinally adrift’ is to risk ‘international crisis’.

The US situation was characterized by all three descriptions 2003–6. It was mired in two counterinsurgencies in Iraq and Afghanistan. Yet it was fighting with a counterinsurgency doctrine that was either non-existent or intractable, and working to rectify this doctrinal void mid-battle. An October 2006 New York Times editorial headed ‘Trying to Contain the Iraq Disaster’ contended ‘all plans to avoid disaster involve the equivalent of a Hail Mary pass’. Given the situation, the US military’s capacity to adapt its doctrine, quickly, mattered more than ever. Thus, no field manual was more eagerly awaited or has been as influential as FM 3-24.

Downloaded more than 600,000 times within a day of its release, and over 1.5 million times in the ensuing month, FM 3-24’s writing process was described by David Kilcullen as ‘unprecedented’, its scope as ‘panoramic’.

Jointly written by the US Army and Marine Corps, FM 3-24 was officially released in December 2006, the culmination of a writing process beginning in October 2004 and intensifying in the period November 2005 to October 2006. FM 3-24’s publication spawned a host of other doctrinal changes, institutionalizing (or reinstitutionalizing) the practice of counterinsurgency across the US military. This chapter examines this process of doctrinal change, situating FM 3-24 in its correct context before diving deeper into its construction and prosecution in the following two chapters.

1 Herbert (1988: 3–4).
This chapter marks the beginning of the main empirical work of this book. Together with Chapter 4, it relies on FM 3-24’s full drafting history, and supplements this with oral evidence from interviews with members of the writing team and other accounts of the development process. FM 3-24 was the most important US military field manual in decades, certainly the most pivotal since the end of the Cold War. By accessing all of the drafts—the intellectual history of FM 3-24—the writing team’s views are properly corroborated. A clearer picture of FM 3-24’s evolution and the significance of certain inclusions and exclusions is presented. This is not the first book that looks at FM 3-24. Thomas Ricks, Bing West, David Ucko, Fred Kaplan and others have all looked into its construction at various lengths. Kaplan’s is the most extensive, drawing similarly on interviews, emails from the writing team, the draft version of FM 3-24 leaked in June 2006 and relevant video material. His focus on the politics of COIN complements this study, and his conclusions on whether or not the agents of change succeeded in their quest is acutely relevant. However, Kaplan’s book was not about international law’s impact, nor did he have access to the successive drafts of FM 3-24 (with the exception of the June 2006 draft that was leaked to the press).

Genealogy

If the only tool you have in your toolbox is a hammer, all problems begin to resemble nails.

John Nagl, *Learning to Eat Soup with a Knife*, 2005

In June 2004, Major Jonathon Graff submitted his Masters dissertation to the US Army Command and General Staff College at Fort Leavenworth, Kansas. Its title, ‘US Counterinsurgency Doctrine and Implementation in Iraq’, was somewhat odd given that neither the Army nor the Marine Corps had produced a manual on counterinsurgency since the mid-1980s. The doctrine Graff reviewed, covering the period 1898–1988, did not conceive of the US as an occupying force or the use of the military to develop a civilian government in the face of ‘a fractious and resistant population’. It envisaged quite the opposite:

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7 Graff (2004: 63).  
Generally, US forces do not engage in combat. The threat to American interests does not support that degree of involvement, even if it were effective. An American combat role tends to undermine the legitimacy of the host government and risks converting the conflict into an American war.

In his dissertation, Graff referred to an interview with Major General David Petraeus, then Commanding General of the 101st Airborne Division, regarding the use of US forces to re-establish an Iraqi police presence. That deployment to Iraq had been Petraeus’ first exposure to combat operations, when he reportedly asked, ‘tell me how this ends?’. Two command posts later, barely twelve months after Graff had submitted his dissertation, Petraeus was the self-appointed architect of the wholesale revision of US counterinsurgency doctrine. This role drove his rapid progression through US military ranks; subsequent roles included Commander of MNF–Iraq; CENTCOM Commander; Commander of the International Security Assistance Force (ISAF) and US Forces in Afghanistan; and Director of the CIA. Army leaders spoke of ‘finding the next Petraeus’ to depict an officer combining strategic leadership with an ability to bear ‘responsibilities at the nexus of the political-military relationship’.

So far as the lineage of FM 3-24 is concerned, it is untrue to say the US Army ‘that rolled into Iraq in 2003 had no counterinsurgency (COIN) doctrine’. Much has been made of prior US experiences of counterinsurgency in the Philippines, Vietnam, and El Salvador, and earlier doctrinal incarnations of counterinsurgency strategy and tactics. What is often overlooked in these accounts is how well-versed the US military was in the language of counterinsurgency. In March 1962, for example, a partial bibliography on ‘Counterinsurgency and Related Matters’ totalling in excess of three hundred sources was prepared for the Joint Chiefs of Staff by the Office of Special Assistant for Counterinsurgency and Special Activities. From 16–20 April 1962, the RAND Corporation hosted a ‘Counterinsurgency Symposium’ in Washington, D.C., to extract the ‘knowledge of men of recent and direct experience in

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14 Curiously, a 1999 Fort Leavenworth paper used US Army FM 100-20, Military Operations in Low Intensity Conflict (1990), as a guide to analyse the Sri Lankan counterinsurgency campaign against Tamil guerrillas. The paper described ‘US counterinsurgency strategy set out in FM 100-20’ as comprising four principles, including ‘unity of effort, maximum use of intelligence, minimum use of violence, and responsive government.’ See Vijayasiri (1999: 35) and also US Army Human Engineering Laboratory, Technical Memorandum 14–89, Urban Counterinsurgency: Case Studies and Implications for US Military Forces, October 1989.
15 Note Kilcullen (2010: 21): ‘In some ways, RAND acted as an institutional memory bank for the new counterinsurgency movement’.
counterinsurgency' and assemble ‘a large body of detailed information on the multifarious aspects of this inadequately explored form of conflict’. Among the participants was one Lieutenant Colonel David Galula, of the French Marine Corps.

At the Symposium, Galula observed that ‘antagonizing the population by an abuse of terror’, as the Japanese had done in the Philippines, was counter-productive, and that the ‘ultimately more successful method’ of counterinsurgency was ‘gradually [to] persuade a population that has not been so antagonized to give you the needed information and to refuse to hide the guerrillas’. The account of the exchange that followed shortly afterwards, between Galula, Charles Bohannan (a retired Australian Lieutenant Colonel), and British Brigadier General David Powell-Jones, reveals the 1960s tension between legality and efficacy:

Although COL. GALULA’S Algerian experience did not bear out COL. BOHANNAN’S theory, both men agreed on the importance of patrolling and, above all, on the fact that the population is the key to the problem. COL. BOHANNAN emphasized again, however, that the operations outlined by COL. GALULA called for an enormous troop-to-guerrilla ratio (not likely to obtain in a country with an indigenous guerrilla force), and also, he pointed out, for the suspension of civil liberties to an undesirable degree.

COL. GALULA thought that the troop-to-guerrilla ratio might not be quite so great a problem as COL. BOHANNAN assumed, but admitted the question of civil liberties was a serious one for the defenders of democracy. The French in Algeria had been very much aware of this, and had gone to extraordinary lengths to maintain the appearance of lawful processes. Until 1958, for example, every unit had a team of gendarmes attached to it, whose function was to follow the men into action and, after the shooting, count the dead and make a report of ‘manslaughter’ against the commanding officers. In a legal farce the case would go to court, there to be dismissed. Also, there was at least a theoretical rule that, when you met an armed enemy, you had to warn him three times (!) before firing at him. These experiences demonstrated the need to adapt a peacetime legislation for the protection of civil liberties to the special conditions of insurgency.

BRIG. POWELL–JONES agreed the problem was difficult, but he insisted on the importance of maintaining a modicum of legality and order, of conducting searches as decently as possible, etc., so that the people can think of you as

16 Electronic copies of these documents on file with the author. The Symposium Report noted the participants ‘combined the experience of some nine different theatres of insurgency during the [1940s and 1950s], including such key areas as Malaya, the Philippines, South Vietnam, Kenya, and Algeria’. When alerted to this, retired Lieutenant Colonel Jan Horvath, author of the 2004 COIN interim manual, maintained (in an email to the author, dated 6 June 2012) that nobody, including commanders downrange and Dr Crane, had copies. ‘That the document exists [in] a library’, Horvath wrote, ‘is inconsequential. If the Soldiers and Leaders on the ground do not have it, do not understand it, cannot recognize the enemy, then it is useless, as those extracts became’.
essentially ‘good’. In Malaya every effort was made, as in Algeria, to preserve at least a semblance of due legal and humane procedure, despite the unfortunate incidents that inevitably occurred now and then.

A high-level conference had actually been held weeks earlier, 23–4 March 1962 at Fort Monroe, Virginia, and attended by the top brass and a host of counterinsurgency specialists, with the express purpose of formulating ‘an imaginative, effective, far-reaching program of immediate and future actions by the Army in the field of counterinsurgency’. A ‘Counterinsurgency Conference Report’ was subsequently prepared for the US Continental Army Command (USCONARC), and approved ‘as the basis for planning for USCONARC staff and for implementation of those recommendations which are feasible within the resources and responsibilities of USCONARC’. The foreword, written by the then Commanding General of the US Army, Herbert Powell, observed:19

The traditions of World War II and Korea, together with the obviously great military strength of the Soviet Union and its satellites, have led to concentration on the training for all-out warfare rather than the low-scale operations characteristic of subversion. A US Army capability in both of these areas shares equal importance.

Fast-forward just over four decades, to 2004. As the US became increasingly frustrated by the intensity of the Iraqi insurgency and rising numbers of coalition and civilian casualties, the failure of the US military to institutionalize doctrine and the lessons of fighting Viet Cong guerrillas became stark.20 Although interest in counterinsurgency had never entirely evaporated, it had been sidelined. Just as ‘No More Munichs’ permeated doctrine before the Korean and Vietnam Wars,21 a desire for ‘No More Vietnams’ prevented institutionalization of the doctrinal lessons of that conflict. Such experiences were ‘perceived as anathema to the US military’,22 as Crane has explained:23

Though there had been such a reaction against defeat in Southeast Asia that Army schools were directed to throw away their counterinsurgency files in the mid 1970s, by the 1980s interest had returned because of conflicts in Nicaragua and El Salvador. But doctrinal guidance was based upon an approach emphasizing only a small advisory footprint heavily dependent on Special Forces, preferring to avoid active or large-scale military intervention. The creation of a separate Special Operations Command in 1987 reinforced the disinterest of American conventional forces in counterinsurgency. At the time of Operation Iraqi Freedom in 2003 the capstone US Army doctrinal manual, FM 3-0 Operations, only devoted one page to counterinsurgency, and the primary emphasis was on providing minimal support so hosts could solve their own problems.

19 Electronic copies of these documents on file with the author. 20 Cassidy (2004: 74).
Yuen Foong Khong warned in 1992 that post-Vietnam thinking had ‘produced no common, unifying lesson that [could] be applied to future problems’.\textsuperscript{24} The lack of consensus was in contrast to the British Army’s positive experience after its conduct of counterinsurgency operations in Malaya; lessons learned were appropriately captured and doctrine was maintained.\textsuperscript{25} In the US, a lack of consensus over Vietnam drove military planners away from counterinsurgency. The success of Operation Desert Storm in Iraq in 1990 appeared to support the view that supreme firepower was the key to victory in war.\textsuperscript{26} However, the ease of that victory, the end of the Cold War and confirmation of US military superiority was to transform the nature of armed conflict. US conventional invincibility ensured its enemies would seek ‘to change the nature of the struggle’.\textsuperscript{27} To its detriment the US persisted in organizing for conventional warfare; it ‘continued to prepare itself to fight the wrong war’.\textsuperscript{28} Robert Gates acknowledged this in October 2007. In words reminiscent of General Powell’s 1962 foreword, Gates said:\textsuperscript{29}

In the years following the Vietnam War, the Army relegated unconventional war to the margins of training, doctrine and budget priorities. . . . This approach may have seemed validated by ultimate victory in the Cold War and the triumph of Desert Storm. But it left the service unprepared to deal with the operations that followed: Somalia, Haiti, the Balkans, and more recently Afghanistan and Iraq—the consequences and costs of which we are still struggling with today.

If anything, the early course of the Iraq War heightened expectations the US could kill and capture its way to victory. Early reports from the field, including the following from Major General Petraeus in Mosul in May 2003, betrayed an institutional reliance on asymmetrical military power.\textsuperscript{30}

[T]he 101st Airborne Division is now over 1200 kilometres from where we went through the berm in Kuwait two months ago. Our soldiers had a number of very tough fights in Southern Iraq, liberating An Najaf, Karbala and Al Hillah, and then clearing al Mamadia (ph), Escondaria (ph) and south Baghdad, as well as Haditha in the western desert. We then air-assaulted 500 kilometres further north to secure and clear Mosul, Tal Afar, Qaiyara and other cities in Nineveh Province. And we are now securing these cities and helping the people of this part of Iraq get their lives back to normal and truly exploit the wonderful opportunity our soldiers have given to them. Again, our soldiers had some tough fights to get here. Indicators of the close combat in which our units engaged are that we shot some 3500 rounds of artillery, nearly 1000 2.75-inch rockets and Hellfire missiles, 114 Army tactical

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{24} Khong (1992: 258–62).
\item \textsuperscript{25} Nagl (2005: 205).
\item \textsuperscript{26} Nagl (2005: 207–8).
\item \textsuperscript{27} Molan (2008: 394); Kilcullen (2006: 121–2).
\item \textsuperscript{28} Nagl (2005: 207–8); Kilcullen (2010: 19).
\item \textsuperscript{29} <http://www.defense.gov/speeches/speech.aspx?speechid=1181> (a. 20 September 2014).
\item \textsuperscript{30} See <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2601> (a. 20 September 2014).
\end{itemize}
\end{footnotesize}
missiles and over 40,000 rounds of Apache and Kiowa machine-gun ammunition. And we also used some 150 sorties of close-air support, and tons of everything else in our inventory.

As Adam Roberts has observed, ‘the limitations of military doctrines and practice are often exposed, not by arguments, but by events’. So it was post-Operation Iraqi Freedom. The US response to the rising insurgency was ‘fundamentally misguided’, with efforts ‘undone by a combination of overwhelmed soldiers and indiscriminate generals’. Rough tactics on the part of troops inflamed the insurgency and disagreement over how best to respond was rife. A New York Times op-ed from the field contrasted the relative success of the Marines under then Major General James Mattis, who had begun to focus on winning local support, to the ‘new get-tough strategy’ of US forces in the Sunni Triangle:

[F]or every reported military success there are also reports of Sunni Iraqis who are angered by tactics like knocking down doors of houses and shops, demolishing buildings, flattening fruit groves, firing artillery in civilian neighbourhoods and isolating large segments of the population with barbed wire fences. Heavily armed raids and air strikes used to ‘send a message’ instead promise to further alienate the Sunnis, especially when they result in so-called collateral damage.

Thomas Ricks explained how US forces violated central tenets of counter-insurgency theory in their efforts to counter the insurgency. Commanders misunderstood the battlespace, too often responding with excessive force. ‘It wasn’t the big headline-grabbing mistakes that undercut the US effort,’ Ricks stated, ‘as much as the daily, routine operations of US troops not trained for counterinsurgency,’ citing one marine’s diary entry as an example:

They had been taking sniper fire from a building for six nights. That night, two AC-130s pumped rounds into it until it was reduced to rubble. Made lots of friends that way. Suggestion that perhaps they should set an ambush and either kill or capture the sniper since he is being so predictable but that idea was rejected. We had to demonstrate our firepower to these people.

Kilcullen backed this view, claiming US and other forces fell into an ‘enemy-centric’ mindset in both Iraq and Afghanistan, which only served to alienate the people and strengthen local support for the insurgencies. As a result, US forces were effectively ‘chasing their tails’. Kilcullen suggested political reasons and institutional inertia prevented the US Department of Defense (DoD) from

recognizing that they were in a counterinsurgency fight.\textsuperscript{39} This was distinct from the reality in Iraq, where many junior field operatives ‘realized early that the way they had been trained to fight was not going to work in this environment’ and that many of their civilian and military commanders ‘did not have the answers they needed’. They began innovating by ‘looking to past doctrine and experience of counterinsurgency to fill the gap’\textsuperscript{40}

By mid-2004, Army leadership realized counterinsurgency doctrine was wholly absent. Lieutenant Colonel Jan Horvath, of the Combined Arms Doctrine Directorate (CADD) at Fort Leavenworth, was tasked with remedying this. In early 2004, Horvath was sent to Fort Hood, Texas, to assist with the training of a core headquarters division about to deploy to Iraq. His role was to ensure commanders ‘understood doctrine’.\textsuperscript{41} When Horvath returned to Fort Leavenworth, as pressure was building for the US Army to produce a ‘book’ on counterinsurgency, Horvath’s commander asked whether the outgoing deployments had discussed counterinsurgency or the raising and training of indigenous security forces. In Horvath’s view, ‘neither of those questions was ever covered’. Although Horvath believed ‘there was not a good plan’ during training, he felt it was not his place to intercede against other more senior commanders.

Two months later, in March 2004, the Commander of the Battle Command Training Program, Colonel Palmer, briefed Lieutenant General William Scott Wallace, Commanding General of CADD, on the Corps-level mission rehearsal exercises held in December 2003. Wallace asked the same question about training in counterinsurgency and developing indigenous forces. The answer given was that those issues had not been discussed. Wallace ordered Colonel Clinton Ancker, the head of Fort Leavenworth’s doctrine division, ‘to develop a new COIN field manual within the next six months’.\textsuperscript{42} Following this meeting, Horvath was given a week to see if there was anything the US Army could use instead of writing a counterinsurgency field manual.\textsuperscript{43} Horvath, who was no expert in counterinsurgency but had a Special Forces background, thought something might be dug up from the Vietnam era. As he described:\textsuperscript{44}

\textsuperscript{39} See, further, Ucko (2009: 102).
\textsuperscript{40} Kilcullen (2010: 19).
\textsuperscript{41} Author’s interview with Jan Horvath, November 2010 (\textit{Horvath}).
\textsuperscript{42} See Kaplan (2013: 133–7).
\textsuperscript{43} \textit{Horvath} indicated that around this time he had contemplated retiring from his post, as he felt that he was not being used and did not want to waste his time. Following the meeting with Colonel Palmer, Horvath’s boss instructed: ‘Tell Horvath not to go anywhere, we’ve got something for him to do.’
\textsuperscript{44} \textit{Horvath}.
Mr Ancker provided me a week to prove something was extant that we could use in lieu of writing a COIN FM. Using the research library, I was unable to find anything substantive or comprehensive. There were many books and booklets, but they were at best ‘an inch deep and a mile wide’.

Consequently, Horvath was instructed to ‘write a book on COIN’. Time was of the essence. Six months later, in October 2004, with notable assistance from Dr Tom Marks and Karlev Sepp, Field Manual (Interim) 3-07.22, Counterinsurgency Operations, was produced. This designation signified not only the interim nature of the manual, which required it to be replaced within two years, but also that counterinsurgency was then viewed as a subset of stability operations and support operations. The interim manual was tactically focused, dominated by ‘specific tactics, techniques, and procedures’ for counterinsurgency operations. Despite the quick timeframe, the finished product was a sound achievement, with many themes continuing through to FM 3-24. But there was no denying it was a rush job.

When asked about the involvement of lawyers in FM 3-07.22, Horvath explained how he had turned to the brother of a former Special Forces colleague, who was a Naval officer and legal adviser at US Pacific Command (PACOM) for advice on the legal questions. When the final version was sent to the JAG school at Charlottesville for review and comment, Horvath’s impression was that despite some adjustments being made, the officers involved were not particularly comfortable with the complexities of counterinsurgency and applicable LOAC. ‘It was difficult to find people who were confident enough to know and apply it properly’, Horvath recalled.

Despite FM 3-07.22’s production, headline-grabbing events, including reports first surfacing in late April 2004 of abuse and torture committed by US troops against detainees at the Abu Ghraib prison in Iraq, together with the November 2004 assault on Fallujah, heightened concerns about the manner of the war’s prosecution. Moreover, US forces were pressuring coalition allies to eschew restraints on the use of force:

It was apparent that many [US officers] considered that the only effective, and morally acceptable, COIN strategy was to kill or capture all terrorists and insurgents; they saw military destruction of the enemy as a strategic goal in its own right.

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45 Author of Maoist Insurgency since Vietnam (1996) and a renowned expert on irregular warfare.
47 See Crane (2007) and also Pregent (2010: 340), who described how stability operations were made a core military mission by DoD in 2005. Horvath observed doctrine on ‘Stability Operations and Support Operations’ was ‘often reviled as a worthless book’.
48 Crane (2007).
49 Horvath.
50 West (2008: 139, 151–4).
51 Aylwin-Foster (2005: 5).
Coalition allies regularly ‘expressed a deep unease with [US] tactics’.\(^{52}\) A British Army account suggested a US ‘sense of moral righteousness combined with an emotivity’ often manifested itself ‘as deep indignation or outrage that could serve to distort collectively military judgment’. One example cited was the first battle of Fallujah, in April 2004.\(^{53}\)

In classic insurgency doctrine, this act was almost certainly a come-on, designed to invoke a disproportionate response, thereby polarizing the situation and driving a wedge between the domestic population and the coalition forces. It succeeded.\ldots US commanders and staff who generally took the broader view of the campaign were so deeply affronted on this occasion that they became set on the total destruction of the enemy. Under emotional duress even the most broad-minded and pragmatic reverted to type: kinetic.

While evidence suggested US forces acted ‘well towards Iraqis most of the time’, their ‘emphasis on the use of force, on powerful retaliation, and on protecting US troops at all costs\(^{54}\) resulted in harsher treatment.\(^{55}\) The final straw came in Haditha, on 19 November 2005,\(^{56}\) when US forces killed 24 civilians in response to an improvised explosive device (IED) attack. As Ricks described, in an account later supported by interrogation documents found abandoned in an Iraqi junkyard after the US withdrawal in December 2012:\(^{57}\)

The Marines\ldots would do many things that long day in response to the bombing, and they later would offer much conflicting testimony about their actions. But one thing they clearly did not do was protect Iraqi civilians—and that is why the Marine killings at Haditha are key to understanding the failure of the first years of the American war in Iraq, and why it became imperative to revamp US strategy\ldots

Mattis was the senior review officer for Haditha. Bing West, who spent considerable time in Iraq with US forces, recalled Mattis being ‘blunt about what he expected’:\(^{58}\)

We have teams to assess incidents\ldots All commanders know to call on these teams immediately and to be clear about the ethical framework. No matter how provoked, a marine has to suck it up, stay friendly one minute longer and not turn into a racist. The goal is to diminish the enemy, not to recruit for him.

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\(^{52}\) Molan (2008: 54).
\(^{53}\) Aylwin-Foster (2005: 6).
\(^{54}\) Ricks (2007: 266).
\(^{58}\) West (2008: 155).
All this does not mean Iraq was devoid of attempts to implement counterinsurgency strategy prior to FM 3-24.⁵⁹ According to Lieutenant General H.R. McMaster, one of the best known US COIN operatives in Iraq and Afghanistan:⁶⁰

The Abu Ghraib prisoner abuse scandal and other high profile failures belied rapid tactical adaptations to the demands of counterinsurgency operations as well as improvements in military education and training. US military investigations of abuse and other failures identified lessons and directed corrective action. Forces in Afghanistan and Iraq developed improved tactics and became increasingly adept at balancing offensive operations with diverse tactics such as economic reconstruction and the development of indigenous security forces. Pre-deployment training improved as commanders sought to replicate the complex conditions that soldiers encounter in counterinsurgency operations.

Mattis, for example, had already taught counterinsurgency theory and practice to marines before their deployment to Al Anbar province at the end of 2003.⁶¹ Despite some resistance, General George Casey, then Commander of MNF–Iraq and later US Army Chief of Staff, established a Counterinsurgency Academy north of Baghdad in late 2005, where incoming commanders attended a five-day immersion course.⁶² There it was stressed ‘the right answer’ in combat ‘was probably the counterintuitive one’: actions that humiliated families, needlessly destroyed property or alienated the local population were to be avoided.⁶³ Nevertheless, these efforts barely scratched the surface of the problem. Workable doctrine was entirely absent, and the interim manual produced by Horvath and his team was viewed by some as ‘unrealistic, outdated, or hard to apply in places like Fallujah, Ramadi, or the Bermel Valley’.⁶⁴

The task of remedying the doctrinal void continued at Fort Leavenworth and at the Marine Corps Base in Quantico, Virginia, following the return of Petraeus and Mattis from Iraq. After FM 3-07.22 had been produced, Horvath had begun work almost immediately on what would become FM 3-24, which he initially conceived as a manual for generals and colonels who were still ‘thinking in a different framework’.⁶⁵ Wholesale doctrinal reassessment did not begin, however, until October 2005, when Petraeus, now a Lieutenant General, assumed responsibility for all doctrinal development in the US Army’.⁶⁶ As Mattis, also now a Lieutenant General, recalled:⁶⁷

⁶¹ Ricks (2007: 317–18). Mattis required his officers to ‘read over one thousand pages of material’.
⁶⁶ FM 3-24: xv. Note also Kaplan (2013: 122–5) and the account there of US Defense Department Directive 3000.05, signed on 28 November 2005, which called for stability operations to be ‘given priority comparable to combat operations’.
⁶⁷ Mattis.
Petraeus and I have known each other for many years. We both came back from Iraq around the same time... He said, ‘You know, we ought to write something.’ I said, ‘Sure, we’ll commit...’ The idea was that we were fighting now against a non-communist insurgency and we needed to make sure that we didn’t just dust off communist counterinsurgency and use that, plus there were a lot of things that were different... training changed, equipment changed, organizations changed as a result and all those things came together.

**Genesis**

FM 3-24’s formal origin lies in FM 3-07.22’s scheduled revision. In late 2005, Horvath had produced a fresh draft of the interim manual. By the same time, Petraeus and Mattis had already settled into command of their services’ respective combined doctrine and training centres. Petraeus sent Horvath’s draft to several trusted advisers in the military and academia, including Eliot Cohen, a professor at the Nitze School of Advanced International Studies at Johns Hopkins University in Washington, D.C. After reviewing the draft, Cohen ‘urged a concerted effort to completely rewrite the manual’. Importantly, Cohen recommended Petraeus tap Conrad Crane as lead author. Crane was Director of the US Army Military History Institute and faculty member of the US Army War College, both based in Carlisle, Pennsylvania. Crane had headed a 2002 US Army War College project ‘to develop a plan to rebuild Iraq if the Army was placed in charge of an occupation force after toppling Saddam Hussein’ that was largely ignored but subsequently hailed for its ‘prescience’. Crane also had a personal connection with Petraeus: they had been classmates at West Point and overlapped as instructors at the US Army Military Academy. Somewhat fortuitously, 7–8 November 2005, the US Army War College co-sponsored a conference in

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68 See Kilcullen (2010: 21).
69 Petraeus confirmed the early discussions with Cohen in November 2005 and insisted he had decided well before he went to Fort Leavenworth that the military needed a new manual: author’s interview with General David Petraeus, 15 August 2011, Fort Myer, VA (Petraeus). Note also Kaplan (2013: 111–16).
70 Crane (2007). Horvath had been reticent to begin work on what became FM 3-24; he believed he did not have the requisite experience. Consequently, the CADD brought in generals to advise on aspects of the draft before Petraeus assumed command. At that point, 4–5 chapters had been drafted. According to Horvath, Petraeus was determined to enhance the final product’s ‘credibility’ and insisted on a ‘Ph.D.’ running the programme.
71 Horvath suggested Crane was not the first asked. Nagl may have been asked, but was reportedly reluctant to be the lead given his commitments at DoD. See, further, Kaplan (2013: 144–5, 147).
73 Crane (2007).
Washington, D.C., with Harvard University’s Carr Center for Human Rights. The topic: ‘Counterinsurgency in Iraq: Implications of Irregular Warfare for the United States Government’. Petraeus was the headline act. As Crane recalled:

[Petraeus and I] had met at the Carr Center conference in early November and talked about the new doctrine he was trying to create. At that time he asked me if I would review it. He called me on the evening of 16 November to offer me the lead role in rewriting the manual. He was correct that I could not turn down such a ‘big opportunity to make a lasting contribution,’ and Dave Petraeus is a hard man to say ‘no’ to.

Following the same conference, Nagl, then an assistant to Deputy Secretary of Defense Paul Wolfowitz, assembled a group at a nearby bar to discuss the new doctrine. The group included Lieutenant Colonel Richard Lacquement, who would write FM 3-24’s interagency chapter, and Kyle Teamey, who would share responsibility for the intelligence section. Janine Davidson, now US Deputy Assistant Secretary of Defense for Plans at the Pentagon, was also there. She remembered:

There were a couple of drafts being produced and people were struggling with it…then there was a top down push by Petraeus. We were at a Conference in D.C. sponsored by Sarah Sewall, who was running the Carr Center for Human Rights, and Petraeus was the last speaker and he got up and talked about counter-insurgency and he said, ‘I just became the head of the Combined Arms Center where we write doctrine and we are going to redo this’, and he looked over at John Nagl and he said, ‘and John’s going to help us.’ I was sitting next to John and he said, ‘I think I just got tasked with writing a new manual, which I don’t have time to do because I’m working in the Deputy’s office’. So we went out for beers after, and literally outlined the manual on a cocktail napkin.

When Crane agreed to be the lead author a fortnight later (only two days before the Haditha killings) he asked for Nagl, who he also knew from teaching at West Point, to be the ‘first member of the writing team and main backup’. Petraeus insisted that the doctrine be a joint effort between the US Army, the US Marines and their British counterparts. Yet Petraeus also wanted the doctrine completed extraordinarily quickly; an ‘ambitious timeline’ the British were apparently unable to meet. Crucially, Mattis, who was

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74 See, additionally, Kaplan (2013: 137–9).
75 Kaplan (2013), referring to an email sent by Petraeus to Crane on 17 November 2005.
76 Kaplan (2013).
77 Author’s interview with Janine Davidson, August 2010 (Davidson). See also Crane (2007), which referred to the disputed existence of the napkin, and compare Kaplan (2013: 143–5). The outcome of the discussions were subsequently communicated to Crane: Kaplan (2013).
79 Crane (2007).
in charge of Marine Corps doctrine at Quantico’s Marine Corps Combat Development Command and doctrinal development, agreed to be involved. The timing of the Mattis and Petraeus commands, then, was extraordinarily important. The two ‘had served together in the Pentagon and Iraq, and had a terrific relationship’. FM 3-24 was to continue and foster this relationship.\(^{80}\)

The creation of the new Army/Marine Corps COIN manual resulted from the fortuitous linkage of two soldier-scholars with similar backgrounds and interests who had been forged in the crucible of Iraq to change their respective services, and were given simultaneous assignments where they could make that happen.

Kilcullen describes Petraeus and Mattis together forming a network that often ‘acted like an insurgency within the bureaucracy, arguing its case and pushing for change in the face of outright opposition’.\(^{81}\) One example of this lay in the influence Petraeus and Mattis exercised over the military’s academic publications. An article titled ‘Changing the Army for Counterinsurgency Operations’, published in *Military Review* in late 2005 by British army Brigadier Nigel Alwin-Foster, for example, which rebuked the performance of the US Army in Iraq, set not just the tone of the debate but also, through Petraeus and Mattis, the nature of the response.\(^{82}\) (Alwin-Foster was a keynote speaker at FM 3-24’s vetting conference.) History now records Mattis and Petraeus going on to occupy several of the most powerful positions in the US military. Speaking about these men in 2010, Crane remembered:\(^{83}\)

\[I\]t was obvious these guys needed to go somewhere. They were both my ideals of the thinking soldier. . . . It was obvious from working with them that they were unique individuals, with a unique combination of military and intellectual skills who deserved to go as far as they could. I fully expected Petraeus to [become] Chairman of the Joint Chiefs, and I expected Mattis to go very far as well.

Understanding the rapid progression of Petraeus and Mattis requires an appreciation for FM 3-24’s role in transforming the US military. As Crane recounted, it was decided very early that ‘counterinsurgency was too broad a theme to be subsumed under stability operations, and the new publication was renumbered as 3-24.’ Although Horvath remained involved until his mid-2006 deployment to the Counterinsurgency Academy in Iraq, formal ownership and ‘primary authorship’ of FM 3-24 had transferred to Petraeus, Mattis and Crane.\(^{84}\) But there was no doubt as to who was steering the ship. ‘One chapter after another I would take control of the electrons,’ Petraeus said: ‘now I owned it.’\(^{85}\)

Counterinsurgency, then, was no longer a subsidiary element of the US military; it was to be an overarching domain. FM 3-24 was the dominant driver

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80 Crane (2007).
83 Crane II.
84 Crane (2007).
85 Petraeus.
in Petraeus’ desire to use his Fort Leavenworth assignment to foster an ‘Engine of Change’ within the US Army. Training curricula were changed to emphasize learning and adapting; training scenarios were reoriented and made more complex to reflect the operating environment in Iraq and Afghanistan, so that officers were better equipped to fight irregular wars; and the Army’s Lessons Learned programme was reinvigorated to integrate insights from the field into education, training and doctrine much faster. Petraeus, in charge of all of this at Fort Leavenworth, recalled: ‘the breadth of responsibility was extraordinary’.

He used the diagram in Figure 3.1 to ‘illustrate his vision’.

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Figure 3.1. Engine of Change.

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86 Petraeus credited the phrase to his predecessor, General William Scott Wallace.

87 Petraeus explained some of the key combat training centres (controlled by Fort Leavenworth) were still doing tank warfare with no civilians on the battlefield, no villages, for probably a year into the Iraq War: ‘We changed all that fairly dramatically’.

88 See, further, Kaplan (2013: 131–3).

89 Petraeus disputed the notion his Fort Leavenworth post was a demotion: ‘I knew I was going back to Iraq. This whole mythology that Petraeus is sent out to pasture [is untrue]. First of all, the Chief of Staff of the Army gave me guidance; he said ‘I’m putting you in this job because I want you to…shake up the Army.’ [He] put the insurgent in charge of not just all the school houses, but of all of our leader development, of all the doctrine development, training…there are at least six hats.’ One included control of Fort Leavenworth’s maximum security prison: ‘For a guy who was going to oversee detention operations [in Iraq and Afghanistan] it was actually pretty instructive’.


90 See Crane (2007).
Development

Contemporary revolutionary warfare can be thought of as a multi-dimensional version of the ancient Oriental game of Go, where two players place markers at intersections of a crosshatched board, trying to block off sections from their opponent. The contest is free flowing, unpredictable without set patterns, and has no established time limits. Mao Zedong required his generals to study it as a metaphor for the People’s War he planned to execute. The game board represents the people, and the side wins that can control the largest portions. The playing pieces symbolize not just military forces, but all those elements of power that help gain legitimacy and popular acceptance. The contest today also has a virtual dimension involving globalized networks and media, while the insurgent players especially are a shifting and difficult to define set of actors. The game is also not ‘fair,’ as most rules favour the insurgent. That is why revolutionary war has been such a common approach used by the weak to combat the strong.

A depiction of revolutionary war in FM 3-24’s initial draft, January 2006

With the key team assembled, the task of writing FM 3-24 began. Crane took three months off from his Carlisle duties to focus exclusively on writing. He commuted regularly from Carlisle to Fort Leavenworth and Quantico to update the Army and Marine Corps, and a core editorial team at Fort Leavenworth, led by Steven Capps, was assigned to assist him. Crane was the ‘big node’ around which the drafts came together. The total number of hours spent on the drafts from November 2005 until completion was immense: Crane joked that while ‘Osama Bin Laden was in his cave in Pakistan; he was in his cave in Carlisle’. Petraeus was heavily involved. ‘It was very clear to me,’ Crane recalled, that ‘Petraeus was going to be an active participant in the creation of [FM 3-24], and we soon established a pattern of weekly, and sometimes daily, communications about the manual.’ As the drafting process intensified, interactions between Petraeus and Crane included regular chapter exchanges on weekends. FM 3-24’s most significant versions and other key writing stages are as follows in Table 3.1.

A week after Petraeus telephoned Crane and asked him to be lead author, Horvath flew to Carlisle for an initial briefing. Crane returned the visit in late November 2005 to meet again with Horvath and also to receive guidance from

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91 This was drafted by Crane, and accompanied by a graphical representation of the ‘Go’ game. He was disappointed it did not make the final version.
92 Crane II.
93 Crane II.
94 Crane (2007).
95 Crane II. Petraeus recalled editing every chapter, including up to 20–30 drafts of the foreword, which first appeared in the January draft.
96 Titles displayed here are as they appear on the front page of each draft.
Petraeus in person. Petraeus was working on an article for the January–February 2006 Military Review edition titled ‘Learning Counterinsurgency: Observations from Soldiering in Iraq’. He wanted these insights incorporated into FM 3-24, and ‘all 14 eventually worked their way into Chapter 1’. The outline and makeup of the writing team were also discussed.99 Table 3.2 gives an indication of key contributors.

Back in Carlisle, Crane’s first task ‘was to develop the central principles and tenets to steer the doctrine’. He re-read Roger Trinquier, Frank Kitson and Robert Thompson to understand classic counterinsurgency theory, considered the latest ideas on irregular warfare from the Marine Corps, and studied more recent works, including those by Steven Metz and David Kilcullen. Nagl suggested the

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97 Largely revised draft of interim FM received from Horvath.
98 Most likely 16 December 2005. According to Horvath (email to the author dated 6 June 2012), this meeting took place on the last day of a conference held at Fort Leavenworth on information operations. The four men ‘assembled in a back room of a building being renovated, with a butcher paper board, and talked our way through a proposed organization of FM 3-24—the chapters, sequences, general content, proposed appendices, and a proposed Military Review article. Then, we talked through the principles, looking at Galula and Robert Thompson, and the counterintuitive nature of many of those principles. We discussed many of the related problems our leaders were encountering in theaters, and then we rewrote many of those principles to embody or capture much of the counterintuitive thinking demonstrated in counterinsurgency.’ Crane transcribed the principles and sent them to Petraeus, who asked Horvath to meet on 22 December to talk about the principles during a call from then General Casey (in theater). (Petraeus was interviewed for a magazine article immediately after this, with photos taken of the COIN discussion.) Horvath sent the principles back to Crane with Petraeus’ guidance for revision. Horvath recounted that Casey had asked Petraeus to release him to run the COIN Centre in Iraq; Petraeus told Horvath he would do so after FM 3-24’s vetting conference in February 2006.
writing team read Galula, which Crane found ‘particularly enlightening’. According to Crane, the most influential pieces (apart from Petraeus’ Military Review article) were papers by Major General Peter Chiarelli and Major Patrick Michaelis (‘Winning the Peace: The Requirement for Full-Spectrum Operations’)

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**Table 3.2. FM 3-24 Key Contributors**

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\(^{100}\) Informed by a number of sources: Crane (2007); **Crane**; Nagl; Horvath; Martins; Davidson; Mattis; author’s interview with Frank Hoffman, Washington D.C., August 2011 (Hoffman). Chapter headings are used as they appear in the final version.

\(^{101}\) According to Horvath, Marks wrote the first chapter of FM 3-07.22 and drafted the first chapter of the updated version handed to Crane and his team. Marks was not part of FM 3-24’s writing team.

\(^{102}\) Described by Crane (2007), as ‘the price the Marines demanded if they were to participate in drafting the overall doctrine’.

\(^{103}\) Built on Horvath’s foundation.

\(^{104}\) See Crane (2007). Members of the writing team were apparently uncomfortable with Corum’s high standards, which they viewed as too Western or idealistic, or both.

\(^{105}\) Hoffman, an expert in ‘hybrid wars’ was described as putting ‘his own stamp’ on the finished product. See also Hoffman (2007).

\(^{106}\) Davis was a student at Fort Leavenworth who strongly advocated for this chapter’s inclusion.

\(^{107}\) Essentially a reformatted version of Kilcullen’s ‘28 Articles’: see Kilcullen (2006); Kaplan (2013: 175–8).
and Karlev Sepp’s survey of best and worst practices in counterinsurgency. This last article would later be summarized in chart form in FM 3-24.\textsuperscript{108}

Crane and the writing team then constructed an original taxonomy of counterinsurgency, a tripartite classification comprising ‘Historical Principles’, ‘Contemporary Imperatives’ and ‘Paradoxes’. The writing team first agreed on eight historical principles for successful counterinsurgency. These expanded on Sepp’s survey of counterinsurgency operational practices and were based on the overriding principle of the people being the centre of gravity.\textsuperscript{109} The eight principles are reproduced below in their final form.\textsuperscript{110}

1. Legitimacy is the main objective.\textsuperscript{111}
2. Unity of effort is essential.\textsuperscript{112}
3. Political factors are primary.\textsuperscript{113}
4. Counterinsurgents must understand the environment.\textsuperscript{114}
5. Intelligence drives operations.\textsuperscript{115}
6. Insurgents must be isolated from their cause and support.\textsuperscript{116}
7. Security under the rule of law is essential.\textsuperscript{117}
8. Counterinsurgents should prepare for the long-term commitment.\textsuperscript{118}

Crane then proposed that modern imperatives of counterinsurgency merited specific exposition. Ultimately, five were agreed on; all bar the second retained their original form through to the final version.\textsuperscript{119}

1. Manage information and expectations.
2. Use the appropriate level of force.\textsuperscript{120}
3. Learn and adapt.
4. Empower the lowest levels.
5. Support the host nation.

\textsuperscript{108} Crane (2007).
\textsuperscript{109} Sepp attempted to discern COIN ‘best practice’ in his study of twentieth century insurgent wars, examining seventeen insurgencies in full and relevant aspects of thirty-six others. Sepp identified the following successful COIN operational practices: 1. Human rights (relying particularly on insurgencies in Kuomintung, China; French Indochina; Batista’s Cuba; Somoza’s Nicaragua; and Soviet-occupied Afghanistan); 2. Law enforcement; 3. Population control; 4. Population process; 5. Counterinsurgent warfare; 6. Securing borders; and 7. Executive authority. Sepp’s examples of unsuccessful practices included a disproportionate kill-capture mentality and reliance, particularly in the US intervention in Vietnam and Soviet occupation of Afghanistan, on ‘massive artillery and aerial firepower’. See Sepp (2005: 9–12), summarized in FM 3-24: Table 1.1.
\textsuperscript{110} FM 3-24: [1-112]–[1-136]. See also Crane (2007).
\textsuperscript{111} Originally ‘Legitimacy as the Main Objective’.
\textsuperscript{112} Originally ‘Unity of Effort’.
\textsuperscript{113} Originally ‘Political Primary’.
\textsuperscript{114} Originally ‘Understanding the Environment’.
\textsuperscript{115} Originally ‘Intelligence as the Driver for Operations’.
\textsuperscript{116} Originally ‘Isolation of Insurgents from Their Cause and Support’.
\textsuperscript{117} Originally ‘Security Under the Rule of Law’.
\textsuperscript{118} Did not appear until subsequent suggestions from the Marines Corps.
\textsuperscript{119} FM 3-24: [1-137]–[1-147].
\textsuperscript{120} Originally ‘Use Measured Force’.
Completing this trinity were counterinsurgency’s paradoxes, which were a focus from the early stages. Nagl recalled Crane and himself ‘writing them up on an easel at Fort Leavenworth in December 2005’.\(^{121}\) Initially designed to encapsulate Petraeus’ fourteen observations from his *Military Review* article, the paradoxes were subject to intense debate throughout the drafting process and after final publication.\(^{122}\) As Crane has observed, they were intended to emphasize the distinctiveness of counterinsurgency from conventional operations. Notwithstanding the wholehearted endorsement of the writing team, the paradoxes were ‘very controversial’ among reviewers of drafts and the completed version, and have been described ‘as “zen-like” by both supporters and critics’.\(^{123}\) Petraeus insisted the final paradoxes, reproduced below, ‘are a strength’ of FM 3-24:\(^{124}\)

1. Sometimes, the more you protect your force, the less secure you may be.
2. Sometimes, the more force is used, the less effective it is.
3. The more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.
4. Sometimes doing nothing is the best reaction.
5. Some of the best weapons in counterinsurgency do not shoot.
6. The host nation doing something tolerably is normally better than us doing it well.
7. If a tactic works this week, it might not work next week; if it works in this province, it might not work in the next.
8. Tactical success guarantees nothing.
9. Many important decisions are not made by generals.\(^{125}\)

Although Crane claims the intent of this section was ‘to stimulate thought, not necessarily prescribe actions’, he is equally clear that the paradoxes were ‘heavily edited by senior officers in the final review’, through the addition of ‘many qualifiers to statements they thought were too dogmatic’.\(^{126}\) Petraeus believed the qualifiers, which he ‘added personally’, were essential, noting especially the paradox that ‘some of the best weapons in counterinsurgency do not shoot’, which had previously been drafted as ‘the best weapons for COIN do not shoot’.\(^{127}\) Where relevant, debates and resulting changes to aspects of

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\(^{121}\) Nagl. 
\(^{122}\) Crane (2007). 
\(^{123}\) Crane (2007). 
\(^{124}\) *Petraeus*; FM 3-24: [1-110]–[1-157]. The original seven paradoxes appearing in January 2006 were less equivocal: 1. The more you protect your force, the less secure you are; 2. The more force you use, the less effective you are; 3. Sometimes doing nothing is the best reaction; 4. The best weapons for COIN do not shoot; 5. The insurgents doing something poorly is sometimes better than us doing it well; 6. If a tactic works this week, it won’t work next week. If it works in this province, it won’t work in the next; 7. Tactical success guarantees nothing. 
\(^{125}\) The paradox originally began with ‘Most’. See Crane (2007). 
\(^{126}\) See Crane (2007). This is not to deny the importance of revisions of the historical principles or imperatives (such as the language regarding the use of force—‘measured’ to ‘appropriate’—in the second imperative), which are also examined in Chapter 4. 
\(^{127}\) In an email to the author, dated 28 May 2012, Petraeus added: ‘I felt very strongly that the paradoxes were, without the qualifiers, nonsensical to anyone who had actually been in a fire-fight’. 

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the historical principles, imperatives and paradoxes will be further explicated in later chapters.

The taxonomy leaves little doubt about the doctrinal metamorphosis FM 3-24 achieved. Take three of its eight guiding principles: ‘legitimacy is the main objective’; ‘political factors are primary’; and ‘security under the rule of law is essential’. Add to these the first two additional imperatives: ‘manage information and expectations’ and ‘use the appropriate level of force’. Combined with the nine paradoxes, this construction dramatically reconceptualized US approaches to its post-9/11 wars. Four years after omitting ‘counterinsurgency as a military mission’, the Army and Marine Corps ‘were now issuing a high-profile field manual whose content was in many ways anathematic to US military orthodoxy’.128

A clue to FM 3-24’s focus lies in the formative Chiarelli and Michaelis article about the requirement for full-spectrum operations. Beginning with an epigraph by President John F. Kennedy (‘few of the important problems of our time have, in the final analysis, been finally solved by military power alone’),129 the authors made the case for the US military to execute the non-lethal side of operations ‘as effortlessly as combat operations’. They depicted the existing training model as ‘shuddering’ from a ‘Cold War mentality’, which meant the US military thought ‘in only kinetic terms’. This prevailing mindset ensured existing ‘regulations, bureaucratic processes, staff relationships, and culture’ complicated any change in emphasis.130 Chiarelli and Michaelis’ experiences 2004–5 as part of Task Force Baghdad (Chiarelli as the commanding general of the 1st Cavalry Division and Michaelis as the operations officer within a squadron of the same Division) convinced them that the US military, ‘as an instrument of national power’, had ‘to change the very nature of what it means to fight’.131 This necessitated improvised adjustment to established systems:132

Even our own C2 [automated command and control] systems and process, oriented on providing clarity above, had to be turned upside down to focus on providing the tip of the spear with the information and actionable knowledge needed to determine the best course of action within the commander’s intent, guidance, rules of engagement, and law of land warfare. Doing this was effective in mitigating and offsetting—on a collective scale—the consequences of our own anachronistic cultural hierarchy against the networked, flat, viral nature of insurgents and terrorists.

130 Chiarelli and Michaelis (2005: 15).
131 Chiarelli and Michaelis (2005: 4).
When interviewed, Petraeus endorsed the full-spectrum nature of modern operations, and insisted the unification of offence, defence and stability operations required a fundamental shift in mindset. In May 2010, Petraeus reflected on this in a speech titled ‘The Surge of Ideas: COINdinistas and Change in the US Army in 2006’.\textsuperscript{133}

In early 2006, we set about capturing the big ideas on counterinsurgency operations. This most famously involved drafting [FM 3-24], but it also entailed developing the overarching concepts for full spectrum operations and for what we call ‘Pentathlete’ leadership, as well as guidelines for human intelligence operations and a host of other subjects. But the counterinsurgency—or COIN—manual was our principal focus, and working with other Marine partners, we published it in under a year, a timeline unprecedented for the publication of a major manual—and just in time to inform the surge of ideas that would guide us in Iraq in 2007…In truth, when one thinks of the big ideas we were communicating—ideas like securing and serving the people and performing tasks across the full spectrum of operations—what we were really conveying was a significant change in our approach to thinking.

Petraeus’ novel approach to constructing FM 3-24 was evident in the vetting conference he held at Fort Leavenworth in February 2006. The attendance of NGOs, journalists, human rights advocates, academics, lawyers and counterinsurgency experts, who together ‘thoroughly revised the manual and dramatically improved it’, prompted one attendee to remark ‘he had never seen such an open transfer of ideas in any institution’.\textsuperscript{134} As Petraeus recalled in his speech, this was a genuinely collaborative exercise:

\textit{[W]e engaged not just members of our military and partner militaries, but also diplomats, aid workers, representatives of NGOs and human rights groups, think tank members, journalists, and, also, of course, those with experience in Iraq and Afghanistan. These individuals formed something of a guiding coalition for the development of the manual and our overall process of change. Pundits even developed a phrase for those who contributed to the manual and embraced its concepts. They called us ‘COINdinistas’.}

Asked, as a military historian, to articulate the ‘biggest difference’ between FM 3-24 and other military manuals, Crane responded by pointing to ‘the broad swathe of contributors to the manual’, noting the ‘Petraeus method was to bring as many people in to be involved in the process as possible’.\textsuperscript{135} Initially, Petraeus wanted the vetting conference in January, but Crane was able to push this back to February. Numbers swelled from Petraeus’ original idea of bringing in 30 or so ‘outside people’ to comment on the draft to over 100.

\textsuperscript{133} See \url{http://www.aei.org/speech/100142} (a. 20 September 2014).
\textsuperscript{134} FM 3-24: xvi; Kilcullen (2009: 119).
\textsuperscript{135} Crane.
The Carr Center for Human Rights was brought in as a co-sponsor, a significant development to which we will return later.\textsuperscript{136} Petraeus himself was front and centre at the conference, as Crane remembered: ‘[Petraeus] spent two days of his time, as busy as he was, sitting there in the front row commenting on everything that was going on.’\textsuperscript{137}

In addition to the Fort Leavenworth conference, a coordinating draft was sent to the Pentagon and to the field in June 2006. Significant efforts were then made to respond to the views of dissenting and even hostile voices, either to bring them on board or accommodate concerns. The writing team gathered in August ‘to digest the thousands of comments’, many of which provided critical insights from Iraq and Afghanistan.\textsuperscript{138} The unremitting exchange of ideas between the writing team and the field of operations has led many to point to the influence of the US military’s junior officers on FM 3-24. As Davidson explained, having a ‘champion’ like Petraeus was instrumental, but ‘intellectually [FM 3-24] was very bottom up’.\textsuperscript{139} Many other officers interviewed made a similar observation. Theory was vigorously checked and modified against direct experience on the ground.\textsuperscript{140} This dynamic, inclusive method, according to Crane, imbued FM 3-24 with its distinctiveness: ‘What is unique about [FM 3-24] was the process that produced it, which was very open, and very quick.’\textsuperscript{141}

Undeniably, the development process was a fast one. The production of a major military doctrine in less than a year was ‘light speed’.\textsuperscript{142} At the end of the process, Crane was named one of Newsweek’s ‘People to watch in 2007’.\textsuperscript{143} Despite Petraeus’ insistence at the time of asking him to take on the job that it was too good an opportunity to turn down, Crane maintained he ‘had no idea’ it would become as big as it did:\textsuperscript{144}

I did know that I could make a contribution and that this was a chance to make a contribution to what was going on, to national security, to the war effort—I knew I could do that—but I had no idea what was going to flow from this.

\textsuperscript{137} See Crane (2007).
\textsuperscript{138} See Crane II.
\textsuperscript{139} Davidson.
\textsuperscript{140} See Crane (2007): ‘It can be said that FM 3-24 had a dozen primary authors, another dozen secondary authors, and 600,000 editors, because all of the Army and Marine Corps got a chance to provide their suggestions.
\textsuperscript{141} Crane.
\textsuperscript{142} Crane: ‘At the end it was basically me and Petraeus trading email messages.’
\textsuperscript{143} Newsweek, 25 December 2006–1 January 2007.
\textsuperscript{144} Crane.
Audiences

I thought we should have an immediate impact on Iraq and Afghanistan and I thought this is the kind of war that we are increasingly more likely to be fighting for the rest of the twenty-first century.

*John Nagl, 2008*

‘This manual is designed to fill a doctrinal gap.’\(^{145}\) The opening sentence of Petraeus’ foreword leaves no doubt as to FM 3-24’s ambition. Yet despite the obvious pressure generated by the conflicts in Iraq and Afghanistan, Crane maintained FM 3-24 was not written with, or driven by, an exclusive Iraq or Afghanistan mindset. Inevitably, however, the course-correction of those conflicts became a dominant objective.\(^{146}\)

You are trying to balance insights from the past with visions of the future and contemporary best practices, but the way the system works, because you have so many inputs from the field and contemporary commanders get to read it and comment and make final changes, it tends to pull you into the present. So you got pulled into an Iraq/Afghanistan mindset.

As explained in Chapter 1, the difficulty with doctrine, especially doctrine developed in the midst of war, is the risk that changes in doctrinal thinking fail to have practical effect. Petraeus observed: ‘Putting out an official document is one thing; getting commanders and their troops to actually implement it is another.’\(^{147}\) These were all legitimate concerns during the drafting process. According to Ricks, ‘what wasn’t clear [during the Fort Leavenworth conference] was whether [FM 3-24] would be produced in time to make a difference in Iraq’.\(^{148}\) A study of General Casey’s ad hoc attempt to teach counterinsurgency had already concluded, ‘20 per cent of them got it, 60 per cent were struggling, and 20 per cent were trying to fight a conventional war, “oblivious to the inefficacy and counter-productivity of their operations”.’\(^{149}\)

Crane, Mattis, Nagl, Kilcullen, Davidson and others are in general agreement on the decisive factor separating FM 3-24 from other manuals: Petraeus. As West wrote, ‘what distinguished [FM 3-24] was the scope and ambition of Petraeus’ outreach.’\(^{150}\) ‘Petraeus was engaged, he was able to break any roadblocks that we had,’ Crane said, ‘this was [Petraeus’] own personal project, he was going to make sure it happened.’\(^{151}\) His direct involvement in the editing process was unprecedented, ensuring the finished product was not only more

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\(^{145}\) FM 3-24: xlv.  
\(^{146}\) *Crane*; *Crane* (2007); Kaplan (2013: 164–5).  
\(^{147}\) Quoted in Ricks (2009: 201).  
\(^{149}\) Ricks (2009: 24–5).  
\(^{150}\) West (2008: 121–2).  
\(^{151}\) *Crane II*: ‘[Petraeus’] personal attention was involved, his personal interest was involved. Anytime I had a problem, he got involved.’
‘readable’ but also far more ‘influential’.\textsuperscript{152} Indeed, Nagl warns not to ‘exaggerate the importance’ of FM 3-24 itself. The ‘real importance’ was that ‘Petraeus engaged completely’ with the process.\textsuperscript{153}

He copy edited every line so the thinking process he went through—I’m confident somewhere in his head he thought he might be going back to Iraq again so he’s preparing mentally for the kind of war we were fighting…when he got on the ground he implemented, I would say (a) to a letter and (b) very, very effectively, the principles that he and Con had talked about.

One crucial question concerns the audience or audiences the writing team intended to influence. That is to say, if Petraeus, Mattis, and company represented an insurgency within the US military, whom was their insurgency directed against? Asked to articulate the key audiences of FM 3-24, as understood by the writing team, Crane confirmed that the question ‘who was the target?’ was heavily discussed. The writing team finally settled on ‘battalion level and above in the military’ as the main target, with the key message: ‘This is how to do a military campaign’. Crane put it as follows:\textsuperscript{154}

We had to change the mind of the military; that’s what we were trying to do. We had to get out of this conventional mindset into a much better learning organization.

Crane reported that Petraeus and Mattis had the same primary goal in using FM 3-24 to change the prevailing mindset of the Army and Marine Corps. Nevertheless, they and the writing team were also deeply aware ‘that there [were] other audiences who were going to read’ FM 3-24, a point evidenced and fostered by Petraeus’ commitment to the vetting conference. As Crane recalled, ‘one of the reasons why I battled a lot with [the writing team] to keep parts of the wording the way it was is because we wanted to keep it at a very sophisticated level for other audiences who were going to read it.’ This was done not to make the finished product ‘so complicated soldiers wouldn’t read it’ but in recognition that the doctrine was aimed principally at ‘college graduates’. The prevailing view was: ‘We can make this a more complex document. We want to make people think about this stuff.’\textsuperscript{155}

Three examples demonstrate FM 3-24’s different target audiences. The first example concerns US civilian leadership,\textsuperscript{156} and is best embodied by the last of the historical principles: ‘Counterinsurgents should prepare for a long-term

\textsuperscript{152} Ricks (2009: 29).
\textsuperscript{153} Nagl.
\textsuperscript{154} Crane.
\textsuperscript{155} Crane. See also Kaplan (2013: 163–5).
\textsuperscript{156} Petraeus, who recounted personally delivering a copy to every member of the Senate Armed Services Committee, to President Bush and to other groups. Some requested a signed copy.
commitment’. Crane explained this last principle emanated from the Marine Corps, with clear intent.\(^\text{157}\)

The Marines said ‘we are doing this because we want to make sure that any civilian leader who reads this understands these things always take a long time and they are always resource heavy, and it’s a mess—this is what you get into if you decide to do this’. So, there was much malice aforethought at putting that principle in but it was aimed at an audience outside the military.

The second example concerns audiences outside the military, many of whom were well-represented at the February 2006 vetting conference.\(^\text{158}\) As Ricks wrote, this conference was of vital importance in building legitimacy for FM 3-24 in the first place: ‘one purpose of the meeting was to ensure [FM 3-24] would stand up to such criticism; another was to build support for it.’ This was especially the case given the invitations issued to the ICRC, Human Rights Watch and the installation of Sarah Sewall as a co-chair and the Carr Center for Human Rights as a co-host. The immediate decision by Petraeus at the conference to strike provisions that were ‘ambiguous about the use of torture’\(^\text{159}\) was a game changer. According to Crane, the involvement of Sewall and the Carr Center was partly coincidental: he had worked previously with both and was looking for sponsorship because the vetting conference had become so large.\(^\text{160}\) The *quid pro quo*, from Sewall’s end, was a request for additional people to be invited. In the end, their influence was considerable:\(^\text{161}\)

[Sewall] brought in a hand-picked group, including a couple of international human rights lawyers, who also were deeply involved in the vetting conference. One of the more painful experiences I had at the vetting conference was one of the evenings, when we were having a reception. I was trying to get to the bar, and I got caught by one of the international human rights lawyers that had been brought in by Sarah and she basically kept me locked in a corner of the room for about an hour to make sure I understood the difference between the law of land warfare and international human rights law and how things change. It was a very useful and informative session for me but also very painful because I was just trying to get a damn drink!

Kilcullen insisted this involvement ‘was not a cynical exercise in building political support’ but part of a broader objective to socialize the doctrine within wider military and civilian circles.\(^\text{162}\) Crane argued outside parties understood FM 3-24 was being aimed additionally at audiences beyond the military, particularly the rest of the government. Sarah Sewall’s introduction

\(^{157}\) *Crane.*

\(^{158}\) For detail on the individuals, see Kaplan (2013: 153–6).

\(^{159}\) Ricks (2009: 25–6).

\(^{160}\) See, further, Kaplan (2013: 148–9).

\(^{161}\) *Crane.*

\(^{162}\) Kilcullen. Compare Kaplan (2013: 165), quoting Tom Marks: ‘This cake was already baked.’
to the University of Chicago Press edition constituted, in part, ‘a salvo aimed at the rest of the government to say: look, this is what the military has done, we have to catch up.’ \(^{163}\) Sewall claimed FM 3-24 was ‘a moon without a planet to orbit’, \(^{164}\) in reference to the disproportionate burden carried by the US military and the need for a whole of government effort across the different agencies, a process that began with FM 3-24’s publication. In this way, groups like Sewall’s also viewed FM 3-24 ‘as a way to jumpstart their own process’. \(^{165}\) Petraeus, however, was clear about other factors motivating the inclusion of such groups: \(^{166}\)

We also have 24-hour news cycles; we have an innumerable number of watchdogs and human rights organizations. There is a reason why we had Sarah Sewall co-sponsoring my counterinsurgency seminar and it was to get some of that in there.

The final example concerns the principal target: the US military itself. \(^{167}\) While this is true of the Army and Marine Corps especially, another example lies in the treatment of the air power section, which was subject to much debate and eventually placed in an appendix. If anything, this decision instigated new Joint Doctrine, which synthesized counterinsurgency operations across the US military. The US Air Force also developed its own doctrine. As Crane recounted: ‘One of the main reasons to do the air power appendix was to get the Air Force interested in counterinsurgency, which we achieved.’ \(^{168}\) This was achieved at some cost. \(^{169}\) Nevertheless the firmness of the writing team’s intent, together with FM 3-24’s several and varied target audiences was clear. Crane confirmed: \(^{170}\)

There was a realization there were other audiences; the main target was the Army and Marine Corps, but I can’t deny that we knew this was going to go broader and inspire and that there were going to be ripples.

\(^{163}\) Crane.  
\(^{164}\) FM 3-24: xl.  
\(^{165}\) Crane. Sewall’s introduction to FM 3-24 supplies an example of groups redirecting FM 3-24 to other audiences: ‘[FM 3-24] concerns implementation. It is not a guide for deciding which insurgencies to squelch. It is neutral regarding the choice of war. Ironically, though, [FM 3-24’s] ultimate value may lie in better informing the nation’s \textit{jus ad bellum} decisions. [FM 3-24 offers an honest appraisal of what it takes to fight a counterinsurgency well. In so doing, [FM 3-24] has the potential to shape America’s choice of war for years to come. But it must first overcome profound institutional and political obstacles. This will require much more than a new field manual.’ See FM 3-24: xlii.  
\(^{166}\) Petraeus. Consider also Kaplan (2013: 160) and his depiction of Petraeus’ ‘\textit{Front Page of the Washington Post Rule’}.  
\(^{167}\) See here Kaplan (2013: 161–2, 165) and the description of Bing West’s comments on the balance afforded to killing and capturing at the vetting conference.  
\(^{168}\) Crane.  
\(^{169}\) In a sign of how heated tensions became, Crane recalled how during the drafting process, at the height of this particular debate, a US Air Force four-star general had put his finger into his chest and asked how he ‘could make air power an appendix’.
\(^{170}\) Crane.
Responses

Obsessed with low-level ‘tactical’ morality—war’s inevitable mistakes—the officers in question have lost sight of the strategic morality of winning. Our Army and Marine Corps are about to suffer the imposition of a new counterinsurgency doctrine designed for fairy-tale conflicts and utterly inappropriate for the religion-fuelled, ethnicity-driven hyper-violence of our time. We’re back to struggling to win hearts and minds that can’t be won. The good news is that the Army and Marine Corps worked together on the new counterinsurgency doctrine laid out in [FM 3-24]. The bad news is that doctrine writers and their superiors came up with fatally wrong prescriptions for combating today’s insurgencies.

Ralph Peters, New York Post, 18 October 2006

The ripples Crane and his team anticipated began to cause waves even before FM 3-24 was officially approved. ‘Critics appeared as soon as drafts began to be circulated,’ said Crane, and ‘Petraeus’ approach was to engage them.’

Retired Lieutenant Colonel Ralph Peters, now writer and columnist, gave the following version of events as to how his criticism, extracted above, emerged:

I went to Jim Mattis and said ‘you have got to get involved to toughen things up’. . . . I believe General Wallace and a few others had [also] said this [the then draft] is too doctrinaire.

Treatment of Peters’ indictment of the draft is particularly instructive.

Peters was invited to Fort Leavenworth, where he debated the issues he had raised with Nagl and Mansoor (who was then Director of the COIN Centre). Peters’ view is that he was invited to the meeting to be placated and to have his ego stroked. Nonetheless, the discussion went for almost two hours, with vigorous debate about insurgencies and what was required—historically and in the immediate campaigns—to combat them.

Crane described the outcome in these terms:

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171 The article was titled: ‘Politically Correct War: US Military Leaders Deny Reality’.
172 Crane (2007).
173 Author’s interview with Ralph Peters, August 2011, Virginia (Peters).
174 Kaplan has a lengthier account, which refers to emails between Petraeus and Crane on how best to respond: Kaplan (2013: 216–21).
175 Kaplan (2013).
176 Kaplan (2013). Peters maintained there was a ‘disconnect between what [Nagl] knew worked on the ground and what, intellectually, he believed would work’. Indeed, Peters argued Nagl conceded what worked was ‘showing the locals who was boss in a very graphic manner’. Compare Kaplan (2013: 220–1).
177 Crane (2007).
As a result of Peters’ input, a few more sentences were changed to project a harder line, though I also managed to keep the qualification that counterinsurgents need to carefully analyze opponents to figure out who was really implacable.

The meeting was a qualified success. When interviewed, Petraeus acknowledged some statements in the early drafts, particularly the parts without qualifiers, were ‘nonsensical’, and that ‘Peters had every reason to say it was too soft’. In December 2006, Peters wrote another piece for the New York Post, extolling the virtues of the now finished FM 3-24, claiming: ‘If a prize were awarded for the most-improved government publication of the decade, we would choose the winner now: “Army Field Manual 3-24, Counterinsurgency’”. The Army and Marine Corps, Peters said, had risen ‘above abysmal earlier drafts’ and emerged ‘with doctrine that will truly help [US] troops’: the time had come ‘to put that doctrine to use’. In August 2012, Peters described this as ‘faint praise’. Peters explained he had not read the final version, but that ‘he gritted [his] teeth and tried to support the cause, because that is what soldiers do,’ adding that he would ‘regret it till the end of his days’. Peters reasserted his enemy-centric stance in 2007, labelling FM 3-24 as ahistorical and as setting ‘impossible standards for victory’. His 2006 turnaround, however, illustrates the willingness of Petraeus and the writing team to engage with all critics.

Although Peters penned his piece in October 2006, the coordinating draft had been circulating in the field since June. Whereas the Marine Corps assembled their own feedback and forwarded the most relevant to the writing team, the Army’s approach was more formal. All responses were categorized as either ‘critical’ or ‘major’, with the most serious comments, by regulation, requiring a reply. A ‘young major’ at Fort Leavenworth was given the ‘sole mission’ to ‘reply to each and every comment’. In August, the writing team went over every comment together. Disagreements emanating from the US Army Intelligence Centre at Fort Huachuca necessitated a separate meeting to work through differences, which Crane estimated put the entire project

178 Petraeus, who also noted that Peters had been looking at older drafts and that many relevant changes had already been made. Kilcullen had a slightly different take: FM 3-24 ‘is skewed very heavily in favour of human rights, minimum force, non-kinetic, primarily because we were looking at the US military in Iraq in 2006: it did not need to be told it is okay to kill the enemy. If anything, they were doing too much of that. They needed to be told the opposite’: author’s interview with David Kilcullen, Washington, D.C., 22 August 2011, (Kilcullen).

179 See Peters, ‘Getting Counterinsurgency Right’, New York Post, 20 December 2006. Of the thousands of articles he has written, Peters said the December 2006 piece is one of a few he regrets writing.

180 Peters.


182 Peters: ‘We have over 2000 years of history of messianic insurgencies…none of them were addressed, they were all ignored…I cannot find one that was put down without serious bloodshed. You have to kill the hard core believers.’

183 Crane II: ‘The Marines weren’t great on feedback.’

184 See, further, Kaplan (2013: 213–16).
back a month, by which time the Peters ‘brouhaha’ had exploded.\textsuperscript{185} Together, these factors forced further delays and had a significant impact on the overall product and timeline. But for these issues, FM 3-24 would have been released earlier and would have been a ‘slightly different product’. Nevertheless, as Crane described, the manner in which Petraeus was personally involved in overcoming roadblocks illustrates his overall stewardship of the project and commitment to its success:\textsuperscript{186}

[W]hen I said ‘I’m having problems getting Fort Huachuca to buy into what we were trying to do’, [Petraeus] called up the two-star general in charge at Huachuca and said ‘we’ve got to get this straight’, and encouraged her strongly to make sure people got out to our meeting to resolve our problems, which they did.

During the consultation period, many ‘senior officers’ were ‘uneasy with the paradoxes section’, which were ‘toned down with qualifiers’ in response to those concerns and the more vocal rebuke by Peters. ‘The result,’ Crane observed, ‘of many of these alterations were to give the manual more “teeth”, dealing in greater detail with the killing and capturing of implacable ideological extremists’, with Petraeus himself creating ‘some of the changes’.\textsuperscript{187} Although Crane believes some of the language would have been tightened regardless, there is little doubt the nature of the criticism forced further revision:\textsuperscript{188}

The general officers were still, and Petraeus himself was, rethinking some of the ‘how to deal with extremism’ stuff, so there would have been more teeth in the final version no matter what, but the delay of a month and getting involved with the Ralph Peters thing even added more teeth…. The Peters brouhaha made Petraeus think about some other things, and all of us discuss some other things, and we put some more discussion in there about extremism, and that some people have to be killed, though I did manage to put the section in there where we say there are going to be implacable foes you have to deal with, but still you have to work out who is really implacable and who is not, because there are still people who you might think are implacable but you can still talk to them, influence them…. So, at the end, the big discussion was ‘how do you deal with extremism, especially Islamic extremism?’

\textsuperscript{185} Crane II. \textsuperscript{186} Crane II. \textsuperscript{187} Crane (2007). \textsuperscript{188} Crane II. On the big discussion about how to deal with extremism, especially Islamic extremism, Crane recalled the debate about how specific to be about the threat: ‘We had to be very careful about dealing with Islam, and some people said we shouldn’t go down that road. We had some inputs from outside people [including consultations about language from Middle East experts]….we tried to steer away from anything that could be seem as a kind of religious commentary.…. [W]e had to call a spade a spade, [the US] are not being attacked by a bunch of Buddhists with bombs. There is a certain group that is a threat and we need to be honest about what that threat is. That was probably the biggest debate in the last stage.’
Crane categorizes the general evolution of changes from the June draft as ‘a little more violence, a little more teeth’, resulting in the greatest volume of changes since those following the earlier vetting conference.\(^{189}\) For some, however, including Crane and Davidson, perceptions that earlier versions of FM 3-24 were too soft are misplaced. Although the new approach was ‘radical’ in light of the past, particularly the immediate past, they argued it never questioned that part of protecting the population meant, ‘killing the bad guys’.\(^{190}\)

Following FM 3-24’s official publication, other notable criticisms emerged. The disagreements over the use of air power and FM 3-24’s ground-centric focus have already been mentioned.\(^{191}\) Another debate within the military concerned the utility of FM 3-24’s prescriptions as a way of waging counter-insurgency. This led to the formation of two camps, the ‘Conservatives’ and the ‘Crusaders’, the latter group led by the so-called ‘COINdinistas’.\(^{192}\) One of the most vocal Conservatives was Colonel Gian Gentile from the West Point Military Academy, who led his second tour to Iraq in 2005 and has a doctorate in history from Stanford. Gentile disputes the credit given to FM 3-24 for helping to turn around the situation in Iraq, especially the meta-narrative that suggests US forces were not doing COIN before FM 3-24, describing that account as ‘a bunch of hogwash’.\(^{193}\) Gentile has contended the enemy-centric approach is better-suited in some instances, and questions the degree of reorientation to irregular warfare in place of conventional combat.\(^{194}\) In 2009, Gentile questioned whether the US Army officer corps had ‘seriously debated’ FM 3-24 and related doctrinal field manuals since 2006, arguing the US ‘Army’ s new and most important doctrinal manuals confirm that fighting as a core competency has been eclipsed in importance and primacy by the function of nation-building’. Explicit in Gentile’s analysis was that the centre of gravity of a conflict ‘does not have to be—and should not always be—the people’.\(^{195}\)

One prominent critic outside of the military is Edward Luttwak. In 2007, Luttwak, who has served as a consultant to the US National Security Council, the White House Chief of Staff, the US Department of Defense and the US State Department, as well as the US military, labelled counterinsurgency

\(^{189}\) Crane.

\(^{190}\) Davidson. Peters insisted, in an email to the author, dated 27 May 2012, that the writing team were ‘adamantly opposed to any further mention of killing or the application of counterinsurgent violence’.

\(^{191}\) See Dunlap (2010); Crane (2007); FM 3-24: xxix–xxxix.

\(^{192}\) See Bacevich (2008).

\(^{193}\) Author’s interview with Colonel Gian Gentile, by telephone, 18 August 2011 (Gentile).

\(^{194}\) See Gentile (2007); Gentile (2008); Crane, (2007).

warfare, as defined by FM 3-24, military malpractice. Luttwak argued, somewhat controversially, that the Roman Empire and the German armed forces in the Second World War provided a better model for a ‘population-centric approach’. In his article for Harper’s Magazine, penned in response to the FM 3-24 drafts circulated by Petraeus and Mattis, Luttwak acknowledged Americans would not want their armed forces to overcome obvious ‘political limitations’ and adopt similar tactics to the Romans or Nazis, but that such limitations nonetheless render US counterinsurgents relatively powerless: 

Consequently, for all the real talent manifest in the writing of FM 3-24 draft, its prescriptions are in the end of little or no use and amount to a kind of malpractice. All its best methods, all its clever tactics, all the treasure and blood that the United States has been willing to expend, cannot overcome the crippling ambivalence of occupiers who refuse to govern, and their principled and inevitable refusal to out-terrorize the insurgents, the necessary and sufficient condition of a tranquil occupation.

There is certainly evidence that, as Luttwak claims, counterinsurgency may be prosecuted in other ways than FM 3-24 stipulates. ‘Contemporary Russian counterinsurgency efforts in Chechnya,’ for example, provide a more dramatic comparison to the actions of US armed forces in Iraq than that provided by US armed forces in Vietnam in the 1960s and early 1970s. The two Chechen wars, between 1994–6 and 1999–2009, witnessed ‘an extraordinary amount of indiscriminate firepower’ by Russian forces, ‘including intensive artillery and aerial bombardment in dense urban settings’. ‘Even the most conservative estimate’ of civilian deaths in Chechnya, Kahl wrote, ‘is 100–175 times the US-caused toll in Iraq through 2006 (controlling for duration and population)’. Similarly, it has been claimed the Sri Lankan government’s 2009 defeat of the Tamil insurgency through brutal, if not remorseless, force confirmed another alternative model to FM 3-24. Nevertheless, although Luttwak’s criticism suggests Western counterinsurgency campaigns may not succeed, Crane notes that the alternative model Luttwak canvassed was ‘unanimously rejected’ by ‘American, British, German, and French doctrine writers’ at a June 2007 conference in France, based on international law, the realities of the current media environment, and a shared conviction that such an approach is counterproductive.

196 See Luttwak (2007); Crane (2007).
201 See, further, Vijayasiri (1999).
204 Crane (2007).
In contrast to Luttwak, Crane conceded Stephen Biddle made some ‘thoughtful’ observations on FM 3-24, especially regarding its applicability to certain civil wars and its awareness of ‘social and political realities’ within them.205 FM 3-24 arguably conflates the role of the host nation with the intervening force such that both are broadly considered ‘the counterinsurgent’. The second iteration of FM 3-24 has attempted to remedy this.206 If the process that produced the first edition of FM 3-24 is any guide, debates over FM 3-24’s second edition were similarly robust, particularly given the contested success of FM 3-24’s ideas downrange. The content of the second edition is explored in Chapter 6. Such debates, in many respects, are symbolic of longstanding disputes in the US military over the use of overwhelming force.207 As Crane observed in 2010, when there was a lively debate about restrictions on the use of force in Afghanistan, the principal reason for including FM 3-24’s paradoxes was to ‘get people thinking’ about these issues. It was not to use FM 3-24 ‘as a template’ for all problem sets.208 The doctrine poses certain questions, but does not prescribe a uniform set of answers.

There is an ongoing tension between counterinsurgency doctrine as a means of fighting and counterinsurgency doctrine as political or extra-military policy. Gentile warned of the dangers of risky foreign policy decisions if US forces ‘get too good’ at counterinsurgency, together with the danger of losing valuable skills at fighting other forms of warfare.209 Equally, Davidson cautioned the US military might revert to type if it is deemed to have failed in its counterinsurgency campaign in Afghanistan.210 The January 2012 US Defense Strategic Guidance indicated the work of the COINdinistas remained contested.211

**Institutionalization**

It is very similar to Iraq and Afghanistan, except that here there is no bad guy. We’re helping the populace, winning their trust. This is right up our alley. All of us are products of the COIN manual.

Marine Corps officer, Haiti, January 2010

By 2009, counterinsurgency as prescribed by FM 3-24 was ‘the most prominent military strategy since containment’,213 and ‘the US Army’s organizing

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205 See, for example, Biddle (2006); Crane (2007).
206 Davidson.
207 Crane.
208 See also Crane (2007); Hoffman (2007).
211 See, for example, Biddle (2006); Crane (2007).
principle.’ This was due largely, it was claimed, to General Petraeus’ successful implementation of the doctrine in Iraq from early 2007, and the speed with which FM 3-24 provoked other doctrinal and government publications. These publications are noted below. The above epigraph detailing the work of the Marine Corps in Haiti following the earthquake there in early 2010 illustrates that certain tenets of the doctrine took hold with the US military and were applied elsewhere.

Petraeus’ direct involvement, and his increasingly likely redeployment to Iraq, helped to accelerate FM 3-24’s approval by the Pentagon:

When we started doing this we did not know that [Petraeus] was going to be executing it in Iraq; that was not the intent of the effort. But, [FM 3-24] would not have happened without his personal involvement. He just kept pushing it and made sure it happened, with resources, with emphasis—any kind of blockages—he just made sure he pushed it through. When a three-star general takes a personal interest in a project like [FM 3-24] it makes things a whole lot easier.

In the period of gathering feedback on the coordinating draft between June and September 2006, it became evident Petraeus might be going back to Iraq. In fact, Petraeus believed he would be going back, most likely as Commanding General. This did not mean the doctrine became specifically geared towards Iraq, but did guarantee institutionalization of the doctrine assumed far greater importance. One example makes this clear: the specificity on force ratios. This topic has attracted considerable debate since, just as it did in the dialogue between Galula and his British and Australian counterparts at the 1962 Symposium illustrated earlier in this chapter. Crane explained how the institutionalization of counterinsurgency principles figured in Petraeus’ approach:

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217 Crane II.  
219 According to Petraeus: ‘The Chief [of the Army] implied that “we’re going to let you take a knee and take a breather—you’ve been downrange for 30 of the previous 35 months, plus a year in Bosnia prior to that—but you’re going back into the fight, and very likely going to replace George Casey”. That was pretty well understood.’ Petraeus also claimed that when a number of experts (including General Keane, Eliot Cohen and Stephen Biddle) met with President Bush in December 2006 ‘they did not agree at all that there should be a surge, but they did agree on who should command whatever the hell it was; there was consensus on that.’ See, further, Kaplan (2013: 237–8, 243).  
220 Understood as the codification, and growing acceptance, of FM 3-24’s principles in the US military, and also the US government. See, further, Kaplan (2013: 165).  
221 Crane II. See FM 3-24: [1-67]. Crane was adamant the paragraph does not recommend a particular ratio. Petraeus insisted the paragraph was included ‘because it was the right thing to do’, even though he knew he would have to answer to it during his confirmation process: ‘intellectually, it was honest to do that’. Petraeus noted it also depends on who you count: ‘our’ forces, ‘their’ forces, and relevant contractors. (He had previously contracted out his own security in the field.)
One of the key paragraphs was the one on force ratios, which shows up in the last version, which was written by Pete Mansoor at the COIN Centre out at Fort Leavenworth. The Marines were very much against any kind of mention of force ratios because they thought people would say ‘that’s doctrine’ and try to lock us into it. In the end they were right, this was probably the most misunderstood part of [FM 3-24]. …But by the time we got into the September-October timeframe General Petraeus knew he was going to be going to Iraq and knew that issue of force ratios was going to come up, so [Petraeus and Mansoor] developed a paragraph on force ratios… but there was a qualifier, it was ‘situation dependant’, so none of these ratios could be relied upon. Everybody, including in congressional hearings, said, ‘well the doctrine recommends this ratio’ and it doesn’t, it doesn’t say that. But [Petraeus and Mansoor] felt there had to be some kind of historic number thrown out there so people could get a sense of how many troops [counterinsurgency] normally takes, how serious a commitment it is.

There is little dispute about FM 3-24’s immediate impact. Examples include the number of downloads in the month following its publication; its upbeat review by Pulitzer Prize-winning author Samantha Power in the New York Times; its publication by the University of Chicago Press; media appearances on ‘The Charlie Rose Show’ and ‘The Daily Show’; and the labelling of ‘CO-INdinistas’ and other plaudits such as Crane’s identification as a Newsweek ‘Person to Watch’ for 2007. Crane counted at least ten direct spin-off articles and associated academic publications emanating from the writing process.

FM 3-24 became a central feature of military training, motivated other countries to reinvigorate their respective counterinsurgency doctrines and was spotted in Taliban training camps. Officers sympathetic to COIN previously passed over for promotion within the military were soon advanced.

FM 3-24’s release, and the perceived success of its prescribed methods in Iraq, marked the beginning of a counterinsurgency era and heralded a doctrinal metamorphosis in approaches to contemporary warfare. FM 3-0, Operations, was updated for the first time since 9/11 in February 2008, consistent with FM 3-24’s prescriptions. The complementary tactical counterinsurgency manual, Tactics in Counterinsurgency (FM 3-24.2) was published in April 2009.

The US Air Force released its own doctrine, USAF AFDD 2-3,
and, in turn, the Joint Chiefs of Staff produced Joint Publication 3-24 for interservice US counterinsurgency doctrine. The first Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates was released by the Joint Forces Judge Advocate, US Forces Joint Command, in July 2007, with successive editions drawing on the experience of COIN operations in Iraq and Afghanistan.229 Despite some delays, the US State Department responded to Sewall’s description of FM 3-24 as a ‘moon without a planet’ by creating an interagency counter-insurgency guide, a process in which Davidson played a key role. Davidson was also consulted on a new manual, Stability Operations and Support Operations, FM 3-07, which although controversial, attempted to follow the FM 3-24 model.230 Finally, the US Army Capstone Concept, Operational Adaptability, was published in December 2009. The manner of its publication led Nagl to argue that ‘FM 3-24’s role in inspiring a more open doctrinal process’ would be ‘as important as its operational prescriptions’.231

As Crane anticipated, FM 3-24 inverted the traditional model of developing doctrine. Army and Marine Corps’ service doctrine was the starting point, instead of a ‘coherent national security strategy’ followed by joint and then individual service doctrine. This ensured the US military was ‘destined to bear a heavy burden in any COIN effort’ until the rest of the government caught up.232 The backwards trajectory of the institutionalization process meant FM 3-24 was a catalyst and the first point of reference, as were its authors. This facilitated welcome revisions and inclusions, particularly in the Joint Publication:233

I was able to get some stuff into Joint Publication 3-24 we could not get in FM 3-24. We did not like the definition of insurgency, but we couldn’t change it. It was too narrow, too tied to supporting a government—there are going to be some situations there are ungoverned spaces—so there is a different definition of insurgency in JP 3-24. Also, the Joint Publication talks more about the carrot and sticks dilemma [dealing with extremism]... and how you get your Allies to do what you need them to do.

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228 US Joint Chiefs of Staff, Joint Publication JP 3-24 was also published by CreateSpace in December 2009, titled The Petraeus Doctrine: The Field Manual on Counterinsurgency Operations.
230 Davidson. FM 3-07 was also published (by University of Michigan Press). Nagl (2010: 119) described FM 3-07’s prescriptions as ‘in keeping’ with FM 3-24. Crane was uncomfortable with one of its conclusions: ‘The most effective long-term measure for conflict prevention and resolution is the promotion of democracy and economic development’. Crane described this as arguably ‘democratic peace theory’ by another name, which he labelled an ‘unproven theory’. See FM 3-07: [1-53].
233 Crane II. Crane had been a long mentor to the author of the Joint Publication.
When I met with Crane in August 2010, he brought the *Washington Post* article about Haiti, quoted at the beginning of this section, to my attention. ‘Counterinsurgency without the shooting’, which was the thrust of the observations on the conduct of the Marine Corps officers, illustrated for Crane how the ‘Marine Corps has absorbed [FM 3-24] lock, stock and barrel. They read it, they talk about it, they understand it, there’s no questioning of it: they just drive on and do it.’\(^{234}\) According to Crane, however, the US Army had not been as good as the Marines in this respect, and was still marked in some quarters by ‘pockets of resistance’.\(^{235}\) In later chapters, I explore FM 3-24’s prosecution in Iraq and Afghanistan and offer a view on FM 3-24’s battlefield impact. Nevertheless, given FM 3-24’s broader institutionalization, it is worth noting the centrality of Petraeus to that ongoing cause, which runs beyond the time period examined by this book. Perhaps never before has US doctrine, or its resulting strategy, become so personified by one individual.\(^{236}\) George Kennan is one example, yet he did not control the manifestations or direct implementation of his containment strategy. As a field commander, Petraeus was in a position to implement his doctrine in a way that Kennan in Moscow or Washington, D.C., simply could not. Consequently, Petraeus assumed a unique if not tenuous position, as Crane described:\(^{237}\)

It is a good thing and a bad thing. [FM 3-24] has become identified so much with [Petraeus]. And there is an anti-Petraeus element, so they become anti-COIN. . . . It’s not just anti-COIN, it’s anti-Petraeus. Gian Gentile’s major motivation is that he was a battalion commander in Iraq in 2005 . . . [Gentile] sees it as a cult of Petraeus and a cult of the surge that denigrates everybody that came before. There’s [also] a certain aura around Casey [then Chief of Staff] that says ‘well if you say that Petraeus saved Iraq that must mean that we screwed it up’ . . . . and Casey is a conventional guy, he’s uncertain with how much COIN we should do. But personalities are wrapped into it. So Petraeus is essential for the success for counterinsurgency but he also creates antibodies against it because of some resentment about his success and what people perceive as ambition. One of the dilemmas of being a good counterinsurgent is that you have got to blow your own horn. People see Petraeus selling COIN as Petraeus selling Petraeus, and that’s very much against the Army culture.

This book does not focus on the strengths and weaknesses of FM 3-24 as a doctrinal basis for waging counterinsurgency. Although the first edition’s

\(^{234}\) *Crane II.*

\(^{235}\) Headed by Gentile and others that had coalesced around him.

\(^{236}\) Petraeus was described in February 2011 as ‘the most celebrated American soldier of his generation’ in an article that claimed the Obama administration hoped to demonstrate ‘proof that its strategy does not depend on the towering reputation of one man’: see Whittell and Evans, ‘Petraeus to quit Afghan campaign’, *The Times*, 16 February 2011.

\(^{237}\) *Crane II.* See also Kaplan (2013: 349–51).
treatment was largely positive, it did not escape criticism.\(^{238}\) Such criticisms largely stemmed from its assumptions,\(^{239}\) together with its adaptability to different types of insurgencies.\(^{240}\) Kilcullen has also underlined the pivotal differences in the nature of today’s insurgencies that distinguish them from their ancestors and necessitate hybrid models incorporating counterinsurgency and counterterrorism.\(^{241}\) While the focus of this book is international law’s function within FM 3-24 and in its implementation, I am mindful FM 3-24’s ongoing institutionalization is relevant to that task. As a standard doctrinal manual, FM 3-24 is slated for periodic review and revision. This is something the original writing team was acutely aware of. Asked in 2010 how much the rise and fall of counterinsurgency depended on Petraeus, Crane remarked:\(^{242}\)

> It’s a good question and I think it’s important and I think it’s essential. There was a move at Fort Leavenworth to rewrite [FM 3-24] and there are people at Fort Leavenworth who don’t like the way [FM 3-24] got done . . . and they wanted to make sure there was nobody involved from the previous writing effort. Once General Petraeus got wind of the rewriting process, he expressed some concern that the force had not yet mastered the doctrine and was not ready for a new version, and when that filtered back to Leavenworth it stopped the process temporarily.

With Petraeus now out of the military and the CIA, it remains an open question as to how far his influence extends. FM 3-24’s rewrite was not a simple exercise. The release date was constantly pushed back as the revised manual was evaluated against lessons learned in Iraq and Afghanistan and as the US position on engaging in irregular war evolved. The second edition was finally released in May 2014 and is discussed in the final chapter.\(^{243}\)

### Conclusion

FM 3-24 was hailed ‘the most academically influential manual in military history’.\(^{244}\) FM 3-24 constituted a watershed in military thinking, elevating

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\(^{238}\) Peters remained one of the most strident critics. In an email to the author, dated 27 May 2012, he wrote: ‘It becomes more obvious each day how comprehensively the Petraeus COIN doctrine has failed in Iraq and is failing in Afghanistan.’


\(^{240}\) Nagl and Fick (2009).


\(^{242}\) Crane II.

\(^{243}\) Note [http://smallwarsjournal.com/blog/coin%E2%80%88center-seeks-input-on-fm-3-24-rewrite] (a. 20 September 2014). In an email to the author, dated 5 September 2014, Crane suggested Petraeus was now further detached from official influence given the circumstances of his resignation from the CIA. Crane wrote: ‘His influence is sorely missed. There is no champion for either COIN or StabOps [stability operations] in the US government, and those communities are now disjointed, aimless, and often competing for scarce resources.’

\(^{244}\) West (2008: 120).
hearts and minds over coercive violence; the defence of civilian populations over offensive action against enemy forces; distributing forces among the people over air power and other large conventional force; and a whole of government over a purely military approach.\textsuperscript{245} FM 3-24 directly challenged those who assumed the success of Operation Desert Storm and apparent confirmation of the ‘Revolution in Military Affairs’ would generate a ‘smaller, more lethal, and more rapidly deployable’ army: it was a ‘direct affront to the way much of the [US] army’ and arguably the US military, saw ‘itself’.\textsuperscript{246} FM 3-24 and, to some extent, FM 3-07, ‘portray a somewhat counterintuitive model for prevailing in these postmodern conflicts’.\textsuperscript{247}

This chapter has examined FM 3-24’s background, charting its genealogy, genesis, development, audiences, responses and institutionalization. What emerges is a doctrine revolutionary in its scope, evolution, construction and nascent entrenchment, if not in its theoretical foundations. The next chapter explores aspects of FM 3-24’s construction more precisely, employing the three pathways introduced in Chapter 1 to determine how, and to what effect, international law manifested itself in FM 3-24’s construction.

The next two chapters are central to this book’s argument about international law’s important but underappreciated influence in the design and execution of modern US COIN doctrine. This chapter employs the pathways advanced at the outset of the book to examine how, and to what effect, international law impacted FM 3-24’s construction. The chosen pathways are intended to help determine how much or how little and why international law mattered in the creation of the new US counterinsurgency doctrine. FM 3-24’s implementation is the focus of Chapter 5.

Let us recall, briefly, the focus of each of the pathways. The first pathway, dealing with international law’s ideational pull, is interested in the extent to which FM 3-24 employs the idea of the rule of law and the degree to which deference to the rule of law led to greater cognisance of international law. More specifically, this pathway tracks how rule of law was exemplified in the process that constructed the doctrine, its prominence in the final product, and how that prominence impacted prescriptions on the use of force and detention operations. Emphasis on the rule of law deepened and entrenched US commitment to certain LOAC and international human rights law principles. The second pathway is interested in how powerfully legality determines legitimacy in FM 3-24. That is, it seeks to examine the relationship between legality and legitimacy in the doctrine, and highlight international law’s role in demonstrating and in articulating legitimacy within modern counterinsurgency operations. Finally, the third pathway examines international law’s mandatory influence. That is, how international law mandated certain outcomes, primarily through its interaction with domestic law and domestic institutions. This mandatory influence resolved uncertainty about the use of torture and facilitated changes to key aspects of the doctrine regarding the use of force.
Approach

FM 3-24 comprises over 150,000 words, and is actually shorter than several of the drafts that preceded it. The writing team received hundreds of thousands of words of feedback on the draft manual at the February 2006 vetting conference and after it was circulated in the field in June 2006. In compiling this chapter I have had access to, and retained electronic copies of, the drafts and much of the feedback. My interviews with individuals associated with the writing process produced around twenty hours of oral testimony, supplying accounts of particular decisions and motivations. Though one must be wary of revisionism and sceptical of relying excessively on oral material, the interview material helps to elucidate the utility of the pathways and international law’s impact. Access to FM 3-24’s drafts facilitates a credible analysis and corroboration of the trajectory of international law’s influence, given the first edition, as released in December 2006, remains unchanged.

This chapter focuses on particular parts of the drafts and the final product to explore each of the pathways and determine international law’s impact. Where possible, I seek to use the material available to explain how this impact relates to the doctrine as a whole. In several cases, this will mean citing extracts of the drafts or final product to demonstrate the scale of changes made and present a fuller picture of the doctrine that emerged.

Pathway I: International Law’s Ideational Pull

FM 3-24’s legal annex (Legal Annex) would appear to be the logical focal point for the examination of international law’s ideational impact and rule of law starting point for US counterinsurgency operations. Actually, it is not. This section will show how much of the rule of law’s interaction occurs outside the Legal Annex in FM 3-24’s main body. The rule of law is not easily disentangled from strategic military considerations in FM 3-24; it is wholly enmeshed with them. As the fourth edition of the Rule of Law Handbook for judge advocates stated: ‘[E]very operation undertaken during a counterinsurgency—offensive, defensive, or stability—has a rule of law component.’

The Legal Annex states the establishment of the rule of law ‘is a key goal and end state’ in counterinsurgency, but nonetheless offers a relatively formulaic definition of key aspects of the rule of law.

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1 ROLH (2010: 21).  
2 FM 3-24: [D-38] (original emphasis).
A government that derives its powers from the governed and competently manages, coordinates, and sustains collective security, as well as political, social, and economic development. This includes local, regional, and national government.

**Sustainable security institutions.** These include a civilian-controlled military as well as police, court, and penal institutions. The latter should be perceived by the local populace as fair, just, and transparent.

**Fundamental human rights.** The United States Declaration on Human Rights and the International Covenant for Civil and Political Rights provide a guide for applicable human rights. The latter provides for derogation from certain rights, however, during a state of emergency. Respect for the full panoply of human rights should be the goal of the host nation; derogation and violation of these rights by HN security forces, in particular, often provides an excuse for insurgent activities.

This description grossly understates the rule of law’s impact in the doctrine, particularly in so far as it affects the use of force.

As explained in the last chapter, one of the historical principles of counterinsurgency uncovered was that ‘security under the rule of law is essential’. A simplified version of this principle appeared in the initial draft of January 2006, but emerged only as ‘security under the rule of law’. By the June draft, personally edited by Petraeus, this had evolved to ‘establish security under the rule of law’. The words ‘are essential’ were added in time for the final version. The rule of law’s importance in the doctrine increased dramatically between the initial draft and the final version released in December 2006.

What is notable is how quickly the vetting conference in February 2006 fastened on the rule of law. As Crane remembered, when asked where ‘security under the rule of law’ came from and what he understood the rule of law to mean in the context of FM 3-24:

A lot of [the changes] came from dealing with Sarah [Sewall] and some of her people. There were issues at the vetting conference—the whole idea that it is not just security but how you achieve it became important. We started getting all this input that security was important and the rule of law was important, so I thought I would combine both ideas. The point we were trying to make there is that it is not enough to achieve security by itself if the backlash is [collateral damage etc]. . . . I had been involved with a number of projects talking about the importance of the rule of law, so it [had] been a big push. I thought it made a good point: it is not just security but security the right way. . . . In counterinsurgency they are inextricably linked.

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3 See FM 3-24: [1-131]–[1-133].

4 Crane.
There was an immediate impact following the vetting conference, as the revised draft of FM 3-24’s first chapter, revealed in the March–April 2006 edition of Military Review, illustrates. In addition to a specific section on the rule of law, including a reference stating soldiers ‘must be aware of the legal procedures applicable to their conduct and support them’\(^5\) (whereby ‘their’ refers to the conduct of rule of law institutions) another section connects the use of force directly to the rule of law:\(^6\)

Any use of force produces many effects, not all of which can be foreseen. The more force applied, the greater the chance of collateral damage and mistakes. Enemy propaganda will portray kinetic activities as brutal. Restrained force also strengthens the rule of law the counterinsurgent is trying to establish.

Mark Martins also recalled the importance of the vetting conference to providing the writing team with ‘a dose of what human rights organisations’ thought of ‘this Galula heavy manual’.\(^7\) As a result, Crane asked Martins to assist with improvements. Following the conference, Martins spent time with the writing team on the sections relating to law and legitimacy and rewrote the Legal Annex. He remembered offering approximately one and a half pages with places where he thought the rule of law could be used, which ‘generally survived’.\(^8\) The changes to the ‘security under the rule of law’ historical principle are striking.\(^9\) This was not limited to packaging: one explanatory paragraph in the initial draft became three after the February vetting conference; these paragraphs, reproduced below, were constantly amended until the final version was released in December 2006. Unaffected text remains in plain font. Text with a strikethrough is text that appeared in the initial draft but was later deleted; italicized text was added in drafts following the vetting conference and retained in the final version:

**SECURITY UNDER THE RULE OF LAW IS ESSENTIAL**

1–59 1–131 The cornerstone of any COIN effort is security for the civilian populace. Without a secure environment, no permanent reforms can be implemented, and disorder will spread. To establish legitimacy, security activities need to move from the realm of major combat operations into the realm of law enforcement. If commanders transition security activities from combat operations to law enforcement as quickly as feasible. If insurgents are seen as criminals, they will lose public support. Using a legal system if

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6 Cohen, et al. (2006: 52); cf. FM 3-24: [1-150], which puts the point in even stronger terms.
7 Martins. 8 Martins.
9 Davidson also recalled Martins’ important role at Fort Leavenworth: ‘He was key in FM 3-24. He was sitting right behind me at the conference and talking about the legal pieces—he has been Petraeus’ right hand man for a while—I remember sitting there and turning to him and saying “you’re the only JAG here, speak up”—then it started pouring out.’
they are dealt with by an established legal system established in line with local culture and practices to deal with such criminals enhances the HN’s legitimacy, the legitimacy of the host government will be enhanced. This process will take time, but Soldiers must be aware of the legal procedures applicable to their conduct and work to support them. They must also assist in the establishment of the indigenous institutions that will sustain that legal regime, including police forces, court systems, and penal facilities. Soldiers and Marines help establish HN institutions that sustain that legal regime, including police forces, court systems, and penal facilities. It is important to remember that the violence levels must be reduced enough for police forces to maintain order prior to any transition; otherwise, COIN forces will be unable to secure the populace and may lose the legitimacy gained by the transition.

1-132 Illegitimate actions are those involving the use of power without authority—whether committed by government officials, security forces, or counterinsurgents. Such actions include unjustified or excessive use of force, unlawful detention, torture, and punishment without trial. Efforts to build a legitimate government through illegitimate actions are self-defeating, even against insurgents who conceal themselves amid non-combatants and flout the law. Moreover, participation in COIN operations by US forces must follow United States law, including domestic laws, treaties to which the United States is a party, and certain HN laws. (See appendix D.) Any human rights abuses or legal violations committed by US forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term COIN efforts.

1-133 Every action by counterinsurgents leaves a ‘forensic trace’ that may be required sometime later in a court of law. Counterinsurgents document all their activities to preserve, wherever possible, a chain of evidence. Accurate documentation can also be an important means to counter insurgent propaganda.

When interviewed in November 2008, Martins remembered one suggested amendment he made that ‘didn’t quite make it’: ‘Every action of the counterinsurgent should be anchored in law’. That exact line appeared as the opening line of [1-80], which became [1-132], in the May 2006 draft (see Figure 4.1). Of the entire subsection dealing with ‘security under the rule of law’ in the May draft, they are the only words in Crane’s edited version with a red line drawn through them. Asked what prompted the deletion, Crane thought it may have been done because the words were perceived as ‘redundant’; that the tenor of that sentence was already imbued in the subsection without needing to be so ‘graphically stated’.10

Crane’s recollection is supported by the other changes introduced after the vetting conference, appearing in the May draft, which directly associate the rule of law with the ‘main objective’ of counterinsurgency: legitimacy. Although this pertains to the next pathway, it is relevant here because it

10 Crane.
informs the ‘security under the rule of law is essential’ principle. An earlier paragraph,\textsuperscript{11} speaks of ‘the presence of the rule of law’ as ‘a major factor in assuring voluntary acceptance of a government’s authority and therefore its legitimacy’. The ‘essence of the rule of law’ is defined as ‘government respect for rules—ideally ones recorded in a constitution and in laws adopted through a credible, democratic process’. The rule of law is said to represent ‘a powerful potential tool for counterinsurgents’, whereby a government’s respect for pre-existing and impersonal legal rules can provide the key to gaining it widespread, enduring societal support.

When interviewed, Martins pointed to these paragraphs to underline the relationship of law with counterinsurgency. Martins suggested the ‘idea’ of law, the very ‘mechanism that makes it law’, underpins why ‘law is a good trick in counterinsurgency’.\textsuperscript{12} For Martins, ‘the law and the rule of law programs, although very modest and with very uneven results, had a significant role in the surge’. Based on his time on the ground in Iraq in 2007, Martins claimed the rule of law’s use as a founding idea ‘was a new way of presenting it and it captured the imagination of a lot of the Iraqis’.\textsuperscript{13} He has continued to assert this in relation to Afghanistan, where in 2009 he became the first JAG to serve in a command role (as commander of detainee and rule of law operations). These claims are explored in Chapter 5.

Other participants in the writing process acknowledged the rule of law’s importance, albeit in different ways. Nagl was more circumspect than Martins. He affirmed the presence of ‘respect for the rule of law’ but suggested its prevalence was due primarily to ‘an understanding of what it means to be a legitimate government, so it’s twice removed, legitimate governance follows the rule of law’.\textsuperscript{14} Matthew Waxman, who was brought into the Pentagon to advise on detainee affairs during the Iraq conflict in the wake of the Abu Ghraib crisis and who advised on aspects of FM 3-24, also highlighted the

\textsuperscript{11} FM 3-24: [1-119]. \textsuperscript{12} Martins. \textsuperscript{13} Martins. \textsuperscript{14} Nagl.
discussion within FM 3-24 of ‘building rule of law institutions both in terms of the mission of building rule of law institutions and capability but also in terms of building public trust and confidence’. For Waxman, these two facets illustrate the importance of ‘perceived compliance with legal rules and legal processes’ by counterinsurgents and the government they are supporting. ‘One of the lessons of both Iraq and Afghanistan,’ Waxman argued, was ‘that the perceived failure to do so can have potentially strategic consequences.’\(^{15}\) Mattis, meanwhile, recounted the ‘classical use of law’ to ‘protect those on the margins, to protect the vulnerable’.\(^{16}\)

FM 3-24 stresses illegal actions by counterinsurgents are destructive to the mission, directly linking the rule of law with the use of force. ‘Using force precisely and discriminately strengthens the rule of law that needs to be established,’\(^{17}\) describes the second paradox of counterinsurgency detailed in FM 3-24 (‘Sometimes, The More Force Used, the Less Effective It Is’). This language was continually edited, including handwritten edits by Petraeus to the June 2006 draft, in order to link indiscriminate and disproportionate use of force and the rule of law more precisely. As we will see, close adherence to principles of distinction and proportionality is described in the doctrine as buttressing the rule of law, which in turn fosters attainment of the main objective: legitimacy.

Reversing reliance on overwhelming firepower was a key goal in FM 3-24. The 2005 Military Review article by Chiarelli and Michaelis stressed this. ‘Kinetic operations would provide definable short-term wins’ the US Army was historically comfortable with, so the authors argued, but would ultimately be their ‘undoing’.\(^{18}\) FM 3-24 is clear: ‘military actions by themselves cannot achieve success in COIN’.\(^{19}\) Political, not military, solutions are preferred.\(^{20}\) Placing a disproportinate emphasis on killing and capturing the enemy rather than securing and engaging the populace, and ignoring peacetime government procedures, including legal procedures, are given as examples of unsuccessful practices.\(^{21}\) As Sewall noted in her foreword to FM 3-24, historically ‘[c]onventional US doctrine has implicitly justified collateral damage in the name of decisive victory’.\(^{22}\) This is emphatically not the case in FM 3-24. Here, because the ‘civilian is fundamental to the counterinsurgency mission’, the consequences of excessive force and civilian deaths ‘finally registers on the radar’.\(^{23}\)

The change of mindset regarding the use of force sought by FM 3-24 is noticeable given the comparatively small loss of civilian life in Iraq compared

\(^{15}\) Waxman.  
\(^{16}\) Mattis.  
\(^{17}\) FM 3-24: [1-150].  
\(^{18}\) Chiarelli and Michaelis (2005: 8).  
\(^{19}\) FM 3-24: [1-156].  
\(^{20}\) FM 3-24: [1-123].  
\(^{21}\) FM 3-24: Table 1-1.  
\(^{22}\) FM 3-24: xxviii.  
\(^{23}\) FM 3-24: xxix, xxvi. See also West (2008: 123, 139).
to previous US counterinsurgency campaigns. As Kahl has observed, adjusting for population size and duration, ‘civilian deaths in Iraq through the end of 2006 were 11–17 times lower than in the Philippines’. Civilian deaths ‘attributable to direct US action and crossfire through the end of 2006 were 17–30 times lower than those from bombing and shelling alone in Vietnam’. Kahl detailed the rigorous vetting process undertaken by the US military in respect of force used in the initial stages of the 2003 Iraq invasion, which were marked by large-scale conventional operations: ‘By the time a target was actually struck, it had been vetted by dedicated intelligence officers and reviewed three or four times by judge advocates for potential Law of War violations’.

A similar level of scrutiny was practically impossible and hardly anticipated once counterinsurgency operations unexpectedly became the norm. Operations rapidly shifted from the ‘orthodox’ battles US forces had trained for. Before too long, US forces were criticized for violating the principle of distinction, for excessive civilian casualties and collateral damage, as well as for dubious interpretations of ‘hostile act’ and ‘hostile intent’ on the part of civilians. In the main, US forces were accused of mounting intensive campaigns in major civilian centres with scant concern for civilian casualties. As Kahl summarized:

The failure of the military to adequately plan or train for both the stability operations and the counterinsurgency mission that confronted US forces once Baghdad fell, however, compounded this problem, contributing to many of the most egregious examples of noncompliance during the early occupation period. . . . Nobody had a plan, and the military failed to adequately prepare and train US forces for stability and counterinsurgency operations.

Although certain units made adjustments, these were not widespread. Perceptions of illegality persisted, particularly regarding the lack of positive discrimination between civilians and insurgents and, consequently, disproportionality. Mistakes were magnified in the two assaults on Fallujah and the heavily publicized incident in Haditha, after which ‘senior US commanders in Iraq ordered immediate refresher training to reinforce appropriate rules of engagement’ and ‘the importance of complying with the Geneva Conventions’. Regular smaller-scale incidents suggested routine violation of the principles of distinction and proportionality. Thomas Ricks asserted such

\[\textit{Note} \text{ Strachan and Scheipers (2011: 9): ‘Paradoxically, the proportionate increase in the number of those civilians who died in wars at the end of the twentieth century, if true, may be no more than a reflection of the dramatic decline in overall number of war-related deaths’.
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behaviour did even more damage than episodes like Haditha. In a 2006 survey, 29 per cent of soldiers and 33 per cent of Marines revealed their commanders did not emphasize such principles. More alarmingly, roughly half the soldiers and an even smaller percentage of Marines surveyed ‘said they would report a fellow unit member who injured or killed a non-combatant’.

As Kahl recorded, ‘one of the explicit goals’ of the Counterinsurgency Academy set up by General Casey in Taji, Iraq, in early 2006 was ‘to avoid many of the mistakes, including abuses of civilians, that occurred during the early occupation period’. In April 2006, Peter Chiarelli, who was by this stage commander of the Multi-National Force in Iraq, ordered all commanders in Iraq to investigate ‘all instances that result in the death or serious wounding of an Iraqi civilian, or that causes property damage of $10,000 or more, regardless of an accusation of misconduct’. About this time, the drafts of FM 3-24 became more sensitive to LOAC principles, especially in highlighting the ‘need for counterinsurgent forces to use the least amount of force possible to reduce risks to civilians’.

FM 3-24 makes clear the need for all officers to be well versed in LOAC. The ninth paradox, ‘many important decisions are not made by generals’, underlines the potential consequences of the decisions of junior officers. FM 3-24 directs officers not simply to master doctrine but to ‘be trained and educated to adapt to their local situations’ and to understand ‘the legal and ethical implications of their actions’. Excessive use of force is said to undercut the whole of government (or ‘full-spectrum’) approach, whereby using force indiscriminately or disproportionately ‘can frequently undermine policy objectives at the expense of achieving the overarching political goals that define success’.

When interviewed, Petraeus stressed the combination of offence, defence and stability operations within counterinsurgency was the critical element, the ‘biggest of the big ideas’ in FM 3-24. For him, paragraph [1-106] was key to understanding current missions. In fact, Petraeus opened FM 3-24 and turned directly to that paragraph: ‘All full spectrum operations executed overseas—including COIN operations—include offensive, defensive, and stability operations that commanders combine to achieve the desired end state.’

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34 Kahl (2007: 35–6).
35 Kahl (2007: 29–30), citing interviews with or articles by key COIN advisers, noting the influence of advice from the Carr Center, Human Rights First, Human Rights Watch and the ICRC, the new COIN Academy in Iraq, and new training courses and scenarios in the US.
36 Petraeus. See also Kaplan (2013: 163–4).
(As we will see in the next chapter, McChrystal believed the rule of law was vital to enabling this comprehensive approach to come together.) This shift to full-spectrum operations and a required ‘unity of effort’, FM 3-24 asserts, ‘places tremendous importance on the measured application of force’.\(^{37}\)

Returning to the rule of law’s relationship with the use of force in FM 3-24, the first paradox of counterinsurgency specified in FM 3-24 maintains ‘ultimate success in COIN is gained by protecting the populace, not the COIN force’.\(^{38}\) The centrality of minimizing the use of force is reinforced by explanations of the next four paradoxes of counterinsurgency detailed in the doctrine. Any increase in the application of force is said to heighten ‘the chance of collateral damage and mistakes’, creating optimal conditions for ‘insurgent propaganda to portray lethal military activities as brutal’. By contrast, ‘using force precisely and discriminately strengthens the rule of law that needs to be established’.\(^{39}\)

As mentioned earlier, whether to stipulate the use of ‘minimum’, ‘measured’ or ‘appropriate’ force was intensely debated during drafting.\(^{40}\) In the initial draft, the language chosen was ‘measured’ force, which eventually became ‘the appropriate level of force’. This change occurred after the June 2006 draft (intended to be the last before FM 3-24’s release) had been edited by Petraeus and was a product of heated discussions between other generals and the writing team in July 2006. As Crane has written elsewhere, this declared imperative ‘underwent the most revision’, with the final wording intended to underline that while ‘minimum necessary force is the general rule’, sometimes ‘overwhelming force may be useful’.\(^{41}\) When pressed, Crane emphasized that debate over the precise language of the imperative, which lay at the heart of the doctrine and the weight to be afforded to killing and capturing, continued right until the very end of drafting, and at the highest levels: \(^{42}\)

The Brits talked a lot about using minimum force. We had this debate and elected for measured force. There was general acceptance for a few drafts on measured force … Frank Hoffman and I had a debate and agreed it needed to be more than just ‘minimum’. So we decided on measured and sold the Marines on that. Eventually the debate opened up again during the last phase in July [2006] and General Petraeus himself finally made the determination that…’we have got to kill some guys’…the final call was [his] and he came up with the final terminology.

\(^{37}\) FM 3-24: [2-4].  \(^{38}\) FM 3-24: [1-149].  \(^{39}\) FM 3-24: [1-150].  
\(^{42}\) Crane. In his edits to the June 2006 (and supposedly final) draft, Petraeus added text to the explanatory paragraphs below this imperative, referring to important training ‘in methods to shape situations so that the “strategic general” is less likely to have to make life or death decisions in the blink of an eye’.
On the specifics of an ‘appropriate level of force’, FM 3-24 maintains: ‘an operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents’. The need for ‘commanders to adopt appropriate and measured levels of force and apply force precisely’ to avoid ‘unnecessary loss of life or suffering’ is deemed critical. The question of ‘who wields force’ is also introduced, with host nation forces preferred where possible to ‘ensure that the application of force is appropriate and reinforces the rule of law’. Training of local forces is to be ‘founded upon the rule of law’; such forces are to be characterized by ‘respect for human rights’ and treatment of prisoners, detainees and suspects in accordance ‘with the norms of international military law’.

Frank Hoffman, who was the primary author of Chapter 7 of FM 3-24, on Leadership and Ethics for Counterinsurgency, claimed he wanted FM 3-24 to prescribe ‘discriminate’ force, but ultimately lost that fight when ‘appropriate’ was chosen as a compromise. Nevertheless, specifics on ‘appropriate level of force’ address many of the issues regarding discrimination and proportionality that some US forces had reportedly disavowed in Iraq and Afghanistan. There is a concerted emphasis on correcting the use of excessive or disproportionate force, despite the desire of the generals to add ‘a little more teeth’ in the final version. Asked about the impact of Haditha and similar events in the drafting process, Nagl recalled:

Con and I and the chapter authors were … very conscious of what was going on in all of [those] events … [I]t wasn’t just a reaction to Haditha but a reaction to the pattern of thought that allowed and enabled Haditha to happen.

Chapter 7 of FM 3-24 tackled this pattern of thought, the so-called ‘frustration factor’, and responded to the increased demand for law-based actions of junior officers. Despite other pre-existing field manuals covering leadership and ethics, FM 3-24 devotes an entire chapter to the subjects. As Hoffman remembered, there was never an argument among the writing team about its necessity. Chapter 7 directs commanders to ‘serve as a moral compass’, which is described as the point of distinction from insurgents:

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43 FM 3-24: [1-141]. 44 FM 3-24: [1-143]. 45 FM 3-24: [6-29], Tables 6-1, 6-2. 46 Hoffman. 47 Crane. 48 Nagl. See also Kahl (2007: 35): ‘In this regard Haditha may well mark a turning point.’ 49 See, for example, FM 6-22, Army Leadership: Competent, Confident, and Agile, 2006. 50 Hoffman. 51 FM 3-24: [7-9]–[7-10].
Senior commanders must maintain the ‘moral high ground’ in all their units’ deeds and words. Information operations complement and reinforce actions, and actions reinforce the operational narrative. All COIN force activity is wrapped in a blanket of truth. Maintaining credibility requires commanders to immediately investigate all allegations of immoral or unethical behaviour and provide a prudent degree of transparency.

Two examples of the requisite standard are detailed. The first refers to the conduct of a particular US officer preventing ‘the My Lai massacre of the Iraq war’.

The second outlines an incident in Iraq in early 2006 when a number of officers were killed or wounded in an IED attack. Wanting to respond, one officer reportedly claimed, ‘there would be a pile of dead Arabs on the street’ the next day. His commander advocated a different approach:

He reminded [them] that a very small percentage of the populace was out to create problems. It was that minority that benefited from creating chaos. The enemy would love to see an overreaction to the attack, and they would benefit from any actions that detracted from the Marines’ honour or purpose. The commander urged his Marines not to get caught up in the anger of the moment and do something they all would regret for a long time.

The pervasiveness of the principles of distinction and proportionality is made clear from two subsections in Chapter 7: ‘Ethics’; and ‘Proportionality and Discrimination’. The Ethics subsection begins by noting the requirement for all officers to obey LOAC, which is described as imposing ‘the highest standards of moral and ethical conduct’. Whereas in conventional conflicts, ‘balancing competing responsibilities of mission accomplishment with protection of non-combatants is difficult enough’, counterinsurgency is described, ‘ethically speaking’, as being ‘much more complex’. Within the Ethics subsection, proportionality is couched in terms of ‘values, requiring measures to limit destruction, especially vis-à-vis “collateral harm”’. Decisions to use ‘excessive force’ are said to ‘alienate the local populace’. Differentiating between where lethal force is necessary and where it is counterproductive is labelled ‘the art of command’. The subsection notes one of the most ‘effective’ ways insurgents ‘undermine and erode’ domestic and international will is to portray counterinsurgents as illegitimate and unethical by their ‘own standards’. Thus, ‘preserving non-combatant lives is central to mission accomplishment’, as is the need to follow ‘internationally recognized human rights standards’.

The Proportionality and Discrimination subsection that follows echoes a strikingly similar chord. What is fascinating about this subsection is how closely it mirrors the language of AP I. The early drafts of FM 3-24 show this

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52 FM 3-24: [7-13].
53 FM 3-24: [7-20].
54 FM 3-24: [7-21], [7-24].
55 FM 3-24: [7-22].
56 FM 3-24: [7-24].
57 FM 3-24: [7-25] (emphasis added).
was the clear intention of the writing team. This is revealed in the extract below, which shows a portion of the May 2006 draft complete with Crane’s handwritten edits. Until this point this specific subsection had barely changed since the January and February editions. The original text of the May draft is in normal font, with any additions italicised and deletions struck through:

7-41. Proportionality and discrimination require combatants not only to minimize harm to non-combatants, but also to make positive commitments to—

* Preserve non-combatant lives by limiting the damage they do.
* Assume additional risk to minimize potential harm.

7-42. Proportionality requires that the advantage gained by a military operation is not exceeded by the collateral harm. Additional Protocol I to the Geneva Conventions stipulates that Combatants must ‘take all feasible precautions in the choice of means and methods of attack, with a view to avoiding, and in any event, to minimizing minimize, incidental loss of civilian life, injury to civilians, and damage to civilian objects. In conventional operations, proportionality is usually calculated in simple utilitarian terms: civilian lives and property lost versus enemy destroyed and military advantage gained.

7-43. But in counterinsurgency operations, advantage is not best calculated in terms of how many insurgents are killed or detained, but rather which enemies are killed or detained. If certain key insurgent leaders are essential to the insurgents’ ability to conduct operations, then military leaders need to consider their relative importance when determining how best to pursue them. In counter-insurgent environments, the number of civilian lives lost and property destroyed needs to be measured against how much harm the targeted insurgent could do if he is allowed to escape. This does not mean the enabling permissions will be unlimited. If the target in question is relatively inconsequential, then proportionality requires combatants to forego severe action, or seek non-combative means of engagement.

7-44. Further, when conditions of civil security exist, the professional military ethic prohibits counter-insurgent forces from engaging in any courses of action in which non-combatants will knowingly be harmed. However, this is not to say that counterinsurgent forces, like police, are prohibited from taking some risks that might place civilian lives in danger. But those risks are subject to the same considerations of proportionality: the benefit anticipated must outweigh the risks taken. For example, in most locales police are permitted to engage in high-speed chases, even though such pursuits can result in accidents in which innocent bystanders are killed. But police are not permitted to engage in such pursuits, or any other activity, if they know civilians will be killed or seriously injured. Further, if the chase takes them through populated areas, they may have to forego it.

7-45. Discrimination requires combatants to differentiate between enemy combatants who represent a threat and non-combatants who do not. In conventional operations, this restriction means that combatants cannot intend to harm
non-combatants; though proportionality permits them to act knowing that some non-combatants may be harmed. In policing situations, combatants cannot act morally in a way that they know bystanders may be harmed.

7-46. In insurgencies, not only can it be difficult to distinguish combatant from non-combatant, it is also difficult to distinguish whether the situation permits harm to non-combatants. Two levels of discrimination are thus necessary:

* Deciding between targets.
* Determining an acceptable risk to non-combatants and bystanders.

7.47. Discrimination also applies to the means by which combatants engage the enemy. The law and morality of war prohibit the use of certain weapons, such as chemical munitions, soft lead bullets, as well as others (See FM 27-10) against combatants. In counterinsurgency environments, combatants must not only discriminate between kinds of weapons but also whether kinetic or lethal means are permitted in the first place. Where civil security exists, even tenuously, counterinsurgents are obligated to pursue non-combat and non-lethal means as a first resort, utilizing lethal force only when necessary.

Recall here the earlier discussion in this book about the disputed applicability of AP I, and the fact that the US is not a party to either of the Additional Protocols. What is clear from the extract above is that while the specific legal references were omitted, the meaning was unchanged. Indeed, the language goes further than AP I in some instances. When interviewed, Crane explained why the legal references were removed:\(^{58}\)

We were told by the lawyers to not put the legal references in; they were going to handle them in their Annex. The sense was we were not qualified to talk about the legal stuff and that needed to be handled by the lawyers. Bottom line is that it got taken out of the manual and stuck back into the [Legal Annex].… No one was willing to fight the lawyers when they said certain things had to be done, so they won those battles without a whole lot of fight. They basically said: we need to handle that because we will word it right, you guys might say something that will get us in trouble.

When pressed on why much of the legal content remained, potentially in a stronger form than the official US position, Crane suggested:\(^{59}\)

The lawyers kept saying that they wanted to control that language so we don’t either lock the US into a position… [T]hey were the ones that pushed against talking about proportionality in the text… [but we insisted] this was something we had to talk about because it reinforces the points we were trying to make about what is different about this kind of war. General Petraeus’ big goal in Chapter 7

\(^{58}\) Crane.

\(^{59}\) Crane, who said it would have been much easier, had Martins been able to stay on longer: ‘we substituted one smart guy for a whole school… it was different’.
was he wanted to make sure it represented the growing frustration that develops in this kind of war and how commanders get pushed and tempted to do things that can be very counterproductive because of this frustration that the enemy plays on. That influenced a lot of what went on [in Chapter 7]. Petraeus really wanted to make sure that came out in the Chapter.

This was borne out in the final version of Chapter 7. Indeed, when editing the June 2006 draft, which was intended to be the final version, Petraeus wrote at the top of the chapter: ‘This is a great Chapter. I’m tempted to say it should be an article in *Military Review*’ (see Figure 4.2).\(^{60}\)

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**Figure 4.2.** ‘This is a great Chapter…’


Petraeus later said:\(^{61}\)

There are huge ideas in there [Chapter 7] on rule of law. And they captured our experience up to that time. Is it a big idea? Yeah. Live your values. It is a huge idea. It is a big enough idea for me to communicate it to all of our troops because I was concerned. And, by the way, we haven’t always done this.

Tellingly, the extracts highlighted above on ‘Proportionality and Discrimination’ remained largely intact and in some cases even stronger, as illustrated below:

... 7-33. **Further** When conditions of civil security exist, the professional military ethic prohibits counterinsurgent forces from engaging in any courses of action in which non-combatants will knowingly be harmed. **Soldiers and Marines may not take any actions that might knowingly harm non-combatants.** However, this is not to say that counterinsurgent forces, like police, are prohibited from taking

\(^{60}\) Original emphasis. \(^{61}\) Petraeus.
some risks that might place civilian lives in danger. This does not mean they cannot take some risks that might put the populace in danger. But those risks are subject to the same rules of proportionality. The benefit anticipated must outweigh the risk taken.

7-46. 7-35. In insurgencies COIN operations, not only can it be difficult to distinguish combatant from non-combatant, it is also difficult to distinguish whether the situation permits hard to non-combatant. It is difficult to distinguish insurgents from non-combatants. It is also difficult to determine whether the situation permits harm to non-combatants. Two levels of discrimination are necessary:

* Deciding between targets.
* Determining an acceptable risk to non-combatants and bystanders.

7-47. 7-36. Discrimination also applies to the means by which combatants engage the enemy. The law and morality of war prohibit the use of certain weapons, such as chemical munitions, soft lead bullets, as well as others (See FM 27-10) against combatants. In counterginsurgeny environments, combatants must not only discriminate between kinds of weapons but also whether kinetic or lethal means are permitted in the first place. Where civil security exists, even tenuously, counterinsurgents are obligated to pursue non-combat and non-lethal means as a first resort, utilizing lethal force only when necessary. The COIN environment requires counterinsurgents to not only determine the kinds of weapons to use and how to employ them but also establish whether lethal means are desired—or even permitted. (FM 27-10 discusses forbidden means of waging war.) Soldiers and Marines require an innate understanding of the effects of their actions and weapons on all aspects of the operational environment. Leaders must consider not only the first order, desired effects of a munition or action but also possible second- and third-order effects—including undesired ones. For example, bombs delivered by fixed-wing closed air support may effectively destroy the source of small arms fire from a building in an urban area; however, direct-fire weapons may be more appropriate due to the risk of collateral damage to nearby buildings and non-combatants. The leader at the scene assesses the risks and makes the decision. Achieving the desired effects requires employing tactics and weapons appropriate to the situation. In some cases, this means avoiding the use of area munitions to minimize the potential harm inflicted on non-combatants located nearby. In situations where civil security exists, even tenuously, Soldiers and Marines should pursue nonlethal means first, using lethal force only when necessary.

7-37. The principles of discrimination in the use of force and proportionality in actions are important to counterinsurgents for practical reasons as well as for their ethical or moral implications. Fires that cause unnecessary harm or death to non-combatants may create more resistance and increase the insurgency’s appeal—especially if the populace perceives a lack of discrimination in their use. The use of discriminating, proportionate force as a mindset goes beyond the adherence to the rules of engagement. Proportionality and discrimination applied in COIN require leaders to ensure that their units employ the right tools correctly with mature discernment, good judgment and moral resolve.
These sections from the final version of FM 3-24 demonstrate that the lawful prosecution of the war by military forces was viewed as critical to the writers of the doctrine: excessive use of force, human rights abuses and other legal violations are heralded as self-defeating. The importance of the principles of distinction and proportionality is apparent throughout and especially clear in Chapter 7, with the overwhelming need to protect civilians, even above fellow counterinsurgents, repeatedly stressed. The big ‘statistic’ in counterinsurgency, Martins confirmed, became ‘civilian casualties’.\(^{62}\) One aspect worth noting here is international law’s role in inculcating a sense of inertia, or internalized caution. This point builds to some extent on what Kahl has termed the annihilation/restraint paradox in the US military.\(^{63}\) Vaughan Lowe’s observations, referred to earlier, are apt: states do not act, people act for them.\(^{64}\) In war, of course, states do not fight; people and machines fight for them. The evidence above illustrates the striking degree to which LOAC, particularly the principles of distinction and proportionality, signposts the reliable (if cautionary) pathway for action.

This pathway has demonstrated the ideational influence of commitment to the rule of law through the drafting process and in FM 3-24’s final version. Specifying that establishing security under the rule of law is an essential goal in counterinsurgency operations elevated the influence of rules of law in the conduct of hostilities, particularly the way in which LOAC should constrain the use of force. As Chapter 1 of FM 3-24 outlined, ‘using force precisely and discriminately strengthens the rule of law that needs to be established’.\(^{65}\) This was not a platitude. The ways and means were specifically explicated in Chapter 7, covering leadership and ethics.

FM 3-24’s takeaway point here is that a certain level of security is required to build rule of law institutions, but that level of security is only possible through the conduct of law-abiding combat operations and the avoidance of the arbitrary use of force.\(^{66}\) Indeed, FM 3-24, despite the apparent efforts of US military lawyers, goes beyond formal US commitments to several international legal instruments, such as AP I, without these being strictly mandatory.\(^{67}\) This nexus between the rule of law and the appropriate use of force in the conduct of kinetic operations is key not only to understanding international

law’s impact but also to the reversal in military mindset attempted by FM 3-24. Close attention to the principles of distinction and proportionality throughout FM 3-24 decisively rejected the prevailing approach and prescribed a change in focus. This was path-breaking, as Nagl and Fick reminded us.68

At the time, the doctrine [FM 3-24] laid out was enormously controversial, both inside and outside the Pentagon. It remains so today. Its key tenets are simple, but radical: Focus on protecting civilians over killing the enemy. Assume greater risk. Use minimum, not maximum force.

What remains to be seen is how influential this doctrinal shift has been in the actual conduct of operations. As reported earlier, a Rule of Law Handbook: A Practitioner’s Guide for Judge Advocates (ROLH) was released by the Joint Forces Judge Advocate, US Forces Joint Command, in July 2007. This Handbook subsequently formed the basis of a five-day conference in Gettysburg, Pennsylvania, beginning in late January 2008, at which FM 3-24 was the only doctrine on the reading list. The first edition of the ROLH, which was intended to ‘serve as a catalyst to begin a more meaningful debate within the US military on the resourcing, responsibility, and doctrinal development on rule of law as a core competency’,69 made direct reference to how rule of law operations relate to counterinsurgency. Much of the focus within the Handbook was defining what was termed the ‘rule of law problem’ and the conduct of rule of law operations on the ground. The fourth edition of the ROLH, released in 2010, demonstrated the gains made and the lessons learned from the conduct of such operations, including how ‘measuring rule of law’ progress had evolved. Strikingly, that edition noted that a ‘command’s ability to establish the rule of law within its area of control’ largely depends on ‘its own compliance with legal rules’, including the capacity to eliminate the ‘seemingly arbitrary use of force’.70 In the next chapter, we will look much closer at the ideational influence of the rule of law in the FM 3-24’s implementation in Iraq and Afghanistan. The 2010 edition of the Handbook signals how FM 3-24 attempted to make uniform what had previously been ad hoc efforts to inculcate rule of law awareness throughout the US military: ‘For the first time, Army COIN doctrine formally embraced rule of law projects’.71

70 ROLH (2010: 21) (original emphasis).
71 ROLH (2010: 6).
FM 3-24 unequivocally prescribes legitimacy as counterinsurgency’s main objective. Acceptance by the population of the legitimacy of the host government, rather than the death of insurgents, is declared the key to victory.\(^{72}\) Exactly how legitimacy is to be demonstrated and articulated by counterinsurgents is the focus of this section. Counterinsurgents seeking to ‘preserve legitimacy’ are instructed by FM 3-24 to ‘stick to the truth and make sure that words are backed up by deeds’.\(^{73}\) The writing team’s initial focus on legitimacy as modern COIN’s principal objective was, it seems, to ensure operations were population-centric, not enemy-centric. ‘But the writers had a lot to learn about what legitimacy meant,’ Dr Crane conceded.\(^{74}\)

The focus on legitimacy in FM 3-24 originally reflected the heavy influence of the Small Wars Operations Research Directorate (SWORD) model. This was initially developed in the mid-1980s by Max Manwaring and has been refined in the decades since.\(^{75}\) It was instigated by a request from the then Vice Chief of Staff of the US Army, General Maxwell Thurman, who ‘wanted to know what the variables were that made a difference between winning and losing in unconventional insurgency type wars’. Manwaring, who had just moved to the Army War College after being Chief of the Central America section at the US Defense Intelligence Agency, ‘got tapped to do it’.\(^{76}\) Manwaring used a modified Delphic technique, whereby practitioners and scholars were asked about factors determinative of the outcomes of counterinsurgency campaigns they had either fought or studied. Seven factors were treated as independent variables.\(^{77}\) Based on this and other research, the model, otherwise known as the Manwaring paradigm, describes legitimacy as constituting ‘the central strategic problem’ of counterinsurgency: the centre of gravity ‘of all power’.\(^{78}\)

Manwaring insisted his role in FM 3-24 was an indirect one. What was more important was that the SWORD model’s findings still hold.\(^{79}\) Previously, these

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\(^{72}\) FM 3-24: [1-14].  
\(^{74}\) Crane (2007).  
\(^{76}\) Manwaring.  
\(^{77}\) See Manwaring and Fishel (2006: 87–9). The variables were: (1) Military actions (of intervening power); (2) Support actions; (3) Host government legitimacy; (4) Host government military actions; (5) Actions against subversion; (6) Unity of effort; and (7) External support to the insurgent. In respect of 43 cases, the first three factors were found to be individually statistically significant at the 0.05 level, while the seventh factor was significant at the 0.01 level. All seven taken together were significant at the 0.001 level, predicting the outcome of 88 per cent of cases.  
\(^{79}\) See, further, Manwaring and Fishel (2006: 29, 46–7, 193–4, 245–6). Note also at 64: ‘However, for ultimate effectiveness, the political and security forces must be able to deal with the illegal opposition on the basis of the rule of law.’
had not been readily accepted by the military. ‘The first time I briefed legitimacy to a general officer,’ Manwaring said, most likely in the late 1980s or early 1990s, ‘I was almost thrown out of his office as he did not like the word; it was not part of the military lexicon’.\(^{80}\) With time, and further experience among military leadership, ‘the word started to creep up’, Manwaring continued, ‘to the point that now it is not only accepted, it is very strongly utilized’.\(^{81}\) In 2006, Edwin Corr likened the influence of the Manwaring paradigm to George Kennan’s policy of containment.\(^{82}\) Just as Kennan supposedly ‘combined the realism of power politics with the pragmatism of American idealism’, Manwaring’s ‘legitimate governance theory’ was said to represent ‘a pragmatic foundation for national and international stability and well-being in the international security arena’.\(^{83}\)

When asked where the impetus had come for using Manwaring’s concept of legitimacy, Crane suggested it was driven initially by a personal connection.\(^{84}\)

We started with Manwaring, and the reason is because I was in the Strategic Studies Institute [at the Army War College, Carlisle, PA] and worked with Max. I was aware of Max’s work on legitimacy and… wanted to get Max involved with [FM 3-24]. The first version is Max; Max writes the first version.

The focus in this pathway is how international law came to be associated with, and directly impact, the concept of legitimacy in FM 3-24’s construction. Although the intricate relationship between international law and legitimacy is implicit in the Manwaring model, it is not explicit. This is clear from the five indicators of legitimacy listed in the initial January and February 2006 drafts.\(^{85}\) 1-52. There are five indicators of legitimacy that must be implemented by any political actor facing threats to stability. They are—

* Frequent selection of leaders in a manner considered just and fair by a substantial majority of the population.
* A high level of popular participation in or support for the political process.
* A low level of corruption.
* A culturally acceptable level or rate of political, economic, and social development.
* A high level of regime acceptance by major social institutions.

Mark Martins recalled the importance of the February 2006 Fort Leavenworth vetting conference to connecting legality with legitimacy for the purposes of FM 3-24:

\(^{80}\) Manwaring. \(^{81}\) Manwaring. \(^{82}\) Manwaring and Fishel (2006: vii). \(^{83}\) Manwaring and Fishel (2006: xv). Note also Doorey (2009: 157). \(^{84}\) Crane. \(^{85}\) Taken from the February 2006 version, which was used at the vetting conference. The definition was virtually unchanged from the January initial draft. \(^{86}\) Martins.
In February, [the drafters] got a dose of what human rights organizations... thought of this Galula heavy manual... that's when I recall Con Crane coming to me and saying 'can you take a stab at this?'... [T]hey had already fastened on Manwaring and legitimacy as a core concept but how to square that with the law was another matter.

Crane backed this version, recalling the criticisms of Manwaring legitimacy at the February vetting conference because it was viewed as too ‘Western’ a construct.\footnote{Crane, who went on to observe that ‘the dilemma you get into, which FM 3-24 does not talk about, is what happens when the local view of legitimacy is so different from yours that your popular support is risked because of your own domestic view of this other type of legitimacy, which may involve [rights regarding women, etc]. How do you resolve these different views of legitimacy? [FM 3-24] does not talk about that. That is the £500 gorilla in the room when you start talking about accepting these local views of legitimacy. What if there is something that violates international human rights law, that sort of thing.’ See also Crane (2007), and Kaplan (2013: 157–8).}

We go to the February vetting conference and people are reading that passage and saying, 'yes, but this is not legitimacy in my part of the world, this is a very Western view of legitimacy'. We kept the Manwaring piece... [emphasized] that this is our definition of legitimacy but in other areas it is different and you need to understand what that is.

The changes after the vetting conference were significant. As for the content of the overarching principle ‘legitimacy as the main objective’, three substantive paragraphs quickly became eight. Among other things, the rule of law, and its relationship with security, was identified ‘as a powerful potential force in counterinsurgency’.\footnote{May 2006 draft: [1-72].} The five indicators of legitimacy remained unchanged in the May 2006 draft, and were, in that version, attributed directly to Manwaring within the text. By the time FM 3-24 was released, that particular paragraph incorporated one additional indicator, and some important caveats.\footnote{FM 3-24: [1-116].}

1-52 1-116. There are five indicators of legitimacy that must be implemented by any political actor facing threats to stability. They are Six possible indicators of legitimacy that can be used to analyse threats to stability include the following:

* The ability to provide security for the populace (including protection from internal and external threats).

* Frequent Selection of leaders in a manner considered just and fair by a substantial majority of the population.

* A high level of popular participation in or support for the political processes.

* A low culturally acceptable level of corruption.

* A culturally acceptable level of political, economic, and social development.

* A high level of regime acceptance by major social institutions.
Surrounding explanatory paragraphs also appeared for the first time in the May 2006 draft, which retained their import and much of the structure and language through to the final version. These reveal the important link between security and legitimacy, and the consequent nexus between security, legitimacy and legality. This nexus places particular importance on the actions of counterinsurgents, and confirms the relationship between the rule of law and legitimacy. ‘The presence of the rule of law’ is described as ‘a major factor in assuring voluntary acceptance of a government’s authority and therefore its legitimacy’. The rule of law is said to represent ‘a powerful tool for counterinsurgents’, whereby a government’s respect for ‘pre-existing and impersonal legal rules can provide the key to gaining it widespread, enduring societal support’. Related to this is the necessity to transition from combat operations to law enforcement expeditiously in order to establish legitimacy through rule of law institutions, which in turn relies on reducing violence levels such that order can be maintained. Illegitimate actions are defined as acts ‘involving the use of power without authority’, including specifically the ‘unjustified or excessive use of force’ by counterinsurgents. In this respect, FM 3-24 is explicit, stating: ‘Any human rights abuses or legal violations committed by US forces quickly become known throughout the local populace and eventually around the world. Illegitimate actions undermine both long- and short-term efforts’.

FM 3-24’s final version also highlights the vital role of information operations (IO) in controlling the narrative and shaping perceptions of illegality and illegitimacy among different audiences. Counterinsurgency campaigns are described as ‘a battle for ideas’. FM 3-24 calls attention to the need for deeds to match words, highlighting how ‘any action has an information reaction’. It demands soldiers consider carefully the ‘impact on the many audiences involved in the conflict and on the sidelines’ and articulate a clear, consistent message. This resulted in a fundamental nexus between legality and legitimacy, as Crane asserted: ‘You cannot divorce the lawyers from it, especially because we understood the perception aspect of COIN. Not only does it have to be the right action it has to be perceived to

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91 FM 3-24: [1-119].
92 FM 3-24: [1-131].
93 See also Manwaring and Fischel (2006: 6): ‘the more intense and voluminous the military actions of the intervening Western power, the more likely the incumbent government is to lose to the adversary’.
94 FM 3-24: [1-132].
95 See especially FM 3-24: [1-138]–[1-140]. See also Chiarelli and Michaelis (2005: 14–15): ‘The actions of soldiers and leaders and their efforts on the ground can resonate at a strategic level in an instant. Shaping the message and tying that message to operations is as important, if not more so, to the desired individual effect as the previous five lines of operations.’
96 FM 3-24: [2-5].
97 FM 3-24: [1-140], [1-122].
be the right action. As Martins recounted, there was, even then, much ‘resistance amongst traditional army thinkers’ to the idea of ‘putting legitimacy at the core and to having these legal concepts define success’. Yet this construct has remained, perhaps in even stronger fashion, as evidenced by the following extract from the 2010 ROLH:

Legitimacy is the watchword of COIN, which means that every operation... has a rule of law component. Any act that the populace considers to be illegitimate (such as the mistreatment of detainees or other criminal acts by Soldiers acting in either their individual or official capacity, even as seemingly insignificant as the failure to obey traffic laws) is likely to discourage the populace from viewing legal rules as binding.

FM 3-24’s fusion of ethical and legal considerations is a fascinating one; the similarities between the subsections devoted to ethics, detention and the use of force are striking. Asked why there was much within FM 3-24 that ‘looked like law’ without necessarily being called such, General Mattis responded:

You’ve picked up on something that we didn’t even articulate to each other because if you take the classical use of law... and what it exists for, to protect those on the margins, to protect the vulnerable, that really is very consistent with the military’s view of itself. So you are able to address this on a moral ethical plane rather than on a strictly legal... if we had gone with a legal approach it would have been unsustainable in what we wanted doctrine to do, but on a moral ethical level the US Military prides itself on its study of history. If you study history you recognise the reality of supremacy of an ethical approach.

Mattis accepted the salience of the narrative in modern warfare and the importance of the law within it, stating officers ‘have had to become more conversant’ in LOAC. This is particularly so given the rise of ‘lawfare’, which was discussed in Chapter 2 and refers to use of law (and alleged violations of LOAC) as a weapon of war. In Mattis’ view, the consequence of the ‘information age’ is the need for all soldiers ‘to be able to explain what we are doing’. The ability to give a ‘compelling persuasive argument’ that one’s values are the right values depends very much on being fluent in law, particularly where civilian casualties are involved.

Mattis cast the issue in moral terms by stating, ‘if the strategy is not sound, not ethically based, then the operation...”

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98 Crane II. In retrospect, in addition to FM 3-24’s sections on information operations, it was timely that 2006 also witnessed the publication of Joint Publication 3-13, Information Operations, which stressed the important part of any IO plan is the commander’s guidance: see Bragg (2009: 323).
99 Martins.
100 ROLH (2010: 21) (original emphasis).
101 See especially FM 3-24: [7-9]–[7-47] and Chapter 7 generally.
102 Mattis.
103 Mattis.
is going to have a challenge’. US forces might be ‘doing the right thing’ but, ‘because of the immaculate conception of war that our laws bring with them... where the paper itself gives the enemy an advantage’, unless civilian casualties can be defended in those terms there are potentially real costs. Often this is required extraordinarily quickly. During operations in Afghanistan there was often a marginal delay, in one case just 17 seconds, between an incident occurring and it appearing on YouTube.104

Major General Jim Molan, Chief Operations Officer under General Casey in the Multi-National Force in Iraq from 2004–5, supplied an interesting example predating FM 3-24’s release of the need of the need to know, understand and implement LOAC principles as a means of demonstrating and articulating legitimacy. Molan met twice with operational lawyers in Australia in a bid to understand the principles more clearly.105 He developed a template based on the ‘proportionality, humanity, distinction, and necessity idea from the law of armed conflict’, and used it each time his authorization was sought for the use of force.106 For Molan, using the template, in addition to the constant presence of a legal adviser, was ‘a process of convincing [himself], knowing that after the event [he] may have to convince [his] supervisor or the ICC.’107 More than ever, Molan recounted, ‘the connection between the importance of being seen to be legal and being legal [was] certainly stressed in an environment where there is greater transparency due to the media’.108

Mattis asserted the military must still be pragmatic, that the US Constitution ‘is not a suicide pact’.109 He pointed to the example of President Lincoln suspending the writ of habeas corpus during the US Civil War. ‘Very seldom does a moral issue hang in the balance,’ he argued, noting in his experience, ‘there are some things that are universal’ and ‘reflected in our body of law.’110

Operationally, however, Mattis accepted there is difficulty. He observed approximately 70 per cent of Marines leave the military by the age of 22, and stressed the difficulty in fast-tracking ‘a generation of young people who grew up watching Beavis and Butthead’ to a level where ‘they can carry automatic weapons among innocent people’. Ultimately for Mattis, however, the real focus of an inquiry about the role of law is the question of values: ‘if you find a Commander who is uncomfortable talking about values or cannot

105 Molan’s account is instructive (2008: 189–90).
107 Molan.
108 Molan. See, further, West (2008: 121): ‘[FM 3-24] didn’t tell the commanders how to adjust the attitudes of their warriors. It did tell them they had to be the designers who defined what they expected their troops to do.’
109 For an exploration of the history of the phrase, see Mullender (2008).
110 Mattis.
put it in persuasive terms’ the enemy ‘will expose it and you will have tragedies, I guarantee it you will have tragedies’.\footnote{Mattis.}\footnote{Martins.}

Although Martins stressed the need for legitimacy ‘not to be reduced to what is legal’,\footnote{Martins.} William Lietzau contended law is often ‘the best guarantee’ of legitimacy: ‘that’s what we use the law for. And legitimacy can never exist outside the law’.\footnote{Lietzau.} The close relationship between FM 3-24’s subsections on ethics, proportionality and discrimination lends support to Lietzau’s depiction of law as ‘the best guide’ to legitimacy. Nagl explained the thinking behind the sub-sections in these terms.\footnote{Nagl.}

A counterinsurgency environment imposes special demands on a soldier … fighting an enemy you can’t identify, who hides among the population or uses the population as a shield … it puts special demands on leaders to create an ethical climate and to reinforce that climate and to … keep a special eye on the guy who’s the hothead. The fact that we felt the need to put the leadership and ethics chapter into [FM 3-24] illustrates that we understood these particular burdens on leaders and that we did not feel that they were being universally implemented.

International law’s importance in this respect is in articulating the legality of military tactics and strategy and in guiding the use of firepower. Graff touched upon the US tendency to misuse material power in his 2004 Iraq study, claiming, ‘power is a force which Arab cultures respect, but the cultural ignorance of [US forces] often leads to misapplication of power that further alienates the Iraqis’.\footnote{Graff (2004: 67–8).} So long as Iraqis bore ‘witness to incidents of lawlessness’, attacks would continue and ‘the necessary feeling of security [would] not permeate the population’.\footnote{Graff (2004: 68).} As Manwaring and John Fishel have written elsewhere, often the more done militarily the worse things get.\footnote{See, further, Manwaring and Fishel (2006: 281–2).} Victory represents ‘the product of connecting and weighting the political, economic, informational, and military instruments of national power within the context of strategic appraisals, strategic vision, and strategic objectives’.\footnote{Manwaring and Fishel (2006: 6).}

FM 3-24 confirms military power is not enough; victory is not calculated by the sum total of battles won. The careful way in which FM 3-24 depicts each of the ‘instruments of national power’ demonstrates awareness of the social and material elements of power.\footnote{FM 3-24: [1-3]–[1-4].} Given the propensity of opponents to operate among civilians, the relationship between each of the instruments of national power and winning the battle is more nuanced.\footnote{FM 3-24: [1-8].} The insurgent’s success depends on ‘sowing chaos and disorder everywhere’, whereas the
counterinsurgent fails ‘unless it maintains a degree of order everywhere’.  

Here, FM 3-24 hints at the ‘productive power’ of law in guiding other instruments of power. One specific example is the emphasis on transitioning from combat to law enforcement. As Martins explained, ‘if you move to law enforcement within a system accepted by the people you will actually be able to discredit the insurgents; they will be seen as common criminals’. 

FM 3-24’s decision not to promote overwhelming military force but to instead focus on protecting civilians remains extremely controversial. When interviewed in 2008, Martins confirmed ‘real antibodies’ persisted; that certain elements of the military retain an allegiance to supreme firepower. The inversion of traditional thinking on military power by FM 3-24 is no small achievement, and is not one easily implemented in the field. This is a task made more acute given FM 3-24’s declaration that the ‘information environment is a critical dimension’, magnified by the ‘internet and compact storage media’. The importance of perception elevates the function of law, as Waxman explained: 

> [P]erceptions about the legality of tactical actions can have enormous strategic significance... operational planning can weight very strongly legal judgments or judgments that, even if not strictly legal are derived from legal principles, because they are going to be very important to shaping perceptions of key audiences, key audiences at home, key audiences among coalition partners and key audiences local to the conflict.

Establishing the link between legality and legitimacy in FM 3-24 itself is insufficient. This, after all, is doctrine ultimately interpreted and executed by non-lawyers. As Crane stressed, the final product, while vetted by lawyers, was a ‘commander’s decision’. Even so, it is in mapping out the main objective of legitimacy that the legal foundations of FM 3-24 are perhaps most stark. FM 3-24 exhibits a clear focus on proportionality, discrimination and minimizing collateral damage. Sections on detention are replete with the language of law. There is a sense that legality is tasked with providing a path to legitimacy for counterinsurgents and a common language to demonstrate this to various audiences. FM 3-24 depicts illegality, especially the unlawful use of force, as sowing the seeds of defeat: ‘security force abuses and the social upheaval

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121 FM 3-24: [1-9]. Consider also Sitaraman (2009: 1829–30): ‘The counterinsurgent seeks legitimacy, which is assisted by its adherence to law and humanity and by the insurgent’s disregard for law and humanity.’

122 See also LWD 3-0-1, [3.18], [4.4(j)] and [6.3], where a ‘pervasive, persistent and proportionate presence’ is declared paramount, and the diplomatic dimension of power is favoured above information, economic, and military power. The ‘politics of counterinsurgency’ are said to be ‘encompassed by the diplomatic category’ in which the ‘law provides the fundamental authority to act and is the genesis of legitimacy’.

123 Martins.

124 Martins.

125 FM 3-24: [1-12], [1-19].

126 Waxman.
caused by collateral damage from combat can be major escalating factors for insurgencies’. As Kilcullen explained, ‘direct combat (not remote engagement by air or artillery)’ became ‘essential’ when rolling out FM 3-24 so as to minimize collateral damage. The goal was to ‘use military force extremely sparingly’ and provide ‘human security to the population, where they live, 24 hours a day’. In this way, FM 3-24 elevated how war is conducted to the same level of importance as its ultimate outcome: the former would determine the latter.

The foregoing has demonstrated international law’s enmeshment with FM 3-24’s depiction of legitimacy and the intended conduct of counterinsurgency. The US military is increasingly trained to approach its conduct in war through a legal prism. International law’s internalization is apparent across all military personnel, as Molan’s account illustrates. Sarah Sewall and Ashley Deeks confirmed LOAC’s growing internalization throughout the military. Mattis accepted violations are bound to occur ‘if the law is not internalized by people who are authorized to conduct violence’. The prevalence of irregular war, Martins suggested, has particularly enhanced understanding of proportionality.

Awareness of proportionality through the force, as the force has had to fight unconventional wars now for seven years, is greater so you get more of an internalisation of this principle and an appreciation of how it applies.

Martins recalled specifically: ‘Often I’m giving [commanders] a legal construct and niche when they’ve already got it internally.’ Internationalization can, however, lead to a low threshold. Notice, for example, headlines following the second battle of Fallujah in November 2004, which ‘screamed that Fallujah had been destroyed’. Internalization can also result in legal compliance being viewed as a box to be ticked, rather than something integral to the battle. There is a hint of this in Molan’s account of a direction given to him by General Sanchez in early 2004 concerning plans to secure Iraq’s oil infrastructure: ‘Speak to the lawyers about what I can legally do in the extreme, but give me a plan tomorrow’.

In counterinsurgency, junior officers as well as commanders are often required to have internalized the principles. Standards vary among commanders and judge advocates. As Waxman noted, often a relevant question is ‘which lawyers’ will interpret the law rather than the law itself.

129 Kilcullen (2009: 14), 23. 130 Deeks; Sewall.
131 Mattis. 132 Martins.
This underscores the importance of not reducing legitimacy to what is legal. For Mattis, ‘what the law tells you to do is at best a starting point but it’s a terrible ending point for your decision making… the true restriction is the values we are fighting for’. His point: simply because something can be argued to be legal does not mean you should do it. This was reinforced in discussions with Petraeus and McChrystal. The bigger question is whether one can ever have a legitimate action that lies outside the law. For Lietzau, ‘legitimacy has to be within the bounds of the law’. Mattis’ position is the same. In his view, lawyers should be brought in ‘right at the beginning of any operation’ to ‘make certain that you are operating within legal bounds’. The moral and ethical bounds and the operational dictates should be ‘even narrower’ than the legal parameters. If military necessity calls for action beyond legal parameters there are two options: ‘if you have time and it’s in advance you tell [the lawyers they] must change and have a persuasive compelling argument… or if it’s an immediate urgent situation you do what you have to do and subject yourself to scrutiny’. (Mattis remembered he had ‘actually come into situations where lawyers were writing the RoE, not operations officers’, which in his view oversteps the mark and demonstrates lawyers being misused.) This formulation betrays recognition that, in any event, legality provides the closest path to legitimacy.

Two ways in which FM 3-24 is applied in the field and internalized within junior officers is through RoE and commanders’ tactical directives. (In practice, tactical directives are a subset of RoE.) Here, it is worth remembering Nagl’s observation: ‘we don’t expect the 18-year-old to know the laws of war, we expect him to understand RoE. International law’s role in RoE is thus worthy of mention. Classically, RoE resemble a Venn diagram: the intersection of political, operational and legal restraints. Law thus ‘provides an outer boundary within which all RoE fall’. RoE are a key medium through which changes in both military and legal doctrine are communicated to soldiers. Here, international and domestic law constraints are influential, as we will see in the next chapter.

The rules articulated by RoE may be ineffective. It is almost impossible to ‘legislate morality’; RoE will not readily change ‘primary, private individual conduct’, especially given the relative youth of soldiers. RoE are followed in a climate where ‘the values used in crisis will come from schemata formed much

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137 Mattis. Lietzau noted the relatively recent elevation of the ranks of legal officers by one star (JAGS, for instance, went from two to three stars), which was justified by proponents as decreasing the likelihood of legally questionable decisions. The claim was that ‘somehow by having lawyers at a higher level you will not have immoral activity’, that the higher rank for legal officers automatically imbues military actions with greater legitimacy—a proposition Lietzau does not embrace.

earlier’, particularly where ‘the chain of command has trained’ soldiers to ‘attack the enemy’.\textsuperscript{142} Despite such imperfections, RoE guidance on ‘proportionality’, ‘direct participation in hostilities’, as well as ‘necessity’, ‘self-defence’ or ‘clear hostile intent’ is vital; ‘military and legal principles’ will generally ‘provide a better basis for making the tough decisions on when, where, and how to use force’.\textsuperscript{143}

Application of the minutiae of LOAC to the vicissitudes of war is not an easy task.\textsuperscript{144} The dominant role of RoE and tactical directives in transforming ‘frightened reactions into appropriate decisions’ is even starker given diverging interpretations of what is ‘necessary’, ‘excessive’, or ‘humane’. RoE and command intent assist in channelling a uniform approach. In FM 3-24, the importance of clear and effective RoE and command guidance to ensure ‘the prudent use of force commensurate with mission accomplishment and self-defence’ is deemed paramount.\textsuperscript{145} As Martins explained, counterinsurgency ‘elevates law just by its dirtiness because it is going to involve people crossing lines more’. This is especially true given the ‘idea that excessive force is delegitimizing’.\textsuperscript{146}

The interface between RoE and command responsibility is stressed in FM 3-24’s leadership and ethics chapter. Given the deference there to the principles of distinction and proportionality, one may expect a greater prejudice towards such principles (and potentially international human rights law) in RoE developed following FM 3-24’s release. Chapter 5 will examine the extent to which revised RoE and tactical directives sought to change decisions by military officers on when to employ force, and how much force to use, as well as in enhancing the internalization of such practices. Nagl acknowledged there was ‘certainly an evolution’ in the RoE in the year FM 3-24 was published, with ‘deeper appreciation for second- and third-order effects of shoot/don’t shoot decisions’. Instruction of RoE in October 2006 ‘was far more sophisticated’.\textsuperscript{147} Even if law remains only a ‘starting point’, the parameters for permissible action narrowed due to FM 3-24. To enhance the pursuit of legitimacy, FM 3-24 intended rules of law in the conduct of war to become far stickier.

All of this poses a final question: why connect legitimacy with legality? Just as legitimacy remains an elusive and slippery concept, so too is the extent to which legality is an ingredient of a ‘legitimate social order’.\textsuperscript{148} Questions have persisted as to whether there is a clear and uncontested meaning of legitimacy and whether legality or legitimacy is best suited to assess the use of force. The

\textsuperscript{142} Martins (1994: 76). \hspace{1cm} \textsuperscript{143} Martins (1994: 80).
\textsuperscript{144} Martins (1994: 108–9). \hspace{1cm} \textsuperscript{145} FM 3-24: Table 5-2.
\textsuperscript{146} Martins. \hspace{1cm} \textsuperscript{147} Nagl.
\textsuperscript{148} Armstrong and Farrell (2005: 5).
significance of Western viewpoints prejudicing legitimacy discourse has also been debated. This pathway has shown how FM 3-24 brings all of these issues into focus.

As Andrew Hurrell has written, ‘the problem of legitimacy arises precisely because of the unstable and problematic relationship between law and morality on the one side and law and power on the other’. Historically, legitimacy has often been equated with lawfulness. Frustrations with the law, however, have led certain states to seek ‘recourse to legitimacy as a supplement to legality’, most notably with respect to Kosovo in 1999 when NATO air strikes were declared by some to be legitimate but unlawful. Yet, as Falk has argued, viewing legitimacy as a means to defend instances of illegality mistakenly casts legitimacy and legality in separate spheres, and dangerously asserts ‘the primacy of politics and the subordination of law’.

The ubiquity and growing complexity of international law has arguably ‘shifted the balance between law’s power-cementing and legitimacy-creating advantages and its constraining and ensnaring costs’. International law may help and hinder the application of the instruments of national power in equal measure. This is partly because international law is nowadays as much about individual rights and common standards as it is about the obligations of, and relationships between, independent states. Individual rights and responsibilities are at the forefront of new rules of international law, which increasingly interact with domestic legal institutions and remedies. International law has become a repository of agreed values as well as a tool through which to constrain coercive action. Ambiguities remain, but the important question is how legality insinuates itself in establishing legitimacy, not how legitimacy may provide cover for illegality. Indeed, this was Martins’ task in FM 3-24.

Legitimacy, especially as applied to the conduct of armed conflict, has many dimensions. Here, though, we are guided by Manwaring legitimacy, and the way in which its evolved form in FM 3-24 interacts with legality. For many of the participants at FM 3-24’s vetting conference in February 2006, the legal character of legitimacy was crucial to any US operational strategy. True, ‘illegal or unlawful action may on occasion be argued to be legitimate’, but actions consistent with international law provided the best guarantee for legitimate actions by counterinsurgents. The final version of FM 3-24 represented the archetypical articulation of that strategy, as well as a foundation for the

objective sought by Manwaring and Fishel in 2006: ‘America must implement a strategy for achieving and maintaining legitimacy—both de jure and de facto.’\textsuperscript{158} A LOAC framework guarantees some element of procedural legitimacy. Furthermore, recalibrating and internalizing ‘what is lawful’, potentially enhances substantive legitimacy.\textsuperscript{159} Nowadays, international law is the arena in which standard-setting takes place, where arguments of morality and political and military necessity are played out. In this sense, international law’s prevalence within FM 3-24 tends to validate Hurrell’s analysis that international law’s importance to legitimacy is not in saying that something is legal or illegal, but rather in ‘the existence within law of well-established patterns of augmentation about the use of force, about the rules that have governed and might govern’ its use.\textsuperscript{160}

Pathway III: International Law’s Mandatory Influence

A discussion of international law’s \textit{mandatory} influence has been deliberately left to last. As has been shown in the first two pathways, international law impacts FM 3-24 irrespective of the extent to which certain decisions made in the writing process were required by law and domestic institutions. This important pathway demonstrates the potential of international law to require certain outcomes, primarily through its interaction with domestic law. Two specific areas are discussed below: detention; and FM 3-24’s third paradox, ‘the more successful counterinsurgency is, the less force can be used and the more risk must be accepted.’\textsuperscript{161}

Notice where the changes discussed below appear in FM 3-24. As suggested earlier, while the Legal Annex supplies an important legal foundation, not all of the ‘law’ appears therein. Indeed, many areas relating to the use of force and detention are discussed in key sections in FM 3-24’s main text. While lawyers attempted to move the bulk of the legal discussion to the Legal Annex to retain ultimate control,\textsuperscript{162} key areas remained entrenched in the core of the new doctrine.

FM 3-24’s early drafts prescribing the rules and limits on detention and interrogation were especially contentious. Although the early drafts said it makes ‘little ethical sense to consider violating current laws and policies pro-

\textsuperscript{158} Manwaring and Fishel (2006: 261). See also Friedman (1990: 60–1).
\textsuperscript{159} Friedman (1990: 59–62).
\textsuperscript{160} Hurrell (2005: 24–5).
\textsuperscript{161} FM 3-24: [1-151].
\textsuperscript{162} Crane II: ‘I could edit anything in the field manual but I couldn’t touch that [Legal] Annex—not even a comma.’
hibiting coercive treatment’ in conventional operations, they clearly implied this is not the case in counterinsurgency, where ‘interrogators are often under extreme pressure to get information’. See, for example, the extract from the February 2006 draft (Figure 4.3).

The following paragraphs, also from the February draft, outlined certain limits on detention. Note below the lack of legal specificity, and the vagueness of the second category of detained persons:

7-54. In counterinsurgency environments, distinguishing an insurgent from a civilian is difficult. Treating the latter like the former is a sure recipe for failure. Individuals suspected of insurgent or terrorist activity may be detained for two reasons: (1) to prevent them from conducting further attacks or (2) to gather intelligence in order to prevent other insurgents and terrorists from conducting attacks. These reasons allow for two classes of persons to be detained and interrogated: (1) persons who have engaged in, or assisted those who engage in, terrorist or insurgent activities; and (2) persons who have incidentally attained knowledge regarding insurgent and terrorist activity, but who are not guilty of associating with such groups.

7-55. By engaging in such activities, persons in the first category may be detained as criminals or enemies, depending on the context. Persons in the second category may be detained and questioned for specific information, but since they have not, by virtue of their activities, represented a threat, they may be detained only long enough to obtain the relevant information. Since persons in the second category have not engaged in criminal or insurgent activities, they must be released even if they refuse to provide information.

The ambiguity regarding the use of torture in interrogation in the early drafts of FM 3-24 is striking. This only reinforced earlier accusations that US interrogation techniques in Iraq and Afghanistan included torture. The January and February 2006 drafts did note the Geneva Conventions and the Convention against Torture and Other Cruel, Inhuman or Degrading
Treatment or Punishment (CAT) prohibit torture ‘in most situations’.

They also detailed how French forces condoned torture during the war in Algieria and, in turn, empowered the moral legitimacy of the insurgency. However, as is evident in Figure 4.4, Chapter 7 did not rule out the prospect of counterinsurgents using torture in particular situations, specifically, ‘tick- ing time-bomb’ scenarios.

Figure 4.4. ‘Limits on Interrogation . . .’


Asked about the ticking time-bomb and other detention provisions in the early drafts, and the response to them at the vetting conference, Crane remembered:

There was an interesting exchange early on [at the conference]. That was the touchstone that really got a lot of international human rights lawyers involved, and I think they were also surprised by the speed of the response to it, which was ‘you’re right, we can’t leave that kind of grey area in the manual, it has to go’. That pleased them that they got that kind of response from the audience . . . it also influenced what came later. . . . [But] there was a strong reaction from the international human rights lawyers, that ‘you can’t say this stuff . . . where does it stop’. And we knew about Abu Ghraib . . . the lawyers would have pulled it out anyway I think. [But] it happened right there at Fort Leavenworth. The discussion went on for about ten minutes and Petraeus said ‘this section has got to go’.

164 Note here US reservations to CAT and its interpretation of ‘torture’ and ‘cruel, inhuman or degrading treatment or punishment’ (CIDTP). The Article 16 obligation to prohibit CIDTP is accepted only so far as CIDTP is prohibited under the US Constitution. The US also stipulated it understands torture to mean an act that is ‘specifically intended to inflict severe physical or mental pain or suffering’, and circumscribed the acts that might constitute this. See Ferstman (2010: 543–4).
165 Crane II.
Petraeus was aware of the ruinous nature of US practice in this area to the campaigns in Iraq and Afghanistan. When interviewed, he recalled recoiling at the early FM 3-24 draft presented to the vetting conference. ‘By the way,’ Petraeus said without prompting, ‘the first volume of this thing [FM 3-24] was horrible, I could not believe it.’ Petraeus insisted he had not seen a draft before the vetting conference, but realized at the conference that ‘it condoned all kinds of egregious stuff’.

The context in late 2005 and through 2006 is important to FM 3-24’s evolution. The Detainee Treatment Act of 2005 (DTA) made clear that, once published, the US Army Field Manual on Intelligence Interrogation (FM 2-22.3) would set the standard for treatment of any person detained by the DoD. The DTA was an amendment to the 2006 Defense Appropriations Act and approved by the US Senate in October 2005. It provided for: (i) uniform DoD standards for interrogation; (ii) prohibition of cruel, inhuman or degrading treatment or punishment of persons under custody or control of the US government, defined in terms of the US ratification to CAT; (iii) certain legal protections for US government personnel engaged in interrogations; (iv) procedures for status review of detainees at Guantánamo Bay, Afghanistan and Iraq; and (v) training of Iraqi forces on treatment of detainees. Petraeus stressed FM 2-22.3 ‘has the force of law for DoD’ and paid particular credit to Senator John McCain for ensuring this was the case.

The chronology following the passage of the DTA is acutely relevant to FM 3-24. In May 2006, DoD issued DoD Directive 2311.01E (DoD Dir. 2311.01E), relating to the ‘DoD Law of War Program’, which contained ‘several notable changes’ from earlier versions. Such versions had insisted, with certain minor variations, that US Armed Forces comply with LOAC however the conflict was characterized and comply with the principles and spirit of the law of war in other operations. The May 2006 version removed that ambiguity, stating that ‘Members of the DoD components comply with

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166 Petraeus. In an email to the author, dated 5 September 2014, Crane provided the following clarification: ‘[Petraeus] had been briefed by me on the content of the manual, and had seen parts of it before the conference. From other conversations with me, he did not think the whole draft was “horrible”, especially since he knew how quickly it had been done. However, he was taken aback by the “ticking time bomb” scenario created by West Point ethicist Tony Pfaff, which was just designed to present the argument, not condone it. [Petraeus] had not seen that chapter before’.

167 Petraeus.

168 Petraeus.

169 See, further, Ferstman (2010: 544–5), where it is explained how the DTA resolved US indeterminacy on the ‘distinction between the lawfulness of torture and other forms of [CIDTP]…making clear that persons in the custody or control of the US Government, regardless of their nationality or physical location, are prohibited from being subjected to [CIDTP]’.


171 See, additionally, Rawcliffe (2006: 24): ‘the “principles and spirit” language can serve as useful ammunition in the fight to promote increased application of the law of war…that language can also serve to justify nearly any deviation from what would be binding international law were the law strictly applied.’
the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.\textsuperscript{172} This policy ‘intended to apply the law of armed conflict for international armed conflict across the conflict spectrum’.\textsuperscript{173} DoD Dir. 2311.01E stated commanders must ensure ‘all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands are reviewed by legal advisers’ to ensure consistency with DoD Dir. 2311.01E and LOAC.\textsuperscript{174} DoD Dir. 2311.01E further defined the law of war as:

That part of international law that regulates the conduct of armed hostilities. It is often called the ‘law of armed conflict.’ The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.

As John Rawcliffe explained, one reading of DoD Dir. 2311.01E is that all triggers from the Geneva Conventions and Additional Protocols regarding the applicability of LOAC had been removed. In other words, irrespective of the form of armed conflict, all LOAC applies. Another, more restrictive reading, is that DoD Dir. 2311.01E only applies international law that is binding on the US, including the triggering language on the substantive provisions contained therein and duly ratified; for example, the specific triggering language in Common Article 3 of ‘armed conflict not of an international character’.\textsuperscript{175}

The 29 June 2006 \textit{Hamdan v. Rumsfeld} decision provided a timely—and binding—US Supreme Court ruling that the Geneva Conventions applied to the conflict between the US and Al Qaeda, including Common Article 3.\textsuperscript{176} The Office of the US Secretary of Defense confirmed this in a memorandum dated 7 July 2006. Despite arguing all current policies with respect to Al Qaeda were commensurate with Common Article 3, it also ordered a review of ‘all relevant directives, policies, practices, and procedures to ensure compliance’, and directed Common Article 3 be applied ‘well beyond what the Supreme Court would require’.\textsuperscript{177}
This DoD order was repeated on 5 September 2006 in another DoD Directive (DoD Dir. 2310.01E), which cancelled and suspended earlier 2004 directives on enemy POWs and other detainees, and stressed DoD policy that the minimum standards articulated in Common Article 3 should be applied to all detainees regardless of status. DoD Dir. 2310.01E reiterated related requirements such as record keeping, the determination of status by competent tribunals and periodic review of detention. It also required all persons subject to the Directive to receive instruction and complete training in applicable law, specifically on the obligation to report alleged or suspected violations, and the role of the ICRC. The Secretary of the US Army was designated as the Executive Agent for the administration of DoD Defense Detainee Operations Policy, and the Chairman of the Joint Chiefs of Staff was required to designate a single point of contact within the Joint Staff for matters pertaining to the Directive’s implementation. Combatant commanders were ordered to ensure compliance. Detainees were to be provided with information, in their own language, of their rights, to include applicable Geneva Convention provisions.

One day later, on 6 September 2006, the US Army published FM 2-22.3 (FM 34-52), Human Intelligence Collector Operations. (Petraeus noted he had always referred to FM 2-22.3 as the ‘Detainee Operations Manual’ instead of by its formal title.) FM 2-22.3 was eagerly anticipated and subjected to much lobbying within and beyond the Pentagon in the lead-up to its publication. It set the US military standards for detention and interrogation, as requested by the DTA, and was cited extensively in FM 3-24. FM 2-22.3 applies Common Article 3 as the minimum standard for treatment of detainees, and prescribes the application of GC III and GC IV ‘for the vast majority of issues which arise in the context of detainee operations’.178 FM 2-22.3’s preface stated in bold type:179

This manual expands upon the information contained in FM 2-0. It supersedes FM 34-52 and rescinds ST 2-22.7. It is consistent with doctrine in FM 3-0, FM 5-0, FM 6-0, and JP 2-0. In accordance with the Detainee Treatment Act of 2005, the only interrogation approaches and techniques that are authorized for use against any detainee, regardless of status or characterization, are those authorized and listed in this Field Manual. Some of the approaches and techniques authorized and listed in this Field Manual also require additional specified approval before implementation.

Let us return to FM 3-24’s drafts, set against this context and following the hostile feedback at the vetting conference. By May 2006, the scale of doctrinal change was astounding. The prescribed approach was unequivocally clear, and sourced in domestic and international law. Below are the relevant revised

178 Jackson and Jenson (2007: 69). See also Parks (2011: 17) which discusses FM 2-22.3 and Article 17 of GC III.
provisions from the May draft. Apart from the reference to the DTA, note the last two sentences of [7-48] and the reversal of the ticking time-bomb position in [7-53]:

**DETENTION AND INTERROGATION**

7-48. Detentions and interrogations are critical components to any military operation. But the nature of the counterinsurgency operations produces the potential for complex detainee situations due to the insurgents’ deliberate integration with the civilian population and lack of distinctive uniform. Interrogators are often under extreme pressure to get information that can save the lives of innocent non-combatants, Soldiers and Marines. While enemy prisoners in conventional war are considered moral and legal equals, the moral and legal status of insurgents is ambiguous and often contested. What is not ambiguous is the legal obligation of American Service members to treat all prisoners and detainees according to the standards of American values and law.

**Limits on Detention**

7.49. Mistreatment of non-combatants, including prisoners and detainees is illegal and immoral and will not be condoned. The Detainee Treatment Act of 2005 makes the standard clear:

*No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.*

*No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.*


...  

**Limits on Interrogation**

7.53. Abuse of detained persons is unprofessional, immoral and illegal. Those military persons who engage in cruel or inhuman treatment of prisoners betray the standards of the profession of arms and the laws of the United States and are subject to punishment under the Uniform Code of Military Justice. The Geneva Conventions as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment prohibit torture and any other forms of cruel, inhumane and degrading treatment. Torture and cruel, inhumane, and degrading treatment is never a morally permissible option, even in situations where soldiers’ lives depend on gaining information. No exceptional circumstances permit the use of torture and other cruel, inhuman or degrading treatment.

These provisions are strengthened in FM 3-24’s final version; the obligations of commanders to be proactive in establishing ‘procedures and checks to ensure
proper handling of detainees’ and ‘to ensure subordinate leaders do not allow apparent urgent requirements to result in violations of these procedures’ are stressed.\textsuperscript{180} The need for the methods chosen to ‘reflect the Nation’s commitment to human dignity and international humanitarian law’ is stated explicitly.\textsuperscript{181} The opening paragraphs to the ‘Detention and Interrogation’ and ‘Limits on Interrogation’ sub-sections are bolstered by cross-references to FM 2-22.3 and applicable LOAC, as the following edited excerpts demonstrate:

7-48 7-38. . . . What is not ambiguous is the legal obligation of Soldiers and Marines to treat all prisoners and detainees according to the standards of American values and law. All captured or detained personnel, regardless of status, shall be treated humanely, and in accordance with the Detainee Treatment Act of 2005 and DoDD 2310.01E. No person in the custody or under the control of DoD, regardless of nationality of physical location, shall be subject to torture or cruel, inhuman, or degrading treatment or punishment, in accordance with, and as defined in, US law. (Appendix D provides more guidance on the legal issues concerning detention and interrogation.)

. . .

7-53 7-42. Abuse of detained persons is unprofessional, immoral, and illegal, and unprofessional. Those military persons who engage in cruel or inhuman treatment of prisoners betray the standards of the profession of arms and the US laws of the United States and. They are subject to punishment under the Uniform Code of Military Justice. The Geneva Conventions, as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, agree on unacceptable interrogating techniques. prohibit torture and any other forms of cruel, inhumane and degrading treatment. Torture and cruel, inhumane, and degrading treatment is never a morally permissible option, even in situations where soldiers’ if lives depend on gaining information. No exceptional circumstances permit the use of torture and other cruel, inhuman or degrading treatment. Only personnel trained and certified to interrogate can conduct interrogations. They use legal, approved methods of convincing enemy prisoners of war and detainees to give their cooperation. Interrogation sources are detainees, including enemy prisoners of war. (FM 2-22.3 provides the authoritative doctrine and policy for interrogation. Chapter 3 and appendix D of this manual also address this subject.)

Crane’s testimony on this process reinforced how the writing team had little choice but to comply with the legal framework emerging from the DTA, DoD Dir. 2310.01E, Hamdan and FM 2-22.3:\textsuperscript{182}

We got told we needed to leave [detainees] to the lawyers. We were going to try and do something on our own because we felt we had to deal with it because it was such a hot item . . . but because of all these laws being passed we needed to let the lawyers handle it. There was a lot of discussion on whether we needed something

\textsuperscript{180} FM 3-24: [7-43]. \quad \textsuperscript{181} FM 3-24: [7-44]. \quad \textsuperscript{182} Crane II.
separate, but we couldn’t escape what was going on around us. . . . Even though generals made changes the lawyers got to see it all. The last commentators on the manual were the lawyers. They were deeply involved in reviewing everything.

FM 3-24’s Legal Annex ultimately distinguishes three situations in which counterinsurgency may be waged: as part of international armed conflict, during occupation and in internal conflicts. The prominence of the Geneva Convention IV during times of occupation is noted. The Legal Annex notes insurgencies are internal conflicts ‘between uniformed government forces and armed elements that do not wear uniforms with fixed distinctive insignia, carry arms openly, or otherwise obey the laws and customs of war’. While the Legal Annex asserts, ‘the main body of the law of war does not strictly apply to these conflicts,’ it acknowledges, in line with Hamdan, that Common Article 3 ‘is specifically intended to apply’.183 The final aspect of the Legal Annex expands on detention and interrogation, in addition to the coverage of those issues in the body of FM 3-24 itself. Recalling ‘instances of detainee abuse, including maltreatment involving interrogation’ in Iraq, the Legal Annex extracts the relevant aspects of the DTA, including the CAT prohibition on CIDTP as defined by US law.184

It is interesting to compare this final version of the Legal Annex to the earlier drafts. The January 2006 initial draft included two legal appendices: the first covered detainee operations and the second dealt with legal considerations more generally. These appendices referred to the provision of humane treatment in accordance with the ‘minimum provisions delineated in the Geneva Conventions’, the avoidance of unnecessary suffering, and no toleration of violations of LOAC and human rights.185 By the second January version, which was preserved for the February draft presented to the vetting conference, the two appendices had been collapsed into one that totalled four pages as opposed to the fourteen pages comprising the previous appendices. Notable provisions here included: the stipulation that where a viable host nation exists, ‘domestic laws of the host nation may apply to US forces in that country unless an international agreement provides otherwise’;186 a contention that while AP I has extended the law of war to certain wars of ‘national liberation’, the US ‘does not recognise this extension’;187 and an assertion that while DoD policy is for US forces to ‘comply with the law of war during all armed conflicts, however such conflicts are characterized’, such forces ‘often lack the resources to comply with the laws of war to the letter’.188 These latter two statements were part of a very brief, if nominal, section on ‘Law of Armed

183 FM 3-24: [D-14]. 184 Detainee Treatment Act, s. 1003(d).
185 See January 2006 Draft: [E-4]. 186 February 2006 Draft: [D-5].
186 February 2006 Draft: [D-8]. 188 February 2006 Draft: [D-10].
Conflict’. The scale of changes to the Legal Annex after the vetting conference and carried through to the final version is enormous. Not only does the Legal Annex more than double in length, significant depth and breadth are added to the provisions referred to above, including applicable LOAC, and additional sections are added or strengthened.

What is notable in the Legal Annex, apart from the material cited earlier on Common Article 3 and standards applicable in detention and interrogation, are the references to RoE, command responsibility and the Uniform Code of Military Justice (UCMJ). These latter three areas are the mechanisms by which the US military regulates the use of force downrange. As we saw in the earlier pathways, the principles of proportionality and distinction were prevalent in the main body of FM 3-24, alongside the stressed need to minimize civilian casualties and collateral damage. The writing team acknowledged this was necessary for strategic reasons and for legal reasons. Ultimately, the standards depicted reflected those in the Additional Protocols. The final aspect dealt with in this pathway, then, is how international law’s influence was brought to bear on other aspects of FM 3-24 purporting to regulate the use of force via RoE.

Our specific attention here is FM 3-24’s third paradox: ‘The More Successful the Counterinsurgency Is, the Less Force Can Be Used and the More Risk Must Be Accepted’. FM 3-24 explains the paradox in the following terms:

1-151. This paradox is really a corollary to the previous one. As the level of insurgent violence drops, the requirements of international law and the expectations of the populace lead to a reduction in direct military actions by counterinsurgents. More reliance is placed on police work, rules of engagement may be tightened, and troops may have to exercise increased restraint. Soldiers and Marines may also have to accept more risk to maintain involvement with the people.

In other words, as the character of the armed conflict changes, criteria for using lawful force tighten. This had previously been heavily resisted by the US military and the Bush administration. As discussed in Chapter 2, this is a requirement that arises through the interaction of LOAC with international human rights law. FM 3-24 expects this relationship to be reflected in operational RoE. Despite earlier—and continued—US objections to being bound by obligations under international human rights law because of arguments surrounding their applicability in armed conflict, FM 3-24 attempts to set them aside.

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189 February 2006 Draft: [D-8]–[D-10]. In an email to the author, dated 5 September 2014, Crane said that he cut much of this material because ‘it was redundant, unnecessary, or going to Chapter 7 [of FM 3-24]’.

190 See FM 3-24: [D-7]–[D-24].
What is interesting about this paradox is the impact of international human rights lawyers, specifically those from Harvard's Carr Center, on its inclusion in FM 3-24. On 21 March 2006, a month following the vetting conference, Crane received an email and accompanying set of slides and notes from Sarah Sewall. One of these slides, reproduced in Figure 4.5, illustrates the inverse relationship asserted between the risk assumed by US forces and the spectrum of violence, along with the associated implications for RoE and escalation of force procedures.

As Crane's account below suggests, this paradox came about largely because the writing team felt it was bound under LOAC and international human rights law to observe certain requirements once the character of the conflict evolved:

![Figure 4.5. 'The more successful the counterinsurgency . . .' Source: Sarah Sewall, former Director of the Carr Center for Human Rights at Harvard University.](image)

![Table 4.5.](table)

As Crane's account below suggests, this paradox came about largely because the writing team felt it was bound under LOAC and international human rights law to observe certain requirements once the character of the conflict evolved.\(^{191}\)

\[\text{[T]he law of war always plays a part, which ties in with the third paradox. After the vetting conference Sarah Sewall wrote me a long paper—it goes back to what the human rights lawyer [in the bar] told me—about how the rules change from law of land warfare to international human rights law as you are more successful, and also how peoples' expectations change: as violence drops they expect you to use less violence also. [Sewall] gave me this long paper and told me it ought to be part of the}\]

\(^{191}\) Crane.
It was controversial because by the time I incorporated it into the drafts, the writing board was pretty much all on board with what we were trying to do. The only issue was at the end with a lot of pushback from some of the Generals.

This particular debate between overwhelming use of force and minimum, adjustable force depending on the character of the conflict is, in many ways, symptomatic of historic debates discussed earlier. In FM 3-24, we see evidence of deepening US commitment to particular interpretations of these international instruments to the extent that such interpretations are manifested in customary international law: the civilian becomes the priority, even where this imperative increases the risk to officers. This tension continued following FM 3-24’s release and subsequent changes to RoE, first in Iraq and then in Afghanistan. Indeed, debate over the precise relationship between LOAC and international human rights law, together with what those bodies of law require persists. Accordingly, the next chapter will spend some time exploring the degree to which this paradox and other controls on the use of force manifested themselves on the ground.

**Conclusion**

Directly and indirectly, international law impacts FM 3-24. We see this through the idea of the rule of law, in international law’s association with demonstrating and articulating legitimacy, and in international law’s interaction with domestic law and US military practices and procedures. All these combined to produce far-reaching doctrinal change intended to turn around US performance in Iraq and Afghanistan. The monumental shift away from extreme firepower and killing insurgents towards protecting civilians and using minimum, not maximum, force was divisive and unprecedented. Mitigating excessive use of force, accompanying human rights abuses (especially detainee mistreatment) and other legal violations were key goals. The method FM 3-24 propagates, including the use of discriminate and proportionate force, was not taken for granted as ‘the only or best approach’ to counterinsurgency. ‘Other historically viable theories’ of counterinsurgency that focused on killing, capturing, and even terrorizing the insurgency and associated civilian populations were known and advocated. International law’s impact, then, was not a *fait accompli*. Nonetheless, it played an essential and, in many respects, an unanticipated role in the development of the new doctrine. This impact was most particular in the areas central to the prosecution of a counterinsurgency military strategy.

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Prosecuting FM 3-24

There is little tradition of disciplined and reasoned assessment of how the laws of war have operated in practice. Lawyers, academics, and diplomats have often been better at interpreting the precise legal meaning of existing accords, or at devising new law, than they have been at assessing the performance of existing accords or generalizing about the circumstances in which they can or cannot work. In short, the study of the law of war needs to be integrated with the study of history; if not, it is inadequate.


The idea of prosecuting doctrine reads like an oxymoron, for doctrine has often been left on the bookshelf. What is unique about FM 3-24 and its doctrinal counterparts is the concerted and immediate effort to implement the ideas on the battlefield. Without its application, the claims that FM 3-24 changed the conduct of the US military are groundless. As Petraeus stated: ‘we changed the Army so we could execute the big ideas downrange.’ Some US forces attempted this before 2006, though their efforts were piecemeal and not executed as a force-wide military or political strategy. This chapter examines the prosecution of the doctrinal changes in Iraq and Afghanistan. We want to know how much or how little and why international law mattered on the front line. Evidence the COIN ‘playbook’ was followed on the ground bodes well as

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3 Petraeus.
4 Crane; author’s interview with US Col Marc Warren (rtd.), 19 August 2011, Washington, D.C., (Warren); Jermy (2011: 264–5); Evans (2011): ‘Some of [FM 3-24’s] methods had already been practiced in Iraq by innovative commanders, but [Petraeus], who oversaw the process of writing FM 3-24 and later went on to command US forces in the country, was key to their institutionalization and broad implementation in the context of an overall theatre-level strategy.’
5 See Sitaraman (2009a): ‘[D]espite the coaches’ rise to prominence, most of the players haven’t read the playbook…. [F]or all the publicity, too few in the field have truly internalised counterinsurgency.’ Sitaraman visited the Counterinsurgency Training Centre at Camp Julien, south of Kabul, Afghanistan, in July 2009. That month marked a strategic shift for ISAF forces,
which limits the weight to be given to Sitaraman’s piece. A paragraph towards the end hints at this; Sitaraman depicted the COIN Centre ‘engaged in a race to make up for lost time—a sprint to change the mindset of the military before Afghanistan deteriorates further’.

6 See Parks (2011: 11): ‘Contrary to what Judge Cassese asserted in Tadic, battlefield practice can be found. But it requires more scholarship than some are prepared to undertake.’


9 CENTCOM was central to an assessment of COIN operations because it was the US unified command responsible for the Middle East and Near Asia, which included Iraq and Afghanistan. Selected interviews with officers from the front line and at CENTCOM will be referenced by pseudonym, with the rank and position of each individual described in general terms.

evidence of international law’s influence. Nevertheless, I guard against assuming international law’s doctrinal influence translates to a direct influence on ground operations if the doctrine was implemented effectively. Other factors are relevant, such as the possibility that commanders were selective in which parts of the doctrine were executed or the locations where this was done.

Accessing battlefield practice without visiting the battlefield is difficult but doable. This chapter brings together field documents, tactical directives and other material covering the conflicts. It also draws on interviews with around sixty individuals who deployed to Iraq or Afghanistan between 2001 and 2011. What follows is not a comprehensive examination of the interaction of law with US military operations during the Iraq and Afghanistan wars. I am interested primarily in the conduct of operations before and after the release of FM 3-24 in December 2006. Comparison of pre- and post-COIN accounts of the battlefield reveal what, if anything, changed, and if so, when and why. Two exercises enhanced the material accumulated. The first was an August 2010 visit to Fort Carson, Colorado Springs, during which interviews with officers from the 4th Infantry Division shortly after their return from a twelve-month deployment to Afghanistan allowed a unique snapshot of COIN operations in Kunar Province. Accounts of these operations included those conducted in the Korengal Valley by a Division criticized for its conduct in Iraq. As I was told many times, COIN is prosecuted by junior officers, relying heavily on the instructions of brigade and company commanders, and especially platoon leaders. The Fort Carson visit facilitated a better understanding of these relationships and how, if at all, COIN ideas and directives filtered down to the lowest levels in these kinetic environments. (‘Kinetic’ is used in this sense to indicate the intensity of the fighting.) These interviews with the 4th Infantry Division were conducted when General Petraeus was under pressure to relax RoE imposed by General McChrystal in Afghanistan in July 2010. The second was an August 2011 visit to CENTCOM to meet with lawyers, analysts and intelligence officials whose experience spanned US military and intelligence activities in the relevant area of operations since 9/11.
Determining international law’s ideational pull, its role in demonstrating and articulating legitimacy, and its capacity to mandate particular outcomes on paper is easier than examining it in practice. Determining influence in written doctrine is more straightforward than speaking to officers and advisers from the front of firefight to the top of the command chain—many of whom are not lawyers—to identify and unpack international law’s influence. This latter task is the ultimate puzzle this book is interested in. Now is a good time to detail these accounts, especially given some US Department of Defense (DoD) electronic records may be missing. However imperfect or revisionist memories of deployments may be, oral history is vital to understanding the post-9/11 wars when assessed alongside other evidence. From a legal perspective too, state practice during armed conflict is of special interest given conjecture over the extent to which military manuals supply evidence of customary international law. To understand international law’s impact on the battle field, scholars must grapple with the reality of life downrange.

Rolling out COIN

Early in the war, General Petraeus had commanded the 101st Airborne Division in Mosul. He sent his troops to live alongside Iraqi residents and patrol the streets on foot. Their presence reassured residents that we were there to protect them. Petraeus then held local elections to form a provincial council, spent reconstruction funds to revive economic activity, and reopened the border with Syria to facilitate trade. His approach was textbook counterinsurgency. To defeat the enemy he was trying to win over the people. It worked. While violence in much of Iraq increased, Mosul remained relatively calm. But when we reduced troops in Mosul, violence returned. The same would happen in Tal Afar. After overseeing training of the Iraqi security forces, General Petraeus was assigned to Fort Leavenworth, Kansas, to rewrite the Army’s counterinsurgency manual. The premise of counterinsurgency is that basic security is required before political gains can follow. That was the reverse of our existing strategy. I decided to keep a close eye on General Petraeus’s work—and on him.

George W. Bush, Decision Points, 2010

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George W. Bush described the ‘surge’, announced on 10 January 2007, as the ‘toughest and most unpopular decision’ of his presidency. Petraeus described it as ‘the surge of ideas, big ideas’. ‘I started communicating the big ideas on day one,’ Petraeus said: ‘I changed the mission right off the bat . . . I knew what we needed to do.’ The new mission was labelled a surge in the media but in reality reflected the shift to population protection and the rolling out of FM 3-24. ‘It is clear we need to change our strategy in Iraq,’ said Bush in his State of the Union address on 23 January 2007.

The shortlist to replace General George Casey as Commanding General in Iraq in late 2006 revealed intent to implement FM 3-24. Two candidates were interviewed by newly appointed Defense Secretary Robert Gates: Mattis and Petraeus. Petraeus remembered being flown to D.C. from Fort Leavenworth the day after Gates was appointed for a meeting with him. Gates departed for Baghdad immediately afterwards. In Petraeus’ words, Gates ‘wanted to put eyes on me’. Upon being told of the decision, Mattis told Gates ‘he agreed completely that Petraeus was the right man for the job’.

Petraeus assumed command on 10 February 2006. Securing Iraq’s and especially Baghdad’s population became ‘paramount in American strategy’. Petraeus’ briefing from his deputy, General Odierno, outlined the mission in terms of securing the population, defeating terrorists and irreconcilables, neutralizing the insurgency, gaining the support of the Iraqi people, and enabling Iraqi self-reliance: a mixture of ‘combat, stability, and support operations’.

General Casey’s approach was reliant on ‘targeted raids throughout the theatre, supplemented by intermittent patrols of urban territory’. One CENTCOM official described the prevailing method pre-surge as ‘a manoeuvre to contact [the enemy] every time’, with the majority of the force located in

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13 Bush (2010: 355). Kilcullen: ‘The subtext of that [Bush] speech was: “I am in charge now, Rumsfeld is gone, I do know what I am talking about, the strategy I am putting forward is COIN.” At that point most of the Army still wasn’t all in’. See also Kaplan (2013: 243).
15 Petraeus. In an email, dated 28 May 2012, Petraeus added he had ‘repeatedly made the point that the most important surge was the surge of ideas, the new strategy, vice the surge of forces, although the surge of forces obviously enabled considerably the implementation of the new ideas. However, without the new ideas, the new strategy, the surge of forces would not have achieved what it did’.
16 See Ricks (2009: 201), quoting Colonel James Rainey: ‘the biggest difference is, we have doctrine now . . . everyone’s doing it now, protecting the population’.
18 Petraeus. 19 West (2008: 220–1).
20 Coincidentally, on the same day Senator Barack Obama announced his candidature for President of the United States in Springfield, Illinois.
forward operating bases (FOBs). Things may not have changed overnight, and certainly elements of the new approach had previously been put into place, but Petraeus standardized the approach. Assisted by other important factors, such as the Sunni Awakening, Petraeus inculcated everyone in Iraq with a belief the strategy would succeed: ‘He applied it. And all of a sudden it seemed to work.’

The passage of time from the FM 3-24’s publication to its implementation was thus remarkably brief. As Kilcullen, who was with Petraeus in Iraq for much of 2007, explained: ‘The book [FM 3-24] got us the ear of the President; the President directed the surge; he put Petraeus in charge of the surge and he gave us basically free reign to try the technique and do it.’ In his reports to Congress in 2007 and 2008, Petraeus highlighted substantial decline in overall civilian deaths in Baghdad and throughout Iraq. He endorsed FM 3-24’s primary mission, ‘to help protect the population’, which entailed not destroying the enemy but rescuing the population. Petraeus gave this account to Ricks: ‘We were seeing the facts validate the academic proposition. The COIN manual has it—but it’s one thing to write it, another thing to operationalize it.’

Two years on a strikingly similar decision was reached vis-à-vis Afghanistan. In March 2009, President Barack Obama announced the deployment of 21,000 additional forces. With Petraeus now in charge of CENTCOM, early reports indicated the Obama administration would attempt to replicate the Iraq strategy. In May 2009, Gates asked for the resignation of General David McKiernan, then commander of US forces in Afghanistan, declaring he needed ‘fresh thinking’ and ‘fresh eyes’ on the problem. Gates nominated Lieutenant General Stanley McChrystal as his replacement. McChrystal had previously commanded US Joint Special Operations Command (JSOC) 2003–8, and was praised by Gates for his ‘unique skill set in counterinsurgency’.

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24 The official (CS) served in Iraq as an intelligence officer and platoon leader in 2006. He remarked: ‘Before 2006 exposure to COIN was just academic.’
25 Crane.
26 Kilcullen. See also Kilcullen (2009: 129).
27 See Kilcullen (2009: 145–8).
28 See Ricks (2009: 240–1). Kilcullen declared the new strategy was succeeding and deserved ‘to be supported’: see Kilcullen (2009: 268). He later told me: ‘Because it worked everyone jumped on board.’
29 Kilcullen: ‘We said, ‘let’s try to recreate the same cycle’. We were copying something that worked in Iraq in the hope that it was going to work in Afghanistan.’
30 See Collins (2011: 80–1): ‘It was not until the obvious success of the surge in Iraq that US decisionmakers—late in the Bush administration—were able to turn their attention to the increasingly dire situation in Afghanistan.’
32 Tyson, ‘Gen. David McKiernan Ousted as Top US Commander in Afghanistan’, Washington Post, 12 May 2009. RUSI described this announcement as changing ‘the strategic landscape in Afghanistan’ and queried whether an incident weeks earlier in western Afghanistan in which significant numbers of civilians were killed had influenced the decision: <http://www.rusi.org/

The key takeaway from this assessment is the urgent need for a significant change to our strategy and the way that we think and operate. NATO’s International Security Assistance Force (ISAF) requires a new strategy that is credible to, and sustainable by, the Afghans. This new strategy must also be properly resourced and executed through an integrated civilian-military counterinsurgency campaign that earns the support of the Afghan people and provides them with a secure environment.

Arguably, McChrystal had already changed the focus of ISAF. In his first Tactical Directive, dated 1 July 2009 (July 2009 Directive), McChrystal’s substantial elaboration on the methods to be employed heralded a fundamental change in approach.34 When interviewed, McChrystal said it would be ‘self-serving’ to pinpoint his assumption of command as the watershed moment because his predecessor, General McKiernan, had attempted to implement elements of a COIN strategy. Chief among these was the move to synchronize the US and ISAF command structures into one chain of command, an alignment credited to McChrystal but begun by McKiernan.35 Nevertheless, McChrystal acknowledged ‘the reality was factors came together to make [the COIN approach] practically true’.36 Other interviewees identified McChrystal’s assumption of command, and especially his July 2009 Directive, as the decisive moment of change. On 1 December 2009 at the U.S. Military Academy at West Point, following months of deliberations and considerable division within his administration,37 President Obama announced the new

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33 See <media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf> (a. 20 September 2014). CS, who was part of CENTCOM’s Insurgency and Resistance Team, visited Afghanistan (Regional Command East) in 2008. He claimed it was like visiting Iraq in 2006: nobody got COIN yet. For McChrystal’s version, see McChrystal (2013: 288–90).


35 This reduced clashes between clandestine special force operations and COIN missions. See Marston and Malkasian (2011: 271); Petraeus; author’s interview with General Stanley McChrystal (rtd.), 19 August 2011, Alexandria, VA (McChrystal): ‘We took it from being counterinsurgency in name, but disconnected and unresourced, to pushing the resourcing, changing the strategy, pushing parts of it forward, but getting everyone to execute together was a work in progress. I give us 50 per cent of the way along there. But more and more people knew it, and expectations were rising. People were starting to understand what they had to do.’

36 McChrystal: ‘McKiernan did not have the resources or the support from D.C. to do it.’

37 Documented in Woodward (2010).
strategy, which incorporated 30,000 more US troops, an additional 10,000 NATO troops, and a doubling of civilian officials.\textsuperscript{38}

Thus, FM 3-24 did not remain in the locker.\textsuperscript{39} Regardless of how one attributes or defines progress in Iraq or Afghanistan from early 2007, counter-insurgency became central to both campaigns. Indeed, it has been argued the success of the Awakening in Iraq was ‘in part a function of the new strategic environment’ the surge created.\textsuperscript{40} The critical task of the rest of this chapter is to determine the interaction of law in this translation of doctrine to operational reality.

Pathway I: International Law’s Ideational Pull

In fact, as the nations of the world have become increasingly interdependent, there has been a realization that adherence to certain internationally accepted moral (and legal) standards of conduct has become more vital than ever before. . . . [T]he apparent needs of the warring parties to justify their use of force could reflect some change in attitude.

Captain David Petraeus, ‘The Just War Tradition’, \textit{Military Review}, April 1984\textsuperscript{41}

David Petraeus was no stranger to the rule of law when he assumed command of multinational forces in Iraq in February 2007. He wrote on the just war tradition in 1984 while studying at the Woodrow Wilson School of Public and International Affairs at Princeton University. Petraeus had studied there under Richard Falk,\textsuperscript{42} a professor of international law, who was quoted in the last chapter on the relationship between legality and legitimacy.\textsuperscript{43} Petraeus, it will be recalled, used a series of articles in \textit{Military Review} in 2006 to get FM 3-24’s ideas out to the field. One of these was his own: ‘Learning Counterinsurgency: Observations from Soldiering in Iraq’. There, Petraeus argued a ‘leader’s most important task is to set the right tone’. As with Chapter 7 of FM 3-24, Petraeus contended that undue emphasis by a commander on the use of force would

\textsuperscript{38} See Collins (2011: 82–4); Nagl (2009).

\textsuperscript{39} In 2011, a survey of US military officers found only 12.2 per cent viewed FM 3-24 as ‘not related at all’ to the success of operations in Iraq or Afghanistan, whereas 68.9 per cent deemed it either ‘somewhat important’, ‘very important’ or ‘essential’ to success: see Schmidt (2011: 208). 18.9 per cent of respondents declared FM 3-24 ‘a little important’. See also Kilcullen (2009: 134, 136–9); Crane (2007).

\textsuperscript{40} See Davidson (2010: 181); Biddle, et al. (2012). \textsuperscript{41} Petraeus (1984: 33, 36).

\textsuperscript{42} Petraeus described Falk as a powerful intellect and a leading legal opponent of the Vietnam War, saying Falk’s area was out of his own ‘intellectual comfort zone’ at the time and a reason why he went to Princeton in the first place.

ensure a similar reliance by subordinates. Setting the right ethical tone, Petraeus declared, is a ‘hugely important task’: If leaders fail to get this right, winking at the mistreatment of detainees or at mishandling of citizens, for example, the result can be a sense in the unit that ‘anything goes’. Nothing can be more destructive in an element than such a sense.

So why, and to what extent, is the rule of law a powerful vehicle here? I have already referred to Martins’ description of the rule of law as a ‘powerful potential tool’ in counterinsurgency. Kilcullen similarly described the rule of law as a ‘political weapon’ to be deployed in COIN. A clue to this paradoxical take on the rule of law as a tool or weapon lies in Galula's conception that counterinsurgents are judged by the population based on what they do, not what they say. This was a powerful consideration for FM 3-24’s writing team. It is counterintuitive to suggest counterinsurgency warfare may be won by using the rule of law ‘weapon’, given the common belief that war is won by conventional weapons and material superiority. The argument inherent in modern US counterinsurgency doctrine is that success in counterinsurgency cannot be achieved by unlawful conduct. Steadfast adherence to the rule of law generates mission accomplishment. We see this idea emerging in Petraeus' writing on the topic, dating back to his 1984 just war article.

Though Petraeus wondered if it was overly academic to theorize about whether law is a tool of warfare or exercises an independent influence, he described the rule of law as a ‘component of a comprehensive civil and military campaign plan’. ‘It has a line of operation,’ Petraeus confirmed: ‘it is a very important element of the overall effort.’ He later added: ‘The rule of law efforts (encompassing not just judicial aspects, but also police and corrections/penitentiary operations) are critical to progress in a comprehensive, civil-military counterinsurgency campaign.’ The view adopted by this book is that the rule of law idea only works as a tool because the law is sufficiently independent and is perceived as being independent. McChrystal alluded to this when he said: ‘if you think about “legal” there is a way you ought to prosecute conflict.’ This became a driving ideal when McChrystal

48 *Crane*.
49 Warren: ‘Part of what [FM 3-24] and [FM 3-07] developed was to put more specific language about the importance of the rule of law and the appearance of doing the right thing and taking into account a more sophisticated approach in terms of second- and third-order impacts.’
50 *Petraeus*. 51 Email to the author, 13 March 2012.
52 *McChrystal* (emphasis added).
assumed command in Afghanistan. For Petraeus, measuring oneself against the rule of law included deference to international law:

There are two reasons to observe international law. It is the right thing to do, and it is also the wise thing to do—that is, the practical course of action in that if you do not do it, it will inevitably bite you in the backside over time, and in some instances bite you in a very substantial way and in a way that is non-biodegradable—it is never going away.

Compliance with, and promotion of, the rule of law was a powerful factor when COIN was rolled out in Iraq and Afghanistan. For some time, however, there was confusion over what the ‘rule of law’ actually meant in operational terms; the centrality of rule of law thinking was new to ‘Big Army’. One need only look at successive editions of the Rule of Law Handbook since its first edition (2007) to appreciate the evolution in its understanding vis-à-vis military operations. The first edition contained a series of definitions about the purpose of law and common features of the rule of law, while noting that from ‘the perspective of a Judge Advocate working within a deployed unit, rule of law operations constitute the legal aspect of stability operations’. The 2011 edition carried the following definition up front:

Rule of Law: … doctrine. A principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights principles.

Rule of law is a particular challenge in conducting military operations because it means different things to different people. It may mean building institutions, development, or fighting corruption, and for each of these may refer to procedural or substantive rules, or a combination of both. It may be used as a synonym for interagency cooperation, for policing and judicial structures, or for governance more generally. For many military officers, it may mean compliance with RoE. In my interviews with officers across the chain of command, almost all would speak of bolstering or supporting the rule of law in Iraq or Afghanistan through rule of law institutions and compliance with

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53 Petraeus.
54 CENTCOM interview with a Lieutenant Colonel from Special Operations Command. See also Levinson (2007: 30).
55 ROLH (2011).
57 See, additionally, Alcala (2011: 7–8).
the laws of war. Asked to define what they meant by the phrase ‘rule of law’, many drew a blank. The intuition seemed to be: ‘I will know it when I see it.’ Kilcullen was blunt when he told me: ‘Rule of law is a bullshit concept in the sense that it is so broad it doesn’t really mean anything.’

Colonel William Gade recalled a fruitless exercise he undertook before deploying as Petraeus’ rule of law lead in Iraq, which involved him seeking out academics and think tanks to ask about activating rule of law ideas in the field. The feedback, Gade lamented, was too abstract, incapable of practical or credible application. As Whit Mason inferred in his edited volume on the rule of law in Afghanistan, uncertainty persists on the ground as well. Indeed, Mason’s book suggested much of the earlier (and perhaps continued) problems in Afghanistan derived from an inadequate, if often absent, understanding of the ‘link between the rule of law and security’ and a ‘superficial understanding of what the rule of law means’ and how it could be fostered.

As with FM 3-24 itself, the idea of the rule of law downrange represented a nascent movement toward a more sophisticated rule of law ideal. Yet, in Iraq and Afghanistan, deference to the rule of law became much more than rhetoric. Colonel Gade and Phil Lynch, who were the military and civilian rule of law leads in Iraq under Petraeus and Odierno during the surge in Iraq, described the rule of law in these terms: as a continuum.

FM 3-24’s rollout meant the rule of law was deemed essential to counterinsurgency success. Ultimately, the rule of law’s centrality to operational progress far surpassed that prescribed by FM 3-24. Every action—offensive, defensive, or stability—is now deemed to have a ‘rule of law component’. The upshot: the rule of law became central, not just essential.

Petraeus stressed the need to be careful about which aspect of the rule of law one is talking about. For him, the rule of law involves mixing several different concepts. Yet the rule of law’s connection with security, RoE, the use of force and the conduct of detention operations was evident. In the last chapter we saw how the rule of law was closely tied to security and especially to the way in which force was used, magnifying the importance of the LOAC requirement to discriminate between civilians and insurgents, and the related imperative

\[\text{Rule of Law in War}\]

58 Kilcullen.
60 Author’s interview with Colonel William Gade, by telephone, 24 February 2012 (Gade).
61 See Mason (2011). Krygier perhaps put it best in the volume (2011: 15): ‘In a way, rule of law promotion is booming. A lot of people and organizations are contracted to work on it, a lot of money is spent on it, a lot of academics study it. And yet it is hard to boast of much success in actually fostering it, much less conjuring it \textit{ex nihilo} or next to \textit{nihil}.’
63 Gade; author’s interview with Phil Lynch, by telephone, 5 March 2012 (Lynch).
64 Kilcullen, who suggested FM 3-24 is limited as a guide here given the lack of specificity on what rule of law means—it is a secondary consideration—or what rule of law progress involves. Nevertheless, he maintained: ‘I would argue in Afghanistan it [rule of law] has to be central’.
for measures to be proportionate. ‘At the end of the day,’ Petraeus acknowledged, the rule of law is often ‘about rules of engagement’. Petraeus was quick to observe the rule of law is also at other times about the ‘three legs of the rule of law stool’ (judicial, corrections/detentions, policing): ‘You have to work all of those.’65 The interrelationship between these manifestations of the rule of law was particularly stark for Petraeus in Afghanistan, where Taliban systems of justice directly competed with ISAF prisons and detention operations. But in the main, Petraeus illustrated the need to differentiate features of the rule of law.66

So we will have to be careful as we are talking... are we talking about international law, or rules of engagement derived from various aspects of international law—UN Security Council resolutions and so on, NATO, or whatever source of authority may be—or are we talking about the rule of law as it is applied broadly to a mission or counterinsurgency operation in a country like Afghanistan or Iraq.

One story illustrating Petraeus’ deference to established legal frameworks is his approach to detention in Mosul in mid-2003, when he instructed the 101st Airborne Division to abide by the Geneva Conventions when dealing with detainees. Petraeus recalled sitting down with his legal adviser, Colonel Richard Hatch, and contemplating how to approach detention:67

We sat down and we realized all of a sudden we were going to do something that, frankly, we hadn’t intended to do. It appeared we were going to have to hang on to some of these [detainees] for weeks or so. We didn’t have any guidance on how to deal with them, so we decided ‘let’s just do what’s familiar, which is the Geneva Conventions’. Everyone knows that, by and large—let’s just adhere to that. And we did and it worked out.

Asked whether he was unique with this approach, Petraeus could not comment. He did, however, remember a report concluding his Division was the only one with a ‘clean bill of health’.68 Kilcullen described Odierno’s 4th Infantry Division having the opposite approach to detention from 2003–4, describing it as a ‘when in doubt, detain, mentality’.69 Hatch recalled Petraeus being well-versed in RoE and LOAC, the latter being an area where Petraeus ‘did not want to push the envelope’, preferring instead to keep a ‘buffer between his actions and the outer bounds of law’.70 Hatch also recalled other units being much more kinetic, namely the 4th Infantry Division, and

65 Petraeus. 66 Petraeus. 67 Petraeus. 68 Petraeus. See, also, Cobain, ‘RAF helicopter death revelation leads to secret Iraq detention camp’, Guardian, 7 February 2012. 69 Kilcullen. 70 Author’s interview with Colonel Richard Hatch, by telephone, 5 July 2011 (Hatch).
a specific meeting in which Lieutenant General Wallace\textsuperscript{71} recommended Odierno adopt more of the Petraeus approach in front of both men.\textsuperscript{72} Back then, Petraeus’ views and approach ‘were very much contested and not universal’,\textsuperscript{73} perhaps also misunderstood. In some quarters they remain so today.\textsuperscript{74}

The Mosul story highlights the early deference of Petraeus to rules of law and law’s ideational value during operations. Put another way, it illustrates how attaching value to the rule of law plays a role in the selection of certain practices above others. A former troop commander, who twice toured to Iraq and was special assistant to Petraeus during the surge, provided some clues as to how the situation in Iraq in 2003 lent itself to innovation, both positive and negative:\textsuperscript{75}

We had been told that it would be a 90-day mission. . . . We were not expecting a heavily kinetic deployment or a deployment that involved any sort of insurgency or resistance to reestablishment of local government. Things like ‘how do you foster economic development, how do you foster rule of law, how do you teach, coach and mentor local government institutions, police, mayors, tribal councils’ we were completely unprepared for. Anything from detainee apprehension, to processing, to interrogation etc was what I would consider a very ad hoc discovery learning base. There was no best practices shared, there was no real doctrinal review, there was not really any up to date doctrine to reach back to.

Colonel Marc Warren was the top US military lawyer in Iraq under General Sanchez 2003–4, the period when the Abu Ghraib scandal came to light. When interviewed, Warren bemoaned the clashing standards and interpretations of legal principles that existed across operations—namely for non-military forces (including the CIA) and certain military forces (such as Special Forces)—as the insurgencies grew in Iraq and Afghanistan. While Warren believed ‘there should never be a different legal standard, or any standard that would violate the law’ (that there should be no special forces or CIA ‘bye’),

\textsuperscript{71} Wallace commanded the V Corps in Iraq. He then became Commanding General of the Combined Arms Center at Fort Leavenworth (preceding Petraeus) before assuming command of TRADOC, the US Army Training and Doctrine Command in late 2005.
\textsuperscript{72} Hatch recalled Wallace saying to Odierno: ‘You need to adopt more of the Petraeus approach here; quit knocking down doors in the middle of the night.’
\textsuperscript{73} Hatch.
\textsuperscript{74} Note, however, the changes in Odierno’s approach over time, recounted by Kaplan (2013: 113–16, 264–26).
\textsuperscript{75} BX. Another officer, who was a Company Executive Officer in the 101st Airborne Division during this period, had a similar take. He felt his company ‘understood COIN pretty well’ in 2003 because they reportedly had the best company commander in the brigade, all of whom served under Petraeus. Nevertheless, because the Division were ‘pretty isolated’ there was no real sense their approach was rare, despite the COIN approach feeling ‘pretty intuitive’. When he returned in 2004–5 to the same place, Mosul, he recalled it being ‘literally on fire’. Although he could not pinpoint a single reason, one significant change had been ‘pulling out of the city and going to the big bases’: \textit{UX}.  

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divergent interpretations could occur with deleterious consequences. In 2010, Warren observed that in the early stages of the Iraq War ‘there was no meaningful planning at higher headquarters concerning prisoners other than enemy prisoners of war’.\textsuperscript{76} Review proceedings instituted under Article 78 of GC IV during Warren’s tour were ‘under constant tension’, with the review board struggling with ‘commanders’ opposition to release decisions, particularly from 4th Infantry Division, and with its own uncertainty over the meaning of the ‘imperative reasons of security’ standard for internment under Article 78’.\textsuperscript{77} Warren told me differences in interpretations created confusion; this appeared the case both for detention and for the use of force.\textsuperscript{78}

You run the risk that some of those things are either actually or alleged to be violations of the law. But some of them may be just violations of standards and policies. When you overlay different standards and policies what will happen is soldiers will gravitate toward whatever standards and policies are perceived in their minds to be best for them. Sometimes best can be easiest. Sometimes best can be the most effective. You can wind up with a lack of discipline and a lack of cohesive command and control.

In 2010, Brigadier General Thomas Ayres, from the JAG Corps, acknowledged the rule of law function was not part of operations or the JAG mission until well after 9/11. One reason for this was begrudging recognition that stability operations were important in Iraq. (Recall the 2004 interim COIN manual, FM 3.07.22, was originally a subset of stability and support operations, and that stability operations were not made a core military mission until 2005.)\textsuperscript{79} Once the surge began, rule of law became an essential part of operations, and, by 2008, a line of operation in its own right.\textsuperscript{80} This is in contrast to General Casey’s 2005 decision, recalled by Colonel Gade, not to make rule of law a separate line of operation.\textsuperscript{81} The difference in rule of law focus between Casey and Petraeus was one of emphasis; under the latter rule of law ‘became very important to the strategy and to the campaign plan’, with considerable high-

\begin{itemize}
\item \textsuperscript{76} Warren (2010: 173). \textit{Gade} backed this, emphasizing ‘higher headquarters’ incorporated CENTCOM and the Joint Staff. In his view, there was no cogent advice provided to those in the field; the general impression was that individuals at political appointee level wanted to avoid or not focus on the issue.
\item \textsuperscript{77} Warren (2010: 174–5).
\item \textsuperscript{78} \textit{Warren}. See also Warren (2010: 182): ‘But in fairness there is a point to be made concerning the possibility of confusion at the soldiers’ level. There were soldiers who served in Afghanistan, where rules and principles were relaxed, and then redeployed to Iraq, where the Geneva Conventions fully applied. There were also soldiers who interacted with special operations and non-military forces which operated under relaxed rules and principles, even in Iraq’. (citations omitted)
\item \textsuperscript{79} Pregent (2010: 340).
\item \textsuperscript{80} \textit{Gade} and \textit{Lynch} said this decision was made early in 2008, but took some months to be fully implemented.
\item \textsuperscript{81} \textit{Gade}.
\end{itemize}
level buy-in from Petraeus and US Ambassador to Iraq Ryan Crocker. The rapidity with which rule of law became both an operational component and an objective (to develop rule of law capacity) meant it took time before US forces clearly defined the rule of law mission. Techniques of measuring rule of law progress changed regularly, as successive ROLHs demonstrated. Nevertheless, deference to the rule of law was an integral development, as Ayres explained:

For years, the Army’s mission was to fight and win the nation’s wars. We thought in terms of short duration wars, and we had two basic doctrinal templates: offence and defence. . . . Doctrinally, if we say we are going to do stability operations, we have to do not only things like build schools and pick up trash but also rule of law. We still do each of the six core functions, but we also have this new function now. . . . Commanders [in Iraq and Afghanistan] heard ‘rule of law’ and turned to in-house counsel embedded with them, and so Judge Advocates started to become involved in rule of law operations.

Recall here, Petraeus’ insistence that the ‘biggest of the big ideas’ in FM 3-24 was the combination of offensive, defensive, and stability operations. Importantly, Petraeus maintained the proportion devoted to each was intended to change over time.

As you can drive the level of violence down, offence and defence get smaller and stability gets larger. Of course, what you are trying to do is just that. The point here is that offence and defence are part of COIN. . . . That is the biggest of the big ideas. This is why you need pentathlete leaders, because you need people who can do all these tasks equally well.

This is a critical observation. It bespeaks the relationship between the conduct of kinetic operations, rule of law development and overall progress. In the last chapter, I argued the rule of law played a pivotal, guiding influence through FM 3-24’s drafting process. Establishing security under the rule of law was entrenched as a key end state. Recognizing the rule of law’s overarching significance required the conduct of hostilities to be bounded by LOAC. A certain level of security is required to build rule of law institutions, but

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82 Gade.

83 See Pregent (2010: 341): ‘The greater challenge is in trying to quantify progress in ‘establishing the rule of law.’ By 2008 the rule of law planners in Iraq were frequently faced with trying to quantify the unquantifiable. How efficient must the courts be? How well trained must the police be? How ‘modern’ must the law be?

84 <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1143&context=jlasc> (a. 5 September 2014).

that level of security is only possible through the lawful conduct of combat operations and the avoidance of arbitrary force. This connection is especially stressed in Chapter 7, on Leadership and Ethics for Counterinsurgency, which Petraeus commended. The nexus between the rule of law and the use of force in conducting kinetic operations is key to understanding international law’s influence in US counterinsurgency operations and to the reversal in military mindset attempted by FM 3-24. The chart of FM 3-24’s logical lines of operation (Figure 5.1), used in discussions about FM 3-24 and in operations, illustrates the interconnectedness, for example, between ‘appropriate mix of effort and use of force’ and security and governance.

So what of the conduct of operations and the ‘appropriate’ use of force in Iraq and Afghanistan? The killings at Haditha marked a turning point on this

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86 See, for example, <http://www.mors.org/UserFiles/file/meetings/07ic/Pierson.pdf> (a. 20 September 2014).
87 Despite the aversion to more complicated PowerPoint slides based on the same format: Bumiller, ‘We Have Met the Enemy and He Is Powerpoint’, New York Times, 26 April 2010.
just as the events at Abu Ghraib sharpened attention on the treatment of detainees. Protecting civilians became central to the nexus between rule of law, security and the conduct of force. Recall in this context Philip Bobbitt’s words from January 2010:89

The war aim in a war against terror is not territory, or access to resources, or conversion to our way of political life. It is protection of civilians within the rule of law. Not coincidentally, this is what General Petraeus realized was necessary in Iraq, and it is what General McChrystal has testified will be his goal in Afghanistan.

Asked whether he agreed with this, Petraeus replied: ‘Absolutely.’90 As the US War in Iraq officially ended on 15 December 2011, much was made of how approaches to civilians defined the course of the war, along with its end.91 When Petraeus assumed command in Iraq, he perhaps had no greater task than reducing civilian casualties. One former special assistant to Petraeus during this time recalled the intensity of efforts to reduce civilian casualties: ‘[Petraeus] was working night and day in terms of commander attention on the issue’.92 Spending time on the front line was a key part of ‘enforcing adherence to the model’, with Petraeus known for spending up to ‘six days a week, sometimes seven, visiting units and bluntly discussing how their operational approach did not fit with the strategic approach’.93 As Petraeus wrote to his forces in May 2007, in what became known as the ‘Living Our Values’ letter:94

Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy. . . . In view of this, I was concerned by the results of a recently released survey conducted last fall in Iraq that revealed an apparent unwillingness on the part of some US personnel to report illegal actions taken by fellow members of their units. The study also indicated that a small percentage of those surveyed may have mistreated non-combatants. This survey should spur reflection on our conduct in combat. . . . Seeing a fellow trooper killed by a barbaric enemy can spark frustration, anger, and a desire for immediate revenge. As hard as it might be, however, we must not let these emotions lead us—or our comrades in arms—to

90 Petraeus.
92 BX.
93 BX.
commit hasty, illegal actions. In the event that we witness or hear of such actions, we must not let our bonds prevent us from speaking up. Leaders, in particular, need to discuss these issues with their troopers—and, as always, they need to set the right example and strive to ensure proper conduct.

Protecting civilians was not new to Petraeus. His 1984 just war article drew attention to the rights of non-combatants and the limited circumstances in which injuring or killing non-combatants may be permitted. Respecting the rights of civilians, however, became central to measuring US progress in Iraq. A slide on overall civilian deaths was the third slide presented to Congress in September 2007 by Petraeus and Ambassador Crocker, and the second slide presented in April 2008. In September 2007, Petraeus noted a decline in civilian deaths by over 45 per cent Iraq-wide and by 70 per cent in Baghdad since the height of the sectarian violence in December 2006. The statistics were contested but the decline was not, as evidenced by the US Council on Foreign Relations graph reproduced in Figure 5.2.

In April 2008, Petraeus reported a further significant reduction, attributing the progress made to several factors, including the transition of soldiers to ‘the conduct of counterinsurgency operations’ across Iraq. There was at least a correlation between the execution of the new manual and a reduction in

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Figure 5.2. Civilian Casualties in Iraq.

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civilian deaths,99 evidence the new approach was permeating throughout the military and recalibrating attitudes and behaviour.100 Still, not everyone accepted the evidence. A confidential report into progress in Iraq and Afghanistan conducted by the RAND Corporation for US Joint Forces Command leaked by Wikileaks in March 2009 noted that insufficient attention was devoted to protecting civilians. We revisit the data on civilian deaths in Iraq and in Afghanistan below.

Reversing the tendency towards overwhelming firepower remained ‘a process of evolution’ when McChrystal assumed command in Afghanistan in June 2009.101 As JSOC Commander 2003–8, McChrystal was ‘constantly’ involved in changes to relevant RoE, though he cautioned against reading too much into written RoE without also appreciating the importance of commander’s intent:102

You cannot not be involved as a commander. [But] rules of engagement were not something, in my view, that you got together with your lawyer and said ‘write me out rules of engagement, send them to the men’ because it was way too complex a situation to just give written rules of engagement. You had to give them intent.

Command intent became vital in Afghanistan, especially ‘because of the enormous sensitivity to civilian casualties that developed over time there’.103 McChrystal sought to deal with the problems generated by civilian casualties as part of his ‘campaign reset’, particularly through the July 2009 Directive, which ‘really did matter’.104 McChrystal explained the impetus behind this in the following terms:105

It was a COIN thing. Our civilian casualties are a moral issue and I care about civilians. That is something I had been watching the previous year when I was in the Joint Staff. I had seen the pain involved with that and I though ‘this is just going to kill us’. So I came to Afghanistan already knowing that was a problem and I had watched the counterinsurgency effort struggling, so I came with the impression we needed to do counterinsurgency better and civilian casualties was one of the things we needed to decrease. When I got there and I did my listening tour I was overwhelmed how much more [of an issue] this was with the Afghan people than even I had realized. What it did was it reinforced my already held belief but increased it quite a lot. I made the decision that I was going to try and change that.

100 West (2008: 121).
101 Lamb: ‘A cultural shift without end.’ Note McChrystal (2013: 289): ‘the NATO Coalition was also responsible for a troubling number of those civilian deaths’.
102 McChrystal.
103 Petraeus.
104 Petraeus.
105 McChrystal. As Chaudhuri and Farrell noted (2011: 273): ‘In his nomination hearings before the US Senate, McChrystal noted that how ISAF conducts its operations “may be the critical point” in winning the support of the Afghan people and thereby campaign success.’
One of the things I knew we needed to do was do real counterinsurgency and I said that, but one of the practical ways to push that was through the Tactical Directive, to make the point that if you kill Afghan civilians you are not going to win hearts and minds. Simple as that.

In February 2009, before McChrystal assumed command, Amnesty International had published a report titled ‘Getting away with murder? The impunity of international forces in Afghanistan’. The report argued that despite FM 3-24 ‘establishing the rule of law’ as ‘a key goal and end state in COIN’, that principle had ‘not been properly implemented by international forces’ in Afghanistan, even with Petraeus as head of CENTCOM. The report noted three tactical directives since June 2008 that had sought to reduce civilian casualties, but alleged this was ‘mere military rhetoric’ and not a ‘top operational priority’:

> Respect for international law, including international human rights law and international humanitarian law as well as respect for the rule of law by international and Afghan security forces, is imperative to bringing security to Afghanistan. Improving access to basic economic and political rights for Afghans is contingent upon improving security and building respect for the rule of law. International forces operating in Afghanistan cannot simply counter the perception common among Afghans that they are above the law. They must, as a matter of international law, ensure proper accountability for the actions of all international forces, whether in the regular military, civilian contractors, or intelligence agencies.

For McChrystal, it was irrelevant whether his soldiers meant to kill civilians or not: ISAF forces had to stop causing civilian casualties. In issuing the July 2009 Directive, McChrystal did not want a tick-a-box directive that enabled officers to shoot under certain conditions and not shoot in others. The issues, he believed, were too complex for hard and fast rules. Undeniably, there was an operational necessity as well, which went beyond legal parameters. ‘I did not want people to be able to live in the legal circle outside the moral circle,’ McChrystal recalled: ‘to be in the bull’s-eye you had to be in the operational circle, which is well nested in the others.’

Many hours were spent drafting and disseminating the July 2009 Directive. McChrystal remembered spending a great deal of time on the precise wording of the ‘Commander’s Intent’, which he wrote personally and ‘agonized over’. Particularly important was

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107 As McChrystal recalled (2013: 289–90), during his confirmation testimony before the Senate Armed Services Committee on 2 June 2009 he said: ‘Our willingness to operate in ways that minimize civilian casualties or damage, even when doing so makes our task more difficult, is essential to our credibility… I cannot overstate my commitment to the importance of this concept’. See, further, McChrystal (2013: 310–13).
108 McChrystal.
that ISAF forces ‘would know it was [him]’. McChrystal wanted them to understand his intent and the overriding purpose of the new rules as much as, if not more than, the specific rules. The July 2009 Directive was thus a pivotal moment:\textsuperscript{109} 

It was the first step in communicating the counterinsurgency strategy, which was subsequently also laid out in the Strategic Review. But I knew this part. I didn’t have to wait for the Review to know that.

The specific RoE changes arising from the July 2009 Directive are discussed below in the third pathway. The interesting thing to note here is that apart from the Commander’s Intent, which comprised eight paragraphs, McChrystal’s legal adviser drafted the rest of the Tactical Directive—almost five pages in all—which he and McChrystal then went over ‘line by line’:\textsuperscript{110} 

McChrystal went on the offensive to implement and sell the terms of the July 2009 Directive.\textsuperscript{111} He ordered it be circulated and posted widely within ISAF and that every officer read it. McChrystal toured numerous outposts, dropping in often without notice to ensure it was understood and was being followed. He implemented a public airwaves campaign to communicate the thrust of the new approach to ISAF forces and to the Afghan people, including a September 2009 \textit{60 Minutes} interview.\textsuperscript{112} The effort, and the response, reveals how controversial the changes were. One US blogger declared the ‘idiotic politeness doctrine is killing soldiers’, suggesting the COIN approach was fictional and that McChrystal should ‘tell it to the Easter Bunny’.\textsuperscript{113} Another claimed the new policy effectively surrendered towns, villages and cities to the Taliban.\textsuperscript{114} Ralph Peters, a staunch critic of FM 3-24 mentioned in Chapter 3, labelled McChrystal ‘morally oblivious’.\textsuperscript{115} Reports from the front line revealed growing frustration and even anger at the restrictions.

McChrystal’s response was to engage with all comers, talk through concerns and explain the new approach. One of the Fort Carson officers I interviewed told me a fellow junior officer emailed McChrystal to protest the changes, 

\textsuperscript{109} McChrystal.\textsuperscript{110} Note McChrystal (2013: 312): ‘To communicate as clearly as I could, I personally wrote the key parts of a tactical directive that was designed to explain my intent in straightforward, non-lawyerly language.’\textsuperscript{111} See, further, McChrystal (2013: 312): ‘I also knew that the military coalition was an immense organisation, and that there was a constant risk of misunderstanding the directive at the lowest levels, where the fight and these decisions were the most difficult. This was especially true since many lieutenants and sergeants never directly read the directives that top-level commanders, like me, put out; they often received the guidance secondhand. Thus, I used every opportunity, and leveraged the leadership and credibility of combat leaders . . . to articulate the policy.’\textsuperscript{112} <http://www.cbsnews.com/videos/general-mccrystal-50077506/> (a. 20 September 2014).\textsuperscript{113} <http://www.wnd.com/2011/07/324565/> (a. 20 September 2014).\textsuperscript{114} <http://warnewsupdates.blogspot.com/2009/06/new-rules-of-engagement-in-afghanistan.html> (a. 20 September 2014).\textsuperscript{115} See Peters, ‘The rules murdering our troops’, \textit{New York Post}, 24 September 2009.
saying they were negating their capacity to ‘win’. McChrystal visited their outpost in Kunar Province less than 24 hours later:116

General McChrystal gets the email and immediately schedules a trip...less then 24 hours later he was going out on patrol with this platoon. After the patrol was done he sits around with all the guys and spends more than an hour hashing out the discussions of why we have these principles and why he issued these directives and why he expects that, if we follow them, that hopefully we will win. Evidently it was just a great experience for the platoon, although it kind of freaked out the commanders....The perception was we were too hard on civilians in the first few years of the war and I think we are still trying to find our way out.

Similar stories were reported, including additional visits to Kunar Province. The most public reaction followed the fatal airstrike on two fuel trucks by German ISAF forces in Kunduz Province in September 2009.117 When asked in general terms about investigations, McChrystal recalled his approach to this incident:118

I was very involved in them. We probably leaned harder on subordinate units. They would do an investigation and say—‘that’s fine’. I would go—‘bulls**t, I’m not buying that. Let’s really drill it’. We hung a few people out to dry. When the case of the [German tanker incident] went off I was out in Kunar with the Ambassador and had a call saying it had happened. I immediately called President Karzai and apologized. I said, ‘I don’t know what happened but our bomb killed Afghans and I’m sorry. I will sort it out’. That night I went back and apologized to the Afghan people on a TV tape and put that out. And then I traveled the next day to [the site] and walked to the ground with some of the locals. The whole point of that was to get everybody’s attention—‘hey look, I am up here, this is a huge deal.’

For McChrystal, this was a balancing act. On the one hand it looked like he ‘did not trust’ his force and that ‘he was hanging the Germans out to dry’. In the end, however, McChrystal backed the imperative to ‘get across that there was almost no way that dropping that bomb and killing that many civilians made sense’. This was all part of the ‘socialization of the force’, which was and remains controversial, though McChrystal insisted that in retrospect he was ‘extraordinarily happy’ he did it, because it established a ‘new relationship with President Karzai, the Afghan people respected it’ and despite some initial protests it was a ‘big attention getter’ for the force: ‘It turned out to be a vehicle

116 *FC6*. Note also a similar story some months later, recounted in McChrystal (2013: 378–80).
I was able to use to make the wider point.'\textsuperscript{119} Despite the frustrations of ISAF forces and other senior officers, McChrystal also made it clear who was in charge, and he demanded compliance. As McChrystal put it: ‘Then there is the compliance part. There is the part of communicating to commanders and saying “I have laid it out to you, I have tried to explain it, I have listened to your concerns: now this isn’t a debate, this is what you are going to do.”’\textsuperscript{120}

For his adviser, Lieutenant General Sir Graeme Lamb, who described the tanker incident as legally, operational and morally ‘absolutely stretching the boundaries’, McChrystal’s response was indicative of his approach to the application (and misapplication) of force, informed both by his legal and operational grounding in the Special Forces, as well as a deep appreciation that ‘you could not shoot your way to success; what he did was disassemble the problem and reassemble a solution.’\textsuperscript{121}

Further attention to the specific measures used to reduce civilian deaths in Iraq and Afghanistan follows in the discussion of the third pathway. The point here is that the impetus for such changes cannot be disentangled from the rule of law. Indeed, the changes flow from that very ideal. The same is true, perhaps even more so, for detention operations. Petraeus’ deliberate steps on this front included his response to the confidential 2006 Pentagon survey in which ten per cent of troops surveyed reported personally abusing Iraqi civilians. The May 2007 ‘Living Our Values’ letter to all soldiers serving in Iraq\textsuperscript{122} was designed to inform them that US doctrine ‘completely, clearly outlaws torture...that’s a line that cannot be crossed’.\textsuperscript{123} Petraeus wrote:

\begin{quote}
Some may argue that we would be more effective if we sanctioned torture or other expedient methods to obtain information from the enemy. They would be wrong. Beyond the basic fact that such actions are illegal, history shows they also are frequently neither useful nor necessary. Certainly, extreme physical action can make someone ‘talk’; however, what the individual says may be of questionable value. In fact, our experience of applying the interrogation standards laid out in the Army Field Manual (2-22.3) on Human Intelligence Collector Operations that was published last year shows that the techniques in the manual work effectively and humanely in eliciting information from detainees. We are indeed, warriors. We train to kill our enemies. We are engaged in combat, we must pursue the enemy relentlessly, and we must be violent at times. What sets us apart from our enemies in this fight, however, is how we behave. In everything we do, we must observe the standards and values that dictate that we treat non-combatants and detainees with dignity and respect.
\end{quote}

This philosophy continued in the April 2008 ‘Strategic Communication Plan’ (SCP) of Joint Task Force 134, established on 15 April 2004 to oversee detainee operations and ‘to serve as the executive agent for execution of theater policy as well as military doctrine’.[124] The SCP began with a Galula quote about counterinsurgents being judged by actions not words, before outlining detention and targeting policy. Two parts of this overview stand out. The first is the imperative, in bold type, that all actions are ‘fully congruent with the ideals that we [MNF–Iraq] promote’ such that there is ‘no ‘gap’ between what we say and what we do’. Related to this are the following underlined words: ‘Our priorities and values must be displayed in every deed, and reflected in the actions of every man and woman serving in internment facilities throughout the Iraqi theatre of operations.’ The second part that stands out is the direct order, underlined, that the execution of the SCP become a command priority.[125]

The order here came from Task Force 134 Commanding General, Major General Douglas Stone. The eight numbered principles governing detainee operations were declared as follows: (1) Rule of Law; (2) Security; (3) Care & Custody; (4) Education; (5) Engagement; (6) Dignity; (7) Cultural Relativism; and (8) Transparency.

We will return to specific detention policies later. For now, the point is to demonstrate the significance of the rule of law to detainee operations on the ground. Task Force 134 vastly expanded its operational scope from 2007–9, so much so that the MNF–I commander established an Interagency Rule of Law Coordinating Centre (IROCC), with the ICRC attending several meetings.[126] Petraeus then instigated a similar programme for Afghanistan. ‘I took the guy that did it for me in Iraq—Major General Stone—sent him to Afghanistan and had him do an assessment,’ Petraeus recalled: ‘that was the justification to establish Joint Task Force 435.’[127] The centrality of the rule of law, according to Petraeus, was why he ‘fought to get [CJIATF] 435 established’.

Many of the tasks subsequently performed by the Combined Joint Interagency Task Force 435 (CJIATF 435) in Afghanistan mirrored those begun during the Iraq surge. Petraeus was quick to point out, however, that Afghanistan was not Iraq, that in many ways it ‘is tougher than Iraq because it does not have the muscle memory Iraq has’ or the same levels of education, and trained lawyers and judicial officers.[128] CJIATF 435, officially requested by McChrystal, was formed in 2009 to assist with promoting the rule of law in detention operations in Afghanistan. CJIATF 435, in turn, spawned the Rule of Law Field Force–Afghanistan (ROLFF–A) ‘to execute

124 See <https://info.publicintelligence.net/TF-134_StratCom_Plan_Iraq.pdf> (a. 20 September 2014).
125 For more information on Task Force 134, see Pregent (2010: 334–6).
126 Pregent (2010: 337–8).
127 Petraeus. See also McChrystal (2013: 347–9).
128 Petraeus.
projects and programs to increase rule of law capacity in Afghanistan’ with respect to detention, prosecutions and other aspects of US operations. Martins was again on the ground to set up both CJIATF 435 and ROLFF–A. Petraeus told Martins that his first job was to provide the kind of oversight for US detainee operations ultimately secured in Iraq under Major General Stone, including the establishment of Detainee Review Boards. The second task was to help the Afghanistan corrections structure (institutions and processes for dealing with convicted criminals, including prisons). The final task was the judiciary. As Petraeus said: ‘This was not our first rodeo; with Martins we did it together.’

Thus, the relationship between the rule of law, security, the use of force and detention, which was observed in FM 3-24, appears to have manifested itself on the ground. The increasing pervasiveness of the law is quite remarkable. As a senior officer in Special Operations Command at CENTCOM told me, legal considerations—as opposed to intelligence—now drive operations. That same officer remarked that he had been in the US Army for 24 years and that the COIN shift across the force was the single most fundamental shift he had seen, a bigger and more rapid shift than occurred at the end of the Cold War.

But what of rule of law thinking among junior officers? Though the influence appears visible among senior commanders, further analysis is necessary to determine whether it penetrated the lower ranks. A clue is offered by the frustration voiced by officers about tighter RoE. One officer, who toured twice to Iraq and was a special assistant to Petraeus in 2007, recalled a similar level of frustration among junior soldiers in Iraq to that expressed by officers in Afghanistan after McChrystal’s July 2009 Directive: ‘That sort of expression of frustration [under McChrystal] by frontline soldiers, we were definitely experiencing that in 06/7 in Iraq.’

Exasperation that the situation was not improving was ‘compounded by this frustration at the change in the RoE’, whereby soldiers would come back from patrol and say ‘what the hell are we doing; relative to my last deployment this is a lot harder because I feel like I can’t kill the “enemy” as wantonly as I did before and I feel a little hamstrung’.

An army captain, who was a platoon leader and executive officer in Iraq from early 2004 to March 2005, painted a similar picture. He recalled doing basic counterinsurgency in 2004, but said it was ‘fairly different’ then, with ‘no big picture’ associated with it. The captain’s pre-deployment training had been almost entirely conventional, consisting mainly of vehicles and

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129 *Petraeus*. Martins is now performing a similar role as Chief Prosecutor, Military Commissions, at Guantánamo Bay, Cuba. See [http://www.npr.org/2012/04/03/149866004/a-prosecutor-makes-the-case-for-military-trials] (a. 20 September 2014).

130 *BX*.

131 *BX*.
'shooting tanks’. His depiction of the use of force by US officers from 2004–5 was ‘hearts and minds’ for the first half, and ‘just reduction’ of the enemy for the second half; that US forces ‘were kind of a blunt instrument, to be used and thrown at a problem’. The captain’s next deployment, this time as a company commander to Kunar Province, Afghanistan, 2009–10, was completely different. What particularly surprised him was the ‘vast’ change in training between deployments. ‘There was just a whole shift,’ the captain said, noting that in his experience the Army historically had been slow to shift, ‘but somewhere between getting back and going again there was a real snowball effect of what needed to be focused on.’ The captain recalled his commander in Afghanistan buying up to thirty books and multiple copies for officers to read. While he viewed COIN as more of a ‘grass roots movement’, with FM 3-24 providing good instruction for incoming leaders, he described ‘the whole movement’ as ‘altering absolutely everything’. The move away from a ‘straight conventional’ mindset meant you did not have a choice but to ‘follow the counterinsurgency principles’. Not doing so guaranteed failure. Significantly, this captain classified his time in Kunar as far more kinetic than Iraq’s most kinetic days: ‘In Afghanistan it was literally the kitchen sink that they [the enemy] would throw at you.’ A former company commander, who deployed five times to Iraq and Afghanistan from March 2003, recalled a similar change in the use of force. ‘Instead of stealthily surrounding a house and blasting our way in,’ he said, ‘we would surround the house, block off the exits, give a bullhorn to our interpreter, and he would call into the house.’ This enabled officers to ‘get all the women and children out of the house’, along with the elderly, and provided a better chance of isolating and capturing the insurgent. The company commander said this approach worked ‘very well’, both in terms of protecting US forces and in terms of limiting damage. Bottom line with that is trying to limit collateral damage in the form of their house, their furniture, their gates, and then also potentially the women and children, the old people that could be unfortunate casualties in the situation where you go into a place, they start shooting, you start shooting and it just gets bad. Asked when he noticed these changes, the company commander stated he observed these most—compared to what he had seen before—in his third deployment, from December 2007. Communicating these changes to those

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132 FC2.  
133 FC2.  
135 UX.  
136 UX.
under his command, however, could be difficult, often requiring one to go ‘back to basics’. For many junior officers, the company commander explained, the deployment did not marry with their assumptions upon joining the military: ‘their idea was that they were there to kill and destroy the enemy—that’s what we do, we are the Army infantry’. He also likened the atmosphere in Iraq then to the situation in Afghanistan under McChrystal. The company commander was often forced to be blunt, particularly with the junior officers. He explained the techniques could save theirs and others’ lives, and potentially another deployment. This meant sometimes resorting to command authority to be clear on what was acceptable and what was not: ‘when something does occur you have to jump on it and squash it’. The officer explained he would use transgressions as opportunities to train his units on escalation of force and emphasize why protecting the population was important. Even so, he believed the RoE still allowed officers to protect themselves and engage a ‘positively identified threat’, saying:137

[T]hose things are constant no matter where you go; no lawyer or judge is going to fault you if you act on those two situations. What you don’t have the right to do is drop a 500 pound bomb on a building where you think something might be hiding, because you really don’t know what is in there. Entering a building at night, by surprise, with armed soldiers, generally carries with it the potential for unintended collateral damage. The ‘tactical callout’ was effective in helping us limit collateral damage—from protecting innocent lives to protecting the infrastructure and furniture of the target house and surround buildings. . . . [These] are all hard things to explain to soldiers, especially if they have just lost somebody close to them, but it is something that has to be constantly emphasized down to soldier level. Actually I think most senior officers who have deployed multiple times get it. There are some battalion commanders who don’t, but I think most of them do at this point.

This company commander and others noticed a gradual move away from lawyers giving the RoE instruction to commanders doing it themselves. ‘As the war progressed,’ I was told, ‘what we saw more and more was a shift away from the lawyers giving the brief’. In his initial deployment, he recalled the commanders desiring that lawyers brief because they were deemed to ‘understand it better than anyone else’. Commanders began to do more of the briefings over subsequent deployments because they were able to draw on personal experiences, and ‘provide powerful vignettes about what happens when you do the right thing or you do the wrong thing’. As the company commander recalled:138

137 UX. 138 UX.
You started getting real-life vignettes that were brought out. Not only would you talk through the rules of engagement, you would also talk through a story—a vignette of some kind—something that could happen or something that actually did happen in Iraq or Afghanistan. Short of the punch line you stop and say, in a group discussion format: ‘what would you do?’ People will give different opinions about things, it usually leads to a discussion about ‘okay, is that legally right, is that legally wrong?’, and sometimes it would be legal to go in either direction: ‘what would be the potential impacts of that decision?’ Normally after the discussion you would talk about: ‘OK, if you had done this in this position that would have been illegal according to our rules of engagement or just standard Geneva Conventions, laws of war etc’. In some of the situations where it could be either you can say, ‘here is what they actually did, here is the impact of what happened’. Those were good vignettes to have and I think it left a good impression on people’s minds about the situations they could face, but those things always have to be reinforced.

Officers differed on whether ethics, operational necessity or legality mattered most in these discussions. There was some consensus that ideas of ‘illegality’ carried some power, particularly in the wake of Abu Ghraib and other scandals,¹³⁹ and that it was essential to be taught and reinforced so that certain situations do not ‘flip back into a grey area’ where certain conduct is perceived as ‘legal’ given the environment.¹⁴⁰ Captain Russell Norman and Captain Ryan Leary, both judge advocates who deployed to MNC–Iraq headquarters 2008–9, stressed the role of operational lawyers in providing ‘tangible results to a commander’ during the most kinetic parts of a COIN operation (which they termed the ‘stop the bleeding’ phase) by ‘creating targeted restraints on the use of force, crafting RoE mindful of cultural and religious sensitivities, providing operational approval guidelines, and giving real-time legal advice to commanders conducting offensive operations’.¹⁴¹ This enabled a faster shift to a focus on the population, an expanded ‘emphasis on the rule of law’ and the capacity to leverage ‘the expertise of civilian organizations’.¹⁴²

Military lawyers were also adapting their understanding of the rule of law on the run. Echoing Ayres, Norman and Leary wrote that rule of law had not previously constituted a ‘core legal discipline’ for judge advocates, and the Office of the Staff Judge Advocate (OSJA) generally had not included a ‘Rule of Law

¹³⁹ UX referred to Frederick (2010), a book about one platoon’s experiences in Iraq, which was marked by ill discipline and brutality.
¹⁴⁰ UX.
¹⁴¹ Norman and Leary (2010: 33 and 35): ‘Planners sought out and welcomed Op Law JAs adjusting the focus and direction in order to more efficiently apply the principles of COIN doctrine’ (citations omitted). Note the example given (2010: 35 fn. 123) so far as creating a ‘more restrictive’ RoE for US forces in a certain area was concerned.
¹⁴² Norman and Leary (2010: 33).
Division’. As a result, the OSJA team to which Norman and Leary belonged, the XVIII ABN Corps, ‘provided information and direct accounts of the COIN in Iraq to the Centre for Legal and Military Operations (CLAMO), which influenced the Rule of Law Handbook’. As the COIN mission transitioned from kinetic operations to a greater focus on the population, including the development of Iraqi governance structures, the operational law division also transitioned. ‘Iraqi law questions became paramount,’ Norman and Leary recalled: ‘commanders at all levels began to focus on defining and quantifying success in rule of law operations throughout Iraq.’ This meant their team was split into a group dealing with ‘traditional operational law issues’ and a ‘completely separate Rule of Law Division’. This Division consisted of operational law judge advocates ‘who had previously provided legal advice and analysis on kinetic operations’, now directed toward ensuring compliance with Iraqi law on questions ranging from detention operations to executive power.

During this phase, MNC–I Op Law and rule of law JAs were consulted so frequently to explain various aspects of Iraqi law, it sometimes seemed they were required to be ‘barred’ to practice law in Iraq.

The use of officers previously involved in kinetic operations in the Rule of Law Division is another example of the essential link between the conduct of security operations and development of rule of law institutions. The primacy of this link is reinforced by recommendations made by Norman and Leary for the reunification of the kinetic operational law team and the rule of law team. ‘This method,’ they argued, benefits from ‘clearer lines of communication and

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143 Gade maintained MNC–I headquarters had a rule of law division earlier, but conceded the focus was entirely different in the period Norman and Leary describe. Previously, the military and civilian sides ‘were striking out at different angles’. Alignment of civilian and military rule of law objectives became the single biggest effort, impacting everything from courthouses to RoE.

144 See Norman and Leary (2010: 33 fn. 108). See also FM 1-04, Legal Support to the Operational Army 5–4 (15 April 2009).

145 Norman and Leary (2010: 34). This included judge advocates assisting in the establishment of ‘commander’s rule of law objectives’.

146 Gade explained the 2008 Iraq-US Security Agreement ensured all actions had to be ‘by, with and through’ Iraqi forces, which meant the onus to fully understand Iraqi law became paramount. Petraeus and Odierno ordered all divisions to operate in concert with Iraqi forces well before this came into effect. Odierno exerted particular pressure on the Special Forces to ensure no unit continued to operate independently. Compare <http://www.cfr.org/iraq/us-security-agreements-iraq/p16448> (a. 20 September 2014); cf. Alcala (2011: 13), which suggested training on applicable law was ‘overlooked until the eleventh hour’ In Iraq, ‘despite the anticipated transition from law of war-based detentions to criminal law-based arrests under Iraqi domestic law’.

147 Norman and Leary (2010: 34). Gade described how principles of international law were implicated in resolving questions of Iraqi law, particularly vis-à-vis detention conditions, and that there was an insistence from the US side that Iraq adhere to its own law. Routine meetings were scheduled with the ICRC to facilitate this. See, further, Alcala (2011: 9): ‘More often than not, therefore, those responsible for conducting rule of law operations must understand both foreign law—that is, nation-specific domestic law—and international law in order to competently prosecute the rule of law mission.’


149 Norman and Leary (2010: 36).
a single chain of command when issues need to be addressed at a higher level’, together with ‘a unity of effort between rule of law and traditional Op Law personnel’. The decisive role played by judge advocates in advancing the rule of law ideal is clear. Their role was magnified by the incorporation of the rule of law as a fundamental line of operation. As Norman and Leary concluded:

Operational Law JAs can use their training in international law and legal reasoning to develop innovative solutions for the commander. By shifting the focus from kinetic operations to capacity building, expanding the emphasis on the rule of law, and utilizing civilian expertise, Op Law JAs can provide significant input for commanders and their staffs at various levels during this crucial phase…. MNC–I JAs discovered this firsthand in Iraq by ensuring that all the staff sections were focused on conducting operations ‘by, with, and through’ the Iraq security forces; by creating a distinct Rule of Law Division focused on developing and fostering Iraqi rule of law projects; and by recommending that civilian experts work in the planning sections on the ground with tactical units to serve as force multipliers. These examples demonstrate how Op Law JAs can and should plan ahead during COIN operations. Such forethought can prove decisive in the final phase of COIN: the movement to self-sufficiency.

Colonel Richard Pregent, a US military lawyer seconded to the US Embassy in Iraq from 2008–9, acknowledged there are times where ‘senior leaders will have to make the decision to improve security that some may criticize as compromising the rule of law’. This is especially the case, Pregent suggested, during ‘an active counterinsurgency’, when ‘the long-term goals of the rule of law mission will of necessity be a lower priority than establishing and maintaining security’. Although recognition of the rule of law’s

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150 Norman and Leary (2010).
151 The military assets devoted to rule of law operations dwarfed civilian efforts (including interagency resources) and stoked arguments about the supposed militarization of the rule of law: see Pregent (2010: 334, 337, 339, 341); Gade; Alcala (2011: 8, 11). A CENTCOM official told me in August 2011 that the problem with asking other agencies to do more is that ‘DoD is the $800 billion gorilla’.
152 Norman and Leary (2010: 38). Gade insisted this quote understates what was going on: commanders at every level, not just judge advocates, were making—and were mandated to make—the mental and operational switch from solitary US operations to operations by, with and through Iraqi forces.
154 Pregent (2010: 324–30). Pregent offered the example of the Iraq Government (GOI) not executing the ‘legally valid arrest warrants issued by the courts’ during the Awakening, which in theory ‘undercut the rule of law in Iraq’. Another example concerned GOI’s position on ‘legacy detainees’ (over 15,000) held by US forces under the 2008 US-Iraq Security Agreement and released periodically thereafter but in many cases transferred to Iraq custody. Pregent alleged warrants were ‘mass-produced’ to engineer this and despite not being based on ‘adequate evidence’ were ‘equated with success’. In a second interview on 31 May 2012 (Gade II), Gade said this last point was ‘unequivocally false’ and disputed some of Pregent’s other conclusions. Gade II also noted the difficulty (from the GOI perspective) of acquiring over 15,000 detainees from an occupying force, and insisted that US judge advocates had reduced that number dramatically prior to transfer. At
centrality to COIN dramatically impacted the conduct of kinetic operations, the focus on security in Iraq during the surge ensured rule of law development lagged behind other objectives. It was principally for this reason that Petraeus and Crocker made the rule of law a separate line of operation in the Joint Campaign Plan in mid-2008.\textsuperscript{155} In many respects, this line of operation provided a pathway for the offensive, defensive and stability aspects of the operations to become better aligned.\textsuperscript{156} One reason, it seems, why rule of law became central is because its establishment was the critical element that enabled US forces to transfer control to Iraqi authorities: without it, the nightmare scenario of ethno-sectarian violence and lawlessness was far more likely to occur.\textsuperscript{157} Such reliance on the rule of law, however, ensured that ‘international civil, political, economic, social, and human rights standards’ guided and in many cases directed the content of Iraqi law.\textsuperscript{158} The credibility of such reforms depended to a large extent on the capacity of US forces to demonstrate they too were operating within relevant LOAC and international human rights law.

Undoubtedly, variance persists between and among commanders and platoons.\textsuperscript{159} One officer, for example, noted that the approach in 2006–7 depended very much on the specific leader at division, brigade, company and platoon level. Such leaders, ‘particularly your O-6 leader’ (usually a brigade commander), could have different impressions of proportionality, discrimination and overall objectives of counterinsurgency. ‘One of the issues that my brigade had,’ he explained, ‘was trying to do [COIN] while simultaneously our division commander and brigade commander wanted to judge success based on the metrics of body counts’. When the same officer later went to theatre level in 2007 he did not see that metric being used, though there were several O-6 commanders ‘who used that metric’.\textsuperscript{160} As a company commander suggested, one’s take on such situations may be that ‘if you don’t fight back or take an iron fist approach you are showing weakness’, though he believed that going ‘overboard’ in those cases simply creates enemies.\textsuperscript{161} Reports alleging US Marines urinated on civilians\textsuperscript{162} and that a US sergeant shot sixteen civilians in an unprovoked attack,\textsuperscript{163} suggest no amount of training will weed out all illegal or immoral practices. While most officers may now ‘get’ counterinsurgency, there is probably more variance than

\textsuperscript{155} See Pregent (2010: 331–2).
\textsuperscript{156} See Alcala (2011: 8–9).
\textsuperscript{157} Gade II.
\textsuperscript{158} See Alcala (2011: 9).
\textsuperscript{159} cf. Frederick (2010).
\textsuperscript{160} BX.
\textsuperscript{161} UX.
\textsuperscript{162} See McGreal, ‘US marines identified in urination video likely to face court martial’, \textit{The Guardian}, 13 January 2012.
commonly perceived, even if it reduces once doctrine, training and command guidance are congruent. Some officers interviewed cautioned that ‘company commanders who were being attacked every day’ might, necessarily, take a far more ‘hardnosed’ approach to counterinsurgency operations. Without further investigation, therefore, there is ‘no guarantee’ a counterinsurgency approach would filter down to those overly kinetic environments.\footnote{UX.}

The insights provided by the officers at Fort Carson are instructive on the overall influence of the rule of law in particularly force-intensive areas, given they were stationed in perhaps the most volatile region of Afghanistan from 2009–10: the Pech River Valley in Kunar Province. One major, who deployed in both Iraq Wars and Afghanistan from 2004–5, described the big difference with this 2009–10 tour—easily his most difficult—was simply how \textit{kinetic} it was. ‘We were in firefights everyday,’\footnote{FC7.}\footnote{FC7 II.} the major said. Yet, as he put it:\footnote{FC3.}

\begin{quote}
We did not even pay attention to body counts; it had nothing to do with our overall strategic goal or our successes. All the focus was on the population and working with government officials.
\end{quote}

Notably, when asked about the nature of the mission itself, there was virtual consensus among the Fort Carson officers interviewed on the population-centric focus. Indeed, the interviews revealed the mix of offensive, defensive and stability operations, described by Petraeus above as the ‘biggest of the big ideas’ in FM 3-24. As one lieutenant, a platoon leader for much of the 2009–10 deployment, said: ‘If we went strictly kinetic, or strictly non-kinetic, we would be doing the wrong thing.’ For him and others, the ‘onus is on the lower level leaders’ to decide what to do on any given day: ‘are you going to worry about the firefight and not go to the village, or are you going to go to the village’\footnote{FC5.}\footnote{FC7 II.}.\footnote{FC3.}\footnote{FC5.} Another platoon leader stated the approach ‘needs to be both’ enemy-centric and population-centric.\footnote{FC5.}\footnote{FC7 II.} The major in charge of operations stressed this combination. He highlighted the enormous responsibility placed on junior soldiers, noting it did not match the video game version of forces ‘shooting everything you see’: ‘that soldier is a policeman, that soldier is an ambassador, that soldier is a soldier, that soldier is a mentor—they do so many different roles’\footnote{FC7 II.}.

Scrutiny over civilian casualties matched the scene depicted above. One platoon leader was clear on how highly it was rated as a measure: ‘The biggest thing for me for an overall indicator of success was obviously no civilian casualties.’\footnote{FC5.} This meant resisting the temptation to ‘blast everything that you see’, turning emotion into ‘aggression focused on one point rather than

\begin{footnotes}
\item[164] UX.
\item[165] FC7.
\item[166] FC7 II.
\item[167] FC3.
\item[168] FC5.
\item[169] FC7 II.
\item[170] FC5. According to this officer, his platoon did not experience one civilian casualty for the year of their deployment, which the officer attributed to ‘double checking and triple checking the numbers’ and understanding the difference between ‘an emotional firefight and an aggressive firefight’.
\end{footnotes}
“the awesome blawesome” where you just shoot everywhere’. It was stressed that this onus ultimately fell on the platoon leader, dealing potentially with teenage officers who might be ‘upset and mad’ and wanting to ‘shoot everything’, and instructing squad leaders to direct their team leaders and soldiers ‘to shoot where they need to’. The pressure to get it right did appear stronger than ever. The major in charge of operations stated: ‘It is huge, it’s a game changer’. ‘Not in a million years would I have made the call to drop’ on the tankers involved in the German Kunduz incident, he continued. This was stressed from above but also came about through recognition that operating disproportionately and killing civilians generated strategic setbacks:

That soldier needs to understand that every time he pulls that trigger there could be an investigation. A soldier pulling a trigger nowadays, it could change that entire village’s perception of what we are trying to do if you kill the wrong person.

Even within this most kinetic of environments, then, the population was the focus. As one company commander, who was a platoon leader in Iraq in 2008 and was ‘non-lethal’ battalion chief for the first part of the 2009–10 Afghanistan deployment before taking command of a company, told me:

The majority of our missions every day, whether it be in Iraq or Afghanistan, was to go out and connect with the people, talk to the people, see what they needed, see how we could help them, see what information they had. Whenever we went into a village [in Afghanistan] we talked about intelligence, security, what they needed as a village.

This message clearly resonated. Several platoon leaders explained their biggest success in Kunar Province was not winning battles, but establishing water wells, flour mills, bridges, or, in two cases, setting up veterinary clinics (‘vet-caps’). This is a marked contrast from an officer’s depiction of life in Iraq between 2005–6, when he recalled being ordered to do a raid based on a hot tip (not intelligence) and coming across a freezing family preparing breakfast: ‘I had fifty ways of killing this family and not a single way of helping them’. Another platoon leader who served in Kunar Province emphasized the consequences of overt firepower: ‘All it takes is one bad firefight or one bad unit or one misstep to happen over there and then you can wipe years of work away. That is what I saw was the biggest trouble.’ The same company commander quoted above described how McChrystal’s July 2009 Directive was fed down the ranks:
McChrystal’s [July Directive] was published when we first got there. Everyone read it. Some changes were made that were published and you made sure everyone read it. I had my platoon leaders back brief me—’hey, do you understand this; tell me what his guidance says.’

For this company commander, the counterinsurgency approach was markedly different from his West Point training earlier in the decade. Shifting to operations that did not prioritize the use of force was difficult, particularly given the tactical focus in his training was all about ‘how to fight the enemy’. By coincidence, his brother was a more recent graduate of West Point and had quite different training methods.\footnote{FC1}

Him and I have a vastly different educational experience because the focus now is IO [information operations] and counterinsurgency; it is a lot more focused on the people. . . . It was definitely hard at first. When I got to Iraq, especially coming straight out of Ranger School, I was so focused on fighting, fighting, fighting, and you get there and my first day I had two different shuras sitting down with people having tea. I didn’t even think about firing my weapon. Then in Afghanistan it is a mixture of both. . . . In Afghanistan our big thing was security through development.

Another company commander emphasized how McChrystal’s tactical directives were communicated down the ranks. ‘Every time there was a change,’ he said, ‘it would get pushed out and there would be a class to make sure all the guys understood and they would have to sign off on the back as acknowledgement.’\footnote{FC2} For this officer, the \textit{substance} of training across his decade in the military had changed considerably more than its \textit{consistency}, ‘to keep up with the changing face of operations’. ‘Moral compasses’ had also deepened, it was felt, despite the ‘ridiculous environment where troops were deploying’ every eighteen months. He believed there was much more focus on ‘individual soldiers’ as opposed to ‘unit level actions’, increased focus, for example, on how ‘that specialist machine gunner’ can impact ‘the outcome of a meeting’. This shift in focus to individual responsibility, in his view, was palpable. The learning process changed from one of ‘action and reaction’ to how one ‘can shape the outcome’. Instead of looking at moving from point to point, there was a discussion of up to eight options and deciding which would work in certain instances: ‘more people focused than tactics focused’.\footnote{FC2}

The brigade judge advocate (BJA), the key legal adviser for the brigade commander during the 2009–10 deployment in Kunar Province, was clear about the enlarged role for the law within counterinsurgency operations. He remembered a big push for officers to read FM 3-24 when it was published, especially among judge advocates, given the view ‘it was a driving force

\footnotetext[178]{FC1.} \footnotetext[179]{FC2. RoE training was done at least monthly in country.} \footnotetext[180]{FC2.}
behind operations’. On the interaction of counterinsurgency and law, the BJA explained:

Law is a critical element to any successful counterinsurgency operation. You want to have a developed legal system in the country that can control, maintain, and safeguard the citizens. That was certainly something we focused on this last year [in Afghanistan]. I also think that aspects of proportionality—those principles—are perhaps even more important in counterinsurgency because of the emphasis, particularly since McChrystal was there, on minimizing civilian casualties and all those things, and I think it plays hand in hand with the principles we were trying to enforce under international law.

The BJA said his team consisted of himself, three other military attorneys, three US State Department civilians (attorneys) working solely on rule of law issues, and some paralegals. ‘No two days were the same,’ the BJA maintained, but his primary focus was ‘to make sure he took care’ of the brigade commander. Attention was generally directed towards ‘rule of law type missions where we were trying to work with local Afghan prosecutors and judges and prison officers’ to develop ‘their capacities’ further. Much time was also spent ‘planning for operations’, where there would be regular discussions about targeting. The BJA was involved in all targeting meetings for the brigade and part of mission planning. Often the significance of the kill or capture level would require briefing to a higher level and another layer of legal review. ‘Ultimately, if there was something wrong’ with the planned operation, the lawyers were expected to say that it did not comply. The principles commonly arising revolved around civilian casualties: anytime there was a risk it ‘added extra scrutiny’. In such cases, discussion centered on the significance of the target and how solid the information was. Here, ‘proportionally’ was the primary legal consideration, because ‘in order to get’ certain targets ‘there would invariably be a risk’ of killing civilians. ‘Military necessity’ was also a feature, though commonly it fell away given the establishment of ‘prioritized target lists’ at higher levels of command, which meant ‘necessity’ was implied. The BJA described the proportionality discussion as follows: You need greater fidelity of information about what we thought was in the house, whether guests would be there. Ultimately you would brief at significantly higher levels if you were dealing with a greater risk [of civilian casualties]. At each level it added questions and added inquiries into not only the necessity but more so what concrete information we had, what we thought we were targeting and how certain we were that we would be able to get the target.

The increased scrutiny on planned targeting operations also translated into the imperative about appropriate use of force. ‘We were always looking to find a better approach,’ the BJA said, which ideally involved ‘not dropping a bomb’. ‘Frankly,’ he continued, ‘McChrystal made that very clear in the directives—he pretty much ruled out that option as an initial approach’. Nevertheless, the BJA felt commanders ‘understood the danger of killing innocent civilians’, which ‘many times outweighed any gains’. 184

We were always looking for minimum approaches, but also wanted to make sure we were protecting our force too, and there were certain instances where knocking on doors was not sensible because it was going to endanger too many lives. Minimum force was certainly a guiding principle for our commanders and from a legal perspective we would constantly reiterate ‘let’s try to make sure that we are certain that this is the approach we need to do—have we looked at all other alternatives first?’

… I think leaders understand. I think they were pretty well brought into the notion that in order to win the campaign here that we need to do as much as we can to try and protect the populace…. I know there are plenty of soldiers that complained about having their hands tied behind their back but I think that for the most part leaders were pretty comfortable with it. Certainly sometimes there were frustrations about particular instances where they wanted to go for something and there was a concern about collateral damage that led to a particular mission not being approved. But I think for the most part leaders were pretty well on board with rationale behind the tactical directives and necessity for them … and the need for them to go down to the lowest level and be explained to soldiers.

The BJA independently voiced two other developments he believed impacted the influence of law on counterinsurgency operations. First, he lauded the benefit of commanders doing RoE briefs instead of lawyers. ‘A lawyer is not the best person to be talking about it,’ he said, ‘when a commander is down there talking to his troops about it, it is absorbed a lot better and certainly means a lot more … the underlying international law principles are there but it really is a leader-soldier directive.’ 185 The judge advocates would provide products commanders could use and highlight key points to be emphasized, especially when there was a new directive. Leaders were required to report back to confirm they had covered everything. Transgressions were certainly investigated, however, 186 the BJA recalled over 200 investigations for his unit. The ‘most significant investigations—when dealing with civilian casualties—were all at general officer level’, so final approval of the investigations resided at a higher level than the brigade commander. 187

184 FC6. 185 FC6. 186 FC3 recounted a specific investigation involving a civilian injury that was alleged to be caused by a ‘problem soldier’ under his command: ‘What needed to be done [the investigation] got done…. But I should have realized he was going to be a problem.’ 187 FC6.
Secondly, the BJA pointed to likely variance between commanders, particularly in the measurement of ‘hostile intent’. Although all required a ‘reasonable certainty’, which was more readily established if particular weapons were being used, there was no black and white line: violence levels and location influenced decisions. In short, there was a discrepancy between commanders on the ‘trigger point’ that crystallized reasonable certainty: the set of facts permitting certain actions. Much depended on a commander’s experience of the area and contextual information, such as historical fighting position. Discussion of ‘hostile intent’ is significant here because it feeds into earlier analysis on direct participation in hostilities and self-defence.

‘One of the main key things,’ the BJA said, which was the brigade commander’s intent, ‘was to increase the transparency of the legal system.’ On the whole ‘everyone was receptive to some of the [rule of law] ideas’. The need for transparency was something that appeared to filter through to all levels in Afghanistan, with several Fort Carson officers commenting on the use of gloves to collect evidence: ‘the whole evidence collection thing was pretty big’. By deployment’s end the brigade had completed five public trials, which ‘were very well received by the public’. One of the trials—a murder trial—attracted ‘almost six hundred attendees’, with ‘people falling out the windows trying to look in to see the court case’. For the BJA, this was a ‘pinnacle moment as far as rule of law development’ went, and got ‘the system out in front of the public’. Another trial was a public corruption trial of the Minister for Economy of Kunar Province, who was caught taking a bribe. Several hundred people attended, which reportedly ‘did a lot for counterinsurgency for people to see one of the public officials being tried for taking a bribe’. A similar approach had been undertaken in Iraq. Martins described, for example, the resignation of former Iraqi Deputy Minister for Health, Hakim al-Zamili, who while ultimately acquitted in a controversial Iraqi trial infected by illegal militia intimidation of witnesses, had been forced to resign amid charges of assisting the Shiite death squads. For Martins, this method enabled the Iraqis to achieve ‘things that you would have thought were untenable politically’. ‘By anchoring their policy to law’, US forces could transition more readily from combat to law enforcement and, in doing so, ‘defend people more successfully’.

Perhaps the greatest impact of the rule of law shift lay in detention operations, otherwise labeled ‘COIN inside the wire’. In reality, this approach applied inside and outside the wire, a point that came across in many interviews. Several specifically credited the influence of Brigadier General Martins. The BJA heralded his value to the overall campaign—Martins had arrived

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midway through their 2009–10 deployment for his own two-year deployment as deputy commander and later commander of rule of law operations—saying it was ‘unheard of’ to have a judge advocate in a command position. Lamb was equally effusive, describing Martins as an ‘extraordinary individual’, who worked ‘unbelievable long hours bringing the rule of law’ to Iraq and then to Afghanistan. For Lamb, Martins’ greatest contribution, quite apart from his unique relationship with Petraeus, was his ability to ‘understand the totality from how you look at the target set through to in fact the release or the locking up of the target set, or the killing of the target set.’ Lamb continued:

[E]verything from there, which goes through judges, through courts, through evidence—all that absolutely captured within his holistic view of that—the rule of law and the importance of that—which is what Petraeus brought to Iraq and what he has brought again, to a lesser extent but the same sort of approach in Afghanistan.

Even so, the Fort Carson officers believed high expectations on rule of law development were unrealistic in the Afghan environment where they were located. ‘We just were not there yet,’ one company commander said: ‘it was the wild west.’ The same officer had told McChrystal as much over a thirty-minute conversation. Asked to relay the substance, the officer said, ‘I think [McChrystal] was looking for some stuff that would have been feasible further on down the line’ but was ‘not really applicable’ to where his team were at. He stressed he did not feel McChrystal’s approach ‘was wrong, by any means’, indeed he insisted he thought it was ‘absolutely right’—the same thought process, simply further matured—but maintained: ‘I can't go the Taj Mahal when I only have a Porta John.’ One captain, who redeployed to the same area of Kunar Province in 2012, reported similar frustrations then in debates about the appearance of security officials at trial instead of relying on sworn witness statements. A meeting convened in March 2012 to discuss witness intimidation reportedly ‘turned into a bashing session on the overly-democratic judicial process, Afghan style’. Nevertheless, the following observation of one of the S-3 officers in Kunar Province, who managed much of the detention and targeting process for his battalion 2009–10, underscored the perceived influence of rule of law thinking on the ground:

Some aspects of the deployment, especially in retrospect, that I find most effective in terms of showing the insurgency for what it was (and what it was not) are when we sought to display ‘rule of law’ as best we could to the local Pashtun population—at the sub-tribal levels and amidst the districts-sponsored ‘shura.’

193 FC6. 194 Lamb. 195 FC2. 196 FC2. 197 FC3, email to the author dated 14 March 2012. 198 FC4, email to the author dated 22 May 2012.
The point advanced in this pathway has been that the ideational influence of the rule of law was pivotal in the change of approach in Iraq and Afghanistan. Even the most junior of officers and leaders in the most kinetic of areas absorbed the centrality of the rule of law in operations. It was understood by senior commanders to be a key, perhaps driving, facet of modern COIN, and the effects filtered right down the ranks. Commitment to the rule of law implicated international law directly, particularly in relation to the use of force. One company commander from Fort Carson perhaps put it best when he described the perception across the board that officers ‘have a greater feel for what needs to happen and more compassion for what needs to happen than they did before’, that they are ‘much better rounded war fighters and diplomats’ and cognizant of the consequences of individual decisions than a decade ago. The big push, this company commander recalled, came in 2006–7, ‘right when Iraq got really bad’, which was, in his mind, when ‘that blanket of counterinsurgency policy came down’.199

Pathway II: International Law and Legitimacy

**Be first with the truth.** Get accurate information of significant activities to your chain of command, to Iraqi leaders, and to the press as soon as is possible. Beat the insurgents, extremists, and criminals to the headlines, and pre-empt rumors. Integrity is critical to this fight. Don’t put lipstick on pigs. Acknowledge setbacks and failures, and then state what we’ve learned and how we’ll respond. Hold the press (and ourselves) accountable for accuracy, characterization, and context. Avoid spin and let facts speak for themselves. Challenge enemy disinformation. Turn our enemies’ bankrupt messages, extremist ideologies, oppressive practices, and indiscriminate violence against them.

General Petraeus, MNF–I, COMISAF COIN Guidance, 21 June 2008

ISAF is not adequately executing the basics of COIN doctrine. Thus the first major recommendation of this assessment is to change and focus on that which ISAF has the most control of: ISAF. The coalition must hold itself accountable before it can attempt to do so with others…. ISAF must operate differently.

General McChrystal, ISAF Campaign Assessment, 23 August 2009

In this pathway much is made of two strands: demonstration and articulation. As outlined earlier, international law has often been seen as a rhetorical device, a common language used to advance or refute particular arguments.

199 *FC2.*
The claim advanced here suggests there is something deeper occurring, such that action and articulation are becoming increasingly inseparable. There is evidence of this in McChrystal’s Afghanistan Campaign Assessment for President Obama, quoted above, which comprised an initial assessment and seven substantive annexures. Annexure D, devoted to ‘Strategic Communication’ (StratCom) is of special interest. There, McChrystal declared the ‘information domain’ a ‘vital battlespace’ critical to the overall effort, ‘specifically, to the operational centre of gravity: the continued support of the Afghan population’. His recommendations indicated the credibility of the message had become integral to the message itself.

Change of Culture: There must be a fundamental change of culture in how ISAF approaches operations. StratCom should not be a separate Line of Operation, but rather an integral and fully embedded part of policy development, planning processes, and the execution of operations…. Implicit in this change of culture is the clear recognition that modern strategic communication is about credible dialogue, not a monologue where we design our systems and resources to deliver messages to target audiences in the most effective manner. This is now a population centric campaign and no effort should be spared to ensure that the Afghan people are part of the conversation. Receiving, understanding, and amending behaviour as a result of messages received from audiences can be an effective method of gaining genuine trust and credibility.

The message is clear: in the global information age one may no longer disaggregate the importance of the actual conduct of operations from the broader, contested narrative of a war. It is no coincidence that annexures on ‘Civilian Casualties, Collateral Damage, and Escalation of Force’ and ‘Detainee Operations, Rule of Law, and Afghan Corrections’ follow immediately after McChrystal’s StratCom plan. The ‘battle of perceptions’, as McChrystal termed it, cannot be won without perceptions reflecting reality. McChrystal argued ISAF ‘must demonstrably change behaviour and actions on the ground—our policies and actions must reflect this reality’. He invoked his July 2009 Directive specifically: ‘StratCom should take every opportunity to highlight the protection of civilians in accordance with the revised Tactical Directive dated 1 July 2009, which is a key StratCom tool.’ The ‘offensive IO’ goal was to expose the insurgency for ‘indiscriminate use of violence’. McChrystal called for new tactics, techniques and procedures to reflect a ‘flatter command philosophy whereby subordinates are expected to act in accordance with the Commander’s Intent to ensure a swift, effective response to achieve the

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200 McChrystal Assessment (2009: D-1).
202 This reflects Molan’s idea of ‘demonstrable legitimacy’: see Molan (2008: 175).
203 McChrystal Assessment (2009: D-3).
information initiative against the enemy’. This was to include ‘risk mitigation measures’ to ensure ISAF were ‘first with the truth’ about civilian casualties.\(^{204}\) Conscious the counterinsurgency campaign was one executed at junior officer level, McChrystal insisted: ‘Every soldier must be empowered to be a StratCom messenger for ISAF.’\(^{205}\)

McChrystal’s call to be ‘first with the truth’ echoed the objective sought by Petraeus in Iraq. In his 2008 COIN Guidance, Petraeus encouraged his forces to ‘foster Iraqi legitimacy’, arguing the ‘legitimacy of Iraqi actions in the eyes of the Iraqi people is essential to overall success’.\(^{206}\) Petraeus also emphasized the significance of IO and how they linked with the objective of legitimacy. Petraeus insisted his forces live their values. Like McChrystal would later do in Afghanistan, he warned officers against giving into ‘dark impulses’ or tolerating ‘unacceptable actions’ by other soldiers. ‘Fight the information war relentlessly,’ Petraeus urged, explaining the imperative for words to back, and inform, deeds.\(^{207}\)

Realize that we are in a struggle for legitimacy that will be won or lost in the perception of Iraqi people. Every action taken by the enemy and our forces has implications in the public arena. Develop and sustain a narrative that works, and continually drive the themes home through all forms of media.

To return briefly to some of FM 3-24’s prescriptions.\(^{208}\) ‘Counterinsurgents seeking to preserve legitimacy’, FM 3-24 outlined, ‘must stick to the truth and make sure that words are backed up by deeds.’\(^{209}\) ‘Victory’, FM 3-24 continued, ‘is achieved when the populace consents to the government’s legitimacy and stops actively and passively supporting the insurgency’.\(^{210}\) The orders from Petraeus and McChrystal bear this out. The key goal outlined was, ultimately, to ‘orientate the message from a struggle for the “hearts and minds” of the population to one of giving them “trust and confidence”’.\(^{211}\) McChrystal’s call for a ‘fundamental change of culture in how ISAF approaches operations’ underlined the importance of *credibility* to the mission, one now directed to winning the trust and confidence of the local population and bolstering the government’s claims to legitimacy. In doing so, the thinking went, support for the insurgency would decline and its key members could be isolated and eliminated. McChrystal’s assessment illustrates how the need to win this narrative directly informed the very shape actions must take. As his key adviser, Lamb, said: ‘the greatest common of the 21st century will be communications. Perceptions become reality.’\(^{212}\)

\(^{204}\) McChrystal Assessment (2009: D-3–D-4).

\(^{205}\) McChrystal Assessment (2009: D-6).

\(^{206}\) Petraeus (2008: 211).

\(^{207}\) Petraeus (2008: 212).

\(^{208}\) FM 3-24: [1-7].

\(^{209}\) FM 3-24: [1-13].

\(^{210}\) FM 3-24: [1-14].

\(^{211}\) McChrystal Assessment (2009: D-5).

\(^{212}\) Lamb.
McChrystal drove home these points in his November 2009 COIN Training Guidance. ‘You must understand the mission; understand what we’re trying to accomplish and why,’ he began: ‘This means you must master COIN in both theory and practical implementation. Only with this understanding can you be an asset to the force and not a liability.’ McChrystal went on to fuse the narrative and the conduct of operations directly, asking officers to consider counterinsurgency as ‘an argument to win the support of the people’, such that ‘every action, reaction, failure to act, and all that is said and done become part of the debate’. McChrystal insisted, ‘the people are the prize’, stressing all population interactions, positive or negative, influence Afghan perceptions of ISAF. He went on to emphasize points on escalation of force, fire support, detainee operations, the myriad of tasks undertaken in counterinsurgency, and the versatility expected of all officers. McChrystal reiterated the need for vast changes in the way officers ‘think, act and operate’, from how they drive or fly, how they use force, how they patrol, and how they fund programmes and projects, which was contrasted to the insurgents’ desire to displace the government’s ‘legitimacy’. McChrystal called for ISAF to make a more ‘compelling’ case, through ‘word and deed’, that it had ‘the capability and commitment to protect and support the people’ and could provide ‘a convincing and sustainable sense of justice and well-being to a weary and sceptical populace’. ISAF forces were to ‘turn perceptions from fear and uncertainty to trust and confidence’. McChrystal implored officers to ‘get rid of the conventional mindset’, stating: ‘If we harm Afghan civilians, we sow the seeds of our own defeat.’ He used the following analogy to warn against playing into the insurgents’ hands:

A military force, culturally programmed to respond conventionally (and predictably) to insurgent attacks, is akin to the bull that repeatedly charges a matador’s cape—only to tire and eventually be defeated by a much weaker opponent. This is predictable—the bull does what comes naturally. While a conventional approach is instinctive, that behaviour is self-defeating. This is part of the reason why eight years of individually successful kinetic actions have resulted in more violence. The maths works against an attrition mindset.

Petraeus adopted a similar mantra when taking over command from McChrystal in Afghanistan in July 2010. In his COMISAF COIN Guidance, released on 1 August 2010, Petraeus reiterated the now expected points about fighting with discipline, reducing civilian casualties to an ‘absolute minimum’, living ‘our’ values, and fighting the ‘information war aggressively’. Petraeus again stressed the need for credible messaging, saying ‘integrity is

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213 Copy on file with the author.
critical to this fight’. His successor, General Allen, continued the push against civilian casualties when he assumed command in July 2011, telling ISAF forces in his initial letter that he expected ‘every member of ISAF to be seized with the intent to eliminate civilian casualties caused by ISAF’. Tellingly, Taliban leader Mullah Omar released a 1800-word statement in November 2011 warning Taliban soldiers they faced ‘sharia justice’ if they killed or injured innocent civilians without taking precautions.

As to the direct link between international law and demonstrating and articulating legitimacy in the conduct of operations, consider first McChrystal’s reference to his July 2009 Directive as a ‘key StratCom tool’. Apart from the Commander’s Intent, which comprised eight paragraphs, McChrystal’s legal adviser drafted the rest of the Tactical Directive—almost five pages all up—which he and McChrystal then went over ‘line by line’. This mandated far greater fidelity in distinguishing between civilians and insurgents and ensuring conduct was ‘clearly proportionate’. McChrystal’s 2009 Afghanistan Campaign Assessment affirmed and even deepened changes to the effective rules of engagement instituted by his July 2009 Directive. McChrystal reiterated sub-unit ground commanders should continue to de-escalate force in populated areas, even ‘breaking contact as appropriate to accomplish the mission’. McChrystal recommended further changes to requests for close air support, stressing that ‘in order to minimize the risk of alienating the Afghan population, and in accordance with international law, ISAF operations must be conducted in a manner that is both proportionate and reasonable’. In language that echoed Chapter 7 of FM 3-24, McChrystal noted a significant amount of civilian casualties occurred during escalation of force procedures (14 per cent of people killed and 22 per cent of those wounded over the previous six months), which he attributed to ‘units with less training experience and lower unit cohesion’, to ‘fear and uncertainty among ISAF soldiers’, and to misunderstanding by Afghans over the warnings issued. These procedures were to be communicated ‘more effectively to the Afghan people in appropriate media’. To make the connection between international law and legitimacy properly, however, we must be more explicit. The upshot is this: there was no other way for a military, especially the US military, to operationalize legitimacy

217 McChrystal.
without prioritizing legality, including closer adherence to LOAC and, in some cases, international human rights law.\textsuperscript{219} For this reason, international law assumed an even greater role. As Frank Hoffman, who wrote the draft of Chapter 7 of FM 3-24, pointed out: neither Galula, nor Thompson nor Kitson stress the word legitimacy. It is very much a feature of modern counterinsurgency.\textsuperscript{220} In Hoffman’s view, legitimacy is used in three ways in the Iraq and Afghanistan counterinsurgency campaigns. The first is in the sense that it refers to the culture of the host country. The last is the end state of successful counterinsurgency—government election and popular support—not in itself a military operating principle. The second, and most critical, refers to the conduct of US, coalition and host nation military forces, whose actions must be seen as legitimate. This element becomes pivotal for US forces and commanders, especially in an environment where there may now be a seven second lag between actual conduct and reported conduct online, instead of a seven day lag officers used to be accustomed to. The contention here is that when the US military considers how to achieve and operationalize legitimacy, there is overt deference to law, which necessarily incorporates LOAC and international human rights law.

One way to illustrate this link is to refer to the ‘Basic IO Loop’ often used in Iraq and Afghanistan as part of the counterinsurgency strategy (see Figure 5.3). The close relationship between the narrative, the use of force, illegitimate actions, perceived security and overall support is made clear.\textsuperscript{221}

The 2009 Campaign Assessment annexure on Detainee Operations, Rule of Law and Afghan Corrections supplies further evidence of the close link between the notion of credibility—perceptions matching reality—to overall legitimacy, and the centrality of legality to this endeavour. McChrystal was typically blunt: ‘[T]he Afghan people see US detention operations as secretive and lacking in due process’. His goal was to ‘develop and build capacity to empower the Afghan government to conduct all detention operations [in Afghanistan] in accordance with international and national law’. It is here we see McChrystal’s formal recommendation for the establishment of CJIATF 435. CJIATF 435 was to have two primary functions: overseeing detention and interrogation for all US-held detainees in Afghanistan, and conducting rule of law operations. Ostensibly a legal agency, CJIATF 435 was to be commanded by a General Officer, comprise around 120 military and civilian

\textsuperscript{219} I am grateful to Frank Hoffman for his observations on this point. Making legitimacy the main objective, it must be stressed, is very different from requiring an action or operation to be legitimate. (It has been argued, for example, that the NATO strikes in Kosovo in 1999 were legitimate despite questionable legality.) When each and every aspect of a war must be tasked towards legitimacy, it is another task altogether to operationalize this in a non-legal way.

\textsuperscript{220} Hoffman.

\textsuperscript{221} Emphasis in original. See: <http://www.mors.org/UserFiles/file/meetings/07ic/Pierson.pdf> (a. 20 September 2014).
staff, and have a command/control headquarters element with six lines of operation. Two stand out:

The Engagement and Outreach Group will formulate and implement strategic communication and outreach as a proactive tool to protect and defend the truth of US detention and interrogation practices, to further assist in the development of the Rule of Law within Afghanistan.

The Legal Group will identify gaps in the Rule of Law framework that are inhibiting US and Afghan detention/corrections operations from completing their mission and will develop solutions through consistent engagement with GIRoA elements and the International Community.

Major General Stone reinforced similar points in Iraq in his 2008 Strategic Communication Plan (SCP) for Task Force 134, which dealt with detainee operations. The execution of the SCP was declared a command priority. Stone demanded all actions become ‘fully congruent with the ideals that [MNF–Iraq] promote’ such that there is ‘no “gap” between what we say and what we do’. Three of Stone’s eight principles stand out. The first is ‘Rule of Law’. The sixth, ‘Dignity’, deals with the dignity and treatment of detainees, said to be ‘of

\[222\] McChrystal Assessment (2009: F-4).
paramount importance’. Stone stated explicitly that violating the dignity of detainees ‘places the stated purpose of our communication efforts at risk’. ‘Adherence to this principle is a 24/7 requirement,’ Stone continued: ‘One breach, actual or perceived, can inflict irreversible damage on our efforts to defeat the insurgency.’ The eighth principle Stone identified was transparency: US willingness to open detention operations to public scrutiny would enable the US to ‘influence public opinion of detainee operations in Iraq, and demonstrate to the world that it respected ‘the Rule of Law and individual human dignity’. Stone concluded: ‘The principle of transparency pertains to both action and intent. It must apply across all warfighting functions, to include areas traditionally considered to be protected.’

When interviewed, Petraeus maintained legitimacy, especially ‘legitimate governance’, was ‘hugely important’. As to achieving it, Petraeus recounted the following factors: ‘you do it by serving the people, not preying on them, by providing rule of law, by demonstrating integrity, by combating corruption and so forth’. Its centrality to COIN—whether it is termed its watchword or fulcrum—was palpable. ‘That is the big idea,’ Petraeus stressed, ‘that governance has to appear legitimate in the eyes of the people and therefore gains their support’. Here, legality and legitimacy were ‘intertwined’ and ‘closely related’. For Petraeus, a constant dilemma in Afghanistan was promoting ‘rule of law when the major export crop was illegal’, where there is ‘a massive illegal narcotics industry that pervades every aspect of society’. Nevertheless, Petraeus insisted rule of law was a ‘critical element’ to legitimacy, which is why as CENTCOM commander he ‘fought to have CJIATF 435 established’.

Lamb was adamant the revised focus on local populations in Iraq and Afghanistan played a vital role in changing the calculus of legitimacy. Necessarily, belief that victory meant winning over the people, not killing and capturing, changed the characterization of the narrative and the imperative to behave accordingly. The new focus ensured foreign forces were judged on two accounts: what they said and whether they did what they said they would do. Failure on either ground meant losing space between the coalition and the population.

If you turn around and say your constant attention should be to the population then how you act—whether it is night raids or whether it is very precise or whether it is a lot cruder—how you act really matters. If you act badly than you can’t turn around and say: ‘we only meant to do this’ or ‘that guy is a bad guy, that is why you uncle, your aunt, your three daughters and your cat died’.

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224 Original emphasis.
225 Original emphasis.
226 Petraeus.
227 Petraeus.
228 Lamb.
McChrystal also emphasized the centrality of legitimacy and its relationship with the law. ‘Winning the hearts and minds,’ McChrystal explained, involved ‘assigning legitimacy’ to government. For him, the objective of legitimacy helped to unify the tripartite mix of offensive, defensive and stability operations. Disentangling the conduct of security operations from the nature of governance was impossible. One example in this respect was the presence of land disputes, on which many of the local issues in Afghanistan turned. The presence of CJTF 435 from 2009 was vital as it facilitated competition with the Taliban through a functioning, effective and fair legal system. McChrystal hailed the building of host nation courts in Iraq and Afghanistan as ‘vital’ for ‘confidence and legitimacy’, lamenting these tasks had been viewed as ‘too hard’ before the installation of a counterinsurgency strategy. He went on to say:

As we try to deal with tactical lessons for the future, the legitimacy of the government is so wrapped up in their ability to provide the most essential services, one of which is rule of law. The degree to which it is corrupt or non-existent is lethal. You can build a host nation army, but if the court system does not exist and isn’t at least tolerably equitable, you won’t get there.

McChrystal described how commitment to legality fastened the three aspects of operations together, linking security goals with governance, development and overall legitimacy. McChrystal suggested his JSOC experience allowed him from an early stage in Iraq, especially given the context provided by Petraeus from early 2007, to view counterterrorist operations as merely a component of the wider strategy. The easy path, he claimed, was for the military to become overly distracted by kinetic operations and not focus on the broader strategic goals. This is why McChrystal viewed the law as ‘essential for two reasons’. First, the law ‘increased your legitimacy because that which you did was underpinned by accepted law, not just something you hid behind’. Second, the rule of law enabled the comprehensive approach to come together: ‘you need everything, not just security’. McChrystal insisted the military ‘has got to understand that’ the use of force ‘needs to be precise, clearly legitimate: people have got to see and believe a strike is reasonable and makes sense’. This means passing ‘a higher perception test than conventional war’.

The Fort Carson officers interviewed, who deployed to two of the most dangerous valleys in Afghanistan, also emphasized the importance of legitimacy. Asked how they would describe their mission in Kunar Province, one army captain, who was a platoon leader and executive officer in Iraq from 2004-2005 before deploying to Afghanistan from 2009–10, replied: ‘I would describe the mission in terms of progress and the establishment of

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229 McChrystal. 230 McChrystal. 231 McChrystal.
legitimacy’. His stated goal was to see ‘a strong police force, a legitimate power structure in my area, and some sort of power sharing brokered with the tribes and the villages’, thus pushing the ‘ink spot strategy’ (small footprints of success, which provide a catalyst for further change). For him, perspective was vital to understanding the objective:

If you put yourself in their shoes [the local population’s] what other options do we honestly have. They are looking at us as an invading force in their country and the only way we are going to be able to get across to them is get them involved and make them see it as a legitimate process itself with us providing that assistance and security as opposed to trying to force it down their throats.

This did not mean, however, that this officer’s view of legitimacy correlated with senior command. The officer told me McChrystal and other commanders ‘were looking for some stuff that would have been feasible further down the line but was not really applicable to where we were at’. ‘It was the same thought process’, the officer insisted, but ‘further matured than I thought we could get to at that point’. What is telling, however, is the officer’s account of what he asked McChrystal on one of his visits. ‘I said my piece,’ the officer remembered, in front of his superiors, ‘I was looking for more police force, some legitimacy … it was very development, government lines of operation related.’ This was despite rule of law potential being limited given the nature of the fight at that time and resources available:

We just weren’t there yet. It was the Wild West. I had nothing, no district centre, no government representation. I think it’s coming. I think the ink spot [strategy] is great and I think it would have worked. We just needed more time to connect the dots … I can’t do government meetings and legal advisers for them when I’ve got people trying to kill me all day long.

Several officers connected legitimacy with the conduct of kill or capture operations and the function of law. Civilian casualties or damage, particularly in the event of miscommunication or where a unit responded disproportionately to instances of alleged hostile intent, were described as enormously destructive to mission momentum. ‘Incidents like that,’ one company commander said, ‘had a terrible impact on a unit’s effectiveness in that area: it just really wrenches away your legitimacy.’ This officer, who deployed five times to Iraq, described how he took decisive action in response to one incident. ‘There was no reason in my mind,’ he said of this particular case, ‘that they should have pulled the trigger at all… I crushed it and used it as a teaching point, training the entire company on escalation of force’, emphasizing why ‘it was important to protect the population, not just ourselves.’

\[232\] FC2. \[233\] FC2. \[234\] FC2. \[235\] FC2. \[236\] UX. \[237\] FC2.
Perhaps we should be unsurprised by the growing importance of demonstrating and articulating legitimacy in modern counterinsurgency, and the centrality of legality to this quest. Yet this is unmistakably distinct from earlier justificatory tools. Part of this is due to the information age: US forces have dealt not only with CNN but Al Jazeera, You Tube, Facebook, Twitter and other forms of social media.\(^{238}\) It takes seconds, as opposed to days, for organizations to upload footage direct and unedited to the internet. Still, it has taken the US military considerable time to catch up and adapt to the virtual battlespace. It took time for doctrine to emerge, for training to match doctrine, and for officers to seize on the impact of all actions in the battle of perceptions. ‘One of the most difficult aspects’ of training forces for counterinsurgency, McMaster argued, is the ‘need to prepare soldiers and units to overcome fear and take aggressive action against the enemy while also inoculating them against abuses and excesses’.\(^{239}\) We see this reflected in Chapter 7 of FM 3-24 and in the actions of commanders and officers downrange. FM 3-24 instructed US forces to ‘work proactively to establish and maintain the proper ethical climate’ and ensure the environment of counterinsurgency operations ‘does not undermine the values’ of soldiers and Marines.\(^{240}\) It suggested combating insurgent efforts to portray US forces as ‘illegitimate’ by ‘treating non-combatants and detainees humanely, according to American values and internationally recognized human rights standards’.\(^{241}\) McMaster believed the COIN approach and related training and education had much to do with the absence of comparable Abu Ghraib- and Haditha-like abuses since FM 3-24 was rolled out.

Petraeus attributed much of his success at Fort Leavenworth to his control over training programmes such that they could mirror new doctrine. As improved as the training has been, however, it took a while for US forces to grapple with the significance of information operations and ‘the rising salience of the virtual dimension’.\(^{242}\) Hoffman has termed the strategic objective in this respect ‘manoeuvring against the mind’, whereby information operations form a fourth block of the Three Block War concept.\(^{243}\) He described the step change in these terms:\(^{244}\)

\(^{239}\) McMaster (2009: 16).
\(^{240}\) FM 3-24: 7-1; McMaster (2009: 17).
\(^{241}\) FM 3-24: 7-5.
\(^{242}\) Hoffman (2009: 100).
\(^{243}\) Hoffman (2009: 108); Hoffman and Mattis (2005). This concept refers to the ability of armed forces to conduct combat, peacekeeping and humanitarian operations in the same location (across three city blocks) at the same time.
As in most irregular and protracted conflicts, the contest for the support of the population is the central or decisive front in the campaign and requires us to recognize that perception may matter more than factual results in the physical battlefield. The ‘wars of opinion’ of Jomini’s day are now the wars of ideas and images of the twenty-first century.

So vital is the virtual to current operations that the ICRC has called for a clear framework on international law applicable to information operations specifically.\textsuperscript{245} In conflicts like counterinsurgency, a persuasive, undeniable narrative will often trump outcomes on the front line. It would be folly, however, to ignore the impact of battlefield conduct on the narrative and on perceptions of that narrative. This is the very point Petraeus, McChrystal and others sought to drive home; that ‘information’ can be portrayed in innumerable ways: every action or inaction is relevant and decipherable by the local population.\textsuperscript{246}

IO is now inextricably linked with military operations, and brings compliance with LOAC and international human rights law sharply into focus. Colonel Darley has hinted at this, arguing ‘what we understand today as the specialties and disciplines’ of IO ‘are in orientation and principle what Clausewitz may have had in mind when prescribing measures to deal with the “moral” dimension of war’.\textsuperscript{247} Nevertheless, the nature of the modern audiences and the ubiquitous, often uncontrolled, type of medium used for communication ensures this dimension is especially challenging. This is particularly so given messages that might historically have been tailored to specific wartime audiences are now intertwined. Given no state has a monopoly on meaning and interpretation vis-à-vis international law, actual or perceived violations are magnified.\textsuperscript{248}

[T]heater-wide rules of engagement and detention policies relay to a much broader group whether you are lenient on criminal behavior, are serious about protecting the population, or view yourself as a conqueror who is above the law. All of these messages can and will be received and promulgated to a wider audience, and most of them will be analyzed, commented on, and redistributed by many sources with divergent views.

What is striking is how unprepared the US and other coalition countries were for the magnitude and velocity of information operations. While this is in sync with disorganization in other areas, the ramifications were profound.

\textsuperscript{245} See Hollis (2009).
\textsuperscript{246} See especially West (2009: 130).
\textsuperscript{247} Darley (2009: 118), going on to quote Clausewitz (1976: 184–5).
\textsuperscript{248} See West (2009: 130).
As a result, three 24/7 ‘Coalition Information Centres’ were established in Washington, London and Islamabad for this purpose. Incredibly, these ceased to function after the fall of Kabul, with the task delegated to ‘overworked or inexperienced tactical military forces in the field or embassy public affairs offices with limited resources’, who carried the ‘mission of communicating Coalition intentions and actions to 25 million Afghans and 120 million Pakistanis’. Similar mistakes were made in Iraq, with CENTCOM’s ‘multimillion-dollar’ Coalition Information Centre in Doha, set up in March 2003 to coordinate information during the invasion, also shut down after the fall of Baghdad. The task was then delegated to Combined Joint Task Force-7 and then the Coalition Provision Authority. There was little effort from any of these bodies to ‘reach out’ to Al Jazeera, despite it boasting millions of Arabic-speaking viewers. At one stage during the invasion a first lieutenant from the Marine Corps was designated liaison officer. It is no surprise, then, that much of the Arab-speaking world and many coalition partners became disillusioned and heavily critical of the US ‘overreliance on a kinetic strategy’. Indeed, certain accounts of the campaign in Fallujah have suggested what was a perfectly legal and well-conducted aggressive assault on the town was declared and accepted to be otherwise due to a lost information battle. Even US Defense Secretary Donald Rumsfeld conceded in 2006 that the US deserved a ‘D’ or ‘D-plus’ for its job in the ‘battle of ideas’.

Given the now perceived supremacy of ‘moral’ claims and the ascendancy of the battle for perceptions, one can understand theoretically how the jump is made to legitimacy. Jose Delgado argues the modern milieu of warfare guarantees ‘psychological and political considerations prevail’, such that legitimacy becomes key to comprehending the political complexion of the overall campaigns. Delgado defines legitimacy as the ‘moral authority underpinning the right to act’, derived from ‘law, international and regional relationships, societal values, religion, and political or public perceptions’.

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253 See Doorey (2009: 159).
of demonstrating and articulating the legitimacy they sought to establish. As Captains Norman and Leary explained:257

The ability of American forces to minimize LoW [law of war] violations and to take appropriate action regarding those breaches that did occur gave legitimacy to US and coalition force operations in the eyes of both the US and Iraqi populations. . . . By ensuring COIN forces operate within the standards of international law, human rights law, and in some cases assisting the commander to add additional restrictions well inside the limits of international law, the citizens of the host nation will be more likely to recognize the legitimacy of the host nation government.

In their 2009 book, Ideas as Weapons, Major G.J. David Jr and Lieutenant Colonel T.R. McKeldin III concluded that in order win over ‘the bulk of populations devoted to a cause, a nation sometimes has little but its actions by which to enunciate its message’.258 The desire of Petraeus and McChrystal for credibility in Iraq and Afghanistan and directive for officers not to put ‘lipstick on pigs’ is testament to this. Modern commanders and political leaders embarking on armed conflict may now need to assume ‘the reality that the battle they fight for information may, in fact, be the primary field of conflict, even if their only weapons are their actions’.259

Pathway III: International Law’s Mandatory Influence

In the last chapter, significant changes to FM 3-24’s drafts in the areas of detention and interrogation were highlighted in this pathway. Early drafts, it will be recalled, were positively ambiguous about the use of torture, whereas later drafts reversed course, stating unequivocally such methods were illegal under domestic and international law. We also saw slow recognition, primarily through the ‘Sewall paradox’ (‘The More Successful the Counterinsurgency Is, the Less Force Can Be Used and the More Risk Must Be Accepted’), that the changing nature of conflict impacts the level of force that may be applied under LOAC and international human rights law, and moves to ensure this was reflected in FM 3-24 and adapted downrange. The task here is to see how international law’s mandatory influence carried through to Iraq and

257 Norman and Leary (2010: 27, 35 fn. 128). The authors attribute this fact as important to an overall change in public opinion, citing a Gallup poll in support: (2010: 27–8 fn. 56).
258 See David and McKeldin (2009: 405): ‘Small actions—a single building project in Baghdad, for example—cannot by themselves counter the spectacular effect of a high-casualty bomb. But large-scale trends in public attitudes can, and generally these trends respond to the actions of the nations involved’.
Afghanistan. Elements of this would have been evident above, but the precise mandatory influence needs to be made clear.

Mandatory legal rules do matter. So much is apparent from the account McChrystal provided on possible approaches to detention when mandatory rules were deemed to be absent:260

The one that was more difficult was detainee operations, because we were in a grey area that none of us had relevant experience for. The decision was made that we would follow the principles of the Geneva Convention, but: they were not prisoners of war; they in fact were something else. Because they were something else—prisoners of war you capture at the beginning of a war and if they are not repatriated earlier at the end they are—for these individuals that was not the intent. The intent was that their war would never end because they were terrorists. Therefore, as you captured them, they didn't have that light at the end of the tunnel: ‘I am going to go home as soon as peace is made’. How do you look at them and how do you treat them? You don’t mistreat them; we knew that—that was not the issue. The issue was: ‘what is the moral balance point between how well they are treated and the expediency of some of the things they were doing, or planning: how do you deal with that fact’. I know we didn’t deal directly with it but you can watch from afar as the CIA dealt with the issues from water boarding and all. There is a moral—there is a two-sided moral argument there. I am against water boarding. I think it was a dumb idea. But I can see how they logically got there. I am not prepared to say the people that made those decisions were stupid or morally bankrupt. They just did not end up at the same place I would have.

McChrystal’s depiction matched the picture presented at CENTCOM, where I was told there was virtually no field expertise on detention and interrogation in Afghanistan following the 2001 invasion. Over time, there was a ‘maturing’ of the battlefield, accompanied by increased transparency. While Abu Ghraib generated much momentum, formal changes were not instituted until after the passage of the Detainee Treatment Act, the decision in Hamdan and release of DoD Dir. 2310.01E and FM 2-22.3. Pursuant to COIN doctrine, headed by FM 3-24, these rules were rigorously enforced. Indeed, commanders placed additional restrictions. This was not an admission that earlier violations were intentional, but an acknowledgment that COIN doctrine required greater precision: restraint became the focus in all aspects of operations.

CENTCOM lawyers stressed such changes were added as a matter of ‘policy’, not out of a belief that they were required by law. One might expect these caveats, however, given US wariness about committing itself to custom.261 What is clear, however, is that the rules made a substantial difference.

260 McChrystal.
261 When asked about this, CENTCOM lawyers were reticent to agree, although they acknowledged the concern that evidence-based targeting becomes the expectation.
We know this because the early position on detention and interrogation in FM 3-24 tracked the Bush administration line: ambiguous on the law, and ambiguous on treatment. It was not until mid-2006 that the doctrinal position was inverted to match the DTA and *Hamdan*, and the ‘COIN inside the wire’ focus emerged.

One key feature of the mandatory rules discussed below, whether they be in relation to detention or the use of force, is their ultimate expression in statutes governing the conduct of US forces, namely the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM), through which the UCMJ is upheld. The UCMJ forms the bedrock of military law in the US and is applicable to all officers. Several provisions regulate adherence to rules governing detention, interrogation and RoE. These include Article 92 (failure to obey an order or regulation), Article 97 (unlawful detention), Article 118 (murder), Article 119 (manslaughter), Article 120 (rape and carnal knowledge), Article 124 (maiming) and Article 134 (general article). In 2008, the MCM was revised to take into account all Executive Orders through to 28 September 2007, which incorporated several rules (RCMs) on detainee treatment and on excessive force. The MCM makes clear that the sources of military jurisdiction include the Constitution and international law, whereby international law includes the law of war. One specific RCM that warrants reference is RCM 916(e), on self-defence as a defence to alleged UCMJ offences, which includes objective and subjective limbs. Part IV of the MCM also elaborates on the elements of each of the punitive articles of the UCMJ. Here we see the scope of Article 92 of the UCMJ, which is taken to include, pursuant to §92(2), ‘all other lawful orders which may be issued by a member of the armed forces’ including ‘written regulations’. Officers may be liable for not obeying an order or for being derelict—either wilfully, negligently, or culpably inefficient—in their performance.

The tortuous journey of the US government’s approach to detention and interrogation post-9/11 appeared settled with the DTA, DoD Dir. 2310.01E, *Hamdan* and FM 2-22.3. The prosecution of COIN in Iraq and Afghanistan was intimately connected with these debates, and Petraeus was adamant FM 2-22.3 held up well in the field. ‘For what it is worth,’ he stated, ‘the standards in there, the techniques in there, have very much held up over time: they do work, there is no question about it.’ Petraeus touted the importance of interrogators building a rapport with those detained, arguing this generated far better intelligence than other nefarious techniques. He also noted the US military now has a group of skilled interrogators who have years of experience and ‘really know the target set’. In the wake of FM 2-22.3,

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262 See MCM: Preamble §1.
265 Petraeus.
Petraeus argued the position is clear: ‘Not only do you not need to water board—and you should not—but it is illegal and it will bite you in the backside if you do it.’\(^{266}\)

On 20 July 2007, however, pursuant to constitutional and statutory authority, including the Military Commissions Act of 2006, President Bush released Executive Order 13440 (E.O. 13440), whereby he declared that a programme of detention or interrogation approved by the CIA Director ‘fully complies’ with US obligations under Common Article 3 if, inter alia, conditions do not include:\(^ {267}\)

\[
\text{[W]illful and outrageous acts of personal abuse done for the purpose of humiliating or degrading the individual in a manner so serious that any reasonable person, considering the circumstances, would deem the acts to be beyond the grounds of human decency, such as sexually indecent acts undertaken for the purpose of humiliation, forcing the individual to perform sexual acts or pose sexually, threatening the individual with sexual mutilation, or using the individual as a human shield.}
\]

E.O. 13440 was met with considerable hostility, primarily because of the words italicized above, which were viewed as perpetuating a dual standard in US approaches to detention operations.\(^ {268}\) The contention was the White House was restricting CIA actions that would transgress the stated parameters to those done for the subjective purpose of humiliating or degrading the detainee. Other purposes, it was presumed, such as collecting vital intelligence information, would not contravene E.O. 13440.\(^ {269}\) In the lead op-ed in the *Washington Post* on 26 July 2007, Professor Robert Turner and General P.X. Kelly, former Commandant of the US Marine Corps, condemned the intended impact of E.O. 13440, stating the President had ‘given the CIA carte blanche to engage in “wilful and outrageous acts of personal abuse”’ and that the language used could not ‘even arguably be reconciled with America’s clear duty under Common Article 3 to treat all detainees humanely and to avoid any acts of violence against their person.’\(^ {270}\)

E.O. 13440 was revoked on 22 January 2009 by President Obama’s third Executive Order (E.O. 13491), titled ‘Ensuring Lawful Interrogations’, which also revoked all ‘executive directives, orders, and regulations inconsistent with’ E.O. 13491, ‘including but not limited to those issued to or by’ the CIA between 9/11 and 20 January 2009. E.O. 13491 ordered, effective

\(^{266}\) Petraeus.

\(^{267}\) See <http://www.fas.org/irp/offdocs/eo/eo-13440.htm> (a. 20 September 2014) (emphasis added).

\(^{268}\) See, further, Graham (2009: 351).


immediately, that any individual under the custody or effective control of the US government, or its departments or agencies, in any armed conflict, ‘shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, that is not authorized by and listed in Army Field Manual 2-22.3’\textsuperscript{271} E.O. 13491 also required the CIA to close any detention facilities it operated as expeditiously as possible, and prohibited it from operating any such detention facilities in the future; it also forbade reliance on interpretations of the law governing interrogation issued by the US Department of Justice between 9/11 and 20 January 2009. ICRC access to detained individuals and a new Special Interagency Task Force on interrogation and transfer policies was also established. All government agencies and departments were reminded of the requirement to comply with applicable law, including the DTA, Geneva Conventions and CAT.\textsuperscript{272}

There is little doubt US detention practices were divergent, unreflective of best practice and quite possibly illegal on the ground in Iraq and Afghanistan up until the legal position was settled by the DTA and Hamdan.\textsuperscript{273} With the exception of CIA detention operations (until January 2009), FM 3-24, FM 2-22.3 and DoD directives ensured Common Article 3 and its accompanying minimum standards had the force of law and were reflected in relevant US military doctrine and the UCMJ. Task Force 134 in Iraq and CJIATF 435 in Afghanistan ensured these new standards could be instituted across the board. As the quotes from junior legal and combat officers demonstrated, the changes instituted were real and were enforced. Especially after 2006, detention operations in Iraq and Afghanistan appeared to follow the requirements of Article 78 of GC IV, ensuring regular processes and periodic review of detention.\textsuperscript{274} The letter from Major General Stone to selected members of the MNF-I Review Committee stressed as much, imploring members to vote to ‘release’ if a detainee did not, on reasonable grounds, remain ‘an imperative threat to security’.\textsuperscript{275}

Major General Stone assumed command of Task Force 134 in early 2007.\textsuperscript{276} Not only was this was a critical juncture in the surge, detainees were literally spilling out of detention facilities, with reports of over 26,000 detainees in late 2007.\textsuperscript{277} By June 2008, that number was down to 21,000, with release rates

\textsuperscript{272} See Wahlquist (2009: 48–9).
\textsuperscript{273} See Waxman (2009a: 343, 346): ‘In June 2006 the US Supreme Court resolved much of this debate, at least as a matter of international law incorporated into US law’.
\textsuperscript{275} See Bill (2010: 443). The article includes a sample letter from Major General Stone to officers selected to be members of the Review Committee.
\textsuperscript{276} Brooks and Miller (2009: 130).
\textsuperscript{277} Bill (2010: 411).
overtaking intake rates from February of that year. Stone’s goal—termed ‘COIN inside the wire’—was to turn detainees into ‘cooperative moderates’ and to improve the transparency and legality of detention operations across the board. As noted, his April 2008 Strategic Communication Plan called for detainee operations to promote and strengthen the rule of law, in accordance with the authority granted by the relevant Security Council resolutions. ‘We must be professional in every aspect of our duties—particularly as they relate to the law,’ stated Stone, ‘the manner in which we conduct internment operations here will not only mean the difference between success and failure in Iraq, but in the war against violent extremism worldwide.’

During the commands of Petraeus and, subsequently, General Odierno, Task Force 134 assumed a greater operational role. Its commander doubled as Deputy Commanding General for Detention Operations (DCG-DO), a two-star position established in the wake of the Abu Ghraib scandal. The process of detention, treatment, interrogation and review instilled under Major General Stone’s command appears to have been fairly scrupulous. Captain Brian Bill, a JAG Corps captain who served in Task Force 134 between 2007–8, has recorded the procedures used in some detail. As he recalled, any interrogations ‘which did occur were conducted in accordance with FM 2-22.3, as had been made mandatory by the Detainee Treatment Act of 2005’. Around 150 personnel were assigned to Task Force 134’s legal office ‘at its height in late 2007’. Bill records both Article 78 and DoD Dir. 2310.01E providing primary legal guidance on detention operations, in addition to review procedures prescribed by the Coalition Provisional Authority. The CENTCOM commander issued further supplementary orders to govern detainee operations and the legal review process. In Bill’s account we again see this notion of certain obligations being ‘mandatory’, required by law:

[DoD Dir. 2310.01E] contains overarching guidance for all US detainee programs. The directive mandates humane treatment for all detainees and, regardless of the detainee’s legal status, requires that the protections contained in Common Article 3 be applied as a minimum. It also provides that detainees who are not prisoners of war ‘shall have the basis of their detention reviewed periodically by competent authority.’

For recent information, see <http://www.usf-iraq.com/> (a. 20 September 2014). Note Brooks and Miller (2009: 132): ‘In most cases examined, the number of released detainees who return to the insurgency is less than the number of insurgents created due to detainee alienation, even where there are high numbers of released detainees.’

SCP (2008: 2).


Bill (2010: 419) (citations omitted).


Over time, the detainee review processes were further developed, including the instalment of Iraqi and coalition force officials on review panels and, ultimately, the creation of a new review procedure, the Multi-National Force Review Committee (MNFRC), which allowed the detainee to appear in person and be a participant in the hearing. Later initiatives provided juvenile detainees with personal representation and increased the programmes available to detainees. As detainee numbers peaked in 2007, nearly one thousand board procedures had to be completed per week to ensure each detainee was reviewed every six months. The MNFRC followed, by analogy, the procedures outlined for Article 5 tribunals (Article 5 of GC III) in US Army regulations. One weakness in the approach conceded by Bill and criticized by the ICRC was that any MNFRC decision on a given detainee to release or retain in detention amounted only to a recommendation to the DCG-DO. This complaint rested on claims of insufficient independence: Task Force 134 officers often sat on MCFRCs and the DCG-DO had an effective ‘veto’ on MCFRC decisions. The response to such claims was that Task Force 134 officers were never ‘upbraided’ for recommendations made and that in ‘the great majority of cases’ recommendations were followed, except for instances where further information came to light ‘that convinced the DCG-DO that the detainee remained an imperative threat’.

One aspect not yet discussed is the ‘special release program’, whereby the DCG-DO would consider requests from Iraqi officials, sheiks or MNF-I for the release of specific detainees. Lamb was heavily involved in this, given his key role in the reconciliation and reintegration programmes. As Bill recorded, these were individually processed, with a memo prepared on each candidate for special release. That memo, ‘staffed through the Legal Advisor to the DCG-DO’, would make a recommendation for the DCG-DO to consider. In general, there was ‘willingness to accept more risk in these releases than with normal periodic reviews’, particularly where such requests emanated from the coalition.

If a ground commander, with knowledge of the detainee’s background, was willing to accept him back within his battlespace, with reluctance the request was often granted. There was generally less tolerance of risk with requests from Iraqi officials, though the political considerations associated with such requests could often tip the balance.

Bill also recorded that, by 2007, it was ‘exceptionally rare’ for the coalition to detain individuals for criminality, whereas this had been done regularly under

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290 Bill (2010: 429).
293 See, for example, McChrystal (2013: 352–4).
CPA authority earlier in the war.\(^{295}\) (Note the early drafts of FM 3-24 recommending this practice be continued.) On the whole, Bill and others insisted DoD practices from 2007 onwards ‘went beyond what the law required’.\(^{296}\) One of the reasons the US maintains such practices should not be ‘taken as establishing custom that will bind the US or others in similar situations’ is that other countries, and even the US, may not always have the resources to ‘provide more than the law requires’.\(^{297}\) Martins also warned against expecting too much in armed conflict and holding officers to ‘the same standards of collecting evidence’ as would be expected in US towns. Attempting ‘to stage CSI Baghdad or CSI Kandahar on a military objective’, Martins said at Harvard Law School in April 2011, can be dangerous.\(^{298}\) Nonetheless, a vision of the US as a trendsetter in this domain is a far cry from earlier practice in Iraq and Afghanistan.

Many officers interviewed stressed the turnaround in detention operations and the treatment of detainees. One described the difference between his two tours of Iraq, the first from 2003–4 and the second from 2006–7, as incredible.\(^{299}\) On his first tour he recalled ‘no practice’, where detaining often meant putting people in the back of a truck, rough treatment and potential infringements of personal dignity. The prevailing mindset was that everybody apprehended was a terrorist. By the second deployment there was a clear process and procedure on how to treat detainees, together with detainee review boards. The two biggest changes were said to be the assumption that those detained were innocent until proven guilty, and that the burden of proof (be it criminality or the existence of a imperative security threat) rested on the detaining unit. Another officer, a company commander, had a similar impression, observing that during his 2007–9 Iraq deployment the mentality on detention had shifted to not detaining where there was doubt, whereas previously it had been ‘when in doubt, detain’.\(^{300}\)

One of the officers at Fort Carson who coordinated the targeting process vis-à-vis detention essentially confirmed the strength of change: ‘I was very frustrated with the [criteria] because in Afghanistan I felt like I was under this huge microscope.’\(^{301}\)

The mandatory influence of law was particularly telling in so far as it impacted the involvement of US allies in detention operations. The House of Lords decisions in *Al-Skeini v. Secretary of State for Defence*\(^{302}\) and *Al-Jedda v. Secretary of State for Defence*\(^{303}\) ensured the UK wound down its involvement in detention and interrogation. The decisions held UK human rights law,

\(^{295}\) Bill (2010).
\(^{296}\) Bill (2010: 438).
\(^{297}\) Bill (2010): ‘US practices should not force them [other countries], through a claim of a new customary international law obligation, to try’.
\(^{298}\) See Martins (2011: 15).
\(^{299}\) BX.
\(^{300}\) UX.
\(^{301}\) FC4.
\(^{302}\) UKHL 26 (2007).
\(^{303}\) UKHL 58 (2007).
including rights derived from the European Convention on Human Rights, protected detainees held by the British military, whether or not such detainees were held on British territory.\textsuperscript{304} In practice, such rights protected detainees held by the British in Iraq and Afghanistan. As Norman and Leary observed, lawyers ‘created a process, approved at US and UK national levels, to facilitate the processing of detainees obtained within the British battlespace’, which had become ‘necessary because of legal and political barriers for British forces in the area of detention operations.’\textsuperscript{305} Stephens, an Australian military lawyer, also emphasized this decisive impact of the interaction of domestic and international law:\textsuperscript{306}

Hence, with respect to detention operations, which are plainly a significant component of COIN operations, it is evidence that the influence of domestic law, such as the U.K. Human Rights Act (which in turn incorporates the European Convention on Human Rights) will continue to have application for activities during armed conflict. As the Al-Skeini case has established, these norms can have decisive legal application in a conflict so as to compel observance by particular forces with respect to particular fact circumstances.

Stephens underlined the direct and indirect influence of such decisions, particularly among coalition partners. For Stephens, irrespective of whether the decisions derive from LOAC, international human rights law, or the interaction of international and domestic law, ‘the impact upon operations on the ground and the indirect policy do influence behaviour and act as socializing agents between forces acting in concert’. To this end, the constraints often involved reaching for the highest common denominator in joint operations: ‘Given the specificity of such obligations the question of lex specialis becomes, in effect, one of HR [human rights] obligations providing definitive guidance.’\textsuperscript{307} As British and Australian lawyers confirmed, non-US partners are often more cautious in determining that a set of facts meets a given standard, whether this was related to the use of force or to detention.\textsuperscript{308}

The restraints caused considerable frustration among senior officers, especially in the Special Forces community. The practical consequence was a much shorter time for UK Special Forces to interrogate those captured prior to their transfer to Afghan security forces or to US forces. Where possible, US forces\textit{did} the detaining, because they were not bound by similar constraints. Indeed,

\textsuperscript{304} Notwithstanding that such rights may have been qualified by Security Council resolutions, by virtue of Article 103 of the UN Charter. See\textit{Al Jedda}.


\textsuperscript{306} Stephens (2010: 311) (citations omitted).

\textsuperscript{307} Stephens (2010: 312).

\textsuperscript{308} Unattributed (CENTCOM).
there is some evidence that coalition forces exploited this process, especially where it came to the involvement of indigenous forces, which is a point explored at the end of this pathway. Certainly, it has been alleged that in the early stages of the Iraq war Australian forces used a ‘legal sleight of hand’ to ensure certain individuals were never recorded as Australian prisoners.  

Apart from detention, which as we have seen was impacted significantly by domestic law and the extent to which it manifested obligations emanating under international law, we also see evidence of mandatory rules impacting the use of force, specifically through RoE and commanders’ tactical directives. The change of strategy and tactics engineered through the COIN approach required operational law judge advocates to ‘play a vital role in the planning and conduct’ of COIN operations. Norman and Leary described the application of COIN doctrine to operational law in Iraq as ‘making a molehill out of a mountain’, with FM 3-24 hastening the unfastening of ‘heavily ingrained conventional perceptions and instincts’, as well as static perceptions on the use of force and standard operating procedures.

One key role judge advocates played was in changing training scenarios, a task begun by Petraeus at Fort Leavenworth, and continued by lawyers in the field. In 2007, Harvard’s Carr Center for Human Rights Policy suggested the US Army’s National Training Centre (NTC) required further improvement, namely in realism, RoE absorption and regular review to reduce civilian casualties in actual armed conflict. The Carr Center noted there was often not enough time between deployments for training at NTC, and that soldiers and generals believed training exercises were insufficiently tough and rigorous.

One conclusion was particularly stark:

When conducting training reviews, NTC has failed to identify and analyze patterns of civilian casualties, a process that could help reduce real-life harm during military operations. The training centre has started to use expanded technology to track the actions of individual soldiers but has not yet fully implemented it. Until September 2007, battle damage assessments did not give systematic attention to either civilian casualties or how and why they occurred. This information is vital for minimizing civilian casualties in the future.

The Carr Center study was based on fieldwork largely predating 2007. Colonel Gade, who recalled being involved in debates about training centers

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312 Norman and Leary (2010: 25).
313 See Docherty (2007: 2–3).
and measuring civilian casualties in the late 1990s, disputed its accuracy.\textsuperscript{317} Gade conceded, however, that there has been a recent shift in emphasis on, and prominence of, the relevant issues, together with how they are treated.\textsuperscript{318} The Carr Center study made clear considerable work remained. Updated training included building new urban training environments (‘we literally “built” towns’),\textsuperscript{319} planning for junior soldier-specific decisions, and review of targeting procedures. Norman and Leary noted specifically that in-theatre training included instruction on ‘how the incidents at Abu Ghraib and Haditha, while instigated by junior service members, had a major strategic impact on the entire Iraqi campaign’.\textsuperscript{320} Citing DoD Dir. 2311.01E, they also stated ‘one of the most important functions’ for operational law JAGs in theatre is to ensure staff sections ‘account for international law in all planning and operational effects’. They argued JAGs needed to be particularly ‘proactive’, ‘because a commander may incorrectly interpret international law, resulting in abuses, even though the commander may have had no malicious intentions’.\textsuperscript{321} Consequently, ‘the absolute need for all operations to comply with international law’ had to be fostered, such that an ‘operational climate’ of ‘proactive compliance was the norm’. Norman and Leary suggested collective efforts to do just that ensured the most substantial high profile transgression [in] over fifteen months was the Koran shooting incident in May 2008.\textsuperscript{322}

Although realistic training scenarios and vignettes on the use of force among civilians were vital,\textsuperscript{323} regulations and rules mattered too. At senior levels, procedural review continued. Insight into this process was provided by a ‘Joint Targeting Cycle and Damage Estimation Methodology’, produced by the General Counsel of the Joint Chiefs of Staff, and released in response to a Freedom of Information Act request made by the American Civil Liberties Union.\textsuperscript{324} The document, dated November 2009 and applicable to all US military aircraft, claimed ‘never before has a nation taken such measures and resources to reduce the likelihood of civilian casualties’, and listed the five basic collateral damage estimation questions to be answered prior to engaging a target as follows:\textsuperscript{325}

\textsuperscript{317} ‘Even in computer-simulated war games in the late 1990s we counted civilian casualties. I know because I would have injects where civilian casualties would float up to the top of the heap that commanders had to pay attention to’: \textit{Gade II}.

\textsuperscript{318} \textit{Gade II}: ‘Was there a greater emphasis paid to it? Yes. People definitely realized post-invasion that civilian casualties had the great potential to have strategic consequences.’

\textsuperscript{319} \textit{Gade}.

\textsuperscript{320} See Norman and Leary (2010: 25 fn. 36).

\textsuperscript{321} Norman and Leary (2010: 27).

\textsuperscript{322} Norman and Leary (2010: 28, 28 fn. 59).

\textsuperscript{323} See Martins (2001).

\textsuperscript{324} Disclosed in \textit{Nasser Al-Aulaqi v. Obama}, US District Court of Columbia, No. 10-cv-1469.

\textsuperscript{325} Documents available: <http://www.aclu.org/drone-foia-department-defense-documents> (a. 20 September 2014); cf. Kahl (2007: 17–18), who outlined the earlier standards (note especially the change in the language to question no. 5).
1. Can I PID [positively identify] the object I want to affect?

2. Are there protected or collateral objects, civilian or non-combatant personnel, involuntary human shields, or significant environmental concerns within the effects range of the weapon I would like to use to attack the target?

3. Can I mitigate damage to those collateral concerns by attacking the target with a different weapon or with a different method of engagement, yet still accomplish the mission?

4. If not, how many civilians and non-combatants do I think will be injured or killed by the attack?

5. Are the collateral effects of my attack excessive in relation to the expected military advantage gained and do I need to elevate this decision to the next level of command to attack the target based on the RoE in effect?

Only months earlier, in February 2009, Lieutenant General Stanley McChrystal, then Director of the Joint Staff for the Joint Chiefs of Staff, had released an instruction on no-strike and collateral damage estimation methodology. This followed DoD Dir. 2311 and other instructions on targeting (namely Joint Publication 3-60 (2007) on ‘Joint Targeting’) to document and consolidate DoD directives on collateral damage. McChrystal’s instruction stressed failure to comply could result in ‘disproportionate negative effects on civilians’ and be considered a law of war violation. Such violation would also subject the US military and civilian leadership to ‘global criticism, which could adversely impact military objectives, alliances, partnerships, or national goals’. Given the high value the US government ‘places on preserving civilian and non-combatant civilian lives’, it was deemed incumbent on the US military to ‘emulate and represent those values through the conscientious use of force in the accomplishment of assigned military missions’. All personnel involved in collateral damage estimation were required to ‘comprehend the definition of collateral damage, its causes, and the impact it has on operations and/or national strategic policy’ and ‘comprehend the principles’ of the law of war and ‘what makes a target lawful and/or unlawful’.

The same was true, and perhaps more acute, for ground operations. In the April 2008 issue of the Army Lawyer, Lieutenant Colonel Randall Bagwell asked how escalation of force—known now as EOF—procedures established

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326 PID is defined as ‘the reasonable certainty that a functionally and geospatially defined object of attack is a legitimate military target in accordance with the Law of War and applicable RoE’.

327 There is an additional stipulation, which comes later, that civilians working in dual-use facilities (facilities with both a military and civilian purpose/function) must be considered as non-combatant casualties for the purpose of casualty estimation, regardless of the RoE in effect.

themselves on ‘the counterinsurgency battlefields’. Observing the historical purpose of EOF procedures was to ‘help with the proportional application of force in self-defence situations’, especially among junior officers on the ground, Bagwell noted EOF had become increasingly directed to positive identification of threats as well as to the proportional application of force in response to such threats. Referring to a revised MNF–Iraq RoE card, issued May 2007, Bagwell unpacked the altered prescriptions. While the RoE remained adamant force could be used to deal with an obvious hostile act or hostile intent, officers were directed to identify this based on conduct: ‘You may engage the following individuals based on their conduct: persons who are committing hostile acts [and] persons who are exhibiting hostile intent’. Importantly, soldiers were also instructed: ‘If time and circumstances permit, use EOF to determine whether hostile act/intent exists’. The justification for the change was clear: the need to reduce civilian casualties, especially given the intense difficulty of distinguishing insurgents from the civilian population. The purpose of the ‘new “threat assessment EOF” was to force the insurgent to self-identify while keeping innocent civilians from being mistaken for threats’. This need for ‘threat identification’, an apparent source of ‘confusion, frustration, and anger’, was a major complaint officers had about COIN RoE in Iraq and Afghanistan.

Norman and Leary, who were in Iraq as the EOF changes were rolled out, acknowledged the shift to use EOF additionally for threat assessment as opposed merely to graduations in the use of force. Declaring that proportionality was the ‘watchword’ for COIN operations as ‘commanders struggle[d] to engage an enemy deeply rooted within the civilian populace’, Norman and Leary observed that JAGs assisted in maintaining tight standards of proportionality in Iraq from 2007–9 by ‘continuously monitoring, assessing, and guiding the application of existing and new RoE, EOF procedures and rules on the use of force (RUF)’. The purported use of such rules is described as follows, and bears out much of the implications of the Sewall paradox:

More specifically, JAs advise commanders to use ROE, EOF, and RUF as tools to accept more risk in order to prevent unnecessary harm to the civilian population.

329 Bagwell (2008: 5). See also Centre for Army Lessons Learned, Escalation of Force Handbook, July 2007. This handbook, produced in the wake of the COIN focus and the overarching need for ‘judicious, appropriate and proportional’ force, includes quotes from Human Rights Watch and an appendix detailing UK RoE training.
330 See also Norman and Leary (2010: 26, 29 fn. 72).
331 See Bagwell (2008: 5 fn. 8, 7 fn 22–4).
332 Bagwell (2008: 8).
333 See Norman and Leary (2010: 33).
334 Norman and Leary (2010: 29 and 29 fn. 72), where the authors noted field efforts to clarify the misconception among servicemembers that RoE, EOF and RUF ‘are intended to restrict their actions on the battlefield’.
335 Norman and Leary (2010: 29) (citations omitted).
in order to further the overall strategic goal of gaining support from the host nation. It should be noted that commanders at various levels may be unwilling to approve of such restraints on the use of force because of the corresponding risk it places on service members; however, JAs should advise commanders that in a COIN operation, the endgame may necessitate the acceptance of additional risk during the initial phases of the operation. By refining the ROE, EOF, and RUF and pushing them to the lowest levels, Op Law JAs help US forces demonstrate their commitment to the measured use of lethal force. This commitment is critical to winning the support of the local population and to COIN strategy during this phase of operations.

Despite the confusion caused by the new EOF procedures, the source was clear. The relevant section of FM 3-24 dealing with using ‘the appropriate level of force’ devoted an entire paragraph to the centrality of escalation of force procedures to the use of precise and measured force, including the use of ‘lesser means of force when such use is likely to achieve the desired effects’. As Bagwell pointed out, in Iraq this morphed into the use of EOF as a threat identification tool in addition to a tool to determine the scale of force (if any) to use. Clearly, the approach was a work in progress. In 2010, WikiLeaks released parts of the revised MNF–Iraq RoE from March 2007. Interestingly, the RoE was changed to consist of a base RoE and eight tabs containing separate RoE provisions, including definitions, general policy, references, mosque operations guidance, international borders guidance, kinetic targeting guidance, the RoE card and the transition team guidance card. At the bottom of the explanatory memorandum was the following note: ‘the RoE card is revised to clarify that forces do not have to proceed through EOF measures when they are confronted with a hostile act or demonstration of hostile intent’. Another order from MNF–Iraq, dated 4 March 2007, was even more emphatic: ‘No one may issue supplementary guidance that forecloses the judgment of an individual facing a split-second and independent decision whether to engage a threat. Your chain of command will stand with you.’

The intent behind the EOF procedures, ‘properly used’, insisted the 2007 Operational Law Handbook, is to allow soldiers ‘more time and better information with which to make use of force decisions’. This practice was all part of prosecuting the surge. As Norman and Leary illustrate, judge advocates in theatre continually sought to ‘find a way to precisely kill the enemy while

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336 See FM 3-24: 1-142.
337 Bagwell (2008: 8, 15, 15 fn. 71). Bagwell also noted the change in requirements in Afghanistan for officers to positively identify targets as opposed to ‘likely and identifiable’ threats.
minimizing collateral damage to civilians’. A key aspect of this was changing levels of approval and notifications requirements and, in some instances, placing legal advisers in tactical command posts (TACs) in the field. One example of this was during the ‘Charge of the Knights’ campaign in Basra in 2008.  

When interviewed, most officers turned first to the RoE when talking about the significance of legal issues in the field. For example, when asked about the function of law, Petraeus spoke of the reasons to observe international law, the first of which was:

> [O]ur rules of engagement, which are of course derived from those—and that is what matters to us of course. We are not sitting there trying to interpret UN Security Council resolutions or other documents, although actually we were keenly aware of them. What we are really doing of course is looking at our rules of engagement, which are typically very detailed and quite well developed.

RoE changes, including enhanced nuance and specificity, were employed to avoid civilian casualties and collateral damage. My interviews and documentary evidence suggest that from 2006 RoE moved in one direction, a direction that was more restrictive. This is in distinct contrast to the 2004–5 period, where in some cases changes afforded greater latitude for the use of deadly force. Petraeus recalled spending a fair amount of time once he assumed command in Iraq ‘getting the big ideas right’ in the RoE, noting they had been tweaked over the years, but insisted it was all about applying them. Moreover, RoE are not always a game changer, because formal changes take a long time to process through the chain of command—including CENTCOM—and through the US government. A set of changes requested by Petraeus when he was CENTCOM commander, for example, were only finalized during his time as a commander back in Afghanistan. At the end of this process the RoE are reduced to a single 3cm × 5cm card issued to all soldiers. Accordingly, commander’s guidance letters, tactical directives, and training (particularly vignettes and other training scenarios) assumed far greater importance, as did the presence of lawyers on the battlefield.

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341 See Norman and Leary (2010: 30–1). Basra revealed key differences between US and British RoE and provided an insight into how the presence of a legal adviser ‘to advise the on-scene commander of the legality of kinetic strikes and offensive operations’ can result in the role and influence of that adviser growing organically given the nature of COIN operations: see (2010: 31 fn. 84).

342 Petraeus. 343 See BX. 344 Hatch. 345 Petraeus. See also Motlagh (2010). 346 Petraeus. 347 Petraeus: ‘The RoE may have all kinds of details and refinements but your troopers are not going to be able to thumb through the pages if somebody raises a weapon.’ 348 Petraeus: ‘When you start to get into various contingency operations the bottom line is you just have the lawyers there. They are part of the planning process. They can tell the planners right
Nowhere was this last point more accurate than in Afghanistan, as witnessed by McChrystal’s July 2009 Directive, which he labelled the first step in laying out his counterinsurgency strategy. Improved training aside, the impact of the July 2009 Directive on the ground was profound. Certainly, it was one of the chief reasons why evidence of a maturing, more precise and increasingly transparent military force emerged as the COIN strategy was rolled out in Afghanistan. Feedback was sought routinely from a variety of sources, including the ICRC and representatives of local populations, which was continually fed down through the forces. The ‘Commander’s Intent’ contained in the July 2009 Directive and written personally by McChrystal is reproduced below.349

2. Purpose:
To provide guidance and intent for the employment of force in support of ISAF operations. This directive also applies to all US forces operating under the operational control or tactical control of US Forces-Afghanistan (USFOR-A). Wherever this directive refers to ISAF SOPs or FRAGOs, USFOR-A forces will refer to comparable USFOR-A SOPs and FRAGOs, where applicable; otherwise, they will follow the ISAF guidance.

3. Commander’s Intent:

a. Our strategic goal is to defeat the insurgency threatening the stability of Afghanistan. Like any insurgency, this is a struggle for the support and control of the population. Gaining and maintaining that support must be our overriding operational imperative—and the ultimate objective of every action we take.

b. We must fight the insurgents, and will use the tools at our disposal to both defeat the enemy and protect our forces. We will not win based on the number of insurgents we kill, but instead on our ability to separate insurgents from their centre of gravity—the people. That means we must respect and protect the population from coercion and violence—and operate in a manner which will win their support.

c. This is different from conventional combat, and how we operate will determine the outcome more than traditional measures like capture of terrain or attrition of enemy forces. We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.

d. While this is also a legal and a moral issue, it is an overarching operational issue—clear-eyed recognition that loss of popular support will be decisive to either side in this struggle. The insurgents cannot militarily defeat us—but we can defeat ourselves.

off the bat if they are just completely off the plot. Then it comes down to what is acceptable in terms of the rules of engagement for collateral damage. Sometimes you will be even more restrictive. It depends on the location and on the situation. In Iraq, for example, I personally approved any night operation going into Sadr City’. See also Martins (2001).

349 Copy on file with the author.
e. I recognize that the carefully controlled and disciplined employment of force entails risks to our troops—and we must work to mitigate that risk wherever possible. But excessive use for force resulting in an alienated population will produce far greater risks. Loss of popular support will translate into more insurgent recruits, more IEDs, and a prolonged conflict with an uncertain outcome. We must understand this reality at every level in our force.

f. I expect leaders at all levels to scrutinize and limit the use of force like close air support against residential compounds and other locations likely to produce civilian casualties in accordance with the guidance that follows. It is my sense that tactical commanders are relying too heavily on CAS [close air support] during engagements when small unit fire and manoeuvre, or withdrawal, will better accomplish the strategic and operational goals for this coalition, while achieving the tactical goal of engaging the enemy and protecting the force. Commanders must weigh the gain of using CAS against the cost of civilian casualties, which in the long run make mission success more difficult and turn the Afghan people against us.

g. I cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce, so I expect our force to internalize and operate in accordance with my intent. Following this intent requires a cultural shift within our forces—and complete understanding at every level—down to the most junior soldiers. I expect leaders to ensure this is clearly communicated and continually reinforced.

h. With the support of the Afghan people, we will win this fight. Maintain our focus on winning their support.

McChrystal’s July 2009 Directive expressly prohibited the use of air-to-ground or indirect fire against residential compounds except under one of three conditions, installed new battle damage assessment requirements, denied ISAF capacity for unilateral (or non-partnered) missions without regional command approval, raised the approval level for night raids, tightened escalation of force procedures and mandated civilian casualty investigations and reporting up the chain of command no more than 24 hours from any given incident. On escalation of force specifically, the directive states: ‘Our success depends on our ability to escalate force proportionally, in a manner that the average Afghan civilian can understand, and respects the fact that this is their country.’ What is particularly noteworthy here is how McChrystal tackled the problems caused by the use of air attacks head on.

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351 Such was the extent of the changes that the Regional Command (South) Commander, Major General de Kruif, sought to clarify the requirements in an additional memorandum, dated 29 July 2009. The memorandum confirmed a number of technical points concerning the July 2009 Directive had been raised with ISAF Headquarters. One specific clarification on air support was as follows (others related to specific rules on partnering): ‘Where a residential compound presents an emerging target of opportunity, for example, a hostile intent or act is detected within the compound, engagement of the compound with air-to-ground munitions and indirect fire must be approved by the next higher headquarters commander. This means the next higher commander not on the ground… the rational for this approval process is to ensure that the decision to engage
Now that we understand some of the rules imposed on forces in Iraq and Afghanistan, many of which invoked international law directly, it is worth investigating whether or not the efforts to reduce civilian casualties in Iraq through tighter, more nuanced RoE, backed by command intent, actually reduced civilian casualties. A February 2011 study into civilian deaths during the Iraq War in *PLoS Medicine* (PLoS study) allows greater scrutiny of claims that civilian deaths—particularly civilian deaths caused by coalition forces—declined following the surge. The study used Iraq Body Count (IBC) data to analyse civilian deaths from March 2003 to March 2008 by perpetrator, weapon, time and location. Out of a total of 92,614 deaths (distinguishing between coalition, anti-coalition, crossfire and unknown perpetrators), 12 per cent (11,516) were attributed to coalition forces. ‘Air attacks without ground fire’ were responsible for 60 per cent of the civilian deaths attributed to coalition forces. Unknown perpetrators were deemed responsible for 74 per cent of all violent civilian deaths, with almost one half of these victims killed by execution. Coalitions forces caused 52 per cent of civilian deaths from armed violence in the first year of the war, whereas in later years unknown perpetrators killed the majority of civilians. The largest annual number of civilian deaths came in the year preceding the surge (March 2006–February 2007).

The *PLoS* study found coalition forces ‘caused a significantly higher proportion of woman and child deaths among its civilian deaths’ than anti-coalition forces, both in terms of deaths caused by air attacks without ground fire and those caused by small arms gunfire. Of that latter category generally, deaths peaked during the invasion stage and saw another (albeit lower) ‘sustained’ peak throughout 2006 and the first half of 2007. The authors noted anti-coalition combatants were often ‘virtually indistinguishable from civilians during military actions and often fight among civilians’, which contributed to civilian deaths caused by coalition forces. Of concern to the ‘surge thesis’ is the tentative conclusion of no ‘significant decrease over time’ in deaths of women and children caused by coalition forces. The 2009 figure cited in the paper did not appear to ‘differ significantly’ from this overall trend. The paper is taken by someone removed from the situation on the ground, who is able to make an objective assessment of the circumstances.’

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354 PLoS Study (2011: 3). Deaths of this nature peaked during the initial invasion, ‘with lower peaks in 2004 and in mid-2006 to 2007’.
355 Torture marks were left on 29 per cent of those individuals executed by unknown perpetrators.
357 PLoS Study (2011: 9–10), employing a Woman and Child Dirty War Index.
suggested the data shows ‘no evidence of a significant decrease in numbers of civilian deaths’ from coalition gunfire during the period of the study; rather, that ‘relatively indiscriminate effects from Coalition gunfire persisted’ over the five years after the invasion.

In one key aspect the PLoS study supports the surge thesis: overall reductions in civilian deaths. The authors noted a key limitation that their analysis only ran to March 2008. They conceded ‘monthly rates of Iraqi civilian deaths from armed violence’ dropped from an average of 1,518 deaths per month between March 2003 and March 2008 to 401 per month from July 2008.\textsuperscript{361} IBC data supports this.\textsuperscript{362} At the end of 2007, IBC reported the civilian death toll fell month-to-month; there were 246 in December 2007 as opposed to 1,683 in January 2007. IBC also reported a considerable drop in civilian deaths outside Baghdad from September 2007 (2,500 to 1,000 per month).\textsuperscript{363} Despite a rise in death numbers involving coalition forces climbing from a range of 544–623 in 2006 to 868–1326 in 2007, IBC reported a range of 8,315–9,028 civilian deaths in 2008 compared to 22,671–24,295 in 2007, which amounted to 25 per day in 2008 as opposed to 76 per day in 2006 and 67 per day in 2007.\textsuperscript{364} Coalition airstrikes had reportedly killed 365 in 2008 by the end of November 2008, compared to 943 in 2007. IBC civilian deaths in 2009 totalled 4,704, the lowest since the 2003 invasion, with deaths attributed to coalition air attacks reduced to zero. Deaths resulting from US-led coalition forces were also ‘dramatically lower’ than 2008, down to 80 from 632.\textsuperscript{365}

The PLoS study does not account for the nearly 30,000 additional troops in Iraq following the surge. As Petraeus suggested, one would expect total deaths to increase with more boots on the ground: ‘When you do that [add forces] the enemy fights back.’\textsuperscript{366} The fact that civilian casualties did not increase but were reduced over time points to greater scrutiny by commanders and more restrictive RoE.\textsuperscript{367} As Lamb stressed, the biggest problem for reconciliation in

\textsuperscript{361} PLoS Study (2011: 12).
\textsuperscript{362} IBC’s analysis of the WikiLeaks War Logs suggested there may be evidence of an additional 15,000 civilian deaths. The matching rates of IBC and WikiLeaks records were much higher (95 per cent) for incidents where over 10 civilians were killed, and lower (73 per cent) when only one or two civilians were killed. One reason for the discrepancy may be the alleged US tendency to classify deaths as ‘enemy’ and not ‘civilian’: <http://www.iraqbodycount.org/analysis/numbers/warlogs/> (a. 20 September 2014).
\textsuperscript{363} <http://www.iraqbodycount.org/analysis/numbers/2007/> (a. 20 September 2014).
\textsuperscript{365} <http://www.iraqbodycount.org/analysis/numbers/2009/> (a. 20 September 2014).
\textsuperscript{366} Petraeus; also Norman and Leary (2010: 30), who recorded that attacks during this period averaged over 350 per week, rising to over 700 per week in March 2008 before falling to less than 150 per week by April 2009.
\textsuperscript{367} BX recalled this issue consuming much of Petraeus’ time.
Iraq pre-surge was the US military. Changing the dominant mindset of that population was perhaps the biggest challenge of all. Colonel Hatch backed this, suggesting that the prevailing mindset among junior officers (battalion level and below) had been that legal officers and legal restrictions were a ‘nuisance’. Only after the surge was it increasingly appreciated across the board that compliance was an enabler, not an inhibitor. On the evidence, it is hard to disagree with Fred Kaplan’s conclusion—himself a surge sceptic in 2007—that the increased troops and new ideas made a considerable difference, both to overall civilian casualties and to Iraqi security.

Just as in Iraq, the crackdown on civilian casualties in Afghanistan helped the campaign make inroads. Around the same time as the July 2009 Directive was issued, DoD tightened the RoE for its contractors in Iraq and Afghanistan. ISAF-related civilian casualties reportedly fell to 25 per cent of the total in 2009 (down from 40 per cent in 2008) and 20 per cent of the mid-year total in 2010. Instead of loosening McChrystal’s RoE via a revised tactical directive when assuming the ISAF command in July 2010, Petraeus ‘doubled down on the orders imposed by his predecessor’ and tightened the rules even further. As reported earlier, General Allen and even Mullah Omar followed a similar objective.

Certainly, there was frustration among some of the Fort Carson officers at the tightened RoE and tactical directives, which necessarily placed them at higher risk, though an insistence that the fundamental aspect of the RoE—self-defence—remained largely unchanged. As the major in charge of operations said:

I always have an issue with rules of engagement because when you read what is written by higher, it is not realistic, it is not practical, it does not fit to what the kids on the ground are facing. The basic rule of engagement for the soldier—if you feel that your life or your fellow soldier’s life are being threatened or are in danger—you have the right to self-defence. That is the basic version of it right there. Sometimes when you read rules of engagement and what you are supposed to do

368 Lamb: ‘The most difficult people for me on reconciliation in Iraq was not the insurgent, not the Iraqi government, but was the American military’.
369 Hatch.
370 See Kaplan, ‘Did We Win the Iraq War? It’s over. Was it worth it?’, Slate Magazine, 15 December 2011: ‘Yet, by the summer of 2007, it was hard to deny that something was happening. Civilian casualties were way down. The Shiite militias had retreated. More and more Sunni militias were cooperating with the same American troops they’d been trying to kill just a few weeks earlier. And the Iraqi military was gaining in strength and competence’. For a full analysis, describing the doctrine as a necessary but insufficient condition of the success of the surge, see Biddle, et al. (2012).
372 Collins (2011: 82).
374 BX.
375 FC7.
it is not realistic because a lot of times the soldiers do not have time. They will put steps—you will meet these gates, you need to do this, this and this before you use deadly force—a lot of times the soldiers do not have that time to make that decision. You do not have the ability to make that escalation to deadly force because you have to make that decision right there on the spot. You do not want the soldier to be scared to pull that trigger, but that soldier needs to understand that every time he pulls that trigger there could be an investigation.

Scrutiny intensified almost from the moment the major’s battalion arrived in Kunar Province, especially after McChrystal’s July 2009 Directive. All knew the risk of investigations for using deadly force; indeed, one officer conveyed a saying used by soldiers that illustrated this: ‘Better to be judged by twelve than carried by six’. Whether they assumed too much risk, and indeed whether the revised RoE required this, was an issue routinely canvassed. Such sentiment matched that voiced by those with multiple deployments to Iraq before and after the surge. One officer with considerable experience in Iraq noted that it was much easier, and much less complicated, to use substantial force between 2003–6, comparing the approach of US forces in the early period to Blackwater: ‘shoot first, ask questions later’. By early 2007, while force was authorized when essential, non-lethal force was the ‘default’. One company commander at Fort Carson told me it was a subject he ‘struggled with the whole time’ on deployment in Kunar, and that he had voiced these frustrations to McChrystal. While McChrystal empathized with these frustrations and agreed soldiers should use force if required, there was a perception among some that higher levels did not understand the fight on the ground. This was not the case across the board, with another platoon leader turned company commander noting he had ‘no frustration’ from his men.

In such a kinetic environment, the officers conceded they did not always get it right. One example offered that appeared to risk crossing the line was the use of civilians to minimize the chance of attack, though that did not appear widespread. There was recognition, however, that ‘it could change the entire village’s perception if you make a mistake and kill the wrong person’. When asked whether command responsibility was emphasized, one company commander replied, ‘unbelievably so’, with approval levels for particular...
weapons moving up one level around the start of their deployment to ensure ‘there was more command guidance on those decisions’.\textsuperscript{382} Officers also attested to the vast turnaround in training environments such that they simulated urban environments.\textsuperscript{383} The proportionate use of force became ‘more important and more of a focus because of the type of fight [US forces were] fighting in Iraq and Afghanistan’. ‘Fighting in an urban environment’ was no longer on the ‘backburner’\textsuperscript{384}

You go back in the early 90s or even 2000 and go look at the US military bases and look at their mountain sites, their urban training environment sites. Nothing. Very small. Very minimal. But now since Iraq and Afghanistan, because we are doing so much fighting inside the urban environment and stuff like that we have come one hundred times forwards [compared to] what we used to train. Because of that, proportionality, ethics and all the other stuff has come into play so much more. You are fighting in the populations, in amongst civilians and innocent people.

It is worth returning briefly to the impact of a lack of mandatory rules, evident in the approach to detention and the use of force by indigenous forces in Iraq and Afghanistan. This was a task Petraeus was intimately involved with, having deployed 2004–5 to build Iraq’s Multinational Security Transition Command (MNSTC-I). The chief focus then was the reestablishment of Iraqi ministries of defence and the interior, including the development of the military and police forces.\textsuperscript{385} The standards sought in the training of indigenous forces was heavily debated by FM 3-24’s writing team, with unease at the first draft of Chapter 6, which dealt with developing local police and security forces and was viewed as too Western. There was a clash between the idealistic, ‘research driven’ idea of counterinsurgency as applied to the conduct expected of indigenous forces and pragmatic field observations.\textsuperscript{386} In the result, the standard was watered down. While the focus on force generation in early years ensured the muddled standards did not translate into battle, the COIN theme of ‘by, with and through’ local forces, known as ‘partnering’, guaranteed greater reliance on Iraqi and Afghan military forces. Training content mattered: in 2008 there were 120 military training teams, 35 national police training teams and 244 police training teams in Iraq.\textsuperscript{387}

One problem with Iraqi or Afghan forces not being required to comply with the same substantive and procedural standards as US and coalition forces is that this lower standard could be taken advantage of. In other words, the lack of precision, the lack of ‘binding’ rules, could be exploited. In my interviews this appeared one area where US forces could be ‘creative’ with RoE or detention standards. When asked about this, one officer observed that ‘on paper’

\textsuperscript{382} See Pregent (2010: 334).
\textsuperscript{383} See Crane (2007).
\textsuperscript{384} See Pregent (2010: 334).
\textsuperscript{385} See Pregent (2010: 334).
\textsuperscript{386} See Crane (2007).
\textsuperscript{387} See Pregent (2010: 334).
the Iraqi Army would appear to conform to standards expected of US forces. In reality, however, they had looser RoE and standards of practice:  

That discrepancy in standards was at times taken advantage of. Situations where the US Army would not be able to operate freely or do ‘xyz’ it was known that the Iraqi Army would be able to do that. It was excused as sort of a cultural intelligence motive—easier and able to discriminate, you had an easier time of dealing with cultural, civilian issues. We assumed it would be easier for them to deal with [them]. At times their practices would not live up to our standards—we turned a blind eye.

Similar practices were reported vis-à-vis Afghanistan. One major explained US forces ‘walked a very fine line sometimes’ because it was not always possible to ‘follow everything by the book’. ‘There was always grey area,’ he stated, ‘and we walked that grey area many times, especially dealing with detention.’

His example was revealing:

There were times when, yes, it would be an ‘ANA detainee’ or an ‘ANP detainee’, just to give ourselves that additional time in order to get the evidence we needed to put these individuals away. It is ridiculous. You are taking a war type situation and trying to put American standard police work into being able to detain a combatant.

The officer blamed the situation (rigorous standards expected of US forces as opposed to local forces) on ‘politics’, and observed: ‘The blowback still from Abu Ghraib and stuff like that, the injustices seen. It is a big deal. . . . It is a big deal for a foreign force to come in and take an individual out of a village’. Standards had tightened considerably since that officer had been a company commander (he noted it had been much easier to detain then). Indigenous forces’ standards may have been exploited, he suggested, ‘so that we could get people who we knew were bad put away’. US forces would know to say the ANA or ANP had captured the individual in question, not them. Asked about this, Petraeus adamantly denied the practice. ‘What we do not do,’ Petraeus said, ‘is use [local forces] because they might be willing to do something to a detainee that we might not be able to do; in fact, we have very clear [rules]—just read the Leahy amendment.’

Certainly, Pregent reported ‘dozens’ of advisors and contractors working with Iraqi security and police forces in 2008 to ‘institutionalize oversight mechanisms’ at training facilities ‘that included

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388 BX. 389 FC7 II. 390 FC7 II. 391 Petraeus: ‘Every country has the equivalent of the Leahy amendment. If we know that other forces are doing something that violates our norms or our laws we will actually withdraw support for them.’ The Leahy amendment is a provision within the US Foreign Assistance Act of 1961 (as amended). It prohibits military assistance to foreign security forces where there is evidence such forces have committed gross violations of human rights. Consider also Johnson (2011), on the effectiveness of the Leahy amendment as a coercive strategy.
respect for basic human rights and the rule of law'. When asked whether US forces could ‘contract out’ of certain obligations by virtue of agreements with a host state, such as Iraq, Gade responded:

That would put us [the US] in a very unfavourable light. We were very conscious of that, certainly in Iraq. We did not want anybody saying that we ‘looked the other way’ while the Iraqis abused their own people. Post-Abu Ghraib there is no way we could do that. . . . [But] once the Security Agreement was signed and official, [Iraq] made it very clear that they wanted to demonstrate their own sovereignty.

Another officer, who was at S-3 level in Kunar Province from 2009–10 and responsible for coordinating the detention and targeting processes, suggested that the ‘idea that Abu Ghraib drove the brunt of [US] detainment practices is a myopic perspective’, even if it ensured ‘more emphasis’ was placed ‘on rules that were already and had long been in place to avoid the mistakes/fallout of the “strategic corporal”’. Nevertheless, the emerging emphasis on ‘Afghans in the lead’, coupled with tighter standards for entry into US detention facilities, reinforced the reality that multiple variables drove operations, especially detention operations. In large part, this was a direct response to the imperative to empower the local population and adapt policies to certain cultural expectations. Clearly, however, the presence and absence of mandatory rules had an impact. On the one hand, there was growing recognition by US forces of the importance of ‘checks and balances’, despite frustration among officers that ‘even if you could prove [individuals] are nefarious you had to prove it to a ridiculous shadow of a doubt’. On the other hand, the lack of mandatory rules governing local forces may have been exploited.

393 Gade II.
394 FC4, email to the author dated 22 May 2012.
395 FC4: ‘Categorizing a detainee as a “ANA” or “ANP” detainee was generally the practice, not because we wanted to only hold the detainee longer while we could sort out the process, but because our criteria for US detention were often so high and revolved around intelligence value, that if a crime had clearly been committed we often could not detain the individual because Bagram [Prison] was unwilling the take the individual. . . . The amount of information needed to detain an individual was, at the time and amidst an insurgency that was very active, perceived as asinine; but in retrospect, I think very important in terms of transitioning judiciary and rule of law practices to the Afghans.’
396 FC4: ‘Jbad or Bagram were not Junar, just like Kunar was not Nangahar, nor Nangahar Helmand etc. I could not expect the policy writers of detention operations to fully understand what we were up against, nor should I make them the target of why I thought certain aspects of our operations were broke. We had a left and right limit. We dealt with cultural nuance that anyone any distance away from it could not possibly understand’. See, further, Nagl, ‘The Age of Unsatisfying Wars’, New York Times, 6 June 2012, which quoted the T.E. Lawrence maxim, endorsed in FM 3-24: ‘Do not try to do too much with your own hands’.
397 FC4.
398 In his email of 22 May 2012, FC4 noted that in retrospect, he did not think the process was ‘ridiculous’, but was ‘simply a process that takes time and patience (as does COIN)’. ‘In that respect,’ he added, ‘I think we were actually on the mark.’
399 FC4, who also noted that often, US forces did not drive this: ‘Pashtuns want to give other Pashtuns the benefit of the doubt. A lot of money exchanges hands behind the scenes that we do.
This is not to say that indigenous forces were not trained to comply with certain legal standards by US forces, rather that the standards were different. One captain who assisted with training the Afghan police and army in the first four months of his 2009–10 deployment described the advances, but also the frustrations, encountered by the training process: ‘you come in with the mindset that you know you can’t train them like an American’. The same captain noted the irony in attempting to train local forces in winning ‘hearts and minds’. While the captain acknowledged that, at battalion and company command level, ANA and ANP forces ‘definitely went through rule of law training’, he also maintained that he learnt a great deal about local customs from the indigenous forces who were being trained, including practices he had not previously be aware of (such as not walking to the west of somebody who is praying). This captain returned to the same area in Kunar Province in 2012, where he served as an advisor to the ANA. His 2010 observation, that ‘corruption was a way of life’ in Afghanistan, was again reinforced on his most recent deployment in debates among the ANA, ANP, and ANSF about witness intimidation.

**Conclusion**

As recently as 2009, Bing West declared the ‘rule of law’ was ‘aiding the insurgency’. West bemoaned, for example, the tendency of US forces to process detainees through multiple layers of review and release ‘eight out of every ten’. ‘A hyperbolic overreaction to the abuses at Abu Ghraib’ had apparently driven the encroachment of law upon military operations. This chapter has sought to establish the rising impact of law, including international law, in the conduct of COIN operations. It has attempted to demonstrate, first, that the comprehensive application of COIN doctrine downrange in Iraq and Afghanistan ensured key legal interactions described in Chapter 4 held up on the ground, and, second, that the pathways enable one to appreciate why, when and how much international law mattered on the front line. The final chapter of this book will examine the implications of these findings in practice and for theoretical approaches to the function of international law in international relations. It also considers the significance of the revision edition of FM 3-24, released in May 2014.
Conclusion

This book has sought to illustrate international law’s importance in the development and execution of modern US COIN doctrine. I have suggested international law’s influence can be understood, individually and collectively, through three pathways: in the ideational pull of the rule of law; in international law’s capacity to demonstrate and articulate legitimacy; and in the mandatory consequences of international law’s interaction with domestic law and domestic institutions. Though the merits of counterinsurgency as a strategy (or toolkit) for fighting modern war will continue to be debated, the evidence suggests the US approached the conduct of legitimate warfare in increasingly legal terms. This was true both in the drafting of doctrine, specifically FM 3-24, and in the prosecution of COIN doctrine downrange in Iraq and Afghanistan.

What is the significance of insinuating legality into the conduct of the armed forces? Does this represent, to paraphrase E.H. Carr, the ultimate politicization of the law, and the embrace of ‘lawfare’? In 2010, Australian Army captain Dale Stephens declared a ‘real revolution in military affairs is under way and it does implicate the law in fundamental ways’. Stephens called for renewed analysis of the ‘interpretive valence of the law’, noting the irony that it was ‘operational pragmatism that has sparked this phenomenon’.1 Intriguingly, Stephens suggested modern US COIN doctrine represented a realization of Morgenthau’s vaunted fusion of policy and international law,2 which paid particular attention to the latter’s social context.3 Such developments, Stephens contended, while possibly positive vis-à-vis COIN, ‘ran the perceived

1 Stephens (2010: 314).
2 Following Morgenthau (1940: 269–70), who wrote (1940: 260, 272): ‘It is a strange paradox that the lay public has observed a much more skeptical and realistic, therefore scientific, attitude toward international law than the science of international law itself’, arguing that ‘the positivist doctrine of international law has completely ignored this particular relationship between the rules of international law and their sociological context.’ See, further, (1940: 284): ‘The science of international law, as well as the social sciences in general, are still awaiting their Newton, their Leibniz, their Faraday, their Carnot, their Maxwell, and their Hertz.’
risk of opening the door to accepting a deeply instrumentalist approach to the law that risks elevating military effectiveness as an interpretive benchmark. More specifically, the danger was an enlarged role for military lawyers and the malleability of interpretive indeterminacy.  

Key to Stephen’s argument, however, and to the realist or instrumentalist logic that might be advanced, is the requirement for such legal interaction within military doctrine and operations to be ‘consciously directed’. This may have been true in some instances, but the empirical chapters have demonstrated that in many cases this did not occur: the notion of the rule of law and especially mandatory legal rules prompted or dictated reversal of specific paths and intended actions. In other words, the alleged fusion of law and policy did not run in the same direction. Though international law has long been subject to political manipulation, what is evident in the last decade’s development and prosecution of US COIN is something quite different. For Martins, this does represent a politicization of the law: ‘it ultimately puts the law in service of something other than itself’. Legality is used as a critical element in establishing legitimacy, including moral legitimacy. Stephens noted, for example, the imposition of ‘humanitarian considerations’ within FM 3-24, ‘as an express preference in the interpretation of the principles of distinction and proportionality’. Such a move, he conceded, has ethical and instrumental elements: ‘It also speaks the language of legitimacy, which is fast becoming the currency of the law of armed conflict but, as stated, is not without its cognitive risks.

It was in characterizing the need to establish moral legitimacy that Manwaring noted the aptness of Sun Tzu’s words: ‘Those who excel in war first cultivate their own humanity and justice and maintain their laws and institutions. By these means they make their governments invincible.’ This has long been the classic conception of law’s use by a preponderant power: the development of laws to suit that power’s interests and protect its position at the apex of the international hierarchy. It is significant, then, that for much of its pursuit of the ‘War on Terror’, the US attempted to exploit gaps in the laws of war, claiming they were not appropriate and adapted for this type of war. That strategy famously failed. Since FM 3-24 and its associated implementation downrange, the US doubled down on relevant international law. In order to ‘excel’ in counterinsurgency, modern US COIN returns not only to the lawful pursuit of war, but also tasks the idea of the rule of law, and the presumed legitimacy of LOAC and international human rights law, with

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6 Martins. See also Martins (2011: 10).
stabilizing its conduct and boosting popular support. The content of many such principles lies in instruments to which the US is not a party. The US has assisted in the cultivation of such laws, but steadfastly refused to adhere or commit to them, especially post-9/11. In modern US COIN, then, international law takes on a more independent role than commonly appreciated.

The pathways were chosen on a hunch that they would elucidate international law’s impact. They have uncovered important empirical and causal insights. What has become clear is that while the pathways are individually vital, they are also intricately connected. Ultimately, we see a collective impact, not mutually exclusive influences. One example of this relationship between the rule of law, mandatory rules and legitimacy can be gleaned from Waxman’s work on detention. Waxman has argued there existed a neat synergy in Iraq and in Afghanistan, due to the counterinsurgency strategy, between ethical and legal principles and military effectiveness. ‘One lesson’ the US military drew from both campaigns, Waxman claimed, ‘is the strategic imperative of high substantive and procedural standards of detainee treatment, especially when seeking to bolster rule of law institutions’. The embrace of rule of law development as a key line of operation underlined this even further, and led to the adoption of recognized international law standards on substantive issues like the use of force and interrogation standards, and procedural rules like the need for a competent tribunal to determine and periodically review status. Together, these helped ‘to lay a foundation of support and legitimacy upon which local rule of law can be built’.

In Waxman’s view: ‘the more that rule of law promotion features as a strategic objective, the more robust procedural protections for detainees will align with military necessity, rather than collide with it’.

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10 See, further, Stephens (2010: 312): ‘When defeat was staring the coalition in the eyes in Iraq in 2007, a radical new strategy was developed that recognized the need for a more careful and judicious application of force. . . . It is clear, though, that the new doctrine reflected in the COIN/stability operations is actually working in the strategic sense.’ Stephens pointed to the role of doctrine in this transition, but noted lawyers had not ‘been as ready to internalize these fundamental changes’.
11 Roberts (2008: 347) suggested that even prior to 9/11 the US ‘continued to take a semi-detached view of much contemporary international law’, including the Additional Protocols and the Rome Statute.
12 As Davidson observed: ‘[I]t was so hard for some of us to watch Abu Ghraib and Guantánamo and wherever there were accusations of human rights abuses by our soldiers. . . . Counterinsurgency, if you look at the history, you will see a lot of harsh practices, and some people question whether the new kinder and gentler version conveniently papers over that. . . . Stuff that worked back then may not work today. In fact, stuff that worked back then will not work today because the norms have changed. I do think that all the literature on the way human rights norms have gone international is true. . . . I do think it’s true and I do think it’s real.’ See, further, Finnemore and Sikkink (1998), an article that remains (as of September 2014) the third most-cited and the second most-read International Organization article.
Several brief observations should be made on the practical revelations from each of the pathways. First, on the centrality of the rule of law, it should be stressed that its embrace as being ‘essential’ to operations in Iraq and Afghanistan was not predestined or designed in a deliberate, instrumental fashion by the US military. It was an approach that evolved over time, initially through the drafting of FM 3-24 (impacted as it was by non-government actors, lawyers and non-lawyers) and then via interactions in the field. Through it all, I suggest we see a real-time incarnation of Palombella’s depiction of the rule of law ideal. I further contend that a commitment to this ideal implicated rules of international law directly and indirectly.

One suspects, however, that the extent of the buy in from senior command to the rule of law has created a paradox. Linking rule of law with security is one thing, but connecting it more deeply with the shape and function of governance structures, even constitutional structures, is a delicate task.\textsuperscript{16} Martins noted the desire to ‘superimpose’ legal ideas upon Iraq was ‘one of the more controversial or debate-inspiring ideas’ of FM 3-24 because it seemed ‘easily discredited’.\textsuperscript{17} Domestic ownership and embrace of the rule of law is fundamental to its success. Martins observed, based on his impressions in Iraq, that the local population were a ‘legalistic culture’ and ‘more enamoured’ with law as an abstraction than the US, which ‘though committed to the rule of law will not see legal rules as credible without the power of enforcement’.\textsuperscript{18} He also believed the ‘law and the rule of law programs’ played a vital role during the surge and ‘captured the imagination’ of many Iraqis. For Martins, examining how well counterinsurgents ‘are encouraging or promoting the rule of law’ in Iraq (or Afghanistan) ‘is an appropriate way to go about’ measuring progress.\textsuperscript{19}

If it’s not yielding stability and we’re getting 1600 ethno-sectarian deaths a month in Baghdad in January of 2006, that is illegitimate, that is just as illegitimate as the other extreme of torture and government run amuck.

Space does not permit full exploration of these issues. Clearly, though, they are significant. Petraeus was no doubt aware of them.\textsuperscript{20} In many respects they reflect historical debates about differences between procedural and substantive elements of the rule of law.\textsuperscript{21} Modern US COIN embraces the procedural

\textsuperscript{17} Martins. LWD3-0-1: [4.22(c)] also notes this dilemma.
\textsuperscript{18} Martins. \textit{Gade II} agreed Iraq was a legalistic culture but suggested Martins’ view is too charitable. For \textit{Gade II}, rule of law ‘was more our idea that we tried to emphasize to them’. More difficult to deal with in Afghanistan and Iraq, perhaps, ‘was the influence of ethno-sectarian population differences’. As \textit{Gade} put it, ‘people will be very legalistic and very driven by the idea of the rule of law’ when it ‘relates to their community, [but] less so when it comes to the militia that they command’.
\textsuperscript{19} Martins. \textsuperscript{20} Kilcullen (2009: 166–70).
\textsuperscript{21} See Hayek (1960); Fuller (1969); Raz (1979); cf. Palombella (2010); Waldron (2006).
aspects of the rule of law, and increasingly also several substantive aspects; witness, for example, the desire for conformity with LOAC and international human rights standards. But the overall ideal is misunderstood and underspecified, particularly in its somewhat fraught relationship with security. A story out of Afghanistan in May 2014 exemplified the tension, quoting a former US Special Operations Forces officer as saying: ‘We can’t sacrifice security for this multigenerational effort to build rule of law.’ There is a consensus the rule of law has to be central, but as Kilcullen observed: ‘Not everyone is a Mark Martins.’ A more complete study of the rule of law’s impact should investigate the reception, definition, variance and relative success of rule of law ideas on the ground. It must also entertain the prospect that historical features of the rule of law that have comprised domestic systems are now especially relevant and applicable to international law. What appears clear, however, is that rules of international law are becoming more salient in the composition of the rule of law ideal. This should not surprise us. Modern international law emerged from the diffusion of domestic rule of law ideas, namely procedural justice. If one commits to an historical continuum of the rule of law, it is only natural that rules of international law bear increasing weight in buttressing rule of law systems.

This last point is particularly relevant to the second pathway, which dealt with the overriding objective of legitimacy. The monograph by Brunée and Toope speaks to the intricate relationship between legality and legitimacy. The empirical findings in this book appear to support aspects of this interactionist account, particularly in so far as it encompasses deference to the rule of law. Legality, including procedural and substantive elements of legality derived from principles of international law, has become especially salient as a determinant of legitimacy. Although many have attempted to separate legality from questions of legitimacy and morality in a theoretical sense, practically this is far more difficult. The evolution and contestation of applicable international laws is in many ways the natural site for such debates to take

22 Mason (2011: 11) argued ‘the actual practice of rule of law promotion remains gravely under-theorized’, observing that in the field ‘rule of law’ often becomes ‘shorthand for the rule of lawyers rather than the rule of law in the classic sense’.


24 Kilcullen: ‘In practice, we haven’t really ever engaged with [rule of law]. We have done a lot of law enforcement [and detention], we have done very little by comparison is on governance reform…. If you are extending the reach of an Afghan government that is corrupt and oppressive and that is abusing the population, making everyone hate them and turn to the Taliban, the better you do with that strategy the worse it is going to get. And that is what we did. I think we have yet to fully engage with the absolute centrality of rule of law in the sense of giving the population access to justice and making the justice of the government more legitimate, more acceptable in the eyes of the population, than the justice that comes from the insurgent.’

place, given the way in which such rules are constructed. Treaty and customary law are developed on the basis of state consent; once crystallized such laws represent widespread state practice and the belief that law requires such practices. One should not assume, among 193 states, that custom and treaties derive only from ‘the strength of a single state or group of states that decide what shall count as law’. In the global information age, with associated 24/7 exposure, one should expect that decisions by states to prioritize legitimacy will seldom involve movement away from international law. This will, in turn, direct greater attention to the effectiveness and independence of such rules, which will not always correlate.

Finally, modern US COIN makes clear the vitality of mandatory rules. These are distinctive legal norms at their most specific and most decisive. The consequences of mandatory rules may be most stark where there are none, for as we have seen the absence of mandatory rules, especially those rules enforced through the operation of domestic law, may be exploited. We saw this especially in relation to detention and interrogation. Further exploitation is expected to be confirmed by the US Senate report into the CIA’s treatment of terror suspects post-9/11. When interviewed, Petraeus suggested a gap still exists in ticking time bomb scenarios that was vulnerable to exploitation:

There is one issue out there that needs to be sorted out. I raised this in my confirmation hearing—the ticking time bomb scenario. I am just trying to be intellectually honest. That is something that I think virtually every citizen would say [is required]. Again you would have to have fairly restrictive standards, and what you have to have is a procedure that is established well in advance that is similar to what we do with the nuclear football. . . . There needs to be a procedure for the case where we know—100 per cent—that this individual did plant a nuclear device underneath the Empire State Building or Capital Hill. We do know it will go off in 30 minutes; we do know he has the codes to stop it; we do know he is not inclined to do that. What do you do now? I think this is where it is worth having a procedure where somebody says, ‘do whatever you need to do’. I think you just need to be honest about this. You can’t live in a dream world, and I think there needs to be acknowledgment of this, it needs to be done with intellectual rigour and realism. . . . You need a legal [procedure] so you are not violating anything legally. Violating the law is not a good approach.

When I spoke to senior legal officers at CENTCOM, change in overall conduct of ISAF operations in Afghanistan was attributed to three factors: McChrystal; the 2005 Detainee Treatment Act; and the change in US administration in

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26 See, further, Koskenniemi (2012: 25–6).
28 Petraeus.
early 2009. On McChrystal, it was said that only he could have done what he did. As a former JSOC commander McChrystal had enormous credibility in the US military, and the reputation to withstand criticism from officers (and lawyers) that his restrictions on the use of force went too far. These criticisms included a number of congressional inquiries, together with a proposed amendment to the Defense Appropriations Act reaffirming the right of officers to act in self-defence.29 (Martins, too, was lauded in this respect for his work in bringing in outsiders to comment on US practices.) So far as the DTA was concerned, CENTCOM officials stressed it was vital that the DTA incorporated GC III as a matter of law. This did not impact transparency initially, but certainly provoked widespread changes. Finally, it was no coincidence that several of President Obama’s first Executive Orders were on detainee operations. There was an ‘emphasis on law from the top down’.30 So much was made clear in President Obama’s remarks on national security at the National Archives in May 2009:31

We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability…. [T]he decisions that were made over the last eight years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable—a framework that failed to rely on our legal traditions and time-tested institutions, and that failed to use our values as a compass.

The White House released a further statement on detainee policy in March 2011. Referencing the 2009 National Archives speech, the statement announced ‘support for two important components of the international legal framework that covers armed conflicts: Additional Protocol II and Article 75 of Additional Protocol I to the 1949 Geneva Conventions’.32 In a nod to the applicability of these frameworks, the statement went on to say that the ‘US Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict’ and urged the Senate to accede to Additional Protocol II ‘as soon as practicable’.33 Around the same time, Hays Parks provided an update on the new DoD Law of War Manual, supposed to be

30 Unattributed (CENTCOM).
33 Note also the comments on this move on the Lawfare blog by John Bellinger and others: <http://www.lawfareblog.com/tag/article-75/> (a. 20 September 2014).
the first produced since 1956, and elaborated on its consistency with each of the Protocols, specifically so far as ‘civilian objects’ are concerned, along with detention and interrogation practices.\textsuperscript{34} Clearly, differences in interpretation remain, particularly on what it means to directly participate in hostilities, and the lack of transparency on drones undermines these developments,\textsuperscript{35} but the US position is now closer to its allies. The legal position embraced by modern US counterinsurgency has been somewhat entrenched.\textsuperscript{36}

There are additional takeaways that flow from the evidence uncovered via these pathways that have particular relevance for scholars of International Relations and International Law. First, even in armed conflict, power can be every bit as social as it is material. FM 3-24 was cognisant of this, as were the most effective commanders on the ground. Second, force was of limited utility over the long-term, and of even less utility unless it was deployed lawfully. Third, despite international law having clear impact on the contours of FM 3-24 and the manner of its execution, other factors such as organizational culture and historical contingency were important enablers. The ‘convening power’ exercised at Fort Leavenworth 2005–6 is testament to this, particularly in its construction as an ‘Engine of Change’, as well as the receptiveness of doctrine authors (and subsequent commanders) to the views of outsiders. Culture and contingency can run in different directions, of course, as has been aptly demonstrated in the post-9/11 operating environment. Compare, for example, the delays involved in releasing the Interagency COIN Manual in 2009 and the failure to release an updated DoD Law of War Manual. Consider also the different permutations and discretion involved when local forces in Iraq and Afghanistan assumed a greater role in the conduct of operations. Nevertheless, it should be clear from the process tracing that some adjustment to theories on the function of law, and of norms, in international politics is required. The case for realists to take international law more seriously and for constructivists to take on questions of causality more rigorously has been put forward.

This book has operated from the proposition that while we may argue about the ingredients of a given law, there are many who can agree a given rule is a legal one and, furthermore, that there is a modern system of international law

\textsuperscript{34} See Parks (2011: 15–18, 20–2). Parks further noted (2011: 18) that the new manual ‘would not have supported and does not now support flawed advice offered by Department of Justice officials in the immediate post-9/11 months that law of war treaty obligations of the United States can be “waived” by the President under his Constitutional authority’. See also Carvin (2010). The new DoD Law of War Manual may now not be released, despite reportedly ‘enjoying the consensus of the four military services’: see Edwin Williamson and William Hays Parks, ‘Where is the Law of War Manual?’, \textit{The Weekly Standard}, 22 July 2013.

\textsuperscript{35} Note President Obama’s speech on this subject at Fort McNair on 23 May 2013: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

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which interacts with domestic, transnational and international political and legal systems. Legal rules crystallise the issues and demonstrate a path forward. They can be sticky. As General Petraeus put it: international law is ‘non-biodegradable—it is never going away’. In a different context, following the Rio+20 Conference in 2012, the Head of Climate Change at PriceWaterhouse Coopers said, ‘the process will get more difficult because the closer one gets to a legal deal, the more real the issues are’. This does not mean law is unchanging, or unaffected by social and political forces. Quite the opposite. Many have suggested the present international legal architecture with respect to irregular war has been found wanting and remains in need of revision.

Instead of dwelling too much on the distinctiveness of law, my sense is that the disciplines of International Relations and International Law now need more work on related issues: what difference international versus domestic legal quality makes; how important the transnational spread and convergence of legal paradigms is; what difference the degree of legal specificity makes; what impact the timing and venue of that specificity has on the speed and direction of norm travel, diffusion and regression; and how we should evaluate the role of lawyers given the influence of the legal terrain on state action, including in armed conflict.

The evidence presented would also support further revision of the norm diffusion and life cycle literature. The conventional view of the norm life cycle is a global-local flow and a relatively ordered pathway of: (i) norm emergence via connected entrepreneurs; (ii) norm spread to states and international organizations; and (iii) internalization in legal structures and broader conformity due to habit and institutionalization. This sequence is not one borne out by the demonstrated interaction of law (and associated norms) with the development and implementation of FM 3-24. Indeed, the order is almost reversed: partially internalized but hitherto unapplied norms cascaded through military doctrine, often aided by well-placed entrepreneurs, sometimes despite competing forces and entrepreneurs. Hamdan v. Rumsfeld’s impact is one example of this; the role of military lawyers in framing rule of law operations and the method through which force was deployed are two others. Part of this was a question of framing; it was also due to certain norms being ‘on the books’ internationally and domestically, but without a relevant,

38 See Petraeus.
40 See Koskenniemi (2012: 12).
42 See, further, Zwingel (2012: 126); McKeown (2009).
recent or established ‘course of dealing’ in an applied sense at the appropriate level. The US COIN story supports the view that the path travelled by norms, insofar as they are divisible from law, is neither linear nor unidirectional. Content, specificity and context are particularly salient to the origin and direction of travel, and would appear to be key markers in the ongoing debate about norm progress and norm regress.

In my view, scholars working on ‘norms’ need to deal with what is perhaps the elephant in the room: just how much of the norm talk is law talk? The literature appears to be increasingly clear on what the law is, but far less clear on what a norm that is not a law is. The distinctiveness of non-legal norms remains an open question, if only because it is difficult to point to a specific non-legal norm that constrains or changes political behaviour to such a degree that scholars and practitioners would sit up and take notice.\textsuperscript{43} Culture, practice, morality—standards of behaviour—are important, but these are less visible, less tangible, less traceable and less extractable from law.\textsuperscript{44} As we saw, ‘values’ were vital in changing US practice in counterinsurgency, but often a legal pathway was used to bring these to life.

Does COIN have a future? There is little doubt we are yet to understand fully the parameters, design and likely proponents of warfare in this century. Notwithstanding, it seems conceivable that modern military forces will be deployed in roles requiring the counterinsurgents’ ‘toolkit’ for much of it.\textsuperscript{45} Only a few years ago, military officials and policymakers appeared to reach a consensus that counterinsurgency operations had ‘never before seemed so central to the future of warfare’.\textsuperscript{46} The 2008 US National Defense Strategy did not use the War on Terror slogan, but spoke of the ‘Long War’,\textsuperscript{47} described as ‘a prolonged irregular campaign, a violent struggle for legitimacy and influence over the population’, where a kill-capture mindset was insufficient and all elements of US power were to be employed in full spectrum counterinsurgency operations.\textsuperscript{48} The 2012 Defense Strategic Guidance spectacularly reversed this position by undertaking not to conduct large-scale, prolonged COIN operations.\textsuperscript{49}

\textsuperscript{44} Indeed, it is quite possible that the epistemic community of lawyers now dominates professional norms. The density of lawyers in Europe has increased by around 2–3 per cent per annum. Raw numbers in the US have gone up 50 per cent in 30 years (now twice as many law graduates as there are jobs each year). Brazil has the second highest lawyer density in the world. In China the licensed number of lawyers is over 200,000—up from a few hundred in 1979. Lawyers are quick to connect: the Law Council of Australia first visited China in 1982 and signed a Memorandum of Understanding with the China Law Society in 1985.
The second edition of FM 3-24, called *Insurgencies and Countering Insurgencies*, is now publicly available, officially released in May 2014. In many respects, it reinforces the approach underlined in the 2006 manual, but only once a decision has been taken to conduct a counterinsurgency operation. The importance of that decision is demarcated by the structure of the 2014 manual, split into three parts: strategic and operational context; insurgencies; and counterinsurgencies. The new manual makes clear that there is a ‘spectrum’ of ways in which the US may be pitted against an insurgency. Once again, this is not altogether different from the idea of ‘full spectrum operations’ and the mix of offensive, defensive and stability operations outlined in the 2006 manual. The new upshot is clear though: the US need not require itself to be the counterinsurgent-in-chief:

The strategy to counter an insurgency is determined by the ends the US wishes to achieve, the ways it wishes to achieve those ends, and the resources or means it uses to enable those ways . . . when and how the US government provides assistance to other states to counter an insurgency is a question of policy and strategy. This position recognizes the long-term commitment required by counterinsurgency may not be desirable, a point never denied in FM 3-24’s first edition, which stressed the protracted, resource and time-intensive nature of counterinsurgency. Nevertheless, the refinement underscores the reality that the US has lost its appetite for nation-building, and the perception that COIN doctrine was ‘blindly followed’ in Afghanistan from mid-2009 without due consideration of whether the conditions necessary for a successful campaign existed. One lesson from Iraq and Afghanistan informing this shift is that the variable the US cannot control—the host nation—can be decisive.

Ideally, the host nation is the primary actor in a counterinsurgency; not an intervening state like the US. Understanding and interacting with the culture of the host nation is therefore key, perhaps more than previously understood,

50 FM 3-24 (2014 edition): [1-5]; cf. Eikenberry (2013): ‘Fragile and failing states will continue to endanger US and international security, and the choice of responses is not limited to doing nothing or deploying massive numbers of troops and civilians who must march in lockstep to the beat of Field Manual 3-24 . . . . Before the next proposed COIN toss, therefore, Americans should insist on a rigorous and transparent debate about its ends and its means.’
53 See Eikenberry (2013): ‘[F]or all of the vaunted agility and resourcefulness of the US armed forces, the risk of senior US commanders’ becoming intellectually arrogant and cognitively rigid is real. The COIN paradigm was applied with such unquestioning zeal that critical thought was often suspended . . . . “COIN” evolved from a noun to an adjective, and its overuse became almost a parody of faithful Red Guards chanting Maoist slogans during the Cultural Revolution.’
54 As Walters (2009: 217) suggested, ‘no amount of “message packaging”, no matter what the qualifications of the “messengers”, nor any action – unified or otherwise – other than that needed to resolve the causes of the conflict’ can overcome the deficiencies of certain kinds of governments ‘in the eyes of a significant portion of its citizens’.
a point reinforced in the new manual. The 2006 manual addressed the cultural divide to some extent through its approval of T.E. Lawrence’s mantra ‘Better the Arabs do it tolerably than you do it perfectly’ in one of its paradoxes. However, as Anthony Bubalo observed, Lawrence’s words were slightly misconstrued: in 1917 Lawrence was ‘talking about Arab ownership of a guerrilla war that they themselves chose to fight against the Turks’. Given the US initiation of the Iraq and Afghanistan conflicts, the circumstances were different, and not entirely solved by partnering. The situation is more complex when the overall objective requires the assignment of legitimacy. Sarah Sewall’s prescient foreword to the 2006 manual is worth recalling in this respect; it argued that one virtue of the manual would be sterner reflection on decisions to conduct counterinsurgency. The 2014 edition would appear to underline this point.

The formula endorsed by the new COIN manual when the decision is made to conduct a counterinsurgency operation by placing boots on the ground does not depart from its predecessor’s playbook. Quite the opposite: the organizing principle remains legitimacy, and the function of law in that endeavour is expressed in stronger terms. Indeed, it could be argued the impact of law is even more prominent in the new edition. The Legal Annex is no longer, because a full chapter on ‘Legal Considerations’ is now part of the main doctrine. Key principles, such as ‘Security under the Rule of Law is Essential’ and ‘Using force precisely and discriminately strengthens the rule of law that needs to be established’, along with the ‘Sewall Paradox’ (the more successful the counterinsurgency is, the less force can be used and the more risk must be accepted) are similarly prominent. It is stressed that ‘all interactions between security forces and the population directly impact legitimacy’.

The concept of direct participation in hostilities by civilians is discussed, whereby membership of armed forces or armed groups or direct participation in hostilities are elucidated as separate bases for targeting under LOAC. The

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55 FM 3-24 (2014 edition): [1-79], [3-1]–[3-4]. Note Petraeus (2013): “Cultural awareness is a force multiplier”. Clearly, we must achieve and maintain a very detailed, granular understanding of the countries and societies in which we operate—and not just at the macro level, but village by village, valley by valley as well.’
56 FM 3-24: [1-154].
57 Bubalo, ‘Lawrence of Arabia is out of place in Iraq’, Financial Times, 12 November 2007. See, further, Eikenberry (2013): ‘Moreover, T.E. Lawrence specialized in inciting revolts, not in state building. Historically, visionary indigenous leaders backed by native populations have been the key to building viable states—not foreigners serving one year tours of duty, no matter how passionate and skilled they might be.’
58 See, for example: <http://smallwarsjournal.com/blog/a-cia-coindinistas-misgivings> (a. 20 September 2014).
59 cf. Eikenberry (2013), who argued in future the ‘essential task is deciding how to do less with less’.
prohibition on torture is reinforced, as is the application of rules regarding targeting and detention in non-international armed conflict. Each of the instruments discussed above in Chapters 4 and 5 are underlined, with additional detail. In many respects, the argument I have put forward in this book is confirmed by the following passage in the new manual:

Following the law of war is a critical component of counterinsurgency operations that directly supports the accomplishment of the strategic mission to defeat the insurgency and establish local rule by gaining the trust of the local civilian population, or at a minimum, enabling the local population to cease active support of the insurgency. Violations of the law of war have a direct and significant negative impact on the ability to conduct successful counterinsurgency operations.

One intriguing aspect of the new manual is its tacit support for transitional justice mechanisms and its sophisticated explanation of the rule of law continuum. Indeed, the manual refers to a range of ‘effects from the application of the rule of law’ and insists, ‘no nation achieves these effects entirely’. Such a depiction, including the stated need to understand the ‘deep cultural and historic roots’ of legal systems, accords neatly with Palombella’s. It also requires the connection of legality with legitimacy to be communicated effectively, as the last paragraph of the new manual makes clear:

Counterinsurgents should inform and educate the media, local community, host nation, and public at large about applicable law of war provisions, US and host nation laws, and the obligations of those participating in hostilities. Providing this information can help build trust and legitimacy by helping locals and the media understand the rules US forces follow and the safeguards they apply in operations. Legal preparation of the battlefield can also help delegitimize the insurgents, as locals and the media will better understand the insurgents’ violation of the laws.

If ‘indirect measures’ do become the preferred pathway for countering insurgencies, one might expect Special Forces, air power and surveillance to assume a heavier burden. This will only intensify calls for more transparency and legal scrutiny for targeting and information operations, including those conducted by drones or in cyberspace, as well as careful consideration of the Leahy amendment’s requirements. It will also necessitate closer inspection of who the exact ‘enemy’ is when insurgencies are associated with either a ‘war on terror’ or ‘persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America’. As Emile Simpson has written, on either analysis

67 See Obama’s speech, Fort McNair, 23 May 2013. Compare Petraeus (2013): ‘During the past decade, other partner nations have also been in need of help in the face of insurgency, including Yemen, Somalia, the Philippines, Pakistan, and Colombia, among others. Indeed, I was keenly
the ‘enemy’ has no clear bounds, except that the classification permits the paradigm of war to enable certain actions precisely because the classification can move an individual from the realm of criminality to combatancy.\(^{68}\) This paradigm preserves the dangerous legal position whereby it can be easier to kill than to capture. Thus, the scope of indirect measures will be indeterminate unless and until the US clearly defines the boundaries of its struggle against terrorism.

History suggests counterinsurgency will remain a fixture of international politics ‘because insurgency itself remains stubbornly alive’.\(^{69}\) Recent events in Iraq, Afghanistan and across the Middle East only serve to reinforce this. Mansoor may well be right in suggesting that ‘Somalia, Afghanistan, and Iraq are harbingers of conflicts to come’,\(^{70}\) especially if adversaries continue to neutralize technological advances by dressing like civilians and hiding in urban populations.\(^{71}\) The question becomes, then, whether and how they will be countered.\(^{72}\) To the extent they are countered, will US strategy and tactics become more conventional?\(^{73}\) Will US officers revert to type and forget modern COIN principles as quickly as they were (re)learnt? Time will tell.\(^{74}\) This book has suggested, however, that US forces ultimately, though not entirely, ‘conscientiously followed the tenets prescribed in the COIN manual’. These tenets embraced the rule of law, generated ‘the strictest rules of engagement in the history of warfare’,\(^ {75}\) and reversed anachronistic approaches to detention and interrogation. There is now a generation of US officers embedded with such experiences. The function of law in modern war may be reversible, but this will not be easily achieved: the evidence runs in the opposite direction.

focused on some of these missions as commander of US Central Command, and on all of them as the director of the CIA…. We provided a variety of enablers—funding, equipment, advisers, training, and intelligence—as well as civilian programs in order to start addressing the root causes of instability. Needless to say, such an approach is always preferable to having to deploy a large ground element, except where the host nation is unable to deal with the situation on its own and our national interests warrant the commitment of our forces…. Indeed, there may be occasions when our strategic interests will leave little choice but to weigh in heavily…. But we must clearly become better at waging small wars through our host nation partners.’

\(^{68}\) Simpson (2013). Consider also Simpson (2012).
\(^{69}\) See Exum (2012: 17), noting (like Kilcullen) that over ‘80 per cent of the conflicts fought since the end of the Napoleonic Era have been civil wars or insurgencies’. Note also Petraeus (2013): ‘Insurgency does not appear to have gone out of style’.
\(^{71}\) Consider, additionally, Kilcullen (2013) and Boot (2013).
\(^{72}\) See, further, Kaplan (2013: 289–93, 354–65).
\(^{73}\) Consider Kalyvas and Balcells (2010).
\(^{74}\) See, further, Ward (2012).
\(^{75}\) West (2012: 8–9).
Bibliography

1. Interviews

In the interests of confidentiality not all interviews—including those completed at Fort Carson in August 2010 (nine individuals) and CENTCOM in August 2011 (twelve individuals)—are listed here. The primary material was also aided by a workshop held in Oxford in May 2011 on the theme ‘COIN: where are we now—and what’s next’, co-badged by the Merton Global Directions Group, Oxford’s Changing Character of War Programme and the British Army COIN Centre. The workshop drew around one hundred participants from academia, government and the military and included presentations from Colonel Alex Alderson, Dr Conrad Crane, Professor Theo Farrell, Brigadier Richard Iron, Lieutenant General Sir Graeme Lamb, Mr Adrian Powell, Professor Cheyney Ryan and Professor Hew Strachan.

Mr John Bellinger
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Mr Bellinger was the principal legal adviser to former US Secretary of State Condoleezza Rice.

Dr Conrad Crane
30 July and 2 August 2010, Carlisle, PA.
Dr Crane is Director of the US Army Military History Institute, based in Carlisle, Pennsylvania. He was the head of the writing team for the first edition of FM 3-24.

Dr Janine Davidson
9 August 2010, Washington, D.C.
Dr Davidson served as the US Deputy Assistant Secretary of Defense for Plans 2009–12. Davidson was involved in early FM 3-24 writing efforts, and played key roles in the Counterinsurgency Interagency Guide and FM 3-07.

Brigadier Bill De Chow
18 April 2011, Dorset, UK.
Brigadier De Chow was Director of ISAF Special Forces in Afghanistan in 2009.

Colonel William Renn Gade
24 February and 31 May 2012, by telephone.
Colonel Gade was the rule of law lead for the military in Iraq 2008–9.
Colonel Richard Hatch
5 July 2011, by telephone.
Colonel Hatch deployed twice to Iraq as part of Operation Iraqi Freedom. He was the Staff Judge Advocate for the 101st Airborne Division, reporting to then Major General Petraeus. From 2004–5 Hatch was the Staff Judge Advocate for Multinational Security Transition Command-Iraq.

Mr Frank Hoffman
17 August 2011, Washington, D.C.
While stationed with the Marines Corps Warfighting Lab in Quantico, Hoffman drafted Chapter 7 of FM 3-24 and assisted with other aspects of COIN doctrine.

Major General David Hook
27 June 2011, Devon, UK.
Major General Hook was Deputy Commander, Regional Command (South) in Afghanistan for twelve months from October 2008 and Director of the HQ ISAF Force Reintegration Cell in Afghanistan for twelve months from October 2011.

Lieutenant Colonel Jan Horvath
24 November 2010, by telephone.
Lieutenant Colonel Horvath (retired) was stationed at the Combined Arms Doctrine Directorate at Fort Leavenworth, Kansas, 2004–6, where he was lead author of the forerunner to FM 3-24, FM 3-07.22. He later served at the Counterinsurgency Academy in Iraq 2006–7.

Dr Colin Kahl
22 August 2011, Washington, D.C.
From February 2009 until December 2011 Dr Kahl was the US Deputy Assistant Secretary of Defense for the Middle East.

Dr David Kilcullen
22 August 2011, Washington, D.C.
Dr Kilcullen was Special Advisor to former US Secretary of State Condoleezza Rice 2007–9 and Senior Advisor to General Petraeus in Iraq in 2007.

Lieutenant General Mart de Kruif
8 August 2011, Oxford, UK.
Major General Mart de Kruif was ISAF Regional Commander (South) from November 2008 to November 2009. He is currently Commander of the Royal Netherlands Army.

Colonel Richard A. Lacquement, Jr
16 August 2011, Carlisle, PA.
Colonel Lacquement is Director of Military Strategy at the US Army War College, served in both Iraq Wars, and authored Chapter 2 of FM 3-24.
Lieutenant General Sir Graeme Lamb
6 July 2011, United Kingdom
Lieutenant General Lamb was Deputy Commanding General of MNF–Iraq during the surge and served as an adviser to Generals McChrystal and Petraeus in Afghanistan.

Mr William Lietzau
13 November 2008, Washington, D.C.
Mr Lietzau was Deputy Assistant Secretary of Defense for Detainee Policy 2010–13. He was formerly Deputy Legal Adviser to the National Security Council and a Special Adviser to the General Counsel of the US Department of Defense. Lietzau was the first Acting Chief Prosecutor for the US Office of Military Commissions. Lietzau was the Pentagon’s negotiator in the 1998 US delegation to Rome and the chief US negotiator for the follow-on Elements of Crimes negotiations for the Rome Statute.

Mr Phil Lynch
5 March 2012, by telephone.
Mr Lynch was the rule of law coordinator for the US Embassy 2008–9, where he served under Ambassador Ryan Crocker.

Dr Max Manwaring
16 August 2011, Carlisle, PA.
Dr Manwaring is a Professor of Military Strategy in the Strategic Studies Institute at the US Army War College and is a retired US Army Colonel. Manwaring has served in US Southern Command and the Defense Intelligence Agency. Manwaring was involved in the early drafts of FM 3-24.

Dr Tom Marks
19 August 2011, Alexandria, VA.
Author of Maoist Insurgency since Vietnam (1996) and a renowned expert on irregular warfare. Marks assisted Horvath with FM 3-07.22 and early drafts of what became FM 3-24.

Brigadier General Mark Martins
10 November 2008, Washington, D.C.
General Mark Martins is former Chief of the International and Operational Law Division in the Office of the Judge Advocate General, who assisted with legal aspects of FM 3-24, including the drafting of the Legal Annex. Martins served in Iraq under General Petraeus during the surge where he was responsible for rule of law and detainee operations, and subsequently deployed to Afghanistan as head of detainee operations and later commander of CJIATF 435 and of the Rule of Law Field Force. He is presently Chief Prosecutor, Military Commissions, at Guantánamo Bay, Cuba.

General James Mattis
12 November 2008, Norfolk, VA.
General Mattis was the Marine Corps lead on FM 3-24. He was CENTCOM Commander 2010–2013, Commander of US Forces Joint Command 2007–10 and Supreme Allied Commander for NATO 2007–9.
General Standley McChrystal
19 August 2011, Alexandria, VA.

General McChrystal was ISAF Commander from June 2009 until June 2010 and JSOC Commander 2003–8.

Major General Jim Molan (retired)
21 January 2009, by telephone.


Dr John Nagl
22 September 2008, Washington, D.C.

Dr Nagl is a retired Lieutenant Colonel of the US Army and former President of the Center for a New American Security. Nagl was one of the drafters of FM 3-24.

Professor Bob O’Neill
3 January 2009, by telephone.

Professor O’Neill served as an Australian officer in Vietnam and was Chichele Professor of the History of War at All Souls College, Oxford, 1987–2000.

General David Petraeus
15 August 2011, Fort Myer, VA.

General Petraeus co-authored FM 3-24 with General Mattis before commanding MNF–Iraq during the surge. After a period as CENTCOM Commander, he was ISAF Commander from July 2010 to July 2011, and Director of the CIA from September 2011 until November 2012.

Mr Andrew Shearer
8 January 2009, by telephone.

Mr Shearer was the Director of Studies and Senior Research Fellow at the Lowy Institute for International Policy and has been a foreign policy and national security adviser to Australian Prime Ministers John Howard and Tony Abbott.

Dr Sarah Sewall

Dr Sewall was Director of the Carr Center for Human Rights Policy at Harvard University and is now Under Secretary of State for Civilian Security, Democracy, and Human Rights at the US State Department. Sewall co-chaired the February 2006 conference that vetted the draft of FM 3-24.

US Colonel Marc Warren
19 August 2011, Washington, D.C.

Professor Matthew Waxman

Professor Waxman was brought into the Pentagon to advise on detainee affairs during the Iraq conflict in the wake of the Abu Ghraib crisis. Waxman also advised on aspects of FM 3-24, including detainee treatment.

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