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Denying Due Process While Promoting Democracy: The Iraqi Detention Story

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During times of military occupation following an armed conflict it is not uncommon for the victors to implement mass detention programmes aimed both at providing security and bringing criminals to justice. International human rights regimes serve as overarching guidance for these programmes but are subject to broad interpretations, so it is often unclear what regulations or laws should inform day-to-day operations. Military and civilian lawyers may find themselves practising in a foreign jurisdiction for which they have no training or experience, let alone licensure. Law enforcement officers and military police are forced to adapt long-held practices to a new environment. Questions arise as to the rights that detained individuals possess, as these programmes frequently combine rules from different legal systems with no clear authoritative hierarchy. Attention is focused on the treatment of detained individuals with far less emphasis placed on their due process rights or other fundamental legal freedoms. This article examines one such instance, the US detention programme in Iraq, and highlights the numerous ethical and professional conflicts presented when members of one justice system are transplanted into another without proper preparation and background.

Keywords: military detention, post-conflict, reconstruction, detainee

1. Introduction

In January 2002 the United States established a detention camp in Guantanamo Bay (Cuba) to facilitate prosecution of those accused of war crimes, to protect the public from dangerous insurgents, and to provide a secure environment in which to conduct interrogations for intelligence purposes.[1] The facility was located outside the United States to remove the prisoners from the American judicial system, thus allowing officials to circumvent various due process requirements.[2] This indefinite detention of prisoners without trial, and allegations of torture as interrogation techniques, quickly led 'Gitmo' to be considered a major breach of human rights by

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[1] US Department of Defense, 'DoD News Briefing – Secretary Rumsfeld and Gen. Pace', 22 January 2002, https://archive.defense.gov/transcripts/transcript.aspx?transcriptid=2254.

[2] There have been numerous attempts to challenge this decision within the US courts, most recently in August 2020: *Al Hela v Trump*, No 19-5079, 2020 US App. LEXIS 27446 (DC Cir. 28 August 2020).

Amnesty International.[3] Yet, despite this backlash, the US went on to implement the same process in Iraq less than two years later. This time it was on a much larger scale.

The United States invaded Iraq in 2003 without a detailed plan for handling large numbers of insurgents. By December 2007 it was estimated there were some 50,000 detainees in Iraq, many of whom were untried and not yet formally accused of any crime; 513 of them allegedly were children.[4] Eventually, more than 100,000 prisoners passed through the American-run system,[5] yet these detentions attracted little of the public outcry that Guantanamo did, despite having a hundred times the number of prisoners.[6] Each of these prisoners saw his or her rights severely curtailed, far past the point that most legal practitioners would consider acceptable under normal circumstances.

The purpose of this article is to highlight some of the ethical conflicts and potential violations of professional responsibility faced by US military attorneys during the long-term detention process of Operation Iraqi Freedom. As these issues are not necessarily unique to this conflict, nor are the attorney-related expectations outlined in this article isolated to the United States, this work hopes to provide awareness of these concerns and promote better methods for addressing them in the future. Many of the descriptions in this article are based on my personal experience as a deployed Liaison Officer to Iraq's Central Criminal Court as part of Task Force 134 in 2008. All opinions expressed in this article are solely my own and do not reflect the official position of the Judge Advocate Corps, the US Air Force, or the Department of Defense.

2. Professional Standards for Attorneys

2.1. Requirements for Military Attorneys

Although each branch of the US armed forces has its own legal department, known as the Judge Advocate (JAG) Corps, the professional standards are quite similar across the services.[7] In order

[3] 'Amnesty International Alleges Detainee Abuse at Guantanamo Prisons', *PBS News Hour*, 3 June 2005, https://www.pbs.org/newshour/show/amnesty-international-alleges-detainee-abuse-at-guantanamo-prisons.

[4] Human Rights Watch, 'US: Respect Rights of Child Detainees in Iraq – Children in US Custody Held Without Due Process', 19 May 2008, https://www.hrw.org/news/2008/05/19/us-respect-rights-child-detainees-iraq.

[5] Open Society Justice Initiative, 'Globalizing Torture: CIA Secret Detention and Extraordinary Rendition', Feb. 2013, https://www.justiceinitiative.org/publications/globalizing-torture-cia-secret-detention-and-extraordinary-rendition.

[6] The Abu Ghraib scandal in 2004 involved the abuse of Iraqi prisoners by 11 US Army soldiers. However, the reaction to these events focused on the behaviour of individual soldiers and their leadership, not with the overall detention process.

[7] The rules of professional responsibility of each respective JAG Corps state that they are based on the American Bar Association's *Model Rules of Professional Conduct* (ABA Book Publishing 2013), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct. See US Department of the Army, Army Reg 27-26, 'Legal Services: Rules of Professional Conduct for Lawyers', 28 June 2018, https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3662_R27_26_FINAL.pdf (Army Rules); Air Force Instruction (AFI) 51-110, 'Air Force Rules of Professional Conduct', 11 December 2018, Attachment 2, https://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-110/afi51-110.pdf (Air Force Rules); and the Navy's rules of professional conduct, Department of the Navy, Office of the Judge Advocate General, 'Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of the Judge Advocate General', JAG Instruction 5803.1E, 20 January 2015, https://www.jag.navy.mil/library/instructions/JAGINST_5803-1E.pdf.

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to receive the designation of 'judge advocate', a person must be a citizen of the United States, graduate from an accredited law school, and be in good standing with and admitted to practice before the highest court in a US jurisdiction.[8] Once selected as a JAG candidate, applicants must meet the respective criteria of each service to receive an officer commission, including medical qualifications and physical fitness standards. Upon completion of branch-specific officer training school, JAGs then attend a seven- to nine-week judge advocate staff officer course. Only those who complete all necessary requirements are eligible to wear a JAG badge and carry the designation of 'JAG officer'.[9]

In addition to those military lawyers who are both licensed attorneys and commissioned officers, each service department also employs civilian attorneys within its JAG Corps. Though some military procedures and protocols differ between the military and civilian members of the Corps, the professional requirements are the same. Upon receipt of the JAG designation or acceptance of employment by the service, both military and civilian lawyers must maintain eligibility to practise law before the highest court of their licensing jurisdiction (usually a state supreme court), including fulfilling continuing education requirements and remaining in good standing.[10] JAG officers may lose their designation and a civilian attorney may be terminated if it is determined, among other things, that they failed to maintain professional licensing requirements or to maintain ethical and professional responsibility standards set by their respective licensing bodies and the Corps.[11]

Each branch of the armed forces has rules of professional conduct that govern the ethical behaviour of its lawyers. These rules are usually adapted from the American Bar Association's (ABA) *Model Rules of Professional Conduct* (Model Rules) unless areas unique to military practice must be considered or where the military has no relevant practice counterpart.[12] Lawyers subject to these rules may face professional disciplinary action if they are violated. Such actions could be handled administratively (within the service) or through referral to the lawyer's licensing body.[13] Thus, lawyers serving the military are subject to the same professional and ethical requirements as all attorneys in the United States – there are no special privileges granted to military attorneys that grant exceptions to these rules. Additionally, these rules are extraterritorial in nature and apply to a lawyer's behaviour regardless of the jurisdiction in which he or she practises.[14]

2.2. US STANDARDS OF PROFESSIONAL CONDUCT

Each licensing jurisdiction in the United States sets its own expectations and standards of conduct for its lawyers, which are binding on those licensed to practice. Nearly all of these jurisdictions

[8] Similar regulations exist across all branches; for an example see AFI 51-101, 'The Judge Advocate Corps', 29 November 2018, Ch 5, para 5.2.
[9] eg, ibid para. 6.2.
[10] ibid para 6.3.
[11] ibid para 7.3.
[12] See regulations cited at n 7.
[13] ibid; see, eg, Air Force Rules (n 7) r 8.3.
[14] See, eg, Air Force Rules (n 7) 29.

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base their rules of practice on the ABA Model Rules.[15] Thus, for the sake of brevity, this section will focus on the standards set out in the Model Rules with the understanding that the same or similar expectations of behaviour will apply to all lawyers licensed in various US jurisdictions. Additionally, the ABA *Standards for the Prosecution Function* (Prosecution Standards)[16] are intended to apply to those attorneys who prosecute criminal cases or who provide advice regarding a criminal matter to government lawyers, agents or offices.[17] The Prosecution Standards are consistent with the Model Rules and are intended to describe desired 'best practices'.[18] Thus, the Model Rules are generally viewed as carrying greater weight than the Prosecution Standards in light of the fact that they represent the various binding standards of professional conduct across jurisdictions. However, the Prosecution Standards are perceived as reflective of the expectations and guidelines governing the actions of prosecutors licensed in the US.

A prosecutor holds a special position of trust within the American legal system. The Prosecution Standards provide that a prosecutor is an 'administrator of justice, a zealous advocate, and an officer of the court'.[19] They must exercise sound discretion and independent judgement in the performance of their duties.[20] A prosecutor's 'client' is the public, or the people, not any government or law enforcement agency.[21] When it comes to investigations, prosecutors are expected to work diligently to identify all information that tends to 'negate the guilt of the accused' or 'mitigate the offense charged'[22] to ensure justice is being served, rather than the will of an agency. They should also advise other government offices involved in the case to do the same. A prosecutor should not move forward with a case unless confident that the accused committed the crime as charged, and that the sought-after punishment is commensurate with the crime.

Prosecutors in the US should not engage in *ex parte* discussions with, or submit material to, a judge without also informing the appropriate opposing counsel.[23] The prosecutor should disclose any information known to be directly adverse to the prosecution position and not disclosed by others.[24] Prior to trial, there should be timely disclosure of such information to the accused's counsel, and the defence should be given the opportunity to examine any physical evidence gathered in the investigation. At or before a defendant's first appearance before a judicial officer, the prosecution should consider whether the accused has counsel and, if not, inquire when counsel will be made available. Unless the accused has affirmatively waived counsel, the prosecutor should ask the court to delay any substantive proceedings until such time as the accused can

[15] American Bar Association, *Model Rules of Professional Conduct* (n 7).
[16] American Bar Association, *Criminal Justice Standards for the Prosecution Function* (4th edn, ABA Book Publishing 2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition.
[17] ibid Standard 3-1.1(a).
[18] ibid Standard 3-1.1(b).
[19] ibid Standard 3-1.2.
[20] ibid.
[21] ibid Standard 3-1.3.
[22] ibid Standard 3-5.4.
[23] ibid Standard 3-3.3.
[24] ibid Standard 3-1.4(c).

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receive a proper defence.[25] Before prosecuting a case it should be determined whether the accused appears to be mentally competent to stand trial, and whether he or she is able to assist in the defence.[26]

Control over scheduling of court appearances, hearings and trials should rest with the court, rather than with the parties.[27] If a guilty verdict is reached, the prosecutor should assist the court in obtaining complete and accurate information for use in sentencing, and provide any information that the prosecution believes is relevant to sentencing to both the court and defence counsel,[28] including all information that tends to mitigate the sentence.[29] Thus, it is as incumbent on the prosecution as it is on the defence to see that the accused receives a fair trial and due process.

2.3. AMERICAN AND INTERNATIONAL CRIMINAL DUE PROCESS RIGHTS

The length of this article does not allow for an in-depth analysis of due process rights in the criminal justice system, either in the United States or elsewhere.[30] Nonetheless, there are basic expectations and rights of prisoners on which most attorneys can agree, though the implementation of these rights may differ between countries. American due process at its most elementary level includes the right to be heard: the accused has a right to a trial and to submit evidence, a right to cross-examine witnesses, a right to testify, and a right to make witnesses come to court to provide helpful testimony. Additionally, the accused enjoys the right to a speedy and public trial by an impartial fact-finder, to be informed of the charges against them, and to have a lawyer speak and act on their behalf.[31] Warrants are required to protect individuals from unreasonable search and seizure.[32] US attorneys assigned to prosecutorial roles take an oath to uphold these standards and should be well aware of the rights of the accused.

At the international level the rights of the accused to a fair trial and due process are well established.[33] In his commentary regarding procedural rights, the Secretary-General of the United Nations has stated that it 'is axiomatic that [an international tribunal] must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings'.[34] This basic protection includes the right to a fair and public hearing, the right to be

[25] ibid Standard 3-6.
[26] ibid Standard 3-5.1.
[27] ibid Standard 3-6.1.
[28] ibid Standard 3-7.3(a).
[29] ibid Standard 3-7.3(b).
[30] For an excellent analysis of due process in international criminal law, see Cristian DeFrancia, 'Due Process in International Criminal Courts: Why Procedure Matters' (2001) 87 *Virginia Law Review* 1381.
[31] United States Constitution, 6th Amendment.
[32] ibid 4th Amendment.
[33] DeFrancia (n 30) 1393.
[34] UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [Contains text of the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991] (3 May 1993), UN Doc S/25704, Annex.

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informed of the nature and cause of the charges, the right to legal counsel, the right to examine witnesses, and protection against self-incrimination.[35]

Thus, at either the national or global level there are certain expectations and responsibilities that prosecutors have in ensuring the protection of the accused's due process rights. This makes it difficult for a lawyer – particularly an American lawyer whose professional standards are explicitly extraterritorial – to excuse any violations of these rights as a geographical or jurisdictional exception.

3. American versus Iraqi Judicial Process: A Tale of Two Systems

The American legal system is based on common law, relying heavily on judicial precedent in formal adjudications. Common law is often referred to as judge-made law, otherwise known as case law.[36] Such a system is based on the belief that an actual dispute between two or more parties allows for the best analysis of all pertinent issues. This approach naturally results in the parties viewing each other as adversaries rather than working together towards a common result.[37] Parties on either side of a case will zealously advocate their position, with the judge serving as a neutral arbiter and mediator. A judge will request the production of evidence or question a witness only in the rarest of circumstances; rather, the burden is on the parties to produce sufficient facts or testimony to prove their version of the case and persuade the judge or jury to rule in their favour.

The Iraqi legal system is civil in nature.[38]

> Civil law systems rely less on court precedent and more on codes, which explicitly provide rules of decision for many specific disputes. When a judge needs to go beyond the letter of a code in disposing of a dispute, the judge's resolution will not become binding or perhaps even relevant, in subsequent determinations involving other parties.[39]

The Iraqi Code is based on that of Egypt and, before that, on the French Code Civil. Although it incorporates Islamic elements, its overall structure and substance is based principally on continental civil law. Therefore, it shares a common substance and legal theory with other systems based on this model such as Egypt, France, Ethiopia, Spain and Italy. Additionally, Iraqi court proceedings are inquisitorial in nature, not adversarial. Its laws are largely secular, though there is some accommodation for traditional tribal practices.[40]

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[35] See, eg, the International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14.

[36] Toni M Fine, *American Legal Systems: A Resource and Reference Guide* (Anderson Publishing, a member of the LexisNexis Group 1997) Ch 1, https://www.lexisnexis.com/en-us/lawschool/pre-law/intro-to-american-legal-system.page#:~:text=Case%20Law,genuine%20interest%20in%20the%20controversy.

[37] ibid s C.

[38] ProElium Law LLP, 'Country Legal System Profiles: Iraq Legal Profile', https://proeliumlaw.com/iraq-legal-country-profile.

[39] Fine (n 36) s C, para 2.

[40] Dan E Stigall, 'Iraqi Civil Law: Its Sources, Substance, and Sundering' (2006) 16 *FSU Journal of Transnational Law and Policy* 1.

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Trial judges in an inquisitorial system are inquisitors who participate actively in fact finding and public inquiry by questioning defence counsel, prosecutors and witnesses. They can even order certain pieces of evidence to be examined if they find presentation by either party to be inadequate. Before a case gets to trial magistrate judges participate in the investigation of the case, often assessing material by police and consulting with the prosecutor.[41]

In an adversarial system the defendant may plead 'guilty' or 'no contest' in exchange for reduced sentences, a practice known as 'plea bargaining' or a plea deal, which is an extremely common practice in the United States.[42] A confession of guilt in an inquisitorial system would not be regarded as grounds for a guilty verdict: the prosecutor is required to provide evidence that supports such a finding.[43]

4. DETENTION GUIDELINES FOR OPERATION IRAQI FREEDOM

4.1. IMPLEMENTING A PROCESS POST-INVASION

When the Baath Party took control of Iraq in 1968 it began to undermine the concept of the rule of law and used the judicial system to extend and consolidate its authority by punishing those who dared to speak against the regime. Judges had to be approved by the Party; the intelligence, military and security services had their own special courts, which tried and sentenced thousands of Iraqis with little regard for due process.[44] Following the US invasion of Baghdad in 2003 the Iraqi justice system was in a state of almost total devastation. Most of the Ministry of Justice buildings had suffered extensive damage from looting and were not operating.[45] Under his authority, as head of the US-led Coalition Provisional Authority (CPA), Ambassador Paul Bremer decreed that the Iraqi Penal Code of 1969 would remain in effect, except for certain provisions dealing with capital punishment and crimes against public officials.[46] To oversee implementation of the Code, Bremer established the Central Criminal Court of Iraq (CCCI). The CCCI was given national jurisdiction and supervisory authority over all local courts, with emphasis placed on crimes related to terrorism, organised crime, governmental corruption, crimes against democracy, and violence based on race, ethnicity, national origin or religion.[47] Judges of the

[41] Mary Ann Glendon, Paolo G Carozza and Colin Picker, *Comparative Legal Traditions in a Nutshell* (3rd edn, Thomson-West 2008) 101.
[42] ibid. Statistics show that approximately 98 per cent of criminal cases in the US are resolved through plea deals rather than trials.
[43] Glendon, Carozza and Picker (n 41).
[44] Phebe Marr, *The Modern History of Iraq* (3rd edn, Westview Press 2012) 139.
[45] Clint Williamson, 'Information Memo to Ambassador Bremer, Subject: "End of Mission Report"', 20 June 2003.
[46] CPA Order No 7: Penal Code (2003). In addition to his authority as head of the CPA, Bremer also cited relevant UN Security Council resolutions, including Resolution 1483 (2003), and the laws of war. The Code of 1969 was in fact fairly liberal and resembled a US criminal code in many respects: offences were listed with the elements required to prove guilt and punishments were appropriate, given the nature of the relevant offence. As many Iraqis would joke to me during my time in their country, '[o]ur laws are good. Saddam just never followed them'.
[47] CPA Order No 13: The Central Criminal Court of Iraq (2004), s 18.

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Court were required to be Iraqi nationals with high moral character and reputation, and a history of opposition to the Baath Party.[48] Notably, the order establishing the CCCI gave the Court permission to request support from the international community or any authorised military force for the investigation or trial of cases, but prohibited the Court from compelling the production of any such personnel.[49] Also, though this order was signed by Bremer during his tenure as head of the CPA, it was intended to continue (and did continue) following the restoration of Iraq's sovereignty on 1 July 2004.[50]

The deteriorating security situation in the summer and autumn of 2003 made the establishment of a new criminal justice system a lower priority for the United States than was originally planned.[51] Secretary of Defence Donald Rumsfeld complained that the Iraqi courts were taking too long to prosecute those who attacked coalition forces and he favoured having US tribunals oversee the trials of these individuals.[52] Bremer disagreed, saying that the US 'must take care not to give the impression that [the US is] in any way interfering with the independent judiciary we all have worked so hard to achieve'.[53] Yet, from the beginning, CPA personnel struggled with a lack of prewar planning for judicial reform. Its justice footprint included only a senior adviser to the Ministry of Justice (who also had to serve as Acting Minister until one was appointed in late 2003), a chief operational adviser, a financial officer, and international advisers assigned to various central and regional offices, including the CCCI. As noted in official correspondence, '[t]here [was] a critical need for [international] prosecutors/lawyers to be deployed in the field to act as monitors and mentors to the judges and lawyers'.[54]

CPA Order No 3, issued on 18 June 2003, established the policy for detention operations. The order distinguished between those individuals held for security reasons and those held for criminal acts.[55] Specifically, the Order stated that '[c]oalition forces [could] detain *any* person suspected of committing a criminal act against the Multi-National Force (MNF) or the Iraqi people' and that forces could also detain a person for 'imperative reasons of security'.[56] The detainee situation quickly became apparent, but the CPA was ill-equipped to handle large numbers of detainees and there was poor coordination between the field units that were capturing and detaining individuals. The Department of Justice oversaw judicial and prison reform, supported by Army civil affairs units and judge advocates from the US service branches. The result was a

[48] ibid s 5.
[49] CPA Order 13 (n 47) s 17.
[50] ibid s 19.
[51] Commanding General CJTF-7 and Senior Advisor Ministry of Justice, Action Memo to the Administrator, 'Subject: The Investigation and Prosecution of Terrorism and Organized Crime in Iraq', 21 September 2003, in James Dobbins and others, *Occupying Iraq: A History of the Coalition Provisional Authority* (RAND Corporation 2009) 160.
[52] Donald Rumsfeld, Memo to Ambassador Bremer and General John Abizaid, 'Subject: Prosecuting Iraqis for Security Offenses Against the Coalition', 20 October 2003, in Dobbins and others, ibid 164.
[53] Paul Bremer, Memo to Secretary Rumsfeld, 'Subject: Detainee Operations in Iraq', 12 May 2004.
[54] Michael J Dittoe, Email to Jessica LeCroy, 'Subject: Back Brief Deputy Secretary of Defense', 26 October 2003, in Dobbins and others (n 51) 152.
[55] CPA Order No 3: Criminal Procedures (2003).
[56] ibid (emphasis added).

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significant amount of the work being undertaken by the US military,[57] which was exactly what Bremer had hoped to avoid.

US soldiers are not trained prison guards. It would have been far more effective to recruit civilian employees from the federal and state departments of corrections – individuals trained to guard and protect inmates while also providing for their daily needs. Instead, soldiers who had been indoctrinated that all insurgents were 'the enemy' were now being told to care for them indefinitely. Clayton McManaway, a career diplomat and Bremer's senior aid and closest adviser, later charged that '[o]f all the US agencies, the Department of Justice's performance in support of the [US] effort in Iraq was the worst by any measure'.[58] Conditions at one prison became so serious that the on-site commander pleaded with the CPA to send more staff so that 'his MPs could quit killing inmates'.[59]

Similar to the practice of the Baath regime, US and coalition forces would frequently enter a home in the middle of the night, drag away all adult males, and provide no information to the family as to the charges or where their relative(s) would be taken. By January 2004, approximately 6,500 civilians were being held as security detainees by coalition forces, which meant they were either believed to have information of value to the coalition and/or had been involved in anti-coalition or anti-state activity. However, there was insufficient evidence available to prosecute any of them, and more than one hundred had no case file at all – merely grid coordinates indicating where they had been apprehended.[60] Human rights groups expressed concern with the handling of detainees, with Amnesty International sending a report to Bremer alleging 'serious reports of torture or ill-treatment by Coalition Forces', which included sleep deprivation, hooding and restraint in stress positions. The report concluded that this treatment would violate the Fourth Geneva Convention and international law.[61] Coalition prisons were guilty of two grievous and somewhat contradicting errors: (i) holding individuals for months without adequate cause, and (ii) releasing dangerous individuals as a result of insufficient or incorrect evidence.[62] The US military found itself releasing those suspected of committing dangerous acts but for whom inadequate evidence existed while simultaneously holding individuals for months or years without trial.[63]

[57] Seth G Jones, *Establishing Law and Order after Conflict* (RAND Corporation 2005) 136–45.
[58] Interview with Clayton McManaway, 22 July 2008, in Dobbins and others (n 51) 152. This is quite a damning accusation, given the overall poor performance of most US agencies during the reconstruction of Iraq.
[59] Edward C Schmults, Info Memo to the Administrator, 'Subject: Prisons Advise Lockdown Crisis Headed to Mission Failure', 27 April 2004, in Dobbins and others (n 51) 153. It should be noted that the prison at issue was Abu Ghraib, the site of the prisoner abuse scandal that President George W Bush would refer to as 'America's greatest defeat in the war on terror'.
[60] CPA Headquarters, Cable to Secretary of Defense, 'Subject: Update on Central Criminal Court of Iraq (CCCI) and Thoughts on Supplementing the CCCI Process', 11 January 2004, in Dobbins and others (n 51) 165; Edward C. Schmults, Senior Advisor to the Ministry of Justice, Memo to Ambassador Bremer, 'Subject: Release of 359 Prisoners', 20 May 2004, in Dobbins and others (n 51) 165.
[61] Amnesty International, 'Iraq: Memorandum on Concerns relating to Law and Order', July 2003, MDE 14/157/2003, 11.
[62] Dobie MacArthur, Action Memo to Ambassador Bremer, 'Subject: Detention Operations Recommendations', 3 April 2004, in Dobbins and others (n 51) 167.
[63] During my time in Iraq, one detainee's file indicated that he had been incarcerated for nearly four years with no court appearance. I was told he was an 'intelligence asset' and bringing him to court would harm the 'relationship' his interrogators were working to develop.

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4.2. STAFFING THE PROCESS: TASK FORCE 134

Initially, criminal detainees were to be given to Iraqi authorities for prosecution in Iraqi courts. However, following the return of sovereignty to Iraq in July 2004 the new Iraqi government formally requested US assistance in maintaining the security of the country on the ground that the Iraqi Army was not capable of doing so.[64] Thus, the US presence changed from one of occupier to requested force multiplier, and coalition forces continued to play a substantial – if not predominant – role in detention operations, even on the criminal side.[65] Multi-National Force – Iraq (MNF–I) was given command oversight of the detention process and was assigned to help Iraq in rebuilding its judicial, correctional and law enforcement systems.[66] Task Force 134 (TF 134) was given primary control over the judicial review aspect of the process. This effort was complicated by the fact that the US advisers were not trained in Iraqi law (its civil law versus common law basis and its inquisitorial versus adversarial focus).

TF 134 was staffed largely by active duty and reserve members from each of the armed services, as well as mobilised units from the Army and Air National Guard. The normal tour length for an individual deploying alone was four to six months within the case processing offices. Units who deployed as a whole to man detention facilities or to secure an area were on 12-month rotations.[67] Thus, throughout the task force turnover was high and continuity was low. Those units assigned to the detention centres typically had no training in corrections; though some may have served as military police or security forces, this duty is vastly different from the long-term care and custody of thousands of prisoners. Interrogations were overseen by military intelligence officers with agents from the Department of Justice (DoJ) frequently participating, even stopping or preventing interrogations and case processing on several occasions.[68] The DoJ has a completely separate organisational hierarchy from that of the Defense Department, so conflicts often arose over who was the true authority when it came to interrogations. Defense – and, thus, the military – was in charge of the detention process, but the DoJ was charged with protecting national security, both for the United States and within Iraq.

By 2005 massive overcrowding within the detention facilities had become a serious problem, with detainees arriving daily by bus at the larger Theater Internment Facilities (TIFs). TIFs were approved for long-term detention and eventually four were established, but detainees were taken into custody across the country by dozens of different coalition units, many of which did not have

[64] UNSC Res 1546 (8 June 2004), UN Doc S/RES/1546.
[65] See, eg, description of the detention process and the role of US forces in Brian J Bill, 'Detention Operations in Iraq: A View from the Ground' (2010) 86 *International Law Studies* 411. This is also true based on my work within the system in 2008.
[66] Per UNSC Res 1546 (n 64), MNF-I was granted authority to use all means necessary to ensure the security and stability of Iraq, at the invitation of its interim government.
[67] Bill (n 65) 418.
[68] This was my personal experience based on discussions with soldiers assigned to the TIFs and when making inquiries about a detainee's case status.

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even short-term holding facilities.[69] Even more alarming was the fact that many detainees became *more* radicalised after spending time in the TIFs, as a result of extensive extremist recruitment networks operating within them.[70] The facilities used for holding detainees were some of Saddam's former – and most notorious – prisons.[71] While there were likely to have been justifiable reasons for this approach, such as the logistical and financial demands of building new facilities, from the Iraqis' perspective the prisons remained centres of secrecy where their family members were held without trial. Only the jailers had changed.

4.3. DETENTION GUIDELINES

Guidance for US-operated detention programmes stems from the Department of Defense (DoD) Detainee Program (Directive).[72] Paragraph 1.2 of this instruction designates the Secretary of the Army as the Executive Agent for detention operations; thus, Army regulations pertaining to the treatment of detainees are followed by all service branches involved in detention operations. The Directive applies to all military departments[73] and all detainee operations conducted by DoD personnel,[74] and is applicable during all armed conflicts, regardless of how such conflicts are characterised, and all other military operations.[75] Punishment of detainees who have committed, or are suspected of having committed, serious offences is to be administered in accordance with due process of law.[76] Further, the Directive provides that all persons taken into the control of DoD personnel will receive the protections of the Geneva Convention, specifically the requirements relative to the treatment of prisoners of war.[77]

The Directive requires that all detainee cases be reviewed 'periodically' and by a 'competent authority'.[78] The CPA Criminal Procedures Memo went further, requiring that each detainee's case must be reviewed within seven days of capture,[79] with subsequent reviews every six months.[80] The language of the Criminal Procedures Order was so broad that any coalition service

[69] Facts presented during briefings on the detention process as part of my pre-deployment training at Fort Dix, NJ, in November 2007.
[70] Similar radicalisation and further criminalisation occur in US prisons, so this problem was not unforeseeable. A colleague of mine at the CCCI Liaison Office was specifically assigned to handle cases arising from *within* the TIFs. These crimes were often especially violent and typically involved 10 or more detainees.
[71] Ironically, during Bremer's tenure, he ordered the creation of a Human Rights Ministry Office at Abu Ghraib to 'provide transparency and information, and counter Iraqi fears' and to serve as 'a showcase for the high standard of detention that the U.S. military provides': Paul Bremer, Memo to Secretary Rumsfeld, 'Subject: Abu Ghraib Prison', 19 June 2003, in Dobbins and others (n 51) 169.
[72] Department of Defense Directive 2310.01E (DoD Directive), http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf.
[73] ibid para 2.1.1.
[74] ibid para 2.1.4.
[75] ibid para 2.2.
[76] ibid para E4.1.3.
[77] Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135.
[78] DoD Directive (n 72) s 4.8.
[79] CPA Order 3 (n 55) s 6.2.
[80] ibid s 6.3.

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member could detain any individual perceived to be a threat to security, the coalition forces or the Iraqi people – in other words, practically any criminal act could fall within the provisions of the Order. Thus, US Central Command (the four-star-level command that overseas operations in southwest Asia) issued several supplemental directives to govern the detention process.[81] Subordinate commanders, including the MNF–I commanding general and officers in charge of units in the field, also provided standards and protocols specific to their areas of operation. What occurred frequently, however, was overarching guidance being drafted based on the procedures already being implemented on the ground by TF 134 personnel. This is not to imply that the chain of command was not aware of what was happening in the detention process; rather, as often happens in large-scale operations, a new idea or approach was tested on a smaller scale before becoming a requirement throughout the country. Regardless of the procedures used, all detainees were judged by the same standard: whether they were a threat to the security of Iraq. No further elaboration or clarification was ever provided, even after the review of thousands of cases.[82]

4.4. The Process in Practice

Most detentions resulted from planned extractions where coalition forces would attempt to capture a known security risk based on intelligence sources, or following combat with hostile forces.[83] Upon making a capture, coalition forces (typically US Army soldiers or Marines) had to immediately shift from 'kill or capture' mode to a CSI-like approach to what was now considered a 'crime scene'. These forces had no special training for such work but were held to a standard similar to that of a US crime scene investigation unit, even though they were operating in a significantly less hospitable and secure environment with far fewer resources.[84] Young service members, most with only a secondary school level of education, would conduct swab tests on detainees' hands for gunpowder or explosive residue, photograph the scene and sketch various diagrams to illustrate the steps of the engagement, and collect and catalogue evidence for use at trial – evidence that typically included substantial amounts of local currency and enough weapons and ammunition to fill large storage sheds. It must be noted that in normal US criminal investigations the arresting officers would not be responsible for all of these steps; rather, various experts would be brought in to handle different aspects of the case. Additionally, general purpose US troops are not trained in procedures such as evidence collection or chain of custody, and do not know how to safely dispose of dangerous material like explosives or ammunition.

At the time of capture the local unit became responsible for all care and treatment of the detainees and would hold them until they could be transported to the TIFs. Upon returning to base the soldiers would write out their statements regarding the mission, explaining what occurred during

[81] Bill (n 65) 421. Most of the orders are classified, making them unavailable for direct citation.
[82] ibid.
[83] Based on my personal observations after handling more than 300 cases at the CCCI.
[84] ibid.

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the engagement and extraction. The strongest statements were those that referred to photographs taken at the scene and any subsequent sketches drawn by the soldiers. These engagements predated the smartphone era, but many soldiers nevertheless had phones with built-in cameras. Soldiers were told repeatedly not to carry their personal cell phones on missions, but were not given cameras to document the scene of capture. Thus, soldiers were forced to disobey orders to gather appropriate evidence.[85]

Detainees were often questioned by the capturing unit, even if no trained interrogators were available. This was a second point of failure in the process: soldiers inadequately trained in interrogation could either fail to conduct proper interviews or damage a case to the point where evidence became inadmissible. The capturing unit was usually given 14 days in which to decide if a detainee should be released or moved to the TIF. The initial review by the local unit, prior to the detainee being formally placed within the MNF–I process, was usually an individual's best chance for release. If an individual was transferred to a TIF (sometimes with an intermediate stop at a regional internment facility serving several local units), all documentary evidence – including photographs, witness statements and diagrams – was sealed in Ziploc-style plastic bags and transported with the individual. Witness statements were almost exclusively provided by coalition forces. Local Iraqis usually refused to provide testimony, whether through written statements or in court, out of fear of retribution.[86] Weapons and ammunition were held by the capturing units for later disposal – this type of evidence was never transported to or presented in court, thus making photographic evidence the only record of its existence at the scene.

The transporting of the detainee and documentary evidence was arranged by any means available, and almost always through unsecured regions of Iraq. This could prove especially arduous if large numbers of detainees were captured at one time. Little to no information was provided to detainees or their families as to the TIF to which they were being moved – indeed, the local unit may not have known prior to delivering the detainee to a regional facility. Families were usually not permitted to speak with detainees prior to their transport, in contradiction to provisions within UN General Assembly Resolution 43/173, 'Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment' (UN Principles).[87] Principle 15 requires that a detainee not be denied communication with the detainee's family for more than 'a matter of days'; Principle 16 requires that promptly after arrest and upon each transfer of location the family is entitled to notification of the detainee's location.[88] Paragraph 4 of this principle permits a delay for 'exceptional needs of the investigation';[89] it is likely that US forces would argue that the

[85] Based on my personal conversations with dozens of capturing troops during my time in Iraq. Every supervising officer with whom I spoke ignored these policy violations because they knew the photographic evidence would be important later in the detention process.

[86] In one case on which I worked the local unit proved to be quite innovative. They made the equivalent of 'Wanted' posters for a group of detainees and stated they would provide security and transportation for any Iraqi who wished to testify against them. After vetting the volunteers for accuracy and credibility, 17 local citizens were transported to the CCCI.

[87] UNGA Res 43/173 (9 December 1988), UN Doc A/RES/43/173 (UN Principles).

[88] ibid.

[89] ibid.

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security situation demanded they keep the location of some detainees secret, although the sheer number of those involved is difficult to justify with a blanket exception. Principles 19 and 20 also provide, respectively, that a detainee must be provided with an adequate opportunity to communicate with the 'outside world' and to be housed close to the detainee's place of residence, if possible.[90] Though these Principles are not binding upon nations, they are indicative of the international community's expected standards of conduct in detainee operations.

Upon arrival at the TIFs detainees were medically screened and assigned a six-digit Internment Security Number (ISN). The detainee's case file was tracked solely by this number from that point forward. Though this was an efficient way of processing and accounting for such large numbers of detainees, TF 134 personnel frequently lamented the commonalities between Iraqi names and how difficult this made it for testifying witnesses to relate what happened during an engagement. Thus, the heavy reliance on referring to detainees by ISN was somewhat culturally biased.

A case file was created for each detainee, which included their general information and background (whether they had been captured before, any intelligence had been gathered about them), recidivist information, available evidence, and companion case information (list of ISNs for those individuals captured with them). This case file was then reviewed by a Magistrate Cell (Mag Cell) within seven days of the detainee's arrival at the TIF – the first formal review of the TF 134 process. This review by the Mag Cell, rather than the 14-day determination by the capturing unit, was apparently used to fulfil the requirements of the seven-day review set out in the CPA memo,[91] even though an individual may have been held for longer than three weeks by this point. It also appears that TF 134 officers were determined to be 'competent authorities' under the DoD Directive.[92]

The Mag Cell – staffed by military attorneys and paralegals mostly from the Air Force and Navy – operated 24/7 during the peak of the troop surge in 2007–08. Cases were assigned to attorneys based on geographic region in the hope that the attorneys would develop a rapport and understanding with the units operating in their assigned areas. However, the assigned regions were so large, and both local units and attorneys were rotated so frequently, that ongoing relationships were hard to establish. Only vague and generalised rumours regarding each unit's operating methods were ever learned, and there was no formal or consistent communication between TF personnel and the units in the field. Additionally, a region's 'culture' would change each time the military division responsible for the area redeployed back to the US and was replaced with a new set of troops.[93]

[90] ibid.
[91] CPA Order No 3 (n 55).
[92] DoD Directive (n 72).
[93] Based on my personal experience as a TF 134 attorney handling cases from Iraq's northern region (south of Kurdistan).

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4.4.1. SECURITY REVIEWS

In view of the high numbers of detainees arriving at the TIFs during the surge, at one point Mag Cell attorneys were conducting upwards of 60 case reviews per day.[94] Mag Cell attorneys had three options: (i) determine that there was enough evidence to prosecute the detainee in a criminal court (approximately 15 to 20 per cent of cases);[95] (ii) determine that the evidence was insufficient for prosecution but still sufficient to establish that the detainee was a security threat; or (iii) determine that there was not enough evidence to hold the detainee and recommend release. If release was recommended, the capturing unit was given an opportunity to provide additional information. Detainees held as security detainees were referred to the Detainee Review Board (DRB) process, a somewhat complicated system of various committees that would review case files at different points in time. The DRB ensured that each security detainee met the right board at the right time with the right information to comply with applicable UN Security Council Resolutions, Iraqi law and the principles of the Geneva Convention.

The DRB process was scattered among different locations throughout Iraq. The Combined Review and Release Board (CRRB) reviewed every security detainee's case within 90 days of Mag Cell determination, and again after 180 days of detention. It included coalition military officers and Iraqi civilians, who were usually ministry employees. The panels were organised to ensure that the majority of members were Iraqi civilians but, as a result of illness, security concerns and scheduling conflicts – particularly around travel to Baghdad – this did not always happen. CRRB members would review each case file, with any necessary translation being made on the spot. However, because all detainee files were classified, they contained information that was not to be released to the detainee or non-US military personnel. This included the Iraqis serving on the various DRB panels. Each file would have any classified materials removed prior to any committee review. Frequently, 100 or more cases were reviewed on a given day, with 12 to 15 per cent of cases recommended for release based on a majority vote. A case summary prepared by a CRRB attorney would be translated into Arabic before the meeting, but all other English documents were merely translated orally.

Because of concerns expressed by international human rights bodies and the fact that little new information was gathered between the Mag Cell review and the first CRRB, TF 134 leadership implemented an in-person review step: the Multi-National Force Review Committee (MNFRC, pronounced *min-frick*). MNFRC reviewed cases 180 days after the first CRRB. To prevent having to transport detainees, these committees met within the TIFs. At one point nine boards at two different TIFs were hearing 20 cases per day, six days per week. Because of their location inside the detention facilities and the danger of travelling to these locations, Iraqis chose not to participate in MNFRC boards, though they were invited to do so. Their absence eliminated the burden of removing classified information from the files and the need to translate certain documents. The detainee was still not permitted to view the file in its entirety

[94] Bill (n 65) 425. My personal conversations with Mag Cell attorneys during my time in Iraq also confirms this.
[95] ibid 426.

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but was permitted to make a personal statement[96] and could answer questions posed by the committee. Approximately 25 to 40 per cent of cases were recommended for release, with the percentage increasing to the higher end the longer the process was in place.

Eighteen months after capture, detainee files met the Joint Detainee Review Committee (JDRC), which consisted of six Iraqi representatives (one each from the Office of the Prime Minister, the Ministry of Defense, Ministry of Interior and Ministry of Human Rights, and two from the Ministry of Justice) and three MNF–I representatives. The detainee was not present but could present written representations.

Threat Assessment Boards (TABs) met within the TIFs every month to score all detainees in the facility. Each detainee was given a threat level score of 1 to 6 based on evidence in the case file and their behaviour in the TIF. TABs typically reviewed approximately 1,500 cases each month. A Release Determination Council (RDC) would review certain cases which might be eligible for expedited release (discussed below) upon the detainee's arrival at the TIF. This board consisted only of three US military officers, one representative who worked in the TIF (also a coalition forces member) and an interpreter.

There were numerous issues with the detention process, in addition to obvious due process concerns arising from a plan that includes 18-month reviews with no court appearances and no end-date for their detention. First, at the CRRB point most of the detainee's file was ignored and never reviewed, as board members quickly learned which parts were the most relevant and 'important' to the decision-making process. As detainees rarely saw their own files and were not privy to board deliberations at any level, it was unclear why some individual might be granted release while others captured during the same mission were not. While the board members were likely to have had their own criteria on which they based their decisions – and these criteria were, in most cases, reasonable and justified – it caused confusion and a lack of transparency within the detainee population.

MNFRC boards were initially created using MNF–I personnel from other offices, with the individuals chosen to serve having little to no knowledge of the detention process or evidentiary standards. Similar to the way in which US service members are assigned to various administrative and oversight boards in the United States, members were selected at random and asked to serve temporarily as board members. Much like board members or jurors, in-depth understanding of the process and its applicable rules was not deemed relevant. However, these individuals were not being asked to decide facts but to render a determination based on societal trends and human behaviour without being provided important background information. As was the case throughout much of the detention process, board members were both untrained and unaware of the various motivations for violence that might have prompted a detainee – they were simply 'the enemy'.

The release rate increased when military personnel started to be assigned directly to MNFRC service and members became far more cognisant of the numerous issues at play with regard to insurgent behaviour. However, using permanently assigned personnel hurt Iraqi acceptance of the

[96] Bill (n 65) 431.

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process, as it appeared that the US was attempting to solidify further control over the system. Even a board vote to release did not result in freedom for the detainees. All releases from detention had to be approved by the TF 134 commander, a two-star-level position usually held by someone with a combat or infantry background; no experience in law or detention operations was required.[97] Even though TF leadership did eventually follow board recommendations in most cases, the approval process through command channels was cumbersome. This caused significant frustration if the detainee discovered that a particular board voted for the detainee's release but the decision was not immediately implemented, as it appeared that coalition forces were not following their own policies.

Some cases were processed through expedited release procedures, particularly if a female detainee was involved. (It was acknowledged by coalition leadership that detaining a woman from the Middle East – even if segregation standards were practised – would have a devastating effect on her standing within the community.) These individuals simply met the RDC upon in-processing at the TIF with decisions typically made on the spot. Additionally, a significant percentage of detainees were juveniles. Except in cases of the very young, minors did not automatically receive the same expedited processing as females. The International Committee of the Red Cross (ICRC) advocated strongly the assigning of a personal representative to any underage individuals within the TIFs to assist with preparation for any review boards and to explain the overall process. This representative was eventually allowed to speak on behalf of the juvenile and advised the board on pertinent issues involved with the case. A MNFRC officer was permanently designated as the juvenile representative in 2007. The hope of the ICRC was that this practice would be implemented for all detainees, not just juveniles. They requested that women and third-country nationals should also receive representation; however, this goal was never realised because of staffing and manpower issues faced by the task force.

Finally, there were special release procedures reserved for those working at TF 134 headquarters. These procedures stemmed from the near-constant requests from Iraqi government officials for family members or friends to be released from detention. In rarer instances, units in the field would petition for release as part of ongoing intelligence operations, or as a show of goodwill. Unit requests were almost always granted as a commander's willingness to allow a potential security risk back into his area of operation carried great weight with TF 134 leadership. Physicians or other medical providers could also request a detainee's release for serious health conditions, similar to compassionate release in US prisons.

4.4.2. CRIMINAL REVIEWS

Cases determined by the Mag Cell to be ready for criminal prosecution were transferred to the CCCI Liaison Office (CCCI-LO) and docketed with the court. Military attorneys assigned to

[97] 'Stone Assumes Command of MNF-I Detention Operations', Centcom Public Affairs, 9 May 2007, https://web.archive.org/web/20070927005132/http://www.centcom.mil/sites/uscentcom2/Lists/Current%20Press%20Releases/DispForm.aspx?ID=4856.

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the CCCI-LO effectively acted as prosecutors before the CCCI. Under CPA Order No 13 the CCCI was granted nationwide jurisdiction and was permitted to request support from the international community, including any authorised foreign military forces in Iraq.[98] The order stated that all prosecutors working for the Court should act in accordance with Iraqi law.[99] It is assumed this provision is what granted CCCI-LO attorneys the authority to practise in Iraqi courts as no formal Iraqi law licence or other court approval was ever bestowed upon them. The hearings before the Court were clearly not military tribunals but rather a function of the Iraqi judicial system.

Once a case was transferred to the Court it was essentially removed from the DRB process until final adjudication. Occasionally, a CCCI attorney would decide that the case was not able to move forward, depending on current practices of the Court, the availability of witnesses and evidence or new legal developments. For example, an Amnesty Law passed in February 2008 effectively prevented the criminal prosecution of hundreds of cases that would normally have fallen within the Court's jurisdiction. Such 'non-referred' cases were sent to the CRRB and placed in the DRB process. Cases at the CCCI were assigned to attorneys by region. Once an attorney received a case from the Mag Cell and deemed it ready for trial the Office-in-Charge (OIC) of the CCCI-LO docketed it with the Court. Thus, the US military was controlling the criminal docket in Iraq's most powerful court.

Case attorneys would request the necessary evidence from the relevant storage facility, send notice to the TIF of the detainee's hearing date in order to arrange transport, review witness statements in the file and select at least two individuals to provide in-person testimony, and submit an orders request at least two weeks before trial for the selected witnesses to travel to the Court. Having soldiers or marines leave a field unit, even for just a few days, could potentially cause significant manpower issues, as well as safety concerns for those who travelled, given the unsecure areas between cities, so docketed court dates were strictly adhered to.

The first phase of the process was an investigative hearing (IH), which was similar to a probable cause hearing. A day or two before this hearing the case attorney would draft a summary of the case and have it translated into Arabic by linguists working for the task force. Typically, each attorney was expected to present at least two cases per day, usually before different judges. In deciding which Iraqi judge would hear each case, the OIC would consider factors such as the number of detainees per case (as it was difficult to complete two cases in one day if both had large numbers involved, and some judges were more efficient than others), and the types of detainee involved (only some judges would hear cases involving juveniles). CPA Order No 13 clearly stated that CCCI judges could not refuse to hear cases submitted to the Court,[100] but this did not seem to matter in practice. For example, it is not known why certain judges refused to hear juvenile cases. If they were assigned these cases – even if just one of many detainees was

[98] CPA Order No 13 (n 47) s 17.
[99] ibid s 14.
[100] CPA Order No 13 (n 47) s 104.

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underage – they would automatically non-refer the case.[101] The availability of linguists was also a concern as, depending on where a detainee was from, there could be significant regional dialect issues. Efforts were made to assign linguists and judges from the same region as where the capture took place, if possible.[102]

Case attorneys were told which judges would hear their cases on the day prior to court, with limited exceptions, and the judge would receive the summative packet describing the case only a few minutes before the hearing. As the Iraqi judicial process is inquisitorial, lawyers – including defence counsel – played a far more limited role during these hearings and any subsequent trials compared with a typical US litigator. Defence counsel were rarely present during investigative hearings, and then usually only for a few minutes as they 'floated' between cases. Most questions were posed by the judge, following a brief oral summary of the case by the military attorney. This is quite common within civil law legal systems as the subject is the focus of the case, with the judge controlling all proceedings. However, the difference in these two approaches was not clearly explained or emphasised to the military attorneys; nor was any attempt made to reconcile any professional conflict that might arise as a result of the different expectations of the role of counsel.

Military attorneys would assist with any needed clarification or misunderstanding between witnesses and judges, especially regarding the use of US military technology. Items such as night-vision goggles and infrared scanners were known to Iraqis, but their everyday casual use by coalition forces was often challenging to explain. Criminal detainees had the right to remain silent, but this was viewed poorly by judges who expected detainees to explain their actions if they wished to be released. If the investigative judge ruled that there was sufficient evidence, the case was scheduled for trial; if not, the case was transferred back to the DRB system.

Following the conclusion of an IH, CCCI attorneys would draft a summative memorandum to be used for internal TF 134 purposes. This memo would include the case history up to that point, a list of the evidence presented at the hearing, the names of testifying witnesses, a brief summary of the proceedings, and the decision of the IH judge. This memo would later be used by the TF trial attorneys (military attorneys who typically had been in-country for several months and were more familiar with the court process). These attorneys would docket cases sent for trial in a similar manner as the IH process. Significantly fewer cases went to trial each day (only three or four) as compared with the 20 to 30 investigative hearings that occurred. This was because of the significantly higher number of IH judges at the Court.

The average CCCI trial, including witness testimony, lasted for only 30 minutes, with a three-judge panel deliberating for less than three minutes. Only evidence that had been considered at

[101] Based on my personal knowledge from conversations with the attorney who handled juvenile cases for the CCCI.

[102] TF 134 linguists were all civilians contracted to work for the coalition. Most were US citizens who had previously immigrated from the Middle East. Several had been away from the region – and Iraq, in particular – for so long that various dialects were challenging for them. No linguist assigned to the CCCI-LO was a professional interpreter; rather, their professions ranged from schoolteacher to mechanic. The linguist with whom I worked most often had responded to an advertisement for linguists in his neighbourhood paper in Chicago.

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the IH could be presented at trial and coalition witnesses rarely travelled to testify at this level; in fact, by the time a detainee was brought to trial the chances were good that the capturing unit had already returned to the United States. Instead, judges typically relied on transcriptions of witness testimony given at the IH. Video-teleconferencing (VTC) was possible because of equipment provided and installed by the US military, but it was an accepted form of testimony only at the IH level and only a few judges would use it. Thus, the trial often served simply as a 'rubber stamp' for the decision of the IH judge. Defence counsel were always present during the trial but made no more than a few passive assertions about the detainee's good character and the fact that it was likely that the detainee was being framed. They did not ask to speak with the military attorneys, to consult with their clients, or to review the case file. It is unknown how defence attorneys were assigned to cases, whether they ever asked to communicate with their clients while they were in detention, or whether they had knowledge of the case prior to the day of trial.

If convicted, detainees were transferred to Iraqi custody on a space-available basis. If no space was available, criminal convicts were held in a separate facility at the TIFs. The conviction rate at the CCCI was just under 60 per cent, far below the US average rate of 90 per cent.[103] There was little incentive for a detainee to plead guilty as the CCCI did not allow plea bargaining, a common practice in civil law systems. Conviction meant transfer to Iraqi custody, where facilities were far below US standards, so it was to the detainee's benefit to prolong the time between capture and conviction.

The DRB process ended for those convicted, as they were now viewed as serving their sentence. Those not convicted were immediately reviewed again through the DRB process, taking the Court's decision into account. As classified information contained in the file could not be shared with the Court, a detainee was frequently still considered a security risk even if acquitted of all criminal charges. This was another area that created trust problems between the coalition and the Iraqis, and with the transparency of the process, as it appeared that the US continued to imprison those whom Iraqi courts felt should be free. When determining whether a detainee could be criminally prosecuted, Mag Cell attorneys were supposed only to consider evidence that could be presented at Court; however, being human, the classified information would often factor heavily in their decision of the true weight of the evidence.

4.5. Procedural Concerns

While the process may seem to have functioned like a well-oiled machine, there were several problems, in addition to the detainee's lack of due process. First, the practice of trying at one time all detainees who were captured together was frustrating. If twelve adult males were detained following a raid on a house, their cases would be joined throughout the detention process and the same criminal charges were required to be levied against them. All of them had to be present during the IH or they would simply blame the absent party and the judge would rule there

[103] Bill (n 65) 437.

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was insufficient evidence to refer the cases to trial. In a way, this was a way for judges to hold coalition forces accountable for their allegations. If a detainee was in US custody, there was no reason why he could not be produced for a court appearance. Regardless of how the IH went, however, the trial panel would typically only hold a homeowner responsible for any contraband found on the property.

Some problems started in the field. All the CCCI judges demanded what became known as the 'money shot': a photograph at the scene of all captured detainees lined up next to all the confiscated weapons, ammunition, money, etc. If this photo was not taken, judges would claim there was no proof that a particular detainee was the one actually captured that day. Units in the field quickly adopted this practice. In most countries, however, such an act would be considered extremely prejudicial and an improper manipulation of the evidence. The judges' desire for these photos as against photos of the evidence *in situ* seemed to override any concern that US forces could have simply staged such displays at their will and pleasure.

Other trial prep practices became so common they were viewed as requirements for every case and were eventually codified in CCCI-LO training materials, but such policies could potentially rise to the level of prosecutorial misconduct in the United States. For example, military attorneys were told they must ensure that at least two witnesses could testify about each allegation. If only one witness was available, or if there was only one witness to a certain detainee's actions (which often happened during chases), the case was considered extremely weak and might even not be referred for prosecution. A further problem with chases was that judges wanted the witnesses to have kept the detainee in sight at all times. If they lost visual contact while rounding a corner or when in a building, judges would often comment that they could no longer be sure they were chasing the same person, even if the clothing and other physical characteristics matched. Witnesses were cautioned about mentioning that they lost sight of the detainee – even for a moment – during their testimony.

Iraqi judges also wanted witness testimony to be *exactly* the same. Even minor variations – 'we chased the detainee for five minutes' versus 'ten minutes'; 'several blocks' versus 'three blocks'; 'a large house' versus 'a seven-room house' – could kill a case. If, during prep, the witness statements were not identical, the attorney would emphasise the importance of matching stories and encourage the soldiers to work together to determine 'what actually happened'. In most western courts this level of similarity would be an indication of witness coaching and evidence a lack of credibility. Prosecutors would be reprimanded for even implying that a witness should change the story from the facts as they occurred, or as the witness remembered them. Witnesses could not be questioned about any changes in their perception of events because neither the court nor defence counsel were provided with copies of any original statements; they received only the military attorney's summary of the evidence in the file. It is assumed that both of these issues regarding witness testimony were tenets of Iraqi evidence law, but this was never explained as such to the military attorneys; rather, it was just the way to do business at the CCCI. No discussions were held about how to merge the requirements of the system with the ethical obligations and training of those expected to practise within it when the two needs collided.

Frequently, CCCI attorneys would receive a case they were not permitted to prosecute because a detainee involved with the case was on 'intelligence hold'. This meant that various intel-gathering agencies were attempting to obtain information from the detainee about co-conspirators or other operatives in the area and it was believed that taking them to trial would damage the 'rapport' that interrogators were building with them. Those on intelligence hold were often kept in complete isolation from other detainees, similar to solitary confinement in US prisons.[104] If the case involved numerous detainees and only one was on intelligence hold, this typically prevented prosecution of every detainee for the reasons mentioned above regarding joint capture/joint trial concerns. In most such cases, detainees had been on intelligence hold for over a year, sometimes for as long as two or three, creating doubt as to how good their intelligence could be after so long. CCCI attorneys would periodically inquire about moving forward with these cases, but these requests were almost categorically denied. Thus, numerous individuals were being held without trial because their co-detainee *might* some day be helpful to US forces.

As mentioned above, on 3 March 2008 the Iraqi parliament passed a General Amnesty Law, which was intended, in part, to ease crowding in Iraqi detention facilities and clear the backlog in the criminal justice system.[105] Those accused of more serious offences (war crimes, crimes against humanity, terrorism, rape and murder) were excluded. Under this law detainees accused only of possessing simple weapons were considered eligible for release. 'Simple' weapons were considered those such as pistols or rifles; 'special' weapons were explosives, such as rockets or grenades. Typically, only massive amounts of simple weapons would result in arrest, as Iraqi law permitted all adult males to openly carry an AK-47 rifle. Following implementation of the amnesty law most of the cases at the CCCI-LO were non-referred for prosecution and sent back to the Mag Cell for entry into the DRB process, as the Court would no longer hear amnesty-eligible cases. Though the law covered 'Iraqi prisoners and those in Iraq', MNF–I consistently maintained that it was not bound by Iraqi law and did not apply amnesty provisions to security detainees. Thus, in an attempt to free individuals from custody, the Iraqi government effectively placed them into the interminable security review process. Following the announcement of the law, hundreds of Iraqis – most of them women – came to the CCCI to inquire when their relatives would be released.[106] Unfortunately, the Court had no information to give them. It took several months before US-held detainees were released under the law. Part of the push in the autumn of 2008 either to release detainees or transfer them to Iraqi custody was because the UN Security Council resolution authorising the detention process would expire on 31 December 2008.[107]

[104] For a comprehensive review of solitary confinement and how it can legally be used only for a short period of time in the US, see Alexandra Harrington, Judith Resnik and Anna VanCleave, 'Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019, A Research Brief', *The Liman Center at Yale Law School*, https://law.yale.edu/sites/default/files/area/center/liman/document/restrictive_housing_legislation_research_brief.pdf.

[105] For a detailed explanation of the law and its purpose, see George Sadak, 'U.S. Forces and Iraq Succeed in Implementing General Amnesty Law', 25 September 2008, https://www.loc.gov/law/foreign-news/article/iraq-u-s-forces-and-the-iraqi-government-succeed-in-implementing-the-general-amnesty-law.

[106] I witnessed these lines of women personally and spoke with some of them in March 2008.

[107] UNSC Res 1546 (n 64) para 12.

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Technological differences often raised evidentiary concerns. Iraqis often questioned the validity of fingerprint evidence and explosive/gunpowder residue tests, which have long been accepted in the west, while at the same time expressing frustration if these tests were not completed. Judges were always sceptical when witnesses testified about night operations and observations using night-vision goggles. On one occasion a judge was so adamant that the soldier could not have seen what he claimed that I asked the judge if he would be willing to try on the soldier's goggles. Both the judge and soldier agreed, and the courtroom lights were turned off. The judge asked the clerk to move around the room and realised the soldier was telling the truth.[108] Similar demonstrations were arranged for other judges when cases involved night operations.

Video footage from unmanned aircraft, or drones, was exceptionally difficult to have admitted, as judges always wanted to speak to the pilots about what they saw. When military attorneys explained that the pilot basically saw what was on the video footage because the drone was flown remotely from a base in the US, the judge would respond that he knew the pilot was no longer in-country and should testify via VTC. It took several tries to explain fully that the pilot had never been in-country and that they 'saw' through a camera on the drone. While judges understood remote technology (the courthouse made use of a bomb-disarming robot supplied by the Army), unmanned aircraft was a much bigger leap.

In the last case I presented before the CCCI an Iraqi soldier had shot two US service members and then claimed it was a sniper; ballistics evidence was needed to prove that the bullets came from the Iraqi's weapon. Obtaining the evidence was easy; two FBI agents who were experts in the field were in-country and willing to testify, but the IH judges had never heard of such evidence before outside Hollywood films and were reluctant to hear the case. The case had been sitting in the CCCI-LO for two years when I arrived in Baghdad. It took me months of work and frequent conversations with various IH judges and the FBI to convince one judge of the validity of the science and agree to hear the testimony.[109]

These events never gave the impression that the Iraqis were unintelligent or uneducated; in fact, it was quite the opposite, as Court personnel were always willing to learn and frequently asked thoughtful and insightful questions about the uses of such technology. The experiences simply illustrate how isolated Iraq had become from the rest of the world under the former regime.

5. ANALYSIS OF POTENTIAL CONFLICTS

As part of an American legal education law students must complete a semester-long course on professional responsibility and ethics. In addition to bar exams, many states also require prospective attorneys to pass the Multi-State Professional Responsibility Exam (MPRE). Further, most attorneys must complete a minimum amount of continuing education hours every one to two

[108] This case was presented for an investigative hearing in March 2008.
[109] To my knowledge, this was the first time ballistics evidence was presented in an Iraqi court.

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years to maintain licensure, and several states require at least a portion of these hours to be in the field of ethics and professional responsibility. The military also requires its attorneys – service members and civilians – to certify annually their understanding of their ethical obligations and licensure requirements. Thus, every lawyer assigned to TF 134 should have been well aware of the various overarching standards and practices that govern their profession.

As discussed in Section 2, a prosecutor's client is the people, and the prosecution should work diligently to ensure that justice is served. This was not the practice in Iraq, where the emphasis was on security with little debate on how the two concerns may interact, either positively or negatively. US prosecutors are told never to enter a courtroom with as little preparation as TF 134 attorneys did on a regular basis. While professional responsibility requires attorneys not to proceed with a case unless they are confident that the accused committed the crime alleged, TF 134 attorneys were given little to no opportunity to further investigate their cases beyond the evidence included in the file. As a result of the expectation that two cases per day were taken to an investigative hearing five days a week, this left little time to investigate cases not yet on the docket. Rarely were there conversations with on-scene investigators; attorneys often spoke only with the two witnesses who were selected to testify in-person, even though a dozen or more soldiers and civilians might have been present at the time of capture. Attorneys were not permitted to question the detainees or any potential co-conspirators, either before or after court. They also could not speak with the intelligence sources that prompted the raids that resulted in a detainee's capture, and were discouraged from asking about the source's history and relationship with coalition forces. No career backgrounds or training histories of the witnesses were available. A field unit's standard practices were learned only through rumours or second-hand stories from co-workers. In effect, the investigation into a detainee's crimes ended at the time of capture, with no real effort to determine the motivation or intent, at least from the perspective of the Court.

To a certain extent all junior prosecutors are assigned cases by more experienced attorneys, but I have never had less interplay with colleagues or been expected to conduct less legal analysis for a case than when serving with TF 134. There was no discussion of charges to be filed or elements to be met. Attorneys entered Baghdad courtrooms based solely on their personal and unilateral decision to prosecute a case, with supervisory review coming mostly after the fact. In most legal offices discourse and debate with co-workers are part of the job. Lawyers assigned to TF 134 were not trained in Iraqi criminal law, yet were expected to practise it before the nation's highest court with no supervision after only observing two or three proceedings.

There was no equivalent to the *Miranda* warnings given upon capture, even where the soldiers were US military police. In fact, many Iraqi citizens and judges seemed perplexed at the idea that detainees might not want to defend themselves.[110] Judges did not ask detainees if they had been treated properly or been given access to counsel and other services. As far as the military attorneys were told, detainees never underwent mental health assessment and were not asked by the attorney or the judge if they understood the proceedings and were aware of

[110] For a first-hand account of how the coalition attempted to introduce the right to remain silent see James Philipps, 'Miranda in Iraq', 14 February 2009, https://kandulawyer.com/2009/02/14/iraqi-miranda-rights.

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their rights. This includes cases involving juveniles. It seemed obvious to me, however, that many detainees were mentally affected by their imprisonment and isolation. Given the recruitment practices of many extremist groups, it is also likely that many detainees were mentally impaired at the time of capture.

Military attorneys were unaware of how to contact defence counsel and never even learned their names. They were not told whether detainees had requested or been assigned counsel or how the assignment process worked. Defence counsel never asked (nor did the military attorneys offer to allow them) to review evidence, to speak privately with clients, or to interview witnesses prior to the investigative hearing. Such behaviour on the part of defence counsel in the US and such disregard for a defendant's right to counsel by a court would obligate a prosecutor to report both counsel and the judge to their licensing bodies for ineffective assistance and judicial misconduct, respectively. In fact, given that defence counsel rarely – if ever – attended investigative hearings, American judges would have been prohibited from proceeding without them.

Coalition forces had sole control over the court docket and over whether a detainee would be released, regardless of how the trial court ruled. This is the equivalent of a US prison warden ignoring a court order. All detainees accused of the same crime were punished and prosecuted to the same extent, with no attempt at negotiation or plea bargaining beyond the select few labelled as 'intelligence sources'. While such 'equal treatment' may seem fair in some parts of the world, a blanket application of the law historically has not produced strong results in respect of preventing recidivism and promoting rehabilitation. Thus, it is difficult to argue that such a practice was in the pursuit of justice. Finally, it should be noted that most US service members are not law enforcement officers and have received no training for such duties, even prior to a combat deployment. Under normal conditions they would never be permitted to gather and catalogue evidence or offer opinion testimony regarding finger-printing and explosive residue testing. The lawyers working with the task force did not have training in Iraqi law, or even civil law systems in general. The gathering and use of evidence in these systems differ from the common law practices with which US personnel are familiar, further complicating the attempted blending of the two approaches.

Obviously, there were significant logistical and security concerns in Iraq that US courts have rarely, if ever, had to contemplate, but it seems that little consideration was given to the ethical quandary in which hundreds of attorneys were placed. They were told to practise law in a manner contrary to US standards of professional conduct, but most did not seem to grasp this at the time – for me, this realisation did not come until years later. If there was an explicit legal authority for my work in Iraq (other than the loose one presented above), it was never clearly explained. Rather, I relied on the authority of my superior officers, both in my immediate chain of command and within the overarching reconstruction programme. It was an unspoken assumption that, because I was a military officer and TF 134 was a military operation, so long as the operation had UN approval and military procedures were followed, everything was fine. However, this defence of improper behaviour went out of favour decades ago.

Standing alone, any of these issues would be sufficient to cause concern within most democratic judicial systems. Taken together, they rise to a level that is likely to violate both

international norms and the civil rights expectations of most nations. The concerns spelled out in this article will never be reviewed by the US Supreme Court or the American Bar Association, given their international flavour and the fact that the military is given wide discretion when it comes to operational matters. Yet we do a disservice to the men and women who serve, and to those they are charged with protecting, by not facing such dilemmas head-on, for we cannot enforce democracy without first practising it.

6. LESSONS LEARNED

Some of the issues presented might have been resolved relatively easily. Under US constitutional law, for example, a prisoner must be presented before a magistrate within 48 hours. In Iraq such a review was permitted to take 14 to 21 days, and was never in person. If an Iraqi court had simply approved such practices by citing exceptional circumstances or finding relevant language in its national law, the process could have been more legitimate. It was clear there was a trade-off between complying with Iraqi law and maintaining security, both of which created conflicts with the professional expectations of US attorneys. It was clear that security was the tantamount concern, and infringement of the other two (if not outright violation) could happen if that is what was necessary to successfully prosecute a case. In the future, rather than attempting to hodge-podge together a hybrid system with conflicting rules that still did not ensure security, serious consideration should be given either to establishing full military tribunals with clear rules of due process or to providing significant support for indigenous systems. In the latter, manpower and logistical help could be added to pre-existing structures through administrative roles without requiring foreign soldiers to participate directly. Such an approach would also allow a faster and more successful rebuilding of local judicial systems.

The thousands of troops that were used to run the TIFs would have better served the Iraqi people (and the coalition's purpose) by providing border security and street patrols. Civilian correctional system employees would have been more equipped to handle the challenges of long-term detentions and could have been contracted in the same manner as linguists and food service personnel. Social workers, counsellors and other aid workers might have been more appropriate board members than government officials, who often brought personal biases into their decisions based on past wrongs or tribal rivalries. Future efforts in this area should focus on rebuilding local courts and starting grassroots social movements, rather than using military labour in a manner that prevents citizen involvement. Field units should be empowered to promote the rule of law through local elections and enforce their results, rather than attempting to centralise a massive detention process which ultimately removed a sizeable chunk of the workforce from the population.

Poor planning before the 2003 invasion of Iraq resulted in many near-insurmountable hurdles over the next half-decade, not the least of which was a devastated court system combined with a rampant insurgent problem. The hybrid model put into place by MNF–I – security versus criminal categories within a combined coalition/Iraqi process – lacked transparency and was widely inefficient in terms of both timeliness and in rehabilitating detainees. The fact that little to no

cultural training was provided to deploying troops resulted in most coalition personnel lacking a fundamental understanding of exactly why so many Iraqis were a security threat. In the simplest terms, it was an 'us against them' mentality when in reality the issues were much more complicated and less clear as to who was on which side. The coalition never seemed to learn the old adage 'the enemy of my enemy is my friend'. All insurgent groups received the same treatment, despite the fact that most were also fighting with each other. US forces did not attempt to leverage these intergroup conflicts on any significant scale. Groups who attacked coalition forces or installations were simply 'the bad guys' – random names on briefing slides sent via email – all of whom simply 'opposed a western presence in Iraq'.

The cause of an insurgency should be rooted out and addressed with at least as much effort as punishing those who participate in it. Focus must be on eliminating a person's motivation for joining an extremist group rather than treating the symptoms by incarcerating thousands. Rampant unemployment and a feeling of powerlessness are addressed when a terrorist group offers a man $50 to plant a roadside bomb; capturing that man and hiding him away from his family does not.

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