

## Notes from the Field

### Detention Operations in a Counterinsurgency: Pitfalls and the Inevitable Transition\*

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A necessary condition for success in any counterinsurgent effort is the establishment of state institutions as the sole provider of key government functions.<sup>1</sup> Because of the massive civil unrest caused by an insurgency, “key government functions” is often associated with security and thought of primarily in terms of troops. Indigenous security forces are indeed a critical element of a counterinsurgency (COIN); Army Field Manual 3-24, *Counterinsurgency*, dedicates an entire chapter to the training and fielding of host nation security forces.<sup>2</sup> Increasing numbers of troops and police, however, can only keep a lid on a simmering population. “In the long term, public order . . . rests on a societal consensus about the legitimacy of state institutions and confidence in the capacity of such institutions to deliver basic services.”<sup>3</sup> This includes confidence that the host nation’s criminal justice system (often boiled down to cops, courts, and confinement) can fairly and efficiently convict suspected insurgents and incarcerate them for their crimes.

The ability to remove malign influences from the battlefield is indispensable in a counterinsurgency, and a portion of this article is devoted to aiding judge advocates in planning for this challenge during multi-national operations. Detention operations conducted by a multi-national coalition, however, can undermine the coalition's counterinsurgency goals because foreign detention operations, to some degree, may supplant the need for the indigenous justice system. Multi-national forces should avoid creating a total reliance on their ability to detain criminal suspects at the expense of lasting, long-term institutional gains. Commanders, however, have a competing interest in establishing security and ensuring malign actors are quickly and efficiently taken off the streets—a priority the local judiciary cannot (and perhaps should not) adopt. As such, commanders are faced with conflicting short- and long-term priorities regarding the prosecution of insurgents. Even when units are ostensibly supporting the local judiciary, there can be pressure to place “security first” and accept shortcuts in the system if it means suspected criminals are arrested (sometimes on dubious evidence) and held longer than host nation and international human rights standards would find appropriate. Judge advocates can mitigate this challenge by working with commanders to support host nation judicial standards, even if select actors in the host nation do not.

To speed installment of the rule of law, judge advocates and their units must be ready for the transition from security-based detention operations to criminal justice-based, host nation-conducted detentions. In the case of Iraq, from 8 June 2004 to 31 December 2008, individuals deemed by the coalition to pose a threat to the safety and security of the Iraqi people and the forces protecting them were temporarily removed from the battlefield.<sup>4</sup> This practice complied with the law of war, was specifically sanctioned by the U.N. Security Council, and was vital to restoring security in Iraq.<sup>5</sup> However, for a COIN effort to achieve lasting success, the host nation’s own institutions must achieve legitimacy. Reaching this end should be the goal from day one.

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\* This article is the first in a series of articles written by members of the XVIII Airborne Corps Office of the Staff Judge Advocate following their deployment as the Multi-National Corps–Iraq, Headquarters, 2008–2009. Each article in the series discusses one significant legal issue that arose in each of the Corps' functional legal areas during the deployment. Articles in the series will cover issues in administrative law, rule of law, contract and fiscal law, operational law, criminal law, and foreign claims.

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<sup>1</sup> U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY 6-90 (15 Dec. 2006) [hereinafter FM 3-24].

<sup>2</sup> *Id.* § 6-1.

<sup>3</sup> JANE STROMSETH ET AL., CAN MIGHT MAKE RIGHTS: BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 135 (2006).

<sup>4</sup> S.C. Res. 1546, ¶ 10, U.N. Doc. S/RES/1546 (June 8, 2004) [hereinafter UNSCR 1546]; Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, U.S.-Iraq., Nov. 17, 2008, [http://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf) [hereinafter Security Agreement].

<sup>5</sup> UNSCR 1546, *supra* note 4; Geneva Convention Relative to the Treatment of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

The purpose of this article is two-fold: (1) discuss the legal limitations some of our coalition partners faced in conducting detention operations in Iraq and (2) use the transition in Iraq from security-based detention to criminal-based detention as a guide to aid future planning efforts. The article will first discuss the authority to detain individuals granted to the multi-national coalition in Iraq and the competing obligations of some of the multi-national partners. It will then discuss issues faced by the coalition in reintegrating or prosecuting former “security detainees” after the broad authorization to detain expired. Admittedly, the transition in Iraq is still in the early stages; the real effect of the detainee release process and, for some detainees, detainee prosecutions, will not be known for some time.

## **Detention Operations—Authorities & Restrictions**

### *International and Host Nation Authorizations*

On 8 June 2004, the U.N. Security Council unanimously passed Resolution 1546, which recognized the multi-national force then in place in Iraq and granted it “the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to [the] resolution . . . .”<sup>6</sup> One annexed letter, from then Secretary of State Colin Powell, specifically requested “internment where this is necessary for imperative reasons of security.”<sup>7</sup> Coalition Provisional Authority (CPA) Memorandum No. 3, which granted the Coalition authority to apprehend persons suspected of having committed criminal acts, was later incorporated into Iraqi law.<sup>8</sup>

Based on these authorizations, a detainee could travel two possible paths within the detention system: that of a “security detainee” or that of a “criminal detainee.” Until 1 January 2009, the process for determining a detainee’s path was as follows:

The detaining unit commander, in conjunction with Judge Advocates working at the [lower level internment facilities] [made] the initial determination either to hold the individual as a security threat or criminal suspect, or to release him. If it [was] necessary to continue holding the individual, he [was] transferred to Camp Cropper to be in-processed into one of the three [theater internment facilities]. The magistrate’s cell at Camp Cropper perform[ed] a second due process review of the individual’s case to again determine if sufficient evidence exist[ed] to hold the individual for security or criminal reasons. If no sufficient evidence exist[ed], the magistrate’s cell [could] recommend the person be released. . . . Based upon their decision, the individual [would] either be immediately released, forwarded to the [Central Criminal Court of Iraq] liaison office for prosecution, or forwarded to the [Combined Review and Release Board] review section for continued internment for security reasons.<sup>9</sup>

### *Coalition Caveats*

Although the U.N. granted broad authority to the multi-national force, individual Coalition partners were often forced to deal with conflicting international treaty obligations or domestic law requirements that restricted their ability to hold security detainees or prohibited them from transferring detainees to Iraqi authorities. For instance, the European Convention on Human Rights (ECHR), adopted by forty-seven states, guarantees habeas corpus-like protections and speedy trial rights to

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<sup>6</sup> UNSCR 1546, *supra* note 4, at 10.

<sup>7</sup> *Id.* at 11.

<sup>8</sup> Coalition Provisional Authority Memorandum No. 3 (Revised), Criminal Procedures § 5(1), at 3 (27 June 2004), [http://www.cpa-iraq.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_\\_Rev\\_.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures__Rev_.pdf) [hereinafter CPA Memorandum No. 3].

A national contingent of the MNF [Multi-National Forces] shall have the right to apprehend persons who are suspected of having committed criminal acts and are not considered security internees (hereinafter “criminal detainees”) who shall be handed over to Iraqi authorities as soon as reasonably practicable. A national contingent of the MNF may retain criminal detainees in facilities that it maintains at the request of appropriate Iraqi authorities based on security or capacity considerations..

<sup>9</sup> Major W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, ARMY LAW., July 2007, at 76. The Central Criminal Court of Iraq (CCCI) is an Iraqi court that has nationwide jurisdiction to try primarily terrorism-related criminal charges. The Combined Review and Release Board (CRRB) presented cases to a board composed of Iraqi Government officials and coalition officers; it decided whether individuals who could not be criminally prosecuted posed a security threat and should, therefore, be detained as a security internee or released.

individuals held under the jurisdiction of signatory states, which effectively prohibits these states from keeping detainees in long-term confinement.<sup>10</sup> Further complicating the transition from security detentions to host nation rule of law, signatories to the Convention face significant hurdles when transferring detainees to host nation custody; if a detainee's Convention rights might be violated by a receiving state, Convention members are prohibited from transferring the detainee.<sup>11</sup> For instance, Iraq provides for and regularly applies the death penalty. Consequently, because forty-one of the forty-seven signatories to the ECHR have ratified a protocol to the Convention prohibiting the death penalty in all circumstances, those members are prohibited by treaty from transferring detainees to Iraqi custody.<sup>12</sup> Moreover, the ECHR, unlike many international treaties—especially those concerning human rights—has some teeth to it. Alleged violations of the ECHR can be brought directly to the European Court of Human Rights, and the Convention grants a right of compensation to anyone whose rights have been violated by a member state.<sup>13</sup>

Domestic law may also limit states' ability to perform the detention piece of a counterinsurgency strategy. For example, in 1998, the United Kingdom (U.K.) passed the Human Rights Act (HRA),<sup>14</sup> which was intended "to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights (ECHR); essentially, it is a domestic law reinforcement to the U.K.'s obligations under the Convention."<sup>15</sup> Specifically, the Act made it unlawful for any "public authority," including the armed forces, to act in a way which is incompatible with an ECHR right.<sup>16</sup> The only defense to an alleged violation is that the public authority had acted in pursuit of a mandatory obligation imposed by the parliament.<sup>17</sup> In the case of Iraq, the U.K. House of Lords decided the HRA, in relation to the ECHR (an international obligation), was preempted by UNSCR 1546 (another international obligation) through Article 103 of the U.N. Charter, and, consequently, the U.K.'s detention operations in Iraq did not fall under the jurisdiction of the ECHR or HRA.<sup>18</sup>

The House of Lords' ruling on the legality of U.K. detainee operations has not been the final word on the subject, however.<sup>19</sup> The European Court of Human Rights continues to issue rulings on British detainees and recently held that the transfer of British detainees to Iraqi custody was unlawful.<sup>20</sup> Meanwhile, in Afghanistan, the U.K. does not conduct long-term detention operations. As part of the NATO-led International Security Assistance Forces (ISAF) mission, the U.K. and

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<sup>10</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, Nov. 4, 1950, Europ. T.S. No. 005 [hereinafter ECHR]. The forty-seven signatory states include all the states of Europe. *Id.*

<sup>11</sup> See MICHAEL FORDHAM QC ET AL., LEGAL OPINION ON DETAINEE HANDOVERS BY UK FORCES: IN THE MATTER OF THE ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION AND IN THE MATTER OF THE HUMAN RIGHTS RESPONSIBILITY ARISING FROM MILITARY DETAINEE HANDOVERS IN IRAQ [AND AFGHANISTAN] (All Party Parliamentary Group on Extraordinary Rendition 2008).

<sup>12</sup> Protocol 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, May 3, 2002, Europ. T.S. No. 187.

<sup>13</sup> ECHR, *supra* note 10, art. 34. Judge advocates and military planners should therefore be ready for situations where coalition partners, although granted complete responsibility for a battlespace, are unable to conduct detention operations. A memorandum of understanding between the United States and the coalition partner may allow for a transfer to U.S. custody; more likely, however, an American presence to handle detentions in the area will be required.

<sup>14</sup> Human Rights Act, 1998, c. 42 (Eng.) [hereinafter HRA].

<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Al-Skeini v. Secretary of State for Defence*, [2008] 1 A.C. 153 (U.K.H.L 2007) (appeal taken from E.W.C.A.) (holding the HRA applies extraterritorially to the acts or omissions of British Soldiers in Iraq and interpreting the phrase "within the jurisdiction of the United Kingdom" to mean "within the effective control" of the United Kingdom); HRA, *supra* note 14, § 6(1).

<sup>17</sup> *Id.* § 6(2).

<sup>18</sup> Penelope Nevill, *Reconciling the Clash Between UK Obligations Under the UN Charter and the ECHR in Domestic Law*, 67 CAMBRIDGE L.J. 3, 448 (2008).

<sup>19</sup> The United Kingdom, whether due to a policy decision or because of uncertainties as the cases wound their way through the courts, continued to apply many of the tenets of the ECHR in Iraq, and, in an effort to avoid running afoul of their human rights obligations, avoided placing detainees into long-term U.K. confinement. In addition to legal restraints, political sentiment in partner countries can influence restrictions they place upon themselves. For instance, even before the expiration of UNSCR 1546 and the signing of its own bilateral agreement (which was even more restrictive than the one between the United States and Iraq), the United Kingdom almost completely absolved itself of any involvement in internment. The government restricted British troops to a supportive mission in United States and Iraqi detainee operations. Because the United Kingdom still had responsibility for a large area of operation (Basra Province) and had a handful of targets it wished to capture before leaving Iraq, maintaining the Coalition's ability to detain individuals in that area required some creative thinking. In the end, the Coalition agreed that a member of the U.S. or Iraqi forces would maintain legal custody and jurisdiction over detainees and U.K. forces would play a purely supporting logistical role in capturing and maintaining detainees until they could be transported to an American or Iraqi detention facility.

<sup>20</sup> Geoff Meade, *European Court Blocks UK Handover of Iraqi Detainees*, INDEPENDENT, Dec. 31, 2008, <http://www.independent.co.uk/news/world/europe/european-court-blocks-uk-handover-of-iraqi-detainees-1218229.html>.

Afghanistan have agreed that U.K. forces will detain individuals in only limited circumstances and all detainees must be transferred to Afghan authorities “at the earliest opportunity.”<sup>21</sup>

### The Transition

For many reasons, including prosecutorial resources, lack of evidence, and operational necessities, the vast majority of individuals captured by the coalition between 2004 and 2009 were processed as security detainees and confined under the authority of UNSCR 1546. This satisfied the immediate need to remove malign influences from the population, if only temporarily. The UNSCR’s broad grant of detention authority expired on 31 December 2008, however, and the Security Agreement between the United States and Iraq replaced the UNSCR as the legal basis for detentions.<sup>22</sup> Article 22 of the Security Agreement addresses detention operations and also supersedes the authority granted to the multi-national force in CPA Memorandum No. 3, which permitted members of the force to apprehend persons suspected of having committed criminal acts.<sup>23</sup> As a result of the change from the UNSCR to the Security Agreement, American and Iraqi authorities were left scrambling to plan for the release of detainees for whom criminal prosecution was not necessary, while simultaneously gathering sufficient evidence to support the prosecution of approximately 5000 “dangerous radicals,” previously held as security detainees before 2009, and transitioning the Coalition to a supporting role with respect to the Iraqi judiciary.<sup>24</sup> Article 22 of the Security Agreement is reproduced below.

#### Article 22 – Detention

1. No detention or arrest may be carried out by the United States Forces (except with respect to detention or arrest of members of the United States Forces and of the civilian component) except through an Iraqi decision issued in accordance with Iraqi law and pursuant to Article 4 [of the Security Agreement].
2. In the event the United States Forces detain or arrest persons as authorized by this Agreement or Iraqi law, such persons must be handed over to competent Iraqi authorities within 24 hours from the time of their detention or arrest.
3. The Iraqi authorities may request assistance from the United States Forces in detaining or arresting wanted individuals.
4. Upon entry into force of this Agreement, the United States Forces shall provide to the Government of Iraq available information on all detainees who are being held by them. Competent Iraqi authorities shall issue arrest warrants for persons who are wanted by them. The United States Forces shall act in full and effective coordination with the Government of Iraq to turn over custody of such wanted detainees to Iraqi authorities pursuant to a valid Iraqi arrest warrant and shall release all the remaining detainees in a safe and orderly manner, unless otherwise requested by the Government of Iraq and in accordance with Article 4 of this agreement.
5. The United States Forces may not search houses or other real estate properties except by order of an Iraqi judicial warrant and in full coordination with the Government of Iraq, except in the case of actual combat operations conducted pursuant to Article 4.<sup>25</sup>

The effect of Article 22 is twofold: (1) all security detainees held by the Coalition on 31 December 2008 (referred to as “legacy detainees”) must either be released in a “safe and orderly manner” or must be transferred to Iraqi custody if Iraqi officials have a judicial order, and (2) any detentions after 31 December 2008 must be conducted in accordance with Iraqi law, including the Iraqi Law on Criminal Proceedings of 1971.<sup>26</sup>

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<sup>21</sup> Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan, U.K.-Afg., Apr. 23, 2005, available at <http://www.publications.parliament.uk/pa/cm200607/cmsselect/cmfa/44/4412.htm>.

<sup>22</sup> Security Agreement, *supra* note 4.

<sup>23</sup> CPA Memorandum No. 3, *supra* note 8.

<sup>24</sup> Allisa J. Rubin, *A Puzzle Over Prisoners as Iraqis Take Control*, N.Y. TIMES, Oct. 24, 2008, at A1.

<sup>25</sup> Security Agreement, *supra* note 4, art. 22.

<sup>26</sup> Law on Criminal Proceedings with Amendments, No. 23, Feb. 14, 1971 (Iraq), available at [http://law.case.edu/saddamtrial/documents/Iraqi\\_Criminal\\_Procedure\\_Code.pdf](http://law.case.edu/saddamtrial/documents/Iraqi_Criminal_Procedure_Code.pdf) [hereinafter Law on Criminal Proceedings] (last visited Nov. 23, 2009).

### *Legacy Detainees in Iraq*

When UNSCR 1546 expired at midnight on 31 December 2008, the United States had roughly 15,000 detainees remaining in its custody.<sup>27</sup> To release them all at once would have been logistically impossible and would have posed a threat to the relative security in place at the time.<sup>28</sup> Pursuant to the requirements of the Security Agreement, Iraq and U.S. authorities established a system of transfer or release based on warrants; detainees named on Iraqi judicial warrants would be released to the Iraqis and all other detainees would be released in a “safe and orderly manner.”<sup>29</sup>

A joint United States-Iraq committee on detainee affairs was established to share information and coordinate investigations between the two governments.<sup>30</sup> Together, the United States and Iraq settled on a schedule of fifty detainee releases per day, which represented the maximum number of individuals the United States could responsibly outprocess from the detainee facilities.<sup>31</sup> Operating through the joint committee, the United States would issue a list of scheduled releases to the Iraqis who would then vet the names through the police and judiciary.<sup>32</sup> Each list included 1200 to 1500 names per month, although the actual number of detainees released could be modified if required by security conditions in a particular area.<sup>33</sup> Detainees for whom a valid warrant existed would be transferred into Iraqi custody on the release date. In the absence of a validated warrant, a detainee on the list would be set free. The Iraqis could also identify detainees “of interest” on the release list. Designating an individual as “of interest” would postpone the detainee’s release by one month to give the Iraqis time to gather further evidence for a valid criminal warrant.<sup>34</sup> Meanwhile, at the same time the Iraqis were vetting the names, U.S. forces would conduct their own vetting through intelligence, provost marshal, and judge advocate offices to ferret out evidence or leads that could be used by the Iraqis to prosecute a case.<sup>35</sup>

### *Reintegration*

Formal release from detention involves more than merely dressing a detainee in civilian clothes, returning his belongings, and allowing him to walk out the front gate of Camp Bucca. The release process is part of a larger reintegration effort that includes post-detention mentoring and training. When scheduled for release, a detainee is transported to and released at or near his place of residence or point of capture; the release point can be modified if the detainee lodges a “fear for life” objection to the location, at which point the detainee, the detainee’s family, and U.S. forces collaborate to determine a safe, alternate release location.<sup>36</sup> At the point of release, a ceremony is held, attended by family members, friends, local leaders, sheiks, and others, during which the detainee must take an oath of good citizenship, renounce violence, and affirm a commitment to the security and stability of Iraq.<sup>37</sup>

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<sup>27</sup> Press Release, Multi-National Force–Iraq, Coalition Begins Releasing Detainees Under New Security Agreement (Feb. 3, 2009), *available at* [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=25249&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25249&Itemid=128).

<sup>28</sup> Interview with Lieutenant Commander Jeffrey Sutton, Chief of Detainee Operations, Multi-National Corps–Iraq, at Camp Victory, Iraq (Mar. 2, 2009) [hereinafter Sutton Interview].

<sup>29</sup> Security Agreement, *supra* note 4, art. 22(4).

<sup>30</sup> Sutton Interview, *supra* note 28; Brigadier General David Quantock, Deputy Commanding General of MNF–I Detainee Operations, Media Roundtable, Taji, Iraq (Feb. 23, 2009), *available at* [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=25573&Itemid=131](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25573&Itemid=131)) [hereinafter Quantock Media Roundtable].

<sup>31</sup> Sutton Interview, *supra* note 28.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> For example, the first releases began on 1 February 2009; the list of 1500 names was given to the Iraqis in December. Of those 1500 individuals, the Iraqis returned with twelve arrest warrants and identified sixty-five detainees of interest; the twelve with arrest warrants were transferred into Iraqi custody, the release of the sixty five detainees of interest was delayed for one month, and the rest were released. The number of arrest warrants presented each month will likely rise as the investigatory process is improved and because the more serious offenders are being saved toward the end to allow the maximum time to gather evidence.

<sup>36</sup> Sutton Interview, *supra* note 28.

<sup>37</sup> *Id.*

Battlespace owners also endeavor to assign a “life coach” to mentor the detainee and monitor his post-release activities.<sup>38</sup> This individual’s role varies, and some detainees may have more than one sponsor. Ideally, this “coach” should act as a guarantor in the form of a local sheik, leader, family member, or friend who takes responsibility for the former detainee’s reintegration into society and counsels him not to return to insurgent activities. The role is akin to the job of a social worker who follows up with the former detainee, ensuring he has rejected violence, and whose duties include putting the detainee in contact with government-sponsored life-skills training programs, counseling, and employment assistance. Alternatively, these coaches might serve purely as employment assistance managers who work with the Iraqi Government and the private sector to assist the detainee to enroll in job training, locate employment opportunity programs, and secure a job. The guarantors are required to attend the release ceremony and sign an agreement outlining their responsibilities.<sup>39</sup>

It is still too early to gauge the effectiveness of this program, but it has been slow to gain traction in Iraq.<sup>40</sup> Besides a signature on a sheet, nothing obligates the guarantor to actually ensure the former detainee will not return to violence. The government has little leverage or oversight over the guarantors and cannot compel them to mentor or assist the detainees. Meanwhile, the high rate of unemployment and the sluggish economy in Iraq almost precludes the need for job assistance or training efforts. An early proposal suggested that the guarantor positions should be paid (e.g., guarantors would be paid \$10 per detainee “guaranteed”), but with no leverage over the guarantor and the potential for corruption, the idea was rejected because of concerns that the program would spiral into little more than a “cash cow” for enterprising sheiks.<sup>41</sup>

Detainees who are not formally released may be transferred to Iraqi authorities for criminal prosecution if certain requirements are met. For example, the United States strictly prohibits the transfer of detainees to Iraqi custody without a valid arrest warrant or detention order issued by an investigative judge (IJ).<sup>42</sup> The joint system established for detainee vetting, both at the national and local levels, was designed to eliminate the need for last minute, unlawful detentions without a warrant by the Iraqis. On several occasions, however, Iraqi security forces at the local level have immediately taken former detainees into custody following their release, in full view of U.S. forces, without valid warrants or orders from a judge. For example, Iraqi Police once arrested twenty detainees as soon as U.S. forces released them, and the unit’s only recourse was to verbally protest the action and report it to the Iraqi Police chain of command.<sup>43</sup> In other cases, irregularities have forced the suspension of releases altogether. For example, releases in Ninewa province were temporarily suspended because the local Iraqi commander had repeatedly arrested released detainees without judicial authorization and contrary to Iraqi law.<sup>44</sup> Once released from U.S. control, U.S. forces have limited options to prevent unlawful arrests, but pressure at the national level has helped reduce the number of post-release arrests. In the case of the twenty detainees described above, the Iraqi Ministry of Interior (MOI) ordered the local police to release the detainees with no outstanding warrants after the American unit had reported the unlawful arrests and coalition police advisors had expressed their objections. The former detainees were quickly re-released, measures were taken by the Iraqis at the national level to prevent similar arrests from happening again, and a noticeable decline of unwarranted post-release arrests occurred in March and April of 2009.<sup>45</sup>

### *Criminal Prosecutions*

Since the expiration of UNSCR 1546, the United States has mostly ceased detaining Iraqis and has, instead, used its vast resources to support the Iraqi criminal judiciary with evidence gathering and processing. While the United States detained hundreds of individuals each month in 2008, only forty-eight detainees entered U.S. internment facilities in the first two

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., E-mail from Lieutenant Commander Jeffrey Sutton, Chief of Detainee Operations, Multi-National Corps–Iraq, to author (June 1, 2009) (on file with author).

<sup>41</sup> Sutton Interview, *supra* note 28

<sup>42</sup> *Id.* This requirement is based on the Iraqi Code of Criminal Procedure and its application to U.S. forces pursuant to the Security Agreement.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Another recent concern has been the increasingly common practice of presenting arrest warrants to U.S. forces at the release ceremony. This practice raises concerns about the validity and authenticity of the warrants. To eliminate the need for last minute warrants, U.S. forces give the Iraqis every opportunity to carefully pre-screen the release list and conduct investigations before the releases. The ability to do this was inhibited in the early stages of the process because the Iraqis were slow to staff their side of the joint committee. However, they now have teams at Camp Bucca and Camp Cropper reviewing files for evidence or leads they can use to investigate criminal activity before individuals are released.

months of 2009, each at the request of a competent Iraqi authority and with the authority of an Iraqi IJ.<sup>46</sup> Intelligence gathering has evolved into evidence gathering in the form of witness statements, photographs, fingerprints, ballistics, DNA, and other evidence.<sup>47</sup> United States forces share this evidence with Iraqi security forces to support applications for arrest warrants and detention orders and to aid in prosecutions in the Iraqi criminal justice system.

All detentions now start with an arrest warrant issued by an Iraqi judge. The Iraqi criminal courts are modeled on the French inquisitorial system where “cases are controlled and investigated by the judiciary. Judges, not lawyers, direct the progress of a case.”<sup>48</sup> The Iraqi Law on Criminal Proceedings generally requires police to have a warrant issued by an IJ prior to an arrest, with a few exceptions—for example, no warrant is required if the police witness a crime in progress.<sup>49</sup> The law, however, does not define the burden of proof setting a minimum evidentiary standard for warrant applications. The standard is flexible and specific to each judge. Therefore, even before the Security Agreement was finalized, units at the tactical level engaged the local judiciary to understand their standards and establish procedures for the presentation of evidence and the expeditious issuance of arrest warrants. The most stringent judges require the testimony of two Iraqi witnesses before issuing a warrant. This “two-witness” standard becomes important at the trial stage, where a minimum of two witnesses is needed to convict a defendant in the absence of a confession.<sup>50</sup> One Iraqi judge cited two reasons for enforcing this standard at the warrant stage: (1) the penalty for serious crimes, including terrorism, could result in death and (2) the issuance of a warrant can have significant consequences—for example, given the feeble state of the Iraqi criminal justice system, once arrested, a suspect could remain in confinement for quite a while before receiving a judicial hearing or being released, regardless of innocence or guilt.<sup>51</sup>

In comparison, other judges may accept the testimony of a single individual before issuing a warrant, especially when confronted with a very credible witness and other evidence to support the accusations. At the other end of the spectrum, some IJs will issue a warrant or detention order if merely informed of the nature of the accusations against an individual, without witness statements or other supporting evidence. Such a low burden of evidence allows authorities to keep an individual under government control and buys time to build an unclassified, evidence-based case against the suspect. However, the few judges that allowed individuals to be arrested on such little evidence kept a close eye on the apprehended individual’s detention; if more substantial evidence was not presented soon after arrest, the judge would order the suspect’s release.

From a military practitioner’s perspective, units should be wary of judges who allow such a low burden of evidence and should avoid applying to them for warrants and detention orders. Securing high numbers of arrest warrants may appear to be an easy win, and the numbers will look good to headquarters; however, high warrant numbers can reflect artificial success and can ultimately undermine long-term rule of law gains. Judge advocates may face the difficult prospect of balancing arrests—and advising commanders against pursuing expeditious but dubious warrants for high-value targets—against long-term stability.

To overcome the limitations posed by individual testimony, the Coalition introduced the use of forensic evidence into the Iraqi criminal justice system. Forensics has often been touted as the surefire solution to ensure objectivity in Iraq’s criminal justice system and wean it from its confessional, witness-based approach.<sup>52</sup> Indeed, a few judges will forgo the need for witnesses if they receive forensic evidence. The notion of forensic science, however, is still very novel to the average Iraqi judge, and, on the whole, judges tend to be skeptical of it. The acceptance of forensics is mostly limited to the Central

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<sup>46</sup> Sutton Interview, *supra* note 28.

<sup>47</sup> Soldiers now attend a three-day training course on crime scene management and evidence collection. They are taught how to photograph a scene, draw or sketch the environment, question witnesses, and handle evidence to ensure proper chain of custody is maintained and evidence is not contaminated.

<sup>48</sup> U.S. Department of State, 2004 Country Report on Human Rights Practices: Iraq § 1, para. (e), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm> (last visited Nov. 6, 2009) (“The criminal justice system is based on the French or civil system. It was modified under the Ottoman Turks and greatly influenced by Egypt.”).

<sup>49</sup> Law on Criminal Proceedings, *supra* note 26, para. 92.

<sup>50</sup> Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT’L L. 1, 80 (2006).

<sup>51</sup> Interview with Judge Nouri al-Maliki, Investigative Judge, Basra Major Crimes Court, in Basra, Iraq (Jan. 14, 2009) [hereinafter Nouri al-Maliki Interview].

<sup>52</sup> UNITED KINGDOM: FOREIGN AND COMMONWEALTH OFFICE, ANNUAL REPORT ON HUMAN RIGHTS 2008—IRAQ, 26 Mar. 2009, <http://www.unhcr.org/refworld/docid/49ce361a2d.html>.

Criminal Court of Iraq, and mostly to those judges Coalition members interact with on a daily basis.<sup>53</sup> Judges in the lower courts and in the provinces, even those who have undergone coalition-sponsored forensics training, still see forensic science as a bit of voodoo and are reluctant to place any weight in it.<sup>54</sup> The Coalition is working to change this opinion by introducing forensic evidence into the system. Early in the conflict, a handful of Coalition forensic labs were established to help link insurgent activities to individuals for coalition intelligence use. Post-UNSCR 1546, however, the labs have taken on the secondary mission of providing evidence, in the form of lab reports, for use in Iraqi courts.<sup>55</sup> Units send evidence to the labs where they are examined for DNA, latent prints, and firearm and toolmark evidence; in return the units are provided a report they can then submit to an Iraqi judge.<sup>56</sup> Convictions based on forensic evidence in the courts, however, have so far been few and far between.

One advantage of Iraq judicial practice relates to verbal warrants. Unlike American judges, Iraqi judges are accustomed to issuing verbal warrants over the phone on the condition that the proper evidence will be presented later, at the earliest possible date. The custom of verbal warrants has enabled the Iraqi Army and police, supported by their U.S. partners, to arrest high value targets on short notice, often after waking up a judge in the middle of the night. Judge advocates must ensure that before applying for a verbal warrant, the security forces, both American and host nation, are prepared to present sufficient, timely evidence in support of the arrest to encourage judges to adhere to due process standards.

### *Turning Intelligence into Usable Evidence*

Individuals designated security detainees under the UNSCR regime were usually detained based on intelligence indicating they had committed acts posing a security threat and, if released, would commit similar acts. The acts considered a security threat, however, were often also violations of Iraqi law (e.g., the Anti-Terrorism Law of 2005).<sup>57</sup> As a result, the same information used to detain individuals for security reasons could also be used to build criminal case files against security detainees. After the expiration of UNSCR 1546, intelligence shops across theater began culling intelligence reports and questioning sources to find witnesses to testify against security detainees in U.S. custody. Increasingly, informants were approached about testifying in front of an Iraqi judge. Other sources of intelligence, such as video feeds from aerial surveillance, were also used with some success to contradict suspects' version of events.

Nevertheless, intelligence information is not a practical substitute for conventionally obtained evidence. The use of intelligence in open court is precarious because it risks disclosing means and methods of obtaining information. Encouraging sources to testify in court also poses a risk to those individuals and may eliminate their usefulness as sources of intelligence information. Further complicating the issue, the vast majority of intelligence is classified and cannot be publicly released without substantial review. This can be mitigated by involving a foreign disclosure officer as part of the evidence-building team. Foreign disclosure officers are knowledgeable on National Disclosure Policy-1, which sets the policy and procedures for the disclosure of classified military information to foreign governments and international organizations.<sup>58</sup> Some classified information, however, simply cannot be released, rendering it useless for prosecution purposes. The better solution is to engage in shoe leather police work from the start.

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<sup>53</sup> Interview with Lieutenant Justin McEwen, TF 134 CCC-I Liaison Attorney, at FOB Union III, Iraq (Mar. 11, 2009) [hereinafter McEwen Interview]. Most judges in Iraq have received some type of Coalition-backed training in forensics. The exact number is hard to know because of the many different agencies, both governmental and non-governmental, sponsoring training programs.

<sup>54</sup> Nouri al-Maliki Interview, *supra* note 51; McEwen Interview, *supra* note 53.

<sup>55</sup> Interview with Lieutenant Colonel Martin Rowe, Battalion Commander, 733d Military Police Battalion (Criminal Investigation Division), at Camp Victory, Iraq (Mar. 12, 2009) [hereinafter Rowe Interview].

<sup>56</sup> *Id.*

<sup>57</sup> Anti-Terrorism Law, No. 13, Nov. 7, 2005 (Iraq). The Anti-Terrorism Law broadly defines terrorism as "every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals." *Id.* art. 1. Anyone who "incites, plans, finances, or assists terrorists" may be convicted of the same penalty as the main perpetrator. *Id.* art. 4.

<sup>58</sup> NATIONAL POLICY AND PROCEDURES FOR THE DISCLOSURE OF CLASSIFIED MILITARY INFORMATION TO FOREIGN GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS (2000) (on file with the Office of the Director for International Security Programs, Office of the Deputy Under Secretary of Defense for Security Policy) (provided to designated disclosure authorities on a need-to-know basis).

## *Investigative Training*

The notion of Soldiers serving as heavily-armed Columboes arose slowly in Iraq; in the latter part of 2008 and early 2009, however, military involvement in law enforcement-like operations was made a priority.<sup>59</sup> In mid-2008, a military police (MP) battalion at the Corps level was tasked to formally train servicemembers on site exploitation; it also managed the forensic facilities noted above to aid Coalition members in interpreting raw materials picked up on the battlefield and identifying usable evidence.<sup>60</sup> Coalition forces also began training servicemembers in crime scene exploitation in an effort to link detainees to the crimes they were suspected of having committed. As part of this initiative, the MP unit created “train the trainer” courses to instruct members of police training teams in proper sensitive site exploitation and produced “smart cards” to be used as quick references in the field. At least one member of each police training team was required to undergo the training, and hundreds of others were certified after attending subsequent training.<sup>61</sup> The course included instruction on how to document sites through photographs, how to draw diagram of sites, how to gather at least two sworn statements from servicemembers or (preferably) Iraqis who had witnessed a crime (e.g., the possession of illegal weapons, discovered at a suspect’s home), and how to record the evidence from a scene using DA Form 4137.<sup>62</sup> Site exploitation training was used as a force multiplier as well; commanders were encouraged to embed trained servicemembers with Iraqi police units to further enhance their development.

## *The Prosecution*

In order to streamline operations, brigades were encouraged to set up a Combined Prosecution Task Force (CPTF) to support and monitor applications for warrants and detention orders and, hopefully, subsequent prosecutions of suspected criminals in their local area. Members assigned to the CPTF included a law enforcement professional, intelligence analyst, judge advocate, and foreign disclosure officer. The evidence this task force produced was fed to either local judges or, in some instances, up the chain to the national courts.<sup>63</sup>

At the national level, a small group of attorneys from Task Force 134, the military organization responsible for detainee operations in Iraq,<sup>64</sup> liaise with judges at the Central Criminal Court of Iraq (CCCI) to facilitate the flow of evidence and judicial orders between the Coalition and the Iraq judiciary. The CCCI is a creation of the Coalition Provisional Authority, which was dissolved in 2004 and was responsible for promoting “the development of a judicial system in Iraq that warrants the trust, respect, and continued confidence of the Iraqi people.”<sup>65</sup> The CCCI holds court in Baghdad, but has nationwide jurisdiction to investigate and try crimes committed in Iraq; its primary focus is terrorism.<sup>66</sup>

To ensure Iraqi penitentiary facilities have the capacity to absorb transfers, the United States built a new prison facility in Taji.<sup>67</sup> The facility is currently operated jointly and the United States uses the facility to train Iraqi correctional officers. When the detention release program is completed, the facility will be transferred entirely to Iraqi control.

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<sup>59</sup> Rowe Interview, *supra* note 55.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* Police training teams (PTTs) are U.S. military police units partnered with Iraqi police units whose mission is to mentor and instruct the Iraqis on proper police techniques and procedures.

<sup>62</sup> U.S. Dep’t of Army, DA Form 4137, Evidence/Property Custody Document (1 July 1976).

<sup>63</sup> Nouri al-Maliki Interview, *supra* note 51. The judge explained that local courts sometimes refused to hear a case due to security concerns or because the prosecution would overwhelm local resources.

<sup>64</sup> *See generally* THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., CTR. FOR LAW & MIL. OPERATIONS, RULE OF LAW HANDBOOK: A PRACTITIONER’S GUIDE FOR JUDGE ADVOCATES 281 (2009).

<sup>65</sup> Coalition Provisional Authority, Order No. 13 (Revised) (Amended), The Central Criminal Court of Iraq (22 Apr. 2004).

<sup>66</sup> *Id.* § 18.

<sup>67</sup> Quantock Media Roundtable, *supra* note 30.

## A Balancing Act

In future operations where the military is responsible both for security and the development of the rule of law, a delicate balance must be struck between security-based detention operations and host nation prosecutions. Future counterinsurgencies will undoubtedly require the expeditious removal of individuals from the battlefield; intelligence requirements and population security will demand it. During this period of security-based detention operations, judge advocates should anticipate the limitations of potential coalition partners to detain suspects and mitigate these restrictions before opportunities are lost. However, judge advocates should also always look ahead to the next stage of the conflict. Fortunately, the notion of Soldier-Columbos is not novel; it's more a matter of timing and emphasis.<sup>68</sup> Unlike Iraq, where the Security Agreement marked a clear end to security detentions, the next operation might not feature such a bright line between military-run detention operations and reliance on the local criminal justice system. Judge advocates must be ready to assist commanders in determining when security internments bring diminishing returns and when the emphasis should shift to host nation prosecutions.

Furthermore, judge advocates should balance the potential conflict between the detention operations mission and the rule of law mission. While acting under the guise of furthering the rule of law, units may be tempted to take advantage of corrupt judges or use their influence with local officials to circumvent the judicial process in order to achieve certain security goals. These quick wins may be operationally expedient but undermine the host nation's capacity-building process. While the counterinsurgency doctrine advocates responsible detention, it calls establishment of the rule of law the end game.<sup>69</sup> Eventually the hard decision to sacrifice operational expediency for long term gains must be made, even at the risk that an insurgent might go free due to lack of evidence or corruption in the system. In the long run, ensuring security through detentions is merely a step in the broader effort to establish respect for and adherence to the rule of law.

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<sup>68</sup> See Annexstad, *supra* note 9, at 14 (describing Soldiers performing sensitive site exploitation and submitting evidence to Iraqi courts early in the conflict).

<sup>69</sup> FM 3-24, *supra* note 1, ¶¶ 6-90 (rule of law) & 7-38 (detention).