

**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**

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“True peace is not merely the absence of tension: it is the presence of justice.”

—Martin Luther King, Jr.

I never understood how a single event could permanently scar a person’s memory, until 11 September 2001. Now, like most Americans, I will never forget the events that took place that day. In addition to scarring my memory, those events triggered the next generation of world conflict, the Global War on Terror. This latest conflict has placed many new demands on today’s military. In addition to being able to fight and win the war on terror, we, as uniformed servicemembers, are now leading a global hunt to bring terrorists to justice.² It is this hunt that has increased the role judge advocates (JAs) are playing and, for the first time in history, the contribution of JAs may determine whether this operation is deemed a success.

When you hear the word “justice” in connection with war, you may assume justice means legally killing terrorists under authorized rules of engagement. But what about the terrorists we capture? How do we bring these individuals to justice? Is it enough to detain them? Or is more required? This article examines how we have answered these questions in Iraq. Specifically, it explores the Central Criminal Court of Iraq (CCCI) and the law as it applies to the prosecution of insurgents. Furthermore, it addresses the limitations of the CCCI and provides a general overview of Task Force 134 (TF 134), the joint task force charged with bringing these individuals to justice.

Before deciding how to bring these terrorists to justice, one must first address their legal status. Under international law, is the insurgent a lawful or unlawful combatant? The answer is crucial, because if designated as lawful, a combatant would be immune from prosecution for participation in the armed conflict and may be entitled to the protections given to a prisoner of war under the Fourth Geneva Convention of 1949.³ Conversely, if designated unlawful, a combatant would receive no such immunity and would be subject to the criminal laws of his captor.⁴ The criteria to identify a lawful combatant are taken from Article 9 of the 1874 Brussels Declaration and were later incorporated into the language of Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War.⁵ These criteria are now considered customary international law.⁶ The basic requirements of Article 4 are that each army has at its head a leader responsible for the actions of his subordinates, and that members wear a distinctive badge recognizable at a distance, carry arms openly, and conform to the laws of war.⁷ An unlawful combatant is merely a civilian who takes a direct role in the hostilities without the benefit of combatant immunity. Thus, an unlawful combatant who participates in normal acts of combat, for example, participating in an ambush of government forces, may be prosecuted for possession of illegal weapons, murder, or even mere membership in the insurgent group. The status of the insurgents in Iraq has been the subject of much debate over the last four years. However, the answer seems clear. There have been no reports of insurgents wearing uniforms, bearing arms in the open, or displaying an emblem or symbol that distinguishes them from the public. There also seems to be no organization to the insurgency to suggest they are commanded by an individual responsible for the acts of his subordinates. Although there has been no formal decision by the U.S. government as to the status of the insurgents, one may conclude, by applying the requirements above, that the Iraqi insurgents are unlawful combatants and are thus subject to prosecution. This means they could be prosecuted either by the Iraqi government, the United States, or both.

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² President George W. Bush, Address at the Commonwealth and Churchill Clubs, San Jose, California (Apr. 30, 2002).

³ L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 109-11 (1993).

⁴ *Id.*

⁵ Nathan A. Canestaro, “*Small Wars*” and the Law: *Options for Prosecuting the Insurgents in Iraq*, 43 *COLUM. J. TRANSNAT’L L.* 73, 99-102 (2004).

⁶ *Id.*

⁷ GREEN, *supra* note 3, at 103.

With numerous options available, it must be determined how best to prosecute insurgents. Since 11 September, the United States has answered this question in different ways for different groups of detainees. It has traditionally been the practice of the United States government to use domestic criminal law to bring terrorists to justice. We continued this practice after 11 September to prosecute individuals like the “American Taliban” John Walker Lindh and the “Shoe Bomber” Richard Reid.⁸ Subsequently, on 17 October 2006, President George Bush signed the Military Commissions Act of 2006 which will be used to prosecute approximately seventy-five of the 440 detainees held at Guantanamo Bay Naval Base for law of war violations.⁹ Finally, there is one method that has surprisingly received almost no publicity since it has been used to bring the vast majority of the terrorists and insurgents detained in Iraq to justice. This system, known as the CCCI, allows the Iraqi government to prosecute individuals with the assistance of the coalition forces. The JAs assigned to this mission work in the TF 134 legal office under the command of Multi-National Force – Iraq (MNF–I).

The Central Criminal Court of Iraq

On 8 October 2003, the CCCI was created by the Administrator of the Coalition Provisional Authority (CPA), L. Paul Bremer, to help promote “the development of a judicial system in Iraq that warrants the trust, respect, and continued confidence of the Iraqi people.”¹⁰ Noting the continued need for military support to help maintain public order, this court has now become the primary vehicle to prosecute terrorists and insurgents for crimes committed in Iraq while ensuring that they receive “fundamental standards of due process.”¹¹ The specifics of this criminal court were spelled out in Amended Coalition Provisional Order Number 13, dated 22 April 2004.¹² The CCCI uses an inquisitory judicial system, as opposed to the accusatory judicial system we are familiar with in the United States. Like other criminal courts in Iraq, the CCCI consists of two chambers, an investigative court and a trial court.¹³

In the inquisitory judicial system, the investigative judge (IJ) plays the key role: taking testimony, reviewing evidence, and referring cases to trial. Although attorneys may start proceedings, they play minimal roles in the investigation. This is drastically different from the accusatory system in which most of these functions would be handled by the prosecutor.¹⁴ Furthermore, the IJ is relatively free to conduct the inquiry as he or she wishes. There are few technical rules of evidence and juries are not part of the system.¹⁵ The inquisitory system of justice focuses on searching for “material truth.”¹⁶

Inquisitory proceedings resemble accusatory system pre-trial conferences.¹⁷ They are conducted in an informal manner and are not transcribed.¹⁸ Also, on appeal, all issues in the case, both law and fact, are open for review, and new evidence can be submitted on all points.¹⁹ In the accusatory system, appeals to an appellate court are mostly on issues of law and do not involve issues of fact which have been determined during the trial process.

Besides the obvious procedural differences, the inquisitory system differs from the accusatory system in several other ways. The judge conducting the investigation is more likely to act upon his biases than is a judge in an accusatory proceeding. Also, the inquisitorial approach is less sensitive to claims concerning material truth.²⁰ In Iraq, the IJ is appointed

⁸ Susan Candiotti, *Walker Lindh Sentenced to 20 Years*, CNN.COM, Oct. 4, 2002, <http://archives.cnn.com/2002/LAW/10/04/lindh.statement/>; *Richard Reid Pleads Guilty Faces Minimum Sentence of 60 Years*, CNN.COM, Jan. 22, 2003, <http://archives.cnn.com/2002/LAW/10/04/reid.guilty.plea/>.

⁹ Jim Garamone, *Bush Says Military Commissions Act Will Bring Justice*, AM. FORCES INFO. SERVICES, Oct. 17 2006, available at <http://www.globalsecurity.org/security/library/news/2006/10/sec-061017-afps01.htm>; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (to be codified at 10 U.S.C. § 948a).

¹⁰ COALITION PROVISIONAL AUTHORITY AMENDED ORDER NUMBER 13 (REVISED) (AMENDED), THE CENTRAL CRIMINAL COURT OF IRAQ (22 Apr. 2004) [hereinafter CPA ORDER No. 13].

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* § 1.

¹⁴ Dictionary by LaborLawTalk, http://dictionary.laborlawtalk.com/inquisitorial_system (last visited May 22, 2007).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

by the administrator and must be an Iraqi national with high moral character who has had no affiliation with the Ba'ath Party.²¹ The IJ conducts an investigative hearing (IH), a fact-finding process that determines if there is enough evidence to refer the matter forward for trial. If there is not enough evidence to refer the case to trial, the judge can either dismiss the charges or hold the case open for further investigation. It is important to note that a dismissal of charges following this hearing would prevent the same or similar charges from being brought against the same defendant in the future.

Under CPA Amended Order Number 13, the CCCI's jurisdiction was expanded to create nationwide discretionary investigative and trial jurisdiction over any crimes committed in Iraq. Section 18 of this order specifies that the CCCI should focus its resources on terrorism.²² Coalition Provisional Authority Memorandum Number 3 implements CPA Order Number 7, establishes a framework for applying criminal law in Iraq, and recognizes that the continued support of multinational forces plays a critical role in the administration of justice.²³ This framework is made up of a combination of the established Iraqi judicial system and is governed by the Iraqi Criminal Proceeding Law of 1971, which applies the Iraqi Penal Code of 1969 and the Iraqi Weapons Code of 1992.²⁴ The CPA modified aspects of this established Iraqi law in 2004 to ensure that fundamental standards of human rights were maintained and that the ongoing process of security detainee management also complied with the Fourth Geneva Convention.²⁵ One of the major changes made by the CPA was the accused's right to be represented by an attorney of his choice in all proceedings before the CCCI.²⁶

²¹ CPA ORDER NO. 13, *supra* note 10, § 5.

- (1) Prior to the assumption of the functions of government on 1 July 2004, the judges of the CCCI shall be appointed by the Administrator and shall:
 - (a) be an Iraqi national,
 - (b) be of high moral character and reputation,
 - (c) have a background of either opposition to the Ba'ath Party, nonmembership of the Ba'ath Party or membership that does not fall within the leadership tiers described in CPA/ORD/16 May 2003/01 and entailed no Involvement in Ba'ath Party activity,
 - (d) have no criminal record unless the record is a political or false charge made by the Ba'ath Party regime,
 - (e) have had no involvement in criminal activities,
 - (f) have demonstrated a high level of legal competence; and
 - (g) be prepared to sign an oath or solemn declaration of office.

Id.

²² *Id.* § 18.

- (1) The CCCI shall have nationwide discretionary investigative and trial jurisdiction over any and all criminal violations, regardless of where those offenses occurred. Its jurisdiction shall extend to all matters that could be heard by any local felony, or misdemeanor court.
- (2) In exercising its discretionary jurisdiction, the CCCI should concentrate its resources on cases related to:
 - (a) terrorism,
 - (b) organized crime,
 - (c) governmental corruption,
 - (d) acts intended to destabilize democratic institutions or processes,
 - (e) violence based on race, nationality, ethnicity or religion; and
 - (f) instances in which a criminal defendant may not able to obtain a fair trial in a local court.
- (3) Any criminal defendant may request the CCCI to review his or her case if the defendant asserts that his case will not be fairly heard by a local criminal court.
- (4) Any felony, misdemeanor or investigative court in Iraq may refer a case to the court.
- (5) If the investigation of a case has been completed by a local investigative court, the CCCI may, if it chooses, conduct the trial of the case without conducting a further investigation. However, the court may order a new investigation, or supplement the prior investigation, if it believes it necessary in the interests of justice to do so.
- (6) The decision of the CCCI to take jurisdiction of a case will end any local courts jurisdiction over such case, and all local courts shall be required to immediately furnish all files to the CCCI and fully cooperate with the court as outlined in section 9 above.

Id.

²³ Coalition Provisional Authority Memorandum No. 3 (Revised), Criminal Procedures, § 1 (24 June 2004) [hereinafter CPA Memorandum No. 3].

²⁴ *Id.* § 2.

²⁵ *Id.* § 1; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 75 (3) & (4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. The exact terms of Article 75 are:

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

If the case is referred to trial by the IJ, a panel of three Iraqi judges examines the evidence, consisting mainly of the IJ's report along with his or her recommendation. The panel then hears the accused if he desires to make a statement. Finally, the panel hears arguments from both the Iraqi defense counsel and Iraqi prosecutor. After a decision is reached, the court either recommends the detainee's release if the evidence was insufficient, or convicts the detainee and sentences him. Upon conviction, the detainee is transferred to Iraqi custody to serve the sentence in an Iraqi confinement facility. All appeals arising from CCCI felony proceedings are heard by the Court of Cassation in accordance with applicable Iraqi law as modified by CPA orders.²⁷

Task Force 134

Before exploring the CCCI process in more detail, it is necessary to introduce the military organization charged with bringing the insurgents to justice. Ensuring individuals detained in Iraq receive proper due process is the mission of TF 134. The TF 134 legal office contains JAs and paralegals from across the branches of service. The office is divided into four sections: a headquarters element, a magistrate's cell, the combined review and release board (CRRB) review section, and the CCCI liaison office. The headquarters element, in addition to being the primary legal advisor to the commanding general, also supervises the day-to-day operations of the other cells. The magistrate's cell is charged with reviewing detention decisions for legal sufficiency when the detainee is inprocessed. The CRRB review section presents cases to a review board made up of Iraqi government officials and coalition forces officers. Finally, the CCCI liaison office reviews and presents cases to CCCI judges at an IH. The CCCI liaison office is staffed with numerous JAs, called liaison officers, who facilitate the prosecution of coalition forces cases. As the focus of this article is the court system, this article explores the CCCI liaison office.

The Process

Coalition forces play a vital role in prosecuting insurgents at the CCCI. In a real sense, the strength of a criminal case begins and ends with them. Coalition forces must collect evidence at the scene and provide the witnesses to testify. The easiest way to explore the CCCI is to follow the process from start to finish. Naturally, it begins with the apprehension and detention of an individual. Coalition forces have been granted the authority to apprehend and detain any person suspected of committing a criminal act against either multinational forces or against the Iraqi people.²⁸ These individuals are then classified as "criminal detainees."²⁹ Coalition forces also have the authority to detain individuals for "imperative reasons of

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) No one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) Anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

Id.

²⁶ CPA ORDER NO. 13, *supra* note 10, § 22.

²⁷ *Id.* § 21.

²⁸ CPA Memorandum No. 3, *supra* note 22, § 5.

²⁹ *Id.* § 5.

security” in accordance with the mandate set out in United Nations Security Council Resolution 1546.³⁰ These individuals are classified as “security internees.”³¹ This is an important distinction because different rights are granted to the different classifications. It is also worth noting that an individual may be classified as both a security internee and criminal detainee. In the event that this happens the individual detainee will be afforded the status granting the most due process rights.

Criminal detainees are first inprocessed by the detaining unit in the field and will be held at that unit’s local internment facility until they can be transferred to a brigade internment facility (BIF) or division internment facility (DIF). They will stay in these slightly larger facilities until they can be transferred to one of the three theatre internment facilities (TIF). In other words, a criminal detainee starts at smaller facilities located in Iraq and are later transferred to the TIFs. There are two TIFs where nearly all of the 14,000 detainees are being held: Camp Bucca and Camp Cropper.³² Coalition Provisional Authority Memorandum Number 3 states that criminal detainees shall be handed over to Iraqi authorities as soon as reasonably practicable.³³ However, an exception to this memorandum allows coalition forces to retain individuals at the request of the appropriate Iraqi authorities based on either security or capacity considerations.³⁴ Currently, coalition forces retain the vast majority of the individuals detained under this exception. Once the individual is inprocessed at the TIF, he is advised of his right to remain silent and is told why he is being held. If the individual is suspected of committing a felony offense, he has the right to consult with an attorney within seventy-two hours of being in-processed at the TIF.³⁵ Coalition Provisional Authority Memorandum Number 3 also states a “criminal detainee shall be brought before a judicial officer as rapidly as possible and in no instance later than ninety days.”³⁶

Security internees can, and usually are, inprocessed like the criminal detainees. For all practical purposes, it is not until after they are inprocessed, and a review of the evidence is conducted, that they are actually designated as either a criminal detainee or security internee. Security internees who have been held longer than seventy-two hours are entitled to a review of the decision to intern them.³⁷ The review must be completed no later than seven days from the date of their internment.³⁸ Each security internee who is interned after 30 June 2004 can only be held for eighteen months before either being released or transferred to the Iraqi government.³⁹ If necessary, however, coalition forces can hold a person longer than eighteen months.⁴⁰

In addition to the rights discussed above, both criminal detainees and security internees have the right to have the operation, conditions and standards of the internment facility conform to Section IV of the Fourth Geneva Convention. They also have the right to have the Ombudsman from the Iraqi Prisons and Detainee Department and official delegates from the International Committee of the Red Cross inspect the health, sanitation, and living conditions at the facility and to privately interview all detainees.⁴¹

³⁰ *Id.* § 6 (citing U.N. SCOR, 4987th mtg., at 15, U.N. Doc S/RES/154 (2004), available at <http://daccessdds.un.org/doc/UNDOC/GEN/NO4/381/16/PDF/NO438116.pdf?OpenElement> (last visited Apr. 21, 2007)).

³¹ *Id.* § 6.

³² Michael Moss, *Iraq’s Legal System Staggers Beneath the Weight of War*, N.Y. TIMES, Dec. 17, 2006, at A1.

³³ CPA Memorandum No. 3, *supra* note 22, § 5.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* § 6.

³⁹ *Id.*

⁴⁰ *Id.* The process for holding a security for longer than eighteen months is:

(6) Where it is considered that, for continuing imperative reasons of security, a security internee placed in internment after 30 June 2004 who is over the age of eighteen should be retained in internment for longer than eighteen months, an application shall be made to the Joint Detention Committee (JDC) for approval to continue internment for an additional period. In dealing with the application the members of the JDC will present recommendations to the co-chairs who must jointly agree that the internment may continue and shall specify the additional period of internment. While the application is being processed the security internee may continue to be held in internment but in any case the application must be finalized not later than two months from the expiration of the initial eighteen month internment period.

Id.

⁴¹ *Id.* §§ 5-6.

The detaining unit commander, in conjunction with JAs working at the BIFs and DIFs, performs the initial due process review. This group, known as the detention review authority, makes the initial determination either to hold the individual as a security threat or criminal suspect, or to release him. If it is necessary to continue holding the individual, he is transferred to Camp Cropper to be in-processed into one of the three TIFs. The magistrate's cell at Camp Cropper performs a second due process review of the individual's case to again determine if sufficient evidence exists to hold the individual for security or criminal reasons. If no sufficient evidence exists, the magistrate's cell can recommend the person be released. There is no set legal standard for making this determination, so the decisions made by the JAs assigned to the magistrate's cell are largely subjective. Based upon their decision, the individual will either be immediately released, forwarded to the CCCI liaison office for prosecution, or forwarded to the CRRB review section for continued internment for security reasons.

Once the case file has been received by the CCCI liaison office, the JA liaison officers again analyze the evidence to ascertain if sufficient evidence exists to indicate that a crime has been committed. Typically, the types of evidence gathered at the scene include pictures, witness statements, diagrams, explosive test results, evidence inventories and, in some cases, confessions. The review must make sure three critical items of evidence are available to present at court. These items include two witnesses who can testify in court, photographs from the events that led to the detention, and a diagram depicting where the events took place.⁴² A deficiency in any of the three areas will leave the office unable to make the case for an IH. Because the evidentiary evaluation of a case is arguably the most important step in the CCCI process, it is appropriate to discuss the evidentiary necessities in more detail.

Witnesses & Testimony

Two witnesses who can testify regarding the facts and circumstances of the event are an absolute necessity. Normally, these witnesses are members of coalition forces that either detained the suspect or were involved in the investigation that led to his detention. Local Iraqis are also eligible witnesses. Because of personal safety concerns and travel issues, however, they rarely—if ever—testify in court. Ideally, witnesses have first-hand knowledge of the events. However, because Iraqi law has no evidentiary rules that apply at the IH or at trial, first-hand knowledge is not necessary. Of course, less weight will be given to the testimony of a witness without first-hand knowledge of the events. It is also important to note that sworn statements are not sufficient to comply with the two witness requirement. Coalition forces must have the witnesses testify either live at the IH or via video telephone conference (VTC), or the court will not hear the case.⁴³ The availability of witnesses to appear before the investigative court via VTC is important for two reasons. First, because the events being evaluated may be months old, and in some cases years old, it is not uncommon for witnesses who were serving in Iraq at the time the individual was detained to have returned to their home station. If they were not able to appear via VTC they would have to be flown to Iraq to testify live. Second, it allows witnesses who are serving outside Baghdad, the sole location for CCCI operations, to spend less time out of the unit. An added benefit to the VTC rule is that witnesses avoid the danger of traveling across Iraq to testify.

Photographs

Photographs that sufficiently document all the events surrounding the detention are also necessary. Common examples include photographs of the detainee with the evidence at the scene, close-up photographs of the evidence, and crime scene photographs that depict shell casings, footprints, and tire tracks. The photographs are critical not only to tie the detainee to the crime scene but also to serve as an inventory of what was found at the scene. This photographic inventory is important because the actual physical evidence is almost never available for use at the IH, nor is it required for a referral to trial.

Diagram or Sketch

A diagram of the location can either be handwritten or computer-generated. This diagram must depict where key pieces of evidence were found. Additionally, it should provide an estimate of the distances from key landmarks to evidence. It is also important to reference the area of the operation by showing the neighborhood, village, or city nearest to the operation. A

⁴² Specialist Brian James Anderson, *Detainee Release Process*, VICTORY TIMES, June 10, 2006, at 4.

⁴³ CPA ORDER NO. 13, *supra* note 10, § 10 (stating that "the CCCI may receive testimony from witnesses who are not present in Iraq by Video Telephone Conference or similar communications technology.").

diagram is an important piece of evidence for the IH and can be produced by the witness during the hearing. Sometimes it is best to present this evidence by allowing the witness to draw the diagram while explaining the events to the Iraqi judge.

While these three categories of evidence are necessary to state a prima facie case against a detainee, coalition forces attorneys have also been working with Iraqi judges to educate them on additional pieces of evidence that could help them in their fact-finding mission. This evidence includes weapons or explosive residue tests performed in the field by coalition forces operators and fingerprint evidence taken from the crime scene. The Iraqi court system does not require expert testimony to present this information, as long as the coalition forces witnesses can testify about the results and that they personally administered the test. Currently, Iraqi judges appear receptive to this type of testimony.

The evaluation of a case for criminal prosecution in Iraq would not be complete without discussing two additional subjects: confessions and multiple detainee cases.

Confessions

It is not uncommon for a JA to open a file in Iraq and find a written confession made by the detainee subsequent to detention. While a confession appears on its face to strengthen the case for potential prosecution, it does not. Under Iraqi criminal law this confession is worthless. The interim Iraqi constitution, termed the Law of Administration for the State of Iraq for the Transitional Period, specifically states that “[t]orture in all its forms, physical or mental, shall be prohibited under all circumstances, as shall be cruel, inhuman, or degrading treatment. No confession made under compulsion, torture, or threat thereof shall be relied upon or admitted into evidence for any reason in any proceeding, whether criminal or otherwise.”⁴⁴ In practice, unless the confession is made either to an Iraqi judge or Iraqi judicial officer it will be given no weight as proof of the commission of a crime. Since the majority of interrogations are conducted in the field or at the unit’s internment facility, it is unlikely that any such confession will be admitted. Finally, it is worth mentioning that coalition forces have recently attempted to have an Iraqi judicial investigator work with the magistrate’s cell at Camp Cropper to re-interview the detainees while inprocessing to obtain any potential confession. Only time will tell how this attempt will be accepted by the Iraqi court system.

Multiple Detainee Cases

Cases that involve multiple detainees also present difficulty for JAs. Unless all detainees are located, it is unlikely to have a suitable case to present to the investigative court for two reasons. First, as a matter of judicial economy, judges do not want to hear partial cases when it is possible to perform one investigation and make a factual finding as to all the detainees. Second, it is an issue of proof. That is, the detainees present at the hearing would most likely blame all the criminal acts on the missing detainees, leaving the court no choice but to dismiss the charges against those present.

Assuming that the JA evaluating the case finds all of the necessary evidence, the case can proceed to an IH. If not, the JA is left with three options. The JA can contact the detaining unit to see if the additional evidence exists, refer the file to the CRRB for a security evaluation, or recommend the individual for immediate release.

Upon referral, coalition forces attorneys docket hearings with the court and ensure witness availability by coordinating with the witness’s unit and command. Coalition forces attorneys are responsible for preparing and presenting cases at the investigative court. Basic case preparation includes ensuring all necessary evidence is ready for entry at hearing. It also includes making sure the witnesses understand the proceedings and can answer the questions they will be asked by the judge. At the hearing, coalition forces attorneys ensure that sufficient evidence is entered for the case to be referred from hearing to trial. They are also allowed to ask questions of both the prosecution and defense witnesses, but any request to ask questions must be with the permission of the judge. All evidence and testimony is recorded at the IH for entry into the record at trial.

If the IH judge refers the case to trial, coalition forces attorneys diligently monitor its progress. Although coalition forces attorneys do not participate in the trials, they do track the cases in order to relay verdicts and sentencing results back to the respective units. As mentioned earlier, the IH is where the majority of the case is developed. Trials are very brief: most

⁴⁴ Coalition Provisional Authority, Law of Administration for the State of Iraq for the Transitional Period art. 15, Mar. 8, 2004, available at <http://www.cdi.org/news/law/Iraq-Constitution.htm>.

last around fifteen minutes and the deliberations are less than half that time.⁴⁵ Some take less than a minute. As part of the process, units are able utilize sentencing data for deterrence purposes within their various areas of operation.

The Combined Review and Release Board (CRRB)

The legal basis for this process is grounded in United Nations Security Council Resolutions 1546 and 1637, authorizing coalition forces to detain individuals for imperative reasons of security.⁴⁶ If the reviewing JA determines that there is no evidence that the detainee has committed a crime, the case will be forwarded to the CRRB to see if the detainee should be held as a security threat. When that determination has been made, detainees become security internees under the Fourth Geneva Convention which mandates they receive an Article 78 administrative review of detention.⁴⁷ This administrative review is conducted by the CRRB, which partners with the Iraqi government to determine which detainees should be interned as a threat to the Iraqi government or to coalition forces. The CRRB is an independent and unbiased board consisting of nine members: six representatives from the Iraqi government, two representatives each from the Ministries of Justice, Interior, and Human Rights, and three senior multinational forces officers. The CRRB meets weekly to review detainee files and determines “which detainees pose a threat and which detainees can be set free.”⁴⁸ The CRRB will review detainee files within the first 90-120 days after they have been interned in a TIF. In accordance with requirements of the Fourth Geneva Convention, their files are reviewed every 120-180 days following the initial board.⁴⁹ Judge advocates assigned to the CRRB review the cases and present the facts to the board. One important evidentiary difference between the CCCI and CRRB is that unlike the CCCI, the CRRB is authorized to use classified information when making its decision to continue internment. Because the volume of cases presented to the CRRB can reach around a thousand a week, deliberations take only a matter of minutes. The majority vote of the board is controlling. If the board determines that the internee is a security threat the individual will be held. On the other hand, if the board finds no threat exists the individual will be recommended for immediate release. However, prior to release, the capturing units and MNF-I intelligence officer are given the opportunity to object to the release.⁵⁰ Should the unit object, the commanding general of TF 134 will make the final decision to release or retain the individual.

Limitations

The CCCI is not without its limitations. As discussed below, some of the limitations concern the system itself, such as throughput and the detainee’s access to defense counsel. Some limitations exist because we are asking our Soldiers, Sailors, Airmen, and Marines to operate as investigators without any training, and because we are placing the intelligence and investigative communities in positions where their respective missions conflict. The good news is that as the Iraqi government continues to grow and take over more control of the court system, most—if not all—of these limitations will disappear.

⁴⁵ Moss, *supra* note 31, at A1.

⁴⁶ CPA Memorandum No. 3, *supra* note 22, § 1.

⁴⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Specifically this article provides:

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power.

Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.

Id.

⁴⁸ Anderson, *supra* note 41, at 1.

⁴⁹ *Id.*

⁵⁰ *Id.*

Throughput

The main limitation facing this system is its ability to handle the workload. Currently, the CCCI has one main courthouse located in Baghdad with approximately three to five Iraqi IJs assigned to hear coalition forces cases. With two-thirds of the detainees interned outside the Baghdad area, the detainees have to be physically moved to Baghdad for an IH. This shuffling of detainees takes time and increases the danger to the coalition forces moving them. Moreover, the witnesses who will testify at the IH also have to come to Baghdad to testify. This leaves their units short of people and also places them in danger while they travel to Baghdad. The inability to move cases through the IH phase creates numerous collateral issues. First, when cases take longer to get to the IH, individuals wait longer to get their day in court. Additionally, every extra day an individual waits for a hearing the number of detainees continues to grow and the CCCI falls further behind. Finally, this puts pressure on the coalition forces that are operating the detention facilities and trying to turn the detention role over to the Iraqi people. The solution to this problem requires stability in Iraq. As the government continues to grow and more judges are trained and added to the staff, additional courts can be added throughout Iraq. This will place courts, judges, and Iraqi attorneys closer to the TIFs, increasing the number of hearings and reducing travel.

Access to a Defense Attorney

For a legal system to be perceived as fair it cannot hamper a person's right to defend himself. The detainees' limited access to evidence and to consult with an Iraqi defense lawyer early in the process has generated criticism.⁵¹ The crux of the problem stems from the fact that if an Iraqi defense attorney wants to meet with a detainee, he is forced to travel to one of the three TIFs mentioned above. Two of the three facilities are located a great distance from Baghdad even though the CCCI sits in Baghdad and most of the Iraqi defense attorneys are also in Baghdad. Thus, it is next to impossible to allow detainees easy access to defense attorneys. Even when the detainees are located in Baghdad arranging meetings is still difficult, primarily because of security concerns. However, this makes a bad impression on Iraqi defense lawyers who believe that the Americans will not allow them access to do their job. It should be noted, though, that every detainee is provided with representation at the IH. This limitation must be addressed, but a short term fix does not appear to be on the horizon. The addition of CCCI courts closer to the other detention facilities would benefit detainees as would the development of Iraqi defense lawyers closer to these areas. This is yet another growing pain that TF 134 manages as it continues to assist the Iraqi government in building the rule of law.

Soldiers and Marines as Investigators

The evidence used to build criminal cases against insurgents comes largely from Soldiers and Marines who are not trained as criminal investigators. They are performing miraculously under the circumstances. Coalition forces in the field receive very little training, if any, about what evidence is necessary to prosecute individuals they detain. Iraq is still a war zone, where these servicemembers' first concerns are accomplishing their primary mission and their own safety. The JAs routinely visit units in the field to discuss emerging trends in the CCCI. This not only makes them aware that people are working to bring these individuals to justice but also helps them understand what is needed to keep these individuals off the street. There is no quick fix to this dilemma; JAs must continue to communicate the evidentiary needs with the average Soldier and Marine in the field to keep them abreast of what is needed to build a criminal case.

Intelligence Versus Investigation

Finally, the JAs evaluating cases routinely encounter the reality that the evidence on a particular individual is classified because it was derived through intelligence sources as opposed to investigative sources. As most of the information derived from the intelligence community is classified, it cannot be presented to the judge during the IH. Without any additional evidence, JAs are left with no other option than to send the file to the CRRB for review. The intelligence community is not concerned with building a criminal case, but is more concerned with finding terrorists and getting bad guys off the street. Without a change in procedure, this problem will continue to hamper the building of criminal cases against these individuals. To date, this problem can only be addressed by engaging with the intelligence community to declassify the evidence needed to present a case to the CCCI. This is relatively simple. The question is whether it can be completed quickly enough to meet the due process timing requirements set in place by the CPA.

⁵¹ Moss, *supra* note 31, at A1.

Even with the limitations discussed above, the CCCI process is a success story in the Global War on Terror. The JAs and paralegals assigned to Task Force 134 are not only bringing these terrorists and insurgents to justice, but they are helping to establish the rule of law in Iraq. It is the latter that will be crucial to our long-term success in the region and to Iraq's success as a nation. Although recent newspaper articles continue to suggest the CCCI is "staggering under the weight of war," when looked at more closely the evidence does not support this conclusion.⁵² Over the past three years coalition forces have detained roughly 61,000 individuals and currently have about 14,000 in detention facilities throughout Iraq.⁵³ Of that 61,000, roughly 3000 have been charged and tried in Iraqi courts with approximately half of those trials resulting in a conviction.⁵⁴ This means roughly 1500 terrorists were brought to justice and nearly 43,000 individuals have been released. These statistics clearly show the system works and while it may not be perfect, it is up and running during a time of war. As this system continues to grow and more courts are opened in areas outside Baghdad, most of the limitations discussed above will fade away, as will the coalition forces' participation in this process. The end result will be the establishment of the rule of law in Iraq, ensuring justice for the Iraqi people. Once there is justice, peace will follow.⁵⁵

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Quote DB, <http://www.quotedb.com/quotes/3642> (last visited Oct. 4 2007).