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# TRYING TIMES: THE PROSECUTION OF TERRORISTS IN THE CENTRAL CRIMINAL COURT OF IRAQ

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> The most important power exercised by an invader occupying a territory is that of punishing, in such a manner as he thinks expedient, the inhabitants guilty of breaking the rules laid down by him for securing the safety of the army.[1]

## I. INTRODUCTION

Creating a new judicial system, as Iraq required after the fall of Saddam Hussein's regime, was no simple task. It would have been sufficiently difficult to find qualified candidates to serve as judges, ensure that they had neither a penchant for corruption nor a strong affiliation with the Baath party, and find suitable courthouses for them to conduct judicial proceedings.[2] In Iraq, however, added to these almost Herculean tasks were

1. SIR HENRY S. MAINE, INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE 187 (1887).

2. John C. Williamson, *Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System*, 33 GA. J. INT'L & COMP. L. 229, 232 (2004) ("During the war itself, and the looting and civil unrest that followed, approximately seventy-five percent of the courts in Iraq were destroyed, including ninety percent in Baghdad alone."); Michael M. Farhang, *Reconstructing Justice*, 27 L.A.

the burdens of protecting the new judges from assassination and instilling newly-minted judges and lawyers with a sense of due process and fairness when their own legal system had a tradition of repression.[3] American advisors had to accomplish these and other tasks without offending the pride of the Iraqi lawyers and judges and without insulting their legal traditions,[4] despite the fact that some of these traditions were barbaric and far outside the norm of modern jurisprudence.[5]

Comparably burdensome was the U.S. duty—an ongoing one—to punish attacks committed by Iraqi and foreign terrorists against U.S. soldiers.[6] The American victims of these assaults, who daily risked their

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LAW. 45, 45 (Aug. 2004) ("Conquering coalition forces found the Iraqi criminal justice infrastructure, especially the court system, in a state of near-total paralysis. Throughout the country, courthouses and other government buildings were looted and plundered."); Craig T. Trebilcock, *Legal Cultures Clash in Iraq*, ARMY LAW., Nov. 2003, at 48 (noting that the author found "smoldering and looted courthouses" in Iraq).

3. As Ambassador Bremer observed, Saddam Hussein's regime used the criminal justice system "as a tool of repression." *See* Coalition Provisional Authority Order No. 7, Penal Code (CPA/ORD/9 June 2003/07) (2003) [hereinafter CPA Order No. 7], *available at* http://www.iraqcoalition.org/regulations/.

4. Williamson, *supra* note 2, at 230 ("we were always mindful of not being too heavy-handed lest we erode our image as liberators").

5. For example, prior to the liberation of Iraq, Iraqi courts permitted the use of torture-induced confessions, so long as there was other evidence to corroborate them. *See* IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 218, *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf ("[I]f there is no causal link between the coercion and the confession or if the confession is corroborated by other evidence . . . then the court may accept it"). The Coalition quickly outlawed this official use of torture and prohibited the use of confessions produced in conjunction with torture. *See* CPA Order No. 7, *supra* note 3, § 3, ¶ 2 ("Torture and cruel, degrading, or inhuman treatment or punishment is prohibited.").

6. The term "soldiers," as used throughout this Article is meant to be interpreted expansively. Thus, the author uses the term to mean all members of the U.S. Armed Forces, including soldiers, sailors, airmen, marines, and coastguardsmen. This Article also often speaks of "insurgents" and "the insurgency" as though there were only one group of insurgents or one insurgency, but it is more accurate to say that there are multiple insurgencies insofar as the various members of the insurgency are motivated by a variety of loyalties and grievances. Rod Nordland et al., *Unmasking the Insurgents*, NEWSWEEK, Feb. 7, 2005, at 20 ("Interviews with guerrilla veterans of the Iraqi war, tribal leaders and Baathists, as well as American, Coalition and Iraqi officials, make it clear this is not one insurgency, but many."); *see* Noah Feldman, *The Sunni Angle*, WALL ST. J., Nov. 16, 2004, at A24. Professor Feldman suggests that there are two groups—Iraqi Sunnis and the foreign jihadists—but there are probably more than just these two: a pro-Baathist element (largely composed of Sunni Moslems); a Wahabbists/al Qaeda segment; Shiite insurgents (perhaps some loyal to Moktada al-Sadr), a nationalist, anti-occupation insurgency; Iranian-backed Shiite insurgents (apart from the other anti-occupation Shiite insurgents); and mercenaries willing to fight for the highest bidder, to name but a few. And these groups are often willing to work together, at least temporarily, to achieve their individual goals, although there are also reports of

lives to keep Iraq safe, were entitled to justice for the injuries they had suffered in the line of duty. This debt of justice was also owed to the United States itself, which was footing the bill for the harm inflicted by these attacks and, as an occupying power, had a strong interest in punishing acts that threatened the success of the occupation.[7]

In almost every conflict involving America, from the Revolutionary War to World War II, the United States has utilized military courts to adjudicate criminal charges against guerillas and insurgents who had attacked or threatened American forces.[8] In Iraq, however, the United States elected to depart from this long-standing tradition, and instead permitted Iraqi judges to try Iraqi insurgents in a court known as the

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infighting and deadly rivalries. *See* Greg Miller & Tyler Marshall, *More Iraqis Lured to Al Qaeda Group*, L.A. TIMES, Sept. 16, 2005, at A1 ("Overall, the officials said, the insurgency in Iraq is divided into three 'clumps': religious extremists such as Zarqawi; former members of the Baath Party of Saddam Hussein; and disparate Iraqi groups acting out of local or national interests."); F. Michael Maloof, *Eerie Historical Parallels*, WASH. TIMES, Aug. 28, 2005 ("Reports now suggest Iran has set up four camps to train suicide bombers."); Arnaud de Borchgrave, *Iran's Strategy*, WASH. TIMES, Aug. 18, 2005, at A14 (discussing the Iranian-backed insurgency in Iraq).

7. The Coalition clearly was an occupying power in Iraq from March 2003 until at least July 2004. Although an Iraqi government currently rules Iraq (or attempts to rule Iraq), it does so with the help of the United States. Furthermore, a sizeable contingent of American troops polices Iraq and performs much of the executive function of the Iraqi government. Thus, for many purposes, it is accurate to say that the United States is still an occupying force in Iraq, even though it has granted Iraq's elected officials considerable autonomy. The United States has the ability to withdraw its support, at which time the Iraqi government would crumble.

8. ELI E. NOBLEMAN, MILITARY GOVERNMENT COURTS IN GERMANY 14 (1950).

> During the past 130 years, the United States Government has engaged in 13 major occupations: Florida; Mexico (twice); the Confederate States; Cuba; Puerto Rico; the Philippines; the Rhineland; Japan; Korea; Austria; Italy; and Germany. In every instance, the occupying forces of the United States have protected their security and maintained law and order in the areas under the control by means of military courts.

*Id.* (citation omitted).

Central Criminal Court of Iraq (CCCI).[9] The U.S. government unwisely pursued this course of action despite substantial precedent to the contrary, evidence that Iraqi judges possessed strong affinity for enemy insurgents, and knowledge that the Iraqi judiciary was inexperienced with the rule of law and was better known for its corruption than its legal acumen.[10]

The American government made this fateful decision on the mistaken belief that: insurgents were few and their reign of terror would be brief;[11] terrorists should be treated as common criminals rather than unlawful combatants; there was a sufficient number of American troops and they possessed sufficient training and the necessary technological assets to serve as detectives in Iraq; Iraqi judges would respect the rule of law and impartially decide cases involving attacks on American victims; the Iraqi people would give greater faith and credit to Iraqi-issued judicial decrees than ones promulgated by Americans, and thus the United States could avoid charges of "victor's justice"; and that a sufficient body of educated and honest judges could be found to staff the Iraqi criminal court. All of these assumptions have proven to be outrageously optimistic and incorrect.

Under general jurisprudential norms, the United States has the right and duty to punish captured belligerents in American-run tribunals even though these crimes were committed outside the United States.[12] After all,

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9. Gregg Zoroya & Rick Jervis, *When Shooting Stops, Troops Turn Detective*, USA TODAY, Aug. 10, 2005, at 1 ("In a little-noticed decision made within months of the U.S.-led invasion in 2003, the United States authorized creation of an Iraqi criminal court that would treat insurgents not as enemy combatants but as criminals."). In one case, however, the United States has elected to try one of the terrorists in a U.S. District Court. A federal grand jury indicted Iraqi-born Wesam Delaema, a resident of Holland who returned to his native land to carry out terrorist attacks against the United States. Shaun Waterman, *U.S. Indicts Dutchman in Iraqi Insurgency*, WASH. TIMES, Sept. 13, 2005, at A16. A videotape found in Delaema's apartment contains footage of attacks on Americans in Iraq, along with Delaema teaching militants how to create and hide improvised explosive devices. *Id.*

10. Zoroya & Jervis, *supra* note 9.

11. *Id.* (noting that when the Coalition Provisional Authority decided to let Iraqi courts try insurgency cases, the "insurgency was in its infancy" and Paul Bremer inaccurately "described the rebels as 'a small minority of bitter-enders.'").

12. *See* The Grapeshot, 76 U.S. 129, 132-33 (1869) (stating that the commander-in-chief has a duty to ensure that justice is administered in occupied territories); *see* NOBLEMAN, *supra* note 8, at 7 ("The right of a military occupant to deprive the existing courts of their jurisdiction of offences against the authority of the occupying power as well as of offences against persons belonging to his armed forces is recognized by most writers on international law, and in practice military occupants have usually acted in accordance with this theory.") (quoting 2 JAMES W. GARNER, INTERNATIONAL LAW AND THE WORLD ORDER 85 (1920)); 2 L. OPPENHEIM, INTERNATIONAL LAW § 172 (6th rev. ed. 1944) (noting that when necessary, an occupying power may set up military courts); PASQUALE FIORE, INTERNATIONAL LAW CODIFIED § 1553 (1918) ("The military occupant of a territory has not only the right to require of the inhabitants complete submission to his authority

Americans are the primary victims of the insurgents prosecuted in the CCCI, and attacks on U.S. soldiers are attacks on the United States itself.[13] And the failure to punish militants is destroying the security and safety

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and the right to punish any violations of that obligation; he has likewise the right to prevent any attempt at such violation by providing very severe punishments against any person making or attempting to make an attack upon the established government and the safety of the army of occupation."); Hamilton v. McClaughry, 136 F. 445, 450 (D. Kan. 1905) ("The first duty of a state is the protection of the lives and property of its citizens, wherever lawfully situated, by peaceable means, if possible; if not, by force of arms. More especially must this protection be afforded the accredited representatives of this government in a foreign country. . . . [I]t follows of necessity, when the armed forces of this government, by authority of the Department of War, are commissioned to enforce the lawful demands of this government against a foreign country . . . there must exist military jurisdiction and power to enforce . . . and protect the lives of the citizens of this country engaged in such military occupations."); Hague Convention, Annex § III, art. 43 (1907) (the occupant "shall take all measures in his power to restore, and ensure, as far as possible, public order and safety. . . .").

13. True, some Iraqi terrorists have increasingly targeted more vulnerable Iraqis, but that is largely due to religious friction and the fact that Iraqis are easier targets. There are several reasons why Iraqis are easier targets than American Soldiers. First, there are more Iraqis in Iraq than Americans. The Americans are better protected than the Iraqis because they have better body armor, armored vehicles, air mobility, and medical services. U.S. soldiers are always armed, whereas Iraqi civilians on the streets generally are not. Finally, for terrorists, engaging American forces in battle entails, a greater magnitude of peril, a magnitude not similarly found in engagements with either Iraqi citizens or the Iraqi armed forces. *See* Rowan Scarborough, *Terrorists Retool Carnage in Iraq*, WASH. TIMES, June 12, 2005, at A1:

> With American soldiers exercising better force protection, thanks to improved armor and training, the insurgents have shifted their attacks to more vulnerable Iraqi troops and civilians. "Terrorists always look for the weakest point," said Dick Bridges, spokesman for the Pentagon's IED task force. "We are no longer the weakest point."

Jill Carroll, *Evolution in Iraq's Insurgency*, CHRISTIAN SCI. MONITOR, Apr. 7, 2005, at 6 (noting that Iraqi soldiers discovered a "fatwa issued by a radical cleric during a raid in Samarra. It ordered jihad on Iraqi forces instead of American troops because the Iraqis are easier to attack.").

It is simple economics: insurgents seek to produce the greatest amount of destruction for the least cost, and American forces frequently compel the terrorists to pay the price for their attacks (often with their lives), a price that Iraqi victims do not similarly demand. Thus, it is still accurate to say that Americans are the primary targets of belligerents, and were it not for these four factors, the militants would almost exclusively attack Americans. Louise Roug & Patrick J. McDonnell, *8 U.S. Troops Killed in Iraq*, L.A. TIMES, May 9, 2005, at 1 (noting that insurgents have shifted "their sights from U.S. forces to Iraqi police and troops, who are perceived as easier targets than better-armed U.S. forces"); Greg Jaffe & Yaroslav Trofimov, *Iraqi Insurgents Change Their Focus*, WALL ST. J., Apr. 21, 2005, at A8 (noting an Army report that attacks "have shifted away from U.S. troops to more vulnerable Iraqis"); Austin Bay, *Al Qaeda's Worst Nightmare*, WASH. TIMES, Apr. 15, 2005, at A21 ("U.S. forces, however, are 'hard targets'—unlike civilians standing in line to vote, U.S. troops shoot back.").

necessary for the United States to succeed in cultivating democracy in Iraq,[14] to the detriment of American interests and Iraqi freedom. American government officials, however, have persisted in their scheme of trying Iraqi terrorists in an Iraqi court hostile to American interests. These officials created the CCCI to be the venue of choice for trying terrorists in part because it is a court composed solely of Iraqi judges.

Perhaps on the surface the plan had some appeal: why not let newly-minted Iraqi judges cut their teeth on these important but manageable cases, thereby gaining important judicial experience in the democratic process while serving under the watchful eye of American personnel? [15] Not only would this demonstrate the level of trust the United States placed in these judges, it would also save the U.S. government the time and expense of creating an alternative forum to adjudicate these cases. Similarly, U.S. troops were and are in short supply in Iraq,[16] so why not use Iraqi judges, rather than American officers, to try the insurgents? American

14. Formerly the U.S. military's standard practice was that "jurisdiction of the indigenous courts will be limited to those violations of laws of the occupied territory which do not affect the security or interest of the occupying forces." NOBLEMAN, *supra* note 8, at 9 n.24 (quoting Army and Navy Manual, Civil Affairs/Military Government note 16 ¶ 31 (FM 27-5) (1947)).

15. The Iraqis believe that they are uniquely qualified to judge their fellow Iraqis, just as the Germans thought they should try accused Germans at the Leipzig trials conducted after World War I, which turned out to be a dismal failure. Gary J. Bass, *Milosevic in the Hague*, 83 FOREIGN AFF. 82, 86 (2003) (describing the Leipzig trials as "a hopelessly botched effort . . . in which a German high court either acquitted or glancingly punished German soldiers"); Gary J. Bass, *War Crimes and the Limits of Legalism*, 97 MICH. L. REV. 2103, 2104 (1999) ("The trials held after World War I, in Leipzig and in Constantinople, degenerated into disaster."); W. Michael Reisman, Book Review: *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, 79 AM. J. INT'L L. 200, 201 (1985) ("The war crimes trials effort after the First World War failed. . . ."); SHELDON GLUECK, WAR CRIMINALS: THEIR PROSECUTION AND PUNISHMENT 32 (1944) ("The French, particularly, were both angered and saddened by the performance of the Leipzig Supreme Court. After recalling their representatives, they and the Belgians, who had suffered most from German atrocities during the first World War, indignantly withdrew the documents of accusation and proof. To them the goings-on at Leipzig were clearly a wholesale miscarriage of elementary justice."). Similarly, Yugoslavs think their courts are the appropriate venue to address any atrocities committed by Yugoslavs. Bass, *Milosevic in the Hague*, *supra*, at 93 ("[O]nly 32 percent of Serbians supported cooperating with the tribunal in the Hague, while 47 percent said they would prefer to address war crimes only in Yugoslavia's own courts . . . ."). They are mistaken, as history has shown.

16. Mark Helprin, *They Are All So Wrong*, WALL ST. J., Sept. 9, 2005, at A16 (noting that the United States has deployed to Iraq "a fraction of the ratio (10:1) long experience indicates is necessary for suppression" of an insurgency); Tony Blankley, *The Case For Victory*, WASH. TIMES, Aug. 24, 2005, at A17 (noting that many suspect "the president is making do with current in-country troop levels because we don't have enough troops world-wide at our current force levels to properly fight the war in Iraq. . . .").

officials reasoned that this approach would conserve valuable human resources for other important missions.

Despite this surface appeal, upon even minimal reflection it is obvious that the scheme makes little sense.[17] The CCCI plan gave Iraqi judges authority over the only impediment to military success in Iraq, the insurgency, thereby vesting these judges with significant power over U.S. military forces, despite the judges' political, cultural, religious, ethnic, and tribal ties to the insurgents that they must judge.

Not surprisingly, the Iraqi judges have taken full advantage of their power. They frequently treat dangerous insurgents like petty criminals. As one critic of the CCCI observed: "people found to have hoarded or transported huge stashes of bombs, machine-guns and rocket-propelled grenades are frequently treated as leniently as drunk drivers and pickpockets."[18] In light of the bountiful mercy of Iraqi courts, it is easy to understand why the families of insurgents clamor for adjudication of their cases before Iraqi judges.[19] Despite the CCCI's popularity with Iraqis, this abdication of the duty to punish is hardly the justice envisioned by the American creators of the CCCI.[20]

This ill-conceived plan continues to empower Iraqi judges—some of whom, beyond their affinity for militants, harbor enmity for U.S. soldiers—to deny U.S. soldiers the justice they deserve.[21] More importantly, the court's acquittals and paltry sentences greatly aid the insurgency by destroying the deterrent value that successful prosecutions would otherwise have entailed.[22] Convictions and commensurate sentences

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17. In making this criticism, the author is keenly aware that it "is easy to be wise after we see the results of experience." Platt v. Union Pac. R.R., 99 U.S. 48, 63 (1878).

18. Colin Freeman, *Saddam's Old Judges Provoke U.S. Fury With Their Lenient Sentences for Insurgents*, TELEGRAPH (London), Mar. 13, 2005, at 29.

19. Doug Smith & Raheem Salman, *Long Jailings Anger Iraqis*, L.A. TIMES, May 29, 2005, at A1 ("Some have called for the immediate transfer of custody to Iraqi authorities. 'This is the Iraqi perception—let the Iraqi people judge them.'").

20. Although it is true that "the decree of a court will not stay the clash of war," the proper punishment of insurgents can deter their specific actions and the general belligerency of their comrades in arms. BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 59 (1928).

21. Dhiya Rasan & Steve Negus, *Iraqi Torture of Prisoners Seen as Open Secret*, FIN. TIMES (UK), Jan. 25, 2005, at 8 ("One judge who refused to disclose his name said he tried to let off lightly insurgents who had targeted Americans. . . .").

22. According to one report, Iraqi courts handling insurgency cases involving attacks on the United States have convicted 301 of the 450 insurgents tried. *See* Smith & Salman, *supra* note 19, at A1. More recently, the conviction rate for the CCCI was only 60%. Zoroya & Jervis, *supra* note 9, at 1. Perhaps the greater problem with the CCCI is its meager sentences. *See generally* Freeman, *supra* note 18, at 29 (noting that the lenient sentences pose little deterrence for the insurgency). More problematic still is the number of cases never brought to court—and the release of these suspects—because American prosecutors fully grasp the futility of such endeavors. Bing West,

could have proven a strong weapon against the Iraqi terrorists, but thanks to the CCCI, the insurgency never had to expend its assets to defend itself against such a weapon. Instead, terrorist leaders inform their disciples that even if they are captured, they can look forward to a brief respite from the fray while they serve their paltry, CCCI-imposed sentences.

Adjudicating terrorism cases in the CCCI has neither deterred attacks nor sent the message to the Iraqi community that terrorist attacks are evil acts transcending those of simple criminals. Instead, the CCCI frequently sends the message that the United States is not serious about defeating the insurgency, because the United States has abandoned its duty to punish captured insurgents. This responsibility has been forfeited to unqualified Iraqi judges who may themselves be part of the insurgency.

Realizing that this was a mistake, the United States eventually ignored CCCI orders to free acquitted insurgents, a wise and completely lawful decision.[23] In other instances, however, the United States has released Iraqi prisoners, thereby freeing them to strike again.[24] Although the United States could try these defendants in U.S. military courts, there is no indication that this will happen, and thus the United States has squandered a golden opportunity to teach Iraqis about the rule of law while swiftly punishing terrorists.

This Article considers the CCCI as an experiment in Iraqi justice. Part II addresses the creation of the CCCI, its judges, and its manner of operation. Included in Part II is a discussion of the initiation of cases, the investigative and trial stages, and sentencing. This Article is highly critical of the U.S. approach to adjudicating terrorism cases in the CCCI, and sets forth detailed reasons for this criticism. In particular, Part III of this Article discusses various ways in which the CCCI obstructs the prosecution of

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*America as Jailer*, NAT'L REV., July 17, 2006, at 27 (noting that the defects in the system for prosecuting Iraqi terrorists sometimes result in their release); *see generally* Freeman, *supra* note 18, at 29; Zoroya & Jervis, *supra* note 9, at 1 (noting that many cases are not brought to the CCCI because American prosecutors could not prevail in that forum, and the suspects are therefore released).

23. *See* WILLIAM E. HALL, A TREATISE ON INTERNATIONAL LAW 562 (8th ed. 1924) ("If the inhabitants of the occupied territory rise in insurrection, whether in small bodies or en masse, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with arms in their hands can in strict law be killed, or if captured be executed by sentence of court martial."). This practice, however, could change. *See* Jamie Tarabay, *Wheels of Iraqi Justice Turn Slowly*, JOURNAL-GAZETTE, Aug. 23, 2004, at 3 ("'We certainly feel this is a relevant court representing the will of the people of Iraq, and we are respecting the decisions it makes when it finds people not guilty.'") (quoting U.S. Lieutenant Colonel Barry Johnson).

24. West, *supra* note 22, at 27 ("What do insurgents have to lose from being arrested for fighting if they know they will soon be released by authoritites?").

enemy combatants, often through archaic rules that are contrary to Anglo-American jurisprudence. For example, this Article discusses the CCCI's employment of the two-witness rule—that is, the refusal to convict a defendant without the testimony of two witnesses that the defendant committed the crime charged.[25] Also addressed is the CCCI's refusal to impose the mandatory minimum sentences prescribed by law, among other techniques employed by the court to thwart justice. [26] This Article concludes that although the creation of the CCCI was engendered by a noble desire to assist the Iraqis in implementing the rule of law, the United States should promptly abandon the practice of permitting the CCCI to adjudicate cases involving attacks against American military personnel and such cases should instead be entrusted to American military courts.[27]

## II. AN OVERVIEW OF THE CENTRAL CRIMINAL COURT OF IRAQ

### A. *The Creation of the Central Criminal Court of Iraq*

The occupation of Iraq has been heavily criticized for the American government's failures to plan for a host of troubles that it should have foreseen,[28] such as the insurgency itself.[29] The United States and its

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25. *See supra* Part I.

26. *Id.*

27. This, of course, would still leave the CCCI free to adjudicate crimes involving both Iraqi victims and perpetrators, cases in which the United States has no compelling interest.

28. Helprin, *supra* note 16, at A16 (noting the "paucity of armored vehicles, body armor, and other staples of battle" that the United States deployed to Iraq); Bradley Graham, *Prewar Memo Warned of Gaps in Iraq Plans*, WASH. POST, Aug. 18, 2005, at A13 ("One month before the U.S invasion of Iraq, three State Department bureau chiefs warned of 'serious planning gaps for post-conflict public security and humanitarian assistance' in a secret memorandum for a superior."); Michael Moss, *U.S. Struggling to Get Soldiers Updated Armor*, N.Y. TIMES, Aug. 14, 2005, at A1 ("Officials now concede that they underestimated the insurgency's strength and commitment to fighting a war in which there are no black lines."); Mark Helprin, *No Way to Run a War*, WALL ST. J., May 17, 2004, at 20:

> Having decided to remake a country of 26 million divided into warring subcultures with a shared affection for martyrdom and unchanging traditions, the administration thought it could do so with 100,000 troops. Israel, which nearly surrounds the West Bank, speaks its language and has 37 years of experience in occupation, keeps approximately (by my reckoning) one soldier on duty for every 40 inhabitants and 1/13th square mile, and the unfortunate results are well known.

29. "Part of the reason for the failure to plan for uncertainties came from the ideological insistence that almost all Iraqis would see Americans as liberators." Mark Sappenfield, *U.S.*

Coalition partners, however, were sufficiently prescient to prepare for implementing the rule of law through a system of independent courts.[30] Insofar as fair and independent courts are the backbone of the rule of law, Iraq could not truly be considered free without courts that fairly applied the law to all litigants.[31]

To achieve this goal, the Coalition established the CCCI in July 2003 to serve as the federal criminal trial court for Iraq.[32] The CCCI was designed to serve as the flagship of the new Iraqi court system, which includes a Federal Supreme Court, [33] a Court of Cassation, Courts of Appeals, local courts, juvenile courts, and a separate court system in the Kurdish region.[34] The CCCI's judges were supposed to be the judicial

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*Tempers Its View of Victory In Iraq*, CHRISTIAN SCI. MONITOR, Sept. 16, 2005, at 1.

30. The Coalition also realized that these tasks would not be easy ones, particularly under the conditions of the occupation. ERNST FRAENKEL, MILITARY OCCUPATION AND THE RULE OF LAW: OCCUPATION IN THE RHINELAND, 1918-1923 ix (1944) ("The liquidation of a war that is waged as a struggle of law against lawlessness automatically raises the problem of the restoration of law under the peculiar conditions of military occupation.").

31. Judicial independence and fairness "is vital in our law . . . ." ROSCOE POUND, THE SPIRIT OF THE COMMON LAW xiii-xiv (1921); Elliot A. Spoon, *Compensation of the Federal Judiciary: A Reexamination*, 8 MICH. J.L. REF. 594, 601 (1975) ("[T]he concept of judicial independence, though difficult to define, goes to the very heart of the American system of government."); *see* Coalition Provisional Authority Order No. 15, Establishment of the Judicial Review Committee (CPA/ORD/June 2003) [hereinafter CPA Order No. 15], *available at* http://www.iraqcoalition.org/regulations/ ("[I]t is inherent to the stability of any society that the judicial system is independent and impartial").

32. Zoroya & Jervis, *supra* note 9, at 1 ("In a little-noticed decision made within months of the U.S.-led invasion in 2003, the United States authorized creation of an Iraqi criminal court that would treat insurgents not as enemy combatants but as criminals.").

33. The Iraqi Federal Supreme Court has nine members and the Chief Justice is Madhat Mahmood. Rick Jervis, *For Iraq's Top Judge, Security Tops the Docket*, USA TODAY, July 7, 2005, at A6.

34. Prior to Operation Iraqi Freedom, the Iraqi judiciary was part of the executive branch's Ministry of Justice, and not a separate branch of the government. There existed numerous courts including the Court of Cassation (the supreme court), Courts of Appeals, Courts of First Instance, Administrative Tribunals, Personal Status Courts (religious courts), criminal courts, civil courts, and juvenile courts. Various tribes also ran their own tribal courts. Additionally, the military had its own system of adjudication, as did some of the security services, and their members were punished in these courts, rather than general courts. Robert Perito, *United States Institute of Peace Special Report 104, Establishing the Rule of Law in Iraq* 5-6 (Apr. 2003), *available at* http://www.usip.org/pubs/specialreports/sr104.pdf (last visited Mar. 2005); *see also* U.S. Government Accountability Office, *Rebuilding Iraq*, GAO-04-902R, Enclosure IX 80 (June 2004) ("A DOJ assessment from July 2003 identified 12 types of courts, including appellate courts, criminal courts, civil courts, and juvenile courts, among others); Jackie Spinner, *Hussein Trial Judges What Passed for Judgment*, WASH. POST, Oct. 23, 2005, at A16 (noting that Awad Haman Bander was former chief judge of the revolutionary court which tried acts of treason during Saddam's reign and sentenced most of its defendants to death); Jervis, *supra* note 33, at A6 ("Iraq

elite—both in the weight of the cases handled and with respect to the judge's legal acumen and integrity—and were to set an example of professionalism for the rest of the Iraqi judiciary. Most importantly, the CCCI was supposed to be free from corruption, Baath Party influence, tribal influences, and anti-American animus,[35] a paradigm to be emulated by other Iraqi courts.

The Coalition entrusted the CCCI with nationwide discretionary jurisdiction over all criminal violations.[36] In exercising this discretionary jurisdiction, the CCCI judges were instructed to concentrate on cases relating to terrorism, organized crime, crimes that potentially could destabilize the government, government corruption, crimes against the government, racially- and ethnically-motivated crimes, and any cases in which the defendants probably would not receive a fair trial in a local court.[37] In addition, both defendants and local courts could petition the CCCI to accept jurisdiction over particular cases,[38] but the decision to exercise jurisdiction rested solely with the CCCI judges.[39]

Initially, the CCCI was obliged to hear cases initiated by U.S. prosecutors through the auspices of the CPA Administrator, but after July 1, 2004, the CCCI was free to decline even these cases.[40] Other than this temporary, compulsory jurisdiction, the CCCI operated as an independent body to the extent that the United States did not directly control its decisions. Whether the CCCI will remain autonomous is unknown. The

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at the time had two judicial systems: regular courts that were generally open to the public and special security courts, which dealt with so-called political crimes, such as treason and dissent. . . . Justice Ministry officials, who took control of the courts in 1978, would pressure judges on selected cases. Resisting meant jeopardizing your career. . . .").

35. Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 213-14 (2005) (noting that the CCCI "was created both to serve as a model for further judicial reform and to try 'those serious crimes that most directly threaten public order and safety'"); David Luhnow, *Overhauling Iraq's Courts*, WALL ST. J., June 18, 2004, at A14 ("The new court is an attempt to ensure that corrupt judges don't let sympathizers of the former regime back on the streets."); *see also* Doug Simpson, *Louisiana-Trained Lawyers Become a Legal Force in Iraqi Courtrooms*, ASSOCIATED PRESS, July 16, 2005 ("The court was created . . . to prosecute insurgent fighters because the military was concerned that Iraq's provincial courts would be influenced by anti-Americanism, and be more likely to acquit those guilty of attacks.").

36. *See* Coalition Provisional Authority Order No. 13, The Central Criminal Court of Iraq (CPA/ORD/X2004/13) (2004) § 18(1) [hereinafter CPA Order No. 13], *available at* http://www.iraqcoalition.org/regulations/.

37. *Id.*

38. *Id.*

39. *Id.* § 19(2).

40. *Id.*

United States has attempted to lay the groundwork for such independence, but the Iraqis must see the venture through to fruition.

## B. *The CCCI Judiciary*

### 1. Courts Under the Baathists

Courts are only as good as the judges who preside over them, and this is certainly true of Iraqi courts. During Saddam's reign, the Iraqi courts, like all other aspects of the government, were tightly controlled and used to keep potential enemies in check.[41] In short, the courts were corrupt to the core, as were the other branches of government.[42] The courts, like the Baath Party, were instruments of tyranny which overlapped each other. Insofar as Baath Party membership was a prerequisite to obtaining government posts,[43] including those on the bench, Iraq's two-year training program for all judges was largely devoid of law, and instead entailed a constant stream of Baath Party indoctrination. [44] This helped ensure that Iraqi judges would be loyal servants of the Hussein government, rather than fair arbiters of justice, a concept completely foreign to the Baath Party.[45]

### 2. Purging the Judiciary of Baathist Influence

After the liberation of Iraq, Ambassador L. Paul Bremer and his staff diligently sought to sever the tentacles of the Baath Party and purge the government of its influence.[46] This was no small task as Baath Party

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41. Farhang, *supra* note 2, at 46 ("Iraq's system of criminal laws under Hussein was used to persecute political dissidents and inflict harsh punishments on those considered disloyal to the regime."). *But see* Williamson, *supra* note 2, at 230 ("In a country like Saddam's Iraq, one would expect that the Ministry of Justice and the courts would be important instruments of oppression. Undoubtedly, they played a role, but the regime primarily relied on a parallel court system to target its opponents rather than on the 'legitimate' courts under the Ministry of Justice. Courts of real interest to the regime tended to be shunted to these parallel structures. . . .").

42. *See* CPA Order No. 15, *supra* note 31, § 1 ("The Iraqi justice system has been subjected to political interference and corruption over the years of Iraqi Ba'ath Party rule").

43. Jon Lee Anderson, *Out on the Street*, NEW YORKER, Nov. 15, 2004, at 75 ("Membership was a requirement for many government jobs . . . ."); *see* L. Paul Bremer, *The Right Call*, WALL ST. J., Jan. 12, 2005, at A10 ("The Baath Party was another important instrument of Saddam's tyranny.").

44. Frank J. McGovern, *Rebuilding A Shattered System*, 25 PA. LAW. 34, 35 (Oct. 2003).

45. Anderson, *supra* note 43, at 72 ("The Party had been virtually synonymous with Saddam Hussein's regime; it was the instrument through which Iraqis were brutalized. At the same time, its members filled jobs at every level of society and anchored the middle class.").

46. "The former top American administrator here, L. Paul Bremer III, purged all high-ranking

membership may have numbered up to 2.5 million,[47] although many were undoubtedly members only for economic reasons.[48] In attempting this feat, Ambassador Bremer roughly patterned de-Baathification efforts after the de-Nazification programs instituted in Germany after World War II.[49] Although the National Socialists also pervaded all aspects of German

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Baathists from public positions in May 2003, but reversed that decision last spring when it became clear that experienced people were needed to help stand up the nascent government." Edward Wong & Erik Eckholm, *Allawi Presses Effort to Bring Back Baathists*, N.Y. TIMES, Oct. 13, 2004, at A12; *see* Anderson, *supra* note 43, at 73 ("On May 16, 2003, Bremer issued a sweeping ban of the Baath Party: all senior party members were barred from public life; lower-level members were also barred, but some could appeal."). Unfortunately, not enough non-Baathist-law professors exist in Iraq to permit a purge of the law school faculties, which means that the next generation of Iraqi lawyers are being indoctrinated with a Baathist view of the law. *See* Donald E. Walter, *Taking Justice to Iraq*, 9 NEXUS J. OP. 3, 5 (2004).

47. Anderson, *supra* note 43, at 74 ("The Baath Party, which kept its records secret, is estimated to have had between a million and two and a half million members, most of them Sunnis, like Saddam."). The Coalition's "purge" of the Baath Party only resulted in preventing the top 1% of the Baath Party from participating in the government. Bremer, *supra* note 43, at A10 ("And so the Coalition prohibited the top 1% of the Baath Party from continuing in government service. . . ."). This still left a large number of high-ranking Baathists to infiltrate the new government, including the judiciary.

48. Yochi J. Dreazen, *On Baghdad Beat, Policeman Dodges Bombs, Turncoats*, WALL ST. J. Aug. 26, 2005, at A1 (discussing an Iraqi policeman who claims he joined the Baath Party "solely to keep his job"); Ellen Knickmeyer, *Iraqi Alliance Seeks To Oust Top Officials of Hussein Era*, WASH. POST, Apr. 18, 2005, at 1 ("Under Hussein, registration in the Baath Party was a requirement for jobs on almost all levels, from army general to teacher."); Perito, *supra* note 34, at 8 ("The Baath Party has a total affiliation of 1 to 1.5 million, but only 50,000 are 'full members.' Most government officials, military officers, and senior administrators are party members for convenience rather than because of ideological commitment. Party membership is required to hold office, for promotions, to obtain economic advantages, and to avoid harassment.").

49. Anderson, *supra* note 43, at 75 ("One of the steps in the appeals process for former Baathists was attendance at a thirty-day de-Baathification course, and I asked [Mithal] Alusi what model he had used for it. 'I've studied the de-Nazification of Germany,' he said."); *see* Coalition Provisional Authority Order No. 1, De-Ba'athification of Iraqi Society (CPA/ORD/16 May 2003/01) § 1, ¶ 2 (2003) ("Full members of the Ba'ath party holding the ranks of" regional command member, branch member, section member, or group member "are hereby removed from their positions and banned from future employment in the public sector."), *available at* http://www.iraqcoalition.org/regulations/.

government,[50] there were key differences in the tasks faced by de-Nazifiers and the de-Baathification commission, especially with respect to what could be achieved in reforming the judiciary.

In post-Nazi Germany, despite absolute control of the German judiciary during the Nazi reign,[51] there still existed a few judges who had remained relatively uncorrupted by Nazism and had experience with the traditional notions of justice.[52] Some had resigned rather than soil their souls with Nazism, and even judges who collaborated with the Nazis generally had been educated in the pre-Nazi era, making at least some of them

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50. HAROLD ZINK, AMERICAN MILITARY GOVERNMENT IN GERMANY 131 (1947) ("[T]he National Socialists had succeeded in permeating virtually every nook and corner of German government from the top to the bottom and not content with that had penetrated into the very heart of the social and economic institutions of the Reich. . . ."); INGO MULLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 37 (Deborah Lucas Schneider trans., 1991) (noting that the "Law for Restoration of the Professional Civil Service . . ." removed from service "all judges and other officials who were Jews, Social Democrats, or otherwise 'politically unreliable' . . . ," thereby "destroying the independence of the courts.").

51. *See* EDITH ROPER & CLARA LEISER, SKELETON OF JUSTICE 57-58 (1941) ("With the advent of the Third Reich the criminal bench was quickly and thoroughly purged. All Jewish judges were thrown out and every other judge who boasted an iota of humanity or was suspected of harboring progressive or liberal notions was routed from the field to the accompaniment of the rankest accusations, even the most rabid libel. Sooner or later most of them were sent to concentration camps. . . . These judges were replaced by men who adhered rigidly to National Socialist concepts. . . ."); *see* NOBLEMAN, *supra* note 8, at 67-68 ("In fact, of all the German institutions in existence prior to the advent of the Nazi regime, the courts received the greatest impact of the National Socialist program."). According to Ingo Muller:

> In Westphalia, for example, 93 percent of court personnel had been members of either the Nazi party or one of its subsidiary organizations. In the district of the Bamberg Court of Appeals, 302 out of 309 jurists had been in the party, and at the Petty Court in Schweinfurt the figure was a solid 100 percent. In the American enclave of Bremen in the British Zone, the Americans found a grand total of two judges who could be considered to have an untainted record.

MULLER, *supra* note 50, at 202 (citations omitted).

52. For example, German law embodied notions of judicial independence which, though compromised by the Nazis, was at least part of the German legal tradition. FRAENKEL, *supra* note 30, at 44 ("For more than a hundred years the independence of the judiciary had been regarded in Germany as the cornerstone of the *Rechsstaat* and the chief guarantee of the freedom of the individual. . . ."). Therefore, the Allies sought to employ judges who had retired before the Nazis came to power, although this measure still did not provide the requisite number of judicial officers needed to staff the German courts. MULLER, *supra* note 50, at 202 ("One solution was to call back judges who had retired prior to 1933, and to employ attorneys on the bench part time. It soon became clear that these measures would not solve the problem. The British decided to treat all jurists who had joined the party after 1937 as having a clean slate, including former army judges who for a long time had not been allowed to join.").

salvageable. Nevertheless, in the American-controlled portion of Germany, the military government disqualified eighty percent of the German judiciary from service.[53] Despite this significant purge of the German judiciary, the American military ensured that the German courts in its sector were fully functioning by March 1946.[54]

In contrast to the German experience, after decades of Baathist rule in Iraq, Baath Party judges were the only ones with judicial experience.[55] American reformers thought this experience was essential to recreate a viable Iraqi judiciary, and that the new Iraqi judiciary should be composed largely of experienced judges or attorneys of great skill. These reformers, however, overlooked a key point: despite their "judicial experience," these judges had little or no experience with the rule of law. Instead from almost the moment they donned their judicial robes, they were steeped in the intricacies of graft and corruption.[56] Prior to the liberation of Iraq, there

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53. ZINK, *supra* note 50, at 125 n.2.

54. *Id.* at 125. ("During this period the military government had to maintain its own tribunals to deal with certain types of cases involving Germans, but more and more the cases were placed under the jurisdiction of German courts as additional judges were 'vetted' and high courts reopened. By March, 1946 all German courts in the U.S. zone had been reopened."). It helped that General Eisenhower had three million Americans under his command, and 10 million total Allied troops in Germany, compared to 130,000 to 150,000 Coalition forces in Iraq. Mark Helprin, *Our Blindness*, WALL ST. J., Jan. 24, 2005, at A18. Also, some corners were cut and Nazi pasts were overlooked in certain cases. MULLER, *supra* note 50, at 202 ("The de-Nazification commissions of the British Zone and the similar tribunals of the American Zone had begun with strong measures, but were soon classifying virtually everyone in either Category 4 ('followers') or Category 5 ('exonerated').").

55. *See* Neil MacDonald, *Baathist Purge May Stall Hussein Trial*, CHRISTIAN SCI. MONITOR, July 28, 2005, at 6 (According to an American official, "practically every judge who served in the Iraqi judicial system under Hussein was a member of the Baath party. 'You had to be, at least nominally,' . . . ."); John F. Burns, *Hussein Tribunal Shaken by Chalabi's Bid to Replace Staff*, N.Y. TIMES, July 20, 2005, at 9 (noting that during Saddam's reign, "all prosecutors, judges and senior court officials were required to join the Baath Party"); Jervis, *supra* note 33, at A6 (Judge "Mahmood started as a judicial investigator in 1960 and became a judge in 1967. But when he refused to join the Baath Party, his promotions stopped, he said."); Caryle Murphy, *Hussein Judge Steps Out of the Shadows*, WASH. POST, Mar. 22, 2005, at 12 (Judge Ra'ed Juhi noted that to "get into the Judiciary Institute you needed 'to be recommended by the Baath offices in the neighborhood you lived in.'").

It is arguable whether this judicial experience is worth anything in light of the pandemic judicial corruption in Iraq and its role in the denial of basic human rights. Those who lack judicial experience are more likely to have the moral purity necessary for service on the bench, since they at least did not sell their souls to become slaves of the Baath Party. *See* Editorial, *When Hussein Goes to Trial*, MILWAUKEE J. SENTINEL, Mar. 9, 2004, at 12A ("Iraq has not had a criminal justice system worthy of the name for decades."); *see also* McGovern, *supra* note 44, at 39 (noting the deficiencies of the Iraqi criminal adjudication system).

56. Trebilcock, *supra* note 2, at 48 ("Initial assessments of the Iraqi courts revealed that the

were roughly 870 judges and prosecutors—prosecutors are quasi-judicial officials under Iraqi law—and the American-run Judicial Review Committee removed about one-fifth of these based on the belief that they were incorrigible.[57] The Committee also appointed about 110 new judges and prosecutors and reinstated 80 who had been removed under Saddam's regime.[58]

Thus, despite criticism that the Baathist purge went too far, compared to post-World War II Germany, the Coalition did not go far enough with respect to cleansing the judiciary.[59] Rather, by making judicial experience under Saddam a prerequisite for judicial service in the post-Saddam era, the Coalition essentially guaranteed Iraq a Baathist judiciary.[60] Thus, it is

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courts of general jurisdiction within each of Iraq's eighteen provinces were widely subject to political control and influence. The Ministry of Justice in Baghdad had previously appointed judges based on party loyalty and their willingness to support Baath party policies through their rulings.").

57. U.S. GOV'T ACCOUNTABILITY OFFICE, REBUILDING IRAQ , GAO-04-902R, at 81-82 (2004) [hereinafter GAO REPORT]. The numbers differ slightly depending on the source. *See, e.g.*, LARRY DIAMOND, SQUANDERED VICTORY 149 (2005) (stating that the CPA judicial review committee assessed about 600 Iraqi judges and dismissed about 120 of them for corruption, incompetence, or ties to the Baath Party). *Compare* Trebilcock, *supra* note 2, at 48 (stating that the Coalition removed one-third of Iraqi judges for corruption or suspicions of malfeasance). In contrast, the CPA disqualified less than 10% of Iraqi military officers from working in the new Iraqi government. *See* Dan Senor & Walter Slocombe, *Too Few Good Men*, N.Y. TIMES, Nov. 17, 2005, at A31:

> [N]either service in the old army or rank-and-file membership in the Baath party would disqualify applicants for the new army. Only those who had worked in Saddam Hussein's intelligence and political control organizations—rather than the regular army or the Republican Guard—and those at the top four ranks of the Baath Party were barred. These bases for disqualification affected less than 10 percent of the total officer corps . . . .

58. GAO REPORT, *supra* note 57, at 65. The New York Times reports that by May 2005, there were 351 "trained judges" in Iraq, up from 175 in June 2004. Adriana Lins de Albuquerque & Michael O'Hanlon, *The State of Iraq: An Update*, N.Y. TIMES, June 3, 2005, at A27. It is not clear if "trained" means "newly trained" or includes judges who served under Saddam and who have since received extensive training from American legal personnel.

59. In defense of the Judicial Review Committee, they were limited by the judiciary that Saddam had created, and there is little the Committee could do in the short term. As the U.S. Government Accountability Office noted, the reform of the Iraqi judiciary is a long-term process. GAO REPORT, *supra* note 57, at 83-84 ("[A] former member of the Judicial Review Committee concluded that rehabilitating Iraq's judicial system would take years as a competent body of legal professionals is developed."). With this admission, the obvious question is: Why, then, did the U.S. government entrust these inexperienced judges with the task of trying insurgency cases, particularly when this approach has little historical precedent?

60. Rasan & Negus, *supra* note 21, at 8 ("One judge who refused to disclose his name said he tried to let off lightly insurgents who had targeted Americans . . . .").

not surprising that Iraqi judges confess to molding their judicial decisions to assist the Baathist-supported insurgency.[61]

The general rule for the CCCI judiciary, notwithstanding some exceptions,[62] was that all of its judges were required to have at least five years of judicial experience, which ensured a judiciary steeped in Baathist ideology.[63] Many officials have realized that "former Baathists who are readmitted to the government without enough precautions can aid the insurgency from within," judges perhaps more so than other bureaucrats.[64] There were also "concerns that former Baathists may be unwilling to stand too strongly against insurgents,"[65] a concern that is only heightened when one considers the results-oriented jurisprudence produced by the CCCI judges.[66] But this did not seem to have bothered the Coalition, even though almost all judges denied having high-level affiliation with the Baath Party, indicating that a number of judges were lying.[67]

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61. *Id.*

62. One exception was Judge Zuhair al-Maliky, the Chief investigative judge of the CCCI, who was subsequently removed from the CCCI by the interim Iraqi government. *See* Scott Peterson, *Demoted Iraqi Judge Fears for his Country's Future*, CHRISTIAN SCI. MONITOR, Nov. 1, 2004, at 11; *see also* McGovern, *supra* note 44, at 37 (noting that in the Babil province, six new judges were added to the bench).

63. *See* CPA Order No. 13, *supra* note 36, § 5, ¶ 1 (Revised) (requiring that judges shall have "demonstrated a high level of legal competence").

64. Wong & Eckholm, *supra* note 46, at A12. Other countries that failed to purge their judiciaries of leftists and totalitarian loyalists have come to rue their forbearance. For example, in Nicaragua, when democratic elements took over from the Sandinista Marxists, "Sandinista judges were allowed to remain in the courts, which of course made the evolution of an independent, property-rights oriented judiciary impossible." Mary Anastasia O'Grady, *Chavez's Tyranny Emboldens Nicaragua's Ortega*, WALL ST. J., Dec. 24, 2004, at A11. Partially because of this decision, the Sandinistas are mounting a strong comeback. *Id.* Similarly, in China "justice" is administered according to the whim of the communist party, and is accomplished by ensuring that the judges are party members. *See* Philip P. Pan, *In China, Turning the Law Into the People's Protector*, WASH. POST, Dec. 28, 2004, at A1, A15 ("More than a quarter-century after launching economic reforms while continuing to restrict political freedom the Chinese Communist Party remains in firm control of the courts. Most judges are party members, appointed by party leaders and required to carry out party orders.").

65. Wong & Eckholm, *supra* note 46, at A12.

66. Iraqi judges were notorious for their lack of a substantial work ethic. The CCCI judges frequently would not arrive at the courthouse before 9:30 a.m., and the court day would usually end by noon or 1:00 p.m. In their defense, part of this schedule may have been mandated by security concerns and power failures at the courthouse, which sometimes made working conditions unbearably hot. For all of these reasons, the CCCI was not known for its diligence. Rajiv Chandrasekaran & Scott Wilson, *Detention Problems Widespread*, PITT. POST-GAZETTE, May 11, 2004, at A1 ("[T]he court has moved slowly.").

67. According to Captain McGovern:

The judges' motives for prevaricating are unknown, but one can surmise that some judges did so simply for financial reasons: they wanted to ensure that they could continue to work as judges. But it is also probable that some of them were acting pursuant to orders from the Baath Party or Iranian intelligence organizations to infiltrate the new Iraqi judiciary.[68] Indeed, Iraqi government officials have conceded that insurgents have infiltrated various departments of the Iraqi government. In light of the manifold pro-insurgent decisions handed down by CCCI judges, it is ironic to read the prerequisites for service on the CCCI promulgated by Ambassador Bremer,[69] including a provision that requires the judges to

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> Only one judge, out of approximately 40, admitted to high-level membership in the Baath Party. . . . It is almost certain he was being honest with us while others were not as forthright about their past. Most judges either denied membership in the party outright, stated that they used to be a member but quit or stated that they were merely low-ranking members. There are some eight levels of hierarchy in the Baath party, and, according, to Civil Administrator Bremer's proclamation, anyone who is in one of the top five levels of the Baath party is to be excluded from public office.

McGovern, *supra* note 44, at 35.

68. Beyond their covert infiltration, Sunni clerics have openly issued a fatwa for insurgents to further infiltrate Iraq's security services. Yaroslav Trofimov, *Iraqi Lawmakers Spar Over Role of Ex-Baathists*, WALL ST. J., Apr. 7, 2005, at A12 ("Shiite suspicions were especially piqued by an unusual fatwa issued Friday by key members of the Sunni Muslim Scholars Association, the influential clerical body that often extends rhetorical and moral support to the insurgency. The fatwa urges the faithful to join U.S.-trained Iraqi military and police forces while abstaining from aid to the occupiers—a call many interpret as an order to take over the security forces from within."); *see also* Arnaud De Borchgrave, *Think Again . . .*, WASH. TIMES, Oct. 3, 2005, at A16 ("Iraq's National Security Advisor Mowaffak al-Rubaie told the BBC, 'Iraqi security forces in general, and the police in particular, in many parts of Iraq, I have to admit have been penetrated by some of the insurgents, some of the terrorists as well.'"); Yochi J. Dreazen, *On Baghdad Beat, Policeman Dodges Bombs, Turncoats*, WALL ST. J., Aug. 26, 2005, at A1 (discussing an Iraqi police officer in Baghdad who was in a shootout with an infiltrator from the insurgency caught stealing weapons for the terrorists); Richard A. Oppel, Jr. & James Glanz, *U.S. Officials Say Iraq's Forces Founder Under Rebel Assaults*, N.Y. TIMES, Nov. 30, 2004, at A1 (noting that Iraqi security forces are "unreliable because of corruption, desertion or infiltration").

69. *See* CPA Order No. 13, *supra* note 36, § 5, ¶ 1:

> [T]he judges of the CCCI shall be appointed by the Administrator and shall:
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> 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, non-membership in 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,

have either opposed the Baath Party or to have had only low-level membership in the Party.[70]

This is not to say that all of the judges of the CCCI still retain Baathist loyalties or are evil men. Indeed, many Iraqi judges have demonstrated great courage against guerillas, who view some of the judges with disdain for having collaborated with the infidels of the Coalition.[71] Accordingly, judges—including CCCI judges—and their families are prime targets of insurgents,[72] and over thirty judges have already fallen prey to an assassin's bullet or bomb.[73] Many others have only narrowly escaped death.[74] For judges, "the simple task of going into the office every day qualifies as an act of bravery."[75] The fact that a judge was the target of an assassination attempt, however, does not guarantee fitness for the bench, a lack of affiliation with the Baath Party, or even honesty, since the motives for assassinations vary. For example, a judge might be in danger of assassination not because he opposes the Baathist insurgents, but because

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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.*

70. *See supra* text accompanying note 69.

71. Sinan Salaheddin, *Gunmen Kill Son of Top Judge*, WASH. TIMES, May 14, 2006, at A1 (discussing the assassination of Judge Midhat al-Mahmad's son). The "followers of Mohammed divide the human race into that of the 'faithful' on one side and that of the 'infidels' on the other side." Theodore P. Ion, *Roman Law and Mohammedan Jurisprudence*, 6 MICH. L. REV. 44, 206 (1907).

72. Jonathan Finer & Andy Mosher, *For Soldier, A Posthumous Day in Iraqi Court*, WASH. POST, June 28, 2005, at A11 ("Judges have been frequent targets of insurgent attacks.").

73. Noam N. Levey, *Four U.S. Soldiers And Iraqi Judge Die in Attacks*, L.A. TIMES, Aug. 19, 2005, at A3 (noting that "Jasim Waheeb, an investigative judge from a Baghdad appellate courts, and his driver were shot to death in the capitals' Dora neighborhood less than two miles from the heavily protected Green Zone"); Jeffrey Fleishman, *Justice is Swift And Deadly in Baghdad*, L.A. TIMES, June 6, 2005, at 1 ("More than 25 judges have been assassinated in Baghdad since major combat operations ended in 2003.").

74. The fear of assassination caused the Iraqi Special Tribunal initially to conceal the names of most of the judges involved in the investigation and trial of Saddam Hussein and senior Baath Party officials. The name of the Special Tribunal's chief investigative judge was revealed only after he was seen on television conducting Saddam Hussein's initial appearance. *See* Robert Collier, *Human Rights Shortcomings in Hussein Tribunal*, S.F. CHRON., Apr. 22, 2004, at A-13 ("[T]he names of the tribunal's prosecutors and judges would remain secret until pretrial questioning. Five judges have been assassinated since the fall of Hussein's regime a year ago.").

75. Bruce I. Konviser, *Courage a Requirement for Iraqi Judges*, WASH. TIMES, May 9, 2005, at A1.

he is a loyal Baathist whom Shiite assassins would like to remove from the bench permanently.

In any event, most Iraqi judges are now well guarded; indeed, as of March 2004, approximately 250 of Iraq's judges were protected by personal security details.[76] But no security system is terrorist-proof, particularly considering the dangers judges face traveling to the courthouses, and they are always vulnerable to car bombs, IEDs, and RPG attacks. In recognition of this danger, the Coalition instituted a pension system to provide for the support of the families of judges who are assassinated,[77] but this is obviously little consolation to a fallen judge or his family.

### 3. Civil-Law Influence and Lack of Independence

Regardless of their loyalties to elements of the insurgency and their inexperience with the rule of law, most of the Iraqi judges possess another flaw: to the extent they have legal training, they are fully steeped in the civil-law tradition—with a dash of Islamic law—in which the judge's role is somewhat mechanistic and generally not as fluid as with common-law judges. Thus, many of them lack the creative streak inherent in the common-law tradition which, in turn, allows the common law to grow in response to the fluidity of the ever-changing world.[78]

The Iraqi judges also display a trait common in bureaucrats from totalitarian countries: lack of initiative. This defect is based in part on the habit of receiving unquestionable orders from superiors, which stifles the need to think independently, compounded by a fear of harsh punishment for making mistakes and a dearth of rewards for demonstrating initiative.[79] With this background, many Iraqi judges appear stymied by simple variations that inevitably arise in criminal litigation, particularly in a combat environment involving organized terrorists seeking to kill as many

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76. GAO REPORT, *supra* note 57, at 83.

77. *See generally* Coalition Provisional Authority Order No. 52, Payment of Pensions For Judges and Prosecutors Who Die While Holding Office (CPA/ORD/6 Jan. 2004/52) (2004), *available at* http://www.iraqcoalition.org/regulations/.

78. *See* Holden v. Hardy, 169 U.S. 366, 387 (1898) ("[W]hile the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuations. . . .").

79. Trebilcock, *supra* note 2, at 48 (noting that, under the Baathists, Iraqi judges "who demonstrated too much initiative or independence ran the risk of being viewed as a potential threat to the regime," and in some quarters, "the slightest deviation from regime policies led to dismissal and imprisonment").

Americans as possible. In Iraq, everything is fluid, but the Iraqi judges tend to think only in terms of solids.[80]

This phenomenon may be attributable to another problem with the Iraqi judiciary, its lack of independence. In the United States, provisions in Article III of the U.S. Constitution insulate the federal bench from the types of external pressure that the English crown placed on its judicial officers, sometimes to the detriment of the American Colonists.[81] First, the Compensation Clause of Article III guarantees judges that their salaries will not be diminished regardless of the unpopularity of their decisions.[82] This precludes the executive and legislative branches from utilizing salary cuts as a means of retaliating against judges for their decisions, a tactic commonly employed in former times.

Second, the Tenure or Good Behavior Clause promises judges the opportunity to serve on the bench, potentially for the rest of their natural lives, regardless of their judicial decisions.[83] This insulates judges from the fear of losing their judicial positions so long as their decisions are not so fundamentally unpopular as to result in their impeachment by the House and removal by the Senate.[84] Of course, these provisions do not guarantee that judges will remain immune from the influence of bribes, the desire for a promotion, peer pressure, passion, elitist loyalties, friendship with a

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80. Iraqi judges have been known to exercise initiative and creativity in manufacturing legal technicalities upon which to base acquittals or to minimize sentences. Similarly, this practice was frequently employed by Nazi judges when the National Socialist Party was just coming to power in Germany. MULLER, *supra* note 50, at 17 ("In many trials in the years that followed, the courts continued to take the Nazi side of the ongoing political struggle, sometimes openly, sometimes behind the façade of legal maneuvers.").

81. *See* U.S. CONST. art. III, § 1. Many state judges do not enjoy these protections.

82. The Compensation Clause states that: "[T]he Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1; *see also* United States v. Hatter, 532 U.S. 557, 560 (2001). According to Alexander Hamilton, next "to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." THE FEDERALIST NO. 78, at 520 (Alexander Hamilton).

83. *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour. . . ."). Federal judges are not completely independent insofar as they are subject to impeachment for high crimes and misdemeanors, as Associate Justice Samuel Chase learned first hand. *See generally* WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992); Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49 (1960). District and appellate court judges also are beholden to the executive insofar as they may seek elevation to a higher court, and even associate justices may be seeking the chief justiceship, and they may believe that their decisions could have bearing on achieving these goals.

84. *See supra* text accompanying note 83.

party, or affinity for a particular economic or social class.[85] Article III, however, completely severs two tentacles that kings and parliaments historically had used to squeeze favorable decisions from judicial officers or punish those who refused to conform to their will.[86] This independence has resulted in greater respect for the American judiciary, and ensures its decisions greater authority than they would enjoy in a system where judges are subject to executive or legislative influence via threats to salary and tenure.[87]

Unfortunately for Iraqi justice, Iraqi judges do not enjoy the same protections. Although the Coalition Provisional Authority tried to ensure that judges would not be removed simply because of unpopular decisions,[88] this lofty goal has proven unachievable. Several judges have been removed for nothing more objectionable than antagonizing powerful government officials. The CCCI judges enjoy one advantage not enjoyed by the typical Iraqi judges: they were appointed by Ambassador Bremer and did not have to face an election. This advantage may be short-lived, however, since the CCCI judges can still be removed from office, which has happened to at least one CCCI investigative judge.[89]

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85. For judges to be truly independent, "they must be courageous and able to withstand external influences whether in the form of bribes, pressure of friend or family, antipathies of class or religion." ARTHUR T. VANDERBILT, JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS AND SELECTION 30 (1956).

86.

> [I]n 1689, the Convention Parliament deposed James II, declared the throne vacant, and offered the crown to William and Mary on the condition that they recognize the Declaration of Rights, the principal document stating the Revolution Settlement. The Act of Settlement of 1701, 12 & 13 Will. 3, c.2, completed the Revolution Settlement and provided that judges should hold office during good behavior, that they should receive ascertained and established salaries, and that they could be dismissed only upon the address of both houses of Parliament.

Robert A. Sprecher, *The Threat to Judicial Independence*, 51 IND. L.J. 380, 385 (1976).

87. Of course, secure tenure does not need to be life tenure. Rather, a limited term of service could be specified, and judges could be protected from removal from office during that term.

88. *See* CPA Order No. 13, *supra* note 36, § 5(2) ("A judge of the CCCI may only be removed by the Administrator where there is clear evidence of unlawful or unethical conduct, breaches of the requirements of this Order, or incompetence on the part of the member."). By permitting judges to be removed for "incompetence" the Order opens the door to abuse of the removal provisions, as an unpopular decision can easily be construed as the product of incompetence.

89. *See* Peterson, *supra* note 62, at 11.

## 4. The CCCI Judiciary

### a. Judge Zuhair Jum'ah Al-Maaliky

One judge removed from the CCCI was its Chief Investigative judge (also called an examining magistrate), Zuhair Jum'ah Al-Maaliky. Judge Zuhair, formerly an amateur boxer and student of English literature, obtained his law degree from Baghdad University, but was not permitted to practice law under Saddam Hussein because he is a Shiite Moslem. He worked for the United States as a translator after the liberation, and later, despite a lack of judicial experience, Ambassador Bremer appointed him Chief Investigative Judge of the CCCI. He was generally friendly to U.S. personnel, and spoke and understood English better than any other judge on the CCCI, which probably explained his appointment to the chief judgeship. Yet in November 2004, Judge Zuhair was removed from the bench by the interim government, perhaps because he angered the government with investigations of powerful politicians like Ahmad Chalabi,[90] but also possibly because of his close ties to the American military.

Before his removal, Iraqi authorities retaliated against the Judge for some of his work by arresting his wife, who is also an attorney. Besides the harassment of his wife, Judge Zuhair had survived at least three assassination attempts in his short tenure as Chief Judge, indicating that some of the insurgents found him unacceptable. He could dodge bullets, but Judge Zuhair could not survive the interim government which removed a number of judges it found meddlesome.[91]

### b. Judge Ra'ed al-Juhy

By far, the best known CCCI judge is Ra'ed al-Juhy,[92] who owes his fame to his appearance on international television while "arraigning" Saddam Hussein and other high level Baathists in July 2004. He did so in his capacity as the Chief Investigative Judge for the Iraqi Special

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90. *See id.*; *see also* Edward Wong, *Chalabi in Comeback, Siding with Shiites*, N.Y. TIMES, Dec. 3, 2004, at A16 ("In his home, Mr. Chalabi noted with a smile that the counterfeiting charges had been dropped . . . and that the judge, Zuhair al-Maliky, had been moved to a lesser court. Mr. Maliky himself said that part of his demotion might have been 'related to the Chalabi case.'").

91. Doug Struck, *Torture in Iraq Still Routine, Report Says*, WASH. POST, Jan. 25, 2005, at A10 ("[J]udges who became too demanding of authorities were removed from their jobs.").

92. Because the requisite transliteration from Arabic script to English text is an inexact science at best, the judge's first name has been spelled as "Raad," Ra'ad," "Ra'ed," "Ra'id," "Rai'd", and his surname: "Juhi," "Juhy," and "Jouhi."

Tribunal,[93] the judicial body that is trying Saddam Hussein and his compatriots.[94] Judge Ra'ed served as an examining magistrate in several of the cases involving Saddam Hussein.[95] Judge Ra'ed, a Shiite Muslim and Baghdad native, graduated from Baghdad University Law School before serving in the Iraqi military and as an investigator in the Iraqi Ministry of Justice.[96] He later completed a two-year course at Iraq's Judicial Institute, a prerequisite to judicial service in Baathist Iraq.[97]

Like Judge Zuhair, Judge Ra'ed has also survived multiple assassination attempts, including a grenade attack after leaving the CCCI courthouse.[98] He has further imperiled his life by working on the investigation of Saddam Hussein.[99] He is relatively young, about thirty-six years old, and exudes optimism, a rare quality in Iraq. He is known to have a pragmatic streak that will serve him well as he forges into new territory prosecuting the Baathists, provided he survives with his life and job intact.[100]

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93. Hannah Allam, *Two Hussein Aides Called To Account*, PHILA. INQUIRER, Dec. 19, 2004, at A2.

94. John F. Burns, *Iraqi Judge Questions Aides of Hussein With Lawyers*, N.Y. TIMES, Dec. 19, 2004, at 13.

95. Edward Wong, *Iraqi Leader Vows to Block Purges on Hussein Tribunal*, N.Y. TIMES, July 29, 2005, at A9 ("Mr. Juhi has been the lead investigator on cases involving Mr. Hussein, and it was his research that led the tribunal to bring charges against Mr. Hussein and three associates related to a massacre in the Shiite town of Dujail. Mr. Juhi is now investigating the Anfal campaign of the late 1980's in which tens of thousands of Kurds were killed, and the suppression of a Shiite rebellion in 1991 that resulted in as many as 150,000 victims being shot dead and bulldozed into graves.").

96. Caryle Murphy, *Hussein Judge Steps Out of the Shadows*, WASH. POST, Mar. 22, 2005, at A12.

97. *Id.*

98. Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Those Actions?*, 28 HAMLINE L. REV. 91, 104 (2005) (noting that CCCI judges have been the target of death threats).

99. Murphy, *supra* note 96, at A12 ("Juhi is the only tribunal judge publicly identified so far. The others remain anonymous because of threats from insurgents, many of whom supported Saddam's government."). The Iraqi Special Tribunal has since disclosed the names of other members of the Tribunal.

100. Ahmad Chalabi seeks Judge Ra'ed's removal from the bench because the judge had previously issued an arrest warrant for the Moktada al-Sadr, the Anti-American Shiite cleric and Chalabi's new best friend in the ever-changing political landscape of Iraq. Wong, *supra* note 95, at A9.

> Mr. Chalabi is trying to purge Mr. Juhi as a show of support of Moktada al-Sadr, the popular firebrand cleric who has led two uprisings against the Americans. Mr. Juhi issued an arrest warrant against Mr. Sadr in 2003 for Mr. Sadr's connection to the killing of an American-backed Shiite cleric. That warrant was later

### c. Judge Loqmaan Thaabit 'Abdur-Razaaq As-Saamraa'i

The CCCI's chief trial judge is Judge Loqmaan Thaabit 'Abdur-Razaaq As-Saamraa'i.[101] A Sunni Moslem, his main claim to fame is that he sacrificed his twenty-two year judicial career under the Baathists by refusing to order the execution of five prostitutes.[102] Consistent with reports of Saddam Hussein's meddling in judicial affairs,[103] Judge Loqmaan claims that when he was chief judge of Saddam Hussein's court, his sentences were often dictated by Saddam Hussein or his family.[104] After removal from the bench, Loqmaan practiced law for ten years before being tapped for the CCCI post.

Although his courage in standing up to Saddam's regime is commendable, and imperiled the judge's life, it still leaves open the question how he managed to dance with the Baathists for twenty-two years without dirtying his hands. In Iraq, however, cleanliness is a relative concept. Although outwardly friendly to U.S. personnel, panels on which Judge Loqmaan has presided over have also been sympathetic to insurgents when it comes time to assess their guilt and determine the appropriate punishment for their crimes. Thus, the insurgency has been fortunate to have Judge Loqmaan looking out for its minions when they appear before his court.

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> suspended because of a cease-fire agreement the Americans and the Iraqi government reached with Sadr.

*Id.*

101. Jackie Spinner, *Iraq's New Form of Justice Seems to Satisfy Few*, WASH. POST, Aug. 4, 2004, at A12. Because of the Arabic transliteration, there are various ways to spell the judge's name in English.

102. *Id.*

103. Jervis, *supra* note 33, at A6 ("Justice Ministry officials, who took control of the courts in 1978, would pressure judges on selected cases. Resisting meant jeopardizing your career. . . . In one case in 1993, the nine judges of the Court of Cassation refused to condemn to death a defendant who had murdered a Saddam associate, Mahmood said. All nine judges were later fired, he said.").

104. Spinner, *supra* note 101, at A12.

> The man in charge of the court, Luqman Thabit, was also chief judge for Hussein's special secret court, in which sentences were often dictated by the Iraqi leader or his sons. Thabit said he was fired and persecuted by Hussein three years ago after he refused to sentence five prostitutes to death.

*Id.*

## C. *Iraqi Criminal Law*

The Iraqi system of criminal adjudication has long been considered "secular" in that Iraqi positive law is not directly or generally derived from Islamic law,[105] or *Sharia*.[106] U.S. advisors sought to carry on this secular tradition,[107] initially by incorporating as much of the existing Iraqi law as was possible. This was probably a mistake, however, because aspects of

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105. Farhang, *supra* note 2, at 46 ("Iraq's criminal justice system was a secular one . . . ."). But even in countries with a strong secular-law tradition, such as Canada, Muslim groups seek the incorporation of *Sharia*, at least into the law of domestic relations. *See* Colin Campbell, *Report Endorses Muslim Law in Ontario*, N.Y. TIMES, Dec. 22, 2004, at A10 ("An Ontario government report recommends that Muslims be allowed to use religious law to settle inheritance and family disputes outside the court system. The report came after an Islamic group, the Canadian Society of Muslims, announced plans to apply Shariah, a legal code based on the Koran, to settle disputes over issues like marriage, divorce and property."). Thus, it is not surprising that Islamic law has entered the "secular" law of countries like Iraq. Even in Saddam's time, family-law issues were decided for Muslim families according to *Sharia*, while Christian families had cases adjudicated according to canon law. Indeed, many Middle Eastern countries that adopted "secular" law for criminal and commercial actions retained Islamic law to govern "personal status" issues such as marriage, divorce, succession, and child custody. *See* LAW AND ISLAM IN THE MIDDLE EAST 3 (Daisy Hilse Dwyer ed., 1990). It is worth noting that, pursuant to *Sharia*, before the middle 1800s the testimony of Christians and Jews was not permitted in Ottoman courts. Daisy Hilse Dwyer, *Introduction*, *in* LAW AND ISLAM IN THE MIDDLE EAST, *supra*, at 3.

106. The term "*Sharia*" literally means "the road to the watering hole." JOHN L. ESPOSITO, ISLAM: THE STRAIGHT PATH 79 (1991) ("The literal meaning of Sharia is 'the road to the watering hole,' the clear, right, or straight path to be followed. In Islam, it came to mean the divinely mandated path, the straight path of Islam, that Muslims were to follow, God's will or law."); Chibli Mallat, *From Islamic to Middle Eastern Law A Restatement of the Field*, 51 AM. J. COMP. L. 699, 719 (2003) ("Strictly speaking, the shari'a derives from two written sources: the Qur'an, the divine Book revealed to the Prophet Muhammad in the late sixth century CE, and the sunna, which is the reported compilation of the conversations (hadith) and deeds of the Prophet collected after his death from his Companions."). Because of transliteration, *Sharia* is spelled various ways, including "Sharia," "Shariah," "Shari'a," "Shari'ah," and "Shari'," among others.

107. Many traditionalist Moslems objected to the adoption of Western law when it was first introduced to Islamic countries, and their dogmatic progeny continue to object to the neglect of *Sharia*. *See* Ann Elizabeth Mayer, *Reinstating Islamic Criminal Law in Libya*, *in* LAW AND ISLAM IN THE MIDDLE EAST 99 (Daisy Hilse Dwyer ed., 1990) ("The adoption of laws of Western origin was opposed and criticized on religious grounds by many Muslims in the Middle East. Islamic clerics, learned in the traditional Islamic sciences, were particularly attached to shari'a law and hostile to a development that threatened to end their long domination of the study of law and the control of legal institutions."). This is similar to the opinion of some Orthodox Jews who, upon the founding of Israel, thought that there was no need for any additional law beyond the religious law. *See* JAMES G. MCDONALD, MY MISSION IN ISRAEL 1948-1951, at 278-79 (1951) ("While the Orthodox groups have disavowed the intention of establishing a theocracy, spokesmen for the more extreme right wing argued, during the debate on the establishment of a formal constitution in Israel, that the law of Moses and the Torah suffice, and that any constitution of a secular nature would be necessarily either superfluous or harmful.").

the civil-law bureaucracy inhibit transparent judicial proceedings and make corruption more difficult to detect.[108] But in light of the limited resources of the United States and the need to act expeditiously to create an Iraqi court system, the thought of converting the Iraqi system into an adversarial or common-law one was all but foreclosed.[109]

The reformers' retention of Iraq's civil-law system is also consistent with international law, which seeks to prevent the violation of rights and legal upheavals during occupation by requiring the occupying power to preserve as much of the native law as possible.[110] But this duty is limited, and it does not require the retention of patently unfair procedures or laws that would materially assist insurgents in thwarting the occupation.[111] Regardless of international law, it was hoped that this preservation of the civil-law system would further enable Iraqis to adjust to the occupation and certainly would be quicker and easier than completely rewriting the Iraqi criminal law and criminal procedure law.[112] The reformers, therefore, authorized the CCCI to utilize the Iraqi Penal Code of 1969,[113] and the 1971

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108. *Righting the Scales*, ECONOMIST, Oct. 8, 2005, at 45 (discussing the plan in some Mexican states to change their court system from an inquisitorial, civil-law one to a common-law, adversarial system more like the United States and England, in part to create more openness and fairness in the courts and to help stamp out corruption).

109. In Colombia, the United States is helping the Colombians convert their civil-law, inquisitorial system into an adversarial one. *See* Fernanda Santos, *Colombia Lawyers Back in School*, N.Y. NEWSDAY, June 4, 2005, at A14 ("Oral trials used to be a rarity in Colombia, where criminal proceedings were generally handled in writing, leading to a bureaucratic nightmare and, often, corruption.").

110. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention] ("The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying power in cases where they constitute a threat to security. . . ."); NOBLEMAN, *supra* note 8, at 5 ("the laws of war require him [the occupier] to respect existing laws, institutions and administration in the occupied area, except where their modification or abolition is absolutely necessary in connection with the occupant's war objectives, the safety of his army or his duty to restore law and order"); FRAENKEL, *supra* note 30, at 189 ("Nevertheless, international law, which originates in and is deeply imbued with the principles of natural law, does not oblige any military government to respect existing laws that violate basic ideas of justice. An occupying power that conforms with the principles of international law is for that very reason obliged to disallow any municipal law that is contrary to the public order of the international community.").

111. Geneva Convention, *supra* note 110, art. 64.

112. Farhang, *supra* note 2, at 46 ("Rewriting the laws from scratch . . . was not a viable option, given both the immediate need for law and order and international law requirements.").

113. *See generally* IRAQI PENAL CODE (1969), *at* http://www.jagcnet.army.mil/JAGCNET Internet/Homepages/AC/CLAMO-Public.nsf/0/d616b3e179d620285256d0a006391f1?Open Document (last visited Aug. 12, 2004); *see generally* CPA Order No. 7, *supra* note 3, § 2, ¶ 1 ("Without prejudice to the continuing review of Iraqi laws, the Third Edition of the 1969 Iraqi

edition of the Iraqi Criminal Procedure Code,[114] with some modifications to both.[115]

The Iraqi criminal law, and thus the CCCI, utilizes the civil-law inquisitorial system to determine criminal liability, as opposed to the Anglo-American adversarial system. More specifically, the Iraqi judicial system and penal code are roughly patterned after the French model,[116] which in the mid-1800s was first introduced into the Ottoman Empire.[117]

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Penal Code with amendments . . . shall apply. . . ."). This retention of the Iraqi Penal Code was in accordance with the Article 64 of the Fourth Geneva Convention. *See* Geneva Convention, *supra* note 110, art. 64 ("The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying power in cases where they constitute a threat to security. . . .").

114. *See generally* IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971], *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf.

115. *See, e.g.*, Coalition Provisional Authority Order No. 31, Modifications of Penal Code and Criminal Proceedings Law (CPA/ORD/10 Sept. 2003) (2003) [hereinafter CPA Order No. 31], *available* at http://www.iraqcoalition.org/regulations/; *see also* Farhang, *supra* note 2, at 46 ("The CPA chose instead to begin revising Iraq's Penal Code on an emergency basis to conform to international human rights standards."). A 2004 CCCI case suggests that further modifications of the Code might be necessary: the CCCI charged an Iraqi by the name of Milthal al-Alusi with violating a provision of the 1969 Code which bars Iraqi citizens from interacting with enemy states. Erick Eckholm, *Iraqi Indicted for Proposal to Open Talks With Israel*, N.Y. TIMES, Oct. 6, 2004, at A12 ("A court of Iraq's interim government has brought criminal charges against a prominent politician for attending an antiterrorism conference in Israel and publicly suggesting that Iraq should open talks with Israel."). The CCCI issued a warrant for Aluse's arrest because he attended an antiterrorism conference in an "enemy" country, namely Israel. Anderson, *supra* note 43, at 78 ("In October, after a private visit to Israel by Mithal al-Alusi, Chalabi's ally on the de-Baathification commission, an Iraqi judge issued a warrant for Alusi's arrest, invoking a Baathist-era law prohibiting travel to the Jewish state."); Eckholm, *supra*, at A12. Under this reading of the Penal Code, Iraqis who cooperate with the United States would also be guilty of violating the law, because from 1991 until the fall of Saddam's government, the United States conducted military operations against the Iraqi government, and thus is an "enemy" like Israel.

116. Farhang, *supra* note 2, at 46 (stating that the Iraqi criminal justice system followed "a French civil law model"); MATHEW LIPPMAN ET AL., ISLAMIC CRIMINAL LAW AND PROCEDURE 3 (1988) ("European codes of law were adopted and adapted by various Islamic states"); ESPOSITO, *supra* note 106, at 144 ("Modern legal change occurred in many parts of the Muslim world during the nineteenth century, when most areas of Islamic law were replaced by modern codes based on European law. Secular courts were created to handle civil and criminal law. . . .").

117. LIPPMAN ET AL., *supra* note 116, at 101 ("The second stage in the introduction of Western laws was the adoption of laws during the *tanzimat* (reform) period between 1839 and 1876. In this period the Ottomans translated the French Commercial and Penal Code and established a new system of secular courts for the code's implementation."). Actually the Turks had some experience with French criminal law by the 1500s, when they signed a treaty with France providing that French subjects in Ottoman lands would be tried under French law. *See* WILL & ARIEL DURANT, THE STORY OF CIVILIZATION: PART VII: THE AGE OF REASON BEGINS 524 n.* (1961) ("In 1536 France had obtained the first Turkish 'capitulations" . . . agreeing that French subjects in Turkish lands

Until 1920, the territory or present-day Iraq was part of the Ottoman Empire, and Iraq was created after World War I from three Ottoman provinces.[118] The Iraqi law, therefore, has a distinct Ottoman flavor that also reflects the influence of Egyptian and Islamic law.[119] In light of the British occupation in the 1920s,[120] Iraqi criminal law also bears vestiges of the Anglo common law, as well as *Sharia*:

> The Criminal Code in effect in early 1968 [after which the current Penal Code was patterned] was based on the Baghdad Penal Code, formulated by the British military in 1918 to replace the Ottoman Codes used by the Turks. Although it drew heavily on Ottoman law, which in turn, was based largely on the French legal tradition, the Baghdad Code included certain amendments and additions adapted from the Egyptian Penal Code. These modificationswere designed

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should be governed and tried by French law. . . .").

118. AS'AD ABUKALIL ET AL., THE MIDDLE EAST 255 (9th ed., 2000); J.N.D. Anderson, *A Law of Personal Status for Iraq*, 9 INT'L & COMP. L.Q. 542, 542 (1960) (noting that the territory of Iraq was part of the Ottoman Empire); *see* Amanda Bower, *Iraq Close Up*, TIME, Mar. 10, 2003, at 30 ("Iraq was created out of three Ottoman Empire provinces—one dominated by Sunni Arabs, one by Shi'ite Arabs and one by Kurds."). "As a result of the creation of mandates under Article 22 of the League Covenant, the three districts of Mosul, Basra, and Baghdad, which formed a part of Mesopotamia, were merged together to constitute the mandated area of Iraq. The Principal Allied Powers decided, at their meeting at San Remo in April 1920, to confer a Mandate for Iraq on Great Britain." R.V. Pillai & Mahendra Kumar, *The Political and Legal Status of Kuwait*, 11 INT'L & COMP. L.Q. 108, 112-13 (1962) (citing H.A. FOSTER, THE MAKING OF MODERN IRAQ (1935)).

119. U.S. Department of State, *2004 Country Report on Human Rights Practices: Iraq* [hereinafter *Country Report*], *available at* http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm. ("The criminal justice system is based on the French or civil system. It was modified under the Ottoman Turks and greatly influenced by Egypt."); EZZELDIN FODA, THE PROJECTED ARAB COURT OF JUSTICE 126-27 (1957) (noting that the Egyptian code was adopted, with some changes, by Iraq).

120. The British exercised substantial influence in Iraq for a span of about forty years:

> [T]he Ottoman Empire allied with Germany in World War I, and the British dispatched an expeditionary force to Iraq to maintain control. The British stayed on after the war. In 1920 the Treaty of Sevres placed Iraq and Palestine under British mandate and Syria under the French. In 1921 the British established a constitutional monarchy in Iraq and placed at its head Faisal ibn Hussein, (Faisal I), a Meccan Hashimite prince whose acceptance by the people derived from his being a descendant of the Prophet Muhammad. In 1932 Iraq became independent, but British influence over the ruling elite continue for nearly three decades.

AS'AD ABUKALIL ET AL., *supra* note 118, at 255.

to bring the Western-inspired law more into conformity with Islamic law and Middle Eastern customs.[121]

Thus, Iraqi criminal law is an amalgam incorporating elements from Islamic,[122] Ottoman,[123] French,[124] English,[125] Egyptian,[126] and Roman

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121. HARVEY H. SMITH ET AL., AREA HANDBOOK FOR IRAQ 357 (1969). S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 167 (1985) ("[E]xamples of legislation introduced by the British mandate authority which remained applicable are the Baghdad Penal Code, 1918 and the Baghdad Law of Criminal Procedure, 1919. These two pieces of legislation remained in force until the late 1960's."). The Baghdad Penal Code and the Baghdad Law of Criminal Procedure were "in turn, 'an amalgam of provisions taken from Ottoman, French, and British criminal law and procedure.'" *Id.* at 167 n.1.

122. SMITH ET AL., *supra* note 121, at 181 ("The judicial system is based partly on the French model as first introduced during Ottoman rule and modified since then and based partly on religious traditions, Islamic and others."); Anderson, *supra* note 118, at 543 n.6 (noting that Iraqi law is partially based on *Sharia*).

123. *Country Report*, *supra* note 119, § 1, ¶ (e) (noting the French, Egyptian, and Ottoman influence on Iraqi law); JOSEPH BRAUDE, THE NEW IRAQ 174 (2003) ("Civil and Criminal Courts drew precedents from the Ottoman canon of the late nineteenth century and new traditions introduced by the British Mandatory government."); Wael B. Hallaq, *"Muslim Rage" and Islamic Law*, 54 HASTINGS L.J. 1705, 1713 (2003) (stating that the Ottoman Penal Code of 1858 was "closely modeled after the French Penal Code of 1810."); SMITH ET AL., *supra* note 121, at 181 ("The judicial system is based partly on the French model as first introduced during Ottoman rule and modified since then and based partly on religious traditions, Islamic and others.").

124. *Country Report*, *supra* note 119, § 1, ¶ (e) (noting the French, Egyptian, and Ottoman influence on Iraqi law); Farhang, *supra* note 2, at 46 (noting the French influence on the Iraqi legal system); LIPPMAN ET AL., *supra* note 116, at 3 & 101 (discussing the French influence on Ottoman law and the European influence on the legal system of Islamic states generally); ESPOSITO, *supra* note 106, at 144 (noting the influence of European law on the criminal law of various Moslem countries); Hallaq, *supra* note 123, at 1713 (stating that the Ottoman Penal Code of 1858 was "closely modeled after the French Penal Code of 1810."); SMITH ET AL., *supra* note 121, at 181 ("The judicial system is based partly on the French model as first introduced during Ottoman rule and modified since then and based partly on religious traditions, Islamic and others."); Anderson, *supra* note 118, at 543 n.6 (noting the French influence in Iraqi law); Ion, *supra* note 71, at 49 n.29 ("The Turks adopted, nearly in their entirety, the commercial and criminal laws of France, and incorporated into their judicial system the procedure of that country in these branches of the law.").

125. BRAUDE, *supra* note 123, at 174 ("Civil and Criminal Courts drew precedents from the Ottoman canon of the late nineteenth century and new traditions introduced by the British Mandatory government."). "The period of British administration was short and the common law system did not take root in Iraq in the same way it had in" such places as "Nigeria, India and Pakistan. The existing legal order prevalent in Iraq successfully resisted any English law penetration into the local and religious norms. Nevertheless, Iraq was influenced by the British justice particularly in procedural aspects of criminal law. . . ." AMIN, *supra* note 121, at 179.

126. Egyptian law had roots in Islamic and French law. FODA, *supra* note 119, at 126-27 (noting that the Egyptian code, which Iraq subsequently adopted, wove together European and Islamic law); A. Kevin Reinhart & Gilbert S. Merritt, *Reconstruction and Constitution Building in Iraq*, 37 VAND. J. TRANSNAT'L L. 765, 781 (2004) ("[Iraqi law] is a civil law system which came through Egypt because Egypt, during the time of Napoleon's campaign, adopted a kind of

law,[127] none of which were adopted in its purest form.[128] Further diluting these influences, the Coalition incorporated elements of American law into the Iraqi system—procedural and substantive rights indigenous to an adversarial system—based on the belief that these rights are essential to fundamental fairness in criminal litigation. For example, Iraqi defendants now enjoy the right to confront adverse witnesses at all stages of criminal proceedings and the right to remain silent when being interrogated.[129] The presence of a document granting these rights, of course, does not guarantee that government agents will always respect them, however.

### D. *Investigative Stage*

As noted above, the Iraqi criminal courts are patterned after the French inquisitorial system,[130] as opposed to the Anglo-American adversarial system. Under the inquisitional system "cases are controlled and investigated by the judiciary. Judges, not lawyers, direct the progress of a case."[131] Thus, there are two branches of the court: an investigative one, staffed by investigative judges also known as examining magistrates, and a trial chamber that ultimately decides guilt or innocence.[132] The examining magistrate judge is not simply "an impartial referee," but "an active

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Napoleonic code system with Islamic elements in it that was later passed along to Iraq."); JOHN KEAY, SOWING THE WIND: THE SEEDS OF CONFLICT IN THE MIDDLE EAST 16 (2003) (discussing the French influence on Egyptian culture and law dating from Napoleon's 1798 invasion of Egypt); *Oriental Laws and Lawyers*, 2 ALB. L.J. 4, 6 (1870) (noting that Egyptian and Ottoman law are extremely similar "with scarcely any deviations").

127. The civil-law tradition has its roots in Roman law, although it also bears strong Germanic influences, and Islamic law was also influenced by Roman law. Peter J. Hamilton, *The Civil Law and the Common Law*, 36 HARV. L. REV. 180, 180 (1922) (noting that the civil law is derived from Roman law); William Wirt Howe, *Roman and Civil Law in America*, 16 HARV. L. REV. 342, 343 (1903) ("But French law was not destined to be entirely Roman in its character. Another important influence was added in the form of what we call the 'barbarian laws' proper, such as those of the Salian Franks, the Ripuarian Franks, and the like."); *see also* Abdur Rahim, *A Historical Sketch of Mohammedan Jurisprudence*, 7 COLUM. L. REV. 255, 258 (1907) (noting the assertion that "Mohammedan Jurisprudence borrowed largely from Roman Law"); Ion, *supra* note 71, at 44 (noting "the influence that the laws of Rome exercised in the development of the Islamic legislation").

128. AMIN, *supra* note 121, at 167 n.1, 178, 179.

129. *See* CPA Order 13.

130. Farhang, *supra* note 2, at 46. "Though there are other systems with international scope—Islamic theocratic law, for example—most countries' legal systems derive from either French civil or English common law." Nicholas Thompson, *Common Denominator*, LEGAL AFF. 46, 47 (2005).

131. *Country Report*, *supra* note 119, § 1, ¶ (e).

132. Liebl, *supra* note 98, at 102.

inquisitor who is free to seek evidence and to control the nature and objective of the inquiry":[133]

> In France, this office traces its origin back to the end of the fifteenth century when French criminal procedure began to follow the lead of the ecclesiastical courts by abandoning the so-called "accusatorial" system under which prosecution was regarded, and treated, as an open public contest between private individuals, in favor of the "inquisitorial" system, where the public prosecutor stepped in to protect the interests of the state, and the initial examination before an officer of the law took on the character of a secret written inquiry where the accused did not appear and was not represented by counsel.[134]

The Iraqi system still follows this model, with a few modifications. Instead of an impartial court judging a dispute presented by two worthy adversaries—a zealous prosecutor arguing for conviction and a dedicated defense counsel clamoring for acquittal—an investigative judge conducts the initial inquiry into a case, and when in his discretionary judgment the inquiry is complete, he submits a dossier to the trial court.[135] The investigative judge's "dossier" or "report" is roughly analogous—when the judge recommends the case continue for trial—to the common law's true bill of indictment, or a "no bill," when the investigative judge dismisses a case.[136]

Unlike an indictment, however, the examining judge's report or dossier also contains a summary of the evidence the examining magistrate heard, as well as his assessment of the evidence, perhaps including even an assessment of the witnesses' credibility. Furthermore, although an indictment cannot serve as evidence in an American court, the CCCI trial judges may partially or completely rely on the investigative judge's report in deciding the defendant's fate at trial.[137] The investigating magistrate "is expected to investigate the matter thoroughly and to prepare a complete written record, so that by the time the examining stage is complete, all the relevant evidence is in the record."[138]

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133. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 127 (2d ed. 1985).

134. JASPER YEATES BRINTON, THE MIXED COURTS OF EGYPT 117 (rev. ed. 1968).

135. "Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an 'indictment.'" *In re* Oliver, 333 U.S. 257, 264 (1948).

136. *Id.*

137. *Id.* at 265 (noting that an indictment cannot serve as evidence against a defendant).

138. MERRYMAN, *supra* note 133, at 129.

A criminal case is initiated by submitting a complaint to the investigating magistrate,[139] which can be submitted orally or in writing. In terrorism cases involving Americans, it falls to American special prosecutors—judge advocates from one of the military services—to bring cases to the Iraqi magistrate's attention and arrange for an investigative hearing. The investigative magistrates have the authority to travel around the country to obtain evidence and interview witnesses [140] and Iraqi law states that the "scene of the incident shall be examined by the investigator or magistrate . . . ."[141] But in light of the dangers posed by the bomb-laden roads of Iraq, the CCCI examining magistrates often work exclusively in their chambers in the CCCI courthouse.[142]

Pursuant to their duty to investigate cases, investigative judges also have the power to issue arrest and search warrants.[143] The United States usually never availed itself of these warrants, however, because the American military already possessed the defendants and sufficient evidence to prosecute the cases, and as an occupying power the United States was sufficiently imbued with *de facto* authority to make arrests without an Iraqi warrant. Because defendants could be detained under the magistrates' warrants, the judges also have the power to make pretrial custody determinations, including the setting of bail. Again, however, these proceedings did not apply to defendants held by the United States.

### 1. Investigative Hearings

In Iraq, the formal judicial process leading to the trial of a defendant begins with an investigative "hearing,"[144] which in many respects is more like a deposition than a hearing. CCCI investigative hearings, like trials, are held in the CCCI courthouse.[145] Unlike trials held in courtrooms,

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139. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 9(A), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ CLAMO-Public.nsf ("The initiation of criminal proceedings from an oral or written complaint is submitted to the examining magistrate. . . .").

140. *Id.* ¶ 52(B).

141. *Id.* ("The scene of the incident shall be examined by the investigator or magistrate. . . .").

142. *See, e.g.*, Peterson, *supra* note 62, at 11.

143. CPA Order No. 13, *supra* note 36, § 20.

144. "Crimes were initially referred to an investigative magistrate empowered to gather evidence, interrogate witnesses, and ultimately refer a criminal case for trial before a trial court judge panel." Farhang, *supra* note 2, at 46. This is the same procedure used in the adjudication of cases against members of Saddam Hussein's regime. *See also* Anthony Shadid, *Hearing Set for Aides of Hussein*, WASH. POST., Dec. 15, 2004, at 1.

145. Most of the courthouses in Iraq survived the invasion intact, only to be ransacked afterwards by hordes of vandals. Farhang, *supra* note 2, at 45; GAO REPORT, *supra* note 57, at 80

however, investigative hearings are generally held in the chambers of the investigative judge, are less formal than trials, and are not truly court proceedings as an individual from a common-law nation would think of them.[146] There is usually one investigative judge assigned to each case, but there is nothing to prevent more than one magistrate from gathering evidence in a particular case.[147] Furthermore, when the assigned magistrate is absent, another investigative judge can substitute for him.

In the American cases, often only one hearing lasting a matter of hours was required to present all of the relevant witnesses and evidence, including an examination of the defendants. In multi-defendant or complex cases there is nothing to prevent an investigative hearing from lasting days or weeks, but these are uncommon. There is also nothing preventing an investigative judge from recalling witnesses that he has already examined, but that was almost never done with terrorism cases.[148]

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(noting that in 2004, there were roughly 130 courthouses and 570 courts in Iraq). This made the administration of justice next to impossible in many areas. As it was, because Saddam Hussein's regime was a rule of despotism rather than a rule of law, expending financial resources to ensure functioning courthouses was not one of its priorities, so many courthouses were already in disrepair prior to the invasion. But the widespread looting post-invasion certainly did not help matters. One Army attorney gave this assessment of Iraqi courthouses:

> For the most part, all courthouse facilities need major repair due to years of neglect and the looting that took place after the fall of the regime.
>
> Most courthouses have broken windows and sections that have been rendered useless due to fire and smoke damage that occurred during the looting. Most courthouses have only intermittent electricity. Most have no phones, no computers, no copiers and limited furniture. Many lost all legal and administrative records in the looting.

McGovern, *supra* note 44, at 34-35.

146. Robert Perito, *United States Institute of Peace Special Report 104, Establishing the Rule of Law in Iraq* 5-6 (Apr. 2003), available at http://www.usip.org/pubs/specialreports/sr104.pdf ("[A]n investigative judge decides whether to prosecute, issues arrest warrants, and determines whether suspects should be remanded to custody").

147. The cases involving the senior Baath Party leaders, handled by the Iraqi Special Tribunal, are notable in that the court utilizes a panel of investigative judges. *See* Allam, *supra* note 93, at A2 (noting that Gen. Ali Hassan al-Majid appeared before a panel of investigative judges).

148. The practice of recalling witnesses for successive examinations is accepted in civil-law countries and existed in the English chancery courts. To preclude using this tool to delay the case, restrictions were placed on the number of times a witness could be recalled to give further testimony. William Hamilton Bryson, *Witnesses: A Canonist's View*, 13 AM. J. LEGAL HIST. 57, 62 (1969) ("The general rule is that witnesses can be examined only three times before publication of their testimony; they cannot be brought back after publication except on new articles, i.e. set of questions.").

In cases initiated by American prosecutors, the prosecution team would submit a short, written statement of the charges to the investigative judge, along with any documentary evidence supporting the charges. This gave the investigative judge a rudimentary understanding of the case prior to examining the defendant and witnesses. Other than these statements, however, the judge comes to the investigative hearing without any information about the case.

An Iraqi investigative hearing can be loosely analogized to an initial appearance, arraignment, preliminary hearing, and grand jury proceedings held in an American court. Thus, like an initial appearance or arraignment in the United States, it is at the investigative hearing that an Iraqi defendant is first apprised of the charges the United States has leveled against him. These may or may not be the charges the investigative judge elects to charge the defendant with, and the CCCI investigative judges usually elected to charge defendants much more leniently than the U.S. prosecutors did. Unlike an arraignment in American courts, however, the Iraqi defendant does not enter a plea to the charges. There is also no discussion of bail or pretrial release, at least with terrorism suspects, the only defendants that American judge advocates prosecuted.

As mentioned above, the CCCI investigative hearings also function like American grand jury proceedings insofar as they protect defendants from facing a trial if there is insufficient evidence to support the accusations leveled against them.[149] The investigative hearings result in a documentary product analogous in function to an American indictment or a "no bill," depending on the magistrate's findings. The document—the magistrate's report—is essential to the case progressing to trial, and no trial can be held unless the examining magistrate agrees that there is probable cause to believe that the defendant committed the specified crime or crimes.

Iraqi investigative hearings, however, differ substantially from American grand jury proceedings, which are also commonly used by American prosecutors as investigative tools.[150] Unlike grand jury proceedings in most American jurisdictions and pursuant to American reforms of the Iraqi system, in the CCCI, Iraqi defendants are permitted to appear

149. *See* Robert Vouin, *The Protection of the Accused in French Criminal Procedure*, 5 INT'L & COMP. L.Q. 1, 5 (1956) ("thanks to the preparatory examination, a person under suspicion is assured of not being put on trial unless grave presumptions of guilt have first been established by a competent judicial authority").

150. RICHARD A. POSNER, OVERCOMING LAW 233 (1995) (noting that some provisions of the Bill of Rights "have even turned topsy-turvy, such as the provision for indictment by grand jury. The grand jury has become an instrument of prosecutorial investigation, rather than being the protection for the criminal suspect that the framers of the Bill of Rights expected it to be.").

before the investigative judge and may testify before the judge without being placed under oath.[151] They are also entitled to hear all of the testimony presented to the investigative judge and to suggest a line of cross-examination of adverse witnesses, and are free to offer their own evidence to rebut the prosecutor's case. American defendants generally do not enjoy the same rights in American grand jury proceedings.[152]

Also in contrast to most American grand jury proceedings, defendants enjoy the right to be present at the hearing, the right to offer testimony in their own defense, the right to remain silent, the right to be apprised of the

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151. In the United States, usually only the prosecutor presents evidence to the grand jury. "[T]he grand jury is a secret body, ordinarily hearing no evidence but the prosecution's, attended by no counsel except the prosecuting attorneys. . . ." Stack v. Boyle, 342 U.S. 1, 10 (1951) (Jackson, J., concurring); RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 120 (1999) ("[U]sually the only evidence laid before a grand jury is the evidence of guilt that the prosecutor has gathered."). That is the practice in federal court. *See* FED. R. CRIM. P. 6(d) ("The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.").

A few states, such as New York, however, permit a defendant to appear and present a defense to the grand jury. William Glaberson, *New Trend Before Grand Juries: Meet the Accused*, N.Y. TIMES, June 20, 2004, at 11 ("Although federal courts and most states, following laws dating to 17th-century England, do not allow the accused the automatic right to testify before grand juries, New York has long granted such a right. In 1978, the state also passed an unusual law that allows a defense lawyer to accompany the target of an investigation into the grand jury room, though not to participate.").

Because the grand jury usually hears only the prosecution's version of events, it is not surprising that grand juries usually indict cases as the prosecutors request, leading to some harsh criticism of grand juries. *See* POSNER, *supra* at 131-32 ("Grand juries usually rubber-stamp the indictments proposed by the prosecutors"); CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION 229 n.6 (1991) ("[I]t is well known that any halfway competent prosecutor can get a grand jury to indict anyone, even the proverbial 'ham sandwich.'"); F. LEE BAILEY, THE DEFENSE NEVER RESTS 256 (1971) ("[T]here is nothing less grand than a grand jury. The typical grand jury is a flock of sheep led by the prosecutor across the meadow to the finding he wants."). This has led some to argue that the Fifth Amendment's presentment requirement is anachronistic and that the grand jury is no longer a valuable instrument for the protection of a defendant's interests. *See* ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 186-87 (Da Capo Press 1972) (1930) ("The grand jury has long outlived its usefulness."); *see* Hurtado v. California, 110 U.S. 516, 533 (1883) (stating that the presentation of a case to a grand jury is not so essential to the concept of ordered liberty that the Fourteenth Amendment requires states to obtain indictment before trying a defendant).

152. "Neither the rules of evidence, nor the constitutional rights of a defendant to be secure from unreasonable searches and seizures, to confront the witnesses against him, and to testify in his own defense apply in grand jury proceedings." R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing The Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 363 (2000). Obviously the right to confront and cross-examine adverse witnesses is nonexistent in most American grand jury proceedings, as is the right to consult with counsel during the proceedings.

right to remain silent, and the guarantee that the investigative judge will not draw an inference adverse to the defendant's presumed innocence if he exercises this right.[153] To assist the defendants in exercising their rights at the investigative hearing,[154] Iraqi defendants are also permitted to have an attorney present during investigative hearings. Importantly, the right to counsel:

> does not mean that counsel for the accused has unrestricted freedom to cross-examine witnesses or to introduce evidence on behalf of his client. The examining phase is still conducted by a judge. Counsel for the accused can, however, participate in the proceedings in such a way as to protect his client's interests, calling certain matters to the attention of the court and advising his client on how he should respond as the proceeding unfolds.[155]

Insurgency defendants are provided counsel free of charge if they cannot afford an attorney.[156] There is usually no way to verify pleas of

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153. David Luhnow, *Overhauling Iraq's Courts*, WALL ST. J., June 18, 2004, at A14 ("American officials have already amended the country's [Iraq's] criminal code. The changes: a ban on confession obtained through torture granting defendants the right to be silent without that being taken as a sign of guilt. . . ."). This is a right that was not afforded to Germans charged with crimes in American military courts in post-World War II Germany. They were required to answer questions posed to them by prosecutors and judges, and if they refused, the judges could draw the inference that the defendant was declining to answer because he had something to hide, a reasonable inference under the circumstances. NOBLEMAN, *supra* note 8, at 103. Civil-law countries generally permit their judges to draw an adverse inference from a defendant's decision not to answer questions. MERRYMAN, *supra* note 133, at 130 (A defendant's "refusal to answer, as well as his answers, will be taken into account in deciding questions of guilt or in fixing the penalty.").

154. Although the defendant's right to be present at hearings and trials is fundamental to common-law systems, this right is not a universally recognized one, and for many years in civil-law systems a defendant could be tried and convicted in absentia as a matter of course. I.L. HUNT, AMERICAN MILITARY GOVERNMENT OF OCCUPIED GERMANY: 1918-1920, at 289 (1943) ("In neither France or Germany is it the custom to require the presence of the defendant in court. Fines and imprisonment may be imposed in his absence, and the civil authorities ordered by the court to carry out the punishment."). In the U.S. federal courts, trials in absentia are permitted, but only when the defendant has voluntarily elected to absent himself, either by absconding or by disrupting proceedings to such an extent that they can only be continued in his absence. *See* FED. R. CRIM. P. 43(c)(1) (setting forth instances when a defendant shall be deemed to have waived his right to be present at trial); Illinois v. Allen, 397 U.S. 337, 342-43 (1970) (trial in absentia is permissible when the trial judge removed the defendant for disruptive behavior).

155. MERRYMAN, *supra* note 133, at 129.

156. CPA Order No. 13, *supra* note 36, § 22 ("All accused persons appearing before the CCCI shall have the right to representation by an attorney of their choice. Where an accused person is unable to afford the services of an attorney the CCCI will provide them with a suitably qualified attorney free of charge."); Liebl, *supra* note 98, at 103 (noting that in the CCCI, attorneys are

poverty, and since most Iraqis are indigent, the investigative judges frequently appoint attorneys to represent CCCI defendants.[157] This and other rights, not surprisingly, did not exist in Saddam's time,[158] but were instituted by the Coalition to help ensure that defendants get a fair shake before the CCCI and other courts.[159] Nonetheless, most defense attorneys do next to nothing for their clients at the investigative stage. They do prove useful to some defendants when, after hearing the prosecution's case and its evidence, they seek out or manufacture alibi witnesses for the trial.[160]

Although pretrial detention does not comport with Islamic law,[161] Iraqi law does recognize pretrial detention and the use of bail to ensure a defendant's presence at court proceedings.[162] But all of the insurgency defendants are detained by the United States from the time they are initially apprehended until they serve their sentences, and some will remain in custody even after their sentences are served if they continue to pose a risk to the United States.[163] Because of the danger to U.S. troops and the

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appointed for the indigent).

157. The attorneys are Iraqi nationals with law degrees from Iraqi universities, frequently Baghdad University.

158. "In the CPA order that established the CCCI, and those that modified the Criminal Code and the Code of Criminal Procedure, we provided certain protections for defendants that had been absent in the Iraqi criminal justice system. Foremost among these was the right to defense counsel from the outset of judicial proceedings. Previously, suspects were only entitled to representation at trial, but the investigative phase in civil law jurisdictions is perhaps as crucial to the ultimate outcome, so it was important to extend this protection during this stage as well." Williamson, *supra* note 2, at 239.

159. Farhang, *supra* note 2, at 46:

> From a U.S. legal perspective, Iraq's former criminal procedure code did not adequately protect a defendant's right to silence. Although a defendant was entitled not to answer questions posed by the investigating magistrate during the investigative stage of a criminal case, the magistrate had no obligation to advise the defendant of this right. The right to remain silent was further undermined by provisions allowing the trial court to question a defendant in criminal proceedings and to consider a refusal to answer such questions as evidence of guilt.

160. Williamson, *supra* note 2, at 240 (noting the poor quality of Iraqi defense attorneys).

161. LIPPMAN ET AL., *supra* note 116, at 61 ("Based on these *Shari'a* principles, most jurists agree that the accused is to be free from pretrial detention. . . .").

162. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶¶ 109-122, *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf.

163. Some of the terrorists were handed over to the Iraqis and were subsequently released. *See* West, *supra* note 22, at 27. At least one terrorist was captured again while carrying out attacks against American military personnel. *See* Victor Davis Hanson, *Western World Shows Too Much Softness In Different Kind of War*, CHI. TRIB., Sept. 2, 2005, at C25 ("It turns out that the terrorist had been captured earlier in December 2004, on suspicion of being involved in a deadly suicide

likelihood of flight,[164] insurgents are never released prior to trial.[165] Indeed, in one case when a defendant was mistakenly released prior to trial, he was never heard from again, and it is next to impossible to track absconders and fugitives. Because of this and the grave nature of the crimes charged in the CCCI, bail is never an issue or a possibility in insurgency cases.[166]

The investigative hearing commences when the defendant and his attorney are brought into the examining magistrate's chambers.[167] Since the defendant remains in the custody of the United States, American personnel accompany the defendant, who is unshackled during the hearing.[168] Of course, the judge is also present, along with the judge's assistant, who summarizes the testimony in writing, and the American prosecutor, a judge advocate from either the U.S. Army, Navy, Marines, or Air Force. No Iraqi public prosecutor is present for the investigative hearing. This means that the investigative judge receives no benefit from

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attack on an American base. Then he was turned over to the Iraqis, sent to the notorious Abu Ghraib jail and released. Once free, he returned to his job of killing Americans. . . .").

164. Although Iraq's criminal justice system is utilized to deal with insurgents, one has to remember that they are more than simple criminals and a criminal justice system—whether American or foreign—may not be well-suited for dealing with terrorism cases. *See* Richard A. Posner, *The Constitution Vs. Counterterrorism*, WALL ST. J., Aug. 22, 2006, at A12 ("the criminal justice system is designed for dealing with ordinary crimes, not today's global terrorism"). American forces in Iraq cannot simply seek assistance from the local police precinct in arresting an insurgent who failed to appear for court. In many locations, the American military is the local police, or at least the only trustworthy police force.

165. This is consistent with the Eighth Amendment to the U.S. Constitution, in which "[t]he right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty." Stack v. Boyle, 342 U.S. 1, 4 (1951) (citing Ex parte Milburn, 9 U.S. (9 Pet.) 704, 710 (1835)).

166. *Brady* or Jencks Act rights are also generally not applicable in the CCCI insofar as there is almost never any exculpatory evidence in the hands of the prosecution, and any written statements made by the defendant generally were classified. *See generally*, Brady v. Maryland, 373 U.S. 83 (1963) (requiring the government to disclose to the defendant all exculpatory evidence in the government's possession).

167. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 57 (A) ("An accused person . . . may attend the investigation while it is in progress."). Under Iraqi law, the investigative hearing is not generally open to the public. *Id.* ¶ 57(C) ("No person other than those previously mentioned may attend the investigation unless the magistrate gives permission."). The United States never prevented members of the public from observing the hearings, but because they were held in the magistrates' chambers, members of the public never attended.

168. The practice is thus consistent with *Deck v. Missouri*, 125 S. Ct. 2007 (2005), in which the Court held that the shackling of a convict during the penalty phase of his trial violates due process because it suggests to the jury that the defendant is a threat to the community. In the Iraqi forum there is no jury and thus no possibility that a jury will draw an inculpatory inference from the shackles.

any investigation or preparation by Iraqi prosecutors,[169] as a grand jury would in the United States. It also means that prior to the trial the public prosecutor has no familiarity with a case,[170] so he must rely on the investigative judge's report for any arguments he chooses to make at trial.[171]

After apprising the defendant of his rights, the first prosecution witness—almost always a member of the U.S. Armed Forces, typically the Army—was admitted to the chambers for examination.[172] The defendant and his attorney were present when the witnesses testified. Although the judge, stenographer, attorneys, and witnesses were seated during the examination, the magistrate required the defendant to stand for the entire hearing.[173] Frequently the judge would start the examination by asking the witness his religion, ostensibly for the purpose of determining whether he could efficaciously swear his oath on the Koran.[174] After the oath, the magistrate proceeded to question the witness.

Because most Iraqi judges understood only Arabic,[175] and most American witnesses spoke only English, the questioning was performed through an interpreter supplied by the United States.[176] As the witness

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169. In insurgency cases, the Iraqi prosecutor had no role, except at trial, and then it seemed as though his only role was to thwart conviction of insurgents. They certainly never investigated the cases and never met with American witnesses despite invitations to do so.

170. In many civil-law nations, including Iraq, the prosecutors are considered to be part of the judiciary. MERRYMAN, *supra* note 133, at 104. Under such circumstances, it might be argued that the prosecutor should not have any predispositions about a case, like a trier of fact. This, however, deprives the fact-finder of the benefits that a zealous advocate can bring to a case, particularly an advocate who knows a case inside and out.

171. American prosecutors tried to remedy this unfamiliarity by creating short memoranda for the Iraqi prosecutor and judges. This practice had one significant drawback: its efficacy was dependent upon the judges and prosecutor actually reading the memos. Because of their haphazard filing "system," the lack of technology, and the general chaos in Iraq, papers filed with various judges or the court were frequently misplaced.

172. Prosecution witnesses testified separately, so as to inhibit tailoring of testimony in an effort to produce a uniform version of events. This practice is consistent with Iraqi law, which states that "[t]he evidence of each witness shall be heard separately. . . ." IRAQI CODE OF CRIMINAL PROCEDURE ¶ 62.

173. U.S. soldiers would often offer the defendant a chair, but the Iraqi magistrates almost never permitted the defendants to sit during any part of the hearings.

174. It is worth noting that before the middle 1800s, the testimony of Christians and Jews was not permitted in Ottoman courts. June Starr, *Islam and the Struggle Over State Law in Turkey*, *in* LAW AND ISLAM IN THE MIDDLE EAST, *supra* note 105, at 78.

175. Bert Caldwell, *A Favorable Verdict on Iraqi Courts*, SPOKESMAN-REV., Oct. 4, 2005, at 6A ("The proceedings are conducted in Arabic, so everything is done using translators.").

176. Arabic language interpreters are in short supply in Iraq, and thus American translators can demand a six-figure salary while native Iraqis can command a salary of at least $400 per month. Thomas X. Hammes, *Lost in Translation*, N.Y. TIMES, Aug. 25, 2005, at A23 (noting the dearth of Arabic language translators in Iraq, the problems this presents for troops seeking to

testified, the examining magistrate would summarize the testimony for his assistant, who proceeded to write down whatever the judge instructed.[177] The record, therefore, was at best a brief encapsulation of the essence of the witnesses' testimony, as altered and interpreted by the examining magistrate and his scribe. The shortcomings of such a system are obvious, though Iraq is not the first venue in which the United States has had to contend with this practice.

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communicate with Iraqis and vice versa, and the need to pay translators more than the standard $400 per month); John M. Glionna & Ashraf Khalil, *"Combat Linguists" Battle On Two Fronts*, L.A. TIMES, June 5, 2005, at 1 ("U.S. troops still often rely on hand signals in communicating with Iraqis as entire combat brigades struggle to make do with only one native Arabic-speaking U.S. soldier."); Solomon Moore, *First the Insurgents, Then Marines*, L.A. TIMES, May 14, 2005, at 1 (relating how "Iraqis . . . struggle to communicate with the troops, who often lack interpreters."). The critical need for more interpreters was demonstrated in one American-Iraqi endeavor that failed miserably because of the inability to communicate:

> On a nighttime raid in Ramadi this month, Army Sgt. First Class Chris Chapin, a military adviser to the Iraqi army, said he had not been able to get the Iraqi troops to mount an operation of about 40 men. Chapin had no interpreter with him, and none of the Iraqis could speak English.
>
> "We definitely need to do something about this interpreter thing," said Sgt. First Class Anthony James, 33, of Vicksburg, Miss. "I don't see things changing here. We're not reaching the people." Because the Iraqis and Americans couldn't communicate with one another, they frequently ended up wandering in the middle of the street, yelling commands in English and Arabic and heading in opposite directions.

Tom Lasseter, *Iraqi Forces Still Far From Ready*, PHILA. INQUIRER, Aug. 30, 2005, at A3.

The American military suffered from a similar dearth of German language interpreters after World War II. NOBLEMAN, *supra* note 8, at 74. Even non-military agencies of the U.S. government are in need of Arabic speakers to act as interpreters. *See* Joel Mowbray, *Arabic Words Go Free in Jails*, WASH. TIMES, July 11, 2005, at A1 ("The federal Bureau of Prisons is holding 119 persons with 'specific ties' to international Islamist terrorist groups, yet has no full-time Arabic translators or a system to monitor their communications. . . .").

177. According to Iraqi law:

> An investigation is to commence with the recording in writing of the deposition of the plaintiff or informant, then of the testimony of the victim and other prosecution witnesses and of anyone else whose evidence the parties wish to be heard, and also the testimony of any person who comes forward of his own volition to provide information, if such information will be of benefit to the investigation, and the testimony of any other persons whom the magistrate or investigator learns is in possession of information concerning the incident.

IRAQI CODE OF CRIMINAL PROCEDURE ¶ 58.

In Germany after World War I, German examining magistrates, who initially investigated crimes against the Allied forces before passing them off to Allied officials, occasionally used their power to summarize testimony so as to distort the record.[178] This is one reason why the United States generally did not rely on German courts to try crimes against Americans:

> Under the procedure followed in the examination of suspects and witnesses by German prosecuting authorities—police officials, state attorneys, and judges—no shorthand record is taken of the questions and answers; it is up to the examining official to summarize the statements made. Tuohy has characterized the German judge as 'something of a Torquemada,' but, if he was opposed to the statute that he was called upon to enforce, Torquemada, far from burning his victims, was in a position to act as co-conspirator with his fellow nationals.[179]

The same is true in Iraq, though more so, for in Iraq there is no American judicial body trying the case. Important nuances were often lost as the words of the defendant and witnesses were translated into the words of the investigative judge, not to mention when they were translated from English into Arabic. This problem was compounded on days when the judges were presented with a large number of witnesses and thus often succumbed to the natural temptation to further abbreviate the synopses of the witnesses' testimony.

Since the judges' summaries were written in Arabic, it was impossible for the single translator provided to U.S. forces to translate every court document into English. Consequently American prosecutors were never sure exactly what the judge's synopsis contained, a significant deficiency because the trial judges would later base their decisions on this mysterious record. Because such a system is unreliable and susceptible to manipulation, the Anglo-American common law long ago abandoned this

178. FRAENKEL, *supra* note 30, at 181.
179. *Id.*

quintessentially continental practice.[180] Because of its civil-law roots, this practice survives in Iraq.[181]

Upon completion of a witness's testimony, the judge might ask the defense counsel for any questions he wanted the judge to pose to the witness. The defendant's attorney is free to suggest relevant questions, but all questioning is done at the magistrate's discretion.[182] This is the defense's first chance to "cross-examine" the witnesses, but most defense attorneys declined the invitation and never bothered to suggest any further questions. A few took the opportunity, but they obviously had little experience cross-examining witnesses and thus were generally ineffective. No attorney ever suggested more than three questions, and this reticence was not attributable to the thoroughness of the examining magistrate's questioning.

Some judges also invited American prosecutors to raise any concerns or suggest questions.[183] This was frequently helpful to the judges, since some of them lacked the inquisitorial skills essential to the functioning of the Iraqi inquisitorial system. Also, much could be lost or distorted in the translation from English to Arabic, and so it was sometimes necessary to get the judges back on the right track. For example, in one case, after a brief colloquy, the judge thought the soldier-witness was accusing the defendant of attacking him with a rocket-propelled grenade (RPG). In actuality, the witness asserted only that defendant possessed and

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180. As Sir Matthew Hale explained:

> [Testimony is given at trial] personally, and not in Writing, wherein oftentimes, yea too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dressing of it up in his own Terms, Phrases and Expressions, whereas on the other Hand, many times the very Manner of a Witness's delivery of his Testimony will give a probable Indication whether he speaks truly or falsely, and by this Means also he has Opportunity to correct, amend, or explain his Testimony upon further Questioning with him, which he can never have after a Deposition is set down in writing.

MATTHEW HALE, THE HISTORY AND ANALYSIS OF THE COMMON LAW OF ENGLAND 257-58 (1713).

181. Apparently this lack of a verbatim transcript is common in civil-law countries, despite the inaccuracies, imprecision, and other ill effects it engenders. *See* MERRYMAN, *supra* note 133, at 116 (noting that in civil-law countries the "hearing judge will make notes (there is no verbatim record) of the testimony and dictate a summary to the clerk.").

182. "No question may be addressed to a witness without the permission of the magistrate or investigator. . . ." IRAQI CODE OF CRIMINAL PROCEDURE ¶ 64(A).

183. "U.S. military lawyers who compile evidence in cases related to U.S. interests are usually permitted to ask questions of the witnesses during" a trial's investigative phase. . . ." Finer & Mosher, *supra* note 72, at A11.

transported the RPG. This was easily corrected by suggesting a few simple questions to the magistrate. Although most investigative judges generally seemed to appreciate this help, some judges held that American prosecutors should have no role in the investigative hearing, even the minimal role of suggesting questions. Thus, in some cases, American prosecutors had to insist that the investigative judge ask a certain line of questions, otherwise, the judge would have overlooked key pieces of evidence.

As discussed below, if the investigative judge fails to mention a crucial fact in his investigative report to the trial judges, it is nearly impossible for the prosecution to establish that fact at trial because trial judges perceive such efforts as an unlawful attempt to reopen a closed record.[184] Iraqi law does not support this exclusion of evidence, as it provides that a trial court "may hear the testimony of anyone who attends it himself and anyone who puts himself forward with information[,]"[185] but the CCCI trial judges have a different understanding of the law. Of course, Iraqi defendants are not similarly constrained by this rule, and enjoy complete freedom to submit new evidence at trial.

After the judge's synopsis of the testimony was recorded, the magistrate would sometimes require the initial prosecution witness to draw a sketch of the crime scene, as is required by Iraqi law.[186] When the stenographer had finished recording the summary of the testimony,[187] the judge invited the witness to sign the summary. The summary was written in Arabic and translation resources were scarce, consequently, the American witnesses frequently signed a piece of paper that was completely unintelligible to them, although, if possible, the translator would hastily review the summary for glaring errors or omissions.[188] After the signing, the next

184. Some Iraqi attorneys suggested that under Iraqi law, prosecution witnesses could present testimony at trial, even if their testimony was not contained in the investigative judge's report. Iraqi law supports this assertion as does a plain reading of Paragraph 171 of the Iraq Criminal Procedure Code. Paragraph 171 provides that "[t]he court may hear the testimony of anyone who attends it and anyone who puts himself forward with information. It may summon any person to attend to deliver his testimony if it considered that this testimony will help establish the truth." The majority of CCCI trial judges, however, refused to permit this practice with respect to American witnesses in cases involving attacks on Americans.

185. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 171.

186. *Id.* ¶ 52(B).

187. Recording of the testimony is required by Iraqi criminal procedure. *Id.* ¶ 128(A) ("Statements of the accused are recorded in the written record by the magistrate or investigator and signed by the accused and the magistrate or investigator."); *Id.* ¶ 63 ("Statements by a witness shall be entered into the record of the investigation without any erasures, crossings out, amendments or additions to the text, which when complete shall be read through and signed by the witness . . . .").

188. If time permitted, American prosecutors would ask the interpreter to read the summary

witness would repeat the process until the United States had exhausted its supply of witnesses and the judge's scribe.

After a while, and a few losses, before the CCCI trial court, American prosecutors learned that the trial court would not convict a defendant unless the prosecution produced at least two witnesses who personally saw the defendant commit each element of the crime charged. So investigative hearings inevitably entailed the questioning of at least two prosecution witnesses, and more if they were available and could safely be transported to the courthouse.[189] American military commanders, however, were often reluctant to send witnesses from their units, for obvious reasons: their absence would deleteriously affect military operations, there was a general shortage of combat troops, a lack of transportation assets, and the witnesses would encounter a host of dangers while traveling on Iraqi roads.

After the prosecution presented its case, the defendant was given the opportunity to testify. Iraqi defendants always elected to tell their own tale,[190] despite their right to remain silent. Although the right to refuse to

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to the witness, but this frequently was not feasible in light of limited translation resources, the volume of cases, and the number of witnesses in each case (no less than three for each case, including the defendant), and the fact that the judges worked limited hours (usually half days).

Indeed, the CCCI judges sometimes complained that American prosecutors were bringing too many cases to the court and that this resulted in a burdensome amount of work for the judges. Apparently the concept of working a full day is not a popular one among the Iraqi judiciary, which is better known for its indolence and acquisitiveness than its work ethic:

> Years of service under a regime where personal and political survival was the prime goal had caused the judges to not develop any fiduciary sense of responsibility for their courts. Rather, the main goal of many Iraqi judges was to use their positions to secure as much personal gain as possible. As Coalition JA personnel sought to discuss restoring court operations, senior Iraqi judges focused on obtaining personal cell phones, sport utility vehicles, and air conditioning as a prerequisite to working.

Trebilcock, *supra* note 2, at 48; McGovern, *supra* note 44, at 36 ("In general, judges say their pay is too low, but they do not seem to be working too hard. They work 9 a.m. to 1 p.m. six days per week. Even during those hours, as we walked around the respective courthouses, most judges and courthouse employees were milling about and not too busy working.").

189. Of course, sometimes only one witness saw the defendant commit the crime. Such cases were doomed to acquittal, and after a certain point the American leadership elected not to pursue these cases. In other cases, several witnesses existed, but their combat unit was otherwise sufficiently engaged in important duties that transporting the witnesses to the CCCI courthouse or permitting the witnesses to suspend their duties was essentially impossible.

190. Fleishman, *supra* note 73, at 1 (describing a capital murder trial in the CCCI in which "the little testimony given was mainly the denials of the accused"). This decision not to remain silent demonstrates, by contradiction, the truth that "'the wise are those who hold their tongues.'" Louis Couturat, quoted in BERTRAND RUSSELL, THE AUTOBIOGRAPHY OF BERTRAND RUSSELL 211

answer questions existed under Iraqi law even before the liberation of Iraq,[191] defendants had no means to compel the government to respect this right, and it was frequently ignored. As to judges drawing an adverse inference from a defendant's refusal to answer questions, Iraqi law specifically stated that a "refusal to answer will be considered as evidence against the defendant,"[192] which is consistent with the practices of other civil-law nations. Only changes to the law instituted by the United States prevented this from occurring in the CCCI.

Defendants who elected to testify enjoyed two advantages not afforded to prosecution witnesses. First, consistent with Islamic law and the civil-law tradition,[193] defendants were not required to testify under oath.[194] This probably makes the defendant's mendacity more palatable to his already diminished ethical sensibilities: he lies, but at least he is not lying to Allah or claiming Allah as his witness. For defendants who are devout Muslims, this rule assures that they will not commit blasphemy because they are permitted to lie without having to defile the Koran with a false oath and thereby risk damnation. According to Mohammed, if a person swears a false oath, "'when he will meet God on the day of Judgment he will find His face turned away from him in anger.'"[195] Permitting witnesses to testify without requiring an oath allowed defendants to forego the truth-enhancing function that this threat of perdition would otherwise have engendered.

The second advantage is that defendants testified after hearing the prosecution's entire case, including any weaknesses. In the United States, criminal rules of discovery are such that defendants do not generally get to hear the prosecution's entire case before trial,[196] and at pretrial proceedings, witnesses—other than the defendant—are sequestered to prevent them from adjusting their testimony to ensure their consistency.[197]

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(1967). Notably, Germans tried in American military courts were always eager to tell their own version of events, despite an insignificant penalty for remaining mum. NOBLEMAN, *supra* note 8, at 103.

191. "The accused does not have to answer any of the questions he is asked." IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 126(B), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf.

192. *Id.* ¶ 179.

193. MERRYMAN, *supra* note 133, at 130 ("As a rule the defendant can be questioned during the examining phase and at trial. He cannot, however, be sworn.").

194. "The accused does not swear the oath unless acting as a witness for other defendants." IRAQI CODE OF CRIMINAL PROCEDURE ¶ 126(A).

195. Rahim, *supra* note 127, at 194 (quoting Mohammed).

196. "A criminal defendant is entitled to rather limited discovery, with no general right to obtain the statements of the Government's witnesses before they have testified . . ." at trial. Degen v. United States, 517 U.S. 820, 825 (1996) (citing FED. RULE CRIM. PROC. 16(a)(2)).

197. *See* FED. R. EVID. 615 ("At the request of a party the court shall order witnesses excluded

Most Iraqi defendants took full advantage of this gift, and tailored their testimony accordingly. This free discovery also assisted defendants in marshaling mendacious witnesses for trial who testified in accordance with the defendant's chosen story.

Defendants in multi-defendant cases enjoyed yet another advantage at the investigative hearing: they testified serially and in the presence of their co-defendants with no sequestration.[198] This facilitated a consistency in their testimony that would otherwise have been nearly impossible. It hardly assisted the judges in ascertaining the truth, as the second and subsequent defendants simply parroted the testimony of the first. This anomaly was not of Iraqi origin. Rather, the presence of all defendants during examination by the magistrate was a direct result of American-backed reforms that gave each defendant the right to be present at all judicial proceedings in his case. This presence makes sense under a common-law system, because defendants have a right to attend all judicial proceedings and to confront their accusers, and hearings in the common-law system are truly judicial proceedings.

In contrast, the prevailing nature of CCCI investigative hearings is, as their name indicates, investigative. Investigative hearings give the investigative judges an opportunity to learn about the events underlying the accusations made by the United States. In this situation, it makes more sense to have each defendant testify separately, without the benefit of hearing a co-conspirator's version of events. A thorough examination of defendants, sufficiently separated to prevent collaborative testimony, is much more likely to elicit truthful testimony or expose contradictions. Alternatively, consistent accounts, unaided by listening to a co-conspirator's version of events, would have given credibility to the defendants' independent recollection of the relevant details.

Another advantage enjoyed solely by the defense was its option not to have defense witnesses testify at investigative hearings. Although defendants had a right to present defense witnesses at the investigative hearing,[199] guilty defendants had little incentive to tip their hand in advance of trial. In contrast, the CCCI trial judges frequently barred prosecution witnesses who did not testify at investigative hearings from testifying at trial. In other words, the defendant enjoyed the benefit of complete discovery of the prosecution's case, but had no reciprocal duty to share

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so that they cannot hear the testimony of other witnesses . . . .").

198. For a discussion of the practice of sequestration of witnesses, see generally John H. Wigmore, *Sequestration of Witnesses*, 14 HARV. L. REV. 475 (1901).

199. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 58 (providing that the examining magistrate will hear the testimony of any witness "whose evidence the parties wish to be heard. . . .").

even the general nature of its defense with American prosecutors.[200] Some defendants took full advantage of this at trial by ambushing the prosecution with alibi witnesses.

### 2. The Investigative Judge's Report and Recommendation

After the American prosecutors and the defense had an opportunity to present evidence, the investigative hearing was concluded. The next step was for the investigative judge to prepare his dossier for the CCCI trial court. This report operates like an indictment when it sets forth the investigative judge's determination that there exists sufficient evidence to warrant a trial.[201] In other instances, the report might state that there is insufficient cause to believe that the accused committed a crime, and that he should not face jeopardy on the charges.[202] More often than not, the investigative judges recommended prosecution and referred the case to the trial arm of the CCCI.[203]

Since the investigative judge is ostensibly neutral, his report should contain information in support of the prosecution along with any exculpatory evidence presented or discovered by the magistrate during his independent investigation. But, as mentioned above, many defendants choose not to submit exculpatory evidence at the investigative stage. This presents no problem for them, as they can submit this evidence at trial.

Not so, however, for the prosecution. The investigative report operates as a limitation on the prosecution because evidence not contained in the report generally will not be admitted later at trial. For example, if a soldier was on leave during the investigative phase of a case, but later returned to Iraq and appeared at trial, the CCCI trial court probably would refuse to hear his testimony since this testimony was not part of the investigative

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200. *See* Christopher C. Langdell, *Discovery Under the Judicature Acts, 1873, 1875*, 11 HARV. L. REV. 137, 137 (1897) ("Discovery is in law the compulsory disclosure by a litigant of such facts within his knowledge, of the contents of such documents in his possession, as will aid his adversary in proving his case or defence.").

201. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 130(B) ("If the act is punishable by law and the magistrate finds that there is sufficient evidence for a trial, a decision is issued to transfer the accused to the appropriate court.").

202. *Id.* ¶ 130(A) ("If the examining magistrate finds that the action is not punishable by law or that the complainant has withdrawn the complaint . . . he issues a decision rejecting the case and closing the case file definitively."); *id.* ¶ 130(B) ("If there is insufficient evidence he [the defendant] is not transferred, an order is issued for his release and the case file is closed temporarily, with a statement containing the reasons for the closure.").

203. At this time the magistrate is supposed to inform the public prosecutor of his decision. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 130(E) ("The magistrate informs the public prosecutor when the decision is issued. . . .").

record. This limitation became particularly problematic because a defendant usually does not indicate the nature of his defense until trial, when the prosecution can no longer rebut that defense. Several militants were acquitted because they set forth a defense at trial which the United States could not rebut because key rebuttal witnesses were not listed in the investigative report and, in any event, their testimony was not memorialized in this dossier.

In the CCCI, rules favoring the native-born terrorists sometimes were the product of the judiciary's desire to assist their countrymen in evading justice. If there is a statutory basis for the rule excluding evidence that is not first submitted at the investigative hearing, it is probably paragraph 212 of the Iraqi Rules of Criminal Procedure. That rule states: "The court is not permitted, in its ruling, to rely upon a piece of evidence which has not been brought up for discussion or referred to during the hearing. . . ."[204] Paragraph 212, however, is vague and ambiguous. It is susceptible to the alternative interpretation that the word "hearing" does not mean "investigative hearing," but is the trial itself. Indeed, in other parts of the Code of Criminal Procedure the term "hearing" clearly refers to the trial.[205] Under this interpretation, paragraph 212 mandates nothing more than that the trial judge not base a verdict on extraneous evidence not contained in the trial record. That is, judges must not utilize extraneous evidence in arriving at their verdict.

This interpretation is particularly reasonable when read in conjunction with the next sentence of the paragraph: "The judge cannot give a ruling on the basis of his personal knowledge."[206] Facts or prejudices derived solely from the judges' personal knowledge are similarly not matters contained in the trial record, and thus should never be the basis for a conviction or acquittal.[207] The contents of a judge's personal knowledge would also be matters not contained in the record. It appears, therefore,

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204. *Id.* ¶ 212.

205. *See id.* ¶ 223(A) ("The court retires before giving its ruling. After it has formulated the ruling, *the hearing* is resumed publicly. The ruling is read out to the defendant or its contents are made clear to him.") (emphasis added). Because this provision refers to a ruling being formulated before the hearing is resumed, the "hearing" referred to in this provision must be the trial, and not an investigative hearing, which do not result in rulings per se. But this text is a translation from Arabic, and there is no guarantee that the translation properly conveys all of the law's nuances.

206. *Id.* ¶ 212.

207. The obvious exception is facts which may be judicially noticed. *See* FED. R. EVID. 201(b) (stating that a court may take judicial notice of facts "generally known within the territorial jurisdiction of the trial court. . . ."); Muller v. Oregon, 208 U.S. 412, 421 (1908) ("We take judicial cognizance of all matters of general knowledge."). It is unclear whether Iraqi law permits judges to take judicial notice of common facts.

that the rule ensures a judgment based on evidence admitted at trial, and not outside influences, prejudices, bribes, or other extraneous matters. But even if Iraqi judges were accurately construing this rule to preclude the admission of new evidence at trial, and not just outside influences, they applied this exclusionary rule only to the prosecution, and not to the defendant. There is no statutory basis for this distinction in the criminal procedure law, which further suggests that the Iraqi judges were operating disingenuously to impede the prosecution of native terrorists.

Importantly, there was no way to challenge the contents of the investigative report, especially since the United States frequently was not granted access to the report prior to trial.[208] Even if access were granted, it is unlikely that the reports could have been translated into English in light of the limited number of translators. Thus, if the investigative judge made an error, or a deliberate omission or fabrication, this error or omission would control the prosecution's case at trial.[209] For example, if the investigative judge overlooked the statement of a particular witness in drafting his report, this witness generally would be precluded from testifying at trial. Consequently, the investigative report operates yet again like a common-law indictment because an indictment limits the scope of prosecution. Under American constitutional law, a defendant can only be convicted of felony charges for which he was indicted by a grand jury. The CCCI investigative report goes much further in limiting the prosecution by also limiting the evidence that may be admitted at trial in support of a charge.

### E. *Trials*

Trials in the CCCI are nothing like criminal trials conducted in the federal and state courts of the United States. The differences begin with the

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208. There are conflicting reports as to whether these reports are part of the case file that is meant to be available to the public. Perhaps access will eventually be granted to all parties and the public, as is generally the case in the United States and which is an essential check on the judiciary's power.

209. Iraqi law sets forth the standard for a magistrate's decision to transfer a case to the trial court:

> A decision of transfer should list the name of the accused, his age, profession, place of residence and the offence of which he is accused as well as the time and date of its occurrence and the law which applies, the name of the victim and the evidence obtained, along with the date of issue of the decision, signed by the magistrate and stamped by the court.

IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 131, *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf.

trier of fact. Trials in the CCCI take place before three-judge panels which decide all questions of law and fact.[210] Thus, unlike the common-law system, there are no jury trials in the Iraqi courts,[211] which is consistent with both the civil and Islamic-law traditions.[212] Before trying a case, the trial judges have access to the investigative judge's report and prepare themselves for a trial by reading this report. The court is free to rely solely or partially on the investigative report in reaching its verdict.

Typical of the civil-law system, the actual event of a public trial could be dispensed with entirely, were it not believed that the public nature helps to prevent corruption and adds some transparency to the process.[213] Consistent with this goal, CCCI trials are open to the public,[214] although some reporters have claimed that Iraqi guards barred them from entering the CCCI courthouse.[215] The defendants' family members frequently have

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210. Three-judge panels are the norm in the civil-law system. MERRYMAN, *supra* note 133, at 131 ("The usual provision is for three judges as the trial level. Even where there is no jury, the requirement of three judges reduces the danger of an arbitrary decision.").

211. SMITH ET AL., *supra* note 121, at 358 ("The jury system is not used in criminal procedure."); *Country Report*, *supra* note 119, § 1, ¶ (e) ("There is no jury in the criminal justice system. A three-judge panel decides if a defendant is guilty."); GAO REPORT, *supra* note 57, at 80 n.1 ("Iraq's judiciary is based on a civil law system similar to France's. Under this system, there are no juries. Judges hear cases, determine guilt and innocence, and sentence the convicted.").

212. LAW AND ISLAM IN THE MIDDLE EAST, *supra* note 105, at 5 ("No jury system exists under Islamic law."); Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT'L L. & POL'Y 145, 149-50 (2000) ("Traditional Islamic law provides for a very simple criminal procedure. There is no jury system. There is no prosecutor, in the common law sense. Instead judges conduct the investigation, the examination, and finally, issue the verdict."). The civil law traditionally did not utilize juries, but this is changing in some civil-law countries, such as France.

213. As discussed by Merryman:

> As a consequence of the nature of the examining phase of the criminal proceeding, the trial itself is different in character from the common law trial. The evidence has already been taken and the record made, and this record is available to the accused and his counsel, as well as the prosecution. The function of the trial is to present the case to the trial judge and jury and to allow the prosecutor and the defendant's counsel to argue their cases. It is also, of course, a public event, which by its very publicity tends to limit the possibility of arbitrary governmental action.

MERRYMAN, *supra* note 133, at 130.

214. Liebl, *supra* note 98, at 103 (noting that the CCCI is open to the public); Spinner, *supra* note 101, at A12 ("Although the court is open to the public, not many Iraqis know that it exists.").

215. Rajiv Chandrasekaran & Scott Wilson, *Mistreatment of Detainees Went Beyond Guards' Abuse*, WASH. POST, May 11, 2004, at A1 ("A reporter who tried to enter was turned away twice by guards."). Apparently these were Iraqi guards, not American soldiers.

fared better, perhaps after bribing the Iraqi security forces, and they regularly attend trials, particularly if they reside in the Baghdad area.

### 1. The Iraqi Public Prosecutor

At trial, the Iraqi public prosecutor represents the Iraqi government, and his special role is denoted by his black robe with red trim. An American military prosecutor is also present to represent American interests, but he is substantially handicapped because he has no standing before the court and so is consigned to sit with the public in the courtroom gallery.[216]

The Iraqi prosecutor is familiar with the case only if he has read the report authored by the investigative judge or the synopsis produced by the American prosecutor. The Iraqi prosecutors made a point of never meeting with prosecution witnesses, and never attempted to gauge their credibility by a personal conference with them. There may be a plausible excuse for this insofar as under the civil-law system the prosecutor is an extension of the judiciary, and not necessarily a force seeking the defendant's conviction, as in an adversarial system.[217] Accordingly, by virtue of Iraq's civil-law tradition, the Iraqi prosecutor was not dedicated to ensuring the conviction and punishment of the defendants and, therefore, the United States has no voice in a trial other than the witnesses, whose testimony is confined to the facts of the specific case.

Under the civil-law system, prosecutors play a limited role at trial and the Islamic criminal-law tradition dispenses with prosecutors altogether.[218] Consistent with these two traditions, the Iraqi public prosecutor has the discretion to be the leading actor or merely make a cameo appearance at trial. Consider, on the one hand, the prosecutor who presented evidence against Saddam Hussein in his first trial before the Iraqi Special Tribunal. He vociferously argued that Saddam and his accomplices were guilty of the Dujayl massacre and proceeded to outline the evidence against the defendants.[219] In contrast, the CCCI public

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216. Finer & Mosher, *supra* note 72, at A11 (noting that the U.S. military prosecutors lack standing before Iraqi trial courts); Spinner, *supra* note 101, at A12 ("[T]he U.S. military has no official role in the actual court proceedings, other than to provide witnesses and an interpreter.").

217. McGovern, *supra* note 44, at 35 ("Prosecutors under the Iraqi system do not present the case against the defendant. Rather, they direct the court's attention to the facts in each case and advise the court on the law. Depending on the facts of the case, prosecutors may argue for conviction or acquittal.").

218. Esmaeili & Gans, *supra* note 212, at 149-50 ("Traditional Islamic law provides for a very simple criminal procedure. There is no jury system. There is no prosecutor, in the common law sense. Instead judges conduct the investigation, the examination, and finally, issue the verdict.").

219. Borzou Daragahi & Zainab Hussein, *Hussein's Attorneys Refuse to Attend Hearings*, L.A.

prosecutor made a few general remarks in cases initiated by the United States, and these were frequently disparaging comments about the quality of the evidence put forth by the United States.

Iraqi prosecutors can be largely irrelevant to criminal cases, however, in part because the inquisitorial judiciary plays such a substantial role in civil-law systems. Thus, for example, a CCCI prosecutor may suggest questions for the judges to pose, but does not himself interrogate witnesses at trial,[220] with minor exceptions.[221] The Iraqi prosecutor makes a brief closing statement, but only a few facts specific to the case are mentioned, and it might simply be a request that the court convict or acquit a defendant. Frequently, the prosecutor's arguments made little sense. In short, the Iraqi prosecutor plays such a minor role that if he were absent from a CCCI trial, or if the position were eliminated altogether, it would make absolutely no difference to the outcome of the cases. Indeed, it is not uncommon for the Iraqi prosecutor to take short naps during trials, even in capital murder cases.[222]

Because the Iraqi public prosecutor is supposed to represent the "interests of justice," it also is not uncommon for a prosecutor to argue for acquittal or even attempt to have a case dismissed before trial. The CCCI public prosecutor repeatedly exercised this power to sabotage cases involving American victims.[223] For example, there is the case of Ziyad Hassan, who employed an improvised explosive device (IED) to murder one U.S. soldier and nearly murdered three others who suffered severe injuries. The public prosecutor sought to dismiss the case and strenuously argued for acquittal based solely on the defendant's concocted alibi. Three

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TIMES, Oct. 24, 2005 ("As the trial opened, he launched a lengthy attack against the crimes of the former regime that prompted at least two vocal objections from the other side of the courtroom.").

220. This is typical of the continental system. NOBLEMAN, *supra* note 8, at 71 ("One of the outstanding differences between American and continental practice is the role of the judge. In continental practice it is the judge, rather than the prosecutor or counsel for the accused, who conducts the trial and actively examines the accused and all witnesses for both sides.").

221. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 168(B), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf ("The court may ask any question necessary in order to clarify the facts after completion of the testimony. The public prosecutor, complainant, civilian plaintiff, a civil official and the defendant may discuss the testimony via the court and ask questions and request clarifications to establish the facts.").

222. Fleishman, *supra* note 73, at 1 (noting that during a capital murder trial the "prosecutor nodded off for a moment").

223. Teri Weaver, *Insurgent's 15-Year Jail Sentence is Little Consolation for Murdered Soldier's Unit*, STARS AND STRIPES (Mideast), June 20, 2005, *available at* http://www.estripes.com/article.asp?section=104&article=29868 (noting that the "Iraqi prosecutor tried twice to get the case [involving the murder of an American victim] dismissed").

of the defendant's friends claimed that he was at work at the time of the attack.[224]

The public prosecutor repeatedly attempted to derail the case despite solid testimony from American military personnel. The testimony indicated that they pursued the defendant from the scene of the attack and captured him nearby, thereby negating the possibility of mistaken identity. The prosecutor chose to ignore the testimony of the American witnesses, however. As Hassan's case demonstrates, in cases involving attacks on Americans, justice would have been better served had there been no Iraqi prosecutor. For obvious reasons, the Coalition Provisional Authority at least should have entrusted American prosecutors with the task of presenting the case against any defendant charged with attacking Americans.[225]

### 2. The Defense

The defendant, of course, is also present at the trial, although trial in absentia is permitted.[226] The accused is entitled to counsel—a right not

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224. Finer & Mosher, *supra* note 72, at A11:

> Hassan's trial began on March 15. Five U.S. soldiers testified, and the judge charged him [Hassan] along with a brother who was also detained at the scene of the attack—with terrorism. But a month later, one day before the final phase was to begin, the Iraqi prosecutor told [Lieutenant Colonel John] Dunlap the staff judge advocate, he would seek to have the case dismissed. Three of Hassan's co-workers had come forward to testify that he had been at work when the bombing took place, and the prosecutor said he found their statements credible.
> * * *
> When the trial ended, the prosecutor again argued that the case should be dismissed, citing the alibi the defendant had offered.

*Id.*

225. Better yet, the CPA should have utilized American military commissions to try these cases.

226. Hearings in absentia are also permitted. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 135.

> If the defendant does not appear before the examining magistrate or investigator, and is not arrested despite the use of methods of compulsion as stipulated in this law, or if he escapes after arrest or detention, and if there is sufficient evidence for a transfer to court, the examining magistrate issues a decision of transfer to the court responsible in order for a trial to be conducted in his absence.

*Id.* (the defendant must be afforded constructive notice by publishing the date of his trial in a local newspaper).

enjoyed under Saddam Hussein[227]—who wears a black robe highlighted with green trim. Because the defendant is in the dock,[228] and the defense attorney is seated near the defense podium, they cannot consult with one another, further negating the value of having a defense attorney present at trial.[229]

As mentioned above, indigent terrorists were provided an Iraqi attorney at taxpayer expense.[230] The CCCI appoints counsel for both the investigative and trial stages of the case. Court-appointed counsel, however, frequently had never met with their clients prior to trial.[231]

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This issue came up in a case where an insurgent had escaped from Abu Ghraib or had been released by mistake. It was difficult to get the court to publish the official notice, and the clerks claimed that the court lacked the funds to pay for a published notice. Iraqi law provides:

> If it becomes clear, once the notification has been issued, that the defendant has absconded, a summons or arrest warrant is pinned up at his place of residence if known, published in 2 local newspapers and announced on the radio or television in the case of significant felonies or misdemeanours, in accordance with a decision by the court. An appointment is set for the trial within a period of no less than a month from the last date of publication in the newspaper for a misdemanour or an infraction and 2 months for felonies.

*Id.* ¶ 143(A); *id.* ¶ 147(A) ("The trial will take place when the two parties attend. If the accused has absconded or is absent without legal excuse, despite his having been informed, a trial will take place in his absence."). In U.S. federal courts, trials in absentia can occur if the defendant voluntarily absconds after his trial has commenced. *See* FED. R. CRIM. P. 43(c)(1)(A); Crosby v. United States, 506 U.S. 255, 260 (1993).

227. Of course, since the outcome of trials under Saddam were predetermined, the denial of the right to counsel was the least of a defendant's problems. As Captain McGovern noted:

> Under the former regime, people charged with political crimes were prosecuted in these [special security] courts, provided they were afforded a trial at all. In fact, they really were not traditional courts at all but rather part of the security apparatus of the regime. They existed for the sole purpose of bringing the appearance of legality to the criminal and barbaric conduct of the former regime. Defendants in these courts had no right to counsel and anyone who was assigned to the case was used to help present the case against the defendant.

McGovern, *supra* note 44, at 39.

228. Spinner, *supra* note 101, at A12 (describing the CCCI dock as "an ornately carved wooden cage at the front of the room.").

229. Williamson, *supra* note 2, at 240.

230. This was a requirement of Iraqi criminal procedure. "The Head of the Court of Felony appoints a lawyer for the defendant if he has not appointed one and the court sets remuneration for the lawyer during judgment on the case. . . ." IRAQI CODE OF CRIMINAL PROCEDURE ¶ 144(A).

231. *See* Fleishman, *supra* note 73, at 1 (describing a defense attorney in a capital murder case who represented four defendants whom he had never met):

Sometimes the attorney appointed for the investigative hearing was not the same one appointed for the trial, making their utility dubious.[232] Court-appointed attorneys apparently are paid the same either way, so they have little incentive to make any extra effort, as their performance regularly demonstrated.[233] It is also common for a defense attorney to represent multiple defendants in a single case, even if they might otherwise plead conflicting defenses.[234]

Hired counsel, however, are sometimes zealous advocates for their clients, with some going so far as to forge official documents in an effort to obtain acquittals. Still, their role is also minimal compared to defense attorneys in a common-law system. Like prosecutors, defense counsel could be banished from the CCCI and this would not affect most of the cases.[235] After all, they do not: make an opening statement; cross-examine prosecution witnesses; examine defense witnesses; advise their clients during trial; research, prepare, or file legal memoranda; or prepare jury instructions. They make only a brief closing argument that hardly changes

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> Ghalib Rubaii sweated in a wrinkled black robe. The homicide lawyer had received a call the night before, the friend-of-a-relative-of-a-friend kind of call coming from a poor street in a mean neighborhood. He would represent the defendants.
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> "I don't know all the details," he said. "I haven't seen the full case." When asked if he had met his clients, he said no. He double-checked a piece of paper to remember their names.
>
> The trial would begin in 20 minutes.

*Id. See also* James Glanz & Sabrina Tavernise, *3 Set to Hang As Executions Return to Iraq*, N.Y. TIMES, Aug. 17, 2005, at A1 (stating that in Iraq, defendants "see their lawyers rarely, or not at all, before trial."). One of Saddam Hussein's co-defendants in the Iraqi Special Tribunal trial for the Dujayl massacre also claimed that he had never met his court-appointed attorney prior to the commencement of the proceedings. Richard Boudreauz & Borzou Daragahi, *Defiant Hussein, Co-Defendants Plead Not Guilty, Win Trial Delay*, L.A. TIMES, Oct. 20, 2005, at 1 ("Azzawi Ali, after identifying himself as a farmer, harangued the bench, saying he had just met his court-appointed lawyer.").

232. American security forces who escorted detainees to the CCCI courthouse permitted conferences with attorneys and their clients before and after hearings, as well as trials. It was the Iraqi defense attorneys who frequently elected not to avail themselves of this privilege.

233. GAO REPORT, *supra* note 57, at 83 ("[I]n some trials, CCCI defense attorneys asked no questions").

234. Fleishman, *supra* note 73, at 1 (describing a capital murder case in which one defense attorney represented all four co-defendants).

235. *Country Report*, *supra* note 119, § 1, ¶ (e) (noting that prosecutors and defense counsel "asked few, if any, questions due to the questioning that has already occurred by the investigative or trial judges. The prosecutors and defense counsel routinely gave initial and final statements to the court.").

from case to case. With such systematic indolence, it is hard to imagine the prosecution ever losing a case, but this regularly happens. Recall that both Iraqi prosecutors and defense counsel have been steeped in an inquisitorial system that used tortured confessions and bribes to decide cases, so there was little need or opportunity for Iraqi lawyers to utilize or develop advocacy skills. It has been suggested that an Iraqi defense counsel's chief function is to act as a conduit for bribes.[236] In such cases, their efforts may prove beneficial to their clients after all.[237]

### 3. Commencement of Trial and the Prosecution's Case

Unlike in American courts, the CCCI three-judge panel is already seated on the bench when the doors of the courtroom are opened for the public to enter. The presiding judge calls the case as the defendants are escorted to the dock.[238] The chief judge then sets forth the charges, apparently reading verbatim from the charging document. Once advised of the charges, the prosecution's witnesses, if there are any,[239] begin testifying.[240] Usually neither the prosecution nor the defense makes an opening

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236. Before the liberation of Iraq, "most judges earned more money accepting bribes than meting out impartial justice. 'Lawyer' and 'fixer' came to be used interchangeably . . . ." BRAUDE, *supra* note 123, at 175. Trebilcock, *supra* note 2, at 48 (noting that under Baathist-Iraq, favorable verdicts were often dependent on bribing the judges). The use of bribes to fix cases has been a long-standing problem in the Middle East. *See Oriental Laws and Lawyers*, *supra* note 126, at 42 ("In giving counsel to a client it is not in reference to the points of law to be established, or any specific declarations which are to be sustained by evidence. On the contrary the lawyers endeavor to explain the surest and most economical method of bribing the kadi.").

237. McGovern, *supra* note 44, at 35 ("One woman to whom we spoke in Najaf stated that no one worked according to the law; rather, the legal system worked through personal relationships. The lawyers would invite the judges and the police commissioner to a feast and they would work things out regardless of the law. She stated that if she wanted to win a criminal case, she had to have a sexual relationship with the policeman.").

238. Under Paragraph 109 of the Iraqi Criminal Proceedings Law, the courts theoretically can release a defendant on bail pending trial. *See* IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 109(A), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf. The United States ensured that this never happened with insurgents who attacked Coalition Forces in light of the additional danger created for troops, and the unlikelihood of the defendant ever appearing for trial. But even without American insistence, pretrial release is uncommon in Iraqi courts. *Country Report*, *supra* note 119, § 1, ¶ (d) ("Lengthy pretrial detention continued to be a significant problem due to backlogs in the judiciary and slow processing of criminal investigations.").

239. In the civil-law system, the trial court can base it decision to convict or acquit on the record compiled by the examining magistrate, thus dispensing with live testimony at trial.

240. According to Iraqi criminal procedure:

statement;[241] instead, the court relies on the record compiled by the investigating magistrate for context and an overview of the case. When witnesses testify at trial, the chief judge questions them, which is consistent with the civil-law inquisitorial system.[242]

As discussed more fully below, the CCCI will not convict a defendant unless there are at least two witnesses who testify under oath that the defendant committed the crime charged.[243] This means that for each case there must be at least two witnesses who will testify that they observed the defendant commit each element of the crime (other than a mens rea element).[244] They testify serially and are separated while testifying so as to prevent witnesses from parroting the testimony of the prior witness.[245]

In terrorism cases involving attacks on American personnel, the United States is responsible for ensuring that witnesses are present at trial. This is no small feat since the time expended by soldiers in prosecuting cases means time away from fighting the war.[246] Furthermore, even contacting witnesses proved difficult in light of the communications systems available

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> The trial begins with the summoning of the defendant and other parties and the formal identification of the defendant. A decree of transfer is then issued. The court hears the testimony of the complainant and the statements of the civil plaintiff, then sees the evidence and orders the reading of the reports, investigations and other documents. The statements of the defendants are then heard, along with the petitions of the complainants, civil plaintiffs, civil prosecutor and public prosecutor.

IRAQI CODE OF CRIMINAL PROCEDURE ¶ 167.

241. This is consistent with the practice of other civil-law countries, including the former Soviet system. EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 338 (1958) ("[T]he opening statement of the prosecutor is not known in Soviet law at all.").

242. The Soviets and French thought this was the appropriate mechanism for interrogating the Nazi defendants at Nuremberg. *Id.* ("The Russians were of the opinion that the tribunal itself, that is, the judges, being the highest authority, should be the first to interrogate the defendants. The French were of the same opinion, following, as they did, the continental practice.").

243. Islamic "rules of evidence, which have been elaborated in the Koran and the *Sunna* and in its early applications, have always been a bulwark for the rights of the accused." M. Cherif Bassiouni, *Foreword*, *in* ISLAMIC CRIMINAL LAW AND PROCEDURE, *supra* note 116, at xi.

244. As noted above, the CCCI sometimes relied on the examining magistrates' reports instead of hearing live testimony from witnesses.

245. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 168(c) ("It is permissible to remove the witness whilst the testimony of another witness is being heard and the witness may be confronted by another witness during the testimony."). Defense witnesses were not subject to this requirement, giving the defense yet another advantage.

246. *See generally* Robert H. Bork & David B. Rivkin, Jr., *A War The Courts Shouldn't Manage*, WASH. POST, Jan. 21, 2005, at A17 (noting that judicial processes will entail "calling witnesses from the combat zone, a procedure that would divert American soldiers form waging war").

to the military in Iraq.[247] Even when their presence is requested at trial, witnesses may still have to travel from the hinterlands of Iraq, and frequently are delayed by roads infested with IEDs or terrorists waiting to ambush convoys.[248]

In Continental European criminal courts it is common for trials to be based on the dossier or report prepared by the investigating magistrate.[249] This permits the court to dispense with many of the witnesses, and the procedural safeguards, required in an Anglo-American forum.[250] The CCCI

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247. Most insurgents have cell phones, which they use to detonate IEDs, but U.S. soldiers make due with less advanced means of communications. While some soldiers purchased their own cell phones, there is no central directory for contacting them through these phones.

Attorneys in the Hurricane Katrina-ravaged South faced many of the same problems that American prosecutors in Iraq faced, including difficulty finding witnesses and evidence along with inadequate communication and transportation assets. *See* Brad Townsend & Lee Hancock, *Katrina Leaves Louisiana Criminal Justice System in Disarray*, CHARLOTTE OBSERVER, Sept. 11, 2005, at 15A (noting the difficulties prosecutors will face in prosecuting cases after Hurricane Katrina has scattered witnesses and destroyed evidence); *see* Thomas M. Burton, *Louisiana Legal System Is Snarled*, WALL ST. J., Sept. 9, 2005, at A12 (discussing the difficulties of finding witnesses and documents essential for litigating cases); *see also* Peter Applebome & Jonathan D. Glater, *Storm & Crisis: The Lawyers; Storm Leaves Legal System a Shambles*, N.Y. TIMES, Sept. 9, 2005, at A1.

248. The roadside bombs are among the leading killers of U.S. soldiers. Mark Washburn, *Iraq's Insurgents Build Bigger, Better Bombs*, MIAMI HERALD, June 10, 2005, at A20 ("Improvised explosive devices, the roadside bombs that insurgents build from castoff artillery shells and munitions, have become the No. 1 killer of American troops in Iraq this year, despite a massive U.S. campaign to blunt their effectiveness."); Bradley Graham & Dana Priest, *Insurgents Using U.S. Techniques*, WASH. POST, May 3, 2005, at A15 ("Roadside bombs—the military calls them 'improvised explosive devices,' or IEDs—continue to rank as the number one killer of U.S. troops in Iraq, according to Pentagon figures. About half of all combat casualties in Iraq are attributed to them.").

249. This is based on a long-standing practice that dates to medieval ecclesiastical courts. MERRYMAN, *supra* note 133, at 113 (noting that in civil cases in civil-law countries often "evidence is received and the summary record prepared by someone other than the judge who will decide the case. . . . [C]ontemporary procedural institutions in the civil law world have been strongly influenced by medieval canonic procedures. In the canon law proceeding, evidence was taken by a clerk, and it was the clerk's written record that the judge used in making his decision."). In light of this long-standing tradition in continental Europe, the same practice was utilized at the Nuremberg trials of Nazi war criminals. GERHART, *supra* note 241, at 359 ("General Donovan argued earnestly that the American case should be proved through the testimony of witnesses. Justice Jackson believed that it was too risky to use enemy witnesses, for regardless of how favorable their previous testimony, on cross-examination a great deal of unfavorable testimony could result.").

250. POSNER, *supra* note 151, at 175. Judge Posner describes a criminal trial typical of the Continental European legal systems:

> [A criminal trial] in the sense of an evidentiary hearing with live testimony, is preceded by a comprehensive investigation by an examining magistrate, who lays

touts a preference for live testimony, influenced by advisors from the United States, but from time to time the court succumbs to the influences of the Continental tradition,[251] particularly in cases in which it was impossible for witnesses to be present.[252]

In such cases, the court will rely solely on the record prepared by the examining magistrate, and the chief judge will somnolently read the examining magistrate's synopsis of the witnesses' testimony into the record,[253] verbatim.[254] Of course, this would hardly comport with the Confrontation Clause of the Sixth Amendment of the U.S. Constitution,[255] which the Framers designed to ensure that the United States did not adopt the civil-law practice of trial by affidavit in criminal cases.[256] Long ago the English common law abandoned the practice because of the danger of erroneous transcription of testimony before the examining magistrate, and the inability to correct these mistakes at trial, among other reasons. As Sir Matthew Hale explained:

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> his findings, in the form of a dossier or report, before the judge or panel of judges that is to conduct the actual trial. Armed with the dossier, the trial panel calls witnesses only as needed to fill gaps or resolve conflicts.

*Id.*

251. This is similar to the way civil proceedings are conducted in civil-law jurisdictions. *See* MERRYMAN, *supra* note 133, at 111-12 ("A typical civil proceeding in a civil law jurisdiction is divided into three separate stages. There is a brief preliminary stage, in which the pleadings are submitted and a hearing judge (usually called the instructing judge) appointed; an evidence-taking stage, in which the hearing judge takes the evidence and prepares a summary written record; and a decision-making stage, in which the judges who will decide the case consider the record transmitted to them by the hearing judge, receive counsel's briefs, hear their arguments, and render decisions.").

252. The Egyptian mixed courts had a similar policy. *See* BRINTON, *supra* note 134, at 120 (stating that the witnesses' testimony to the examining magistrate may not be communicated to the trial court except through their own testimony "unless it was impossible to secure their attendance at trial").

253. This is done even in murder cases. *See Iraqi is Convicted in Shooting Death of U.S. Reservist*, ASSOCIATED PRESS, Dec. 12, 2004 (stating that in the case of Alaa Sartell Khthee, an Iraqi convicted of killing Navy Lt. Kylan Jones-Huffman, "the two prosecution witnesses were not present at the trial, but their sworn testimony was admitted. . . .").

254. One must keep in mind that the record is the examining magistrate's synopsis of the witnesses' testimony, and not a verbatim record of their testimony.

255. *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

256. *Id.* at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of ex parte examinations as evidence against the accused"); Mattox v. United States, 156 U.S. 237, 242 (1895) (stating that "[t]he primary object of the [Confrontation Clause] . . . was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness. . . .").

> [Testimony now is given at trial] personally, and not in Writing, wherein oftentimes, yea too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dressing of it up in his own Terms, Phrases, and Expressions, whereas on the other Hand, many times the very Manner of a Witness's delivery of his Testimony will give a probable Indication whether he speaks truly or falsely, and by this Means also he has opportunity to correct, amend, or explain his Testimony upon further Questioning with him, which he can never have after a Deposition is set down in writing.[257]

But the Iraqis, consistent with the civil-law tradition,[258] do not consider it necessary to afford a defendant the opportunity to confront adverse witnesses at trial.[259] As Sir Matthew Hale pointed out, this practice also

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257. HALE, *supra* note 180, at 257-58.

258. "English common law has long differed from continental civil law in regard to the manner in which witnesses give testimony in criminal trials. The common-law tradition is one of live testimony in court subject to adversarial testing, while the civil law condones examination in private by judicial officers." *Crawford*, 541 U.S. at 43 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373-74 (1768)). In the civil-law tradition, it is thought that a "documentary curtain" would "produce a greater likelihood of fair proceedings, unaffected by influence brought to bear on the judges by interested persons." MERRYMAN, *supra* note 133, at 114. But civil-law countries are moving away from this view, for reasons of credibility determination, as opposed to the idea that a defendant ought to be free to confront his accusers. *See id.* ("preparation of the record by someone other than the judge who is to decide the case is now seen to be a defect because it deprives the judge of the opportunity to see and hear the parties, to observe their demeanor, and to evaluate their statements directly"); *Righting the Scales*, *supra* note 108, at 45. Some Mexican states seek "to move from a Napoleonic inquisitorial system, where prosecutors take most of the decisions and judges act largely as rubber stamps, toward a more British- or American-style adversarial system in which oral arguments before a judge in court play a key role." *Id.*

259. "The Confrontation Clause of the Sixth Amendment gives the accused the right 'to be confronted with the witnesses against him.' This has long been read as securing an adequate opportunity to cross-examine adverse witnesses." United States v. Owens, 484 U.S. 554, 557 (1988). As Chief Justice Warren noted, this right was considered essential to fairness even in Roman times:

> When Festus more than two thousand years ago reported to King Agrippa that Felix had given him a prisoner named Paul and that the priests and elders desired to have judgment against Paul, Festus is reported to have stated: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning the crime laid against him."

forfeits a key ancillary benefit of confrontation: an opportunity for the trier of fact to assess credibility based on an observation of the witnesses' demeanor and manner of speech.[260] Lack of confrontation also makes a liar's task easier insofar as he does not have to lie to the face of his victim. As the U.S. Supreme Court recognized: "It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.'"[261] Similarly, lack of confrontation means that the judges or attorneys cannot propound clarifying questions or expose erroneous testimony by a witness.[262] Although American advisors encouraged the CCCI to adopt a system entailing live testimony and a confrontation right for all defendants, the Iraqi judges obviously have not fully embraced this concept,[263] and were

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Greene v. McElroy, 360 U.S. 474, 496 n.25 (1959) (Warren, C.J.) (quoting *Acts* 25:16); *see also Crawford*, 541 U.S. at 43 ("The right to confront one's accusers is a concept that dates back to Roman times.").

260. *See* Mattox v. United States, 156 U.S. 237, 242-43 (1895) (stating that the Confrontation Clause compels a witness "to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). This facet of a lack of confrontation also does not seem to concern practitioners in the civil-law systems. MERRYMAN, *supra* note 133, at 116 (noting that frequently in civil-law systems, the "hearing judge's recollection of the witness's hesitancy, furtive demeanor, or patent insincerity—unless reflected in the written summary of his testimony in the record—cannot affect the findings of fact."). Under Iraqi law, the trial court is the sole judge of credibility. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 215, *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf ("The court has absolute authority in evaluating testimony. It can either fully accept it, or reject it, accept the statements given by the witness during the police investigation or during reports from the primary investigation or given in front of another court in the same case, or completely reject the witness' statements.").

261. Coy v. Iowa, 487 U.S. 1012, 1019 (1988).

262. Again, Sir Matthew Hale states:

> [B]y this Course of personal and open Examination, there is Opportunity for all Persons concerned viz. the Judge, or any of the Jury or Parties, or their Council or Attornies, to propound occasional Questions, which beats and bolts out the Truth much better than when the Witness only delivers a formal Series of his Knowledge without being interrogated and on the other Side, preparatory limited, and formal Interrogatories in writing, preclude this Way of occasional Interrogations, and the best Method of searching and sifting out the Truth is choked and suppressed.
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> Also by this personal Appearance and Testimony of Witnesses, there is Opportunity of confronting the adverse Witnesses, of observing the Contradiction of Witnesses sometimes of the same side, and by this Means great Opportunities are gained for the true and clear discovery of the truth.

HALE, *supra* note 180, at 258.

263. In terrorism cases, the Iraqi judges had already lost much in the translation, as most

almost always willing to revert to their civil-law practice of omitting confrontation and instead relying on the investigative report for a determination of the facts.[264]

This practice sometimes proved beneficial to the United States, because it necessarily denied the defendant the opportunity to cross-examine prosecution witnesses at trial.[265] Normally, in American courts, the prosecution can prevail despite the cross-examination of its witnesses, but the CCCI is not a normal court. At trial, in the CCCI, even with the abbreviated cross-examination common in the CCCI, a simpleton defense attorney should have been able to elicit from prosecution witnesses a few contradictions, ambiguities, or memory lapses. After all, most of the prosecution witnesses were U.S. service personnel and were vulnerable to minor lapses in memory because of their long shifts,[266] their lack of sleep,[267] the stress of battle, the speed and surprise with which attacks occurred, and the minor inaccuracies that resulted from translation of the witnesses' testimony from English to Arabic.[268]

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prosecution witnesses were U.S. soldiers who did not speak Arabic, and the judges did not speak English.

264. Fleishman, *supra* note 73, at 1 (discussing a capital murder trial involving four defendants in which no prosecution witnesses testified at trial).

265. Of course, the defendant had an opportunity to cross-examine the prosecution's witnesses at the investigative hearing. The concept of trials devoid of live witnesses never sat well with American prosecutors, probably because "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017 (quoting Pointer v. Texas, 380 U.S. 400, 404 (1965)).

266. *See* Jonathan Roberts, *Iraq War: Media Distortions Shut Out Positives*, ATL. J.-CONST., Sept. 16, 2005, at 17 (recounting that U.S. soldiers in Iraq have worked "16 ½-hour days for months on end, with only one day off. . . ."); Jonathan Finer, *In Tall Afar, A Brawl to Blow Off Some Steam*, WASH. POST, Sept. 14, 2005, at A27 (noting that U.S. soldiers were working "18-hour days").

267. Finer, *supra* note 266, at A27 (noting that the U.S. soldiers involved in one campaign "had slept an average of less than five hours a night over nearly two weeks and were exhausted." They were constantly on foot and constantly on the move from the moment they woke on a rooftop or living room floor or back yard of a commandeered home.).

268. Attorneys David B. Rivkin, Jr. and Lee A. Casey have noted the difficulties of applying America's properly high standards of evidence utilized in civilian-law enforcement cases to the evidence—including testimony derived from a soldier's memories of attacks—obtainable under battlefield conditions:

> Moreover, there are numerous practical difficulties in applying a law enforcement paradigm to the war on terror. For example, civilian courts assume and expect that the prosecution will be able to obtain sufficient evidence against an accused in a context where the evidence can be collected, controlled and validated based on a "chain of custody." This is impossible when the "crime scene" is a foreign battlefield, which may include hundreds of square miles, where American forces

Despite careful preparation of the witnesses, they sometimes misstated the exact time or date of an incident, the number of bullets or number and types of weapons recovered from the scene,[269] the names of each of the defendants, or the list of other soldiers who were present. This created minor contradictions with the testimony of other prosecution witnesses or with an individual witness's own prior testimony before the investigative judge.[270] In light of their frequent exhaustion, the "fog of war," and the fact

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> are engaged in ongoing combat operations. Even eyewitness accounts by the capturing U.S. personnel can be successfully challenged by defense lawyers, educating the jury about fear, confusion and the fog of war that permeates all combat.

David B. Rivkin, Jr. & Lee A. Casey, *The Flawed Alternatives*, WASH. TIMES, Sept. 9, 2005, at A23.

269. Soldiers have recovered plenty of munitions—well over 400,000 tons—from foreign terrorists (Iraqis) with similar first names (frequently "Mohammed") and unfamiliar and unusual surnames and tribal names. This makes it unlikely that soldiers will remember the minute details of recovering munitions from a particular defendant unless they are instructed to write reports of their activities and are afforded the means and an opportunity to do so. Mark Mazzetti & Maggie Farley, *White House Downplays Missing Iraq Explosives*, L.A. TIMES, Oct. 26, 2004, at A1.

270. When the soldiers are at the scene of a terrorists attack, they frequently receive hostile fire when collecting evidence, or have just finished a firefight. *See* Michael M. Phillips, *In Iraq, U.S. Troops Try to Beat Ambushers at Their Own Game*, WALL ST. J., Jan. 13, 2006, at A1 (describing an incident where Marines went to recover the body of a terrorist they had killed, hoping to obtain intelligence, whereupon "other insurgents opened fire, setting off a brief skirmish"). Remembering details for a subsequent trial is not their first priority. *See* Phillip O'Connor, *City Prosecutor Pursues Attackers in Iraq*, ST. LOUIS POST DISPATCH, Mar. 4, 2004, at A1 (noting that witnesses were not concerned with "making a prosecutable case," rather "[t]hey were concerned with rounding up the people who created a threat to them and their buddies. Making a good solid case, getting all the evidence corralled, naming names and contacts, taking photographs, chain of custody—these are thoughts that didn't cross their mind.") (quoting COL Dwight Warren, former Chief American Special Prosecutor). "'The paperwork (needed) for convicting these guys is substantial,' says Capt. Bart Nagle, 35, of Richmond, Va., the intelligence chief for the Marine battalion in Ramadi." Zoroya & Jervis, *supra* note 9, at A1.

With increased training and constant reinforcement, evidentiary collection has improved. Smith & Salman, *supra* note 19, at A1; *see also* Zoroya & Jervis, *supra* note 9, at A1 (noting that "[n]early every Humvee in the Army's 3rd Infantry Division is stocked with an 'evidence kit,' which includes blank sworn-statement forms, a digital camera, plastic gloves and a spray that detects gunpowder residue").

The difficulty of obtaining evidence on the battlefield may account for the fact that the United States prosecuted only a small fraction of Iraqis whom they have detained, while releasing the vast majority of those arrested. Chandrasekaran & Wilson, *supra* note 215, at A1 ("Of the 43,000 Iraqis who have been imprisoned at some point during the occupation, only about 600 have been referred to Iraqi authorities for prosecution. . . .") Although the U.S. also released prisoners when it cut deals with terrorists, such as the Sunnis. *See* Michael Georgy, *U.S. Releases 1,000 from Abu Ghraib Prison*, WASH. TIMES, Aug. 28, 2005, at A1 ("The U.S. military said yesterday that it freed 1,000 detainees from Iraq's Abu Ghraib prison at the Baghdad government's request, in the largest release

that these soldiers had other things on their minds—like survival—it is surprising that more contradictions were not elicited.[271]

Beyond misstatements at trial, "contradictions" were also created due to the lack of a verbatim transcript of the investigative hearing. The record of the investigative hearing, because it is a mere summary of the investigative magistrate's understanding of the witnesses' testimony, is rife with imprecision and inaccuracy.[272] An accurate investigative report is dependent upon an accurate translation of the witness's testimony by the translator, an accurate paraphrasing by the investigative judge, and an accurate recording of the judge's synopsis by his scribe.[273] At trial, the witness was again dependent upon the translator to express the witness's thoughts to the trial court. If the translator, judge, or scribe made an error at the investigative hearing, the soldier's testimony at trial would often "contradict" his prior testimony, even though the testimony from the witness's mouth was always accurate and consistent.

When acquitting defendants, a court might speciously focus on these contradictions,[274] claiming that the witnesses were obviously fabricating

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to date. It was not clear whether the decision [to release the Sunni prisoners] was linked to a demand from Arab Sunnis opposed to a draft constitution. . . .").

Unfortunately, some of the released prisoners were members of terrorist organizations and have used their freedom to strike at their former captors yet again. Hanson, *supra* note 163, at C25 ("It turns out that the terrorist had been captured earlier in December 2004, on suspicion of being involved in a deadly suicide attack on an American base. Then he was turned over to the Iraqis, sent to the notorious Abu Ghraib jail and released. Once free, he returned to his job of killing Americans . . . ."). The U.S. was committed to trying cases in which there was a reasonable chance of prevailing at trial, and the CCCI ensured that these cases were few.

271. John H. Wigmore, *Some Lessons for Civilian Justice To be Learned from Military Justice*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 170, 170 (1920) ("The prime object of military organization is Victory, not Justice. The Army's object is to kill, disable, or capture our enemy before he can kill or capture us. In that death-struggle which is ever impending, the Army, which defends the Nation, is strained by the terrific consciousness that the Nation's life and its own is every moment at stake. No other objective than Victory can have first place in its thoughts. . . .").

272. A difference of merely one word can have a dispositive impact on a case. *See* Heather Won Tesoriero, *At Vioxx Trial, Fast Talkers Challenge Court Stenographer*, WALL ST. J., Oct. 25, 2005, at B1, B4 (noting that in trials, very "subtle differences between words can be crucial. Lawyers here recently argued over whether one of the parties had stated that Merck received reprimanding 'letters' or a single reprimanding 'letter' from the Food and Drug Administration related to its marketing practices for Vioxx.").

273. In civil-law countries, the record compiled by the investigative judge is typically made available for examination by the prosecutor and defense counsel before trial. They can, therefore, ensure its accuracy or at least argue that portions are inaccurate. MERRYMAN, *supra* note 133, at 130 ("[T]his record is available to the accused and his counsel, as well as the prosecution"). That was not always the case with the CCCI, however.

274. Tommy Santora, *LA Army National Guard Lawyers Help Convict Iraqi Terrorists Who*

evidence,[275] but ignoring the fact that the witness testimony was in perfect accord on all major points and that the practice of using handwritten synopses practically guarantees that the system will be rife with "contradictions," inconsistencies, and errors. In doing so, the trial judges also sometimes ignored more egregious contradictions in the defendants' testimony, a glaring inconsistency on their own part. Thus, to the extent that prosecution witnesses could avoid this quagmire at trial, the United States and the interests of justice greatly benefited.[276]

### 4. The Defense's Case

After the last prosecution witness testifies, the court will inquire whether the defense cares to offer any witnesses. Although Iraqi defendants now enjoy the right to decline to testify, not a single defendant ever refused the opportunity to tell his side of the story, even when silence would have been more prudent. One explanation for this phenomenon may be the fact that defendants knew they would not face hostile cross-examination. Defendants also frequently would lie through their teeth, perhaps because they were not constrained by an oath to tell the truth, and occasionally they would forget that their new lies contradicted the yarns they had spun for the investigative judge. Some defendants also produced witnesses to corroborate their version of events.

Iraq does not have an equivalent to the American Federal Rule of Criminal Procedure 12.1, which requires defendants to advise the prosecution in advance whenever they intend to present an alibi

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*Commit Crimes Against U.S. Soldiers*, NEW ORLEANS CITY BUS., Aug. 18, 2005 ("Iraqi judges are very concerned with details. If one soldier says something happened at 3:30 and another one says 3:35, that could be the difference for a dismissal.").

275. The CCCI judges almost never revealed their rationale for an acquittal, although they may have done so post hoc in internal court documents. They would, however, make comments from the bench in response to a witness's testimony, from which it was possible to glean the judges' thought processes and predict with reasonable certainty when they would acquit.

276. But the United States also forfeited a potential benefit, insofar as it lost another opportunity to demonstrate how a fair trial could simultaneously safeguard truth and the civil liberties of defendants. Merely tacking a few American constitutional rights onto the trial procedures of an Islamic-civil-law trial court could never result in a workable system. Tossing the Bill of Rights to terrorist-defendants, though well intentioned, was not sufficient to extricate the Iraqi Inquisition from the netherworld it had become accustomed to inhabiting, nor was it sufficient to ensure justice for the atrocities committed by terrorists. *See* David B. Rivkin, Jr. & Lee A. Casey, *A Recipe for Disaster*, WALL ST. J., Mar. 17, 2006, at A12 (When a defendant "is part of an international terrorist network, engaged in openly declared hostilities against the U.S. government and individual American citizens, the assumptions underlying the criminal justice system in general, and the protections of the Bill of Rights in particular, also break down.").

defense.[277] Accordingly, in Iraq, the "manufactured alibi is one of the main avenues for escape of the guilty."[278] Iraqi law also imposes no duty on the defense to disclose its witnesses before trial, even though the defense attorney knew the prosecution's entire witness list, and had the opportunity to see these witnesses testify before the investigative judge. Thus, the American prosecutors never knew what a defense witness would claim at trial.

A number of insurgency cases arose from terrorist ambushes of U.S. soldiers, so perhaps it was only fitting that CCCI trials often were a series of defense ambushes. The CCCI judges compounded this problem through their reluctance to cross-examine defense witnesses, or even ask the defense witnesses probing questions beyond "what did you see?" and "when did you see this?" There was effectively no cross-examination of defense witnesses, in part because the Iraqi prosecutor seldom suggested any questions and American prosecutors had no standing in the court.[279]

In many cases, the prosecution's lack of live witnesses aided the defense because there were, therefore, no witnesses to rebut the defendants' manufactured evidence. Like the Nazi defendants at Nuremberg and criminal defendants in the United States, Iraqi defendants knew that an empty chair, unoccupied by "the real perpetrator who the stupid Americans failed to capture and mistakenly believed was the defendant," proved a ready scapegoat to whom their own misdeeds and

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277. FED. R. CRIM. P. 12.1 provides:

> Within 10 days after the request [for information about an alibi defense], or at some other time the court sets, the defendant must serve written notice on an attorney for the government of any intended alibi defense. The defendant's notice must state . . . the name, address, and telephone number of each alibi witness on whom the defendant intends to rely.

*Id.*; *see generally* Robert W. Millar, *The Statutory Notice of Alibi*, 24 AM. INST. CRIM. L. & CRIMINOLOGY 849 (1933).

278. Robert W. Millar, *The Modernization of Criminal Procedure*, 11 J. AM. INST. CRIM. L. & CRIMINOLOGY 433, 350 (1921).

279. Finer & Mosher, *supra* note 72, at A11 (noting that the U.S. military prosecutors mainly serve as advisers to Iraqi prosecutors); Spinner, *supra* note 101, at A12 ("[T]he U.S. military has no official role in the actual court proceedings, other than to provide witnesses and an interpreter").

culpability were easily attributed.[280] Prosecution witnesses who could convincingly identify the defendant as the perpetrator of the crime might have thwarted such scapegoating.

Thus, in cases in which the prosecution presented no witnesses at trial, relying instead on the testimony summarized in the investigative report, and the defendants produced multiple alibi witnesses, there was no way the court could seek clarification or further evidence from the American witnesses. On more than one occasion, the Iraqi judges used this as their excuse to acquit guilty defendants or justify measly sentences.[281] Unfortunately, the two most common means of overcoming this problem—seeking a continuance to garner more evidence and thereby demonstrate the falsehood of the defendant's alibi or submitting rebuttal testimony—are not permitted in the CCCI.[282]

Even when witnesses are present and testify, CCCI trials are generally short, seldom lasting more than a few hours. For example, a capital murder case involving four defendants, in which the United States was not involved because the victim was an Iraqi official, the entire trial lasted just two hours.[283] The abbreviated nature of CCCI trials is due in part to the nature of the crimes typically charged (usually a straightforward allegation that the defendant attacked U.S. troops), the inability of the United States to present scientific evidence in support of the prosecution (because of a lack of a crime lab and readily available experts), minimal direct examination of witnesses, and the dearth of cross-examination. Abbreviated trials are also consistent with the Iraqi and Islamic legal traditions.[284] Under the Baath Party, Iraqi criminal trials sometimes took

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280. GERHART, *supra* note 241, at 423 ("When hard pressed these defendants were almost unanimous in shifting the blame on other men, sometimes on one and sometimes on another. But the names which were repeatedly picked out were those of Hitler, Himmler, Goebbels and Borman, all of whom were either dead or missing."); *see* Mary Flood, *Ex-Enron Chief Ken Lay To Face Two Criminal Trials*, HOUS. CHRON., Oct. 20, 2004, at 1 ("'[I]t's much easier to point fingers at people who aren't sitting next to you in the courtroom'") (quoting SEC attorney Jacob Frenkel).

281. Judges frequently did not state their rationale for their verdict or sentence. Sometimes the prosecution learned of their rationale through informal contacts with various judges.

282. Theoretically, Iraqi law permits rebuttal testimony at the discretion of the court, sua sponte or at the behest of one of the parties. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 175, *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf ("The court may itself, or based on the request of the parties, request discussion of a testimony or return to its discussion and seek clarification of what the witness has said in order to establish the facts."). But the CCCI judges never saw fit to exercise their discretion that way, and the public prosecutor never encouraged the judges to hear rebuttal testimony.

283. Fleishman, *supra* note 73, at 1 (noting that the "trial had lasted two hours").

284. *Oriental Laws and Lawyers*, *supra* note 126, at 21 ("All trials before Mohammedan tribunals are short. Neither cross-questioning nor perplexing suggestions by counsel ever occur.

a matter of minutes. This celerity was typical even in trials involving relatively complex crimes, like currency manipulation.[285] For better or worse, the CCCI has continued this tradition.[286]

### 5. Entering the Defendant's Plea and Closing Arguments

After the trial court hears the prosecution and defense witnesses, and is satisfied that a prima facie case has been established, it asks the defendant to enter a plea.[287] To American lawyers, the practice of entering a plea near the end of a trial seemed strange. The Anglo-American approach of entering a plea before the trial commence seemed more logical, since if a defendant pleaded guilty the court could have saved itself the time and energy of hearing all of the evidence. But under the civil-law system, a trial must take place regardless of whether the defendant admits his crime.[288]

> With us, the defendant who pleads guilty foregoes a trial. In the civil law world, a trial cannot be averted by a guilty plea. The accused's confession can be admitted as evidence, but the trial must go on. The court determines guilt, it is said, not the defendant or the prosecutor.[289]

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Nothing impedes a direct march to the point, when two witnesses are present to establish a fact.").

285. *See* Michael Hedges, *Iraqi Amputees Travel From Houston to White House*, HOUS. CHRON., May 26, 2004, at A3:

> Nine years ago the seven men were in Abu Ghraib, awaiting the terrifying moment when they'd be placed on a gurney so a surgeon could slice off their limbs while Saddam's secret police videotaped the mutilation. The men say they were arrested by the regime at a time when the economic embargo of Iraq by the United Nations and Saddam's mismanagement had wrecked the country's economy. They were picked to serve as scapegoats by Saddam, they said. The men, small business owners in various precincts of Baghdad, were charged with currency manipulation, given a cursory 30-minute trial and thrown in Abu Ghraib.

286. Lenny Savino, *Prosecutor Helps Bring Justice to Iraq*, TAMPA TRIB., Dec. 22, 2005, at 1 (noting that CCCI felony trials typically last 15 minutes). "Iraqi trials are much different from American trials. . . . They are more like a culmination of the trial judges studying the investigative file, which is prepared by a separate investigative judge and investigators." *Id.*

287. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 181(C) ("If it appears to the court, after the aforementioned steps have been taken, that the evidence indicates that the defendant has committed the offence being considered, then he is charged as appropriate, the charge is read to him and clarified and he is asked to enter a plea.").

288. MERRYMAN, *supra* note 133, at 131.

289. *Id.*

Under Iraqi law, the defense is supposed to present its case after the defendant's plea,[290] whether he pleads guilty or innocent, but that was not the usual practice in the CCCI. Whether a defendant pleads guilty or not-guilty, the CCCI will hear the evidence and will only inquire about the defendant's plea after hearing all of this evidence. Thus, the only advantage gained by a guilty plea in the Iraqi system is that perhaps the judges are not burdened with making a decision as to the defendant's guilt.[291] The prosecution is still required to present its full case.

After the court enters the defendant's plea, the prosecution and defense counsel give their closing arguments regardless of whether the defendant has admitted his guilt.[292] As mentioned above, these arguments are generally quite bland and generic. Their only redeeming quality is their brevity, generally never exceeding five minutes in length, and for some otiose attorneys, closing arguments may take as little as thirty seconds.[293] Closing arguments generally exceeded three minutes only in "complex" cases. Usually either the Iraqi prosecutor diffidently claimed that the defendant was guilty and should, therefore, be convicted, or he execrated the American witnesses for minor contradictions and argued that these required the court to acquit.[294]

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290. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 181(D) ("If he [the defendant] denies the charge . . . defence witnesses are heard and the remaining evidence in his defence is heard, unless the court finds it to be an unjustified attempt to impede the investigation or to mislead the court.").

291. This is similar to the practice used in U.S. courts-martial, where the prosecution must set forth an abbreviated case, usually testimony from the defendant himself, to show the judge that the defendant is indeed guilty. *See* 10 U.S.C. § 845(a). Arguably this is another layer of protection for a defendant, ensuring that he was not coerced into a guilty plea for a crime he did not commit. However, it also takes valuable time and resources, and may bring out facts that will harm the defendant at sentencing.

292. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 181(D) (stating that at the end of the trial "the commentary of the other parties the public prosecutor and the defence of the defendant are heard").

293. Recall that one of the purposes of holding a trial in the civil-law system is to permit the attorneys to argue their case to the judges. MERRYMAN, *supra* note 133, at 130 ("The function of the trial is to present the case to the trial judge and jury and to allow the prosecutor and the defendant's counsel to argue their cases."). Since argument is almost nonexistent in the CCCI, the judges can base their decision on the written record, and under this system there is little need for a trial.

294. Under Iraqi Law, Iraqi prosecutors have the power to argue for acquittal. Perito, *supra* note 146 ("The prosecutor has the power to argue against the conclusion reached by the investigative judge, if he or she thinks the investigation was mishandled or the accused is innocent."). Iraqi prosecutors frequently take full advantage of this power. *See* Lenny Savio, *Prosecutor Helps Bring Justice to Iraq*, TAMPA TRIB., Dec. 22, 2005, at 1 (noting that during "his summation, one [Iraqi] prosecutor says there is not enough evidence to convict the defendants" of entering Iraq with the intent to commit jihad.").

Although the prosecution has the burden of proving the defendants' guilt to the court's standard of certainty—to convict, the CCCI must be "satisfied that the defendant committed the offence of which he is accused"[295]—the defense never argued that the prosecution failed to meet its burden, possibly because Iraqi defense attorneys do not readily conceptualize burdens of proof or persuasion. Instead, the defense attorneys typically asked the court for mercy because the defendants were poor and the sole means of financial support for their large families. They would also add, sometimes almost as an afterthought, that their clients were innocent and the U.S. soldiers were obviously prevaricating. They might pepper their closing arguments with an invective that American witnesses always perjured themselves, but they never fully developed this point with examples or evidence. Unlike American trials, the Iraqi defense attorneys usually neither critique the prosecution's evidence nor discuss its deficiencies.[296]

### 6. Announcing the Verdict and Sentencing

Unlike American jurisdictions, in Iraqi courts there is no bright line separating the guilt phase of a trial from sentencing. After closing arguments, the baliff clears the CCCI courtroom except for the panel of judges.[297] They remain in the courtroom to carry out their deliberations in private.[298] This conference usually lasts no more than ten minutes,[299] whereupon the bailiff calls the participants back into the courtroom and the chief judges announces the court's verdict.[300] The verdict must have the

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295. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 182(A). The law similarly states:

> The court's verdict in a case is based on the extent to which it is satisfied by the evidence presented during any stage of the inquiry or the hearing. Evidence includes reports, witness statements, written records of an interrogation, other official discoveries, reports of experts and technicians and other legally established evidence.

*Id.* ¶ 213(A).

296. Fleishman, *supra* note 73, at 1 (describing one closing argument by a defense attorney as "a flourish of a textured voice, a plea, strings of words and outrage, but little evidence.").

297. *Id.*

298. *Id.* (noting that at the end of the defense's closing argument the "judges cleared the courtroom to begin deliberations").

299. *Id.* (noting that in a murder case involving four defendants, the judges deliberated all of nineteen minutes); Spinner, *supra* note 101, at A12 (noting that the CCCI judges deliberated ten minutes in a terrorism case); *Oriental Laws and Lawyers*, *supra* note 126, at 5 (noting that in Moslem courts "the law has no delays").

300. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 223(A) ("The court retires before giving its

support of at least two of the three judges on the panel.[301] If the defendant is found guilty, the sentence is also read.[302]

Because there is no bifurcation of the determinations of guilt and punishment, a defense attorney must argue mitigating circumstances as an alternative to his argument that his client is innocent. This puts the defense attorney in the unenviable position of having to argue: "There is absolutely no doubt that my client is truly, truly innocent; but if he is not, please show him mercy." Similarly, since defense counsel has only one opportunity to call witnesses, including witnesses to argue in mitigation of punishment, he has to do this before the judges have announced their verdict. Perhaps for this reason, most defense attorneys do not call mitigation witnesses, and instead refer in their closing arguments to the defendant's good character and family responsibilities.

Under Iraqi law, judges are supposed to articulate the rationale supporting their verdicts and sentences,[303] but in the CCCI, the judges do so only in a cursory fashion. Their "rationale" rarely amounts to anything more than a statement of the obvious. For example, when acquitting a defendant, the court might unhelpfully explain: "We find the defendant not-guilty because the evidence failed to persuade us that he is guilty." Their "not-guilty" verdict already communicated this idea, so this terse statement of their reasoning was essentially worthless.

Greater particularization would have been helpful, but perhaps the judges believed that this would have cabined their discretion in subsequent

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ruling. After it has formulated the ruling, the hearing is resumed publicly. The ruling is read out to the defendant or its contents are made clear to him.").

301. *Id.* ¶ 224(B) ("Rulings are issued on the basis of consensus or a majority of them. All those dissenting from the majority decision must explain their views in writing.").

302. *Country Report*, *supra* note 119, ("Defendants who are found guilty are sentenced immediately."); IRAQI CODE OF CRIMINAL PROCEDURE ¶ 182(A) ("If after the trial has been conducted as above, the court is satisfied that the defendant committed the offence of which he is accused, it issues a verdict of guilty and rules on the penalty to be applied."); *id.* ¶ 223(B) ("If the verdict is guilty, then the court must issue another ruling at the same hearing with the penalty and explain them both.").

303. The Iraqi criminal procedure law states:

> The ruling should contain the name of the judge or judges who have issued it, the defendant, the other parties and a representative of the public prosecutor, a description of the offence he is accused of perpetrating, the paragraph of law which applies, the reasons for the court's ruling and the reasons for the level of sentence passed.

*Id.* ¶ 224(A).

cases,[304] as it would have proven unseemly "to decide the same question one way between one set of litigants and the opposite way between another."[305] Providing reasons would have created an expectation that the CCCI judges would consistently apply the same evidentiary standard to both prosecution and defense witnesses,[306] thereby inhibiting the judge's discretion. Perhaps the most striking difference between the Iraqi legal system, being that of a civil-law country, and the American legal system (a common-law system), is that judicial precedent is not a binding source of law, and the CCCI clearly was not going to depart from this practice by explaining the rationale for its decisions.[307]

More often than not, the CCCI judges would acquit the insurgents of the felony charges proposed by the American prosecutors, and instead hold them accountable for some minor infraction. Iraqi law gives judges considerable discretion in this respect. They can find the defendant guilty of a crime which the defendant was not formally charged, so long as the crime for which the court convicts is less serious than the crime charged.[308]

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304. One of the key reasons why stare decisis is so important to the rule of law is its role in limiting the discretion of courts, thereby preventing them from favoring one party in a particular case. Litigants will remind a court of decisions in similar cases and will ask the court to act accordingly in their case. The court will either comply or will be forced to explain how the cases differ such that the previous rule is inapplicable. Hubbard v. United States, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) ("The doctrine of stare decisis protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of arbitrary discretion in the courts is restrained.") (citing THE FEDERALIST No. 78).

305. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1920).

306. Neither the civil-law nor the Islamic-law traditions strictly adhere to the rule of stare decisis to the same extent that common-law judges generally do. MERRYMAN, *supra* note 133, at 22 ("[T]he familiar common law doctrine of *stare decisis*—i.e. the power and obligation of courts to base decision on prior decisions—is obviously inconsistent with the separation of powers as formulated in civil law countries, and is therefore rejected by the civil law tradition. Judicial decisions are not law."); ESPOSITO, *supra* note 106, at 86 ("Islamic law does not recognize a case law system of legally binding precedents."); J.N.D. Anderson, *A Law of Personal Status for Iraq*, 9 INT'L & COMP. L.Q. 542, 545 (1960) (noting that "the doctrine of *stare decisis* is unknown" in the Islamic tradition); Rahim, *supra* note 127, at 266 ("The Mohammedan jurisprudence . . . does not accept legislation by the State as a legitimate source of law. Nor does it admit the principle of judge-made law. The Qadhi's legal pronouncement were binding only for the decision of the particular case before him, but had no value as a precedent."). Despite disdain for stare decisis, at a certain point it becomes embarrassing for Iraqi judges to decide identical cases dissimilarly.

307. S.H. AMIN, MIDDLE EAST LEGAL SYSTEMS 227 (1985).

308. It appears that this power is derived from paragraph 192 of the Iraqi Code of Criminal Procedure. *See* IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 192, *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf ("If it appears that the defendant has committed a minor offence which has no connection with the offence with which he has been charged the court completes the trial and issued the verdict without the need for a new offence. . . .").

Thus, a defendant could be charged with and tried for attempted murder, but the CCCI might instead find him guilty of negligently discharging a firearm. This tactic was frequently employed by the CCCI judges. They relished this power and used it extensively, presumably because they thought it unwise to anger the United States by acquitting the defendants outright. The judges thought that convicting defendants of other, less-serious crimes would placate American soldiers.

As discussed more fully below, the CCCI judges theoretically do not have complete discretion in sentencing.[309] The Iraqi Criminal Law sets forth maximum punishments, and the orders of the Coalition Provisional Authority, while in effect, set forth mandatory minimum punishments.[310] The judges, however, found these restraints on their discretion irksome, so they invented novel means of evading the mandatory minimum sentences. Accordingly, in most insurgency cases, the sentences were extremely lenient. Sentences ranged anywhere from time-served to thirty years of imprisonment. Fines are permitted, but with Iraq's abject poverty,[311] they are seldom imposed and most assuredly never collected. Sentences can be suspended, and CCCI judges occasionally utilized this device to further minimize the effects of a conviction. Iraq has no parole system, nor sentence reduction for good behavior, at least not formally.

### F. *Appeals*

Appeals from the CCCI trial court are heard by the Iraqi Court of Cassation,[312] and they are commenced by filing a petition with the CCCI or with the Court of Cassation within thirty days of the trial court's ruling.[313] Consistent with the civil-law tradition, an appellant may

309. *See* CPA Order No. 3.

310. *Id.*

311. The average annual salary in Iraq is between $1,000 and $2,000. Hammes, *supra* note 176, at A23 (relating that Iraqi translators, who earn above-average salaries, can command up to $400 per month); Beth Potter, *Many Still Rely on Rations to Keep Food on the Table*, USA TODAY, Oct. 22, 2004, at A6 (noting that the average government salary in Iraq is less than $200 per month); Cesar G. Soriano, *Iraqis Enjoy New Freedom of Expression on Web Journals*, USA TODAY, Apr. 20, 2004, at A16 (noting that Iraqi physicians earn about $160 per month); Edward Wong, *Iraqi Police: Hunting and Hunted*, SEATTLE TIMES, Oct. 3, 2004, at A11 (noting that Iraqi police earn about $228 per month); John Tierney, *The Struggles for Iraq*, N.Y. TIMES, Sept. 10, 2003, at A11 (noting that the average annual salary for Iraq's middle-class worker is $2,000).

312. *See* CPA Order No. 13, *supra* note 36, § 211. Consistent with the civil-law tradition, appeals could be heard as to issues of both law and fact. MERRYMAN, *supra* note 133, at 120 ("In the civil law tradition, the right of appeal includes the right to reconsideration of factual, as well as legal issues.").

313. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 252(A) ("The appeal takes place by means of a petition presented by the petitioner, or his legal representative, to the Criminal Court which issued

challenge the trial court's legal or factual determinations, or both. Another novel feature, in contrast with U.S. jurisprudence, is that the prosecution can also appeal acquittals, based on either legal or factual errors.[314] Thus, an acquittal does not necessarily mean that the defendant is off the hook for his crime. That depends on whether the prosecution elects to appeal the acquittal and how the appellate courts receive the appeal.

The prosecutor might also appeal a conviction if he believes that the defendant is innocent or the trial court committed a reversible error. The Court of Cassation bases its decision largely on the written record, but may also hear oral argument at its discretion.[315] It also has substantial discretion as to the form of its own judgment. Thus, it can: completely reverse findings of fact or law, completely reverse the sentence, order re-sentencing or re-sentence the defendant itself, reverse regarding one element of the crime, completely or partially affirm convictions on multiple charges, remand for any further hearings, or even demand a full retrial.[316] Like the trial court, the Court of Cassation must give an explanation for its rulings.

Although Iraqi insurgents were acquitted in a number of cases, to the best of the author's knowledge, the Iraqi prosecutor never pursued appeals of those cases, despite requests to do so from American prosecutors. This is not surprising, since the Iraqi prosecutor himself advocated acquittal in many of these cases, and had he appealed, he would have been arguing a position contradictory to the one he espoused at trial. In one case, when American prosecutors approached the Iraqi prosecutor beseeching him to appeal an adverse sentencing decision, the prosecutor initially balked, then reluctantly agreed to file the appeal. But in light of his opposition to filing the appeal and his ability to sabotage any appeal he did file, the United States elected not to travel down this road. Because the United States, as a non-party, lacks standing to pursue appeals, they were not a weapon in the American legal arsenal. More recently, as adverse decisions accumulate, there are reports that military attorneys have started to seek more appeals. Military attorneys either press the public prosecutor or

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the judgment, to any other Criminal Court, or direct to the Court of Cassation, within a period of thirty days, starting from the day after the judgment was issued. . . .").

314. McGovern, *supra* note 44, at 35-39 ("Prosecutors may appeal the court's decision in a criminal case if they disagree with the outcome, whether it is conviction or acquittal.").

315. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 258(B) ("It is up to the Court of Cassation to summon the accused, the plaintiff, the civil plaintiff or person with civil liability (or both), or the representative of the Public Prosecutor to hear their statements or for any purpose it requires in order to obtain the truth.").

316. *Id.* ¶ 259(A).

pressure the Iraqi courts to give American prosecutors the authority to pursue appeals, independent of the public prosecutor.

Like trials, appeals move swiftly in Iraq in part because little other litigation occupies the appellate judges, although the number of cases requiring appellate review is increasing. This swiftness in rendering decisions is consistent with Islamic tradition, according to which justice is speedily administered to malefactors.[317] Thus, for example, in a death penalty case that arose in the CCCI (but which did not involve an attack on U.S. forces), the defendants exhausted all of their appeals within two months of their trial and sentencing. This contrasts starkly with the snail's pace appeal process common in the United States, but also leads to questions about the extent of review these Iraqi cases receive on appeal.

The rapidity of the Iraqi appellate courts' decisions suggests that only cursory review is afforded to these cases. Of course, the brevity of the process may also be a result of the limited number of issues that Iraqi appellate courts review compared to American ones. Iraqi defendants have fewer rights than American defendants, there is no jury and thus no claims that the jury was prejudiced by a piece of evidence, defense counsel are nearly always ineffective due to the limited role they play, and the prosecution does next to nothing, so it cannot be claimed that its non-existent actions prejudiced the defendant. There is also no verbatim transcript of the trial for an appellate court to peruse, which further limits the extent of the appellate court's review. Iraqi courts also do not permit collateral attacks on convictions, as are permitted in U.S. courts under sections 2254 (state convictions) and 2255 (federal convictions) of title 28 of the U.S. Code.[318]

## III. ABSURDITIES AND ANOMALIES OF THE CCCI

The foregoing gives an overview of what Iraqi "justice" entails for insurgents and their American victims as a case progresses through the CCCI. The following sections narrows the focus, zeroing in on particular

317. *Oriental Laws and Lawyers*, *supra* note 126, at 21 ("Punishment is never delayed long after conviction, whether for a capital or minor offense, but follows the sentence. . . . Arguments in favor of the criminal, with a view to showing extenuating circumstances, or appeals, in the form of petitions after sentence, either to modify the punishment on account of newly discovered testimony, or a pardon, seem wholly unknown among the people who are thus quick to punish an infraction of law.").

318. *See* 28 U.S.C. § 2254 (authorizing federal habeas corpus review for inmates in state custody); 28 U.S.C. § 2255 (authorizing federal habeas corpus review for prisoners in federal custody).

shortcomings and absurdities of trials in the CCCI. After all, it is the CCCI trials where the damage is actually done to American interests, where insurgents are allowed to escape punishment for their crimes, and where CCCI judges employ various techniques to defeat justice.

### A. *Exemption of Defendants from the Oath Requirement*

As mentioned above, prosecution witnesses were required to testify under oath at both the investigative hearing and the trial,[319] a practice the United States readily endorsed. The truthful man has nothing to fear from an oath, although some religions frown upon the practice of administering oaths to witnesses, such as the Jewish religion and some Christian sects.[320] In pre-Norman England, suits were often decided on oaths alone, and oaths remain the only sacramental observance—a "ceremonial appeal to divine agency"—left in American law.[321]

In modern times, oaths exist for purposes beyond simply calling upon a deity to confirm the truth of testimony or punish those who testify falsely. Oaths serve to remind witness of the importance of truthful testimony and thereby encourage witnesses to testify truthfully,[322] particularly in criminal cases where the stakes may give rise to a strong

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319. IRAQI CODE OF CRIMINAL PROCEDURE ¶ 168(A) ("Before giving testimony each witness is asked to give his full name, profession, age, place of work and relationship to the parties. Before giving his testimony, he must swear that he will speak the truth and nothing but the truth.").

320. With respect to Jewish law:

> Neither the Bible or the Talmud imposes upon the witnesses any oath to confirm his testimony. This provision is respected in the Civil Practice of New York State. The Divine prohibition of bearing false witness was considered by Moses and the Jewish Legislators succeeding him, as sufficient to induce people to state truths only. Indeed, some Jewish Philosophers consider swearing injurious in itself; for he who swears is Ipso Facto suspected of lacking credibility. . . .

Theodore Spector, *Some Fundamental Concepts of Hebrew Criminal Jurisprudence*, 15 J. AM. INST. CRIM. L. & CRIMINOLOGY 317, 319 (1924).

321. Albert S. Thayer, *Sacramental Features of Ancient and Modern Law*, 14 HARV. L. REV. 509 (1901) ("In our own system of law we have but one sacramental observance remaining, and that is the oath.").

322. EEOC v. Shell Oil Co., 466 U.S. 54, 76 n.32 (1984) ("The function of an oath is to impress upon its taker an awareness of his duty to tell the truth. . . .") (citing MCCORMICK, LAW OF EVIDENCE 582 (2d ed. 1972)); California v. Green, 399 U.S. 149, 158 (1970) (Confrontation "insures that the witness will give his statements under oath—thus impressing upon him the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury").

urge to prevaricate.[323] Similarly, oaths give witnesses added incentive to tell the truth, for while testifying under oath, a witness who commits perjury is subject to prosecution for providing false testimony.[324]

In the Iraqi courts and the courts of other civil-law nations, [325] defendants, and only defendants, are exempted from the oath requirement. Although some defendants were denied the opportunity to swear an oath in Marian England,[326] because they were considered unworthy of taking an oath,[327] courts in common-law nations abandoned this exclusion long ago.[328] The reason is obvious: exempting defendants from the oath requirement thereby inhibits the ascertainment of truth. It means that defendants are not instilled, at least through an oath, with the notion that truthful testimony is supremely important. They are also deprived of any benefit that testimony under oath could entail for their defense.

By refusing to employ oaths for the defendants' testimony, the CCCI was practically inviting defendants to perjure themselves.[329] Indeed, this is

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323. "In criminal law, the desire of the offender to escape, and the desire of his friends and relatives that he escape, are strong and active." POUND, *supra* note 151, at 67-68.

324. *See* IRAQI PENAL CODE § 3, ¶ 251 (1969), *at* http://www.jagcnet.army.mil/JAGCNET Internet/Homepages/AC/CLAMO-Public.nsf/0/d616b3e179d620285256d0a006391f1?Open Document.

325. It was common practice not to require an oath of witnesses testifying in court proceedings in America's western territories which has been governed by Spanish or Mexican civil-law systems, although this practice changed as American settlers forced the adoption of the common-law system in these areas. AURORA HUNT, KIRBY BENEDICT: FRONTIER FEDERAL JUDGE 52 (1961) ("An oath was seldom required of a witness. . . .").

326. Crawford v. Washington, 541 U.S. 36, 52 (2004) ("Under the Marian statutes, witnesses were typically put on oath, but suspects were not.") (citing 2 HALE, PLEAS OF THE CROWN 52 (1678)).

327. A.T. CARTER, A HISTORY OF THE ENGLISH COURTS 3 (7th ed. 1944) ("In Criminal cases also the Oath was used, but in the background was the Ordeal if the accused was of bad character and not oath-worthy. . . .").

328. American military courts in post-World War II Germany initially did not administer oaths to defendants. NOBLEMAN, *supra* note 8, at 102 ("For reasons which are not clear, at no time during a trial or proceeding in a military government court, was the accused permitted to be sworn."). This practice later changed, however. *Id.* at 178 ("The accused may, but need not testify in any proceedings . . . if he desires to testify, he must be sworn and may then be cross-examined like any other witness. . . ."). All testimony in the post-World War I tribunals was under oath. *See id.* at 36 (noting that in American military courts created in post-World War I Germany, all "evidence was required to be under oath."); HUNT, *supra* note 325, at 93-94 ("All evidence was required to be under oath."). This historical use of oaths by military courts is yet another factor militating in favor of utilizing military courts in Iraq.

329. Because "perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings," United States v. Mandujano, 425 U.S. 564, 576 (1976), one would think that the Iraqi courts would do their utmost to discourage perjury. According to Machiavelli "men will always be false to you unless they are compelled by necessity to be true," and an oath may be one

part of their rationale for not subjecting defendants to an oath. It is expected that a defendant will lie to save his skin, therefore the court should not profane the Koran by "requiring" the defendant to commit perjury after swearing an oath upon the Koran.[330] This practice is also, in some sense, contrary to the *Sharia*, which in cases where the prosecution lacked two witnesses, required the aggrieved party or complainant to swear an oath that his accusations were true.[331] Similarly, under Islamic law, a defendant was sometimes compelled to take an oath that he did not commit the crime charged.[332] This system placed great emphasis on the oath, for upon taking the oath, the defendant was acquitted, but if he refused, he was found guilty and punished.[333]

Perhaps the CCCI's practice may also be explained by the Islamic legal custom that perjury is not a punishable offense (although it is theoretically punishable under Iraqi law).[334] Since a defendant who lies under oath cannot be punished under Islamic law, a judge might conclude, there is little reason for placing him under oath. The CCCI jurists might also believe that anyone willing to commit serious crimes like those of the insurgents probably is not shy about adding perjury to his list of malefactions, and thus there is no sense in requiring an oath or threatening prosecution for perjury.

It is also true in Islamic countries that various aspects of the civil law arose as a means of evading burdensome and irrational practices under *Sharia*. Thus, in many Islamic countries, *Sharia* was applied to family law and inheritance cases, while a separate body of law applied to criminal and commercial disputes.[335] The decision to permit a defendant to testify

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way to compel veracity. NICCOLO MACHIAVELLI, THE PRINCE, 117 (Luigi Ricci ed., Oxford Univ. Press 1999) (1532).

330. U.S. military personnel would sometimes swear on the Bible, but more frequently no holy book was used to administer their oaths.

331. LIPPMAN ET AL., *supra* note 116, at 71.

332. *Id.*

333. *Id.* ("Where the plaintiff is unable to produce the required number of qualified witnesses, the *qadi* customarily requests the defendant to take a holy oath denying the allegations. . . . If the defendant takes the oath, the case is dismissed; if he declines following three requests, judgment is entered for the plaintiff."). Notice that this practice requires the drawing of an inference, which Islamic law generally disdains.

334. *See* JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 187 (1964) ("There is no punishment for perjury, nor for giving false evidence; it is merely made known publicly (*ta'rif*), and in certain cases liability for the damage caused arises. . . ."); LIPPMAN ET AL., *supra* note 116, at 70 ("Bearing false witness is a *Ta'azir* offense punishable by *tashir* (public labeling—taking the offender to every part of the city and proclaiming that he is not to be trusted).").

335. ESPOSITO, *supra* note 106, at 87-88 ("Islamic society possessed a dual system of laws and courts (Sharia and Grievance), religious and secular, with complementary jurisdictions. Sharia

unsworn may be part of this secularization of the law. Perhaps it is an attempt to get around the swearing contests that arose under *Sharia* when neither the defense nor prosecution could produce two witnesses to corroborate their respective stories. Additionally, civil-law nations frequently let defendants testify unsworn—a practice also adopted at the Nuremberg Trials, influenced as they were by French and Soviet law[336]—so it is also likely that in some quarters the Iraqi law simply adopted this custom from its civil-law cousins.

Regardless of the origin of the rule, the CCCI judges apparently agree with Dostoevsky that "nothing in the world is harder than speaking the truth,"[337] particularly for guilty defendants,[338] and so the judges do not require oaths of defendants. One CCCI judge opined the court's rationale for this rule: because the defendant could lose his liberty, the law permits him to defend himself with whatever weapons he finds at his disposal. In justifying this rule, he compared the CCCI's practice to the American defendant's right to remain silent and to refuse to answer questions. This is a misleading and defective analogy, however. The two practices are similar insofar as in both cases the defendant declines to reveal the truth. But refusing to answer questions is not as misleading as deliberately stating a falsehood, and the two are generally not considered to be morally equivalent. Affirmatively representing that something is true when the defendant knows it to be false is hardly the same thing as refusing to answer questions. To be silent is one thing; to deliberately fabricate testimony and mislead a court is another.[339]

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courts were increasingly restricted to the enforcement of family laws (marriage, divorce, inheritance) and the handling of religious endowments. The Grievance courts dealt with public law, especially criminal law, taxation, and commercial regulations. This approach continued throughout Islamic history.").

336. GERHART, *supra* note 241, at 381 ("At the end of all the evidence, each of the defendants would be allowed to rise and make a final unsworn statement to the tribunal as in the continental criminal procedure.").

337. FYODOR M. DOSTOEVSKY, CRIME AND PUNISHMENT 440 (Constance Garnett trans., 1981) (1866).

338. But it is for exactly that reason the CCCI should use whatever force religious belief can bring to bear to encourage defendants to testify truthfully. This is consistent with Dean Pound's suggestion that "[t]he enforcement of law depends largely upon the extent to which the lawmaker can identify social interests with individual interests, and thus enlist individual desire to enforce his precepts." POUND, *supra* note 151, at 67-68.

339. In other words: "Perjury is one thing; testimonial recalcitrance another." Brown v. United States, 356 U.S. 148, 153 (1958). This is consistent with the legal maxim: aliud est celare, aliud tacere—To conceal is one thing, to be silent another. *See* Graham v. Aetna Ins. Co., 132 S.E.2d 273, 275 (S.C. 1963); Twing v. Schott, 338 P.2d 839, 844 (Wy. 1959).

Furthermore, according to the American practice, a defendant can choose either to testify or remain silent; he is not given the discretion to pick and choose which questions he will answer on cross-examination.[340] If the defendant testifies in an American court, it is likely he will be subjected to a grueling cross-examination. The Iraqi defendant, however, has the benefit of answering only some questions truthfully, thereby lending credence to the lies he carefully weaves into the truthful testimony. CCCI defendants are not subjected to serious questioning from a skilled adversary, and are immune from cross-examination from American prosecutors, therefore, they have an excellent chance of using their lies to commit a fraud upon the court. Of course, it became obvious in the CCCI that some judges were willingly duped.

The key premise underlying the practice of unsworn testimony is that defendants frequently lie, even when sworn. One would think, then, that the CCCI judges would habitually discount the value of the defendants' testimony. If the law expects those accused of crimes to be mendacious, judges have been fairly warned that they should exercise at least a minimum level of skepticism when faced with a defendant's testimony. It is obvious from the CCCI verdicts, however, that the court regularly credits the incredible, unsworn testimony of defendants over the sworn testimony of U.S. military personnel. Various CCCI verdicts definitively demonstrate that the CCCI habitually gives less weight to the sworn testimony of American witnesses than to unsworn Iraqi ones.

But perhaps criticism of this practice is much ado about nothing, for Iraqi terrorists probably would have lied regardless of whether they had taken an oath to tell the truth because the truth would have thwarted their hopes for obtaining an acquittal. Nevertheless, it seems strange that at least in cases involving terrorism, where the stakes are higher, a court would not at least attempt to encourage truthfulness through requiring defendants to testify under oath, since truth is essential to the court's determination of guilt and innocence, and the rule of law.

Furthermore, many insurgents were devout Muslims, upon whom the oath might have had a powerful effect: "Practicing Muslims believe in an

340. United States v. Havens, 446 U.S. 620, 626-27 (1980) ("It is essential . . . to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth."); Brown v. United States, 356 U.S. 148, 153 (1958) ("He who offers himself as a witness is not freed from the duty to testify. The court (except insofar as it is constitutionally limited), not a voluntary witness, defines the testimonial duty."); United States v. Payton, 159 F.3d 49, 58 (2d Cir. 1998) ("When a defendant offers an innocent explanation he 'opens the door' to questioning into the truth of his testimony, and the government is entitled to attack his credibility on cross-examination.").

omniscient God who will punish severely those who take a false oath."[341] In a study of the courts of Islamic Morocco, it was found that lying litigants would frequently "maintain their testimony 'right up to the moment of oath-taking and then to stop, refuse the oath, and surrender the case.'"[342] Accordingly, perhaps at least a few Muslim terrorists would have admitted their guilt rather than risk punishment from Allah for falsely swearing on the Koran.

Another reason why the rule permitting defendants to testify unsworn will not have a long-term benefit to the insurgency is that U.S. troops are adapting to the rule. Thus, although the CCCI rule exempting defendants from the oath requirement may be designed to aid guilty terrorists, the judges' tack may actually be proving more dangerous to the militants still battling U.S. forces than the truth would have. The acquittals and paltry sentences resulting from this practice exposed the U.S. military to contempt and frustrate the soldiers who risk their lives daily to destroy the insurgency.[343] They have also undermined the morale of the soldier-witnesses and their comrades.[344]

American soldiers who learned of the CCCI's shady practices quickly brought word back to their units that Americans are unlikely to receive justice at the CCCI. This denial of justice may have resulted in orders to kill these insurgents—which are lawful orders[345]—or the adoption of

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341. LIPPMAN ET AL., *supra* note 116, at 71.

342. *Id.*

343. Zoroya & Jervis, *supra* note 9, at 1. Trying insurgency cases in the CCCI disadvantages the United States and its soldiers in multiple ways:

> The decision to treat insurgents as criminals has forced soldiers to act as cops and has authorities scrambling to build cases against thousands of detainees in U.S.-run prisons. Some soldiers say running rebels through the courts places American forces at a disadvantage, burdening soldiers in a guerrilla war with peacetime rules.
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> "A lot of times, we'd catch a guy but didn't have enough evidence, so he gets released," says Staff Sgt. John Perdue, whose unit is hunting for car bomb factories in Baghdad. "Then you see him a few days later, same guy. It's frustrating."

*Id.*; West, *supra* note 22, at 27 ("What do insurgents have to lose from being arrested for fighting if they know they will soon be released by authorities?").

344. Freeman, *supra* note 18, at 29 ("'There are times when the sentences are a source of frustration for the soldiers involved.' . . .") (quoting Lieutenant Colonel Barry Johnson).

345. "What has been called the paramount law of self-defense, common to all countries, has established the rule that whatever force is necessary is also lawful." Commonwealth *ex rel.* Wadsworth v. Shortall, 55 A. 952, 955 (Penn. Sup. Ct. 1903); Curtis A. Bradley & Jack L.

informal practices, to ensure that terrorists who demonstrate hostile intent are killed,[346] rather than captured and taken before the CCCI.[347] Adoption of these practices may be seen as necessary to achieve victory and protect fellow soldiers,[348] since merely capturing terrorists will simply result in their appearance before the CCCI and the lenient treatment or freedom that adjudication in that forum frequently entails.[349]

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Goldsmith, *International Law, Clear Statement Requirements, and Constitutional Design*, 118 HARV. L. REV. 2683, 2689 (2005) ("It is widely recognized that a nation involved in an armed conflict is permitted under the laws of war to use force against most of the enemy's armed forces, regardless of whether those forces meet the direct participation standard."); Karima Bennoune, *Toward a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 186 (2004) (acknowledging that "it is mostly lawful to kill enemy soldiers in conflict"); Paul M. Barrett, *A Young Lawyer Helps Chart Shift in Foreign Policy*, WALL ST. J., Sept. 12, 2005, at A1 ("'A nation at war may use force against members of the enemy at any time, regardless of their proximity to hostilities or their activity at the time of attack.'") (quoting Professor John Yoo); HALL, *supra* note 23, at 562 ("if the inhabitants of the occupied territory rise in insurrection, whether in small bodies or en masse, they cannot claim combatant privileges until they have displaced the occupation, and all persons found with arms in their hands can in strict law be killed, or if captured be executed by sentence of court martial.").

346. After all, as American judges have recognized, the "purpose of battle is to kill." Yamashita v. Styer, 327 U.S. 1, 47 (1946) (Rutledge, J., dissenting).

347. Phillips, *supra* note 270, at A1 ("When they see someone in the act of planting a bomb, their orders are to shoot to kill."); Tom Lasseter, *U.S., Iraqi Forces Open Assault in Deadly Zone*, PHILA. INQUIRER, Aug. 6, 2005, at A1 (noting that one Marine instructed his troops: "'If somebody shoots at you, you waste' him. . . ."); Richard A. Oppel, Jr., *A Volley of Fire From a Fast-Moving Target*, N.Y. TIMES, Nov. 4, 2004, at A8 ("One recent morning Sergeant Floyd helped lead a team of soldiers on an ambush mission to take out mortarmen caught firing at the base. Before the mission he admonished the youngest soldiers: 'Hostile intent, kill them dead, O.K.? Don't try to detain them. Kill them dead.'"); *see also* Edward Wong, *Back by U.S., Iraqis Raid Camp and Report Killing 80 Insurgents*, N.Y. TIMES, Mar. 24, 2005, at A1, A11 (describing a joint attack on 80 Iraqi insurgents in which "no prisoners were taken"). There is also substantial evidence to support a contrary position, including reports of large-scale captures of insurgents. *See* Ellen Knickmeyer, *Baghdad Toll Nears 200 as Insurgent Strikes Continue*, WASH. POST, Sept. 16, 2005, at A27 (discussing the Tall Afar campaign in which U.S. and Iraqi troops killed 371 and captured 1163 suspected insurgents).

348. Iraqis seem to be adopting a similar idea that the self-help remedy may be the only one available to them. *See* Edmund Sanders, *Baghdad Blast Kills Scores of Iraqis*, L.A. TIMES, Sept. 14, 2005 ("'We are fed up with the government,' said Adhmed Qusay, another job seeker. 'They are doing nothing. They should exterminate those terrorists. If the government can't do it, we will do it ourselves.'").

349. This is not to say that the soldiers based their "decisions" whether to kill or capture an attacker on the decisions of the CCCI. In most instances the soldiers kill to defend their own lives or those of their friends, and thus the CCCI judgments never come into play. But there might be some close cases—perhaps when a terrorist is spied holding a rifle, and thus is a legitimate target, but the soldier "believes" that the enemy might be persuaded to surrender or could be disabled with non-lethal force—where the terrorists will now be killed because American forces do not want to

Indeed, several soldiers and Marines informed American prosecutors that they had no choice but tell their troops to kill insurgents in light of the verdicts and light sentences handed down by the CCCI. So in that sense, the CCCI unwittingly might have helped to thwart the insurgency by demonstrating to American troops that their own brand of justice was the only justice that many of the terrorists would face. Of course, quintessentially judicial decisions—such as the degree of guilt and proportionality of punishment—should not be made under the heat of hostile fire, but the CCCI leaves U.S. soldiers little alternative.

### B. *The Iraqi Two-Witness Rule*

Another rule wielded by Iraqi judges to stymie the prosecution of insurgents was the two-witness rule. This rule holds that all criminal cases require the testimony of two eyewitnesses for conviction, and that a court may not convict any defendant absent testimony from at least the requisite two witnesses.[350] Strictly speaking, Iraqi black-letter law does not literally require the testimony of two witnesses to prove a case. It merely states: "One testimony is not sufficient for a ruling if it is not corroborated by other convincing evidence or a confession from the accused. The exception of this rule is if the law specifies a particular way of proving a case, which must be followed."[351] But the CCCI judges have interpreted this rule, or have adopted their own rule, to require the testimony of two eyewitnesses in all criminal cases.

This rule probably entered the Iraqi legal tradition from Islamic-religious law,[352] which has "extensive evidential requirements."[353] Islamic

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take the risk that he will escape justice in the CCCI.

350. Compare this to the principle generally followed in the United States that "the truth is not to be determined merely by the number of witnesses on each side of a controversy." Weiler v. United States, 323 U.S. 606, 608 (1945).

351. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 213(B), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf.

352. Courts in civil-law systems draw heavily on customary law as the basis for decisions. MERRYMAN, *supra* note 133, at 23. It is not difficult to imagine that courts in the Islamic world would incorporate elements of the Islamic law into the customary criminal law, and vice-versa. *Cf.* LAW AND ISLAM IN THE MIDDLE EAST, *supra* note 107, at 3 ("Much of what is deemed Islamic originated in pre-Islamic custom and the incorporation of customary or European law into legal corpuses that are labeled as Islamic on their home ground continues to this day . . . ."). Indeed, because of English involvement in the area, one can even see strains of English common law in Iraqi law, just as American law is now beginning to influence Iraqi law. This specific amalgamation is somewhat unique, although the concept is not. Safia K. Hohsen, *Women and Criminal Justice in Egypt*, *in* LAW AND ISLAM IN THE MIDDLE EAST , *supra* note 107, at 16 (noting that Egyptian criminal law has elements of French, Islamic, Ottoman, Indian, Belgian, and Italian law); Thompson, *supra* note 130, at 47 (noting that Japanese law is generally based on Chinese law, but

law also generally disdains circumstantial evidence that would be required to prove a case in the absence of eyewitnesses to a crime, and it entails strict prerequisites concerning the number of witnesses necessary for proving various crimes,[354] particularly sexual crimes.[355] For example, the Koran requires four eyewitnesses to prove adultery, while other crimes can be prosecuted with only two witnesses.[356] Since many crimes occur without the observation of two or four individuals, it is an understatement to say that Islamic law provides "considerable protection for the accused."[357] *Sharia* "makes the prosecution of criminal cases difficult, if not impossible, in practice."[358]

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also has elements of German law, which had incorporated elements of French and Roman law, and due to the American influence on post-World War II reconstruction, Illinois law).

353. LAW AND ISLAM IN THE MIDDLE EAST, *supra* note 107, at 3.

354. NEW ENCYCLOPEDIA OF ISLAM 419 (Cyril Glasse ed., rev. 2001) ("It is not possible to incriminate someone in shari'ah law upon circumstantial evidence; there must be witnesses, or the confession of the accused."). This disdain for circumstantial evidence is troubling, since circumstantial evidence is often the only form of evidence available, especially in Iraq, where witnesses are reluctant to testify and a lack of plea bargaining prevents "flipping" co-defendants. *See* Zoroya & Jervis, *supra* note 9, at 1 ("In the case of the Ramadi ambush [that killed 5 Marines], Marines collected as much circumstantial evidence as they could. After that, the evidence was turned over to the CCCI."). Furthermore, circumstantial evidence can be just as reliable as eyewitness testimony. *See* Robert A. Mintz, *Building Up A Case*, NAT. L.J., Nov. 22, 2004, at 31 ("Those who underestimate the power of circumstantial evidence do so at their peril. While eyewitness testimony, Perry Mason-style, can make for moments of high drama in the courtroom, experienced prosecutors know that more often than not it is circumstantial evidence that brings home the conviction."); *see also* Ann Coulter, *Contrary to Court TV, Most Evidence in Murder Cases is Circumstantial*, SHREVEPORT TIMES, Dec. 19, 2004, at 7 ("There's a name for people who take a dim view of circumstantial evidence because they don't understand the concept of circumstantial evidence: They're called 'O.J. jurors.'").

Unlike Iraqi law, American jurisprudence permits convictions based solely on circumstantial evidence. *See* United States v. Hirschberg, 988 F.2d 1509, 1516 (7th Cir. 1993) ("Circumstantial evidence may be the sole support for the conviction.").

355. Judges in Islamic countries, even in countries that have developed a secular law, still resort to the command of Islamic evidentiary law that there be two witnesses to support a charge of spousal abuse, for example. *See* Sudarsan Raghavan, *Slave To Custom*, SEATTLE TIMES, Nov. 28, 2004, at A3 (discussing how Afghani Supreme Court Justice Sayeed Omar Munib utilized *Sharia* law, which requires two witnesses to spousal abuse, rather than Afghani civil law, in holding that a thirteen year-old girl must return to the husband whom she accuses of beating, raping, and sodomizing her since she was nine years old).

356. LIPPMAN ET AL., *supra* note 116, at 69 ("The number of eyewitnesses required to prove the defendant's guilt is set out in the Koran. Four witnesses are required to establish the offenses of adultery and sodomy, while two witnesses are required for other offenses."); Koran 65:2 ("And take for witnesses two person from among you.").

357. Michael M.J. Fischer, *Legal Postulates In Flux: Justice, Wit, And Hierarchy in Iran*, *in* LAW AND ISLAM IN THE MIDDLE EAST, *supra* note 107, at 117.

358. NEW ENCYCLOPEDIA OF ISLAM, *supra* note 354, at 419; *see also* Ferris K. Nesheiwat,

The Iraqi two-witness rule is also consistent with ancient civil law.[359] Indeed, the Iraqi manifestation of the two-witness rule may have been derived in part from the civil law, which has influenced Iraqi law in various ways and which also contains certain numerical prerequisites for testimonial evidence.[360] Such a rule would have been highly palatable to Iraqi Muslims in light of it concurrence with Islamic law on this point. As with the Koranic version of the multiple-witness rule,[361] the civil law appropriated much of this rule from the Biblical command regarding the requisite proof for serious crimes—including a two-witness rule—although forms of this practice existed in the Roman law even before Constantine and the Christianization of Europe.[362]

A form of the two-witness rule appears in both the Old and New Testaments,[363] where it was obviously designed to protect innocent

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*Honor Crimes in Jordan: Their Treatment Under Islamic and Jordanian Criminal Laws*, 23 PENN ST. INT'L L. REV. 251, 266 (2004) (noting that under Islamic criminal law a "conviction can only be attained by evidence of a high degree of reliability."); *see* Esmaeili & Gans, *supra* note 212, at 155 (noting that sometimes Islamic evidentiary rules "are practically an insurmountable barrier to any conviction. . . .").

359. William H. McBratney, *The One Witness Rule in Massachusetts*, 2 AM. J. LEGAL HIST. 155, 155 (1958) ("The early civil law used a technique of proof whereby a party had to present a number of oaths according to a schedule based upon the nature of the fact to be proved and upon the rank and importance of the adversary.").

360. In the civil law tradition, the "rules governing the weight to be given to certain kinds of testimony were mechanical in operation. The court was required to give predetermined weight to testimony based on the number, status, age, and sex of the witnesses. *To prove a fact, a given number of witnesses was required.*" MERRYMAN, *supra* note 133, at 118 (emphasis added).

361. Insofar as Islam has roots in Judaism and Christianity, it presumably inherited the two-witness rule from these religious traditions. LIPPMAN ET AL., *supra* note 116, at 2 (discussing that Islamic criminal law "absorbed elements from ancient Rome, Greece, Persia, Europe, and the Old and New Testaments."); Ion, *supra* note 71, at 47 (noting that Mohammed and his disciple Abdallah Ibn Abbas were acquainted by Jewish writings and probably derived some of the Islamic legal tradition from Judaism); *id.* at 200 n.75 (noting the Christian influence on Arabic tribes before the founding of Islam).

362. John H. Wigmore, *Required Numbers of Witnesses: A Brief History of the Numerical System in England*, 15 HARV. L. REV. 83, 84 (1901) ("It has been doubted whether the Roman law in its prime (that is, before 200 A.D.) proceeded upon a numerical system in its treatment of witnesses. But it is clear that by the time of the Emperor Constantine, and also in the later codification of Emperor Justinian, which served as a sufficient foundation for the Continental civil law, the Roman law had adopted the general rule that one witness alone was insufficient upon any point.").

363. *See Deuteronomy* 17:5-6 (Douay-Rheims Bible) ("Thou shalt bring forth the man or the woman, who have committed the most wicked thing, to the gates of they city, and they shall be stoned. By the mouth of two or three witnesses shall he die that is to be slain. Let no man be put to death, when only one beareth witness against him."); *see Deuteronomy* 19:15 (Douay-Rheims Bible) ("One witness shall not rise up against any man, whatsoever the sin or wickedness be: but in the mouth of two or three witnesses every word shall stand."); *see Numbers* 35:30 (Douay-

individuals from false accusations, particularly those facing the death penalty for fictitious crimes.[364] The two-witness rule was also common in old English law, both in equity courts and the common-law courts.[365] It could also be found in the law of certain American colonies, such as Massachusetts, in cases punishable by death.[366] But the rule was generally abandoned by the Anglo common law by the seventeenth century as an irrational limitation on the trier of fact's province to rely on circumstantial

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Rheims Bible) ("The murder shall be punished by witnesses: none shall be condemned on the evidence of one man."); *see Matthew* 18:15-16 ("If thy brother offend against thee go, and rebuke him between thee and him alone. If he shall hear thee, thou shalt gain thy brother. If he will not hear thee, take with thee one or two more that in the mouth of two or three witnesses every word may stand."); *see 2 Corinthians* 13:1 ("In the mouth of two or three witnesses shall every word stand."); *see 1 Timothy* 5:19 (Douay-Rheims Bible) ("Against a priest receive not an accusation, but under two or three witnesses.").

364. Jewish law also contains a two-witness rule when the defendant is Jewish; gentiles are not afforded the same protection, however:

> [W]ithout the testimony of two competent witnesses, a Jew cannot be convicted for a capital crime, or for an offense whose penalty is flogging. The witness must describe the criminal act directly; circumstantial evidence is not allowed. By way of contrast, the Noahide courts trying non-Jews are free of such formal restrictions. A single witness's testimony suffices to convict. Any witness is competent to testify to what he knows about the matter and the court may judge the truth of the case by free evaluation of the witness' credibility.

Arnold N. Enker, *Aspects of Interaction Between the Torah Law, the King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1137 (1991).

365. Bryson, *supra* note 148, at 63 (stating that in the chancery courts a "party cannot prove a point by the evidence of a single witness; there must be at least two, but two is sufficient, and the inference is that no more should be produced."). Wigmore described the practice in English common-law courts:

> There was . . . in the English common law courts of the 1500s, nothing at all of repugnance to the numerical system already fully accepted in the ecclesiastical law. The same popular probative notion there prevailed among judges, juries, and counselors as on the Continent. They were equally prepared and accustomed to weigh testimonies by numbers, and therefore would see nothing fallacious in a rule declaring one witness not enough, and requiring a specified number of witnesses.

Wigmore, *supra* note 362, at 90-91.

366. McBratney, *supra* note 359, at 158 ("After observing the proceedings in Plymouth, the members of the General Court of Massachusetts enacted specific legislation on the subject in 1641 . . . 'no man shall be put to death without the testimonie of two or three witnesses, or that which is equivalent thereunto.'"). Notice that in Massachusetts there was not a strict "two-witness" rule insofar as other "equivalent" evidence would suffice.

evidence and to make credibility determinations.[367] Nonetheless, vestiges of the two witness requirement still exist in English and American law,[368] but only with respect to the prosecution of treason and certain acts of perjury.[369]

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367. Sir Matthew Hale observed:

> [I]t is one of the Excellencies of this Trial above the Trial by Witnesses, that although the jury ought to give a great Regard to Witnesses and their Testimony, yet they are not always bound by it, but may either upon reasonable Circumstances, inducing a Blemish upon their Credibility, though otherwise in themselves in strictness of Law they are to be heard, pronounce a Verdict contrary to such Testimonies, the Truth whereof they have just cause to suspect, and may and do often pronounce their Verdict upon one single Testimony, which Thing the Civil Law admits not of.

HALE, *supra* note 180, at 259. Again, he notes:

> [Juries] are not precisely bound to the Rules of the Civil Law, viz. To have Two Witnesses to prove every Fact, unless it be in Cases of Treason, nor to reject one Witness because he is single, or always to believe Two Witnesses if the Probability of the Fact does upon other Circumstances reasonably encounter them. . . .

*Id.* at 260.

368. *See* United States v. Chaplin, 25 F.3d 1373, 1377 (7th Cir. 1994) ("The two-witness rule arose in England, during the seventeenth century. At that time, the common law courts assumed jurisdiction over perjury cases with the abolition of the Court of Star Chamber, which had followed the practice of the ecclesiastical courts of requiring two witnesses. As a result, even in the common law courts, in which the testimony of a single witness was usually sufficient . . . a perjury conviction could be obtained only on the testimony of two witnesses.") (citation omitted). Besides requiring two witnesses, under the law, unsworn confessions of treason were not sufficient to support a conviction. Crawford v. Washington, 541 U.S. 36, 70 n.3 (2004) (Rehnquist, C.J., concurring).

369. U.S. CONST. art. III, § 3, cl. 1 ("No person shall be convicted of Treason unless on the Testimony of Two Witnesses to the same overt Act, or on Confession in Open Court."); 18 U.S.C. § 2381 (criminalizing treason); Cramer v. United States, 325 U.S. 1 (1945) (treason); McBratney, *supra* note 359, at 156-57 ("[I]t is well settled that at least two witnesses are necessary to a conviction of treason. In the United Sates, the requirement is specifically set forth in the Constitution, and is now so firmly implanted in Anglo-American law that the exception is know as the 'treason rule,' and has become an integral part of the law on that subject."). For the history of the two-witness rule in English law, see L.M. Hill, *The Two-Witness Rule in English Treason Trials: Some Comments on the Emergence of Procedural Law*, 12 AM. J. LEGAL HIST. 95 (1968); Wigmore, *supra* note 362, at 90-91. Canada has moved beyond a literal two-witness rule, and instead created one that looks more like America's two-witness rule with respect to perjury, for example, one witness plus some corroborating evidence. *See* C.R.C. ch. C-34 s. 47(3) (2005) ("No person shall be convicted of high treason or treason on the evidence of only one witness, unless the evidence of that witness is corroborated . . . by evidence that implicates the accused.").

Regardless of its origin,[370] it is easy to understand one rationale for a two-witness rule, ensuring that only the guilty are convicted. In a sense it comports with the Anglo-American view, noted by Blackstone,[371] that it is better to let a number of guilty persons go unpunished than to convict one innocent man.[372] The key term, however, is the "number of guilty persons" that are to go free, for opinion as to the appropriate number varies from scholar to scholar.

Blackstone said it was better that ten guilty persons escape justice, but Benjamin Franklin thought it better that one hundred guilty men go free rather than one innocent man be punished, to list but two examples.[373] Fear of Moslem terrorists has led some Dutch politicians to propose a contrary calculus. "'When it comes to preparing for a terrorist attack, it's better to have 10 possibly innocent people temporarily in jail than one with a bomb on the street,' said Mixime Verhagen, the floor leader of the Dutch Christian Democrats."[374]

Of course, the practicality of Blackstone's aphorism is highly dependent on the number of guilty persons who are to go free to ensure that the innocent are adequately protected. Thus, this principle is practiced in the United States only to an extent.[375] After all, the only way to ensure

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370. The two-witness requirement in the Constitution was based on an analogous requirement in English statutory law, which was derived from Canon-law provisions dealing with the crime of heresy, which was in turn derived from the civil law. *See* United States v. Robinson, 259 F. 685, 691 (S.D.N.Y. 1919) (L. Hand, J.) ("The requirement of two witnesses probably had its rise from the canon law. . . . It was the rule of canon law, borrowed from the civil law, that two witnesses were ordinarily necessary.").

371. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (photo reprint 1967) (1783)) ("[T]he law holds, that is better that ten guilty persons escape, than that one innocent suffer."). According to one source, this is exactly the idea motivating the Islamic two witness rule, among other evidentiary rules, that exists in Iraq. *See* LIPPMAN ET AL., *supra* note 116, at 68 ("Islamic law thus shares the common law principle that it is preferable that several guilty persons should escape punishment than that one innocent person should be convicted.").

372. *See* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174-75 (1997). In reality, mistakes in either direction, convicting the innocent or letting the guilty escape just punishment, are unfortunate and should be minimized to the extent reasonably possible.

373. *See id.*

374. *See* Robert Wieloard, *Dutch Lawmakers Say Government Underestimated Islamic Terror Threat*, ASSOCIATED PRESS., Nov. 11, 2004.

375. Like all other principles, this one is valued relative to other important legal principles. *See* Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice. . . ."); GEORGE F. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 93 (1983) ("The most important four words in politics are 'up to a point.' Are we in favor of free speech? Of course—up to a point. Are we for liberty, equality, military strength, industrial vigor, environmental protection, traffic safety? Up to a point. (Want a significant reduction of traffic deaths? Then ban left turns. You say that would be going

that the innocent are never wrongly convicted is to never convict anyone,[376] a practice that would prove suicidal for civilized society.

In the Moslem world,[377] as well as parts of Europe, the purpose of the two-witness rule was ignored and the operation of rule was so perverted that it actually led to great harm for defendants. Because the rule makes it so difficult to convict defendants, including obviously guilty defendants, governments quickly found a way around the rule: torture.[378] Rather than

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too far? Then you are for improving traffic safety—but only up to a point.)"); *Cf.* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 15 (1985) ("[P]eople *draw* lines . . . as a way or ordering social existence. . . .").

376. In the words of Judge Kozinski:

> Any rule of decision must strike a balance between two kinds of potential error—alpha and beta. For example, in the criminal context, the two types of error are unjust convictions of innocent persons (alpha errors) and wrongful acquittals of guilty ones (beta errors). . . .
>
> Any rule of decision reflects a policy judgment as to the proper trade-off between alpha and beta errors. The rule of decision we've adopted in criminal cases tilts heavily away from alpha errors (erroneous guilty verdicts), embodying the popular notion that it is better for ten guilty persons to go free than to convict an innocent one. Even there, however, we do not adopt a rule that calls for absolute certainty. Rather, we accept as inevitable that some, although hopefully few, alpha errors will slip through; the occasional conviction of an innocent is the bitter price we pay for avoiding the wholesale acquittal of the guilty.

Bunnell v. Sullivan, 947 F.2d 341, 352-53 (9th Cir. 1991) (Kozinski, J., concurring) (citing G. Keppell, Design and Analysis 65-66 (1973)).

377. In using the adjective "Moslem," it is important to note, as Pope Benedict XVI did, that "Islam is not a uniform thing. In fact, there is no single authority for all Muslims. . . . [n]o one can speak for Islam as a whole; it has, as it were, no commonly regarded orthodoxy." Cardinal Joseph Ratzinger, quoted in John L. Allen, Jr., *Pope Benedict on Islam*, NAT'L CATH. REP., July 29, 2005, at 20.

378. The use of torture to compel truthful testimony has an extensive history. *See* A. Lawrence Lowell, *The Judicial Use of Torture*, 11 HARV. L. REV. 220 (1897). But tortured and coerced confessions have been prohibited in civilized nations for a considerable time. *See* Mincey v. Arizona, 437 U.S. 385 (1978); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Brown v. Mississippi, 297 U.S. 278 (1936). They were also prohibited by Iraq's criminal procedure law, but this was ignored in practice. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 127, *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/ CLAMO-Public.nsf ("The use of any illegal method to influence the accused and extract a confession is not permitted. Mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants are considered illegal methods."); *but see id.* ¶ 218 ("It is a condition of the acceptance of the confession that it is not given as a result of coercion, whether it be physical or moral, a promise or a threat. Nevertheless, if there is no causal link between the coercion and the confession or if the confession is corroborated by other evidence which convinces the court that it is true or which has led to uncovering certain truth, then the court may accept it.").

granting defendants their liberty when accusations were uncorroborated by two eyewitnesses, authorities would torture or imprison defendants until they obtained a confession, regardless of actual guilt or innocence.[379] The more severe the torture, the quicker the confession.

This practice continued through the time of Saddam Hussein[380] and reportedly remains standard police procedure in Iraq to this day.[381] For example, in one CCCI case, which did not involve U.S. soldiers, the defendants were accused of murdering a senior intelligence official in the Iraqi Interior Ministry. One of the defendants had confessed to the crime prior to trial, but he told the CCCI trial judges that the confession was procured by torture. He claimed that the Iraqi police "'tortured me for five days, tore off my clothes and underwear and threatened to rape me and

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In light of the widespread use of torture in the Middle East, the condemnation of the abuse at Abu Ghraib by Middle Eastern governments was hypocritical. These governments regularly utilize torture in their criminal justice systems. Bret Stephens, *Birth of a Nation*, WALL ST. J., May 27, 2005, at A12, (describing various torture methods and devices used by Syrian officials to coerce confessions from the innocent); Alasdair Palmer, *Briton Hates "Savages,"* WASH. TIMES, June 1, 2005, at A13 ("For nearly three years, Sandy Mitchell was held in a Saudi Arabian jail and tortured until he confessed to a bombing he did not commit."); Glenn Frankel, *Briton's Tale of Torture Offers View of Saudi Justice*, WASH. POST, May 19, 2005, at A20 (discussing Saudi Arabia's prosecution of an Englishman, Sandy Mitchell, for terrorist attack by Islamic militants and in which the government knew Mitchell had no involvement; besides a mock execution, Mitchell was "punched, kicked, spat at, beaten on the soles of his feet with an ax handle and chained for nine days to a steel door from in his cell"). The court sentenced Mitchell to death after a ten-minute hearing.

379. LIPPMAN ET AL., *supra* note 116, at 122 ("The requirement of two *'adl* male eyewitnesses at times resulted in acquittals based on failure of proof. Some doubted the ability of the threat of divine punishment to guarantee truthful oaths and testimony, and supported the extraction of confessions by threat, torture and imprisonment."). The two-witness rule may also be the root cause of the use of torture in Roman canon law. *Id.* (citing JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 7 (1977)).

380. *See* Salih Saif Aldin & John W. Anderson, *Suspect's Death Evokes Hussein Era*, WASH. POST., Apr. 9, 2005, at 18 (noting that "techniques favored by Iraq's old justice system" included "torture, disappearances and death-in-custody"); Luhnow, *supra* note 35, at A14 ("American officials have already amended the country's criminal code. The changes: a ban on confession obtained through torture . . . .").

381. *Country Report*, *supra* note 119 ("Reportedly, coerced confessions and interrogation continued to be the favored method of investigation by police. According to one government official, hundreds of cases were pending at year's end alleging torture."); *see* Naomi Klein, *Torture's Part of the Territory*, L.A. TIMES, June 7, 2005, *available at* 2005 WLNR 9082668 ("An internal report from the 1st Cavalry Division . . . states that 'electrical shock and choking' are 'consistently used to achieve confessions' by Iraqi police and soldiers."); Aldin & Anderson, *supra* note 380, at 18 (noting the continued use of torture by Iraqi police services); Struck, *supra* note 91, at A10 (noting routine use of torture).

bring my wife and sisters in to rape them.'"[382] To avoid further suffering and to protect his family, the defendant promptly confessed.

Jeremy Bentham said that the two-witness rule was designed to "giv[e] security to the innocent" and that "the law which causes a man to perish upon the deposition of a single witness is fatal to liberty."[383] It is possible to protect the innocent from false testimony, however, without adopting a rule requiring a minimum of two eyewitnesses. Alternatively, the two-witness rule does not need to be strictly applied or applied to every crime, or it could be applied flexibly according to the Anglo-American tradition of the two-witness rule, which is not as rigid as the Islamic version.[384] Thus for example, under English law, the weight of the rule was somewhat mitigated by the fact that the "two witnesses could be divided within the indicted offence, so that one testified to one criminal act and the second to another . . . ."[385] Under this approach, a prosecutor could prevail even without two eyewitnesses for each element of an offense, so long as there were a total of two witnesses to testify about an offense. Similarly, the U.S. Supreme Court has held that witnesses obviously cannot testify as to the defendant's state of mind, knowledge, or intent when he was committing his criminal acts,[386] and thus the two-witness rule is not applied to the mens rea elements of crimes.

In the perjury context, there are also various exceptions and ways to circumvent the two-witness rule.[387] Under the Anglo-American version of the perjury two-witness rule, "the falsity of a defendant's testimony cannot be proved beyond a reasonable doubt by the uncorroborated testimony of one person . . . ."[388] Originally, the rationale behind the rule was that in perjury prosecutions, the defendant's testimony under oath would counter the evidence of a single prosecution witness, hence the need for a second

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382. Fleishman, *supra* note 73, at 1.

383. EDWARD J. WHITE, THE LAW IN THE SCRIPTURES 122 (1935) (quoting Jeremy Bentham, Rationale of Judicial Evidence Book IX).

384. Hill, *supra* note 369, at 95.

385. *Id.*

386. Cramer v. United States, 325 U.S. 1, 31 (1945) ("What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses, it would be to hold that it is never provable. It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses.").

387. *See, e.g.*, United States v. Nicoletti, 310 F.2d 359, 362 (7th Cir. 1962) (holding that the two-witness rule does not apply when the allegedly perjurious testimony concerns the defendant's state of mind).

388. POSNER, *supra* note 151, at 51 n.63; 18 U.S.C. § 1621; Hammer v. United States, 271 U.S. 620, 626 (1926) ("The uncorroborated oath of one witness is not to establish the falsity of the testimony of the accused set forth in the indictment as perjury.").

prosecution witness to break the "tie."[389] But this anachronistic rationale soon evolved into one of protection for trial witnesses who, without such protection from a perjury prosecution, might be reluctant to testify.[390]

As the Supreme Court observed:

> In order that witnesses may be free to testify willingly, the law has traditionally afforded them the protection of certain privileges, such as, for example, immunity from suits for libel springing from their testimony. Since equally honest witnesses may well have differing recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon "an oath against an oath."[391]

Thus, the two-witness rule protects witnesses from facing a perjury prosecution unless at least two witnesses can be found to contradict his testimony.[392]

In the United States, the two-witness rule operates as a common-law evidentiary standard rather than an element of the crime.[393] It nevertheless limits the ability of courts to dispense justice in perjury cases. Because it has the propensity to impede justice, the two-witness rule has been criticized by legal scholars as a crude and anachronistic device almost to

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389. United States v. Chaplin, 25 F.3d 1373, 1377 (7th Cir. 1994) (quoting 7 Wigmore on Evidence 2040(a), at 359-60 (Chadbourne rev. 1978)). But as the *Chaplin* panel commented: "In light of modern notions of the function of the jury, this original justification of the two witness rule provides a very weak rationale for the application of the rule in the contemporary trial setting." *Id.* at 1378.

390. Weiler v. United States, 323 U.S. 606, 609 (1945).

391. *Id.*

392. Other common-law rules protect witnesses in criminal proceedings from civil suits for defamation or malicious prosecution. The rationale is that such immunities will more often encourage truthful testimony in criminal proceedings and it is better to let the judge or jury hear a wider spectrum of evidence and permit them to decide credibility issues. To prevent "harassment of witnesses and to promote unrestrained testimony in criminal cases, the Supreme Court held that witnesses at trials are absolutely immune form suits under § 1983 for providing false testimony at trials." Cervantes v. Jones, 188 F.3d 805, 809 (7th Cir. 1999) (citing Briscoe v. LaHue, 460 U.S. 325, 334 (1983)); Jones v. Cannon, 174 F.3d 1271, 1286 (11th Cir. 1999) (holding that a witness is absolutely immune from civil suits for false testimony provided to a grand jury); Curtis v. Bembenek, 48 F.3d 281, 285 (7th Cir. 1995) (holding that a police officer was entitled to immunity from suit for false testimony at a probable cause and suppression hearing). It is worth asking whether this rationale is sound, and indeed, the common law did not extend this immunity to so-called "complaining witnesses," the witness who instigated the criminal prosecution in the first place. *See Cervantes*, 188 F.3d at 809-10; White v. Frank, 855 F.2d 956, 958-59 (2d Cir. 1988).

393. United States v. Onomonu, 999 F.2d 43, 46 (2d Cir. 1993); Gebhard v. United States, 422 F.2d 281, 286 (9th Cir. 1970).

the same extent as others like Bentham sing its praises.[394] Critics contend, however, that the rule is not likely to result in more reliable results than trials conducted without the "benefit" of such a rule.[395] In light of this criticism, it is not surprising that Congress found a way around the two-witness rule by enacting a perjury statute making perjury provable regardless of whether the prosecution can muster two witnesses.[396]

Even without this statute, the "two-witness rule" was something of a misnomer because prosecutors were never absolutely compelled to produce two witnesses in support of a perjury prosecution. The rule "'does not literally require the direct testimony of two separate witnesses, but rather may be satisfied by the direct testimony of one witness and sufficient corroborative evidence.'"[397] Indeed, in its present form, the two-witness rule "is really nothing but a short-cut way of stating that in a perjury trial the evidence must consist of something more convincing than one man's word against another's."[398] Thus a prosecutor can choose to satisfy his

394. *See Weiler*, 323 U.S. at 609 ("It is argued that since effective administration of justice is largely dependent upon truthful testimony, society is ill-served by an 'anachronistic' rule which tends to burden and discourage prosecutions for perjury."); *see* United States v. Chaplin, 25 F.3d 1373, 1378 n.4 (7th Cir. 1994) ("The two-witness rule has been criticized as an historical anachronism.");*Cf.* Cramer v. United States, 325 U.S. 1, 47-48 (1945) (Jackson, J.) ("It is not difficult to find grounds upon which to quarrel with this Constitutional provision. Perhaps the framers placed rather more reliance on direct testimony than modern researches in psychology warrant. Or it may be considered that such a quantitative measure of proof, such a mechanical calibration of evidence is a crude device at best or that its protection of innocence is too fortuitous to warrant so unselective an obstacle to conviction."); *c.f.*, United States v. Robinson, 259 F. 685, 691 (S.D.N.Y. 1919) (Hand, J.) ("Such a procedural requirement, wherever it comes from, implies a system of trial not rational in its processes at all, one in which the cause was tried by the sacramental nature of the oath itself . . . one where the witnesses were guarantors or sponsors for the parties. . . .").

395. *Weiler*, 323 U.S. at 609.

396. 18 U.S.C. § 1623(e) (1999) ("Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."); *Chaplin*, 25 F.3d at 1378 n.5 (stating that Congress has "abolished the two-witness rule in prosecutions brought under 18 U.S.C. § 1623, which concerns false declarations made before a grand jury or a court.").

397. *Chaplin*, 25 F.3d at 1377 (quoting United States v. Diggs, 560 F.2d 266, 269 (7th Cir. 1977)); *see* United States v. Davis, 380 F.3d 183, 195 (4th Cir. 2004) (citing United States v. Knohl, 379 F.2d 427, 443 (2d Cir. 1967)). The statutory text of the Iraqi "two witness" rule similarly permits reliance on other credible evidence. IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 213(B), *available at* https://www.jagcnet.army.mil/JAGCNET Internet/Homepages/AC/CLAMO-Public.nsf ("One testimony is not sufficient for a ruling if it is not corroborated by other convincing evidence or a confession from the accused. The exception of this rule is if the law specifies a particular way of proving a case, which must be followed."). The CCCI judges ignored this caveat, however, and always required the testimony of two witnesses.

398. United States v. Beach, 296 F.2d 153, 155 (4th Cir. 1961).

burden of proof with two witnesses, but may also use one witness and "independent evidence so corroborative of the direct testimony that the two when considered together are sufficient to establish the falsity of the accused's statement under oath beyond a reasonable doubt."[399] This is frequently not difficult to do. Accordingly, this diminishes the danger that the two-witness rule will permit a defendant to evade justice.

Not so with the Iraqi two-witness rule. It was more burdensome because U.S. personnel were not aware of the strict manner in which the CCCI would apply the rule until they saw it operate as the ostensible rationale for several acquittals.[400] For their part, the investigative judges had recommended several one-witness cases for trial—the equivalent of an indictment—which suggested that these judges believed these cases warranted a trial, even with only one witness. The trial judges, however, refused to place any stock in the testimony of only one American witness, even when supported by other substantial evidence. The CCCI acquitted defendants, ostensibly on this ground, after full trials.[401]

Such a strict and bizarre application of a mere evidentiary rule so inhibits justice that it virtually begs for the crafting of exceptions, particularly in cases where the application of such a rule would result in the release of dangerous terrorists. Thus, for example, judges with an ounce of creativity might be expected to craft a rule in murder cases that the testimony of the medical examiner concerning the cause of the victim's death, along with testimony connecting the defendant with the murder weapon would constructively constitute one witness to the crime. A rule holding that expert testimony, when combined with testimony from an actual witness to the crime, is sufficient evidence for a conviction would

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399. *Chaplin*, 25 F.3d at 1381 (quoting *Diggs*, 560 F.2d at 270); *see Weiler*, 323 U.S. at 610 ("Two elements must enter into a determination that corroborative evidence is sufficient: (1) that the evidence, if true, substantiates the testimony of a single witness who has sworn to the falsity of the alleged perjurious statement; (2) that the corroborative evidence is trustworthy.").

400. Strange rules like this one often lead creative common-law judges to formalistic measures designed to evade application of the rule. *See, e.g.*, GRANT GILMORE, THE AGES OF AMERICAN LAW 38 (Yale Univ. Press 1977) ("Justice Story of the Supreme Court and Chief Justice Shaw of Massachusetts are among the notable judicial figures of the period who are known to have been convinced antislavery men. . . . It fell to the lot of both men to write opinions in slavery cases. In these opinions they seem to have been driven into a formalism which was entirely foreign to the ideas they had expressed and the principles they had stood for during their long careers."). But formalistic procedures devoid of any practical value also lead pragmatic judges to find creative means of evading such rules.

401. "Undoubtedly in some cases documents emanating from the accused and the attending circumstances may constitute better evidence . . . than any amount of oral testimony." Hammer v. United States, 271 U.S. 620, 627 (1926). Apparently the Iraqi judiciary does not concur with these sentiments.

be reasonable and would permit the court to keep up the pretense of adhering to the two-witness rule.[402]

Indeed, the strange results this rule engenders suggest that Iraqi judges do not punctiliously enforce their two-witness rule anyway. They presumably do not enforce it as to any scienter requirements of a crime.[403] What is certain is that the judges of the CCCI strictly enforced their two-witness rule whenever the victims were U.S. soldiers.[404] Notably, the Iraqi judges do not preclude an insurgent's close friends and family members from testifying on his behalf as alibi witnesses. This happens despite the fact that Islamic law precludes such testimony because these witnesses have too great a stake in the outcome to ensure truthfulness.[405] Perhaps this aspect of *Sharia* never made it into Iraqi law, or perhaps the judges pick and choose the evidentiary rules they apply on a given day.[406]

To the extent that the Iraqi judiciary seems to have a fondness for the two-witness rule or perhaps feels compelled by *Sharia* law to enforce the rule in defense of Iraqi defendants,[407] it is unlikely that there will be any modification of this rule anytime soon.

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402. "Mohammed himself said that the laws should be modified according to the exigencies of the time," and since the inception of the two-witness rule great strides have been made in the forensic sciences, advancements that the law should take into account by loosening the two-witness rule. Ion, *supra* note 71, at 47 n.16.

403. In the United States, the two-witness rule for both treason and perjury applies only to acts and omissions susceptible of observation by witnesses, but not the defendant's motivations for criminal acts or omissions. *See* Cramer v. United States, 325 U.S. 1, 31 (1945) ("What is designed in the mind of an accused never is susceptible of proof by direct testimony. If we were to hold that the disloyal and treacherous intention must be proved by the direct testimony of two witnesses, it would be to hold that it is never provable. It seems obvious that adherence to the enemy, in the sense of a disloyal state of mind, cannot be, and is not required to be, proved by deposition of two witnesses."); *see* United States v. DeZarn, 157 F.3d 1042, 1053 (6th Cir. 1998) ("[T]he two witness rule is inapplicable when the only issue at trial relates to the state of mind of the accused").

404. Of course, "it is always a comfort to be able to hide behind the law," especially when making irrational decisions. POSNER, *supra* note 151, at 255.

405. LIPPMAN ET AL., *supra* note 116, at 69 (stating that "a witness may not testify in a case involving an immediate member of his family or in a case in which he may benefit from the outcome of the proceeding.").

406. Civil-law countries generally are not known for possessing a developed body of evidentiary law and Iraq seems to have inherited this defect. Hamilton, *supra* note 127, at 183.

407. Islamic law does not look kindly on circumstantial or non-testimonial evidence. NEW ENCYCLOPEDIA OF ISLAM, *supra* note 354, at 419 ("It is not possible to incriminate someone in shari'ah law upon circumstantial evidence; there must be witnesses, or the confession of the accused. This makes the prosecution of criminal cases difficult, if not impossible, in practice."); LIPPMAN ET AL., *supra* note 116, at 121.

### C. *Absence of Plea Bargaining*

In addition to the CCCI's refusal to require defendants to testify under oath and its scrupulous adherence to the two-witness rule, the CCCI further inhibits the prosecution of terrorists by not allowing plea bargains. Therefore, because American prosecutors have nothing to offer Iraqi terrorists in exchange for their cooperation, their defendants have no incentive to assist the prosecution, provide actionable intelligence, and testify against other insurgents. Other than offering complete immunity from prosecution,[408] the United States is unable to cut deals or offer potential witnesses reduced charges or lenient sentences in exchange for valuable testimony against other terrorists. In American courts, U.S. prosecutors and judges have observed that "[i]n many cases it is impossible to convict a criminal defendant without using the threat of prosecution to get his accomplices to testify against him,"[409] and this has certainly proven to be true in Iraq. Because of the difficulty in obtaining evidence, the "disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice,"[410] but not in Iraq. There, U.S. prosecutors, who have no standing in Iraqi courts,[411] also lack authority to offer deals to defendants.[412] True, the CCCI judges enjoy the authority to

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408. The examining magistrate could offer immunity to a defendant to encourage him to testify against another criminal, but American prosecutors were not free to propose this course of action, and the investigating judges never approached the prosecutors with an offer to grant immunity. *See* IRAQI CODE OF CRIMINAL PROCEDURE (English translation) [1971] ¶ 129(A), *available at* https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf ("The examining magistrate may offer immunity with the agreement of the Criminal Court, for reasons recorded in the record, to any defendant accused of an offence in order to obtain his testimony against others involved in its commission, on condition that the accused will give a full and true statement.").

409. POSNER, *supra* note 151, at 108.

410. Santobello v. New York, 404 U.S. 257, 260 (1971). "[E]veryone understands that to nail a really big criminal, the little criminals must sometimes be given a pass." POSNER, *supra* note 151, at 146.

411. Finer & Mosher, *supra* note 72 (noting that the U.S. military prosecutors lack standing before Iraqi trial courts); Spinner, *supra* note 101, at A12 ("the U.S. military has no official role in the actual court proceedings, other than to provide witnesses and an interpreter"). Compare this to the Yemeni tribunals that tried six individuals involved in the attack on the U.S.S. Cole, which killed seventeen U.S. sailors. Though the court was composed of Yemeni officials, American prosecutors were permitted to represent the interests of the United States. Neil MacFarquhar & Dave Johnston, *Death Sentences in Attack on Cole*, N.Y. TIMES, Sept. 30, 2004, at A1. The court sentenced two of the six defendants to death, while two government officials who had forged identification papers received only five-year sentences. *Id.*

412. The best that the American prosecutors could do is offer a co-defendant complete immunity in exchange for his testimony. At trial, however, the judges would question why the

permit American prosecutors to prosecute cases directly in that court,[413] rather than through Iraqi prosecutors, but they never utilized this power. In any event, the Iraqi judges are unlikely to honor deals made by the United States and defendant-witnesses.[414]

Part of this problem stems from the fact that plea bargaining is completely foreign to Iraqi judges,[415] as it is to most jurists of the civil-law tradition. They perceive plea-bargaining to be unfairly inconsistent in the treatment of defendants—some of whom may be treated leniently in exchange for their cooperation—and contrary to the rule of law.[416] In

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witness was not also charged, and probably would have either dismissed the case or would have given the defendant a reduced sentence to punish the Americans for prosecuting only one of the potential defendants, a practiced frowned upon in Iraq. Of course, in American jurisdictions, the trial judge has no obligation to accept a plea agreement. Lynch v. Overholser, 369 U.S. 705, 719 (1962). But because of burgeoning caseloads, judges have a strong incentive to dispose of as many cases as they can by means other than full trials on the merits.

When crimes involved multiple perpetrators, only some of whom were captured by U.S. forces, the Iraqi judges would question why only a few of the perpetrators were on trial. Similarly, on more than one occasion, the Iraqi judges refused to hold trials for crimes in which the United States had several defendants in custody but elected to prosecute defendants piecemeal, usually because of transportation problems. Indeed, according to the CCCI judges, it is impossible under Iraqi law to sever trials of defendants. As a matter of judicial economy this might make some sense, but it is not as though the CCCI was inundated with cases. Indeed, most CCCI judges worked only half days.

In contrast to the CCCI's practice, American law readily permits—and sometimes requires—separate trials in cases involving multiple defendants. *See* FED. R. CRIM. P. 14(a) ("If the joinder of offenses or defendants in an indictment, or information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires."); Bruton v. United States, 391 U.S. 123 (1968) (holding that two defendants may not be tried by the same jury where the prosecution will present evidence that one defendant confessed to the crime of which both defendants were charged and the confessing defendant is not available for cross-examination).

413. *See* CPA Order No. 13, *supra* note 36, § 17(1) ("The CCCI shall be able to request the support from the international community, any authorized foreign military forces in Iraq or diplomatic posts in Iraq for the investigation or trial of cases.").

414. The Coalition Provisional Authority Order creating the CCCI did permit judges to reduce sentences, including mandatory minimum sentences, in exchange for cooperation, including cooperation given after the sentence was imposed. *See id.* § 13(2). The power granted by this provision was rarely, if ever, used.

415. Marlisle Simons, *Iraqis Not Ready for Trials; U.N. To Withhold Training*, N.Y. TIMES, Oct. 22, 2004, at A11 (noting that the "notion of plea bargaining" is foreign to Iraqi judges and prosecutors).

416. In the words of Merryman:

> Civil lawyers criticize the common American practice of plea bargaining (giving the prosecutor discretion to charge a lesser offense or call for a lighter sentence if the defendant agrees to plead guilty). This practice seems to them to frustrate

contrast, in the U.S. federal courts, roughly ninety percent of criminal defendants plead guilty pursuant to a plea agreement.[417] Plea agreements, therefore, prevent the federal and state courts in the United States from grinding to a halt. An absence of plea deals would require substantially more judges, prosecutors, investigators, and defense attorneys to deal with the increased workload the full trials would entail.[418] U.S. trials have become lengthy and expensive affairs in part because defendants enjoy a broad range of substantive and procedural rights.

In light of the time and expense of American trials, it has proven useful, to both prosecutors and defendants, to enter plea agreements. Defendants waive some of their rights and admit guilt—and in some cases assist the prosecution by testifying against other defendants—in exchange for something of value, such as the dismissal of some charges or a recommendation from the prosecutor that the judge be lenient in sentencing. Were this process permitted in Iraq, cases could be handled with greater dispatch and efficiency, and would entail outcomes beneficial to the United States, the defendants, and the Iraqi people.[419]

Most importantly, plea bargaining would give U.S. prosecutors something of value to offer terrorists who possess valuable information about their fellow militants which could help prosecutors obtain the capture and conviction of these other terrorists. Beyond that, many of these terrorists possess information that could be used to prevent future attacks, and thereby save innocent American and Iraqi lives. Since some of these terrorists are simply petty criminals who are paid a pittance by Baathists to carry out attacks and are generally devoid of any real loyalty to the

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> legislative intent and the legitimate expectation of victims, and to compromise the rule of law. Their law and their prosecutorial traditions both sharply limit prosecutorial discretion.

MERRYMAN, *supra* note 133, at 130.

417. Administrative Office of the United States Courts, Judicial Facts and Figures, Table 5.3, U.S. District Courts. Criminal Defendants Disposed of by Method of Disposition, *available at* http://www.uscourts.gov/judicialfactsfigures/table3.05.pdf (last visited Mar. 17, 2005).

418. Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

419. This is not to say that plea-bargaining is a perfect solution to the problems posed by extensive criminal litigation. But it does entail some concrete advantages to both society and criminal defendants. The fact that both prosecutors and defendants freely enter into such agreements confirms this.

insurgency,[420] it is probable that if offered incentives such as reduced sentences, these criminals would quickly turn on their employers.

But without the ability to dangle this carrot in front of them, or the stick of commensurate sentences to induce action, American prosecutors will almost never be able to persuade Iraqi terrorists to provide intelligence or testify against their fellow terrorists.[421]

### D. *Closure of the Record and Refusal to Permit Rebuttal Evidence*

Another difficulty in prosecuting cases before the CCCI was the court's practice of closing the record to the prosecution upon the investigative judges' submission of the investigative report to the trial judges. Accordingly, if the United States came across evidence not previously obtainable, but after the investigative judge had submitted his dossier to the trial court, the trial judges would refuse to allow this evidence to be presented at trial. Indeed, in one case in which American prosecutors discovered additional witnesses after the investigative judge had passed a case to the trial court, but before the trial, American prosecutors attempted to reopen the case. But the investigative judge adamantly refused to receive the evidence. The judge claimed it would have been a violation of Iraqi law to do so, and that there was no mechanism to reopen the case absent a special order from the trial court. At trial, in turn, the CCCI trial judges refused to hear evidence from witnesses who have not first testified before the investigative judge.

Understandably every judicial system requires finality and a point beyond which new evidence cannot be submitted. Without such a rule, parties would have no incentive to diligently and expeditiously gather and

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420. Richard Lowry, *What Went Right*, NAT'L REV., May 9, 2005, at 31 ("On the edges of this core of the insurgency were criminals (Saddam emptied the jails in October 2002 in anticipation of the invasion.)"); Trebilcock, *supra* note 2, at 48 (noting the "rampant criminal activity from thousands of criminals that the Baathist regime released immediately before the war").

421. One might suppose that creative Americans could devise a system whereby insurgents might be rewarded for cooperation, but this has yet to occur. American special prosecutors have no direct control over the length or conditions of detention—which is the province of the military police—nor do they control intelligence gathering—which is the domain of military intelligence. This separation of functions works to the detriment of bringing terrorists to justice and thus the prevention of future attacks. There is also a mistaken belief, engendered by the vague language of the Geneva Conventions, that providing special privileges to cooperative insurgents would violate the provisions of Geneva. Heather Mac Donald, *How to Interrogate Terrorists*, CITY J., Winter 2005, *available at* http://www.city-journal.org/html/15_1_terrorists.html (noting that legal memoranda interpreting the Geneva Conventions would have precluded "providing a detainee an incentive for cooperation—such as a cigarette or, especially favored in Cuba, a McDonald's Filet-O-Fish sandwich.").

present evidence, and cases would drag on for years, thereby denying defendants a speedy trial and a prompt decision from the court. The problem with the CCCI's rule is that it completely precludes the prosecution from further developing the evidence from the time the investigative judge submits his dossier to the trial court to the date of trial, while the defendant is not similarly precluded form gathering new evidence during this period. Were these rules the norm in American jurisdictions, prosecutors would be precluded from offering at trial any evidence that had not been previously submitted to the grand jury. In other words, prosecutors would be forced to submit their entire case, including the testimony of all witnesses, to the grand jury, and anything not submitted to the grand jury could never be considered at trial. Furthermore, the defendant would have the opportunity to see and hear all of the prosecution's evidence, and thereby tailor his own testimony or that of his witnesses accordingly.

So in cases where the American prosecutors sought to present evidence to the investigative judges over the course of several weeks—usually because transportation was in short supply and not all of the witnesses could testify on the same day—they had to request that the investigative judges not prematurely submit the cases to the trial court before all of the evidence had been presented. But because the American attorneys enjoyed no standing,[422] and the investigative judge is the master of the case, the investigative judges were under no obligation to accede to the American prosecutor's request. Sometimes they did and sometimes they did not.[423]

A related problem concerned rebuttal evidence. As previously noted, an Iraqi defendant is under no obligation to participate in the investigative hearing, and can elect to remain silent and not present a defense during the investigative stage of the proceedings.[424] The defendant is further protected by the rule that no adverse inference can be drawn from his refusal to testify, just as in the United States.[425] An Iraqi defendant, therefore, may wait until trial to ambush the prosecution with a fully-developed defense, which admittedly is a wise course of action on his part. At trial, Iraqi defendants would then frequently raise defenses—usually an

422. Finer & Mosher, *supra* note 72 (noting that the U.S. military prosecutors lack standing before Iraqi trial courts); Spinner, *supra* note 101, at A12 ("[T]he U.S. military has no official role in the actual court proceedings, other than to provide witnesses and an interpreter.").

423. With one or two exceptions, the investigative judges were generally accommodating to the American prosecutors, and would most likely hold a case until all evidence was presented. Such requests for forbearance, however, could not be made in cases where new evidence was discovered post-investigative hearing but pretrial.

424. CPA Order No. 13, *supra* note 36.

425. *Id.*

alibi defense—to which the prosecution needed to submit rebuttal evidence.[426] As mentioned above, under the CCCI's system, however, the prosecution's case was considered closed upon delivery of the investigative judge's report to the trial judges, and therefore no rebuttal evidence could be submitted at trial.

Thus, no matter how unexpected and unfounded a defense might be, American prosecutors could not offer evidence to rebut it. Such a system invites abuse by defendants, and many Iraqi defense attorneys took full advantage of this defect. Indeed, it was surprising that more attorneys did not afford themselves the opportunity for deception that the CCCI extends to defendants. Of course, this practice conflicts with Anglo-American notions of a fair trial, and greatly impedes efforts to uncover the truth. But it does comport with the Islamic law or *Sharia*,[427] which is presumably why CCCI judges so tenaciously clung to this practice. The fact that the rule thwarted American efforts to obtain justice also encouraged CCCI judges to apply it in terrorism cases, perhaps to demonstrate their antipathy for U.S. soldiers or to further encumber the American occupation of their country.[428]

Military occupation courts are designed to prevent these shenanigans by the judges of an occupied nation, and are in fact that only means of controlling judicial decisions designed to encumber an occupation army. As explained by Dr. Fraenkel:

> The judicial process is essentially different from other forms of administration, for it is subject to no orders from superiors. Administrative agencies of the executive branch of government can be subjected to outside supervision and control without changing their basic structure, because in any case they function on the principle of hierarchical authority. The activities of courts, however, can be only accepted or rejected; if the independence of the judiciary is to be respected at all, the courts cannot be subjected to interference. For this reason an occupation regime must create its own courts for all litigation that it is not willing to entrust to the free functioning of the courts of the occupied country.[429]

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426. The Iraqi prosecutor never made an effort to obtain rebuttal evidence from the United States, suggesting that he did not desire a conviction or he knew that the deck was stacked against conviction such that presenting rebuttal evidence would be futile.

427. *See* LIPPMAN ET AL., *supra* note 116, at 121.

428. FRAENKEL, *supra* note 30, at 21-22.

429. *Id.*

American military occupation courts certainly could have been used effectively in Iraq, if for no other reason than to overcome the anachronistic and burdensome rules of the CCCI under which American prosecutors were and are forced to operate.

### E. *Lack of Substantial Cross-Examination of the Defendant and Defense Witnesses*

A lack of cross-examination of defendants and defense witnesses was yet another patent defect of the CCCI.[430] This is ironic considering that a portion of ancient Iraq, then known as Babylon, was the scene of perhaps the greatest and most famous demonstration of the power of cross-examination to uncover truth.[431] The story of this trial is set forth in the Biblical book of Daniel, in which Daniel thwarts the evil machinations of two judges who sought to seduce the virtuous Susanna, who rebuffed their advances.[432] As a result, the judges accused her of fornication, and claimed that they had spied Susanna in the throes of passion with her lover.[433]

Daniel defeated this false accusation through the art of cross-examination. He separated the two judges and then questioned each one. They tripped over their own lies when one testified that he saw Susanna being ravished by her lover under a mastic tree while his partner in perjury swore it was under an oak tree.[434] Justice triumphed over evil when, after Daniel showed both of the judges to be liars, the community sentenced the malevolent pair to the death they would have inflicted on the God-fearing

430. Generally speaking, civil-law lawyers are not considered to be adept at cross-examination as they rarely employ this tool. *See* MERRYMAN, *supra* note 133, at 115 ("The familiar pattern of immediate, oral, rapid examination and cross-examination of witnesses in a common law trial is not present in the civil law proceeding.").

431. For a brief discussion of Babylon and Babylonian civilization, see generally WILLIAM C. MOREY, ANCIENT PEOPLES (1914).

432. *See Daniel* 13:1-64 (New American Bible).

433. *Id.*

434. *Id.*

Susanna.[435] As Daniel observed after eliciting the contradiction from one of the evil judges: "Your fine lie has cost you your head."[436]

As Daniel demonstrated, there frequently is no better instrument than cross-examination for the task of uncovering lies and getting at the heart of the truth, especially when multiple witnesses testify untruthfully about the same event.[437] The U.S. Supreme Court, quoting Professor Wigmore, called cross-examination "'the greatest legal engine ever invented for the discovery of truth.'"[438] In the words of one author: "no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions."[439] Not surprisingly, then, many practitioners believe that cross-examination is "the most devastating weapon in the trial lawyer's arsenal . . . ,"[440] because sooner or later most liars get caught in a trap their own lies have created. In the words of one trial attorney: "A thousand facts

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435. This is consistent with the law set forth in the Book of Deuteronomy, and Iraqi law. The Book of Deuteronomy states:

> If a lying witness stands against a man, accusing him of transgression, Both of them, between whom the controversy is, shall stand before the Lord in the sight of the priests and the judges that shall be in those days. And when after most diligent inquisition, they shall find that the false witness hath told a lie against his brother: They shall render to him as he meant to do to his brother, and thou shalt take away the evil out of the midst of thee: That others hearing of this may fear, and may not dare to do such things.

*Deuteronomy* 19: 16-20 (Douay-Rheims Bible). Similarly, the *Sharia*-influenced Iraqi Penal Code states:

> Any person who falsely testifies for or against the accused is punishable by detention plus a fine or by one of those penalties.
>
> If the accused is subsequently convicted as a result of that testimony, such person is punishable by the penalty for the offense for which the accused was convicted.

IRAQI PENAL CODE § 3, ¶ 252 (1969), *at* http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/d616b3e179d620285256d0a006391f1?OpenDocument.

436. *Daniel* 13:55 (New American Bible).

437. "[C]ross examination is a tool used to flesh out the truth. . . ." Crawford v. Washington, 541 U.S. 36, 77 (2004) (Rehnquist, C.J., concurring).

438. California v. Green, 399 U.S. 149, 158 (1970) (quoting 5 Wigmore § 1367).

439. FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION 7 (4th ed. 1936).

440. BAILEY, *supra* note 151, at 18. Although "[c]ross-examination rarely succeeds in getting the witness to admit that he lied," a demonstration of a witness's deceit is often sufficiently worthwhile in itself, regardless of whether a witness actually confesses his mendacity. ALAN M. DERSHOWITZ, THE BEST DEFENSE 402 (1982).

spring up to bedevil the lie; I never am so certain of success as when a witness has deliberately fabricated evidence. For, if I am prepared and persistent, such a witness cannot survive,"[441] as the book of Daniel eloquently demonstrates.[442]

But in present-day Babylon, it is now the evil judges' turn to have their revenge, as they thwart the cross-examination—and justice—that led to their demise at the hands of Daniel. Recall that American prosecutors have no standing before the CCCI and so must rely on the Iraqi prosecutor and judges to elicit relevant testimony from witnesses. Because most Iraqi defendants testify in their own defense, and many construct grand confabulations to mislead the court, it is relatively easy to ensnare them in the web of lies they spin.

Many Iraqi jihadists are not particularly sophisticated and are unaccustomed to thinking for themselves and on their feet. So even a mediocre cross-examiner should have been able to uncover a defendant's lies. But catching terrorists in their prevarications requires a little preparation and some tenacity in conducting a cross-examination. Sadly neither the Iraqi prosecutor nor the judges showed any inclination to tenaciously cross-examine defendants, and many a dissembling terrorist escaped with his criminal secrets unrevealed.

For example, several defense witnesses testified in one case that they saw the defendant at his home or in his neighborhood about the time an American military base was attacked. They swore that the United States apprehended the defendant at his house later that night, even though the defendant was captured outside the perimeter of the military base immediately following the attack. In addition, the defendant was captured with his AK-47 that was hot to the touch and spent AK-47 rounds, and he

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441. LOUIS NIZER, MY LIFE IN COURT 327 (1961); *but see* Richard Underwood, *The Limits of Cross Examination*, 21 AM. J. TRIAL ADVOC. 113 (1997) (taking a less enthusiastic view of the power of cross-examination).

442. Perhaps these sentiments, and the Daniel story, are manifestations of Aristotle's belief that "things that are true and things that are just have a natural tendency to prevail over their opposites. . . ." Aristotle, Rhetoric (W. Rhys Roberts trans.) in 2 THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION 2154; 1355a (Jonathan Barnes ed., 1984); *but see* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 334 (1996) ("The economic marketplace penalizes bad decisions. The intellectual and cultural 'marketplace'—in which the ideas of politics, the humanities, and most of the social sciences, and popular entertainment are offered—imposes few or no penalties for being wrong, even egregiously wrong. In fact, patently foolish ideas are likely to be regarded as daring."). Thus the truth may not always prevail over falsity. *See* GEORGE F. WILL, *Commencement Address at Duke University, in* THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS 132 (1994) ("Truths increase arithmetically; but errors increase exponentially.").

was found in a vehicle perforated with bullet holes from U.S. soldiers defending the perimeter of the base. It should have been easy to demonstrate that the defendant's alibi witnesses were lying, especially since they were the defendant's own family members and thus they had added incentive to lie. But the Iraqi prosecutor and judges made no attempt to obtain the truth from these witnesses. They never tested their grand story for weaknesses or even minor contradictions, which should have been easy to elicit considering the number of witnesses.

This reluctance to cross-examine defendants and defense witnesses may stem from a lack of experience with the technique, since under Saddam Hussein torture was regularly used to coerce confessions from defendants.[443] So attorneys and judges had little need to develop their cross-examination skills or other investigative techniques.[444] Similarly, that the art of cross-examination is foreign to many civil-law proceedings,[445] so this reluctance to cross-examine defendants and their witnesses may be attributable to the CCCI's civil-law heritage.[446] More

443. Ambassador Bremer struck the provision in the Iraqi Penal Code authorizing torture as a punishment. *See* CPA Order No. 7, *supra* note 3, § 3, ¶ 2; *see* Luhnow, *supra* note 35, at A14 ("American officials have already amended the country's criminal code. The changes: a ban on confessions obtained through torture. . . .").

But old habits are hard to break, and apparently many Iraqi police officers would rather break bones than the habit of relying on torture to elicit confessions. *See Country Report*, *supra* note 119 (noting that "torture and ill treatment of detainees is reportedly 'commonplace'"); *see* Jeffrey Fleishman & Asmaa Waguih, *Iraqi Security Tactics Evoke the Hussein Era*, L.A. TIMES, June 19, 2005, at 1 (noting that Iraqi police units are using torture "tactics reminiscent of Saddam Hussein's secret intelligence squads"); *see* Bradley Graham, *Army Warns Iraqi Forces on Abuse of Detainees*, WASH. POST, May 20, 2005, at A1 ("Before leaving Iraq in February, the 1st Cavalry Division compiled a list of more than 100 allegations of abusive treatment of detainees over the previous six months—not by U.S. troops, but by Iraqi soldiers and police."); *see* Jill Carroll, *Old Brutality Among New Iraqi Forces*, CHRISTIAN SCI. MONITOR, May 4, 2005, *available at* 2005 WLNR 6928105 ("[Iraq's] nascent justice system that has an erratic record of prosecuting insurgents, has spawned a return of Hussein-era tactics among many of the country's security forces."); *see* Aldin & Anderson, *supra* note 380, at 18 (discussing the continuing use of torture by Iraqi police forces and security services); Struck, *supra* note 91, at A10 ("Iraqi police, jailers and intelligence agents, many of them holding the same jobs they had under Hussein are 'committing systematic torture and other abuses' of detainees. . . .").

444. The ability to cross-examine witnesses in an effective manner is not an innate skill. Rather, it requires development through practice. John W. Davis, *Foreword*, *in* THE ART OF CROSS-EXAMINATION, *supra* note 439, at xiii ("Undoubtedly cross-examination is among the most difficult of all the arts of the advocate. It is also one of the most valuable.").

445. MERRYMAN, *supra* note 133, at 115.

446. *Id.* at 130 ("[T]here is no developed system of cross-examination comparable to ours, although the prosecutor may suggest questions to be put to the defendant by the judges.").

likely, the judges' disinterest in cross-examination also stems from Islamic law, which frowns upon and may even "forbid" cross-examination.[447]

"All trials before Mahommedan tribunals are short. Neither cross-questioning nor perplexing suggestions by counsel ever occur. Nothing impedes a direct march to the point, when two witnesses are present to establish a fact."[448] Under Islamic law, then, "witnesses are not subject to cross-examination on the facts."[449] To the extent the CCCI judges are influenced by Islam, they might consider cross-examination unworthy of their time.[450] There is also the possibility that the judges and prosecutors were not inclined to uncover the truth. This is a plausible theory when one considers that the CCCI prosecutor and judges did attempt cross-examination a few times, but only when the witnesses were American soldiers. As discussed below, the CCCI prosecutor only attempted cross-examination of American witnesses, although he usually left defense witnesses untouched.

Whatever its etiology, the CCCI's lack of skilled cross-examination greatly reduces the value of conducting investigations or trials in that court. Before entrusting terrorism cases to them, the United States should have ensured that Iraqi prosecutors and judges had been tutored in the art of cross-examination, perhaps by watching experienced American prosecutors in an American-run court pick apart the terrorists' yarns and those of their witnesses.[451] Beyond its immediate pedagogical value for effective trial advocacy, this approach could have demonstrated to Iraqis that there is an effective alternative to torturing defendants until they confess. They could have learned that a sound cross-examination is superior, both intellectually and morally, to a coerced confession, since cross-examination elicits the truth from the recesses of the defendant's own guilty mind, rather than his body's aversion to pain.

### F. *Hostile Iraqi Prosecutors Cross-Examining American Witnesses*

Although the Iraqi prosecutor was reluctant to cross-examine Iraqi terrorists and defense witnesses, he showed no hesitation in cross-examining American prosecution witnesses. These witnesses were nearly

447. *Oriental Laws and Lawyers*, *supra* note 126, at 21.

448. *Id.*

449. LIPPMAN ET AL., *supra* note 116, at 70.

450. *Id.*

451. A substantial number of American civilian and military attorneys volunteered to come to Iraq to instruct judges in modern jurisprudential techniques. Obviously it is difficult to instill proficiency in such a short period of time, and the art of cross-examination was foreign to most of the Iraqi judges. Judicial reformation is a long-term project.

always U.S. soldiers or Marines, and the matters addressed on cross-examination were extraneous issues that were of no consequence to the case, but which might demonstrate an imperfect memory.

On one occasion, the Iraqi prosecutor asked a succession of U.S. soldiers the exact time that they encountered a defendant who had fired upon them with his AK-47. Of course, the standard operating procedure for U.S. soldiers is to return fire when fired upon; the standard procedure is not to look at a clock and note the exact time. It is not surprising that when answering the prosecutor's question, each soldier offered a slightly different time, although all of their responses were times proximate to 5:00 p.m. Nevertheless, the prosecutor vigorously argued for acquittal based on these "contradictions." It made no difference to the Iraqi prosecutor that each of the witnesses testified correctly about the substance of the attack, nor that the soldiers had recovered the weapon used by the defendant. His hostility towards the United States was as obvious as his efforts to derail the prosecution of the terrorists.

In another case, the same prosecutor cross-examined three American witnesses about the date the defendant attacked them. Two of the witnesses gave the correct date, but one could not remember the exact date; he was mistaken by a difference of two or three days. The prosecutor used this memory lapse to argue that the attack never occurred and that the whole case had been fabricated by the United States. Whether this approach proved successful is unclear because the CCCI frequently acquitted defendants, including this defendant, for any number of reasons.

Under Iraqi law, prosecutors are called upon to independently evaluate cases in an effort to determine whether witnesses, including prosecution witnesses, are telling the truth. But the approach used by the CCCI prosecutors is not a manifestation of a zealous loyalty to this duty. Rather, it is an obvious attempt to assist the insurgency and publicly disgrace the United States. The conduct of these prosecutors profoundly demonstrates why Iraqis should never have been empowered to adjudicate cases against Iraqi terrorists who attacked American forces. Time and again they have demonstrated that their loyalties are firmly tied to the terrorists, and not to impartial justice.

### G. *Minimizing Attempted Murder*

Yet another anomaly arose in the CCCI's treatment of attempted murder cases, the primary type of prosecution initiated by the United States in the CCCI. Under Iraqi law, attempted murder is a crime carrying a

mandatory sentence of fifteen years of imprisonment.[452] Fifteen years is a respectable sentence, although it is arguable that this punishment is insufficient considering the harm that could have resulted had the attempt succeeded, the paramount need to deter this type of conduct particularly during a military occupation, and the fact that U.S. soldiers could lawfully have killed any terrorists caught in the act of attempting to murder U.S. troops instead of capturing them and submitting their cases to the CCCI.

The fundamental problem faced in prosecuting attempted murder cases in the CCCI is that, under Iraqi law as construed by the CCCI judges, the crime of attempted murder is only committed when the victim is seriously wounded and comes within a breath of dying. Or so the Iraqi judges held in acquitting numerous terrorists who had attempted to murder American soldiers and Marines.[453] Without a serious wounding of the American victim, the Iraqi judges refused to convict insurgents of attempted murder and instead convicted them of reckless use of firearm or assault.[454]

Ironically, at the same time they imposed this rule, the CCCI judges imposed a rule that required the victim to testify at trial before they would convict a defendant of attempted murder. This places an attempted murder

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452. Under the Iraqi Penal Code, attempts are punishable by fifteen years imprisonment if the underlying offense is punishable by life imprisonment. IRAQI PENAL CODE ¶ 31 (1969), *at* http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/d616b3e179d620285256d0a006391f1?OpenDocument (last visited Aug. 12, 2004). Murder is an offense punishable by life imprisonment. *Id.* ¶ 405. Therefore attempted murder is theoretically punishable by up to fifteen years of imprisonment. But the CCCI never handed down a fifteen-year sentence for attempted murder.

453. Compare the less stringent proximity of harm requirement of attempted rape in Egyptian law, which is similarly based on French and Islamic law, and influenced Iraqi criminal law. Safia K. Mohsen, *Women and Criminal Justice in Egypt*, *in* LAW AND ISLAM IN THE MIDDLE EAST, *supra* note 105, at 21:

> [T]he law makes it possible for the woman to bring charges of attempted rape in cases in which the sexual assault was interrupted for one reason or another. Thus a man who pulled a woman by the arm and started to reach for her undergarments, fleeing when the woman screamed for help, was convicted of attempted rape.

According to the logic of the Iraqi judges, these actions would not constitute attempted rape, but rather simple assault, since penetration was not imminent, and indeed the man may have intended only to steal the victim's undergarments. Despite the absurdity of this idea, if the victim were an American woman, it is quite likely the Iraqi judges would adopt this nonsensical reasoning. If the victim were an Iraqi woman, however, one could reasonably expect them to agree with the Egyptian court.

454. In one attempted murder case involving a defendant who used a rifle to shoot at a U.S. soldier, one of the CCCI trial judges told the soldier that the defendant obviously was not attempting to murder him, since the defendant missed.

victim in a difficult position: the victim must be near death (for there could be no attempted murder when he was not so harmed) but must also testify before the investigative judge and the trial court (which he is unlikely to be able to do if he is near death or seriously wounded). It is nearly impossible to meet this burden, at least in the short term, and thus a defendant will be acquitted or his trial will be substantially delayed while the victim recuperates. This takes formalistic adherence to evidentiary rules to a new depth of absurdity.

The ostensible rationale for the Iraqi rule of attempted murder is twofold. First, only severe injuries adequately demonstrate a defendant's intent to kill the victim, an essential element to a conviction for attempted murder. That is the judges claim that they cannot infer homicidal intent merely from potentially homicidal acts, consistent with their reluctance to rely on circumstantial evidence.[455] Unless the victim is seriously injured, it cannot be said with certainty that the defendant was truly attempting to murder him, or so the asserted Iraqi reasoning goes.

The second rationale is that only serious injury warrants a punishment for a defendant. Under the *lex talionis* "eye for an eye" calculus that is the backbone of Islamic criminal law, the court cannot extract the defendant's eye (or take away his freedom) absent a showing that the defendant plucked the victim's eye or otherwise inflicted serious harm. According to the Iraqi judges' view, absent a serious wounding, a terrorist inflicted no palpable harm by merely attempting to murder American soldiers, and thus there was insufficient harm to warrant a long stretch in prison. A contrary rule, in their estimation, would punish defendants merely for harboring an evil intent, as opposed to crimes they had actually committed.

Of course, the foolishness of this rule and the asserted rationales becomes readily apparent after considering a few simple hypotheticals. Take, for instance, a terrorist who grabs a pistol and shoots one thousand rounds at a victim from a distance of six feet, but who is also a particularly bad shot and thus is only able to nick his victim a couple of times or misses him entirely. As Oliver Wendell Holmes observed: "I do not suppose that firing a pistol at a man with intent to kill him is any the less an attempt to murder because the bullet misses its aim."[456] Certainly the victim is no less

455. Of course, serious wounding does not necessarily indicate homicidal intent (the defendant could accidentally injure or kill someone, and thus lack the requisite intent for murder or attempted murder), and is merely circumstantial evidence of the defendant's purpose. So in the end, the CCCI judges must rely on circumstantial evidence to determine intent regardless of the quality of the wounding or the absence of an injury, and their distinction as to the seriousness of a wounding is nonsense.

456. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 69 (Dover Publ'ns 1991) (1881).

psychologically traumatized by these near misses, and he very nearly became a murder victim. Furthermore, under Christian ethical standards, the defendant is guilty of murder for the evil intent in his mind.[457] Yet under Iraqi law, as construed by the CCCI, this defendant cannot be convicted of attempted murder. Similarly, if a defendant detonated one thousand car bombs which failed to seriously harm anyone, he also could not be convicted of attempted murder, even though he clearly and repeatedly intended to murder, he committed the actus reus of murder numerous times, and indeed satisfied every element of murder except the production of a cadaver.[458]

Unfortunately, the CCCI rule exists in the real world and not just the realm of the hypothetical. Take, for example, the case of a defendant named Walid Saleby Al-Kaledi. He fired on U.S. troops with an AK-47 as they were patrolling the area near Abu Ghraib market, a Sunni stronghold and a particularly dangerous area for American troops. The defendant was aiming at the gunner of one of the HMMWVs,[459] a Sergeant from the First Cavalry Division, who was sitting in the gun turret and thus was directly exposed to hostile fire. The Sergeant testified at trial that he heard the bullets whizzing past his head and impacting around him. He also looked directly at the defendant's face and saw that he was intentionally aiming his weapon at the Sergeant.

Demonstrating great restraint, the Sergeant elected not to return fire because, in his words, there were Iraqi children around and he feared hitting one of them. The Sergeant's testimony was corroborated by three other U.S. soldiers, and the defendant himself admitted that he was shooting the AK-47, but used a standard Iraqi defense that he was at a wedding and the shooting was celebratory fire not aimed at the American soldiers.[460]

The Iraqi prosecutor, Abd Al-Wattab Salman, and the panel of trial judges openly exhibited hostility to the American witnesses and attempted

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457. This consistent with the legal maxim: Voluntas in delictis non exitus spectator.—In crime, the will, and not the result, is looked to.

458. Again, although the Iraqi courts are ostensibly secular, Iraqi law and its judicial system are steeped in the Islamic tradition and Islamic principles seep into the law every day. Thus, the CCCI's deficient application of the law of attempt may stem from a reliance on Islamic law, which has not developed law regarding attempt. *See* SCHACHT, *supra* note 334, at 187 (discussing that in Islamic law "any theory of attempt, or complicity, of concurrence is lacking").

459. "HMMWV" stands for High-Mobility Multi-purposed Wheeled Vehicle, also known as a "Humvee" or "Hummer." *See* Carol J. Williams, *Soldiers Get Extra Layer of Defense*, L.A. TIMES, July 29, 2005, at A4.

460. Defendants frequently claimed that they had fired their weapons in celebration of a wedding, and U.S. soldiers just happened to have stepped into their line of fire.

to create inconsistencies between the statements the witnesses had made before the investigative judge and their trial testimony. For example, they questioned one witnesses about his failure to mention at the investigative hearing that the barrel of the defendant's rifle was hot to the touch.[461] But this fact was not particularly relevant at the investigative hearing insofar as the defendant himself admitted that he had fired the weapon, and the defendant did not contest this point at either the investigative hearing or the trial.

Instead of bringing this admission to the court's attention, and thus the irrelevance of whether the witness truly detected a hot barrel on the defendant's rifle, the Iraqi prosecutor intimated that the American officer was lying.[462] Although in written submissions to the CCCI, the American prosecutor had argued that the defendant was guilty of attempted murder, the Iraqi prosecutor argued at trial that there was no evidence that the defendant intended to kill the Sergeant or his fellow soldiers. Taking dead aim at someone and firing a deadly weapon—a fully automatic rifle used by military forces throughout the world—is not indicative of intent to kill, at least to CCCI judges.[463] Of course, this "rule" may be a mere pretext for more corrupt influences. It is worth noting that in this case, the Iraqi prosecutor argued more forcefully for acquittal than the defense attorney did. Perhaps the defense attorney already knew the outcome of the case, as one of the judges, Ali Hussan Al-Shameri apparently was from the same tribe as the defendant, and tribal affinities are strong in Iraq.[464] In the end,

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461. A better question might be why at the investigative hearing the Iraqi investigative judge never asked the witness whether the barrel was hot.

462. *Sharia* law, which has influenced Iraqi law, abhors inconsistencies, even irrelevant ones. *See* LIPPMAN ET AL., *supra* note 116, at 70 ("[Under *Sharia*] only small inconsistencies are permitted in proceeding to conviction.").

463. Time and again the Iraqi prosecutors and judges exhibited a reluctance to draw even simple inferences. Without direct testimony supporting an idea, it apparently was forever denied access to the judges' brains. Yet even under Islamic law judges will ascertain intent in murder cases by looking at the type of weapon used. "In Islamic law, intent is discerned from the manner in which the crime is committed, in particular the type of weapon used. The assumption is that an individual intending to kill will use a weapon with lethal capabilities. Relying on this type of visible, objective evidence avoids the necessity of determining what was in the mind of the offender at the time." LIPPMAN ET AL., *supra* note 116, at 50.

464. Sabrina Tavernise & Qais Mizher, *In Iraq's Mayhem, Town Finds Calm Through Its Trail Links*, N.Y. TIMES, July 10, 2006, A1 ("'The Tribe in Iraq is the basic building block of society . . . .'"); Susan Sachs, *The Sheik Takes Over*, N.Y. TIMES, June 6, 2004, at A14 ("Today there are an estimated 100 major tribes, 25 tribal confederations and several hundred cohesive clans in Iraq, and experts estimate that perhaps 40 percent of Iraqis still feel a close affinity to their tribes."); Scheherezade Faramarzi, *Reward for Hussein Not Tempting to Many in Mosul*, MILWAUKEE J. & SENTINEL, Aug. 31, 2003, at 29 (noting the strong tribal ties among Sunnis in Iraq); Trebilcock, *supra* note 2, at 48 (noting the pressure judges feel from tribal leaders to decide

the court convicted the defendant of reckless discharge of a firearm and sentenced him to 1.5 years of imprisonment,[465] a paltry sentence in light of the harm he intended to inflict, tried to inflict, and almost accomplished.

Then there was the case of Faa'ez Mohaawish Zeidaan, who on July 5, 2003, attacked soldiers from the First Armor Division. The defendant was driving his grey Mercedes after curfew, and when the soldiers attempted to stop the car, he fired 15 rounds at them from an AK-47. Again, the Iraqi judges convicted him of reckless discharge of a firearm and sentenced him to ten months of imprisonment, which he had already served by the time the trial commenced.[466] The CCCI, therefore, obviously intended to put Zaidaan back on the streets immediately, thereby enabling him to return to his jihad.

A similar result was obtained in the case of Ali Abraham Akmeed. On December 29, 2003, he fired an AK-47 at the gunner of a HMMWV. A Humvee's gunner is frequently the target of terrorist attacks, as his upper body is outside the HMMWV and thus exposed to bullets, shrapnel, and explosive concussions.[467] They are unprotected from rapid ejections, rollovers, and the head trauma that ensues, all of which have killed a number of soldiers.[468] In short, the gunner is extremely vulnerable and

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cases in accordance with tribal loyalty); Kenneth R. Timmerman, *Iraqi Connection to Oklahoma Bombing*, INSIGHT ON THE NEWS, Apr. 15, 2002, at 20 (noting that in Iraq, tribal "ties create bonds of absolute loyalty").

465. Under *sharia* evidentiary law, it is common for Islamic courts to acquit a defendant of a crime for which there is insufficient evidence and instead convict him of a lesser crime. *See* LIPPMAN ET AL., *supra* note 116, at 73 ("In practice, the *qadi* may attempt to circumvent the foregoing [evidentiary] rules. Should the evidence fail to establish a *Hudud* offense but the *qadi* nonetheless believes that some crime was committed, he may impose a *Ta'azir* penalty, rather than acquit.").

466. By contrast, recall that when Iraqis were polled about the appropriate sentence for Jeremy Sivits, the least culpable of the Abu Ghraib soldiers, they said that he deserved to die simply for snapping a picture of another soldier holding an Iraqi prisoner in a headlock and for failing to report the abuse he had seen. *See Abused Iraqi's Kin Seek Death Sentences*, PRESS ATLANTIC CITY, May 19, 2004, at A6 ("relatives of those still held at Abu Ghraib prison said Tuesday the only suitable punishment would be death."). This sentence should also be compared to sentences handed down in Germany after World War II, by U.S. military courts. For example, when a German teenager lied to American military officials about his citizenship—hoping to escape the post-war hunger, homelessness, and poverty plaguing Germany, he falsely claimed that he was an American—he was sentenced to three years in prison, and could have been sentenced to death. NOBLEMAN, *supra* note 8, at 85.

467. *See* Juliet Macur, *At War In Bomb Field, At Peace In Field of Dreams*, N.Y. TIMES, Aug. 19, 2005, at A1 (discussing an attack on a convoy that injured Sergeant Dillon Ondo, who was manning the gunner's turret of a Humvee).

468. For an account of one hero's tragic demise, see Ann Scott Tyson, *Horror Glimpsed From the Inside of a Humvee in Iraq*, WASH. POST, Apr. 21, 2005, at A1, A16 (describing Private Joseph Knott, of the 3rd Armored Calvary Regiment, who volunteered to serve as a gunner and who died

presents an inviting target to insurgents.[469] Fortunately Akmeed was not a good shot, and the rounds missed the soldier's head, but just barely. The convoy then pursued Akmeed, who surrendered when he saw that he was cornered and outnumbered.

The American witnesses each testified to these facts at trial, that the barrel of the Akmeed's rifle was hot to the touch, and that the odor of gunpowder was prevalent, indicating that the weapon had recently been fired. Although the defendant denied firing the AK-47, three other Iraqis at the scene identified him as the shooter. Nevertheless, the CCCI convicted him only of reckless discharge of a weapon, and sentenced him to six months of imprisonment.[470]

Another problem with the CCCI's attempted murder policy is the lack of guidance as to what type of injury is sufficiently severe to meet the threshold for a charge of attempted murder. In one case, the CCCI judges made clear that several slashes to a soldier's face, not far from his jugular vein, were not sufficiently severe to constitute attempted murder. That case involved a U.S. Army Specialist who was attacked while guarding a bank in Karkh, Iraq. An insurgent by the name of Dhurghaam Eidaan Arabl Al-Kananni drew a knife and attacked the soldier, severely slashing his face. Failing to kill the specialist with his knife, Al-Kananni grabbed for the soldier's rifle, nearly pulling it away from him before two other U.S. soldiers intervened and subdued the defendant.

At trial, evidence of the soldier's injuries, including photographs, were admitted into evidence, along with testimony that he was hospitalized for his injuries, and missed five days of duty. Typical of questions from the bench, the presiding judge, Chief Judge Loqmaan Thaabit Abdur-Razaaq

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of severe head trauma in 2005 when he was thrown from the turret of his Humvee); *see also* Hal Bernton, *Accident or Ambush?; Army Widow Pursuing Truth Finds Contradictions*, SEATTLE TIMES, Oct. 5, 2005, at 1 (discussing the death of Private First Class John Hart, who served as a Humvee gunner in October 2003); *see also* Bob Herbert, *The Pain Deep Inside*, N.Y. TIMES, Aug. 8, 2005, at A19 (recounting the death of a Humvee gunner who was trapped under the Humvee after insurgents attacked with rocket-propelled grenades and caused the Humvee to roll).

469. Herbert, *supra* note 468, at A19.

470. Freeman, *supra* note 18, at 29 (noting that "[i]nsurgents convicted of serious weapons and explosives offences in Iraq are escaping with jail terms of as little as six months . . . in the CCCI). Contrast this with post-World War II Germany, where a sentence of six months of imprisonment might be given for crimes of omission when committed by elderly defendants, such as when an eighty-five year old German failed to turn over an inoperable firearm to American military authorities. NOBLEMAN, *supra* note 8, at 90. Six-month sentences were also handed out by American judges for cases of simple assault where both the victim and perpetrator were Germans and no U.S. soldier was targeted. *Id.* at 110. A defendant might have warranted a one-year sentence for lying about membership in the secret police. *Id.* at 116. Obviously the American military judges in Germany took to heart their mission of ensuring law and order in occupied Germany.

As-Samraa'i, asked the American witnesses a series of questions suggesting that the Specialist had injured himself on security wire, as opposed to having suffered his injuries during the attack by the defendant. Of course, there was no evidence in the record to support this theory, but that was no impediment to creative judicial minds seeking grounds for acquittal. The witnesses unequivocally repeated that Judge Loqmaan's pet theory had no basis in fact.

The defendant himself claimed that the soldiers jumped him for no apparent reason, and he only drew his knife in self defense. In cryptic comments the judges chalked the attack up to the defendant's youth—he was twenty years old at the time—and convicted him of battery, sentencing him to a paltry 1.25 years of imprisonment. Afterwards, in an informal conversation with the American prosecutor, Judge Loqmaan said that the injuries were not sufficiently serious to sustain a charge of attempted murder. Unfortunately, there are too many other similar cases to discuss all of them.[471] Suffice it to say that rulings such as these only encourage attacks on American forces,[472] and they follow no discernable rationale

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471. For example, there was also the case of Al-adli Thar Mohammed, who was tried by the CCCI panel of Lakman Thabit Adb Al Razek; Adnan Muhammed Hadi; and Quhtan Al Garrari. On February 5, 2004, the defendant ran outside of his house and yelled at some U.S. soldiers passing by. He then opened fired on them with an AK-47 rifle. The soldiers identified themselves, but the defendant continued to fire at them. The soldiers used their vehicle to ram the gate surrounding the defendant's yard; still, the defendant continued shooting at them, and stopped only when he ran out of ammunition. He fled to another part of his house where he kept a stash of bullets.

U.S. soldiers apprehended Mohammed as he was attempting to reload his rifle; he resisted them until he was handcuffed. At trial, the defendant argued, somewhat inconsistently, that he did not know that he was firing at soldiers and instead thought he was firing at someone else; he did not shoot in the direction of the soldiers, but was firing his weapon into the air; and he is married and has four children who are dependent upon him for financial support, and thus the judges should be merciful. They were. The CCCI convicted him of unlawful possession of a weapon and sentenced him to two years of imprisonment.

472. Even if they are convicted, insurgents are sometimes released and thus become free to join the battle again. This happened in at least one case and probably many more. Some of the terrorists were handed over to the Iraqi government, which promptly released many of the terrorists. *See* Hanson, *supra* note 163, at C25 ("It turns out that the terrorist had been captured earlier in December 2004, on suspicion of being involved in a deadly suicide attack on an American base. Then he was turned over to the Iraqis, sent to the notorious Abu Ghraib jail and released. Once free, he returned to his job of killing Americans. . . ."). To thwart such schemes, the United States had until recently maintained custody of most of these insurgents even after their CCCI sentences have expired, much to the consternation of the Iraqi judiciary and insurgency.

Despite these objections from the Iraqi judiciary, retention of Iraqi terrorists even after they served their paltry CCCI sentences is lawful because it is designed to keep insurgents from re-entering the fray. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) ("The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up

other than a desire to minimize sentences and protect terrorists by convicting them of lesser charges.

At best, these acquittals of attempted murder may be the result of a belief that because the victims (narrowly) escaped injury, no harm was done. But, this ignores the obvious: even unsuccessful attempts to murder cause substantial injury, both to the individual who escapes death and the American efforts to rebuild Iraq. For this reason, English courts convicted criminals for their attempted crimes since the 1600s, a practice first adopted by the Star Chamber,[473] but which by the 1700s was also adopted by the common-law courts.[474] Iraqi judges, however, apparently have not progressed that far.

Furthermore, in these attacks, the defendants demonstrate their willingness to kill U.S. soldiers, and thus must be punished for the actions they took to steal the lives of U.S. soldiers,[475] just as apprehended thieves

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arms once again."). The U.S. government is in a difficult position with regards to detention of Iraqis. If the Iraqis take custody, many insurgents will be released, but the insurgents will not have recourse to American courts via habeas corpus actions. If the Americans retain custody, the insurgents will be kept off the battlefield, but they may have recourse to American courts through habeas corpus actions, thereby further encumbering an already overburdened American miliatry. *See* Rasul v. Bush, 124 S. Ct. 2686, 2696, 2707 (2004) (Kennedy, J., concurring) ("From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war."). At best, the insurgents could argue that they qualify as prisoners of war. Under Article 118 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135, to ensure that the Iraqi terrorists do not take up arms again, the United States can maintain custody of them at least until the cessation of active hostilities, which obviously has not yet occurred in Iraq. But the insurgents, because they fail to meet the four criteria of Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War, are not prisoners of war and would not be protected by Article 118. Instead, the United States is simply required to act reasonably with respect to detaining them.

473. Francis Bowes Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 828 (1928).

474. According to Sayre:

> That those should not be allowed to go free who attempt to commit some crime but fail, is a feeling deep rooted and universal. But the present generalized doctrine that attempts to commit crimes are as such and in themselves criminal is of comparatively late origin. Nothing of such a doctrine is to be found in the treatises on criminal law prior to the nineteenth century, in spite of the fact that records of cases going back to early times show occasional convictions where the defendant failed to complete the crime attempted.

*Id.* at 821.

475. Fritzgerald writes:

are punished even when they did not permanently deprive owners of their property because their arrest resulted in the recovery of the goods.[476]

> Larceny protects owners against permanent deprivation of their property, but the law does not wait for this to happen; it steps in to penalize the mere taking of property with such intent. Arson protects owners against the destruction of their property by fire, but once again the law does not wait till this result is achieved; it intervenes to prohibit the mere act of setting fire to the property.[477]

This is done, not only for retributive purposes, but also to prevent the defendant from acting on his criminal intent in the future (specific deterrence), and to deter others from committing similar acts by demonstrating that even failed attempts to steal, burn, or kill will entail substantial penalties (general deterrence).[478]

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> [T]he existence of a penalty for attempts affords an extra hazard to the would-be criminal. The main deterrent is, of course, the penalty for the complete offence, since most criminals aim to succeed, but the penalty for the attempt provides an extra deterrent. Not only will he be punished if he succeeds, but also in the event of failure.

P.J. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 98 (1962).

476. *Id.* at 98.

477. *Id.*

478. Terrorists learn from the law, the way it is enforced or ignored, and legal decisions. They shape their conduct accordingly. When the United States implemented a rule precluding troops from holding Iraqi prisoners for more than three days unless they made incriminating statements, a note on a prison wall instructed prisoners not to say anything and that if they remained silent, the Americans would be forced to release them in three days. *The Prisoners' Code*, U.S. NEWS & WORLD REP., Jan. 10, 2005, at 8. ("Sources say the prisoners know of the new rules. Arabic script on the walls of Abu Ghraib counsel the detainees to stay mum for the three days, and then they will be set free. Out of frustration, some units are detaining fewer suspects. . . .").

Similarly when the Pentagon denied interrogators the use of investigative techniques commonly used by police forces throughout the United States, the insurgents knew and responded accordingly. *See* Heather MacDonald, *How to Interrogate Terrorists*, CITY J., Winter 2005, http://www.city-journal.org/html/15_1_terrorists.html (last visited Feb. 24, 2005) ("'The Iraqis already know the game. They know how to play us,' a marine chief warrant officer told the Wall Street Journal . . . We can't even use basic police interrogation tactics.'"); *see also* Zoroya & Jervis, *supra* note 9, at 1 ("The more clever insurgents [in Iraq] are learning the system and taking advantage of it."); *see also* Editorial, *The Pentagon and 'Lawfare,'* WASH. TIMES, Mar. 24, 2005, at 20 ("U.S. officials know al Qaeda briefs its cadres on U.S. law. . . ."). So, reports of stiffer sentences rapidly would have been disseminated among the Iraqi prisoners, and soon thereafter among the Iraqi populace, including insurgents still at large, thereby deterring future attacks. If plea bargaining were possible, stiffer sentences would also encourage captured terrorists to cooperate and inform on their co-conspirators in exchange for lenience.

The practices of the Iraqi criminal justice system with respect to attempted crimes hardly comport with the notions of harm, prevention, deterrence, and criminal intent prevalent in modern criminal law.[479] At worst, however, these decisions exhibit a bias by the trial judges against Americans and in favor of the insurgency dominated by their fellow Iraqis.[480] So far, only one Iraqi judge has publicly admitted that his goal is to acquit as many Iraqi terrorists who attack Americans as he can, but there are bound to be more judges like him.[481]

Perhaps he and his colleagues are motivated by an adherence to a brand of Islam that rejects punishing Moslems for inflicting harm on "infidels"

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479. Attempted crimes are punished—because it is a safe bet that an initially-unsuccessful criminal will continue attempting his crime of choice until he succeeds, unless he is made to pay the price for his unsuccessful attempts. Forcing terrorists and their accomplices to bear a burden for their murders and attempted murders deters future attacks. One American military officer in Iraq understands this concept. He has begun destroying all Iraqi "structures" near the location of IED attacks, which hopefully will ensure that the "local community is inconvenienced" and thus "perhaps they will put pressure on the insurgents to stop" their attacks. Pamela Hess, *Officer Commands Respect From Locals*, WASH. TIMES, Sept. 26, 2005, at A13. This is a small step toward exacting a greater price from insurgents, thereby increasing the cost of their "business" and the destruction they can produce. Judge Posner discusses the economic rationale behind prosecuting criminal attempts, including the possibility that if attempts were not prosecuted, the criminal who did not initially succeed would simply try again:

> Consider now the punishment of attempts. A man enters a bank, intending to rob it, but a guard spots him and seizes him before he can do any harm. The fact that he came so close to robbing it indicates that he is quite likely to try again unless restrained, so putting him in prison we can probably prevent some robberies. Also, making the attempt punishable increases the expected costs of bank robbery to the robber without making the punishment for bank robbery more severe . . . . He cannot be certain that his attempt will succeed, and if it fails he will not merely forgo the gains from a successful robbery but will incur additional (punishment) costs. Punishing attempts is thus like maintaining a police force: It raises the expected punishment cost for the completed crime without increasing the severity of the punishment for that crime.

RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 230 (6th ed. 2003).

480. Wong & Eckholm, *supra* note 46, at A12 ("There are also concerns that former Baathists may be unwilling to stand too strongly against insurgents."). The Iraqi judges have had a habit of basing their judicial decisions on their biases since long before the Americans arrived in Iraq. *See* Trebilcock, *supra* note 2, at 48 ("Over the past thirty-five years, the Iraqi courts have been characterized by bias and favoritism, with verdicts being routinely influenced by payoffs and tribal affiliations.").

481. Rasan & Negus, *supra* note 21, at 8 ("One judge who refused to disclose his name said he tried to let off lightly insurgents who had targeted Americans. . . .").

or non-Moslems.[482] Whatever the underlying rationale, the CCCI's failure to punish insurgents who attempt to murder Americans strongly militates against the continued prosecution of such cases in this flawed court. It would be better for the United States to admit that this course of action was doomed to failure from the start, and begin trying these belligerents in American military courts. As long as the CCCI continues to devalue American lives, American prestige, influence, and any chance of success in Iraq, will continue to decline.

### H. *Refusal To Convict for the Crime of Conspiracy*

One of the greatest difficulties faced by American and English prosecutors at Nuremberg was the task of educating French and Soviet attorneys about common-law concepts such as conspiracy and persuading them to utilize this tool in the prosecution of the Nazis.[483] The crime of conspiracy is well-developed in Anglo-American law, but in 1945, this doctrine was not widely utilized in Continental legal systems.[484] During the discussion of conspiracy law, "the Russians and French seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked."[485] But the Anglo-American view ultimately prevailed,[486] and by using the theory of criminal liability inherent in

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482. LIPPMAN ET AL., *supra* note 116, at 50.

483. Count I of the Nuremberg Indictment of the major Nazi war criminals set forth a conspiracy charge:

> All the defendants, with divers other persons, during a period of years preceding 8 May 1945, participated as leaders, organizers, instigators, or accomplices in the formation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of this Tribunal, and in accordance with the provisions of the Charter, and individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.

TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 29 (1947).

484. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 36 (1992) ("The Anglo-American concept of conspiracy was not part of European legal systems . . . ."); BRADLEY F. SMITH, THE ROAD TO NUREMBERG 52 (1981) ("[C]onspiracy is primarily an Anglo-American legal conception with few parallels in continental and international law.").

485. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 115 (2005).

486. *Id.*

conspiracy law, the Nuremberg prosecutors were able to show the criminality of those who participated in the Nazi conspiracy.[487] They did this by ascribing responsibility for crimes to co-conspirators who, although they were not always the most proximate cause of the evil acts committed, facilitated these crimes in substantial ways or should have foreseen that their co-conspirators would carry out such criminal acts in furtherance of the Nazi conspiracy.[488]

The common-law rationale for punishing co-conspirators is that conspiracies, even those that fail, are more dangerous than crimes committed by single actors.[489] Multiple actors make it more likely that the

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487. "Once the existence of a conspiracy is shown, slight evidence may be sufficient to connect a defendant with it." LEON JAWORSKI, THE RIGHT AND THE POWER: THE PROSECUTION OF WATERGATE 212 (1976). Importantly, the conspiracy "agreement need not be explicit; a tacit agreement may support a conspiracy conviction." United States v. Handlin, 366 F.3d 584, 589 (7th Cir. 2004) (citing United States v. Clay, 37 F.3d 338, 341 (7th Cir. 1994)).

488. TAYLOR, *supra* note 484, at 630 ("In line with Jackson's conception of the prosecution's case, these opening sections [of the Nuremberg indictment] were heavily laden with 'Nazi conspirators' and the growth of a huge 'conspiracy.' The result was that "conspiracy pictured in Count One completely dwarfed Count Two, crimes against peace . . . ."). Not everyone approved of this use of conspiracy law. Edmund M. Morgan, acting dean of the Harvard Law School and a former lieutenant colonel in the judge advocate general's corps, wrote a paper commenting on the idea of prosecuting the Nazis under a conspiracy theory:

> "The conspiracy theory is too thin a veneer," Morgan declared, "to hide the real purpose, namely the creation of a hereto unknown international offense by individuals *ex post facto*." Having uttered the Latin phrase most likely to cause lawyer's knees to wobble, the acting dean advanced the view that it would be better to abandon the whole conspiracy approach as "not only unwise but unjustifiable."

SMITH, *supra* note 484, at 132-33.

489. United States v. Jimenez Recio, 537 U.S. 270, 275 (2003) (internal quotations and brackets omitted).

> The conspiracy poses a threat to the public over and above the threat of the commission of the relevant substantive crime—both because the combination in crime makes more likely the commission of other crimes and because it decreases the probability that the individuals involved will depart from their path of criminality.

*Id.*; United States v. Shi, 317 F.3d 715, 717 (7th Cir. 2003) (Posner, J.) ("Conspiracies are punished separately from single-offender criminal acts, and often as severely even if the conspiracy fails to achieve its aim, because a group having an illegal purpose is more dangerous than an individual who has the same purpose."); United States v. LeFevour, 798 F.2d 977, 982 (7th Cir. 1986) (Posner, J.) ("One of the reasons for punishing conspiracy separately from the substantive offense that the conspirators have agreed to commit is that a conspiracy makes detection harder by enabling

criminal schemes will succeed, that the magnitude of the harm will be greater than if a single defendant had acted independently, and detection of the crimes and apprehension of the co-conspirators is more likely to be thwarted by concerted activity.[490] The consolidation of resources that co-operative criminal enterprises entail make such endeavors more dangerous in each of these respects, and thus they warrant greater punishment, even when they fail to achieve their objective.

Although ostensibly based on the French model, the Iraqi Penal Code contains several provisions dealing with conspiracies and liability for participation in conspiracies.[491] Despite the presence of these conspiracy provisions in the Penal Code, the CCCI judiciary clearly is not as comfortable with the concept as are Anglo-American judges.[492] But these Iraqi statutory provisions permit the punishment of co-conspirators, even a co-conspirator who merely "gives assistance to a conspirator or facilitates the meeting of a group of conspirators or gives them shelter or helps them in any way knowing the aim of the conspiracy . . . ."[493]

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members to be assigned different duties, including preventing detection.").

490. POSNER, *supra* note 479, at 230 ("The special treatment of conspiracies makes sense because they are more dangerous than one-man crimes.").

491. The Iraqi Penal Code states:

> A criminal conspiracy is considered to be an agreement between two or more people to commit a felony or misdemeanor such as theft, fraud or forgery, whether or not it is a specified offence or arises out of acts that are aided and abetted, even though that agreement is in the initial planning stages or has been in existence only for a short time.

IRAQI PENAL CODE ¶ 55 (1969), *at* http://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/d616b3e179d620285256d0a006391f1?OpenDocument (last visited Aug. 12, 2004).

492. A plurality of the Supreme Court recently held that "conspiracy" is not a crime under the law of war. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2780-81 (2006) (plurality opinion). Justice Thomas's dissent, however, refutes this position. *Id.* at 2836 n.14 (Thomas, J., dissenting) (The law of war and of the United States "has consistently recognized that conspiracy to violate the laws of war is an offense triable by military commission."). Regardless, the plurality's view would not prevent an American military occupation court from prosecuting Iraqi insurgents for conspiracy because, under international law, an occupation government has the legislative power to create and define crimes. MAINE, *supra* note 1, at 179. Also, conspiracy is already an offense under Iraqi criminal law, and under principles of international law, an occupation government should retain as much of the occupied country's criminal law as is possible. *See* Geneva Convention, *supra* note 110, art. 64 ("The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying power in cases where they constitute a threat to security . . . .").

493. *Id.* ¶ 58.

Yet despite repeated promptings and pleas from American prosecutors, the CCCI judges never charged a single defendant with conspiracy, either for purposes of attributing responsibility to the co-conspirator or the enhancement of sentences for their concerted activities. Thus, terrorists fared the same in the CCCI whether acting in concert with others or acting autonomously.[494] The fact that a particular terrorist's crime would have been impossible to commit without the assistance and support of a conspiracy, and the fact that these terrorist conspiracies were tearing Iraq apart, made no difference to the CCCI judges.

Part of the reason the Iraqis did not pursue criminal prosecution of conspiracies, other than bias or the civil law's dislike of the concept of conspiracy[495] could be that the conspirators appearing before the CCCI generally failed to attain their objective: the death of American soldiers. Thus, according to the judges' view of the law, these defendants merely attempted crimes, but never actually committed a crime.[496] According to the Iraqi's logic, the conspirators had not inflicted harm on the U.S. soldiers, even though many had missed their intended targets by a narrow margin. As with attempt, under the Iraqi's "eye for an eye, tooth for a tooth" system of justice,[497] there was nothing to punish, since the victim lost neither his eye, his tooth, nor his life.

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494. This can easily be demonstrated by comparing cases in which there was a single actor with those in which there were multiple co-conspirators. There are differences neither in the CCCI's findings of liability nor in its sentencing, despite the dissimilarity of the two types of cases.

495. Islamic law apparently enhances the punishment for some concerted criminal activity, suggesting that Islamic scholars perceived the increased danger that these cooperative criminal enterprises entail. LIPPMAN ET AL., *supra* note 116, at 47 ("Banding together with intent to plunder and murder is punishable by a discretionary penalty, usually imprisonment until the individual repents.") (citing MUHAMMAD IQBAL SIDDIQUI, THE PENAL LAW OF ISLAM 141-43 (1979)). But Islam does not recognize the law of conspiracy to the extent that it refuses to ascribe responsibility for a co-conspirator's criminal actions to other members of the conspiracy. Nesheiwat, *supra* note 358, at 266 (Under Islamic law "a person cannot be held responsible for the acts of other people. This principle is articulated in the Prophetic Sunnah and in the Quran with such verses as "'Each soul is rewarded on its own account,' and 'No burdened soul can bear another's burden.'").

496. POSNER, *supra* note 479, at 230 (At common law, a "conspiracy that does not succeed is still punished. It is a form of attempt.").

497. LIPPMAN ET AL., *supra* note 116, at 23 ("Influenced by many elements, Islamic law absorbed rules and codes from both the Old and New Testaments. The provision 'an eye for an eye' was taken from the Bible, but it was mentioned even earlier in Hammurabi's code."). For the Old Testament version of this principle, see *Exodus* 21:23-24 (Douay-Rheims Bible) ("But if her death ensure thereupon, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot. . . ."); *Leviticus* 24:19-20 (Douay-Rheims Bible); *Deuteronomy* 19:20-21 (Douay-Rheims Bible). *Cf. Koran* 5:48 ("Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.").

## I. *Disdain for Mandatory Minimum Sentences*

If Iraqi judges lacked an affinity for their conspiracy statute, they absolutely loathed mandatory minimum sentences.[498] In the United States, Congress has extensively utilized minimum sentences for various crimes,[499] thereby making it mandatory for courts to impose the prescribed sentences on persons convicted of committing the particular crime. American judges balk at them, claiming that mandatory minimums invade their inherent discretion in sentencing matters, but when push comes to shove, American judges impose them as required by law.[500] Not so in Iraq.

In Iraq, Ambassador L. Paul Bremer increased the maximum penalties for a host of crimes that were undermining the security and stability of Iraq,[501] including kidnapping, rape, and the destruction of infrastructure.[502] He also initiated a mandatory minimum punishment for possession or use of "special category weapons."[503] Indeed, Coalition Provisional Order Number 3, Weapons Control, *required* CCCI judges to sentence defendants to a mandatory minimum thirty years if they were found to have possessed, transported, distributed, sold, or used "special category weapons."[504] The Order defined these as "explosives, improvised explosives or incendiary devices, grenades, rockets, shells or mines and any means of discharging such items, crew-served weapons of any kind,

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498. Islamic law varies in the amount of discretion judges enjoy in meting out punishments to wrongdoers. LIPPMAN ET AL., *supra* note 116, at 87 ("There is little or no discretion in the infliction of *Hudud* and *Quesas* punishments, which are prescribed by the Koran and the *Sunna*. The *Shari'a* gives the *qadi* considerable discretion in the infliction of *Ta'azir* punishments, which range in gravity from a warning to death.").

499. 18 U.S.C. § 2252A(b)(1) (establishing a five-year minimum sentence for receiving or distributing child pornography); 18 U.S.C. § 2422(b) (requiring a minimum sentence of five years of imprisonment for enticing or persuading a minor to engage in prostitution).

500. The U.S. Supreme Court has held that the Federal Sentencing Guidelines, which provide comprehensive rules for the calculation of sentences for federal crimes, are merely advisory. *See* United States v. Booker, 543 U.S. 220 (2005). This holding does not affect mandatory minimum sentences imposed by statute upon conviction of particular federal crimes.

501. *See* CPA Order No. 13, *supra* note 36, § 13(1) ("The penalties imposed by the CCCI shall be as prescribed for their equivalent courts under Iraqi law, as modified by CPA orders.").

502. *See* CPA Order No. 31, *supra* note 115, §§ 2(1), 3(1), 4(1).

503. *See* Coalition Provisional Authority Order No. 3, Weapons Control (CPA/ORD/23 May 2003/03), § 6, ¶ 2(b) [hereinafter CPA Order No. 3], *available at* http://www.iraqcoalition.org/regulations/. There was an escape provision, permitting judges to deviate from the 30-year minimum, but only in exceptional cases. *Id.*

504. *Id.*

and Man Portable Air Defense Systems of any kind."[505] The Order also authorized a maximum term of life imprisonment for these crimes.[506]

Although stiff, these sentences are not as severe as the mandatory death sentence that Islamic law imposes on insurrectionists,[507] which is what those who carry special category weapons in Iraq generally are. The mandatory sentences were also clearly warranted in light of the damage the insurgency was inflicting on U.S. troops and Iraqi citizens, not to mention the nascent Iraqi government.[508] These explosive devices that were supposed to earn defendants a thirty-year prison term include the IEDs that literally were and are tearing U.S. soldiers apart.[509] These IEDs are the insurgent's weapon of choice due to their lethality and propaganda value. Beyond killing Americans and destroying essential equipment, the explosions demonstrate destructive power disproportionately greater than the actual support the insurgents enjoy among the Iraqi populace.[510]

The explosions that rock the cities and communities of Iraq can be heard and felt miles beyond the blast radius. They remind Iraqis that they could meet the same fate as the latest victims, they instill terror in the populace, and induce otherwise cooperative Iraqis to shun American personnel, thereby further hampering efforts to rebuild Iraq. These explosions also cause the Iraqi people to question the ability of the United States and the American-backed Iraqi government to protect them and remove terrorists from the streets, either by imprisoning or killing them. In light of these substantial secondary effects, Ambassador Bremer elected to implement a punishment generally proportional to the magnitude of the harm caused by explosive devices.[511] Because the extent of the threatened

505. *See id.* § 1, ¶ 9.

506. *See id.* § 6, ¶ 2(b).

507. Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507, 511 (2005) ("Punishments for these crimes are fixed: judges have no discretion once a person has been found guilty.").

508. Because sabotage of power-generating stations and kidnappings were also sapping the country, Ambassador Bremer increased the penalties for those crimes. *See* CPA Order No. 31, *supra* note 115, § 4.

509. Washburn, *supra* note 248, at A20 ("Improvised explosive devices, the roadside bombs that insurgents build from castoff artillery shells and munitions, have become the No. 1 killer of American troops in Iraq this year, despite a massive U.S. campaign to blunt their effectiveness."); Graham & Priest, *supra* note 248, at A15 ("Roadside bombs—the military calls them 'improvised explosive devices,' or IEDs—continue to rank as the number one killer of U.S. troops in Iraq, according to Pentagon figures. About half of all combat casualties in Iraq are attributed to them.").

510. *See* Tom Bowman, *Pentagon Details U.S. Deaths in Iraq*, BALTIMORE SUN, Jan. 13, 2005, at 4A ("Blast injuries from roadside and car bombs, rocket-propelled grenades and mortars account for more than half the U.S. combat deaths in Iraq, according to a new Pentagon analysis.").

511. Charles L.B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 688 (1934) ("People

harm was severe, including death and paralysis for troops, death or severe injury for innocent Iraqi civilians, and civil war for the nation as a whole, the punishment for possessors of special category weapons was also justifiably great.

The efficacy of a punishment to deter antisocial behavior is directly proportional to the magnitude of the punishment and the probability of its implementation.[512] That is, the greater the severity of the punishment, the greater the chance a potential defendant will avoid conduct that likely will result in that punishment.[513] Although Ambassador Bremer could not directly control the probability that an terrorist would be captured,[514] he did his best to ensure that those who were caught would be punished commensurate with the devastation their crimes engendered, hoping that this would have a specific and general deterrent effect. Thus, mandating thirty years of imprisonment for possession or use of an explosive device or weapon was eminently reasonable, although the death penalty may have been a more appropriate and efficacious punishment.

The Iraqi judges on the CCCI disagreed, however. They chafed under the mandatory sentencing provisions,[515] which, in their minds, were too

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are punished to deter them from further sinning and scotch the potential peculations of their fellows."). The severe punishment also could have communicated the extent of American disapproval of possession and use of special category weapons. GEORGE F. WILL, THE WOVEN FIGURE: CONSERVATISM AND AMERICA'S FABRIC, 1994-1997, at 204 (1997) ("[P]unishment should do more than make offenders suffer; the criminal law's expressive function is to articulate society's moral condemnation.").

512. POSNER, *supra* note 151, at 16-17 ("[A] model of criminals as rational maximizers may correctly predict that an increase in the severity of punishment or in the probability of its imposition will reduce the crime rate even if most criminals have serious cognitive or emotional deficits. They are sufficiently rational to respond, though perhaps only moderately, to changes in incentives.").

513. "Punishment is the staple resource of the criminal law. It relies upon fear as a deterrent, seeking to create a widespread fear of punishment and to bring this fear home to the would-be offender at the crises of action." POUND, *supra* note 151, at 75-76. As even Pound concedes, "fear is never a complete deterrent," but it is the best that the courts have to offer in the way of crime prevention. *Id.*

514. For that, Ambassador Bremer had to rely on the U.S. soldiers who performed a police function and the CCCI judges who adjudicated the particular cases. Theoretically, he could have requested more troops (and Ambassador Bremer now claims that he made such a request), thereby increasing the number of U.S. soldiers hunting terrorists and, concomitantly, the chances of capturing terrorists. The problem is that, due to the downsizing of the U.S. military following Operation Desert Storm, there are an insufficient number of troops to wage the war in Iraq while permitting the soldiers a predictable schedule of one year in Iraq or Afghanistan followed by one year in the United States.

515. Even in the United States, judges dislike mandatory sentencing schemes, and are not above criticizing them and finding ways to circumvent them. *See* United States v. Detwiler, 338 F. Supp. 2d 1166 (D. Or. 2004). Many judges see them as infringing on their power to sentence criminals. The Supreme Court, however, has held that the legislature has the constitutional power

severe for Iraqis who only desired to rid their country of meddlesome Americans. The judges quickly made their disagreement known in various ways, each of which resulted in terrorists escaping the mandatory penalty.[516]

First, there were outright acquittals in cases that should have carried the mandatory minimum sentence. But the CCCI judges realized that they could keep this up for only so long, so they quickly employed other tactics and excuses. For example, there was the case involving defendant Ra'ad Sa'eed Rasheed Al-Qaisy, who was caught red-handed with over thirty grenades, rocket propelled grenade launchers, and various components of improvised explosive devices, all of which are special category weapons. Persisting in their refusal to order punishments proportionate to the danger of these weapons, the judges simply ignored the law and imposed a term of imprisonment of only seven years. When the U.S. prosecutor inquired about this, the judges initially claimed that the mandatory thirty-year sentence was an American law that did not apply to an Iraqi court. Of course, if that were so, the mandatory sentences meant nothing and had no effect since there was no American or Coalition-sponsored court in Iraq other than the CCCI. That is, if, as the judges claimed, the laws only applied to American courts or Coalition courts, enacting these laws was utterly futile since there were no American or Coalition courts in Iraq, and Ambassador Bremer possessed legislative authority only in Iraq.

Perceiving the fatuity of their argument, the CCCI judges later abandoned it. They claimed instead that they had employed their judicial discretion and had elected to charge the defendant under Iraqi law, rather

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to mandate a sentencing range or even a mandatory sentence for a specific crime. *See* Mistretta v. United States, 488 U.S. 361, 364 (1989) ("Congress, of course, has the power to fix the sentence for a federal crime . . . and the scope of judicial discretion with respect to a sentence is subject to congressional control."); *see Ex parte* United States, 242 U.S. 27, 42 (1916) (White, C.J.) ("[T]he authority to define and fix the punishment for crime is legislative. . . ."); *see* United States v. Wiltberger, 18 U.S. 76, 95 (1820) (Marshal, C.J.) ("[T]he power of punishment is vested in the legislative not the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

516. In one case involving a defendant named Mohammed Ahmed Mahmood, the court did sentence him to the mandatory minimum thirty years. Mahmood was found with eleven 60 mm mortar rounds in his car. His defense was that he had found the rounds and was taking them to the police station. Soldiers in the area noted that after his arrest, the number of mortar attacks declined sharply. *See* American Forces Press Service, *Iraq's Central Criminal Court Convicts Insurgents*, *available at* http://www.defenselink.mil/news/Aug2004/n08022004_2004080205.html (last visited Feb. 23, 2005). Notably, other defendants with more powerful weapons received lesser sentences than did Mahmood. In the interest of full disclosure, it should be noted that the author was the special prosecutor who appeared on behalf of the United States at the investigative hearing in Mahmood's case.

than the CPA provision, and thus the CPA mandatory minimum sentences, though perhaps applicable to the CCCI, did not apply in that particular case. Using the same logic, the CCCI continued to hand out inadequate sentences well below the mandatory minimum sentences required by the Coalition order.[517]

In a later case, the judges changed their rationale again. They argued that they could not impose a thirty-year sentence without first having the opportunity to observe *in camera* the actual explosive devices the defendant possessed. Of course, the judges knew that explosives are so dangerous that the American military units that discover such materials destroy them on-site. The judges also knew that the Americans were not going to transport explosive devices through a combat zone to the courthouse, and thereby jeopardize the lives of the transporting soldiers.

Finally, when all these false rationales failed, the CCCI judges would hold that a particular case was "exceptional" and according to CPA Order No. 3, they could depart from the mandatory minimum.[518] The judges did not articulate what made a particular case "exceptional," nor why they departed so drastically from the mandatory thirty-year sentences.[519] For example, in one case involving a defendant named Mahmod Jabr Khaliil AtTa'abi, the panel should have sentenced the defendant to the mandatory thirty years, since the defendant was found in possession of four RPG rounds, four fragmentary grenades, six sticks of TNT, multiple blasting caps, two automatic rifles and one heavier machine gun, along with miscellaneous ammunition and magazines. The panel, however, ordered the defendant incarcerated for ten years because the court, in Judge Loqman's words, "felt mercy" for the defendant.

These practices, besides negating any specific deterrent value that the mandatory sentences had, soon became known to terrorists and their attorneys. Even the media widely reported the judges' practice of evading the mandatory sentences called for in the regulations.[520] This sent a loud

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517. *See, e.g.*, Department of Defense, *Iraqi Court Convicts Three of Planting Roadside Bomb, available at* 2004 WL 65722257, Apr. 14, 2004 (relating that three Iraqis caught planting a roadside bomb composed of 12 to 14 pounds of C-4 explosive material were sentenced to ten years in prison).

518. *See* CPA Order No. 3, *supra* note 503, § 6, ¶ 3 ("The mandatory minimum term of imprisonment of 30 years is subject to the proviso that in exceptional circumstances relating to the offender or the offense, the punishment may be reduced. The transport, distribution, sale or use of a Special Category Weapon shall never constitute exceptional circumstances.").

519. The judges of the CCCI finally did impose the mandatory minimum sentence in the case of Mohammed Ahmed Mahmood, as discussed above.

520. *See* Rajiv Chandrasekaran & Walter Pincus, *Bremer's Edicts Leave His Mark*, SEATTLE TIMES, June 27, 2004, at A11 ("Judges on the Central Criminal Court of Iraq, who were appointed by Bremer, have refused to impose 30-year sentences on people detained with grenades and other

and clear message to insurgents that the Iraqi judiciary did not believe that their conduct warranted serious punishment. This was certainly not the message that the American military wanted to send, nor the American people. The rule of law requires that judges, especially unelected judges, follow the law, regardless of whether they personally disapprove it.[521] Until the CCCI judges start consistently applying the laws that require mandatory minimum sentences, it cannot be said that they follow the rule of law.

## IV. CONCLUSION

Small portions of the Iraqi judicial system have taken small steps towards implementing the rule of law, but Iraq still has a substantial distance to travel before these efforts come to fruition. The creation and nurturing of the CCCI was a noble attempt to assist the Iraqis in achieving this goal. But in light of the substantial defects from which the Iraqi judiciary continues to suffer, it is unclear why the United States continues to entrust the CCCI with the task of adjudicating criminal cases that directly impact the effectiveness and success of the U.S. effort to liberate and stabilize Iraq.[522]

In Iraq, ruthless insurgents continue to prey upon American soldiers who strive to keep the peace and reconstruct Iraq. At times, the terrorists have been so well organized that they effectively ruled entire cities, a direct threat to the authority and prestige of the United States, two essential components of a successful military occupation. Litigation is not an effective countermeasure in itself, but in conjunction with forceful military

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military weapons.").

521. This is even more true in cases where an occupying power gives an order to judges of the occupied nation, such as ordering them to sentence defendants according to a fixed sentencing scheme. FRAENKEL, *supra* note 30, at 227 ("The rule of law in a democratic state is based on the consent of the citizens. In an occupied territory, public power is enforced upon the residents regardless of their inner feelings.").

522. Elsewhere the author has argued in favor of Iraqi nationals trying Saddam Hussein and other high-ranking Baath party officials because Iraqi citizens were their primary victims. The caveat is that the United States should have the opportunity to retry any defendants who do not receive justice at the hands of the Iraqis. According to this logic, U.S. personnel should be judging Iraqi insurgents who attack American Forces, since Americans are the primary victims. *See, e.g.*, PETER PAPABATOS, THE EICHMANN TRIAL 1 (1964) (noting that the Nazi Adolf Eichmann was tried before Israelis judges; Jews were Eichmann's primary victims). To the extent that insurgents are also committing crimes against the Iraqi citizenry, the Iraqi courts should also be entitled to charge them, when the United States is finished with its own trials.

operations, the prosecution of captured terrorists can be an important component of the effort to dismantle an insurgency.

Because of the pro-insurgency rulings of the CCCI, the terrorists who are arrested for their crimes usually evade the punishments warranted by their misdeeds, effectively negating much of the value of capturing them in the first place.[523] Not only are these militants not deterred, their coddling by the CCCI sends a strong message to other terrorists: attack the Americans and you will never be punished. Thus, it is not surprising that the insurgency continues to tear Iraq apart. It is also no surprise that Iraq has become an international academy for terrorists which specializes in "hands on" instruction in the art of destruction.[524] Because of the CCCI, instead of facing execution or long prison sentences, these terrorists will soon graduate from their school of terrorism,[525] and will migrate to other parts of the world to ply their new trade.[526] They have already attacked

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523. West, *supra* note 22, at 27 ("Iraqi judges, often intimidated and openly suspicious of written testimony from American soldiers, tend to free the accused. Net result: Over 85 percent of those detained are released within six months.").

524. *See* Rod Nordland, *Terror for Export*, NEWSWEEK, Nov. 21, 2005, at 38 ("If Afghanistan under the Taliban was a backwoods school for terrorism, Iraqi is an urban university."); Ellen Knickmeyer, *General Decries Call for Timetable in Iraq*, WASH. POST, Nov. 17, 2005, at A26 (Army Major General William Webster "said he believes it is 'a distinct possibility' that insurgents now were training in Iraq for attacks in other countries."); Michael Slackman & Souad Mekhennet, *Jordan Says Bombing Suspect Aimed to Avenge Brothers*, N.Y. TIMES, Nov. 15, 2005, at A3 ("The Central Intelligence Agency recently warned that a new generation of jihadists was being trained in the Iraq war, and that these fighters could soon take their cause to other countries."); *Canadian Spy Chief Calls Iraq Home for Terrorism*, WASH. POST, Oct. 21, 2005, at A20 ("Iraq has become a 'kind of latter-day Afghanistan' that is training foreign terrorists and providing a testing ground for new terrorist techniques that are being exported, the head of Canada's intelligence service said Thursday."); Dana Priest & Josh White, *War Helps Recruit Terrorists, Hill Told*, WASH. POST, Feb. 17, 2005, at A1 ("'These jihadists who survive will leave Iraq experienced and focused on acts of urban terrorism.'") (quoting former CIA Director Porter J. Goss).

525. Michael Slackman & Scott Shane, *Terrorists Trained by Zarqawi Went Abroad, Jordan Says*, N.Y. TIMES, June 11, 2006, at 1 (Abus Musab al-Zarqawi "recruited about 300 who went to Iraq for terrorist training and sent them back to their home countries, where they await orders to carry out strikes."); Thom Shanker, *Abu Ghraib Called Incubator for Terrorists*, N.Y. TIMES, Feb. 15, 2006, at A12 ("American commanders in Iraq are expressing grave concerns that the overcrowded Abu Ghraib prison has become a breeding ground for extremist leaders and a school for terrorist foot soldiers."); Dan Murphy, *Iraq's Foreign Fighters: Few But Deadly*, CHRISTIAN SCI. MONITOR, Sept. 27, 2005, at 1 ("Iraq has become one of the global centers for the recruiting and training of . . . 'neo-Salafi' terrorists. These are essentially Islamist fighters that share Al Qaeda's extreme rejection of non-Muslim 'infidels' and seek to create Islamic states patterned after the Arabian peninsula of the 7th and 8th centuries.").

526. Sami Yousafzai & Ron Moreau, *Unholy Allies*, NEWSWEEK, Sept. 26, 2005, at 40 (noting that al Qaeda has "opened an underground railroad to and from jihadist training camps in the Sunni Triangle" of Iraq, and that "graduates" of the terrorist training program have moved elsewhere in

Jordan and reportedly have made their way into Kuwait and Europe.[527] Nobody, then, should be surprised when one of their terrorist cells turns up in New York or Houston.[528]

The results-oriented judging that regularly occurs in the CCCI demonstrates that at least portions of the nascent Iraqi judiciary are largely unwilling to administer justice when this entails punishing fellow Iraqis who oppose the American forces.[529] The U.S. service members who have sacrificed all that they have and who risked their lives in Iraq deserve better than this.[530] They deserve to know that when they detain Iraqis who have attacked them, those war criminals will be punished in proportion to the severity of their crimes and the harm they intended to inflict on the United States. Ironically, in creating the CCCI, Ambassador Bremer intended for the court to become the model for all Iraqi courts and he said that the CCCI will "allow us to try particularly egregious criminals quickly

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the world, including Afghanistan, equipped "with more-effective killing techniques and renewed enthusiasm for the war against the West").

527. Slackman & Mekhennet, *supra* note 524, at A3 (discussing the November 2005 suicide bombing of three hotels in Jordan); Jay Solomon et al., *Radicals in Iraq Begin Exporting Violence, Mideast Neighbors Say*, WALL ST. J., Oct. 7, 2005, at A1 ("Three al Qaeda operatives crossed from Iraq into Jordan in August, smuggling seven Katyusha missiles in the underbelly of an aging Mercedes with a hidden second gas tank. Their orders were to bomb the headquarters of Jordan's intelligence service and the U.S. and Israeli embassies.").

528. *See supra* text accompanying note 527; *see* Nordland, *supra* note 524, at 38 (quoting "a senior Taliban official who uses the nom de guerre Abu Zabihullah" for the proposition that "Iraq is where the fierce encounters take place, where we recruit and dispatch fighters'"); Scott Shane, *London, Madrid, Bali. And Yet Nothing Here*, N.Y. TIMES, Sept. 11, 2005 (noting that Stephen E. Flynn of the Council on Foreign Relations and others "fear that the lessons jihadists learn in Iraq—in urban combat, the use of explosives and especially attacks on strategic sites—may one day threaten the United States"). President George W. Bush himself has expressed fears that Iraqi-trained terrorists will apply their skills in other locations, such as the United States. Solomon et al., *supra* note 527, at A1 ("President Bush voiced concern yesterday that al Qaeda and others want to make Iraq a base from which to launch operations against the U.S. and other secular governments.").

529. It is inherently unwise to give such great power over the occupation to citizens of the occupied country. FRAENKEL, *supra* note 30, at 224 ("It is perhaps conceivable that in some circumstances an occupied country would not feel hostility toward the occupying power, and that its courts would interpret . . . [the applicable laws] with the same objectivity that they would apply to their own constitution. But even in that situation—if it ever existed—it is highly doubtful whether the courts of the occupied country are the proper agencies to review the actions of the occupants.").

530. In the words of President Bush, we must "'honor them by completing the mission for which they gave their lives, by defeating the terrorists, advancing the cause of liberty, and building a safer world.'" George W. Bush, quoted in Richard W. Stevenson, *Bush Pays Tribute to Generations of Fighters Killed in Wars*, N.Y. TIMES, May 31, 2005, at A15. Trying Iraqi terrorists in courts that actually punish them would go a long way toward accomplishing these goals.

to show people that we are serious about creating law and order. . . ." [531] Instead, the court has quickly become of model of incompetence that turns violent terrorists into ebullient acquitees and shows them that, so long as the CCCI is in charge of justice, there will be no law, order, or justice in Iraq. The CCCI has failed to live up to the Ambassador's irrationally high hopes, and it further subtracts from the existing dearth of law and order in Iraq. Regardless of whether Iraqi judges are intentionally sabotaging justice, America's hopes for justice in Iraq are not being realized in the CCCI.

Much of the insurgent activity in Iraq warrants a strong military response, not a judicial one. But to the extent that judicial proceedings are useful to determine the culpability of particular terrorists, these proceedings should be conducted by military commissions staffed by American military and civilian personnel—the primary victims of the terrorist attacks[532]—using procedural rules suitable for crimes committed in a war zone.[533] Only then can the United States ensure that justice is properly administered to the terrorists destroying Iraq. Using the CCCI as an instrument to accomplish this task has not only resulted in a failure to

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531. Luhnow, *supra* note 35, at A14; *see* Fox, *supra* note 35, at 213-14 (noting that the CCCI "was created both to serve as a model for further judicial reform and to try 'those serious crimes that most directly threaten public order and safety'"). The CCCI also was supposed to be a forum staffed by judges cleansed of any anti-American sentiments. Doug Simpson, *Louisiana-Trained Lawyers Become a Legal Force in Iraqi Courtrooms,* ASSOCIATED PRESS, July 16, 2005 ("The court was created . . . to prosecute insurgent fighters because the military was concerned that Iraq's provincial courts would be influenced by anti-Americanism, and be more likely to acquit those guilty of attacks.").

532. Because they are the primary victims, U.S. personnel would be more likely to ensure that justice is administered to the insurgents, as history demonstrates:

> Countries typically worry more about war crimes when their own citizens are the victims. . . . After World War I, France and Belgium pressed hardest for prosecution of German war crimes, precisely because they had taken the brunt of the war. Britain was somewhat less concerned, but took particular interest in German U-boat warfare—the war crime that most directly affected the British sailors. And America, even under the moralistic Woodrow Wilson, was the least enthusiastic of all, having suffered the least.

Gary J. Bass, *Atrocity and Legalism,* 132 DAEDALUS 73, 80 (2003). Even Islamic law suggests that Americans should be trying terrorists who attack Americans. Under Islamic law "retaliation is the right of the person injured or his family." Rahim, *supra* note 127, at 186.

533. Military Commissions can utilize "'rules of evidence that take into account the unique battlefield environment that is different from peacetime law enforcement practice.'" Neil A. Lewis, *Guantanamo Tribunal Process In Turmoil,* N.Y. TIMES, Sept. 26, 2004, at 129 (quoting Col. Wayne Dillingham).

properly punish insurgents, but has also spawned a host of new evils—including damaging the prestige and undermining the authority of the United States—all while emboldening terrorists in Iraq and elsewhere. The United States has forfeited a golden opportunity to demonstrate to Iraq and other developing nations how the essence of the rule of law can be implemented, even under wartime conditions. The United States can do better, and must do better if it hopes to administer justice and introduce the rule of law to those parts of the world desperately in need of justice and law.