

# XVII

---

---

## Detention Operations in Iraq: A View from the Ground

---

---

**Brian J. Bill\***

### *Introduction*

**F**or many, detention operations in Iraq will be forever linked with the criminal abuses that occurred in Abu Ghraib.<sup>1</sup> The ensuing efforts to assign personal responsibility to those involved satisfied some proportion of the public and left others demanding more. As the story eventually faded from the front pages, public interest in detention operations in Iraq faded as well, and many could be forgiven the assumption that such operations had all but ended in the wake of Abu Ghraib.

Yet detention operations did not end in Iraq. Indeed, they expanded well beyond the scope that many believed possible earlier. At their height in late 2007, coalition forces<sup>2</sup> were detaining in excess of 26,000 persons within Iraq. But like the dog that didn't bark, the later operations failed to attract any significant notice, despite their extensive nature. This article will attempt to shed some light on subsequent detention operations conducted by the coalition forces, focusing on those aspects associated with the legal authorities to detain and release detainees.

Part I will discuss the legal background against which detention of persons is authorized during conflicts and other operations. Part II will describe in some detail the command structure of the operation and the applicable regulatory guidance, and then will explain the various review processes by which detainees were initially interned and then eventually released. Because the author's experience in

---

\*Captain, JAGC, US Navy.

detention operations was in 2007 and 2008, the processes discussed will necessarily be limited to that time period. This need not be a significant liability, as that period offered both already-developed and innovative processes that deserve study, and potential emulation in similar situations in the future, with which Part III will be mostly concerned.

### *Part I—The Law*

The detention operation with which this article is primarily concerned is that under the auspices of relevant resolutions of the United Nations Security Council. The authorities granted there did not arise in a vacuum, however, and the international laws applicable to earlier phases of the operations in Iraq still retained some degree of authority. Accordingly, a review of those applicable laws will be presented.

#### **A. Combat Operations**

Following the initiation of combat operations<sup>3</sup> on March 20, 2003,<sup>4</sup> Common Article 2 of the Geneva Conventions<sup>5</sup> was triggered, and therefore all the provisions of the Conventions applied to operations that followed. In addition, the *jus in bello* provisions relating to targeting of persons on the battlefield<sup>6</sup> were also applicable. Accordingly, combat forces were permitted to use lethal force against combatants, and required to refrain from the use of force against non-combatants. Persons captured on the battlefield would be assessed to fall into one of several categories, and their subsequent treatments depended on the applicable categories.

Combatants would normally be considered prisoners of war. Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War (PW Convention) sets out the criteria for prisoner of war status, the predominant categories being members of the enemy's armed forces and members of organized militias who are under responsible command, wearing a distinctive sign, carrying their arms openly, and observing the law of war.<sup>7</sup> Assuming the person fits into one of these categories, he is immediately treated as a prisoner of war in accordance with the remainder of the PW Convention, and he is detained for the remainder of the conflict.<sup>8</sup> The detaining power is under no obligation to review the status of the prisoner of war nor to release him until after the cessation of hostilities.

If there is doubt about the detained person's status as a prisoner of war, the detaining power shall convene a tribunal to make the determination in accordance with Article 5 of the PW Convention.<sup>9</sup> Article 5 provides very little guidance as to the nature of the tribunal; the practice of the United States is to set up an administrative panel of three officers to hear the evidence, with no involvement of counsel for the person in question.<sup>10</sup> The charter of the Article 5 tribunal is a limited one:

does the person whose case is before it (there is no requirement that the person be physically present before the tribunal) meet one of the criteria of Article 4? The tribunal need not determine that the person is a lawful combatant, though it will likely do so in making a determination of status. The text of Article 5 supports this conclusion, beginning, “Should any doubt arise as to whether persons, *having committed a belligerent act* and having fallen into the hands of the enemy . . . .”<sup>11</sup> This verbal formulation indicates that it is, by this point, a given the person has committed a belligerent act, though who has made that determination is nowhere stated. The Article 5 tribunal, therefore, does not determine whether the person’s detention will continue, but merely decides whether the provisions of the PW Convention will apply to that detention. Another implication is that the drafters may have thought that doubt would *only* arise in the case of a potential illegal combatant, for in the other categories—for example, the armed forces—it is not necessary that the service member ever commit a belligerent act to receive prisoner of war protection.

Should the person be determined *not* to be a prisoner of war, the next step in the legal analysis is one of some controversy, brought into prominence by the decision of the United States to detain persons in Guantanamo. That decision is not the focus of this article, so the respective positions will merely be summarized. The US position is that there is a gap in coverage between the PW Convention and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Civilians Convention), into which persons characterized variously as illegal combatants, unprivileged belligerents, or, as used in Guantanamo, enemy combatants fall. Customary international law permits the detention of all combatants, legal or illegal, for the pendency of the conflict. The characterization of a combatant as “illegal” renders him liable for prosecution without the benefit of combatant immunity, while also depriving him of protection under the PW Convention. The contrary position is that there are no gaps between the 1949 Conventions, and that a detained person who does not benefit under the PW Convention must necessarily benefit from the Civilians Convention.

Assuming the “no-gaps” position as a matter of convenience of discussion, the detaining power next turns to the Civilians Convention to determine whether detention is available. The first issue is whether the person is a “protected person” under Article 4 of the Civilians Convention.<sup>12</sup> In short, Article 4 declares all non-national (of the detaining power) civilians to be protected persons, then excepts certain subclasses from that protection.<sup>13</sup> Non-protected persons benefit only from the general protections set forth in Part II of the Civilians Convention,<sup>14</sup> and from the general standards of humane treatment contained in Common Article 3.<sup>15</sup> Protected persons benefit from the more substantive protections contained in Part III of the Civilians Convention. In the context of detention, the legal

analysis depends on *where* the protected person is being detained, though the practical effect between the two is not great.

Part III of the Civilians Convention is entitled “Status and Treatment of Protected Persons.” The first section is entitled “Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories.” This section provides protections that, while more specific than those set out in Common Article 3, are not appreciably greater.<sup>16</sup> The next two sections are split in their coverage between that afforded to protected persons in the home territory of the detaining power and those who are detained in occupied territory.<sup>17</sup> As regards the power to detain protected persons, the applicable articles provide similar, though not identical, protections and procedures.

Article 41, which applies to protected persons in the detaining power’s home territory, permits internment or assigned residence<sup>18</sup> of protected persons if “other methods of control mentioned in the present Convention [are] inadequate.”<sup>19</sup> Article 42 goes on to provide that internment may only be ordered “if the security of the detaining power makes it absolutely necessary.”<sup>20</sup> Article 43 provides for reviews of the initial decision to order internment, with reconsideration of the decision occurring “as soon as possible by an appropriate court or administrative board,” and a further review accruing twice yearly.<sup>21</sup>

In occupied territories, all the provisions related to internment are in a single article, Article 78. There is a slightly different standard from that espoused in Article 42; under Article 78, internment is possible “for imperative reasons of security.”<sup>22</sup> Unlike Article 42, which is silent on the procedures by which the detaining power makes the initial determination to intern, Article 78 provides that such a decision must be made “according to a regular procedure to be prescribed by the Occupying Power.”<sup>23</sup> The Article 43 “reconsideration” is in Article 78 restyled as an “appeal,” to be decided “with the least possible delay.”<sup>24</sup> Further review of continued internment is to be “if possible every six months,”<sup>25</sup> which is probably a better formulation than the “twice yearly” formulation in Article 43. This section of Article 78 concludes with the requirement that the review be by a “competent body”<sup>26</sup> set up by the detaining power, which is much less rigorous than the court suggested by Article 43, though maybe about the same as the administrative board option also provided in Article 43.

## **B. Occupation Phase**

President Bush announced the end of combat operations on May 1, 2003.<sup>27</sup> This date marks the beginning of the occupation phase in Iraq. Common Article 2 remained applicable at this time,<sup>28</sup> and the Geneva Conventions therefore continued

in full applicability as a matter of law. Accordingly, the legal authorities to detain civilians were unchanged during this period.

Shortly after the occupation began, the Coalition Provisional Authority (CPA) was established to function as the interim government of Iraq.<sup>29</sup> The CPA issued various orders codifying some of the procedures affecting detention operations. These will be discussed in some detail later. It is necessary to note now, however, that the CPA pronounced that its orders and regulations would remain binding Iraqi law after the dissolution of the CPA.<sup>30</sup> This is important because some of the procedures used in later detention operations continued to trace their authority from CPA issuances, as the Iraqis had neither rescinded nor repealed them.

### **C. United Nations Mandate**

With the imminent standing up of the new Iraqi government, the United Nations Security Council provided a different legal authority for continued combat and detention operations, apart from the previously explicit reliance on Geneva Conventions rules related to international armed conflict or occupation.

United Nations Security Council Resolution (UNSCR) 1546<sup>31</sup> was passed on June 8, 2004, in anticipation of Iraqi resumption of sovereignty on June 30, 2004. It is explicitly a Chapter VII<sup>32</sup> resolution by which the Security Council acts in its mandatory, international law-making role. For present purposes, paragraph 10 contains the following, where the Security Council

[d]ecides that the multinational force<sup>[33]</sup> shall have the authority to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to this resolution expressing, inter alia, the Iraqi request for the continued presence of the multinational force and setting out its tasks . . . .<sup>34</sup>

Two letters are annexed to the resolution. The first was from the Prime Minister of the Interim Government of Iraq, Dr. Allawi, in which he wrote:

Until we are able to provide security for ourselves, including the defense of Iraq's land, sea and air space, we ask for the support of the Security Council and the international community in this endeavour. We seek a new resolution on the Multinational Force (MNF) mandate to contribute to maintaining security in Iraq, including through the tasks and arrangements set out in the letter from Secretary of State Colin Powell to the President of the United Nations Security Council.<sup>35</sup>

Secretary Powell's letter contains the critical language:

Under the agreed arrangement, the MNF stands ready to continue to undertake a broad range of tasks to contribute to the maintenance of security and to ensure force protection. These include activities necessary to counter ongoing security threats posed by forces seeking to influence Iraq's political future through violence. This will include combat operations against members of these groups, *internment where this is necessary for imperative reasons of security*, and the continued search for and securing of weapons that threaten Iraqi security.<sup>36</sup>

UNSCR 1546 therefore authorized internment for imperative reasons of security, and while it may have been preferable to have had such language in the resolution proper,<sup>37</sup> it nevertheless included the authorization through this internal chain of references. The authority to intern was not dependent on any other international law authorities; that is, with the resumption of Iraqi sovereignty it was recognized that that the occupation, and the ability to intern through Article 78, had ended. Rather, this is an example of the Security Council making binding international law.

By its terms, UNSCR 1546 was to expire at the conclusion of the process of forming an Iraqi government;<sup>38</sup> prior to the national voting that took place on December 15, 2005, the Security Council acted again in UNSCR 1637<sup>39</sup> to extend the mandate until December 31, 2006. UNSCR 1723<sup>40</sup> extended it yet again to December 31, 2007, and UNSCR 1790<sup>41</sup> further extended it to December 31, 2008. In each of these subsequent resolutions no explicit reference was made to combat operations or internment. Rather, each reaffirmed the authorizations contained in UNSCR 1546, which itself contained the combat and internment authorizations.

Returning to the authorization for internment, the language chosen for Secretary Powell's letter—internment for imperative reasons of security—appears to be taken directly from Article 78 of the Civilians Convention as the closest legal analogy. Whether that was objectively true or not, and whether it was the intention of the Security Council, it was Article 78 and associated articles to which coalition forces looked in designing the operation to be later described.

#### **D. Post-mandate Authority**

Prior to the Security Council action in UNSCR 1790,<sup>42</sup> it was already recognized that the UN mandate would end after December 31, 2008.<sup>43</sup> After long negotiations throughout 2008, two agreements were signed on November 17, 2008.<sup>44</sup> The Strategic Framework Agreement<sup>45</sup> set forth a number of aspirational principles to guide future relationships between the United States and Iraq. The Security Agreement<sup>46</sup> sets forth the rules to be followed by US forces beginning on January 1, 2009. Very decidedly, the broad mandate of the UNSCR era had ended. In regard to detention operations, the Security Agreement moved away from the "imperative threat" administrative internment model to one that is based on criminal

detention overseen by the Iraqi judiciary.<sup>47</sup> Those detainees whose detentions predated January 1, 2009 (i.e., those who had been detained under authority of the Security Council resolutions) are to be released “in a safe and orderly manner” unless the Iraqis are able to charge them criminally, in which case the Iraqis will assume custody.<sup>48</sup>

## *Part II—Description of Detention Operations*

### **A. Structure**

In this section, the practical application of the law, such as it was, to actual detention operations will be described. It will begin with a short explanation of the command relationships as they existed at the time. Although such details usually appeal only to military professionals, a familiarity with the various units and officials will help in understanding the interplay of the various procedures used in detention operations in Iraq.

The combatant commander with responsibility for Iraq is the Commander, US Central Command,<sup>49</sup> headquartered in Tampa, Florida. Central Command issued numerous orders containing policies and guidance that were utilized in detention operations.

The senior coalition force commander in Iraq was designated as Commander, Multi-National Forces–Iraq, often abbreviated as MNF-I. The commander has always been a US Army four-star general; the commanders during the period to be discussed below were Generals David Petraeus and Raymond Odierno.<sup>50</sup> The relevant major subordinate commanders to MNF-I were Multi-National Corps–Iraq, or MNC-I, and the Deputy Commanding General for Detention Operations (DCG-DO), who was also designated as the Commander, Task Force 134 (TF 134).<sup>51</sup>

MNC-I, commanded by a three-star Army general, contained all of the operating forces in Iraq. Iraq was divided by MNC-I into subregions, each of which was commanded by a two-star general.<sup>52</sup> Though the boundaries between them changed, there were, during the times relevant for this article, six subregions, designated as Multi-National Divisions–North, Baghdad, and Central, and Multi-National Force–West,<sup>53</sup> all of which were US commands; any detainees from these units would go into US detention. The remaining regions were Multi-National Division–Center-South, comprising a small region commanded by the Polish, and Multi-National Force–Southeast, most notably containing Basra, commanded by the British.<sup>54</sup> Few detainees were taken in Multi-National Division–Center-South, though they would eventually wind up in US detention facilities. The British ran their own detention facilities.

The position of the Deputy Commanding General for Detention Operations was an unusual one. As a result of the abuses uncovered at Abu Ghraib,<sup>55</sup> the DCG-DO was established as a two-star general position, reporting directly to the Commander, MNF-I. The DCG-DO was responsible for setting and implementing detention policy throughout Iraq. Anomalously, a two-star general was in the position to make policy that a three-star (MNC-I) was to follow. Although in practice this unusual power relationship proved no problem, there were occasions, mostly related to policies associated with the release of detainees, where the interests of MNC-I and DCG-DO clashed. Unless the situation was otherwise resolved, the Commander, MNF-I, made the final decision.

The DCG-DO also commanded TF 134,<sup>56</sup> and it was in this position that the commander spent the great majority of his time.<sup>57</sup> The primary responsibility of TF 134 was the proper care and custody of the detainees in centralized facilities, known as theater internment facilities (TIFs).<sup>58</sup> Subsidiary responsibilities included the lawful interrogation of detainees and the provision of due process hearings to the detainees regarding their continued detention.

TF 134 was itself largely made up of individual augmentees and ad hoc units. Unlike the multinational divisions, where the commanding general would deploy to Iraq with most of his normal staff, the commander of TF 134 was ordered individually to his position. The rest of the headquarters staff consisted of active-duty officers and enlisted personnel from all of the armed services, or mobilized members of the reserves or National Guard. Many were volunteers, serving tour lengths of four to twelve months, though six months was the norm. Under the headquarters staff were subordinate organizations, though only the major organizations applicable to this article will be discussed.

### *1. Care and Custody*

Doctrinally, care and custody of detainees is a military police (MP) function,<sup>59</sup> and MP commanders were placed in charge of the theater internment facilities. This was an instance where an existing staff, normally an MP brigade headquarters, would deploy in full.<sup>60</sup> Their staff would be augmented in theater by individual augmentees. The guards in the compounds would come from other existing MP companies, most of which were in the reserve or National Guard,<sup>61</sup> or from provisional units of airmen or sailors whose specialties were anything but MP-related duties.<sup>62</sup> Redundant layers of command were necessary to ensure that this diverse guard force, with its vastly different service experiences, functioned as a cohesive and professional force in an environment that permitted no mistakes.

## *2. Interrogations*

All interrogations of detainees within a theater internment facility were conducted by the Joint Intelligence and Debriefing Center (JIDC). The JIDC was commanded by a colonel of the military intelligence branch, who reported directly to the Commander, TF 134. The personnel under the JIDC commander comprised a military intelligence brigade headquarters element, typically from the Army reserves or Army National Guard, heavily supported by individual augmentees from other services, as well as by various contractors.

Every security detainee, shortly after his arrival at the theater internment facility and while still being processed into the facility, would undergo a screening interview by JIDC interrogators.<sup>63</sup> The purpose of the screening was to gather basic biographical information, and to generally assess the detainee's knowledge and cooperation.<sup>64</sup> Although the facts and circumstances that led to the detainee's capture and internment would be discussed, the screener's task was not to attempt to prove or disprove the facts underlying the capture; rather, he was to assess whether the detainee knew anything that would be of future tactical or strategic importance. For example, if a detainee was captured while emplacing an improvised explosive device, or IED, the screener would undoubtedly ask about the circumstances surrounding that act, but would focus his questioning on whether this detainee knew where the device was made, or who was in charge of the network responsible for IEDs in that region, and so on. If the screener believed that the detainee had information on these areas, he would schedule the detainee for further interrogation at a later time. Most detainees, however, were screened as having little intelligence value, and were never again interrogated.

The follow-on interrogations which did occur were conducted in accordance with Army Field Manual 2-22.3,<sup>65</sup> as had been made mandatory by the Detainee Treatment Act of 2005.<sup>66</sup> The field manual lists the approved "approaches" an interrogator may take with any detainee;<sup>67</sup> anything not listed is per se unauthorized and the manual makes clear that certain actions are always prohibited.<sup>68</sup> Though there was concern that, by explicitly setting out the approaches that would be used, the quantity and quality of the intelligence gained from interrogations would suffer, anecdotal indications are that the fears have been unjustified.<sup>69</sup>

## *3. Legal Reviews*

The legal section of TF 134 was uniquely structured, and had a very limited and defined mission. In a normal military command, the judge advocate to a commander is responsible for providing advice on many topics: military justice, administrative law, fiscal issues, ethics, operational law and contracts, among others. The commander of TF 134, however, did not have such a judge advocate on his staff; rather,

the Staff Judge Advocate to the Commander, MNF-I, was tasked to provide him advice in all of these areas. The head of the TF 134 legal office was instead denominated as the Legal Advisor to TF 134; his mission was solely the legal processing of detainees.<sup>70</sup>

The TF 134 legal office was staffed exclusively by individual augmentees, predominantly from the Air Force and Navy, with a very few from the Army (mostly reserve or National Guard), Marine Corps and Coast Guard. At its height in late 2007, the TF 134 legal office had approximately 150 personnel assigned. Of these, approximately one-third were judge advocate officers, with the remainder made up of enlisted paralegal specialists, information technology specialists and investigators. As the number of detainees decreased throughout 2008, so did the size of the TF 134 legal office.

The TF 134 legal office was structured largely along functional lines. Each of the review boards was assigned a number of judge advocates and enlisted support personnel. The Central Criminal Court of Iraq liaison office was similarly staffed. A headquarters element section was also established to coordinate the actions of the other sections and to process special cases. Each section reported to a designated officer-in-charge, who reported to the Legal Advisor, who in turn reported to the DCG-DO.

## **B. Legal Guidance**

As discussed in Part I, the “law” under which the United States operated was the Security Council resolutions permitting detention for imperative reasons of security; the Geneva Convention for the Protection of Civilians, specifically Article 78, would be applied by analogy. In the absence of other binding law,<sup>71</sup> policy and regulatory guidance filled the void. However, in the discussion that follows, it will be noted that there are few citations to authority, for the following reason: there was little binding authority.

Department of Defense Directive 2310.01E<sup>72</sup> contains overarching guidance for all US detainee programs. The directive mandates humane treatment for all detainees<sup>73</sup> and, regardless of the detainee’s legal status, requires that the protections contained in Common Article 3 be applied as a minimum.<sup>74</sup> It also provides that detainees who are not prisoners of war “shall have the basis of their detention reviewed periodically by competent authority.”<sup>75</sup> The directive otherwise provides little specific guidance.

The Coalition Provisional Authority required, in its Memorandum 3,<sup>76</sup> certain procedures to be followed in the detention of security detainees. Detainees whose detention lasted more than seventy-two hours would be entitled to a review of the decision to intern,<sup>77</sup> and that review had to occur within seven days.<sup>78</sup>

Further reviews were required “periodically,” with the first review required within six months.<sup>79</sup>

Using these directives as a base, Commander, US Central Command, issued several supplemental orders which governed detention operations in general and the legal review process in particular.<sup>80</sup> The Commander, MNF-I, further implemented the Central Command orders, especially when the Central Command order permitted the Commander, MNF-I, to delegate certain of the powers that had been bestowed upon him.<sup>81</sup> These orders were still written at a relatively high level of generality. When they were more detailed, they were usually descriptive of the procedures already developed within TF 134. Put another way, TF 134 developed practices and procedures which were thought to best implement the overarching guidance, though hardly as unconstrained actors, as both Central Command and MNF-I were always aware of what was going on in TF 134. When the time came to revise the Central Command and MNF-I orders, those responsible for the revisions were usually quite satisfied with making directive the procedures being used. A prime example of this was the Multi-National Force Review Committee (MNFRC).<sup>82</sup> This was a TF 134 initiative to improve the Combined Review and Release Board (CRRB), but it was not mentioned at the time of its implementation in either the Central Command or MNF-I directives. When updated, both directives ordered the implementation of the Multi-National Force Review Committee in the form in which it was already being used.

This lack of detailed guidance provided a useful degree of flexibility and permitted TF 134 legal personnel, who were dealing with issues on a day-by-day basis, to adopt procedures best suited to the circumstances. It should not be characterized as a totally ad hoc process, changeable at will and subject to no oversight. Procedures were not changed unless they yielded improvements and then only after consultation with the chain of command.

Although the procedures occasionally changed, the substantive standard used throughout all legal reviews was always the same: whether the detainee was an imperative threat to security. This critical standard never received any further elaboration in any of guidance discussed above and so the term was used in its colloquial sense.<sup>83</sup>

## **C. Practice**

### *1. Preliminary Matters*

Detention begins when a soldier on the ground determines that a person is a threat. Coalition forces in Iraq had been authorized the power to detain persons, but had also been authorized the power to engage in combat operations, which imply the

use of force (up to and including deadly force): detention on the battlefield is an application of authorized force. The soldier may decide to subsequently release the person captured or may decide that he presents a more lasting threat, in which case he would return to his unit with the detainee in custody. The detainee will be enrolled in the unit's internment facility and if qualified interrogators are available will be questioned. Within a short period, normally fourteen days, the unit must decide to release him, or to seek longer-term detention in the theater internment facility. If the latter, the decision must be approved by a brigade commander.

The detainee is then either convoyed or flown by the capturing unit to Camp Cropper TIF,<sup>84</sup> which is located within Victory Base Complex.<sup>85</sup> At Camp Cropper, the capturing unit turns over all personal effects of the detainees. These effects are warehoused until they are returned to the detainee upon his release. The capturing unit personnel also turn in whatever evidence they have to support continued detention. At a minimum, this must include a completed standard form, which contains, among other things, identifying information about the detainee, a short synopsis of the conduct which led to his capture and identification of relevant witnesses. In addition, two sworn statements describing the capture or other circumstances are required. In most cases, more information would be included, such as pictures, charts and other relevant statements. Assuming these items were all produced, TIF personnel "sign" for the detainee and his personal effects, and the capturing unit is relieved of any further responsibility for both.

Administrative in-processing consists of a medical screening and treatment if required; clothing and supplies issue; and various briefings related to rules and regulations inside the TIF. Importantly, it is at this point that the detainee is assigned an internment security number, or ISN;<sup>86</sup> it is by this six-digit number that the detainee will be referred to throughout his period of detention. This entire process may take two or three days, during which the detainees are segregated from the general population within the TIF. It is also during this period the JIDC would perform the initial interrogation screening interview. At the conclusion of the in-processing, the detainee would be assigned to a compound within Camp Bucca or Camp Cropper TIFs.

Contemporaneous with the detainee's in-processing, the detainee's legal file will be put together. This all-important file will often serve as a proxy for the detainee himself. Initially it consists only of the paperwork delivered by the capturing unit, together with the results of the interrogation screening and medical screening. It is delivered to the Task Force 134 Magistrate Cell for further processing.

At the Magistrate Cell, personnel place the paperwork into standard six-part folders, labeling the outside of the folder with the detainee's ISN. The various parts—standard forms, statements, other evidence, intelligence information, if

any, and process paperwork—are arbitrarily chosen and only serve to make examining a particular file for a certain piece of information easier. The file normally contains only paper, though occasionally capturing units will include a CD-ROM or DVD which might contain video or scans of additional documents. Real evidence, to the extent that it still exists,<sup>87</sup> is referred to in the file but is physically housed within the Camp Cropper TIF warehouse.

Though a file would seem to be only a file, the detainee file has a few unusual features that are worth discussing, if only because they affect future reviews.

First, there are portions of the file that are classified, and the entire folder is therefore marked as containing classified information, usually at the secret level. This is rarely an issue in normal processing because all US personnel whose jobs involve these files have a secret clearance. Indeed, in general terms it was possible to share most classified material with coalition force personnel in the course of duties; Iraqi members of the Combined Review and Release Board<sup>88</sup> were also permitted access to some classified data. The problem arose when it was necessary to convey information from the file to the detainee, either in written form or in person, during the Multi-National Force Review Committee.<sup>89</sup> No classified material could be shared with the detainee. In those instances, it was necessary to convey information in more general terms that were not classified. A further problem with classification was that some of the material in the file would be classified as prohibiting dissemination to all, or most, other countries; the shorthand would be that the information was classified as NOFORN, meaning no foreign dissemination. Iraqi members of the Combined Review and Release Board were not permitted access to NOFORN material. Accordingly, part of the process of putting the files together in the Magistrate Cell was to segregate NOFORN materials into yet another file folder that was contained within the normal six-part folder. When the time came to provide the file to an Iraqi member, for example, the NOFORN folder would be pulled out, and at the conclusion of the hearings the NOFORN folder would be returned to the six-part folder for storage.

It should be noted that no sustained effort was attempted to translate all of the information contained in the file into Arabic. Such a task was beyond the capabilities of the already overworked translators. Certain material (e.g., detainee or witness written statements) would start in Arabic and be translated into English; the Arabic material remained in the file. Any correspondence with the detainee was translated into Arabic, and both the English and Arabic versions were included in the file. But US service member statements, intelligence and interrogation reports, and any other documents remained in English only. At the boards where the Iraqi members did not speak English (a significant number did), the interpreter assigned to the board would go through the file and provide an on-the-spot translation of

the relevant documents. This was not a perfect solution, but under the circumstances, it was the best that could be done.

The final comment about the files in general concerns one of the most troublesome types of evidence—the Iraqi informant. Sectarian violence was often higher than violence directed against coalition forces. Even within particular sects, there are the lawless and the law-abiding. Iraqis almost always knew who the “bad guys” were. It took a personal act of courage by an Iraqi to provide a statement to coalition forces implicating his or her neighbor in insurgent acts. Sometimes these statements would be the basis upon which targeting decisions would be made. In other cases, after a person was detained coalition forces would canvass the village soliciting statements in the hopes that the prospect of the person’s continued detention would encourage informants to come forward. In either case, it was necessary to provide the informant with a measure of confidentiality, as any other course put the informant’s life in great danger. Some units would protect the informant’s name by assigning him a number, which is all that would be reflected in the file.<sup>90</sup> If the informant number was not enough to protect him, perhaps because he gave information that would otherwise reveal his identity, the report might be classified at some level, which led to the classification problems discussed above.

There were two great difficulties with these statements. First, there was no realistic way to test their veracity. Most would be characterized as sworn statements, yet it was never clear who was administering the oath, and whether the informant believed that swearing to an American or his designee carried the same weight that swearing before an Iraqi official would. More important, once the informant provided his statement, he had no further relationship to the case as it progressed through the various levels of review. Both the sheer number of detainee cases and the dangerous security situation in the field made it unlikely that informants would be interviewed a second time about a particular case, and the format of the reviews, being administrative rather than criminal, did not require any personal participation by the informant. So, the informant’s statement had to be taken at face value. If the informant had provided truthful information in the past (this was often noted by the capturing unit in the paperwork they provided),<sup>91</sup> the board assessing the information might give it more credence. On the other hand, an informant of unknown reliability might be viewed with skepticism. The detail provided by the informant could be another indicator of truth, as might the informant’s averment that he personally witnessed some action on the part of the detainee as opposed to merely hearing about it. Corroboration among various informant statements might also help.

The second problem flowed from the first. It became evident, at least as early as the time in which the detainee population was growing rapidly, that certain Iraqis

were informing on their neighbors for personal reasons. The so-called “grudge informer” isn’t a new phenomenon.<sup>92</sup> If coalition forces received information, credible on its face, that a person was an insurgent, they would obligingly pick up the neighbor and whisk him away. In Iraq at the time, there was no effective sanction for bearing false witness against a neighbor. If subsequently released, the former detainee would not know the identity of the informant against him so there was no risk. As boards became more experienced with assessing the validity of informant statements, these types of statements tended to stand out, but not always.<sup>93</sup>

## *2. Magistrate Cell Review*

The Magistrate Cell was staffed with an officer-in-charge and ten to twelve attorneys, slightly more enlisted paralegals and several interpreters. From the middle of 2007 until the middle of 2008, it operated around the clock, with two shifts working twelve hours each. This coincided with the surge in troops in Iraq, hence the greatest influx of detainees. In the fall of 2007, more than sixty detainees, on average would arrive every day at Camp Cropper TIF and require review by the magistrate. The attorney magistrates would typically review cases from a single operational area; for example, two attorneys might be assigned to cases coming from Multi-National Division Central. The benefit of this arrangement was that the reviewing attorney was better able to become familiar with the method of processing the evidence used by that unit and build a relationship with those responsible for the processing at the operational level.

Through policy, the Magistrate Cell review was to be complete within seven days of the detainee’s arriving at the TIF.<sup>94</sup> Accordingly, the attorney magistrates would begin working on the cases as they came in and the file folders were assembled. In practice, the seven-day limit was rarely violated, despite the overwhelming number of cases arriving daily.

The procedure used by the magistrate was unremarkable: did the evidence contained in the folder<sup>95</sup> support the belief that this person was an imperative threat to security? If the magistrate’s answer was yes, a notification was prepared for the detainee and his detention would continue, subject to subsequent reviews. If no, the capturing unit was given notification of the intent to release the detainee and invited to submit additional evidence that might not have been included in the original package. The magistrate would also frequently contact the capturing unit asking for clarification of materials in the package; for example, if there is a reference in the file to a witness statement that was not there, the magistrate would call and ask for it. The intent was not to perfect the case for continued detention, but only to ensure that all the available facts were in front of the decisionmaker. If,

after these efforts, the evidence was still insufficient the detainee would be processed for release.

The attorney magistrate's decision was, in general effect, final. There were too many cases coming through the office for the officer-in-charge to do anything more than random quality assurance checks and the TF 134 Legal Advisor was even less able to oversee individual cases. Insofar as these attorneys would process many hundreds of cases during their tours, their judgment became quite refined.

An additional decision made by the attorney magistrate was whether there was sufficient competent evidence in the file to merit prosecution at the Central Criminal Court of Iraq.<sup>96</sup> As seen, the paper file was sufficient for the purposes of deciding on continued detention, but the file alone, to the extent that its contents could even be shared given its often classified nature, would not prevail in a prosecution in Iraqi court where witnesses and physical evidence were necessary. Accordingly, the magistrate would refer those cases that appeared to contain the requisite unclassified and available evidence to the TF 134 legal office charged with assisting with prosecutions. The magistrates were instructed to be liberal in referring cases, since cases could be non-referred, but there was no effective mechanism to prosecute cases which had not been referred in the first place. Even with this liberal practice, the referral rate for prosecution was fairly constant at only 15 to 20 percent.

The notification of continued detention prepared when the magistrate decided that continued detention was appropriate was additionally styled as an advisement of appeal rights, with an invitation to the detainee to choose to appeal, and, if he did so, to submit reasons why he was not an imperative threat to security. These notifications were delivered to the detainees in translated form and read to those who were illiterate.<sup>97</sup> Written appeals were translated back into English and entered into the file for review by the next board.

### *3. Combined Review and Release Board Review*

Regardless of whether the detainee elected to appeal his continued detention, his case would be reviewed automatically by the appellate body, called the Combined Review and Release Board, or CRRB. To put it another way, the CRRB reviewed every case that passed through the Magistrate Cell. The CRRB was to review the case within ninety days,<sup>98</sup> though in practice, especially once the Multi-National Force Review Committee came into being, the CRRB review was completed within two or three weeks of the magistrate's decision to continue detention. Until it was replaced by the Multi-National Force Review Committee, discussed below, the CRRB also performed the six-month periodic review of every detainee's case. The

CRRB procedures were the same, whether the case before it was an initial appeal or later periodic review.

The CRRB was a panel made up of both Iraqi and coalition force officials. The Iraqi members were generally civilian employees from the Ministries of the Interior, Justice and Human Rights. The coalition forces members were always US military officers, usually drawn from MNF-I staff elements. The panels were composed so that each had an Iraqi majority, although due to absences, that was not always possible. The lack of an Iraqi majority did not invalidate the board. To permit the attendance of the Iraqi members, the CRRB convened in the International Zone. The members were already working elsewhere in the International Zone, and were provided with passes, or were met and escorted, which permitted their entrance to the US Embassy Annex within the International Zone.

The process was overseen by the CRRB office of the TF 134 legal office, with an officer-in-charge and four to six attorneys, together with paralegal and interpreter support. The CRRB office was responsible for “docketing” all the cases and preparing the files for review. The file would be reviewed to ensure its completeness and the reviewing attorney would write a summary of the case, which would be translated into Arabic. Material which could not be shared with the Iraqis because of its classification as NOFORN would be placed in a separate folder within the larger detainee folder if it had not already been done beforehand. Boards were held up to five days a week, depending on the cases ready for review and member availability.

On the day of any particular board, the files would be brought to a conference room where the members had been assembled. A CRRB attorney and interpreter would accompany the files. There was little ceremony. If there were no Iraqi members, or if the Iraqis read and understood English, as many did, each member would read through the file on his own and provisionally vote whether there was sufficient evidence to consider the detainee an imperative threat to security or not. Discussion of the cases was encouraged, though it was up to the members how much they did, if at all. At the end of the consideration and discussion, the votes would be tallied; a majority prevailed. If the Iraqi members did not understand English, the interpreter would perform an ad hoc translation of the relevant evidentiary documents in the file as it was impossible, due to the volume of cases and chronic shortage of skilled interpreters, to translate everything in every file other than the CRRB attorney-prepared summary of the case. Discussion of the cases had to be through the medium of the interpreter, but it still occurred. The CRRB attorney played little role in the board other than ensuring that all the files were considered and the voting was taking place.

The historic recommended-for-release rate at the CRRB was approximately 12 to 15 percent, especially when it was the only board conducting periodic reviews.

Once the CRRB became the initial appeal-only board, the recommended-for-release rate increased, but only marginally, never reaching 20 percent.

#### *4. Multi-National Force Review Committee Review*

The CRRB was an efficient, though not necessarily effective, tool for determining whether a detainee was an imperative threat to security. Chief among the problems was the file on which the reviews were based: there was little or no change in the file from review to review. The evidence supporting the detainee's initial detention, assuming that it was sufficient to pass through previous boards, was more likely than not to also prove sufficient to pass through any subsequent boards. Indeed, the only real differences among the boards were the change in the membership reviewing the file; different members might reach different conclusions based on the same evidence in the file. The CRRB was also, perversely, too efficient, especially when members, most notably the Iraqi members, were long-term members. As with any task, the longer one works on it, the better and faster one becomes. The detainee files were often quite thick, but among all the paper there were usually only a couple of very important pieces of relevant information. Ignoring the trivia, an experienced member knew what to look for, but it occasionally happened that the trivia contained information that could have a bearing on the outcome. Nevertheless, as the board had a hundred or more files before it every day, careful consideration of each was usually sacrificed for speed. A factor in this as well was that the review became that of the file, not the underlying person whom the file represented. Each file had, as its first page, a picture of the detainee, and occasionally had other photographs of him as part of the evidence, but this was not always enough to impress upon the members that they were dealing with a real person, not just an ISN.

The file-only method of review had a more practical downside: disruption in the TIFs. General Stone, the DCG-DO at the time, would often liken the situation to that of the movie *The Gods Must Be Crazy*, in which a Coke bottle, discarded from a passing airplane, lands near an African tribesman, and he then attempts to return this gift of the gods. Releases from the TIFs were almost as haphazard, at least from the detainees' point of view. One day a detainee would be tapped on the shoulder and told that he was about to be released: he didn't know how that decision was reached or why. Likewise, those detainees around him, who didn't get the tap, were equally mystified about why they too were not being released. Detainee discontent resulted in riots and near-riots becoming increasingly common in Camp Bucca.<sup>99</sup>

For all these reasons, the DCG-DO decided to institute a new review procedure, which was named the Multi-National Force Review Committee. The single biggest innovation was that the detainee was to appear before the board and participate in the hearing. This led to many other practical changes.

First, because transportation of large numbers of detainees was impossible, the detainees could not come to the boards. Instead, the boards had to go to the detainees. Accordingly, all boards would henceforth be held within the TIFs in order to facilitate easy and secure detainee movement. Space to hold the boards was initially a problem, but was solved relatively quickly. Camp Cropper only required a single board to handle its volume of boards and a trailer in the TIF proved adequate to the need. At Camp Bucca, with its much larger detainee population, a suite of trailers was eventually installed to comprise what became known as the “Justice Complex.” It included several board rooms, administrative spaces and a holding area for the detainees.

Second, whereas the CRRB was able to work through a hundred or more cases in a day, any reasonable board procedure involving the detainee would have to accept many fewer completed boards per day. With a detainee population during this period exceeding 20,000, topping out at more than 26,000 in the fall of 2007, it was necessary to complete just under one thousand boards per week in order to ensure that all detainees were provided a review every six months (or twenty-six weeks). This necessitated greatly expanding the number of boards running every day. Various combinations were tried, with nine boards (eight at Camp Bucca, one at Camp Cropper) hearing twenty cases per day, with boards held six days a week finally being settled upon. This gave a theoretic capacity of over one thousand cases per week, though that capacity was never reached as boards would often be cancelled and rescheduled due to administrative difficulties with moving files, detainee unavailability due to sickness, difficulty in finding sufficient members to sit on the boards or security issues beyond control (e.g., a security operation or exercise run by TIF leadership). As many as thirty boards per day were tried, but that proved to be too many, exhausting the board members. As the detainee population decreased, the number of hearings per day per board was decreased. It was found that anything less than fifteen hearings per day was too “easy” on the members, when the standard workday in Iraq was twelve hours. The solution was to slowly decrease the number of boards, maintaining fifteen to twenty hearings for each.

Third, because of the increased number of boards, there was an increased need for members. Recall that the CRRB was a joint Iraqi–coalition forces board. With that in mind, the Iraqis were approached prior to the first MNFRC, briefed on the concept, and asked whether they would like to participate as members. Although they were supportive of the new board system and expressed an interest in sending members, no Iraqi members ever participated. This could be explained by a number of reasons. The CRRB was held in the International Zone, close to the ministry offices of the Iraqi members. Gaining access to the Embassy Annex complex through security was a challenge, but one that was met. Now the boards were being

held at the TIFs. Daily travel to Camp Cropper from the International Zone was possible, but only in armored convoys. Travel to Camp Bucca was all but impossible for the Iraqis on their own, and spending an extended period at that very remote location, once they got there, would not have appealed to any of the potential Iraqi members. While the Iraqis would have been welcomed as members, their absence did lead to many administrative conveniences, as there was no need to worry about access to classified material in the files that could not be shared with the Iraqis and no material in the files needed to be translated by the interpreters.

The question was where to find the other members. MNC-I was initially invited to send members prior to the first boards, but declined, although as will be discussed it did send members later. With no Iraqis, no MNC-I members, and no extant ability to task other units to provide members, all MNFRC members were at first drawn from TF 134. Officers from throughout Camp Bucca were tasked with sitting on the boards, without being relieved of their normal duties. Senior officers in the grade of O-4 and above to sit as president of each board were in especially short supply and therefore those that were available were tasked disproportionately. The TF 134 chief of staff decreed that all TF 134 staff officers assigned to the headquarters would travel to Camp Bucca to sit on boards for two weeks. This helped, though wasn't a full solution. TF 134 also requested, and was granted, the assignment of a group of officers and senior enlisted personnel whose sole job in Iraq would be as MNFRC members. They reported administratively to the Legal Advisor. Their presence greatly relieved the burden on personnel assigned to the TIF staff from sitting as members. Additionally, as these permanent MNFRC members heard more and more cases their expertise greatly increased, improving decisions. Nevertheless, the "TF 134-only" boards were responsible for the lack of acceptance of the results early in the process.

With no prior practice to consult in the design of the MNFRC, the procedures utilized for an Article 5 tribunal,<sup>100</sup> set forth in the Army regulation providing policy and procedures for the treatment of, *inter alia*, detainees,<sup>101</sup> were used by analogy. The board was composed of three members. The president was a senior officer, O-4 or above. One of the other members could be a senior enlisted person, in the grade of E-7 or above.<sup>102</sup> Each member was provided with a memorandum entitled "Instruction to Members," signed by the DCG-DO, which set forth his expectations for their performance and his thanks for their serving as members.<sup>103</sup> Each member signed the memorandum indicating he or she had read and understood the contents. MNFRC staff members would also provide training on the process, especially on how to read and understand the detainee files.

The night before the board the members were required to read the files, taking notes as necessary. The boards began early in the morning and ran until all were

completed. Each board was held in a separate hearing room, minimally configured with a table in the front for the members, a table for the detainee, a seat for the interpreter and several chairs in the back for any observers. A guard was always present, in whose physical custody the detainee always remained.

The hearing followed a script. The president began by explaining the nature of the hearing and its purpose, paying special attention to an explanation of the standard of imperative threat to security that the board would be using to arrive at its decision. The detainee was told that he could offer evidence of any kind. He could make a statement, but was not compelled to do so. If he consented to make a statement and to answer questions, he was encouraged to speak truthfully; to this end he was sworn in in an appropriate manner. The preliminaries over, the president detailed the nature of the evidence against the detainee. The detainee then had the opportunity to rebut the evidence.<sup>104</sup> The board members would then ask questions, usually about the detainee's pre-capture conduct, but also about his conduct within the TIF and often his intentions once he was released. At the conclusion of this portion, the president would return to the script, remind the detainee that the board would be voting on whether the detainee presented an imperative threat to security, and dismiss him back to the TIF. The members would deliberate and vote; a majority vote won. Each member would sign the voting sheet and a short description of why the board voted as it did was written on it. The dissenting member, if any, also had the opportunity to write a short statement. The MNFRC staff member collected the voting sheet and file, and set up the next board.

The critical role of the interpreter must be mentioned here. Accurate, faithful interpretation was required but occasionally not delivered. All interpreters were hired by a government contractor, which certified as proficient all those it hired. Some were clearly more proficient than others,<sup>105</sup> but in a theater where interpreters of *any* proficiency were in short supply, the MNFRC staff was happy to have every one it had. Another problem that sometimes occurred was that the interpreter took on too much of an expanded role, propounding questions that weren't asked by the assigned members or embellishing answers made by the detainee. In certain situations, this made sense; for example, if the detainee didn't understand the question as phrased by the member, the interpreter could more reasonably ask it in a different manner or as a series of questions. At other times, the interpreter's intrusion was improper and was stopped.

The MNFRC result yielded a recommendation to the DCG-DO on the status of the detainee: its vote to release did not itself effect a release. All recommendations for release had to be approved by the DCG-DO,<sup>106</sup> who was free in theory and practice to disregard the recommendation of the MNFRC or that of any of the other boards earlier discussed. This was a continued complaint of the International

Committee of the Red Cross (ICRC) representatives. In the ICRC's view, the board deciding the appeal under either Article 43 or 78 of the Civilians Convention needed to be "independent," and to have the final authority on release.<sup>107</sup> The complaint had two strands. One was that the members of the boards needed to be independent of the DCG-DO; because the members all worked for TF 134, they were not independent. The response was always that, as a practical matter, the DCG-DO had little interest in, and absolutely no direct input into, any board. His interest was merely institutional: Was the procedure fair and being followed? Were the members being exposed to all the evidence and were they voting their conscience? If so, results in any particular case were a matter outside of the DCG-DO's notice. Never were magistrates or board members upbraided for their recommendations and so they were independent in reality, even if not in theory.

There was no good answer to the second strand of the complaint about the DCG-DO's final authority. The regulations delegating release authority to the DCG-DO did not permit further delegation to a lower level such as a board nor would the DCG-DO have been inclined to do so even if possible. His ability to provide quality assurance provided some level of comfort in the operating forces that releases were appropriate.<sup>108</sup> In the great majority of cases, the recommendation of the MNFRC (or any other review board) was followed, and the detainee released. In those instances when the recommendation was not followed, it was because of additional information being brought forward that convinced the DCG-DO that the detainee remained an imperative threat.<sup>109</sup>

From the beginning, the MNFRC yielded a higher release rate than the CRRB. The institutional response progressed from expectation, through mild alarm, to final acceptance. Some explanation is in order. When the MNFRC was first instituted, it had a minimum number of boards; the CRRB still functioned as the primary six-month review mechanism. It happened at a time that there was an independent requirement for major releases of detainees (e.g., the coalition generally released a number of detainees during Ramadan as a gesture of goodwill). To "harvest" these increased numbers of releases, the early boards were "seeded" with cases of detainees who were thought to represent lower threats. The resulting release recommendation rate for these MNFRCs was just under 25 percent, compared with 12 to 15 percent for the CRRB, fulfilling the need for releases. The rate was high, but expected. However, once the "seeding" stopped and regular cases came before the boards, the recommended release rate stayed at around 25 percent, and actually began increasing, until it reached a relatively steady rate of over 40 percent. This was the alarm phase, mostly on the part of the operating forces, which increasingly came to view the MNFRC as merely a release board. Within the TF 134 staff, the increasing recommended release rate was troubling only if it indicated that either the

process was bad, or the members were not taking their duties seriously. Investigation proved neither to be true. Put another way, the TF 134 staff's view was that if the process was fair—and was followed—the recommended release rate was merely whatever it was. The substantial increase over that of the CRRB was attributed to three factors. The first was the presence of the detainee. As a simple matter of human nature, having a real person in front of you, instead of merely a file with his picture, is more likely to engender empathy, and, in close cases, may make the difference. Second, though the detainee's evidence was nearly always just his statement and answers to questions, it was more than what was in the paper file. Finally, a board process, following a script, lent itself to greater deliberation on each case. Matters which might have escaped the notice of the CRRB could be discovered by a board which had more time to review the case.

Final acceptance of the MNFRC process, and the higher recommended release rate, took more time. In the beginning of 2008, MNC-I members began to participate on the MNFRC. At the direction of MNF-I, MNFRC panels would have two MNC-I members each, giving them the majority vote. The results were instructive. On the first Saturday<sup>110</sup> with MNC-I members, the recommended release rate “dropped” to around 20 percent. On Sunday, it increased to maybe 24 percent, and so on, upward every day, until by Thursday it was again near 40 percent. On Saturday, new members would be seated, and the process repeated. Eventually, Saturday's rate began increasing, and within several months, the new boards were consistently recommending releases at around 40 percent, regardless of the day.<sup>111</sup> The reasons could only be discovered anecdotally. In the beginning, hostility toward the process was clearly evident; that hostility waned as individual members' tenures wore on and waned organizationally as MNC-I recognized that these results were attributable to their own members. In the end, the operating forces, through their participation in the release process, took an ownership stake, which led to their acceptance of the results.

Although the MNFRC received many improvements—a more focused script, permanent members, MNC-I members—one of the more interesting was the assignment of personal representatives to some of the detainees. The credit belongs to the ICRC representatives who first proposed the idea. As indicated, detainees appeared before the MNFRC alone. Among the population of detainees was a significant number of juveniles.<sup>112</sup> The ICRC asked whether it was possible to help the juvenile detainees at their MNFRC review for it would be a very important, but also forbidding, process for them. The ICRC representative initially suggested assigning counsel to the juveniles. A compromise was reached, modeling the concept on that of the personal representative assigned to persons appearing before a Combatant Status Review Tribunal.<sup>113</sup> The personal representative was not a lawyer; his or her

role was not to act as an advocate during the hearing. Rather, the representative's role was to assist the detainee in preparing for the hearing, explaining the process and appearing with him at the hearing. The personal representative could make a statement for the detainee and could suggest to the members questions that might be relevant, but he or she was not to offer argument in the manner of counsel.

The implementation of providing a personal representative for juveniles began in late 2007. One of the officers assigned as a permanent MNFRC member was re-assigned as the juvenile personal representative. A naval reservist, whose civilian job was as a school teacher with significant counseling experience, was chosen for the position; experience showed that she was an excellent choice. Experience also showed, as reported by MNFRC members and juvenile detainees alike, that the initiative was a success. The ICRC next asked to expand the program to represent other vulnerable populations, to include female detainees, third-country nationals (i.e., detainees who were not citizens of Iraq) and those detainees with diminished mental capacity. These, too, were successfully implemented, mostly because of the overall limited numbers.<sup>114</sup> Expanding the program further was explored with the ICRC, but no other discrete population that needed representation was identified. The ICRC was unapologetic in its request that *every* detainee receive the benefit, but that was logistically and administratively impractical. Indeed, the ICRC, while happy enough with the limited personal representation, never hid its ambition to push the MNFRC process until, step-by-step, legal counsel were assigned to all detainees at every hearing.

Though not part of the MNFRC process, some mention should be made of the programs offered to the detainees within the TIF, as participation in some of these could have a positive impact on the detainee's case. In mid-2007, when faced with rising numbers of detainees and rising discontent among them, the DCG-DO decided to implement a set of formal programs that eventually became known as Theater Internment Facility Reconciliation Center, or TIFRC, services.<sup>115</sup> The services included literacy programs (well over half of the detainee population was illiterate), limited vocational training, work programs and religious engagement classes.<sup>116</sup> Though these programs could be viewed as a kind of social work, the focus was on reducing the threat a participating detainee presented, thereby facilitating his earlier release from custody. The programs had two main purposes. The first responded to the finding that a majority of the detainees had joined the insurgency for money: they had no jobs and were willing to take cash to emplace IEDs, etc. The vocational training and work programs were designed to address that problem. The second purpose responded to the belief that insurgent extremists were misusing Islam to encourage insurgent acts as a religious duty. Once the detainees learned to read, they could study the Quran, with the help of Iraqi clerics

contracted by US forces, and determine for themselves that Islam teaches quite the opposite. The hope was that completion of the programs would change a former security threat into no threat at all.

The TIFRC concept was developed contemporaneously with the MNFRC, and integrated into the MNFRC's process. MNFRC members were specifically directed to consider the detainee's participation, if any, in the TIFRC services in making their determination on whether he presented an imperative threat. It was to be considered merely as a factor among many: there was no pressure to recommend release for successful participants, and failure to participate was not to be considered negatively. Additionally, the MNFRC members had the opportunity to recommend for future TIFRC participation those detainees whose detention they decided to continue but who might benefit, next time, from having gone through the programs. Providing them with this recommendatory power was valuable early in the TIFRC process when the services were just beginning. When the services became more widely available to all detainees, the MNFRCs were no longer given the option of "retain, with TIFRC."

### *5. Special Release Processing*

The discussion up to this point has focused on regularly scheduled reviews, from the initial review at the Magistrate Cell through the CRRB and MNFRC. However, there was another significant method by which detainees' cases would be reviewed, and detainees released—that was through special release processing. Although there were many ways that the special release process could be initiated, the single constant was that the DCG-DO made an individual decision whether to grant the release.

Special release requests originated from many sources. Some came from Iraqi officials. It was a rare meeting with Iraqi government officials, or other important personages, such as influential sheiks, where the DCG-DO did not return with a list of detainees to consider for special release. Other requests would come from within the coalition: officials from the battalion through the MNF-I level would often ask for releases to further their engagement efforts. A somewhat separate category included those requests from doctors, asking for the compassionate release of detainees with terminal or serious medical conditions.

These requests were individually processed.<sup>117</sup> Attorneys within the headquarters element of the TF 134 legal office would be designated as "Special Release Attorneys," whose job would be to research the case, write a memo detailing the relevant facts, and make a recommendation as to whether the request should be granted or not. The memo was staffed through the Legal Advisor to the DCG-DO, who would make the final decision. The standard against which the decisions were made remained the same—imperative threat to security—but there was a

willingness to accept more risk in these releases than with normal periodic reviews. This was most evident for requests which originated from within the coalition: if a ground commander, with knowledge of the detainee's background,<sup>118</sup> was willing to accept him back within his battlespace, with reluctance the request was often granted. There was generally less tolerance of risk with requests from Iraqi officials, though the political considerations associated with such requests could often tip the balance.

#### *6. Criminal Prosecution*

CPA Memo 3 provided that coalition forces could detain two classes of persons: those "suspected of having committed criminal acts and [who] are not considered security threats,"<sup>119</sup> and others "for imperative reasons of security in accordance with the mandate set out in UNSCR 1546."<sup>120</sup> To the extent the authority to detain persons for criminal acts had been used earlier, by 2007 it was exceptionally rare for coalition forces to apprehend and hold a person who presented only a criminal threat. Rather, all detainees processed into the TIF went through the Magistrate Cell and were assessed as imperative threats to security as already described. That is not to say that criminal prosecutions did not occur, for that was another major operation that must be discussed, albeit briefly.<sup>121</sup>

CPA Order 13<sup>122</sup> established a national-level court called the Central Criminal Court of Iraq, or CCCI. The Court's jurisdiction extended to all criminal violations, misdemeanor or felony, though in its discretionary jurisdiction it was encouraged to concentrate on the most serious cases, such as terrorism, acts intended to destabilize democratic institutions, and violence based on race, nationality, ethnicity or religion.<sup>123</sup> The CCCI sat in Baghdad in a building just outside the International Zone. It was the court to which all coalition force detainee criminal cases were referred.

Within the TF 134 legal office there was a CCCI liaison office, which was tasked to prepare cases for eventual prosecution at CCCI. Attorneys within that office would receive the files forwarded to it from the Magistrate Cell and determine, based on their experience with the Court, whether prosecution was worthwhile, based on either the nature of the misconduct alleged or the state of the evidence and availability of witnesses. A case for which prosecution was not deemed worthwhile was "non-referred," after which the detainee's case would be returned for review by the CRRB or MNFRC, as appropriate, to determine whether he remained an imperative threat.

Those cases that warranted prosecution were prepared for prosecution by the CCCI liaison office attorney, and then presented to the Iraqi prosecutor and investigative judge for proceedings in accordance with the Iraqi criminal code. It is

important to note that the CCCI liaison office attorneys did not themselves prosecute any case; however, their role hardly ended with passing off a prepared case file. The CCCI liaison office attorney would collect all physical evidence, summarize all other evidence, arrange the presence of witnesses and ensure that the detainee defendant appeared. The attorney would be present for the investigative hearing and subsequent trial, and would be responsive to any questions or requests for evidence from the judges. Investigative judges would often solicit from the attorney questions that they (the judges) might want to ask. If the CCCI liaison office attorney didn't act as the prosecutor, he or she was certainly a very active "shadow" prosecutor.

Convictions resulted in just less than 60 percent of the cases. Compared to those of any normal US jurisdiction, where conviction rates regularly exceed 90 percent, these results were not particularly impressive. However, there were several reasons to be satisfied with the results. The Iraqi system did not engage in any type of plea bargaining, so a powerful incentive to plead guilty to charges was removed. A defendant taking his chances at trial is occasionally rewarded. CCCI liaison attorneys were also forced to take cases to trial they knew would not result in conviction. For example, assume coalition forces raid a house and find a cache of illegal weapons, IED-making materials, etc. They detain all of the military-aged males in the house. CCCI liaison attorneys would have to bring all of these persons to the joint trial, knowing that the Court was likely to convict only the owner of the house or someone else who could be said to have possessed the weapons, acquitting the rest. If even one of the persons found during the raid was not brought to trial, all defendants would point to the missing person as the possessor of the weapons and the Court would find no one guilty.

Those convicted would be transferred to Iraqi custody as soon as possible but due to the overcrowding of Iraqi facilities it often did not happen quickly. These detainees remained in the TIF, though in a separate compound, while awaiting eventual transfer. They were otherwise treated the same as all other detainees, other than that their periodic reviews ended because they were considered to have begun serving their sentences.

If the Court failed to convict the detainee defendant, the criminal proceeding ended but the person was still a security detainee. These cases would be immediately reviewed by the CRRB or MNFRC for its recommendation. In the case where the file contained information that could not be shared with the Court because of its classification, the board could well conclude that the detainee remained a threat and recommend his continued detention despite the acquittal. This was a source of confusion for the detainee and of tension with the Court, though most of the judges understood the separate security-based detention authority.

*Part III—Applications for the Future*

This article has presented a description of the detainee operations during a portion of coalition operations in Iraq, and may prove to be of some limited value in the documentation of that experience. However, more important, the lessons learned may prove to be useful in future operations. The following comments and recommendations are offered in that hope.

Before offering such comments, it is important to insist that the practices described earlier or recommended below should not be taken as establishing custom that will bind the United States or others in similar situations. The law, such as it was applied by analogy to detainee operations, is not very detailed nor, in some ways, very demanding. This author is confident that the reviews of the cases of detained persons went beyond what the law required. The United States was able to set the conditions for the practices described by devoting substantial financial and personnel resources to the detention mission in Iraq; those generous resources may not be available in a future operation, and thus it may become necessary to adhere only to the more minimal requirements of the positive law. Other nations may not have the resources under any circumstances to enable them to provide more than the law requires and the US practices should not force them, through a claim of a new customary international law obligation, to try.

**A. Detainee Personal Appearance**

All things being equal, a review at which the detainee appears and speaks is likely to be better than one in which he is not given that opportunity. “Better” in this context means more likely to arrive at a correct assessment of the level of threat the detainee presents. Detention is costly: to the detaining power in resources and personnel; to the detainee and his family, which often suffers; and to the occupied or host nation, depending on the legal authority for the detention, which needs to move beyond civilian internment as it reasserts its own sovereignty. Of course, in a situation in which civilian internment is permitted in any form, things are not always equal. The somewhat relaxed requirements for hearings under the Geneva Conventions clearly recognize that in a conflict certain unavoidable impositions on individual rights will occur and that even a minimal process will, if followed, be better than no process at all.

Nevertheless, if resources permit, it would be worthwhile to permit the detainee to appear at all levels of review. The MNFRC proved successful, and if it worked with over twenty thousand detainees, it would certainly work in smaller-scale detention operations. The CRRB would have been replaced totally by the MNFRC in its reduced role as the ninety-day appeal board but for the Iraqi participation.

Insofar as Iraqi participation on the MNFRC was unable to be arranged and the CRRB was the only time when the Iraqis did participate, it was determined to be politically inexpedient to abolish it. However, a future detention operation need not be constrained by these considerations, and the appeal and subsequent review board could be designed from the beginning with the appropriate membership.

Permitting a personal appearance at the initial review stage, at the point where the Magistrate Cell functioned, need not require an MNFRC-like panel (though it could); it is quite possible for the magistrate to conduct the hearing, and make the decision, alone. Consideration was given to permitting detainees to personally appear before the Magistrate Cell, but insufficient manning prevented that from occurring. The attorneys assigned as magistrates were already employed full-time in preparing and perfecting the files, writing summaries, and so on, and levying an additional requirement upon them to hold a hearing for each of those same cases would have been impossible. But, as stated before, with greater personnel resources, or with fewer cases, it would have been possible and beneficial.

The problem with this recommendation is that it is essentially irrevocable during the remainder of that operation. Should personal appearance be the standard set at the beginning, and the operational tempo dramatically increases or the security situation deteriorates, it will be difficult to revert to a file-only review, mostly because of the negative reaction from the detainees,<sup>124</sup> and possibly by organizations, such as the ICRC, monitoring the process. There is a certain appeal, therefore, in starting with the minimums and improving them once a steady state has been realized.

### **B. Personal Representatives**

The decision to grant a personal representative to the detainees, or any subgroups thereof, must be based on the perceived need and the availability of resources. It may yield better results and will help the perception of fairness by the detainees. Efforts to turn any of the hearings into a fully adversarial process, with or without the involvement of counsel, should be resisted until such time as national policymakers direct a different course, and then only after debating the compatibility of such a procedure in an area of conflict.

### **C. Technology**

Better uses of technology may not have directly benefited the quality of the reviews, but certainly would have eased the administrative burdens associated with the hearings. Consider the role of the detainee file. It was the centerpiece of every review, even at the MNFRC. If the file was lost or missing, nothing could be done with that detainee. (In almost all cases, the file could often be reassembled from its

constituent parts scattered throughout the force.) The logistical effort to track and move the files was impressive. The files were assembled at the Magistrate Cell, and when their review was complete, they were boxed up and convoyed to the International Zone, where they would be collected by the CRRB (and a more limited number by the CCCI liaison office). Upon completion of the CRRB review, they were boxed up again, convoyed back to Victory Base, put on a plane at Baghdad International Airport, flown to Basra, and convoyed to Camp Bucca. If the file was needed for special release processing, it would return along that path to Victory Base Complex, and maybe back to Camp Bucca again later before it returned to another way station in this possibly unending process.

Ideally, files would begin their lives as scanned images, using a program such as Adobe Acrobat to organize the pages in a standardized manner similar to the six-part folders. New material (e.g., the results of a periodic review) could be inserted at the appropriate place in the electronic file. The files would reside on a central server, with visibility throughout the force. Board members would each have computers with which to read the electronic files.

Many efforts were made to reach this ideal, but the sheer number of files in existence made it impractical with the then-current resources. Scanning can be time consuming and quality assurance must be strict if all paper documents are to be destroyed. Each resulting file often exceeds twenty-five megabytes in size. While storage requirements are considerable, though manageable, bandwidth considerations are not so easily solved. Some method must be reached to ensure the “originality” of a single version (the paper file system has this obvious advantage) that can be changed only by those authorized to do so. None of these problems are intractable—bandwidth will likely be the most difficult challenge, as it is always in short supply, especially in an area of conflict—and future technological innovation may make their solutions so much easier.

Another technological solution, one which was investigated but not implemented mostly due to lack of bandwidth again, was “virtual” hearings, at which one or more of the members might participate from a remote location. Such a system would have much appeal, eliminating the onerous travel to a remote location such as Camp Bucca.<sup>125</sup> The quality of the resulting hearing, however, would be correlated to the quality of the video-teleconference link, as the visual aspects of a hearing are often more important than the aural. Compare, for example, a situation where the members appeared to the detainee, and the detainee to the members, on a laptop screen using a webcam versus a full-motion, wide-screen presentation. A virtual presence is always inferior to real presence; the issue is always how much degradation is acceptable.

#### **D. Broad Participation Membership**

Boards, specifically the MNFRC, worked well with “general purpose” officers, yet as the process matured and the types of persons who sat on the boards broadened the process improved. When designing a review panel for a future board, it would be best to begin with the broadest possible participation.

In an operation which permits the involvement of representatives of the host nation, the benefit of having them participate will likely outweigh the administrative burdens (clearances and disclosure predominantly). They need not be given the majority vote, such as was the case in the CRRB, though the political situation, especially one in which the visiting force’s presence is based on host-nation consent, may warrant that concession. The cultural sensitivities and awareness that such members bring to the board cannot be otherwise replicated.

Concerning own-force members, senior enlisted members are always a valuable addition, despite an otherwise pervasive preference for officers only.<sup>126</sup> Members from the operating forces must participate. In addition to their wealth of experience resulting from seeing the same type of incidents that have resulted in detention occur firsthand, their involvement helps to lend an ownership stake in the process to the operating forces.<sup>127</sup> Permanent members, if they are available, will almost certainly have little or no operating exposure, but their experience reviewing many, many boards will help to establish some parity of treatment across the process.

#### **E. Programs within the TIF**

Administrative detention has been recognized as necessary during the types of operations described. The conditions under which the detainees are held must comport with enumerated standards: these responsibilities are doctrinally exercised by the military police, and help to maintain the peace and order of the detainee camps. However, the same conditions may also have a direct bearing on the legal reviews. Programs such as those of the TF 134 TIFRC discussed above are designed to reduce the threat the detainees present post-capture. Participation in these programs by the detainee must be highlighted to the board reviewing his continued detention and assessed as one additional factor among many in determining whether the detainee remains an imperative threat. If members, educated about the TIFRC programs, are according them no weight in their decisions, the programs should be changed or cancelled, except to the extent that they serve a separate military police function within the TIF. On the other hand, programs which have a positive effect on board decisions should be expanded, with the hope of greater numbers of releases of those who are no longer threats.

*Conclusion*

Detention, in some form, is a reality in every operation, just as the application of force, in some form, often including deadly force, is also a reality. The availability of detention to soldiers in a conflict may tend to reduce the amount of force that would otherwise be used to complete a mission: without detention available, the soldier can either shoot to kill or let the targeted person run away to fight again tomorrow. Detention is hardly cost-free, and its very availability can often lead to abuses of the authority that allows it. The law regarding detention attempts to strike the appropriate balance in often general terms, explicitly relying upon the good faith of the parties in applying the law to facts on the ground.

The detention operations described in this article represent an evolution over several years. They were characterized by an overall good-faith effort to apply the letter and spirit of the law, but they were far from perfect. The damage caused by Abu Ghraib is incalculable, but it focused command attention on detention operations and made incredible resources available to improve them, and so resulted in a much better product. Procedures were developed and conscientiously applied, but mistakes are likely in any system. Many were detained, and for too long, who did not deserve to be detained. The process eventually found them, and they were released. Many were released who should not have been released, either through oversight, failure to synthesize all available information or by misjudgments by the reviewing board; some returned to the insurgency and killed coalition force members or Iraqi citizens, and this too is a tragedy. Mistakes on either side are inevitable; the best systems can only hope to minimize them.

## Appendix

(TF 134 Letterhead)

Reply to Attention of  
MNFI-DCG-DO

5 August 2007

MEMORANDUM FOR MULTI-NATIONAL FORCE REVIEW COMMITTEE  
MEMBERS

SUBJECT: Multi-National Force Review Committee Instructions

1. You have been selected for important duty as a member of the Multi-National Force Review Committee (MNFRC). This duty is a critical part of the efforts of the Multi-National Force, and vital to a measured and steady reintegration of security internees back into Iraqi society. While assigned, this will be your primary duty, until your assignment ends. You should review this letter and other instructional material that will be made available to you prior to your first board.

2. The persons who appear before you are security detainees. We detain them under the authority of the United Nations Security Council Resolutions which permit us to hold those who present imperative threats to coalition forces or the Iraqi people. Although in many cases their conduct could be characterized as criminal, it is not necessary to our detention that they be charged with, or convicted of, a crime. Similarly, the detainees are not serving a sentence. Rather, they are held because they have been determined to be security threats.

3. Your task is to determine whether the detainee remains an imperative threat to security. You must believe that there are reasonable grounds to sustain that finding. "Reasonable grounds" consist of sufficient indicators to lead a reasonable person to believe that detention is necessary for imperative reasons of security.

4. You should consider the following factors in arriving at this determination:

- Your focus should be on the threat the detainee presents today, not the threat he posed when he was captured. Pre-capture conduct may be important as an indicator of the detainee's threat level now, and in the future, but it is not the sole indicator. The detainee will have undergone several legal reviews prior to appearing before you. You are in no way bound by their findings and recommendations.

- You will have access to classified and unclassified information associated with the case. As you review the information, focus on facts, not on the conclusions of others: it is your job to draw the conclusions.

- You should understand that time spent in the Theater Internment Facility (TIF) can change a person—for good or for bad. It is your job to assess that change, and apply it to your threat determination. In this regard, you will be provided with a “report card” for each detainee. It will detail his performance in the TIF, including: any disciplinary infractions; any instances of positive performance; participation in educational classes, religious enlightenment courses, or in various vocational training courses. Be aware that a detainee may engage in negative or group behaviors in a prison-like environment for self-preservation. You will be provided with various assessments of the detainee by counselors, psychologists, and religious leaders. Take all of these items into account when you make your decision.

- You will have the opportunity to question the detainee. Make use of it, but be mindful of disclosing classified information, especially sources and methods of collection. It is up to you to determine the detainee’s credibility, and what weight you give his answers. Be aware that cultural differences may complicate this challenge. A cultural advisor will be available to help you in this regard.

- Treat the detainee with respect. Show no bias to his regional or religious background. Don’t be affected by his manner of dress or personal appearance. Finally, remember that, although you will be participating in many of these boards, he only gets to appear before this one, and your decision is going to have a profound impact on his life.

5. At the conclusion of the hearing, you will be able to discuss the case with your fellow members, and vote. Each member’s vote is equally weighted. Senior members will not unduly influence junior members. You must decide first whether the detainee is an imperative threat to security. If he is not, you should vote to Release; if he is, you should vote to Retain. Majority rules. If the majority votes to Retain, you next vote whether the detainee should be recommended for participation in TIFRIC, or TIF Re-Integration Center. This program is described more fully in information available to you, but is generally for those detainees whom you feel will benefit from the suite of services offered on their way to eventual release. Again, majority rules.

6. If you have any questions about this duty, contact the TF 134 Legal Advisor or his MNFRC Representative.

7. Thank you for participating in this process. You are making a difference in our efforts to ensure the safety and stability of Iraq, and the success of the Coalition Force mission.

/signed/  
DOUGLAS M. STONE  
Major General, USMC  
Deputy Commanding General for  
Detainee Operations

I hereby acknowledge receipt of these instructions and will comply with all of the above:

---

Signature and date

### *Notes*

1. See, e.g., Seymour M. Hersch, *The Annals of National Security: Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004, at 42, available at [http://www.newyorker.com/archive/2004/05/10/040510fa\\_fact](http://www.newyorker.com/archive/2004/05/10/040510fa_fact).

2. As will be discussed, though technically a coalition operation among many nations, the primary actor, and in most cases the only actor, in the detention operations discussed in this article was the United States. Nevertheless, since some aspects of the operation did involve the coalition in the broader sense, the term “coalition forces” will be used as a shorthand.

3. Note that this article will not discuss the legal basis for initiating conflict, or *ius ad bellum*. For such a discussion, see Andru E. Wall, *Was the 2003 Invasion of Iraq Legal?*, which is Chapter IV in this volume, at 69.

4. See President George W. Bush, President Bush Addresses the Nation (Mar. 19, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/03/20030319-17.html> (announcing that combat operations had begun in Iraq as of March 19, 2003, in Washington, DC, but March 20 in Iraq due to the time difference).

5. Article 2 is common to all four Geneva Conventions. See Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Wounded and Sick Convention]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Shipwrecked Convention]; Convention Relative to the Protection of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter PW Convention]; Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Civilians Convention]; all reprinted in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 198; 222, 223; 244, 245; and 301, 302; respectively. Common Article 2 states: “[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . .”

## *Detention Operations in Iraq: A View from the Ground*

---

6. See generally Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Law and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 73. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 5, at 422.

7. PW Convention, *supra* note 5, art. 4. The remaining categories of persons eligible for prisoner of war status include armed forces of a government not recognized by the detaining power, civilians accompanying the force, certain merchant mariners, and civilians comprising mass levies. *Id.* For a discussion suggesting additional inferred conditions over the four enumerated in the text, see YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 36 (2004).

8. PW Convention, *supra* note 5, art. 118.

9. *Id.*, art. 5.

10. See Headquarters, Department of the Army, Reg. 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997) [hereinafter AR 190-8]. AR 190-8 has applicability among all four US services: the Air Force, Marine Corps and Navy have each provided AR 190-8 a designation within their own systems of regulations.

11. PW Convention, *supra* note 5, art. 5 (emphasis added).

12. Civilians Convention, *supra* note 5, art. 4.

13. The exceptions from protected-person status include nationals of a country not a party to the Convention, and nationals of neutral States in the territory of the detaining State, and nationals of cobelligerents anywhere, so long as the neutral or cobelligerent State has normal diplomatic relations with the detaining State. *Id.*

14. Part II is entitled “General Protection of Populations Against Certain Consequences of War.” *Id.*, Part II. The articles therein (Articles 13–26) generally protect hospitals, medical personnel and transports associated with the same, and encourage the parties to specially protect certain vulnerable populations (expectant women, children, etc.). *Id.*

15. Like Article 2, Article 3 is common to all the Geneva Conventions. See Wounded and Sick Convention, *supra* note 5, art. 3; Shipwrecked Convention, *supra* note 5, art. 3; PW Convention, *supra* note 5, art. 3; Civilians Convention, *supra* note 5, art. 3. Although by its terms Common Article 3 applies only to armed conflicts “not of an international character occurring in the territory of one of the High Contracting Parties,” the ICRC *Commentary* makes clear that these same standards were intended to apply to all armed conflicts. The *Commentary* states:

The value of the provision [sub-paragraph (1) of Common Article 3] is not limited to the field within Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in international armed conflicts proper, when all the provisions of the Convention are applicable. For “the greater obligation must include the lesser,” as one might say.

COMMENTARY ON GENEVA CONVENTION III RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 38 (Jean S. Pictet ed., 1958) [hereinafter ICRC COMMENTARY].

16. Compare, e.g., Civilians Convention, *supra* note 5, Article 27 requirement of humane treatment without adverse distinctions with a similar provision in Common Article 3, paragraph 1, *id.*; Article 32’s, *id.*, prohibition of murder and torture with Common Article 3, *id.*, paragraph 1(a); and Article 34’s, *id.*, prohibition on the taking of hostages with Common Article 3, paragraph 1(b), *id.*

17. Section II is entitled “Aliens in the Territory of a Party to the Conflict,” *id.*; Section III is “Occupied Territories,” *id.*

18. Although the Civilians Convention typically discusses internment along with assigned residence, the focus of this article is only on internment, and therefore any references to assigned residence will be henceforth disregarded.

19. Civilians Convention, *supra* note 5, art. 41. The text of the article is actually written to make clear that nothing *more severe* than assigned residence or internment is possible; by clear implication, assigned residence or internment is therefore permissible.

20. *Id.*, art. 42.

21. *Id.*, art. 43.

22. *Id.*, art. 78. The ICRC *Commentary* suggests that the “imperative reasons of security” standard of Article 78 is more stringent than the “absolutely necessary” standard of Article 42, even though their colloquial meanings seem substantially equivalent. Comparing Article 78 to Article 42, the *Commentary* states:

In occupied territories the internment of protected persons should be even more exceptional than it is inside the territory of the Parties to the conflict; for in the former case the question of nationality does not arise. That is why Article 78 speaks of imperative reasons of security; there can be no question of taking collective measures: each case must be decided separately.

ICRC COMMENTARY, *supra* note 15, at 367. The observation is resolved in the commentary to Article 41: “[T]here might be situations—a threat of invasion for example—which would force a government to act without delay to prevent hostile acts, and to take measures against certain categories without always finding it possible to consider individual cases.” *Id.* at 256.

23. Civilians Convention, *supra* note 5, art. 78. In discussing the content of the “regular procedure” to be followed, the *Commentary* refers the reader to the “precise and detailed procedure to be followed” set out in Article 43. ICRC COMMENTARY, *supra* note 15, at 368. However, the promised detail is lacking both in the text of Article 43 and its accompanying commentary; both are written at the same level of generality as Article 78. See Civilians Convention, *supra* note 5, art. 43; ICRC COMMENTARY, *supra* note 15, at 261.

24. Civilians Convention, *supra* note 5, art. 78.

25. *Id.*

26. *Id.* The commentary to Article 78 offers the observation that the reviewing body must be more than a single individual. ICRC COMMENTARY, *supra* note 15, at 369. *But see* YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 175 (2009), where Professor Dinstein discusses, approvingly, Israel’s decision to have Article 78 appeals decided by a single judge.

27. See President George W. Bush, President Bush Announces Major Combat Operations in Iraq Have Ended (May 1, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/05/20030501-15.html>.

28. “The Convention shall also apply to all cases of partial or total occupation . . .” Civilians Convention, *supra* note 5, art. 3, para. 2.

29. CPA Regulation No. 1, issued on May 16, 2003, is the means by which the CPA established itself. Section 1 declared that “[t]he CPA shall exercise powers of government temporarily in order to provide for the effective administration of Iraq during the period of transitional administration . . .” “The CPA is vested with all executive, legislative, and judicial authority necessary to achieve its objectives . . .” Coalition Provisional Authority Regulation No. 1, CPA/REG/16 May 2003/01 (May 16, 2003), sec. 1, *available at* [http://www.cpa-iraq.org/regulations/20030516\\_CPAREG\\_1\\_The\\_Coalition\\_Provisional\\_Authority\\_.pdf](http://www.cpa-iraq.org/regulations/20030516_CPAREG_1_The_Coalition_Provisional_Authority_.pdf).

30. CPA Regulation No. 1 states, “Regulations and Orders will remain in force until repealed by the Administrator or superseded by legislation issued by democratic institutions of Iraq.” *Id.*,

## *Detention Operations in Iraq: A View from the Ground*

---

sec. 3(1). Throughout its existence, the CPA also issued various memoranda. These are defined as interpretive guides to regulations and orders, *id.*, sec. 4(1); as such, they cannot be considered “law” in the same sense as regulations and orders.

31. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004).

32. U.N. Charter chap. VII (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression).

33. S.C. Res 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003), also a resolution under Chapter VII, previously authorized “a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq.” *Id.*, para. 13.

34. S.C. Res. 1546, *supra* note 31, para. 10.

35. *Id.* at 8.

36. *Id.* at 11 (emphasis added).

37. The public statements of many Security Council representatives adverted to the importance of the explicit Iraqi request for assistance to their voting for the resolution. See Press Release, Security Council, Security Council Endorses Formation of Sovereign Interim Government in Iraq; Welcomes End of Occupation by 30 June, Democratic Elections by January 2005, U.N. Doc. SC/8117 (June 8, 2004), *available at* <http://www.un.org/News/Press/docs/2004/sc8117.doc.htm>. Accordingly, the annexation of the Allawi letter to the resolution no doubt served a political purpose.

38. S.C. Res. 1546, *supra* note 31, para. 12.

39. S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005).

40. S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006).

41. S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

42. *Id.*

43. See The White House, Fact Sheet: U.S.-Iraq Declaration of Principles for Friendship and Cooperation (Nov. 26, 2007), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-1.html>. Among the principles contained in the declaration are “Iraqis have expressed a desire to move past a Chapter VII MNFI mandate and we are committed to helping them achieve this objective,” and “[a]fter the Chapter VII mandate is renewed for one year, we will begin negotiation of a framework that will govern the future of our bilateral relationship.” *Id.*

44. For a more detailed treatment of the two agreements, see Trevor A. Rush, *Don’t Call It a SOFA!: An Overview of the U.S.-Iraq Security Agreement*, ARMY LAWYER, May 2009, at 34.

45. Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, Nov. 17, 2008, *available at* [http://www.mnf-iraq.com/images/CGs\\_Messages/strategic\\_framework\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/strategic_framework_agreement.pdf).

46. Agreement Between the United States of America and the Republic of Iraq on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, Nov. 17, 2008, *available at* [http://www.mnf-iraq.com/images/CGs\\_Messages/security\\_agreement.pdf](http://www.mnf-iraq.com/images/CGs_Messages/security_agreement.pdf) [hereinafter Security Agreement].

47. See *id.*, art. 22. See also Rush, *supra* note 44, at 42–46.

48. Security Agreement, *supra* note 46, art. 22.

49. The area of responsibility for Central Command included Iraq, Afghanistan, the Horn of Africa, Iran and Pakistan. See United States Central Command, AOR Countries, <http://www.centcom.mil/en/countries/aor/> (last visited Aug. 31, 2009). Needless to say, each of these countries assigned to the commander of Central Command presented significant military challenges.

50. General Petraeus assumed the position of Commander, MNF-I, on February 10, 2007. See Multi-National Force–Iraq, Petraeus Assumes MNF-I Command, <http://www.mnf-iraq.com> (search “petraeus assumes command,” All Words option) (last visited Aug. 31, 2009). General Odierno assumed command on September 16, 2008. See Multi-National Force–Iraq, Odierno Assumes Command of Coalition Forces in Iraq, <http://www.mnf-iraq.com> (search “odierno assumes command,” All Words option) (last visited Aug. 31, 2009).

51. The other major subordinate command, Multi-National Security Transition Command–Iraq, was not involved in detention operations.

52. These were usually division commanders in their normally assigned, non-deployed billet.

53. Multi-National Force–West was the region commanded by a Marine Corps general, the operating forces of which were predominantly, but not exclusively, Marines. The different name—“Multi-National Force” versus “Division”—is the remnant of an earlier command relationship by which the Marine commander, then a three-star general, was independent of MNC-I and reported directly to MNF-I.

54. As the Polish and British forces departed from Iraq, their areas of responsibility were assumed by Multi-National Division–Central, which was re-designated as Multi-National Division–South. See Multi-National Force–Iraq, MND-C, MND-SE Operating Areas Combine to Create MND-South, <http://www.mnf-iraq.com> (search “mnd south british,” All Words option) (last visited Aug. 31, 2009).

55. See Antonio M. Taguba, Army Regulation 15-6 Investigation of the 800th Military Police Brigade (certified on June 4, 2004), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) [hereinafter Taguba Report]. General Taguba recommended “[t]hat a single commander in CJTF-7 be responsible for overall detainee operations throughout the Iraq Theater of Operations.” *Id.* at 21. CJTF-7 was the predecessor command to MNF-I.

56. The genesis of the name of the task force came simply from the name of the building—Building 134 on Camp Victory—at which the task force was initially headquartered.

57. As will be seen below, the execution of the detention operation mission was overwhelmingly more time consuming than that of creating policy. In recognition of that, all of the commander’s staff resided in TF 134; there was no identified staff for the DCG-DO.

58. Operating units, such as divisions and brigades, would also operate small internment facilities, at which detainees would be held for a limited period of time before being transferred to the theater internment facility. The operations at the lower-level facilities are not the focus of this article.

59. Headquarters, Department of the Army, FM 3-19.40, Internment/Resettlement Operations para. 3-12 (Sept. 4, 2007). In accordance with US Department of Defense, Directive 2310.01E, The Department of Defense Detainee Program para. 1.2 (Sept. 5, 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf> [hereinafter DoDD 2310.01E], the Secretary of the Army is designated the Executive Agent for Detention Operations. As such, doctrinal publications such as FM 3-19.40 have applicability across service lines.

60. TF 134 benefited from having both active-duty brigade elements, commanded by a colonel (O-6), and reserve or National Guard units, commanded by brigadier generals (O-7).

61. One of the consequences of the extensive detention operation missions in Iraq and Afghanistan was that active-duty MP units were heavily stressed, and therefore in short supply.

62. For example, Navy provisional units might be made up of aviation mechanics, sonar men or boatswain’s mates, and be commanded by a surface warfare officer. All were individual augmentees, who would form into units in the United States, train for a period of time, deploy and then upon redeployment return to their original units.

## *Detention Operations in Iraq: A View from the Ground*

---

63. Headquarters, Department of the Army, FM 2-22.3, Human Intelligence Collector Operations para. 6-13 (Sept. 2006), *available at* [http://www.fcml.org/pdfs/civ\\_liberties/Field\\_Manual\\_Sept06.pdf](http://www.fcml.org/pdfs/civ_liberties/Field_Manual_Sept06.pdf) [hereinafter FM 2-22.3].

64. *Id.*, para. 3-24.

65. FM 2-22.3, *supra* note 63.

66. Detainee Treatment Act of 2005, Div. A, Title X, § 1002, Pub. L. No. 109-148, 119 Stat. 2680 (codified at 10 U.S.C.S. § 801 Note (LexisNexis 2009)) [hereinafter DTA]. The Act provides: “No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.” *Id.*, § 1002(a). In essence, the DTA “enacted” certain portions of FM 2-22.3, *supra* note 63, into positive law. The decision was welcomed by many as a means of providing transparency to interrogation operations, and criticized by others on constitutional grounds or the practical ground that by limiting interrogation methods to those publicly disseminated, potential enemies may benefit by developing effective resistance techniques. See James A. Barkei, *Legislating Military Doctrine: Congressional Usurping of Executive Authority Through Detainee Interrogations*, 193 MILITARY LAW REVIEW 97 (2007) (arguing that the DTA impermissibly intrudes upon the President’s powers).

67. FM 2-22.3, *supra* note 63, chap. 8.

68. *Id.*, para. 5-75.

69. As a participant in many briefings to distinguished visitors, among them congressional leaders and Department of Defense officials, at TF 134, this author heard many questions about the effect of the Detainee Treatment Act/FM 2-22.3 scheme. The JIDC commander and his head interrogator always responded that they supported the policy and believed that it did not adversely affect their ability to harvest useful intelligence.

70. This position was another result of the recommendations of General Taguba. See Taguba Report, *supra* note 55, at 21, where it was recommended “[t]hat it is critical that the proponent for detainee operations is assigned a dedicated Senior Judge Advocate, with specialized training and knowledge of international and operational law, to assist and advise on matters of detainee operations.”

71. It is argued that human rights law is equally applicable and binding to the detention operations in Iraq conducted by the United States. For purposes of this article the author will simply espouse the US government position that human rights law did not apply.

72. DoDD 2310.01E, *supra* note 59.

73. *Id.*, para. 4.1.

74. *Id.*, para. 4.2.

75. *Id.*, para. 4.8.

76. Coalition Provisional Authority Memorandum No. 3 (Revised), Criminal Procedures, CPA/MEM/27 June 2004/03 (June 27, 2004), *available at* [http://www.cpa-iraq.org/regulations/20040627\\_CPAMEMO\\_3\\_Criminal\\_Procedures\\_Rev\\_.pdf](http://www.cpa-iraq.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf) [hereinafter CPA Memo 3].

77. *Id.*, sec. 4.1.

78. *Id.*, sec. 4.2.

79. *Id.*, sec. 4.3.

80. US Central Command promulgated its orders in many areas, to include those applicable to detention operations, as Fragmentary Orders (or FRAGOs), in recognition that the FRAGO modified a previously issued overarching order. The FRAGOs changed with some regularity and, more important, were always classified, so they defy easy citation. The general provisions discussed here, however, are unclassified.

81. MNF-I issued its order in this area in memorandum form. Like the Central Command FRAGOs, the memorandum order was classified, and citation to it, even if possible, would not be helpful.

82. See *infra* Part II.C.4.

83. S.C. Res. 1546, *supra* note 31, merely puts forth the standard of “imperative reasons of security,” echoing the same language in Article 78, Civilians Convention, *supra* note 5. The ICRC *Commentary* makes it clear that it should be a high standard, but struggles to provide further coherent guidance as to its meaning. Internment under Article 78 is said to be “even more exceptional” than that under Articles 41 and 42, though only in the sense that internment must be applied individually as opposed to collectively. ICRC COMMENTARY, *supra* note 15, at 367. See discussion, *supra*, in note 22. In a comment to Article 42, it is offered that in order to intern “the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.” The footnote to this assertion reads: “The fact that a man is of military age should not necessarily be considered as justifying the application of these measures, unless there is a danger of him being able to join the enemy armed forces.” *Id.* at 258. The *Commentary* raises as many questions as it solves. Interning a person for his “activities” is straightforward, and is the normal basis on which detention would depend. “Knowledge” and “qualifications” are less clear: is it possible to intern a person for merely knowing how to make or emplace an IED? And what to make of the footnote regarding those of military age? It begins by saying that being of military age is not a reason for internment, but then says that it can be such a reason if there is a danger of the person being able to join the opposing force, regardless of any intention of doing so. Other commentators have also struggled with the quality of the standard. See, e.g., DINSTEIN, *supra* note 26, at 173 (citing various Israeli court cases construing the “imperative threat” standard, revealing only different verbal formulations, with little additional specificity); Ashley S. Deeks, *Administrative Detention in Armed Conflict*, 40 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 403, 406 (noting only that Article 78 establishes a “high” standard, representing a balance between the needs of the State for security and individual liberty).

84. TF 134 owned two camps containing TIFs. Camp Cropper is the facility through which every detainee first passed. It was at Camp Cropper that all administrative processing and initial interrogations would be conducted. Some detainees would remain at Camp Cropper; others would be sent to Camp Bucca in southern Iraq close to the border with Kuwait. Camp Bucca was built solely for the purpose of holding detainees. It was administratively subdivided into two and then three individual TIFs, mostly for the purpose of command and control, but for this paper, it will be treated as a single facility.

85. Victory Base Complex surrounds Baghdad International Airport and extended to most of the area that was known as the Al Faw Palace complex. This is a different area from the International Zone, popularly known as the “Green Zone,” which comprises an area on the western bank of the Euphrates River. The US Embassy is located in the International Zone; first housed in Saddam Hussein’s former presidential palace, it has since moved to a new building elsewhere in the zone. Certain of the review boards discussed later were conducted in the International Zone. Victory Base Complex and the International Zone are separated by approximately seven miles. To get from one to the other required either a military convoy or a helicopter flight.

86. See DoDD 2310.01E, *supra* note 59, para. 4.4.1.

87. As will be evident throughout this article, detainee operations are neither premised upon nor necessarily directed toward successful criminal prosecution. Soldiers are not criminal investigators and the uncertain security situation rarely permitted any forensic exploitation of the capture site. To take the clearest case, detainees would often be found in possession of dangerous

weapons; after taking pictures of them, the weapons were usually destroyed in the field in the interest of safety and force protection.

88. See discussion *infra* Part II.C.3.

89. See discussion *infra* Part II.C.4.

90. The unit would maintain the information permitting a correlation between the assigned number and the informant's actual identity.

91. See FM 2-22.3, *supra* note 63, at 6-10, for a discussion of the "rating" system used to assess cooperation and knowledge of detainees or other informants.

92. See David Dyzenhaus, *Symposium: The Hart-Fuller Debate at Fifty: The Grudge Informer Case Revisited*, 83 NEW YORK UNIVERSITY LAW REVIEW 1000 (2008).

93. An anecdote might be helpful. Detainee A was picked up and held on the strength of the statement of a neighbor that implicated Detainee A in various insurgent activities. Detainee A later claimed, truthfully in the eyes of the board which voted for his release, that he was feuding with this neighbor because he (Detainee A) had accused the neighbor's daughter of immoral behavior. Detainee B, whose case happened to come up for review at the same time, was also the victim of the same neighbor's complaints; in this case, Detainee B stated he had complained to the authorities that the neighbor was running a bordello, after which he was detained by coalition forces. Detainee B was also voted for release. Although the results in each of these cases may have been release if viewed individually, the happenstance of them both being reviewed at the same time made the truth clearer.

94. See CPA Memo 3, *supra* note 76, sec. 4.2. It was generally assumed that the Magistrate Cell review was the review required by the guidance, though an argument could be made that the review at the brigade level by the commander and his staff complied with the requirement.

95. The detainee did not appear before the magistrate. See the discussion in Part III, *infra*, about efforts made to explore the possibility of detainee involvement at this stage.

96. See discussion, *infra* Part II.C.6, on the process followed for criminal prosecutions.

97. All correspondence was delivered by a TF 134 organization called the Detainee Assistance Center. Minimally staffed with an attorney or two, as many paralegals, and several interpreters, its main task was to answer any questions the detainees had about their legal situations.

98. Article 78 required that the detention procedure "shall include a right of appeal for the parties concerned. Appeals shall be decided with the least possible delay." Civilians Convention, *supra* note 5, art. 78. CPA Memo 3 did not include a requirement for an appeal; the six-month review was the first required review subsequent to the initial seven-day review. CPA Memo 3, *supra* note 76, sec. 6. The ninety-day review was clearly established in written guidance and actual practice by 2007, but its genesis is unclear.

99. Certainly detainee disturbances were not caused solely by the review system utilized, though it was a contributing factor. An additional factor was the work of detainee provocateurs, generally identified as extremists, who continued to carry on the insurgency from within the internment facilities.

100. PW Convention, *supra* note 5, art. 5.

101. AR 190-8, *supra* note 10, para. 1-6, entitled "Tribunals."

102. This was one of the divergences from AR 190-8 (the other was that no written record, aside from the written voting sheet, was prepared). AR 190-8 states that all members are to be commissioned officers. *Id.* The decision was that senior enlisted personnel, with their significant military experience and maturity, would often be better members than would very junior officers. In other military administrative boards, such as boards to administratively separate members from the service, the three-member panel may include a senior enlisted member; see, e.g., Headquarters, Department of the Army, Reg. 635-200, Active Duty Enlisted Administrative Separations

para. 2-7.a (June 6, 2005); Bureau of Naval Personnel, Department of the Navy, Naval Military Personnel Manual art. 1910-502 (June 21, 2008). A less principled reason was the need to increase the pool of members from which TF 134 drew.

103. The text of the “Instructions to Members” is included as an appendix, *infra*.

104. I offer no claim here that these hearings were contests among equals. The military detainees had many resources to draw upon to collect evidence, while the detainee often had little more in his defense than his own statement and answers to questions.

105. Common to any operation which relied upon interpreters, the quality of the interpretation provided could only be assessed by other interpreters, whose own proficiency could be as questionable.

106. As the DCG-DO was exercising delegated power from MNF-I, the Commanding General, MNF-I, also had the power to order a release, which he exercised occasionally.

107. Admittedly, neither the text to either of the articles nor the *Commentary* specifically makes these a requirement. See Civilians Convention, *supra* note 5, arts. 43, 78; ICRC COMMENTARY, *supra* note 15, at 260, 368. The ICRC’s position was based more on practical realities. For a board to be fair, it had to be able to arrive at an independent decision. For a board to be worthwhile, it had to have a final effect and not be merely recommendatory.

108. This is hardly a legal argument. Rather, it is a concession to the need to relieve some of the natural tension that exists between the operating forces which capture and detain persons and an organization such as TF 134 charged with holding, and releasing, those same detainees. In very general terms, the operating forces would prefer that no detainees were released: they were threats when captured, and would be threats again if released. It is too easy, in their view, for garrison-based organizations, such as TF 134, to release detainees, because they aren’t likely to encounter them again on the street. Having a general officer make the final decision reduced some amount of the public recrimination.

109. The process followed was this: every MNFRC release recommendation was vetted through the capturing unit for comment. If the capturing unit had no comment or objection, the release would be approved. If the unit objected, it was required to provide additional information about the detainee that might not have been available in the file. Once received, the detainee would appear before a second MNFRC, which had the benefit of the new evidence. This second board (which, in the mania for acronyms, was called the P-MNFRC, for Post-MNFRC) was unconstrained by the results of the first, and its new recommendation would be followed in the same manner as a regular MNFRC.

110. No boards were held on Friday, the Islamic holy day. The MNFRC work week began on Saturday.

111. The rates provided here are rough averages and reflect the trend of the data reported to the DCG-DO, who reported it in turn to MNF-I. The actual data are now unavailable and irretrievable.

112. CPA Memo 3, in the section discussing security internment, stated: “Any person under the age of 18 interned at any time shall in all cases be released not later than twelve months after the initial date of internment.” CPA Memo 3, *supra* note 76, sec. 6.5. Determining a detainee’s age was often difficult, as many did not know their birthdates, and documentation was rarely available. Those under age eighteen who had been detained for one year were released with no other process necessary. Those who turned eighteen while in custody did not, TF 134 reasoned, benefit from the CPA Memo 3 provision, and their detentions continued until they were otherwise released.

113. See Memorandum from the Deputy Secretary of Defense to the Secretaries of the Military Departments et al., Implementation of Combatant Status Review Tribunal Procedures for

## *Detention Operations in Iraq: A View from the Ground*

---

Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006) (Encl. 3, Personal Representatives Qualifications, Roles and Responsibilities), *available at* <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf>.

114. TF 134 held several hundred juveniles, though because of the ability to hold them for only one year, they appeared usually only once each before an MNFRC. *See* discussion *supra* note 112. There were usually fewer than two hundred third-country national detainees, and female detainees never exceeded twenty at any one time, and were usually fewer than five. There was no established method for identifying those with diminished mental capacity. The medical command planned at one time to screen every detainee for mental ability for its own treatment purposes. TF 134 would have used whatever list they provided, but little came of it. Identification of those in this last category was therefore ad hoc. Because of the limited numbers, only two personal representatives were necessary at a time: one at Camp Cropper, where all juveniles and females were held, and one at Camp Bucca for anyone else.

115. Early in his tenure as DCG-DO, which began in May 2007, General Stone had a vision of moving away from the warehouse model used at Camp Bucca to smaller, regionally based TIFs. These would be designed and built as TIFs first and foremost, but with facilities to permit the services discussed in the text. Initially denominated as TIF Re-Integration Centers (TIFRIC), the name was later changed to TIFRC. Two TIFRCs were planned, one in Ramadi in western Iraq, and one in Taji, just north of Baghdad; only Taji was completed in late 2008. While awaiting these facilities, Camps Cropper and Bucca TIFs were reconfigured to offer the same services, so that they became TIFRCs in the same sense.

116. Naming the religious component proved very difficult. It could not appear to be the US government encouraging religion from the point of view of a US audience nor the United States “teaching” Islam to an Iraqi audience. Religious “engagement” was chosen as a somewhat neutral term.

117. When large-scale requests were received, it was impractical to consider each individual as described in the text. For example, it was not unusual to receive a list of ISNs from Iraqi officials that ran into the hundreds of detainees. In those cases, the cases would be sent immediately to an out-of-cycle MNFRC; the members were made aware of the reason for the special hearing. The results of the MNFRC would then substitute for the recommendation usually made by the special release attorney for the DCG-DO’s decision on release.

118. One of the consequences of regular unit rotations through the theater was that successor units often had little information about “their” detainees (in the sense that the detainees had been captured in, and would return to, their areas of operation). Departing units would sometimes box up all detainee files and bring them back with them to their home bases in the United States or elsewhere; sometimes they would be stored in a warehouse on a base in Iraq with no easy means of retrieving individual files. It would occasionally happen that a unit would ask for the release of a detainee about whom it had little information, and when more fully acquainted with the facts underlying the original detention, it withdrew its request.

119. CPA Memo 3, *supra* note 76, sec. 5.1.

120. *Id.*, sec. 6.1.

121. For a more detailed description of the procedures used in criminal prosecutions by authors who were assigned to TF 134, see Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLORIDA JOURNAL OF INTERNATIONAL LAW 1 (2006); W. James Annestad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and the Future of Detainee Prosecutions*, ARMY LAWYER, July 2007, at 72.

122. Coalition Provisional Authority Order No. 13 (Revised)(Amended), The Central Criminal Court of Iraq, CPA/ORD/X 2004/13 (Apr. 22, 2004), *available at* [http://www.cpa-iraq.org/regulations/20040422\\_CPAORD\\_13\\_Revised\\_Amended.pdf](http://www.cpa-iraq.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf).

123. *Id.*, sec. 18.

124. The MNFRC was designed, in part, to address detainee discontent. *See* discussion *supra* note 99 and accompanying text. The MNFRC largely fulfilled its promise, and was often credited, by the DCG-DO and other officials, with being the single biggest factor in subsequent TIF “calming.” Detainees finally saw that reviews were ongoing, and participated in the hearing of their own cases. Increased numbers of detainees were being released. As time went on, the calming effect dissipated, for there were detainees who appeared before MNFRC and yet were not being released. Had the MNFRC simply been ended, and the CRRB reinstated, we could have expected much worse.

125. A species of this worked successfully at CCCI. Those US service members who were witnesses in a CCCI case, but who had rotated back to the United States, were permitted to testify before the investigative judge via video teleconference.

126. Two anecdotes may help illustrate the point. General Petraeus observed an MNFRC at Camp Bucca several months after they had begun running. He sat in on a case in which the detainee was alleged to have been involved with an IED attack on coalition force soldiers. After the explosion the soldiers traced the wire used to initiate the IED to the house in which they found the detainee. General Petraeus sat through the entire hearing and remained—quietly—as the members deliberated. Unanimously they provisionally voted to retain. General Petraeus got up to leave, and said something to the effect of “If I was voting, I would vote to release” and left. Two of the members—the two officers—then changed their votes. The sole enlisted member stood his ground; that is why they are invaluable to a process such as this. The other anecdote relates to comments members would make at the conclusion of their service on the MNFRC. Senior enlisted members would often say that they were going to go back to their units and make sure they did things correctly in the future, and were able to do so in a way that officers cannot.

127. As with many matters discussed, this is a recommendation based on practicalities, not the law. In the abstract, detainees should be released or detained based solely on the quality of the evidence; the operating forces, in a military hierarchy, must acknowledge that. Nevertheless, it must be recognized that the operating force’s lack of acceptance of the process can ultimately frustrate the entire effort. A process in which they are given a voice may avoid that result.