

REPORT DOCUMENTATION PAGE

Form Approved
OMB No. 0704-0188

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1. REPORT DATE (DD-MM-YYYY) 14-02-2005		2. REPORT TYPE <p style="text-align: center;">FINAL</p>		3. DATES COVERED (From - To)	
4. TITLE AND SUBTITLE The Law of Occupation and Criminal Prosecution - A Perspective in Iraq				5a. CONTRACT NUMBER	
				5b. GRANT NUMBER	
				5c. PROGRAM ELEMENT NUMBER	
6. AUTHOR(S) Kersas Dastur Paper Advisor (if Any): CDR Peter Dutton				5d. PROJECT NUMBER	
				5e. TASK NUMBER	
				5f. WORK UNIT NUMBER	
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) Joint Military Operations Department Naval War College 686 Cushing Road Newport, RI 02841-1207				8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)				10. SPONSOR/MONITOR'S ACRONYM(S)	
				11. SPONSOR/MONITOR'S REPORT NUMBER(S)	
12. DISTRIBUTION / AVAILABILITY STATEMENT Distribution Statement A: Approved for public release; Distribution is unlimited.					
13. SUPPLEMENTARY NOTES A paper submitted to the faculty of the NWC in partial satisfaction of the requirements of the JMO Department. The contents of this paper reflect my own personal views and are not necessarily endorsed by the NWC or the Department of the Navy.					
14. ABSTRACT The United States has declared a Global War on Terrorism and conducted military operations in Iraq. As the coalition operation has not been completed yet, and there is currently much turmoil in the country, the future of Iraq is still unknown. One issue worthy of discussion is the role coalition forces have taken with the detention of and prosecution method for persons committing crimes during the occupation of Iraq. It is important to know that as the phases of the operation have changed, so have the rules or laws. Once major combat operations have ceased, military forces are following the laws of occupation. During the occupation, military forces are often the target of violence from guerillas, terrorists, insurgents and common criminals. Because the rules of warfare have changed during the transition, the way in which these perpetrators of violence are handled also needs to change. The transition phase from military combat operations to occupation is of critical importance. The warfare commander and the staff must recognize the importance of the law of occupation and how to prosecute insurgents. They must also effectively plan and incorporate the legal process while achieving the stated objectives and desired end state.					
15. SUBJECT TERMS Law of Occupation, Iraq, Insurgents, Criminal Prosecution, CCCI, Central Criminal Court of Iraq					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT	18. NUMBER OF PAGES <p style="text-align: center;">26</p>	19a. NAME OF RESPONSIBLE PERSON Chairman, JMO Dept
a. REPORT UNCLASSIFIED	b. ABSTRACT UNCLASSIFIED	c. THIS PAGE UNCLASSIFIED			19b. TELEPHONE NUMBER (include area code) <p style="text-align: center;">401-841-3556</p>

**NAVAL WAR COLLEGE
Newport, RI**

**THE LAW OF OCCUPATION AND CRIMINAL PROSECUTION –
A PERSPECTIVE IN IRAQ**

By

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A paper submitted to the faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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Abstract

The United States has declared a Global War on Terrorism and conducted military operations in Iraq. As the coalition operation has not been completed yet, and there is currently much turmoil in the country, the future of Iraq is still unknown. One issue worthy of discussion is the role coalition forces have taken with the detention of and prosecution method for persons committing crimes during the occupation of Iraq. It is important to know that as the phases of the operation have changed, so have the rules or laws. Once major combat operations have ceased, military forces are following the laws of occupation. During the occupation, military forces are often the target of violence from guerillas, terrorists, insurgents and common criminals. Because the rules of warfare have changed during the transition, the way in which these perpetrators of violence are handled also needs to change. The transition phase from military combat operations to occupation is of critical importance. The warfare commander and the staff must recognize the importance of the law of occupation and how to prosecute insurgents. They must also effectively plan and incorporate the legal process while achieving the stated objectives and desired end state.

INTRODUCTION

As military forces engage in war and military operations other than war (MOOTW) there exists guidance as to what rules and customs of warfare apply. Some of these may be internally generated while others are derived externally from formal agreements such as The Hague and Geneva Conventions. The outcome is the Rules of Engagement (ROE). In some areas there is overlap and conflict between the internal and external inputs. How this guidance or these rules are interpreted and executed in the field will vary, and with that so will the impact it makes.

The United States has declared a Global War on Terrorism and conducted military operations in Iraq. As the coalition operation has not been completed yet, and there is currently much turmoil in the country, the future of Iraq is still unknown. One issue worthy of discussion is the role coalition forces have taken with the detention of and prosecution method for persons committing crimes during the occupation of Iraq. It is important to know that as the phases of the operation have changed, so have the rules or laws.

The guidance during combat operations and that for an occupying force are different. There is a distinct difference between a prisoner of war (POW), a war criminal, and someone who has committed a criminal act against civil law. As with the fog of war also comes the fog of criminal prosecution. Once major combat operations have ceased, military forces are following the laws of occupation. During the occupation, military forces are often the target of violence from guerillas, terrorists, insurgents and common criminals. Because the rules of warfare have changed during the transition, the way in which these perpetrators of violence are handled also needs to change. The transition phase from military combat operations to occupation is of critical importance. The warfare commander and the staff must recognize

the importance of the law of occupation and how to prosecute insurgents. They must also effectively plan and incorporate the legal process while achieving the stated objectives and desired end state.

END OF MAJOR OPERATIONS

With the evolution of military conflicts and the transformation of military warfare over history, it becomes self evident that every conflict is different. Although the reasons for and intensity of military engagements may vary, there has been a global effort to streamline the "rules of warfare". The Hague Conventions, the Geneva Conventions, international and domestic laws have all been used to shape the ROE used by U.S. Forces. Current laws are clear, but often not precise enough to predict with absolute certainty one common interpretation. The main aspects of this paper focus on when the conventions apply, who is entitled to combatant/prisoner of war (POW) status, and who is a plain criminal.

The Geneva and Hague Conventions were specifically enacted to codify rules for warfare. The conventions were enacted to codify what is acceptable and non-acceptable behavior in wartime including the occupation phase. They address how wars may be fought, how prisoners should be treated, how civilians should be treated, and the responsibilities of an occupying power to name just a few.

Although this may seem straightforward, and it is for the combat operations, the line starts to blur during the occupation. It is at this time that the government and official forces of that government have either been defeated or have capitulated. It would seem that at this time the war is over. In fact, as we have seen in Iraq, it may have just begun. Sections of the population may not accept what has occurred and may not simply give in to a belligerent occupation. They may rise up individually or in groups to oppose the occupation by foreign

forces. The occupying power is now required to enforce the laws and essentially keep the peace. In Iraq, this task is being accomplished by the same combat trained forces that invaded the country.

The following are some of the ROE used by the forces in Operation Iraqi Freedom during the combatant phase of the operations.¹ They include:

- 1 - all enemy military forces were considered hostile and could be attacked within the given guidelines,
- 2- positive identification (PID) was required prior to engagement,
- 3 - anyone who surrendered or was out of battle due to sickness or wounds could not be engaged,
- 4 - civilian personnel along with historical/religious/medical buildings could only be attacked if in self-defense,
- 5 - treat all civilians and their property with respect and dignity,
- 6 - and detain civilians who interfere with the mission or for self-defense.

These rules appropriately tell the forces who, what, and when they can and cannot engage in hostilities in accordance with the law of armed conflict. There is also a reminder in the Combined Forces Land Combatant Commander (CFLCC) ROE Card to "Comply with the Law of War."² There is no reference of what to do when confronted with a civilian-clothed individual who is armed and has displayed hostilities. Item four does say, "Detain civilians if they interfere with mission accomplishment or if required for self defense."³ Item two

¹ CFLCC ROE Card, 31 January 2003, NWC 5011.

² Ibid.

³ Ibid.

provides guidance for use of deadly force for self protection, protection of civilians, etc.⁴

These ROE are specifically designed for the combat phase of operations. The guidance does not go beyond that. There is no mention of what to do with the persons caught or with any weapons confiscated. It simply addresses the here and now questions. Understandably, the immediate security and safety of the ground troops is critical. The rules are written for the combatant phase. Ultimately the Geneva Conventions will determine the fate of those captured. During the occupation phase, the opposing forces or people are not combatants, they are criminals and the rules that govern their fate are different. In this case, the rules that govern the criminals are based on Iraqi law.

RESPONSIBILITIES OF THE OCCUPYING POWER

As of May 01, 2003 the U.S. declared an end to major combat operations. This date is important because it specifically marked the beginning of the occupation phase. With the focus shifting from combat operations to those of a more civic minded occupational force, the applicable laws and responsibilities of the occupying forces now take effect. The Hague 1907 Article 42 states:

Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.⁵

The Hague 1907 Article 43 states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.⁶

⁴ Ibid..

⁵ Hague Conventions 1907, Article 42, <<http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>>.

Along with the responsibility of maintaining public order and safety, the Geneva Conventions also give the occupier certain rights and guidelines to conduct the occupation.

Geneva Convention IV (Relative to the Protection of Civilian Persons in Time of War)

Article 5 states:

Where in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State....

In each case, such persons shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention....⁷

Geneva Convention IV Article 64 states:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention.

Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws....⁸

Geneva Convention IV Article 66 states:

...the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country....⁹

Geneva Convention IV Article 68 states:

Protected persons who commit an offence which is solely intended to harm the Occupying Power, but which does not constitute an attempt on the life or limb of members of the occupying forces or administration, nor a grave

⁶ Hague Conventions 1907, Article 43.

⁷ Geneva Conventions IV, Article 5, <<http://www.genevaconventions.org>>.

⁸ Geneva Conventions IV, Article 64.

⁹ Geneva Conventions IV, Article 66.

collective danger, nor seriously damage the property of the occupying forces or administration or the installations used by them, shall be liable to internment or simple imprisonment, provided the duration of such internment or imprisonment is proportionate to the offence committed.

Furthermore, internment or imprisonment shall, for such offences, be the only measure adopted for depriving protected persons of liberty. The courts provided for under Article 66 of the present Convention may at their discretion convert a sentence of imprisonment to one of internment for the same period.

The penal provisions promulgated by the Occupying Power in accordance with Articles 64 and 65 may impose the death penalty on a protected person only in cases where the person is guilty of espionage, of serious acts of sabotage against the military installations of the Occupying Power or of intentional offences which have caused the death of one or more persons, provided that such offences were punishable by death under the law of the occupied territory in force before the occupation began....¹⁰

With a multitude of concerns regarding administration of the occupied territory, one significant question is that of sovereignty. Who retains sovereignty? Can an occupying power make its own laws and enforce them, or does the occupying power have a responsibility to respect existing laws? The conventions leave much to be debated, but most experts agree that the legitimate government of the territory retains sovereignty, but it is temporarily suspended during the occupation.¹¹ The occupying power exercises the right of administration until such time that the final disposition of the territory is decided, and assumes responsibility to provide orderly government.¹² The accepted interpretation of Hague Article 43 and Geneva Convention Article 64 deem the occupant has now become responsible for maintaining the laws that are indigenous to the territory occupied. The duties are not only for law enforcement, but also for judicial trials, school systems, food

¹⁰ Geneva Conventions IV, Article 68.

¹¹ Gerhard von Glahn, The Occupation of Enemy Territory (Minneapolis: The University of Minnesota Press, 1957), 31.

¹² Gerhard von Glahn, 29.

distribution, and a multitude of other items directly related to the interests of the native inhabitants of that territory. No small task.

With the Iraqi government out of commission, it was up to the coalition forces to establish an effective means for security, including criminal prosecution. The coalition sought to remedy this by establishing the Central Criminal Court of Iraq (CCCI). The CCCI came into being by Coalition Provisional Authority (CPA) Order Number 13 signed into effect on June 18, 2003. (There was an amended revision signed April 22, 2004.)¹³ Although the CCCI was set up as a court to try offenses against the occupation, it was also established as a general court as part of the reconstruction effort in Iraq and crimes committed by an Iraqi can be tried there.¹⁴ The establishment of the CCCI was one step in the rebuilding of the Iraqi government. It was only after the combat phase and during the occupation that the coalition forces could start to rebuild the fallen government and the court system. After thorough preparations in renovating a building, hiring a staff, and training everyone it was ready for business. In Baghdad, on June 18, 2003 the CPA published a public notice which announced the establishment of the CCCI and stated that, "... (the CCCI) will apply and operate under Iraqi law and.... will be modeled on the current Iraqi court system. The Court will deal with serious offenses that most directly threaten the security and civil order in Iraq."¹⁵ With a few exceptions, the court used the Iraqi Criminal Code (pre 1969 Ba'athist rules) and their criminal procedures. A case is first heard by an evidentiary judge then if deemed that there is

¹³ Coalition Provisional Authority, Order 13: The Central Criminal court of Iraq, 22 April 2004 <http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf>.

¹⁴ Sandra Hodgkinson, "RE: request your assistance with a JMO paper." Email to Kersas Dastur, 12 January 2005.

¹⁵ Coalition Provisional Authority, Public Notice: Regarding the Creation of a Central Criminal court of Iraq and Adjustments to the Criminal Code, 18 June 2003 <http://www.iraqcoalition.org/regulations/20030618_20030618_CPANOTICE_Crim_Court_Code.html.pdf>.

enough evidence it goes to a panel of three judges for trial. A person who is suspected of having committed a crime can and is detained by the occupying forces.¹⁶

CCCI ISSUES

The Central Criminal Court of Iraq has been up and running for over a year. Coalition members have been able to learn about the Iraqi penal system and how judges view evidence. A U.S. military liaison to the criminal court praised the judges and estimates an 80% conviction rate for persons charged with attacking U.S. troops or on weapons possession charges.¹⁷ A Navy Judge Advocate working with detainee operations in Baghdad estimates a 75% conviction rate.¹⁸ Although these rates may sound good, they only reflect those cases that go to trial. There have been thousands of cases which have not gone to trial. These folks were detained for one reason or another, and were literally released without any penalty. They were set free because of a lack of evidence to even go to trial. It does not make sense to overburden an already full docket at the CCCI with trials that the prosecution knows will not be won. This would serve only to create more work for everyone involved and further retard the wheels of justice. The key factor in getting more convictions is to know what will and will not suffice for evidence in an Iraqi court. Remember, the CCCI is run by Iraqi judges and Iraqi lawyers under Iraqi laws (with some noted exceptions established by the CPA) .

If a weapons cache is found in a house or in a car, the coalition forces will detain all the persons in the car and in the house. Although simple possession of the weapons is a

¹⁶ Coalition Provisional Authority, Memorandum 3: Criminal Procedures, 18 June 2003, 4.

¹⁷ Edmund Sanders, "Trial and Tribulations of Iraqi Judges," Los Angeles Times, 9 August 2004.

¹⁸ Andru Wall, "RE: request your assistance with a JMO paper." Email to Kersas Dastur, 13 January 2005.

punishable offense, one problem is identifying ownership of the weapons. The prosecution must link the evidence to each individual. Just because you were in the car or in the house is not enough cause to be charged. By Iraqi standards, the judge will only convict the owner of the house or the owner/driver of the car. The other people, even if they had knowledge of the weapons cache, are freed unless a direct link is established.¹⁹

The judges determine sentences based on the weight of the evidence. Stronger evidence equals longer sentences, while weaker evidence equates to a shorter sentence. One problem is that weapons captured from insurgents are separated from the insurgents and sent for destruction. While this is the most effective way to get the weapons permanently off the streets, it hurts the prosecution's case later for not having actual evidence in court.

In the interim, photographs have been taken to document the evidence. A clear good quality photograph is weighted more heavily than a grainy poor quality photograph. The picture must also contain the offender and the weapons together. Iraqi judges also believe in the power of two. They require at least two eyewitnesses or two sworn statements. This relates to the Koran which mentions two witnesses.²⁰ The Koran makes reference to two witnesses in at least two places: "[5.106] ...call to witness between you when death draws nigh to one of you, at the time of making the will, two just persons from among you, or two others from among others than you....", and "[2.282] O you who believe! when you deal with each other in contracting a debt for a fixed time, then write it down...and call in to witness from among your men two witnesses; but if there are not two men, then one man and two

¹⁹ Ibid.

²⁰ Ibid.

women from among those whom you choose to be witnesses, so that if one of the two errs, the second of the two may remind the other".²¹

More interesting is what Iraqi judges will allow as evidence and what they will not. Circumstantial evidence will almost never get a conviction, while hearsay is allowed. Often it seems to be more related to who the judge is rather than a rule of Iraqi law. Most judges will not accept scientific evidence. Although it is not known for sure why this is, it may be because of a lack of understanding or the possibility of tampering. They also tend to assign punishments based on the weight of the evidence rather than the severity of the crime.²²

If all the evidence is correctly collected and presented, the CCCI does work, and successfully assigns long sentences for crimes against the occupation. For instance, in October 2003, two oil smugglers each received a seven year prison sentence. They were smuggling diesel fuel out of Iraq, their ship was seized by coalition forces, and the trial took two days.²³ In April 2004, three Iraqis each were sentenced to 10 years in prison for actions against the coalition. They were caught by coalition soldiers while in the act of burying an improvised explosive device (IED).²⁴ In September 2004, three Iraqis each received a three year prison sentence for possessing illegal explosives. Their car was searched after it made attempts to avoid a U.S. patrol. The car was full of explosive devices. They were convicted on the testimony of the soldiers.²⁵ In April 2004, an Iraqi was sentenced to three years in

²¹ Koran, <<http://www.hti.umich.edu/k/koran/>>.

²² Andru Wall.

²³ Shane Wolfe, "Iraq's Central Criminal Court Convicts Two Oil Smugglers," 14 October 2003.

²⁴ "Court Convicts Three Iraqi Men for Actions Against Coalition." Defend America. 14 April 2004.

²⁵ "Illegal weapons bring insurgents three years in prison." News Release: HQ USCENTCOM. 20 September 2004.

prison for possession of illegal weapons.²⁶ Also, in April 2004 in four separate trials, one man received six months for possession of explosives and a detonation device, a second man received one year for possession of illegal weapons, a third man received thirty years for possession of illegal weapons found in the trunk of his car, and a fourth man received eighteen months for possession of improvised explosive device making materials.²⁷

These examples do show that the Iraqi court system can and does work. What it does not show is why thousands of criminals who were released. The weak link would appear to be connecting the law enforcement procedures to the judicial requirements. For example, policemen in the United States know what they need to do (proper documentation, collect evidence, follow procedures) in order to provide the public prosecutor with what he/she needs to go to court prepared to win. If they do not get what they need then the criminal will most likely go free. The same is true in Iraq. The ground forces in Iraq, performing essentially a law enforcement role, often do not know what they must do in order to convict criminals in an Iraqi court. They have not trained for these types of operations, nor have they been trained on rules of evidence in Iraqi courts.

After understanding what evidence is admissible and also what carries weight in an Iraqi court, the problem then moves to having any evidence at all. The concept of collecting evidence is more of a police or law enforcement matter than a military war fighting matter. Military forces tend to be concerned with attacking the enemy and staying alive, not looking for evidence to convict the person who presents a threat to them, or to civil order.

²⁶ Ibid.

²⁷ Iraq's Central Criminal Court convicts Insurgents," American Forces Information Service, 2 August 2004.

Additionally, it is often impossible to locate military witnesses at the time of the trial. Due to the length of time between capture and trial, often the military witness had redeployed to another unit or returned to the United States.²⁸ Finally, coalition ground forces have not been trained in evidence collection procedures or given “rules of engagement” to collect or preserve admissible evidence in court. They are war fighters, not detectives or lawyers.

TRANSITIONS

Every aspect of how combatants and non-combatants are detained, treated, and prosecuted is important. If they are not handled in accordance with the conventions and Iraqi rules of law/evidence they will eventually be set free or the process will discredit the coalition. The Combatant Commander (COCOM) is trying to achieve his end state objectives as quickly and safely as possible. Forces will not be able to transition the country to the civilian government or redeploy if security is not established. If the process is compromised, the criminal element on the streets will severely hamper coalition efforts.

Therefore, the procedures for detaining civilians and the evidence required to prosecute them is key to the COCOM’s successful transition from Phase III (combat) operations to Phase IV (post hostilities) operations. Most detainees were apprehended while in the act of violating the law. They can be held for up to six months, but must have their cases reviewed periodically. Constantly reviewing cases certainly is a time consuming event and manpower intensive. While this option certainly gets them off the street, it is only a temporary fix. At some point down the road, they will be released. Many of these captured criminals have committed violent acts toward coalition forces and in all likelihood will resume these actions once released. This is the last thing forces need during Phase IV operations while the

²⁸ Ian Wexler, Judge Advocate, interview by author, 21 January 2005.

coalition is working toward stability and support operations, humanitarian assistance, and reconstruction.

Obviously, the most beneficial option is to send them to prison. This is the only way to get these violent criminals off the street for an extended period of time. Six months or a year detention and then release versus five or ten years in prison makes a difference. The assumption is that once released a criminal will most likely commit a crime again. If these individuals are attacking coalition forces the coalition forces on the ground will have to expend more time, effort, money, and lives in dealing with these folks a second or even third time. Getting these criminals off the street for extended periods of time allows the coalition to complete its mission and also allows the new government to flourish. Providing humanitarian relief, effecting a regime change, achieving a representative self-government, and capturing terrorists are all greatly aided by getting the criminals off the streets. These objectives in turn work toward the desired end state, a free and democratic Iraq.

PROPOSALS FOR THE COMMANDER

Train your troops. Troops spend endless hours on how to shoot, how to fight, how to survive, and how to kill. They need to spend time and resources on training for what needs to be done to effectively document the capture of criminals. Remember that it is the laws of the occupied territory that are used to convict the insurgents, therefore, the training needs to concentrate on the laws of that country or territory. Coalition forces must be trained with some of the same knowledge that the lawyers in the CCCI have. I do not suggest we make every combatant a legal expert, but they have to know the basics.

Some of the training would include how to document the incident and how to document the evidence to have the strongest case in court. The troops need to know that good quality

photographs, thorough documentation, and eyewitness accounts are the keys to getting a conviction in Iraq.

Take for example filling out the CPA apprehension form (Appendix A).²⁹ This document will later be used in court and needs to be as accurate and precise as possible. The importance is who, what, where, when, why, and how.³⁰ An example is identifying the location with a town name, identifying landmark, and even drawing a map. The judges do not weigh grid coordinates very heavily. Another example is to include what the soldiers were doing when they came across the criminal to give them the authority or legitimacy to capture that individual. Other questions that need to be answered specifically include: What caused you to search these premises? Why did you look there? How did you detain the people?³¹ It is important to answer all these questions because the Iraqi judges want to know the whole story, and the form will be used to corroborate other sworn testimony. They want to be confident that the detainee was apprehended legally and it gives them the details they want to know before handing out a sentence. They do not take it on faith that the coalition forces were in the right and conducted everything accordingly. They want to see it in writing.

The forces also need to be trained on keeping the evidence or getting the proper photos. Although in all likelihood it is not practical from a safety point of view to keep the weapons, it does make sense from a legal point of view. A photo is the next best option. The Iraqi judges will accept a photo in lieu of the actual weapons. This was not known to coalition

²⁹ "CCCI - Abu Ghraib," Power Point Presentation, Multi-National Force-Iraq: 2004.

³⁰ Ibid.

³¹ Ibid.

forces initially, but became evident as more trials were held. Had legal planners studied Iraqi law more, this would have been known earlier and could have led to evidence collection training occurring much earlier than it actually has. The photo must have the criminal and the weapon(s) at the same time. Pictures of boxes do not count. Before photographing, one must open the box and show the munitions.³² This kind of training has recently been conducted with troops on the front lines.³³

The other side of the training is providing the tools to accomplish the documentation. One answer may be to provide a kit with a disposable/polaroid camera, CPA form, a pen, and instructions and points of contact on what to do. Taking pictures and filling out forms might not be too high on the list of things to do when in a dangerous situation, but can be completed when the threat has passed. If the forces know what they have to do to put the criminals in prison and keep them from being released, they will be more likely to do it.

Another suggestion is to provide security for judges.³⁴ Judges are often threatened or killed. They may tend to give leaner penalties or acquit individuals in order to lessen the likelihood of being victims themselves. With proper protection, they will not be afraid to give more harsh penalties and may not acquit as many individuals. We have this same situation in the United States and, in order to combat it our government provides judges with protection. Why would this threat be any less emphasized in a war torn country?

Analysis of the ROE Cards used in Phase III and Phase IV operations demonstrate further a shortcoming of the effort to address the legal issues surrounding detainees. The ROE Card

³² Ibid.

³³ Joseph Girodono, "Trying insurgents in Iraqi courts seen as big step in rebuilding legal system," Stars and Stripes - Mideast Edition, 10 January 2005.

³⁴ Sandra Hodgkinson.

in Phase III states "Do not target enemy infrastructure (public works, commercial communication facilities, dams), lines of communication (roads, highways, tunnels, bridges, railways), and economic objects (commercial storage facilities, pipelines) unless necessary for self-defense or if ordered by your commander."³⁵ The ROE Card used during Phase IV states;

"Necessary force, including deadly force, is authorized for the protection of some types of property including the following: public utilities, hospitals and public health facilities, electric and oil infrastructure, coalition and captured enemy weapons and ammunition, financial institutions, and other mission essential property designated by your commander."³⁶

Note the items in the ROE definitely are designed to avert unnecessary damage to or destruction of critical Iraqi infrastructure. Why? It all goes toward the desired end state, a stable and free Iraq. It makes sense that destruction of these critical items would severely handicap the process of rebuilding Iraq and ensuring it was stable. What is lacking is any guidance on the legal process of keeping the criminals off the street. Getting criminals off the streets for the long term certainly helps to make conditions for a stable country. Yes, there were Judge Advocates assigned in the field and at the battalion level.³⁷ Yes, the ROE were designed to focus the soldiers' conduct in a combat type environment, not a court room, yet the planners really dropped the ball by not including some guidance here.

CJCSI 3121.01A specifically states that the "ROE should support achieving the desired end state."³⁸ The Staff Judge Advocate (SJA) most certainly should provide inputs to the

³⁵ CFLCC ROE Card, 31 January 2003, NWC 5011.

³⁶ Ibid.

³⁷ Ian Wexler, Judge Advocate, interview by author, 21 January 2005.

³⁸ CJCS. Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01A. Wahsington DC: 15 January 2000. NWC 1062, L-2.

ROE Planning Cell. From there, some note should be included in the ROE Card. Yes, the Judge Advocates are responsible for training the forces in proper procedures, but the numbers are not there. With thousands of troops and only a handful of Judge Advocates, the ROE Card is the ideal place to emphasize the importance of proper evidence handling in pre-deployment training.

With any occupation there is going to be some criminal element and the courts in which they are to be prosecuted should have played a much larger role prior to Phase IV. Although the concept and inception of the CCCI was known prior to the invasion, there did not appear to be a complete follow-through to the end. In reality the CCCI was not fully operational until several months after its inception. There were large shortfalls in funding and in organizational structure inhibiting effective use of the court.³⁹

One month after the inception of the CCCI, Judge Mofed Mahmud Ali Al-Barakat stated, "Everything has been destroyed or stolenThings are far from stable."⁴⁰ Manpower, vehicles, and force protection were not allocated sufficiently. U.S. Judge Advocates drove themselves, armed with AK-47s through the streets of Baghdad, to get to court.⁴¹ Detainees and military witnesses often did not make it to court because a lack of coordination. It wasn't for several months, and only after including the court schedules and witness requirements in the Fragmentation Order (FRAGO), that the resources began to be allocated for CCCI operations.⁴² Eventually, the FRAGO did include the evidentiary requirements in order to disseminate the word. Although the training and requirements are

³⁹ Ian Wexler.

⁴⁰ Seb Walker, "Courts struggle with lack of staff, increase in crime." Baghdad Bulletin. 20 July 2003.

⁴¹ Ian Wexler.

⁴² Ian Wexler.

now promulgated, they were not at the transition to the occupation. Detainees had to be released due to insufficient evidence for trial. Had the ground units had this information from day one, then they would not have been required to encounter the same criminals twice.

CONCLUSION

While understanding that criminal prosecution and responsibilities of the occupying power have a distinct and important role to play in the post-combat phase of operations, it is also important to realize that organization of the efforts in that period is crucial to the success of the efforts made. In order to better deal with post-hostilities and their efforts after military operations other than war (MOOTW), the United Kingdom has initiated a Post Conflict Reconstruction Unit (PCRU). The PCRU has been developed to work at the national, international, and economic sectors to improve their post-conflict efforts. This group will also address the shortcomings when multiple agencies, military and civilian, government and non-government , are not working together.⁴³ With a permanent staff of about forty and a surge capability of hundreds of trained experts, the PCRU will advise, plan, and implement strategy for civilian post-conflict reconstruction.⁴⁴ The group was developed based on previous experiences in Iraq, Afghanistan, East Timor, Sierra Leone, and the Balkans. They have learned that delaying efforts and not having a sound post-conflict strategy

"undermines the prospects for sustainable peace, longer-term development and poverty reduction, provides opportunities for organized crime, drug and people trafficking to flourish, provides a benign operating environment for terrorists, delays the re-establishment of normal life as it prolongs the unnecessary suffering and the involvement of the UK, and can result in prolonged development and overstretch of UK forces."⁴⁵

⁴³ Conflict Reconstruction Unit Implementation Team, "PCRU Background Brief," 13 September 2004, 2.

⁴⁴ Conflict Reconstruction Unit Implementation Team, 5.

⁴⁵ Ibid.

The U.S. and Coalition forces face exactly these kinds of problems. Current resistance in Iraq is referred to as 4th Generation Warfare (4GW).⁴⁶ It is specifically this type of insurgency, using unconventional tools and methods, which seriously undermines prospects for achieving stability in Iraq.⁴⁷ It is because of the 4th Generation Warfare and the capabilities of its practitioners, that the warfare commander must use all of the tools available in order to achieve the stated objectives. The most successful tool in combating the criminal element during the occupation phase is successful prosecution and long-term prison sentences for those who are captured. The worst possible result is the release of hostile elements because there is insufficient evidence of their crimes.

⁴⁶ Elaine Grossman, "New Briefing Applies 4th Generation Warfare Ideas to Iraq Conflict," Inside Defense: 23 December 2004, 1.

⁴⁷ *Ibid*, 2.

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COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM
 YELLOW FIELDS MUST BE FILLED IN, IF APPLICABLE, UPON APPREHENSION

<input type="checkbox"/> Offense against Civilian(s) [check one] If "Other" then describe: _____			
<input type="checkbox"/> Arson (I.P.C. 342)	<input type="checkbox"/> Solicitation of Fornication/Prostitution (I.P.C. 399)	<input type="checkbox"/> Rape/Indecent/Sexual Assaults/Acts (I.P.C. 393-98, 402)	<input type="checkbox"/> Murder (I.P.C. 405)
<input type="checkbox"/> Aggravated Assault/Assault With Intent To Kill (I.P.C. 410)	<input type="checkbox"/> Maiming (I.P.C. 412)	<input type="checkbox"/> Simple Assault (I.P.C. 415)	<input type="checkbox"/> Kidnapping (I.P.C. 421)
<input type="checkbox"/> Burglary or Housebreaking (I.P.C. 428)	<input type="checkbox"/> Extortion/Communicating Threats (I.P.C. 430)	<input type="checkbox"/> Theft (I.P.C. 439)	<input type="checkbox"/> Destruction of Property (I.P.C. 477)
<input type="checkbox"/> Obstructing a Public Highway/Place (I.P.C. 487)	<input type="checkbox"/> Discharging Firearm/ Explosive in City/Town/Village (I.P.C. 495)	<input type="checkbox"/> Riot or Breach of Peace (I.P.C. 495(3))	<input type="checkbox"/> Other
<input type="checkbox"/> Offense against Coalition Forces [check one] If "Other" then describe: _____			
<input type="checkbox"/> Violation of Curfew	<input type="checkbox"/> Illegal Possession of Weapon	<input type="checkbox"/> Assault/Attack on Coalition Forces	<input type="checkbox"/> Theft of Coalition Force Property
<input type="checkbox"/> Trespass on Military Installation or Facility	<input type="checkbox"/> Photographing/Surveilling Military Installation or Facility	<input type="checkbox"/> Obstructing Performance of Military Mission	<input type="checkbox"/> Other
Apprehending Unit: _____		Location Grid: _____	
Date of Incident: (D/M/Y) / / to / /	Time of Incident: hrs to hrs	Date of Report: (D/M/Y) / /	Time of Report: hrs
Detainee # _____		Key Connected Person: <input type="checkbox"/> Victim <input type="checkbox"/> Witness	
Last Name: _____		Last Name: _____	
First Name: _____ Given Name: _____		First Name: _____ Given Name: _____	
Hair Color: _____	Scars/Tattoos/Deformities: _____	Hair Color: _____	Scars/Tattoos/Deformities: _____
Eye-Color: _____	Weight: lb Height: in	Eye-Color: _____	Weight: lb Height: in
Address: _____		Address: _____	
Place of Birth: _____		Place of Birth: _____	
Ethn/Tribe/ Sect:	Sex: <input type="checkbox"/> M <input type="checkbox"/> F	Phone#: DOB D/M/Y: <input type="checkbox"/> Mobile <input type="checkbox"/> Regular	Ethn/Tribe/ Sect:
			Sex: <input type="checkbox"/> M <input type="checkbox"/> F
<input type="checkbox"/> Passport <input type="checkbox"/> Dr. license <input type="checkbox"/> Other (specify)	<input type="checkbox"/> Passport <input type="checkbox"/> Dr. license <input type="checkbox"/> Other (specify)	Document #:	Document #:
Total Number of Persons Involved _____ (list names/identifying info on reverse under "Additional Helpful Information")			
<input type="checkbox"/> Vehicle Information		Vehicle Number _____ of _____ Vehicle(s)	Owner: _____
Make: _____	Color: _____	VIN: _____	
Model: _____	Type: _____	Plate No.: _____	Number of People in Vehicle: _____
Year: _____	Names of People in Vehicle: _____		
Contraband/Weapons in Vehicle: _____			
<input type="checkbox"/> Property/Contraband	<input type="checkbox"/> Weapon	Photo Taken of Suspect with Weapon/Contraband: Yes/ No	
Type: _____	Model: _____	Color/Caliber: _____	
Serial No.: _____	Quantity: _____	Make: _____	Receipt Provided to Owner: Yes/ No
Other Details: _____		Where Found: _____	Owner: _____
Name of Assisting Interpreter: _____		Email, Phone, or Contact Info: _____	
Detaining Soldier's Name (Print): _____		Supervising Officer's Name (Print): _____	
Last, First MI		Last, First MI	
Signature: _____		Signature: _____	
Email: _____		Email: _____	
Unit Phone: _____	Date: / /	Unit Phone: _____	Date: / /



COALITION PROVISIONAL AUTHORITY FORCES APPREHENSION FORM



Why was this person detained? _____

Who witnessed this person being detained or the reason for detention? Give names, contact numbers, addresses.

How was this person traveling (car, bus, on foot)? _____

Who was with this person? _____

What weapons was this person carrying? _____

What contraband was this person carrying? _____

What other weapons were seized? _____

What other information did you get from this person? _____

Additional Helpful Information: _____

Selected Bibliography

- "CCCI - Abu Ghraib," Presentation, Multi-National Force-Iraq: 2004. Wall, Andru. <warriorlaw@hotmail.com> "RE: request your assistance with a JMO paper." [Attachment with E-mail to Kersas Dastur <kersas.dastur@nwc.navy.mil>] 13 January 2005.
- CJCS. Standing Rules of Engagement for U.S. Forces, CJCSI 3121.01A. Washington DC: 15 January 2000. Reprint: Joint Military Operations Department, NWC 1062.
- Coalition Provisional Authority. Administrator. Order Number 7: Penal Code. 9 June 2003. <http://www.iraqcoalition.org/regulations/20030610_CPAORD_7_Penal_Code.pdf> [30 December 2004].
- Coalition Provisional Authority. Administrator. Order Number 13: The Central Criminal Court of Iraq. 18 June 2003. <<http://www.cpa-iraq.org/#>> [30 December 2004].
- Coalition Provisional Authority. Administrator. Order Number 13(revised)(Amended): The Central Criminal Court of Iraq. 22 April 2004. <http://www.iraqcoalition.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf> [30 December 2004].
- Coalition Provisional Authority. Administrator. Memorandum Number 3: Criminal Procedures. 18 June 2003. <http://www.iraqcoalition.org/regulations/20040627_CPAMEMO_3_Criminal_Procedures_Rev_.pdf> [30 December 2004].
- Coalition Provisional Authority. Administrator. Order Number 3(Revised): Weapons Control. 31 December 2003. <http://www.iraqcoalition.org/regulations/20031231_CPAORD3_REV_AMD_.pdf> [30 December 2004].
- Coalition Provisional Authority. Administrator. Order Number 31: Modifications of Penal Code and Criminal Proceedings Law. 10 September 2003. <http://www.iraqcoalition.org/regulations/20030921_CPAORD31.pdf> [30 December 2004].
- Coalition Provisional Authority. Administrator. Public Notice: Regarding the Creation of a Central Criminal Court of Iraq and Adjustments to the Criminal Code. 18 June 2003. <http://www.iraqcoalition.org/regulations/20030618_20030618_CPANOTICE_Crim_Court_Code.html> [30 December 2004].
- Congressional Research Service, U.S. Treatment of Prisoners in Iraq: Selected Legal Issues. The Library of Congress: 2004.
- "Court Convicts Three Iraqi Men for Actions Against Coalition." Defend America. 14 April 2004. <<http://www.defendamerica.mil/archive/2004-04/20040415am2.html>> [9 January 2005].

CFLCC ROE Card, Operation Iraqi Freedom, 31 January 2003, Reprint: Joint Military Operations Department, NWC 5011.

"Geneva Convention." Society of Professional Journalists.
<<http://www.genevaconventions.org>> [7 January 2005].

Giordono, Joseph. "Trying insurgents in Iraqi courts seen as big step in rebuilding legal system." Stars and Stripes. 26 December 2004. <<http://pstripes.ods.mil/article.asp?section=104&article=25317&archive=true>> [10 January 2005].

Green, Leslie. The Contemporary Law of Armed Conflict, 2nd ed. U.K.: Manchester University Press, 2000.

Grossman, Elaine. "New Briefing Applies 4TH Generation Warfare Ideas to Iraq Conflict." Inside Defense. 23 December 2004. <http://www.insidedefense.com/secure/defense_docnum.asp?f=defense_2002.ask&docnum=PENTAGON-20-52-1> [February 2005].

"Hague Conventions, 1907." The Avalon Project at Yale Law School.
<<http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>> [3 December 2005].

Hodgkinson, Sandra. <Sandra_L._Hodgkinson@nsceop.gov> "RE: request your assistance with a JMO paper." [E-mail to Kersas Dastur <kersas.dastur@nwc.navy.mil>] 12 January 2005.

"Iraq's Central Criminal Court Convicts Insurgents." American Forces Information Service. 2 August 2004. <http://www.defenselink.mil/new/Aug2004/n08022004_2004080205.html> [9 January 2005].

"Illegal weapons bring insurgents three years in prison." News Release: HQ USCENTCOM. 20 September 2004. <http://www.arcent.army.mil/media_releases/2004/September/sep20_08.asp> [9 January 2005].

"Koran." The Holy Qur'an, translated by M.H. Shakir, Tahrike Tarsile Qur'an, Inc., in 1983 Last revision 7 January 2000. <<http://www.hti.umich.edu/k/koran/>> [19 January 2005].

Mallison, W.T and Jabri, R.A. The Juridical Characteristics of Belligerent Occupation and the Resort to Resistance by the Civilian Population: Doctrinal Development and Continuity. The George Washington Law Review, Vol. 42 No. 2, January 1974. Reprint.

Post Conflict Reconstruction Unit Implementation Team. "PCRU Background Brief." London, 13 September 2004.

Sanders, Edmund. "Trial and Tribulations for Iraqi Judges; They investigate cases but do not preside over them. They're probing, impassioned -- and under threat. They say they won't be deterred." Los Angeles Times. 9 August 2004. Lexis-Nexis. Los Angeles, CA: Lexis-Nexis. [10 January 2005].

Spring, Baker. "Operation Iraqi Freedom: Military Objectives Met." The Heritage Foundation. 18 April 2003. <<http://www.heritage.org/Research/MiddleEast/wm261.cfm>> [17 January 2005].

U.S. Department of the Army. The Law of Land Warfare. FM 27-10. Washington D.C.: July 1956.

von Glahn, Gerhard. The Occupation of Enemy Territory. Minneapolis: The University of Minnesota Press: 1957.

Walker, Seb. "Courts struggle with lack of staff, increase in crime." Baghdad Bulletin. 20 July 2003. <http://www.baghdadbulletin.com/pageArticle.php?article_id=73&cat_id=18> [10 January 2005].

Wall, Andru. <warrriorlaw@hotmail.com> "Hello from Camp Victory, Baghdad." [E-mail to Peter Dutton <peter.dutton@nwc.navy.mil>] 19 October 2004.

Wall, Andru. <warrriorlaw@hotmail.com> "RE: request your assistance with a JMO paper." [E-mail to Kersas Dastur <kersas.dastur@nwc.navy.mil>] 13 January 2005.

Wexler, Ian. Navy Judge Advocate. Interview. 21 January 2005. Justice School, Naval Station Newport, R.I..

Wexler, Ian. "Living History in Iraq." Richmond Law (Fall 2004): 8.

Wolfe, Shane. "Iraq's Central Criminal Court Convict Two Oil Smugglers." Coalitional Provisional Authority. 14 October 2004. <http://www.iraqcoalition.org/pressreleases/20031014_OCT-14-Copnvnction.htm> [9 January 2005].