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Iraq

The Quality of Justice

Failings of Iraq's Central Criminal Court

HUMAN RIGHTS WATCH

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Human Rights Watch
350 Fifth Avenue, 34th floor
New York, NY 10118-3299 USA
Tel: +1 212 290 4700, Fax: +1 212 736 1300
hrwnyc@hrw.org

Poststraße 4-5
10178 Berlin, Germany
Tel: +49 30 2593 06-10, Fax: +49 30 2593 0629
berlin@hrw.org

Avenue des Gaulois, 7
1040 Brussels, Belgium
Tel: + 32 (2) 732 2009, Fax: + 32 (2) 732 0471
hrwbe@hrw.org

64-66 Rue de Lausanne
1202 Geneva, Switzerland
Tel: +41 22 738 0481, Fax: +41 22 738 1791
hrwgva@hrw.org

2-12 Pentonville Road, 2nd Floor
London N1 9HF, UK
Tel: +44 20 7713 1995, Fax: +44 20 7713 1800
hrwuk@hrw.org

27 Rue de Lisbonne
75008 Paris, France
Tel: +33 (1)43 59 55 35, Fax: +33 (1) 43 59 55 22
paris@hrw.org

1630 Connecticut Avenue, N.W., Suite 500
Washington, DC 20009 USA
Tel: +1 202 612 4321, Fax: +1 202 612 4333
hrwdc@hrw.org

Web Site Address: http://www.hrw.org

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The Quality of Justice

Failings of Iraq's Central Criminal Court

I. Summary

The Central Criminal Court of Iraq (CCCI) is the country's flagship criminal justice institution. Yet it is an institution that is seriously failing to meet international standards of due process and fair trials. Defendants often endure long periods of pretrial detention without judicial review, and are not able to pursue a meaningful defense or challenge evidence against them. Abuse in detention, typically with the aim of extracting confessions, appears common, thus tainting court proceedings in those cases.

The failings of the court are all the more striking because of the stakes riding on it. The CCCI, established by the US-led Coalition Provisional Authority (CPA) in 2003, commands greater resources and broader authority than any other Iraqi criminal justice institution. Its mandate encompasses the critical task of coping with security-related criminal cases under the framework of Iraqi law, including the country's constitution and penal code. The CPA decree that established the court cites the importance of "development of a judicial system in Iraq that warrants the trust, confidence and respect of the Iraqi people."[1] Far from serving as a model criminal justice institution, the court has failed to provide basic assurances of fairness, undermining the concept of a national justice system serving the rule of law.

Human Rights Watch monitored court proceedings and met with judges, defense attorneys, defendants, and others. We found that the majority of defendants endured lengthy pretrial detention without judicial review, that they had ineffectual legal counsel, and the court frequently relied on the testimony of secret informants and confessions likely to have been extracted under duress. Judges in many instances acknowledged these failings and dismissed some cases accordingly, particularly those involving alleged torture, but the numbers of cases where such allegations arise suggest that serious miscarriages of justice are frequent. Human Rights Watch also monitored a limited number of cases involving children, and found that the authorities failed to hold them separately from adult detainees, and that their access to counsel and prompt legal hearings was no better than that of adults.

[1] CPA/ORD/11 July 2003/13, as amended.

Structural problems, due in part to political fractiousness and inefficiency among Iraqi institutions, play a role in undermining the CCCI's proceedings. Iraq's parliament approved a General Amnesty Law in February 2008, in part to reduce the detainee population and thus the burden on the justice system. Persons accused of war crimes, crimes against humanity, and other offenses committed between July 1968 and May 2003 as outlined in the statute for Iraq's Supreme Criminal Tribunal would not be eligible for amnesty. The amnesty as passed would benefit persons held for more than six months without an investigative hearing, or for more than a year without referral to a court. Implementation, however, has lagged very seriously. The continued high number of persons in detention facilities has put serious strain on the CCCI, where dozens of judges hear thousands of cases a month, and further delayed judicial review of detentions.

A related concern is impunity for those responsible for torture and other ill-treatment of detainees. The Presidency Council, which must approve all legislation passed by the parliament before it becomes law, did not approve in late 2007 a measure that would overturn current law and allow for prosecution of Iraqi officials who have engaged in abuse of detainees.

Other failings reflect the fact that the Iraqi justice system, and hence the CCCI, does not have jurisdiction over individuals taken into custody by the US-led Multinational Force in Iraq (MNF). The MNF refers only a small number of the persons it detains to the CCCI for prosecution, and in those cases has exercised broad influence on proceedings since it provides physical security and plays a dominant advisory role, though that influence is less pronounced than in the court's early days. The refusal in particular of US military officials involved in detention matters to honor hundreds of decisions by the court to release detainees in US military custody has further undermined respect for the Iraqi judicial system. (This report does not address the status of detainees held by the US military as security detainees, except in the context of their transfer to the CCCI for prosecution.)

The current structural limits on the court's jurisdiction, independence, and capacity should not obscure the obligation of Iraq's judicial authorities to meet basic

standards of fairness in court proceedings. Those standards are required under both international and domestic law.

Iraq's future as a society based on rule of law and respect for fundamental rights depends in large part on the establishment of a credible and sustainable Iraqi national criminal justice system embodying international standards of fairness. This idea underpins all projects of national reconciliation. Justice, administered impartially to all Iraqis, by Iraqis, would signify the country's break with the abuses of the Saddam Hussein era. Regrettably, some of the failings in the court's proceedings show disturbing continuity with that period. A legal culture that has not accepted concepts like the right to a credible defense and committed itself to meeting basic standards of due process links present criminal justice to past repression through the arbitrary exercise of authority.

II. Recommendations

To the Iraqi Government

On administration of justice

- Disallow confessions and other evidence that has been obtained through torture or other unlawful methods.
- Limit the use of secret informants as a basis for pretrial detention or conviction by establishing procedures for verifying the credibility and veracity of such evidence in a timely manner.
- Allow detainees the opportunity to sufficiently challenge evidence provided by secret informants, while not endangering the safety of witnesses.
- Ensure that arrests comply with Iraq's domestic law that requires arrest warrants from a judicial authority (except in cases *in flagrante delicto*).
- Ensure that family members and legal counsel have prompt access to detainees and provide legal counsel with case files on a timely basis.
- Notify detainees, family members, and defense counsel in advance of hearing dates and postponements.
- Initiate a review of previous convictions to ensure that such convictions were not based on coerced confessions or solely on unfounded statements of secret informants.
- Revise the Criminal Code and Criminal Procedure Code to ensure that the rights of defendants meet international standards, notably by prohibiting torture and other mistreatment and the use of coerced confession as evidence. Ensure that child detainees are held separately from adults in accordance with the Convention on the Rights of the Child and the Iraqi Child Welfare Law.
- Revise the Child Welfare Law to require that parents or guardians and counsel are present during the questioning of children and at their investigative hearings.

On unlawful arrest and detention

- Ensure that persons taken into custody are brought before an investigative judge within 24 hours of arrest, in conformity with Iraq's Code of Criminal Procedure.
- Immediately release or charge with a cognizable criminal offense all those currently held without charge.

On torture and ill-treatment

- Condemn publicly any use of torture or other mistreatment in pretrial detention, including during interrogation with the aim of eliciting confessions.
- Investigate promptly all allegations of torture and ill-treatment, and institute disciplinary measures or criminal prosecution, as appropriate, against guards, interrogators, and other detention facility officials who are responsible for the abuse of prisoners.
- Abrogate the provision of Iraq's Code of Criminal Procedure (article 136(b)) that requires the permission of superiors to bring criminal charges against officials, including those implicated in the torture and ill-treatment of detainees.
- Conduct prompt medical examinations of detainees who allege abuse in detention or during interrogation.
- Compensate victims of torture, ill-treatment, and arbitrary detention adequately and in a timely manner.
- Implement the general recommendations of the UN Committee Against Torture and the UN special rapporteur on torture to establish a fully independent complaints mechanism for persons who are held in state custody.
- Fulfill obligations as a state party to the Convention against Torture to:
    - enshrine the prohibition against torture in training of security forces and other personnel engaged in detention; and
    - specify interrogation practices with the goal of preventing torture and other mistreatment of detainees.

To the United States Government and the Multinational Force (MNF)

- Transfer the cases of all Iraqi detainees to the legal jurisdiction of the Iraqi courts. Do not physically transfer detainees to Iraqi government custody where there is a fear of torture or other mistreatment. Act to improve treatment in Ministry of Justice detention facilities through frequent and unannounced inspections in conjunction with the Ministry of Human Rights.
- Coordinate with Iraqi judicial authorities to identify detainees in MNF custody who meet requirements to benefit from the General Amnesty Law.
- Ensure that, until such time as all Iraqi detainees are transferred to Iraqi custody, family members and legal counsel have prompt access to detainees.
- Ensure that advisers to the MNF providing assistance to the Iraqi government on administration of justice, policing, and detentions give priority to the investigation of allegations of the torture or ill-treatment of detainees by Iraqi police and military forces.
- Assist the creation of Iraqi mechanisms for investigating allegations of abuse of detainees.
- Assist the Iraqi government to establish an independent complaints mechanism, which could include an ombudsman for judicial, penal, and detention matters, to receive and investigate complaints by detainees of abuse by detaining officials. Such a mechanism should be accessible to children.
- Assist the Iraqi government to comply with international standards relating to the treatment of children in detention by holding them in facilities separate from adult detainees.

To the International Donor Community

- Monitor criminal justice, police, security, and counterterrorism assistance to ensure Iraqi compliance with international human rights standards in the criminal justice system and police and intelligence forces.
- Make human rights training an integral component of all capacity-building and training programs involving the criminal justice system, police, and intelligence agencies.

- Support the Iraqi Bar Association and other legal organizations that provide free legal representation for defendants in the criminal justice system.
- Support the development of an independent National Human Rights Commission and local independent human rights groups with a monitoring capacity.

III. Methodology

Human Rights Watch attended investigative hearings and trial proceedings at the Central Criminal Court of Iraq in Baghdad on six separate occasions in May 2008. These proceedings occurred in two locales: the court's al-Karkh branch, in western Baghdad, which hears the cases of detainees held by the US-led Multinational Force-Iraq, as well as those of detainees referred for prosecution by Iraqi authorities; and the court's Rusafa branch, in eastern Baghdad, which deals only with cases of detainees held and referred by Iraqi authorities.

Investigative hearings are not normally open to the public. Those present included an investigative judge, prosecutor, and judicial investigator. In the cases of MNF detainees, a judge advocate general (JAG) or other US military personnel administering the referral of a case to the CCCI were also present, typically accompanied by an interpreter and MNF personnel appearing as witnesses in the investigative hearing or to escort the detainees.

Investigative judges at both branches of the court gave Human Rights Watch permission to examine documents presented in the course of the hearings, including confessions, summaries of witness statements, photographs, descriptions of physical evidence, and, in the case of MNF referrals, Arabic translations of MNF case files. Officials of the court also gave Human Rights Watch permission to speak to detainees held by Iraqi authorities and present for investigative hearings and trials.

Court-appointed counsel and privately retained lawyers spoke with Human Rights Watch before and after investigative hearings and trials. Judges at both branches of the court, including the chief investigative judges, granted Human Rights Watch multiple interviews in response to queries about particular cases and procedural questions that arose during hearings. MNF Detainee Operations, the US military detainee affairs body, met with Human Rights Watch and also provided partial written responses to queries about aspects of the process of referring MNF detainees to the court.

Human Rights Watch attended the investigative hearings of 71 defendants, 15 of whom were in MNF custody, as well as five trials in Iraqi-referred cases involving a total of 17 defendants. All of the defendants in the trials and investigative hearings were male; three were children. The investigative hearings were divided between the two venues; the trials Human Rights Watch attended were held at the Rusafa branch of the court. Human Rights Watch spoke with about three dozen detainees in Iraqi custody who were brought to one of the court's branches for their investigative hearings. Those conversations typically took place in common areas of the Karkh facility or holding cells at the Rusafa branch of the court.

Iraqi security forces escorting prisoners to hearings were present when Human Rights Watch spoke with detainees at al-Karkh, although detainees were in most cases seated at enough distance from their guards and one another to allow for private conversations. Detainees at the Rusafa branch of the court spoke with Human Rights Watch in a common holding cell or outside the rooms in which their investigative hearings were held, escorted by foreign security contractors. These security contractors did not know Arabic, thus allowing for confidential discussions.

The US embassy in Baghdad facilitated transport to the Rusafa branch of the CCCI on two occasions. US personnel effectively denied Human Rights Watch access to MNF detainees referred to the court in al-Karkh: on three occasions when Human Rights Watch attended proceedings at the Karkh branch of the court, US marshals controlling one entrance to the court complex informed Human Rights Watch that they would expel us from the building unless we agreed not to speak with MNF detainees; on two occasions Human Rights Watch was obligated to accept a US military escort to ensure we had no contact with any detainee. No consistent explanation was offered for these restrictions on contact with detainees.

IV. Background

In July 2003 the Coalition Provisional Authority (CPA) established the Central Criminal Court of Iraq to hear cases involving serious criminal offenses, including terrorism, organized crime, governmental corruption, acts of sabotage, and sectarian or ethnic violence.[2]

The CPA based its authority to enact such sweeping legal measures and reforms on United Nations Security Council Resolution 1483, which recognized the United States and the United Kingdom as temporary occupying powers in Iraq. The resolution emphasized the binding obligations of the occupying powers under international law and affirmed explicitly the applicability of international humanitarian law.[3] The CPA's mandate from the United States and the United Kingdom outlined its role as a temporary governing authority in Iraq.[4] Based on its interpretation of the mandate outlined in Resolution 1483, the CPA issued Regulation 1, which laid out the CPA's understanding of its own authority.[5] According to Regulation 1, CPA Regulations and Orders took "precedence over all laws and publications to the extent such other laws and publications are inconsistent."[6]

The CCCI as framed by Order 13 of April 2004 comprises an investigative court and a felony court.[7] Both chambers function under legislation drafted and revised during the period of Baath party rule: the Iraqi Criminal Procedure Code of 1971, as amended, and the Iraqi Criminal Code of 1969, as amended. Additionally, juvenile detainees are subject to the Iraqi Child Welfare Law of 1983.

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[2] CPA/ORD/11 July 2003/13, as amended.

[3] S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/RES/1483, May 22, 2003.

[4] Letter from Jeremy Greenstock, Permanent Representative of the UK, & John D. Negroponte, Permanent Representative of the US, to the president of the UN Security Council, May 8, 2003.

[5] CPA Regulation 1, CPA/REG/16 May 2003/01, May 16, 2003.

[6] Ibid. section 3(1).

[7] CPA Order 13 (Revised) (Amended), CPA/ORD/22 April 2004/13, April 22, 2004.

While the jurisdiction of the CCCI is concurrent with local criminal courts, the CCCI has nationwide discretionary investigative and trial jurisdiction "over any and all criminal violations."[8] The order establishing the court indicated that the CCCI should concentrate its resources on the most serious criminal offenses.[9] An assertion of jurisdiction by CCCI at the investigative or trial stage automatically ends any local court jurisdiction. The CCCI may also hear cases in instances where a criminal defendant may not be able to obtain a fair trial in a local court. Any other Iraqi court may also refer a case to the CCCI.[10]

The CCCI thus hears the cases of detainees referred by several Iraqi law enforcement agencies, as well as the Multinational Force. The court has two separate branches in Baghdad. The Karkh branch is located adjacent to the International Zone ("Green Zone"), which currently houses the US embassy, military facilities, and many Iraqi governmental institutions. This branch of the court hears cases of detainees held by Iraq's Ministries of Justice and Interior,[11] and also a select number of cases of detainees held by the MNF and referred to the CCCI for criminal prosecution under Iraqi law. The Rusafa branch of the court is located within the heavily fortified "Rule of Law" judicial complex in eastern Baghdad. The Rusafa branch only hears cases of detainees held by Iraqi authorities. Central Criminal Court officials in May 2008 described plans to establish panels in Mosul, Tikrit and Kirkuk, referred to as Major Crimes Courts.[12] These panels would consist of both local judges and judges traveling from Baghdad.

Iraq's broad counter-terrorism legislation (*Qanun Mukafahat al-Irhab*) has been the main legal basis for arrests and prosecutions stemming from the Baghdad Security

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[8] CPA Order 13, section 18(1).

[9] The offenses outlined by CPA Order 13 are terrorism; organized crime; governmental corruption; acts intended to destabilize democratic institutions or processes; violence based on race, nationality, ethnicity or religion; and instances in which a criminal defendant may not be able to obtain a fair trial in a local court. Ibid., section 18(2).

[10] Ibid., section 18(4).

[11] Detainees who have been held by the Ministry of Defense also appear at the CCCI, although their referrals occur through other agencies.

[12] Human Rights Watch interview with investigative judge (name withheld), CCCI-Rusafa, May, 11, 2008. In an interview with Human Right Watch on October 7, 2008, a Higher Judicial Council official said the panels were in place in all of Iraq's governorates apart from the three comprising the territory of the Kurdistan Regional Government.

Plan.[13] The security plan, launched in conjunction with the US troop surge of 2007, rapidly expanded detainee populations in Iraqi and MNF custody: it saw the population of detainees in Iraqi government custody (excluding the Kurdistan Regional Government) swell from approximately 17,000 at the end of March 2007 to approximately 23,000 by the end of the year.[14] Additionally, as of October 7, 2008, there were approximately 80 children in MNF custody, down from close to 700 children at the end of December 2007[15].

Referrals by the MNF

MNF decisions on referral to the CCCI are made by the MNF's Magistrate Cell, an administrative body that reviews the cases of MNF detainees following their transfer to a Theater Internment Facility, namely the two primary MNF detention facilities in Iraq: Camp Bucca near Basra in southern Iraq and Camp Cropper near Baghdad's airport.[16] Magistrate Cells, composed of judge advocates, perform case reviews and can release the detainee, forward the case for continued review and detention under MNF auspices, or refer the case to a CCCI liaison office, which concludes a final review prior to referring a case for prosecution before the CCCI.[17] While Human Rights Watch made repeated requests to MNF officials for clarification of MNF criteria in deciding which cases to refer to the CCCI, it did not receive a clear and comprehensive statement of policy. One MNF legal advisor indicated that such decisions depended primarily on whether a case could be brought based upon unclassified evidence, and that only approximately 10 percent of all MNF detainees faced possible criminal prosecution in the CCCI.[18]

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[13] Anti-Terrorism Law (Qanun Mukafahat al-Irhab), no. 13 (2005). The anti-terrorism law broadly defines terrorism as "every criminal act committed by an individual or an organized group that targeted an individual or group of individuals or groups or official or unofficial institutions and caused damage to public or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and create chaos to achieve terrorist goals." Ibid., art. 1.

[14] UN Assistance Mission for Iraq (UNAMI) Human Rights Report, 1 April-30 June, 2007, 1 July-31 December, 2007.

[15] Ibid.; Email communication with TF-134 Public Affairs Officer Maj. Neal Fisher, October 7, 2008.

[16] United Nations Assistance Mission for Iraq (UNAMI), Human Rights Report, 1 July-31 December 2007 ([March] 2008), para. 67.

[17] Major W. James Annexstad, "The detention and Prosecution of Insurgents and Other Non-Traditional Combatants – A Look at the Task Force 134 Process and the Future of Detainee Prosecutions," *Army Lawyer*, July 2007.

[18] Human Rights Watch interview with Capt. Brian Bill, legal adviser TF-134, Baghdad, May 12, 2008.

As of early October 2008, detainees held by the MNF numbered about 17,700, down from 21,000 in late July.[19] Detainees in the custody of the MNF are held under the broad authority of detention the United States has claimed for the MNF under United Nations Security Council Resolutions 1546, 1637, and 1723, particularly citing language referring to "internment where this is necessary for imperative reasons of security."[20] The United States has maintained that this language, which mimics language in the Fourth Geneva Convention, is the basis for the MNF's applying the Fourth Geneva Convention more generally to the treatment of detainees in Iraq. However, the Fourth Geneva Convention has not been applicable to Iraq since the declared end of the belligerent occupation.

The detention of individuals pursuant to Resolution 1546 and successive resolutions must be read in light of the currently applicable international law in Iraq. Since the end of the inter-state armed conflict between Iraq and the states of the MNF in 2003, and the declared end of the belligerent occupation in June 2004, the continuing hostilities in Iraq are considered to be a non-international armed conflict. During such a conflict, the applicable rules for the treatment of persons in custody are found in article 3 common to the Geneva Conventions and international human rights law.[21]

The International Covenant on Civil and Political Rights (ICCPR), which Iraq ratified in 1971, requires that all persons arrested be promptly brought before a judge,

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[19] Human Rights Watch email communication with TF-134 Public Affairs Officers LTC Kenneth Plowman, July 25, and Maj. Neal Fisher, October 7, 2008.

[20] Letters of June 5, 2004, between the Prime Minister of the Interim Government of Iraq and the US Secretary of State annexed to Security Council Resolution 1546.

[21] The ICRC issued a statement on August 5, 2004 that stated in part, "After the hand-over of power from the Coalition Provisional Authority to the interim Iraqi Government on 28 June 2004, following the United Nations Security Council resolution 1546 stating the end of the foreign occupation, the legal situation has changed. As stated in the resolution, the presence and the military operations of the Multi-National Forces in Iraq are based on the consent of the Interim Government of Iraq. The ICRC therefore no longer considers the situation in Iraq to be that of an international armed conflict between the US-led coalition and the state of Iraq and covered by the Geneva Conventions of 1949 in their entirety. The current hostilities in Iraq between armed fighters on one hand opposing the Multi-National Force (MNF-I) and/or the newly established authorities on the other, amount to a non-international armed conflict. This means that all parties including MNF-I are bound by Article 3 common to the four Geneva Conventions, and by customary rules applicable to non-international armed conflicts." ICRC, "Iraq post 28 June 2004: protecting persons deprived of freedom remains a priority," August 5, 2004, http://www.icrc.org/Web/Eng/siteengo.nsf/iwpList265/89060107D77D7299C1256EE7005200E8 (accessed October 23, 2008). For an analysis of the occupation's legal end, see Sir Adam Roberts, International Humanitarian Law Research Initiative, "The End of Occupation in Iraq," June 28, 2004, http://www.ihlresearch.org/iraq/feature.php?a=51 (accessed October 23, 2008).

informed of criminal charges, have access to legal counsel and family members, and receive a trial meeting international fair trial standards.[22]

The MNF has acknowledged 367 cases in which it maintained custody following a CCCI ruling that dismissed the charges or brought a verdict of not guilty, as of December 11, 2007.[23] The United States bases this overarching authority on the broad mandate it contends it was granted under the successive United Nations Security Council resolutions.

February 2008 Amnesty and the CCCI Caseload

In February 2008, Iraq's parliament passed a General Amnesty Law intended in part to ease crowding in detention facilities and backlog in the criminal justice system. The law excluded from amnesty those accused of the most serious offenses, including war crimes, crimes against humanity, other death-penalty eligible offenses, and terrorism resulting in killing or permanent disability. Those who could benefit from the amnesty included persons held for more than six months without an appearance before an investigative judge, and anyone held for a year without referral to a court.[24]

Failures of administration have prevented the amnesty from alleviating the backlog that the CCCI faces. Approximately 96,000 cases had been approved for amnesty by July 2008 by the judicial committee that reviews applications, according to the Higher Judicial Council. As of September 2008, an estimated 5,000 to 8,000 detainees in Iraqi facilities had been released under the terms of the amnesty, most of them from facilities run by the Ministry of Justice.[25] A ministry official in October estimated that approximately 3,200 detainees had been released from Ministry of

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[22] International Covenant on Civil and Political Rights, (ICCPR), adopted December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, ratified by Iraq January 25, 1971, arts. 9 and 14.

[23] UNAMI Human Rights Report, 1 July-31 December 2007, para. 71, n. 95.

[24] General Amnesty Law (Qanun al-'Afw al-'Aam), http://www.parliament.iq/Iraqi_Council_of_Representatives.php?name=articles_ajsdyawqwqdjasdba46s7a98das6dasda7das4da6sd8asdsawewqeqw465e4qweq4wq6e4qw8eqwe4qw6eqwe4sadkj&file=showdetails&sid=1431 (accessed October 24, 2008).

[25] Human Rights Watch correspondence with Western diplomat monitoring amnesty implementation, September 9, 2008.

Justice facilities in Baghdad, Diyala, Basra, Hilla, and elsewhere[26]. The limited impact on the overall detainee population stems in part from the fact that the vast majority of applicants approved for amnesty are not in custody. As of May, prisoners and detainees accounted for about 25 percent of 68,796 approved applications; by September, that percentage stood at about 19 percent of 120,596 grants of amnesty.[27] (Those at large or on bail make up the other categories of applicants. Grants of amnesty relate to charges, rather than individuals, who may face multiple charges.)

One obstacle to implementation has been coordinating releases with detaining authorities and verifying that detainees are not also being held for offenses not included in the amnesty. A diplomat monitoring implementation of the amnesty told Human Rights Watch of persistent reports that officials of various detention facilities had demanded bribes from families before they would release detainees.[28]

The effective exclusion of MNF detainees from the amnesty constitutes a further constraint. The law as approved defines potential beneficiaries as "Iraqi prisoners and those in Iraq" but retains an ambiguous formulation on the subject of MNF detainees.[29] The MNF has consistently maintained that it is not bound by Iraqi legal decisions mandating release of detainees.[30]

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[26] Human Rights Telephone interview with Ministry of Justice official (name withheld), October 20, 2008.

[27] Higher Judicial council bulletins on amnesty rulings as of May 13 and September 10, 2008.

[28] Human Rights Watch correspondence with Western diplomat monitoring amnesty implementation (name withheld), June 25, 2008.

[29] "The Iraqi Government shall undertake the necessary measures to transfer those detained in the MNF jails to Iraqi jails in order to implement the provisions of this law with respect to them." General Amnesty Law, art. 6.

[30] See, for example, "Coalition forces set to release former detainee (Baghdad),"MNF press release, April 14, 2008, http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=18464&Itemid=128 (accessed October 23, 2008), on the decision to release Bilal Hussein, an Associated Press photographer held by US forces for two years over alleged links to insurgents. Hussein's case was referred to the CCCI in December 2007 and he received an amnesty determination in April 2008. The statement cited the head of MNF Detainee Operations as saying "the MNF-I determination in Hussein's case was based on the specific information in his file, as well as improvements in the security situation that have lessened the threat posed by a release in this case," adding, "The Amnesty Law, by its own terms, applies only to criminal cases before Iraqi courts, and does not apply to those persons detained in Coalition custody as security detainees…"

V. Legal Framework

Iraqi law, including the Constitution and the Criminal Procedure Code, articulates standards of fairness in court proceedings and provides baseline protections for criminal defendants. Some of these are amplified in Iraqi's obligations as a party to international legal standards. That legal framework as it applies to the CCCI is presented below. The key aspects in which the practical functioning of the court are badly adrift from the applicable laws and standards are also noted here, and elaborated in the succeeding chapters of this report.

Iraqi Law

Iraq's Criminal Procedure Code governs proceedings before the CCCI. Additionally, the constitution adopted in October 2005 by popular referendum provides baseline protections for criminal defendants. The constitution affirms the principle of equality before the law and guarantees criminal defendants a broad array of rights, including: the right to be deprived of liberty only by decision of a competent judicial authority; the right to freedom from unlawful detention; the right to have preliminary investigative documents submitted to a competent judge within 24 hours from the time of arrest (which may be extended only once, for an additional 24 hours); the right to have a private residence searched only by decision by a competent judicial authority; the right to be presumed innocent until proved guilty pursuant to law; the right to a fair trial; the right to legal defense during all phases of investigation and trial, and for a court-appointed counsel to be provided for those without access to defense counsel; the right to remain silent; and the right to freedom from all forms of torture and inhumane treatment.[31] The constitution prohibits the use of any confession made under force, threat, or torture.[32] The constitution also includes a

[31] Constitution of the Republic of Iraq (Dustur Jumhuriyyat al-'Iraq), arts. 19 (on rights of defendants and presumption of innocence); 17 (on searches); and 37(3) (on prohibition of torture).

[32] This prohibition carried over the amendment to the law initiated by the CPA and had rendered article 218 of the Iraqi Criminal Procedure Code inoperative. Article 218 had allowed for the admissibility of a coerced confession under certain circumstances.

limited right to a public hearing, as courts can decide to make such hearings secret.[33]

Iraqi judicial authorities told Human Rights Watch that the constitutional requirement that preliminary investigative documents be submitted to a competent judge within 24 hours from the time of arrest establishes the legal framework for arrests.[34] However, the more stringent requirements in the Criminal Procedure Code remain operative and represent a further protection enshrined by law. Article 123 of the Criminal Procedure Code requires that a defendant be brought before an investigative judge or a judicial investigator within 24 hours of arrest.[35] At this initial hearing the defendant must be informed of the offenses that he or she has been accused of committing. The Criminal Procedure Code provides that authorities may renew detention for a period of 15 days upon each separate judicial hearing, up to a maximum of six months total for the most serious offenses.[36] In the event that an investigation has not been completed after six months, the appropriate criminal court must authorize an extension of the detention.[37]

Human Rights Watch attended the investigative hearings of 71 defendants before the CCCI, many of which clearly ran afoul of these legal protections. In many instances, detainees were brought before an investigative judge months or, in some cases, years following initial detention or judicial hearing. While many of the detentions in question qualified for extension to allow for continued investigations, formal judicial

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[33] The rights and liberties outlined in the constitution largely track those in the Law of Administration for the State of Iraq for the Transitional Period, widely referred to as the "TAL" (the TAL served as an interim constitution, although the Iraqis were keen to avoid that locution since a popularly elected government did not draft the document). There are, however, several key differences with the Iraqi constitution. The TAL included a right to engage independent and competent counsel, which is broader and more explicit than the constitutional standard that "the right to defense shall be sacred and guaranteed in all phases of investigation and trial." Constitution, art. 19(4). The TAL also included the right to remain silent with no compulsion to testify, the right to be informed of these various rights upon arrest, and it made specific mention of a right to a speedy and public trial.

[34] Judges at the Karkh and Rusafa branches of the CCCI expressed this position to Human Rights Watch researchers during interviews carried out at the CCCI.

[35] Iraqi Criminal Procedure Code, art. 123.

[36] Ibid., art. 109(a) and (c).

[37] Ibid., art. 109(c). There are explicit limits on the possible length of any such extension, namely, such an extension cannot exceed one quarter of the maximum possible sentence for the alleged offense. The court can also order a defendant's release under such circumstances.

procedures for the renewal of detentions were not followed in practice as a general matter.

Iraq's Criminal Procedure Code generally provides clear procedures for the detention, investigation, and prosecution of criminal defendants. An arrest can only be made in accordance with a warrant issued by a competent judicial authority, excepting an arrest for a crime witnessed by the arresting authority.[38] The Criminal Procedure Code also governs searches and requires that a search of an individual or a private residence be authorized by a competent legal authority.[39] It stipulates that an investigative judge lead the fact-finding and investigation into the alleged crime and also conduct the investigative hearings.[40] The investigative judge can deputize investigative officers to examine the crime scene and gather forensic evidence, or do so himself.[41] Other than the confiscation of weapons and arms by MNF, presented as photographic evidence during hearings before the CCCI, Human Rights Watch observed no presentations of forensic evidence of any kind. The lack of forensic evidence places further stress and reliance upon interrogation and secret informants (see below) for prosecution and conviction.

The investigative judge or a criminal investigator can record the testimony of witnesses.[42] Other than secret informants, the CCCI proceedings Human Rights Watch attended were devoid of any witnesses other than MNF military personnel, in cases of MNF referral.

Following the completion of an investigation, the investigative judge makes a decision regarding the disposition of the case. If the judge finds that the act in question is illegal and that there is sufficient evidence supporting the charge, the judge then recommends a referral (*ihala*) and transfer of the case to the appropriate

[38] Ibid., art. 102(1)(a).

[39] Ibid., art. 73. Searches of individuals or residences are permissible without a warrant if a properly authorized officer witnesses a crime. Ibid., art. 79.

[40] The investigative judge may delegate the initial investigation to a judicial investigator who will conduct the initial investigation under the supervision of the investigative judge. Ibid., art.51(a).

[41] Ibid., arts. 43 and 52(b).

[42] Ibid., art. 58.

trial venue.[43] Upon referral for trial, the court may consolidate cases involving multiple defendants if the accused were jointly involved.[44] The Criminal Procedure Code requires that the judge issue a formal charge with a high degree of specificity prior to the institution of trial proceedings.[45] Three-judge panels conduct trial proceedings before the CCCI.

Like the constitution, Iraq's Criminal Procedure Code bans the use of "any illegal methods to influence the accused and extract a confession."[46] It also provides for criminal liability for torture or other instances of abuse in custody.[47] Article 333 of the Penal Code also criminalizes the actions of any public official or agent who tortures or orders the torture of an accused, witness, or informant in order to compel a confession.[48] While judges at the CCCI took issues of torture and abuse seriously in hearings attended by Human Rights Watch, many of the detainees Human Rights Watch interviewed made credible allegations regarding mistreatment, indicating that the use of brutal interrogation tactics remains a serious problem for Iraq's criminal justice system.

Article 136(b) of the Criminal Procedure Code contains a major legal obstacle to prosecuting government officials who have engaged in or authorized abuse of detainees.[49] This article requires that where the alleged offenses took place in the course of or arising from official duty, the "responsible minister" (for example, the Interior Minister in cases involving police) must permit referral of the accused official for trial.[50] The CPA suspended article 136 in its entirety in an implementing memorandum that sought to establish procedures for the application of Iraqi criminal procedure,[51] and under the constitution all CPA laws remain valid unless

[43] Ibid., art. 130(b). Alternatively, an investigative judge can simply dismiss a case for lack of evidence.

[44] Ibid., art. 133.

[45] Ibid., art.187.

[46] Ibid., art. 127: "Mistreatment, threats, injury, enticement, promises, psychological influence or use of drugs or intoxicants are considered illegal methods."

[47] Iraqi Penal Code, arts. 25 and 26.

[48] Iraqi Penal Code, art. 333. Torture includes the use of force and threats of force.

[49] Iraqi Criminal Procedure Code, art. 136(b).

[50] Ibid.

[51] Coalition Provisional Authority Memorandum No. 3 (Revised), CPA/MEM/27 June 2004/03, June 27, 2004.

they are specifically abrogated by enacted legislation.[52] However, successive Iraqi governments since the official end of the occupation in mid 2004 have invoked article 136 to block prosecutions of alleged official corruption.[53] Judicial authorities expressed frustration with this specific provision during interviews with Human Rights Watch. In October 2007, the Iraqi Council of Representatives (*majlis al-nuwwab*, or parliament) amended the Criminal Procedure Code, deleting article 136(b), even though it was already constitutionally inoperable.[54] The Presidency Council, which is authorized to review legislation and then ratify or veto it, did not take action in this instance.[55] The legislation was returned to parliament, but no further action was taken.

Iraq's constitution affirms that "the right to a defense shall be sacred and guaranteed in all phases of investigation and trial."[56] This provision, absent from the inherited Criminal Procedure Code, was adopted from the CPA amendment of the code.[57] In practice, the right to a defense is compromised routinely in investigative and trial proceedings before the CCCI. The causes of this infringement are multiple, and include: difficulties in accessing detainees as a result of the security situation; the lack of a vibrant and established culture of legal defense; and insufficient judicial oversight. The practical effect is a highly curtailed right to counsel.[58] Even though counsel were present at almost all hearings Human Rights Watch attended before investigative judges, and at all trial proceedings before the CCCI, such hearings were very often the first and only encounter between counsel and the accused, and detainees in no fashion enjoyed "adequate time and facilities for the preparation of" an effective defense.[59]

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[52] Constitution, art. 130.

[53] Walter Pincus, "There is Corruption in Iraq," *Washington Post*, June 25, 2007 (noting the reinstatement of the provision by successive prime ministers, 'Ayad Allawi and Ibrahim al-Ja'afari, and its continued use under current prime minister Nouri al-Maliki).

[54] Law for the Revision of the Iraqi Criminal Procedure Code (Qanun Ta'deel Qanun Usul al-Muhakamat al-Jaza'iya Raqam (23) li Sanat 1971 al-Mu'addal), 2007, art. 1.

[55] Constitution, arts. 73 and 138.

[56] Ibid., art. 19(4).

[57] Coalition Provisional Authority Memorandum No. 3 (Revised), CPA/MEM/27 June 2004/03, June 27, 2004.

[58] In addition to the Iraqi constitution, the ICCPR requires that the accused have the right to counsel "in the determination of any criminal charge against" the accused. ICCPR, art. 14(3)(d).

[59] Ibid., art. 14(3)(b).

The investigative and trial hearings that Human Rights Watch attended included cases that relied exclusively or almost exclusively on secret informants. Article 47(2) of the Criminal Procedure Code allows informants to request secrecy in cases that touch upon national security or in other serious criminal cases.[60] In such instances, as identified by the article, an informant may request the court that "his identity not be disclosed and that he not be considered a witness."[61] The law leaves it to the judge's discretion as to whether to proceed on the basis of such information, following further investigation and corroboration.[62] The law provides a further check on the use of secret informants by requiring that a single testimony cannot form sufficient basis for a ruling if other convincing evidence does not corroborate that testimony, or if it is not supported by a confession from the accused.[63] The court can even reject confessions as sufficient corroboration.[64]

Human Rights Watch observed cases that the CCCI dismissed because they were based exclusively on the testimony provided by secret informants. Such dismissals, while clearly appropriate, often came only after months and in some cases years of pretrial detention, due to the lack of proper judicial oversight of the use of secret informants. This problem in part reflects a lack of judicial capacity to deal with the overwhelming numbers of detainees. While the difficult security situation throughout Iraq may require security arrangements that ensure the safety of witnesses, it is also crucial to protect the right of the accused to challenge the evidence presented against them. The use of such informants at the CCCI, which Human Rights Watch observed, challenges basic notions of due process and fairness enshrined by the constitution and by international human rights law.[65]

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[60] Iraqi Criminal Procedure Code., art. 47(2).

[61] Ibid.

[62] Ibid.

[63] Ibid., art. 213(b).

[64] Ibid., art. 213(c). This provision originally stated that "the court can accept a confession only if it is satisfied with it and if there is no other evidence which proves it to be a lie." CPA Memorandum No. 3 revised this provision to read, "the court can accept a confession only if it is satisfied with it."

[65] Constitution, art. 19(5) and (6); ICCPR, art. 14(3)(e) ("In the determination of any criminal charge against him, everyone shall be entitled to… examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him").

Under article 4(1) of the anti-terrorism law, the death penalty applies to those who incite, plan, finance or assist terrorists to commit any of the crimes covered by the law.[66] In addition to amending and suspending various provisions of the Criminal Procedure Code, the CPA also suspended portions of the Penal Code, including the application of capital punishment.[67] Following the formal end of the occupation to an Iraqi government on June 28, 2004, the government of interim Prime Minister 'Ayad Allawi reinstated the death penalty for a wide range of offenses.[68]

International Human Rights Law

The government of Iraqi has legal obligations under international human rights treaty law and customary law. It is bound by the treaty obligations of previous Iraqi governments.[69] Most notable among Iraq's treaty obligations are those laid out by the International Covenant on Civil and Political Rights, which establishes the basic requirements for international standards for protections and the due process rights of detainees. [70]

In addition to Iraqi legal requirements governing initial arrest and detention procedures, the ICCPR requires that "[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."[71] As noted above, there are numerous instances where detainees were brought initially before a judicial authority only after a significant period of months, and in some cases, years.

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[66] Anti-Terrorism Law, art. 4(1).

[67] Coalition Provisional Authority Order 7, CPA/ORD/10 June 2003/7, June 10, 2003.

[68] Order for the Reintroduction of the Death Penalty, No. 3, 2004. The death penalty is a longstanding penalty within the Iraqi criminal justice system—see Iraqi Penal Code, arts. 85(1) and 86. Human Rights Watch opposes the death penalty in all circumstances because of its cruelty and finality.

[69] See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 115 U.N.T.S. 331, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed October 21, 2008), section 3 (international agreements are not terminated by a change in government),

[70] Iraq ratified the ICCPR on January 25, 1971.

[71] ICCPR., art. 9(3).

International human rights law also governs the treatment of detainees. The prohibition against torture and other mistreatment is a longstanding and fundamental norm of customary international law.[72] The ICCPR requires that detainees be treated with respect for their "inherent dignity,"[73] and mandates that detainees shall "not be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[74] Similar prohibitions are found in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), to which Iraq acceded in August 2008,[75] and other treaties.[76]

The Convention against Torture specifically prohibits using as evidence in any proceeding "any statement which is established to have been made as a result of torture."[77] As noted above, in those hearings where torture was raised by detainees, CCCI judges were attentive and responsive; however, a number of detainees interviewed by Human Rights Watch provided credible allegations of abuse in initial detention, indicating the persistence of this problem. The lack of forensic evidence in many instances heightens the dependence and reliance on confessions, which places further stress on the nature of interrogations.

The ICCPR requires states to afford criminal defendants the right to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."[78] The Human Rights Committee, the body responsible for monitoring state compliance with the ICCPR, has noted that criminal defendants do not have "an

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[72] See, for example, Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: NP Engel, 2nd ed., 2005), pp. 157-58.

[73] ICCPR., art. 10(1).

[74] Ibid., art. 7.

[75] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987. Iraq's Presidency Council on August 17, 2008 approved a parliamentary decision to accede to the Convention against Torture. See http://www.iraqipresidency.net/news_detial.php?language=arabic&id=6067&type=news (accessed October 23, 2008).

[76] See, for example, the Convention on the Rights of the Child, art. 37(a).

[77] Convention against Torture, art. 15. The only exception is a statement against a person accused of torture as evidence that the statement was made.

[78] ICCPR, art. 14(3)(e).

unlimited right to obtain attendance of any witness requested by the accused or their counsel, but only a right to have witnesses admitted that are relevant for the defense, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings."[79] The observed use of secret informants at the CCCI is inconsistent with international standards of due process and fairness, since defendants are held for significant periods of time prior to investigative hearings and without any procedural recourse to challenge the use of secret informants.

Under the ICCPR, the right to due process and a fair trial includes the right to counsel in the determination of any charge against a detainee.[80] This standard indicates that the right to counsel attaches to all stages of legal proceedings. Observed instances of investigative hearings conducted without the benefit of counsel, and instances verified by court records of interrogations following arrest or detention without the benefit of counsel, violate this requirement. The right to counsel also encompasses the ability to adequately consult with counsel.[81] The difficulties in accessing detainees, and the lack of continuity with respect to court-appointed counsel, impairs this right and limits the effectiveness of counsel.

The provision of Iraq's Code of Criminal Procedure (article 136(b)) that requires the permission of superiors to bring criminal charges against officials, including those implicated in the torture and ill-treatment of detainees, undermines the right of victims of human rights violations to an effective remedy, as provided under the

[79] UN Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, U.N. Doc. CCPR/C/GC/32 (2007).

[80] ICCPR, art. 14(3)(b).

[81] The Basic Principles on the Role of Lawyers states, "All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials." Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 118 (1990), principle 8.

ICCPR.[82] The UN Human Rights Committee has criticized laws that are impediments to the establishment of legal responsibility.[83]

Child Detainees

Under the Iraqi Child Welfare Law, children between the ages of 9 and 18 are considered juveniles,[84] and can be arrested and detained for both criminal offenses and for status offenses such as being homeless or begging. The law states that those accused of criminal offenses must be held separately from adults.[85] Upon arrest, children must be transferred immediately to the custody of juvenile police forces.[86] The law also stipulates that the questioning of children be undertaken by a specialized juvenile investigative judge.[87] If an investigative judge deems the evidence sufficient for referral of a juvenile case, the judge is then directed to transfer the child for psychological examination.[88] The law sets no limit on how long a child can be held pending trial, age determination, or the court ordered psychological examination.

In instances where identity documents are not forthcoming or appear to contradict physical appearance, or where detainees do not know their precise birthdates, detainees may be held with adults before a judicial hearing that is likely the first opportunity to identify them as children. The juvenile court can refer a detainee for medical investigation and questioning to determine age.[89] However, the Child

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[82] ICCPR, art. 2(3) (a) (states party to the ICCPR undertake "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity").

[83] UN Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 17 ("impediments to the establishment of legal responsibility should … be removed").

[84] Iraqi Child Welfare Law, art. 3(2); 24-26, 52, , 73(3), 76.

[85] Ibid., art. 10. Article 52(3) requires that where separate detention facilities are unavailable, special measures must be taken to prevent the intermingling of juvenile and adult detainees.

[86] Ibid., art. 48.

[87] Ibid., art. 49(1).

[88] Ibid., art. 51(1).

[89] Ibid., art. 4.

Welfare Law is vague on this point and does not provide clear standards, only requiring "medical examination to determine age based on scientific methods."[90]

The Convention on the Rights of the Child (CRC), to which Iraq acceded in 1994, requires that "[t]he arrest, detention or imprisonment of a child … be used only as a measure of last resort and for the shortest appropriate period of time."[91] Like the ICCPR it requires that children accused of criminal offenses be detained separately from adults.[92] However, international juvenile justice standards go beyond the baseline protections provided in Iraqi law in providing strict standards on prompt access to legal counsel and more expansive parental access rights. Amplifying concerns with respect to the questioning and interrogation of juveniles, the UN Committee on the Rights of the Child, which monitors state compliance with the Child Rights Convention, has emphasized that a child "being questioned must have access to a legal or other appropriate representative, and must be able to request that their parent(s) be present during questioning."[93] The Committee goes on to emphasize that a court or other judicial body , when "considering the voluntariness and reliability of an admission or confession by a child, must take into account the age of the child, the length of custody and interrogation, and the presence of legal or other counsel, parent(s), or independent representatives for the child."[94] While the Iraqi Child Welfare Law requires parents or other relatives be granted access to trial hearings, Iraqi law falls short of this standard as there is no such requirement under Iraqi law for access for counsel or parents during interrogation or investigative hearings; security circumstances have raised a further obstacle to ensuring family visits.

The findings of this report relate to adult detainees, although the limited number of proceedings involving children that Human Rights Watch witnessed reinforces concerns that they are held with adults in detention facilities. In one instance, a

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[90] Ibid.

[91] Convention on the Rights of the Child, adopted November 20, 1989, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (entered into force September 2, 1990), art. 37(b).

[92] Convention on the Rights of the Child, acceded to by Iraq June 15, 1994, art. 37(c); and ICCPR, art. 10(b). The latter includes a limited exception in instances where such separation would not be in a juvenile's "best interest."

[93] Committee on the Rights of the Child, February 9, 2007, U.N. Doc. CRC/C/GC/10, para. 23h.

[94] Ibid.

child in Iraqi custody had been detained prior to his investigative hearing in an army installation without separate facilities for children. In another, an MNF detainee who had turned 18 approximately three months before his court appearance had not been transferred out of the juvenile population.

VI. Delays in Hearings

The failure to provide judicial hearings within a reasonable period of time stood out among the procedural failings Human Rights Watch observed during its attendance at investigative hearings and from interviews with detainees referred for trial to the CCCI. A majority of detainees had been held for months, and in some cases years, before referral to a judge.

The delays are, in some measure, the result of the dramatic growth in the Iraqi detainee population during the implementation of the Baghdad Security Plan in 2007 (see Chapter IV, above). Over the course of the year, the investigative division of the Karkh branch of the court handled a total of 32,084 cases, referring 7,447 for trial and dismissing 17,820; of cases referred for trial, 2,875 were concluded during the year.[95] A staff of 10 trial judges, 25 investigative judges, and 15 judicial investigators is responsible for handling this caseload.[96]

The delays also reflect failures of procedure prior to handling at the CCCI. In certain instances, investigative judges dealt with those failures—including lack of counsel at previous investigative hearings, and allegations of coerced confession—by dismissing cases. In one set of hearings that Human Rights Watch attended, an investigative judge ordered the release of 11 detainees rounded up during mass arrests carried out by an Iraqi army unit in Mahmoudiyya and accused of belonging to the Jaysh al-Mahdi, the militia linked with the movement headed by Moqtada al-Sadr. These detainees, who testified they had been in custody for periods ranging from 30 days to five months, had never been referred to an investigative judge. Nor were arrest warrants, physical evidence, or summaries of testimony by informants included in their case files. None had had access to counsel.[97]

In a separate investigative hearing, a defendant detained by the Iraqi army in July 2007 and accused of membership in an Islamist group was released after he

[95] Statistics provided by CCCI-Karkh to Human Rights Watch, May 15, 2008.

[96] Ibid.

[97] Human Rights Watch observation of investigative hearing, CCCI-Karkh, May 5, 2008.

testified that he had received only a single investigative hearing, without counsel, after his arrest.[98]

In other instances, judges acknowledged grave procedural errors by starting the process anew, with further hearings and further prolonged detention. A defendant at the Rusafa branch of the court told Human Rights Watch he had been detained in January 2006 during a raid by Interior Ministry commandos and held since then in Baghdad's transfer prison. That defendant, who previously had an investigative hearing some months after his initial detention, without counsel, on charges of theft and murder, this time received a hearing with counsel present. The judge referred his case for further investigation.[99]

[98] Human Rights Watch observation of investigative hearing, CCCI-Rusafa, May 11, 2008.

[99] Human Rights Watch observation of investigative hearing, CCCI-Rusafa, May 14, 2008.

VII. Lack of Evidence and Reliance on Secret Informants

The investigative hearings and trials that Human Rights Watch observed relied almost exclusively on confessions and the summarized testimony of witnesses and informants. No physical evidence was introduced at any stage of any proceedings, including cases in which US judge advocate generals presented evidence against MNF detainees facing weapons charges. On one occasion, that evidence consisted in part of statements from US forces and photographs of the defendants with weapons alleged to be theirs. In another case, the charge sheet alleged the detainee had made bombs, though the attending JAG said that detaining forces had conducted no explosives residue test.[100]

The absence of physical evidence—other than photographs of weapons that JAGs alleged detainees had possessed when detained—in the investigative hearings that Human Rights Watch witnessed, and the corresponding reliance on the testimony of secret informants and confessions, suggests several consequences for the proceedings of the court. Most notably, the recourse to secret informants compounds the problem of lengthy delays in processing cases. Introducing the testimony of a secret informant presumes the possibility of summoning that informant in person by judicial order later to corroborate testimony if needed. In remarks on the use of secret informants in the court, UNAMI notes that informants frequently ignore a summons when issued, resulting in further extension of detention of the accused.[101]

Iraqi judicial authorities told Human Rights Watch that the testimony of secret informants is a principal source of evidence in the security-related cases at the core of the court's mandate—particularly in cases that originate in mass detentions associated with military operations. One CCCI investigative judge estimated secret informant testimony figures in 40 percent of all cases heard by the court.[102] Another

[100] Human Rights Watch observation of Investigative hearings, CCCI-Karkh, May 5, 2008.

[101] UNAMI Human Rights Report, 1 July-31 December 2007

[102] Human Rights Watch interview with CCCI judge (name withheld), May 11, 2008.

senior judge acknowledged such testimony was open to abuse, but deemed it unavoidable under present security conditions:

> Now because of the security situation, and the fear of revealing one's identity, there is greater reliance on the secret informant. It's not just fear of simple retribution, it's also the risk to extended families and so forth…. There is a certain amount of uneasiness about this subject, politically and because of the possibility that such testimonies are spurious … For instance, the army may be working in a hot area, and take testimonies relating to the presence of kidnappers. It then becomes a question of bringing the informant to the judge, and there may be problems of credibility … We have a lot of false informants presenting a lot of false testimony … If we depend on this evidence, yes, there are going to be victims but there will be fewer victims than if we disregarded the informants completely.[103]

During its monitoring of the court's proceedings, Human Rights Watch found that judges were willing to dismiss some cases that were based entirely on the testimony of secret informants. In a trial at the Rusafa branch of the court on May 11, 2008, a defendant faced charges, based on the testimony of secret informants, of planning sectarian attacks as the leader of an al Qaeda cell. The Iraqi army had detained the defendant in 2007 following an insurgent attack. He denied the charges and claimed to have no knowledge of people named as co-conspirators; the defendant as well as defense counsel and the prosecutor, noted that previous statements had been taken, presumably by detaining forces, without an investigative judge or counsel present. The prosecutor suggested dismissal, and defense counsel alluded to the existence of an exculpatory witness whose testimony had not been admitted at the investigative phase. The presiding judge acquitted the defendant on the grounds that no there was no evidence other than the testimony of secret informants.

[103] Human Rights Watch interview with CCCI judge (name withheld), May 14, 2008.

Iraq's Higher Judicial Council said in November 2008 that judges had been instructed to dismiss cases in which informants did not respond to a summons and there was no other basis for continued detention.[104]

[104] In response to queries from Human Rights Watch to Iraq's Higher Judicial Council about administrative measures to regulate the use of secret informants, a senior investigative judge replied as follows: "All those conducting investigations have been instructed that no one may be detained except on the basis of an arrest warrant issued by the court. This warrant is issued only after the secret informant appears before the judge, is sworn in and after the judge is convinced of the necessity of issuing the warrant. The difficulty has been overcome this way regarding new cases…As for old cases in which the secret informant's statement has been taken by an investigating officer, they have been dealt with by a mechanism that comprises giving the secret informant notice to appear before the competent judge. In the event the informant does not appear, and the suspect's statements are not sufficient for referral for prosecution and there is no evidence in the documentation, the competent judge issues an order to release the detainee and close the investigation." Human Rights Watch email communication with Higher Judicial Council, November 19, 2008.

VIII. Access to and Quality of Defense

Over the course of dozens of investigative hearings and several trials, Human Rights Watch observed few instances of active, competent, and prepared defense. On a few occasions, no defense counsel was present during investigative hearings, which proceeded nonetheless. While either court-appointed or private counsel was available for the majority of defendants, the defense was in nearly all instances perfunctory at best. In a majority of investigative hearings that Human Rights Watch witnessed, court-appointed counsel did not speak or otherwise intervene.

In an investigative hearing at the Rusafa branch of the court on May 11, 2008, a police officer named Ammar Feisal faced charges of murder and assorted acts of terrorism allegedly carried out with al Qaeda members in Baghdad's Fahhama district. The charges, drawing in part on the testimony of a secret informant, described Feisal as a member of a cell that set up fake checkpoints in Fahhama in 2006 to carry out sectarian killings and kidnappings. Feisal, whom Iraqi security forces detained in March 2008, had privately retained counsel, but at his hearing he was represented by a court-appointed lawyer who only received the case file immediately before the hearing began.

After hearing the summary of the charges, most of them capital offenses, his court-appointed counsel requested permission from the investigative judge to be excused, citing the obligation to appear at another hearing. The judge refused the request, and counsel complied with the judge's order to stay, but did not speak at any time during the hearing. Following Feisal's account of the killing for which he faced the murder charge, the judge transferred that count to the investigative section of a local court with a request to allow Feisal to summon exculpatory witnesses (something that his court-appointed lawyer had not sought to do). The judge recommended Feisal's continued detention and a further investigative hearing on the terrorism-related charges.[105]

[105] Human Rights Watch observation of investigative hearing, CCCI-Rusafa, May 11, 2008.

Human Rights Watch attended investigative hearings at the Karkh branch of the court in the cases of three men detained by Iraq's National Guard in Mahmoudiyya in November 2006. Two of the men were brothers facing a series of charges including terrorism, kidnapping, murder, and rape; the third, not related to the others, was detained along with them while riding in their vehicle. All told the court they had had prior investigative hearings in other venues without defense counsel, and were making their initial appearances at the CCCI. All alleged that detention officers abused them during detention and coerced their confessions.

One of the defendants in the case, Sattar Ali Muhammad al-Ubaidi, denied all of the charges and told the investigative judge that interrogators had tortured him, threatened him with death, and forced to him to place his fingerprint on the text of a confession while blindfolded. His brother, Kaiser Ali Muhammad Salim al-Ubaidi, showed the judge scars that he described as the result of abuse during detention by the National Guard. The third defendant, Bassem Muhammad Hussein, told the judge he too had been forced to fingerprint a confession while blindfolded and displayed scars on his foot that he claimed were the result of abuse while in custody of the National Guard. When Hussein referred to other scars that he claimed were the result of torture, the investigative judge told him not to display them. All of the detainees said they had no knowledge of any charges or evidence against them. The court-appointed lawyer present during the hearing asked no questions and made no attempt to question the validity of the statements forming the basis of prosecution.[106]

In a separate set of investigative hearings that Human Rights Watch attended at the same court on May 5, four men detained in Baghdad during a raid by US troops faced charges of illegal possession of weapons. The detainees claimed they were forced to pose for photographs with caches of weapons; those photographs were subsequently introduced as evidence. During the hearings, which a US military JAG and interpreter also attended, one detainee, Nassir Abdelamir Abbas, claimed he had been detained on the basis of confusion between his name and that of "Abu Nasir," an individual sought by MNF troops on the basis of intelligence reports. At

[106] Human Rights Watch observation of Investigative hearing, CCCI-Karkh, May 6, 2008.

that point in the hearing, the court-appointed counsel who had attended both hearings had left the room and did not return subsequently.[107]

In a May 11, 2008 trial hearing at the Rusafa branch of the court that Human Rights Watch attended, a defendant detained in Salahuddin province in 2005 faced charges relating to alleged attacks on Iraqi security forces. The court allowed an initial statement of the charges without defense counsel present, then halted the proceedings to summon a court-appointed lawyer who had no prior knowledge of the case. The defendant recounted being detained in Baiji on suspicion that the vehicle in which he was riding had been stolen; police subsequently told him the vehicle was thought to be connected to the attacks on security forces. During questioning immediately after his arrest, he said, police interrogators told him he was also a suspect in a murder case in the nearby city of Tikrit, and transferred him to the custody of police there. The defendant displayed scarring that he said was the result of torture during interrogations, and that he had agreed to endorse a confession with his fingerprint after one such interrogation session.

At the trial hearing the defendant denied all the charges. He said that he believed he had been detained due to similarity between his name and that of another man who had been arrested in connection with attacks on security forces but released after his family bribed local police. The defense in the trial consisted of repeating the prosecutor's request for dismissal on the grounds that there were no eyewitnesses or physical evidence, and that the confession had been coerced. The presiding judge cited the scarring that the defendant displayed as grounds for concluding that he had been tortured to elicit a confession, and the panel of judges acquitted him.[108]

In addition to the failures to challenge evidence or provide a defense, Human Rights Watch noted broader structural failings in access to counsel that effectively make vigorous defense unlikely. One privately-retained counsel told Human Rights Watch that he had some degree of access to clients in pretrial detention at certain Iraqi government facilities.[109] The overwhelming majority of defendants at the court have

[107] Human Rights Watch observation of Investigative hearing, CCCI-Karkh, May 5, 2008.

[108] Human Rights Watch observation of trial hearing, CCCI-Rusafa, May 11, 2008.

[109] Human Rights Watch interview with defense lawyer (name withheld), CCCI-Rusafa, May 14, 2008.

court-appointed lawyers with whom they have never met and who have no knowledge of the case prior to the investigative hearing. As a consequence, these defendants are ill-informed about the substance of charges and evidence they face, their rights within the investigative and trial processes, as well as about any appeal proceedings. Court-appointed counsel fulfills a minimum requirement, as outlined in Iraqi law, including the constitution, for representation, but offers little by way of substantive defense. One investigative judge, queried about the quality of representation, told Human Rights Watch, "Effectively and generally they are not fulfilling an active defense role."[110]

Lack of continuity in representation by court-appointed lawyers between the investigative and trial stages further degrades the quality of defense. In only two of the trials that Human Rights Watch observed did defendants have the same counsel that had represented them at the investigative stage. In one of those two cases, a privately retained lawyer had managed to have access to the accused while they were held in Baghdad's transfer prison (*Tasfirat*). In other trial hearings that Human Rights Watch observed, defense counsel read case files during or immediately before the trial commenced; their interjections, if they made any, echoed reservations that prosecutors themselves expressed about evidence.[111]

Effective lack of access to counsel affects also MNF detainees referred for prosecution before the CCCI. MNF officials told Human Rights Watch that they provide detainees two weeks' notice before their date of referral for prosecution, and afford detainees the opportunity to contact and retain counsel, but that defense lawyers do not seek to visit detainees. According to one legal advisor with the MNF,

> While in the Temporary Internment Facility, detainees do have the ability to request a phone call to retain defense counsel. There have been concerns that the detainees are not using it for those purposes, and in the past when there had been 40-50 phone calls arranged we found that they were talking to their families, so we cut back. [112]

[110] Human Rights Watch interview with investigative judge (name withheld), CCCI-Rusafa, May 11, 2008.

[111] Human Rights Watch observation of trial hearings, CCCI-Rusafa, May 11 and 14, 2008.

[112] Human Rights Watch interview with Capt. Brian Bill, May 12, 2008.

Court-appointed defense lawyers counter that they seldom receive notice of a hearing in advance and that, absent arrangements to guarantee their security in visiting an MNF detention facility, they have no access to detainees. They also cited difficulties in access to clients in the holding cells of the courts before investigative hearings. "The hearing is always the first meeting with the defendant," said one court-appointed lawyer, who added that his first reading of case files frequently occurred during the hearing itself.[113] The MNF advisor acknowledged that "coming to Camp Cropper is not easy," but claimed that "the defense counsel does not want to do it."[114] Maj. Gen. Douglas Stone, the head of detainee operations until June 2008, told Human Rights Watch, "Why is this a problem for defense counsel when hundreds of employees manage to come in every day?"[115] Defense counsel cited logistical difficulties and risks to their safety as main obstacles to meeting with clients in MNF facilities.

Whatever the weight of logistical and security considerations, the effect on the court's proceedings is clear. Defendants facing terrorism-related charges and other felonies, some of which carry a death sentence, enter investigative hearings and trials with little or no opportunity to contest or introduce evidence or witnesses.[116]

[113] Human Rights Watch interviews with defense lawyers (names withheld), CCCI-Karkh, May 5, 2008.

[114] Human Rights Watch interview with Capt. Brian Bill, May 12, 2008.

[115] Human Rights Watch interview with Maj. Gen. Douglas Stone, Baghdad, May 12, 2008.

[116] Figures from the trial section of CCCI-Karkh indicate that this branch of the court issued 175 death sentences in 2007.

IX. Coerced Testimony and Abuse in Detention

The reliance on confessions in the CCCI cases raises serious concerns about the fairness of those proceedings. Torture and other forms of abuse in Iraqi detention facilities, frequently to elicit confessions in early stages of detention, are well-documented.[117] The reliance on confessions in the court's proceedings, coupled with the absence of physical or other corroborating evidence, raises the possibility of serious miscarriages of justice. In at least 10 investigative hearings and two trials that Human Rights Watch observed, defendants renounced confessions submitted as evidence. In most of those cases, the defendants said they had been physically abused or threatened by interrogators. The large majority of those cases involved detainees held by Iraqi authorities. In the cases of MNF detainees disputing confessions while being prosecuted in the CCCI, one claimed to have been punched and kicked at the time of initial detention and subsequently pressured to sign a confession.

Judges at the investigative and trial phase displayed some willingness to countenance allegations of abuse, and dismiss cases apparently tainted with coerced confessions.[118] In the trial of the defendant facing charges relating to an attack on Iraqi security forces in Salahuddin province (mentioned in the preceding chapter in the context of ineffectual defense counsel), the defendant told the court that while in the custody of police in Tikrit he was tortured repeatedly until he put his fingerprint on the text of a confession. The defendant showed the judges scars on his back, abdomen and legs that he said resulted from torture during interrogation sessions over a period of approximately 40 days. The presiding judge noted that the defendant's confession was likely coerced, and the panel of judges acquitted him.[119]

Most of the approximately three dozen detainees Human Rights Watch spoke with recounted that Iraq's military or security forces arrested them in the course of large-

[117] See UNAMI Human Rights Report, 1 July-31 December 2007; and Human Rights Watch, *The New Iraq? Torture and Ill-treatment of Detainees in Iraqi Custody*, vol. 17, no. 1(E), January 2005, http://hrw.org/reports/2005/iraq0105/.

[118] It was less clear that judicial authorities were likely to initiate investigations into suspected cases of torture, or that such proceedings would be pursued wholeheartedly. See UNAMI Human Rights Report, 1 July-31 December 2007, para. 65.

[119] Human Rights Watch observation of trial hearing, CCCI-Rusafa, May 11, 2008.b

scale round-ups. They said abuse occurred in the early stages of pretrial detention. A detainee awaiting his investigative hearing at the court's Rusafa branch told Human Rights Watch he had been detained at an Iraqi army checkpoint in Baghdad's Doura district by soldiers from a predominantly Shia unit who recognized his family name as Sunni. The detainee claimed that prior to his transfer to a Ministry of Justice holding facility, detaining forces had blindfolded and beaten him, subjected him to electric shocks, and forced to him drink large quantities of water while not allowing him to urinate.[120]

Another detainee at the same branch of the court told Human Rights Watch he had been held by an Iraqi national guard unit south of Baghdad in August 2007, accused of bomb attacks on Iraqi security forces, and kept for four months prior to his transfer to Baghdad's transfer prison (*Tasfirat)*. During that period, he said, his jailers beat him with sticks and their fists, and suspended him from a rod by his hands and feet before beating him on the torso and limbs.[121]

A third detainee awaiting an investigative hearing told Human Rights Watch he had been detained by an Iraqi army unit in July 2006 and taken to an army base in southern Baghdad where he was held for six months. He displayed scars consistent with accounts of beatings he claimed to have suffered during that period. He said his jailers had suspended him by his bound hands and administered electric shocks to his ears, hands, and genitals. He claimed they coerced him into signing a confession during that period.[122]

A fourth detainee told Human Rights Watch he had been detained during an Iraqi army sweep in Yousufiyya south of Baghdad in January 2007 and held at an army base for three months before being brought to Baghdad's transfer prison. During that time his jailers applied electric shocks to his ears and genitals; he displayed scars consistent with the type of abuse he described.[123]

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[120] Human Rights Watch interview with unnamed detainee, CCCI-Rusafa, May 14, 2008.

[121] Human Rights Watch interview with unnamed detainee, CCCI-Rusafa, May 14, 2008.

[122] Human Rights Watch interview with unnamed detainee, CCCI-Rusafa, May 14, 2008.

[123] Human Rights Watch interview with unnamed detainee, CCCI-Rusafa, May 14, 2008.

X. Acknowledgments

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HUMAN RIGHTS WATCH
350 Fifth Avenue, 34th Floor
New York, NY 10118-3299

www.hrw.org

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The Quality of Justice

Failings of Iraq's Central Criminal Court

The Central Criminal Court is Iraq's main criminal justice venue. This report describes serious failings to provide due process and meet international and domestic standards of fairness in the Central Criminal Court. Human Rights Watch monitored court proceedings and interviewed detainees and court personnel in Baghdad, and found that defendants have little chance to pursue a meaningful defense, challenge evidence, or receive prompt judicial review of their cases. Interviews with defendants suggested that abuse in the initial stages of detention, often with the goal of producing confessions, remains widespread. Reliance on the testimony of secret informants limits the ability of the accused to confront evidence presented against them. Judges often acknowledged the flaws in cases they heard, and dismissed them accordingly, but the numbers of cases that include allegations of coerced confessions, for example, suggests that serious miscarriages of justice are frequent.

These shortfalls, in an institution intended to serve as a model for Iraq's criminal justice system, seriously undermine Iraq's efforts to construct a national justice system that embodies and upholds the rule of law. The large caseload along with limits on the court's capacity do not change the obligation of Iraqi authorities to meet basic standards of fairness in court proceedings, as specified in domestic and international law. Meeting those standards is crucial to a project intended to demonstrate a break with the abuses of Saddam Hussein's era and support the goal of political accommodation through the impartial administration of justice.

Iraq should revise its Criminal Code and Criminal Procedure Code to ensure the rights of defendants in line with international fair trial standards, and disallow confessions obtained through torture or ill-treatment. Iraq should also ensure compliance with its own laws providing for prompt judicial review and release all detainees not charged with criminal offenses.

Right: An Iraqi detainee during his judicial hearing in a west Baghdad courtroom on November 6, 2007.

Front cover: Blindfolded Iraqi detainees being led to a West Baghdad courtroom for hearings before a judge on November 6, 2007 .