

THE IRAQI CRIMINAL JUSTICE SYSTEM, AN INTRODUCTION

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The purpose of this article is to serve as a brief introduction to the criminal justice system, such as it is, in Iraq today. It is based on my review of the Iraqi Criminal Procedure Code,¹ my discussions with a small number of individuals—both Iraqi and American—familiar with the system, and my own (admittedly-limited) observations of the system during a six-month military deployment to Baghdad.²

One might argue—as many U.S.-trained common-law attorneys do—that a criminal justice system that neither adheres to *stare decisis* nor atomizes crimes into “elements” can hardly provide true justice. An equally-plausible argument

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1. Criminal Procedure Code No. 23 of 1971 (translated alternately as “Law on Criminal Proceedings, With Amendments” and “Criminal Procedure Code”) [hereinafter Criminal Procedure Code]. The Criminal Procedure Code contains procedural guidelines for all criminal investigations and trials of felonies and misdemeanors in Iraq. It appears that an official translation was never published in the English edition of *Al-Waqai Al-Iraqiya* (The Iraqi Gazette), the Government of Iraq’s official weekly register of national-level policy pronouncements (laws, regulations, and Republican Council Ordinances). However, there are two basic translations of the Code, both undated, both anonymous. The best sources on the internet for the translations, and a variety of other reference materials, are the *Global Justice Project: Iraq* (GJPI) sponsored by the S.J. Quinney College of Law at the University of Utah, *Criminal Procedure Code 23 of 1971*, GLOBAL J. PROJECT: IRAQ, (Apr. 25, 2009), <http://www.gjpi.org/2009/04/25/criminal-procedure-code-23-of-1971/>. and *Grotian Moment: The International War Crimes Trial Blog* sponsored by the Case Western Reserve University Law School, Iraqi High Tribunal Trials, Grotian Moment: The International War Crimes Trial Blog, <http://law.case.edu/saddamtrial/index.asp?t=1> (last visited Oct. 7, 2010). The original translations, including the one posted on the Case Western site, were made between September 1984 (the date of the most recent amendment annotated therein—see Criminal Procedure Code, art. 160) and October 1988 (the date of the next most recent amendment thereafter—to Article 47, which is not captured in the translation). The version on the GJPI site (currently dated Mar. 14, 2010) is an update of the same translation incorporating subsequent amendments. It has addressed many typographical errors and omissions (e.g., it now includes Article 77 which was previously missing), but it still uses the British spelling of most words.

2. I was deployed in mid-2007 with the initial contingent of the Law and Order Task Force (LAOTF), an experimental unit envisioned by General David Petraeus, then-commander of Multi-National Forces-Iraq, and his Staff Judge Advocate (lead attorney), Colonel Mark Martins. One of our missions was to help with the construction and initial case-processing of the newly-formed Rusafa Branch of the Central Criminal Court of Iraq (CCCI). Although I was able to learn much about Iraqi black-letter criminal law during my deployment, my exposure to the practical aspects of the system is admittedly limited.

could be made that true justice cannot be achieved in a system that insists on having a defendant's fate decided by a lay peer jury with no legal training and that builds a complex network of evidentiary rules that restrict consideration of relevant and probative evidence. To a significant extent, one's determination of justice is based in large part on whether one finds justice in doing right by society (*i.e.*, punishing the guilty despite any corruption or misconduct by the government investigators) or in doing right by the individual (letting an obviously-guilty person go free in order to "punish" the "system").

Although this philosophical dilemma partly prompted this article, it is beyond its scope. This article will not conduct a normative analysis of any particular legal system, nor does it propose to conduct a comparative analysis of the civil law trial-by-judge system such as it exists in Iraq and the common law trial-by-jury system used in criminal trials in the United States. Instead, the goal of this article is to step through the Iraqi criminal justice system writ large—as it is envisioned in the Iraqi Criminal Procedure Code and as I have seen it in practice.

I. IRAQI CRIMINAL JUSTICE SYSTEM—THE PLAYERS

During its short-lived tenure as the *de facto* Government of Iraq, the Coalition Provisional Authority (CPA) attempted a limited overhaul of the Iraqi criminal justice system.³ One change was the creation of the Central Criminal Court of Iraq (CCCI),⁴ a court with sweeping, nation-wide criminal jurisdiction⁵ but a specific mandate to focus on terrorism, organized crime, corruption, and other serious cases.⁶ Fortunately for the Iraqis, the CPA did not try to impose procedures or

3. For example, the CPA abolished the death penalty (although later it was reinstated by the Iraqi-elected government). It also deleted a series of political crimes from the Iraqi Penal Code. Although duly-elected governments subsequent to the extinction of the CPA have directly addressed some of the CPA's actions, I have no data on which to judge the extent to which members of the Iraqi bar—and more specifically the Iraqi judges—accept as legitimate, and accord credence to, the sum total of all changes to Iraqi law made by the CPA.

4. See Coalition Provisional Authority Order No. 13 of 2004 (forming the Central Criminal Court of Iraq) [hereinafter CPA Order No. 13]. Although the Code translation available on the GJPI website, GLOBAL J. PROJECT: IRAQ, *supra* note 1, properly advises at page 3 that "publication in . . . [The Iraqi Gazette] would appear to be . . . regarded as a de-facto requirement" for legitimacy of any Iraqi legal decree, I have been unable to determine whether CPA Order No. 13 was properly published in The Iraqi Gazette. Regardless, the Iraqis obviously accept the legitimacy of the CCCI, as it has been in continuous operation since 2004 - investigating, trying, and sentencing thousands of Iraqi citizens.

5. CPA Order No. 13, § 18(1):

The CCCI shall have nationwide discretionary investigative and trial jurisdiction over any and all criminal violations, regardless of where those offenses occurred. Its jurisdiction shall extend to all matters that could be heard by any local felony, or misdemeanor court.

The traditional Iraqi courts, consisting of investigative courts, misdemeanor (trial) courts, and felony (trial) courts, have limited geographic jurisdiction. Appeals are lodged in regional courts of appeals, with final criminal appellate authority residing in the national Cassation Court.

6. *Id.* § 18(2):

In exercising its discretionary jurisdiction, the CCCI should concentrate its resources on cases related to:

- a) terrorism,
- b) organized crime,

substantive law from common-law systems on the new court. Instead, the CCCI is configured and runs in the same way as the regular provincial criminal courts in Iraq. Each branch of the CCCI consists of an Investigative Court and a Felony (trial) Court.⁷ The Court implements Iraqi substantive and procedural criminal law the same as other courts.⁸ Appeals travel directly to the Court of Cassation.⁹ The Iraqi Criminal Procedure Code thus applies to all cases processed through the CCCI, from arrest and detention through investigation, trial, and punishment.¹⁰

A. A Quick Comparison of Roles and Responsibilities

Regardless of the court in which the Code is being applied, it is important to understand a little about the players in order to understand the Code. Some writers have made the mistake of trying to compare a civil law trial-by-judge system with the common law trial-by-jury system used in criminal trials in the United States.¹¹ In the confines of an article such as this, to do any kind of satisfactory comparative analysis is impossible. However, by referencing the key benchmarks in both justice systems, it is easy enough to see that they both attempt to arrive at the same goals—public punishment of criminal offenders—albeit from different cultural and historical perspectives.

In the United States criminal justice system, the prosecutor is a personage of enormous power. The prosecutor is the one who reviews data collected by the police (and who, to some extent, directs the type of information and evidence to be collected), who decides whether the evidence is sufficient to go forward, who formulates the nature and content of criminal charges, who controls the offer and acceptance of plea bargains, who decides the means and method by which incriminating evidence will be presented to the fact finder, and, finally, whose charisma and credibility are to some extent in play when lay peer juries are evaluating the sufficiency of the evidence. The prosecutor and police in our accusatorial system work together, often with considerable government resources at their disposal, to investigate allegations of criminal conduct. If they believe a crime has been committed, they then determine (i) who they believe should be held to account for the crime, (ii) in what forum and with what charges the alleged

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- c) governmental corruption,
 - d) acts intended to destabilize democratic institutions or processes,
 - e) violence based on race, nationality, ethnicity or religion; and
 - f) instances in which a criminal defendant may not be able to obtain a fair trial in a local court.

7. *Id.* § 1(2).

8. *Id.* § 4:

The CCCI shall apply Iraqi law as modified by applicable CPA Orders and this Order.

9. *Id.* § 21:

All appeals arising from CCCI proceedings shall be heard in accordance with applicable Iraqi law as modified by CPA orders but the Court of Cassation shall hear all appeals from the Felony Court.

10. *See id.* § 18.

11. *See, e.g.,* Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 FLA. J. INT'L L. 1, 21 (2006).

offender should be charged, and (iii) the substance and means of presenting the facts to a fact finder.¹² In this system, the judge's role is that of a gatekeeper, a referee who makes sure the charges are supported by reliable and relevant evidence. In the United States system, in which it is paradoxically almost impossible for a lawyer to sit on a jury of peers, the fact-finding panel is given only superficial legal guidance on the legal definitions and presumptions relevant to the particular case it is considering. The purpose of this practice seems to be a desire to ensure that the members are focused solely on the facts as they relate to the charge, rather than on any broad legal consequences of those facts.

In the Iraqi civil-law criminal justice system, the prosecutor and judge basically switch roles. The Iraqi prosecutor is very much an administrative official whose job is to review the case file for completeness, and to provide recommendations to the judges as they try the case and deliberate their findings. The judges (first the investigative judge, then the trial judges) take center stage—literally—as they run the criminal investigation, issue arrest warrants, interview witnesses, determine appropriate charges, weigh the evidence, issue findings, and pass sentences. Whereas the United States criminal justice systems intentionally separate the pre-trial investigation (in which the judge is only tangentially involved) from the trial process, Iraqi courts consider fact gathering to be an integral part of the judicial purview. Although there is obviously a role for some (even significant) data collection prior to the start of official criminal proceedings, the process—at least on paper—calls for the investigative judge (or his¹³ own duly appointed judicial investigator) to repeat or confirm all critical facts in the case. While the prosecutor attends the trial (and even remains with the judges during their deliberations), his role is largely administrative in nature.

To an Iraqi lawyer (and likely the average Iraqi citizen on the street as well), the idea that an untrained member of the public could or should be involved in determining something so important as guilt or innocence in a criminal case is preposterous. Trial judges are the best and brightest of the legal profession and have significant training and experience prior to being appointed to the bench. The judges rightly consider themselves experts in knowing what the law says and, more importantly, what it means.¹⁴

12. Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 793-94 (2003).

13. The English translation of the Iraqi Criminal Procedure Code uses the masculine pronoun throughout, except as required for context; this article will do the same.

14. Although case verdicts, much less judicial explications of the same, are not formally recorded for future reference in other unrelated cases, there actually is a system in place for checking poor judicial performance. One of the roles of the Public Prosecutor is to ensure that the law is followed. They can report a judge if they believe the judge has acted inappropriately. Furthermore, the Minister of Justice and appellate court presidents review the work product of and have disciplinary authority over all investigative and trial judges. Judicial Organization, Law No. 160 of 1979 (Iraq), arts. 55-60, available at http://www.gjpi.org/wp-content/uploads/2009/01/jud_org_law.pdf; CPA Order No. 13, § 5(2) (authorizing removal of judges only upon “clear evidence of unlawful or unethical conduct, breaches of the requirements of this Order, or incompetence on the part of the member.”).

It is a truism that the standard American lawyer answer to any legal question is “it depends”—because a slight change in the facts can often lead to significant changes in legal consequences. However, once all relevant facts have been determined, a lawyer can give a definitive answer based on the law as it stands at that time. Of course, the well-entrenched principle of judicial review allows American courts to decide that one or another social (non-legal) consideration should affect the outcome of the case.

Iraqi judges do not have such leeway. Their job is to apply the facts to the plain wording of the law. As such, the concept of following precedent is meaningless because it is irrelevant: an Iraqi judge is commissioned to determine whether the accused in a particular case violated the law *vel non*.¹⁵ Looking to other cases will not tell us whether this accused is guilty or not. To paraphrase General David Petraeus’ September 2007 interviews leading up to his testimony before Congress, the facts inform the law rather than drive it.¹⁶

This point is further driven home by the simple fact of the timing of the official charge. In the American court system, the accused is charged prior to trial proceedings. The entire focus of the prosecution case is directed toward the specific wording of the charge. On many occasions, the defense case is built around trying to defeat one or more elements of the specific charge rather than to completely deny responsibility for any criminality. In the Iraqi system, although an accused is certainly aware of the type of criminal incident for which he is being investigated, the official charge is almost anticlimactic as it comes at the end of the trial. This one procedural change obviates an accused’s ability to structure a defense argument built around hypertechnical attacks on the verbiage of the charge and holding the government to what it thought it could prove. Instead, it puts the focus of the entire proceeding on a determination of the facts and their consequence under the law. The Iraqi judges spend their time trying to determine what, if anything happened. Only after ascertaining the facts (with or without counterargument by defense counsel¹⁷) are the Iraqi judges in a position to formally charge the accused. In Iraq, no one gets off on a technicality.

15. I have no data to justify any discussion of judicial corruption where racial or religious biases factor into the judges’ decisions.

16. *Time to Head to Congress: Gen. Petraeus Preps for Much-Anticipated Iraq Progress Report*, ABC NEWS, Sept. 4, 2007, <http://abcnews.go.com/WN/story?id=3556742&page=1>. Gen. Petraeus said that troop fatigue issues would “inform” rather than “drive” his recommendations regarding troop cuts. *Id.*

17. Although all persons accused of felonies or misdemeanors are entitled to court-appointed defense counsel, Article 19, § 11, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (“The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer.”), and an accused has a right to present a defense in all phases of investigation and trial, *Id.* at Article 19, § 4 (“The right to a defense shall be sacred and guaranteed in all phases of investigation and the trial.”), the defense bar is still struggling to find its voice. *See infra* Section II.E.7. Defense counsel issues.

B. The Players—Qualification, Training, Appointment, and Tenure

All players in the Iraqi criminal justice system are trained professionals. Although there appear to be no special training requirements for defense lawyers (whether appointed or retained), other than graduation from law school,¹⁸ Iraqi law imposes specific requirements on all prosecutors and judges involved in the investigation and trial of accused criminals.¹⁹

1. The Police

As with American society, the “face” of the criminal justice system that is most familiar to the average Iraqi is the police officer. Civilian police officers—members of the Iraqi Police or the Iraqi National Police, both of which fall under the Ministry of Interior (MOI)—patrol the streets, act as first responders, and conduct the initial (perfunctory) crime scene investigations. Together with the Iraqi military, the police units were a major focus of intense rebuilding efforts and training efforts following the U.S.-led occupation in 2003, most notably from the Civilian Police Assistance Training Team (CPATT), a subdivision of Multi-National Security Transition Command-Iraq (MNSTC-I).²⁰ International police-training teams have been working closely with new recruits to accomplish the goal of a competent and corruption-free force. One of the primary training facilities for the Iraqi Police is the Baghdad Police College located in Rusafa, a neighborhood wedged along the east side of the Tigris River between Baghdad proper and Sadr City.²¹

The original curriculum at the Police College was a three-year course of study covering such diverse topics as the Penal Code, constitutional law, economics, languages (Kurdish, English, and Persian), first aid, fingerprinting and criminal photography, weapons training, horsemanship, criminal sociology, Islamic law, and forensic medicine.²² Candidates for the Police College must be young, healthy, upstanding Iraqi citizens.²³ As it turns out, the Police College is an interesting cultural experiment in and of itself—bringing Shia and Sunni cadets together in an environment where they have to learn to rely on each other.

18. Law school in Iraq, as with the Police College, is a four-year post-secondary baccalaureate program. There is no tuition expense for an individual's first undergraduate degree. Interview with Zuhair Al-Maliki, former Chief Investigative Judge of the Central Criminal Court of Iraq (CCCI), in Baghdad, Iraq (Aug. 6, 2007).

19. Judicial Institute, Law No. 33 of 1976 (Iraq), arts. 1, 8.

20. MNSTC-I was a direct subordinate command of the Multi-National Corps-Iraq, which in turn reported directly to Multi-National Forces-Iraq.

21. OFF. OF THE SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, REPORT NO. PA-08-152, ANBAR RULE OF LAW/JUDICIAL COMPLEX, RAMADI, IRAQ 2 (2009), available at <http://www.sigir.mil/files/assessments/PA-08-152.pdf>.

22. See Of the Police College, Revolutionary Command Council Regulation No. 1 of 1969, art. 18.

23. The original regulation creating the modern Police College specified that recruits must be Iraqi nationals whose father was Iraqi and whose mother was at least from an Arab country, high school graduates, between sixteen and twenty-two years six months of age, at least 165 cm tall with a chest measuring at least 80 cm, able to pass a medical examination or physical fitness test, and “of good conduct and reputation, not convicted on a felony or misdemeanor degrading the Honor.” *Id.* art. 10.

2. Judicial Investigators

In addition to police detectives and investigators, there are groups of “judicial investigators” who are lawyers working directly for the investigative judges. Their duty is to investigate the crime scene in the absence of the investigative judge and to conduct any other inquiries directed by the investigative judge.²⁴

3. The Public Prosecutor and the Judges

With a few special exceptions, all prosecutors and judges are graduates of the Judicial Institute,²⁵ a two-year specialized course designed to raise the “efficiency” of those who desire to enter the public judiciary.²⁶ To be eligible for acceptance,

24. Criminal Procedure Code No. 23 of 1971 (Iraq), art. 51:

A. The initial investigation shall be conducted by investigative judges or by judicial investigators acting under the supervision of investigative judges.

B. In case of necessity and if an investigative judge is not available an immediate decision may be made or immediate action taken in the course of an investigation into a felony or misdemeanor, provided that the officer responsible for the investigation lays the matter before any judge within the investigative judge’s area of competence, or within all adjacent area, so that the judge may consider what action needs to be taken.

C. Any judge may conduct an investigation into a felony or misdemeanor that has taken place in his presence if an investigative judge is not available.

D. The relevant documents in the cases specified in sub-paragraphs B and C shall be submitted as quickly as possible to the investigative judge concerned and the decisions and action provided for in those two paragraphs shall be subject to the decision and action taken by the investigative judge.

E. The judicial investigator shall be appointed by order from the Minister of Justice, provided he possesses a recognized qualification in law or holds a recognized diploma from the legal department of the technical institutes. Police officers and sub-officers and legal officers of the Ministry of Justice may be granted the powers of a judicial investigator by order from the Minister of Justice.

F. No judicial investigator may perform the functions of his office for the first time unless he has passed a special course of the Judicial Institute of no less than three months if he obtained a recognized law degree or no less than a full calendar year if he holds a recognized diploma from the legal department of the technical institutes and he has sworn the following oath before the President of the Court of Appeal:

“I swear by Almighty God that I shall perform the functions of my office with justice and shall apply the law faithfully.”

25. As an exception, a 2006 Amendment of the Law of Judicial Organization provided:

It is permitted to appoint the lawyer or the public employee who holds a bachelor degree in law as a judge by a presidential decree in exception from the requirement of being a graduate from the Judicial Institute provided that he has spent at least ten years in the law profession or worked in the courts, and that he is not over fifty years of age.

The author has a copy of the text of the law, but no information regarding its number or date of publication in The Iraqi Gazette. Amendment to the Judicial Organization Law No. 160 of 1979, 2006 (Iraq). The substance of the law was confirmed in a personal interview with Zuhair Al-Maliki, a former Chief Investigative Judge for the Central Criminal Court of Iraq (CCI)—who personally benefitted from it because he himself not a graduate of the Judicial Institute. Interview with Al-Maliki, *supra* note 18.

26. Judicial Institute, Law No. 33 of 1976 (Iraq), arts. 1, 8.

one must obviously be a lawyer, and one must demonstrate a solid background and good credentials.²⁷

The actual application process for the Judicial Institute apparently involves three steps: a general written test in knowledge of the law, an oral exam in the form of an interview by a panel of five judges/prosecutors, and—most importantly—an “appearance” test, which is a separate interview by a panel of five judges/prosecutors to determine if the candidate looks, talks, and acts like a judge. An unwritten requirement, which can be a showstopper, is one’s judicial pedigree—coming from the right family and having ties to the right influential people.²⁸

The curriculum at the Judicial Institute mirrors subjects covered in law school,²⁹ but the courses are taught by experienced lawyers and former judges who discuss the practical application of the law.³⁰ At the end of the first year of studies, the top students are placed in a judgeship track while the rest continue in a public prosecutor track.³¹ Thus, lawyers identified as future judges and future prosecutors train side by side.

To be eligible for appointment as a judge in the courts of Iraq, one must be Iraqi by birth, married, and a graduate of the Judicial Institute.³² The original oath of office read as follows:

27. The Iraqi Judicial Institute Law spells out eligibility criteria, to include being Iraqi by birth, less than thirty-six years old upon matriculation, never implicated in a non-political crime involving dishonor, of good conduct and reputation, physically fit, and a law school graduate. Later amendments relaxed the age requirement to a range of twenty-eight to forty, Revolutionary Command Council Resolution No. 665 of 1981 (Iraq), but, later amendments also added the requirement that the applicant’s parents both be Iraqi by birth, *id.*, and that the applicant be married. First Amendment to the Law of Judicial Institute No. 33 of 1976, Law No. 7 of 1980 (Iraq).

28. Interview with Al-Maliki, *supra* note 18.

29. First year subjects include civil law, penal law, evidence, personal status law, civil procedure, criminal procedure, Arabic, and French or English. Second year subjects are criminal investigation, forensic medicine, criminal psychology, and conflicts (for future judges) or comparative public prosecution (for future prosecutors). Amendment to the Law of Judicial Institute No. 33 of 1976, Law No. 18 of 1988 (Iraq), art. 5. Note that the study of evidence likely consists of studies related only to For Evidence Law No. 107 of 1979 (Iraq), art. 11. This law specifically applies to civil, commercial, and personal status cases. *Id.* There is no law of evidence applicable to the criminal law.

30. Interview with Al-Maliki, *supra* note 18.

31. *Cf.* Judicial Institute Law No. 33 of 1976 (Iraq), art. 17 (specifying that graduates assuming either a judgeship or an assistant prosecutor position must be “among those eligible” for each of the two respective posts). Note that there appears to be no further specialization. Thus, all future judges take the same course of studies, regardless of whether their future employment will be in the criminal courts, the administrative courts, the personal status courts, the juvenile courts, or the labor courts.

32. Judicial Organization Law No. 160 of 1979 (Iraq), arts. 36, § 1, *available at* http://www.gjpi.org/wp-content/uploads/2009/01/jud_org_law.pdf. The requirement, *see supra* note 27, that applicants to the Judicial Institute not only be Iraqi by birth but born to parents who themselves were Iraqi by birth, applies equally to judicial appointees. *See* Revolutionary Command Council Resolution No. 665 of 1981 (Iraq). On the other hand, the requirement that judicial appointees be graduates of the Judicial Institute is subject to the exception also noted above—*i.e.*, that non-graduates may be appointed by Presidential decree. Amendment to the Judicial Organization Law No. 160 of 1979, 2006 (Iraq); *see supra* note 25.

I swear by god that I shall judge among people with justice and apply the Laws honestly with what comply with their goals in building the united democratic socialist society.³³

Judges are eligible for promotion every five years.³⁴ Their rise through the ranks of four pay grades (from “Fourth Class” or “Grade D” up to “First Class” or “Grade A”³⁵) determines, in addition to salary raises, their eligibility for specific postings (from regional offices to the more exclusive positions in Baghdad, as well as from investigative to trial judge). Thus, only the more senior members of the judiciary are eligible for trial and appellate judgeships and other positions of importance.³⁶ Judges may continue to serve until mandatory retirement at age sixty-three³⁷ unless removed involuntarily after receiving two poor performance reports while in the same grade or if deemed incompetent.³⁸

Prosecutors are to be pillars of uprightness.³⁹ More specifically, the role of the Public Prosecutor is to be a check on judicial overbearance and to ensure justice throughout the criminal justice system. Thus, they are specifically tasked with a wide and varied set of responsibilities:

- Review and opine on proposed judicial actions (1) transferring a case to trial, (2) ordering collection of body fluids, hair samples, or fingerprints, and (3) attaching property of a fugitive or accused;⁴⁰
- Oversee cases originating by action of a criminal complainant;⁴¹
- Inspect detention centers;⁴²
- Review all death penalty cases before submission to the Court of Cassation; and⁴³
- Attend investigative hearings as well as trials, cross-examine, and advise the judges on the disposition of a case.⁴⁴

The career path of prosecutors mirrors that of judges. Thus, as with judges, a prosecutor must be Iraqi by birth, married, and a graduate of the Judicial Institute.⁴⁵ They take a similar oath.⁴⁶ They are eligible for promotion every five

33. Judicial Organization, art. 37, § 2.

34. *Id.* art. 38.

35. *Id.* art. 45.

36. *See id.* arts. 30, 47, 48, 50, 54.

37. *Id.* art. 42.

38. *Id.* arts. 39, 58, 59.

39. Public Prosecution Law No. 159 of 1979 (Iraq), art. 39.

40. *Id.* art. 4.

41. *Id.* art. 7, § 1.

42. *Id.* art. 7, § 2.

43. *Id.* art. 28, § 1(C).

44. Amendment to the Law of Public Prosecution No. 159 of 1979, Law No. 15 of 1988 (Iraq), art. 2.

45. Public Prosecution Law, art. 41, para. 1. Since prosecutors, like judges, must be graduates of the Judicial Institute, and since applicants to the Judicial Institute must not only be Iraqi by birth but born to parents who were Iraqi by birth, it follows that prosecutors must be Iraqi born to Iraqi parents. *See supra* note 27. On the other hand, the exception allowing judges to be appointed who are not

years.⁴⁷ Furthermore, they, too, rise through four pay-grade levels, and their salary structure appears to be identical to that of judges.⁴⁸ Finally, they are subject to mandatory retirement with pension at age sixty-three.⁴⁹

II. IRAQI CRIMINAL JUSTICE SYSTEM—THE PROCESS

Unlike the United States' criminal justice process, where informal fact-gathering in preparation for the formal (accusatorial) trial process is largely done outside the realm of the disinterested judicial branch of government, the Iraqi penal system—structured similarly to the Egyptian and continental civil law models—considers the investigatory, fact-gathering phase as the actual first step in its formal (inquisitorial) trial process.⁵⁰ Although there is obviously a role for some (even significant) data collection prior to the start of judicial involvement, the process—at least on paper—calls for the investigative judge (IJ) (or his own staff “judicial investigator”) to repeat or confirm all critical facts in the case.

The remainder of this article will set out both the black-letter law from the Iraqi Criminal Procedure Code and the way I observed it in practice—with the caveat that my exposure to the process was meager at best and limited to small portions of Baghdad.

A. *The Initial Investigation*

The initial investigation includes all government-led pre-trial actions taken in response to a discovery or report of a crime. Criminal cases in Iraq, as in the United States, begin either when the police arrest a suspect or when an individual presses charges.⁵¹ A complaint can be instigated by an injured party, his representative, or a government official in the judicial system.⁵² Because crimes are essentially torts where the state sues on behalf of the victim (and society at

Judicial Institute graduates does not expressly apply to prosecutors. Amendment to the Judicial Organization Law No. 160 of 1979, 2006 (Iraq); *see supra* note 25.

46. Public Prosecution Law at art. 42, para. 2:

I swear by God to perform the works of my duty and apply the Laws with [sic] loyally and faithfully in conformity with its aims in Building the United Socialist Democratic Society.

47. *Id.* art. 43, para. 1.

48. Compare Public Prosecution Law, art. 43, with Judicial Organization Law No. 160 of 1979 (Iraq), art. 38.

49. Public Prosecution Law, art. 57, para. 1.

50. *See* CPA Order No. 13, §§ 1-2 (2004); Criminal Procedure Code No. 23 of 1971 (Iraq), art. 51.

51. Criminal Procedure Code, art. 1(A):

Criminal proceedings are initiated by means of an oral or written complaint submitted to an investigative judge, a [judicial] investigator, a policeman in charge of a police station, or any crime scene officer by an injured party, any person taking his place in law, or any person who knows that the crime has taken place. In addition any one of those listed can notify the Public Prosecution unless the law says otherwise. In the event of a witnessed offence the complaint may be submitted to whichever police officers or sub-officers are present.

52. An attorney in fact cannot prosecute a case on behalf of an estate. *See id.* art. 9(D):
If a person who had the right to submit the complaint dies, the right to submit the case does not transfer to his heirs.

large), the Iraqi system melds any private tort cause of action with the public prosecution. The criminal complaint is thus not only a claim for criminal justice and request that punitive action be taken against a perpetrator, but it includes the concomitant civil action as well.⁵³

Some complaints must be filed by the victim alone,⁵⁴ but other individuals can provide information on a criminal case—such as eyewitnesses,⁵⁵ persons who encounter evidence of a crime,⁵⁶ police officers,⁵⁷ and certain professionals

53. *Id.* art. 9(A):

The submission of the complaint should include the claim for criminal justice which is a petition that penal measures be taken against the perpetrator of the offense and for the penalty to be imposed on him. The written complaint includes the claim for civil justice as long as the complainant does not declare otherwise.

54. *See id.* art. 1(A); *see also supra* note 51. The victim (“aggrieved party”) or his representative must personally file the complaint in cases involving such crimes as adultery, polygamy, defamation, divulging secrets, verbal assault (if the victim was not engaged in public service), theft, rape, breach of trust, fraud, damage to or sabotage of private property, trespass, or throwing objects at vehicles, buildings, gardens, or compounds. Criminal Procedure Code, art. 3(A). Such complaint must be filed within 3 months (of the crime or notice thereof), absent compelling extenuating circumstances. *Id.* art. 6. If there are multiple victims, only one need file the complaint. *Id.* art. 4(A). If there are multiple accused, a complaint against one is a complaint against all—except in the case of adultery (where complaints must be filed separately against both perpetrators, including one’s spouse). *Id.* art. 4(B).

55. Criminal Procedure Code, art. 1(B):

An offense is considered to have been witnessed if it was witnessed whilst being committed or a [sic] shortly afterwards or if the victim followed the perpetrator afterwards or if shouting crowds followed him afterwards or if the perpetrator was found a short while later carrying the equipment or weapons or goods or documents or other things pointing to the fact that he was a perpetrator or participant in the offense or if traces or signs indicate this at the time.

56. *Id.* art. 47(1):

Any person against whom an offense is committed and any person who learns that an offense has been committed in respect of which proceedings have been instituted without a complaint being submitted, or who learns that a suspicious death has occurred, may inform the investigative judge or the [judicial] investigator or the Public Prosecution or any police station.

57. *Id.* art. 49:

A. Any policeman in charge of a police station receiving information that a felony or misdemeanor has been committed shall immediately record the informant’s statement in writing and require the informant to append his signature. He shall then send a report of the matter to the investigative judge or [judicial] investigator. If the information he has received makes it clear that the felony or misdemeanor took place in the presence of witnesses then he shall take the action specified in Article 43.

B. If the information he has received makes it clear that an infraction has been committed he shall send a summary report of the offense to the [judicial] investigator or investigative judge. The report shall give the name of the informant, the names of witnesses and the section of the law that applies to the incident.

C. The policeman in charge of a police station must in every case enter in the station logbook a summary of the information received concerning an offense and the time at which the information was received.

designated as mandatory reporters, including public servants and medical professionals.⁵⁸

Once a complaint has been filed or a case opened, it has a life of its own. It cannot be withdrawn; nor can execution of the judgment be stopped⁵⁹—not even in the event of the death of the complainant.⁶⁰

In theory, the investigative process appears redundant. The Code identifies at least three types of investigating officials—crime scene investigating officers,⁶¹

58. *Id.* art. 48:

Any public servant who, in the course of performing his duties or as a consequence of performing his duties, learns that an offence has been committed or suspects that an offence has been committed in respect of which proceedings have been instituted without a complaint, and any person who has given assistance in his capacity as a member of the medical profession in a case where there are grounds for suspecting that an offence may have been committed [sic] well as any person who is present when a felony is committed must immediately inform one of the persons specified in Article 47.

59. *Id.* art. 2:

The complaint may not be dropped, cancelled or withdrawn from nor can the judgment issued on it be withdrawn from or not executed, except under the circumstances explained in the law.

The exceptions seem to include the fact that the victim-complainant may withdraw from the complaint.

Id. art. 9(C):

The person who submitted the complaint has the right to withdraw from it. If a number of persons submitted the complaint and some of them withdraw, this does not invalidate the rights of the others.

Withdrawal of one of several complainants does not affect the case. *Id.* art. 9(E):

If there are many persons accused and the complaint against one of them is withdrawn, this does not extend to the others, unless the law stipulates otherwise.

60. *Id.* art. 7:

If the aggrieved party passes away after submitting the complaint, this death will have no effect on the processing of the complaint.

Contrast this with the situation where a complainant in an existing case later dies. *Id.* art. 9(D):

If a person who had the right to submit the complaint dies, the right to submit the case does not transfer to his heirs.

61. *Id.* art. 39. “Crime scene officers” or investigating officers—not to be confused with the judicial investigators working at the behest of the investigative judge—include, “according to their areas of competence.” *Id.*:

- i. Police officers, police station commanders and sub-officers.
- ii. Mayors of villages and of urban neighborhoods—in respect of the notification of offenses, the apprehension of suspects and the safe custody of persons who should be detained.
- iii. Railway stationmasters and their deputies, train guards/conductors, port managers/harbor masters, airport managers and captains of ships and aircraft and their deputies—in respect of offenses committed within their areas of responsibility.
- iv. Heads of government departments and official or semi-official establishments and agencies—in respect of offenses committed within their areas of responsibility.
- v. Public servants authorized to investigate offenses and take appropriate action within the limits of the powers accorded to them by the relevant laws.

judicial investigators (sometimes simply called “investigators”),⁶² and the investigative judge (IJ) himself. Regardless of their organizational affiliation, the on-scene investigating officers, when acting in that capacity, report directly to the Public Prosecutor’s Office.⁶³ However, if they are derelict in their duties, they answer directly to the IJ.⁶⁴ These first responders conduct an initial round of data collection⁶⁵ before reporting the matter to the IJ or the Public Prosecutor’s Office.⁶⁶

The investigating officer’s duty is to “go immediately” to the situs of the crime and proceed to take statements (including from the alleged perpetrator),

62. *Id.* art. 51; *see also supra* note 24 and corresponding text, discussing judicial investigator authorities as defined in Article 51.

63. Criminal Procedure Code, art. 40(A):

Each crime scene officer acts within the bounds of his area of competence, under the supervision of the Public Prosecution and in accordance with the provisions of the law.

64. *Id.* art. 40(B):

Crime scene officers are subject to the control of the investigative judge, who may request the superiors of such officers to look into any case where an officer acts in a manner inconsistent with his duties or is remiss or negligent in his work and to institute disciplinary proceedings against him, such proceedings being without prejudice to the officer’s liability to criminal proceedings should he commit an act that constitutes an offense.

65. *Id.* art. 43:

When a crime scene officer, within his area of competence as specified in Article 39, is informed or becomes aware that an offense has been committed in the presence of witnesses, he is required to notify the investigative judge and the Public Prosecution of the occurrence of the offense, to go immediately to the place where the offense occurred, to take down in writing a statement from the victim of the offense, to orally question the person about the accusation made against him, to impound any weapons and anything that may appear to him to have been used in the commission of the offense, to examine and preserve any material traces of the offense, to establish the status and whereabouts of the persons involved and or [sic] anything else that may assist in investigating the offense, to hear statements by any person who was present or that can be obtained [sic] from other persons concerning the facts of the case or the perpetrator of the offense and to cause a written record of all such information to be duly made.

66. *See id.* art. 46:

The crime scene officer’s task ends when the investigative judge, [judicial] investigator or representative of the Public Prosecution arrives, except in regard to any matter for which they assign responsibility to him;

see also id. art. 50(A):

As an exception to the first sub-paragraph of Article 49, the policeman in charge of a police station shall conduct an investigation into any offense if he is instructed to do so by an investigative judge or [sic] [judicial] investigator or if he considers that referring the informant to an investigative judge or [judicial] investigator would delay necessary action and result in evidence of the offense being destroyed or lost, the course of the investigation being impaired or the suspect fleeing, provided that the officer submits the documentary record of the investigation to the investigative judge or the [judicial] investigator as soon as he has completed it;

id. art. 51(A):

The initial investigation shall be conducted by investigative judges or by [judicial] investigators acting under the supervision of investigative judges.

collect evidence, and make inquiries.⁶⁷ They have authority to “forbid” the movement of witnesses/personnel at the scene and to issue summonses for the appearance of other necessary witnesses, but they apparently do not have enforcement authority,⁶⁸ instead, they simply note any refusal to cooperate in their official record of the case.⁶⁹ This investigation is preliminary to the official investigation conducted by the IJ or the IJ’s own judicial investigator: the investigating officers merely pass all information and evidence received (there are no specific chain-of-custody requirements⁷⁰), including their own narrative report of their investigative actions, to the court authorities as part of the case file.⁷¹

B. The Initial Investigation, Some Observations

Following the 2003 U.S.-led occupation of Iraq, and the subsequent violent backlash from the various groups hostile to Coalition operations, the security situation worsened to the point that traditional police could not conduct criminal investigations as they had done previously during the relatively secure environment managed by the Saddam regime.⁷² Thus, for several years, the civilian police—through lack of training and resources, were unable to perform their regular crime-prevention and crime-investigation roles. This responsibility thus fell to various Coalition groups who conducted patrols either on their own or as training missions for Iraqi forces.⁷³ Given the high level of violence, it simply was not feasible, in most instances, for first responders to cordon off a crime scene and collect forensic evidence—even if they had been so inclined. Furthermore,

67. *Id.* art. 41:

Crime scene officers are authorized within their areas of competence to inquire into offenses and to receive any statements and complaints that may be made in regard to these offenses. They are required to assist the investigative judge, [judicial] investigators, police officers and sub-officers, to pass on to them any information concerning the offenses that may come into their possession, to apprehend those who committed the offenses and to deliver them to the appropriate authorities. They are also required to record all action taken in official reports signed by them, stating the time and place the action was taken, and to deliver immediately to the investigative judge all statements, complaints, reports and other documents and all impounded items and substances.

68. *But see id.* art. 45:

The crime scene officer may request the assistance of the police if necessary.

69. *Id.* art. 44:

When a crime scene officer goes to the place where a witnessed offense has occurred he may forbid those present to leave or move away from the scene of the offense until an official record has been made. He may also summon immediately any other person who may be able to supply information establishing the facts of the case; if any person refuses such summons the investigating officer shall note the refusal in the official record.

70. *See id.* art. 42:

Crime scene officers are required to use all possible means to preserve evidence of an offense.

71. *Id.* art. 41; *see also supra* note 67.

72. *See* ROBERT M. PERITO, U.S. INST. PEACE, THE COALITION’S PROVISIONAL AUTHORITY’S EXPERIENCE WITH PUBLIC SECURITY IN IRAQ, 3-5 (2005), *available at* <http://www.usip.org/resources/coalition-provisional-authoritys-experience-public-security-iraq-lessons-identified>.

73. *See id.*

during the heady days of the 2007 surge, most arrests were of terrorism suspects—many of whom were treated as security internees rather than as criminal detainees.⁷⁴

C. Pretrial Investigation—The Initial Judicial Phase

Once the police or other investigating officer has concluded the initial fact-gathering phase and turned over all reports, statements, and evidence, the investigative judge takes over the case. The Code anticipates that the IJ's investigation will occur in two phases. The first phase is an "initial" investigation of the crime scene and related environs⁷⁵ in which the IJ travels about—even outside his geographical jurisdiction, if necessary—making arrests, conducting searches, and collecting evidence.⁷⁶ The second phase of the investigation is a formal hearing conducted in the IJ's offices.⁷⁷

The purpose of the IJ's investigation is to create a dossier, which will be used as the official record during the trial.⁷⁸ In a very real sense, the IJ is the quintessential finder of fact because testimony at trial—if there is any at all⁷⁹—is often a formality, merely confirming the facts already established by the IJ. As such, this pretrial investigation may have more bearing on establishing the ultimate fate of the accused than does the trial itself.

In establishing the facts of the case, the IJ holds almost unlimited authority—over the scope of the inquiry, the format and substance of testimony, the witnesses, and even public access to the proceedings. Thus, for example, other than

74. See Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq), § 7; see also *infra* note 109 and corresponding text for more discussion about security internees.

75. Criminal Procedure Code, art. 52:

A. The investigative judge shall conduct the investigation into all offences in person or by means of [judicial] investigators. He may authorize any crime scene officer to carry out any particular action on his behalf.

B. The scene of the incident shall be examined by the [judicial] investigator or judge so that he may take the action specified in Article 43, record the nature of any material trace or evidence of the offence and of the injury sustained by the victim, note the apparent cause of any death that has occurred and arrange for a sketch-map of the scene of the incident to be made.

C. If the investigative judge is notified of an offence that has occurred in the presence of witnesses he must, whenever possible and without delay, go to the scene of the incident in order that he may take the action specified in subparagraph B and notify the Public Prosecution accordingly.

76. *Id.* art 56(A):

The investigative judge may move to any other place within his area or jurisdiction to conduct any part of his investigation, if such a move is required in the interest of the investigation, he may move to any place outside his area of jurisdiction if the exigencies of the investigation so require. In this case he shall have powers of apprehension, arrest and search, and authority to hear witnesses, to question suspects and persons connected with the incident under investigation and to release persons with or without bail, provided that he notifies the investigative judge of the district of the measures he has taken in that district.

77. See *id.* art. 57; see also *infra* note 80.

78. See *infra* note 240 and corresponding text.

79. See Criminal Procedure Code, art. 167; see also *infra* text accompanying note 300.

individuals specifically authorized by the IJ to attend the hearing, only the accused and the plaintiff (victim) are allowed in the room—and even they may be excluded by the IJ for good cause shown.⁸⁰

The closed nature of the hearing obviously does not extend to necessary fact witnesses. In fact, although there is provision for collection and consideration of “hard” evidence, Iraqi criminal procedure writ large is clearly slanted in favor of witness testimony—and lots of it. In an interesting chicken-and-egg phenomenon, Iraqi praxis and the Code have both evolved to disfavor consideration of forensic or other non-testimonial evidence.⁸¹ It is true that the Code does provide for appointment of expert witnesses (who obviously work for the court, not for the prosecution or defense),⁸² and authorizes the IJ to collect⁸³ forensic evidence (from both accused and victim)⁸⁴ and to conduct exhumations.⁸⁵ However, the primacy

80. Criminal Procedure Code, art. 57:

A. An accused person, a plaintiff, a civil plaintiff, a person responsible in civil law for the actions of the accused and their representatives may attend the investigation while it is in progress. The judge or the [judicial] investigator may prohibit their attending if the matter in hand so requires, for reasons that he shall enter in the record, with the proviso that they shall be granted access to the investigation as soon as the need to prohibit their attendance ceases and that they shall not have the right to speak unless permitted to do so and that if permission is withheld a note to that effect shall be entered in the record of the investigation.

B. Any person who makes a request may receive a copy of the papers unless the investigative judge considers that to provide them would affect the course or confidentiality of the investigation.

C. No person other than those previously mentioned may attend the investigation unless the investigative judge gives permission.

81. *See id.* art. 61:

A. Testimony is to be given orally but permission may be given for the witness to refer to written notes if the nature of the evidence so requires.

B. Any person who is unable to speak may give his evidence in writing or in conventional sign [sic] language if he is unable to write.

C. If a witness does not understand the language in which the investigation is being conducted, or is deaf or dumb, a person must be appointed to translate what the witness says, or interpret the witness's sign language, after taking an oath that he will translate or interpret truthfully and faithfully.

82. *Id.* art. 69:

A. The [investigative] judge or [judicial] investigator may, of his own accord or based on the request of the parties, appoint one or more experts to offer opinions on matters connected to the offense being investigated.

B. The investigative judge or [judicial] investigator may ask the expert to attend when called.

C. The [investigative] judge may permit the wages of the expert be borne by the treasury as long as the price is not unreasonably high.

83. *See infra* note 116 and accompanying text.

84. Criminal Procedure Code, art. 70:

The investigative judge or [judicial] investigator may compel the plaintiff or defendant in a felony or misdemeanour case to cooperate in physical examination or the taking of photographs, or through fingerprinting or analysis of blood, hair, nails, or other items for the purposes of the investigation. Physical examination of a female should be conducted by another female.

85. *Id.* art. 71:

of testimony is firmly entrenched: the first order of business during the formal investigation is a thoroughgoing exposition of facts by the complainant and victim.⁸⁶

So compelling is the preference for witness testimony that, while the rules regarding physical evidence are minimal or hardly referenced in the Code, the details regarding calling of witnesses are extensive. Witnesses can be summoned to appear and testify under penalty of arrest for contempt.⁸⁷ More importantly for the accused, although there is a right against self-incrimination,⁸⁸ the protection is not without its limits (either in theory or in practice) given the significance laid on in-court confessions.⁸⁹ For example, spousal communications are the only recognized category of privilege, but the privilege is not absolute.⁹⁰ All of-age witnesses questioned during the hearing speak “on oath.”⁹¹ They must identify

The investigative judge may, if necessary, give permission for the exhumation of a corpse by an expert or specialist doctor, in the presence of those with a connection who are able to attend, in order to establish the cause or [sic] death.

86. *Id.* art. 58:

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

87. *Id.* art. 59:

A. Witnesses are to be summoned by the investigative judge or [judicial] investigator to attend during the investigation by means of a writ of summons which will be served upon them by the Police or by an official of the department issuing the writ or by a village or district mayor or by any other person authorized by law. Writs of summons addressed to persons employed in government establishments or agencies or in official or semi-official departments may be served on them by their departments.

B. In the case of offences committed in the presence of witnesses the witnesses may be summoned orally.

C. An investigative judge may issue an order for the arrest of any witness who fails to attend in due time and for him to be compelled to attend in order to give evidence.

88. *Id.* art. 126(B):

The accused is not required to answer any of the questions he is asked;

see also infra Section II.E.8. Self-incrimination.

89. *See infra* text accompanying note 114.

90. Criminal Procedure Code, art. 68:

A. No married person shall be a witness against his or her spouse unless he or she is accused of adultery or an offence against the spouse’s person or property [sic].

B. One of the persons aforementioned may be a defense witness for the other and any part of his or her evidence leading to the conviction of the accused shall be deemed to be invalid.

91. *Id.* art. 60(B)-(C):

B. Each witness who has attained the age of fifteen years is to be required, before he gives evidence, to swear on [sic] oath that the evidence he will give shall be the truth. Any person who has not attained the aforementioned age may be heard

their relationship to the accused, the victim, and the complainant.⁹² Pains are taken to accommodate the live testimony of witnesses, to include the use of memory aids, sign language, and translators.⁹³ Each witness' statement must be reduced to writing and witnesses may be recalled to clarify previous testimony.⁹⁴ The preference for a live witness is so strong that the Code provides for payment of witness travel costs⁹⁵ and instructs the IJ to travel to the witness' location if necessary to procure live testimony.⁹⁶ On the other hand, once a witness is under examination, the IJ controls the nature, substance, and delivery of all questions

for the purpose of evidential inquiry without being on [sic] oath.

C. A complainant and a civil plaintiff may be heard as witnesses and may take the oath.

92. *Id.* art. 60(A):

Each witness is to be asked to state his full name, occupation, place of residence, relationship to the accused, to the victim, to the complainant and to the civil plaintiff.

93. *Id.* art. 61; *see supra* note 81.

94. *Id.* art. 63:

A. Statements by a witness shall be entered in the record or the investigation without any erasures, crossings out, amendments or additions to the text, which when complete shall be read through and signed by the witness, or if the witness cannot read shall be read out to him and then signed by the person who entered it in the record. No correction or alteration shall be accepted unless signed both by the investigative judge or [judicial] investigator and by the witness.

B. The accused and the other parties may make observations on evidence given and may ask for a witness to be questioned again, or for other witnesses to be questioned about other facts to which they refer, unless the investigative judge considers that a response to the request would be impossible or impracticable or would delay the investigation unjustifiably or would pervert the course of justice.

95. *Id.* art. 66:

If so requested by a witness the investigative judge shall assess the travel expenses and other necessary expenditure incurred by the witness, as well as any wages he has been deprived of, as a result of his attendance away from his normal place of residence, and shall order their reimbursement from Treasury funds.

96. *Id.* art. 67:

If the witness is ill or if there is anything else which prevents him from attending then the investigative judge or [judicial] investigator shall go to the witness's current place of residence in order to receive and record his evidence.

propounded to the witness.⁹⁷ Furthermore, equal in importance to the substance of the witness' testimony⁹⁸ is the IJ's assessment of the witness' credibility.⁹⁹

Most interestingly, oral testimony is not presented seriatim in the type of individual-witness question-and-answer format used in American courts; rather, witness testimony is more conversational (albeit potentially confrontational).¹⁰⁰ The conversational nature of the testimony goes beyond a witness' own observations of fact—to include observations about other evidence and even asking or suggesting that other witnesses be summoned.¹⁰¹ The only real limits on witness testimony are that (1) all questions must be vetted through the IJ, and (2) a witness' statement can be curtailed if it is irrelevant or offensive.¹⁰²

Throughout this process, an accused is, of course, entitled to representation by a retained or appointed defense attorney.¹⁰³ However, the Code does not identify any specific role the defense bar is to play.

97. *Id.* art. 64:

A. No question may be addressed to a witness without the permission of the investigative judge or [judicial] investigator and no questions may be put to a witness that are not relevant to the case or which impinge upon others. A witness may not be addressed in a declaratory or insinuating manner and no sign or gesture may be directed at him that would tend to intimidate, confuse or distress him.

B. A witness may not be prevented from giving evidence that he wishes to give and may not be interrupted while giving it, unless he speaks at undue length on matters not relevant to the case or on matters that impinge on others, offend common decency or infringe security.

98. *See infra* text accompanying notes 113-115 (noting that the IJ actually writes the summary of testimony, highlighting or downplaying facts as the IJ, in his sole discretion, deems appropriate).

99. Criminal Procedure Code, art. 65:

The investigative judge or [judicial] investigator must note in the record of the investigation anything he observes about a witness that may affect his fitness to give evidence or to sustain the process of giving evidence because of his age or physical, mental or psychological condition.

100. *Id.* art. 62:

The evidence of each witness shall be heard separately but witnesses may confront each other and the accused.

101. *Id.* art. 63(B):

The accused and the other parties may make observations on evidence given and may ask for a witness to be questioned again, or for other witnesses to be questioned about other facts to which they refer, unless the investigative judge considers that a response to the request would be impossible or impracticable or would delay the investigation unjustifiably or would pervert the course of justice.

102. *Id.* art. 64; *see also supra* note 97.

103. *Id.* art. 144:

A. The Head of the Court of Felony appoints a [sic] attorney for the accused in felonies if he has not appointed one and the court sets remuneration for the lawyer during judgment on the case. The decision to appoint the representative is considered an order of delegation. If the attorney can demonstrate a legal excuse for not accepting the brief, then it is for the head of the court to appoint an alternative [sic] attorney.

B. The appointed attorney must prepare the submission and defend the accused, or be replaced by an appointed attorney, with the court imposing a fine

The IJ's role in the judicial process ends in one of three ways: he dismisses the case with prejudice,¹⁰⁴ he closes the case temporarily due to lack of evidence or because the perpetrator cannot be identified (or, interestingly, because the incident was an act of God),¹⁰⁵ or he finds sufficient evidence that a crime has been committed and that this accused committed the crime—in which case he binds the accused over for trial.¹⁰⁶ The IJ prepares a formal dossier with summaries of all witness testimony and the statement of the accused, as well as an executive summary describing the relevant details of the case.¹⁰⁷

D. Pretrial Investigation—The Initial Judicial Phase, As Observed

Each opportunity I had to witness an Iraqi court proceeding¹⁰⁸ created lasting impressions. First, was the indelicate ballet of shuffling prisoners—marched from buses to holding cells, then to the IJ's chambers—dressed in sandals and brightly-colored jumpers. In the morning, there would be a line marching into the building, the continuity broken occasionally by an amputee hobbling in on crutches or being carried in by his fellow detainees. Their overseers orchestrated their movements at

implemented by a memo written by the head of the court to the department of implementation, without violating the procedural rules of the court, in accordance with the Law of Lawyers. He shall be exempt from the fine if at any time it is proved that he was excused from attending the session in person or through a representative;

see also supra note 17; *infra* Section II.E.7. Defense counsel issues (discussing defense counsel roles and issues).

104. Criminal Procedure Code, art. 130(A):

If the investigative judge finds that the action is not punishable by law or that the complainant has withdrawn the complaint, or that the offence is one over which he has no authority without reference to the judge, or that the accused is not legally responsible because he is a minor, he issues a decision rejecting the case and closing the case file definitively.

105. *Id.* art. 130(B)-(C):

B. If the act is punishable by law and the investigative judge finds that there is sufficient evidence for a trial, a decision is issued to transfer the accused to the appropriate court. If there is insufficient evidence he is not transferred, an order is issued for his release and the case file is closed temporarily, with a statement containing the reason for the closure.

C. If the investigative judge finds that the perpetrator is unknown or that the incident was an act of God, he issues a decision to close the case temporarily.

106. *Id.* art. 130(B).

107. *Id.* art. 131:

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

108. I readily admit that my personal observations may not be at all representative of the criminal justice system as it occurs in the court systems that have been extant throughout Iraq since the original adoption of the Criminal Procedure Code. The totality of my observations of investigative hearings occurred at the main (Al Karkh) branch of the Central Criminal Court of Iraq (CCCI), while all of my observations of trial hearings were at the Rusafa Branch of the CCCI. The relevant players were Iraqis, but the forum was a Coalition creature. Nevertheless, I am confident that the process is not *significantly* different elsewhere.

every phase—first to the dusty holding cells, then to the internal hallways adjacent to the IJs’ chambers to await the calling of their case. The courthouse almost had an atmosphere of a crowded marketplace. When their case was called, they would be ushered into the office. The IJ would sit at his large desk, which was situated in such a way that it was obvious to all present that this was his show.

The Al Karkh facility processed all criminal cases investigated and presented by Task Force 134, the Coalition unit tasked with processing persons captured by MNF-I forces. An initial review process determined whether the MNF-I detainees should be released to the Iraqi criminal justice process or held indefinitely as Coalition security internees—either because they were a potential source of ongoing actionable intelligence or because they were deemed a persistent threat, but there was insufficient releasable (unclassified) information to use against them in a criminal prosecution.¹⁰⁹ Those released to Iraqi authorities were processed in the new CCCI court system, with Iraqi judges applying Iraqi law.

The investigative hearing was an intimate setting. It was rare to have more than seven or eight people in the room, including the IJ, his recorder (judicial investigator?), the accused, the prosecutor (usually played by a U.S. military lawyer), a defense counsel, a translator or two for the U.S. military members present, a few witnesses—usually U.S. military members who had arrested the individual while on patrol—and maybe an observer or two (like me). Only on rare occasions did the defense counsel say a word during the entire hearing. Whereas one (male) Iraqi witness might be considered sufficient to establish a case ready to move forward (providing the accused confessed¹¹⁰), it was understood (maybe even a policy) that Iraqi IJs would not accept the testimony of just one U.S. military witness in any case—no matter how many photographs, diagrams, or other pieces of evidence there might be.

Task Force 134 apparently had a working relationship with the Public Prosecutor’s Office at CCCI whereby military attorneys were deputized as “Special Prosecutors”,¹¹¹ although they were obviously not Prosecutors under Iraqi law—not having been to the Judicial Institute nor falling under the Office of Public Prosecution. Although the Code does not really envision any participation by the Public Prosecutor during the investigative phase,¹¹² the Prosecutor does,

109. Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq), § 7, available at <http://www.ictj.org/static/MENA/Iraq/iraq.cpamemo3.062704.eng.pdf>.

110. Criminal Procedure Code, art. 213(B):

One testimony is not sufficient for a ruling if it is not corroborated by background information or other convincing evidence or an admission from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed;

see also infra text accompanying notes 280-283.

111. This assertion is made based on a variety of Task Force 134 documents in the possession of the author.

112. Criminal Procedure Code, arts. 40(A), 43, 46, 47(A), 84 (enumerating the duties of the Public Prosecutor); *see also* Public Prosecution Law No. 159 of 1979 (Iraq); *supra* text accompanying notes 39-44. The involvement of the Public Prosecutor’s Office in any particular criminal case is fairly superficial until a formal trial is called. The Public Prosecutor is available as a sort of Inspector General

nevertheless, have an institutional interest in monitoring developments in each case to ensure compliance with law and procedure. It was my experience that the military attorneys' participation was limited to preparing military witnesses for the hearing and accommodating their presence. It was rare that the attorneys were allowed to question a witness directly. Instead, depending on the indulgence of the IJ, they often had to request or suggest that the judge question the accused on a certain point to try to bring out some fact the attorney considered relevant. The judge might ask the question just as the attorney had suggested, he might reword it, or he might not ask it at all.

To me, the most striking aspect of the investigative hearing was that the dossier prepared and submitted by the IJ did not seem to contain any primary evidence.¹¹³ Instead, the IJ would dictate a summary of each witness' testimony, as well as a review of all diagrams and photographs mentioned during the hearing. The IJ's recorder (perhaps his judicial investigator?) would sit at the corner of his desk and transcribe his dictation in longhand onto blank sheets of paper—making a simultaneous file copy by use of carbon paper slid between two sheets of paper held by a binder clip (reportedly an Iraqi practice in all walks of life). It was this handwritten dictation that became the case file forwarded to the trial court.

The Iraqi judiciary apparently has a saying that “the confession is the master of evidence.”¹¹⁴ The IJ's true power is most poignant in the surprisingly-large majority of cases where there is a confession. On the one hand, confessions were transcribed in the same quotidian way as the IJ's executive overview of the entire case and other witness statements. On the other hand, it was in fact the IJ's terminology, not the accused's, that was ultimately adopted as the confession. I witnessed more than one IJ dictate his version of the confession and even get in sidebars—sometimes involving some amount of obvious disagreement—with the accused over just how the facts should be portrayed. In the end, the accused would adopt the statement and affix to it his mark or signature.

The foregoing practice was in sharp contrast to the level of acceptance by the IJ and trial judges alike with respect to extrajudicial confessions. Even though the Coalition forces had an extensive training program to ensure that their police patrols thoroughly documented the crime scene with photographs, diagrams, and tape recordings,¹¹⁵ the judges appear chary of accepting any confessions made to the police/military agents who effected the arrest. The judges feel a strong need to witness the confession themselves (and perhaps to massage it in their own verbiage). Accordingly, such out-of-court confessions typically hold little to no weight.

to ensure that the investigators and judges properly adhere to legal requirements. *But see* Amendment to the Law of Public Prosecution No. 159 of 1979, Law No. 15 of 1988(Iraq), art. 2.; *supra* note 44 and accompanying text (Public Prosecutor is entitled to attend investigative hearings).

113. *See supra* text accompanying notes 81-85.

114. Interview with Al-Maliki, *supra* note 18.

115. *See* Rita Boland, *Battlefield Crime Scene Investigators Gather Evidence to Stop Terrorists*, SIGNAL, Nov. 2009, at 34, available at http://www.afcea.org/signal/articles/templates/SIGNAL_Article_Template.asp?articleid=2104&zoneid=54.

E. Special Issues Under the Code

The Iraqi Criminal Procedure Code addresses a variety of issues that are not part of the investigation and trial process *per se*, but have significant bearing on them.

1. Searches and Seizures¹¹⁶

The rules regarding searches of persons or places are not unlike American Fourth Amendment jurisprudence.¹¹⁷ For example, although government officials looking for evidence of a crime may not search a person or place without prior authorization,¹¹⁸ the IJ's authority in ordering searches is quite broad.¹¹⁹

As in other areas of the law, the legal standard for the investigative judge is hazy: he simply must have reason (probable cause?) to believe that useful evidence will be found which will shed light on the investigation.¹²⁰ If necessary, authorities

116. I was never in a position to witness a field investigation, so I cannot offer any observations of whether praxis differs from theory. I can say, however, that the investigative hearings and trials I observed did not seem to utilize any seized items as evidence—relying, instead, on witness statements, photographs, and pictures drawn by the witness at the scene. To my recollection, I never observed any discussion of an objection to any search or seizure.

117. See Article 17, Section 2, Doustour Joumhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005:

The sanctity of the homes shall be protected. Homes may not be entered, searched, or violated, except by a judicial decision in accordance with the law.

118. Criminal Procedure Code, art. 72(A):

The searching or any person or entry of any house or any business premises for the purposes of a search are not permitted other than in cases stipulated by law;

see also *id.* art. 73(A):

The searching of any person or entry of a house or other business premises for the purpose of a search is not permitted unless based on an order issued by the competent legal authority.

119. See *id.* art. 70:

The investigative judge or [judicial] investigator may compel the plaintiff or accused in a felony or misdemeanour case to cooperate in physical examination or the taking of photographs, or through fingerprinting or analysis of blood, hair, nails, or other items for the purposes of the investigation. Physical examination of a female should be conducted by another female.

120. *Id.* art. 74:

If it appears to the investigative judge that a particular person is holding items or papers which would inform the investigation, he may issue a written order for the items to be submitted. If he believes that the order will not be obeyed or is worried that the items will be removed, he may conduct a search procedure in accordance with the paragraphs below;

see also *id.* art. 75:

The investigative judge may order the searching of any person or house or any other place owned by the person accused [of] committing an offence if the search may reveal the presence of documents, weapons, tools or persons who have had a part in the offence or are held against their will;

id. art. 76:

If it appears to the investigative judge, based on information or an indication, that a residence or other place is being used to keep stolen money, or that it contains items involved in an offence, a person who is being held against his will or a person who has committed an offence, he may order the search of that location

may use force to effectuate a search.¹²¹ On the other hand, despite a seeming lack of standards regarding the level of suspicion required to justify a search, searches are theoretically conducted under the aegis of an investigative judge. Thus, although there are no legal standards set forth in the Code, they are likely discussed both in law school and at the Judicial Institute. It should also be noted that there is a panoply of rights reminiscent, and perhaps more protective, of individual concerns than in American jurisprudence:

- The police may not deviate from the scope of the authorization.¹²²
- The search authorization requirement extends even to areas outside the control of the accused—where an American suspect would not have standing to contest the search.¹²³
- The default rule is that searches take place in the accused's presence; furthermore, impartial witnesses observe the search to safeguard against police impropriety.¹²⁴
- Notwithstanding the lack of a specific requirement to maintain a

and take legal measures in relation to the money or persons, whether or not the location is owned by the accused;

id. art. 77:

The person undertaking the search may search any individual at the search site on the basis that such individual may be hiding something for which the search is being conducted.

Note that Article 77 was not included in any of the original English translations of the Criminal Procedure Code. It is now extant in the GJPI version. *See supra* note 1.

121. Criminal Procedure Code, art. 81:

The person to be searched, or whose property is to be searched, in accordance with the law, must allow the persons searching to perform their duty. If he prevents the search, the person undertaking the search must carry it out through the use of force or may request police assistance.

122. *Id.* art. 78:

A search is not permissible except when looking for the items to which the search relates. If the search reveals the existence of another item indicating an offense, it may be seized.

123. There must be an authorization to search not only the person or real property owned by an accused, *see* Criminal Procedure Code, art. 75; *see supra* note 120 and accompanying text, but locations *not* owned by the defendant as well. *See* Criminal Procedure Code art. 76; *see also supra* note 120 and accompanying text.

124. Criminal Procedure Code, art. 82:

The search should take place in the presence of the accused and the owner of the house or place of business, if appropriate, and in the presence of 2 witnesses, along with the mayor or his appointee. The person conducting the search is to prepare a record in which are recorded the procedures and time of the search along with the location, items seized with descriptions, names of those present in the location as well as a note of the accused and those connected with the case and the names of witnesses. This record should be signed by the accused, the owner of the place, the person who carries out the search and those present. Any refusal to sign should be noted in the record. The accused should be given a copy or [sic] the record on request, as may those connected to the case, and copies of letters or documents should be given to their owners, if that is not detrimental to the investigation.

chain-of-custody paper trail,¹²⁵ the Code has direct safeguards against evidence tampering.¹²⁶

- Personal privacy considerations even extend to personal effects.¹²⁷
- Female body searches must be conducted by other females.¹²⁸
- Suspects may even raise objections during the course of the search¹²⁹

Iraqi law also recognizes some of the same types of exceptions to the warrant/order requirement:

- Emergency circumstances entry¹³⁰
- Plain view seizure¹³¹
- Search incident to arrest¹³²

125. *See id.* art. 42; *see also supra* note 70 and accompanying text.

126. *Id.* art. 83:

The person carrying out the search must place seals on all locations and items containing evidence needed for the investigation, which should be protected. It is not permissible to break this seal except by order of the investigative judge and in the presence of the accused and owner of the property and the person who checked the goods. If one of them is unable to attend or send a delegate, it is permissible to break the seal in his absence.

127. *Id.* art. 84:

A. If, amongst the articles in the location being searched, there are letters, documents or other personal items, it is not permissible for anyone to read them other than the person conducting the search, the investigative judge, the [judicial] investigator and a representative of the Public Prosecutor.

B. If the items seized are papers which have been sealed in any way, it is not permissible for any person other than the investigative judge or the investigator to open them and read them. This reading should take place in the presence of the accused and those connected with the location. If the papers have no connection with the case, they should be returned to the owner and not made public.

128. *Id.* art. 80:

If a female is to be searched, the search must be conducted by a female appointed for the purpose, with the identity or [sic] the searcher being recorded in the record;

see also id. art. 70:

Physical examination of a female should be conducted by another female.

129. *Id.* art. 86:

Objections to the search procedures should be submitted to the investigative judge who must make a quick decision.

130. *Id.* art. 73(B):

It is permitted to search any location without prior permission in the event of a request for assistance from a person inside the location, or in the case of fire, drowning or other similar case of necessity.

131. *Id.* art. 78:

If the search reveals the existence of another item indicating an offense, it may be seized.

132. *Id.* art. 79:

- Exigent circumstances search¹³³
- Weapons pat-down¹³⁴

Finally, it is worth noting that the Iraqi Penal Code,¹³⁵ the main source of substantive criminal law in Iraq, makes it a crime for public officials to enter a home to conduct a search without consent or proper authorization.¹³⁶

2. Compulsory Appearance—the Summons¹³⁷

At any time during the fact-gathering phase, the official may issue a summons to any person with knowledge of the case.¹³⁸ The summons is prepared in duplicate and signed by the process server and the recipient, with each receiving a

The [judicial] investigator or crime scene officer may search the person arrested in cases in which the arrest is permitted by law. In the event of the deliberate commission of a felony or misdemeanor [sic] which has been witnessed, he may inspect the house of the accused, or any place in his possession, or seize persons, papers or items which inform the investigation if there is a strong indication of their presence.

133. *Id.* art. 85:

Any person conducting a search outside the area of jurisdiction of the judge who issued it, must, before the search is carried out, refer to the investigative judge of the area in which the place to be searched is located. In urgent cases he may carry out the search immediately and then inform the investigative judge of the area.

134. *Id.* art. 107:

Anyone who arrests someone in accordance with the law must take from him any weapons he is carrying and hand them over immediately to the person issuing the arrest warrant or to the nearest police station or to any member of the police.

135. Penal Code No. 111 of 1969 (Iraq), *available at* http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf. The author is not aware of an English translation of the Code being published in the English version of The Iraqi Gazette, but this version appears to be an official translation commissioned by the Iraqi Ministry of Justice.

136. *Id.* ¶ 326:

Any public official or agent who, in the course of his official duty, enters the house of a person or any part thereof without the consent of that person or causes another to enter the house in circumstances other than those in which the law sanctions such entry or without due care to the procedures laid down for making such entry is punishable by detention plus a fine or by one of those penalties.

The same penalty applies to any public official or agent who carries out a search of a person, house or location without the consent of the owner or causes another to carry out the search in circumstances other than those in which the law sanctions such search or without due care to the procedures laid down for such search.

137. As with searches and seizures, I had no opportunity to observe the summons process either in action or being discussed during a judicial hearing.

138. Criminal Procedure Code, art. 87:

The court, investigative judge, [judicial] investigator or policeman in charge of a police station may issue a summons to the accused or to a witness or to anyone connected with the case. There should be two copies of the document on which are recorded the person issuing the summons and the person summoned, along with their place of residence, the time and place of the requested attendance, the type of offense being investigated, and the legal paragraph on which it is based.

copy.¹³⁹ In cases where the recipient refuses to sign or cannot sign (due to illiteracy?), a witness can sign the documents attesting to their delivery.¹⁴⁰ Personal service of a summons is not required: if it is known that the witness is in-country, the summons may be served on a spouse, close relative, or coworker.¹⁴¹ In fact, if no one is available to accept service of process, the summons may simply be affixed to the recipient's door, with the server and witnesses attesting to the posting.¹⁴² If the witness is in-county but outside the jurisdiction of the official issuing the summons, the server can send it to a process server who has jurisdiction in the witness' location.¹⁴³ If the witness is outside Iraq, service is accomplished by mail using the same procedures used in civil cases.¹⁴⁴ A witness who presents to the investigative judge without being summoned must submit a written pledge to appear when requested.¹⁴⁵ This places the individual under the same legal requirement to appear as a person summoned. In consequence, failure to appear is a basis for the issuance of an arrest warrant.¹⁴⁶

139. *Id.*; see also *id.* art. 88:

The person summoned notes the contents of the summons and signs the original document with his signature or finger print. The other copy is handed to him and an indication is made on the original document that notification has been carried out, which includes a statement of the time and date of notification. If the person summoned will not accept the summons or is unable to sign, the person tasked with notification must ensure that he is informed of the contents in the presence or [sic] witnesses, and leave him the other copy, after noting this on both copies, followed by his signature and those of the witnesses.

140. *Id.* art. 88.

141. *Id.* art. 89(A):

If the person summoned is not present in his home or place of work and it is found that he is present in the country, the summons can be presented to his spouse, other relatives or relatives by marriage living with him, a person working for him or an employee at his place of work, who should sign the original copy and pass him the copy. If he does not, or cannot, sign, the procedures given in Article 88 above should be followed.

142. *Id.* art. 89(B):

If the person tasked with notification does not find any of the persons mentioned above, he pins a copy of the paper on the outer door of the residence or place of work, after signing in front of witnesses, explaining the steps taken on both the copy and the original.

143. *Id.* art. 91:

A summons to a person outside the geographical jurisdiction of the authority issuing that summons is sent to a [sic] authority within the geographical jurisdiction for notification in accordance with the rules stated above.

144. *Id.* art. 90:

The notification of persons outside Iraq and of corporate bodies is done through use of a written summons in accordance with the procedures outlined in the Code for Civil Procedures.

145. *Id.* art. 96:

If a person who should have had a summons or arrest warrant issued against him, appears before the judge or [judicial] investigator, the judge must ask him for a written pledge, with or without bail, saying that he will attend at the required time. If he does not attend, and does not have a legal excuse, the judge must issue an arrest warrant.

146. *Id.* art. 97:

3. Arrest and Detention

The Iraqi Criminal Procedure Code, consistent with the overarching theme of the investigative judge leading the charge to determine whether and by whom a crime has been committed, envisions an orderly process where an arrest is authorized by the investigative judge only once the investigation has progressed sufficiently to identify a suspect. In fact, the default position in the Code is that arrests must be effectuated pursuant to a judge-issued warrant,¹⁴⁷ barring other legal authority.¹⁴⁸ The warrant specifically identifies the suspect and the general nature of the crime he is accused of committing.¹⁴⁹ Unlike summonses, which are issued for witnesses or petty criminals,¹⁵⁰ arrest warrants are not limited by the

If the person does not attend after being summoned, without a legal excuse, or if there is a fear that he will abscond or influence the investigation, or if he does not have a specific place of residence, the judge may issue a warrant for his arrest.

147. *Id.* art. 92:

Arrest or apprehension of a person is permitted only in accordance with a warrant issued by a judge or court or in other cases as stipulated by the law.

148. *See id.* art. 102:

A. Any person may arrest any other person accused of a felony or misdemeanor without an order from the authorities concerned, in any of the following cases:

- i. If the offence was committed in front of witnesses.
- ii. If the person to be arrested has escaped after being arrested legally.
- iii. If he has been sentenced in his absence to a penalty restricting his freedom.

B. Any person may, without an order from the authorities concerned, arrest any other found in a public place who is in a clear state of intoxication and confusion and has created trouble or has lost his reason;

see also id. art. 103:

Any policeman or crime scene officer must arrest any of the following if they encounter them:

- i. Any person against whom an arrest warrant has been issued by the competent authorities;
- ii. Any person carrying arms, whether openly or concealed, violating the provisions of law;
- iii. Any person thought, based on reasonable grounds, to have deliberately committed a felony or misdemeanor and who has no particular place of residence;
- iv. Any person who impedes a member of the court or public official from carrying out his duty.

149. *Id.* art. 93:

The arrest warrant should contain the full name of the accused, with his identity card details and physical description if these are known, as well as his place of residence, his profession, and the type of offence to which the warrant relates, the legal provision which applies and the date of the warrant. It should be signed and stamped by the court. In addition to the details given, the warrant should contain an instruction to members of the police force to arrest the accused, by force if he will not come voluntarily.

150. *See id.* art. 99:

In the case of an offence punishable by a period of detention exceeding one year, the accused is called to attend by the issue of an arrest warrant against him, unless the judge sanctions the issue of a summons. However, the issuing of a summons for an offense punishable by death or life imprisonment is not

judge's jurisdictional limits and thus are enforceable throughout the entire country.¹⁵¹

Police or court officers have authority to make warrantless arrests under a variety of specified circumstances.¹⁵² Citizen's arrest is also authorized.¹⁵³ Force (apparently including lethal force in cases where the alleged offense merits the death penalty) may be used to enter a place to accomplish an arrest or to subdue a person being arrested.¹⁵⁴

The orderly process anticipated by the Code is that the accused is presented to the investigative judge for initial questioning¹⁵⁵ within twenty-four hours of arrest.¹⁵⁶ Following this interrogation, the judge determines whether the arrestee

permitted.

151. *Id.* art. 94:

A. The arrest warrant is valid in all areas of Iraq and must be executed by anyone to whom it is sent. It remains current until it has been executed or cancelled by the party issuing it or by a higher authority with legal right to do so.

B. The wanted person must be informed of the warrant which has been issued for his arrest and be brought before the party who issued the warrant;

but see id. art. 100:

If the arrest warrant is to be executed outside the area of jurisdiction of the judge who issued it, the person charged with its execution should present it to the appropriate judge in the area for permission to execute it, unless he believes that the opportunity to arrest the person will be missed;

see also id. art. 101:

A. If the arrest warrant is executed outside the jurisdiction of the judge who issued it, and if there is no permission to release the accused by pledge or bail as stipulated in Article 95, the judge must detain him and send him under escort to the judge who issued the warrant.

B. If the bail put forward by the accused is not accepted, or if he is unable to make the pledge as stipulated in Article 95, the judge must detain him and send him under escort to the judge who issued the warrant.

152. *See id.* art. 103; *see supra* note 148 and accompanying text.

153. *See id.* art. 102; *see supra* note 148 and accompanying text.

154. *Id.* art. 105:

Any person who is sent an order to arrest someone, and any person charged with making an arrest in a witnessed offence must pursue the accused in order to arrest them, and if the presence of the accused is in doubt, or he hides somewhere, persons in that place should be asked to hand him over or to offer all possible facilities to enable his arrest. If this is not allowed, the person making the arrest must enter this place or any place in which the accused has taken refuge, by force, in order to arrest him;

see also id. art. 108:

If the accused resists arrest or tries to escape, the person arresting him in accordance with the law may use reasonable force to enable him to carry out the arrest and to move him without allowing him to escape, provided that this does not lead to the death of anyone who has not committed an offense for which the death penalty or life imprisonment is prescribed.

155. For discussion of the right against self-incrimination, *see infra* Section II.E.8. Self-incrimination.

156. Criminal Procedure Code, art. 123(A):

The investigative judge or [judicial] investigator must question the accused within 24 hours of his attendance, after proving his identity and informing him of

should be detained and for how long. The Code prescribes a range of pretrial-restraint time periods, depending on the punishment prescribed for the crime of which the person is accused:

- Death penalty cases: the judge may order the accused to be held indefinitely.¹⁵⁷
- Crimes punishable by up to three years detention, imprisonment for a term of years, or life imprisonment: the judge may order successive fifteen-day periods, but may release either on bail¹⁵⁸ or on a written pledge to appear.¹⁵⁹
- Crimes punishable by no more than three years of detention or a fine: the judge must order the release of the accused unless “he considers” that such release will frustrate justice.¹⁶⁰
- Persons accused of mere “infractions”: no pretrial restraint may be imposed unless the person is homeless.¹⁶¹

Under all of the foregoing circumstances, detention should not exceed one-quarter of the maximum potential sentence, and in no case longer than six months; the criminal court must approve any detention beyond six months and may not approve any detention longer than one-quarter of the maximum potential sentence.¹⁶² Detention is meant to be a temporary status¹⁶³—*i.e.*, a person is to be

the offence of which he is accused. His statements on this should be recorded, with a statement of evidence in his favour. The accused should be questioned again if necessary to establish the truth.

157. *See id.* art. 109(B):

If the person arrested is accused of an offence punishable by death the period stipulated in sub-paragraph (A) may be extended for as long as necessary for the investigation to proceed until the investigative judge or criminal court issues a decision on the case on completion of the preliminary or judicial investigation or the trial.

158. Bail issues regarding amounts, handling of funds, and seizure of personal property to satisfy debts to the court are set forth in Criminal Procedure Code, arts. 114-122.

159. *Id.* art. 109(A):

If the person arrested is accused of an offence punishable by a period of detention not exceeding 3 years or by imprisonment for a term of years or life imprisonment, the judge may order that he be held for a period of no more [than] 15 days on each occasion or order his release on a pledge with or without bail from a guarantor, and that he attend then requested if the judge rules that release of the accused will not lead to his escape and will not prejudice the investigation.

160. *Id.* art. 110(A):

If the person arrested is accused of an offence punishable by a period of detention of 3 years or less or by a fine, the judge must release him on a pledge with or without bail unless he considers that such a release will obstruct the investigation or lead to the accused absconding.

161. *Id.* art. 110(B)

If the person arrested is accused of an infraction, he may not be held unless he has no particular place of residence.

162. *Id.* art. 109(C):

The total period of detention should not exceed one quarter of the maximum permissible sentence for the offence with which the arrested person is charged

held only so long as is necessary to conduct the investigation.¹⁶⁴ If a detainee is exonerated, he is to be released immediately.¹⁶⁵

The foregoing plethora of specific provisions in the Iraqi Criminal Procedure Code is bolstered by a variety of others elsewhere in Iraqi law. For example, the post-Saddam Hussein Iraq Constitution provides a number of references to minimum standards regarding treatment of criminal suspects. Starting from the idealized concepts that human dignity is to be “protected,”¹⁶⁶ that the accused is presumed innocent until proved guilty,¹⁶⁷ and that individuals have the right to be treated with justice in all judicial proceedings,¹⁶⁸ the Constitution specifically prohibits “unlawful detention.”¹⁶⁹ The Constitution also goes so far as to specify that “no person may be kept in custody or investigated except according to a judicial decision”¹⁷⁰ and that preliminary investigative documents must be submitted to an IJ within twenty-four hours of “arrest”—this period being extended at most only once for an additional twenty-four hours.¹⁷¹ All persons

and should not, in any case, exceed 6 months. If it is necessary to increase the period of detention to more than 6 months, the judge must submit the case to the Felony Court to seek permission for an appropriate extension, which must not itself exceed one quarter of maximum permissible sentence, or he should order his release, with or without bail, under the terms of sub-paragraph (B).

163. *But see* Modifications of Penal Code Proceedings Law, CPA Order No. 31 of 2003 (Iraq), § 6 : Notwithstanding the bail provisions contained in Paragraph 109 of the Criminal Proceedings Law No. 23 of 1971 the reviewing judge may order a person suspected of committing an offense punishable by life imprisonment to be held without bail until trial.
164. Criminal Procedure Code, art. 111:
The judge who issued the decision to detain the accused may decide to release him on a pledge, with or without bail, before the end of the period of detention stipulated in sub-paragraph (B) of Article 109, and he may return him to the holding detention if necessary for the investigation.
165. *Id.* art. 130(D):
An accused who has been detained will be released once the decision to reject the case or to release him has been issued.
166. Article 37, Section 1(A), Doustour Joumhourait al-Iraq [The Constitution of the Republic of Iraq] of 2005:
The liberty and dignity of man shall be protected.
167. *Id.* Article 19, Section 5:
The accused is innocent until proven guilty in a fair legal trial. The accused may not be tried for the same crime for a second time after acquittal unless new evidence is produced.
168. *Id.* Article 19, Section 6:
Every person shall have the right to be treated with justice in judicial and administrative proceedings.
169. *Id.* Article 19, Section 12(A):
Unlawful detention shall be prohibited.
170. *Id.* Article 37, Section 1(B):
No person may be kept in custody or investigated except according to a judicial decision.
171. *Id.* Article 19, § 13:
The preliminary investigative documents shall be submitted to the competent judge in a period not to exceed twenty-four hours from the time of the arrest of

accused of felonies or misdemeanors have a constitutional right to court-appointed defense counsel¹⁷² and to present a defense in all phases of investigation and trial.¹⁷³

The Iraqi Penal Code¹⁷⁴ actually enumerates several crimes applicable to government officials who violate a suspect's rights regarding detention:

- It is a crime to arrest, detain, or imprison any person in circumstances other than those stipulated by law.¹⁷⁵
- It is a crime for detention facility and prison officials to accept prisoners without a valid detention or imprisonment order.¹⁷⁶
- It is a crime to willfully fail to execute the duties of one's office¹⁷⁷ or to commit an act in breach of one's duties with intent to harm the welfare of an individual.¹⁷⁸
- It is a crime to maltreat a private citizen, causing him to suffer a loss of esteem or dignity or to experience physical pain.¹⁷⁹

the accused, which may be extended only once and for the same period.

172. *Id.* Article 19, § 11:

The court shall appoint a lawyer at the expense of the state for an accused of a felony or misdemeanor who does not have a defense lawyer.

173. *Id.* Article 19, Section 4:

The right to a defense shall be sacred and guaranteed in all phases of investigation and the trial.

174. Criminal Procedure Code No. 23 of 1971, art. 107; *see supra* note 134.

175. Penal Code No. 111 of 1969 (Iraq), art. 322, available at http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf:

Any public official or agent who arrests, imprisons or detains a person in circumstances other than those stipulated by law is punishable by a term of imprisonment not exceeding 7 years or by detention. The penalty will be a term of imprisonment not exceeding two years or detention if the offence is committed by a person wearing an official uniform to which he is not entitled or who uses a false identity or makes use of a counterfeit order claiming it to have been issued by an authority that is entitled to issue such orders.

176. *Id.* art. 324:

Any public official or agent who is entrusted with the administration or supervision of a centre, prison or other institution set aside for the discharging of a penalty or precautionary measure and who admits a person without an order to do so from a competent authority or refrains from implementing an order issued for the release of such person or for his continued detention following the period prescribed for his custody, detention or imprisonment is punishable by detention.

177. *Id.* art. 330:

Any public official or agent who unlawfully refrains from executing the duties of his office or wilfully [sic] fails to fulfil [sic] his duties in response to a request or instruction or to mediation by another or for any unlawful reason is punishable by detention.

178. *Id.* art. 331:

Any public official or agent who wilfully [sic] commits an act in breach of the duties of his office or refrains from executing the affairs of that office with intent to harm the welfare of an individual or to benefit one person at the expense of another or at the expense of the state is punishable by detention plus a fine or by one of those penalties.

In sum, legal authorities abound for ensuring that no individual is held longer than appropriate. Unfortunately, as noted in the next section, a disconnect exists between black-letter law and reality.

4. Arrest and Detention, Some Observations¹⁸⁰

Arrest and detention truly deserve their own treatment as they literally became an issue of overwhelming importance. In 2007, my task force was created, in part, to try to address the issue of the large number of detainees—some four to five thousand—being held at Rusafa Prison on the outskirts of Baghdad. This group was a mix of unfortunate souls: most were in pretrial detention and had been there for two or three years without having seen a judge. Some of them were accused of crimes whose maximum potential sentences were less than the time they had spent in detention; some had actually been through the judicial process and were either acquitted or deemed releasable due to insufficient evidence. The prison was literally bursting at its seams, and officials were scrambling to create a permanent tent city in the adjacent field to relieve the pressure.

A number of causes exist for the overcrowding problem: the religious prejudices of judges who were ill-inclined to release an individual not of the judge's own religious persuasion; the dismal state of security at courthouses, which directly impacted the number of hours judges dared to work; and the successes of the Coalition-backed patrols, which apprehended accused terrorism suspects in large numbers.¹⁸¹ However, perhaps the biggest culprit was the all-entrance, no-exit nature of the detention system: judges simply had no realistic incentive to release prisoners. This, in turn, was a function of the process in which detainees entered the system.

Most on-scene criminal investigations are conducted by Ministry of Interior (MOI) personnel—either Iraqi National Police, Iraqi Police, or investigators from the MOI Criminal Investigations Division (CID).¹⁸² Many police precincts, at least

179. *Id.* art. 332:

Any public official or agent who cruelly treats a person in the course of his duties thereby causing him to suffer a loss of esteem or dignity or physical pain is punishable by a period of detention not exceeding 1 year plus a fine not exceeding 100 dinars or by one of those penalties but without prejudice to any greater penalty stipulated by law.

180. This paper will not address the collateral issue of security detainees—*i.e.*, those persons seized by coalition forces following the 2003 occupation of Iraq. A review process was created to determine whether such individuals should be released to civilian authorities to be prosecuted for their crimes under substantive Iraqi criminal law—including the provisions of the well-used Anti-Terrorism Law No. 13 of 2005 (Iraq), promulgating a capital offense of “terrorist acts”—or whether they should be retained by coalition forces and held indefinitely without charge—either because they were deemed to be a potential source of valuable intelligence or they were deemed a security risk but there was insufficient releasable (read unclassified) information to secure their conviction in an Iraqi tribunal. *See* Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq), §§ 5-6 (providing specific substantive and procedural rights for criminal detainees and MNF Security Internees).

181. Interview with Colonel Mazin and Captain Hayder, Officials with MOI Records Department, in Baghdad, Iraq (Oct. 2007- Nov. 2007).

182. *Id.*

in Baghdad, have resident investigative judges (or close access to a judicial facility) who can issue arrest warrants on short notice. MOI personnel thus bring the individuals arrested into the system, and their case file is created at the local level. The MOI personnel eventually transfer them to a regional holding facility before ultimately passing them to the custody of the Ministry of Justice (MOJ), which owns both the courts and the prisons. The case file, however, is transferred to one of the two main police General Directorates in Baghdad—al-Karkh and al-Rusafa.¹⁸³

It appears that the MOJ apparatus does not have accurate copies of the MOI information. Thus, when the deadline for release comes up, no judge can make an accurate assessment of whether the individual should be released because the case file is incomplete.

The normal procedure should be for the investigative judge to issue a “straight release” (the individual is to be released immediately) or a “conditional release” (the individual is to be released if he is not otherwise wanted on criminal charges).¹⁸⁴ However, the process of determining whether a person is otherwise wanted can take days, weeks, or even months.¹⁸⁵ The prison officials (MOJ employees) query the police precinct (MOI employees) that made the original arrest whether it has any other outstanding warrants on the same person. If that precinct has other warrants outstanding, it responds directly. If not, a process is initiated to query all police precincts throughout the country.¹⁸⁶ The local police precinct forwards the request up through its regional police headquarters to the provincial police headquarters, which sends it to a MOI central office with a request to query neighboring provinces.¹⁸⁷ An MOI official duly notes the request and sends copies to the other provincial police headquarters, which in turn send the request on down.¹⁸⁸ Responses have to follow the same path up through MOI and back to the originating police precinct, before returning it to the (MOJ) prison officials.¹⁸⁹ This time-intensive process has no real solution in the near term: even if local police precincts had computers and electricity to run them, no centralized database exists where such information might be posted. Although there is, as I was told by an MOI official, a policy that all police units must send a letter to the Police Affairs Division at MOI informing it of all arrests, there is no similar process for the issuance of arrest warrants.¹⁹⁰ Of course, the problem is exacerbated by inter-ministry rivalries: MOI employees have no incentive to maintain a database of arrest warrants issued by investigative judges (MOJ employees).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

Sadly, a data stream already exists that could be used to shorten this timeline significantly. All local precincts mail a report containing copies of all outstanding arrest warrants and their current detainees to MOI twice a month.¹⁹¹ The officials who receive the reports do not enter the information into any database or ledger. Instead, as I witnessed firsthand, they are permanently “archived” in various boxes stacked in closets or on top of shelving units at the MOI main headquarters.

Notwithstanding the maximum pretrial detention periods mandated in the Code,¹⁹² government officials have no incentive to actually order release from pretrial confinement. Prison funding appears to be based on occupancy rates, so the warden wants to retain as many individuals as possible. Judges do not want to be known as having ordered the release of an individual later found to be guilty or a recidivist. Accordingly, the default is that “temporary” pretrial detention orders are automatically renewed unless affirmatively overridden.¹⁹³ Correlative to the foregoing, the granting of bail seems to be a rare phenomenon.

5. Habeas Corpus, Some Thoughts

The dismal track record regarding unjustified pretrial detentions indicates that the constitutional and codal rights discussed above are not self-executing. It also indicates that a *habeas corpus* right of action under Iraqi law does not exist. Because the IJ really “owns” the entire criminal justice process from initial arrest through referral to trial (he oversees all investigations and collection of evidence, he issues the arrest warrants, and he conducts the formal “discovery” process of the investigative hearing), he is theoretically empowered to dismiss charges or take any other action necessary to ensure justice in an individual case. A *habeas corpus* proceeding is designed to compel the agency with control over a detainee to justify to an impartial judge its basis for continued detention of the accused. However, because the IJs are both the agency and the judge, a *habeas* proceeding would essentially consist of the judge issuing himself a show cause order. Put that way, the absurdity of the situation is clear.

Is there, then, any remedy in cases where the arrest/detention warrant has lapsed? According to the attorneys who take cases as appointed defense counsel at the Rusafa branch of the Central Criminal Court of Iraq, no remedy exists. They assert that if a complainant has filed a formal charge and a suspect has been formally arrested (pursuant to a warrant issued by an IJ), the judge “has to give” an extension when the warrant expires.

6. Plea Bargaining, Some Thoughts

The concept of plea bargaining seems just as ill-fitting in the Iraqi system as does a *habeas corpus* claim. Because a case still has to be investigated prior to trial,¹⁹⁴ an accused’s in-court confession speeds the process along only ever so slightly. However, upon reflection, it would seem that a defendant could spend his

191. *Id.*

192. *Id.*

193. *Id.*

194. *See infra* notes 235-36 and accompanying text.

allotted testimony time introducing mitigating evidence in hopes of leniency in sentencing. In the end, however, it seems that mitigation factors are something the judges would adduce during the course of the investigation and trial. As such, the accused's compliance may not be afforded any weight.

7. Defense Counsel Issues¹⁹⁵

The health of the Iraqi defense bar has been an issue of concern for some time. Attorneys who support themselves as defense counsel are in an unenviable dilemma. They simply cannot afford to take work only as appointed defense counsel because the fees for each case only amount to the equivalent of twenty to forty U.S. dollars. To make matters worse, the process of paying their vouchers takes at least a year. On the other hand, in the occasional cases where they are retained by a client, they can command fees of one thousand to four thousand U.S. dollars—but then they face animosity from the judges whose salary is significantly less. They also face the very real possibility of retaliation from a complainant's family—or from members of the general community—who assume that those defending suspects accused of terrorism are themselves aligned with terrorist organizations.

The attorneys readily admit that the low fees definitely impact their motivation in appointment cases, but they also admit they can have little impact on a case even when they are motivated. They blame their inability to impact a case on the lack of motivation of salaried investigative judges who have no incentive to invest effort in pursuing a missing case file.

8. Self-Incrimination

The Iraqi Penal Code¹⁹⁶ specifically prohibits the use of torture by officials to extract a confession.¹⁹⁷ In addition, the new Iraq Constitution prohibits psychological and physical torture as well as inhumane treatment; it specifically provides that coerced confessions “shall not be relied on.”¹⁹⁸ It also provides that persons made to confess under duress “shall have the right to seek compensation for material and moral damages incurred in accordance with the law.”¹⁹⁹ It is up to Iraqi judges to ensure that these provisions are meaningful. It may precisely be the spirit of these provisions that gives rise to anecdotal evidence of judges discrediting confessions that may have been coerced.

195. See *supra* note 17.

196. Penal Code No. 111 of 1969 (Iraq), available at http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf; see also *supra* note 135.

197. *Id.* art. 333:

Any public official or agent who tortures or orders the torture of an accused, witness or informant in order to compel him to confess to the commission of an offense or to make a statement or provide information about such offence or to withhold information or to give a particular opinion in respect of it is punishable by imprisonment or by detention. Torture shall include the use of force or menaces [sic].

198. Article 37, § 1(C), Doustour Joumhourait al-Iraq [The Constitution of the Republic of Iraq] of 2005.

199. *Id.*

By law, an accused is questioned shortly after arrest.²⁰⁰ Prior to questioning, the accused must be informed of, and understand, the right to remain silent and to have an attorney provided at no expense.²⁰¹ An accused's assertion of rights must be scrupulously honored,²⁰² and the interrogation must otherwise be free of coercion.²⁰³ The IJ or investigator then records the accused's statement²⁰⁴ (which

200. Criminal Procedure Code No. 23 of 1971 (Iraq), art. 123(A):

The investigative judge or investigator must question the accused within 24 hours of his attendance, after proving his identity and informing him of the offence of which he is accused. His statements on this should be recorded, with a statement of evidence in his favour. The accused should be questioned again if necessary to establish the truth.

201. *Id.* art. 123(B)-(C):

B. Before questioning the accused the investigative judge must inform the accused that:

- i. he or she has the right to remain silent and no adverse inference may be drawn from accused's decision to exercise that right;
- ii. he or she has the right to be represented by an attorney, and if he or she is not able to afford representation, the Court will provide an attorney at no expense to the accused.

C. The investigative judge or investigator must determine whether the accused desires to be represented by an attorney before questioning the accused. If the accused desires an attorney, the investigative judge or investigator shall not question the accused until he or she has retained an attorney or until an attorney has been appointed by the court.

Note that subparagraphs (B) and (C) were added by Criminal Procedures, CPA Memorandum No. 3 of 2003 (Iraq).

202. Criminal Procedure Code, art. 126(B):

The accused is not required to answer any of the questions he is asked;

see also id. art. 123(C); *supra* note 201.

203. Criminal Procedure Code, art. 127:

The use of any illegal method to influence the accused and extract an admission is not permitted. Mistreatment, threats, injury, enticement, promises, psychological influence, or use of drugs or intoxicants are considered illegal methods;

see also Article 37, Section 3, Doustour Joumhourait al-Iraq [The Constitution of the Republic of Iraq] of 2005:

All forms of psychological and physical torture and inhumane treatment are prohibited. Any confession made under force, threat, or torture shall not be relied on, and the victim shall have the right to seek compensation for material and moral damages incurred in accordance with the law.

204. Criminal Procedure Code, art. 128:

A. Statements of the accused are recorded in the written record by the [investigative] judge or investigator and signed by the accused and the [investigative] judge or investigator. If the accused is unable to sign, this should be recorded on the written record.

B. If the statement of the accused includes an admission to the commission of an offence, the judge must record the statement himself, and read it back after a period of time. The judge and accused must then sign. If the accused would like to write down his statement in his own hand, the judge must enable him to do this, but it must be in the presence of the judge who must sign it, along with the accused, and after recording this in the written report.

is unsworn²⁰⁵), including any exculpatory details or evidence adduced by the accused that the judge deems to be admissible.²⁰⁶

At any time during the investigative hearing, the accused has the right to make statements, to discuss the statements of other witnesses, and to request that witnesses be summoned.²⁰⁷

If an accused's statement implicates a co-defendant, the cases are severed,²⁰⁸ presumably so that a co-defendant is not convicted based on the unsworn statement of his partner in crime. It appears that Iraqi law makes no provision for testimonial immunity, but it does specifically allow the grant of transactional immunity: an IJ can, with permission of the trial court, immunize an accused in order to receive sworn testimony²⁰⁹ against a co-conspirator.²¹⁰ If the trial court ultimately accepts the witness' testimony as "full and true," his charges are released with prejudice.²¹¹ If the court doubts his testimony, he not only remains on the hook for his previous charges, but his testimony is used against him—although (since the court believes the statement to be a prevarication) the statement at that point is presumably considered only for its value as a mendacity qualifier rather than for the truth of the matter asserted.²¹²

205. *Id.* art. 126(A):

The accused does not swear the oath unless acting as a witness for other accused persons.

206. *Id.* art. 128(C):

Testimony which the accused asks to present in his defence should be recorded in the written report along with investigation of other proof presented by him, unless the investigative judge decides not to grant the accused's request, because he believes it be an unjustified attempt to impede the investigation, or to mislead the judge.

207. *Id.* art. 124:

The accused has the right to make his statement at any time after listening to the statements of any witness, and to discuss it or to request that he is summoned for this purpose.

208. *Id.* art. 125:

If it becomes clear that the accused is a witness against another accused, his testimony is recorded and the two cases are separated.

209. *Id.* art. 126(A); *see supra* note 205.

210. *Id.* art. 129(A):

The investigative judge may offer immunity with the agreement of the Felony Court, for reasons recorded in the record, to any person accused of an offence, in order to obtain his testimony against others involved in its commission, on condition that the accused will give a full and true statement. If he accepts the offer, his testimony is heard and he remains an accused person until a decision on the case is issued.

211. *Id.* art. 129(C):

If the Felony Court finds that the statement given by the accused who has been offered immunity is full and true, then it will halt permanently legal proceedings against him and release him.

212. *Id.* art. 129(B):

If the accused does not submit a full and true statement, whether through deliberate concealment of any important issue or through false statements, he loses his right to immunity by decree of the criminal court, and procedures are

9. Hearsay

It appears that the court may accept extrajudicial statements made by a witness in another case if the court is convinced that it is impossible to procure the witness to testify in the current case.²¹³ The same rule seems to apply to extrajudicial confessions.²¹⁴

Despite the right to silence during the investigation phase,²¹⁵ the trial “court may ask the defendant any questions considered appropriate to establish the truth before or after issuing a charge against him.”²¹⁶ Furthermore, “[a] refusal to answer will be considered as evidence against the defendant.”²¹⁷ Any previous statements given by the defendant will then be read and used against him.²¹⁸ In fact, the court has “absolute [discretionary] authority” to accept or reject any statements collected at any time throughout the investigative and hearing process.²¹⁹

taken against him for the offense for which he was offered immunity or any other related offense. His statements are used as evidence against him.

213. *Id.* art. 217(A):

The court has absolute authority in evaluating the accused’s admission and acting upon it whether it was given in front of the court, in front of the investigative judge, during other court hearing of the same case or in another case, even if the witness subsequently withdraws his statement. The court can accept his confession to the [judicial] investigator if there is enough evidence to convince it that the investigator did not have sufficient time to present the accused to the [investigative] judge so that his confession could be recorded.

214. *Id.* art. 217(B):

Admissions may not accepted be [sic] if the conditions stipulated in A are not present.

215. *Id.* art. 126(B):

The accused is not required to answer any of the questions he is asked.

216. *Id.* art. 179:

The court may ask the accused any questions considered appropriate to establish the truth before or after issuing a charge against him.

217. *Id.* The extensively-annotated version of the Criminal Procedure Code on the *Global Justice Project: Iraq*, *supra* note 1, discusses—in the introductory notes and again in a footnote to CPC Article 179—a botched attempt by the Coalition Provisional Authority (CPA) to delete the second sentence of CPC Article 179, adding that, regardless of the validity of the deletion, the sentence should be correctly rendered in English as: “A refusal to answer will NOT be considered as evidence against the defendant.” Criminal Procedure Code, art. 179, n.63. It is impossible to know how well the niceties of this discussion are known to most Iraqi judges.

218. *Id.* art. 180:

If the accused refuses to answer questions directed to him or if his answers are contradictory or contradict his previous statements, the court may order the reading and hearing of the accused’s earlier answers and statements.

219. *Id.* art. 215:

The court has absolute authority in evaluating the testimony. It can either fully accept it or reject it, accept the statements given by the witness during the police investigation or during reports from the initial [judicial] investigation or given in front of another court in the same case, or completely reject the witness’ statements.

10. Evidence

As noted above, no body of black-letter law exists covering limitations on collection and consideration of evidence in Iraqi criminal jurisprudence.²²⁰ About the closest the Code comes to discussing evidence is its tangential reference to chain of custody²²¹ and a provision stating that the court may consider any statement made by a victim under threat of death.²²²

11. Insanity

If it appears that an accused is mentally incapable of preparing his own defense, a medical committee conducts a mental health examination on him.²²³ The court places the case on hold and he is institutionalized.²²⁴ If the court authorizes bail, it may release the accused to his relatives on the condition that they commit to procure appropriate mental health treatment.²²⁵ If the medical committee determines that he was not criminally responsible due to mental illness at the time of the action under review, the court enters a finding of “diminished responsibility” and the accused is released to his family—on the condition that he will undergo appropriate treatment.²²⁶

220. *See supra* note 29.

221. Criminal Procedure Code, art. 42:

Crime scene officers are required to use all possible means to preserve evidence of an offence.

222. *Id.* art. 216:

The court may accept the statement of a dying victim as evidence relating to the offence and its perpetrator or any other related matter.

223. *Id.* art. 230:

If it appears during an investigation or proceedings, that the accused is not able to conduct his own defence on the grounds of mental illness, or if the situation requires an examination of his mental faculties in order to test his criminal responsibility, the investigation or court proceedings are suspended, by decision of the investigative judge, or court, and, if he has been charged with an offence for which he cannot be released on bail, he is placed under supervision in a government health institution, capable of treating mental illness. For other offences, however, he is placed in a government, or non-government health institution, at his expense on the request of whoever is acting on his behalf in law, or at the expense of his family, on payment of a surety by a guarantor. A specialist government medical committee is charged with carrying out an examination and presenting a report on the state of his mental health.

224. *Id.*

225. *Id.* art. 231:

If it appears from the report of the committee referred to in Article 230 that the accused is not able to present his own defence, the investigation is postponed until he has sufficient mental awareness to make his own defence, and he is placed under the supervision of a government health institution if he is accused of an offence for which he cannot be released on bail. But in the case of other offences, he can be handed over to one his relatives on a surety from a guarantor, on condition that a commitment is made that he should receive treatment in Iraq, or elsewhere.

226. *Id.* art. 232:

If it appears from the decision of the medical committee that the accused was not criminally responsible owing to mental illness at the time the offence was

F. The Trial

Iraqi penal courts—as opposed to the investigative courts—are divided by subject matter jurisdiction between the Court of Misdemeanor, the Court of Felony, and the Court of Cassation.²²⁷ The Central Criminal Court of Iraq, by the terms of its incorporation, is a hybrid forum with jurisdiction over both felonies and misdemeanors.²²⁸

As a case wends its way from the investigative court to the trial court, the case and the status of the individual go through a variety of simultaneous transitions. For example, some available translations of the Code, without explanation, change the nomenclature of the individual from accused to defendant.²²⁹ The nature of the case also seems to begin to solidify: whereas an investigation may have covered multiple accused and multiple crimes, the Iraqi penal system favors separate trials of the same accused for separate crimes;²³⁰ joinder of criminal charges only occurs

committed, the judge will decide diminished responsibility and the court will issue a judgment of diminished responsibility and will take whatever action is necessary for handing him over to one of his relatives, on payment of a guarantee, to undergo whatever treatment is necessary.

227. *Id.* art. 137(A):

Penal courts are the Court of Misdemeanor, Court of Felony and Court of Cassation. These courts have jurisdiction to consider all criminal cases with a few special exceptions.

The Court of Cassation is an appellate court with “jurisdiction to review provisions and rulings issued on felonies, misdemeanors, and other cases stipulated by law.” *Id.* art. 138(C):

The Court of Cassation has jurisdiction to review provisions and rulings issued on felonies, misdemeanors and other cases stipulated by law.

It also reviews all death sentences. *Id.* art. 254(A):

If the Criminal Court has issued a sentence of death or life imprisonment, it must send a file on the case to the Court of Cassation within ten days of the issue of the judgment, so that it can be reviewed for cassation, even if an appeal has not been lodged;

see also id. art. 224(D):

If the court issues a death sentence, it must explain to the person given the sentence that his case papers will be sent automatically to the Court of Cassation for review. He may also appeal against the ruling at the Court of Cassation within 30 days, starting from the day after the ruling has been issued.

228. CPA Order No. 13, § 18 (The CCCI has “nationwide discretionary investigative and trial jurisdiction over any and all criminal violations,” but is commissioned to specifically focus on cases involving terrorism, organized crime, government corruption, acts against democratic institutions, hate crimes (violence based on race, nationality, ethnicity, or religion), and cases where individuals would not be able to get a fair trial in a local court.); *see also supra* text accompanying notes 4-9.

229. This is the case with the version posted on the *Grotian Moment Blog*; the *GJPI* version continues to use the term “accused.” *See supra* note 1.

230. Criminal Procedure Code, art. 188:

- A. One charge is made for each offence ascribed to a particular individual.
- B. One charge is made for multiple offences as stipulated in sub-paragraph 132(A).
- C. One charge is made for each connected offence as stipulated in sub-paragraph 132(B).
- D. It is permissible to make one charge against all the perpetrators of one offence.

where the offenses are closely related—as a single string of events, as arising from a single common purpose, or as similar offenses against multiple victims.²³¹ However, several defendants' cases will be consolidated if they involve a single crime.²³² Furthermore, just as an accused can be tried *in absentia*,²³³ an absent defendant's case is not severed when there are multiple accused for a single crime.²³⁴

Still, every defendant has an inviolable (perhaps unwaivable) right to an investigation on all crimes with which he will ultimately be charged²³⁵—even for

E. There will be a trial for each charge.

F. The trial will take place as if for a single case under the circumstances stipulated in Articles 132 and 133.

231. *Id.* art. 132(A):

If several offenses are attributed to the accused, a single case is brought against him in the following circumstances:

- i. If the offences resulted from one action;
- ii. If the offences resulted from actions linked to each other and for a common purpose;
- iii. If the offences are of the same type and are committed by the same defendant against the same victim, even if they occur at different times;
- iv. If the offences are of the same type and occurred within one year against different victims, on the condition that there are no more than 3 victims for each case.

232. *Id.* art. 133; a single case is brought as stipulated in Article 132 if there are several accused, whether as principals or accessories.

233. *Id.* art. 135:

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

Procedures related to appeal of *in absentia* guilty verdicts are set forth in Criminal Procedure Code, arts. 243-48. Notice of the outcome of the case, and issuance of arrest warrants are in Criminal Procedure Code, art. 149:

A. The trial of an absent accused or one who has absconded is conducted according to the guidelines for the conduct of trials where the accused is present.

B. Notification of the *in absentia* judgement is given to the person against whom the judgement has been made. If the accused has absconded at the time of notification, notification is given as stipulated in Article 143.

C. The court issues an arrest warrant against the person who has been sentenced *in absentia* to a penalty restricting his freedom, for a felony or misdemeanor;

see also id. art. 151:

In the case of an accused who absconds after presenting his defence but before the issue or [sic] a verdict, without informing the court of any legal excuse, an arrest warrant is issued, requiring him to attend for delivery of the verdict.

234. *Id.* art. 148:

If there are a number of accused and amongst them is one who has absconded or is absent, the trial of those who are present takes place, as does the trial of those absent, but the case of those who are present takes precedence over the case of those who are absent.

235. On the timing of the official charge, *see infra* Section II.F.1. The Formal Charge.

felonies committed in open court.²³⁶ Thus, if evidence comes to light implicating a suspect who is not before the court, the case *sub judice* may be suspended pending an investigative hearing as to the newly accused, or the single defendant who has already been before an investigative judge may be tried on his or her own accord.²³⁷

Criminal trials in Iraq, as in other civil law jurisdictions, are meant to be succinct.²³⁸ The business rules for the entire hearing are laid out in one short article of the Code:

The trial begins with the summoning of the defendant and other parties and the formal identification of the defendant. A decree of transfer is then issued. The court hears the testimony of the complainant and the statements of the civil plaintiff, then sees the evidence and orders the reading of the reports, investigations and other documents. The statements of the defendants are then heard, along with the petitions of the complainants, civil plaintiff, civil prosecutor and public prosecutor.²³⁹

When a trial court receives a case dossier from an IJ, it sets a trial date and notifies the defendant and all relevant witnesses and parties.²⁴⁰ If the accused cannot be found, public notice is provided and he may be tried *in absentia*.²⁴¹

236. Criminal Procedure Code, art. 159:

A. If a person commits a misdemeanor or infraction whilst in the court room, the court may evaluate the case against him at the time, suspending the initial case and making a ruling after listening to statements from a representative of the Public Prosecutor, if present, and statements in defense of the person mentioned, or transferring him to an investigative judge after making a written record of the incident.

B. If a felony is committed, the court makes a written record of the event and transfers the accused to an investigative judge for the necessary legal steps to be taken.

237. *Id.* art. 155:

A. It is not permissible to try any accused who has not been referred to the court.
B. If it becomes clear to the court before judgment on a case is made, that there are other persons linked to the offence, either as principals or as accessories, and procedures have not been taken against them, it may consider the case with regard to the accused present, and request that the investigative authorities take legal proceedings against the other persons or decide to suspend the case until the investigation has been completed.

238. I have not heard of any trial lasting longer than an hour. Most take less than half that time.

239. *Id.* art. 167.

240. *Id.* art. 143(A):

The court, on receipt of the case file, must set a date for the trial and inform the Public Prosecution, the accused and those with any connection and any of the witnesses who are to testify, by means of a written summons, at least one day before the trial in the case of an infraction, three days before for a misdemeanour and 8 days before for a felony. Informing the accused's attorney of the order to attend does not dispense with the need to inform the accused.

241. *Id.* art. 143(C):

If it becomes clear, once the notification has been issued, that the accused has

As in the investigative hearing, all live witnesses attend the hearing together. They testify under oath,²⁴² but, as in the investigative hearing, they provide spontaneous statements rather than simply responding to interrogatories. The judges, the prosecutor, the defense counsel, the complainant—even other witnesses—may then ask questions to clarify the witness' testimony.²⁴³ There is no verbatim transcript of court proceedings, so the entire hearing looks more like “Question Time” in Parliament than a deposition²⁴⁴—including the fact that the defendant is standing in a dock at the center of the courtroom rather than sitting at a defense table or on a witness stand to the side of the judges' bench.²⁴⁵

Any individual with relevant information²⁴⁶ to provide on the case at hand may come forward or be summoned as a trial witness.²⁴⁷ Purposely withholding information from the court is grounds for a contempt finding.²⁴⁸

absconded, a summons or arrest warrant is pinned up at his place of residence if known, published in two local newspapers and announced on the radio or television in the case of significant felonies or misdemeanours, in accordance with a decision by the court. An appointment is set for the trial within a period of no less than one month from the last date of publication in the newspaper for a misdemeanour or an infraction and two months for felonies;

see also id. art. 147(A):

The trial will take place when the two parties attend. If the accused has absconded or is absent without legal excuse, despite his having been informed, a trial will take place in his absence.

242. *Id.* art. 168(A):

Before giving testimony each witness is asked to give his full name, profession, age, place of work and relationship to the parties. Before giving his testimony, he must swear that he will speak the truth and nothing but the truth.

243. *Id.* art. 168(B)-(C):

B. The witness gives his testimony orally and he may not be interrupted during its delivery. If he is unable to speak due to disability, the court will give him permission to write his statement. The court may ask any questions necessary in order to clarify the facts after completion of the testimony. The Public Prosecution, complainant, civilian plaintiff, a civil official and the accused may discuss the testimony and ask questions and request clarifications to establish the facts.

C. It is permissible to remove the witness whilst the testimony of another witness is being heard and the witness may be confronted by another witness during the testimony.

244. *See id.* art. 175:

The court may, either on its own or at the request of the parties, request discussion of a testimony or return to its discussion and seek clarification of what the witness has said in order to establish the facts.

245. This is a personal observation of various courtrooms in Baghdad.

246. *Id.* art. 169:

The testimony should be based on the facts which the witness is able to recall through one of his senses;

but see id. art. 214:

The court must decide that the witness is not fit to give testimony if it becomes clear he is unable to remember details of the event or that he is not fully aware of the of value of the testimony he is giving due to his age or his physical or psychological state.

247. *Id.* art. 171:

In the event a witness is unable or unwilling to testify, the court may use previous testimony to bolster, supplement, or constitute witness testimony.²⁴⁹ The court may dispatch a judge or other representative of the court to take the testimony of a witness unable to attend the trial, in which case the parties or their representatives may attend and participate in the taking of the testimony.²⁵⁰

The court may hear the testimony of anyone who attends the trial and anyone who puts himself forward with information. It may summon any person to attend to deliver his testimony if it is considered that this testimony will help establish the truth;

see also id. art. 174:

A. If the witness does not attend, the court may, despite his prior notification, permit that he be re-summoned to attend or it may issue an arrest warrant against him for attendance to deliver the testimony and the witness may be given a penalty as prescribed by law for not attending.

B. If the witness attends the court before the trial has been completed and it becomes clear that he has an acceptable excuse for being late, the court may retract the judgement issued against him.

248. *Id.* art. 176:

If the witness refuses to swear the oath or give testimony, other than in cases where this is permissible by law, the court may issue a sentence against him as prescribed by law for refusal to testify and may order the reading of his previous statement which should then be treated as a testimony which was given in front of the court.

249. *Id.* art. 170:

The court may order that testimony, previously given in the written report collating the evidence or during the initial investigation or before it or any another criminal court, be heard in front of it, if the witness claims not to recall all or some of the facts to which he testified, or if the previous statement clarifies his current statement before the court. The court and other parties may discuss all of this;

see also id. art. 172:

If the witness does not appear or if his testimony cannot be heard because he has died, is unable to speak or is no longer qualified to testify or because his whereabouts are unknown or if his appearance before the court would cause delay or exorbitant expense, the court may decide to hear testimony previously given in the written record of the collection of evidence or during the initial investigation, or in front of another criminal court in the same case. This testimony will be treated as though it were given before the court.

250. *Id.* art. 173:

If the witness is excused due to illness, or any other reason for his inability to attend, from giving his testimony, the court, after informing the parties, may delegate a member of the court, an investigative judge or misdemeanour judge, to travel to the witness's location to hear the witness and send a written report to the court.

The parties may attend in person or through representatives and direct the questions they think appropriate. If, after the transfer or sending of a judge to the location of the witness, the reason is deemed not to be valid, a penalty may be imposed as prescribed by law for failure to attend.

Unlike the more intimate—and closed—nature of the investigative hearing conducted by an IJ, the trial is an open proceeding.²⁵¹ However, as with the investigative hearing, the trial judges own their courtroom. Thus, they may:

- remove the defendant from the proceedings for being unruly,²⁵²
- (except in capital cases) order the defendant released or held during the proceedings,²⁵³
- hold audience members in contempt for leaving an open session of court,²⁵⁴
- cut off irrelevant argument or testimony,²⁵⁵
- exclude witnesses from court while not testifying,²⁵⁶ and
- suspend proceedings, as they deem necessary.²⁵⁷

Likewise, the trial judges also have considerable leeway in limiting their consideration of testimony and argument.²⁵⁸ As to information not available

251. *Id.* art. 152:

Trial sessions must be open unless the court decides that all or part should be held in private and not attended by anyone not connected with the cases, for reasons of security or maintaining decency. It may forbid the attendance of certain groups of people.

252. *Id.* art. 158:

The accused may not be removed from the court room during consideration of the case unless he violates the rules of the court, in which case procedures continue as if he were present. The court must keep him informed of the procedures which took place in his absence.

253. *Id.* art. 157:

The court may, at any time whilst the case is being considered, order the release of the accused with or without bail unless he is accused of an offence punishable by death. It may order his arrest or detention following any release, stating the reasons for this in the order issued.

254. *Id.* art. 153:

The court and those entrusted with its administration may prohibit any individual from leaving the court room, and if someone leaves in violation of this prohibition, without the permission of the court, the court may rule immediately for detention for 24 hours or a fine not exceeding 3 dinars, with no right to appeal against this ruling. The court may however issue a pardon before the end of the session and retract the ruling issued.

255. *Id.* art. 154:

The court may prevent the parties and their representatives speaking at undue length or speaking outside the subject of the case, repeating statements, violating guidelines or making accusations against another party or a person outside the case who is unable to put forward a defence.

256. *Id.* art. 168(C):

It is permissible to remove the witness whilst the testimony of another witness is being heard

257. *Id.* art. 162:

The court may decide on the suspension of a case for a suitable period if necessitated by circumstances. It must inform the accused, other litigants and witnesses who have not yet testified that they are to attend the session when it resumes and the court will meet the cost of their expenses.

before the court, the trial court has subpoena power²⁵⁹ and can order additional investigation,²⁶⁰ including the appointment of experts.²⁶¹ Subpoenaed items must be presented to all parties present at the trial.²⁶² If a judge is replaced during the course of the trial, the new judge need not start a *de novo* review of the case: it is within his discretion to base his judgment on the procedures and investigations undertaken by his predecessor.²⁶³

Notwithstanding all of the foregoing powers of the trial court, the Code nevertheless accords a minimum level of dignity to the defendant, even as it offers a nod to the adage that one is considered innocent until proved guilty:²⁶⁴ the defendant is not subject to physical restraints while in the courtroom.²⁶⁵

1. The Formal Charge

Perhaps the most vivid difference between common law and civil law criminal trials is in the timing of the charge. Although the accused is certainly aware of the type of offense the IJ is investigating, he may not know specifically with which crime the IJ will charge him. In Iraqi courts, it is not until after the trial judge has taken and considered all evidence, that the trial judge officially

258. Compare Criminal Procedure Code, art. 154, *supra* note 255 (trial court may limit testimony or argument for undue length, offering irrelevant information, repeating statements, violating guidelines, or making accusations about persons not before the court) and Criminal Procedure Code, art. 64, *supra* note 97 (investigative judge may only restrict testimony that is irrelevant, offensive, or harmful to security).

259. Criminal Procedure Code, art. 163:

The court may order that any investigatory procedure or procedures be taken, or that any person be ordered to hand over information, documents, or items, if that will assist the investigation. In the event of a refusal to hand over something in his possession, a person should be transferred to an investigative judge for legal procedures to be taken against him.

260. *Id.*; see also *id.* art. 165:

The court may proceed to conduct an investigation if it appears that this will assist in establishing the truth and should allow the litigants to attend the investigation.

261. *Id.* art. 166:

The court may appoint one or more experts in matters requiring their opinion and may permit the wages of the expert to be borne by the treasury as long as the price is not unreasonably high.

262. *Id.* art. 164:

The court orders that items seized be brought to the courtroom wherever possible, where the accused and other parties are able to see and note them.

263. *Id.* art. 161:

If the case is being reviewed by a judge whose place is taken by another judge, the second judge may base his judgement on procedures and investigations undertaken by his predecessor or he may repeat these procedures and investigations himself.

264. In fact, the current Constitution, adopted long after the Code, specifically provides: "The accused is innocent until proven guilty in a fair legal trial." Article 19, Section 5, *Doustour Joumhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005.

265. Criminal Procedure Code, art. 156:

The accused attends the court room without restraint or handcuffs and the court must use necessary means to ensure the security of the court room.

determines what crime, if any, the defendant actually committed.²⁶⁶ This practice obviates the need for litigation of issues, such as specificity of charges, lesser included offenses, multiplicitousness of charges, and the like. After the facts are firmly established in the minds of the judges, they can turn their legal training to finding the proper niche for the given facts in the substantive criminal law.

The charge is formalized once all the evidence has been received at trial; its parameters are not circumscribed by the offense as characterized in the original arrest warrant or the findings of the investigative judge.²⁶⁷ If the complainant has, during the course of the judicial proceedings, withdrawn the complaint, or if the facts do not validate a finding of guilt on any possible charge, the judges dismiss the case.²⁶⁸ (Such an outcome is fairly unlikely, since the IJ would presumably have weeded out any such cases.) If, however, the judges determine among themselves that the facts evidence a crime, the defendant is “charged as appropriate” and asked to enter a plea.²⁶⁹

If there is anything short of a full and valid confession—the defendant pleads not guilty, appears confused by the proceedings, does not offer a defense, etc.—“the case goes to trial.” The defendant is afforded an opportunity to present any valid witnesses and evidence he might have.²⁷⁰ Following the defense case, the

266. *Id.* art. 203.

267. *Id.* art. 187:

A. The charge is written down on a special piece of paper in the name of the judge issuing it, with his position and includes the name of the accused, his identity details, the place and time of commission of the offence and a legal description of the offence and the name of the victim or of the item against which the offence was committed, the way in which it was committed and the legal paragraphs which apply. The paper is dated and signed by the judge or head of the court.

B. In setting out the description for the offence, the court is not restricted to the definition in the arrest warrant or summons or transfer decision.

268. *Id.* art. 181:

A. If the complainant withdraws the complaint or the court considers that the complaint has been withdrawn in accordance with the provisions of Article 150 [regarding abandonment or withdrawal of claims] and if the offence is one in which conciliation is permissible without a court agreement, the complaint is considered as rejected.

B. If, after taking steps to clarify the situation as described in the Articles above, it becomes clear to the court that the evidence does not point to the accused having committed the offence with which he is charged, his release is ordered.

269. *Id.* art. 181(C):

If it appears to the court, after the aforementioned steps have been taken, that the evidence indicates that the accused has committed the offence being considered, then he is charged as appropriate, the charge is read to him and clarified, and he is asked to enter a plea.

270. *Id.* art. 181(D):

If he denies the charge or does not offer a defence, if he requests a trial or if the court considers that his confession is confused, or that he does not understand the consequences or if the offence is punishable by death then the case goes to trial, defence witnesses are heard and the remaining evidence in his defence is heard, unless the court finds it to be an unjustified attempt to impede the investigation or

parties, the prosecutor, and the defense counsel may each make a closing statement;²⁷¹ however, the defendant gets the last word.²⁷²

If the defendant confesses to the charge, the court hears him out and the case is finished—there is no need for further evidence.²⁷³ Several provisions in the Code are in place to ensure that the confession is valid: the court cannot consider any part of a confession it deems to be the product of coercion,²⁷⁴ and the court can parse a non-coerced confession and accept—at face value only—those parts it deems truthful and corroborated,²⁷⁵ even if the confession was extra-judicial.²⁷⁶ It also follows that the court would have to find the defendant competent the same as any other witness.²⁷⁷ Ultimately, however, harkening back to the concept that the judges are masters of their domain, the judges can accept any confession they, in their discretion, deem valid.²⁷⁸

In the end, while *ex parte* communications and a judge's personal extra-judicial knowledge may not have any bearing on a verdict,²⁷⁹ the judges are free to

to mislead the court

271. *Id.* art. 181(D):

When this has been completed, the commentary of the other parties, the Public Prosecution, and the defence of the accused are heard

272. *Id.* art. 181(E):

The defendant should be the last to speak in the judicial investigation or trial.

273. *Id.* art. 181(D):

If the defendant confesses to the charge against him and the court is satisfied of the truth of his confession and that he understands its implications, then the court listens to his defence and issues a judgement in the case without any requirement for further evidence

274. *Id.* art. 218:

It is stipulated that an admission must not have been extracted by coercion.

275. *Id.* art. 219:

It is permissible for the court to divide the admission up, accept the part which it believes to be correct and reject the rest. It is not however permissible to interpret the admission or divide it into parts if it is the only piece of evidence in the case.

276. *Id.* art. 217:

A. The court has absolute authority in evaluating the accused's admission and acting upon it whether it was given in front of the court, in front of the investigative judge, during other court hearing of the same case or in another case, even if the witness subsequently withdraws his statement. The court can accept his admission to the [judicial] investigator if there is enough evidence to convince it that the investigator did not have sufficient time to present the accused to the [investigative] judge so that his admission could be recorded.

B. Admissions may not accepted be [sic] if the conditions stipulated in A are not present.

277. *Id.* art. 214

The court must decide that the witness is not fit to give testimony if it becomes clear he is unable to remember details of the event or that he is not fully aware of the of [sic] value of the testimony he is giving due to his age or his physical or psychological state.

278. *Id.* art. 213(C):

The court can accept an admission only if it is satisfied with it.

279. *Id.* art. 212:

consider a wide range of information—with the caveat that a conviction cannot be based on one uncorroborated witness²⁸⁰ (unless the witness is the defendant²⁸¹). They may consider as substantive evidence all statements made during the trial hearing, hearsay statements made by a victim under threat of death,²⁸² anything in the investigation dossier forwarded by the investigative judge, and any other reports of investigation prepared by other investigating officials (as long as the official wrote them concurrent with the events “or not long afterward”).²⁸³

2. The Ruling

After the court gives the defendant the opportunity to make his final statement, the case is submitted to the court for a verdict. The court declares a formal recess and “retires.” During this recess, the defendant, defense counsel, witnesses, and gallery are ushered from the room, while the judges and prosecutor remain inside. The judges vote and formulate their ruling and, if necessary, the penalty.²⁸⁴ They prepare a formal record of the trial on the spot—there is no verbatim transcript in civil law systems—with a summary of the procedural

The court is not permitted, in its ruling, to rely upon a piece of evidence which has not been brought up for discussion or referred to during the hearing, nor is it permitted to rely on a piece of paper given to it by a litigant without the rest of the litigants seeing it. The judge cannot give a ruling on the basis of his personal knowledge.

280. *Id.* art. 213:

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

B. One testimony is not sufficient for a ruling if it is not corroborated by background information other convincing evidence or a confession from the accused. The exception to this rule is if the law specifies a particular way of proving a case, which must be followed.

281. *See id.* art. 219; *see also supra* note 275.

282. Criminal Procedure Code, art. 216:

The court may accept the statement of any dying victim as evidence relating to the offence and its perpetrator or any other related matter.

283. *Id.* art. 220:

A. Reports of investigations and of the collating of evidence, and all the details in them about procedures of disclosure, searching, and other official reports, are regarded as elements of proof to be taken into consideration by the court. The litigation can discuss them or prove the opposite.

B. The court must treat events written down by the officials in their reports as part of their official duties as evidence which corroborates their statement, provided they wrote them when they occurred or not long afterwards;

see also id. art. 213; *supra* note 280.

284. Criminal Procedure Code, art. 223:

A. The court retires before giving its ruling. After it has formulated the ruling, the hearing is resumed publicly. The ruling is read out to the accused or its contents are made clear to him.

B. If the verdict is guilty, then the court must issue another ruling at the same hearing with the penalty and explain them both.

aspects of the case, from investigation through trial.²⁸⁵ The ruling, which details the substantive aspects of the case, lays out the foundational basis of the verdict, the legal ruling, and any dissenting opinions.²⁸⁶ Interestingly, dissenters from a guilty verdict must still opine on an appropriate sentence.²⁸⁷

If the evidence indicates a more serious offense than was charged, or if there is variance between the charge and the accusation, the charge is withdrawn and a new charge issued in its place.²⁸⁸ The court notifies the defendant of the change and allows him time to defend against the new charge.²⁸⁹ On the other hand, if the court determines that the defendant has been overcharged, it simply adjusts its verdict accordingly.²⁹⁰

285. *Id.* art. 222:

Everything that takes place in the court is written up in a report. The judge or the chief justice signs all its pages. The report must include the date of each hearing, whether it was public or closed, the names of the judge or judges who considered the case, the clerk, the representative of the Public Prosecution, the names of the accused, and other members of accused's team, the names of the witnesses, a report on the papers which were read out, the requests made, the procedures concluded, a summary of rulings, and everything else that occurred during the trial.

286. *Id.* art. 224:

A. The ruling should contain the name of the judge or judges who have issued it, the accused, the other parties and a representative of the Public Prosecution, a description of the offence he is accused of perpetrating, the paragraph of law which applies, the reasons for the court's ruling and the reasons for the level of sentence passed. The ruling on the penalty must contain the principal and subsidiary penalty penalties impose [sic] by the court; the amount of compensation for which the court has ruled the accused or person, if any, taking civil liability to be liable; or the court's decision on the return, confiscation or destruction of assets or items claimed. The judge or the court's panel signs and dates every ruling and seals them with the seal of the court.

B. Rulings are issued on the basis of consensus or a majority of them. All those dissenting from the majority decision must explain their views in writing.

287. *Id.* art. 224(C):

Any person disagreeing with the guilty ruling must still express his opinion on the most appropriate penalty for the offence on which a guilty ruling has been made.

288. *Id.* art. 190(A):

If it becomes clear that the accused is accused of an offense punishable by a more severe penalty than that with which he has been charged, or if there is a difference between the descriptions given in the charge and the accusation, the charge must be withdrawn and a new charge issued.

289. *Id.* art. 190(B):

The court notifies the accused of all changes and amendments made to the charge in accordance with sub-paragraph A and grants a period of time for defence to challenge this new charge if this is requested.

290. *Id.* art. 191:

If the accused is charged with an offence consisting of a number of actions, and it subsequently appears that the accused committed only part of the offence, the court completes the trial and issues a verdict without the need for a new charge to be issued.

Once the paperwork is completed (normally a period lasting no more than five to ten minutes), the hearing is reconvened; the defendant is notified of the verdict and (if applicable) the penalty.²⁹¹ Upon conviction of a capital offense, the court also notifies the defendant of the automatic appeal process.²⁹²

The “burden of proof”—to put it in common-law parlance—seems fairly vague by American standards: if “the court is satisfied that the defendant committed the offense of which he is accused, it issues a verdict of guilty and rules on the penalty to be applied.”²⁹³ “If the court is satisfied that the defendant did not commit the offense of which he is accused or that the action in question is not a criminal offense, a verdict of not guilty is issued.”²⁹⁴ On similarly-vague standards, the court may also dismiss the charge for lack of evidence,²⁹⁵ or find the defendant incompetent.²⁹⁶ In the latter three situations, the defendant is released (unless other cases remain pending).²⁹⁷

Although cassation and retrial appeals are available to one convicted in an Iraqi criminal trial, Iraqi law provides for definitive finality, both as to procedure²⁹⁸

291. *Id.* art. 181(D):

[Following closing statements of all parties and the defendant, t]he end of the trial is then announced, and the court issues its verdict in the same session or in another session held soon afterward;

see also id. art. 223; *supra* note 284.

292. Criminal Procedure Code, art. 224(D):

If the court issues a death sentence, it must explain to the person given the sentence that his case papers will be sent automatically to the Court of Cassation for review. He may also appeal against the ruling at the Court of Cassation within 30 days, starting from the day after the ruling has been issued.

293. *Id.* art. 182(A):

If, after the trial has been conducted as above, the court is satisfied that the accused committed the offence of which he is accused, it issues a verdict of guilty and rules on the penalty to be applied.

294. *Id.* art. 182(B):

If the court is satisfied that the defendant did not commit the offence of which he is accused or that the action in question is not a criminal offence, a verdict of not guilty is issued.

295. *Id.* art. 182(C):

If it becomes clear to the court that there is insufficient evidence to condemn him the charge is dropped and he is released.

296. *Id.* art. 182(D):

If it becomes clear to the court that the accused is not legally responsible for his actions the court issues a judgment of diminished responsibility and follows the steps stipulated by law.

297. *Id.* art. 182(E):

A detainee is released when a verdict of not-guilty, diminished responsibility, release or rejection of the complaint is issued, as long as there is no other legal reason for his detention.

298. *Id.* art. 225:

The court is not permitted to retract, alter or change a ruling it has issued except to correct a material error. This must be noted down in the margin and considered a part of the ruling.

and as to substance.²⁹⁹ Thus, once the court issues a ruling, only clerical changes may be made and the civil trial can use the finding as conclusive proof of guilt.

G. The Trial, Some Observations

It comes as a shock to most U.S. attorneys that a criminal trial in Iraq lasts on the order of thirty minutes, and that deliberations take less than five. However, given a good understanding of the entirety of the process leading up to the trial, this should really come as no surprise. In my experience, it was rare that the trial judges would call live witnesses.³⁰⁰ Why should they? Their statements had been duly recorded by a trained investigative judge. Thus, the vast majority of the hearing is comprised of administrative duties: formally reviewing the witness statements, questioning the defendant on any previous statements he had made, and propounding the final charge.³⁰¹ As the judges and prosecutor have already reviewed the case file beforehand, the hearing is really meant to clarify any confusion arising from the record. And the deliberations? Because the judges are familiar with both the law and the established facts, it would be surprising if it took them any longer to agree on a verdict.

I pause here to note one interesting point about Iraqi justice. The United States Constitution provides criminal defendants with a right to be confronted by their accusers.³⁰² There is no such provision in Iraqi law. In fact, to the contrary, there is a recognized procedure for informants to be granted anonymity in the most serious cases.³⁰³ They provide an *in camera* statement to the IJ and their identities are never disclosed to the accused/defendant nor to the public.³⁰⁴ Although this would be hearsay (and hearsay) in a U.S. courtroom, the IJ and trial judges have a fiduciary duty to remain impartial. They accord the testimony only as much weight as they deem appropriate under the law, considering it in conjunction with all other evidence in the case. Still, I cannot help but be cynical myself. I observed a trial where, as far as I could understand through the translation, the defendant—a frumpy man in his sixties—was ultimately convicted of terrorist acts and condemned to hang based on the accusations of one or two anonymous

299. *Id.* art. 227(A):

A final criminal verdict of guilty or not guilty is proof of the event to which the offense relates, ascribing it to its perpetrator and its legal status.

300. Most of the witness statements are collected by the investigative judge. *See supra* text accompanying notes 78-79.

301. Criminal Procedure Code, art. 203; *see supra* note 266.

302. U.S. CONST. amend. VI.

303. Criminal Procedure Code, art. 47(B):

If the complaint is about offences against the internal or external security of the state, crimes of economic sabotage and other crimes punishable by death, life imprisonment or temporary imprisonment and the informant asks to remain anonymous, and not to be a witness, the judge has to register this with the notification in a special record prepared for this purpose, and conduct the investigation according to the rules, considering the information included in the notification without mentioning the informant's identity in the investigative paper.

304. *Id.*

witnesses. Knowing he would never learn the identity of the complainant, he begged the court to consider that it might be, as he supposed, the vindictive accusation of his estranged wife. In the end, either the informant was not his wife or the judges believed her testimony over his plaintive protests.

III. POST-TRIAL ISSUES

A. Cassation

The Court of Cassation is an appellate court with “jurisdiction to review provisions and rulings issued on felonies, misdemeanors, and other cases stipulated by law.”³⁰⁵ It conducts mandatory review of all capital and life imprisonment cases.³⁰⁶ Additionally, any party—the prosecutor, the accused, the complainant, the civil plaintiff—can appeal the substantive ruling or judgment in a finalized case.³⁰⁷ The Cassation Court can also review a case *sua sponte*.³⁰⁸ Mistakes in the application or interpretation of the law, as well as material procedural errors, can

305. *Id.* art. 138(C); *see supra* note 227.

306. Criminal Procedure Code, art. 254(A):

If the Felony Court has issued a sentence of death or life imprisonment in the presence of the accused, it must send a file on the case to the appellate court within ten days of the issue of the judgment, so that it can be reviewed for cassation, even if an appeal has not been lodged.

307. *Id.* art. 249(A):

The Public Prosecutor, the accused, the complainant, the civil plaintiff and the person who is liable under civil law have the right to appeal to the Court of Cassation against the provisions, decisions and judgments issued by the Court of Felonies on a misdemeanor or felony, if it was based on a breach of the law or a mistake in the application of the law or in its interpretation, or if there was a fundamental error in the standard procedures or in the assessment of the evidence or of the penalty, and this error influenced the judgment.

The civil plaintiff and the person with civil liability can appeal the correlative civil rulings on the non-criminal side of the case. *See id.* art. 251(A).

308. *Id.* art. 264(A):

In addition to the provisions put forward, the Court of Cassation may, either of its own accord or in response to a request from the Public Prosecution or anyone else connected with the case, ask for the file on any criminal case to check the provisions and rulings issued on it, as well as the procedures and orders. In this case, it has the authority stipulated in this decision to consider an appeal, although it may not reverse a finding of not guilty or increase the severity of the penalty, unless it is requested so to do within 30 days from the date of issue of the judgment or ruling.

be appealed,³⁰⁹ but jurisdictional or detention determinations cannot.³¹⁰ An appeal petition for any ruling incorporates all prior related judgments or decisions.³¹¹

An appellant must submit the petition for appeal through official channels within thirty days following the date of judgment.³¹² The court issuing the decision being appealed is responsible for forwarding the case file to the Court of Cassation.³¹³ The court must also automatically forward files on cases resulting in sentences of death or life imprisonment within ten days.³¹⁴

When the Court of Cassation receives an appeal, it solicits review and input from the Public Prosecutor,³¹⁵ and considers any arguments made by the parties.³¹⁶

309. *Id.* art. 249(B):

A mistake in the proceedings cannot be ignored unless it has not been damaging to the defense of the accused.

310. *Id.* art. 249(C):

No individual appeal for cassation will be accepted over decisions issued on matters of jurisdiction, over preparatory and administrative decisions or any other decision on which there has not been a ruling in the case, unless it is subject to a halt in progress in the case; decisions involving arrest, detention and release on bail, or release without bail are also excluded.

311. *Id.* art. 250:

An appeal against a judgment or decision on which there has been a ruling in the case must include all the judgments and decisions already issued or connected with it.

312. *Id.* art. 252:

A. The appeal takes place by means of a petition presented by the petitioner, or his legal representative, to the criminal court which issued the judgment, to any other criminal court, or directly to the Court of Cassation, within a period of thirty days, starting from the day after the judgment was issued, if in the presence of the parties, or from the date it was regarded as having the status of being issued in the presence of the parties, if it was in absentia.

B. If the petitioner is in prison, in detention, or in any way inhibited, he may present the petition through a prison, detention centre or appropriate official.

C. The petition contains the name of the petitioner, a summary of the judgment against him and its date, the name of the court which issued the judgment, the grounds on which the appeal is based and the final result.

D. The petitioner may show the grounds for the appeal separately on the petition, or he may give new grounds, before the decision is made. It is the responsibility of all parties involved in the case to present their own written statements and applications.

313. *Id.* art. 253:

It is up to the court that issued the judgment or decision for cassation to send a file on the case to the Court of Cassation, as soon as an appeal petition has been presented to it, or as soon as the Court of Cassation calls for it, in pursuance of Article 249, Sub-paragraph C.

314. *Id.* art. 254(A); *see supra* note 306.

315. Criminal Procedure Code, art. 255:

In accordance with Article 254, the Court of Cassation sends the case file to the Chief Prosecutor's Office, immediately upon its receipt together with the grounds for the appeal, petitions and statements received from the parties involved in the case, presenting their demands and queries about the judgment or decision within 20 days of their receipt.

316. *Id.* art. 254(C):

The Court can summon the parties (the accused, the plaintiff, the civil plaintiff, and the Public Prosecutor) as it deems necessary.³¹⁷

The Court has plenary authority to correct jurisdictional problems in a case³¹⁸ and to change the substantive outcome, including reformation of the penalty and redefinition of the offense to conform to the facts adduced by the investigative and trial judges.³¹⁹ It may confirm a verdict of guilty *vel non*, confirm or reduce an adjudged penalty, order a new trial—and even reverse a finding of not guilty or return a case for consideration of a higher sentence.³²⁰ Regardless of the action it takes, the court must identify the grounds for its decision.³²¹

The appellate court shall accept papers submitted by the accused and those involved in the case before it issues its decision.

317. *Id.* art. 258:

A. If it appears to the Court of Cassation that an appeal against a judgment or decision issued by the criminal court has not been presented within the period specified in law, it will confirm its formal rejection.

B. It is up to the Court of Cassation to summon the accused, the plaintiff, the civil plaintiff or person with civil liability (or both), or the representative of the Public Prosecution to hear their statements or for any purpose it requires in order to obtain the truth.

318. *Id.* art. 261:

If the Court of Cassation reverses the verdict issued by a court which does not have jurisdiction, the case is transferred to the court which does have jurisdiction and the court which issued the verdict is given notification.

319. *Id.* art. 260:

The Court of Cassation may change the legal description of the offence for which a verdict of guilty has been issued against the accused to another description which corresponds with the nature of the act committed and may pronounce him guilty in accordance with the paragraph of the law which applies to this action, and review the penalty to see if it is appropriate or to make it more lenient.

320. *Id.* art. 259(A):

It is up to the Court of Cassation, after checking the case documentation, to issue its decision on the matter in one of the following ways:

1. Confirm the ruling on the evidence presented and the principal and any supplementary penalties passed, as well as any other legal clauses;
2. Confirm the ruling of not guilty, conciliation, diminished responsibility or the decision to discharge, or any other ruling or decision in the case;
3. Confirm the conviction with a reduced penalty;
4. Confirm the conviction and return the documents, for review of the penalty, with a view to increasing its severity;
5. Return the documents to the Court once again to review the verdict of not guilty, with a view to passing a sentence;
6. Reverse the guilty verdict and the principal and supplementary penalties, and any other legal judgments, with a view to passing a verdict of not guilty, annulling the charge and releasing the accused.
7. Reverse the conviction ruling and penalty ruling and return the documentation to the Court for a re-trial, either complete or partial;
8. Reverse the ruling of not guilty, conciliation or diminished responsibility, or the decision to discharge, or any other ruling or decision in the case, return the documentation for a re-trial or a repeat judicial investigation.
9. Confirm the ruling issued in a civil case, reverse it completely, or reduce the amount of the penalty awarded, or return the ruling to the court to

During the pendency of an appeal, the defendant is still subject to implementation of the adjudged sentence (other than death).³²²

In addition to appeals of final verdicts, the prosecutor may submit an interlocutory appeal, requesting that the Court terminate a case, temporarily or permanently, if he or she deems that justice so requires.³²³ If the Court orders a permanent suspension of proceedings pursuant to such an appeal, this ruling is equivalent to a not-guilty verdict (but it does not affect any civil actions arising out of the same incident).³²⁴

Parties to the case may request a correction of the Cassation decision on substantive grounds,³²⁵ but no recognizable right of action exists for correction of

complete the investigation, or to hold a review with the aim of increasing the amount of the penalty awarded.

321. *Id.* art. 259(B):

The Court of Cassation will explain in its decision the grounds on which it is based.

322. *Id.* art. 256:

An application for cassation over judgments and decisions does not imply suspension of their implementation unless the law so stipulates.

323. *Id.* art. 199:

A. The Chief Prosecutor may request that the Court of Cassation put an end to the procedures of examination or trial, either temporarily or permanently, in any case up to the point of the issue of the final verdict, if there is a reason justifying this action.

B. The request must include the justification and, when submitted to the Court of Cassation, the papers of the court are requested, and the investigative judge or court must send them for examination on the case.

C. The Court of Cassation checks the request and decides whether to accept it and suspend proceedings permanently or temporarily for a period not exceeding three years, if he finds justification. If there is no justification, the request will be refused.

D. After the Court of Cassation has issued its decision, the file is returned and a copy of the decision is sent to the Director of Public Prosecutions.

E. If the decision stipulates a suspension of proceedings, the investigative judge or court must release the accused if he is detained. The issue of this decision will not prejudice the right of the judicial authorities or court to confiscate items, the possession of which is illegal.

F. The decision to suspend proceedings temporarily may be converted to one of permanent suspension in accordance with the provisions stipulated in this section.

324. *Id.* art. 200:

A. The investigation and trial will resume after the end of a period of temporary suspension from the point where they stopped.

B. The decision to suspend proceedings permanently has the same legal effect as a not guilty verdict, although it does not prejudice potential damages from a civil case raised, or the payment of compensation.

325. *Id.* art. 266:

A. The Public Prosecution, the convicted person and all others connected with a criminal case may request the correction of a legal error in the decision issued by the Court of Cassation, provided the request is submitted within 30 days, counted from the date a convicted, imprisoned or detained person is notified of the cassation decision or, otherwise, from the date the court dealing with the case receives the case documentation from the Court of Cassation.

decisions ordering additional procedures.³²⁶ Only one request may be accepted (per party?).³²⁷ The Court's decision to accept or reject a request for correction is final—it cannot be corrected.³²⁸

B. Retrial

Retrial may be requested through the Public Prosecutor³²⁹ in the following circumstances: the defendant's putative murder victim has been found alive; another person has subsequently been convicted of the same crime; the defendant's conviction was based on an expert's testimony or document's authenticity which is later proven to be false; previously-unknown exculpatory facts have come to light; the conviction was based on another judgment subsequently quashed or annulled; or the offense or sentence no longer applies to the accused.³³⁰ If a request for retrial is denied, it may not be resubmitted without citing additional grounds.³³¹

B. The request is submitted directly to the Court of Cassation, or through the court, or prison or centre administration, if the convicted person is already in prison or detained.

326. *Id.* art. 267:

A request for correction is not accepted for the following decisions:

- A. A decision for reversal and re-trial or a second judicial investigation;
- B. A decision issued for the return of case documentation for review of the judgment;
- C. A decision or judgment issued by the Court of Cassation General Board.

327. *Id.* art. 269(A):

A request for correction can only be accepted on one occasion.

328. *Id.* art. 269(B):

Decisions to turn down or accept a request for correction cannot be corrected after issue.

329. *Id.* art. 271:

A request for a re-trial is submitted to the Public Prosecution by the person convicted, or whoever represents him in law. If the person convicted has died the request can be submitted by his wife or one of his relatives, but the request must clearly explain the ground on which it is based and be accompanied by supporting documentation.

330. *Id.* art. 270:

A re-trial can be requested for a case which resulted in a sentence or imposition of penalties for a felony or misdemeanor under the following circumstances:

- A. If the accused was convicted of murder and the person for whose murder he was convicted is found alive;
- B. If a person was convicted of an offense and a judgment was later issued against another person for committing the same offence since one of the two judgments must be against a person innocent of the offense;
- C. If a person is convicted on the basis of the testimony of an expert or the opinion of a specialist, or document, and later a definitive judgment is issued against the witness or expert on the basis of having borne false witness, or the document is proven to be a forgery;
- D. If after the judgment is issued, facts come to light, or documents are presented which were not known at the time of the trial, and these prove the innocence of the convicted person.
- E. If the judgment was based on a judgment which was quashed or annulled by lawful means.
- F. If a guilty or not guilty judgment, or a final decision for discharge was

After the petition is submitted, the Public Prosecutor reviews the case file and submits an opinion on the merits of the petition to the Court of Cassation.³³² The Court of Cassation then reviews the case file and the evidence supporting the request³³³ to determine whether the legal preconditions for retrial are satisfied.³³⁴ The retrying court conducts a new trial, which can result in partial or full annulment of the previous judgment, a confirmation of the previous findings and sentence, or affirmation of the conviction with a new sentence.³³⁵ As with an application for cassation,³³⁶ the defendant is subject to the sentence originally adjudged during the petition review and any retrial process: the grant of a retrial petition does not estop the enforcement of any penalty except death.³³⁷ Any new sentence adjudged cannot exceed the original sentence³³⁸—except, presumably in cases where new evidence of additional crimes has also come to light.

An annulment results in the return of the defendant to his *status quo ante* in all respects.³³⁹ Thus, a retrial proceeding continues despite the death of the

issued on the basis of a criminal act, either separate or related to the original offence;

G. If for any lawful reason the offence or sentence no longer apply to the accused.

331. *Id.* art. 279:

If the request for a re-trial is turned down, or if a decision is issued for non-interference with the original judgment, the request cannot be submitted for a second time, on exactly the same grounds as were used in the first request.

332. *Id.* art. 272:

The Public Prosecution will carry out an examination of the grounds supporting the request and will check the case documentation. He then submits the papers, together with his assessment, to the Court of Cassation as quickly as possible.

333. *Id.* art. 274:

The Court of Cassation reviews the request by carrying out an inspection of the case documentation and it is up to the court to undertake whatever inquiries and questioning of witnesses it considers necessary.

334. *Id.* art. 275:

If the Court of Cassation finds that the request for a re-trial fails to satisfy the necessary legal conditions, it will decide to turn it down. If it finds the request justified, it will return the documentation to the court which issued the judgment, or to the court which has taken its place, together with its decision for a re-trial.

335. *Id.* art. 276:

The trial takes place on the basis of the requested re-trial referred back to it, and if it decides there is no just cause to interfere with the original judgment, it issues a decision accordingly; if however it decides on annulment, either total or partial, and that the person convicted is not guilty, it will issue a new judgment, but this will not be more severe in its sentence than the previous one. Its judgment will be in accordance with legal procedures.

336. *Id.* art. 256; *see supra* note 322.

337. Criminal Procedure Code, art. 273:

The request for a re-trial can only halt implementation of a sentence if it was in respect of [sic] the death penalty.

338. *Id.* art. 276; *see supra* note 335.

339. Criminal Procedure Code, art. 278:

Following the annulment of a judgment, all its civil or criminal consequences are removed, either in total or in part, and the amount of any fine or compensation is

convicted defendant³⁴⁰—presumably to allow posthumous exoneration and the concomitant restoration of civil and property rights.

C. Custody and Fines

Sentences run from the date of implementation until noon on the date of release.³⁴¹ Time served in pretrial detention may offset either a sentence of imprisonment³⁴² or a fine.³⁴³ On the other hand, failure to pay a fine may result in the fine being converted to a specific amount of imprisonment time.³⁴⁴ Sentences of married couples where each spouse is convicted of crimes may, upon request

returned together with any impounded or confiscated property. If such items are no longer present, their value is paid out, unless the confiscation was not a legal duty.

340. *Id.* art. 277:

If the person convicted has died, or if he dies after the request has been submitted, the court continues with the measures for a re-trial and appoints someone to be responsible for the defence, if the person who requested the re-trial had not already appointed someone to represent his defense. The court then issues its decision not to interfere with the original judgment, or for annulment, either in full or in part, or for a declaration of not guilty on the part of the deceased. Its decision will be in accordance with legal procedures.

341. *Id.* art. 294(A):

The sentence is calculated from the day it is implemented against the convicted until noon on the day he is discharged.

342. *Id.* art. 295:

The period of detention is deducted from the period of the sentence issued against the convicted person for the same offence. If there are several offences within the same case, this period is deducted from the least severe penalty.

343. *Id.* art. 298:

If a person is sentenced to a fine only, and he has already been detained for the offence of which he has been convicted, the amount of the fine can be reduced for every day he was detained. If the person is sentenced to imprisonment and a fine, and the period he spent in detention is longer than the period of the prison sentence, the amount of the fine is to be reduced by one half of one dinar for every extra day served. If the number of days in question adds up to exceed the amount of the fine payable, then the court can decide to discharge him.

344. *Id.* art. 299:

A. If a person is sentenced to a fine, whether or not with imprisonment as well, and he does not pay the money, the court will sentence him to imprisonment for half of the maximum period for the offense concerned, if he was sentenced to both prison and a fine.

B. If an offense was punished by a fine only, the period of imprisonment to which the court can sentence the accused in the event of the fine not being paid is reduced proportionally to the amount outstanding. However the total period of the prison sentence must not exceed 2 years.

C. The prison sentence comes to an end, in the event of non-payment of the fine, upon the discharge of the fine, or a part of it relative to the remainder of the sentence.

D. Payment of the fine, or a portion of it, can be paid to the court, police station or prison administration, and when this happens the convicted person can be discharged immediately.

(and posting of appropriate bail),³⁴⁵ be ordered to be served consecutively if they have responsibility for a child under twelve years old.³⁴⁶

D. Termination of a Criminal Case

With regard to the termination of a case, the Code provides:

A criminal case is concluded upon the death of the accused, the issue of a guilty or not guilty judgment, or a judgment or decision of diminished responsibility for the offence concerned, or a final decision for discharge of the accused or a pardon, or the permanent cessation of proceedings, or for other reasons stipulated in law.³⁴⁷

E. Death Penalty

In capital cases, the condemned is imprisoned pending the final processing of his case.³⁴⁸ There is an automatic review of the matter by both the Cassation Court and the head of State.³⁴⁹ An execution may not take place until four months postpartum for a pregnant female,³⁵⁰ on an official holiday or a religious festival

345. *Id.* art. 297:

The decision to postpone implementation of a sentence is issued in accordance with Article 296 by the court which issued the sentence, in response to the request of the convicted person. The court will demand bail to guarantee that he returns to serve the sentence upon expiry of the period of time in question. The court calculates the amount of the bail and includes it in the decision issued granting the postponement of implementation. It is the responsibility of the court to make appropriate arrangements in this way to ensure the convicted person does not run away.

346. *Id.* art. 296:

If a man and his wife are both awarded custodial sentences for a period of more than one year for different offenses, and they have not been in prison before, implementation of the sentence with regard to one of them can be postponed if they have responsibility for a young child of less than 12 years and they have a fixed place of residence.

347. *Id.* art. 300.

348. *Id.* art. 285(A):

The person condemned to death is placed in prison until steps have been taken for carrying out the sentence.

349. *Id.* art. 286:

If the Court of Cassation confirms the death sentence as issued, it will send the case file to the Prime Minister, who is responsible for passing it on to the President of the Republic to seek the necessary decree for carrying out the sentence.

The President of the Republic issues the decree for carrying out the sentence, or for commuting it, or for pardoning the condemned person. If he issues the decree for implementation, the Prime Minister issues an order to that effect, including the decree of the Republic, in accordance with legal provisions.

350. *Id.* art. 287:

A. If the condemned person is pregnant when the order for implementation arrives, it is the responsibility of the prison administration to inform the head of the Chief Prosecutor to present a notification to the Minister of Justice to delay execution of the sentence, or to reduce it. The Minister of Justice then submits this notification to the President of the Republic. Implementation of the sentence is delayed until another order is issued by the Minister of Justice in accordance

pertinent to the condemned,³⁵¹ or until the condemned has made a final confession (if his religion so dictates).³⁵² The execution is carried out by a reading of the death decree,³⁵³ a taking of any last statement of the condemned,³⁵⁴ and the hanging—the sole authorized means of execution,³⁵⁵ followed by the obligatory final paperwork annotating the event.³⁵⁶ The condemned's relatives are entitled to visit the day before the execution³⁵⁷ and to receive the body afterward.³⁵⁸ If they

with the decision of the President of the Republic. If the renewed order rules for implementation of the death sentence, it is not carried out until four months after the date of delivery of the child, whether the delivery is before or after the arrival of the order.

B. The judgment in sub-paragraph A is applicable to a condemned person whose child is delivered before the arrival of the order for implementation if the period of four months from the date of her confinement has not expired. The sentence is not carried out until four months have elapsed from the date of her confinement, even if the renewed order for implementation arrives.

351. *Id.* art. 290:

The death penalty cannot be carried out on official holidays and special festivals connected with the religion of the condemned person.

352. *Id.* art. 292:

If the religion of the condemned person requires him to make confession before death, the necessary arrangements are to be made for him to meet a cleric of his religion.

353. *Id.* art. 289(A):

The director of the prison reads the Republic decree for the implementation of the sentence to the condemned person at the place of execution, so that the others present can hear.

354. *Id.* art. 289(B):

If the condemned person wishes to make a statement, the judge notes down what is said and this is endorsed by the other members present.

355. *Id.* art. 288:

The sentence of death is carried out by hanging within the prison, or any other place in accordance with the law after the issue of the decree of the President of the Republic for the sentence to be carried out in accordance with Article 286. The execution is witnessed by the Implementation Board, comprising a Misdemeanor Court judge, a member of the Public Prosecution, if available, a representative of the Ministry of the Interior, the director of the prison and the prison doctor, or any other doctor delegated by the Ministry of Health. The accused's legal representative is excused from attendance if he so requests.

356. *Id.* art. 289(C):

Once sentence has been carried out, the director of the prison signs a form, on which he [sic] doctor confirms death, and the time this took place, and the remainder of those resent [sic] sign the document accordingly.

357. *Id.* art. 291:

It is the responsibility of the relatives of the condemned person to visit on the day before sentence is to be carried out. It is the duty of the prison administration to info [sic] them of the date accordingly.

358. *Id.* art. 293:

The corpse of the executed person is handed over to relatives if they so request. Otherwise the prison authorities will carry out the burial at government expense, but there will be no funeral ceremony.

decline to accept the body, it is given an ignominious burial at government expense.³⁵⁹

IV. MISCELLANY

The goal of this article has been to provide a broad overview of the investigation and trial process in Iraq. There are some topics, however, that are so esoteric or not germane to that goal as to merit little discussion. Thus, the following have not been discussed at length elsewhere:

- Seizure of a felon's property is authorized.³⁶⁰ Seizure of an absconded accused felon's property is authorized to induce him to come forward.³⁶¹
- Conciliation, a creature unique to civil law systems (in which the defendant may provide restitution or otherwise provide

359. *Id.*

360. *Id.* arts. 183-86.

361. *Id.* art. 121:

A. If an arrest warrant issued against the accused for the commission of a felony is not executed, the investigating judge and criminal court may issue an order for the seizure of the moveable and immoveable property of the accused. After execution, papers are immediately sent to the Court of Felony, and if supported by the court, the authorities who decided on the detention will issue a statement, published in the local newspapers, on the television and using other methods of publication as appropriate, which states the name of the accused, the offence of which he is accused and the property which has been seized. It will ask him to give himself up to the nearest police station within 3 days. It will also ask that any person with knowledge of the location of the accused inform the nearest police station. If the Court of Felony does not support it, the seizure is cancelled. If the decree of seizure was issued by the Court Felony [sic], it is implemented, and the statement is issued without need for approval from any other authority.

B. If the accused does not give himself up within the period stipulated, the authorities which issued the decree of seizure will deposit moveable assets with the judicial guard for safekeeping and they will be administered under his supervision. The immoveable assets will be handed over to the Office for Confiscated Property to administer, in its capacity as property with an absentee owner. The property will remain confiscated in this way until the death of the accused is proven; he is sentenced or proved guilty or not liable; he is released; or the complaint against him is dropped. At that point, the property will be returned to him or whoever is the rightful owner.

C. If the property seized will deteriorate quickly or is expensive to maintain, or if the authorities issuing the decree of seizure decide to sell it, it is sold in accordance with the Law of Implementation based on a memo sent to the person in charge of implementation.

D. If the accused gives himself up or is arrested, either the seized property or its value is returned in full.

E. Any person to whom an accused person who has absconded owes money on a legal basis, shall be paid monthly from the seized assets at the same rate as payment was being made before the seizure, by decree of the authorities which issued the decree of seizure.

satisfaction to the complainant, such that the complainant withdraws the complaint), is available in the Iraqi system.³⁶²

- Misdemeanor Courts ruling in cases involving only a penalty of detention may use the summary trial method in lieu of a more robust trial.³⁶³ The summary process entails hearing the complainant/plaintiff from the associated civil case, hearing the witnesses, reading the reports, and listening to the defendant.³⁶⁴ There is no formal charging or plea process.³⁶⁵ Instead, the court issues a verdict—based on whether it “is satisfied” or not that the defendant committed the offense of which he is accused.³⁶⁶ The maximum punishment that may be issued following a summary trial is the maximum penalty for an infraction as set forth in the Penal Code.³⁶⁷
- Iraqi law recognizes a version of the double jeopardy principle: cases that are conclusively final³⁶⁸ usually may not be relitigated.³⁶⁹ The exception is those cases in which new evidence is found to show material flaws in the facts presented at trial.³⁷⁰

362. *Id.* arts. 194-98.

363. *Id.* arts. 201-04.

364. *Id.* art. 203(A):

The process of a [summary] trial entails the court hearing the testimony of the complainant or civil plaintiff, testimony of the witness, reading reports, then hearing a statement from the accused, if in attendance, without any charge being made, and recording a written summary of this, thus covering all aspects of the case.

365. *Id.*

366. *Id.* art. 203(B)-(C):

B. If the court is satisfied, after taking the steps described in sub-paragraph A, that the accused committed the offense of which he is accused, it issues a guilty verdict and rules on the penalty to be imposed.

C. If the court is satisfied that the accused did not commit the offense of which he is accused, or if there is insufficient evidence for conviction, or if the action which was committed is not a criminal offense, a ruling is made that the accused be released.

367. *Id.* art. 204(C):

If the court reviews a case of misdemeanor in summary form, it may not give a judgment exceeding the maximum penalty for an infraction as stipulated in the Penal Code.

368. *Id.* art. 300; *see supra* note 347.

369. Criminal Procedure Code, art. 301:

There cannot be a return to investigation and court proceedings against the accused, for whom the criminal case has been concluded, except under circumstances stipulated in law.

370. *Id.* art. 303:

The investigation or court proceedings against an accused may be resumed after the criminal case has been closed if, after the issue of the judgment or definitive or final decision, it emerges that there was an act or consequence of the offense for which the accuse was tried, or had proceedings taken against him, which was

- Regardless of the outcome of a particular case, contraband taken from the accused is confiscated.³⁷¹ Specific provisions describe the handling of other impounded items, depending on their nature, establishment of ownership, and outcome of the case.³⁷²

The following subjects are specifically addressed in the Code, but not discussed in this article:

- The relationship of a criminal case to its concomitant civil (tort) case³⁷³
- Geographic jurisdiction of the IJ/subject matter jurisdiction of investigating authorities³⁷⁴
- Bail, and the subsequent confiscation of property in consequence of its violation³⁷⁵
- Procedural issues related to investigation of cases committed by juveniles³⁷⁶
- Procedures for handling misdemeanor breaches of the peace³⁷⁷
- Extradition, foreign service of process, and other extraterritorial issues³⁷⁸
- Conditional discharge (probationary parole)³⁷⁹
- Cash sureties³⁸⁰
- Handling of impounded goods³⁸¹
- Commitment to keep the peace³⁸²
- Commitment to good behavior (a program where the prosecutor or an investigative judge can recommend that a recidivist or unemployed person be placed on probation or pay a surety in lieu thereof for one to three years)³⁸³

fundamentally different from the facts as presented in the trial.

371. *Id.* art. 307:

The discharge of a case for any lawful reason does not prevent the confiscation of goods whose possession is prohibited in law.

372. *See id.* arts. 308-16.

373. *See id.* arts. 10-29.

374. *See id.* arts. 53-55.

375. The authority of a judge to order or allow bail or a written pledge is covered in Criminal Procedure Code, arts. 95-96. Collateral issues involving the inability to make bail or failure to appear after posting bail are treated at Criminal Procedure Code, arts. 101, 111-22.

376. *See id.* arts. 233-42.

377. *See id.* arts. 321-30.

378. *See id.* arts. 352-68.

379. *See id.* arts. 331-37.

380. *See id.* arts. 325-30.

381. *See id.* arts. 308-16.

382. *See id.* arts. 317-20.

383. *See id.* arts. 321-24.

- Pardon³⁸⁴

Finally, it is simply impossible, in an article of this nature, to address the myriad of non-Code issues that impact directly the administration of justice in the Iraqi system. Thus, I have consciously avoided a discussion of the hierarchical structure of the court system, and the many changes the Coalition Provision Authority made to Iraqi criminal procedure law, including the elimination of the death penalty (which was subsequently reinstated by the Council of Representatives). I have also chosen to avoid any significant reference to the substantive penal laws of Iraq—or even to the categorization of crimes into felonies, misdemeanors, and infractions.

384. *See id.* arts. 338-41.