

Justice on hold: accountability and social reconstruction in Iraq

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Abstract

Having invaded Iraq without UN Security Council authorization, the United States was unable to convince many countries to take a meaningful role in helping Iraq deal with its violent past. Always insisting that it would “go it alone”, the United States implemented accountability measures without properly consulting the Iraqi people. Nor did the United States access assistance from the United Nations and international human rights organizations, all of which possess considerable knowledge and experience of a wide range of transitional justice mechanisms. In the end, the accountability measures introduced by the Americans either backfired or were hopelessly flawed. What are needed in Iraq are a secure environment and a legitimate authority to implement a comprehensive transitional justice strategy that reflects the needs and priorities of a wide range of Iraqis. Such a strategy should contain several measures, including prosecutions, reparations, a balanced approach to vetting, truth-seeking mechanisms and institutional reform.

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In the pre-dawn hours of 30 December 2006, four executioners, their faces covered in balaclavas, escorted Saddam Hussein to the gallows. As they did so, a man standing amongst a group of official witnesses quietly slipped a cellphone camera out of his pocket and focused it on the condemned leader. What unfolded next in the semi-darkness of the chamber was more reminiscent of a public hanging in the eighteenth century than a considered act of twenty-first century justice. As one of Hussein's executioners dropped a noose on to his shoulders and tightened it around his neck, a group of onlookers began shouting insults. One man chanted a Shiite version of a Muslim prayer, clearly a sectarian barb aimed at Hussein, a Sunni. "Go to hell!" another voice shouted from the darkness. Then, as Saddam began to pray, the trapdoor suddenly opened and his body plunged into the drop.

Later that day, the video of Saddam Hussein's execution was aired repeatedly on Iraqi television. And, as numerous journalists reported, the video's strong sectarian overtones worried many Iraqis – Sunni and Shiites alike – who feared it would only fan the violence raging around them.¹ Equally disturbing, they said, was the feeling of *déjà vu* that the execution evoked.² During Saddam's 35-year reign, prisoners – many of whom had been executed at the same gallows – were themselves regularly taunted and mistreated in their last hours. For many Iraqis it was as if nothing had changed.

Hussein's execution marked the low point of a deeply flawed effort by the Bush administration to bring justice to the people of Iraq. The project began shortly after the US-led Coalition swept into Baghdad in April 2003. As the occupying power, the United States needed to secure a sprawling city, quell a growing insurgency and give immediate attention to numerous infrastructure, public health and safety needs. By the same token, public statements by the Bush administration had placed a high priority on uniting Iraqis and restoring their dignity. These were lofty pledges – pledges that many Iraqis across the country, as well as many abroad, embraced.

But these naïve assumptions were soon dashed as US troops, outnumbered and unprepared, stood by helplessly as much of Iraq's remaining physical, economic and institutional infrastructure was systematically looted and sabotaged.³ Then, as spring turned into summer, hopes that a new and united Iraq would arise from the rubble were quashed by a nascent insurgency composed of Saddam loyalists and foreign fighters, creating a security quagmire that would last for the foreseeable future.

Amid this growing chaos, L. Paul Bremer III, a career diplomat in the US Department of State and an expert on terrorism and homeland security, arrived in Iraq to serve as the chief administrator of the Coalition Provisional Authority (CPA). Bremer issued several directives in the first month of his tenure that would set the course for years to come for how Iraqis would confront the legacy of past

1 See John Simpson, "Saddam hanging taunts evoke ugly past", *BBC News*, Baghdad, 30 November 2006.

2 See John Burns, "Hussein videos grip Iraq: attacks go on", *New York Times*, 31 December 2006.

3 Larry Diamond, "What went wrong in Iraq", *Foreign Affairs*, Vol. 83 (2004), p. 34.

crimes.⁴ Most notable (and controversial) was the introduction on 16 May 2003 of the “De-Baathification” programme, in which the army and other security forces were dissolved and members of certain ranks in the Baath Party were removed from their positions and banned from future employment in the public sector. A later decree, issued on 10 December 2003, created the Iraqi Special Tribunal for Crimes against Humanity⁵ to prosecute Iraqi nationals or residents of Iraq accused of genocide,⁶ crimes against humanity and war crimes. Bremer also mandated a series of other administrative and institutional directives, including the establishment of a property claims commission, a central criminal court, a task force on victim compensation, and a new Iraqi army and civil defence corps.

Over the next three years, Bremer’s directives were enacted as violence and lawlessness mounted in Iraq. By late 2006, suicide bombings had become almost daily events, already high levels of sectarian violence were rising, and few Iraqis were sanguine about their future. Eighty-two per cent of Iraqis polled by the BBC in January 2007 said they had no or very little confidence in the US-led occupation. Over half (53 per cent) said they had lost faith in their own government, elected under a new constitution in late 2005. Asked whether the execution of Saddam Hussein was helpful in bringing about reconciliation in Iraq, 62 per cent of Shiites thought it would, while 96 per cent of Sunnis thought it made reconciliation more difficult.⁷

This article examines how the US occupation and the Iraqi government have shaped the development of transitional justice mechanisms in Iraq and how ordinary Iraqis have perceived these processes. We discuss the recent history of prosecutions for human rights violations, efforts to purge the Iraqi government of wrongdoers, and emergent mechanisms for truth-seeking and reparations. Our research includes interviews since 2003 with Iraqi, US and British officials, forensic scientists, and representatives of the United Nations and non-governmental organizations. One of the authors of this article (Sissons) has intensively monitored De-Baathification issues and developments at the Iraqi High Tribunal during five missions to Baghdad from 2004 to 2007. Another (Stover)

4 The Coalition Provision Authority Orders are available at http://www.cpa-iraq.org/government/governing_council.html (last visited 20 November 2007). Several orders deal with transitional justice measures, including Coalition Provision Authority Order No. 1, “De-Baathification of Iraqi Society”, CPA/ORD/16 May 2003/01; Coalition Provision Authority Order No. 2, “Dissolution of Entities”, CPA/ORD/23 May 2003/02; Coalition Provision Authority Order No. 7, “Penal Code”, CPA/ORD/10 June 2003/07; Coalition Provision Authority Order No. 13 (Revised), “The Central Criminal Court of Iraq”, CPA/ORD/18 June 2003/13; Coalition Provision Authority Order No. 15, “Establishment of the Judicial Review Committee”, CPA/ORD/23 June 2003/15; Coalition Provision Authority Order No. 35, “Re-establishment of the Council of Judges”, CPA/ORD/21 Sept 2003/35.

5 The jurisdiction of the Iraqi Special Tribunal covers the crimes mentioned above, as well as violations of stipulated Iraqi laws committed from 17 July 1968 to 1 May 2003. CPA Order No. 48, “Delegation of Authority Regarding an Iraqi Special Tribunal”, available at www.iraqcoalition.org/regulations/20031210_CPAORD_48_IST_and_Appendix_A.pdf (last visited 20 November 2007).

6 Early in 1959 the government of Iraq, a military dictatorship, signed the Convention on the Prevention and Punishment of the Crime of Genocide. See Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, 78 UNTS 277 (entered into force on 12 January 1951, entered into force for the United States on 23 February 1989).

7 “Iraq poll 2007”, *BBC News*, 19 March 2007, p. 2.

accompanied Kurdish troops into Kirkuk during the first days of the war and later returned to Iraq to conduct on-site visits to mass graves and to interview representatives of Iraqi government and non-government institutions that possessed documents of alleged human rights abuses obtained during and after the war.⁸ Finally, two authors (Pham and Vinck) conducted a comprehensive qualitative study in July and August 2003 in order to understand how Iraqis wished to deal with their legacy of human rights violations and political violence.⁹

Transitional justice mechanisms

Societies emerging from periods of war or political repression can deal with the past in a number of ways. They can ignore a legacy of conflict and widespread violations of human rights and international humanitarian law by passing amnesty laws that pardon past offenders. Or they can confront them head-on by pursuing criminal trials, establishing truth commissions and initiating vetting and lustration programmes to remove past offenders from the public sector. They can also provide reparations and apologies to victims, create memorials, locate and identify the bodies of the missing, return stolen property, establish days of mourning and remembering, reform history textbooks, institute legal and institutional reforms to conform to international standards of human rights, and enact laws to correct the distributional inequities that often underlie conflicts.

All these activities comprise the main components of “transitional justice”, which can be defined as a “set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”.¹

Our studies have found that for transitional justice mechanisms to be effective in postwar societies they must meet six conditions.²

First, such measures can only be fully realized in a secure environment. Security in the aftermath of war and widespread political violence trumps everything; it is the central pedestal that supports all else. Without some level of security, witnesses cannot be transported to and from the courtroom safely, victims cannot tell their stories publicly, and investigators cannot collect and preserve evidence securely.

Second, it is imperative that a large segment of the population views the implementing authorities as both legitimate and impartial. While a necessary condition in all post-war settings, it is especially important in the

8 See e.g. Eric Stover, William D. Haglund and Margaret Samuels, “Exhumation of mass graves in Iraq: considerations for forensic investigators, humanitarian needs, and the demands of justice”, *Journal of the American Medical Association*, Vol. 290 (6 August 2003), pp. 663–6.

9 *Iraqi Voices: Attitudes toward Transitional Justice and Social Reconstruction*, Human Rights Center, University of California, Berkeley, and ICTJ, May 2004.

aftermath of inter-ethnic conflicts or in situations where the prevailing authority is an occupying power.³

Third, the new authorities must have the political will and capacity to ensure that transitional justice measures have sufficient time to achieve their intended goals.

Fourth, they must implement such mechanisms in a manner that avoids collective guilt.

Fifth, and most importantly, transitional justice measures are most effective when they have been selected through a genuine process of consultation with those most affected by the violence. To the extent possible, all sectors of a war-ravaged society – the individual, community, society and state – should become *engaged participants in* and not merely *auxiliaries to* the processes of transitional justice and social reconstruction, although, undoubtedly, at different times and in different ways. Victims must receive formal acknowledgment and recognition of the grave injustices and loss they suffered. Families of the missing must be able to recover, bury, and memorialize their dead. Bystanders – those who did not actively participate in violence, but who also did not actively intervene to stop abuses – should come to recognize that their passivity contributed to the maintenance of a repressive state. Perpetrators must be held accountable for their crimes so as to validate the pain and suffering of victims and to communicate publicly that the past horrors deserve societal condemnation.

Finally, transitional justice mechanisms work more effectively if they are implemented alongside programmes designed to promote political, economic and social reconstruction; freedom of movement; the rule of law; access to accurate and unbiased information; and educational reform.⁴

1 Naomi Roht-Arriaza, “The new landscape of transitional justice”, in Naomi Roht-Arriaza and Javier Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, Cambridge University Press, Cambridge, 2006, p. 2.

2 See Eric Stover, Hanny Megally and Hania Mufti, “Bremer’s “Gordian knot”: transitional justice and the US occupation of Iraq”, *Human Rights Quarterly*, Vol. 27 (2005), pp. 830–57.

3 See e.g. John W. Dower, *Embracing Defeat: Japan in the Wake of World War II*, W. W. Norton, New York, 1999.

4 This was the finding of a five-year study of justice and social reconstruction in Rwanda and the former Yugoslavia conducted by the Human Rights Center, University of California, Berkeley. See Eric Stover and Harvey M. Weinstein, “Conclusion: A common objective, a universe of alternatives”, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004, pp. 323–42.

Past crimes, future reckoning

Iraq’s confrontation with its violent past presents one of the most complex cases since the end of the Second World War. Transitional justice efforts have faced several challenges from the outset. First, there is the sheer magnitude and severity of the crimes Hussein and his fellow Baathists committed against the Iraqi people over a period of 35 years. Violence was a tool of state policy and deployed against all perceived or real threats. The regime executed thousands of government

opponents, left more than 300,000 missing and likely dead, crushed all dissent, and displaced more than a million Iraqis or forced them into exile abroad. Between 1977 and 1987 Iraq troops destroyed nearly 5,000 Kurdish villages and killed thousands of Kurdish civilians, in accordance with Baath policies of Arabization and a series of bloody pacification campaigns. The latter included mass forced disappearances and indiscriminate bombardments, including, from 1987 on, the use of chemical weapons. During the “Anfal” (“the Spoils” in Arabic) campaign between February and September 1988, Iraqi troops stormed the highlands of Iraqi Kurdistan and gassed or otherwise executed more than 100,000 Kurds, forcibly displacing survivors to areas under government control.¹⁰ In southern Iraq, Saddam expelled an estimated half a million Shiites to Iran for fear that they might support Iran during the Iran–Iraq war (1980–8), and later executed or “disappeared” up to 70,000 civilians in the aftermath of a failed uprising after the end of the 1991 Gulf War. Most of Iraq’s missing are thought to be buried in dozens of mass graves across Iraq, some containing thousands of victims.¹¹

Second, decades of repressive rule have fractured the individual and collective identities of Iraqis. The climate of terror engendered a breakdown of trust and confidence at all levels of society. Having lived under an autocratic state that imposed a single Iraqi identity for decades, many Iraqis emerged from the 2003 war torn between the state-imposed civic identity and their own ethnic and religious identities. During our interviews with Iraqis in 2003, Kurds, Turcomans and Assyrian Christians said that the Baathist state had promoted an Arab identity that resulted in overt discrimination against non-Arabs. Meanwhile, many Sunni respondents feared that a new Iraqi government, and especially one that contained an overwhelming majority of Shia or Kurds, would target Sunnis as a “collective scapegoat” for the crimes of the past. Yet, despite these concerns, many respondents told us that “unity exists” in Iraq and blamed the dictatorship for having fomented discord to maintain control. Respondents said – perhaps overly optimistically – that these divisions would diminish with the end of the regime.

Third, the political context of the US invasion and occupation of Iraq have had a decisive impact on accountability efforts. Following the invasion, it quickly became apparent that Iraq’s occupiers lacked the linguistic, cultural and regional expertise necessary to understand Iraqi politics and society. Nor, with over one hundred thousand troops on the ground, were they accepted as a legitimate and impartial authority. Their status as occupiers and their lack of expertise meant that, despite good intentions, Coalition leaders were entirely the wrong group of players to jump-start an effective transitional justice process. Nor could they engineer the Iraqi ownership and impartial approach that such an effort required. Indeed, by the time of Bremer’s arrival to head the CPA, insecurity in Baghdad had turned the US occupation into a physical and psychological bunker.

10 There is a significant variation in figures, with Kurdish authorities and Iraqi prosecutors stating that up to 180,000 were killed.

11 See e.g. *Iraq’s Crimes of Genocide: The Anfal Campaign against the Kurds*, Human Rights Watch/Middle East, New Haven, 1995.

“Separated from Iraqis by the formidable security around the three-square-mile “Green Zone” (where the CPA was based) and around the CPA’s regional and provincial headquarters”, writes a former Coalition advisor, “the American civilians had little, if any, contact with the Iraqi people.”¹²

Fourth, decades of autocratic rule have eviscerated Iraq’s capacity to develop and administrate laws and policies, especially one as complex and resource-demanding as a transitional justice process. Iraqis also particularly distrusted the legal system, which they perceived as corrupt and influenced by politics. At the same time, the US occupiers were relying heavily on the advice and counsel of Iraqi exiles, many of whom lacked meaningful local knowledge, social networks or technical skills.

Finally, simmering tensions between the United States and the United Nations over the legality and necessity of the war have severely limited the participation of foreign experts in the process of transitional justice in Iraq. By “going it alone”, the United States has alienated many of the very government and non-government entities that were best poised to pass on to the Iraqis the “lessons learned” and “best practices” gleaned from similar transitional processes in other countries. As a result, experts – particularly those working with non-governmental or United Nations organizations – were left watching or critiquing from the sidelines.

Despite these formidable challenges, Coalition officials in Baghdad moved swiftly to launch several transitional justice initiatives, including a “De-Baathification” programme, a tribunal and a task force to develop a policy for reparations for past crimes. They also explored truth-seeking options, such as a truth commission, but decided not to pursue concrete truth-seeking measures. Each of these initial steps has had important practical and political consequences.

Prosecutions

During the 1990s, *Human Rights Watch* and other international human rights organizations tried unsuccessfully to persuade the United Nations and individual governments to establish an international tribunal to prosecute Saddam Hussein and other Iraqi leaders for crimes against humanity and other serious crimes. Then, in the months leading up to the US-led invasion of Iraq, the Bush administration began invoking Hussein’s human rights record as a subsidiary justification for the offensive. In September 2002 a group of US inter-agency leaders decided that if a tribunal were established, it should be an Iraqi-led effort, a policy that was announced shortly before the fall of Baghdad.¹³

The announcement generated considerable international unease, as the decision had been made without consulting Iraqis inside Iraq or international

12 Diamond, above note 3, p. 39.

13 Personal communication (Sissons) with US government officials. US Department of Defense, “Geneva Convention, EPWs and War Crimes”, briefing, Washington, DC, 7 April 2003.

experts, and without access to or knowledge of Iraqi judicial conditions on the ground. As *Human Rights Watch* wrote in July 2003,

The Iraqi judiciary, weakened and compromised by decades of Baath party rule, lacks the capacity, experience, and independence to provide fair trials for the abuses of the past. Few judges in Iraq, including those who fled into exile, have participated in trials of the complexity that they would face when prosecuting leadership figures for acts of genocide, crimes against humanity, or war crimes.¹⁴

Many observers suspected that the decision was crafted to suit US policy interests, rather than those of a robust accountability mechanism.¹⁵

Aloof from international concerns, Coalition planners worked to implement Washington's policy as Coalition detention facilities filled with regime officials and others accused of human rights abuses. In July 2003 the newly formed Iraqi Governing Council (IGC), working in tandem with Coalition experts, established a four-person judicial commission to design a domestic judicial process for trying Saddam Hussein and others allegedly responsible for past crimes.¹⁶ It was an opaque and difficult process. Coalition personnel were trained in common-law legal systems, but had little, if any, orientation towards the civil-law tradition employed in Iraq. Most had practically no experience with international criminal law. Their Iraqi counterparts, on the other hand, were grounded in Iraq's flawed legal tradition, with no international criminal legal experience.

In late 2003, a few days before images of Saddam Hussein's capture were broadcast worldwide, the CPA established the Iraqi Special Tribunal for Crimes against Humanity (hereinafter referred to as the "Tribunal").¹⁷ *Human Rights Watch* and other human rights groups criticized the Tribunal's draft statute for disregarding essential fair trials guarantees and failing to set standards that would ensure that judges and prosecutors possessed adequate experience and could function in an independent and impartial manner. Human Rights Watch called on the United Nations not to lend "its legitimacy and expertise" to what it called a "fundamentally flawed" tribunal that was inherently vulnerable to political manipulation.¹⁸ Indeed, the United Nations pursued a policy under which it neither assisted nor contacted the Tribunal; instead, the Tribunal became heavily dependent on the support of the Regime Crimes Liaison Office (RCLO), a group of mainly US officials based in the US embassy in Baghdad.

14 "Iraq: Justice needs international role", press release, *Human Rights Watch*, 15 July 2003.

15 Suspicions included: a US desire to ensure a court that would not inquire too closely into US policies in support of Iraq during the 1980s, including the period of the Anfal campaign; avoidance of the eventuality that any possible violations of international humanitarian law by US armed forces could fall under the Tribunal's jurisdiction; and US policy positions opposing the International Criminal Court and retaining the death penalty.

16 See "Briefing paper: creation and first trials of the Supreme Iraqi Criminal Tribunal", *International Center for Transitional Justice*, October 2005, pp. 6–7.

17 CPA Order 48, above note 5.

18 See "Memorandum to the Iraqi Governing Council on the Statute of the Iraqi Special Tribunal", *Human Rights Watch*, December 2003.

Human Rights Watch, the International Center for Transitional Justice (ICTJ) and other international human rights organizations also criticized the IGC and CPA for their lack of meaningful consultation with the Iraqi people, including the hundreds of thousands of victims and their families who were rapidly organizing themselves. In fact, the only initiatives that attempted to sound out the opinions and attitudes of the Iraq population with regard to a future transitional justice process were organized by civil society organizations.

Our organizations conducted one of the first studies in July and August 2003 to assess the opinions and attitudes of a wide spectrum of Iraqis with regard to justice and human rights.¹⁹ The study found that a broad cross-section of Iraqi society strongly believed that the leadership of the previous regime should face trial for its acts, and that these trials should take place in Iraq and under Iraqi control. Despite mistrust towards the legal system in place under Saddam's regime, respondents expressed confidence that a sufficient reserve of "clean" (that is, uncorrupted) Iraqi lawyers and judges existed and could initiate the trials of those responsible for the most serious crimes. Respondents emphatically rejected the prospect of trials dominated by the international community or a foreign state, although they did not reject expertise and assistance from abroad if it would help to ensure the fairness, integrity and transparency of the trial process. Above all, they wanted the trials to be fair, impartial and able to withstand public scrutiny in Iraq and elsewhere.

In August 2005 the Iraqi parliament adopted a new statute for the Tribunal and changed its name to the Iraqi High Tribunal.²⁰ While the Tribunal was created as a domestic court inserted into the Iraqi legal system, its jurisdiction covered international crimes and legal provisions that were developed after the Second World War but had never been included in Iraqi law. Politically, Iraqi insurgents and much of the surrounding Arab region viewed the new tribunal as the illegitimate and politicized weapon of the US aggressor, an argument expertly wielded by Hussein and other defendants in the Tribunal's first trial. By September 2007 the Tribunal had completed two trials, *al-Dujail* and *al-Anfal*, and had begun a third trial involving crimes committed during the 1991 uprising. Tribunal officials have announced that there will be a total of fourteen trials.

The first trial involved charges of crimes against humanity related to the aftermath of a failed July 1982 assassination attempt against Saddam Hussein in the Shiite town of al-Dujail. The *Dujail* trial ran from 19 October 2005 to 26 December 2006, when final judgments were handed down. The ruling, later confirmed by the Cassation Chamber, found Hussein and six other accused guilty of a series of crimes, including crimes against humanity, wilful killing, torture and arbitrary detention. Hussein was executed four days later and three other high-ranking officials were executed in the following weeks.

19 *Iraqi Voices*, above note 9, pp. i–iv.

20 Law of the Supreme Iraqi Criminal Tribunal (Law 10 of 2005), *Official Gazette of the Republic of Iraq*, 18 October 2005.

Unlike the *Dujail* trial, which concerned crimes committed in a single town, the *Anfal* trial involved massive crimes, including the alleged gassing, imprisonment, execution and displacement of over 100,000 Kurds during the eight-phase Anfal military campaign of 1988. When the *Anfal* trial opened in August 2006 Hussein, his cousin Ali Hassan al-Majid and five security officials were accused of genocide, crimes against humanity and war crimes. But after Hussein's execution, public interest in the continuing trial of the remaining six accused declined dramatically amongst all groups except the Kurds. Final verdicts were handed down in August 2007.

Before discussing individual trials, it is important to note that between the time when investigations began in 2004 and the announcement of the first verdicts two years later, Iraq had lapsed into intense conflict. This had severe consequences for the Tribunal's work. Three defence lawyers and various Tribunal staff and their close relatives were killed, while witnesses and their families in the first trial had suffered multiple retributive attacks.²¹ Quite apart from the Tribunal's own missteps, the rising violence fundamentally undermined its ability to exemplify new norms of accountability and justice. For what did it matter if the crimes of the past were adjudicated against yesterday's leaders when tens of thousands of Iraqis were dying in the streets?

Dujail trial

The *Dujail* trial commenced at a time when Iraqis seemed hopeful about their future. A constitutional referendum had been held and national elections were about to take place. Many of the Tribunal judges hoped that the *Dujail* trial would create a new standard of Iraqi justice, one that was procedurally and substantively fairer than that of the previous regime. The Iraqi public had similarly high expectations, although public debate frequently focused on a different outcome: the humiliation of Iraq's former leaders in the courtroom and swift implementation of the death penalty.

Over the next two months Iraq was galvanized by the *Dujail* trial. It was televised via national and regional satellites, and viewers watched spellbound as Hussein, his half-brother Barzan al-Tikriti, former Prime Minister Taha Yasin Ramadan, despised former head of the Revolutionary Court Awad Hamd al-Bandar, and four Dujaili party functionaries were accused of horrific crimes. Complainants and witnesses testified with great emotion about the killing of their families and their own suffering under torture and through years of imprisonment.²² This was a first for Iraq and in much of the region. Hussein and al-Tikriti used the platform to lambaste the US-led occupation and portray themselves as persecuted Arab leaders responding with dignity and forbearance, while defence

21 See Miranda Sissons and Ari S. Bassin, "Was the Dujail trial fair?", *Journal of International Criminal Justice*, Vol. 5 (2007), pp. 272–86.

22 Complainants were also allowed to be represented by legal counsel, who participated throughout.

counsel argued strenuously that the Tribunal, fruit of the poisoned tree of the invasion, was illegitimate.

After the first two months, however, the Iraqi public mood shifted from excitement to anxiety. Many Iraqis thought that Presiding Judge Rizgar Amin was giving Hussein and other defendants too much latitude during proceedings. There were also rumblings that the trial was beginning to take too long. Without a public outreach strategy, the Tribunal had no way of informing the public that such perplexing courtroom machinations were part and parcel of an open judicial process. This failure to educate the public cost the Tribunal dearly. Not only did it undermine its ability to illustrate new standards of justice, it also deprived it of potential allies and rendered it increasingly vulnerable to political interference from individuals who neither knew nor cared what the Tribunal was attempting to achieve.

Political interference was the single largest failing in the *Dujail* trial. The first intrusion took place in January 2006, when Presiding Judge Amin resigned after weeks of public criticism of his handling of the trial by the Minister of Justice and other leading political figures. Meanwhile, several other members of the Trial Chamber had already left the bench. Other examples of executive interference soon followed. The first occurred when the Higher National De-Baathification Commission²³ suddenly ousted the judge due to replace Amin from the Trial Chamber, reportedly because of his liberal leanings. A second major instance of political interference took place in the final stages of deliberations in the Trial Chamber. As rumours spread that Hussein might not be given the death penalty, the Commission intervened to replace one judge in the Trial Chamber and one in the Cassation Chamber. It is unclear whether this move decisively influenced the final ruling, as Presiding Judge Ra'uf Abd al-Rahman reportedly fought relentlessly to maintain the Tribunal's independence, but the message was certainly clear: political imperatives far outweighed the integrity of the judicial process. Too much judicial independence would not be tolerated.

The trial also suffered from other important flaws. First, Dujail was not seen as fully representative of the regime's crimes, nor did it have the emotional significance of other cases. There seemed little pressing reason to open with events that occurred in a single Shiite town more than twenty-five years previously. The fact that many of the victims were allegedly linked with the Dawa party was also unfortunate. Few Iraqis missed the fact that the Dawa was now an important element of the Iraqi governing coalition and that the Prime Minister was a leading Dawa leader.²⁴

Second, the Trial Chamber lacked the analytical skills to build a detailed picture of the workings of the regime. Although evidence as to the crime base was plentiful, the Tribunal found it extremely difficult to analyse the linkage and

23 The De-Baathification requirements in Article 33 of the Tribunal Statute were far higher than those usually required, and were drafted in a deliberately unclear manner.

24 Both Ibrahim al-Jaafari (Prime Minister at the beginning of the *Dujail* case) and Nuri al-Maliki (from the middle of the *Dujail* case) were members of this Shiite Islamist political group.

contextual evidence that would allow the court and the public to understand how the regime functioned as a whole, and the role of individuals accused in relation to specific crimes. (This was particularly obvious in the case against Taha Yasin Ramadan, and also in the discussion of the Revolutionary Court trial of some 146 Dujailis.) Historians or other expert witnesses, who might have provided some of this valuable evidence, were not called to testify. Instead, the Trial Chamber eventually resorted to unsupported inferences to fill important gaps and so obtain the desired outcome.

Another shortcoming of the *Dujail* trial was its failure to live up to minimum fair trial standards. Although Dujail was almost certainly the fairest trial ever held in Iraq, it still failed to meet guarantees contained in the Tribunal's own statute and Article 14 of the International Covenant on Civil and Political Rights (ICCPR). Throughout the trial the Tribunal placed defendants at a significant disadvantage vis-à-vis the prosecution. It permitted ambiguous charging, limited access to important evidence and denied defendants the full opportunity to contest the evidence against them.²⁵ In addition, the abbreviated appeals process was inadequate to evaluate the complex substantive and procedural issues that arose during the trial. At the root was the Tribunal's inability to accept the defence as an essential partner in the truth-seeking process, which was not helped by repeated instances of unprofessional and sometimes unethical behaviour by certain defence counsel. Another factor was the defence weakness in effectively challenging the Trial Chamber on these issues.

Many Iraqis cared little for these defects and rejoiced at the final ruling on 26 December 2006, which upheld all findings except sentencing for Taha Yasin Ramadan, which it increased to the death penalty. But many more hesitated at the circumstances surrounding Hussein's execution, which was not only blatantly sectarian in implementation but had also involved tortured manipulation of death-penalty ratification requirements and breached various provisions of the Iraqi Criminal Procedural Code, including the requirement that executions not be carried out on religious holidays. The execution undid the pedagogical lesson the trial had been designed to achieve. The trial was not seen as an instrument of justice, but of sectarian revenge. Tensions rose inside Iraq, and Hussein was lionized as a martyr in the Arab world and beyond.

Anfal trial

The Tribunal's second trial opened while the *Dujail* trial was still under way. The defendants included Saddam Hussein, his cousin Ali Hassan al-Majid (nicknamed "Chemical Ali" for his alleged use of chemical weapons against the Kurds), and five other co-defendants. The Tribunal charged the seven men with genocide, crimes against humanity and war crimes, for their role in planning, authorizing

25 Examples of such shortcomings included insufficiently specific charging documents, inadequate security arrangements, failure to gather and disclose exculpatory evidence, late or incomplete disclosure, and limited opportunities to confront witnesses as a result of witness confidentiality mechanisms.

and executing the 1988 Anfal campaign targeting the Kurdish population of northern Iraq.²⁶

Unlike *Dujail*, the Iraqi regime's massive 1988–9 campaign against its Kurdish citizens had received worldwide publicity and been extensively documented by human rights organizations. It was a vastly more prominent series of crimes, of great emotional significance to Kurds. A wealth of official Iraqi documents attested to the regime's systematic and intentional use of chemical weapons against the Kurds, as well as mass executions, imprisonment and forced relocation.

Anfal's prominence resulted in a better-organized and well-resourced investigative phase. By the time the case reached the Trial Chamber both the Tribunal and the Regime Crimes Liaison Office had learned from *Dujail*'s substantive and procedural problems. The accused in *Anfal* were also far easier to manage than in the *Dujail* trial, perhaps because five of the seven defendants were military and intelligence professionals who did not contest the court's authority or use the trial as an oratorical platform. Moreover, the evidence was damning: Iraqi officials had documented their plans to use "special weapons" against Kurdish "saboteurs" in meticulous detail, and the 10,000-page trial dossier gave an intricate insight into the campaign's design, implementation, chain of command and effect. The documentary evidence was complemented by vivid testimony from some 80 complainants and witnesses, as well as forensic and ballistics experts.

Despite a strong case and rich evidence, the *Anfal* trial still suffered from significant flaws. The first, unsurprisingly, was that of political interference. After just nine sessions the office of the Prime Minister requested that Presiding Judge Abdallah al-Amiri be removed. Amiri, an experienced and well-respected judge, had caused public consternation and prompted complaints from the prosecution for appearing to be partial to the defence. His comment to Saddam Hussein, "You were not a dictator", caused widespread public outcry. He was immediately removed by executive request (rather than under the Tribunal's own procedures to deal with situations of bias) and replaced by Judge Muhammad Uraybi al-Khalifa, who immediately took a hard-line approach in the courtroom.

The second and perhaps surprising area of political interference was related to the cases of Sultan Hashem and Hussein Rashid, both well-connected Sunni career military officers. Hashem was a former army chief of staff and Minister of Defence who during the Anfal campaign was commander of the First Corps; Rashid was army deputy chief of staff for operations during the Anfal campaign. In at least some quarters the two were respected military professionals who had had no choice but to follow the orders of a malevolent leadership, honourable men who symbolized the problems of collective scapegoating of the Sunni military elite. Trial and Cassation Chamber judges reportedly came under strong political pressure not to impose the death penalty, resulting in a legal and political crisis that, at the time of writing, has not yet been resolved.

26 For a detailed overview of *Anfal* trial developments, see the ICTJ trial updates at <http://www.ictj.org/en/where/region5/564.html> (last visited 20 November 2007).

Equality of arms was also a significant issue. Judge al-Khalifa often appeared impatient or dismissive of defence requests, *inter alia* repeatedly refusing to facilitate the testimony of defence witnesses through video testimony or other innovative means. As a result, only six defence witnesses testified during the course of the trial, in contrast to some 100 prosecution witnesses and complainants. Relationships between the judge and key lawyers soured as time went on, and a scandal erupted when the presiding judge ordered the arrest of defence counsel Badia Ezzat Aref for contempt of court when attempting to challenge the judge's refusal to receive a CD-ROM into evidence.²⁷

The final significant feature of the *Anfal* trial was the place it failed to occupy in the public domain. Iraqis watched early proceedings of both trials with interest and concern. But, as mentioned above, after Hussein's execution public interest plummeted. While TV broadcasts of the proceedings continued, the flow of visitors to observe them ceased. Indeed, for much of the latter half of the trial there was at most one visitor in the observation chamber: an Iraqi observer for an international organization.

The Trial Chamber handed down its *Anfal* ruling on 24 June 2007; the Cassation Chamber followed suit ten weeks later. Al-Majid, Rashid and Hashem were given multiple death sentences. Two other defendants were given life imprisonment and charges against one were dropped for lack of evidence. Although the full story of the *Anfal* trial has yet to be completed, it is clear at the time of writing that the trial had, in the short term, failed to make the impact that many earlier proponents had hoped for. Despite spellbinding evidence, massive crimes and better organized trial proceedings, *Anfal* was compromised by the fact that it took place after the *Dujail* trial.

To date, hopes that the Tribunal could serve as the foundation of an impartial and fair judicial system in Iraq have not been borne out. Nor are they likely to be. Although the Tribunal operates better than courts under the previous judicial system, it has failed to demonstrate a clear commitment to new values of impartiality, judicial independence, equality of rights and the rule of law.

Vetting and De-Baathification

Vetting to remove abusive officials from positions of authority, if carried out fairly, properly and prudently, can be a legitimate part of a larger process of institutional reform in periods of transition. It can also play an important role in ensuring that past abuses are not repeated and can deprive offenders of retaining power and influence over the affected populations during the social reconstruction process. At the same time, vetting is a complex, sensitive and resource-intensive process that is fraught with pitfalls. Vetting programmes, if badly handled, can easily turn into purges and so create further abuse, resentment and distrust.

27 Without US intervention Aref almost certainly would have been killed during detention; he was later spirited out of the country, unable to return.

Finally, extremely broad or poorly targeted vetting programmes can also deplete a post-war society of trained administrators. Indeed, the history of the last fifty years shows that countries trying to make the transition to democracy almost inevitably bring back some members of the ousted regime.²⁸

On 8 May 2003, before Paul Bremer left for Iraq, Secretary of Defense Donald Rumsfeld gave him a memo entitled “Principles for Iraq-Policy Guidelines” that specified that the US-led coalition “will actively oppose Saddam Hussein’s old enforcers – the Baath Party, Fedayeen Saddam, etc.” and that “we will make clear that the US-led coalition will eliminate the remnants of Saddam’s regime”.²⁹ Douglas Feith, Secretary of Defense for Policy, also gave Bremer the draft of a proposed CPA order initiating a policy of De-Baathification.

Ahmed Chelabi, leader of the Iraqi National Congress, and a handful of other Iraqi exiles had already developed the outlines of such a policy, drawn primarily from European experiences of de-Nazification at the end of the Second World War. The lessons and insights gained from more than fifty years of other, more recent, vetting programmes, such as those in Bosnia and Herzegovina or in El Salvador, were never taken into account.³⁰ Chelabi’s ideas appear to have heavily influenced the policy instructions given to Bremer prior to his departure for Iraq.³¹ Bremer arrived in Baghdad on 9 May 2003. Just one week later, he set into motion a De-Baathification process that would have a profoundly destabilizing effect on Iraqi society.

The Arab Socialist Baath Party was a secretive Arab nationalist grouping, established in Syria in the 1940s, that Hussein used to gain access to power in 1968 and the presidency of Iraq in 1977. The party was one of the major instruments through which Iraqis, especially Shiites and Kurds, were brutalized. Following Stalinist models it had a secretive, cell-based structure that eventually paralleled or controlled all major institutions of society and government, with military and professional offices, student offices and an elaborate geographical network. Membership was a prerequisite for many professions, and the reports of local Baath Party members were vital in securing access to education and jobs, as well as maintaining a clean official record.

Coalition forces announced the “disestablishment” of the Baath Party on 16 April 2003. For many Iraqi Shiites and Kurds in the Iraqi Governing Council, some kind of vetting was an absolute necessity for a peaceful transition to democracy in Iraq. But the US-led Coalition also needed to address the fears of the newly disenfranchised Sunnis and, on a basic level, to keep the country functioning. All of this had to be achieved without access to reliable data on the structure of the Baath Party.

28 See David Cohen, “Transitional justice in divided Germany after 1945”, in Jon Elster (ed.), *Retribution and Reparation in the Transition to Democracy*, Cambridge University Press, Cambridge, 2006, pp. 59–88.

29 Quoted in L. Paul Bremer III, “How I didn’t dismantle Iraq’s army”, *New York Times*, Op-Ed, 6 September 2007.

30 Sissons interview with Dr Ahmed Chelabi, March 2006. On the lessons of vetting programmes see Alexander Mayer-Rieckh and Pablo de Greiff (eds.), *Justice as Prevention: Vetting Public Employees in Transitional Societies*, Social Science Research Council, New York, 2007.

31 See L. Paul Bremer III with Malcolm McConnell, *My Year in Iraq: The Struggle to Build a Future of Hope*, Simon & Schuster, New York, 2007.

In a fateful decision, Bremer adopted two sweeping measures. The first CPA Order, issued just one week after Bremer's arrival, dismissed four levels of Baath Party members from government service and banned them from all future state employment. It is important to note that all dismissals were based purely on rank, with no relation to individual wrongdoing. In addition, all bureaucrats from the top three ranks of government service were to be interviewed to check their party affiliation, and were to be dismissed if they held the rank of party member or above.³² Bremer had the power to make exemptions on a case-by-case basis. The order applied to all national ministries, affiliated corporations and other government institutions, including hospitals, schools or university management. In addition, all those dismissed were eligible for criminal investigation. In the following months an estimated 30,000 individuals, including some 6,000 to 12,000 educators, were summarily dismissed from their posts.³³

One week later Bremer disbanded the Iraqi special courts, armed forces, intelligence forces and related ministries.³⁴ All persons at the rank equivalent to colonel or above were deemed to be senior party members unless they could prove otherwise. A number of other institutions closely identified with the Baath Party or Hussein's family were also disbanded, such as the paramilitary *fidayin Saddam* and the National Olympic Committee. The decision to disband the intelligence apparatus has not been widely questioned, but the fateful decision to dissolve Iraq's military has been almost universally condemned. In addition to the security implications of the dissolution, there were also severe social consequences. Iraq's military had been major source of employment, social mobility and national pride. In the following weeks Bremer ordered a series of additional De-Baathification mechanisms to flush out the system in detail.³⁵ Registers were created to list and maintain control of Baath Party property – some Iraqi Governing Council members had already taken the leadership's Baghdad palaces for their own use – and the process was given nominal Iraqi ownership. An Iraqi De-Baathification Council (IDC) was ordered into being (although whether it actually functioned is unclear), and a set of implementation instructions announced.³⁶ Military investigators were to investigate the party affiliation of all ministerial employees;

32 See Coalition Provisional Authority Order No. 1, above note 4. This order designated the top four levels of party membership as "senior Party members". This included the ranks of *'udw qutriyya* (regional command member), *'udw far* (branch member), *'udw shu 'bah* (section member), and *'udw firqa* (group member). In all cases, the Administrator could grant exceptions on an individual basis.

33 L. Paul Bremer, Coalition Provisional Authority press briefing, 25 November 2003 (on file with authors).

34 Coalition Provisional Authority Order No. 2, above note 4.

35 Coalition Provisional Authority Order No. 4; Coalition Provisional Authority Order No. 5, "Establishment of the Iraqi Debaathification Council"; Coalition Provisional Authority Memorandum No. 1, "Implementation of De-Baathification Order No. 1", CPA/MEM/3 June 2003/01.

36 The Council was empowered to trace party assets and investigate the identity and whereabouts of Baath Party officials and members involved in violations of human rights, and was charged with advising on implementation of De-Baathification goals. It was also given wide powers to gather and present any other information relevant to De-Baathification efforts. Individuals adversely affected by the decisions of the Council could appeal in writing to Bremer for a reversal and he retained the authority to grant exceptions on a case-by-case basis.

those belonging to the banned levels of party membership would be dismissed unless their employer requested an “exception”. Individuals could appeal against findings on factual grounds to joint military–civilian committees, which would also grant or deny exception requests. Despite all the paperwork, actual implementation seems to have varied heavily across ministries, according to the individual attitude of the responsible minister. Lower-level employees were the first to be sacked, with ministerial power-holders often the last in line.³⁷ Some categories of members retained pension rights but would lose them in the case of an unsuccessful appeal.

The CPA failed to consult the Iraqi people about the desirability of its sweeping and often arbitrary De-Baathification process. Nor had it enough party or government data to judge whether the policy was well-founded. Our survey found that while the majority of respondents blamed the Baath Party for past crimes and felt that those responsible should be dismissed, they also felt it was unfair to penalize individuals solely on the basis of their party membership and sought to draw distinctions between members of the party, whom they referred to as Baathists, and ardent supporters of Saddam Hussein, whom they termed Saddamists. While respondents in northern Iraq generally supported a purging of the Baath Party from government institutions, many respondents in central or southern regions expressed concern about the impact of wide-scale De-Baathification on the need for human resources to rebuild the country.³⁸

De-Baathification quickly slipped out of the control of the CPA. Within six weeks the Iraqi Governing Council had seized the initiative and created the Higher National De-Baathification Commission (HNDBC) with Ahmed Chelabi as its head. Chelabi and his advisers swiftly issued regulations that were posted in all ministries.³⁹ The CPA grudgingly acknowledged the coup several months later, although by this stage it was becoming increasingly opposed to De-Baathification’s social and administrative effects, particularly in areas such as education.⁴⁰

Chalabi’s aggressive measures reached their nadir in 2003 with the dismissal of 12,000 Iraqi teachers, who had found their appeals blocked or endlessly deferred by the review process. In one of his final acts as CPA head, Bremer attempted to dissolve the Commission; shortly thereafter the interim Iraqi Prime Minister, Ayad al-Alawi, also sought to restrain the Commission’s power. But the Commission was too politically and bureaucratically astute to be easily

37 This is based on De-Baathification field research 2006–7 by the International Center for Transitional Justice.

38 *Iraqi Voices*, above note 9, pp. 51–2.

39 See IGC Decision 21 of 18 August 2003 and Higher National De-Baathification Commission Order Number 1 of 14 September 2003 (on file at ICTJ). Determinations of membership were usually based on an individual’s pay records at their place of employment, as party members often received extra allowances. Party membership records had not been found.

40 Jonathan Steele, “Anti-Baathist ruling may force educated Iraqis abroad”, *Guardian*, 30 August 2003, p. 16.

reined in, and at the time of writing had survived unscathed even as multiple reform proposals were tabled in 2006 and 2007.

The 2003–7 De-Baathification process was severely flawed in a number of ways. First, there was the problem of design. De-Baathification did not include any vetting policy: no attempt was made to assess individuals' suitability for public employment based on their human rights record or other criteria of integrity. The assumption was that all party members above a certain rank should be dismissed from government service, presuming that such persons *must* have perpetrated serious human rights violations or *must* have been ideologically committed to Baathism, and so were unfit for public employment. No factual basis for these assumptions has ever been made publicly available.

The policy was both too broad and too narrow: it no doubt removed many individuals who were not abusers from office (for example, the teachers dismissed in late 2003), but did not remove abusers who held lower-level party positions or indeed no positions at all. The incoherence bred widespread resentment from both sides. The Shia complained that abusers had not been acted against and feared that there were insufficient means of preventing the party's return to power. The Sunnis complained that De-Baathification was an instrument of collective punishment used to bar Sunnis from future participation in Iraqi public and political life. In the end, both were correct.

Second, De-Baathification procedures were unfair and opaque. Individuals were automatically dismissed without basic due process procedures, such as being notified of the information against them, the right to a hearing prior to dismissal, or the right to examine their own file. Exemptions and reinstatements were technically possible, but depended on ill-defined and often changing criteria. As a result, the HNDBC wielded enormous power over the lives of thousands of people with little or no accountability. There was the strong perception, and sometimes the reality, that the De-Baathification Commission was merely another political tool in the hands of its Shia masters. Its power extended to government contracting, approval of electoral candidacies, the leadership of NGOs, media outlets and professional associations, and intervention in judicial selection at the trials of the Iraqi High Tribunal.⁴¹

Third, De-Baathification made nearly everyone in Iraq unhappy. The Iraqi High Tribunal was dealing with only a handful of perpetrators and, in the absence of other visible large-scale initiatives to deliver justice to victims, De-Baathification became a stalking horse for all the demands of victims for justice in Iraq. By 2006 most Iraqis thought of De-Baathification as a policy that should prosecute perpetrators, secure reparations, return stolen property, create memorials, revise educational curricula and prevent the Baath Party's return to power in the future. But the bitterness and controversy De-Baathification provoked took their toll, and in 2006 the Iraqi government came under heavy

⁴¹ De-Baathification provisions were contained in a host of laws, not just the De-Baathification orders. These included the electoral law, the Statute of the Iraqi High Tribunal, the constitution and other legal instruments.

pressure to revise the programme. The deteriorating political and security environment – plus the political skill of De-Baathification’s supporters – meant that change was slow to materialize. When it did, the changes were relatively weak. After fits of stop–start negotiations among the Iraqi leadership the Iraqi parliament was scheduled in September 2007 to consider a compromise draft law in which the framework of De-Baathification would essentially remain, but the rank at which it was carried out might differ. Some former defence-related officials and members of the armed forces would no longer be banned from public employment as long as they had not committed any crimes. Not only would the HNDBC remain, but it would be granted additional powers, including the right to launch criminal investigations and initiate prosecutions, a frightening proposal that also aroused judicial ire. Most people also missed one important additional point: almost all individuals eligible for De-Baathification had already been sacked. The game had shifted to control of reinstatements. But no attention had been paid to developing clearer reinstatement procedures which, although they were supposedly automatic, required an application process. The draft continued to give the HNDBC authority to act arbitrarily and unfairly in enforcing the same flawed De-Baathification system in a civil service that was in chaos.⁴² At the time of writing this article there was little hope of any better outcome.⁴³

Truth seeking

Long before the outset of war, international human rights organizations and Iraqis in exile had begun discussing the idea of establishing truth and reconciliation committees to confront the massive human rights abuses of the Saddam era. With planning and good co-ordination, truth commissions can complement the work of criminal prosecutions by gathering and preserving the testimonies of victims of human rights abuses and investigating and exposing the larger historical patterns of abuse, responsibility and complicity. By investigating key cases, researching the causes and consequences of past abuses and writing a public report, a truth commission can formally acknowledge what has been denied, give respect and a voice to victims, and help to shape other justice mechanisms, such as reparations.⁴⁴

In our 2003 survey of Iraqis, we found that legitimacy and public support for a truth-seeking process in Iraq would only emerge through an open, transparent and inclusive process of public consultation and education. Iraqis had

42 The International Center for Transitional Justice suggested an end to De-Baathification within one calendar year and the creation of clear hiring and promotions guidelines to prevent the recruitment of abusers to the public service in the future.

43 A new “Accountability and Justice Law” was passed by the Iraqi parliament on 12 January 2008, and approved by the presidency council on 3 February. For an overview of its contents see Miranda Sissons *Briefing Paper: Iraq’s New Accountability and Justice Law*, International Center for Transitional Justice, January 2008, available online at <http://www.ictj.org/images/content/7/6/764.pdf>

44 See, e.g., Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, New York, 2001.

little understanding of a truth commission and limited exposure to other countries' experiences. Thus educating the nascent organizations of Iraqi civil society, religious and community leaders, representatives of ethnic groups and a broad cross-section of Iraq's (highly literate) population would be an indispensable first step.⁴⁵ Respondents were quick to suggest their own version of how a truth-seeking process should be conducted. Among the suggestions were:

“establishing local committees of reputable individuals to gather testimony and document the names of the dead and missing ... declaring days of remembrance as national holidays; establishing memorials in every town and region; creating museums and documentation centers, photographic and videographic displays, and artistic works of literature, cinema, and theatre; and preserving detention centers and instruments of torture”.⁴⁶

In Iraq, where only a small fraction of the total number of perpetrators will be prosecuted before the Iraqi High Tribunal and other courts, a truth commission could help to provide a comprehensive account of human rights violations over the past quarter-century by analysing the vast amount of evidence gathered by organizations and individuals within and outside Iraq. It could also explore the role of external players in preventing or enabling human rights abuses. Most importantly, a truth commission could deal with the fate of hundreds of thousand of Iraqis who are missing, disappeared or presumed dead. Either alone or in conjunction with the International Committee of the Red Cross (ICRC), it could help to trace the missing and oversee the exhumation of mass graves.

At the time of writing, neither the Iraqi government nor the Bush administration has given serious thought to establishing a truth commission. And in the light of the ongoing violence in Iraq, such an institution will not be feasible in the foreseeable future. However, this does not mean that the Iraqi government, in consultation with the United Nations and other organizations such as the ICRC and the International Center for Transitional Justice, should not begin exploring the possibility of initiating a truth-seeking process. A truth commission in Iraq should be built on the principles of education, consultation, independence and co-ordination. Establishing it will take time.

Since a vast majority of Iraqis support criminal prosecutions of past human rights offenders,⁴⁷ care will need to be taken to demonstrate that a truth commission will be a complement rather than an alternative to prosecutorial processes. Educating the population about the scope, objectives and limitations of a truth commission will be indispensable. This educational effort should address

45 *Iraqi Voices*, above note 9, pp. 55–6.

46 *Ibid.*, p. 51.

47 *Ibid.*, pp. 48–50. A similar survey carried out in southern Iraq found that 98 per cent of the respondents wanted those responsible for human rights committed crimes during the previous regime to be punished, and that 77 per cent favoured a court process over non-judicial processes. See *Southern Iraq: Report of Human Rights Abuses and Views on Justice, Reconstruction, and Government*, Physicians for Human Rights, 18 September 2003, p. 8.

all relevant sectors of society so that it is not perceived as a dialogue between “elites” or certain political factions.

Legitimacy and public support for a truth-seeking process in Iraq will be best achieved through a genuine process of public consultation and deliberation. Proposed laws establishing the commission should be publicized and debated in a variety of fora to ensure public understanding and commitment. Public debates should be held throughout the country on a range of topics, including the nature of the violations to be investigated, the principal objectives and legal powers of the commission, and whether the commission should hold public hearings for victims and publish the names of individuals accused of human rights violations. Those who serve on the commission should be well-respected persons of the highest integrity who represent a balance of political forces, ethnic groups and religious communities. For a number of reasons, including operational requirements that will encourage victims of sexual abuse to come forward, it is imperative that both women and men be represented on it.

Reparations

History has shown that reparations in the form of material and symbolic compensation are essential for victims of massive violations of human rights. They can be as fundamental as one-time financial payments to individual victims, or collective processes such as public memorials, days of remembrance, parks or other public monuments, renaming of streets or schools, preservation of repressive sites as museums, or other ways of creating public memory. They can encompass educational reform, the rewriting of historical accounts and education in human rights and tolerance. Yet whatever reparations scheme is pursued, writes Naomi Roht-Arriaza, caution must be exercised not to use it “to stigmatize and marginalize those groups whose members perpetrated the abuse. Reparations must be offered in ways that acknowledge the suffering of victims but do not victimize others who did not actively engage in the violence.”⁴⁸

In our 2003 survey, we found that while Iraqis overwhelmingly supported material and symbolic compensation for victims of violations of human rights, they did not necessarily support single-instance *ex gratia* financial payments.⁴⁹ Many respondents recognized that the losses suffered were incalculable and that no amount of money could replace a family member (or, in some cases, an entire family) killed by the regime. Respondents suggested forms of reparations that included providing physical and mental health services and access to education and employment, meeting basic needs for shelter, food and clothing, returning confiscated property and establishing memorials inscribed with victims’ names.

48 Naomi Roht-Arriaza, “Reparations in the aftermath of repression and mass violence”, in Eric Stover and Harvey M. Weinstein (eds.), *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge, Cambridge University Press, 2004, pp. 121–39.

49 *Iraqi Voices*, above note 9, p. 40.

The vast majority of respondents believed that the financial costs of reparations should be borne by the Iraqi state.⁵⁰ Several stressed the need for security for victims' families. Reinstating dignity to honour the victims and their families was also mentioned.

On 26 May 2004, five weeks before the handover of power to the Iraqis, Bremer appointed Malek Dohan al-Hassan, then head of the Iraqi Bar Association, as chair of a task force on reparations and instructed him “to define the types of injustice for which compensation should be provided”.⁵¹ The group was also tasked with deciding who would be eligible for compensation, the appropriate level of compensation and the mechanisms through which it should be delivered. The task force was constituted but its members quickly disappeared – along with the millions of dollars allocated to fund initial compensation schemes.

Muslim and Arab culture places significant emphasis on the notion of compensation for harms suffered. Similarly, the pension and other benefits the Hussein regime had given to select veterans of the Iran–Iraq War and other groups had led many Iraqis to have high expectations of what an acceptable reparations scheme would contain. Members of the Iraqi Prime Minister's office pursued the idea of a reparations policy, albeit with little appetite for practical or financial details. Victim representatives then became exasperated and went ahead with their own drafting process via a parliamentary committee for martyrs and victims. In January 2006 the committee rushed through two laws – the Martyrs Association Law⁵² and the Law of the Political Prisoners Association⁵³ – which, in turn, established two separate foundations to design and implement reparations programmes.

The committee had acted quickly because it feared that the new permanent parliament would not support reparations legislation. But haste had its consequences. The law was passed without scrutiny by the relevant legal officials, with the result that the final legislation violated several important Iraqi legal requirements. The programmes they instituted were moreover unfunded and ill-designed; eligibility was not defined according to impartial legal norms and was therefore open to accusations of sectarian and other bias; the laws promised very high benefits, such as housing and lifelong pensions, but the foundations had few resources with which to implement them. Even worse, the administrative mechanism set up to receive and decide on reparations requests was absolutely inappropriate and would be incapable of processing hundreds of thousands of claims.

One year later the Iraqi Prime Minister, acting through his reconciliation initiative, had earmarked \$170 million for the foundations' operations and

50 Ibid., p. 42.

51 Coalition Provisional Authority press release, “Ambassador Bremer announces creation of special task force on compensation for victims of the former regime”, Baghdad, 26 May 2004.

52 Council of the Presidency, Decision Number 3 of the Year 2006, Martyrs' Association Law, *Iraqi Gazette* No. 4018 (6 March 2006).

53 Council of the Presidency, Decision Number 4 of the Year 2006, Law of the Political Prisoners Association, *Iraqi Gazette* No. 4018 (6 March 2006).

selected individuals to serve as board members. Yet political and logistical problems had prevented the foundations from beginning their work. The two bodies were crippled by legal problems, ranging from the legal incapacity to design their own regulations or internal budget to litigation brought by Sunni parliamentarians who objected to the foundations' selective focus. Despite these major barriers, foundation board members optimistically spoke of preparing to receive applications and some parliamentarians were ready to admit that the laws should be revised, *inter alia* perhaps to include victims of post-2003 violence. But high-level attention, beset by other problems, was meagre. At the time of writing it seemed likely that Iraqi victims of severe human rights violations would continue to lack any kind of reparations process for the foreseeable future.

Conclusion

Recently the US and Iraqi governments erected a heavily fortified compound in the Rusafa neighbourhood to ensure security for the trials of some of Iraq's most dangerous suspects, serve as a prison and detention facility for thousands of prisoners, and shelter judges and their families. Known as the "Rule of Law Complex", the court tried forty-three suspects in the first six weeks of operations, a rate of about one suspect a day. The Bush administration, which has invested heavily in the Rusafa complex, hopes to create a network of similar legal fortifications in other parts of Iraq, starting with Ramadi, the capital of Anbar province. Despite its status as a protected area, the Rusafa complex is not immune from the many problems afflicting Iraq's legal system. They include the large number of detainees that has resulted from the surge of US and Iraqi military operations, allegations of the use of torture to extract confessions and concerns about the impartiality of some court officials.⁵⁴

This state of affairs hardly bodes well for the promotion of national reconciliation in Iraq. Nor is it conducive to the development of an independent, transparent and accessible judicial system, which is a key component of social reconstruction. Moreover, insecurity has created an environment in which many people are reluctant to speak publicly about their suffering and losses under the previous regime. These conditions suggest that implementation of a full-scale transitional justice process is not currently practicable.

That said, it would be a great tragedy to deny the Iraqi people the justice they so clearly desire. What is needed in Iraq is a secure environment and a legitimate authority to implement a comprehensive transitional justice strategy that reflects the needs and priorities of a wide range of Iraqis. It should contain a broad range of measures, including prosecutions, reparations, vetting, truth-seeking measures and institutional reform. To develop and implement such a strategy will take time and will require community-based consultations

54 Michael G. Gordon, "Justice from behind the barricades in Baghdad", *New York Times*, 30 July 2007.

throughout the country. It will also require the participation of both Iraqi and international experts, working with the assistance of an impartial body (preferably the United Nations) and making recommendations to the Iraq government.

For this strategy to be as effective as possible in Iraq, it should be linked to a process of social reconstruction that reaffirms and develops shared values and human rights. Our studies of survivors of genocide and other massive human-rights abuses in over a dozen countries suggest that the idea of justice encompasses more than criminal trials and the *ex cathedra* pronouncements of judges.⁵⁵ It means returning stolen property, locating and identifying the bodies of the missing so that they can be returned for proper burial, securing reparations and apologies, leading lives devoid of fear, securing meaningful jobs, providing children with good schools and teachers, and helping those traumatized by atrocities to recover. In other words, criminal justice and “truth-telling” alone cannot suture the lesions of individual and collective trauma in Iraq and other countries emerging from long periods of repressive rule. “It requires”, as Kirsten Campell suggests, “a fundamental change to the social order which made possible the original trauma of crimes against humanity.”⁵⁶ In this sense, justice in Iraq remains the event that is yet to come.

55 See Stover et al., above note 13, pp. 1–26.

56 Kirsten Campell, “The trauma of justice”, presented at the international conference on “Human fragility: rights, ethics, and the search for global justice”, University of the West of England (Bristol), January 2001.