

Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq

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Most Iraqis welcomed us as liberators. And we glowed with pleasure at that welcome. But now the reality of foreign troops on the streets is starting to chafe. Some Iraqis are beginning to see us more as occupiers than liberators.¹

I. INTRODUCTION

On Thursday, July 1, 2004, the Iraqi public and audiences around the world were transfixed by the image on their television screens: Saddam Hussein, the former dictator of Iraq, sitting in the dock in a courtroom, listening to charges of war crimes and crimes against humanity for which he is to be prosecuted. Yet the first images of the court proceedings against Saddam Hussein were also a reminder that symbolism is in the eye of the beholder. What to some might appear as a triumph for the enforcement of international standards of justice and the transition to the rule of law in Iraq, may to others seem a show trial adding insult to the injury of the U.S. occupation of Iraq.

Asked to identify himself by the investigative judge presiding over the proceedings, Mr. Hussein declared, "I am Saddam Hussein, President of the

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1. *Iraq: Next Steps—What Will an Iraq 5-Year Plan Look Like?: Hearing Before the Senate Comm. on Foreign Relations*, 108th Cong. 13 (2003) (testimony of Ambassador L. Paul Bremer, presidential envoy to Iraq and Chief Administrator of the Coalition Provisional Authority).

Republic of Iraq." When the judge corrected him and stated that he was the *former* president of Iraq, Mr. Hussein curtly dismissed the correction, insisting that no valid or legitimate authority had divested him of a title bestowed on him by "the will of the [Iraqi] people."² Through the rest of his twenty-six-minute appearance in the courtroom, Mr. Hussein questioned the authority of the Iraqi tribunal and delivered a political diatribe against the occupation. U.S. and Iraqi officials were sufficiently concerned about the resonance of this message that they took measures to shield the identity of the investigative judge, "fearful of his assassination."³ Two principal reactions to the courtroom scene could be discerned from person-on-the-street interviews conducted with Iraqis immediately after the images from the courtroom were televised: first, fear of Saddam Hussein's return after a performance suggesting that he was neither as weak nor as humbled as previous reports by the George W. Bush administration had suggested; and second, approval of Mr. Hussein's defiance of the occupation authority's legitimacy.⁴ Both of these reactions suggest something disturbing about the record of the Coalition Provisional Authority (CPA), the Iraqi Governing Council (IGC), and its successor, the Interim Iraqi Government: more than a year after the prior regime was deposed, the Iraqi public had little confidence in the new administration's ability to establish a legitimate new government in Iraq or to prevent the return of authoritarianism.

The first example of Iraq's new justice system at work reflects the deeply problematic relationship between occupation, accountability, and justice. The hearings were held in a makeshift court constructed by U.S. occupation authorities, on a U.S. military base, on Iraqi soil, at an undisclosed location, with the identity of the judges kept secret, no defense counsel permitted to appear in the courtroom, and the defendants held incommunicado for months prior to their appearance in court.⁵ The courtroom was filled with U.S. military personnel dressed in civilian clothes, the journalists in the audience were carefully vetted by U.S. authorities,⁶ and the images and sounds from the courtroom were subject to U.S. censors.⁷ The retributive appeal of such a tribunal is clear. The then-executive director of the Iraqi Special Tribunal, Salem Chalabi, announced shortly after the initial hearings that the death penalty would be restored (after it had initially been suspended under the occupation) and that "capital punishment would be available to the judges in the special tribunal's trials, even if it were formally restored after the current hearings began."⁸ While many Iraqis may have been satisfied to see their former dictator deprived of the rights that so many of them were denied

2. John Burns, *Defiant Hussein Rebukes Iraqi Court for Trying Him*, N.Y. TIMES, July 2, 2004, at A1.

3. *Id.*

4. In July 2004, when the courtroom scenes were televised, I joined the worldwide television audience from my family home in Istanbul, Turkey. The immediate reactions of Iraqis were captured for the Turkish audience by interviews in Baghdad, Basra, and Mosul that were broadcast on the two principal all-news television networks in Turkey: CNN Turk and NTV.

5. Burns, *supra* note 2, at A1.

6. Claire Cozens, *Media Blocked from Saddam Hearing*, GUARDIAN (U.K.), at <http://www.guardian.co.uk/Iraq/Story/0,2763,1251618,00.html> (July 1, 2004).

7. Robert Fisk, *US Military Tried To Censor Coverage of Saddam Hearing*, THE INDEPENDENT (U.K.), July 3, 2004, at 30.

8. Burns, *supra* note 2, at A6.

under the Baath regime, the absence of certain procedural protections and the imposition of the death penalty may undermine transitional justice in Iraq. Show trials, if that is what the tribunal ultimately delivers, may symbolize a transition from one regime to the next, but not a transition to the rule of law. Indeed, the ongoing repression and violation of rights in Iraq in the initial post-conflict period have already seriously diminished Iraqi and international public confidence in the prospects for the rule of law in Iraq.

To approach the inquiry about the relationship between rule of law and justice on the one hand and regime change, occupation, and reconstruction on the other, the argument in this paper will progress through several topics. Section II reviews the course of the invasion and occupation of Iraq and considers the legal basis for the current, largely U.S. experiment in nation-building. This overview will also consider the prior question of whether nation-building is a feasible endeavor for an external occupier, or whether it might be more appropriate to focus efforts on a less ambitious, more limited project. Section III considers the significance of establishing the rule of law as part of any project to rebuild Iraq. Section IV examines the relationship between ordinary and extraordinary justice and asks how issues of transitional justice interact with efforts to reestablish the Iraqi legal system. Section V turns to the special challenges faced by a belligerent occupying authority tackling issues of accountability and justice. Here, the paper will pay particular attention to the specificities of the U.S. record in Iraq and to arguments that a new model of political trusteeship is most appropriate for considering the rights and obligations of strong powers—such as the United States—when reconstructing weaker nations subdued by military force. These arguments relate to a broader debate regarding justice and nation-building in Iraq—namely the relationship between belligerent occupation and legitimacy, to which the paper returns in conclusion.

II. INVASION, OCCUPATION, AND NATION-BUILDING: THE U.S. PROJECT IN IRAQ

A. *Nation-Building Versus State-Building and the International Law of Belligerent Occupation*

On March 20, 2003, the United States commenced a military attack against Iraq that resulted, shortly thereafter, in a full-scale invasion of the country. This war was widely considered illegal under both international law and the rules of the prevailing international peace and security system established (largely by the United States) in the post–World War II era.⁹ The

9. Immediately preceding the war, international lawyers issued numerous opinions stating that the use of military force against Iraq would violate international law. For instance, the International Commission of Jurists released a statement that the attack on Iraq constituted an illegal invasion that amounted to a war of aggression. Press Release, International Commission of Jurists, ICJ Deplores Moves Towards a War of Aggression on Iraq, at [http://www.icj.org/news.php3?id_article=2770-
&lang=en](http://www.icj.org/news.php3?id_article=2770-&lang=en) (Mar. 18, 2003). Similarly, an open letter published in the British *Guardian* newspaper, signed by sixteen French and British academic specialists in international law (based at Oxford, Cambridge, the London School of Economics, and the University of Paris), stated that “there is no justification under international law for the use of military force against Iraq.” *War Would Be Illegal*, *GUARDIAN* (U.K.), Mar. 7, 2003, at 29, available at <http://www.guardian.co.uk/Iraq/Story/>

U.S. postwar strategy in Iraq was to govern directly as a belligerent occupant rather than cede power to a formal U.N. civilian administration to govern the country during the post-conflict transition. During complex negotiations in May 2003, the United States prevailed in a political struggle in the U.N. Security Council to obtain some measure of international legal authority,¹⁰ and with Security Council Resolution 1483 in place, the U.S.-led CPA became the internationally recognized transitional occupation government of Iraq, subject to the international law of occupation (as the resolution underscored)—principally the Hague Regulations of 1907 and the Geneva Conventions of 1949.¹¹

Once the decisions to invade and then directly occupy and administer Iraq had been carried out, the United States faced two significant questions about its strategy for post-conflict Iraq: how to govern and how to exit. This strategic choice, in turn, is directly related to the prospects of establishing the rule of law in Iraq. A military administration relying principally on its monopoly of force to administer post-conflict Iraq is unlikely to yield robust local institutions capable of maintaining stability or commanding legitimacy. In contrast, however, a hands-off occupation strategy might run the risk of allowing a single strongman to take the reigns, an Islamist government to form, or conditions of civil strife to yield to secessionism in the north or south

0,2763,909314,00.html. For additional articles detailing the consensus among international lawyers concerning the illegality of the U.S. attack on Iraq, see *Iraq War Illegal, Says Annan*, BBC.com, at http://news.bbc.co.uk/2/hi/middle_east/3661134.stm (Sept. 16, 2004) (citing comments by U.N. Secretary-General Kofi Annan during an interview with the BBC that the U.S.-led invasion of Iraq was “not in conformity with the UN Charter” and was therefore illegal); Jeff Sallot, *Legal Experts Say Attack on Iraq Is Illegal*, GLOBE & MAIL (Can.), Mar. 20, 2003, at 10 (noting that dozens of Canadian law professors and experts in international law consider an attack on Iraq illegal); Emma Thomasson, *Iraq War Illegal but Trial Unlikely, Lawyers Say*, REUTERS, at <http://middleeastinfo.org/article2270.html> (Mar. 19, 2003) (noting that “many leading legal experts have rejected attempts by Washington and London to justify a war with Iraq without a new [Security Council] resolution explicitly authorizing force”). Indeed, a deputy legal adviser to the United Kingdom’s Foreign Office resigned after ministers ignored advice that the war in Iraq would be illegal. Marie Woolf, *Legality of Iraq Occupation “Flawed”*, THE INDEPENDENT (U.K.), July 5, 2004, at 1 (quoting Elizabeth Wilmshurst, the lawyer who resigned from the Foreign Office, stating that “‘it could be alleged that the use of force in Iraq was aggression’ while ‘the kinds of abusive treatment of Iraqi prisoners that have been alleged could amount to war crimes’”). Further, in the aftermath of the war, numerous officials, including high-ranking U.N. officials and even U.S. supporters of the invasion, have publicly stated that the war was illegal. See, e.g., Oliver Burkeman & Julian Borger, *War Critics Astonished as US Hawk Admits Invasion Was Illegal*, GUARDIAN (U.K.), Nov. 20, 2003, at 4 (reporting on a statement by Richard Perle, former Pentagon adviser, that the invasion of Iraq was illegal); Anne Penketh & Andrew Grice, *Blix: Iraq War Was Illegal*, THE INDEPENDENT (U.K.), Mar. 5, 2004, at 1 (reporting that former U.N. chief weapons inspector Hans Blix stated that the war in Iraq was illegal).

10. For an account of the Security Council deliberations culminating in a resolution recognizing the role of the United States and the United Kingdom in Iraq, see Felicity Barringer, *Security Council Almost Unanimously Approves Broad Mandate for Allies in Iraq*, N.Y. TIMES, May 23, 2003, at A12; David Osborne, *UN Lifts Sanctions and Backs Role of Allies in Iraq*, THE INDEPENDENT (U.K.), May 25, 2003, at 6.

11. S.C. Res. 1483, U.N. SCOR, 58th Sess., 4761st mtg., U.N. Doc. S/Res/1483 (2003). The international law of occupation places considerable constraints on the authority a belligerent occupant may permissibly exercise in a post-conflict setting, particularly with respect to the political institutions and legal system of the state under occupation. Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, arts. 54, 64, 6 U.S.T. 3516, 75 U.N.T.S. 287; Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 43, 36 Stat. 2277 [hereinafter *Hague Regulations*]. There is good reason for these limitations, related to the conflicting interests of the occupier and occupied. See *infra* Section II.B.

of Iraq. In some respects, the CPA struck a middle ground through the use of local proxies (the IGC and then the Interim Government) to attenuate its direct administration of Iraq by force. Unfortunately, this middle-of-the-road strategy may have been designed more to compensate for the absence of sufficient troop levels in Iraq than to empower local political institutions: neither the IGC nor the Interim Government has yielded a viable model of local governance capable of establishing the rule of law. Indeed, questions about the legitimacy and authority of the U.S. occupying forces and their Iraqi proxies helped fuel, in part, the current insurgency and caused many of America's international allies to question the legitimacy of U.S. conduct in postwar Iraq.¹² In part to compensate for this legitimacy deficit—both local and international—the United States returned to the United Nations to fashion a preliminary exit strategy, the partial transition of “sovereignty” to Iraqi proxies accomplished in June 2004. A deal was struck with the principal players in Iraq, and a transfer was engineered to an interim Iraqi cabinet composed of individuals selected primarily by the CPA rather than the United Nations.¹³

Having undone Iraq's principal state institutions through radical de-Baathification and the dissolution of the army, and having allowed chronic public insecurity to govern the streets of Iraq, the thirteen months of direct U.S. occupation through the CPA depleted Iraqi confidence in U.S. governance strategies, wasted the potential political capital of legitimacy that the United States (and the transitional Iraqi authorities) had initially enjoyed after the fall of the Baath regime, and squandered a valuable opportunity to lay institutional foundations for the rule of law in Iraq. In contemplating this dismal record, one might ask how these errors could have been avoided. A previous nation-building project in Iraq in the early twentieth century had culminated in an equally poor record in terms of fostering stable, liberal institutions.¹⁴ To consider the sources of failure for external interveners in Iraq, it helps to begin by examining the goals of nation-building more generally.

Nation-building is an enormous subject on which a vast literature exists, expanding daily.¹⁵ When conducted by external interveners, nation-building

12. Christoph Wilcke provides a concise and helpful explanation of the U.S. legitimacy deficit in Iraq:

The occupation's legitimacy deficit can be traced to two trends in national and local governance. Instead of holding free elections, the US appointed national and local councils to govern at its behest. Instead of nurturing the popular legitimacy of these councils, the occupation authority opted for representational formulas based on the sectarian and ethnic composition of the country.

Christopher Wilcke, *Castles Built of Sand: US Governance and Exit Strategies in Iraq*, in MIDDLE EAST RESEARCH AND INFO. PROJECT, MIDDLE EAST REP. No. 232, Fall 2004, at <http://www.merip.org/mer/mer232/wilcke.html>.

13. For an account of the frustration of the U.N. Secretary-General's special adviser on Iraq, Lakhdar Brahimi, at the CPA's failure to adopt his proposals, crafted in consultation with a broad range of Iraqis, see Dexter Filkins, *U.N. Envoy Wants New Iraq Government To Court Foes of Occupation*, N.Y. TIMES, June 3, 2004, at A1.

14. See, e.g., TOBY DODGE, *INVENTING IRAQ: THE FAILURE OF NATION BUILDING AND A HISTORY DENIED* (2003).

15. In addition to the dozens of policy institutes, think tanks, government agencies, and international organizations commissioning studies of various aspects of nation-building, a number of

involves the exercise of domestic authority by foreign actors with a view to establishing a desired institutional framework prior to the return of sovereignty to representatives of the indigenous population.¹⁶ Salient features of such an exercise include the preference of the external intervener for a particular outcome of the nation-building exercise, and the abrogation of the sovereignty of the indigenous population toward that end. In addition, depending on the conditions pertaining in the relevant territory prior to the intervention, nation-building may quite literally require the creation of a national identity, if no such preexisting shared identity unites the territory. External nation-builders must assume core state responsibilities, including the provision of security and the exercise of political authority for the duration of the intervention. At its most ambitious, external nation-building seeks to replace existing local institutions with new ones, often designed by foreign experts and imposed from above. The ambition and breadth of such projects, frequently undertaken in the name of such laudable goals as democratization and liberalization, lie at the root of their failure.

In the case of Iraq, external nation-builders have ostensibly shared a specific political goal in occupying the territory: the creation of a liberal Iraqi state. Toby Dodge provides an excellent history of the early twentieth-century British nation-building experiment in Iraq.¹⁷ Dodge details the ambitious and ultimately unsuccessful British efforts to build a liberal state in Iraq, focusing on the disadvantages of an external occupier that faces financial and political constraints on its investment in the territory and seeks to transplant foreign political conceptions and institutions without a detailed understanding of Iraqi society. Dodge's study displays a keen awareness of the danger that history might repeat itself in the current U.S.-led occupation in Iraq. In a country such as Iraq, with deep ethnic and sectarian fissures running through the "national" identity of the society, large-scale nation-building of the kind envisioned by the U.S. administration—and its British predecessors in Iraq—may well require the forging not only of new institutions but also of a unifying national identity. However, such a project would substantially exceed the authority of occupying powers under international law. The tolerance that existed for the radical social engineering projects of national-identity formation in the first half of the twentieth century and during the state formation period following decolonization is no longer as prevalent, since minority rights and diverse ethnic identities exert competing demands. Further, the construction of a common national commitment to citizenship in a unified state is not a project

recent monographs have added a significant scholarly contribution to the contemporary debates on the subject, notably in studying particular nation-building efforts in context. *See, e.g., AFTER EMPIRE: MULTIETHNIC SOCIETIES AND NATION-BUILDING—THE SOVIET UNION, AND THE RUSSIAN, OTTOMAN AND HABSBURG EMPIRES* (Karen Barkey et al. eds., 1997); JAMES DOBBINS ET AL., *AMERICA'S ROLE IN NATION-BUILDING: FROM GERMANY TO IRAQ* (2003); NOAH FELDMAN, *WHAT WE OWE IRAQ: WAR AND THE ETHICS OF NATION-BUILDING* (2004); *NATION-BUILDING UNRAVELED?: AID, PEACE AND JUSTICE IN AFGHANISTAN* (Antonio Donini et al. eds., 2004); *REVOLUTIONARY CURRENTS: NATION-BUILDING IN THE TRANSATLANTIC WORLD* (Michael A. Morrison et al. eds., 2004).

16. By contrast, many twentieth-century nation-building projects were indigenous exercises to forge the institutional and political prerequisites to establish viable nation-states in post-colonial territories. Such indigenously led nation-building exercises, while fraught with challenges, do not raise the ethical and logistical obstacles with which much of this paper is concerned.

17. DODGE, *supra* note 14.

that external powers can successfully undertake. This is a long-term, incremental, indigenous, socio-political process that, if at all feasible, will have to be undertaken autonomously by Iraqis. What, then, is the appropriate scope for reconstruction efforts by the occupying powers overseeing regime change in Iraq?

State-building is a term that is often used interchangeably with nation-building, but it ought not to be. State-building aims at institutional support and capacity enhancement—a set of technical prescriptions and logistical assistance programs designed to strengthen the legal and political systems of a given country. Rather than replacing or redesigning local institutions from above, state-building is an effort to empower indigenous actors to improve existing institutional capacity through the provision of technical, logistical, and financial support. Even in the context of a post-conflict occupation, state-building exercises retain most local institutions and indigenous civil servants, with a reconstruction goal of rebuilding and strengthening state capacity rather than recreating the state from scratch.¹⁸ This less ambitious project is a more viable undertaking for an external power seeking to foster improved conditions for the development of representative institutions in another country. This project shares a great deal in common with the humanitarian efforts that have become increasingly common in the last decade for the reconstruction, on a consensual basis, of post-conflict societies.

In contrast to the bolder and more ambitious project of nation-building, state-building is an administrative exercise that requires first that the occupying powers meet the basic security requirements of the territory. Once public order is established, state-building involves the reconstruction of public (civilian) infrastructure and the design of transitional institutions necessary to sustain governance. A good example of a successful state-building project is the much-studied Allied occupation of Germany after World War II.¹⁹ After a military defeat and a recent political history of totalitarian rule (but a prior political history with democratic institutions), the German nation was in need of a fresh institutional start, for which the Allied occupation provided the basic infrastructure. Germany was, however, endowed with some measure of the basic elements of nationhood: a common national identity, a common political culture, and significant institutional endowments in terms of state capacity. In addition, Germany had prior experience with democratic institutions, providing a favorable context for the reconstruction of a stable and liberal institutional framework. Finally, the U.S. occupation of Germany

18. It is worth noting that the most successful U.S. exercises in post-conflict occupation and reconstruction are better characterized as state-building than as nation-building. For instance, the U.S. occupation retained most of the state apparatus in both Germany and Japan after World War II, and most of the civil servants in both countries were reinstated in the postwar bureaucracies. See FRANCIS FUKUYAMA, *STATE-BUILDING: GOVERNANCE AND WORLD ORDER IN THE 21ST CENTURY* 38-39 (2004).

19. Numerous scholars have returned to the German example to ask what lessons it holds for current U.S. post-conflict occupation and reconstruction efforts. See, e.g., DOBBINS ET AL., *supra* note 15; NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA'S EMPIRE* (2004); FUKUYAMA, *supra* note 18; David M. Edelstein, *Occupational Hazards: Why Military Occupations Succeed or Fail*, 29 INT'L SECURITY 1, 49, 61-65 (2004).

took place against the backdrop of an external security environment that was conducive to local acceptance of the state-building exercise.²⁰

The Iraqi context, in contrast, presents challenges of the nation-building variety.²¹ Unfortunately, an external intervention is particularly ill-suited to the difficult process of politico-cultural development and social identity formation that Iraqi nation-building might require. Having razed much of Iraq's state infrastructure to the ground through bombing campaigns and de-Baathification purges, the U.S. occupation authority may not be regarded by most Iraqis as a benevolent power to which they are able to transfer the loyalty and commitment that would be required to instill a new political culture in Iraq. Prevailing in a military battle against a weak state with limited defensive capacities is scarcely a qualification for the job of nation-building.²² One commentator argued in the immediate aftermath of the war that

[t]o make the occupation of Iraq a success, the Bush administration needs to reverse course and get the United Nations involved in all aspects of state-building and nation-building, beginning with the reestablishment of order and basic services. The credibility and the legitimacy of U.S. leadership, together with a stable, independent, and free Iraq, are at stake.²³

In light of the ongoing reluctance of the United States to involve the United Nations, what are the current prospects for the nation-building project in Iraq?

The three criteria for assessing these prospects are the feasibility, desirability, and morality of a nation-building project undertaken by belligerent occupiers following the military defeat of an occupied territory. The preceding discussion considered the serious feasibility problems raised by the nation-building exercise in Iraq. While current conditions in Iraq may require comprehensive nation-building, such a project is beyond the capabilities of occupying powers. The better model for a more robust nation-building project would be indigenous ownership of both institutional design and implementation along with external logistical support. For new state institutions to be stable and durable, they must be the product of local political

20. For a helpful discussion of the favorable local conditions in the case of postwar Germany, see DOBBINS ET AL., *supra* note 15, at 153. Edelstein provides a good analysis of the role the external threat posed by Soviet expansion in Eastern Europe played in fostering German acceptance of the U.S. occupation authority. Edelstein, *supra* note 19, at 62-63.

21. These challenges derive partly from the absence of a common national identity or institutional endowment favorable to democratization and liberalization in Iraq, but also in large measure from the U.S. occupation authority's decision to dismantle Iraqi state capacity from the outset by purging the civil service and disbanding the army.

22. It is useful to recall that designing and establishing new state institutions is a political rather than a technical exercise. In order for such new institutions to command any allegiance among Iraqis, they would have to be the product of political bargains struck among indigenous actors, rather than an end-run around such political processes and the imposition of grand designs and best practices by an external intervener. One advantage of an international or multilateral civilian administration over a unilateral foreign occupation is the enhanced likelihood, in the case of the former, of the promotion of local ownership of institutional reforms through the early and broad involvement of indigenous elites in the transitional governance processes. The experiences with transitional administration of territories in Bosnia, Kosovo, Cambodia, and East Timor present a record of incorporating local authorities in the design and planning phases, as well as the implementation, of transitional administration of post-conflict territories.

23. Ronald Bruce St. John, *Nation-Building Versus State-Building in Iraq*, GLOBAL BEAT SYNDICATE, Aug. 4, 2003, at <http://www.nyu.edu/globalbeat/syndicate/stjohn-2-080403.html>.

bargains commanding sufficient consensus to bolster their perceived legitimacy. The creation of institutions under occupation undermines the likelihood of such a consensus being created and detracts from the legitimacy of the enterprise. In the absence of a willingness to cede authority over the Iraqi transition to a fully resourced U.N. civilian administration capable of supporting indigenous bargains, this feasibility constraint calls for more modest objectives. The best available alternative is likely the creation of transitional institutions to permit Iraqis to choose the ultimate form of the legal and political institutions of their state, and then the provision of logistical and financial support to those institutions as Iraqis rebuild their own nation.

With respect to the desirability of nation-building under occupation, a conception of nation-building that requires an occupying power, without a democratic mandate or the consent of the population under occupation, to alter the fundamental legal, political, and economic system of the occupied territory conflicts directly with the constraints built into the international law of belligerent occupation.²⁴ Article 43 of the 1907 Hague Regulations requires that an occupying power “re-establish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”²⁵ The prohibition on wholesale revision of the legal infrastructure of the state is clear.²⁶ Any reconstruction effort by occupying powers is limited under international law to providing transitional arrangements to further the self-determination interests of the occupied population. In this instance, the international legal constraints on the U.S.-led occupation of Iraq should limit the CPA (and now the U.S. super-embassy in Iraq)²⁷ to making strictly necessary structural changes in Iraq for the sole

24. The international law of belligerent occupation was written in the twentieth century—and rewritten in the wake of World War II—precisely for the protection of the interests and rights of militarily weak states potentially subject to occupation. There is no mystery, then, in the fact that stronger states may chafe at the limitations written to protect the peoples that they subjugate by force, and one need not search for profound changes in the international system to explain why powerful states—that do not themselves fear occupation—consider these rules “quaint.” See *Excerpts from Gonzales’s Legal Writings*, N.Y. TIMES, Nov. 11, 2004, at A2 (citing a legal memorandum written by then-White House counsel Alberto Gonzales, arguing that a change of paradigm in the nature of war “renders . . . quaint some of [the Geneva Convention’s] provisions”). For the foundational texts of the international law of belligerent occupation, see *supra* note 11.

25. Hague Regulations, *supra* note 11, art. 43. Expansive readings of this provision have been advanced to suggest that it may permit some revisions to the underlying legal system in the interest of ensuring “public order and safety.” See, e.g., EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 11 (1993).

26. On the basis of a conventional reading of the constraints imposed by these provisions, British Attorney-General Lord Peter Goldsmith wrote a memorandum, leaked in the *New Statesman*, advising the Blair government that the imposition of major structural reforms in Iraq was not authorized under international law. The memorandum refers to the Geneva Conventions of 1949 and the Hague Regulations of 1907, *supra* note 11, and lists specific “limitations placed on the authority of an Occupying Power,” including attempts at “wide-ranging reforms of governmental and administrative structures”; “any alteration in the status of public officials or judges,” except in exceptional cases; changes to the penal laws; and “the imposition of major structural economic reforms.” John Kampfner, *Blair Was Told It Would Be Illegal To Occupy Iraq*, NEW STATESMAN (U.K.), May 26, 2003, at 16.

27. The CPA was officially replaced by the largest U.S. embassy in the world (with a staff of over 3000) under the leadership of then-Ambassador John Negroponte on June 28, 2004. References to the U.S. occupation authorities are generally intended to encompass the CPA and the super-embassy in Baghdad that oversees more than 140,000 U.S. forces in Iraq, coordinates with Prime Minister Iyad Allawi’s Interim Government, and will coordinate with the new government of Prime Minister-

purpose of designing transitional institutions to enable the Iraqi people to participate in choosing the form of their new government and the substance of their new constitution.²⁸ Whether, beyond these transitional structures, the Iraqi people choose to entrench representative institutions should depend on the outcome of their participation in the transition and not on designs imposed by external intervention.²⁹

Finally the discussion turns to the ethical considerations raised by nation-building through occupation. Here it will be helpful to consider a detailed example of the nature of the conflicts of interest between the occupying powers and the occupied indigenous population.

B. *Conflict of Interests: Building a Market Economy Through Occupation in Iraq*

The U.S. approach to rebuilding post-conflict Iraq has taken the form of a democratization project bundled with a neoliberal economic agenda. Changes to the Iraqi legal system have often been justified in terms of the need to foster political liberalization in a post-authoritarian context. Whether the U.S.-led occupation has facilitated or retarded democratization remains an

designate Ibrahim Jaafari under the transitional national assembly based on the Iraqi election of January 30, 2005.

28. Whether Iraq's January 30 election brought into being such a transitional institution has been called into question as a result of the boycott of the elections by the Iraqi Sunni community. As late as December 28, 2004, Iraq's ambassador to the United Nations suggested that the date of the election be reconsidered in light of the ongoing violence and the likely non-participation of Sunni parties. Samir S.M. Sumaidaie, *Rethinking Iraq's Election*, WASH. POST, Dec. 28, 2004, at A19 (noting that "to hold elections under current circumstances, when a sizeable part of the country is not secure, just for the sake of voting, would produce a disproportionate and nonrepresentative national assembly"). In any event, the 275-member Transitional National Assembly that resulted from the elections does not include proportionate representation of the Sunni community, and as such it suffers a serious handicap that may undermine the durability of the eventual constitution produced by the assembly. One hundred and forty seats in the assembly are held by the United Iraqi Alliance, a Shiite coalition endorsed by Grand Ayatollah Ali Sistani. The Kurdistan Alliance holds an additional seventy-five seats, and a group led by Interim Prime Minister Allawi holds forty, with the remaining twenty seats divided among nine other parties. Pragmatic indigenous leaders elected to the assembly may yet find a way to incorporate proportionate Sunni representation, but if they do so, it will be the product of a local bargain rather than the transitional institutions provided by the U.S. occupying authorities under the Transitional Administrative Law (the interim constitution drafted, under the aegis of the CPA, by the IGC) under which the elections were convened. For an account of the post-election tensions between the Sunni and Shiite communities in Iraq, see Liz Sly, *With Assembly Shaped, Iraq Constitution Next*, CHI. TRIB., Feb. 18, 2005, at C1 (noting that "[t]ensions between the Sunni and Shiite communities have been rising amid fears that the exclusion of Sunnis from the process will deepen the insurgency"). See also Matthew B. Stannard & Edward Epstein, *Elections Begin Yearlong Political March in Iraq*, S.F. CHRON., Jan. 28, 2005, at A13; *Al-Jaafari Says He Would Accept PM Job*, CNN.com, at <http://www.cnn.com/2005/WORLD/meast/02/17/iraq.main/index.html> (Feb. 17, 2005); *Shiite Alliance Wins Plurality in Iraq*, CNN.com, at <http://www.cnn.com/2005/WORLD/meast/02/13/iraq.main/index.html> (Feb. 13, 2005).

29. On the eve of the elections, several U.S. analysts were already expressing concerns about any constitution that would eventually issue from an elected Iraqi assembly, particularly with respect to the rights accorded to women, the status of Islam under the constitution, and the procedural mechanisms for ratification. Stannard & Epstein, *supra* note 28 (citing the respective concerns regarding a future Iraqi constitution of Larry Diamond, Professor of Political Science at Stanford University, and Senior Adviser to the Coalition Provisional Authority, January-April, 2004; Nathan Brown, Senior Associate, Carnegie Endowment for Peace; Brett McGurk, Associate General Counsel to the Coalition Provisional Authority, January-June, 2004 and Counsel in the Office of the Legal Adviser at the U.S. Embassy in Baghdad, June-October, 2004; and Anthony Cordesman, Chair in Strategy at the Center for Strategic and International Studies).

outstanding question, but changes ostensibly designed to promote democratization are permissible on an expansive reading of the international law governing occupation. By contrast, measures designed to facilitate the economic liberalization of Iraq are totally indefensible in the absence of a democratic mandate or the consent of the Iraqi people. The linking of democratization to the establishment of a market economy takes the U.S. reconstruction strategy in Iraq well beyond any internationally recognized legal authority.

As indicated in the earlier discussion of the international law of occupation, the transformation of an occupied country's fundamental laws is illegal except insofar as it is necessary to bring the country's laws into compliance with contemporary international human rights standards or to meet the urgent security needs of the occupying authority. To the extent that the occupying power is understood as a guardian or trustee, its obligation is to maintain the laws in force and provide the underlying population with the opportunity to elect a representative government that might then choose to transform the legal system. The U.S.-led occupation authority has undertaken a structural transformation of Iraq's economy through the promulgation of orders overriding preexisting legal and regulatory frameworks governing the Iraqi economy.³⁰ The issuance of orders by the occupation authority designed to create a model market economy—one exceptionally open to foreign investment—is most evident in Order Number 39, issued by Paul Bremer as chief administrator of the CPA in September 2003.³¹

The nature of the transformation entailed by Order Number 39 and other economic regulations issued as orders by the CPA raises a sharp ethical conflict inherent in the project of nation-building through occupation.³² The structural transformation of the Iraqi economy was effected through the imposition of contracts on interim Iraqi authorities appointed by the United States and the promulgation of regulatory changes directly by the CPA. In this process of transformation, no mechanism adequately took account of the interests of the Iraqi population. The lack of accountability to the population potentially adversely affected by these changes and the absence of a democratic mandate for the CPA's authority weaken ethical arguments

30. The parceling out of reconstruction contracts in Iraq on a preferential basis to U.S. corporations is seen by some commentators as going hand-in-hand with this transformation of the Iraqi economy to create an environment friendly to foreign (read U.S.) investors, treating both the rebuilding of the country's physical infrastructure and the restructuring of its economy as a form of war prize. For instance, Naomi Klein has advanced the argument that reconstruction in Iraq has become a form of war booty. Naomi Klein, *Bomb Before You Buy: The Economics of War*, 2 SEATTLE J. SOC. JUST. 331, 335 (2004).

31. The order states plainly that Iraq is to "transition from a . . . centrally planned economy to a market economy." Coalition Provisional Authority, Order No. 39, Doc. No. CPA/ORD/19 September 2003/39, http://www.iraqcoalition.org/regulations/20031220_CPAORD_39_Foreign_Investment_.pdf (Sept. 19, 2003) [hereinafter CPA Order No. 39].

32. For purposes of this paper, a close consideration of Order No. 39 will make this point clear. However, among the other orders deserving scrutiny are: Order No. 40, permitting the privatization of the Iraqi banking sector (rescinded by Order No. 94); Order No. 49, dropping the corporate tax rate to a flat rate of 15% (a nearly two-thirds reduction) (amended by Order No. 84); Order No. 12, eliminating all tariffs on foreign goods (rescinded by Order No. 54); and Order No. 17, making foreign contractors "immune from Iraqi legal process." See Coalition Provisional Authority, CPA Official Documents, <http://www.iraqcoalition.org/regulations/#Orders> (last visited Apr. 20, 2005).

premised on treating the U.S. occupation authority as a trustee acting on behalf of the Iraqi people.

A closer examination of the particular changes enacted by Order Number 39 makes plain this conflict of interest. Order Number 39 enacted five fundamental changes to transform the structure of the Iraqi economy:

1. Privatization of state-owned enterprises;
2. 100% foreign ownership of businesses permissible in all sectors except oil and mineral extraction, banks, and insurance companies (though the latter two are addressed under separate orders);
3. National treatment of foreign firms;
4. Unrestricted, tax-free remittance of all funds associated with the investment, including, but not limited to, profits; and
5. Forty-year ownership licenses with an option to renew.³³

The transformation of the underlying Iraqi economy and the legal system supporting it entailed by this order is extensive. Iraq's centrally planned economy placed all national enterprises under state ownership. Accordingly, the first change detailed above amounts to a sale of the key industrial assets of the state. These state-owned enterprises include many of the key utilities (water, electricity, sewage) damaged by the U.S. bombing campaign during the war. While these assets were being privatized, generous reconstruction contracts were awarded by the Bush administration to such firms as Bechtel and Halliburton.³⁴ Both privatization, which leaves thousands of public sector employees jobless, and the award of reconstruction contracts to non-Iraqi firms have seriously worsened an already catastrophic rate of unemployment in Iraq. Yet the privatization provisions of this order are perhaps the least objectionable of its features.

The aspects of Order No. 39 that represent a sharp departure from the semi-protectionist practices of most sovereign states are the remaining four: 100% foreign ownership in key industries, national treatment of foreign firms, unrestricted repatriation of profits, and forty-year ownership licenses. In sectors of the economy involving national security, key industries, or strategic assets, restrictions on foreign ownership are commonplace. Similarly, to treat foreign firms on an equal footing with national firms is to prohibit any protection of domestic industries in Iraq. Few countries in the world, if any, completely prohibit preferential treatment for national investors and national contractors over foreigners.³⁵ The free repatriation of profits generated in Iraq,

33. CPA Order No. 39, *supra* note 31. Cf. Aaron Mate, *Pillage Is Forbidden: Why the Privatisation of Iraq Is Illegal*, GUARDIAN (U.K.), at <http://www.guardian.co.uk/comment/story/0,3604,1079562,00.html> (Nov. 7, 2003) (arguing that the inclusion of state-owned enterprises within the definition of "business entities" under Section 1 of Order No. 39 authorizes privatization).

34. For an example of the generosity of contracts awarded to U.S. corporations for Iraqi reconstruction, see Matt Kelley, *Halliburton Gets over \$10B of Work in Iraq*, boston.com, at http://www.boston.com/business/articles/2004/12/10/halliburton_gets_over_10b_of_work_in_iraq (Dec. 10, 2004).

35. Ironically, the United States itself appears to be engaging in preferential treatment toward U.S. corporations in its bidding (or no-bid) process for the award of Iraqi reconstruction contracts. That such preferences should be permitted for U.S. firms in Iraq but not for local firms suggests another example of a conflict of interest between occupier and occupied. See Gail Russell Chaddock, *Targeting No-Bid Deals*, CHRISTIAN SCI. MONITOR, Oct. 10, 2003, at 2; *Pentagon Probes Halliburton's Iraq Contracts*, WASH. POST, Oct. 26, 2004, at A23.

particularly at a time when the Iraqi economy is badly in need of the investment of such revenues locally, shows little attention to the interests or preferences of the Iraqi population. With U.S. corporations reaping staggering profits in Iraq, the prohibition on Iraqi directives to reinvest some proportion of these revenues in the troubled Iraqi economy represents a conflict between the interests of the CPA and the interests of ordinary Iraqis. Finally, the effort to lock future Iraqi governments into binding forty-year contracts negotiated by a U.S. occupation authority bargaining largely with U.S. corporations provides strong grounds to charge the Bush administration with war profiteering.³⁶

The impact of Order Number 39 on the Iraqi economy is stark and designed to be durable. The marketization of Iraq's economy is problematic both because the CPA violated the international law of belligerent occupation by enacting legal and regulatory changes that alter Iraq's economy and because these changes were made without the consent or participation of Iraqi representatives. Further, the changes wrought by the CPA may have a significant long-term impact on the Iraqi economy, even after the return of sovereignty to a transitional Iraqi government.³⁷ In considering the implications of Order Number 39 for subsequent Iraqi control of their own economy, one author has noted that the order permits no more than semi-sovereignty for a future Iraqi state.³⁸ Technically, a future sovereign Iraqi government may repeal the orders issued by the CPA. However, with many of these orders in place during the crucial first two years of post-conflict reconstruction, the favorable terms for U.S. corporations have enabled them to assume key roles with respect to infrastructure construction, operation, and maintenance that will make them difficult and costly to replace once a sovereign Iraqi government assumes authority. In addition, the powerful U.S. interest in retaining the CPA regulatory framework for a marketized Iraq will constrain the ability of a future Iraqi state to make changes to these laws while maintaining access to international capital markets. For instance, one U.S. law firm, commenting on the likely growth of foreign investment in Iraq, noted that future Iraqi governments would be unlikely to repeal Order Number 39 for fear of losing much-needed foreign investment.³⁹ Further, the likely dependence of Iraq for some time on the assistance of U.S.-dominated international financial institutions and the costs in the international system for reneging on contracts—even contracts imposed under occupation—are sufficiently great that the restructuring of the Iraqi economy will likely be more durable than the attempted transformation of Iraq's political institutions

36. For an example of an allegation of war profiteering, see Brian Whitaker, *Spoils of War: US Plans To Sell Off Iraqi Businesses Are Simply the Modern Equivalent of Pillage*, THE GUARDIAN (U.K.), Oct. 17, 2003.

37. One analyst has noted that the CPA orders have given the United States a "lock on Iraq's economy." Antonia Juhasz, *The Hand-Over That Wasn't: Illegal Orders Give the U.S. a Lock on Iraq's Economy*, L.A. TIMES, Aug. 5, 2004, at B15.

38. Melissa A. Murphy, *A "World Occupation" of the Iraqi Economy? How Order 39 Will Create a Semi-Sovereign State*, 19 CONN. J. INT'L L. 445, 446 (2004); see also Daphne Eviatar, *Free-Market Iraq? Not So Fast*, N.Y. TIMES, Jan. 10, 2004, at B3.

39. Press Release, White & Case LLP, White & Case Lawyers See Foreign Investment in Iraq Growing Through New Development Fund, at http://www.whitecase.com/news/-news_detail.aspx?newsid=10704&type=News+Releases (Oct. 3, 2003).

towards democratization.⁴⁰ Adding economic structural adjustment to the already profound destabilization of Iraq following the war has done nothing to enhance the legitimacy of the occupation or improve the prospects for stabilizing Iraq. The fact that U.S. economic interests are well served by the transformation of the Iraqi economy while Iraqis experience further dislocation highlights the divergence between the interests of the occupying powers and the interests of the Iraqi population.

The portrait of the post-Baath Iraq emerging today is hardly one that is friendly to the rule of law or to political liberalization. Indeed, it may well be that while the U.S. invasion and occupation deposed the regime of Saddam Hussein, the authoritarian regime-type over which Hussein presided has not been disestablished. Given that U.S. military casualties have been at higher levels since the so-called transfer of authority to the Iraqi interim government and given the increasing strength of the Iraqi resistance, the vaunted transition has failed to meet its principal objectives.⁴¹ The question then is how to advance the project of establishing the rule of law in Iraq given the many mistakes in the nearly two years since the end of the conflict that have badly prejudiced the outcome.

III. REBUILDING IRAQ: THE RULE OF LAW UNDER FIRE

The explosion of violence in Iraq has shifted international attention from reconstruction to stabilization. If security is ever restored to the streets of Iraq, the question of nation-building will reemerge as an important test of how the U.S. invasion and occupation will be judged. The prospects for creating a commitment to the rule of law in post-conflict Iraq may determine the outcome of this test. What would such a commitment entail?⁴²

40. For instance, the International Monetary Fund (IMF), in which the United States plays a dominant role, may require Iraq to retain the changes made under Order No. 39 in order to benefit from access to IMF loans. See Brian Dominick, *U.S. Forgives Iraq Debt To Clear Way for IMF Reforms*, NEW STANDARD (Dec. 19, 2004), at http://newstandardnews.net/content/?action=show_item&itemid=1340 (noting that it would be very difficult for Iraq to "step back from any of [the] policies" adopted under Order No. 39 and still benefit from IMF assistance).

41. PHYLLIS BENNIS ET AL., INST. FOR POLICY STUDIES & FOREIGN POLICY IN FOCUS, A FAILED "TRANSITION": THE MOUNTING COSTS OF THE IRAQ WAR (2004), available at <http://www.ips-dc.org/iraq/failedtransition>. This report also provides a tally of the mounting costs of the U.S. presence in Iraq since the transition, finding, in terms of costs to the United States, an increase in popularity and support for al-Qaida as a direct consequence of the occupation, loss of U.S. credibility in the region and internationally, roughly \$211.1 billion expected to have been allocated to Iraq by congressional appropriations by the end of 2004, and an increase in oil prices. The costs for Iraqis have of course been far greater, with an estimated 100,000 civilian deaths, tens of thousands more injured, the unknown long-term health and environmental consequences of the widespread use of depleted uranium in the country, the rise in all forms of criminal activity and concomitant decrease in public security, a doubling of unemployment to 60%, and losses to the economy from the devastation of Iraq's oil industry. In addition to these costs, the report also takes account of the social costs faced by Iraqis in terms of the destruction of their health and education infrastructure, the widespread human rights abuses associated with the occupation, and the sovereignty costs of military occupation. Finally, the international community has suffered the deterioration of established norms of international law, the weakening of international institutions (principally the United Nations), damage to the global environment, the undermining of the global peace and security system, and the weakening of nonproliferation and disarmament norms. *Id.*

42. There is a related question, taken up to some extent above and in more detail below, that should remain in the background of any consideration of what is required to create a rule-of-law culture. Is this task appropriate given the obligations and limitations of an occupation authority?

Drafting excellent new Iraqi laws on paper will not suffice to change Iraqi legal culture, as policymakers in other transitional contexts have learned through bitter experience. Unless the Iraqi public has confidence in and respect for the legal system, the rule of law will remain absent. Instilling such confidence in a population that is accustomed to regarding law as a tool of repression is challenging enough. With most Iraqis facing a daily struggle for survival in an anarchic post-conflict context, it is nearly impossible. Extreme public insecurity in Iraq not only pushes the rule-of-law agenda to the backburner; it actively undermines the privileging of justice over order. Any population subjected to the levels of chaotic violence prevalent in post-conflict Iraq will be predictably desperate to see order restored to the streets. This observation was Hobbes' great insight. If the nation-builders in Iraq are not seeking to construct a Leviathan, they will face serious obstacles. To be sure, there are scenarios under which one could imagine extreme political violence giving way to the rule of law. The construction of a legal system endowed with effective enforcement mechanisms and built on transparent and legitimate institutions might be sufficient to commit Iraqis to a new social contract based on the rule of law. Yet an important window of opportunity to establish credible institutions capable of containing violence and establishing both law and order was lost in the summer of 2003. Although other such opportunities may remain, the privileging of order over law in an environment of heightened insecurity is a dangerous context in which to build new institutions.

These challenges are further exacerbated by the fact that any new institutions are liable to be perceived as the products of occupation. To inspire confidence in the rule of law, the legitimacy deficit suffered by institutions perceived as external impositions will have to be overcome. Aside from the question of the way in which such institutions are perceived, there is also the substantive problem of how an occupying authority can involve itself in the production of appropriate institutions absent a thorough knowledge of the contextually specific, local conditions the institutions are designed to serve.⁴³ Indeed, most rule-of-law assistance and democratization programs sponsored by Western governmental and nongovernmental organizations (NGOs) over the last decade have suffered from precisely this deficiency. As a result, they have relied on best practices compilations and a hodge-podge of local customs and traditions to try to craft new institutions and frameworks that, once formulated, recall Frankenstein's monster. Patched together from a number of other contexts, but fundamentally informed by a conception of political and legal institutions appropriate for a Western-style liberal democracy, these projects have had little lasting impact or success in the local contexts in which they have operated. While most analysts agree, especially based on prior experiences in Bosnia and Kosovo, that "winning the peace" hinges on

43. As argued in Section II, *supra*, the design of new institutions is not a technical task to be accomplished by experts imposing grand designs based on predetermined end-goals, but rather a political task that can be accomplished in a durable and legitimate fashion only by local actors striking complex bargains among competing indigenous interests and factions. Whether the task of building such institutions can feasibly be accomplished by external actors is a recurring question.

establishing the rule of law,⁴⁴ creating a free and fair political system, and inspiring public confidence in the police and the courts, there is little consensus on how these tasks are to be accomplished.⁴⁵ In the remainder of this Section, I will try to bring some clarity to this discussion by defining the rule of law, examining its purposes in a nation-building context, considering local traditions of the rule of law on which the Iraqi project might draw, and identifying, in concrete terms, the preconditions necessary to establish the foundations for the rule of law in Iraq.

A. *Defining the Rule of Law*

Perhaps because of its centrality to the most important political questions of the day, there are considerable differences between various scholarly treatments of the concept of the rule of law. Rather than getting enmeshed in those debates, I will offer a functional definition drawn from the objectives associated with rule-of-law programs in post-conflict situations. In those contexts, rule of law generally means: the provision of effective police, courts, and prisons; consistent, fair, and publicized laws; recognition and protection of basic rights; a reasonably representative and transparent set of institutions for legislation and the promulgation of regulations; and accountability for the abuses committed during and prior to the conflict. The institutionalization and legitimization of these features of the rule of law require effective public order through law enforcement as early as possible in the transitional period.

This definition of the rule of law is quite minimalist. By contrast, a more robust definition might add further elements such as the establishment of a functional and democratic constitutional framework and legislation to support a market economy. The problem with such a broader definition is that the political form and the economic structure of a post-conflict regime should reflect the preferences of the post-conflict society.⁴⁶ But establishing the basic

44. See, e.g., Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46, 47-48 (2001). With respect to the U.N. missions in Kosovo and East Timor, Strohmeyer notes that

[t]he United Nations's most recent experiences in transitional administration demonstrate that justice, and law enforcement more broadly, must be seen as effective from the first days of an operation. The inability to react swiftly to crime and public unrest, particularly in post conflict situations when criminal activity tends to increase, and the failure to detain and convict suspected criminals promptly and fairly, can quickly erode the public's confidence in the United Nations.

Id. at 60.

45. The failure to establish conditions to secure the rule of law in the aftermath of the invasion was not for a lack of awareness of the crucial importance of this strategy. See, e.g., Paddy Ashdown, *What Baghdad Can Learn from Bosnia*, GUARDIAN (U.K.), Apr. 22, 2003, at 6.

The failure to establish, quickly and decisively, the rule of law in Bosnia-Herzegovina, repeated in Kosovo, is something for which we have paid a high price Unless law and order is consolidated quickly and comprehensively [in Iraq], peace will not take hold and the benefits of the coalition victory will be swiftly lost as criminals and corruption swarm into the vacuum.

Id.

46. An externally run nation-building project might attempt to foreclose this issue by imposing an institutional design based on predetermined political goals. For the reasons previously adduced, such a project is unlikely to succeed in establishing durable institutions. See *supra* Section II.A.

elements of the rule of law, particularly under conditions of occupation, will likely have to precede the possibility of measuring such preferences, either through elections or through other participatory, deliberative processes, in the same way that state-building is necessary for nation-building. Securing public order, functioning law enforcement mechanisms, and transitional political institutions—all of which fall in the realm of state-building—will put in place the conditions for free and fair elections to be held, constitutional assemblies to be formed, and legislative, regulatory, and economic policy preferences to be expressed in the context of nation-building. If all of these accomplishments come after the establishment of the basic rule-of-law framework, then they must be treated separately from the conditions for the rule of law, *tout court*. To determine the form of the political and economic structures of the post-conflict Iraqi state at the outset—democratic institutions with a free market economy—is to foreclose Iraqi self-determination. Even if it were considered desirable to constrain Iraqis to adopt particular institutions, it is not clear that such a constraint would be feasible beyond the short term. The durability of the political and economic structures that emerge from the occupation will likely be proportionate to domestic perceptions of their legitimacy.

For the purposes of the reconstruction of Iraq, the U.S. occupation authority's conception of the rule of law seems to be of the more robust variety, including the meta-framework for establishing a liberal, free-market democracy. Given the news from Iraq, this vision seems wildly unattainable and idealistic, but that observation should not obscure the prior question of whether this more robust definition is desirable. Just as this discussion considered the desirability of a nation-building project in Iraq, so too should it inquire into the desirability of an ambitious, substantive conception of the rule of law.

Different actors in the international system advocate the rule of law for different reasons.⁴⁷ Many of the recommendations associated with the rule-of-law toolkit that has emerged out of a decade of programs were developed in the post-communist setting and are less applicable outside of that context. In countries emerging from civil conflict or external military intervention, foreign advisers and NGOs are often present on a less consensual basis, and the circumstances of the underlying societies do not necessarily resemble those found in former communist nations.

The reform priorities in post-conflict settings require careful, context-specific planning. Where, as in Iraq, a territory is governed by a U.S. civilian

47. As Rosa Ehrenreich Brooks has noted, at least three forms of rule-of-law packages are advanced by different international actors. International financial institutions have incorporated rule-of-law and governance requirements into the conditionality provisions of their loans to ensure that the underlying legal and regulatory frameworks support the protection of property rights and the enforcement of contracts. Numerous NGOs advocate the rule of law as essential to the protection of human rights and the provision of constitutional limitations on state power. Effective law enforcement and international legal harmonization through rule-of-law promotion are even considered prongs of the war on terror, insofar as coordinated international policing efforts require the right infrastructure in domestic legal systems. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law"*, 101 MICH. L. REV. 2275, 2276-77 (2003). Further, many rule-of-law and governance programs were designed for post-Soviet transitions. Specifically, many of the programs in the 1990s focused on developing the legal, regulatory, and institutional infrastructure to support a market economy and democratization. *Id.*

administrator (or an ambassador who works directly with interim Iraqi officials), and U.S. forces are directly involved in detaining Iraqi suspects, supervising courts, and controlling prisons (often run out of U.S. military bases), there is a serious danger that rule-of-law programs will take on an imperial complexion. This result is particularly damaging because where the promotion of the rule of law is perceived as part and parcel of an imperialist project, even the most carefully tailored program will fail. While the formal, institutional objectives of a rule-of-law program may be secured with the aid of new judicial and law enforcement personnel and by rebuilding courthouses, the substantive commitment of the local population to those institutions, and to the rule of law more generally, will likely be undermined.⁴⁸ But how, then, can the underlying purpose of rule-of-law programs—engendering a legal and political culture that supports and preserves institutions that enforce laws, protect rights, and legislate and adjudicate in ways that are perceived to be fair and legitimate—be accomplished under occupation?

Perhaps the best response requires developing a context-specific account of the purpose of rule-of-law promotion in Iraq. In light of the current impasse in Iraq, more modest, less ambitious priorities focusing on the essential requirements for the transitional period are in order. Bold visions of democratization and free markets should be deferred until Iraqis can express their preferences for the political form and economic structure of their future, sovereign state. In the interim, rule-of-law promotion should be restricted to the basics of establishing transitional institutions capable of commanding the respect of some plurality of the Iraqi population they are designed to serve—in other words, restricted to the rule of law for the purpose of state-building. Particularly in a context in which the public insecurity resulting from the U.S. occupation has exacerbated the underlying ethnic and sectarian fissures in Iraqi society, persuading significant sectors of the population to transfer their loyalties from ethnic, sectarian, or tribal affiliations to national or federal institutions, albeit transitional ones, is a sufficiently ambitious goal. Building on the legal traditions of the region would be a good starting point.

B. *Rule of Law in the Arab World*

There are three sets of resources and one important insight to be drawn from a consideration of the operation of the rule of law in the Arab world.

48. Brooks attributes the failure of many rule-of-law promotion programs to a failure to take norms and culture adequately into account. *Id.* at 2285. She argues that changes in the formal law cannot by themselves generate new normative commitments to the rule of law. *Id.* at 2301. The socio-cultural prerequisites for that commitment are generated by norm entrepreneurs engaging in broad politico-cultural agenda-shifting projects and seeking to initiate incremental change. *Id.* at 2326-28. Such strategies are driven by indigenous players, for the most part, and involve a long-term commitment that generally outstrips the political and financial investment that external actors are prepared to make to engage with the local context. *Id.* at 2333-40. Brooks concludes by noting that

[i]n a sense, citizens of Kosovo, Afghanistan, Iraq and the like must put up with some of the worst aspects of imperialism (culturally insensitive occupying armies that drive up prices, distort local economies, and push through ham-handed "reforms") with few of imperialism's benefits, such as they were; the new imperialists lack the capacity or the will to stamp out crime, pick up the trash, or make the trains run on time.

Id. at 2283.

First, as this paper will suggest below, the rule of law in the Middle East, and in Arab constitutional traditions in particular, prioritizes the organization of political power over the limitation of political authority. Put more simply, the rule of law is about enhancing state capacity. Second, some important rule-of-law commitments and values are present in Arab legal traditions. Third, there are resources in Iraq's political and legal traditions, including those built on Baathist ideology, that might serve the purposes of institution-building oriented toward the rule of law in Iraq today. Finally, an insight drawn from the discussion of these first three points is that the rule of law may have to serve different purposes and take a different form in the Iraqi transitional context from the ideal type of the liberal, free-market, democratic model that is most commonly promoted through rule-of-law assistance programs. In particular, disaggregating commitments to a market economy or to Western-style, liberal rights protection from the basic project of establishing the minimum conditions for the rule of law may be an important determinant of the initial success of the programs undertaken in Iraq.

In his research on the antecedents of Middle Eastern constitutions as a synthesis from Ottoman, Egyptian, and colonial constitutional traditions of the nineteenth century, Nathan Brown notes that these constitutions were generally drafted in the broader political context of authoritarian rule and designed to augment political authority rather than check it. While the constitutional traditions of the region may be authoritarian, they are not merely rhetorical exercises. These constitutions were designed to enhance state authority, render the exercise of executive power more efficient, build administrative capacity, reiterate the sovereignty of the state, and promote the ideology of the ruling party.⁴⁹ Many of these goals are also U.S. priorities in Iraq—at least those that pertain to effective, efficient governance and centralized authority. With twenty-twenty hindsight, commentators and U.S. officials alike agree that the decisions to disband the Iraqi military, take apart the state security apparatus (including its basic policing infrastructure), and engage in widespread lustration of Baathist civil servants were disastrous.⁵⁰ Similarly, dismantling existing institutions of governance, however flawed, without an alternative set of structures in place to take over basic state functions, is obviously ill-advised.

Another interesting potential resource in post-colonial Arab legal systems is the propensity to adopt and adapt elements from Western legal traditions. Elites in Iraq and throughout the Arab world fashioned their own legal systems, post-independence, based at least in part on those aspects of Western legal models that were expected to render political power more effective, centralized, and efficient. To some extent the norms of liberal legality—conceiving of the rule of law as a means of checking executive

49. NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD xiii-xiv, 10-13, 91-94 (2002).

50. For instance, Prime Minister Tony Blair and retired U.S. General Jay Garner, the first Bush administration appointee placed in charge of the occupation in Iraq in March 2003, have both publicly stated that the decision to disband the Iraqi army was a mistake. See, e.g., *Blair: Totally Disbanding the Iraqi Army Was a Mistake*, AUSTRALIAN BROADCASTING CORP., Sept. 26, 2004; Michael McDonough, *Garner: US Made Postwar Iraq Mistakes*, ASSOCIATED PRESS, Nov. 26, 2003.

authority and subjecting political institutions to governance according to law—were also adopted through a combination of isomorphism and emulation in the Arab legal systems of the twentieth century. The concept of *siyadat al-qanun* (the Arabic equivalent of the rule of law) is present in the legal traditions of most Arab states, as are prohibitions on retroactive laws, the protection of basic property rights, and the principle of judicial independence.⁵¹ In all three of these domains, as with the rule of law more generally, these principles are generally honored in the breach, but they are present in written constitutions and laws and in the political and legal consciousness of citizens of Arab states.

Finally, it is worth noting that Iraq's own constitutional tradition was premised on Baathist ideology. While the United States has been able to eliminate the Baath party and de-Baathify the Iraqi public sector, some of Baathism's core values have likely survived these purges in the underlying political culture of Iraq. The principles of Arab unity,⁵² nationalism, and social and economic justice will likely remain among the basic cultural commitments of Iraqi society. Building on these core values, rather than seeking to efface them, is one way to take account of local culture in the institution- and state-building process.⁵³ If the United States is committed, as it appears to be, to maintaining Iraq as a multiethnic, secular state within its present borders, it will have to find ways of identifying and building on national institutions that can support a common Iraqi identity. If Iraqis cannot successfully transfer at least some loyalty to national institutions, then political liberalization and heterogeneity may prove to be incompatible with preserving Iraq's territorial unity. Other than the underlying values of Baathism, the only other common political experience that cuts across most lines in Iraq is that of opposing occupation. On the one hand, this observation highlights the difficulty of establishing the conditions for stable, national institutions as an occupying power. The United States may ironically face a situation in which the strongest basis for the emergence of a common Iraqi identity will be united opposition to the U.S. presence in Iraq. On the other hand, though such a united common identity may not support stable

51. NATHAN J. BROWN, *THE RULE OF LAW IN THE ARAB WORLD: COURTS IN EGYPT AND THE GULF* 8-10, 241 (1997). For a discussion of constitutional developments and isomorphism with certain Western legal concepts in the broader Islamic world, see *id.* at 1-18.

52. This commitment to solidarity has no doubt been attenuated to some extent for many Iraqis embittered by what they perceive as Arab complicity in the crimes of the Baath regime or the failure of other Arab states to intervene on behalf of Iraq during the twelve-year-long sanctions regime. Nonetheless, continued popular expressions of empathy for the plight of the Palestinians in Iraq, coupled with a sense that the state has emerged from its long period of isolation and rejoined the broader region, indicate that even the pan-Arab commitments of Baathism have not been fully undermined.

53. For instance, the privileging of principles of equity over efficiency in the socio-economic commitments of Iraqis should be respected. Adopting a conception of the rule of law premised on economic liberalization may not be compatible in the short term with Iraqi political culture. For an excellent discussion of the origins and basic tenets of Baath ideology, see WILLIAM L. CLEVELAND, *A HISTORY OF THE MODERN MIDDLE EAST* 325-26 (3d ed. 2004) (noting that Baath doctrine emphasizes "a revolutionary mission to bring an end to social injustice, class exploitation and tyranny and to establish freedom, democracy and socialism"). For additional sources on Baath doctrine, see *Encyclopaedia of the Orient, Ba'th Socialist Party*, at <http://lexicorient.com/e.o/baath.htm> (last visited Apr. 20, 2005); Library of Congress Country Studies, *The Baath Party*, at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+iq0077\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+iq0077)) (May 1988).

transitional institutions as long as U.S. forces remain in effective control of Iraq, it may provide a basis for securing broad commitment to national institutions under a successor regime. Once Iraq regains full sovereignty, a post-conflict regime might be able to instill public commitment to its institutions as a symbol of liberation from U.S. domination, particularly if it succeeds in preserving some autonomy in its subsequent relations with the United States. If the concern lies principally with building stable and legitimate institutions and securing public commitment to them in rule-of-law promotion efforts, then whether success in these regards is accomplished at the expense of anti-Americanism should be of secondary importance.⁵⁴

This brief survey of the potential rule-of-law resources in Arab and Iraqi legal traditions offers meager pickings for the liberal democratizer. Is there something worth salvaging in the promotion of the rule of law once it has been unbundled from other substantive commitments such as democratization, marketization, or a liberal conception of individual rights? In line with the more modest ambitions advanced in Section II, it is useful to return to the question of how to define the rule of law and understand its relationship to state-building. On the basis of the foregoing discussion, the definition appropriate to present conditions in Iraq may have to be limited to the following: a commitment to the autonomy of legal institutions, the protection of basic rights (that is, a potentially smaller category than might be thought basic to a liberal account of rights), and tolerance for regulatory controls incompatible with a fully liberal, market-based economy. From this definition, the goal would be to design institutional arrangements that promote accountability in governance and protect citizens' rights, rather than ideally liberal institutions that have a lesser prospect of taking root. In other words, the priority for building the rule of law in Iraq would be the more modest (though still quite ambitious) goal of establishing stable and transparent laws and ensuring the protection of the basic rights valued by the members of the Iraqi polity to lay the foundations of an Iraqi state, rather than embarking on ambitious projects to attain complete political and economic liberalization.

C. *Establishing the Rule of Law in Iraq*

The discussion now turns to the practical question of what policies might best promote the establishment of basic rule-of-law commitments in present-day Iraq. A survey of authoritative policy literature on this subject yields a set of six prerequisites for establishing the rule of law, most of which follow readily from the previous discussion.⁵⁵

1. Establish security: This heading groups recommendations ranging from the role of the military in doing police work until public

54. To the extent that this claim seems problematic, it is another illustration of the divergence of interests between occupier and occupied.

55. For some examples of this literature, see WILLIAM G. O'NEILL, HENRY L. STIMSON CTR., *REBUILDING THE RULE OF LAW IN IRAQ: TEN TIPS FROM RECENT EXPERIENCE* (2003), available at http://www.stimson.org/fopo/pdf/boneillivag_Rol.pdf; Marcia Coyle, *Towards an Iraqi Legal System*, NAT'L L.J., Apr. 21, 2003, at A5; Joseph P. Markoski & Thomas J. Ramsey, *Iraq and the Rule of Law*, IRAQ RECONSTRUCTION REP., Apr. 24, 2003, at 11, available at <http://www.ssd.com/newsletter/Communications/062003/IraqRule.pdf>.

security is established on the streets of Iraq, to the need to recruit, train, and restructure the local police force, to the need to protect the civilian population from looting, marauding, and vigilante justice. The missed opportunity to establish security at the beginning of the post-conflict period has had devastating consequences for the course of state-building in Iraq. Once it became apparent to the Iraqi people that law and order had dissolved and that no one exercised effective control, the emergence of self-help and self-defense systems—and worse, ones that privileged communal identities—was the predictable and dangerous consequence.⁵⁶

2. Police and judicial reform: The Iraqi legal profession was largely defunct under the Baath regime. The judicial system was subverted, with courts placed under the executive and special security courts operating concurrently with their own, largely secret jurisdiction. Lawyers and judges played a role in supporting the Baath police state, further undermining Iraqi confidence in the legal system.⁵⁷ Rebuilding the judiciary and police reform are essential steps toward inspiring confidence among Iraqis in a new, effective, and fair legal system. The combined institutions of law enforcement will have to be rebuilt, from the police to the prisons to the courtrooms, and legal professionals to staff these institutions will have to be recruited and trained. Crucially, such reforms

56. Regional experts and policymakers foresaw these developments and warned of the potential “primordialization” of Iraq should the public security infrastructure be destroyed and chaos prevail in the aftermath of a war. *See, e.g.,* Toby Dodge & Steven Simon, *Introduction to IRAQ AT THE CROSSROADS: STATE AND SOCIETY IN THE SHADOW OF REGIME CHANGE* 9, 18 (Toby Dodge & Steven Simon eds., 2003).

57. One U.S. Army JAG reserve officer stationed in Iraq and tasked with the oversight and restoration of Iraqi courts in southern Iraq described the state of the Iraqi judiciary after thirty-five years of Baathist rule as follows:

Initial assessments of the Iraqi courts revealed that the courts of general jurisdiction within each of Iraq’s eighteen provinces were widely subject to political control and influence. The Ministry of Justice in Baghdad had previously appointed judges based on party loyalty and their willingness to support Baath party policies through their rulings Operating under a tight hierarchal structure, the chief judge in each province was expected to demonstrate unwavering obedience to Baathist policies and orders from Baghdad After decades of living under such centralized control, the senior members of the Iraqi bench had become political functionaries who knew that their primary goal was obeying the regime, with their secondary duty being administering justice to the Iraqi people. In maintaining a judiciary that was politically obedient, however, the regime also triggered unanticipated secondary consequences. By placing the needs of the people in second place, the regime unwittingly planted the seeds for corruption and bias as the judges placed self-interest above other issues. Over the past thirty-five years, the Iraqi courts have been characterized by bias and favoritism, with verdicts being routinely influenced by payoffs and tribal affiliations. During Coalition interviews with sitting Iraqi judges throughout southern Iraq in June and July 2003, virtually all judges acknowledged that widespread corruption characterized their system. The judges also acknowledged that a litigant’s tribal and political connections under the old regime would frequently be a prime consideration in the outcome of both criminal and civil trials.

Craig T. Trebilcock, *Legal Cultures Clash in Iraq*, ARMY LAW., Nov. 2003, at 48 (citations omitted).

require input from Iraqis to secure a measure of local ownership of the reformed legal system and the resulting institutions.

3. Prison reform: In the wake of the Abu Ghraib prison scandal, it goes without saying that “[h]ow a state treats its prisoners is compelling evidence of its respect for human rights.”⁵⁸ Correcting the record of human rights violations that have badly tarnished the image of the U.S. occupation of Iraq cannot be limited to the punishment of a few low-ranking servicemen and women. Better accountability mechanisms, available to ordinary Iraqis, must be put in place to punish prison abuse. Investing in the necessary infrastructure for the humane treatment of prisoners in Iraq must also top the list of priorities for reconstructing the legal system.
4. Modernizing laws: Iraqi civil and criminal codes need revision to remove instruments of repression. The U.S. State Department commissioned a group of exiled Iraqi jurists and Arab-American lawyers to produce a proposal to overhaul the Iraqi legal system in the run-up to the war in 2002. Known as the “Future of Iraq” project, this exercise yielded a detailed proposal that was ultimately discarded by Pentagon planners.⁵⁹ Designing a framework in which Iraqi participation and feedback is solicited for any legislative or regulatory reform initiative (even when reforms are undertaken on a transitional basis) is essential to instill public acceptance of the reform process and to legitimize its outcome.⁶⁰
5. Building oversight and accountability mechanisms: For Iraqis to develop confidence in the police and the courts, oversight mechanisms to curb corruption, prohibit brutality, and publicly investigate and punish instances of abuse are essential, both because of their disciplinary function and because they would represent a symbol of the transition away from totalitarian legalism to the rule of law. Any accountability mechanisms must hold the occupying power and its forces to the same standard applicable to Iraqis.
6. Transitional justice: Arresting and prosecuting the worst abusers under the Baath regime is perhaps the one priority that was

58. O’NEILL, *supra* note 55, at 2.

59. Jonathan S. Landay & Warren P. Strobel, *Lack of Planning Contributed to Chaos in Iraq*, KNIGHT-RIDDER, July 12, 2003, available at <http://www.miami.com/mld/miamiherald.6285256.htm>. For critical views on the project since its inception in 2002, see Ctr. for Media and Democracy, *Future of Iraq Project*, at http://www.disinfopedia.org/wiki.phtml?title=Future_of_Iraq (last visited Apr. 20, 2005).

60. A corollary to the modernization of the laws is the need to convene a national constitutional assembly to draft a new Iraqi constitution. Following Iraq’s January 30 election, such an assembly is the next step in the transition toward a future, sovereign Iraqi state. The principles enshrined in any constitution drafted by such an assembly cannot be foretold by the course of rule-of-law projects in the transitional period. The new constitution, if it is to be durable, must be the product of an indigenous political process—if the result of such a process is a non-federal or non-democratic constitution, that result will have to be respected internationally as the outcome of a legitimate Iraqi deliberative process. For more on the tension between the desired outcome from a U.S. perspective and the likely outcome of a representative Iraqi constitutional process, see *supra* notes 28-29 and accompanying text.

immediately and properly adopted by the occupation authority. But these prosecutions will do little to promote the rule of law unless they are widely accepted as legitimate by the Iraqi people. A broad swathe of Iraqis should have been brought into the process of choosing the appropriate combination of available instruments for transitional justice,⁶¹ including prosecution, before the current model of the Iraqi Special Tribunal was adopted. With the tribunal now in flux, there may be an opportunity to revisit the question of institutional design.⁶²

While these recommendations are straightforward enough in theory, the devil is in the details of implementation. Be that as it may, the implementation of a strategy to establish the rule of law in the aftermath of the invasion was an obligation the U.S. government undertook when it decided to occupy Iraq.⁶³ So long as the United States maintains forces under U.S. command in effective control of Iraq, it remains responsible for internal security, public order, and establishing the rule of law. The lessons of previous multilateral peace operations are among the most valuable guidelines for developing a new strategy to accomplish the first prerequisite of the rule of law—establishing security. Of the previous peace operations, the one that yields the most transferable lessons is probably Kosovo. Bernard Kouchner, the senior U.N. official in Kosovo, has publicly commented that to his mind, the single

most important lesson to be learned from Kosovo . . . is that peacekeeping missions need a judicial or a law-and-order “kit” made up of trained police officers, judges and prosecutors, plus a set of potentially draconian security laws or regulations that are available upon their arrival. This is the only way to stop criminal behavior from flourishing in a postwar vacuum of authority.⁶⁴

That these comments preceded the war in Iraq by over two years is striking. This emphasis on establishing order and on having a legal “kit” at the ready to begin establishing the rule of law as early as possible in the post-conflict context represents a striking affirmation of the centrality of the rule of law to peace- and state-building.⁶⁵

61. Alexander Boraine, the president of the International Center for Transitional Justice, offered a concise overview of the different available instruments in the arsenal of traditional justice in an address presented at an Ottawa symposium on transitions to democracy. Alexander Boraine, *Transitional Justice as an Emerging Field*, Remarks at a Symposium Entitled *Repairing the Past: Reparations and Transitions to Democracy*, at <http://web.idrc.ca/uploads/user-S/10829975041revised-boraine-ottawa-2004.pdf> (Mar. 11, 2004).

62. This issue will be taken up in detail in Section IV, *infra*.

63. As Senior Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit noted after his visit to Iraq as part of a judicial training program sponsored by the State Department:

[T]he promise we have made to Iraq [is] of a constitutional democracy, to be held up as a model in the Middle East

. . . Bremer has completely botched this job. There are, I think, plausible reasons for our being [in Iraq], but there is no plausible reason, in my view, for doing it the way we are doing it.

A. Kevin Reinhart & Gilbert S. Merritt, *Reconstruction and Constitution-Building in Iraq*, 37 VAND. J. TRANSNAT'L L. 765, 774, 778 (2004).

64. R. Jeffrey Smith, *Kosovo Still Seethes as U.N. Official Nears Exit*, WASH. POST, Dec. 18, 2000, at A20.

65. These same lessons were also underscored by Paddy Ashdown, the international community's High Representative in Bosnia:

IV. TRANSITIONAL JUSTICE: ACCOUNTABILITY AND THE RULE OF LAW

The preceding Section considered the centrality of the rule of law in a transition to a legitimate successor regime in Iraq and surveyed six sets of measures to foster the rule of law. The first five—establishing security, police and judicial reform, prison reform, modernizing laws, and building accountability mechanisms—are essential to the functioning of the ordinary legal system enforcing the rule of law through legitimate institutions. The sixth element—that of transitional justice—raises the question of the relationship between extraordinary justice and the rule of law. As indicated by the inclusion of transitional justice among the basic prerequisites for establishing the rule of law, the legitimacy of a new legal system emerging after a period of lawlessness depends significantly on holding the prior regime accountable for its abuses. But it is not enough to call for transitional justice measures to be taken. How the successor regime holds its predecessor accountable is crucial for the prospects of establishing the rule of law. In particular, if the successor regime opts to prosecute the prior leadership for their abuses, it is essential to the success of the transition that such prosecutions are perceived as legitimate and fair, both domestically and internationally.

A. *Trying Saddam Hussein*

With the capture of Saddam Hussein on December 13, 2003,⁶⁶ the Bush administration, the IGC, the international community, and even many ordinary Iraqis experienced a rare moment of accord: all agreed that Mr. Hussein must be held accountable for his regime's crimes. The link between accountability for past crimes and the establishment of a new rule-of-law culture raises the stakes in deciding who should try Mr. Hussein, where, and against what standard. As it happened, three days before the capture of Mr. Hussein, the U.S.-appointed IGC issued the Statute of the Iraqi Special Tribunal (the

In Bosnia, we thought that democracy was the highest priority and we measured it by the number of elections we could organize In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in police and the courts.

Paddy Ashdown, *What I Learned in Bosnia*, N.Y. TIMES, Oct. 28, 2002, at A25. Similarly, a U.S. district court judge who visited Iraq in May 2003 published an op-ed piece in the *Wall Street Journal* emphasizing that while progress toward elections would be laudable, the real priority must be the rule of law:

[I]f Iraq is to become a sovereign state, responsible to the will and needs of its people, the Coalition and the Governing Council must first establish order through the rule of law. They must be given the money and manpower to build a working judicial system; there must be civil and criminal courts, and prosecution and law enforcement must be seen to be honest, predictable, fair and accessible to all.

Donald Walter, *Don't Cut and Run*, WALL ST. J., Nov. 4, 2003, at A18.

66. *Saddam Hussein Arrested in Iraq*, BBC.com, at http://news.bbc.co.uk/2/hi/middle_east/3317429.stm (Dec. 14, 2003); see also Press Release, Office of the White House Press Secretary, President Bush Addresses Nation on the Capture of Saddam Hussein, at <http://www.whitehouse.gov/news/releases/2003/12/20031214-3.html> (Dec. 14, 2003).

Statute),⁶⁷ establishing a court to try Iraqis accused of war crimes and crimes against humanity during the Baathist era.⁶⁸ The Statute was consistent with the public position adopted by the United States that former President Hussein should be tried before an Iraqi tribunal convened for the specific purpose of holding the former regime accountable for war crimes and crimes against humanity committed against the Iraqi people. While international human rights organizations and international lawyers agreed that the Iraqi people should be afforded an opportunity to hold the Baath regime accountable, there were serious concerns about holding trials either before a special tribunal convened by the United States and the occupation authorities,⁶⁹ or in the Iraqi judicial system that had so recently emerged from three decades of Baath rule.⁷⁰ Iraqis were for their own reasons concerned that a tribunal convened by the United States would be perceived as illegitimate both within the country and internationally.⁷¹ The significance of the trial of Mr. Hussein is as much a

67. The Statute was enacted directly into law by the IGC through special arrangements ceding legislative authority temporarily to the Council for the purpose of enacting the Statute under Order No. 48 issued by then-U.S. Chief Administrator for Iraq, Paul Bremer. Coalition Provisional Authority, Order No. 48, Doc. No. CPA/ORD/9 December 2003/48, http://www.cpa-iraq.org/regulations/-20031210_CPAORD_48_IST_and_Appendix_A.pdf (Feb. 16, 2005). For the text of the Statute, see Coalition Provisional Authority, The Statute of the Iraqi Special Tribunal, http://www.cpa-iraq.org/human_rights/Statute.htm (Feb. 15, 2005).

68. As of July 2004, twelve high-ranking members of the former Baath regime had appeared before the Tribunal for preliminary hearings: Saddam Hussein; Abid Hamid Mahmud al-Tikriti (former presidential secretary); Ali Hassan al-Majid (former presidential adviser); Barzan Ibrahim al-Hassan al-Tikriti (former presidential adviser); Watban Ibrahim al-Hassan al-Tikriti (former presidential adviser); Taha Yassin Ramadan al-Jizrawi (former vice-president); Tariq Aziz (former deputy prime minister); Sultan Hashim Ahmed (former defense minister); Muhammad Hamza al-Zubaydi (former member, Revolutionary Command Council); Aziz Salih al-Numan (former head of the Baath party for western Baghdad); Kamal Mustafa Abdullah al-Tikriti (former commander of the Republican Guard); and Sabir Abdul Aziz al-Douri (former mayor of Baghdad). *Iraq's Top Detainees*, BBC.com, at http://news.bbc.co.uk/1/hi/world/middle_east/3850567.stm (July 1, 2004). Presumably, mid-level suspects will be prosecuted by ordinary courts in order to lighten the load on the tribunal and focus its work on the most egregious crimes committed by the top leadership.

69. The United Nations, in particular, has voiced serious concerns about the Iraqi Special Tribunal and its competence to meet international legal standards in trying the former Baath regime:

[U.N. Secretary-General Kofi Annan] raised concerns about the tribunal in general. A letter from Mr. Annan's office expressed "serious doubts" that the Iraqi Special Tribunal could meet "relevant international standards." It reiterated his view that the United Nations should not assist national courts that can order the death penalty and said that the organization has no legal mandate to assist the tribunal.

Marlise Simons, *Iraqis Not Ready for Trials; UN To Withhold Training*, N.Y. TIMES, Oct. 22, 2004, at A11.

70. See Rajiv Chandrasekaran, *Rights Court Run by Iraqis Is Approved by Council*, WASH. POST, Dec. 10, 2003, at A1 (noting that the composition of the tribunal, drawn from Iraqi prosecutors, judges, and lawyers, "has alarmed international human rights organizations, which contend that Iraq's legal system is too corrupt and inexperienced to handle complex cases"); see also Kenneth Roth, *Now, Try Him in an International Court: Saddam Captured*, INT'L HERALD TRIB., Dec. 15, 2003, at 10. Roth, executive director of Human Rights Watch, argues that the fairness of the tribunal before which Saddam is tried will determine "whether his prosecution advances the rule of law in Iraq or perpetuates a system of arbitrary revenge." He notes in particular that while a legitimate tribunal would have to include jurists with an international reputation for integrity, "Saddam's brutal and arbitrary justice system can hardly be expected to have produced such jurists." Roth concludes that an "internationally led tribunal would be a far better option." *Id.* Other international and Iraqi commentators echoed Roth's concerns regarding the competence and impartiality of the Iraqi judicial system. See, e.g., Chandrasekaran, *supra*, at A1 ("[I]nternational experts . . . noted that the United Nations and the U.S. Justice Department both issued reports in recent months calling into question the competence and impartiality of Iraq's judicial system.").

71. See, e.g., Jennifer R. Ridha, *Get America Out of the Tribunal*, N.Y. TIMES, July 7, 2004, at

matter of the prospects for the rule of law in Iraq as it is a question of adjudicating the human rights abuses of his regime. Should the trial appear unfair, and particularly if a flawed trial should end with a death sentence, it may confirm fears that the U.S. occupation authority and Iraqi administrators are continuing the long tradition of politicized justice that was the hallmark of the Baath legal system. Such politicization would gravely undermine the prospects for the rule of law and democratization in Iraq. Among the most urgent tasks before the United States and Iraqi transitional authorities, then, is to ensure that trials holding members of the Baath regime accountable for past abuses exemplify the legal culture to be established in post-Baath Iraq, including compliance with international legal standards of justice, due process, fairness, and transparency.⁷²

B. *Designing the Iraqi Special Tribunal*

The tribunal was designed by a team of Iraqi lawyers working with CPA-provided U.S. legal advisers. The international community—including international lawyers with specific expertise in the workings of the ad hoc international war crimes tribunals for the former Yugoslavia, Rwanda, Cambodia, and the hybrid tribunal of Sierra Leone—was pointedly excluded from the process.⁷³ Fears abound that after decades of repression, the Iraqi

A21 (Iraqi-American lawyer citing concern that U.S. involvement in the Tribunal would detract from the perceived legitimacy of the proceedings). At a recent training session held in London for Iraqi judges on the tribunal, the judges themselves cited concerns “that they had little grasp of what one called ‘this whole new body of law’” in reference to the complexities of international law used to deal with mass killing and genocide. Simons, *supra* note 69, at A21. Simons goes on to describe conversations with Iraqi judges who felt

caught between international public opinion and the opinion of Iraqis. They want experienced judges from other nations to sit on the bench with them but fear that many Iraqis will see this as humiliating Several participants said that involving other countries, and preferably the United Nations, would provide greater legitimacy to the tribunal. “It would stop the impression that the whole thing is run by the Americans,” said one prosecutor.

Id.

72. A new Baghdad courthouse located in the heavily guarded Green Zone was completed in February 2005 as the venue for the prosecutions. In the absence of greater international involvement, the U.S. Department of Justice and the U.S. Department of State have been sending legal advisers to the Iraqi judges appointed to the court to provide them with legal training. Indications have been given that the first trial will be of Ali Hassan al-Majid, also known as “Chemical Ali,” followed by the trial of Barzan Ibrahim al-Hassan al-Tikriti, a commander of the Republican Guard and director of the Iraqi intelligence service. Faye Bowers, *War-Crimes Trials Gear Up in Iraq*, CHRISTIAN SCI. MONITOR, Feb. 23, 2005, at A3; John F. Burns, *Trials of Some of Hussein’s Aides To Start Within Weeks; His Is Expected in 2006*, N.Y. TIMES, Feb. 10, 2005, at A8.

73. While international jurists were not consulted in the drafting of the Statute, the Statute does provide for international assistance from lawyers, judges, forensic evidence specialists, and investigators. Further, under pressure from international human rights organizations, the Statute was amended to provide for the addition of foreign judges. See Chandrasekaran, *supra* note 70, at A1 (“In a last-minute concession to the rights groups, [IGC] officials said, the U.S. occupation authority asked council members to include a provision giving the council the right to appoint international judges if needed.”). Nevertheless, as several commentators have argued, the design of the tribunal did not benefit from the experience gained by the international community through the prosecutions of war crimes committed in Rwanda and the former Yugoslavia. One significant lesson to be drawn from the experience of those tribunals—based on the complexity of the trials and the extraordinary burdens on the jurists undertaking them—is that the Iraqi Special Tribunal will require international lawyers of the highest caliber and integrity for the trial of Saddam Hussein and his associates to have a semblance of fairness. On the need for skilled international jurists for the credibility of the tribunal, see Roth, *supra*

justice system will not be able to meet the challenge of engaging in complex war crimes prosecutions on its own. Even with the effective assistance of the international community, the tribunals for the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia have had to overcome massive technical and logistical hurdles in coping with enormous dockets and the vast quantities of evidence and testimony involved in such cases. The expertise developed by the international community in the conduct of previous tribunals will be sorely needed as the Iraqi Special Tribunal's work gets underway. Further, the Tribunal's jurisdiction is not limited to the atrocities committed by the Baath regime against its own population. In fact, the tribunal will have to hold Saddam Hussein and his regime accountable for war crimes with a significant international dimension, including crimes committed during the Iran-Iraq war and the occupation of Kuwait. As one international human rights expert has commented, "[t]hese accusations have an international dimension to them that needs to be addressed in a tribunal that has a strong international flavor."⁷⁴ The absence of international consultation or a clear role for international jurists in the tribunal has led some critics to voice concerns that the United States was preparing "show trials" for the Baath regime.⁷⁵

This argument about so-called show trials has three distinct prongs. First, it is claimed that the United States excluded international jurists from the process of designing the tribunal because it did not wish to be hampered by the evidentiary and procedural standards to which international tribunals must adhere in mounting a case against the former Iraqi regime. By this logic, satisfied that Saddam Hussein and his coterie were guilty of crimes against humanity, the United States would afford them a cursory chance to prove their innocence before having the tribunal pass pre-determined verdicts of guilt.⁷⁶

note 70 ("To avoid being perceived as show trials or victor's justice the prosecutions of the former Ba'ath regime leaders call for highly experienced jurists of unquestioned integrity."). Several human rights organizations in particular issued sharply worded statements decrying the failure to consult with the United Nations or international legal experts in drafting the Statute or convening the tribunal. For instance, in December 2003, Amnesty International issued the following statement: "Amnesty International has expressed concern to the Coalition Provisional Authority (CPA) and the Iraqi Governing Council about the decision to establish an Iraqi special tribunal that was taken without prior consultation with the Iraqi civil society or the international community." Press Release, Amnesty Int., Iraq: Tribunal Established Without Consultation, at <http://web.amnesty.org/library/index/ENGMD141812003> (Dec. 10, 2003).

74. Human Rights First, *Prosecuting Saddam Hussein: A Conversation with Fiona McKay*, Director of the International Justice Program at Human Rights First, at http://www.humanrights-first.org/international_justice/w_context/w_cont_11.htm (Dec. 19, 2003). McKay continues in the same interview to note:

[A] tribunal that combines Iraqi law and jurists with international law and expertise may have more legitimacy in the eyes of Iraqis and the region. It is important that trials of Saddam Hussein and others don't come to be perceived as revenge trials. The involvement of international experts will help lend the entire process the legitimacy it needs to be successful.

Id.

75. See, e.g., Alex Boraine, *Justice in Iraq: Let the UN Put Saddam on Trial*, INT'L HERALD TRIB., Apr. 21, 2004, at 8 (arguing that "[i]f leaders of Saddam Hussein's regime are prosecuted by, or on behalf of, the United States, Iraqis will view the prosecutions as 'show trials'"); Chandrasekaran, *supra* note 70 ("Richard Dicker, director of the international justice program at Human Rights Watch in New York, said he feared the Iraqi tribunals could 'degenerate into political show trials.'"); Robert Collier, "Human Rights Shortcomings" in Hussein Tribunal: Concern Grows that Trial Will Be Seen as a Kangaroo Court, S. FR. CHRON., Apr. 22, 2004, at A13.

76. For instance, Salem Chalabi, the former chief administrator of the tribunal, has publicly

Second, there was concern that the United States intended to keep a tight leash on the proceedings in an effort to shield itself and its European allies from scrutiny for their role in arming the Iraqi regime and enabling its commission of crimes against the Iraqi people,⁷⁷ and particularly against the Iranian people through the use of banned chemical weapons, among others.⁷⁸ Finally, the CPA's insistence that the former Baath leadership be tried by an Iraqi tribunal was viewed by some as an extension of the Bush administration's hostility to principles of universal jurisdiction and to the use of independent international courts for the enforcement of humanitarian law.⁷⁹ The Iraq tribunal would be a forum for show trials, according to these critics, in the most pejorative sense.⁸⁰

C. *Show Trials: Exemplary or Pejorative?*

In contrast to the arguments advanced by critics, there is a second sense in which prosecutions in the context of transitional justice inevitably constitute show trials. Trials that exemplify international standards of accountability for atrocities are for show in the best possible sense: they provide a public forum for local and international audiences that demonstrates that justice is being served and leaders are being held accountable for their crimes. Declaring that the laws of war and human rights standards are universally applicable sends a powerful message to the domestic population that suffered under the prior regime—and to other abusive regimes—that international crimes can and should be punished.

stated concerns that the tribunal may be manipulated to create "[s]how trials followed by speedy executions" for short-term political gain, which would undermine the development of the rule of law in Iraq in the long run. John F. Burns & Dexter Filkins, *Iraqis Battle Over Control of Panel To Try Hussein*, N.Y. TIMES, Sept. 29, 2004, at A1. Human Rights Watch has noted that the tribunal's statute lacks several of the basic procedural and substantive safeguards required under international fair trial standards. HUMAN RIGHTS WATCH, *Iraq*, in HUMAN RIGHTS WATCH WORLD REPORT 466, 471 (2005), available at <http://hrw.org/wr2k5/wr2005.pdf>.

77. As Jennifer Ridha has noted:

[R]ightly or wrongly, the commission of Iraqi war crimes raises the question of American support for the Hussein regime. Indeed, Jacques Vergés, a French lawyer who says he has been asked to help represent Mr. Hussein, has already promised that the issue will take center stage before the special tribunal. Mr. Vergés has stated that he hopes to nullify Mr. Hussein's crimes by demonstrating that the United States was complicit in their commission.

Ridha, *supra* note 71.

78. On the question of whether evidence of European and U.S. complicity might be brought in by the defense teams for the Baath leaders prosecuted by the tribunal, see Aaron Glantz, *Iraq: The West May Go On Trial with Saddam*, INTER PRESS SERVICE NEWS AGENCY, <http://ipsnews.net/-interna.asp?idnews=24261> (June 18, 2004) (reporting that some allege that French, German, and U.S. companies that sold chemical weapons to the Baath regime during the Iran-Iraq war may be implicated in the evidence presented by Mr. Hussein's defense lawyers). On the question of foreign officials who might be brought before the tribunal to testify, see Joe Conason, *Who Will Testify at Saddam's Trial*, N.Y. OBSERVER, Dec. 22, 2003, at 5 (noting that U.S. Defense Secretary Donald Rumsfeld, who acted as President Reagan's special envoy to Iraq in the early 1980s, as well as numerous other U.S. officials, might be called as witnesses before the tribunal).

79. In this vein, Kenneth Roth of Human Rights Watch has argued that the creation of the Iraq tribunal "reflects less a determination to see justice done than a fear of bucking Washington's ideological jihad against any further enhancement of the international system of justice." Roth, *supra* note 70.

80. See *supra* note 75.

The pejorative meaning of show trials advanced by the critics of the Iraqi Special Tribunal is the flip side of the coin. If prosecutions appear to be conducted by an illegitimate tribunal or a tribunal that does not have jurisdiction to prosecute all abuses equally and fairly, or if the rules adopted by the tribunal fall short of international standards of procedural fairness, then the court will set the wrong kind of example. Regardless of the tribunal before which Saddam Hussein is tried, his trial and the trials of other members of his regime will represent instances of exemplary justice that will either establish or jeopardize several critical aspects of the rule of law in the post-Baath context. Some of the basic principles that the practice of exemplary justice through the public trials of former regime leaders should include are: procedural standards of justice; evidentiary standards for criminal conviction; the impartiality and competence of Iraqi courts; and the equality of all Iraqi citizens, including those holding high political office, before the law. To achieve these objectives, Iraqis must be convinced of the legitimacy of the tribunal and the regime that has convened it.

In addition to their exemplary function, these prosecutions also serve a historical purpose. They must afford the Iraqi people an opportunity to establish a record of the war crimes and crimes against humanity committed by the Baath leadership. This process will necessarily be a wrenching one, considering that the regime committed significant atrocities against its own people as well as aggression, crimes against humanity, and war crimes against neighboring countries. Trials of former Baath officials, then, serve multiple purposes: they symbolize the illegitimacy of the prior regime and its leadership, initiate a period of transitional justice to advance both exemplary and ordinary justice, establish a full historical record of the crimes of the Baath regime, and enforce international humanitarian and human rights norms as a new foundation for the rule of law in Iraq. How well does the current conception of the tribunal serve these purposes?

The single greatest concern is that the two meanings of show trials—the pejorative and the exemplary—will be conflated in a cynical exercise of victor's justice designed to create the historical record most convenient to the effective occupation authority in Iraq and its local proxies. Under these circumstances, the tribunal not only would make a mockery of bringing the Baath leadership to justice but, more damningly, would undermine the establishment of the rule of law in post-Baath Iraq. To better understand the relationship of transitional justice to building the foundations of ordinary justice through the rule of law, the following Section will first provide a working definition of transitional justice and will then consider the case of the proposed prosecutions of the Baath regime before the Iraqi Special Tribunal in more detail.

D. *Defining Transitional Justice*

Transitional justice refers specifically to accountability mechanisms designed to address human rights abuses committed by a regime once that regime has fallen. For countries undergoing a transition from repression to a legitimate government, holding the prior regime accountable presents the first

real test for the establishment of the rule of law.⁸¹ Efforts to rebuild the rule of law while coming to terms with the lawlessness of a prior regime face significant challenges.⁸² Surveying the full range of transitional justice instruments available to serve the interests of accountability and transition will provide the appropriate context against which to judge the choice of prosecution over other available mechanisms.

Four categories of transitional justice mechanism have been well developed in the recent practice of states transitioning away from an abusive past, as well as in the scholarly literature. The one that has been discussed so far in this Section is the application of criminal sanctions against those held accountable for the abuses of the prior regime.⁸³ The principle of *nullum crimen, nulla poena sine lege* (without a law, there is no crime and no punishment) and the prohibition on ex post facto laws must apply for the sanctions to constitute acceptable instruments of transitional justice. A second category of mechanisms in the arsenal of transitional justice is non-criminal sanctions. Here, those believed to have been responsible for abuses under the prior regime are subjected to administrative penalties and lustration for their past activities. De-Baathification, for instance, which involves the purging of the ranks of the civil service at all levels of individuals directly associated with the Baath party, is an example of such non-criminal sanctions.⁸⁴ A third

81. See the description of the "kangaroo trial and execution" of former Romanian dictator Nicolae Ceaucescu in Neil J. Kritz, *The Dilemmas of Transitional Justice*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES xix, xxi (Neil J. Kritz ed., 1995) [hereinafter TRANSITIONAL JUSTICE].

82. Stephen J. Schulhofer, *Roundtable on the Court's Ruling*, in 1 TRANSITIONAL JUSTICE, *supra* note 81, at 653.

83. Ruti Teitel has noted that early conceptions of transitional justice, perhaps under the influence of the Nuremberg tribunals, viewed punishment as a necessary feature of transitional justice, to demonstrate that the successor regime represents a clear break from the past and is capable of imposing punitive sanctions on members of the former regime. Teitel argues that this conception of transitional justice has given way to another claim, "that successor regimes [are] obligated to investigate and to repair wrongs perpetrated under prior regimes." Ruti Teitel, *From Dictatorship to Democracy: The Role of Transitional Justice*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 272, 273 (Harold Hongju Koh & Ronald C. Slye eds., 1999). She bases this argument on the experience of Latin American transitions. These regimes underwent internal transition (not regime change through external military intervention) and relied on amnesties to accomplish non-violent succession. However, she notes that despite the amnesties, some successor regimes did engage in prosecutions of the leadership of the prior regime but framed these in terms of "limited" criminal sanctions—prosecutions that yielded pronouncements of guilt and comprehensive records of abuse rather than extensive or maximal punishment. The role of the judicial proceedings was to investigate abuses and pronounce verdicts that individualized accountability in ways that other transitional justice mechanisms, such as truth commissions, may not have been able to do. In this conception of transitional justice, the formal recognition of prior wrongdoing through judicial mechanisms is prioritized over retribution, deterrence, or rehabilitation in the context of extraordinary justice for regime crimes. In transitional contexts where successor regimes may be vulnerable to destabilizing social cleavages triggered by more extensive forms of punishment that assign blame in ways that exacerbate intercommunal grievances, one way to overcome what has come to be known as the "punish-or-pardon" dilemma is to assign responsibility combined with largely non-criminal sanctions. See Teitel, *supra*, at 273-78.

84. Ideally, these non-criminal sanctions should apply on the basis of some procedure to determine whether particular individuals were in fact abusive, active Baath party members. Further, such procedures should meet basic standards of fairness and impartiality and should be governed by publicly available rules. None of these requirements was met by the process adopted under the U.S. occupation for the de-Baathification of the Iraqi state. Rather, the purges associated with de-Baathification were often perceived as opportunities to settle old scores and were thus delegitimized in the eyes of the Iraqi public. Worse, the breadth of the de-Baathification process left the Iraqi public sector decimated, leading to massive unemployment and a reduction in the effectiveness of basic Iraqi institutions.

mechanism of transitional justice is the creation of an officially sanctioned historical record of the prior regime's abuses.⁸⁵ Finally, a fourth method focuses on creating a national climate of reconciliation for the victims of past abuses by taking detailed histories of their suffering under the prior regime and instituting mechanisms to provide victims with compensation and restitution.⁸⁶

How do these mechanisms relate to the situation in Iraq? The legitimacy of Iraqi successor institutions, including the Iraqi Special Tribunal, will inevitably be linked to the conditions of occupation under which they emerge. The relationship of the tribunal to an occupation authority that is seen by some Iraqis as illegal and repressive may undermine the perceived legitimacy of the prosecutions of Saddam Hussein and the other Baath leaders. Given the already severe fissures between the Sunni and Shiite communities in Iraq, the application of severe criminal sanctions—including the imposition of capital punishment—might trigger political vendettas and other forms of intercommunal strife between aggrieved Sunni Iraqis and communities perceived to have encouraged such sanctions. Such politicization would aggravate the legitimacy deficit faced by the reformed Iraqi judicial system as it struggles to make good on its new commitment to the rule of law. One way to alleviate these problems would be to incorporate a wider range of transitional justice measures into the design of accountability mechanisms for passing judgment on the Baath regime. With these concerns in mind, the discussion now turns to a consideration of the tribunal currently convened to prosecute the Baath leadership.

E. *The Iraqi Special Tribunal: Structure and Jurisdiction*

A brief description of the structure and substantive jurisdiction of the tribunal may help to ground the remainder of the discussion. The tribunal is comprised of five units: tribunal investigative judges; ten trial chambers (each with a five-judge panel); one appeals chamber (a nine-judge appellate court); a prosecutions department; and an administrative department.⁸⁷ While the tribunal does not have a defense department for the benefit of the accused, it

85. Most commonly, such a record is compiled through a painstaking process of collecting testimonial and physical evidence in national, public hearings—often televised or otherwise dramatically conveyed to a wide audience of citizens and international observers—frequently in the form of a truth commission. Perhaps the most famous example of such a mechanism is South Africa's Truth and Reconciliation Commission. For an excellent history of the South African Truth and Reconciliation Commission, see ALEX BORAINÉ, *A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION* (2001).

86. For a discussion of the use of mechanisms for compensation and restitution in transitions from a prior repressive regime, see Kritz, *supra* note 81, at xxviii-xxx. Many examples of the use of such mechanisms can be drawn from the post-communist transitions in Eastern Europe, including in Bulgaria, the Czech Republic, Germany, Hungary, Lithuania, Russia, and Slovakia. For a compilation of the relevant laws of restitution, compensation, and restoration of property in these countries, see 2 *TRANSITIONAL JUSTICE*, *supra* note 81, at 643-817. Chile is an example of a country that combined a commission of inquiry with mechanisms of compensation and restitution. On the Chilean National Commission on Truth and Reconciliation, see *id.* at 101-69; for the Chilean Law Creating the National Corporation for Reparation and Reconciliation, see *id.* at 685-96.

87. Statute of the Iraqi Special Tribunal, *supra* note 67, art. 3.

does recognize the right to defense.⁸⁸ In terms of substantive jurisdiction, the tribunal will hear four categories of crimes: genocide, crimes against humanity, war crimes, and an assortment of specific offenses under Iraqi law, including misappropriation of funds and invasion of another Arab country.⁸⁹ With the exception of references to particular Iraqi criminal provisions, the substantive terms of the Statute have a great deal in common with the Rome Statute of the International Criminal Court⁹⁰ (ICC) and the various international agreements on which the Rome Statute is based.⁹¹ The tribunal's jurisdiction is limited to crimes committed between July 17, 1968, and May 1, 2003, the period during which the Baath regime ruled Iraq. Finally, the tribunal's personal jurisdiction is limited to Iraqi nationals and residents.⁹²

One might criticize the limitations on the tribunal's personal jurisdiction over non-Iraqi nationals. That the tribunal will not be able to hear evidence regarding war crimes and crimes against humanity committed by non-Iraqis against Iraqis during the 1991 Gulf War or the 2003 invasion of Iraq may undermine its credibility to some extent for ordinary Iraqis. However, while most Iraqis will likely accept a tribunal that limits its jurisdiction to crimes committed by the Baath regime, there are other criticisms that may give observers pause. For instance, the Statute departs from the International Covenant on Civil and Political Rights (ICCPR)⁹³ in two important respects: the Statute provides no guarantee against double jeopardy⁹⁴ and it permits the imposition of the death penalty.⁹⁵ The ICCPR is generally considered to set forth the minimum standard required under international law for the protection of the rights of the accused. The Iraqi Statute falls far short, for instance, of the more robust protections provided by the Rome Statute.⁹⁶ The Director of

88. *Id.* art. 20(d)(2).

89. *Id.* arts. 10, 14.

90. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3 (entered into force July 1, 2002) [hereinafter Rome Statute].

91. The Rome Statute recognizes four categories of crime. The first three are consistent with the three international categories recognized by the Iraqi Special Tribunal Statute. The fourth category is that of the crime of aggression. *See id.* art. 5(1). It is interesting that this category was omitted from the Iraqi Special Tribunal Statute in light of its potential applicability to crimes committed by the Baath regime against both Iran and Kuwait. The apparent desire of the drafters of the Statute to limit accountability to crimes committed in the course of the invasion and occupation of Kuwait is demonstrated by the content of the fourth category of crime recognized under the Iraqi Special Tribunal Statute, which encompasses a crime that may be paraphrased as the use of armed force against an Arab country. *See Statute of the Iraqi Special Tribunal, supra* note 67, arts. 11-14.

92. *Id.* arts. 1(b), 10.

93. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

94. In Articles 25 and 26 (governing review and appeals proceedings), the Statute specifies that acquittals in the trial chambers may be reversed by the appeals chamber and that the accused may be re-tried for an offense if a new fact comes to light and the appeals chamber deems it appropriate. Statute of the Iraqi Special Tribunal, *supra* note 67, arts. 25-26.

95. Amnesty International noted in a December 2003 statement that it is "a great disappointment to see representatives of the Occupying Powers now supporting or professing neutrality on the issue of the death penalty in Iraq rather than encouraging the permanent end of this obsolete and inhuman punishment." Collier, *supra* note 75.

96. Rights afforded under the Rome Statute but excluded from the provisions of Article 20 (Rights of the Accused) of the Statute of the Iraqi Special Tribunal include the right to be free from coercion, duress, torture, arbitrary arrest, and detention; the right to see evidence in the prosecutor's possession; a requirement that the court be convinced of guilt beyond a reasonable doubt; and a prohibition on trials *in absentia*. Compare Rome Statute, *supra* note 90, arts. 55(1)(b), (d), 67(2), 66(3),

the International Justice Program at Human Rights Watch, Richard Dicker, has complained that the Statute has "glaring human rights shortcomings" as a result of the inadequate protections afforded to defendants.⁹⁷

Other criticisms of the tribunal have focused on the context in which it was convened and particularly the U.S. role in its design. For instance, one commentator has argued that the Iraqi interim government "should reconsider provisions of the tribunal law that seemingly emphasize some actions by Mr. Hussein, like the invasion of Kuwait, that were met with U.S. reprisal, more than those that benefited from the support of the United States, like the war with Iran."⁹⁸ Arguments have also been advanced to accord a greater role to international jurists and prosecutors in the proceedings while minimizing the role of U.S. advisers. These recommendations would bring the tribunal in closer keeping with the model of a hybrid international-local tribunal best exemplified by the Special Court for Sierra Leone.⁹⁹ Under such a model, the tribunal would allow Iraqi judges and prosecutors to work side by side with leading international judges and lawyers with expertise and experience drawn from previous war crimes prosecutions, support that Iraqi jurists have already requested.¹⁰⁰

Finally, the tribunal came under heightened scrutiny in the fall of 2004 as political struggles over its control among Iraqi officials became public. Salem Chalabi, a U.S.-trained lawyer who enjoyed close ties with the U.S. authorities in Iraq during the CPA's tenure, was originally appointed as the executive director of the tribunal by the Iraqi National Congress in April 2004.¹⁰¹ He was subsequently removed from that position by the Iraqi Interim Government after charges were filed against Mr. Chalabi in an Iraqi court on an unrelated matter.¹⁰² Mr. Chalabi was replaced by Amer Bakri, a member of Interim Prime Minister Iyad Allawi's political party, the Iraqi National Accord.¹⁰³ While the initial appointment of Mr. Chalabi had been controversial as a result of his family ties and his connections to the U.S. occupation authority, his replacement has generated even greater anxiety about the tribunal's politicization. Indeed, Mr. Chalabi himself has publicly commented that he believes the Interim Iraqi Government replaced him in

63, with Statute of the Iraqi Special Tribunal, *supra* note 67, art. 20.

97. His principal complaint concerns the possibility that confessions obtained through coercion might be admissible as evidence before the tribunal. Dicker also notes that "[i]n a fair trial, the accused's rights must be respected The first group of accused, including Saddam Hussein, had no access to defense lawyers when they were interrogated nor when they were brought to court on July 1." Simons, *supra* note 69.

98. Ridha, *supra* note 71.

99. For information on the proceedings before the Special Court for Sierra Leone, see The Special Court for Sierra Leone, at <http://www.sc-sl.org>.

100. Simons, *supra* note 69 (quoting Iraqi judges concerned that they will need greater support from international jurists to ensure the legitimacy of the tribunal).

101. *Tribunal Set Up for Saddam Trial*, BBC.com, at http://news.bbc.co.uk/2/hi/middle_east/-3644431.stm (Apr. 21, 2004) (noting that the Iraqi National Congress had appointed Salem Chalabi, the nephew of its then-head Ahmed Chalabi, as general director of the tribunal).

102. *Iraq PM "Seeks Saddam Show Trial"*, BBC.com, at http://news.bbc.co.uk/1/hi/world-middle_east/3684052.stm (Sept. 23, 2004) (noting that murder charges had been filed against Mr. Chalabi, and that he believed his replacement as director of the tribunal was politically motivated).

103. Burns & Filkins, *supra* note 76.

order to engage in “show trials followed by speedy executions.”¹⁰⁴ These public, political struggles over the composition of personnel controlling the tribunal’s proceedings have done serious damage to the perceived integrity, impartiality, and legitimacy of the tribunal. Worse, the public accusation that the tribunal will ultimately engage in show trials, particularly when issued by one of the drafters of its Statute, may persuade Iraqis that the shadow of political justice still falls over Iraq’s legal system before the tribunal even hears its first case.

The appearance that the tribunal will engage in show trials in the pejorative sense—whether as a result of its composition, the limitation on rights afforded to defendants, or its association with the U.S. occupation¹⁰⁵—carries serious dangers for the establishment of the rule of law in Iraq. These criticisms of the tribunal should be addressed immediately to salvage its reputation and the integrity of its prosecutions. With respect to the composition of the tribunal, it is important for the Interim Iraqi Government or its successor to take immediate measures to assure Iraqi and international observers that the staffing of the tribunal is free of political considerations, particularly through the inclusion of international judges with a reputation for impartiality.¹⁰⁶ The deficiencies in the Statute might also be remedied by amendment, particularly with the input of international lawyers who have developed expertise in the basic international standards to protect the rights of the accused. There are also lessons to be learned from how these protections have been operationalized in a wide variety of contexts including, most recently, in the design of the Special Court for Sierra Leone.¹⁰⁷ It is the last of the potential criticisms that is the most vexing and difficult to address. The question of whether a tribunal perceived by Iraqis as having been convened under the authority of an occupying army can escape the appearance of

104. *Iraq PM “Seeks Saddam Show Trial”*, *supra* note 102.

105. Nor does it help that the United States has been engaging in what much of the world perceives as show trials of its own at its military base in Guantánamo, Cuba. The military commissions that provide cursory review of the basis for the indefinite detention of non-U.S. citizens held at a detention facility at the Guantánamo military base have generated widespread criticism among U.S. and international jurists. See, e.g., “*Bin Laden Driver” Hearing Halted*, BBC.com, at <http://news.bbc.co.uk/2/hi/americas/3994183.stm> (Nov. 9, 2004) (citing a decision by the U.S. District Court for the District of Columbia to halt the proceedings of a military commission at Guantánamo until a determination could be made as to the applicability of the Geneva Conventions to the accused); Nick Childs, *Guantanamo Controversy Rumbles On*, BBC.com, at <http://news.bbc.co.uk/1/hi/world-americas/3754238.stm> (Oct. 18, 2004) (noting that the United States has finally established some form of cursory review for those indefinitely detained at Guantánamo).

106. Alex Boraine is a prominent proponent of this reasoning, arguing that “[i]f justice is to be done and the full truth is to be told, then the ownership and design of these processes must be left to legitimate representatives of the Iraqi people, acting with the full support and assistance of the United Nations.” Boraine, *supra* note 75.

107. Many scholars have argued that the hybrid model of the Special Court for Sierra Leone is the most appropriate model for the Iraqi tribunal. For instance, Alex Boraine notes that “[b]y drawing on both national and international staff, the ‘hybrid’ tribunals have sought to blend international expertise and impartiality with local ownership and legitimacy.” *Id.* The appeal of combining local ownership with international impartiality is especially strong in the Iraqi context, particularly in light of the controversies that have surrounded the composition of the Iraqi Special Tribunal to date. *But see* Interview by Tony Jones with Geoffrey Robertson, *US Needs to Rethink Hussein Trial*: Robertson, AUSTL. BROADCASTING CORP., <http://www.abc.net.au/lateline/content/2004/s1245842.htm>. (Nov. 17, 2004) (suggesting that conditions in Iraq are so poor that the tribunal should be moved outside the country).

victor's justice is an extremely important one. The final Section of this paper will consider this question in the broader context of the special challenges faced by an occupying power interested in instilling the rule of law in an occupied territory.

V. TRUSTEESHIP AND THE SPECIAL CHALLENGES OF TRANSITION THROUGH EXTERNAL INTERVENTION

A general theme running through this paper has been that nation-building is rendered particularly precarious when undertaken through occupation. State-building exercises in which the international community provides support to a successor regime, rather than engaging in unilateral or multilateral administration of an occupied territory, are, for all their challenges, more straightforward than the enterprise on which the U.S. government has embarked in Iraq. In considering the particular challenges of justice under occupation, this Section will set forth three basic points regarding the tension between occupation and the prerequisites for establishing the rule of law. It will then briefly analyze recent arguments in defense of a conception of political trusteeship in Iraq. It will conclude by proposing some modest ambitions for securing the conditions for the rule of law in Iraq going forward.

Three aspects of the U.S.-led occupation of Iraq pose a real dilemma for the establishment of the rule of law. First, the invasion and occupation of Iraq are widely seen as illegal under international law. With the United States perceived as having trampled the rule of law at the international level to accomplish its regime-change objectives in Iraq, subsequent U.S. claims to be advancing the cause of rule-of-law promotion by establishing the foundations for a new legal system in Iraq ring hollow to many Iraqi and international observers. Second, during the course of the occupation, the United States has consistently ignored the international law of belligerent occupation, set forth in the 1907 Hague Regulations and the 1949 Geneva Conventions.¹⁰⁸ For instance, it was noted above that the international law framework for belligerent occupation requires an occupying power to retain the status quo with respect to the legal and political system of the occupied territory, except where modifications are strictly necessary for reasons of security.¹⁰⁹ Since one of the declared objectives of the U.S. occupation of Iraq was regime change, the CPA and the Bush administration made it clear from the outset that these requirements would not be observed and that an interim constitution would be put in place, designed precisely to transform the Iraqi legal and political system.¹¹⁰ But these alterations to the underlying Iraqi legal system were undertaken without the consent of the Iraqi people, a democratic mandate, or the international legitimacy that would have been associated with a U.N.

108. *See supra* note 9.

109. *See supra* note 26 and accompanying text.

110. The interim Iraqi constitution was adopted by the CPA on March 8, 2004, and was intended to be a foundational step toward building a new culture of constitutionalism in Iraq. Coalition Provisional Authority, Law of Administration for the State of Iraq, <http://www.cpa-iraq.org/-government/TAL.html> (Mar. 8, 2004).

framework for the conduct of the civilian administration of Iraq. There is a fundamental tension underlying U.S. arguments for building the rule of law in the Iraqi domestic legal system, even as the conduct of the occupation has undermined fundamental features of the international rule of law concerning occupation.

While these first two problems are serious, the third dilemma is perhaps the most damaging to the prospects of rule-of-law promotion through occupation. U.S. efforts to afford impunity to U.S. military and civilian personnel in Iraq directly undermine basic principles of the rule of law. By placing themselves above the law, the U.S. occupation authorities do a tremendous disservice to the cause of justice in Iraq. This form of impunity is in tension with both the robust conception of the rule of law advanced by U.S. nation-builders and the international law of occupation to which such authorities are subject.¹¹¹

One way in which authoritarian regimes distinguish themselves is through their propensity to place their leadership above the law. Such a system of impunity enables the entrenchment of the authoritarian regime while civic life, constitutional commitments, and political life atrophy. This was the method by which the Baath regime governed Iraq for thirty-five years. The pattern is in danger of repeating itself so long as Iraqis are daily conveyed the message that there is no mechanism through which they may pursue judicial redress for harms they suffer at the hands of the occupation administration and its army, and that U.S. citizens operating in Iraq enjoy near-total impunity.

There are both subtle and not-so-subtle ways in which this message is communicated. In the early days of the occupation, President Bush issued an executive order that prohibited all judicial process with respect to Iraqi oil reserves and production,¹¹² which may arguably preempt the application of the Alien Tort Claims Act to actions by CPA officials or U.S. contractors operating in Iraq.¹¹³ While this order may not be familiar to most Iraqis, a less subtle message was delivered during the course of the revelations of the abuses that took place at the Abu Ghraib prison. Indeed, one might argue that the Abu Ghraib scandal, and its handling by the occupation authorities, the U.S. Department of Defense, and the Bush administration, sounded the death knell for the legitimacy of the U.S.-led occupation in Iraq and its claims

111. On the robust conception of rule of law, see *supra* note 46 and accompanying text. On the international law of occupation applicable to U.S. officials in Iraq, see *supra* notes 11, 24-28 and accompanying text.

112. Exec. Order No. 13303, 68 Fed. Reg. 31, 931 (May 28, 2003). In a relevant passage, the order declares that "any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following: (a) the Development Fund for Iraq, and (b) all Iraqi petroleum and petroleum products." *Id.*

113. See, e.g., Lisa Girion, *Immunity for Iraqi Oil Dealings Raises Alarm*, L.A. TIMES, Aug. 10, 2003, at A1 (quoting Tom DeVine, legal director of the Washington-based Government Accountability Project, who notes that "as written, the executive order appears to cancel the rule of law for the oil industry or anyone else who gets possession or control of Iraqi oil or anything of value related to Iraqi oil"); Anthony J. Sebok & Claire R. Kelly, *Does a Presidential Iraq Executive Order Take Away Tort Victims' Right to Sue?*, FindLaw's Legal Commentary, at http://writ.news.findlaw.com/commentary/20031103_kelly.html (Nov. 3, 2003) (arguing that the order "may also prohibit a plaintiff from bringing a tort claim . . . arising from Iraqi oil production" and that it may have been prompted by recent Alien Tort Claims Acts suits in U.S. courts).

regarding the rule of law.¹¹⁴ While there is no need to review the sordid details of the abuses committed at Abu Ghraib, it is worth noting that the procedures for the incommunicado and secret detention of Iraqis at various detention facilities on U.S. military bases had already given rise to a perception among ordinary Iraqis that those who were detained by U.S. authorities were effectively disappeared well before the revelations concerning Abu Ghraib. Stories of relatives going from one U.S. military base to another in search of detained loved ones are commonplace.¹¹⁵ The photographs from Abu Ghraib only completed the picture of the daily conditions of detention for the largely civilian detainee population held at military bases without access to lawyers or family visits. In the words of one Iraqi judge, far from strengthening the new Iraqi judicial system, “when coalition forces detain people in coalition-run prisons like Abu Ghraib, family members often are unable to find out where they are kept. The families turn to the Iraqi judiciary but local authorities have no more information than they do [T]his situation has made judges even more vulnerable.”¹¹⁶

In addition, Iraqis take for granted that neither civilian U.S. occupation officials nor U.S. military personnel are liable to be brought before the Iraqi judiciary to answer for their abuses. Property confiscation and destruction, home demolition, arbitrary detentions, abuses during security sweeps or while in detention, and the arbitrary killing of civilians, either in detention or in routine encounters with coalition forces, all lie beyond the jurisdiction of Iraqi courts.¹¹⁷ The fact that the Iraqi civilian population is subject to these abuses

114. The abuses at Abu Ghraib have been documented in exhaustive detail. For an excellent compilation of analysis and essays on the abuses as well as official documents and photographs detailing the extent of the abuses and the Bush administration's evolving legal position on the use of torture, see MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004). For additional compilations of official documents, reports from official investigations, and published analyses, see *THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL REPORTS OF THE INDEPENDENT PANEL AND PENTAGON ON THE SHOCKING PRISONER ABUSE IN IRAQ* (Steven Strasser ed., 2004); *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua L. Dratel eds., 2005). For a detailed analysis of the policies that led to the prisoner abuses at Abu Ghraib, see SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004).

115. See, e.g., Hannah Allam, *Dozens of Missing Iraqis Believed To Be Lost in Abu Ghraib Prison*, KNIGHT-RIDDER, June 10, 2004, available at <http://www.realcities.com/mld/-krwashington/8891610.htm> (noting that “[w]ith no clearinghouse for missing-person reports and technical errors in the intake process, families . . . can do little but wait outside the tall prison gates in hopes that someone recognizes the missing men pictured on their flimsy, photocopied fliers”); Ian Fisher, *Searing Uncertainty for Iraqis Missing Loved Ones*, N.Y. TIMES, June 1, 2004, at A1 (noting that a “Red Cross [report] directed to the American-led occupation authorities [stated] that the system for notifying families of prisoners effectively did not exist”); Dan Murphy, *At Prison Gate, Iraqi Families Vent*, CHRISTIAN SCI. MONITOR, Mar. 26, 2004, at 6, available at <http://www.csmonitor.com/2004/0326/p06s01-woiq.html> (describing a convoy of Iraqi prisoners taken away from Abu Ghraib in buses to an unknown destination as their families watched and wept); Alex Rodriguez, *U.S. Holding Iraqis at Notorious Prison; Families Barred and Very Few Inmates Have Been Allowed To See Lawyers*, CHIC. TRIB., Aug. 6, 2003, at 4 (noting that Said Boumedouha of Amnesty International had said that “the U.S. also has not devised a way for Iraqi families to learn where relatives are in custody”).

116. Charles Recknagel, *Iraq: Judges Say Improving Rule of Law Depends on Security*, RADIO FREE EUROPE, at <http://www.rferl.org/featuresarticle/2004/09/c727eb91-42a7-4039-b4ea-d26500b15f05.html> (Sept. 15, 2004) (citing Judge Noman Fathy Hassan of the Iraqi Court of Cassation in Baghdad).

117. The *Washington Post* reported just before the dissolution of the CPA and the transfer of sovereignty to the Iraqi Interim Government that [t]he Bush administration has decided to take the unusual step of bestowing on its own troops and personnel immunity from prosecution by Iraqi courts for killing Iraqis or

without any domestic forum for redress echoes the experience of Iraqis under the prior regime. When placed in the broader context of U.S. efforts to shield U.S. forces and personnel from ICC jurisdiction, universal jurisdiction, and any other international accountability mechanism for war crimes, these practices are that much more damning.¹¹⁸ Under the Bush administration, international law may sometimes be a useful tool, but it rarely, if ever, represents a constraint on U.S. actions. The contempt shown by the U.S. government for the rule of law at the international level has undermined the international legitimacy of the occupation and may well color Iraqi perceptions of U.S. arguments in favor of the domestic rule of law for Iraq. Furthermore, the accusations of victor's justice in the trials of Saddam Hussein and other members of his regime are exacerbated by the appearance that the United States has placed itself above the law in Iraq.

What, then, is the remaining best-case scenario for advancing the rule of law in Iraq? Several recent commentators have proposed that the U.S. occupation of Iraq be understood as a sort of political trusteeship.¹¹⁹ This idea of political trusteeship suggests that the intervention in Iraq is designed to prepare the Iraqi people for self-governance. There are numerous objections that may be advanced against such a conception, not least the facts on the ground in Iraq. Two criticisms that have received particular attention are those of paternalism and the difficulty presented by the self-interested pursuit of an occupation strategy by an occupying power when the interests of the occupier and the occupied diverge. Versions of both of these criticisms have been elaborated in the foregoing discussion.¹²⁰ Noah Feldman has offered responses to these criticisms, which run roughly as follows.¹²¹ First, while the problem of paternalism is a serious one, it may be attenuated or overcome by rendering

destroying local property after the occupation ends and political power is transferred to an interim Iraqi government, U.S. officials said. The administration plans to accomplish that step—which would bypass the most contentious remaining issue before the transfer of power—by extending an order that has been in place during the year-long occupation of Iraq. Order 17 gives all foreign personnel in the U.S.-led Coalition Provisional Authority immunity from “local criminal, civil and administrative jurisdiction and from any form of arrest or detention other than by persons acting on behalf of their parent states.

Robin Wright, *U.S. Immunity in Iraq Will Go Beyond June 30*, WASH. POST, June 24, 2004, at A1. In an unprecedented subsequent decision, the Bush administration extended this immunity to U.S. civilian contractors working in Iraq. Ellen McCarthy, *Immunity Provision Extended for U.S. Firms with Reconstruction Contracts*, WASH. POST, June 29, 2004, at A18. Indeed, Iraqi judicial authorities' jurisdiction over Iraqis was also called into question under the Interim Iraqi Government. See, e.g., Lisa Ashkenaz Croke, *Washington Refuses To Relinquish Legal Authority to “Sovereign” Iraq*, NEW STANDARD, July 7, 2004, at http://newstandardnews.net/content/?action=show_item&itemid=645 (noting that the question of whether the Iraqi Interim Government or U.S. officials had jurisdiction over detainees remained unsettled after the “transfer” of sovereignty).

118. On U.S. efforts to undermine the authority of the ICC and to conclude bilateral immunity agreements to shield U.S. personnel from the jurisdiction of the ICC or other forums in which they might be held accountable for war crimes or crimes of occupation, see Justice Richard J. Goldstone, *US Withdrawal from ICC Undermines Decades of American Leadership in International Justice*, 21 INT'L CRIM. CT. MONITOR 3 (2001), available at <http://www.iccnw.org/publications/monitor/-21/monitor21.200106.english.pdf>; Amnesty Int., *US Threats to the International Criminal Court*, at http://web.amnesty.org/web/web.nsf/print/icc-US_threats-eng (July 2004).

119. See FELDMAN, *supra* note 15; see also Henry H. Perritt, Jr., *Structures and Standards for Political Trusteeship*, 8 UCLA J. INT'L L. & FOREIGN AFF. 385 (2003).

120. See *supra* Section II.B.

121. FELDMAN, *supra* note 15, at 52-91.

the occupying authority accountable to the occupied population in the design undertaken for nation-building. In response to the second criticism, Feldman argues that the self-interested pursuit of an occupation strategy may be beneficial to both the occupying authority and the population living under occupation where their interests converge. Based on these insights, he provides an account of a best-case scenario in Iraq.

The accountability mechanisms Feldman suggests to overcome the first objection center on free speech, freedom of assembly, and participation. So long as the occupation authority permits the local population to express freely their views concerning the nation-building process, allows them to meet and express collectively their views to the occupation authority, and selects some members of the local population to act as representatives that provide input into the process, there is a sufficient degree of accountability to address the problem of paternalism. With respect to the problem of self-interest, Feldman suggests that the interest being pursued by the U.S. government in Iraq be understood as the national security interest in ensuring that Iraq does not become a breeding ground for terror. Conceived in this way, the convergence of our interests with those of the Iraqi population is clear. The argument about interest convergence is then elaborated in terms of a power negotiation between the occupation authority and the principal Iraqi leaders who command domestic legitimacy.¹²² There is one additional gloss on this argument: the problem of interest divergence between occupier and occupied is no greater, according to Feldman, in the case of a unilateral occupation than in the case of a multilateral or U.N.-mandated occupation.¹²³

As I have argued in this paper, neither the mechanisms for holding the U.S. occupation authority accountable for its conduct to the Iraqi people nor the incentive structures for interest convergence underlying the occupation are sufficiently robust to justify the continuation of the U.S. project in Iraq in its present form. The basic insight of the paternalism objection is that there is no basis to believe that an external intervener will be better able to perceive the long-term interests of the occupied territory's population than that population's own representatives. A response that turns on providing accountability mechanisms in lieu of the consent of the governed would need to provide a significant degree of accountability. Direct accountability mechanisms, such as an international or hybrid court before which Iraqis could seek redress against U.S. administrators and military forces for the abuses committed during the occupation, do not exist and are extremely unlikely to emerge. Accordingly, and particularly following the revelations of systematic abuses committed in Iraq, mechanisms for holding the occupying power accountable will be insufficient unless they provide government by consent and the subjection of rulers—be they Iraqi or U.S.¹²⁴—to the laws

122. It is worth noting that the local leaders with whom the occupation authority engages in power-brokering here are not the same as the representatives appointed to address the first problem of paternalism. Thus in the examples Feldman provides, it is not negotiations with the Governing Council but rather with indigenous leaders such as Grand Ayatollah Ali al-Sistani, who derive their legitimacy from popular support, that address the problem of self-interest. *Id.* at 67, 89.

123. *Id.* at 90.

124. For these purposes, no significant transition occurred when the baton was passed from the CPA to the U.S. embassy in Baghdad. So long as a large U.S. military force continues to patrol the

applicable in Iraq. As for the argument of interest convergence, the discussion of the transformation of Iraqi commercial laws and the issuance of executive orders to immunize U.S. citizens from judicial process for their activities related to the Iraqi oil industry should suffice to suggest that a divergence of interests exists between U.S. civilian administrators, military personnel, contractors, and corporations, on the one hand, and ordinary Iraqis on the other. Assessing the legitimacy of the continuing U.S. presence in Iraq requires consideration of this divergence of interests.

Would an international trustee face the same legitimacy deficit based on self-interest as any individual state trustee? I would argue that it would not confront the same degree of delegitimization for three reasons. First, an international organization's self-interest is not bound up with the commercial, territorial, or geopolitical strategic objectives of a state actor. It would be naive to claim that international organizations are not hostage, in many respects, to the underlying state interests of their members. Nevertheless, we might also concede that the only state in the international system powerful enough to completely harness the United Nations to the furtherance of its unilateral interests is the United States. After a year and a half of direct U.S. occupation, most Iraqis might be willing to take their chances with indirect U.S. occupation mediated through the United Nations, which would at least involve an international civil service with state-building experience and a civilian police force as part of the package. Second, although the United Nations does face some legitimacy challenges in Iraq as a result of its role in enforcing the twelve-year-long sanctions regime, its reputation has not been tarnished by the occupation nearly to the extent that the U.S. presence in Iraq has. Finally, international organizations are less able to shield their personnel from accountability for abuses committed in an administered territory. In short, restoring the rule of law in Iraq and promoting transitional justice will be better served by internationalizing support for Iraqi-led state-building while transitioning away from occupation.

Unsurprisingly, I am not alone in coming to this conclusion with respect to the best-case scenario for Iraq. It is perhaps appropriate that I conclude these reflections by quoting from a strategy research report prepared for the Army War College in March 2004:

History teaches that processes of transitional justice succeed when they acquire legitimacy among the affected population and in the eyes of the world community. Such legitimacy can best be achieved when Iraqi-owned processes are supported by international actors. The United Nations and other international organizations have substantial expertise from experience gained in other post-conflict settings. Coalition and interim Iraqi officials should draw heavily on this expertise and experience to help ensure success in reestablishing the rule of law and in winning the peace in Iraq.¹²⁵

To be legitimate, durable, and effective, Iraq's new institutions and the foundations for the rule of law will have to be established by Iraq's legitimate representatives with the support and assistance of the international

streets of Iraq under U.S. command, the United States should be recognized as the *de facto* ruler of Iraq.

125. RICHARD O. HATCH, *RESTORING THE RULE OF LAW IN POST-WAR IRAQ: STEPS, MISSTEPS AND A CALL TO MAXIMIZE INTERNATIONAL SUPPORT FOR IRAQI-LED PROCESSES* iii (2004).

community. Continuing the current strategy of indefinite de facto occupation will yield disappointment for America's would-be nation-builders and a catastrophe for Iraq.