

Sidelined: Human Rights in Postwar Iraq

By Joe Stork and Fred Abrahams¹

Human rights have had an inconsistent place in the Iraq crisis of 2003. The Bush administration's campaign to build domestic and international political support in the lead-up to war sometimes invoked the appalling human rights record of Saddam Hussein's government, though few believed this was a significant motivating factor behind the decision to go to war. After the battlefield successes of March and April, as its claims of Iraqi weapons of mass destruction lost credibility, the administration more insistently cited human right crimes to justify the war retrospectively.

In the military occupation of Iraq and counterinsurgency operations, however, the United States and its partners have treated human rights issues as matters of secondary importance, demonstrating ambivalence toward human rights and humanitarian law concerns. They have too often set aside lessons from past international interventions that demonstrate the importance of rights monitoring and protection.

This essay examines three aspects of this problem: the failure to deploy sufficiently trained and equipped forces for law enforcement responsibilities; the failure initially to protect mass grave sites or to ensure that professional forensic exhumations were conducted to preserve evidence of past atrocities; and the dogged resistance of the U.S. to any international role in efforts to address responsibility for serious past crimes in Iraq.

The despotic and abusive rule of Saddam Hussein is gone, and Iraqis today can express themselves without fear of arbitrary detention, torture, or execution. Political parties and civic associations have emerged quickly, and many of the new associations are dedicated to one or another aspect of a larger human rights agenda, such as documenting cases of the "disappeared" or safeguarding and cataloguing documents of the myriad security agencies that were the infrastructure of Ba`thist repression. But the rule of law has not arrived, and as of this writing, seven months into the occupation, the

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country is still beset by the legacy of human rights abuses of the former government, as well as new ones that have emerged under the occupation.

Meeting Law Enforcement Responsibilities

The problematic human rights dimension of U.S. policy in Iraq stood out clearly in April and May, with the failure of war planners to address post-war obligations of the U.S.-led coalition to respect civilian lives and property, including public property, and provide basic security for Iraqi residents. Initially, such security extended to little beyond the Ministry of Oil, which was well-guarded while other government buildings were looted. The occupying power neglected to provide sufficient and suitable forces for this task and failed to order troops to take steps to halt the widespread and protracted looting, therefore not meeting its international humanitarian law obligations.² U.S. Defense Secretary Donald Rumsfeld appeared to dismiss such concerns with his “freedom’s untidy” comment,³ perhaps reflecting his own share of the responsibility for this failure. Subsequent accounts of the Pentagon’s dismissal of postwar plans developed by other government agencies, such as the State Department-sponsored Future of Iraq Project, reinforced such perceptions.⁴ Lt. Gen. (Ret.) Jay Garner, who headed the U.S. stabilization and reconstruction effort for the first month after major combat ceased, said that the Future of Iraq Project’s report “was good work” but that it “wasn’t well received” by the Pentagon’s civilian leadership.⁵

One irony was the failure to stop the looting of Iraqi military arsenals. Human Rights Watch researchers in Iraq came across caches of antitank and antipersonnel mines, and even missiles. It is not clear why the occupying forces did not more actively collect the weapons that insurgents might be using against them now. “There were a couple of areas that we were concerned about—nuclear plants and that type of thing, for obvious reasons,” Lt. Gen. James Conway, Commander of the First Marine Expeditionary Force, told the U.S. public television news program Frontline. “But the things that came down

² The Hague Regulation of 1907, to which the U.S. is party, provides that the occupying power “shall take all steps in his power to re-establish and insure, as far as possible, public order and safety....” Art. 43.

³ “DoD News Briefing – Secretary Rumsfeld and Gen. Myers,” transcript, p. 7, www.defenselink.mil/transcripts/2003/tr20030411-secdef0090 (retrieved December 2, 2003).

⁴ The project brought together several hundred Iraqi expatriates under State Department auspices beginning in April 2002 to assess Iraqi societal and infrastructure needs and propose reconstruction plans in various sectors.

⁵ Garner also said he tried to recruit the project’s director, Tom Warrick, to his team, but that Warrick apparently “just wasn’t acceptable” to the Pentagon. See Frontline documentary “Truth, War and Consequences,” www.pbs.org/wgbh/pages/frontline/shows/truth/interviews/garner (retrieved December 2, 2003).

for us to protect were very few in number in the early going. Not a very extensive list at all.”⁶

Eventually the looting slowed, when all that remained was dust and debris. But security remained a problem in many cities, with thefts, car-jackings, kidnappings, and sexual assaults on women and girls an ongoing concern. As with the looting, this problem had been foreseen. Recent experience from Kosovo, East Timor, and Afghanistan made clear that professional police forces are required after an armed conflict to patrol streets and maintain civic order. Also needed are jails and judges—the basics of a criminal justice system. Many experts warned well before the war that, in the words of the Future of Iraq Project report, “the period immediately after regime change might offer these criminals the opportunity to engage in acts of killing, plunder and looting.”⁷

Security was not merely desirable, but reflected the legal obligation of the occupying power under international humanitarian law to restore and maintain public order. It was a chaotic post-conflict scene, as U.S. commanders say, but the conditions did not absolve the U.S. and its coalition partners of their responsibilities under international humanitarian law.

Problematic adherence to human rights norms in Iraq since major combat operations ended has been especially evident in the deployment of combat forces for policing tasks. Human Rights Watch investigations of civilian deaths have raised serious concerns regarding the failure to deploy sufficient numbers of appropriately trained and equipped forces in this regard. These serious shortcomings have been exacerbated by a systematic failure to undertake sufficiently high-level investigations in cases of civilian deaths that may have resulted from excessive or indiscriminate use of lethal force by U.S. troops.⁸

The death of `Adil `Abd al-Karim al-Kawwaz is a case in point. On August 7, al-Kawwaz was driving home from his in-law’s house in Baghdad with his wife and four children just prior to the evening curfew. It was dark and he did not see the U.S. soldiers from the 1st Armored Division operating a checkpoint with armored vehicles and heavy-caliber guns. No signs or lights indicating their presence were visible, and al-

⁶ Ibid., see <http://www.pbs.org/wgbh/pages/frontline/shows/truth/interviews/conway.html>

⁷ “U.S. study foresaw pitfalls in Iraq” by Eric Schmitt and Joel Brinkley, *New York Times*, October 20, 2003.

⁸ *Violent Response: The U.S. Army in al-Falluja*, Human Rights Watch, June 2003; *Hearts and Minds: Post-war Civilian Casualties in Baghdad by U.S. Forces*, Human Right Watch, October 2003.

Kawwaz did not understand he was supposed to stop. He drove too close and the soldiers opened fire, killing him and three of his children, the youngest of whom was eight years old.

This shooting was not an isolated event. At checkpoints, during raids, or after roadside attacks, edgy U.S. soldiers have resorted to lethal force with distressing speed. Troops also have not been adequately equipped with non-lethal or less lethal equipment, such as tear gas and rubber bullets, for use in establishing control of a situation without recourse to live fire. When they have reason to use lethal force, soldiers sometimes respond in an excessive and indiscriminate way that put civilians at risk.

Compounding the problem is a lack of accountability for unlawful deaths. Coalition soldiers and civil authorities, and even independent non-Iraqi contractors engaged by them, are immune from Iraqi law, under the terms of Coalition Provisional Authority (CPA) Decree 17. This leaves it up to the member states of the U.S.-led coalition and their respective militaries to investigate such incidents and hold accountable anyone found to have used, or condoned the use of, excessive or indiscriminate force.

The U.S. military has asserted that all incidents involving suspicious or wrongful death are being properly investigated. In response to a Human Rights Watch report, a CPA statement said, "We have fully investigated all credible reports and have taken appropriate action considering the constitutional protections for all the soldiers involved, applicable military law, and the law of war."⁹

But adequate investigations did not take place, contributing to an atmosphere of impunity in which soldiers feel they can pull the trigger without consequences if their actions resulted in wrongful death or injury. As of October 1, the U.S. military had announced completing only five investigations into allegedly unlawful civilian deaths. In all five investigations, the soldiers who fired were found to have operated within the military rules of engagement. In one case, the findings recommended that checkpoints be better marked--unfortunately that came in September, after another family had been killed in a car at a checkpoint.

⁹ Vivienne Walt, "Iraqi families want retribution for deaths; some charge U.S. soldiers unjustly shoot, kill civilians," *San Francisco Chronicle*, November 24, 2003.

Human Rights Watch investigated two of these five incidents and found evidence to suggest that soldiers had in fact used excessive force. In one case, from August 9, soldiers from the 1st Armored Division's 3rd Brigade mistakenly shot at an unmarked Iraqi police car as it chased suspected criminals in a van, killing two Iraqi policemen. A witness said one of the policemen was killed after he had stepped out of his car with his hands raised and shouting "No! Police!" U.S. soldiers beat a third policeman who was in the car.

The second case was the shooting of the al-Kawwaz family, recounted above. The U.S. military called that "a regrettable incident," but determined that soldiers from the 1st Armored Division's Alpha 2-3 Field Artillery had acted within the rules of engagement. The U.S. military gave the family \$11,000 "as an expression of sympathy."

Human Rights Watch investigated civilian deaths in Baghdad as a result of U.S. fire after May 1, 2003, and estimated that as of September 30 there had been ninety-four cases in the capital alone that warranted an official investigation. The U.S. military does not even attempt to track how many civilians its soldiers have killed, saying it is "impossible for us to maintain an accurate account."¹⁰ The failure to attempt even a rough tally suggests that Iraqi civilian loss of life or serious injury are not primary concerns.

U.S. military personnel acknowledge that one underlying problem is the reliance on combat troops to perform post-conflict policing tasks. Soldiers from the 82nd Airborne or the 1st Armored Division fought their way into Iraq and are now being asked to show patience and restraint in an increasingly risky environment. As one U.S. officer told Human Rights Watch, "it takes a while to get the Rambo stuff out." Military police, by contrast, are better suited to deal with these tasks, but the Bush administration is apparently reluctant to call up more reservists or National Guard forces that could perform these tasks.

The rules of engagement of U.S. troops in Iraq are not made public, due to security concerns. But Iraqis have a right to know how they can avoid walking into their own deaths. Through proper signs in Arabic and public service campaigns, they should know how they are expected to behave at checkpoints or during raids on their homes.

¹⁰ *Hearts and Minds: Post-war Civilian Casualties in Baghdad by U.S. Forces*, Human Right Watch, October 2003.

U.S. soldiers have for the most part not had training to compensate for their understandably weak comprehension of Iraqi culture, not to mention an inability to speak or understand Arabic. For at least the first months of the occupation, most checkpoints and patrols did not have Arabic translators available. At checkpoints, soldiers used hand signals or verbal orders that Iraqis did not understand, sometimes with fatal results. Other misunderstandings were also damaging. Male U.S. soldiers sometimes searched Iraqi women, although this practice abated over time. Other soldiers put their feet on the heads of detainees, a serious affront to personal dignity.

As attacks on U.S. soldiers have grown more frequent and more intense, the danger of harm to civilians grows. After unknown attackers shot down a U.S. Blackhawk helicopter near Tikrit on November 7, killing six soldiers, the U.S. military responded with a “show of force” that included the use of tanks, howitzers and planes dropping 500-pound bombs. “We’ve lost six of our comrades today,” a U.S. officer was quoted as saying. “We’re going to make it unequivocally clear what power we have at our disposal.”¹¹

In Tikrit in mid-November U.S. forces reportedly used tank and artillery fire to destroy homes belonging to families of Iraqis who allegedly mounted attacks against U.S. forces. A spokesman for the U.S. Army’s 4th Infantry Division said the demolitions were intended to “send a message” to the insurgents and their supporters.¹² While U.S. troops are entitled to suppress armed attacks against them, destroying civilian property as a reprisal or as a deterrent amounts to collective punishment, a violation of the 1949 Geneva Conventions.¹³

The escalating use of force reveals how the occupying powers have been unable to secure law and order, even when attacks on coalition troops were not a daily event. From the beginning of the occupation, U.S. troops have failed to communicate effectively with the local population on security issues, and to deploy sufficient numbers of international police or constabulary (*gendarme*) forces, and have relied on combat troops for policing duties without appropriate training.

¹¹ Anthony Shadid and Vernon Loeb, “Another Copter Down in Iraq; 6 GIs Killed,” *Washington Post*, November 8, 2003.

¹² Rajiv Chandrasekaran and Daniel Williams, “U.S. Military Returns to War Tactics,” *Washington Post*, November 22, 2003.

¹³ Fourth Geneva Convention of 1949, art. 33.

Some military officers have acknowledged that soldiers were inadequately trained and equipped for what they call SASO—Stability and Support Operations. “The soldiers have been asked to go from killing the enemy to protecting and interacting, and back to killing again,” one U.S. military commander wrote in an After Action Report. “The soldiers are blurred and confused about the rules of engagement, which continues to raise questions, and issues about force protection while at checkpoints and conducting patrols.”¹⁴

In some cases, soldiers did not have the right equipment, like construction and barrier materials, to establish checkpoints. Even interpreters were lacking, leaving the soldiers unable to communicate with the local population they were supposed to serve. “These interpreters are critical to the team’s ability to interact with civilians, discern their problems, and broadcast friendly unit intentions,” the After Action Report said. “Often times the unit had crowds and upset civilians to deal with and absolutely no way to verbally communicate with them.”¹⁵

The failure to provide a secure environment seriously affects Iraq’s vulnerable populations: women, children and minority groups. The widespread fear of rape and abduction among women and their families has kept women and girls at home, preventing them from taking part in public life. Iraqi police give a low priority to allegations of sexual violence and abduction. The victims of sexual violence confront indifference and sexism from Iraqi law enforcement personnel, and the U.S military police are not filling the gap.¹⁶ Almost half of Iraq’s population is under the age of eighteen, and the war and its aftermath are exposing them to continued risk. Drugs are becoming more prevalent and the number of street kids has grown.

“You don’t want troops to do policing but you have no choice,” an Australian coalition official told Human Rights Watch. The coalition wants to hand law enforcement tasks over to the Iraqi police and army, he said, but these institutions are still weak and, despite improvements, they are not yet capable of performing the necessary tasks alone.

¹⁴ “Subject: Operation Iraqi Freedom After Action Review Comments,” April 24, 2003, conducted by TCM C/3-15 Infantry, Task Force 1-64 [declassified], <http://www.strategypage.com/dls/articles/20030912.asp> (retrieved October 17, 2003).

¹⁵ Ibid.

¹⁶ *Climate of Fear: Sexual Violence and abduction of women and girls in Baghdad*, Human Rights Watch, July 2003.

The training and reequipping of the Iraqi police and army must continue so that they can assume greater responsibility for law and order. But there are risks in the push to get Iraqi security forces on the street. Independent monitoring and redress systems must be in place from the beginning. And training must include thorough instruction in human rights law enforcement standards for crowd control, treatment of detainees, conduct of interrogations, and other areas where the Iraqi police have displayed shortcomings in the past. The occupying forces must also screen and vet local officials, police, and other security personnel to ensure that human rights abusers do not rejoin their ranks.

This extends to the judicial system. Major resources and efforts are needed to reestablish an independent judiciary and to retrain jurists, prosecutors, defense attorneys, police officers, and court personnel. Iraq's prisons, sites of grave human rights abuses in the past, must be brought up to international standards. While some steps have been taken to start this process, Iraqi laws that do not meet international due process and fair trial standards must be repealed or brought into compliance with international human rights and fair trial standards.

Mass Graves

On March 4, 1991, thirteen-year-old Khalid Khudayyir and his thirty-three-year-old cousin Fu'ad Kadhim left their village in southern Iraq on foot, headed for the city of al-Hilla to buy food. They never returned.

More than twelve years later, on May 16, 2003, the family learned of their fate when their identification documents were found among decomposed human remains in a mass grave near al-Mahawil military base, some twenty kilometers north of al-Hilla. Like thousands of Iraqis in the predominantly Shi'a southern part of the country, they had been arrested and "disappeared" during the Iraqi government's brutal suppression of the popular uprising that followed the Iraqi army's defeat in Kuwait in 1991.

For the Khudayyir family, the gruesome discovery brought some closure to a sad and horrific chapter in their lives. For Iraq's Shi'a population, and other Iraqis as well, it helped mark a beginning of collective reckoning with decades of state persecution and mass murder. Almost immediately after the fall of the government in April, Iraqis began to identify mass gravesites around the country.

The acting mayor of al-Hilla notified U.S. military authorities on May 3 of one of the smaller al-Hilla mass gravesites. The gravesite at al-Mahawil contained the remains of more than two thousand Iraqi victims. Another mass gravesite about five kilometers distant contained several hundred bodies. A third site just south of al-Hilla contained an additional forty bodies. In all three sites the bodies were buried en masse, in contact with one another, rather than in individual plots.

A U.S. assessment team from the Office of Reconstruction and Humanitarian Assistance (ORHA, the predecessor of today's Coalition Provisional Authority, or CPA), visited several days later and recommended that military troops secure the sites and arrange for exhumations by forensics experts. Instead, in the absence of a comprehensive strategy for assisting with mass grave exhumations, desperate families used shovels and mechanical backhoes to search fields, tumbling bodies into heaps of clothes and bones. U.S. Marines at the site, whose orders were simply to "assist local authorities," videotaped the exhumation and collected some testimonies. The family of Khalid and Fu'ad found what they sought, but hundreds, perhaps thousands, of others may be denied that closure due to the disorganized and unprofessional exhumations. After frantic digging at the largest site in the area, more than one thousand remains—approximately half of those originally interred—were reburied without identification in conditions that almost surely preclude subsequent identification.¹⁷

The experience at al-Mahawil was not unique. In the southern city of Basra and its environs, eyewitnesses to the killings of scores of young Shi'a men in 1999, in reprisal for street disturbances following the assassination of Ayatollah Muhammad Sadiq al-Sadr by government agents in February 1999, came forth to identify three of the numerous unmarked gravesites in the area. There, too, families waited in vain for direction from U.S. and U.K. authorities as to how the coalition intended to exhume the gravesites and preserve evidence for possible criminal proceedings. Relatives grew impatient as they combed through lists of executed prisoners recovered from looted government archives, and began to excavate some of the sites without professional direction or support. At the gravesite of al-Birigisia, thirty miles south of Basra near an oil refinery, the chaotic conditions at the exhumation precluded even rudimentary precautions against misidentification of remains.

¹⁷ *The Mass Graves of al-Mahawil: The Truth Uncovered*, Human Rights Watch, May 2003.

Mass graves of this sort almost always indicate that the deaths were the result of natural disasters or mass atrocities. The random manner in which Khalid Khudayyir and Fu'ad Kadhim and thousands like them across Iraq were exhumed in those weeks after the fall of Saddam Hussein's government exposed a disturbing lack of planning by the U.S.-led coalition. Saddam Hussein's government "disappeared" at least 290,000 Iraqis over the years of its rule. Despite awareness of Saddam Hussein's crimes—indeed often using them to justify war—the occupying power did not secure the gravesites, provide forensic teams, or tell desperate Iraqis searching for their loved ones what procedures and mechanisms were being planned to address the crisis.

This failure to protect the mass gravesites had direct consequences, first of all for the families of victims, and the effects likely will be felt for years. The flawed exhumation at al-Mahawil rendered perhaps half the bodies unidentifiable. Bodies were mixed up and many corpses were dismembered. Identity documents were lost. There were also consequences for holding accountable those most responsible for these atrocities. These mass gravesites were crime scenes, and evidence that could have been crucial to future criminal prosecutions for crimes against humanity may have been tainted if not lost or destroyed.

Many mass gravesites remain undisturbed. Not all of the relevant evidence has been lost, by any means, and practices appeared to improve with time. According to U.S. officials with the Coalition Provisional Authority, the intervention of local rights activists, political parties, and community and religious leaders convinced many families and relatives of the need to conduct exhumations in a professional manner, with the help of trained forensic experts, in order to provide more reliable identifications and to preserve evidence for future criminal proceedings.

U.S. officials also told Human Rights Watch that they are working with Iraqi leaders to select some twenty key gravesites connected to the major incidents of atrocities, such as the 1988 Anfal campaign against Iraq's Kurds in the north and the 1991 and 1999 massacres of Shi'a in the south, based on assessments of international forensic teams that have visited the country. These sites would be the focus for forensic investigations in connection with trials of top leaders of the former government before a special tribunal.

Nevertheless, by failing to secure sites like those at al-Mahawil and al-Birigisia, the U.S. risked compromising the ability of Iraqis and the international community to hold accountable those responsible for serious past crimes such as genocide, crimes against

humanity, and war crimes, at least with regard to the evidence of specific atrocities uncovered and now lost or ruined at those sites.

What Kind of Tribunal

The question of accountability for past atrocities and need to ensure some measure of justice for the victims and their survivors ranks as an issue of great concern to many Iraqis. How these matters are addressed by the CPA, and by the Iraqi Governing Council it appointed, has consequences not just for perpetrators and victims of serious abuses under the rule of Saddam Hussein. The decisions made—or avoided—today will affect as well the quality of Iraq's criminal justice system in the immediate and longer-term future. Those decisions will also potentially influence the future of international justice mechanisms as they emerged in the 1990s, namely the special criminal tribunals of former Yugoslavia and that of Sierra Leone, and most recently the International Criminal Court.

So far, the steps taken by the CPA and the Iraq Governing Council, and the directions they have signaled, leave much to be desired.

Six months after the overthrow of the Saddam Hussein government, events have demonstrated the need to move swiftly on the justice front. One indication is the steady pace of revenge killings of former government and Ba`th Party officials, killings that reportedly numbered in the "several hundred" in early November 2003.¹⁸

Other indicators are the murders of local Iraqi judges who were collecting evidence for criminal prosecutions. Muhan Jabr al-Shuwaili, the top al-Najaf governorate judge and one of a four-member investigative commission set up by al-Najaf's municipal council, had reportedly recorded 400 complaints and issued twelve arrest warrants in only a few months of work. On November 3, several men kidnapped him from his home, drove him to a deserted cemetery, and executed him with two shots to the head, saying

¹⁸ Susan Sachs, "Iraqis Seek Justice, or Vengeance, for Victims of the Killing Fields," *New York Times*, November 4, 2003.

“Saddam has ordered your prosecution.”¹⁹ The next morning Isma`il Yusif Sadiq, a judge from Mosul, was gunned down in front of his house.²⁰

Despite this intimidation, other local investigative efforts are continuing, illustrating the strength of the search for accountability. The Iraqi Bar Association has reportedly registered some 50,000 claims for loss of lives and property at the hands of the former government. In the words of district court judge Qais `Abbas Rida, “We have to let every single Iraqi file his case. We should broadcast these trials to the whole world.”²¹ Rida says he took testimony and forensic evidence from a man who had been tortured on orders of former Revolutionary Command Council deputy chairman `Izzat Ibrahim al-Duri and sent a warrant for al-Duri’s arrest to all police stations in the country.

Iraqi human rights groups, like the Association of Victims in Basra, have emerged around the country—preserving documents, cataloguing names, identifying those names with various waves of repression. The groups have by and large refused to divulge the names of informers and intelligence agents, and thereby probably avoided a bloodbath. But for how long?

In Baghdad’s Republican Palace, now the headquarters of the CPA, there are Americans and others who are serious about justice and accountability issues, but it is not clear how much resonance their views have in Washington policy-making circles. To date the Bush administration has firmly resisted calls to establish an independent repository to collect and safeguard evidence and set minimum standards for gathering documents, forensic evidence, and testimonies.

What should have happened, as it did in the case of former Yugoslavia and Rwanda (and in slightly different form in Cambodia and East Timor), was a U.N. Security Council resolution authorizing the secretary-general to establish an international commission of some half-dozen experts, Iraqi and international in composition, with at least a four-month mandate, to

¹⁹ The account is from one of the judge’s associates, a prosecutor who was also kidnapped but released unharmed. See Nayla Razzouk, “Iraq judges probing Saddam-era cases angry at lack of US protection,” *Agence France-Presse*, November 6, 2003 (retrieved December 2, 2003).

²⁰ Dan Murphy, “In the new Iraq, local officials put lives on the line,” *Christian Science Monitor*, November 7, 2003 (retrieved December 2, 2003).

²¹ Susan Sachs, “Iraqis Seek Justice, or Vengeance, for Victims of the Killing Fields,” *New York Times*, November 4, 2003.

- establish an independent national central repository to receive documentary, forensic, and other forms of evidence (at least two international forensic teams reportedly declined to conduct exhumations in absence of an independent repository for evidence);
- coordinate international forensic efforts to train Iraqis to conduct exhumations and identification of remains ;
- establish a minimum-standards process for establishing the fate of the “disappeared;”
- develop minimum standards for gathering testimonies, documents, and forensic evidence (e.g., chain of custody standards);
- recommend mechanisms of accountability: the right mix of a special tribunal for those most responsible for the most serious offenses; necessary legal reforms to allow regular Iraqi criminal courts to handle the majority of alleged perpetrators of serious human rights crimes; a truth and justice mechanism to deal with lower-grade perpetrators and to establish a historical record; and vetting mechanisms to remove past abusers from government posts on the basis of individual accountability, in a way that doesn’t add new rights violations;
- Recommend best practices for witness and victim protection.

Six months on, this is still missing. Security Council Resolution 1483 marks a key moment lost: that resolution’s preamble “affirm[s] the need for accountability for crimes and atrocities committed by the previous Iraqi regime,” but there is nothing in the operative paragraphs on how this is to happen, or who is responsible for developing policy. The main responsibility for this failure rests with the U.S. and U.K., but other Council member states failed to challenge them.

Human Rights Watch and colleague organizations have urged the secretary-general to initiate such a commission, based on the implicit authorization in 1483 which empowered the secretary-general’s Special Representative for Iraq to “encourage[e] efforts to promote legal and judicial reform.” Special Representative Sergio Vieira de Mello, in his meetings with the Security Council in late July, before he returned to Baghdad and his death, reportedly encountered opposition to this idea from the U.S. and found no appetite on the part of the secretary-general to take up the fight in the face of that opposition.

The “Iraqi-led” process as publicly endorsed by U.S. officials has effectively been translated by the Iraqi Governing Council as an “Iraqi-only” process, recognizing but then marginalizing the essential international dimension. With some assistance from a British legal advisor, the Judicial Commission set up by the Governing Council has drafted a statute that, once-approved by the Governing Council and ratified by CPA head Paul Bremer, will have the force of law. As of early December the draft was reportedly very close to completion but there were no indications that either the Governing Council or the CPA would make it public and invite comment, reflecting a distinct lack of transparency.

The draft statute incorporated many positive features, including international legal definitions of genocide, war crimes, and crimes against humanity as justiciable matters, largely reflecting the language of the Rome Statute of the International Criminal Court. But it also included violations of Iraqi criminal law, for the most part serious crimes like murder but also vaguely worded prohibitions against “abuse of position [of authority],” for example, and “use of the armed forces of Iraq against an Arab country.” This seemed to reflect a determination to be able to punish former government officials even if the evidence did not support conviction on the most egregious offenses in the “crimes against humanity” categories. It also suggested an inclination to have the tribunal cast a wide net, to be able to bring within its purview whomever the present authorities wish to punish. Many of these people should be tried instead before ordinary (reformed) Iraqi criminal courts. This language left the proposed tribunal open to inefficiency if not outright abuse.

The draft statute recognized the need for an international component by mandating the president of the tribunal to appoint non-Iraqis as advisors to the separate chambers. The non-Iraqis, in addition to prior judicial or prosecutorial experience, must also have experience in international war crimes trials. For the Iraqi judges themselves there is not—there could not realistically be—any such requirement of international experience.

The draft statute also stipulated that the prosecutors and investigative judges—in the French-derived Egyptian model on which Iraq’s judicial system is based, investigative judges conduct interrogations and inquiries to make the first determination of a prima facie criminal violation—must be Iraqi nationals, though again each of these departments was required to appoint non-Iraqi advisors.

The main impetus for this insistence that only Iraqis serve as judges and other key positions in the tribunal was the Iraqi Governing Council. This reflected in part an

abiding distrust of the United Nations, blaming the world body for not taking stronger measures against Saddam Hussein's government despite its tyranny and awful crimes. There was also an Iraqi concern to preserve use of the death penalty, something that would not be possible in a U.N.-mandated tribunal.²²

While Iraqi concerns must be taken seriously, it is also critical that the justice effort has integrity and credibility, which is not likely in an Iraqi-only process given the state of the Iraqi judiciary after decades of autocratic rule and the concerns detailed above. Even so, there has been little evident objection to the Governing Council plan from the Bush administration, which from the outset has manifested a largely instrumentalist approach to issues of accountability and justice in Iraq. The crimes of the former government have been duly recited and deplored, and justice promised, but the mechanism under consideration displays serious deficiencies. Several factors probably account for this, including the administration's aversion to anything hinting of "international justice," a concern that the jurisdiction of any justice mechanism be confined to crimes of Iraqi officials, and a desire to preserve some ability to trade prosecution deals for intelligence on weapons of mass destruction and other subjects of interest.

The most appropriate mechanism, drawing on the positive as well as negative experience of the existing international tribunals, would be a mechanism incorporating Iraqi and international expertise and experience, located if security conditions permit in Iraq, and using Arabic and Kurdish as the official languages of the tribunal. The presence of Iraqi jurists and prosecutors will help ensure that the composition of the tribunal and associated mechanisms reflects Iraqi society, whose interests are most directly at stake. At the same time, the presence of international jurists and prosecutors on the staff, not just as advisors but as integral members of the team of judges and lawyers at the core of the tribunal, would help ensure the necessary degree of credible impartiality and independence, competence in prosecuting and adjudicating extremely complex criminal proceedings, and familiarity with developments in international justice standards.

Ensuring human rights accountability

An essential element of any reform and reconstruction process is transparency and accountability. In the short term, independent monitoring and reporting can curb abuses of power, provide a modicum of credibility and legitimacy, and offer a forum for

²² Coalition Provisional Authority Order Number 7, section 3, suspended use of the death penalty.

grievances to be aired. In the long term, independent institutions are needed to ensure a government that is committed to the protection of basic human rights essential to a democratic society.

The Coalition Provisional Authority has a Human Rights and Transitional Justice division. Its mandate, however, does not include monitoring or reporting on current abuses, but only on abuses of the past. It does important work in the area of civil society development and human rights education, but the primary task is documenting Saddam Hussein's crimes, dealing with mass graves (which it has done better since the extremely problematic beginning) and assisting the establishment of a tribunal for past abuses. Its web page, like the entire website of the CPA, is primarily in English. It leaves an impression that its purpose is to show the outside world what the CPA is doing, rather than to inform Iraqis on how their country is being run and how their rights today can be protected.

The Governing Council—the interim body appointed by the CPA—included a Ministry of Human Rights in the cabinet it announced in early September 2003, but it remains untested. What is needed is a statutorily independent monitoring system, like an ombudsman's office or national human rights institution. International donors, who have committed \$33 billion to Iraq since the war, should support the creation of such an institution with a mandate to cover the full range of human rights issues and the power to conduct investigations and make recommendations to both the occupying powers and any transitional Iraqi authority. It should have the necessary independence, diversity, resources, and geographic presence to do the job well.

Ultimately it is Iraqis who will best be able to ensure that the authorities in their country abide by international human rights standards, and the occupying powers and donor countries must do more to assist local nongovernmental organizations. The nascent human rights community in Iraq needs and desires training, management skills, and financial assistance from abroad. As the development of a local human rights community in Cambodia and East Timor has made clear, the United Nations and foreign donors can play an important role in fostering development of such groups.

In the meantime, the United Nations should better address the need for human rights protection, as security allows, by expanding the monitoring operations of the United Nations High Commissioner for Human Rights. The member states of the Commission for Human Rights, moreover, should make it a priority at its next annual meeting, in March-April 2004, to renew the mandate of the special rapporteur on Iraq and specify

that the mandate includes on-going developments as well as past abuses. The work of the monitors and the special rapporteur alike could provide donors with authoritative information and analysis on the human rights situation within the country and make recommendations for remedial action, including long-term institutional reform.

Such monitoring missions have played a constructive role in other post-conflict transitions, like in Cambodia, East Timor, Bosnia-Herzegovina, and Kosovo. Security conditions may constrain United Nations efforts in Iraq, but this should not prevent donors from earmarking funding for this purpose, or the United Nations identifying suitable experts and preparing to extend its presence on the ground. Without such mechanisms to keep a check on abuses—to promote government transparency in general—Iraq's transitional period may proceed without the human rights grounding that is essential.

Toward that end, the United States and its allies should move quickly to address the serious human rights shortcomings of the occupation to date. The first is to carry out investigations of all cases where there are credible allegations or other reasons to suspect that use of lethal force by occupation troops may have led to wrongful death or injury to Iraqi civilians. The second is to establish an independent central depository to receive forensic evidence from mass graves as well as documentary evidence and eyewitness testimonies related to serious past human rights abuses. The third is to endorse publicly and support diplomatically the establishment of a special criminal tribunal for past crimes that incorporates experienced international as well as Iraqi judges and prosecutors in all key departments.